C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nº : 500-17-111162-205

SUPERIOR COURT
(Civil Division)

MITCHIKANIBIKOK INIK
(ALGONQUINS OF BARRIERE LAKE)

Applicant

v.

ATTORNEY GENERAL OF QUÉBEC
(GOVERNMENT OF QUÉBEC AND MINISTER OF ENERGY AND NATURAL RESOURCES)

Respondent

and

SOCIÉTÉ QUÉBÉCOISE D'EXPLORATION MINIÈRE INC. (SOQUEM)

Impleaded Party

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OVERVIEW

1. The Applicant, the Mitchikanibikok Inik First Nation (the "**MIFN**"), also known as the Algonquins of Barriere Lake or ABL, have occupied their unceded, traditional, and current-use territory since time immemorial. The MIFN rely on their territory for spiritual, cultural, and physical survival and assert Aboriginal rights and title over it. In breach of its constitutional duties, Québec subjects the MIFN's territory – their home – to "free entry" mining, by which claim registration, renewal and transfer and certain mining exploration activities occur without consultation.

2. In Yukon, another Canadian jurisdiction heavily invested in mining, First Nations challenged a free entry mining regime like Québec's. The Yukon Court of Appeal found the regime unconstitutional and ruled that the government must consult with First Nations before mineral rights are made available to third parties and before any mining exploration activities take place. Similarly, the free entry regime in Québec's *Mining Act*[1] (the "**Act**") cannot persist. It systematically breaches Québec's constitutional Duty to Consult ("**DTC**") and accommodate Indigenous Peoples under s. 35 of the *Constitution Act, 1982.*[2] It threatens the MIFN's ability to exercise their Aboriginal rights and the integrity of their asserted title.

3. This case also seeks redress for a specific, egregious failure to consult: the transfer of 1,052 mining claims comprising a massive portion of the MIFN's territory. These claims were originally acquired with no consultation and were then transferred to a Crown corporation that promotes mining activities (the Impleaded Party, SOQUEM), again with no consultation. Québec refused the MIFN's repeated requests to participate in the settlement negotiations that led to the transfer, despite knowledge of their asserted rights and title over the territory – a breach of the DTC and of fiduciary obligations. The MIFN seek an order maintaining a suspension on further transfer or exploration of these claims, until this specific breach has been resolved.

4. Reforms are needed to bring the Act into compliance with the Supreme Court's consultation standard. Such reforms are manifestly achievable. Yukon's free entry mining regime is already changing to accommodate Aboriginal rights, as are regimes in other mining jurisdictions.

5. The MIFN are not alone in their cause. First Nations across Québec have repeatedly and clearly expressed the view that the free entry mining regime threatens their rights and title, and they demand to be consulted before mining claims are made available on their territories. The MIFN seek remedies that will allow Québec and its mining regime to comply with its constitutional obligations under the DTC.

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[1] *Mining Act*, CQLR c M-13.1 [***Mining Act***].

[2] Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

I. FACTS

The parties

6. The MIFN are a First Nation and "band" under s 2 of the *Indian Act*.[3] The people of the MIFN occupy unceded traditional territories in Québec, and comprise over 700 members, approximately 580 of whom reside on the reserve, located near Rapid Lake, north of Maniwaki. The MIFN assert and continues to have and to exercise Aboriginal rights and title in these territories, which are recognized and affirmed by s. 35 of the *Constitution Act*, *1982*.[4]

7. The Respondent is the Crown in Right of Québec (the "**Crown**" or "**Québec**"), having as one of its agents the Minister of Energy and Natural Resources ("**MERN**"),[5] who is responsible for the Act, including the registration, renewal, and transfer of mineral claims and the management of other mining-related rights.

8. SOQUEM is a crown corporation of the Respondent that holds registered mining claims and has undertaken certain exploration activities in the MIFN's territory. It is a subsidiary of *Ressources Québec*, which is in turn a subsidiary of *Investissement Québec*.[6] Pursuant to s. 2 of the *Act respecting Investissement Québec*,[7] the property of *Investissement Québec* "forms part of the domain of the State".

The traditional territory of the MIFN

9. Aside from a small 59-acre reserve, the MIFN's traditional territory is vast and includes over 10,000 km^2 identified in the Trilateral Agreement, which will be further explained below (the "**Area**"). Most of the territory is near or within the *Réserve faunique La Vérendrye*, at the junction of the Gatineau and Ottawa Rivers.[8]

10. The MIFN's traditional territory includes many sites of ecological, cultural, and spiritual importance that are central to the exercise of their Aboriginal rights, their physical survival, and their cultural identity. For instance, their territory is home to many species of trees, plants and animals that are essential for hunting, trapping, harvesting, and gathering activities for subsistence, medicinal and ceremonial purposes. Their territory also houses burial sites, ceremonial sites, heritage sites, occupancy sites, and other sacred areas. It is subdivided into tracts of land which have been managed by families for generations with political, social and practical

[3] RSC 1985 ch I-5.
[4] Affidavit of former Chief Casey Ratt, December 16, 2020, at paras 3-4 and 11 [**Ratt Affidavit**].
[5] The MERN has since become the Minister of Natural Resources and of Forests (MNRF).
[6] Affidavit of Tony Brisson, 16 May 2022, at para 4 [**Brisson Affidavit**].
[7] CQLR c I-16.0.1.
[8] Ratt Affidavit, at para 4.

implications. Connection to the land is vital to the MIFN in many ways, such as for the survival of their language.[9]

11. The activities listed above take place throughout the MIFN's traditional territory. While some activities are static, others are dynamic, such as hunting, fishing, or trapping sites. These sites frequently change either through natural variations or artificially, through projects under Québec's control like forestry and potentially mining activities.[10] The ability of the MIFN to practice their way of life in their territory is placed at risk unless they have meaningful prior notice from the Respondent about activities in their territory, are consulted in a true dialogue about such activities, and are accommodated to minimize the impact of disruptions.[11]

12. There are currently several hundred mining claims within the MIFN's traditional territory, including in locations where the MIFN practices cultural and spiritual activities.[12] For example, several SOQUEM-held claims are located approximately 20 kilometers north from the MIFN's reserve at Rapid lake, which the MIFN frequently accesses for hunting, fishing, and trapping.[13]

The agreements with the Respondent regarding the Area

1) 1991 Trilateral Agreement

13. The Respondent, the MIFN, and the Government of Canada entered into a Trilateral Agreement in 1991 (the "**TA**") with an objective to ensure the rational management of renewable resources over portions of the Area (identified in Annexes 1 and 2 of the TA). The renewable resources subject to the TA were explicitly identified as being forests and wildlife, and there was no mention of mineral resources, which of course are not renewable resources.[14]

14. The TA explicitly acknowledges that the territory it covers, included in Annexes 1 and 2, is "currently used" by the MIFN and that the Area is used by the MIFN for "traditional activities".[15]

15. The TA also sets out a process through which special representatives of the Respondent and the MIFN would supervise a task force in the identification of "measures to harmonize the conduct of forestry activities with the traditional

[9] Ratt Affidavit, at para 7.
[10] Ratt Affidavit, at para 8. For a list of mining exploration activities that took place in part of the MIFN's territory between 2008 and 2020, see Affidavit of Roch Gaudreau, May 13, 2022, at para 75 [**Gaudreau Affidavit**].
[11] Ratt Affidavit, at paras 8, 9.
[12] Exhibit P-23.
[13] Ratt Affidavit, at para 10.
[14] Exhibit P-1, at paras 2, 5.
[15] Exhibit P-1, at preamble and para 5.

activities of the Algonquins of Barriere Lake, as well as the sensitive zones which should be protected more especially in a provisional manner."[16]

16. In 1992, a disagreement arose between Québec and the MIFN as to control and responsibility for the "technical work" contemplated in the TA. Québec viewed the technical work to be under its sole jurisdiction, whereas the MIFN interpreted the TA to require a unified technical team coordinated by, and responsible to, the Special Representatives chosen by both parties.[17]

17. Ultimately, the dispute was placed in mediation before Justice Réjean Paul who produced a mediation report on September 14, 1992. While Justice Paul's report did not make a conclusion on whether the TA constitutes a Treaty (though he noted that it could encompass all the characteristics of one), he defined it as a "solemn agreement" which "must always be omnipresent when the CAAFs [forest management and timber supply agreements] are granted by the Ministry of Forests to private entrepreneurs."[18]

2) 1998 Bilateral Agreement and Implementation Agreement

18. The Respondent and the MIFN reaffirmed the TA by entering into a Bilateral Agreement in 1998 (the "**BA**"). Like the TA, the BA is concerned solely with the management and disposition of renewable resources and makes no mention of mineral resources.[19]

19. Pursuant to the BA, the MIFN and the Respondent began to negotiate a draft Implementation Agreement until around June 2017 (the "**IA**").[20] The Respondent has longstanding knowledge of the various areas, zones and activities taking place within the MIFN's territory, as appears from the IA, further described hereafter.

20. The IA states that in 2006, the draft management plan produced by the parties identified areas of concern ("**AoC**") for the MIFN for each of the seven Traditional Management Areas ("**TMA**") identified within the TA Territory. The IA identifies AoC as areas adjacent to sites that may be affected by planned forest and wildlife management activities, including land used by the MIFN for cultural activities.[21]

21. The IA also defined TMA as an aggregation of thirteen zones being used by the MIFN for the harvesting of natural resources and social, cultural, and spiritual

[16] Exhibit P-1, at para 5.
[17] Exhibit P-19, at p 24.
[18] Exhibit P-19, at p 27.
[19] Exhibit P-2, at p 1.
[20] Exhibits P-2 and P-3.
[21] Exhibit P-3, at pp 10-11.

purposes. The IA further recognizes that TMAs represent extended family use areas and as such, the families have an interest and role in their management.[22]

22. The IA goes on to define maps of "deemed sensitive areas" ("**SAS**") as maps of sites deemed by the MIFN to be of particular importance for the maintenance of their traditional activities, traditional values, and heritage. These maps are included in a confidential annex to the IA.[23]

23. The terms of reference of the IA further note that Québec agrees to inform as early as possible, and as feasible, the Joint Management Committee of any potential project in which Québec is involved in as a proponent which has the potential to adversely affect the MIFN's asserted rights and interests.[24]

24. Finally, the IA notes that the territory identified in Annex 1 of the TA is the MIFN's current-use territory over which it pursues traditional activities, that there needs to be an acceptable balance between their cultural needs and resource supply, and that any obligations on the Respondent to consult the MIFN shall be conducted on a government-to-government level.[25]

The MIFN have consistently asserted Aboriginal rights and title over the Area

25. The MIFN have asserted and continue to assert and exercise Aboriginal rights in their traditional territory. The MIFN have since time immemorial resided in and carried on their own practices and customs for survival or cultural reasons in their traditional territories, including but not limited to hunting, fishing, trapping, navigation, and worship.[26]

26. Québec admits that the MIFN assert Aboriginal rights in at least part of the Area. By email dated October 9, 2020, it admitted that: "*Le PGQ a connaissance d'une revendication du demandeur de droits ancestraux, excluant un titre foncier ancestral, sur le territoire de l'Annexe 2 de l'entente trilatérale*."[27]

27. Québec is aware of the MIFN's position that mining and forestry activities affect their Aboriginal rights. Québec's affiant, Denis Bélanger, refers to several news articles in which members of the MIFN describe how forestry and mining companies have

[22] Exhibit P-3, at p 10.
[23] Exhibit P-3, at p 12. This confidential annex is not included in Exhibit P-3.
[24] Exhibit P-3, at p 18, at para 6.2.
[25] Exhibit P-3, at paras 3 and 43.
[26] Ratt Affidavit, at para 4. See also Exhibit P-19, at p 25.
[27] Exhibit P-13. Québec further acknowledges the MIFN's asserted rights over the Area in the Affidavit of Hélène Giroux, May 12, 2022, at para 2 [**Giroux Affidavit**] in which she states: « *Au moment des faits pertinents, Copper One inc. détenait 1052 claims pour les avoir acquis de Ressources Cartier inc. en décembre 2011, tous situés sur* ***le territoire sur lequel [MIFN] revendique des droits ancestraux****.* » (emphasis added).

taken over their territory and have compromised their ability to feed their community and to practice their culture.[28]

28. The MIFN also assert Aboriginal title over the Area. The MIFN's people and ancestors have occupied their traditional territory since time immemorial and their presence on the land can be traced back thousands of years. The MIFN's Aboriginal title has never been ceded by treaty nor extinguished by conquest.[29]

29. The MIFN have made their Aboriginal title assertions known to Québec on many occasions, including the following:

    1) The MIFN, as one of the representatives of the Algonquin Nation, gave the Respondent formal notice of their asserted title in a 1992 submission to the Members of the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty of the National Assembly of Québec.[30] The submission is clear that the Algonquin Nation, including the MIFN, has never given up Aboriginal title to any part of their traditional territory, which includes all lands and water within the Ottawa River watershed on both sides of the Ontario-Québec border.

    2) A 1992 disagreement between the MIFN and the Respondent over the interpretation of the TA again brought the MIFN's Aboriginal asserted title to Québec's attention. Throughout discussions with Québec, the MIFN reiterated that they have never renounced their rights, which are derived from their longstanding occupation on the lands.[31]

    3) The MIFN communicated their asserted Aboriginal title to the Respondent again in 2016, in the context of permit requests for forestry activities in the Area. In a letter dated December 16, 2016, the MIFN expressed their view that the Act violates the "constitutionally protected Aboriginal rights **and title** of our First Nation."[32] (emphasis added)

    4) The MIFN further reminded the Respondent of their asserted Aboriginal title in emails dated September 14 and October 12, 2017, when requesting to participate in settlement negotiations between the Respondent and Copper One Inc. ("**Copper One**") over mining claims in their territory. The correspondence stated that "as a First Nation on unceded territory, [the MIFN] has the constitutional right to be consulted and accommodated by Québec on anything affecting its aboriginal rights **or title**."[33] (emphasis added)

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[28] Respondent Exhibits PGQ-3 to PGQ-7.

[29] Ratt Affidavit, at para 4.

[30] Exhibit P-4, at p 37; Ratt Affidavit, at para 11.

[31] Exhibit P-15, at p 3; Exhibit P-17, at p 2.

[32] Respondent's Exhibit PGQ-13 (Letter of December 16, 2016, in the heading: "Re: Quebec Mining Act Violations of Mitchikanibikok Peoples' Rights **and Title**" (emphasis added)).

[33] Exhibits P-8 and P-9.

5) The MIFN noted, in their Application for Orders to Disclose Documents as a conservatory intervenor in the 2017 litigation between Copper One and the Respondent Attorney General of Québec, that the Minister of Forests, Wildlife and Parks ("**MFFP**") "is aware that the traditional territory of the MIFN has never been ceded to the Crown by treaty. The Minister is also aware that the MIFN assert aboriginal rights **and title** within its traditional territory, and that these aboriginal rights and title are constitutionally protected under s. 35 of the *Constitution Act, 1982*."[34] (emphasis added)

6) In the Superior Court's Judgment of May 16, 2018, the court stated that "the Mitchikanibikok Inik essentially allege that Copper One's mining claims cover approximately 300 km2 of the territory **on which the Nation holds title** and exercises Aboriginal rights."[35] (emphasis added)

7) The MIFN again clearly reminded the Respondent of their assertion to title and expressed some of their concerns regarding potential adverse effects on their asserted title, in a letter dated May 3, 2019.[36]

8) The Respondent was clearly notified of the MIFN's claim to Aboriginal title in their territory through the present Application for Judicial Review, submitted to this court in this matter in January 2020, as well as the MIFN's Amended Application submitted in November 2020.[37]

9) On November 10, 2021, the Honourable Marie-Claude Lalande, j.s.c., in her decision on the Respondent's Motion for Particulars (which will be explained below at paras 66-67), noted that the MIFN *« allègue[nt] occuper et revendiquer des territoires traditionnels non cédés correspondant ou incluant au moins un territoire délimité en 1991 par [la TA]. »*[38] In the context of the Motion, both Justice Lalande and the Respondent acknowledged that the MIFN's title assertion was plead (*« allégué »*) within their Amended Application.[39]

10) On November 16, 2021, the Assembly of First Nations of Quebec and Labrador ("**AFNQL**"), of which the MIFN is a member,[40] adopted a statement entitled "First Nations continue to hold Aboriginal rights and title to their land" in which

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[34] Exhibit P-12, at para 10 b). See also paras 2, 10 a), and h).
[35] *Copper One Inc c. Attorney General of Québec,* 2018 QCCS 2358, at para 6 [***Copper One***].
[36] Respondent's Exhibit PGQ-24.
[37] Application for Judicial Review and Permanent Injunction, at para 12.
[38] *Mitchikanibikok Inik First Nation (Algonquins of Barriere Lake) c. Procureur général du Québec*, 2021 QCCS 4752, at para 6 [***Particulars Judgment***].
[39] *Particulars Judgment,* at para 50, see also paras 49, 51; *Notes du Procureur général du Québec au soutien de sa demande en précisions* (2021 QCCS 4752), at para 23, see also paras 32-34, 53, 63.
[40] Exhibit P-24.

it reminded Québec that "First Nation governments in Quebec-Labrador have ancestral and treaty rights to their lands and resources."[41]

30. Canada and Ontario have recognized that the Algonquin people have a credible, unceded Aboriginal rights and title claim. Both governments are currently in negotiations with the Algonquin people for their title claim.[42]

The previous litigation involving the Respondent and SOQUEM

31. In 2009, Resources Cartier Inc. obtained 1,052 mining claims on the MIFN's territory, which Copper One subsequently acquired over the following years. No consultation ever took place concerning the registration of these claims between the MIFN, Québec, or the third-party companies.

32. In 2016, Copper One sought a forestry management permit from the MFFP to perform deforestation work to gain access to sites subject to its mineral claims.[43] In 2017, having received no response to its permit request, Copper One brought an application for judicial review seeking to compel the MFFP to deliver the permit.[44] It was at this point that the MIFN first became involved in the matter by seeking and obtaining leave to intervene as a conservatory intervenor to protect their rights and title and to oppose Copper One's permit request.[45]

33. On April 28, 2017, the MFFP informed Copper One that it intended to refuse the requested forestry management permit.[46] In response, Copper One amended its application to compel the MFFP to issue the permit.[47] This prompted the MIFN to file a written contestation, opposing Copper One's application.[48]

34. On September 12, 2017, shortly after learning that Copper One and the Respondent were engaged in settlement discussions, the MIFN asked the Respondent to be allowed to participate in those discussions because of the possibility of their Aboriginal rights and title being adversely affected. As a conservatory intervener and therefore a party to the proceeding, the MIFN noted that their exclusion from those discussions opened the door to further litigation.[49] The Respondent refused to include the MIFN in the settlement discussions.[50]

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[41] Exhibit P-25.
[42] Ratt Affidavit, at paras 5-6; Exhibits P-26 and P-27.
[43] Respondent's Exhibit PGQ-12.
[44] Respondent's Exhibit PGQ-10.
[45] *Copper One*, at paras 5-6.
[46] *Copper One,* at paras 10-11.
[47] Respondent's Exhibit PGQ-11.
[48] *Copper One*, at para 13.
[49] Exhibit P-6, at p 1.
[50] Exhibit P-7.

35. The MIFN renewed their request on September 14 and October 12, 2017. The MIFN also reiterated that the Crown had a duty to consult and accommodate them prior to finalizing any settlement that could affect their Aboriginal rights and title, and that the failure to do so was an actionable constitutional violation that would likely lead to further legal challenges.[51] The Respondent did not agree to undertake, and in fact did not undertake, any such consultation or accommodation.

36. On November 15, 2017, without prior notice to the MIFN or any consultation despite the MIFN's clearly communicated position, Copper One and the Respondent entered into a settlement whereby Copper One agreed to assign its 1,052 mineral claims within the Area to SOQUEM, while the Respondent agreed to pay it $8,000,000.00.[52] The transfer of mineral claims was signed on November 21, 2017, and registered on January 9, 2018.[53]

37. The term of these 1,052 mining claims was suspended on February 8, 2017, pursuant to s. 63 of the Act and have remained suspended following their transfer to SOQUEM.[54] Concretely, this means that no exploration activities can occur until the suspension is lifted. Neither SOQUEM nor the Respondent have expressed that consultation will necessarily occur before the lifting of the suspension.

38. After the settlement between the Respondent and SOQUEM was concluded, the MIFN filed a pleading seeking to invalidate the settlement, invoking procedural arguments and reserving constitutional arguments for another time. The pleading was dismissed and, as they indicated they would do, the MIFN raises the constitutional issue in the present Application.

The MIFN's position on mining activities within their territory

39. The MIFN has communicated to the Respondent their longstanding opposition to mining activities on their territory on multiple occasions, such as during the negotiation of the IA. During the negotiation of the IA, the Respondent placed a moratorium on mining in the MIFN's territory in 2011.[55]

40. In June 2016, the moratorium was lifted without any prior notice to or consultation with the MIFN. In response, the Band Council of the MIFN adopted a Resolution setting out its opposition to mining activities and sent a copy to the Respondent on September 7, 2016.[56]

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[51] Exhibits P-8 and P-9.
[52] Exhibit P-10, at para 6.
[53] Exhibit P-11.
[54] Giroux Affidavit, at para 17.
[55] Exhibit P-21, at p 1; Ratt Affidavit, at paras 19-20.
[56] Exhibit P-21, at p 1; Ratt Affidavit, at para 20.

41. The MIFN opposes any mining activities, including the registration of claims, exploration, and extraction within their traditional territory that are incompatible with the resource development strategy laid out in the various agreements with the Respondent.[57]

42. The AFNQL, of which the MIFN is a member,[58] adopted a Resolution[59] in 2017 stating that:

> "B. AFNQL continues to oppose the Quebec Mining Act because the Act is inconsistent with the Articles of [the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)] and is inconsistent with recent case law in Canada, such as [*Ross River*], and as such is unconstitutional; moreover the Quebec Mining Act violates Aboriginal Rights, Title and Treaties by:
>
> i. Maintaining the outdated "Free Entry" mining regime on lands and territories subject to Aboriginal Rights, Title and Treaties.
>
> ii. By not requiring consultation and accommodation let along consent with First Nations prior to staking mining titles (claims) or conducting exploration activities towards the development of mines.
>
> C. Quebec's Mining Act enables online mineral claim staking ('click-and-claim') on lands and territories subject to Aboriginal Rights, Title and Treaties without any requirement to consult, accommodate or obtain consent from affected First Nations;
>
> D. Quebec's Mining Act allows multiple exploration activities, including aerial and land surveying, felling trees, blasting and drilling, trenching and the construction of temporary roads and shelters, without any permits, […] let alone consultation, accommodation and consent with First Nations;
>
> E. Claim staking represents alienation of First Nations rights and territories, and mineral exploration activities may have direct impacts on Aboriginal rights; […]."

43. In this proceeding, the AFNQL provided an affidavit[60] re-stating its position that:

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[57] Exhibit P-21, at p 6; Ratt Affidavit, at para 19.

[58] Exhibit P-24.

[59] Exhibit P-28, at p 2.

[60] Affidavit of Regional Chief of the AFNQL Ghislain Picard, November 23, 2022, at paras 18-20: « L'APNQL est d'avis que l'enregistrement, le renouvellement ou le transfert de claims miniers sur les territoires où des Premières Nations revendiquent des droits ancestraux, y compris des titres, peut avoir des effets négatifs sur ceux-ci. »

- "18. […] the registration, renewal or transfer of mining claims on territories where First Nations claim Aboriginal rights, including title, may have a negative impact on them";

- "19. […] the Crown has a duty to consult and accommodate affected First Nations in determining whether mining claims on the lands in question should be made available to third parties under the provisions of the [Act]"; and that

- "20. […] the Crown has a duty to notify, consult and accommodate the affected First Nations before allowing mineral exploration activities to take place on the lands in question, considering that such activities may be prejudicial to asserted aboriginal rights and title."

The registration of mining claims under the Act

44. The mining process consists of four broad steps: exploration, development (*mise en valeur*), operation (*exploitation*), and restoration (*restauration minière*). These steps take place over several years, and even decades in some cases.[61] This litigation pertains to the first broad step in that process, when mining claims are registered, and when exploration activities are undertaken pursuant to those claims.

45. Québec's mining regime can be characterized as 'free entry'. As Professor Sophie Thériault explains, a key characteristic that makes a mining regime 'free entry' is that they "provide the right of the miner to stake a "claim" on a territory in order to secure prior and exclusive access to a definite [tract] of land for researching publicly owned minerals […]. Such claims can usually be renewed in accordance with the conditions set forth by law, in particular that the claim holder has performed the minimal work required by regulation".[62] Professor Thériault points out that many sections of the Act specifically espouse these characteristics, including ss. 61, 64, 65 and 72 impugned in this Application.[63]

46. Under the Act and associated regulation, any person or organization can register a claim by using the GESTIM website to designate an area on a map and by filling out a form and paying a small fee.[64] The size of claims is determined by the Minister, and measure on average around 50 hectares.[65] A claim holder can hold many adjacent individual mining claims concurrently, thereby covering a very large area,

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[61] Gaudreau Affidavit, at para 22.

[62] Sophie Thériault, "Aboriginal Peoples' Consultations in the Mining Sector: A Critical Appraisal of Recent Reforms in Quebec and Ontario" in Martin Papillon & André Juneau, eds, *Aboriginal Multilevel Governance*, (Montreal: McGill-Queen's University Press, 2015), 143, at p 145 [**Thériault 2015**].

[63] Thériault 2015, at p 145.

[64] *Mining Act*, ss 47, 49*; Regulation respecting mineral substances other than petroleum, natural gas and brine*, M-13.1, r 2, at ss 6 and 8; Gaudreau Affidavit, at para 8 c.

[65] *Mining Act*, s 42; Gaudreau Affidavit, at para 9. Mr. Gaudreau provides the number of claims in Québec (198 758) and their total area covered (10 067 405 hectares) as of December 31, 2021. This represents an average of 50.65 hectares per claim.

as is the case with the 1,052 claims on the MIFN's territory held by Copper One, and now by SOQUEM.[66] Taken together, these claims represent an area of 300 km^2,[67] larger than the island of Laval.

47. Claims are delivered taking into account various constraints on mining within the territory, such as national and provincial parks and agreements with certain First Nations.[68] There is no such agreement with the MIFN. Such agreements generally require years of discussions and much work from both parties, as was the case between at least 2012 and 2017 with the Abitibiwinni First Nation agreement.[69]

48. The registrar issues a certificate of registration of a claim to an applicant whose notice of map designation is accepted. The Respondent acknowledges that claims registration is a fettered or non-discretionary power (*pouvoir lié*): complete and compliant applications must be accepted.[70] It is then entered into the public register of real and immoveable mining rights (the "**Register**") created under the Act.[71]

49. The Register contains detailed information on mining rights including their renewal, transfer, abandon, revocation or expiry.[72] The GESTIM website allows any person or organization to search active, historical, and requested mining rights on a territory of interest.[73] Neither GESTIM nor any other mechanism notifies First Nations prior to claims being registered, renewed or transferred on their territory.

50. The first term of a claim expires three years after its registration. The Minister shall then renew the claim for another term of two years provided that the claim holder applies prior to its expiry, pays the fee, and complies with the Act and regulations.[74] This compliance includes performing activities of a minimal value determined by regulation prior to the expiry of the claim, failing which the claim holder may perform the activities required on other claims within a 4.5 km radius or pay a fee.[75] The

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[66] Exhibit P-23.
[67] *Copper One*, at para 6.
[68] Gaudreau Affidavit, at paras 19-20.
[69] Respondent's Exhibit PGQ-26.
[70] *Notes du Procureur général du Québec au soutien de sa demande en précisions* (2021 QCCS 4752), at p 7, citing to the *Mining Act*, ss 46-56.
[71] *Mining Act*, s 56; Gaudreau Affidavit, at para 3.
[72] Gaudreau Affidavit, at para 4.
[73] Gaudreau Affidavit, at para 7.
[74] *Mining Act*, s 61.
[75] *Mining Act*, s 72; Gaudreau Affidavit, at para 38. The *Regulation respecting mineral substances other than petroleum, natural gas and brine*, CQLR c M-13.1, r 2, s 15, sets out the minimum cost of activities that must be undertaken prior to the expiration of the claim, which varies between $48 and $3,600. The Act states that where the activities required have not been performed, the claim holder may instead pay an amount equal to twice the minimum cost of the activities that should have been performed: *Mining Act*, s 73.

claim can be continuously renewed by the claim holder as long as they comply with the conditions noted above,[76] and therefore can exist in perpetuity.

51. Claim holders can also transfer their claims to third parties. Transfers shall be registered in the Register on presentation of evidence of the transfer and payment of a fee.[77] In fact, around 40% of claims are transferred during the first two years of their delivery.[78] The ability to transfer claims thus creates a market in which mining claims are bought and sold for valuable consideration.[79]

52. Once mineral substances that can be developed are discovered on the territory, the claim holder can apply for a mining lease in order to obtain the right to exploit the discovered resource. The Minister shall grant the application for a mining lease if the conditions set out in the Act are fulfilled, and may subject it to conditions.[80]

The exploration activities that can occur pursuant to claims

53. Once a claim has been issued, the claim holder is granted certain rights over the claimed area, including the exclusive right to perform exploration activities. Some of these rights are granted immediately without the need to obtain any authorization or permit:

    a) the exclusive right to explore for mineral substances on the parcel of land subject to the claim (with the exception of sand, gravel, common clay, and inert mine tailings);[81]
    b) the right of access to the parcel of land subject to the claim, and to "perform any exploration work thereon";[82]
    c) the right to erect and maintain a temporary, portable structure on the parcel of land subject to the claim;[83]
    d) the right to use sand or gravel for mining activities;[84] and
    e) the right to extract and ship mineral substances for sampling and of quantities of less than 50 metric tonnes.[85]

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[76] *Notes du Procureur général du Québec au soutien de sa demande en précisions* (2021 QCCS 4752), at p 7.
[77] *Mining Act*, s 14.
[78] Gaudreau Affidavit, at para 28.
[79] Gaudreau Affidavit, at paras 14 and 28: "14. Le claim est un droit minier, réel et immobilier. Il ne confère aucun droit foncier. On peut le transférer, le transiger, l'optionner et le vendre."; "28. […]. Les titulaires cherchent à vendre à des sociétés d'exploration les groupes de claims qu'ils ont acquis. [...]."
[80] *Mining Act*, s 101; Gaudreau Affidavit, at para 43.
[81] *Mining Act*, s 64; Gaudreau Affidavit, at para 32.
[82] *Mining Act*, s 65; Gaudreau Affidavit, at para 33.
[83] *Mining Act*, s 66; *Ministerial Order respecting the types of construction that the holder of a claim, a mining exploration licence or a licence to explore for surface mineral substances may erect or maintain on lands of the domain of the State without ministerial authorization*, M-13.1, r 3, s 1.
[84] *Mining Act*, s 68.
[85] *Mining Act*, s 69; Gaudreau Affidavit, at para 34.

54. Certain exploration activities are subject to additional requirements, such as authorizations from different ministers. These include bulk sampling of over 500 metric tonnes, rock scouring of over 10,000 m^2, and excavations of over 5,000 m^3.[86] Under such thresholds, exploration activities can generally be undertaken by the claim holder as soon as the claim is registered.

55. Claim holders must transmit to MERN an annual report of the activities they have undertaken pursuant to their claims.[87]

Québec does not consult prior to claiming or certain exploration activities

56. Despite provisions of the Act which explicitly direct Québec to construe the Act "in a manner consistent with the obligations to consult [Indigenous] communities",[88] Québec admits that it "has not and does not consult the Applicant prior to registering mining claims in the Area."[89] This is not only the case with respect to the MIFN, but also generally. When explaining the regime's operation in general, the Respondent's affiant, Mr. Roch Gaudreau, also confirmed in pretrial examination that consultation does not occur prior to registering claims.[90] Additionally, neither Québec nor SOQUEM consulted the MIFN prior to the transfer of the Copper One claims to SOQUEM, despite the MIFN's specific requests during the 2017 litigation.[91] There is also no evidence of the MIFN being consulted prior to the renewal of claims on their territory, like the SOQUEM claims. In summary, Québec does not consult Indigenous Peoples, including the MIFN, prior to registering, renewing or transferring mining claims on their territory.

57. The Respondent states that under the current mining regime, consultation is only undertaken in relation to exploration activities that require authorizations, and even then, only when **the Respondent** believes that those activities are susceptible of having prejudicial effects on Aboriginal rights and interests.[92]

58. The Respondent's selective approach to consultation is confirmed in MERN's 2019 Aboriginal Community Consultation Policy Specific to the Mining Sector (the "**Policy**"). The Policy recognizes Québec's constitutional duty to consult and accommodate First Nations and states that it is "consistent" with the respect of its obligations.[93] The Policy sets out that Québec consults Indigenous communities

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[86] See Gaudreau Affidavit, at paras 35-37.
[87] Gaudreau Affidavit, at para 39.
[88] *Mining Act*, ss 2.1-2.3.
[89] Exhibit P-13, at p 4.
[90] Transcript of Mr. Roch Gaudreau pretrial examination, September 22, 2022 [**Gaudreau pretrial examination**], at p 27, lines 9-16, and at p 29, lines 11-16.
[91] Exhibits P-6 to P-8.
[92] Gaudreau Affidavit, at para 65; Gaudreau pretrial examination, at p 28, line 23 to p 30, line 2.
[93] Exhibit P-5, at pp 1, 3.

"separately, when circumstances so require, when a mining activity requiring the issuance of a right, permit or authorization is likely to have an adverse effect on their established or claims Aboriginal or Treaty rights."[94]

59. The Policy does not address consultation by Québec when claims are registered, renewed, or transferred. Additionally, it does not require that claim holders inform concerned Indigenous communities prior to the registration of claims on their traditional territories, but merely "recommends" that they do so in the 60 days after a claim is registered.[95] It also does not require that claim holders notify Indigenous communities, or even Québec, before "exploration work" is carried out – rather, Québec merely "invites" claim holders to do so.[96]

60. The Policy also refers to Québec's Interim Guide for Consulting the Aboriginal Communities (the "**Interim Guide**"), updated in 2008. Though not specific to mining, the Interim Guide sets out that consultation must take into account new requirements in Aboriginal law that flow from cases such as *Haida*.[97]

61. The Respondent provided a list of mining activities that occurred on part of the Area, the Annex 2 TA territory, between 2008 and 2020.[98] During that period, multiple exploration activities occurred without additional authorizations, such as surveys, outcrop search and analysis, sampling involving the collection of 324 samples of 3 kg or less spread over 90 claims, rock scouring and excavation.[99] There is no evidence that the MIFN was consulted prior to any of these activities.

62. Between 2009 and 2011, SOQUEM undertook several of these exploration activities in relation to the 49 claims it held or partially held in the Annex 2 TA territory.[100] In particular, SOQUEM undertook hole drilling activities spread over two claims for which it obtained an intervention permit.[101] There is no evidence that the MIFN was consulted prior to SOQUEM undertaking any of these activities.

63. In addition to the activities that are known to have occurred on the Annex 2 TA territory between 2008 and 2020, the Act and related regulation grant claim holders exclusive rights to undertake certain exploration activities without obtaining any

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[94] Exhibit P-6, at p 3. See also pp 6, 12.
[95] Exhibit P-5, at p 6.
[96] Exhibit P-5, at p 6; Mr. Gaudreau confirmed that the measures suggested to proponents under the Policy are not mandatory: see Gaudreau pretrial examination, at p 40, lines 1-23.
[97] Exhibit P-29, at p 3.
[98] Gaudreau Affidavit, at para 75.
[99] Gaudreau Affidavit, at paras 75-79. Mr. Gaudreau noted that the sampling, rock scouring and excavation activities did not require any authorizations, as the sampling activities were below the volume threshold requiring authorization, and the rock scouring and excavation activities were limited to small surfaces spread over four claims: see Gaudreau affidavit, at paras 78-79.
[100] Gaudreau Affidavit, at para 75: according to the table, SOQUEM undertook rock scouring, sampling, technical evaluations, and geochemical, geological, and areal geophysical surveys, in addition to drilling.
[101] Gaudreau Affidavit, at para 80.

authorization or permit.[102] These activities may have occurred and may continue to occur at any time pursuant to claims on the MIFN's territory without their consultation.

64. During the pretrial examination of the Respondent's affiant, Mr. Roch Gaudreau, he acknowledged that under the current mining regime, exploration activities with potential impacts on the living environment («*milieu de vie*») and causing potential harms («*préjudices*») to communities, such as excavations under the threshold of 5,000 m^2, scouring under 10,000 m^2, and bulk sampling under 500 metric tonnes, do not require authorization and therefore do not involve consultation.[103]

65. In summary, the Respondent does not consult the MIFN prior to the registration, transfer, or renewal of mining claims within their territory. There is also no consultation of the MIFN prior to claim holders undertaking certain exploratory activities within their territory, which the Respondent acknowledges may be causing impacts and harms to communities.

Procedural history

66. The MIFN filed their Application for Judicial Review and Permanent Injunction in this matter on January 16, 2020. On November 3, 2020, the MIFN filed an Amended Application in order to add the Impleaded Party, SOQUEM.

67. On March 11, 2021, the Respondent filed a *Dénonciation pour obtenir des précisions* (Motion for Particulars) relating to certain parts of the Amended Application. On November 10, 2021, Justice Lalande dismissed that Motion.[104]

II. ISSUE IN DISPUTE

68. The MIFN submit that all conclusions sought rest on the following central issue: is the free entry regime of the *Mining Act* constitutionally valid with respect to the Respondent's duty to consult and accommodate the MIFN?

III. SUBMISSIONS

69. This application raises the following issues:

A) The registration, renewal and transfer of claims within Québec's mining regime triggers the Duty to Consult the MIFN.

B) Québec was required to consult the MIFN on the transfer of the Copper One claims to SOQUEM.

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[102] See paras 53-54 of this brief.
[103] Gaudreau pretrial examination, at p 36, line 4 to p 37, line 17.
[104] *Patriculars Judgment*.

C) The appropriate remedy includes striking down the impugned components of the mining regime, with appropriate time for statutory and regulatory reform. The SOQUEM claims must remain suspended, subject to consultation.

A) The registration, renewal and transfer of mining claims triggers the duty to consult the MIFN

70. For the issues regarding the registration, renewal, and transfer of mining claims, the standard of review is correctness, because the existence, scope and content of the duty to consult are all constitutional questions under s 35 of the *Constitution Act, 1982*.[105]

71. As set out by the Supreme Court of Canada in *Haida*, the Duty to Consult (DTC) is grounded in the honour of the Crown.[106] The honour of the Crown requires that, in accordance with s. 35 of the *Constitution Act, 1982*, the Crown must act honourably in negotiations with First Nations whose asserted rights and title claims have not been settled by treaty. This "implies a duty to consult, and, if appropriate, accommodate" First Nations whose rights or title are affected by Crown conduct.[107]

72. This case calls upon the Court to determine whether the DTC has been triggered by Crown conduct, a necessary step before determining the scope and content of consultation and accommodation (which this Court is **not** being asked to do).

73. The duty to consult is triggered 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."[108] In this case, all aspects from *Haida* are made out, triggering the DTC.

(i) The Respondent is well aware of the MIFN's asserted Aboriginal rights and title

74. The Respondent admits knowledge of the MIFN's asserted Aboriginal rights in part of the Area, but denies knowledge of a title claim: "*Le PGQ a connaissance d'une revendication du demandeur de droits ancestraux, excluant un titre foncier ancestral, sur le territoire de l'Annexe 2 de l'entente trilatérale*".[109]

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[105] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, at para 63 [***Haida***]; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 55 [***Vavilov***]; *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758, at paras 82-83 [***Ermineskin***]; *Interlake Reserves Tribal Council Inc. et al. v. Manitoba*, 2022 MBQB 131, at para 72 [***Interlake***].

[106] *Haida*, at para 16.

[107] *Haida*, at para 20.

[108] *Haida,* at para 35. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para 31 [***Rio Tinto***].

[109] Exhibit P-13.

75. The Respondent's admitted knowledge of assertion of rights is itself sufficient to satisfy the first branch of the test for triggering a DTC. However, the record before this court leaves no doubt that the Respondent is also aware of the MIFN's assertion of title. Assertion of title has been communicated to them on multiple occasions by the MIFN over the past several decades.

76. As the Supreme Court set out in *Rio Tinto*, Crown knowledge of asserted Aboriginal title can be "actual" or "constructive". The court explained that "[a]ctual knowledge arises when a claim has been filed in court or advanced in the context of negotiations", and that "[c]onstructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated."[110] Either form of knowledge is sufficient to satisfy this step.[111] The MIFN submit that the Crown has acquired actual knowledge, and at the very least, constructive knowledge of asserted title stemming from the MIFN 's continuous occupation and the unceded status of their territory set out in various documents.

77. The MIFN has raised their asserted title with the Crown in the context of negotiations several times. For example, the MIFN communicated their assertion of title in the context of negotiating the TA with Québec and Canada in 1992.[112]

78. The MIFN also clearly communicated their asserted title in February of 1992, when the Algonquin Nation, made up of 10 distinct communities including the MIFN, made a presentation to the Québec government asserting Aboriginal rights **and title** to their traditional territories.[113]

79. While the MIFN submit that the above instances made the Crown actually aware of their title assertion, the Crown at the very least has constructive knowledge of the MIFN's assertion of title. The Crown was made aware of the MIFN's continuous occupation of the unceded territory in question on multiple occasions, including in the affidavit provided by former Chief Ratt in this Application.[114] This knowledge is bolstered by the MIFN's repeated assertions of title in the context of various court proceedings, such as in 2017 and 2020.[115] From these instances and more,[116] it is clear that the Crown has a sufficient base of knowledge, whether actual or constructive, of the MIFN's asserted title.

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[110] *Rio Tinto,* at para 40.
[111] *Haida*, at para 35.
[112] See para 29. 2) of this brief, citing to Exhibit P-15.
[113] See para 29. 1) of this brief, citing to Exhibit P-4, at p 37.
[114] Ratt affidavit, at para 11.
[115] See para 29. 4), 5), and 8) of this brief, citing to Exhibits P-8, P-9, the Application for Judicial Review and Permanent Injunction, and the Amended Application for Judicial Review and Permanent Injunction in the present matter.
[116] See the entirety of para 29 of this brief for the full list of instances where the Respondent was notified of the MIFN's asserted title.

80. The Respondent suggests, through the affidavit of Mr. Brunelle, that the MIFN have never brought a documented and detailed title claim to Québec's attention.[117] However, the Respondent's views on the level of detail or documentation of a title claim are irrelevant at this stage. To require a documented and detailed title claim is incompatible with the notion of "constructive" knowledge, which necessarily exists without such documented claims.

81. In *Haida,* the Supreme Court drew a distinction between, on the one hand, Crown knowledge "sufficient to trigger a duty to consult and, if appropriate, accommodate" and, on the other hand, the "content or scope of the duty in a particular case."[118] The strength or detail of asserted title may be relevant for the scope of the duty, which is not at issue in this application. At the triggering of the DTC stage, which is the subject of this application, the threshold for knowledge of a credible title assertion claim is "not high" and can be satisfied where, as here, "lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community."[119] The MIFN has always occupied their traditional territory, and has never made a treaty ceding or surrendering their title or rights.[120] Proof that the title assertion will succeed is not required.[121]

82. In sum, the first branch of the test for triggering the DTC is satisfied. The Respondent has admitted knowledge of the MIFN's asserted Aboriginal rights in the territory on which it issues mining claims and has had actual and constructive knowledge of the MIFN's asserted title for over three decades. At the very least, the Respondent has constructive knowledge of the asserted title stemming from the MIFN's continuous occupation and the unceded status of their territory.

(ii) Québec's free entry mining regime is "contemplated Crown conduct"

83. The *Haida* test requires the identification of "contemplated Crown conduct" that might adversely affect Aboriginal rights or title. Importantly, this "conduct" does not need to present itself in the form of active, discretionary statutory decision making.

84. In *Ross River*, Crown counsel for the Yukon argued that the registration of a mining claim is not "contemplated Crown conduct" since the Crown is not afforded any discretion in the recording of the claim. The Crown argued that since mineral claims are granted automatically when third parties properly record a claim pursuant to statutory requirements, this "absolves the Crown of its duty to consult".[122]

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[117] Affidavit of Mr. Patrick Brunelle, May 12, 2022, at para 25.
[118] *Haida*, at para 37, 42.
[119] *Rio Tinto,* at para 40.
[120] Ratt Affidavit, at para 4.
[121] *Rio Tinto,* at para 40.
[122] *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, at paras 34, 36 [***Ross River***].

85. However, the Yukon Court of Appeal disagreed and found that rather than absolving the Crown of the DTC, a statutory regime that fails to provide any Crown discretion in the registration of mineral claims is in fact "the source of the problem" contributing to the triggering of the DTC under the *Haida* test.[123] As the court explained:

> "[37] The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. **Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist**.
>
> [38] The honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land. **Far from being an answer to the plaintiff's claim in this case, the failure of the Crown to provide any discretion in the recording of mineral claims under the *Quartz Mining Act* regime can be said to be the source of the problem.**" (emphasis added)

86. The *Ross River* decision stands as a strong and applicable authority on this matter, after the Supreme Court denied leave to appeal.[124] In another decision, the Supreme Court further endorsed *Ross River* in 2018.[125]

87. Québec's lack of discretion in granting the registration, renewal, and transfer of mining claims does not absolve the Crown of its DTC. Rather, Québec's free entry mining regime is the "source of the problem." Sections 46-56 of the Act afford Québec no discretion in registering mining claims, since registration is a fettered or non-discretionary power ("*pouvoir lié*"), where complete and compliant applications must be accepted.[126] Similarly, the renewal and transfer of claims also provide for no discretion, as does the automatic granting of rights to claim holders to pursue certain exploration activities.[127] This is contemplated Crown conduct for the purpose of the *Haida* test.

(iii) The registration, renewal and transfer of mining claims may adversely affect the MIFN's asserted title and rights

88. At the next stage of the *Haida* test, the MIFN must show that the conduct contemplated by the Crown may adversely affect an asserted Aboriginal right or

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[123] *Ross River,* at paras 37-38.
[124] *Government of Yukon v. Ross River Dena Council*, 2013 CanLII 59890 (SCC).
[125] *Mikisew Cree First Nation v. Canada (Governor in Council)*, 2018 SCC 40, at para 46 [***Mikisew***].
[126] *« Notes du Procureur général du Québec au soutien de sa demande en précisions »* (2021 QCCS 4752), at p 7.
[127] See paras 53-54 of this brief detailing the automatic rights granted to claim holders to transfer claims and pursue certain exploration activities.

title.[128] The Supreme Court has clarified that at this stage, "immediate impact[s] on lands and resources" need **not** be identified.[129] Rather, the activities of concern can include "high-level management decisions or structural changes to the resource's management" that may "set the stage for further decisions that will have a *direct* adverse impact on land and resources".[130] Thus, a systemic structure like Québec's free entry mining regime, which grants rights in perpetuity over claimed land and allows access for exploration, is a source of potential adverse effects on asserted Aboriginal rights and title.

89. In *Haida*, the court found that the DTC applied not only to the direct harvesting of timber, but to the transfer and replacement (i.e. renewal) of tree farm licenses as a high level, strategic stage of Crown conduct pre-empting direct, on the ground threats to Aboriginal rights and title.[131] Similarly, in the present case, the registration, renewal, and transfer of mining claims represent high-level conduct that heightens the threat of adverse effects on the MIFN's asserted rights and title.

90. Québec's free entry mining regime automatically engages the MIFN's rights and title whenever it allows a third party to register, renew, or transfer a claim, or to perform exploration activities on their territory. While the Crown may not have a DTC First Nations within the law-making process,[132] once the legislation is established, a regime structured in such a way that it eschews required consultation cannot be sustained under section 35.[133] Here, legislation and policy affect the MIFN's rights and title without prior consultation and accommodation.

91. As in *Ross River*, Québec's mining regime does not provide an opportunity for consultation with First Nations regarding the registration, renewal, or transfer of mining claims on their traditional territories, or in advance of exploration activities that can occur pursuant to claims without authorization. Instead, the Act permits third parties to engage Aboriginal rights and title by granting them statutory rights and imposing regulatory requirements in the MIFN's territory.

92. The potential impacts of the free entry mining regime on the MIFN's rights and title are not merely "speculative"[134]. There are appreciable threats to their rights and title from "high level" or "strategic" Crown actions such as the registration, renewal and transfer of claims, as well as through certain exploration activities that are automatically permitted by those actions.[135]

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[128] *Haida,* at para 35.
[129] *Rio Tinto*, at para 47.
[130] *Rio Tinto*, at para 47.
[131] *Haida*, at paras 10, 67.
[132] *Mikisew*, at para 41.
[133] *Ross River*, at para 39; *Mikisew*, at para 46.
[134] *Rio Tinto,* at para 46.
[135] See activities automatically allowed upon registration of a mining claim listed at paras 53-54 of this brief.

Potential to Adversely Affect Aboriginal Title

93. Where, as in this case, there is an assertion of Aboriginal title, the Crown has a duty to consult prior to contemplating conduct that may potentially adversely impact that asserted title. Aboriginal title confers the following rights[136]:

- 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.

94. Québec's free entry mining regime, particularly the registration and renewal of mining claims, poses appreciable threats to all of rights listed above, which are claimed by the MIFN through their assertion of title.

95. Mining claims can be registered at any time by anyone, for any available part of the territory. The claim holder receives access to a claim site for at least three years, but the ability to renew and transfer the claim makes the control of the claim site indefinite: rights over the land may exist continuously so long as the criteria for renewal or transfer are fulfilled. These mining rights are held against all others, including the MIFN's, save for certain pre-existing mining rights that may exist on the territory.[137]

96. Subordination of the MIFN's rights to those of the claim holders represents an immediate threat to asserted Aboriginal title that is supposed to be respected as a potential right to "exclusive use and occupation of the land […] for a variety of purposes."[138] Indefinitely subjecting the MIFN's territory to mining interests makes it impossible for the MIFN to determine how that land will be used, and to proactively plan for the use and management of the land.[139]

97. While the MIFN's asserted title has not been proven in court and therefore does not immediately confer absolute exclusive title rights, it does demand some level of consultation prior to conveying rights to a claim holder, as set out by the Yukon Court of Appeal:[140]

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[136] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para 73 [***Tsilhqot'in***], as cited in *Ross River Dena Council v. Yukon*, 2019 YKSC 26, at paras 4-5 [***Ross River 2019***].

[137] *Mining Act*, s 64.

[138] *Delgamuukw v. British Columbia,* 1997 CanLII 302 (SCC), [1997] 3 SCR 1010, at para 117. Québec's own Interim Guide acknowledges that "Aboriginal title includes the right to occupy lands and to use natural resources on an exclusive basis." See Exhibit P-29, at p 5.

[139] Sophie Thériault, "Repenser les fondements du régime minier québécois au regard de l'obligation de la Couronne de consulter et d'accommoder les peuples autochtones", 2010 6-2 *Revue de droit du développement durable de l'Université McGill* 217, 2010 CanLIIDocs 62, available online: <https://canlii.ca/t/2m7g>, at 233.

[140] *Ross River Dena Council v. Yukon,* 2020 YKCA 10, at para 10 [***Ross River 2020***].

> "[10] […] 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. Rather, it is intended as a mechanism to preserve Aboriginal interests while land and resource claims are ongoing, or where the proposed action may interfere with a claimed right or title: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 at para. 33; *Ka'A'Gee Tu First Nation v. Canada (Attorney General),* 2012 FC 297 at para. 123."

98. The Federal Court recently endorsed *Ross River's* conclusion that the staking of a mining claim may adversely affect title, finding that the automatic authorization of mineral claims under a mining regime triggers the DTC because it represents the "divesting of land by the Crown" to a third-party claimant.[141] Such "divesting" occurs "even when physical activities are not authorized in a decision."[142]

99. In this case, the divestment of value and interest away from the MIFN and into the hands of third parties can be in the millions of dollars – a deprivation of the economic benefits of the land without consultation. For example, Québec paid $8,000,000 for the claims on the MIFN's territory that were transferred from Copper One to SOQUEM, with no consultation of the MIFN.[143] As admitted by Québec, transfers of mining claims are a common occurrence, with approximately 40% of claims being transferred within the first two years of their registration.[144] Without consultation, this leaves the MIFN and other Indigenous communities uncertain of who is ultimately in control of the valuable right to determine which of the possible uses of their traditional territories will prevail, a right that divests the MIFN and others of their rights to determine how the land should be valued and planned for various uses.

100. Ultimately, the MIFN has an interest in the exclusive occupation and use of the lands in question, even if their title assertion has not yet been made out in court. The DTC is triggered by the existence of juxtaposing claim holder mining rights of access and use of parts of the MIFN's territory, and the claim holder's ability to define the land's value and intended use, in terms that may differ sharply from the MIFN's interests and values.

Potential to Adversely Affect Aboriginal Rights

101. Threats to Aboriginal rights materialize as soon as a claim is registered. Also, the claim holder immediately acquires the authority to perform exploration activities that could disrupt the culture and practices of the MIFN. The Act grants access to the MIFN's territory, and rights to enter and conduct certain exploration activities on it. As found by the Yukon Court of Appeal in *Ross River*, free entry mining regimes that

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[141] *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency*, 2022 FC 102, at para 87 [***Mikisew 2022***].
[142] *Mikisew 2022*, at para 87.
[143] Exhibit P-10.
[144] Gaudreau Affidavit, at para 28.

enable such threats without allowing for consultation cannot subsist under the DTC.[145]

102. In her decision on the Motion for Particulars, Justice Lalande wrote the following[146]:

> *« À la lecture de la [demande amendée], il est aisé de comprendre comment, aux yeux de la M.I.F.N., l'une ou l'autre des activités d'exploration minière permises par un claim sont susceptibles d'avoir des répercussions sur les pratiques traditionnelles de chasse, de pêche, de trappe, de navigation et de culte qu'elle allègue vouloir préserver. Ces répercussions tiendraient du simple fait que ces pratiques et coutumes soient empêchées ou perturbées par l'exploration minière sur tout ou une partie du territoire. »*

103. The *Ross River* court found that the activities permitted without consultation under the Yukon free entry regime "have a substantial impact on the land".[147] The potential impact of these activities on asserted rights and title were found to necessitate consultation prior to availing mining rights to third parties and allowing them to perform such exploration activities in the plaintiff's territory.[148]

104. Considering *Ross River*, the Saskatchewan Court of Appeal in *Buffalo River Dene Nation v. Saskatchewan* found that free entry regimes allowing *any* physical access to the land by third parties trigger the DTC. Crown conduct permitting physical access to the territory trigger "actual foreseeable adverse impacts" and threats to Aboriginal rights and title. Indeed, the Court contrasted a situation in which potential impacts were only speculative (since there was no surface access to the mineral rights flowing from the challenged decision) with the scenario in *Ross River*, where the DTC was triggered since the claim holder held an automatic right to enter onto the territory to perform certain activities.[149]

105. *Buffalo River Dene* shows why the impugned elements of Québec's mining regime operate in a manner that triggers the DTC. The potential impacts on the MIFN's rights and title are not speculative: the MIFN engage in many traditional ecological, cultural and spiritual activities in areas where claims are present and where certain exploration activities could begin at any moment without consultation.[150] Their Aboriginal rights face an immediate threat from the point of claim registration onward. Third parties receive rights, which can be renewed and transferred indefinitely, to enter the MIFN's territory and perform exploratory work that could disrupt the surface and subsurface of the land.[151] The automatic exploration rights include the removal of up to 50 metric tons of subsurface minerals for sampling,

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[145] *Ross River,* at para 37.
[146] *Particulars Judgment*, at para 53.
[147] *Ross River*, at para 25.
[148] *Ross River*, at para 56.
[149] *Buffalo River Dene Nation v. Saskatchewan,* 2015 SKA 31, at paras 96, 104-105 [***Buffalo River Dene***].
[150] Ratt Affidavit, at paras 7-10.
[151] Brisson affidavit, at para 14.

among other rights granted without any consultation.[152] The claim holder can perform these activities without any consultation with Indigenous communities who have asserted rights in the location of the mining claim.[153]

106. SOQUEM has suggested in its evidence that certain exploration activities are "minor" (*travaux mineurs*) while others (including some of those automatically granted to the claim holders without consultation) are not.[154] Such a distinction is subjective and cannot displace the Crown's legal duty to consult on potential impacts. Impacts may appear small to Québec or a claim holder but could be significant to the community on whose territory they occur, for instance if done in a sacred burial ground or another site of cultural importance to the community.

107. Only consultation -- not a subjective Crown opinion on which activities are "minor" or which can have prejudicial effects -- can determine the significance of impacts to any particular First Nation's asserted rights and title and whether accommodation is required. Each community has unique rights, and ways of exercising those rights. Determining which activities would adversely affect rights can only occur through consultation with the communities in question.

Conclusion on triggering the Duty to Consult

108. Québec's free entry mining regime on the MIFN's territory triggers the DTC. When the DTC is triggered, its proper scope and content is determined with reference to the circumstances of contemplated Crown conduct, on a "spectrum" informed by the severity of potential impacts.[155] Those determinations are not for this Court to make in the context of this litigation, which is about the **existence** of the DTC, not its **exercise**.

(iv) Consultation Must Occur Prior to Registering Claims

109. The posting of claims registration, renewal or transfer to the GESTIM website does not constitute consultation on, nor even notice of, mining claims. Even if it did constitute notice, it is insufficient and occurs unconstitutionally late.

110. The court in *Ross River* found that the "potential impact of mining claims on Aboriginal title and rights is such that mere notice cannot suffice as the sole mechanism of consultation".[156] Here, the Crown does not even provide notice, via GESTIM or otherwise, to First Nations regarding mining claims. Rather the GESTIM system burdens First Nations with discovering the claims that have already been

[152] See activities automatically allowed upon registration of a mining claim listed at paras 53-54 of this brief.
[153] Brisson Affidavit, at para 33.
[154] Gagnon Affidavit, at paras 14-17; Brisson Affidavit, at paras 25-26.
[155] *Haida*, at para 43; *Tsilqhot'in*, at para 79.
[156] *Ross River*, at para 44.

made on their territory. It is the Crown, not First Nations, that bears the burden and onus of providing notice and information.[157]

111. In any event, GESTIM postings occur too late to be constitutionally meaningful. In *Ross River,* the court found that any mining regime that grants claims to third parties, accompanied by immovable rights to enter and disturb the land in certain ways, must allow for consultation **prior** to the granting of those claims.[158] Consultation must occur before asserted Aboriginal rights and title are adversely affected.[159] GESTIM manifestly fails to do this.

112. UNDRIP sets out the requirement for States to consult with Indigenous Peoples "**prior** to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[160] (emphasis added) The National Assembly of Québec unanimously adopted a motion asking Québec to recognize the principles of UNDRIP and commit to negotiating its implementation in 2019.[161] Canada adopted the *UNDRIP Act* in 2021, which seeks to affirm UNDRIP as a "universal international human rights instrument with application in Canadian law."[162] Québec's own Interim Guide, which sets out the terms and conditions according to which consultations are conducted,[163] states that "consultation must be initiated as far as possible upstream from the decision-making process, notably at the strategic planning stage of the envisaged actions."[164] Both of these documents demand that consultation occur at the earliest possible stage, which in the context of the mining regime should be interpreted as prior to the registration of claims.

113. In summary, Québec has not met its obligations under the DTC by failing to provide consultation on, or even notice of, the registration, renewal, or transfer of mining claims, or certain exploration activities that can occur pursuant to those claims. GESTIM does not and cannot remedy this constitutional flaw.

B) Québec was required to consult the MIFN on the transfer of the Copper One claims to SOQUEM

114. The standard of review for the transfer of the Copper One claims is correctness since it is about the existence of a duty to consult on that transfer and the refusal of the Respondent to undertake such consultation.[165]

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[157] *Haida*, at para 43.
[158] *Ross River*, at paras 44, 56.
[159] *Ross River*, at para 44.
[160] *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), Article 32(2). See also Exhibit P-28.
[161] Québec, National Assembly, *Journal of debates*, 45:8, No 68 (9 October 2019) available online: <assnat.qc.ca>; See also Exhibit P-25, at p. 3.
[162] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c 14, s 4 (a).
[163] Exhibit P-29.
[164] Exhibit P-29, at p 9. See also Exhibit P-5, at p 3.
[165] *Haida*, at para 63; *Vavilov*, at para 55; *Ermineskin*, at paras 82-83; *Interlake*, at para 72.

115. As explained above, the transfer of mining claims within the MIFN's territory triggers the DTC. Québec breached this duty by refusing to consult the MIFN before transferring 1,052 mining claims on the MIFN's territory, covering 300 km^2, to its own crown corporation, SOQUEM.

116. Québec's failure to consult the MIFN on the transfer of these mining claims is no mere misstep on the part of Québec. Rather, Québec actively refused the MIFN's repeated requests to participate in the settlement negotiations with Copper One despite actual and constructive knowledge of the MIFN's asserted rights and title over the territory.[166] Québec failed to "substantially [address the MIFN's] concerns as they are raised […] through a meaningful process of consultation"[167] and failed to construe the Act "in a manner consistent with the obligation to consult [Indigenous] communities."[168]

117. Québec's transfer of the Copper One claims involved self-dealing on the part of the Crown, since it transferred the claims, a valuable asset, to itself (in the form of SOQUEM, a Crown entity). Such conduct is, at best, an egregious breach of the DTC: it is one thing for the Crown ignore a constitutional obligation, it is worse for the Crown to benefit itself as a result.

118. In the special circumstances of the transfer at issue, the Crown's conduct amounts to a breach of fiduciary obligation to the MIFN in addition to a breach of the DTC. While the DTC is distinct from the Crown's fiduciary duty, "the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples."[169] Fiduciary obligations are a "permanent feature" of the Crown-First Nation relationship, first undertaken by the Crown in the *Royal Proclamation of 1763*,[170] when it made Indigenous lands inalienable to anyone but the Crown.[171]

119. The precise scope and nature of the Crown's fiduciary obligations will vary depending on the circumstances of each case,[172] and in this case the circumstances of the transfer of claims to SOQUEM had hallmarks of a fiduciary occasion[173]:

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[166] Exhibits P-6, P-8, and P-9.
[167] *Haida*, at para 42.
[168] *Mining Act*, s 2.1.
[169] *Haida*, at para 54.
[170] George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No. 1 states that the Crown found it "just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, **and who live under our Protection**, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as**, not having been ceded to or purchased by us**, are reserved to them, or any of them, as their Hunting Grounds." (emphasis added)
[171] *Guerin v. The Queen*, [1984] 2 SCR 335.
[172] *Wewaykum Indian Band v. Canada*, 2003 SCC 45.
[173] *Manitoba Metis Federation v. Canada*, 2013 SCC 14, at para 50 [***MMF***].

(i) Québec has acknowledged that it has fiduciary duties to the MIFN regarding resource extraction, (ii) the transfer engages the MIFN's legal and substantial interests, (iii) the Crown assumed discretionary control of those interests, and (iv) the MIFN was particularly vulnerable. A fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers.[174]

120. By assenting to the terms of the TA and BA, Québec acknowledged that a fiduciary duty exists between the Crown and MIFN in the context of resources within the MIFN's territory. The TA, which "can encompass all the characteristics of a treaty",[175] explicitly recognizes Canada's "fiduciary responsibility towards" the MIFN.[176] Québec subsequently affirmed this undertaking in the BA, which was signed only by Québec and the MIFN.[177] These explicit acknowledgements by Québec are reinforced by provisions of the Act which require it to be "construed in a manner consistent with the obligation to consult [Indigenous] communities" and acknowledge that "taking into account the rights and interests of [Indigenous] communities is an integral part of reconciling mining activities with other possible uses of the territory."[178]

121. The transfer of mining claims engages the legal and substantial interests of the MIFN through its potential to adversely affect the MIFN's rights and title over the territory. As set out above, claim holders are granted rights of access to the claim site and exclusive exploration rights therein.[179] This puts the MIFN's asserted title and rights at risk from both recognisable, physical threats to their traditional territories and the rights exercised thereon, as well as less immediate threats brought on by the access, control over, occupancy, and valuation of the MIFN's territory. The MIFN's interest over their territory is also undermined by Québec's ability to transfer rights over the MIFN's territory without consultation.

122. Finally, the transfer was an occasion on which the Crown "assumed discretionary control over specific Aboriginal interests" such that "the honour of the Crown gives rise to a fiduciary duty."[180] This was more than the automatic operation of statute: Québec negotiated the transfer with full knowledge that the MIFN asserted an interest in it, yet refused to consult them.

123. Despite being aware of the MIFN's status as a "party to the proceeding" and their asserted rights and title over the territory, Québec excluded the MIFN entirely from

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[174] *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*, 1995 CanLII 50 (SCC), [1995] 4 SCR 344, at para 53.
[175] Exhibit P-19 at p 26.
[176] Exhibit P-1 at p 1.
[177] Exhibit P-2 at p 1.
[178] *Mining Act*, ss 2.1, 2.2.
[179] *Mining Act*, ss 64-65.
[180] *Haida*, at para 18.

an important decision affecting their rights and title – just as it had done when it unilaterally decided to lift the mining moratorium in their territory in 2016 without notice or consultation with the MIFN.[181] Québec's refusal to allow the MIFN to participate in settlement negotiations showcases the MIFN's vulnerability.

124. Québec had a duty to consult and to act with honour and utmost good faith in dealings with the MIFN.[182] It did not do so. Instead, it refused to consult the MIFN and illicitly allowed itself (through SOQUEM) to benefit from that constitutional breach.

C) The remedies

Reforming the free entry regime is achievable

125. Given the inherent violations of the DTC due to the free entry nature of Québec's mining regime, the regime is unconstitutional and cannot subsist. The MIFN therefore ask that it be struck down, and that the Respondent be given some time, through a suspension, to reform the regime.

126. SOQUEM's evidence suggests that the free entry claims regime is "essential" to the functioning of the mining industry, and Québec's evidence attempts to colour the file with allegations about the economic importance of the mining sector.[183] However, these industrial and economic concerns are not a justification for the violation of the MIFN's constitutional rights. They are political concerns that have absolutely no relevance for the narrow constitutional questions before the Court: is the DTC triggered or not. How it is managed thereafter is beyond the scope of the present litigation. Further, any argument that functional reform is not possible should be rejected considering the many successful reforms of, or ongoing efforts to reform, similar regimes in Canada and internationally.

a. The Yukon court-initiated reforms to free entry mining

127. The case of *Ross River* confirms that the economic importance of a provincial or territorial mining sector is not a valid excuse to save an archaic free entry regime like that which existed in Yukon at the time, and exists in Québec today. While the chambers judge in that case believed the economic importance of the mining sector to dictate that consultation could occur only *after* claims were made on the territory of a First Nation, the Court of Appeal discerned that such an analysis is misplaced in a DTC analysis. As the court set out[184]:

> "[43] […]. I fully understand that the open entry system continued under the *Quartz Mining Act* has considerable value in maintaining a viable

[181] Exhibit P-21, at p 1; Ratt Affidavit, at para 20.
[182] *MMF*, at para 47.
[183] Brisson Affidavit, at para 39; Affidavit of Simon Fraser, May 11, 2022, at paras 2-11.
[184] *Ross River,* at para 43.

> mining industry and encouraging prospecting. I also acknowledge that there is a long tradition of acquiring mineral claims by staking, and that the system is important both historically and economically to Yukon. It must, however, be modified in order for the Crown to act in accordance with its constitutional duties."

128. The *Ross River* decision spurred the government into action to comply with the DTC. Ever since, the Ross River Dene Council and the Yukon have been in negotiations to bring the mining regime into compliance with the court's order.[185] While the Yukon government has not yet undertaken a complete overhaul of the legislative regime, it has made efforts in the interim to comply with the court's order by issuing Orders in Council prohibiting the placing of new mining claims in the Ross River area, while ongoing consultation with First Nations proceeds.[186]

129. The Supreme Court has endorsed the *Ross River* approach to remedying an unconstitutional mining regime[187]:

> "Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or **more systemically through legislative or regulatory amendments**." (emphasis added)

b. The Australian reforms to free entry mining

130. Canadian provinces and territories are not the only jurisdictions where free entry mining systems have been reformed to entrench more consultation prior to the acquisition of mining rights. For example, two sub-national jurisdictions in Australia have seen their mining regimes reformed to require some forms of consideration, notice and consent of Indigenous communities with rights and title interests prior to the registration of mining rights or the undertaking of certain exploration activities.

131. In Australia's Victoria State, proponents must apply for a license to obtain mining rights and explain how they will comply with legislation which requires the consideration of Indigenous communities' rights and title interests.[188] The Minister has the discretion to grant the application or not, even if it substantially complies.[189] In Australia's Northern Territory, before undertaking any exploration activities, proponents must obtain licenses which are granted at the Minister's discretion.[190] Upon obtaining a license, proponents must also notify Indigenous communities with

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[185] *Ross River 2019,* at para 10.
[186] *Ross River 2019*, at para 10.
[187] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*, 2017 SCC 40, at para 22.
[188] *Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019* (Vic) 2019/48, art 13 c).
[189] *Mineral Resources (Sustainable Development) Act 1990* (Vic) 1990/92, at s 25(3).
[190] *Mineral Titles Act 2010* (NT), 2010/27, s 27 [***Mineral Titles Act 2010***].

asserted native title at least 14 days before any preliminary exploration occurs and provide extensive details on their proposed entry onto the land.[191]

132. Where a territory is recognized as "Aboriginal land" or an "Aboriginal community living area", preliminary exploration activities require the consent of the community.[192]

133. While the MIFN do not purport to closely compare the types of Aboriginal rights present in Australia to those in Canada and at issue in this application, these examples show that it is possible to reform a free entry mining regime to require additional steps and government oversight prior to obtaining mining rights to, entering on, and exploring the territories of Indigenous communities.

c. The other ongoing reforms and challenges to free entry regimes in Canada

134. Recent reforms and challenges of free entry mining regimes in other Canadian jurisdictions further confirm that such regimes are facing broad questions of constitutional legitimacy for failure to adhere to the DTC, and that reform is possible.

135. In Ontario, reforms to the province's free entry mining regime have integrated more consultation at the early exploration stages of the regime. In 2009, the Ontario *Mining Act* and related regulations were reformed to integrate mandatory consultation through an "exploration plan" before undertaking certain "early exploration activities", such as surveying land with the use of a generator, or obtaining rock or mineral samples with equipment weighing less than 150 kg.[193] Claim holders must now provide the Director of Exploration with the exploration plan detailing the activities, which the Director must share with Indigenous communities whose existing or asserted Aboriginal or treaty rights could be adversely affected by the activities.[194] Indigenous communities then have an opportunity to express any concerns for potential adverse effects with the Director, and the Director then uses their discretion to decide whether the indicated adverse effects "*may* require the early exploration proponent to consult with the community as directed."[195]

136. While Ontario's reforms have improved some aspects of consultation at the exploration stage, the reforms did not establish provisions for consultation with Indigenous communities *prior* to the registration, renewal or transfer of mining

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[191] *Mineral Titles Act 2010*, s 20; *Mineral Titles Regulations 2011* (NT), 2011/39, s 16 and 17. Preliminary exploration activities include the examination of geological characteristics, the use of hand-held and non-mechanical tools for the removal of small samples of minerals for analysis, and marking boundaries for a proposed application for a mineral title, among other activities: see *Mineral Titles Act 2010*, s 17.
[192] *Mineral Titles Act 2010*, s 21(1) and (2).
[193] *Mining Act*, RSO 1990, c M14, s 2 [***Mining Act*** **(Ontario)**], ss 78.2 (1), 78.3 (2) ; *Exploration Plans and Exploration Permits*, O Reg 308/12 [***EPEP***], s 4, "Early exploration plan activities" set out in Schedule 2.
[194] *EPEP,* ss 5(1), 7(1)-(2).
[195] *EPEP,* s 7(3).

claims on their traditional territories. Because of this, Ontario's regime remains below what is required to be compliant with the DTC. Nevertheless, these reforms demonstrate that, at least at the early exploration stage, improved consultation is not only possible – it has already been implemented.

137. In British Columbia, the Supreme Court of British Columbia will soon hear a challenge of the province's *Mineral Tenure Act* that allows third parties to register claims and exercise certain exploration rights on a free entry basis, without consulting concerned Indigenous communities on their assertions of rights and title.[196] While the resolution of that litigation is pending, it is another indicator that, in light of the *Ross River* decision in the Yukon, the time is ripe to question free entry mining regimes for their non-adherence to the DTC.

The Conclusions sought within this Application

138. The main conclusions sought by the MIFN are declarations about the DTC being triggered by the registration, renewal, and transfer of mining claims and by mining exploration activities (conclusions 3 and 4). To be clear, the MIFN do not ask this honourable Court to determine which exploration activities trigger the DTC (according to the MIFN all exploration activities trigger the DTC). Nor do the MIFN ask the Court to determine the scope or content of the DTC.

139. Québec's free entry mining regime is fundamentally at odds with such declarations, so the MIFN ask this Court to strike down the relevant sections of the Act and the Consultation Policy (conclusions 2 and 5).

140. Ensuing legislative reforms to ensure compliance with the DTC will take some time, so the MIFN propose that this Court suspend the effect of conclusions 2 and 5 for one (1) year (conclusion 6).

141. The MIFN also ask this Court to issue a declaration and order redressing the unconstitutional transfer of 1,052 mining claims from Copper One to SOQUEM in a pragmatic, forward-looking manner, namely by ordering that the term of those claims remains suspended while the parties engage in dialogue and reach an agreement (conclusions 7 and 8).

142. Finally, in order to prevent future prejudice to the MIFN's asserted rights and title, the MIFN seek a declaration and order that Québec must consult the MIFN prior to the registration, renewal and transfer of mining claims on their territory (conclusions 9 and 10).

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[196] Petition in the case of *Smgyigyetm Gitxaala and Gitxaala Nation v. Her Majesty the Queen et al*, court file no s. 219179, available online: <s3.amazonaws.com> at pp 7-10. The Gitxaala Nation argues that the BC system's automatic granting of exclusive mineral rights to third parties may adversely impact Gitxaala title and rights, as it is inconsistent with future and present use and occupation of title lands, and the right to manage resources on that territory.

143. The MIFN request costs (conclusion 12). However, in the event that the Application is dismissed, the MIFN ask that it be without costs, among other reasons because the present litigation transcends the interests of the parties to this proceeding.

144. The Respondent's evidence[197] mentions Bill 102, which aims to eventually increase the number of situations where consultation would occur prior to certain exploration activities only. This is not relevant, since the Court must render its judgment on the basis of the law as it is in effect at the time of the judgment, not on the basis of a future, hypothetical legal framework. Indeed, the relevant changes brought by the Bill are set to come into effect when the corresponding regulation will come into effect.[198] There are well-documented cases in Québec and Canadian law when regulation mandated by a statute is not enacted for many years, or at all. This Court is asked to render a judgment now that ensures that Québec's unconstitutional mining regime does not continue to bypass its constitutional DTC First Nations with potential impacts on their rights and title.

IV. CONCLUSIONS

145. The MIFN respectfully request the following conclusions, which now reflect the case management elements from the minutes of the hearing of September 16, 2021:

1) **GRANT** the present application;

2) **DECLARE** that sections 56, 61, 65, and 72 of the *Mining Act* (CQLR, c. M-13.1) are unconstitutional and of no force or effect;

3) **DECLARE** that the Respondent has a duty to consult and accommodate the Applicant in determining whether mining claims on Crown lands within the Area are to be made available to third parties under the provisions of the Act;

4) **DECLARE** that the Respondent has a duty to notify, consult, and accommodate the Applicant before allowing any mining exploration activities to take place within the Area, to the extent that those activities may prejudicially affect Aboriginal rights and title claimed by the Applicant;

5) **DECLARE** that the *Aboriginal Community Consultation Policy Specific to the Mining Sector* published on or around October 22, 2019, is unconstitutional and of no force or effect;

6) **SUSPEND** the declarations 2 and 5 above for one year to allow appropriate statutory and policy changes;

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[197] Gaudreau Affidavit, at paras 92-98; Gaudreau pretrial examination, at p 35, line 23 - p 41, line 24.

[198] Bill nº 102, *An Act mainly to reinforce the enforcement of environmental and dam safety legislation, to ensure the responsible management of pesticides and to implement certain measures of the 2030 Plan for a Green Economy concerning zero emission vehicles*, 42nd leg (Qc), 2nd sess, 2022, s 184(2°), with respect to s 69.

7) **DECLARE** that the transfer of mineral claims to SOQUEM breached Québec's fiduciary duty toward the Applicant and its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982*;

8) **ORDER** that the term of the mineral claims held by SOQUEM remain suspended, until such time as the parties negotiate and mutually consent to a just remedy for these breaches subject to the Court's approval;

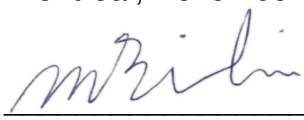
9) **DECLARE** that prior to any future registration, renewal, or transfer of mineral claims in the Area, the exact identity of which shall be provided at the hearing on the merits or at whichever time the Court deems appropriate, Québec must consult and accommodate the Applicant;

10) **ORDER** the Respondent not to issue, renew, or transfer any mining claims upon the Area prior to consultation with the Applicant and appropriate accommodation;

11) **ORDERING** any such further and other relief as this Court may deem just.

12) **THE WHOLE, WITH LEGAL COSTS**.

Montreal, November 25, 2022



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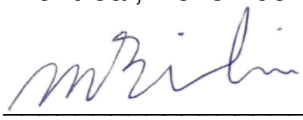

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V. AUTHORITIES

JURISPRUDENCE

Copper One Inc c Attorney General of Québec, 2018 QCCS 2358

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Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

Ermineskin Cree Nation v. Canada (Environment and Climate Change), 2021 FC 758

Interlake Reserves Tribal Council Inc. et al. v. Manitoba, 2022 MBQB 131

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Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

Ross River Dena Council v. Yukon, 2019 YKSC 26

Delgamuukw v. British Columbia, [1997] 3 SCR 1010, CanLII 302

Ross River Dena Council v. Yukon, 2020 YKCA 10

Mikisew Cree First Nation v. Canadian Environmental Assessment Agency, 2022 FC 102

Guerin v. The Queen, [1984] 2 SCR 335, CanLII 25

Wewaykum Indian Band v. Canada, 2003 SCC 45

Manitoba Metis Federation v. Canada, 2013 SCC 14

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Clyde River (Hamlet) v. Petroleum Geo-Services Inc, 2017 SCC 40

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Statutes

Mining Act, CQLR c M-13.1

Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11

Indian Act, RSC 1985 ch I-5

Act respecting Investissement Québec, CQLR c I-16.0.1

United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14

Regulations

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OTHER PROVINCIAL LEGISLATION

Statutes

Mining Act, RSO 1990, c M14

Regulations

Exploration Plans and Exploration Permits, O Reg 308/12

INTERNATIONAL LEGISLATION AND AGREEMENTS

Statutes

Mineral Resources (Sustainable Development) Act 1990 (Vic) 1990/92

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Regulations

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DOCTRINE AND PLEADINGS

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Nº 500-17-111162-205
Superior court of Québec (Civil Division)
Province of Québec
District of Montréal

MITCHIKANIBIKOK INIK (ALGONQUINS OF BARRIERE LAKE)
Applicant

v.

ATTORNEY GENERAL OF QUÉBEC (GOVERNMENT OF QUÉBEC AND MINISTER OF ENERGY AND NATURAL RESSOURCES)
Respondent

and

SOCIÉTÉ QUÉBÉCOISE D'EXPLORATION MINIÈRE INC. (SOQUEM)
Impleaded Party

APPLICANT'S BRIEF

November 25, 2022

ORIGINAL

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