The Unconstitutionality of Canada's Free Entry Mining Systems and the Ontario Exception

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I. ABSTRACT

The recent amendments to Ontario's *Mining Act* have ushered in significant changes in the way mineral claims are acquired, explored and developed, within the free entry mining system in the province. The amendments, for the most part, aim to ensure that Ontario's free entry mining regime complies with Aboriginal law, particularly with respect to the duty to consult required under section 35 of the *Constitution Act, 1982*. Despite the modernization in the law and the improved Aboriginal consultation under the Act, there are academic opinions, which maintain that the amended statute is still unconstitutional. This article makes an incisive review of the modernized *Mining Act* and its relevant *Regulation*. It also examines Ontario's government policy on consultation with Aboriginal peoples. It takes a position different from that of existing academic opinions. It argues that the statute has become constitutionally compliant, especially because of the entrenched statutory scheme for Aboriginal consultation and a scheme for providing an immediate notice of a mining claim registration to any affected Aboriginal people. For these reasons, this article maintains that the unconstitutionality argument that is generally ascribed to free entry systems in Canada does not apply to Ontario's reformed free entry regime.

Keywords: Aboriginal Rights, Duty to Consult, Free Entry, Mining Act,

II. INTRODUCTION

Recently, Ontario's *Mining Act*[1] received a substantial overhaul in the form of significant legislative amendments and new regulatory initiatives which are collectively dubbed "modernization" by the Ministry of Energy, Northern Development and Mines (ENDM).[2] The modernization which began with the enactment of the *Mining Amendment Act, 2009*,[3] was designed primarily to promote mineral exploration and development in a way that recognizes Aboriginal and treaty rights; to introduce processes that are respectful of the interests of private landowners; and to minimize the environmental impact of mineral exploration and development.[4] The inclusion within the modernization goals of the need to promote mining in a way that respects Aboriginal and treaty rights is indicative of the fact that the old *Mining Act* which pre-dated the 1982 constitutional entrenchment of Aboriginal and treaty rights might have floundered in living up to its expectations in light of the constitutional status given to Aboriginal rights. However, notwithstanding the modernization efforts, dissenting opinions persist, which suggest that the re-branded *Mining Act* has still not scored a

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1 R.S.O. 1990, c. M.14 [*Mining Act*].

2 The Ministry of Energy, Northern Development and Mines (ENDM), formerly Ministry of Northern Development and Mines (MNDM), is the provincial ministry that has the administrative responsibility for the *Mining Act*. The same ministry also has the responsibility to facilitate consultation with Aboriginal communities where the need arises, in the course of staking and registration of mineral claims, exploration and development of minerals in Ontario. The name changes from MNDM to ENDM took effect recently under Premiere Doug Ford's administration, in January 2019.

3 S.O. 2009, c. 21 - Bill 173.

4 See Ontario Ministry of Energy, Northern Development and Mines, "Modernizing the Mining Act (MAM)" (last visited 18 May 2020), online: *Ministry of Energy, Northern Development and Mines* <www.mndm.gov.on.ca/en/min es-and-minerals/mining-act>.

passing mark with respect to compliance with Canada's constitution, particularly with respect to the Crown's duty to consult and accommodate; a procedural right that stems from the interpretation of section 35 of the *Constitution Act, 1982*.[5] The constitutionality question is chiefly centered on a critique of the *Mining Act*-based practice and procedure by which miners in Ontario acquire mineral or mining claims, known as the "free entry" or "open entry" system.[6] The core of the constitutionality argument, as will be discussed further below, is that the application of the free entry system to lands with pre-existing or potential Aboriginal rights or title claims offends the constitutionally protected Aboriginal and treaty rights.

Post-amendment, the *Mining Act* has attracted a number of enlightening commentaries. Bruce Pardy and Annette Stoehr make a blanket assessment of the statute in conjunction with the *Far North Act*[7] and conclude by characterizing the amendment as a case of failed reform.[8] As the scholars argue, some of the changes introduced in the new statute, such as online staking of claims, merely modernized the procedures and mechanics of mineral development without providing genuine reform.[9] They also argue that the new statute, like the old one, preserves the priority given to the pursuit of mineral rights over other surface rights.[10] Thus, they maintain that the main flaws in the old statute persist, meaning that the unconstitutional free entry system as under the old statute is continued in the modernized statute.[11] Karen Drake, in a more recent work, forcefully and pointedly, champions the position that the *Mining Act*'s unconstitutionality remains notwithstanding the amendments.[12] Her argument is hinged on three grounds. First, under the amended statute, Aboriginal consultation is not required prior to staking a mining claim. Second, the amended statute permits mining proponents to carry out low

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5 Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

6 See section III below, where free entry is discussed in some detail.

7 S.O. 2010, c. 18.

8 Bruce Pardy & Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2011) 23 J Envtl L & Prac 1 at 15.

9 *Ibid* at 2, n 5.

10 *Ibid* at 6.

11 *Ibid* at 15.

12 Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 2:2 JSDLP 183.

impact exploration activities without first engaging in Aboriginal consultation. Third, the Aboriginal consultation procedure under the amended statute forbids the operation of Anishinaabe law by failing to provide adequate time for the Anishinaabek decision-making process.[13]

Some other scholars before Karen Drake had critiqued the free entry systems generally, although based on different perspectives and not focusing on the regime in Ontario.[14] Nigel Bankes stands out among them. As an ardent critic, he has consistently maintained the position that free entry systems generally are unconstitutional. Together with Cheryl Sharvit, he surveys the free entry regimes under the Yukon *Quartz Mining Act*[15] and the *Canada Mining Regulations*[16] as applicable in Northwest Territories.[17] Their conclusion is that the regimes amount to a *prima facie* violation of existing Aboriginal title, and thus unconstitutional; and the infringement cannot be justified.[18] Later on, he makes a compelling case for the abolition of free entry mining regimes[19] and further suggests that the Yukon Court of Appeal

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13 *Ibid at* 185-187.

14 See, John D Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington, DC: Resources for the Future, Inc., 1987) at ch. 5; and Charles F Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, DC: Island Press, 1992) at 43-50.

15 R.S.C. 1985, c. Y-4.

16 C.R.C. 1978, c. 1516.

17 Nigel Bankes & Cheryl Sharvit, "Aboriginal Title and Free Entry Mining Regimes in Northern Canada" (1998) Canadian Arctic Resources Committee, Northern Minerals Programs Working Paper No. 2, online (PDF): <http://epub.sub.uni-hamburg.de/epub/volltexte/2010/5122/pdf/NMPWorkingPaper2BankesandSharvit.pdf> [perma.cc/P7KR-PNF4].

18 *Ibid* at 90-92.

19 Nigel Bankes, "The Case for the Abolition of Free Entry Mining Regimes" (2004) J Land Resources & Envtl L (2004) 24:2 317 [Bankes 1] (advocating for the abolition of free entry mining regimes for the following four reasons: inconsistency with the constitutional protection of Aboriginal and treaty rights; obstruction of landscape level efforts to protect ecological integrity; inadvertent government exposure to miner's claim for compensation when taking back lands which miners freely acquired by staking claims; and finally, the undue dissipation of economic rents which arises from the fact that staking of claim is largely speculative and opportunistically driven).

decision in *Ross River Dena Council v Government of Yukon*[20] portends the death of free entry regimes in Canada.[21]

While I share the same view with these scholars that a traditional free entry mining regime is unconstitutional, I believe that the current law and practice of free entry in Ontario has reasonably smothered the fire of the unconstitutionality argument. In other words, the amended *Mining Act* and *Regulation* have demonstrated an effort to be constitutionally compliant with respect to the Crown's duty to consult to such an extent that a further critique of Ontario's regime as being unconstitutional is substantially attenuated. But I will also be quick to note that mere duty to consult and accommodate, assuming that it is performed in a constitutionally desirable fashion, does not address the underlying injustice to the economic rights of the Aboriginal peoples[22] to the natural resources of Canada. That issue may be explored in another forum because it deserves extensive research on its own. This paper is designed to examine the efforts made by the Ontario government to bring the *Mining Act* into conformity with the constitution. To this extent, this paper is not to be seen as countering the popular position taken by the scholars mentioned above but should be seen as providing an alternative perspective to the constitutionality argument, which further lays the groundwork for a more incisive evaluation of Ontario's free entry regime.

For a road map, I will present first a succinct discussion of the classic free entry mining system to provide a context for the associated legal and critical analyses. Following that, I will briefly review the jurisprudence on the Crown's duty to consult under the constitution. Then comes a survey of the amended *Mining Act*, the accompanying *Regulation* and policy, as well as the modernization indices that mark out Ontario's free entry regime as

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20 2012 YKCA 14 [Ross River].

21 Nigel Bankes, "The death of free entry mining regimes in Canada?" (15 January 2013) (last visited 18 May 2020), online: University of Calgary Faculty of Law Blog on Developments in Alberta Law <ablawg.ca/2013/01/15/the-death-of-free-entry-mining-regimes-in-canada/> [perma.cc/TZ2K-3FTW] [Bankes 2] (commenting on *Ross River Dena Council v Government of Yukon* decision, in which the Yukon Court of Appeal unanimously held that the regime for the acquisition of a quartz mineral claim in Yukon was constitutionally deficient for failing to provide mechanism for consultation with First Nations prior to recording of claims).

22 Please note that the terms, "Indigenous peoples", "First Nations" and "Aboriginal Communities" have been used in this article to also refer to Aboriginal peoples.

being now constitutionally compliant. That is followed by my thoughts on the future of the duty to consult under Ontario's free entry regime in light of the modernization. Finally comes the conclusion, which maintains that the new *Mining Act* has complied with the requirements of the duty to consult under section 35 of the *Constitution Act, 1982*.

III. A REVIEW OF THE TRADITIONAL FREE ENTRY MINING SYSTEM

In the mining law lexicon, free entry (also called "free miner") practice refers to the acquisition of a mineral right by first staking a claim. It is a centuries-long practice that has roots in the Anglo-western world, Canada not being an exception. Its evolution and history are well documented.[23] In Canada, it is practiced in a number of provinces and territories including Ontario,[24] and it is one of the two main methods of acquiring mineral rights; the other being the ministerial discretion system.[25] The principles of a traditional free entry system involve the right of free access to public lands in quest of Crown minerals, the right to stake a mineral claim and obtain title to the minerals, and the right to develop or mine the minerals discovered.[26]

Outside of the "rights" mantra, as Nigel Bankes clearly explains, the traditional free entry systems in Canadian jurisdictions share common

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23 See, Barry Barton, *Canadian Law of Mining*, 2nd ed (Toronto: LexisNexis, 2019) at 185-247; Dwight Newman, *Mining Law of Canada* (Toronto: LexisNexis, 2018) at 77-80 [Newman, Mining Law of Canada].

24 The provinces and territories are British Columbia under its *Mineral Tenure Act*, RSBC 1996, c 292; Manitoba under its *Mines Minerals Act*, CCSM, c M162; New Brunswick under its *Mining Act*, SNB 1985, c M-14.1; Newfoundland and Labrador under its *Mining Act*, SNL 1999, c M-15.1; Saskatchewan under its Crown Minerals Act, SS 1984-85-86, c C-50.2; the Northwest Territories under its *Northwest Territories Mining Regulations*, SOR/2014-68; Nunavut under its Nunavut Mining Regulations, SOR/2014-69; and Yukon under its *Quartz Mining Act*, SY 2003, c 14.

25 This is the system retained in Alberta under its *Mines and Minerals Act*, RSA 2000, c M-17 and *Metallic and Industrial Minerals Tenure Regulation*, Alberta Regulation 145/2005; Nova Scotia under its *Mineral Resources Act*, SNS 1990, c 18; and Prince Edward Island under its Mineral Resources Act, RSPEI 1988, c M-7. See Newman, *Mining Law of Canada, supra* note 23 at 80-88.

26 Barton, *supra* note 23 at 525.

distinctive features.[27] They are defined by the freedom of a miner to physically enter any open Crown land not already subject to a claim, whether surveyed or unsurveyed, and stake a claim to any potential minerals that may exist below the surface.[28] All that a miner requires in order to do this is to secure a prospector's licence as in Ontario, a free miner certificate, or a similar type of licence – the name varies from province to province. However, a certificate or licence is not required in the Yukon. Crown lands are expected to be open for staking unless they have been specifically withdrawn from mining access.[29] Once a claim is staked, it must be registered with the office of the Mining Recorder to perfect it, and the Recorder cannot exercise any discretion to refuse to register a claim, so long as the claim is presented in the appropriate form and the lands are not withdrawn.[30] Thus, as case law has shown, a properly staked claim that meets statutory requirements is automatically entitled to receive registration or recording without any exercise of discretion on the part of the Recorder.[31]

Again, a registered claim may be potentially held indefinitely unless abandoned or forfeited in a prescribed manner.[32] The free entry features under the *Mining Act* are established in sections 19, 27, 28, 38, 70, 72 and 65 collectively. The unconstitutionality concern therefore stems from a *prima facie* absence of a statutory scheme for prior consultation with any Aboriginal peoples that may have existing or potential claims of Aboriginal rights or title on lands on which mining claims have been staked and recorded.[33] The manner in which the amended *Mining Act* and *Regulation* have attempted to navigate around this unconstitutionality concern is the key issue examined in this paper.

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27 Bankes 2, *supra* note 21.

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Halferdahl v Canada (Mining Recorder) (Whitehorse Mining District)* [1992] 1 FC 813 (FCA); *Canada (Attorney General) v Halferdahl* [1996] FCJ 694 (TD). See also, Bankes 2, *supra* note 21.

32 See, Bankes 1, *supra* note 19 at 318.

33 Bankes 2, *supra* note 21.

IV. AN ABSTRACT OF THE JURISPRUDENCE ON THE DUTY TO CONSULT

In the context of this article, the duty to consult is not discussed in a broad scope. Since the enactment of section 35 of the *Constitution Act, 1982*, and the evolution of its jurisprudence, no single issue within that sphere of discourse has been as topical as the Crown's duty to consult and accommodate. Scholars from both legal and non-legal backgrounds, as well as practitioners, have written numerous published works in which the duty to consult is discussed from diverse perspectives. Its constitutional, theoretical and legislative perspectives have been considerably explored. In my opinion, abundant knowledge of it may now be easily accessible.[34] The duty to consult has been examined in the context of resource jurisdiction and ownership,[35] resource development[36] and resource regulation.[37] It has also been discussed in terms of procedural justice from an administrative law perspective;[38] its development in the case law has been inquired into;[39]

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34 See Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009); Dwight Newman, *Revisiting the Duty to Consult Aboriginal Communities* (Saskatoon: Purich Publishing, 2014); Dwight Newman, "The Section 35 Duty to Consult" in Peter Oliver, Patrick Macklem & Nathalie des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017); Ravina Bains & Kayla Ishkanian, *The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies* (Vancouver: Fraser Institute, 2016); Zachary Davis, "The Duty to Consult and Legislative Action" (2016) 79 Sask L Rev 17; and Jamie D. Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing, 2015).

35 Dwight Newman, *Natural Resources Jurisdiction in Canada* (Markham: LexisNexis, 2013) at 39-47.

36 Dwight Newman, *Is the Sky the Limit? Following the Trajectory of Aboriginal Legal Rights in Resource Development* (Ottawa: Macdonald-Laurier Institute, 2015) at 11-16; and Heather L Treacy, Tara L. Campbell & Jamie D. Dickson, "The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development" (2007) 44:3 Alta L Rev 571.

37 Dwight Newman, "Changing Duty to Consult Expectations for Energy Regulations: Broader Implications from the Supreme Court of Canada's Decisions in *Chippewas of the Thames* and *Clyde River*" (2017) 5:4 Energy Reg Q 21.

38 Lorne Sossin, "The Duty to Consult and Accommodation: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93.

39 Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139.

and its practical application critiqued.[40] The Crown's duty to consult has also been analyzed in the context of decision making by administrative tribunals,[41] as well as in the context of conflicting representations within the Aboriginal communities.[42] Scholars have also surveyed a third party's prospects of engaging the Crown in litigation for loss arising from the Crown's failure to do the Aboriginal consultation in appropriate circumstances.[43] Indeed, the literature on the Crown's duty to consult has been on the increase and the list of works on this topic is seemingly endless.[44]

The scholarly works mentioned in the preceding paragraph are for the most part reflections and or treatises on decided cases touching on the duty

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40 Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 397.

41 Nigel Bankes, "Clarifying the Parameters of the Crown's Duty to Consult and Accommodate in the Context of Decision-Making by Energy Tribunals" (2018) 36:2 J Energy & Nat Resources L 163 [Bankes 3].

42 Ian Peach, "Who Speaks for Whom? Implementing the Crown's Duty to Consult in the case of Divided Aboriginal Political Structures" (2016) 59:1 Can Pub Admin 95.

43 Ashley B. Ayliffe, "Externalizing the Duty: A Cause of Action Where Crown Failure to Consult First Nations Results in Third Party Loss" (2007) 16 Dalhousie J Legal Stu 47.

44 See also, Felix Hoehn and Marshal Stevens, "Local Government and the Crown's Duty to Consult" (2018) 55:4 Alta L Rev. 971; Stephen S. Crawford, "The Canadian Crown's Duty to Consult Indigenous Nations' Knowledge Systems in Federal Environmental Assessments" (2018) 9:3 The Int'l Indigenous Pol'y J, Art 4; Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation? (2017) 13:1 MJSDL 1; Holly L Gardner, Denis Kirchhoff & Leonard J Tsuji, "The Streamlining of the Kabinakagami River Hydroelectric Project Environmental Assessment: What is the Duty to Consult" with Other Impacted Aboriginal Communities When the Co-Proponent of the Project is an Aboriginal Community?" (2015) 6:3 The Intl Indigenous Pol'y J, Art 4; Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonlith Indian Band v Salmon Arm (City)" (2014) 47:1 UBC L Rev 293; Dimitrios Panagos & J Andrew Grant "Constitutional Change, Aboriginal Rights, and Mining Policy in Canada" (2013) 51:4 Commonwealth & Comp Pol 405; Clara MacCallum Frazer & Leela Viswanathan, "The Crown Duty to Consult and Ontario Municipal-First Nation Relations: Lessons Learned from the Red Hill Valley Parkway Project" (2013) 22:1 Supplement, Can J Urban Research 1; Holly L Gardner et al, "The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?" (2012) 3:2 The Int'l Indigenous Pol'y J, Art 7; and Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41:1 Alta L Rev 49.

to consult, and the cases include decisions of different levels of court, provincial and federal alike. The sheer volume of the literature demonstrates the topical nature of the duty to consult, which is often a source of tension in the relationship between the Crown and Aboriginal peoples, especially in the context of resource development. The tension underscores the fact that the duty to consult, whether in itself or the way it is done, may not be the expected panacea for the well-founded discontent of the Aboriginal peoples. With that being said, in nearly three decades of section 35 judicial interpretation, some clear principles on duty to consult doctrine have emerged and become common knowledge.

A. The Principles of the Duty to Consult

The duty to consult doctrine is one way the case law has given a breath of life to section 35 provisions, by maintaining that in order to meaningfully recognize and respect the Aboriginal and treaty rights enshrined in that section, it is in the honour of the Crown and in the interest of reconciliation, to consult with the Aboriginal peoples in making decisions that have the potential to affect their rights. As succinctly enunciated in *Haida Nation v British Columbia*,[45] the Crown's "duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown" which "is always at stake in its dealings with Aboriginal peoples."[46] The Supreme Court of Canada in that case took the initiative of establishing the trigger for holding the Crown accountable for her obligation to consult. The trigger or rather the "test" clearly stated is that "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it..."[47] With such a low threshold, the possibility of the Crown relying on a lack of knowledge as a defence in the face of any violation of the duty to consult obligation is virtually non-existent.

However, attention should be drawn to the fact that the content of the duty varies in each case depending on the apparent weakness or strength of the Aboriginal claim or interest at stake. Arguably, the government is given

45 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

46 *Ibid* at para 16.

47 *Ibid* at para 35.

leeway to choose what is to be an appropriate consultation in each case. Accordingly, likening the duty to a spectrum, the court emphasizes that:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.[48]

> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.[49]

Later on, in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*,[50] the same court broke the trigger test into three elements, namely, "(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."[51] The three elements must be satisfied in any particular circumstances before the Crown is required to consult. While acknowledging that the threshold is not high, the court elaborates upon the three elements. First, "actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted."[52] But constructive knowledge "arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated." In this regard, the proof that the claim will succeed is immaterial, so long as the claim is

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48 *Ibid* at para 43.

49 *Ibid* at para 44.

50 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*].

51 *Ibid* at para 31.

52 *Ibid* at para 40.

credible.[53] As such, "tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice."[54]

Second, the contemplated Crown conduct is not restricted to conduct or decisions that have an immediate impact on lands and resources of the Aboriginal peoples, but the duty is triggered if a decision or conduct has the potential for adverse impact. Accordingly, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights."[55] Notable examples include the transfer of tree licences, which would have permitted the cutting of old-growth forest as in *Haida Nation*;[56] the approval of a multi-year forest management plan for a large geographic area as in *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*;[57] the establishment of a review process for a major gas pipeline as in *Dene Tha' First Nation v. Canada (Minister of Environment)*;[58] and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission.[59]

Third, for the duty to consult to be triggered, a causal connection must exist between proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal rights. Past wrongs, including earlier breaches of the duty to consult, are not enough.[60] The pith and substance of it, therefore, is that the government action must have an adverse effect on the Aboriginal peoples' ability to exercise their Aboriginal rights in the future. As such, neither mere speculative impacts nor an adverse effect on Aboriginal peoples' future negotiating position will suffice.[61] Although often the adverse effects are physical in nature, however, some high-level

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53 *Ibid.*

54 *Ibid.* With this statement, the court reaffirms and validates the principles enunciated in *Haida Nation* that the content of the duty to consult is contingent on the strength or weakness of the Aboriginal claim or interest at stake.

55 *Ibid* at para 44.

56 *Haida Nation*, *supra* note 45.

57 2008 BCSC 1642, [2009] 1 CNLR 110.

58 2006 FC 1354, [2007] 1 CNLR 1, aff'd 2008 FCA 20, 35 CELR (3d) 1.

59 *Rio Tinto*, *supra* note 50 at para 44. This particular example relates to "An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re, 2009 CarswellBC 3637 (B.C.U.C.)". The accompanying citation could not be verified.

60 Rio Tinto, *supra* note 50 at para 45.

61 *Ibid* at para 46.

management decisions or structural changes to natural resources management policy may also adversely affect Aboriginal rights, notwithstanding that such decisions have no immediate physical impact on lands and resources.[62]

Finally, while the ultimate legal responsibility for consultation and accommodation rests with the Crown, the operational aspects of the duty to consult and accommodate can be delegated to third parties who are directly involved in the day-to-day resource development projects.[63] This is particularly the case with the mining industry, where in practice, mining claim holders engaging in mineral development projects are delegated to do the consultation.[64]

With respect to treaty rights, the decision of the Supreme Court of Canada in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[65] has put it beyond doubt that the Crown's duty to consult and accommodate equally applies in the treaty rights context. As a treaty party, the Crown will always have notice of its contents. The question in each case will be the determination of the "degree to which the conduct contemplated by the Crown would adversely affect the rights of the Aboriginal parties so as to trigger the duty to consult," and the level of consultation required to be done by the Crown.[66] Without a doubt, it follows that in the context of treaty rights, the duty to consult is inevitable notwithstanding that a Crown's conduct or decision may not amount to an infringement of a treaty right of the Aboriginal peoples.[67] However, in my opinion, the possibility that the free entry system as it currently exists in Ontario may ever be in conflict with a treaty right is extremely low, if not non-existent.

There is no doubt that the practice of staking and recording of mineral claims under the *Mining Act* meets the first trigger element for the duty to consult as enunciated in *Rio Tinto*. Apart from the obvious instances where the Crown has actual knowledge or is deemed to have constructive knowledge of Aboriginal rights or title claims,[68] the ENDM as an agent of

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62 *Ibid* at para 47.

63 Haida Nation, *supra* note 45 at para 53.

64 See section V(C) below.

65 2005 SCC 69, [2005] 3 SCR 388.

66 *Ibid* at para 34.

67 *Ibid* at paras 59-61.

68 For an insight on those instances, see Newman, *Revisiting the Duty to Consult Aboriginal Communities*, *supra* note 34 at 30.

the Crown has a thorough knowledge of all lands in Ontario, that being a key element of the current Aboriginal consultation policy in Ontario.[69] The policy was designed for the most part, upon the understanding that the government is aware of every land in Ontario with the Aboriginal peoples' involvement. But it is a different position for the other two elements - the contemplated Crown conduct and the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. Apparently, the current position of the law and legal opinions does not suggest that the staking of mineral claims satisfies those trigger thresholds for the duty to consult. That is part of the reasons that support the position taken in this paper that the current free entry system in Ontario may have reasonably complied with the demands of constitutionality with respect to the duty to consult. For the sake of clarity however, no suggestion is made here that the consultation issue only revolves around staking a claim. As I discussed below, consultation is required in every other important stage in mineral development after a claim is staked. That is indeed the true essence of the modernization.

V. THE ONTARIO'S REFORMED FREE ENTRY REGIME

This section focuses on the key grounds for demonstrating the compliance of the *Mining Act* and its free entry regime with section 35 of the *Constitution Act, 1982*. There are three of them. The first is the textual and purposive compliance grounds and the existence of an entrenched statutory scheme for mandatory Aboriginal consultation. The second is the absence of the Crown's discretion in staking and recording a claim. In other words, the act of staking a claim does not involve an exercise of Crown's discretion that triggers a consultation, and as such, the unconstitutionality argument seemingly may not have arisen in the first instance. The third is the industry practice and procedures, based on the ENDM's policy for

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69 See Ontario Ministry of Northern Development and Mines, "MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration" (Version 1.0, September 2012) at 7 (last visited 12 July 2019), online: *Ministry of Northern Development and Mines* <https://www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf> (Hard copy on file with the author) [ENDM's Policy].

providing immediate notice to Aboriginal peoples once a claim is staked and registered on a land with an Aboriginal right or claim.

A. The Textual and Purposive Compliance Ground

A review of the *Mining Act* is argumentatively a good starting point in demonstrating those modernization elements that attempt to align Ontario's free entry regime with section 35 of the *Constitution Act, 1982*. The word "Aboriginal" is used around 29 times in the revised *Mining Act*, which seems to suggest a renewed interest in reconciling Ontario's mining law with the constitutional rights of Aboriginal peoples. One strategic use of the word is found in a solemn declaration in section 2, which states that the purpose of the statute is:

> "...to encourage prospecting, registration of mining claims and exploration for the development of mineral resources, 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 duty to consult, and to minimize the impact of these activities on public health and safety and the environment".

With such a strong statement of purpose setting the tone for recognition of Aboriginal rights and interests, the statute sets the stage for ensuring that concrete provisions are made to consider as many as possible Aboriginal interests at every important stage in minerals prospecting and development operations, including doing the requisite Aboriginal consultations. In effect, the statute creates several restrictions that limit the availability of lands for mining once it is determined that an Aboriginal interest may be impacted, as well as requiring Aboriginal consultation in such circumstances.

One of the key factors that the Minister may consider for withdrawal of lands from mining access is whether the lands meet the criteria prescribed for a site to be of Aboriginal cultural significance.[70] Invariably, lands that are appropriately designated to be of Aboriginal cultural significance would be withdrawn from mining access. Similarly, the Minister is entitled to restrict the use of surface rights of a holder of a mining claim, where those rights impact any land designated to be a site of Aboriginal cultural significance.[71] Moreover, to carry out certain exploration activities, an

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70 *Mining Act*, *supra* note 1, s. 35(2)(a).

71 *Ibid*, s. 51(4)(a).

exploration permit is required from the Director of Exploration, who will only issue it after considering among others, whether an affected Aboriginal community has been consulted.[72] And any mining lease issued eventually must also contain a clause to the effect that it is subject to the protection provided for Aboriginal or treaty rights in section 35 of the *Constitution Act, 1982*.[73]

The *Mining Act*'s commitment to the recognition and affirmation of constitutionally protected Aboriginal and treaty rights is further demonstrated by the requirement for an Aboriginal consultation even with respect to post-mine development operations. In order to determine whether to approve an application for a voluntary rehabilitation of a mine hazard, the Director of Mine Rehabilitation shall consider whether any required Aboriginal consultation has been made as prescribed.[74] In a similar manner, Aboriginal consultation is also required where a mining proponent who is not already subject to a mine closure plan wishes to commence or recommence an advanced exploration[75] or wishes to commence or re-commence mine production.[76] The statute also creates a mechanism for resolution of disputes that may arise in connection with an Aboriginal consultation or the assertion of Aboriginal or treaty rights, by designating one or more individuals, who will mediate in such disputes for settlement.[77] Further, the statute also empowers the Lieutenant Governor in Council to make regulations not only governing issues relating to whether the land is a site of Aboriginal cultural significance,[78] but also governing all aspects of Aboriginal consultation, including the manner in which any consultation may occur as well as the delegation of some procedural aspects of the consultation.[79]

An application of textual and purposive analyses both of which are cardinal principles of statutory interpretation to the above-reviewed

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72 *Ibid*, s. 78.3. See also, *Ontario Regulation 308/12: Exploration Plans and Exploration Permits*, s. 11 (*O. Reg. 308/12*).

73 Mining Act, *supra* note 1, s. 86.1.

74 *Ibid*, s. 139.2(4.1).

75 *Ibid*, s. 140(1).

76 *Ibid*, s. 141(1).

77 *Ibid*, s. 170.1(1).

78 *Ibid*, s. 176(1) 24.2.

79 *Ibid*, s. 176(1) 24.3.

provisions of the *Mining Act*, may lead to a conclusion that the statute does in fact comply with the constitutional provisions in section 35 of the *Constitution Act, 1982*. A textual analysis is based on the notion that texts of a statute provide a credible indication of legislative intentions. As Lamer C.J. notes in *Ontario v Canadian Pacific Ltd.*,[80] "the best way for the courts to complete the task of giving effect to legislative intention is usually to assume that the legislature means what it says, when this can be clearly ascertained *from the texts*."[81] With respect to purposive analysis, Dickson J. in *Covert v Nova Scotia (Minister of Finance)*[82] opines that "[t]he correct approach, applicable to statutory construction generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose."[83] Indeed, whether the *Mining Act* is textually or purposively construed, the conclusion is the same - it is not unconstitutional with regard to section 35 of the *Constitution Act, 1982*, and by the same token, the free entry regime based on it is also not unconstitutional.

B. The Absence of Crown's Discretion in Staking and Registration of a Claim

Arguably also, Ontario's free entry system has become distinctive from a jurisprudential point of view. One contentious issue is the question of whether the act of staking and recording a claim amounts to conduct or decision making by the Crown that adversely affects the Aboriginal or treaty rights, thus triggering a duty to consult. A decision of an Ontario Divisional Court delivered before the amended *Mining Act* came into force, suggests that the question may be answered in the negative. In *Wahgoshig First Nation v Solid Gold Resources Corp et al* [indexed as *Wahgoshig First Nation v Ontario*],[84] the Wahgoshig First Nation (WFN) made an application for an injunctive order stopping Solid Gold from continuing with mining exploration work

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80 [1995] SCJ No. 62, [1995] 2 SCR 1031.

81 *Ibid* at para 11 (Emphasis added).

82 [1980] 2 SCR 774, [1980] SCJ No. 101.

83 *Ibid* at 807. For a detailed understanding of both the textual and purposive analyses as principles of statutory interpretation, see, Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis, 2014) at 227 & 259.

84 112 OR (3d) 782, 2012 ONSC 2323.

on its registered claims, which happen to lie within the traditional lands over which WFN asserts Aboriginal and treaty rights. The ground for the application was that Solid Gold failed to do any Aboriginal consultation before going ahead with its exploration work. The application was granted but Solid Gold was given leave to appeal the order. However, Wilton-Siegel J. in his ruling notes that "...Solid Gold acquired its mining claims as of right under the *Mining Act* at an earlier time and thereby became entitled under that statute to engage in an exploration programme *without any Crown action*,"[85] and that "[a]bsent a finding that the *Mining Act* is unconstitutional, there may be no basis for finding that the issuance of the mining claims is subject to invalidation by virtue of a failure of Ontario to honour a duty to consult at the time of issuance."[86] Although those statements are *obiter dicta*, they stand as an acknowledgement that the act of staking and registering a mining claim does not amount to a discretionary action by the Crown that could trigger a duty to consult. In other words, the second element in the trigger threshold - the *Haida* test, is not met when a mining claim is staked and registered.

A similar argument was made by the government of Yukon in *Ross River* that the recording of a quartz mining claim did not involve the exercise of any discretion by the Crown, and not being contemplated Crown conduct, the second element of the *Haida* test was not met.[87] The argument was rejected by the Yukon Court of Appeal which maintained that the absence of statutory discretion in relation to the recording of claims under the *Quartz Mining Act* did not absolve the Crown of its duty to consult.[88] However, the court also laid out the key factor that informed its position in this case – the regime for the acquisition of a quartz mineral claim in Yukon *failed to provide any mechanism for consultation with First Nations.*[89] The position is not the same under Ontario's *Mining Act*, where provisions are made requiring Aboriginal consultation at every important stage in mineral exploration after a claim is recorded. Arguably, the court in *Ross River* would have arrived at a similar conclusion as the suggestions made in *Wahgoshig*

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85 *Ibid* at para 47. The emphasis is mine.

86 *Ibid* at para 74.

87 *Ross River*, *supra* note 20 at paras 27 & 34.

88 *Ibid* at para 36.

89 *Ibid* at paras 37 & 40. The emphasis is mine.

First Nation's case if the *Quartz Mining Act* then had contained a mechanism for Aboriginal consultation, following the recording of a claim.

The foregoing argument about the absence of Crown discretion does not align with the position taken by Karen Drake, who is opposed to it on the ground that constitutional law trumps legislation.[90] The scholar argues that the government cannot bypass its constitutional duties by legislating away its discretion. While I acknowledge that constitutional law trumps legislation, the application of that principle to the present case is faulty. The *Mining Act* construed purposively is constitutionally sound. It overtly entrenched the duty to consult as one of its core principles. The judicial suggestion in *Wahgoshig First Nation's case* that the very duty to consult is not triggered at the point of staking and recording claims with no exercise of Crown's discretion involved may not be a compelling reason to suggest that Ontario is legislating away its constitutional obligation. Indeed, the opinion of Justice Wilton-Siegel may be better appreciated if one adverts his or her mind again to the fact that the decision in *Ross River* was influenced for the most part, by the fact that there was no scheme for Aboriginal consultation in the territory's *Quartz Mining Act* at that time. But despite the position of the case law, one can see that the *Mining Act* may have gone out of its way to do more, so as to put its constitutional compliance beyond argument by containing provisions for a statutory scheme as mentioned above, for mandatory Aboriginal consultation. The *Mining Act*'s consultation scheme indeed mirrors to a reasonable extent, the Yukon's legislative response to *Ross River* decision. The territory in section 133(1)(b) of its *Quartz Mining Act* (as amended), requires Aboriginal consultation prior to the approval of an exploration program but not before the recording of mining claims.

Another insight to be drawn from the decision in *Wahgoshig First Nation's case* is the fact that WFN failed to raise an argument regarding an absence of consultation before or at the time Solid Gold's claims were staked or recorded. Such a stance by WFN is an obvious acquiescence to the fact that the "staking and recording" of a claim does not trigger consultation. It is also a tacit acknowledgment that mere staking and recording of claims does not adversely affect Aboriginal or treaty rights.

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90 Drake *supra* note 12 at 200.

C. The Industry Practice and Procedures Based on ENDM's Policy

The critical procedural issues necessary for analysis at this point involve practices surrounding the early stages of exploration following the staking and recording of a claim. In addition to the *Mining Act* and its *Regulation*, the ENDM has created an operational policy[91] that provides a detailed guide on doing Aboriginal consultation in the early phases of mineral exploration. The policy is built on an important tripod. The first leg is that the Crown, mining prospectors and First Nations have roles to play in the consultation process.[92] The second leg is that the Crown could delegate the procedural aspects of the consultation to industry proponents, and the third leg is that the extent of consultation required in appropriate cases falls along a spectrum, ranging from mere notice to deeper consultation.[93] And of course, the degree of consultation required depends on the nature of Aboriginal rights in issue and the seriousness of potential impacts of mining on those rights.[94]

With that being said, upon the recording of a mining claim, the ENDM as Crown's agent must provide written notice of the claim to Aboriginal communities known to have interests in the affected lands. The notice will include the claim holder's contact information as well as information about any *subsequent approval and consultation process* the First Nation can anticipate.[95] At the same time, the ENDM provides the claim holder with specific information about individuals within the First Nation communities who may have been identified as a consultation contact.[96] Where no such consultation contact exists, then the notification and consultation efforts are extended directly to the Chief and Council for the affected First Nation.[97] ENDM thus, encourages both the First Nation communities and prospectors (claim holders), to communicate and build a consultation

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91 ENDM's Policy, *supra* note 69.

92 *Ibid* at 5.

93 *Ibid* at 3.

94 *Ibid*.

95 *Ibid* at 6. The emphasis is mine.

96 *Ibid*.

97 *Ibid*.

relationship at a very early stage. First Nations communities for their part, are encouraged to proactively contact the claim holder after receiving the notice of claim to seek more information and ask questions.[98] It follows that an early consultation happens before any form of exploration starts, meaning that no physical interference with lands happens before the consultation.

Admittedly, funding is a critical issue for the Aboriginal peoples when it comes to engagement in the consultation process. Lack of funding could hamper meaningful participation in consultation as in *Saugeen First Nation v Ontario (Minister of Natural Resources and Forestry)*,[99] where an Ontario Divisional Court commented that the scope of the duty to consult includes funding for the Aboriginal party, especially where the Crown is aware of their funding needs.[100] However, the Ontario government has established a New Relationship Fund, part of which is core consultation capacity funding to help the Aboriginal peoples in the consultation with governments and the private sector on land and resource matters.[101]

Going back to the industry practice and procedures, in 2018, Ontario established a Mining Lands Administration System (MLAS),[102] which introduced online staking and registration of claims, and it is available round the clock, and can be accessed from anywhere around the world. This means that physical contact with lands in the course of acquiring claims are completely eliminated, thus stamping out the objectionable staking-related interference with lands, especially lands with Aboriginal or treaty rights claims. In effect, the MLAS has turned online staking into what looks like a mere policy regulation similar to any other administrative policy, which

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98 *Ibid*.

99 [2017] OJ No 3701, 2017 ONSC 3456.

100 *Ibid* at paras 26, 27, 34, 35, 47, 111, 156-160. See also: John J Wilson, "Divisional Court Finds Duty to Consult Required Crown to Provide Promised Capacity Funding" (25 January 2018), online: *Gowling WLG* <https://gowlingwlg.com/en/insights-resources/articles/2018/divisional-court-finds-duty-to-consult-required/>.

101 The Community of Nezaadiikaang: Lac Des Mille Lacs First Nation, "New Relationship Fund" (last visited 22 August 2020), online: *Lac Des Mille First Nation* <http://lacdesmillelacsfirstnation.ca/pages/view/new-relationship-fund>.

102 MLAS is created under s. 4.1 of the *Mining Act*. This section is part of the amendments made to the *Mining Act* through the *Aggregate Resources and Mining Modernization Act, 2017*, Sch 2, s. 3, which came into force on January 9, 2018. See Ontario Gazette, Volume 150, Issue 59, of December 9, 2017.

does not impact any rights unless and until an actual contact is made with lands. Even at that, the MLAS facilitates more timely and efficient Aboriginal consultation because once a claim is registered online, the ENDM provides notification directly to Aboriginal communities that may be adversely affected by later exploration activities.[103] The notification is in turn confirmed to the claim holder, who is encouraged to share information and build relationships with those communities in order to facilitate the consultation process as the claim holder's claim progresses up the mining ladder.[104]

In keeping with its purposes, the *Mining Act* expressly makes it clear that the recording or rather, registration of a mining claim, does not confer on a prospector any right, title, or interest in the claim except the right to perform assessment work or to obtain a lease from the Crown.[105] Prior to performing the first prescribed assessment work, a holder of an Ontario mining claim is merely a licensee of the Crown and becomes a tenant at will of the Crown after the performance of the assessment work.[106] Further, a claim holder can only ever enter upon, use, or occupy a mining claim for any exploration work after meeting the requirements in sections 78.2 and 78.3 of the *Mining Act* and in the *Regulation*.[107] That takes us to the policy requirements for exploration plan and exploration permit applications, which are created to provide comprehensive, non-technical, and detailed

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103 Government of Ontario, "Mining Act Awareness Program (MAAP)" (last visited: 21 May 2020), online: *MAAP* <https://www.mlas.mndm.gov.on.ca/maapp/en/confirmation-of-mining-claim-registration-to-surface-rights-owner>.

104 *Ibid*.

105 Mining Act, s. 50(1). The assessment work involves minimal work required under s. 65 of the Mining Act to be done on a claim annually in order to retain title to the claim, although money payment can be made in lieu of assessment work. Looking at the nature of activities that qualify as assessment work under the s. 2 of the Assessment Work, O. Reg. 65/18, and which are measured by the amount of money spent thereon, one finds that they are basically similar in category to an early exploration work, and as such envisage doing necessary Aboriginal consultation for that purpose. However, based on the ENDM's policy, an earlier notice to the Aboriginal people of the claim's registration would, in fact, trigger requisite consultation before the claim holder gets to the stage of doing annual assessment work.

106 *Ibid*.

107 *Ibid*, s. 50(2.1). The Regulation referenced here is the Ontario Regulation 308/12: Exploration Plans and Exploration Permits (O. Reg. 308/12).

information about the nature of the proposed activities that require the respective plan or permit.[108]

Generally, a claim holder is required to submit an exploration plan to the Director of Exploration in order to engage in early exploration work or activities and to do any Aboriginal consultation that may be required.[109] However, a claim holder has an option whether or not to give the impacted Aboriginal communities a notice of intent to submit an exploration plan.[110] If the claim holder gives the notice of intent to the Aboriginal communities, then the Director of Exploration has an option whether or not to direct the claim holder to consult at that point and submit a consultation report together with the exploration plan.[111] However, where a formal exploration plan is submitted dispensing with the notice of intent, the Director is required to give notice of that plan to the impacted Aboriginal communities by sending a copy of the plan to them, and invite them to provide written concerns regarding any adverse impact of the exploration activities on their

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108 ENDM's Policy, *supra* note 69 at 7.

109 Mining Act, *supra* note 1 , s. 78.2(1). The early exploration activities as prescribed in s. 4 of the O. Reg. 308/12 and listed in s. 1 of schedule 2 thereof refer to the following:

1. Any geophysical surveys that require the use of a generator to be carried out.

2. Mechanized drilling for the purpose of obtaining rock or mineral samples, if the assembled weight of the drill and its associated equipment, excluding drill rods, casings and bits, does not exceed 150 kilograms.

3. Line cutting, where the width of the lines does not exceed 1.5 metres.

4. Mechanized surface stripping where,

i. a single location is to be stripped and the total area to be stripped does not exceed 100 square metres, or

ii. 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.

5. Pitting and trenching where,

i. a single pit or trench is to be dug and the total volume of the pit or trench to be dug exceeds one cubic metre but does not exceed three cubic metres, or

ii. two or more pits or trenches are to be dug and the edges of a pit or trench are within 200 metres of the edges of another pit or trench and the aggregate of the volume of the pits or trenches exceeds one cubic metre but does not exceed three cubic metres.

110 O. Reg. 308/12, s. 6(3).

111 *Ibid*, s. 6(4). The ENDM however encourages claim holders to give notice of exploration plan to the communities and address their concerns in advance, before submitting the plan to avoid delays and objections.

Aboriginal or treaty rights.[112] The Aboriginal communities have three weeks within which to respond.[113] Upon receiving comments from the Aboriginal Communities, the Director may require the claim holder to consult with the communities.[114] Where appropriate, the claim holder may be required to withdraw or adjust the plan in order to address Aboriginal concerns.[115] However, 30 days after notice of the plan has been given to the Aboriginal communities, a claim holder may commence exploration activities as detailed in the exploration plan unless the plan is withdrawn or the Director determines that an exploration permit is required.[116] The ENDM has explained that rarely are concerns raised by Aboriginal communities fail to be addressed in the exploration plan process, to warrant demanding the claim holder to apply for an exploration permit.[117]

Apart from the requirement for an exploration permit that flows from the exploration plan process, there is a category of exploration activities that requires a direct application for an exploration permit.[118] They are listed in the *Exploration Plans and Exploration Permits Regulation*.[119] The application for

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112 *Ibid*, s. 7(1) & (2).

113 ENDM's Policy, *supra* note 69 at 7.

114 *O. Reg. 308/12*, s. 7(3).

115 *Ibid*, s. 8(1). See also, ENDM's Policy, *supra* note 69 at 7.

116 *Ibid*, s. 9(1).

117 ENDM's Policy, *supra* note 69 at 7.

118 *Mining Act, s.* 78.3.

119 *O. Reg. 308/12*, s. 11 & Schedule 3, s. 1. The activities include:

1. Mechanized drilling for the purpose of obtaining rock or mineral samples, if the assembled weight of the drill and associated equipment, excluding drill rods, casings and bits, is greater than 150 kilograms.

2. Mechanized surface stripping where,

i. a single location is to be stripped and the total area to be stripped exceeds 100 square metres but is less than the threshold for advanced exploration as set out in Ontario Regulation 240/00 (Mine Development and Closure under Part VII of the Act) made under the Act, or

ii. 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 total area to be stripped exceeds 100 square metres but is less than the threshold for advanced exploration as set out in Ontario Regulation 240/00 (Mine Development and Closure under Part VII of the Act) made under the Act.

3. Line cutting, where the width of the lines cut is 1.5 metres or more.

an exploration permit follows the same process as in an exploration plan process. Ultimately, the impacted Aboriginal communities receive a copy of the permit application and respond with written comments setting out any concerns that they may have.[120] The exploration permit process however differs only to the extent that the Director of Exploration is required, within 50 days after the notice of the permit application is given to the Aboriginal communities involved, to make a substantive decision as to whether or not to issue the permit[121] and could put the permit approval process on temporary hold to facilitate further consultation.[122] However, in any case, the Director must be satisfied that appropriate Aboriginal consultation has been undertaken before issuing an exploration permit.[123]

Critics may argue that the 3 weeks, 30 days and 50 days mentioned above for the Aboriginal communities to respond to notices may be insufficient for the Aboriginal peoples' decision-making process.[124] My opinion is that the stated time frame is only a guide. This opinion is informed by the fact that the ENDM's policy is seemingly comprehensive in that it makes provisions for dealing with situations where no response is received from the First Nation communities after notice has been given to them or other efforts have been made to seek consultation with them. In a situation like that, ENDM would require the claim holder to follow up with the community to encourage their response or ENDM may take such a step directly.[125] However, failure by the community to make a comment does not

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4. Pitting and trenching where,

   i. there is a single pit or trench and the total volume of the pit or trench exceeds three cubic metres but is below the threshold for advanced exploration as set out in Ontario Regulation 240/00 (Mine Development and Closure under Part VII of the Act) made under the Act, or

   ii. there are two or more pits or trenches and the edges of a pit or trench are within 200 metres of the edges of another pit or trench and the aggregate of the total volume of the pit or trench exceeds three cubic metres but is below the threshold for advanced exploration as set out in Ontario Regulation 240/00 (Mine Development and Closure under Part VII of the Act) made under the Act.

120 *O. Reg. 308/12*, ss. 13 & 14.

121 *Ibid*, s. 15(1)(a).

122 *Ibid*, s. 16(1)1.

123 *Ibid*, s. 15(1)(a).

124 See Drake, *supra* note 12 at 213-217.

125 ENDM's Policy, *supra* note 69 at 8.

affect due diligence efforts on the part of the claim holder or ENDM, nor does it not stop ENDM from making a decision, which would be made based on ENDM's understanding of rights or interests that may be impacted by the proposed activity.[126]

ENDM has suggested in its policy document that the exploration plan activities are expected to have little potential for impact on Aboriginal rights.[127] However, that seems to fly in the face of some of the activities listed in the *Regulation*.[128] Whether such activities could adversely affect traditional Aboriginal rights, such as hunting, trapping, fishing and foraging, is still a question that does not seem to be resolved in the jurisprudence as it stands now. However, although mechanical drilling for the purpose of obtaining rock or mineral samples may not be a low impact activity, the fact remains that a sufficient consultation scheme is put in place beginning from the moment a claim is registered online to ensure that any concerns of the affected First Nation communities are addressed in a timely manner. It goes without saying that from a policy and practice perspective, the Crown's duty to consult is meaningfully implemented under the *Mining Act*, and as such, provides no strong ground to impugn the constitutionality of the free entry regime based thereon.

VI. THOUGHTS ON THE FUTURE OF THE DUTY TO CONSULT

In the final analysis, the future of Aboriginal consultation under Ontario's mining law will no longer involve the question of whether or not consultation is done, but whether a consultation is adequate for the purpose. A recent judicial review decision by an Ontario Divisional Court in *Eabametoong First Nation v Ontario (Minister of Northern Development and Mines)*[129] seems to support this view. The ENDM's policy on consultation demonstrably provided a helpful guide in the case. Ostensibly, the mining claims in respect of which an exploration permit application was made, would have been recorded and a notice of them provided to Eabametoong First Nation communities in accordance with the policy, and as such, the

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126 *Ibid.*

127 *Ibid* at 5.

128 *O. Reg. 308/12*, s. 4.

129 [2018] OJ No 3748, 2018 ONSC 4316, 2018 CarswellOnt 11572.

constitutionality of the recording process was not in issue. That demonstrates two things. First, the mere recording of mining claims does not adversely impact Aboriginal and treaty rights. Second, even if it does impact them, the immediate notice given to the affected First Nation communities satisfies the consultation requirement, which falls along a spectrum. The issue in that case, in any event, was whether an adequate Aboriginal consultation had been done. An exploration permit was granted upon the application of a mining company, Landore Resources Canada Inc. (Landore). It was granted despite the fact that Landore did not follow through to conclude an Aboriginal consultation that was underway. The First Nation's concerns were not reasonably addressed. The court unanimously reasoned that no adequate consultation with Eabametoong First Nation was done, and accordingly set aside the decision granting the permit, and required the permit application to be reconsidered after an adequate consultation had been done.

The *Eabametoong First Nation's* case is indicative of the policy and practice regarding Aboriginal consultation under the reformed Ontario's free entry system. It further demonstrates that the duty to consult is meaningfully implemented under the *Mining Act*, providing less room to impugn the constitutionality of the free entry regime based on it. As it appears, the Ontario regime has taken the duty to consult obligation to a relatively high level by ingraining that obligation in its mining procedures in a way that may provide sustainable access to minerals for all stakeholders.

VII. CONCLUSION

The manner of Aboriginal consultation prescribed under the *Mining Act*, its *Regulation* and accompanying policy is sufficient to meet the requirements of the duty to consult under section 35 of the *Constitution Act, 1982*. Practically speaking, on all accounts, the statutory regime upon which Ontario's free entry regime is based meets the requirements for constitutionality. The ENDM's consultation policy particularly enhanced this position by ensuring that any Aboriginal community impacted by a registered mining claim is immediately put on notice of that claim and an early opportunity created for consultation. Moreover, notwithstanding that the act of staking a claim from the case law perspective does not involve an exercise of Crown's discretion to trigger a duty to consult, yet the modernized mining regime in Ontario has taken an extra step to do more

so as to put its constitutional compliance beyond argument by providing a statutory scheme for mandatory Aboriginal consultation, even at that early stage.