

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

GRASSY NARROWS FIRST NATION

Applicant

- and -

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO
as represented by THE DIRECTOR, MINISTRY OF THE ENVIRONMENT,
CONSERVATION AND PARKS**

Respondent

APPLICATION UNDER
Section 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar by the method of hearing requested by the applicants, unless the court orders otherwise. The applicants request that this application be heard

- In person
- By telephone conference
- By video conference

at the following location:

Osgoode Hall, 130 Queen Street West, Toronto, ON M5H 2N5

on a day to be set by the registrar.

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 an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date _____

Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
Osgoode Hall, 130 Queen Street West
Toronto ON M5 2N5

TO: **Fariha Pannu, P. Eng.**
Director appointed for the purposes of Part II.1 of the
Environmental Protection Act
Industrial Wastewater Approvals
fariha.pannu@ontario.ca

Ministry of the Environment and Climate Change
7th Floor, 135 St. Claire Avenue West
Toronto, ON M4V 1P5

AND TO: **Paul Kovarik**
Director, Northern Region
Drinking Water and Environmental Compliance Division
Ministry of the Environment, Conservation and Parks

c/o Legal Services Branch
Ministry of the Environment, Conservation and Parks
10th Floor, 135 St. Clair Ave West
Toronto, ON M4V 1P5

Attention: Laurence Borg, Legal Director (Acting)
laurence.borg@ontario.ca

AND TO: **Attorney General of Ontario**
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9

Attention: Chantelle Blom, Director (Acting)
chantelle.blom@ontario.ca

APPLICATION

Introduction

This is an application for judicial review brought by Grassy Narrows First Nation of a decision, dated August 22, 2025, of the Director, Ministry of the Environment, Conservation and Parks (“Director”): (1) refusing to exercise statutory power to issue stop and control orders preventing and remediating industrial discharges of contaminants to the environment from the Madsen Mine, an inactive mine site that has recently re-opened, in the Red Lake District of northwestern Ontario; and (2) failing to fulfill its obligation to meaningfully consult with, accommodate, or obtain the consent of, the Applicant Grassy Narrows First Nation (“Grassy Narrows”) prior to the mine re-opening. The mine site’s discharges: (1) constitute an immediate, on-going, and increasing danger to the human life and health of persons who are members of Grassy Narrows from exposure to methylmercury, a neurotoxin, and other contaminants; (2) adversely impact the treaty and constitutional rights of Grassy Narrows within the “Area” described below; and (3) cause ongoing harm to the environment, water quality, and aquatic biota.

In particular, the Director’s refusal to exercise statutory power under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (“*EPA*”), will result in, among other problems:

- (a) continued, as well as an expected increase in, discharges of sulphate and other contaminants from the Madsen Mine into area water bodies that are upstream of, and run through, the Area;
- (b) formation of methylmercury, a highly neurotoxic compound that bioaccumulates and biomagnifies in the aquatic food chain, including fish, due to the presence of discharged sulphate acting on inorganic mercury already present in Area waters;

(c) immediate, on-going, and increasing danger to aquatic biota who live in those waters and to biota who consume them; and

(d) immediate, on-going, and increasing danger to the life, health and rights of members of Grassy Narrows consuming the fish, wildlife, and plants impacted by methylmercury and other contaminants.

Grassy Narrows seeks judicial review of the Director's decision refusing to exercise statutory power under the *EPA* on the basis that it: (1) is unreasonable; (2) materially infringes on the treaty and constitutional rights of its members to continue, and obtain the benefits of, their traditional harvesting practices in their Territory without risk to life and health; and (3) causes adverse effects to the environment within the Area described below.

Relief Requested

1. The Applicant makes application for:

(a) an order declaring that:

(i) in refusing to issue a stop order under section 8 of the *EPA* to prevent immediate danger to the life and health of persons who are members of Grassy Narrows from exposure to methylmercury and other contaminants due to Madsen Mine industrial discharges of sulphate and other contaminants into area waters, the Director acted without legal authority under the *EPA* or, in the alternative, acted unreasonably;

(ii) in refusing to issue a control order under section 7 of the *EPA* to prevent Madsen Mine industrial discharges of sulphate and other contaminants into

area waters causing, or likely to cause, an adverse effect in contravention of section 14 of the *EPA*, the Director acted without legal authority under the *EPA* or, in the alternative, acted unreasonably;

- (iii) in failing to comply with the Crown's obligation to consult, accommodate and obtain the consent of Grassy Narrows when making a decision about Madsen Mine industrial discharges with the potential to adversely impact Grassy Narrows' Aboriginal or treaty rights, the Director breached section 35 of the *Constitution Act, 1982*;
- (b) an order in the nature of *certiorari* quashing or setting aside the decision of the Director;
- (c) an order in the nature of *mandamus* that the Director exercise statutory powers of decision forthwith to issue orders to stop and control Madsen Mine industrial discharges under sections 7 and 8 of the *EPA* requiring that all necessary actions shall be undertaken in a timely way to remediate current and past sources of contamination originating at the Madsen mine and to restore the affected environment and return it to its previous uncontaminated state;
- (d) an order requiring the application to proceed on an expedited and urgent basis;
- (e) if requested by motion, an order granting leave to make this application to a single judge of the Superior Court of Justice in accordance with section 6(2) of the *Judicial Review Procedure Act*;

- (f) an interim, interlocutory, or permanent order prohibiting the conducting of mining operations at the Madsen Mine until such time as this application can be determined on its merits;
- (g) an order, if necessary, extending the time to bring this application for judicial review pursuant to subsection 5(2) of the *Judicial Review Procedure Act*;
- (h) an order requiring the Respondent to pay Grassy Narrows' costs of this Application if requested or, in the alternative, an order that all parties shall bear their own costs;
- (i) such further or other relief as counsel may advise and this Honourable Court may permit.

Grounds for the Application

2. The Grounds for the application are:

The Parties

- (a) The Applicant, Grassy Narrows, is an Anishinaabe First Nation located in northwestern Ontario. Grassy Narrows is the collective rights holder of an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*, an Indigenous people within the meaning of the *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/49 (2007) (“*UNDRIP*”), and the Asubpeeschoseewagong Anishinabek under the *Asubpeeschoseewagong Anishinabek Aaki Declaration* (Grassy Narrows Land Declaration or the “Land Declaration”). Grassy Narrows has the status of a “band” within the meaning of the *Indian Act*, R.S.C., 1985, c. I-5.

- (b) Members of Grassy Narrows rely on fishing in the Area as a significant part of their way of life, and on the consumption of fish as a significant part of their diet. Existing mercury pollution dating from the discharge of mercury by a Dryden, Ontario chlor-alkali plant in the 1960s in area waters has had, and continues to have, a significant adverse effect, due to the consumption of mercury-contaminated fish, on the health and well-being of members of Grassy Narrows who have been diagnosed with, or whose children have been diagnosed with, symptoms consistent with mercury poisoning. Industrial discharges of sulphate and other contaminants from the Madsen Mine pose an immediate danger, as well as serious chronic risk, of additional harm to the physical and mental health and well-being of community members because they will trigger the formation of methylmercury and other contaminants in Area waters, increase their accumulation in the aquatic food chain, including fish caught and consumed by community members, and prolong and exacerbate existing harms from, and create additional fear and anxiety within Grassy Narrows community about, mercury exposure and other contaminants.
- (c) The Respondent, Ontario, is the representative of the Crown in right of Ontario designated by section 14 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17.
- (d) The Ontario Ministry of the Environment, Conservation and Parks (the “Ministry” or “MECP”) is responsible for the administration of the *EPA*. Director Pannu within the Ministry is an Ontario public servant responsible for considering and issuing approvals and orders under various sections of the *EPA*, including sections 7, 8, and Part II.1 of the Act. Director Kovarik is Ontario’s administrative decision-maker

who exercised a statutory power of decision under the *EPA* by refusing to issue stop and control orders in this matter.

Grassy Narrows' Treaty 3 and Inherent Indigenous Rights

- (e) Grassy Narrows people are Anishinaabe people. Grassy Narrows people hunt, trap, fish, and practice their Anishinaabe way of life to provide for themselves, their families and community. These land and water-based practices have always been, and they continue to be, essential to Grassy Narrows people's sense of self and identity, culture, wellbeing, health, and economy.
- (f) Grassy Narrows people follow the teachings of their Elders to be responsible for *Manaachitootaa Aki*, to protect the land. The land and the water sustain Grassy Narrows' way of life.
- (g) Grassy Narrows exercises rights under Treaty 3. The Anishinaabe Chiefs who negotiated Treaty 3 with the Crown treaty commissioners were focused on preserving their way of life for the present and coming generations. They were only prepared to enter into a treaty if the Crown promised that the Anishinaabe way of life would continue, including their traditional fishing, hunting, trapping, food, medicine gathering, trading, ceremonial practices, and other land and water-based practices.
- (h) The Anishinaabe Chiefs' agreement to the Treaty was contingent on the Crown's promise that they would retain their way of life, including their traditional fishing, hunting, trapping, and rice harvesting activities as before.

- (i) Ontario has real or constructive knowledge of Grassy Narrows' Treaty 3 rights and interests.
- (j) These myriad traditional practices continue to this day and are integral to the distinctive Grassy Narrows culture.
- (k) Grassy Narrows exercises its inherent right to self-determination and law-making powers that are ancillary to self-determination. Such inherent rights are recognized in international instruments including *UNDRIP*, to which Canada is a signatory.

Grassy Narrows' Interim Core Area of Interest for Mining

- (l) The environment in and around Grassy Narrows has been significantly impacted by industrial activities for many decades, including river diversion, dam and hydroelectric projects, pulp and paper manufacturing that led to the dumping of approximately 9,000 kilograms of mercury into the English-Wabigoon River System and ongoing effluent discharge, clearcut logging, and mining.
- (m) The impacts of industrial activity have been highly detrimental to Grassy Narrows people, their health, and their ability to exercise their rights and have exceeded any reasonable threshold. Accordingly, Grassy Narrows people are particularly vulnerable to additional and cumulative environmental contamination.
- (n) In the 1970s and 1980s, Grassy Narrows called on Ontario to respond to the mercury crisis by taking concrete action, including by agreeing that Grassy Narrows would control their lands and waters in a manner that would best position Grassy Narrows to restore their way of life, to protect Grassy Narrows people from

further harm and to protect the land and water on which Grassy Narrows people rely. Rather than respecting Grassy Narrows' wishes, Ontario authorized extensive clear-cut logging in the Whiskey Jack Forest, which likely released new, or additional, sources of mercury into the watershed, and increased methylmercury contamination of fish, and consequential harm, or further harm to the health and wellbeing of Grassy Narrows people. These authorizations had the effect of prolonging and exacerbating the mercury crisis.

- (o) In 2007, Grassy Narrows people declared a moratorium on industrial activity in the Treaty 3 lands and waters around them until such time as the Crown upholds the honour of the Crown in its dealing with Grassy Narrows and obtains Grassy Narrows' consent. In 2015, in a community referendum conducted with support from Ontario, Grassy Narrows people voted strongly against industrial logging.
- (p) In October 2018, Grassy Narrows enacted a Land Declaration. The Land Declaration is a sacred Grassy Narrows law of inherent right that sets out the will of Grassy Narrows people. The Land Declaration protects an Indigenous Sovereignty and Protected Area (also referred to as an Indigenous Protected and Conserved Area or "IPCA"); and bans certain land uses within the IPCA, including a ban on mineral staking and mining as well as other mining activities that do not have Grassy Narrows' consent.
- (q) Ontario has real or constructive knowledge of the Land Declaration.
- (r) Grassy Narrows' Interim Core Area of Interest for Mining (the "Area"), a map of which forms part of the record, identifies an area in which mining-related activities

could have direct adverse impacts on the Aboriginal, Treaty, and inherent rights of Grassy Narrows and its community members. The Madsen Mine, and the lands and waters downstream of the site, are within this Area.

- (s) The Area was identified by Grassy Narrows on an interim basis and was provided to the Crown on or around November 2, 2023, in response to the Crown's first-ever request that Grassy Narrows identify the Area. The Area is not a complete representation of Grassy Narrows' area of interest. Grassy Narrows continues to document the full extent of its Territory, and the Interim Core Area of Interest for Mining is without prejudice to the determination of the full geographical extent of Grassy Narrows' Territory.
- (t) The two latest owners of the Madsen Mine also have real or constructive knowledge of the Area.

Industrial Discharges from Madsen Mine Following 2020 Approval by Director

- (u) The site of the Madsen Mine in Red Lake, Ontario was initially staked in 1934 and began production in approximately 1938. There have been several ownership changes over time. The mine ceased operations in the 1970s. In late 2020, Director Pannu issued an approval, amended in 2021, known as an Environmental Compliance Approval ("ECA") under the *EPA* to the then owner of the Madsen Mine, Pure Gold Mining, Inc. The ECA authorized industrial discharges to water of certain contaminants and the construction of works and other measures to control those discharges.

- (v) By late 2022, mining operations at the site had ceased again, and by mid-2023 ownership of the Madsen Mine had changed hands to the current owner, Red Lake Madsen Mine, Ltd. Commencing in or about early to mid-2025, mining activities at the mine resumed under the new ownership.
- (w) Throughout this five-year period, regardless of whether the Madsen Mine was operating or not, industrial discharges of contaminants from the site to area waters continued. However, following the late 2020 re-opening of the mine, a major increase in the discharge of contaminants occurred. This increased discharge has continued to the present, with indications of further increases coinciding with recent work preceding the latest restart of the mine in 2025.
- (x) Ontario has never provided notice to, or consulted with, Grassy Narrows about any Crown decisions in respect of the Madsen Mine, including the 2020 or 2025 re-starts of mining operations.
- (y) For many years, Grassy Narrows has been repeatedly raising concerns with Ontario and Canada about the potential impacts of mining, including downstream impacts and cumulative impacts.
- (z) Commencing in and around August 2024, Grassy Narrows attempted to obtain documentation from Ontario, Canada and/or the owner on the types, quantities, concentrations, locations, and effects of contaminants being discharged from the Madsen Mine site to Area waters. Canada and the current mine owner provided partial information for the first time to Grassy Narrows in late 2024 and early 2025. Review of this information by Grassy Narrows' experts revealed serious problems

with not only the types, quantities, concentrations, locations, and effects of industrial discharges that had been occurring since late 2020 but also were anticipated to substantially increase with the resumption of mining in 2025. The experts also raised concerns with the state and efficacy of the works and other measures required to prevent and control such discharges under the ECA.

Grassy Narrows Attempts to Get Ontario / Director to Address Environmental Problems

- (aa) In 2025, Grassy Narrows began providing information to Ontario / Director respecting the “substantial and severe” contamination problems identified by its experts with industrial discharges from the Madsen Mine, including: (1) the release of acutely toxic water to the environment for durations of up to a few months; (2) the enormous increases in the presence of sulphate and other contaminants downstream from the mine site, and its potential for increasing the methylation of elements like mercury and arsenic in area waters; and (3) the ineffectiveness to date of various works and measures required by the ECA to prevent or mitigate these and other environmental problems.
- (bb) The information provided by Grassy Narrows was of no avail in persuading Ontario / Director to: (1) require a pause in the 2025 re-opening of the Madsen Mine to permit meaningful consultation with the Applicant; (2) adopt amendments to the ECA; or (3) issue corrective orders under the *EPA* to resolve identified environmental problems.
- (cc) On May 12, 2025, the Ministry of Mines wrote to Grassy Narrows informing Grassy Narrows for the first time that Ontario did not intend to require any new

permits, nor amendments to existing permits, before the current owner re-opened the mine, and that Ontario therefore did not believe that there was a duty to consult Grassy Narrows.

- (dd) On July 4, 2025, Grassy Narrows formally requested that Director Pannu exercise her power to issue stop and control orders under the *EPA* to address or mitigate the identified environmental problems within 30 days. On August 22, 2025, Director Kovarik responded to the Grassy Narrows request indicating his refusal on behalf of the MECP to exercise statutory power under the *EPA* to resolve the identified environmental problems adequately or at all.

The Decision Was Made Without Legal Authority or Was Unreasonable

Stop Order Authority and Director's Decision Refusing to Invoke It

- (ee) Section 8 of the *EPA* provides the Director with statutory power to issue a stop order against a source of contaminants that pose an immediate danger to human life, the health of any persons, or to property:

“8 (1) When the Director, upon reasonable and probable grounds, is of the opinion that a source of contaminant is discharging into the natural environment any contaminant that constitutes, or the amount, concentration or level of which constitutes, an immediate danger to human life, the health of any persons, or to property, the Director may issue a stop order directed to,

- (a) an owner or previous owner of the source of contaminant;

(b) a person who is or was in occupation of the source of
contaminant; or

(c) a person who has or had the charge, management or control of
the source of contaminant.”

(ee.1) Section 128 of the *EPA* prescribes the content of a stop order, if issued:

“**128** The Director may, where he or she is authorized by this Act to issue a stop order, order the person to whom it is directed to immediately stop or cause the source of contaminant to stop discharging into the natural environment any contaminant either permanently or for a specific period of time.”

(ee.2) Pursuant to section 130 of the *EPA* all persons named in a stop order must immediately comply with the order once it is served upon them.

(ee.3) The decision of the Director, in refusing to issue a stop order under section 8 of the *EPA*, was without legal authority in its disregard of the immediate danger posed by the industrial discharges from the Madsen Mine of sulphate and its capacity to precipitate or accelerate the formation of methylmercury in area waters and the aquatic food chain, including fish, and the consequential harm to life and health of members of Grassy Narrows consuming the fish.

Control Order Authority and Director's Decision Refusing to Invoke It

- (ff) Section 7 of the *EPA* provides the Director with statutory power to issue a control order against persons responsible for the discharge of contaminants into the natural environment that cause, or may cause, an adverse effect:

“7 (1) When the report of a provincial officer contains a finding that a contaminant discharged into the natural environment is a contaminant the use of which is prohibited by the regulations or is being discharged in contravention of section 14 or the regulations, the Director may issue a control order directed to,

- (a) an owner or previous owner of the source of contaminant;
- (b) a person who is or was in occupation of the source of contaminant; or
- (c) a person who has or had the charge, management or control of the source of contaminant.

(1.1) No order shall be issued under subsection (1) as a result of a finding that a contaminant is being discharged in contravention of section 14 unless the contravention causes or is likely to cause an adverse effect.”

- (ff.1) Section 14 of the *EPA* prohibits any person from discharging a contaminant, or causing or permitting the discharge of a contaminant, into the natural environment, if the discharge causes or may cause an adverse effect.
- (ff.2) Section 1 of the *EPA* lists a wide range of prohibited “adverse effects” including:

- “(a) impairment of the quality of the natural environment for any use that can be made of it,
- (b) injury or damage to property or to plant or animal life,
- (c) harm or material discomfort to any person,
- (d) an adverse effect on the health of any person,
- (e) impairment of the safety of any person,
- (f) rendering any property or plant or animal life unfit for human use,
- (g) loss of enjoyment of normal use of property, and
- (h) interference with the normal conduct of business.”

(ff.3) Section 124 of the *EPA* prescribes the content of a control order, if issued:

“**124** (1) The Director may, where he or she is authorized by this Act to issue a control order, order the person to whom it is directed to do any one or more of the following, namely,

- (a) to limit or control the rate of discharge of the contaminant into the natural environment in accordance with the directions set out in the order;
- (b) to stop the discharge of the contaminant into the natural environment,
- (i) permanently,
- (ii) for a specified period, or
- (iii) in the circumstances set out in the order;

(c) to comply with any directions set out in the order relating to the manner in which the contaminant may be discharged into the natural environment;

(d) to comply with any directions set out in the order relating to the procedures to be followed in the control or elimination of the discharge of the contaminant into the natural environment;

(e) to install, replace or alter any equipment or thing designed to control or eliminate the addition, emission or discharge of the contaminant into the natural environment;

(f) to monitor and record, both in the manner specified in the order, the discharge into the natural environment of the contaminant specified in the order and to report thereon to the Director;

(g) to study and to report to the Director upon,

(i) measures to control the discharge into the natural environment of the contaminant specified in the order,

(ii) the effects of the discharge into the natural environment of the contaminant specified in the order,

(iii) the natural environment into which the contaminant specified in the order is being or is likely to be discharged; and

(h) to report to the Director in respect of fuel, materials and methods of production used and intended to be used, and the wastes that will or are likely to be generated.

- (ff.4) Pursuant to section 125 of the *EPA* all persons named in a control order must comply with the order forthwith, or by the date specified in the order, once it is served upon them.
- (ff.5) The decision of the Director, in refusing to issue a control order under section 7 of the *EPA*, was without legal authority in its disregard of the Madsen Mine industrial discharges of sulphate and other contaminants into area waters that were causing, or likely to cause, an adverse effect in contravention of section 14 of the *EPA*, and the harm such discharges could pose to members of Grassy Narrows.

Refusal to Issue a Stop and / or a Control Order Was Unreasonable

- (gg) In the alternative, the decision of the Director was unreasonable in that: (1) it failed to provide coherent reasons for not issuing a stop order, or any reasons for not issuing a control order, in the face of the immediate danger, and adverse effects, respectively, presented by Madsen Mine industrial discharges of sulphate to area waters causing the formation of methylmercury whose bioaccumulation and biomagnification in fish posed severe health threats to members of the Applicant community consuming the fish because of the compound's neurotoxic properties; (2) it ignored and/or was inconsistent in the face of the evidence and arguments before it regarding either: (a) the threats posed by the acutely, and synergistically, toxic substances in the Madsen Mine industrial discharges being released to area waters, or (b) the failure on their face, or as applied, of ECA-required works and measures in controlling the problem; and (3) such reasons as were provided were conclusory in nature, lacking in any real analysis and, therefore, amounted to the

provision of no reasons at all. Accordingly, the Director's decision as a whole lacks the hallmarks of reasonableness and is not transparent, intelligible, or justified.

- (hh) Although the proposal to re-open the Madsen Mine was new, and posed potentially serious risks to the environment, the public and Grassy Narrows people, and despite clear evidence that the site's previous authorizations had failed to prevent adverse effects, the Director unreasonably chose not to require any new or amended authorizations for the current mine owner, and chose not to post notice of the re-opening of the mine to the Environmental Registry of Ontario nor to carry out meaningful consultation with, the public or Grassy Narrows.

The Decision Violated Grassy Narrows Section 35 Rights as Ontario Had a Duty to Consult, Accommodate and Obtain Its Consent

- (ii) The honour of the Crown creates a "special relationship" that requires the Crown to act honourably in all its dealings with Indigenous peoples. Ontario is obligated pursuant to section 35 of the *Constitutional Act, 1982* to act honourably in its dealings with Indigenous peoples. The underlying purpose of the honour of the Crown is to facilitate reconciliation.
- (jj) The duty to consult, accommodate and obtain Consent is a duty that flows from the honour of the Crown.
- (kk) The duty to consult, accommodate and obtain Consent is triggered when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or Treaty right and contemplates conduct that might adversely affect it.

- (ll) Under Crown law the degree of consultation required depends on the strength of the Indigenous claim and the seriousness of the potential impact on the rights.
- (mm) Under Crown law, Consent is required at the high end of the consultation spectrum when the strength of the Indigenous claim and/or the seriousness of the potential impact are high. At all material times, the Crown is required, at a minimum, to meaningfully consult and accommodate, where necessary, at a level commensurate with the location on the consultation spectrum
- (nn) Under Crown law, Consent is also required when the cumulative impacts of industry exceed a threshold beyond which they have a meaningful impact on the Treaty rights of the First Nation.
- (oo) Article 32 of the *UNDRIP* requires States to consult and cooperate in good faith with Indigenous peoples through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
- (pp) In 2016, Canada endorsed the *UNDRIP* “without qualification” and committed to its “full and effective implementation.”
- (qq) International instruments which Canada enters into also have application to sub-national governments within Canada, including the Government of Ontario.
- (rr) The honour of the Crown is informed by the Crown’s obligations under *UNDRIP*.

- (ss) The strength of Grassy Narrows' claimed rights is at the high end of the spectrum because its Treaty rights are established.
- (tt) Ontario has knowledge, real or constructive, that: (1) Grassy Narrows members are Indigenous people who rely on fishing and the practice of their Treaty Rights; (2) the Madsen Mine falls within Grassy Narrows' Core Area of Interest for Mining; and (3) the Grassy Narrows reserve is located downstream from the Madsen Mine.
- (uu) Ontario has knowledge, real or constructive, of the "substantial and severe" contamination problems identified by Grassy Narrows' experts with industrial discharges from the Madsen Mine, including: (1) the release of acutely toxic water to the environment for durations of up to a few months; (2) the enormous increases in the presence of sulphate and other contaminants downstream from the mine site, and its potential for increasing the methylation of elements like mercury and arsenic in area waters; and (3) the ineffectiveness to date of various works and measures required by the ECA to prevent or mitigate these and other environmental problems.
- (vv) Accordingly, Ontario had a duty to consult, accommodate and obtain consent prior to allowing the re-opening of the Madsen Mine in a manner that ensured Grassy Narrows had the capacity and time required to meaningfully engage.
- (xx) On or around April 28, 2025, aware of media reports that the current owner intended to imminently reopen the mine, Grassy Narrows wrote to Ontario reiterating its expectation that it would be meaningfully consulted with respect to all aspects of the project and requested a pause until such consultation could be carried out.

- (yy) On May 12, 2025, an official from the Ministry of Energy and Mines advised Grassy Narrows that the Madsen Mine is fully permitted and does not require any further permits, approvals or authorizations to continue its mining activities. To date, Ontario has refused to meet with Grassy Narrows to discuss its concerns about the Madsen Mine.
- (zz) On May 22, 2025, the current owner issued a press release communicating its decision to restart the Madsen Mine “immediately” and noting that this re-start was “slightly ahead of schedule.”
- (aaa) Grassy Narrows was not consulted, accommodated nor did it provide consent for any of the permits, approvals or authorizations granted by Ontario for the Madsen Mine. In particular, there was no notice to, nor meaningful consultation with, Grassy Narrows before the ECA was issued in 2020, amended in 2021, or the Madsen Mine Site was re-opened in 2025.
- (bbb) Madsen Mine site operations and conditions have been, and likely will continue to be, the source of substantial and severe contamination to the detriment of the Grassy Narrows community and their established Treaty and constitutional rights. The current ECA has proven to be ineffective at preventing adverse environmental impacts from the Madsen Mine over the past five years.
- (ccc) In its request for control and stop orders under the *EPA*, Grassy Narrows also requested that Ontario immediately begin consultations with Grassy Narrows in respect of the Madsen Mine and not allow any activities that might impact their rights prior to meaningful consultation, accommodation and informed consent. The

Director failed to respond at all to this request and therefore continues to fail to engage in any meaningful consultation or accommodation and continues to fail to obtain Grassy Narrows consent to any of the mining activities at Madsen Mine. There has been no meaningful consultation with Grassy Narrows in relation to the Madsen Mine.

Constitutional and Statutory Provisions

- (ddd) *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, section 35;
 - (eee) *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/49 (2007);
 - (fff) *Indian Act*, R.S.C. 1985, c. I-5;
 - (ggg) *Courts of Justice Act*, R.S.O. 1990, c. C.43;
 - (hhh) *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17;
 - (iii) *Environmental Bill of Rights, 1993*, S.O. 1993, c.28;
 - (jjj) *Environmental Protection Act*, R.S.O. 1990, c. E.19;
 - (kkk) *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;
 - (lll) *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194;
- (mmm) Such further or other grounds as counsel may advise and this Honourable Court may permit.

Documentary Evidence

3. The following documentary evidence will be used at the hearing of the application:
- (a) the record to be filed by the Respondent Director pursuant to section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;
 - (b) Such further or other material as counsel may advise and this Honourable Court may permit.

September 8, 2025

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Applicant

-and- **HIS MAJESTY THE KING IN RIGHT OF ONTARIO**
Respondent

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPLICATION

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