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Delivered via Email

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cc: ceaa.information.acee@canada.ca

Re: Formal Request to Minister Wilkinson for a Regional Assessment for the Ring of Fire region

Dear Minister Wilkinson,

We write to you today **to request that a regional assessment be conducted** for the Ring of Fire region in the far north of Ontario. We are students and faculty members affiliated with the Environmental Justice & Sustainability Clinic at Osgoode Hall Law School and selected advisors. Our expertise lies in the areas of environmental, natural resource, and Aboriginal law and policy.¹

Given the considerable number of currently proposed and anticipated future developments in the Ring of Fire region, we urge you to exercise the discretionary power granted to you under ss.92 and 93 of the *Impact Assessment Act* to establish a committee to conduct a regional assessment in this area.² We submit that there are significant opportunities here for the Minister to enter into agreement with relevant Indigenous governing authorities to jointly establish the committee and determine the manner in which the regional assessment should be conducted. By considering the total and combined impacts of expected changes in a region, a regional assessment supports the development of a cumulative effects framework that can reduce uncertainty and help prevent adverse social, cultural, environmental and economic effects related to the proposed and anticipated consequential developments. Further, a regional assessment could identify and compare future development scenarios for the region, and identify ways to enhance the prospects for positive contributions to sustainability, rather than simply mitigating development's adverse impacts. We would urge the joint committee to approach the assessment in such a way as to be in a position to recommend a strategic plan and set of programs for effectively managing the scale and pace of development in the Ring of Fire.

There are several individual project assessments already underway in this region, including the Marten Falls Community Access Road Project (Reference number: 80184),³ the Webequie Supply Road (Reference number: 80183),⁴ and the Wunnumin HIRCI Compound Construction (Reference number: 80308).⁵ We submit that other already reasonably foreseeable projects in the region include Noront's Eagle's Nest Mine, several further all-season roads that will be necessary to connect those already proposed to mine sites and provincial highways, an anticipated energy transmission corridor, as well as ongoing mineral exploration.⁶

We have followed the framework provided in the Agency's Operational Guide⁷ to submit information demonstrating the need to conduct a regional assessment in this area. First and foremost, we identify opportunities for collaboration with the Indigenous nations of the region and urge the Federal government to develop meaningful government-to-government relationships with these communities and/or governing bodies and to recognize their inherent jurisdiction and their right to self-determination.

Second, we advance several claims to demonstrate why a regional assessment is warranted in this case. A regional assessment would inform and improve future impact assessment decisions by establishing a framework for evaluating cumulative impacts into which individual project assessments could be nested. Without that framework, it will be impossible to effectively monitor the cumulative impacts that threaten this region's unique social, cultural and ecological values. As an example, we argue that the northern boreal forest is a unique socio-ecological system that performs crucial climate mitigation functions, primarily through its ability to sequester carbon in its extensive network of undisturbed peatlands. Understanding and documenting these functions at a regional scale can assist in preventing the ecosystem fragmentation that puts those values at risk; this will increase the effectiveness of future impact assessments. Further, climate change mitigation is a pressing federal objective.

Third, we document the extensive expected impacts of development in this region on Indigenous interests, constitutionally-protected Aboriginal and Treaty rights, and the rights and responsibilities of Indigenous Peoples protected under international law. It will not be possible to safeguard these rights, responsibilities and interests, particularly the meaningful right to harvest in the territory, without taking into account the cumulative effects of all proposed and anticipated developments in the region. Further, a failure to establish an effective mechanism for doing so, exposes the government to expensive and time-consuming litigation that will only exacerbate tensions.

Fourth, we detail how development in this region could impact other specific areas within federal jurisdiction, including migratory birds, species at risk, biodiversity conservation, and fisheries. The far north is home to endemic plant and animal species, many 'cultural keystone' species, and serves as a last stronghold for a variety of threatened species such as the woodland caribou, lake sturgeon, and wolverine. As we demonstrate, the evidence indicates that Indigenous governance of territories maximizes the potential for effective biodiversity conservation, further underscoring the importance of a joint committee for a regional assessment.

Finally, we conclude by highlighting that there has been significant public interest in the proposed developments in this region, including its cumulative effects. Decisions such as these, that involve the implications of opening up an entire region to new development involve inherent trade-offs, which give rise to a need to weigh anticipated opportunities and challenges from a broad diversity of perspectives and with a long-term lens. We highlight just one example of an area in which considerable public interest has been focused: the disproportionate adverse impacts of anticipated subsequent developments on Indigenous women and girls in the region.

1. Opportunities for collaboration with jurisdictions in the region

The now-dissolved Regional Framework Agreement (“RFA”)⁸ negotiated between the previous Ontario government and the nine Matawa First Nations⁹ demonstrates that remote Indigenous communities that will be affected by future development in the region have both an ongoing interest in, and the capacity to play a formal role in, decision-making processes. We encourage the Federal government to collaborate with the Matawa First Nations collectively to conduct a Regional Assessment, in recognition of their presence and inherent jurisdiction on their traditional territories.

We recognize that, since the dissolution of the RFA process, two of the Matawa First Nations have entered confidential bilateral negotiations with Ring of Fire mining company Noront Resources Ltd. and Ontario. These negotiations have produced various arrangements, including economic stakes for at least one of the communities in future mining. The Ontario New Democrats' Indigenous Affairs critic, Sol Mamakwa, has rightly expressed concern that a succession of one-to-one agreements would be used as a “divide and conquer approach.”¹⁰ However, the fact that two of the affected Matawa nations are now proponents of projects in the region does not diminish or unduly complicate the case for a regional assessment. It simply demonstrates the complexity of the issues at stake, and the need for a broader regional visioning process to guide the coming developments and assist in ensuring that all future agreements integrate foreseeable regional impacts. The Impact Assessment Act enables a new vision for partnership and collaboration that should be embraced openly. We urge the Federal government to seek partnership with Indigenous governing authorities that encompasses both proponent communities and their neighbors with stakes in the region. We also urge the Federal government to find ways of meaningfully engaging nations downstream of the Ring of Fire whose Aboriginal and Treaty rights will certainly be impacted by the proposed and anticipated developments.

We support a government-to-government relationship, recognizing the inherent jurisdiction of First Nations and their rights to self-determination. We encourage the Federal government to take the opportunity to demonstrate leadership in establishing government-to-government relations by creatively considering the most equitable and effective governance structure for the Regional Assessment. In 2013, the Matawa nations engaged in a community-driven regional process of negotiation related to mineral development in the Ring of Fire. In this process it was recognized that the Matawa nations would

become partners in an “enhanced participation” process for environmental assessments and would jointly design processes for long-term environmental monitoring. Ontario provided funding to support the Regional Process, including logistical, coordination, communication and project management support. There is plenty to learn and build on from that experience, for establishing a joint committee for Regional Assessment.

Meaningful partnership is achievable, as has been demonstrated by other examples, such as in the environmental assessment process for the *Voisey’s Bay Nickel Mine (Voisey’s Bay, Labrador, 1997-1999)*, implemented through a memorandum of understanding (“MOU”) with the Innu Nation and the then-Labrador Inuit Association (“LIA”) (which later became the Nunatsiavut Government).¹¹ Notable strengths of the Voisey’s Bay process were that it gave full consideration to traditional knowledge, whether written or presented orally, and that it adopted a sustainability-based approach.¹² The MOU also set out a scoping exercise that was carried out in several communities to explain the assessment process, identify key issues, receive feedback on the draft guidelines, and seek views about obtaining, using and evaluating traditional knowledge.¹³ These inclusions demonstrate the crucial importance of engaging Indigenous communities in “developing baselines, predicting impacts, and determining the significance of the project’s effect.”¹⁴

In the *Great Sand Hills Regional Assessment (Southwest Saskatchewan, 2005-2007)*, the provincial government created a Scientific Advisory Committee comprised of six experts to conduct a regional assessment in response to concerns about the cumulative effects of continued resource development.¹⁵ This committee partnered with the Qu’Apelle Tribal Council, and sought assistance from an advisory group of elders, to conduct a First Nations use and culture assessment. The committee also carried out a variety of engagement measures with members of potentially-impacted First Nations communities in Treaty 4, 6, and 7, including focus groups, cross-cultural interviews, and participatory mapping sessions, which helped establish current values and uses of the land as well as identify culturally and spiritually significant areas.¹⁶

The Strategic Assessment of Wood Buffalo National Park (Northern Alberta/NWT, 2016-2018) effectively combined international standards for world heritage sites, Parks Canada guidelines and Indigenous knowledge from 14 different communities to generate a comprehensive analysis of industrial development induced impacts upon the Park. Importantly, this assessment was initiated by the Mikisew Cree through a petition to UNESCO to have the Park’s world heritage status designated as “In Danger”. This avenue was undertaken after 30 years of requests for additional attention to the worsening ecological conditions of the Park, particularly the Peace-Athabasca Delta. The assessment was an exercise in collaboration between by scientists, Indigenous knowledge holders and consultants, with guidance from federal and international authorities.

We could identify shortcoming of each of these assessments based on today’s standards, of course, and a Regional Assessment in the Ring of Fire will have to meet a higher bar. To deliver cutting-edge tiered regional assessment regime the joint committee will have to genuinely respect Indigenous

jurisdictions, implement credible and authoritative public processes for assessing cumulative environmental effects, investigating alternatives, and provide a framework to guide the planning and assessment of individual projects based on their contributions to sustainability in the region.

Furthermore, in the years since these assessments were completed, we have witnessed an explosion of interest and expertise in place-based Indigenous-led impact assessment models emerging across Canada.¹⁷ From coast to coast to coast, Indigenous communities have been developing and engaging with alternative approaches to impact assessment in response to proposed developments within their traditional territories.¹⁸ These approaches are grounded in each nation's own social, political and legal orders and can exist in parallel with, or completely independently of legislative processes under Canadian or provincial law.

We encourage the federal government to recognize the affected Indigenous nations as rightful decision-makers and establish a joint process to implement a regional assessment.

2. Informing future impact assessment decisions

Conducting a regional assessment in Ontario's far north should bring people to the table to consider future scenarios or trajectories, current values, and how to go about maintaining or supporting these values into the future by considering cumulative effects. The Regional Assessment thus sets a context for individual project assessments and establishes a framework for assessing cumulative impacts. It may also provide key information for the development of necessary ecological, social and cultural thresholds appropriate for supporting responsible decision-making and long-term sustainability in the Ring of Fire region. These thresholds will serve to inform future impact assessment decisions, making them more efficient and effective. Expected projects that will require impact assessment in the future include: further road proposals to connect the mine sites to the provincial highway network; future mines, such as Noront's Eagle's Nest, that will either be subject to IA through Ministerial designation or be of a large enough scale to trigger the IAA on their own; and expected future hydro-electric corridors.

Regional assessments allow for the development of a framework for assessing cumulative effects that can be used to inform future project planning and development. They are the responsible alternative to simply allowing for 'death by a thousand cuts'. This phenomenon has been demonstrated in northern British Columbia, where 250,000 individual permits and approvals were issued without a regional analysis of the cumulative effects of such a high volume of permitted industrial activities.¹⁹ As a result of this siloed approval process, the province is now immersed in a court claim brought by Blueberry River First Nation, who asserts that the province infringed upon their treaty rights to hunt, trap and fish by approving this volume of development within their traditional territory without a mechanism for assessing the cumulative impact.²⁰ That case is part of a wave of litigation now coming forward as nations defend their "meaningful right to harvest" in the courts.²¹

While any single project may not reach or surpass a threshold, the combined impacts may do so. Ecological thresholds are described as “points where small changes in land use produce large, nonlinear ecosystem responses”.²² Examples would include area-sensitive species that require large, unfragmented tracts of contiguous habitats to survive (such as caribou), or species that have a minimum viable population size.²³ Adopting a regional management strategy can ensure that these thresholds or “tipping points”, which could significantly alter or damage the ecosystem, are avoided. A regional assessment also reflects the reality that these complex socio-ecological systems must “endure the whole array of stresses” that development inflicts upon them.²⁴ If multiple projects are proposed or underway in a region, then an assessment that simply considers the effects of each single project on its own will not capture the true impact on the region or its peoples, given that the project will not be carried out in isolation of any and all other stressors.²⁵

This is particularly true with respect to the unique peatland socio-ecology of Ontario’s far north. While water flows downstream, water bodies are also interconnected in complex relationships by various species and peoples moving throughout the watershed, and individual project assessments may not be able to capture such interactions within their scope of assessment, preventing parties from understanding the regional effects of the project.²⁶ It can also be difficult to discern whether an impact is to be attributed to a particular project site or associated infrastructure which may service several projects.²⁷ For example, disturbed peatlands have demonstrated significantly lower hydraulic connectivity than undisturbed peatlands, which limits their ability to filter contaminants from the environment.²⁸ While the removal of this essential ecosystem service may not appear significant in the context of one road proposal, the cumulative impact of multiple roads, exploration, and mine operation on the functions of peat soils and surface and groundwater quality could be highly significant in terms of both ecosystem and human health. An effective Regional Assessment will ensure that such impacts are not discounted or ignored and are able to effectively inform future impact assessments.

Example: Ensuring Continued Carbon Sequestration

As an example, a sustainability concern which ought to inform future federal impact assessments and merits inclusion in a regional assessment is the region’s ability to sequester and store carbon. While the trees of the boreal forest and the peatbog wetlands sequester and hold significant stores of carbon, wildfires, new infrastructure and industrial activity can release this carbon and quickly transform a carbon sink into a carbon source. The peatlands and forests of Ontario’s far north are believed to store 35.3 and 2.6 billion tonnes of carbon, respectively.²⁹ These peatlands annually sequester the equivalent of one-third of Ontario’s total carbon emissions³⁰, making these resources “globally important stores of carbon”.³¹

The maintenance of high levels of carbon sequestration has been identified as a key aim of land use planning in the region.³² The Far North Science Advisory Panel that reported in 2010 warned against the dangers of fragmentation, stating that “[l]arge intact landscapes are more resilient to disturbance than smaller ones, and those that have been eroded by human

impacts... [and] large, natural ecosystems also play a critical role in storing and sequestering carbon and thus mitigating climate change.³³

In its 2017 National Inventory Report (“NIR”), the Government of Canada began estimating anthropogenic emissions and emissions removals from forest land. Its 2019 NIR states that “forest land remaining forest land” is one of the most influential categories on national emissions trends.³⁴ The United Nations Intergovernmental Panel on Climate Change agrees, emphasizing the importance of the land sector in climate mitigation.³⁵ The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (“IPBES”) affirms such statements, noting that the global forest carbon sink removed approximately 2.4 billion tonnes of carbon each year from 2000 to 2007, of which the global boreal forest stores approximately 21 percent.³⁶ The IPBES warns, however, that global deforestation has surpassed the proposed Planetary Boundaries ‘safe limit’ for land-system change (a 25 percent reduction in forests). Today, forests have been reduced to 68 percent of their historical baselines, which the IPBES states could critically weaken “the biosphere’s contribution to global climate regulation” and “risk tipping the Earth system out of the environmentally stable state it has been in throughout the history of civilization”.³⁷

This is crucially important as the *Impact Assessment Act* calls specifically for the Minister to consider how a project will impact Canada’s ability to meet its climate change commitments.³⁸ As a signatory to the *Paris Agreement*, Canada is committed to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels” and pursue “efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”³⁹ Global temperatures have already increased by 1.1°C above pre-industrial levels, however, and “[w]e are on the brink of missing the opportunity to limit global warming to 1.5°C.”⁴⁰

It is therefore critical that Canada understands how fragmentation of the boreal forest will impact its ability to meet its climate targets. Canada must have a means of protecting this carbon sink and tracking how any and all development impacts the forest or peatland’s capacity to store carbon. As a piecemeal approach to approving development will obscure the total permitted fragmentation, disturbance, and deforestation, a regional assessment must be conducted to consider the total and combined impacts of proposed development on Ontario’s boreal forest and peatlands.

Similarly, a regional assessment will be necessary for establishing thresholds for social and cultural integrity in the region. The processes for determining these thresholds should be led by the communities themselves, who have the requisite knowledge and expertise to carry them out effectively.

3. Proposed and anticipated projects present a high likelihood of impacts, including cumulative impacts, on the rights of Indigenous Peoples in the region

The anticipated developments in the Ring of Fire region engage a multitude of Indigenous interests, constitutionally protected Aboriginal and Treaty rights, and rights and responsibilities under international law. A regional assessment

is the only means by which to adequately and comprehensively fulfill the federal government's legal obligations. Moreover, engaged participation by Indigenous Peoples in a regional assessment process may prove to be the most informative, expeditious and efficient way to assess the impacts of various projects proposed for the region.

The northern two-thirds of Ontario's boreal region contains 34 First Nations communities accessible mainly by air and winter roads.⁴¹ Indigenous peoples are the region's sole occupants. They are the long-term stewards of these lands, and therefore they have the most at stake in the short and long-term changes in the region. Their interests are central to any decisions concerning development. They stand to be the most affected as they interact with the land on a regular basis on multiple levels, including culturally, spiritually, socially and economically. They depend on the ongoing ecological integrity of the region to meet livelihood needs, through activities such as hunting, trapping, fishing, and gathering.⁴² But as stewards, the Indigenous Peoples of the area also bring knowledge otherwise unavailable to impact assessment proceedings.⁴³ Moreover, the presence of constitutionally protected Aboriginal and Treaty rights should be the overriding factor in determining how best to ensure effective environmental assessments.

Section 35(1) of the *Constitution Act, 1982* states, "[t]he existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed."⁴⁴ Treaty 9 is the agreement signed between First Nations in Northern Ontario and the Crown. The articles of the Treaty provided that the Indigenous Peoples would "have the right to pursue their usual vocations of hunting trapping and fishing...subject such regulations as may from time to time be made by the government of the country..."⁴⁵. However, based on the representations made to them by the Crown treaty commissioners, the Indigenous nations who entered into Treaty 9 understood the treaty as being "about friendship, not about cession."⁴⁶ They believed, as the Matawa Chiefs Council puts it, that they would receive "protection and assistance"⁴⁷ in exchange for "a land sharing and resource sharing arrangement".⁴⁸ This is consistent with John Long's research findings that the people of Treaty 9 "expected the treaty to be a confirmation of the fur trade model of co-existence, a modest sharing of the land and its benefits."⁴⁹ They understood that it would protect their relationship to the land, and the rights and responsibilities they exercise according to their own laws by stewarding it.

As a result of their constitutionally protected rights, Indigenous Peoples are owed, at the very least, a Duty of Consultation and Accommodation. The established jurisprudence indicates that the duty is a constitutional obligation, whereby the honour of the Crown is at stake.⁵⁰ In our view, achieving meaningful accommodation of the significant Indigenous interests affected by the irreversible decision about whether to open this territory to development requires the government to partner with Indigenous nations on a Regional Assessment. Accommodation will require consideration of alternative options and scenarios, so as to determine which projects should go forward, and how adverse impacts can be minimized, not just on a project-by-project basis, but overall, on a cumulative level. As they have been stating for many years, the Indigenous nations of the region must control the pace and scale of development.⁵¹

There are also international obligations and commitments to consider, such as those pursuant to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). For example, Art.8 provides that: States shall provide effective mechanisms for prevention of, and redress for: Any action which has the aim *or effect* of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities...” [emphasis added].⁵² In this case, we submit that, at minimum, an ‘effective mechanism’ must consist in a regional impact assessment of the proposed and anticipated developments. Moreover, Articles 10, 11, 19, 28, and 29 respectively require that “free, prior and informed consent” of Indigenous Peoples must be obtained before proceeding with decisions that may threaten those rights. A regional assessment is crucial for fulfilling the ‘prior’ and the ‘informed’ elements of consent such that decisions can stand up to judicial scrutiny. In the present case, it has been demonstrated that there are cultural significance and livelihood considerations in and around the Ring of Fire area. In order to ensure that such interests and rights are respected, a Regional Assessment on a government-to-government relationship is required.

4. *There is a high likelihood of effects on areas within federal jurisdiction, including cumulative effects, in the region*

There are a number of further areas of federal jurisdiction that stand to be affected by proposed developments in this region, including migratory birds, species at risk, fisheries, and biodiversity. Given the complexity of the socio-ecological systems in-and-around the Ring of Fire, and the potential for cumulative effects in each of these areas, individual project assessments will not be sufficient to fulfill the federal government’s legal obligations towards these matters.

Migratory Birds

A regional assessment will be necessary for the Federal government to meet its obligations to protect migratory birds. The *Migratory Birds Convention Act, 1994* (MBCA) enacted a set of rules to implement Canada’s international obligations in this area.⁵³ The generally-intact boreal landscape in northern Ontario is a habitat for many migratory birds and the Ring of Fire area specifically is an important nursery for migratory boreal birds. It is also connected to a globally significant migratory flyway for waterfowl and shorebirds along the James Bay and Hudson Bay coasts.⁵⁴ Thousands of songbirds return to nest in the boreal forest each year, while the coastal wetlands along James Bay and Hudson Bay are the largest in North America and are also some of the most productive subarctic wetland habitats in the world.⁵⁵ Moreover, the array of waterfowl species that occur in Ontario’s boreal region is substantive: 31 species breed or have bred in the region; 22 of which are regular and relatively widespread within suitable habitats; six non-breeding species pass through as migrants; it is estimated there are over two million breeding waterfowl of all species combined (ducks, geese and swans) occupy the region; and there is an estimated fall flight of 4-5 million birds.⁵⁶

There are at least 50 species of birds covered by the MBCA in Ontario,⁵⁷ and there are many migratory birds that utilize boreal forest habitats in northern

Ontario and in the Ring of Fire. One such family is waterfowl, which includes species such as ducks and geese. The spring and fall goose hunt has significant cultural significance for Indigenous peoples of the region as well.⁵⁸ Given the intricacy of waterways in the Ring of Fire, and the complex social and ecological relationships at stake, there appears no other adequate means other than a regional assessment to appropriately determine the impacts of the proposed and anticipated developments on migratory birds and the communities that depend on them.

Species at Risk

The Government of Canada ratified the *United Nations Convention on Biological Diversity* in 1992. Responsibility for achieving its aims is recognized as shared between the federal and provincial and territorial governments.⁵⁹ The federal government enacted the *Species at Risk Act* (“SARA”) to meet its obligations under the Convention and also cooperates with other jurisdictions such as Ontario that have enacted their own regimes.

Several species at risk inhabit the Ring of Fire area and engage Canada’s obligations under SARA”. Moreover, recent amendments to Ontario’s *Endangered Species Act* (“ESA”) ⁶⁰ mean that provincial law may no longer provide protections for species in the region consistent with SARA’s statutory purpose. Therefore, federal species at risk jurisdiction is inevitably engaged in Ontario’s far north region. Furthermore, especially as it relates to infrastructure, a regional assessment is the only viable way to determine the best and least disruptive routes for each individual project to minimize impacts on species at risk, in line with the federal government’s obligations to mitigate fragmentation and habitat loss.

Some species of concern in the Ring of Fire region will fall under both SARA and ESA. For example, the Attawapiskat River provides habitat for Lake Sturgeon (*Acipenser fulvescens*), which are enumerated as a species of “Special Concern” in the Southern Hudson Bay-James Bay area⁶¹ and are considered “Threatened” in the neighboring Saskatchewan – Nelson River area under the ESA.⁶² Lake Sturgeon are also listed as a “Special Concern” species in SARA in the Southern Hudson Bay – James Bay area. As well, Woodland Caribou (*Rangifer tarandus caribou*), which inhabit the Ring of Fire area north of Sioux Lookout, are considered a “Threatened Species” under both the ESA and SARA. A Regional Assessment should consider cumulative disturbance at the appropriate scale for Woodland Caribou and Lake Sturgeon populations in northern Ontario.⁶³

SARA acknowledges wildlife species and ecosystems as part of Canada’s and the world’s heritage whereby “the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.”⁶⁴ Moreover, the Government of Canada has stated that community and Indigenous traditional knowledge should be considered in determining which species may be at risk, the listing of species and in implementing recovery measures.⁶⁵ Indeed, the SARA requires consideration of Indigenous knowledge during the listing process and mandates cooperation with Indigenous communities with respect to protection strategies and plans.⁶⁶

This is particularly important in a region largely populated by Indigenous people with land-based economies and cultures. Communities in the far north will be best positioned to understand the impacts of proposed development on particular species and how to avoid or mitigate them. As the UN IPBES has recently noted, biodiversity is highest on Indigenous-managed land and the protection of Indigenous land management and knowledge is a critical part of protecting both species and habitat.⁶⁷

The construction and presence of roads in a remote region can be expected to have far-reaching impacts on biodiversity. Impacts can include, fragmenting wildlife habitat and disrupting migration patterns; vegetation loss; erosion of sandy soils; increase in poaching resulting from facilitated access; increased wildlife mortality due to vehicle collisions; and introduction of foreign invasive plant species.⁶⁸ Roads also allow easier access to the area, which may encourage or facilitate over-hunting and fishing.⁶⁹ This accessibility also reduces the cost of exploration, which may encourage subsequent exploration, and in turn, future development.⁷⁰ As former chief Moonias has stated: “[w]e are concerned that the bridges and the road will open up the territory. They will create access to our land.”⁷¹

As noted above, the Ring of Fire region is a key habitat for Woodland Caribou, a “threatened” species under the federal *Species at Risk Act*.⁷² This region is disproportionately important to the caribou and comprises part of their high winter occupancy.⁷³ Because “caribou tend to abandon winter ranges for years following human disturbance”, the far north region has “markedly high conservation value.”⁷⁴ Caribou aerial surveys revealed that caribou avoided both transportation corridors and mining sites.⁷⁵ Roads perpendicular to migration routes can create physical barriers, while other roads act as a line which caribou will not cross, creating behavioural barriers.⁷⁶ Due to the interrelation of these barriers, “when dealing with a species that moves over large areas, it is necessary to address issues with a landscape perspective.”⁷⁷ Indigenous communities place a high cultural significance on caribou, and their own knowledge confirms concerns about the impact of disturbance on caribou.⁷⁸ William Ross notes that Elders in the Northwest Territories were concerned that dust from the roads and the nearby Ekati Diamond Mine would cover the vegetation that caribou feed on.⁷⁹ Elders in Naskapi Nation (northeastern Quebec) stated in community meetings that “[t]here is too much noise and shaking of the ground because of the mines. This is affecting the caribou. You don’t see them anymore.”⁸⁰ Individually assessing one road proposal at a time will not accurately predict how caribou and other wildlife are impacted by the total developmental and infrastructural changes. A regional assessment allows for comprehensive consideration of the cumulative impacts on the entire socio-ecological system.

As briefly identified above, weakened provincial endangered species laws may mean there will be a higher reliance on SARA to promote and uphold conservation efforts. This includes Canada’s national Target 1 of conserving seventeen percent of terrestrial and inland water areas by 2020.⁸¹ Earlier this year, Ontario removed many of the protective measures in its *Endangered Species Act*.⁸² The amendments amplify the need for a regional assessment in the far north. First, the amended Section 9 gives the Minister the power to make regulations limiting the application of prohibitions with respect to a

species.⁸³ Second, the new Section 8.2 provides for a one-year delay of the prohibitions after a species is listed on the *Species at Risk in Ontario List* as endangered or threatened, with the possibility of an extension up to three years.⁸⁴ Third, Section 5 is amended to allow a species not to be listed or to be de-listed if it safely exists in another nearby jurisdiction.⁸⁵ Finally, the new Section 16.1 provides for discretion to authorize a party to engage in activities affecting endangered or threatened species that would otherwise be prohibited in exchange for payment into a new fund.⁸⁶ With fewer provincial protections in Ontario, federal jurisdiction may provide the only back-stop for species and habitats under threat.

Fisheries

The federal *Fisheries Act*⁸⁷ aims to conserve and protect both fish and fish habitats. Due to the Indigenous interests and Aboriginal rights tied to fisheries⁸⁸, as well as the interconnectedness and complexity of large watersheds in the Ring of Fire, a regional assessment is required to assess the cumulative effects of the multiple proposed and anticipated projects on federal responsibilities to protect fish and fish habitat. While there may be exceptions, the Act prohibits anyone from carrying on any work, undertaking or activity that results in the “serious harm” to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.⁸⁹ “Serious harm” is defined as the death of fish or any permanent alteration to, or deconstruction of, fish habitat. This provision was introduced in the predecessor legislation in 1977, and when its terms were debated in Parliament, the Honourable Roméo LeBlanc, Minister of Fisheries and Oceans and the Environment, explained its purpose:⁹⁰

“Protecting fish means protecting their habitats. Protecting the aquatic habitat involves controlling the use of wetlands. The banks of streams, the foreshores of estuaries, provide nutrients to the larger ecosystem of lakes and oceans in amounts far out of proportion to their size. The chain of life extending to the whole open ocean depends on bogs, marshes, mudflats, and other "useless-looking" places that ruin your shoes . . . These rich shore areas support salmon, lobster, herring and other local populations; their influence extends for hundreds of miles, even to the most rocky shorelines. They are the irreplaceable nurseries of fisheries well-being.

. . .Habitat protection will always remain a difficult battle because it runs against the energies of good people following their natural bent: developers, loggers, land reclaimers, and so on. The work of constant monitoring and restraint where necessary is hard, but the alternative prospect of forever losing stocks or species of fish is not acceptable.”

The *Fisheries Act* imposes obligations on proponents whose undertakings may affect fish or fish habitat, and imposes obligations on the federal government to ensure that those are fulfilled. In the Ring of Fire context, the multiple water crossings and potential effects on significant wetlands indicates a need for *Fisheries Act* authorizations. There will be direct and indirect impacts from the proposed mining, including turbidity and potentially harmful compounds that leach or are discharged from tailings and effluence during

operations.⁹¹ However, direct and indirect impacts also stem from transportation and transmission infrastructure, including increased access for fishing, fish passage restriction at culverts (*i.e.*, stream crossings), water withdrawals (*i.e.*, ice road creation), and sedimentation.⁹² In his affidavit, Moonias also outlined the significance of fisheries for Indigenous Peoples in the Ring of Fire area with respect to culture, sustenance, and ultimately Indigenous rights.

5. Considerable public interest exists related to proposed and anticipated developments and cumulative effects in the region.

The proposed development in the Ring of Fire region has garnered considerable public interest, particularly around its inevitable cumulative effects. Decisions such as these, that involve the implications of opening up an entire region to new development, involve the need to compare future scenarios in order to evaluate opportunities and challenges arising from a broad diversity of perspectives and with a long-term lens. We highlight just one example of an area in which considerable public interest has been focused: the disproportionate impacts of anticipated subsequent developments on Indigenous women and girls in the region.

Making a decision of such a magnitude – whether to open up a significant ecosystem to industrial development – must involve careful evaluation of the consequences of the decision for various interests.⁹³ Ensuring equitable consideration of consequences is important because often those parties who benefit the most are not the same as those who stand to lose the most. An effective impact assessment will include these considerations, and a regional assessment in this context is the only effective means of doing so. While historical approvals of large industrial projects demonstrated an absence of comprehensive assessment of risk and impact distributed among different members of society (*i.e.*, economic over cultural and historic, which has occurred disproportionately for Indigenous communities, as well as other equity-seeking groups⁹⁴), a regional assessment in the far north is a critical opportunity to do so. A regional assessment is the most effective means of achieving the equitable approach outlined in the *IAA*.

The public interest requires that all aspects relating to the risks and opportunities of a proposed project be exhaustively put forward and compared with alternative approaches forward. Moreover, a clear and transparent evidence-based demonstration of benefits—economic or otherwise—is necessary. Public interest in the region has generated doubts and questions about the benefits of development in the Ring of Fire.⁹⁵ Conversely, a thorough presentation of any impacts or costs is also necessary. Project-level assessments suffer from significant scientific deficits: a lack of information with respect to the interaction of various project effects; reliance on narrow mitigation measures with little or no established effectiveness; and no capacity to consider truly alternative visions for the future, or competing scenarios and pathways.⁹⁶ Project assessments are forced to grapple with large scale strategic uncertainty. Proponents become burdened by answering larger scale problems, like regional economic trajectories, that are outside of their scope of consideration. Project assessments are unable to capture the public interest and distributional justice concerns that often dominate the dialogue in

public consultations. Regional assessments could provide guidance to project proponents on these larger, value-laden considerations. As such, a regional assessment provides a more thorough consideration of the public interests at stake given the interconnectedness of ecosystem integrity, cultural survival and socioeconomic progress in the Ring of Fire.

Example: Expected impacts on Indigenous Women and Girls

Over the last several years, the Federal Government has emphasized the importance of conducting gender-based analysis plus (“GBA+”) when assessing projects. This analysis “considers the potential for disproportionate effects based on sex and gender... in addition to the potential for disproportionate effects on groups represented by the “+” component of “GBA+”, which may include groups identified by age, place of residence, ethnicity, socioeconomic status, employment status or disability.”⁹⁷ This analysis is enshrined in the *Impact Assessment Act*, which dictates that “[t]he impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account... the intersection of sex and gender with other identity factors.”⁹⁸

An important issue that has received considerable and growing public interest in recent years is the relationship between large resource development projects and violence against women and girls—particularly Indigenous women and girls.⁹⁹ The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (“MMIWG”) 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.”¹⁰⁰ Social worker Helen Knott notes that Indigenous women and girls in Northern British Columbia face more risk due to “the large numbers of men who come to the region to work in industry and the way that their economic power emboldens them to express racist and sexist attitudes they might suppress elsewhere.”¹⁰¹ Similarly, a regional assessment of hydroelectric development in Northern Manitoba showed that the workforce’s arrival contributed to increased rates of racial and sexual violence for Indigenous women and children.¹⁰² The MMIWG final Inquiry Report states the federal government’s responsibility very clearly: they must “do a more thorough job of considering the safety of Indigenous women and children when making decisions about resource extraction on or near Indigenous territories”.¹⁰³

A regional assessment would allow for the impacts of widespread social changes to be brought about by the introduction of a transient mining workforce to be examined, prior to the irreversible decision to build a road. In its recommendations regarding extractive industries, the MMIWG called for all levels of government to ensure that gender-based socioeconomic impact assessments are completed on all projects “as part of their decision making”.¹⁰⁴ Assessing each project individually will not address the cumulative effects and compounding risks of opening up a previously remote area, particularly without meaningful inclusion and engagement of Indigenous peoples, perspectives and knowledge in the process. Thus, to accurately conduct an impact assessment in this region, the potential adverse cumulative impacts on Indigenous women and girls must be considered.

Conclusion

We strongly urge the Minister to exercise the discretionary power granted under the *Impact Assessment Act* to establish a joint committee to conduct a Regional Assessment in the Ring of Fire region. As we have sought to make clear in this letter, there is overwhelming evidence to support this decision. We have demonstrated that, on each of the five criteria listed in the Operational Guide that a strong case exists in favour of conducting a regional assessment: A regional assessment could inform future federal impact assessment decisions; there is the potential for effects from development within federal jurisdiction, including cumulative effects, in the region; there are opportunities for collaboration with jurisdictions in the region; there is the potential for impacts, including cumulative impacts, to the rights of Indigenous people in the region; and there has been considerable public interest related to development or cumulative effects in the region.

Indigenous peoples, Ontarians and Canadians deserve to know and understand the full impact of the proposed and anticipated changes in the Ring of Fire. Conducting a Regional Assessment will help to inform local communities and the broader public, including a fulsome analysis of the challenges and opportunities inherent in undertaking plans for large-scale development projects, and their distribution. Further, the federal government has acknowledged that it must consider the cumulative impacts of development shown to disproportionately affect Indigenous women and girls.

Impacts to the peatlands' and forests' ability to continue sequestering carbon are a matter not only of national importance, but also of global significance. Given the Federal government's commitment to pursue efforts to limit global warming to 1.5°C and the rapidly-disappearing window of opportunity to do so, the protection of this carbon sink is critical. As individual project assessments will hide the total and combined impacts of development on the forest and peatlands, a Regional Assessment must be conducted.

Regional 'studies' alone will not suffice. The central challenges in the Ring of Fire do not derive from insufficient data, or scientific knowledge gaps. What is needed is a joint committee that can propose options, compare alternatives, generate dialogues and acknowledge the trade-offs. In the Ring of Fire, Ontario's fragmented approach exacerbates uncertainties, deepens disagreements, and cannot advance the Federal government's commitments to reconciliation. A sustainability-focused and strategic Regional Assessment with Indigenous governing authorities as genuine partners is the only credible way forward. Comparing alternative scenarios put forward against transparent criteria allows future trajectories to be evaluated against widely understood valued components.

In Canada, there are advanced multi-scale, tiered urban plans that illustrate how growth can be moderated and sustainable communities can be fostered. Remote, regional planning for industrial development has fewer examples to draw from, is complicated by few residents and those that do live in the region are primarily in politically marginalized communities without sufficient capacity to demand such initiatives, and the impacts of such endeavours are

less predictable. As such, it has been more politically expedient to avoid undertakings of this kind that Canadians in urban centers have come to expect. We urge the federal government to make the Ring of Fire an example of credible regional assessment with clear sustainability based-criteria, the application of multiple scenarios, on the understanding that there is significant federal interest in ensuring the sustainability of any developments in the region.

The likelihood of wide-ranging and cumulative impacts highlight the importance of conducting a Regional Assessment. When the Eagle's Nest nickel mine project description was initially submitted by Noront Resources Ltd, a transportation corridor was considered to be an essential part of the project.¹⁰⁵ The same was true for the earlier Cliffs Chromite Project.¹⁰⁶ It is openly acknowledged that the roads are to serve future mines, and that the mines are not viable without the roads. To now assess each discrete portion of road separately, ignoring the impacts of the proposed projects' related infrastructure and consequential developments, constitutes improper project-splitting and conceals the proposed projects' total impacts. The jurisprudence suggests that attempts to artificially separate related undertakings or activities for the purposes of making environmental assessment go smoother or quicker constitutes improper project splitting.¹⁰⁷ In our submission, trying to proceed with individual project assessments in the Ring of Fire without an overarching Regional Assessment invites litigation which will only inevitably slow decision-making.

Instead, this is an opportunity for the Federal government to work alongside Indigenous governing authorities and develop an equitable governance structure that respects and responds to First Nations' inherent jurisdiction, works in parallel with Indigenous-led impact assessment processes, and considers the spiritual, cultural and economic connections to upholding the ecological integrity of their homelands. Aspects of such a partnership were demonstrated by the RFA between the former Ontario government and the Matawa First Nations. We urge you to move forward with establishing a joint committee to conduct a regional assessment in this region and to build meaningful, long-term, government-to-government relationships in the process.

Sincerely,

<original signed by>

Dayna Nadine Scott
On behalf of the Osgoode Environmental Justice & Sustainability Clinic

¹ This letter has been written by faculty members and law students from Osgoode Hall Law School, supported by Dr. Cole Atlin and Jenna Davidson. Dr. Dayna Nadine Scott is an Associate Professor & the York Research Chair in Environmental Law & Justice in the Green Economy, and Dr. Estair Van Wagner is an Assistant Professor. Scott and Van Wagner are the co-directors of the Osgoode Environmental Justice and Sustainability Clinic. Christie McLeod is in her final year of Osgoode's joint MES/JD program; Isaac Twinn is in his final year of the JD. Dr. Cole Atlin is a postdoctoral fellow at Memorial University and a specialist in next-generation environmental assessment and Jenna Davidson is a planner and recent graduate of the MES program.

² *Impact Assessment Act*, SC 2019, c28 s1, S2, S6(1)(d), (l) [*Impact Assessment Act*].

³ "Marten Falls Community Access Road Project" (last modified 29 November 2019), online: *Impact Assessment Agency of Canada* <iaac-aeic.gc.ca/050/evaluations/proj/80184>.

⁴ "Webequie Supply Road" (last modified 13 November 2019), online: *Impact Assessment Agency of Canada* <iaac-aeic.gc.ca/050/evaluations/proj/80183>.

⁵ "Wunnumin HIRCI Compound Construction" (last modified 13 November 2019), online: *Impact Assessment Agency of Canada* <iaac-aeic.gc.ca/050/evaluations/proj/80308>.

⁶ See also letter from Wildlife Conservation Society (Cheryl Chetkiewicz, Justina Ray, and Matthew Scrafford) to Minister Wilkinson re Formal Request for a Regional Assessment with respect to Marten Falls Community Access Road Project (Reference number: 80184) and Webequie Supply Road (Reference number: 80183) (12 November 2019) [*Wildlife Conservation Society letter*].

⁷ "Operational Guide: Requesting a Regional or Strategic Assessment under the Impact Assessment Act" (last modified 10 September 2019), online: *Government of Canada*

<www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html>.

⁸ "Regional Framework Agreement" (26 March 2014), online (pdf): *Ontario Ministry of Energy, Northern Development and Mines* <www.mndm.gov.on.ca/sites/default/files/rof_regional_framework_agreement_2014.pdf>.

⁹ "What Matawa Means" (last visited 29 November 2019), online: *Matawa First Nations* <www.matawa.on.ca/about-us/>.

¹⁰ Matt Prokopchuk, "Ontario government ends Ring of Fire regional agreement with Matawa First Nations" (27 August 2019), online: *CBCNews* <www.cbc.ca/news/canada/thunder-bay/regional-framework-ends-1.5261377>.

¹¹ "Voisey's Bay Mine and Mill Environmental Assessment Panel Report: Appendix C: Memorandum of Understanding" (last modified 6 July 2016), online: *Canadian Environmental Assessment Agency* <www.ceaa-acee.gc.ca/default.asp?lang=En&n=0A571A1A-1&offset=22&toc=show> [*Voisey's Bay MOU*]; Bram F Noble, "Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment" (July 2016) at 27, online: *Macdonald-Laurier Institute* <www.researchgate.net/publication/305333790_Learning_to_Listen_Snapshots_of_Aboriginal_participation_in_Environmental_Assessment> [Noble]

¹² *Voisey's Bay MOU*, *supra* note 17.

¹³ *Ibid*, Schedule 1.

¹⁴ Noble, *supra* note 18 at 17.

¹⁵ Noble, *supra* note 18 at 23; "Government responds to the Great Sand Hills Regional Environmental Study" (11 July 2007), online: *Government of Saskatchewan* <www.saskatchewan.ca/government/news-and-media/2007/july/11/government-responds-to-the-great-sand-hills-regional-environmental-study>.

¹⁶ Noble, *supra* note 18 at 11, 24.

¹⁷ Spitzig 2019; Gibson et al; Doelle and Sinclair 2019.

¹⁸ Bruce & Hume, 2015; Metlakatla First Nation, 2015; Stk'emlúpsenc Te Secwépemc Nation, 2017; Tsleil-Waututh Nation, Treaty, Lands & Resources Department, 2015

¹⁹ "Regional Strategic Environmental Assessment for Northern British Columbia: The Case and the Opportunity" (May 2016) at 4, online (pdf): *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/WCEL_NBCenviroAssess_report_FINAL_0.pdf>.

²⁰ *Yahey v British Columbia*, 2017 BCSC 899.

²¹ Imai, S. (2017). Consult, Consent & Veto: International Norms and Canadian Treaties. In *The Right Relationship, Reimagining the Implementation of Historical Treaties* (1st ed., pp. 370-409). Toronto: University of Toronto Press.

²² Marian Weber, Naomi Krogman & Terry Antoniuk, "Cumulative Effects Assessment: Linking Social, Ecological, and Governance Dimensions" (2012) 17:2 *Ecol & Soc* 22 at 24.

²³ Peter N Duinker & Lorne A Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) 37:2 *Envtl Management* 153 at 156.

²⁴ *Ibid* at 156.

²⁵ *Ibid* at 157.

²⁶ "How to protect water through the Canadian Environmental Assessment Act - Part 4" (5 October 2016), online: *Council of Canadians* <canadians.org/blog/protect-water-part-4>.

²⁷ "Cumulative Effects Assessment Practitioners' Guide: 2.0 Assessment Fundamentals" (6 July 2016) s2.1, online: *Canadian Environmental Assessment Agency* <www.ceaa-acee.gc.ca/default.asp?lang=En&n=43952694-1&offset=6>.

²⁸ Bernd Lennartz & Haojie Liu, "Hydraulic Functions of Peat Soils and Ecosystem Service" (2019) 7:92 *Frontiers in Environmental Science* at 4; Indra Narayan Shrestha & Bhagwan Ratna Kansakar, "Comparison Of Preferential Flow Of Solute In Porous Media With Darcy's Flow" (2016) 5:7 *Intl J of Scientific & Technology Research* at 151.

²⁹ "Science for a Changing Far North: The Report of the Far North Science Advisory Panel" (April 2010) at 13, online (pdf): *Legislative Assembly of Ontario* <www.ontla.on.ca/library/repository/mon/24006/302262.pdf> [*Science for a Changing*].

³⁰ *Ibid* at 23.

³¹ *Ibid* at xi.

³² *Ibid* at 4.

³³ *Ibid* at 80.

³⁴ “2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada” (2019) at 28, online (pdf): *Environment and Climate Change Canada* <publications.gc.ca/collections/collection_2019/eccc/En81-4-2017-1-eng.pdf>.

³⁵ “Land is a Critical Resource, IPCC report says” (8 August 2019), online: *Intergovernmental Panel on Climate Change* <www.ipcc.ch/2019/08/08/land-is-a-critical-resource_srccl/>.

³⁶ Kazuhito Ichii et al., “IPBES Global Assessment on Biodiversity and Ecosystem Services: Chapter 2.2 Status and Trends – Nature - Draft” (31 May 2019) at 21, online (pdf): *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* <ipbes.net/system/tdf/ipbes_global_assessment_chapter_2_2_nature_unedited_31may.pdf?file=1&type=node&id=35276>.

³⁷ *Ibid* at 7-8.

³⁸ *Impact Assessment Act*, *supra* note 6, S22(i), 63(e).

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