

Court cases and Yukon mining: What you need to know

Nuri G. Frame and Tasha Paramalingam



1

Overview



FNNND and their Treaty



Legal context



FNNND's recent mining related litigation



FNNND Mining Policy



Q&A



2

2

FNNND & their Traditional Territory

- First Nation of Na-Cho Nyäk Dun (FNNND) is a self-governing First Nation
- FNNND's Traditional Territory covers over 160,000 km² and is a focal point for Yukon mineral development
 - 82,000 quartz and placer claims in FNNND's Traditional Territory
 - Approximately 43% of all quartz mining claims in the Yukon are in FNNND's Traditional Territory
 - Eagle Gold Mine disaster



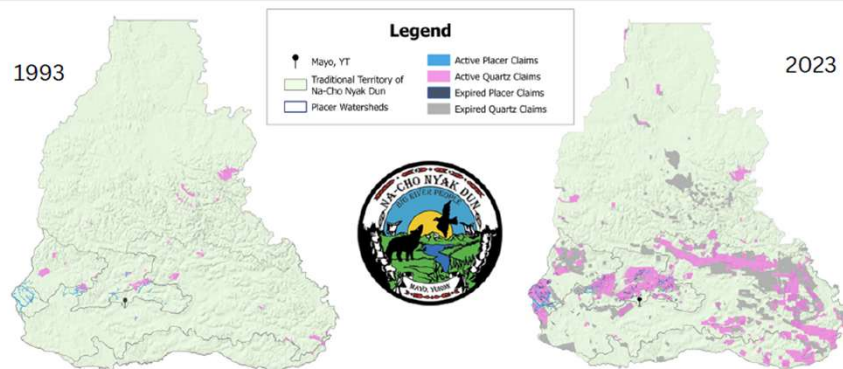
3

3

Free Entry Mineral Staking in the Traditional Territory of Na-cho Nyäk Dun

By Razz Routly, Supervised by Murray Richardson

In the 30 years since the Na-cho Nyäk Dun's Final Agreement was signed, the system of free-entry quartz and placer claim skating has led to the proliferation of mineral claims and development within the traditional territory. Claims can be staked by anyone over the age of 18 for a cost of \$10 by physically going to the site, clearing brush and planting stakes along the center line. No permission, assessment, or notice is required to be obtained from the nation ahead of time, violating the informed consent of the nation. The figure below shows the dramatic difference in area affected by the free-entry staking system between 1993 and 2023.



4

4

FNNND Final Agreement: Key provisions and promises

- **Sustainable Development:** “beneficial socio-economic change that does not undermine the ecological and social systems upon which communities and societies are dependent”
 - Sustainable Development must guide land management decisions (sections 11.1.1.6, 11.4.5.9, and 12.1.1.4)
- **Co-management:** FNNND managing the Traditional Territory with public government
 - Special management areas (Chapter 10)
 - Land use planning (Chapter 11)
 - Development assessment (Chapter 12)
 - Water management (Chapter 14)
 - Fish and wildlife (Chapter 16)
 - Forest resources (Chapter 17)
 - Economic development (Chapter 22)



5

5

Legal context: *Manitoba Metis Federation v. Canada*, 2013 SCC 14

Key issue: What duties govern Crown conduct with respect to treaty promises?

- The honour of the Crown requires:
 - Taking a broad, purposive approach to the interpretation of treaty promises and obligations
 - Acting diligently to fulfill treaty promises and obligations, and reconciliation
- This requires the Crown give effect to the purposes behind treaty promises
 - A pattern of errors and indifference that frustrates these purposes may breach this duty
 - Indigenous peoples must not be left with “an empty shell of a treaty promise”



6

6

Legal context:

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53

Key issue: What is the interaction between the duty to consult and modern treaties?

- Modern treaties should be interpreted in accordance with the intentions of the parties
- But modern treaties are not “complete codes” that exhaustively define the rights and obligations of the parties
- The duty to consult is part of the broader legal framework within which modern treaties must be interpreted
- Modern treaties can shape what consultation should look like



7

7

Legal context:

Western Copper Corporation v. Yukon Water Board, 2011 YKSC 16

Key issue: What is the relationship between *Yukon Environmental and Socio-economic Assessment Act* (YESAA), the *Waters Act*, and the *Quartz Mining Act*?

- The YESAA process is a planning tool that precedes more technical regulatory licensing processes under the *Waters Act* and *Quartz Mining Act*
- Even where Yukon issues a decision document accepting a recommendation from Yukon Environmental and Socio-economic Assessment Board (YESAB) that a project be allowed to proceed, the Yukon Water Board (YWB) has discretion to deny a water licence
- Mining operations are subject to overlapping regulatory oversight, including by Yukon and the YWB



8

8

Legal context:

Liard First Nation v. Yukon and Selwyn Chihong Mining Ltd., 2011 YKSC 55

Key issue: What is the relationship between YESAA evaluation reports and decision documents?

- Evaluation reports balance the objectives of protecting the environment with conducting an efficient and effective assessment
- Factors that YESAA requires be “considered” need not be resolved or determined at the assessment stage
- A decision body must consider the submissions and reports that informed YESAB’s recommendation before issuing its decision document



9

9

Legal context:

Ross River Dena Council v. Yukon, 2012 YKCA 14

Key issue: How does the duty to consult apply to mineral staking claims?

- Yukon has a duty to consult Indigenous nations before recording mineral staking claims or allowing mining exploration activities on their lands
- Bare notice is not sufficient
- The “open entry” system under the *Quartz Mining Act* should be updated to ensure that staking and exploration processes are consistent with this duty to consult



10

10

Legal context:

White River First Nation v. Yukon, 2013 YKSC 66

Key issue: How does the duty to consult apply when a decision body intends to reject a YESAB recommendation?

- Where the duty to consult falls on the deep end of the spectrum, it requires a meaningful exchange of views that results in accommodation
- Where a decision body intends to reject a recommendation from YESAB, the duty to consult requires that the decision body explain its basis for rejecting the recommendation to the relevant Indigenous nations
- Indigenous nations should have a meaningful opportunity to respond before issuing a decision document
- The mining authorization was quashed



11

11

Legal context:

First Nation of Na-Cho Nyäk Dun v. Yukon, 2017 SCC 58

Key issue: What is the role of courts in resolving disputes that arise during modern treaty implementation, including the correct interpretation of the land use planning provisions in the Final Agreement?

- Chapter 11 of the Final Agreement reflects a promise that First Nations will co-manage their Traditional Territories with public government
- Courts pay close attention to the terms of modern treaties, which requires interpreting provisions in light of the treaty's objectives and text as a whole
- The land use planning provisions in the Final Agreement limit Yukon's power to modify a final recommended land use plan
- Yukon's approval of its modified Peel Watershed land use plan was quashed



12

12

Legal context:

Ross River Dena Council v. Yukon, 2024 YKCA 18

Key issue: What is the scope of the duty to consult during the YESAA process?

- In the context of a YESAA assessment, the duty to consult is informed by YESAA and the common law
- Where raised by an Indigenous nation, concerns about the economic feasibility of a proposed project fall within the scope of the duty to consult
- Decision bodies must meet their duty to consult before issuing a decision document for a proposed project
- Consultation on an important issue cannot be deferred to the regulatory licensing stage
- The authorization was quashed



13

13

FNNND's recent mining litigation:

First Nation of Na-Cho Nyäk Dun v. Yukon, 2024 YKCA 5

Key issue: What special obligations attach to areas subject to an ongoing land use planning process?

- Yukon breached its duties flowing from the honour of the Crown and its duty to consult FNNND by authorizing a mineral exploration project in the Beaver River watershed, which was subject to an ongoing land use planning process
- The Final Agreement enshrines FNNND's right to co-manage the lands and resources of their Traditional Territory, including through land use planning
- Yukon's authorization undermined the land use planning process and FNNND's Treaty rights
- Yukon's authorization was quashed



14

14

FNNND's recent mining litigation: *Yukon v. YESAB*, 2025 YKSC 14

Key issue: What obligations flow from a complete land use plan re mineral projects in the planning region?

- YESAB's recommendation that a mineral exploration project not proceed in the Peel Planning Region did not affect Yukon's legal rights or obligations
- YESAB's recommendation was not amenable to judicial review



15

15

FNNND Mining Policy

- FNNND supports sustainable development in FNNND's Traditional Territory when it is:
 - founded in FNNND's ancient principles of reciprocity;
 - respectful of FNNND's rights and interests; and
 - consistent with FNNND's traditional use and ways of living in FNNND's Traditional Territory.
- The FNNND Mining Policy sets clear terms to ensure this balance is achieved and maintained, while accommodating development
- The Policy provides clarity and transparency to proponents
- For FNNND to consider a proposed project, the proponent must confirm in writing that the project will only proceed with FNNND consent
- The Policy creates a potential pathway to obtain FNNND's consent & support for mineral activity



16

16

Questions?

