IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gitxaala v. British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680

Date: 20230926
Docket: S219179
Registry: Vancouver

Between:

Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of Smgyigyetm Gitxaala, and Gitxaala Nation

Petitioners

And

Chief Gold Commissioner of British Columbia, Lieutenant Governor in Council of British Columbia, Attorney General of British Columbia, Christopher Ryan Paul, Oliver John Friesen, GMR Global Mineral Resources Corp., and Johan Thom Shearer

Respondents

- and -

Docket: S224680
Registry: Vancouver

Between:

Ehattesaht First Nation and Chief Simon John in his capacity as Chief of the Ehattesaht First Nation on behalf of All Members of the Ehattesaht First Nation

Petitioners

And

His Majesty the King in Right of the Province of British Columbia, as represented by the Chief Gold Commissioner of British Columbia; Attorney General of British Columbia; Privateer Gold Ltd.; Almehri Mining Inc.; GMR Global Mineral Resources Corporation; Lieutenant Governor in Council of British Columbia; Andre Lyons, Calvin Manahan, and Forest Crystals Ltd.

Respondents

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Petitioners in Action # S219179:	L.C. Fong, K.C. G. Smith S. Zhu
Counsel for the Petitioners in Action # S224680:	L. Glowacki M. Giltrow, K.C. G. Hermansen
Counsel for Chief Gold Commissioner of British Columbia, Attorney General of British Columbia, and Lieutenant Governor in Council of British Columbia:	L. Greathead S. A. Bevan R. Dickinson
Counsel for Privateer Gold Ltd.:	J. Williams
Counsel for the Attendees Gitanyow Hereditary Chiefs and Nak'azdli Whut'en First Nation:	M. Underhill K.C. A. Kirby
Counsel for the Attendees Association of Mineral Exploration, Prospectors and Developers Association of Canada, and Mining Association of BC:	K. O'Callaghan N. Surkhan
Counsel for the Attendees Ts'kw'aylaxw First National and Nuxalk Nation:	K. Ramji
Counsel for the Attendee Human Rights Commissioner for British Columbia:	T. Williams-Davidson, K.C. H. Hoiness
Counsel for the Attendees First Tellurium Corp. and Kingston Geoscience Ltd.:	K. Hille
Counsel for the Attendees BC Assembly of First Nations, Union of British Columbia Indian Chiefs, and First Nations Summit:	J. Walker H. Roche
Counsel for the Attendee Mining Watch Canada, the B.C. Mining Law Reform Network, Wildsight, SkeenaWild Conservation Trust, Kamloops Moms for Clean Air, and Western Canada Wilderness Committee (the “ENGO Coalition”):	M. Blakley

Place and Date of Trial/Hearing:	Vancouver, B.C. April 3–6, 11–14, and 20–21, 2023 May 3–5, and 19, 2023
Place and Date of Judgment:	Vancouver, B.C. September 26, 2023

Table of Contents

Introduction

[1] These reasons address the claims made by the petitioners in two separate petitions. The two petitioners are First Nations within British Columbia ("BC"). The petitioners argue that the current mineral tenure system in the province operates in contravention of the Crown's duty to consult with First Nations. The petitioners seek several forms of relief which I outline below.

[2] Mineral exploration in BC 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 unclaimed Crown land. The holder of a mineral claim (the "recorded holder") is granted various rights, including the right to explore and dig up the claim area to search for minerals. If minerals are found, and the miner wishes to extract them on a commercial level, they must apply for further approvals under the *Mines Act*, R.S.B.C. 1996, c. 293.

[3] There is no consultation with affected First Nations at the time a mineral claim is granted. Consultation only occurs at the later permitting stages.

[4] Both petitioners assert rights to certain territories in BC. These petitions relate to the petitioners' asserted rights, and not to established or treaty rights. Both petitioners argue that the granting of mineral claims under the *MTA* adversely affects their asserted rights. The petitioners' claims arise from two different legal bases.

[5] First, the petitioners claim that the mineral tenure system breaches their rights under s. 35 of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution*]. They allege that mineral claims adversely impact their Aboriginal claims or rights and, as a result, the test set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (the "*Haida* Test"). The *Haida* Test dictates that the province has a duty to consult before granting those mineral claims. The petitioners submit that the breach is occasioned either by the improper implementation of the *MTA*, or alternatively, by the constitutional invalidity of the *MTA*.

[6] Second, the petitioners rely on the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*DRIPA*], and the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) G.A. Res 61/295 [*UNDRIP*]. They submit that the *MTA* is inconsistent with the rights recognized in both *DRIPA* and *UNDRIP*.

[7] The petitioners seek either a declaration or injunctive relief. They also seek to quash several recently granted mineral claims.

[8] In response, the province acknowledges that the *MTA* and the broader schemes of mineral exploration and mining, like most natural resource legislation, raise the issue of "reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions": *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 1. The province submits that reconciliation of the Aboriginal rights of Gitxaala and Ehattesaht with the competing claims, interests, and ambitions of others, can best be achieved through ongoing dialogue.

[9] The province does not deny that it owes any obligation to First Nations with respect to mineral prospecting. As discussed below, the origins of the *MTA* date back to 1859. Our society has evolved. The province says that it is working in consultation with First Nations to reform the mineral tenure system. The province submits that the process of legislative reform and reconciliation should be allowed to continue.

[10] With that said, the province acknowledges that a court ruling will assist in facilitating the dialogue by answering the legal issue of whether s. 35 imposes, through the honour of the Crown, a constitutional obligation on the province to consult with Indigenous groups prior to the registration of mineral claims in their territories.

[11] In response to the petitioners' arguments, the province submits that the current mineral tenure system, and the granting of mineral claims, do not create adverse impacts that are sufficient to trigger a duty to consult.

[12] The province further submits that *DRIPA* does not create any justiciable rights, nor does it implement *UNDRIP* into domestic law. The province submits that *DRIPA* sets out a commitment to reconciliation and not the establishment of rights that can be enforced by the courts.

[13] Finally, the province submits that if I find in favour of the petitioners, then the proper remedy would be a declaration of that right. The province also requests that the declaration be suspended for a period of 18 months in order to allow the parties to work toward reconciliation of these issues.

Summary of Findings

[14] As discussed below, the parties proceeded through their submissions over a period of 14 days. Due to the volume and variety of issues presented, each party took many legal positions and many positions in the alternative. I find it efficient at this early stage to set out the positive findings that I make in these reasons. By doing so, I eliminate the need to address many of the alternative positions taken by the parties. By definition, these findings fall into the "big picture" category. I deal with the granular analysis below.

a) Applying the *Haida* Test, I find that a duty to consult is triggered by the current system of issuance of mineral claims because it causes adverse impacts upon:

    i. areas of significant cultural and spiritual importance to the petitioners; and

    ii. the rights of the petitioners to own, and achieve the financial benefit from, the minerals within their asserted territories.

b) I find that this duty to consult flows from s. 35 of the *Constitution* and the application of the *Haida* Test.

c) I find that the Chief Gold Commissioner ("CGC") has discretion, within the existing *MTA*, to create a structure that provides for consultation with First Nations. It follows that

   i. I do not find that the *MTA* is constitutionally invalid; and

   ii. I do not need to address the alternative position that the Lieutenant Governor in Council is in breach of their s. 35 obligations by failing to promulgate regulations.

d) Having considered the text, context, and purpose of *DRIPA* and its relationship to *UNDRIP*, I find that *DRIPA:*

   i. s. 2 does not implement UNDRIP into the domestic law of BC;

   ii. s. 3 does not create justiciable rights;

   iii. however, I have used *DRIPA* as an interpretive aid in addressing the proper reading of the *MTA*.

e) I find that the proper remedy in these cases is a declaration that the province owes a duty to consult. I suspend the implementation of that declaration for a period of 18 months to allow the CGC or the executive branch to consult and design a regime that allows for consultation (or if necessary, for the province to amend legislation). It follows that I am not granting the injunctive relief or the quashing relief sought by the petitioners.

[15] I pause here to note that this is, to my knowledge, the first judicial consideration of the legal effect of *DRIPA*. As noted above, I find that the petitioners are not entitled to any relief under *DRIPA* or *UNDRIP*. As I discuss in that section of these reasons, I anticipate that this will be the first of many opportunities for the

courts to consider *DRIPA* and *UNDRIP*. I expect that both the legislation and the jurisprudence will develop over time. However, these reasons address the legal effect of the current legislation.

Important Legal Concepts

[16] My reasons below proceed upon a foundation of legal principles that are not in dispute. These principles provide the context for my reasons:

a) Indigenous rights are existing rights. This proposition is not in issue. As stated by Chief Justice McLachlin in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*]:

> [69] … At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

b) The petitioners are First Nations who assert that they hold rights that pre-existed the province's assertion of sovereignty in the 19th century.

c) The work of reconciling Indigenous legal systems with BC's and Canada's legal systems is ongoing.

d) The petitioners have not settled treaties with Canada or BC. The petitioners' claims are at a chronological stage wherein their assertion, and the extent, of their rights and title to territories has not been settled.

e) There is always a gap in time between the moment a First Nation asserts its rights over any territory and the final settling of that Indigenous claim. The practical reality of the reconciliation process is that the parties require a working legal framework during that interim period. That legal framework has been set out in a progression of prior cases.

f) During that interim period, the Crown has the obligation of managing and administering the land over which any First Nation asserts rights or title.

g) The "honour of the Crown" requires the province to take the necessary steps to protect the asserted interests of First Nations until such time as the full nature of those rights can be resolved.

h) There will be circumstances where the province makes decisions in the management of territories that have an adverse impact on the First Nation asserting rights and title to that territory. When an adverse impact occurs, the province has a duty to consult with the affected First Nation.

i) Part of the legal framework for this interim period consists of the *Haida* Test. In short, a duty to consult arises when:

   i. the province is aware of a First Nation's asserted claim to a territory;

   ii. the province contemplates conduct; and

   iii. that conduct may adversely affect or impact an Aboriginal claim or right.

[17] The province acknowledges that elements i. and ii. are established in these cases. Hence, these reasons focus primarily on the third element of the *Haida* Test. The petitioners allege that they suffer adverse impacts from the granting of mineral claims. The province says that they do not.

[18] I also want to address the use of language and alphabet in my reasons. In submissions, counsel referred to many persons, places, and terms in the language and alphabet of either the Ehattesaht (Nuu-chah-nulth) or the Gitxaala. In these reasons I have attempted to explain the English translation of those terms. I have primarily used English terms in the process of my writing. I proceeded in this fashion because I am writing for a larger audience and in the English language. I mean no disrespect by replacing the Nuu-chah-nulth and Gitxaala terms with my understanding of the closest English translation.

List of Issues, Procedural and Substantive, and Non-Issues

[19] In addition to the main substantive issue (the *Haida* Test), I address the following issues below:

a) The petitioners are proceeding by way of judicial review. Hence:

   i. Is a judicial review the proper mode of proceeding?

   ii. If so:

      1) Is the relief sought systemic or particular to the individual petitioners?

      2) What is the decision under review?

      3) What is the standard of review?

      4) What is "the record" of the impugned decision?

      5) What evidentiary rules are applicable to the evidence adduced by the petitioners and the respondents?

b) Following a discussion of those procedural and evidentiary issues, I set out the factual basis (the "Record") upon which I am proceeding.

c) Based upon the Record, does the granting of mineral tenures under the current mineral tenure system trigger a duty to consult pursuant to s. 35 of the *Constitution*?

d) If a duty to consult exists under s. 35, and the province is in breach of that duty, does that infirmity arise from:

   i. the improper implementation of the *MTA* by the Chief Gold Commissioner? or

   ii. the constitutional invalidity of the *MTA*?

e) Does *DRIPA*:

i. "implement" *UNDRIP* into the domestic law of BC?

ii. create justiciable rights?

f) If a duty to consult is found, what is the appropriate remedy?

[20] I note that these issues lead to numerous sub-issues which I outline and discuss below.

[21] To be clear, the only substantive issue before me is whether the duty to consult is triggered at the mineral claim stage. The parties agree that the appropriate "measures" (meaning the level, type, or depth of any consultation) are not a proper consideration for the court in these proceedings.

[22] Further, I am not deciding any issues relating to placer mines. (Placer mining involves separating heavily eroded minerals, like gold, from sand or gravel, usually on the run of a river.)

[23] Finally, apart from the specific mineral claims noted in the two petitions (and discussed below), I am not deciding the validity of any previously registered mineral claims, mineral leases, or mines. Hence, to be clear, this decision does not affect the rights of the recorded holder of any existing mineral claim in BC except insofar as that recorded holder of that claim is named as a respondent in one of the two petitions.

[24] I now turn to a description of the parties and the territories in issue.

The Parties and the Territories

The Petitioners

[25] In the first petition, the petitioner is Sm'ooygit Nees Hiwaas ("Nees Hiwaas"), also known as Matthew Hill, a hereditary chief of a clan of the Gitxaala Nation. The governing body of the Gitxaala Nation, the Smgyigyetm, or hereditary table,

appointed him to bring this petition. Given his representative capacity, I refer to this petitioner throughout these reasons as “Gitxaala” and people who comprise the nation as “the Gitxaala”.

[26] Nees Hiwaas describes the Gitxaala traditional territories as a portion of BC in the area of Banks Island. Banks Island is located between Haida Gwaii and the mainland, approximately 100 kilometers south of the City of Prince Rupert. Gitxaala asserts rights and title to this area, including the air, lands, waters, and water-covered lands. Gitxaala has not signed any treaty or completed any negotiation with BC or Canada regarding its traditional territory. As a result, this petition proceeds on the basis of Gitxaala’s asserted claims. For efficiency in these reasons, I refer to these areas as the “Gitxaala Territory”. To be clear, however, that term is used for convenience. It neither connotes nor confers any rights to Gitxaala. I describe the evidence adduced by Gitxaala below under the heading “What is the Record?”

[27] The second petition is brought by Chief Simon John (“Chief John”) in his capacity as the Chief of the Ehattesaht First Nation on behalf of all members of that nation. Given his representative capacity, I refer to this petitioner throughout these reasons as “Ehattesaht.”

[28] Chief John describes the Ehattesaht First Nation as a group of approximately 542 members. The Ehattesaht are within the Nuu-chah-nulth cultural and linguistic group and reside on the West Coast of Vancouver Island. He describes the traditional territory of the Ehattesaht between Kyuguot Channel and Moxino Point, including the north half of Esperanza Inlet and Hecate Channel, Zeballos Inlet, Espinosa Inlet, Espinosa Arm, Port Eliza, Queen’s Cove, Rugged Point and the surrounding lands. For the assistance of non-residents of the area, this territory is approximately 100 kilometers northwest of the Town of Tofino. Although I used the term “traditional territory” above, Chief John describes the close connection that the Ehattesaht have to the lands and waters upon which they have lived for thousands of years. Ehattesaht has not signed any treaty or completed any negotiation with BC regarding its traditional territory. As a result, this petition proceeds on the basis of

Ehattesaht's asserted claims. For convenience in these reasons, I sometimes refer to these areas as the "Ehattesaht Territory". As noted above, my use of that term is for convenience and neither connotes nor confers any rights to Ehattesaht. I further describe the evidence adduced by Ehattesaht below under the heading "What is the Record?"

[29] Gitxaala and Ehattesaht are:

a) bands as defined in s. 2(1) of the *Indian Act*, R.S.C. 1985 c. 1-5; and

b) "aboriginal peoples" for the purpose of s. 35(1) of the *Constitution.*

The Respondents

[30] In the further amended petition of Gitxaala, the named respondents are:

a) Chief Gold Commissioner of British Columbia ("CGC");

b) Lieutenant Governor in Council of British Columbia ("LGIC");

c) Christopher Ryan Paul and Oliver John Friesen;

d) GMR Global Mineral Resources Corp. ("GMR"); and

e) Johan Thom Shearer.

[31] The CGC and the LGIC are represented by the Ministry of the Attorney General of the province. When a position is taken by counsel for the Attorney General, I refer to those parties in these reasons as "the province". However, when I address the functions of each provincial actor, I discern between them.

[32] Mr. Paul and Mr. Friesen are the holders of five mineral claims registered in 2018 comprising approximately 1,200 hectares located on Gitxaala Territory. Gitxaala seeks to quash these mineral claims. Mr. Paul and Mr. Friesen filed a response to the petition but did not make submissions at the hearing.

[33] Mr. Shearer is the holder of a mineral claim registered in 2020 comprising 172.78 hectares located on Gitxaala Territory. Gitxaala seeks to quash that mineral claim. Mr. Shearer did not respond to the petition.

[34] GMR was the holder of a mineral claim registered in 2018 comprising 58.78 hectares located on Gitxaala Territory. Gitxaala seeks to quash that mineral claim. GMR did not respond to the petition and evidence adduced at the hearing indicated that GMR's mineral claims lapsed by the final date of the hearing.

[35] In the further amended petition of Ehattesaht, the named respondents are:

a) His Majesty the King in Right of British Columbia as represented by the Chief Gold Commissioner of British Columbia;

b) The Attorney General of British Columbia;

c) Lieutenant Governor in Council of British Columbia;

d) Privateer Gold Ltd.;

e) Almehri Mining Inc.;

f) GMR Global Mineral Resources Corporation; and

g) Andre Lyons, Calvin Manahan, and Forest Crystals Ltd.

[36] Again, the CGC and the LGIC are represented by the Ministry of the Attorney General of the province.

[37] Privateer Gold Ltd. ("Privateer") is the holder of 16 mineral claims in Ehattesaht Territory, six of which were registered in 2022. It responded to the petition and made submissions at the hearing. Ehattesaht seeks to quash certain of Privateer's mineral claims.

[38] Almehri Mining Inc. was the holder of 11 mining and mineral claims in Ehattesaht Territory, all of which were registered in or after 2020. Ehattesaht seeks

to quash those mineral claims. However, evidence tendered at the hearing indicated that all 11 of Almehri's mineral claims had lapsed.

[39] GMR was the holder of five mineral claims in Ehattesaht Territory, registered in 2022. GMR did not respond to the petition. The Ehattesaht petition seeks to quash GMR's mineral claims. However, evidence tendered at the hearing indicated that all five of the mineral claims had lapsed.

[40] Mr. Lyons and Mr. Manahan are directors of Forest Crystals Ltd. ("Forest Crystals"). Mr. Lyons and Mr. Manahan each hold a mineral claim in Ehattesaht Territory. Ehattesaht seeks to quash these mineral claims. Evidence tendered at the hearing indicated that some of these mineral claims had lapsed. Ehattesaht also relies on the actions of Forest Crystals to illustrate adverse impacts on its rights. I discuss that evidence below.

The Intervenors

[41] Pursuant to my earlier ruling (2023 BCSC 29), there are eight intervenors (the "Intervenors") on the two petitions:

a) Gitanyow Hereditary Chiefs ("Gitanyow") and Nak'azdli Whut'en First Nation ("Nak'azdli");

b) Nuxalk Nation, as represented by its Chief and Hereditary Chiefs ("Nuxalk Nation");

c) Ts'kw'aylaxw First Nation, as represented by its Chief and Counsel ("TFN");

d) BC Assembly of First Nations, First Nations Summit, and Union of British Columbia Indian Chiefs (together, "FNLC");

e) Human Rights Commissioner for British Columbia ("BCHRC");

f) First Tellurium Corp. and Kingston Geoscience Ltd. ("First Tellurium/Kingston");

g) Mining Watch Canada, the B.C. Mining Law Reform Network, Wildsight, SkeenaWild Conservation Trust, Kamloops Moms for Clean Air, and Western Canada Wilderness Committee (the "ENGO Coalition"); and

h) Association for Mineral Exploration British Columbia, the Mining Association of British Columbia, and the Prospectors and Developers Association of Canada (collectively, the "Mining Industry Coalition" or "MIC").

[42] In general terms, the Mining Industry Coalition supported the position of the province, while the other Intervenors supported the petitioners. The Mining Industry Coalition's submissions focussed primarily on "Remedies" and supported the province's position that any relief that is granted should be suspended to allow for a transition period. To avoid duplication, the other Intervenors (in support of the petitioners) cooperated and divided the legal issues between themselves. Where those arguments divert from the petitioners' submissions, I have noted it below. I highlight, at this point, that the position taken by the BCHRC on the legal impact of *DRIPA* diverts from the positions of the petitioners and the province.

[43] According to my prior ruling, the affidavits of the Intervenors are not admissible as evidence in these petitions.

The Remedies Sought by the Petitioners

[44] For ease of understanding, I set out here a broad description of the relief sought and the respondents' position. I then set out the petitioners' claims for relief in detail.

[45] The relief sought by the petitioners is premised on their assertion that registration of mineral claims on their territories generally, and of the named claims specifically, adversely affect their asserted Aboriginal rights and title. Hence, consultation must occur before minerals claims are granted.

[46] As discussed in detail below, the petitioners chose to proceed by way of judicial review. Relief in judicial reviews is always discretionary.

[47] The two petitioners seek similar types of relief. The primary focus of their submissions was the implementation of the statutory scheme as opposed to the validity of the statutory scheme itself. Both petitioners seek declarations that the CGC's conduct in establishing an online system that allows automatic registration of mineral claims in their territories, without creating a system for consultation, breaches the obligations of the Crown.

[48] In the alternative, the petitioners argue that, if I find that the CGC has been acting within their proper authority under the *MTA*, then I should grant a declaration pursuant to s. 52 of the *Constitution* that certain sections of the *MTA* are inapplicable to their territories or constitutionally invalid.

[49] The petitioners also seek to quash or set aside specific mineral claims in each of their territories.

[50] Finally, the petitioners seek injunctive relief (both interim and final) to prevent further mineral claims from being registered in their territories until appropriate consultation can occur.

[51] I set out below a more detailed description of the relief sought by the petitioners.

Gitxaala

[52] Gitxaala seeks declarations that the Crown owes a duty to consult, and where appropriate, accommodate Gitxaala prior to allowing further acquisition of mineral claims in the lands over which it asserts title. It specifically frames these as:

a) a declaration that the province owes a duty to consult and accommodate Gitxaala prior to granting mineral claims in lands over which Gitxaala asserts Aboriginal title and that it failed to fulfill this duty;

b) a declaration that the CGC and the LGIC failed to uphold the honour of the Crown by enabling the online mineral registry to register claims without implementing measures requiring prior discharge of the duty to consult; and

c) alternatively, if the Court does not find that the CGC had discretion to establish an online registration system that required consultation, a declaration that s. 4 of the *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004 [*MTAR*], allowing registration of new claims is of no force and effect insofar as it forecloses discharge of the duty to consult.

[53] Gitxaala also seeks:

a) a declaration that the granting of mineral claims through the online registration system without consultation is inconsistent with *UNDRIP*; and

b) a declaration that the Province must consult with Gitxaala concerning measures necessary to ensure that laws and regulations relating to the grant of mineral tenures comply with *UNDRIP*.

[54] Gitxaala seeks to set aside, or quash, specific claims that were acquired without consultation on lands over which it asserts Aboriginal title. All of the claims are on Banks Island. The seven claims are:

- a 96.27-hectare claim, title number 1060541, initially registered on or about May 12, 2018 ("Claim #1");

- a 154.03-hectare claim, title number 1060731, initially registered on or about May 24, 2018 ("Claim #2");

- a 231.10-hectare claim, title number 1060750, initially registered on or about May 25, 2018 ("Claim #3");

- a 57.78-hectare claim, title number 1060752, initially registered on or about May 25, 2018 ("Claim #4");

- a 674.07-hectare claim, title number 1060849, initially registered on or about May 30, 2018 ("Claim #5");

- a 57.96-hectare claim, title number 1064493, initially registered on or about November 15, 2018 (the "Centre Claim"); and

- a 172.78-hectare claim, title number 1079580, initially registered on or about November 13, 2020 (the "2020 Claim").

[55] Gitxaala also seeks a permanent injunction prohibiting the automatic granting of mineral claims without consultation on the lands over which they assert Aboriginal title.

[56] Since the filing of this petition, the Centre Claim and the 2020 Claim have both forfeited. The respondents Mr. Paul and Mr. Friesen are the registered holders of Claims #1–#5.

[57] There are a number of other historic mineral claims on Banks Island that Gitxaala has not challenged.

Ehattesaht

[58] The remedies sought by Ehattesaht are similar to those sought by Gitxaala.

[59] Specifically, Ehattesaht seeks declaratory relief as follows:

a) A declaration that the Provincial Crown had a duty to consult with Ehattesaht before granting mineral claims in lands over which Ehattesaht asserts Aboriginal rights and title, and that it failed in fulfilling its duty;

b) A declaration that the operation of the online registration system for mineral claims is inconsistent with the honour of the Crown, the Province's duty to consult pursuant to s. 35, and the rights recognized in *UNDRIP* and *DRIPA*; and

c) If the court finds that the CGC was acting within their authority (*i.e.*, if it is found that the *MTA* foreclosed any consultation by government prior to the registration of mineral claims), then they seek a declaration that s. 6.2 of the *MTA* and/or s. 4(9) of the *MTAR* are constitutionally inapplicable to mineral claims registered without prior consultation on lands over which Ehattesaht asserts Aboriginal rights and title.

[60] Ehattesaht seeks an order quashing or setting aside the following mineral claims. Ehattesaht identified these particular claims because they are in the "the Nomash", an area within the Nomash and Zeballos River watersheds with deep historical and cultural significance for the Ehattesaht people. Ehatis, the main Ehattesaht community, is situated in the Nomash, and the nation has used and occupied the Nomash since before contact with Europeans and the Crown's assertion of sovereignty. The claims Ehattesaht seeks to quash or set aside are:

a) registered to Privateer Gold Ltd.: Mineral Title Numbers 1074243, 1074242,1074245, 1074246, 1074247, 1074248, 1074249, 1074250, 1074448, 1078087, 1094446,1094447, 1094448, 1094449, 1094450, and 1094451;

b) registered to Almehri Mining Inc.: Mineral Title Numbers 1078960, 1078961, 1078962, 1078963,1084721, 1084722, 1084723, 1084724, 1084725, 1084726, and 1084727(all forfeited);

c) registered to GMR Global Mineral Resources Corp: Mineral Title Numbers 1095269, 1095270, 1095271, 1095272, and 1095273; and

d) registered to Andre Lyons and Calvin Manahan: Mineral Title Number 1062742.

[61] Of the 36 claims Ehattesaht seeks to quash, 16 had been forfeited by the time of the hearing including all impugned mineral claims held by Almehri and GMR. GMR holds other claims in Ehattesaht territory that Ehattesaht has not sought to quash. There is also evidence that seven of the 36 claims had been amalgamated

into a single claim. Hence, the amalgamation results in a *status quo* appearing to be a decrease in the number of claims held. However, the total area affected by those claims remains the same. Among the 20 claims in good standing is at least one claim held by Forest Crystals or Andre Lyons on behalf of Forest Crystals.

[62] Ehattesaht also seeks the following injunctive relief:

a) An order enjoining the CGC from granting minerals claims or allowing renewals of existing claims in lands over which Ehattesaht asserts Aboriginal rights and title without first consulting with Ehattesaht and until a means is established through which prior consultation can occur.

b) An interlocutory or interim injunction enjoining the Chief Gold Commissioner from granting mineral claims or allowing for renewals of existing claims issued in lands over which Ehattesaht asserts Aboriginal rights and title until this petition is determined, *i.e.*, until the reasons are released.

Important Terms

[63] For ease of reference and understanding, I set out here a number of terms that are used in the mineral exploration vernacular. The definitions provided below are based on the statutory definitions in the *MTA* and the *Mines Act.* I have edited those definitions down and only include the portions of which are relevant to the current proceeding:

a) Free miner: a person who holds a valid and subsisting free miner certificate issued under the *MTA*;

b) Mineral claim or mineral tenure: a claim to the minerals within a defined area that is registered with the CGC under Part 2 of the *MTA*;

c) Mining lease: a lease issued under Part 3 of the *MTA*;

d) Mine permit: a permit issued under s. 10 of the *Mines Act*, allowing the steps toward the construction of a mine;

e) Chattel interest: the recorded holder of a mineral claim receives a "chattel interest" in the minerals. (This concept is discussed in depth below.)

f) Recorded holder: the person whose name appears as the owner of the mineral claim.

[64] As discussed in detail below, the mineral titles registration system progresses as exploration develops into production. The first step is for a free miner to register a mineral claim over an area and become the recorded holder. If the exploration of that area suggests the existence of profitable mineral deposits, then the recorded holder can apply for a mineral lease, which provides greater exploration rights and greater rights to the minerals. To proceed further, the recorded holder is required to apply for a permit under the *Mines Act*.

Preliminary Issues

The Form of Proceeding

[65] The two petitioners bring these claims by way of judicial review. Several preliminary questions arise from this procedural choice:

a) Is a judicial review the proper proceeding?

b) Is the relief sought systemic or particular to the individual petitioners?

c) What is the decision under review?

d) What is the standard of review?

e) On what basis was that decision made? (What is the record?)

[66] I deal with each issue in order. I note that the issues overlap and are intertwined.

Proper Mode of Proceeding

[67] First, I deal with the propriety of bringing the claims as petitions for judicial review.

[68] The two petitions are brought under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], and in particular, s. 2:

> **Application for judicial review**
>
> 2 (1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[69] The petitioners seek a number of forms of relief including declarations, injunctions, and the quashing of existing mineral claims.

[70] In its response, the province took issue with proceeding by way of petition. That position led to considerable submissions relating to whether a petition is the correct form of proceeding. However, the province ultimately conceded that:

a) I should decide the substantive issues as presented in these petitions; and

b) any concerns relating to the form of proceeding present (at worst) an "irregularity". Hence, any evidentiary or procedural issues do not go to the core of the hearing.

[71] In other words, the province agrees that, with adaptations, I can decide the issues in these petitions without converting them to actions. Nevertheless, I will now summarize the parties' submissions on the proprietary of bringing the present claims as petitions for judicial review. These submissions provide important context for my subsequent discussion on the appropriate adaptations required in these cases that are not standard judicial review procedure.

[72] The underpinning of the province's submission is that the petitions constitute standalone challenges to the validity of the *MTA* and, therefore, are more appropriately categorized as actions for declaratory relief. Further, the province argue that the petitioners have failed to identify specific instances of statutory

decision-making to be reviewed. In this regard, the province submits that this judicial review is an "awkward fit" in these circumstances.

[73] In response, the petitioners submit that they do not (primarily) challenge the constitutionality of the *MTA* itself; they impugn the manner in which the CGC exercised its powers under the *MTA*.

[74] I agree with the petitioners that their claim predominantly is about decisions made by statutory actors under the *MTA*. While both petitioners did advance arguments in the alternative challenging the constitutionality of the *MTA*, those arguments do not transform their claims into something other than petitions.

[75] Furthermore, the petitioners have correctly identified a statutory decision maker, the CGC, whose decisions can properly be subject to judicial review. With that said, I agree with the province's contention that the particular decision challenged by the petitioners is not readily identifiable. To illustrate that point, I note that, at some point, the CGC decided that there would be consultation at the "mineral lease" stage but not the "mineral claim" stage (*i.e.*, consultation with First Nations occurs at the time a mineral claim is converted to a lease but not at the time a mineral claim is first registered). Thus, the CGC decided to "draw the line" at a point after a mineral claim has been issued. However, it is unclear where or when that decision was made, or by whom. There is no record of that decision.

[76] As I discuss below, it is not the issuance of individual mineral claims that constitutes the reviewable decision. The decision at issue relates to the decision-making of the CGC in establishing and overseeing the operation of that online registration system. The individual mineral claim registrations are consequences of these originating high-level decisions.

[77] Accordingly, I find that what at issue is the CGC's ongoing decision <u>not</u> to implement a system that provides for consultation prior to the issuance of mineral claims. For this reason, the impugned decision-making in this case can be categorized as a series of "non-decisions."

[78] It follows that the petitioners seek judicial review of a series of non-decisions for which there is no written record. I accept the province's submission that this scenario presents an "awkward fit" for a judicial review.

[79] Despite that "awkward fit", as noted, the province's stated position is that any procedural difficulty created by the bringing of this claim as a judicial review is only an "irregularity". To be clear, the province's position is that the petitioners' claims should be adjudicated, in full, on the basis of these petitions. However, proceeding in this manner requires adaptations.

Is the relief sought systemic or particular to the individual petitioners?

[80] The next issue that derives from the discussion above relates to the nature of the relief sought. Although the petitioners seek specific relief in relation to each of their asserted territories, the nature of the judicial review relates to the larger issue of the province's decision on "where to draw the line" based on the correct interpretation of the *MTA*. That issue is, in my opinion, systemic.

[81] The province characterizes the petitioners' arguments as an attack on the whole system of mineral claims acquisition. The province argues that granting the petitioners' requested remedies would amount to dismantling the provincial free entry system and would throw the mining regulation regime into disarray. I discuss below the province's evidence regarding statistical and financial impact. Essentially, the province says that if I grant a declaration that the province was required to consult with the petitioners about mineral claims within their territories, then the practical result would be an obligation to consult with <u>all</u> First Nations in BC. The province says that is an obligation that it (currently) lacks the capacity to fulfill.

[82] In response, the petitioners submit that the remedies they seek would only affect their asserted territories and specific mineral claims thereon. They say that the decision would have precedential effect, meaning that other First Nations could commence their own proceedings for similar relief.

[83] The upshot of the province's submission is that, while the petitioners submit that they only seek relief in respect of their own territories, the practical impact will apply across the province.

[84] So, the question arises: Is the relief sought systemic, or particular, to the individual petitioners?

[85] In my opinion, the short answer to this question is: Both.

[86] First, both petitioners seek systemic declarations that:

a) the CGC has a constitutional duty to consult with them about mineral claims on lands to which they assert Aboriginal rights and title, and failed to do so; and

b) the current online mineral tenure registration system operates in a way that is inconsistent with s. 35 the *Constitution,* and *UNDRIP and DRIPA*.

[87] The petitioners also seek particularized relief: the quashing of specific mineral claims in their asserted territories. They argue, in part, that the duty to consult varies with the relationship of a particular First Nation to the affected land. They submit that the depth of the consultation must be assessed on that basis. For example, there would be a difference between:

a) territories to which a First Nation claims title; and

b) territories to which a First Nation asserts a non-exclusive hunting right.

[88] The petitioners assert that the former would require deeper consultation.

[89] However, as noted above, the scope of my decision only addresses the existence of a duty to consult. It does not address "measures". It follows that I am not considering the strength of the petitioners' asserted claims, nor the depth of the consultation requested. I am only considering the existence (the triggering) of the right.

[90] As discussed below, the evidence establishes that the CGC acted at a higher decision-making level in the process of establishing and administering the mineral tenure system. Put another way, the decision in question was not the CGC's exercise of their statutory authority in respect of the issuance of individual mineral claims. The decision (or non-decisions) in issue occurred at a higher level when the system was designed. Hence, the issue I am addressing is systemic. In my opinion, the appropriate remedy is a general declaration; therefore, it is my intention that the remedy that I grant at the end of these reasons applies more broadly than the territories of the two petitioners.

[91] That is not to say, however, that I cannot address individual claims. A general declaration does not preclude other specific declarations or relief pertaining to the petitioners and their individual claims. The province concedes that it is aware of the petitioners' rights and title claims. In my opinion, it is also appropriate for me to consider whether a declaration, or other relief, is available in respect of the asserted territories of the two petitioners.

[92] All of this is to say that:

a) in the first instance, I am not considering these two petitions as specific challenges to the issuance of mineral claims on the asserted territories of the two petitioners. Instead, I am considering the higher-level decision making that led to the CGC to "draw the line" where it did. With a few exceptions that I outline below, there is nothing in the factual matrix that distinguishes any specific mineral claims in the petitioners' territories from any other mineral claims in the province;

b) however, having analysed the evidentiary and legal considerations in relation to the alleged systemic problems, I am not precluded from considering the remedies sought in relation to the specific territories of the two petitioners.

[93] With those positions in mind, I accept the province's further submission that the following principles govern the judicial review process:

a) The court's role is supervisory.

b) The court must address the standard of review.

c) The court must determine the "Record", in other words, the factual and administrative underpinning of the decision in question.

[94] I now proceed to discuss the remaining issues under this heading:

a) What is the decision under review?

b) What is the standard of review?

c) What is the record?

What is the decision under review?

[95] As noted above, the Ehattesaht and the Gitxaala frame their claims in relation to the operation of the mineral tenure system as a whole. Intrinsic in those claims are questions about the decision-making of both the CGC and the LGIC. The petitioners question the series of decisions that have the effect of allowing the registration of mineral claims without consultation. In the alternative, the petitioners say that, if the court finds that the provincial actors are acting within the proper exercise of their authority, then the *MTA* itself is invalid legislation.

[96] The province accepts that characterization of the questions.

[97] Hence, I am proceeding on the basis that the petitioners question the series of higher-level decisions (or non-decisions) that have the effect of allowing the registration of mineral claims without consultation.

What is the standard of review?

[98] The parties agree that the question of whether a duty to consult arises is a question of law. Hence, the proper standard of review is "correctness".

[99] However, on questions of fact, or mixed fact and law, a reviewing body may owe a degree of deference to the decision maker.

[100] The Crown submits that, on evidentiary issues, I should grant deference to the provincial actors in respect of the information they relied upon to arrive at the decision not to consult at the mineral claim stage.

[101] I address those concerns when dealing with the specific evidentiary issues.

What is the record?

[102] In general, the evidence admissible on judicial review is the record that was before the decision maker at the time the impugned decision was made: *JRPA*, s. 17; *Albu v. University of British Columbia*, 2015 BCCA 41 at paras. 35–36. This general rule, however, is "clearly geared to tribunals that make adjudicative decisions at hearings": *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 41. For non-adjudicative decisions, like the ones at issue in the present case, there may not be a record of what information was before the decision maker. Thus, the general limiting rule should be adapted in the case of non-adjudicative decisions to allow for greater flexibility in defining the scope of the "record": see, *e.g.*, *Chartrand v. The District Manager*), 2013 BCSC 1068 at para. 117, varied on other grounds, *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345; *Gamlaxyeltxw v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCSC 440 at paras. 13, 15.

[103] In this case, there is no formal record; there is no record of what the CGC considered when "drawing the line". Nor is there, for example, a collection of memorandums indicating the reasons behind the CGC's decision. For this reason, I conclude that a flexible, purposive approach to defining the record is appropriate.

Specifically, evidence should be admitted if relevant to the issues I am to decide on this petition.

[104] As noted, the overarching question in this case relates to the duty to consult under the *Haida* Test. As summarized by the Supreme Court in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*], the elements of the *Haida* Test are as follows:

> [31] The … duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35 [of *Haida*]). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.
>
> [Emphasis in original.]

[105] On the first two parts of the test, the province concedes that it has actual knowledge of the claims asserted by the two First Nations to the territories described above. Hence, evidence of the nature of the asserted claims is relevant, but not in dispute. The province also concedes the second ground: that the decision to design a system that allows for the granting of mineral claims without consultation constitutes "Crown conduct".

[106] Hence, this case ultimately turns on whether the third element of the *Haida* Test is satisfied. More specifically, the core issue in this case is whether the operation of the current mineral tenure system adversely affects an Aboriginal claim or right. It is against the backdrop of this issue that I define the scope of the record for this petition.

[107] Again, because there is no "record of the proceeding" in preparation for the hearing, the parties were left to construct an evidentiary record from scratch. The parties filed approximately 50 affidavits.

[108] The parties disagree over what information should be included in the record. There is tension between the "Record" that the petitioners propose, and the "Record"

the province proposes. In the subsequent sections, I summarize the evidence led by the parties and set out my findings regarding admissibility.

The Province's Evidence

[109] The province submits that the record should include information pertaining to the following:

a) The historical evolution toward the current mineral tenure system;

b) The legislative context of the mineral tenure system including what is, and is not, authorized by the grant of a mineral claim and the *MTA*'s relationship to other legislation;

c) An understanding of the main actors within the Ministry including:

i. the province's efforts toward reconciliation;

ii. the statistical information relating to:

(1) the benefits of mining, the number of mineral claims, mineral leases, and mines;

(2) the number and geographical scope of asserted claims of rights and title within BC.

[110] The province relies on these categories of evidence to satisfy its onus in establishing the correctness of the CGC's decisions. The province argues that that evidence is required to provide context to the underlying CGC decisions.

[111] I accept that the province's evidence in the general areas set out above is admissible. In my opinion, I need to admit evidence regarding the context of the legislative scheme and the CGC's implementation of that scheme. Such evidence explains the underpinning of the Crown's position that the *MTA* does not cause adverse impacts.

[112] I accept the province's submission on this point to an extent. The province acknowledges that evidence relating to the benefits of mining and the administrative problems presented by consultation do not constitute information that is relevant to the *Haida* Test. In other words, the province acknowledges that its obligation to consult cannot be avoided or delayed on the basis that mining is good for the economy or that consultation will be difficult.

[113] I have set out below:

a) the legislative history;

b) the current legislative and regulatory framework;

c) the province's affidavit evidence which provides further context and explanation of the implementation of that framework.

[114] Except where noted otherwise, I admit the province's evidence discussed in the subsequent sections as relevant evidence forming part of the "Record".

Historical Evolution of the Mineral Tenure Regime

[115] BC's current mineral tenure regime finds its roots in colonial legislation first codified in the *Gold Fields Act*, 1859. That Act introduced the 19th century concept of "free miners" and the "free entry" system to the colony of BC. The concept of "free entry" in Canada is predicated on two legal assertions (by the government):

a) that the Crown owns all lands within the colony's territorial boundaries that have not otherwise been devolved, granted or sold to individuals; and

b) that all subsurface minerals vest in the Crown, regardless of surface title.

[116] From the earliest days of exploration, free miners were given license to roam the colony, and later the province, and physically stake claims. Once an area was "staked" or claimed, certain rights accrued to the claim-holder. Those rights protected their interests.

[117] The province has modified and amended the legislation over time. Until 1958, the province made “Crown mineral grants” of the rights to minerals. Some of those grants continue to exist. Crown mineral grants held both surface and subsurface rights.

[118] From 1958 to 2004, the physical staking of claims remained the practice in BC. In 2004, the province amended the *MTA* and adopted an online system for claims registration of mineral claims. That system remains in place today. Notably, the creation of the online registration system pre-dated the decision of the Supreme Court of Canada in *Haida*, and the creation of the *Haida* Test. It follows that the CGC could not have anticipated the *Haida* Test when developing the system.

The Legislative Context

[119] Mineral claims (and some mining activities) are governed by the *MTA* and the associated *MTAR*. Other statutes, regulations, and policies concerning land use, rights of way, and compensation are also involved. Other legislation that influences the mineral tenure system includes:

a) the *Land Act*, R.S.B.C. 1996, c. 245, which:

   i. excepts and reserves all rights in minerals to the government or those authorized by it (s. 50(1)(a));

   ii. provides a general right for individuals to enter Crown lands; and

   iii. provides for the creation of the Land Use Policy: Permission, May 8, 2014, which describes activities permissible on Crown lands.

b) the *Mines Act*, which defines a “mine” and “mining activity” (generally, activities requiring mechanization) and the *Mines Regulation*, B.C. Reg. 126/94;

c) the *Forestry and Range Practices Act*, S.B.C. 2002, c. 69, and the associated Regulation, B.C. Reg. 36/2023, which regulate the cutting of trees and riparian setbacks for road building;

d) the *Water Sustainability Act*, S.B.C. 2014, c. 15, which sets out requirements for permits (also known as "Notices of Work"), exempting most mineral exploration activities under the *MTA* which use handheld tools;

e) the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, which protects Aboriginal artifacts (This legislation is currently undergoing a review process in concert with the implementation of *DRIPA*); and

f) the *Mineral Tax Act*, R.S.B.C. 1996, c. 291, which establishes production-based taxation for quarries and mines.

The Mineral Tenure Act and Regulation

[120] The *MTA* and *Mines Act* regulate the spectrum of activities ranging from mineral exploration to mineral extraction. In general, the *MTA* regulates the initial exploratory stages of the process related to identifying potential mineral deposits and securing rights to them. The *Mines Act* regulates the later stages, which include establishing a mine and extracting minerals from the claim area.

[121] The *MTA* is administered by the CGC and the Mineral Titles Branch ("MTB"), which grant licences and permits and also rule on disputes under the *MTA*.

[122] In order to become a registered holder of a mineral claim, a person must first acquire a free miner certificate ("FMC"): *MTA*, s. 7. A free miner certificate is available to a person over the age of 18 ordinarily resident in Canada, or a Canadian corporation or partnership. Upon registration and payment of a fee of $25 for an individual ($500 for a corporation), the CGC must issue an FMC to the applicant: s. 8(2).

[123] Section 11(1) gives a free miner the right to enter upon, and explore for minerals, on all lands where minerals are vested in or reserved to the government.

The Mineral Titles Online Registry

[124] Prior to 2004, the registration of mineral claims required physical attendance at the site of the claim. In 2004, the *MTA* was amended to provide for an online registry and electronic registration of mineral claims: s. 6.2.

[125] In addition to any requirements under the regulations, the CGC may:

> (a) establish requirements for information that must be supplied to effect a registration and the format in which the information must be supplied, and may make those requirements known electronically to users of the registry;
>
> (b) establish any other matter or requirement in order to ensure proper functioning of the registry; and
>
> (c) require a registration to be made electronically in accordance with the regulations.

[126] I return to these powers below when discussing the CGC's discretion.

[127] Section 6.3 provides that "[a] person may register a claim in accordance with the regulations." That person must be a free miner.

[128] The online mineral tenures registry provides access to a map of the province overlaid with a grid delineating blocks or "cells" of registered and available claims. Because some cells are partially overlaid with older claims (registered prior to 1958, the Crown mineral grants), it is possible to register a claim to part of a cell. A free miner can click on the map to choose available individual cells or groups of adjacent cells and register them as claims at a prescribed fee of $1.75 per hectare. The *MTAR* sets out that an individual claim may consist of up to 100 complete or partial adjoining cells: s. 4(1). Overlapping claims are not allowed in the online system.

Once the fee is paid, the registration becomes effective. The person registering the claim is referred to as the "recorded holder".

What is allowed, and required, once a mineral claim is registered?

[129] Section 14(1) of the *MTA* gives the holder of a mineral claim the right to enter onto the surface of the claim to conduct exploratory activities. However, the manner of exploring is limited. I discuss those limitations below.

[130] In addition to Crown lands, mineral claims can be granted over fee simple lands. However, the holder of title to the surface retains some limited protections. For example, a free miner cannot explore on land occupied by, or immediately surrounding, a building, an orchard, land under current cultivation, land lawfully occupied for mining purposes, or land in an ecological reserve or park.

[131] Under s. 17(1), the minister may impose restrictions on the use of land for mineral activities to protect cultural heritage resources, or for other reasons. This can occur despite the fact that mineral claims exist in that area. The imposition of this type of restriction does not result in compensation for the recorded holder. However, there can be compensation if the province expropriates land under s. 11 of the *Park Act*, R.S.B.C. 1996, c. 344. Section 22 of the *MTA* also gives the CGC the power to establish mineral reserve areas in which claims cannot be registered.

[132] The *MTA* provides that the recorded holder of the mineral claim has both rights and obligations. Further, although a certain amount of work is required, the scope of that work is limited, unless a further permit or lease is obtained.

[133] In order to maintain a mineral claim, the holder must undertake regular work, measured on an annual basis, or pay a fee in lieu of that work. All work must be performed with hand tools. The use of machinery or explosives on mineral claims requires a permit under the *Mines Act*.

[134] The recorded holder is required to do work to maintain the mineral claim in order to "continue" the claim from year to year (s. 29). That work includes collecting

and extracting samples, digging trenches, and removing ore. Again, those activities are both required and limited:

a) Bulk samples of ore on claims are limited to 1,000 tonnes per cell per year: *MTA,* s. 11.1(1); *MTAR*, s. 17(1).

b) A bulk sample of up to 10,000 tonnes of ore may be extracted from a mineral claim not more than once every five years: *MTAR*, s. 17(3).

c) Although not contained in the *MTA* or the Regulation, the CGC circulated "Information Update No. 38, Permissible Activities without a Mines Act Permit (Interim Guidance)", dated December 3, 2019 ("Information Update No. 38"). It provides that pits or trenches must not exceed 1.2 metres in depth and three cubic metres in volume. There is a limit of five un-reclaimed pits at one time.

[135] As discussed below, the petitioners point to these allowances as evidence of the substantial destruction of, or interference with, the land that is authorized by the issuance of a mineral claim. In response, the province says that these figures represent "limits", not "allowances". The province says that, because the recorded holder is limited to the use of hand tools, it would be impossible to extract these volumes of ore.

What is granted to the recorded holder with a mineral claim?

[136] The petitioners submit that the grant of a mineral claim transfers a "bundle of rights" to the recorded holder. The province does not accept the petitioner's full description. However, it is helpful to set out the petitioners' position regarding what the "bundle of rights" includes:

a) a "chattel interest" in all minerals in the claim area;

b) a right to convert the ownership interest into a long-term lease;

c) exploration rights, which include the right to "use, enter or occupy the surface of a claim … for the exploration or development or production": s. 14(1); and

d) the related right to engage in surface exploration, and the right to extract ore up to the specified amounts (described above).

[137] The province does not accept this characterization of the "bundle of rights". Specifically, the province submits that the right granted to the minerals (pursuant to s. 28(2)) is not an "ownership" interest, but a "chattel" interest. I address this distinction below. In short, the province submits that a "chattel" interest is a minor form of grant and that there is no real potential impact on the petitioners' Aboriginal rights and title.

When is a further permit or licence required?

[138] If a recorded holder finds minerals, or evidence of the existence of minerals, they will want to proceed with further activities that are not authorized by the mere authorization of the mineral claim. In order to proceed, they must apply for a "mineral lease" under Part 3 of the *MTA*. A mineral lease is the next step in the process toward a mining permit under the *Mines Act.*

[139] A recorded holder of a mineral claim may apply to convert a mineral claim to a mineral lease by taking the steps prescribed by the *MTA*, s. 42(1), namely:

a) paying a prescribed fee;

b) if requested by the CGC, having the land surveyed;

c) posting a notice, in the office of the CGC, stating that the recorded holder intends to apply for a mining lease; and

d) publishing that notice in one issue of the Gazette and a local newspaper (four consecutive weeks).

[140] Once these requirements are met, s. 42(4) states that the CGC must issue the mining lease. The maximum length of any mining lease term is 30 years.

[141] The petitioners note the mandatory wording of s. 42(4). They submit that this mandatory wording means that the right to convert a mineral claim to a mineral lease is a part of the "bundle of rights" associated with a mineral claim.

[142] Obtaining a mineral lease conveys a greater interest to the minerals within the leasehold. Mineral leases fall within Part 3 of the *MTA* which includes the following provision:

> **Effect of leases**
>
> 48 (2) A lease is an interest in land and conveys to the lessee the minerals … together with the same rights that the lessee held as the recorded holder of the claim … but is subject to a valid charge registered against the record of the claim.

[143] The petitioners submit that, because the recorded holder of a mineral claim has a right to convert that claim into a mineral lease, it follows that the granting of a mineral claim transfers (at least the right to proceed to) an "interest in land" which "conveys to the lessee the minerals" (subject to valid charges).

[144] As noted, the province's position is that, at the "mineral lease" stage, consultation is required with any First Nation that asserts rights or title over the area of the mineral lease. For my discussion below, it is important to note that there is no mention of the "duty to consult" within Part 3 of the *MTA*. In other words, the CGC used their discretion to implement consultation at that stage. Further, s. 42(4) is clear that the CGC must issue the mining lease. Hence, the impact of any consultation is questionable. However, that is not the issue before me.

[145] Obtaining a mineral lease does not authorize the lessee to conduct mining activities. Instead, it is the *Mines Act* that governs all activities beyond exploration. Thus, the *Mines Act* regulates all activities involving the excavation of the ground using equipment (or explosives) and the extraction or production of minerals for sale. The definition in s. 1 of the *Mines Act* provides that a "mine" includes:

> (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
>
> (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
>
> (c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,
>
> (d) closed and abandoned mines, and
>
> (e) a place designated by the chief inspector as a mine;

[146] Activities undertaken in relation to a mine under the *Mines Act* require permits or "Notices of Work" and other approvals such as environmental assessments. Exploratory works under the *MTA* and *MTAR* do not require *Mines Act* approvals.

[147] In addition to legislation and regulations, the CGC and the MTB also provide Information Updates. I mentioned above Information Update No. 38 which gives guidance on mineral-related activities that do not meet the definition of a "mine" and therefore do not require a permit. I discuss that update in more detail below when discussing the province's affidavit evidence.

[148] With that overview of the legislative context, I now turn to the evidence of the province, some of which touches on the Ministry's interpretation of the legislation.

The Province's Affidavit Evidence

[149] The province tendered 16 affidavits which flesh out the legislative scheme. The affidavits address the following general areas:

a) An explanation of the legislative scheme and the operation of the mineral titles online registry ("MTO");

b) Which activities are authorized under a mineral claim (without further permit);

c) The timeline and permits required to develop a mine;

d) Statistics;

e) The capacity of the ministry to conduct consultation; and

f) The value to BC of the mining industry.

[150] I address each sub-heading below, along with my reason for either admitting, or excluding, the information into evidence. In order to be admissible, the information must provide insight into the decision-making process of the CGC and the MTB or it must assist me in coming to the appropriate remedy. As a general overview, the information that I discuss below is either general background or explanation of the legislative scheme.

[151] The province tenders the affidavits of Mr. Mark Messmer, who was the CGC from 2016 to 2023. With the one exception noted below, I accept Mr. Messmer's evidence as part of the general background information that informed the decisions of the CGC.

An explanation of the legislative scheme and the operation of the MTO

[152] Affidavit #1 of Mark Messmer (in the Gitxaala petition) ("Messmer Affidavit") outlines the operation of the MTO which commenced in 2004.

[153] Prior to 2004, in order to register a mineral claim, a free miner was required to personally attend at the claimed site, as well as submit paper forms. The MTO replaced the prior "staking" system in 2004 and created a purely online registration system for mineral claims. To accomplish this objective, the MTO divided the province into "cells", with each cell being a near-rectangle of land approximately 20 hectares in size. Through the MTO portal, free miners can register or "continue" their mineral claims, submit applications for mineral leases, and pay rents and fees. The MTO is also a searchable database. Since 2004, all new registrations have occurred through the MTO. Despite the passage of time, some pre-2004 "legacy claims" continue in existence. The CGC is responsible to maintain the MTO.

[154] Messmer Affidavit indicates that registration of mineral claims through the MTO is an administrative, automated function. That fact is not in dispute. As discussed above, that is not the issue in these petitions. The issue in these petitions relates to the higher-level decisions. The Messmer Affidavit was sworn before the nature of the legal issues in the litigation had crystallized.

[155] The registration of a mineral claim does prompt some interaction with First Nations:

a) When a person registers a mineral claim, they receive a "Title Overlap Notice" indicating the First Nation(s) whose asserted claims overlap with the newly acquired mineral claim. The CGC encourages early consultation with those First Nations, although the CGC takes no steps to facilitate that discussion. (There is no dispute that the honour of the Crown requires the province to actually conduct any consultation that is mandated.)

b) The MTB is in the process of requisitioning new software that will auto-generate a notification report to any First Nation within whose asserted territory a mineral claim is registered. At the time of the swearing of his affidavit (March 22, 2022), Mr. Messmer expected the notification system to be operational by the fall of 2022. (I received no information indicating that the system was, in fact, operational.)

[156] It follows that it is feasible for the MTB to provide notice to both the free miner and the First Nation(s) at the time of registration. Further, this requisition by the CGC and the MTB clearly indicates that they anticipated instituting an automatic notice to First Nations without requiring any amendment to the legislation.

[157] Mr. Messmer notes that the *MTA* allows for the closing of areas to the registration of mineral claims. The mechanism under the statute allows designated lands to be removed from the definition of "mineral lands". That term means lands in which the right to explore for, develop, and produce minerals is vested in or reserved to the government. Mr. Messmer says:

a) Section 22 of the *MTA* provides for the designation of areas as “mineral reserves”. That designation prevents any further registration of mineral claims within the boundaries. This process is used for parks, conservancies, ecological reserves and land designated as “Indian reserve” land under the *Indian Act*. As of March 2022, approximately 23.5 percent of the province was closed to mineral claim registrations by s. 22 designations as “mineral reserves”.

b) When the province has concluded a treaty with a First Nation, and where that treaty provides that the First Nation owns the mineral resources in a territory, then those lands are no longer “mineral lands”, and those areas are closed to mineral claim registration.

[158] Part of the relief sought by the petitioners includes an injunction preventing the registration of any further mineral claims in their territories until a consultation process is in place. Mr. Messmer acknowledges that the CGC has established certain areas as “no registration reserves” where First Nations’ have settled claims. In creating those reserves, the CGC relied upon the authority provided in s. 22 of the *MTA*. He notes that these “no registration reserves” are typically designated in highly populated areas. However, this process is also used when the province’s negotiations with a First Nation have reached the cabinet level (*i.e.*, near ratification) and the settlement might result in a transfer of land. The CGC creates these “no registration reserves” to “lock down” the territory in question.

[159] Regarding the disturbance to the land, Mr. Messmer notes that the legislative scheme requires:

a) a certain amount of work to be performed on the mineral claim on an annual basis. The miner has the alternative of paying cash in lieu of that work.; and

b) that the mineral claim be converted to a mineral lease before any “commercial scale production” can occur.

[160] At para. 21 of the Messmer Affidavit, Mr. Messmer states that he does not believe the CGC has the discretion to "fundamentally change the claim registration system so as to make the registration of a claim contingent on prior decision-making informed by a notification and consultation process." Further, he does not believe that it would be practically feasible to alter the system so as to provide for "pre-registration consultation" without changing any other part of the *MTA*. Still further, he does not believe that such a change would be within the parameters of the *MTA* in its current form.

[161] In my opinion, the statements of Mr. Messmer at para. 21, constitute either his opinion, or a submission, regarding the proper interpretation of his authority under the *MTA*. At best, his statements provide some insight to his reasons for where the CGC "draws the line". However, his conclusion on the scope of his discretion is certainly not determinative. Mr. Messmer's opinion about the interpretation of the *MTA* is not "evidence". Instead, his statements address legal issues that are for me to address. I place no weight on the opinions expressed in those statements.

Authorized Activities under a Mineral Claim (Without Further Permit)

[162] This portion of my reasons consists partly of evidence and partly of the province's submissions.

[163] The province adduces this evidence to support its position that there is limited impact on the land from mineral exploration. In other words, the activities authorized under a mineral claim are limited and do not cause an adverse effect

[164] The province's position is that the registration of a "mineral claim" under the *MTA* is a preliminary step in the regulatory scheme, which occurs at the very early-stage of exploration activity. The province submits that the rights associated with a "mineral claim" are limited. Pursuant to s. 28 of the *MTA*, a "mineral claim" confers a "chattel interest" in the minerals.

[165] The province concedes that s. 14(1) of the *MTA* provides that a claim also confers the right to "use, enter or occupy the surface of a claim … for the exploration or development or production". However, those surface rights are subject to other provisions in the *MTA*, including the restriction on mining activity that falls under the *Mines Act*. Hence, the only "mining activity" that the recorded holder may carry out (without a permit) is low-impact, non-mechanized activity falling outside the definition of "mining activity". I discuss the nature of those activities below.

[166] The starting point regarding authorized activities is s. 17 of the *MTAR* which provides:

> **Production on a claim and bulk sample**
>
> 17(1) A recorded holder of a mineral claim must not produce or cause to have produced more than 1000 tonnes of ore in a year from each unit in a legacy claim or each cell in a cell claim.
>
> …
>
> (3) Despite subsection (1), a bulk sample of up to 10 000 tonnes of ore may be extracted from a mineral claim not more than once every 5 years.

[167] The petitioners and the province view these limits from different perspectives. I deal with the petitioners' perspective below.

[168] From the province's perspective, while these may appear (to a non-miner) to be large allowable volumes of extraction, these amounts are typically for testing purposes at the exploration stage. This level of extraction would rarely represent continuous production for profit. If the miner intends to exceed these production limits on their mineral claim, they require a mining lease in substitution for its mineral claim.

[169] Mr. Messmer acknowledges that the *MTA* and the *MTAR* do not purport to define, on a granular level, the types of work that are authorized within the boundaries of a mineral claim. For that reason, the MTB issues Information Updates. As noted above, the MTB released Information Update No. 38 in 2019 to further define the scope of authorized activities. I set out portions of the Information Update No. 38 below. That document begins:

> The purpose of this Information Update is to provide guidance to recorded holders and their agents regarding the types of activities that the Province interprets as unlikely to meet the definition of a "mine" under the Mines Act. As a result, these activities may generally be undertaken by recorded holders in the absence of a Mines Act permit …

[170] Information Update No. 38 then sets out the MTB's concept of what work can be performed on land without a *Mines Act* permit:

> … Early-stage exploration activities that cause nil or negligible disturbance to the respective mineral or coal title area will generally not meet the definition of a mine. … If disturbance is found to be excessive, the Chief Inspector could designate the place as a mine.

[171] Information Update No. 38 then lists the activities that are authorized by a mineral claim:

> MINERAL AND COAL The following list describes the types of mineral and coal exploration activities that the Province views as falling outside the definition of a mine. These activities can generally be undertaken by recorded holders or their agents without a Mines Act permit or a written exemption:
>
> • airborne geophysical surveying;
>
> • baseline data acquisition, such as mapping, taking photos, and measuring water quality;
>
> • ground geophysical surveying without the use of exposed electrodes;
>
> • establishment of grid lines that does not require the felling of trees. If tree felling and/or vegetation disturbance is proposed, an authorization under the Forest Act may be required;
>
> • geological and geochemical (soil or rock) sampling conducted using hand-held tools;
>
> • pitting, trenching, drilling, or channel cutting using hand-held tools, consistent with the following:
>
> no use of explosives or expanding grout;
>
> the total volume of each pit or trench does not exceed 3 cubic metres in volume;
>
> each pit or trench does not exceed 1.2 metres in depth;
>
> the cumulative total of all un-reclaimed pits and/or trenches does not exceed 5 pits and/or trenches at any one time; and,
>
> not conducted within a stream and/or the riparian setback.

[172] As discussed in more detail below, the parties characterize the volume provisions of the *MTAR* and Information Update No. 38 from different perspectives:

a) The province says that the figures set out above are not limits to be met, but absolute caps. The province notes that no machinery, beyond handheld tools, is permitted. The province submits that these production figures cannot reasonably be reached using hand tools as required.

b) Viewed from the petitioners' perspective, Information Update No. 38 allows recorded holders of mineral claims to perform significant amounts of work and, hence, to cause significant adverse impacts.

[173] The province places significant emphasis on the "nil or negligible disturbance" language in Information Update No. 38. It also emphasizes that the update limits the work done to "hand tools". Hence, no machinery is involved at the mineral claim level.

[174] To move from the exploration stage to the establishment of a producing mine, the applicant must first apply to convert the mineral claim into a mining lease under s. 42 of the *MTA*. This step is usually taken in conjunction with an application to the Major Mines Office for a "mining" permit under s. 10(1) of the *Mines Act*. As noted above, the CGC has no discretion here, and the granting of a mineral lease under s. 42 is mandatory. The granting of the lease carries with it the conveyance of the minerals: s. 48.

The Timeline and Permits Required to Develop a Mine

[175] The province submits this evidence, in part, to rebut the evidence of the petitioners. As discussed below, the petitioners submit that the granting of a mineral claim, and a mineral lease, create "momentum" toward a mine. The petitioners argue that, despite consultation, it is difficult to derail the "runaway train" once the mining company commences the permitting process.

[176] The province notes that the underpinning of the entire mining system is the requirement that a permit must be obtained under the *Mines Act* before the commencement of "any work in, on or about a mine". This is specified in s. 10(1) of the *Mines Act* which states that "[b]efore starting any work in, on or about a mine,

the owner, agent, manager or any other person must hold a permit issued by the chief permitting officer".

[177] The province says that the issuance of a permit under s. 10(1) of the *Mines Act* is a statutory decision-making process, entailing many areas of consultation, including with Indigenous groups. (In tendering this evidence, the province does not take the position that, because there is a duty to consult at this later stage, there is no need for consultation at the early stage. This evidence simply explains the permitting process and the reasons behind the choice of where to "draw the line".)

[178] The definition of a "mine" is broad and includes the "mechanical disturbance of the ground" and "exploratory drilling, excavation, processing".

[179] As a result of this broad definition of the term "mine" in the *Mines Act*, the s.10(1) permit requirement covers activities that may include even simple exploration activities. The ministry uses two categories of *Mines Act*, *s.* 10 permits to authorize "work in, on or about a mine" where the work is aimed at extraction of "minerals". Permits for activities at the stage of exploring for minerals are called "MX" (or "exploration") permits. Permits for activities at the stage of producing minerals for profit are called "M" (or "major mine") permits.

[180] The province concedes that s. 17 of the *MTAR* allows for some production of "ore" from a mineral claim. That production is limited:

a) up to the specified thresholds of 1,000 tonnes of ore in a year from each unit in a legacy claim or each cell in a cell claim": *MTAR*, s. 17(1); or

b) "a bulk sample of up to 10,000 tonnes of ore … not more than once every 5 years": *MTAR*, s. 17(3).

[181] However, Mr. Messmer says that this level of production typically is for testing purposes at the exploration stage, rather than being continuous production for profit. Thus, the policy of the chief permitting officer is to issue an MX permit authorizing "bulk sample" extraction on a mineral claim only if satisfied that the "bulk sample" is

an advanced exploration step to support a defined resource model and to inform a future mine plan, and the extraction is not for the sole purpose of production. The idea behind the scheme is that, in order to engage in continuous production for profit, a proponent must have a "M" permit in place.

Statistics

[182] The provincial affidavits also provide information about the volume of mineral claims as at February 14, 2022:

a) There were 32,541 mineral claims, plus 7,934 placer claims and 449 mineral leases.

b) Mineral claims plus mineral leases cover 12.4 percent of the land mass of BC.

c) There were 16 "major mines" in the province.

[183] Further, the province points to other statistics indicating the number of new claims versus lapsed claims in an average year:

a) During the period from 2011 to 2022, the total number of extant mineral claims (on a yearly basis) has varied from a low of 29,835 to a high of 51,603.

b) During the same period, the number of mineral leases has varied between 448 and 466.

c) Each year, approximately 25 percent of existing mineral claims lapse. Conversely, approximately 25 percent of existing mineral claims were newly acquired in the preceding year (as opposed to being continuations).

d) Of the 41,173 current mineral claims (including placer), approximately 50 percent are less than 10 years old. A further 25 percent are between 10 and 20 years old. The remaining 25 percent are more than 20 years old. The oldest mineral claim is 130 years old.

e) On an annual basis, the CGC usually grants between 5,000 and 6,000 new mineral claims. In contrast, it grants between two and four mineral leases per year. A mineral lease can cover and incorporate a number of individual mineral claims.

Addressing Specific Parts of the Gitxaala Evidence and Claim

[184] Addressing the specific claims of the Gitxaala, Mr. Messmer notes:

a) Gitxaala asserts rights and title over 2,862,884 hectares.

b) Much of that total area (at 60 percent) consists of tidal waters, which are not “mineral lands”.

c) Hence, only 28.55 percent of the asserted Gitxaala Territory is open to mineral claim registration.

d) As of February 14, 2022, there were 124 mineral claims (including one lease) in Gitxaala territory.

Addressing Specific Parts of the Ehattesaht Evidence and Claim

[185] Regarding the Ehattesaht Territories, Mr. Messmer states:

a) Ehattesaht asserts rights and title over an area of approximately 94,336 hectares.

b) As of September 21, 2022, there were 123 mineral claims registered in Ehattesaht covering 9,372 hectares (9.9 percent of the total area).

c) Between 2005 and 2022, the number of mineral claims in Ehattesaht Territory has fluctuated from a high of 168 (as of December 31, 2012) to a low of 65 (as of December 31, 2005).

d) There was a gold mine in the Nomash area in the 1930s. That is the general area wherein Privateer has mineral claims.

e) There are three "open" *Mines Act* permits. However, two of those are not active.

f) The one still-active permit is a mineral exploration permit MX-8-286 granted to Privateer. It allows for up to 100 drill sites over five years. That permit (and an amendment to it) is the subject of a petition for judicial review filed by Ehattesaht on July 22, 2021 (BC Supreme Court Vancouver Registry Docket S216764). The petition challenging the MX- 8-286 permit is being held in abeyance while negotiations between Ehattesaht and the provincial government are ongoing.

[186] I describe below the Ehattesaht's evidence regarding the activities of one of the respondents, Forest Crystals. On behalf of the province, that evidence is addressed by Mr. Donald Harrison in his affidavit #1. He says that Forest Crystals conducted illegal hand excavation for quartz crystals in 2018 in Ehattesaht Territory. He describes that as a discrete and isolated incident of non-compliance, which attracted a swift response from the Ministry. Those steps included full reclamation of the site within 18 months of initial enforcement action. Shortly after viewing photographs depicting the extent of the non-permitted excavation, which exceeded the limits of Information Update No. 38, a mines inspector issued a stop-work order. When Forest Crystals subsequently applied for a *Mines Act* permit to authorize the activity, a mines inspector rejected the application because of the potential for impacts to Aboriginal interests.

Timeline for Legislative Reform

[187] The province submits evidence on the timeline for legislative reform as part of the underpinning to its submission that any remedy should be suspended. This evidence outlines the government's prior efforts in amending the *MTA*.

[188] Mr. Peter Wijtkamp, an executive director in the ministry's Policy and Competitiveness Branch, states that the ministry has recognized for several years that the current legislative scheme could benefit from modernization and greater

responsiveness to the concerns of Indigenous peoples around mineral exploration and mining within their asserted traditional territories.

[189] With those goals in mind, the ministry engaged with First Nations and industry stakeholders in 2017 to 2019 with a view to amending the *MTA*. He advises that the topics discussed in 2019 included:

a) enhanced protections for sites of Indigenous cultural significance;

b) additional requirements for free miner certificates;

c) enhanced notification of mineral claim registrations to Indigenous Nations;

d) clarification of the rights and interests conferred by a mineral claim; and

e) expansion of discretion in the issuance of mining leases.

[190] Mr. Wijtkamp says that the ministry received pushback on the concept of reducing the "bundle of rights" conferred with a mineral claim. The mining industry felt the reforms went too far. The First Nations representatives felt they did not go far enough. As a result of that impasse, the ministry decided to pause the process with the idea that the province would later incorporate the concepts into broader work being planned and undertaken pursuant *to DRIPA* (which I discuss below).

[191] Still on the topic of legislative reform, the province notes that, following a similar case in Yukon, where a duty to consult was found by the Yukon Court of Appeal in 2012, the work of reforming the Yukon legislative scheme continues, despite the effluxion of more than a decade. I discuss that decision, *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 [*Ross River 2012*], in detail below. The province's point is, in effect, that these things take time.

The Value to BC of the Mining Industry

[192] The province tenders this evidence primarily in relation to its submission regarding the appropriate remedy. The province acknowledges that economic benefit cannot displace the duty to consult.

[193] As discussed below, the province submits that any declaration or injunction should be suspended so as to achieve the goals of both reconciliation and continuing the economic benefits of the mining industry for all British Columbians.

[194] Regarding the value of mining, the province notes that mineral resources are hidden under the surface of the land. The mineral resources across BC have not been exhaustively investigated or defined. The geography of BC presents massive remote areas with difficult terrain and limited infrastructure. Many parts of the province remain underexplored.

[195] The province submits that mineral exploration is investment-intensive and high-risk business. Mineral resources generate economic returns only after a lengthy period of investment in exploration and development. It can take decades between initial exploration and the establishment of a mine.

[196] Much mineral exploration will be fruitless, leading only to the conclusion that an area contains no resources worth mining. The probability of successfully establishing a mine is very low. Despite the existence of more than 30,000 mineral claims, BC has only 16 operating “major mines” where commercial-scale extraction of minerals is occurring.

[197] Despite the high-risk nature of the enterprise, the province estimates that in 2021, exploration companies spent $660 million on mineral projects.

[198] The province also provided evidence regarding the impact of the mining industry and mining exploration on the provincial economy.

[199] Turning to statistics, Mr. Wijtkamp advises that in 2020, the mining industry:

a) produced $7.3 billion worth of minerals;

b) was responsible for three percent of the gross domestic product of the province;

c) supported 11,293 jobs.

[200] Further:

a) mineral exploration (as distinct from “mining”) required private expenditures of $659.8 million in 2021; and

b) the average annual direct mineral tax revenue approximates $250 million.

[201] The thrust of Mr. Wijtkamp’s financial evidence is that mining is important to the province’s economy. This was also the major thrust of the submission of the Intervenor, the “Mineral Exploration Coalition” (which coalition consists of the Association for Mineral Exploration of BC, the Mining Association of BC, and the Prospectors and Developers Association of Canada). I accept that general premise.

The Petitioners’ Evidence

[202] I have addressed below, in summary fashion, the nature and content of the petitioners’ affidavit material. The main thrust of the affidavits relates to the adverse impacts from the standpoint of the petitioners. However, the affidavits address other issues. I have also set out the province’s position and my findings on the admissibility of that evidence.

[203] I note, at the outset, that the province does not dispute the admissibility of evidence that tends to establish either “general background” or adverse impact. In that regard, the province does not dispute the admissibility of the petitioners’ evidence:

a) describing the petitioners and their traditional territories;

b) describing the specific mineral claims and holders that are in issue;

c) establishing that the province had knowledge of the asserted rights and title of the two First Nations petitioners. However, the province submits that this evidence is not necessary because this is an admitted fact.

d) Statistical evidence relating to the impact of mineral claim registrations on the land base. (The province accepts the admissibility, but not necessarily

the accuracy of the content of the petitioners' affidavits. The province tendered responsive affidavits.)

e) Evidence of the impact of mineral claims on the land base from the perspective of the petitioners.

f) Finally, the province accepts that (admissible) evidence of adverse impacts can be accepted as part of the record. As noted above, I have ruled that this is one of the "adaptations" required in this proceeding.

[204] However, as I outline below, the province takes issue with significant portions of the petitioners' affidavit material. The province takes more issue with Gitxaala's evidence than Ehattesaht's, largely as a result of the fact that Gitxaala tendered more affidavit material covering a greater range of topics. The primary objections raised by the province are:

a) the evidence is not relevant to the issues before the Court; and

b) the information in the affidavits was not within the knowledge of the provincial actors who decided that there was no duty to consult at the mineral claim stage. Hence, it was not part of "the Record".

Ehattesaht Evidence

[205] The Ehattesaht evidence is divided into separate areas, each of which builds on the other. The evidence consists of two main supporting affidavits with a further two affidavits filed in reply to the province's material. I set out below a summary of the information included in those affidavits.

[206] There is no issue with the admissibility of the following evidence:

a) The Ehattesaht have resided in their traditional territory for millennia. The people, land, water, air, plants, and living creatures therein constitute an inseparable and interdependent whole known as the "Ha-Hahoulthee". This term expresses the spiritual and cultural connection to the land that

informs the legal and political systems as well as concepts of ownership and stewardship.

b) Given its proximity to the Zeballos River and Zeballos Inlet, fishing is central to the Ehattesaht's way of life. However, the Ehattesaht are also active in the seasonal use of the territory for hunting, trapping and harvesting, among other activities.

c) Ehattesaht had, and continue to have, strong concepts of property rights, territorial boundaries, and governance.

d) The oversight of the territory includes spiritual practices, which include reverence for crystals that are found within the territory. The reverence for these crystals is not in dispute. In November 2019, as part of its specific opposition to the activities of the respondent Forest Crystals (which I discuss below), Ehattesaht commissioned a report to explain the historical context of the importance of crystals to Ehattesaht. That report references the diaries of Captain Cook from 1778 which indicate that he collected many artifacts from the Ehattesaht, including a carved quartz crystal. Hence, the evidence of Ehattesaht's connection to the crystals is strong.

e) BC courts have recognized and declared Ehattesaht to have Aboriginal rights to fish for food and to use the land for social, ceremonial, and commercial purposes. In the following decisions, Ehattesaht was a named plaintiff:

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2009 BCSC 1494;

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2011 BCCA 237;

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2013 BCCA 300;

Ahousaht Indian Band and Nation et al v. Canada, 2021 BCCA 155;

Ehattesaht First Nation v. British Columbia (Agriculture and Lands), 2011 BCSC 658 at para. 3.

f) A dispute involving the Ehattesaht arose due to the activities of a company named Forest Crystals which held mineral claims on Ehattesaht asserted territory. (I noted above the province's position regarding the dispute with Forest Crystals.)

g) Ehattesaht is also in a dispute with the respondent Privateer which holds a number of mineral claims within an area of Ehattesaht asserted territory known as the "Nomash". That area is roughly defined by the watersheds of the Zeballos River and its tributary, the Nomash River. Generally, the Nomash is the area located between the town of Zeballos and an area approximately 15 km northeast of it.

h) As noted above under the heading "Statistics", there was a gold mine located in the Nomash area commencing in the 1930s. Privateer's mineral claims are in the area surrounding that former mine.

i) Privateer possesses the one still-active mineral exploration permit. On March 12, 2021, the MTB amended that permit, increasing the amount of work and permitting up to 100 drill sites over five years. As noted, that amendment by the MTB is the subject of a petition for judicial review filed by Ehattesaht. That litigation is in abeyance during negotiations.

[207] There are, however, areas of the Ehattesaht evidence that the province does not accept as being relevant or admissible. Specifically, the province objects to the portions of the evidence of Chief Simon John relating to certain activities of the respondent Forest Crystals. There is little dispute about what happened. However, the parties disagree on whether the facts indicate an adverse impact.

[208] Ehattesaht says that the principals of Forest Crystals conducted activities including digging for crystals within the Ehattesaht territory. These activities caused concern for members of Ehattesaht. When Forest Crystals complained to the ministry about interference with one of their work pits, an MTB official advised Forest Crystals that they could erect fencing and place “No Trespassing” signs in the area. On this issue, I am satisfied that the MTB official was mistaken in relation to the advice provided. However, the perception of members of Ehattesaht was that they were being told where they could and could not go within their asserted territory.

[209] Chief John says that, at some point, Forest Crystals’ activities exceeded the authorized bounds under their mineral claim. The province accepts this characterization. Following complaints from both Forest Crystals and Ehattesaht, the province wrote to Forest Crystals and indicated that their activities exceeded the authorization. At that point, Forest Crystals applied for a mining lease. Ehattesaht opposed Forest Crystals’ application for the mining lease and any further permits.

[210] As noted above, the province submits that Forest Crystals was acting outside the authorization in its mineral claim. This breach led the MTB to issue a cease and desist letter to Forest Crystals. When Forest Crystals applied for a *Mines Act* permit to authorize the activity, a mines inspector rejected the application because of the potential for impacts to Aboriginal interests. The province says this example was an isolated incident and that, if anything, it shows that the system worked.

[211] The province says two further things:

a) The fact that Forest Crystals exceeded the allowable amount of work authorized by its mineral claim is not relevant to the underlying issue of whether the CGC has a duty to consult. In essence, the CGC is entitled to act on the presumption that miners will obey the law.

b) To the extent that the evidence discloses that Ehattesaht opposed further permits for Forest Crystals, the province points to this as evidence disclosing that the system worked. The province, after consulting with

> Ehattesaht, did not approve the application for a lease or further permit by Forest Crystals.

[212] In answer to the province's position, Chief John says that the problem arose before the time of the application for the mining lease. Forest Crystals conducted (authorized) activities within its mineral claim area including the digging and removal of crystals. Those actions removed the crystals, thus eliminating Ehattesaht's ownership rights over them. Further, the granting of the mineral claim disregarded Ehattesaht's right to make decisions about their territory. It also did physical damage to the territory, the sacred crystals, and Ehattesaht's asserted claims for rights and title.

[213] On this evidence I accept both positions:

a) First, I accept that Chief John's evidence is admissible to provide the Ehattesaht's perspective on the adverse impact that Forest Crystal's activities had on Ehattesaht's interests. In that respect, I accept as relevant Chief John's statements that Forest Crystals' authorized activities disregarded Ehattesaht's rights.

b) I also accept the province's position that evidence of a recorded holder exceeding the authority provided under its mineral claim is not evidence that is part of the record in deciding whether a duty to consult exists. In my opinion, the existence of a duty to consult must arise on the basis that the legislative scheme will be (or has been) obeyed. A duty to consult does not arise on the basis that an individual has breached, or may breach, the statutory scheme.

[214] With respect to the activities of Privateer, Chief John states that Privateer plans to undertake mining activity on Ehattesaht's asserted territory in the Nomash area. A map of the area indicates that Privateer's claims are located in an area relatively close to the main community of Ehattesaht.

[215] Privateer's submissions mirror those of the province. Its principal, Mr. Nigel Bester, states that, since 2017, the company has been acquiring mineral claims, and currently holds a number of (pre-1957) Crown mineral grants. Privateer has the intention of proceeding to a mining permit. It is currently in litigation with Ehattesaht over the exploration permit that was issued in 2017 and amended in 2020.

[216] On this issue, I accept the position that, to the extent that the dispute between Ehattesaht and Privateer (and the province) relates to permitting beyond the mineral tenure stage, it is not relevant to this judicial review. Put another way, the facts disclose that during the further permitting stage, Ehattesaht has been actively involved in consultation with the province.

Gitxaala Evidence

[217] Gitxaala filed 17 affidavits (7 "main" and 10 "reply"). I address the admissible, the disputed, and the inadmissible information below.

Evidence Admissible by Agreement

[218] There is no dispute regarding admissibility or the accuracy of the following background information supplied by the Gitxaala affidavits. The following evidence is relevant to the assessment of the First Nation's perspective on the impact of mining exploration.

[219] Gitxaala are the "People of the Salt Water". Their language is Sm'algyax. They are the original inhabitants of the north coast of what is now BC. Gitxaala presence on Gitxaala Territory extends back into antiquity. They have an intimate and ancient relationship with their territory and the living things in it.

[220] The territory over which Gitxaala asserts rights and title (again, the "Gitxaala Territory") stretches from the Alaska Border south beyond Aristazabal Island, inland to the Skeena River watershed, and west to the Hecate Strait including the Queen Charlotte basin. The centre of this territory is Banks Island. Gitxaala describes Banks Island as their "breadbasket" or "table", because of its particular abundance of

food sources, including a variety of fish, shellfish, mammals, birds, and plant life. Banks Island has a long history of ownership, governance, and use by Gitxaała.

[221] The members of Gitxaala are divided into four main “clans” and 23 “houses”, which can be understood as territory-holding lineages. Each house owns, governs, and is responsible for specific territories within the greater Gitxaala territory. Ownership and governance rights are exclusive in Gitxaala law.

[222] Like the Ehattesaht, the Gitxaala have a strong connection to the land and all living things within its asserted territory. This strong connection is the basis of Gitxaała’s system of laws and spiritual beliefs.

[223] The Gitxaala term for all living things within their territory is “naxnox”. Gitxaala’s spiritual beliefs include supernatural beings or nature spirits within the territory, known as Naxnanox. Gitxaala’s ancestors learned the values and beliefs that define their culture and system of laws through experiences with supernatural beings. According to Gitxaala beliefs, these supernatural beings have their own physical dens or territories within Gitxaala traditional territories which are sacred to the Gitxaala people.

[224] Gitxaala’s system of laws (known as the “ayaawx”) have been passed down through generations. These laws and governance models are informed by Gitxaala spiritual beliefs. The leaders of the community are required to manage the territory with a view to sustaining abundance for future generations. Further, the laws regulate control over land use. Only certain people may access or use particular territories and the resources therein. The hereditary chief of a particular area has control over entry into that area. Counsel for Gitxaala submit that it is only by understanding their system of laws can one appreciate the impacts of Crown conduct on Gitxaala.

[225] Gitxaala’s traditional practices include the taking and using of minerals. One example involves an area along the east coast of Banks Island called Ksgaxlam, which means “the place of the mountain where crayon (coloured chalk or marker) is

found." For centuries, the Gitxaala have collected that chalky substance, ochre, and used it to mix into paint. Gitxaala argues that any grant of a mineral claim over this area would prohibit Gitxaala from using these minerals or pursuing this traditional activity and right to use the lands.

[226] As noted, the hereditary chiefs are responsible for the maintenance of Gitxaala Territory for future generations. That responsibility includes the maintenance of the homes, or dens, of the supernatural beings that are core to their spiritual beliefs. The mineral tenure system allows miners to stake claims over areas that constitute these supernatural dens. Overlapping mineral exploration constitutes disruption of these sacred areas and is forbidden under Gitxaala law.

[227] Mineral exploration activities have been ongoing on Banks Island since the 1960s. I discuss below the issues relating to the Yellow Giant Mine on Banks Island. For the reasons I discuss below, I find that evidence relating to that mine are not part of the record of the CGC's decision, and hence not relevant to this judicial review. In short, the problems with the Yellow Giant Mine, although significant, do not inform the issue of whether a duty to consult is owed at the mineral claim stage.

[228] However, as general background information, I accept that Gitxaala, as a community, gained a heightened awareness and antipathy to mining activities after the Yellow Giant Mine closed down and toxic spills occurred in 2015. The province does not dispute that the mine was abandoned and that it continues to require remediation.

[229] Gitxaala's evidence described above is admissible.

[230] Gitxaala submits that the evidence described above is relevant to a number of issues. Situations such as the Yellow Giant Mine, and the registration of mineral claims on Gitxaala Territory, bring shame to all the houses by virtue of disrespectful or incorrect behaviour. This is known as "dirtying the blanket." All the Gitxaala chiefs are responsible for responding to these actions which breach Gitxaala law. As discussed below, Gitxaala submits that the actions of the Crown affect the territory.

All chiefs must ensure corrective action is taken. This petition is itself a corrective action taken by the Gitxaala hereditary chiefs.

[231] In the context of the paragraphs above, Gitxaala submits that the mineral tenure regime is an attack on Gitxaala society. In that regard, Gitxaala experienced Crown conduct, pursuant to the mineral tenure regime, as an attack on multiple fronts:

a) against the integrity of the Gitxaala legal system and the authority of hereditary chiefs to govern their lands and waters under the traditional system of law;

b) against Gitxaala's ownership of and inherent title to their traditional territories;

c) against Gitxaała's spiritual relationship with their territory and all beings within it; and

d) ultimately, against the fabric of Gitxaala culture.

[232] As noted, the evidence describe above is not in dispute.

Evidence of Disputed Relevance

[233] The province argues that parts of the Gitxaala evidence (below) are not admissible on the basis that they are not relevant, or on the basis that there is conflict with other evidence.

[234] The affidavits filed by Gitxaala include information relating to:

a) the history of mineral claims on Banks Island and the surrounding areas;

b) the Yellow Giant Mine, which was located on Banks Island and resulted in toxic spills and, as yet uncompleted, remediation;

c) the mineral tenure system in the state of Northern Australia;

d) the standards of an industry group called The Initiative for Responsible Mining Assurance ("IRMA").

[235] First, Gitxaala notes the longstanding mineral claims on its territories to establish the indefinite tenure created by the registration system.

[236] Second, addressing the Yellow Giant Mine, Gitxaala submits that the province:

a) engaged in inadequate, hasty consultation;

b) trampled over Gitxaala's concerns and favoured the miner's requests at the permitting stages (exploration and major mine permits);

c) provided inadequate monitoring of the mine, leading to the despoiling of an area of Banks Island; and

d) failed to remediate, or monitor, the site after it was abandoned.

[237] Hence, Gitxaala submits that, despite consultation at the mineral lease and *Mines Act* permit stage, it is difficult to derail the "runaway train" once the mining company commences the permitting process.

[238] Gitxaala submitted evidence of the mineral tenure system in the state of Northern Australia. That material proffers evidence of another jurisdiction wherein consultation with First Nations occurs at the mineral claim stage. This evidence was buttressed by submissions on behalf of the intervenors, First Tellurium Corp. and Kingston Geoscience Ltd. Those companies, based in Ontario, engage in consultation at the exploration stage.

[239] Gitxaala also put forward evidence from an industry group called IRMA. IRMA has published draft standards that require consultation with Indigenous groups. These standards were also the subject of the submissions of the intervenor, the ENGO Coalition.

[240] The province responds to each of these areas as follows:

a) While the province accepts that mineral claims can have a long duration, evidence of older claims on Gitxaala Territories are not relevant to the current dispute. In particular, many of the claims discussed in the affidavit material pre-date the 1990s. Those claims pre-date the origin of the *Haida* Test in 2004. Hence, they could not have been part of the CGC's decision making on the duty to consult.

b) With respect to the Yellow Giant Mine, the province acknowledges that Banks Island was damaged, and remediation is still required, but:

   i. the recorded holder of the mineral claim applied for an exploration permit and then a mine permit. The province consulted with Gitxaala in respect of both permits. Hence, the mine did not proceed to development until after the province consulted with Gitxaala; and

   ii. following the establishment of the mine, the principals acted in breach of their permits, leading to the spills and the need for remediation. Those principals were prosecuted under the *Environmental Management Act*. S.B.C. 2003, c. 53;

   iii. hence, the damage resulting from this mine, while tragic, is not relevant.

c) In answer to the "runaway train" argument (*i.e.*, that the mine permitting process is difficult to stop because it has momentum), the province points to several, highly developed mine proposals that have not proceeded because of environmental concerns raised by First Nations. There is no "momentum". To the contrary, miners face multiple permitting road-blocks.

d) With respect to the mineral tenure system in Northern Australia, the province says that any such comparison could never be "apples to apples."

e) With respect to the IRMA draft standards, the province notes that the existing IRMA standards do not call for consultation with Indigenous groups. That requirement is only included in the "draft" standards that the members of IRMA have not yet adopted.

Discussion on Admissibility

[241] On the issue of admissibility, I accept the general propositions put forward by the province for the following reasons:

a) The long duration of mineral claims is not in dispute. Mineral claims are time limited, but can be "continued" from year to year. It is not disputed that some claims are decades old.

b) Evidence of the detrimental effects of mining (as opposed to mineral exploration) is not part of the record. Put another way:

i. The CGC and the LGIC have chosen to "draw the line" by not requiring consultation at the "mineral claim" stage. Instead, the CGC requires consultation at the "mineral lease" and other permitting stages.

ii. Hence, any adverse impact that occurs after the granting of an exploration permit, or a mineral lease, by definition, occurred after consultation.

iii. The question for this judicial review is whether the issuance of mineral claims, on their own, triggers a duty to consult. The fact that there were adverse impacts from later mining activity is not relevant to that question.

iv. More to the point, the existence of adverse impacts from later exploration or mining activity may form part of the decision-making process of the CGC on why consultation is required at that (later) stage. However, it was not part of the decision of where to "draw the line". Hence, it was not part of the record.

v. There is a dispute on the existence of the "momentum" or "runaway train" model of mine permit approval. I am satisfied that the province's evidence addresses that issue. I am satisfied that mining permits require significant permitting. There are many steps in the process and there is no "runaway train" leading to the granting of a *Mines Act* permit.

c) Hence, evidence of the adverse impacts caused by the Yellow Giant Mine is not admissible on this judicial review to establish that mineral claims (on their own) cause adverse impacts.

[242] The province also disputes the admissibility of an affidavit and report relating to the regulation of mineral exploration in Northern Australia. Gitxaala tendered the report, at least in part, as evidence that mining exploration and consultation can co-exist. On this issue, I accept the submission of the province for two reasons:

a) There is no evidence to establish that the underlying Indigenous claims of rights and title in Australia are analogous to the issues faced in BC.

b) There is no suggestion that either the CGC or LGIC were aware of the mineral tenure system, or the underpinnings of the duty to consult, in one state in Australia.

[243] Turning to the IRMA standards, I accept that the "draft" IRMA standards are not admissible as evidence of the industry practice. It stands to reason that the existing IRMA standards could be admissible as evidence of a standard that is upheld within a segment of the industry. However, those standards are clearly in flux. I place no weight on the IRMA standards

[244] I further note that the province takes issue with the accuracy of the Gitxaala evidence regarding whether there was sufficient consultation before the permitting of the Yellow Giant Mine. Given the substantial negative impact of that mine closure and the need for remediation, it is not surprising that a significant portion of Gitxaala's material addresses the consultation process during that permitting

process. However, having found that the information about the mine is not relevant to my analysis, it follows that any dispute about the underpinning of that permitting process is also not relevant.

[245] I have set out above my decision that Gitxaala's affidavit material relating to the adverse impacts from the Yellow Giant Mine is not admissible because it is not relevant to the specific issue before me. However, I consider the affidavit material on that topic to provide general background relating to the overall position of Gitxaala and part of the impetus for this petition.

[246] It follows from my discussion above that:

a) I find that Gitxaala's affidavit material relating to the Yellow Giant Mine is admissible as general background information, but not admissible as an "adverse impact" of the mineral tenure system.

b) I find that the following evidence is inadmissible. Evidence going to:

   i. "momentum" or "runaway train" arguments;

   ii. detrimental effects of mines and mining generally;

   iii. Australian mining laws; and

   iv. IRMA standards.

c) However, I accept that the other evidence provided in Gitxaala's affidavit material (as described above) is admissible as either background information or evidence of adverse impacts.

[247] Having decided the procedural issues, I now proceed to the substantive issues.

Substantive Issues

The Underlying Issue: Has the province drawn the line in the correct place?

[248] As noted above, the province defines the ultimate question for this petition as a determination of whether the province "drew the line" in the right place. In other words, is the province correct in its position that the granting of a mineral claim does not trigger a duty to consult? While the petitioners raise some concerns with that characterization, I find it a useful starting point for my analysis.

[249] The province, meaning either the CGC or the MTB, decided that its duty to consult arises at some point after the mineral tenure stage. In other words:

a) the province does not provide for consultation at the point when a free miner applies for a mineral tenure under the online registration system;

b) instead, the province provides for some level of consultation if the initial exploration is successful and the miner seeks to proceed to a deeper level of exploration or extraction (at the time of a mineral lease or a *Mines Act* permit).

[250] In addressing this issue, I accept the submission of the petitioners that it is not relevant for my assessment whether consultation exists at a later step in the mineral exploration process. The considerations in the *Haida* Test do not ask whether there will be consultation at some later stage. Instead, the *Haida* Test looks at the circumstances faced by the province and the First Nation at each stage in the process. The very nature of the test is designed to determine when consultation should occur.

[251] In addressing this issue, I have ordered my analysis as follows:

a) Is there a duty to consult under s. 35 of the *Constitution* and the *Haida* Test?

   i. The petitioners' arguments

ii. Province arguments

b) Where does the infirmity lie?

i. in the legislation? or

ii. in the implementation of the legislation?

c) Does a duty arise under *DRIPA*?

[252] I note that each petitioner, for the sake of efficiency, focussed their submissions on a different legal issue respectively. Specifically, Ehattesaht focussed their submissions on the *Haida* Test and its relationship to s. 35 of the *Constitution Act*. Gitxaala focussed its arguments on *UNDRIP* and *DRIPA*.

Is there a duty to consult under s. 35 of the *Constitution Act* and the *Haida* Test?

[253] Before delving into the submissions of the parties, I note that there is no significant dispute on the nature of the application of the *Haida* Test.

[254] There are three elements to the *Haida* Test:

a) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;

b) contemplated Crown conduct; and

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

[255] As noted above, the province concedes the first two elements. The only question for me to determine is whether the granting of mineral claims adversely affects a claim or right of the petitioners.

[256] Further, as noted above, the sole question for me is whether the duty is triggered. I am not considering the "measures", or the "depth", of the consultation that the province may be required to implement.

The Petitioners' Submissions

[257] An overview of the petitioners' submissions can be summarized as follows:

> The province is aware of the strong claims that the petitioners have to the territories over which they claim rights and title. The registration of mineral claims, and the rights associated with those mineral claims, interferes with the petitioners' asserted rights and title.

[258] As described above, the submissions of each petitioner overlap, but express the adverse impacts in slightly different terms. Due to the overlap, I have described them below in combined form.

[259] The petitioners submit that the grant of mineral tenures has a number of existing and potential impacts on their rights. I describe those impacts in brief before delving into them in more detail. I divide them into two general groups:

a) Non-physical Impacts (*i.e.*, political/legal/cultural/spiritual); and

b) Physical Impacts (Loss of minerals/loss of financial benefit of the minerals/disturbance of the land).

[260] I have addressed them in this fashion because, as discussed below, there are different considerations in respect of each type of impact.

[261] I refer to the first group of impacts as "non-physical" to distinguish them from physical impacts such as the loss of minerals and other physical disturbances. However, there is overlap. For example, there can be disputes involving the (physical) disturbance of culturally or spiritually important land.

[262] For the reasons discussed below:

a) I do not accept the petitioners' submissions on "legal order impacts" and "decision-making and governance impacts". In other words, the alleged infringement on these areas does not constitute an "adverse impact" for the purpose of the *Haida* Test.

b) However, I do accept the petitioners' submissions in relation to the adverse impact on cultural and spiritual aspects, specifically in relation to places of significance.

c) I also accept the petitioners' submissions in relation to the physical impacts (loss of minerals, physical disturbance, and loss of financial benefit of the minerals).

"Non-physical" Impacts

[263] The petitioners submit that the grant of a mineral claim results in the following non-physical adverse impacts on their rights and title:

a) A loss of decision-making power: Grants of mineral rights interfere with the petitioners' management, decision making, and governance. The petitioners lose their power to decide on present and future land uses.

b) Legal order and governance impacts: The granting of mineral claims ignores the petitioners' legal order, thereby undermining the application of their law and jurisdiction. This adversely affects the petitioners' title and rights. Specifically, Gitxaala argues that, in the Gitxaala system of law, the hereditary chiefs are granted ownership, governance, and control over their territories. A mineral claim includes the rights to access and explore the mineral claim area and, therefore, encroaches on the traditional powers of the hereditary chiefs.

c) Cultural and spiritual impacts: The potential adverse impacts described above have added significance in the context of the petitioners' cultural and spiritual dimensions. Without consultation, grants of mineral claims

may have adverse impacts on places of spiritual significance. In other words, if an area has special spiritual significance to a First Nation, then any degree of mineral exploration activity on that land may have adverse impact on their spiritual beliefs. In the cases of the two petitioners, two examples are:

i. the removal of crystals (Ehattesaht); and

ii. any mineral claim in the Ksgaxlam, the place of the mountain where crayon (coloured chalk or marker) is found (Gitxaala).

[264] I address the legal order, governance, and decision making separately, and then discuss the cultural and spiritual aspects.

The Province's Position

[265] In answer to these propositions, the province argues that an adverse impact (to a non-physical right) does not arise simply because mineral claim registrations are conceptually inconsistent with the present exercise of Aboriginal title rights. The province says the law is clear that the relief to which a First Nation is entitled is different at the "asserting" stage than at the "Aboriginal title" stage.

[266] The areas of Aboriginal title were identified in *Tsilhqot'in Nation* at para. 73:

> … the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

[267] The province submits that those rights are associated with (and follow the settlement of) Aboriginal title. They are not rights that can be asserted or enforced prior to the settlement of Aboriginal title. The province submits that the petitioners' arguments on adverse impact focus on a conceptual inconsistency (that currently exists) between:

a) the Crown's administration of the territories (including the grant of proprietary interests in minerals to third parties); and

b) certain elements of Aboriginal title (the right to determine legal order and the right to govern and make decision regarding land use).

[268] The province submits that the petitioners' submissions on these issues overlook the temporal aspect of both the First Nation's asserted rights and the mineral claims.

[269] First, the province addresses the temporal element of the First Nation's asserted rights. At present (*i.e.*, before settlement of the petitioners' title claims), the Crown retains the obligation to manage the land and resources, subject to the duty to consult when it is triggered. This means that my assessment of whether there is an adverse impact (on these rights) cannot proceed on the basis of the enjoyment of claimed Aboriginal title at present, as if these rights had already been declared. Instead, the province submits that the analysis must be forward-looking. The proper analysis requires an examination of whether the impact of the Crown conduct (*i.e.,* granting mineral claims) will affect the Indigenous group's ability to fully realize the benefits of Aboriginal title in the future (*i.e.,* after settlement of title).

[270] For an example, the province points to Gitxaala's assertion that, under its legal structure, the hereditary chiefs decide who can access their lands. At present, the province decides who can access those lands. Those general provisions are contained in the *Land Act*. The province says that it is not an adverse impact that people can access Gitxaala's asserted territories. However, once Gitxaala has established Aboriginal title, then Gitxaala's system of law may govern. In the meantime, the province administers the territory in a manner that preserves it so that, after settlement of title, Gitxaala will be able to govern pursuant to its legal order.

[271] In other words, the province submits that, at this stage, the hereditary chiefs do not have the right to determine who enters their lands. Gitxaala law does not yet govern. That is an asserted right. Hence, it is not an adverse impact for the province to allow individuals onto Gitxaala's asserted territory. If (current) access to the land constituted an adverse impact, then, in effect, a duty to consult would be triggered

simply by the province authorizing a person to walk on the land. The province says that the law does not support that assertion.

[272] The province submits that this point was made clear in the statement of the Supreme Court of Canada in *Rio Tinto* at para. 46:

> [To trigger the duty to consult] there must an 'appreciable adverse effect on the First Nations' ability to exercise their aboriginal right'. The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [Emphasis added.]

[273] The province submits that, at some point in the future, the petitioners will settle their title claims. At that point, the petitioners will be able to exercise these rights (to the extent they have been settled or negotiated).

[274] The province draws an analogy to the decision of the Yukon Court of Appeal in *Ross River Dena Council v. Yukon*, 2020 YKCA 10 [*Ross River 2020*] (which decision is to be distinguished from *Ross River 2012*).

[275] It is important for the reader to understand that the *Ross River* litigation proceeded in three parts.

[276] First, in 2012, the Yukon Court of Appeal decided *Ross River 2012*, a case which related to quartz mineral claims. The plaintiff, Ross River Dena Council, was successful. (I discuss this decision in detail below.)

[277] Second, in *Ross River Dena Council v. Yukon (Government of),* 2015 YKSC 45, the same plaintiff sought a declaration that the issuance of hunting licences "has the potential to adversely affect Aboriginal title and the right to hunt in the Ross River Area" (at para. 58). In that case, the rights asserted by the plaintiff related to the existing right to hunt. The court held that the duty to consult was triggered, but found that Yukon had sufficiently consulted with the plaintiff and, therefore, had fulfilled its duty. Hence, no declaration was necessary.

[278] In 2019 (at the trial level) and 2020 (at the appellate level), the same plaintiff sought a declaration that Yukon had a duty to consult before issuing hunting licences because of the First Nation's asserted title rights. The plaintiff cited the title rights described at para. 73 of *Tsilhqot'in Nation* (described above).

[279] The council is referenced in the decisions as "RRDC". This third action was dismissed at trial: *Ross River Dena Council v. Yukon*, 2019 YKSC 26.

[280] On appeal, the court's analysis in *Ross River 2020* at paras. 9–10, in refusing the supplementary declaration, proceeded from the principle that:

> 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.

[281] The court elaborated its reasoning at paras. 21–23:

> [21] RRDC's argument is problematic for two key reasons. First, as Yukon points out, issuing hunting licences does not, in and of itself, give the holder of the hunting licence the right to enter land that it could not otherwise enter. A right to hunt within a region does not confer a right to enter private property situated within that region. A hunting licence is not a defence to trespass: *Wildlife Act*, s. 100.
>
> [22] Second, RRDC's argument is at its core a claim that it can assert a right, at the present time, to control who enters the claimed land and, therefore, Yukon must consult with RRDC whenever it contemplates action that would allow or encourage others to enter the land. This is so, on RRDC's argument, even when the activities conducted by others on its claimed territory have no identifiable adverse impact on the land or the RRDC's members' rights, <u>at present</u> <u>or in the future</u>, other than, circuitously, the very fact that RRDC cannot exclude them. The problem with this is that RRDC has not established Aboriginal title to the Ross River Area; the process is still at the claim stage. Without an established claim, RRDC does not have an exclusive right to control the use and occupation of the land <u>at present</u>, nor does it have a right to veto government action. That being the case, the legal framework set out in *Haida Nation* and *Rio Tinto* applies.
>
> [23] This leads to the root of the problem with these two grounds of appeal. RRDC has not identified any potential adverse impact on the subject matter of its asserted claim which could affect its ability to fully realize the benefits of Aboriginal title, if and when it is finally established. Thus, the third requirement of the framework set out in *Haida Nation* and *Rio Tinto* has not been satisfied.
>
> [Emphasis in original.]

[282] The province notes that our Court of Appeal endorsed this temporal aspect of the right in *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 [*Gamlaxyeltxw BCCA*]. That decision dealt with the scope of the duty to consult when there were overlapping claims as between First Nations. Justice Hunter wrote for the court:

> [65] Where the scope and extent of the claimed Aboriginal interests have not yet been determined, the duty to consult derives from the need to protect these interests while land and resource claims are ongoing: *Rio Tinto* at para. 33. The purpose of the duty to consult, however, is not to provide claimants immediately with what they could be entitled to upon proving or settling their claims: *Ross River Dena Council v. Yukon*, 2020 YKCA 10 at para. 10.

[283] The province says that the petitioners' submission essentially breaks down into the following question: Does the registration of a mineral claim raise the prospect that the presence of this proprietary interest, in and of itself, may intrude on the enjoyment of Aboriginal title in the future?

[284] The province submits that, on this question, it is necessary to answer the practical question of: What would happen to the mineral claim if and when there is a future declaration of Indigenous title over the territory where the mineral claims are located?

[285] First, the province notes that mineral claims are temporary and must be continued from year to year. The province submits that the amount of disturbance of the land pursuant to a mineral claim (without further permit) is "nil or negligible". (I discuss this concept, and the petitioners' perspectives, below.)

[286] The province acknowledges that, upon declaration of Aboriginal title, the existing mineral claims would continue. However, from a practical level, those continuing mineral claims would resolve themselves.

[287] The province submits that, after a declaration of Aboriginal title, if the holder wished to develop the claim further, then one of two scenarios would occur. Either:

a) the Indigenous group would have to consent to further authorizations such as a *Mines Act* permit; or

b) the Crown (in concert with the miner) would have to meet the "justification analysis" in order to authorize further development activity on existing mineral claims.

[288] In the second scenario, if the Crown believed that the broader public good should override the title-holding First Nation's wishes, then the government would have to show (*Tsilhqot'in* at para. 77):

a) that it discharged its procedural duty to consult and accommodate;

b) that its actions were backed by a compelling and substantial objective; and

c) that the governmental action is consistent with the Crown's fiduciary obligation to the group.

[289] The province submits that any mining operation would have a very difficult time meeting the justification test. The threshold is high. In other words, the second scenario (proceeding without the First Nation's consent) is not going to happen.

[290] The province concedes that the recorded holder of the mineral claim could seek to continue (without further permit) to access and explore the land. However, in reality, this is in only a hypothetical problem. In order to make mineral exploration financially viable, the end goal must be the development of a mine. Hence, once the First Nation has achieved Indigenous title, the miner would require the consent of the First Nation to move past the mineral claim stage. Hence, in reality, the holders of any mineral claims would attempt to achieve consent to further development, and if they failed, they would walk away. Again, this brings the argument back to the temporary nature of the mineral claim. If the First Nation's consent is not obtained, the mineral claim will be abandoned because it has no value.

[291] On the basis of the analysis above, the province submits that the petitioners' title interests (as they may exist in the future) are protected. The mere existence of a

mineral claim within asserted territory causes no irrevocable prejudice to the First Nation's future title rights to govern according to their legal order. While the mineral claim may notionally be "on the books", it will effectively be sterilized from further development following the declaration of title (unless the First Nation consents to the development of a mine).

[292] Thus, following declaration of Indigenous title, each petitioner will be able to govern their territories according to their system of laws. The province has not ceded any right to any other entity. Decisions regarding land use can be pursued by the First Nation.

The Petitioners' Position

[293] On this issue, the petitioners submit that the province's argument puts forward a narrow and technical interpretation of the honour of the Crown.

[294] They cite the reasoning in *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74:

> 23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". …
>
> 24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. … the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims**.** In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).
>
> [Emphasis added.]

[295] Ehattesaht points to the cumulative effect of mineral claim registration, especially in areas in the Nomash and Zeballos River watersheds. Those areas are

close to Ehattesaht's main community and very important for their Aboriginal rights and way of life. These multiple claims create a cumulative effect that negatively impacts Ehattesaht's present and future use of its territory, threatening Ehattesaht's way of life and cultural security. This cumulative effect provides context to, and should inform consultation with respect to, the grants of mineral tenures.

[296] Gitxaala submits that a grant of mineral rights may adversely impact Gitxaala's legal order by ignoring and thereby undermining Gitxaala law.

[297] Gitxaala cites *Reece v. Canada (Attorney General)*, 2022 BCSC 865, to support the proposition that, for purposes of an interlocutory injunction, a transfer of lands would involve "irreparable harm" to an Indigenous Nation's legal regime. In *Reece* at para. 114, the affiants articulated the impacts as including harm to their legal system:

> [114] The impacts of a transfer of the Nasoga Lands to the Nisga'a are described by Mr. Reece to include:
>
> a) Harm to the Allied Tribes's legal system:
>
> i. If the Nisga'a are granted the right to exclude others and decide on land use in ways inconsistent with the Allied Tribes's ownership of the lands pursuant to Tsimshian law, the Allied Tribes's entire legal system in connection with the lands would be undermined.
>
> ii. The transfer of the lands to the Nisga'a in the manner contemplated would violate the sacred obligations of the Allied Tribes to protect the integrity of their territory.
>
> iii. The transfer would undermine the Tsimshian legal system in resolving disputes about ownership of territory and other rights, including the recitation of histories of ownership and the witnessing of such recitations at formal ceremonial gatherings, or feasts.
>
> [Emphasis added.]

[298] In *Reece*, Justice Baker concluded that this articulation of impacts "is sufficiently grounded in the evidence; it is not mere speculation or assertion of possibility. I accept the harm as articulated by [the Indigenous Nations' affiants] will be irreparable for the Allied Tribes": para. 124. I address this decision below.

[299] Gitxaala further submits that, in *Gamlaxyeltxw BCSC*, the province's disregard of the Gitanyow Nation's own laws represented an "affront" to the Nation that constituted serious "potential injury" to those Indigenous laws, and therefore contributed to a consultation duty at the higher end of the spectrum. The issue in that case was the determination of the total annual harvest (or "TAH") of moose in the Nass Wildlife Area:

> [261] Gitanyow Ayookxw (law) commands that non-Wilp members seek and obtain permission from the Hereditary Chief before harvesting in the territory over which that Chief has Daxgyet (spiritual and lawful authority). The presence of non-Gitanyow hunters within Gitanyow Lax'yip, when those hunters have not obtained from the Hereditary Chief permission to be on the land to harvest moose, is an affront to the Gitanyow. That impact cannot be quantified, but the potential injury to such a fundamental edict of Gitanyow Ayookxw is serious.
>
> [262] I am persuaded by the foregoing, that the potential seriousness of the TAH decision's impact on the Gitanyow's exercise of its asserted right to harvest moose justifies a degree of consultation placed higher on the spectrum than at the low end.
>
> [Emphasis added.]

[300] I address this decision below.

[301] Gitxaala further submits that, in a "duty to consult" context, the courts have recognized that the province's decisions may directly impact the exercise of an Indigenous Nation's own laws, and that such an impact engages the duty to consult and accommodate. For example, *Wii'litswx v. BC (Minister of Forests)***,** 2008 BCSC 1139, dealt with consultation regarding forest licence replacements in the traditional territory of the Gitanyow Nation. When addressing the issue of the authority of hereditary chiefs over their family territory, or "wilp", the court noted at para. 26:

> [26] Logging activity has impacted other aspects of Gitanyow culture as well. It has destroyed the Wilp cabins. Removal of resources has prevented the Hereditary Chiefs from carrying out their duties under Gitanyow Ayookxw, or law, to manage their Wilp territories and resources to ensure future sustainability. As well, they have been unable to draw on these resources to maintain their Wilp culture and traditional activities, and instead must use personal funds for these purposes. Gitanyow say that this has caused not only financial hardship, but pain and shame among its people.
>
> [Emphasis added.]

[302] As discussed below, Gitxaala focusses upon the underlined words. I address this case below. However, it is clear that para. 26 discusses a mix of current physical adverse impacts (destroyed cabins, financial hardship) as well as disruptions in the application of the Gitanyow legal order.

[303] Gitxaala notes that the Court in *Wii'litswx* concluded, at para. 247, that:

> ... the honour of the Crown and s. 35 of the *Constitution Act* imposed a constitutional duty to meaningfully consult and reach accommodation with respect to the recognition of the Wilps and Wilp boundaries in the strategic decision to replace the FLs [forest licences]. Dismissing such recognition as impractical, without discussion or explanation, fell well below the Crown's obligation to recognize and acknowledge the distinctive features of Gitanyow's aboriginal society, and reconcile those with Crown sovereignty.

[304] Gitxaala submits that the province granting mineral claims on Banks Island is a serious affront to Gitxaala's legal order, because it ignores, and is contrary to, Gitxaala law, or *ayaawx*. The grants of mineral claims purports to authorize third parties to act contrary to the *ayaawx*. A grant is essentially contemptuous conduct that undermines the rule of Gitxaala law.

Analysis of the Adverse Impact on Legal Order and Governance

[305] In my opinion, the province's characterization of the law in this area is the correct one. In other words, the obligation of the Crown is to administer the territories until such time as Aboriginal title is settled. The role of the province is to preserve the territories such that each First Nation can exercise its Aboriginal title rights after Aboriginal title is settled.

[306] It follows that the province administering the territory (at present) in a manner that does not accord with the First Nations' system of law, governance or management, does not create an adverse impact that triggers consultation (based solely on those rights). For the duty to consult to be triggered, the impugned Crown conduct must in some way impede the petitioners' ability to govern their land in the future, when title is established. The petitioners submit only that their ability to govern at present is interfered with. As I explain below, this is not the type of adverse impact contemplated by the *Haida* Test.

[307] In my opinion, the cases that the petitioners rely upon do not assist in relation to the issues presented on this judicial review.

[308] The *Reece* and *Gamlaxyeltxw BCSC* decisions relate to disputes involving multiple Indigenous groups against the province and the Nisga'a Nation.

[309] In *Reece*, pursuant to the Nisga'a Final Agreement, the province proposed to transfer lands to the Nisga'a Nation. The plaintiff, on behalf of the Allied Tribes of Lax Kw'alaams and Metlakatla, asserted rights over some of those lands. The plaintiffs sought an injunction to prevent the transfer on the basis that the Allied Tribes would suffer irreparable harm if the land was transferred. That injunction was granted.

[310] Justice Baker in *Reece* found that the Allied Tribes would, in fact, suffer irreparable harm if the province transferred the land. The court found that, in part, the construction of pipelines and other work could destroy evidence critical to establishing the Allied Tribes' use and control of the lands at the relevant times. Further, any development of the lands would likely interfere with sites sacred to the Allied Tribes. In her reasons, Justice Baker accepted that the plaintiffs would suffer the adverse impacts described in para. 114 (above). However, in my opinion, the key to Justice Baker's decision relates to the Crown losing control over the land and thus the ability to consult regarding its use. Justice Baker wrote at para. 124:

> [124] I am satisfied that the Allied Tribes will suffer irreparable harm if the Disposition and Consent are proceeded with at this time. I am satisfied that the irreparable harm asserted by the Allied Tribes is sufficiently grounded in the evidence; it is not mere speculation or assertion of possibility. I accept the harm as articulated by Mr. Reece and Mr. Leighton will be irreparable for the Allied Tribes. In addition, I find the most significant harm is the transfer of the Nasoga Lands into the control of the Nisga'a under the Treaty. I find this transfer will result in a significant impairment of the Allied Tribes's right to be consulted and, potentially, accommodated by the Crown prior to any potential infringement of their rights and title in the Nasoga Lands pending determination of their claims.
>
> [Emphasis added.]

[311] In my opinion, the decision in *Reece* does not turn on the existence of an adverse impact on the plaintiffs' asserted legal system. Instead, the critical finding

was the fact that, if the land was transferred to the Nisga'a, then the Crown would lose all control over it. This would result in a "significant impairment" of the right to be consulted about infringements on the plaintiffs' rights and title regarding that land.

[312] On that basis, I find that *Reece* does not assist the petitioners.

[313] In *Gamlaxyeltxw BCSC*, the Gitanyow asserted a claim for Aboriginal rights over (again) territory that overlaps with an area subject to the Nisga'a Treaty. They sought the right to be consulted concerning two decisions to be made by the Minister of Forests pursuant to that Treaty:

a) the approval of the total allowable harvest (TAH) of moose in the overlap area; and

b) the approval of the annual management plan for the Nisga'a hunters.

[314] I note that the discussion in para. 261 (copied above) relates to the total annual harvest of moose. As noted, on the facts of that case, the Minister already consulted with the plaintiffs about that harvest. Hence, the issue for the court was the degree of consultation, as noted in para. 262 of the decision (above). It follows that the adverse impact of the "total harvest" decision had already been recognized by the province. The asserted right to harvest moose was not in issue, except as it related to the depth of consultation.

[315] However, on the other issue addressed in *Gamlaxyeltxw BCSC,* the Minister took the position that there was no duty to consult on the annual management plan (as distinct from the annual harvest) because there was no adverse impact on the plaintiffs. The chambers judge held that the duty to consult was not triggered by the approval of the annual management plan. That decision was upheld on appeal.

[316] Hence, in my opinion, *Gamlaxyeltxw BCSC* does not assist the petitioners. Instead, it supports the province's position. I return to the reasoning of the Court of Appeal in *Gamlaxyeltxw BCCA*:

> [65] … The purpose of the duty to consult, however, is not to provide claimants immediately with what they could be entitled to upon proving or settling their claims: *Ross River Dena Council v. Yukon*, 2020 YKCA 10 at para. 10.

[317] This statement by the Court of Appeal is echoed in the province's submission in the case before me.

[318] My opinion on this issue is confirmed when I consider the practical implementation of the petitioners' position, if followed to its logical conclusion:

a) The province is obligated to administer territories in the period between assertion of rights and the declaration of title.

b) Pursuant to the third element of the *Haida* Test, the province has a duty to consult where there is an adverse impact.

c) The petitioners argue that a government decision that overrides the implementation of their legal system or system of government constitutes an adverse impact.

d) Every action that the province takes in a territory is authorized by the provincial legal system and system of government.

e) By definition, the province's decisions will not arise from the First Nation's legal order or system of government.

[319] On the basis of the analysis set out above, I find that the granting of mineral claims does not trigger a duty to consult insofar as the petitioners have argued that such claims adversely impact the petitioners' asserted Aboriginal rights to manage their territories in accordance with their legal systems or systems of government.

Cultural and Spiritual Impacts

[320] Turning to the cultural and spiritual impacts, I reach a different conclusion.

[321] In order to put this issue in context, I address three specific examples of geographic areas and geologic formations within the territories of the petitioners that have significant cultural and spiritual value.

[322] Ehattesaht places great value on the existence of crystals in their territory. As noted above, Captain Cook's diary references a carved crystal he received from the Ehattesaht in 1778.

[323] Gitxaala points to two geographical areas of cultural and spiritual significance:

a) Ksgaxlam is the place where, for centuries, Gitxaala have gone to collect coloured chalk for the purpose of creating paints and markings.

b) As described by the affidavit of the petitioner Nees Hiwaas, Gitxaala believes that all living things in Gitxaala Territory have their own naxnox (pluralized "naxnanox"). Naxnanox are supernatural beings or nature spirits. Gitxaala's ancestors learned the values, beliefs, and law that define Gitxaala culture through experiences with naxnanox. Naxnanox have spanaxnanox (dens or territories) within Gitxaala Territories. Gitxaala Traditional Territories are the physical home of these supernatural beings.

[324] The evidence tendered by Gitxaala indicates that the location of the supernatural "dens" is a guarded secret within their culture. However, the disturbance of any of these dens, which would be occasioned by mineral exploration, would constitute the disturbance of a spiritual place that cannot be repaired.

[325] I am aware that few readers of these reasons, outside of the members of Ehattesaht and Gitxaala, will have an appreciation for Gitxaala spiritual beliefs. For the context of this discussion, I am attempting to consider these submissions within a cultural and spiritual context that a wider group may appreciate. For example, I transpose the petitioners' position onto the position that might be taken by groups within the Catholic faith if a mineral claim were granted at the Sanctuary of Our Lady of Lourdes in France, or by groups within the Jewish faith if the same were granted

at the Western Wall in Jerusalem. On a more local level, what position would be taken if a mineral claim was granted in a cemetery? In my opinion, these examples assist in placing the petitioners' positions in context.

[326] I further note that the concept of "adverse impacts" must be viewed through the lens of the First Nation. In other words, the duty to consult is not triggered when the province believes there is an adverse impact. The situation must be viewed from an Indigenous perspective. I discuss below, under the heading "Physical Impacts", the province's submission that the physical disturbance of the land (authorized by a mineral claim) is "nil or negligible". However, viewed from the First Nation's perspective, the activities of recorded holders could potentially damage areas that are culturally or spiritually significant to the petitioners. Hence, the perspective of the petitioners is an important consideration.

[327] In my opinion, the petitioners' submissions describe a situation where the physical impact of mining exploration intersects with the non-physical rights of the First Nation. For Ehattesaht, the collision arose when Forest Crystals staked a mineral claim and commenced the removal of crystals in Ehattesaht territory. For Gitxaala, the collision occurred with the prospect of mineral claims being allowed in the Ksgaxlam area and other spiritually significant areas.

[328] On this issue, the Court of Appeal recently indicated its approval of decision makers recognizing spiritual beliefs as worthy of protection. In *Redmond v. British Columbia*, 2022 BCCA 72, Mr. Redmond applied for Crown land tenure to build a private, run-of-river hydroelectric generator. The river was located on the traditional territory of the Cheam First Nation and had great spiritual importance to them. Mr. Redmond argued that denial of his application infringed upon his freedom of religion. Justice Grauer wrote:

> [92] I agree with the review judge that it was reasonable for the Director to consider the impact of the project on the Cheam's spiritual practices. In doing so, the Director did not evaluate the Cheam's spiritual beliefs, or purport to arbitrate dogma. What he did was recognize those beliefs as worthy of protection as part of the mandated process of reconciliation. The Director was obliged to do so both constitutionally and in accordance with the guidance of the Land Allocation Policy.

[329] I accept the position taken by the petitioners in relation to the adverse impact of mineral claims on their spiritual beliefs. These are impacts that are felt currently. Further, the nature of the impact cannot be corrected such that the petitioners will be able to pursue their spiritual practices after the declaration of Indigenous title. If the spiritually significant sites are disturbed, the effect could be permanent.

[330] On that basis, I find that the allowance of mineral claims without consultation creates an adverse impact on the petitioners' Aboriginal rights regarding their cultural and spiritual beliefs.

[331] I pause to note that the petitioners point to these examples as being both indicative of the problem and illuminating of the solution. They submit that if consultation occurred, then specific sensitive areas and formations could be identified and protected. I discuss below the specific powers in s. 17 of the *MTA* which provide for the ministry to protect a "cultural heritage resource" which term includes a location that is of cultural significant to an Aboriginal people.

Physical Impacts

The Petitioners' Position

[332] The petitioners submit that the grant of a mineral claim results in the following physical adverse impacts on their rights and title:

a) Loss of minerals**:** The holder of a mineral claim is authorized to extract minerals from the claim area, subject to the prescribed limits. The petitioners argue that this constitutes an adverse impact because it permanently reduces the quantity of minerals that would be subject to Aboriginal title.

b) Loss of mineral rights: The holder of a mineral claim receives a bundle of rights, which includes a property interest to the minerals within the claim area. Thus, the mineral rights that normally accompany Aboriginal title are stripped away. The petitioners rely on the decision in *Ross River 2012,* in which the Yukon Court of Appeal stated that transferring to a mineral claim

holder mineral rights adversely impacts Aboriginal title. I discuss that decision in detail below.

c) Loss of financial benefit: The entire system of mineral exploration is designed as a method to raise capital. The rights secured by a mineral claim can form the basis for outside investment. By granting those rights to the recorded holder, the province removes that opportunity from any First Nation asserting rights and title.

d) Impact on lands and territory: The holder of a mineral claim is authorized to extract and explore for minerals. This work can cause physical damage to the claim area that amounts to an adverse impact.

[333] In support of these positions, the petitioners base their arguments on three decisions.

[334] First, as noted above, the petitioners place significant weight on the decision of the Yukon Court of Appeal in *Ross River 2012*. In that case, the court opined that the grant of a mineral claim that involves a transfer of mineral rights results in an adverse impact on Aboriginal title. Justice Groberman for the court, wrote:

> [32] There can also be no doubt that the third element of the Haida test is made out where the Crown registers a quartz mining claim within the plaintiff's claimed territory. Aboriginal title includes mineral rights (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 122). In transferring mineral rights to quartz mining claim holders, the Crown engages in conduct that is inconsistent with the recognition of Aboriginal title.

[335] In addition to *Ross River 2012*, the petitioners rely on *Haida* where McLachlan C.J. referred to the exploitation of resources on claimed land as an example of conduct inconsistent with the honour of the Crown. Specifically, at para. 27:

> To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[336] The petitioners further rely on the underlying statement in *Delgamuukw* at para. 122:

> 122 … On the basis of *Guerin*, aboriginal title also encompass mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands.

[337] The core of this issue turns on whether the granting of any interest in mineral triggers a duty to consult because, in and of itself, it results in an adverse impact.

[338] The petitioners also submit that the provincial grant of mineral claims creates a monetary value upon which third parties can capitalize. On this point, the petitioners point to the evidence of the province's expert, Mr. Hicken, who states:

> Mineral claims have market value based on their potential for the existence and discovery of an economic mineral deposit… Mineral properties, typically comprising one or more mineral claims, are bought, sold, and optioned by individuals and companies.

[339] Hence, the petitioners submit that the granting of mineral tenure creates value for the recorded holder (and eliminates value for the First Nation) in two ways: first, in respect of the transfer of the chattel interest in the minerals themselves; and second, in the prospective investment in the mineral claim. They submit that the entire point of mineral exploration is the potential of financial gain from mining activity, whether through mining or marketing. Put differently, the purpose of granting mineral claims is to enable third parties to exploit a particular resource.

[340] The petitioners cite the Supreme Court of Canada's decision in *Tsilhqot'in Nation* where the McLachlan C.J. boiled the issue down (at para. 70) that "[i]n simple terms, the title holders have the right to the benefits associated with the land -- to use it, enjoy it and profit from its economic development."

[341] Hence, the petitioners submit there is a direct conflict between the rights granted to recorded holders and their own Aboriginal rights and title. Regardless of the nature of the transfer (chattel or otherwise), the grant is a property right. It creates access to the value and the benefit of the minerals that is held by the recorded holder as long as the mineral claim is extant.

[342] Further, the petitioners point to the significant (from their perspective) disturbance of the territory that is permitted under a mineral claim. I discussed above the limits on trenching and digging. While the province points to the "nil or negligible" language in Information Update No. 38, Ehattesaht notes that there are more than 100 active mineral tenures on their small territory. Hence, the potential exists for substantial disturbance of the land.

The Province's Position

[343] In broad overview, the province makes the following submissions on the issue of whether the physical impacts identified by the petitioners trigger the duty to consult:

a) Mineral claim holders are only authorized to engage in activities that cause a nil or negligible disturbance to the land.

b) Mineral claims are temporary.

c) The land can be returned to the petitioners.

d) The decision in *Ross River 2012* involved a set of facts and reasoning that are not analogous to those in the present case.

e) The nature of the transfer of a mineral is minor since the claim holder only receives a chattel interest in the minerals.

[344] I discuss each of the province's arguments in greater detail below.

Minimal Impact Upon the Land

[345] The province's position is that the holders of mineral claims are only permitted to engage in activities that cause a "nil or negligible" disturbance to the land. This level of disturbance, the province argues, does not trigger the duty to consult.

[346] I noted above that the petitioners and the province disagree on the amount of physical work that can be performed on a mineral claim "cell." The province notes

that there is a minimum amount of work that is required each year. That work includes the collecting and extracting of samples, digging trenches, and removing ore. Again, those activities are both required and limited. The maximum amount of work allowed is in the following areas:

a) Bulk samples of ore 1,000 tonnes per cell per year (*MTA*, s. 11.1(1)).

b) A bulk sample of up to 10,000 tonnes of ore may be extracted from a mineral claim not more than once every five years (*MTAR*, s. 17(3)).

c) Pits or trenches must not exceed 1.2 metres in depth and three cubic metres in volume. A limit of five un-reclaimed pits at one time (Information Update No. 38).

[347] The petitioners point to these allowances as evidence of the substantial disturbance to the land. In response, the province says that these figures represent "limits" not "allowances". The province says that, because the miner is limited to the use of hand tools, it would be impossible to extract these volumes of ore.

Mineral Claims Are Temporary

[348] The province notes that, under the legislative and regulatory scheme, there is a temporal aspect to any mineral claim. Although mineral claims can be continued, they ultimately lapse or expire. That temporal, or temporary, aspect means that when the Crown grants a mineral claim, the recorded holder's control over the lands and minerals will eventually revert back to the Crown. The Crown acknowledges that if further permitting and mining occurs, then there is a ceding of more title. However, those steps do not occur without consultation with First Nations.

[349] Further, the province repeats its submission that the assessment of adverse impacts (under the *Haida* Test) cannot proceed on the basis that the effect of contemplated Crown conduct on the enjoyment of claimed Aboriginal title at present, as if those rights had already been declared.

[350] Instead, the analysis must be forward-looking. The proper analysis requires examination of whether the impact of the Crown conduct on the land and resources (the subject-matter of the unresolved claim) will affect the First Nation's ability to fully realize the benefits of Aboriginal title in the future, when title is finally declared. In support of this point, the province cites the statement of the Supreme Court of Canada in *Rio Tinto* at para. 46 (*supra*).

[351] The province submits that the mineral claims will ultimately revert to the Crown at some point in the future. Hence, the Crown will be in a position to provide that interest to the First Nation when the ultimate declaration of the Aboriginal title is negotiated.

The Relevance of Ross River 2012

[352] As noted, the petitioners rely heavily on para. 32 of *Ross River 2012* (dealing with transfer of mineral rights) as support for their position that the grant of a mineral claim, which includes a transfer of rights to the minerals, impacts the petitioners' property interests and the economic components of Aboriginal title. The province refers to the statements in para. 32 as the "shortcut" to adverse impacts.

[353] The province submits that that I should not base my decision on *Ross River 2012* for the following reasons:

a) It is not binding on this Court.

b) It is distinguishable.

c) It is dubious authority.

[354] I discuss each point below. The three points have significant overlap.

[355] The province's first position is that *Ross River 2012* is a decision of the Yukon Court of Appeal and is not binding upon me. The province acknowledges that it is persuasive authority, but submits that it is no more persuasive than any appellate decision from another province or territory.

[356] Second, the province submits that *Ross River 2012* is distinguishable. The province submits that, to the extent the court focussed on "adverse impact" in *Ross River 2012,* that analysis is found at para. 33 where the court discusses the scope of exploration allowed under a "Class 1" exploration program. Those activities include: "the clearing of land, the construction of lines, corridors and temporary trails, the use of explosives, the removal of subsurface rock, and other specified activities": para. 25.

[357] The province submits that the Yukon legislation allowed significantly more disturbance of the land (*i.e.,* use of explosives) than the *MTA*. On that basis the province submits that the court's analysis in *Ross River 2012* was based on significantly greater "adverse effect" to the land.

[358] The province further submits that the transfer of the interest in the minerals under the Yukon statute is greater than the *MTA*. Under the Yukon legislation, the holder of a mineral claim receives a "chattel interest, equivalent to a lease of the minerals." Under the *MTA*, the recorded holder receives only a "chattel interest." This choice of language means that a mineral claim under the Yukon legislation is a "chattel real" and as such confers an interest in land. I discuss the difference between this type of grant, and the *MTA*, below.

[359] As a corollary to that argument, the province submits that the decision in *Ross River 2012* does not explain or assist in answering why a minor ("chattel") grant of mineral rights would be sufficient to create an adverse impact. In other words: How is it that <u>any</u> grant of a proprietary interest in minerals, no matter how insubstantial, causes an adverse impact that risks undermining the Indigenous group's future enjoyment of the benefits of Aboriginal title? On that basis, the province submits that the legal analysis in *Ross River 2012* applies to a different legislative scheme. It does not apply to the factual and legislative matrix that exists in British Columbia.

[360] On this point, the province submits that the third element of the *Haida* Test (adverse impact) was not the focus of the parties' arguments in *Ross River 2012*. On

appeal, the respondent Yukon only weakly contested that the threshold of adverse impact was not met. As Groberman J.A. noted at para. 34 of his reasons, "[t]he real issue that divide[d] the parties to this litigation [was] the question of whether the second element of the *Haida* test [was] engaged in this case." Hence, the focus of the arguments in *Ross River 2012* lay elsewhere. The focus was not on the third aspect of the *Haida* Test. The province submits that this explains the court's sparse and cursory analysis of "adverse impact" at para. 32.

[361] The province's third position on *Ross River 2012* and, specifically para. 32, is that it is dubious authority for the "shortcut" analysis on the third element of the *Haida* Test. Put another way, the province submits that the court relied on imprecise language from the Supreme Court of Canada in para. 122 of *Delgamuukw.*

[362] The province makes the difficult submission that the statement in para. 122 of *Delgamuukw* that "aboriginal title also encompass mineral rights" is not good authority for the proposition that Aboriginal title, in fact, encompasses mineral rights. The province submits that, at para. 122 of *Delgamuukw*, Lamer C.J.C. conflated two concepts: the scope of title to reserve lands under the federal *Indian Act* and Aboriginal title.

[363] The province submits that the cases cited by Lamer C.J.C. in para. 122 deal with reserve lands, not Aboriginal title. In support of this position, the province points to scholastic writing on this issue, including *Canadian Law of Mining*, 2nd ed. (Toronto: Lexis Nexus, 2020), where, at 129–130, Professor Barton explained the difficulties with Lamer C.J.C.'s reasoning in the cited paragraph of *Delgamuukw* as follows:

> … None of the cases that provide the modern delineation of Aboriginal title—*Guerin*, *Delgamuukw* and *Tsilhqot'in*—dealt with mineral rights conclusively. In *Delgamuukw* [at para. 122], Lamer C.J.C. said that Aboriginal title encompasses mineral rights; but in truth the proposition cannot be supported by the reasoning he offered. Invoking *Guerin*, he argued that the presumption in the *Indian Act* and the *Indian Oil and Gas Act* that the Aboriginal interest in reserve lands includes mineral rights applied to Aboriginal title generally. But LaForest J. [in *Delgamuukw* at para. 192] was right to say that these statutory provisions and regulations concerning reserve lands should not be applied to traditional tribal lands, huge tracts of land subject to Aboriginal rights of

> occupancy; and *Guerin* did not so require. However, he did not consider mineral rights specifically. Chief Justice Lamer was also wrong to say that the *Indian Oil and Gas Act* presumes that the Aboriginal interest includes mineral rights; in truth, the Act applies to oil and gas rights only if those rights are included in the title of the reserve.

[364] On these bases, the province submits that the Yukon Court of Appeal's proposition at para. 32 of *Ross River 2012* is dubious, specifically pointing to the statement, "Aboriginal title includes mineral rights (see *Delgamuukw* at para. 122)." The province submits that the reasoning in *Ross River 2012* should be confined to the points that Groberman J.A. articulated in para. 33, addressing the significant scope of work authorized by the Yukon legislative scheme.

[365] In summary, the province submits that the reasoning in para. 32 of *Ross River 2012* proceeded along the following misguided line of reasoning:

a) The starting point was the statement that "Aboriginal title includes mineral rights" (for which Groberman J.A. cited *Delgamuukw* at para. 122 as authority).

b) Thereafter, the reasoning proceeded to the proposition that the recording of a mineral claim transfers mineral rights. The court assumed that such conduct, *ipso facto,* is Crown conduct that is "inconsistent with the recognition of Aboriginal title".

c) That proposition consequently led to the conclusion that there is "no doubt that the third element of the *Haida* test is made out where the Crown registers a quartz mining claim".

[366] Despite having taken the positions set out above, the province also acknowledges that, even if the jurisprudence on Aboriginal title and mineral rights has yet to crystallize, the trend is toward accepting the proposition that Aboriginal title includes mineral title. The province notes that Professor Barton states at 130 in *Canadian Law of Mining*:

> More definite is the growing clarity of *Tsilhqot'in* that under Aboriginal title Indigenous owners are indeed owners of the land… Aboriginal title in *Tsilhqot'in* included the land's timber resources, and there seems to be no reason for mineral resources to be treated differently. These points lead very clearly to the conclusion that Aboriginal title must include mineral resources. No doubt the point will be put to rest in due course.

[367] The province further acknowledges that its own conduct has been consistent with the concept that Indigenous rights and title include the minerals in asserted territories. For example, following the 2014 decision of the Supreme Court of Canada in *Tsilhqot'in* (which granted Aboriginal title to the petitioner), the province made the administrative decision to close mineral claim registrations in Tsilhqot'in Nation's Declared Title Area even though the issue of mineral ownership had not been finally determined.

[368] The province submits that, as an alternative to the reasoning in *Ross River 2012,* a more applicable analysis is contained in *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources),* 2015 SKCA 31 [*Buffalo River*].

[369] In *Buffalo River*, the issue of adverse impact arose in relation to Saskatchewan's auction of five-year exploration permits in respect of subsurface oil sands minerals located under Treaty 10 lands. The auction and subsequent issuance of the exploration permits occurred without consultation with Buffalo River Dene Nation whose members hold the right to practise traditional uses (*e.g.*, hunting, trapping, and fishing) on Treaty 10 lands. The Saskatchewan Court of Appeal concluded that the initial posting and issuance of exploration permits in respect of Treaty 10 lands did not meet the threshold of an "adverse impact" required to trigger the duty to consult.

[370] The province acknowledges that the factual underpinning and the Saskatchewan legislation does not overlap with British Columbia for several reasons:

a) Although a mineral licence in Saskatchewan grants some rights to explore for minerals, it does not provide any authorization to the permit-holder to

enter on or use the surface of the Crown mineral lands to which the Crown disposition applies. Consultation with First Nations and Metis communities would occur if the permittee applied for surface access.

b) The legislation also does not explicitly define an exploration permit as a form of proprietary interest, although it confers entitlements on the permit-holder. Further, a permit has value because it provides the security of tenure that is integral to the process of raising investment capital for the purposes of undertaking exploration and development.

c) The members of Buffalo River Dene Nation held treaty rights only to practise traditional uses on the surface of the land. In other words, unlike the petitioners in this case, Buffalo River Dene Nation did not have a claim of Aboriginal title to the land itself (and hence, no claim to the subsurface resources).

[371] Nevertheless, the province submits that on a proper analysis of the "adverse impact" question in relation to future enjoyment of Aboriginal title, the present case is not substantially different from *Buffalo River.* As such the present facts squarely engage the reasoning of the Saskatchewan Court of Appeal in that case.

[372] In *Buffalo River* at para. 14, the court summarized the scheme as follows:

> [14] The granting of an Exploration Permit [first-stage] thus affords the Permit-Holder with exclusive subsurface rights in a specified area and exclusive mineral exploration rights with respect thereto, but does not grant the Permit-Holder any right to access the surface of the Disposition Lands or to extract oil sands or other minerals therefrom. To do this, the Permit-Holder must separately obtain surface access rights from the Environment Ministry [second-stage] and, if same are granted and the Permit-Holder's exploration proves a commercially-viable mineral, the Permit-Holder must subsequently obtain a lease from the Energy Ministry [third-stage] before the Permit-Holder may begin to actually extract the mineral discovered.

[373] The Saskatchewan Court of Appeal concluded that the circumstances in *Buffalo River* did not constitute an adverse impact. The court held that the initial posting and issuance of exploration permits did not trigger the duty to consult, in part, because of the regulatory scheme and the Crown policy. The court held that

the Crown's first-stage decision to issue the exploration permits could not directly or indirectly impact the permit land or treaty rights under Treaty 10, absent further stages of decision making. As the court summarized in its conclusion at para. 88:

> [88] … In simple terms, there is no intersection of the two sets of rights or, on a Venn diagram basis, there is no overlap between [the permittee's] rights under the [exploration permits] and Buffalo River's DN's rights under *Treaty 10*.

[374] At paras. 91–92, the court elaborated:

> [91] …The duty to consult is triggered at a low threshold, but it must remain a meaningful threshold—the applicant has to establish some sort of appreciable or discernible impact flowing from the impugned Crown conduct before a duty to consult in relation to that impact will arise. This is both logical and practical because there has to be *something* for the Crown and the Aboriginal group to consult about—the duty to consult is, at core, a practical doctrine. Put another way, it makes little sense for the duty to consult to arise where, as the Chambers judge concluded here, there is nothing to consult about, *i.e.*, nothing to reconcile.
>
> [92] What I mean by this is that, here, Buffalo River DN has not established that a foreseeable impact on *Treaty 10* lands (and, consequently, on its members' hunting, trapping, and fishing rights) could possibly arise *without* the occurrence of a subsequent or second-stage approval from the Crown. However, once any form of surface access is *contemplated*, then *actual* impact on *Treaty 10* land becomes *possible*. It is at this point in the process that the Permit-Holder is required to provide a plan for its proposed exploration or development of minerals lying under the surface of *Treaty 10* lands. It is at this point that the Crown and Buffalo River DN would have something meaningful, in the sense of quantifiable, to consult about, to reconcile. And, indeed, the Crown seems to acknowledge that it would have a duty to consult with Buffalo River DN *if* this matter were to reach this point in the regulatory process.
>
> [Emphasis in original.]

[375] The province submits that this analysis in *Buffalo River* offers an instructive counterpoint to *Ross River 2012* and that this reasoning should apply to the analogous staged process under the *MTA* and the *Mines Act*.

[376] The provincial respondents maintain that on a proper analysis of the adverse impact question in relation to future enjoyment of Aboriginal title, the present case is not substantially different from *Buffalo River* and as such squarely engages the reasoning of the Saskatchewan Court of Appeal in that case. *Buffalo River* is not, of

course, binding authority. However, the province submits that, of the two appellate decisions, it provides the more persuasive analysis on the question of adverse impact under the British Columbia scheme than *Ross River 2012*.

The Nature of the Transfer of a Mineral Is Minor Since the Claim Holder Only Receives a Chattel Interest in the Minerals

[377] Following on from its submission on *Buffalo River*, the province submits that the holder of a mineral claim receives only a "chattel interest" in the minerals. This discussion also illuminates the province's prior submission regarding the difference between the *MTA* and the Yukon legislation which grants a "chattel interest, equivalent to a lease of the minerals."

[378] The *MTA* defines the right conferred with a mineral claim as a "chattel interest." The province submits that, in the hierarchy of property interests, this type of interest falls into the category of personal property. It does not constitute real property or an interest in land.

[379] The province notes that, in the past, a mineral claim has been considered to be akin to a *profit à prendre*. That term denotes an agreement that creates a right, privilege, or interest that allows a person to use the soil or products of another's property. The phrase can be translated to a "right to take." Typical examples are licences to fish or hunt. The analogy between a mineral claim and a *profit à prendre* is applicable because a mineral claim allows the recorded holder to enter onto the Crown land and take any minerals thereon, subject to restrictions on the amount of work performed.

[380] The traditional concept of a *profit à prendre* is considered to be an interest in land. To be clear, a mineral claim was not interpreted to be a *profit a prendre*. At most, a mineral claim has been said to be "*similar to*" a *profit à prendre*. A *profit à prendre*, as defined by Prof. Ziff (Principles of Property Law, 6th ed. (Toronto: Carswell, 2014),

> … entitles the holder to take some part of the produce, such as timber, crops, turf, soil, grass, or animals from land belonging to another. It may entitle the holder to extract oil and natural gas: that is the type of grant often used in

> modern mining operations. A profit can be either held with others (in common), or exclusively (in severalty). Title to the objects covered by the grant of a *profit à prendre* is acquired through capture, not before: it is a right to win or extract (thus the term *prendre*).

[381] The province submits that the evolution of the grants of mineral claims indicates the minor nature of the "chattel" interest:

a) Prior to February 28, 1957, there was a statutory mechanism for government to convey full ownership of minerals to grantees, under so-called "Crown-granted mineral claims." Clearly, until 1957, the mineral claim could include a registered interest in land.

b) Between 1960 and 1977, s. 16 of the *Mineral Act*, R.S.B.C. 1960, c. 244, provided that a mineral claim was "deemed to be a chattel interest, equivalent to a lease." Hence, the legislation during those years was interpreted as continuing to grant an interest in land.

c) In 1977, s. 16 of the *Mineral Act* became s. 21(1) of the *Mineral Act*, S.B.C. 1977, c. 54. The words "equivalent to a lease" were removed in the 1977 version. Hence, from 1977 onward, the legislation provides only a personal property interest (a "chattel personal").

d) The nature of this amendment was considered by the Court of Appeal in *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324 [*Rock Resources*]. The court noted that the phrase "equivalent to a lease" had existed since the 1896 version of the *Mineral Act*. The court interpreted the 1977 amendment as downgrading the proprietary interest conferred by a mineral claim under the *MTA* from an interest in land to mere personalty, because of the removal of the words "equivalent to a lease of the minerals" from the definition.

[382] On this point, the province notes the difference between the mineral tenure schemes of BC and Yukon. The Yukon legislation specifically grants a "chattel interest, equivalent to a lease of the minerals" and not simply a "chattel interest."

Hence, the province submits, *Ross River 2012* deals with a regime that grants a greater interest to the miner.

[383] The province submits that, as personal property, a mineral claim is less substantial than an interest in land. Mineral claims are capable of being recorded only in the Mineral Titles Online registry. Mineral claims granted under the *MTA* (apart from "Crown granted 2 post claims" issued before 1957, which are interests in land) cannot be registered in the land title office as encumbrances or charges against fee simple title.

[384] The province likens the interest conferred with a mineral claim with a bare licence or authorization (*e.g.*, like a commercial fishing licence). While not traditionally viewed as "property", nevertheless it may constitute a major commercial asset that can be bought and sold and that as a matter of statutory interpretation must be assigned value in a bankruptcy.

[385] The province notes that, to some extent, the petitioners' submissions focus on s. 28(1) of the *MTA* which provides that:

> 28(1) Subject to this Act, the recorded holder of a claim is entitled to those minerals … that are held by the government and that are situated vertically downward from and inside the boundaries of the claim.

The province submits that these arguments gloss over s. 28(2), which provides that the nature of the interest is a "chattel interest".

[386] The province submits that even if the recorded holder becomes "entitled" to the minerals upon registering the claim, s. 28(1) makes that entitlement "[s]ubject to this Act". Those limitations include both the granting of only a "chattel interest" and s. 14(2) which prohibits any mining activity until the granting of a permit under the *Mines Act*.

[387] Further, the province submits that, during the duration of a mineral claim, the minerals continue to be "held by the government" (unless they are removed by the

recorded holder). In other words, minerals are not severed and granted to the recorded holder *in situ* at the time of registration of the mineral claim.

[388] The province points to the distinction between the wording of s. 28(2) (mineral claims) and s. 48(2) which deals with the interest transferred upon obtaining a lease. Section 28(2) says that the leaseholder is "entitled to the minerals". Section 48(2), which provides that a mining lease "conveys to the lessee the minerals … within and under the leasehold, together with the same rights that the lessee held as the recorded holder of the claim" (emphasis added). The province submits that this wording indicates that the entitlement under s. 28(2) must be something less than the conveyance that occurs under with the grant of a mining lease.

Application of Law to Facts: Is the duty to consult triggered?

[389] I have considered all of the province's submissions on the "physical" impacts. For the reasons set out below, I do not accept them. To re-state, the petitioners submit that the granting of mineral claims results in an adverse physical impact by causing the following: (1) a loss of minerals; (2) a loss of mineral rights; (3) a loss of the ability to raise capital; and (4) a non-negligible disturbance to the claimed land.

[390] First, I find that a loss of minerals (that is, the permanent removal of minerals from asserted territories) constitutes an adverse impact for the purpose of the *Haida* Test. The holder of a mineral claim, under the *MTA*, is authorized to collect and extract a prescribed amount of minerals from the claim area. To permanently remove minerals from land is to permanently reduce that land's value. An irreversible reduction in the value of asserted territory is, in my view, exactly the type of adverse impact the *Haida* Test envisioned.

[391] While I acknowledge that a mineral claim itself is temporary, the removal of minerals is not.

[392] Second, turning to the loss of mineral rights, I agree with the reasoning found in *Ross River 2012*. In my opinion, that decision was properly decided. An overly narrow understanding of Aboriginal title, one that excludes the rights to subsurface

minerals, is inconsistent with the goals of reconciliation and upholding the honour of the Crown. As the court stated in *Ross River 2012*, "The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims": para. 37. In this case, the petitioners assert rights to subsurface minerals. The honour of the Crown requires consultation prior to transferring away the rights to those minerals to third parties.

[393] As noted, the province submits that the Saskatchewan case of *Buffalo River*, contains a better and more applicable legal analysis than *Ross River 2012*. However, in my opinion the analysis is less applicable. Critically, in the Saskatchewan case, the First Nation had not asserted any subsurface rights. As the court stated at para. 105:

> [105] … Buffalo River DN's sole concern [was] with respect to the impact of subsurface resource exploration and development on its hunting, trapping, and fishing rights under *Treaty 10*, all of which are exercised only in respect of the surface of the land.
>
> [Emphasis added.]

The petitioners in this case, unlike in *Buffalo River*, do assert rights to subsurface minerals. This case can be distinguished from *Buffalo River* on that basis.

[394] I do not accept the province's submission that there is no adverse impact because the interest the province transfers is only a "chattel" interest in the minerals. I fail to see how the categorization of the right as a chattel interest alters the analysis. The dispositive consideration, in my view, is that the petitioners are losing part of their asserted rights to the minerals.

[395] Last, I turn to the province's submissions regarding the limited nature of the physical disturbance that is authorized under a mineral claim. Again, this disturbance must be viewed from the perspective of the First Nation. In this regard, the province's unilateral categorization of the disturbance as "nil or negligible" is unhelpful. Having regard to the perspective of the petitioners, in my view, the potential physical disturbance caused by the activities authorized under a mineral claim constitutes an adverse impact. I note, by way of example, that the holder of a

mineral claim has the right to engage in pitting, trenching, and drilling, and to conduct geological sampling using tools such as hand-held drills, and set up temporary residence on the claim area with tents, trailers, or campers. Further, numbers of adjacent cells are often obtained by individual recorded holders, leading to a cumulative effect on the First Nation asserting rights.

[396] In summary, I am not persuaded by any of the province's submissions regarding the granting of mineral rights and its physical impact on the petitioners. I find that the grant of a mineral claim:

a) confers the right to remove a prescribed amount of minerals from the claim area. The loss of minerals reduces the value of the territory and, thus, adversely affected Aboriginal rights and title;

b) transfers some element of ownership of minerals to the recorded holder. The petitioners assert rights to those minerals in this case and, therefore, consultation is required prior to transferring those rights to a third party;

c) confers the exclusive right to explore for minerals with the area. That right provides a financial benefit, the right to raise capital through investment. The First Nation is deprived of that opportunity; and

d) affords the recorded holder the right to disturb the land. While the parties do not agree on the breadth of that right, in my opinion, viewed from the Indigenous perspective, the allowable disturbance is greater than "nil or negligible".

[397] In my opinion, all of these examples constitute adverse physical impacts that should trigger the duty to consult.

[398] On that basis, I find that the granting of mineral claims under the *MTA* results in adverse impacts on First Nations.

[399] I noted near the outset of these reasons the tension between the specific allegations and relief sought by the petitioners, when positioned adjacent to the

more general “declaratory” position that would apply to the entire province. I have also described, in general terms, two types of impact:

a) the physical impact on areas of cultural and spiritual importance; and

b) the physical and economic impact of the grant of mineral rights.

[400] In my opinion, the former adverse impact (cultural and spiritual) is based upon the evidence adduced by the petitioners regarding their experiences in their own territories.

[401] On the other hand, the latter adverse impacts arise generally from the operation of the *MTA*. Hence, in my opinion, this portion of my decision has broader application than the territories of the two petitioners. In that regard, I find that a duty to consult arises based upon the operation of the *MTA*.

Nature of the Breach

[402] Above, I have found that a duty to consult arises. It follows from that analysis that the province is in breach of its duty to consult with the petitioners.

[403] The next question to address is the nature, or underlying cause, of the breach. The two possible sources of the breach can be described as follows:

a) either the *MTA* and its regulations are constitutionally invalid (or inapplicable) because they do not provide authority for pre-registration consultation; or

b) the CGC or the LGIC are the cause of the breach because the *MTA* and its regulations provide the authority to institute consultation, but they failed to implement that process.

[404] As between the CGC and the LGIC, the two possibilities are described in the relief sought in the Gitxaala petition. Gitxaala seeks:

a) a declaration that the CGC acted in a manner inconsistent with the honour of the Crown by failing to use their administrative discretion to incorporate pre-registration consultation into the Mineral Titles Online system; or alternatively,

b) a declaration that the LGIC acted in a manner inconsistent with the honour of the Crown by failing to amend the *MTAR* to provide for pre-registration consultation with Indigenous Nations.

[405] In my opinion, failure lies at the CGC level. As a result, I do not address the decision making at the LGIC level.

[406] For the reasons set out below, I find that the *MTA* provided the necessary authority and discretion to the CGC to provide for pre-registration consultation. It follows that I find that the *MTA* is constitutionally valid legislation (or, not "constitutionally invalid" legislation).

Statutory Interpretation

[407] The answer to the constitutional validity argument depends, in part, on whether the CGC had the authority or discretion within the *MTA* to institute a consultation process. Determining the breadth of the CGC's discretion requires some degree of statutory interpretation.

[408] The guiding rule of statutory interpretation remains the "unified textual, contextual and purposive approach" to find a meaning harmonious with the Act as a whole. That proposition is from *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837 [*Rizzo Shoes*], "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[409] However, there is now a statutory overlay that applies to statutory interpretation in British Columbia. Specifically, in 2021, the province amended the *Interpretation Act*, R.S.B.C. 1996, c. 238, to include s. 8.1 which provides:

> **Section 35 of *Constitution Act*, 1982 and Declaration**
>
> **8.1** (1) In this section:
>
> **"Declaration"** has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> **"Indigenous peoples"** has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> **"regulation"** has the same meaning as in the *Regulations Act*.
>
> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> (3) Every Act and regulation must be construed as being consistent with the Declaration.

[410] The parties agree that subsection (3) requires that *UNDRIP* be considered when interpreting provincial Acts and regulations. In other words, the parties agree that, in this case, *UNDRIP* should be used as an interpretive aid when interpreting the *MTA*. However, the parties disagree about how *UNDRIP* is to be used.

[411] The province submits that *UNDRIP*'s interpretive utility plays only a limited role in statutory interpretation. The province submits that the provisions of *UNDRIP* should be considered at the end of the interpretive exercise, simply as a means to support or confirm a particular interpretive result.

[412] The petitioners disagree and submit that the Declaration should play a substantial role in the entirety of the interpretive process, and not a mere confirmatory role at the end. Specifically, the petitioners argue that interpretations consistent with the rights recognized by the Declaration should be preferred over those that are not.

[413] The petitioners' position is that s. 8.1 provides the court with an additional interpretive tool in circumstances where more than one interpretation may be possible. Section 8.1 provides that the court must interpret provincial laws in a manner that is consistent with s. 35 and *UNDRIP*. In other words, s. 8.1 acts as an interpretive aid during the entirety of the interpretive process, and not a mere "confirmatory" role at the end.

[414] The province relies on the Supreme Court of Canada decision in *Quebec v. 9147-0732 Quebec Inc.,* 2020 SCC 32 ("9147") where the majority concluded that non-binding international instruments play the "limited role of providing support or confirmation for the result reached by way of purposive interpretation." In this case, the province argues that the Declaration's role as an interpretive aid should be limited in the same manner.

[415] In my view, the issue in the present case can be distinguished from the issue before the Court in *9147*. Here, the issue is the effect of a specific statutory provision which requires consideration of a specific international instrument in interpreting provincial legislation. In *9147*, the Court was concerned with the interpretive relevance of international instruments more generally. In that case, the Court was considering only the common law (*Rizzo Shoes*) approach. In contrast, I am addressing a situation wherein applicable legislation (s .8.1 of the *Interpretation Act*) expressly requires me to consider an international instrument as part of the interpretive process.

[416] In my opinion, the purpose of s. 8.1 is clear and evident in the text of the section. That is: when I consider the proper interpretation of the *MTA*, I should apply the *Rizzo Shoes* analysis. However, within that analysis, I am required to construe the *MTA* in a manner that upholds (as opposed to abrogating) the Indigenous rights of the petitioners. In other words, if there are two (or more) possibly valid interpretations of the *MTA*, then I am to construe the Act in a manner that is consistent with *UNDRIP* (*i.e.,* that protects Indigenous rights).

[417] It follows that I do not accept the province's submission that the process outlined in s. 8.1 should be undertaken after the *Rizzo Shoes* analysis. In this regard, s. 8.1 is best described as overlaying the interpretive process. In my opinion, that is the proper description, and it denotes the proper approach. Section 8.1 is not a trailer that is attached to the back-end of the process. Instead, it is an umbrella that covers the entirety of the process.

[418] In my opinion, the application of s. 8.1 in this case does no more, and no less, than provide that overlay. Hence, when I assess whether the *MTA* is constitutionally valid, I must construe it in a manner that upholds the Aboriginal rights enshrined in s. 35 and set out in *UNDRIP*. As I describe below, the logical extension of that overlay is that I find the legislation to be valid. To jump ahead for a moment, in short, I find that where there is a question in the interpretation of the *MTA* regarding the breadth of the CGC's authority, I construe that issue liberally, such that the legislation upholds Indigenous rights. The logical end-point of that analysis (when combined with the text, context, and purpose) is that the CGC has been improperly implementing the *MTA* by not providing for pre-registration consultation.

Interpretation of the *MTA*

[419] As noted above, the question here is whether the *MTA* provides authority to institute a pre-registration consultation process.

[420] The province's (and the CGC's) position is that the CGC does not have the discretion to implement this type of process. I find that a proper interpretation of the *MTA* (keeping s. 8.1 of the *Interpretation Act* in mind) leads to the conclusion that the CGC does, in fact, have such authority and discretion.

[421] Before addressing the petitioners' submissions regarding statutory provisions and CGC discretion, I outline certain baseline propositions and evidence from the CGC that inform my decision:

a) Very few provincial statutes contain provisions describing whether the statute is providing a discretion, authority, or obligation to consult with Indigenous groups. Hence, the absence of such language does not indicate that the discretion or authority does not exist. In fact, conversely, the fact that a consultation process exists in the context of legislation that does no refer to it, suggests that tacit discretion exists within many statutes.

b) The province's position, based upon the Messmer Affidavit, is that the CGC "does consult on the issuance of mining leases." However, there is no text in the *MTA* or *MTAR* providing that authorization or discretion in respect of mining leases. Hence, the CGC exercises their discretion to implement that consultation.

c) I also note the evidence in the Messmer Affidavit outlining some of the software that the CGC uses:

   i. Upon registration of a mineral claim, the CGC software automatically notifies a free miner of the Indigenous group or groups who have asserted claims over that land. The affidavit does not say when this software was put in place, but it has existed since at least 2018. Notably, the software does not notify the Indigenous group. Further, there is no provision in the *MTA* or *MTAR* providing for this form of notification.

   ii. Mr. Messmer further states that the CGC is in the process of requisitioning programming changes so that the online registration system will auto-generate a corresponding notification report to the affected Indigenous group or groups. This requisition process began around June 2021. Again, notably, there is no provision in the *MTA* or *MTAR* authorizing this form of notification.

d) I infer from the two sub-paragraphs above that:

   i. until at least 2021, the CGC felt that it was more important to notify miners about Indigenous groups than to notify Indigenous groups about miners. It created software that sent notifications to one party, but not the other; and

   ii. the CGC is able to take these steps toward notification without any specific legislative or regulatory amendment or authorization.

[422] While this evidence does not establish that the CGC has the discretion to establish pre-registration consultation, it does provide some evidence of the scope of the CGC's discretion.

[423] The petitioners submit that, while parts of the *MTA* contain mandatory language, the Act provides broad discretion to the CGC with respect to whether and how mineral claims are granted. For example, s. 6.2(1) requires the CGC to "establish and maintain a mineral titles online registry for the purposes of registrations respecting claims." However, the CGC retains specific discretionary powers by which registrations may be controlled:

a) Section 6.2(2)(a): the CGC "may" establish information requirements in order to effect the registration of a mineral claim. The petitioners submit this could include requirements for information about the discharge of Crown consultation and accommodation prior to registering mineral claims.

b) Section 6.2(2)(b): the CGC "may" "establish any other matter or requirement in order to ensure proper functioning of the registry". The petitioners submit this could include requirements related to the evidence of the discharge of the duty to consult prior to registering mineral claims.

c) Section 6.6(a): the CGC "may" suspend any function of the registry if the CGC is satisfied that it is not practicable to provide the function.

d) Section 22: "Despite any other provision of this Act", the CGC "may" create mineral reserves that, *inter alia*, prohibit or restrict the registration of mineral claims or the conduct of mining activities within the mineral reserve.

e) Section 17: the CGC can ban exploration in an area that contains a "cultural heritage resource". The definition of "cultural heritage resource" includes sites that are of cultural significance to Aboriginal people. In the *MTA*:

> **"cultural heritage resource"** means an object, a site or the location of a traditional societal practice that is of historical, cultural or archaeological significance to British Columbia, a community or an aboriginal people;
>
> **17** (1) Despite this or any other Act, the minister may, by order, restrict the use of surface rights, or restrict the right to or interest in minerals or placer minerals, comprised in all or part of a mineral title if the minister considers that all or part of the surface area is or contains a cultural heritage resource or that the surface area, or the right to or interest in the minerals or placer minerals, should be used for purposes other than a mining activity.

[424] The petitioners also point to other provisions that empower the CGC to implement consultation requirements in areas he may delineate by regulation. I need not address them here.

[425] Again, the province's position is that the free entry mineral tenure system allows persons interested in exploring for minerals to "stake" mineral claims through a non-discretionary administrative process.

[426] In my opinion, and with the greatest respect, the province's position misses the point. Under the auspices of the *MTA* (and predecessor legislation), the CGC established the mineral tenure system. The manner of registration of mineral claims, pursuant to that system, is "automatic." However, it is only "automatic" because it was designed that way by the CGC. I accept the petitioners' submissions regarding the discretion that is granted to the CGC, especially under ss. 6.2, 17, and 22. I accept that those provisions provide the CGC with the discretion to change the requirements of registration and allow the CGC to restrict the use of certain lands.

[427] With respect to the CGC's position that it does not have discretion to consult with Indigenous groups, in my opinion, that is simply wrong. Section 17 gives the "the Minister" the power to restrict the use of surface rights in areas of cultural significance to Aboriginal people. It stands to reason that the CGC could only learn of the existence of those areas of cultural significance through consultation.

[428] In interpreting the *MTA* in accordance with the *Rizzo Shoes* test, including the overlay of s. 8.1 of the *Interpretation Act*, I find that the *MTA* does provide the CGC

with the necessary discretion to institute some form of consultation prior to registration of mineral claims. In particular:

a) s. 6.2 provides discretion on the information required for filing;

b) s. 17 provides for restrictions on surface rights in areas that are culturally significant to an Aboriginal people; and

c) s. 22 provides discretion to set aside reserve areas.

[429] Finally, on this issue, I note that in *Ross River 2012*, the Yukon Court of Appeal held that, although amendment to legislation "may" be required, it is sufficient for a plaintiff to show that the statute contains discretionary power that the CGC could use to discharge its duty to consult regarding mineral claims. The means of bringing the system into compliance are not for the court's meddling. I note these two paragraphs:

> [45] It is not necessary or appropriate for the Court, in this proceeding, to specify precisely how the Yukon regime can be brought into conformity with the requirements of *Haida*. Those requirements are themselves flexible. What is required is that consultations be meaningful, and that the system allow for accommodation to take place, where required, before claimed Aboriginal title or rights are adversely affected.
>
> ...
>
> [52] It may be that changes to the *Quartz Mining Act* will be necessary to comply with this imperative. The defendant argues that the Court ought not to address the possibility of statutory change because the current case does not specifically seek to invalidate statutory provisions. I would not accede to that argument. As the plaintiff points out, it is *possible* for the government to meet the requirements of *Haida* under the current statute by engaging in consultations with a view to using s. 15 of the *Quartz Mining Act* to exclude from quartz mining claims all areas in which exploration activities would prejudice claimed Aboriginal rights. Therefore, the plaintiff did not need to assert, nor could it demonstrate, that the statute itself is incompatible with its duties under *Haida*.

[430] On that basis, I find:

a) The *MTA* provides the necessary authority and discretion to the CGC to comply with its duty to consult.

b) The CGC has not complied with that duty.

c) It follows that the failure of the Crown to comply with its duty to consult arises from the failure of proper implementation of the provisions of the *MTA* by the CGC.

d) That failure places the CGC in breach of its constitutional obligations under s. 35.

e) It further follows that I do not need to address the decisions of the LGIC.

f) It further follows that I find that the *MTA* is not constitutionally invalid.

[431] The result of a finding that the CGC breached the duty to consult is that the petitioners are entitled to a remedy or remedies. I discuss those remedies below.

UN Declaration on the Rights of Indigenous Peoples

[432] Having made the findings above relating to the *Haida* Test, s. 35, and the duty to consult, I now proceed to the second half of the petitioners' argument. The petitioners seek a declaration that the current process for granting mineral titles under the *MTA* is inconsistent with *UNDRIP*.

[433] I set out my analysis on the proper interpretation of *DRIPA* below. In the end, I find that *DRIPA* does not implement *UNDRIP* into the domestic law of the province. Further, I find that, properly interpreted, s. 3 of *DRIPA* does not create justiciable rights as proposed by the petitioners.

[434] I am aware that there is significant interest in this issue and, so far, very little judicial comment. As noted by Justice Kent in Thomas and *Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15:

> [212] It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title.

[435] Justice Kent went on to note that a higher court will ultimately determine the effect of *DRIPA*. I am cognizant that these reasons may represent the first in a long progression of judicial considerations of *UNDRIP* and *DRIPA*.

Background

[436] The General Assembly of the United Nations *adopted UNDRIP* on September 13, 2007. The Declaration is a comprehensive delineation of the individual and collective rights of Indigenous peoples. The rights it recognizes include the right to self-governance, the right to practice and maintain cultural, political and legal traditions, the right to land ownership, and many others rights. *UNDRIP* makes clear the urgency in enshrining and respecting these rights; they constitute "minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world": Article 43.

[437] In May 2016, Canada announced its formal endorsement of *UNDRIP*. To be clear, an "endorsement" does not constitute "implementation." The Declaration is a non-binding international instrument. Thus, the endorsement did not result in an immediate change to the domestic laws of Canada. As noted by Justice L.F. Gower in *Ross River Dena Council v. Canada*, 2017 YKSC 59 at para. 302:

> [302] *UNDRIP* was adopted by the General Assembly of the United Nations on September 13, 2007. It is undisputed that, as a declaration, it is a nonbinding international instrument. Unlike treaties, declarations are not signed or ratified. Canada has endorsed *UNDRIP,* meaning that it has expressed its political support for the Declaration.

[438] I also note the comments of Hinkson C.J.*,* in *Snuneymuxw First Nation v. Board of Education – School District #68*, 2014 BCSC 1173 at para. 59 (which was decided prior to Canada's endorsement in 2016):

> [59] At the outset, I must state that I am unable to accept the reliance placed by the petitioners upon the Declaration. The Declaration has not been endorsed as having legal effect by either the Federal Government or the Courts. Canada is a signatory to the *UNDRIP*, but has not ratified the document. The Federal Government, in announcing its signing of the Declaration, stated that the Declaration is aspirational only and is legally a non-binding document that does not reflect customary international law nor change Canada's domestic laws. This fact has been recognized by Canadian

> courts in considering the application of the Declaration, as well as the fact that the document is too general in nature to provide real guidance to courts; see: *National Corn Growers Assn. v. Canada (Import Tribunal)* (1988), 58 D.L.R. (4th) 642, [1988] F.C.J. No. 1159 (C.A.), aff'd [1990] 2 S.C.R. 1324; *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814, 287 D.L.R. (4th) 452; and *Hupacasath First Nation v. Canada (Foreign Affairs)*, 2013 FC 900, 288 C.R.R. (2d) 253. Thus, the Declaration is unlike the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which had been ratified but not legislatively implemented when it was relied on by Justice L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

[439] Again, the two decisions referenced above must be read in the context that they pre-date November 2019 when BC brought into force *DRIPA*. There are three aspects of *DRIPA* worthy of highlight in this case:

a) Section 2 expressly sets out *DRIPA*'s three purposes, one of which is to "to affirm the application of [UNDRIP] to the laws of British Columbia."

b) Section 3 provides that "[i]n consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with [*UNDRIP*]*."*

c) Sections 4 and 5 impose prospective procedural obligations on the government for achieving legislative reform, including creating an action plan and preparing annual progress reports.

[440] In enacting *DRIPA*, British Columbia became the first province in Canada to enact legislation in relation to *UNDRIP*. Similar legislation was enacted by the federal government in June 2021.

[441] On November 25, 2021, British Columbia passed Bill 29, the *Interpretation Amendment Act*, *2021*. Bill 29 added s. 8.1 to the *Interpretation Act* which, among other things, requires that every provincial enactment be construed in a manner consistent with *UNDRIP*.

[442] I addressed above the implications of s. 8.1 of the *Interpretation Act*. The remaining two issues to be decided concerning the effect of both *DRIPA* and *UNDRIP* are:

a) Did *DRIPA* implement *UNDRIP* into the domestic law of British Columbia?

b) Does s. 3 of *DRIPA* raise justiciable questions of law? If so, what are they?

[443] I deal with each issue in order below.

Did *DRIPA* "implement" the Declaration into the domestic laws of British Columbia?

[444] As noted above, a non-binding international instrument endorsed by the executive branch of government does not become a binding source of domestic Canadian law until implemented through legislation: *Baker v. Canada*, 1999 SCC 699 at para. 69.

[445] In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, the Court explained the rationale for this rule in the context of discussing international treaties:

> [159] … a treaty has no formal legal effect domestically until it is transformed or implemented through a domestic-law making process, usually by legislation (Harrington, at pp. 482-85; Currie, at p. 235). Giving an unimplemented treaty binding effect in Canada would result in the executive creating domestic law — which, absent legislative delegation, it cannot do without infringing on legislative supremacy and thereby undermining the separation of powers. Any domestic legal effect therefore depends on Parliament or a provincial legislature implementing the treaty rule into a domestic law that can be invoked before Canadian courts (Currie, at p. 237).
>
> [Emphasis added.]

[446] The use of the word "implementing" is important. Further, legislation "implementing" an international instrument into domestic law must do so expressly. As stated by Laskin C.J. in *MacDonald et al. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 at 171, 1976 CanLII 181, mere general approval of an international instrument is not sufficient and must "not be left to inference":

> In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. Of course, even so, a question may arise whether the legislation does or does not go beyond the obligations of the treaty or convention.

[447] On the "implementation" question described above, I note that both petitioners agree with the province's position that *UNDRIP* has not been "implemented."

[448] However, the intervenor BCHRC takes the position that *DRIPA* does, in fact, implement *UNDRIP*. To be clear, that position exceeds the position taken by the petitioners and the province. However, I find it necessary to address it in full.

[449] The BCHRC submits that by "affirm[ing] the application of [*UNDRIP*] to the laws of British Columbia", s. 2(a) of *DRIPA* "implemented*" UNDRIP* into domestic law.

[450] I pause here to note my understanding of the BCHRC's use of the word "implemented". Implementation is the means by which an international instrument becomes part of domestic law: Ruth Sullivan, The Construction of Statutes, 7th ed. (Toronto: LexisNexis, 2022) at p. 567. Accordingly, an international instrument that has been "implemented" has the same legal effect as a provincial or federal enactment. It can create rights for citizens, impose obligations on the government, and create causes of action. In this regard, when the BCHRC argues that the Declaration has been "implemented", I understand that submission to mean that the Declaration now has the full force and effect of law in British Columbia.

[451] As noted, the province disagrees with that position and submits that the language used in s. 2(a) falls short of the direct and explicit language required from the legislature to implement an international instrument. The two petitioners agree with the province's position on whether "implementation" has occurred. However, to be clear, the position of Gitxaala and the province diverge regarding the impacts of

the enactment of *DRIPA* and s. 8.1 of the *Interpretation Act*. I discuss in Gitxaala's position on the impact of these two enactments below.

[452] Turning back to the submission of the BCHRC, it is clear that determining the effect of s. 2(a) of *DRIPA* involves an exercise of statutory interpretation. As discussed above, the modern approach to statutory interpretation requires consideration of the text, purpose and context of a statute: *Rizzo Shoes* at para. 21. The goal is to ascertain an interpretation that finds harmony between the words of the statute, its intended objective, and the context in which it was enacted: *MediaQMI Inc. v. Kamel*, 2021 SCC 23 at para. 37.

[453] In advancing their proposed interpretations, the parties each point to statements made during legislative debate (Hansard evidence). While such statements can assist in illuminating the purpose of legislation and serve as evidence of legislative intent, they should not be relied on without qualification: *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 at para. 47. In this regard, I am mindful of the limited reliability of Hansard evidence, given that the relevant consideration is the intent of the legislature, not the intent of its individual members: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 68.

[454] The BCHRC focusses on s. 2(a) to ground the assertion that *UNDRIP* has been implemented. Accordingly, the focus of my analysis will be on the effect of that particular provision.

[455] To interpret s. 2(a), it is necessary from the outset to properly characterize the provision itself. In full, s. 2 reads:

> 2 The purposes of this Act are as follows:
>
> (a) to affirm the application of the Declaration to the laws of British Columbia;
>
> (b) to contribute to the implementation of the Declaration;
>
> (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

[456] Thus, s. 2 sets out the "purposes" of the *DRIPA*.

[457] In *The Construction of Statutes*, Ruth Sullivan, at 446, describes such provisions as "purpose statements" which are not substantive provisions that create rights or impose obligations. Instead, they are interpretive provisions that give meaning to and assist in understanding the substantive provisions in legislation. As Sullivan explains at 446:

> Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles, norms, or policies. Unlike preambles, purpose statements come after the enacting clause of the statute and are part of what is enacted into law…However, <u>like definition and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation – that do apply to facts – are to be interpreted</u>.
>
> [Emphasis added.]

[458] The British Columbia Court of Appeal applied this approach in *Greater Vancouver (Regional District) v. British Columbia*, 2011 BCCA 345. In that case, the appellant argued that a statement of principles in s. 3(c) of the *Local Government Act*, R.S.B.C. 1996, c. 323, imposed binding obligations on the provincial legislature. The relevant portion of s. 3(c) stated that the relationship between regional districts and the provincial government is based on principles that included the phrase "notice and consultation is needed for Provincial government actions that directly affect regional district interests".

[459] The Court of Appeal found that s. 3(c) was not itself a substantive provision in the legislation, likening it to the type of statement found in a preamble. The Court of Appeal confirmed that s. 3(c) "create[d] no legally enforceable obligation on the part of the Province": at para. 45. Justice Newbury then provided her opinion on the inclusion of aspirational goals in statutes at para. 47:

> [47] I conclude that the chambers judge did not err in finding that s. 3(c) of the *Local Government Act* could not constitute a "manner and form" restraint on the authority of the Province to enact the *Reconciliation Act*. Having said this, I do think it regrettable that the Province chose to state the "principles" it did in s. 3(c) if it did not intend them to have any legal effect. It may be that one or more regional districts have taken some comfort from s. 3(c), or have even relied on it to their detriment. Such a turn of events would be

> unfortunate and can do little to help develop a positive relationship between the Province and regional districts. Perhaps the technique of including aspirational goals in statutes should be reconsidered, and statements of this kind should return to preambles where they are clearly differentiated from substantive and enforceable statutory obligations.

[460] *DRIPA* does not contain a preamble. Its objectives and purposes are only set out in s. 2. Furthermore, in my opinion, the enumerated purposes are stated broadly and lack the clear and precise language found within the other provisions of the Act.

[461] Hence, the text leads me to conclude that s. 2 was not intended to be a rights-creating, substantive provision. Instead, s. 2 simply contains statements of purpose to be used for interpreting the substantive provisions of the legislation.

[462] The BCHRC submits that s. 2(a) of *DRIPA* implemented the Declaration such that it now has the full force and effect of law in British Columbia. To be clear, if correct, this would be a substantive outcome of great significance. In that context, I am unable to conclude that the legislature, having used broad and imprecise language, intended that the statement of purpose in s. 2(a) would effect such a significant outcome.

[463] On that front, I consider that other provincial legislation implementing international instruments provides useful points of comparison. For example, both the *International Sale of Goods Act*, R.S.B.C. 1996, c. 236 [*ISGA*], and the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154 [*FAA*], implement international instruments into British Columbia law. Notably, neither Act employs a broad statement of purposes or principles to achieve the implementation. For example, the *FAA* achieves implementation of a United Nations convention by simply stating (in s. 2), “The Convention applies in British Columbia” (see also: *ISGA*, s. 2).

[464] A purposive analysis further supports the conclusion that s. 2 did not implement *UNDRIP* into domestic law. Section 2(b) provides that the purpose of *DRIPA* includes “to contribute to the implementation” of *UNDRIP*. The inclusion of the phrase “contribute to” in s. 2(b) strongly indicates that s. 2(a) did not, in fact, accomplish “implementation” as the BCHRC suggests.

[465] This purpose is also reflected in ss. 4–5 of *DRIPA*, which place prospective obligations upon the government to achieve alignment between the laws of British Columbia and the Declaration. For instance, s. 4 requires the government to create an action plan for legislative reform and to consult with Indigenous peoples in the process. In this way, *DRIPA* contemplates and acknowledges that there is (current) misalignment between the laws of British Columbia and the Declaration. It also puts steps in place to resolve those inconsistencies. I return to this point below when discussing "Justiciability."

[466] On the basis of the analysis above, I find that a correct, purposive interpretation of *DRIPA* does not lead to the conclusion that *DRIPA* "implemented" *UNDRIP* into domestic law. Instead, *DRIPA* contemplates a process wherein the province, "in consultation and cooperation with the Indigenous peoples in British Columbia" will prepare, and then carry out, an action plan to address the objectives of *UNDRIP*.

[467] Turning to the "context", as noted, the province points to comments during the legislative debates by the Honourable Scott Fraser, the Minister of Indigenous Relations and Reconciliation. He stated that *DRIPA* would "not, in and of itself, give the UN declaration legal force and effect." He further asserted that "[b]ringing laws into alignment with the UN declaration won't happen overnight. It will be generational work."

[468] For its part, the BCHRC argues that *DRIPA* is human rights legislation and, therefore, should be interpreted broadly and liberally and notes the following from Honourable Scott Fraser's address to the Legislature:

> For the first time in history of this province and in the history of Canada, this legislation is going to affirm human rights—norms that have been long established, but in an Indigenous context. They are human rights that Canadians have been supporting and advocating for decades. They are rights that are established in our very own Charter.

[469] I acknowledge the human rights character of the legislation and the need to interpret such legislation expansively. Furthermore, I am mindful that s. 8.1(3) of the

Interpretation Act requires that I interpret provincial enactments in a manner consistent with the standards set out *UNDRIP*. However, I find that these factors do not overcome the fact that s. 2(a) is a broad statement of purpose that cannot, on its own, produce substantive outcomes.

[470] In sum, s. 2(a) of *DRIPA* does not implement *UNDRIP* into the domestic law of British Columbia. This interpretation is consistent with the characterization of s. 2(a) as a purpose statement as well as the legislation's purpose and context. As such, *UNDRIP* remains a non-binding international instrument.

Does s. 3 of *DRIPA* raise justiciable questions of law?

[471] The next question is whether *DRIPA*, and in particular s. 3, creates justiciable rights. Again, the proper analysis of this question requires that I address the "text, context and purpose" of the Act. Further, according to s. 8.1(3) of the *Interpretation Act*, I am to interpret *DRIPA* with the overlay that it is consistent with *UNDRIP*.

[472] As noted, s. 3 of *DRIPA* provides:

> 3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

[473] Justiciability is a question about whether the courts have the institutional capacity and authority to resolve a particular dispute. It is predominantly a question about subject matter. Specifically, an inquiry into justiciability asks whether the subject matter of a dispute is one suitable for judicial intervention.

[474] Resolving issues of justiciability involves considering questions of significant importance to Canada's constitutional democracy, including normative questions regarding the proper scope of judicial authority; constitutional questions regarding the relationship between the judiciary and other branches of government; and more general questions about the capacity of courts and judicial decision makers: Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012) at 6–7.

[475] The overarching goal is to ensure that the court remains within the confines of its proper constitutional role: *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at para. 33.

[476] In discussing how to determine whether an issue is justiciable, the Supreme Court of Canada stated the following in *Highwood Congregation v. Wall*, 2018 SCC 26:

> [34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).
>
> [35] By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

[477] I discuss the positions of the parties below.

The Petitioners' Position on Justiciability

[478] The petitioners argue that s. 3 imposes on the government a duty that is engaged in the event the laws of British Columbia are found to be inconsistent with the Declaration. Whether there is inconsistency, the petitioners argue, is a justiciable question. If a court finds that the laws of British Columbia are inconsistent with *UNDRIP*, then the petitioners submit that the court should declare that the government must take all measures necessary to remedy that inconsistency.

[479] The petitioners submit that s. 3 addresses all situations where "the laws of British Columbia" are inconsistent with *UNDRIP* for whatever reason. They submit that s. 3 involves three features:

a) It looks to the consistency of laws with *UNDRIP*: First, s. 3 contemplates action by government where any law(s) of British Columbia lack consistency with the *UNDRIP*. A law will be inconsistent with the *UNDRIP* where its provisions or its operation have the effect of adversely impacting any *UNDRIP* right or impeding any *UNDRIP* requirement. They further submit that the court has the institutional capacity to adjudicate any inconsistency between a law and an *UNDRIP* right. Hence, they argue, the question of consistency is "justiciable".

b) It imposes a legal duty on government: Second, the petitioners submit that s. 3 imposes a legal duty on the part of government, in the event that a law lacks "consistency" with the *UNDRIP*. The duty is to take "all measures necessary" to ensure that the law becomes consistent with *UNDRIP*. The petitioners concede that determining what measures are necessary is not justiciable. In other words, the petitioners agree that it is not up to the courts to determine whether the government has satisfied its obligation under s. 3.

c) Section 3 requires consultation and cooperation with Indigenous peoples to carry out the legal duty: The petitioners submit that if a law is inconsistent with *UNDRIP*, and government, therefore, has a statutory duty to "take all measures necessary" to align it with *UNDRIP*. They argue the duty includes an obligation of the government to consult and cooperate with Indigenous peoples to develop the necessary measures. The task of identifying and advancing specific measures, whether operational or legislative, therefore, falls to the province and Indigenous peoples, not the court.

[480] Hence, in short, for the purpose of this judicial review, the petitioners argue that "consistency" is justiciable. If that position is correct, it would follow that I would be required to determine whether the *MTA* is "consistent" with *UNDRIP*.

The Province's Position on Justiciability

[481] The province submits that s. 3 does not impose a justiciable duty on the government. The province makes several submissions on this issue:

a) The phrase "ensure" does not connote an imperative meaning. Hence, s. 3 does not impose a legal duty on the government.

b) The province emphasizes the multiple focusses and the generational timeframe of the work required to align the laws of British Columbia with *UNDRIP*.

c) The use of the term "must" in legislation creates an imperative (*Interpretation Act*, s. 29). It is often used in legislation to impose obligations on government actors: Ruth Sullivan, *The Construction of Statutest* at 89, 92. However, in s. 3, the word "must" applies to the phrase "take all measures".

[482] In addition, the province notes s. 29 of the *Interpretation Act* defines government as "His Majesty in Right of British Columbia", a term which is synonymous with the "Crown". In Hogg, Monahan & Wright, Liability of the Crown, 4th ed (Toronto: Thomson Reuters Canada, 2011) at 11–13, the writers explain that the term "Crown" is used to refer to the executive branch of government:

> In its more common sense, the term the Crown simply refers to the executive branch of government. It is never used for the legislative branch, despite the fact that the Queen or her representative plays a formal role in the legislative process, giving "royal assent" to all bills. Nor is the term ever used for the judicial branch, which is independent of the executive and legislative branches… Despite the fact that we now have a "constitutional monarchy", in which the role of the Queen and her representatives in Canada (as well as elsewhere in the Commonwealth) has become almost entirely formal, the term "the Crown" has persisted as the name for the executive branch of government.

[483] The province submits that the executive branch does not have the power to amend statutes. It can only introduce bills for the legislature to debate and possibly pass. Hence, to the extent that s. 3 requires work to be done on the "laws", that

requires the legislative branch to amend statutes that will ensure consistency with *UNDRIP*. This reasoning leads the province to three cascading conclusions:

a) Section 3 cannot, as a matter of constitutional law, repeal or modify existing legislation. It only directs the executive, which does not have that power.

b) It is the executive branch (not the legislative) that is required to work in consultation and cooperation with Indigenous peoples to prepare and propose legislation.

c) Hence, s. 3 creates a non-justiciable obligation on "government" (the "Crown") to work with Indigenous peoples to propose amendments to provincial laws. In other words, s. 3 does not change the law. It is forward-looking.

[484] The province submits that these conclusions support the province's overall submission that the text of s. 3 of *DRIPA* indicates the legislative intention that government and Indigenous peoples should work together in consultation and cooperation to implement *UNDRIP*. That work should be done through the framework set out in the Act. Notably, that framework provides for accountability to the legislature, not enforcement through the courts.

Analysis

[485] As a starting point, I agree with the petitioners that, in isolation, the question of "consistency" is justiciable. That is, I agree that the courts have the institutional capacity and legitimacy to determine whether the laws of British Columbia are "consistent" with the rights set out in *UNDRIP*. In my view, interpreting international instruments and comparing such instruments to domestic law falls within the expertise of judicial decision makers.

[486] However, while s. 3 may raise a justiciable question, it does not necessarily follow that the section either commands or invites judicial intervention. Put

differently, notwithstanding my conclusion that “consistency” is justiciable, I must still determine whether s. 3 calls on the courts to adjudicate the question of consistency.

[487] I conclude that s. 3 does not have that effect. I reach this conclusion for two reasons.

[488] First, s. 3 does not impose a requirement of consistency. As noted, s. 3 uses imperative language, specifically the term “must.” However, the word “must” is used in connection with the phrase “take all measures necessary.” No imperative language is used in connection with the phrase “consistency.” This, in my view, indicates that s. 3 was not intended to invoke the courts to adjudicate every instance where the laws of BC may be inconsistent with *UNDRIP*.

[489] Second, s. 3 allows for the Indigenous peoples of BC, instead of the courts, to be involved in the determination of whether the province’s laws are consistent with *UNDRIP*. Section 3 starts with the phrase “In consultation with the Indigenous peoples of British Columbia.” I consider that placement and wording to be important. There must be cooperation and consultation in determining whether the duties imposed by s. 3 are satisfied. It is not for the court to intervene and unilaterally determine what is meant by this provision. The provision contemplates ongoing cooperation between the government and the Indigenous peoples of BC to determine which of our laws are inconsistent with *UNDRIP*.

[490] Therefore, I find that s. 3 does not call upon the courts to adjudicate the issue of consistency. I do note, however, that s. 3 obligates the province to consult and cooperate with the Indigenous peoples of British Columbia. It may be the case that failure to do so would constitute a justiciable breach of the government’s obligations. However, that question does not arise on this hearing and will be for a future court to decide.

[491] As a final point, I note that the parties agree that the question of what is meant by “all measures necessary” is not a justiciable question. Because there is no

dispute on this issue, I accede to the parties' position. I do not suggest that I have determined the issue.

Remedies

[492] Having found the implementation of the *MTA* breaches the s. 35 duty to consult, I must now address remedies. In broad overview, the petitioners seek:

a) Declarations

b) Injunctions

c) Quashing of Existing Mineral Claims

[493] In response, the province submits that (if I find a breach):

a) A suspended declaration would be the appropriate remedy.

b) There should be no injunction.

c) The existing mineral claims should not be quashed.

[494] As I discuss below, my decision whether to grant declaratory relief is dependent, to some extent, on whether I grant injunctive relief. As a result, I address it last.

Injunctive Relief

[495] The two petitioners both seek injunctive relief. Ehattesaht also seeks interim injunctive relief pending the outcome of these petitions.

[496] The province opposes the granting of injunctions. The primary ground is that a declaration is sufficient relief. The province will heed the declaration. Hence, the province says that there is no reason to depart from the general rule against granting injunctive relief against the Crown.

[497] The specific orders sought by the petitioners are as follows:

Gitxaala

a) An injunction directing the CGC to discontinue or suspend the functions of the (mineral tenure online) registry concerning the automatic granting of mineral titles over lands over which Gitxaala has asserted aboriginal title.

Ehattesaht

b) An order enjoining the CGC from granting mineral claims, through the mineral titles online registration system or otherwise, on land over which Ehattesaht assert Aboriginal rights or title without first fulfilling the duty to consult with Ehattesaht respects to their asserted aboriginal rights or title.

c) An order enjoining the CGC from allowing for registration or renewal of any mineral claim on land over which Ehattesaht assert Aboriginal rights or title, through the mineral titles online registration system or otherwise until establishing a means by which consultation will occur prior to granting mineral claim and/or which allows for upholding of the honour of the Crown in granting mineral claims.

d) An interlocutory or interim injunction enjoining the CGC from allowing registration or renewal of any mineral claim on land over which Ehattesaht assert aboriginal rights or title until the application for judicial review is heard by the Court.

Interim Injunction

[498] In addition to the final injunction, Ehattesaht (but not Gitxaala) seeks an interim injunction “until the application for judicial review is heard by the Court”.

[499] The test for an interim injunction (*RJR MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311) differs from the test for a final injunction (which I discuss below). I deal with the three parts of the *RJR MacDonald* test below. Given that I have ruled in favour of Ehattesaht’s petition, there is clearly a serious question to be tried. Hence, my focus is on irreparable harm and balance of convenience.

[500] First, dealing with irreparable harm, I find that there is insufficient evidence to satisfy that part of the test.

[501] Ehattesaht's application for the interim injunction came on during the course of the hearing. I outline the chronology below. I reserved judgment on that application at the close of the hearing of the petitions. The "interim" nature of the injunction would last until the hearing, or presumably, the release of these reasons.

[502] Because I am now releasing these reasons, the "interim" period has expired, and the issue of the interim injunction is now moot.

[503] However, on the merits of the application, I consider the timing to be important. Ehattesaht commenced its petition on June 9, 2022. Ehattesaht brought this application forward in the midst of the hearing of the petition in mid-April 2023. After submissions by the respondents' counsel and discussions in court, Ehattesaht amended its original formulation of the injunction in late April 2023.

[504] The concerns raised by opposing counsel related to the over-breadth and unclear nature of Ehattesaht's original wording. The original version of the notice of application sought to enjoin the "registration or renewal" of claims. However, "renewal" is not a concept within the *MTA*. Instead, claims are "continued". In response to these concerns, counsel submits that a paragraph be fashioned by the court which would achieve the result that the need for "continuing" (or "extending") mineral claims on a yearly basis could be "paused" in line with the steps that were taken during the Covid 19 pandemic. The revised relief, as I understand it, would require the CGC to formulate alterations to the mineral tenure online registration system. In my opinion, these amended proposed terms do nothing to fix the uncertain and overbroad nature of the relief sought.

[505] I understand Ehattesaht's concern to be the prospect of the registration of a swath of "new" mineral claims (prior to the release of these reasons). In other words, a number of prospectors would take advantage of the interim period before the release of my ruling, and register mineral claims. However, I find that there was no

evidence to support that concern. To the contrary, the statistics in evidence indicated that the total number of mineral claims registered in Ehattesaht territory has diminished from 123 (as of September 21, 2022) to 100 claims (as of May 1, 2023). As noted above, the respondents Almehri and GMR allowed their claims to lapse. I infer that the existence of, and uncertainty created by, this litigation has scared off at least some prospectors. On that basis, I find that there was insufficient evidence of irreparable harm.

[506] I turn to the issue of balance of convenience. In addition to the evidentiary issues, in my opinion, the petitioner was not able to provide a sufficiently narrow and targeted term of an order that would:

a) have the desired effect (preventing new registrations);

b) be within the authority and ability of the CGC; and

c) not affect the rights of non-parties.

[507] In my opinion, the granting of any injunctive relief in this case risks interference with the rights of non-parties. Specifically, an interim injunction restraining the CGC from taking certain steps may have the unintended, and unforeseen impact on non-party recorded holders of mineral claims. In my opinion, the inability to ensure that non-parties will not be affected tips the balance of convenience against Ehattesaht.

[508] Given that these reasons are now released, the interim injunction is moot. For the reasons set out above, I would not have granted it.

Final Injunction

[509] The parties agree that the test for a final or permanent injunction granted at the end of a proceeding focuses on whether and what type of injunction is an appropriate remedy in the circumstances. In *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, Groberman J.A. wrote:

> [28] In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, per se, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[510] The petitioners' position is straightforward. They have established a right to consultation. Until the current systems is amended, registration of future new claims will be made without consultation. As a result, I should prevent those registrations from occurring in breach of the petitioners' rights.

[511] On the issue of injunctions against the province, the petitioners concede that the general force of prior decisions indicate that injunctive relief against the province is available, but only if all other remedies will not suffice.

[512] However, they submit that the Supreme Court explicitly identified injunctive relief as a remedy available for a Crown breach of the duty to consult in *Rio Tinto* at para. 37:

> [37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: …

[513] Regarding the distinctions, and comparisons, between injunctive and declaratory relief, in *Yahey v. British Columbia*, 2021 BCSC 1287, Justice Burke wrote:

> [1886] As legal commentators and jurists have noted, in many situations injunctions and declarations are functionally equivalent, and declarations are generally preferred and are well suited to provide relief against governments (Roach at 12.20, 12.30, 12.110, 12.120, 12.260). Declaratory remedies allow governments to conceive of ways to satisfy the judicial declaration and help to maintain the balance in our democratic institutions (Roach at 12.260, 12.261).
>
> [1887] While the Province is not immune from injunctive relief where a constitutional violation has been found (*Doucet-Boudreau v. Nova Scotia*

> *(Minister of Education)*, 2003 SCC 62 at paras. 70-74 with respect to c*harter* violations), in my view declaratory relief is preferable here.

[514] The province opposes the granting of injunctive relief. The province points to the *Crown Proceeding Act,* R.S.B.C. 1996, c. 89:

> (4) In a proceeding, the court
>
> > (a) must not grant an injunction or make an order against an officer of the government if the effect of granting the injunction or making the order would be to give relief against the government that could not have been obtained in proceedings against the government, and
> >
> > (b)may make an order declaring the rights of the parties instead of granting the injunction or making the order.

[515] The province acknowledges that s. 11(4) provides a "general rule", and not a complete bar, against injunctive relief. However, the province submits that neither petitioner provides any evidence of exceptional circumstances as to why the general rule should not apply.

[516] The province submits that, just as it is not the role of the court to "design a fishery… or a river flow regime" (referring to *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155; *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15), it would contravene the separation of powers for the court to direct the CGC on how to consult on mineral claims, particularly as this topic requires input from other potentially affected First Nations.

[517] I have been careful throughout these reasons to delineate between deciding whether a "duty to consult" exists and not discussing the "measures to resolve the breach." To be clear, I am not addressing the "measures." However, I note that *Ross River 2012* is the case proffered by the petitioners, and found by me, to be most factually and legal analogous to these petitions. In *Ross River 2012*, the court included the following discussion on remedies:

> [55] The chambers judge granted a declaration that the Government of Yukon has a duty to consult after the issuance of a mineral claim within the Ross River Area, and a declaration that the duty to consult may be satisfied by giving notice to the First Nation that a mineral claim has been issued, through providing the report prepared by the Mining Recorder under s. 6 of the *Quartz Mining Act*.

> [56] I would allow that appeal by granting the following declarations:
>
> a) the Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising the Ross River Area are to be made available to third parties under the provisions of the *Quartz Mining Act.*
>
> b) the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff.
>
> [57] The plaintiff acknowledges that the Government of Yukon may well wish to make statutory and regulatory changes in order to provide for appropriate consultation, and has suggested that the declarations be suspended for a period of time. As there is no opposition to that suggestion, I would agree to suspend the declarations for a period of one year.
>
> [Emphasis added.]

[518] I take two things from this discussion of the remedies:

a) The depth of the "measures" required to remedy the breach may range from a low of "notify" to a high of "accommodate".

b) Where the "measures" may require statutory and regulatory changes, the suspension of declaratory relief may be appropriate.

[519] In my opinion, injunctive relief is not the preferable order in these cases. I make that finding for the reasons set out below.

Scope is Unclear

[520] As discussed above in relation to the interim injunction, in my opinion, the scope of the injunctive relief sought by the petitioners is unclear. That uncertainty leads me to a concern that the rights of non-parties will be affected.

[521] Both petitioners seek to prohibit the granting of mineral claims over their territories. Ehattesaht specifically mentions both the registration and renewal of claims.

[522] In their mildest form, the paragraphs describing the relief sought could be interpreted as barring the registration of "new" mineral claims in the two territories.

However, the concept of a “new” mineral claim is unclear. It could refer to a mineral claim on a cell that has never been registered before. It could refer to the “new” registration of a mineral claim on a cell where the prior claim has recently lapsed.

[523] Further, the inclusion of the term “renewal” in Ehattesaht’s application causes further concerns. As noted above, under s. 29 of the *MTA* and s. 10 of the *MTAR*, claims are “continued” or “held” in good standing on a yearly basis by conducting a prescribed amount of work or paying a fee. Hence, an injunction barring the “renewal” of claims would (or could) prevent that “continuation” from occurring. My concern is that I am not sure what the end result of that order would be. It may have the effect of cancelling every mineral claim on the petitioners’ territory over the next 12 months. That result would affect every recorded holder in the Ehattesaht and Gitxaala territories, most of whom are non-parties. Further, it would affect longstanding mineral claims when the petitioners have clearly opted to only sought to quash more recent (2018 and newer) claims.

[524] As noted, Ehattesaht proposed modified wording suggesting a “pause” in registrations and cancellations. In my opinion, that form of relief is not appropriate as a final order.

“Measures”

[525] As I have noted throughout these reasons, the question before me is whether the current mineral tenure system triggers a duty to consult. The parties agree that, if that duty is triggered, then the decision on any “measures” to remedy the breach must be left to the province.

[526] My reasons above only address whether a duty exists. I have not been asked, nor have I attempted, to determine:

a) the strength of the petitioners’ claims for Indigenous title,

b) the depth of the adverse impacts,

c) the intensity of the interference with cultural and spiritual beliefs.

[527] That being the case, in my opinion, injunctive relief may grant the petitioners greater (final) relief in this petition than the accommodation to which they are entitled after those remaining issues are determined.

[528] In my opinion, the granting of injunctive relief treads into the realm of "measures." The granting of any injunctive relief would require the Crown to operate in a specific manner that may affect the scope of the remedial steps that the crown may take.

Declaration is Sufficient

[529] As discussed below, I grant declarations sought by the petitioners. In my opinion, those declarations provide the petitioners with sufficient remedies in the circumstances.

[530] On the basis of the entirety of my considerations above, I exercise my discretion against the ordering the injunctions sought by the petitioners.

The Quashing Remedy

The Petitioners' Positions

[531] As noted, the petitioners seek to quash (extinguish) a number of mineral claims on their territories.

[532] The court's power to quash or set aside the mineral claims can be found in two places:

a) Section 7 of the *JRPA* provides that "[i]f an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration"; and

b) Section 2(2)(a) of the *JRPA* empowers the court to grant relief in the nature of *certiorari*.

[533] The petitioners' position is that the granting of each mineral claim constituted a "decision" by the CGC. Hence, the grant of each of the impugned claims by the CGC constitutes both an exercise of a statutory power of decision-making that may be set aside under *JRPA,* s. 7, and a decision of sufficiently public character that may be quashed under *JRPA,* s. (2)(a).

[534] The petitioners rely on Supreme Court of Canada's decision in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*] at para. 24, where it quashed an authorization by the National Energy Board for offshore seismic testing. The Court specifically affirmed that Crown conduct that does not comply with the duty to consult is contrary to constitutional limits on Crown's authority and discretion and should be set aside.

> [24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review.

[535] The petitioners submit that in *Clyde River,* the Court resorted to quashing the decision because the underlying decision had been made on the basis of inadequate consultation. They submit that the duty to consult with respect to the impugned claims cannot be met after the mineral claims have been granted.

[536] In the present case:

a) Ehattesaht has named as respondents several recorded holders who registered claims in recent years. The focus is the claims in the Zeballos River and Nomash River watershed. (See paras. 60–63 above.)

b) Gitxaala seeks to quash Claims #1 through #5 that were acquired without consultation on Banks Island. (see paras. 54–57 above.)

[537] The identified tenures were granted without fulfilling the duty to consult, and Ehattesaht seeks an order that they be set aside.

Individual Respondents' Positions

[538] As noted, a number of the recorded holders of mineral claims who were named as respondents in these petitioners allowed their claims to lapse.

[539] Privateer continues to hold a number of mineral titles within Ehattesaht territory. Privateer opposes the quashing of its claims. It submits that it is an innocent third party that registered the impugned claims in good faith and in reliance on the provincially mandated registration system. Privateer submits that the *de facto* doctrine provides that its claims should not be quashed.

[540] As noted above, in the Gitxaala proceeding, the respondents Mr. Paul and Mr. Friesen are the registered holders of Claims # 1–#5 on Banks Island. They oppose an order quashing their claims. Mr. Paul deposed that those claims were filed in 2018. He says that any cancellation or quashing of these 2018 claims would result in the claims holders incurring "at least $163,000 in damages" arising from costs related to registering the claims, assessment of the claims, lost opportunity costs, lost profits, and devaluation of the claims because of the litigation.

The Province's Position

[541] The provincial respondents say that the mineral claims should not be quashed for at least three reasons:

a) The quashing of the claims is not consistent with the forward-looking nature of the duty to consult.

b) The issuance of an individual mineral claim is not a decision *per se* that is capable of being quashed. The *de facto* doctrine applies to protect third-party interests in relation to acts carried out under a presumptively valid regulatory scheme.

c) Alternatively, if the issuing of the mineral claim is a decision, the court should exercise its discretion not to quash the mineral claims in the circumstances.

[542] The province submits that the duty to consult is forward-looking. It implicates contemplated conduct. The province cites *Upper Nicola Indian Band v. British Columbia (Environment),* 2011 BCSC 388 at paras. 119–120, where Justice Savage (as he then was) wrote:

> [119] In my opinion *Carrier Sekani* explains *Haida Nation SCC*. It does not support the position that consultation must go beyond *contemplated conduct* and address the ongoing impacts of past decisions. *Carrier Sekani* confirms that consultation is to be directed at the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions.
>
> [120] … The purpose of the duty to consult is to protect unproven or established rights from the effects of proposed conduct pending claims resolution.
>
> [Emphasis in original.]

[543] Hence, the province argues, quashing existing mineral claims that were registered pursuant to a regulatory regime that was presumptively valid is not consistent with the forward-looking nature of the duty to consult.

[544] The province and Privateer also argue that the *de facto* doctrine applies on these facts. That doctrine gives effect to the justified expectations of third parties who relied upon the government actors administering invalid laws. In this case, the expectation of all recorded holders of mineral claims was that their registration was legal and valid.

[545] The province notes that in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 1985 CanLII 33, the Supreme Court of Canada found that all Acts of the legislature of Manitoba were invalid because they were not provided in both French and English as required by *Manitoba Act, 1870.* In order to avoid a "legal vacuum" and to protect the actions performed pursuant to the invalid legislation, the Supreme Court of Canada granted a suspended declaration of invalidity and applied the *de facto* doctrine. The Court explained that the *de facto* doctrine:

> … recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the *de facto* doctrine will save those

> rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.

Analysis

[546] First, I accept the "forward looking" nature of the duty to consult. I note that the Court's comments in *Rio Tinto*:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[547] In my opinion, the existing, impugned mineral claims are the product of past conduct by the province.

[548] Second, I accept the submission of the province and Privateer on the applicability of the *de facto* doctrine. I have found, above, that the fault in the system lies, not in the granting of individual mineral claims, but in the higher-level decision making relating to the CGC's discretion to consult with First Nations. Mineral claim registrations are not *per se* decisions, but rather interests issued in the past under a then-presumptively valid legislative scheme. The *de facto* doctrine applies, and an order quashing the mineral claims is not appropriate in the context of these petitions. On the applicability of the *de facto* doctrine, I agree with the province's submission.

[549] Third, there is nothing, apart from the date, that distinguishes the impugned mineral claims from any other mineral claims in the asserted territories of the petitioners. In my opinion, the quashing of the impugned claims could bring into question the validity of other mineral claims filed in the same time reference.

[550] On that point, I wish to be clear in these reasons that I am making no finding and no order that affects the validity of existing mineral claims. In other words, all mineral claims registered under the existing system are valid.

Declaratory Relief and Suspension Thereof

[551] It follows from my discussion above that having rejected the orders for injunctions, I exercise my discretion to grant declaratory relief.

[552] The nature of that declaratory relief is as sought by the petitioners:

> A declaration that the CGC's conduct in establishing an online system allowing automatic registration of mineral claims in their territories, without creating a system for consultation, breaches the obligations of the Crown.

[553] I grant that declaration.

[554] As discussed above, I consider the nature of this issue to be "systemic". I have noted above the decisions and the discussion of remedies in *Ross River 2012* and *Yahey*. In my opinion, the interests of justice will not be served by making this declaration solely in relation to the territories of the two petitioners. On that basis, I grant the general declaration regarding the obligations of the CGC throughout the province.

[555] Viewed from a practical perspective, the CGC, and perhaps the ministry, will have to take steps to implement a program. I do not know what that program will look like, but it will not happen tomorrow.

[556] Hence, in my opinion, the just result is to suspend the declaration for a period of 18 months to allow the design and implementation of a program of consultation.

Summary and Final Word

[557] In 1997, in the concluding sentences of his judgment in *Delgamuukw*, Chief Justice Lamer noted that s. 35 of the *Constitution* provides a basis upon which subsequent negotiations can take place. He reflected upon the importance of resolving these differences through negotiation because, as he noted, "Let's face it, we are all here to stay."

[558] That statement applies equally to the circumstances at issue in these petitions. The province, First Nations, and the mineral exploration industry will be here. The goal is to develop a mineral tenure system that recognizes the rights of BC's Indigenous people. My hope is that that goal can be achieved in the 18 months I have set aside for that purpose.

[559] I repeat here the summary of my findings:

a) Applying the *Haida* Test, I find that a duty to consult is triggered by the current system of issuance of mineral claims because it causes adverse impacts upon:

   i. areas of significant cultural and spiritual importance to the petitioners; and

   ii. the rights of the petitioners to own, and achieve the financial benefit from, the minerals within their asserted territories.

b) I find that the duty to consult flows from s. 35 of the *Constitution* and the application of the *Haida* Test.

c) I find that the CGC has discretion, within the existing *MTA*, to create a structure that provides for consultation with First Nations, and it follows that:

   i. I do not find that the *MTA* is constitutionally invalid; and

   ii. I do not need to address the alternative position that the Lieutenant Governor in Council is in breach of their s. 35 obligations by failing to promulgate regulations.

d) Having considered the text, context, and purpose of *DRIPA* and its relationship to *UNDRIP*, I find that *DRIPA:*

   i. at s. 2 does not implement *UNDRIP* into the domestic law of BC;

ii. at s. 3 does not create justiciable rights;

iii. however, I have used *DRIPA* as an interpretive aid in addressing the proper reading of the *MTA*.

e) I find that the proper remedy in these cases is a declaration that the province owes a duty to consult. I suspend the implementation of that declaration for a period of 18 months to allow the CGC or the executive branch to consult and design a regime that allows for consultation (or if necessary, for the province to amend legislation). It follows that I am not granting the injunctive relief or the quashing relief sought by the petitioners.

[560] In closing, I would be remiss if I did not acknowledge the tremendous effort and assistance provided by counsel in these petitions. It should be evident from these reasons that every issue was raised, researched, and argued in a manner that was of great help to me. I thank them for their efforts.

"A. Ross J."