

FEDERAL COURT

BETWEEN:

MARTEN FALLS FIRST NATION, WEBEQUIE FIRST NATION, NIBINAMIK
FIRST NATION, NESKANTAGA FIRST NATION, EABAMETOONG FIRST
NATION, GINOOGAMING FIRST NATION, LONG LAKE #58 FIRST NATION,
CONSTANCE LAKE FIRST NATION and AROLAND FIRST NATION

("MATAWA FIRST NATIONS")

Applicants

THE ATTORNEY GENERAL OF CANADA
and
CLIFFS NATURAL RESOURCES INC.

Respondents

Application under s. 18 and 18.1 of the *Federal Courts Act*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant 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 applicant. The applicant requests that this application be heard at Toronto, Ontario.

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 prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

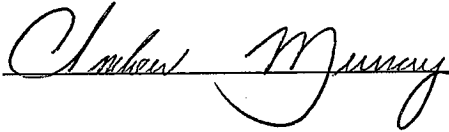
Copies of the Federal Courts Rules information concerning the local

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.

November 7, 2011

Issued by:
(Registry Officer)



**ANDREW MURRAY
REGISTRY OFFICER
AGENT DU GREFFE**

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
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TO EACH RESPONDENT:

THE ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Justice Building, 4th Floor
284 Wellington Street
Ottawa, ON K1A 0H8
Served via the Federal Court Registry

CLIFFS NATURAL RESOURCES INC.
200 Public Square, Suite 3300
Cleveland, OH 44114
U.S.A

AND ON NOTICE TO:

Canadian Environmental Assessment Agency
22nd Floor, Place Bell
160 Elgin Street
Ottawa ON K1A 0H3

The Honourable Peter Kent
Minister of the Environment
Les Terrasses de la Chaudière
10 Wellington Street, 28th Floor
Gatineau, QC K1A 0H3
Served via the Federal Court Registry

Fisheries and Oceans Canada
Headquarters 200 Kent Street
Ottawa, ON K1A 0E6

Natural Resources Canada
580 Booth Street
Ottawa, ON K1A 0E4

Transport Canada
330 Sparks Street
Ottawa, ON K1A 0N5

APPLICATION

THE MATTER UNDER REVIEW

The Agency's Decision

1. This is an application for judicial review in respect of the decision of the Canadian Environmental Assessment Agency ("the Agency") regarding the "track" of the environmental assessment of the Cliffs Chromite Project and the manner in which the federal Crown will consult and accommodate the applicants on this project.
2. In September or October 2011, the Agency chose to leave the federal environmental assessment ("EA") for the project as a Comprehensive Study, which is a less intensive "track" for an EA, and decided not to request the Minister to refer the project to a Review Panel, a more intensive assessment track. This is the decision under review.
3. The Agency's decision was communicated to the applicants on October 7, 2011, by letter. On that day, the Agency wrote to the applicants informing them that the project would proceed as a Comprehensive Study, despite the applicants' repeated requests that the project be referred to a Review Panel (more specifically, a Joint Review Panel).

The Matawa First Nations and Their Underlying Rights

4. The applicants are First Nations who live and have always lived in what is now called northern Ontario. The applicants are Aboriginal peoples within the meaning of s. 35 of the *Constitution Act, 1982* and have constitutional rights under that section. The applicants also each have the capacity of a "band" within the meaning of the *Indian Act, RSC 1985, c I-5*.

5. Together, the nine applicants form a regional political body called Matawa First Nations, led by a Chiefs Council.
6. On a larger scale, the applicants are represented by the Nishnawbe-Aski Nation and the Chiefs of Ontario, both political organizations of First Nations in the province of Ontario, and the Assembly of First Nations, a national First Nations political body.
7. The indigenous languages in the applicants' communities include Ojibway (*Anishinaabemowin*), Oji-Cree and Cree (*Mushkego*).
8. Eight of the applicants are parties to Treaty 9, a treaty made in northern Ontario in 1905-06 and with further adhesions in 1929-1930.
9. The applicants who are parties to Treaty 9 have long asserted, and continue to assert, that they have never ceded, sold or surrendered their homelands, and never agreed to give up their inherent jurisdiction over their territories and peoples. The First Nations maintain an oral version of the Treaty in which their ancestors entered into a political relationship with the Crown based upon the principles of friendship, mutual respect and shared arrangements. According to their understanding of the Treaty, the First Nations promised peaceful relations and a willingness to share the use of their homelands with the newcomers, while the Crown promised to protect the First Nations' livelihood and jurisdiction in a new era where both First Nations and non-Aboriginal peoples would take part in shaping the future of this vast northern region.
10. The Government of Canada has been aware of the First Nations' understanding of Treaty 9 for many years, but to date, it has refused to recognize this understanding of Treaty 9. The Crown asserts a different view of Treaty 9.

11. Nevertheless, while the exact content of the Treaty 9 is in dispute, there is some common ground. The applicants believe that the Government of Canada recognizes that eight of the applicants do have Treaty 9 rights, and accepts that these Treaty rights include, at a minimum, the right to hunt, fish, trap and gather in the Treaty territory.
12. Long Lake #58 First Nation asserts, and has long asserted, that it is not a party to any treaty. It asserts Aboriginal rights and title that are the subject of a land claim filed in the Ontario Superior Court.
13. The Matawa First Nations and their citizens continue to use the resources of their homelands for traditional purposes. They continue to engage in and rely on harvesting practices in their territories, including but not limited to hunting, trapping, fishing, berry-picking, gathering medicines and other plants, travelling across lands and waters, maintaining trails and access routes, maintaining cabins for land use purposes, practicing ceremonies, and other activities.
14. The applicants have an intimate relationship with the lands and waters of their traditional territories. Their ancestors travelled these lands and waters for generation after generation, earning their livelihoods according to a seasonal round. Burial grounds and other archaeological sites, often sacred to the applicants and largely undocumented, are located throughout the region.
15. The Matawa First Nations are proud of their identities and cultures. They are committed to economic, social, cultural and political development in their communities and in their homelands – in a manner that respects the Treaty and their Aboriginal rights, their traditions, the environment, and the long-term health and well-being of present and future generations.

The Cliffs Chromite Project

16. In just the past four years, it has become known that the homelands of the applicants are also the site of significant mineral deposits. In the area now dubbed "The Ring of Fire", significant quantities of chromite, nickel, copper, and platinum, as well as zinc, gold and diamonds are said to lie beneath the surface. Provincial officials and the mineral industry say the Ring of Fire may be the largest mineral development opportunity in Ontario in over a century; "another Sudbury".
17. As a consequence, the Matawa First Nations have found themselves in the middle of a mineral rush of historic proportions. Exploration companies flooded their territories; mining companies quickly bought up interests. According to provincial officials, dozens of companies now have interests in tens of thousands of mineral claims.
18. Cliffs Natural Resources Inc. ("Cliffs") is planning the first mining project within the Ring of Fire, and it is entering the federal and provincial environmental assessment processes. Called the Cliffs Chromite Project, the project includes:
 - a. An open pit chromite mine and processing facilities for 6,000 to 12,000 tonnes per day of chromite ore, expected to run for 30 years with a transition to underground operations;
 - b. Additional facilities in and around the mine site, including an ore processing facility; tailings ponds; a diesel generating station; fuel, chemical and explosive storage facilities; and other infrastructure;
 - c. Transportation facilities including a 340 km all-season road going north-south through the homelands of several Matawa First Nations to a railroad facility near Nakina, and an all-season airstrip near the mine; and

d. A ferrochrome production facility to be located near Sudbury.

19. The Cliffs Chromite Project is not the only project planned in the Ring of Fire; it is merely the first project to be submitted for environmental assessment.
20. Soon after Cliffs submitted its project, another company, Noront Resources Ltd. ("Noront"), submitted another project to the federal environmental assessment process. The Noront Eagle's Nest Project focuses on a nickel-copper mine to be located only a few kilometres from the proposed Cliffs mine. In addition to the mine, Noront's project includes another 225 km all-season road, a 90 km winter road, storage of mine tailings, approximately 100 km of underground mine slurry pipeline, a diesel generating station and railroad interconnections.
21. The applicants' understanding is that additional projects are in the advanced exploration phase and may lead to further mine development proposals in the region.
22. These developments are planned to occur where the applicants now live, have always lived, and will always live. The applicant First Nations are the only people or virtually the only people who have permanent settlements in the Ring of Fire area and live there on a permanent basis.
23. This area is in the muskeg of the James Bay Lowlands, one of the world's largest wetland ecosystems. It is a fragile environment, much of it in pristine condition untouched by industrial development. This remote area is in what Ontario calls the "far north", about 500 km northeast of Thunder Bay. It currently has no all-season roads or rail corridors. Its northern boreal ecosystem is home to diverse wildlife, including woodland caribou, a species at risk.

24. The environmental effects of the Cliffs Chromite Project will be significant.
25. The applicants rely on the wildlife, lands and waters of the Ring of Fire area and the surrounding region.
26. The potential adverse impacts of the Cliffs Chromite Project on the applicants are significant. If it takes place, the Cliffs Chromite Project will change the land and the lives of the Matawa First Nations, forever.
27. If considered on a cumulative basis with the other developments in the Ring of Fire, the potential impacts on the applicants and on the environment are even more dramatic.

The "Tracks" of a Federal Environmental Assessment

28. Before a development project breaks ground, each government has a responsibility to take care to assess its potential impacts, including its effects on the physical environment, social effects, effects on Aboriginal and Treaty rights, and other impacts.
 - a. The First Nations have a customary legal obligation to their members and to their lands to assess the project carefully and to facilitate a process where their communities can come to a collective and fully-informed decision about how to proceed with respect to the project.
 - b. Ontario will assess the project or components of the project through the Ontario *Environmental Assessment Act*, RSO 1990, c E 18.

- c. Canada will assess the project through the *Canadian Environmental Assessment Act*, SC 1992, c 37("the Act"). This is the process at issue in this case. As outlined below, a federal EA may be capable of integrating all three levels of assessment into a comprehensive process.

29. The federal Act contains five options or tracks for an environmental assessment. These are, at increasing levels of intensity: (1) No assessment, (2) Screening, (3) Comprehensive Study, (4) Mediation, (5) Review Panel.

30. The Cliffs Chromite Project falls under the Act and must be either a Comprehensive Study or a Review Panel:

- a. Conducting no assessment is not an option in this case. This project does not come under the exceptions in s. 7(1) of the Act.
- b. A Screening is the least intensive EA option, used for small projects. Because the Cliffs Chromite Project falls under the Comprehensive Study List Regulations (SOR 94-638), the responsible authority under the Act was required under s. 21 of the Act to put the project under the Comprehensive Study track, rather than use a Screening. This was done.
- c. A project may be referred to a Mediation or Review Panel at any time.
- d. Mediation is not a viable option in this case. Among other things, it requires the consent of the project proponent and other interested parties under s. 29(2), which has not been given.

- e. Under s. 25, the Agency can request the Minister of the Environment refer the project to a Review Panel if the project may cause significant adverse environmental effects or if public concerns warrant a referral. A referral to a Review Panel is ultimately made by the Minister.
- f. A Review Panel may become a Joint Review Panel through an agreement with other governments.

Canadian Environmental Assessment Agency

- 31. By virtue of s. 11.01(1) of the Act, the Canadian Environmental Assessment Agency acts as the 'responsible authority' for the purposes of this project. As such, it has certain powers, functions and responsibilities under the Act in managing the EA for this project.
- 32. The Agency's objects are set out in s. 62 of the Act. They include, among others: administering the environmental assessment process, promoting uniformity and harmony in assessments across all levels of government, and engaging in consultation with Aboriginal peoples.
- 33. The Agency's role is set out on their website as follows: "Our role is to provide Canadians with high-quality environmental assessments that contribute to informed decision making, in support of sustainable development. The Agency plays a leadership role in the review of major projects assessed as comprehensive studies and those referred to review panels. We also coordinate the Government of Canada's Aboriginal consultation activities during the environmental assessment process."

34. When the Cliffs Chromite Project's project description was accepted by the Agency for consideration under the Act, the Agency informed the applicants that the Agency would be "the federal Crown consultation coordinator" for the project, and that in this capacity, "the Agency will use the environmental assessment process as the main forum through which consultations will take place".

The Matawa First Nations Seek An Appropriate Process

35. When the Crown has real or constructive knowledge of First Nations' known or asserted rights and interests, the Crown has a constitutional duty to consult and accommodate those First Nations whenever it contemplates conduct that might adversely affect them.

36. Rooted in s. 35 of the *Constitution Act, 1982* and the core legal principle of the honour of the Crown, the duty is focused on the goal of reconciliation between asserted Crown sovereignty and the asserted rights of Aboriginal peoples.

37. The Matawa First Nations have consistently, repeatedly and urgently called on the Government of Canada and the Government of Ontario to ensure that the process for assessing the Ring of Fire projects is:

- a. ***Inclusive*** (appropriately broad, comprehensive and intensive given the scale of the projects and their potential impacts);
- b. ***Integrated*** (including maximum integration between federal, provincial and Aboriginal legal components);
- c. ***Coordinated*** (including appropriate coordination between the assessments of the multiple projects being proposed within the Ring of Fire region at the same time);
- d. ***Independent*** (providing fairness to all and impartiality in relation to the proponent and Crown decision-makers);

- e. **Flexible** (allowing for reasonable adjustments according to the needs of the First Nations and other circumstances that may arise in a review of this nature).

38. The applicants believe and have communicated that the process of assessment must respect First Nations by, among other things:

- a. Allowing sufficient time and flexibility in the process;
- b. Providing resources and capacity to allow the First Nations to meaningfully develop, gather and contribute information and to allow them to meaningfully study and respond to the information from the proponents;
- c. Providing capacity and opportunity for First Nations to perform their own customary legal duties with regard to land governance;
- d. Including community decision-making processes and procedures, for example in seeking guidance from Elders and using oral forums in addition to written ones, providing for oral translation, and providing opportunities for discussion;
- e. Ensuring a fulsome review of all impacts, including the complex environmental and Treaty/Aboriginal rights impacts associated with a project, and the most thorough consideration of potential mitigative and accommodative measures.

39. Starting in May 2011, before any project descriptions had been accepted by the Agency for consideration under the Act, the Matawa First Nations formally called for a Joint Review Panel structured by a negotiated agreement between Canada, Ontario and the First Nations.

40. This is a reasonable, sound approach. Among other things:

- a. It is compatible with both the applicants' understanding of the Treaty and Canada's understanding of the Treaty;
- b. It is compatible with Canada's (and Ontario's) legislation;
- c. It is capable of meeting the applicants' needs described above;
- d. It is an approach that the Agency and the federal Crown have used successfully several times with other First Nations on other major projects in Canada, including in the case of the Voisey's Bay nickel mine in Labrador. That project was reviewed under the Act by an independent panel established pursuant to a four-party agreement between the Innu Nation, the Labrador Inuit Association, and the federal and provincial Crowns.

41. The Matawa First Nations voiced their views and proposal to numerous officials including: the Agency, the federal Minister of the Environment, the Prime Minister of Canada, staff at Ontario's Ministry of Northern Development and Mines, the provincial Minister of the Environment, and the Premier of Ontario.

42. Other Aboriginal and non-Aboriginal communities who live in surrounding areas that may be affected by the Cliffs Chromite Project and other Ring of Fire Projects have voiced their support for the Matawa First Nations and their EA proposal. Consistent and significant public concerns have been expressed about this project and the EA track in which it will be assessed.

The Agency Ignores the Applicants, and Selects an Insufficient EA Track

43. Yet despite the need to consult and accommodate the applicants, despite the significant environmental effects of the project, despite the public concerns expressed about the project and the EA, and despite all of the applicants' efforts, the Agency chose to leave this project as a Comprehensive Study, and not request the Minister to refer the project to a Review Panel.

44. A Comprehensive Study is not a sufficient mechanism to consult and accommodate the applicants in respect of the Cliffs Chromite Project. The honour of the Crown requires more. Among other things:

- a. The Comprehensive Study is a largely paper-based assessment process that does not offer the same opportunities for public participation as a Review Panel, particularly oral hearings.
- b. As the Comprehensive Study is directed by Crown officials, and not by an independent panel, it may result in a narrower approach to the examination of potential impacts and mitigation measures.
- c. The Comprehensive Study process has short, inflexible deadlines established under regulation.
- d. As the Comprehensive Study process is engaged through written comments and submissions, it is largely inaccessible to the public living in the area in question, especially the significant number of Matawa First Nations members who do not speak, read or write in English or French.

- e. Although the federal Comprehensive Study and the provincial environmental assessment requirements may be 'harmonized', they are not fully integrated and proceed as separate processes, imposing additional requirements and burdens on First Nations communities with limited capacity.

- 45. Matawa First Nations have accordingly determined that the Comprehensive Study process does not meet the needs of the First Nations, and have communicated this consistently to Canada.
- 46. The Agency largely ignored the Matawa First Nations' concerns about the assessment process and their proposal to negotiate a workable process.
- 47. The Agency did not meaningfully consult the applicant First Nations about the selection of the assessment process, and did not accommodate their needs.
- 48. The Comprehensive Study is now underway.

RELIEF

- 49. The applicant makes application for:
 - a. An order that the Cliffs Chromite Project shall be referred to a Review Panel;
 - b. An order that the Government of Canada shall discuss the mandate and terms of reference of the Review Panel with the applicants and with the Government of Ontario with a view to reaching an agreement for a Joint Review Panel;

- c. An order prohibiting the Government of Canada from taking any steps to approve, permit or allow any aspect of the Cliffs Chromite Project or proceed with the project in any way until a Review Panel has been completed and all other requirements of the *Canadian Environmental Assessment Act* have been met;
- d. A declaration that, in the circumstances of this case, a Comprehensive Study is an inadequate mechanism to fulfill the Crown's duty to consult and accommodate the applicants with respect to the Cliffs Chromite Project;
- e. A declaration that, in the circumstances of this case, it would be unreasonable for the Minister of the Environment to fail to refer the Cliffs Chromite Project to a Review Panel;
- f. A declaration that the Crown has a duty to consult and accommodate the applicants in respect of the Cliffs Chromite Project, that this is an ongoing duty on the high end of the spectrum, and this duty includes but is not limited to consultation and accommodation in respect of the selection and implementation of the appropriate track for environmental assessment;
- g. A declaration that the Crown's duty to consult and accommodate the applicants in respect of the Cliffs Chromite Project includes but is not limited to consultation and accommodation in respect of the terms of reference and procedures as may be required to meet the reasonable needs of the First Nations to fully participate in the environmental assessment;

- h. A declaration that the applicants have not been sufficiently consulted or accommodated in the selection of the appropriate track for environmental assessment of the Cliffs Chromite Project;
- i. In the alternative to (a) and (b), an order that the Canadian Environmental Assessment Agency shall request the Minister of the Environment to refer the Cliffs Chromite Project to a Review Panel;
- j. In the further alternative to (a) and (b), an order setting aside the Canadian Environmental Assessment Agency's act or decision not to utilize its discretion under section 25 of the *Canadian Environmental Assessment Act* to request the Minister to refer the project to a Review Panel; and
- k. In the further alternative to (a) and (b), an order that the Canadian Environmental Assessment Agency shall consult and accommodate the applicants in respect of the selection of the appropriate track for environmental assessment of the Cliffs Chromite Project;
- l. The costs of this Application on such terms as this Honourable Court may determine;
- m. And such further and other relief as this Honourable Court may determine to be just.

GROUNDNS

50. The grounds for the application are:

The Crown is in Breach of its Constitutional Duty to Consult and Accommodate

51. The first ground of review is that the Crown is in breach of its duty to consult and accommodate the applicants.
52. The Crown failed to adequately consult and accommodate the applicants in respect of the process itself. In a project of this nature, the environmental assessment process itself has an impact on the applicants and their rights. It acts as the blueprint for the entire project.
53. Additionally, a Comprehensive Study is an insufficient means to consult and accommodate the applicants in respect of the project overall, given its scale, intensity and level of impact on the applicants and their rights.
54. Among the options in the Act, only a Joint Review Panel, structured by a negotiated agreement, has the potential to fulfill the Crown's duty to consult and accommodate in the circumstances of this project.
55. The duty to consult and accommodate is ongoing. The applicants do not wish to sit on their rights and wait until the eleventh hour, when the proponent is breaking ground, to challenge this process. The error in respect of the proper process should be corrected immediately.

The Agency Committed Errors of Administrative Law

56. The second ground of review is that the Agency committed errors of administrative law in making its decision not to exercise its discretion under section 25 of the *Canadian Environmental Assessment Act* to request the Minister to refer the Cliffs Chromite Project to a Review Panel.
57. The Agency committed an error by failing to take relevant considerations into account, namely the considerations of significant adverse environmental effects under section 25(a), and considerations of public concern under section 25(b), and relevant factors that go towards those two considerations.
58. The Agency committed an error by improperly failing to exercise its discretion under section 25 of the Act to request the Minister to refer the Cliffs Chromite Project to a Review Panel.
59. The Agency committed an error in making an unreasonable decision, having regard to the full scheme of the Act and all the circumstances of this case.
60. The Agency committed an error contrary to procedural fairness in failing to provide the applicants with written reasons for its decision.

Statutes and Rules Relied On

61. The applicants rely on the following statutes and rules:
- a. Section 35 of the *Constitution Act, 1982*;
 - b. Section 91(24) of the *Constitution Act, 1867*;
 - c. The legal principle of the honour of the Crown;

- d. The *Canadian Environmental Assessment Act*, SC 1992, c 37, and in particular but without limitation sections 2(1), 25, and 28; and
- e. The *Federal Courts Act*, RSC 1985, c F-7, and in particular but without limitation sections 18 and 18.1.

EVIDENCE

62. This application will be supported by the following material:

- a. A certified copy of the record from the Agency;
- b. The affidavits of the applicants to be filed;
- c. Such other affidavit and other material as counsel shall advise and this Honourable Court shall permit.

CERTIFIED RECORD

63. The applicant requests the Agency to send a certified copy of the following material to the applicant and to the Registry pursuant to Rule 317 of the *Federal Courts Rules*:

- a. A complete copy of the project file;
- b. In particular, any request, recommendation or advice made by the Agency to the Minister of the Environment in respect of the Cliffs Chromite Project, if any, all material before the Agency in forming such request, recommendation or advice, and any response from the Minister.

November 7, 2011

A handwritten signature in black ink, appearing to be a stylized combination of initials or a name, positioned above a horizontal line.

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