



Osgoode Hall Law School of York University
Osgoode Digital Commons

Commissioned Reports, Studies and Public
Policy Documents

Faculty Scholarship

2023

Impact Assessment in the Ring of Fire: Contested Authorities, Competing Visions and a Clash of Legal Orders

Dayna Nadine Scott

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/reports>



Part of the [Environmental Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Impact Assessment in the Ring of Fire: Contested Authorities, Competing Visions and a Clash of Legal Orders

Dayna Nadine Scott*

Table of Contents

Introduction	00
Introduction to the Territory	00
The “Breathing Lands” are Homelands	00
The “Ring of Fire” is a Deposit of Minerals	00
Indigenous Resistance to Extraction	00
Ontario’s Vision for the Ring of Fire	00
The Road to the Ring of Fire is Paved with Environmental Assessments	00
Provincial Environmental Assessment: “Stuck in the 1970s” or at least the 1990s	00
Federal Impact Assessment: “Next Generation”?	00
The Regional Assessment	00
What is Indigenous-led IA in this context?	00
The Road Proponent First Nations’ Approach to IA	00
Are the Road Proponent First Nations conducting Indigenous-led Assessments?	00
Conclusion: Contested Authorities, Competing Visions and a Clash of Legal Orders	00

Abstract

In 2007, a significant mineral deposit dubbed the “Ring of Fire” was discovered in the boreal peatlands in Treaty No.9 territory in the far north of Ontario. The original project proposal submitted to the Canadian Environmental Assessment Agency was for a chromite mine and an associated infrastructure corridor to connect the remote location to the provincial highway system. As years went by without progress on the regulatory approvals, the proponent sold its claims at a loss. In the period that followed, Ontario negotiated with the Matawa First Nations (the nine most proximate First Nations) who were, as a united block, claiming to hold inherent jurisdiction and governing authority over their homelands in the Ring of Fire region, an area exclusively occupied by Indigenous peoples. Those negotiations soon broke down and Ontario pivoted to bilateral negotiations with individual “mining-ready” First Nations. Deal-making from that approach has produced two First Nations willing to act as proponents for all-season roads along the same corridor as the mining road originally proposed. Three road segments became subject to both provincial and federal environmental/impact assessments. The Impact Assessment Agency of Canada also initiated a Regional Assessment for the Ring of Fire region, which was intended to examine the cumulative impacts of all the expected changes in the region brought about by opening up the far north. Each of these assessments is now mired in controversy about who holds jurisdiction, who can provide or withhold their consent to major projects in the region, and whose law applies when environmental/impact assessments are conducted. This case study illustrates how difficult it can be to apply a term such as “Indigenous-led impact assessment” in a context of overlapping territories, competing authorities, and multiple legal orders.

* The author wishes to acknowledge the skilled research assistance and insights of Osgoode JD student Isabel McMurray.

Introduction

The “Ring of Fire” is the name given to a significant deposit of minerals discovered in the boreal far north of the province of Ontario in 2007. The deposit was once hyped for the presence of chromite, although it is now nickel—a crucial component of electric vehicle batteries, said to be necessary for the transition to a green economy—that is attracting the most attention. The “critical minerals” strategies of both Ontario and Canada lay out a rationale for mining in the Ring of Fire as a part of a strategic effort to secure supply chains for electric vehicle batteries.¹ But development of the mineral resources of the Ring of Fire has been on the table for over a decade, long before these rationales for the mining emerged. Despite the enthusiasm of multiple successive governments, the remote location and lack of infrastructure, as well as the inability of governments to obtain the buy-in of all the First Nations communities in the region, has meant that the imminent and dramatic change to the region that has been repeatedly predicted is still uncertain, and at least several years off.

The Hudson Bay Lowlands remains one of the world’s largest, most intact ecological systems. They form part of the world’s second-largest peatland complex and are globally significant for both climate change and biodiversity protection.² These peatlands sequester an estimated 35 billion tons of carbon.³ The boreal forest and peatlands thus play key roles in regulating the climate. In fact, one reason that proposed mining in this region generates so much controversy is that both proponents and opponents of development are now mobilizing climate justice rationales. There are concerns about the long-term release of carbon resulting from disturbance of the peatlands, weighed against arguments that Canada will need to expedite critical minerals projects to meet our ambitious objective to transition to a net-zero economy by 2050.⁴

Any potential for wealth generation in developing the Ring of Fire is also accompanied by the potential for significant negative impacts on the remote Anishinaabe and Anishini communities that are the region’s sole occupants. These communities are already experiencing an ongoing state of social emergency: youth suicide, addiction, and housing crises are recurring, COVID-19 exposed major health vulnerabilities, and persistent deficits of essential community infrastructure, including safe drinking water.⁵ Any credible assessment of the potential risks

¹The rationales are either explicit or implied. See, for example: Ontario, Ministry of Mines, *Ontario’s Critical Minerals Strategy: Unlocking potential to drive economic recovery and prosperity 2022-2027* (March 2022) at 13–14, 24–26, online (pdf): Ontario.ca <<https://www.ontario.ca/files/2022-03/ndmnr-ontario-critical-minerals-strategy-2022-2027-en-2022-03-22.pdf>>; Canada, Natural Resources Canada, *From Mines to Mobility: Seizing opportunities for Canada in the global battery value chain—What we heard report* (2020), online (pdf): Canada.ca <https://publications.gc.ca/collections/collection_2021/nrcan-nrcan/M4-203-2020-eng.pdf>; Canada, Natural Resources Canada, *The Canadian Critical Minerals Strategy— From Exploration to Recycling: Powering the Green and Digital Economy for Canada and the World* (9 December 2022) at 12, 22–24, online (pdf): Canada.ca <<https://www.canada.ca/content/dam/nrcan-nrcan/site/critical-minerals/Critical-minerals-strategyDec09.pdf>> [NRCan, The Canadian Critical Minerals Strategy].

²Mushkegowuk Council, Press Release, “MC announces new Indigenous-led Project to protect Globally significant Marine Area” (1 October 2020) online: *Mining Life* <<https://mininglifeonline.net/company-news/mc-announces-new-indigenous-led-project-to-protect-globally-significant-marine-area/14569>>. The Lowlands are “also an important global stopover for billions of migratory birds”: Parks Canada, News Release, “Government of Canada and Mushkegowuk Council working together to protect western James Bay” (9 August 2021) online: *Government of Canada* <<https://www.canada.ca/en/parks-canada/news/2021/08/government-of-canada-and-mushkegowuk-council-working-together-to-protect-western-james-bay.html>>.

³James Wilt, “The battle for the ‘breathing lands’: Ontario’s Ring of Fire and the fate of its carbon-rich peatlands” *The Narwhal* (11 July 2020), online: <<https://thenarwhal.ca/ring-of-fire-ontario-peatlands-carbon-climate/>>.

⁴NRCan, The Canadian Critical Minerals Strategy, *supra* note 1 at 26.

⁵See, for example, Olivia Stefanovich, “COVID-19 tents, shacks turned into homes amid housing crisis in Eabametoong First Nation” *CBC* (25 February 2021), online: <<https://www.cbc.ca/news/politics/eabametoong-housing-crisis-covid-isolation-tents-1.5924625>>; Jamie Pashagumskum, “Neskantaga First Nation issues state of emergency for members off reserve” *APTN National News* (24 February 2021), online: <<https://www.aptnnews.ca/national-news/neskantaga-first-nation-issues-state-of-emergency-for-members-off-reserve/>>; Curve Lake First Nation and Whetung, Neskantaga First Nation and Moonias v Attorney General of Canada, “Fresh as Further Amended Statement of Claim” (29 May 2020), Court file no. T-1673-19 at para 47.

associated with such development would have to take account of significant cumulative effects, as the all-season roads and other infrastructure would literally ‘pave the way’ for multiple mines and multiple generations of extraction.⁶

At the time of writing, there are no less than seven separate environmental/impact assessment processes underway in the region (“EA” and “IA,” respectively). Each of the three separate all-season road segments are subject to both provincial and federal individual project-based assessments and a Regional Assessment under the federal Impact Assessment Act is (theoretically) ongoing.⁷ The all-season roads are being put forward for environmental assessment by First Nation proponents, adding another layer of complications as neighboring First Nation communities vigorously oppose those same roads. Many analysts have noted the complexity of the contemplated infrastructure decisions, the potential for lasting negative socio-ecological impacts, and the likelihood of legal challenges grounded in Indigenous and Treaty rights.⁸ Despite the obvious and urgent need for a deep and wide assessment of likely future scenarios, the critical minerals rationale has various actors pushing for quicker regulatory approvals.⁹

⁶Dayna Nadine Scott et al, “Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario’s Ring of Fire” (14 April 2020) at 1, online (pdf): *YorkU* <<https://www.osgoode.yorku.ca/wp-content/uploads/2014/08/SCOTT.Final-Synthesis-report.pdf>>.

⁷Canada, Impact Assessment Agency of Canada, “Marten Falls Community Access Road Project” (last updated 13 January 2023), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80184?culture=en-CA>>; Ontario, Ministry of Environment, Conservation, and Parks “Marten Falls community access road project” (last updated 14 October 2021), online: *Ontario.ca* <<https://www.ontario.ca/page/marten-falls-community-access-road-project>>; Canada, Impact Assessment Agency of Canada, “Webequie Supply Road Project” (last updated 5 January 2023), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80183>>; Ontario, Ministry of Environment, Conservation, and Parks “Webequie supply road project” (last updated 14 October 2021), online: *Ontario.ca* <<https://www.ontario.ca/page/webequie-supply-road-project>>; Ontario, Ministry of Environment, Conservation, and Parks “Northern road link project” (last updated 2 May 2022), online: *Ontario.ca* <<https://www.ontario.ca/page/northern-road-link-project>>; Canada, Impact Assessment Agency of Canada, “Regional Assessment in the Ring of Fire Area” (last updated 22 April 2022), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468>>. Canada, Impact Assessment Agency of Canada, “Northern Road Link Project” (last updated 23 February 2023), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/84331>>.

⁸See Cheryl Chetkiewicz & Anastasia Lintner, “Getting it Right in Ontario’s Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire (Wawangajing)” (2014), online (pdf): *Wildlife Conservation Society* <<https://global.wcs.org/Resources/Publications/Publications-Search-11/ctl/view/mid/13340/pubid/DMX2453300000.aspx>>; Dayna Nadine Scott, “Canada’s environment minister is headed for trouble if Ottawa doesn’t correct course on the Ring of Fire” (26 January 2022), online: *The Conversation* <<https://theconversation.com/canadas-environment-minister-is-headed-for-trouble-if-ottawa-doesnt-correct-course-on-the-ring-of-fire-175616>>; Cole Atlin, *Pushing for Better: Confronting Conflict, Unsustainability & Colonialism Through Sustainability Assessment and Regional Assessment in the Ring of Fire* (PhD Dissertation, Social and Ecological Sustainability, Waterloo University, 2019), online: *UWSpace* <<https://uwspace.uwaterloo.ca/handle/10012/14509>>; Environmental Justice and Sustainability Clinic, “EJSC Submissions on the Draft Agreement for Regional Assessment in the ROF” (1 February 2022), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/56898>>.

⁹In 2021, the federal government reported that, “the pace of development should be accelerated if Canada and the United States are to effectively reduce their reliance on critical mineral imports from non-market economies, boost domestic production to meet future demand, and adhere to high ESG standards. This is especially true due to the specific demands of the mining sector—steep upfront costs, regulatory hurdles, delayed revenue streams, opaque markets, and fluctuating prices, all within a typical 5-to-25-year timeline for mines to become operational.” Canada, Global Affairs Canada, “U.S.-Canada/Canada-U.S. Supply Chains Progress Report” (18 November 2021), online: *Canada.ca* <https://www.international.gc.ca/transparency-transparence/supply_chains_progress_report-rapport-etape_chaine_approvisionnement.aspx?lang=eng>. Colin Hardie, “Critical minerals: a panel discussion from PDAC 2022” *Canadian Mining Journal* (12 October 2022), online <<https://www.canadianminingjournal.com/featured-article/critical-minerals-a-panel-discussion-from-pdac-2022/>>. Natural Resources Minister Jonathan Wilkinson echoed some of the same pro-development talking points when he launched the Canadian Critical Minerals Strategy on December 9, 2022. See David Thurton, “Ottawa’s critical mineral strategy calls for faster project approvals” *CBC* (9 December 2022), online: <<https://www.cbc.ca/news/politics/critical-minerals-strategy-1.6679728>>.

For those interested in environmental and resource governance and the practice of impact assessment, there is also a pressing need for conceptual clarity around what a term like “Indigenous-led assessment” could possibly mean in a context such as this. The purpose of this case study is to unpack this question—exploring what the term could mean in relation to assessments conducted by First Nation proponents of major projects, and in the context of divisions within and between various neighboring Indigenous communities.

In terms of a methodology for this case study, I draw on publicly available regulatory documents and correspondence filed with IAAC and the Ontario Ministry of Environment, Conservation and Parks. Knowledge of the dynamics between various First Nations in the region, Ontario, Canada, and the IAAC derives from multiple years of participatory action research in collaboration with the leadership of Neskantaga First Nation.¹⁰ Further insights have been obtained through the review of litigation documents, documents released through freedom of information and privacy legislation, and many conversations and meetings over several years with participants in the various processes described here.

This case study consists of three parts. In Part I, *Introduction to the Territory*, I outline how Indigenous Peoples of the James Bay Lowlands regard the territory as their homelands, how outsiders have characterized the urgency of accessing the mineral deposits known as the Ring of Fire, the resistance to extractivism in the region, and Ontario’s vision for the way forward. In Part II, *The Road to the Ring of Fire is Paved with Environmental Assessments*, I outline the various environmental and impact assessments ongoing in the region, their multiple mandates, competing authorities and the clash of legal orders at the heart of the dispute over who should be conducting them. In Part III: *What is Indigenous-led IA in this context?* I examine the difficulties of overlapping territories and competing visions, and I confront persistent tensions around divisions within and between communities generated when Indigenous peoples are the proponents of contested projects.

Introduction to the Territory

This part of Ontario is inhabited almost exclusively by remote Indigenous communities, who continue to maintain and renew their connection to their homelands by exercising their rights to hunt, fish, harvest food and medicines, practice ceremony, and continue to care for the lands and waters as they have since time immemorial. The major watersheds of the region are shown in Figure 1 below. First Nations in the region state that they “depend on the [James Bay Lowlands] biodiversity and the richness of its fish, wildlife, and plants for food, medicine, cultural and spiritual values, and economic livelihoods.”¹¹ Moreover, the archaeological and cultural evidence in the area shows that First Nations have been using these lands and waters since time immemorial.¹² Maggie Sakanee, of Neskantaga First Nation, says that the community’s health is intimately connected to the lands and waters of the Lowlands.¹³ Mike Koostachin, of Attawapiskak First Nation, goes further to state that contaminating the James Bay Lowlands would be akin to destroying the life of First Nations peoples.¹⁴ The Elders of

¹⁰The author has been working alongside the leadership of Neskantaga First Nation on issues related to the proposed Ring of Fire developments for many years. Her research has been funded by a SSHRC Insight Grant (*Consent & Contract: Authorizing Extraction in Ontario’s Ring of Fire*, 2015–2017), a SSHRC Partnership Development Grant (*New Techniques for Authorizing Extraction*, 2016–2019) and a Partnership Grant (*Infrastructure After Extractivism*, 2021–2027). She is also a co-Director of Osgoode Hall Law School’s Environmental Justice & Sustainability Clinic: the Clinic provides research and strategic advice to Neskantaga First Nation on environmental/impact assessment.

¹¹Aroland First Nation, “Appendix A – Request for a Regional Assessment” (29 October 2019) at 4, online: (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80468/133833E.pdf>>.

¹²*Ibid* at 5.

¹³Logan Turner, “Life on the line” *CBC* (12 September 2022), online: *CBC* <<https://www.cbc.ca/newsinteractives/features/a-divisive-road-to-ring-of-fire-ontario>>.

¹⁴Mining Injustice, “Minister Guilbeault: Listen to the grassroots in Treaty 9! (ft. Mike Koostachin)” (24 February 2022) at 00:03:58, online (video): *YouTube* <https://www.youtube.com/watch?v=TsEyM6_XHZI>.

Kitchenuhmaykoosib Inninuwig First Nation refer to the James Bay Lowlands as “‘the breathing lands’ because they are the lungs of the Earth.”¹⁵

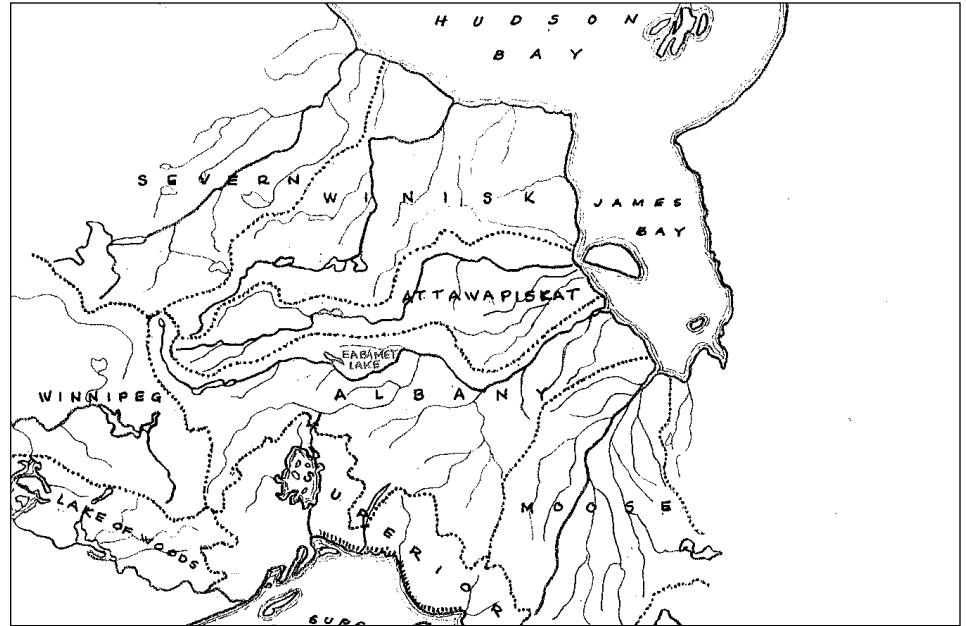


Figure 1: Northern Ontario's Major Watersheds¹⁶

The “Breathing Lands” are Homelands

The First Nations of the region are signatories to Treaty No. 9, which covers most of the James Bay Lowlands in Ontario. Treaty No. 9 was signed in 1905 and 1906, though additional communities adhered to the treaty later in 1908 and 1929–1930.¹⁷ At the time Treaty No. 9 was signed, Indigenous communities understood that it was an agreement to share the land in exchange for specific treaty benefits, and the protection of the Crown.¹⁸ From the Crown’s perspective, Treaty No. 9 was a land surrender treaty intended to open northern Ontario up for resource development.¹⁹ According to the text of the Treaty, the Indigenous signatories agreed to “hereby cede, release, surrender and yield up to the Government of the Dominion of Canada ... all their rights, titles and privileges whatsoever,” to their traditional territory.²⁰ This is the so-called “surrender” clause. The Treaty goes on to state that, while Indigenous communities have the right to hunt, trap, and fish in their traditional territory, the Crown has the right to take up land from time to time for “settlement, mining, lumbering, trading or other purposes.”²¹ This is the “taking up” clause. The operation of these two clauses have to date provided the rationale for Crown control over development approvals in Treaty No. 9 territory.²²

¹⁵ Allan Lissner, “The Breathing Lands” *Alternatives Journal* (28 February 2013), online: *Alternatives Journal* <<https://www.alternativesjournal.ca/community/web-exclusive-the-breathing-lands/>>.

¹⁶ Ontario, Department of Lands and Forests, *Ontario Resources Atlas* (Toronto: Government of Ontario, 1982) at 9.

¹⁷ John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: MQUP, 2010) at 84–88.

¹⁸ Sheldon Krasowski, *No Surrender: The Land Remains Indigenous* (Regina: University of Regina Press, 2019) at 2; Long, *Treaty No. 9*, *supra* note 17 at 353; Andrew Costa, “Across the Great Divide: Anishinaabek Legal Traditions, Treaty 9, and Honourable Consent” (2020) 4:1 *Lakehead LJ* 1 at 8.

¹⁹ Long, *Treaty No. 9*, *supra* note 17 at 32.

²⁰ *The James Bay Treaty - Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930* online: Government of Canada <<https://www.rcaanc-cirnac.gc.ca/eng/1100100028863/1581293189896>> [Treaty No. 9].

²¹ *Ibid.*

²² Costa, “Across the Great Divide,” *supra* note 18 at 7.

Indigenous communities throughout Treaty No. 9, however, firmly dispute that they ever ceded, sold, or surrendered their homelands or their inherent jurisdiction over their territories and people.²³ Indigenous communities repeatedly assert their inherent jurisdiction over the territory and continue to practice their own Anishinaabe and Anishini laws and customs, and implement their own protocols. As an example, then-Chief Wayne Moonias of Neskantaga First Nation stated recently:

We believe that our lands are held collectively by our community, and our Anishinaabe laws require us to collectively manage and protect our homelands. We have our own forms of governance, protocols, law, authority, and jurisdiction, which are informed by the foundational principles of: *Mno-bimaadiziwin*, good life; *Onda-tisiwin*, the source of life; and *Bima-chiwin*, the sustaining of life. ... These *aadizookaanag*, or “sacred teachings,” are passed on orally from generation to generation so that we will always know who we are, where we come from, how we fit into the world, and how we need to behave in order to ensure a long life. These sacred elements have sustained Neskantaga since time immemorial. ...

Neskantaga has a vested responsibility over our homelands that is inherent and includes the right and duty of stewardship over the land and the right to self-determination and governance. It is the belief of the Neskantaga people that these rights and responsibilities were given to the Anishininuwug by the Creator. We exercise these rights and responsibilities on the basis of laws that are not written, but rooted in our customary law, our traditional and cultural values, and the ceremonies and beliefs that connect the Neskantaga people to the land. We believe we have the right to be sustained by our homelands, as we always have been, in modern and evolving ways, and that this principle includes the right to the equitable sharing of wealth from our homelands.²⁴

Indigenous communities of Treaty No. 9 continue to assert and exercise jurisdiction over their homelands through mechanisms located both inside and outside of settler state law and institutions. Communities have partnered with different branches of the federal government to enact conservation areas and launch collaborative research on cultural keystone species of fish, for example.²⁵ Communities have also asserted their own jurisdiction by denying would-be miners access to their “assets” (demonstrating their effective control over the territory)²⁶ and by declaring and enforcing moratoriums on development activity across their territories.²⁷ Contestation over mining in the Ring of Fire thus emerges out of this complex terrain of jurisdictional contention amid globally significant ecosystems.

²³ Ryan Bowie, “Reconciliation and Indigenous resurgence in the Ontario Far North and Mushkegowuk Cree land use planning processes” (2021) 39:4 Politics and Space 722 at 737; Lenny Carpenter, “Mushkegowuk launches lawsuit on Treaty promises” *Wawatay News* (1 December 2015) online: <<https://wawataynews.ca/home/mushkegowuk-launches-lawsuit-treaty-promises>>.

²⁴ *Moonias and Neskantaga First Nation v Ministry of Northern Development, Mines, Natural Resources, and Forestry*, Court file no. CV-21-00672552-0000 (Affidavit of Chief Wayne Moonias at paras 9–11) [*Neskantaga First Nation v MNDMNR*].

²⁵ See, for example: Canada, Parks Canada, “Government of Canada and Mushkegowuk Council working together to protect western James Bay” (9 August 2021), online: *Canada.ca* <<https://www.canada.ca/en/parks-canada/news/2021/08/government-of-canada-and-mushkegowuk-council-working-together-to-protect-western-james-bay.html>>; Neskantaga is currently in the process of developing a collaborative youth sturgeon stewardship program funded by Fisheries and Oceans Canada, similar to the Moose Cree First Nation study of Lake Sturgeon further south: Moose Cree First Nation & WCS Canada, “About” (no date), online: Learning from Lake Sturgeon <https://learningfromlakes-turgeon.ca/about?fbclid=IwAR1-hfQXfBrYaYTXW_DLT93>.

²⁶ See, for example, *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC).

²⁷ Attawapiskat, Fort Albany, & Neskantaga First Nations, “First Nations Declare Moratorium on Ring of Fire Development” (5 April 2021), online: *NewsWire* <<https://www.newswire.ca/news-releases/first-nations-declare-moratorium-on-ring-of-fire-development-854352559.html>>.

The “Ring of Fire” is a Deposit of Minerals²⁸

In September 2007, Canadian junior mining company Noront Resources Ltd. discovered deposits of nickel, copper, platinum, and palladium in the James Bay Lowlands in Northern Ontario on an exploratory mining expedition. Noront nicknamed their exploration camp the “Ring of Fire,” and the name later came to be applied to the entire region and its crescent-shaped mineral-rich deposit.²⁹ The Ring of Fire is about 550 kilometers northeast of Thunder Bay and covers approximately 5,000 square kilometres of the James Bay Lowlands, see map in Figure 2 below.³⁰ Since its discovery, at least 4,600 mining claims have been staked in the Ring of Fire.³¹ In 2010, then Ontario Premier Dalton McGuinty initiated plans for major mining developments in the Ring of Fire area in the Speech from the Throne.³² At the time, chromite was considered the most strategically important mineral to pursue; vanadium, zinc, and gold are also present.³³ Many of the deposits contain minerals considered “critical” on both the federal and provincial critical minerals lists.³⁴



Figure 2: Location of the Ring of Fire mineral deposits in relation to the surrounding Matawa and Mushkegowuk First Nations in the James Bay lowlands.³⁵

²⁸ As an example of how many Indigenous peoples in the region feel about the term “Ring of Fire,” Chief Sol Atlookan stated in 2022 that “our homelands stretch across the northern river systems, including and beyond what industry calls the ‘Ring of Fire.’” Matawa First Nations, “Matawa Chiefs’ Council Acknowledge the Support of the Chiefs of Ontario in Asserting Their Sovereignty, Rights, Interests, and Jurisdiction in the Ring of Fire Region” (17 November 2022), online: *Matawa First Nations* <<http://www.matawa.on.ca/matawa-cc-acknowledge-support-of-coo-in-asserting-sovereignty-rights-interests-and-jurisdiction-in-the-rof-region/>>.

²⁹ Peter Gorrie, “The Ring of Fire” (31 August 2010), at 23, online (pdf): *ON Nature Magazine* <onnaturemagazine.com/the-ring-of-fire.html>.

³⁰ *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Notice of Application at para 14).

³¹ Gorrie, “The Ring of Fire,” *supra* note 29.

³² “Text of throne speech” *Toronto Star* (8 March 2010), online: <https://www.thestar.com/news/ontario/2010/03/08/text_of_throne_speech.html>.

³³ *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Notice of Application at para 23).

³⁴ Canada, Natural Resources Canada, “Critical Minerals Centre of Excellence” (last updated 2 November 2022), online: *Canada.ca* <<https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/critical-minerals/23414>>; Ontario, Ministry of Mines, “Critical minerals” (last updated 12 December 2022), online: *Ontario* <<https://www.ontario.ca/page/critical-minerals>>.

³⁵ Heather Kitching, “Australian owner of major Ring of Fire deposits brings big promises, controversial reputation” *CBC* (25 May 2022), online: <<https://www.cbc.ca/news/canada/thunder-bay/wyloo-metals-ontario-ring-of-fire-andrew-forrest-stake-1.6443170>>.

Currently, the Ring of Fire is a cornerstone of Ontario's economic plan to integrate the province into global supply chains as a reliable supplier of critical minerals, especially for battery production in the electric vehicle manufacturing sector.³⁶ Over the years, government officials have projected that the Ring of Fire contains up to \$120-billion worth of minerals and represents a "multi-generational" mining opportunity. An Ontario cabinet Minister once enthusiastically billed it as "Ontario's oil sands."³⁷ These estimates are now widely acknowledged to have been wildly optimistic and many experts are beginning to question whether this potential can realistically be achieved, given the infrastructure deficits, the division amongst the interested and affected First Nation communities, and the likely environmental costs.³⁸

Indigenous Resistance to Extraction

In the early days, proposals for development in the Ring of Fire met with resistance from an allied group of Indigenous communities in the region. The Matawa Tribal Council, composed of nine 'autonomous' First Nations in the region that includes both road-connected and remote communities, reaffirmed their commitment to work together on land, resource, and water issues in the 2011 *Unity Declaration* (see Figure 3 below). With this, they presented a united negotiating front to a province eager for extraction.³⁹ The communities expressed concern that Ring of Fire mining and infrastructure development would alter the regional landscape and ecosystems significantly. They feared that changes would cause habitat fragmentation affecting rare species, such as the culturally important Lake Sturgeon or Caribou, potentially release pollutants and effluents into sacred rivers, such as the Attawapiskat or the Albany, possibly impair carbon sequestration functions of the peatlands, increase non-native hunting and fishing pressures facilitated by easier access, and introduce of non-native species, among other concerns.⁴⁰ In the years since, serious risks of sexual violence and trafficking of Indigenous women and girls have been added to that list, as the incidence of those risks associated with opening up previously remote areas to roads and the presence of industrial man-camps has become better understood through the work of the National Inquiry on Murdered and Missing Indigenous Women and Girls.⁴¹

³⁶ Ministry of Mines, *Ontario's Critical Minerals Strategy*, *supra* note 1 at 13–14, 25.

³⁷ Daniel Tencer, "Clement: Ontario 'Ring Of Fire' Will Be Canada's Next Oil Sands" *Huffington Post* (26 April 2013), online: *The Huffington Post Canada* <www.huffingtonpost.ca/2013/04/26/ring-of-fire-ontario-tony-clement_n_3159644.html>.

³⁸ See, for example, Joseph Quesnel & Kenneth P. Green, "First Nations can't veto Ring of Fire development in northern Ontario" (17 June 2017), online: *Fraser Institute* <<https://www.fraserinstitute.org/article/first-nations-cant-veto-ring-of-fire-development-in-northern-ontario>>; Emma McIntosh, "Four years in, Doug Ford still can't pay for a mining road to Ontario's Ring of Fire: internal documents" *The Narwhal* (11 May 2022), online: <<https://thenarwhal.ca/ring-of-fire-ontario-election/>>; Noront Resources Ltd., "BHP makes recommended all-cash offer of C\$0.55 per share for Noront" (27 July 2021), online: *GlobeNewswire* <<https://www.globenewswire.com/en/news-release/2021/07/27/2269305/0/en/BHP-makes-recommended-all-cash-offer-of-C-0-55-per-share-for-Noront.html>>; As an example of the continuing division, a report from the Fall Assembly of the Chiefs of Ontario in November 2022 stated as a summary that "[Progressive Conservative's] First Nation partner in Ring of Fire defends project as other Chiefs condemn it." Alan S. Hale, "Queen's Park Today—Daily Report" (16 November 2022) at 3–5, online: *Queen's Park Today* <https://mcusercontent.com/88c2969b1996ffe8d5dce8a56/files/93533b26-010e-0e3f-4eaf-b7a8a-ca23e91/November_16_2022_Daily_Report.pdf>.

³⁹ Matawa First Nations, "Unity Declaration" (13 July 2011), online (pdf): *Matawa First Nations* <<http://www.matawa.on.ca/wp-content/uploads/2019/05/Mamow-Wecheekapawetahteewiin-Unity-Declaration-Signed-July-13-2011.pdf>>.

⁴⁰ Dayna Nadine Scott et al, "Synthesis Report," *supra* note 6 at 4. [citations omitted]

⁴¹ See "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls – vol 1a" (June 2019), online: *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.



Figure 3: Watersheds Within the Matawa Homelands and Traditional Territory. The shading indicates the extent of the Matawa homelands and Traditional Territory.⁴²

As mentioned, negotiations between Ontario and the Matawa Tribal Council proceeded from 2013 to 2018, attempting to reach a consensus on major challenges such as inherent jurisdiction, revenue sharing, and environmental assessment.⁴³ These talks broke down after Ontario ended the Regional Framework Agreement and refocused its attention on confidential bilateral negotiations between the province and individual “mining-ready” First Nations in the area.⁴⁴ Since discussions fell apart, various First Nations have continued to oppose development in the Ring of Fire. For example, in January 2021, the Mushkegowuk Council Chiefs called for a moratorium on development in the Ring of Fire until a proper protection plan could be implemented for the James Bay Lowlands.⁴⁵ In April 2021, Neskantaga First Nation, Attawapiskat First Nation, and Fort Albany First Nation took the next step and jointly declared a moratorium on any development in or to facilitate access to the Ring of Fire.⁴⁶ In November of the same year, Neskantaga First Nation launched litigation against Ontario’s flawed consultation process on proposed road development in the Ring of Fire.⁴⁷ Neskantaga continues to assert that they have not granted their free, prior, and informed consent to permit development to proceed.⁴⁸

⁴² Matawa First Nations Management and Four Rivers Inc, “Watersheds Within the Matawa Homelands and Traditional Territory,” (2014, revised 2020). [Copy with author.]

⁴³ Dayna Nadine Scott et al, “Synthesis Report,” *supra* note 6 at 5. [citations omitted]

⁴⁴ Matt Pokopchuk, “Ontario government ends Ring of Fire regional agreement with Matawa First Nations” *CBC* (27 August 2019), online: <<https://www.cbc.ca/news/canada/thunder-bay/regional-framework-ends-1.5261377>>.

⁴⁵ Mushkegowuk Council, “Mushkegowuk Chiefs Call for Moratorium on Development Activities in the Ring of Fire to Ensure Sensitive Wetlands and Waters are Protected First” (12 January 2021), online (pdf): *WWF* <https://wwf.ca/wp-content/uploads/2021/01/Moratorium_.pdf>.

⁴⁶ Attawapiskat, Fort Albany, & Neskantaga First Nations, “First Nations Declare Moratorium on Ring of Fire Development,” *supra* note 27.

⁴⁷ Falconers, “Neskantaga First Nation Goes to Court Over Ontario’s Flawed Consultation on the Ring of Fire” (26 November 2021), online: *Falconers* <<https://falconers.ca/neskantaga-first-nation-goes-to-court-over-ontarios-flawed-consultations-on-ring-of-fire-road/>>.

⁴⁸ Neskantaga First Nation, online: *Twitter* <<https://twitter.com/NeskantagaFN/status/1554620047296970752?s=20&t=MUDvW-pwLU3qxa7g9BjM9A>>.

In an affidavit for separate litigation about exploration in their traditional territory, Chief David Nakogee of Attawapiskat First Nation stated that the Ring of Fire “will cause severe and permanent adverse effects to the environment and our Indigenous land-based culture.”⁴⁹ Other Indigenous communities in the area continue to express concern about proposed development in the Ring of Fire, though they face major capacity and resource challenges in terms of engaging in ongoing resistance. Former Chief Elizabeth Atlookan of Eabametoong First Nation has expressed that the province’s approach to consultation on the Ring of Fire “is not tailored to the realities on the ground for Ontario’s fly-in First Nations that lurch from crisis to crisis while patching creaking infrastructure.”⁵⁰ Atlookan went on to explain that communities are not equipped to deal with the disruption that development will bring to their ways of life.⁵¹

Former Chief Wayne Moonias of Neskantaga in litigation with Ontario over its failure to meaningfully consult in relation to the Ring of Fire roads states:

We remain seriously concerned about the Ring of Fire’s threats to Aboriginal, Treaty, and Inherent Rights, including irreversible damage to our homelands and those of other First Nations. ...We also remain deeply concerned that road construction, mines, refineries, and other aspects of the Ring of Fire infrastructure will be located in areas of cultural significance across the watershed. We are especially concerned about the likelihood that construction of access roads will rely on eskers as the source for the necessary gravel/sand, which is likely to disturb sites of cultural and ecological significance. Eskers are naturally occurring formations of elevated gravel, which are quite noticeable in the Ring of Fire region. Eskers are where we traditionally practiced and continue to practice our harvesting rights, and where there are documented sites of cultural significance, such as burial grounds, sacred sites, trails, and villages of our ancestors. They form a central component of our past, present, and future.⁵²

A summary of discussions at the Fall Assembly of the Chiefs of Ontario in November 2022 stated that “sentiments expressed ...were overwhelmingly against the project, as Chief Moonias declared his community will do everything in its power to prevent the project unless it gets a “big say” in how the Ring of Fire will be operated.”⁵³ Moonias continued, “If the industry and the government wants to proceed without our free, prior, and informed consent, we will defend our right. We will defend our lands...We’re going to fight.”⁵⁴ “I will tell you this”, he continued, “Neskantaga First Nation will be there to stop Premier [Doug] Ford if he gets on that dozer,” referencing Ford’s 2018 promise to “hop on a bulldozer” himself if that was what was necessary to build a road to the Ring of Fire.⁵⁵

⁴⁹ *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196 at para 58.

⁵⁰ Jorge Barrera, “Overwhelmed” CBC (27 November 2018), online: <<https://newsinteractives.cbc.ca/longform/eabametoong-ring-of-fire>>.

⁵¹ *Ibid.*

⁵² *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Affidavit of Chief Wayne Moonias at paras 43–44).

⁵³ Alan S. Hale, “Queen’s Park Today—Daily Report,” *supra* note 38 at 3.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* See also “Progressive Conservatives outline plan for northern Ontario” CBC (16 March 2018), online: <<https://www.cbc.ca/news/canada/sudbury/doug-ford-northern-ontario-1.4579311>>. Four years later, First Nations still felt the sting of that remark: in November 2022, Chief Wayne Moonias stated in a Chiefs of Ontario meeting that “I will tell you this: Neskantaga First Nation will be there to stop Premier Ford if he gets on that dozer.” Alan S. Hale, “Queen’s Park Today—Daily Report,” *supra* note 38 at 1.

Ontario's Vision for the Ring of Fire

In large part, delays to development in the Ring of Fire derive from the need for significant infrastructure investment to access the remote mining region.⁵⁶ The Ring of Fire requires a large-scale government-funded infrastructure program, which, among other things, includes bringing electricity, high-speed Internet, and transportation access to the region. The biggest hurdle is the construction of a North-South transportation corridor which will connect the mine site with the highway and the transcontinental railway network.⁵⁷ Building an all-season road that can handle heavy-truck traffic across a 300km stretch of muskeg is not an easy or inexpensive endeavour.⁵⁸

Over the last decade, much of the debate has focused on who will pay for the required roads. The 2014 Ontario Budget committed up to 1\$ billion dollars to supporting road infrastructure in the Ring of Fire, conditional on matching contributions from the federal government.⁵⁹ Later in 2014, as part of their election platform, Kathleen Wynne's Ontario Liberals committed to funding the road infrastructure even without the support of the federal government.⁶⁰

But in 2019, Ontario requested a federal commitment to share costs for developing road infrastructure into the Ring of Fire. In reply, the federal government advised the province to "work through Infrastructure Canada to develop a complete application for road infrastructure that could be taken to the federal Treasury Board per the terms of the Integrated Bilateral Agreement between the federal and Provincial Governments."⁶¹ The federal government has indicated that it will consider cost-sharing the construction of the road infrastructure.⁶² No firm commitments have been made to date, however, though there is some indication that Natural Resources Canada may be warming to the idea.⁶³ The projected cost for the road infrastructure necessary to connect the Ring of Fire to the provincial highway network has crept to over \$2 billion, according to a provincial briefing note from September 2021.⁶⁴ As a result, it is not clear where the necessary funds will emerge from.

Nor is it clear who will *build* the roads. Initially, the roads were going to be built by one of the mining proponents in the region. Noront Resources Ltd. ("Noront"), now named Ring of Fire Metals, remains the single largest holder of mining claims in the Ring of Fire.⁶⁵ Their signature project in the region is the proposed Eagle's Nest Project, an underground nickel-copper-platinum multi-metal mine.⁶⁶ As initially proposed in August 2011, Eagle's Nest included a processing facility, a concentrate pipeline, ancillary mine infrastructure, and an

⁵⁶ *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Notice of Application at para 19).

⁵⁷ *Ibid* at para 20.

⁵⁸ See Emma McIntosh, "Four years in, Doug Ford still can't pay for a mining road to Ontario's Ring of Fire: internal documents," *supra* note 38.

⁵⁹ Ontario, Ministry of Finance, "Building Opportunity Securing Our Future: Ontario Budget 2014" (1 May 2014), at 35, online (pdf): Ontario <<https://collections.ola.org/mon/28007/327633.pdf>>.

⁶⁰ Kaleigh Rogers, "Ontario Liberals promise \$1-billion for Ring of Fire" *The Globe and Mail* (24 May 2014), online: <<https://www.theglobeandmail.com/news/politics/ontario-liberals-promise-1-billion-for-ring-of-fire/article18835742/>>.

⁶¹ Canada, Natural Resources Canada, *Meeting between Minister of Natural Resources and Greg Rickford, Minister of Energy, Northern Development and Mines and Minister of Indigenous Affairs, Government of Ontario Ref# 187537, with the Lands and Minerals Sector (LMS)* (Obtained through Access to Information Request A-2021-00214/TR) at 6.

⁶² *Ibid* at 8.

⁶³ Emma McIntosh, "Federal government moving closer to funding Ring of Fire mining roads: document" *The Narwhal* (25 October 2022), online: <<https://thenarwhal.ca/ring-of-fire-federal-briefing/>>.

⁶⁴ Emma McIntosh, "Four years in, Doug Ford still can't pay for a mining road to Ontario's Ring of Fire: internal documents," *supra* note 38.

⁶⁵ Jessa Gamble, "What's at stake in Ontario's Ring of Fire" (24 August 2017), online: *Canadian Geographic* <<https://canadiangeographic.ca/articles/whats-at-stake-in-ontarios-ring-of-fire/>>.

⁶⁶ Ring of Fire Metals, "Eagle's Nest" (2023), online: *Ring of Fire Metals* <<https://www.rofmetals.com/projects/eagles-nest/>>.

all-season access road that would connect the mine to the provincial highway network.⁶⁷

Noront received provincial approval for the Terms of Reference for an environmental assessment for the Eagle's Nest Project, including the proposed transportation corridor, on June 18, 2015.⁶⁸ As recently as January 2022, Ring of Fire Metals indicated that the environmental assessment of the project was on hold pending the completion of other environmental assessment research in the area, presumably referring to the road projects.⁶⁹

The federal comprehensive study of the Eagle's Nest Project, which included the transportation corridor, was terminated on August 28, 2019, when the new Impact Assessment Act came into force.⁷⁰ It is unlikely that Eagle's Nest will be subject to an impact assessment under the new legislation, as the projected daily ore production of the project is below the applicable threshold necessary to trigger a federal impact assessment.⁷¹

However, in the time since the initial project description in 2011, the road project has dropped out of all the mining company's project planning discussions. For example, the road is not mentioned in the latest description of the project on the Canadian Impact Assessment Registry home page.⁷² Nor is it mentioned on Ring of Fire Metals' website.⁷³ Ring of Fire Metals appears to have recused themselves as proponents for the road infrastructure.

The Road to the Ring of Fire is Paved with Environmental Assessments

In 2019, two of the "mining-ready" Indigenous communities in the region put themselves forward as proponents for specific segments of the road infrastructure. Marten Falls First Nation ("MFFN") and Webequie First Nation ("WFN") have collectively proposed three road projects to connect the Ring of Fire mining district to the provincial highway network.⁷⁴ First, there is the Marten Falls Community Access Road (the "MFCAR"), which is a North-South road that would connect the provincial highway to the Marten Falls community. The MFCAR is proposed by MFFN.⁷⁵ Second is the Webequie Supply Road (the "WSR"), which is the East-West supply road leading directly from the Webequie community into the Ring of Fire mining

⁶⁷ Impact Assessment Agency of Canada, "Public Notice—Eagle's Nest Project – Public Comments Invited and Federal Funding Available" (15 November 2011), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/O50/evaluations/document/91690>>; Ontario, Ministry of Environment, Conservation, and Parks, "Noront Eagle's Nest Multi-metal Mine" (last updated 8 July 2021), online: *Ontario* <<https://www.ontario.ca/page/noront-eagles-nest-multi-metal-mine>>. Of interest, Noront initially planned on operating side by side with a chromite mine proposed by Cliffs Natural Resources Inc. At the time, the proponents seemed to have envisioned collaborating on some local infrastructure and operating both mines simultaneously. In 2015, Cliffs Natural Resources Inc terminated their project and withdrew from the Ring of Fire. See Impact Assessment Agency of Canada, "Cliffs Chromite Project" (last updated 5 February 2015), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/O50/evaluations/proj/63927?culture=en-CA>>.

⁶⁸ MECP, "Noront Eagle's Nest Multi-metal Mine," *supra* note 68.

⁶⁹ Noront Resources Ltd., "Project Status" (2021), online: *Wayback Machine* <<https://web.archive.org/web/20211129000838/https://norontresources.com/projects/eagles-nest-mine/project-status/>>.

⁷⁰ Impact Assessment Agency of Canada, "Eagle's Nest Project" (last updated 28 August 2019), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/O50/evaluations/proj/63925>>.

⁷¹ *Physical Activities Regulations*, SOR/2019-285, s18(c) [*Physical Activities Regulations*]. Eagle's Nest projected a production capacity of just under 3000 tonnes of ore per day. Assessments are required for mines producing 5000 tonnes of ore per day, or more. As such, smaller projects are not likely to undergo a federal impact assessment unless the Minister of Environment and Climate Change grants a designation request.

⁷² IAAC, "Eagle's Nest Project," *supra* note 68.

⁷³ Ring of Fire Metals, "Eagle's Nest," *supra* note 67. Of interest, the road projects were also not mentioned on Noront Resources Ltd.'s website prior to the Wyloo Metals takeover. Noront Resources Ltd., "Project Details" (2021), online: *Wayback Machine* <<https://web.archive.org/web/20220118072618/https://norontresources.com/projects/eagles-nest-mine/project-details/>>.

⁷⁴ "Marten Falls Community Access Road" (no date), online: *Marten Falls Community Access Road* <<https://www.martenfallsaccessroad.ca>> ["MFCAR"]; "Webequie Supply Road" (no date), online: *Webequie Supply Road* <<https://www.supplyroad.ca>> ["WSR"]; "Northern Road Link" (no date), online: *Northern Road Link* <<https://northernroadlink.ca>> ["NRL"].

⁷⁵ "MFCAR," *supra* note 75.

district. This is proposed by WFN.⁷⁶ Third, and most crucially is the Northern Road Link (the “NRL”), which would complete the North-South route by joining the MFCAR all the way to the proposed mine site, thereby directly connecting the Ring of Fire to the provincial highway network. The NRL is jointly proposed by MFFN and WFN.⁷⁷

These roads effectively replicate the 300-kilometre all-season access road initially proposed by Noront to serve the Eagle’s Nest Project. In response to Webequie First Nation and Marten Falls First Nation’s proposed projects, Ring of Fire Metals has signaled that it intends to modify the scope of its project proposal to reflect this change once the road work is sufficiently underway.⁷⁸ In the following excerpt, Al Coutts, former President/CEO of Noront Resources Ltd, and now Advisory Committee member at Ring of Fire Metals describes what happened. In remarks at an event as part of the Prospectors & Developers Association of Canada (PDAC) called “Unlocking the Ring of Fire” in 2022 he stated:

... Finally, on obtaining the infrastructure commitments from government. This was, it’s really interesting because the Province of Ontario, when they issued Noront the terms of reference for the project, they wanted us to be the proponent of the 300 kilometre, all-season gravel road into the region. And we started along those lines, but it quickly became apparent that the local communities wanted to have a lot of involvement with the development of the road and the infrastructure. It was going to cross their traditional lands. They wanted to be party to it, they wanted to understand it fully, they wanted to have say, they wanted to provide Aboriginal traditional knowledge.

Eventually what happened—and it was neat, it was iterative too—a model emerged, between the Government of Ontario and Noront and the local First Nations, that saw the First Nations take over the proponenty of the roads themselves. Webequie First Nation and Marten Falls First Nation, the communities with the traditional land use in the area, are permitting the road over their traditional lands and the Government of Ontario is bankrolling that assessment, allowing the communities to engage the appropriate engineering and other skills to put together the environmental assessment. But it’s a great model, it’s a fantastic model that emerged. The communities have that involvement, they know exactly what’s going on, they are the proponents....And that’s what really unlocked everything. Once we got the two First Nations on board, and they took over the proponenty of the road, everything started to move.⁷⁹

Chief Bruce Achneepineskum of Marten Falls First Nation, a road proponent, vigorously defends the decision to lead the environmental assessment of the MFCAR. He wrote in September 2021:

We reserve the right to make decisions in our traditional territory. We have watched others enjoy the fruit of development, while our community has languished in poverty and a perpetual lack of opportunity. It is impossible to change our circumstances without the proposed projects in the Ring of Fire. Without these projects, our community will continue to wither away. However, with these projects, we can inject hope into our

⁷⁶ “WSR,” *supra* note 75.

⁷⁷ “NRL,” *supra* note 75.

⁷⁸ Noront Resources Ltd., “Eagle’s Nest Mine: Environmental Assessment” (2021), online: *Wayback Machine* <<https://web.archive.org/web/20211023172613/https://norontresources.com/projects/eagles-nest-mine/environmental-assessment/>>.

⁷⁹ Al Coutts, “Unlocking the Ring of Fire” (remarks delivered to the Prospectors and Developers Association of Canada, online, 29 June 2022) [notes on file with the author].

community and plant the seeds for a brighter future.⁸⁰

Still, Chief Achneepineskum has also acknowledged publicly that unless the Province finds ways to “bring other First Nations on board” the Ring of Fire will continue to stall.⁸¹ During a panel discussion hosted by the Empire Club in December 2022 that included Ontario Minister of Mines George Pirie, Chief Achneepineskum stated: “My question to the government is: why not start a process [to get them to come to the table]? Because, as I see it, if we don't have the willing participation from other communities in the nearby area, things will be delayed and even halted.”⁸²

The upshot of this is that these three road projects are being assessed in a complex regulatory framework under settler law, put forward by First Nation proponents. Provincial and federal legislation applies concurrently to make an environmental assessment (by Ontario) and an impact assessment (by Canada) necessary for each project. Additionally, the federal Impact Assessment Agency of Canada (IAAC) is conducting a Regional Assessment in the Ring of Fire area, which should have implications for future development in the region. In other words, a total of seven separate environmental assessment processes are ongoing for just the road projects alone.⁸³

Provincial Environmental Assessment: “Stuck in the 1970s” or at least the 1990s⁸⁴

The road proponents have each agreed to voluntarily subject the projects to environmental assessment under Ontario’s *Environmental Assessment Act*.⁸⁵ The voluntary agreement for the MFCAR was signed in May 2018. As proposed, the road’s purpose is to connect MFFN to the provincial highway network and improve community wellbeing. The project description acknowledges that other parties, including industry, may also use the road infrastructure.⁸⁶ On October 8, 2021, the government of Ontario approved the Terms of Reference for the MFCAR.⁸⁷ MFFN is currently developing the environmental assessment report for the project and estimates that the report will be finalized in the spring of 2025.⁸⁸ The voluntary agreement for the WSR was signed on the same day in May 2018.⁸⁹ The stated purpose of the WSR is to connect Webequie community members to opportunities for employment and economic development, as well as to connect mining development in the Ring of Fire region to the Webequie Airport.⁹⁰ The Terms of Reference for the WSR were also approved on October 8, 2021.⁹¹ WFN is currently gathering information and assessing the potential

⁸⁰ Marten Falls First Nation, “Re: Terms of Reference for the Regional Assessment in the Ring of Fire Region” (21 September 2021) at 3–4, online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57596>>.

⁸¹ Alan S. Hale, “PCs must find way to bring other First Nations on board, or Ring of Fire will stall: Chief” (15 December 2022), online: *Queens Park Today* <<https://www.politicstoday.news/queens-park-today/pcs-must-find-way-to-bring-other-first-nations-on-board-or-ring-of-fire-will-stall-chief/>>.

⁸² Chief Bruce Achneepineskum, “Ring of Fire Progress Update” (remarks delivered at the Empire Club of Canada, Toronto, 14 December 2022), online: *Empire Club of Canada* <<https://empireclubofcanada.com/event/ring-of-fire-2022/>> [notes on file with the author].

⁸³ IAAC, “Marten Falls Community Access Road Project,” *supra* note 7; MECP, “Marten Falls community access road project,” *supra* note 7; IAAC, “Webequie Supply Road Project,” *supra* note 7; MECP, “Webequie supply road project,” *supra* note 7; MECP, “Northern road link project,” *supra* note 7; IAAC, “Regional Assessment in the Ring of Fire Area,” *supra* note 7; IAAC, “Northern Road Link Project,” *supra* note 7.

⁸⁴ Cheryl Chetkiewicz, “Critical Minerals and the Climate” (remarks made at a seminar of the Osgoode Environmental Justice & Sustainability Clinic, Toronto, 24 November 2022), notes on file with author.

⁸⁵ *Environmental Assessment Act*, RSO 1990, c E.18, s 3.0.1 [EAA]; MECP, “Marten Falls community access road project” *supra* note 7; MECP, “Webequie supply road project,” *supra* note 7; MECP, “Northern road link project,” *supra* note 7.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ “Schedule” (no date), online: *Marten Falls Community Access Road* <<https://www.martenfallsaccessroad.ca/schedule/>>.

⁸⁹ MECP, “Webequie supply road project,” *supra* note 7.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

impacts of the project as they develop the environmental assessment report.⁹² Finally, the voluntary agreement for the NRL was signed more recently, on October 28, 2020.⁹³ MFFN and WFN are the joint proponents for the NRL, that stated purpose of which is to connect the MFCAR to the Ring of Fire mining development area, and thus provide a route for mined ore to reach the provincial highway and rail networks.⁹⁴ The project is currently waiting for Ontario to approve the Terms of Reference.⁹⁵

Ontario's Environmental Assessment Act (EAA) was passed in 1975, updated in 1996 with Bill 76.⁹⁶ It contains no mention of the duty to consult and accommodate (DTCA). In fact, Neskantaga First Nation became so frustrated during the COVID-19 crisis that the community launched litigation against Ontario to complain about the process of 'consultation' that was undertaken under the EAA in relation to the MFCAR.⁹⁷ As Former Chief Wayne Moonias states in his affidavit filed as part of the application:

This application arises out of our community's recent negative experience with Ontario, specifically with the process for developing Terms of Reference ("ToR") for an Environmental Assessment ("EA") of a proposed road through our homelands. Throughout this process, our community's insistence on meaningful consultations was ignored, as was the fact of our ongoing state of social emergency, which meant that we were not in a position to undertake or engage in meaningful consultations. In this affidavit, I share information on our Anishinaabe decision-making protocols, the failure to respect those protocols during the recent ToR process, and a snapshot of our ongoing state of social emergency.⁹⁸

The Notice of Application states that court challenge "is about the extent of the Duty to Consult and Accommodate *Indigenous communities in crisis*, as it relates to Environmental Assessments in Ontario."⁹⁹

The EAA does not explicitly require any specific consultations with affected First Nations.¹⁰⁰ The consultation tool enabled by the Act is a generic feedback mechanism that envisions opportunities for public input.¹⁰¹ It allows any interested party to submit feedback, which is then sorted through by the project proponents or, external consultants retained by the proponents. In other words, the Act completely fails to implement the unique duties imposed by the settler state legal regime -- the DTCA, the Honour of the Crown, and the principles of reconciliation. Additionally, and more importantly, the regime fails to account for the conditions on the ground in affected First Nations. As Former Chief Wayne Moonias references above, Neskantaga respects well-defined, centuries-old legal protocols around consultations, which the community argues the proponents repeatedly failed to respect.¹⁰²

⁹² "The Process—EA Process Milestone" (no date), online: *Webequie Supply Road* <<https://www.supplyroad.ca/our-process/#assessment-milestones>>.

⁹³ MECP, "Northern road link project," *supra* note 7.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Richard D. Lindgren & Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs Reality" (2010) 21 JELP 279 at 279–80, 285 n 38.

⁹⁷ See *Neskantaga First Nation v MNDMNR*, *supra* note 24.

⁹⁸ *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Affidavit of Chief Wayne Moonias at para 4).

⁹⁹ *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Notice of Application). [Emphasis added]

¹⁰⁰ Apart from empowering the Minister of the Environment, Conservation, and Parks to make a regulation that could require a proponent to carry out consultation with "aboriginal communities," the EAA is notoriously silent on the duty to consult and accommodate. As of yet, these regulations have not been passed. See EAA, *supra* note 86 at s 40(2)(c).

¹⁰¹ See EAA, *supra* note 86 at ss. 5.1, 6.

¹⁰² See *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Affidavit of Chief Wayne Moonias at para 4); *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Notice of Application at para 32).

The EAA's provisions also do not contemplate any situation where a First Nation faces additional, extraordinary barriers to participating in consultation activities, as was the case during the COVID-19 pandemic. In fact, in most EA and IA regimes under settler state law in Canada today, the relevant Minister lacks the discretionary power to pause any step in the process due to social emergencies, public health emergencies, or any other reason.¹⁰³ In other words, the emphasis in these regimes on 'legislated timelines' allows for the situations, as happened in respect of the MFCAR EA during the COVID-19 pandemic, where a project proponent is free to ignore the needs of a First Nation with s.35 rights at stake. This arguably violates the DTCA, the Honour of the Crown, s. 35 of the Constitution, and the principles of Reconciliation. It remains to be seen whether settler jurisprudence will develop in such a direction to recognize this. Further, and again – more profoundly – it is also an open question as to whether settler jurisprudence will genuinely grapple with the idea that meaningful consultation requires specific consultations with each affected First Nation, on that Nation's own terms, and in line with its own laws, customs, and protocols tied to the territory.

Federal Impact Assessment: "Next Generation"?

Each road segment is likewise undergoing, or is anticipated to undergo, a federal impact assessment under the *Impact Assessment Act (IAA)*.¹⁰⁴ The impact assessment process for the MFCAR began on August 9, 2019.¹⁰⁵ On February 24, 2020, the IAAC issued a Notice of Commencement of an Impact Assessment along with a suite of documents to help MFFN prepare an Impact Statement for the project.¹⁰⁶ MFFN anticipates submitting the final Impact Statement to the Agency in spring 2025.¹⁰⁷ The impact assessment process for the WSR began on July 23, 2019.¹⁰⁸ IAAC issued the Notice of Commencement of an Impact Assessment for the WSR on February 24, 2020.¹⁰⁹ WFN is currently preparing the Impact Statement for the project but has not made any public estimates of when they will submit the document to the Agency.¹¹⁰ Finally, the impact assessment for the NRL has not yet begun, but the project will more than likely trigger a federal impact assessment. It is unclear when MFFN and WFN intend to begin the federal assessment process.

The federal *Impact Assessment Act* evolved from the highly contested Bill C-69 (the so-called "No Pipelines Bill") and promised a "next generation" approach, incorporating a climate test, sustainability assessment, and provisions to allow for assessments to be

¹⁰³ For example, under the *IAA*, a time limit may be suspended for any activity related to a designated project only if the proponent requests the Minister of the Environment and Climate Change to do so. IAAC may not, of their own volition, suspend a time limit during an impact assessment. See *Information and Management of Time Regulations*, SOR/2019-283, s 2(a).

¹⁰⁴ IAAC, "Marten Falls Community Access Road Project," *supra* note 7; IAAC "Webequie Supply Road Project," *supra* note 7, IAAC, "Northern Road Link Project," *supra* note 7.

¹⁰⁵ Canada, Impact Assessment Agency of Canada, "Public Notice—Marten Falls Community Access Road – Public Comments Invite" (9 August 2019), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/document/132263>>.

¹⁰⁶ Canada, Impact Assessment Agency of Canada, "Notice of Commencement of an Impact Assessment" (24 February 2020), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/document/133939?culture=en-CA>>.

¹⁰⁷ "Schedule," *supra* note 89.

¹⁰⁸ Canada, Impact Assessment Agency of Canada, "Public Notice—Webequie Supply Road – Public Comments Invited" (23 July 2019), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/document/131054>>.

¹⁰⁹ Canada, Impact Assessment Agency of Canada, "Notice of Commencement of an Impact Assessment" (24 February 2020), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/document/133940>>.

¹¹⁰ "The Process—EA Process Milestone," *supra* note 93.

conducted in partnership with “Indigenous Governing Bodies.”¹¹¹ At the same time, or perhaps in exchange for these ‘wins’ for the governing Liberals, the IAA also included fairly high thresholds to trigger a federal impact assessment of a mining project. As such, it is still uncertain as to whether the mines envisioned for the Ring of Fire will trigger an impact assessment under the federal Act.¹¹²

The Regional Assessment

In the dominant, settler legal tradition in Canada, environmental assessment is the central regulatory tool for anticipating and planning for the effects of industrial development. However, it is widely recognized that project-level, proponent-driven assessment methods—whether conducted under the federal or the provincial regime—are woefully inadequate for considering the potential cumulative and regional impacts of developments on ecosystems and communities.¹¹³ These assessments cannot provide an adequate base for determining whether proposed developments are likely to contribute to lasting well-being and sustainability for the people of the region. This is in large part because the roles and responsibilities that Indigenous peoples take on as ecological stewards, in tandem with their spiritual and cultural connection to the land, are poorly understood and generally have not been integrated into project-level assessment mechanisms.¹¹⁴

As mentioned, the Anishinaabe and Anishinii communities that stand to be most impacted by development in the Ring of Fire are remote communities accessible only by air and winter roads. Indigenous peoples are the region’s sole occupants. They are the long-term stewards of the lands, and therefore they have the most at stake in both the short and long-term changes in the region. They stand to be the most affected by development and infrastructure as they interact with the land regularly 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.¹¹⁵ But as stewards, the Indigenous Peoples of the area also bring crucial knowledge otherwise unavailable to EA and IA proceedings. In fact, the provisions for partnering with Indigenous jurisdictions included in the new Act could be interpreted as emerging in recognition of this. The Expert Panel for the Review of Environmental Assessment Processes stressed

¹¹¹ See Josh K. Elliot, “Why critics fear Bill C-69 will be a ‘pipeline killer’” *Global News* (21 June 2019), online: <<https://globalnews.ca/news/5416659/what-is-bill-c69-pipelines/>>; *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA]. See, for example, ss 22(1)(a), 22(1)(h), 63(a), 63(e), 114(1)(e), 114(1)(f). Whether the IAA lived up to this promise is another matter altogether. See for example, Meinhard Doelle, “Bill C-69: the Proposed New Federal Impact Assessment Act” *Environmental Law Blog*, February 9, 2018; Sara Mainville, “The ghost of the Harper Omnibus legislation continues on with Bill C-69” OKT blog, February 9, 2018; Chris Tollefson, “Environmental Assessment Bill is a Lost Opportunity”, Policy Options, February 14, 2018. For excellent scholarship on “next generation” approaches, see A. John Sinclair, Meinhard Doelle & Robert B. Gibson, “Next generation impact assessment: Exploring the key components” (2021) *Impact Assessment and Project Appraisal* 1-17; and Meinhard Doelle and A. John Sinclair, *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act*, Irwin Law, 2021.

¹¹² *Physical Activities Regulations*, *supra* note 72 at ss 18–25. In their submissions on the “Discussion Paper Regarding the Proposed Project List,” the Canadian Environmental Law Association highlighted that the proposed increases in the thresholds for many designated project types (including mining) lacked credibility or scientific justification. These thresholds were not determined “in an open, traceable, and evidence-based decision-making process,” which leads to some suspicion as to how these thresholds were decided upon at all. See Richard D. Lindgren, “Submissions by the Canadian Environmental Law Association to the Government of Canada Regarding Discussion Paper on the Proposed Project List and Discussion Paper on Information requirements and Time Management Regulatory Proposal” (30 May 2019) at 1–2, 11–13, online (pdf): *Let’s Talk EA* <<https://letstalkimpactassessment.ca/8869/widgets/34212/documents/16566>>.

¹¹³ See, for example, Cole Atlin & Robert Gibson, “Lasting regional gains from non-renewable resource extraction: The role of sustainability-based cumulative effects assessment and regional planning for mining development in Canada” 4(1) *Extractive Industries and Society* 41-62.

¹¹⁴ Dayna Nadine Scott et al, “Synthesis Report,” *supra* note 6.

¹¹⁵ *Marten Falls First Nation et al v Attorney General of Canada and Cliffs Natural Resources Inc*, Court file no. T-1820-11 (Affidavit of Chief Peter Moonias at para 10).

in their final report that, “Federal IA governance structures and processes should support Indigenous jurisdiction.”¹¹⁶ Further, given commitments to reconciliation and the adoption of UNDRIP implementing legislation, the IAA provisions for partnering with Indigenous Governing Bodies seemed to provide a nod to the fact that more than mere ‘consultation’ or ‘engagement’ is required where significant Indigenous rights and interests are at stake.¹¹⁷

As such, it was hoped that the new IAA would open space for a ground-breaking Regional Assessment in the Ring of Fire. On February 10, 2020, then federal Minister of Environment and Climate Change Jonathan Wilkinson agreed to initiate a Regional Assessment in the Ring of Fire Area.¹¹⁸ He stated that the purpose of conducting a regional assessment would be to “assess the effects of existing or future physical activities carried out in a region.”¹¹⁹ While the exact goals, objectives, and planned outcomes of the Regional Assessment are still being developed, many hoped that the assessment would not only provide baseline data to inform cumulative effects analysis for future impact assessments, as is envisioned by the IAA, but would be genuinely oriented towards finding pathways to durable, positive contributions to sustainability for the region and viable, prosperous futures for its inhabitants in line with their own visions and priorities.

In this vein, a group of collaborators and I released a *Synthesis Report* completed in partnership with the leadership of Neskantaga First Nation in April 2020 entitled, ‘Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario’s Ring of Fire’.¹²⁰ The report recommends that, following a comprehensive regional assessment process that develops a cumulative effects framework, with applicable social and ecological thresholds and essentially lays out the terms and conditions of opening up the north to development, all subsequent project-level assessments in the Ring of Fire would be conducted by joint review panels, jointly appointed by the Crown and the applicable “Indigenous governing authority”.¹²¹ The suggested joint review panel process would allow the affected Indigenous communities to grant or withhold their consent to projects on their lands.¹²² There has not been any formal government response to the *Synthesis Report*, though Attawapiskat First Nation raised it in a public comment to IAAC as a potential model for the Regional Assessment.¹²³

In December 2021, only few months into the new Minister of Environment and Climate Change Steven Guilbeault’s term, the IAAC launched a public comment period on a “Draft

¹¹⁶ Canada, Expert Panel on the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (31 March 2017) at 25, online (pdf): Canada.ca <<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>>. See also the section on “Indigenous Knowledge” at 33–34.

¹¹⁷ See IAA, *supra* note 112 at 114(1)(e), 114(1)(f).

¹¹⁸ Letter from Minister Jonathan Wilkinson to Aroland First Nation (10 February 2020), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80468/133829E.pdf>>; Letter from Minister Jonathan Wilkinson to Wildlife Conservation Society Canada (10 February 2020), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80468/133830E.pdf>>; Letter from Minister Jonathan Wilkinson to Osgoode Environmental Justice and Sustainability Clinic (10 February 2020), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80468/133831E.pdf>>.

¹¹⁹ Canada, Impact Assessment Agency of Canada, “Regional and Strategic Assessments” (last modified 7 April 2022), online: Canada.ca <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-strategic-assessments.html>>.

¹²⁰ See Dayna Nadine Scott et al, “Synthesis Report,” *supra* note 6.

¹²¹ *Ibid* at 2, 25–26.

¹²² *Ibid* at 2–3, 24.

¹²³ See, Attawapiskat First Nation, “Establishing a new 2022 Ring of Fire Commission/(namely) A NEW COOPERATIVE Regional Assessment MODEL overseen by CANADIAN MINISTRIES AND INDIGENOUS GOVERNING AUTHORITIES” (28 April 2022), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58425>>.

Agreement to Conduct the Regional Assessment in the Ring of Fire Area.”¹²⁴ The Draft Agreement outlined the “the goal, objectives and planned outcomes of the regional assessment, as well as key aspects of its governance and administration” and included the proposed “Terms of Reference” for the Regional Assessment.¹²⁵ This initial TOR and Draft Agreement was roundly criticized and rejected.¹²⁶ Much criticism centered on the failure to recognize any form of Indigenous jurisdiction and governing authority in the proposed Regional Assessment process. Initial hopes that the Agency would decide to partner with an Indigenous governing authority in the region, so that a meaningful assessment of cumulative impacts, considering the ongoing social emergency, could be informed by the applicable Indigenous legal orders, had clearly been misplaced.

The Draft Agreement undermined Indigenous jurisdiction in the Regional Assessment in several ways. One of the most significant was by relegating First Nations to a “participation” role, and emphasizing engagement through an “Indigenous Talking/Sharing Circle.”¹²⁷ As described, the function of the Talking Circle was deeply unclear and verged on tokenism. Several communities argued that the framework of the Draft Agreement expected Indigenous peoples to contribute their knowledge and expertise but did not allow space for Indigenous decision-making.¹²⁸ Others pointed out that the proposed narrow geographic scope for the Regional Assessment was inappropriate given the ecological connectivity across various watersheds and peatlands that will be impacted not only by the mining, but the planned infrastructure developments needed to reach the proposed mines. These, among other flaws, informed widespread opposition to the Draft Agreement by Indigenous communities in the Ring of Fire region.¹²⁹

Other organizations also called on the IAAC to rewrite the “Draft Agreement” to explicitly incorporate Indigenous jurisdiction and decision-making. For example, the Mining Injustice Solidarity Network (MISN) partnered with Friends of the Attawapiskat River to produce *A Treaty Peoples’ Briefing*.¹³⁰ This series of eight videos hosted on social media intended to

¹²⁴ Canada, Impact Assessment Agency of Canada, “Public Notice: Regional Assessment in the Ring of Fire Area—Public Comment Period & Virtual Information Sessions on the draft Agreement to conduct the Regional Assessment” (3 December 2021), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/document/142278>>.

¹²⁵ *Ibid.*

¹²⁶ See, for example, Nibinamik First Nation, “Nibinamik First Nation’s Preliminary Comments on the draft Agreement and Terms of Reference for the Ring of Fire Area” (7 March 2022), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58371>>; Mushkegowuk Council, “Comments on behalf of the Mushkegowuk Council on the Draft Agreement to Conduct a Regional Assessment in the Ring of Fire Area” (2 March 2022), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57740>>; Weenusk First Nation, “Weenusk First Nation Review of the draft Agreement and Terms of Reference” (17 February 2022), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58351>>.

¹²⁷ Impact Assessment Agency of Canada, “Draft Agreement to Conduct the Regional Assessment” (3 December 2021) at 8, s 6.0; at 20, Appendix D, online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80468/142280E.pdf>> [“Draft Agreement”].

¹²⁸ Logan Turner “First Nations leaders demand equal partnership in Ottawa’s ‘broken’ regional assessment for Ring of Fire” *CBC* (28 January 2022), online: <<https://www.cbc.ca/news/canada/thunder-bay/ring-of-fire-regional-assessment-broken-fn-leaders-1.6330328>>.

¹²⁹ See, for example: Nibinamik First Nation, “Nibinamik First Nation’s Preliminary Comments on the draft Agreement and Terms of Reference for the Ring of Fire Area” (7 March 2022), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58371>>; Mushkegowuk Council, “Comments on behalf of the Mushkegowuk Council on the Draft Agreement to Conduct a Regional Assessment in the Ring of Fire Area” (2 March 2022), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57740>>; Weenusk First Nation, “Weenusk First Nation Review of the draft Agreement and Terms of Reference” (17 February 2022), online: *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58351>>.

¹³⁰ “Ring of Fire: Protecting the Attawapiskat River—A Treaty Peoples’ Briefing” (2021), online: *Mining Injustice Solidarity Network* <<https://mininginjustice.org/ring-of-fire/>>.

provide an alternative briefing for the new “activist” Minister Guilbeault, describing the background context of the Ring of Fire.¹³¹ The campaign called upon the Minister to dissolve the Draft Agreement and to establish an Indigenous-led Regional Assessment process.¹³²

As a result of the significant opposition, the Minister released a statement in April 2022 that he would be “carefully considering” comments received during the public comment period.¹³³ Many Indigenous communities in the region were willing to work with the IAAC and the Minister to develop a better model, hoping for one that would be radically different than the first, and would meaningfully incorporate their jurisdiction. The road-proponent First Nations initially defended the original TOR, with MFFN also arguing for a very narrowly scoped Regional Assessment that “should be focused on the ROF area, and it should not include our Community Access Road.”¹³⁴ However, in June 2022, the Chiefs of the Matawa First Nations announced that they were collaborating to develop a mutually agreeable process to establish an Indigenous Governing Body/Authority to co-lead the Regional Assessment in the Ring of Fire in joint partnership with the IAAC, and presumably Ontario.¹³⁵ Mushkegowuk Council came out in support of this proposal shortly thereafter.¹³⁶ Discussions continued over the fall and in to the winter, with the Chiefs of Ontario announcing their support for the Chiefs of Matawa First Nations’ ongoing efforts to assert their sovereignty, rights, interests, and jurisdiction in the Ring of Fire area in November 2022.¹³⁷ Minister Guilbeault finally met in person with the Chiefs of both tribal councils early in 2023 in Thunder Bay. As of the time of writing, it seems that Minister Guilbeault will work with First Nations in the region to co-develop a TOR for the Regional Assessment.¹³⁸ He stated, “Its clear to me that there is no access to critical minerals in Canada without Indigenous Peoples being at the table in a decision-making position.”¹³⁹

What is Indigenous-led IA in this context?

Indigenous communities across the boreal peatlands of Treaty No.9 are clearly asserting and exercising inherent jurisdiction over their homelands. The protocols and processes for decision-making that they employ often – but not always – exist in tension with the settler state processes. As an example, the road proponent communities have entered into a variety of agreements with Ontario and mining companies. The agreements to voluntarily subject their projects to Ontario’s environmental assessment process probably stand in greatest contrast to the positions of the communities rejecting Ontario’s jurisdiction in their territories. Most recently, Ring of Fire Metals and MFFN have entered into a memorandum of understanding for future collaboration on the Ring of Fire in December 2022.¹⁴⁰

¹³¹ The Canadian Press, “An activist in office: Steven Guilbeault’s first year as environment minister”, *CBC news* online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/steven-guilbeault-environment-minister-first-year-1.670214>>.

¹³² *Ibid.*

¹³³ IAAC, “Regional Assessment in the Ring of Fire Area,” *supra* note 7.

¹³⁴ Marten Falls First Nation, “Re: Terms of Reference for the Regional Assessment in the Ring of Fire Region,” *supra* note 81 at 4.

¹³⁵ Matawa First Nations, “Matawa Chiefs Work Towards Solidifying Approach to Ring of Fire Regional Environmental Assessment” (13 June 2022), online: *Matawa First Nations* <<http://www.matawa.on.ca/matawa-chiefs-council-work-towards-solidifying-approach-to-ring-of-fire-regional-environmental-assessment/>>.

¹³⁶ Mushkegowuk Council, “Mushkegowuk Council Supports Matawa First Nations” (15 June 2022), online: *Mushkegowuk Council* <https://www.mushkegowuk.ca/posts/2022-06-15_mushkegowuk-council-supports-matawa-first-nations>.

¹³⁷ Matawa First Nations, “Matawa Chiefs’ Council Acknowledge the Support of the Chiefs of Ontario in Asserting Their Sovereignty, Rights, Interests, and Jurisdiction in the Ring of Fire Region,” *supra* note 28.

¹³⁸ Emma McIntosh, “Scratch that: feds to rethink Ring of Fire environmental assessment after First Nations criticism” *The Narwhal*, March 7, 2023, online: <<https://thenarwhal.ca/ontario-ring-of-fire-regional-assessment/>>.

¹³⁹ *Ibid.*

¹⁴⁰ Ring of Fire Metals, “Ring of Fire Metals and Webequie First Nation Sign Memorandum of Understanding on Ring of Fire Development” (6 December 2022), online: *NewsWire* <<https://www.newswire.ca/news-releases/ring-of-fire-metals-and-webequie-first-nation-sign-memorandum-of-understanding-on-ring-of-fire-development-837924127.html>>.

But both MFFN and WFN assert that they are exercising their jurisdiction in tandem with their participation in the settler state regulatory processes.¹⁴¹ In so doing, these communities are acting both as Indigenous governments with inherent jurisdiction over the land, and simultaneously as proponents for these road projects, carrying out assessments under settler law and arguably lending legitimacy to a colonial regulatory regime. The Gwich'in Council International Report from 2018 considered the question of Indigenous proponents for major projects. The authors state that, in some cases where First Nations are proponents, it may be advisable not to adopt an Indigenous-led impact assessment model, and instead to “run the assessment through the existing legislated process.”¹⁴² A benefit of this approach, according to the authors, is that the Indigenous nation:

can focus its efforts on the proponent side of the equation without taking on the role of process manager. This may include the Indigenous proponent engaging early and often with members of the nation, choosing valued components that are often ignored in legislated systems (e.g., food security, cultural continuity, connection to land), setting up an internal decision-making process that includes members and leadership (not just [economic-development] company management), and the embracing of Indigenous decision-making lenses like inter-generational equity, precaution, and adherence to natural and customary laws.¹⁴³

As stated in the Introduction to this report, Indigenous communities have developed a range of different approaches to impact assessment to consider proposed developments within their homelands. And while these approaches are grounded in each nation’s own social, political and legal orders, they can exist in parallel with, subsumed within, or completely independently of legislative processes under settler law.¹⁴⁴ In the following section, I describe the process undertaken by the First Nation road proponents in the Ring of Fire for the purpose of understanding what it means in the context of Indigenous-led IA.

The Road Proponent First Nations’ Approach to IA

While we recognize that the MFFN has been seeking a community access road since long before the Ring of Fire became Ontario’s excuse to build one, it must be stressed that the First Nation communities that are the all-season road proponents are also generally (and perhaps necessarily) proponents of development in the Ring of Fire. They often say that they consider

¹⁴¹ See, for example: Webequie First Nation & Marten Falls First Nation, “Environmental Assessment Planning Begins on Proposed Northern Road Link” (3 May 2021), online: *NewsWire* <<https://www.newswire.ca/news-releases/environmental-assessment-planning-begins-on-proposed-northern-road-link-896385428.html>>; Marten Falls First Nation, “Marten Falls First Nation’s North-South Road Goes to the Community and Eventually to Ring of Fire” (31 August 2017), online: *PR Newswire* <<https://www.prnewswire.com/news-releases/marten-falls-first-nations-north-south-road-goes-to-the-community-and-eventually-to-ring-of-fire-300512245.html>>; Gary Rinne, “Two First Nations ask neighbours : ‘trust us’ with assessment for a Ring of Fire road” *TBNewsWatch* (4 May 2021), online: <<https://www.tbnewsWatch.com/local-news/two-first-nations-ask-neighbours-trust-us-with-assessment-for-a-ring-of-fire-road-3745846>>; Webequie First Nation, “Webequie First Nation’s Submission to the Regional Assessment.” (9 March 2022) at 2, online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57829>>.

¹⁴² Ginger Gibson, Dawn Hoogeveen, & Alistair MacDonald et al, “Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review” (April 2018) at 14, online (pdf): *Gwich’in Council International* <https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf>.

¹⁴³ *Ibid.*

¹⁴⁴ See Sarah Morales, “Environmental Challenges on Indigenous Lands: Indigenous-led Assessment Processes as a Way Forward” (4 July 2019), online: *Centre for International Governance Innovation* <<https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward/>>; Amanda Spitzig, *Laying the Groundwork for a Community Risk Assessment of the Ring of Fire and Related Infrastructure* (Master’s Research Project, Graduate Program in Environmental Studies, York University, 2017) online: *YorkSpace Institutional Repository* <<https://york-space.library.yorku.ca/xmlui/bitstream/handle/10315/36373/MESMP03056.pdf?sequence=1&isAllowed=y>>.

it a “multi-generational... transformational” opportunity for their members.¹⁴⁵ Chief Bruce Achneepineskum, of Marten Fall First Nation, has stated that the potential developments “will advance our First Nation sovereignty. The agenda must be First Nations-driven and not determined by government, industry, and environmental interests only. ... [T]he impact [must] be maximized to improve the lives of our First Nations people.”¹⁴⁶

Further, MFFN and WFN have both explained that they are incorporating Indigenous legal principles and facets of their inherent jurisdiction over their territories into the assessment process. For example, MFFN is implementing five Guiding Principles (see Figure 4, below). One of the principles states that “Everything on our land and water is living and needs to be respected.” These principles were adapted from the MFFN Community Based Land Use Plan for Project Planning and Engagement and are intended to guide MFFN throughout the assessment processes.¹⁴⁷ MFFN does not elaborate upon these in their formal submissions to IAAC.¹⁴⁸

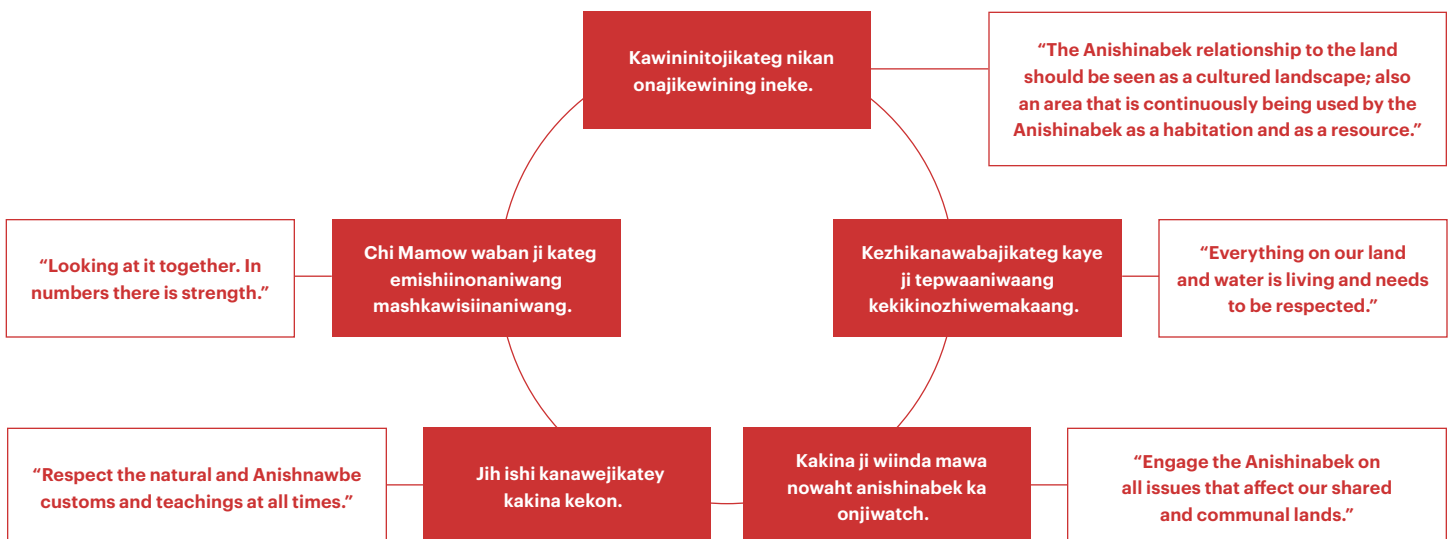


Figure 4: MFFN Guiding Principles¹⁴⁹

MFFN has also introduced an Indigenous Knowledge Program (“the IK Program”). The IK Program aims to collect Indigenous Knowledge relevant to the MFCAR, including “information on Indigenous land and resource use and important cultural values in and around the project area.”¹⁵⁰ Information gathered through the IK Program has been used in tandem with scientific approaches to form “the foundation for baseline conditions, predicting potential

¹⁴⁵ Matawa First Nations, “Matawa Chiefs’ Council Acknowledge the Support of the Chiefs of Ontario,” *supra* note 28.

¹⁴⁶ *Ibid.*

¹⁴⁷ “Guiding Principles” (no date), online: *Marten Falls First Nation Community Access Road* <<https://www.martenfallsaccessroad.ca/guiding-principles/>> [“Guiding Principles”].

¹⁴⁸ Note, for example, that the phrase “guiding principles” does not appear in the “Detailed Project Description of a Designated Project” for the MFCAR. Marten Falls First Nation, “Detailed Project Description of a Designated Project” (9 November 2019), online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80184/133143E.pdf>>.

¹⁴⁹ “Guiding Principles,” *supra* note 143.

¹⁵⁰ “Indigenous Knowledge Program Fact Sheet” (January 2021) at 1, online (pdf): *Marten Falls Community Access Road* <<https://www.martenfallsaccessroad.ca/wp-content/uploads/2021/01/MFFN-CAR-Project-IK-Program-Fact-Sheet-English-Version-Final-January-2021.pdf>>.

project impacts, and determining appropriate mitigation and monitoring methods.”¹⁵¹ On one reading, MFFN’s deliberate centering of IK can be seen as a foregrounding of Indigenous ways of knowing.

Additionally, MFFN is in the process of establishing an Indigenous Knowledge Sharing Agreement and a Memorandum of Understanding with Aroland First Nation. These documents will govern how both communities will work together on the MFCAR.¹⁵² These documents are put forward as an exercise of self-determination as two First Nations come to an agreement on the operation of each community’s own protocols and knowledges, independent of the Crown.

WFN explains that the Webequie Project Team is being provided guidance from community Elders to ensure that consultation and engagement is undertaken in a respectful manner that reflects WFN’s culture and traditions.¹⁵³ The Project Team is likewise guided by six Elders’ Guiding Principles (see Figure 5, below).¹⁵⁴ They include the “Mutual recognition of ancestral knowledge” and “Mutual recognition of traditional protocols”, amongst others. This guidance and these principles demonstrate that WFN is eager to incorporate elements of their distinct Indigenous legal principles into the conduct of the environmental/impact assessments.

- ☑ Mutual recognition of nation to nation;
- ☑ Mutual recognition of ancestral knowledge;
- ☑ Mutual recognition of traditional knowledge and practices;
- ☑ Mutual recognition of clan families and relationships;
- ☑ Mutual recognition of sustainable livelihood; and
- ☑ Mutual recognition of traditional protocols.

Figure 5: WFN Elders’ Guiding Principles¹⁵⁵

Further, WFN has introduced a Three-Tier Model to guide their approach to Indigenous consultation. This incorporates traditional cultural values, customs, and beliefs alongside modern-day protocols for engagement. It aims for an intersectional and intercultural consultation approach.¹⁵⁶ The Core Tier assesses the community and their overall wellbeing, which is broken down into the community’s physical, mental, and social health, education, employment opportunities, and income. The Relational Tier deals with the preservation of the Indigenous culture of the community and incorporates increasing understanding of the culture by others, language, traditional cultural activities, and ancestral knowledge inheritance. The Foundational Tier assesses Treaty and Partnerships, looking to the fair sharing of benefits from the land between the First Nation, the state, and industry.¹⁵⁷ In their “Detailed Project

¹⁵¹ “Indigenous Knowledge Program Fact Sheet” (January 2021) at 1, online (pdf): Marten Falls Community Access Road <<https://www.martenfallsaccessroad.ca/wp-content/uploads/2021/01/MFFN-CAR-Project-ik-Program-Fact-Sheet-English-Version-Final-January-2021.pdf>>.

¹⁵² MFFN, “Detailed Project Description of a Designated Project,” *supra* note 144 at 80, 100.

¹⁵³ “Community Approach” (no date), online: *Webequie Supply Road* <<https://www.supplyroad.ca/community-approach/>> [“Community Approach”].

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Webequie First Nation, “Webequie Supply Road: Detailed Project Description” (November 2019) at 129–31, online (pdf): *Canadian Impact Assessment Registry* <<https://iaac-aeic.gc.ca/050/documents/p80183/133147E.pdf>> [WFN, “WSR: Detailed Project Description”].

Description for a Designated Project,” WFN explains that the Three-Tier Approach forms the basis for their own EA process, which will “run in parallel and be [integrated] with the existing provincial and federal EA/IA processes.”¹⁵⁸ Overall, the Three-Tier approach articulated says that Webequie aims to centre Indigenous protocols for consultation, rather than the typical Crown consultation protocols that accompany standard environmental/impact assessments.¹⁵⁹ In this, it could be argued that Webequie First Nation is deliberately reshaping the consultation framework to suit WFN’s own values and legal order. It is fair to say, however, that not all neighboring First Nations have experienced Webequie’s approach to consultation as significantly different from the Crown’s.¹⁶⁰ For the NRL, the two proponent First Nations have established Joint Principles to guide the assessment. These principles combine MFFN’s Elder’s Principles with the WFN Three-Tier consultation model.¹⁶¹ It is unclear how these principles will guide the assessment process and how the final decisions will be made.

During the December 2022 Empire Club panel discussion, Ontario Minister of Mines George Pirie emphasized how Ontario, in supporting Marten Falls and Webequie First Nations to lead the environmental assessment processes, as well as to “lead the consultation process with the other communities in their traditional territory”, are “doing it differently.”¹⁶² Reacting to Pirie’s comment, however, Chief Moonias dismissed the idea that this is an ‘Indigenous-led’ process, saying it is yet another example of “Ontario attempting to hand off its obligation to consult with First Nations to someone else.”¹⁶³

Are the road proponent First Nations conducting Indigenous-led Assessments?

Indigenous knowledge systems are obviously crucial sources of knowledge when conducting assessments of developments that may impact the socio-ecological and cultural values of a community. However, as indicated in the Introduction to this report, there is a serious risk that Indigenous knowledge, when “integrated” into a settler IA process, will be misinterpreted, deliberately misused, or hollowed out in an exercise of justifying decisions already made. Perhaps MFFN and WFN feel they have secured an appropriate level of control in this situation. But there are reasons to question whether that will be possible, despite their intentions and efforts. The assessments are being carried out under Ontario and Canadian law, in settler institutions and structures, by conventional large corporate consultancies, and according to settler state timelines and habits. Will these permit Anishinaabe principles, values, and logics to penetrate the highly administrative and bureaucratized world of environmental assessment? Can they transform those processes and logic to reflect local realities, capacities, and priorities?

Some scholars are not optimistic, writing that there is a persistent incommensurability of Indigenous and non-Indigenous knowledges. To Paul Nadasdy, for example, Indigenous people’s knowledges and experience often cannot be actualized through institutional processes designed and implemented by the settler state.¹⁶⁴ If the proponent First Nations lead IAs that

¹⁵⁸ *Ibid* at 139.

¹⁵⁹ *Ibid* at 129–31.

¹⁶⁰ Niall McGee, “Neskantaga First Nation says it wasn’t adequately consulted in key Ring of Fire environmental study”, *The Globe and Mail*, March 6, 2023.

¹⁶¹ “Joint Principles” (no date), online: *Northern Road Link* <<https://northernroadlink.ca/a-joint-principles/>>.

¹⁶² Minister George Pirie “Ring of Fire Progress Update” (remarks delivered at the Empire Club of Canada, Toronto, (14 December 2022), online: *Empire Club of Canada* <<https://empireclubofcanada.com/event/ring-of-fire-2022/>> [notes on file with the author].

¹⁶³ Alan S. Hale, “PCs must find way to bring other First Nations on board, or Ring of Fire will stall: Chief,” *supra* note 82. In my own support of Neskantaga First Nation’s position, I gave an interview at the PDAC meeting in March 2023 in which I stated, “Instead of meaningfully engaging with Neskantaga on their terms, as Neskantaga’s own laws require, the proponent’s consultants continue to just send email updates and invite them to webinars”, quoted in Aidan Chamandy, “Ring of Fire environmental assessment takes next step over some First Nations’ objections” *Northern Ontario Business*, March 7, 2023.

¹⁶⁴ Paul Nadasdy, “The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice” (2005) 47(2) *Anthropologica* 215-232.

follow what has been the experience to date in Canada, adopting an approach of weak “incorporation” of Indigenous knowledges without applying the Indigenous law binding in the territory, it must be questioned whether it can constitute Indigenous-led IA.¹⁶⁵ As Kris Statnyk says, “the efficacy of traditional knowledge is dependent on respect for the underlying force and weight of the Indigenous legal traditions that are an integral aspect of the Indigenous knowledge systems.”¹⁶⁶

These assessments, conducted by First Nation proponents operating within settler environmental/impact assessment processes are important to follow for learning more about how Indigenous legal orders are deployed within a colonial legal framework. The main concern is whether or how the character of an Indigenous legal order is affected when operating wholly inside Ontario’s and Canada’s processes and applying those logics. As mentioned, it is safe to say that at least some of the neighboring First Nations have not experienced the approach to consultation undertaken by the road proponent First Nations to be significantly distinct from the approach taken in the past by the Crown or mining company proponents. However, it is possible that *within* the road proponent communities, members have experienced the process completely differently. There is little publicly available information about this, and thus, it is very difficult to assess. Some might argue it is inappropriate for outsiders to do so.

Conclusion: Contested Authorities, Competing Visions and a Clash of Legal Orders

A joint statement by Matawa Chiefs Council in November 2022 emphasized the communities’ focus on inherent jurisdiction in their territories. Although Chief Achneepineskum of Marten Falls emphasized the right of his First Nation to choose to support development in the Ring of Fire, the statement also included a quote by Former Chief Wayne Moonias of Neskantaga emphasizing the need for each First Nation to provide their “free, prior and informed consent... as Rights-Holders in [their] homelands”.¹⁶⁷ Chief Moonias also pointed to the need to respect community voices and elders and to respect applicable Indigenous laws and protocols, stating that the “First Nations are waiting for the Government of Canada and the province of Ontario to demonstrate the proper respect and for an appropriate government-to-government relationship and dialogue to be established.”¹⁶⁸

In fact, the quote from Chief Sol Atlookan of Eabametoong First Nation seems to speak directly to the issues at the core of the debate over environmental/impact assessment in the region: “The reality is that no decision can be made yet about the ring of fire roads or possible mines; the assessments must give our membership an informed view of the risks and possibilities of those things in due time ... If we are really talking about forever change to our homelands, there must be a new approach to shared decision-making and real commitment to positive generational change driven by our people.”¹⁶⁹ Indigenous-led assessments would ideally provide this “new approach”. They should overcome at least some of the obvious shortcomings identified in Crown processes. Ideally, both legal orders would operate side-by-side as two equally valid legal frameworks, rooted in separate constitutional orders and values but capable of productive outcomes based on shared jurisdiction. Possibilities for this are addressed in the conclusion of this report.

¹⁶⁵ Carol Hunsberger & Sâkhitowin Awâsis, “Energy Justice and Canada’s National Energy Board: A Critical Analysis of the Line 9 Pipeline Decision” (2019) 11(3) Sustainability 783–802.

¹⁶⁶ Kris Statnyk, “Throwing Stones: Indigenous Law As Law in Resource Management” (Pacific Business & Law Institute, Aboriginal and Environmental Law Program, January 20, 2016) at 8 [unpublished].

¹⁶⁷ Matawa First Nations, “Matawa Chiefs’ Council Acknowledge the Support of the Chiefs of Ontario,” *supra* note 28.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*