Grassy Narrows First Nation Challenges Ontario's Mining Claims Regime

On July 10, 2024, Grassy Narrows First Nation (Grassy Narrows) launched a challenge against Ontario's *Mining Act* (the *Mining Act*), claiming that the system for granting mining claims pursuant to the legislation (the Mining Claim Regime) is unconstitutional and inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Grassy Narrows also asserts that Ontario breached its duty to consult Indigenous peoples by granting mining claims and allowing exploratory work without discharging its duty to consult and receiving Grassy Narrows' free, prior and informed consent.

The Mining Claim Regime and Free-Entry Systems

Ontario's Mining Claim Regime is a 'free-entry' system. A free-entry system allows nearly any person to register a mining claim (also commonly referred to as a 'mineral claim') on public and private land, including the territories of Indigenous communities. The holder of a mining claim then automatically receives rights to use and occupy the claim area and undertake exploratory activities therein. The registration of a mining claim and the granting of certain mining rights occurs without an exercise of discretion on the part of the

applicable government and often are not subject to a requirement to provide prior notice to that government nor an affected Indigenous community. Other Canadian jurisdictions, such as Quebec and British Columbia, also utilize a free-entry regime.

Under the Mining Claim Regime, a person may obtain a prospector's license through an online system, the Mining Lands Administration System (MLAS), after the completion of a one-hour online course and payment of a fee. The holder of a prospector's license may then register (called 'staking'), through the MLAS, a mining claim on any land open for prospecting. The *Mining Act* does not require consultation with affected Indigenous communities prior to the staking of a mining claim.

Upon registration of their mining claim, the claim holder obtains the right to enter, use and occupy the claim area and the right to obtain a mining lease, pursuant to which minerals within the claim area can be extracted and sold. A mining claim holder must either complete the requisite annual level of exploratory work or pay a fee to maintain their mining claim.

In 2009, the *Mining Act* received a substantial overhaul that, in part, aimed to better address constitutionally protected Aboriginal and treaty rights.[1] The legislative amendments included the introduction of:

- a requirement that Indigenous communities be notified immediately after a mining claim is registered;
- a requirement to acquire prior to certain exploration activities either an exploration plan (for lower impact exploration activities) or an exploration permit (for higher impact exploration activities), both of which may require prescribed consultation to be discharged prior to acquisition;
- a resolution process for disputes related to

consultation obligations; and

- the explicit inclusion of consultation and constitutionally protected Aboriginal and treaty rights as factors the responsible minister must consider when making certain decisions pursuant to the *Mining Act*.

Grassy Narrows' Claim

In its claim, Grassy Narrows identifies an area of its territory over which it asserts that mining-related activities have a direct adverse impact on community members' Aboriginal, Treaty 3, and inherent rights (the Claim Area). Grassy Narrows asserts that the Claim Area is covered by approximately 10,000 mining claims, which, when combined with mining-related tenures such as mining leases, cover approximately 30 percent of the Claim Area. Grassy Narrows notes that most of the mining claims within the Claim Area have been registered since 2018 when the MLAS was introduced.

The duty to consult arises when the Crown (e.g., the Ontario government) contemplates conduct that may adversely impact an Aboriginal right, including asserted Aboriginal title. When the duty to consult is triggered, it creates consultation and accommodation requirements the Crown must discharge.

Grassy Narrows asserts that it is not notified, consulted, meaningfully accommodated nor has it given its free, prior and informed consent before mining claims are registered, renewed or transferred in the Claim Area under the Mining Claim Regime and, that as a result:

- specific provisions of the *Mining Act* related to the Mining Claim Regime and exploratory work breach section 35 of the *Constitution Act, 1982* (which constitutionally protects its Aboriginal, treaty and inherent rights) (Section 35) such that the provisions are unconstitutional and of no force or effect within the Claim Area;

- the Mining Claim Regime and the provisions enabling exploratory work within mining claims are inconsistent with UNDRIP and of no force or effect;
- Ontario has, and breached, a duty to consult, accommodate, and obtain free, prior and informed of Grassy Narrows when granting mining claims and allowing exploratory work to be carried out on such claims pursuant to the Mining Act; and
- existing mining claims, and mining activities carried out on such claims, granted under the Mining Claim Regime in the Claim Area are inconsistent with Section 35 and UNDRIP and are of no force or effect.

Grassy Narrows seeks declaratory relief to this effect as well as declarations that:

- Ontario must discharge its duty to consult, accommodate, and obtain the free, prior, and informed consent of Grassy Narrows prior to any future registration, renewal or transfer of mining claims within the Claim Area;
- Ontario be prohibited from issuing, renewing or transferring any mining claims in the Claim Area until it has discharged its duty to consult and obtained the free, prior and informed consent of Grassy Narrows;
- existing mining claims and interests in the Claim Area be rescinded or alternatively, timely enforceable mechanisms for Grassy Narrows to be consulted and accommodated and provide its free, prior and informed consent be implemented for the resolution of such existing claims and interests; and
- Ontario must engage in good faith negotiations with Grassy Narrows to resolve Grassy Narrows' outstanding concerns about the contribution mining activities have on cumulative land use impacts.

Grassy Narrows' challenge to the *Mining Act* comes after it brought another claim against the Ontario and federal governments in relation to mercury contamination. Grassy

Narrows asserts in that claim filed June 2024 that both governments authorized industrial activity that polluted the Wabigoon River, in which Grassy Narrows' community members exercise their Treaty 3 right to fish, and failed to remediate the pollution such that it affected members' ability to safely exercise their fishing rights.

Free-Entry System Challenges and Changes in Canada

Indigenous communities have brought challenges against the free-entry mining regimes of three other Canadian jurisdictions. In two of these jurisdictions, courts held that the free-entry system was inconsistent with those provinces' duty to consult.

British Columbia

Grassy Narrows' challenge follows the recent success of a similar claim brought by Gitxaala Nation and Ehattesaht First Nation against British Columbia's mineral tenure system. On September 26, 2024, the British Columbia Supreme Court found the administration of the province's mineral tenure regime pursuant to the *Mineral Tenure Act* breached British Columbia's duty to consult. The decision required British Columbia to amend its mineral claim system to address the lack of consultation with Indigenous peoples prior to the granting of a mineral claim; something British Columbia was already in the process of addressing.

For more details on *Gitxaala v. British Columbia (Chief Gold Commissioner)* and Gitxaala Nation and Ehattesaht First Nation's appeal, see our previously published summary and analysis of the decision.

Subsequently, on March 7, 2024, British Columbia's Ministry of Energy, Mines and Low Carbon Innovation announced interim measures in the form of four Orders in Council (OICs)

resulting from agreements between British Columbia, Gitxaala Nation and Ehattesaht First Nation. The OICs place restrictions on the issuance of mineral claims, mineral leases and *Mines Act* permits, and the performance of mining activities, in designated areas located in Gitxaala Nation's and Ehattesaht First Nation's territories. The OICs are intended to be in place until British Columbia modernizes the *Mineral Tenure Act* in alignment with UNDRIP, as set out in the British Columbia's *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) Action Plan and in response to the decision in Gitxaala v. British Columbia.

For more details on the OICs, see our previously published summary of the interim measures.

Quebec

In 2019, the Mitchikanibikok Inik First Nation (Mitchikanibikok Inik) brought a challenge against Quebec's *Mining Act*. Mitchikanibikok Inik alleges that certain portions of the legislation, those which establish the free-entry mining claims regime, breach Quebec's duty to consult as no consultation with the Mitchikanibikok Inik, nor other Indigenous communities, occurs prior to authorization of mining activities that may affect Aboriginal rights and title. The challenge was heard in February 2024 and the Quebec Superior Court is expected to render a judgment this year.

In May 2024, Quebec introduced Bill 63, *An Act to amend the Mining Act and other provisions* (Bill 63). Among other proposed changes, Bill 63 allows Quebec to enter into agreements with Indigenous communities to "reconcile mining activities with the activities pursued by Indigenous people" for food, ritual or social purposes or specific hunting and fishing rights.[2] These agreements will determine which parts of the community's territory are open to mining activities (prospecting, exploratory work and mining operations) and mining rights, and conversely, which parts of the territory

are protected from such activities.

The responsible minister may, by registration of notice, temporarily suspend prospecting and the granting of minerals rights on areas subject to such an agreement until the agreement takes effect. Thus, 'mining rights' could be suspended while an agreement is being negotiated or after an agreement is reached, if the agreement contemplates delayed implementation of the open or protected areas.

The bill does not expressly contemplate how Indigenous communities' overlapping territory claims will be addressed in such agreements.

Bill 63 also provides the responsible minister the power to impose conditions and obligations on a 'mining right' holder for two purposes: (1) to prevent or limit impacts on Indigenous communities; or (2) to enable prioritization and conciliation of uses and the preservation of the territory.[3] Additionally, Bill 63 enables the responsible minister to refuse an application for a mining lease, to terminate a mining lease, or to reduce the area subject to it, for the purpose of preventing and limiting impacts on Indigenous communities.

Read more about Bill 63 and the proposed changes to Quebec's *Mining Act* on our previously published overview of the bill.

Yukon

In 2012, the Yukon Court of Appeal (YKCA) held that Yukon's free-entry mining regime established under the *Quartz Mining Act* was inconsistent with its duty to consult Indigenous peoples.[4]

Ross River Dena Council (Ross River), a member of the Kaska First Nation that had not entered into a final agreement with

the federal and Yukon governments, challenged the free-entry system on the basis that it was not consulted nor accommodated prior to the non-discretionary granting of mineral claims that impacted its Aboriginal rights.

The YKCA held that the recording of a mineral claim triggered Yukon's duty to consult. In doing so, the YKCA commented:

"The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims … 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.[5]"

As the duty to consult was triggered by the registration of a mineral claim, the YKCA reiterated, in the context of the mineral tenure regime, a key principle of the duty to consult: the Yukon must undertake (and thus the free-entry regime must allow) consultation activities commensurate with the extent to which Aboriginal rights may be affected by mining activities. Where exploration activities authorized by the registration of a mineral claim would have a serious or long-lasting adverse effect on Aboriginal rights other than title, Ross River must, prior to the granting of the mineral claim, be provided notice of such mineral claim and be given consultation opportunities.

Yukon's mere provision of notice to Ross River after a mineral claim subject to Aboriginal title claims was recorded did not meet Yukon's duty to consult obligations. Rather, Yukon was found to be required to consult with Indigenous communities before opening up areas for the registration of mineral claims subject to Aboriginal title claims.

The YKCA suspended its declaration of Yukon's duty to consult beyond notice for one year after the decision was issued to allow the implementation of needed changes to the *Quartz Mining Act*.

In 2013, Yukon adopted amendments the *Quartz Mining Act* and the *Placer Mining Act* to address the YKCA's ruling.[6] The amendments to included:

- a prohibition, within designated areas (including the Ross River area), on specific exploration activities until Yukon consulted with each affected Indigenous community and determined whether any adverse impacts on the Indigenous community's Aboriginal rights could be appropriately mitigated; and
- a consultation process consisting of the following: (1) the entity seeking to register a mining claim must notify Yukon of the proposed exploration activities; (2) Yukon then has 25 days to initiate consultation with any affected Indigenous community to determine whether the activities appropriately mitigate any adverse impacts to the Indigenous communities' rights; and (3) Yukon permits the exploration activities if appropriate, rejects the proposed activities or allows the activities to proceed subject to conditions.

In 2018, Yukon announced it would defer the tabling of proposed further amendments to the *Quartz Mining Act* (which would have allowed for agreements between Yukon and Indigenous communities under which only the Indigenous community could enter land currently protected from staking for the purpose of staking) in response to feedback from Indigenous communities and industry.

Next steps

A hearing date for Grassy Narrows' claim has not yet been set.

If Grassy Narrows' claim is successful, the *Mining Act* provisions establishing the Mining Claim Regime and exploratory work rights could be amended.

Footnotes

1. Bill 173, *An Act to amend the Ontario Mining Act*, received Royal Assent on October 28, 2009.

2. Bill 63, section 2.

3. Bill 63, section 22.

4. *Ross River Dena Council v. Government of Yukon*[*Ross River Dena Council v. Yukon*].

5. *Ross River Dena Council v. Yukon* at para 37.

6. Bill 66, *An Act to Amend the Placer Mining Act and the Quartz Mining Act*, received Royal Assent on December 19, 2013.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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