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Closing Remarks of Pays Plat First Nation

Introduction

Through the course of this Hearing, Pays Plat First Nation ("PPFN") has made it clear that it has serious concerns with the sufficiency of the information upon which the environmental impact of the Project is being assessed.

While PPFN is prepared to work cooperatively with the Proponent to progress this Project in an environmentally sound manner, the First Nation has a high stake in the progression of the mine, and it is of the utmost importance that the environmental risks of the Project be mitigated in every possible manner, at all times.

The people of Pays Plat have occupied their traditional lands on the central north shore of Lake Superior since time immemorial. Their cultural legacy as hunters, fishers, trappers, and gatherers originates in this region. PPFN's cultural connection with their traditional lands in the immediate vicinity of the Project will be materially and irrevocably impacted.

As we heard during the community session on April 8th, community members have a deep connection to Hare Lake, Hare Creek, Angler Creek, and the surrounding area. We heard of the deep inter-generational relationship that community members have with the area, as well as with Lake Superior. These traditional territories of the Nation represent an area of healing and are of profound spiritual significance. The impacts of the Project will not just affect the exercise of constitutional rights of current community members, but will also affect these *sui generis* interests of future generations to come.

Consequently, it is imperative that the Panel address the deficiencies in the data that has been identified during the course of the Hearing.

Baseline sampling ought to be updated as a condition for the Project proceeding. A viable fishery offsetting plan should be developed, and ought to be supported by Fisheries and Oceans Canada, as well as impacted First Nations. Sediment and aquatic sampling should be enumerated as a core condition for approval. Tailings dam failure should be accounted for, and details on water treatment of phosphorus provided.

These are not unreasonable conditions, but rather are based on key deficiencies in the data and the corresponding concerns that participants have raised.

PPFN submits that it would be unreasonable to leave these concerns unaddressed, and as a result, leave future generations liable for the impact of the Project. Consequently, these written closing submissions will re-iterate key deficiencies in the data, and PPFN's high stake in having those deficiencies addressed.

Technical Concerns

Aquatic Baseline

The EIS Guidelines for the project state that the adequacy of the baseline "*shall be evaluated based on, but not limited to, such factors as … adequacy of sampling effort, across all seasons and over multiple years; and distribution of sampling effort both temporally and geographically for different habitat types within each water body.*" Consequently, a crucial requirement for the Aquatic Baseline was to design a sampling strategy that included an adequate sampling effort to examine the geographic and temporal variation of fish populations in the Local Study Area.

The Aquatic Baseline has three main deficiencies that affect its ability to characterize the spatial and temporal variation in the aquatic communities: it lacks an explicit sampling design and strategy, employs a minimum sampling effort, and lacks an updated description of ecological parameters for the aquatic communities.

The lack of an explicit sampling design resulted in a minimum sampling effort in the surveys of the aquatic communities. The Aquatic Environment Baseline Report Update indicates that the baseline studies included "*multi-year, multi-season surveys of aquatic habitats and communities in the study area*" and that only minor additional information was identified as required to supplement the studies published in 2007, 2009, 2012, and 2013.

Implicitly, this conclusion is based on the premise that the current information adequately describes the aquatic habitat to be impacted during the development of the Project. For this premise to be true, it must be possible to infer the status of the fish communities in 2021 or later.

Consider the fish community in Hare Lake, for instance. First, the Proponent must estimate with a degree of certainty its diversity and the abundance and age structure of each population. Fish surveys in Hare Lake *ad hoc* to this Project were conducted in 2009, 2011, and 2013. Some methodological differences between the 2009 and 2011 surveys may account for unexplained variation in the diversity of fish and their abundance. For example, in 2009, using a seine net resulted in the capture of 60 logperch individuals. In 2011, a seine net was not used, but 21 logperch individuals were trapped using a Nordic net, resulting in a relative abundance of roughly one-third of that observed in 2009.

In contrast, the relative abundance of spottail shiner in 2009 was approximately two-thirds of that observed in 2011 when Nordic nets were introduced in the sampling. Was the variation in logperch and spottail shiner abundances due to natural change between years or sampling error introduced by using different techniques? Further, what would be the expected abundance of these species in 2021 or later?

These examples illustrate how the lack of methodological planning can introduce unaccounted sources of error in estimating ecological parameters. Most importantly, it shows that the

information contained in the Aquatic Baseline is insufficient to assess the potential adverse effects of the Project on fish populations.

Yellow perch and spottail shiner were the most abundant fish species in Hare Lake. The length of individuals captured in 2011 and 2013 was recorded to examine the age structure of their populations. The length-frequency histograms included in the Aquatic Baseline showed a change between years in the age structure of both populations. In 2011, the yellow perch population was dominated by the abundant young-of-the-year (YOY), with smaller proportions of presumed 1+ and 2+ classes fish.

In contrast, in 2013, the age class 1+ was arguably as abundant as the YOY. The histograms also showed an apparent decrease in the abundance of YOY in 2013. For spottail shiner, changes between years in the age structure of the population are more evident. In 2011, two discrete age classes were observed, 1+ and YOY, the former being the most abundant, while the presence of 2+ fish is uncertain. In 2013, a multimodal distribution was observed, with YOY being described as the most abundant, followed by 1+ and 2+ fish. These results illustrate the dynamic nature of the fish populations in Hare Lake.

It is essential to understand the range and causes of variation in fish population parameters to assess the potential adverse effects of the Project. However, the Aquatic Baseline lacks profound interpretations of the observed changes in the age structure of the populations, raising critical questions. For example, what could explain the changes between years in the age structure of the populations? Could the rarity of 2+ spottail shiner in 2011 be a consequence of high YOY mortality in 2009? Alternatively, could the differences be the result of methodological changes or varying efforts between surveys?

Because none of these questions are addressed, it is impossible to make inferences about temporal changes in the abundance of each age class. Crucially, the minimal temporal replication (n = 2), the high variation observed between years, and the lack of interpretation of the results make it impossible to infer the age structure of the populations in 2021 or later.

Consequently, the effects of the Project cannot be adequately assessed because the current status of the receiving fish populations in Hare Lake is unknown.

Fishery Offsetting Plan

As noted in the Pinchin review of the EIS Addendum (CIAR 894), the objective of a Fish Offsetting Plan is to support the conservation of fish and their habitat by "*counterbalancing the residual death of fish and/or harmful alteration, disruption or destruction of fish habitat resulting from carrying on works, undertakings or activities authorized under the Fisheries Act.*" As the testimony at the Hearing demonstrated, the Fisheries Offsetting Plan presented by the Proponent

is insufficient to achieve the objectives set in the federal policy due to four major flaws: 1) The plan assumes that the productivity of the habitat to be destroyed and created are equivalent. 2) The plan lacks adequate measures of success because the baseline data is deficient. 3) The plan does not account for time lags in the restoration of productivity. 4) The measures proposed in the plan may result in extensive winter mortality of salvaged fish.

One approach to achieving the objectives of an Offsetting Plan is to provide in-kind compensation for the habitat destroyed. In this approach, the fish habitat that is impacted is replaced by the same quantity and quality. However, in-kind replacement is subject to uncertainty in the outcome and a time lag between the adverse effects and the implementation of measures. Thus, it must be emphasized that additional offsetting measures are required to account for uncertainty and time lags. A review of projects showed that success in maintaining the productivity of ecosystems is linked to using multipliers to determine the amount of offsetting measures to be implemented (CIAR 894).

The Fisheries Offsetting Plan presented by the Proponent establishes a false equivalency between the amount of habitat to be destroyed and created. In other words, the plan assumes that the habitats destroyed and created are functionally the same, resulting in no net loss of fish productivity. However, using the habitat area as a currency representing the amount to be compensated is widely discredited because it ignores the ecological differences between habitats differing in type, location, time, or ecological context. This false equivalency of habitat is the biggest drawback of in-kind habitat replacement as it assumes that the new habitat will fully replace the functionality of the removed habitat.

The flawed equivalency of habitats in the plan is further compounded by the deficiencies of the supporting studies: the baseline in productivity against which no net loss should be measured is unknown. The aquatic baseline is inadequate, with minimal or no temporal replication, undescribed natural variation in fish productivity, and a large temporal gap between the studies and the proposed activities.

Implicitly, the EIS Addendum and the Fish Offsetting Plan assume that the baseline conditions are fixed at the time of the development of the Project, ignoring the dynamic nature of the ecosystems. For example, the fish studies conducted at Hare Lake showed a three-fold change in the catch-per-unit effort between samplings undertaken in 2011 and 2013. No additional fish studies were conducted after those years.

If we assume that the Project will be developed in 2022, What is the expected fish productivity in Hare Lake in 2022 against which the no net loss principle should be measured? It is a fact that a benchmark for fish productivity cannot be determined. Then, the logical truth is that it is impossible to evaluate the success of the Offsetting Plan.

The measures proposed in the plan may result in extensive mortality of salvaged fish due to a lack of overwintering habitat. The plan proposes to offset an area of 20.21 hectares. The most

significant contribution to that total offset area is made by the measure to colonize several fishless lakes (15.45 ha). However, the baseline studies show that these lakes lack overwintering habitat due to low levels of dissolved oxygen below the ice cover.

To our knowledge, the proponent has not updated the information presented in the baseline studies. Thus, our best understanding to date indicates that these fishless lakes are inadequate to offset the loss of habitat causes elsewhere in the project area, and they should not receive further consideration.

Offsetting measures also include activities to "enhance the habitat and increase community diversity" in Lake 8. Our current understanding of the habitat in Lake 8 indicates that overwintering of fish may not be possible, due to low availability of oxygen. If habitat enhancement measures are implemented, dissolved oxygen during winter may increase to levels suitable to fish. However, the success is uncertain, and it could only be evaluated by reassessing Lake 8 during the winter months.

In addition to concerns about habitat suitability, water levels in Lake 8 are maintained by a beaver dam. Should the dam fail, as it is often the case, water levels in Lake 8 may drop below what is suitable for maintaining self-sustaining fish populations. While it is not up to the proponent to intervene with the natural ecosystem dynamics, the failure of the beaver dam would eliminate the offset measures, causing a net loss of fish productivity.

Given the unsuitability of the habitat, the uncertainty of success, and the fluctuating nature of the system, the habitat enhancement of Lake 8 should not be considered an appropriate offsetting measure.

When the contribution of the colonization of fishless lakes and the enhancement of Lake 8 are removed from the Offsetting Plan, the resulting total area of measures is 4.76 ha. However, it should be noted that 4.0 ha of the total area are represented by an *ex-situ* offsetting measure, the "Shipyard Road Fish Habitat Creation and Enhancement." While this measure may align with some regional fisheries objectives, it does not contribute to offset the loss of resources to local rightsholders and stakeholders, given the distance to the area of the Project.

Cumulative Effects

The *Canadian Environmental Assessment Act* (2012) and the EIS Guidelines require that the Proponent consider any cumulative effects resulting from the interaction of the Project with past, present, and future physical activities. Thus, the Proponent is responsible for analyzing the cumulative effects on valued ecosystem components by considering additive, synergistic, induced, and other forms of interactions along the pathways of effects.

The most significant problem in the environmental assessment of this project is the lack of understanding of the ecological scale at which the effects should be measured, and the inadequate identification of the recipients of the effects. The ecological processes that threaten the conservation of biodiversity operate at the population level. Thus, understanding the combined effects of multiple developments requires quantifying how they influence the vital rates of populations. Logically, then, cumulative effects occur at scales that are population-specific, and the use of a single scale of analysis for all species is inadequate.

Consequently, because the spatial scales of analysis may be either smaller or larger than the scale of populations, the cumulative effects will be, at best, overestimated. Logically, the worst-case scenario implies underestimating the cumulative effects on the recipient populations and, should the Project be developed, reduce their likelihood of survival.

Several specific deficiencies are found throughout the assessment, in addition to the inadequate ecological framing. First, the methodology implicitly assumes that the nature of the interactions between the effects of all the activities is additive. While this may be true in some instances, other effects may interact in a synergistic nature or respond to thresholds, and, in that case, the cumulative effects could be underestimated. Further, the assessment reveals some conceptual misunderstanding around cumulative effects and their ecological impacts. In several instances, it is argued that because the project-specific effects are much smaller than the effects of other activities, the cumulative effects must be insignificant.

This conceptual error also gravely ignores that ecological thresholds may be surpassed even when the contribution of a new activity is of minor magnitude compared to the existing ones. Finally, the assessment justifies the "sustainability" of the Project based on the fact that "*cumulative change in wildlife habitat ... is not materially different than that represented by commercial timber harvesting alone.*" Regardless of the credibility of the claim, the supporting evidence is erroneous, as the ecological effects of habitat transformation and habitat destruction are materially different.

As noted in the Pinchin review of the EIS Addendum (CIAR 894), the data presented does not evaluate potential cumulative effects on Areas of Concern in Lake Superior. For instance, human activities have resulted in mercury accumulation (Hg) in terrestrial and aquatic ecosystems. Studies have demonstrated that forestry operations can increase the concentrations and loads of Hg to surface waters by mobilizing it from the soil. Clearing, grubbing, and stripping of vegetation, topsoil, and other organic material during the activities of the Project may result in the release and mobilization of Hg from the soil into adjacent watersheds.

A recent study showed that bays in the Great Lakes receiving riverine inputs have high mercury concentrations, leading to consumption restrictions. Peninsula Harbour (Marathon) and Jackfish Bay (near Terrace Bay), which are part of the Regional Study Area for the Project, were declared as Areas of Concern in the past due to high levels of contaminants in the water, including mercury.

The circulation of waters along the north shore of Lake Superior follows a general westerly direction. This pattern means that effluents entering Lake Superior at the mouth of Hare Creek will reach the Jackfish Bay Area of Concern in Recovery. Jackfish Bay was designated as an Area of Concern due to the past and present degradation of the water quality and environmental health caused by the effluents from the pulp and paper mill in Terrace Bay. The degradation has resulted in low water quality, contamination of sediment, and fish and fish habitat destruction, among other consequences.

Although environmental health has improved, the potential for cumulative effects due to the proposed mining development will threaten the recovery of Jackfish Bay. Considering these concerns, it is important to adequately assess the levels of contaminants resulting from the combined effect of the Project and past, present, and future physical activities.

Lake Superior can only withstand so many toxic industrial sites. Each new industrial site needs to be weighed carefully.

Tailings Dam and Water Treatment Failures

PPFN is glad to be working with PGM on their tailings dam and water treatment plant construction design. To this effect, we have been assured that the dam constructed at the PGM site will be a downstream dam. However, we do have some outstanding concerns that we wish to bring to the Panel's attention.

Paramount, we wish the Panel to ask – and consider, what the mitigation and remediation techniques will be in the event of a failure. Considering the impact that climate change has had on 1 in 50, 1 in 100, and 1 in 500-year extreme storm events, will the water treatment facility be able to handle excess water? Will the dam be modified to accept more tailings? And most relevantly, how will PPFN be compensated for the irreparable loss of their traditional land in the event of a catastrophic failure?

There have been over 63 major tailings dam failures reported worldwide over the past 50 years. While these failures have been attributed to a number of factors, research has shown that there is a demonstrable upward trend in high-consequence tailings dam disasters.

The results of these failures are catastrophic to the environment. In Canada, one of the most infamous disasters occurred at the Mount Polley Mine in British Columbia. On August 4, 2014, after a tailings dam failure, approximately 17 million cubic meters of water and 8 million cubic meters of tailings/materials were released from the tailings dam. This effluent was introduced to lakes and streams that served as drinking water and fish spawning grounds.

The incident at Mount Polley Mine was far from an isolated failure. In June of 2015 the Lac Des Iles in Northern Ontario was forced to discharge its tailing pond water into the environment without treatment due to excess water from a rain event.

Water with high levels of suspended solids, aluminum, and iron was released without treatment. This was particularly impactful to the nearby Gull Bay First Nation, which was never consulted regarding the release of untreated water on or around their traditional lands.

Just as in this Project, engineers assured the regulatory bodies that a Tailings Dam failure would never occur. But it did, and will likely happen again in the future without proper planning. No effort should be shared when it comes to constructing a Tailings Dam this close to Lake Superior.

If such an incident were to take place at the Marathon PGM site, it would mean irreversible damage to PPFN traditional territory. As these submissions have already made clear, Lake Superior is a sacred living entity, and PPFN has protected her since time immemorial.

PPFN utilizes not only Lake Superior, but many of the surrounding lakes, rivers, creeks and lands to perform their cultural ways of fishing, gathering and hunting. To lose these waters and lands due to a tailings or water treatment failure would pose an identifiable and appreciable adverse effect on PPFN members – both present, and future. Truly, it would be life altering.

PPFN is prepared to work closely with Marathon PGM to ensure that both the tailing pond and water treatment facilities are designed using the most modern applications. The Panel must ensure that no effort is spared in designing and constructing the Tailings Dam on this Project.

Outstanding Concerns

Through the course of the Hearing, a number of concerns have been raised by various parties – including PPFN, and answered by the Proponent. However, a number of issues remain outstanding.

During the March 21st session PPFN asked the Panel to clarify the proper procedure regarding following up on these issues. The Panel indicated that such questions should be raised during the closing remarks. As such, PPFN wishes to raise a few notes for the Panel's consideration:

Geordie and Sally Deposits

During the March 16th session the question was raised regarding the prospect of the Geordie and Sally deposits, and whether their inclusion would necessitate the commencement of a new Environmental Assessment process. However, the Proponent was unsure on whether this would be the case and no undertakings were required to clarify this issue. Considering the massive

increase in the Project footprint that would occur if these deposits were included, this outstanding question ought to be answered.

While assurances have been made that a new EA process will be necessary to include the additional deposits, no firm answer or source has been provided to the Panel.

Water Quality Testing

During the March 18th session, the Proponent noted that larger scale rock testing with regards to water quality will be commenced once blasting begins. As Dr. Morin from CRINO noted, these are issues with the baseline water quality data, and PPFN worries that it may be too late to get accurate water quality data once blasting begins.

Additionally, during the March 19th session, the Proponent acknowledged that no winter sampling had been conducted. PPFN wishes to ensure proper winter aquatic sampling will occur prior to any effluent being introduced into the aquatic environment around the Project area.

This sampling – both winter and large scale rock testing, is necessary to properly gauge the adverse impact of the Project through its lifespan.

Waterflow Monitoring

Drawing on the March 17th recommendations by the Ministry of the Environment and Climate Change Canada, PPFN submits that it would be prudent to add the restart of waterflow monitoring for baseline data at Hare Lake as a condition to the Project moving forward.

As a follow-up point, PPFN wishes to ask whether Hare Lake will be dewatered for the length of time it will take to take the water treatment pit to fill. To that effect, will the fishery compensation plan continue for the entire period of time that the pit is being filled?

Procedural Fairness Concerns

It is also important to address the limitations on PPFN's participation in the Hearing. Through the course of the Hearing – particularly during the community session, we did not hear from community members who were potentially uncomfortable with their traditional knowledge and testimony being made public as a default. Under the current procedures, these members would have had to evidence harm caused by the disclosure of their testimony in order to have it made confidential.

This discomfort is a direct consequence of the Panel choosing to proceed under the 2012 *Canadian Environmental Assessment Act* rather than the 2019 *Impact Assessment Act*.

It is no surprise that some members were reluctant to participate in a process that chose to disregard a decade of advancement in the treatment of First Nations and Indigenous Traditional Knowledge.

While we both acknowledge and understand the Panel's March 4th letter outlining its reasons and do not wish to re-examine this issue, it is nonetheless important to note that even a cursory comparison of the 2012 *Canadian Environmental Assessment Act* to the 2019 *Impact Assessment Act* shows the 2012 legislation deficient in its treatment and consideration of First Nation rights, culture, and traditional knowledge.

The changes manifested in the 2019 legislation reflect the common law requirements with regard to Indigenous consultation and accommodation developed by a series of Court decisions, executive commitments, and International legal developments that have occurred since 2012.

It was well within the Panel's authority and jurisdiction to proceed with amended procedures to reflect these changes, while also still respecting the 2012 procedures that the Project was commenced pursuant to. Having not done so, PPFN was confronted with a decision to either waive full exercise of its rights, or not participate and leave its concerns unaired.

While PPFN has been committed to fully participating in this process in order to advocate for the environmental interests of the Nation, it ought to be recognized that the price for this advocacy was a limitation on PPFN's constitutional rights.

This becomes particularly significant in light of the comments from the April 8th PPFN Community Session. The individuals who volunteered to limit the full exercise of their rights did so because of the strength of their conviction. It is important to the community that the Panel and Public alike understand the depth of PPFN's connection to the aquatic environment on their traditional territories.

The water on and around Hare Lake, Angler Creek, and Lake Superior represents healing, renewal, and a connection with PPFN's profound cultural history.

The testimony of the community members who did feel comfortable with the Hearing Procedures ought to carry considerable weight considering the sacrifice that the testimony represented.

The testimony from the technical sessions should also carry significant weight, especially in light of the dearth of time provided by the Panel for PPFN to review data on Water Quality, Hydrology, and Caribou. As noted in its January 04, 2022, letter, PPFN required significantly more time to review and respond to the January 15, 2022, data provided by the Proponent. The requested extra time was not granted.

As it stands, PPFN only had a few months to review and respond to significant new information corresponding with key areas of concern to the First Nation while simultaneously preparing for the Hearing. The result was an overload on PPFN's capacity to meaningfully participate in the Hearing, and properly engage with the data.

PPFN ought to have been entitled to review the adequacy of the data to be satisfied that the environment will be protected. In the normal course, this data should have been reviewed in detail prior to the Hearing to ensure public confidence in the data.

Unfortunately, the Panel chose to continue with the Hearing regardless of the insufficient information, and is continuing with the process with key areas of concern – such as the fishery offsetting plan, left unresolved. PPFN is prejudiced by having to continue advocate for the sufficiency of this plan without the procedural safeguards of the Public Hearing.

Constitutional Underpinning & Concurrent Superior Court Title Claim

It cannot be emphasized enough that section 35(1) of the *Constitution Act, 1982* protects the right of First Nations to participate in any Project which would impact the exercise of their Aboriginal rights. To that effect, the *sui generis* interest of PPFN community members to hunt, fish, trap, and gather on their traditional territories are solemn, constitutionally protected promises that have been consistently affirmed by the executive, the legislature, and the judiciary.[1]

Truly, the practice of community members to hunt, fish, gather, trap, and heal on their traditional territories are not merely tangential to the collective lived experience of the Nation, but rather are a fundamental component of life for the community.

It is important to note that PPFN were neither consulted nor signatories to the Robinson Superior Treaty of 1850, and are asserting Aboriginal title over their traditional lands – including Hare Lake, Angler Creek, and the surrounding area. While it is recognized in law that the limits of traditional territories – particularly referring to hunting, fishing, gathering, and trapping lands, are typically ill-defined in areas where there is not a treaty, PPFN has provided an abundance of historical, genealogical, and oral evidence to the Panel clearly grounding their deep and profound connection to Hare Lake, Angler Creek, and the surrounding area.[2]

The Aboriginal title claim, filed in the Superior Court of Justice, has been ongoing for the greater part of a decade, and PPFN has been diligently and consistently advancing its *sui generis* interest in its traditional territories.

To that effect, drawing on the seminal Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia,* where Aboriginal title is asserted but has not yet been established – as is the case here, section 35(1) requires that the Crown nonetheless consult and accommodate the interests of the group asserting title. The governing ethos is not one of competing interests, but of reconciliation.[3] The result is to protect Indigenous rights while also allowing the reconciliation of Indigenous interests with those of broader society.

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[1] *Guerin v. R.,* 1984 CarswellNat693, [1984] 2 S.C.R. 335 (S.C.C.) at 382. See also PPFN's Written Submissions.
[2] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 at 22.
[3] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 at paras 2 and 17.

The reconciliation of Indigenous interests is also seen when considering the 'compelling and substantial legislative objective' of the Project from the Indigenous perspective, along with the perspective of the broader public.[4] Fortunately, PPFN has consistently maintained that it is of the utmost importance that the environmental risks of the Project be mitigated in every possible manner, at all times, and that it has serious concerns with the sufficiency of the information upon which the environmental impact of the Project is being assessed.

PPFN's perspective of environmental protection directly aligns with the broader public policy of protecting the environment and broader society from harm in cases where there is uncertainty in the data. This policy is aptly embodied in the precautionary principle.

The technical concerns, outstanding concerns, and procedural fairness concerns expressed earlier in these submissions showcase a clear uncertainty in the data used to assess the environmental impact of the Project. These concerns reflect the interest of the community in protecting the environment of PPFN's traditional territories.

It is trite law at this point that Aboriginal title is a collective right, that is protected for current and future generations. As such, future generations of PPFN are expected to be able to benefit from the use and enjoyment of their traditional territories. A meaningful diminution of their hunting, fishing, trapping, and gathering rights on these territories constitutes an infringement.[5]

The depth, breadth, and intensity of the testimony delivered at PPFN's April 8th community session clearly demonstrates the many identifiable and appreciable potential adverse effects to PPFN community members' *sui generis* interests that would be incurred by the Project. [6]

Conclusion & Proposed Conditions on the Project

Considering the impediments on PPFN's full participation in the Hearing, the constitutional framework obliging the reconciliation of PPFN's perspective, and the fact that PPFN's perspective aligns directly with the precautionary principle, PPFN appeals to the Panel to take notice of its concerns, and consider a few conditions on the Project moving forward.

The conditions that PPFN is proposing fall well within the authority of the Panel, pursuant to article 3.19 of the Appendix of the Terms of Reference (CIAR 730), and are crucial for the Project proceeding in a manner that provides for the protection, conservation, and management of the environment.

[4] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 at para 81.
[5] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 at paras 15, 74, and 124.
[6] *Ross River Dena Council v. Yukon*, 2020 YKCA 10, 2020 CarswellYukon 30 (Y.T.C.A) at paras 21-23.

Environmental Monitoring

Paramount, PPFN has serious concerns with the sufficiency of the information upon which the environmental impact of the Project is being assessed. The uncertainty in the collection methods of the data, along with the absence of crucial information like a fishery offsetting plan, leads to further uncertainty as to the true environmental impact of the Project.

This necessitates, at the very least, a robust monitoring program incorporated into the Project as a condition.

In their response to Undertaking 31, the Proponent has committed to conducting environmental monitoring as a part of its Environmental Monitoring and Management Program. To this effect, they committed to consult with First Nation communities as a part of this program, and it is PPFN's understanding that they will be included as an integral aspect of the monitoring of Hare Lake, Angler Creek, and the surrounding area.

This commitment ought to be formalized as a condition to the Project, considering the immense importance of robust and thorough environmental monitoring to the precautionary principle.

Updating Aquatic Baseline Data

In like vein to the previous point, and as noted during the March 17 Aquatic Environment session, the presented aquatic baseline data is not properly multi-session or multi-location as advertised. Through the course of the Hearing, we have learned that multiple different locations have been inconsistently tested over multiple sessions. Deficiencies in the collection of the aquatic baseline data undermines the very data upon which the environmental impacts of the Project are being assessed.

Consequently, PPFN would request, as a condition to the project, that the baseline data be augmented with further testing.

This condition is reflected by a number of the Proponent's commitments as outlined in their response to Undertaking 31. In fact, the Proponent has explicitly committed to additional aquatic sampling for a full suite of constituents including metals (total and dissolved) (e.g. mercury/ methyl mercury, PGMs), anions (including sulphate), nutrients (phosphorus, nitrogen), organic carbon, alkalinity, hardness, pH, alkalinity, conductivity, temperature, and dissolved oxygen.

However, at no point in the document has the Proponent explicitly committed to correcting the procedural deficiencies undermining the baseline data presented before us. All that is mentioned is that 'monitoring will occur at various times of the year, consistent with ECA and MDMER requirements'.

It ought to be required that the sampling be carried out four times per calendar year, in all seasons, in specific and consistent sampling areas. These collection techniques will ensure reliable data by reducing the number of variables in the samples. To understand changes over time, it is vital to keep factors that may introduce error constant. This was lacking in the collection of the baseline data, and it PPFN's hope that it is not lacking in the additional sampling that is to occur.

Continued Funding to the ECCC Great Lakes Initiative

During PPFN's community session, the importance of Lake Superior to the community was well-communicated. For a nation that has inhabited the northern shore of Lake Superior since time immemorial, this is unsurprising.

Unfortunately, due to industry and the corresponding contaminants, the north shore of Lake Superior has been labeled an Area of Concern (AOC). Since 2018, PPFN has worked with ECCC's Great Lakes Protection Initiative to address this issue, and work to restore this AOC.

The focus of the project has been to collect baseline data to aid in monitoring changes over time on Lake Superior, its tributaries and local island areas. Through the course of the Initiative, PPFN has collected yearly samples of water, soil, and sediments its study areas

An additional component of the Great Lakes Protection Initiative included documenting wetland areas on the shorelines of the mainland and the islands near PPFN. Vegetation surveys were conducted and used its results to create a medicinal plant database to assess the shoreline biodiversity.

The funding received in support of the Great Lakes Protection Initiative has been very important to PPFN. However, the funding expired earlier this year, and it is uncertain whether this vital work will be able to continue.

Considering the complimentary measure that the Great Lakes Protection Initiative will pose to the additional aquatic sampling that the Proponent has committed to, as well as the broader societal interest in preserving the quality of Lake Superior, PPFN requests that the Panel recommend the restoration of the Initiative's funding.

Fishery Offsetting Plan

Last, PPFN requests that the Panel require a viable fishery offsetting plan which is supported by Fisheries and Oceans Canada, as well as impacted First Nations, as a condition for the Project.

As noted earlier, the *sui generis* interest of PPFN community members to fish on their traditional territories is a solemn, constitutionally protected promise that has been consistently affirmed by the executive, the legislature, and the judiciary. A meaningful diminution of the fishing rights on Angler Creek, Hare Lake, and the surrounding area constitutes an infringement on PPFN's rights.

The affect of the effluent discharge on the fish in these water bodies constitutes an identifiable and appreciable adverse effect on PPFN rights. A coherent, robust, and well-informed fishery offsetting plan is of the utmost importance to mitigate this incredible risk.

Conclusion

To finish, the people of Pays Plat have occupied their traditional lands on the central north shore of Lake Superior centra since time immemorial. Their legacy as hunters, fishers, trappers, and gatherers originates in this region. As we learnt during the April 8th community session, these activities are not merely tangential to collective lived experience of the people of Pays Plat, but rather are the *sui generis* interests and Aboriginal rights promised in section 35 of the *Constitution Act, 1982*.

The *Constitution Act, 1982* acknowledges and protects Aboriginal Rights from infringement by Federal and Provincial law. This protection pursuant to s.35 of the encompasses the Aboriginal Rights of PPFN members to hunt, fish, and gather in their traditional territory.

This protection includes consideration of the Indigenous perspective, which is further is enhanced by the Aboriginal title claim that PPFN is pursuing, as well as the embodiment of the precautionary principle in the Indigenous perspective that PPFN has presented to the Panel throughout the Hearing.

Considering the concerns that PPFN has raised through the course of these submissions, as well as the constitutional framework obliging the reconciliation of PPFN's perspective, PPFN hopes the Panel will adopt the recommended conditions on the Project. This will go a long way to mitigate the environmental risks of the Project.