CITATION: Moonias v. Ministry of Northern Development, Mines, Natural Resources and Forestry, 2023 ONSC 5942
COURT FILE NO.: CV-21-00672552-0000
DATE: 20231020

ONTARIO SUPERIOR COURT OF JUSTICE

RE: 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

-and-

Webequie First Nation, Intervener

BEFORE: Shin Doi J.

COUNSEL: *Julian N. Falconer, Asha James, and Jeremy Greenberg*, for the Applicants

Kisha Chatterjee, Brendan Haynes, Michele Valentini, and Ryan Ng, for the Respondent Ontario

Rodney Northey, Kennedy A. Bear Robe, and Graham Reeder for the Respondent Marten Falls First Nation

Robert B. Cohen and Sandra Gogal for the Intervener Webequie First Nation

HEARD: July 13 and 14, 2023

ENDORSEMENT

[1] The Applicants seek declaratory relief in the form of judicial interpretations and guidance in respect of the *Environmental Assessment Act*, R.S.O. 1990, c. E. 18 and Regulations governing consultations with First Nations on environmental assessments pursuant to Rule 14.05(3)(d) and (h) of the *Rules of Civil Procedure*. In particular, the Applicants seek a declaration on the interpretation of sections 5.1 and 6 of the *Environmental Assessment Act* and associated deadlines regulation O.Reg. 616/98 to conform with Constitutional requirements. The Applicants also seek a declaration on the extent of the Duty to Consult and Accommodate as it relates to the drafting of Terms of Reference for an Environmental Assessment, and as required pursuant to the Honour of the Crown and section 35 of the *Constitution Act, 1982*.

[2] The Application is dismissed because it is not properly brought under Rule 14.05(3)(d) and (h) and the court has no jurisdiction to rewrite the *Environmental Assessment Act* or provide 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. There is no live issue or dispute of rights to be determined by the court. The Application is neither an application for judicial review nor a constitutional challenge to legislation. While the context of the Marten Falls Community Access Road (the "Access Road") is referenced, there must be a live issue for judicial interpretation and guidance in respect of the *Environmental Assessment Act* and Regulations governing consultations with First Nations on environmental assessments pursuant to Rule 14.05(3)(d) and (h) of the *Rules of Civil Procedure.* I agree with the Respondent Ontario that the "Application is a *de facto* reference that seeks the court's guidance on how Ontario should discharge the duty in the future, in the absence of a factual foundation." A reference and the relief sought in the Application are not within the jurisdiction of this court.

I. Background Facts

[3] The Applicant, Neskantaga First Nation, is a recognized First Nation pursuant to the *Indian Act*, RSC 1985, c I-5. The Applicant, Wayne Moonias, is the former Chief of Neskantaga and a resident of the Neskantaga Indian Reserve. [1]

[4] The Respondent, Ministry of the Environment, Conservation and Parks is responsible for administering the *Environmental Assessment Act* in Ontario and for review/approval of the Terms of Reference under the *Environmental Assessment Act*. The Respondent, the Ministry of Northern Development, Mines, Natural Resources and Forestry is responsible for overseeing the province's resource extraction industry, and specifically, the Right of Fire initiative. The government respondent to this Application is Ontario and not those ministries.[2]

[5] The Respondent Marten Falls First Nation is a First Nation located within the Ring of Fire project area and the proponent of a proposed access road known as the Marten Falls Community Access Road. Marten Falls First Nation is a remote community, approximately 200 kilometres from the nearest public roadway, and has no all-season road access. [3]

[6] The Intervener Webequie First Nation is a First Nation and the proponent of a proposed access road of roughly 107 kilometres known as the Webequie Supply Road and a joint proponent of the Northern Road Link which is roughly 126 kilometres in length. The Webequie Supply Road would connect Webequie First Nation to the Ring of Fire and the Northern Road Link would connect the Ring of Fire to the provincial highway system via the Access Road.[4]

[7] The Ring of Fire is a region covering approximately 5,000 square kilometres in the James Bay Lowlands of northern Ontario[5] and "located about 500 kilometres northeast of the City of Thunder Bay, in Ontario's Far North."[6] The Ring of Fire has large mineral deposits and is the site

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[1] Amended Notice of Application, para 5.
[2] Respondent Ontario Factum, para 49.
[3] Respondent Marten Falls First Nation's Factum, para 1.
[4] Respondent Ontario Factum, para 41.
[5] Amended Notice of Application, para 14.
[6] Respondent Ontario Factum, para 42.

of future mining projects. The Ring of Fire is an "important source of critical minerals used in the communications, defence, and electric vehicle sectors."[7]

[8] On October 8, 2021, Ontario approved the Terms of Reference for the Environmental Assessment related to the Access Road. On October 29, 2021, Ontario issued its Notice of Commencement of Environmental Assessment with respect to the Access Road. The Access Road would connect Marten Falls First Nation to the provincial highway system. There is also the Webequie Supply Road which would connect Webequie First Nation to the Ring of Fire mineral development area. The Northern Road Link, jointly proposed by Marten Falls First Nation and Webequie First Nation, would be an all-season road approximately 126 kilometres in length and would connect the proposed Ring of Fire mining development area to the provincial highway system via the proposed Marten Falls First Nation Community Access Road.

[9] The Applicants submit that they 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 for a mining road in Neskantaga's homelands."[8] The Applicants state that the Access Road "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".[9]

[10] The Applicants complain that Ontario'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."[10]

[11] The Respondents are deeply concerned that the Applicants are undermining the "years of good-faith efforts" to improve the lives of community members through all-season road access and carrying out consultations in accordance with the law and approved Terms of Reference. Marten Falls First Nation states that it has been seeking an all-season road to its community for over 20 years.[11] The much-needed road would help Marten Falls First Nation members access other communities for "education, training, and employment, reduce transportation costs for goods and services, and improve access to healthcare."[12]

[12] The Applicants emphatically deny that undermining the Marten Falls First Nations' efforts is their intention or goal in this proceeding. The Applicants state that while they rely on the example of the consultations surrounding the Access Road, the purpose is to obtain general

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[7] Respondent Marten Falls First Nation Factum, para 23.
[8] Applicants Factum, para 4.
[9] Applicants Factum, para 4.
[10] Applicants Factum, paras 23, 96
[11] Respondent Marten Falls First Nation Factum, para 24.
[12] Respondent Marten Falls First Nation Factum, para 25.

direction on the Duty to Consult and Accommodate, and the *Environmental Assessment Act*, ensuring the necessary processes are in place.

[13] The Respondents argue that the Applicants never sought a judicial review, nor seek relief for any past conduct of Ontario or Marten Falls First Nation or commentary on past consultation or the proposed road projects. Therefore, the Respondents argue, that the Application should be dismissed.

II. Rule 14.05(3)(d) and (h) of the *Rules of Civil Procedure*

[14] The Applicants bring this Application pursuant to Rule 14.05(3)(d) and (h) of the *Rules of Civil Procedure*. I am not satisfied that the Application is properly brought under the Rule.

[15] The Rule provides as follows:

> 14.05 Application under Rules
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> (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
>
> (d) the **determination of rights** that **depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution**;
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> (h) in respect of **any matter where it is unlikely that there will be any material facts in dispute requiring a trial**.

[16] The Court of Appeal held in *Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change)* 2016 ONCA 283 (CanLII) at para 19, that "Rule 14.05(3)(d) does not expand the court's jurisdiction to grant declaratory relief on the basis of a free-standing challenge to the wisdom or fairness of governmental action." The Court of Appeal explained at para 16,

> Although the court has broad jurisdiction to grant declaratory relief as a result of its inherent jurisdiction and pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the party seeking the declaration must establish that the question it raises in its application is a legal or justiciable issue: L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), at p. 275; *Bedford Service Commission v. Nova Scotia (Attorney General)*, [1976] N.S.J. No. 479, 72 D.L.R. (3d) 369 (C.A.), rev'd on other grounds 1977 CanLII 213 (SCC), [1977] 2 S.C.R. 269, [1977] S.C.J. No. 5.

[17] The court does not have jurisdiction to grant declaratory relief based on a free-standing challenge by the Applicants to the preparation of a Terms of Reference and consultations under the *Environmental Assessment Act.* The questions about judicial interpretation and guidance raised by the Applicant do not raise legal or justiciable issues. This is not a situation where the court can

determine the rights of a First Nation that depend on the interpretation of the *Environmental Assessment Act* because there are no specific facts to ground those rights.

[18] Furthermore, as the Intervener Webequie First Nation pointed out, "opinion, advice or direction of the court" is permitted under Rule 14.05(3)(a) but only on a question affecting the rights of a person in respect of the "administration of the estate of a deceased person or the execution of a trust". This proceeding does not pertain to either an estate of a deceased person or the execution of a trust.

[19] Rule 14.05(3)(h) also does not apply because there are no specific material facts. Rule 14.05(3)(h) allows an application to be brought where it is unlikely that there will be any material facts in dispute requiring a trial. Hence, the Application is not properly brought under Rule 14.05(3)(d) and (h).

III. *Environmental Assessment Act*

[20] Rule 14.05(3) is procedural in nature and assumes the court has jurisdiction (*Bunker v. Veall*, 2023 ONCA 501; *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363). Rule 14.05(3) does not create or give jurisdiction to the court, so it is necessary to consider the court's jurisdiction in connection with the *Environmental Assessment Act* and Regulations governing consultations with First Nations on environmental assessments. The law is clear that the court does not have jurisdiction to rewrite the *Environmental Assessment Act* and Regulations. It is also clear that this proceeding is not a constitutional challenge to the legislation.

[21] The *Environmental Assessment Act* provides protection, conservation, and wise management in Ontario of the environment (s. 2). The statute sets out a "planning and decision-making process to evaluate the potential environmental effects of a proposed undertaking, known as the Environment Assessment process." Most importantly, section 2.1 states that "nothing in this Act shall be construed 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 the *Constitution Act, 1982."*

[22] Section 5.1 provides that "when preparing proposed terms of reference and an environmental assessment, the proponent shall consult with such persons as may be interested." Section 6 covers requirements for the Terms of Reference proposed by a proponent including public comment. Ontario Regulation 616/98 deals with deadlines under the *Environmental Assessment Act.*

[23] Ontario submits that consultation with interested persons is a cornerstone of the environmental assessment process and a legal requirement of the *Environmental Assessment Act* – the persons to be consulted includes any potentially affected Indigenous communities. The Respondents explain that First Nations lands do not automatically fall under the *Environmental Assessment Act* unless there is an agreement to do so. Absent an agreement and a live issue under the *Environmental Assessment Act*, a determination about First Nations consultations on environmental assessments cannot be made.

[24] The Applicants argue that the *Environmental Assessment Act* uses outdated language, was developed prior to the Truth and Reconciliation Commission Report in 2015, has "not kept up with

the Honour of the Crown" and needs to incorporate and appreciate Indigenous concepts. The Applicants further argue that the legislation and regulations fail to address pandemic and emergency realities impacting First Nations from meaningfully participating in the environmental assessment consultations.

[25] Rewriting and updating the *Environmental Assessment Act* to address the Applicants' concerns are not within the jurisdiction of this court. As held in *Grain Farmers of Ontario* at para 23, it is not "within the power of this court to rewrite or "correct" legislation argued by a party to be faulty or ambiguous."

IV. Duty to Consult and Accommodate, and Delegation

[26] The court also does not have jurisdiction to make a declaration on the extent of the Duty to Consult and Accommodate as it relates to the drafting of a Terms of Reference for an environmental assessment and as required pursuant to the Honour of the Crown and s. 35 of the Constitution Act, 1982.

[27] The Duty to Consult and Accommodate stems from the *Constitution Act, 1982*, s. 35(1) which recognizes existing aboriginal and treaty rights. The Court of Appeal held in Association of *Iroquois and Allied Indians v. Ontario (Minister of Environment, Conservation and Parks)*, 2022 ONSC 516, the Crown has a duty to consult in respect of the rights and interests of First Nations. As explained by the Divisional Court in *Attawapiskat First Nation v. Ontario*, 2022 ONSC 1196 at para 4, "the duty to consult is an incident of the Honour of the Crown, which is engaged in any dealing between the Crown and First Nations." The Supreme Court of Canada held in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511 at para 17,

> **In all its dealings with Aboriginal peoples**, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, **the Crown must act honourably**. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, supra, at para. 186, quoting Van der Peet, supra, at para 31.

[28] The Applicants seek a general direction on the Duty to Consult and Accommodate as it relates to the drafting of Terms of Reference for an environmental assessment. I agree with the Respondent Ontario that the "Application is a *de facto* reference that seeks the court's guidance on how Ontario should discharge the duty in the future, in the absence of a factual foundation." [13] A reference is not within the jurisdiction of this court and there must be a factual foundation for the drafting of a Terms of Reference for an environmental assessment.

[29] The Applicants argue that they seek clarity on the extent to which the Crown may delegate aspects, ensuring that no substantive element of the Duty to Consult and Accommodate is "offloaded" on to third parties.[14] The Applicants submit that they are not challenging delegation

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[13] Respondent Ontario's Factum, para 7.
[14] Applicant Neskantaga's Factum, para 7.

to Marten Falls First Nation and Ontario's past conduct. The Applicants are concerned about pitting one First Nation against another First Nation.

[30] As held in Association of Iroquois and Allied Indians at para 11, "it is for the Crown to devise consultation processes to discharge its constitutional duties." It is settled law, and undisputed in the proceedings, that the ultimate legal responsibility for consultation and accommodation must rest with the Crown. The context of the Access Road offered as an example does not provide evidence that the Crown offloads its responsibilities or that a First Nations proponent is problematic. The Crown was legally permitted to delegate the procedural and coordination aspects of the consultation for the Access Road to the third-party proponent, which was Marten Falls First Nation.[15] The Crown did not relieve itself of its responsibility, its Honour of the Crown, and its duty. There is significant evidence that the Crown remained responsible for the consultation and that Marten Falls First Nation provided apt assistance. The evidence indicates that the Crown maintained oversight and intervened when issues arose. Ontario submitted evidence demonstrating the detailed consultation process that it had undertaken. Marten Falls First Nation also submitted that 22 First Nations including the Applicant Neskantaga First Nation and Indigenous representatives were provided with extensive notice, opportunities for dialogue and input, support for participation, and options for accommodation. One First Nation was not pitted against other First Nations but rather they worked collaboratively and co-operated. As the Respondent Marten Falls First Nation notes, the consultation that Marten Falls First Nation undertook is unchallenged.

V. Code of Practice

[31] During the hearing of the Application, the Applicants focused on the Code of Practice. The Applicants submit that the only processes/guidance document related to consultation on the Terms of Reference issued by the Ontario government is a "generic" guidance document, called the Code of Practice. The Applicants state that the Code of Practice describes the overall Environment Assessment Act consultation process, which contains passing reference to "Aboriginal peoples". The Applicants argue that the "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." The Applicants note that the last revision of the Code of Practice was in January 2014 which was prior to the Truth and Reconciliation Commission Report of 2015 and prior to the pandemic.

[32] The Code of Practice outlines the legislative requirements as well as the Ministry of the Environment, Conservation and Parks' expectations for the preparation and review of a Terms of Reference. Ontario states in the Code of Practice that it is published as a "living document that will be reviewed and revised as necessary." Ontario further provides a process for input, stating that "any comments, suggestions for revision or clarification are welcomed and should be sent to the Director of the Environmental Assessment Branch…"

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[15] Respondent Ontario's Factum, para 80.

[33] There is a stipulated government mechanism for review, revision, or clarification of the Code of Practice. It is not appropriate for the court to circumvent that process.

[34] For the reasons above, the Application is dismissed. No costs are sought by the Respondents and so no costs are awarded.

Shin Doi J.

Date: October 20, 2023