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REPORT ON METALLURGICAL TESTWORK

McBean Gold Prospect---Caouette Vein
Latitude 49 degrees, 30 minutes Longitude 86 degrees, 30 minutes
UTM Zone 16, N 5505205, E 534554
Longlac Area
NTS 42EIONE
Claims 203719, 313728, Thunder Bay Mining Division
Claim Map McBean Lake Area, G-321

Work Carried out from August 20, 2022 to October 18, 2022
Report Date; December 9, 2022
William C. Kerr

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF APPENDICES

Introduction and Summary

The Caouette shaft was sunk in the late 1930's at the northeast terminus of a reported gold bearing vein west of the Theresa mine property. The writer acquired this property by staking in 2001 . Trench sampling carried out by the author on several occasions has always returned high (though erratic) values of gold. This has been a combination of grab, chip, and channel samples. Several of these samples have been assayed by commercial laboratories, and others have been mortar/pestle and panned then examined under binocular microscope. These procedures have unequivocally confirmed the presence of gold values in the quartz shear in the trench. Samples of the exposed muck-pile have always reported negative results which might imply a steep rake or plunge to the vein.

A sample from the Caouette gold-bearing vein was collected on August 20, 2022 by William Kerr for Exploits Exploration Corporation. Previously submitted assessment report 2.57321 "Report on Trench Assay Sampling on Claim TB 1213504" by William Kerr, dated November 28, 2016, herein attached as Appendix B shows the location of the sample. This location map is reproduced as Figure 3. A sample of approximately 30 kg from the highest grade (based on visible gold present in outcrop at location LLC-16, Figure 3, page 11 of the 2016 Assessment Report referenced in Appendix B) was collected. The claim was subject of a court action by Ginoogaming against the Caouette and other mining claims in the area where Exploration Plans and Permits were in place. Please refer to page 5 "Litigation" and Appendix C.. The action by Ginoogaming was unsuccessful, the claim remained in good standing, and low-impact assessment work was therefore required to maintain this.

The sample was submitted for metallurgical work-up at SGS facilities in Lakefield, Ontario, a world famous metallurgical research and work facility. The test-work was started on or about the sample delivery date on September 6, 2022, completed on or about October 10, 2022, and the final report by SGS was completed on October 18, 2022. The SGS report is attached as Appendix D.

SGS conclusions based on the test-work are the following;

- The average grade of the sample, based on four cuts, is 23.1 g/t Au.
- Sixty nine percent (69%) of the gold reported to the gravity circuit, proving that gold in the Caouette quartz vein is suitable for gravity concentration.

The report demonstrates that this Caouette vein contains high-grade easily-recoverable and potentially-economic quantities of free-milling gold.

For the purposes of this "Grass Roots Prospecting Report", the information is presented in compliance with Technical Standards for Reporting Assessment Work-version 2-July 5, 2018, hereinafter referred to as TSR.

Title

Exploits Exploration Corporation (EEC) holds a l00 % interest in one legacy mining claim 1213504, now current mining claims 203719 and 313728. Appendix A details the Abstracts for the claim units covering the former Caouette gold showing, composed of a roughly 0.75 claim unit located in the Mcbean Lake area in the Thunder Bay mining division. EEC is the professional services corporation of William Kerr, and the claim was transferred from William Kerr to EEC in September, 2020 with Permission of Justice Meyers in an Injunction-related Case Conference to remove any potential liability to William Kerr. See section **Litigation.** Mr Kerr acts as an agent of EEC as presented in Appendix E.

Address for service for the holder of the claims covered by this report is as follows:

Exploits Exploration Corporation
c/o William C. Kerr
22 Greenwin Village Road
North York, Ontario M2R2SI

Property, Location, and Access

The mining claims are located within the Thunder Bay Mining Division. Figure I details the approximate location. Claim numbers 203719 and 313728 are located in north-east McBean Lake area, approximately 9.6 kilometres south of Longlac. Access to the claims is through the old Theresa Mine Property, west of the Making Ground River. A very strong railcar bridge was removed several years previously, over the Making Ground River; access across this sluggish stream can now be had by either canoe or small raft. Figure 2 is an expanded view of Figure I, showing the property on a claim scale.

Previous Work

The following was documented in the previous work report filed by the writer in 2001. "The property was first worked in 1934: and the initial gold discovery was attributed to Moses Fisher. The individual claims were eventually consolidated under the control of A. Caouette, who optioned the ground west of the Making Ground River to the N. A. Timmins Corporation in 1936. Surface stripping, 1250 feet of diamond drilling, a small bulk sample and underground work was carried out in 1936 and 1937. The underground work consisted of an inclined two compartment shaft to the 135 foot level with a working level at 125 feet. At this level a total of 241 feet of drifting and 91 feet of crosscutting were done. The option was dropped in that year. Subsequent work to the late 1980's consisted of sporadic re-sampling of the trenches. Duration Mines held an option on the Theresa Mine Property in the late 1980's, and carried out substantial stripping but no record of their work is on file."

The author carried out a resampling programme in 2001, which was filed and accepted for assessment credit. The trenches were cleaned out, and five channel samples were taken from the vein proper and assayed and confirmed the presence of gold in the surface trenches. Seven samples were taken from a parallel vein to the northwest, and eight grab samples were taken from various positions from the surface of the muck pile. These samples were mortared and pestled and panned, and no gold was observed in any of these samples. The conclusions based on Kerr's 2001 work are as follows:

- the vein as exposed in the trench was indeed auriferous.
- The parallel vein to the northwest contained no gold.
- The quartz exposed on surface of the waste pile contained no gold.
- It was concluded that this quartz was possibly from the parallel non-gold bearing vein, intersected in the crosscut and hence probably the last material excavated from underground and hence on top of the dump. Further sampling of the dump was warranted to determine if this was the case.

Based on the results of the sampling carried out by the author in 2001, it was obvious there were at least two veins, one barren. As the quartz material sampled from the surface of the dump was likewise barren, it was concluded that this quartz could be from the crosscut at depth and possibly represent the down dip extension of the barren vein. It was felt that the number of samples collected in this manner would be not be completely unrepresentative of the underground workings, even though there was no possibility of determining if the material sampled was of shaft or drift material.

Accordingly, in 2006 it was decided to sample the interior of the dump to verify if there was any unexposed auriferous quartz. A posthole auger and pick were used to attempt to get a sample from a depth of 1.0 metre, but it was found that a depth of 0.3 metre was the maximum generally obtained in the difficult material. The purpose was to try and obtain unbiased samples and sample under where past prospectors would have taken easily obtained specimens from the surface of the pile over the years. Out of the 26 samples collected, only 9 samples contained quartz material, in varying concentrations up to l00 percent.
The host rock in all cases was fresh unaltered diorite. A number of samples, while lacking in quartz, contained appreciable sulphides, and these were likewise reduced by mortar and pestle. Each sample was examined, and the most promising material in each sample was mortared and pestled, and the -20 mesh material was collected.Approximately 4 pounds of sample were taken from each site, and bagged, for a total of 26 sites. The quartz exposed in the trench was auriferous, while the parallel vein was completely barren.

The samples were subsequently panned, and the concentrates were examined under binocular microscope. Several concentrates had appreciable sulphides, and these samples were roasted over a fireplace and subsequently panned prior to mikework. No gold was observed. As a test on the quality control, two samples were collected from the auriferous trench and inserted into the sample stream unknown to the sample processor. In both these samples, appreciable gold and sulphides were returned in sufficient quantities to confirm that the trench contained at least quarter ounce material and this panning evaluation was a fair technique.

Litigation

The ability to perform certain work on this claim unit remains impacted related to a Statement of Claim and related injunction by Ginoogaming, filed in August of 2020. This is not yet public information on Canlii so can not be included herein. Whilst Mr Kerr/Exploits were successful in defending the Injunction commenced by Ginoogaming (Appendix C, which is public information on Canlii), the Exploration Permit Application remains on hold, the claim is under threat for renewed injunction if and when a renewed Permit application is applied for, and the aforementioned Statement of Claim remains in effect until litigation commences at some time in the future.. Accordingly, until this Ginoogaming SoC is resolved one way or the other, certain advanced work on this claim, such as mechanized stripping or large-scale bulk sampling, must remain in abeyance.

Current Programme

The work was carried out on August 20, 2022. The site of high grade sample number LLC-16 (with visible gold locally in this outcrop) was revisited and a sample was taken from the outcrop by simple manual methods using grubhoe, sledgehammer and chisel. Approximately 30 kilograms in one sample was collected from this area and was representative across the average width of the vein (0.55m) so this may be considered a true channel sample. To confirm, a single sample was taken across the vein (sample length of 0.55 m) at GPS 5504777N, 553728E. The centre of the sample was located at former site LLC-16. The sample was collected in two rice bags, tied together and slung over shoulders, for ease of transport. The sample was almost 95% vein quartz, with 5% dioritic wall rocks. Visible gold was present in very fine grain size in a patchy distribution, usually accompanied by 1% amounts of pyrrhotite and occasionally chalcopyrite.

The sample was submitted for metallurgical work-up at SGS facilities in Lakefield, Ontario, a world-famous metallurgical research and work facility. The test-work was started on or about the sample delivery date on September 6, 2022, completed on or about October 10, 2022, and the final report by SGS was completed on October 18, 2022. The SGS report is attached as Appendix D.

Conclusions

Conclusions based on the sampling and metallurgical test-work are the following;

- The average grade of the sample, based on four cuts, is 23.1 g/t Au.
- Sixty nine percent (69%) of the gold reported to the gravity circuit, proving that gold in the Caouette quartz vein is “free” and is suitable for gravity concentration.
- The 4.5 m sampled strike length is significant relative to the known short strike length of the vein (~~ 27 metres).

The report demonstrates that this Caouette vein locally contains high-grade easily-recoverable and potentially-economic quantities of free-milling gold.

_____
William C. Kerr
Date March 18, 2023

References

ODM 1936 Vol 45, pt. I, p. 10, Production of Gold Mines, 1935
ODM 1937, Vol 46, pt. 3, p 18, Description of Properties, N.A. Timmins Corporation
ODM 1954, vol 63, pt. 2, p. 96, Report on Mines, Theresa Gold Mines Limited MDI file # TB 0149
ODM 1971, Mineral Resources Circular #3, Gold Deposits of Ontario, Theresa Mine, pp 291-292
Kerr, W. C., September 13, 2001, Geological Report on a Surface Exploration Programme, McBean gold Prospect, MDI TB 0149. Report filed for Assessment Credit with MNDM
Kerr, W. C., May 24, 2007, Report on Sampling of Underground Material from Surface Waste Dump, McBean Gold Prospect, Caouette Showing, MDI TB 0149. Work Report filed for Assessment Credit with MNDM
Kerr, W. C., November 18, 2016, Report on Trench Assay Sampling on Claim TB 1213504

Statement of Qualifications

I, William C. Kerr of 22 Greenwin Village Road in North York, Ontario, certify that:
I graduated from the University of New Brunswick, Fredericton, New Brunswick, in 1975 with a Bachelor of Science degree in geology
I am a member in good standing of the Association of Professional Geoscientists of Ontario; Registration Number 0120.
I hold a lifetime registered membership in good standing of the Association of Professional Engineers and Geologists of Saskatchewan, Registration Number 12624.
I hold a Permanent Prospectors license in the Province of Ontario. Lic # P 11202, received in the mid 1990's, having personally ground-staked over 500 units.
I have practiced my profession as a geologist since 1975, during which time I have held technical and executive positions with senior and junior mining companies throughout North and South America, central Asia, Australia and Africa. I have also worked as an independent consultant providing various exploration management services to geological and geophysical exploration companies and the mining industry in Canada, Mexico, and Saudi Arabia.
I have authored a number of reports to National Instrument 43-101 (NI 43-101) standards, including lead author of the worlds first technical report in 2003 on uranium Reserves and Resources after N1 43-101 was enacted, and remain a "qualified person" as defined in NI 43-101. I was lead author, of the lead article, of SEG Newsletter 99 in 2014, which has been called in print both “the best paper every written in the Newsletter” and “a stunning success”. The paper also became mandatory reading for undergraduate students at the Colorado School of Mines.

I have authored all sections of this report.

Dated at Riyadh, Kingdom of Saudi Arabia, this 9th day of December, 2022.

William C. Kerr

APPENDIX A

Ontario Ministry of Energy, Northern Development and Mines

Ministère de l'Énergie, du Développement du Nord et des Mines

Claim Abstract
203719
Status: Active

Cell Claim Type:	Boundary Cell	Due Date:	20-Jun-2023	Total Reserve:	100
Special Status:	N	Total Work:	200	Assessment Assmnt:	50000
Number of Cells:	1	Work Required:	200	Consultation Reserve:	0
Registration Date:	10-Apr-2018	Total Payment In Place:	0	Exploration Reserve:	100
Anniversary Date:	20-Jun-2023	Last Paid in Place Date:			
UTM Zone:	16	Mining Division:	Thunder Bay		
MNR District:	Nipigon	Township Name:	MCBEAN LAKE AREA		

Legacy Claim	1213504
Cell ID(s)	42E10I276

Client Number	Recorded Holder(s)	Percent
10002372	Exploits Exploration Corporation	100

Claim Abstract

203719

Status: Active

Event #	Recorded By	Event Description	Abstract Wording	Event Date
1332639	MLAS System internal	Assess Request for Exclusion of Time	Data patch to apply Recorder Excludes 380 Days under s. 67 and Sets New Anniversary Date as 20-Jun-2023 as per file MIL 10-3 21-22-67(3)	10-Feb-2022
1326539	Tova Gossling	Add Abstract Entry	Hold-Special Circumstances Apply	31-Jan-2022
1062026	WILLIAM KERR	Complete Transfer of Mining Claim(s)	WILLIAM KERR (151867)Transfers 100% to Exploits Exploration Corporation (10002372)	10-Sep-2020
891259	WILLIAM KERR	Distribute Approved Credits	$200 Exploration Credit Withdrawn	13-Jan-2020
891259	WILLIAM KERR	Distribute Approved Credits	$200 Exploration Credit Applied	13-Jan-2020
579105	WILLIAM KERR	Transfer Conversion Credit Bank	Conversion Bank Credit Transfer	09-Apr-2019
118863	MLAS System internal	Record Migrated from Claims 3.2	Converted from legacy claim(s) 1213504	10-Apr-2018

Reservations under the Mining Act may apply

Note: Status of Claim is based on information currently on record.

Ontario Ministry of Energy, Northern Development and Mines

Ministère de l'Énergie, du Développement du Nord et des Mines

Claim Abstract
313728
Status: Active

Cell Claim Type:	Boundary Cell	Due Date:	20-Jun-2023	Total Reserve:	159
Special Status:	N	Total Work:	200	Assessment Assmnt:	50000
Number of Cells:	1	Work Required:	200	Consultation Reserve:	0
Registration Date:	10-Apr-2018	Total Payment In Place:	0	Exploration Reserve:	159
Anniversary Date:	20-Jun-2023	Last Paid in Place Date:			
UTM Zone:	16	Mining Division:	Thunder Bay		
MNR District:	Nipigon	Township Name:	MCBEAN LAKE AREA		

Legacy Claim	1213504
Cell ID(s)	42E10I275

Client Number	Recorded Holder(s)	Percent
10002372	Exploits Exploration Corporation	100

Claim Abstract

313728

Status: Active

Event #	Recorded By	Event Description	Abstract Wording	Event Date
1332639	MLAS System internal	Assess Request for Exclusion of Time	Data patch to apply Recorder Excludes 380 Days under s. 67 and Sets New Anniversary Date as 20-Jun-2023 as per file MIL 10-3 21-22-67(3)	10-Feb-2022
1326539	Tova Gossling	Add Abstract Entry	Hold-Special Circumstances Apply	31-Jan-2022
1062026	WILLIAM KERR	Complete Transfer of Mining Claim(s)	WILLIAM KERR (151867)Transfers 100% to Exploits Exploration Corporation (10002372)	10-Sep-2020
891259	WILLIAM KERR	Distribute Approved Credits	$200 Exploration Credit Withdrawn	13-Jan-2020
891259	WILLIAM KERR	Distribute Approved Credits	$200 Exploration Credit Applied	13-Jan-2020
579105	WILLIAM KERR	Transfer Conversion Credit Bank	Conversion Bank Credit Transfer	09-Apr-2019
234982	MLAS System internal	Record Migrated from Claims 3.2	Converted from legacy claim(s) 1213504	10-Apr-2018

Reservations under the Mining Act may apply

Note: Status of Claim is based on information currently on record.

APPENDIX B

2·57321

REPORT ON TRENCH ASSAY SAMPLING ON CLAIM TB 1213504

McBean Gold Prospect—Caouette Vein
Latitude 49 degrees, 30 minutes
Longitude 86 degrees, 30 minutes
UTM Zone 16, N 5505205, E 534554
Longlac Area
NTS 42E10NE
Claim 1213504, Thunder Bay Mining Division
Claim Map McBean Lake Area, G-321

Work Carried out October 24 to 28, 2016
Report Date; November 28, 2016
William C. Kerr

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

LIST OF APPENDICES

Introduction and Summary

The Caouette shaft was sunk in the late 1930's at the northeast terminus of a reported gold bearing vein west of the Theresa mine property. The writer acquired this property by staking in 2001. Trench sampling carried out by the author on several occasions has always returned high (though erratic) values of gold. This has been a combination of grab, chip, and channel samples. Several of these samples have been assayed by commercial laboratories, and others have been mortar/pestle and panned then examined under binocular microscope. These procedures have unequivocally confirmed the presence of gold values in the quartz shear in the trench. The shaft and associated exploration drifts reported negative results which might imply a steep rake or plunge to the vein. Samples of the exposed muckpile, taken by the author on several occasions, have always shown absolutely no gold.
Exploration permit No. PR14-10515, dating from 2014-May-09 to 2017-May-08, was received to excavate a rock trench to better define the distribution of the high grade gold values and associated sulphide minerals in much fresher rock than is exposed on surface. Unfortunately, the physical work was unable to be carried out to the date of this report, and the permit will expire in the spring of 2017. As at the current time only a total of five channel samples (2001 generation) have been taken over a 22 metre length of the vein (the vein proper is 30 to 35 metres long), it was always felt that more infill and on-strike sampling would be prudent prior to any further trenching. Accordingly, twenty two samples were taken in October composed of chip-channels and grabs. This will allow a better siting of any future trench to be carried out under a subsequent application for an extension of the expiring work permit.

Title

The writer holds 100% interest in one mining claim covering the former Caouette gold showing, composed of a 0.75 unit located in the Mcbean Lake area in the Thunder Bay mining division. This claim (TB 1213504) was staked on June 1, 2001, was GPS surveyed to acceptable standards in 2014, and is in good standing. Address for service for the holder of the land covered by this report is as follows:

William C. Kerr
22 Greenwin Village Road
North York, Ontario
M2R2S1

Property, Location, and Access

The claim is located within the Thunder Bay mining Division. Figure 1 details the approximate location. Claim No. TB 1213504, a 0.75 unit claim, is located in north-east McBean Lake area, approximately 9.6 kilometres south of Longlac. Access to the claim is through the old Theresa Mine Property, west of the Making Ground River. The

number 2 post of TB 1213504 is located on the west bank of the river. Figure 2 is an expanded view of Figure 1, showing the property on a claim scale.

Previous Work

The following was documented in the previous work report filed by the writer in 2001. "The property was first worked in 1934, and the initial gold discovery was attributed to Moses Fisher. The individual claims were eventually consolidated under the control of A. Caouette, who optioned the ground west of the Making Ground River to the N. A. Timmins Corporation in 1936. Surface stripping, 1250 feet of diamond drilling, a small bulk sample and underground work was carried out in 1936 and 1937. The underground work consisted of an inclined two compartment shaft to the 135 foot level with a working level at 125 feet. At this level a total of 241 feet of drifting and 91 feet of crosscutting were done. The option was dropped in that year. Subsequent work to the late 1980's consisted of sporadic re-sampling of the trenches. Duration Mines held an option on the Theresa Mine Property in the late 1980's, and carried out substantial stripping but no record of their work is on file."
The author carried out a resampling programme in 2001, which was filed and accepted for assessment credit. The trenches were cleaned out, and five channel samples were taken from the vein proper and assayed and confirmed the presence of gold in the surface trenches. Seven samples were taken from a parallel vein to the northwest, and eight grab samples were taken from various positions from the surface of the muck pile. These samples were mortared and pestled and panned, and no gold was observed in any of these samples. The conclusions based on Kerr's 2001 work are as follows:

1. the vein as exposed in the trench was indeed auriferous
2. The parallel vein to the northwest contained no gold
3. The quartz exposed on surface of the waste pile contained no gold. It was concluded that this quartz was possibly from the parallel non-gold bearing vein, intersected in the crosscut and hence probably the last material excavated from underground and hence on top of the dump. Further sampling of the dump was justified to determine if this was the case.

Based on the results of the sampling carried out by the author in 2001, it was obvious there were at least two generations of quartz. The quartz exposed in the trench was auriferous, while the parallel vein was completely barren. As the quartz material sampled from the surface of the dump was likewise barren, it was concluded that this quartz could be from the crosscut at depth and possibly represent the down dip extension of the barren vein, as it would have been the last material excavated from underground. Accordingly, in 2006 it was decided to sample the interior of the dump to verify if there was any unexposed auriferous quartz. A posthole auger and pick were used to attempt to get a sample from a depth of 1.0 metre, but it was found that a depth of 0.3 metre was the maximum generally obtained in the difficult material. The purpose was to try and obtain unbiased samples and sample under where past prospectors would have taken easily obtained specimens from the surface of the pile over the years. As the shaft followed the

dip of the vein, and the drift also followed the vein, it was felt that the number of samples collected in this manner would be not completely unrepresentative of the underground workings, even though there was no possibility of determining if the material sampled was of shaft or drift material. It was also impossible, using the auger, to sample material at the base of the pile as a 0.6 metre maximum was about the deepest sample obtained by hand power alone. In any event, out of the 26 samples collected, only 9 samples contained quartz material, in varying concentrations up to 100 percent. Approximately 4 pounds of sample were taken from each site, and bagged, for a total of 26 sites were sampled.

The host rock in all cases was fresh unaltered diorite. A number of samples, while lacking in quartz, contained appreciable sulphides, and these were likewise reduced by mortar and pestle. Each sample was examined, and the most promising material in each sample was mortared and pestled, and the -20 mesh material was collected.

The samples were subsequently panned, and the concentrates were examined under binocular microscope. Several concentrates had appreciable sulphides, and these samples were roasted over a fireplace and subsequently panned prior to mikework. No gold was observed. As a test on the quality control, two samples were collected from the auriferous trench by the sampler and inserted into the sample stream unknown to the sample processor. In both these samples, appreciable gold and sulphides were returned in sufficient quantities to confirm that the trench contained at least quarter ounce material and this panning evaluation was a fair technique.

Geology

From Kerr, 2001...."The Claim is located within the Superior Province of the Canadian Shield. According to Fairburn, 1938, the area consists predominantly of altered mafic volcanic rocks, agglomerates, and metasediments. These units have been intruded by massive quartz dirite-granodiorite bodies. All of these units are cut by northwest trending diabase dykes. The claim covers a large area of quartz diorite intrusion. Although some previous workers have identified basaltic rocks proximal to the Cauoette Shaft, only quartz diorite and diorite were visible to the author.

Current Programme

The current work was carried out between Oct 24 and Oct 28, 2016, including mobilization from, and demobilization to Toronto. A small tent camp was set up near the bridge over the Making Ground River on the east bank.
The trench was chained and marked for a length of 30 metres in a SW direction from the midpoint of the concrete shaft cap. The trench had badly slumped over the years, so much time was spent in cleaning out the sampling sections. Because of the heavy slumping, bad rainy weather and non-mechanized cleaning (grubhoe and shovel), only narrow sections were cleaned for the sampling of the bedrock. The weather was very wet

during the sampling, and while the slumping was ongoing, relatively good samples were obtained in a combination of channels, chips, and grabs. Several flank samples were taken next to high-grade assays originally collected in the 2001 programme.

Table 1 describes the results of the samples. Figure 3 is a plot of the samples combined with the sample locations taken in the prior report, and shows (in parenthesis) results of all samples reported in ounces/ton.

Conclusions

The infill sampling carried out in 2016 has

1. demonstrated continuity of the gold bearing part of the quartz vein over a length of 27 metres, which is 5 metres longer than previously known.
2. located in more detail the higher grade portions of the vein, which now will be the focus of further rock trenching.
3. also demonstrated, through the presence of the lower grade areas, that the vein is not continuously mineralized with high grade material. The lowest of all samples were those located proximal to the shaft, indicating that the shaft was likely sunk on un-mineralized, or poorly mineralized parts of the vein, perhaps explaining why there are no values in any of the muck-pile samples taken to date.

William C. Kerr
Date Nov 28/2016

References

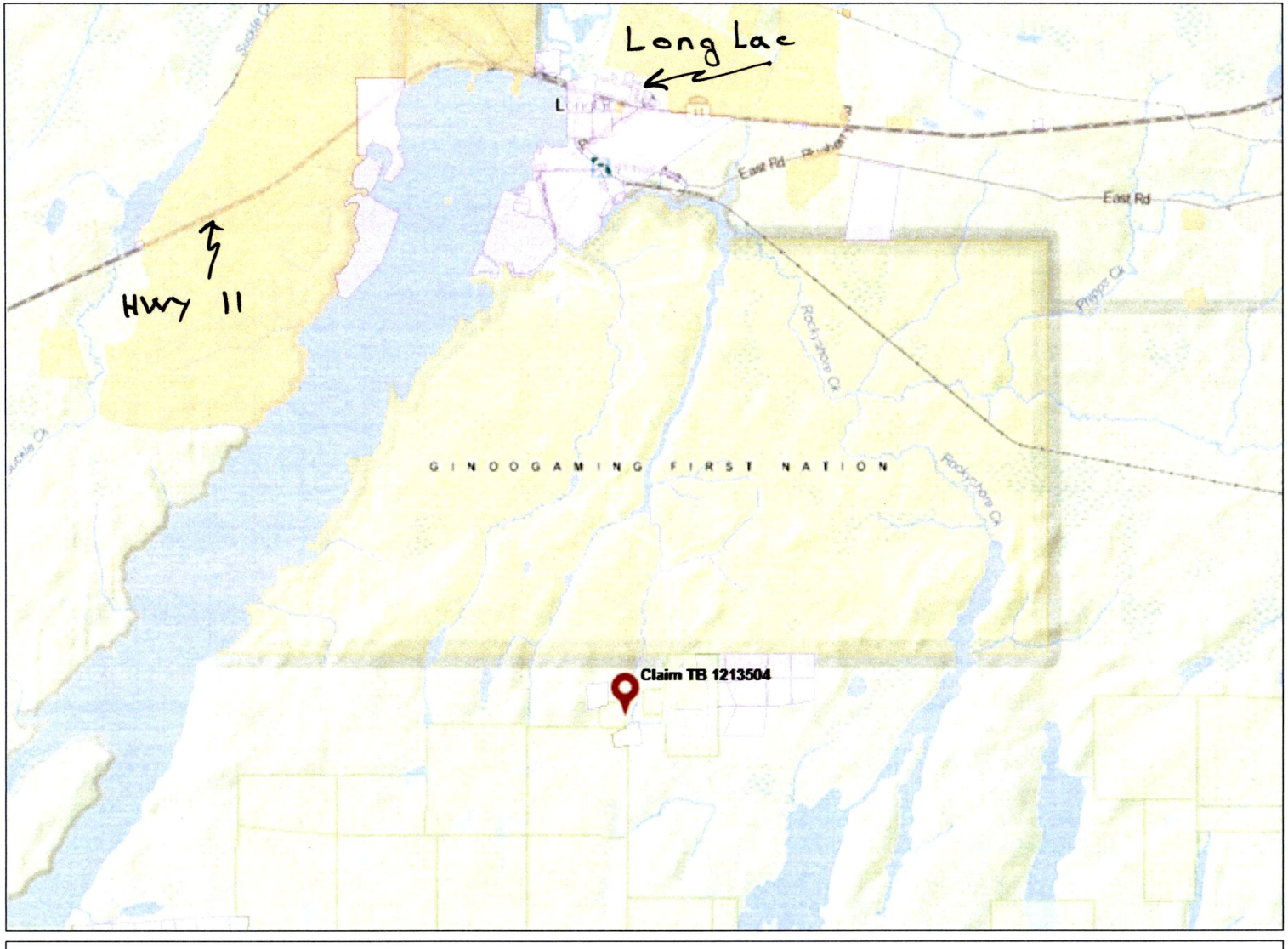
ODM 1936 Vol 45, pt. 1, p. 10, Production of Gold Mines, 1935
ODM 1937, Vol 46, pt. 3, p 18, Description of Properties, N.A. Timmins Corporation
ODM 1954, vol 63, pt. 2, p. 96, Report on Mines, Theresa Gold Mines Limited
MDI file # TB 0149
ODM 1971, Mineral Resources Circular #3, Gold Deposits of Ontario, Theresa Mine, pp 291-292
Kerr, W. C., September 13, 2001, Geological Report on a Surface Exploration Programme, McBean gold Prospect, MDI TB 0149. Report filed for Assessment Credit with MNDM
Kerr, W. C., May 24, 2007, Report on Sampling of Underground Material from Surface Waste Dump, McBean Gold Prospect, Cauette Showing, MDI TB 0149. Work Report filed for Assessment Credit with MNDM

Ontario

MINISTRY OF NORTHERN DEVELOPMENT AND MINES
CLAIMaps

Figure 1

Notes:
To Accompany Technical Report titled " Report on Trench Assay Sampling on Claim TB 1213504" by William Kerr, 2016



Legend

Administration Boundaries
- Mining Divisions
- Resident Geologist District
- Townships and Areas
- UTM Grid
- Geographic Lot Fabric
- Other Federal Land

Mineral Tenure Grid
- OMTG Tenure Grid

Alienations
- Withdrawal
- Notice

Unpatented Claim
- Active
- Reconciled
- Pending

Disposition
- Disposition

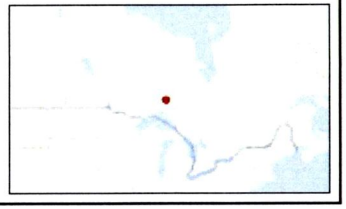
Disposition Symbols
- Camp
- Disposition Unknown/Pending
- Freehold Patent Mining Rights Only
- Freehold Patent Surface Rights Only
- Freehold Patent Surface and Mining Rights
- Land Use Permit
- Leasehold Patent Mining Rights Only
- Leasehold Patent Surface Rights Only
- Leasehold Patent Surface and Mining Rights
- License of Occupation Mining Use Only
- License of Occupation Surface Use Only
- License of Occupation Surface and Mining Rights
- License of Occupation Uses Not Specified
- Order in Council
- Tower
- WPLA

Geology Layers
- AMIS Sites
- AMIS Features
- Drill Holes
- Mineral Occurrences

0 4.7 km

Projection: Web Mercator

N



Ontario

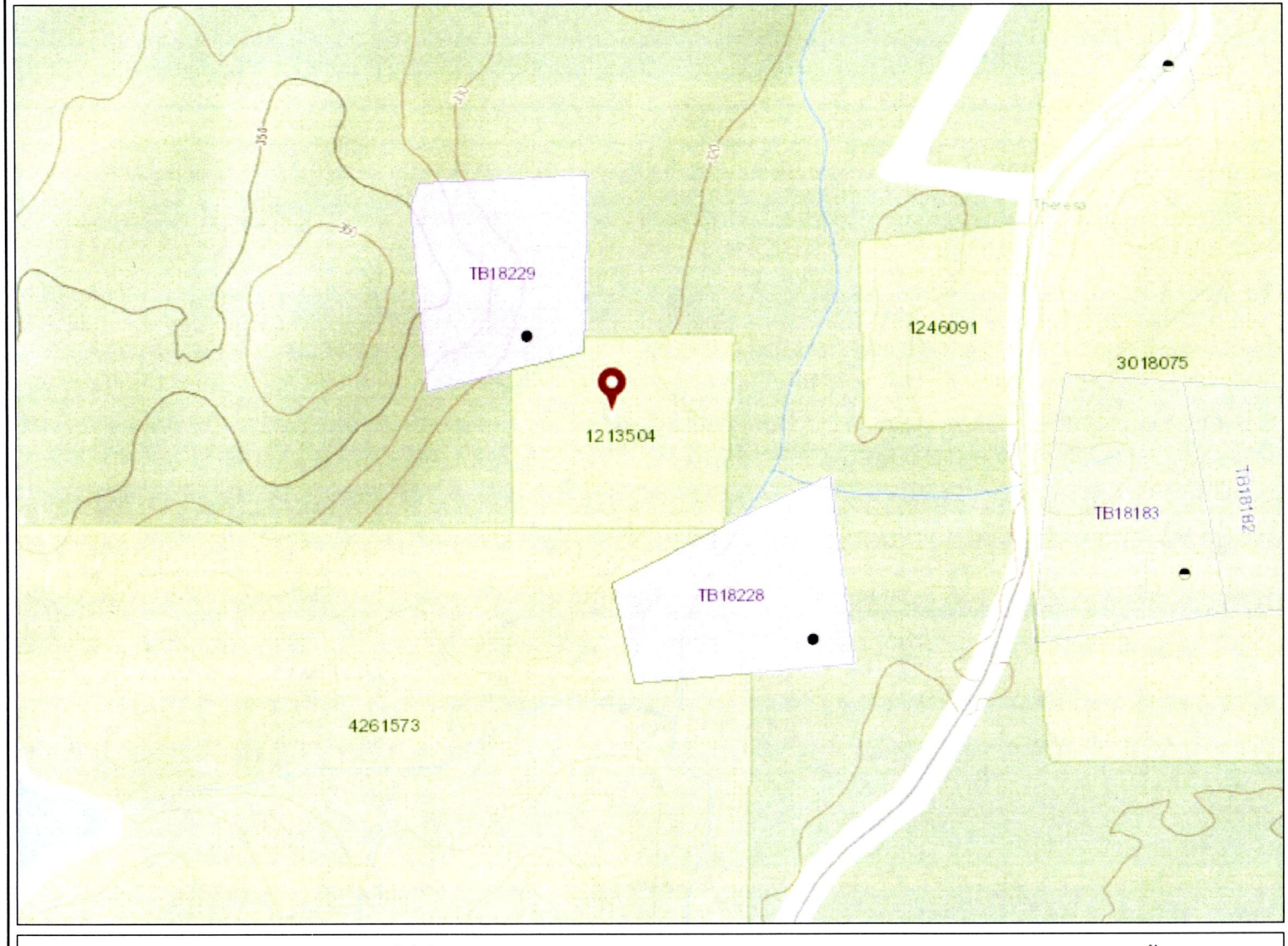
MINISTRY OF NORTHERN DEVELOPMENT AND MINES

CLAIMaps

Figure 2

Notes:

To Accompany Technical Report titled " Report on Trench Assay Sampling on Claim TB 1213504" by William Kerr, 2016



Legend

Administration Boundaries
- Mining Divisions
- Resident Geologist District
- Townships and Areas
- UTM Grid
- Geographic Lot Fabric
- Other Federal Land

Mineral Tenure Grid
- OMTG Tenure Grid

Alienations
- Withdrawal
- Notice

Unpatented Claim
- Active
- Reconciled
- Pending

Disposition
- Disposition

Disposition Symbols
- Camp
- Disposition Unknown/Pending
- Freehold Patent Mining Rights Only
- Freehold Patent Surface Rights Only
- Freehold Patent Surface and Mining Rights
- Land Use Permit
- Leasehold Patent Mining Rights Only
- Leasehold Patent Surface Rights Only
- Leasehold Patent Surface and Mining Rights
- License of Occupation Mining Use Only
- License of Occupation Surface Use Only
- License of Occupation Surface and Mining Rights
- License of Occupation Uses Not Specified
- Order in Council
- Tower
- WPLA

Geology Layers
- AMIS Sites
- AMIS Features
- Drill Holes
- Mineral Occurrences

0 0.6 km

Projection: Web Mercator

N

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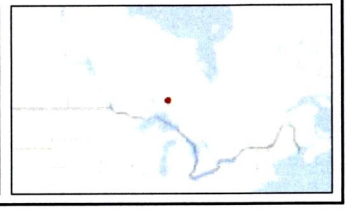


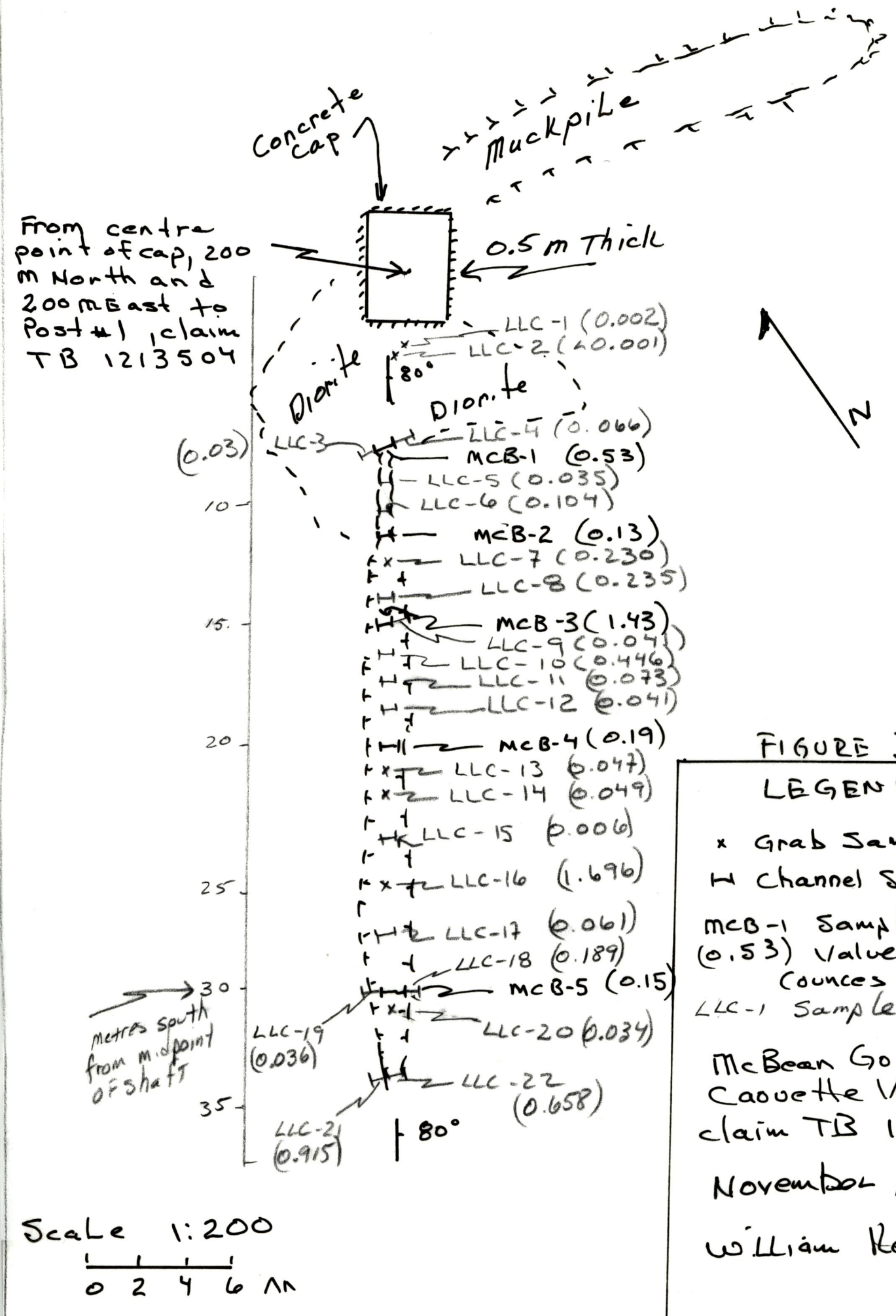


FIGURE 3

LEGEND

× Grab Sample

⊢ Channel Sample

MCB-1 Sample no. (2005) (0.53) Value in opt (ounces per ton)

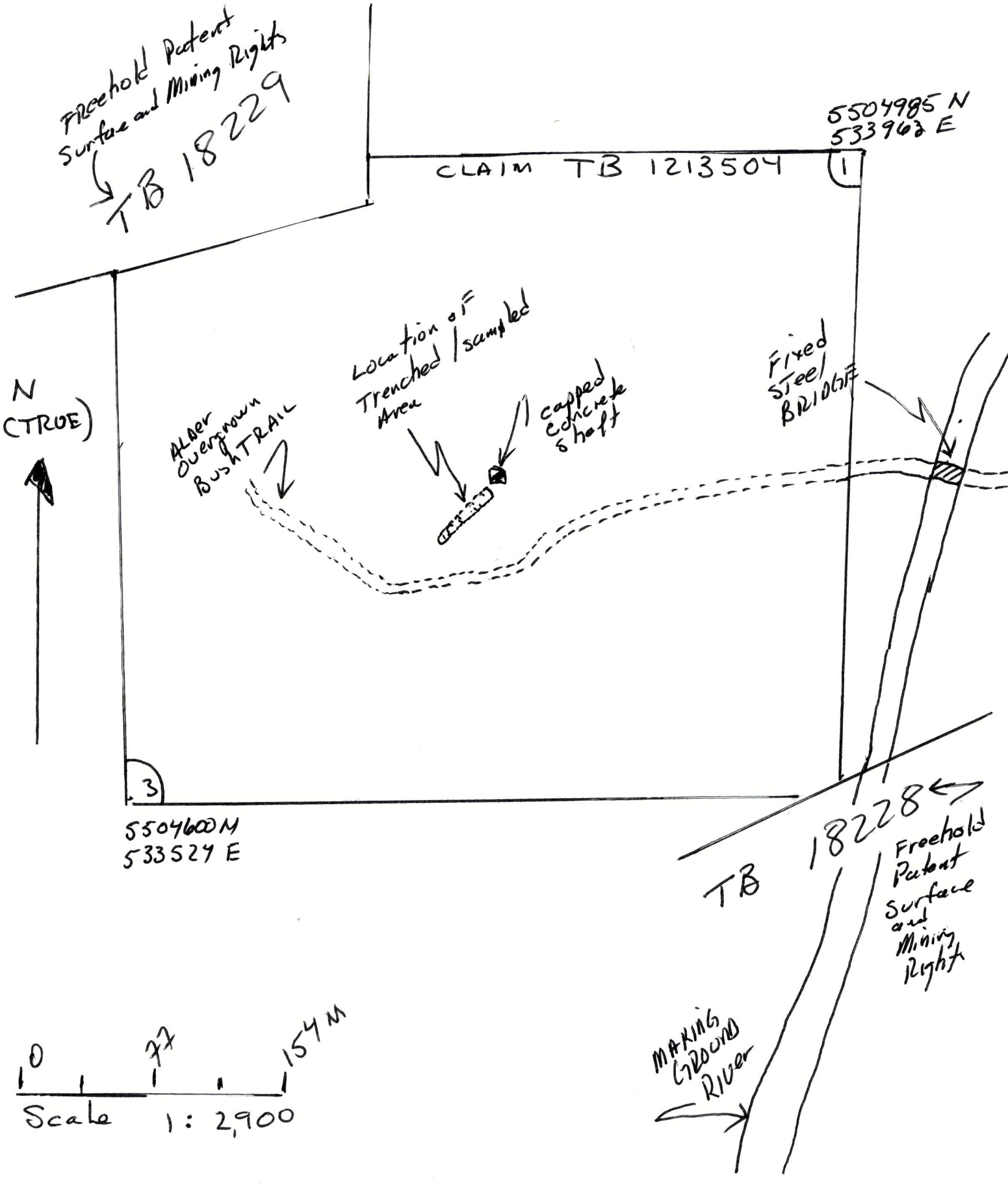
LLC-1 Sample no (2016)

McBean Gold Prospect
Caouette Vein
claim TB 1213504

November / 2016

William Kerr

FIGURE 4



Mc Bean Lake
AREA

WILLIAM KERR
JAN 17/2017

TABLE 1

Samples	Value	Sample Type	Length	
LLC 1	0.002	Grab	x	Hand specimen grab sample lime green chert, banded rock, very silificied, no calcite, no sulphides
LLC 2	<0.001	Grab	x	hand specimen grab sample 4" bull quartz vein whitish non sild, qtz vein. Absolutely no sulphides, no Caco3
LLC 3	0.03	chip/channe	0.5 m	Flank sample adjoining MCB01 to the west. Barren looking, massive rock
LLC 4	0.066	chip/channe	0.5 m	Flank sample adjoing MCB01 to east. Also Barren massive rock with rare qtz stringers,no sulphides.
LLC 5	0.035	chip/channe	0.75 m	50% iregular quartz veinlets, rare tourmaline xls, dioritic matrix. Locally sheared
LLC 6	0.104	chip/channe	1.0 m	Perhaps 25% irregular qtx vlts, rare sulphide splash Po, possibly Py to maximum 2% locally
LLC 7	0.23	grab	x	rubbly, not sure is subcrop, so grab. Gossaniferous iron stained on surface and on fracture surfaces, likely original diorite material
LLC 8	0.235	chip/channe	0.5 m	80% good sheared tourmaline to 5% quartz vein, rare sulphides disseminated in matrix
LLC 9	0.041	chip/channe	0.60 m	Flank sample to MCB-3 to the east. Barren looking rock
LLC 10	0.446	chip/channe	0.75 m	clear crystalline bull quartz vein, very hard, cherty, no sulphides visible but strongly silicified,
LLC 11	0.073	chip/channe	0.75 m	sito 10 but with 2 to 4% sulphides, disseminated
LLC 12	0.041	chip/channe	0.5 m	poorly mineralized sheared dioritic rock. Only minor qtz veinlets, rare disseminated sulphides
LLC 13	0.047	grab	x	very difficult sample, likely subcrop. Strongly oxidized, no visible sulphides
LLC 14	0.049	grab	x	white massive quartz to 50% as veinlets in sheared dioritic rock
LLC 15	0.006	chip/channe	0.5 m	blocky, massive, wispy foliation qtx veinlets in green dark groundmass On close examination, thin sulphide layers visible though rare. A distinctive layered rock
LLC 16	1.696	grab	x	nice qtz rich sulphide rich (Po and rare cpy) sample. Wispy anastomozing sulphide layers in brecciated quartz. Loose grab, cannot chip/channel but at least 25 cms wide
LLC 17	0.061	chip/channe	0.5 m	mottled rock, dark matrix wispy wavy oxidized along layers. Looks like felsite andesite tuffaceous material?
LLC 18	0.189	chip/channe	0.5 m	this sample flank to MCB-5. Very well laminated schistose quartz veinlets in a dark andesitic matric. Perhaps .5% sulphide but poss oxidized Po and fleck cpy.
LLC 19	0.036	chip/channe	0.40 m	Flank to west of MCB-5. Barren looking diorite,one single qtz veinlet, no sulphides visible
LLC 20	0.034	grab	x	Larger sample, irregular wispy quartz veinlets with disseminated--not banded--sulphides
LLC 21	0.915	chip/channe	0.6 m	Much sulphides, 3 larger pieces likely 50% of sample, 1 is qtz rich, small, one is small high grade highly banded rock, one chip is mottled green basalts?
LLC 22	0.658	chip/channe	0.4 m	Two large well-banded sulphide rich samples make up 50% of sample chips

Ontario

Ministry of Northern Development and Mines

Active Mining Claim Abstract
| Main Menu | Back |

THUNDER BAY	Claim Number: TB 1213504		Status: ACTIVE
Due Date:	2017-Jun-05	**Recorded:**	2001-Jun-05
Work Required:	$391	**Staked:**	2001-Jun-01 10:21
Total Work:	$5,609	**Township/Area:**	MCBEAN LAKE AREA (G-0321)
Total Reserve:	$0	**Lot Description:**	,
Present Work Assignment:	$0	**Claim Units:**	1
Claim Bank:	$0		

Claim Holders

Recorded Holder(s) Percentage	Client Number
KERR, WILLIAM CHARLES (100.00 %)	151867

Transaction Listing

Type	Date	Applied	Description	Performed	Number
STAKER	2001-Jun-05		RECORDED BY KERR, WILLIAM CHARLES (P11202)		R0140.31315
OTHER	2001-Sep-14		WORK PERFORMED (ASSAY, GEOL) APPROVED: 2001-NOV-01	$1,813	Q0140.30743
WORK	2001-Sep-14	$1,600	WORK APPLIED (ASSAY, GEOL) APPROVED: 2001-NOV-01		W0140.30743
OTHER	2007-May-28		WORK PERFORMED (MICRO) APPROVED: 2007-AUG-02	$1,570	Q0740.00994
WORK	2007-May-28	$1,570	WORK APPLIED (MICRO) APPROVED: 2007-AUG-02		W0740.00994
WORK	2009-Jun-11	$30	WORK APPLIED		W0940.01589
OTHER	2010-Oct-25		WORK PERFORMED (PRECUT) APPROVED: 2011-FEB-03 Previously: 1676	$1,426	Q1040.02459
WORK	2010-Oct-25	$1,426	WORK APPLIED (PRECUT) APPROVED: 2011-FEB-03 Previously: 1676		W1040.02459
TRAN	2011-Aug-11		KERR, WILLIAM CHARLES (151867) TRANSFERS 100.00 % TO KERR, WILLIAM C (403368)		T1140.00324
TRAN	2013-Aug-07		KERR, WILLIAM C (403368) TRANSFERS 100.0 % TO KERR, WILLIAM CHARLES (151867)		T1340.00254
WORK	2013-Aug-19	$183	WORK APPLIED		W1340.02108
OTHER	2014-Jul-07		WORK PERFORMEDGPSG APPROVED: 2014-JUL-17	$400	Q1440.01478
WORK	2014-Jul-07	$400	WORK APPLIEDGPSG APPROVED: 2014-JUL-17		W1440.01478
OTHER	2014-Oct-20		EXPLORATION PERMIT NO. PR14-10515 EFFECTIVE FROM 2014-MAY-09 TO 2017-MAY-08 FOR THE FOLLOWING ACTIVITIES: (PHYSICAL / PTRNCH)		J1440.00359
WORK	2016-Jan-15	$400	CASH-IN-LIEU PAYMENT APPLIED		W1640.00115

Claim Reservations

01 400' surface rights reservation around all lakes and rivers
02 Sand and gravel reserved
03 Peat reserved
04 Other reservations under the Mining Act may apply
06 Excluding road

Swastika Laboratories Ltd

Established 1928

Assaying - Consulting - Representation

Assay Certificate

Certificate Number: 16-1506

Company: **William C. Kerr**

Project: Long Lac

Report Date: 08-Nov-16

Attn: Exploration Geologist William C. Kerr

We hereby certify the following Assay of 22 rock/grab samples submitted 28-Oct-16 by Exploration Geologist William C. Kerr

Sample Number	Au FA-MP Toz/t	Au Chk FA-MP Toz/t	Au FA-GRAV Toz/t
LLC1	0.002		
LLC2	< 0.001		
LLC3	0.030		
LLC4	0.066		
LLC5	0.035		
LLC6	0.104		
LLC7	0.230		
LLC8	0.235		
LLC9	0.041		
LLC10	0.545	0.403	0.446
Blank Value	< 0.001		
OxH97	0.037		
LLC11	0.073		
LLC12	0.041		
LLC13	0.047		
LLC14	0.049		
LLC15	0.006		
LLC16	1.438		1.696
LLC17	0.061		
LLC18	0.189		
LLC19	0.036		
LLC20	0.034	0.027	
LLC21	0.622		0.915
LLC22	0.659		0.658

Certified by Denis Chartre

Denis Chartre

1 Cameron Ave., P.O. Box 10, Swastika, Ontario P0K 1T0
Telephone (705) 642-3244 Fax (705) 642-3300

Statement of Qualifications

I, William C. Kerr of 22 Greenwin Village Road in North York, Ontario, certify that:

- I graduated from the University of New Brunswick, Fredericton, New Brunswick, in 1975 with a Bachelor of Science degree in geology
- I am a member in good standing of the Association of Professional Geoscientists of Ontario; Registration Number 0120.
- I am a registered member in good standing of the Association of Professional Engineers and Geologists of Saskatchewan, Registration Number 12624.
- I hold a Permanent Prospectors license in the Province of Ontario. Lic # P11202, received in the mid 1990's.
- I have practiced my profession as a geologist since 1975, during which time I have held technical and executive positions with senior and junior mining companies throughout North and South America, central Asia, Australia and Africa. I have also worked as an independent consultant providing various exploration management services to geological and geophysical exploration companies and the mining industry in Canada, Mexico, and Saudi Arabia.
- I have authored a number of reports to NI 43-101 standards, including lead author of the worlds first technical report in 2003 on uranium Reserves and Resources after NI 43-101 was enacted, and remain a "qualified person" as defined in National Instrument 43-101.
- I have authored all sections of this report

Dated at North York this 28th day of November, 2016

William C. Kerr

APPENDIX C

CITATION: Ginoogaming First Nation v. Her Majesty The Queen In Right of Ontario et al., 2021 ONSC 5866
COURT FILE NO.: Court File No.: CV-20-00646347-0000 / CV-20-00650748-0000
DATE: 20210901

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
GINOOGAMING FIRST NATION Plaintiff (Moving Party)	*Kate Kempton, Corey Shefman and Christopher Evans,* for the Plaintiff (Moving Party)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE DIRECTOR OF EXPLORATION, THE QUATERNARY MINING & EXPLORATION COMPANY LIMITED, HARDROCK EXTENSIONS INC., MICHAEL MALOUF and WILLIAM KERR Defendants (Responding Parties)	*K. Chatterjee, T. Lipton,* Lawyers for the Defendants/Responding Parties, Her Majesty The Queen in Right of Ontario and The Director of Exploration *Michael Malouf,* non-lawyer for the Defendant/Responding Party, THE QUATERNARY MINING & EXPLORATION COMPANY LIMITED *Michael Malouf,* non-lawyer for the Defendant/Responding Party, HARD ROCK EXTENSION INC. MICHAEL MALOUF, Self-Represented Defendant/Responding Party WILLIAM KERR, Self-Represented Defendant/Responding Party **HEARD: June 1, 2021**

VELLA J.

REASONS FOR DECISION

[1] This is a motion brought by the Ginoogaming First Nation ("Ginoogaming") seeking the following interlocutory relief:

(a) An interlocutory injunction against Michael Malouf ("Mr. Malouf") and his prospecting companies, The Quaternary Mining & Exploration Company Limited

("Quaternary") and Hard Rock Extension Inc. ("Hard Rock") (collectively, the "Prospecting Companies") to restrain them from carrying on any mining related exploration activities on the territory hereinafter defined (for purposes of this motion only) as the Wiisinin Zaahgi'igan pending determination of this action;

(b) An interlocutory injunction against William Kerr ("Mr. Kerr") restraining him from carrying on any mining related exploration activities on the land hereinafter defined (for purposes of this motion only) as the Wiisinin Zaahgi'igan (sometimes referred to as "WZ") pending determination of this action;

(c) An interlocutory order against Her Majesty The Queen in Right of Ontario (the "Crown") and the Director of Exploration (the "Director") declaring that no approval of the Caouette Permit Application (as hereinafter defined) made by Mr. Kerr should be made or that if it is approved, the issuance of such an approval in the circumstances would constitute a breach of the Crown's duty to consult and accommodate Ginoogaming.

PROCEDURAL AND PRELIMINARY MATTERS

[2] By way of a preliminary matter, Malouf was granted an order permitting him to represent the Prospecting Companies as a non-lawyer by Myers J. In the resulting order, however, Quaternary was accidentally omitted. Mr. Malouf has asked for an order rectifying this omission. None of the parties took objection to this request. I am prepared to correct that omission upon receipt of the appropriate proposed amending order from Mr. Malouf, on notice to the remaining parties.

[3] Each of the parties filed extensive evidentiary records. Furthermore, cross examinations on the affidavits of the deponents were conducted.

[4] General objections were made by each of the parties challenging various aspects of the affidavits on the basis that some of the paragraphs constituted inadmissible hearsay evidence. For example, in the sole affidavit offered by the Crown, Mr. Barnes addresses what happened during the course of the consultation process with Ginoogaming, which involved telephone calls at which he was not present. Some of the challenges to the affidavits filed by the First Nation are based on the fact that some of the information received was from unidentified Elders from the community and one affidavit attached a photograph of an abandoned mine. Mr. Malouf's affidavit also reflects similar challenges. Not much time at the hearing was devoted to argument with respect to these general objections, as the parties were content to proceed on the basis of the existing record on the basis that where questionable hearsay is introduced through the affidavits, I should take that factor in considering the weight to be attached. I agree with the position.

[5] In addition, the Crown challenged the qualifications of certain of Ginoogaming's expert witnesses (Ms. Jorgenson and Dr. Gibbons) and submit that these challenges should also go to the weight attached to the expert evidence. I agree with this approach as well.

ISSUES

[6] The following issues are to be determined at this motion:

(a) Is there any evidence suggesting that Mr. Malouf, in his personal capacity, is properly the subject of an interlocutory injunction?

(b) Does this court have jurisdiction to issue an interlocutory order in the nature of a declaration against the Crown and the Director?

(c) Is it premature to issue an interlocutory injunction against Kerr?

(d) In relation to whether an interlocutory (or interim) injunction should issue against any or all of the respondents:

(i) Does Ginoogaming raise a serious issue to be tried?

(ii) If the interlocutory injunction were to be denied, would Ginoogaming suffer irreparable harm?

(iii) What party (or parties) does the balance of convenience favour?

(e) Should Ginoogaming be relieved from the undertaking to pay damages arising from the issuance of an interlocutory injunction?

OVERVIEW

[7] This is a motion for an interlocutory injunction brought by Ginoogaming to prevent any mining activities from being carried out on any part of their traditional territory, identified by the First Nation as Wiisinin Zaahgi'igan, and currently the subject of an early exploration (mining) permit (the "2019 Ferau Permit"). This land in question is, according to the evidence, approximately 140 square kilometers, including Ginoogaming's reserve territory which is approximately 70 square kilometers.

[8] Ginoogaming is a small Anishinaabe First Nation located in northern Ontario, approximately 40 kilometers east of Geraldton, along the northern shore of Long Lake. Ginoogaming is a signatory to and treaty rights holder under Treaty No. 9, also known as the James Bay Treaty, made in 1905, and one of nine First Nations who are members of the Matawa First Nations Management (also known as a Tribal Council).

[9] The Crown, through the Ministry of Energy, Northern Development and Mines ("ENDM"), has responsibility over mining activities under the auspices of the *Mining Act* and regulations and issued an early exploration permit to Mr. Malouf in 2019 (the "2019 Ferau Permit"). It also owes a responsibility to First Nations that may be adversely impacted by any proposed decisions regarding the issuance, amongst other things, of early exploration permits that may be inconsistent with First Nations' Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*.

[10] Michael Malouf is a long-time prospector. He founded his companies, Quaternary and Hard Rock, many years ago. Quaternary holds 284 mining claims in relation to what has been described as the "Hardrock Property" since the 1980's and includes within that area the mining (cell) claims that are the subject of the 2019 Ferau Permit and located within Wiisinin Zaahgi'igan. The Hardrock Property is described as consisting of 24 kilometers of contiguous mining claims. The subject mining claims, called the 2019 Ferau Permit project or claims, are located on the eastern one-third of the Hardrock Property, located about 5 kilometres south and southwest of Ginoogaming's reserve in the townships of Abrey, Coltham, Croll and the McBean Lake Area. Hard Rock (Extension Inc.) is a junior exploration company that was formerly a publicly traded company (before the 2019 Ferau Permit was issued). It holds options to earn a 100% interest in the Hardrock Properties (subject to a 4% Net Smelter Return Royalty and $60,000 Annual Advance Royalty Payments, which are payable to Quaternary). Quaternary is the controlling shareholder of Hard Rock and holds the 2019 Ferau Permit.

[11] Michael Kerr is also a prospector. He has an application for an early exploration permit (under the *Mining Act*) with respect to what has been called the "Caouette Project". The Caouette Permit application has been put on "temporary hold" (as defined under the *Mining Act*) by the Director and continues to be on temporary hold. Accordingly, no permit has been issued to date. The Caouette Project is located on the site formally occupied by the Theresa mine – a gold mine that operated from the 1930s and 1950s and is located within Wiisinin Zaahgi'igan, approximately 1 kilometre south of Ginoogaming's reserve.

[12] The area that is the subject of the Ferau Permit and Caouette Permit Application and is in dispute is the non-reserve portion of Wiisinin Zaahgi'igan. It is generally located immediately to the south of the reserve, and borders at or near the east side of Long Lake.

[13] The Crown only took a position with respect to its duty to consult and accommodate and any irreparable harm within that context but did not otherwise take a position with respect to irreparable harm or the balance of convenience. It also took no position with respect to Ginoogaming's motion as against the other parties.

ANALYSIS

[14] For purposes of this motion, the Crown accepts that Wiisinin Zaahgi'igan is a place that contains locations of cultural and spiritual importance to members of the Ginoogaming. The Crown also accepted for purposes of this motion the statements set out in the Ginoogaming's factum at paragraphs 5 to 8 and the first sentence of paragraph 9, including the position that the Crown owes a duty to consult and accommodate Ginoogaming in respect of the Ferau Permit and the Caouette Permit Application.

Issue 1: Is there any evidence suggesting that Michael Malouf, in his personal capacity, is properly the subject of an interlocutory injunction?

[15] Mr. Malouf properly points out that he is not personally in control of the mining activities of the Prospecting Companies, nor is he the permit holder with respect to the 2019 Ferau Permit. Accordingly, he asks the court to dismiss the motion as against him, in his personal capacity.

[16] No evidence was offered suggesting that Mr. Malouf, acting in his personal capacity, poses any threat to engaging in the challenged early exploration mining activities within Wiisinin Zaahgi'igan that are at the heart of this motion.

[17] Accordingly, the motion as against Mr. Malouf, in his personal capacity, is dismissed. The parties have not established the requisite connection between Mr. Malouf and the interlocutory injunctive relief sought.

[18] I was not asked to consider whether the non-permit holder prospecting company, Hard Rock, was properly the subject of this motion, and therefore this ruling is without prejudice to any argument that company may wish to make in relation to this issue.

Issue 2: Does this court have jurisdiction to issue an interlocutory order in the nature of a declaration against the Crown and the Director?

[19] Ginoogaming seeks interlocutory relief as against the Crown and the Director in the form of a declaration, stated in para. 3 of its Notice of Motion as follows:

> [A] declaration that ENDM shall not issue an approval for the Caouette Permit Application, or that the issuance of such an approval in the circumstances would constitute a breach of the Crown's duty to consult and accommodate GFN.

[20] In my view, this form of interlocutory declaratory relief is precluded by operation of section 22(4) of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17 ("CLPA"), which states as follows:

> 22(4) The court shall not make an interim or interlocutory order declaratory of the rights of the parties.

[21] I was not referred to any caselaw in which s. 22(4) of the CLPA has been considered.

[22] Therefore, Ginoogaming's claim for relief as against the Crown and the Director fails on this ground alone.

[23] In the alternative, the claim for relief is premature for the reasons that follow under the next issue.

Issue 3: Is the request to issue an interlocutory injunction against Kerr premature?

[24] Ginoogaming's request for interlocutory declaratory relief in relation to the Caouette Permit Application is premature, since the Director has yet to render a decision, under section 78.3 of the *Mining Act*, with respect to that application, which, as at the hearing of this motion, continued to be on "temporary hold".

[25] A similar situation was considered by Pierce R.S.J. sitting as a single judge on the Divisional Court in *Fort William First Nation v. Ontario*, 2014 ONSC 4474.

[26] In *Fort William*, the First Nation sought an interim injunction pending the Divisional Court hearing of four applications for judicial review seeking to prevent the relevant provincial government ministries from permitting a company to access or develop a wind farm on the First Nation's traditional territories, which land was under the control of the City of Thunder Bay.

[27] Fort William alleged that the Crown had failed in its duty to consult with the First Nation in relation to the proposed wind farm that would be situated on its traditional territory. However, the Director from Ministry of the Environment had yet to issue the required permit to enable the wind farm to proceed.

[28] Pierce, R.S.J. ruled that Fort William's motion was premature since the Director had yet to render a decision on the issue of the required permit. If the Director ultimately declined to issue the requisite permit, then the issue of the adequacy of the Crown's duty to consult would be moot. However, Pierce R.S.J. made her ruling without prejudice to the First Nation renewing its request once the Director made a decision.

[29] It is important that the court have the benefit of a full evidentiary record, which would include all matters relating to the duty to consult up to and including the Director's decision.

[30] I am of the view that the same considerations apply to Ginoogaming's motion against Mr. Kerr. In the event that the Director ultimately declines to approve Mr. Kerr's Caouette Permit Application, then the issue of whether the Crown met its constitutional and common law duty to consult and accommodate with respect to that decision, together with the question of whether the early exploration activities violate Ginoogaming's Aboriginal and treaty rights under s. 35 of the *Constitution Act*, and whether the Crown acted honourably, will all be moot.

[31] In the event the Director grants approval of the Caouette Permit application, then Ginoogaming will have legal remedies available to it, including renewing its motion for interlocutory injunctive relief on appropriate materials as against Kerr.

[32] I am further satisfied that without approval of the Caouette Permit Application, Ginoogaming's asserted rights are not in jeopardy by Mr. Kerr so long as the Application is on "temporary hold" (as that term is defined under the *Mining Act* and the regulations).

[33] Accordingly, the motion for interlocutory injunctive relief is dismissed against Mr. Kerr, without prejudice to Ginoogaming's rights, including renewing its request for interlocutory injunctive relief against Mr. Kerr should the temporary hold currently in place over the Caouette Permit Application be released and the Director decide to approve the Caouette Permit Application.

Issue 4: Should an interlocutory (or interim) injunction be granted in the circumstances of this proceeding?

4.i: Interlocutory and interim injunctive relief in the context of Indigenous rights claims

[34] The three-part test for the granting of interlocutory injunctive relief is set out in the Supreme Court of Canada decision of *R.J.R.-MacDonald Inc. v Canada*, [1994] 1 S.C.R. 311. The

moving party seeking the relief, in this matter Ginoogaming, must satisfy the court on a balance of probabilities that:

(a) there is a serious question to be tried;

(b) the First Nation will suffer irreparable harm if the requested relief is not granted; and

(c) the balance of convenience favours the First Nation in the circumstances of this matter.

[35] This test has been applied by courts across the country to claims relating to Aboriginal and treaty rights advanced by Indigenous peoples and their leadership. However, in applying this test, the analysis must be informed by Indigenous legal principles alongside common law principles.

[36] Of particular relevance to the resolution Indigenous claims based on Aboriginal and treaty rights under s. 35(1) of the *Constitution Act*, is the goal of reconciliation.

[37] As stated by the Supreme Court of Canada in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386 at para. 86:

> Injunctive relief to delay the project may be available. Otherwise, the best that can be achieved in the uncertain interim while claims are resolved is to follow a fair and respectful process and work in good faith toward reconciliation …. in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.

4.ii Does Ginoogaming raise a serious issue to be tried?

[38] In *R.J.R.-MacDonald Inc.*, the Supreme Court of Canada, at p.348, stated that the court is to approach the first stage of this three-part test on the basis of "common sense and an extremely limited review of the case on the merits."

[39] The Supreme Court further cautioned, p. 348, that the motions court "should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law." Furthermore, the Court, at p. 337, held that once the motions judge is satisfied that the motion is neither vexatious nor frivolous, the motions judge should proceed to a consideration of irreparable harm and the balance of convenience.

[40] The Supreme Court of Canada's caution regarding the low threshold presented by the serious issue branch of the test has been reflected in many decisions relating to claims advanced by Indigenous peoples and their First Nations in relation to Aboriginal, treaty, and constitutional rights, including those framed in the Crown's duty to consult and accommodate; e.g., *Williams v. British Columbia*, 2018 BSCS 1271, at para. 5; *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708, at para. 42.

[41] I am satisfied that in the event an interlocutory or interim injunction is granted, it will not amount to a final determination of this lawsuit.

[42] Ginoogaming submits that there are three serious issues to be tried:

(a) Has the Crown discharged its duty to consult and accommodate in the circumstances presented by this action?

(b) Have the Defendants unjustifiably infringed Ginoogaming's Aboriginal and/or treaty rights under s. 35 of the Constitution Act, 1982?

(c) Has the Honour of the Crown been upheld in the course of its dealings with Ginoogaming through its interpretation of the *Mining Act*?

Has the Crown discharged its duty to consult and accommodate the concerns of Ginoogaming with respect to the proposed early exploration mining activities on WZ when it issued the Ferau Permit and afterwards?

[43] There is no dispute that the Crown owes a duty to consult and accommodate to Ginoogaming with respect to the proposed mining exploration activities which were eventually approved by the Director when it granted the Ferau Permit in 2019. The Crown further acknowledges that the duty to consult and accommodate is reflected in section 35 of the *Constitution Act, 1982* and is grounded in the Honour of the Crown (see also *Haida Nation*, at para. 16).

[44] The duty to consult and accommodate is also reflected in the preamble to the *Mining Act* itself:

> s. 2 The purpose of this Act 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.

[45] Furthermore, as stated in *Ktunaxa* (summarizing the dicta from *Haida the Nation*), at para. 80:

> The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. The obligations on the Crown are to provide notice and information on the project, and to consult with the Aboriginal group about its concerns. The obligations on the Aboriginal group include: defining the elements of the claim with clarity (*Haida*, para. 36); not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (*Haida*, para. 42).
>
> The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto

> over developments pending proof of their claims. Consent is required only for *proven* claims, and even then only in certain cases. What is required is a balancing of interests, or a process of give and take (*Haida*, paras. 45 and 48-50).

[46] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 49, the Supreme Court of Canada defined described the duty of accommodation as a process:

> [t]his [process] flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile"… "an adjustment or adaptation to suit a special or different purpose….a convenient arrangement: a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

[47] At this stage of the proceedings, this court is not called upon to judge the adequacy of the Crown's efforts to consult and accommodate, but rather to determine whether there is a serious issue raised by Ginoogaming with respect to that adequacy.

[48] The duty to consult and accommodate is a constitutional obligation imposed on the Crown in its dealings with First Nations and the Indigenous peoples of this country. As it is part of an ongoing evolving relationship, the Crown must also act honourably in discharging this duty.

[49] The Supreme Court of Canada has emphasized time and again that the duty to consult and accommodate must be *meaningful*. It is not a matter of form; it is a matter of substance.

[50] Furthermore, this duty guarantees a process only, but not an outcome (*Ktunaxa*, at para. 83). In other words, just because a First Nation's demands are not met does not lead to the automatic conclusion that the Crown breached its duty to consult and, where appropriate, accommodate.

[51] The submissions regarding the duty to consult and accommodate in this motion were focused primarily on the Crown's efforts to engage with Ginoogaming over what was then the 2019 Ferau Permit application by Quaternary, and the Caouette Permit Application. In light of my ruling dismissing the motion as against Mr. Kerr, I will only focus on the process that has been engaged in thus far as between the Crown and the Ginoogaming with respect to the 2019 Ferau Permit application and following approval of this permit.

[52] Of note, under the legislative scheme reflected by the *Mining Amendment Act, 2009*, which came into force November 1, 2012, there are now statutory and regulatory requirements imposed upon early exploration proponents to ensure their activities are consistent with protections provided for existing Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*. For example, s. 17(1) 3 of Ontario Regulation 308/12 of the *Mining Act*, (Exploration Plans and

Exploration Permits) provides that, unless waived, an early exploration proponent who proposes to carry out any exploration permit activities *shall* comply with the requirement that they be conducted in a manner consistent with the protection provided for existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. This regulation is consistent with the purpose of the *Mining Act* as reflected in section 2 of that statute and quoted above. In addition, under the amendments to the *Mining Act* reflected in the *Mining Amendment Act 2009* there were added requirements that persons seeking to submit an exploration plan (the stage before an exploration permit) and an application for an exploration permit should engage with "aboriginal consultation" within the potentially affected First Nation.

[53] At this juncture, it is useful to set out the chronology of material interactions that occurred between the Crown and Ginoogaming. This is not in serious dispute as between these parties. I will also note, however, that Mr. Malouf had a number of interactions with Ginoogaming, dating back to 2011. However, as the Crown takes the position that it did not delegate the discharge of its duty to consult to Mr. Malouf, I will not include the communications and interactions initiated by Mr. Malouf (and which are set out in his affidavit). While Mr. Malouf made efforts to engage with the Ginoogaming from as early as 2011 (with respect to Quaternary's initial approved early exploration permit relating to the Ferau Project in 2015, and subsequently renewed in 2019), the more recent efforts were made pursuant to the ENDM's encouragement consistent with the *Mining Act*, as amended, and the related regulations, effective in 2012 and 2013. The duty to consult and accommodate addressed in this motion focuses on the 2019 Ferau Permit, and not its predecessor 2016 Ferau Permits and 2015 Ferau Permit application. However, the information received by Mr. Malouf on behalf of Quaternary and by the Crown relative to the earlier permit is relevant in terms of informing their state of knowledge when the 2019 Ferau Permit application was made.

[54] The majority of Mr. Malouf's interactions with Ginoogaming occurred in 2015, leading to the issuance of the initial Ferau Permits (PR-10719 and PR-15-10733) on May 2016 for a three-year term expiring on March 9, 2019 (the "2016 Ferau Permits"). As admitted by Mr. Malouf, no work was carried out under the 2016 Ferau Permits due to a change in plans on the part of Quaternary.

Chronology of interactions between Ginoogaming and the Crown/ENDM

[55] Both the First Nation and Crown agree that the first notice of the 2019 Ferau Permit Application was provided by ENDM by way of a letter dated July 11, 2018 and sent July 20, 2018. This occurred as a result of the ENDM identifying Ginoogaming as one of five First Nations it considered could be adversely impacted by the proposed early exploration mining activities. The letter attaches a copy of the Ferau Permit Application. While the Application included maps and other information about the proposed work, the information was at a "fairly high level" owing to the "speculative nature of early exploration activities, according to the Crown's witness, Patrick Barnes.

[56] The deadline for delivery of any concerns or objections by Ginoogaming to the Ferau Permit Application was August 19, 2018.

[57] When ENDM did not hear back from Ginoogaming, it sent an email on July 30, 2018 by way of a follow up.

[58] Conrad Chapais, the Implementation Coordinator for Ginoogaming deposed that he requested more time to collect the information ENDM was looking for in terms of identifying specific cultural and spiritual sites in the area, but ENDM does not have a record of this communication.

[59] Having received no response by the stipulated deadline, ENDM assumed Ginoogaming had no concerns about the mining activities proposed by the Ferau Permit Application. Quaternary's targeted date for work to commence was March 10, 2019.

[60] Thereafter, Ginoogaming was copied on correspondence from the ENDM responding to concerns about the Ferau Permit application raised by another of the potentially affected First Nations. As a result of those concerns, the Director placed the Ferau Permit Application on a "temporary hold" under the *Mining Act*, and this was extended to May 29, 2019.

[61] Thereafter, the Ferau Permit, PR-18-000135, was issued on June 21, 2019 for a three-year period with additional terms and conditions. Ginoogaming received a copy of the 2019 Ferau Permit on June 21, 2019.

[62] On June 28, 2019, Mr. Malouf provided what is called a "mobilization notice" (that was included as a term of the 2019 Ferau Permit), which required Quaternary to notify ENDM two weeks prior to commencing work on the ground. The work was to commence "as early as" July 18, 2019. This mobilization notice prompted telephone calls between the Ginoogaming and staff at ENDM. During the course of this telephone communication in July 2019, ENDM staff was advised that Ginoogaming had serious concerns about the 2019 Ferau Permit and objected to any work occurring within Wiisinin Zaahgi'igan. ENDM was advised that Ginoogaming had been engaged in work to collect cultural values within Wiisinin Zaahgi'igan, had made attempts to buy the claims from Mr. Malouf, and advised of the Ginoogaming's Treaty Land Extension Claim (TLE Claim). However, Ontario and Canada had already accepted Ginoogaming's TLE Claim for negotiation in February and April 2016, respectively, and tripartite negotiations have been ongoing since September 2016.

[63] Despite the mobilization notice, no work was done within Wiisinin Zaahgi'igan under the 2019 Ferau Permit in 2019 and through to May 29, 2020, again due, in part, to an undisclosed change in plans on the part of Quaternary. Then on May 29, 2020, ENDM received a further mobilization notice advising that Quaternary intended to commence work under the Ferau Permit on June 1, 2020.

[64] On June 11, 2020, ENDM contacted Ginoogaming to advise that Quaternary could commenced work "as early as the next day."

[65] At this point in time, Ginoogaming hired a law firm and their lawyer contacted ENDM on June 11, 2020 advising that the Ferau project was located on land that was of high cultural and

spiritual significance to Ginoogaming and demanding that ENDM either cancel the permit or ask Mr. Malouf to suspend the project, failing which litigation would commence.

[66] On June 12, 2020, a further telephone conversation occurred between Ginoogaming and ENDM. Representatives of Ginoogaming voiced strong concerns about the Ferau project and indicated they had been raising these concerns for a long time.

[67] On June 19, 2020, at a telephone conference call, Ginoogaming advised that an archaeology study had been initiated to determine the location and nature of any specific cultural sites. It had previously advised that it had retained an expert to prepare maps showing cultural sites as well. Further telephone calls ensued in June 2020 to discuss the timing of the research reports that Ginoogaming was assembling, and time for ENDM to review same.

[68] On July 20, 2020, two research reports were provided to ENDM on behalf of Ginoogaming – one report was an initial archaeological assessment, and the other addressed cultural keystone places relating to Ferau Project and Wiisinin Zaahgi'igan. A third report, called The Four Rivers Report, was provided to ENDM on July 24, 2020 and contained mapping of Wiisinin Zaahgi'igan relative to the Ferau Permit project. An addendum to the Cultural Keystone Place report was provided to ENDM on August 26, 2020.

[69] On July 28, 2020, a key meeting (and apparently the only one) was held between ENDM and representatives of Ginoogaming, along with lawyers, on the Zoom virtual platform to discuss the research reports provided by Ginoogaming and the First Nation's spiritual and cultural claims, including its importance as a place for hunting, fishing, and harvesting, with respect to Wiisinin Zaahgi'igan. Unfortunately, this meeting was ultimately terminated by Ginoogaming who felt that the ENDM were asking questions requiring them to further pinpoint exact locations for the various spiritual sites (including gravesites) and cultural sites that could not be answered without further research. As a result, Ginoogaming felt that the meeting had become futile.

[70] There does not appear to have been any further interactions by way of consultation as between ENDM and Ginoogaming since then (save for a letter dated August 14, 2020 from the Director to Ginoogaming setting out a summary of the ENDM's understanding of Ginoogaming's position), and there are no suggestions of any approach in which the First Nation's concerns might be accommodated or the consultation advanced.

[71] In the meantime, Mr. Malouf voluntarily agreed to postpone Quaternary's proposed work under the 2019 Ferau Permit. As a result of this voluntary gesture, and the ensuing interim injunction obtained on consent on September 10, 2020, no work has been done in WZ under the 2019 Ferau Permit (or the 2016 Ferau Permits either).

The Crown's duty to consult and accommodate when Aboriginal and Treaty Constitutional rights are at issue

[72] Much emphasis was placed by the Crown and the Prospecting Companies on the number of engagements with Ginoogaming that transpired between 2018 and 2020 in various forums: written, telephone, and one virtual meeting. Furthermore, the Crown, supported by the Prospecting

Companies, submits that the reason why no accommodation has been offered to Ginoogaming is because Ginoogaming will accept nothing short of a complete withdrawal of the 2019 Ferau Permit and a complete permanent cessation of any proposed mining activities within Wiisinin Zaahgi'igan.

[73] The Crown and the Prospecting Companies also say that at times Ginoogaming was unresponsive to, or silent in response to, invitations by ENDM to voice objections. The Crown states that it has provided sufficient supports for Ginoogaming to have the resources to effectively participate in consultations in a timely manner. The Crown also submits that ENDM staff have had the opportunity to learn from Ginoogaming about its land use and cultural values, such as during earlier discussions related to the issuance of a prior early exploration permit for the Ferau project in 2015.

[74] The Crown, supported by the Prospecting Companies, says that its hands are tied in light of Ginoogaming's position that the only satisfactory accommodation would be a revoking of the Ferau Permit and an agreement that no mining activities would be done within Wiisinin Zaahgi'igan. In other words, Ginoogaming will not accept any accommodation.

[75] In any event, the Crown says there are statutes of general application that require proponents to stop working on their projects and report to Ontario where they have discovered objects of potential archaeological significance, namely, the *Ontario Heritage Act*, R.S.O. 1990, c. O. 18 and *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, c. 33. It is the Crown's position that these statutes are sufficient to respond to Ginoogaming's concerns and thus discharge its duty to accommodate.

[76] Furthermore, the Crown submits that its duty to consult in this case is at the "lower end of the spectrum" because Treaty No. 9 explicitly provides that the Crown has the right to "take up" the WZ lands "from time to time" for among other activities, mining. This clause, commonly referred to as the taking up clause, has been interpreted by other courts to mean that, under this treaty, the Crown promised the signatory (Indian Bands) First Nations that in exchange for the surrender of these lands to the Crown, the First Nations would be able to continue to "hunt, fish and trap" on these surrendered lands as they have since time immemorial, with the exception that this right could be taken away by the Crown so that it could make the same land available to settlors for purposes such as mining.

[77] The Crown admits that it cannot take up the subject lands for these types of purposes purely at its will. However, the Crown says that its obligation to the adversely affected First Nation(s) is discharged through the duty to consult and accommodate. It relies on the Ontario Division Court decision rendered in *Eabametoong First Nation v. Minister of Northern Development and Mines*, 2018 ONSC 4316.

[78] In *Eabametoong* at para. 91, the Divisional Court held that Ontario's constitutional duty to consult, when it is in the context of the exercise of the Treaty 9 taking up clause, is at the "lower end of the spectrum." That case involved a judicial review application by the First Nation challenging the Director's decision to issue an early exploration permit to a mining company permitting drilling within Eabametoong's traditional territory.

[79] However, in *Eabametoong*, the Divisional Court couched this characterization of the duty to consult, at paras. 92-93, by maintaining that, pursuant to the Supreme Court of Canada's decision rendered in *Haida Nation*, and reinforced in *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Crown's duty to consult, even if at the low spectrum due to the taking up clause, must still be meaningful and consist of "talking together for a mutual understanding" (*Haida*, at para. 43). This type of engagement is required because in all of its dealings with Indigenous peoples and First Nations, the Crown's honour is invoked. Further to this end, relationship building is the core value of promoting reconciliation with Indigenous peoples (*Mikisew*, at para. 1).

[80] Furthermore, it must be noted that while not every "taking up" by the Crown will constitute an infringement of the Treaty that must be justified under the test set out in *R. v Sparrow*, [1990] 1 S.C.R. 1075, *Mikisew* was decided after a full trial on the merits and, in the circumstances of that case, the Supreme Court of Canada found the infringement to be a minor one not attracting the *Sparrow* test. In the end, however, the court in *Mikisew* found that the Crown had breached its duty to consult.

[81] Similarly, unlike the matter before me, *Eabametoong* also represented a final determination of the matter on the merits, by way of a judicial review application, rather than an assessment of whether there is a serious issue raised within the context of a motion for an interlocutory injunction.

[82] Having reviewed the evidentiary record, there is a serious issue raised with respect to whether the Crown has carried out a meaningful consultation with Ginoogaming in advance of issuing the Ferau Permit. The initial notice provided by way of letter, with the follow up email, does not seem to me to be *effective* communication with Ginoogaming. Elder Victor Chapais deposed in his affidavit, "[w]e try and deal with issues through talking in a circle. We take our time to understand other people's perspectives. We did everything we could to be diplomatic in an Anishinaabe way: through talking, listening and trying to reach an understanding."

[83] In Conrad Chapais' affidavit, he deposed that it is not the Anishinaabe way to contradict people (i.e.: bluntly raise objections) and that it is very important to listen. Further, a lot of value is placed in the Anishinaabe culture of trying to reach a mutual understanding and agreement "so that every[one] owns the decision and freely accepts it."

[84] Critically, the evidence also demonstrates, from Ginoogaming's perspective, that for the Anishinabek "silence doesn't mean agreement or indifference."

[85] In addition, Ginoogaming disputes the Crown's claim that it has adequate resources to effectively participate in meaningful consultation in a timely manner. The support to which the Crown refers is the availability of one paid position at Matawa Tribal Council called a mineral development advisor intended to assist Matawa Tribal Council and its member communities with participating in project specific regulatory processes under the *Mining Act*. This single funded position is to provide advice to, and act as a liaison on behalf of, the nine First Nations members of Matawa. Ginoogaming provided evidence that supports its position that this single position is inadequate to the meet the collective needs of the Matawa membership.

[86] The Crown has also funded, since 2011, the position of a community communications liaison officer (CCLO) at Ginoogaming.

[87] However, no funding is provided to hire the experts that seem necessary in order for Ginoogaming to meet the Crown's requirement that it pinpoint the exact locations within the broader WZ area that are of particular cultural, and spiritual significance, including the individual gravesites, to the First Nation so that the Crown can, in turn, consider what accommodations might be appropriate to meet Ginoogaming's concerns.

[88] Ginoogaming filed an affidavit of its CCLO who was in place from 2009 to 2018. Conrad Chapais deposed that the demands placed on him far exceeded his capacity in terms of the number of plans and permits for exploration and other proposed mining projects during that timeframe. For example, when this funded position was created, it was originally dedicated to the Ring of Fire and this project took up most if not all of his time. Then he had to add the Greenstone Gold Mine project to his responsibilities, but no further funding was provided to expand his position.

[89] In addition, there is evidence in the record that supports Ginoogaming's submission that it has long taken positive initiatives aimed at protecting Wiisinin Zaahgi'igan from any development. For example, in the affidavit of Peter Rasevych, the major special projects director at Ginoogaming, and also the successor to Mr. Chapais as the CCLO, a number of initiatives are outlined such as securing logging rights through the Kenogami Forest Management Plan (through a First Nations organization commonly referred to as Needak, of which Ginoogaming is a member) and the Ginoogaming Nanagjitong Nibi Water Declaration to protect the waters. These initiatives are aimed at preventing destruction of the waters and forests and many have been in place prior to the 2019 Ferau Permit application being made. In addition, in 2012, Ginoogaming commenced a Treaty Land Entitlement claim seeking additional land to be added to its reserve territory in the amount of approximately 29.5 square kilometers and asking that the land added, if granted, be within WZ. In addition, the Chief and Council passed a Band Council Resolution on May 8, 2020, calling for a moratorium on all industrial activity in Wiisinin Zaahgi'igan.

[90] In my view, a serious issue has been raised with respect to whether the Crown's efforts to date have discharged the duty to have meaningful consultation, in part, due to the unilateral time efforts imposed for these discussions, both in the period leading up to the approval of the Ferau Permit application and subsequently. Without meaningful consultation, there cannot be any meaningful attempt to reach accommodation and the path to reconciliation is thwarted.

[91] Letter writing has seemingly been an ineffective form of communication and therefore puts into question whether one letter and follow email leading up to the approval of the 2019 Ferau Permit was "meaningful" consultation. The lack of attendance at Ginoogaming (acknowledging that the COVID 19 pandemic likely made this impossible) also likely did not help. Meaningful consultation must consider the cultural context of the engaged Indigenous form of communication and consultation where the emphasis is on speaking and active listening with a view to developing a mutual understanding and, hopefully, a resolution.

[92] Letter writing, while a convenient way to paper communication, is not necessarily adequate in the Indigenous cultural context within which governments must deal, and ineffective within the

Anishinabek cultural context as described in the evidentiary record by Ginoogaming's witnesses. Without meaningful consultation, determining what is a reasonable accommodation cannot be properly assessed, since one must first understand what the true nature and extent of the concerns are. If from the perspective of the Ginoogaming, it is all or nothing at the end of the day, then perhaps Ginoogaming will have foreclosed the opportunity for accommodation short of being ceded the land comprising Wiisinin Zaahgi'igan. However, that issue is not before me to resolve.

[93] Given the seriousness of the claims advanced by Ginoogaming, the length of time devoted to these consultations seems inadequate. The consultations only started, at the earliest, with the provision of notice in July 2018, and any form of engagement (meaning two-way dialogue) did not really start until the summer of 2019 after the Ferau Permit application was approved. The pandemic has intervened, and no doubt has significantly hampered efforts to engage in meaningful consultation. By way of contrast, in *Ktunaxa*, there had been two decades of consultations. I am not suggesting what the correct time period is for this matter – it will be dependent on many factors. However, whatever that time period is, it has not yet been optimized.

Breach of Aboriginal and treaty rights under s. 35, Constitution Act, 1982

[94] The people of Ginoogaming describe Wiisinin Zaahgi'igan as a deeply important place to them, both culturally and spiritually. Elder Chapais stated that "Wiisinin Zaahgi'igan is very, very important to us as a community. It's hard to describe our spirituality in words." "Every culture worships in different ways, we worship in Wiisinin Zaahgi-igan. Any amount of uninvited destruction in Wiisinin Zaahgi-igan is harmful to us. Our lands and waters make us Anishinaabe. When harm is done to them, even harm that may seem to others to be minor, it affects who we are as a people."

[95] Spiritual rights are, as yet, an unproven Aboriginal right under s. 35 of the *Constitution Act* and raises a serious issue based on the evidentiary record. The Crown concedes that there are spiritual and sacred sites within Wiisinin Zaahgi'igan. The Prospecting Companies did not persuade me to the contrary.

[96] I also accept that whether spiritual rights have been surrendered under Treaty No. 9 raises a serious issue for trial. In *Ktunaxa*, the issue for the Supreme Court of Canada was whether the First Nation's claim to a sacred place and associated spiritual practices fell within the scope and ambit of s. 2(a) of the *Canadian Charter of Rights and Freedoms*, not under s. 35 of the *Constitution Act*.

[97] The Court observed, at para. 78:

> The constitutional guarantee of s. 35 of the *Constitution Act, 1982* is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests: *Haida Nation*, at paras. 25 and 27. Where, as here, a permit is sought to use or develop lands subject to an unproven Aboriginal claim, the government is required to

> consult with the affected Aboriginal group and, where appropriate, accommodate the group's claim pending its final resolution. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

[98] As well, the Supreme Court of Canada in *Ktunaxa*, at para. 84, was clear that it was not appropriate for a court under a judicial review application to make determinations relative to the existence, scope and ambit of "unproven" Aboriginal rights under s. 35 of the *Constitution*. Rather, that determination can only be made after a trial with the benefit of a full evidentiary record.

[99] In addition, Wiisinin Zaahgi-igan has been described in the evidence as the community's breadbasket. Ginoogaming describes this area as their primary place for hunting, fishing, and other harvesting activities. Again, the Crown does not dispute this, and the Prospecting Companies have not persuaded me to the contrary. I have considered the taking up clause argument and addressed it above under the duty to consult and accommodate and so will not repeat that analysis. My conclusion is that the allegation of breach of treaty rights as it relates to the taking up clause raises a serious issue for trial based on the evidentiary record.

Breach of the honour of the Crown

[100] Ginoogaming also submits that a serious issue is raised with respect to the Crown's interpretation of the "statutory provisions which have an impact upon treaty or aboriginal rights" (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41). Ginoogaming argues that the Crown did not take a broad and purposive interpretation of the *Mining Act* in its dealings with it in relation to the 2019 Ferau Permit application approval process and afterwards.

[101] Ginoogaming relies on s. 2 of the *Mining Act* in support of this submission.

[102] The argument did not persuade me that this constitutes a separate ground for finding that there is a serious issue raised.

[103] Accordingly, Ginoogaming has raised, in the evidentiary record, two serious issues to be resolved.

[104] The first serious issue is whether the Crown engaged in meaningful consultation and accommodation sufficient to discharge its constitutional duty to consult and accommodate Ginoogaming in its interactions with the First Nation during both the period leading up to the approval of the 2019 Ferau Permit application, and afterwards. This, in turn, engages the honour of the Crown.

[105] The second serious issue is whether the proposed early exploration mining activities by the Prospecting Companies would infringe Aboriginal and treaty rights protected by section 35 of the *Constitution Act, 1982*.

4.iii If the interlocutory injunction were to be denied, would Ginoogaming suffer irreparable harm*?*

[106] The second test that Ginoogaming must meet is that it will suffer irreparable harm should this motion be denied.

[107] In *RJR-MacDonald,* at p. 341, the Supreme Court of Canada said that "'Irreparable' refers to the nature of the harm suffered rather than its magnitude." The example of irreparable harm cited by the Court to illustrate this point was where there would be a permanent loss of natural resources in the event the challenged activity is not enjoined.

[108] In the context of Aboriginal and treaty rights cases, courts have recognized that absolute certainty of irreparable harm is not always required. In addition, courts have recognized that activity that restricts a First Nation's ability to exercise its Aboriginal and/or treaty rights in and of itself can constitute irreparable harm. *Wahgoshig First Nation v. Ontario*, 2013 ONSC 632, at paras. 48-53 reviews several examples in which irreparable harm has been found in this context.

[109] The Crown submits that Ginoogaming has failed to set out its harms with sufficient specificity to discharge the requirement of irreparable harm. Therefore, in order to establish irreparable harm, the Crown is really saying that Ginoogaming must first be able to pinpoint with exactitude at this early stage of the proceedings, by way of example, where every unmarked gravesite is located within Wiisinin Zaahgi'igan. Furthermore, Ginoogaming must be able to put on a map the exact locations of all significant sites that fall under their claim of Aboriginal and treaty rights.

[110] This appears to have been the main stumbling point in the stalled consultation, as the area in question spans approximately 70 square kilometers. Ginoogaming is actively engaged in determining the location of the cultural and spiritual or sacred sites within Wiisinin Zaahgi'igan. In addition, the First Nation is engaged in collecting the necessary information to identify important areas for hunting, fishing, and other harvesting activities, which may span the entire area.

[111] In my view, the Crown's argument is too focused on requiring the First Nation to pinpoint each location of spiritual and cultural significance. The Crown concedes that some locations have already been identified on maps to date.

[112] Furthermore, the Crown's argument seems to focus more on the magnitude of the alleged irreparable harms rather than the nature of those harms.

[113] A similar situation was reviewed in *Wahgoshig*. In that case, the court, at paras. 44, 49, found that the irreparable harm requirement was satisfied as the First Nation had demonstrated that there was a reasonable possibility that the impugned mining exploration activities would damage, or may have already damaged, cultural and spiritual sites that had yet to be located. Important to that decision was the finding that there was a serious issue raised as to whether or not meaningful consultation had occurred. See also *Homalco Indian Band v. British Columbia (Minister of*

Agriculture), 2004 BCSC 1764 (sub nom *Blaney et al. v. Minister of Agriculture et al.)*, at para. 45.

[114] In *Tlicho Government v. Canada (Attorney General)*, 2015 NWTSC 9, at para. 68, the court went one step further and held that where an alleged breach of constitutional rights is at issue, the moving party need only prove a reasonable likelihood of irreparable harm. This is because in *RJR-MacDonald*, at pp. 341-2, the Supreme Court of Canada noted that quantifying monetary damage flowing from a breach of a constitutional right may be difficult. The Court in *Tlicho*, at para. 68, stated:

> Both *Homalco* and *Wahgoshig* were cases where the applicants alleged there was a breach of the duty to consult. In my view, however, the proposition that an applicant need only show a reasonable likelihood of irreparable harm is applicable to any case where breach of a constitutional right is alleged. To hold otherwise would create an impossible standard in cases where applicants seek to prevent the often intangible and somewhat unpredictable types of harm which can flow from a breach of constitutional rights.

[115] Several cases have found irreparable harm would occur when the impugned activity will harm or interfere with culturally significant sites and burial sites (See for example, *Hunt v. Halcan Log Services Ltd*., 34 D.L.R. (4th) 504; *MacMillan Bloedel Ltd. v. Mullin*, 1985 Carswell BC 66 (B.C.C.A); *Touchwood File Hills Qu'Appelle District Chiefs Council Inc. v. Davis, Lindsey and Sinclair et al* (1985), 41 Sask. R. 263 (Q.B.)).

[116] In addition, courts have found that impugned activity that would breach Aboriginal and/or treaty rights, including restrictions on their ability to exercise such rights in preferred places and manners, can also satisfy the irreparable harm branch of the *RJR-MacDonald* test (See for example, *Relentless Energy Corporation v. Davis et al.*, 2004 BCSC 1492, at para, 23; *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development*, [1979] 1 F.C. 487, at para. 11; *Snuneymuxw First Nation et al. v. R.,* 2004 BCSC 205; *Homalco*; *Pasco v. C.N.R.* (1985), 69 BCLR 76 (S.C.), aff'd 1985 CanLII 6994 (B.C.C.A.)).

[117] In this case, if injunctive relief is denied, the proposed mining exploration activity, based on the existing evidentiary record, would likely cause irreparable harm in at least two ways.

[118] First, the proposed early exploration mining activities could reasonably result in desecration of grave sites, and the destruction of other sites of spiritual and cultural significance. This in turn would negatively interfere with the First Nation's Aboriginal and/or Treaty rights as constitutionalized by s. 35 of the *Constitution Act*, including a breach of the honour of the Crown.

[119] Second, the proposed mining exploration activities could reasonably result in a destruction of important wildlife and plant life and thus also interfere with the First Nations exercise of Aboriginal and/or Treaty rights, also constitutionalized, by placing restrictions on where they may exercise those rights.

[120] These types of harms cannot be properly compensated by an award of monetary damages. Once a burial site or other sacred site is desecrated, there is no amount of money that can

compensate for that type of harm. Once a people's right to practice their spiritual beliefs is seriously harmed there is no amount of money that can compensate that type of harm. Finally, as observed by the Supreme Court of Canada, quantifying monetary damage flowing from a breach of a constitutional right may be difficult.

[121] Accordingly, I find that Ginoogaming would suffer irreparable harm if some form of injunctive relief is not granted.

4.iv. Does the balance of convenience favour granting Ginoogaming an interlocutory injunction?

[122] As noted in *RJR-MacDonald*, these motions will often be resolved at the balance of convenience stage of the three-part test. This branch of the test requires that the court assess which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, while awaiting a determination of the matter at trial. This exercise requires a consideration of the factors that are specific to the case.

[123] Mr. Malouf, on behalf of the Prospecting Companies, submits that it is his companies that will suffer irreparable harm. Mr. Malouf submits that an injunction would "annul the Prospectors' right to explore the Ferau claims, immediately devalue their sole asset and end their livelihood." He made several points in his factum and in oral submissions.

[124] Mr. Malouf submits that he did everything reasonable to engage with the First Nation, since in or around 2011, including attending at meetings with Chief and Council and representatives, and that it is fundamentally unfair that his Prospecting Companies be penalized by what would amount to, in his view, the exercise of a veto by the First Nation over the 2019 Ferau Permit. He said that the duty to consult is a two-way street. He also submitted that Ginoogaming has acted in bad faith by not having told him that it had significant concerns with the proposed Ferau early exploration work (that became the subject of the 2016 and 2019 Ferau Permits) in the course of those early meetings and communications with the First Nation.

[125] However, the First Nation's obligation is to engage with the Crown in the course of the Crown's efforts to discharge its duty to consult. As Ontario's witness, Patrick Barnes, noted, the ENDM's policy and operational approach to consultation at early exploration is to recommend prospectors engage with First Nations at an early stage of the process, consistent with s. 2(b) of Ontario Regulation 308/12 to the *Mining Act*, Exploration Plans and Exploration Permits. Mr. Barnes deposed that the ENDM did not delegate any procedural aspects of the consultation process to Mr. Malouf. That said, there is no evidence to suggest that Mr. Malouf's early proactive efforts to engage with Ginoogaming were not done in good faith, and indeed these types of efforts are to be encouraged. However, Mr. Malouf's early efforts were also in his Prospecting Companies' best interests. That said, those efforts cannot guarantee a particular outcome either, and those in the mining industry must by now be well aware that mining rights must be balanced with Aboriginal and treaty rights as reflected in the *Mining Act*. The fact of proactive efforts to engage an affected First Nation is a factor that the Director may consider in deciding whether to approve an application for an early exploration permit.

[126] Mr. Malouf says that the First Nation avoided the short limitation period applicable to judicial reviews (of the Director's decision to approve the 2019 Ferau Permit) by starting an action instead, and that it should not be permitted to get around that limitation period. However, as I have already discussed, in *Ktunaxa* the Supreme Court of Canada stated that in these types of cases where, in particular, unproven Aboriginal rights are in issue (in this case, spiritual rights), then a judicial review application is not the right way to proceed. Rather, an action is the appropriate proceeding. This is the procedure Ginoogaming has followed.

[127] Mr. Malouf submits that the Ferau project land is the most promising asset in the Hardrock Property portfolio. Mr. Malouf alluded to having a potential purchaser for the Hardrock Property mining claims in 2018. However, no evidence has been offered updating the status of what has happened, if anything, with the potential purchaser, nor has Mr. Malouf tendered evidence of any other potential purchasers or major investors who have been discouraged due to these ongoing proceedings.

[128] Mr. Malouf also submits that Hard Rock has invested approximately 7.3 million dollars in relation to the Hardrock Property, which includes the lands covered by the Ferau Permit. To place this in context, Quaternary is the registered owner of 284 mining claims totaling 12, 107 acres and is divided into two blocks of contiguous mining claims, referred to by him as the Northern Block and the Southern Block. However, Mr. Malouf offers no evidence of this other than his own bald statement and a document he prepared for purposes of this litigation. More importantly, Mr. Malouf offers no breakdown of how much money Hard Rock Extension invested in the Ferau project as distinct from the other mining claims owned by Quaternary.

[129] The Northern Block covers 5.2 kilometers and is referred to as the Hol-Lac Project. It is not related to the 2019 Ferau permit.

[130] The Southern Block covers approximately 24.0 kilometres. It runs west to east, and the individual projects are referred to as the Hardrock West, Hardrock East, Geraldton-Longlac, and the Ferau Projects.

[131] The 2019 Ferau Permit relates to 108 mining claims covering approximately 4,643 acres according to Mr. Malouf.

[132] Further, Mr. Malouf submits that Quaternary is in significant debt to his family in the amount of $336,913 and has only $20,000 in cash. However, again, aside from his bald statement in his affidavit, there is no evidence of the financial status of Quaternary or whether this company will go bankrupt if the interlocutory injunction is granted.

[133] As important in this weighing of the competing factors is the fact that Quaternary has held the mining claims that are the subject of the subsequent Ferau Permit for decades and yet did not apply for an early exploration permit (which is in the very early stages of mining development under the *Mining Act*) until 2015. Quaternary took no steps to proceed with the authorized early exploratory activities during the three-year term of the 2016 Ferau Permits because its plans changed. Thereafter, when the 2019 Ferau Permit was issued on June 21, 2019 for a further three-year period, Quaternary still took no authorized early exploratory activities from June 21, 2019 to

July 18, 2019 because once again, according to Mr. Malouf, plans changed. No explanation was provided for why or how Quaternary's plans changed. As well no authorized early exploratory work has taken place to the date of this hearing.

[134] I also have no evidence from the Prospecting Companies as to what, if any, work has been done by Quaternary in relation to the remaining tracts of the Hardrock Property which are the subject of approved early exploratory permits also issued in 2019.

[135] The affidavit of Dr. Julie Selway, a professional geologist and expert retained by Ginoogaming to review the affidavits and exhibits of Mr. Malouf and Mr. Kerr, was filed. Dr. Selway explained that in order for "cell claims" (the mining claims) to be kept in good standing, a claim holder must spend at least $400 a year on them. Based on her review of the Hardrock Property claims, in her opinion, Mr. Malouf has sufficient exploration reserve credits accumulated to renew the Ferau project claims for approximately 5 years, even if Quaternary were to do no further work on any part of the Hardrock Properties in the meantime.

[136] Furthermore, based on her review of Mr. Malouf's affidavit as well as a search of the relevant Government of Ontario assessment reports and the Mining Lands Administration System ("MLAS") claim abstracts, the last time any drilling was conducted in the Ferau project area was 1987.

[137] If Quaternary conducted any exploration work on the remaining parts of the Hardrock Properties, the associated reserve credits could also be applied to the Ferau project without doing any physical work in Wiisinin Zaahgi'igan.

[138] Dr. Selway disputes Mr. Malouf's evidence that the Hardrock Properties "have the potential to produce 80M [million] PLUS ounces of gold" because the estimate is not backed up with a NI 43-101 compliant resource, was not calculated using CIM Estimation of Mineral Resources and Mineral Reserves Best Practices Guidelines ("CIM Guidelines") and did not use geological data extracted from Hardrock Properties. CIM stands for the Canadian Institute of Mining, Metallurgy and Petroleum.

[139] In any event, Mr. Malouf's estimate was not prepared in accordance with industry standards.

[140] Dr. Selway further explained that Mr. Malouf's methodology is not reliable as what he did to estimate the potential of 80 million ounces of gold in the ground comprising the Ferau Permit was to base calculations on neighbouring Greenstone Gold Mines' resources, and then multiply that figure by 7 since the Ferau Permit property is 7 times longer than Greenstone Gold Mines' property. In order to have a proper estimate of the potential gold holdings, the CIM Guidelines require that an estimate be based on drill hole collar locations, downhole location surveys, lithology, assays and specific gravity – none of which was done by Mr. Malouf. In other words, there is no reliable information upon which Mr. Malouf can reliably estimate how much gold, if any, is likely in the Ferau Permit project lands within Wiisinin Zaahgi'igan.

[141] In addition, it is noted by Dr. Selway that the land over which the authorized exploration activities are permitted under the 2019 Ferau Permit are located on a relatively small portion of the Hardrock Property. There is nothing preventing Quaternary from exercising its authorized early exploration activities on these other blocks of land. Ginoogaming does not take issue with Quaternary exercising early exploratory activities beyond Wiisinin Zaahgi'igan.

[142] Dr. Selway's evidence was not seriously challenged, and I accept her evidence.

[143] The court appreciates Mr. Malouf's voluntary agreement to refrain from work during the period from June 12, 2020 to the end of July 2020 at the request of ENDM to allow consultation with Ginoogaming. This is in the best interests of reconciliation. The court also appreciates the highly speculative nature of prospecting as described by Mr. Malouf and that it is not unusual for mining claims to not progress beyond the staking of the claim.

[144] Given what is at stake, including the irreparable harm that would be occasioned to Ginoogaming, as already described, and as contrasted with the fact that the Quaternary's mining claims and the potential minerals that might be located in any of the mining cells on lands in WZ is speculative and in any event are not going anywhere (see *Baker Lake*, at para. 11, for an analogous situation), and the additional reasons reflected above, I find that the balance of convenience favours Ginoogaming.

[145] That said, the court is sympathetic to the plight of the Prospecting Companies and in particular Quaternary as they are, in a manner of speaking, caught in the middle between the Crown and Ginoogaming who are seemingly at an impasse. There is no feasible way Quaternary can determine the viability, and potential mineral production capability, of the Ferau Permit mining claims until it can go onto the property and conduct the early exploration activities.

[146] Accordingly, in my view, the balance of convenience favours the granting of an interim injunction against the Prospecting Companies in the circumstances presented by this case as will be further explained.

4.v. Conclusion: An interim injunction promotes reconciliation

[147] In *Haida*, the Supreme Court of Canada urged a process to resolves these types of disputes by way of negotiation leading to reconciliation. The Court, at para. 32, stated:

> Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

[148] Further to the directive from the Supreme Court of Canada in cases such as *Haida* and *Ktunaxa* that it is incumbent that these types of disputes attempt to be mutually resolved in order to reach the goal of reconciliation, in my view it is premature to consider whether an interlocutory injunction ought to be granted at this stage of the proceedings.

[149] Rather, the parties must be given further time to renew and continue meaningful consultation. This may mean that more progress must be made by Ginoogaming to collect the information it needs regarding identifying cultural and spiritual locations, and key areas for

medicinal harvesting, hunting, fishing, and other key traditional practices within Wiisinin Zaahgi'igan. The Crown may well consider it helpful to assist the First Nation's capacity to do this.

[150] Accordingly, I am extending the interim injunction, subject to further order of this court, with the direction that the parties are to engage in meaningful consultation. By parties, I am referring to Ginoogaming and the Crown. At some point, it may be helpful to include Quaternary in this dialogue.

[151] The parties are to arrange a further appearance before me in or around 6 months from the release of this decision; i.e., the week of January 31, 2022. This is the only way, in my view, that the parties will have the opportunity to more fully engage, attempt to reach a resolution, and take an important step towards the goal of reconciliation between the Crown and this First Nation, as set out in *Haida*, at para 45. It may also help forge a path forward that could lead to an accommodation, which may also benefit the Prospecting Companies.

Issue 5: Should Ginoogaming be relieved from the undertaking to pay damages arising from the issuance of an interim injunction?

[152] Ginoogaming requests that this court exercise its discretion to relieve it from the usual undertaking as to damages generally required to be given by the moving party in interlocutory injunction matters. Similar considerations apply in motions for interim injunctive relief.

[153] The Crown took no position in relation to this issue, but Mr. Malouf vigorously argued that an undertaking as to damages ought to be imposed on Ginoogaming.

[154] Rule 40.03 provides:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[155] This rule represents the codification of the equitable principle requiring an undertaking from the moving party as to damages. It reflects the recognition that the plaintiff should pay damages that the defendant has suffered as a result of the interlocutory or interim injunction should the plaintiff ultimately be unsuccessful at trial. Courts should not exercise their discretion to grant relief from the undertaking in the absence of special circumstances.

[156] Ginoogaming requests that the court exercise its discretion to grant relief from this usual requirement as it is impecunious, and the undertaking would represent a barrier to its ability to pursue this important litigation.

[157] On the other hand, the Prospecting Companies are the only defendants who are the subject of the resulting interim injunction. Mr. Malouf submitted that Ginoogaming ought not the exempted from giving an undertaking as to damages because, in his submission, Ginoogaming is

not impecunious. He points to the evidence contained in Ginoogaming's motion material that since March 2020 it has received funding from Indigenous Services Canada through a comprehensive funding agreement, and that it also receives funding from Canada for its building projects and has other assets and sources of revenues.

[158] Mr. Malouf characterizes Ginoogaming as "Goliath" compared to him and the Prospecting Companies, whom he characterizes as "David", as in his view the First Nation is "richer" than his Prospecting Companies are. He is also concerned that absent the undertaking, the First Nation will enjoy "litigation immunity especially if, at the end of the day the Crown covers [Ginoogaming's] costs as an Honour of the Crown gesture." However, I do not see it that way. Ginoogaming is subject to the same cost exposures as any other party to litigation.

[159] In addition, Ginoogaming has filed evidence in support of its claim of impecuniosity in the affidavit of Councilor Sheri Taylor. Councilor Taylor deposed that the funds provided through Indigenous and Northern Affairs Canada (INAC) are for specific programs dictated by INAC, such as housing, infrastructure and health, and that they are fully spent every year on those designated programs.

[160] Councilor Taylor further deposed that Ginoogaming is in debt in the approximate sum of $8,000,000 as a result of cumulative deficits. She attached an audit for Ginoogaming from 2017-2018, which is the most recent audit that it could afford to pay for. It shows a net debt at the end of that fiscal year of $2,111,513.

[161] I am satisfied on the evidence that Ginoogaming is impecunious and accept the evidence of Councilor Taylor on this point.

[162] Courts have relieved First Nations from the obligation to provide this undertaking as to damages in other cases: see, for example, *MacMillan Bloedel Ltd.*at para. 88; *Pasco*, at para. 42; and *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (Ont. S.C.), at para. 124.

[163] In considering what constitutes "special circumstances" in the context of Indigenous rights cases such as this one, the courts have found the fact of impecuniosity to be a special circumstance; see *Platinex*, at para. 120 and the cases cited therein. Compelling in this case is the ratio from *Homalco.)*.

[164] In my view, based on the evidentiary record, it would not be fair and just in the circumstances of this case to require Ginoogaming to give an undertaking as to damages at this stage of the proceedings. This First Nation is impoverished, the minerals at question are not going anywhere during the operation of this interim injunction, the Prospecting Companies renewed the mining options for the Ferau Permit for many years without any active effort to pursue the mining potential, and the Prospecting Companies have the ability to pursue mining exploration on the majority of their claims over the traditional territory of Ginoogaming *without objection* from this First Nation.

[165] This litigation raised issues of public importance that deserve to be resolved with the benefit of a full evidentiary record at a trial.

[166] However, this court reserves the right to make whatever further orders it deems just, including the right to make an order requiring an undertaking as to damages and a renewed request for a interlocutory injunction as against the Prospecting Companies or either one of them an order terminating the interim injunction and any other matter that may arise in the interim that will assist the parties along the path towards reconciliation.

RULING AND COSTS

[167] This court orders the following:

i. Myers J.'s Order is amended to add that Mr. Malouf is granted leave to represent the defendant, Quaternary, as a non-lawyer, *nunc pro tunc*;

ii. The motion for an interlocutory injunction against Mr. Malouf in his personal capacity is dismissed;

iii. The motion for an interim declaratory order against the Crown and the Director is dismissed;

iv. The motion for an interlocutory injunction against Mr. Kerr is dismissed, without prejudice to Ginoogaming's right to renew this motion in the event that the Director lifts the temporary hold on the Caouette Permit Application and grants approval;

v. An interim injunction is granted in favour of Ginoogaming against Quaternary and Hard Rock, in accordance with the terms set out in this court's reasons at paras. 153-155;

vi. The court dispenses with the undertaking as to damages with respect to this interim injunction.

[168] The court is considering the appropriate order as to costs. The cost outlines have been uploaded on to CaseLines (with the exception of the Crown's). If the parties cannot agree, then Ginoogaming is to deliver its written submissions to the court within 30 days from the release of these reasons. The responding parties will have 20 days to deliver their respective written responding submissions. The written submissions shall not exceed 5 pages double spaced and shall be delivered to my judicial assistant.

Vella J.

Released: September 1, 2021

CITATION: Ginoogaming First Nation v. Her Majesty The Queen In Right of Ontario et al., 2021 ONSC 5866
COURT FILE NO.: Court File No.: CV-20-00646347-0000 /
CV-20-00650748-0000
DATE: 20210901

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GINOOGAMING FIRST NATION

Plaintiff (Moving Party)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE DIRECTOR OF EXPLORATION, THE QUATERNARY MINING & EXPLORATION COMPANY LIMITED, HARDROCK EXTENSIONS INC., MICHAEL MALOUF and WILLIAM KERR

Defendants (Responding Parties)

REASONS FOR DECISION

Vella J.

Released: September 1, 2021

APPENDIX D

To :	Mr. William Kerr, President
From :	Lesley Hendry
Company :	Exploits Exploration Corporation
Date :	October 18, 2022
Re :	**Summary of SGS Testwork Completed on One Sample from Caoutte Vein Gold**

This memo summarizes the testwork completed at SGS Lakefield under project number 18813-01. Testwork was requested by Mr. William Kerr of Exploits Exploration Corporation and completed in September 2022. The project was managed by Lesley Hendry, Senior Metallurgist with over 25 years of experience, and laboratory testwork was completed by Carie Stere, Principal Technologist with over 20 years of laboratory experience.

Sample Receipt, Preparation, and Head Assays

Samples were received from Exploit Explorations in September 2022 and given receipt number 0037-SEP22. The shipment consisted of two rice bags, weighing approximately 30 kg. The entire sample was crushed to pass 10 mesh, blended, and split into two 10 kg charges. The sample was labelled as Sample 1. A 200 g cut was submitted for four 30 g gold assays by fire assay, total sulphur, sulphide sulphur, whole rock analysis, and a multi-element ICP scan. The results are summarized in Table 1. A 500 g cut was submitted for gold analysis by the screened metallics protocol. The feed for the screened metallics assay was stage pulverized and screened at 150 mesh to produce 20-30 g of plus 150 mesh fraction for gold fire assay to extinction. The minus 150 mesh fraction was assayed for gold in duplicate and the overall gold grade of the sample was calculated from the masses and assays of the two fractions. The results are shown in Table 2.

Table 1: Chemical Analysis of Sample 1

Element	Sample 1				
Units	Cut A	Cut B	Cut C	Cut D	Average
SiO_2 %	80.3	---	---	---	---
Al_2O_3 %	1.99	---	---	---	---
Fe_2O_3 %	8.33	---	---	---	---
MgO %	0.65	---	---	---	---
CaO %	3.35	---	---	---	---
Na_2O %	0.28	---	---	---	---
K_2O %	0.1	---	---	---	---
TiO_2 %	0.12	---	---	---	---
P_2O_5 %	0.05	---	---	---	---
MnO %	0.07	---	---	---	---
Cr_2O_3 %	0.03	---	---	---	---
V_2O_5 %	< 0.01	---	---	---	---
LOI %	2.33	---	---	---	---
Sum %	97.6	---	---	---	---
S %	2.36	2.37	---	---	2.37
S= %	2.01	2.01	---	---	2.01
Au g/t, FA	23.3	30.7	19.1	19.2	23.1
Au, g/t, SM	26.2	---	---	---	---
Ag g/t	< 2	---	---	---	---
As g/t	< 30	---	---	---	---
Ba g/t	30	---	---	---	---
Be g/t	0.17	---	---	---	---
Bi g/t	< 20	---	---	---	---
Cd g/t	< 2	---	---	---	---
Co g/t	16	---	---	---	---
Cu g/t	231	---	---	---	---
Li g/t	< 10	---	---	---	---
Mo g/t	6	---	---	---	---
Ni g/t	< 20	---	---	---	---
Pb g/t	< 20	---	---	---	---
Sb g/t	< 10	---	---	---	---
Se g/t	< 30	---	---	---	---
Sn g/t	< 20	---	---	---	---
Sr g/t	17.2	---	---	---	---
Tl g/t	< 30	---	---	---	---
Y g/t	4.5	---	---	---	---
Zn g/t	163	---	---	---	---

Table 2: Screened Metallics for Gold Analysis

Sample ID	Head Grade	+150 Mesh		-150 Mesh			% Au Distribution	
		%		%	Au, g/t		+150	-150
	Au, g/t	Mass	Au, g/t	Mass	a	b	Mesh	Mesh
Sample 1	**26.2**	2.2	192	97.8	23.5	21.4	16.3	83.7

The average fire assay gold grade of the sample was 23.1 g/t Au. The wide range in gold assays of the four grab samples (19.1 to 30.7 g/t) is likely due to the presence of coarse free gold and sampling variability. This variability is minimized in the screened metallics procedure, which yielded a gold grade of 26.2 g/t, with 16.3% of the gold in the coarse fraction. The gold in the coarse fraction would likely report to a gravity concentrate. No high levels of detrimental elements were reported in the ICP scan. The whole rock analysis indicated that the sample consisted mainly of silica, 80.3%.

Gravity Separation Testing

Knelson/Mozley Testing

Gold recovery through gravity concentration was evaluated by standard Knelson/Mozley testing. The testwork procedure consisted of rod mill grinding of the samples to a target P_{80} of 150 µm. The ground sample was then passed through a Knelson MD-3 concentrator, and the Knelson concentrate was further upgraded on a Mozley table. Roughly 0.1% of the mass was collected in the Mozley concentrate, which was assayed to extinction, along with two subsamples of the combined Knelson plus Mozley tailings. The assay and mass balance result is reported in Table 3.

Table 3: Gravity Separation Test Results Summary

P_{80}	Gravity Concentrate			Head
µm	Mass, %	Assay Au, g/t	% Rec'y Au	Grade, Au, g/t
149	0.111	13,946	**69.1**	22.4

About 69% of the gold in the feed was recovered in a gravity concentrate grading 13,946 g/t Au, proving that this sample is very suitable for gravity concentration. The calculated head grade was 22.4 g/t Au.

A picture of the gravity concentrate on the Mozley table is shown in Figure 1.

Figure 1: Gravity Concentrate on Mozley Table

Lesley Hendry
SGS Natural Resources
Senior Metallurgist, Extractive Metallurgy - Gold

Test: G-1 **Project:** 18813-01 **Operator:** C. Stere **Date: 09/23/22**

Purpose: To evaluate the gravity separation amenability of Sample 1.

Procedure: The test feed was prepared as described below, and passed through the Knelson MD-3 concentrator. The concentrate was recovered and upgraded on the Mozley Laboratory Separator (MLS). The Mozley gravity concentrate was submitted for gold assay (fire assay to extinction), the Mozley and Knelson tailings were combined and submitted for assay.

Feed: 10000 g **Sample 1**

Grind: 10 kg **P_{80} =** 149 µm
24 min/10 kg 10 kg mill #2
65 % Solids

Metallurgical Balance

Product	Weight		Assays, g/t	% Distribution
	g	%	Au	Au
Mozley Concentrate	11.074	0.111	13,946	69.1
Combined Gravity Tailing**	9,989	99.9	6.92	30.9
Calculated Head	10,000	100.0	22.4	100.0
Direct Head	10,000	100.0	23.1	

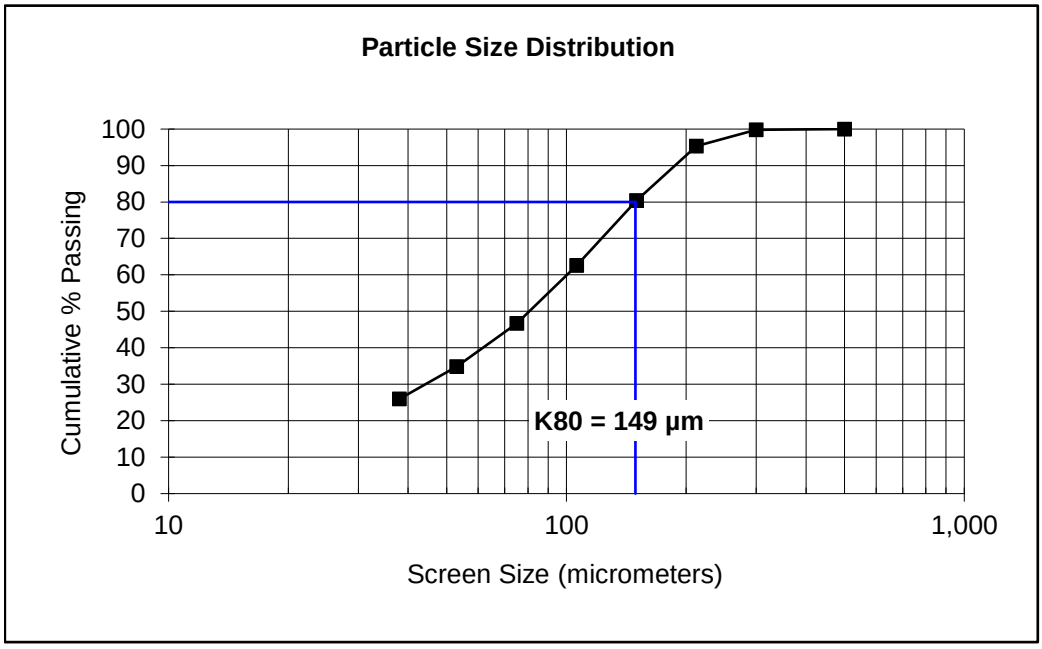
** Combined Gravity Tailing 7.63 g/t Au
6.21
Average 6.92

SGS Minerals Services
Size Distribution Analysis

Project No.
18813-01

Sample: **G1 Tailing Residue** Test No.: **Sample 1**

Size		Weight	% Retained		% Passing
Mesh	µm	grams	Individual	Cumulative	Cumulative
32	500	0.0	0.0	0.0	100.0
48	300	0.3	0.2	0.2	99.8
65	212	5.8	4.5	4.7	95.3
100	150	19.4	14.9	19.6	80.4
150	106	23.1	17.8	37.4	62.6
200	75	20.6	15.9	53.3	46.7
270	53	15.4	11.9	65.1	34.9
400	38	11.6	8.9	74.1	25.9
Pan	-38	33.7	25.9	100.0	0.0
Total	**-**	**129.9**	100.0	**-**	**-**
K80	**149**				



SGS Canada Inc.
P.O. Box 4300 - 185 Concession St.
Lakefield - Ontario - KOL 2HO
Phone: 705-652-2000 FAX: 705-652-6365

LR Internal Priority
Attn : L. Hendry

17-October-2022

Date Rec. : 14 September 2022
LR Report : **CA07266-SEP22**
Project : CA20M-00000-110-18813-01

CERTIFICATE OF ANALYSIS

Final Report

Sample ID	SiO2 %	Al2O3 %	Fe2O3 %	MgO %	CaO %	Na2O %	K2O %	TiO2 %	P2O5 %	MnO %	Cr2O3 %
1: Heads Sample 1	80.3	1.99	8.33	0.65	3.35	0.28	0.10	0.12	0.05	0.07	0.03
2-DUP: Heads Sample 1	---	---	---	---	---	---	---	---	---	---	---
3-DUP: Heads Sample 1	---	---	---	---	---	---	---	---	---	---	---
4-DUP: Heads Sample 1	---	---	---	---	---	---	---	---	---	---	---

Sample ID	V2O5 %	LOI %	Sum %	S %	S= %	Au g/t	Ag g/t	As g/t	Ba g/t	Be g/t	Bi g/t	Cd g/t
1: Heads Sample 1	< 0.01	2.33	97.6	2.36	2.01	23.3	< 2	< 30	30	0.17	< 20	< 2
2-DUP: Heads Sample 1	---	---	---	2.37	2.01	30.7	---	---	---	---	---	---
3-DUP: Heads Sample 1	---	---	---	---	---	19.1	---	---	---	---	---	---
4-DUP: Heads Sample 1	---	---	---	---	---	19.2	---	---	---	---	---	---

Sample ID	Co g/t	Cu g/t	Li g/t	Mo g/t	Ni g/t	Pb g/t	Sb g/t	Se g/t	Sn g/t	Sr g/t	Tl g/t	Y g/t	Zn g/t
1: Heads Sample 1	16	231	< 10	6	< 20	< 20	< 10	< 30	< 20	17.2	< 30	4.5	163
2-DUP: Heads Sample 1	---	---	---	---	---	---	---	---	---	---	---	---	---
3-DUP: Heads Sample 1	---	---	---	---	---	---	---	---	---	---	---	---	---
4-DUP: Heads Sample 1	---	---	---	---	---	---	---	---	---	---	---	---	---

Control Quality Assays: Not Suitable for Commercial Exchange

Sarah Thyret-Arbour
Technologist, Mineral Services, Analytical

OnLine LIMS

0003086328

SGS Canada Inc.
P.O. Box 4300 - 185 Concession St.
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Phone: 705-652-2000 FAX: 705-652-6365

LR Internal Priority
Attn : L. Hendry

17-October-2022

Date Rec. : 14 September 2022
LR Report : **CA07274-SEP22**
Project : CA20M-00000-110-18813-01
Client Ref : Mayfair Gold Fenn Gibb

CERTIFICATE OF ANALYSIS

Final Report

Sample ID	Au met g/t	Au +150 g/t	+150 wt g
1: Heads -Sample 1 +150/-150m A, B	26.2	192	11.89

Sample ID	Au -150 A g/t	Au -150 B g/t	total wt g	Au -150 Average g/t
1: Heads -Sample 1 +150/-150m A, B	23.5	21.4	535.8	22.5

Control Quality Assay
Not Suitable for Commercial Exchange

Sarah Thyret-Arbour
Technologist, Mineral Services, Analytical

OnLine LIMS

0003086298

SGS Canada Inc.
P.O. Box 4300 - 185 Concession St.
Lakefield - Ontario - KOL 2HO
Phone: 705-652-2000 FAX: 705-652-6365

LR Internal Priority
Attn : N. Sharma / C. Stere

17-October-2022

Date Rec. : 26 September 2022
LR Report : **CA07599-SEP22**
Project : CA20M-00000-110-18813-01

CERTIFICATE OF ANALYSIS

Sample ID	Au mg	GrossDryWt g	Tare Wt g
1: G1 Mozley Concentrate	154.110	12.983	1.909

Control Quality Assays: Not Suitable for Commercial Exchange

Sarah Thyret-Arbour
Technologist, Mineral Services, Analytical

OnLine LIMS

00003086286

SGS Canada Inc.
P.O. Box 4300 - 185 Concession St.
Lakefield - Ontario - KOL 2HO
Phone: 705-652-2000 FAX: 705-652-6365

LR Internal Priority
Attn : N. Sharma / C. Stere

17-October-2022

Date Rec. : 28 September 2022
LR Report : **CA07686-SEP22**
Project : CA20M-00000-110-18813-01

CERTIFICATE OF ANALYSIS

Final Report

Sample ID	Au g/t	GrossDryWt g
1: G1 tailing Residue CUT A	7.63	9979.8
2: G1 tailing Residue CUT B	6.21	---

Control Quality Analysis: Not Suitable for Commercial Exchange

Sarah Thyret-Arbour
Technologist, Mineral Services, Analytical

OnLine LIMS

0003086274

APPENDIX E

Agent report for WILLIAM KERR (151867)

Client Number	Client Name	Client Status	Profile Administrator
411867	ARGO GOLD INC.	Active	N
10002372	Exploits Exploration Corporation	Active	Y

Date / Time of Issue: Thu Jan 16, 11:35:20 EST 2020

Ontario

Ontario Ministry of Northern Development and Mines
Mining Lands Claim Map

Administrative Districts

Township

Unknown

Mining Division

Land Registry

MNRF District Office

Nipigon

Topographic

Legend

Mining Claim
- Mining Claim
- Boundary Claim
- Legacy Claim

Alienation
- Withdrawal
- Notice

ENDM Administrative Boundaries
- ENDM Townships and Areas
- Geographic Lot Fabric
- Mining Division

Land Tenure
- Surface Rights
- Mining Rights
- Mining and Surface Rights
- Order-in-Council
- Federal Land Other

Building as Symbol
Building to Scale
Runway
Heliport \ Hospital Heliport
Seaplane Base
Ferry Route
Trail Head \ Trail
Railway \ Train Station
Railway with Bridge
Railway with Tunnel
Road (Major → Minor)
Winter Road
Road with Bridge
Road with Tunnel
Primary, Kings or Provincial Highway
Secondary Highway
Tertiary Highway
District, County, Regional or Municipal Road
Toll Highway
One Way Road
Road with Permanent Blocked Passage
Road with Address Ranges
Hydro Line, Communication Line or Unknown Transmission Line
Natural Gas Pipeline, Water Pipeline or Unknown Pipeline
Spot Height
Index Contour
Contour
Wooded Area
Wetland
Waterbody
Waterbody Elevation
Watercourse
Falls
Rapids
Rapids \ Falls
Rapids
Rocks
Lock Gate
Dam \ Hydro Wall
Dam \ Hydro Wall
Provincial \ State Boundary
International Boundary
Upper Tier \ District Municipal Boundary
Lower Tier \ Single Tier Municipal Boundary
Lot Line
Indian Reserve
Provincial Park
National Park
Conservation Reserve
Military Lands

Scale: 1:50,000

0 — 10.00 km

Map Datum: NAD 83
Projection: Web Mercator

N

Those wishing to stake mining claims should consult with the Provincial Mining Recorders' Office of the Ministry of Northern Development and Mines for additional information on the status of the lands shown hereon. This map is not intended for navigational, survey, or land title determination purposes as the information shown on this map is compiled from various sources.

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The information shown is derived from digital data available in the Provincial Mining Recorders' Office at the time of downloading from the Ministry of Northern Development and Mines web site.

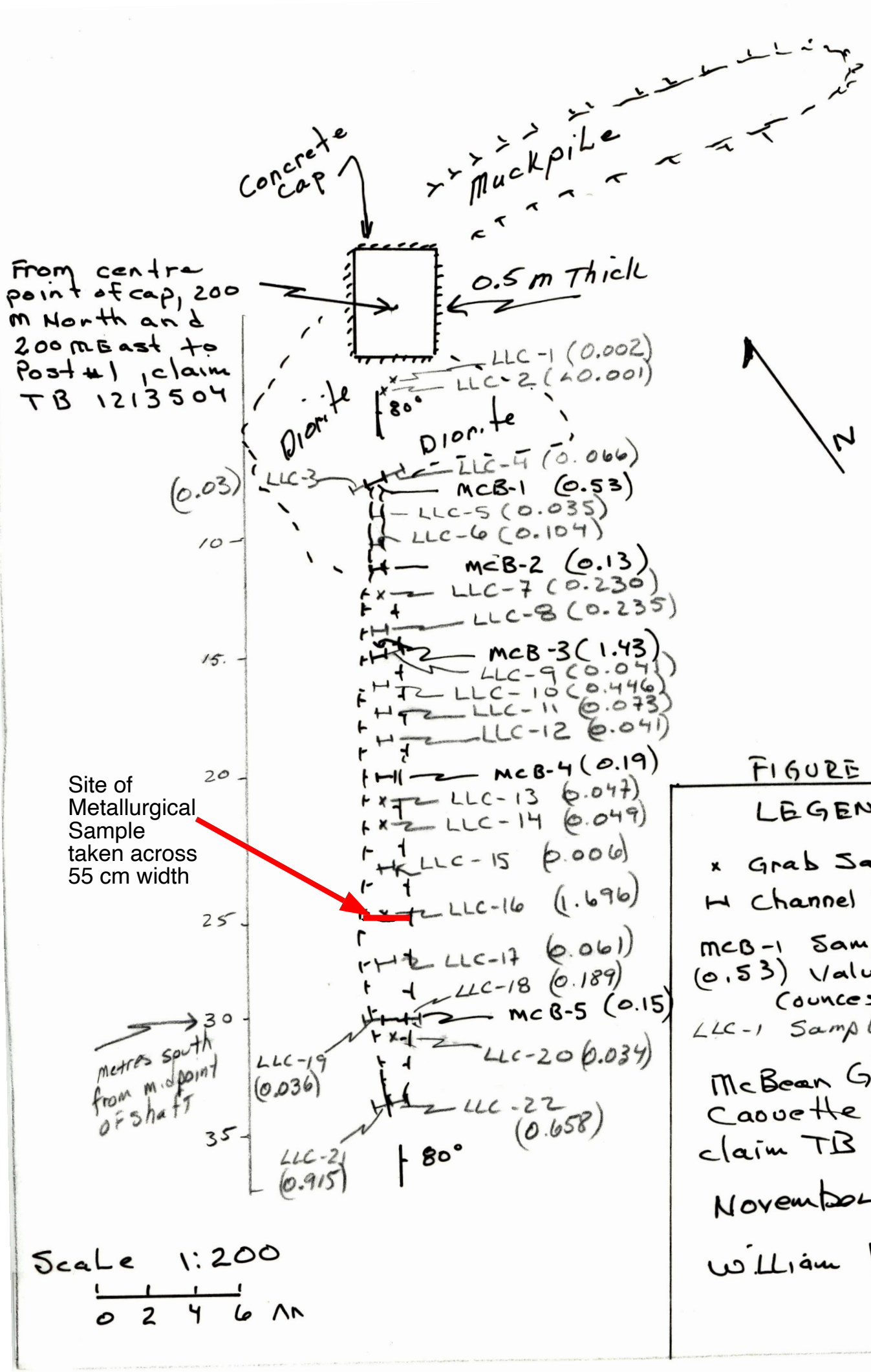


FIGURE 3a

LEGEND

× Grab Sample

⊢ Channel Sample

MCB-1 Sample no. (200)
(0.53) Value in opt
(ounces per ton)

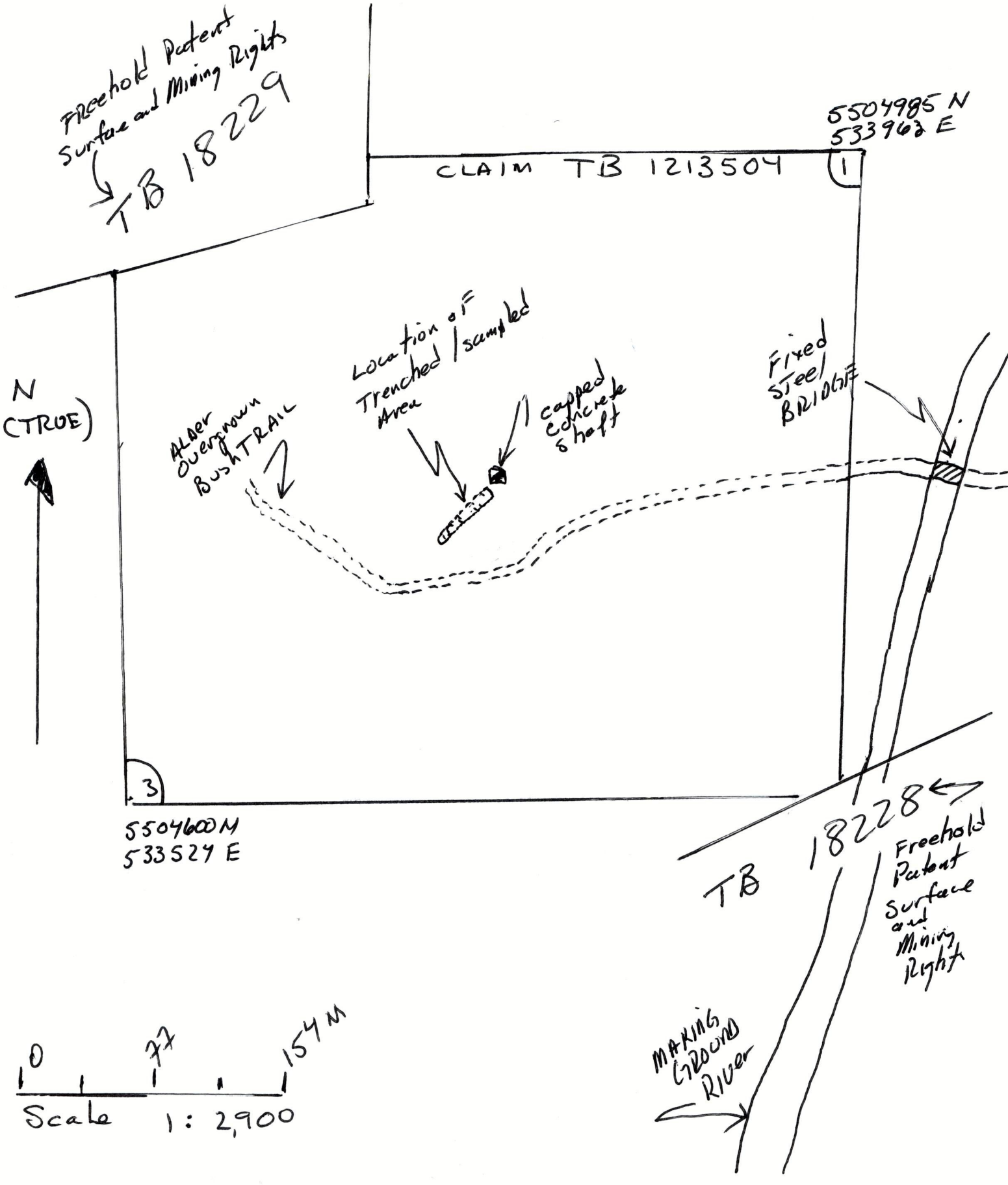
LLC-1 Sample no (2016)

McBean Gold Prospect
Caouette Vein
claim TB 1213504

November / 2016

William Kerr

FIGURE 3b



Mc Bean Lake
AREA

WILLIAM KERR
JAN 17/2017

Date / Time of Issue: Fri Nov 25, 04:52:50 EST 2022

Ontario

Ministry of Mines (MINES) Mining Lands Claim Map

Administrative Districts

Township
MCBEAN LAKE AREA
Mining Division
Thunder Bay
Land Registry
THUNDER BAY
MNRF District Office
Nipigon

Caouette Vein claim units

Topographic

Legend

Building as Symbol
Building to Scale
Runway
Heliport \ Hospital Heliport
Seaplane Base
Ferry Route
Trail Head \ Trail
Railway \ Train Station
Railway with Bridge
Railway with Tunnel
Road (Major → Minor)
Winter Road
Road with Bridge
Road with Tunnel
Primary, King's or Provincial Highway
Secondary Highway
Tertiary Highway
District, County, Regional or Municipal Road
Toll Highway
One Way Road
Road with Permanent Blocked Passage
Road with Address Ranges
Hydro Line, Communication Line or Unknown Transmission Line
Natural Gas Pipeline, Water Pipeline or Unknown Pipeline
Spot Height
Index Contour
Contour
Wooded Area
Wetland
Waterbody
Waterbody Elevation
Watercourse
Falls
Rapids
Rapids \ Falls
Rapids
Rocks
Lock Gate
Dam \ Hydro Wall
Dam \ Hydro Wall
Provincial \ State Boundary
International Boundary
Upper Tier \ District Municipal Boundary
Lower Tier \ Single Tier Municipal Boundary
Lot Line
Indian Reserve
Provincial Park
National Park
Conservation Reserve
Military Lands

Mining Claim
Mining Claim
Boundary Claim
Legacy Claim
Alienation
Withdrawal
Notice
MINES Administrative Boundaries
MINES Townships and Areas
Geographic Lot Fabric
Mining Division
Land Tenure
Surface Rights
Mining Rights
Mining and Surface Rights
Order-in-Council
Federal Land Other

Scale: 1:18,055

0 — 3.61 km

Map Datum: NAD 83
Projection: Web Mercator

N

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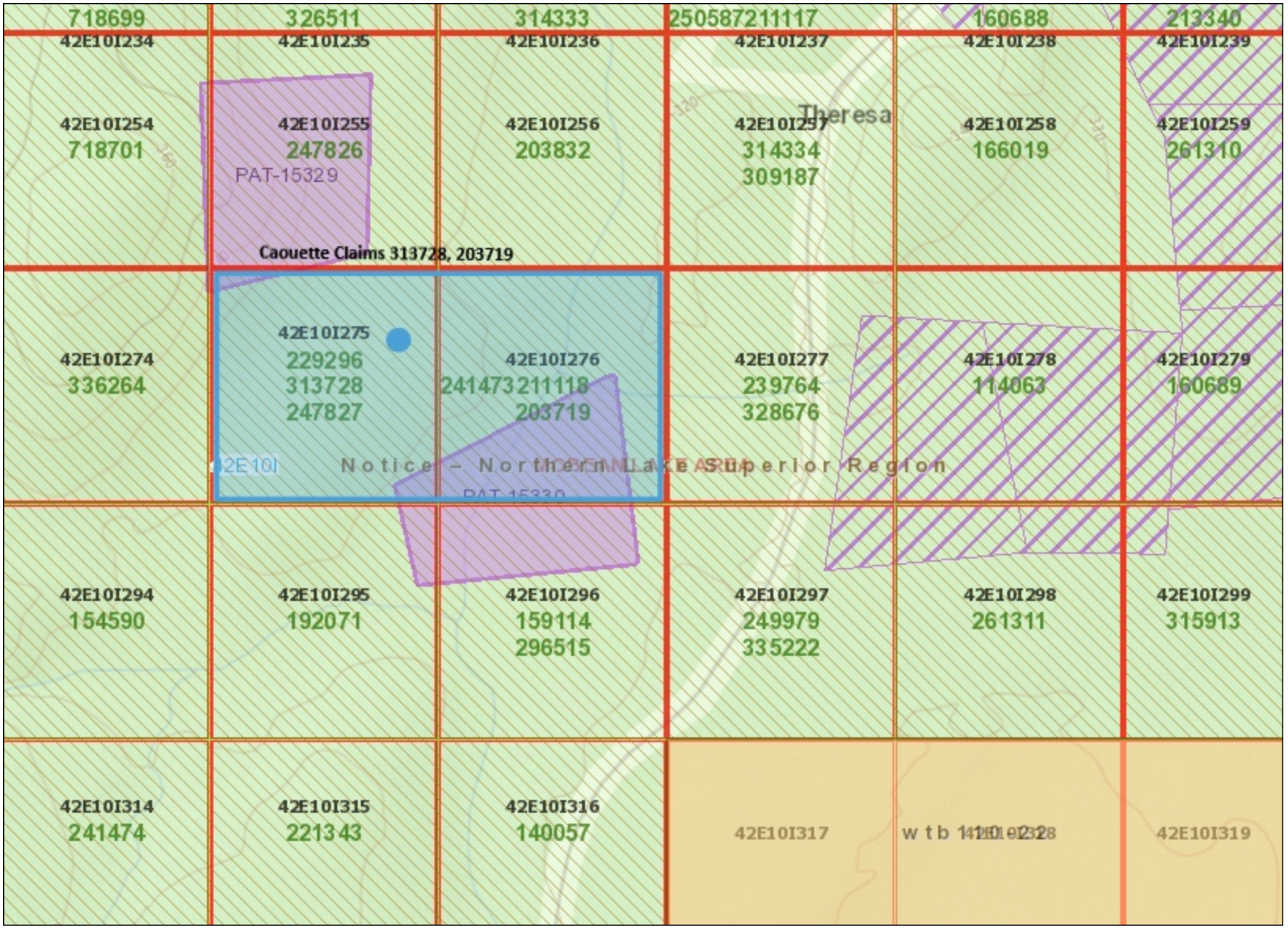
Ontario

Ministry of Mines (MINES)

MLAS Map Viewer

Caouette Claims 313728, 203719

Notes:
Sample Location at 533728E, 5504777N denoted by blue dot



Legend

Provincial Grid Cell
- Available
- Pending
- Unavailable

Mining Claim
- Mining Claim
- Boundary Claim

Alienation
- Withdrawal
- Notice

MINES Administrative Boundaries
- MINES Townships and Areas
- Geographic Lot Fabirc
- UTM Grid 1K
- UTM Grid 10K
- Mining Division
- Mineral Exploration and Development Region
- CLUPA Protected Area - Far North
- Resident Geologist District
- Federal Land Other
- Native Reserves
- AMIS Sites
- AMIS Features
- Drill Hole
- Mineral Occurrences

MLAS Mining History
- Withdrawal - History
- Notice - History
- Mining Claim - History
- Mining Land Tenure - History
- Legacy Claim

Provincial Grid
- Provincial Grid 250K
- Provincial Grid 50K
- Provincial Grid Group

Land Tenure
- Surface Rights
- Mining Rights
- Mining and Surface Rights
- Order-in-Council

Those wishing to register mining claims should consult with the Provincial Mining Recorders' Office of the Ministry of Mines (MINES) for additional information on the status of the lands shown hereon. This map is not intended for navigational, survey, or land title determination purposes as the information shown on this map is compiled from various sources. Completeness and accuracy are not guaranteed. Additional information may also be obtained through the local Land Titles or Registry Office, or the Ministry of Natural Resources and Forestry. The information shown is derived from digital data available in the Provincial Mining Recorders' Office at the time of downloading from the Ministry of Mines (MINES) web site.

0 0.59 km

N

Projection: Web Mercator