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FILED ONLINE

Ministry of the Environment, Conservation and Parks
College Park 5th Floor
777 Bay Street
Toronto, ON M7A 2J3

Dear Sirs/Mesdames:

Re: Moving to a project list approach under the Environmental Assessment Act, ERO Number: 019-4219

COMMENTS ON DRAFT PROJECT LIST REGULATION UNDER THE ONTARIO ENVIRONMENTAL ASSESSMENT ACT

From: Olthuis Kleer Townshend LLP (OKT) on behalf of the Applicants in Ontario Divisional Court File 282-20.

A. SUMMARY INTRODUCTION

These comments are submitted under protest and under the duress deliberately created by Ontario. OKT requested that the Project List Regulation be withdrawn and shelved until a decision on the Court Application is rendered and any required steps flowing therefrom are taken, and until there is a jointly determined engagement process with full funding for its implementation provided by Ontario. Ontario refused all of this.

In purporting to modernize environmental assessment (EA) in Ontario, the Ontario government has effectively stripped the *Environmental Assessment Act* of what credibility the last regime had left. "Modernizing" EA in this case is synonymous with removing its application so as to enable commercial projects to extract profits more readily, at the expense of environmental and sociocultural health and wellbeing.

In a world in which it has become apparent that this "destroy now, pay later" paradigm of environmental conquest has led humanity into a climate code red, this "modernization" approach is far off what both western and indigenous science demands. In a world in which the racist underpinnings of colonialism have been openly condemned and in which it is a democratic priority to reverse and make restitution for such widespread systemic white supremacy, this paradigm

threatens to push indigenous peoples' relationship to the environment into worsened impoverishment.

Modernizing an EA regime in this set of current facts, should mean a more, not less, robust EA process that prioritizes a holistic and cumulative understanding of the environment, and endeavours to protect and heal the floral, faunal and human aspects of it rather than render all more vulnerable and weaker.

A robust, modern EA regime is key to environmental protection, averting a global climate catastrophe, and protecting the exercise of Indigenous peoples' rights to use and occupy and connect with lands. Ontario, as the Crown, has legal obligations in all three areas.

The proposed *Comprehensive EA Project List* and other related regulations offer little respect or protection of the environment, climate or rights of Indigenous peoples.

There are serious deficiencies with Ontario's proposed regulations:

1. The regulations do not mandate cumulative effects assessment, which is inconsistent with Ontario's Statement of Environmental Values and recent judicial decisions.

2. The regulations do not include a mechanism for submitting designation requests, which effectively bars First Nations and the wider public from articulating their concern with a project that is not on the project list—and there are many projects not on the project list.

3. There are many gaps in the types of projects designated for EA.

4. The EA modernization process is inaccessible to First Nations. It is fragmented, poorly publicized, run unilaterally by Ontario, severely under funded and tokenistic.

Ontario should set aside all the proposed regulations and engage in serious, meaningful engagement with First Nations about the *Environmental Assessment Act* (Act) and the regulations as one package. Ontario should be open to redoing or amending the Act based on the many weaknesses with it that the Applicants have identified. The engagement should be mutually developed, joint and supported by good capacity funding for legal and technical advisor services and community input. Instead, all that Ontario has done is bully ahead its Act, and then put its already-drafted regulations on the ERO for comment, with perfunctory webinars. A joint process facilitated by the Chiefs of Ontario has been proposed by OKT and the Applicants on a number of occasions and Ontario has refused to so engage.

B. FOUR TYPES OF DEFICIENCIES WITH THE PROJECT LIST REGULATION

1. Cumulative Effects Assessment is Necessary

The proposed Project List regulations do not incorporate an assessment of cumulative effects or cumulative impacts as part of an environmental assessment. There is no legislative requirement to assess cumulative effects or track landscape-level impacts in project proposals or as part of ministerial duties. This stands in sharp contrast both to existing Ontario policy commitments and recent legal decisions that find cumulative effects assessment part of the Crown's duty to protect the practice of Aboriginal and Treaty rights.

There must be a cumulative effects assessment framework across Ontario. This is equally important in highly developed parts of the province as in lightly developed parts of the province. In densely populated southern Ontario, cumulative effects assessment is a necessary to ensure that First Nations members can still meaningfully exercise their Aboriginal and Treaty rights in the face of encroachments from others' land use and development.

While Northern Ontario is significantly less settled than the South, cumulative effects assessment is no less important. Northern Ontario is home to the world's second largest peatlands complex as well as a huge host of unique wildlife.[1] The peatlands are a nationally and internationally significant carbon sink, sequestering an estimated 35 billion tonnes of carbon per year. Disturbances to the peatlands, like mining or the construction of mining infrastructure, risks turning them into a massive emitter of methane and carbon.[2] Without cumulative effects assessment, Ontario risks significant greenhouse gas emissions and the destruction of critical wildlife habitat. First Nation rely on this fragile ecosystem to exercise their rights and the Crown must ensure that they can continue to do so. Ontario's too-weak EA regime including the regulations threaten to push the climate code red into a permanent and irreversible catastrophe.

This lack of cumulative effects assessment stands in stark contrast to the recent draft Statement of Environmental Values (SEV) of the Ministry of Environment, Conservation, and Parks. The draft SEV commits that "The Ministry adopts an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them."[3] An ecosystem approach to environmental protection and resource management would involve a regulatory regime that mandated cumulative effects assessment, to understand the interactions between the air, land, water, and living organisms, and to act to prevent further detrimental interactions in areas where the ecosystem is strained and fragile as a result of human development. Moreover, it would involve preventing detrimental interactions in areas that are as yet undeveloped by the province.

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[1] James Wilt, "The battle for the 'breathing lands': Ontario's Ring of Fire and the fate of its carbon-rich peatlands" (11 July 2020), online: *The Narwhal* <https://thenarwhal.ca/ring-of-fire-ontario-peatlands-carbon-climate/>.
[2] *Ibid.*
[3] Ontario, "Draft Statement of Environmental Values: Ministry of the Environment, Conservation, and Parks" (December 2020) at 3, online: *Environmental Registry of Ontario* <https://prod-environmental-registry.s3.amazonaws.com/2020-12/Draft%20SEV.pdf>.

The draft SEV goes on to state that, "[the] Ministry considers the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society."[4] Considering the cumulative effects on the environment must be understood as more than simply ceding to the needs of the economy, over and above environment and society. It also must be read in combination with the Ministry's commitments to Indigenous peoples in the SEV.

Overall, the *Environmental Assessment Act* itself actively undermines efforts to assess cumulative effects. The amended EAA defines ancillary enterprises or activities in such a way to capture only things done by the same project proponent that are directly related to the maintenance or operation of the project.[5] This facilitates project splitting, where different proponents undertake different elements of the assessment and undergo EAs completely isolated from each other. This is eminently clear in the hotly contested Ring of Fire in Northern Ontario.

Noront Resources Limited is the proponent for several proposed mine projects in the area. These are being assessed separately from three proposed road projects connecting the mining sites to the provincial highway system, as two local First Nations are jointly and separately acting as proponents for these roads. These projects are no longer ancillary enterprises or activities as they are undertaken by different proponents. This "modernized" EA regime prohibits Ontario from considering the cumulative effects of the road projects in conjunction with the proposed mines. This offers no opportunity for understanding the cumulative effects of other historic, current, or future projects. The result is that cumulative effects assessment in the hands of proponents, who will resist undertaking additional, non-mandatory studies that may undermine the viability of their project.

Jurisprudence Requires Cumulative Effects Assessment

Recent jurisprudence has held that the Crown must undertake cumulative effects assessment in order to uphold their obligations to protect Aboriginal and Treaty rights. This elaborates on earlier case law that helped define the limits on the Crown's ability to infringe on Treaty rights. In 2005, the Supreme Court of Canada explained that the "taking up clause" in many history treaties is limited by whether or not an Indigenous community can maintain a meaningful ability to exercise their rights in their traditional territories.[6]

More recently, *Yahey v British Columbia* clarified that the Crown's right to take up lands cannot eclipse a First Nation's meaningful right to practice their way of life.[7] Brought by Blueberry River First Nation, this case establishes that the focus of an infringement analysis is on "whether the treaty rights can be *meaningfully* exercised, not on whether the rights can be exercised *at all*."[8] The Court concluded that provincial regulatory regimes for authorizing industrial development in British Columbia "do not ensure that the taking up of land protects the meaningful exercise of

[4] *Ibid.*
[5] *Environmental Assessment Act,* RSO 1990, c E 18, at s 3(3–4) [*EAA*].
[6] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 38–48.
[7] *Yahey v British Columbia*, 2021 BCSC 1287 at para 532 [*Yahey*].
[8] *Ibid* at para 540.

treaty rights. The provincial processes do not adequately consider treaty rights or cumulative effects and have contributed to the meaningful diminishment of Blueberry's treaty rights[.]"[9]

The Court also found that wildlife management efforts in Blueberry River First Nation's traditional territory offered little by way of protecting wildlife. Oil and gas development was allowed in some protected areas "if the activity will not have a 'material adverse effect[.]'"[10] Ontario's *Endangered Species Act* offers similar such exemptions to wildlife protection. The Minister can authorize individual activities or issue regulations exempting regulated activities from the prohibition on killing wildlife on the Species at Risk in Ontario's List or damaging their habitat.[11]

Recently, the Auditor General of Ontario has found that the "Environment Ministry does not have a long-term strategic plan to improve the status of species at risk."[12] Between the possibility of regulations exempting activities under the EAA from the prohibition on killing endangered species or damaging their habitat, and the EAA's utter lack of cumulative effects assessment, Ontario is steadfastly refusing to protect wildlife in the province to allow for the meaningful exercise of Aboriginal and Treaty rights.

In *Yahey* the Court concluded that the Crown had unjustifiably infringed Blueberry River First Nation's Aboriginal and Treaty rights, stating that "The Province has failed to diligently implement the Treaty promise to protect the Plaintiffs' treaty rights and ways of life from the cumulative impacts of development on the land."[13] It follows that Ontario has a positive obligation to assess cumulative effects in order to protect and uphold Aboriginal and Treaty rights. This requires an ability to assess the impacts of different industries across the province.

These proposed regulations deprive Ontario of an opportunity to track and assess cumulative effects and their impact on the exercise of Aboriginal and Treaty rights in the province. There is an inherent limit to how much land the Crown can take up, and the Crown must have the available data to make such a determination. The regulations, as proposed, do not require any cumulative effects assessment such that Ontario would be able to make such a determination.

Ontario has a positive obligation to assess cumulative effects as part of its obligations to uphold the Honour of the Crown. Refusing to mandate cumulative effects assessment undermines the province's ability to meet that obligation (which it already struggles to do). Failure to mandate cumulative effects assessment will inexorably lead to the heaping accumulation of adverse effects that will crush the meaningful practice of Aboriginal and treaty rights in the province. This is what the Court in *Yahey* referred to as "death by a thousand cuts".[14]

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[9] *Ibid* at para 1751.
[10] *Yahey* at paras 1777–78.
[11] *Endangered Species Act, 2007*, SO 2007 C-16 at ss 9, 10, 17–18 [*ESA*].
[12] Auditor General of Ontario, "Summary: Annual Report of Environmental Audits" (22 November 2021) at 5, online (pdf): *Office of the Auditor General of Ontario* <https://auditor.on.ca/en/content/news/21_summaries/2021_summary_ENV.pdf>.
[13] *Yahey* at para 1786.
[14] *Yahey* at para 1780.

2. Designation Request Process is Necessary

In seeking to "align Ontario with other jurisdictions across Canada who use project lists,"[15] Ontario has created a project list unlike any other jurisdiction in Canada. While British Columbia and the federal government both rely on project lists to specify which projects are designated projects and which are not, these lists are significantly larger and are effectively kept open by the designation request process.

In British Columbia, s 11 of the *Environmental Assessment Act* details the Minister's power to designate a project as reviewable.[16] The Minister must consider a number of factors in deciding whether to designate a project, including "whether the applicant is an Indigenous nation" and "whether the eligible project could have effects on an Indigenous nation and the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."[17] In the *Impact Assessment Act*, s 9 outlines the federal Minister's power to designate physical activities.[18] The Minister may consider "adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada—including Indigenous women—recognized and affirmed by section 35 of the *Constitution Act, 1982*[.]"[19] In both regimes, the Minister may act of their own initiative or upon request from a member of the public.[20]

In Ontario, only the Minister can propose additional designations and exemptions.[21] There is no mechanism for a member of the public or an Indigenous community to request the designation of a project that is not on the project list. An interested party may request a Part II Order on the grounds that "the order may prevent, mitigate or remedy adverse impacts on the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*."[22] This is unlike the designation request process either federally or in British Columbia in that it only elevates an assessment already designated under the *Environmental Assessment Act* to undergo a more detailed assessment. In other words, the bump up process does not allow for members of the public or Indigenous communities to request an assessment of a project that is not on the project list.

3. Significant Gaps in the List of Projects – Many Types not Included

There are a significant number of projects that simply are not on the *Comprehensive EA Project List.* Ontario insists that either adequate assessments are undertaken under different legislative and regulatory regimes, or that no assessments are necessary for these projects. First Nations in Ontario feel the cumulative effects of these projects nevertheless, whether or not the province is willing to assess these effects or designate these projects.

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[15] Ontario, "Moving to a project list approach under the Environmental Assessment Act" (26 November 2021), online: *Environmental Registry of Ontario* <https://ero.ontario.ca/notice/019-4219>.
[16] *Environmental Assessment Act*, SBC 2018 C-51, at s 11 [BC *EAA*].
[17] *Ibid* at s 11(4)(a–b).
[18] *Impact Assessment Act*, SC 2019, C-28, at s 9 [*IAA*].
[19] *Ibid* at s 9(2).
[20] BC *EAA* at ss 11(2), 11(7); *IAA* at s 9(1).
[21] Ontario, "Moving to a Project List Approach under the Environmental Assessment Act" (26 November 2021) at 4, online (pdf): *Environmental Registry of Ontario* <https://ero.ontario.ca/notice/019-4219#supporting-materials>.
[22] *EAA* at s 16(6).

Ontario will not be conducting EAs for any new mines. This is seriously concerning as mining has always been a contentious industry in the province, especially when Aboriginal and Treaty rights and Aboriginal title are concerned. Scholars have pointed out that Treaty 9 in particular was intended to open up Northern Ontario for resource development.[23]

First Nations continue to be affected by mining decisions by provincial regulatory bodies, and continue to fight for their Aboriginal and treaty rights. Kitchenuhmaykoosib Inninuwig First Nation's opposition to Platinex Inc.'s proposed development on their traditional territory, following a failure to respect consultation protocols and ongoing land claim negotiations, set the tone for development in Northern Ontario in the early 2000s.[24] In 2018, Eabametoong First Nation successfully overturned a licencing decision by the Minister of Northern Development and Mines following a failure to adequately discharge the duty to consult.[25] In 2021, Ginoogaming First Nation were granted an injunction to allow for further accommodation discussions regarding proposed development in their traditional territory.[26]

Attawapiskat First Nation continues to deal with significant adverse environmental effects caused by De Beers' Victor Diamond Mine. The mine caused a major increase in methylmercury contamination in the Attawapiskat River, which the community has relied on for drinking water and fish since time immemorial. Attawapiskat First Nation anticipates further significant adverse environmental effects from the proposed mining activities and associated infrastructure planned for the Ring of Fire. The community relies on the EA regime for consultation and accommodation, to ensure that their concerns are heard and that their rights are protected. Removing mining from the EA process entirely poses a serious threat to Attawapiskat First Nation's way of life

Ontario will not be conducting EAs for forestry projects. The MNRF already deeply undermined their credibility in forestry management by slowly dismantling the hard-won terms and conditions in the Timber Class Management EA before Ontario revoked Declaration Order 75. In removing all forestry activities from assessment and refusing to give First Nations and the public the tools to request a designation of specific projects, Ontario has reaffirmed that it is open for business at the expense of the exercise of Aboriginal and treaty rights.

Migisi Sahgaigan (Eagle Lake First Nation) notes that increased forestry activities in their traditional territory has resulted in increased methyl-mercury poisoning and pollution in local river systems and fragmented local wildlife habitat. The community had previously requested an EA of the Wabigoon Forest Management Plan, which was declined. However, the request resulted in imposition of six additional conditions on the MNRF in response to concerns raised by the community.

Forests are critical to the culture and society of Temagami First Nation. Community members exercise their rights in the forests of their traditional territory and rely on them for the transfer of

[23] John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: MQUP, 2010) at 32.
[24] *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171.
[25] *Eabametoong First Nation v Minister of Northern Development and Mines*, 2018 ONSC 4316.
[26] *Ginoogaming First Nation v Ontario,* 2021 ONSC 5866.

cultural and spiritual traditions and practices between generations. Provincial forest management planning has significant impacts on Temagami First Nation, and the significant cumulative impacts of these activities have seriously undermined their ability to exercise their rights.

By removing mining and forestry entirely from the EA process, without allowing for a thorough designation request mechanism, Ontario effectively precludes itself from discharging its constitutional duty to consult and accommodate these First Nations and all others in Ontario. By declining to consider mining or forestry as "contemplated Crown conduct," Ontario has granted itself permission to take up lands as it sees fit, without checks or balances to ensure that Aboriginal and Treaty rights are protected. The regulations must be amended to include a designation request mechanism that allows communities to request an assessment for projects not included on the project list.

4. EA "Modernization" Process is Inaccessible to First Nations

Ontario's process for modernizing EA legislation is unlike the process of modernizing federal impact assessment legislation or the process undertaken in British Columbia. Ontario has introduced piecemeal change to the *Environmental Assessment Act* through legislation exempted from consultation and revocations, and has undertaken comment periods on a number of different inter-related regulations. Each of these disparate documents must be read in conjunction with each other for the reader to understand the whole of the proposed "modernized" EA regime.

This particular public comment period asks participants to comment on four different regulations and offers *Moving to a Project List Approach under the Environmental Assessment Act* as additional background information. The latter notes that there are further regulations to come to clarify the process of conducting a "streamlined" EA.[27] This piecemeal EA modernization process fails to meet the bar set by rigorous consultation processes in other jurisdictions.

In modernizing the *Canadian Environmental Assessment Act, 2012*, the federal government convened an expert panel in August 2016 to conduct consultations across the country to better understand what the public and Indigenous communities wanted from EA.[28] The expert panel was further advised by a Multi-Interest Advisory Committee, composed of "representatives of Indigenous organizations, industry associations and environmental groups."[29] This expert advice formed the foundation of the *Impact Assessment Act*, which progressed through the legislative process over the course of a year and a half, and was firmly and aggressively vetted by the House of Commons and the Senate.[30] The *Impact Assessment Act* came into force in August 2019.[31]

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[27] Ontario, "Moving to a Project List Approach," *supra* note 30 at 3.
[28] Canadian Environmental Assessment Agency, "Government of Canada Moving Forward with Environmental Assessment Review" (15 August 2016), online: *Newswire* <https://www.newswire.ca/news-releases/government-of-canada-moving-forward-with-environmental-assessment-review-590224291.html>.
[29] Canada, "Review of environmental assessment processes: Expert Panel Terms of Reference" (28 June, 2017), online: *Canada.ca* <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/final-terms-reference-ea.html>.
[30] Parliament of Canada, "An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts" (n.d.), online: *LEGISinfo* <https://www.parl.ca/LegisInfo/en/bill/42-1/c-69>.
[31] *Ibid.*

The regulations supporting the *Impact Assessment Act* underwent further public consultation. The federal government circulated a discussion paper on their approach to revising the project list. This consultation period ran for four months in early 2018, during which time the government sought input from working groups, stakeholder advisory groups, and Indigenous communities.[32] Afterwards, the federal government sought further comments in the fall of 2018 on a proposed project list.[33] The regulations were finalized in August 2019.[34]

In the process of modernizing the *Environmental Assessment Act*, British Columbia convened an Environmental Assessment Advisory Committee in early 2018. The First Nations Energy and Mining Council led Indigenous engagement, which included four regional workshops, a province-wide forum, and direct engagement with Indigenous nations.[35] In June 2018, British Columbia released a Discussion Paper for consultation, which tied EA reform to reconciliation and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.[36] By fall 2018, British Columbia had "direct engagements with 73 Indigenous nations, 7 industry and business associations (63 representatives), 33 non-governmental organizations and 44 EA practitioners."[37] The new *Environmental Assessment Act* passed third reading in November 2018, and came into force in December 2019.[38]

The delay in coming into force allowed British Columbia time to develop supporting regulations, like the *Reviewable Project Regulations*. From February 2019 to November 2019, the province held extensive meetings with "stakeholders, including industry, environmental groups, industry associations, local governments and environmental assessment practitioners" to inform policy and regulatory development.[39] This feedback informed the Reviewable Project Regulation Intention

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[32] Canada, "Consultation Paper on Approach to revising the Project List" (8 February 2018), online: *Canada.ca* <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/consultation-paper-approach.html>.
[33] *Ibid.*
[34] *Physical Activities Regulations*, SOR/2019-285.
[35] British Columbia, "Revitalizing B.C.'s environmental assessment process" (7 March 2018), online: *BC Gov News* <https://news.gov.bc.ca/releases/2018ENV0009-000337>.
[36] British Columbia, "Environmental Assessment Revitalization Discussion Paper" (June 2018) at 4, online (pdf): *British Columbia* <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_discussion_paper_final.pdf>.
[37] British Columbia, "Environmental Assessment Revitalization Intentions Paper" (2018) at 3, online (pdf): *British Columbia* <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_intentions_paper.pdf>.
[38] British Columbia, "The Environmental Assessment Act and Associated Regulations and Agreements" (n.d.), online: *British Columbia* <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/act-regulations-and-agreements>.
[39] British Columbia, "Engagement on Environmental Assessment Revitalization" (n.d.), online: *British Columbia* <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/engagement-on-revitalization>.

Paper, which was released for public comment in September 2019.[40] Comments on the Intention Paper helped shape the final regulations, which were finalized in November 2019.[41]

In light of the extensive consultation preceding both federal impact assessment legislation and provincial environmental assessment legislation in British Columbia, Ontario's consultation process is unduly complex, poorly publicized, and ill-informed. While both the British Columbia *Environmental Assessment Act* and the federal *Impact Assessment Act* have obvious shortcomings, they were developed and implemented in dialogue with the Indigenous communities and the public. Ontario's entire EA "modernization" process is unjustifiably truncated, piecemeal in nature, and is being developed as dictated by the interests of the development industry.

Constitutional Obligations

The Supreme Court of Canada has ruled that "no aspect of the law-making process—from the development of the legislation to its enactment—triggers a duty to consult."[42] Even so, absent a constitutional or statutory requirement to do so, the federal government and British Columbia undertook extensive consultation with Indigenous communities on the content of reformed EA legislation and regulations. Ontario, on the other hand, did have a requirement to consult. Ontario committed to consult in SEVs and in the 2019 Discussion Paper,[43] and continues to refuse to do so honourably.

First Nations in Ontario must be deeply engaged in this EA modernization process, and this should extend to collaboration and co-design of the new regime. This could take the shape of technical working groups nominated by First Nations across the province. This process must include capacity funding or support for communities to access expertise on environmental and legal issues. While First Nations are experts on their traditional territories, Ontario has changed the environmental protection regime in the province so wholly that communities struggle to protect and uphold their rights. They require legal and expert advice in analysis to properly participate in an EA modernization process.

This consultation would be more efficient and more effective if undertaken through a joint process with the Chiefs of Ontario, much as British Columbia did with the First Nation Energy and Mining Council. The Chiefs of Ontario could likewise lead in-depth consultation in a single forum, staffed by qualified, knowledgeable, and experienced individuals put forward by First Nations. They have undertaken similar efforts in the past in other areas of law reform and policy development.

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[40] British Columbia, "Environmental Assessment Revitalization Reviewable Projects Regulation Intentions Paper" (6 September 2019), online (pdf): *British Columbia* <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/rpr-engagement/reviewable_projects_regulation_intentions_paper_final.pdf>.

[41] BC Reg 243/2019.

[42] *Mikisew Cree First Nation v Canada (Governor in Council),* 2018 SCC 40 at para 50 [*Mikisew 2018*].

[43] Ministry of the Environment and Climate Change, "Statement of Environmental Values: Ministry of the Environment and Climate Change" (n.d.) online: *Environmental Registry of Ontario* <https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change#:~:text=Statement%20of%20Environmental%20Values%20%3A%20Ministry%20of%20the,recognize%20the%20inherent%20value%20of%20the%20natural%20environment>; Ontario, "Discussion Paper: Modernizing Ontario's Environmental Assessment Program" (25 April 2019), online: <https://ero.ontario.ca/notice/013-5101#supporting-materials>.

Undertaking a joint technical approach would allow the province to engage with all 133 First Nations in Ontario, supported by qualified professionals, land stewards, and Elders. This process would alleviate the consultation burden and fatigue that Ontario's current approach is imposing on individual First Nations.

Understanding that there is ordinarily no constitutional obligation to consult on legislative change, the Supreme Court noted that, once enacted, legislation and regulations must uphold Aboriginal and Treaty rights as recognized and affirmed under s 35 of the *Constitution Act, 1982* its application.[44] Given the monumental shortcomings outlined above and below, it is doubtful that Ontario's current scheme for EA "modernization" would uphold these rights.

C. CONCERNS WITH SPECIFIC PROVISIONS OF THE PROJECT LIST REGULATION

EAA Regulation – Exemptions from the Act and from Part II.1 of the Act

Section 4(1) of these regulations exempt road projects from assessment if the road provides access to a "renewable energy generation facility or a renewable energy testing facility."[45] There are serious issues with exempting roads from assessment, regardless of where the roads lead. Linear access features like roads lead to increased predation of large ungulates like caribou by wolves. Roads "create corridors for wolves to travel and sightlines for wolves to more easily spot caribou."[46] Facilitating caribou decline by exempting road projects from assessment undermines Ontario's commitment to protecting caribou, a threatened species per the *Endangered Species Act*.[47]

Moreover, road projects have already proven to be contentious projects throughout the province. Many Indigenous communities in the Ring of Fire are strongly opposed to road projects in their traditional territories.[48] Other communities located near renewable energy facilities may have similar concerns that the province must be able to consult on and accommodate. Eliminating any kind of road project from the category of "contemplated Crown conduct" is a bare-faced attempt to sidestep Indigenous concerns with infrastructure projects and shirks Ontario's constitutional obligations.

Section 13(1–2) of these regulations exempts undertakings related to a settlement agreement between the provincial Crown and Indigenous communities with respect to a land claim from

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[44] *Mikisew 2018* at para 52; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[45] Ontario, "EAA Regulation – Exemptions from the Act and from Part II.1 of the Act" (26 November 2021) at s 4(1), online: *Environmental Registry of Ontario* <https://ero.ontario.ca/notice/019-4219#supporting-materials>.
[46] Robyn Allan, Peter Bode, Rosemary Collard & Jessica Dempsey, "Who Benefits from Caribou Decline?" (December 2020) at 16 n17, 17, online (pdf): *Canadian Centre for Policy Alternatives* <https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2020/12/ccpa-bc-Who-Benefits-From-Caribou-Decline-2020.pdf>.
[47] *ESA* at Schedule 4.
[48] 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>.

undergoing an environmental assessment.[49] This regulation appears to exempt a wide variety of undertakings that implement "an agreement…about land or any interest in land" from environmental assessment. As written, this seems to go beyond undertakings that implement land claims and could apply to any agreement between "an Indigenous community" and the Minister of Indigenous Affairs about a disposition of land or interests in land. This could be interpreted as a wider exemption from environmental assessment, and could exempt resource development and infrastructure works from an EA provided that there was some kind of agreement in place. This could also pit Indigenous communities against each other, as an agreement between one Indigenous community and the Crown could preclude the EA of a project that would have serious effects on another community's practice of their Aboriginal and Treaty rights.

EAA Regulation – General and Transitional Matters Regulations

Section 4(1) of these regulations deal with the contents of an EA prepared for a Part II.3 project, adding to the information required under the EAA.[50] Section 4(1)(b) and (c) clarify that the proponent must provide "a list of studies and reports which are under the control of the proponent and which were done in connection with the Part II.3 project or matters related to the project" and "a list of studies and reports done in connection with the Part II.3 project or matters related to the project of which the proponent is aware and that are not under the control of the proponent[.]"[51] This phrasing suggests that the proponent need only provide lists of these studies and reports, and that the regulator may never even see the reports or studies referred to. In other words, the proponent merely has to show that they have conducted studies and offers the Ministry no opportunities to review their results or validity.

A recent report from the Canadian Centre for Policy Alternatives warns that proponent benefit projections are suspicious at best, and radically inflated at worst.[52] In examining three coal mines in north-eastern British Columbia, the *Who Benefits from Caribou Decline?* report found that only 34% of the promised taxes were paid to the provincial and federal governments, that only 59% of forecasted employment materialized, and that production at the mines fell short by 63% of the approved capacity.[53] These benefits projections are often exaggerated because proponent data relies on flawed modelling. Proponents often forecast project benefits based on input-output models that presume a scenario of constant output at favourable prices. This ignores the boom-and-bust reality of the resource extraction, which operates with fluctuating prices, changing demand for product, and precarious financial situations.

As the environmental assessment process in British Columbia does not require proponents to indicate the risks inherent in their data modelling, regulators continue to uncritically accept these optimistic predictions.[54] Neither Ontario's guidance for preparing and reviewing the terms of reference for an EA nor the guidance on preparing and reviewing EAs requires the proponent to

[49] Ontario, "EAA Regulation – Exemptions," *supra* note 54 at s 13(1–2).
[50] Ontario, "EAA Regulation – General and Transitional Matters Regulations" (26 November 2021) at s 4(1), online (pdf): *Environmental Registry of Ontario* <https://ero.ontario.ca/notice/019-4219#supporting-materials>.
[51] *Ibid* at s 4(1)(b)–(c).
[52] Allan, Bode, Collard & Dempsey, *supra* note 56 at 39.
[53] *Ibid* at 8, 39.
[54] *Ibid* at 41–43.

outline the risks in the benefit prediction models used.[55] This suggests that omitting these studies and reports entirely from detailed review by the provincial government could lead to the approval of projects with outsized forecasted benefits that proponents will fail to live up to.

EAA Regulation – Part II.3 Projects – Designations and Exemptions

In these proposed regulations, a "sensitive area" is defined as "an area of residential land use, or an environmentally-sensitive area such as an area that includes natural heritage features, cultural heritage or archaeological resources, recreational land uses or other sensitive land uses."[56] This definition should be amended to explicitly include lands and territory that are spiritually and culturally significant to First Nations.

Yours truly,
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[55] Ontario, "Preparing and reviewing terms of reference for environmental assessments in Ontario" (n.d.), online: *Government of Ontario* <https://www.ontario.ca/page/preparing-and-reviewing-terms-reference-environmental-assessments-ontario>.; Ontario, "Preparing environmental assessments" (n.d.) online: *Government of Ontario* <https://www.ontario.ca/document/preparing-and-reviewing-environmental-assessments-ontario>.

[56] Ontario, "EAA Regulation – Part II.3 Projects – Designations and Exemptions" (26 November 2021) at s 1, online (pdf): *Environmental Registry of Ontario* <https://ero.ontario.ca/notice/019-4219#supporting-materials>.