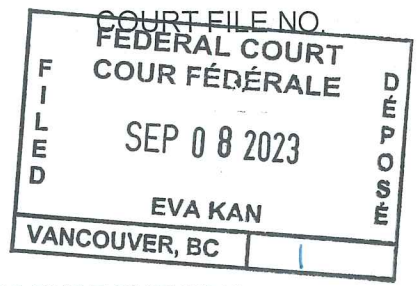


101

T-1877-23

FEDERAL COURT



BETWEEN

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

Applicant

AND

ATTORNEY GENERAL OF CANADA and FORAN MINING CORPORATION and MCILVENNA BAY OPERATING LIMITED

Respondent

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

NOTICE OF APPLICATION

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

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

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

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

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

Date: SEP 08 2023

Issued by: ORIGINAL SIGNED BY EVA KAN (Registry Officer) A SIGNÉ L'ORIGINAL

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

TO:

ATTORNEY GENERAL OF CANADA c/o
DEPARTMENT OF JUSTICE CANADA
British Columbia Regional Office
900-840 Howe Street
Vancouver BC, V6Z 2S9

AND TO:

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

APPLICATION

1. This is an application by the Métis Nation – Saskatchewan (the “**MN-S**”) for judicial review in respect of a decision issued by the President of the Impact Assessment Agency of Canada (the “**President**” and the “**IAAC**”, respectively), under the authority delegated to him by the Minister of Environment and Climate Change Canada (“**ECCC**” and the “**Minister**”, respectively), on August 10, 2023 (the “**Decision**”).
2. The Decision did not give reasonable consideration to, or correctly determine, whether the proposed McIlvenna Bay Mine Project (the “**Project**”) qualifies as a “designated project” within the meaning of the *Impact Assessment Act*, SC 2019, c 28, (the “**IAA**”) by reason of sections 18(c) and 18(d) of the *Physical Activities Regulations*, SOR/2019-285 (the “**Physical Activities Regulations**”).
3. Furthermore, the Decision improperly declined to designate the Project pursuant to section 9(1) of the *IAA* and the Schedule to the *Physical Activities Regulations*. In addition, the President failed to consult with the MN-S with respect to the exercise of his authority under section 9(1) of the *IAA*.
4. The Project is a proposed base and precious metals underground mine and surface mineral processing facility to be constructed by McIlvenna Bay Operating Ltd., a wholly owned subsidiary of Foran Mining Corporation (together, the “**Proponent**”).

THE APPLICANT MAKES APPLICATION FOR:

5. An order in the nature of *certiorari*, quashing or setting aside the Decision;
6. A declaration that the Decision is unreasonable because the President:
 - (a) failed provide adequate reasons as to which of the Project's physical activities was

approved to be carried out pursuant to a permit issued by Transport Canada under the *Canada Navigable Waters Act*, RSC 1985, c. N-22, on March 17, 2023 (the “Permit”);

- (b) improperly determined that he was precluded from designating the Project for a federal assessment under section 9(1) of the *IAA* by reason of section 9(7)(b);
 - (c) failed to give reasonable consideration to the MN-S’ request that the Project be designated for a federal assessment under the *IAA*;
 - (d) failed to uphold the honour of the Crown in refusing to designate the Project for a federal assessment under section 9(1) of the *IAA* by reason of section 9(7)(b);
 - (e) failed to take reasonable steps to consider whether the Project or a portion thereof is a “designated project” within the meaning of the *IAA* by reason of sections 18(c) or 18(d) of the *Physical Activities Regulations*;
 - (f) failed to uphold the honour of the Crown when assessing whether the Project or a portion thereof is a “designated project” within the meaning of the *IAA* by reason of sections 18(c) or 18(d) of the *Physical Activities Regulations*; and
 - (g) failed to designate the Project or a portion thereof for a federal assessment under section 9(1);
7. An order of in the nature of *mandamus* compelling the Minister to take reasonable steps to assess whether the Project is a “designated project” within the meaning of the *IAA* by reason of sections 18(c) or 18(d) of the *Physical Activities Regulations*;
8. An order of in the nature of *mandamus* compelling the Minister to reassess whether any physical activity comprising the Project should be designated under section 9(1) of the

IAA;

9. A declaration that the honour of the Crown requires that the President consult with the MN-S with respect to the exercise of his authority under section 9(1) of the *IAA*;
10. An injunction preventing the Proponent from taking any steps in reliance of the Decision or to take any steps that would prevent the Minister from designating the Project or a portion thereof by reason of section 9(7)(a) of the *IAA* until after the Minister has:
 - (a) taken reasonable steps to assess whether the Project is a “designated project” within the meaning of the *IAA* by reason of sections 18(c) or 18(d) of the *Physical Activities Regulations*; and
 - (b) reassessed whether any physical activities comprising the Project should be designated for a federal assessment under section 9(1) of the *IAA*
11. An order for costs of and incidental to this application; and
12. Such further and other relief as this Court may deem appropriate.

THE GROUNDS FOR THIS APPLICATION ARE:

Introduction

13. The Project contains a proposed base and precious metals underground mine and a surface mineral processing facility located in east-central Saskatchewan, on land that is part of the traditional territory of the Métis Nation, which is described by the Métis Nation as the Métis Homeland. The construction, operation, and de-commissioning of the Project is a cause of concern to the MN-S given the nature of the Project and its location on the Métis Homeland.
14. The Project underwent a provincial assessment under Saskatchewan’s *The Environmental Assessment Act*, SS 1979-80, c E-10.1. The Minister of the Environment of Saskatchewan

approved the Project in a decision dated July 24, 2023.

15. On July 6, 2023, the MN-S submitted a Designation Application (defined below) to the Minister to request that he consider whether the Project is or ought to be designated for a federal impact assessment under the *IAA*.
16. On August 10, 2023, the President issued the Decision in response to the Designation Application. Counsel for the MN-S followed up with the Impact Assessment Agency of Canada (“**IAAC**”) on August 25, 2023, with questions as to the process by which the President made the Decision (the “**MN-S Follow-up**”). The IAAC provided responses to certain of those questions on August 31, 2023 (the “**IAAC Response**”).

Parties

17. The MN-S is the democratically elected government of the Métis of Saskatchewan representing the rights and interests of Saskatchewan Métis, who are Aboriginal peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.
18. The MN-S is exclusively mandated to represent the Métis Nation within Saskatchewan based on the authorizations it receives from its Citizens and the Métis collectivity throughout Saskatchewan comprised of those Citizens, in respect of collectively held Métis Aboriginal rights, interests, and claims, as recognized by the Government of Canada in the *Métis Nation within Saskatchewan Self-Government Recognition and Implementation Agreement* signed February 24, 2023.
19. ECCC is a department within the Government of Canada and is responsible for a wide range of environmental issues, including coordinating environmental policies and programs, as well as preserving and enhancing the natural environment and renewable resources in Canada. IAAC is accountable to ECCC and is responsible for undertaking and delivering impact assessments that look at both positive and negative environmental, economic, social, and

health impacts of potential projects.

20. McIlvenna Bay Operating Subsidiary Ltd., a wholly owned subsidiary of Foran Mining Corporation, is the Project proponent.

The Project

21. The Proponent seeks to build the Project, which is comprised of two primary distinct components: (1) a base and precious metals underground mine (the “**Mine**”); and (2) a surface mineral processing facility (the “**Mill**”). The Mine and the Mill are also supported by a paste plant and a water treatment plant. The Mine, Mill, paste plant and water treatment plant are all located in east-central Saskatchewan, approximately 375 kilometres northeast of Saskatoon and 65 kilometres west-southwest of Creighton.
22. The Minister has recognized the distinct “physical activity” categories of new metal mines, new metal mills, and new hazardous waste treatment facilities within the *Physical Activities Regulations*.
23. The Project also includes a outfall structure in Hanson Lake which discharges effluent from the water treatment plant (the “**Outfall**”).

The Project Location and the Métis Homeland

24. The Project is located on Crown lands within Treaty 10 Territory and the documented traditional territory of the Métis Nation. The Project specifically sits within MN-S Eastern Region I (“**ERI**”) which is in the heart of the Métis Homeland and holds significant historic and ongoing importance for the Métis Nation.
25. Cumberland House, located in ERI, is the oldest historic Métis community in Saskatchewan, founded in 1774. Cumberland House pre-dates the Red River Métis Colony, which was

founded in 1812. Cumberland House played a significant role as a hub of the historic Métis economy, having hosted one of the most important fur depots in Canada and also supported the trade of pemmican. That trade was a major factor in the emergence of the new and distinct Métis society.

The IAA Regime for Project Designation

26. Under the *IAA*, federal impact assessments are undertaken for designated projects. A designated project, for the purposes of the *IAA*, can include one or more physical activities, and can include additional physical activities which are incidental to each other, but which are distinct physical activities.

27. To qualify as a designated project, a project must contain a physical activity:

(a) which has been identified in regulation; or

(b) which the Minister elects to designate specifically under section 9(1) of the *IAA*.

28. The *Physical Activities Regulations* sets out those physical activities and classes of physical activities which, if contained in a project, will necessarily qualify the project as a designated project. Physical activities that constitute a “designated project” include, as set out in section 18 of the *Physical Activities Regulations*:

18 The construction, operation, decommissioning and abandonment of...

(c) a new metal mine, other than a rare earth element mine, placer mine or uranium mine, with an ore production capacity of 5 000 tonnes per day or more; and

(d) a new metal mill, other than a uranium mill, with an ore input capacity of 5 000 tonnes per day or more

29. Section 9(1) of the *IAA* grants the Minister power to designate a physical activity that is not described in the *Physical Activities Regulations* if, in the Minister’s opinion, either “the

carrying out of that physical activity” may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.

The Designation Application

30. On July 6, 2023, the MN-S submitted an application to the Minister (the “**Designation Application**”), asking him to:
- (a) consider whether the Project meets the criteria for a designated project pursuant to the *IAA* and sections 18(c) 18(d) of the *Physical Activities Regulations*; and
 - (b) otherwise, by ministerial order, designate the Project for a federal impact assessment pursuant to section 9(1) of the *IAA* on the basis that the Project will cause adverse effects and will raise public concerns relating to adverse direct and incidental effects that warrant the designation.
31. The Designation Application submitted that the Minister should assess the Project for the purpose of determining whether it qualified as a “designated project” on the basis that:
- (a) the Mine appears to have a “capacity” in excess of 5,000 tonnes per day of ore, satisfying sections 18(c) of the *Physical Activities Regulations*; and
 - (b) the Mill appears to have a “capacity” in excess of 5,000 tonnes per day of ore, satisfying sections 18(d) of the *Physical Activities Regulations*.
32. The Designation Application further submitted that, if the Minister concludes that the Project does not qualify as a “designated project” by reason of the *Physical Activities Regulations*, that the Minister should exercise his authority to designate the project a “designated project” under section 9 of the *IAA* on the basis that the Project:

- (a) contains both a Mine and a Mill which, together, have the potential to create adverse effects similar to, or in excess of, those adverse effects which would be anticipated from a stand-alone Mine with capacity of 5,000 tonnes per day of ore and thereby satisfying sections 18(c) of the *Physical Activities Regulations*, or a stand-alone Mill producing 5,000 tonnes per day of ore and thereby satisfying sections 18(d) of the *Physical Activities Regulations*;
- (b) is anticipated to adversely impact areas within federal jurisdiction, including Indigenous peoples and lands, species at risk, migratory birds, fish and fish habitats;
- (c) has the potential to raise interprovincial concerns given its proximity to the Saskatchewan-Manitoba border;
- (d) will adversely affect the rights of the Métis and contribute to the cumulative impacts of other developments in and around Hanson Lake and the broader region around Flin Flon, which is an area of cultural significance to MN-S that has already faced significant pressure from past development; and
- (e) will otherwise be assessed through a processes that does not adequately consult with the MN-S or address Métis rights and interests, and which expressly refuses to consider Métis claims to commercial harvesting rights and Aboriginal title or to recognize the role of the MN-S as the appropriate representative of Métis rights.

The Decision

33. The Decision states, *inter alia*, "As proposed, the project would produce copper and zinc ore concentrates containing gold and silver up to a total production rate of 4,200 tonnes per day." The production rate as stated here is below the threshold to trigger designation under section 18 of the *Physical Activities Regulation*. As a result of this statement

regarding the production rate, the President concluded that the Project is not designated under the *Physical Activities Regulation*.

34. The President also declined to designate any of the physical activities of the Project under the authority granted to him by section 9(1) of the *IAA*. In his declination, the President specifically relied on section 9(7)(b) of the *IAA*, which states that a designation of a physical activity must not be made if:

a federal authority has exercised a power or performed a duty or function conferred on it under any Act of Parliament other than this Act that could permit the physical activity to be carried out, in whole or in part.

35. The President stated that the Permit, which concerns the narrow issue of the construction of the Outfall in light of its potential impact on navigable waters, constitutes a federal authority exercising a power or performing a duty or function under section 9(7)(b) of the *IAA*. In the President's estimation, the Permit precluded him from designating the Project under section 9(1) of the *IAA*.

36. Notably, the President did not comment on or clarify which of the Project's physical activities the Permit purportedly permitted to be carried out. Rather, he stated that the Permit "could permit the physical activities to be carried out in whole or in part."

The MN-S Follow-up and the IAAC Response

37. After reviewing the Decision, counsel for the MN-S followed up with the IAAC seeking further information regarding the Decision, specifically:

- (a) What steps did IAAC/the President take to assess the reasonableness of the proponent's submission that the maximum capacity of the Project will not exceed 4,200 tonnes per day?
- (b) How did IAAC/the President reconcile the proponent's assertion that the maximum capacity of the Project will not exceed 4,200 tonnes per day with Foran's public disclosures which say that annual production will result in an average of 4,200 tonnes per day?

- (c) What bottlenecks in throughput did IAAC/the President identify for both the proponent's mine and mill that would keep either from exceeding production of 4,200 tonnes per day?
 - (d) Does IAAC/the President provide proponents with guidance on determining "capacity"?
 - (e) Is the concept of "capacity" interpreted consistently by IAAC/the President in assessing the various physical activities set out in the Physical Activities Regulations?
 - (f) In concluding that the Transport Canada permit precluded the Minister's designation under paragraph 9(7)(b), can you identify which materials IAAC/the President considered and the physical activities that the President concluded were permitted by the Transport Canada permit?
38. The IAAC Response to the MN-S follow-up referred in part to the IAAC's "Operational Guide Designating a Project under the Impact Assessment Act". This guide requires that, before the IAAC initiates its review of a request to designate a project (such as the MN-S' Designation Application), the IAAC "must first review the information received to evaluate whether or not the physical activity is described on the Project List. The evaluation may include seeking information from the proponent and federal authorities, as appropriate."
39. The IAAC Response referred to correspondence between the Proponent and the IAAC regarding the maximum capacity of the Project, but provided no details as to how the discrepancy between the Proponent's assertions of the average production rate and maximum capacity of the Project could be reconciled.

The Decision and the IAAC Follow-up are Unreasonable

The President Improperly Relied on the Permit

34. In his Decision, the President declined to designate any of the physical activities of the Project under 9(1). The President specifically relied on section 9(7)(b) of the *IAA*, which states that a designation of a physical activity must not be made if:

a federal authority has exercised a power or performed a duty or function conferred on it under any Act of Parliament other than this Act that could permit **the** physical activity to be carried out, in whole or in part.

35. The President declined to designate Project on this basis by citing the Permit issued by Transport Canada. The Permit concerns the construction of the Outfall and specifically its potential interference with navigation. The Outfall is one of the methods by which the water treatment plant discharges water.

36. The Decision specifically states:

On March 17, 2023, Transport Canada issued an approval under the Canadian Navigable Waters Act for an outfall structure that, according to the Project's Environmental Impact Statement issued to the Saskatchewan Ministry of Environment as part of Saskatchewan's The Environmental Assessment Act process, is an element of the Project and therefore, **could permit the physical activities to be carried out in whole or in part.**[Underlining added.]

37. In this statement, the President failed to specify which of the Project's physical activities was approved by the Permit. The text of section 9(1) states in part:

9 (1) The Minister may, on request or on his or her own initiative, by order, **designate a physical activity** that is not prescribed by regulations... [Underlining added.]

38. A project under the *IAA* can contain multiple "physical activities". For example, a pipeline and oil shipment terminal may constitute one project but contain multiple physical activities. A designated project is described under the *IAA* as follows:

designated project means one or more physical activities that:

- (a) are carried out in Canada or on federal lands; and
- (b) are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1)

It includes any physical activity that is incidental to those physical activities...

39. The restriction on *IAA* section 9(1) found in 9(7)(b) and cited by the President only prevents the Minister from designating a "physical activity" where a federal authority has otherwise permitted that same "physical activity". Section 9(7)(b) in no way restricts the Minister from designating a

physical activity where an “incidental” or distinct physical activity which is part of the same project has been otherwise permitted by a separate federal authority.

40. As discussed, the Project includes the Mine, the Mill, and a number of incidental facilities, including a paste plant, a water treatment plant, and the Outfall. As per the “designated project” definition above, each of these components of the Project is a physical activity. Under the IAA, the Outfall appears incidental to the water treatment plant. The water treatment plan may likewise be incidental to the Mill or the Mine, or both. If the President seeks to rely on the Permit to decline to designate all of the Project’s physical activities, he must specify which physical activities the Permit authorizes and explain the connection between the Permit and each of the physical activities. He failed to do so.
41. Further and in addition, the Permit is not the kind of “power” or “duty” exercised by a federal authority that section 9(7)(b) of the IAA contemplates. The Outfall is a relatively minor and ancillary component of the Project. Transport Canada’s considerations in issuing the Permit in no appreciable way duplicate the environmental assessment that would be undertaken by the IAAC should the Project be designated under the IAA. The Permit itself expressly states that “This approval relates only to the interference of your work [(i.e., the Outflow)] with navigation under the CNWA...”.
42. The MN-S’s follow-up on August 25, 2023 expressly asked the IAAC to identify which materials the President considered in coming to his Decision regarding the Permit, and asked the IAAC to clarify which physical activities the President conclude were approved by the Permit. The IAAC Response is largely unresponsive to these requests and fails to identify the relevant physical activities.

The President Relied on an Incorrect Production Rate

43. The Decision states, *inter alia*, “As proposed, the project would produce copper and zinc

ore concentrates containing gold and silver up to a total production rate of 4,200 tonnes per day.” The production rate as stated here is below the threshold to trigger designation under section 18 of the *Physical Activities Regulation*.

44. This statement is incorrect. The Project contemplates annual mining and processing throughput equating to an **average** of 4,200 tonnes per day. Average production is distinct from capacity. This average daily production rate does not correspond with the Project's capacity in a single day as contemplated by section 18 of the *Physical Activities Regulations*.
45. The capacity triggers under the *Physical Activities Regulations* are best understood as maximum production rates. Capacity in this context measures what can be achieved in a single day assuming optimal normal operating conditions. Accordingly, the estimated **average** production of 4,200 tonnes per day measured over a full year is not reflective of the **daily capacity** of the Project.
46. The MN-S follow-up specifically addressed this issue and asked the IAAC to clarify the steps taken to ensure that the President's conclusion regarding a 4,200 tonnes per day Project capacity is accurate. No responsive information was provided, other than a blanket statement that the Proponent confirmed that the Project's maximum capacity is 4,200 tonnes per day. Again, no consideration was given to the Mine and the Mill as physical activities that could each, independently, qualify the Project for designation under the *Physical Activities Regulations*. In addition, the reasons failed to explain how the President considered the concerns raised by the MN-S or to describe any reasonable steps taken by the President to address discrepancies in the materials provided by the Proponent.

The President Failed to Uphold the Honour of the Crown

47. The purpose and intention of the act, and the honour of the Crown does not permit the Minister to simply ignore obvious deficiencies in the statements of the Proponent or to ignore other

evidence and simply accept the assertions of the Proponent.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING

48. The record before the President with respect to the Decision;
49. Affidavit(s) which may be filed in the within proceeding; and
50. Such further and other material as counsel for the parties may advise.

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

1. Any material relied on by ECCC in issuing the Decision.

Date: September 8, 2023.



Lawyers for the Applicant, the MN-S

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