BC MINING LAW REFORM

Indigenous Governance & Mining

University of Victoria Environmental Law Centre

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Introduction

Most Indigenous peoples in British Columbia have never ceded or surrendered their traditional territories. Their inherent rights to self-government and self-determination are expressed through their laws and customs, and are dictated through oral histories and acts of governance. Since 1982, the Canadian Constitution has acknowledged and affirmed aboriginal and treaty rights,[1] and the Truth and Reconciliation Commission (TRC) of Canada made 94 Calls to Action, largely aimed at state governments, for decolonizing Canadian society.[2] From international law, the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") affirms the rights of Indigenous peoples to participate in decision making about their traditional territories, and be entitled to give free, prior and informed consent before development can occur.[3] In this modern Indigenous rights landscape,[4] British Columbia's mining regime still reflects a 19th century approach. While all lands in BC are a First Nation's traditional territory, mining law makes virtually all of the province available for mining[5] as if traditional territories are still "waste lands of the Crown."[6]

Many of the longstanding disputes between the provincial government and Indigenous communities relate to the siting, operation, or historical impacts of a mine. For example, the Tsilhqot'in National Government has opposed the proposed Prosperity Mine through three assessment processes, maintaining the position that the proposals to either drain or permanently contaminate Teztan Biny (Fish Lake) is contrary to their laws. The proposed mine's location at the headwaters of the Taseko, Chilko, Chilcotin and Fraser River systems is a "cultural keystone place" for the Tsilhqot'in people. Likewise, the Stk'emlúpsemc te Secwépemc Nation undertook a community assessment of the proposed Ajax Mine near Kamloops using its own Indigenous decision-making process. In rejecting the project as proposed, the Stk'emlúpsemc te Secwépemc Nation concluded that it had not given its free, prior and informed consent for the project, in particular because its proposed location would cause irreparable harm to Pipsell (Jacko Lake). Finally, when the provincial government took no punitive action after the Mount Polley mine tailings pond collapse released 24 million cubic metres of mine tailings into Hazeltine Creek and Quesnel Lake, a member and former Chief of the Xat'sull First Nation felt compelled to bring charges against the mining company via private prosecution. Five months later, the BC Prosecution Service took over, and soon after dropped the charges.

These examples underscore the fundamental conflict between Indigenous rights and the mining regime in BC—a conflict that even the BC Auditor General's audit of compliance and enforcement in the mining sector failed to address.[7] This conflict is rooted in the provincial government's lack of recognition of the inherent legal rights of First Nations and a regulatory regime that has continued to allow significant ecological impacts to First Nations' lands and waters. In an era of constitutionally acknowledged Aboriginal rights and government commitment to implementing the UNDRIP, the allocation of mineral tenures,

mine siting and mine impacts continue without government-to-government processes for establishing ecological standards, watershed planning, cumulative watershed assessments and community-based monitoring.

Indigenous rights and mining

Courts have interpreted the purpose of section 35 of the Constitution Act, 1982, which acknowledges and affirms Aboriginal and treaty rights, as the "reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[8] Colonial court cases that address reconciliation focus more on its process than on substantive principles or ultimate outcomes. Reconciliation is viewed as the result of "negotiated settlements, with good faith and give and take on all sides, reinforced by judgments of this Court."[9] These negotiations should include all affected First Nations,[10] and are a process not a final legal remedy.[11] The routine framework for principled reconciliation of Aboriginal rights with the interests of Canadian society is the Crown's duty to consult and accommodate First Nations.[12] As expressed by common law courts, the "best way" to achieve reconciliation is to require provincial and federal governments to justify activities that infringe or deny Aboriginal rights.[13]

It is important to note that section 35 does not "protect" Aboriginal rights. Most of the contemporary court cases dealing with section 35 address whether or not the Crown has fulfilled its procedural duty to consult and accommodate, and accept infringement of Aboriginal rights as justified.[14] Courts will rarely direct specific consultation and accommodation procedures, nor will they give substantive direction on reconciliation efforts. Since this procedural requirement provides few substantive remedies or limitations on Crown approvals in traditional territories,[15] the application of section 35 has been criticized as discriminatory in approach. Courts have limited its interpretation to historic realities, rather than allowing it to develop organically like other areas of constitutional law.[16] In traditional territories, overarching provincial jurisdiction for lands and water continues—except in a few pockets[17]—and development of natural resources continues apace.[18]

The underlying problem with focusing on the process and not the substance of land development is twofold. First, environmental assessment becomes the vehicle through which mine tenure, which occurs well before any assessment and mine siting, is discussed. However, environmental assessment is not designed to address the fundamental question of whether it is ever appropriate to locate a mine on a specific site; it asks instead under what conditions it would be acceptable to operate a mine in the proposed location. To respect Indigenous rights, the yes/no question of mine tenures and location needs to be grounded in the Indigenous value of land as the basis of life and law and must occur well before an environmental assessment for a specific proposal. The appropriate vehicle for

identifying appropriate areas for mining—if any—is through land or watershed planning led or co-led with the Indigenous communities whose traditional territory is involved. Second, there are no ongoing processes through which First Nations experiencing the impact of operating, closed or abandoned mines can monitor and communicate those impacts to the provincial government—and put in place adaptive strategies for addressing negative effects.

The Truth and Reconciliation Commission of Canada's interpretation of reconciliation includes developing new relationships between Indigenous peoples and the state, because the economic sustainability of Canada depends on accommodating the rights of Indigenous peoples.[19] For Indigenous peoples, natural resource development is entwined with reconciliation,[20] and "sustainable reconciliation involves realizing the economic potential of Indigenous communities in a fair, just, and equitable manner that respects their right to self-determination."[21] The TRC calls on governments to reconcile Indigenous and state legal orders.[22] It also points to UNDRIP as the appropriate framework for reconciliation and calls for its implementation by all levels of government.[23]

The United Nations Declaration on the Rights Of Indigenous Peoples: Free, prior and informed consent

The Declaration sets out many important principles for redressing the structures of colonization and promoting inherent Indigenous jurisdiction. Most relevant for mining on traditional territories is UNDRIP's focus on participation in decision making, and processes for assessing and giving ongoing consent. It states that Indigenous people have the right to participate in and adjudicate decision-making processes using their own procedures, institutions, laws and land tenure systems.[24] It also establishes the critically important requirement that Indigenous peoples must give "free, prior and informed consent" (FPIC) before any activity takes place in their traditional territories. "Any activity" would include staking claims. The FPIC aspect of UNDRIP is the principle that Indigenous peoples have adopted most strongly as a precondition for Crown-approved activities in their traditional territories. For example, the Northern Secwepemc te Qelmucw Leadership Council adopted the Northern Secwepemc te Qelmucw Mining Policy in 2014, and its first guiding principle prohibits mining without the free, prior and informed consent of the Northern Secwepemc te Qelmucw.[25] Other examples include the Stk'emlúpsemc te Secwépemc Nation explicitly not giving consent for the Ajax mine to operate in their territory, and the Tsleil-Waututh Nation's Stewardship Policy which requires consultation activities to seek to achieve informed consent.[26] Finally, the international Initiative for Responsible Mining Assurance (IRMA) will not certify a new mine unless the proponent has obtained the free,

prior and informed consent of potentially affected Indigenous peoples.[27]

In September 2017, the Province of BC made reconciliation a cross-government priority and indicated that Cabinet Ministers were "reviewing policies, programs and legislation to determine how to bring the principles of UNDRIP to action in British Columbia."[28] The provincial government followed this commitment with draft principles to guide the BC public service on relationships with Indigenous people, which included acknowledging "[t]he right of Indigenous peoples to self-determination and self-government, and the responsibility of government to change operating practices and processes to recognize these rights" and FPIC.[29]

Expressions of these commitments began emerging in provincial government policy and government-to-government agreements in 2018. For example, as a condition of tenure renewal, the provincial government committed to requiring fish farm operators to negotiate agreements with First Nations in whose territory they propose to continue operating.[30] The memorandum of understanding between the First Nations in the Nicola Valley and the provincial government also includes a clause in the preamble that "both Parties are committed to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples."[31]

Operationalizing FPIC requires ongoing decision-making processes that can address the siting of mines and their effects throughout the entire life of the mine—including closure as well as the impacts of orphaned and abandoned mines. As exploration and siting mines within traditional territories are "yes/no" questions, those questions must be set in a planning and regulatory structure that recognizes, respects and protects Indigenous interests. As discussed below, watershed plans can identify those areas that may be appropriate for mining, while ecological standards and cumulative effects assessment can address the ecological consequences of mining activities. Finally, Indigenous community-based monitoring can generate watershed-specific data, informed by traditional knowledge, that can support decision making that recognizes that ongoing consent may be withdrawn at anytime, and the government-to-government relationships on which continued consent rests.

1. **RECOMMENDATION: Ensure that no mineral tenuring, mining exploration, siting, or other activities occur without the free, prior, and informed consent of affected Indigenous communities.**

2. **RECOMMENDATION: Establish consent-based government-to-government processes for determining the appropriateness of specific locations for mineral development *prior* to environmental assessment.**

Government-to-government agreements

For over a decade, Indigenous Nations and the Province of BC have entered into government-to-government agreements that establish the processes by which they will make decisions about a specific matter or within a designated area.[32] These "reconciliation" or "protocol" agreements typically address enhanced decision making through consultation or joint management boards, ecosystem-based management, land and water use planning, management objectives, forestry, revenue sharing, and dispute resolution.[33] In establishing a medium-to-long-term relationship, they set out both:

- how the parties will make decisions; and
- on what they will seek ongoing agreement.

Courts are beginning to recognize that these government-to-government agreements bind the parties in actions they take related to the agreement's subject matter. For example, in 2015 the Haida Nation challenged the federal Minister of Fisheries and Oceans' decision to permit a commercial herring fishery in Haida marine territory.[34] In overturning that decision, the federal court found, in part, that the Haida would suffer irreparable harm because the parties had not yet completed a marine area management plan, the development of which they had agreed to through government-to-government agreements.

Government-to-government agreements can address many mining issues: communication and negotiation protocols and procedures; mineral tenure allocation; entry requirements for exploration; processes for siting and developing mines; royalties, revenue-sharing and capacity funding; monitoring and enforcement standards; and closure, reclamation and remediation standards. The details of these agreements can also establish:

- A comprehensive ecosystem-based approach to free-entry and mine management, based on traditional knowledge from which land use plans, watershed plans, and mining policies are drawn;
- An agreement that the basis for mining activities is the free, prior and informed consent (FPIC) of the affected Indigenous Nations and that FPIC will be grounded in the land use or watershed plans developed and adopted by those Nations;
- Baseline ecological standards for different ecological elements (such as the standard of 80% old growth over a 250-year timeframe found in the Great Bear Rainforest agreements);[35]
- Operating and monitoring standards that adhere to community-based plans such as the Northern Secwepemc te Qelmucw Mining Policy, Taku River Tlingit Mining Policy, and others described in *Fair Mining Practices: A New Mining Code for British Columbia*;[36]

- Social monitoring and built-in contingencies to prevent and/or abate negative social consequences brought about by the presence of a transient, male-dominant workforce;
- The monitoring and enforcement roles and responsibilities between Indigenous Nations (e.g. Indigenous Guardians), the Ministry of Energy and Mines, and an independent compliance and enforcement unit;
- A framework for tracking and publicly posting all mining compliance and enforcement information, as well as Environmental Assessment Certificates, permit conditions and other regulatory requirements in easily understandable formats;
- A commitment to developing risk-based inspection regimes for all mining activities, with clear inspection; and
- Mechanisms for enabling and funding Indigenous-led and community-based monitoring programs for mining activities.

3. **RECOMMENDATION: Establish government-to-government relationships for seeking, evaluating and earning the continued consent of First Nations governments for any mining activities, including staking claims, within their traditional territories.**

4. **RECOMMENDATION: Co-develop processes with Indigenous Nations to seek agreement on ecological standards, watershed plans, cumulative watershed assessments, and community-based monitoring for their territories.**

Ecological, social and mining standards

Absent standards that mandate a specific ecological goal or operations criteria, all decisions about activities in traditional territories are open to wide discretion in decision making. Yet, the ultimate goal in any region, traditional territory or watershed is good ecological and social function. Definition of that function in ecological and social terms is a prerequisite to mine exploration and operations, and ecological or cultural sensitivity will preclude mining activities in some areas. Likewise, continued licence for those operations depends on monitoring and adaptive management as data is generated and the impacts of mine activities are better understood.

When an adaptive, purposeful ecological framework for decision making is in place, decisions are limited by community-endorsed ecosystem-based standards and procedures. This narrowing of discretion makes decision making simpler, but not necessarily easier, because decisions must adhere to watershed-specific standards. There is less discretion for decision makers because the foundation of the decision—ecological and community health—is predetermined. This is the case in the Great Bear Rainforest where the Reconciliation Protocol sets out the procedures for enhanced decision making,[37] and the various agreements and Orders under forestry legislation operationalize the commitment to return 80% of the region to old growth forest over a 250-year timeframe.[38] Other examples include the Haida Gwaii Management Council composed equally of Haida and provincial appointees making forestry decisions[39] and the Northern Secwepemc Te Qelmucw Mining Policy, which is grounded in traditional values, community health and ecological balance.[40]

5. **RECOMMENDATION: Pursuant to government-to-government agreements, establish legally enforceable ecological and social standards or targets for each watershed or traditional territory based on the Indigenous Nations' priorities, knowledge and values.**

6. **RECOMMENDATION: Embed those standards in watershed plans, cumulative watershed assessments, and provincial laws, orders, permits and approvals.**

Watershed plans (land and water use plans)

The question of whether a location within a traditional territory or watershed is appropriate for mining comes before environmental assessment. There are locations in traditional territories where it will never be appropriate to undertake natural resource extraction due to the important cultural or ecological status of that location. However, appropriate locations for mining may be determined through comprehensive watershed planning.[41] (The term watershed planning includes both land and water use plans, as terrestrial and aquatic ecosystems are intertwined.) Indigenous communities may develop watershed plans as expressions of their jurisdiction—and such plans will be more comprehensive than traditional use studies—establishing both land and water use parameters. For example, watershed plans would designate protected areas, emphasizing connectivity between representative ecosystems—as well as create "no go" zones for important cultural sites, communities, and sensitive ecological areas. Watershed plans

would incorporate zoning—what types of activities can occur in which locations—and buffer zones with special rules around protected areas.

For example, the Great Bear Rainforest agreements are based on the land use plans developed by the First Nations of the Central Coast.[42] These land use plans were the basis of land conservation and zoning decisions that created new land use designations in colonial law, creating conservancies, biodiversity, mining and tourism areas, and ecosystem-based management operating areas.[43] Likewise, the Gitanyow Hereditary Chiefs used their Indigenous laws to create their comprehensive land use plan that is the basis of their government-to-government discussions with the provincial government about forestry and other activities in their *Wilps* (traditional territories).[44]

7. **RECOMMENDATION: Enable Indigenous Nations to undertake comprehensive watershed planning that includes zoning, land and water use parameters, connected protected areas, and no go and buffer zones.**

8. **RECOMMENDATION: Adopt Indigenous Nations' watershed plans into operating agreements and the provincial regulatory regime to ensure that mining and other natural resource activities are only approved if they align with these plans.**

9. **RECOMMENDATION: Create provisions in provincial law to retire mineral rights if they are inconsistent with Indigenous Nations' land use plan designations.**

Cumulative watershed assessments

In a context where the provincial government has reformed environmental assessment laws with the aim of "ensuring the legal rights of First Nations are respected, and the public's expectation of a strong transparent process is met,"[45] project assessment must clearly include socio-ecological cumulative effects.[46] Each watershed is subject to multiple activities that change its ecological status, and each community feels the impact of different industries. The total effect of all activities in a First Nations' traditional territory must be evaluated each time a new project is proposed in a watershed, while the project-specific impacts must meet provincial and community standards.[47]

While not well-implemented in Canada, scientists and scholars across disciplines point to the necessity of cumulative effects assessment.[48]

Like land and watershed planning, assessment is a key governance activity for Indigenous communities. For example, First Nations can exercise their jurisdiction and inform their decision making through cumulative impacts assessment. Both the Stk'emlúpsemc te Secwépemc and Tsleil-Waututh Nations undertook their own assessments of proposed industrial projects as part of exercising their Indigenous laws and governance, an approach that can be broadened to include cumulative effects assessment.

10. **RECOMMENDATION: Partner with Indigenous Nations to create joint assessment and monitoring procedures and forums that generate standards for data and a venue for ongoing adaptive management of traditional territories.**

11. **RECOMMENDATION: Ensure that BC's new Environmental Assessment regime, regulations and approach include scoping for all new proposed activities and cumulative environmental and social impact of all activities in a watershed—so that parties can evaluate both the project-specific incremental effects and cumulative load on the watershed.**

12. **RECOMMENDATION: Link cumulative effects' assessments to land use plans and ecological standards for Indigenous Nations' territories so projects will be rejected at the outset if they would offend established watershed zoning and standards.**

Community-based monitoring

In most watersheds, particularly in remotely populated BC, there is little real time environmental and social data that can be used in decision making and adaptive management. Community-based monitoring can generate credible data to fill gaps in industry and government monitoring, and provide Indigenous communities with the data they need to exercise their inherent jurisdiction in watershed governance. Local community members are more often on-the-ground to engage in data collection, and the results can inform baseline studies, monitoring reports, adaptive management and enforcement

decisions. Citizen's Advisory Councils in Alaska are a good example of the important role that community-based programs can play in ensuring adequate monitoring and enforcement of environmental standards.[49]

For First Nations, community-based monitoring can be an expression of their territorial jurisdiction and self-governance. In addition to traditional knowledge, generating scientific data that will be used for monitoring, adaptive management, and enforcement decisions creates a platform for making operational decisions. Examples of Indigenous-led community-based monitoring programs include the Guardian Watchmen programs of the Coastal First Nations, the staff of which monitor, protect, and restore cultural and ecological values.[50] In Australia, the Indigenous Rangers program empowers Indigenous people to combine traditional knowledge with conservation training to protect and manage their land, sea and culture. In 2016, nearly 800 rangers were active, developing partnerships with research and educational organizations, engaging with youth, and generating additional income and jobs in the environment, biosecurity and heritage sectors.[51]

13. **RECOMMENDATION: Establish and fund Indigenous-led community-based watershed monitoring programs through government-to-government agreements.**

14. **RECOMMENDATION: Develop data collection protocols and train community-based monitoring staff so that data generated locally can be used for management, governance, and statutory decision making.**

Endnotes

1 *Constitution Act,* 1982, s 35.

2 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 6: Reconciliation* (Winnipeg: McGill-Queens University Press, 2015) at 202-212. ("TRC Reconciliation")

3 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/29, art 19, online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

4 For an in-depth discussion of implementation of the Declaration, see the chapters by John Borrows, Gordon Christie and Sarah Morales in Centre for International Governance Innovation. *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo, ON: CIGI, 2017).

5 The AME Report calculates that only 18.59% of BC's land base falls under a "Prohibited Access" category, of which only 0.65% that is either treaty settlement land or Indian Reserve land. Hemmera, *Framing the Future of Mineral Exploration in British Columbia: AME BC Mineral Land Access and Use Report* (AME BC, 2016), online, at 5.

6 This is a term that appears from *Gold Fields Act, 1859*, s V; through the *Gold Mining Ordinance, 1867*, s 22; and many mining (and other) statutes, up to and including the *Mineral Act*, RS 1936, c 181, s 14(1): "Every free miner shall, during the continuance of his certificate, but not longer, have the right to enter, locate, prospect, and mine: (a) Upon any waste lands of the Crown ...".

7 First Nations are mentioned only as interviewees for the audit and in reference to consultation in the Response from Government; Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016), at pp. 104, 18, 27, online: http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf.

8 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 31 and affirmed in *Delgamuukw v BC*, [1997] 3 SCR 1010, [1997] SCJ No 108 at para 186.

9 *Delgamuukw*, at para 186.

10 *Delgamuukw*, at para 186.

11 *Haida Nation v BC*, 2004 SCC 73 at para 32 ("Haida Nation").

12 Haida Nation, *ibid* at paras 20, 25, 32, and 35, and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 at paras 54 and 63 ("Mikisew Cree").

13 *R. v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 at 1109 and affirmed in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 119.

14 A blunt example of this is the BC Court of Appeal's ruling that the establishment of a municipality had, at best, a minimal impact on claimed Aboriginal rights and title: *Adams Lake Indian Band v BC*, 2012 BCCA 333. Kaitlin Ritchie argues that this focus on consultation and accommodation is undermining reconciliation as a goal with three areas of risk being delegation, lack of capacity and the cumulative effects of consultation: Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 43 UBC Law Review 397.

15 The notable exception is Tsilhqot'in Nation, where the Supreme Court of Canada found Aboriginal title in the claim area; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. There are a few appeal board or court decisions that overturn a permit, licence or other provincial entitlement, such as *Chief Sharleen Gale and Fort Nelson First Nation v Assistant Regional Water Manager*, 2012-WAT-013(c) (BC EAB 2015) where the BC Environmental Appeal Board cancelled a permit to take water for hydraulic fracturing due to inadequate consultation and accommodation, as well as inadequate factual scientific basis on which to issue the permit. See also *Mikisew Cree* where the Supreme Court of Canada overturned a federal permit and sent the decision back to the Minister for further consultation; *Mikisew Cree First Nation v Canada* (Minister of Canadian Heritage) 2005 SCC 69.

16 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at pp. 129-131.

17 See, for example, the *Haida Gwaii Reconciliation Act*, SBC 2010, c 17.

18 The decision *Grassy Narrows First Nation v Ontario* (Natural Resources) 2014 SCC 48 at para 50 confirmed provincial governments' primary role in managing natural resources in the context of Aboriginal rights.

19 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 6: Reconciliation* (Winnipeg: McGill-Queens University Press, 2015) at pp. 202-212.

20 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 6: Reconciliation* (Winnipeg: McGill-Queens University Press, 2015) at pp. 206.

21 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 6: Reconciliation* (Winnipeg: McGill-Queens University Press, 2015) at p. 207.

22 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 6: Reconciliation* (Winnipeg: McGill-Queens University Press, 2015) at Call to Action 45.

23 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 6: Reconciliation* (Winnipeg: McGill-Queens University Press, 2015) at p. 15.

24 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/29, at Articles 18 and 27, online: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. See also Hannah Askew et al, *Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with reference to Fresh Water Resources*, (West Coast Environmental Law, 2017), online: https://www.wcel.org/sites/default/files/publications/betweenlawandaction-undrip-fpic-freshwater-report-wcel-ubc.pdf; David Szablowski. "Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice." *Canadian Journal of Development Studies* 30, 1-2 (2011): 111-130.

25 Northern Secwepemc te Qelmucw Leadership Council. *Northern Secwepemc te Qelmucw Mining Policy* (November 19 2014) at 4.1.1, online: https://www.fairmining.ca/wp-content/uploads/2014/12/NStQ-Mining-Policy_Nov19.20141.pdf.

26 Tsleil-Waututh Nation. Tsleil-Waututh Stewardship Policy (2009), online: https://www.bcuc.com/Documents/Proceedings/2009/DOC_22571_D-29_Tsleil-Waututh-Nation-funding-comments.pdf.

27 Initiative for Responsible Mining Assurance. IRMA Standard for Responsible Mining IRMA-STD-001 (2018), online: http://www.responsiblemining.net/images/uploads/IRMA_STANDARD_v.1.0_FINAL_2018.pdf at 2.2.2.2 and 2.2.6.1. The IRMA Standard is clear that a company must abandon a proposal if they do not obtain FPIC: 2.2.2.4. If Indigenous peoples' representatives clearly communicate, at any point during engagement with the operating company, that they do not wish to proceed with FPIC-related discussions, the company shall recognize that it does not have consent, and shall cease to pursue any proposed activities affecting the rights or interests of the Indigenous peoples. The company may approach indigenous peoples to renew discussions only if agreed to by the Indigenous peoples' representatives;

Beyond requiring FPIC, the IRMA Standard also requires mining companies to comply with Human Rights Due Diligence Requirements. These Requirements include obligations placed upon mining companies themselves to: "adopt a policy commitment" to "respect all internationally recognized human rights;" conduct periodically updated human right impacts assessments and respond to any impact findings; monitor any

impact indicators, and; "report publicly on the effectiveness of its human rights due diligence activities." Further, the provincial government must respond to IRMA's standards by ensuring that "mining project stakeholders…have access…to grievance mechanisms through which they can raise concerns and seek recourse" for human rights grievances; Initiative for Responsible Mining Assurance, *IRMA Standard for Responsible Mining* IRMA-STD-001 (2018), at p. 26-28.

28 Province of BC. Statement of Premier John Horgan on the 10th Anniversary on the UN Declaration on the Rights of Indigenous Peoples. (September 13 2017), online: https://news.gov.bc.ca/releases/2017PREM0083-001562.

29 Province of BC. Draft Principles Guide B.C. Public Service on relationships with Indigenous peoples (May 22 2018), online: https://news.gov.bc.ca/releases/2018PREM0033-000978.

30 Mike Laanela. "BC fish farms to require First Nations approval starting in 2022," (2018 June 20), online: https://www.cbc.ca/news/canada/british-columbia/bc-fish-farms-first-nations-approval-1.4714036; Province of BC. "BC government announces new approach to salmon farm tenures." News Archives. (2018, June 20) online: https://news.gov.bc.ca/releases/2018AGRI0046-001248. See also the consent-based processes outlined in the Letter of Understanding British Columbia-First Nations Collaborative Solutions for Finfish Aquaculture Farms in the Broughton Area. (June 27 2018), online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/lou_broughtonfn_27june2018.pdf.

31 Nicola Watershed Pilot Memorandum of Understanding (March 23, 2018), online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/nicola_watershed_pilot_mou_-_signed_2018.pdf.

32 The Province of BC lists Reconciliation and Other Agreements at https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements. See also the extensive orders, plans an data emanating from the government-to-government agreements relating to the Great Bear Rainforest: https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/land-use/land-use-plans-objectives/west-coast-region/great-bear-rainforest/great-bear-rainforest-legal-direction-agreements.

33 See, for example, the older land and resources protocol agreement with the Coastal First Nations at https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-rainforest/great-bear-rainforest-first-nations-agreements/turning_point_protocol_agreement_signed_optimized.pdf.

34 *Haida Nation v Canada* (Fisheries and Oceans), No. T-73-15 (FC March 6, 2015).

35 Curran, Deborah. "'Legalizing' the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation" (2017) 62:3 McGill Law Journal 813.

36 Maya Stano & Emma Lehrer. *Fair Mining Practices: A New Mining Code for British Columbia* (Victoria: Fair Mining Collaborative, 2013).

37 Wuikinuxv Nation, Metlakatla First Nation, Kitasoo Indian Band, Heiltsuk Nation, Haisla Nation, Gitga'at First Nation, and the Province of British Columbia as Represented by the Minister of Aboriginal Relations and Reconciliation. Documents include "Reconciliation Protocol, 2009" (10 December 2009); "Amending Agreement, 2010" (7 December 2010); and Haisla Nation, "Amending Agreement, 2011" (October 25-November 21 2011) http://www2.gov.bc.ca/gov/DownloadAsset?assetId=65D0CE9AEA1B4C3DA033DEC0FA51D6CC.

38 Curran, Deborah. "'Legalizing' the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation" (2017) 62:3 McGill Law Journal 813; Nanwakolis Council, Coastal First Nations & Ministry of Forest, Lands and Natural Resource Operations. *Ecosystem-Based Management on BC's Central and North Coast (Great Bear Rainforest): Implementation Update Report July 2012* (2012).

39 Haida Nation and British Columbia, Kunst'aa guu—Kunst'aayaa Reconciliation Protocol (11 December 2009), online: http://www.haidanation.ca/Pages/Agreements/pdfs/Kunstaa%20guu_Kunstaayah_Agreement.pdf; *Haida Gwaii Reconciliation Act*, SBC 2010, c 17.

40 Northern Secwepemc te Qelmucw Leadership Council. Northern Secwepemc te Qelmucw Mining Policy (November 19 2014) at 11.1.1, online: https://www.fairmining.ca/wp-content/uploads/2014/12/NStQ-Mining-Policy_Nov19.20141.pdf.

41 For more in-depth treatment of watershed planning, see Maya Stano & Emma Lehrer. *Fair Mining Practices: A New Mining Code for British Columbia* (Victoria: Fair Mining Collaborative, 2013) at pp. 96-114.

42 See the multiple strategic land use planning agreements between the Province of BC and each First Nation online: https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/land-use/land-use-plans-objectives/west-coast-region/great-bear-rainforest/great-bear-rainforest-legal-direction-agreements.

43 Merran Smith and Art Sterritt. "Towards a Shared Vision: Lessons Learned from Collaboration Between First Nations and Environmental Organizations to Protect the Great Bear Rainforest and Coastal First Nations Communities" in Lynn Davis (ed.), *Alliances: Re/Envisioning Indigenous-non-Indigenous Relationships* (Toronto: University of Toronto Press, 2010) at pp. 131-148; Justin Page, *Tracking the great bear: how environmentalists recreated British Columbia's coastal rainforest, Nature, history, society* (Vancouver: UBC Press, 2014).

44 Gitanyow Hereditary Chiefs Land Use Plan Maps, online: http://www.gitanyowchiefs.com/media/maps/.

45 Province of BC. Environmental Assessment Revitalization Discussion Paper. (Victoria: Province of BC, 2018), online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_discussion_paper_final.pdf at 3.

46 For more in-depth treatment of assessment in the mining context, see Maya Stano & Emma Lehrer. *Fair Mining Practices: A New Mining Code for British Columbia* (Victoria: Fair Mining Collaborative, 2013) at Chapter 6. See also the consensus statement on environmental assessment from environmental law organizations in BC: West Coast Environmental Law Association, Ecojustice and Environmental Law Centre (University of Victoria). *A Blueprint for Revitalizing Environmental Assessment in British Columbia*. (April 1 2018), online: https://www.wcel.org/sites/default/files/publications/2018-04-blueprintforrevitalizingeainbc-final-v2.pdf.

47 The IRMA standard calls for both social and cumulative impact assessment: Initiative for Responsible Mining Assurance, *IRMA Standard for Responsible Mining IRMA-STD-001* (2018), at 2.1.3.3.

48 See, for example, Cole Atlin & Robert Gibson. "Lasting regional gains from non-renewable resource extraction: The role of sustainability-based cumulative effects assessment and regional planning for mining development in Canada" (2017) 4:1 The Extractive Industries and Society 36; John Sinclair, Meinhard Doelle & Peter N Duinker. "Looking up, down, and sideways: Reconceiving cumulative effects assessment as a mindset" (2017) 62: Journal Article Environmental Impact Assessment Review 183.

49 Environmental Law Centre. "Citizen's Advisory Councils and the Prince Rupert area." p 5.

50 See the Coastal First Nations Regional Monitoring System, online: https://coastalfirstnations.ca/our-environment/programs/regional-monitoring-system/.

51 Australian Government, "Indigenous Rangers—Working on Country" (2016) Department of the Prime Minister and Cabinet, online: https://www.pmc.gov.au/indigenous-affairs/environment/indigenous-rangers-working-country.