Gitxaala v. British Columbia and the impact on mineral tenure

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The Sept. 26, 2023 ruling of the British Columbia Supreme Court in *Gitxaala v. British Columbia* (Chief Gold Commissioner) will have profound effects on the province's approach to authorizing mineral tenures in British Columbia. Mineral exploration in B.C. is regulated under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 (MTA). Under the MTA, "free miners" are entitled to register a "mineral claim" over unclaimed Crown land. The holder of a mineral claim (the recorded holder) is granted various rights, including the right to explore and dig up the claim area to search for minerals.

The Gitxaala Nation and Ehattesahet First Nation (the petitioners) argued that the current mineral tenure system in British Columbia operates in contravention of the Crown's duty to consult with First Nations and adversely affects their asserted aboriginal rights.

Significantly, at the time a claim is staked, the province does not consult First Nations. Instead, the Province consults First Nations at the time a recorded holder applies for permits to undertake further exploration and tenures for development. This approach to mineral resources and consultation exists in many other provinces and territories, and so the impact of this decision may extend beyond British Columbia.

The petitioners argued the mineral tenure system breaches their rights under s. 35 of *The Constitution Act, 1982*, and specifically that the province was in breach of its duty to consult pursuant to the test set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (the Haida Test). The petitioners also argued that the mineral tenure system was inconsistent with the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (DRIPA), and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

Analysis

Duty to consult

The Ehattesaht and the Gitxaala framed their claims in relation to the operation of the mineral tenure system as a whole. Intrinsic in their claims were questions about the decision-making of both the Chief Gold Commissioner (CGC) and the Lieutenant

Governor in Council of British Columbia (LGIC). Namely, that the CGC acted in a manner inconsistent with the honour of the Crown by failing to use their administrative discretion to incorporate pre-registration consultation into the Mineral Titles Online system and that the LGIC acted in a manner inconsistent with the honour of the Crown by failing to amend the MTAR to provide for pre-registration consultation with Indigenous Nations. The Court was of the opinion that the failure lay at the CGC level and as a result did not address the decision making at the LGIC level.

The Court made it clear that the only substantive issue to be addressed was whether the duty to consult is triggered at the mineral claim stage. Specifically focusing on the third element of the Haida Test – whether the granting of mineral claims adversely affects or impacts a claim or right of the petitioners.

The Court ultimately found that the granting of mineral claims does trigger a duty to consult as such claims:

1. adversely impact the petitioners' aboriginal rights regarding their spiritual and cultural beliefs;
2. confer the right to remove a prescribed amount of minerals from the claim area, thereby reducing the value of the territory and, thus, adversely affecting aboriginal rights and title;
3. transfer some element of ownership of minerals to the recorded holder, and because the petitioners assert rights to those minerals, consultation is required prior to transferring those rights to a third party;
4. confer the exclusive right to explore for minerals within the area, which provides a financial benefit, and the First Nation is deprived of that financial opportunity; and
5. afford the recorded holder the right to disturb the land, in a manner that, from the Indigenous perspective, is greater than "nil or negligible".

Significantly, the Court considered the duty to consult to be triggered not just when the province believes there is an adverse impact. The situation must also "be viewed from an Indigenous perspective" (para 326).

The final step of the Court's duty to consult analysis was to determine the nature, or underlying cause, of the breach. Ultimately, the Court held that the CGC was the cause of the breach on the grounds that:

> "[u]nder the auspices of the MTA (and predecessor legislation), the CGC established the mineral tenure system. The manner of registration of mineral claims, pursuant to that system, is "automatic." However, it is only "automatic" because it was designed that way by the CGC…Section 17 gives the "the Minister" the power to restrict the use of surface rights in areas of cultural significance to Aboriginal people. It stands to reason that the CGC could only learn of the existence of those areas of cultural significance through consultation" (at paras 426 and 427).

The Court highlighted that the fault in the system lies not in the granting of individual mineral claims, but in the CGC's discretion to consult (or not) with First Nations.

DRIPA and UNDRIP

The Court held, that neither DRIPA nor UNDRIP create substantive obligations in domestic law that relate to the province's duty to consult, noting that "a correct, purposive interpretation of DRIPA does not lead to the conclusion that DRIPA 'implemented' UNDRIP into domestic law. Instead, DRIPA contemplates a process wherein the province, 'in consultation and cooperation with the Indigenous peoples in British Columbia' will prepare, and then carry out, an action plan to address the objectives of UNDRIP" (at para 466).

Remedy

The court issued a declaration that "the CGC's conduct in establishing an online system allowing automatic registration of mineral claims in [the petitioners'] territories, without creating a system for consultation, breaches the obligations of the Crown" (at para 552). The Court expanded the declaration to include mineral claims throughout the province, stating that "the interests of justice will not be served by making this declaration solely in relation to the territories of the two petitioners" (at para 554).

The Court did not provide substantive direction to the province on how to revamp the existing system, instead it simply noted that "from a practical perspective, the CGC, and perhaps the ministry, will have to take steps to implement a program. [The Court does not] know what that program will look like, but it will not happen tomorrow" (para 555).

Due to the "forward looking" nature of the duty to consult, Honourable Justice A. Ross stated, "I wish to be clear in these reasons that I am making no finding and no order that affects the validity of existing mineral claims. In other words, all mineral claims registered under the existing system are valid" (para 550).

The court also indicated that the goal of the 18-month deferral is to allow, "the province, First Nations, and the mineral exploration industry... to develop a mineral tenure system that recognizes the rights of B.C.'s Indigenous people" (para 558).

Key takeaways

There are several key implications from this decision. First, the Province is obligated to redesign its approach to consultation before issuing new mineral claims. Even if this decision is appealed, it will no doubt prompt the province to accelerate a commitment in its 2022 DRIPA Action Plan to "modernize the *Mineral Tenure Act* in consultation and cooperation with First Nations and First Nations organizations." Given the experience of other jurisdictions to modernize their mineral staking process, the Province may be hard pressed to complete this work within the 18-month timeframe mandated by Justice Ross.

This decision also responds to a concern voiced by industry participants with respect to the uncertainty created by provincial and federal legislation to embrace UNDRIP, especially the UNDRIP provisions relating to "free, prior and informed consent" by indigenous groups to the use of their lands and territories. Justice Ross clearly ruled that UNDRIP does not create substantive rights or obligations in domestic law in this context. Industry participants will also welcome the characterization of the "forward looking" nature of the duty to consult, especially the fact that existing tenures continue to be valid. Indigenous groups, by contrast, may point to this decision as a need for

government to make more explicit and specific commitments to substantive reconciliation.

This decision answers several significant and novel questions. Given the relatively recent adoption of UNDRIP and DRIPA, the expected continued judicial consideration, and wide range of strongly held views on the path forward for reconciliation in Canada, we do not expect it to be the last word.

For questions related to this case or for advice related to mining, please reach out to any of the key contacts below.

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