CITATION: Eabametoong First Nation v. Minister of Northern Development and Mines, 2018 ONSC 4316
DIVISIONAL COURT FILE NO.: 209/16
DATE: 20180716

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., Sachs and C.J. Horkins JJ

BETWEEN:	
Eabametoong First Nation Applicant	Robert J. M. Janes, QC and Krista Robertson, for the Applicant
– and –	
Minister of Northern Development and Mines, The Director of Exploration for the Ministry of Northern Development and Mines and Landore Resources Canada Inc. Respondents	Kisha Chatterjee and David J. Feliciant, for the Respondents, Minister of Northern Development and Mines and The Director of Exploration for the Ministry of Northern Development and Mines Jeff G. Cowan, for the Respondent, Landore Resources Canada Inc.
	HEARD at Toronto: February 7 and 8, 2018

Sachs J.

Introduction

[1] On March 31, 2016, The Director of Exploration for the Ministry of Northern Development and Mines ("the Director") granted an exploration permit (the "Permit") to Landore Resource Canada Inc. ("Landore"). The Permit authorizes mine exploration drilling in an area in Northern Ontario that is within the traditional territory of the Eabametoong First Nation ("Eabametoong").

[2] On this application for judicial review Eabametoong seeks to set aside the Permit on the basis that the Director failed to properly discharge the Crown's duty to consult. The parties agree that the Crown had a constitutional duty to consult Eabametoong, but disagree as to whether that duty was discharged. The parties also agree that the Director's

decision that the duty was discharged is to be reviewed by this court on a standard of reasonableness. The parties disagree as to the remedy that should be imposed if this court were to find that the Director's decision that the duty was properly discharged is an unreasonable one.

[3] For the reasons that follow I would grant the application and set aside the Director's decision to grant the Permit. I would remit the application back to the Director pending completion of adequate consultation with Eabametoong.

[4] Fundamentally, I find that certain clear expectations were created by the Crown and its delegate, Landore, as to how the duty to consult would be fulfilled in this case and then, without meeting those expectations or offering an explanation as to why they could not be met, the Crown changed the process in such a way as to render it one that could not reasonably be considered to be a genuine attempt at "talking together for mutual understanding". In conducting my analysis, the controlling question was whether the consultation in this case could reasonably have been found to have maintained the honour of the Crown and fulfilled its duty to attempt to further the goal of effecting "a reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake." (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 43 and 45).

The Duty to Consult and the Regulatory Regime

The Duty to Consult

[5] The lands that the Permit affects are subject to Treaty 9. Under that treaty, the First Nations communities surrendered certain lands, subject to the right to "pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered", subject further to the government's right to take up certain tracts of the surrendered lands for certain purposes, one of which is mining. Thus the lands in question are surrendered lands that the government has the right to "take up."

[6] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 the Supreme Court of Canada set up a general framework for the duty to consult and accommodate, in the context where Aboriginal title or rights claims had not been decided. In doing so, they made a number of important statements about the duty to consult.

[7] In discussing the source of the duty the court states the following at paras. 16 – 17:

> [16] The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples. It is not a mere incantation, but rather a core precept that finds it application in concrete practices.

> [17] The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. 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." (citations omitted).

[8] The court also makes several important points about the scope and the content of the duty to consult. First, it varies with the circumstances. However, in general terms, "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." (para. 39).

[9] In all cases the honour of the Crown requires that the Crown act in good faith "to provide meaningful consultation appropriate to the circumstances." This does not require agreement, but it does require that the Crown have a real intention to substantially address Aboriginal concerns. It also requires that the Indigenous communities not frustrate the Crown's reasonable good faith efforts by taking unreasonable positions or thwarting governments from making decisions (para. 42).

[10] At the lower end of the spectrum "where the claim to title is weak, the Aboriginal right limited, or the potential infringement minor…the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. 'Consultation in its least technical definition is talking together for mutual understanding.'"(para. 43). At the higher end of the spectrum "deep consultation, aimed at finding a satisfactory interim solution, may be required."(para.44).

[11] "The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake."(para. 45).

[12] At para. 46 the McLachlin C.J., for the Court, quotes from the New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) and states that it provides "insight" into what is meant by consultation in this context:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed… genuine consultation means a process that involves…
>
> -gathering information to test policy proposals
> -putting forward proposals that are not yet finalised

> -seeking Maori opinion on those proposals
> -informing Maori of all relevant information upon which those proposals are based
> -not promoting but listening with an open mind to what Maori have to say
> -being prepared to alter the original proposal
> -providing feedback both during the consultation process and after the decision-process

[13] The court makes it clear that "[i]t is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts." (para. 51).

[14] At all times the duty to consult remains the obligation of the Crown. This "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal groups." While the Crown may delegate procedural aspects of the consultation to third parties, the ultimate legal responsibility for the consultation remains with the Crown (para. 53).

[15] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Supreme Court of Canada addressed the duty to consult in the context of a proposal for a winter road that was going to be placed on First Nations land that had been surrendered and that was subject to a "taking up" exception, like the land at issue in this case. At paragraph 1 of the decision Binnie J., for the Court, states:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

[16] Since the road at issue was a "fairly minor winter road" that was being built on surrendered lands where the First Nations "hunting, fishing and trapping rights are expressly subject to the 'taking up' limitation" the court found that the Crown's duty to consult lay at the lower end of the spectrum. As described by the court at para. 64 this meant that :

> The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case

> here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.

The Regulatory Regime

[17] Prior to November 1, 2012, mining exploration in Ontario did not require a permit. On November 1, 2012 a new regulatory regime requiring a permit and consultation for early exploration came into effect. This regime is embodied in *Exploration Plans and Exploration Permits*, O. Reg. 308/12 (the "Regulation), under the *Mining Act*, RSO 1990, c M.14 (the "Act").

[18] Section 14 of the Regulation requires the Director to identify and notify any Aboriginal communities that may be affected by a submitted application for an exploration permit. Those communities may then provide the Director with written comments as to any adverse effects the activities proposed in the permit may have "on their existing or asserted Aboriginal or treaty rights." In such an event, the early exploration proponent "shall consult with Aboriginal communities pursuant to any direction provided by the Director". The Director may require the proponent to file a "consultation report" in an approved form regarding "any consultation process that has been conducted, including with regard to any arrangement reached with an Aboriginal community or the efforts made to reach such an arrangement, before deciding whether to issue an exploration permit."

The Policy

[19] The Ministry of Northern Development and Mines ("MNDM") also put in place written guidelines setting out "its approach to implementation of the consultation requirements" required under the Regulation (the "Policy").

[20] The Policy summarizes what the duty to consult consists of and sets out that the extent of the duty may fall along a spectrum "depending on the nature of the rights in question and the seriousness of the potential impact on those rights." It also clearly states that "[r]egardless of the extent of the consultation required, courts have been clear that meaningful consultation always requires that the Crown to provide for a process that enables:

- Starting the process in a timely way, when information can still be effectively considered and incorporated into a project plan, as appropriate;
- Sharing information on the proposed action or activity;

- Obtaining information from the community on their rights and assertions and any perceived impacts;

- Considering the potential impacts and determining how to proceed, including proposals to address concerns raised, where appropriate;

- Providing feedback during the consultation process and after a decision is made."

[21] The Policy has a section entitled "Who does what?" While the Crown may delegate procedural aspects of the consultation process to the proponent, the duty remains the Crown's and thus it is up to the Crown to "provide direction on the scope of the consultation required in the circumstances;" "provide ongoing direction, oversight and supervision of the process;" and "assess the sufficiency of consultation and accommodation, where required, and make a decision."

[22] The Proponents are expected to participate directly in the consultation process by providing information to the affected communities about the proposed exploration activities, gathering information from those communities about how those activities could adversely affect the communities' Aboriginal or treaty rights, discussing with the communities and the Minister if appropriate ways to minimize or avoid the concerns raised and "documenting the process and decisions made and reporting to MNDM."

[23] Aboriginal communities are also expected to participate in the process by outlining their concerns "with sufficient detail and specificity that the Crown and proponents can consider and assess" those concerns and address them, if required; "not frustrate reasonable, good faith efforts to consult; not take unreasonable positions to thwart government from making decisions or in an attempt to prevent projects from proceeding."

[24] The Policy also contains a section called "Record Keeping and Reporting". It imposes an obligation on the proponent to "keep a detailed record of any and all efforts they take to notify and consult with Aboriginal communities."

[25] When a project is at the stage of requiring an exploration permit, MNDM "strongly encourages proponents to make efforts, including through the required consultation process, to reach arrangements with communities."

The Consultation in This Case

Eabametoong and the Lands Covered by the Permit

[26] Eabametoong is an Anishinabek Nation whose reserve is situated at Fort Hope in Northern Ontario. Its traditional territories are situated around this community. The Permit area in and around Miminiska and Keezhik Lakes is used year round by several extended families for sustenance, cultural and spiritual purposes according to the traditional stewardship rules of the Eabametoong family clans.

[27] The record before us discloses that the Miminiska and Keezhik Lakes area is "near and dear" to Eabametoong. It is approximately 42 kilometres west of the Fort Hope reserve, and is accessed by Eabametoong members primarily by boat in the summer and snowmobile in the winter. The food security of Eabametoong depends on harvesting in this area. The remote natural quality of the area sustains the cultural and emotional well-being of the Eabametoong families who maintain cabins, registered trap lines and fishing sites around the lakes. Many Eabametoong elders were born in the area and the graves of their ancestors are situated throughout the area. As the Director acknowledged in the Permit, "the Miminiska area is used intensively and extensively."

Landore's Claims in the Area

[28] Landore has two blocks of mining claims in the area – a southern block on the Miminiska Lake Property and a northern block on the Keezhik Lake Property. The two blocks are approximately 15 kilometres apart. The southern block is composed of 3 continuous properties covering an area of 5,494 hectares with 52 patented claims and 22 staked claims. The northern block is composed of 43 staked claims over 9,470 hectares.

[29] Landore's patented claims are not subject to the Regulation. Under the Act, Landore must perform a certain amount of exploration on its staked claims to keep them in good standing. The Director suspended this obligation in order to allow the consultation process to be completed and that suspension was continued pending the completion of these proceedings. Landore has also committed to not conducting any further exploration pending the disposition of this application.

Landore's Previous Contact with Eabametoong

[30] Landore acquired its patented and staked claims in the Miminiska Lake Property between 2000 and 2003. It completed four drilling campaigns between 2003 and 2005. None of this activity required a permit. In the course of this exploration Landore did have contact with Eabametoong. No further exploration was conducted in this area after 2005.

[31] In 2011 to 2013 Landore expressed an interest in conducting some exploratory drilling in the Keezhik Lake area and held some discussions with the Eabametoong about their proposed activities. However the work did not proceed at that time.

Landore Applies for the Permit

[32] As of April 1, 2013, early exploration on staked claims became the subject of the Regulation and could not take place without a permit.

[33] On August 22, 2013 Landore contacted the Chief of Eabametoong and advised them that they wished to conduct a 2,000 metre drilling programme on the Keezhik Lake Property during January to February of 2014. The letter closed in the following manner:

> Landore respects Eabametoong's traditional territory. As such, Landore kindly requests Eabametoong's approval and support

> before proceeding with its proposed exploration program. Landore looks forward to continuing its good working relationship with Eabametoong.

[34] On September 10, 2013 the Chief replied to Landore indicating that they would like to have a face-to-face meeting to discuss Landore's plans and to establish a good working relationship. At this visit Eabametoong wanted to introduce Landore to the family/clan members who continued to exercise their Aboriginal and treaty rights in the area. Eabametoong also wanted to enter into "an Agreement in the form of a MOU or LOI to formalize our/your intention on the basis of good faith and respect."

[35] On September 13, 2013 Landore wrote back to the Chief confirming that it would also like to sign a Memorandum of Understanding with Eabametoong "to build upon our existing working relationship." It then attached a proposed MOU based upon the one that it had entered into with another First Nation in 2007. Landore also welcomed the opportunity for a face-to-face meeting with the Chief, the council and the family/clan members who were interested in Landore's exploration activities.

[36] On October 10, 2013 Landore submitted its application for the Permit. The application was amended the next day. As already indicated the Permit was for early exploration activities only. At this stage the activity that is authorized on the land is drilling with mechanized equipment. Each hole drilled would be 15 cm or less in diameter. Landore's application indicated that it desired to drill in excess of 20 holes, although at the hearing before us Landore stated that it intended to limit its activities to 20 drill holes. While the extent of the footprint on the land created by this activity is not entirely clear, the record before us is clear that the footprint extends beyond the holes themselves. Areas of land have to be cleared to make a pad large enough for the safe operation of the drill and any equipment used to support the drilling. If the area is a remote one (which this one is) helicopters are used to support the drilling. The drills are taken apart, flown in by helicopter to the site and reassembled. The drill pad for helicopter supported drilling is typically 40 to 50 meters in diameter.

[37] Landore's application was circulated by the Director to Eabametoong (the Aboriginal community that the Director identified as having traditional lands in the area of the proposed exploration) on October 29, 2013. The Regulation provides that if the Director is satisfied that appropriate Aboriginal consultation has been carried out, the Director is to make a decision on the permit application within 50 days of the circulation date. However, the Director retains the discretion to put a temporary hold on the application.

The First Face-to-Face Meeting

[38] The first meeting between Landore and Eabametoong after Landore filed its application took place on December 5, 2013 at Landore's offices in Thunder Bay. Landore's CEO and Eabametoong's Chief and Council members attended.

[39] On December 9, 2013 Ms. Tuomi (Landore's Exploration Manager) wrote to the Director detailing its version of what occurred at that meeting. As put in that correspondence:

> [Landore's Chairman/President] gave Eabametoong a corporate review of Landore and [Landore's Exploration Manager] gave full presentation on Landore's Miminiska Lake project and proposed exploration activities.
>
> Eabametoong did not raise any concerns during the course of this meeting regarding any adverse effects the activities proposed in this application may have on its existing or asserted Aboriginal or treaty rights.
>
> Landore has fulfilled all obligations, including consultation, in regards to this permit application.

[40] On the same day that Ms. Tuomi wrote the Director to advise them that Landore had fulfilled its obligations regarding consultation, Ms. Tuomi emailed Eabametoong's Chief enclosing a revised MOU and attaching reference claim maps for Eabametoong to review and approve.

[41] In the meantime, Eabametoong's view was that the December 5th meeting was only the beginning of the consultation process, a process that would also include having Landore meet with the Eabametoong's members who were most directly affected by the Permit and executing a MOU. Given their view that the December 5th meeting was purely introductory, the Chief and Council members who attended the meeting chose not to make any substantial comment on the proposed exploration.

[42] On December 12, 2013 Eabametoong contacted the Ministry by telephone seeking to clarify the consultation process and the deadlines for the Permit decision. As a result, the Director contacted both Landore and Eabametoong and arranged for a deferral of the permit decision until January 14, 2014 to allow for a consultation meeting with the affected land users.

Eabametoong Details Its Concerns About the Proposed Exploration

[43] On January 6 and 7, 2014 Eabametoong held a two day internal meeting with representatives of the families with customary rights in the affected areas to discuss Landore's proposal. A wide range of concerns were expressed, which were detailed in a list that Eabametoong sent to the Ministry on January 14, 2014. The notes from that meeting also indicated the need for further information in respect of the exploration proposal.

[44] On the same day the Ministry replied, promising that it would be in touch with Eabametoong "over the next couple days regarding these comments." That contact never happened, although the day after receiving the comments the Ministry wrote to Landore

to request a meeting to discuss the comments. That meeting (which did not include Eabametoong) occurred on March 6, 2014.

[45] According to a memorandum prepared by Landore as to what occurred at that meeting, it was agreed that Landore would go to the affected community for a further meeting in the early summer of 2014 and Landore would continue its talks with Eabametoong to establish a MOU. According to that memorandum, Ms. Tuomi "stated that Eabametoong's approval of Landore's proposed exploration activities hinges in part on the establishment of a MOU, and so the MNDM must grant the Exploration Permit after this has been done." The Ministry agreed that the temporary hold on Landore's permit application would continue and that Landore would be relieved of any financial or work obligations for its staked claims while the consultation process unfolded.

The Second Face-to-Face Meeting

[46] While the parties had originally hoped to hold a meeting in January of 2014, that meeting was postponed to the summer, both to accommodate the schedules of the parties involved and to allow the Ministry to meet with Landore regarding Eabametoong's concerns. As a result, the second face-to-face meeting between Eabametoong and Landore after the Permit application was filed did not occur until July 7, 2014.

[47] The Ministry did not attend the meeting and Landore kept no notes of the meeting or the concerns that were expressed at that meeting. It is clear that land users expressed frustration and anger about past impacts from previous drilling in the Miminiska area and expressed concerns about how more drilling in the areas covered by the proposed permit would also interfere with fish and wildlife. At the end of the meeting the CEO of Landore committed to a follow-up community meeting.

[48] After the July 7, 2014 meeting Eabametoong and Landore continued to engage regarding setting up a follow-up community meeting. The communications between the parties reveal that neither party communicated any sense of urgency about setting up this meeting. Landore sent emails in both September and December of 2014 asking for a proposed date. Eabametoong, in the meantime, advised Landore that it was experiencing a community crisis as a result of a series of suicides, deaths and arsons. In the midst of these crises Eabametoong held an election.

[49] On June 26, 2015 Landore emailed Eabametoong's Chief to congratulate her on her re-election and to ask for a suggestion as to a date for another community meeting and confirmed that one of the topics for that meeting would be the MOU.

[50] On July 1, 2015 the Chief emailed back suggesting that Landore contact Eabametoong with a view to setting up a further community meeting in early August of 2015. Landore did not reply to this email.

[51] At the end of August and in September of 2015 emails were exchanged between the Ministry and Eabametoong about a further in person meeting, possibly in October of 2015. No meeting was arranged for October.

The Ministry Begins to Push for a Conclusion to the Consultation Process

[52] On November 6, 2015 the Ministry wrote Landore asking for an update on the Permit application and stating that "there will be a push from MNDM to deal with all 'held' permits to make a decision one way or another in the coming months."

[53] Ms. Tuomi replied on November 13, 2015. In her reply she gave her account of the reasons for the delay. In doing so she stated that the second meeting was delayed until July of 2014 "due to organizational issues at the First Nation" (which is not accurate). She indicated that since that meeting Landore had been trying to set up a further community meeting, without success. She then asked for the Ministry's assistance "in the advancement of positive communications with Eabametoong." She did not advise the Ministry that Landore had failed to respond to Eabametoong's email suggesting that the parties work towards a further community meeting in early August of 2015.

[54] The Ministry intervened with a view to coordinating a community meeting between Eabametoong and Landore, with Ministry representatives in attendance. Both parties proposed dates in December, but their dates did not align. Thus, the Ministry began to canvass dates in January of 2016. The Ministry proposed either January 13 or 14, 2016. Eabametoong agreed, but Landore wanted the meeting to be an in person meeting, with their CEO in attendance and suggested that he might be in the country later in January (the CEO resided in Europe.)

Landore Requests a Private Meeting with the Director

[55] On January 3, 2016 Ms. Tuomi of Landore emailed the Director stating that it was "urgently" requesting a meeting with the Director in advance of any meeting with Eabametoong. Emails were exchanged between the Ministry and Landore with a view to setting up both a face-to-face meeting between the Ministry and Landore and a meeting with the Ministry, Landore and Eabametoong.

[56] On January 7, 2016, the Ministry emailed Landore indicating that they were going to coordinate "face-to-face meeting(s) during the week of January 18, 2016" as Landore's CEO was going to be in Thunder Bay at that time.

[57] On January 19, 2016, unbeknownst to Eabametoong, the Ministry and Landore had a face-to-face meeting. No face-to-face meeting was arranged that involved Eabametoong.

[58] Eabametoong was never told what took place at the face-to-face meeting between the Ministry and Landore until it commenced this litigation. It since learned that at that meeting Landore advised the Director in confidence that it had entered into negotiations with Barrick (a major gold mining company) and needed to get its permit approved as soon as possible. At that meeting Landore also agreed to decommission its previous Miminiska Lake exploration camp in exchange for being able to use the Eabametoong facilities for future exploration work.

Events Following the January 19, 2016 Private Meeting

[59] From the time of the meeting on January 19, 2016 neither the Ministry nor Landore made any further attempts to set up a community meeting with Eabametoong, nor was Eabametoong advised of any reason for this change in approach.

[60] On January 20, 2016 the Ministry advised Landore that it would be "writing to [Eabametoong] to inform them that we plan to make a decision on the permit in the near future and asking for any information they have that might influence the decision by the Director of Exploration." The Ministry also asked Landore to confirm in writing its intention to "dismantle and clean up the existing Miminiska campsite."

[61] On January 26, 2016 Landore emailed the Ministry confirming that "in consideration of Landore being able to utilise [Eabametoong's] facilities at Fort Hope including their accommodation unit for staging future exploration programs, Landore would be agreeable to decommission the Miminiska camp."

[62] On February 10, 2016 Landore wrote to the Ministry indicating that it had not heard from the Ministry and stating "For reasons we discussed with you during the last meeting in January, Landore has an urgent need for this Exploration Permit. Please let me know when the MNDM will grant this permit."

[63] Ms. Tuomi, who wrote this email, was cross-examined about the "reasons" she was referring to that gave rise to this urgent need for the permit. She stated that the only reasons she was referring to were the fact that Landore had waited long enough for the permit, had fulfilled all the requirements to obtain the permit and its shareholders were growing impatient.

[64] Her evidence stands in contrast to the evidence of Mark O'Brien, the Ministry representative. He stated on cross-examination that he had been told by Mike Grant, the Ministry representative who was at the January 19, 2016 meeting and who was dealing with Ms. Tuomi, that the urgent need that had been communicated to the Ministry was the fact that Landore was negotiating with a senior mining company.

[65] On February 11, 2016, the day after the Ministry received the email from Landore expressing its "urgent need", Mike Grant replied to Ms. Tuomi, stating that he had written to Eabametoong "to tell them that the decision on the permit will be made on February 22, 2016, unless significant information identifying specific adverse impacts from the proposed activities is provided to me."

[66] On February 11, 2016, Mr. Grant also wrote to Eabametoong advising them of Landore's commitment to decommission the Miminiska Lake exploration camp and stating :

> I plan to make a decision on the permit application noted above, on February 21, 2016; my decision will be based on available, relevant information. If [Eabametoong] can provide any additional information identifying potential adverse impacts to your

> community's asserted or established Aboriginal treaty rights that may arise from proposed site-specific exploration activities, it will be considered in my decision.

[67] As soon as it received this letter, Eabametoong contacted Ms. Tuomi at Landore requesting a meeting. On February 16, 2016 Landore replied, stating that it had waited long enough, had held two meetings and was not prepared to have another one. No reason was given for the sudden urgency.

[68] On February 19, 2016 Eabametoong's counsel wrote the Ministry expressing its concern that "notwithstanding significant efforts on the part of both Landore and Eabametoong" Landore had abandoned its efforts to "meet with Eabametoong and chose to terminate consultations." The letter also stated that after the efforts that had been made to arrange a meeting in January of 2016, Eabametoong was shocked to receive the Ministry's letter indicating that it was proceeding with a decision on the permit. Eabametoong's counsel reiterated the significance of the territory to Eabametoong, its concerns with Landore's past track record, the list of concerns generated at the Eabametoong community meeting on January 7 and 8, 2014, the need for a Memorandum of Understanding and the fact that Eabametoong had attempted to set up a subsequent meeting with Landore, but that this had proved difficult because of Landore's insistence that its CEO, who resides in the United Kingdom, be present in person at any such meeting. The letter concludes by stating:

> It is impossible to consider how the activities associated with the Permit application would not have a significant impact on the exercise of Eabametoong's Aboriginal and Treaty rights, both in the short and long term. At a minimum, land users will be immediately displaced from the area. On a longer term, particularly if the site is not adequately remediated as in the past, Eabametoong members will not have confidence in the safety of harvesting in the area, and their sense of stewardship, relationship to the land, and traditional knowledge of the land and its resources will be disrupted or destroyed. To date, Landore has taken no steps to address or respond to Eabametoong's concerns, despite Eabametoong's clear communications to Landore of the significance of the area to the exercise of Eabametoong's Aboriginal and Treaty rights and its concerns about the impacts of exploration drilling and associated activities.
>
> If MNDM proceeds to issue the Permit to Landore in the present circumstances, Ontario will be in breach of the honour of the Crown and its duty to consult with Eabametoong. Eabametoong would view the Permit to be unlawful, and subject to judicial review.

[69] On March 3, 2016, Mike Grant of the Ministry wrote to Ms. Tuomi at Landore enclosing the conditions that the Ministry proposed to place on the permit. Ms. Tuomi replied on the same date, confirming that Landore agreed with the conditions and stating "It would be very good if MNDM could issue this permit by tomorrow as Landore will be meeting with Barrick on Sunday (March 6) at their office in Toronto to discuss the Miminiska project."

[70] On March 4, 2016 the Ministry wrote to Eabametoong indicating that it was enclosing "possible terms and conditions" to address the concerns raised by the community at their meeting in January of 2014. The letter summarized some of the proposed terms and set a deadline of March 11, 2016 for a response to the proposed conditions. According to the letter, after March 11, 2016, the Ministry hoped "to be in a position to proceed with a permitting decision." The letter also acknowledged Eabametoong's desire for a Memorandum of Understanding and encouraged continuing engagement to achieve such an agreement, engagement that the Ministry was prepared to facilitate.

[71] On March 11, 2016, Eabametoong's legal counsel responded, indicating how and why the proposed permit conditions did not address most of the concerns raised by the Eabametoong in relation to the permit; registering its view that a deadline of five business days to respond to the proposed conditions was unreasonable and reiterating the need for a meeting with community members before the permit was issued. The letter detailed the following reasons why a community meeting was necessary and why the proposed conditions did not alleviate the need for such a meeting:

(1) The proposed conditions would require Landore to provide written advance notice of its intention to mobilize and demobilize on its mining claims to conduct exploration on a specific site and to provide work plans on an annual basis. The intent of these conditions, according to the Ministry, was to inform the community in advance of the "intended timing, location and nature of the company's exploration activities." (see Ministry letter, March 4, 2016). According to Eabametoong, the permit application did not give it sufficient information to know where "line cutting, trenching, pitting and drilling are proposed" within the large area covered by the application, thus enabling Eabametoong "to identify specific areas of sensitivity, use or concern" A meeting would enable the parties to share maps and plans. Simply requiring Landore to give notice of its proposed specific activities after it already has a permit "would not give Eabametoong any rights to provide meaningful input or be accommodated if they are merely notified that drilling is about to occur in a sensitive area."

(2) The proposed terms and conditions provided that no exploration activities were to take place within 30 metres of the shore of a body of water from April 15 to May 31 inclusive; no exploration activities were to take place from September 15 to October 15 inclusive and all cut lines were to have a setback of a minimum of 10 metres from the high-water mark of water bodies. According to the Ministry's letter of March 4, 2016, the first condition was meant to address the concern

identified by Eabametoong about the aesthetic impact of the exploration activities on tourism in the area and the other two were meant to address Eabametoong's concerns about the impact on the exploration activities on the spring goose hunt and fish harvest (and related spawning activities) and on the fall moose hunt festival. According to Eabametoong, without specifics as to where the activities were to occur, Eabametoong had been unable to compile data as to the traditional uses that Eabametoong has exercised in those areas. Direct community engagement would allow Eabametoong to identify those areas where they exercise their Treaty rights and to identify the nature of those rights so that specific conditions could be put in place to protect those rights. As put by Eabametoong's counsel "It is clear that members intensively and regularly use the area. Simply stating there must be small set backs from water courses does not address potential significant adverse impacts to Treaty rights. For example, trenching on a trapline, or drilling into a grave site or other areas of historical or cultural significance."

(3) In spite of the discussion about this commitment, there was no proposed term or condition to address Eabametoong's concerns "about debris and pollution left by the proponent from prior activities, which is deeply offensive to Eabametoong, yet no concrete steps have been taken beyond verbal assurances to actually carry out clean up and remediation." Attached to the letter was a report that Eabametoong had previously provided to the Ministry on the state of Landore's previous camp from its 2011 activities. According to Eabametoong, it required "a good faith, face-to-face meeting with the proponent and Ontario and a concrete plan of action to restore trust and confidence in Eabametoong members that the proponent will conduct its activities in a respectful manner and that Ontario will enforce its regulatory requirements that workplaces be kept clean during operations and left clean at the termination of activities. It is unacceptable that the proponent would receive authorization form MNDM to proceed with new activities when there is outstanding damage from previous activities that has gone unaddressed for several years."

(4) According to Eabametoong, it is its practice and the standard industry practice, for a proponent to enter into a Memorandum of Understanding with the affected First Nation before carrying out any exploration activities. In spite of Landore's stated intention to negotiate such an agreement, no meeting had occurred to facilitate this negotiation and no agreement was in place. Once Landore had its permit it would have no incentive to negotiate such an agreement. "An agreement cannot be struck without appropriate information sharing, efforts to address Eabametoong concerns, and measures in place to restore the broken relationship between this company and Eabametoong."

[72] The Ministry did not reply to this letter. After Eabametoong commenced its judicial review application it obtained a document from the Ministry in which a Ministry official had gone through each one of the concerns expressed by Eabametoong in January of

2014 and commented on those concerns. Much of the information in this document was never communicated to Eabametoong prior to the commencement of this proceeding.

The Ministry Issues the Permit

[73] On March 31, 2016, the Ministry granted the Permit to Landore subject, essentially, to the conditions it had originally proposed and that are discussed above.

Events Following the Issuance of the Permit

[74] After the Permit was issued Eabametoong commenced this application for judicial review. Landore then met with Eabametoong in May, June and September of 2016. According to Eabametoong, the meetings were confidential, without prejudice meetings to settle the litigation. According to Landore, the meetings should be taken into consideration in assessing whether the Ministry fulfilled its duty to consult.

[75] In December of 2016, Landore agreed in writing to refrain from exploration on its claims covered by the Permit during the judicial review process.

[76] Landore did not ultimately enter into a deal with Barrick.

The Position of the Parties

Eabametoong's Position

[77] Eabametoong argues that the Director's decision to issue the Permit was unreasonable because it failed to meet its duty to consult – a duty that arises out of the honour of the Crown and is meant to encourage reconciliation through a process of meaningful dialogue that exhibits respect for First Nations. According to Eabametoong, the process that was followed in this case failed in three significant ways:

(a) The Crown and its delegate, Landore, committed to a course of action about how that consultation would occur and then abruptly changed course without explaining why to Eabametoong and without giving Eabametoong an opportunity to respond to that reason. In particular, Landore, as the Crown's delegate, led Eabametoong to believe that before any permit was issued a further meeting with the affected community would be held and a Memorandum of Understanding would be negotiated. Instead of following through on this commitment, the Crown and Landore abruptly changed their course of action in January of 2016 to allow Landore to obtain the Permit in response to its desire to enter into negotiations with Barrick and did so without being forthright with the affected First Nations community. Eabametoong submits that this not only violates case law that has found that commercial timelines cannot dictate the consultative process, but also undermines the honour of the Crown.

(b) Part of the duty to consult includes a duty to share information. The Crown and Landore failed to meet this aspect of the duty when it failed to communicate to

Eabametoong why it was so abruptly changing its consultative process and when it failed to provide Eabametoong with its commentary to the concerns that Eabametoong had expressed.

(c) Landore failed to meet its obligation to record its interactions with Eabametoong and this lack of documentation contributed to the Director's unreasonable finding that there had been appropriate consultation. In particular, the Director made its finding without any record of how the concerns raised by the community in early 2014 had been addressed or what further concerns had been expressed in the only meeting between Landore and affected land users on July 7, 2014.

[78] According to Eabametoong, these failures are not a small matter that can be fixed later. Mining approval permits are progressive, building towards a long-term relationship. If they go wrong at the beginning, it becomes hard to change course. If the dialogue starts with the Crown withholding information and having confidential meetings that result in a change of course without explanation, it leads to what happened in this case. Instead of promoting reconciliation, the relationships become adversarial and litigious.

The Ministry's Position

[79] The Ministry submits that the duty to consult in this case was at the low end of the spectrum, given the strength of the right asserted (not very strong as the lands at issue are surrendered lands that the government has the right to "take up") and the seriousness of the impact of the proposed activities on the lands (not very serious as the proposed permit is only for early exploration activities.)

[80] According to the Ministry, at the low end of the spectrum, the duty to consult calls for clear and timely notice of the project under consideration in sufficient form and detail that its impact can be assessed by the affected Aboriginal community; a reasonable time for the Aboriginal community to respond; a meaningful opportunity for the Aboriginal community to present its views and a full and fair consideration of the community's concerns by the Crown.

[81] The Ministry further argues that in reviewing the Director's decision as to whether the duty to consult has been fulfilled, the standard is not perfection, but reasonableness. Thus, the gaps in record-keeping that Eabametoong has pointed out do not detract from the overall reasonableness of the consultation that took place.

[82] The Ministry asserts that the Director exceeded what the duty required in the circumstances of this case. The Director provided clear and timely notice of Landore's permit application to Eabametoong. Consultation took place over a two and half year period, which gave Eabametoong more than sufficient time and opportunity to respond with its concerns. The members of the families most affected by the proposed permit met in January of 2014 and made a list of their concerns. The Permit that was ultimately issued took those concerns into account in the conditions that the Director attached to the

Permit. Thus, Eabametoong's concerns were clearly fully and fairly considered by the Director.

[83] The Ministry disputes Eabametoong's allegation that there was an abrupt change in process that occurred as a result of the meeting between the Director and Landore on January 19, 2016. According to the Ministry, commencing in the fall of 2015, the Director had clearly communicated its wish to move the consultation process along and make a decision respecting the Permit.

[84] The Ministry submits that Eabametoong's argument that the duty to consult was breached because of the Director's failure to ensure that there was a community meeting cannot succeed, because this would give Eabametoong the power to prescribe the manner of consultation. The Supreme Court in *Haida Nation* made it clear that consultation does not give Aboriginal communities any such power and there is no duty to agree.

[85] The Ministry also argues that Eabametoong's expectation that a MOU would be in place before the Permit was issued was also an unreasonable one. Consultation law does not require that financial arrangements between proponents and affected communities be entered into before a permit is issued.

[86] Finally, the Ministry submits that if this Court finds that it has not met its duty, the appropriate remedy is not to quash the Permit, but to direct that further consultation take place.

Landore's Position

[87] Landore adopts the submissions of the Ministry as outlined above. It emphasizes that the question that this Court has to ask is not whether it would have reached a different conclusion, but whether the decision of the Director to end the consultation in the way that he did was a reasonable one. Landore submits that it clearly was. It had been two and a half years since Landore had applied for its permit and the Director had the detailed expressed concerns from the internal community meeting in January of 2014 and Eabametoong's counsel's correspondence in February and March of 2016. The Director was in a position to weigh the respective interests and make a decision.

[88] According to Landore, Eabametoong's position is essentially that a further community meeting and a signed Memorandum of Understanding were conditions precedent of the exploration permit. The law on consultation is clear that Eabametoong's interests do not enable it to require a specific process or to require that an agreement be reached. Landore submits that Eabametoong is attempting to elevate Landore's attempts to have a further meeting and enter into a MOU into a Crown promise.

[89] Landore also argues that Eabametoong's submissions ignore Landore's prior consultation and community meetings before the exploration permit process commenced in the fall of 2013, and subsequent to the issuing of the exploration permit. They also ignore Landore's experience with other First Nations in Northwestern Ontario, which Landore states

demonstrates its commitment to fostering ongoing relationships with Ontario First Nations as it pursues its exploration activities in the area.

[90] With respect to the Barrick Gold issue, Landore emphasizes that the inquiry it had received from Barrick was a very preliminary one; that there was ultimately no deal reached; that the Ministry did not yield to its request to make a decision on the permit before it met with Barrack at its offices on March 6, 2016; that any conditions that were attached to the permit would bind any subsequent holder of the permit (including Barrick); and that Landore's main reason for wanting a decision was the desire to do some exploration before the end of the winter in 2016.

Analysis

[91] I agree with the Ministry and Landore that the duty to consult in this case lay at the lower end of the spectrum. I say this because the lands in question are surrendered lands that the government had the right to "take up" for mining. Therefore, Eabametoong's claim to title of the lands was a weak one. The Permit was a permit for early exploration activities. Thus, the effect on the lands was considerably less than other mining activities. However, early exploration involves more than just drilling holes. It involves setting up camps and drilling pads to accommodate the equipment and manpower needed to drill those holes. The interests at stake for Eabametoong in the lands were important ones. As already noted, the lands were used year round by several extended families for sustenance, cultural and spiritual purposes; the lands help sustain the cultural and emotional well-being of Eabametoong families who maintain cabins, registered trap lines and fishing sites around the lakes and the graves of Eabametoong ancestors are situated in the area. In the Permit, the Director acknowledged that "the Miminiska area is used intensively and extensively."

[92] I also agree that at the lower end of the spectrum, the duty to consult does not require that an agreement be reached or that a particular process of consultation be followed. However, what it does require is that whatever process the parties engage in is one that is genuinely aimed at listening to each other's concerns and being prepared to address those concerns – in other words, as put in *Haida Nation* at para. 43, "talking together for mutual understanding." This phrase is an important one – it involves more than the use of words or the appearance of listening. It requires real engagement aimed at promoting a profound and important end – reconciliation between the Crown and Indigenous peoples.

[93] Promoting reconciliation requires being aware at all times that the relationships between the Crown and Indigenous peoples has historically been fraught – characterized, to use the words of Binnie J. in *Mikisew Cree First Nation*, by a "long history of grievances and misunderstanding" where "[t]he multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies." (para. 1). Achieving reconciliation requires acting in a way that is trustworthy, straightforward and genuine.

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

[95] In considering whether the Crown can be reasonably considered to have met its duty to consult it is necessary to look at both its actions and Landore's actions. The Crown delegated aspects of the consultation process to Landore. Once that happened, as the Policy makes clear, it became important for Landore to document its interactions with Eabametoong. By doing so, the Crown could ensure that it had all the information it needed to determine whether it had fulfilled its duty to consult. It is also necessary to examine whether Eabametoong did anything to frustrate the Crown's efforts by taking unreasonable positions or thwarting the government's attempt to make a decision (*Haida Nation* at para. 42).

[96] Once it was clear that early exploration needed a permit and that those permits were subject to the duty to consult, Landore reached out to Eabametoong requesting its "approval and support before proceeding with its proposed exploration program". When Eabametoong responded by indicating that this would entail meeting face-to-face with affected family/clan members and entering into a MOU, Landore replied in writing stating that it would like to do both.

[97] The expectation that there would be a MOU was reinforced when Landore's Exploration Manager, Ms. Tuomi, sent a revised MOU to Eabametoong on December 9, 2013, after the parties met face-to-face for the first time on December 5, 2013.

[98] In January of 2014, Eabametoong sent the Ministry a list of its concerns, including its need for further information regarding the exploration proposal. The concerns focused on the potential effects on fish and wildlife in the area and its corresponding impact on hunting, fishing and tourism. They also focused on the fact that prior drilling had adversely affected the area and that those effects had been exacerbated by a lack of clean up after the drilling had taken place. In the document, it was clear that the community wanted to meet with Landore to obtain more information about where the actual drilling was going to take place so that they could provide more meaningful comments about how to alleviate the impact of that drilling and ensure the clean-up of the area. Finally, the concerns addressed the need for a MOU to be in place before the drilling took place.

[99] In March of 2014 Landore and the Ministry met to discuss Eabametoong's comments. At that meeting Landore confirmed to the Ministry that it would go to the affected community for a further meeting in the summer of 2014 and that it would continue its talks with Eabametoong to establish a MOU. In a memorandum written by Ms. Tuomi detailing what occurred at the March 2014 meeting she wrote that "Eabametoong's approval of Landore's proposed exploration activities hinges in part on the establishment

of a MOU and so the MNDM must grant the Exploration Permit after this has been done."

[100] Landore and the affected members of the Eabametoong community met face-to-face in the summer of 2014. What occurred at that meeting is unclear as Landore kept no notes. However, what is clear is that the meeting was a hostile one, with frustration being expressed by land users about past impacts from drilling by Landore in the Miminiska area and concerns about how more drilling in the area would interfere with fish and wildlife. It is also clear that at the end of the meeting Landore's CEO committed to a follow-up meeting with the same community.

[101] In June of 2015, Landore contacted Eabametoong with a view to setting up a further meeting and confirmed that one of the topics to be discussed at that meeting would be the MOU. Eabametoong replied suggesting a meeting in early August of 2015. Landore did not reply and so no further meeting was set up.

[102] In the fall of 2015 the Ministry got involved, seeking to make a decision on the permit application. Their intervention resulted in several efforts being made to set up a further community meeting between Landore and Eabametoong in January of 2016. Dates were proposed for mid-January. Eabametoong agreed, but Landore wished its CEO to be there so no date was settled upon.

[103] Landore's CEO did in fact come from Europe during the week of January 18, 2016, but Eabametoong was never advised of this fact. Instead, the Ministry met privately with the Landore on January 19, 2016. After that private meeting, all further efforts to arrange a community meeting ceased.

[104] On February 11, 2016 the Ministry contacted Eabametoong to tell them that Landore had agreed to clean up the camp it had used when it engaged in previous exploration activities on Miminiska Lake and that a decision would be made on the permit in 10 days "unless significant information identifying specific adverse impacts is provided to me." After receiving this letter, Eabametoong contacted Landore to request a meeting. Landore refused.

[105] On February 19, 2016 Eabametoong wrote to the Ministry expressing its dismay and shock that Landore had abandoned its efforts to meet with Eabametoong and had chosen to terminate consultations.

[106] On March 4, 2016, the Ministry replied by sending Eabametoong a list of conditions it proposed to include in the permit to address the concerns raised by the community in its meeting in January of 2014. This was the first response that Eabametoong had had to those concerns from the Ministry. Eabametoong was given until March 11, 2016 to comment on those proposed conditions as, after that date, the Ministry hoped "to be in a position to proceed with a permitting decision." The proposed conditions said nothing about Landore decommissioning its Miminiska Lake exploration camp.

[107] On March 11, 2016 Eabametoong's counsel responded detailing its reasons why the proposed conditions did not address most of the concerns raised by Eabametoong in relation to the permit. While the details of the response are outlined earlier in these reasons, what the response underlines is the need for a meeting with the community so that Landore and the parties could discuss where the proposed drilling was to occur. Once that information was known, Eabametoong could provide Landore with more specific data concerning the nature of the Treaty rights they exercised in the area and the parties could discuss specific measures to alleviate the impact on those rights. The letter also pointed out that the proposed terms did not include a commitment to clean up from previous drilling activities, a term that had been discussed. Finally, it pointed out its expectation that there would be a MOU entered into before any exploration occurred.

[108] The Ministry did not reply to this letter. Instead, on March 31, 2016, it issued the Permit with the conditions as set out in its letter of March 4, 2016.

[109] This summary of the events leading to the Permit makes it clear that from Eabametoong's perspective it is reasonable for them to have felt that their expectations regarding the consultation process that they understood was going to take place was abruptly terminated. Essential to that process was a further community meeting and a MOU, the terms of which were to be discussed at the community meeting. Eabametoong's expectations in this regard were reasonable ones – given everything that had occurred between them, Landore and the Ministry prior to February 11, 2016. Until that date, as far as Eabametoong knew, the next step in the process was going to be a meeting between Landore and the affected community that the Ministry was going to facilitate. It was unreasonable to find that consultation had occurred when the Ministry had so recently been working to arrange this meeting as part of fulfilling its consultation requirement.

[110] I am prepared to accept that the Ministry, for appropriate reasons, has the right to change the course of a consultation process in spite of any expectations that may have been established in that regard by it or its delegate. However, if it does so, it must do so in a way that does not involve compromising the objectives of the duty to consult – namely, upholding the honour of the Crown by attempting to further the goal of effecting a reconciliation between the Crown and Indigenous peoples.

[111] In this case, the Crown changed course without any explanation to Eabametoong. Further, it did so after a series of events that, once they became known, understandably gave rise to the view on Eabametoong's part that the Ministry focus had switched from "talking together for mutual understanding", to making sure that Landore had its permit in time to engage in discussions with Barrick Gold.

[112] I say this because after the private meeting between Landore and the Ministry on January 19, 2016 (which Landore had requested), all attempts to set up a further community meeting ceased. At that meeting Landore told the Ministry about its negotiations with Barrick and its need to get a permit as soon as possible. The day after the meeting, the Ministry confirmed to Landore that it was going to inform Eabametoong that it was planning to make a decision on the permit in the near future. On February 10, 2016, when

Landore had not heard from the Ministry, it wrote to the Ministry reiterating its "urgent" need for the permit. While Landore took the position that the "urgent" need did not have to do with Barrick, the Ministry representative, Mr. O'Brien, confirmed that the need that had been communicated to the Ministry, was the fact that Landore was negotiating with a senior mining company. The day after the letter from Landore reminding the Ministry of its urgent need for the permit, the Ministry wrote to Eabametoong advising them of its intention to make a decision on the permit within the next 10 days.

[113] The Ministry maintains that its decision to proceed in the way that it did was not driven by Landore's timetable with Barrick. Landore's application had been pending for some time and the Ministry's actions after January 19, 2016 were simply a logical extension of the desire it had expressed in the fall of 2015 to move the consultation process along and make a decision on the permit. It may be that this is what drove the Ministry's actions, but what is not explained is why, without explanation, the Ministry went from attempting to set up a community meeting in the week of January 18, 2016 (when Landore's CEO was going to be in Thunder Bay), to ceasing all such attempts without explanation to Eabametoong after it had met privately with Landore's CEO on January 19, 2016.

[114] In *Squamish Nation v. British Columbia (Minister of Community Sport and Cultural Development),* 2014 BCSC 991, the Court stated at para. 214:

> The Crown may not conclude a consultation process in consideration of external timing pressures when there are outstanding issues to be discussed….As Jack Woodword says in *Native Law* (looseleaf 2014-release1), (Toronto: Carswell, 1994) at 5,2040:
>
> > The Crown must give the Aboriginal group a reasonable amount of time to respond to a referral and to engage in consultation. The Crown must be prepared to let consultation run its course; it cannot abort the consultation process because of other time pressures where the Aboriginal group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussion. (citations omitted)

[115] The Ministry argues that there was no need for a further community meeting as its duty to consult was more than adequately fulfilled without it. Eabametoong had had notice of the proposed permit, had met with Landore in December of 2013, had expressed its concerns in writing in January of 2014, had had one face-to-face community meeting with the Landore CEO in the summer of 2014 and was given an opportunity to comment on the proposed conditions to the permit, conditions that were specifically designed to address Eabametoong's concerns.

[116] This is where it becomes necessary to look beyond form to substance. After Eabametoong expressed its concerns in January of 2014, it received no communication from the Ministry regarding those concerns until March 4, 2016 when the Ministry wrote to Eabametoong enclosing the list of proposed conditions that were apparently designed to meet those concerns. When Eabametoong pointed out why those proposed conditions did not meet their concerns and why the community meeting they had been told would take place was essential, the Ministry did not reply. It simply issued the Permit and made no changes to the conditions.

[117] It was only after Eabametoong commenced judicial review proceedings that the Ministry produced a document that made it clear that someone had gone through each one of Eabametoong's concerns and made comments on them. Many of these comments were never shared with Eabametoong. This is unfortunate since when it came to one of the major concerns that Eabametoong had expressed, namely that drilling on the lake affects fish, the comment appeared in the form of a question about where the evidence was to support this concern. Eabametoong was never given the opportunity to answer this question since it was not aware that it was an issue for the Ministry.

[118] Another concern that Eabametoong had expressed in January of 2014 was its desire that a MOU be in place before drilling took place. The Ministry's comment on this request was that this was "contrary to legal requirements & MNDM policy". At no point did the Ministry communicate this position to Eabametoong or allow Eabametoong to address it. It was clearly Eabametoong's view that entering into a MOU was part of standard industry practice. As well, the Ministry's delegate, Landore, had on several occasions expressed its view that a MOU would be signed before the permit was issued. Landore communicated this view to the Ministry in March of 2014. It cannot be honourable for a government body to allow its delegate to create expectations with an indigenous community (expectations that the government knows about) and then not let the community know that these expectations were "contrary to legal requirements & MNDM policy."

[119] In terms of Landore and the dialogue that it had with Eabametoong about their concerns, the only time that Landore and Eabametoong met to discuss those concerns was in July of 2014. Landore kept no detailed record of what took place at that meeting, but what is clear, is that at the end of the meeting, all parties agreed that there should be another face-to-face community meeting so that the discussion could continue.

[120] Can it reasonably be said that this chain of events meets the bar of "talking together for mutual understanding"? In my view, it cannot. In coming to this conclusion I accept that the standard is not perfection. However, there was no real and genuine attempt by the Ministry or Landore to listen to Eabametoong's concerns, provide feedback about those concerns and to discuss ways to meet those concerns (if possible). Instead, the concerns were noted, the expected opportunity for discussion was foreclosed without explanation and the Ministry proceeded in a unilateral way (without seeking or giving real feedback) to make its decision. Taken in context, its solicitations for comments from Eabametoong in February and March of 2016, do not reflect a genuine desire to engage in real,

straightforward and honest consultation. Rather, they appear to be notifications that a decision had basically been made and if Eabametoong has anything to say they should do so within a very short time frame.

[121] Fundamentally, the Ministry's conduct cannot reasonably be considered to be the type of conduct that would promote reconciliation between the Crown and Indigenous peoples. That requires managing the consultation process in a way that fosters trust as opposed to misunderstanding and betrayal. While I do not regard the Ministry's actions as deliberately attempting to do anything untrustworthy, viewed in the context of what happened, they unfortunately do not meet the standard required to maintain the honour of the Crown.

[122] In terms of Eabametoong's conduct, while it is clear that their community crises caused them to be unavailable to hold a follow-up community meeting for a year, there was no suggestion from the Ministry or Landore during that time that the meeting had to be held sooner. As soon as the crises were resolved and the election held, Eabametoong was contacted by Landore about a meeting. They replied suggesting a meeting that summer. It was Landore who did not reply. Once the Ministry made known its desire to move the consultation process along, there is no evidence that Eabametoong did anything to obstruct the process. When the Ministry focused in on the middle of January 2016 as a meeting time, Eabametoong indicated it was available and willing to meet. It was the Ministry who did not follow up on a meeting date during the time period during which Landore's CEO was available.

[123] Landore submitted that Eabametoong had no genuine desire to find a way to agree to a permit and that their demand for a MOU and a community meeting was just a way for them to obstruct the permit process. I agree with Landore and the Ministry that the duty to consult does not give Eabametoong the right to unilaterally insist that a MOU be in place before the permit was granted. However, that is not what happened here. Eabametoong and Landore agreed that a MOU should be negotiated before the permit was issued. The Ministry was advised of this fact by Landore in March of 2014 and did not in any way indicate that this was somehow contrary to Ministry policy. Eabametoong and Landore also agreed that the MOU would be negotiated at the second community meeting. Since that meeting was not held, no attempts were made to negotiate a MOU. In other words, the record in this case does not support Landore's position that Eabametoong's desire for a MOU was a disguised desire to block the issuance of a permit.

[124] Landore also argues that in assessing whether the Ministry had fulfilled its duty to consult it is important to take into account the meetings that Landore had with Eabametoong in May, June and September of 2016, after the Permit had been issued. I disagree. First, the duty to consult must be fulfilled before, not after the decision triggering the duty has been made. Second, the meetings all occurred after this judicial review application had been issued, making them possible settlement meetings (which are clothed with confidentiality) rather than ongoing consultation.

[125] For these reasons, I find that the Director's decision that the Ministry's duty to consult had been discharged was an unreasonable one.

Remedy

[126] The Minister submits that even if the court finds that Ontario has not met its duty, the appropriate remedy is not to quash the Permit, but to direct that further consultation take place.

[127] I disagree. The duty to consult is a duty that must be discharged before, not after, a decision gets made. As put by the Court in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, (2006) 272 D.L.R. (4th) 727 (Ont. S.C.J.) at para. 89:

> The objective of the consultation process is to foster negotiated settlements and avoid litigation. For this process to have any real meaning it must occur before any activity begins and not afterwards or at a stage where it is rendered meaningless.

Conclusion

[128] For these reasons I grant the application and set aside the Director's decision to grant the Permit. Landore's permit application is remitted back to the Director and MNDM pending completion of adequate consultation with Eabametoong.

[129] The parties advised us in writing that they have reached an agreement on the question of costs. If they wish the terms of that agreement to be reflected in an order, they may advise us what they have agreed to.

I agree. _____

Marrocco A.C.J.S.C.

Sachs J.

I agree.

C.J. Horkins J.

Released: July , 2018

CITATION: Eabametoong First Nation v. Minister of Northern Development and Mines, 2018 ONSC 4316
DIVISIONAL COURT FILE NO.: 209/16
DATE: 20180716

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., Sachs and C.J. Horkins JJ

BETWEEN:

Eabametoong First Nation

Applicant

– and –

Minister of Northern Development and Mines, The Director of Exploration for the Ministry of Northern Development and Mines and Landore Resources Canada Inc.

Respondents

REASONS FOR JUDGMENT

Released: July 16, 2018