

APPENDIX C

**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

AFFIDAVIT OF CHIEF WAYNE MOONIAS

I, Chief Wayne Moonias, of Neskantaga First Nation, MAKE OATH AND SAY:

1. I am the elected Chief of Neskantaga First Nation, and as such have knowledge of the information contained in this affidavit.
2. I am now in my third term as Chief, having previously served as a Band Councillor, and as Advisor to Leadership in our First Nation.

Background

3. On November 23, 2021, our community initiated a Rule 14.05 Application, under the Ontario *Rules of Civil Procedure*, seeking judicial interpretation of the obligation to consult First Nations under the Ontario *Environmental Assessment Act* (“EAA”).

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

Background of My Community and My People

Our Homelands and Cultural Heritage

5. We are a remote community. Our reserve is located approximately 560 km north of Thunder Bay, on the shores of Attawapiskat Lake. Our young and growing population consists of about 494 members, with approximately 357 living on reserve. For the majority of the year, we are only accessible by airplane. During winter, we are also sometimes accessible by ice road. In recent years, due to climate change, the ice road was only available for between five to seven weeks each year.
6. We are the original occupants of our homelands. There are family ties between our people on Attawapiskat Lake and the communities of Marten Falls, Webequie, Eabametoong, Nibinamik, Attawapiskat, and many other communities in the region.
7. We are an Anishinaabe people, with a longstanding oral tradition based in our language and culture, which includes responsibility for our historical, traditional, ancestral, and customary lands. We are recognized as Aboriginal peoples within the meaning of s. 35 of the *Constitution Act*, 1982. We also have the capacity of a "Band" within the meaning of the *Indian Act*, RSC 1985, c I-5. We are descendants of signatories of the James Bay Treaty – Treaty No. 9 of 1905, which we entered into

as a sovereign nation. Neskantaga is one of nine First Nation members of Matawa First Nations Management, a registered non-profit Tribal Council.

8. Our community operates based on collective decision-making. Our community protocols are embedded in our Anishinaabe tradition, which requires that whenever decisions need to be made – especially the important decisions affecting our homelands – we are required to engage with our Elders, Traditional Knowledge-holders, and community members in order to be educated and to reach an informed decision. We have always been taught to reach decisions by consensus, and that in times of crisis or loss, it is even more important to take the time necessary to heal, and to be in a good place before we can reach a decision.
9. We believe that our lands are held collectively by our community, and our Anishinaabe laws require us to collectively manage and protect our homelands. We have our own forms of governance, protocols, law, authority, and jurisdiction, which are informed by the foundational principles of: *Mno-bimaadiziwin*, good life; *Onda-tisiwin*, the source of life; and *Bima-chiwin*, the sustaining of life. These principles are fundamental to achieve *Aki-bimaadiziwin*, physical well-being and *Achak-bimaadiziwin*, spiritual well-being, and form the basis for our Indigenous laws and protocols.
10. Understanding different aspects of the Anishinaabe world and the Spirits is taught through stories called *aadizokaan*. These *aadizookaanag*, or “sacred teachings,” are passed on orally from generation to generation so that we will always know who we are, where we come from, how we fit into the world, and how we need to behave in order to ensure a long life. These sacred elements have sustained Neskantaga since time immemorial.
11. Neskantaga has a vested responsibility over our homelands that is inherent and includes the right and duty of stewardship over the land and the right to self-determination and governance. It is the belief of the Neskantaga people that these rights and responsibilities were given to the

Anishininuwug by the Creator. We exercise these rights and responsibilities on the basis of laws that are not written, but rooted in our customary law, our traditional and cultural values, and the ceremonies and beliefs that connect the Neskantaga people to the land. We believe we have the right to be sustained by our homelands, as we always have been, in modern and evolving ways, and that this principle includes the right to the equitable sharing of wealth from our homelands.

12. Neskantaga asserts Aboriginal rights and title over our entire homelands. The Crown's failure to fulfill the Honour of the Crown, the Duty to Consult and Accommodate, and the solemn promises of Treaty 9 must be remedied through Reconciliation and a new relationship. We acknowledge the intent and principles of *The Journey Together: Ontario's Commitment to Reconciliation with Indigenous Peoples*, the *Truth and Reconciliation Commission of Canada: Calls to Action* and the *United Nations Declaration on the Rights of Indigenous Peoples*. We expect Ontario should be committed to these principles as well.

The Attawapiskat Watershed

13. We live on the shores of Attawapiskat Lake at the head waters of the Attawapiskat River. The Attawapiskat watershed is the lifeline of our community, the heart of our homelands, and the sacred and spiritual landscape of Neskantaga. One other First Nation lies on the Attawapiskat River, namely Attawapiskat First Nation, which is located at the mouth of the river on James Bay, to the east.
14. The Attawapiskat River is hundreds of kilometers long, with tributaries throughout our homelands. Since time immemorial, Neskantaga members have relied upon the Attawapiskat watershed to practice our traditional way of life, including teachings on the land, hunting, fishing, trapping, and gathering plants, berries, and medicines. From the summer until winter, we harvest sturgeon, whitefish, pickerel, pike, speckled trout, burbot, and other fish. We hunt moose, and each spring and

fall we hunt geese, ducks, and other animals. We also traditionally and historically hunted woodland caribou, although in recent years the population near the community has declined, and we have far fewer opportunities to hunt.

15. There are two historical travel routes between the Attawapiskat River system and the site of the historic Marten Falls Post on the Albany River. Neskantaga's strategic location on Attawapiskat Lake, between the James Bay Coast and interior, gave our people access to resources from the Attawapiskat, Winisk, and Albany river drainages. Neskantaga historically occupied a hamlet site named Shekaachiwanaang, which is located along the Attawapiskat River about halfway between Pym Island and the historic Beteau Lake settlement. This site of historical and cultural significance for Neskantaga is in close proximity to the proposed road access route of the Ring of Fire mineral development area. (**Exhibit "A"** is a map of this area.)
16. We have always used and continue to use the Attawapiskat River and other watercourses as our principal means of transportation. Many Neskantaga families travel to Pym Island, which lies approximately 100 kilometres from our reserve. Some families travel even further, all the way to the mouth of the river at James Bay. The Attawapiskat watershed includes McFaulds Lake as well as the Muketei River, where some Neskantaga families have always fished, hunted, and travelled.
17. Our ancestors are buried throughout our homelands, and there are many sacred and ceremonial sites located throughout the Attawapiskat watershed. The sacred lands of the Neskantaga people within the Attawapiskat watershed serve as the only places where specific community spiritual ceremonies can be performed in privacy, silence, and an undisturbed natural setting. It is essential that these areas remain undisturbed, as they remain an integral link between Neskantaga's past, present, and future. The ceremonies connect us with our past, and are part of an ongoing process of revitalizing,

preserving, and engaging with our culture, and are vital to the future well-being of Neskantaga and the continued protection of the land itself.

We are a Remote Community in Crisis

18. The remoteness of our community brings unique challenges related to, among other things, increased cost of living, infrastructure and housing challenges, water distribution, availability of fresh food, travel challenges, access to communications networks (radio, Internet), and access to services including first response to fire and medical emergencies, healthcare, education, child welfare, and other social services.
19. In addition to our remoteness, we face many overlapping crises, some longstanding and some new. We live every day with the inequities of not having access to clean drinking water or to adequate housing and infrastructure, and more recently we have been faced with the COVID-19 crisis. This near-permanent state of social emergency informs everything we do, forcing difficult decisions about where to allocate resources, and taking time and energy away from the proactive, community-building initiatives that are so important for the health, safety, and well-being of our members.
20. The elected leadership and First Nation staff are the first line of response in meeting essential needs and responding to the challenges of day-to-day life in a remote community, not to mention the many crises we continue to face. Life as a series of repeated shocks – the longest boil-water advisory in Canada, for example – creates profound governance challenges for our community, taking up valuable time and resources from elected leadership and staff as we try to address these challenges. Living with crisis also means that we see high staff turnover and staff burnout, with individuals overwhelmed by trying to handle these many day-to-day challenges.

21. We have repeatedly communicated to Ontario about the extent of these multiple, overlapping crises, including in a “Crisis Timeline” table that we submitted to Ontario and project proponents in the Ring of Fire area. Attached as **Exhibit “B”** is a copy of the “Crisis Timeline” table.

The Ongoing Water Crisis and a New Pandemic Crisis

22. Since 1995, our community has remained under the longest-running boil water advisory across Canada. In 2011, an engineering assessment commissioned by the federal government deemed that our drinking water systems were “high risk.” (See **Exhibit “C”**, at p. 106 of the exhibit.) Under the boil water advisory, we are forced to rely on a mix of bottled water and outdated, frequently malfunctioning, water distribution systems. We regularly contend with water shortages as well as contamination from sources such as sewage and water distribution system failures.
23. Our many ongoing challenges are thrown into striking relief when we look at just the past two years, a period during which our water crisis increased, and a pandemic completely upended our lives and everyone else’s across Treaty No. 9.
24. To begin with, on September 13th, 2019, we were informed of a pump failure affecting the pressure in the community water distribution system. As a result of this occurrence, we held several meetings and decided as a community to declare a state of emergency, and on September 16th, 2019, we initiated a self-evacuation of 255 people (See **Exhibit “D”** for a copy of our community’s declaration of the state of emergency, alongside a news article about the evacuation.)
25. Approximately six months later, the COVID-19 pandemic commenced. From March 17, 2020 to July 29, 2020, we declared a state of emergency and imposed our first COVID-19 community lockdown, closing our borders to non-essential travel. We also adopted our community Pandemic

Plan at this time, which was used as a model for pandemic plans in other communities. (**Exhibit “E”** is a copy of our notice of the state of emergency, border closure, and our Pandemic Plan.)

26. On October 8, 2020, we faced another crisis with our water distribution system, and on October 17, 2020, we again evacuated half our population, 230 or so individuals, who only began to return in mid-December 2020. (**Exhibit “F”** is a letter from Nishnawbe Aski Nation Grand Chief Fiddler advising the Ontario government of this evacuation.)
27. In January-February 2021, a number of community members living in Thunder Bay fell ill with COVID-19. In response, on February 23, 2021, we declared our first COVID-19 emergency for members outside the Nation, restricting non-essential travel and further restricting the ability of members to travel into the Nation. (**Exhibit “G”** is a copy of the state of emergency.)
28. In May 2021, we declared our second state of emergency over COVID-19 within the Nation, following an outbreak in our population (**Exhibit “H”**). Once again, we were forced to impose border closures and community health measures aimed at reducing the spread of the virus. Although we were able to briefly lift some (though not all) measures in Fall 2021, we were quickly forced to reinstate the state of emergency, and our border control and health measures, due to rising COVID-19 numbers resulting from the new “Omicron” variant.
29. The reality is that pandemic response has occupied much of our time and resources in the past two-plus years, and we once more find ourselves in a COVID-19 state of emergency. We are doing our best to ensure the safety of our community, with insufficient resources and infrastructure just to respond to COVID-19, our ongoing water crisis, and state of social emergency, let alone address other matters such as the ongoing work in the Ring of Fire.
30. The Ontario government is well aware of the challenges posed by the pandemic when it comes to engaging with Indigenous communities. In May 2020, the Ministry of Indigenous Affairs of Ontario

(“IAO”) produced and distributed an “Operational Guide for Consultation with Indigenous Peoples in the COVID-19 Context”. This guide advises, among other things, that First Nations should not be pressed into consultation exercises when there is a state of emergency in a community. This Guide is enclosed as **Exhibit “I”** to my affidavit.

31. Neskantaga has done its best to abide by guidelines from leading public health authorities. By way of example, attached as **Exhibit “J”** is the latest version of the *Community-Based COVID-19 Preparedness and Response Action Plan* of the Sioux Lookout First Nations Health Authority (“SLFNHA”), which helps our community. This document provides a snapshot of the extensive efforts and demands on our community as we try to slow the spread of this deadly virus.

Additional Crises Affecting My Community

32. At the same time, we suffer from persistent underfunding in a number of areas, notably housing and infrastructure. Our buildings are old, decaying, and unsafe, and we often have several generations of family living together in crowded conditions. Unfortunately, several of our community members are also experiencing homelessness. These conditions create many health and safety risks, including COVID-19 exposure and an increased risk of fire, which is made worse by a lack of adequate fire services. Over two hundred of our members live off-reserve not by choice, but because of a significant housing shortage. (**Exhibit “K”** is a news article referring to the housing conditions.)
33. Last year, our community also faced a health and safety concern related to the multiple forest fires that raged across northwestern Ontario through summer/fall 2021. Although no evacuation was necessary, we saw heavy smoke drift into our community, requiring additional health supports for vulnerable members. (**Exhibit “L”** is a news article reporting on the forest fires.)
34. Finally, our community is also one of the many First Nations plagued by mental health crises and disproportionate death rates. Although our population living within the Nation is less than four

hundred people, in just the period between March 2020 and May 2021 – and as reflected in the “Crisis Timeline” we provided to Ontario during the Ring of Fire discussions, as seen at **Exhibit “B”** – four of our community members passed away, placing us too often in a state of mourning and drawing on our resources, including our emotional/spiritual resources.

35. I provide all this information by way of context for the situation we now find ourselves in - even as we continue to devote all our resources to this state of social emergency, Ontario has pushed ahead with “Ring of Fire” developments in our homelands, ignoring our repeated requests to undertake meaningful consultations in line with the Duty to Consult and Accommodate.

The Ring of Fire

36. The Ring of Fire is the colloquial name given to a mineral-rich 5,000 square kilometre potential mining region. The Ring of Fire has been under economic development for mining since 2007. The proposed mining district falls within our homelands, within the Attawapiskat watershed, which we are obligated to protect in line with *Mno-bimaadiziwin*, *Onda-tisiwin*, and *Bima-chiwin*.
37. Since the Ontario and Canadian governments first announced plans for development in the Ring of Fire more than a decade ago, my community, together with other First Nations in the region, communicated the need for a regional approach that would factor in the cumulative impacts of all developments in the region. Community members have repeatedly expressed concerns about impacts to our homelands, and to our ability to exercise our Aboriginal, Treaty, and Inherent Rights, including but not limited to the right to determine how the land will be used, based on our Free, Prior, and Informed Consent (“FPIC”).

Lessons from COVID-19 Decision-Making

38. From the moment it became clear that Ontario was driving mining development in the Ring of Fire, we have insisted upon a consultation framework in line with our Anishinaabe laws and protocols. Community consultation on any matter of the magnitude of the Ring of Fire development is a necessity. Such consultations are time and resource-intensive exercises and are required by our Indigenous laws. Virtual or superficial consultation is insufficient.
39. By way of example, when it first became apparent that the COVID-19 pandemic may necessitate community safety measures, we convened a decision-making session within Neskantaga. This was before there were any cases in the community, which allowed us to meet in-person, ensuring all members had a voice and could collectively reach a decision. This consultation alone, on the most significant new health risk to our community (not discounting the ongoing water crisis), eventually required eight days of in-person discussions. As discussed above, we ultimately declared a state of emergency and implemented measures related to essential and non-essential activities, as well as border closures. We consciously chose to not designate mining or mining-related activities as essential, for the obvious reason that mining is not “essential” for a community faced with housing deficits, a boil water advisory, and COVID-19.

The Neskantaga First Nation Community Protocol on Development

40. To be clear, Neskantaga is not inherently “anti-development.” However, we insist that our community consensus decision-making process be respected any time there is proposed activity which may have an impact on our homelands. To that end, we have adopted the Neskantaga First Nation Community Protocol on Development, which sets out the principles that apply to any consultations process at Neskantaga.

41. This Protocol has been shared with Ontario and with project proponents seeking to initiate development in our homelands in the Ring of Fire. Among other principles, it clearly states that (1) Neskantaga's internal consensus-based decision making process must be respected; (2) this internal decision-making process requires time, information, and resources, in order to make a fully-informed decision, in the form of a community resolution; (3) the decision-making process cannot be rushed; (4) the community's designated representatives are responsible for communicating to project proponents any concerns or feedback arising from that community process; and (5) representatives of project proponents will only be invited to attend at the community once they receive permission to do so. Attached as **Exhibit "M"** is a copy of this protocol.

The "Eagle's Nest" and other Mining Projects

42. Our Application focuses on our recent negative experiences related to a road project, and the complete failure to respect our decision-making and consultation processes. The road project is being developed in our homelands to connect a number of mines to Ontario's southern highway network. The most significant of these mines, directly bearing on our rights and the use of our homelands, are a chromite mine project and the "Eagle's Nest" nickel mine project, to be located within our homelands near McFaulds Lake, connected to the Attawapiskat River. Originally, Cliffs Natural Resources owned the chromite project, while Noront Resources owned the "Eagle's Nest" project, although Cliffs then sold the chromite project to Noront. We recently learned that Noront is now preparing for a potential sale of both projects to a new owner, Wyloo Metals.
43. In response to these proposed developments, we have repeatedly raised our inability to undertake meaningful consultations related to the Ring of Fire, given the need to deal with COVID-19, the water crisis, and other threats that our community is facing. We remain seriously concerned about

the Ring of Fire's threats to Aboriginal, Treaty, and Inherent Rights, including irreversible damage to our homelands and those of other First Nations.

44. We also remain deeply concerned that road construction, mines, refineries, and other aspects of the Ring of Fire infrastructure will be located in areas of cultural significance across the watershed. We are especially concerned about the likelihood that construction of access roads will rely on eskers as the source for the necessary gravel/sand, which is likely to disturb sites of cultural and ecological significance. Eskers are naturally occurring formations of elevated gravel, which are quite noticeable in the Ring of Fire region. Eskers are where we traditionally practiced and continue to practice our harvesting rights, and where there are documented sites of cultural significance, such as burial grounds, sacred sites, trails, and villages of our ancestors. They form a central component of our past, present, and future.
45. Many civil society groups have echoed our concerns, including the Canadian Environmental Law Association, the Council of Canadians, West Coast Environmental Law, the Wildlife Conservation Society of Canada, MiningWatch Canada, Friends of the Attawapiskat River, and the Yellowhead Institute at Ryerson University. By way of example, see **Exhibit "N"** for a joint letter from a coalition of civil society groups calling for a moratorium on mining development in the Ring of Fire.

Project Splitting

46. In August 2011, Cliffs Natural Resources initiated the early stages of developing an EA related to the overall impact of its chromite mining project. This EA would have factored in the mine itself, a refinery, and the construction of a North-South Road access corridor connecting the mine to the highway system to the south. Ontario publicly supported Cliffs' selection of a north-south corridor to develop the mining district. However, this EA never left the initial drafting stages, and Cliffs ultimately sold its interests to Noront Resources in 2015.

47. Beginning in 2018, Ontario entered into three agreements by which it provided funding to two First Nations, so that they would become the new project proponents for multiple, distinct projects for EA purposes, thereby splitting up the proposal which Cliffs originally approached as a single project.
48. On May 3, 2018, the Minister of Environment and Climate Change signed an agreement with Marten Falls First Nation, through which it received funding to become the new proponent of a “Marten Falls Community Access Road”, which would be the section of the road connecting to the southern Ontario highway system. On May 3, 2018, the Minister signed a similar agreement with Webequie First Nation, through which it became the new proponent of a “Webequie Supply Road”, which would run east-west within the mining district. Attached as **Exhibit “O”** are the two May 2018 agreements with respect to the Access Road and Supply Road.
49. Subsequently, on October 28, 2020, the Minister of the Environment, Conservation and Parks entered into a third agreement with these communities, by which Marten Falls and Webequie received funding to become the joint proponents of a “Northern Road Link”, representing the remaining section of the road project. Attached as **Exhibit “P”** is the October 2020 agreement with respect to the Northern Road Link.
50. The net result of all of the above is that, instead of one all-encompassing environmental assessment as Cliffs originally planned, Ontario has now structured it so there are at least seven separate environmental or impact assessment processes. By our count, these include:
 - a) One Regional Assessment for the Ring of Fire under the federal *Impact Assessment Act*;
 - b) One provincial EA and one federal Impact Assessment (“IA”) on the Marten Falls Community Access Road (with the new project proponent being Marten Falls First Nation);
 - c) One provincial EA and one federal IA on the new Webequie Supply Road project (with the proponent being Webequie First Nation); and

- d) One provincial EA and one federal IA on the “Northern Road Link” (with joint proponents – Webequie and Marten Falls).

51. We anticipate there will also be additional assessments, including:

- a) an EA for the Eagle’s Nest mine (currently suspended, pending sale of the mine to Wyloo Metals);
- b) an EA for a chromite mine (abandoned by the current owner Noront, although it is unclear what will occur pending sale to Wyloo);
- c) an EA for a refinery that would have been attached to the chromite mine (and which, like the EA for the chromite mine, appears to have been abandoned pending sale to Wyloo); and
- d) various other permitting applications, which we have only just started to receive and have not yet had time to review in order to understand their full scope.

52. Additionally, we remain concerned about additional impacts to the mining projects, given the pending acquisition of Noront by the Australian mining company Wyloo Metals, which we only learned about in late 2021. We understand that if the arrangement is completed, Wyloo would acquire up to all of the issued and outstanding common shares of Noront that Wyloo does not already own, and therefore take ownership of its mining interests in the Ring of Fire. It remains entirely unclear to our community what the impact of Wyloo’s acquisition of Noront may be, but this has not stopped Ontario with moving ahead with the multiple EA processes.

The Marten Falls Community Access Road

53. The so-called Marten Falls Community Access Road is the first phase of a North/South Road into the mining district which will go directly through our homelands. The second phase of this road project, the Northern Road Link, is planned to include a bridge across the Attawapiskat River in the heart of our homelands.

54. Ontario is promoting the North-South Road as essential infrastructure that will open up the region to extensive mining development. We have repeatedly informed Ontario of our concerns that the road project will pass directly through our ancestral burial grounds and areas containing other sites of cultural and historical significance. Construction of the road will require bridges to pass over bodies of water such as rivers and streams, the construction of ditches for water flow connections and to balance water levels, the construction of quarries, and the construction of temporary access roads, work areas, and camps.
55. The impact of the road project on our rights will likely be extensive, profound, and irreversible. Our homelands and way of life will not be the same once the road and bridges are built, and we will lose access to key sites that form part of our culture and history. The project also means year-round access to the Far North, which means an increase in outsiders unfamiliar with our ways, and who may act in ways detrimental to our homelands (for example, hunting or fishing in ways that violate our rights, or which harm our sacred sites). Any increase in travelers and workers threatens to infringe our rights and cause substantial and permanent harm to our culture and way of life.

The Ontario Process Lacks an Indigenous Lens

56. We were strong supporters of the October 2016 Regional Framework Agreement between Ontario, Neskantaga, Marten Falls, and other Matawa member Nations. That Agreement was intended to ensure that Ring of Fire developments and potential impacts were assessed in a holistic way, treating the various project components (roads, mines, etc.) as part of one overarching project. Unfortunately, in 2019, the Ontario government walked away from the Framework Agreement, negating all the hard work that had been done on ensuring this holistic approach. Attached as **Exhibit “Q”** is a copy of the now-cancelled Regional Framework Agreement. Attached as **Exhibit “R”** is a

copy of the August 2019 letter from Minister Rickford cancelling the Regional Framework Agreement.

57. With that approach now abandoned, the EA process – specifically, on the three sub-components of the road project, now that the project has been split up – are moving ahead under the deeply inadequate *EAA* process, which does not include the required Indigenous lens.

Ontario Deems Mining Essential, But Not Our Community's Needs

58. Ironically, even as our community took steps to protect ourselves against COVID-19, the Ontario government chose to designate mining as an “essential” activity and therefore exempt not only mining itself, but also environmental assessments of mining projects, from the government’s own restrictions on activities during the pandemic. As a result, consultations on the road projects and other aspects of the Ring of Fire were able to proceed throughout the COVID-19 pandemic. (See **Exhibit “S”**, *Ontario Regulation 82/20: Order under Subsection 7.0.2 (4) under the Emergency Management and Civil Protection Act, 1990, s. 32: Mining.*)

Our Negative Experience with Ontario's Broken Consultation System

Marten Falls Community Access Road Terms of Reference

59. In October 2020, Ontario initiated a public comment period related to the Marten Falls Community Access Road, which is one of the three components of the overall road project. Following a year of public consultations, on October 29, 2021, Ontario issued the Notice of Commencement on the EA for the Access Road (**Exhibit “T”**).
60. From the outset, we raised concerns about the Access Road project. As early as 2018, Neskantaga started discussions with the project proponent Marten Falls about the need for consultations on the

Access Road project. In December 2018, Marten Falls formally informed Neskantaga, by way of letter, of its intention to begin drafting Terms of Reference for an EA pursuant to the *EAA*. Attached as **Exhibit “U”** is the correspondence dating from this period.

61. Representatives from Neskantaga repeatedly requested more information and raised concerns about the proposed scope of the project, its connections to the broader Ring of Fire initiative, and consultation with Indigenous communities. Neskantaga also raised concerns about whether the consultation process was in line with the principles of Reconciliation, the Honour of the Crown, UNDRIP, and FPIC. Neskantaga also repeatedly advised of the multiple states of emergency related to water, COVID-19, and other crises, advising that its submissions were being made under duress given the lack of resources or timing. Examples of correspondence raising these issues, sent from leadership to Ontario and project proponents, is attached as **Exhibit “V”**. Similar correspondence from Neskantaga’s Technical Advisor is attached as **Exhibit “W”**. Attached as **Exhibit “X”** is correspondence from a group of legal experts raising concerns with Ontario’s EA process.
62. In June 2020, Marten Falls shared with Neskantaga a “Consultation Record” (**Exhibit “Y”**), documenting engagement between Marten Falls and Neskantaga to date. This Record demonstrates, among other things, that:
 - a) In late 2019, Neskantaga objected to Ontario delegating to Marten Falls First Nation the consultation obligations for the Access Road project, and stated that Neskantaga would like to “consult with Ontario on a government to government basis”;
 - b) Neskantaga requested a collaborative decision-making process in respect of the Marten Falls road planning studies and implementation/scope of the EA;

- c) Neskantaga inquired how the Marten Falls Project team would meet the standards related to UNDRIP and Neskantaga's own Development Protocol, including mechanisms for community consultations;
- d) Neskantaga proposed that an agreed process should be in place on how Neskantaga knowledge could inform and be incorporated into the development of the baseline wildlife research and other studies;
- e) Neskantaga inquired on the consideration of existing ongoing and adverse effects of mining claims in the cumulative effects analysis; and
- f) Neskantaga inquired about a community-specific Consultation Plan for Neskantaga, independent of the general "Indigenous Knowledge Program".

63. The Consultation Record shows that the Marten Falls project team indicated some willingness to engage with these requests, including the need for Indigenous input on development of EAs and baseline studies. The Record also reflects how, during this period, Neskantaga was preoccupied with various crisis matters, including the community evacuations described above. The road project team stopped short of committing to a Neskantaga-specific consultation process and refused to even consider a pause to the process while we focused on our overlapping states of emergency.

The thirty-day extensions are an "ad hoc" solution and do not respect First Nation requirements

64. Following back and forth correspondence between our community, Marten Falls, and Ontario, on October 23, 2020, Ontario posted the draft ToR for the EA for the Access Road for public comment, with a sixty-day comment period. The day earlier, Neskantaga wrote to Ontario again requesting that the process be paused, given the many crises we were facing and the need to convene our own consultations in line with our laws. We repeated these requests in additional correspondence

throughout 2020 and 2021. Collected correspondence from this period, showing, among other things, our requests for pauses to the consultation process, and that we advised Ontario and project proponents of the ongoing emergencies at Neskantaga, can be seen at **Exhibit “Z”**.

65. However, rather than halt the process, Marten Falls relied upon the mechanical application of thirty-day extensions to the existing comment period deadlines. This rote application reflects, in our view, the reality that the *EAA* does not actually provide for First Nations consultations during such EA processes, let alone the possibility to pause during a crisis. The approach of rote thirty-day extensions is grossly insufficient compared to the needs of our Nation to abide by our own consultation protocols. Given the added burden of the many crises during this period, not least the water-related evacuations and COVID-19, this approach left us feeling disrespected and ignored.
66. In the end, left with no other options, we submitted incomplete feedback with respect to the proposed Terms of Reference for the EA on the Access Road. In these submissions, which we made under duress, we again reiterated our inability to undertake meaningful community discussions, the reality of the ongoing state of emergency, and the fact that our consultation process had not been engaged or respected. To be clear, these submissions do *not* reflect anything resembling community consensus with respect to the Access Road. Rather, they represent our best efforts, given limited time and resources, to submit *something* to a process that was otherwise prepared to barrel ahead without our involvement at all. Attached as **Exhibit “AA”** are those submissions, dated December 21, 2020 and March 31, 2021.

The Indigenous Knowledge Program”

67. The Access Road project team did establish a passive mechanism for First Nations feedback, known as the “Indigenous Knowledge Program.” We were approached by Marten Falls to ask if we wished

to make submissions to this Program, which was designed to “share existing and relevant Indigenous knowledge” and obtain “project-specific Indigenous knowledge” about land and resource use. It was not, however, designed to allow for a First Nation-specific process, nor could it account for Indigenous laws or the cultural importance of the areas of our homelands under threat. Attached as **Exhibit “BB”** is the “About the Indigenous Knowledge Program” section of its website.

68. In our view, the Program is at best an information-gathering exercise, based on soliciting submissions from Indigenous communities generally about Indigenous knowledge and cultural considerations. It is not, however, a program that can allow for meaningful dialogue with affected communities, based in the consultation requirements of those communities. We find it revealing that both the public comment mechanism and the Indigenous Knowledge mechanism rely on the same email address, info@martenfallsaccessroad.ca. Once again, First Nations-specific concerns are “lumped in” with the general public comment mechanism.

Impacts of Project Splitting

69. Despite Cliffs Resources’ original approach of treating the mine, road, and other infrastructure as one project, Ontario decided to split it into multiple individual projects. This decision creates significant risks. The cumulative effects of the road project go well beyond a single Access Road, and if that road is treated in isolation, it may create a situation where assessors are blind to impacts once it links up to other parts of the project, such as the Supply Road and the Northern Road Link.
70. Additionally, the splitting of the projects creates structural barriers to consultation. Instead of a single consultation period involving meaningful community participation, Neskantaga is required to participate in multiple feedback periods, one for each project: the Marten Falls Community Access Road project, the Webequie Supply Road project, the Northern Road Link, and eventually

the construction of mines and potentially a refinery. In line with our laws, each time we are asked to comment on these sub-projects, we will need to convene in-person consultations with community members, Elders, Traditional Knowledge-holders, and political leadership. This creates extra risks in the COVID-19 context, especially with Elders and the need to invite outsiders into the community as part of consultations.

Recent Developments

71. As a final note, I would like to share the context in which I am signing this affidavit. There have been a number of recent developments which highlight the challenges faced by our community – and which Ontario continues to ignore. I have done my best to summarize these developments here, although the reality is that the situation is now changing on a daily basis.
72. At the time I swear this affidavit, we now have multiple confirmed cases of COVID-19, both within our Nation and our membership living outside the Nation, with dozens of potential exposures now staying in isolation. We are doing our best to prevent a full-blown outbreak, as is already happening in some neighbouring First Nations. As part of our community health measures, we are taking every step necessary to treat and track cases, support members who are in isolation, and restrict travel into and out of the Nation. Due to a housing shortage, there are significant challenges in finding places for individuals to isolate, and we remain seriously concerned about overcrowding where individuals are exposing others to the virus. Many individuals outside the Nation are not able to return due to the lack of space.
73. At the same time, we are mourning the recent deaths of two community members, one who had been experiencing homelessness within our community, and the other who was living in Thunder Bay at the time of her death. We also have another community member currently in hospital, who has been unresponsive for several days. We also had a house fire in late January, where a single mother of

five children had to be rescued. Thankfully, everyone survived, but it was difficult to contain, due to the lack of fire trucks and firefighting equipment.

74. We also remain short-staffed in our First Nation administration department, given recent staff turnover, travel restrictions, and individuals exposed to COVID-19. All of us, from leadership down to every healthy community member, are doing our best to work for our Nation. But it takes time and resources which we do not have, and all our time has been taken up dealing with one crisis after another. I managed to find the time to swear this affidavit, but we fear the situation is only going to get worse.
75. In the meantime, we are being inundated with requests for more and more “virtual consultations” and “virtual information sessions.” In just the past two weeks, we have been invited to no less than eight different sessions scheduled to take place over a month, with sixteen more sessions proposed either for later this month or soon after. This is an overwhelming number of consultation proposals, and barely begins to scratch the surface of the number of requests that we receive – not to mention, a renewed insistence from Ontario and project proponents to enter into the Nation, despite our ongoing state of emergency. The virtual sessions also occur on a wide variety of platforms that community members may not have access to, experience with, or a stable enough phone/Internet connection to connect with.
76. We have done our best to send students and representatives from outside the Nation to take notes at these sessions, given our preoccupation with more urgent matters. Clearly, by sending outsiders to take notes for us, this does *not* constitute meaningful consultations. We only sent these note-takers to monitor those sessions while we deal with COVID-19, the water crisis, and the state of social emergency. Unfortunately, our note-taking representatives have been met with resistance from organizers, who insist that only leadership and advisors from the Nation can attend. This is a striking

failure to acknowledge the ongoing crisis, and to push ahead with these virtual sessions despite our inability to meaningfully participate. Attached as **Exhibit “CC”** are examples of five recent letters inviting Neskantaga to participate in various virtual sessions.

Conclusion

Reconciliation and Free, Prior, Informed Consent

77. We take our commitment to Reconciliation seriously. We are open and willing to work with Ontario and Canada. But Reconciliation is a two-way street. Ontario seems to have forgotten that the relationship between the Crown and First Nations is supposed to be based on the recognition of rights, respect, cooperation, and partnership. This relationship is grounded in a constitutionally recognized special relationship, and real, concrete obligations in the form of the Honour of the Crown and Duty to Consult and Accommodate.
78. We are also keenly aware of Canada’s recent commitments to implement the *UN Declaration on the Rights of Indigenous Peoples*. Now that the government’s *United Nations Declaration on the Rights of Indigenous Peoples Act*, Bill C-15, has passed (Royal Assent on June 21, 2021), we merely ask that Ontario consider the requirements set out in *UNDRIP* itself:

31(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

(2) 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.

(Exhibit “DD”, United Nations Declaration on the Rights of Indigenous Peoples, Arts. 31(1)-31(2).)

Our “Solutions Agenda”

79. While Neskantaga is not inherently opposed to the Marten Falls Access Road, we repeatedly raised concerns that required more time and a more in-depth consultation process in order to share all the comments our community would have liked to make. Instead, our needs were ignored, our Indigenous laws and protocols were ignored, our state of social emergency ignored, and the ToR for the environmental assessment on the Access Road was approved without our meaningful input. Today, work progresses on the Access Road EA and on many other aspects of the Ring of Fire development, including the other road components.
80. When we filed this application, it was because we believed that our experience with the Access Road highlights the fundamental failings of Ontario’s environmental assessment process, which will continue to affect us for years to come. In summary, the Access Road consultations were:
- a) based on paper reports and paper responses, rather than oral tradition;
 - b) conducted entirely virtually/remotely due to pandemic considerations;
 - c) lacking in translations and interpretation, including plain-language summaries, in our language, of the many complex documents that make up the process;
 - d) deliberately framed as a distinct process, disconnected from the regional and cumulative impacts that need to be assessed and planned, and dramatically increasing the number of consultations we will be expected to undertake;
 - e) on a fixed schedule with the impossibility to allow for the needs of Indigenous communities, not least a remote First Nation in crisis;
 - f) unable to allow us to fulfil our own customary legal duties regarding decisions affecting our land and our people; and

g) took a disrespectful and irresponsible approach to our involvement, by letting the project proponent write all the reports, and the Ontario government make all the decisions. There is no independent review and affected First Nations are an afterthought.

81. Looking forward, we remain deeply concerned that unless a court helps to clarify the consultation requirements under Ontario's EA process, we will be subjected to more of the same. Neskantaga's position is that meaningful consultations with our Nation can only be carried out by effective grassroots community engagement; the convening of a Neskantaga Elders' Council; meeting with community members and Traditional Knowledge-holders; and meeting, in-person, in line with our protocols for consensus decision-making. This is the process we have always relied upon, as reflected in our Development Protocol. It is unclear why Ontario cannot agree to this process.
82. Additionally, this approach must acknowledge the realities of the state of social emergency in Neskantaga, and the likelihood that emergencies may interfere with or require the pause of a process, as the case may be. As we have always said, a one-size-fits-all approach to consultations is not appropriate: we have our own consultation and decision-making protocols, and just because something might work for another First Nation, does not mean it works for us. At the same time, *any* developments in the Ring of Fire must be approached through a regional lens, one which recognizes that the Access Road, the Supply Road, the Northern Road Link, and all other developments are *not* distinct projects, but form part of a broader Ring of Fire initiative.
83. Only very recently (February 2022) did Ontario finally approach First Nations in the area to initiate discussions about developing a cumulative effects approach. While potentially a welcome development, we know very little about what Ontario is planning, and it comes long after the Terms of Reference for the EA on the Access Road were already approved. Even now, Ontario continues

to disregard the fact that Neskantaga and several of our neighbours are dealing with COVID-19 outbreaks, and we do not have the time or resources to participate in these discussions.

84. The time has long since passed when it was acceptable for Ontario to treat us as a mere “stakeholder” like any other general public participant in a public feedback process. This is our land, subject to our laws. We insist upon meaningful consultations in the spirit of Reconciliation.

85. I make this affidavit in support of our Application, and for no other or improper purpose.

SWORN BEFORE ME virtually at)
Toronto,)
in the Province of Ontario, with)
the affiant appearing at)
Thunder Bay,)
in the province of Ontario)
this 4th day of March, 2022)
in accordance with O. Reg. 431/20:)
Administering Oath or Declaration)
Remotely)

<original signed by>

A Commissioner, etc.

<original signed by>



Chief Wayne Moonias (appearing virtually)