

Legal backgrounder: Gitxaala’s legal challenge to BC’s mineral claim regime

On October 25, 2021, the Gitxaala filed a Petition in the British Columbia Supreme Court seeking judicial review with respect to seven mineral claims granted by the BC government between 2018 and 2020 on Banks Island in Gitxaala territory. This backgrounder provides basic legal context and a summary of the case filed.

What are the main issues in Gitxaala’s judicial review?

Gitxaala’s judicial review petition addresses three overarching, interconnected key issues:

- 1) Between 2018 and 2020, the Province granted seven mineral claims in the heart of Gitxaala territory on Banks Island without consulting Gitxaala about potential adverse effects on their Aboriginal rights and title, which the courts have held includes mineral rights. This is a breach of the Crown’s constitutional duty to consult and accommodate Gitxaala. Gitxaala asks the Court to overturn the seven mineral claims.
- 2) BC operates its online mineral titles registry to automatically grant mineral claims to free miners. This is inconsistent with the honour of the Crown, which is the constitutional principle that gives rise to the duty to consult and accommodate, because the automatic nature of the registry prevents consultation from taking place. This will lead to the same problems reoccurring in Gitxaala territory (and elsewhere). Gitxaala asks the Court to declare that BC is implementing the online mineral titles registry in an unconstitutional manner, and to suspend the registry in Gitxaala territory until a resolution is reached.
- 3) The *Mineral Tenure Act* regime results in Indigenous peoples being automatically dispossessed of important aspects of their title and rights to resources without any consent, consultation or even notice. This is inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which BC has affirmed in the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*. Gitxaala asks the Court to declare that *DRIPA* legally requires the BC government to consult and cooperate with Gitxaala (as well as other Indigenous peoples) about measures necessary to bring the *Mineral Tenure Act* regime into consistency with UNDRIP.

What is the process in BC for obtaining a mineral claim?

- A person must be a “free miner” to acquire a mineral claim. Any Canadian corporation, partnership, or person over 18 who resides or is authorized to work in Canada may become a free miner by requesting a free miner certificate and paying a nominal fee.¹
- A free miner can acquire a mineral claim on the internet by going to the Mineral Titles Online Registry, selecting cells on a map and paying a small fee (\$1.75 per hectare) with a credit card. Upon payment, the mineral claim is immediately and automatically issued to the free miner.²
- No Crown consultation or engagement of any kind occurs with impacted Indigenous nations because the provincial government grants mineral claims through this automatic online system.

¹ *Mineral Tenure Act* (“MTA”) sections 7-8.

² MTA sections 6.3 and 6.8(1); *Mineral Tenure Act Regulation* (“MTA Regulation”) section 4 and Schedule B; see also <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/mineral-titles/mineral-placer-titles/mineraltitlesonline/about-mto/making-a-registration-in-mto>.

What does a person acquire when granted a mineral claim?

- The holder of a mineral claim immediately acquires the following ownership rights:
 - The claim holder is legally “entitled to those minerals... that are held by the government and that are situated vertically downward from and inside the boundaries of the claim.”³
 - The claim holder may renew the mineral claim indefinitely on a year-to-year basis by conducting exploration and development work, or by paying a fee instead (if the claim is not renewed then it expires after a year and may be acquired by another free miner).⁴
 - The claim holder may transfer the mineral claim to another person.⁵
 - The claim holder is entitled to compensation from the provincial government if the government takes the mineral claim, for example by creating a park.⁶
- The holder of a mineral claim is entitled to enter, use and occupy the mineral claim area for exploration and development purposes.
 - While large-scale mechanical disturbance requires a permit from the Province, a claim holder can conduct many other types of exploration and development activities without the Province requiring a permit. For example, the Province does not require a permit for: surveying; establishing grid lines; trenching, pitting or drilling without mechanized tools; geological or geochemical sampling without mechanized tools; etc.⁷
- The holder of a mineral claim has the option to convert the claim into a mining lease lasting up to 30 years, which may be renewed for a further 30 years. The BC government does not have discretion to refuse the mining lease, so long as basic administrative procedures (such as paying a fee and posting notice) are followed. The mining lease provides “an interest in land and conveys to the lessee the minerals... within and under the leasehold” in addition to all the rights that come with the mineral claim.⁸

In summary, the BC government grants mineral claims that convey important ownership and exploration rights with no consultation or engagement of any kind with impacted Indigenous nations like Gitxaala. This is inconsistent with Gitxaala’s own inherent jurisdiction in its territory, Canada’s constitutional law requirements, UNDRIP, and the provincial government’s stated commitment to reconciliation. Gitxaala is asking the Court to intervene and assist in correcting the BC government’s failings in this regard, with a view to securing systemic changes to BC’s *Mineral Tenure Act* to bring it into alignment with the UNDRIP.

³ MTA section 28(1).

⁴ MTA section 29; MTA Regulation sections 7-11.

⁵ MTA section 6.34.

⁶ MTA section 17.1; *Rock Resources Inc v British Columbia*, 2003 BCCA 324.

⁷ MTA section 14; *Mines Act* section 10; see also <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/mineral-titles/notices-mineral-placer-titles/information-updates/infoupdate38.pdf>.

⁸ MTA sections 42 and 48.