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Supreme Court of British Columbia finds that Province has a duty to consult on mineral tenure claims

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Authors: Maureen Killoran, KC, Richard J. King, Sander Duncanson, Sean Sutherland, Ankita Gupta, Marleigh Dick, Shelby Wilson

On September 26, 2023, the Supreme Court of British Columbia (the Court) in *Gitxaala v. British Columbia (Chief Gold Commissioner)*[1] (the Decision) held that the Province of British Columbia (the Province) has a duty to consult Indigenous groups when registering mineral claims under the *Mineral Tenure Act*[2] (the MTA) within their traditional territories. The Court suspended its declaration for 18 months to facilitate the design of a mineral claims regime that allows for consultation or for the government to amend the MTA, if necessary.

This Decision has important implications for mineral tenure systems across Canada and the application of British Columbia's *Declaration of the Rights of Indigenous Peoples Act* (DRIPA) – which the Court interpreted for the first time in the Decision.

Background

In British Columbia, mineral exploration is regulated by the MTA and the *Mines Act* (the MA). Under the MTA, "free miners" are entitled to register "mineral claims" over unclaimed Crown lands and conduct initial exploration of the respective lands for minerals. Under a mineral claim, a "free miner" can collect bulk samples of up to 1,000 tonnes of ore per year from each unit of a claim or a bulk sample of 10,000 tonnes of ore from the mineral claim as a whole using pitting, trenching, or drilling; conduct geological sampling using tools such as hand-held drills; and set up temporary residence on the claim area with tents, trailers, or campers.[3]

If a "free miner" wishes to conduct further exploration, they must apply for a "mineral lease" under the MTA. Subsection 42(1) of the MTA outlines steps that must be taken to convert a mineral claim to a mineral lease (i.e., a fee, land survey, and public notice). If the Chief Gold Commissioner (CGC) is satisfied that all of the requirements of s. 42(1) of the MTA have been met, then the CGC is required to issue a mineral lease. Although a mineral lease conveys the exclusive right to the minerals to the lessee,[4] it does not authorize any mining activity.[5] Once a miner wishes to extract the minerals on a commercial level, they then must apply for a permit through the *Mines Act*[6] (MA). Unlike a mineral claim, there are no exploratory work requirements to maintain a mineral lease in good standing.[7] An application to convert a mineral claim to a mineral lease is usually brought in conjunction with a mining permit under the MA.[8]

The current mineral claims regime does not require consultation with First Nations at the

time a mineral claim is registered.

The Petitioners, the Gitxaala Nation and the Ehattesaht Nation (the Nations), argued that the Province's failure to consult prior to registering mineral claims under the MTA breached the duty to consult under s. 35 of Canada's Constitution and British Columbia's DRIPA.[9] The Province argued that it appropriately "drew the line" by requiring consultation at later steps of the mineral exploration process, after the initial exploration is successful and the miner seeks to proceed to a deeper level of exploration and extraction.

The Court's decision

The Province has a duty to consult

The Court held that the Province has a duty to consult with Indigenous groups flowing from s. 35 of the Constitution. Pursuant to two decades of Supreme Court of Canada jurisprudence, the duty to consult arises when the Crown (here, the Province) is aware that: (1) an Indigenous group has asserted a claim over a territory; (2) the Crown contemplates conduct, and (3) such conduct can adversely impact or affect an Aboriginal right or claim.[10]

The Province conceded that elements (1) and (2) were established. The Province conceded that it had actual knowledge of the claims asserted by the Nations to the disputed territories and conceded that the decision to design a system that allows the granting of mineral claims without Indigenous consultation constituted Crown conduct.[11]

With respect to the third element of the test, the Court held that the registration of mineral claims causes adverse impacts upon areas of cultural and spiritual significance to the Nations, and the Nations' asserted rights to own, and achieve the financial benefit from, the minerals within their asserted territories, thereby triggering the duty to consult.[12] Among other things, the Court noted that the grant of a mineral claim: [13]

1. Confers the right to remove a prescribed amount of minerals from the claim area which reduces the value of the territory and, thus, adversely affects Aboriginal rights and title.
2. Transfers some element of ownership of minerals to the recorded holder. As the Nations asserted rights to those minerals in this case, consultation was required prior to transferring those rights to a third party.
3. Confers the exclusive right to explore for minerals with the area, which includes financial benefit and the right to raise capital through investment, an opportunity that the First Nation is deprived, and
4. Affords the recorded holder the right to disturb the land, which viewed from the Indigenous perspective is greater than "nil or negligible".

Several of these considerations appear to be premised on areas where Indigenous groups assert Aboriginal title. Nevertheless, in discussing the concept of "adverse impacts", the Court emphasized that it must be viewed "through the lens of the First Nation".[14] This reasoning led the Court to reject the Province's argument that mineral claims lead to "nil or negligible" physical disturbance and instead conclude that the authorized pitting, trenching, drilling, geological sampling, and temporary residence for workers is, from an "Indigenous perspective", a potential adverse impact to trigger the "duty to consult".[15] This reasoning is notable because it, arguably, applies a subjective lens to the "potential adverse effects"

trigger for the Crown's duty to consult.

As a result, the Court held that the Province has a duty to consult Indigenous groups when registering mineral claims under the MTA. The Court suspended its declaration for 18 months to facilitate the design of a mineral claims regime that integrates Indigenous consultation.

The application of DRIPA and UNDRIP

In addition to making arguments under s. 35 of the Constitution, the Nations argued that DRIPA and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) mandated consultation prior to registering mineral claims under the MTA. After noting that this case marked the first judicial consideration of the legal effects of DRIPA, the Court held that the Nations were not entitled to any relief under DRIPA or UNDRIP because: (1) s. 2 of DRIPA does not implement UNDRIP into the Province's domestic law; and (2) the requirements under s. 3 of DRIPA to consult and cooperate with Indigenous peoples and take all measures necessary to ensure provincial laws are consistent with UNDRIP mandates ongoing cooperation between the Province and Indigenous peoples to determine which laws are inconsistent with UNDRIP – it does not allow the Court to intervene to unilaterally determine the matter.[16]

However, consistent with British Columbia's *Interpretation Act*, the Court used DRIPA as an aid to interpret the MTA. This aided the Court in its conclusion that the Province has been improperly implementing MTA by interpreting it as allowing for mineral claims to be registered without any prior consultation.

Significance

The Court's reasoning that the Crown's duty to consult applies to mineral claims registrations could apply to other similar regimes across Canada. The Court in this case specifically noted that, although the Nations sought specific relief in relation to each of their asserted territories, the nature of the judicial review related to a larger, systemic issue: the physical and economic impact of a grant of mineral rights under the MTA, which applies broadly across British Columbia. The same logic could potentially apply to other mineral rights regimes.

More generally, the Decision further lowers what is already a low bar for triggering the Crown's duty to consult by capturing activities that are permitted under regulatory regimes without any express Crown authorization, and by viewing "potential adverse effects" through the lens of Indigenous groups. If the Court's reasoning is adopted by courts across the rest of Canada, there may be other circumstances in which the Crown's duty to consult is triggered where consultation was previously not required.

The Decision is also noteworthy because it represents the first time that a B.C. court has considered the legal effect of DRIPA. The Court confirmed that DRIPA and UNDRIP should be used as interpretive aids during the entirety of the interpretive process and not have a mere "confirmatory" role at the end. Notably, this aspect of the Court's decision has received significant criticism, including from B.C.'s Human Rights Commissioner, who intervened in the case to argue that the Court has a role in enforcing the application of DRIPA. Given that action plans for both DRIPA and its federal legislative equivalent are currently being implemented by the British Columbia and federal governments, we expect that this will be an area of live debate moving forward.

Lastly, in contrast to other court decisions that have retroactively quashed authorizations or enjoined future activities after a finding of inadequate Crown consultation, the Court in this held that a declaration was the proper remedy. The Court chose not to grant any injunctive or other relief sought by the Nations due to the "forward looking" nature of the duty to consult.[17] This aspect of the Decision reflects a more pragmatic approach to addressing deficiencies with Crown consultation than we have seen in other cases.

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[1] *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 [*Gitxaala*].

[2] *Mineral Tenure Act*, R.S.B.C. 1996, c. 292.

[3] *Gitxaala*, at paras. 171, 395; see also: *Mineral Titles Information Update No. 38 – Permissible Activities without a Mines Act Permit (Interim Guidance)*; *Mineral Titles Information Update No. 40 – Mining and Placer Leases Explained*.

[4] *Gitxaala*, at para. 174.

[5] *Mineral Titles Information Update No. 40 – Mining and Placer Leases Explained*.

[6] *Mines Act*, R.S.B.C. 1996, c. 293.

[7] *Mineral Titles Information Update No. 40 – Mining and Placer Leases Explained*.

[8] *Gitxaala*, at para. 174.

[9] *Gitxaala*, at para. 1.

[10] *Gitxaala*, at para. 16.

[11] *Gitxaala*, at para. 105.

[12] *Gitxaala*, at para. 14.

[13] *Gitxaala*, at para. 396.

[14] *Gitxaala*, at para. 326.

[15] *Gitxaala*, at para. 395.

[16] *Gitxaala*, at paras. 14 and 488-489.

[17] *Gitxaala*, at paras. 15 and 546.