Free Entry, Aboriginal Rights and the *Discussion Paper* on a New Northwest Territories *Mineral Resources Act*

1. Introduction

The Government of the Northwest Territories is presently engaged in the preparation of a new *Mineral Resources Act.* In this regard, it has just released (August 2017) a *Discussion Paper* entitled *Unlocking Our Potential Together* which stresses various key issues to be addressed by the Act including a clear process providing certainty for obtaining exploration rights and access to land and respect for existing aboriginal rights and claims to land (1). It proposes to maintain the present free entry system for the acquisition of mineral rights while, at the same time, to abide by the constitutional duty to consult, and where appropriate, accommodate, Aboriginal peoples. This presentation purports to underline some of the pitfalls of such a dual purpose.

2. The Current Free Entry System and the Discussion Paper Proposals

Northwest Territories mining legislation is inherited from Federal regulations (2). In 2014, the Government of Canada gave the Government of the Northwest territories control over the management of public lands (3). This legislation, like most Canadian mining legislation, provides for a free entry system. Such a system allows prospectors, other individuals and companies to enter lands where the government owns the mineral rights in order to acquire such rights without the government's permission. While such a unilateral system of acquisition of mineral rights has been the subject of much criticism in many quarters (4), it is heavily supported in the mining exploration industry and is in force in most Canadian mining jurisdictions, albeit many are now providing various types of restrictions (5).

This free entry unilateral appropriation system generally provides for four types of rights :

a) The right to carry out prospecting activities on available land;
b) The right to stake (or obtain on-line) mining claims and to have these recorded;
c) The right to carry out exploration work on the claims;
d) The exclusive right to bring the discovered minerals into in production.

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1. Discussion Paper, p. 20
2. Northwest Territories Mining Regulations, SOR/2014-68.
3. Northwest Territories Devolution Act, S.C. 2014, c. 2, s. 51 (1).
4. See, for instance, Ugo Lapointe, « L'héritage du principe de *free mining* au Québec et au Canada», *Recherches amérindiennes au Québec, 2010, 40, 3, pp.9-25* and Sophie Thériault, «Repenser les fondements du régime minier québécois au regard de l'obligation de consulter et d'accommoder les peuples autochtones», *JSDLP,* 2010, 6, 2, pp. 217-245.
5. In Ontario, for example, the free entry system now also requires exploration permits in cases where aboriginal rights must be taken into consideration.

The GNWT *Discussion Paper* does not propose any changes to the free entry system generally. It simply refers the reader to the existing M*ining Regulations* which provide for traditional mining claims acquisition through ground staking while, at the same time, alluding to possible future provisions enabling online map staking (6) . The *Discussion Paper* does not mention aboriginal rights or interests as it refers to this early stage of the mining cycle.

3. Consideration Given in the *Discussion Paper* to Aboriginal Consultation

Aboriginal consultation is mentioned later in the *Discussion Paper*. While the Government of the Northwest Territories says that it recognizes the constitutional duty to consult with, and where appropriate, to accommodate, Aboriginal peoples, it does not propose any ways and means for doing so in the early stages of the mining cycle. It does, however, open the door for provisions in the future *Mineral Resources Act* on this matter as it says that the Act is an opportunity to clarify the responsibilities of the NWT Government in order to ensure that legal obligations are met (7).

On the other hand, the GNWT has its hands tied on major portions of the land as it cannot change the provisions of any aboriginal land claims agreement since aboriginal rights have here been transformed or converted into Treaty rights. Government consultation duties here come under the realm of the applicable Treaty, the provisions of which are constitutionalized and, as such, take precedence over any other legal instrument.

It would seem, however, that the GNWT has no intention at all, at least at the present time, to provide in the new Mineral Resources Act for consultation of aboriginal groups before allowing mining claims to be staked on lands where Aboriginal rights are asserted.

4. The three-part test for triggering the duty to consult and accommodate

The Supreme Court of Canada, in *Rio Tinto Alcan* (8), confirmed the three-part test for triggering the duty to consult and accommodate that was mentioned in the *Haida* case (9) :

a) The Crown must have real or implied knowledge of an asserted aboriginal right;
b) The Crown's proposed conduct or decision may adversely impact the aboriginal right;
c) The proposed conduct or decision must have a potential adverse effect on the asserted right.

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6. Discussion Paper, pp. 22-24.
7. *Ibid.,* pp. 32-33.
8. *Rio Tinto Alcan v. Carrier Sekani Tribal Council,* (2010) 2 S.C.R. 650
9. *Haida Nation v. British Columbia,* (2004) 3 S.C.R. 511; see also Karen Drake, «The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabeck Law», *JSDLP,* 2015, 11, 2, pp. 183-218.

Regarding the free entry system, the first requirement is met when an Aboriginal group has asserted its rights through litigation or negotiations. The second requirement is met when a decision, act or policy providing for free entry enables exploration work that has an adverse effect on aboriginal rights such as hunting rights. The third requirement implies a connection between the conduct or decision and its adverse effects: for instance, as aboriginal title carries with it mineral rights (10), the staking of claims has an adverse effect on the title.

Thus, the simple fact that the free entry system enables one to acquire claims and carry out exploration work on the claims is sufficient to trigger the duty to consult and accommodate prior to their acquisition when the Government has knowledge of the asserted right.

5. Lessons from the Ross River Dena Council Judgment of the Yukon Court of Appeal

As the Government of the Northwest Territories plans to submit a legislative proposal to the Legislative Assembly of the NWT during its Winter 2018 legislative session, it would be well advised to bear in mind the very wise words of the Yukon Court of Appeal in the *Ross River Dena Council* case (11) :

« The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First nations can be reconciled with the Crown's right to manage resources. Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist. »

As it would appear from the August 2017 *Discussion Paper* that the proposed Mineral Resources Act would be similarly defective, the GNWT has food for thought here. The Yukon Court of Appeal further commented as follows (12) on a free entry system that allows one to unilaterally acquire mining claims in a such a way (i.e. without prior consultation with the appropriate Aboriginal group):

« The honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land ... the failure of the Crown to provide any discretion in the recording of mineral claims under the *Quartz Mining Act* can be said to be at the source of the problem. »

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10. *Delgamuukw v. British Columbia,* (1997) 3 S.C.R. 1010.
11. *Ross River Dena Council v. Government of Yukon*, (2012) YKCA 14, par. 37.
12. *Ibid.,* par. 38.

6. The Crux of the Problem : Irreconcilability

The free entry system has its defenders and many feel that it is the best way to ensure successful mining development. Others feel that the system, which was born in North America during the 1849 California gold rush, is outdated and at odds with more contemporary concerns such as environmental protection or the social acceptability of projects.

The system must be looked at in completely different way in the context of the constitutional duty to consult and accommodate Aboriginal groups. The latter is simply irreconcilable with the former: even if the Government wished to engage into prior consultation with the proper Aboriginal group, it cannot do so because the prospector, other individual or company has the absolute right, under the system, to acquire unilaterally the mineral rights.

The issue has become more important in light of the *Tsilhqot'in* case where aboriginal title was recognized by the Supreme Court of Canada (13). As title entails proprietary rights to minerals, what happens then to rights acquired under the free entry system? And may the holder of the mining claims sue the Government for having neglected to provide proper and meaningful consultation of the Aboriginal group?

The two ideas (free entry and the duty of prior consultation) are clearly incompatible. This irreconcilability must be addressed in order to find solutions to the problem. The obvious answer is to do away with the free entry system in areas where aboriginal title is asserted and replace it with a permitting system with exploration permits granted only once the duty is met. But the GNWT apparently has not such intention.

7. Possible Solutions

How, then, can constitutional obligations (which supersede any law, regulation decision or policy) be met while, at the same time, retaining the free entry system and providing for clarity and certainty?

The Yukon Court of Appeal itself, in the *Ross River Dena Council* case, mentioned various methods of accommodating aboriginal title claims. For instance, it referred to a possible prohibition in the staking of mining claims in all or part of the claimed territory or changes to the enabling Act itself to comply with the imperative of prior consultation, and where appropriate, accommodation of the affected Aboriginal group (14).

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13. *Tsilhqot'in Nation v. British Columbia,* (2014) 2 S.C.R. 256.
14. *Supra,* note 11, par. 49 and 52.

The Yukon *Quartz Mining Act* was then, in accordance with the judgment, amended in 2013 in order to provide that the latter would take place in designated areas (15). The new *Mineral Resources Act* of the NWT could enable the government to meet its constitutional obligations while preserving a good part of the free entry system characteristics in various ways:

a) A provision requiring that lands where aboriginal title is asserted be open to staking only once the government has met its duty to consult and accommodate the Aboriginal group;
b) Alternatively, a provision requiring that in such a case the Aboriginal group must be consulted and accommodated before the mining claim is recorded;
c) Another alternative would be a provision whereby no exploration work may be carried out therein until a consultation and accommodation process is completed;
d) In all cases, there should be a provision requiring that an Impacts and Benefits Agreement (IBA) be concluded between the mining company and the Aboriginal group before the beginning of production.

In this way, the Government of the Northwest Territories would abide by section 52(1) of the *Constitutional Act of 1982:*

« The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.»

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(consent granted)

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15. *An Act to Amend the Yukon Placer Mining Act and the Yukon Quartz Mining Act,* S.Y., 2013, c. 18.