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Dear Impact Assessment Agency of Canada,

This comment is submitted pursuant to the public participation period on the *Draft Agreement to Conduct the Regional Assessment* as part of the Regional Assessment in the Ring of Fire Area (the "Regional Assessment"), on behalf of Osgoode Hall Law School's Environmental Justice & Sustainability Clinic. We note that the Clinic was one of the original requesters of the Regional Assessment.[1] Much of what we urged in our request is still pertinent and pressing. This Regional Assessment remains an excellent opportunity to partner with an Indigenous jurisdiction to further the goals of sustainability and reconciliation in Ontario's far north. The cumulative effects of proposed development in the Ring of Fire continue to pose significant risks to the practice of Aboriginal and Treaty rights in the region, and to specific areas within federal jurisdiction.

We have made several detailed proposals throughout the past two years, and note that our clinic directors have collaborated with Neskantaga First Nation on the *Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability- Informed Impact Assessment in Ontario's Ring of Fire*.[2] The *Synthesis Report* puts forward a possible model for how to structure a multi-jurisdictional assessment in partnership with Indigenous peoples. In this letter we do not make detailed submissions, but instead present our concerns under two broad themes.

First, the most pressing concern is that the *Draft Agreement* does not facilitate a partnership with an Indigenous Governing Body. In this respect, our position is that the Regional Assessment fails to uphold several obligations and commitments of the Government of Canada. The Regional Assessment should include Indigenous peoples as full participants in decision-making. This is an opportunity to build a multi-jurisdictional legal framework to structure future impact assessments in the area. The *Draft Agreement* must comply with the recently enacted *United Nations Declaration on the Rights of Indigenous Peoples Act*, including the principles of free, prior, and informed consent. This requires both enacting a process informed by applicable Indigenous legal orders and integrating negotiation and consent throughout the Regional Assessment. Lastly, the Regional Assessment must ensure that the Crown governments uphold their constitutional obligations under Treaty No. 9. This involves a

robust cumulative effects framework to ensure that Aboriginal and Treaty rights can continue to be meaningfully exercised in the region.Second, we are concerned that the proposed narrow scoping of the Regional Assessment is fundamentally inappropriate to achieve its purposes. The geographic scoping in the *Draft Agreement*, limited to the precise location of known mineral deposits, is inadequate to support a Regional Assessment that can achieve the Government of Canada's stated aims and obligations, including the legal obligation assess cumulative impacts so as to protect the meaningful exercise of Aboriginal and Treaty rights. The geographic scoping should be informed by a detailed understanding of the region's watersheds and hydrological functions of the peatlands. The proposed project scoping is underinclusive and will result in a framework that underestimates the total cumulative effects of the proposed mining and infrastructure projects in the Ring of Fire. These limitations threaten the utility of the Regional Assessment and undercut the Government of Canada's legal obligations to Indigenous peoples, as well as its environmental obligations, commitments in respect of climate change, and progress towards sustainability.

Concern #1: The *Draft Agreement* Fails to Facilitate an Indigenous Governing Body as Partner Jurisdiction

The *Draft Agreement* fails to meet the standard set and the obligations affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("*UNDRIPA*").[3] We further note that the preamble of the *Impact Assessment Act* ("*IAA*") itself recognizes the federal government's commitment to "implementing the United Nations Declaration on the Rights of Indigenous Peoples."[4] Even though the government has not yet undertaken the necessary processes to make Canadian laws consistent with the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), Canada cannot shirk these obligations in the design of the Regional Assessment. Meaningful implementation of these obligations involves proactively and deliberately implementing the principles of the Declaration in the structure and conduct of this Regional Assessment, which the *Draft Agreement* fails to do.

A recent court decision out of British Columbia drily remarked that, "It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title."[5] If Canada intends the *UNDRIPA* to be more than vacuous talk, the structure and content of the Regional Assessment must be shaped by the rights that the Declaration recognizes and affirms.

The Backgrounder on *UNDRIPA* states that "The purpose of this Act is to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law. It also provides a framework to advance implementation of the Declaration at the federal level."[6] The government has recognized that implementing UNDRIP can result in meaningful change to how Indigenous peoples participate in natural resource development. The Backgrounder gives examples like, "having Indigenous peoples as full partners

in the natural resource and net-zero carbon economy and ensuring that Indigenous peoples have a seat at the table for decisions that may affect their communities."[7] Implementing UNDRIP *must* result in Indigenous peoples participating as full partners in decision-making affecting natural resources on their lands and territories. The Regional Assessment, as a planning process intended to inform future Crown decisions in the region, particularly for mining projects, therefore, must be co-governed by Indigenous peoples.

Critics are skeptical of the efficacity of UNDRIP legislation, as it "focuses on high-level, aspirational commitments rather than on delivering concrete, immediate change to Indigenous peoples."[8] But as Bruce McIvor remarks, "The point of the UNDRIP legislation is not to create Indigenous rights, but rather to hold the federal government to the international legal standards it has publicly endorsed."[9] The Regional Assessment is an opportunity to meaningfully and practically enact the principles of UNDRIP on the ground, and as the first such opportunity that has emerged since the passage of the *UNDRIPA*, it is crucially important that Canada embrace this opportunity.

All negotiations and consultation happen in the shadow of the law. This should include *UNDRIPA*, and certainly includes customary international law. Regardless of how the government frames the adoption of UNDRIP itself, customary international law has imported much of the Declaration into Canadian common law.[10] This means that, whether the government is eager to take up the opportunity presented here or not, it nevertheless has an obligation to act in accordance with the principles articulated in the original Declaration. In order to maintain the rights that UNDRIP affirms, there is a reciprocal obligation upon the government to uphold and protect the ability to exercise these rights.[11] As part of that reciprocal obligation, the Regional Assessment must explicitly commit to upholding UNDRIP. At a minimum, Section 1.1 of the *Draft Agreement* should be updated to reflect that this is part of the goal of the Regional Assessment. This should also involve acting on the right of Indigenous peoples to participate in decision-making that affects their rights in Article 18, should incorporate the principles of free, prior, and informed consent per Article 32.2, and should ensure that the Crown upholds their obligations under Treaty 9 per Article 37.1.

Indigenous Peoples Must Be Partners in Decision-Making

Article 18 of UNDRIP states that, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Our position is that implementing Article 18 in this context places a legal obligation on the federal government to establish joint decision-making with an Indigenous Governing Body as a partner jurisdiction. Participating in decision-making must involve the meaningful integration of Indigenous legal orders into the Regional Assessment process alongside with, and as equal partner to, the settler legal order.

The *IAA* itself facilitates this. Section 94 of the *IAA* requires that the Agency "must offer to consult and cooperate with any jurisdiction […] that has powers,

duties or functions in relation to the physical activities in respect of which the assessment is conducted."[12] The Agency should recognize that Indigenous peoples' own inherent jurisdiction charges them with powers, duties, and functions in relation to the lands and territories that they have occupied and stewarded since time immemorial. The *IAA* defines jurisdiction broadly to include both an Indigenous governing body with powers, duties, or functions under a land claim agreement or under federal legislation and an Indigenous governing body with whom the government has an agreement under section 114(1)(e).[13]

In the absence of the regulations that would give effect to agreements under section 114(1)(e), the Agency should recognize that *UNDRIPA* itself qualifies as "an Act of Parliament" that recognizes "powers, duties, or functions in relation to an assessment."[14] To that end, the recent *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* decision recognized that "*UNDRIP* states in plain English that Indigenous peoples […] have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories."[15]

Different Articles of the Declaration animate different powers, duties, and functions. Article 25 protects Indigenous peoples' right to maintain and strengthen their spiritual relationship to their traditional territory, and to uphold their responsibilities to future generations in that respect. Article 29(1) states that "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." These Articles articulate a duty to future generations to protect the environment, and a duty to the environment itself. In the context of the looming climate crisis, and in light of the essential climate functions performed by the peatlands surrounding the Ring of Fire, these Articles describe a duty to ensure that future generations can continue to depend on the productive capacity of the lands that Indigenous communities in this region have relied upon since time immemorial. This relation demands meaningful inter-jurisdictional collaboration.

As it stands, we have serious concerns about the proposed Committee. Sections 3.2 and 3.3 of the *Draft Agreement* explain that the Committee will be jointly appointed by the two partner jurisdictions, the federal Minister of the Environment and the Ontario Minister of Northern Development, Mines, Natural Resources, and Forestry.[16] The first thing to note is that the federal government has a long history of appointing committees and panels composed entirely of non-Indigenous members.[17] This would be particularly egregious in the Ring of Fire, where Indigenous peoples are the region's sole occupants. However, even if the Ministers jointly approve the appointment of an Indigenous person to the Committee, the government is choosing 'Indigenous representation' over partnership with an Indigenous governing body. We need to make it very clear that these are completely different approaches. While Indigenous representation on the Committee is necessary, it must be achieved through partnership with the applicable Indigenous governing body. As Article 18 clearly states, "Indigenous peoples have the right to participate in decision-

making in matters which would affect their rights, *through representatives chosen by themselves* in accordance with their own procedures[.]"[18]

Partnership with an Indigenous governing body, on the other hand, would involve First Nations in the region determining a process for themselves for appointing their own representatives and having a vote in the approval of other Committee members—the Indigenous governing body would have a role on par with the other partner jurisdictions, as an equal partners in the planning process. This would result in the meaningful inclusion of applicable Indigenous legal frameworks in the Regional Assessment itself. Moreover, this would build a strong foundation for multi-jurisdictional impact assessments in the Ring of Fire going forward, where federal, provincial, and Indigenous laws can be braided together into a single assessment. Commentators have remarked that, "Imagining a process of braiding together strands of constitutional, international and Indigenous law allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship justly encompassing these different legal traditions might mean."[19]

The Regional Assessment Must Implement Free, Prior and Informed Consent

Article 32.2 of UNDRIP states that, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." The Regional Assessment is intended to establish a foundational framework that will affect the approval (**or rejection**) of designated projects affecting Indigenous lands, territories, and resources. There is already much speculation about mineral utilization and exploitation in the area, which will inevitably and necessarily have effects on water, the peatlands, wildlife, and other resources. As such, the principles of free, prior, and informed consent (FPIC) must be incorporated into the *Draft Agreement* to ensure that the Committee and its supporting bodies can meaningfully, respectfully, and intentionally consult with affected Indigenous communities.

Many Indigenous communities in the region have indicated that they are willing to work with industry to ensure that resource development is undertaken in ways that are mutually beneficial, respectful of Indigenous laws and rights, and sustainable. In other words, Indigenous communities want to be able to articulate their *free, prior, and informed consent* as part of resource extraction decision-making processes. This must necessarily involve incorporating these same principles into the *Draft Agreement* such that they may help build a framework for future development that is predicated upon FPIC.

The federal government has explained that, "FPIC describes processes that are free from manipulation or coercion, informed by adequate and timely information, and occur sufficiently prior to a decision that Indigenous rights and interests can be incorporated or addressed effectively as part of the decision making process—all as part of meaningfully aiming to secure the consent of

affected Indigenous peoples."[20] While affirming that this does not constitute a veto over government decision-making, the Backgrounder notes that FPIC implementation will require creativity to "ensure meaningful and effective participation in decision-making."[21] The Ring of Fire is one such situation that demands creativity. Processes that facilitate FPIC can be incorporated throughout the planned Regional Assessment.

Consultation must occur "in good faith with the indigenous peoples concerned through their own representative institutions."[22] This obligation calls into question the adequacy of the proposed "Indigenous Talking/Sharing Circle" described in Section 6.0 and elaborated upon in Appendix D of the *Draft Agreement*.[23] As described, the function of the Talking Circle is deeply unclear and verges on tokenism. It is not for the Crown to structure the proposed Talking Circle. The *Draft Agreement* must be updated to reflect that Indigenous peoples will decide how to structure the Talking Circle in a culturally appropriate way.

Elder Victor Chapais has described that in Ginoogaming First Nation, "[w]e try and deal with issues through talking in a circle. We take our time to understand other people's perspectives. We did everything we could to be diplomatic in an Anishinaabe way: through talking, listening and trying to reach an understanding."[24] Similarly, Neskantaga First Nation's laws require in-person meetings with community members and Elders, where information is shared orally in the Ojibwe and Oji-Cree languages, and the group strives for consensus.[25] Other Indigenous communities in the region may have different laws and protocols that govern their decision-making processes. The Talking Circle must be structured and implemented in accordance with the applicable Indigenous legal traditions.

The *Synthesis Report*, produced in collaboration with Neskantaga First Nation, proposes a joint decision-making model and underscores the importance of recognizing the inherent jurisdiction of Indigenous communities over their lands and territories. This proposal includes an Elders Council which would govern through consensus, including in relationship with what the *Draft Agreement* calls the Committee.[26] Consensus is "well-established in Anishinaabe communities, and […] holds in-built mechanisms of accountability that are maintained through long-standing relationships and social cohesion."[27]

The *Draft Agreement* should introduce consensus decision points throughout the Regional Assessment. Specifically, there should be a consensus process prior to finalizing the draft report for delivery to the Minister. This consensus process must offer Indigenous communities the opportunity to talk through the report according to the customs and traditions of their legal orders. This process would create an opportunity for communities to provide their FPIC as a contributing Indigenous jurisdiction prior to the finalization of the report. This must involve an iterative, ongoing, and respectful process of negotiation that leads to mutual understanding where all parties can own the decision. The Crown must be willing to discuss amendments to the proposed terms of the final

report and make meaningful alterations to how the Regional Assessment will be implemented and enacted in the region.

This necessarily involves an extension to the timeline outlined in the *Draft Agreement*. Section 7.6 currently states that, "The Committee will submit its final Report to the Ministers within 18 months of the public announcement of the appointment of its members[.]"[28] Eighteen months is insufficient time to gather the necessary data needed to support the Regional Assessment, and insufficient to allow for meaningful Indigenous consultation in culturally appropriate ways. The *Draft Agreement* must be updated to include timelines decided in partnership with Indigenous jurisdictions.

Further, we must point out that the COVID-19 pandemic continues to impose very challenging circumstances on many communities, with remote First Nations communities facing disproportionate burdens. It is extremely imprudent to impose a short timeline in this context. The Crown must recognize that they are engaging with communities in crisis that are struggling with serious consultation overload. The strain of the pandemic is exacerbated by existing social crises in the communities surrounding the Ring of Fire. Indigenous communities in Ontario's far north have been disproportionately affected by the pandemic, and are dealing with ongoing boil water advisories, a state of emergency related to denial of school to young people, as well as youth suicide and addictions crises. Indigenous communities cannot keep up with the number of requests for consultation and engagement that they receive.[29] Communities are exhausted and frustrated by the continual imposition of external timelines. This reality provides further justification for the Regional Assessment to be established in partnership with an Indigenous governing body, respecting each community's capacity to engage and participate as circumstances change.

The Regional Assessment Must Be a Framework for Cumulative Impacts of Development on Treaty No. 9

Article 37.1 of UNDRIP states that, "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements." Indigenous communities in the Ring of Fire are signatories to Treaty No. 9 – The James Bay Treaty. At the time it was signed in 1905, and when later adhesions were signed in 1929, communities understood that the treaty was not a surrender document, but an agreement to share the land in exchange for specific treaty benefits.[30] John Long notes that, "[the northern Ojibwe and Cree] understood and expected Treaty No. 9 to be a confirmation of the fur trade model of coexistence, a modest sharing of the land and its benefits."[31] Communities expected that the Crown would serve a protectorate role by upholding the Treaty and preserving the signatories' rights.[32] And while these expectations have seldom been met in the past, the Regional Assessment offers a renewed opportunity for the Crown to signal that it intends to adopt an honourable approach to its treaty obligations.

Recent jurisprudential developments demonstrate that Canadian courts are prepared to hold the Crown to these obligations. Specifically, we now understand that the "right to the recognition, observance and enforcement of treaties"[33] requires that the Crown must protect the Indigenous community's ability to practice their rights. Courts have recently found that this includes a positive obligation on the Crown to assess cumulative effects of development to ensure that these rights can be meaningfully practiced. In *Yahey v British Columbia,* the Court clarified that the focus is on "whether the treaty rights can be *meaningfully* exercised, not on whether the rights can be exercised *at all*."[34] In that case, the Court found that the cumulative effects of regulatory regimes authorizing industrial development in British Columbia contributed to the meaningful diminishment of the Indigenous community's treaty rights.[35]

Similarly, *Fort McKay First Nation v Prosper Petroleum Ltd* holds that the Honour of the Crown infuses the performance of every Treaty obligation, including the careful balancing of the exercise of Treaty rights with ongoing development in the Treaty territory.[36] This requires that the Crown must be able to understand the cumulative effects of numerous developments on an Indigenous community's ability to exercise their rights. The Court in *Saik'uz,* in finding that the Indigenous plaintiffs had an Aboriginal right to fish, necessarily found that "[as] an incident to the honour of the Crown, both the provincial and federal governments have an obligation to protect that Aboriginal right."[37]

These cases, collectively, illustrate that where an Aboriginal or Treaty right exists, the Crown has a positive obligation to protect the meaningful exercise of this right by gaining a thorough understanding of the cumulative effects of development on the community's traditional territory. This must be a pressing concern in the context of the Regional Assessment. A Regional Assessment conducted without the partnership of an Indigenous jurisdiction cannot assess impacts on Aboriginal and Treaty rights, or Aboriginal title. A joint process *could* contribute to the Crown's assessment of cumulative impacts on these rights, although it would not be sufficient to do so. A government-to-government Regional Assessment process is one step in a larger process to ensure rights recognition and protection, but it is just one step. The positive obligation to protect the exercise of Aboriginal and Treaty rights through an understanding of cumulative impacts requires a multi-faceted, whole-of-government approach. It cannot be fulfilled within the Regional Assessment framework alone.

In gathering data to address extant gaps in knowledge in the Ring of Fire and describing the existing social and ecological conditions in the area, the Regional Assessment must clearly define the parameters for future development that uphold the meaningful exercise of existing Aboriginal and treaty rights. This information must be incorporated into the Regional Assessment such that future Crown actors can rely upon it in making permitting and other decisions authorizing resource extraction and development. Specifically, this information must meaningfully substantiate assessments of the adverse impact that any proposed project has Aboriginal and Treaty rights, the extent to which these impacts are significant, and the possibilities for mitigation.[38] In other

words, the Regional Assessment must establish a *cumulative effects assessment framework* in the Ring of Fire to ensure that communities can continue to meaningfully practice their Aboriginal and Treaty rights. According to the Impact Assessment Agency of Canada, "Regional assessments are one component of a broader Government of Canada effort to address the issue of cumulative effects nationally." As such, the Regional Assessment presents an opportunity to create a framework for the Ring of Fire that could actually *prevent* what Justice Burke in the *Yahey* decision refers to as "death by a thousand cuts".[39]

Concern #2: The Proposed Scope is Inappropriately Narrow

As it stands, the only completed regional assessment to date—the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador—was roundly criticized for scoping out the impacts that oil extraction will have on a fragile marine ecosystem. Critics have dismissed that assessment as little more than an instrument to allow unfettered development in the area with little to no assessment of cumulative impacts moving forward.[40] Judicial review applications have been filed and appeals are working their way through the courts. With this level of criticism and pushback on the Newfoundland Offshore assessment, we urge the Agency to amend the scope of the Regional Assessment in the Ring of Fire from what is currently set out in the *Draft Agreement*, to allow the assessment to meet the purposes set out in section 6 of the *IAA*, primarily: fostering sustainability, protecting the components of the environment within the legislative authority of Parliament, and assessing cumulative effects.[41]

If regional assessments are the primary tool in the *IAA* to understand the cumulative impacts of large-scale, multi-project development in an area, then the scope must be sufficiently broad to achieve that purpose. The geographic scope must be large enough to include all of the physical areas and communities which may experience positive or negative effects as a result of multi-project development. Similarly, the activity scope must account for all types of development proposed for the region, *including all associated infrastructure,* and not just the one narrow type of project in support of which most or all other development will occur. The purpose is to support sound planning and development choices in the face of multiple, interconnected pressures and potential impacts of human activity. With this understanding of the purpose of a regional assessment, we identify severe flaws in the scoping, both geographic and activity-based, adopted in the *Draft Agreement*.

The Appropriate Geographic Scale is based on Watersheds

Watersheds are the ecologically, culturally, and legally appropriate scale for conducting a Regional Assessment in the Ring of Fire. Understanding how water flows in the region is essential. According to the peatland distribution survey done by the Government of Canada, the Ring of Fire sits in the middle of an area considered to be 75–100% covered in Bog/Fen class peatlands and represents one of the densest wetland coverage areas in the country.[42] Peatlands are a wetland ecosystem in which the "ground" is made of mostly sphagnum mosses layered over each other over thousands of years.[43] In these ecosystems,

the acidic water and anaerobic environment slow down decay so much that peat can be as much as 10 metres deep. Peat accumulates because production is faster than the rate of decay.[44] Because these are areas of extremely slow-decaying organic matter, they act as a "carbon sink," meaning they trap and hold carbon.[45]

There are two primary types of peatland in the Ring of Fire area, bogs and fens. Because bogs and fens are layers of waterlogged plant material with a surface-level water table, it's more helpful to think of them as a very wet sponge rather than a tract of solid land. They have a unique hydrology heavily defined by the movement of water.[46] For example, a study of a gun range on a Norwegian peatland showed the relative ease with which copper, lead, and other contaminants leached into the groundwater, as all elements were found downstream of the range in toxic levels. This study found that the peatland's high permeability and water table contributed to the transport of the toxins across the site.[47] Further, a recent study has shown that climate change induced changes in the peatlands increase both the accumulation of mercury in the peat and facilitate the transportation of mercury downstream in spring snowmelt.[48] Mercury is already a significant concern in the region given the known mercury contamination by Victor Diamond Mine, owned by De Beers.[49] In this case, the proposed boundary of the study fails to capture the full ecosystem over which the peatlands may transport contaminants associated with proposed mining activities, roads, and other infrastructure.

Multi-project scoping and its expansion beyond a piecemeal approach were seen as one of the primary strengths of a regional approach in relation to the traditional project-by-project approach. Regional assessments are meant to be an opportunity to look at how all human activity in an area, although individually approved, may create a problem when looked at cumulatively, as is made obvious by the *Yahey* case. With the current proposed activity scope of the Regional Assessment in the Ring of Fire, the picture of the stress being put on the environment and the practice of harvesting will be incomplete, as it will omit the complex web of infrastructural supports, such as all-weather roads, transmission lines and work camps, which would not exist outside of the approval of the mines.

The Scope of Included Activities Must Capture More than Mines

In the *Draft Agreement*, the proposed activity scope is a "focus on future mine development activities most likely to occur and also considering the relationship of and potential interactions between said mine development activities with those of other existing and future activities[.]"[50] While what constitutes mine development activity is somewhat opaque, the tail end of the sentence is so vague and uncertain as to be bordering on meaninglessness. Will the construction of work camps or a potential new town to accommodate the expected influx of workers be considered another 'activity'? What about peat harvesting? What about roads other than those exempted from the regional assessment in Section 2.5? Although they are not linked to a specific mine, would those roads have been built without the mining interest? How precise does the relationship between human activity and a particular mine need to be for it to be considered a mine development activity? If a potential new town is

for the workers of several mines is it, like the roads, not linked to a specific mine and thus not part of the scope of the assessment?

Even Noront Resources Ltd., who urged the Agency to adopt a minimal geographic scope for the Regional Assessment, are in favour of a reasonably expansive activity scope and noted that the regional assessment should not be limited to mining activities. Instead, they proposed that the scope include infrastructure building, tourism, power generation and transmission, forestry, and telecommunication.[51] In other words, Noront's submission acknowledges that for mining to happen in this remote part of the province, an increase in all of these other areas would also be necessary. In fact, none of the public comments submitted suggested that it is appropriate to limit the scope of the assessment to only mining development. The submission from St. Marys River Binational Public Advisory Council stated their concerns that Noront Resources Ltd.'s proposed smelter/processing plant will not be included in the scope of the regional assessment.[52] As written, the *Draft Agreement* will ensure that the cumulative impacts of the development in the Ring of Fire will not include high-polluting facilities like smelters and processing plants. This omission will result in serious data gaps that will result in unaccounted for cumulative impacts to health and the environment. In other words, it appears instrumentally scoped so as to capture the expected benefits of mining development, without capturing the widespread social, cultural, ecological and public health costs.

This underinclusive scope will severely undercut Canada's commitments to meeting its environmental obligations and its commitments in respect of climate change. We note that this is one of the main factors that the Minister must consider in making the public interest determination per section 63 of the *IAA.*[53] It is fundamentally illogical for the Regional Assessment to deliberately undermine the possibility of informed Ministerial decision-making in respect of sustainability in future impact assessments in the Ring of Fire region.

On this issue, again, we are faced with a more pronounced problem regarding scoping due to the nature of the peatlands surrounding the Ring of Fire. Aside from mines, there will need to be roads and production facilities, and potentially even railways, to accompany the removal of the minerals. In a study on the Copper Cliff Smelter in Sudbury, several minerals were found in the surface peat of that area's peatlands.[54] The concentrations of copper and nickel in the surface peat of several wetlands are still potentially toxic, and the researchers found them to be well above the provincial soil quality guidelines.[55] Only at 60km outside of the smelter did levels of metal contaminants start to dissipate.[56] Not only is there a risk of metal contamination to the peatlands surrounding the mines, but there is an additional risk to the peatlands surrounding the processing facilities.

At the Sudbury site, the soil remediation is expected to take centuries, even with eliminating metal emissions from the smelters.[57] The proposed ferrochrome smelter in Sault Ste. Marie, which would not exist without the mining in the Ring of Fire, does not seem to trigger a federal or provincial environmental

assessment as it does not meet the requirements of provincial class EA,[58] is not on the proposed list for comprehensive assessment,[59] and is not a designated project under the *IAA*. However, as shown in the Sudbury case study, these processing plants have significant negative environmental impacts. The smelter in Sault Ste. Marie should be included in the activity scope of this regional assessment because it will create negative environmental impacts that are a direct result of the mining development in the Ring of Fire. Cumulative impacts need a broad scope to be fully understood—the cumulative impacts of mining development in the Ring of Fire will include the impacts of related and supporting industry development in the area, and so should the scope of the Regional Assessment.

Scoping out the Roads is a Profound Mistake

We are seriously concerned about the decision to not to include the Marten Falls Community Access Road Project, the Webequie Supply Road Project, or the Northern Road Link Project in the proposed scope of the Regional Assessmetn.[60] These roads are meant to be supply and connection roads between Marten Falls and Webequie First Nation and are *also intended to facilitate the mine development process in the Ring of Fire*. It is important to note that these are just the *first* roads that will go in, and the *Draft Agreement* explicitly excludes them because they are not linked to any *specific* mine.[61] It seems safe to assume any infrastructure needed for mining development to the extent predicted in the area will be shared and used by multiple communities and industrial interests. In addition, due to the almost complete lack of all-weather roads in the far north, there may be even more roads or railroads built to facilitate the transport of materials from the mines to the processing plants. These projects need to be included in the scope to accurately assess the cumulative impacts of mining exploration and development.

These roads may cause serious cultural impacts. There are many cultural heritage sites throughout the far north that remain undocumented but for the memories and knowledge of Indigenous knowledge keepers. Marten Falls First Nation has already updated their proposed alternative routes for the Marten Falls Community Access Road due, in part, to concerns that the initial alternative routes would interfere with sites of cultural-historical sensitivity associated with the Ogoki River.[62] It is entirely reasonable to assume that these proposed roads and other infrastructure necessary to support development in the Ring of Fire could threaten other cultural heritage sites. The roads must be included in the Regional Assessment to ensure that the federal government can accurately understand the cumulative impacts of development on cultural heritage.

Ecologically, roads or “linear disturbances”, are known to have severe local impacts on water flow and nutrient retention in Boreal regions. Although there is currently limited research on the effects on plant/soil processes in peatlands,

researchers argue that roads in these ecosystems are likely to contribute to fragmentation and altered hydrology on a large scale. Of note is that in northern Alberta, where several roads were built to accommodate gas exploration, the disturbances to those peatlands negatively impacted populations of endangered woodland caribou.[63] Provincial environmental assessment processes similar to those under which the proposed roads are being assessed in Ontario are not structured to properly evaluate the impact of road projects on species like caribou. This is because provincial environmental assessment is very project specific and fails to adequately address the cumulative impacts of development in a region generally. Unfortunately for caribou, and wetlands more generally, the long-term consequences to ecosystems primarily come in the form of cumulative impacts which are not adequately addressed in project-based impact assessment.[64] This exact problem is part of why regional assessments are pursued, but they only work if they are not scoped so narrowly as to merely recreate an individual project assessment framework.

Development that is "not directly related to a specific mine" but directly related to mining may have devastating social impacts. Roads associated with industrial development have, multiple times over, been proven to dramatically and disproportionately negatively impact the health and safety of Indigenous women, girls, and gender non-conforming individuals. The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls detailed how "resource extraction projects can drive violence against Indigenous women in several ways, including issues related to transient workers, harassment and assault in the workplace, rotational shift work, substance abuse and addictions, and economic insecurity."[65] These issues will not be fully or meaningfully addressed by provincial environmental assessments because each of those will only address specific road segments in isolation of the future mines to be developed. A regional approach that captures the full scope of contemplated activities in the Ring of Fire could, however, assess how proposed mining that will change the use, danger, and impact associated with the proposed roads.

Work camps present a stark example. These camps frequently fall below the threshold requirements of provincial environmental assessment,[66] meaning the only chance to document their ecological and, more importantly, their social and cultural impacts is by explicitly scoping them *into* the Regional Assessment. The risk of sexual violence and sex trafficking is exceptionally high for Indigenous women and girls within the proximity of industrial work camps.[67] Moreover, racism and social isolation faced by of Indigenous workers remains an issue at work camps.[68] A regional cumulative effects assessment of hydroelectric development in Manitoba found that the arrival of a large and transient workforce to the area resulted in Indigenous women and children being targeted explicitly for racial and sexual violence by workers.[69]

The *Draft Agreement* does mention taking into account the views of Indigenous women in the assessment.[70] Unfortunately, by scoping the assessment so narrowly, in both geographic terms and in relation to included activities, the Committee will not be in a position to meaningfully assess the risks posed by the full picture of proposed developments and infrastructural changes to the region. Moreover, the *Draft Agreement* merely states the assessment will take the views of women into account, with no binding commitment to address the views through solid and preventative action.

Ecosystem Fragmentation of the Peatlands Will Exacerbate the Climate Crisis – Even if the Mining is for 'Critical Minerals'

The Regional Assessment in the Ring of Fire needs to take all of these scoping issues into account *now* because bog variety peatlands are considered functionally impossible to fully remediate.[71] When disturbed, if not remediated sufficiently, not only do they stop storing carbon, they become net carbon and methane emitters.[72] The Hudson's Bay Lowlands contain nearly 75% of the carbon stored in the far north, and when disturbed, the emissions of methane and carbon dioxide from the peatlands will likely accelerate global warming.[73]

Peatlands, formed over tens of thousands of years, are thought to take several centuries to return to "peat accumulating ecosystems." In England's lowland bogs, remediation efforts were found to be impossible as the climatic conditions of the present were too different from those of the past to be able to restore the areas to peat accumulating ecosystems.[74] The characteristics of peat accumulation and lack of decay are what make peatlands carbon sinks; if decay increases, they stop sinking and start emitting.

The first step in remediation is generally restoring the water level to the surface, which can take up to 3 years of strategic flooding or draining. Then, appropriate vegetation development needs to occur, which requires decades of close monitoring. The final step is the return of the ecosystem to one of net peat accumulation which takes several centuries.[75] No mining company will commit to that level or expense of remediation, and even if they did, it would likely be an impossible commitment to keep.

The role of peatlands as carbon sinks becomes particularly pressing in light of the various reports on critical mineral development as necessary for the fight against climate change. The phrase "critical minerals" has become popular in political discourse in Canada within the last few years and, indeed, appears in direct reference to the proposed development of the Ring of Fire in the *Draft Agreement* at section B2.3(c) of Appendix B. When outlining the contents of the Committee's report, this section states that the Committee will also include "the purpose and need for such mining activities, including their potential

benefits at the local, regional, and national scales and role in providing *access to critical minerals*."[76]

It is essential to understand that "critical minerals" is not a scientific or technical category, but a political designation invoked in a specific geo-political context, often linked to notions of scarcity and national emergency.[77] Currently, in Canada, interest in 'critical minerals' is linked to a trade agreement with the U.S aimed at securing a stable supply chain of minerals and elements 'critical' to the manufacturing of batteries and green technology.[78]

The switch to electric vehicles and green technology is currently being promoted as a way to meet climate change objectives worldwide. However, the transition to these technologies is predicted to be extremely mineral and carbon intensive. For example, the world bank report titled "*Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition*" argues that, yes, initially mining the critical minerals for green technologies will be carbon-intensive; however, ultimately, the phasing out of combustion engines will result in an overall reduction in human-caused greenhouse gas emissions.[79] The report calculates the comparative greenhouse gas emissions by only accounting for the strict emissions of vehicles and mines, however, and not the loss of carbon storehouses like massive peatlands and forests, nor environmental contamination, nor the carbon intensity of necessary remediation projects. The report acknowledges that its methodology does not consider the transportation of renewable energy technology—just the extraction of minerals, production and processing.[80] So not only do the mainstream calculations not account for the impact of losing the carbon storage power of the peatlands, they also do not account for the carbon dioxide and methane that will be emitted when those peatlands are disturbed. The calculations would also not include the thousands of kilometres that heavy raw materials will be transported by road and rail through our province to be processed. Looking at the mining through the "critical minerals" lens is useful, however, as it clarifies why looking at the whole picture with an eye to cumulative impacts is essential to understand how this development will hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

The scope of the Regional Assessment must be broadened to ensure that the process does not merely replicate the piecemeal nature of individual environmental assessments on a broader scale. If it is not, the federal government will continue to blind itself to the cumulative impacts of development on land and people, in violation of its legal obligations.

Conclusion and Recommendations

We strongly urge the Agency to take this opportunity to reflect on how to ensure that the Regional Assessment in the Ring of Fire is a 'watershed moment' – a landmark assessment that will usher in a truly new approach to environmental governance for Canada. As the first regional assessment under the *IAA*, the government has a crucial opportunity to set a high bar for protecting the environment and working towards reconciliation in future regional assessments.

This Regional Assessment must be a full expression of the principles articulated in and affirmed by *UNDRIPA*. It should be undertaken in full partnership with an Indigenous Governing Body and foster a multi-jurisdictional legal process that recognizes the inherent jurisdiction of Indigenous peoples. The Regional Assessment must fully incorporate and embody FPIC. The Regional Assessment must commit to fully implementing the Crown's obligations under Treaty No. 9 by undertaking an in-depth study—in full partnership with Indigenous communities—of the cumulative effects of development on Treaty signatories' ability to exercise their constitutionally protected rights.

The Regional Assessment should be scoped to the watershed, to better reflect how the cumulative impacts of development will affect a sensitive cultural and ecological environment. It should be scoped to include the impacts of all proposed development activities in the Ring of Fire, from mining projects to infrastructure projects, especially roads into remote regions. A failure to do so will seriously undermine Canada's ability to meet its obligations to Indigenous peoples, to protect the environment, and to meet its international climate change obligations.

We urge you to restructure the *Draft Agreement* to reflect these concerns.

Sincerely,

<Original signed by>

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Associate Professor,
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[4] *Impact Assessment Act*, SC 2019, c 28, Preamble [*IAA*].
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[6] Department of Justice, Canada, "Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*" (10 December 2021) at 1, online (pdf): *Canada.ca* <https://www.justice.gc.ca/eng/declaration/about-apropos.pdf> ["Backgrounder"].
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[11] *Ibid* at 11.
[12] *IAA*, *supra* note 4 at s 94.
[13] *Ibid* at s 2 "jurisdiction" (f) & (g).
[14] *Ibid* at s 2 "jurisdiction" f(ii).
[15] *Saik'uz* at para 208.
[16] Impact Assessment Agency of Canada, "Draft Agreement to Conduct the Regional Assessment" (3 December 2021) at 5, ss 3.2–3.3, online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80468/142280E.pdf> ["Draft Agreement"].
[17] A random selection of three notable joint review panels shows that none of the panelists self-identify as Indigenous in their biographies. Only two of the nine panelists were women. Impact Assessment Agency of Canada, "Backgrounder: Proposed Jackpine Mine Expansion Project in Alberta – Joint Review Panel - Biographical Notes" (31 July 2013) online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/52085?culture=en-CA>; Impact Assessment Agency of Canada, "Backgrounder: Deep Geologic Repository for Low and Intermediate Level Radioactive Waste Project – Joint Review Panel — Biographical Notes" (30 September 2013) online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/53990?culture=en-CA>; Impact Assessment Agency of Canada, "Backgrounder: Northern Gateway Pipeline Project – Joint Review Panel - Biographical Notes" (30 September 2013) online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/40561?culture=en-CA>.
[18] *UNDRIPA*, *supra* note 3 at Article 18, emphasis added.
[19] Oonagh Fitzgerald & Risa Schwartz, "Introduction", in Oonagh Fitzgerald & Risa Schwartz, eds, *CIGI Special Report: UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, (31 May 2017) at 3, online (pdf): *CIGI Online* <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20II%20Special%20Report%20lowres.pdf>.
[20] "Backgrounder," *supra* note 6 at 3.
[21] *Ibid.*
[22] *UNDRIPA*, *supra* note 3 at Article 32.2.
[23] "Draft Agreement," *supra* note 16 at 8, s 6.0; at 20, Appendix D.
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[32]Andrew Costa, "Across the Great Divide: Anishinaabek Legal Traditions, Treaty 9, and Honourable Consent" (2020) 4:1 Lakehead LJ 1 at 8.
[33] *UNDRIPA*, *supra* note 3 at Article 37.1.
[34] *Yahey v British Columbia*, 2021 BCSC 1287 at para 540 [*Yahey*].
[35] *Ibid* at para 1751.
[36] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 54 [*Prosper Petroleum*].

[37] *Saik'uz* at para 653.
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[39] *Yahey* at para 1780.
[40] Cloe Logan, " Appeal aims to stop drilling for oil offshore of Newfoundland and Labrador" (17 January 2022), online: *The National Observer* <https://www.nationalobserver.com/2022/01/17/news/appeal-aims-shut-door-offshore-drilling-newfoundland-and-labrador>.
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[55] *Ibid*.
[56] *Ibid* at 1.
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