December 9, 2011

Supreme Court of Yukon Considers Duty to Consult and "Free Entry" Mining System

On November 15, 2011, the Supreme Court of Yukon released its decision in *Ross River Dena Council v. Government of Yukon,* 2011 YKSC 84.[1] The case is important as it is the first court decision to consider the issue of whether the Government of Yukon has a duty to consult with First Nations when recording quartz mineral claims under the *Quartz Mining Act* (the "**Act**"). It is also somewhat unique as the recording of a quartz mineral claim by the Mining Recorder is not a discretionary act under the "free entry" system established by the Act.

The Ross River Dena Council applied to the Court for a declaration that the Yukon Government had a duty to consult *prior to* recording mineral claims. Mr. Justice Veale of the Yukon Supreme Court found that in light of the activities that flowed from recording, the duty to consult was triggered; however, the Court found that due in part to the strategic and highly confidential nature of mineral staking, the duty to consult arose *after*, and not before, the recording of the mineral claim by the Mining Recorder. The Court also concluded that consultation was limited in these circumstances to providing notice.

Background

The Ross River Dena Council is a Kaska First Nation for which no Final Agreement is in effect. The Kaska Traditional Territory represents 23% of Yukon land and the Ross River Area in particular is approximately 13% of Yukon land. At the time of decision, there were 8,633 active mineral claims in the Ross River Area.

Under the Act (which came into effect in April 2003), the Yukon Government, in particular the Mining Recorder, began recording the location of quartz mineral claims within the boundaries of the Ross River Area. This was done without prior consultation with the Ross River Dena. The scheme under the Act provides no discretion to the Mining Recorder to refuse to record a claim. So long as the locator has provided (1) a plan showing the location of the mineral claim; (2) the payment of a fee; and (3) the prescribed application with supporting declarations, the Mining Recorder is required to issue a record of mineral claim. As part of the scheme, the Mining Recorder does advise the locator if the mineral claim is on lands subject to unsettled aboriginal land claims; however, there is no statutory requirement to notify the relevant First Nation.

[1] A full copy of the Decision is available at: http://www.yukoncourts.ca/courts/supreme/judgments.html

Notably, once the claim has been recorded, the locator is permitted to carry out a number of exploration activities under the *Quartz Mining Land Use Regulation* (including construction of camps, storage of fuel, clearing and trenching, etc.) without obtaining any further approvals. [2]

Positions of the Parties

Ross River Dena argued that the Crown owed a duty to consult as the act of recording the mineral claim led directly to development activities on the affected land. The Crown took the position that the Act did not provide the Mining Recorder the discretion to deny recording the claim thus there was no government action or decision to which the duty to consult could attach. The intervener, the Chamber of Mines, argued that the existence and ownership of the mineral claim came into existence once located, not at the time of recording. As a result, there was no decision by the Crown; its role was solely to record without any exercise of discretion.

Court's Finding and Final Disposition

The Court applied the three part test developed by the Supreme Court of Canada [3]: (i) does the Crown have knowledge or a potential aboriginal claim or right; (ii) is there contemplated Crown conduct; and (iii) is there a potential that the contemplated conduct may adversely affect and aboriginal claim or right?

As to the first element of the test, the Court found that the Ross River Dena had asserted title to the relevant area and the Crown had knowledge of this claim.

As to the requirement of contemplated Crown conduct, the Court disagreed with the Crown and Chamber of Mines that the duty to consult applied only to discretionary decisions. It noted that the duty to consult is "a constitutional principle that applies 'upstream' of a statute" like the Act. [4] The focus of the analysis is not whether there is "a decision as opposed to administrative action, or a decision with discretion, but rather whether there is any conduct or action of the Crown." [5] As a result, the Court found that the recording of a mineral claim was "Crown conduct" that could trigger the duty to consult.

As to the issue of adverse impacts, the Court accepted Ross River Dena's argument that the various activities that a locator would be able to engage in after registration and without further permits or approvals, could give rise to potential adverse impacts. Further, a causal relationship existed between permission to engage in those activities and recording by the Mining Recorder.

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[2] The *Yukon Environmental and Socio-economic Assessment Act* imposes a duty to consult for Class 2, 3 and 4 mining exploration programs. However, this duty to consult is not engaged at the stages of recording a quartz mineral claim or conducting a Class 1 exploration program.

[3] See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 39-50. Chris Sanderson, Q.C. and Keith Bergner of Lawson Lundell acted for BC Hydro, one of the successful appellants in the *Rio Tinto* case. For Lawson Lundell's summary of the case, see http://www.lawsonlundell.com/resources-news-133.html

[4] Para. 54.

[5] Para. 55. [Emphasis in original.]

Accordingly, the Court concluded that the Government of Yukon did have a duty to consult.

However, a unique aspect of the decision is the Court's finding in respect of the timing of consultation. Taking into consideration not only the scheme set out in the Act, but also the strategic and highly confidential nature of staking mineral claims, the Court found that the "the appropriate time for consultation is after the grant of the mineral claim, when the holder of the claim has some security of tenure and the First Nation is able to determine its potential adverse impact."[6]

For the purpose of this Court action, the Court found that the scope and content of the duty extended only to notice until more information about proposed exploration activities is available. The Court stated that this is "not particular onerous" and the Government could "simply provide the First Nation with the monthly report it now receives from the Mining Recorder."[7] The Court granted a declaration that the Government of Yukon has a duty to consult after the issuance of a mineral claim. However, the Court suspended the effect of its declaration for one year at the request of the Government of Yukon for the purposes of allowing it to review the Act.

Discussion and Implications

The Government of Yukon now has a choice to make. It can:

(a) accept the decision and alter its practice to comply with the Court's declaration. The new procedures would have to be established in the coming year;

(b) challenge the decision in the Yukon Court of Appeal. An appeal would have to be filed within 30 days of the November 15, 2011 decision; or

(c) consider amendments to the Act. In many jurisdictions, a claim holder is not entitled to undertake significant exploration activities without obtaining additional authorizations. If the Act was amended such that these additional "Class 1" exploration rights were not automatic, the Crown's duty to consult may not be triggered at all at the stage of recording a mineral claim.

The implications for exploration/mining companies and for First Nations will depend on which of these options the Government of Yukon pursues.

[6] Para. 73. Emphasis in original.
[7] Para. 74.

Lawson Lundell will continue to monitor and report on any major developments. Please do not hesitate to contact Keith Bergner (Aboriginal law) or Chris Baldwin or Khaled Abdel-Barr (Mining) should you wish to further discuss this Court decision or its implications for your activities in Yukon.

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