

FILED	FEDERAL COURT COUR FÉDÉRALE	DÉPOSÉ
	AOUT 21 2023 AUG 21 2023	
	SVETLANA DOBROTA	
VANCOUVER, BC.		

COURT FILE NO. T-1739-23

FEDERAL COURT

BETWEEN

**MÉTIS NATION – SASKATCHEWAN, MÉTIS NATION - SASKATCHEWAN
SECRETARIAT INC.**

AND

Applicant

**CANADA (MINISTER OF TRANSPORT) and FORAN MINING CORPORATION and
MCILVENNA BAY OPERATING LIMITED**

Respondent

APPLICATION UNDER s. 18.1 OF THE *FEDERAL COURTS ACT*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT: A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at VANCOUVER.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: AUG 21 2023

Issued by: ORIGINAL SIGNED BY
SVETLANA DOBROTA
A SIGNÉ L'ORIGINAL
(Registry Office)

Address of local office: Federal Court Vancouver Local Office
PO Box 10065, 701 W Georgia Street
Vancouver BC, V7Y 1K8

TO:

CANADA (MINISTER OF TRANSPORT) c/o
DEPARTMENT OF JUSTICE CANADA
British Columbia Regional Office
900-840 Howe Street
Vancouver BC, V6Z 2S9

AND TO:

FORAN MINING CORPORATION
904-409 Granville St.
Vancouver, BC
V6C 1T2, Canada

APPLICATION

1. This is an application by the Métis Nation – Saskatchewan (the “**MN-S**”) for judicial review in respect of a permit issued by Transport Canada on March 17, 2023 (the “**Permit**”) to McIlvenna Bay Operating Limited, a wholly owned subsidiary of Foran Mining Corporation (together, the “**Proponent**”) under section 7(6) of the *Canadian Navigable Waters Act*, R.S.C., 1985, c. N-22 (the “**Act**”) for an outfall structure portion of the McIlvenna Bay Mine Project (the “**Project**”). The MN-S was made aware of the Permit on August 10, 2023.

THE APPLICANT MAKES APPLICATION FOR:

2. An order quashing or setting aside the Permit;
3. A declaration that the Permit constitutes a breach by Canada, as represented in these proceedings by the Minister for Transport (the “**Minister**”), of its legal and constitutional duties to the MN-S to:
 - (a) Consult with the MN-S in respect to the subject matter of the Permit and strategic implications of the issuance of the Permit;
 - (b) Accommodate the MN-S in respect of the actual and potential impacts of the Permit on the MN-S’s asserted Aboriginal rights Aboriginal title; and
 - (c) Uphold the honour of the Crown;
4. A declaration that it was an error of law or unreasonable for the Minister to issue the Permit under section 7(6) of the *Act* in respect of the Project before the Crown had fulfilled its constitutional duties to consult with and accommodate the MN-S as described above;
5. An injunction preventing the Proponent from taking any steps in reliance of the Permit;
6. A declaration that the Permit fails to comply with the *Act*;
7. Costs; and
8. Such further and other relief as this honourable Court may deem appropriate and just.

THE GROUNDS FOR THIS APPLICATION ARE:

Parties

9. The MN-S is the democratically elected government of the Métis of Saskatchewan representing the rights and interests of Saskatchewan Métis, who are Aboriginal peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.
10. The MN-S is exclusively mandated to represent the Métis Nation within Saskatchewan based on the authorizations it receives from its Citizens and the Métis collectivity throughout Saskatchewan comprised of those Citizens, in respect of collectively held Métis Aboriginal rights, interests, and claims, as recognized by the Government of Canada in the *Métis Nation within Saskatchewan Self-Government Recognition and Implementation Agreement* signed February 24, 2023.
11. Transport Canada is a department within the Government of Canada and is responsible for the regulation of road, air, and marine transportation in Canada.
12. McIlvenna Bay Operating Subsidiary Ltd., a wholly owned subsidiary of Foran Mining Corporation, is the Project Proponent and recipient of the Permit.

The Project

13. The Proponent seeks to build the Project, a base and precious metals underground mine and surface mineral processing facility located in east-central Saskatchewan, approximately 375 kilometres northeast of Saskatoon and 65 kilometres west-southwest of Creighton, Saskatchewan.
14. The Project proposes to mine and process ore from the McIlvenna Bay deposit in east-central Saskatchewan. The Project is expected to transport ore concentrate to Flin Flon, Manitoba via road where it would be loaded onto railcars and distributed for smelting.
15. The Project is located on Crown lands within Treaty 10 Territory and the documented traditional territory of the Métis Nation, among other Indigenous peoples of the area.

The Crown's Consultation Obligation

16. The Crown has an obligation to consult an Indigenous community when the Crown (1) has knowledge, real or constructive, of a potential Aboriginal right or claim, and (2) contemplates conduct that (3) might adversely affect the Aboriginal right or claim.
17. The duty to consult extends to strategic, higher-level decisions that may have an impact on Aboriginal claims and rights.
18. The duty to consult varies with the circumstances, depending on the strength of the claim by the Aboriginal group and the seriousness of the potential impact. The duty to consult is grounded in the honour of the Crown and is a legal and constitutional obligation that acts as a constraint on the Crown's decision-making power.
19. The Government of Saskatchewan and the Proponent have acknowledged the impact of the Project on the Métis Nation and the Crown's corresponding duty to consult the MN-S with respect to the Project.

The Permit

20. The Permit was issued on March 17, 2023, under section 7(6) of the *Act*. The *Act* provides protections to maintain the public right of navigation on all navigable waters in Canada, including those for recreational purposes or as a means of transport or travel for Indigenous peoples of Canada. Works that affect navigation require approval under the *Act*, and Project criteria for outfalls and water intakes have such navigational effects as to trigger the approval requirements.
21. The Proponent applied for the Permit in July of 2022. The Permit application involved certain activities and work to be carried out respecting the Project which could have a prejudicial effect on the Aboriginal rights or title of the MN-S. The Crown's duty to consult with MN-S respecting the Permit was accordingly at issue.
22. The issuance of the Permit represented a strategic, higher-level decision, since it had the potential to remove the authority of the Minister of the Environment to designate the Project

under section 9(1) of the *Impact Assessment Act*. S.C. 2019, C. 28, section 1 (“**IAA**”).

23. Between July 2022 and March 2023, the MN-S did not receive appropriate notifications or information about the Permit, including the potential that the issuance of the Permit may preclude the Project's designation under the IAA.
24. The Minister issued the Permit stating in part that “the Minister has considered each of the factors listed in subsection 7(7) of the *Act*, additional information provided by [the Proponent], and any adverse effects that the decision to approve the work may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.”
25. The MN-S submits that the Minister did not provide appropriate notification to the MN-S with respect to the consideration or issuance of the Permit and its implications pursuant to the IAA. Notification of the issuance of the Permit and its implications under the IAA were only brought to the attention of the MN-S in passing by way of a letter from the Impact Assessment Agency of Canada to counsel for the MN-S on August 10, 2023.
26. The Crown has not fulfilled its duty to consult and accommodate the MN-S with respect to the Permit in this case.


THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING

27. The record before Transport Canada with respect to the Project;
28. Affidavit(s) which may be filed in the within proceeding; and
29. Such further and other material as counsel for the parties may advise.

The MN-S requests that Transport Canada send a certified copy of the following material that is not in the possession of the MN-S but is in the possession of Transport Canada to the MN-S and to the Registry of the Federal Court:

1. Any material relied on by Transport Canada in issuing the Permit.

Date: August 21, 2023.

Per 

Lawyers for the Applicant, the MN-S

Cassels Brock & Blackwell LLP

2200 – 885 West Georgia Street Vancouver, BC V6C 3E8

Arend J.A. Hoekstra

Tel: 604.283.1481

Fax: 604.691.6120

Email: tisaac@cassels.com

Emilie Cox

Tel: 778.372.7342

Fax: 604.691.6120

Email: ecox@cassels.com

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of _____ AUG 21 2023 A.D. 20 _____

Dated this _____ day of AUG 21 2023 20_____



**SVETLANA DOBROTA
REGISTRY OFFICER
AGENT DU GREFFE**