

## Grassy Narrows brings the battle over mining claims and the duty to consult to Ontario

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Authors: [Richard J. King](#), [Alan Hutchison](#), [Ben Beiles](#)

On July 10, 2024, Grassy Narrows First Nation (GNFN) filed a notice of application (the application) in the Superior Court of Justice challenging the constitutionality of the Ontario *Mining Act*.

The application alleges that the *Mining Act* violates GNFN's treaty rights under section 35 of the *Constitution Act, 1982* and contravenes principles laid out in the United Nations

Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>[1]</sup> The primary contention of the application revolves around the absence of a process for consultation and accommodation of Indigenous groups prior to registering mining claims and conducting certain assessment activities under the *Mining Act*.

From the perspective of the mining industry, this application may add to the growing list of challenges to developing mining projects at a time when Canada is looking to expand critical mineral production.

### Background

This legal action comes on the tails of *Gitxaala v. British Columbia (Chief Gold Commissioner)*,<sup>[2]</sup> in which the Supreme Court of British Columbia held that the Province of British Columbia has a duty to consult with Indigenous groups when registering mineral claims in their traditional territory. You can read more about the *Gitxaala* decision [in our earlier Update](#).

In brief, the Court held that the registration of mining claims under the B.C. mining title regime has adverse impacts on asserted First Nation rights and on territory with cultural and spiritual significance to First Nations.<sup>[3]</sup> These adverse impacts included conferring the exclusive right on prospectors to explore and disturb the land, as well as the right to remove prescribed amounts of minerals from the land.<sup>[4]</sup> Therefore, the duty to consult is triggered every time a mining claim is registered.

The GNFN application raises much of the reasoning adopted by the B.C. Supreme Court. However, there are some notable differences in Ontario's mining regulatory scheme that could ultimately lead to a different result.

In Ontario, the *Mining Act* regulates the staking of mining claims and the subsequent

exploration and development of mineral resources.<sup>[5]</sup> Under the *Mining Act*, individuals are able to register mining claims online after completing a one-hour online course and paying a small fee.<sup>[6]</sup> Once they have registered their mining claim, a licensee is able to perform assessment work on that claim as prescribed by the regulations.<sup>[7]</sup> This can include taking samples, exploratory drilling and other assessment work that involves entering on and using the claim for the purpose of prospecting.<sup>[8]</sup>

Additionally, once a claim is registered and a prescribed level of assessment work is performed and reported, the holder of a mining claim is entitled to a lease of the claim.<sup>[9]</sup> Therefore, the staking and registration of mining claims is an important stage in the eventual development of an operational mine.

The Crown's duty to consult and accommodate, and protections for section 35 rights, are integrated into the *Mining Act* when a person engages in early exploratory activities that meet a certain threshold.<sup>[10]</sup> These activities are set out in Schedule 2 and 3 of Ontario Regulation 308/12: *Exploration Plans and Exploration Permits*, and include, for example, geophysical surveys that involve a generator or mechanized drilling for the purpose of obtaining samples.<sup>[11]</sup> Any early exploration proponent must conduct these prescribed activities in a manner "consistent with the protection provided for existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*".<sup>[12]</sup> Additionally, consultation with potentially impacted Aboriginal communities is a mandatory component of the exploration plan and permit processes.

According to the notice, there are approximately 10,000 registered mining claims in the "Grassy Narrows' Interim Core Area of Interest for Mining" (the area).<sup>[13]</sup> GNFN identified the area in November 2023 as an interim representation of the area in which mining-related activities could have direct adverse impacts on the First Nation and its members.<sup>[14]</sup> The application does not comment on whether any exploration plans or permits have been issued in relation to the mining claims in the area.

#### The notice of application

The primary contention of the application revolves around the lack of consultation or accommodation of GNFN prior to registering mining claims or engaging in assessment activities that do not meet the threshold for an exploration plan or permit.

GNFN claims that the registration of mining claims and assessment activities have the potential to cause adverse impacts on GNFN rights, including adverse physical impacts such as the loss of minerals, mineral rights, interference with trapping lines and hunting grounds and the non-negligible disturbance of Treaty land.<sup>[15]</sup> On that basis, GNFN asserts that Ontario has a duty to consult, accommodate and obtain consent, which flows from section 35 of the *Constitution Act, 1982* and Article 32 of the UNDRIP.<sup>[16]</sup> In particular, GNFN points to interference with its Treaty 3 rights to maintain traditional practices such as hunting, fishing, trapping and rice harvesting, as well as its inherent right to self-determination.<sup>[17]</sup> The application also cites Article 32 of UNDRIP, which requires states to consult and co-operate in good faith with Indigenous Peoples in order to obtain their free, prior and informed consent regarding projects affecting their lands, territories and other resources.<sup>[18]</sup>

Since the *Mining Act* does not provide for consultation or accommodation for early exploratory activities unless an exploration plan or permit is required, GNFN asserts that the

duty to consult is not fulfilled.

As such, the First Nation seeks

- declarations that sections of the *Mining Act*, regulations under the *Mining Act* and the system of registering of mining claims are unconstitutional<sup>[19]</sup>
- declarations that Ontario has a duty to consult and accommodate and obtain free, prior and informed consent from GNFN when determining whether to grant, renew or transfer mining claims and allow assessment work to be carried out<sup>[20]</sup>
- declarations that existing mining claims in the area, including ongoing mining activities, are not consistent with section 35 and the UNDRIP and must be rescinded<sup>[21]</sup>
- an order in the nature of prohibition preventing Ontario from issuing, renewing or transferring mining claims in the area until the duty has been discharged<sup>[22]</sup>

Implications of GNFN's claim

It remains unclear whether the GNFN claim will succeed. While the application replicates many of the arguments that were successful in *Gitxaala*, the Court may find that the existing Ontario mining regime is more effective than the British Columbia regime at protecting Aboriginal rights and facilitating consultations where appropriate.

In contrast to British Columbia, the Ontario regime expressly incorporates Aboriginal consultation into the rights and obligations of claim holders under the *Mining Act*.<sup>[23]</sup> While both jurisdictions consider Aboriginal rights in the permitting process for mineral exploration, the Ontario regime goes a step further in making the primary rights associated with mining claims — the right to conduct mineral exploration — subject to prescribed Aboriginal consultation. Arguably this makes Ontario mining claim rights subject to Ontario's constitutional obligations with respect to Aboriginal rights.

As a matter of practice, it should also be noted that the Ontario Mining Lands Administration System identifies areas impacted by First Nations claims in the online staking process. This links the mineral tenure system to First Nations claims and ensures that project proponents have notice of potential affected First Nations prior to any exploration work taking place.

These considerations may distinguish the Ontario regime from that of British Columbia. However, should GNFN succeed in its legal challenge, the decision could have far-reaching implications for the mining industry in Ontario and across Canada. If the GNFN claim proceeds to trial, it will test the constitutionality of one of the most significant mineral title regimes in Canada at a time when Canada is seeking to expand its production of critical minerals. It may also lead to uncertainty in other jurisdictions in Canada.

There are already several advanced critical mineral projects in northwest Ontario that are impacted by First Nation claims. The initiation of this legal action creates uncertainty for the development of those projects as proponents and regulators may hold off on approving initiatives that might run afoul of a court decision that imposes more rigorous consultation requirements. It also may adversely affect the ability of project proponents to obtain financing. This uncertainty clashes with the Ontario government's stated goal of fast tracking the permitting process for these mining projects. The prospect of a court decision that requires the transformation of the Ontario mining title regime is not compatible with an expeditious approval process.

[1] *Grassy Narrows First Nation v. His Majesty the King in Right of Ontario* (10 July 2024), Toronto CV-24-00723693-0000 (SCJ) (GNFN application).

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

[3] *Gitxaala*, at para. 14.

[4] *Gitxaala*, at para. 396.

[5] *Mining Act*, R.S.O. 1990, c. M.14 (Mining Act).

[6] *Mining Act*, s. 19(1), s. 38(2); *Mining Claims*, O Reg 66/18, s. 2.

[7] *Mining Act*, s. 50(1).

[8] *Mining Act*, s. 65, s. 66; *Assessment Work*, O Reg 65/18, s. 2(1).

[9] *Mining Act*, s. 81.

[10] *Mining Act*, s. 78.2, s. 78.3.

[11] *Exploration Plans and Exploration Permits*, O Reg 308/12, Schedule 2 and Schedule 3.

[12] *Exploration Plans and Exploration Permits*, O Reg 308/12, s. 2.

[13] GNFN application, s. 2(v).

[14] GNFN application, s. 2(q).

[15] GNFN application, s. A(kk)(i).

[16] GNFN application, s. A(y), s. A(ee).

[17] GNFN application, s. 2(e) – s. 2(g).

[18] GNFN application, s. 2(ee).

[19] GNFN application, s. 1(a), s. 1(d). Seeks to declare unconstitutional: *Mining Act*, s. 27, s. 28, s. 38, s. 38.3, s. 50(2), s. 52(1), s. 65(1), s. 66; *Mining Claims*, O Reg 66/18; *Assessment Work*, O Reg 65/18.

[20] GNFN application, s. 1(b), s. 1(f).

[21] GNFN application, s. 1(e), s. 1(h).

[22] GNFN application, s. 1(g).

[23] See *Mining Act*, s. 78.2 and s. 78.3.