Court File No. 585/12

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N :

WABAUSKANG FIRST NATION

Applicant

- 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

Respondents

FACTUM OF RUBICON MINERALS CORPORATION

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FACTUM OF RUBICON MINERALS CORPORATION

OVERVIEW

1. Rubicon Minerals Corporation ("**Rubicon**") is developing a gold mine, known as the Phoenix Gold Project, in northwestern Ontario. It has obtained the appropriate regulatory authorization pursuant to the Ontario *Mining Act* in that its "closure plan" has been accepted for filing by The Minister of Northern Development and Mines and the Director of Mine Rehabilitation for the Ministry of Northern Development and Mines (collectively, "**Ontario**"). Wabauskang First Nation ("**WFN**") seeks an order quashing or "suspending" the decision to accept the closure plan for filing (the "**Decision**").

2. Because the closure plan potentially affects WFN's Aboriginal and treaty rights (WFN's territory lies within Treaty 3), Ontario undertook consultations with WFN prior to accepting Rubicon's closure plan for filing, in accordance with the Crown's duty to consult as recognized by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

3. This application raises three issues:

   (a) Did the proper level of government grant the regulatory authorization?

   (b) Did Ontario improperly delegate too much of the consultation process to Rubicon?

   (c) If there was improper delegation, what should the remedy be?

Did the proper level of government grant the regulatory authorization?

4. WFN claims that pursuant to Treaty 3, Ontario might not have exclusive regulatory jurisdiction to make the Decision. Rather, WFN says, it is possible that the federal government might also have to be involved.

5. However, WFN's contention can only prevail if two things happen:

(a) First, the Supreme Court of Canada would have to overturn the decision of the Ontario Court of Appeal in *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158, which rejected the very contention that WFN is now advancing in this case, and restore the trial judgment (*Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801).[1]

(b) Second, WFN would have to succeed in demonstrating that the activities authorized by the Decision meet the threshold of causing a ***significant interference*** with WFN's treaty rights to hunt and fish. The trial decision interpreted Treaty 3 to require federal involvement in regulatory matters that are otherwise within provincial jurisdiction if the activity in question would constitute a significant interference with Aboriginal rights granted by Treaty 3.

6. WFN's arguments cannot succeed. This Court should apply the law that binds it – namely the decision of the Court of Appeal in *Keewatin* – without "suspending" the Decision (a remedy unknown to administrative law) in case the Supreme Court of Canada overturns *Keewatin*. In any event, Rubicon's activities authorized by the Decision do not rise to the level

[1] Leave to appeal has been granted and the appeal is scheduled to be argued in the Supreme Court of Canada on May 15, 2014.

of a significant interference with WFN's treaty rights, so on the facts the question of whether *Keewatin* will be upheld or reversed by the Supreme Court of Canada is irrelevant.

Did Ontario improperly delegate the consultation process to Rubicon?

7. The law is clear that the Crown may delegate procedural aspects of the consultation process to an industry proponent, while retaining overall responsibility for the consultation process and upholding the honour of the Crown. Delegation of procedural aspects often occurs because in practice the industry proponent is usually in a far better position than the Crown to provide the information needed for the consultation process and, where appropriate, to accommodate Aboriginal interests.

8. That is precisely what happened in this case. Ontario delegated procedural aspects of the consultation process to Rubicon, but remained actively involved itself and supervised Rubicon's efforts throughout. The Decision should not be quashed on this ground.

If there was improper delegation, what should the remedy be?

9. If any remedy is granted, it should solely be directed at Ontario and should not be directed at Rubicon. As a matter of law, it is clear that the duty to consult is owed only by the Crown, not by a private entity like Rubicon. Thus if there was a breach of the duty to consult, it was Ontario's responsibility, not Rubicon's. Moreover, Rubicon has, in reliance upon the Decision, expended much effort and has spent millions of dollars developing its proposed mine. While that work has been under way, WFN has not moved expeditiously to bring this judicial review application to Court (by the time this application is argued in mid-April 2014, it will have been nearly two and one-half years since the Decision was rendered). It would be unjust for

Rubicon (and its stakeholders, including shareholders, investors, employees and contractors working on the mine site) to face the cessation, even temporary, of its mine development efforts because of a breach for which Rubicon has no responsibility, particularly where there is no evidence advanced by anyone (including WFN) that Rubicon has done anything wrong.

PART I - THE FACTS

Rubicon and the brownfield Phoenix Gold Project site

10. Rubicon is a publicly-traded mineral exploration and development company, headquartered in Toronto. Rubicon's main project is the development of a potential gold mine known as the Phoenix Gold Project. The site is located on privately owned land in northwestern Ontario within the traditional territory of WFN, which is within Treaty 3. Treaty 3 is one of the post-Confederation numbered treaties entered into between the Crown and Aboriginal peoples. It was signed in 1873.

Reference: Affidavit of Darryl Boyd ("**Boyd Affidavit**"), paras. 5-7; Application Record of Rubicon, Tab 1, p. 4

11. Importantly for the question of whether the threshold of significant interference is met (which will only be legally relevant if the Supreme Court of Canada overturns the Court of Appeal's decision in *Keewatin*), the Phoenix Gold Project Site is a "brownfield" site rather than a "greenfield" site. Before Rubicon acquired the property in 2002, there had been significant previous development on the privately owned site. The Phoenix Gold Project site is approximately 55 hectares in size. Of those 55 hectares, approximately 35 hectares constitute the brownfield site. It has been in various stages of development since the 1920s. As explained in the Law section below, it is clear that the Crown's duty to consult is not engaged regarding the

Decision in respect of potential interferences with Aboriginal interests that resulted from previous development or activities.

Reference: Boyd Affidavit, paras. 8-13; Application Record of Rubicon, Tab 1, pp. 4-6

12. Also important for the question of whether the threshold of significant interference is met is the fact that prior to filing the closure plan that is being challenged in this proceeding, which authorized Rubicon to proceed to the production phase of its project (the "**Production Closure Plan**"), Rubicon filed another closure plan that authorized advanced underground exploration (the "**Advanced Underground Exploration Closure Plan**"). The Advanced Underground Exploration Closure Plan authorized a significant amount of work, and has never been challenged either in this proceeding or in any other way.

Reference: Boyd Affidavit, paras. 16-18; Application Record of Rubicon, Tab 1, pp. 7-8

13. Thus if the question of whether there is significant interference with Aboriginal and treaty rights is legally relevant – which would only be the case if the Supreme Court of Canada restores the trial judgment in *Keewatin* – the question is as follows: to the extent there is the incremental interference with WFN's treaty rights ***beyond*** the interference caused by historical work on the site prior to Rubicon's arrival in 2002 and the interference caused by work under the Advanced Underground Exploration Closure Plan (which has never been challenged), does that incremental interference constitute significant interference with WFN's treaty rights?

Consultations with WFN prior to the filing of the Production Closure Plan

14. Very extensive consultations with WFN were undertaken prior to the filing of the Production Closure Plan, led by Ontario and with procedural aspects delegated to Rubicon. In terms of Rubicon's involvement, the key dates and events are as follows:

(a) **November 20, 2008.** The consultation process began. Rubicon contacted WFN and asked for a meeting.

Reference: Boyd Affidavit, paras. 23-24; Application Record of Rubicon, Tab 1, p. 9

(b) **December 9, 2008.** Rubicon's President and CEO wrote to WFN's Chief Leslie Cameron: "It is our understanding that [WFN] has Traditional Territory in this region and we therefore look to you for advice." He also wrote: "Rubicon looks for your guidance in establishing a good working relationship with you, the band council and members of your communities."

Reference: Boyd Affidavit, para. 25 and Exhibit D; Application Record of Rubicon, Tabs 1 and 1D, pp. 9-10 and 186-187

(c) **January 7, 2009.** The first in-person consultation meeting was held, with representatives of WFN, Ontario and Rubicon present.

Reference: Boyd Affidavit, paras. 26-27; Application Record of Rubicon, Tab 1, p. 10

(d) **November 3-5, 2010.** There was a further in-person consultation meeting, among WFN, Rubicon, and another First Nation in the area, Lac Seul First Nation ("**LSFN**"). At this point, Rubicon understood that WFN and LSFN were standing as one party for the purpose of consultation regarding the Project.

Reference: Boyd Affidavit, para. 35; Application Record of Rubicon, Tab 1, p. 12

(e) **February 9, 2011.** This was the first time WFN had expressed any concerns about Rubicon's activities. These concerns were subsequently addressed in the manner described in subparagraphs (n) and (o) below.

Reference: Boyd Affidavit, paras. 36-39 and Exhibit H; Application Record of Rubicon, Tab 1, pp. 13 and 211-212

(f) **February 2011.** Rubicon submitted a Production Closure Plan. Ultimately, as noted below, it was withdrawn to permit additional consultation.

Reference: Boyd Affidavit, paras. 42-44; Application Record of Rubicon, Tab 1, pp. 14-16

(g) **March 22, 2011.** Rubicon learned that WFN wished to be consulted separately from LSFN, contrary to Rubicon's previous understanding that WFN and LSFN would be working together. From that point onwards, Rubicon respected WFN's wishes, agreeing to consult with and fund WFN separately.

Reference: Boyd Affidavit, paras. 46-49; Application Record of Rubicon, Tab 1, pp. 16-17

(h) **March 25 and 31, 2011.** In-person consultation meetings took place between WFN and Rubicon.

Reference: Boyd Affidavit, paras. 50-54; Application Record of Rubicon, Tab 1, pp. 17-19

(i) **April 5, 2011.** Rubicon withdrew its Production Closure Plan to allow additional time for consultation with WFN.

Reference: Boyd Affidavit, paras. 54-55 and Exhibit N; Application Record of Rubicon, Tabs 1 and 1N, pp. 19-20 and 297

(j) **April 12, 2011.** Rubicon provided funding to WFN to allow WFN to retain its own consultant to review the Production Closure Plan.

Reference: Boyd Affidavit, paras. 59-60; Application Record of Rubicon, Tab 1, p. 20

(k) **May 4, 2011.** Rubicon advised WFN that it intended to resubmit the Production Closure Plan on May 6, 2011.

Reference: Boyd Affidavit, para. 65 and Exhibit W; Application Record of Rubicon, Tabs 1 and 1W, pp. 22 and 781

(l) **May 6, 2011.** An in-person consultation meeting was held among WFN, Ontario, and Rubicon. At the conclusion of the meeting, Rubicon decided not to proceed with its intention to resubmit the Production Closure Plan, in order to ensure further meaningful consultation with WFN.

Reference: Boyd Affidavit, paras. 67-68; Application Record of Rubicon, Tab 1, pp. 22-23

(m) **June 7-29, 2011.** Rubicon made repeated requests of WFN to move the process along in an attempt to resubmit the Production Closure Plan by June 30, 2011. Eventually, Rubicon indicated that it would delay resubmission until July 15, 2011.

Reference: Boyd Affidavit, paras. 76-78 and Exhibits BB-DD; Application Record of Rubicon, Tabs 1 and 1BB -1DD, pp, 24-25 and 798-806

(n) **July 26, 2011-August 31, 2011.** There were a number of communications and meetings to address concerns raised by WFN's consultant. ***Ultimately, all of the consultant's recommendations were implemented by Rubicon and incorporated into the Production Closure Plan.***

Reference: Boyd Affidavit, paras. 82-86 and 95; Application Record of Rubicon, Tab 1, pp. 26-28 and 30

(o) **September 17-18, October 3, 2011 and October 13-14, 2011.** Further meetings occurred to discuss the incorporation of the recommendations of WFN's consultant. At the last meeting, Rubicon informed WFN that it intended to submit a revised Production Closure Plan on October 17, 2011.

Reference: Boyd Affidavit, paras. 91-96; Application Record of Rubicon, Tab 1, pp. 29-30

(p) **October 17, 2011.** Rubicon submitted its revised Production Closure Plan.

Reference: Boyd Affidavit, para. 97; Application Record of Rubicon, Tab 1, p. 30

15. Rubicon proceeded with the submission of the Production Closure Plan on October 17, 2011 for several reasons. First, Rubicon and WFN had engaged over a lengthy period of time in significant consultations, and WFN's concerns had been accommodated and addressed in the Production Closure Plan as eventually submitted. Second, Rubicon was facing significant economic pressures from the market to advance and continue development of the project, which had by now been delayed since April 2011 in order to accommodate WFN's timeframes for consultation.

Reference: Boyd Affidavit, para. 102; Application Record of Rubicon, Tab 1, pp. 31-32

Section 14 of the Production Closure Plan

16. Section 14.2.1 of the Production Closure Plan includes a number of binding and enforceable commitments Rubicon made toward ongoing consultation with WFN, including:

(a) the provision of a 45 day window for WFN to review future applications under the *Mining Act* or environmental legislation, with Rubicon providing reasonable funding to WFN for a review by a mutually agreed upon qualified professional and giving a commitment that Rubicon will "reasonably incorporate the review comments arising from these reviews into the application prior to submission to the respective government agency"; and

(b) a commitment to provide, within 90 days of the end of each calendar year, an annual environmental performance report to WFN to summarize the results of all environmental monitoring completed in relation to the project during the calendar year, with Rubicon providing reasonable funding to WFN for a review by a mutually agreed upon qualified professional and giving a commitment that

Rubicon will "reasonably incorporate any program modification recommendations into the on-going monitoring program" and "reasonably incorporate any recommendations for further environmental impact mitigation measures into the Project operating plan".

Reference: Production Closure Plan, Section 14.2.1; Boyd Affidavit, Exhibit V; Application Record of Rubicon, Tab 1V, pp. 513-514

17. Section 14.2.1 notes:

> "It is acknowledged that the commitments in this Closure Plan are being made in the spirit of meaningful and good faith consultations, without formal agreement from WFN. Rubicon shall endeavor to engage WFN regarding these planned mitigation measures and amend these commitments in the Closure Plan as may be necessary. It is Rubicon's expectation that the clear and enforceable commitments to impact mitigation measures and commitment to fund and engage in on-going consultation made herein fulfill the obligations of the Project proponent in relation to the Crown's duty to consult with aboriginal communities."

Reference: Production Closure Plan, Section 14.2.1; Boyd Affidavit, Exhibit V; Application Record of Rubicon, Tab 1V, p. 514

There is no significant interference with treaty rights

18. The Production Closure Plan does not indicate material off-site environmental impact from the Phoenix Gold Project. The project footprint does not extend beyond the long-held privately owned land (surface and mineral rights) within the Phoenix property. Access to the site is via a corridor that utilizes existing roads, trails or otherwise developed lands. There is a very small effluent plume, after which effluent is fully assimilated and water quality effectively returns to "background".

Reference: Boyd Affidavit, para. 126 and Exhibit III; Application Record of Rubicon, Tabs 1 and 1III, pp. 38-39 and 1241-1251

19. The assessment of both Ontario and Rubicon is that no steps taken under the Production Closure Plan will cause any significant interference with WFN's Aboriginal or treaty rights. All of Rubicon's current activities are confined to the 55 hectares of privately owned, already highly developed industrial footprint and the access corridor. No WFN traplines are affected by the Phoenix Gold Project. ***WFN has not identified any significant impacts on its Aboriginal or treaty rights to contradict this conclusion reached by Ontario and Rubicon.***

Reference: Boyd Affidavit, para. 129; Application Record of Rubicon, Tab 1, p. 40

Affidavit of Cindy Blancher-Smith, para. 54; Application Record of Ontario, Vol. 1

Rubicon's continued commitments to WFN

20. On December 1, 2011, Rubicon made a commitment to delay breaking new ground and to delay any construction activities on "new land" (i.e., previously undeveloped land) until a traditional use and occupancy study was complete or until June 30, 2012, whichever was earlier. This offer was a voluntary step by Rubicon. WFN had indicated it would need two to three months to complete a traditional use and occupancy study. Rubicon chose the June 30, 2012 date in order to give WFN even more time than it had indicated was necessary (nearly seven months as opposed to two or three). Rubicon also made a contribution of $20,000 to provide some of the required funding for the traditional use and occupancy study.

Reference: Boyd Affidavit, paras. 118-119; Application Record of Rubicon, Tab 1, pp. 36-37

Crown involvement in the consultation process

21. The affidavit of Cindy Blanchard-Smith, the Assistant Deputy Minister in the Mines and Minerals Division of the Ontario Ministry of Northern Development and Mines, sets out in great detail the consultation steps undertaken by Ontario. It is clear that these steps were quite

independent of those undertaken by Rubicon. For example, Ontario suggested to Rubicon that it delay the submission of its initial Production Closure Plan, and encouraged WFN to withdraw it to allow WFN time to retain a third party consultant.

Reference: Affidavit of Cindy Blancher-Smitth, paras. 55, 56 and 58; Application Record of Ontario, Vol. 1

22. To the extent there were limitations on Ontario's involvement, they resulted from WFN's own wishes. On several occasions Rubicon suggested that representatives of the Ontario government attend meetings with WFN, but WFN objected. Out of respect of WFN's wishes, on these occasions Rubicon did not press the issue and proceeded to meet with WFN without members of the Ontario government being present.

Reference: Boyd Affidavit, para. 122; Application Record of Rubicon, Tab 1, p. 37

Project activities since the Decision

23. Of great relevance to the issue of remedy should the Court find there has been a breach of the duty to consult is the activities Rubicon has undertaken to develop the Phoenix Gold Project since the Decision.

24. The chronology is important. The Decision was made on December 2, 2011. The application for judicial review was not filed for more than a year, on December 20, 2012. The application was not perfected until November 2013. The hearing has been scheduled for April 15-17, 2014 – nearly two and a half years after the Decision.

25. Since the Decision, Rubicon has been working continuously on the project. These steps include the commencement of construction of additional mining infrastructure, including a gold mill; construction of on-site accommodations; establishment of an on-site quarry to provide

construction rock; commencement of construction on an on-site tailings management facility; and improvements to the access road. Since December 2011, Rubicon has spent approximately $161 million. As of November 2013 (when Rubicon's responding affidavit was sworn), the project was about 42% complete.

Reference: Boyd Affidavit, paras. 130-132; Application Record of Rubicon, Tab 1, pp. 40-41

26. Production is currently expected to commence in the first quarter of 2015.

Reference: Boyd Affidavit, para. 132; Application Record of Rubicon, Tab 1, p. 41

27. As of November 2013, there were approximately 120 people working on the site, including about 45 Rubicon employees and about 75 contractors. If work on the project were stopped, even temporarily, there would be drastic implications for Rubicon and the people working on the site. Those people would be thrown out of a job. Rubicon could potentially be put in breach of contracts with its contractors. Some employees might not return to work at the site due to perceived uncertainty with the project. Reluctance on the part of the skilled workforce to return to the project following a work stoppage could also prove to be very harmful, causing material delays and capital cost overruns.

Reference: Boyd Affidavit, para. 134; Application Record of Rubicon, Tab 1, pp. 41-42

PART II - THE ISSUES RAISED BY WFN

The *Keewatin* issue: there was no need for federal involvement

28. The trial decision in *Keewatin* held that the harvesting clause in Treaty 3 requires the involvement of both the federal and provincial governments in matters of natural resource regulation (otherwise within exclusive provincial jurisdiction) where there would be significant interference with treaty rights. This is precisely the argument WFN advances in this case,

although WFN seeks to recast the threshold of significant interference into a threshold of *prima facie* infringement (an issue addressed at paragraph 36).

29. The *Keewatin* trial decision was reversed by the Court of Appeal, which held that the two-stage regulatory process posited by the trial judge was "unnecessary, complicated, awkward and likely unworkable":

> "The two-step process is unnecessary to protect the Aboriginal Treaty harvesting right because when the Crown, through Ontario, takes up land, it must respect the Treaty right. When Ontario stepped into Canada's shoes by virtue of the process of constitutional evolution, the legal standard that binds the Crown did not change and the Treaty right is fully protected. To require both levels of government to be engaged in a two-step process is, on its face, complicated and awkward. It is difficult to see how the process of consultation, which is required when the Treaty harvesting right is affected by taking up, would be improved by involving both levels of government."
>
> Reference: *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158 at para. 153; Brief of Authorities of Rubicon, Tab 8

30. As a simple matter of *stare decisis*, this Court is bound by the decision of the Court of Appeal. The fact that *Keewatin* is under appeal to the Supreme Court of Canada does not change things. This Court is bound to apply the law as determined by the Court of Appeal. That simple proposition is sufficient to dispose of the *Keewatin* issue.

31. But WFN seeks to get around this point by suggesting that the Decision should be "suspended" until the ruling of the Supreme Court of Canada in *Keewatin*. There are several answers to this suggestion.

32. First, WFN is suggesting a remedy that is unknown to the law. WFN cites no authoritiy in support of its suggestion that the Decision be "suspended". This is because administrative law has no mechanism to "suspend" a decision while the court plays a wait-and-see game with

respect to the outcome of other litigation. An administrative decision is either invalid under the law as it exists at the time of judicial review (in which case it is quashed) or it is valid under that law (in which case the reviewing court does not interfere). There is no middle ground.

33. Even if the middle ground WFN urges did exist in law, it would be inappropriate to apply in this case. The earliest a decision can be expected from the Supreme Court of Canada in *Keewatin* is the very end of 2014 or more likely early 2015. This assumes argument proceeds as scheduled in May 2014 and judgment is reserved for about the six month average for appeals at the Supreme Court of Canada. By this time, the Phoenix Gold Project will be close to production. "Suspending" the Decision would entail allowing Rubicon to go through with all or almost all of its mine development before proceeding with a challenge to the regulatory authorization pursuant to which the development is being undertaken. This approach would be patently unfair to Rubicon.

34. In *Beckman v. Little Salmon/Carmacks First Nation*, the Supreme Court of Canada noted that "somebody has to bring consultation to an end and to weigh up the respective interests" [emphasis omitted], and held that the interests of the industry proponent (who in that case had been waiting eight years for a decision) should not be held hostage to a longstanding sense of frustration on the part of the First Nation towards the actions (or inactions) of the government involved. Similarly in this case, it would be unfair to Rubicon to "suspend" the Decision until late 2014 or early 2015 or even beyond to see what the Supreme Court of Canada does in *Keewatin*.

Reference: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras. 80-84; Brief of Authorities of Rubicon, Tab 2

35. In any event, even if the Supreme Court of Canada were to restore the trial judgment in *Keewatin* – a seemingly unlikely proposition given the strength of the Court of Appeal's rebuke of the trial judgment[2] – it would not matter on the facts. The trial judgment held that federal involvement is only required where there is ***significant interference*** with treaty rights.

36. WFN attempts to recast the threshold of significant interference into a threshold of *prima facie* interference, claiming that the trial decision in Keewatin is inconsistent with the decision of the Supreme Court of Canada in *R. v. Morris*.[3] There are two answers to this contention. First, it takes this Court even further into the realm of the speculative, urging, in effect, "don't apply the Court of Appeal's decision in *Keewatin* even though it is binding on you, and don't apply the trial decision either because we interpret the threshold for federal involvement differently than the trial judge did". As previously noted, what is relevant is the law as it currently exists, not as the law might exist at some future time. Second, the distinction urged by WFN does not exist. The formulation in the trial decision in *Keewatin* is that federal involvement is triggered at the point of "significant interference" with treaty rights. The formulation in *R. v. Morris* is as follows:

> "Essentially, therefore, a *prima facie* infringement requires a 'meaningful diminution' of a treaty right. ***This includes anything but an insignificant interference with that right.*** If provincial laws or regulations interfere insignificantly with the exercise of treaty rights, they will not be found to infringe them and can apply *ex proprio vigore* or by incorporation under s. 88." [Emphasis added.]

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[2] "[T]he trial judge made many errors .... It is neither necessary nor desirable for us to canvas all of the issues and arguments that were raised; we have chosen to focus on what we perceive to be the truly dispositive aspects of this case": *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158 at para. 23.

[3] See para. 37 and footnote 66 of WFN's factum.

There is no meaningful distinction – even a semantic one – between "significant interference" and "anything but an insignificant interference".

Reference: *R. v. Morris*, 2006 SCC 59 at para. 53; Brief of Authorities of Rubicon, Tab 13

37. The significant interference could only arise from the Production Closure Plan. Effects caused by historical exploration on the site are not relevant. Effects caused by the Advanced Underground Exploration Closure Plan are not relevant. Potential or speculative impacts of future exploration or mining activities are not relevant.

38. This is because of the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* which held that the duty to consult is confined to "adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact of the claimed rights on the current decision under consideration."

Reference: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 (***"Rio Tinto"***) at para. 53; Brief of Authorities of Rubicon, Tab 14

39. *Rio Tinto* further held that the claimant Aboriginal group must demonstrate a ***causal relationship*** between the current Crown conduct and potential impacts on Aboriginal claims or rights. Past wrongs, or speculative impacts, do not trigger the duty to consult:

> "The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. ***Past wrongs, including previous breaches of the duty to consult, do not suffice.***
>
> Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting

> unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). ***Mere speculative impacts, however, will not suffice.*** As stated in *R. v. Douglas*, 2007 BCCA 265 (CanLII), 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, ***there must an 'appreciable adverse effect on the First Nations' ability to exercise their aboriginal right'***. The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice. ...
>
> ***An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult.*** The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34." [Emphasis added.]
>
> Reference: *Rio Tinto, supra* at paras. 45-46, 48; Brief of Authorities of Rubicon, Tab 14

40. This is not to say that WFN is without a remedy for past wrongs. It has a remedy – it can sue the Crown for damages or other relief under whatever causes of action are applicable. However, the proper remedy is not to quash this Decision. The duty to consult is forward-looking, not backward-looking. Relief for past wrongs is available in an appropriate case, but this is not such a case.

41. As summarized in paragraphs 18 and 19 above, the evidence establishes that the incremental impact of the Production Closure Plan is negligible – in the language of the trial decision in *Keewatin*, it is not "significant". Even if the trial judgment in *Keewatin* were restored, the result would be the same.

42. Thus, on the law there is no jurisdiction to "suspend" the Decision, and on the facts there is no basis for doing so even if there were such jurisdiction.

The Crown did not improperly delegate to Rubicon

43. There is no dispute that a duty to consult arose in this case (because WFN has recognized treaty rights which might be affected by the Production Closure Plan). There is also no dispute that the duty was owed by the Crown, not by Rubicon. The seminal case on the duty to consult is the Supreme Court of Canada's decision in *Haida Nation v. British Columbia (Minister of Forests)*. *Haida Nation* established that the duty to consult emanates from the honour of the Crown and is not owed by third parties like Rubicon:

> "***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: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices. ...
>
> It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, ***the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.***" [Emphasis added.]
>
> Reference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (***"Haida Nation"***) at paras. 16 and 53; Brief of Authorities of Rubicon, Tab 5

44. At the same time, it is clear that the Crown may – and often does – delegate procedural aspects of the duty to consult to third parties like Rubicon. As expressed in *Haida Nation*, "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments." The reason that such delegation is permissible and common is obvious: the industry proponent is often in a

much better position than the Crown to provide the information needed for the consultation process.

Reference: *Haida Nation, supra* at para. 53; Brief of Authorities of Rubicon, Tab 5

45. Aside from the delegation issue, it is clear that there could be no viable challenge to the consultation process in this case. This conclusion flows from three legal propositions.

46. First, the scope of the duty of consultation varies depending on the circumstances and exists along a spectrum depending on the strength of the rights asserted and the potential for adverse effects by a Crown decision on such asserted rights:

> "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. [...] '"[C]onsultation" in its least technical definition is talking together for mutual understanding': T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required....
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. ... Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns...."

Reference: *Haida Nation, supra* at paras. 43–45; Brief of Authorities of Rubicon, Tab 5

47. Second, the duty to consult does not afford Aboriginal peoples a veto over governmental decision-making. There is no duty on the Crown to reach agreement with Aboriginal groups in consultation, and the Crown may proceed to make decisions whether or not Aboriginal groups

agree with such decisions. However, the Crown must ensure that the consultation process by which it makes its decisions is fair, reasonable and consistent with the honour of the Crown. The commitment is to a meaningful process of consultation, carried out in good faith, on both sides, and an effort to understand each other's concerns and move to address them.

Reference: *Haida Nation, supra* at paras. 42, 48 and 49; Brief of Authorities of Rubicon, Tab 5

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 at para. 66; Brief of Authorities of Rubicon, Tab 11

48. Third, contrary to the submission of WFN the standard of review with respect to the adequacy of consultation is reasonableness, not correctness. *Haida Nation* held that the standard is reasonableness and that the focus is on the ***process*** of consultation and accommodation, not outcomes. Courts should defer to the Crown on how the process is carried out, as long as the Crown has taken the Aboriginal claims seriously, has upheld the honour of the Crown, and has ensured that the consultation process is fair and reasonable:

> "***The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required;*** the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." ***The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.***
>
> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. ***The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.***" [Emphasis added.]

Subsequent cases have reiterated the reasonableness standard of review.

Reference: *Haida Nation, supra* at paras. 62 and 63; Brief of Authorities of Rubicon, Tab 5

Ahousat First Nation v. *Canada (Fisheries and Oceans)*, 2008 FCA 212 at para. 54; Brief of Authorities of Rubicon, Tab 1

Beckman v. Little Salmon/Carmacks First Nation, supra at para. 48; Brief of Authorities of Rubicon, Tab 2

49. Considering the consultation record in conjunction with these three legal propositions, it is apparent that the consultation steps were more than adequate and there is no basis for this Court to intervene. WFN's input was actively sought out. The regulatory process was delayed on several occasions – on certain ones at the behest of Ontario – to afford WFN more time. Financial resources were provided to WFN to independently select and retain the expert assistance WFN required. There were multiple communications between the parties, including numerous in-person meetings. Rubicon has made a binding commitment in the Production Closure Plan to continue to participate in and fund the consultation process.

50. Indeed, the consultation process was exemplary. The language used by the Supreme Court of Canada upholding the consultation process in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* are equally apposite for this case:

> "By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, 'the positions of all of the Project Committee members, including the TRTFN had crystallized' … The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult."

Simply because WFN does not agree with the Decision does not mean that it was arrived at unreasonably or that WFN was denied fair process.

Reference: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 41; Brief of Authorities of Rubicon, Tab 16

51. The only issue, then, is whether Rubicon was too much involved and the Crown too little involved.

The Crown properly delegated procedural aspects of the consultation process

52. The law is clear: as previously noted, *Haida Nation* endorsed the principle that procedural aspects of the consultation process can be delegated.

53. This means that the Crown is entitled to rely on its existing regulatory processes and on third parties to carry out procedural aspects of consultation which the Crown knows is taking place between Aboriginal groups and third parties. Some examples from the case law assist in illustrating how these principles work in practice, and demonstrate that the process followed in this case was proper:

(a) In *Kelly Lake Cree Nation v. Minister of Energy and Mines*, the B.C. Supreme Court held:

> "There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing....It is my view that **a** consideration of the question of consultation must be taken [*sic*] into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also ***the consultations between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.***" [Emphasis added]

Reference: *Kelly Lake Cree Nation v. Minister of Energy and Mines*, [1999] 3 C.N.L.R. 126 (B.C.S.C.) at para. 154; Brief of Authorities of Rubicon, Tab 10

(b) In *Brokenhead Ojibway First Nation v. Canada (A.G.),* the Federal Court dismissed three judicial review applications challenging Crown approval of three pipeline projects in southern Saskatchewan and Manitoba. The Federal Court held that the Crown may consider opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review. This is not a delegation of the Crown's duty, but rather a means by which the Crown may be satisfied that Aboriginal concerns have been considered, and where appropriate accommodated. In *Brokenhead*, the Court afforded deference to the existing regulatory process (in that case, the National Energy Board), concluding that it was sufficient to satisfy the Crown's duty to consult.

Reference: *Brokenhead Ojibway First Nation v. Canada (A.G.),* 2009 FC 484 (**"*Brokenhead*"**) at para. 25; Brief of Authorities of Rubicon, Tab 3

54. Similarly, in this case in assessing the Production Closure Plan and reaching the Decision, Ontario was not confined solely to consultation activities that Ontario carried out directly with WFN. Rather – contrary to the submissions of WFN – Ontario was entitled to consider the consultation carried out with WFN by Rubicon, and to form its own views in respect of such consultation. In preparing the Decision, Ontario had the consultation record provided by Rubicon, and Rubicon provided frequent updates to the Crown regarding consultation with WFN. Ontario supervised the process throughout, even if Rubicon was (necessarily) on the front lines for most of the consultation.

55. It is also legally significant that there were occasions on which WFN did not want Ontario to participate in the consultation process and insisted that only Rubicon attend consultation sessions. Ontario clearly cannot be faulted for this. Aboriginal groups cannot

refuse to participate in Crown consultation and then complain that there was inadequate consultation. Indeed, as part of the process of consultation and the interaction between the Crown and Aboriginal peoples, First Nations are duty bound to engage in consultation in good faith, and they cannot, by their conduct, place unnecessary obstacles in the way of the consultation process. As expressed in *Haida Nation*:

> "At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. ***As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached:*** [...] Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted." [Emphasis added.]
>
> Reference: *Haida Nation*, *supra* at para. 42; Brief of Authorities of Rubicon, Tab 5

56. *Brokenhead* reiterated that Aboriginal groups cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief:

> "I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. ***First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate.*** ..." [Emphasis added.]

There are numerous other authorities to the same effect.

Reference: *Brokenhead, supra* at para. 42; Brief of Authorities of Rubicon, Tab 3

Ryan v. Fort St. James Forest District (District Manager), [1994] B.C.J. No. 2642 (B.C.S.C.) at paras. 23 and 26, affd. (1994), 40 B.C.A.C. 91; Brief of Authorities of Rubicon, Tab 15

Halfway River First Nation v. BC (Ministry of Forests), 1999 BCCA 470 at para. 161; Brief of Authorities of Rubicon, Tab 6

57. The consultation process unfolded exactly as it should have. Ontario upheld the honour of the Crown, with Rubicon undertaking procedural aspects of the delegation progress. There is no basis for this Court to interfere.

PART III - ADDITIONAL ISSUE RAISED BY RUBICON

58. If, contrary to the foregoing, this Court finds that the Crown breached the duty to consult by improperly delegating to Rubicon, the Court will have to fashion a remedy. That remedy should be directed solely at the Crown and should not interfere with Rubicon's mine development by quashing the Decision or otherwise. This conclusion is supported both by the facts and the law.

59. With respect to the facts, three points are relevant. First, Rubicon's efforts to consult with and accommodate its First Nation neighbours are beyond any reasonable criticism. Second, WFN has not prosecuted this judicial review application in a timely way, and Rubicon has relied on the Production Closure Plan to continue to develop its mine, spending tens of millions of dollars in the process. Third, any interference with the mine development would harm not only Rubicon but entirely innocent individuals, namely the 140 or so employees and contractors who are working on the site and who would be thrown out of work.

> legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration. Accordingly, as explained by the Immeubles Port Louis case and by the leading texts, (see Brown and Evans, supra at para. 3:5100; de Smith, *supra*, at 579; Jones and de Villars, *Principles of Administrative Law* 3rd ed. (Scarborough, Ont.: Carswell, 1999) at 583), ***a remedy may be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest or to third parties who have acted in good faith upon the impugned act or decision***." [Emphasis added.]
>
> Reference: *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.) at para. 258, leave to appeal refused and reconsideration dismissed, [2001] S.C.C.A. No. 63; Brief of Authorities of Rubicon, Tab 4

64. In *Chippewas of Sarnia*, a case where a First Nation sought the return of disputed lands, the Ontario Court of Appeal confirmed that prejudice to innocent third parties ***must be balanced*** with the rights of First Nations. Even where the First Nation had raised serious doubt about the title of the third parties, the Court was not prepared to find the First Nation entitled to the return of disputed lands but held instead that the First Nation had a right to claim damages against the Crown:

> "We have found that there was no proper surrender of the aboriginal title to the lands. As already mentioned, aboriginal title is a fundamental and constitutionally protected right. It will require exceptional circumstances for a court to withhold a remedy to protect or vindicate aboriginal title. For the foregoing reasons, we are persuaded that exceptional circumstances exist in the present case. The interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent. In so holding, we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns."
>
> Reference: *Chippewas of Sarnia, supra* at para. 275; Brief of Authorities of Rubicon, Tab 4

65. Applying this principle in the context of the duty to consult, the courts have shown considerable reluctance to close businesses when fashioning a remedy for breach of the duty:

"Therefore, the Crown's contemplated move of the casino to the Bridgepoint lands triggered a duty to consult. To be effective, consultation should take place at the earliest stages, before irrevocable steps have been taken. That did not occur. What relief is appropriate in these circumstances?

In the petition, the Petitioners seek orders setting aside the Lottery Corporation's decision to relocate the casino to the Bridgepoint lands and prohibiting the Lottery Corporation from taking further steps to relocate or substantially change the gaming facility until it has satisfied its duty to consult and accommodate. This would shut down the casino and impair the entire development.

This relief is not appropriate in the circumstances of this case. As the petitioners acknowledge, practically speaking, at this late date, accommodation could only be economic accommodation. Because the harm suffered by the Musqueam from a failure to consult and potentially accommodate is compensable it is not appropriate to set aside the decisions, close the casino, and cause consequential damage."

Reference: *Musqueam Indian Band v. Richmond (City),* 2005 BCSC 1069 at paras. 116-118; Brief of Authorities of Rubicon, Tab 12

Hupacasath First Nation v. British Columbia (Minister of Forests), 2005 BCSC 1712 at 314 and 317; Brief of Authorities of Rubicon, Tab 7 (setting aside the Crown's decision would cause "significant prejudice" to the third party, so the Court declined to do so)

66. These cases confirm that the interests of affected third parties are an important consideration for the Courts both when the sufficiency of the Crown's process for consultation is evaluated and when a remedy is fashioned where the process has been found wanting. Further, timely decision making is paramount to the interests of third parties, particularly companies such as Rubicon, which face market constraints to raise financing and proceed with their development work.

67. On the facts of this case, if there was a breach of the duty to consult any remedy should be limited to the Crown and should not affect Rubicon.

PART IV - ORDER REQUESTED

68. Rubicon requests that this application be dismissed with costs. If the application is granted in any respect, any remedy should be directed solely towards Ontario and should leave Rubicon's Production Closure Plan intact.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18TH DAY OF FEBRUARY, 2014.

Geoff R. Hall
McCarthy Tétrault LLP

Thomas Isaac per GRHall

Thomas Isaac
Osler, Hoskin & Harcourt LLP

Counsel for Rubicon Minerals Corporation

SCHEDULE "A" - AUTHORITIES REFERRED TO

1. *Ahousat First Nation* v. *Canada (Fisheries and Oceans)*, 2008 FCA 2121
2. *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53
3. *Brokenhead Ojibway First Nation v. Canada* (A.G.), 2009 FC 484
4. *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), leave to appeal refused and reconsideration dismissed, [2001] S.C.C.A. No. 63
5. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
6. *Halfway River First Nation v. BC (Ministry of Forests)*, 1999 BCCA 470
7. *Hupacasath First Nation v. British Columbia (Minister of Forests),* 2005 BCSC 1712
8. *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801
9. *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158
10. *Kelly Lake Cree Nation v. Minister of Energy and Mines,* [1999] 3 C.N.L.R. 126 (B.C.S.C.)
11. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69
12. *Musqueam Indian Band v. Richmond (City),* 2005 BCSC 1069
13. *R. v. Morris*, 2006 SCC 59
14. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43
15. *Ryan et al. v. Fort St. James Forest District (District Manager)*, [1994] B.C.J. No. 2642 (B.C.S.C.), aff'd (1994), 40 B.C.A.C. 91
16. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74

SCHEDULE "B"- TEXT OF RELEVANT STATUTES, REGULATIONS AND BY-LAWS

Treaty 3 Harvesting Clause

Her Majesty further agrees with her said Indians, that they the said Indians, shall have [the] right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.