Mining and Consent Project
Issue Paper
BC Mining Law Context
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Introduction

The objective of this issue paper is to consider **where** in the BC exploration and mining process the Crown and industry must obtain consent. Should they obtain consent, that is **full** consent, at each and every stage of the mining process? Or is consent that is **incremental** or **modified** sufficient? Whether consent is full, incremental or modified, the requirements must be clearly set out in the key stages, or **decision points**, in the mining lifecycle. This is a complex exercise - the BC mining law framework is a compilation of 160 years of cutting and pasting of Crown statutes, regulations and policies. Creation of a **consent framework** requires careful consideration and balancing of Indigenous values of culture and heritage, the environment and the economy. These values must **now** be front and centre and **integrated** into BC's mining framework. The five decision points that form the backbone of the BC mining process are:

1. obtaining Crown mineral title by staking a claim online,
2. exploration and development activities requiring a Crown "Notice of Work" permit and related authorizations such as water discharge and water use permits,
3. issuance of a Crown environmental assessment certificate,
4. converting a Crown mineral claim into a Crown mining lease and issuance of a "major mines" permit for mineral production, and
5. determination by the Crown of the amount of financial security to reclaim mine sites.

These five items do overlap and not every mining decision point is listed (there are dozens). Our **objective is for the BC mining process** to **recognize and respect** First Nations' **title, jurisdiction and authority**. UNDRIP, through the BC *Declaration Act* provides First Nations an unparalleled opportunity to recast the regulatory process for mining in BC. We very likely **will not see this opportunity again**. Do not let COVID-19 slow you down. Do not let BC, federal and international politics sway you. This opportunity provides First Nations the basis to **benefit and prosper** from their lands, denied since the first European contact, while **increasing certainty** for industry and public government to access and produce minerals.

The economic lift from the emerging multi-trillion dollar sector of **sustainably sourced, "climate-smart**" battery, jewelry and technology minerals and metals is not to be denied. Tesla, Apple, Microsoft, BMW, Amazon, Facebook, Google, Alibaba, Tiffany & Co., and every developed nation government on the planet as well as thousands of other end-users require **responsibly mined and sustainably sourced** minerals for the world's growing population of eight billion people.

First Nations **must seize** this opportunity. Australia, northern European nations and USA are ahead of us in retooling their mineral exploration and mining legislation. For First Nations to be a **leader in sustainable mineral sourcing** and play an **integral role** in the Canadian and global economy, the time to act is now to **infuse consent into the BC mining process**.

UNDRIP and the BC *Declaration Act* are the pathway to First Nations self-determination. The BC *Declaration Act* provides the foundation for **tangible** jurisdiction and authority of First Nations to exercise their Inherent and constitutional rights over natural resources on, in and under their lands.[1] Achieving self-determination in mineral exploration and mining means rewriting legislation rooted in the mid 19th century.[2]

What the BC government does in recasting its mining legislation **must be** crystal clear. There is **no room** for ambiguity and vagueness. There is **no room** for half measures. Recognition and implementation of consent is mandatory if BC, as a mining destination, is to avoid being dogged with uncertainty. Investors will simply move their funds to competing jurisdictions with sustainable, FPIC mining regimes.

Much of what is set out in this paper **is happening** on the ground with **progressive** companies. These companies respect First Nations Inherent **and** Aboriginal title and rights in carrying-out responsible, sustainable exploration and mining. They **publicly support** UNDRIP, FPIC and the *Declaration Act*.[3] They are also moving forward to adopt the world's leading sustainable mining standard, the Initiative for Responsible Mining Assurance,[4] or IRMA, which requires demonstrated adherence to FPIC.[5]

This "high bar" of sustainable mining is the touchstone for our conversation of **when** consent in the mining process must be obtained. In the same way that the 2019 BC *Environmental Assessment Act*[6] identifies key process decision points for the environmental assessment process, this paper sets out the key decision points in the mining process **where** consent must be obtained.

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[1] This issue paper focuses on lands that are not subject to section 91(24) of the *Constitution Act, 1982*. Minerals on reserve are subject to a complex Canada-British Columbia hybrid legislative regime unilaterally imposed on First Nations in 1943.

[2] The list of British Columbia legislation regulating mineral exploration and mining is lengthy. All mineral exploration and mining legislation was drafted with the sole objective of extracting as much mineral wealth from ancestral lands as cheaply and as quickly as possible, no matter what the environmental or social consequence and without regard to Indigenous rights.

[3] See the advertisement in the Globe and Mail, BC Edition, Page A6, November 4, 2019 where six exploration and mining companies supported passage of the *Declaration Act* and implementation of FPIC in British Columbia.

[4] https://responsiblemining.net.

[5] Members include Anglo American with more than a dozen mines around the globe and ArcelorMittal, the world's leading steel and mining company. IRMA members also include BMW, Microsoft, the Responsible Minerals Initiative and Tiffany & Co. Mineral end-users, more accurately their shareholders and customers, demand that minerals are sustainably and responsibly sourced. Adhering to the IRMA standard certifies that the mineral end-users are also adhering to FPIC.

[6] See: https://www.bclaws.ca/civix/document/id/complete/statreg/18051.

BC's Mineral Exploration and Mining Regime[7]

BC's mining law regime comprises the *Mineral Tenure Act*[8] (the "*MTA*"), the *Mines Act*[9] and the *Health, Safety and Reclamation Code for Mines in British Columbia*[10] (the "*Code*"). The *MTA* provides for issuance of mineral tenures (rights and title to minerals), the *Mines Act* provides high level requirements for mining projects and the *Code,* a regulation under the *Mines Act*, provides the operational detail for safety of mine site workers and the environment. The legislation was written before UNDRIP, the *Declaration Act*[11] and the *Constitution Act, 1982* and key Supreme of Canada decisions on Aboriginal title of *Calder*, *Delgamuukw* and *Tsihlqot'in*. Mining in BC is mainly regulated by the Ministry of Energy, Mines and Petroleum Resources ("EMPR") and the Ministry of Environment and Climate Change Strategy ("MoE").

History

To determine where consent is required in the mining process, one must understand the colonization history underpinning BC mining law. The task of First Nations is to persuade the BC government, in a manner similar to updating the *EAA*, to modernize more than 160 years of colonial mining legislation.

The foundation of the British Columbia mining system is, of course, British. Britain's creation of the Colony of Vancouver Island and the Charter of Grant of Vancouver Island to the Hudson's Bay Company in 1849, and the discovery of gold in early 1850s on Haida Gwaii and later in the Fraser River watershed, spurred Governor James Douglas' proclamation in 1857 of Crown ownership of "all mines and minerals".[12] This

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[7] This issue paper discusses mineral claims and mining leases; placer claims and placer leases have a slightly different legal regime. Coal, petroleum and natural gas, water and groundwater, geothermal resources, and earth, soil, peat, marl, sand and gravel have significantly different tenure and operational regimes.

[8] https://www.bclaws.ca/civix/document/id/complete/statreg/00_96292_01.

[9] https://www.bclaws.ca/civix/document/id/complete/statreg/96293_01.

[10] https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health_safety_and_reclamation_code_2017_rev.pdf.

[11] https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1. The *Declaration Act* states, "**Measures to align laws with Declaration** 3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."

[12] The definition of what is, and what is not a "mineral" in British Columbia is vague; substances that potentially fall within the legislative, treaty or vernacular definition of "mineral" include: (1) precious, semi-precious and base metals, (2) natural substances, industrial minerals, naturally occurring useful minerals, (3) '*Land Act*' minerals and dimension stone, or any element which forms part of the agricultural surface of the land (e.g., earth, diatomaceous earth, soil, peat, marl, lime slate, shale, argillite, granite, limestone, marble, clay, gypsum, ash, volcanic ash, riprap, stone products, random borrow materials, rock and sand and gravel), (4) fossils, (5) critical, strategic, green, technology and minor metals, minerals under moratorium in British Columbia (e.g. uranium and thorium, or partial moratorium such as jade), (6) minerals in oil field brines (e.g., lithium and vanadium) and (7) substances dissolved in groundwater and steam, water and water vapour of geothermal resources. Minerals that are *in situ*, in place, in

proclamation was integral to Britain's 1858 creation of the Colony of British Columbia (the mainland) and the passage of the *Gold Fields Act, 1859* and with it, the **colonial "free entry" system**.[13] Since 1859 layer upon layer of Crown mining laws have been unilaterally and systematically, **without** notice, consultation or consent, imposed on First Nations.

The five key mining process decision points: **where should consent be obtained?**

1. Registration of a mineral claim (online staking)

Before addressing the need for consent in the issuance of a mineral claim, the issue of access to land needs consideration. Access to land and the registration of mineral claims is the foundation of the BC mining process. Physical access to land begins well before Crown rights to minerals are issued by online staking. **Prospectors do impact Indigenous lands**. But prospecting does not require a Crown authorization. Accessing culturally sensitive areas, soil sampling in riparian zones and the use of helicopters, ATVs and trucks impact ungulates, fowl and other wildlife. While prospecting with a pack horse and a pick & shovel in 1920 may have had little impact, prospecting in 2020 is entirely different.

Every square centimetre of BC has already been prospected. **There is not a single BC valley or mountain range that has not at some point been staked, assayed or investigated for minerals and metals**. The BC government's mineral inventory, MINFILE, contains geological and economic information on more than 14,750 mineral, industrial mineral and coal mines, deposits and occurrences. That is **a lot** of data. And the next wave of 21st century exploration, similar to the 19th century gold rushes, is upon us. BC is now being **intensively prospected** in the search for **climate smart** and "**critical**" minerals required for electric vehicles, renewable power and electronic devices. There are no substitutes for these minerals. None.

Physical access to Indigenous lands is a longstanding concern. So, we must ask the question: do prospectors need consent **prior to** accessing First Nations' land? Or is notice by a prospector to a First Nation sufficient? If so, should notice be given prior to access or after the fact? Or is no consent, and no notice OK?

Obtaining a mineral claim[14] is carried out under the *MTA* and is called "registration". Registration is done through the British Columbia government's Mineral Title Online system (known as the "MTO") with a **click of a mouse from anywhere in the world**,

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bedrock, in talus, in tailings, in submerged lands, stockpiles, dumps, previously mined deposits of minerals and those existing as placers that are loose, or found in fragmentary or broken rock or occurring in loose earth, gravel and sand are also vague and must also be carefully defined.

[13] See: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/mineral-titles/mineral-placer-titles-getting-started/forms-maps-publications/general-information/history_of_mining.pdf?bcgovtm=Cowichan%20Valley%20Newsletter.

[14] Section 12 of the *MTA* states, "The following are individual and distinct mineral titles constituted, acquired and maintained independently: (a) a mineral claim; (b) a placer claim; (c) a mining lease; (d) a placer lease."

without notice to anyone. The click of the mouse conveys a potentially **highly valuable** legal interest - the right to **all minerals** in the land.[15] Subject to paying a fee, there is no government discretion in issuing a mineral claim to a company whose headquarters is in, say, China, Russia or North Korea. Registering a claim is 100% automatic. It's like BINGO; you line up five numbers and you win. But obtaining a mineral claim is easier than winning at BINGO, because there is no luck required.

A mineral claim is **automatically issued** upon payment of a fee of $1.75 per hectare and is valid for one year.[16] $1.75 per hectare is incredibly inexpensive. A claim expires one year after registration unless exploration and development are performed to maintain the claim in good standing.[17]

An exploration interest must be issued - NOT a mineral claim

A mineral claim is a form of mineral title and is the embodiment of the free entry system introduced into the Colony of BC in 1859. It is a **proprietary right to minerals** within the claim area.[18] The staking of a claim, without consent, should result in the issuance of a **lesser** legal interest than a mineral title. Something analogous to an "exploration interest" must be issued and **not** a mineral claim. An exploration interest can be exclusive, to foreclose overstaking by third parties. The exploration interest could be structured such that a prospector, for a period of time (e.g., 1 to 4 years), is entitled to be first in line to convert the exploration interest into a mineral claim upon fulfilling certain requirements and thus enabling consent. This is a form of **modified free entry**. The exploration interest ensures a prospector's right to minerals, but at the same time recognizes consent, and the **jurisdiction and authority** of a First Nation over its lands.

A government **agreeing with a First Nation to implement consent** is not unheard of. As part of a land claim negotiation with the Government of Yukon, the Kaska Nation entered into a bi-lateral agreement in 2003 agreeing, in part, as follows:

> 3.3 Yukon shall not agree to any significant or major dispositions of interests in lands or resources or significant or major authorizations for exploration work and resource development in the Kaska Traditional Territory without consulting and **obtaining the consent of the Kaska**. Consultation and **consent shall be required** in particular for the following:

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[15] See section 28 of the *MTA*: https://www.bclaws.ca/civix/document/id/complete/statreg/00_96292_01; also see the *Mineral Tenure Act Regulation* which sets out the detail of the British Columbia mineral title registration system: https://www.bclaws.ca/civix/document/id/complete/statreg/529_2004.

[16] A claim, or part of a claim may be renewed annually, for $5 per hectare for years 1 and 2, $10 per hectare for years 3 and 4, $15 per hectare for years 5 and 6 and $20 per hectare thereafter.

[17] See sections 8 and 10 of the *Mineral Tenure Act Regulation*, https://www.bclaws.ca/civix/document/id/complete/statreg/529_2004.

[18] Mineral claims, because they are mineral titles, are potentially highly valuable; for example see the $30 million payment in 2011 by the BC government to Boss Power Corp. for mineral claims near Kelowna: https://www.northernminer.com/regulatory-issues/boss-power-wins-30m-settlement-from-bc-govt/1000653317/.

(a) Hard rock mines with a type A water license, coal mines, major hydro developments, major construction and linear projects such as highways and pipelines;
(b) Any other project subject to a level II screening process under the *Yukon's Environmental Assessment Act*;
(c) Major land use designations; and
(d) Such other similar matters which the working group established under 3.4 may recommend and to which the parties agree.

3.4 A working group consisting of equal representation from the Yukon and the Kaska shall be struck and given the **task of establishing a process for the consent** requirement set out in 3.3. To that end, the working group may propose changes to legislation, regulations and policies, practices and procedures. The process shall reflect the following principles:

(a) It must be transparent and timely;
(b) Consent will not be withheld unreasonably; and
(c) It must be consistent with existing Yukon First Nation Final Agreements.

(Bolding of text added for emphasis.)

Ross River Dene Council 2012 Yukon Court of Appeal Decision

The Yukon Court of Appeal 2012 decision[19] involving the Ross River Dena Council ("RRDC") and mineral title issuance under the Yukon *Quartz Mining Act* is instructive. The court declared that under the Yukon *Quartz Mining Act* consultation must be carried out by the Crown prior to issuance of a mineral title. As the Yukon government issued a mineral title without discharging its duty of consultation, RRDC's **constitutionally protected right of Aboriginal title was infringed**. Notably, the Yukon government applied for leave to appeal the decision but was denied by the Supreme Court of Canada which means that the appeal decision is correct. Because of this decision all of Kaska traditional territory in Yukon is withdrawn from staking.

Issuance of mineral titles under the Yukon *Quartz Mining Act* is based on the system of free entry – the same system that is used for issuing mineral titles in the *MTA*. Despite the RRDC decision and the fact that **many** mining jurisdictions[20] have **successfully transitioned** to modified free entry systems where the use of discretion by administrators is part and parcel of the mineral title issuance process, the BC government has **refused** time and again to seriously consider any modification to the free entry system. The BC government's actions demonstrate their belief that the free entry system does not infringe section 35 rights of Indigenous peoples for issuing mineral titles. This inflexibility is due to concerted lobbying by the Association of Mineral Exploration ("AME"), which represents

[19] The decision can be accessed here: https://www.canlii.org/en/yk/ykca/doc/2012/2012ykca14/2012ykca14.pdf.
[20] The State of Western Australia and its *Mining Act, 1978* is regarded as the world's leading exploration and mining jurisdiction.

the interests of some, but certainly not all, of those in mineral exploration. AME's horse and buggy view is that the BC mineral tenure system is "modern" and "a model to follow by jurisdictions around the world".[21]

The RRDC decision was released in late 2012 and arguably is now **old law**, superseded by the global acceptance of UNDRIP and the *Declaration Act*. **Consent should be the requirement for issuing a mineral title and not the discharge of the duty of consultation**. The Supreme Court of Canada in the 2014 *Tsihlqot'in*[22] decision was clear that where Aboriginal title exists, consent is required prior to the Crown issuing a natural resource tenure to a third party.[23] The Supreme Court of Canada in *Tsihlqot'in* further stated that where Aboriginal title was determined after a Crown authorization, that activities or a project under such an authorization would be retroactively infringing and if unjustifiable, may result in cancellation of the project. The same logic applies to Crown legislation.

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[24] (Underlining added for emphasis by the issue paper author.)

2. Exploration, development and production

Exploration and development involve construction of roads, trails and worker camps, trenching and drilling, and geological, geochemical and geophysical surveys. Where exploration for a mineral involves "mechanical disturbance", or where more than 1,000 tonnes of ore is to be removed from a claim by hand, a permit issued under the *Mines Act* by EMPR's chief permitting officer is required. This permit is informally called a "Notice of Work"[25] (or "NoW") issued under section 10 of the *Mines Act*.[26]

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[21] https://amebc.ca/updates/possible-changes-to-the-mineral-tenure-act/. Much of AME statements were in fact considered, and rejected by the Yukon Court of Appeal in the RRDC decision.

[22] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

[23] Consent is, however, subject to the justification test where under limited circumstances tenures may be validly issued by the Crown notwithstanding infringement of Aboriginal title.

[24] Paragraph 92, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

[25] See: https://portal.nrs.gov.bc.ca/web/client/-/notice-of-work; also see: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/exploration/mineral_and_coal_exploration_now_application_companion.pdf; an application for a NoW also serves as a single point of access for key authorizations such as a short term water use approval or an occupant license to cut.

[26] A NoW permit is also required for a bulk sample of up to a maximum of 10,000 tonnes of ore extracted no more than once every five years per claim. See section 17 of the *Mineral Tenure Act Regulation*: https://www.bclaws.ca/civix/document/id/complete/statreg/529_2004. Bulk sample permits are increasingly being sought for critical metal projects. Such projects often have much smaller footprints and lower ore tonnage

It is vitally important to be aware that a NoW permit authorizes **not only mineral exploration and development** activities, but **also production** of placer minerals, sand, gravel, industrial minerals and rock quarries as so-called "regional mines". 'Notice of Work' is a highly deceptive title for a permit implying an authorization for projects that have little or no impact. There are literally hundreds of regional mines in BC and hundreds more exploration and development projects. And all of these producing mines are approved at the sole discretion of the chief permitting officer.

Terms and conditions of a NoW permit include requirements set out in the *Code* and those set at the sole discretion of the chief permitting officer. A NoW permit includes provisions for health and safety of workers and the public and protection of the environment. NoW permits also include closure and reclamation obligations including the requirement to post security (also known as a bond) for mine site reclamation once mining activity has ceased.[27] And not all mines require a *Mines Act* permit. The chief permitting officer has discretion (once again) to exempt certain mines from regulatory oversight of the *Mines Act*.

The EMPR currently uses two processes for permitting producing mines:

(1) A NoW permit is required for placer mining, sand and gravel pits, rock quarries and industrial mineral quarries (aka, regional mines). NoW permits are issued by delegated inspectors in any of EMPR's five regional offices. NoW permit applications may require review by a regional Mine Development Review Committee.

(2) Issuance of a "major mine" permit for larger mine proposals (and changes to such mines). Major mine permitting involves an integrated *Mines Act* and *Environmental Management Act* process between EMPR and MoE. Large, complex applications may be reviewed by a Mine Review Committee managed by the British Columbia Major Mines Office.

While it is clear that consent should be required for issuance of a NoW permit, water discharge and water use permits or a major mines permit, **is consent required for other authorizations** for exploration activities and for development of regional mines and for major mines? Crown authorizations (that is, permits and licences) under environmental,[28] forestry and cultural heritage[29] legislation may be required. By far, the **most significant of authorization** is the environmental assessment certificate.

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than for "major mines". Critical metal projects require detailed geochemical and metallurgical information to determine if a project is economic to attract debt and equity investment to finance mine construction.

[27] See section 10(4) and (5) of the *Mines Act*: https://www.bclaws.ca/civix/document/id/complete/statreg/96293_01; also see the *Code*: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health_safety_and_reclamation_code_2017_rev.pdf

[28] *Environmental Management Act*, see: https://www.bclaws.ca/civix/document/id/complete/statreg/03053_01.

[29] *Heritage Conservation Act*, see: https://www.bclaws.ca/civix/document/id/complete/statreg/96187_01.

3. Environmental Assessment

Consent does not exist in the *EAA*. The obligation of the minister(s) in deciding to issue an environmental assessment certificate is set out in section 29 of the *EAA*. Where a First Nation does not provide consent to issue an environmental assessment certificate the minister(s), before making a decision, must meet with the First Nation to "attempt to achieve" consensus. If there is no consensus, the minister must publish reasons why the decision to issue an environmental assessment certificate was made.

An environmental assessment certificate is **the** most significant authorization in developing a mine. The granting of the priority legal interests in minerals through claim registration and the issuance of mining leases typically occurs before an environmental assessment certificate is issued. Is the current *EAA* **sufficient** with its "seek to achieve" consensus standard? It likely is not. But if consent is required for operational authorizations such as the issuance of a water discharge permit then perhaps the *EAA* "seek to achieve" consensus standard issue is moot. As the issuance of an environmental assessment certificate is viewed by industry as the primary Crown authorization in developing a mine the language in the *EAA* should be revisited.

The *EAA* regulation setting out the criteria and effects thresholds for conducting an environmental assessment for a mine project is complex.[30] Not all mines require an environmental assessment certificate. For example, if a mine has a production capacity of less than 75,000 tonnes/year of mineral ore, or if a placer mineral mine has a production capacity of less than 250,000 tonnes/year of pay-dirt, they **may not be subject** to the *EAA*. A mine project may also require a federal impact assessment ("IA") authorization under the *Impact Assessment Act*. The triggers for a federal IA are more complex than for an environmental assessment. For projects that trigger an environmental assessment, an environmental assessment certificate must be issued prior to mine construction and mineral production.

4. Replace a mineral claim with a mining lease

To produce minerals a mineral claim must be first converted to a mining lease (or in the case of placer claim, into a placer lease)[31] under the *MTA*. There is no government discretion to an application to convert a mineral claim to a mining lease. Subject to payment of a fee, possibly a survey of the mineral claim, posting of a notice and publishing of the notice in the British Columba Gazette and a local newspaper, **issuance of the lease is automatic**. At the sole discretion of chief gold commissioner, a mining lease may be issued for a term up to 30 years with an entitlement of renewal for one or more terms not exceeding 30 years each.

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[30] See section 4 and also Part 3 of the *Reviewable Projects Regulation*: https://www.bclaws.ca/civix/document/id/complete/statreg/243_2019.

[31] Placer mining while mainly for gold and jade may also occur for platinum group elements, rare earth elements, titanium, tin and other minerals having significant density.

A mining lease "conveys" the minerals in the claim to the claim holder (who now becomes a lease holder). That is, the lease holder (called the lessee) now **owns the minerals**. Full stop. While the issuance of a mineral claim is significant, the issuance of a mining lease, with the conveyance (that is the transfer, of ownership of minerals to the lease holder) is highly significant. Construction financing, for example, is not available until a mining lease is issued. The importance of having a mining lease is mission critical for a mine proponent.

The concern of the absence of consent for the automatic issuance of a mining lease is **identical** to the issuance of a mineral claim for exploration. The free entry system and the *Gold Fields Act, 1859* apply symmetrically, almost as bookends, with the automatic issuance of mineral claims for exploration and mining leases for production. Clearly, **consent must be** part of the decision to issue a mining lease.

5. Mine closure and reclamation

The closure and reclamation of mine sites in British Columbia has often been a failure. Few mine sites are reclaimed and restored to their pre-mining state. Numerous mines have 'in perpetuity' legacies (that is, **forever**) of toxic metals and acidic waste water that escape, or are discharged via Crown permit, into the environment.[32] The traditional response to address risks of toxic metals and acid drainage is for the government to collect security from mine owners. The security is used to pay for clean-up and reclamation of mine sites. Government does not collect security, however, to address disasters such as the tailings storage facility breach at the Mt. Polley mine in 2014.[33]

British Columbia is not a "polluter-pay" jurisdiction where mining companies that impact the land, air and water must pay the true costs of their polluting mines. Far from it. Full cost, or actual accounting of security for reclamation appears to be rare. **Insufficient security taken by EMPR from mine owners for reclamation appears to be the norm**. This unfunded liability ultimately becomes a cost to the taxpayer and directly impacts the social and economic health of local First Nations for generations after a mine has ceased operation.

If all conditions of the *Mines Act*, the *Code* and the permit authorizing the mine have been fulfilled to the satisfaction of the chief permitting officer, the mine owner's security will be **returned** and the owner **released** from further obligations under the *Mines Act*.

Mining jurisdictions around the world **underestimate** the amount of security required for clean-up and reclamation of mine sites. **Some governments however are**

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[32] The Britannia copper mine near Britannia Beach is an example of in perpetuity water treatment. See: https://www2.gov.bc.ca/gov/content/environment/air-land-water/site-remediation/remediation-project-profiles/britannia-mine and also see:

[33] See FNEMC report: http://fnemc.ca/wp-content/uploads/2015/07/Using-FA-to-reduce-the-risk-of-mine-non-remediation.pdf.

raising the bar. Quebec, for example, requires mine owners to pay the **full amount** of security to government **within three years** after the commencement of mine operations. Unlike other sectors, such as oil shipping, there is no pool of funds in the mining sector to address reclamation security shortfalls and for mining disasters such as the 2014 Mt. Polley tailings dam breach.

Should consent be required to determine, and return, security placed by a mine owner under the *Mines Act* as set by the chief permitting officer? In my opinion, yes, **there must be consent**.

Discussion

The determination of **where consent needs to be obtained** by the Crown and industry in the BC exploration and mining process **requires careful consideration**. This issue paper raises questions, and provides potential answers to assist First Nations in deciding where consent is required for key decision points in the mining process. The current mining process involves the issuance of a number of legal interests over an extended period of time. This is why First Nations tend to support mining projects in an incremental manner.

The **fundamental principle** for mineral exploration and mining in BC is that where a legal interest is to be granted, conveyed or issued (pick your verb) then consent is required – that is, **free, prior and informed consent**. The potential of irreversible harm to the environment means the requirement of consent is non-negotiable.

Whether consent is **full, incremental or modified**, the requirements must be clearly set out in the key stages, or **decision points**, in the mining lifecycle. First Nations must put their minds to establishing a **consent framework** based on their culture and heritage, the environment and the economy. These **values** must **now** be front and centre and **integrated** into the key decision points involving consent in BC's mining process.

The BC government and the mining sector must **rethink** their approach to mine closure. The track record of abandoned and orphaned mines in BC is appalling. Bankrupt mining companies leave dangerous, **toxic legacies** that damage the health and culture of First Nations and also drain the wallets BC taxpayers, individual and corporate.

A system must be created where a mine, notwithstanding the financial troubles of its owner, must not simply be reclaimed, it **must be restored**. The standard of mine site **reclamation** in BC is **minimalist** at best. Moving sand and dirt around and seeding exotic grasses fertilized by human waste (benignly called 'biosolids") is reclamation at its finest, or its worst – cheap and easy. **Restoration** means just that – fully restore the land and waters to their **pre-mining** state using an Indigenous designed, and Indigenous led, holistically rooted approach. Nothing less will do. The requirement of full restoration of a mothballed mine site, possibly with in perpetuity water treatment, must be an integral part of a financial assurance scheme **before** mines are permitted for production. If not, then First Nations should not provide their consent.

This issue paper concludes with nine **Guiding Principles** which, in my view as a Tahltan elder, must be part of a First Nation's decision on whether or not to grant consent.

Guiding Principles

A statement of sacred responsibilities and inherent rights granted to our People by the Creator.

Oneness of all Things

1) Our relationship to the land is inseparable and enduring based on the belief that all things have a spirit and are of oneness. We must listen to the spirit of the land.

Protection of the Land

2) We are born into our ancestral land and as a result have a sacred responsibility to work to preserve and protect our ancestral lands for present and future generations. We cannot be separated from our land.

Respect is Paramount

3) Respect for ourselves, each other, the land and environment is a core value passed on by our ancestors.

Water is Sacred

4) As part of our life-blood, water is a sacred and precious resource, and must be protected and respected.

Balance must be Maintained

5) Balance must be maintained with our land and all our relations now and for future generations.

6) Sharing is an important principle of our culture, including the sharing of the land and the benefits derived from the land.

Sacred Laws

7) Our sacred laws and our code of conduct are the basis of our relationship to the land and to our culture.

Traditional Knowledge

8) Traditional knowledge is an accumulation of knowledge and wisdom founded on observation and interaction with the land and passed on by our elders from generation to generation through stories and legends.

Respect for Future Generations

9) It is our sacred responsibility to strive to protect our ancestral lands for future generations.