Mining Exploration and Section 35(1) Rights: Two Rail Cars On a Collision Course?

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1. INTRODUCTION

Under the 'free entry' system prevalent in most jurisdictions across Canada, mining companies are granted exclusive rights to access Crown lands to explore, stake, and claim mineral rights in relative secrecy. The result is that in the early stages of mine development Aboriginal interests go unprotected, creating a situation where First Nations tend only to learn of significant activity occurring in their traditional territories after these events have already occurred.

In the wake of the ongoing staking and exploration activities across Canada, many First Nations are finding that the Crown often fails to address potential adverse impacts of mining at the staking and exploration stage. The mine exploration regimes in most jurisdictions do a poor job, if at all, in reconciling the constitutionally-protected rights of First Nations, the Crown's duty to consult, and the vested interests created by the granting of mineral rights for mining companies.

The duty to consult both serves to preserve Aboriginal interests and assists in fostering a relationship between the parties that make negotiation possible.[1] Indeed, meaningful consultation and accommodation lies at the heart of Crown-Aboriginal relations, with negotiation providing the preferred method for achieving reconciliation.[2] However, recent litigation highlights the tension between judicial principles regarding the duty to consult and the existing regulatory regimes established for mine exploration activities. The case law also demonstrates the need to recognize the array of potential impacts from all exploration, staking, and claim development related activities, and to provide mechanisms for ensuring meaningful consultations with First Nations at the pre-exploration and tenuring stages.

2. DUTY TO CONSULT (SUMMARY)

The government's duty to consult and accommodate Aboriginal interests is grounded in the honour of the Crown.[3] While the court encourages that this honour must be understood

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[1] *Haida Nation v. British Columbia (Minister of Forests),* [2004] SCC 73 at para. 39 ("*Haida")*
[2] *Haida* at para 14.
[3] *Haida,* at para. 16.

generously, and with a view that it gives rise to different duties in different circumstances,[4] the honour of the Crown has not been recognized as an independent cause of action.[5] However, where Aboriginal interests are being seriously pursued, the Crown acting honourably cannot run roughshod over those interests, and must respect those potential yet unproven interests. In the interim, the Crown may continue to manage the resource in question pending claims resolution.[6] In the case of existing Treaty rights, the duty to consult with respect to those existing rights is even greater.[7]

Importantly, the honour of the Crown is always at stake in its dealings with Aboriginal peoples,[8] and in some instances the honour of the Crown can result in enforceable fiduciary duties.[9] While the Crown's fiduciary obligations and its duty to consult and accommodate are grounded in the principle of honour of the Crown, the duty to consult is distinct from any fiduciary duty that may be owed.[10]

The duty to consult and accommodate Aboriginal interests is triggered when the Crown is contemplating any decision that has the potential to adversely impact rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This includes decisions that create physical impacts as well as strategic, higher level decisions. These are decisions which may lead to future direct impacts or may limit the Crown's capacity to ensure that resources are managed in a manner which supports the continued exercise of constitutionally protected rights.[11]

There must be a causal relationship between the proposed government action and the potential for adverse impact to the Aboriginal claim or right.[12] In addition, it must be the exercise of the right or claim that is adversely impacted and not the First Nations' future

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[4] *Haida*, at para. 17.
[5] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219 (MBCA) Leave to Appeal to the Supreme Court of Canada granted in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] S.C.C.A. No. 344 ("*Manitoba Métis"*).
[6] *Haida*, at para. 27.
[7] *West Moberly First Nation v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para. 129 ("*West Moberly*").
[8] *Haida*, at para. 16.
[9] *Manitoba Métis*, at para. 405.
[10] *Haida*, at para. 54.
[11] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 42-50 (*Rio Tinto)*.
[12] *Rio Tinto*, at para. 45; see also *West Moberly*, at paras. 180-184.

negotiating position.[13] Past wrongs, or an underlying or continuing breach, do not meet the threshold as an adverse impact triggering a duty to consult.[14] Instead, a duty to consult arises from *current* government conduct or decisions that potentially adversely impact an Aboriginal claim or right that actually exists,[15] and is limited to the specific Crown proposal at issue and not to a larger project that the current proposal is merely a part.[16] McLachlin, C.J. writing for the Supreme Court of Canada in *Rio Tinto Inc. v. Carrier Sekani Tribal Council*[17] states:

> The duty to consult…derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation seeking interlocutory injunctions to halt threatening activity.[18]

While the consultation process does not need to redress past wrongs, proper understanding of past, current, and future activity is necessary to determine the seriousness of the proposed activity currently being contemplated.[19] In effect, the historical context is essential to a proper understanding of the seriousness of the potential impacts.[20]

The focus in each case is to determine the degree to which the contemplated Crown activity will adversely affect the claimed rights, so as to trigger the duty to consult.[21] However, the flexibility is not in what triggers the duty to consult, but in the variability of that duty to consult once it is triggered.[22] Specifically, the scope of the duty required in order to maintain the honour of the Crown varies depending on the strength of the claim and the seriousness of any potentially adverse effect upon the Aboriginal interest being claimed.[23] Where the claim is weak or there is a minor infringement, the Crown duty may only require giving notice, disclosing information, and discussing responses to the notice.[24] On the other end of the spectrum, deep consultation aimed at achieving a satisfactory interim solution may be required in cases where

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[13] *Rio Tinto,* at para 46.
[14] *Rio Tinto,* at paras. 45 and 46.
[15] *Rio Tinto,* at paras. 41 and 49.
[16] *Rio Tinto,* at para. 53.
[17] *Rio Tinto,* at para. 2.
[18] *Rio Tinto,* at para. 33.
[19] *West Moberly* at paras. 116 and 117.
[20] *West Moberly,* at para. 117; see also *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 21.
[21] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 34 ("*Mikisew"*).
[22] *Mikisew*, at para. 34.
[23] *Haida*, at para. 39.
[24] *Haida*, at para. 43.

the strength of the potential but unproven claim or the existing Treaty right is established, the contemplated infringement is significant, or there is a high risk of irreparable damage.[25] Essentially, the content of the duty to consult will be governed by the context.[26] Finch J.A. (later C.J.B.C.) stated in *Halfway River*:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever, possible, demonstrably integrated into the proposed plan of action. [Emphasis added.][27]

Information obtained through consultation may, in some circumstances, oblige the Crown to accommodate the Aboriginal claim or Treaty right by the Crown changing its policies or its proposed course of action.[28] However, the Crown is also required to balance potential outcomes respecting the claimed or existing s. 35(1) rights with other societal interests.[29]

Third parties are under no obligation to consult and accommodate and they cannot be held liable for a Crown's failure to uphold its duty in this regard. The honour of the Crown cannot be delegated, [30] although certain procedural aspects of consultation may be delegated to third parties by the Crown. Nonetheless, the Crown alone is liable for any consequences arising from its interactions with third parties which impact Aboriginal interests.[31]

With respect to the Crown delegation to statutory decision-makers, it is well established that statutory decision-makers are required to respect legal and constitutional limits.[32] The Crown's duty to consult lies upstream of the statutory mandate of decision-makers.[33] As a result, Crown decision-makers cannot rely on the limits of their statutory duty to avoid consultation or accommodation as appropriate in the circumstances.

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[25] *Haida*, at para. 44.
[26] *Mikisew*, at para. 3.
[27] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, (1999) BCCA 470 *("Halfway River")* at para. 159-160 (aff'd in *Mikisew*, at para. 64)
[28] *Haida*, at paras. 46 and 47.
[29] *Haida*, at para. 54.
[30] *Haida*, at para. 53.
[31] *Haida*, at para. 53.
[32] *West Moberly* at para. 106.
[33] *West Moberly* at para. 106.

The duty to consult and accommodate is not a duty to agree.[34] The duty is to a meaningful consultation process and to accommodate reasonably, which does not preclude hard bargaining by the Crown.[35] A reasonable process, even in cases involving potential significant destruction of pristine wilderness, may sufficiently discharge the Crown's duty to consult.[36]

3. CASE STUDIES

(a) BRITISH COLUMBIA

There are currently more than 350 active exploration projects underway in B.C. and more than 30 proposed new mines.[37] Mining and its related activities make up a significant portion of B.C's economy. Like most other provinces and territories in Canada, B.C.'s mining regime is premised on the 'free entry' system and governed by the *Mineral Tenure Act*. Registering or staking mineral claims under this legislation gives claims holders the exclusive right to explore and develop minerals.

Prior to the introduction of Mineral Titles Online (MTO) in 2005, miners in B.C. physically staked claims. Now MTO allows prospectors with a Free Miner's certificate, a credit card and an internet connection to stake mineral claims without ever seeing the land, or consulting with First Nations. The result has been record-breaking levels of staking activity. In the eight days after MTO began, miners staked 3,100 claims that covered more hectares than all the previous year's claims combined."[38]

Legislation in B.C. requires miners to notify private landowners and outline the nature and scope of their mining activities at least eight days before entering the claim area. First Nations, however, are not considered 'landowners'. As such, they are not afforded the same

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[34] *Haida*, at para. 42.
[35] *Haida*, at para. 42.
[36] *Taku River Tlingit First Nation v. B.C. (Project Assessment Director*), [2004] 3 S.C.R. 550.
[37] Association For Mineral Exploration British Columbia, *Mineral Exploration* Sector- *British Columbia Top Seven Issues and Recommendations (*Vancouver, B.C: 2010) at p. 3. Accessed online at <http://www.amebc.ca/documents/about-us/Mineral%20Exploration%20Sector%20Top%20Seven%20Issues%20-%202010.pdf> on January 12, 2012.
[38] Harvard Law International Human Rights Clinic, *Bearing the Burden: The Effects of Mining on First Nations in British Columbia* (2007) at p. 55. Accessed at <http://www.law.harvard.edu/programs/hrp/documents/BTB_WEB_16Dec2010-FINAL.pdf> on January 12, 2012.

notice.[39] First Nations usually become aware of a mineral claim when they receive a 'Notice of Work' to permit the mineral rights holder to begin exploration and associated activities. Yet this occurs only after companies have staked claims and conducted early exploration on First Nations lands. Typically, this triggers a 30-day window in which First Nations can respond to the project.

Two recent cases arising in the British Columbia courts illustrate the tension between mine exploration and First Nation interests, and how that tension plays out through the Crown's duty to consult.

(i) The Burnt Pine Caribou and the West Moberly First Nations

In June 2005, the province's Ministry of Energy, Mines and Petroleum Resources ("MEMPR") issued a *Mines Act* permit to First Coal Corporation ("First Coal"), allowing the company to commence exploration activities within the traditional hunting grounds of the West Moberly First Nations ("West Moberly").

These advanced exploration activities, indeed the anticipated mine site as a whole, are located on core winter habitat for a small herd of woodland caribou known as the Burnt Pine herd. This herd has been reduced to a population of approximately 11 animals.[40]

Little to no consultation occurred between the Crown and West Moberly respecting activities authorized under the Permit from 2005 to 2009, although biologists from the Ministry of Environment ("MOE") and the Ministry of Forests and Range ("MOFR") consistently recommended that MEMPR reject the proposed exploration activities[41] as the property was located in fragile caribou habitat which was under protective measures to recover the caribou population, including the Burnt Pine Herd.[42]

West Moberly opposed the permits, providing MEMPR with detailed submissions of their concerns. West Moberly argued that the exploration work would create a significant impact

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[39] *Ibid*., at p. 58.
[40] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 ("*West Moberly (BCSC)*"), affirmed 2011 BCCA 247 at para. 18.
[41] In May 2008, FCC applied to amend the Permit to authorize a 100,000 tonne bulk sample program (subsequently reduced to 50,000 tonnes) and in November 2008, FCC applied for another Permit amendment to authorize a 173 drill-hole advanced exploration program: *West Moberly (BCCA),*paras. 1, 30 and 31.
[42] *West Moberly (BCSC),* paras. 20 to 23, and 57 to 58.

on their Treaty protected right to hunt caribou within their traditional territory and as a part of their seasonal round.[43] West Moberly linked the decline of caribou to a number of cumulative factors including habitat loss and fragmentation of habitat due to logging, industrial development, and other impacts, and in particular the construction of the WAC Bennett Dam and flooding of the Williston Reservoir.[44]

The province did not accept that West Moberly members held a Treaty right to harvest caribou according to its traditional seasonal round. On July 20, 2009, MEMPR responded with the Crown's first characterization by the province of West Moberly's rights and the anticipated impacts of the project, without any reference to the oral promises made by the Crown with respect to the parties' intention at the time Treaty 8 was made with respect to the rights reserved to the Indians to hunt, fish and trap. MEMPR took the position that the right to hunt was simply a right to hunt for meat.[45]

The mining exploration permits were approved one month later in September 2009, and a related forestry permit was approved in mid-October 2009.[46] At the end of October 2009, West Moberly brought a petition in BC Supreme Court seeking judicial review of the mining exploration permits, on the basis of a failure of consultation.

The matter was heard in early February 2010 and Mr. Justice Williamson rendered judgment on March 19, 2010. He found that although Treaty 8 contemplates the taking up of land for mining, read in view of its oral promises, it protects the meaningful exercise of traditional practices. He agreed with West Moberly's position that its Treaty rights to hunt included the right to harvest caribou in the area affected, and held further that a balancing of Treaty rights with the rights of the public generally would not be achieved by allowing the caribou herd to be extirpated. He held that the Crown failed to meaningfully consult or accommodate West Moberly, providing slow and superficial responses and unreasonably refusing to institute measures to increase the Burnt Pine Herd. To redress this failure, Williamson J. suspended the advanced exploration and cutting permits for 90 days and ordered the Crown to implement in

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[43] *West Moberly (BCSC)*, paras. 24 and 25.
[44] *West Moberly (BCSC)*, para. 17.
[45] *West Moberly (BCSC)*, paras. 26 to 31, 37; *West Moberly (BCCA)*, paras. 40 to 44
[46] *West Moberly (BCSC)*, paras. 1 to 4.

that period a reasonable, active program for the protection and augmentation of the Burnt Pine Herd.[47]

The province appealed. The appeal was heard in early January 2011 and judgment was rendered on May 25, 2011. Chief Justice Finch wrote the majority opinion, with Mr. Justice Hinkson concurring in all but one aspect, and Madam Justice Garson issuing her own reasons in dissent.

The majority affirmed that the Crown's duty to consult lies upstream of the statutory mandate of decision makers, stating that "in exercising its powers in this case, MEMPR was bound by and had to take cognizance of, Treaty 8 and its true interpretation."[48] Indeed, there was nothing preventing MEMPR from acquiring, from other ministries or elsewhere, the resources necessary to fully consider the issues raised by West Moberly.[49]

The majority upheld the lower court's finding that West Moberly's ancestors had hunted caribou as part of their traditional seasonal round, within the area affected by First Coal's mining activities. The Treaty promises made to West Moberly encompassed more than a right to food; they included protection of the Dunne-za traditional way of life, which includes the right to hunt caribou as part of the seasonal round.[50]

The majority found that the consultation process could not be said to be reasonable or meaningful in part because MEMPR had proceeded with consultation on a fundamental misconception of the nature of West Moberly's Treaty rights. [51] As a result, MEMPR had never seriously considered West Moberly's position. Instead, MEMPR presumed that "explorations should proceed and some sort of mitigation plan would suffice."[52] MEMPR did not offer persuasive reasons why West Moberly's preferred course of action was "unnecessary, impractical, or unreasonable."[53] MEMPR's response to West Moberly's concerns had been slow and cursory, waiting until a month before the decision to provide an assessment of the

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[47] *West Moberly (BCSC)*, at paras. 13 to 15, 51, 53, 57 to 59, 63, and 83.
[48] *West Moberly*, at paras. 106 to 107.
[49] *West Moberly*, at paras. 107 to 108.
[50] *West Moberly*, at paras. 130, 137.
[51] *West Moberly*, at paras. 150 to 151.
[52] *West Moberly*, at para. 149.
[53] *West Moberly*, at paras. 148 to 149.

anticipated impacts on their rights. The result was a superficial exercise which precluded consideration of a full range of possible outcomes and amounted to nothing more than an opportunity for the First Nation to "blow off steam."[54]

Significantly, the majority found that an examination of the cumulative effects of development is "essential to a proper understanding of the seriousness of potential impacts"[55] on Treaty rights. This does not involve addressing 'past wrongs', but rather to recognise the current state of affairs and the possible consequences of further activity in the area. MEMPR erred in refusing to consider the depleted state of the caribou herd as a factor which increased the seriousness of the potential adverse effects of mining exploration. Finch C.J. held that future impacts of a project may also fall within the scope of consultation, including the consideration of the potential impacts of full scale development. Hinkson J.A. concurred on this point, but held that accommodation measures should be limited to redressing only the impacts of the current decision, not past or future harms.

The majority set aside the chambers judge's order requiring the Crown to implement a plan to protect the Burnt Pine herd within 90 days. In its place, the majority stayed the Bulk Sample and Advanced Exploration permits pending meaningful consultation in accordance with their reasons.

On September 1, 2011, British Columbia and First Coal sought leave to appeal to the Supreme Court of Canada. At the time of writing[56], the decision on whether the Supreme Court will hear the case is currently pending.

(ii) The Prosperity Project and Tsilhqot'in First Nation

For nearly 20 years, Taseko Mines Ltd. ("Taseko") has pursued regulatory approval for the 'Prosperity Project,' a proposed open pit gold and copper mine in the Cariboo-Chilcotin region of B.C. Through the *Mineral Tenure Act*, Taseko has staked a potential billion-dollar claim to one of the largest undeveloped gold and copper deposits in Canada.[57]

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[54] *West Moberly*, at paras. 148 to 149.
[55] *West Moberly*, at para. 117.
[56] February 13, 2012
[57] *Taseko Mines v. Phillips*, 2011 BCSC 1675 at para. 2 ("*Taseko*").

The proposed mine lies within the traditional territory of six bands collectively known as Tsilhqot'in First Nation ("Tsilhqot'in"). The Tsilhqot'in opposition to the mine has been vigorous, citing unacceptable environmental and cumulative effects that would irreparably damage their community's wellbeing.

The mine's initial development plan proposed the conversion of Teztan Biny (Fish Lake) into a tailing pond, which would have destroyed essential trout habitat and potentially exposing downstream salmon stocks to contaminants. Although a provincial-level environmental assessment approved the project, it was also subject to a federal Environmental Review Panel. The Panel's report eventually led to the rejection of the project, citing significant and unjustifiable adverse environmental effects.[58] The federal government accepted the Panel's report and did not approve the proposed project. However, the federal government explicitly stated it was not opposed to the mining of the ore body and that nothing prevented Taseko from submitting a new project proposal which addressed these issues.

In August 2011, Taseko submitted its new project description, named the 'New Prosperity Project,' to the Canadian Environmental Assessment Agency ("CEAA"). The CEAA advised Tsilhqot'in of the submission and indicated it would make a decision on whether to accept the project for review within 90 days. During this period, Taseko obtained 2 provincial permits to carry out exploratory drilling, test pitting, and timber clearing on the proposed project site. However, when Taseko attempted to start work these permits, there were met with a blockade and a refusal by Tsilhqot'in to recognize the authority to proceed into its traditional territory. The Tsilhqot'in felt the revised project remained unjustifiable.

The parties had two divergent perspectives on the significance of the submission of the new project to CEAA. Taseko held the view that the project would automatically proceed to environmental assessment. Tsilhqot'in, on the other hand, was of the belief that it was still possible that project would be rejected outright, without proceeding further. Indeed, Tsilhqot'in had made this clear in its response to Taseko's permit application, indicating to the province that the move was premature given that the project may not proceed to environmental assessment.

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[58] *Taseko*, at para. 7.

The Tsilhqot'in suggested that exploration should not proceed and that it ought not to be put to further effort or expense dealing with the application pending further review.[59]

On September 22, 2011, MEMPR wrote the Tsilhqot'in National Government outlining their recommendations and advised them that any further comments were due on September 29th. On the date of the deadline, Tsilhqot'in responded in writing and left a voicemail requesting a meeting prior to any permits being issued. On that same day, however, the Inspector of Mines issued the permits.[60] The following week, the CEAA referred the New Prosperity Project for environmental assessment.

On November 18, 2011, Taseko applied for an injunction preventing Tsilhqot'in members from obstructing, impeding or restricting its exploration work. The Tsilhqot'in countered with an injunction of its own, preventing Taseko from conducting exploration work until its application for judicial review on the permit approvals had been heard and determined.

At the hearing, Tsilhqot'in argued that deep consultation on the permits was required. It submitted that the Crown fell short on its duty to consult by rushing approvals, failing to provide timely notice and reasons, failing to consider the cumulative effects and carrying out their duty on an erroneous view of their obligations.[61] The Crown argued that it was correct to focus on the effect of the exploration work alone, alleging that Tsilhqot'in neglected to participate in consultation in a meaningful way—holding fast to their opposition and waiting until Taseko had vested rights before challenging the mine.[62] Moreover, the Crown took the position that it was statutorily required to consider the permit applications and make a decision, irrespective of the federal regulatory process. The potential impact of the exploration work was assessed as moderate and Tsilhqot'in proof of aboriginal rights as low.

While not commenting on the correct interpretation of the scope of the duty to consult, Mr. Justice Grauer held that the balance of convenience favoured an injunction against Taseko, as the harm suffered to their interests was relatively was minor.[63] In weighing the decision, he

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[59] *Taseko*, at para. 26.
[60] *Taseko*, at paras. 32 and 33.
[61] *Taseko*, at para. 46.
[62] *Taseko*, at para. 47.
[63] *Taseko*, para. 57.

noted that the geology and the ore will remain, but the same could not be said of the habitat presently left to Tsilhqot'in, were the exploration activities were to be undertaken.[64] Grauer J. granted the injunction for 90 days, pending the determination of Tsilhqot'in's related judicial review proceeding.[65]

(b) ONTARIO

In Ontario, the *Mining Act* also establishes a 'free entry' system whereby all Crown lands, including those subject to Aboriginal land claims, are open for prospecting and staking. Recently, the Ontario government sought to 'modernize' the *Mining Act*, becoming the first Canadian jurisdiction to integrate Aboriginal consultation into requirements for exploration and mine development. The Act states that its purpose is to "encourage prospecting, staking, and exploration in a manner consistent with s. 35, including the duty to consult."[66] The Ontario government has also outlined plans to create land withdrawals for Aboriginal sites having regard for their traditional and current use.[67] While the incorporation of constitutional principles is laudable, the cases below demonstrate the difficulty of incorporating divergent philosophies into one piece of legislation.

Again, there are two cases which illustrate the tension between the exploration regime in place to facilitate mining claims and the constitutionally protected rights of First Nations as expressed through the consultation process with the Crown.

(i) Solid Gold and Wahgoshig First Nation

From 2007 to 2010, Solid Gold Resources Corp. ("Solid Gold") staked 103 unpatented mining claims, collectively known as the 'Legacy Project,' within Treaty 9 lands.[68] These claims surround Lake Abitibi, the traditional territory and sacred birthplace of the Wahgoshig First Nation ("WFN") people.

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[64] *Taseko*, para. 66.
[65] As of the date of the writing of this paper, judicial review of the permits has not taken place.
[66] Section 2, *Mining Act*.
[67] Government of Ontario, Ministry of Northern Development, Mines and Forestry, *Update on Modernizing Ontario's Mining Act*, (2011) at p.18. Accessed at <http://www.mndm.gov.on.ca/mines/mining_act_e.asp> on January 26, 2012.
[68] *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al*., 2011 ONSC 7708 at para 3 ("Wahgoshig").

Although the Crown instructed Solid Gold to contact WFN, no consultation occurred before Solid Gold began drilling, clearing forest, bulldozing access routes and transporting fuel into the drill site.[69] WFN eventually discovered the drilling activity and the identity of the corporation, contacting them in an attempt to consult. Again, no consultation occurred. On November 8, 2011, the Crown advised Solid Gold that consultation must occur.[70] Solid Gold ignored this instruction.

The following day, WFN filed a notice of claim against Solid Gold and Ontario over the failure to consult. Solid Gold subsequently increased its drilling, bringing in a second rig.[71]

In December 2011, WFN brought an application preventing Solid Gold from engaging in mineral exploration on Treaty 9 lands. WFN argued that the exploration program had and would continue to negatively impact its Aboriginal and Treaty rights, culture, and its relationship with the land.[72] WFN pointed out that drilling occurred in an area of known cultural heritage, as identified by the Ministry of Natural Resources.[73]

Solid Gold maintained that it had no legal obligation to consult WFN and that WFN has no power to veto its exploration activities. It pointed to the *Mining Act* which "establishes a 'free entry' system whereby all Crown lands, including those subject Aboriginal treaties, may be claimed without and consultation or a permit required."[74] It further submitted that WFN could not prove that it would experience any irreparable harm as a result of the drilling.

The province took no position on the motion, although it acknowledged that Solid Gold failed to fulfil the duty to consult delegated by the Crown. Ontario submitted that "without the requisite dialogue and information exchange…concerns over the potential impacts of drilling…are magnified significantly and a climate of mistrust intensifies."[75] The province

[69] *Wahgoshig*, at para. 12.
[70] *Wahgoshig*, at para. 14.
[71] *Wahgoshig*, at para. 16.
[72] *Wahgoshig*, at para. 19.
[73] *Wahgoshig*, at para. 13.
[74] *Wahgoshig*, at para. 23.
[75] *Wahgoshig*, at para. 27.

maintained, however, that the relief sought by WFN would act to polarize the parties.[76] It asked the court to fashion another remedy that would facilitate the consultation process.

Madam Justice Brown held that Solid Gold made a concerted, wilful effort *not to consult* WFN.[77] In fact, there was no indication that it "intended in good faith to consult regarding the Legacy Project or any future projects."[78] The judge solidly rejected Solid Gold's proposition that surrendered land extinguished WFN's claim to any rights, stating that this approach is the "antithesis of reconciliation and mutual respect."[79]

The court granted an injunction against Solid Gold for 120 days and required the Province, Solid Gold and WFN to enter into a *bona fide*, meaningful consultation and accommodation process.[80] The judged held that "to refuse to enjoin Solid Gold from its drilling, in the circumstances of this case, will send the message that Aboriginal and treaty rights, including rights to consultation and accommodation can be ignored by exploration companies, rendering the First Nations constitutionally-recognized rights meaningless."[81]

(ii) Mining Moratoriums and the Kitchenuhmaykoosib Inninuwug Nation

For the past decade, the Kitchenuhmaykoosib Inninuwug Nation ("KI") has been fighting to enforce a mining moratorium over its Treaty Land Entitlement ("TLE") land selections and traditional territory. KI insists that while it is not opposed to development, it wishes be a full partner and consulted throughout the process, using community based decision-making.

Throughout KI's mining moratorium, the Ontario government continued to allow mining exploration companies to stake claims. One of these companies was Platinex, a junior mining company, which acquired 81 mining leases within KI's traditional territory and TLE land selections. Conversations between KI and Platinex continued over the next 7 years, with KI consistently expressing opposition to exploration.

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[76] *Wahgoshig*, at para. 28.
[77] *Wahgoshig*, at para. 60.
[78] *Wahgoshig*, at para. 58.
[79] *Wahgoshig*, at para. 55.
[80] *Wahgoshig*, at para. 78.
[81] *Wahgoshig*, at para. 72.

Platinex continued with its exploration plans, raising nearly one million dollars in flow-through funds. In its corporate disclosure reports, Platinex stated that KI had 'verbally consented' to the exploration work, and that the company could 'proceed without opposition' if consultations continued.[82] Platinex's reports made no mention of the letters of opposition received from KI.

In January 2006, Platinex and KI agreed to a community meeting so that members could voice their concerns over its exploration projects. However, once it became clear that Platinex would not be able to change KI's decision to suspend exploration, it cancelled the meeting.[83] Later that month, KI's band council wrote to Platinex, prohibiting them from drilling and transporting equipment though its territory.

Platinex ignored KI's letter, sending a drilling team to begin exploration. KI responded by traveling to the drilling camp to protest the drilling. In a situation described as 'threatening,' Platinex alleged that KI members blockaded the road and purposely ploughed over the airstrip, preventing anyone from leaving the area by plane. Contrastingly, KI described the protest as peaceful, noting that the blockade consisted mostly of children and elders standing on the road and refusing to let the trucks pass. KI explained the ploughing as an expressive act, stating that the airstrip remained intact throughout the period. The Ontario Provincial Police, who were present throughout the demonstration, took no action whatsoever.[84] Platinex eventually moved its drilling crews out of the area. After its departure, KI dismantled the site, offering to return equipment, though the company never responded.[85]

After the confrontation with KI, Platinex applied to the court for relief. KI counterclaimed, asking for an injunction to protect the basis of its TLE claim. The court ordered Platinex to cease all exploratory activities for five months. Mr. Justice Smith held that Platinex's decisions had been unilateral and dismissive of KI's interests. He did not accept that KI had acted improperly or illegally, believing "they had no other viable option but to confront Platinex

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[82] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al*., 2006 ONSC 26171 at para. 27 ("*KI*").
[83] *KI*, at para. 29.
[84] *KI*, at para. 38.
[85] *KI*, at para. 40.

in order to stop the drilling."[86] He found that while Platinex would experience hardship as a result of the injunction, to a large degree it was the author of its own misfortune.[87] That is, "Platinex decided to gamble that KI would not try to stop them and essentially decided to try to steamroll over the KI community by moving in a drilling crew without notice."[88] Further, Platinex's decision to issue flow-through shares seemed particularly misguided, given that it was clearly advised of KI's opposition.

While critical of Platinex, Smith J. also pointed out the failings of the Ontario government, who was almost entirely absent from the consultation process. In his reasons, Smith J. held that the Crown had abdicated its responsibility and delegated its duty to consult to Platinex. The court stated that despite repeated judicial messages delivered over the course of 16 years on the significance of consultation, "the evidentiary record in this case sadly reveals that the provincial Crown has not heard or comprehended this message" and has failed in fulfilling its obligation."[89]

Subsequent to this injunction, Platinex was eventually permitted to resume its mineral exploration. Further confrontations resulted in KI leaders being jailed for six months for disobeying a court order not to interfere with the exploration work. Ultimately, the Ontario government paid Platinex $5 million to surrender its mineral claims and settle a lawsuit stemming from the government's failure to properly consult KI.[90]

KI's struggle to impose its mining moratorium continues. Another battle over mining exploration is heating up with God's Lake Resources, a gold company who has allegedly staked claims on top of sacred KI burial sites. The company has dismissed KI's concerns as "rhetoric, indicating that they intend to continue exploration."[91] In what seems like history repeating itself, Ontario refuses to stop the company from disturbing the graves while a resolution is negotiated.

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[86] *KI*, at para. 126.
[87] *KI*, at para. 76.
[88] *KI*, at para. 71.
[89] *KI*, at para. 95.
[90] Ontario Federation of Labour, *Ontario Labour Movement warns of Ipperwash in the making if province does not stop violation of KI sacred burial sites and exploitation of land*, published November 29, 2011, accessed at <http://ofl.ca/index.php/news/index_in/ontario_labour_movement_warns_of_ipperwash_in_the_making_if_province_does_n/> on January 11, 2012.
[91] *Ibid.*

(c) YUKON

The Yukon has a long history of fame for its mining resources.[92] Revenue generated from this industry continues to grow with record breaking numbers in the territory. Mineral exploration spending in 2011 was expected to be in excess of $300 million, nearly twice as high as the previous year.[93] The recent frenzy in staking activity has meant that nearly 250,000 claims, or a tenth of the Yukon's land mass, have been staked this year alone.[94] The sheer volume of these claims has led First Nations throughout the territory to call for reform. They argue that they are swamped by proposals and the current process does not allow for a constructive and informed dialogue.

(i) Ross River Dena and a Challenge to Quartz claims

The Ross River Dena Council ("Ross River Dena") is a Kaska First Nation, one of three Yukon First Nations yet to sign a Final Land Claim and Self Government Agreement. From 1996 to 2002, the Ross River Dena participated in negotiations, until the Government of Canada land claims mandate expired. Since then, there have been no further talks.[95] The Ross River Dena, however, has been granted interim land withdrawals to protect lands selected by the First Nation from disposition and staking. Currently, there are 8,633 active mineral claims within the Ross River area, comprising 14% of the total land mass covered by its land claim.[96]

Section 12 of the *Quartz Mining Act* provides that "any individual 18 years of age or older may enter, locate, prospect, and mine for minerals on…any vacant territorial lands." To record a mineral claim, a locator must simply provide a plan showing the location of the mineral claim, payment of the necessary fee, and the prescribed application accompanied by an affidavit.[97] The holder of a mineral claim is "entitled to all the minerals found in or under the lands together with the right to enter on and use and occupy the surface of the claim."[98] While

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[92] The Klondike Gold Rush of the late nineteenth century is but one example.
[93] Yukon News, "Yukon mineral exploration industry enjoys a banner year", published December 23, 2011, accessed at < http://www.yukon-news.com/business/26504/> on January 10, 2012 [Banner Year].
[94] *Ibid.*
[95] For the most recent judicial comments on those negotiations, see *Ross River Dena Council v. Canada*, 2012 YKSC 4
[96] *Ross River Dena Council v. Government of Yukon (Chamber of Mines)*, 2011 YKSC 84 at para. 11 ("*Ross River*").
[97] *Ross River*, at para. 28.
[98] *Ross River*, at para. 32.

the mineral claim holder will be informed if their claim falls on Kaska land, consultation for Class 1 exploration programs is not required. This can result in the claim holder undertaking exploration work without being required to notify the government or obtain any permits prior to beginning work. This creates a situation where neither the Yukon government nor First Nations may know the location, extent, or impact of quartz exploration activity.

The Ross River Dena Council brought a summary trial proceeding seeking a declaration that the Crown has a duty to consult prior to the recording of quartz mineral claims. The Yukon government argued that in recording the claim, it was merely carrying out a statutory requirement. Ownership of a quartz mineral claim comes into being when a person locates and stakes it, requiring no Crown grant of authorization, and no exercise of discretion.[99] The notion that mineral claims and exploration go undisclosed is based on the idea that staking is strategic and highly confidential, resulting in considerable expense and financial risk. As such, requiring consultation prior to staking would create an administrative nightmare and would involve disclosing valuable commercial interests.[100]

The Ross River Dena nonetheless argued that disposition of mineral rights triggers the duty to consult as outlined in *Haida* as the recording of a mineral claim has the potential to negatively impact Aboriginal rights and title. That is, Class 1 exploration activities, which include the construction of camps, storage of fuel, construction of lines and corridors, clearing and trenching, the use of explosives and the removal of rock,[101] create significant impacts on the environment and the rights of First Nations.

Mr. Justice Veale held that the Ross River Dena had made out the elements of the *Haida* test. He concluded that the duty to consult was triggered, but only after the mineral claim was staked. He felt that this was the most appropriate time for consultation to arise as the claim "holder has some security of tenure and the First Nation is able to determine its potential adverse impact."[102] He suggested that consultation is needed at this stage because exploration programs "which are not subject to any notice, permission or assessment certainly carry the potential for

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[99] *Ross River*, at para. 50.
[100] *Ross River*, at para. 71-72.
[101] *Ross River*, para. 39.
[102] *Ross River*, at para. 73.

adverse impacts…"[103] He furthered that the duty to consult lies 'upstream' of the statute and that despite the non-discretionary nature of the *Quartz Mining Act*, the government cannot follow a legislative mandate in a manner that offends the Constitution. [104]

4. DISCUSSION

Although litigation is not a preferable route for dealing with Aboriginal concerns, in the cases reviewed above, injunctions and judicial review have proven to be important tools for halting exploration activities that may irreparably harm Aboriginal and Treaty rights. Relief granted by the courts can prove to be a valuable interim process to encourage the parties to return to negotiations, restrain the use of power and provide incentives for the parties to negotiate a conclusion in a manner that respects Aboriginal rights.[105] It is difficult to see how true constitutional rights can meaningfully exist without some legal protection against the exercise of power. As Professor Kent Roach notes, "Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation."[106]

The above cases also highlight how courts have struggled with the tension between mining regimes, which promote staking and exploration, and First Nations' constitutional rights. The face of mining has changed since the origins of the free entry system in Canada. The reality is that staking an exploration has become large scale and industrialized. As such, the consequences of these activities are much greater than those envisioned in the early days of prospecting when the claim-staking or exploration-tenure regimes were developed.

The jurisprudence shows a growing recognition that tenure decisions and mine exploration activities can and do pose serious adverse impacts on Aboriginal and Treaty rights, especially in areas of high cultural significance. The potential cumulative effects of further development may bring a particular tract of land to an ecological breaking point, at least with respect to the continued ability of First Nations to use that land as they have always done.

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[103] *Ross River*, at para. 68.
[104] *Ross River*, at para. 54.
[105] Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights," (1992) 21 Man. L.J. at para 5.
[106] *Ibid.*, at para 2, 8.

In the context of assessing potential impacts to Aboriginal and Treaty rights, controlling the momentum of mine exploration has proven to be extremely difficult. On a high level, mine exploration regimes across the country appear to have serious flaws with respect to ensuring that principles of consultation are being met in a meaningful and balanced way. Compounded with First Nations lack of notice, time, and resources to adequately study and respond to the effects of exploration activities, make it incredibly burdensome for First Nations to clearly articulate adverse effects and manage development within their territories. Without early and meaningful engagement, the cases illustrate the real possibility that First Nations' lands will suffer irreparable harm. It also results in First Nations not having sufficient opportunities to minimize impacts, protect their rights or share in joint ventures.

Moreover, a lack of proper and timely consultation has the potential to significantly impact industry, especially junior companies operating on narrow margins. Contrary to the decision in *Ross River Dena* ,[107] we do not believe that meaningful consultation can occur after the claim-staking or exploration-tenure stage. Instead, it would be beneficial to all parties for that consultation to occur prior to claims being staked and exploration tenures being granted. First Nation interests would be identified well in advance for all to consider and before industry had vested interests in proceeding to development, including exploration. By engaging First Nations earlier, exploration companies could identify potential issues as well as opportunities for building mutually beneficial relationships with the potentially affected First Nations. Some mine exploration companies and First Nations have had success developing consultation protocols and agreements that articulate appropriate consultation processes, provide mechanisms to remedy disputes, and even allow First Nations to share in the revenue generated by mine development of their territories.

However, at the most basic level, the Crown and industry must be mindful of Canada's constitutional arrangements including the duty of consultation. A lack of understanding on what constitutes proper consultation and accommodation may preclude positive working relationships for First Nations and industry. While the law is clear that First Nations do not have a veto over mine exploration, the balancing of Aboriginal and Treaty rights through the duty of consultation

[107] *Ross River*, at paras. 78 to 82.

may result in significant alterations or even relocation of proposed projects, or other measures to protect the continued, meaningful exercise of those Aboriginal and Treaty rights. This can be a particularly difficult notion to accept for companies who may literally be sitting on a gold mine.

Perhaps what is most interesting in many of these cases is the pervasive reticence of provincial and territorial governments to ensure that consultation is adequate and meaningful prior to the authorization of exploration tenures and exploration activities. There is a flavour of minimization by the Crown of the potential harm from such tenures or activities on the asserted or existing First Nation right which runs through all the cases considered above. This blinkered perspective has drawn fairly sharp criticism from the bench.[108] It is also a position without judicial support. The jurisprudence is clear that the Crown has the ultimate responsibility for faithfully discharging the duty to consult and to protect First Nation interests from abuse. In doing so, the Crown must be ready and willing to acknowledge and give priority to s. 35(1) rights where appropriate.

All of this points to a need for the Crown to be actively involved in the consultation process from beginning to end. Although the law is clear that procedural aspects of consultation can be delegated to third party resource developers, in practice that sometimes appears to be whole-scale abdication of Crown participation in the consultation process. By any reasonable standard, that is not honourable conduct. The Crown must take an active role in consultation (something entirely missing in *Wahgoshig* and in the early stages of *KI)* and cannot rely solely on the mitigation efforts advanced by the proponent (as was the case in *West Moberly*).

Better still, the Crown should engage in modernizing legislative regimes to accord to the duty to consult. The example discussed in this paper clearly points to the need for law reform to the various tenure and exploration regimes in place in the jurisdictions reviewed above (and perhaps across the country generally). The staking of claims and the exploration for mining resources is based on an archaic and antiquated approach to mining from the nineteenth century. That was a very different time from today, with its modern exploration technology and a mature jurisprudence regarding the constitutional protection of Aboriginal and Treaty rights. The regulatory regimes governing the exploration and staking of mineral and other subsurface

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[108] *West Moberly*, at paras. 146, 149-151.

resources other than petroleum and natural gas resources desperately needs to be modernized, so that it can be responsive to the modern economy and the modern state of the law. Arguably, that has happened in the oil and gas sector, and there would seem to be a similar need for the same to happen to the mining sector as well. [109, 110, 111] Otherwise, mine exploration and Aboriginal interests remain on an irreconcilable 'collision course.'

[109] In British Columbia the first step in oil and gas development occurs when a company expresses an interest in developing a specific parcel of land. At this stage, MEMPR consults with local governments and First Nations. Based on the feedback received, MEMPR will determine whether or not a parcel will be included in a competitive auction of Petroleum and Natural Gas (PNG) tenure, or whether specific caveats will be placed on the land parcel. See Ministry of Energy, Mines and Petroleum Resources, Government of British Columbia, "Oil and Gas Development and You, Information for Land Owners", located at: http://www.em.gov.bc.ca/OG/oilandgas/Neemac/Documents/Oil%20and%20Gas%20Development%20and%20You%20FINAL.pdf, at pp. 3 & 4, accessed on February 9, 2012.

[110] Alberta and Ontario also utilize a tenure system for the sale of oil and gas leases. See Government of Alberta Energy, "Alberta's Oil and Gas Tenure," located at: http://www.energy.gov.ab.ca/Tenure/pdfs/tenure_brochure.pdf at p. 12, accessed on February 9, 2012; See Ontario Ministry of Natural Resources, "Oil, Gas and Salt Resources, Part IV of the Mining Act and Ontario Regulation 263/02," located at: http://www.mnr.gov.on.ca/en/Business/OGSR/2ColumnSubPage/STEL02_167097.html, accessed on February 9, 2012.

[111] Quebec uses a call for bids process only for exploration licences located in offshore locations. See, Ressources naturelles et Faune Québec, "Highlights on Energy, The Process," located at: http://www.mrnf.gouv.qc.ca/english/energy/oil-gas/oil-gas-process.jsp, accessed on February, 9, 2012.