CV-21-00672552-0000
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHIEF WAYNE MOONIAS and NESKANTAGA FIRST NATION

Applicants

- and –

MINISTRY OF NORTHERN DEVELOPMENT, MINES, NATURAL RESOURCES AND FORESTRY; MARTEN FALLS FIRST NATION; MINISTRY OF THE ENVIRONMENT, CONSERVATION AND PARKS; and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondents

NOTICE OF APPLICATION
(Pursuant to Rules 14.05 and 38 of the *Rules of Civil Procedure*)

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following pages.

THIS APPLICATION will come on for a hearing

☒ In person

☐ By telephone conference

☐ By video conference

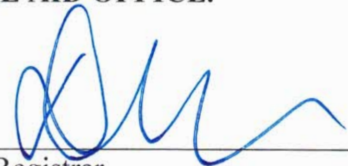
on a date and time to be determined by the Registrar of the Superior Court at 330 University Avenue, Toronto, Ontario M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE

APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE: NOV. 23, 2021 **ISSUED BY:** 

Court Registrar
Ontario Court of Justice
330 University Avenue, 8th Floor
Toronto, Ontario
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TO:	Ministry of the Environment, Conservation, and Parks College Park 5th Floor, 777 Bay St, Toronto, ON M7A 2J3
AND TO:	Ministry of Northern Development, Mines, Natural Resources and Forestry Whitney Block, 99 Wellesley St W, Toronto, ON M7A 1W3
AND TO:	Marten Falls First Nation c/o Chief Bruce Achneepineskum Marten Falls Indian Reserve No. 65, General Delivery Ogoki Post: P0T 2L0
AND TO:	Her Majesty the Queen in Right of Ontario (Ministry of the Attorney General) 720 Bay Street, 8th floor Toronto, Ontario M5G 2K1
AND TO:	THIS HONOURABLE COURT

APPLICATION

The Applicant, Neskantaga First Nation, is a remote Oji-Cree First Nation. Neskantaga First Nation is a signatory to Treaty 9 and a recognized Band pursuant to the *Indian Act*. The Neskantaga Indian Reserve is situated on Attawapiskat Lake in the District of Kenora. Along with the other Aboriginal parties to Treaty No. 9 (1905), Neskantaga has long asserted, and continues to assert, that it has never ceded, sold, or surrendered its homeland or its inherent jurisdiction over its territory and its people.

The Applicant, Chief Wayne Moonias, is the elected Chief of Neskantaga First Nation, and has held this role since April 1, 2021.

This is an application about the extent of the Duty to Consult and Accommodate Indigenous communities in crisis, as it relates to Environmental Assessments in Ontario. The legislation is completely silent on this duty. The Applicants respectfully seek guidance on the extent of this duty, following their recent experience of inadequate consultations on a component of a larger road project that will run through their homelands/traditional territory.

THE APPLICANTS MAKE APPLICATION FOR:

1. Declaratory relief in the form of judicial interpretations and guidance in respect of the Ontario *Environmental Assessment Act* and Regulations governing consultations with First Nations on environmental assessments.
2. This Honourable Court's guidance pursuant to Rule 14.05(3)(d) and 14.05(3)(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in the form of declaratory relief in respect of the following:
    a. A Declaration on the interpretation of sections 5.1 and 6 of the Ontario *Environmental Assessment Act* ("*EAA*"), and associated deadlines regulation O. Reg. 616/98, to conform with Constitutional requirements; and

b. A Declaration on the extent of the Duty to Consult and Accommodate, as it relates to the drafting of Terms of Reference for an Environmental Assessment, and as required pursuant to the Honour of the Crown and section 35 of the *Constitution Act,* 1982;

3. The costs of this application; and

4. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

The Applicants

5. The Applicant, Neskantaga First Nation ("Neskantaga" or "NFN"), is a recognized First Nation pursuant to the *Indian Act*, RSC 1985, c I-5 (the "*Indian Act*"). The "Ring of Fire" region falls within the homelands (also known as "traditional territory") of Neskantaga in the James Bay Lowlands area. There is a high risk that, based on the current plans for the construction of roads, mines, and other types of infrastructure in the region, Neskantaga will suffer irreversibly negative impacts to its Aboriginal rights and title. These impacts will affect the people, land, territory, and resources of Neskantaga.

6. The Applicant, Chief Wayne Moonias (the "Chief" or "Chief Moonias"), is the lawfully elected Chief of Neskantaga First Nation and a resident of the Neskantaga Indian Reserve.

The Respondents

7. The Respondent, the Ministry of the Environment, Conservation and Parks (the "Ministry of the Environment"), is responsible for administering the *EAA* in Ontario, and for review/approval of the Terms of Reference for any Environmental Assessment under the *EAA*.

8. The Respondent, the Ministry of Northern Development, Mines, Natural Resources and Forestry (the "Ministry of Mines") is responsible for overseeing the province's resource extraction industry, and, specifically, the Ring of Fire initiative.

9. The Respondent, Marten Falls First Nation ("Marten Falls" or the "proponent"), is a First Nation located within the Ring of Fire project area. Marten Falls is the proponent of a proposed Marten Falls Community Access Road (the "Access Road" or "MFCAR"), which would affect the rights and title of Neskantaga.

10. The Respondent, Her Majesty the Queen in Right of Ontario, is named alongside the Ministry of the Environment and the Ministry of Mines, in respect of the Honour of the Crown.

Other Entities (Non-Parties)

11. Both the Applicant Neskantaga First Nation and the Respondent Marten Falls First Nation are members of Matawa First Nations ("Matawa"), which is one of the seven Tribal Councils that form Nishnawbe Aski Nation ("NAN").

12. Neskantaga is one of only two First Nations situated along the Attawapiskat River (the "river"), the other First Nation being Attawapiskat First Nation ("Attawapiskat"). Neskantaga is located on the shores of Lake Attawapiskat at the eastern headwaters of the river, while Attawapiskat is located at the mouth of the river on James Bay.

13. Noront Resources Inc. ("Noront") is the project proponent for the "Eagle's Nest" mine, which will connect to the Marten Falls Community Access Road.

Overview

14. The underlying issues in this application relate to the proposed development of the "Ring of Fire", a mining region covering approximately 5,000 square kilometres in the James Bay Lowlands of northern Ontario. This mineral-rich region in the James Bay Lowlands is the future site of several large-scale mining projects with potentially significant impacts to the environment, and to the rights and title of First Nations residing in this area, including the Applicants.

15. The Applicants seek judicial interpretation of the Duty to Consult and Accommodate ("DTCA") as it relates to the preparation, under provincial law, of Terms of Reference ("ToR") for an

Environmental Assessment ("EA") for any project that may have an impact on Aboriginal/Treaty rights. This includes all projects planned for the Ring of Fire region and running through the homelands of Neskantaga First Nation.

16. On October 8, 2021, the government of Ontario approved the ToR for the EA related to the Marten Falls Community Access Road. On October 29, 2021, the Government of Ontario issued its "Notice of Commencement of Environmental Assessment" with respect to the Access Road.

17. The Access Road is the first step in a major series of expected developments in the Ring of Fire region that will have profound cumulative effects on Neskantaga's Aboriginal and Treaty rights. Although the ToR for the Access Road have already been approved, the Court's findings on the extent of the DTCA under Ontario law would affect future project-level EAs under the *EAA* as well. This would notably include the development of ToR for the EAs on the "Eagle's Nest" mining project and the Northern Road Link, both of which pose potentially significant risks to the Aboriginal/Treaty Rights of Neskantaga. Additionally, any finding on the extent of the DTCA and the *EAA* would also have significant consequences for future consultations on ToR for EAs under the *EAA* more generally across the Ring of Fire, and for First Nations across the province.

18. The Applicants seek the court's interpretation of the process that must be followed for consulting with First Nations under the *EAA* in line with the Duty to Consult and Accommodate. Recently, the Applicants experienced entirely inadequate consultations on the ToR for the EA related to a single Access Road. Given those failings, the Applicants bring this application amidst serious concerns that Ontario's current process falls well below what is legally required.

The Ring of Fire

19. The Ring of Fire is the colloquial name given to a potential multi-metal mining district located 500 kilometres northeast of Thunder Bay, in the James Bay Lowlands of Northern Ontario. Since the early 2000s, significant deposits of chromite, nickel, copper, platinum, vanadium, zinc, and gold

have been found in the Ring of Fire region. For a number of reasons, most notably the remote nature of the deposits and the need for significant infrastructure investments to access the region, the project has been stalled for many years.

20. The Ring of Fire initiative consists of the exploration and development of multiple potential mineral deposits, with a long-term goal of constructing several mines and a potential refinery. The initiative involves a large-scale government-funded infrastructure program, which, among other things, includes bringing electricity, high-speed Internet, and transportation access to the region. A core component of the initiative is the construction of a North-South transportation corridor which will connect the mine site with the highway and the transcontinental railway network.

21. In 2012, then-Premier of Ontario Dalton McGuinty initiated the province's plans for a major mining development project in the Ring of Fire area. In 2016, the Ontario government committed $1 billion toward industrial and social infrastructure in the Ring of Fire on the condition that Canada match Ontario's contribution.

22. The Canadian mining company Noront Resources Inc. is the single largest holder of mining claims in the Ring of Fire. This includes the site designated for the proposed "Eagle's Nest" multi-metal nickel mine, which will be constructed first, followed by the future construction of mines for chromite and other minerals. Noront's proposed Eagle's Nest mine falls within the homelands of Neskantaga First Nation.

23. Neskantaga First Nation files this Application following years of raising concerns over the potential impacts on its homelands, including: environmental harm to land and water; negative impacts to species relied upon as part of Neskantaga's culture and way of life; harvesting and fishing rights; and to longstanding Treaty rights owed to Neskantaga under Treaty No. 9, as well as unextinguished Aboriginal rights and title dating since time immemorial.

The Marten Falls Community Access Road

24. The Ontario-funded plan to develop the Ring of Fire hinges on the development of a North-South all-season road corridor to provide access to the region.

25. Originally, this transportation corridor formed part of a single, interconnected project encompassing a planned mine and refinery, and was treated as such by the original mining project proponent. However, the construction of the roads has recently been split into three distinct projects: (1) the Marten Falls Community Access Road, which is the first section of the North-South route, and which would provide the sole all-season road access into the mining district; (2) the Northern Road Link ("NRL"), which would complete the North-South route by connecting the MFCAR to the Eagle's Nest mine site itself; and (3) the East-West supply road within the district, also known as the Webequie Supply Road (the "WSR" or "Supply Road"). Each project is now headed by a First Nation proponent or joint First Nation proponents, rather than the mining company itself.

26. The Applicants bring this application in relation to the first project, the MFCAR, also known as the Access Road. The proponent for this project is Marten Falls First Nation. The Access Road, in addition to providing the sole all-season route into the mining district from the provincial highway system, would also include a "spur" road that connects directly to Marten Falls. The Access Road would therefore also provide year-round road access to the Marten Falls community.

The Environmental Assessment Requirements

27. As the proponent for the MFCAR, Marten Falls is required to undertake an Environmental Assessment ("EA") under the Ontario *EAA* and an Impact Assessment ("IA") under the federal *Impact Assessment Act* ("*IAA*"). For the past several years, Marten Falls has been working with Ontario and Canada to coordinate the preparation and rollout of these assessments.

28. In 2018, Ontario initiated funding of the environmental assessments of the North-South route and the East-West Supply Road.

29. Since November 2020, a further, separate assessment process known as a Regional Assessment has been underway in the Ring of Fire region, pursuant to the federal *IAA*.

30. At the time of filing of this application, the various project specific provincial EAs and federal IAs are currently in the preliminary stages.

The Proponents Failures to Abide by Neskantaga Consultation Requirements, and to Accommodate Specific Barriers to Feedback

31. In line with its obligations under the provincial *EAA,* Marten Falls, as the Access Road proponent, initiated public consultations with respect to the draft ToR for the planned Environmental Assessment. These consultations encompassed both a general, public feedback period, and soliciting input to the proponent's "Indigenous Knowledge and Consultation and Engagement Program."

32. From the outset, the Applicants raised concerns about the inadequacies of these processes, and the need for an Indigenous-specific consultation in line with the legal and cultural protocols and traditions of Neskantaga. These protocols, which follow long-standing Oji-Cree and Anishinaabe customs for community-based decision making on lands and resources, are informed by centuries of Indigenous law and practice. Among other elements, these protocols require that leadership convene in-person meetings with community members, including Elders, and share information orally and traditionally in the Ojibwe and Oji-Cree languages. The principles and protocols of the oral tradition are an integral aspect of the laws of Neskantaga, and the requirements described above are the *bare minimum* required by Neskantaga.

33. The Applicants also face additional barriers to meaningful consultation due to a series of recent and chronic crises. The most notable of these is the ongoing boil-water advisory which has been in effect since 1995—the longest running in Canada. The water crisis at Neskantaga poses serious health risks to community members and remains a major ongoing concern. In fact, since Fall 2019 there have been two community evacuations caused by water safety concerns, both of which occurred

after Marten Falls had begun work on developing the Environmental Assessment for a portion of the road network. In September 2019, the community was forced to evacuate when a pump failure left homes with no water or unchlorinated water. In late 2020, distribution issues with the drinking water system became so severe that it necessitated a second temporary community evacuation, given the severe health risks to community members, especially infants, children, the elderly, and those with health problems. Although community members have since returned to Neskantaga, the boil-water advisory remains in place, posing ongoing risks to community members.

34. Additionally, the COVID-19 pandemic has been a major barrier to any community activity. Neskantaga has declared three separate states of emergency in the past two years, closing its borders to non-essential travel and initiating measures to reduce in-person meetings and community gatherings of the type that would be necessary to fulfil its consultation protocols as described above.

35. Ontario is aware of the existence of such COVID-19 related barriers. At the height of the pandemic, the Ministry of Indigenous Affairs Ontario ("IAO") produced and distributed an "Operational Guide for Consultation with Indigenous Peoples in the COVID-19 Context", which advises, among other things, that First Nations should not be pressed into consultation exercises when there is a state of emergency in a community. It is only very recently that Neskantaga has begun to reopen its borders, in a phased reopening and recovery, as vaccination rates have increased in recent months.

36. In correspondence dating back to 2019, the Applicants repeatedly advised Ontario of the specific barriers—including a water crisis and then a pandemic—that prevented Neskantaga from engaging in meaningful consultations. Neskantaga objected, and continues to object, to the imposed timelines as inadequate and not taking into consideration both the DTCA and the specific legal and cultural protocols of their First Nation. Neskantaga also objects to the MFCAR "Indigenous Knowledge" program, which operates as a mere information-gathering exercise embedded within the public feedback mechanism; this program is overseen by the same team of external consultants and not as a First Nation-specific fulfilment of the DTCA.

37. Nevertheless, throughout the proponent's development of the ToR, the proponent imposed timelines on Neskantaga that ran parallel to the public feedback period. This was despite Neskantaga's repeated requests for a temporary halt, so that it could have an opportunity to assess the crises it was facing and determine when it would be in a position to meaningfully participate in consultations. The proponent's response was, on a handful of occasions, an entirely mechanical application of a thirty-day extension, without responding to Neskantaga's expressed need for an actual pause. Ultimately, however, the feedback period closed without opportunity for meaningful consultation with Neskantaga. As of October 8, 2021, the Terms of Reference for the Environmental Assessment have been approved by the Ontario government, under the Ontario *EAA*.

Project Splitting Creates Unnecessary Additional Burdens

38. This Application arises in an unusual context: what began as a single transportation corridor to serve a mining project, overseen by a single project proponent (a mining company which later sold its stake to Noront Resources), has now been split off into multiple, discrete projects with various First Nation proponents. First, the EA for the road corridor component was separated from the EA for the mining component of the project. Then, the road corridor itself was separated into three distinct projects with three distinct EAs, namely: the Marten Falls Community Access Road, the Northern Road Link, and the Webequie Supply Road. Ontario also agreed to fund the proponents for each of these road segments—Marten Falls for the Access Road, Marten Falls and Webequie jointly for the Northern Road Link, and Webequie for the Supply Road—for the purposes of Environmental Assessment.

39. Ontario facilitated the splitting of the project, with the result that two Matawa Nations (Marten Falls and Webequie) now serve as proponents on projects that will have potentially significant impacts on the rights of a third Matawa member, namely the Applicant, Neskantaga First Nation. By proceeding in this fashion, Ontario has deliberately made what is already difficult—a remote

community participating in a complicated technical environmental assessment process—far more complicated. These additional and unnecessary burdens create significant consultation barriers for Neskantaga First Nation.

40. Since each road segment is now a separate project, each road segment will require its own EA under the provincial legislation. This means three separate consultation periods, where Neskantaga must provide input three different times, and where, pursuant to its own laws and traditions, each consultation will require the convening of the community, meeting in-person with Elders, and abiding by longstanding Oji-Cree and Anishinaabe decision-making traditions related to lands and resources.

41. For an already over-burdened community, this tripling of consultation periods is overwhelming and is already sowing confusion and placing the community under consultation duress. Once the multiple consultations get underway, there is a further likelihood of consultation fatigue, as well as potentially significant health and safety risks. By proceeding within the framework dictated by Ontario, the result would be that the provincial government would force a community, already dealing with multiple crises, to devote already-inadequate resources to multiple rounds of consultations. Additionally, there are real health risks associated with the tripling of in-person consultations, particularly with Elders in the context of a COVID-19 pandemic that has not yet resolved.

42. The reality is that all these smaller projects—each individual road segment, the construction of the future mines, and the broader infrastructure initiative—are all part of a more expansive plan to develop the Ring of Fire. By splitting the project, and in particular the road components, into smaller pieces, Ontario has impeded Neskantaga's ability to keep up with, and to substantially engage with the EAs for these projects.

Consultation Requirements under the Ontario Environmental Assessment Act

43. The first step in the provincial EA is the development of ToR for the EA itself. The general consultation requirements with respect to the ToR are set out under the Ontario *EAA,* ss. 5.1 and 6. These sections refer generally to consultations and do not specifically refer to Indigenous consultations or the DTCA.

44. Section 5.1 of the *EAA* reads, "[w]hen preparing proposed terms of reference and an environmental assessment, the proponent shall consult with such persons as may be interested."

45. Sections 6(1) and 6(2) sets out the requirement to prepare and submit the environmental assessment. Section 6(3) further indicates that, in submitting ToR for approval, "[t]he proposed terms of reference must be accompanied by a description of the consultations by the proponent and the results of the consultations." Finally, Section 6(3.6) provides for a time-delimited public feedback period, as follows:

> **Any person may comment in writing on the proposed terms of reference to the Ministry and, if the person wishes the comments to be considered by the Minister in deciding whether to approve the proposed terms of reference, shall submit the comments by the prescribed deadline.**

46. The "Deadlines" Regulation, O. Reg. 616/98 issued under the *EAA,* does not set out any timeline to provide comments on the draft Terms of Reference for an EA. The Regulation only provides for a public comment period with respect to the completed environmental assessment itself, after public notice has been given. Per the Table appended to O. Reg. 616/98, any person may provide comments on a published EA to be considered during the preparation of the Ministry review, so long as the comments are submitted by "[t]he last business day of the seventh week after public notice is given."

47. Although none of the above sections refer to Indigenous consultations, s. 2.1 of the *EAA* does acknowledge Aboriginal and Treaty Rights as follows:

> **For greater certainty, nothing in this *Act* shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act*, 1982.**

The DTCA and Environmental Assessments

48. In addition to the statutory requirement of public consultations set out above, project proponents are delegated some of the procedural aspects of the Duty to Consult and Accommodate.

49. The DTCA is a legal concept referring to the obligation imposed upon the federal and provincial Crown to consult a First Nation on any projects that may have an impact on any Aboriginal and/or Treaty rights.

50. The test for when the DTCA arises is set out in the 2004 Supreme Court decision *Haida Nation v. British Columbia (Minister of Forests)*, which states that the DTCA is activated where:

a. The Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right;
b. The Crown is contemplating conduct or a decision affecting that right; and
c. There is potential that the contemplated conduct may adversely affect that Aboriginal claim or right.

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 at para 16 ["Haida Nation"]

51. The DTCA reflects the international legal principle of Free, Prior, and Informed Consent ("FPIC"), which is enshrined in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). FPIC forms part of the internationally recognized right of self-determination of Indigenous peoples and requires that Indigenous peoples be able to make an informed decision about a project that may affect their rights. UNDRIP has been incorporated into Canadian law by way of the federal government's *United Nations Declaration on the Rights of Indigenous Peoples Act*, Bill C-15, which received Royal Assent on June 21, 2021.

The Ontario EAA Fails to Fulfil the DTCA

52. As noted above, the specific consultation requirements related to Environmental Assessments under the *EAA* do not refer to Aboriginal or treaty rights and do not require any specific consultations with affected First Nations. The Applicants submit that, as currently implemented, these provisions (ss.

5.1 and 6 of the *EAA*) fail to fulfil the DTCA. The Applicants therefore ask for the Court's declaration as to the actual extent of the DTCA in the context of EAs under the provincial legislation.

53. The consultation mechanism envisioned by ss. 5.1 and 6 is a generic feedback mechanism. It allows any interested party to submit feedback to a central feedback hub, which is then sorted through by the project proponent or, as is the case with the Access Road, by an external consultant retained by the proponent. By requiring First Nations to submit their comments or concerns within this generic feedback period, the provisions fail to consider the unique needs of First Nations, the unique duties imposed by the DTCA, the Honour of the Crown, and the principles of Reconciliation. The provisions fail to provide the flexibility necessary for the Crown to make a determination as to whether the conditions on the ground in the affected communities are such that the consultation has been meaningful.

54. Additionally, the generic feedback mechanism is, in certain respects, a passive mechanism; while it welcomes feedback from any interested party, it does not specifically require that any group, First Nation or otherwise, be consulted. While it is true that the proponent Marten Falls did, in fact, reach out to the Applicant Neskantaga to solicit feedback through the general consultation mechanism, these provisions, as they currently stand, fail to contemplate meaningful First Nations-specific consultation.

55. Additionally, as seen in the specific case of Neskantaga, the mechanism fails to account for the unique needs and context of affected First Nations. As described above, Neskantaga has well-defined, centuries-old community protocols around consultations, which the proponent failed to respect. Instead, Neskantaga was expected to submit through the generic feedback mechanism within the imposed deadlines. Neskantaga was not given the opportunity to bring its community together to gather feedback, in line with its laws and protocols, in order to prepare a meaningful submission. A generic feedback mechanism that purports to be inclusive of First Nations requires a

structural or procedural imposition that accommodates the way a particular First Nation gathers and submits such feedback. Currently, the *EAA* provisions do not provide for such accommodation.

56. The failure of the *EAA* to appropriately provide for First Nations consultations is further highlighted by the way the *EAA* fails to accommodate for any situation where a First Nation faces additional, extraordinary barriers to consultation, as is the case with Neskantaga. As the *EAA* provisions currently stand, the Minister lacks the discretionary power to pause the process of developing the ToR for the Environmental Assessment, or to permit First Nations feedback after a public comment period has closed. In other words, the *EAA*'s current provisions allow for situations, such as this one, where a project proponent is free to ignore the needs of a First Nation with s. 35 rights at stake, either because the First Nation's specific consultation requirements are not respected, or because the First Nation has practical barriers to consultation (here, various ongoing crises including COVID-19 and a boil-water advisory). This directly violates the principles of DTCA, the Honour of the Crown, s. 35 of the *Constitution,* and the principles of Reconciliation.

Conclusion

57. Neskantaga remains of the view that, on its own, a generic feedback mechanism is not sufficient to fulfil the DTCA. That Duty requires specific consultations with the affected First Nation, on that Nation's terms, and in line with its laws, customs, and practices. This process must involve educating the First Nation about potential impacts, being educated by the First Nation about its own concerns, needs, laws, and cultural context, and, finally, the proponents genuinely turning their minds to whether those concerns can or must be accommodated.

58. The Applicants therefore respectfully ask this Court to:

    a. Issue a declaration on the interpretation of ss. 5.1 and 6 of the Ontario *EAA*, and associated deadlines regulation, to conform with Constitutional requirements; and

b. Issue a statement on the extent of the DTCA as it relates to the drafting of Terms of Reference for an Environmental Assessment under the *EAA*.

Rules, Statutes and Regulations Relied Upon

59. The Applicants rely on ss. 2.1, 5.1, and 6 of the Ontario *Environmental Assessment Act;*

60. The Applicants rely on s. 35 of the *Constitution Act, 1982*;

61. The Applicants rely on the *United Declarations on the Rights of Indigenous Peoples;*

62. The Applicants rely on Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act;* and,

63. The Applicants rely on Rules 14.05(3)(d) and (h), Rule 5.03, and Rule 38, of the *Ontario Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

i) Affidavit of Chief Wayne Moonias (to be produced); and

ii) Such further and other material as counsel may advise and this Honourable Court permit.

DATE: November ~~22~~ 23, 2021

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CHIEF WAYNE MOONIAS et al. -and- **MINISTRY OF NORTERHN DEVELOPMENT et al.**

Applicants **Respondents**

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Court File No.

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

NOTICE OF APPLICATION

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