

The Trials and Tribulations of Ontario's *Mining Act*: The Duty to Consult and Anishinaabek Law

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After a series of high profile disputes pitting statutory mining rights against constitutionally protected Aboriginal rights, Ontario finally amended its Mining Act. This paper argues that Ontario's amended regime still fails to comply with the Crown's duty to consult and accommodate Aboriginal peoples in at least three ways. First, some areas of Ontario are subject to Aboriginal title claims. Recording a mining claim within Aboriginal title territory triggers the duty to consult, but the amended Mining Act still does not require consultation prior to the recording stage. Second, at least some treaties in Ontario, such as Treaty Nine, protect the

right to implement the laws of the First Nations signatories, including Anishinaabek laws. The early exploration activities permitted by the Mining Act violate Anishinaabek laws about land use and thus adversely impact a treaty right, again with no requirement to engage in prior consultation. Third, the new regulations run afoul of both Anishinaabe law and Canadian law by failing to allow sufficient time for Anishinaabek decision-making processes. For these reasons, the amended Mining Act is still unconstitutional and another round of amendments is required.

Après de nombreux conflits hautement médiatisés, opposant les droits des minières et les droits constitutionnels autochtones, l'Ontario s'est finalement décidé à modifier sa Loi sur les mines. Cet article soutient que, malgré les amendements apportés, le régime ne respecte pas l'obligation de consultation et d'accommodement qu'a la Couronne envers les autochtones d'au moins trois façons. En premier lieu, certaines régions ontariennes font l'objet d'une revendication du titre ancestral. L'enregistrement d'une concession minière au sein d'un territoire visé par un titre ancestral donne naissance à une obligation de consultation. Or, la Loi sur les mines amendée n'exige pas de consultation avant l'étape de l'enregistrement. En second

lieu, quelques traités en Ontario, tels que le Traité no 9, protègent le droit des Premières Nations signataires, dont les Anishinaabeks, de mettre en œuvre des lois. Les explorations préliminaires autorisées en vertu de la Loi sur les mines enfreignent les lois Anishinaabeks portant sur l'usage du territoire et briment ainsi un droit issu d'un traité sans qu'il y ait d'exigence de consultation préalable. En dernier lieu, la nouvelle réglementation contrevient au droit Anishinaabek et au droit canadien en ne laissant pas suffisamment de temps au processus décisionnel des Anishinaabeks. Pour ces raisons, la Loi sur les mines demeure anticonstitutionnelle et de nouveaux amendements sont requis.

Titre francophone : Le long parcours de la *Loi sur les mines* Ontarienne : Le devoir de consultation et le droit Anishinaabek

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1. INTRODUCTION	185
2. THE PROBLEM: CONFLICT BETWEEN FREE ENTRY MINING ACT RIGHTS AND CONSTITUTIONAL RIGHTS	188
2.1 THE DUTY TO CONSULT AND ACCOMMODATE	188
2.2 FREE ENTRY	190
2.3 EXAMPLES OF THE CONFLICT BETWEEN <i>MINING ACT</i> RIGHTS AND CONSTITUTIONAL RIGHTS	191
2.3.1 <i>KITCHENUHMAKOSIB INNINUWUG FIRST NATION AND PLATINEX INC</i>	191
2.3.2 <i>ARDOCH ALGONQUIN FIRST NATION AND FRONTENAC VENTURES CORPORATION</i>	192
2.3.3 <i>WAHGOSHIG FIRST NATION AND SOLID GOLD RESOURCES CORP</i>	193
3. ONTARIO'S SOLUTION	193
3.1 THE AMENDED <i>MINING ACT</i>	193
3.2 FREE ENTRY REDUX?	195
4. THE PROBLEMS WITH ONTARIO'S SOLUTION	197
4.1 WILL ACTIVITIES PERMITTED BY THE AMENDED <i>MINING ACT</i> TRIGGER THE DUTY TO CONSULT REGARDING ABORIGINAL TITLE?	197
4.1.1 <i>FIRST REQUIREMENT: CROWN KNOWLEDGE OF AN ASSERTED RIGHT</i>	197
4.1.2 <i>SECOND REQUIREMENT: CROWN CONDUCT OR DECISION ADVERSELY IMPACTING THE ASSERTED RIGHT</i>	199
4.1.3 <i>THIRD REQUIREMENT: POTENTIAL ADVERSE IMPACT ON THE ASSERTED RIGHT</i>	200
4.2 WILL ACTIVITIES PERMITTED BY THE AMENDED <i>MINING ACT</i> TRIGGER THE DUTY TO CONSULT REGARDING TREATY RIGHTS?	204
4.2.1 <i>OVERVIEW</i>	204
4.2.2 <i>A TEXTUAL APPROACH</i>	205
4.2.3 <i>A MORE RIGOROUS APPROACH</i>	206
4.3 THE SUFFICIENCY OF CONSULTATION UNDER ANISHINAABE LAW AND CANADIAN LAW	213
5. CONCLUSION	217

1. INTRODUCTION

A series of high profile disputes in Ontario have pitted rights granted under the *Mining Act*¹ against constitutionally protected Aboriginal rights. These disputes resulted in blockades, jail sentences, and multi-million dollar lawsuits against the Ontario government. Beginning in 2009,² Ontario finally addressed the conflict between statutory mining rights and constitutional Aboriginal rights by amending its *Mining Act*,³ with new regulations coming into force as recently as April 2013.⁴ This paper argues that, despite these amendments, the *Mining Act* is still unconstitutional, as it runs afoul of the Crown's obligations to consult Aboriginal peoples and accommodate their rights pursuant to section 35(1) of the *Constitution Act, 1982*,⁵ in at least three ways.

First, Ontario's revised mining regime still does not require consultation prior to the recording of a mining claim. Yet, recording a claim for territory subject to an assertion of

¹ *Mining Act*, RSO 1990, c M14 as it appeared prior to 27 October 2009 [*Mining Act 1*].

² The first set of amendments came into effect on October 28, 2009: *Mining Amendment Act, 2009*, RSO 2009, c 21.

³ *Mining Act*, RSO 1990, c M14 [*Mining Act 2*].

⁴ *Exploration Plans and Exploration Permits*, O Reg 308/12, s 22 [*Exploration Regs*].

⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”, s 35(1)) [*Constitution*].

Aboriginal title⁶ constitutes a Crown decision that triggers the common law/constitutional duty to consult,⁷ and consultation must occur *prior to* the Crown decision at issue.⁸ Both the Crown and mining proponents have sought to avoid this problem by arguing that the test for triggering the duty to consult is not satisfied at the recording stage. This paper critiques those arguments and demonstrates that some areas in Ontario are subject to Aboriginal title claims, and within these areas, recording a mining claim does in fact satisfy the test for triggering the duty to consult as first articulated by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)* and subsequently refined in *Rio Tinto Alcan v Carrier Sekani Tribal Council*.⁹

Second, Ontario's revised mining regime allows proponents to engage in so-called low impact exploration activities prior to consultation. These activities trigger the duty to consult when they occur in territories covered by at least some of the treaties in Ontario, such as *Treaty Nine*.¹⁰ Ontario has tried to resist this conclusion, arguing that the test for triggering the duty to consult is not met because low impact exploration activities do not adversely impact treaty rights to hunt and fish. This argument rests on a strictly textual interpretation of the treaties. This paper challenges the textual interpretation and defends a more rigorous approach. Applying the rigorous approach reveals that the First Nations signatories to *Treaty Nine* have a treaty right to exercise jurisdiction and implement their own laws, including Anishinaabek laws, within their territories. The early exploration activities permitted by the *Mining Act*, however, violate Anishinaabek legal principles and protocols about land use. As such, these activities adversely impact the treaty right to implement Anishinaabek laws.

⁶ Aboriginal title is one particular type of Aboriginal right; that is, "Aboriginal right" is a category that includes Aboriginal title within it (*R v Adams*, [1996] 3 SCR 101 at para 25, 138 DLR (4th) 657). Specifically, Aboriginal title is a beneficial interest in land, which entitles its holder to use, enjoy, and profit from the economic development of the land (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 70, [2014] 2 SCR 257 [*Tsilhqot'in Nation*]). Land surrender treaties are generally thought to extinguish Aboriginal rights, including Aboriginal title. Thus, Aboriginal nations who have not entered into land surrender treaties typically assert claims of Aboriginal rights and title. In contrast, Aboriginal nations who have entered into land surrender treaties typically assert rights pursuant to those treaties.

⁷ The duty to consult is a common law duty insofar as it predates s 35(1) of the *Constitution Act, 1982* (Jack Woodward, *Native Law Vol 1* (Toronto: Thomson Reuters Canada Limited, 1994) (loose-leaf 2015 supplement) ch 5 at para 1250, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17, [2004] 3 SCR 511 [*Haida Nation*]). After the enactment of s 35(1), the duty to consult is also a constitutional duty (see *R v Kapp*, 2008 SCC 41 at para 6, [2008] 2 SCR 483, cited in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 41, [2010] 3 SCR 103). In other words, the duty to consult has "both a legal and constitutional character" (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34, [2010] 2 SCR 650 [*Rio Tinto Alcan*]).

⁸ See *Rio Tinto Alcan*, *ibid* at para 35; *Tsilhqot'in Nation*, *supra* note 6 at para 78; *Ross River Dena Council v Yukon*, 2012 YKCA 14 at paras 18, 45, (2012) 358 DLR (4th) 100 [*Ross River Dena* 2012], leave to appeal to SCC refused, 35236 (September 19, 2013).

⁹ *Haida Nation*, *supra* note 7 at para 35; *Rio Tinto Alcan*, *supra* note 7 at paras 40–50.

¹⁰ *Treaty Nine* was executed by representatives of Ontario, Canada, and various First Nations in northern Ontario in 1905 and 1906, with adhesions made in 1929 and 1930. According to its written text, *Treaty Nine* is a land surrender treaty. First Nations signatories, though, take a very different view, which is discussed in sub-section 4.2.3, below. For a comprehensive discussion of *Treaty Nine*, see John S Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 40 [Long, *Treaty No. 9*].

Third, the *Mining Act's* consultation procedures prohibit the operation of Anishinaabe law¹¹ by failing to allow sufficient time for Anishinaabek decision-making processes. This is a problem because Aboriginal perspectives, including Aboriginal laws, are supposed to inform the interpretation of rights protected by section 35(1) of the *Constitution*¹² including not only substantive rights, but arguably also procedural rights, such as the duty to consult.¹³ Consultation procedures, then, should accommodate Anishinaabek laws about legitimate decision-making processes. The *Mining Act's* extremely tight timelines are also inconsistent with Canadian jurisprudence that establishes an obligation on the Crown to provide Aboriginal nations with adequate time to engage in consultation.¹⁴

Commentators have conducted insightful assessments of Ontario's revised mining regime.¹⁵ None of these assessments, though, apply the test for triggering the duty to consult to the amended legislation. The lack of any previous application of the test is not surprising, given that previous assessments were published before the release of the new *Mining Act* regulations¹⁶ pertaining to Aboriginal consultation.¹⁷ Now that the consultation regulations are available, the time is ripe to assess Ontario's new mining regime in the light of the triggering test. In

¹¹ By "Anishinaabe law", I mean the laws of Anishinaabe nations, as opposed to Canadian laws applied to Indigenous nations, such as the Anishinaabe. An examination of the laws of each of the Indigenous nations within Ontario is beyond the scope of this paper.

¹² *Supra* note 5.

¹³ For a discussion of the history and theory underlying the duty to consult as articulated in the jurisprudence pursuant to section 35(1), see section 2.1, below.

¹⁴ For a discussion of this argument, see section 4.3, below.

¹⁵ See Dimitrios Panagos & J Andrew Grant, "Constitutional Change, Aboriginal Rights, and Mining Policy in Canada" (2013) 51:4 J Commonw & Comp Pol 405; Rachel Ariss with John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Halifax: Fernwood Publishing, 2012) [Ariss with Cutfeet, *Keeping the Land*]; Neal Smitheman, Tracy Pratt & Andrew Baerg "Consultation – Then and Now" Ontario Bar Association - Aboriginal Law (December 2012) online: <oba.org/en/pdf/sec_news_abo_dec12_sol_smi.pdf>; Bruce Parry & Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2011) 23 J Envtl L & Prac 1; Graham Mayeda, "Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations" (2010) 6 JSDLP 143; 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 JSDLP 217 at 236 [Thériault, "Repenser les fondements"]. For a discussion of the mining regimes in Quebec and Ontario, see 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*, McGill-Queen's University Press [forthcoming]. For an application of international legal principles to Ontario's mining regime, see Penelope Simons and Lynda Collins, "Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective" (2010) 6 JSDLP 177. But for a more sanguine assessment of the *Mining Act* amendments, as well as an application of the *Mining Act's* consultation framework to the municipal context, see Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonlith Indian Band v Salmon Arm (City)" (2014) 47 UBC L Rev 293.

¹⁶ *Exploration Regs*, *supra* note 4.

¹⁷ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 153; Parry & Stoehr, *supra* note 15 at 8. Simons & Collins, *supra* note 15 at 185; Mayeda, *supra* note 15 at 152; Thériault, "Repenser les fondements", *supra* note 15.

undertaking this task, this paper provides a template for First Nations and the Métis Nation in Ontario to challenge the constitutionality of Ontario's revised mining regime.

2. THE PROBLEM: CONFLICT BETWEEN FREE ENTRY MINING ACT RIGHTS AND CONSTITUTIONAL RIGHTS

The problem with the old *Mining Act* stemmed from its free entry or open entry system, which prevented the Crown from fulfilling its duty to consult.¹⁸ The next three sub-sections explain the intersection between the duty to consult and accommodate and the free entry system.

2.1 THE DUTY TO CONSULT AND ACCOMMODATE

The duty to consult and accommodate has evolved over the past 25 years through the Supreme Court of Canada's section 35(1) jurisprudence.¹⁹ In 1990, the Court in *R v Sparrow* held that the Crown can justify its infringement of an Aboriginal right if it satisfies certain requirements, one of which is that the Crown must first consult with the Aboriginal people in question.²⁰ Then in 2004, the Court in *Haida Nation* established that this duty arises not only at the stage of justifying an infringement of a proven right, but also before the right in question has been either proven in court or admitted by the Crown.²¹ The duty includes not only consultation, but also – in some situations – accommodation.²² The duty is grounded

¹⁸ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 37–39. For use of the term “open entry” as a synonym for “free entry”, see *Ross River Dena* 2012, *supra* note 8 at para 20.

¹⁹ The discussion in this section of the legal principles flowing from the duty to consult and accommodate is arranged in a loose chronological order for the sake of emphasizing the Crown's delay in amending the *Mining Act*. But for a comprehensive and up-to-date account of the duty to consult and accommodate, see Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd, 2014) [Newman, *Revisiting*]. For a critical analysis of the duty to consult and accommodate, see Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23 Windsor YB Access Just 17; Timothy Huyer, “Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation” (2006) 21 Windsor Rev Legal Soc Issues 33; Verónica Potes, “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” (2006) 17 J Envtl L & Prac 27; Wapshkaa Ma'iingan (Aaron Mills), “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9 Indigenous LJ 107 at 151-57; Tara Ward, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law” (2012) 10 Northwestern J Intl Human Rights 54; Derek Inman, Stefaan Smis & Dorothee Cambou, “‘We Will Remain Idle No More’: The Shortcomings of Canada's ‘Duty to Consult’ Indigenous Peoples” (2013) 5 Goettingen J Intl L 251; Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate: Threatening the Goals of Reconciliation and Accommodation” (2013) 46 UBC L Rev 397.

²⁰ *R v Sparrow*, [1990] 1 SCR 1075 at para 82, 70 DLR (4th) 385 [*Sparrow*]. For further jurisprudence affirming the duty to consult, see also *Haida Nation*, *supra* note 7 at paras 22ff. Although the duty to consult in *Sparrow* applies to established and not merely asserted rights, in order to fulfill this duty the Crown must still engage in consultation before the right is established, unless the trial of the Aboriginal right is bifurcated into two separate phases, one dedicated to proving the existence of the right and another dedicated to proving justification of the infringement.

²¹ *Haida Nation*, *supra* note 7 at paras 34–35.

²² *Ibid* at paras 46–47.

in the honour of the Crown,²³ and lies solely with the Crown.²⁴ Although procedural aspects of the duty may be delegated to third parties such as industry proponents, the Crown alone remains legally liable for any failure to consult and accommodate.²⁵ In *Rio Tinto Alcan*,²⁶ the Supreme Court of Canada refined the criteria articulated in *Haida Nation* into a three-part test for triggering the duty:²⁷ first, the Crown must have real or constructive knowledge of an asserted Aboriginal or treaty right;²⁸ second, there must be some Crown conduct or decision that may adversely impact the asserted right;²⁹ third, there must be a causal connection between the proposed Crown conduct or decision and the potential adverse impact on the asserted right.³⁰ If these three requirements are met, consultation and accommodation must occur *before* the Crown makes the decision or engages in the activity that adversely affects the right.³¹ If consultation were to occur after the decision or activity is already a *fait accompli*, it would be futile.

In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, the Court held that the duty to consult and accommodate applies in the treaty context. It explained that the duty to consult and accommodate is triggered when the Crown contemplates activity that might adversely impact a treaty right, even if that activity does not amount to an infringement of the treaty right.³²

Despite the well-established existence of the duty to consult and accommodate in the Court's section 35(1) jurisprudence, the free entry system enshrined in the pre-2009 *Mining Act*, described below, allowed mining proponents to acquire mineral rights and engage in mining activities that at least *prima facie* satisfied the three-part test for triggering the duty to consult, without first consulting and accommodating the affected Aboriginal people.

²³ *Ibid* at para 16. The honour of the Crown “refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign” (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 65, [2013] 1 SCR 623). The purpose of the honour of the Crown is “the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty” (*ibid* at para 66).

²⁴ *Haida Nation*, *supra* note 7 at paras 53, 56.

²⁵ *Ibid*.

²⁶ *Rio Tinto Alcan*, *supra* note 7 at para 39.

²⁷ *Haida Nation*, *supra* note 7 at para 35.

²⁸ *Rio Tinto Alcan*, *supra* note 7 at para 40. For a discussion of the first requirement of the triggering test, see Newman, *Revisiting*, *supra* note 19 at 39-45.

²⁹ *Rio Tinto Alcan*, *supra* note 7 at para 42. For a discussion of the second requirement of the triggering test, see Newman, *Revisiting*, *supra* note 19 at 46-52.

³⁰ *Rio Tinto Alcan*, *supra* note 7 at para 45. For a discussion of the third requirement of the triggering test, see Newman, *Revisiting*, *supra* note 19 at 52-55.

³¹ See *Rio Tinto Alcan*, *supra* note 7 at para 35; *Tsilhqot'in Nation*, *supra* note 6 at para 78; *Ross River Dena* 2012, *supra* note 8 at paras 18, 45.

³² *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 33, [2005] 3 SCR 388 [*Mikisew Cree*].

2.2 FREE ENTRY

A free entry system allows prospectors to obtain rights to Crown minerals without owning the land in question³³ and without obtaining the Crown's permission.³⁴ That is, the Crown retains no discretion in deciding whether to grant or deny rights to obtain minerals.³⁵ Ontario's pre-2009 mining regime instantiated this key feature of a free entry system in at least four ways.³⁶

First, it provided that anyone with a prospector's licence could stake a mining claim on any Crown lands and even on non-Crown lands where the Crown had reserved the mineral rights,³⁷ subject to certain limited exceptions.³⁸ The majority of land in Ontario, as in much of the rest of Canada, falls within these two categories.³⁹ Second, once a mining claim had been properly staked, the prospector was entitled to have that claim recorded; under the previous *Mining Act*, the Crown retained no discretion to refuse to record a mining claim as long as it complied with the staking and recording requirements of the *Mining Act*.⁴⁰ These requirements were mere technicalities such as paying a fee and complying with the prescribed methods for staking.⁴¹ Once a claim was recorded, the holder of the claim was then entitled to engage in exploration activities on the land in question.⁴² Exploration activities were potentially extensive and intrusive.⁴³ Third, a claim holder was also entitled to exclude all others from staking a

³³ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 37.

³⁴ As Panagos & Grant note, the free entry system for mining can be contrasted with the regulatory framework pertaining to logging and other land use activities where acquiring rights requires first obtaining permission from the Crown: Panagos & Grant, *supra* note 15 at 407-408.

³⁵ But see *ibid* at 408. Panagos & Grant argue that the two pillars of mining policy in Canada are free entry and "significant government discretion". While the exercise of government discretion may be a feature of other stages of various mining regimes in Canada, a key element of a free entry system is the lack of government discretion at the stage of recording a mining claim, which is the basis for the acquisition of mineral rights.

³⁶ For a summary of these four features of a free entry system, see Ontario Ministry of Northern Development and Mines, "Modernizing Ontario's Mining Act: Finding a Balance" (August 2008) at 12 [Ontario Ministry of Northern Development and Mines, "Finding a Balance"], cited in Pardy & Stoehr, *supra* note 15 at 2-3. Cf. Barton's description of the features of a free entry system: "(i) a right of free access to lands in which the minerals are in public ownership, (ii) a right to take possession of them and acquire title by one's own act of staking a claim, and (iii) a right to proceed to develop and mine the minerals discovered" (Barry J Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) at 115).

³⁷ *Mining Act 1*, *supra* note 1, ss 27-28.

³⁸ *Ibid*, ss 29-32. See Ontario Ministry of Northern Development and Mines, "Finding a Balance", *supra* note 36 at 12.

³⁹ Pardy & Stoehr, *supra* note 15 at 2-3.

⁴⁰ *Mining Act 1*, *supra* note 1, s 46(1). See Ontario Ministry of Northern Development and Mines, "Finding a Balance", *supra* note 36 at 12.

⁴¹ *Mining Act 1*, *supra* note 1, ss 38, 44(1.1).

⁴² *Ibid*, s 65(1) (refers to exploration activities as "assessment work").

⁴³ O Reg 193/06, s 10 includes the following within "assessment work": "manual and mechanical overburden stripping", "bedrock trenching", "open cutting", "digging pits" and "recutting boundary claim lines once every five years."

claim, and therefore also from acquiring mineral rights, within the claim area.⁴⁴ Finally, on complying with additional technical requirements, a claim holder was entitled to a mining lease,⁴⁵ which vested rights to obtain minerals in the claim holder.⁴⁶

Under this free entry system, the Crown was unable to comply with its constitutional obligations pursuant to section 35 of the *Constitution Act, 1982*, most notably the duty to consult and accommodate. The following three situations illustrate the tension between the duty to consult and Ontario's pre-2009 mining regime.

2.3 EXAMPLES OF THE CONFLICT BETWEEN *MINING ACT* RIGHTS AND CONSTITUTIONAL RIGHTS

2.3.1 *KITCHENUHMAKOOISIB INNINUWUG FIRST NATION AND PLATINEX INC*

In 2006, Platinex Inc. acquired mineral rights under the *Mining Act* that were located within the traditional territory of Kitchenuhmaykoosib Inninuwug First Nation.⁴⁷ Because the pre-2009 *Mining Act* was in effect, Platinex was able to acquire these mineral rights automatically, with no ability on the part of the Crown to deny the claim due to insufficient consultation. Representatives of Kitchenuhmaykoosib Inninuwug protested, thereby physically preventing Platinex from conducting any drilling.⁴⁸ Although a court repeatedly ordered the parties to engage in consultation as required by the Supreme Court of Canada's section 35(1) jurisprudence, it also ordered that the objective of the consultation was to develop an agreement allowing Platinex to conduct drilling.⁴⁹ In doing so, it was concerned with protecting Platinex's statutory rights to the minerals under the *Mining Act*.⁵⁰ When Platinex obtained an order permitting it to proceed with its drilling activities,⁵¹ members of Kitchenuhmaykoosib Inninuwug prevented Platinex representatives from accessing the land.⁵² Eight members of Kitchenuhmaykoosib Inninuwug were held to be in contempt of court and each was sentenced to six months in jail.⁵³ Platinex then initiated an action against Ontario, seeking damages in

⁴⁴ *Mining Act 1*, *supra* note 1, ss 27(c), 46(2). See Ontario Ministry of Northern Development and Mines, "Finding a Balance", *supra* note 36 at 12.

⁴⁵ *Mining Act 1*, *supra* note 1, s 81(1).

⁴⁶ *Ibid*, ss 1(1) (see the interpretation of "mining rights"), 90(1). See Ontario Ministry of Northern Development and Mines, "Finding a Balance", *supra* note 36 at 12. A lease is a type of patent, as defined by *Mining Act 1*, *supra* note 1, s 1(1).

⁴⁷ *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 DLR (4th) 727 at paras 5–6, 11, [2006] 4 CNLR 152 [*Platinex Inc* 2006].

⁴⁸ *Ibid* at para 14.

⁴⁹ *Ibid* at para 139; *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* (2007), 29 CELR (3d) 116 at para 188, [2007] 3 CNLR 181 [*Platinex Inc* 2007a]

⁵⁰ *Ibid* at paras 163, 171–72.

⁵¹ *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* (2007), 29 CELR (3d) 191 at para 17, [2007] 3 CNLR 221.

⁵² *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2008] 2 CNLR 301 at para 12, 77 WCB (2d) 325 [*Platinex Inc* 2008].

⁵³ *Ibid* at paras 1, 54.

excess of \$70 million, complaining that its rights under the *Mining Act* had not been enforced.⁵⁴ Ontario eventually agreed to pay Platinex \$5 million to settle the dispute.⁵⁵

2.3.2 ARDOCH ALGONQUIN FIRST NATION AND FRONTENAC VENTURES CORPORATION

In *Frontenac Ventures Corp v Ardoch Algonquin First Nation*,⁵⁶ Frontenac Ventures Corporation acquired mineral rights under the pre-2009 *Mining Act* without consulting the Algonquin First Nations who asserted Aboriginal title to the land in question.⁵⁷ The Ardoch Algonquin First Nation protested against Frontenac's proposed exploration activities, which led to a blockade preventing Frontenac from accessing the lands in question.⁵⁸ Frontenac then sued the Ardoch Algonquin First Nation and other protesters for \$77 million.⁵⁹ Members of the Ardoch Algonquin First Nation were eventually held to be in contempt of court for violating an injunction prohibiting their blockade.⁶⁰ One such member, Robert Lovelace, who was the spokesman and chief negotiator for the Ardoch Algonquin First Nation, was sentenced to six months in jail and fined \$25,000.⁶¹ On the appeal of his sentence, Mr. Lovelace explained that Frontenac's proposed mineral exploration would violate Algonquin law, as the Ardoch Algonquin First Nation had imposed a moratorium on such exploration activities.⁶² In granting the appeal, the Ontario Court of Appeal observed that although Frontenac's proposed actions were legal under the *Mining Act*, the response of the Ardoch Algonquin First Nation was "grounded, at a minimum, in a respectable interpretation of s. 35 of the *Constitution Act, 1982*" and 20 years of jurisprudence from the Supreme Court of Canada obligating the Crown to engage in consultation and accommodation.⁶³ The Court of Appeal did not consider whether the *Mining Act* was unconstitutional because that issue was not before it; the First Nation appellants appealed only their sentences, not the injunction itself.⁶⁴

⁵⁴ James Thom, "Platinex launches \$70M lawsuit against province", *Wawatay News* (29 May 2008) online: *Wawatay News Online* <wawataynews.ca/archive/all/2008/5/29/Platinex-launches-70M-lawsuit-against-province_13366>.

⁵⁵ The settlement also entitled Platinex to "potential future royalty interest on the property" (Rick Garrick, "Platinex drops lawsuits, surrenders claims in KI lands", *Wawatay News* (29 December 2009) online: *Wawatay News Online* <wawataynews.ca/archive/all/2009/12/29/Platinex-drops-lawsuits-surrenders-claims-in-KI-lands_18804>).

⁵⁶ For a concise analysis of this case, see Ryan Newell, "Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law" (2012) 11:1 *Indigenous LJ* 41 at 55–59.

⁵⁷ *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 12–13, 91 OR (3d) 1.

⁵⁸ *Ibid* at paras 14–15.

⁵⁹ *Ibid* at para 16.

⁶⁰ *Ibid* at paras 21, 26.

⁶¹ *Ibid* at paras 10, 29.

⁶² *Ibid* at para 27.

⁶³ *Ibid* at paras 45, 62.

⁶⁴ *Ibid* at paras 6-7.

2.3.3 WAHGOSHIG FIRST NATION AND SOLID GOLD RESOURCES CORP

Although the third case did not involve blockades or jail time, the tension it exposed between the *Mining Act* and Aboriginal rights was no less stark. After Solid Gold Resources Corp. recorded claims within the traditional territory of Wahgoshig First Nation,⁶⁵ the Crown advised Solid Gold that it should consult with the First Nation.⁶⁶ By that point, however, Solid Gold was already entitled to engage in exploration activities pursuant to the *Mining Act*, and had no legal obligation to consult.⁶⁷ Thus, Solid Gold began exploratory drilling without engaging in any consultation.⁶⁸ Wahgoshig First Nation then obtained an interlocutory injunction halting Solid Gold's drilling while the parties, including the Crown, engaged in consultation, as required by the Supreme Court of Canada's section 35(1) jurisprudence.⁶⁹ In response, Solid Gold sued Ontario for \$100 million.⁷⁰

These three cases provide a vivid illustration of the chaos that ensued under the pre-2009 *Mining Act*, including blockades, jail sentences, law suits against the Ontario government, and Ontario taxpayers paying millions of dollars to settle such law suits. These disputes dealt with interlocutory injunctions; none progressed to the stage where the issue of the constitutionality of the *Mining Act* was squarely before a court. Thus, no such declaration of unconstitutionality was ever made. Even so, the complete lack of any consultation requirement in the pre-2009 *Mining Act* provides a strong *prima facie* indication that it was unconstitutional. Not surprisingly, then, the Ontario government announced its intention to amend the *Mining Act* shortly after the Ontario Court of Appeal released its decision in *Frontenac Ventures Corp v Ardoch Algonquin First Nation*.⁷¹ The amendments pertaining to Aboriginal consultation came into effect between November 1, 2012 and April 1, 2013.⁷²

3. ONTARIO'S SOLUTION

3.1 THE AMENDED *MINING ACT*

Under the new regime, prospectors can no longer acquire rights to engage in certain exploration activities by merely staking a claim and having it recorded. Instead, once a claim has been recorded, a proponent must submit an exploration plan prior to engaging in prescribed

⁶⁵ *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708 at paras 4, 7, 108 OR (3d) 647 [*Wahgoshig* 2011].

⁶⁶ *Ibid* at para 10.

⁶⁷ *Wahgoshig First Nation v Ontario*, 2012 ONSC 2323 at para 6, 112 OR (3d) 782 (Div Ct) [*Wahgoshig* 2012].

⁶⁸ *Wahgoshig* 2011, *supra* note 65 at paras 11, 57.

⁶⁹ *Ibid* at paras 1, 15, 60, 78.

⁷⁰ Ian Ross, "Gold junior miner takes on government", Northern Ontario Business (17 September 2012) online: Northern Ontario Business <northernontariobusiness.com/Industry-News/mining/2012/09/Gold-junior-miner-takes-on-government.aspx>.

⁷¹ Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 150.

⁷² *Exploration Regs*, *supra* note 4, ss 22–23.

exploration activities.⁷³ If the proponent's proposed exploration activities go beyond those prescribed for exploration plans, it must apply for and receive an exploration permit prior to engaging in those activities.⁷⁴

On receiving an exploration plan, the Director of Exploration⁷⁵ shall provide a copy to potentially affected Aboriginal communities.⁷⁶ Those communities will then have three weeks⁷⁷ to respond in writing with concerns about adverse impacts on their established or asserted Aboriginal or treaty rights.⁷⁸ If the Director receives any such response, he or she may direct the proponent to consult with the Aboriginal community.⁷⁹ In addition, the Director may require the proponent to obtain an exploration permit if necessary to address established or asserted Aboriginal or treaty rights.⁸⁰ As long as the Director does not direct the proponent to obtain an exploration permit, the proponent may engage in the activities set out in the exploration plan 30 days after the plan has been sent to the Aboriginal community.⁸¹

The process for exploration permits is similar to that described above for exploration plans. On receiving an application for an exploration permit, the Director shall provide a copy to potentially affected Aboriginal communities, who may then provide written comments to both the Director and the proponent about adverse impacts on their established or asserted Aboriginal or treaty rights.⁸² The Director may direct the proponent to consult with the

⁷³ *Mining Act 2*, *supra* note 3, s 78.2. See *Exploration Regs*, *supra* note 4, s 4 (the prescribed activities are set out in s 1 of Schedule 2 to *ibid*). These activities may be summarized as follows:

1. any geophysical surveys that require the use of a generator;
2. mechanized drilling with a drill weighing less than 150 kilograms;
3. line cutting, where the width of the lines does not exceed 1.5 metres;
4. mechanized surface stripping that does not exceed 100 square metres in specified areas; and,
5. pitting and trenching between one and three cubic metres.

⁷⁴ *Mining Act 2*, *supra* note 3, s 78.3. The prescribed activities are set out in s 1 of Schedule 3 to O Reg 308/12 (see *Exploration Regs*, *supra* note 4, s 11). These activities may be summarized as follows:

1. mechanized drilling with a drill weighing more than 150 kilograms;
2. mechanized surface stripping covering between 100 square metres and the threshold for advanced exploration;
3. line cutting, where the width of the lines cut is 1.5 metres or more; and,
4. pitting and trenching between three cubic metres and the threshold for advanced exploration.

⁷⁵ *Exploration Regs*, *supra* note 4, s 1(1).

⁷⁶ *Ibid*, s 7(1).

⁷⁷ Ontario Ministry of Northern Development and Mines, "MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration" (September 2012) at 7, online: <www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf> [Ontario Ministry of Northern Development and Mines, "Consultation and Arrangements"].

⁷⁸ *Exploration Regs*, *supra* note 4, s 7(2).

⁷⁹ *Ibid*, s 7(3).

⁸⁰ *Ibid*, s 18(1)(a).

⁸¹ *Ibid*, s 9(1)(b), s 1(1). Note that the only other reason why a proponent may not commence exploration activities after 30 days is if the proponent withdraws the exploration plan (*ibid*, s 9(1)(a)).

⁸² *Ibid*, s 14(1)-(2).

Aboriginal community.⁸³ Before issuing an exploration permit, the Director must be “satisfied that appropriate Aboriginal consultation has been carried out”.⁸⁴

3.2 FREE ENTRY REDUX?

Much of the scholarship to date has focused on whether Ontario’s new regime is still a free entry system. Some commentators answer this question in the affirmative,⁸⁵ while others answer it in the negative.⁸⁶ This section argues that the new regime only partially exhibits the first and second features of a free entry system set out above in section 2.2, but it still fully exhibits the third feature, according to which a claim holder’s right to stake a claim, and therefore also to acquire mineral rights within the claim area, was an exclusive right.⁸⁷

The first feature of a free entry system, which provides that prospectors may enter lands containing Crown-owned minerals to engage in prospecting,⁸⁸ is still at least partially present in the new mining regime. Prospectors may still enter the relevant lands⁸⁹ in northern Ontario and parts of southern Ontario in order to prospect for minerals and stake a claim using the ground staking system,⁹⁰ which involves physically marking the staked area.⁹¹ In other parts of southern Ontario, though, map staking must now be used to stake a claim,⁹² which does not involve physical entry onto the land being staked.⁹³

The second feature of a free entry system refers to a proponent’s right to engage in exploration activities upon merely staking and recording a claim.⁹⁴ The *Mining Act* still exhibits an aspect of this feature insofar as a proponent may still undertake certain low impact exploration activities after staking a claim without engaging in consultation, specifically those that fall outside the list of prescribed exploration activities that require an exploration plan

⁸³ *Ibid*, s 14(2).

⁸⁴ *Ibid*, s 15(1)(a).

⁸⁵ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 150. Panagos & Grant, *supra* note 15 at 418–19; Simons & Collins, *supra* note 15 at 183–85; Rachel Ariss & John Cutfeet, “Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law” (2011) 10 *Indigenous LJ* 1 at 18 [“KI FN”]; Pardy & Stoehr, *supra* note 15 at 2.

⁸⁶ See Smitheman, Pratt & Baerg, *supra* note 15 at 3.

⁸⁷ This section does not discuss the fourth feature of a free entry system identified in section 2.2, as the obtaining of a mining lease is not relevant to the analysis in section 4 regarding whether the duty to consult is triggered by recording a claim or by early exploration activities.

⁸⁸ See section 2.2, above.

⁸⁹ Granted, there are now more restrictions on the lands available to be staked (*Mining Act 2*, *supra* note 3, ss 29–30). Also, the Minister may withdraw from prospecting and staking lands that meet the criteria for “a site of Aboriginal cultural significance” (*ibid*, s 35(2)(a)). The significance of sites of Aboriginal cultural significance are discussed in section 4.1.3, below.

⁹⁰ *Ibid*, s 27; O Reg 43/11, s 21(2) [*Staking Regs*].

⁹¹ *Ibid*, ss 1, 2.

⁹² *Ibid*, s 21(1).

⁹³ *Ibid*, ss 24, 26(1).

⁹⁴ Ontario Ministry of Northern Development and Mines, “Finding a Balance”, *supra* note 36 at 12. See section 2.2, above.

or an exploration permit.⁹⁵ The Crown still has no discretion to decline to record a mining claim or require consultation as long as the claim complies with certain minimal technical requirements.⁹⁶ Once the claim has been recorded, the holder of a recorded claim may engage in any non-prescribed exploration activities – which include low impact activities such as pitting and trenching below a prescribed threshold – without acquiring permission from the Crown and hence without consultation occurring.⁹⁷ However, as discussed above in section 3.1, the Crown now has discretion to require a proponent to engage in consultation before undertaking prescribed exploration activities.

Ontario's new mining regime still exhibits the third feature of a free entry system, according to which the rights acquired by proponents are exclusive rights.⁹⁸ It is still the case that once a claim is recorded, no one else may stake a claim, or acquire mineral rights, within the claim area.⁹⁹

Given the continued existence of these aspects of a free entry system, we may wonder whether the amendments are sufficient to allow the Crown to comply with its constitutional duties. The next section examines this issue.

⁹⁵ *Mining Act 2*, *supra* note 3, s 78.2(1); *Exploration Regs*, *supra* note 4, Schedule 2, ss 1.4(ii), 1.5(i), 1.5(ii). Section 1.4(ii) provides that claim holders must submit an exploration plan prior to engaging in mechanized stripping if “two or more locations are to be stripped and the edges of a location where stripping is to be carried out are within 200 metres of the edges of another location, and the aggregate of the area of the locations to be stripped does not exceed 100 square metres.” The implication is that a claim holder may engage in mechanized stripping without submitting an exploration plan and hence without engaging in consultation as long as the locations to be stripped are more than 200 metres apart. Section 1.5(i) provides that claim holders must submit an exploration plan prior to digging a pit or trench between one to three cubic metres in volume. The implication is that a claim holder may dig a pit or trench less than one cubic metre in volume without submitting an exploration plan and hence without engaging in consultation. Section 1.5(ii) provides that claim holders must submit an exploration plan prior to digging two or more pits or trenches within 200 metres of each other and the combined volume of the pits or trenches is between one to three cubic metres. The implication is that a claim holder may dig pits or trenches that are more than 200 metres apart or that have a combined volume of less than one cubic metre, without submitting an exploration plan and hence without engaging in consultation.

⁹⁶ *Mining Act 2*, *supra* note 3, ss 27-28, 38, 44(1.1), 46(1). See also Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 152-53.

⁹⁷ Proponents who wish to engage in pitting and trenching beyond the prescribed amount must first submit an exploration plan (*Mining Act 2*, *supra* note 3, s 78.2(1)). See also *Exploration Regs*, *supra* note 4, Schedule 2, s 1.5 (the implication is that a proponent may engage in pitting and trenching of less than the prescribed amount without submitting an exploration plan or obtaining an exploration permit).

⁹⁸ See section 2.2, above.

⁹⁹ *Mining Act 2*, *supra* note 3, ss 27(c), 46(2).

4. THE PROBLEMS WITH ONTARIO'S SOLUTION

4.1 WILL ACTIVITIES PERMITTED BY THE AMENDED *MINING ACT* TRIGGER THE DUTY TO CONSULT REGARDING ABORIGINAL TITLE?

Scholars have critiqued the amended *Mining Act* because consultation is still not required prior to staking and recording a claim.¹⁰⁰ Merely noting the lack of consultation, though, is not sufficient to establish the full extent of the problem. It is also necessary to demonstrate that staking and recording a claim satisfies each step of the three-part test for triggering the duty to consult and accommodate. Ontario's position is that staking and recording activities do not satisfy all three of these requirements.¹⁰¹ If this is true, then the duty to consult is simply not triggered and the lack of consultation is not problematic.¹⁰² The remainder of section 4.1 argues that some areas within Ontario are subject to Aboriginal title claims, and staking and recording activities in these areas satisfy all three requirements of the triggering test.

4.1.1 FIRST REQUIREMENT: CROWN KNOWLEDGE OF AN ASSERTED RIGHT

According to the first requirement for triggering the duty to consult, the Crown must have real or constructive knowledge of an asserted right, such as Aboriginal title. The Crown has real knowledge of claimed rights that have been asserted in either litigation or negotiations, and it is deemed to have constructive knowledge when it is aware of evidence that supports a viable claim to the right.¹⁰³ If there are no Aboriginal title claims in Ontario, explicit or otherwise, then the Crown can have no duty to consult regarding Aboriginal title. Those responsible for amending the *Mining Act* may have assumed that all of Ontario is subject to historical land surrender treaties,¹⁰⁴ and so all Aboriginal title claims in the province have been extinguished. Such an assumption, however, is incorrect. Some First Nations in Ontario have never entered into a land surrender treaty, including the particular land surrender treaty that purports to cover their territory. These First Nations assert Aboriginal title to their traditional territory.¹⁰⁵ The First Nations involved in *Frontenac Ventures Corp v Ardoch Algonquin Nation*, discussed above in section 2.3.2, provide one example.¹⁰⁶ Other examples include the Walpole Island

¹⁰⁰ See e.g. Thériault, "Repenser les fondements", *supra* note 15 at 236–37; Simons & Collins, *supra* note 15 at 201; Ariss & Cutfeet, "KI FN", *supra* note 85 at 18.

¹⁰¹ Ontario Ministry of Northern Development and Mines, "Consultation and Arrangements", *supra* note 77 at 5.

¹⁰² See Smitheman, Pratt & Baerg, *supra* note 15 at 2; Thériault, "Repenser les fondements", *supra* note 15 at 236.

¹⁰³ Newman, *Revisiting*, *supra* note 19 at 39.

¹⁰⁴ See Michael Coyle, "Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future - Part I" (2005) 31 *Queen's LJ* 75 at 89.

¹⁰⁵ See *ibid* at 109, 115 and 89, n 34.

¹⁰⁶ For the latest update on the status of the Aboriginal title negotiation between the Algonquins of Ontario, the Government of Canada and the Government of Ontario, see Government of Ontario, "Algonquin Land Claims" (9 October 2014) online: Ontario <ontario.ca/aboriginal/algonquin-land-claim>.

(Bkejwanong) First Nation,¹⁰⁷ Wikwemikong Unceded Indian Reserve,¹⁰⁸ the Begetikong Anishnabe (Ojibways of Pic River First Nation),¹⁰⁹ Long Lake #58 First Nation,¹¹⁰ Bingwi Neyaashi Anishinaabek (Sand Point First Nation),¹¹¹ and Pays Plat First Nation.¹¹² In assessing this first requirement, a court will hold that the Crown has actual knowledge of claims filed in court or asserted in negotiations.¹¹³ Thus, to the extent that each of the above-noted First Nations has initiated litigation or simply informed the government of their assertion of Aboriginal title, they have satisfied the first requirement.

Moreover, the Métis in Ontario may have Aboriginal title claims that meet the first requirement. With the exception of the Métis in the Rainy River and Rainy Lake area, Métis collectives in Ontario have never executed land surrender treaties.¹¹⁴ It is arguably open to these remaining Métis communities in Ontario to assert Aboriginal title to their traditional territories.

Although some scholars have questioned the possibility of a successful Métis title claim,¹¹⁵ the Supreme Court of Canada's recent decision in *Tsilhqot'in Nation* undermines their concerns. Prior to *Tsilhqot'in Nation*, it may have seemed that the occupation exhibited by a highly mobile nation such as the Métis was not intensive enough to satisfy the sufficiency criterion within the test¹¹⁶ for Aboriginal title.¹¹⁷ In granting a declaration of Aboriginal title to the *Tsilhqot'in Nation*, though, the Court rejected the notion that only sites of intensive

¹⁰⁷ See Coyle, *supra* note 104 at 109, n 107; David McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario* (Waterloo: Wilfrid Laurier University Press, 1999) at 149.

¹⁰⁸ See *ibid* at 149.

¹⁰⁹ See "Pic River pursuing Aboriginal title claim", *Anishinabek News* (3 July 2014) online: <anishinabeknews.ca/2014/07/03/pic-river-pursing-aboriginal-title-claim>.

¹¹⁰ See Long Lake #58 First Nation, "About Us", online: <longlake58fn.ca/about-us.html>.

¹¹¹ The Government of Canada's website reports that Bingwi Neyaashi Anishinaabek (Sand Point First Nation) has an active Superior Court action (court file number CV-2006-141) for Aboriginal title against Canada and Ontario, online: Government of Canada <http://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/LitigationView.aspx>.

¹¹² The Government of Canada's website reports that Pays Plat First Nation has an active Superior Court action (court file number CV-2006-177) for Aboriginal title against Canada and Ontario, online: Government of Canada <http://sidait-atris.aadnc-aandc.gc.ca/atris_online/Content/LitigationView.aspx>.

¹¹³ Newman, *Revisiting*, *supra* note 19 at 39.

¹¹⁴ The "Halfbreeds" in the Rainy River and Rainy Lake area in Ontario signed an adhesion to *Treaty Three* on September 12, 1875: *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, 12 September 1875, Cat No Ci 72-0366, online: <aadnc-aandc.gc.ca/eng/1100100028675/1100100028679>.

¹¹⁵ See e.g. Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich Publishing Limited, 2012) at 400-403; Thomas Flanagan, "Metis Aboriginal Rights: Some Historical and Contemporary Problems" in Menno Boldt & J Anthony Long, with Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 230 at 237.

¹¹⁶ See *Tsilhqot'in Nation*, *supra* note 6 at paras 32, 37 for the test for Aboriginal title. The test includes three criteria: a) sufficiency of occupation, which refers to the intensity and frequency of the use of the land, b) continuity and c) exclusivity of occupation (*ibid* at para 37).

¹¹⁷ For example, the British Columbia Court of Appeal rejected the Aboriginal title claim of the *Tsilhqot'in Nation* on the grounds that they did not demonstrate intensive occupation of their land, given that they

occupation, such as villages or farms, could qualify for Aboriginal title.¹¹⁸ It held instead that the sufficiency criterion may be satisfied by the “regular use of territories for hunting, fishing, trapping and foraging,”¹¹⁹ all of which were traditional activities of the Métis prior to the assertion of Crown sovereignty. If the Crown is aware of evidence that the Métis in Ontario engaged in these activities, then after *Tsilhqot’in Nation*, it is arguable that the Crown will be deemed to have constructive knowledge of a Métis claim to Aboriginal title.¹²⁰

Of course, the Métis – as well as any other Aboriginal peoples – can satisfy the first requirement by simply informing the Crown that they assert a claim for Aboriginal title.¹²¹ In order to trigger the duty to consult, Aboriginal peoples, including both First Nations and the Métis, need not actually *prove* their Aboriginal title claim; an asserted but unproven Aboriginal title claim satisfies the first requirement for triggering the duty.¹²² As such, there are compelling reasons to conclude that those First Nations and the Métis Nation in Ontario who assert Aboriginal title can satisfy the first requirement for triggering the duty to consult.¹²³

4.1.2 SECOND REQUIREMENT: CROWN CONDUCT OR DECISION ADVERSELY IMPACTING THE ASSERTED RIGHT

The second requirement for triggering the duty to consult states that there must be some Crown conduct or decision that may adversely impact the asserted right. Those responsible for amending the *Mining Act* may have assumed that no Crown decision occurs at the staking and recording stage, and hence this requirement is not met. As discussed above in section 3.2, the amended *Mining Act* still exhibits this aspect of the second feature of a free entry system; that is, the Crown still has no discretion to refuse to record a properly staked claim. Without discretion, some argue, there is no decision.

This argument was advanced in *Ross River Dena Council v Yukon* by the Yukon government, who argued that the second requirement was not met in that case because under the free entry system in place in the Yukon, merely recording a mining claim involved no discretionary action by any government representative.¹²⁴ Similarly, in *Wahgoshig* 2012, discussed above in section 2.3.3, this argument found favour with the Ontario Divisional Court, which suggested

were a semi-nomadic people (*Tsilhqot’in Nation v British Columbia*, 2012 BCCA 285 at paras 215-16, (2012) 33 BCLR (5th) 260, rev’d *Tsilhqot’in Nation*, *supra* note 6).

¹¹⁸ *Tsilhqot’in Nation*, *supra* note 6 at para 42.

¹¹⁹ *Ibid.*

¹²⁰ The Crown’s knowledge of the Aboriginal title claim may be either real or constructive (*Rio Tinto Alcan*, *supra* note 7 at para 40). Newman explains that where “certain lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community, the Crown could be deemed to have constructive knowledge of an Aboriginal title claim in respect of such lands” (*Revisiting*, *supra* note 19 at 39).

¹²¹ As Newman notes, the Crown has actual knowledge of an Aboriginal title claim when the claim has been asserted in negotiations with the government (*Revisiting*, *supra* note 19 at 39).

¹²² *Tsilhqot’in Nation*, *supra* note 6 at para 80.

¹²³ For example, in *Ross River Dena* 2012, *supra* note 8 at para 28, the Yukon government conceded this point.

¹²⁴ *Ibid* at paras 27, 34.

that Solid Gold acquired rights under Ontario's *Mining Act* automatically, without any action on the part of the Crown, and so the second requirement was not met.¹²⁵

The problem with this argument is that it overlooks the trite but true principle that constitutional law trumps legislation. In other words, the government cannot circumvent its constitutional duties by legislating away its discretion. As some courts and commentators have put it, “[t]he Crown’s duty to consult cannot be boxed in by legislation.”¹²⁶ According to another popular judicial refrain, the duty to consult and accommodate “lies upstream” of any statutory regime.¹²⁷ Support for this view can be found in the Yukon Territory Court of Appeal’s decision in *Ross River Dena Council v Yukon*, for which the Supreme Court of Canada refused leave to appeal.¹²⁸ Here, the Court of Appeal held that staking and recording a claim on land subject to an Aboriginal title claim does in fact meet the second requirement.¹²⁹ As the Court of Appeal put it, instead of being an answer to the Aboriginal community’s complaint, the lack of Crown discretion in recording mineral claims was the source of the problem.¹³⁰

As such, the second requirement for triggering the duty to consult is clearly met by the act of recording a claim despite – or perhaps more properly because of – the continuing lack of Crown discretion.

4.1.3 THIRD REQUIREMENT: POTENTIAL ADVERSE IMPACT ON THE ASSERTED RIGHT

The third requirement states that there must be a causal connection between the proposed Crown conduct or decision and the potential adverse impact on the asserted right in order to trigger the duty to consult. Adverse impacts include not only physical impacts on the resource in question, but also high-level or management-type decisions that do not have an immediate physical impact on the resource, but that allow for negative impacts on the Aboriginal right in the future.¹³¹ The Yukon Territory Court of Appeal in *Ross River Dena v Yukon* considered this requirement to be uncontentious in the context of recording a mining claim.¹³² It cited the majority’s decision in *Delgamuukw v British Columbia* as support for the proposition that

¹²⁵ *Wahgoshig* 2012, *supra* note 67 at para 47.

¹²⁶ Woodward, *supra* note 7 at ch 5, paras 1321, 1400, citing *Ka’a’Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, [2007] 4 CNLR 102 at para 121. See also *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 177, 178 DLR (4th) 666.

¹²⁷ *Wahgoshig* 2011, *supra* note 65 at para 41. See also *West Moberly First Nations v British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247 at para 106, (2011) 18 BCLR (5th) 234 [*West Moberly*], leave to appeal to SCC refused [2011] SCCA no 399; *Ross River Dena Council v Government of Yukon*, 2011 YKSC 84 at paras 53-54, (2011) 343 DLR (4th) 545 [*Ross River Dena* 2011]; *Klahoose v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 at para 131, [2009] 1 CNLR 110; *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at para 19, (2005) 251 DLR (4th) 717.

¹²⁸ *Yukon v Ross River Dena Council*, [2013] SCCA no 106.

¹²⁹ *Ross River Dena* 2012, *supra* note 8 at para 38.

¹³⁰ *Ibid.*

¹³¹ *Rio Tinto Alcan*, *supra* note 7 at para 47.

¹³² *Ross River Dena* 2012, *supra* note 8 at para 32.

Aboriginal title includes mineral rights,¹³³ and then concluded that the Crown's transfer of mineral rights to a third party is inconsistent with Aboriginal title.¹³⁴ In other words, even if it is true that staking and recording a claim causes no significant physical disruption to the land, this action still creates an adverse impact by depriving Aboriginal title holders of the minerals to which they are entitled pursuant to their Aboriginal title.

The Yukon Territory Court of Appeal is correct on this point. In *Tsilhqot'in Nation v British Columbia*, the Supreme Court of Canada affirmed *Delgamuukw's* description of the content of Aboriginal title: Aboriginal title includes the right to exclusive use and occupation of the land for a variety of purposes, including non-traditional uses such as economic development, as long as the use is consistent with Aboriginal title's inherent limit.¹³⁵ According to this inherent limit, Aboriginal title lands cannot be used so as to deprive future generations of the Aboriginal group in question from maintaining their relationship with the land.¹³⁶ Subject to this inherent limit, Aboriginal titleholders are entitled to the economic fruits of the land,¹³⁷ which would naturally include minerals.

In contrast, in *Natural Resource Jurisdiction in Canada*, which was published before the Supreme Court of Canada refused leave to appeal in *Ross River Dena v Yukon*, Dwight Newman questions this proposition.¹³⁸ He points to the passage in *Delgamuukw* where Lamer CJ illustrates Aboriginal title's inherent limit by explaining that an Aboriginal group who proved title through use of the land as a hunting ground cannot use it in way that would prohibit hunting, for example by strip mining it.¹³⁹ From this, Newman concludes that the Aboriginal title of some Aboriginal peoples may not include subsurface mineral rights if exercising those rights would be irreconcilable with the activities on which the Aboriginal community bases its Aboriginal title claim.¹⁴⁰ The Supreme Court of Canada reaffirmed the existence of an inherent limit on Aboriginal title in *Tsilhqot'in Nation*;¹⁴¹ thus an assessment of the strength of Newman's argument is warranted.

The problem with Newman's line of reasoning is that Lamer CJ's example merely establishes that the Aboriginal community may not be entitled to access the minerals by certain methods; it does not establish that the Aboriginal community is not entitled to the minerals themselves. This distinction is important. The Aboriginal community may not be entitled to

¹³³ Lamer J, writing for the majority, concludes that "aboriginal title also encompass[es] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands" (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 122, 153 DLR (4th) 193 Lamer J [*Delgamuukw*]).

¹³⁴ *Ross River Dena* 2012, *supra* note 8 at para 32.

¹³⁵ *Tsilhqot'in Nation*, *supra* note 6 at para 67, citing *Delgamuukw*, *supra* note 133 at paras 117, 166.

¹³⁶ *Delgamuukw*, *supra* note 133 at paras 127-8.

¹³⁷ *Tsilhqot'in Nation*, *supra* note 6 at paras 2, 67, 70, 73.

¹³⁸ Dwight Newman, *Natural Resource Jurisdiction in Canada* (Markham, Ontario: LexisNexis Canada Inc, 2013) at 90-93 [Newman, *Natural Resource Jurisdiction*].

¹³⁹ *Ibid* at 92, citing *Delgamuukw*, *supra* note 133 at para 128.

¹⁴⁰ *Ibid*.

¹⁴¹ The Supreme Court of Canada reaffirmed that Aboriginal title land cannot be used in a way that is "irreconcilable with the ability of succeeding generations to benefit from the land" (*Tsilhqot'in Nation*, *supra* note 6 at para 74).

access the minerals until sustainable extraction technology is developed, but in the meantime, their entitlement to the actual minerals means that access to those same minerals by anyone else would amount to an adverse impact on Aboriginal title.

Another argument that supports the conclusion that Aboriginal title includes mineral rights proceeds from the assumption that one of the Crown's purposes in executing treaties was often to open up the land for mining.¹⁴² If Aboriginal title did not include mineral rights, then the purported extinguishment of Aboriginal title in these treaties would be superfluous.

If Aboriginal title includes rights to the minerals within Aboriginal title territory, then staking and recording a claim constitutes an adverse impact on Aboriginal title. As discussed above in section 3.2, Ontario's new mining regime still exhibits the third feature of a free entry system insofar as the effect of recording a mining claim is that all others are thereby prevented from acquiring mineral rights in the claim area. As a result, a mining claim held by a third party prevents an Aboriginal community from extracting minerals within its own Aboriginal title territory.¹⁴³ Thus the third requirement for triggering the duty to consult is met with respect to recording a claim on territory subject to an Aboriginal title claim.

Ontario may attempt to argue that although Aboriginal title claims meet the third requirement, the content of the duty to consult in these cases is so minimal that the *Mining Act's* new consultation provisions satisfy it. This argument relies on the principle that the content of the duty to consult exists on a spectrum.¹⁴⁴ If the duty falls at the low end of the spectrum, the Crown may only be required to "give notice, disclose information, and discuss any issues raised in response to the notice."¹⁴⁵ If the duty falls at the high end of the spectrum, the Crown must engage in what the Supreme Court of Canada calls "deep consultation".¹⁴⁶ The extent of the negative impact on the claimed right is one factor used in assessing where the duty falls on the spectrum.¹⁴⁷ Ontario's position may be that any negative impact flowing from recording a mining claim within Aboriginal title territory is minor, and thus satisfied by the *Mining Act's* new consultation provisions, given that consultation occurs shortly after the recording stage and prior to any extensive exploration. The chambers judge in the *Ross*

¹⁴² For the explanation that one of the Crown's purposes in entering *Treaty Three* was to allow for mineral extraction, see *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 at paras 209, 368, [2012] 1 CNLR 13; Woodward, *supra* note 7 at 248.1; Bruce A Clark, *Indian Title in Canada* (Toronto: The Carswell Co Limited, 1987) at 80; Tim E Holzkamm, "Ojibwa Knowledge of Minerals and Treaty #3" in William Cowan, ed, *Papers of the Nineteenth Algonquian Conference* (Ottawa: Carlton University, 1988) 89 at 92. For the explanation that one of the Crown's purposes in entering the Robinson Superior and the Robinson Huron Treaties was to allow for mineral extraction, see Barton, *supra* note 36 at 86; Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke & Co, 1971) at 16. For an example of a Hudson's Bay Company officer recommending that the Crown enter into a treaty covering *Treaty Nine* territory for the sake of opening the area to mineral prospecting, see Long, *Treaty No. 9*, *supra* note 10 at 40.

¹⁴³ For the conclusion that consultation must occur prior to the recording stage because recording results in the prospector acquiring significant rights in the land in question, see Thériault, "Repenser les fondements", *supra* note 15 at 236-37; Simons & Collins, *supra* note 15 at 201.

¹⁴⁴ *Haida Nation*, *supra* note 7 at para 43.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at para 44.

¹⁴⁷ *Ibid* at paras 43-44.

River Dena v Yukon case endorsed a similar position when he held that the Yukon government could meet its consultation obligations by simply giving notice to any affected Aboriginal communities after a claim had been recorded.¹⁴⁸

This argument is not persuasive for at least two reasons. First and foremost, the jurisprudence firmly establishes that in order for the duty to be met, consultation must occur *before* the right is adversely affected.¹⁴⁹ Second and similarly, the consultation that occurs after a claim has been recorded is not sufficient to address Aboriginal title claims. The Supreme Court of Canada has emphasized that consultation “cannot exclude accommodation at the outset.”¹⁵⁰ The Crown must be open to the possibility of rejecting a proposed project.¹⁵¹ Gordon Christie’s analogy of looters pillaging a house illustrates the normative force underlying this principle:¹⁵² consultation without any possibility of accommodation is akin to looters forcing a homeowner to help the looters plunder his or her own house.¹⁵³ Likewise, under the amended *Mining Act*, the Crown is unable to deregister a mining claim as part of the consultation process. If the Director is not satisfied with the Aboriginal consultation, he or she may of course decline to issue an exploration permit.¹⁵⁴ And if the Director believes that additional time is required to deal with Aboriginal or treaty issues, he or she may put a temporary hold on the process.¹⁵⁵ But neither the *Mining Act* nor its regulations provide for the deregistration of a mining claim as a result of consultation.¹⁵⁶

Ontario may also attempt to argue that the third requirement is not satisfied because the *Mining Act*’s new provisions allowing land to be withdrawn from staking are sufficient to prevent any adverse impact on Aboriginal title claims. For example, “a site of Aboriginal

¹⁴⁸ *Ross River Dena* 2011, *supra* note 127. See also *Ross River Dena* 2012, *supra* note 8 at para 5.

¹⁴⁹ See *Tsilhqot’in Nation*, *supra* note 6 at para 78; *Ross River Dena* 2012, *supra* note 8 at paras 18, 45.

¹⁵⁰ *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 52, [2014] SCJ no 48 [*Grassy Narrows*]. See also *Mikisew Cree*, *supra* note 32 at 54.

¹⁵¹ See Woodward, *supra* note 7 at ch 5, para 1891, citing *West Moberly*, *supra* note 127 at para 149; *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para 127, (2005) 39 BCLR (4th) 263 [*Homalco Indian Band*].

¹⁵² Christie, *supra* note 19 at 42. Christie articulates this analogy in the context of critically analyzing the significance of the lack of a veto on the part of Aboriginal nations during consultation. He likens Aboriginal nations to homeowners whose house is being systematically looted, and he argues that a duty to consult without a veto on the part of the Aboriginal nations is like telling the homeowners to consult with the looters about their pillaging of the house. I submit that the analogy also illuminates the significance of consultation without the possibility of accommodation.

¹⁵³ *Ibid.*

¹⁵⁴ *Exploration Regs*, *supra* note 4, s 15(1)(a).

¹⁵⁵ *Ibid.*, s 16(1)(1).

¹⁵⁶ It should be noted that the Minister may appoint an individual or a board to hear disputes related to Aboriginal consultation and that individual or board “shall make a report to the Minister setting out recommendations” (*Mining Act* 2, *supra* note 3, s 170.1(1)–(2)). In response, the Minister may “take any actions that he or she considers appropriate in the circumstances” (*ibid.*, s 170.1(3)(c)). This could conceivably include deregistering the claim. Even if it does, however, it is arguably still not sufficient to comply with the duty to consult jurisprudence, because deregistering a claim is still not a possibility from the outset of consultation. This remedy is not available until the issue has escalated beyond consultation to a hearing (see *Mining Act* 2, *supra* note 3, ss 170.1(1)–(2), 170.1(3)(c)).

cultural significance” may be withdrawn from staking if it meets the specified criteria.¹⁵⁷ The problem with this argument is that these sites are restricted to a surface area of 25 hectares or less.¹⁵⁸ Aboriginal title claims easily exceed this size.¹⁵⁹ Ontario may also attempt to rely on a new provision that prohibits any new mine from opening in the far north if there is no community-based land use plan for the area in question or if there is a community-based land use plan but the plan designates the area as being inconsistent with the opening of a new mine.¹⁶⁰ The problem with this option is that it is not available in the near north or the south,¹⁶¹ which is precisely where the traditional territories of many First Nations asserting Aboriginal title, as well as the Métis Nation, are located.¹⁶²

To illustrate the practical significance of the foregoing analysis, consider the example of the Ardoch Algonquin First Nation. The outcome of that dispute likely would have been substantially the same under the new mining regime. No amount of consultation after the recording of Frontenac’s claim would have resolved the dispute, given the moratorium on mineral exploration under Algonquin law combined with the Crown’s continuing inability to deregister Frontenac’s claim.

In summary, recording a claim in territory subject to an Aboriginal title claim satisfies all three requirements for triggering the duty to consult. Because the amended *Mining Act* still does not require consultation prior to recording a claim, the *Mining Act* is still unconstitutional.

4.2 WILL ACTIVITIES PERMITTED BY THE AMENDED *MINING ACT* TRIGGER THE DUTY TO CONSULT REGARDING TREATY RIGHTS?

4.2.1 OVERVIEW

As discussed above in section 3.2, Ontario’s new mining regime still partially exhibits the second feature of a free entry system insofar as proponents may still undertake low impact exploration activities prior to engaging in any consultation. When some of these exploration activities occur on land covered by certain treaties in Ontario, such as *Treaty Nine*, they satisfy all three requirements for triggering the duty to consult. The first requirement – that the Crown must have real or constructive knowledge of the asserted right – is met. As a party to the treaty, the Crown “will always have notice of its contents.”¹⁶³ The second requirement – that there must be some Crown conduct or decision at issue – is also met for the same reasons discussed above regarding Aboriginal title claims. This leaves only the third requirement, namely, that there must be a potential adverse impact on the asserted treaty right.

¹⁵⁷ *Ibid*, s 35(2)(a).

¹⁵⁸ O Reg 45/11, s 9.10(1).

¹⁵⁹ For example, according to the Government of Ontario’s website, the area of land covered by the Aboriginal title claim of the Algonquins of Ontario is 36,000 square kilometres (Ontario, “The Algonquin land claim”, online: <ontario.ca/aboriginal/algonquin-land-claim>).

¹⁶⁰ *Mining Act 2*, *supra* note 3, s 204(2).

¹⁶¹ See Simons & Collins, *supra* note 15 at 204.

¹⁶² For further discussion and critique of the *Far North Act*, 2010, SO 2010, c 18, in the context of Aboriginal rights issues, see *ibid* at 203-204; Pardy and Stoehr, *supra* note 15 at 8-9.

¹⁶³ *Mikisew Cree*, *supra* note 32 at para 34.

Ontario's position is that low impact exploration activities do not satisfy the third requirement because activities such as "walking a grid or taking grab samples" have no adverse impact on "treaty rights such as hunting, fishing, trapping, and gathering".¹⁶⁴ The notion that treaty rights consist merely of rights to hunt, fish, trap, or gather is based on a textual approach to treaty interpretation. In contrast, the First Nations signatories to *Treaty Nine*, for example, assert that their treaty rights include the right to exercise governance and jurisdiction over their territories based on the oral promises of the treaty. If this is correct, then even so-called low impact exploration activities constitute an adverse impact on these treaty rights, because many of these activities violate the laws of the *Treaty Nine* signatories, such as Anishinaabek laws. The remainder of this section argues in support of this conclusion; it examines both the textual approach and a more rigorous approach based on the parties' oral promises, and argues that the latter should prevail over the former. As a result, even low impact exploration activities adversely impact treaty rights in Ontario, and thus they trigger the duty to consult.

4.2.2 A TEXTUAL APPROACH

If Ontario's interpretation of the treaties is correct, low impact exploration activities have no adverse impact on treaty rights, because these activities are unlikely to have any significant effect on the continued existence of animals and fish. As long as treaty rights are nothing more than mere hunting and fishing rights, low impact exploration activities do not meet the third requirement and hence, the duty to consult is not triggered.¹⁶⁵

This understanding of the treaties is based on a purely textual interpretation. The written text of *Treaty Nine*, for example, states that the First Nations signatories agreed to "cede, release, surrender and yield up to the government of the Dominion of Canada...all their rights titles and privileges whatsoever, to the lands" specified in the treaty.¹⁶⁶ The written text also states that the First Nations retain the right to hunt over all of the surrendered territory, but this right is subject to what is known as a 'taking up' provision, according to which the Crown can take up land "for settlement, mining, lumbering, trading or other purposes."¹⁶⁷

The motion judge's interpretation of *Treaty Nine* in *Platinex Inc 2007a* illustrates the textual approach.¹⁶⁸ He referred to the written words of the treaty¹⁶⁹ and described the First

¹⁶⁴ Ontario Ministry of Northern Development and Mines, "Consultation and Arrangements", *supra* note 77 at 5.

¹⁶⁵ For a similar line of reasoning, see *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31 at paras 88-89, [2015] SJ no 151, where the Saskatchewan Court of Appeal held that treaty rights under *Treaty Ten* are mere rights to hunt and fish (as opposed to rights of governance and jurisdiction over the land) and thus issuing an exploration permit did not meet the third requirement for triggering the duty to consult because the permit only granted an inchoate interest in the minerals and did not authorize the proponent to enter onto the land.

¹⁶⁶ *The James Bay Treaty - Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930*, July 1930, Cat No: Ci 72-0964, online: Aboriginal Affairs and Northern Development Canada <aadnc-aandc.gc.ca/eng/1100100028863/1100100028864> [*Treaty Nine*].

¹⁶⁷ *Ibid.*

¹⁶⁸ The provinces' approach also epitomizes the textual approach: See Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provision" (2001-2002) 27 *Queen's LJ* 1 at 6 [Imai, "Treaty Lands"].

¹⁶⁹ *Platinex Inc 2007a*, *supra* note 49 at para 102.

Nations' rights as "traditional harvesting rights (hunting, fishing and trapping), subject to the rights of the Crown, which are also described in the treaty and which include the right to take up land for mining and other purposes."¹⁷⁰

4.2.3 A MORE RIGOROUS APPROACH

The Supreme Court of Canada has consistently rejected a one-sided interpretation of the treaties that recognizes only the written text. Instead, "the oral promises made when the treaty was agreed to are as much a part of the treaty as the written words."¹⁷¹ This means that extrinsic evidence of the oral promises made, as well as the historical, political and cultural context of the treaty, is admissible even when the text of the treaty is unambiguous on its face.¹⁷² Writing for the majority in *R v Badger*, Cory J explains the rationale underlying this more rigorous approach:

[W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.... The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.¹⁷³

In the case of treaties concluded with Indigenous nations who neither spoke nor read English, a more rigorous approach includes an examination of the oral promises made to the Indigenous nations in their own language, as these promises are more likely to reflect the common intention of the parties, which is the guiding principle of treaty interpretation.¹⁷⁴

¹⁷⁰ *Ibid* at para 116. For a more recent decision that also employs a purely textual analysis of treaty rights in the context of the amended Mining Act and a claim for breach of the duty to consult, see *Wabauskang First Nation v Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424 at paras 212, 217, 324 OAC 341.

¹⁷¹ *R v Morris*, 2006 SCC 59 at para 24, [2006] 2 SCR 915 [*Morris*], citing *R v Marshall*, [1999] 3 SCR 456 at para 12, 177 DLR (4th) 513 [*Marshall* 1999].

¹⁷² *Marshall* 1999, *supra* note 171 at para 11. See also *R v Taylor and Williams* (1982), 34 OR (2d) 360 at 369, 62 CCC (2d) 227 (Ont CA); leave to appeal to SCC refused [1981] SCCA no 377; *Delgamuukw*, *supra* note 133 at para 87; *R v Sioui*, [1990] 1 SCR 1025 at 1045, SCJ no 48 [*Sioui*]; *Morris*, *supra* note 171 at para 18.

¹⁷³ *R v Badger*, [1996] 1 SCR 771 at para 52, 133 DLR (4th) 324 [*Badger*]; see also *Marshall* 1999, *supra* note 171 at para 14.

¹⁷⁴ *Sioui*, *supra* note 172 at 1069; *Marshall* 1999, *supra* note 171 at para 14, Binnie J, and at para 78, McLachlin J, dissenting (but not on this point); *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 24, 2 SCR 220, McLachlin CJ [*Marshall* and *Bernard*]; *Mikisew Cree*, *supra* note 32 at para 28.

What can we learn, then, from the relevant extrinsic evidence? Although overgeneralizations must be avoided, the comprehensive research completed by the Royal Commission on Aboriginal Peoples lends credibility to its conclusion that Aboriginal peoples had no intention of relinquishing sovereignty or surrendering title when executing treaties.¹⁷⁵ As the Commission explains, notions such as “extinguishment” and “surrender” are non-existent in many Indigenous cultures¹⁷⁶ and defy articulation in many Indigenous languages.¹⁷⁷ First Nations did not agree to surrender or extinguish their rights insofar as they did not even contemplate these concepts. Instead, First Nations assert that they agreed to share their land with the newcomers, as equals, and that neither would interfere with the other.¹⁷⁸

Treaty Nine is one instance of this phenomenon. Extrinsic evidence is necessary to its interpretation because it was recorded only in English, although its First Nations signatories did not speak, much less read, English.¹⁷⁹ In his exhaustively researched monograph on *Treaty Nine*, John Long demonstrates that the relevant extrinsic evidence supports the First Nations’ perspective on the meaning of this treaty.¹⁸⁰ For example, Long reproduces a passage written by Duncan Campbell Scott, a commissioner for *Treaty Nine*, in which Scott concedes that the First Nations could never have comprehended the surrender provision in the written text of

¹⁷⁵ Royal Commission on Aboriginal Peoples, *The Final Report of the Royal Commission on Aboriginal Peoples, Restructuring the Relationship: Volume 2 - Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996) at 40, online: Indian and Northern Affairs Canada <ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html> [Royal Commission].

¹⁷⁶ For an explanation of the Kitchenuhmaykoosib Inninuwug First Nation’s view that their land is not something that they can give away, see Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 47. Similarly, regarding the First Nation signatories to *Treaty Nine*, Imai explains that their “intentions for the treaties would have been informed by First Nation laws, which may not have characterized land, or rights to game and fish, as fungible commodities capable of being sold” (Imai, “Treaty Lands”, *supra* note 168 at 13).

¹⁷⁷ *Badger*, *supra* note 173 at 44. See Tracey Lindberg, “The Doctrine of Discovery in Canada” in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) 89 at 110-13. For an in-depth discussion of the Algonquian worldview regarding space (as opposed to the western concept of “land”), see James (sákéj) Youngblood Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18 *Dalhousie LJ* 196 at 216-224.

¹⁷⁸ Royal Commission, *supra* note 175 at 45. See also Henderson, *supra* note 177 at 219, 231-33; Felix Hoehn, *Reconciling Sovereignities: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 119-22; Leroy Little Bear, “Aboriginal Rights and the Canadian ‘Grundnorm’” in J Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) 243 at 247. For support for the conclusion that First Nations and the Crown agreed that neither would interfere with the other, see John Borrows’s account of the meaning of the Two Row Wampum, or Gus-Wen-Tah, including the explanation that the two boats represented in the wampum would travel together down the river, but neither nation would try to steer the other’s boat (John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 164).

¹⁷⁹ See Long, *Treaty No. 9*, *supra* note 10 at 329; Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 27.

¹⁸⁰ Long, *Treaty No. 9*, *supra* note 10 at chapter 23. For a similar discussion of the promises made to the First Nations signatories to *Treaty Nine*, including an account of the First Nations’ recollection of and perspective on the meaning of the treaty, see Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 23-28.

the treaty, and so the commissioners did not even try to explain this concept to them.¹⁸¹ The personal journal of another of the commissioners for *Treaty Nine*, D George MacMartin,¹⁸² is consistent with Scott's admission. It reveals that for many of the communities visited, the treaty commissioners characterized *Treaty Nine* as being about peace and friendship, rather than a surrender of land.¹⁸³ For example, according to MacMartin's journal, the commissioners told the First Nations at Moose Factory that "the King had sent his representatives to them to make a Treaty, that he wished them to be happy and prosperous and that if they entered into Treaty they would be protected."¹⁸⁴ The protection referred to here was from the incursions of non-Indigenous settlers, miners, loggers, and constables.¹⁸⁵ Long provides evidence that the treaty commissioners gave similar explanations at Osnaburgh, Fort Hope, Marten Falls, and Fort Albany.¹⁸⁶ Even when the First Nations questioned the concept of reserves, the Crown representatives still did not explain that the treaties were meant to effect a surrender of title to their land. For example, MacMartin gives this account of the discussion at Marten Falls: "When it was explained to them that they could hunt and fish as of old and they were not restricted as to territory, the Reserve merely being a home for them where no white man could interfere or trespass upon, that *the land was theirs forever*, they gladly accepted the situation and said they would settle the reserve question later on."¹⁸⁷ Not only did the commissioners not explain that the treaty would extinguish their title to the land, but they told the First Nations the precise opposite, namely, that their land "was theirs forever". Long documents similar promises made to other *Treaty Nine* signatories.¹⁸⁸

Based on this extrinsic evidence and these oral promises, the true nature of the agreement under *Treaty Nine* emerges. If the parties agreed that they would peacefully co-exist together and that the First Nations' land would be theirs forever, with no mention of surrender or extinguishment of their rights, then the actual right of the First Nations under *Treaty Nine* is the right to continue to govern themselves and their land, just as they always had, by exercising

¹⁸¹ Long, *Treaty No. 9*, *supra* note 10 at 333.

¹⁸² *Ibid* at 335, 114-15.

¹⁸³ See *ibid* at 335-37; see also John S Long, "How the Commissioners Explained Treaty Number Nine to the Ojibway and Cree in 1905" (2006) 98:1 Ontario History 1 at 27; Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 23.

¹⁸⁴ Long, *Treaty No. 9*, *supra* note 10 at 337.

¹⁸⁵ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 24. Imai explains that the First Nations signatories to *Treaty Nine* "entered into those negotiations to *preserve* their way of life, not to *extinguish* their rights to the land and their rights to hunt, trap and fish" ("Treaty Lands", *supra* note 168 at 13-14 [footnote omitted]). See also Patrick Macklem, "The Impact of Treaty Nine on Natural Resource Development in Northern Ontario" in Michael Asch, ed, *Aboriginal Title and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 97 at 127.

¹⁸⁶ Long, *Treaty No. 9*, *supra* note 10 at 336-37.

¹⁸⁷ See *ibid* at 349-50 [emphasis in Long's reproduction of the passage].

¹⁸⁸ *Ibid* at 338-40.

their own jurisdiction and by enforcing their own laws and legal traditions.¹⁸⁹ Indeed, this is how *Treaty Nine* First Nations view their treaty rights.¹⁹⁰

Given the foregoing, the motion judge's textual interpretation of *Treaty Nine* in *Platinex Inc* 2007a constitutes a legal error. He fails to refer to any of the treaty interpretation jurisprudence discussed above,¹⁹¹ much less the legal principles contained therein. Although he acknowledges, in long quotations, that he heard evidence of the Kitchenuhmaykoosib Inninuwug First Nation's perspective on their rights and responsibilities under the treaty, including their responsibilities to their land,¹⁹² he never acknowledges the possibility that this evidence may challenge a purely textual interpretation of the treaty. Instead, he assumes that the Kitchenuhmaykoosib Inninuwug affiants are muddled and confused, and concludes that the sum of the treaty's meaning is embodied in the English text:¹⁹³

[I]t appears that those affiants...may not fully appreciate the fundamental fact that all Aboriginal title and interest in the land was surrendered when Treaty Nine was signed. The right that remains is the right for KI to be consulted when there is a taking up of land that may have a harmful impact on the traditional harvesting rights, as described in the treaty.¹⁹⁴

The motion judge seems to rely on the Supreme Court of Canada's decision in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* as support for his strictly textual approach.¹⁹⁵ In *Mikisew Cree*, Binnie J, writing for the Court, held that the First Nations signatories to *Treaty Eight* – which, like *Treaty Nine*, contains a taking up clause – had nothing more than hunting and fishing rights that were subject to the Crown's right to take up land.¹⁹⁶ Far from having a right to exercise jurisdiction, the First Nations had a right to be consulted when the taking up process adversely affected their hunting rights.¹⁹⁷

Because this interpretation mirrors the text of *Treaty Eight*, some might assume that the Court in *Mikisew Cree* is advancing a purely textual approach. Nothing, however, could be further from the truth. Justice Binnie cites the passage from *Badger*, quoted above,¹⁹⁸ which underpins the more rigorous approach and rejects a strict, technical interpretation of the

¹⁸⁹ For an explanation of the understanding of the First Nation signatories to *Treaty Nine*, including the view that sharing the land with the newcomers did not mean ceding their own jurisdiction, see Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 27.

¹⁹⁰ Ariss and Cutfeet reproduce Sarah Beady's recollection that "[w]e were never told that our right to rule our people and land would be taken from us" (Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 26).

¹⁹¹ See *supra* notes 171–73 and accompanying text.

¹⁹² *Platinex Inc* 2007a, *supra* note 49 at paras 118–20.

¹⁹³ For an insightful critique of the motion judge's reasoning in *Platinex Inc* 2007a, including the recognition that he failed to apply the principles of treaty interpretation affirmed by the Supreme Court of Canada and thereby incorrectly focused on the text of the treaty, see Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 110–12; Ariss & Cutfeet, "KI FN", *supra* note 85 at 31–32.

¹⁹⁴ *Platinex Inc* 2007a, *supra* note 49 at para 148.

¹⁹⁵ *Ibid* at para 161.

¹⁹⁶ *Mikisew Cree*, *supra* note 32 at para 30.

¹⁹⁷ *Ibid* at paras 33–34.

¹⁹⁸ See the text accompanying note 173.

treaties.¹⁹⁹ He also purports to ground his interpretation of *Treaty Eight* in the First Nations' understanding of the treaty.²⁰⁰ The reasoning of *Mikisew Cree* does not suggest that all historical land surrender treaties must be interpreted as the Court in *Mikisew Cree* interpreted *Treaty Eight*.²⁰¹ On the contrary, *Mikisew Cree* affirms the guiding principle of treaty interpretation, namely, that the goal is to ascertain the common intention of the parties.²⁰² The common intention of the parties to one treaty cannot be ascertained by identifying the common intention of other parties to some other treaty.²⁰³ Thus, the common intention of the parties to *Treaty Eight*, as identified in *Mikisew Cree*, cannot be used to ascertain the common intention of the parties to *Treaty Nine*. For these reasons, the motion judge's reliance on *Mikisew Cree* in *Platinex Inc 2007a* to support a purely textual approach is unpersuasive.

If the treaty rights of the First Nations signatories to *Treaty Nine* include the right to govern their land according to their own laws, then the next question is whether low impact exploration activities adversely affect this right.²⁰⁴ To find the answer, we must consider First

¹⁹⁹ *Mikisew Cree*, *supra* note 32 at para 29.

²⁰⁰ Justice Binnie cites *Badger* (*supra* note 173 at para 57), which is also about *Treaty Eight*, in support of his conclusion that the First Nations signatories to *Treaty Eight* understood that the Crown would have a right to take up land under the treaty (*Mikisew Cree*, *supra* note 32 at para 25). The majority in *Badger*, in turn, purports to base this conclusion on the First Nation's oral history regarding *Treaty Eight*, although the majority also concedes that the First Nations' understanding was that most of the territory covered by *Treaty Eight* would remain available to them for hunting, fishing, and trapping (*Badger*, *supra* note 173 para 57).

²⁰¹ Some might be tempted to conclude that the Supreme Court of Canada's decision in *Grassy Narrows* (*supra* note 150) establishes the principle that each of the historical land surrender treaties, including *Treaty Nine*, will henceforth be interpreted as protecting mere hunting and fishing rights subject to the Crown's right to take up land, given that the Court in *Grassy Narrows* assumed that the First Nation's rights under *Treaty Three* would be subject to the *Mikisew Cree* analysis, which in turn rests on the premise that First Nations' treaty rights to hunt and fish are subject to the Crown's right to take up land (paras 51-53). It must be borne in mind, however, that these statements in *Grassy Narrows* are obiter. The issues before the Court were solely threshold issues regarding Ontario's, as opposed to Canada's, authority to exercise rights under the treaty and to justifiably infringe First Nations' treaty rights (para 19). The substantive issue of the content of the First Nation's treaty rights was simply not considered; this issue will be the subject of the second phase of the trial, which had not commenced as of the release of *Grassy Narrows* (para 19).

²⁰² *Mikisew Cree*, *supra* note 32 at para 28.

²⁰³ For the argument that each treaty must be given its own interpretation based on its own particular context, see Imai, "Treaty Lands", *supra* note 168 at 25.

²⁰⁴ The analysis in this section and the next employs Anishinaabek laws, and as such, I wish to acknowledge my limitations in undertaking this task. In so doing, I am attempting to heed Hadley Friedland's advice that "[l]egal scholars engaging with Indigenous legal traditions should do so reflexively, conscious of the limits and contributions possible in their role and of their work within the broader communities of practice they engage with" (Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 *Indigenous LJ* 1 at 7 [Friedland, "Reflective Frameworks"]). I wish to acknowledge that I am not fluent in Anishinaabemowin, which is an important limitation given the fundamental interconnection between Indigenous languages and Indigenous jurisprudences, as well as the challenges in attempting to discuss certain Indigenous laws in written English (see Ariss & Cutfeet, "KI FN", *supra* note 85 at 5-7; Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 43). Also, I am a citizen of the Métis Nation of Ontario, but not of any Anishinaabe nation. I have family members and ancestors who are and were members of the Métis community around Dryden and Wabigoon, Ontario,

Nations' laws about land.²⁰⁵ In his article, "Aki, Anishinaabek, kaye tahsh Crown," Wapshkaa Ma'iingan (Aaron Mills) generously shares an Anishinaabe legal perspective on land. Mills explains that for the Anishinaabek, plants, animals, and even rocks have legal personality.²⁰⁶ Not only are plants, animals, and rocks alive, they exercise agency and volition.²⁰⁷ Thus, as John Borrows explains, "Using rocks without their consent could be considered akin to using another person against his or her will."²⁰⁸ This does not mean that we can never use rocks, for example, under Anishinaabe law.²⁰⁹ But it does mean that we must first obtain the rocks' permission to do so.²¹⁰ This may require engaging in certain ceremonies,²¹¹ following certain Anishinaabek legal protocols,²¹² and complying with Anishinaabek legal principles.²¹³ Some rocks and some land, however, may never be available for certain uses, no matter how much we might wish it were otherwise.²¹⁴ As Mills so articulately puts it when describing the sacred territory at the summit of Mount McKay in Thunder Bay, Ontario, "[t]he world's largest

and I have family members and ancestors who are and were members of Waabigoniw Saaga'iganiw Anishinaabeg (the Wabigoon Lake Ojibway Nation), which is within *Treaty Three* territory in Ontario. I actively seek to identify and implement Métis and Anishinaabek laws and normative principles in my life, but I still have much to learn. As a consequence, I rely on publicly available resources that have been published by members of Anishinaabek communities. As Friedland notes, although "publically available published resources may raise serious questions of bias and legitimacy", the work of community members, depending on their involvement with their community, may be considered more legitimate than that of academics not affiliated with the Aboriginal community in question (*ibid* at 12). Of course, I remain responsible for any misinterpretations of these works.

²⁰⁵ I am cognizant that my discussion of Anishinaabe law, being as brief as it is, may suffer from the problems identified by Val Napoleon; she notes that oversimplified descriptions of Indigenous legal traditions can make them appear "disconnected and bizarre" or "completely and hopelessly stuck in the past" (Val Napoleon, *Ayook: Gitksan Legal Order; Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished], cited in Friedland, "Reflective Frameworks", *supra* note 219 at 14). To mitigate these potential issues, I encourage readers experiencing the doubts identified by Napoleon to acquire a more comprehensive understanding of Anishinaabek laws by engaging with Anishinaabek communities, participating in Anishinaabek ceremonies and working with Anishinaabek legal principles and protocols. The following works illustrate the application of Anishinaabek laws, and thus readers may find them helpful in this regard: John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at ch 1 (entitled "With or Without You: First Nations Law in Canada") & ch 2 (entitled "Living Between Water and Rocks: The Environment, First Nations, and Democracy") [Borrows, *Recovering Canada*].

²⁰⁶ Mills, *supra* note 19 at 116, 117, 116, nn 25–26.

²⁰⁷ See Mills, *ibid* at 116; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 245 [Borrows, *Canada's Indigenous Constitution*].

²⁰⁸ *Ibid*.

²⁰⁹ Mills, *supra* note 19 at 120.

²¹⁰ Borrows, *Canada's Indigenous Constitution*, *supra* note 207 at 245.

²¹¹ For an example of such a ceremony, see Borrows's account of the pipe ceremony (*ibid* at 245).

²¹² For an example of such a protocol, see Mills's account of the practice of offering *Asseyma* (tobacco) (*supra* note 19 at 127–29).

²¹³ For examples of such principles, see *ibid* at 120–29 (discussion of the Anishinaabek law of necessity and continuity and the Anishinaabek law of respect). For an illustration of the ways in which Anishinaabek laws can influence environmental decision-making, see Borrows, *Recovering Canada*, *supra* note 205 at ch 2.

²¹⁴ See Mills, *supra* note 19 at 120; Borrows, *Canada's Indigenous Constitution*, *supra* note 207 at 245.

supply of pricelessness could be discovered at the peak of Mount McKay, and still it would have to be left undeveloped.”²¹⁵

Rachel Ariss and John Cutfeet describe similar laws belonging to the Kitchenuhmaykoosib Inninuwig First Nation,²¹⁶ which is an Oji-Cree nation and whose laws constitute a subgroup of Anishinaabe law.²¹⁷ The Kitchenuhmaykoosib Inninuwig First Nation uses the term *Kanawayandan D'aaki* to describe their sacred and legal duty to protect and keep their land.²¹⁸ Connected to this duty is a conception of land that differs markedly from the western view. For the Kitchenuhmaykoosib Inninuwig, land is not an object.²¹⁹ It is not a resource to be exploited or even managed.²²⁰ Land is something that people have a relationship with, and *Kanawayandan D'aaki* ensures that that relationship is a good one.²²¹

Given the foregoing, even some low impact exploration activities satisfy the third requirement for triggering the duty to consult First Nations who have signed *Treaty Nine*. As discussed in section 3.2 above, the new mining regime still partially exhibits the second feature of a free entry system insofar as a proponent may still conduct certain exploration activities without submitting an exploration plan and hence without engaging in consultation. Prior to conducting any consultation, proponents may dig as many pits and trenches as they like, as long as these pits and trenches are more than 200 metres apart and the volume of rocks removed from each one is no greater than one cubic metre.²²² In other words, proponents may remove and use rocks without complying with the Anishinaabek legal principles and protocols discussed above, and without ensuring that their actions comply with *Kanawayandan D'aaki*. This violation of Anishinaabek land use laws breaches the First Nations' treaty right to exercise governance and jurisdiction over their land, and as such these so-called low impact exploration activities adversely impact the treaty right.

As a result, even if Ontario's amended mining regime had been in effect, it would not have prevented a dispute from arising between Kitchenuhmaykoosib Inninuwig First Nation and Platinex. Platinex would still be statutorily entitled to treat the land as a commodity instead of as a relation by engaging in so-called low impact exploration activities without first undertaking the appropriate Anishinaabek legal protocols or procedures and without complying with *Kanawayandan D'aaki*.

²¹⁵ See Mills, *supra* note 19 at 120.

²¹⁶ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 43–48.

²¹⁷ For an explanation of the relationship between Anishinaabe law and the law of Kitchenuhmaykoosib Inninuwig, including confirmation that Kitchenuhmaykoosib Inninuwig's sacred law, *Kanawayandan D'aaki*, includes the Anishinaabe legal principles discussed in the above paragraph, see Mills, *supra* note 19 at 113, n 14.

²¹⁸ See Ariss with Cutfeet, *Keeping the Land*, *supra* note 15 at 43–44. Ariss and Cutfeet recognize the inherent connection between an Indigenous language and that community's laws, as well as the challenges in discussing Kitchenuhmaykoosib Inninuwig's laws in translation (*ibid* at 43).

²¹⁹ *Ibid* at 45.

²²⁰ *Ibid*.

²²¹ *Ibid*. For a similar account of the Haudenosaunee legal obligation to protect the land, see Newell, *supra* note 56 at 61.

²²² *Exploration Regs*, *supra* note 4, Schedule 2, s 1(5)(ii).

This does not mean that mining in Ontario is impossible. Many First Nations are not opposed to resource development.²²³ But they want it to happen in a way that respects their most cherished beliefs and laws.²²⁴ The *Mining Act* is still unconstitutional insofar as it allows proponents to adversely impact First Nations' treaty rights to implement their laws throughout their territories without requiring any consultation before this adverse impact occurs. As discussed above, in order to satisfy the duty to consult, consultation must occur prior to any adverse impact on the treaty right.²²⁵

4.3 THE SUFFICIENCY OF CONSULTATION UNDER ANISHINAABE LAW AND CANADIAN LAW

Thus far, this paper has considered whether mining activities trigger a duty to consult before consultation is required under Ontario's amended regime. We can also assess the actual procedure for consultation within the new mining regime, particularly now that the regulations on Aboriginal consultation are available. This section argues that these regulations run afoul of both Anishinaabe law and Canadian law by failing to allow sufficient time for Anishinaabek decision-making processes.²²⁶

A long line of Supreme Court of Canada decisions consistently confirms the important role that Aboriginal perspectives play in establishing the existence of Aboriginal rights²²⁷ and in interpreting treaty rights.²²⁸ These perspectives include the laws and legal traditions of the relevant Indigenous nation.²²⁹ Indigenous laws and legal systems are the foundation for the "practices, traditions and customs"²³⁰ that are protected as Aboriginal rights.²³¹ As John Borrows puts it, "Indigenous legal traditions are inextricably intertwined with the present-day Aboriginal customs, practices, and traditions that are now recognized and affirmed in section 35(1) of the *Constitution Act, 1982*."²³²

²²³ See Mills, *supra* note 19 at 144, 161-62; *Platinex Inc 2007a*, *supra* note 49 at para 25; Newman, *Natural Resource Jurisdiction*, *supra* note 138 at 31.

²²⁴ For an explanation of the motivation underlying Kitchenuhmaykoosib Inninuwug's actions in terms of their desire to fulfill their obligations under their own law as opposed to a desire for "a better deal", see Mills, *supra* note 19 at 159. See also Ariss and Cutfeet, "KI FN", *supra* note 85 at 3; Newell, *supra* note 56 at 61.

²²⁵ See *Ross River Dena 2011*, *supra* note 127 and accompanying text.

²²⁶ Thériault makes a similar point regarding Quebec's environmental assessment process, namely that it neither considers Aboriginal knowledge nor respects Aboriginal methods of decision-making (Thériault, "Repenser les fondements", *supra* note 15 at 241-42).

²²⁷ See *R v Van der Peet*, [1996] 2 SCR 507 at para 49, 137 DLR (4th) 289 [*Van der Peet*]; *Delgamuukw*, *supra* note 133 at paras 81-82, 112, 147-48; *Marshall and Bernard*, *supra* note 174 at paras 45-48, 50, 69; *Tsilhqot'in Nation*, *supra* note 6 at paras 14, 32, 34, 35, 41, 44, 49, 54.

²²⁸ *R v Nowegijick*, [1983] 1 SCR 29, at 36, 144 DLR (3d) 193; *Sioui*, *supra* note 172 at 1068-69, 113; *Badger*, *supra* note 173 at paras 52-54; *Marshall 1999*, *supra* note 171 at paras 12, 19, McLachlin J dissenting (but not on this point) at para 78.

²²⁹ *Delgamuukw*, *supra* note 133 at paras 147-48; *Tsilhqot'in Nation*, *supra* note 6 at para 35.

²³⁰ *Van der Peet*, *supra* note 227 at para 44.

²³¹ *Ibid* at paras 40, 42; *Mitchell v MNR*, 2001 SCC 33 at para 10, [2001] 1 SCR 911. See Karen Drake, "R v Hirsekorn: Are Métis Rights a Constitutional Myth?", Case Comment, (2013) 92:1 Can Bar Rev 149 at 166.

²³² Borrows, *Canada's Indigenous Constitution*, *supra* note 207 at 11.

Indigenous laws should inform not only substantive Aboriginal rights but also the duty to consult,²³³ which is a procedural obligation,²³⁴ given that the rationale underlying the duty to consult is the promotion of reconciliation between the Crown and Aboriginal peoples.²³⁵ The Supreme Court of Canada has held that recognizing Aboriginal legal perspectives is one way to promote reconciliation.²³⁶ Thus, the recognition of Indigenous laws within consultation procedures would advance the goal of achieving reconciliation. Hence, it is not surprising that Ontario's draft consultation guidelines acknowledge the benefit of following Indigenous protocols when engaging in consultation.²³⁷

The *Mining Act's* consultation procedures conflict with at least two interrelated Anishinaabek legal principles: (i) the obligation to wait, make observations and gather information prior to making a decision, and (ii) the obligation to engage in collective, rather than individual, decision-making.²³⁸ John Borrows identifies these principles operating within an 1838 account of a man from French River, Ontario, who was said to have become a windigo.²³⁹ The account was recorded by William Jarvis, Superintendent of Indian Affairs at the time.²⁴⁰ Over a period of weeks, the man in question gradually exhibited signs of becoming a windigo. Eventually, the Anishinaabek people, along with this man, set out to join other members of their community, walking through deep snow to get to them. They then formed a council to decide what to do. Jarvis emphasizes that the decision reached was "the deliberate act of this tribe *in council*."²⁴¹

Borrows notes that in this account, the group did not take action right away; even though the man was becoming dangerous, the group waited for two or three weeks, continuing to collect information by observing his behavior, before acting.²⁴² The willingness to wait in order to continue to collect information in the face of growing danger illustrates the strength of this obligation. Borrows also notes that collective decision-making must have been important to

²³³ For compelling arguments in favour of recognizing Indigenous laws within the Canadian legal system, see Borrows, *Canada's Indigenous Constitution*, *supra* note 207 at 10–11.

²³⁴ The Supreme Court of Canada affirms that the duty to consult is a procedural duty in *Tsilhqot'in Nation*, *supra* note 6 at para 80.

²³⁵ *Haida Nation*, *supra* note 7 at para 32; *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 28, [2013] 2 SCR 227. In fact, the reconciliation of Aboriginal and non-Aboriginal peoples is the "fundamental objective of the modern law of aboriginal and treaty rights" (*Mikisew Cree*, *supra* note 32 at para 1).

²³⁶ *Van der Peet*, *supra* note 227 at para 49.

²³⁷ See Ontario, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights* (June 2006) at 16, online: <ontario.ca/government/draft-guidelines-ministries-consultation-aboriginal-peoples-related-aboriginal>. See also Newman, *Revisiting*, *supra* note 19 at 133.

²³⁸ Borrows, *Canada's Indigenous Constitution*, *supra* note 207 at 82–83.

²³⁹ *Ibid* at 81–82. Hadley Friedland explains that the windigo, or *wetiko*, exists within the oral traditions of many Indigenous societies, including Anishinaabek societies. Although the windigo is most commonly known as a cannibal, Friedland argues that it is actually a complex intellectual concept that should be understood as a legal concept (Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] at 21–22 [Friedland, *The Wetiko*]).

²⁴⁰ Borrows, *Canada's Indigenous Constitution*, *supra* note 207 at 81.

²⁴¹ *Ibid* at 82 [emphasis added].

²⁴² *Ibid* at 82.

these Anishinaabek people. They travelled through heavy snow in order to join the rest of their group before making a decision, instead of simply taking action individually.²⁴³

The consultation protocol developed by Kitchenuhmaykoosib Inninuwug First Nation exhibits both of these legal principles. The first step of their protocol requires a proponent to provide information about a proposed development to the Chief and Council. At the second step, the proponent conducts a public presentation for community members. The third step allows individuals who would be particularly affected by the development to consult directly with the proponent. At the fourth step, the community discusses what type of mitigation or accommodation would be acceptable. The fifth step is a community referendum on whether to approve the development and the sixth step involves written communication of the community's decision to the proponent.²⁴⁴ Two features of this process stand out. First, gathering information is a key focus. Second, unlike a representative democracy, the Chief and Council do not have the authority to make unilateral decisions, at least not about land development.²⁴⁵ On this subject, the only legitimate decision is a collective one.²⁴⁶

Collective decision-making takes time, more time than unilateral, individual decision-making. It requires organizing and attending meetings, educating community members, and participating in discussions. As stated in section 3.1, Aboriginal communities have only three weeks to respond to an exploration plan. The probability that an Anishinaabe community will be able to collect all relevant information from both the proponent and its own members, retain experts, obtain reports from their experts, hold a community meeting, and then come to a decision together within three weeks is extremely low. This is especially so in the light of the challenges facing Aboriginal communities, such as a lack of resources, capacity, funding, and the education and training needed to critically analyze technical documents.²⁴⁷ Moreover, since the duty to consult exploded onto the legal scene after the *Haida Nation* decision in 2004, Aboriginal communities have been inundated with an unwieldy volume of consultation notices.²⁴⁸ As such, even the 50-day timeframe to respond to exploration permits²⁴⁹ is woefully inadequate without substantial funding and support for capacity-building. The British Columbia Supreme Court recognized this issue in the *Tsilhqot'in* trial decision:

It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate

²⁴³ *Ibid.* For a similar explanation of the significance of this story, see John Borrows (Kegeedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 226.

²⁴⁴ Ariss & Cutfeet, "KI FN", *supra* note 85 at 17–18. *Platinex Inc 2007a*, *supra* note 49 at paras 24–26.

²⁴⁵ *Platinex Inc 2007a*, *supra* note 49 at para 27.

²⁴⁶ Long's account of the *Treaty Nine* discussions in 1905 at Osaburgh confirms this principle. Chief Missabay would not agree to terms put to him on the spot. Instead, he and his fellow Ojibwe representatives left and then returned the next day, after speaking with their people. As Long puts it: "Their 'chiefs' had influence but no real authority" (*supra* note 10 at 339–40).

²⁴⁷ As Ritchie puts it, "It is well known that the majority of First Nation communities are lacking in resources of every kind" (*supra* note 19 at 420).

²⁴⁸ See Ritchie, *ibid* at 421.

²⁴⁹ *Exploration Regs*, *supra* note 4, s 15(1).

resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.²⁵⁰

It is not surprising, then, that one of the Union of Ontario Indians' primary concerns about the *Mining Act* amendments was the unreasonable timeframes,²⁵¹ compounded by the lack of support, funding, or resources for capacity building.²⁵²

Ontario may argue that Anishinaabek peoples who do not have sufficient time to engage in collective decision-making should simply appoint someone to make a unilateral decision about each exploration plan and permit. Such a proposed solution would be untenable because, aside from the lack of resources and funding, this type of unilateral decision-making would be a violation of Anishinaabek law. As Val Napoleon notes, "Indigenous peoples were and are reasonable and reasoning peoples".²⁵³ A reasonable assumption is that reasonable people do not willingly violate their own laws. Instead, activities covered by exploration plans and exploration permits will go ahead without Aboriginal consultation. As indicated in section 3.1, if an Aboriginal community fails to respond to an exploration plan, the proponent is automatically entitled to undertake the exploration plan activities 30 days after the plan was sent to the Aboriginal community.²⁵⁴ Similarly, in the case of applications for exploration permits, Ontario's position is that a "[l]ack of response [from Aboriginal communities] will not prevent a decision by the [Ministry of Northern Development and Mines (MNDM)]."²⁵⁵ Instead, the MNDM will base its decision on its own understanding of the Aboriginal or treaty rights at issue.²⁵⁶ The failure to account for the existence of Aboriginal title claims in Ontario, as well as the strictly textual interpretation of treaty rights implicit within the *Mining Act* amendments,²⁵⁷ does not bode well for the MNDM's ability to accurately assess Aboriginal and treaty rights. The result will be inadequate consultation with Anishinaabek communities.

For these reasons, the outcome of the dispute between Wahgoshig First Nation and Solid Gold would likely have been no different under Ontario's new mining regime.²⁵⁸ Solid Gold would still be able to acquire statutory rights to minerals long before Wahgoshig First Nation, an Anishinaabe and Cree nation, had the opportunity to implement the Anishinaabek legal

²⁵⁰ *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 1138, [2008] 1 CNLR 112. See also Ritchie, *supra* note 19 at 421-22.

²⁵¹ Union of Ontario Indians, Lands & Resources Department, "Anishinaabek Minerals and Mining: Community Engagement Sessions Report 2011" at 7, online: <anishinabek.ca/download/MiningReport.pdf>; "Below the Surface: Anishinabek Mining Strategy" (15 January 2009) at 12, online: Anishinabek Nation <anishinabek.ca/download/Mining%20Final%20Report.pdf> ["Below the Surface"].

²⁵² Union of Ontario Indians, Land & Resources Department, *supra* note 251 at 5-6; "Below the Surface", *supra* note 251 at 9.

²⁵³ Val Napoleon, "Thinking about Indigenous Legal Orders" in René Provost, Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht, Netherlands: Springer, 2013) 229 at 232, citing Friedland, *The Wetiko*, *supra* note 239 at 45).

²⁵⁴ *Exploration Regs*, *supra* note 4, s 9(1).

²⁵⁵ Ontario Ministry of Northern Development and Mines, "Consultation and Arrangements", *supra* note 77 at 8.

²⁵⁶ *Ibid.*

²⁵⁷ See sections 4.1 and 4.2.2.

²⁵⁸ See section 2.3.3, above.

obligations to wait, make observations, and gather information prior to decision-making, and to engage in collective decision-making.

The obligation to provide First Nations with a sufficient amount of time to engage in consultation is a principle not only of Anishinaabe law but also of Canadian law. In *Moulton Contracting Ltd v British Columbia*, the British Columbia Supreme Court held that the province's level of consultation with the Fort Nelson First Nation regarding logging licences failed to uphold the honour of the Crown.²⁵⁹ The level of consultation required in this case was at the low end of the spectrum.²⁶⁰ Nonetheless, the Court held that the province had an obligation to give the Fort Nelson First Nation sufficient time to respond to its notice about the proposed logging licences.²⁶¹ In this case, the province waited more than three months before proceeding without the First Nation's written response.²⁶² If three months is not enough time to uphold the honour of the Crown, three weeks is surely inadequate. Similarly, in *Dene Tha' First Nation v Canada (Minister of Environment)*, the Federal Court held that the Crown breached its duty to consult on the ground that, among other things, the amount of time given to the First Nation to respond to the consultation notice was too short.²⁶³ And in *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries)*, the British Columbia Supreme Court held that the Crown was not entitled to terminate consultation merely because the proponent was under time pressures to proceed with its proposed project.²⁶⁴ These precedents indicate that the *Mining Act's* timelines are too short to comply with the duty to consult.

5. CONCLUSION

Ontarians would do well to avoid the kinds of protests that have resulted from a lack of consultation, not to mention the consequent government liability that runs to tens of millions of dollars. It may seem like a laborious process, but getting the *Mining Act* right is worthwhile. The preceding analysis illustrates that mining claims within Aboriginal title territory should not be recorded in the absence of any Aboriginal consultation. Similarly, even low impact exploration activities cannot occur in at least some treaty territories in the absence of any Aboriginal consultation. Finally, consultation timelines must be longer. The preferred solution would be to reach agreements with Aboriginal communities about which areas are, and which are not, open for staking.²⁶⁵ But this will take time. In the meantime, consultation must occur at the very outset of the mining sequence and the timelines must be extended. Industry proponents may balk at this conclusion. The solution, though, is not to violate Aboriginal rights. After all, they are, or at least they are supposed to be, *constitutional* rights. Another

²⁵⁹ *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348 at para 293, [2014] 2 CNLR 240.

²⁶⁰ *Ibid* at paras 292, 296.

²⁶¹ *Ibid* at paras 296, 293.

²⁶² *Ibid* at paras 52, 62.

²⁶³ *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at para 116, [2007] 1 CNLR 1. For this characterization of the decision's ratio, see Woodward, *supra* note 7 at ch 5 at 73.

²⁶⁴ *Homalco Indian Band*, *supra* note 151 at para 108. For this characterization of the decision's ratio, see Woodward, *supra* note 7 at ch 5 at 97.

²⁶⁵ See Thériault, "Repenser les fondements", *supra* note 15 at 238. For example, First Nations have criticized the land use planning provisions of the *Far North Act* for giving the Minister and Cabinet the power to override decisions made by First Nations. See Simons & Collins, *supra* note 15 at 203-204.

round of amendments is required, but the resulting social and political stability will justify the effort.