Court File No. 585/12

ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

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 THE APPLICANT

(LESLIE CAMERON ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF WABAUSKANG FIRST NATION, Applicant)

LESLIE CAMERON ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF WABAUSKANG FIRST NATION, Applicant

Bruce Stadfeld McIvor
and Kathryn Buttery
FIRST PEOPLES LAW CORPORATION
300-111 Water Street
Vancouver, BC V6B 1A7
Tel: 604.685.4240
Fax: 604.681.0912
Email: bmcivor@firstpeopleslaw.com
Solicitor for the Applicant

Applicant's Factum

I N D E X

Court File No. 585/12

ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

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 THE APPLICANT

I. INTRODUCTION

1. This is an application for judicial review by Wabauskang First Nation ("Wabauskang") of the decision of 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 December 2, 2011 to accept a production closure plan (the "Closure Plan") submitted by Rubicon Minerals Corporation ("Rubicon") in respect of the proposed Phoenix Gold Project (the "Project").

2. This application raises two issues of fundamental importance—whether Ontario can infringe treaty rights and, if it can, what limits exist on the Crown's right to delegate the duty to consult to third parties.

3. The law on the jurisdictional issue is unsettled. In *Keewatin*, the Ontario Court of Appeal held that Ontario can take up lands so as to infringe treaty rights and that there is no role for the federal government in protecting treaty rights.[1] That decision is now on appeal before the Supreme Court of Canada.

4. In *Haida* the Supreme Court was unequivocal that the honour of the Crown cannot be delegated and that only procedural aspects of the duty to consult can be delegated to third parties.[2] Wabauskang submits that the record here establishes that in deciding whether to accept the Closure Plan, the Director on behalf of Ontario went far beyond delegating procedural aspects of consultation to Rubicon. Rather than engage with Wabauskang directly, the Director limited her role to assessing the adequacy of Rubicon's efforts to consult and accommodate Wabauskang in respect of the Project. Consequently, the Crown breached its constitutional obligations to Wabauskang.

5. The fulfillment of Canada's treaty promises is essential to the ongoing process of reconciliation between Aboriginal peoples and the Crown. On this application, Wabauskang asks this Court to confirm Canada's responsibility to protect Wabauskang's rights under Treaty 3 and in the alternative, to conclude that Ontario exceeded the

---

[1] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 (CanLII) [*Keewatin* Appeal Decision]
[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*] at para. 53

permissible limits on delegating procedural aspects of consultation and thereby breached its legal obligation to consult and accommodate Wabauskang.

II. FACTS

A. Background

6. Wabauskang is a Treaty 3 First Nation whose community is based on reserve land near Ear Falls, Ontario.[3] In 1873, Wabauskang entered into Treaty 3 with Canada. The rights promised under Treaty 3 are fundamental to Wabauskang as a people. It is through the exercise of these rights that Wabauskang members maintain their connection to the land and their ancestors.[4] Wabauskang continues to look to the federal Crown as the treaty partner responsible for protecting Wabauskang's treaty rights.[5] Wabauskang understands that its treaty rights include a right to share in the benefits of resources extracted from its territory and to share in decisions about those resources.[6]

7. Wabauskang has experienced increased pressure from the Crown and resource companies to undertake development activities in its territory in recent years.[7] Wabauskang members continue to exercise their treaty rights as much as possible despite these challenges, and to engage with the Crown and companies operating in their territory.[8]

---

[3] Affidavit of Chief Leslie Cameron, October 30, 2013 [Chief Cameron Affidavit] at para. 2
[4] Chief Cameron Affidavit at para. 6
[5] Chief Cameron Affidavit at para. 3-4
[6] Chief Cameron Affidavit at para. 4, 39, 40, 42
[7] Chief Cameron Affidavit at para. 7
[8] Chief Cameron Affidavit at para. 8

B. The Phoenix Gold Project

8. Rubicon is seeking to develop an underground gold mine in Wabauskang's territory near Red Lake, Ontario.[9] If allowed to proceed, the Project has the potential to adversely affect Wabauskang members' ability to exercise their treaty rights, including the right to hunt, fish and practice other traditional activities on the land.[10]

9. On October 17, 2011, Rubicon filed the Closure Plan, as defined in section 139(1) of the former *Mining Act*[11], in respect of the Project.[12] The Minister of Northern Development, Mines and Forestry, now the Minister of Northern Development and Mines (the "Minister"), is the agent of the Crown responsible for administering the *Mining Act* for Ontario. Pursuant to the *Mining Act*, the Director is delegated to make decisions on behalf of the Minister. When a closure plan is filed, section 141(3) of the *Mining Act* provides that within 45 days the Director shall acknowledge receipt in writing of the closure plan or return the plan for refiling if it does not sufficiently address the prescribed reporting requirements. Written acknowledgement under section 141(3)(a) constitutes approval of the Closure Plan. On December 2, 2011, the Director acknowledged receipt of the Closure Plan (the "Decision").[13] This is the decision under review.

C. The *Keewatin* Proceedings

10. The primary issue on this judicial review is whether the Director had jurisdiction to accept the Closure Plan. This issue is closely related to the proceedings in *Keewatin*, which

---

[9] Chief Cameron Affidavit at para. 9
[10] Chief Cameron Affidavit at para. 10, 30, 31, 45, 57; Exhibit "EE"
[11] *Mining Act* RSO 1990, Chapter M. 14 (in force between April 4, 2011 and October 31, 2012) [*Mining Act*].
[12] Chief Cameron Affidavit at para. 64; Exhibits "FF," "GG"
[13] Chief Cameron Affidavit at para. 85; Exhibit "VV"

deal with a similar issue with respect to Ontario's jurisdiction to issue forestry authorizations in the Keewatin Lands in Treaty 3, including the area of the proposed Project.[14] In the *Keewatin* trial decision, the Court held that Ontario does not have jurisdiction to issue authorizations within the Keewatin Lands where doing so would result in a *prima facie* infringement of the right to hunt or fish guaranteed under Treaty 3. Wabauskang holds the same constitutionally-protected treaty rights with respect to the Keewatin Lands as Grassy Narrows First Nation ("Grassy Narrows"), the plaintiff in *Keewatin*, and as such was granted Party Intervener status in the appeal of the *Keewatin* trial decision at the Ontario Court of Appeal.[15]

11. The Director's Decision was made subsequent to the *Keewatin* trial decision but prior to the December 7, 2011 order of the Court of Appeal staying the trial decision pending the determination of the appeal.[16]

12. On March 4, 2013, on the request of Wabauskang and with the consent of Rubicon, the Court ordered that the deadline to perfect the judicial review be extended until 90 days after the Court of Appeal issued its decision in the *Keewatin* appeal.[17] On March 18, 2013, the Court of Appeal reversed the trial decision and held that Ontario has jurisdiction to issue authorizations in the Keewatin Lands without Canada's involvement.[18]

---

[14] *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801 [*Keewatin* Trial Decision]. For the purposes of this litigation, the "Keewatin Lands" are defined as lands within Treaty 3 which lie north of the English River and east of Ontario's current boundary with Manitoba. The Keewatin Lands were added to the province of Ontario pursuant to the *Ontario Boundaries Extension Act* in 1912.
[15] Chief Cameron Affidavit at para. 17; *Keewatin v Ontario (Natural Resources)*, 2012 ONCA 472 (CanLII)
[16] Chief Cameron Affidavit at para. 16; Exhibit "A"
[17] Chief Cameron Affidavit at para. 19; Exhibit "C"
[18] *Keewatin* Appeal Decision

13. Wabauskang and Grassy Narrows filed separate applications at the Supreme Court of Canada for leave to appeal the Court of Appeal's decision in May 2013.[19] On July 26, 2013, on a motion by Wabauskang which was opposed by Rubicon, this Court ordered that the deadline for Wabauskang to perfect the judicial review be further extended until 45 days after the earlier of the Supreme Court's decision on the leave to appeal applications in *Keewatin* or until the parties attempted to resolve the issues in the judicial review through mediation.[20] In the order, the Court confirmed the relationship between the *Keewatin* case and the judicial review and recognized that the *Keewatin* case "could be determinative of a key issue in the judicial review."[21]

14. The Supreme Court granted Wabauskang and Grassy Narrows leave to appeal the Court of Appeal's *Keewatin* decision on September 19, 2013.[22] The outcome of the Supreme Court's decision will determine whether Ontario has the jurisdiction to issue authorizations which infringe the Treaty 3 harvesting right in the Keewatin Lands, and as such will play a central role in the determination of whether the Director had jurisdiction to accept Rubicon's Closure Plan.[23]

D. Consultation Pre-Closure Plan

15. On May 6, 2011, Wabauskang met with representatives from Ontario and Rubicon about the Project. At the meeting, Wabauskang provided Ontario with a copy of Wabauskang's draft Consultation and Accommodation Protocol, which outlined Wabauskang's minimum expectations for consultation and accommodation with the

[19] Chief Cameron Affidavit at para. 21; Exhibits "D,""E,""F," "G"
[20] Chief Cameron Affidavit at para. 22-24; Exhibits "H," "I"
[21] Chief Cameron Affidavit at para. 24; Exhibit "I"
[22] Chief Cameron Affidavit at para. 25; Exhibit "J"
[23] Chief Cameron Affidavit at para. 29

Crown about proposed development in Wabauskang's territory.[24] Between the initial May 6, 2011 meeting and the Director's Decision, Wabauskang met with Rubicon about the Project primarily for the purpose of negotiating an Impacts Benefits Agreement ("IBA").[25] To date, Wabauskang has been unable to reach agreement with Rubicon on an IBA.[26]

16. Rubicon and Wabauskang also engaged in "on the record" consultation discussions regarding the Closure Plan.[27] Wabauskang retained a consultant to evaluate Rubicon's draft Closure Plan and the effects it could have on Wabauskang's treaty rights. The report identified a number of concerns including potential impacts of the Project on Wabauskang members' ability to exercise their right to fish at Red Lake and the effect of chemicals from the mine on the water quality and recommended additional consultation and strategies to minimize the potential impacts on treaty rights.[28]

17. At a meeting on October 14, 2013, Rubicon acknowledged that Wabauskang had raised serious concerns about the Closure Plan that Rubicon and Wabauskang should resolve together.[29] However, over Wabauskang's objections, Rubicon filed the Closure Plan on October 17, 2011.[30]

18. Subsequent to the filing of the Closure Plan, Wabauskang repeatedly emphasized to Rubicon and Ontario that it had outstanding concerns about the Project.[31] Wabauskang further reminded the Director that based on the *Keewatin* trial decision, Ontario did not

[24] Chief Cameron Affidavit at para. 49-52; Exhibits "Z" and "AA"
[25] Chief Cameron Affidavit at para. 53
[26] Chief Cameron Affidavit at para. 54
[27] Chief Cameron Affidavit at para. 55
[28] Chief Cameron Affidavit at para. 56-58; Exhibit "EE"
[29] Chief Cameron Affidavit at para. 59-63
[30] Chief Cameron Affidavit at para. 64; Exhibit "FF"
[31] Chief Cameron Affidavit at para. 65-66; Exhibits "HH," "II," "MM"

have jurisdiction to authorize the Project without Canada's involvement if the result would infringe Wabauskang's treaty rights.[32] In response to Wabauskang's concerns, Rubicon advised the Director that in its opinion, Ontario's authority to accept the Closure Plan was not affected by the *Keewatin* trial decision, and Ontario advised Wabauskang that Ontario intended to review Rubicon's engagement with Wabauskang.[33]

19. Wabauskang and Ontario met to discuss the Closure Plan on November 25, 2011.[34] In advance of the meeting, Wabauskang provided Ontario with a draft Engagement Protocol which was intended to facilitate meaningful consultation about Wabauskang's concerns with the Closure Plan.[35] Ontario advised Wabauskang both before and at the November 25th meeting that it would not consider or discuss the draft Engagement Protocol and that the meeting would be limited to discussing whether Wabauskang had any outstanding concerns with how Rubicon had consulted with Wabauskang.[36]

20. Subsequent to the meeting, Wabauskang again expressed its concerns about the Project and its disappointment in Ontario's refusal to address these concerns by letter to the Director and to the Honourable John Duncan, then Minister of Aboriginal Affairs and Northern Development.[37]

21. The Director accepted the Closure Plan on December 2, 2011.[38]

---

[32] Chief Cameron Affidavit at para. 70-71; Exhibit "LL"
[33] Chief Cameron Affidavit at para. 68, 73; Exhibits "KK," "OO," "QQ"
[34] Chief Cameron Affidavit at para. 69
[35] Chief Cameron Affidavit at para. 76; Exhibit "RR"
[36] Chief Cameron Affidavit at para. 77-82; Exhibit "SS"
[37] Chief Cameron Affidavit at para. 83, 84; Exhibits "TT,""UU"
[38] Chief Cameron Affidavit at para. 85; Exhibit "VV"

E. Consultation Post-Closure Plan

22. After the Decision, Minister Duncan responded to Chief Cameron's letter to advise that Canada understood that Ontario intended to address Wabauskang's concerns about the Project through Rubicon.[39]

23. Wabauskang continued to seek meaningful engagement with Ontario about the impacts of the Project after the Director's Decision. On Wabauskang's request, Wabauskang met with the Director and other Ontario representatives on April 3, 2012.[40] At the meeting, Ontario advised that it was only willing to facilitate a meeting between Wabauskang and Rubicon about the concerns identified in the consultant's report. Ontario would not discuss accommodation measures respecting Wabauskang's treaty rights, including revenue-sharing or shared-decision making in respect of the Project.[41]

24. Wabauskang delayed filing its notice of application of judicial review of the Decision on the understanding from Ontario and Rubicon that there would be additional opportunities for consultation and accommodation.[42] Rubicon had also advised Wabauskang that it was still interested in negotiating an IBA.[43] However, there was no substantive consultation with Ontario following the acceptance of the Closure Plan and Wabauskang's negotiations with Rubicon were unsuccessful.[44] As a result, Wabauskang filed its notice of application for judicial review on December 20, 2012.[45]

---

[39] Chief Cameron Affidavit at para. 87; Exhibit "WW"
[40] Chief Cameron Affidavit at para. 88; Exhibit "XX"
[41] Chief Cameron Affidavit at para. 89, 90; Exhibit "YY"
[42] Chief Cameron Affidavit at para. 91; Exhibit "AAA"
[43] Chief Cameron Affidavit at para. 91; Exhibit "AAA"
[44] Chief Cameron Affidavit at para. 92
[45] Chief Cameron Affidavit at para. 93

25. Wabauskang continued, without success, to ask Ontario to address its concerns about the Project through the Honourable Rick Bartolucci, Minister of Northern Development and Mines, after filing the notice of application.[46] No further consultation and accommodation has taken place in respect of the Project.

III. ISSUES

A. The Director's Decision is reviewable on a correctness standard

26. The applicable standard of review in respect of the Director's decision to accept the Closure Plan is correctness. Applying the factors established by the Supreme Court of Canada in *Dunsmuir*,[47] Wabauskang submits that there is no privative clause that applies to the provisions of the provincial *Mining Act* in issue here indicating the need for deference to the Director. Wabauskang further submits that the Director has not developed any particular expertise with respect to the issues raised by Wabauskang in this application. Finally, the nature of the questions of law in issue in this application is such that a correctness standard should be applied.

27. Wabauskang submits that the Director, on behalf of Ontario, was required to inquire into whether Ontario had jurisdiction to apply the relevant sections of the *Mining Act* prior to exercising her delegated statutory powers in respect of the Closure Plan. Specifically, the Director was obligated to inform herself of the potential impacts of the Decision on Wabauskang's treaty rights. In failing to do so, the Director misconceived of

[46] Chief Cameron Affidavit at para. 94; Exhibits "BBB," "CCC"
[47] *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 (CanLII) [*Dunsmuir*] at para. 55

her authority under the *Mining Act* and acted *ultra vires* her jurisdiction. Such questions of jurisdiction are subject to a correctness review.[48]

28. In the alternative, if this Court finds that the Director was not required to conduct an inquiry into Ontario's jurisdiction, Wabauskang submits that the *Mining Act* is constitutionally inapplicable to the extent that the Director's Decision to accept the Closure results in a *prima facie* infringement of Wabauskang's treaty rights.

29. The Supreme Court of Canada has held that questions of law that are of "central importance to the legal system… and outside the… specialized area of expertise" of an administrative decision maker will also give rise to a correctness standard of review.[49] In particular, the correctness standard of review applies to constitutional issues, including constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*.[50] Accordingly, the Director's decision attracts a correctness review.

30. In the further alternative, if Ontario did have the requisite jurisdiction to accept the Closure Plan pursuant to the *Mining Act*, Wabauskang submits that the Director, acting on behalf of Ontario, improperly delegated the Crown's constitutional duty to consult with Wabauskang to Rubicon. Questions of the existence or nature and scope of the Crown's duty to consult are reviewable on a correctness standard.[51] The Crown's preliminary assessment of the strength of the First Nation's claim and the assessment of the potential

---

[48] *Dunsmuir* at para. 59
[49] *Dunsmuir* at para. 55, citing *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77 at para. 62
[50] *Dunsmuir* at para. 58, citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322
[51] *Chartrand v. The District Manager*, 2013 BCSC 1068 (CanLII) at para. 119, citing *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (CanLII) [*West Moberly*] at para.77

impact on the First Nation's Aboriginal rights must also be correct.[52] As such, the issues of whether and the extent to which the Director was entitled to delegate consultation to Rubicon are questions of law, reviewable on a correctness standard.[53]

B. Ontario did not have jurisdiction to accept the Closure Plan

(a) Section 141(3)(a) of the *Mining Act* is constitutionally inapplicable to the extent that it results in a *prima facie* infringement of Wabauskang's treaty rights

31. The provincial *Mining Act* is constitutionally inapplicable insofar as its operation results in a *prima facie* infringement of Wabauskang's treaty rights. In *Morris,* the Court held that the doctrine of interjurisdictional immunity operates to render provincial legislation inapplicable to the extent that it results in a meaningful diminution of a treaty right.[54] This principle was affirmed in *Canadian Western Bank v Alberta,*[55] where the Supreme Court held that federal legislation will prevail and provincial legislation will be inoperative to the extent of the incompatibility in situations where the operational effects of provincial legislation are incompatible with federal legislation.[56] Interjurisdictional immunity applies where the adverse impact of a law adopted by one level of government impairs the core competence of the other level of government.[57] In *Canadian Western Bank*, the Court held with respect to Aboriginal and treaty rights that the Court takes a strict view of the basic content of the federal power with respect to "Indians" and that in

---

[52] *Enge v. Mandeville et al*, 2013 NWTSC 33 (CanLII) at para. 26 [*Enge*]; *Haida* at para. 61, 63
[53] *Haida* at paras. 61, 63; *White River First Nation v. Yukon Government*, 2013 YKSC 66 (CanLII) [*White River*] at para. 92; *Enge* at para. 26
[54] *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*] at para. 90-91, 100
[55] *Canadian Western Bank v Alberta* [2007] 2 SCR 3, 2007 SCC 22 [*Canadian Western Bank*]
[56] *Canadian Western Bank* at para. 69
[57] *Canadian Western Bank* at para. 48-49

some cases, federal exclusivity is justified because of the special position of Aboriginal people.[58]

32. Wabauskang submits that the provincial *Mining Act* is constitutionally inapplicable to the extent that the Director's Decision to accept the Closure Plan pursuant to section 141(3)(a) results in a *prima facie* infringement of Wabauskang's treaty rights and intrudes upon the federal government's exclusive jurisdiction to protect treaty rights.

(b) The Director was obligated to make inquiries to determine whether Ontario had jurisdiction to accept the Closure Plan

33. It is a well established principle that Crown decision-makers are required to respect legal and constitutional limits. The Crown's duty to consult lies upstream of the statutory mandate of decision-makers.[59] Where a decision-maker is called on to approve an activity that triggers the duty to consult, the decision-maker must first determine the scope of the duty before deciding whether the duty has been fulfilled.[60] In order to determine whether accommodation measures are necessary or appropriate, the decision-maker must be informed in advance of the decision about the nature and severity of the potential impacts of a decision on treaty rights. [61]

34. Similarly, where there is a credible question as to whether a provincial statutory decision might intrude on Canada's exclusive jurisdiction under section 91(24), the decision-maker must first enquire into whether the decision represents a *prima facie* infringement. If it does, the decision-making process must involve Canada. Ontario's

---

[58] *Canadian Western Bank* at para. 60-61.
[59] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 10 [*Beckman*] at para. 48
[60] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 [*Kwikwetlem*] at para. 65
[61] *Beckman* at para.73

obligation to determine whether a decision has the potential to infringe a treaty right such that the decision would exceed its jurisdiction prior to making the decision has been specifically recognized in the context of Treaty 3.[62]

35. Prior to the Decision, Wabauskang advised the Director that the Decision had the potential to significantly affect its treaty rights.[63] The Director failed to conduct the necessary inquiries to determine whether the Decision would result in a *prima facie* infringement of those rights despite Wabauskang's repeated requests to discuss the potential impacts of the pending Decision to accept the Closure Plan.[64] As such**,** Wabauskang submits that the Director's Decision should be suspended pending the Director's fulfillment of her obligation to determine the potential impacts of the Decision on Wabauskang's treaty rights and whether those impacts are such that the Decision was outside Ontario's legal jurisdiction.

(c) The Director's Decision was outside of Ontario's legal jurisdiction

(i) <u>The Decision will result in a *prima facie* infringement of Wabauskang's treaty rights and as such is constitutionally inapplicable</u>

36. In the alternative, should this Court conclude that the Director was not obligated to conduct the inquiry described above, Wabauskang submits that the facts set out in

[62] *Keewatin* Trial Decision at para. 1570. The trial judge held that Ontario's right to take up lands to the point of infringement "involves a concomitant duty to assess <u>in advance</u> the impacts on Treaty Harvesting Rights of any activities it is being asked to patent or license." The Ontario Court of Appeal's decision reversed the decision of the trial judge, but not on this issue. The Court of Appeal's decision is now on appeal before the Supreme Court of Canada.
[63] Chief Cameron Affidavit at para.49-52, 66, 70; Exhibits "AA,""II," "LL"
[64] Chief Cameron Affidavit at para.49-52, 66, 70; Exhibits "AA," "II," "LL"

Wabauskang's Application Record support a finding by this Court that the Decision will result in a *prima facie* infringement of Wabauskang's treaty rights.[65]

37. The Supreme Court has confirmed that a decision which will result in more than an insignificant interference with a treaty right constitutes a *prima facie* infringement.[66] In the case at hand, the Director's Decision will have more than an insignificant impact on Wabauskang members' ability to exercise their constitutionally-protected treaty rights beyond the minimum threshold for a *prima facie* infringement, notwithstanding the Director's failure to conduct the inquiries described above.[67] As a result, the provincial legislation is inapplicable to the extent that it impairs the exclusive federal jurisdiction over treaty rights.[68]

38. In the event that this Court concludes that it cannot make a determination on the issue of whether the Decision constitutes a *prima facie* infringement without further evidence, Wabauskang submits that the appropriate outcome would be for this Court to suspend the Decision and order a trial to determine whether the Decision constitutes a *prima facie* infringement of Wabauskang's treaty rights.

---

[65] *Morris*
[66] *Morris* at para. 53; *William v. British Columbia*, 2012 BCCA 285 at para. 294, 322. In the *Keewatin* trial decision, Justice Sanderson made reference at para. 1570 to Ontario's right to "patent and licence land up to the point of significant interference" with the treaty right. This statement is inconsistent with the Supreme Court's description in *Morris* of a *prima facie* infringement as anything more than an "insignificant interference" and as such Justice Sanderson's comments do not constitute the applicable test for determining whether Wabauskang's treaty rights have been infringed by the Director's Decision.
[67] Chief Cameron Affidavit at para. 10, 30-45, 57; Exhibits "O," "P," "Q," "R," "S," "T," "U", "V," "W," "EE"
[68] *Morris, Canadian Western Bank*

(ii) Provincial jurisdiction to infringe treaty rights in the Keewatin Lands is an issue of national importance now before the Supreme Court of Canada

39. The issue of the province's jurisdiction to infringe treaty rights in the Keewatin Lands has been recognized as an issue of national importance and is the subject of a pending appeal before the Supreme Court brought by Wabauskang and Grassy Narrows.[69] The appellants will ask the Supreme Court to reverse the 2013 decision of the Ontario Court of Appeal and to confirm the *Keewatin* trial decision, where the trial judge held that Ontario does not have jurisdiction to issue land-use authorizations within the Keewatin Lands where doing so would result in a *prima facie* infringement of the right to hunt or fish guaranteed under Treaty 3.[70] The trial decision was the prevailing law in Ontario with respect to provincial jurisdiction to infringe treaty rights in the Keewatin Lands at the time the Director issued the Decision.

40. The *Keewatin* proceedings and the case at hand address substantially the same issues with respect to the constitutional applicability of provincial legislation in respect of the Treaty 3 taking up clause in the Keewatin Lands. The Supreme Court's decision is expected to clarify, on a final basis, the uncertainties with respect to provincial jurisdiction in Treaty 3 that arise as a result of the Court of Appeal's decision and will directly address the issue of Ontario's authority to infringe Wabauskang's treaty rights. Given the above, Wabauskang submits that the question of whether Ontario had legal jurisdiction to accept the Closure Plan should only be determined once this Court has the benefit of the Supreme Court's decision in *Keewatin.* Wabauskang reserves its right to seek leave from the Court to amend its submissions on this issue following the Supreme Court's decision.

---

[69] Chief Cameron Affidavit at para. 25; Exhibit "J"
[70] *Keewatin* Trial Decision at para. 1452

C. The Director on behalf of Ontario breached the Crown's duty to consult with and accommodate Wabauskang

41. The Director on behalf of Ontario was obligated to fulfill the Crown's constitutional duty to assess Wabauskang's asserted claims and to consult and accommodate Wabauskang about potential impacts of the Project on Wabauskang's treaty rights.

42. Treaty 3 and the other numbered treaties are solemn agreements between Aboriginal peoples and Canada which are essential to achieving reconciliation of the Crown's assertion of sovereignty with the fact of pre-existing Aboriginal societies.[71] The Crown's duty to consult with Aboriginal peoples in respect of decisions with the potential to impact treaty rights is key to reconciliation.[72] The duty "is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."[73]

43. By failing to assess Wabauskang's claims, refusing to consult directly with Wabauskang and by improperly delegating the Crown's consultation obligations to Rubicon, the Director failed to discharge Ontario's constitutional obligation to Wabauskang.

---

[71] *R. v Calder*, [1996] 1 SCR 660; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*]
[72] *Mikisew* at para. 63
[73] *Haida* at para. 32

(a) The Director breached Ontario's consultation obligations by failing to assess and consult on Wabauskang's asserted claims

(i) The Director was obligated to consult about Wabauskang's asserted treaty rights

44. The Crown is obligated to consider the impacts of a potential decision or action on the credible asserted claims of Aboriginal peoples.[74] It is not open to the Crown to refuse to participate in a process to determine, recognize and respect a First Nation's claim to a treaty right. As the Court held in *Haida* in the context of asserted Aboriginal rights, to "unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource."[75]

45. In the case at hand, Wabauskang advised Ontario that it had significant concerns about the Project's effect on its asserted treaty rights to share in the benefits from resources extracted from its territory and to share in decisions made in respect of such resources.[76] The Director was obligated to consider the potential impacts of the Project on Wabauskang's credible claims. If the Director believed that Wabauskang's claims were not credible, she was obligated to consider the claims further, discuss them with Wabauskang and communicate her decision to Wabauskang. The Director took none of these steps.

---

[74] *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 (CanLII) [*Ross River*] at para. 17
[75] *Haida* at para. 27
[76] Chief Cameron Affidavit at para. 4, 39-44, 49-52, 66, 70, 77-83, 88-89; Exhibits "Z," "AA," "II," "LL," "RR," "TT," "XX," "YY." In the *Keewatin* Trial Decision at para. 1631, the right to share in the benefits of resources in Treaty 3 was specifically recognized. The Court of Appeal reversed the trial decision but not on this basis. Shared decision-making in respect of resource development has been identified by the courts as a potential form of accommodation of where First Nations' constitutional rights stand to be affected. See *Kwikwetlem* at para. 67.

Instead, she refused to discuss these issues with Wabauskang and delegated consultation to Rubicon.[77]

46. As a consequence of the Director's decision to accepted the Closure Plan without consulting with Wabauskang on its asserted rights or engaging with Wabauskang about its Consultation and Accommodation Protocol or Engagement Protocol, the gold deposits in the area of the proposed Project may be partly or completely depleted, thus depriving Wabauskang of the right to benefit from the resources in its territory and share in decision-making about the use of those resources on a permanent basis.[78] This is precisely the scenario the duty to consult and accommodate is intended to avoid.

(ii) The Crown thwarted reconciliation

47. The Director was obligated to advance reconciliation through negotiations by consulting with Wabauskang about potential impacts on Wabauskang's asserted treaty rights to revenue-sharing and shared decision-making, and failed to do so by delegating consultation to Rubicon.

48. The honour of the Crown requires that government participate in a process of negotiation to determine, recognize and respect the potential rights embedded in section 35.[79] However, as the Supreme Court held in *Mikisew,* in many instances the "multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive

[77] Chief Cameron Affidavit at para. 75, 77, 82; Exhibits "QQ," "SS"
[78] Chief Cameron Affidavit at para. 45
[79] *Haida* at para. 25

controversies."[80] Here, the Director's indifference to Wabauskang's concerns demonstrated a lack of respect for Wabauskang's claims, interests and ambitions. Instead of promoting reconciliation between Wabauskang and the Crown, the Director frustrated it.

(iii) The Crown cannot avoid consultation through a lack of mandate

49. The Director claimed that the Ministry lacked the necessary mandate to engage in discussions about the possibility of revenue-sharing and shared decision-making with Wabauskang.[81] Statutory decision-makers may require assistance or advice from other government ministries or consultants, but may not rely on administrative challenges, including a lack of a mandate to discuss certain issues, as a basis on which to refuse to consult.[82]

50. The Crown's duty to consult must be fulfilled regardless of whether the statutory regime precludes the decision-maker from exercising his or her discretion in respect of a decision. As the Yukon Court of Appeal recently held in *Ross River*, the duty to consult is a mechanism by which the claims of Aboriginal peoples may be reconciled with the Crown's management of resources, and as such, "statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist."[83]

51. The Director was obligated to take Wabauskang's claims seriously, to consider the strength of the asserted claims and consult with Wabauskang directly about potential impacts on those claims—she failed to do so.

---

[80] *Mikisew* at para. 1 (emphasis added)
[81] Chief Cameron Affidavit at para. 89-90; Exhibit "YY"
[82] *West Moberly* at para. 106-107
[83] *Ross River* at para. 37 (emphasis added)

(iv) The Crown failed to meet minimum consultation requirements

52. The Crown's obligation to Aboriginal peoples requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests.[84] Even at the lower end of the consultation spectrum, consultation must include sufficient time for the First Nation to prepare its views, an opportunity to present its views and full and fair consideration of the views presented.[85] Consultation must be more than a "mere courtesy"[86] and includes a duty to discuss important decisions with the affected First Nation.[87]

53. The Director was obligated to make good faith efforts to understand Wabauskang's concerns and to make efforts to address them. On behalf of the Crown, the Director bore the burden of explaining to Wabauskang why Ontario's use of the lands could not be accommodated with Wabauskang's reasonable expectations under Treaty 3.[88] In refusing to do so and in delegating the consultation process to Rubicon, the Director failed to fulfill the Crown's duty to consult.

(b) The Director breached Ontario's constitutional obligations by delegating consultation to Rubicon

(i) Rubicon cannot fulfill the Crown's duty to consult

54. The duty to consult is a constitutional imperative which flows from the honour of the Crown. The honour of the Crown cannot be delegated. While the Crown may delegate

[84] *Kwikwetlem* at para. 62
[85] *Beckman* at para. 74-75
[86] *White River* at para. 102, citing *Beckman* at para.57
[87] *Haida* at para. 24, 40
[88] *Haida* at para. 50

procedural aspects of the consultation process to third parties, "the ultimate legal responsibility for consultation and accommodation rests with the Crown." [89] The Crown bears sole responsibility for carrying out substantive aspects of the duty to consult.

55. The Crown's constitutional obligations could not be fulfilled through delegation of the consultation process to Rubicon. Consultation "is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise."[90] To carry out consultation on behalf of the Crown, the consulting entity must have "powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests."[91] Rubicon would not and could not fulfill the Crown's constitutional obligations, nor does it have the remedial authority to effect accommodation of Wabauskang's treaty rights.[92]

56. Rubicon's inability to fulfill the Crown's consultation obligations is similar to that of a municipality without the legal obligation, ability or willingness to accommodate on substantive issues**.**[93] Rubicon lacked "the authority to engage in the nuanced and complex constitutional process involving 'facts, law, policy and compromise' referred to in *Rio Tinto.*"[94]

57. Further, the discharge of the Crown's constitutional obligations revolves "around the direct interaction between Ontario and the First Nation signatories."[95] Ontario cannot

---

[89] *Haida* at para. 53
[90] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Carrier Sekani*] at para. 60
[91] *Carrier Sekani* at para. 74
[92] Chief Cameron Affidavit at para. 59-65, 67, 71-72, 97-98; Exhibits "HH," "II," "MM," "NN," "OO"
[93] *Neskonlith Indian Band v. Salmon Arm (City),*2012 BCCA 379 (CanLII) [*Neskonlith*] at para. 66, 68
[94] *Neskonlith* at para. 68
[95] *Keewatin* Appeal Decision at para. 212

rely on an intermediary such as Rubicon to discharge the Crown's obligations. The Director could not rely on Rubicon to fulfill the Crown's consultation obligations because third parties bear no independent duty to consult and accommodate.[96] Only the Crown is legally responsible for the "consequences of its actions and interactions with third parties, that affect Aboriginal interests," and third parties "cannot be held liable for failing to discharge the Crown's duty to consult and accommodate."[97] Here, as a result of the Director's delegation of consultation to Rubicon, important issues relating to the protection of Wabauskang's treaty rights were not addressed because Ontario was absent from the consultation and Rubicon would not- and could not- address them.[98]

(ii) Ontario's delegation of consultation breached the honour of the Crown

58. The duty to consult is a manifestation of the honour of the Crown, and as such, the Crown is obligated to act honourably in implementing treaties between Aboriginal peoples and the Crown.[99] The Crown cannot contract out of its duty of dealing honourably.[100] The Director was not at liberty to attempt to contract out of the Crown's duty to act honourably in its dealings with Wabauskang by delegating consultation to Rubicon. In doing so, the Director breached the honour of the Crown.

(iii) Ontario cannot rely on Rubicon's consultation record as evidence of consultation

59. The Director was not entitled to rely on the consultation of record of Rubicon, a mining company with interests which are independent and distinct from the Crown, to

---

[96] *Haida* at para. 10
[97] *Haida* at para. 56
[98] Chief Cameron Affidavit at para. 97-98
[99] *Haida* at para.17
[100] *Beckman* at para. 61

determine whether the duty to consult had been fulfilled. However, this is exactly what the Director did.

60. Where consultation is delegated to a proponent, it may be difficult for the First Nation to tell when they are and are not engaged in consultation. The danger of proponents engaging in discussions which may later be portrayed as part of a consultation process can be overcome by either the Crown carrying out consultation directly, or by explicitly delegating consultation where it does so.[101] In the case at hand, as a consequence of the Director's delegation, the purpose of meetings between Wabauskang and Rubicon were unclear and meetings at which no consultation discussions took place were subsequently mischaracterized by Rubicon as constituting consultation.[102]

61. Rubicon's ability to carry out consultation differs from the delegated authority considered in *Kwikwetlem,* where the court held that the British Columbia Utilities Commission was responsible as an agent of the Crown for assessing the adequacy of the consultation record of another Crown agent, the British Columbia Hydro and Power Authority.[103] Rubicon is not an agent of the Crown, and the Director cannot rely on Rubicon's consultation record as evidence of Crown consultation with Wabauskang.

62. The Crown alone is responsible for ensuring that the duty to consult is fulfilled. In the case at hand, the relevant consultation record is that of Ontario. While the Crown may be able to rely on any regulatory processes it initiates and on third parties executing

---

[101] *Louis v. British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070 (CanLII), 2011 BCSC 1070 [*Louis*] at para. 234; *Halalt First Nation* v. *British Columbia (Minister of Environment)*, 2011 BCSC 945 (CanLII), 2011 BCSC 945 at para. 73, relying on Professor Dwight G. Newman in *The Duty to Consult: New Relationships with Aboriginal Peoples* [Saskatoon: Purich Publishing, 2009]
[102] Chief Cameron Affidavit at para. 53, 74; Exhibits "CC," "PP"
[103] *Kwikwetlem*

procedural matters of consultation, it cannot rely on evidence of a proponent supposedly discharging the Crown's duty to consult. The Court is restricted by focusing on the Crown's duties rather than industry proponents because "the Crown bears the ultimate responsibility for discharging its constitutional duty, such that the honour of the Crown cannot be delegated."[104]

63. It was not open to the Director to rely on Rubicon's record of engagement with Wabauskang as evidence of consultation, and it is not open to this Court to rely on Rubicon's consultation record in assessing whether Ontario adequately consulted with Wabauskang.

(iv) The Director's process of delegation to Rubicon was improper

64. Consultation was delegated to Rubicon in the absence of an appropriate forum, regulatory scheme or legislative authority. The Director was allowed unstructured discretion in the delegation of consultation.

65. The Crown may create a forum for other purposes by which consultation may take place if in substance the appropriate level of consultation is provided.[105] No such forum was established in respect of the Project. Instead, Rubicon undertook to fulfill the Director's obligations to consult and accommodate outside of any specified forum and without explicit direction or limits from the Crown on the extent to which Rubicon should engage with Wabauskang and without the Crown providing an explanation to Wabauskang as to the scope and limits of Rubicon's responsibilities.

---

[104] *Louis* at para. 231, citing *Haida, supra* at para. 53

[105] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku*]; *Beckman* at para. 39

66. Where the Crown delegates consultation, it must establish "regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource."[106] By contrast, in the case at hand there was no specific process in place under statute describing Rubicon's responsibilities at the time Rubicon filed its Closure Plan, even though the *Mining Act* expressly provided for the creation of such a procedure.[107] Rather, the consultation process set out pursuant to the *Mining Act* Regulations was restricted to a requirement that the proponent check a box on a schedule which stated that consultations with Aboriginal peoples affected by the Project had been carried out.[108]

67. Ontario further breached the Crown's duty to consult by allowing the Director unstructured discretion in the delegation of consultation to Rubicon. In the context of a regulatory process with the potential to infringe Aboriginal rights, the Crown "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance."[109] This same principle applies here to the Crown's duty to consult. Ontario was obligated to develop a regime that "provides for consultation commensurate with the nature and strength of the Aboriginal rights or title claim and with the extent to which

---

[106] *Carrier Sekani* at para. 56. See also *Louis* at para. 232, *Beckman* at para 39 and *Taku,* all of which are examples of specific processes set up under statute. In *Taku* at para. 40 the Supreme Court emphasized that no separate consultation process was required in that case because the *Environmental Assessment Act* "specifically set out a scheme that required consultation with affected Aboriginal peoples." As a result of the scheme established pursuant to the provincial legislation in *Taku,* a Project Committee was established which included the formation of working group and subcommittees, the commissioning of studies, and the preparation of written recommendations in which the affected First Nation was played a role.
[107] *Mining Act,* s.176(1)(24.3)
[108] *Mining*, O Reg 240/00, Schedule 2, Section 14 (in force between October 31, 2011 and October 1, 2012)
[109] *R. v. Adams,* [1996] 3 S.C.R. 101 at para. 54

proposed activities may interfere with claimed Aboriginal interests."[110] In the absence of explicit guidance or a specific regime, the Director was not entitled to rely on Rubicon's delegated consultation with Wabauskang.

(v) By delegating consultation to Rubicon, the Director denied Wabauskang an opportunity for meaningful consultation

68. The Crown's duty to consult is more than a simple check-in procedure to assess whether the First Nation is satisfied.[111] As a result of the Director's delegation of the consultation process to Rubicon, the Director failed to fulfill her consultation obligations by reducing her role to one of merely assessing Rubicon's consultation efforts.

69. Even had Ontario set up an appropriate forum and clearly defined limits on Rubicon's consultation responsibilities, simply providing such a process is insufficient to fulfill the Crown's consultation obligation where there is no meaningful engagement on the issues at hand. A consultation process which assumes that the project in question will proceed and which fails to meaningfully address the First Nation's concerns "does not recognize the full range of possible outcomes, and amounts to nothing more than an opportunity for the First Nations 'to blow off steam.'"[112]

70. For consultation to be meaningful and genuine there must be an exchange of views and dialogue which allows for input into the decision-making process.[113] Consultation and accommodation requires responsiveness on the part of the Crown.[114] As the B.C. Supreme Court held in *Wii'litswx*, "[m]eaningful consultation is characterized by good faith and an

[110] *Ross River* at para. 7
[111] *White River* at para. 111
[112] *West Moberly* at para. 149
[113] *White River* at para. 112
[114] *Taku* at para. 25

attempt by both parties to understand each other's concerns, and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the aboriginal rights enshrined in s. 35 of the *Constitution Act*."[115] It is not sufficient for the Crown to simply assess whether earlier consultation was satisfactory or to provide the affected First Nation with an opportunity to blow off steam.

71. The Director had a duty to consider and respond to the substantive concerns about the impacts of the Project identified by Wabauskang. If the Director could not consult or accommodate Wabauskang on these issues, she was obligated to provide Wabauskang with a satisfactory, reasoned explanation as to why its position was not accepted.116. However, when Wabauskang sought consultation directly with Ontario, the Director relied on Rubicon's record of engagement to assess whether the Crown's consultation obligations had been fulfilled.117 As a result, Wabauskang's concerns were never addressed and the Crown's duty was not fulfilled.

Conclusion

72. At stake for Wabauskang in this application is the protection of Wabauskang's treaty rights as guaranteed pursuant to section 35 of the *Constitution Act, 1982.*

73. Wabauskang submits that the Director failed to make the necessary inquiry into whether or not her Decision constituted a *prima facie* infringement of Wabauskang's treaty rights. If she was not required to make such an inquiry, Wabauskang submits that the

---

[115] *Wii'litswx* v. *British Columbia (Minister of Forests)*, 2008 BCSC 1139 (CanLII), 2008 BCSC 1139 at para. 178
[116] *West Moberly* at para. 147
[117] Chief Cameron Affidavit at para.66, 70, 75-77; Exhibits "II," "LL," "QQ," "SS"

Decision did constitute a *prima facie* infringement and therefore section 141(3)(a) of the *Mining Act* was constitutionally inapplicable and the Decision must be quashed.

74. If Ontario did have jurisdiction to apply its legislation, Wabauskang submits that the Director improperly delegated the Crown's legal obligation to Rubicon and consequently breached its constitutional obligation to consult and accommodate Wabauskang.

75. The issue of Ontario delegating consultation is of utmost importance to Wabauskang and many other Ontario First Nations. It is for this Court to breathe meaning and substance into the Supreme Court's unequivocal pronouncement that the honour of the Crown cannot be delegated. Without a clear line being drawn on the limits of Ontario's right to delegate procedural aspects of consultation to mining companies and other third parties, the promise of reconciliation embedded in section 35 of the *Constitution Act, 1982* will remain unrealized.

IV. ORDER REQUESTED

76. Wabauskang seeks the following relief on this application for judicial review:

a. an order that the Director's Decision be suspended until Ontario determines whether it had the legal jurisdiction to make the Decision; or in the alternative

b. an order that the Director's Decision be quashed;

c. costs on a substantial indemnity basis; and

d. such other relief as counsel may advise and this Court deems appropriate.

Date: November 4, 2013

_____

Acting as Agent on behalf of First Peoples Law Corporation

_____

Bruce Stadfeld McIvor
FIRST PEOPLES LAW CORPORATION
300-111 Water Street
Vancouver, BC V6B 1A7
Tel: 604.685.4240
Solicitors for Wabauskang First Nation

_____

Kathryn Buttery
FIRST PEOPLES LAW CORPORATION
300-111 Water Street
Vancouver, BC V6B 1A7
Tel: 604.685.4240
Solicitors for Wabauskang First Nation

_____

Angela D'Elia
FIRST PEOPLES LAW CORPORATION
300-111 Water Street
Vancouver, BC V6B 1A7
Tel: 604.685.4240
Solicitors for Wabauskang First Nation

Schedule A - Table of Authorities

Jurisprudence

Statutes and Other References

Schedule B – Excerpted Legislation

Mining Act

R.S.O. 1990, CHAPTER M.14

Historical version for the period April 4, 2011 to October 31, 2012.

Last amendment: 2010, c. 18, s. 23.

PART VII
REHABILITATION OF MINING LANDS

Definitions and application of Part

Definitions

139. (1) In this Part,

"advanced exploration" means the excavation of an exploratory shaft, adit or decline, the extraction of prescribed material in excess of the prescribed quantity, whether the extraction involves the disturbance or movement of prescribed material located above or below the surface of the ground, the installation of a mill for test purposes or any other prescribed work; ("exploration avancée")

"adverse effect" means,

(a) injury or damage to property,

(b) harm or material discomfort to any person,

(c) a detrimental effect on any person's health,

(d) impairment of any person's safety,

(e) a severe detrimental effect on the environment; ("conséquence préjudiciable")

"closed out" means that the final stage of closure has been reached and that all the requirements of a closure plan have been complied with; ("fermé")

"closure" means the temporary suspension, inactivity or close out of advanced exploration, mining or mine production; ("fermeture")

"closure plan" means a plan to rehabilitate a site or mine hazard that has been prepared in the prescribed manner and filed in accordance with this Act and that includes provision in the prescribed manner of financial assurance to the Crown for the performance of the closure plan requirements; ("plan de fermeture")

"Director" means a Director of Mine Rehabilitation appointed under subsection 153 (2); ("directeur")

"inactivity" means the indefinite suspension of a project in accordance with a filed closure plan where protective measures are in place but the site is not being continuously monitored by the proponent; ("inactivité")

"mine production" means mining that is producing any mineral or mineral-bearing substance for immediate sale or stockpiling for future sale, and includes the development of a mine for such purposes; ("production minière")

"progressive rehabilitation" means rehabilitation done continually and sequentially during the entire period that a project or mine hazard exists; ("réhabilitation progressive")

"project" means a mine or the activity of advanced exploration, mining or mine production; ("projet")

"proponent" means the holder of an unpatented mining claim or licence of occupation or an owner as defined in section 1; ("promoteur")

"protective measures" means steps taken in accordance with the prescribed standards to protect public health and safety, property and the environment; ("mesures de protection")

"rehabilitate" means measures, including protective measures, taken in accordance with the prescribed standards to treat a site or mine hazard so that the use or condition of the site,

(a) is restored to its former use or condition, or

(b) is made suitable for a use that the Director sees fit; ("réhabiliter")

"site" means the land or lands on which a project or mine hazard is located; ("lieu")

"temporary suspension" means the planned or unplanned suspension of a project in accordance with a filed closure plan where protective measures are in place and the site is being monitored continuously by the proponent. ("suspension temporaire") 1996, c. 1, Sched. O, s. 26.

Application of Part

(2) Without restricting the scope of this Part, this Part applies to projects including,

(a) the underground mining of minerals, excluding natural gas, petroleum and salt by brining method;

(b) the surface mining of metallic minerals;

(c) the surface mining of non-metallic minerals, excluding natural gas, petroleum and aggregate as defined in the *Aggregate Resources Act*, on land that is not Crown land;

(d) advanced exploration on mining lands. 1996, c. 1, Sched. O, s. 26.

Mine production

141. (1) No proponent other than a proponent who is subject to a closure plan shall commence or recommence mine production without,

(a) giving notice to the Director in the prescribed form and manner;

(b) giving public notice at the prescribed time and in the prescribed form and manner;

(c) filing a certified closure plan with the Director as required under subsection (2); and

(d) receiving a written acknowledgment of receipt for the certified closure plan from the Director. 1996, c. 1, Sched. O, s. 26.

Closure plan

(2) After public notice has been given under clause (1) (b), the proponent shall file with the Director a closure plan certified in the prescribed form and manner certifying that the plan complies with the prescribed requirements. 1996, c. 1, Sched. O, s. 26.

Acknowledgment of receipt

(3) Within 45 days after the filing of the certified closure plan, the Director shall,

(a) acknowledge receipt, in writing, of the closure plan to the proponent; or

(b) return the closure plan for refiling if it does not sufficiently address all of the prescribed reporting requirements for a certified closure plan. 1996, c. 1, Sched. O, s. 26.

Effect of acknowledgment

(4) The certified closure plan of a proponent who receives a written acknowledgement of receipt under clause (3) (a) is considered filed as of the date indicated on the written acknowledgment of receipt. 1996, c. 1, Sched. O, s. 26.

Regulations

176. (1) The Lieutenant Governor in Council may make regulations generally,

1. governing the opening, construction, maintenance and use of roads to, through or over mining claims, mining locations or lands sold or leased as mining lands or recorded as mining claims or locations under this Act or a predecessor thereof, and for the opening, construction or maintenance and use of ditches, aqueducts or raceways through, over or upon such claims, locations or lands for the conveying and passage of water for mining purposes;
2. prescribing the form of any application, notice, report, log, record, dispute, certificate, permit, statement or other document required, permitted or provided for, by or under this Act and requiring its use;

2.1 prescribing additional restrictions or requirements respecting the lands on which mining claims shall not be staked or recorded for the purposes of subsection 29 (1) and section 30;

2.2 prescribing the size and form of mining claims, the manner of ground staking and the time and manner of affixing tags in respect thereto and the methods that may be used to delineate a mining claim by map staking;

2.3 governing the requirements for obtaining a prospector's licence or renewal of a licence, including prescribing the prospector's licence awareness program and the evidence required to prove successful completion of the program;

2.4 prescribing factors to be considered by the Minister in making an order to withdraw lands under subsection 35 (1);

3. governing the assessment of the mineral potential of lands and prescribing additional criteria for the purposes of subsection 35.1 (9);

3.1 governing the manner in which mining rights that have been withdrawn under section 35.1 are opened;

4. governing the manner in which confirmation of staking must be given to a surface rights owner for the purpose of section 46.1;
5. prescribing the annual rental for a licence of occupation;
6. prescribing the information to be shown on a sketch or plan accompanying an application to record a mining claim;

6.1 prescribing additional circumstances in which the Minister may make an order under subsection 51 (4);

7. prescribing, for the purposes of subsection 52 (1), the conditions on which permission may be given to mine, mill and refine mineral substance from an unpatented mining claim; Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 7 is repealed and the following substituted:

7. prescribing the quantity of mineral bearing substances that require permission to be obtained, and prescribing any terms and conditions upon which permission may be granted to mine, mill and refine mineral bearing substance from an unpatented mining claim, for purposes of section 52;

See: 2009, c. 21, ss. 81 (5), 102 (2).

8. prescribing the annual units of assessment work to be performed by the holder of a mining claim;

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 8 is repealed and the following substituted:

8. governing the annual units of assessment work to be performed by the holder of a mining claim, the circumstances in which a claim holder may make payments instead of performing annual units of assessment work, limitations on the substitution of payments for units of assessment work, the amount of such payments and the allocation of such payments as assessment work credits;

See: 2009, c. 21, ss. 81 (5), 102 (2).

9. prescribing, for the purposes of subsection 65 (2), locations, other than the office of the recorder, in which may be filed assessment work reports and prescribing the date reports in respect of specified types of assessment work shall be filed;

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 9 is repealed and the following substituted:

9. prescribing, for the purposes of subsection 65 (4), the date reports in respect of specified types of assessment work shall be filed;

See: 2009, c. 21, ss. 81 (5), 102 (2).

10. prescribing the types of work eligible for assessment work credits, the method of calculating and approving credits for work performed and the manner of distribution of credits to mining claims;

11. prescribing the manner in which prospecting and regional surveys performed before recording are eligible for assessment work credits;

12. prescribing the manner in which exploration work performed on mining lands may be allocated to contiguous unpatented mining claims;

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 12 is repealed and the following substituted:

12. prescribing the manner in which assessment work performed on mining lands, or payments made instead of assessment work, may be allocated to contiguous unpatented mining claims;

See: 2009, c. 21, ss. 81 (8), 102 (2).

13. prescribing the conditions on which an extension of time for the performing of and filing a report on assessment work may be allowed by a recorder;

14. prescribing the annual rental for the first year for a lease of a mining claim, the rate for each subsequent year and the annual rental for a renewal lease;

15. prescribing the rental rate for the mining rights only in respect of a mining claim;

16. prescribing the additional assessment work to be performed in respect of any excess area of a mining claim or in respect of excess average area of mining claims within a perimeter survey;

17. prescribing, for the purposes of subsection 70 (2), the conditions on which the holder of a mining claim may abandon part of the claim;

17.1 prescribing exploration activities or classes of exploration activities for which the prescribed requirements must be met or for which an exploration plan or an exploration permit is required, and prescribing circumstances in which an activity must be dealt with under an exploration permit;

17.2 governing the application for and issue, refusal, renewal, amendment and cancellation of exploration permits and prescribing their standard terms and conditions and governing the resolution of disputes relating to a refusal to issue or renew an exploration permit, a cancellation or amendment of an exploration permit, or relating to terms and conditions imposed on an exploration permit;

17.3 governing how the activities described in an exploration plan or exploration permit are carried out and requiring the prescribed rehabilitation activities to be performed;

17.4 governing how objections regarding exploration plans are to be made and the process for addressing the objections;

17.5 providing that sections 78.2, 78.3, 78.5 and 78.6 apply to a region of Ontario on and after the date specified for the region;

18. prescribing the annual rental of a lease referred to in section 82;

19. prescribing the annual rental of a lease or renewal lease of surface rights referred to in section 84;

19.1 where a rental is to be prescribed under this Act, prescribing a minimum rent or a method of calculating rent;

20. prescribing the methods and procedures to be followed in the surveying of mining claims;

21. prescribing rates of interest for the purposes of this Act;

22. prescribing, for the purposes of subsection 183 (3), the size, form, manner and time of staking and recording mining claims on land in which an interest is retained after surrender;

23. prescribing, for the purposes of section 187, the amount of tax to be paid for each hectare and prescribing a minimum tax or a method of calculating tax;

24. prescribing classes of instruments and documents that may be filed through transmission by electronic means in such manner as is prescribed;

24.1 governing whether land is used for mining purposes for the purpose of subsection 189 (1.1);

24.2 governing whether land is a site of Aboriginal cultural significance;

24.3 requiring consultation with Aboriginal communities in the prescribed circumstances and governing all aspects of Aboriginal consultation under this Act, including the manner in which any consultation that may occur under this Act is to be conducted and providing for the delegation of certain procedural aspects of the consultation;

24.4 setting out requirements respecting the dispute resolution process referred to in section 170.1 and otherwise governing the process, and prescribing the circumstances in which the process shall or may be used;

24.5 providing for transitional matters that the Lieutenant Governor in Council considers advisable to facilitate implementation of this Act or to deal with problems or issues arising as a result of the repeal or re-enactment of any provision of this Act;

25. defining any word or expression for the purposes of this Act and the regulations that has not already been expressly defined in this Act;

26. prescribing anything that by this Act is to be or may be prescribed. R.S.O. 1990, c. M.14, s. 176 (1); 1994, c. 27, s. 134 (11); 1996, c. 1, Sched. O, s. 32 (1); 1997, c. 40, s. 5 (1); 1999, c. 12, Sched. O, s. 52 (1-3); 2006, c. 33, Sched. R, s. 1; 2007, c. 7, Sched. 22, s. 3 (1); 2009, c. 21, s. 81 (1-4, 6, 7, 9), 101 (4).

Transition

(1.1) A regulation under paragraph 24.5 of subsection (1) may provide that it applies despite anything in this Act. 2009, c. 21, s. 81 (10).

Mining Act
Loi sur les mines

ONTARIO REGULATION 240/00

MINE DEVELOPMENT AND CLOSURE UNDER PART VII OF THE ACT

Historical version for the period October 31, 2011 to October 1, 2012.

SCHEDULE 2

Item	Column 1	Column 2
1.	Letter of transmittal	(i) to be signed and dated by the proponent, where an individual, or where the proponent is a corporation, a senior officer of the corporation.
		(ii) indicate that closure plan document constitutes entire closure plan and whether submitted for filing or approval under Part VII of the Act.
		(iii) names of agents or employees, if any, authorized to act on behalf of the proponent.
2.	Certification	(i) statement of certification set out in subsections 12 (2) and (3) of the regulation.
3.	Project information	(i) name and address of the proponent, location and address of project site.
		(ii) boundaries of the project site, details of the land tenure of the project, including the proponent's interest in the mining lands within the boundaries and of the tenure of land not owned but leased or otherwise controlled by the proponent.
		(iii) a site plan of legible scale indicating the location of all project features, including all openings to the surface, in relation to the site boundaries and the claim numbers, parcel numbers and, where applicable, the township name, lot number and concession number.
		(iv) plans and sections of proposed new underground development.
4.	Current project site conditions	(i) details of the current land use of the site and the immediately adjacent lands that may be affected by the project, including current zoning and official plan designations, where applicable.
		(ii) topographical details of the site, including a plan of appropriate scale and contour interval where the project will alter existing site topography.
		(iii) details of the surface waters on or flowing through the site and any surface waters receiving flow from the site, including an assessment of the quality and quantity of such waters that indicates whether and to what extent they will be affected by the project and shall be consistent with the monitoring requirements specified in the Code and a plan of legible scale showing the current location of all such waters and their watershed boundaries.
		(iv) details of the ground waters within and beyond the site boundaries that may be affected by the project, including the identification of aquifers and an assessment of the quality and quantity of such ground waters that indicates whether and to what extent they will be affected by the project and shall be provided in accordance with the Code.
		(v) details of the terrestrial plant and animal life that may be affected by the project.
		(vi) details of the aquatic plant and animal life that may be affected by the project.
		(vii) complete details of any previous activities that may have resulted in a mine hazard existing on the site or any contamination of the site that has occurred, including the history of the site, an assessment of any physical mine hazards that exist and an assessment of any current contamination of soils, surface and ground waters that exist at the start of the project.
5.	Project description	(i) a brief summary of the project.
		(ii) details of the mineralogy of the ore and host rock within the site.
		(iii) details of the mining activities anticipated throughout the life of the project, including methods and rates of mine development and mining, and methods and procedures for handling mine backfill.

		(iv)	details of any processing, including a general description of the process, types and rates of any reagents used and a process water balance.
		(v)	details of existing and expected buildings and infrastructure on the site, including their size, type, use and location and a surface plan, at a legible scale, showing their location.
		(vi)	details of the production, handling and disposal of any tailings on the site, including the physical and chemical nature of the tailings, an assessment of the potential for metal leaching and acid mine drainage in accordance with the Code, the rate of production of tailings, methods of handling tailings, the location, size and nature of any tailings impoundment and treatment areas and a surface plan of legible scale showing the location of any such areas with engineering details of any impoundment structures.
		(vii)	details of the production, handling, storage and disposal of waste rock, ore, concentrate and overburden, including the physical and chemical nature of the materials, an assessment of the potential for metal leaching and acid mine drainage in accordance with the Code, the rates of production of such material, methods of handling and the location, size and nature of any storage or disposal areas and a surface plan of legible scale showing the location of any storage or disposal areas.
		(viii)	available details of any existing or proposed waste management systems and treatment or disposal sites, including disposal sites located within tailings areas, a description of the treatment or disposal process or system and a surface plan of legible scale showing the location of any treatment or disposal site and effluent discharge points.
		(ix)	details of any water management or treatment systems, including a description of the processes and physical facilities for such systems.
		(x)	details of storage sites for petroleum products, chemicals, explosives, hazardous substances and toxic substances, including the quantity of materials stored, the size, nature and location of such storage areas and a surface plan of legible scale showing their location.
		(xi)	a proposed schedule.
6.	Progressive rehabilitation	(i)	details of any such measures anticipated during the life of the project, including a schedule for carrying them out.
7.	Rehabilitation measures — temporary suspension	(i)	details of measures to restrict access to the project site, buildings and other structures to authorized persons to secure petroleum products, chemicals, waste and waste management systems are made secure and to dispose of or remove explosives from the site.
		(ii)	details of measures for the prevention of unauthorized or inadvertent access to mine openings to the surface.
		(iii)	details of measures to ensure maintenance of mechanical and hydraulic systems in a no-load condition and the safety and security of electrical systems.
		(iv)	details of measures to control effluents of all types
		(v)	details of measures to ensure that all waste rock piles and stockpiles of ore, concentrate, overburden and other materials are maintained in a safe and stable condition.
		(vi)	details of measures to ensure that all tailings, water and other impoundment structures are maintained in a safe and stable condition in accordance with the Code.
		(vii)	a schedule of rehabilitation measures to be implemented in order for the project to be considered in temporary suspension.
8.	Rehabilitation measures — state of inactivity	(i)	details of measures to restrict access to the project site, buildings and other structures to authorized persons.
		(ii)	details of how all shafts, raises or open stopes are to be secured in accordance with the Code.
		(iii)	details of how all portals of adits and declines are to be secured in accordance with the Code.
		(iv)	details of measures to ensure that all other mine openings to surface that create a mine hazard are stabilized and secured in accordance with the Code.
		(v)	details of measures to ensure that all mechanical and hydraulic systems are maintained in a no-load condition and that non-essential electrical systems are de-energized and all other electrical systems are made safe and secure.
		(vi)	details of measures to monitor, maintain or rehabilitate all tailings

			impoundment areas.
		(vii)	details of measures to monitor, maintain or rehabilitate all landfill or other waste management sites.
		(viii)	details of measures to remove, dispose of, isolate or manage on site all petroleum products, chemicals and waste, including PCBs, and to ensure that all explosives are disposed of or removed from the site.
		(ix)	details of measures to ensure that all waste rock piles and stockpiles of ore, concentrate, overburden and other materials are maintained in a physically and chemically safe and stable condition.
		(x)	details of measures to ensure that all tailings, water and other impoundment structures are maintained in a safe and stable condition in accordance with the Code.
		(xi)	details of a site inspection program to be conducted at least once every six months to ensure that the required rehabilitative measures are in place and how the site inspections will be recorded and reported to the Director.
		(xii)	a schedule of the rehabilitation measures to be implemented in order for the project to be considered in a state of inactivity.
9.	Rehabilitation measures — closed out	(i)	details of how all shafts, raises or open stopes shall be secured in accordance with the Code.
		(ii)	details of how all portals of adits and declines are to be secured in accordance with the Code.
		(iii)	details of the measures to be implemented to ensure that all other mine openings to surface that create a mine hazard are stabilized and secured in accordance with the Code.
		(iv)	details of the measures to be implemented to assess the stability of surface and subsurface mine workings and any measures to be used to ensure stability of the ground surface in accordance with the Code, including reports of all studies conducted under sections 30, 31 and 32 of Schedule 1.
		(v)	details of how all buildings, power transmission lines, pipelines, airstrips and other structures and infrastructure will be removed or otherwise disposed of.
		(vi)	details of how all machinery, equipment and storage tanks will be removed or otherwise disposed of.
		(vii)	details of how all transportation corridors will be closed off and revegetated in accordance with the Code.
		(viii)	details of how all concrete structures, foundations and slabs shall be removed or covered and revegetated in accordance with the Code.
		(ix)	details of how all petroleum products, chemicals and waste will be removed or disposed of on-site and that all explosives will be disposed of or removed from the site.
		(x)	details of how any PCBs or PCB contaminated material will be removed or managed on-site.
		(xi)	details of measures to rehabilitate all landfill sites and other waste management sites.
		(xii)	details of measures to test soils in the immediate vicinity of any petroleum product, chemical, explosive or waste storage or transfer sites and measures to be implemented including a risk assessment analysis to control or dispose of any soils found to be contaminated.
		(xiii)	details of measures to ensure physical and chemical stability, erosion control and surface and ground water quality at all tailings areas.
		(xiv)	details of measures to ensure physical and chemical stability, erosion control and surface and ground water quality at all waste rock piles and stockpiles of ore, concentrate, overburden and other materials.
		(xv)	details of measures to breach or stabilize all tailings, water and other impoundment structures against static or dynamic loadings to ensure the containment of materials and to maintain the specified land use.
		(xvi)	details of measures to remove or make inoperable all decant structures, other than dam spillways.
		(xvii)	details of measures to ensure that the physical structure of all water courses and drainage channels remaining on the site will be naturally stable and integrated into the surrounding ecosystem, and that they will be consistent with the specified land uses of the site.
		(xviii)	details of measures to ensure that the revegetation of all disturbed areas will be self-sustaining, integrated with the surrounding ecosystem and consistent

			with the specified land uses of the site in accordance with the Code.
		(xix)	a schedule of the rehabilitative measures to be implemented before the project can be considered closed out.
10.	Monitoring	(i)	details of the monitoring programs and procedures in accordance with the Code to ensure that the physical stability of mine hazards located on the site provide the level of protection required for each stage of closure, including the locations, methods and frequencies of monitoring and how the results of the monitoring will be recorded and reported to the Director.
		(ii)	details of the monitoring programs and procedures in accordance with the Code to ensure that the chemical stability of tailings, waste rock, ore stockpiles, concentrate stockpiles, overburden and other stockpiles, and surface and subsurface effluents provide the level of protection required for each stage of closure, including the locations, methods and frequency of sampling, the parameters to be analyzed, the analytical methods to be used and how the results of the monitoring will be recorded and reported to the Director.
		(iii)	details of any biological monitoring programs and procedures to assess the effects of the project on any biological communities. These details shall include the locations, nature, methods and frequency of monitoring, the biological communities to be monitored and how the results of the monitoring will be recorded and reported to the Director.
11.	Expected site conditions	(i)	details of the specified land uses of the site after close out.
		(ii)	details of the site topography after close out if significant changes to the existing site topography are expected, including a topographic plan of legible scale and contour interval.
		(iii)	details of the expected conditions, after close out, of all surface waters on or flowing through the site and any surface waters receiving flow from the site, including the expected quantity and physical and chemical quality as well as all expected final water elevations of all surface waters that may be affected by the project.
		(iv)	details of the expected conditions, after close out, of all ground waters located within the site that may have been affected by the project, including the expected location of aquifers, the expected quantity, the expected physical and chemical quality, all expected final water elevations and the compatibility with expected land use of all ground waters that may be affected by the project.
		(v)	details of the expected condition of the terrestrial plant and animal life communities, as compared to the condition of such communities prior to the start of the project, that may have been affected by the project, including the methods to be used to assess the health or quality of the communities to demonstrate that the project will sustain terrestrial plant and animal life and that the project can be considered closed out.
		(vi)	details of the expected condition of the aquatic plant and animal life communities, as compared to the condition of such communities prior to the start of the project, that may have been affected by the project, including the methods to be used to assess the health or quality of the communities to demonstrate that the project will sustain aquatic plant and animal life and that the project can be considered closed out.
12.	Costs	(i)	details of the expected costs of implementing the rehabilitation measures and monitoring programs required to close out the site, including at least a detailed expenditure schedule and an itemized estimate of capital costs and operating costs based on the market value of the material goods and services provided.
13.	Financial assurance	(i)	the form and amount of the financial assurance to be provided.
		(ii)	all financial and commercial information used to establish the financial assurance.
14.	Consultation with aboriginal peoples	(i)	the consultations carried out with all aboriginal peoples affected by the project, including a description of their comments and responses, if any, to the proposed closure plan.

BETWEEN:

WABAUSKANG FIRST NATION
APPLICANT

AND:

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES ET AL

Court File No. 585/12

ONTARIO SUPERIOR COURT OF JUSTICE (DIVISIONAL COURT)

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANT

FIRST PEOPLES LAW CORPORATION
300-111 Water Street
Vancouver, BC V6B 1A7

Bruce Stadfeld McIvor LSBC#: 507891

Tel: 604.685.4240
Email: bmcivor@firstpeopleslaw.com

Solicitor for the Applicant

RCP-E 4C