Cassels

BCSC Acknowledges Crown Duty to Consult in Granting of Mineral Tenures, Opens Door to Greater Uncertainty

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On September 27, 2023, the British Columbia Supreme Court (BCSC) released its decision in *Gitxaala v. British Columbia (Chief Gold Commissioner)*.[1] The decision addressed the claims of two First Nations (First Nations) that British Columbia's (BC or the Province) free entry mineral tenure regime was inconsistent with the Crown's duty to consult.

The Court found that the claim registration process, which granted the claimant a mineral claim as well as certain rights to remove minerals and disturb lands within the claim area, triggered the Crown's duty to consult. This conclusion was generally consistent with the Supreme Court of Canada's 2004 landmark decision in *Haida Nation v. British Columbia (Minister of Forests).*[2]

In reaching its ultimate conclusion, the Court introduced two new concepts that could have broad implications for government decision-makers and the natural resource industry.

First, the Court found that failure of government agents to implement an alternative regulatory regime constituted an ongoing "non-decision" which was capable of being reviewed.

Second, the Court found that the loss of the value of minerals represented an "adverse impact" on claims to Aboriginal title requiring consultation.

Background

Mineral exploration in British Columbia 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 areas of land. The holder of a mineral claim is granted various rights, including the right to enter lands, explore for minerals, and remove samples. Permits may be required to undertake more invasive work, remove bulk samples over 1,000 tonnes, or to construct a mine, however the Court noted that significant amounts of smaller disturbances such as the digging of pits and trenching may occur without any consultation occurring, and that 1,000 tonnes could appear to some to be a large allowable volume of material.[3]

The First Nations asserted Aboriginal rights, including Aboriginal title encompassing mineral rights, and argued that the granting of mineral claims under the MTA adversely affected their asserted rights and triggered the Crown's duty to consult which was unmet by the existing MTA regime.

Significant Issues for Consideration

In making its decision, the Court failed to grapple with several significant issues which create uncertainty for government decision-makers and project proponents.

New Opportunities for Seeking Judicial Review

The claim was brought as an application for judicial review (which allows for an expedited "summary" challenge of a decision by a government decision-maker). Since the granting of claims under the existing process is automatic, there was no "decision" to issue claims that could be challenged. Instead, the First Nations challenged the *ongoing decision of the Province not to implement a different system for issuing mineral claims* which the Court categorized as "a series of "non-decisions."[4]

British Columbia did not oppose the "non-decision" basis for the application. In accepting this apparently novel approach, the Court cited no existing authorities.

In permitting a judicial review based on a "non-decision," the Court opened the door for similar claims to be brought in the future wherever there is a concern that a regulatory regime has not been optimized to address consultation. For example, where legislation provides ministerial authority to create regulations, the failure of the Minister to, at any time, institute an alternative set of regulations could constitute a "non-decision" capable of triggering a judicial review.

"Removal of Minerals" as a Potential Adverse Effect Requiring Consultation and the Potential for Accommodation

In assessing the impact of issuing mineral claims on the asserted rights of the First Nations, the Court considered the economic value of the minerals that could be removed by a claim holder.

The Court found that the removal of mineral resources constituted a permanent reduction in the value of the lands over which Aboriginal title was claimed, given that a holder of a mineral claim, under the MTA, would be authorized to collect and extract a prescribed amount of minerals from the claim area. The Court noted that removal of minerals would reduce the economic potential of the lands available to a First Nation should title later be proven. The Court grounded its reasoning in the fact that Aboriginal title could encompass the right to the mineral resources,[5] going on to note that narrowly defining Aboriginal title to exclude minerals "is inconsistent with the goals of reconciliation and upholding the honour of the Crown."[6]

Implication for Accommodation

The Supreme Court of Canada has been clear that for consultation to be meaningful, the Crown must be

prepared to accommodate the Indigenous community's concerns. While consultation will not always lead to accommodation, and accommodation may or may not result in an agreement, a consultation process which does not include an intention on the part of the Crown to meaningfully address Aboriginal concerns is flawed.[7] The Crown cannot have a consultation process which excludes the possibility of accommodation from the outset.

In its decision, the Court identified the removal of mineral resources as a potential adverse effect for which the Crown owed a duty to consult, since the economic value of the lands could be reduced by the time Aboriginal title was established. This approach diverges from recent case law suggesting that no duty to consult arises from loss of land value if the loss could simply be compensated if and when Aboriginal title is established.[8]

Recognizing a loss of economic value as an impact capable of triggering the Crown's duty to consult, raises challenging implications for how a meaningful process of consultation and accommodation would occur in the existing duty to consult framework as contemplated in *Haida Nation*. In particular, (a) what is the intended topic of consultation, and (b) what is appropriate accommodation (given there must be the potential for accommodation)?

Topic of Consultation

Consultation has been described as "talking together for mutual understanding,"[9] yet once the Province is aware that mineral rights are asserted, it is unclear what further "consultation" would be necessary in order to recognize the concern of loss of economic value from the minerals. Presumably every Indigenous community asserting such a right would share the same concern regarding loss of value, but understanding the loss of market value does not depend on developing a unique understanding of a particular Indigenous community's culture or knowledge.

Topics of Accommodation

Consultation cannot be effective without a meaningful opportunity for accommodation. However, where the losses are purely economic and can be fully compensated if and when Aboriginal title is established, it is unclear what would constitute meaningful accommodation in the interim period.

Providing a form of interim compensation would go beyond what was previously considered appropriate in the context of the Crown's duty to consult, given the Indigenous community would be able to effectively realize the benefits of their asserted rights without establishing them. The issue was summarized by the Yukon Territory Court of Appeal as follows:

Aboriginal title that is claimed, but not established, does not confer ownership rights… The purpose of the duty to consult is not to provide claimants immediately with what they could be entitled to upon proving or

settling their claims.[10]

Finally, it's not clear that even if Aboriginal title is established, that the benefiting Indigenous party would be entitled to the full benefit from such resources. In the landmark decision of *Tsilhqot'in Nation*, which found Aboriginal title to exist in Northern British Columbia, the Supreme Court of Canada expressly noted that the Province could justifiably infringe on Aboriginal title in order to further "the development of agriculture, forestry, *mining*, and hydroelectric power."[11]

Even if the Indigenous community were able to extract and market the resources themselves upon establishing Aboriginal title, it may be challenging to assess what the "net" value of these missing resources might be after considering the costs of developing a mine.

Implications for All Projects

The Court's decision has potential implications for all proponents seeking to extract natural resources from lands subject to Aboriginal title.

The decision could be used to suggest that the Crown must consult whenever an activity could reduce the market value of lands. In some cases, these impacts may be minimal and the discussion straightforward, but in the case of operating mines, they could be substantial. In each of these cases, parties may struggle to understand what they should discuss as part of the consultation, including whether they should be sharing private revenue projections, mining plans, or facilitating the retention of valuation experts by an Indigenous party.

Where consultation is meaningful, it must contemplate accommodation, giving rise to significant challenges for both proponents and governments. Governments could conceivably address this risk by agreeing not to rely on limitation provisions to prevent a future claim for loss of value if Aboriginal title is ultimately established. Alternative methods of accommodation would appear to be limited to providing some form of compensation in the immediate term, but there is no clear indication of what might qualify as "reasonable accommodation" in any circumstance.

Conclusion

The Court's conclusion, that bundling mineral claim rights along with rights to impact lands in a potentially significant manner triggered the Crown's duty to consult, appears consistent with earlier jurisprudence. However, in reaching this conclusion, the Court took novel approaches to considering Aboriginal rights and Crown decisions that could have broad implications for decision-makers and industry.

In permitting judicial review based on a "non-decision," the Court has opened the door for similar claims to be brought in the future wherever there is a concern that a regulatory regime has not been optimized to

address consultation.

By recognizing a loss of economic value as an impact capable of triggering the Crown's duty to consult, the Court has raised challenging implications for how a meaningful process of consultation and accommodation would occur in the existing duty to consult framework. In particular, what "reasonable accommodation" might be expected for a loss in potential value of lands.

Both of these novel approaches could have substantial implications for industry and the crucial role governments play in discharging the Crown's duty to consult and reconciling Indigenous and non-Indigenous interests.

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

[2] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.

[3] Para. 168.

[4] Para. 78.

[5] See for example *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 122.

[6] Para. 392.

[7] On this point generally see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 63-69.

[8] *Mi'kmaq of PEI v. Province of PEI et al*, 2019 PECA 26 para 16.

[9] *Haida Nation, supra* at para. 43.

[10] *Ross River Dena Council v. Yukon*, 2020 YKCA 10 at paras. 9-10.

[11] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
