Public Comment

TO: Ministry of Mines

DATE: Thursday, November 30, 2023

RE: Comment Regarding Environmental Registry of Ontario Proposal 019-7762

This comment responds to the Ontario Ministry of Mines' ("Ministry") request for "feedback on potential changes to" the *Mining Act* ("Act") dated October 19, 2023.[1] The Ministry seeks, specifically, feedback on "Mining Lands Administration System" (MLAS) improvements—the MLAS being the system which operates Ontario's online mining claim process.[2]

This comment will argue that the mining claim process operated by the Ministry is fundamentally flawed as it neglects to recognize that the duty to consult and accommodate ("Duty") can be triggered at the mining claim stage. This comment will consider the recent decision of the Supreme Court of British Columbia in *Gitxaala v. British Columbia (Chief Gold Commissioner)* 2023 BCSC 1680 ("*Gitxaala*"), particularly the parallels between British Columbia's ("BC") *Mineral Tenure Act* ("*MTA*") and *Mineral Tenure Act Regulation* ("*MTAR*") and the equivalent provisions and procedures in Ontario under the Act, to posit that Ontario's mining claim process can trigger the Duty.[3] As occurred in *Gitxaala*, this comment will apply the test from *Haida Nation v British Columbia (Minister of Forests) 2004 SCC 73 ("Haida")* to determine whether the Duty can arise under the online mineral claims process in Ontario.[4] The current failure to acknowledge the Duty can be triggered at the mining claim stage may lead to Ontario neglecting the rights of Indigenous groups granted under section 35 of the *Constitution Act, 1982* in relation to not only Aboriginal title claims, but also to Aboriginal treaty

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[1] *Mining Act*, RSO 1990, c M.14 [*Act*]; Government of Ontario, "Seeking input on opportunities to improve Ontario's mineral exploration assessment work regime" (19 October 2023), online: *Environmental Registry of Ontario* <https://ero.ontario.ca/notice/019-7762> [*Comment*].
[2] *Comment*, *supra* note 1.
[3] *Mineral Tenure Act*, R.S.B.C. 1996 [*BC Act*], c. 292; *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004 [*BC Reg*].
[4] 2004 SCC 73 [*Haida*].

and rights claims.[5] While not all online mining claims under the current approach will trigger the Duty, the application of the Act must nonetheless recognize a triggering of the Duty *can* occur so as to avoid further prejudicing Indigenous rights.

Additionally, it will be argued that the current system of mining claims complicates future land use claims, as Aboriginal title, rights, and treaty claims can interact with those of mining claimholders who have staked rights. Lastly, this comment will assert that, in addition to the above, the mining claim system in Ontario is fundamentally at odds with the explicit purpose of the Act, the Honour of the Crown ("Honour") as guaranteed by s.35 of the *Constitution Act, 1982*, and the principles of reconciliation, and therefore must be changed.

The *Gitxaala* Decision

The decision of the court in *Gitxaala* arose from claims made by two Indigenous groups regarding the constitutionality of BC's online mining claim system, as governed by the *MTA*. In the result, the court found that the issuance of mining claims in the first instance can—and in this case did—trigger the Duty as enshrined in the *Constitution Act, 1982*.[6]

The court applied the test from *Haida* as outlined in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43* ("*Rio Tinto*") which states that, for the Duty to be triggered, the Crown must have "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".[7] Accordingly, the test for when the Duty arises can be summarized as: "(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right".[8]

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[5] *The Constitution Act, 1982,* Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s 35 [*Constitution*].
[6] *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 [*Gitxaala*].
[7] *2010 SCC 43*, at para 31 [*Rio Tinto*].
[8] *Ibid.*

In *Gitxaala*, BC conceded that the first two requirements of the *Haida* test were met. The Province conceded it had actual knowledge of the claims of the Indigenous groups—thereby satisfying part 1 of the *Haida* test—and also that "the decision to design a system that allows for the granting of mining claims without consultation constitutes 'Crown Conduct'" sufficient to satisfy part 2 of the test.[9] The question before the court therefore solely related to the third step of the *Haida* test – whether the contemplated conduct may adversely affect an Aboriginal claim or right.[10]

The court in *Gitxaala* determined that the online claim process in BC triggered the Duty for four reasons. The granting of a mining claim was found to (1) confer "a right to a prescribed amount of minerals from the claim area", which reduces the value of the affected land thereby adversely affecting Aboriginal rights and title; (2) transfer "some element of ownership of minerals to the recorded holder"; (3) bestow "the exclusive right to explore for minerals in the area" claimed, a right which "provides a financial benefit" and which "[t]he First Nation is deprived of", and; (4) afford "the recorded holder the right to disturb the land", the effect of which "viewed from the Indigenous perspective…is greater than 'nil or negligible'".[11] Notably, it was not the cumulative effect of these consequences which was found sufficient to meet part 3 of the *Haida* test, rather, each was sufficient *individually* to trigger the Duty.[12] The analysis provided by the court in *Gitxaala* in relation to each effect will be considered further below in comparing the mining claim systems of BC and Ontario.

The Act and the Rights Afforded to Mining Claim Holders

Section 2 of the Ontario Act states: "[t]he purpose of th[e] Act is to encourage prospecting, registration of mining claims and exploration…in a manner consistent with the recognition and

[9] *Gitxaala*, *supra* note 6 at para 105.
[10] *Ibid*, at paras 105-106.
[11] *Ibid*, at para 396.
[12] *Ibid,* at para 397.

affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the [D]uty".[13] The Act also requires that exploration plans or exploration permits—both of which require the applicant to have first obtained a mining claim—must be acquired in accordance with any Aboriginal consultation deemed necessary by the Director.[14] That is, consultation in accordance with the Duty occurs at both the exploration plan and exploration permit stage under the current regime. However, the Act does not require consultation or even notification of potentially affected Aboriginal rights or title claims under the mining claim process, prior to plans and permits being issued. Rather, all that is required to register a claim is a prospector's licence, which can be acquired with payment of a small fee. The licensee may then register a mining claim "on any…Crown lands", subject to limited exceptions.[15]

While a registered mining claim grants the holder the fewest rights in terms of the allowable exploratory or mining work permitted on the claimed land within the scheme of the Act—that is, it allows for less than the exploration permit or mining license—it nonetheless provides the holder various rights.[16] Once a mining claim is registered, no other mining claim may be made in relation to that land.[17] Further, while an exploration plan must be submitted and approved—which engages a consultation process pursuant to the Act—for a mining claim holder to partake in the exploratory activities listed in Schedule 2 of *Exploration Plans and Exploration Permits* ("Exploration Regs"), no such plan, or consultation, is required for exploratory activity on land subject to a mining claim which *does not meet the threshold* of the prescribed activity in Schedule 2.[18] That is, the holder of a mining claim may, without consultation, engage in pitting and trenching on the land subject to the claim, "as long as these pits and trenches are more than 200 metres apart and the volume of rocks

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[13] *Act*, *supra* note 1, s 2.
[14] *Ibid*, s 78.2(1), s 78.3(2).
[15] *Act, supra note 1*, s 27, s 38(2).
[16] *Ibid*, s 27(c), s 50(1), *Exploration Plans and Exploration Permits*, O Reg 308/12, Schedule 2 [*Regs*].
[17] *Act, supra note 1*, s 27(c).
[18] *Regs*, *supra* note 16, Schedule 2.

removed from each one is no greater than one cubic metre".[19] The Act therefore affords a mining claim holder with considerable rights once the mining claim is registered—the claim is exclusive, as no others may be registered on that land, and they are granted rights to enter the land and commence exploratory activities below the threshold established in the Exploration Regs. All of this is done without *any* consultation in relation to potentially affected Aboriginal rights or title claims.

Applying *Haida*—The Act's Mining Claim Process Satisfies Requirements One and Two

The first part of the *Haida* test for determining whether the Duty is triggered requires that the Crown possesses actual or constructive knowledge of an Aboriginal treaty, title or rights claim which exists in relation to the relevant piece of land. A mining claim made in relation to land where either an existing treaty or title claim is present and known, would therefore suffice.

It is true that much of the Crown land in Ontario is subject to an historic or modern treaty, and as such, many mining claims would likely relate to Aboriginal rights rather than title. However, it cannot be said that claims to Aboriginal title do not exist in Ontario. Indeed, various Indigenous groups in Ontario have not signed treaties with the Crown and therefore have never ceded their claims to Aboriginal title, with one such notable example being the Algonquin land claim.[20] Regardless, either a claim to Aboriginal title or rights suffice for the purpose of the first part of the *Haida* test. The Crown "will always have notice" of the terms of a treaty to which it is a party, while title claims will suffice if the Crown has actual or constructive knowledge.[21]

As noted, the Crown in *Gitxaala* conceded that "the decision to design a system that allows for the granting of mineral claims" without consultation sufficed to satisfy the second requirement

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[19] Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law", (2015) 11 McGill Journal of Sustainable Development Law 184 at 212 [*Drake*]; *Regs*, *supra* note 16, Schedule 2.
[20] *Drake*, *supra* note 19, at 198, Government of Ontario, "The Algonquin land claim" (22 February 2023), online: *Government of Ontario* <https://www.ontario.ca/page/algonquin-land-claim>; Long Lake #58 First Nation, "About Long Lake #58 First Nation", online: *Long Lake #58 First Nation* <https://www.longlake58fn.ca/about>.
[21] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para 34 [*Mikisew*].

of *Haida*.[22] While *Gitxaala* is not binding precedent on Ontario courts, it is nonetheless persuasive that the Crown was willing to concede entirely on this point. Those in support of Ontario's current mining claim system argue that since there is no Crown discretion involved in granting a mining claim, no Crown "conduct" is engaged in the process.[23] However, this argument fails to acknowledge the constitutional nature of the Duty—one that "cannot be boxed in by legislation".[24] It seems quite evident that, in operating the mining claim process, the Crown engages in "conduct" sufficient to satisfy the second *Haida* requirement.

***Haida* Requirement Three Can Be Met and the Duty Can Be Triggered**

The third requirement under the *Haida* test to trigger the Duty requires that the proposed Crown conduct must "adversely affect an Aboriginal claim or right".[25] This adverse impact must be assessed from the perspective of the Indigenous claimant.[26] The impugned provisions of the *MTA* and the *MTAR* in *Gitxaala* share similarities to those in the Act and the Exploration Regs. For example, section 17 of the *MTAR* establishes that the holder of a mineral claim in BC "must not produce…more than 1000 tonnes of ore in a year" from a single cell within a mineral claim.[27] The *MTAR* was further clarified by Information Update No. 38 which stated that "the total volume of each pit or trench [must] not exceed 3 cubic metres in volume" and that there must not be more than five pits or trenches on the land relating to a given mineral claim at a given time.[28] The provisions governing what mining claimholders in BC could remove from the lands to which their claims related was therefore simultaneously more and less strict than the equivalents in Ontario—as noted, a mining claimholder in Ontario must not remove more than one cubic metre of volume

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[22] *Gitxaala*, *supra* note 6 at para 105.
[23] *Drake*, *supra* note 19, at 200; Martin-Joe Ezeudu, "The Unconstitutionality of Canada's Free Entry Mining Systems and the Ontario Exception" (2020) 20 Asper Review of International Business and Trade Law 155 at 172-174.
[24] *Drake*, *supra* note 19, at 200; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, at para 121.
[25] *Rio Tinto*, *supra* note 7, at para 31.
[26] *Gitxaala*, *supra* note 6 at para 326.
[27] *Ibid*, at para 166; *BC Reg*, *supra* note 3, s 17.
[28] *Gitxaala*, *supra* note 6 at para 171.

from a pit or trench, compared to three in BC, but there is no limit to the number of pits or trenches that can be dug, so long as they are more than 200 metres from any other pit or trench.[29]

The similarity of the rights given under both regimes is relevant with respect to the first consequence, or effect, discussed in the decision in *Gitxaala*—the reduction of the value of the land by the removal of minerals. The court, in reaching its decision the Duty was triggered, cited the extent to which claimholders could remove minerals from the land subject to the claim as direct evidence of an adverse effect, sufficient to satisfy the third *Haida* requirement.[30] The Crown argued that mining claims were temporary, and therefore any loss of rights by an Indigenous group asserting an Aboriginal title or rights claim was temporary.[31] However, the court rejected this argument and found instead that while "a mineral claim itself is temporary, the removal of minerals is not".[32] Specifically, the court in *Gitxaala* found that a mining claimholder was "authorized to collect and extract a prescribed amount of minerals from the claim area", and that doing so "is to permanently reduce that land's value".[33] Further, the court stated that the "irreversible reduction in the value of asserted territory is…*exactly the type of adverse impact* the *Haida* [t]est envisioned" (emphasis added).[34] The exercise for the court was to determine "whether the impact of the Crown conduct…will affect the First Nation's ability to fully realize the benefits of Aboriginal title in the future" (emphasis in original), and the allowances made for mining claimholders to remove minerals from a claim area adversely affected that ability.[35]

It is worth noting that the court in *Gitxaala* did not articulate a minimum threshold for what constitutes sufficient removal of minerals to meet the third requirement in *Haida*, only that the

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[29] *Gitxaala, supra* note 6 at para 171; *Regs*, *supra* note 16, Schedule 2.
[30] *Gitxaala*, *supra* note 6 at paras 390-391.
[31] *Ibid*, at para 348.
[32] *Ibid*, at para 391.
[33] *Ibid*, at para 390.
[34] *Ibid.*
[35] *Ibid*, at paras 350, 396, 546.

allowances provided in the *MTA* and *MTAR* satisfied the requirement. However, the absence of a minimum threshold does not assist the supporters of the current process under the Act with respect to whether the Duty is engaged at claim registration. As explored above, the allowances granted in provisions of the Act and Exploration Regs are not identical to those in the *MTA* and *MTAR*, but viewed from the perspective of "whether the impact of the Crown conduct…will affect the First Nation's ability to fully realize the benefits of Aboriginal title [or rights] in the future", it is difficult to see how the right to remove one cubic metre of minerals from a pit or trench, compared to three in BC, does not constitute an adverse effect.[36] This is especially true when coupled with the less restrictive approach the Act takes, when compared to BC, in relation to the number of pits or trenches which can be dug .[37]

The second adverse effect found by the court in *Gitxaala* related to the loss of mineral rights the Indigenous claimants suffered by virtue of the registration of mining claims. The "dispositive consideration" for the court was that the Indigenous group lost "part of their asserted rights to the minerals" associated with the land over which their claim and the mining claim related.[38] This ground of adverse effect may not apply in all cases in Ontario, as not all Aboriginal claims will necessarily relate to subsurface mineral rights. However, as will be discussed further below, simply because this will not be present in *every* Aboriginal title, right or treaty claim in relation to the grant of a mining claim does not justify the assumption *no* grant of a mining claim could trigger the Duty.

The third adverse effect in *Gitxaala*, which arguably flows from the second adverse effect, was the Indigenous group's loss of the ability to raise capital.[39] In granting a mining claim, the Province was granting what "may [depending on whether valuable minerals are found in exploratory

[36] *Gitxaala*, *supra* note 6 at paras 171, 350; *Regs*, *supra* note 16, Schedule 2.
[37] *Gitxaala*, *supra* note 6 at para 171; *Regs*, *supra* note 16, Schedule 2.
[38] *Gitxaala*, *supra* note 6 at para 394.
[39] *Ibid*, at para 389.

activities] constitute a major commercial asset that can be bought and sold".[40] In depriving an Aboriginal group of that ability, the Crown creates an adverse effect.[41] As noted, not all mining claims will result in a "major commercial asset" for the mining claimholder.[42] However, for the purpose of the *Haida* test, the granting of a mining claim deprives the Aboriginal group of even the potential of realizing on that opportunity, and that is sufficient.[43] The Ontario system as it currently operates produces the same result as in *Gitxaala*. Once a mining claim is registered, the claimholder obtains the benefit of exclusive mining claim rights for the subject lands and is entitled to engage in various exploratory activities – all to the detriment of Aboriginal title and rights.[44]

While the focus thus far has been on the consequences from mining claim registration, if those exploratory activities produce positive results, the claimholder may escalate the claim through an application for an exploration plan or permit, and eventually a mining lease.[45] Indeed, under section 81(1) of the Act, "[u]pon compliance with this Act…and upon payment of the rent for the first year, the holder of a mining claim is *entitled* to a lease of the claim" (emphasis added).[46] While "compliance with th[e] Act" for a mining lease includes the consultation of affected Indigenous groups—the fact the holder of a mining claim is *entitled* to a mining lease of that land, where the lease subsists for twenty-one years, indicates the magnitude of rights which can flow from the issuance of a mining claim, and why recognizing that the Duty can be triggered at the mining claim stage is so critical.[47] While a mining claim does not automatically develop into a mining lease under

[40] *Gitxaala*, *supra* note 6 at para 384.
[41] *Ibid*, at para 396.
[42] *Gitxaala, supra* note 6 at para 384.
[43] *Ibid*, at para 396.
[44] *Act*, *supra* note 1, s 27(c); *Regs*, *supra* note 16, Schedule 2.
[45] *Act*, *supra* note 1, ss 81, 78(2), 78(3); *Regs*, *supra* note 16, ss 4, 11, Schedule 2, Schedule 3.
[46] *Act*, *supra* note 1, s 81(1).
[47] *Ibid*, s 81(3).

the Act, the issuance of a mining claim on its own is sufficient—as the court in *Gitxaala* found—to constitute a "major commercial asset" of which an Aboriginal claimant may be deprived.[48]

The last adverse effect found in *Gitxaala* was that of a "greater than nil or negligible" disturbance of the land.[49] The court cited the fact that a mining claim granted the holder the ability to pit and trench on the land and noted how "adjacent cells are often obtained by individual recorded holders, leading to a cumulative effect on the First Nation asserting rights".[50] As previously mentioned, mining claimholders in Ontario also can pit and trench on the claim area land, subject to restrictions on the volume of material removed.[51] In addition, it appears in many cases there also is a cumulative impact under the Act's current scheme. According to information most recently updated on the Province of Ontario website on November 7, 2022, in Ontario's Ring of Fire—an area "located approximately 500 kilometres northeast of Thunder Bay [which] *covers about 5,000 square kilometres*"—there are "about 26,167 active mining claims held by 15 companies and individuals, *covering approximately 4,972 square kilometres*" (emphasis added).[52] That is to say, there are, according to Ontario's own published data, approximately 28 square kilometres of land in the Ring of Fire that is not subject to a mining claim. Given the exploration activities a mining claimholder can conduct, and the absence of any limits on the number of claims, it seems evident the cumulative disturbance to the land that can be wrought by mining claimholders in Ontario can constitute an adverse effect "on the First Nation asserting rights".[53] Again, even though the decision in *Gitxaala* is not binding in Ontario, its analysis and findings support the conclusion the Duty can be triggered by the issuance of a mining claim through the MLAS.

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[48] *Gitxaala*, *supra* note 6 at para 384.
[49] *Ibid*, at para 396.
[50] *Ibid*, at para 395.
[51] *Act*, *supra* note 1, s 78(1); *Regs*, *supra* note 16, Schedule 2.
[52] Government of Ontario, "Ontario's Ring of Fire" (November 1 2022), online: *Government of Ontario* <https://www.ontario.ca/page/ontarios-ring-fire> [*Ring of Fire Data*].
[53] *Gitxaala*, *supra* note 6 at para 395.

The Duty Can Be Triggered in Relation to Treaty Rights Claims

The analysis above most aptly applies to claims for Aboriginal title. Indeed, *Gitxaala* related to a claim for Aboriginal title, and requirement three—adverse effect—of the *Haida* test is more easily met where the underlying claim is for Aboriginal title. As Aboriginal title constitutes a broad Aboriginal right, establishing that Crown conduct constitutes an adverse effect is more straightforward.[54]

However, this does not mean the Duty cannot arise in relation to an Aboriginal treaty in Ontario. There are more than 40 treaties which have been agreed between Ontario and Indigenous groups, many of which include explicit reservations of rights for the Indigenous groups in question.[55] As a party to these treaties, the Crown "will always have notice of [their] contents" and as such, can easily meet the first requirement of the *Haida* test—actual or constructive notice of an Aboriginal right.[56] As established previously, the operation of the MLAS constitutes Crown "conduct" sufficient to satisfy requirement two of the *Haida* test.

The difficulty when considering treaty rights arises over the third *Haida* requirement. The rights reserved for Indigenous signatories to many Ontario treaties are "to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered".[57] Rights of this kind were reserved pursuant to the James Bay Treaty (also known as Treaty 9), which covers large swaths of land in Northern Ontario—including the Ring of Fire. The question under the third *Haida* requirement therefore becomes, can the Crown conduct in issuing mining claims adversely affect the Aboriginal treaty right in consideration—namely, the rights to hunt and fish?

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[54] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para 119.
[55] The James Bay Treaty - Treaty No. 9 (Made in 1905 and 1906), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028863/1581293189896> [*Treaty 9*]; Government of Ontario, "Map of Ontario treaties and reserves" (October 23 2023), online: *Government of Ontario* <https://www.ontario.ca/page/map-ontario-treaties-and-reserves>.
[56] *Mikisew*, *supra* note 21 at para 34; *Drake*, *supra* note 19 at 204; *Rio Tinto*, *supra* note 7 at para 31.
[57] *Treaty 9*, *supra* note 55; *Ring of Fire Data*, *supra* note 52.

As previously noted, the extent to which mining claimholders can disturb the relevant lands is not insignificant. Given there exists no limit on the number of pits or trenches a mining claimholder can dig, so long as each has a volume of less than one cubic metre and are not within 200 metres of each other, it is certainly conceivable a court could find an adverse effect to Aboriginal treaty rights such as rights to hunt or fish.[58] This is especially true in areas like the Ring of Fire—governed by Treaty 9 which afforded hunting and fishing rights—given the potential for cumulative effects from the number of active mining claims and their geographical breadth.[59] At a practical level, these two factors, when combined, reduce the amount of land available for the exercise of granted Aboriginal rights to hunt and fish, thereby adversely effecting those rights. As such, the Duty *can arise* in the context of treaty rights in Ontario.

In addition, the evolutionary nature of the recognition of Aboriginal rights in Canada supports a prudent approach when dealing with government action which may intersect with Aboriginal rights. Indigenous people are challenging what they perceive as restrictive interpretations of treaty rights. In the context of Treaty 9, it is well documented that the oral promises made in relation to that treaty by the Crown and its representatives and the wording of the official treaty differ considerably.[60] The Indigenous signatories to Treaty 9, based on the oral promises made to them by the Crown, understood the Treaty as one under which they agreed to a relationship of "peace and friendship, rather than a surrender of land", where Indigenous signatories were not surrendering their "right to continue to govern themselves and their land…by exercising their own jurisdiction and by enforcing their own legal traditions".[61] As Karen Drake argues, interpreting

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[58] *Regs*, *supra* note 16, Schedule 2.
[59] *Ring of Fire Data*, *supra* note 52.
[60] 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), Ch at 335-337; *Drake*, *supra* note 19 at 208; Rachel Ariss, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Halifax: Fernwood Publishing, 2012) at 26 [*Keeping the Land*].
[61] *Drake*, *supra* note 19 at 208-209; *Keeping the Land*, *supra* note 60 at 23, 27; 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.

historic treaties such as Treaty 9 on the basis of the written text alone obfuscates the true agreement reached by the parties.[62] Indeed, "the Supreme Court of Canada ("SCC") has rejected a one-sided interpretation of the treaties that recognizes only the written text".[63] Instead of focusing exclusively on the written text, the SCC has stressed that interpretation ought to assess "the oral promises made when the treaty was agreed to", as they are "as much a part of the treaty as the written words".[64]

While it is true that efforts by Treaty 9 First Nations to obtain a declaration that the true text of Treaty 9 was misrepresented to its Indigenous signatories and thus its textual interpretation must be done in conjunction with oral promises have been unsuccessful, the assertion of those rights by Indigenous signatories to Treaty 9 continue.[65]

As noted, guidance from the SCC indicates historic Ontario treaties should be interpreted in a manner which incorporates both the textual agreement and the oral promises made in negotiation. While this guidance has not always been followed, it is possible a court will find the true agreement reached between the Crown and the Indigenous signatories to Treaty 9 is one of peaceful co-existence, where the Indigenous groups surrendered no authority regarding their jurisdiction to govern themselves. If this occurs, then the Aboriginal treaty rights which could be affected by the issuance of mining claims would be considerably broader – more than "mere hunting and fishing rights", lowering the threshold for the establishment of an adverse effect sufficient to meet the third *Haida* requirement.[66] Recognizing the applicability of the Duty to the MLAS is not only necessary because of existing rights granted to Indigenous signatories to historic Ontario treaties, it also is in

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[62] *Drake*, *supra* note 19 at 207.
[63] *Ibid*, at 206.
[64] *R v Morris*, 2006 SCC 59 at para 24 citing *R v Marshall*, 3 SCR 456 at para 12; *Drake*, *supra* note 19 at 206.
[65] Alex Brockman, "First Nations leaders in Treaty 9 say their message is clear — no development without us as partners", *CBC News* (April 26 2023), online: <https://www.cbc.ca/news/canada/thunder-bay/first-nations-lawsuit-ring-of-fire-development-1.6822920>.
[66] *Drake*, *supra* note 19 at 205.

keeping with the spirit of reconciliation and is a prudent approach given the continuing claims to Aboriginal rights, and the evolving nature of those rights.

Status Quo Complicates Land Claims for Both Indigenous and Non-Indigenous Groups

A long-standing principle of Ontario's land claims policy is that Ontario will not expropriate private property in the settlement of a land claim, nor will it revoke leases, licenses, and permits for Crown land and natural resources before expiry without the consent of the holder[67]. However, it is also an explicit goal of the Ontario government to operate its policies compatibly with the goal of reconciliation with Indigenous Ontarians.[68] In the context of mining claims, therefore, Ontario operates a land claims policy which employs two contradictory principles.

In granting mining claims, Ontario confers to claimholders rights which it has long-pledged not to revoke without the consent of the holder.[69] The mining claim process also facilitates a high number of claims on land. As noted, in the Ring of Fire region, nearly all the land is subject to a mining claim—of which there are over 26,000 in a space of 5,000 square kilometers.[70]

On its face, and in isolation, this is not necessarily an issue. However, given the prevalence of Indigenous land claims in Ontario—there are currently over 80 Indigenous land claims in the Province—and the frequency with which mining claims are made, the current approach is unsatisfactory and unnecessarily complicates the land claims process.[71] This is the case from both the perspective of the Indigenous groups who have and continue to claim rights to the lands over

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[67] Government of Ontario, "The land claim negotiation process" (September 18 2023), online: *Government of Ontario* https://www.ontario.ca/page/land-claim-negotiation-process [*Land Claim Process*].
[68] Government of Ontario, "Ontario's commitment to reconciliation with Indigenous peoples" (May 2, 2022), online: *Government of Ontario* <https://www.ontario.ca/document/spirit-reconciliation-ministry-indigenous-relations-and-reconciliation-first-10-years/ontarios-commitment-reconciliation-indigenous-peoples> [*Reconciliation Commitment*].
[69] *Land Claim Process*, *supra* note 67.
[70] *Ring of Fire Data*, *supra* note 52.
[71] Government of Ontario, "Current land claims" (October 19 2023), online: *Government of Ontario* <https://www.ontario.ca/page/current-land-claims>.

which mining claims are approved, and the perspective of those to whom the mining claims are granted.

A complicating factor which exacerbates the flaws in the current structure is the timing differential between mining claims and Indigenous land claims. Indigenous land, rights and treaty claims or negotiations can take decades. At the same time, the number of mining claims registered through the MLAS system has increased considerably in recent years, with claims becoming effective immediately on compliance with the minimal formalities.[72] The slower pace of the land claim and treaty negotiation process cannot compete with the speed of obtaining a mining claim.

This issue is exemplified by Gull Bay First Nation's recent attempt to expand its reserve land.[73] Negotiation between the First Nation and the Crown has been ongoing for over a decade and only reached the stage of land selection in March 2023. When negotiations began, the area sought by the First Nation was subject to few mining claims. However, due to the relative ease with which mining claims may be registered and the discovery of potential lithium mining opportunities in the area, mining claims in the area have significantly grown.[74]

At present, despite the fact the Province is aware of the First Nation's assertion of rights and the ongoing negotiations, prospective claimholders are entitled to make claims to the land subject to the First Nation's claim, and will do so absent notice of the Nation's claim as it remains unrecognized due to the ongoing status of negotiations between the Nation and the Province. As discussed, so long as prospective claimholders comply with the minimal formalities for obtaining a

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[72] Maan Alhmidi, "Four Ontario First Nations voice concerns over mining claims on their lands", *Global News* (February 1 2023), online: <https://globalnews.ca/news/9452452/ontario-first-nations-mining/>.
[73] Sarah Law, "First Nation calls mining stakes 'unlawful, invalid' as it challenges Ontario's free-entry system", *CBC News* (August 3 2023), online: <https://www.cbc.ca/news/canada/thunder-bay/gull-bay-first-nation-mining-1.6925579 > [*Gull Bay*]; Gull Bay First Nation, "Public Notice:
Strenuous Opposition to Mining Claims Registration on Territory in Close Vicinity to KZA Reserve" (July 30 2023), online: *Gull Bay First Nation* <http://www.gullbayfirstnation.com/wp-content/uploads/2023/07/2023-07-30-FINAL-Public-Notice-for-KZA-website.pdf>.
[74] *Gull Bay*, *supra* note 73.

mining claim, they will be conferred rights in relation to the claimed area. Accordingly, both the First Nation and the mining claimholder move forward with claims to the same lands.

To complicate matters, mining claims generally cannot be made on reserve land in Ontario under the Act.[75] As such, if the Gull Bay First Nation is successful in its claim for reserve land expansion, these mining claims granted in the interim, but prior to the conclusion of negotiations between the First Nation and the Province, will be in direct contradiction to the law surrounding mining claims on reserve land.[76] The result will be an *ad hoc* determination of which mining claims may remain—if any—and may very well result in litigation between claimholders granted rights in the interim who have expended resources and time developing their claims only to learn of their ineffectuality given the outcome of negotiations between Gull Bay and the Province. Regardless of the outcome, the situation necessarily creates considerable uncertainty for both the Gull Bay First Nation and claimholders.

In addition to creating uncertainty, it puts Ontario in an escapable conflict – it cannot comply with both its stated position of not revoking permits without consent of the holder and functioning with a view to reconciliation with Indigenous peoples.[77] It will either have to revoke the granted mining claim—presumably without consent—or alter the Act to allow claims on reserve land, thereby negatively impacting Indigenous rights as represented by the exclusion of mining claims from reserves, an outcome which cannot be said to be anything other than corrosive to reconciliation. This conflict, and the unnecessarily complicated outcome it produces, could be prevented through a triggering of the Duty prior to a mining claim being issued to a prospective claimholder. In such a system, unlike the *status quo*, a prospective claimholder would be required to

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[75] Government of Ontario, "Claim Holder's Guide to Conversion" (2018), online: *Geology Ontario* <https://www.geologyontario.mndm.gov.on.ca/mines/lands/mining-sequence/claim_holders_guide_to_conversion_en.pdf> [*Guide to Conversion*]; *Act*, *supra* note 1, s 30.
[76] *Guide to Conversion*, *supra* note 75; *Act*, *supra* note 1, s 30.
[77] *Reconciliation Commitment*, *supra* note 68.

consult where the *Haida* test is met. The case of Gull Bay First Nation is such an instance. The Crown has actual knowledge of the claimed right—it is negotiating with the First Nation regarding the reserve expansion—thereby satisfying the first part of the *Haida* test. Crown action is occurring in the form of the granting of mining claims, fulfilling the second part. Lastly, this Crown conduct has an adverse effect on the Indigenous right claimed. The third step of *Haida* requires an assessment of whether "Crown conduct on the land…will affect the First Nation's ability to *fully realize* the benefits" of the right claimed in the future (emphasis added).[78] As explored above, it is evident the granting of a mining claim on land subject to reserve expansion negotiations—where, if the expansion is granted, no mining claims may exist—adversely affects the First Nation's ability to fully realize the benefits of that right. As the *Haida* requirements would be met in the Gull Bay case, the Duty would be triggered, and prospective claimholders would be made aware of Indigenous claims in relation to the land over which they seek a mining claim. This would decrease uncertainty over land rights, as claimholders would be aware of the potential for Indigenous rights to be granted in the land in the future and could therefore assess their expenditure in relation to any claims on that land accordingly. Finally, and most significantly, this approach would align with Ontario's commitment to reconciliation as Indigenous rights to consultation would be recognized.

The Gull Bay First Nation claim demonstrates the way in which the current mining claim system complicates land claims in the event of Aboriginal rights, treaty or title claims for both Indigenous groups and claimholders. An acknowledgment that the Duty can be triggered at the mining claim stage would address this issue.

***Status Quo* is Inconsistent with the Purpose of the Act, the Honour and Reconciliation**

As discussed above, neither the Act nor the Exploration Regs provide for the application of the Duty at the mining claim registration stage. This is the case despite section 2 of the Act which

[78] *Gitxaala*, *supra* note 6 at para 350.

states that its purpose is to encourage mining activity in Ontario "in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, *including the [D]uty*" (emphasis added).[79] Without acknowledging that the Duty can arise with the issuance of the mining claim, the Act cannot meet its stated purpose. Further, a contention that the scheme of the Act has been designed in a manner which assumes that instances of the Duty being triggered by mining claims are rare, and therefore satisfactorily dealt with on an *ad hoc* basis, is not convincing.[80] Decisions of the SCC have unequivocally held that the consultation owed under the Duty must happen *prior to any adverse effect*.[81] Additionally, the SCC has stressed that the process "cannot exclude accommodation at the outset".[82]

This failure to recognize that the issuance of a mining claim can trigger the Duty also is inconsistent with the principle of the Honour of the Crown ("Honour"), as discussed in *Haida*.[83] The Honour is defined in *Haida* generously to mean that, "in all its dealings with Aboriginal peoples… the Crown must act honourably", and this includes "honourable negotiations" with Indigenous peoples wherever claims or disputes arise.[84] The Duty is derived from the Honour—it is an "incident" of it—and must be conducted in compliance with the Honour.[85] This requirement applies to both the Provincial and Federal governments.[86]

As canvassed herein, the Duty is triggered where the *Haida* test is met.[87] Under the current process for mining claims, by the time impacted Indigenous groups are first consulted, the Crown has already granted the mining claimholder exclusive rights to the claimed land and exploration

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[79] *Act*, *supra* note 1, s 2.
[80] *Drake*, *supra* note 19 at 203.
[81] *Ibid*, at 203; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at para 78.
[82] *Drake*, *supra* note 19 at 203; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, at para 52 [*Grassy Narrows*].
[83] *Haida*, *supra* note 4 at paras 20-21.
[84] *Haida*, *supra* note 4, quoting *R. v Van der Peet*, [1996] 2 S.C.R. 507, at para 17; *Haida*, *supra* note 4 at para 20.
[85] *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196, at para 4 [*Attawapiskat*].
[86] *Grassy Narrows*, *supra* note 82 at paras 50-51; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 52.
[87] *Attawapiskat*, *supra* note 85 at para 4.

activity may have already begun. This approach is clearly at odds with any meaningful understanding of the requirements of "honourable negotiation" inherent in the Honour.[88] In the context of granting mining claims, for honourable negotiation to occur, the Duty should arise prior to any rights vesting in a prospective claimholder. Simply put, the current approach cannot possibly meet the requirement of "honourable negotiations" inherent in the Honour when a claimholder is granted rights in the land prior to negotiations with an Indigenous group. In such a case, any resultant negotiation is necessarily on uneven footing. This outcome is patently at odds with the Honour as Indigenous rights and voices are ignored.

Further, and as canvassed above, this approach is inconsistent with Ontario's stated goal of reconciliation. The Provincial Crown—in pursuing reconciliation with Indigenous peoples—cannot maintain an "approach to Indigenous relations and reconciliation…rooted in a commitment to establish and maintain constructive, co-operative relationships based on mutual respect" while simultaneously denying the existence of the Duty arising from the issuance of mining claims on lands subject to Aboriginal treaty, rights, or title claims.[89]

If the issuance of a mining claim can trigger the Duty, it is incumbent on Ontario to ensure that consultation occurs at a stage where all parties to the negotiation are on even footing. This is the only way meaningful consultation rooted in a relationship of mutual respect can manifest. In the context of mining claims, while it is true the Duty will not be triggered in every instance, the fact that a mining claim *can* trigger the Duty necessarily means mining claims must be assessed as potentially triggering the Duty prior to a claim's granting. To do otherwise is to either ignore the Duty or push potential claims for breach into an *ad hoc* resolution process. Such an approach

[88] *Haida*, *supra* note 4 at para 20; *Attawapiskat*, *supra* note 85 at para 4.
[89] *Reconciliation Commitment*, *supra* note 68.

disregards the stated purpose of the Act and is inconsistent with the Honour and the process of reconciliation, and therefore must be changed.

Conclusion—The Duty Must be Recognized at the Mining Claim Stage

For the reasons addressed herein, the application of the Act must be altered to recognize that the Duty can be triggered at the mining claim stage. The Duty will not necessarily be triggered by all mining claims. However, as the analysis of *Gitxaala* and the equivalent provisions of the Act and Exploration Regs illustrates, a mining clam can trigger the Duty. In those instances, it is critical for procedural effectiveness, reconciliation, and the Honour that the Duty operates to "recogniz[e] and affirm" Indigenous rights pursuant to s.35 of the *Constitution Act, 1982*.[90] To ensure this outcome, the application of the Act, Exploration Regs and the mining claim system in Ontario must change.

[90] *Constitution*, *supra* note 5, s 35.