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British Columbia Free Entry Mining System Triggers Duty to Consult and Must Change: *Gitxaala v British Columbia (Chief Gold Commissioner)*

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Case Commented On: *Gitxaala v British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680 (CanLII)

The Supreme Court of British Columbia (BCSC) recently ruled that the existing mineral tenure system in the province triggers provincial Crown obligations to consult First Nations. While the duty to consult is now a relatively mature area of law in Canada that is "replete with indicia for what constitutes meaningful consultation" (*Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 (CanLII) at para 41), some areas of uncertainty remain. This case dealt with one such long-standing question: does British Columbia's "free entry" mineral tenure regime trigger the Crown's duty to consult? This post discusses the findings of the court and briefly comments on implications of the decision for BC and the rest of Canada. My colleague Nigel Bankes recently wrote a post on the aspect of this decision pertaining to the *United Nations Declaration on the Rights of Indigenous Peoples* (here), and my other colleague, Dr. Elizabeth Steyn, will soon publish a post on the sacred sites dimension of the decision.

Regarding the duty to consult part of the decision, it is fair to say that this ruling represents a helpful and long overdue clarification that should provide the impetus needed for reforms across the country. Indeed, Nigel Bankes commented on this area of the law in an ABlawg post more than 10 years ago (see here) and in other articles more than two decade years ago (see e.g. here) laying out the argument that free entry mining regimes are inconsistent with the Crown's duty to consult (see "The Case for the Abolition of Free Entry Mining Regimes" (2004), 24(2) J Land Resources & Envtl L 317-322). It is nice to see the courts finally catch up and adopt that interpretation.

Background

The BCSC noted that BC's mineral tenure system dates back to 1859 (at paras 9, 115), and has for many decades been regulated under the *Mineral Tenure Act*, RSBC 1996 c 292 (*MTA*) (at para 2) and administered by the Chief Gold Commissioner (CGC). Justice Alan Ross succinctly explained how it has functioned: "[f]rom the earliest days of exploration, free miners were given license to roam the colony, and later the province, and physically stake claims. Once an area was 'staked' or claimed, certain rights accrued to the claim-holder. Those rights protected their interests" (at para 116), which may be both surface and subsurface rights (at para 117). The volume of activity under this regime is remarkably high, seeing 5000 – 6000 new mineral claims annually, and in the 2011 – 2022 period, the total number of extant mineral claims varied from 29,835 to 51,603 (at para 183). Under the existing regime, there is no consultation with affected First Nations at the time the mineral claim is registered; consultation only occurs at later permitting stages (at paras 3, 249).

It was in this context that Gitxaala First Nation and Ehattesaht First Nation claimed that the free entry mineral tenure system triggers the duty to consult (at para 5). Both First Nations ("the petitioners") have asserted Aboriginal rights and title in BC (at paras 5, 25 – 28). In their view, the province has a duty to consult *before* granting mineral claims, and the province was therefore in breach of its duties by not consulting as part of the mineral claims granting process. They further asserted that this breach "is occasioned either by the improper implementation of the MTA, or alternatively, by the constitutional invalidity of the MTA" (at para 5). The province, in response, argued that the current mineral tenure system, and the granting of mineral claims, do not create adverse impacts that are sufficient to trigger a duty to consult (at para 11). However, the province did acknowledge that it may have an obligation to First Nations with respect to mineral prospecting (at para 9) and that "a court ruling will assist in facilitating the dialogue by answering the legal issue of whether s. 35 [of the *Constitution Act, 1982*] imposes, through the honour of the Crown, a constitutional obligation on the province to consult with Indigenous groups prior to the registration of mineral claims in their territories" (at para 10).

Duty to Consult Triggered

The key question was whether the legislation itself was somehow unconstitutional in light of the province's consultation obligations, or whether it was how the *MTA* was being implemented by the CGC that was unconstitutional. More specifically, the questions were whether the granting of mineral tenures under the current mineral tenure system trigger a duty to consult pursuant to s 35 of the *Constitution Act, 1982*, and, if a duty to consult does exist, whether the province is in breach of that duty by virtue of the improper implementation of the *MTA* by the CGC or by virtue of the constitutional invalidity of the *MTA* itself (at para 19).

Justice Ross concluded that a duty to consult is indeed triggered by the issuance of a mineral claim under the *MTA* (at para 14). While he did not accept the petitioner's position that granting of mineral claims triggers a duty to consult by virtue of adverse impacts on the petitioners' asserted rights to manage their territories in accordance with their legal systems or systems of government (at para 319), Justice Ross did find that issuance of mineral claims causes adverse effects upon "areas of significant cultural and spiritual importance to the petitioners" and "the rights of the petitioners to own, and achieve the financial benefit from, the minerals within their asserted territories" (at para 14). He also found that because the CGC has discretion under the *MTA* to create a structure that provides for consultation with First Nations, the *MTA* is not constitutionally invalid (at para 14). Rather, it was how the CGC was implementing the *MTA* that was improper.

En route to arriving at his conclusion, Justice Ross succinctly set out the legal landscape as follows:

> My reasons below proceed upon a foundation of legal principles that are not in dispute. These principles provide the context for my reasons:
>
> a) Indigenous rights are existing rights. This proposition is not in issue. As stated by Chief Justice McLachlin in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*]:
>
> > [69] … At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however,

was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

b) The petitioners are First Nations who assert that they hold rights that pre-existed the province's assertion of sovereignty in the 19th century.

c) The work of reconciling Indigenous legal systems with BC's and Canada's legal systems is ongoing.

d) The petitioners have not settled treaties with Canada or BC. The petitioners' claims are at a chronological stage wherein their assertion, and the extent, of their rights and title to territories has not been settled.

e) There is always a gap in time between the moment a First Nation asserts its rights over any territory and the final settling of that Indigenous claim. The practical reality of the reconciliation process is that the parties require a working legal framework during that interim period. That legal framework has been set out in a progression of prior cases.

f) During that interim period, the Crown has the obligation of managing and administering the land over which any First Nation asserts rights or title.

g) The "honour of the Crown" requires the province to take the necessary steps to protect the asserted interests of First Nations until such time as the full nature of those rights can be resolved.

h) There will be circumstances where the province makes decisions in the management of territories that have an adverse impact on the First Nation asserting rights and title to that territory. When an adverse impact occurs, the province has a duty to consult with the affected First Nation.

i) Part of the legal framework for this interim period consists of the *Haida* Test [see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII)]. In short, a duty to consult arises when:

i. the province is aware of a First Nation's asserted claim to a territory;

ii. the province contemplates conduct; and

iii. that conduct may adversely affect or impact an Aboriginal claim or right.

The province acknowledges that elements i. and ii. are established in these cases. Hence, these reasons focus primarily on the third element of the *Haida* Test. The petitioners allege that they suffer adverse impacts from the granting of mineral claims. The province says that they do not. (at paras 16-17)

This quote set the groundwork for focusing only on the third element of the *Haida* test. As such, "the sole question… is whether the duty is triggered" and there was no need for Justice Ross to "consider the 'measures' or 'depth' of consultation that the province may be required to implement" (at para 256).

Regarding the cultural and spiritual impacts, Justice Ross found that the type of mineral claims issued under the *MTA* allow for disturbance of the land, such as through collection of bulk samples of ore up to 1000 tonnes per year and by creating pits and trenches of a certain size (at para 346). Emphasizing that "[t]he situation must be viewed from an Indigenous perspective" and "through the lens of the First Nation" (at para 326), Justice Ross accepted the position of the petitioners, finding that the physical impact of mining exploration provided for under the *MTA* "intersects with the non-physical rights of the First Nation" (at para 327) and that effects of disturbance of spiritually significant sites could be permanent (at para 329). This creates an adverse impact on the petitioners' rights regarding their cultural and spiritual beliefs (at para 330), thus satisfying the third element of the *Haida* test (as noted above, see the forthcoming post of by my colleague, Dr. Elizabeth Steyn, for deeper discussion on this aspect of the ruling).

Regarding physical impacts, Justice Ross focused on whether the granting of any interest in minerals triggers a duty to consult "because, in and of itself, it results in an adverse impact" (at para 337). He rejected the province's arguments that holders of mineral claims may only engage in activities that cause a 'nil or negligible' disturbance, and that the duty was not triggered given the temporary nature of mineral claims under the *MTA* (at paras 390 – 391). Again emphasizing that physical disturbance must be viewed from the perspective of the First Nation (at para 395), Justice Ross found that the grant of a mineral claim constitutes adverse physical impacts that trigger the duty to consult (at para 397). He cited four clear examples, namely that the granting of a mineral claim:

> a) confers the right to remove a prescribed amount of minerals from the claim area. The loss of minerals reduces the value of the territory and, thus, adversely affected Aboriginal rights and title;
>
> b) transfers some element of ownership of minerals to the recorded holder. The petitioners assert rights to those minerals in this case and, therefore, consultation is required prior to transferring those rights to a third party;
>
> c) confers the exclusive right to explore for minerals with the area. That right provides a financial benefit, the right to raise capital through investment. The First Nation is deprived of that opportunity; and
>
> d) affords the recorded holder the right to disturb the land. While the parties do not agree on the breadth of that right, in my opinion, viewed from the Indigenous perspective, the allowable disturbance is greater than "nil or negligible". (at para 396)

Justice Ross then turned to the nature of the breach, finding that "failure lies at the CGC level" (at para 405). He found that the *MTA* "provided the necessary authority and discretion to the CGC to provide for pre-registration consultation" and that therefore "the MTA is constitutionally valid legislation (or, not "constitutionally invalid" legislation)" (at para 406). More specifically, he

found that "the MTA does provide the CGC with the necessary discretion to institute some form of consultation prior to registration of mineral claims. In particular:

a) s. 6.2 provides discretion on the information required for filing;

b) s. 17 provides for restrictions on surface rights in areas that are culturally significant to an Aboriginal people; and

c) s. 22 provides discretion to set aside reserve areas." (at para 428)

With respect to remedy, Justice Ross rejected the petitioners' requests to quash existing mineral claims (at paras 14(e), 546 – 550), and also rejected the petitioners' requests for injunctions (at paras 14 (e), 495 – 528), opting instead to grant declaratory relief. In particular, he granted a declaration that "that the CGC's conduct in establishing an online system allowing automatic registration of mineral claims in their territories, without creating a system for consultation, breaches the obligations of the Crown" (at paras 552-553). However, he proceeded to suspend that declaration for a period of 18 months "to allow the design and implementation of a program of consultation" (at para 556). In practical terms, this means the free entry system in BC in its present form has a shelf life of 18 months; however, it is difficult to predict what that revised program will entail. Legislative amendments are not required according to Justice Ross (also, of course, not precluded), but beyond that, his guidance was minimal: "I do not know what that program will look like, but it will not happen tomorrow" (at para 555).

Commentary

Gitxaala contributes welcome additional contour in the duty to consult legal landscape. Subject to any appeal and ensuing changes from higher courts, this BCSC ruling will be relevant and instructive for provinces and territories that have free entry mining systems. For example, reform of the similar system in the Yukon is a long standing issue (see media coverage from earlier this year here). The key take-away from *Gitxaala* is clear: the duty to consult is triggered by a free entry mining system. However, each province and territory will have differences that matter. It could, for example, be the case that under the *Gitxaala* approach some statutes are actually unconstitutional if, unlike BC, the legislation does not provide sufficient discretion for the government to adequately consult with Indigenous communities. Or it could be the case that, similar to BC, the legislation is implemented in a way that is unconstitutional by virtue of not including consultation with Indigenous communities. One option in all jurisdictions will be to proactively reform existing law(s) and practices.

Notwithstanding this enhanced clarity, an important question remains: what is the content of the Crown's consultation duty? Justice Ross did not have to engage with this question (see paras 21, 89) – i.e. where along the spectrum of consultation obligations this would fall (see here for a succinct explainer of the spectrum approach). And so open questions remain as to what the Crown must do to discharge the duty to consult in any given free entry mining regime context within any given province or territory.

It is also notable that, notwithstanding Justice Ross' lengthy consideration of UNDRIP and BC's UNDRIP implementation legislation (again, see Nigel Bankes' post for detailed discussion of this aspect), the duty to consult analysis in this decision was focused entirely on consultation as

opposed to any notion of consent being a requirement prior to issuance of mineral claims under the *MTA*. As such, even the reformed *MTA* implementation regime is unlikely to be an example of implementation of free, prior, and informed consent as conceived under several UNDRIP provisions, such as articles 19 and 32 . Justice Ross certainly did not prescribe this approach or guide the province to integrate consent into the reformed regime. Indeed, as noted in Nigel Bankes' post on this case, Justice Ross did not engage with any particular UNDRIP provisions.

As such, while *Gitxaala* is a step toward more clarity regarding when the duty to consult is triggered, it falls short of meeting high expectations around Canada's full support for UNDRIP and implementation of the Declaration domestically. One particularly interesting jurisdiction to watch in this context will be the Northwest Territories, where the territorial government just passed its own UNDRIP implementation law (see here) in a jurisdiction with modern treaty, numbered treaty, and non-treaty areas. As is common in this area of the law, one question has been answered but more remain.

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