



## MUSHKEGOWUK COUNCIL

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### **Comments on behalf of the Mushkegowuk Council on the Draft Agreement to Conduct a Regional Assessment in the Ring of Fire Area**

The Mushkegowuk Council represents seven First Nations in the Western James Bay and Hudson's Bay region of Ontario's Far North. Its member nations are Attawapiskat First Nation, Taykwa Tagamou First Nation, Kashechewan First Nation, Fort Albany First Nation, Moose Cree First Nation, Chapleau Cree First Nation and Missanabie Cree First Nation. Much of the traditional territory of the First Nations that form the Council lies within and downstream from the area earmarked for mining development known as the Ring of Fire.<sup>1</sup> Any development there will profoundly affect the rights of the Omushkego People and the natural environment that is integral to their way of life.

The Mushkegowuk Council has grave concerns about the structure and scope of the Draft Agreement to Conduct a Regional Assessment in the Ring of Fire Area ("Draft Agreement"). As currently framed, the Draft Agreement will result in a Regional Assessment that fails to achieve the goals of the *Impact Assessment Act*,<sup>2</sup> jeopardizes Canada's ability to meet its commitments on climate change, and, most fundamentally, does harm to Canada's efforts at reconciliation with Indigenous peoples.

A fresh start is needed, to create a Regional Assessment that is co-developed, co-governed and co-implemented with First Nations in the Ontario Far North, including the Mushkegowuk First Nations. As the preamble to the *Act* recognizes, regional assessments are an important tool for understanding of the effects of future physical activities. They guide regional development planning by identifying development

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<sup>1</sup> See <https://wwf.ca/stories/mushkegowuk-council-carbon-peatlands-climate-change-ring-of-fire/> for a map of Mushkegowuk territory

<sup>2</sup> *Impact Assessment Act*, SC 2019, c 28, s 1 [the "Act" or the "IAA"]

objectives and scenarios, and allow for consideration of cumulative impacts. They must be considered at several decision points under the *Act*, including whether to designate a project for assessment (s. 9(1)), whether an impact assessment will be required, (s. 22) and for the creation of exemption regulations (s. 112).

In the context of a region where there has not been any significant industrial development, and whose largely intact peatlands and boreal forests are globally significant carbon storehouses and protectors of species at risk, getting the Regional Assessment right is of crucial importance. Excluding Indigenous peoples from its structure and governance is unjust and unacceptable.

### **Co-Governance is Achievable**

There is no legal impediment to the federal government entering into a Regional Assessment that is co-governed with Indigenous peoples. There are at least two paths to doing so: An honourable agreement may be made under inherent jurisdiction affirmed in Treaty, or a regulation may be made pursuant to the *Act*.

#### a) Inherent Jurisdiction

Treaty 9 communities, who, at the time Treaty 9 was presented for signature to First Nations in 1905 and 1906, were assured they could continue to hunt and fish where they pleased and that their traditional livelihoods would not be interfered with,<sup>3</sup> have inherent jurisdiction over their land and resources. That alone allows the federal Minister to jointly establish and conduct a regional assessment with them.

This was recognized by the expert panel that outlined recommendations to the Minister tasked with reviewing the federal environmental assessment processes at the time the *Act* was being created:

IA should not be a process designed and imposed from afar; Indigenous Peoples should have the ability to adapt the process to reflect their traditions, customs, law and aspirations. Ideally, for many parts of the country, there will be co-management of IA processes and natural resources between Indigenous Groups and the federal government.<sup>4</sup>

The Minister can and should enter into a co-governance agreement with the Nations comprising the Mushkegowuk Council on the basis of the promises in Treaty 9, the Crown's fiduciary obligations, and the First Nations' inherent right to self-government.

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<sup>3</sup> Murray Klippenstein and Paul Quick, *The Oral Promises of Treaty 9*, September 2010, Online at: <http://www.treaty9diaries.ca/materials-and-documents/discussion-paper/>. Their paper goes on to note that those promises are legally binding in Canadian law.

<sup>4</sup> Expert Panel for the Review of Environmental Assessment Processes, "Building Common Ground: A New Vision for Impact Assessment in Canada", at section 2.3.1, Online at: [https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#\\_Toc019](https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#_Toc019)

There is no need for the Minister to be constrained by a construction of the term “jurisdiction” in the *Act* that excludes certain Indigenous governing bodies from exercising their inherent rights. Such an approach is inconsistent with reconciliation and the honour of the Crown.

b) Agreement pursuant to a regulation made under s. 109(e) of the *Act*

The *Act* provides that the Governor-in-Council may make a regulation to facilitate First Nation co-governance of a regional assessment, pursuant to s. 109(e). In discussions with the Mushkegowuk Council, staff from the Impact Assessment Agency of Canada indicated the intention to create a global regulation to facilitate Indigenous co-governance, but that it would be “years” before such a regulation is in place. While the Mushkegowuk Council can appreciate that such a regulation would indeed require extensive consultation, no such regulation has even been tabled despite the *Act* having been in force since 2019.

Further, no explanation has been offered as to why a regulation could not be enacted permitting co-governance specifically for the Ring of Fire Regional Assessment. The *Act* allows for this pursuant to ss. 109 (e) and 114(e), the latter enabling the Minister to enter in agreements with “any Indigenous governing body...”. The federal government regularly exercises the ability to issue specific regulations pursuant to other legislation. Doing so in this instance is clearly within the purview of the *Act*.

**The Draft Agreement is Contrary to the UNDRIP and the *UNDRIP Act***

Instead of a co-governed Regional Assessment, the Draft Agreement proposed is one made between the federal Minister of Environment and Climate Change and the Ontario Minister of Northern Development, Mines, Natural Resources and Forestry. It relegates the Indigenous peoples, who are the sole occupants of the region that will be fundamentally altered by mining development and related physical activities, to “advisory support” roles.

The Mushkegowuk Council has long communicated to the IAAC that an advisory role in the Regional Assessment would not be acceptable and repeatedly advised against the IAAC unilaterally drafting and circulating terms of reference. Despite this dialogue, the IAAC has done just that, circulating a Draft Agreement which provides only a tokenistic advisory role for Mushkegowuk communities.

Proceeding with the Regional Assessment as proposed in the Draft Agreement is not in keeping with Canada’s obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”). With the enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, Canada must take all measures necessary to ensure that the laws of Canada are consistent with the

UNDRIP.<sup>5</sup> That includes the *Impact Assessment Act*, the preamble of which speaks to Canada's commitment to implementing the UNDRIP's terms.<sup>6</sup>

As the UNDRIP's articles make clear, performative consultation and "advisory support roles" are not enough:

- Article 18 provides 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 ...;
- Article 26 enshrines the right of Indigenous peoples to their traditional lands, territories and resources;
- Article 32 speaks to the right of Indigenous peoples to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. It mandates states to consult and cooperate with Indigenous peoples to obtain their free and informed consent prior to the approval of any project affecting their lands or territories.

Affected First Nations must have decision-making power to create and govern the Regional Assessment. Nothing less will be sufficient to advance true reconciliation. The RA as described in the Draft Agreement falls far short of the free, prior and informed consent standard enshrined in the Declaration.

In his response to the request from Aroland First Nation to conduct a Regional Assessment in the Ring of Fire region, Minister Wilkinson noted that one of the reasons an RA would be conducted was that there "are opportunities to collaborate with the Province of Ontario and to involve Indigenous groups, non-government organizations and others in the planning and conduct of a regional assessment".<sup>7</sup>

Those opportunities to collaborate have not come to pass. The Draft Agreement as negotiated between Canada and Ontario, to the exclusion of affected First Nations, has resulted in a framework that is fundamentally flawed and whose outcome cannot fulfil the purposes of the *Impact Assessment Act*. Even Health Canada has pointed out that it is unclear how the Draft Agreement considers the government's commitment to implement the UNDRIP and the *UNDRIP Act*.<sup>8</sup>

For reasons outlined below, the Mushkegowuk Council cannot support the current process as it stands. The following highlights some of its primary flaws with reference to the terms of the Draft Agreement:

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<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s. 5

<sup>6</sup> *Act*, s 1, Preamble

<sup>7</sup> <https://iaac-aeic.gc.ca/050/documents/p80468/133829E.pdf>

<sup>8</sup> Submission of Health Canada dated February 1, 2022, Online at: <https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80468/comment-57196/Health%20Canada%20Comments%20on%20draft%20Agreement%20RoF%20RA%20Feb%202022.pdf> [Health Canada Submission]

## The Draft Agreement Takes Mining Activity as a Given

Section 1.1 of the Draft Agreement frames the goal of the RA as to provide “information knowledge and analysis regarding mine development activities and other existing and future physical activities in the Ring of Fire and their potential effects...”<sup>9</sup>

Section 2.1 states that, “[g]iven the known mineral resources and mining potential of the Assessment Area, the Regional Assessment will focus on future mine development activities and their potential effects, as these types of activities are considered the most likely future physical activities to be proposed and carried out in this region in the foreseeable future.”<sup>10</sup>

It is the governments of Canada and Ontario who consider mining activities to be the “most likely” industrial activities to be carried out. The Mushkegowuk Council does not take this as a given.

As former Grand Chief Solomon pointed out in a letter to Minister Wilkinson in July of 2020, successive Ontario governments have made the development of the Ring of Fire the centre of their northern economic development policies, while excluding the Council from consultation processes with the interested mining companies. The First Nations comprising the Council have also been excluded from federal and provincial funding programs associated with mining training and infrastructure development.

Mining is only one of a number of possible development options for the region. The economic viability of large-scale mining the Ring of Fire region remains unknown. The Mushkegowuk Council is not aware of any independent analysis of the economic returns of mineral extraction in the region, or who those returns will profit. The repeated claim of mineral riches is based on provincial government analysis that has been described as “mostly aspirational hogwash” by some industry experts.<sup>11</sup> Minerals in the Ring of Fire are believed to be mainly chromite, but the economic case for building a chromite mine in the region is unclear. According to the U.S. Geological Survey, there are already enough chromite reserves in the world to last for centuries.<sup>12</sup>

Apart from a lack of clarity about the economic potential of mining in the Ring of Fire – not least for the region’s communities – the Draft Agreement is silent on the gender-based impacts and risks of mining development. As the National Inquiry into Missing

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<sup>9</sup> Draft Agreement, s. 1.1

<sup>10</sup> Draft Agreement, s. 2.2

<sup>11</sup> McGee, N. and J. Gray. October 25, 2019. *The Road to Nowhere: Claims Ontario’s Ring of Fire is worth \$60 billion are nonsense*. The Globe and Mail, Online at <https://www.theglobeandmail.com/business/article-the-road-to-nowhere-why-everything-youve-heard-about-the-ring-of>

<sup>12</sup> U.S. Geological Survey Mineral Commodities Summary 2020, p. 47, Online at <https://pubs.usgs.gov/periodicals/mcs2020/mcs2020.pdf>

and Murdered Indigenous Women and Girls found, resource extraction projects can exacerbate the problem of violence against Indigenous women and girls.<sup>13</sup>

Among its findings,

- Large numbers of transient workers flooding into communities can put Indigenous women at risk of being targeted for violence;<sup>14</sup>
- Indigenous women who work at mines are frequently exposed to sexual harassment and abuse, as well as racism;<sup>15</sup> and
- Indigenous women face barriers to participating in the extractive economy, and those who do participate are often in relatively low-paying roles.<sup>16</sup>

The Inquiry's final report noted the repeated calls from Indigenous organizations for socio-economic impact assessments of proposed resource extraction projects to include gender-based analysis.<sup>17</sup> Despite this, gender is given one passing reference in an appendix to the Draft Agreement.<sup>18</sup>

An analysis of industrial development in the Ring of Fire region must also grapple with the potential for negative effects on the local economy, including boom-and-bust cycles associated with extractive industries, the potential for a rise in cost of living, and the potential for loss of livelihoods due to environmental degradation. These issues are all the more pertinent in the context of a region whose communities already face grave socio-economic challenges.

The Draft Agreement approaches the Regional Assessment process as though it is a mining proponent. Instead, the Regional Assessment must analyze the potential risks, impacts, benefits and downsides to mineral development, and compare these with other possible development options. There may be a case that transport links are needed in the region to help connect First Nations communities to the rest of the province, but the RA must not simply assume that the mining potential in the region is undisputed and mining is the most viable development option. The RA must include an analysis of mining viability and financial risks.

As framed in the Draft Agreement, the Regional Assessment will not be sufficient to determine a path forward for development that is appropriate for and supported by the First Nations living in the region.

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<sup>13</sup> "Reclaiming Power and Place", The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Chapter 7, p. 584, Online at <https://www.mmiwg-ffada.ca/final-report/>, ["MMIWG Report"]

<sup>14</sup> MMIWG Report, p. 584

<sup>15</sup> MMIWG Report, p. 587

<sup>16</sup> MMIWG Report, p. 589

<sup>17</sup> MMIWG Report, p. 591

<sup>18</sup> See B1.6(j), which asks the Committee to "Consider the intersection of sex and gender with other identity factors and make recommendations on the manner in which future impact assessments should consider and address these factors".

## The Geographic Scope is Inappropriate

The geographic scope of the RA as described in Section 2.2 and Appendix B is too narrow insofar as the Assessment Area includes only the area “centred on the Ring of Fire mineral deposits in northern Ontario.” Even if the Mushkegowuk Council was to accept mining development as the focus of the Regional Assessment, impacts from mineral extraction in the region will extend far beyond the Ring of Fire, both downstream and down-muskeg, into the James Bay and Hudson Bay lowlands. A narrow geographic scope undermines the very purpose of a regional assessment, which is to look beyond immediate project-level impacts and allow for the study and consideration of cumulative effects of development.

The potential of impacts to the integrity of the wetlands located in the Hudson and James Bay Lowlands are significant. As Natural Resources Canada has pointed out, the Assessment Area is not appropriate to the listed Assessment Priorities.<sup>19</sup> The cumulative effects of mining activities, road projects and other physical infrastructure will necessarily disturb intact peatlands and boreal forests. As detailed further below, such development will invariably release carbon into the atmosphere. Changes to climate will accelerate the variability of the wetland water tables, leading to possible increased methylmercury levels and premature degradation of the wetlands. Traditional territories of communities comprising the Mushkegowuk Council that are downstream from the mining sites will invariably be affected, yet are excluded from the Assessment Area.

Allowing the Committee to define one or more separate “Study Areas” does not resolve this shortcoming. It should not be in the discretion of the Committee to decide whether to consider areas whose environment and people will invariably be impacted by proposed mining development. The *Impact Assessment Act* mandates a committee conducting an assessment take into account scientific information and Indigenous knowledge provided with respect to the assessment.<sup>20</sup> Mushkegowuk Cree Elders have cautioned that the lowlands are deeply interconnected with underground rivers and streams not visible in aerial photos. The muskeg that is downstream from the Ring of Fire filters vast quantities of water that flow into Hudson Bay and James Bay. Affected land and waterways will not only be subject to environmental degradation, but may impact on the food security and sovereignty of downstream communities, who harvest food and medicines within their traditional territories.

The lowlands ecosystem is a complex living network, and must be assessed with specific regard for the interconnected web of biodiversity which characterizes the region and makes it so vital. Having excluded First Nations from the design of the Regional Assessment, the Draft Agreement fails to account for their knowledge of how the

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<sup>19</sup> Submission of Natural Resources Canada dated February 2, 2022, Online at: <https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80468/comment-57198/NRCan%20Comments%20on%20draft%20Agreement%20of%20Ring%20of%20Fire%20Regional%20Assessment.pdf>, NRCan suggests that it may be more appropriate to look at physiographic boundaries, such as watersheds. [NRCan Submission]

<sup>20</sup> *Act*, s. 97(2)



region's land and waterways are interconnected, resulting in a geographic scope that is far too narrow to fulfil the purposes of either the *Act* or the Regional Assessment itself.

### **The Assessment Priorities Fail to Include Climate and Carbon**

The Hudson Bay and James Bay Lowlands are the second largest peatland complex in the world,<sup>21</sup> and a critically important carbon sink that sequesters more than 12 megatons of carbon dioxide each year. The peatlands are estimated to store as much carbon as all of the other natural ecosystems of Ontario combined, and contain as much water as Lake Erie, moving water into lakes and rivers and acting as storehouses for carbon, mercury and other minerals.<sup>22</sup> Their disturbance could lead to disproportionate increases in greenhouse gas emissions.

The Regional Assessment must account for the irreparable loss of carbon sequestration capabilities as a result of extractive activity and development in the region. The federal government has set Canada's climate target for 2030 as a 40-45 percent emissions reduction from 2005 levels. In light of this, it is inexplicable that climate change is not among the "Assessment Priorities" listed in the Draft Agreement.<sup>23</sup>

Other ministries have pointed out this glaring absence. Natural Resources Canada, for example, has proposed the addition of three new Assessment Priorities centred on climate, being carbon stocks and fluxes, wetlands structure and function, and cumulative impacts of climate change and development on ecological systems.<sup>24</sup>

Worldwide, peatlands store three times as much carbon as boreal and tropical forests combined, and the high-density carbon of the Hudson Bay Lowlands provides one-tenth of the cooling effects of the world's peatlands.<sup>25</sup> A recent article in the journal *Nature* found that the carbon sequestration function of forested peatlands remains poorly documented, despite their widespread distribution.<sup>26</sup> The authors nevertheless highlighted the significance of forested peatlands for carbon sequestration and suggested that greater consideration be given to peat carbon stores in national greenhouse gas inventories and conservation policies.

In addition to their importance as carbon stores, peatlands are an incredibly difficult ecosystem to rehabilitate: they grow at a rate of only one millimetre per year.<sup>27</sup> The Hudson Bay Lowlands are centuries old. If extractive activities degrade them, their carbon sequestration capabilities will be impossible to recover on any timescale aligned with Canada's short or long-term greenhouse gas reduction goals.

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<sup>21</sup> The largest is the western Siberian lowlands, See Far North Science Advisory Panel, "Science for a Changing Far North" (April 2010), Online at: <https://collections.ola.org/mon/24006/302262.pdf> [FNSAP Report]

<sup>22</sup> FNSAP Report, pp. 9, 24

<sup>23</sup> Draft Agreement, s. 2.3

<sup>24</sup> NRCan Submission

<sup>25</sup> <https://www.canadiangeographic.ca/article/whats-stake-ontarios-ring-fire>

<sup>26</sup> <https://www.nature.com/articles/s41598-021-82004-x>

<sup>27</sup> <https://thenarwhal.ca/ring-of-fire-ontario-peatlands-carbon-climate/>, citing Maria Strack, a Canada Research Chair in ecosystem and climate at the University of Waterloo



Resource extraction in the Hudson and James Bay Lowlands could not only destroy this globally critical carbon sink; it could release a huge store of carbon and escalate climate change further into catastrophe. A proper Regional Assessment must include a full, robust investigation of *all* the potential consequences of industrial activities at various scales of development. As it is not possible to predict the nature, location and timing of activities, a properly done Regional Assessment ought to model various development scenarios and analyze the potential consequences of each, including consideration of a range of pit sizes and locations, different types of mining operations and various amounts of hauled tonnage.

The peatland disturbance from mining development and other physical infrastructure, including roads and its impact on climate is by far the most significant environmental effect of development in the Far North. The fact that climate change is not among the priorities to be studied by the Committee (the phrase “climate change” appears once in the Draft Agreement, in an appendix) undermines the seriousness and utility of the entire Regional Assessment.

### **The Project Scope is Too Narrow**

Section 2.5 begins with the incorrect statement that “[i]t is acknowledged that there are on-going impact and environmental assessments for proposed road developments in Northern Ontario that are not linked to specific mine development activities, which will continue according to their separate legislated processes and timelines.”<sup>28</sup>

Contrary to the statement in section 2.5, the proponents of the road projects under consideration explicitly link them to mining development. The Terms of Reference for the Northern Road Link (NRL) Environmental Assessment<sup>29</sup> state that the proposed road “will connect the Ring of Fire mineral deposits in the McFaulds Lake area to the all-season highway network.” The proponent goes on to say that,

The Ring of Fire in the Ontario far north is considered one of the most promising mineral development opportunities in the province in over a century, with potential for multi-generational chromite production and significant production of nickel, copper and platinum (NDMNR 2021a). Mine development in the Ring of Fire area is currently unlikely without year-round access.<sup>30</sup>

The project description for the proposed Webequie Supply Road says that the road will be part of an all-season connection between the McFaulds Lake area and the provincial highways system to “ensure/maximize the viability of mine developments”. Its goals and objectives are described as being “[t]o facilitate the movement of materials, supplies and

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<sup>28</sup> Draft Agreement, s. 2.5

<sup>29</sup> Proceeding pursuant to Ontario’s *Environmental Assessment Act*, RSO 1990, c E. 18

<sup>30</sup> Northern Road Link Draft Terms of Reference, s. 1.4.2, online at: [https://northernroadlink.ca/wp-content/uploads/2021/11/Northern-Road-Link\\_Draft-ToR\\_20211116.pdf](https://northernroadlink.ca/wp-content/uploads/2021/11/Northern-Road-Link_Draft-ToR_20211116.pdf),

people from the Webequie Airport to the area of existing mineral exploration activities and proposed mine developments in the McFaulds Lake area”.<sup>31</sup>

The proposed Marten Falls Community Access Road will connect to the two other roads. Its proponent describes its purpose as providing “all-season multi-purpose ground access” between Marten Falls First Nation and the provincial highway network, while also conceding that the road will serve not only community access, but also “industrial supply needs”.<sup>32</sup>

Mineral resource development in the Ring of Fire region is not feasible in the absence of road access. While the Draft Agreement states an intention not to duplicate the road assessments,<sup>33</sup> the purpose of a Regional Assessment – to look beyond individual projects and assess cumulative environmental, social and other impacts – cannot be fulfilled if the planned road developments are not part of the scope of study. Woodland caribou, for example, are identified as one of the RA’s Assessment Priorities.<sup>34</sup> The construction of roads in the region will fragment caribou habitat. The RA cannot meaningfully fulfil its purpose in the absence of consideration of how road construction will affect the region. NRCan, Health Canada and the Department of Fisheries and Oceans have all submitted that the Draft Agreement should include consideration of infrastructure, including roads, associated with mine development.<sup>35</sup>

Not enough is known about how impacts from various road construction projects and mining activities will overlap and reinforce total cumulative effects in such a globally significant region as the Hudson Bay and James Bay lowlands. Much more research is needed on the hydrology of this region, not least regarding groundwater flow and interconnectivity, carbon sequestration, caribou calving and aquatic habitat. The Regional Assessment ought to provide an opportunity to gather baseline information and develop a long-term regional plan, and to minimize or mitigate future risks from industrial development in the region.

Transport corridors are inextricably linked to the potential for mineral development. If the mining development is the stated purpose of the Regional Assessment, or one of its purposes, proposed roads must necessarily be included in its scope.

## **The Committee Structure Unlawfully Excludes Indigenous Peoples**

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<sup>31</sup> Webequie Supply Road Environmental Assessment Terms of Reference, s. 1.4.1, online at: <https://www.supplyroad.ca/wp-content/uploads/2020/04/Section-1-3a.pdf>

<sup>32</sup> Terms of Reference for the Marten Falls Community Access Road Environmental Assessment, p. 13, online at: [http://www.martenfallsaccessroad.ca/wp-content/uploads/2020/09/Section-1-6\\_RPT\\_2020-09-09\\_Proposed-ToR\\_60593122\\_WEB.pdf](http://www.martenfallsaccessroad.ca/wp-content/uploads/2020/09/Section-1-6_RPT_2020-09-09_Proposed-ToR_60593122_WEB.pdf)

<sup>33</sup> Draft Agreement, s. 2.5

<sup>34</sup> Draft Agreement, s. 2.3

<sup>35</sup> NRCan Submission, Health Canada Submission, Submission of the Department of Fisheries and Oceans dated January 2022, Online at: <https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80468/comment-57439/-Ring%20of%20Fire%20draft%20agreement%20-%20DFO%20comments%20January%202022%20final.pdf>

Section 3 of the Draft Agreement provides for a Committee to conduct the RA consisting of five members approved by the federal Minister of Environment and Climate Change and Ontario's Minister of Northern Development, Mines, Natural Resources and Forestry.

Section 4 establishes a Committee Secretariat to provide administrative and technical support to the Committee conducting the RA, co-managed by and comprised of staff from the Impact Assessment Agency of Canada and the government of Ontario.

With respect to Indigenous peoples, s. 5.7 provides that the Committee will seek their "knowledge and perspectives" on matters relevant to the conduct of the RA,<sup>36</sup> and s. 6 provides that an "Indigenous Talking / Sharing Circle (the "Circle") may be established" to bring forward perspectives "for consideration by the Committee in its conduct of the Regional Assessment".<sup>37</sup> The Draft Agreement does not require that Committee actually consider the Indigenous perspectives that may be shared. This is despite the fact that the *Act* itself requires that the Committee's report to the Minister set out how it took into account and used Indigenous knowledge provided with respect to the assessment.<sup>38</sup>

Appendix D to the Draft Agreement provides that the Circle would be comprised of "individual community members from Matawa-member First Nations and Mushkegowuk-member First Nations who exercise traditional and cultural activities in the Assessment Area...".<sup>39</sup> As noted above, the Assessment Area excludes large swathes of the traditional territory of the Mushkegowuk-member First Nations that lie downstream, and whose lands, waterways and communities will be affected by development there. The Draft Agreement therefore provides no assurance that downstream First Nations will be able to participate even in an advisory capacity.

Regardless, in meetings with the IAAC over the past several months, the Mushkegowuk Council has repeatedly expressed that "advisory support" roles are not adequate. They do not fulfil the rights to participate in decision-making that the UNDRIP enshrines. Structuring the Committee this way perpetuates the history of colonial approaches to Indigenous peoples, and undermines the efforts at reconciliation to which the Prime Minister claims his government is committed.

With respect to the composition of the Committee itself, s. 3.9 provides that its members "will be unbiased and free from real or perceived conflict of interest with respect to the Regional Assessment".<sup>40</sup> In a meeting with staff from the IAAC on April 1, 2021, the Mushkegowuk Council learned that the Agency intended to exclude elected officials from the affected Mushkegowuk Nations from serving on an assessment committee, on the premise that they would be "biased" and unable to fairly discharge their duties. In a subsequent meeting, Agency staff resiled from that, saying that members of

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<sup>36</sup> Draft Agreement, s. 5.7

<sup>37</sup> Draft Agreement, s. 6.2

<sup>38</sup> *Impact Assessment Act*, s. 102(2)

<sup>39</sup> Draft Agreement, D1.2

<sup>40</sup> Draft Agreement, s. 3.9

Mushkegowuk First Nations would not be presumptively excluded, although their position on elected representatives remained unclear.<sup>41</sup>

In light of this, the Mushkegowuk Council leadership was dismayed to see “non-bias” and “conflict of interest” appear in the Draft Agreement, particularly because the Draft Agreement does not otherwise guarantee Mushkegowuk representation on the Committee. Taken together with the past statements of IAAC staff, this language can only be interpreted as a pretext to exclude Mushkegowuk nations from participation in the Regional Assessment, having already denied them the ability to co-govern and co-implement a Regional Assessment mandate.

The expressed attitudes of IAAC staff, and the exclusionary language in the Draft Agreement, are contrary to the statutory intention of the *Act* to facilitate inclusion of Indigenous communities on assessment committees. Ontario and Canada have arrogated to themselves the right to appoint a committee. In the circumstances, the Mushkegowuk Council is concerned that the “bias” test invites considerations of factors such as race, place of birth or identity – particularly Indigenous and Mushkegowuk identity. Inviting members of federal and provincial ministries – who are tasked with approving Committee members<sup>42</sup> – to scrutinize nominees for “bias” in this context is tantamount to inviting government officials to violate Canada’s human rights laws.

The Mushkegowuk Council has repeatedly stated that Indigenous peoples must be considered equal partners in the Regional Assessments with the federal and provincial governments through a co-governance relationship. Advisory supports and talking circles are not a substitute for decision-making powers.

### **Concluding Remarks**

Indigenous communities are not merely stakeholders in this process; they are rights holders. Treating them otherwise has resulted in a Draft Agreement that is fundamentally flawed in several respects:

It takes mining development as a given, in the absence of any supporting evidence that mining is an optimal option for the region, with respect to the environmental and social consequences for the region’s 24,000 people, and even with respect to economic viability. Alternative development scenarios must be considered through a local, Indigenous-led process before an appropriate path forward is determined. The overall sustainability objectives of affected communities must remain at the fore.

It focuses on an Assessment Area that has little bearing on the realities of the region’s sensitive and complex topography.

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<sup>41</sup> NRCan makes the submission that the description of the Committee’s composition is unclear as to whether it will include Indigenous representation, further underscoring how misplaced the IAAC’s equating of Indigeneity with bias is in the context of Committee membership.

<sup>42</sup> Draft Agreement, s. 3.3

It fails to give appropriate weight to climate change considerations, despite the global importance of the ancient – and to date, undisturbed – peatlands of the Hudson and James Bay lowlands as a carbon sink.

The Draft Agreement must be jettisoned in favour of a co-governed process.

First Nations across Treaty 9 territory have never ceded their traditional lands. They maintain longstanding social, cultural, and livelihood ties to the land. They must be equal partners with the federal and provincial governments in co-developing, co-managing and co-governing the Regional Assessment. Not only is there no legal impediment to co-governance, an interpretation of the *Impact Assessment Act* that is consistent with the *UNDRIP Act* makes co-governance legally imperative. Indigenous leadership must be at the fore of a robust investigation and decision-making process for what can and should happen with the home of the Omushkego, the Breathing Lands.

Thank you

A handwritten signature in black ink, appearing to read 'Ryan Small', written over a horizontal line.

Ryan Small  
A/Executive Director  
Mushkegowuk Council