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January 15, 2013

The death of free entry mining regimes in Canada?

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Decision commented on:

Ross River Dena Council v Government of Yukon, 2012 YKCA 14.

I (along with co-author Cheryl Sharvit) and others have long tried to make the case that free entry mining regimes are not only bad public policy but also unconstitutional on the grounds that the common premises of free entry regimes are inconsistent with the Crown's duty to consult indigenous peoples whose rights and interests may be affected by the government's decisions to allow others to acquire rights in traditional territory. See Bankes and Sharvit, *Aboriginal Title and Free Entry Mining Regimes in Northern Canada*, (1998) here and Bankes, "The Case for the Abolition of Free Entry Mining Regimes" (2004), 24(2) J. Land, Resources, & Envtl. Law 317-322.

I can now cite this unanimous and succinct decision of the Yukon Court of Appeal (authored by Justice Groberman) in support of at least the constitutional branch of the argument. In this case the Ross River Dena Council (RRDC) sought a declaration that the Government of Yukon had a duty to consult prior to recording the grant of quartz mineral claims within the traditional territory of the First Nation. The RRDC is part of the larger Kaska Nation and is one of three Yukon First Nations that has not ratified a final land claim agreement on the basis of the Yukon Umbrella Final Agreement. The *Quartz Mining Act* of Yukon (SY 2003, c14), in common with other free entry mining regimes (or "open entry" as the judgement terms them), is characterized by the ability of the miner to locate or stake a claim on any open lands that are not already subject to a claim by another miner. All lands are presumed to be open for staking unless specifically withdrawn. The claim must be recorded with the Mining Recorder's office to perfect it, but the Recorder has no discretion to refuse to record provided that the claim is presented in proper form and the lands are not withdrawn: *Halferdahl v Canada Mining Recorder, (Whitehorse Mining District)*, [1992] 1 FC 813 (FCA) and *Canada (Attorney General) v Halferdahl*, [1996] FCJ 694 (TD)). The legislative scheme provides no opportunity (or requirement) for consultation (and accommodation) with a First Nation that may have a claim of aboriginal rights or title within the area subject to the mineral claim. While most subsequent exploration activities will be subject to land use permitting and environmental assessment requirements, certain activities (i.e. those covered by a Class 1 exploration program) may be carried out without any need for permits etc.

Haida Nation v British Columbia (Ministry of Forests), 2004 SCC 73 establishes the trigger for the Crown's duty to consult and the threshold for the trigger is low (at para 35):

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when

> the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it …

And in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 (at para 31) the Court suggested that this could be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

In this case while Yukon did not concede that it had already accepted that the Kaska had rights and title throughout Kaska traditional territory it did concede that the Kaska\RRDC claim was (at para 31) "a serious one with sufficient credibility to satisfy the first element of the *Haida* test."

The second element of the test was the most contentious here since Yukon argued (at para 34) that

> …. the recording of a quartz mineral claim is not "contemplated Crown conduct" because the statute does not give the Mining Recorder any discretion in respect of the recording of a quartz mining claim. If the quartz mining claim formally complies with the requirements of the statute, the Recorder must record it. The Government of Yukon says that because the granting of a mineral claim is automatic when the statutory requirements are met, there is no duty to consult.

But the Court had no sympathy with that argument (at paras 37 & 38):

> [37] The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. 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.
>
> [38] The honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land. Far from being an answer to the plaintiff's claim in this case, the failure of the Crown to provide any discretion in the recording of mineral claims under the *Quartz Mining Act* regime can be said to be the source of the problem.

The third part of the test was also established since (at para 32) "In transferring mineral rights to quartz mining claim holders, the Crown engages in conduct that is inconsistent with the recognition of Aboriginal title."

Before Justice Veale, the chambers judge who heard the application, Yukon had argued that any duty to consult could be satisfied by providing notice and by providing for more meaningful consultation after the claim was recorded when the explorationist was seeking to engage in more intensive exploration activities. Anything else, suggested Yukon, would be both inconsistent with the legislative scheme and impractical. Justice Veale ultimately accepted that line of argument leading Justice Groberman to comment on appeal (at para 42) that

> It is apparent that the judge considered the open entry aspects of the *Quartz Mining Act* to be essential to the mining industry, and considered that any requirement of consultation greater than the mere furnishing of notice of claims would be impractical.

But such an approach did not sit well with Justice Groberman (at paras 43 – 44):

> I am of the opinion that the judge erred in his analysis. I fully understand that the open entry system continued under the *Quartz Mining Act* has considerable value in maintaining a viable mining industry and encouraging prospecting. I also acknowledge that there is a long tradition of acquiring mineral claims by staking, and that the system is important both historically and economically to Yukon. It must, however, be modified in order for the Crown to act in accordance with its constitutional duties.
>
> The potential impact of mining claims on Aboriginal title and rights is such that mere notice cannot suffice as the sole mechanism of consultation. A more elaborate system must be engrafted onto the regime set out in the *Quartz Mining Act*. In particular, the regime must allow for an appropriate level of consultation before Aboriginal claims are adversely affected.

What were the implications of this for Yukon? Although professing reluctance (at para 45) to "specify precisely how the Yukon regime can be brought into conformity with the requirements of *Haida"* Justice Groberman actually had quite a bit of advice for the government. In particular, Justice Groberman pointed out that the power of Yukon to withdraw lands from the staking regime was one tool that had been used in the past (pre-*Haida*) to accommodate Kaska interests and might be used again in the future (at para 52), at least to accommodate aboriginal *title* interests (at para 49):

> A prohibition on locating claims in all or part of the claimed territory is the most obvious method (though, perhaps, not the only method) of accommodating Aboriginal title claims. Claims to Aboriginal rights other than title raise other issues. The location and recording of a quartz mining claim, in and of itself, is not likely to interfere with claims to Aboriginal rights other than title. It is the actual performance of work on the land that may affect such claimed rights.

But Justice Groberman also acknowledged that such a tool might be too blunt (at para 53):

> Given the importance of the open entry system to the mining industry and the Yukon economy, the Government of Yukon may not see s. 15 of the *Quartz Mining Act* as an ideal instrument for dealing with claims to Aboriginal rights. It is, of course, open to the Legislature to fashion a more flexible or precise statutory mechanism.

In the end, all parties proved surprisingly accommodating. In its claim for relief the RRDC had *inter alia* sought a declaration that all minerals claims that had been recorded without the opportunity for consultation and accommodating RRDC interests were void. That request for relief passed by the wayside and instead Justice Groberman granted the following declarations:

a) the Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising the Ross River Area are to be made available to third parties under the provisions of the *Quartz Mining Act*.

b) the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff.

But then, upon the suggestion of counsel for the *applicant*, Justice Groberman agreed (at para 57) to suspend the declarations for one year to allow Yukon, if it wished "to make statutory and regulatory changes in order to provide for appropriate consultation ….".

This is an important decision since it is one of the few cases in which the Courts have acknowledged that the Crown is in breach if its obligations because of a structural problem with the relevant legislation which effectively makes it impossible to comply with both its constitutional obligations and any statutory obligations. The case also confirms that it is no answer for government to say that this is always the way that we have done business in the mining sector. In sum, we are moving on from free entry, one of Charles Wilkinson's "Lords of Yesterday", and in the view of this blogger, it's about time! While governments have a lot of discretion in the way in which they manage resources (and note the absence, at para 17, of any possessive pronoun) they "must do so only with due consideration of the effect of that management on Aboriginal rights claims."