



January 28, 2022

Via email [ohchr-expertmechanism@un.org](mailto:ohchr-expertmechanism@un.org)

**RE: Submission from the Friends of the Attawapiskat River  
United Nations Expert Mechanism on the Rights of Indigenous Peoples**

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The Friends of the Attawapiskat River (the “Friends”), represented by legal counsel at the Canadian Environmental Law Association (CELA),<sup>1</sup> welcome this opportunity to provide submissions to the United Nations’ “Expert mechanism on the rights of Indigenous peoples.”

The Friends are an Indigenous grassroots group based in Treaty 9, in the far north of Ontario, Canada, dedicated to protecting the health of the waters, people, and communities living downstream of the proposed ‘Ring of Fire.’<sup>2</sup> As Treaty 9 people, the Friends have a shared responsibility to protect Treaty lands from exploitation and degradation. This means safeguarding the integrity of the boreal and muskeg of the Hudson Bay-James Bay lowlands, its significant contribution to mitigating climate change, and the health of their grandchildren and those not yet born.

By way of this letter, the Friends provide its submission to the United Nations (UN) for the purpose of its Expert Mechanism pursuant to Human Rights Council resolution 33/25.<sup>3</sup> As the Friends’ actions are based on activities occurring in Treaty 9 lands and many of its members are the descendants of the Treaty signatories, this submission will focus on our experience and the extent to which Canada has sought to meaningfully protect and respect treaty rights.

### **ABOUT THE ‘RING OF FIRE’**

The region dubbed the ‘Ring of Fire’ is located 500km northeast of Thunder Bay, Ontario in the Hudson - James Bay Lowlands region (HJBL) and in the lands of Treaty 9.<sup>4</sup> While the area has been touted for its potential abundance of valuable minerals, such as chromite, copper, and gold,<sup>5</sup> the region is also home to nearly 40,000 Indigenous peoples across 34 communities. The HJBL region in northern Ontario is the largest wetland in North America and the second largest peatland complex in the world, covering over 325,000km<sup>2</sup>. It is the homeland of the Omushkego Nations providing food, and medicine, as well as cultural and sacred spaces for traditional practices and ceremony. However, mineral extraction both in the HJBL (e.g., De Beers Victor Diamond Mine) and upstream, particularly in the area known as the Ring of Fire, have historically impacted and promise to cause unprecedented change to this ecosystem and its people in the years to come.

The peatland (or muskeg) and the many watersheds that intersect in the Ring of Fire, are inherent to Indigenous culture and well-being since time immemorial. Water and the muskeg hold incredible importance in Indigenous spirituality and represent an ongoing relationship with the Creator. The

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<sup>1</sup> CELA is an environmental, legal aid clinic, founded in 1970. Our advocacy on behalf of the Friends is available online: <https://cela.ca/casework-mining-justice-and-indigenous-rights/>

<sup>2</sup> Online: <https://attawapiskatrivertprotectors.com/>

<sup>3</sup> Online: <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Treaties-Constructive-Agreements.aspx>

<sup>4</sup> Scott et al. "Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario’ Ring of Fire” (2020) Osgoode Digital Commons 2807.

<sup>5</sup> *Ibid* at 3.

watershed and muskeg are sacred to Indigenous peoples in the area. The 100-year mining development proposed for this area would not only lead to unprecedented cumulative impacts and threaten the land that has been home to Indigenous nations since time immemorial, but carcinogenic exposures and emissions of heavy metals from mining operations would add to many communities' pre-existing health crises.

## COMMENTS TO THE EXPERT MECHANISM ON INDIGENOUS RIGHTS

### 1. The need for Canada to uphold the UNDRIP, Article 37 in the context of Treaty 9

The Friends submit Canada has not upheld the spirit and intent of Article 37 of the United Nations Declaration for the Rights of Indigenous Peoples (UNDRIP) and must be accountable to the Indigenous nations present in Treaty 9 territory. As Article 37 of UNDRIP states:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

In recent years, Canada has commenced federal impact assessment in the region for the Ring of Fire mining project and its accompanying infrastructure. The province of Ontario in Canada has approved thousands of mining claims to be staked and exploration activities to occur in Treaty 9 lands. However, as detailed in this submission, the Friends has repeatedly shared with Canada and the province that these developments and accompanying government decisions are moving forward absent the full and fair involvement, and consent of Indigenous and Treaty 9 rights holders.

### 2. Treaty interpretation and the wrongful denial of Treaty rights

The lands where the Ring of Fire exists are subject to a treaty known as Treaty 9. Treaty 9 was signed in 1905 by First Nations and the Crown, however, as many, including legal scholars have remarked, treaties were generally entered in bad faith on the side of the Crown government, resulting in dishonesty, broken promises, and sharp dealings with the Indigenous nations at the time<sup>6</sup>. For instance, one of the most significant treaties signed between the Crown and the Indigenous nations at the time of European arrival was the Treaty of Niagara. This treaty mentions several phrases that claim Indigenous communities were willingly signing over or 'selling' their lands in return for Crown protection<sup>7</sup>. However, documented Elder testimony and Indigenous treaty items in the form of wampum, paint a much clearer picture of what was actually agreed upon by the two sovereign nations. Contrary to the text of the written treaty, the agreement did not involve any land ceding at all, but rather, a willingness to peacefully share the lands with colonial settlers<sup>8</sup>. For instance, at the Treaty of Niagara, a wampum belt was given as a symbol of peaceful coexistence with Indigenous nations<sup>9</sup>.

The wampum is considered sacred in Indigenous culture. Further, the specific Wampum used at this treaty signing contained a design that represented two distinct nations, peacefully coexisting on the land at an arm's length<sup>10</sup>. Despite this meaning which has been repeatedly and consistently expressed by elders,

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<sup>6</sup> Sharon H. Venne, "Treaties Made in Good Faith," *Canadian Review of Comparative Literature/Revue Canadienne de Littérature Comparée* 34, no. 1 (2011)

<sup>7</sup> John Borrows, "Wampum at Niagara: The Royal Proclamation," *Canadian Legal History*.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra* note 10.

<sup>10</sup> *Supra* note 10.

the wording of the treaty—which was written in a language that Indigenous nations could not understand—was relied upon by the Crown and taken up in Canadian law. This resulted in the widespread colonial belief that the lands that were traditionally Indigenous territory, were given up or ceded to the Crown when instead, they were taken without consent.

Courts have begun to create more holistic rules to treaty interpretation in Canada<sup>11</sup>. For instance, oral testimony and the circumstances at the time of the treaty are now given equal weight to the specific writing in the treaty<sup>12</sup>. The reason for this is that courts now state that treaty interpretation must occur in accordance with the common intention of the treaty partners<sup>13</sup>.

In the context of Treaty 9, Indigenous leaders have consistently argued that lands were never ceded and the writing on the treaty was never explicitly told to chiefs at the time of signing<sup>14</sup>. In addition to landmark cases which now require the use of holistic evidence when interpreting treaties in Canadian law, the terms of the treaty can reasonably be assumed to be of similar terms as treaties that Indigenous nations have been carrying out for thousands of years with other sovereign nations prior to European arrival. Similar to what the wampum at Niagara truly meant to Indigenous Nations at the time, Treaty 9 represented a solemn agreement with the Government of Canada to peacefully coexist on the lands as two equals.

On this basis, the terms of treaty have been violated for the past century with residential schools, assimilationist practices, and the lack of clean drinking water and health services provided to Indigenous communities, all of which are essential in colonized settler areas in Canada<sup>15</sup>. It continues in the context of the Ring of Fire, where mining development continues absent the free, prior, and informed consent of Treaty 9 members and commitments by Canada to uphold and respect Treaty 9 rights.

### **3. The promotion and respect of treaty rights must be based on Indigenous worldviews**

The Friends submit Indigenous worldviews must be considered when assessing treaty relationships and Canada's will to uphold and respect treaty rights. The work of Indigenous scholars, for instance, outline how Indigenous worldviews are rooted in relationships<sup>16</sup>. While Western views consider objects like lands and natural resources as inanimate, in Indigenous cultures, these lands are considered to have capacity, conscience, and a sacred element in Indigenous spirituality<sup>17</sup>. Further, Indigenous worldviews place a responsibility to each member of the nation to maintain a good relationship with other beings that provide for them<sup>18</sup>. In this sense, the land is seen as a 'being' or having a spirit, and therefore is in a relationship with Indigenous peoples. As such, the land cannot be owned according to their worldview as it has its own capacity and standing in the eyes of the Creator.

### **4. Government decisions on the 'Ring of Fire' mining proposal must include Treaty 9 rights holders and uphold their rights**

Canada's consultation on the Ring of Fire must include Treaty and inherent rights holders and respect Indigenous communities' views on engagement and consent, as based on inherent laws and the Spirit of

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<sup>11</sup> *Marshall*, at para 78.

<sup>12</sup> *Delgamuukw v. British Columbia*, 1997 3 SCR 1010, at para 87.

<sup>13</sup> Coyle & Borrows, (2017) at p 8.

<sup>14</sup> *Ibid.*

<sup>15</sup> Online: CBC news, <https://newsinteractives.cbc.ca/longform/st-anne-residential-school-opp-documents>

<sup>16</sup> Leroy Little Bear, "Jagged Worldviews Colliding," *Reclaiming Indigenous Voice and Vision* (2000).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Supra* note 15.

Intent of Treaties. To date, obligations to protect the sacred Treaty have not been met. The Friends provide a synopsis of their efforts to date, illustrating that Canada has not discharged its duty to work in the best interests of title holders, which is the Indigenous grassroots. Nor, has Article 37 of UNDRIP, which seeks to promote and respect treaty rights, been upheld. In support of this submission, we provide the following examples.

**a. *Impact Assessments and consideration of Indigenous rights***

A number of impact assessments (IA), led by Canada, are being carried out in the Ring of Fire area. While the Friends of the Attawapiskat river provided comments to Canada urging the IAs promote consultation within communities,<sup>19</sup> communities remain minimally consulted. This means many community members are completely unaware of the thousands of mining claims currently being staked directly upstream of their communities.

**b. *Moratorium on mineral claims and exploration***

The Friends called on the government in November 2020 to stop the approval of mining permits due to concern over the growing numbers of claims being granted without any Indigenous approval<sup>20</sup>. With little to no Indigenous engagement, in February 2021, the Friends called upon the government yet again for a moratorium on projects in the Ring of Fire until proper environmental assessments and plans were in place to determine the severe environmental and health effects of the projects<sup>21</sup>. To date, no action has been taken by the government to pause mineral claims and exploration activities nor develop protection plans for this unique and at-risk region.

**c. *Consultation during the COVID-19 pandemic***

In December 2021, Canada released a draft Agreement which informs a regional, impact assessment for the Ring of Fire.<sup>22</sup> In the lead up to this, the Friends - joined by a number of leading civil society and environmental organizations - asked the following be prioritized<sup>23</sup>:

- 1) Ensure all decision-making and planning is driven by a commitment to advance Indigenous rights of self-determination
- 2) Complete an assessment of cumulative impacts, based on both scientific knowledge and Indigenous Knowledge, before authorizing prospecting, exploration, and development activities to safeguard watersheds (including the Attawapiskat, Albany, Ekwan and Winisk), the Hudson Bay Lowland, and critical habitat of boreal caribou ranges
- 3) Critically review the scope and objectives of the Regional Assessment to ensure the future scenarios include any proposed ferrochrome smelter and processing of other metals that may be extracted from the region
- 4) Address fundamental knowledge gaps, combined with projected scenarios, to identify outcomes which align with Indigenous values and rights, as well as federal and provincial commitments to biodiversity and climate change goals

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<sup>19</sup> Online: <https://cela.ca/friends-of-the-attawapiskat-river-comments-on-ring-of-fire/>

<sup>20</sup> Online: <https://cela.ca/joint-request-to-pause-decisions-on-ring-of-fire-exploration-permits/>

<sup>21</sup> Online: <https://cela.ca/letter-to-canada-and-ontario-calling-for-a-moratorium-in-the-ring-of-fire-to-protect-watersheds-and-indigenous-rights/>

<sup>22</sup> Online: <https://iaac-aeic.gc.ca/050/evaluations/proj/80468>

<sup>23</sup> Online: <https://cela.ca/call-for-moratorium-in-ring-of-fire/>

- 5) Proactively consider mining-induced change and address legacy impacts of current mineral exploration and developments in the Ring Fire on Indigenous rights, including impacts on cultural values, traditional economies, and ecosystems
- 6) Address fundamental knowledge gaps and limitations in policy that result in a piecemeal approach to impact assessment on the environment, Indigenous rights, and the public interest
- 7) Undertake a full review of the De Beers Victor diamond mine project, including predicted and actual effects on the social-ecological system in the Attawapiskat River and Hudson Bay Lowland, to fulfill communities' right to information and to apply "lessons learned" to any proposed future developments

Unfortunately, there is no indication at this stage of early engagement on the regional assessment that the feedback by the Friends has been taken up. Instead, regional assessment places Canada with Ontario as leads, and Indigenous roles being assigned advisory or supportive functions only. Contrary to our suggestions, the assessment also defines the geographic boundary of the assessment by the Ring of Fire mineral deposits, and not the Attawapiskat, Albany, Ekwan, and Winisk watersheds. Having a watershed approach is crucial if we are to protect lands and waters before irreversible damage occurs. Altogether lacking from the regional assessment's priorities are considerations of protecting Indigenous rights, biodiversity, and climate.

Canada has also chosen to proceed with a time-barred planning process for the regional assessment during the COVID-19 pandemic, when Omicron has forced travel restrictions and lockdowns within Indigenous communities. The Friends communicated this to Canada in a letter, however the request for any change to the 60-day public comment window went unheeded. Ultimately, Canada continues to move forward unilaterally, when instead, Canada should allow Indigenous peoples to lead a process, in an area which is exclusively occupied by Indigenous communities, to determine the future of their homelands.

## CONCLUSION

The Friends appreciate this opportunity to provide comments to the Expert Mechanism on Indigenous Rights and would welcome further opportunities to share their experience with you.

As the Friends' most recent petition for Treaty 9 members notes,<sup>24</sup> Canada's approach on the Ring of Fire stands contrary to the principles enshrined in the UNDRIP which safeguard the individual and collective rights of Indigenous people, imposing a duty on Canada to achieve the free, prior and informed consent of Treaty 9 members before any development or use of resources on the land occurs. The Friends are among the Indigenous grassroots rising up to protect their inherent and Treaty rights promised by Treaty 9 "for as long as the sun shines, as long as the waters flow, as long as the grass grows, and as long as the winds blow."

Sincerely,

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<sup>24</sup> Online: <https://attawapiskatriverprotectors.com/have-a-say-in-the-environmental-assessments/>