Court File No. CV-21-00672552-0000

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 HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondents

APPLICANTS' FACTUM
Application returnable on July 13, 2023

"If I have to hop on a bulldozer myself, we're going to start building roads to the Ring of Fire."

- Premier Doug Ford, March 16, 2018[1]

[1] Tweet from Premier Doug Ford (March 16, 2018), online at https://twitter.com/fordnation/status/974702173568323584

PART I – OVERVIEW

1. This Application is centered on bringing long-overdue clarity to Ontario's constitutional obligations to consult and accommodate Aboriginal/Indigenous peoples under the *Environmental Assessment Act*, R.S.O. 1990, c. E.18 ("*EAA*"). While Canadian law – not to mention the Crown's self-imposed commitments – have evolved since 1990, Ontario's framework for consultations under the *EAA* has not kept pace, leading to unacceptable situations in which the rights of Indigenous peoples are being bulldozed over, in clear violation of the Crown's constitutional obligations.

2. The intent of the Application before this Honourable Court is twofold: First, to obtain clarity as to what steps the Ontario Crown is actually required to take to fulfil the Duty to Consult and Accommodate ("DTCA") whenever consultations are undertaken under the *EAA*, thereby ensuring the DTCA is fulfilled in line with constitutional principles including the Honour of the Crown. Second, to obtain clear statements from the Court as to the extent the Crown can delegate consultation duties – and what steps the Crown must then follow to ensure that the DTCA is fulfilled, in line with those constitutional principles. This particularly requires a framework for ensuring the DTCA is fulfilled when a First Nation is clearly not in a position to meaningfully participate in consultations, for example because it is in a state of emergency.

3. While the Application relies, in part, on a specific example – consultations on the initial stages of mining roads in the homelands of Neskantaga First Nation ("Neskantaga") – the purpose is to obtain general direction on the DTCA and the *EAA*, ensuring the necessary processes are in place. Without urgently needed judicial intervention, in the form of a clear, unambiguous statement on Ontario's obligations under the DTCA in line with constitutional principles, the absence of such guidelines and processes will continue to be felt by First Nations across the province.

4. The Applicants brought this Application in November 2021, following a consultation process which resulted in deeply inadequate consultations with respect to the development of Terms of Reference ("ToR") for a mining road in Neskantaga's homelands. This "Marten Falls Community Access

Road" ("Access Road" or "MFCAR") forms one-third of a single, overall, road project which will connect the "Ring of Fire" region to southern Ontario, and which originally was a single road, but which Ontario split into three components for "consultation purposes".

5. The Crown's actions with respect to the "Access Road" were exacerbated by the fact that Neskantaga was – and remains – in the midst of multiple, long-running states of emergency, including Canada's longest-standing boil-water advisory, inadequate and crumbling infrastructure, inadequate healthcare services, the COVID-19 pandemic, and a major mental health/suicide crisis, as well as specific crisis "flareups" such as multiple community evacuations.

6. Part of the reason for filing this Application is to clarify how the Crown should act when there are clearly situations which prevent a First Nation from meaningfully participating in standard environmental assessment ("EA") consultations. In those situations, the Applicants respectfully submit that there needs to be a recognition that arbitrary, time-limited deadline extensions (such as the thirty-day extensions the Crown occasionally "granted" to Neskantaga), subject to renewal at the discretion of project proponents (i.e., not the Crown itself), are insufficient to fulfil the constitutional duties of the Crown.

7. The Application specifically questions the appropriateness of Crown conduct in the delegation of the DTCA to third-party project proponents in this context. Without contesting the ability to delegate certain, procedural aspects of the DTCA to third parties, the Applicants seek clarity on the extent to which the Crown may delegate these aspects, ensuring that no substantive element of the DTCA is "offloaded" onto third parties.

8. The Application also raises the unusual question of the extent to which – if at all – the Crown may delegate the DTCA to First Nations and rely on those First Nations to consult and accommodate other First Nations (including those with overlapping claims to Aboriginal rights and/or title in a given area).

PART II – FACTS

The Applicants

9. The Applicant, Neskantaga First Nation, 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 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 mining infrastructure in the region, Neskantaga will suffer irreversibly negative impacts to its Aboriginal rights and title. These impacts will affect the people, lands, territory, and resources of Neskantaga.

10. The Applicant, Wayne Moonias, is the former Chief of Neskantaga and a resident of the Neskantaga Indian Reserve. Although Mr. Moonias no longer holds the role of Chief, the Application is supported by the present Chief and Council, led by the duly elected Chief Chris Moonias.

The Respondents

11. 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*.

12. 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.

13. 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 Access Road, which would affect the rights and title of Neskantaga. No separate relief is sought against Marten Falls First Nation.

14. The Respondent, His Majesty the King in Right of Ontario, is named alongside the Ministry of the Environment and the Ministry of Mines, in respect of the Crown.

Ontario's Plans for the "Ring of Fire"

15. The Ring of Fire is the single-largest "mineral potential" mining region in North America. Development plans have been in place for the Ring of Fire for decades. Both the provincial and federal governments have announced their intent to facilitate the construction of large-scale infrastructure projects, on a scale to rival the Alberta Tar Sands, aimed at maximizing the extractive potential of this region.[2]

16. The region also falls within the area of Treaty No. 9, made between the Crown and First Nations in 1905. The proposed mining developments – including the proposed road project which will run through the Attawapiskat River Watershed – fall within the homelands of Neskantaga.[3]

17. The Ontario government has been transparent about its aggressive plans for development of the Ring of Fire. Notably, Premier Ford has publicly proclaimed that he would "hop on a bulldozer" in order to get the roads built to the Ring of Fire.[4]

18. Meanwhile, the developments in the Ring of Fire have been progressing in the absence of clearly defined requirements for fulfilling the DTCA, and in the absence of measures for the Crown to ensure that it fulfils its constitutional duties towards Indigenous peoples affected by developments.[5]

19. In the case of Neskantaga, consultations have primarily taken the form of emails and webinars convened by a designated "Project Team", managed by third-party project proponents who are, in fact, First Nations themselves. The role of the provincial Crown has been limited, in its affiant's own words, to <u>reactive</u> actions, such as "responding to requests from communities" and "answering correspondence".[6]

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[2] Affidavit of Chief W. Moonias (March 4, 2022), at paras 36-37 ["Moonias Affidavit"]
[3] Ibid, at paras 13-17.
[4] Transcript of Examination of Mr. Andrew Evers (Apr. 3, 2023) at p. 147, lines 6-13. ["Evers Transcript"]
[5] Moonias Affidavit, at para 35.
[6] Evers Transcript, at p. 39, lines 6-14.

The Burden of Consultations: Overlapping Processes and Community Crises

20. One aspect of Ontario's aggressive efforts to develop the Ring of Fire is that there are – and will be – multiple, overlapping projects which require environmental assessments under the *EAA* and, by definition, consultations with affected communities. Ontario has no framework for how to accommodate overlapping consultations – i.e., consultations on multiple, overlapping projects – which demand time and resources from First Nations communities, placing onerous burdens on those communities to devote limited human resources towards "participation."

21. This Application cites, as an example, Ontario's decision to "split" a single road project, connecting the region to the southern Ontario highway network, into three discrete components "for environmental assessment purposes". Although the road and mine were initially one project with a single designated "project proponent" – a mining company – in 2018 Ontario signed deals with two First Nations to take over as project proponents for what ultimately became three separate projects:

    a. the Marten Falls "Community Access Road" (with Marten Falls First Nation delegated consultation responsibilities);

    b. a so-called "Webequie Supply Road" (with Webequie First Nation delegated consultation responsibilities); and

    c. a "Northern Road Link" which would connect the future mine site to the southern Ontario highway network (with both Marten Falls and Webequie acting as joint proponents).[7]

22. While not seeking in any way to challenge the decision to split that project, the practical outcome is that affected First Nations – in this case, the Applicants – are now called upon to participate in three, overlapping consultation processes: one for each part of the road, tripling the consultation burden imposed on the affected First Nation. Neskantaga has faced, and continues to face, multiple competing requests from different project proponents to participate in information sessions and "Q&As", to make submissions to knowledge-gathering exercises, and to review a high volume of

[7] Moonias Affidavit, at paras 46-51.

documents specific to each project. At the same time, Neskantaga has expressed serious, unanswered concerns about the fact that project-splitting risks losing sight of the cumulative impacts of all three "projects" – in fact, one overall road project – on their rights.[8]

23. At the same time, Neskantaga has faced multiple, overlapping crises which prevent its participation even in those public/general comment activities implemented by project proponents. While there have been specific crisis flare-ups – notably, multiple evacuations arising out of worsening water conditions, plus several community lockdowns during the COVID-19 pandemic – these overlapping states of emergency are long-running, dating back decades, to the full awareness of the Crown. Among others, these crises have included: the COVID-19 pandemic, Canada's longest-running boil-water advisory, multiple community evacuations, crumbling infrastructure, insufficient and inadequate housing, and a community mental health crisis, including high rates of suicide.[9]

The Legal Framework

Constitution Act, 1982

24. To begin with, the underlying legal framework for this question arises from the Crown's constitutional obligations. Under s. 35(1) of the *Constitution Act,* 1982, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[10]

Environmental Assessment Act, R.S.O. 1990, c. E.18, sections 5.1 and 6

25. The immediate legislation is the *EAA*, a provincial statute, adopted in 1990. It governs the conduct of EAs on projects implemented or authorized by the provincial Crown in Ontario. The purpose of the *EAA* is "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."[11]

26. The *EAA* applies to the following categories of projects:

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[8] Moonias Affidavit, at paras 61-62.
[9] Ibid, at paras 18-35, Exhibits "B" through "K"
[10] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35(1) ["*Constitution Act*"].
[11] *Environmental Assessment Act*, R.S.O. 1990, c. E.18, s. 2 ["*EAA*"].

(a) enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities;

(b) major commercial or business enterprises or activities or proposals, plans or programs in respect of major commercial or business enterprises or activities of a person or persons, other than a person referred to in clause (a), designated by the regulations;

(c) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause (a), if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program.[12]

27. As can be seen here, some projects are carried out by the Crown directly. Others are carried out by "project proponents", which can include both Crown entities as well as private, third-party project proponents. That is the case with the various roads described above, where the First Nation project proponents have agreed to submit the road projects for review under the *EAA* framework. Regardless of whether the proponent is the Crown or a third party, the start of every project requires the preparation of ToR which outline the terms and process for an EA. The ToR is prepared by the proponent, and then submitted to the Ministry of the Environment for review under s. 6 of the *EAA.*[13]

28. In July 2020, the *EAA* was updated to insert a new s. 2.1, entitled "Existing aboriginal and treaty rights", echoing the provision found at s. 35 of the *Constitution Act*:

> 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. 2020, c. 18, Sched. 6, s. 2.[14]

29. In terms of consultation obligations, the only actual obligation under the *EAA* is to consult with "interested persons", pursuant to s. 5.1 of the *EAA,* which reads as follows:

> When preparing proposed terms of reference and an environmental assessment, the proponent shall consult with such persons as may be interested.[15]

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[12] *EAA,* s. 3.
[13] *Ibid,* s. 6.
[14] *Ibid,* s. 2.1. As amended on July 21, 2020.
[15] *Ibid,* s. 5.1.

30. As Ontario has acknowledged, for consultation purposes, Indigenous persons are considered to fall within the category of "interested persons" under s. 5.1, and do not have their own, distinct category of consultation. In fact, they are merely referred to as "interested persons" in the glossary attached to the general *EAA* consultation guidance document published by Ontario.[16]

31. The only other requirement for consultations relates to a general "public comment" mechanism, outlined at s. 6(3.6) of the *EAA*, referring to comments after draft ToR have been published:

> 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.[17]

32. Beyond these provisions, there is no specific section in the *EAA* that directly addresses the requirement for – or content of – consultations with Indigenous peoples under the DTCA.

United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")

33. At international law, Canada is legally obligated to obtain the Free, Prior, and Informed Consent ("FPIC") of an Indigenous community on any resource project planned or under development in its homelands:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[18]

34. The legal duty of FPIC is enshrined in Canadian law through the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (S.C. 2021, c. 14), which received Royal Assent on June 21, 2021, giving UNDRIP the force of domestic law. Although the *UNDRIP Act* directly applies to the federal government (with provinces free to adopt their own, comparable

[16] Evers Transcript, at p. 96, lines 5-13.
[17] *EAA*, s. 6(3.6).
[18] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Article 32(2) ["*UNDRIP*"]. Emphasis added.

provincial statutes, which Ontario has pointedly not done) its effect nevertheless is to enshrine FPIC and the principles of UNDRIP as factors for courts to consider in relation to the DTCA across jurisdictions in the country.[19]

PART III – ISSUES

35. The issues to be determined by this Honourable Court are as follows:

a. 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.

b. 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:

i. A Declaration on the interpretation of sections 5.1 and 6 of the *EAA* and associated deadlines regulation O. Reg. 616/98, to conform with Constitutional requirements; and

ii. 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 s. 35 of the *Constitution Act*;

c. Costs of this Application; and

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

[19] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14, s. 5 ["*UNDRIP Act*"].

PART IV: LAW AND ANALYSIS

The Honour of the Crown

36. The fundamental objective of the modern law of aboriginal and treaty rights is the "reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[20]

37. Indeed, one of the central roles of the Court itself is to ensure the Crown fulfills its obligation to move forward on the path of Reconciliation, with the Court's own "responsibility to advance reconciliation, which is linked to maintaining the honour of the Crown, and where appropriate, to act in a manner that maintains the honour of the Crown vis-à-vis the aboriginal peoples."[21]

38. The Honour of the Crown is the underlying principle that informs all Crown conduct with respect to the rights protected by s. 35 of the *Constitution Act.* This doctrine is inextricably linked to that of Reconciliation, which together operate as a "constitutional principle." Hence, "the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."[22]

39. In other words, the reconciliation of Aboriginal and non-Aboriginal Canadians is the "grand purpose" of s. 35 of the *Constitution Act*, and the "first principle" of Aboriginal law.[23]

40. At its core, the Honour of the Crown requires that the Crown itself – not any other third-party – participate in a process of negotiation to determine, recognize and respect the potential rights embedded in s. 35 of the *Constitution Act*.[24]

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[20] *Anderson v. Alberta*, 2022 SCC 6, at para 25.
[21] *Joyce v. Nova Scotia (Attorney General)*, 2022 NSSC 22, at para 60.
[22] *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, at para 113.
[23] *Ibid*, at para 112.
[24] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para 25 ["*Haida Nation*"].

41. The Honour of the Crown is a longstanding principle, which has been animating Crown conduct since at least the *Royal Proclamation of 1763*, recognizing that the Crown, in asserting sovereignty over lands already occupied by First Nations, undertook obligations of honour.[25]

42. The Honour of the Crown is a fundamental concept that exists as a source of obligations independent of Treaty obligations and fiduciary duties, requiring that the Crown act with honour and integrity, avoiding even the appearance of sharp dealing. It is, therefore, a general principle that underlies all of the Crown's dealings with Aboriginal peoples.[26]

43. As the Honour of the Crown is part of the Reconciliation process, it is essential that, throughout the consultation process, the concerns of Indigenous peoples are heard and taken seriously. As the Supreme Court of Canada has observed:

> The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.[27]

44. Furthermore, this principle cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of Reconciliation mandated by s. 35 of the *Constitution Act.*[28]

45. As discussed below, the requirement for the Crown to act honourably informs its duty to consult and, where necessary, accommodate the requirements of Indigenous communities. This DTCA is itself a "constitutional duty, the fulfillment of which is consistent with the honour of the Crown".[29]

The Duty to Consult and Accommodate

46. The DTCA is a direct, practical manifestation of the Honour of the Crown, imposing both procedural and substantive requirements on consultations with Indigenous communities whenever their rights

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[25] *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 at para 479; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, at paras 24-25 ["*Taku River*"]; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para 9 ["*Mitchell*"].
[26] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209, at paras 45-46 ["*Iskatewizaagegan*"].
[27] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, at para 1.
[28] *Taku River*, at para 24.
[29] *R. v. Kapp*, 2008 SCC 41, at para 6 ["*Kapp*"].

are implicated by Crown actions. The DTCA is an integral part of the ongoing process of Reconciliation between the Crown and Indigenous peoples. Consultation and accommodation, together, are considered "an essential corollary to the honourable process of reconciliation" demanded by s. 35 of the *Constitution Act*.[30]

47. The DTCA's grounding in the Honour of the Crown gives it both a "legal and constitutional character."[31]

48. The DTCA seeks to provide protection to Aboriginal and Treaty rights while furthering the goals of Reconciliation between Aboriginal peoples and the Crown. In other words, the Honour of the Crown is "best reflected" by the constitutionally imposed requirement for consultation with a view to Reconciliation.[32]

49. The Supreme Court "has recognized that '[t]he constitutional dimension of the duty to consult gives rise to a special public interest' which surpasses economic concerns. A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met".[33]

50. Significantly, the obligations of the DTCA lie "upstream" of any other legislative or other framework, and legislative requirements cannot be used to subvert or justify deviation from the fulfilment of this duty. In other words, the DTCA "cannot be boxed in by legislation", or circumscribed by what happens to be encoded in a given statute.[34]

51. In situating the DTCA "upstream" of the statutes under which the ministerial power has been exercised, the courts have made clear that the relevant Crown official "is not able to follow a statute, regulation or policy in such a way as to offend the Constitution."[35]

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[30] *Haida Nation*, at para 38.
[31] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para 34 ["*Carrier Sekani*"]; also see *Kapp*, at para 6.
[32] *Carrier Sekani*, at paras 32 and 34.
[33] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, at para 59 ["*CTFN*"], quoting *Carrier Sekani*, at para 70.
[34] *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, at para 121.
[35] *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, at para 131, citing *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, at para 177 ["*Halfway River*"], and *Musqueam*

52. The DTCA requires that the Crown ensures, as a first principle, that Indigenous rights are not trampled upon as a result of Crown actions, but, moreover, are fully respected, embraced, and accommodated as necessary. The DTCA therefore "represents ... a further step towards embracing the honour of the Crown as a limit on Crown sovereignty in relation to Indigenous peoples."[36]

53. There are three key requirements for triggering the DTCA, namely: (a) the existence of contemplated Crown conduct, or conduct authorized by the Crown; (b) that this conduct is contemplated in a geographic area with established or potential Aboriginal or Treaty rights, including rights asserted but not yet determined or defined; and (c) that there is potential for adverse impacts on said rights.[37]

54. The DTCA therefore arises when "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[38]

55. Once the Crown is put on notice of an actual or potential Aboriginal rights impact, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is. This is not a general duty, but a specific one: the Crown is engaged to actually determine what, on the facts, is required in order to fulfil the DTCA with the specific First Nation in the specific circumstances on the specific project.[39]

56. The DTCA requires only the *potential* for an impact. Thus, a right need only be credibly asserted in order to trigger the duty, and there need only be the possibility of an impact, without needing to determine whether that impact will, in fact, occur.[40]

57. Steps in a consultation process may include, but are not limited to, the following:

    a. Initiation of the consultation process, triggered when the Crown has knowledge, whether real or constructive, of the potential existence of an Aboriginal right or treaty right and contemplates conduct that might adversely affect it;

Indian Band v. British Columbia (Minister of Sustainable Resource Management), 2005 BCCA 128, at para 19 (Southin J.A. dissenting on other grounds). Also see *Ross River Dena Council v. Yukon*, 2012 YKCA 14.

[36] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para 70.

[37] *R. v. Desautel*, 2021 SCC 17, at para 72 ["*Desautel*"]. Also see generally *Haida Nation*.

[38] *Haida Nation*, at para 35.

[39] *Desautel*, at para 76.

[40] *Carrier Sekani*, at para 40; *Haida Nation*, at paras 27 and 37.

b. Determination of the level of consultation required, by reference to the strength of the *prima facie* claim and the significance of the potential adverse impact on the Aboriginal interest; Consultation at the appropriate level; and

c. If the consultation shows it is appropriate, accommodation of the Aboriginal interest, pending final resolution of the underlying claim.[41]

58. However, these steps are not a "a rigid test or a perfunctory formula." In the end, there is only one question — "whether in fact the consultation that took place was adequate." [42]

Ontario Illegally Delegates the DTCA Under the Current *EAA* Framework

59. The DTCA is triggered in respect of both Crown conduct (i.e., the actions of a government ministry like the provincial Ministry of Northern Development, Mines, Natural Resources and Forestry), and to conduct authorized by the Crown but carried out by third parties. However, even where the conduct will be carried out by a private actor, the Crown is expressly prohibited from delegating the DTCA to that private actor, beyond certain "procedural" aspects of consultation, such as communicating information about the project. The ultimate legal responsibility for consultation and accommodation rests with the Crown, because the Honour of the Crown cannot be delegated.[43]

60. This is, of course, because the DTCA is a constitutional process, one which requires "powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interest." By definition, a non-Crown actor lacks those powers or duties. [44]

61. In the event the Crown does delegate some – though, by law, not all – aspects of the DTCA to a project proponent, it is legally bound to deal honourably with affected First Nations communities. This does not require agreement, but it does require that the Crown have a real intention to

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[41] *Ktunaxa Nation v. B.C. (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, at para 81 ["*Ktunaxa*"].
[42] Ibid, at para 81. Emphasis added.
[43] *Haida Nation*, at para 53; and *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2005 BCSC 1712, at para 100 ["*Hupacasath*"].
[44] *Carrier Sekani*, at para 74, emphasis added; *Louis v. British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070, at para 231.

substantially address concerns raised by affected communities, and to do so substantively, not merely as a matter of form. This has been referred to as a "profound" aspect of the DTCA:

> The other profound aspect of the duty to consult is that what is at stake is the "honour" of the Crown. Acting honourably is not a matter of form; it is a matter of substance. In the context of the duty to consult, it requires conduct that demonstrates a genuine and good faith intention to listen, consider and respond to Indigenous concerns. As emphasized in the Policy, "sharing information" and "providing feedback" are important components of the duty to consult. Maintaining the honour of the Crown also requires conduct that promotes reconciliation, rather than distrust and misunderstanding.[45]

62. This is a contextual analysis, requiring, in each instance, that the Crown has managed the "consultation process in a way that fosters trust as opposed to misunderstanding and betrayal."[46]

63. In delegating procedural aspects of the DTCA, the Crown must further be satisfied that an appropriate level of consultation was fulfilled. "The issue to be decided in every case is whether an appropriate level of consultation is provided through the totality of measures the Crown brings to bear on its duty of consultation."[47]

64. In evaluating whether the DTCA has been fulfilled, the Crown is legally bound to ascertain independently whether consultations undertaken on its behalf suffice in the circumstances to discharge its obligations under the Honour of the Crown and the DTCA. This means that it is not up to a delegated party, such as a project proponent, to determine whether the DTCA has been fulfilled. In fact, if the Crown leaves it to the delegated party to decide whether the Crown fulfilled the DTCA, that very act – of relying on the reporting of a third party to evaluate whether consultations were sufficient – represents an illegal delegation of the Honour of the Crown itself.[48]

65. As a result, the Crown is prohibited from relying "entirely" upon a delegated party's consultation reports, and, in particular, that party's claims that consultations have been sufficiently conducted with a given Indigenous community. In circumstances where the purported "consultation process

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[45] *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316, at para 94 ["*Eabametoong*"].
[46] *Eabametoong*, at para 121.
[47] *Gitxaala Nation v. Canada*, 2016 FCA 187, at para 214.
[48] *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139, at paras 74, 93.

engaged in by the Province" relies primarily on an engagement record produced by a project proponent, this would be inadequate and violate the DTCA. So, for example, if the province made "little attempt to engage in its own consultation", failed to hold face to face meetings with representatives of the Nations, or "denied requests for further consultation because of time constraints", these would all indicate that the DTCA had not been fulfilled.[49]

66. To be clear, while the Crown can delegate certain procedural aspects of the DTCA, these are, by definition, limited to pure procedure and cannot involve any of the Crown's substantive obligations. Moreover, the Crown must be careful to ensure that such "delegation" is not so unstructured as to afford unlimited discretion on third party "project proponents" to decide what constitutes "procedure" vs. "substance", let alone to enact any of the substantive aspects.[50]

67. Interestingly, if the Crown makes representations to a project proponent that the Crown has fulfilled the DTCA, but has not in fact done so, it can be liable not only for failure to fulfil a constitutional duty, but also for breach of a contractual obligation to the (private) project proponent.[51]

68. Significantly, the Crown cannot contract out of its legal obligation to fulfil the DTCA.[52]

69. While there is nothing to prevent procedural aspects being delegated – such as providing, obtaining, and discussing information about a proposed project– the moment the Crown contracts out of its substantive legal duties, it is in breach of the Honour of the Crown. In other words, the Crown has a duty to "ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown." If the Crown "contracts out" of this duty to a third party, "the Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.[53]

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[49] *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991, at para 210. Also see para 209, noting the distinction between the general consultation process and the s. 35 consultation process.
[50] *Haida Nation*, at para 51.
[51] *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348, at paras 3 and 302-303.
[52] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para 61 ["*LSCFN*"].
[53] *Carrier Sekani*, at para 47.

70. Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources, with the DTCA extending to "strategic, higher-level decisions" – such as the framework put in place to ensure the DTCA is being fulfilled – that may have a potential downstream impact on Aboriginal claims and rights.[54]

71. The bottom line is that, while "[t]he Crown may delegate procedural aspects of consultation," it is the Crown that owes Indigenous communities a duty to consult about, and, as appropriate, accommodate the rights those communities have, or credibly claim to have. This is so because the duty "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. … The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests."[55]

Ontario Illegally Delegates the DTCA to First Nations

72. In order to fulfil the DTCA, the consulting party must have "powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests."[56] By definition, a First Nation cannot itself possess those powers; since it is not the Crown, it cannot "reconcile" between itself and another First Nation.

73. The DTCA relies on the Crown's inherent "authority to engage in the nuanced and complex constitutional process involving 'facts, law, policy and compromise'", as required by the Honour of the Crown. Since Ontario, as of now, possesses or claims the authority to provide approvals for EA and ToR under the *EAA*, it is therefore Ontario which must fulfill this duty.[57]

74. Ontario has, of course, accepted this obligation to "consult with First Nations and accommodate their treaty rights whenever they are sufficiently impacted." These "significant protections", which are, "grounded in the honour of the Crown and s. 35 of the *Constitution Act*, 1982", revolve around

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[54] *Ibid*, at paras 41-47. Citations omitted.
[55] *Haida Nation*, at para 54.
[56] *Ibid*, at para 74.
[57] *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, at para 68.

the "direct interaction" between Ontario and First Nations. No other party can stand in the place of Ontario in fulfilling these obligations.[58]

75. The experience of the Applicants suggests that Ontario has no framework in place to prevent precisely such a situation. In 2018, Ontario brokered deals with Marten Falls and Webequie to take over as road proponents on what had then become three separate road projects, with these First Nations acting as "project proponents for environmental assessment purposes" under the *EAA*.[59]

76. The consequence of this was that two First Nations were then delegated consultation-related duties which would require them to consult with other First Nations with potentially overlapping Treaty or Aboriginal rights claims in the region. Nominally, these consultations were to be limited to merely procedural aspects only, but Ontario never clarified the distinction between procedural and substantive, and left it to the First Nation project proponents to make determinations which are, by law, required to be made by the Crown. Specifically, it was the road "project proponent" which ultimately made the decision that the Access Road EA would proceed into subsequent stages, even when Neskantaga was seeking a pause in the process because it was not in a position to participate – and where the only "accommodation" was the application of rote thirty-day extensions, which are not the same as a pause to the process.[60]

Ontario Lacks an Indigenous-Specific Framework Under the *EAA*

77. The content of the DTCA is context-specific, requiring an evaluation of the circumstances in each instance.[61]

78. However, Ontario lacks a detailed Indigenous-specific consultation framework to ensure that the constitutional obligations of the DTCA and Honour of the Crown are fulfilled under the *EAA*. This is an oversight which Ontario has itself acknowledged, admitting that the entirety of its guidance on

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[58] *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158, at paras 211-212.
[59] Moonias Affidavit, at para 47.
[60] Ibid, at paras 64-66; Evers Transcript, p. 109, lines 1-21; and p. 111, lines 18-22.
[61] *Haida Nation*, at paras 39-40.

consultation with Indigenous peoples consists of (1) a "generic" guide to *EAA* consultations, with passing reference to "Aboriginal people", and (2) a proponent-specific *EAA* guide, which by definition is about the role of non-Crown parties, who do not carry obligations under the Honour of the Crown.[62]

79. Ontario has confirmed that there is no other *EAA* consultation requirement beyond the general "public comment" period at s. 5.1 of the *EAA*. To the extent Indigenous peoples are consulted under the *EAA,* it is only ever under this general public comment provision:

> Q. And the way it operates, as I understand, is that Indigenous People, First Nations communities, are classified under interested persons. Is that right, for the purposes of the language to be found in 5.1 of the Environmental Assessment, correct?
>
> A. Yes. And in the glossary of the Code of Practice, interested persons includes Indigenous or Aboriginal communities, I believe it's referred to in the Code.[63]

80. Nor does Ontario have any framework for ensuring Crown representatives meet with Indigenous communities when they have raised concerns about circumstances – such as community crisis – which preclude consultations. In the case of Neskantaga, the Crown has confirmed that "There were no meetings involving staff from MINES and/or MECP in relation to Neskantaga First Nation's capacity to participate meaningfully in the creation of the [Access Road] TOR."[64]

81. Similarly, Ontario has further confirmed that the only framework for consultation is that which is set out at ss. 5.1 and 6 of the *EAA*, along with the deadlines regulation in O. Reg. 616/98. In the case of Neskantaga, at no point in that entire consultation process were there any "meetings between 'senior management' at MECP and Neskantaga First Nation regarding community crises concerns asserted by the community, in relation to the preparation of the TOR for the proposed [Access Road]." In other words, no other consultation process was ever offered, and in the end Neskantaga

[62] Evers Transcript, at p. 104, lines 12-20.
[63] Ibid, at p. 96, lines 5-13.
[64] Evers Transcript, at p. 59, lines 18-22 and Undertakings Given On The Cross-Examination Of Andrew Evers On April 5, 2023, prepared by Ministry of the Attorney General (Ontario), at p. 6, Undertaking #8.

was unable to participate in those Q&A/general information sessions which were convened by the project proponent (not even by the Crown itself).[65]

82. Moreover, an invitation on the part of the Crown to an Aboriginal group to participate in an EA is not necessarily sufficient to discharge the Crown of its DTCA, especially where the First Nation has repeatedly informed the Crown that it is not in a position to take up the invitation.[66]

83. This is not to say that reliance on a "generic" consultation mechanism could not, in the right circumstances – and with appropriate specification for the affected Indigenous communities – be leveraged to fulfil the DTCA. What matters in such circumstances is that the Aboriginal group must be consulted "as a First Nation" and not "as members of the general public."[67]

84. In such circumstances, the Crown should give notice to the affected First Nation and engage directly with them, rather than doing so as an afterthought to a general public consultation. Among other steps, the Crown should: provide direct information about the project, addressing what the Crown knows to be the First Nation's interests and what the Crown anticipates might be the potential adverse impact on those interests; and the Crown should solicit and listen carefully to the First Nation's concerns and attempt to minimize adverse impacts on their rights.[68]

85. Put simply, if the consultation is "as an afterthought to a general public consultation", then it is insufficient to fulfil the DTCA.[69]

Ontario Further Lacks a Framework to Accommodate Indigenous Communities in Crisis.

86. Consultation is not a "mere courtesy."[70]

87. Thus, in addition to generally lacking a framework for fulfilling the DTCA (as described in the previous section), one of the core concerns raised in this Application is the apparent lack of a

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[65] Undertakings Given On The Cross-Examination Of Andrew Evers On April 5, 2023, prepared by Ministry of the Attorney General (Ontario), at p. 12, Under Advisement #3.
[66] *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, at para 100 ["*Innu of Ekuanitshit*"].
[67] *Innu of Ekuanitshit*, at para 100.
[68] *Hupacasath*, at para 115.
[69] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, at para 64.
[70] *White River First Nation v. Yukon Government*, 2013 YKSC 66, at para 102.

framework for situations where First Nations signal that they are unavailable or incapable of participating in the Crown's proposed consultation process.

88. The DTCA imposes a positive obligation, requiring the Crown to take proactive steps to ensure that an Aboriginal community is, first, "provided with all necessary information in a timely way" and, then is also given the "opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."[71]

89. In every instance of consultations, the Crown must ensure there is sufficient time for each affected First Nation to prepare its views, and that they are given an opportunity to present their views, ensuring the Crown gives full and fair consideration of what the First Nation has submitted.[72]

90. However, Ontario has conceded that it does not have any framework or guidelines in place for how to respond to a situation where a First Nation is incapable of participating in the consultation process, as set out in the *EAA* and the associated deadlines regulation O. Reg. 616/98. So, for example, if an Indigenous community is dealing with an emergency at the time that a proponent is conducting public consultations, Ontario has no framework in place to address those circumstances – even, and especially, when Ontario is aware that the community has communicated to the Crown about the impossibility of consultations at a particular time. In other words, even when the Crown is aware that the DTCA cannot be fulfilled because an Indigenous community is not available for consultation, the Crown has no framework for addressing that failure to fulfil the DTCA.[73]

91. In the case of Neskantaga, after communicating that "they were unable to be involved in the planning process and unable to substantively communicate their concerns", the only option available to

[71] *Halfway River*, at para 160.
[72] *LSCFN*, at paras 74-75.
[73] Ibid, at p. 111, lines 18-15, and p. 112, lines 1-5.

"accommodate" was to provide thirty-day "extensions". In Ontario's own words, there were no "other forms of accommodation extended beyond the extensions."[74]

92. Equally troubling is the fact that it is left up to the project proponent (i.e., not the Crown) to exercise their discretion to grant temporary extensions to the comment period. In the case of Neskantaga, for example, a total of nine weeks' worth of extensions were granted over the course of two years, during which the Crown was aware that the DTCA could not be fulfilled, given Neskantaga's ongoing crises and inability to be consulted. While these extensions did make it possible for Neskantaga to make submissions outside the original period, the ToR and EA processes nevertheless continued apace without Neskantaga's involvement throughout those nine weeks. In practical terms, this meant that even when Neskantaga did, belatedly, manage to make some submissions, the process had moved on without them, in a very real manifestation of the "path dependency" which is common in the EA context.[75]

93. In the case of Neskantaga, at the height of overlapping states of emergency, the Crown began aggressively pushing forward with its Ring of Fire plans, encouraging Marten Falls First Nation to commence consultations on its "Access Road". Marten Falls was required to develop ToR for the EA that would be conducted under the *EAA* itself, and to do so, it needed to speak to all Indigenous communities and "interested parties" which stood to be affected by the project.[76]

94. However, the Crown, instead of working closely with Neskantaga leadership to understand its needs and work to accommodate them, effectively offloaded the entire DTCA on the "project proponent", which, in this case, was another First Nation, Marten Falls. Then, Marten Falls – which, by definition, does not carry the Honour of the Crown and does not have the mandate, let alone legal obligations, to fulfil the DTCA or the Honour of the Crown, proceeded to push ahead with a generic

[74] Evers Transcript, p. 109, lines 1-21; and p. 111, lines 18-22.
[75] Ibid, p. 110, lines 1-13
[76] Moonias Affidavit, at para 59-60.

"public comment" initiative which (a) left no room for specific, culturally contextualized consultations with affected First Nations, and (b) flatly ignored Neskantaga's repeated requests to pause consultations while it addressed the multiple overlapping crises described above.[77]

95. In the end, Neskantaga found itself forced to submit incomplete, hastily compiled comments whenever it could, without being able to convene its own community members to fulfil its own, internal, community consultation protocols as required under its laws. These unfinished, un-reflective "comments" – submitted not in *dialogue*, as required by the Crown's DTCA, but rather as part of the First Nation "project proponent" general public comment period – then became the sole input Neskantaga was able to provide. Neskantaga clearly indicated the comments were not reflective of the community's views and were made "under duress". [78]

96. Concurrent with the aforementioned consultations on the road projects, the Applicant Neskantaga also found itself deeply embroiled in multiple, overlapping crises – some long-running, and some entirely unexpected. As mentioned, these crises included forest fires, a long-running boil water advisory, multiple community evacuations over a two-year period, and measures taken to stem the tide of the COVID-19 pandemic. As a result, Neskantaga was overwhelmed and incapable of participating meaningfully in any consultation processes (of which there are, as noted, now <u>three</u> processes for what was once a single road project). [79]

97. Ontario concedes that it does not have in place <u>any requirements</u>, requiring <u>any specific actions</u>, or <u>any general guidance at all</u> on how to ensure that the DTCA is fulfilled when an Indigenous community is unavailable:

> Q. What I just described? A First Nation community experiencing community crisis, lacks capacity to participate, raises the concern with you; where does your code of practice assist or give guidance on what to do?
>
> A. It doesn't that I recall.

[77] Moonias Affidavit, at paras 59-62, 68.
[78] Ibid, at paras 61, 63, 66.
[79] Ibid, at para 18-35 ("Our Community in Crisis"), and 71-74 ("Recent Developments").

> Q. That's what I saw when I looked through. Where does the Environmental Assessment Act and/or regulations thereto give you guidance and respect of the issue I've just asked you about?
>
> A. It doesn't.
>
> Q. It's fair to say that there does not appear to be any rules tailored towards this issue, am I right?
>
> A. Well -- no. No, there isn't.[80]

98. That said, even though there is no provision for Indigenous-specific consultations under the *EAA*, the Ontario Crown has, over time, acknowledged that the DTCA must be fulfilled when a project has the potential to implicate Aboriginal Rights or Treaty claims, whether realized or credibly asserted – a duty which, in the context of the *EAA*, falls to the Ministry of the Environment.[81]

99. In total, the following are – by Ontario's own admission – the only processes/guidance documents related to consultations on ToR issued by the Ontario government:

    a. A "generic" guidance document, called the *Code of Practice*, describing the overall *EAA* consultation process, which contains passing reference to "Aboriginal peoples"; and

    b. A project proponent-specific guidance document, describing a proponent's (i.e., non-Crown) role in conducting only the procedural – but not substantive – aspects of the DTCA.[82]

100. As Ontario's affiant acknowledges, that "generic" *Code of Practice* – the sole piece of publicly-issued guidance on the process for consultations for project proponents – is not, in fact, intended to deal with Indigenous consultations:

> [Q.] It means it's not specific to Indigenous -- discharge of the obligation to follow through on the duty to consult with Indigenous people… This is not a document focused on that, correct?

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[80] Evers Transcript, p. 66, lines 8-22.
[81] Affidavit of A. Evers, for the Respondent Ontario (Jan. 20, 2023), at para 2. ["Evers Affidavit"]
[82] Evers Affidavit, at Ex. "C" and "H"; Evers Transcript, p. 104, lines 12-20.

> A. Well, it provides a direction on methods and consultation with. It's not targeted to just Indigenous communities, but proponents can certainly use it for guidance, for methods and collecting information, considering information as part of the process.[83]

101. In fact, Ontario has conceded that, to the extent there is any guidance at all on fulfilling the DTCA in the context of EAs, the most significant guidance is that which is directed at project proponents, (i.e., non-Crown actors) who do not have a responsibility to fulfil the DTCA:

> Q. But in neither case is there any detailed development of Ontario's duty to consult in the context of environmental assessment? Am I right?
>
> A. I would agree, yes.
>
> Q. And there aren't any other documents in your Affidavit that do that, correct?
>
> A. That's correct.[84]

102. In other words, there is no other guidance specifically directed at ensuring Crown (Ontario) compliance with this DTCA, encompassing all of the substantive aspects of that duty:

> Q. So now, since these documents don't do it, and you remember my question; what policies, guidelines, or rules do you know of that are directed at establishing compliance by Ontario with the constitutional duty to consult with Indigenous people?
>
> A. I'm not aware of any.[85]

103. Unsurprisingly, individuals in managerial positions within Ontario's Ministry of the Environment do not receive any formal training on fulfilling the DTCA in line with the Honour of the Crown.[86]

Ontario's Consultation Framework Disregards Indigenous Law

104. As a final note, the duties relating to the Honour of the Crown arise in the context of Aboriginal law; that is, the law of settler Canada which describes the relationship (and tension) between Canada and the Indigenous peoples who lived here prior to European contact.

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[83] Ibid, p. 101, lines 13-24.
[84] Ibid, p. 104, lines 17-23.
[85] Ibid, p. 105, lines 9-14.
[86] Evers Transcript, p. 19, lines 7-14.

105. However, the Crown is also legally obligated, as part of the process of Reconciliation, to respect Indigenous law – which is not the same as Aboriginal law. Both before and after the arrival of European settlers, the Aboriginal peoples in North America had well-developed civilizations that had legal systems and legal customs. Those discrete legal systems are the source of Indigenous law, the law that governs the first cultures as discrete civilizations or civil societies.[87]

106. To that end, the Applicants respectfully submit that the DTCA must, by definition, also entail considerations of the Indigenous legal framework which exists in a given First Nation whenever the DTCA is triggered. This Indigenous legal framework includes laws, protocols, teachings, and other aspects that will be unique to each community.[88]

107. In the case of Neskantaga, for example, there are long-established forms of Anishinaabe governance, protocols, law, authority, and jurisdiction related to communal decision-making. These protocols are embedded within the oral tradition, and are informed by the foundational principles of: *Mno-bimaadiziwin*, good life; *Onda-tisiwin*, the source of life; and *Bima-chiwin*, the sustaining of life. These principles are fundamental to achieve *Aki-bimaadiziwin*, physical well-being and Achak-*bimaadiziwin*, spiritual well-being, and form the basis for the community's Indigenous laws and protocols. At the heart of these protocols is a requirement that major community decisions be the result of an internal, community-based dialogue process.[89]

108. Neskantaga has communicated these laws and customs to outside parties, including the Ontario Crown. Notably, the community has adopted a Neskantaga First Nation Community Protocol on Development, which expressly deals with the question of proposed developments in Neskantaga's homelands. The Protocol requires, among other steps, that prospective developments respect Neskantaga's internal community-based decision-making process, which requires in-person oral

[87] *Iskatewizaagegan*, at para 48.
[88] Moonias Affidavit, at paras 8-11.
[89] Moonias Affidavit, at paras 8-10, 41.

dialogue in the Anishinaabe language, and that decision-making process requires time, information, and resources, in order for the community to make a fully informed decision. However, Neskantaga's experience – particularly during COVID-19 lockdowns when in-person dialogue was impossible – has been that the Crown and its project proponents do not respect these protocols.[90]

109. Looking forward, as this Court considers the requested Declaration on the extent of the DTCA under the *EAA*, the Applicants respectfully suggest that the contextual inquiry with each First Nation must therefore also include consideration of that community's own Indigenous laws.

Nature of Requested Declaration

110. As a final note, this Application seeks only declaratory relief in the form of statements from the Court about the nature of a particular statutory framework. The Applicants reiterate that they do not request any review of past Crown conduct, or any orders made against the Crown. The Applicants only request that the Court make declarations which will serve as general guidance for fulfilling the DTCA going forward.

111. The applicable test for when a declaration should be granted involves three, inter-related questions: (1) whether the court has jurisdiction to hear the issue; (2) whether the question is real and not theoretical; and (3) whether the party raising the issue has a genuine interest in its resolution.[91]

112. Furthermore, a declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties.[92]

113. A factor militating in favour of granting a Declaration is if it "would guarantee both certainty and accountability" with respect to a statutory framework, and to "avoid uncertainty in the future".[93]

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[90] Ibid, at paras 40-41, and Exhibit "M".
[91] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, at para 46.
[92] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at para 11 ["*Daniels*"].
[93] *Daniels*, at paras 15, 20.

114. A declaration should not merely be a "a restatement of the existing law", but rather offer the practical utility of clarifying a disputed or unclear framework.[94]

Applying the Declaration "Test" to this Application

115. In the circumstances, the Applicants respectfully submit that these requirements are met.

116. Clearly, this Court has jurisdiction to order such a Declaration, pursuant to Rule 14.05 of the Ontario *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 – which is not contested by the Respondents.

117. Secondly, the question is decidedly more than theoretical: it deals with the real, practical matter of how Indigenous communities should be consulted when the Ontario Crown embarks upon an environmental assessment – something which the Crown does nearly every day, and which is becoming ever more frequent in the Applicants' homelands as mining development continues.

118. Finally, it is not contested that the Applicants (and, for that matter, the Respondents) have a genuine interest in the resolution of this question. For the sake of clarity for all of this province, including all communities (Indigenous and non-Indigenous alike), there will be real value in the Court's guidance on how to ensure these constitutional obligations are fulfilled.

PART V: RELIEF REQUESTED

119. The Applicants respectfully request:

a. Declaratory relief in the form of judicial interpretations and guidance in respect of the Ontario *EAA* and Regulations governing consultations with First Nations on environmental assessments.

b. 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:

[94] *Ibid,* at para 56.

i. A Declaration on the interpretation of sections 5.1 and 6 of the *EAA* and associated deadlines regulation O. Reg. 616/98, to conform with Constitutional requirements; and

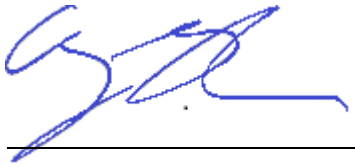
ii. A Declaration on the extent of the Duty to Consult and Accommodate, as it relates to the drafting of Terms of Reference for an Environmental Assessment, and as required pursuant to the Honour of the Crown and s. 35 of the *Constitution Act*;

c. Costs of this Application; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 26th day of June 2023.



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Schedule "A": List of Authorities

1. *Anderson v. Alberta*, 2022 SCC 6.
2. *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103
3. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44.
4. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099
5. *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189
6. *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99
7. *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316
8. *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 FCR 418
9. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.
10. *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470.
11. *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2005 BCSC 1712
12. *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209
13. *Joyce v. Nova Scotia (Attorney General)*, 2022 NSSC 22
14. *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763
15. *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158
16. *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642
17. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386.
18. *Louis v. British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070
19. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
20. *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765
21. *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33
22. *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348
23. *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128.
24. *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379

25. *R. v. Desautel*, 2021 SCC 17

26. *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41

27. *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701

28. *Restoule v. Canada (Attorney General)*, 2021 ONCA 779.

29. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650

30. *Ross River Dena Council v. Yukon*, 2012 YKCA 14

31. *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991

32. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.

33. *White River First Nation v. Yukon Government*, 2013 YKSC 66

34. *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139

Schedule "B": Relevant Statutes and Regulations

***Environmental Assessment Act,* R.S.O. 1990, c. E.18**

Existing aboriginal and treaty rights
2.1 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. 2020, c. 18, Sched. 6, s. 2.

Obligation to consult
5.1 When preparing proposed terms of reference and an environmental assessment, the proponent shall consult with such persons as may be interested. 1996, c. 27, s. 3.

Terms of reference
6 (1) The proponent shall give the Ministry proposed terms of reference governing the preparation of an environmental assessment for the undertaking. 1996, c. 27, s. 3.

…

Comments
(3.6) 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. 2000, c. 26, Sched. E, s. 2 (2).

Approval
(4) The Minister shall approve the proposed terms of reference, with any amendments that he or she considers necessary, if he or she is satisfied that an environmental assessment prepared in accordance with the approved terms of reference will be consistent with the purpose of this Act and the public interest. 2000, c. 26, Sched. E, s. 2 (3).

Mediation
(5) Before approving proposed terms of reference, the Minister may refer a matter in connection with them to mediation and section 8 applies with necessary modifications. 1996, c. 27, s. 3.

Deadline
(6) The Minister shall notify the proponent whether or not the proposed terms of reference are approved and shall do so by the prescribed deadline. 1996, c. 27, s. 3.

Same
(7) Different deadlines may be prescribed with respect to proposed terms of reference that are referred to mediation and with respect to those that are not. 1996, c. 27, s. 3.

O. Reg. 616/98: DEADLINES, under *Environmental Assessment Act*, R.S.O. 1990, c. E.18

Item	Deadline	Method of Determination
1.	*Terms of Reference* The deadline under subsection 6 (6) of the Act for the Minister to notify the proponent whether or not the proposed terms of reference are approved.	The last business day of, (a) the twelfth week after the proposed terms of reference are received by the Ministry under subsection 6 (1) of the Act, if there is no reference to mediation under subsection 6 (5) of the Act; or (b) the seventh week after the mediator's report is received by the Minister, if there is a reference to mediation under subsection 6 (5) of the Act.

CHIEF WAYNE MOONIAS et al. **Applicants**

-and-

MINISTRY OF NORTHERN DEVELOPMENT et al. **Respondents**

Court File No. CV-21-00672552-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

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