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Hearings begin in Gitxaała Nation's legal challenge to BC's *Mineral Tenure Act*

Nation heads to BC Supreme Court for two-week hearing in landmark mining case – the first to consider the enforceability of BC's Declaration on the Rights of Indigenous Peoples Act

VANCOUVER / xʷməθkʷəy̓əm, Sḵwx̱wú7mesh & səl̓ilwətaʔɬ territories – Today the British Columbia Supreme Court will begin hearing arguments in Gitxaała Nation's ground-breaking legal challenge against the provincial government's "free entry" mineral claim staking regime. The case is the first of its kind in BC, and seeks to overturn multiple mineral claims that were granted by the Province on *Lax k'naga dzol,* (Banks Island) in the heart of Gitxaała territory, without consent, consultation or even notification to Gitxaała.

Gitxaała's case argues that BC's outdated practice of granting mineral claims without Indigenous consultation or consent is inconsistent with constitutional requirements as well as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which BC has legally committed to implement. The case will be heard alongside a related legal challenge filed by the Ehattesaht First Nation.

"Gitxaała *smgyigyet* (hereditary leaders) have the responsibility to manage and protect our territories and resources according to the *ayaawx* (Gitxaała laws). Our *ayaawx* expresses, among other things, the sacredness of our territory, and the need to treat the environment with the greatest respect and to ensure proper treatment of our resources," said Gitxaała Sm'ooygit Nees Hiwaas (Matthew Hill).

"By giving away the mineral rights that are part of our territory, the Province has broken both our laws, and their own," Nees Hiwaas said.

BC's current *Mineral Tenure Act* permits anyone with a free miner certificate to acquire mineral claims online through an automated system in First Nations' territories, without their consultation or consent. Since Gitxaała launched the case in October 2021, the provincial government has made public commitments to reform the mineral tenure regime, yet it has not changed its legal position and continues to fight Gitxaała in court.

This closely-watched case will be one of the first to interpret BC's *Declaration on the Rights of Indigenous Peoples Act* (DRIPA). In addition to Gitxaała, the Court will hear from the Ehattesaht, as well as a range of intervenors arguing against BC's "free entry" mineral tenure regime, including the First Nations Leadership Council, four individual Indigenous nations, six environmental and community groups and two mineral exploration businesses. The BC Human Rights Commissioner is also intervening in the case.

"Despite the reported progress and new relationships promised when the government signed the *Declaration on the Rights of Indigenous People Act* into law, the Province continues to give away mining rights in our territory without our consent. This impacts our ownership, governance and use of our

lands, and interferes with our right to make management decisions and to choose our own priorities," said Gitxaała Chief Councillor Linda Innes.

"While proudly announcing its commitments to reconciliation, the Crown continues to argue *in court* that they have no legal obligation to make good on those commitments – and that is a problem that should be of serious to concern to all residents of British Columbia, not just Gitxaała," Innes said.

In addition to setting aside existing mineral claims that are part of the court proceeding, Gitxaała is asking the court to suspend claim staking in Gitxaała Territory.

The full case will be heard over two weeks at the BC Supreme Court, from April 3-14, 2023.

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Additional resources:

Legal backgrounder attached

Legal backgrounder: Gitxaała's legal challenge to BC's mineral claim regime

From April 3-14, 2023 the BC Supreme Court will hear Gitxaała Nation's ground-breaking legal challenge against the provincial government's "free entry" mineral claim staking regime and mineral claims granted by the BC government in Gitxaała territory.

This backgrounder provides basic legal context and a summary of the case, which was filed in October 2021.

What are the main issues in Gitxaała's judicial review?

Gitxaała's judicial review petition addresses three overarching, interconnected key issues:

1) Between 2018 and 2020, the Province granted multiple mineral claims in the heart of Gitxaała territory on *Lax k'naga dzol* (Banks Island) without consulting Gitxaała 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 Gitxaała and does not align with standards of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), including the principle of "free, prior, informed consent". Gitxaała asks the Court to overturn the mineral claims.

2) BC operates its online mineral titles registry to automatically grant mineral claims to free miners. This is inconsistent with UNDRIP and 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 Gitxaała territory (and elsewhere). Gitxaała asks the Court to declare that BC is implementing the online mineral titles registry in an unconstitutional manner, and to suspend automated grants of mineral claims in Gitxaała territory.

3) The *Mineral Tenure Act* regime results in Indigenous Peoples being dispossessed of important aspects of their title and rights to resources without any consent, consultation or even notice, contrary to the articles of UNDRIP – which BC has affirmed in the *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*) apply to the laws of BC. Gitxaała asks the Court to declare that the *Mineral Tenure Act* regime is inconsistent with UNDRIP, and that *DRIPA* legally requires the BC government to consult and cooperate with Gitxaała (as well as other Indigenous peoples) about measures necessary to bring the *Mineral Tenure Act* regime into consistency with UNDRIP.

In June 2022, the Ehattesaht First Nation filed a similar judicial review challenging mineral claims in its territories. The parties have agreed for the two cases to be heard at the same time.

These proceedings will be the first time the BC Supreme Court is being called on to substantively interpret DRIPA. DRIPA affirms the application of UNDRIP to the laws of BC, including the common law duty to consult, which Gitxaała says must now be interpreted in light of the standards set out in UNDRIP, including the requirement to obtain the 'free, prior, and informed" consent of Indigenous peoples.

Who else is involved in the hearing?

There are a number of groups intervening in the Gitxaała Nation's legal challenge against BC's "free entry" mineral tenure regime. An intervenor is a person or group that is not a party to a case, but who is nonetheless allowed to make legal arguments on important issues in the case. The intervenors in the case are:

1) The First Nations Leadership Council, consisting of: the BC Assembly of First Nations, the First Nations Summit, and the Union of British Columbia Indian Chiefs
2) Ts'kw'aylaxw First Nation
3) Nuxalk Nation
4) Gitanyow Hereditary Chiefs and Nak'azdli Whut'en First Nation
5) The Human Rights Commissioner for British Columbia
6) A coalition of non-governmental organizations and community groups consisting of: MiningWatch Canada, the BC Mining Law Reform Network, Wildsight, SkeenaWild Conservation Trust, Kamloops Moms for Clean Air, and Western Canada Wilderness Committee
7) First Tellurium Corp. and Kingston Geoscience Ltd. (two mineral exploration businesses that support free, prior and informed Indigenous consent "as the cornerstone for a progressive, 21st century mineral exploration industry.")
8) A coalition of mining industry associations consisting of: the Association for Mineral Exploration British Columbia, the Mining Association of British Columbia, and the Prospectors and Developers Association of Canada.

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.

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]

[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.
[3] MTA section 28(1).

    - 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 protected area.[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]
    - Mineral claim holders may also extract up to 1000 tonnes of ore per year per cell of their claim without further provincial approval, and an individual claim may have up to 100 cells (i.e., the legal limit on extraction without any further permit would be up to 100,000 tonnes of ore per year)[8]
- 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.[9]

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 Gitxaała. This is inconsistent with Gitxaała's own inherent jurisdiction in its territory, Canada's constitutional law requirements, UNDRIP, and the provincial government's stated commitment to reconciliation. Gitxaała 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 UNDRIP.

[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, section 14(1); MTA Regulation, sections 4(1) and 17(1).
[9] MTA sections 42 and 48.