CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Civil Division)

No:

MITCHIKANIBIKOK INIK (ALGONQUINS OF BARRIERE LAKE), Mitchikanibikok Inik First Nation reserve, located in Kitiganik (City of Rapid Lake), district of Pontiac, province of Québec, J0W 2C0

Applicant

v.

ATTORNEY GENERAL OF QUÉBEC (GOVERNMENT OF QUÉBEC AND MINISTER OF ENERGY AND NATURAL RESOURCES), having an office at 1, Notre-Dame Street East, 9th floor, in Montreal, district of Montreal, province of Québec, H2Y 1B6

Respondent

APPLICATION FOR JUDICIAL REVIEW AND PERMANENT INJUNCTION

(Ss. 76, 529 (1), and 509 CCP; and ss. 35 and 52 of the *Constitution Act, 1982*)

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RESPECTFULLY DECLARES THE FOLLOWING:

PURPOSE OF THE APPLICATION

1. This is an application by the Mitchikanibikok Inik First Nation (also known as the Algonquins of Barriere Lake) pursuant to ss. 35 and 52 of the *Constitution Act, 1982*. It challenges the constitutionality of certain sections of the *Mining Act* (CQLR, c. M-13.1) ("**Act**"). It respectfully asks the Court to:

    a. declare that sections 56, 61, 65, and 72 of the *Mining Act* (CQLR, c. M-13.1) are unconstitutional and of no force or effect;

b. declare that the Respondent has a duty to consult and accommodate the Applicant in determining whether mineral rights on Crown lands within the Area (described below) are to be made available to third parties under the provisions of the Act;

c. declare that the Respondent has a duty to notify, consult, and accommodate the Applicant before allowing any mining exploration activities to take place within the Area, to the extent that those activities may prejudicially affect Aboriginal rights and title claimed by the Applicant;

d. declare that the *Aboriginal Community Consultation Policy Specific to the Mining Sector* published on or around October 22, 2019 is unconstitutional and of no force or effect;

e. suspend the above declarations for one year to allow appropriate statutory and regulatory changes;

f. declare that the transfer of mineral claims to SOQUEM breached Québec's fiduciary duty toward the Applicant and its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982*;

g. order that the mineral claims held by SOQUEM remain suspended, until such time as the parties negotiate a just remedy for these breaches subject to the Court's approval

h. declare that prior to any future registration, renewal, or transfer of mineral claims in the Area, the exact identity of which shall be provided at the hearing on the merits or at whichever time the Court deems appropriate, Québec must consult and accommodate the Applicants;

i. order the Respondent not to issue, renew, or transfer any mining rights upon the Area prior to consultation with the Applicant and appropriate accommodation;

j. order any such further and other relief as this Court may deem just;

2. The Applicant brings this application because the Respondent maintains an Act (and a related policy) under which it does not consult the Applicant prior to registering, renewing, or transferring mineral claims upon the Applicant's unceded Indigenous territory, as it must under s. 35 of the *Constitution Act, 1982*. Consultation is necessary so that the Respondent identifies and accommodates Aboriginal rights which may be adversely affected by mineral claims granted to others under the Act;

THE PARTIES

3. The Applicant is a First Nation and "band" recognized pursuant to the *Indian Act,* RSC 1985, ch. I-5. The people of the Mitchikanibikok Inik occupy unceded traditional territories in Québec, and comprise over 700 members, approximately 580 of whom reside on the reserve, located near Rapid Lake, north of Maniwaki;

4. The Applicant's people and ancestors have occupied its traditional territories since time immemorial. These territories were never ceded to the Crown by conquest or treaty. The Applicant claims and continues to have Aboriginal rights in these territories, which are recognized and affirmed by s. 35 of the *Constitution Act, 1982*;

5. The Respondent is the Crown in Right of Québec ("**Crown**" or "**Québec**"), having as one of its agents the Minister of Energy and Natural Resources who is responsible for the Act, including the registration, renewal, or transfer of mineral claims and management of other mining-related rights;

RELATIONS WITH THE CROWN

6. In 1991, Québec and the Government of Canada entered into a Trilateral Agreement with the Applicant, **EXHIBIT P-1**, governing the management of natural resources in "territory currently used by the latter", which is defined in a map at Annex 1 of the Trilateral Agreement ("**Area**"). The Trilateral Agreement also recognizes that the parties agree that the Area is used for "traditional activities";

7. The Trilateral Agreement was subsequently reaffirmed in 1998 by Québec in a Bilateral Agreement, **EXHIBIT P-2**, and recently formed the basis for negotiations with Québec of a draft Implementation Agreement, **EXHIBIT P-3**;

8. Each of these agreements reaffirms a portion of the traditional territory used by the Applicant in the Area. In the words of the draft Implementation Agreement, the Area "is a territory that is currently used by ABL [the Anglicised named of the Applicant] and shared with other communities";

9. It has never been the case that the Applicant and the Respondent have agreed on the management principles for the claiming and extraction of mineral resources in the Area. The Trilateral Agreement and the agreements that follow it are concerned with the management and disposition of renewable resources, such as timber and fauna, and are largely silent on mineral resources;

10. In the absence of agreement, the Applicant relies on the established duty of the honour of the Crown and s. 35 of the *Constitution Act, 1982*, to structure its relationship with the Crown in the Area, and in particular: (i) its Aboriginal rights in law, and, (ii) its claimed Aboriginal title;

11. **With respect to Aboriginal rights**: the Applicant has since time immemorial resided in and carried on their own practices and customs for survival or cultural reasons in its traditional territories, including but not limited to hunting, fishing, trapping, navigation, and worship, as will be shown at the hearing;

12. **With respect to Aboriginal title**: the Applicant has consistently claimed Aboriginal title to its traditional territories. As its Aboriginal title has been neither ceded by treaty nor extinguished by conquest, the Applicant maintains its claim of Aboriginal title today. The basis of the Applicant's claim to Aboriginal title is explained in a 1992 submission by the Algonquin Nation to Québec, **EXHIBIT P-4**, and may be further explained at the hearing. For greater certainty, the Applicant does not seek to prove its Aboriginal title in this case, but the Crown has knowledge that a *prima facie* basis for Aboriginal title exists;

THE DEFICIENCIES OF QUÉBEC'S MINING ACT

13. The actions of Québec under the Act, in registering, renewing, or transferring mineral claims, automatically and without further legal authorization, open the way for third parties to conduct mining-related activities that infringe the aforesaid Aboriginal rights and claimed Aboriginal title. Pursuant to ss. 65, 68, 69, 72, and related provisions of the Act, these activities include to explore for minerals (including to extract and dispatch up to 50 metric tons of samples), make use of sand and gravel, and perform works that Québec prescribes by regulation;

14. Consultation with the Applicant is required prior to registering, renewing, or transferring mineral claims, because the Applicant is the only one who possesses necessary information and traditional knowledge to inform the Crown, so that it can avoid the impairment of asserted or recognized rights caused by the implementation of a specific mining-related activity;

15. Factually, Québec currently does not consult and accommodate the Applicant before registering, renewing, or transferring mineral claims, nor does it thereafter consult and accommodate prior to the performance of the activities summarized in paragraph 13 above, which are dependent on sections 56, 61, 65, and 72 of the Act and their related provisions. This mode of operation is aligned with the spirit of the Act's "free entry" or "free mining" system provided in Division III of the Act;

THE POLICY

16. Pursuant to s. 2.3 of the Act, on or around October 22, 2019, the Minister exercised his discretion to publish the *Aboriginal Community Consultation Policy Specific to the Mining Sector* ("**Policy**", **EXHIBIT P-5**). The Applicant submits that the Policy

does not direct or recommend behavior on the part of the Crown which would meet its constitutional duties under s. 35 and is therefore of no help to the validity of the impugned sections of the Act;

17. On the contrary, the Policy recommends and purports to authorize practices that, if acted on by third parties, enable Québec to avoid undertaking the consultation and accommodation required by s. 35 of the *Constitution Act, 1982* when a mineral claim is registered, renewed, or transferred;

18. The Applicant respectfully submits that the Policy must therefore be declared unconstitutional and invalid;

THE SOQUEM TRANSFER

19. So as to preserve its rights, the Applicant has previously requested Québec to consult it on mineral claim transactions in the Area. Québec refused that request, on several occasions;

20. In 2017, litigation arose between a registered holder of mineral claims, Copper One Inc. ("**Copper One**") and Québec, concerning deforestation and mining exploration. The Applicant intervened in that litigation to defend its rights;

21. On September 12, 2017, shortly after learning that Copper One and Québec were engaged in settlement discussions, the Applicant, through its legal counsel, specifically asked the Respondent to be allowed to participate in those discussions, because of the possibility of Aboriginal rights being affected, as appears from correspondence, **EXHIBIT P-6**;

22. The following day, September 13, 2017, the Respondent replied by email, **EXHIBIT P-7**, refusing to allow the Applicant to participate in the settlement discussions;

23. The Applicant, through its legal counsel, renewed its request to the Respondent to participate in the settlement discussions on September 14, 2017, and October 12, 2017, as appears from correspondence, respectively **EXHIBITS P-8 and P-9**. In that correspondence, the Applicant reminded the Respondent of the existence of its Aboriginal rights and title claim, and the Crown's duty to consult and accommodate the Applicant prior to finalizing any settlement. The Respondent did not agree to perform any such consultation or accommodation;

24. Thereafter, with no prior notice to the Applicant or any consultation whatsoever, on November 15, 2017, Copper One and the Respondent entered into a settlement of their litigation. Therein, Copper One agreed to assign 1,052 mineral claims to the Société québécoise d'exploration minière ("SOQUEM"), while Québec agreed to pay it $8,000,000.00. The transfer of mineral claims occurred shortly thereafter, by

a transfer document that Copper One signed for SOQUEM's benefit on November 21, 2017, the whole as appears from the Transaction detailing the settlement and transfer document, respectively **EXHIBITS P-10 and P-11**;

25. SOQUEM is a subsidiary of Ressources Québec, and in turn a subsidiary of Investissement Québec. Pursuant to s. 2 of the *Act respecting Investissement Québec*, its property "forms part of the domain of the State". The settlement in which SOQUEM received registered mineral claims in the Area from Copper One, arranged and financed by Québec, resulted in the enrichment of SOQUEM;

26. The Applicant allege that when the Crown (as the Attorney General of Québec and the Minister of Energy and Natural Resources) refused to consult the Applicant on the transfer of mineral claims in which the Crown (as SOQUEM) knowingly enriched itself, the Crown acted in bad faith and engaged in self-dealing that is prohibited by the fiduciary duty of the Crown toward aboriginal people;

27. The Crown had adequate time to consult the Applicant in good faith between the date that Copper One and Attorney General of Québec agreed on transferring mineral claims to SOQUEM (November 15, 2017, at the latest) and the date that the Minister of Energy and Natural Resources registered the transfer (January 9, 2018). Notwithstanding the Crown's refusal to consult, during this interval, the Applicant expressly warned the Crown that the transfer constituted illegal self-dealing in violation of its fiduciary duty, in an Application dated December 15, 2017 that it served on the Respondent and filed with the Court, **EXHIBIT P-12**;

28. A remedial principle for breach of fiduciary duty is to restore the person suffering the breach to the same place that it would be but for the breach. In this regard, on the date that SOQUEM acquired the transferred mineral claims, Québec had suspended the claims indefinitely under s. 63 of the Act;

29. The Applicant respectfully seeks an order requiring SOQUEM to continue possessing the mineral claims, and Québec to continue suspending the claims indefinitely, until such time as the parties negotiate an equitable, alternative disposition remedying the Crown's failure to consult and breach of fiduciary duty, for the Court's later approval;

CLAIMS UPON THE AREA

30. At the time of this application, according to GESTIM, Québec's mining rights registry, there are several hundred mineral claims located in the Area, which are likely to infringe the Applicant's aboriginal rights or title claims, as will be shown at the hearing;

31. Because mineral claims are highly dynamic and exist for only two years (subject to renewal) it is not possible to specify at this time the identity of each claim implicated by this application, as the number and identity of the claims certainly would change by the time this application is argued and decided. A detailed list of all registered mineral claims within the Area will be provided at the hearing or at whichever time the Court deems appropriate;

32. In the interim, this application should be interpreted as implicating every mineral claim registered in the Area at the time of filing of the present application, which for the reasons outlined above is subject to change from time to time;

33. The present application is well founded in fact and in law.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present application;

DECLARE that sections 56, 61, 65, and 72 of the *Mining Act* (CQLR, c. M-13.1) are unconstitutional and of no force or effect;

DECLARE that the Respondent has a duty to consult and accommodate the Applicant in determining whether mineral rights on Crown lands within the Area are to be made available to third parties under the provisions of the Act;

DECLARE that the Respondent has a duty to notify, consult, and accommodate the Applicant before allowing any mining exploration activities to take place within the Area, to the extent that those activities may prejudicially affect Aboriginal rights and title claimed by the Applicant;

DECLARE that the *Aboriginal Community Consultation Policy Specific to the Mining Sector* published on or around October 22, 2019, is unconstitutional and of no force or effect;

SUSPEND the above declarations for one year to allow appropriate statutory and regulatory changes;

DECLARE that the transfer of mineral claims to SOQUEM breached Québec's fiduciary duty toward the Applicant and its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982*;

ORDER that the mineral claims held by SOQUEM remain suspended, until such time as the parties negotiate and mutually consent to a just remedy for these breaches subject to the Court's approval;

DECLARE that prior to any future registration, renewal, or transfer of mineral claims in the Area, the exact identity of which shall be provided at the hearing on the merits or at whichever time the Court deems appropriate, Québec must consult and accommodate the Applicants;

ORDER the Respondent not to issue, renew, or transfer any mining rights upon the Area prior to consultation with the Applicant and appropriate accommodation;

ORDER any such further and other relief as this Court may deem just.

THE WHOLE, WITH LEGAL COSTS.

Ottawa, December 6, 2019

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Montréal, December 6, 2019

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SWORN STATEMENT OF CHIEF CASEY RATT

I, the undersigned, Chief Casey Ratt, domiciled at the Mitchikanibikok Inik First Nation reserve located in Kitiganik (City of Rapid Lake), province of Québec, JOW 2C0, do solemnly declare the following:

1. I am the Chief of the Mitchikanibikok Inik (also known to Canada as the Algonquins of Barrière Lake, and to Québec as the Algonquins of Lac-Rapide);

2. The Mitchikanibikok Inik are a First Nation and band recognized by the *Indian Act*;

3. I am authorized by the Council of the Mitchikanibikok Inik to swear this sworn statement.

4. I have reviewed the enclosed application;

5. I attest that the facts alleged therein are true to the best of my knowledge.

AND I HAVE SIGNED:

Chief Casey Ratt

Affirmed before me in Ottawa,
On December 6, 2019

Commissioner of Oaths

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Civil Division)

No:

MITCHIKANIBIKOK INIK (ALGONQUINS OF BARRIERE LAKE)

Plaintiff

v.

ATTORNEY GENERAL OF QUÉBEC (GOVERNMENT OF QUÉBEC AND MINISTER OF ENERGY AND NATURAL RESOURCES)

Respondent

NOTICE OF PRESENTATION

Addressee: **ATTORNEY GENERAL OF QUÉBEC**
(GOVERNMENT OF QUÉBEC AND MENR)
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Montreal, Québec H2Y 1B6

TAKE NOTICE that the APPLICATION FOR JUDICIAL REVIEW AND PERMANENT INJUNCTION will be duly presented before the Superior Court of Québec in room 2.16 of the courthouse of Montréal, located at 1, Notre-Dame Street East, Québec, on February 24, 2020 at 9 a.m., or so soon thereafter as counsel may be heard.

Ottawa, December 6, 2019

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