

Court of Appeal File No. M4210
Divisional Court File No. 585/12

COURT OF APPEAL FOR ONTARIO

BETWEEN:

WABAUSKANG FIRST NATION

APPLICANT
(Moving Party)

- and -

The MINISTER OF NORTHERN DEVELOPMENT AND MINES, the DIRECTOR OF
MINE REHABILITATION for the MINISTRY OF NORTHERN DEVELOPMENT AND
MINES, and RUBICON MINERALS CORPORATION

COURT OF APPEAL FOR ONTARIO
FILED / DÉPOSÉ

SEP - 9 2014

REGISTRAR / GREFFIER
COUR D'APPEL DE L'ONTARIO

RESPONDENTS
(Responding Parties)

NOTICE OF MOTION FOR LEAVE TO APPEAL

The Moving Party/Applicant, Wabauskang First Nation ("Wabauskang" or "the Applicant"), will make a motion in writing to the Court pursuant to Rule 61.03.1 of the *Rules of Civil Procedure* for leave to appeal the decision of the Ontario Divisional Court in *Wabauskang First Nation v. Minister of Northern Development and Mines et al.*

The Court will hear the motion 36 days after service of the Applicant's motion record, factum and transcripts, if any, or on the filing of the Applicant's reply factum, if any, whichever is earlier, at 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: This motion is to be heard in writing.

1. **THE MOTION IS FOR:**

- a. an order granting Wabauskang leave to appeal the decision of the Ontario Divisional Court dated August 28, 2014 in *Wabauskang First Nation v. Minister of Northern Development and Mines et al.*, Court File # 585/12;
- b. costs of this motion in any event of the cause on a substantial indemnity basis; and
- c. such other relief as counsel may advise and which the Court considers appropriate.

2. **THE GROUNDS FOR THE MOTION ARE:**

- a. Wabauskang is an Aboriginal people within the meaning of section 35(1) of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK), 1982*, c 11. Wabauskang has the capacity of a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c.I.5.
- b. In 1873, Wabauskang’s ancestors entered into Treaty 3 with the Crown. Wabauskang members continue to exercise their Treaty rights to the extent possible.
- c. Wabauskang understands that its Treaty rights include a right to share in the benefits of resources extracted from its territory and to share in decision-making about how its lands and resources are used.
- d. Rubicon Minerals Corporation (“Rubicon”) is seeking to develop its proposed Phoenix Gold Mine project (the “Project”).
- e. The Project is located within Wabauskang’s territory and has the potential to adversely affect Wabauskang’s Treaty rights.

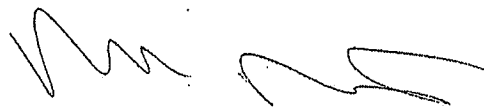
- f. On December 2, 2011, the Director of Mine Rehabilitation (the “Director”) for the Ministry of Northern Development, Mines and Forestry (now the Ministry of Northern Development and Mines) on behalf of the Crown in right of Ontario (“Ontario”) accepted a Production Closure Plan submitted by Rubicon in respect of the proposed Project pursuant to section 141(3)(a) of the former *Mining Act* RSO 1990, Chapter M. 14 (the “Decision”).
- g. The Director’s Decision constitutes the main authorization necessary for the proposed Project to enter into production.
- h. On December 20, 2012, Wabauskang filed an application for judicial review in respect of the Decision on the basis that the Director on behalf of Ontario failed to discharge the Crown’s duty to consult and accommodate Wabauskang by improperly delegating the Crown’s constitutional obligations to Rubicon.
- i. In the judicial review, Wabauskang sought an order that the Decision be suspended pending the fulfilment of the Crown’s constitutional obligations to Wabauskang or in the alternative, an order that the Decision be quashed.
- j. The judicial review was heard by the Divisional Court on April 15-17, 2014.
- k. On August 28, 2014, the Divisional Court dismissed the judicial review and held that Ontario had fulfilled the Crown’s constitutional obligations to Wabauskang and that Ontario had not improperly delegated the duty to consult and accommodate to Rubicon.

- I. The Divisional Court erred in law by concluding the following in its decision to dismiss the judicial review:
 - i. that the Director on behalf of Ontario did not improperly delegate the Crown's duty to consult and accommodate in respect of potential impacts of the Project on Wabauskang's Treaty rights to a third-party proponent;
 - ii. that the Director on behalf of Ontario was not obligated to consult with Wabauskang about Wabauskang's asserted claims to shared decision-making and revenue-sharing pursuant to Treaty 3;
 - iii. that the Director on behalf of Ontario was not required by law to share the Crown's preliminary assessment of the strength of Wabauskang's claims and its assessment of the potential impacts of the Project on those claims with Wabauskang; and
 - iv. that the applicable standard of review was reasonableness.
- m. The extent to which the Crown is entitled to delegate aspects of its constitutional duty to consult and accommodate First Nations to third-party proponents in the context of mining in Ontario is an unresolved issue of public importance.
- n. Section 6(1) of the *Courts of Justice Act*, RSO 1990, c C.43.
- o. Rules 37 and 61.03.1 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194.
- p. Such further and other authority as counsel may advise and as this Court may permit.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- a. The factum of the Applicant, to be filed.

Date: September 8, 2014.



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Solicitor for Wabauskang First Nation

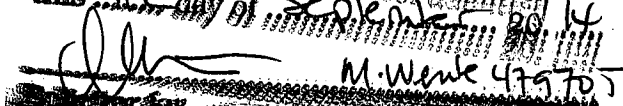
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 of Mine Rehabilitation

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Geoff R. Hall
 Solicitor for Rubicon Minerals Ltd.

Service of a true copy hereof admitted
 this 8th day of September 2014
 on behalf of Rubicon

 M. Wente 479.705
 Agents for Solicitors to Applicants

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WABAUSKANG FIRST NATION
APPLICANT

AND:

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES ET AL

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COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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