



## MINERAL CLAIMS AND THE DUTY TO CONSULT IN YUKON

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On December 27, 2012, the Yukon Court of Appeal handed down its decision in *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14. The decision related to an appeal of Mr. Justice Veale’s decision regarding the claim of the Ross River Dena Council (“**RRDC**”) against the Yukon Government.

The appeal concerned the duty of Yukon to consult with RRDC when allowing mineral claims to be recorded over land on which RRDC has asserted claims of Aboriginal title and Aboriginal rights. RRDC appealed from the Chambers Judge’s decision that only notice was required to be given to RRDC for recorded claims within their territory.

RRDC claims Aboriginal title over some 63,000 sq. kilometres of the southeast part of Yukon, comprising of approximately 13% of Yukon.

Under the Yukon *Quartz Mining Act*, SY 2003, c 14, mineral rights can be obtained by physically staking a claim and then recording it with the Mining Recorder. The staker is then entitled to ownership of the minerals within the claim and to conduct certain exploration activities without notice or government authorization.

The Court of Appeal found that RRDC had strong claims to at least some parts of their traditional territory. The Court also found that under the system in place, at the time of trial, certain (class one) exploratory work could be carried out by a claim holder without consultation and that such work could adversely affect claimed Aboriginal rights.

The Court found, in adopting the reasoning in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 (“**Haida**”), that while the Crown is entitled to manage resources it must do so only with due consideration of the effect on Aboriginal rights. The Crown must engage in *bona fide* consultation with a view to accommodating these rights before authorizing any activities that could adversely affect those interests. The nature of the consultation depends on the strength of the claim and the potential adverse effect on such rights.

The Court discussed the “open entry” mining regime in Yukon and also referenced that a claim holder could undertake a class one exploration program without any notice or permits. The Court did acknowledge the requirements of the *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7 which requires consultation with First Nations. The Court found that, while class one exploration programs are less intensive and cover smaller areas than class two, three and four programs, they can still have a substantial impact on the land.

In addressing the question as to whether or not the recording of a claim triggered consultation, the Court accepted the reasoning in *Rio Tinto Alcan Inc. v. Carriers Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 (“**Rio Tinto**”). *Rio Tinto*, a Supreme Court of Canada decision, described the three elements of the test to determine whether the Crown’s duty to consult is triggered as being:

1. the Crown’s knowledge of a potential Aboriginal claim;
2. the contemplated Crown conduct; and

3. the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

The Court found the first element of the test, knowledge of the Plaintiff's asserted Aboriginal claim, had been met because negotiations had been previously carried out affecting the claim. The Court addressed the issue that the Kaska, RRDC, did not need to establish Aboriginal rights and title within its traditional territory, since the Yukon Government did not dispute that "the claim [of RRDC] is a serious one with sufficient credibility to satisfy the first element of the *Haida* test".

The Court also found that the third element of the *Haida* test was met on the grounds that by transferring mineral rights to quartz mining claim holders the Crown engaged in conduct inconsistent with the recognition of Aboriginal title. In addition, the Court found that the right to carry out class one exploration activities could "seriously impede or prevent the enjoyment of some Aboriginal rights in more than a transient or trivial manner".

The Court determined that the real issue between the parties was whether or not the recording of a claim resulted in the obligation to consult since once a claim is staked the recorder must record the claim. The Yukon Government argued that there are no actions required on the part of the Government in granting a claim since the right to stake and record a claim did not require any approval from the Crown. The Yukon Government's position was that, as long as the statutory requirements are met, the granting of a mineral claim is automatic. The Court, however, found that under Section 15 of the *Quartz Mining Act* the Government had a broad discretion to create reserves and in the exercise of that discretion it could prevent staking within the reserved areas.

The Court also noted that the duty to consult exists to ensure that the Crown, in managing its resources, does not ignore Aboriginal claims. The Court stated "[s]tatutory 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". The Court found the failure of the Crown to provide any discretion in the recording of claims was the source of the problem. Even though the Court found that the doctrine of parliamentary sovereignty means that governments can pass legislation, there is still a duty to consult and governments cannot justify the absence of consultation in the carrying out of a statutory regime.

The Court addressed the issue of the need for confidentiality in acquiring mineral titles because of the "open entry" concept and that such a system has "considerable value in maintaining a viable mining industry and encouraging prospecting". However, the Court went on to say that "[i]t must, however, be modified in order for the Crown to act in accordance with its constitutional duties" and that mere notice cannot be the sole mechanism of consultation.

In addressing the question of what consultation is required, the Court found that it was not necessary or appropriate for the Court to specify precisely how the legislation can be brought into conformity with the requirements of *Haida*. The Court also made no finding as to whether or not the consultation that had previously occurred, which resulted in a staking prohibition of

some 4,800 sq. kilometres of the lands claimed by RRDC, was consultation in accordance with the requirements of the *Haida* decision.

The Court found that “[t]he location and recording of a quartz mining claim, in and of itself, is not likely to interfere with claims to Aboriginal rights other than title. It is the actual performance of work on the land that may affect such claimed rights”. The Court found specifically that the system in place did not address concerns relating to the effect of class one exploration activities on Aboriginal claims. The Court also found that the Crown must consult with RRDC regarding class one exploration activities that could have serious or long lasting adverse effects on Aboriginal rights. Notice of such proposed activities and an opportunity to consult must be given to First Nations.

The Court noted that Section 15 reserves may not be the ideal instrument for dealing with Aboriginal rights given the importance of the open entry system to the mining industry and the Yukon economy, however, it was “open to the Legislature to fashion a more flexible or precise statutory mechanism”.

In the result, the Court made the following declarations:

1. the Yukon Government has a duty to consult with RRDC on whether mineral rights on Crown lands within the Ross River Area might be made available to third parties; and
2. the Yukon Government has a duty to notify, and where appropriate consult and accommodate, RRDC before allowing any mining exploration within the Ross River Area.

The Court suspended the declaration for a period of one year to allow the Government to address the problems.

In the course of issuing the above decision, the Court also addressed the issue as to whether or not the Yukon Chamber of Mines had a right to appear as an intervenor on the appeal. The Court found that in order to appear as an intervenor on an appeal it was necessary to apply for such status to the Court of Appeal rather than the Supreme Court. This issue arose in the context of the parties appearing to have assumed throughout the course of the proceedings that the right to be named as a party in an appeal, and to intervene at the appellate level, arose as a result of the party’s intervenor status at the Supreme Court level.