

BC  
MINING  
LAW REFORM



# Mineral Tenure

## University of Victoria Environmental Law Centre



---

For their generous support, thank you to:

vanouver  
foundation

 **Tides Canada**

---

This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).

Cover photo: Wilderness Committee

# Introduction

BC's mineral tenure rules—which determine where mining can occur—are rooted in a 19<sup>th</sup> century gold rush-era approach that gives unique priority to mineral development over other land uses and rights. Under our outdated system, only a small portion of the provincial land base is designated "off-limits" to mining.<sup>1</sup> Across most of the province, our mining laws create confusion and conflict by claiming to give mining rights preference over private property rights, Indigenous rights, local bylaws, land-use planning, and the protection of sensitive areas.

Under the current system, mining companies can stake and develop claims in sensitive watersheds, valuable ecological areas, First Nations' traditional territories, and other people's private property. Miners are not governed by zoning bylaws—or by land-use plans that apply to other industries. As a result, mines are often proposed in areas where they may have significant negative environmental, cultural, social and economic impacts—and unduly impact other land uses and industries such as tourism and fishing.<sup>2</sup>

In recent years, other jurisdictions have reformed their mining laws—and done away with the antiquated colonial rules that enabled miners to illegitimately stake claims on Indigenous lands and in sensitive ecosystems. In contrast, in recent years British Columbia has made the process for miners to secure mineral claims even easier. Since 2005, BC has operated an online claim registration system where an individual or a company can fill out a basic Free Miner's application, pay a small fee and click an online map to register a claim.<sup>3</sup>

Once a claim has been registered, the recorded claim holder obtains the right to "use, enter and occupy" the claim area for the exploration and development of mineral resources.<sup>4</sup> Significantly, these rights even extend to mineral claims registered on private land. While private landowners are entitled to notice of any mining activities on their property and compensation for any damage incurred, private landowners cannot prevent claimholders from entering their land.<sup>5</sup> What little protection landowners had was further reduced by the provincial government in the early 2000s when it amended the *Mineral Tenure Act* to eliminate a prohibition on miners interfering with private landowners.<sup>6</sup>

Beyond rights of access, a claim holder also has the right to develop minerals on a claimed property, up to a specific volume.<sup>7</sup> If they want to expand and start producing minerals, they must convert their claim into a mineral lease. However, if the claim holder meets the application information requirements, government cannot refuse to grant a mineral lease.<sup>8</sup> In other words, under our current laws the provincial government cannot deny mineral rights to anybody who meets the basic requirements.



This mining-first approach creates problems because, in many parts of BC, Indigenous peoples and British Columbians would elevate other land and water values over mining. We need to reform our mining laws to protect these values and to:

- implement the UN Declaration on the Rights of Indigenous Peoples (UNDRIP);
- give private landowners control over the activities that take place on their property;
- enable communities to designate local lands for a diverse range of uses, including drinking water source protection;
- ensure the integrity of land and water plans across the province;
- provide certainty to industry regarding which areas can be staked and developed;
- protect the rich natural heritage of the province; and
- reduce the risk of having to compensate private claims holders with public money for prohibiting mining in ecologically or culturally significant areas.

There are examples that BC can look to inform needed changes in our mining laws. Ontario, for example, has traditionally had a similar system to BC, but recently (2009) reformed its mining laws in the areas of mineral tenure, private property rights, Indigenous engagement and the permitting of exploration and development. Quebec changed its Mining Act in 2013 and now requires written consent from landowners before mineral exploration can take place. Quebec's updated laws also enable municipalities to designate 'no-go zones' for mining activities for various purposes (e.g. drinking water source protection). Notably, mining in these provinces has continued to enjoy record levels of investment.<sup>9</sup>

## Discretionary mineral rights

BC should follow the example of other jurisdictions and reform its system of automatically issuing mineral rights to applicants. BC's current mineral rights regime *requires* government to issue mineral tenures to any applicant that meet the basic requirements. This is sometimes referred to as a 'non-discretionary' system. 'Non-discretionary' means that government is unable to consider and balance different interests before deciding whether to grant mining rights. In contrast, a discretionary system for mineral rights would allow BC to require "both prior consideration of other interests in the area as well as the environmental sensitivity and significance of the claimed areas."<sup>10</sup>

A discretionary system could help avoid having taxpayers pay out compensation to miners who file claims in areas that government eventually decides to protect. When BC banned mining in the Flathead River Valley (near the Waterton Lakes-Glacier National Park World

Heritage Site), Cline Mining sued the province for half a billion dollars compensation for the mining claim they lost for a mountaintop removal coal mine. British Columbians had to pay \$30 million to a uranium company that staked a claim before BC's decision to ban uranium mining.<sup>11</sup> A discretionary system would allow government to deny tenure applications in areas that are likely to be protected in the future—thus avoiding public payouts for privately held tenures that have little prospect of ever being mined.

A variety of considerations could be built into a discretionary system. For example, the ability to acquire mineral rights could be contingent on the applicant first "securing access agreements with landowners, including First Nations" in the area.<sup>12</sup> Government could have the ability to protect the public by denying mineral rights to applicants with poor environmental or compliance records or without technical or financial capacity. Further, mineral claim-holders would no longer have an automatic right to a mining lease and their rights could be made conditional on Indigenous and landowner consent, land use planning and other factors.<sup>13</sup>

Outside BC, there are numerous mining jurisdictions that have some kind of discretionary system in place for allocating mineral rights:

- Three Canadian jurisdictions feature a "Crown discretion" system for granting mining leases: Alberta,<sup>14</sup> Nova Scotia,<sup>15</sup> and Prince Edward Island.<sup>16</sup>
- New Mexico will deny an exploration permit application if the applicant's past conduct (because of failure to comply with *Mining Act* provisions or regulations) "has resulted in the forfeiture of financial assurance."<sup>17</sup>
- New South Wales, Australia grants discretion to government decision makers to refuse tenure applications for a suite of reasons.<sup>18</sup>

- 1. RECOMMENDATION: Adopt a discretionary mineral tenure regime that incorporates a broad suite of values and interests, and ensures that in issuing tenures, decision-makers:**
  - Uphold Indigenous title, rights and interests;
  - Respect community and regional land-use designations and planning processes;
  - Consider the cumulative watershed impacts of industrial activities; whether lands are likely to be protected in the future; the track records of applicants; and other relevant factors.

## Landowner consent for mining activities

Many landowners would be surprised to discover that BC's *Mineral Tenure Act* still allows a mining claim to be registered and developed on their private land—without their consent. This type of incursion still happens—for example, the Bepple family near Kamloops was unable to stop a company from strip-mining their land.<sup>19</sup> In 2018, the Robinson family near Quesnel watched in shock as a foreign-owned mining company destroyed three hectares of their land and excavated huge pits near the Quesnel River.<sup>20</sup> Current mineral tenure laws offend the public ideal that people should be able to protect their private land from trespass and destruction.<sup>21</sup>

Reforming the mineral tenure system to respect the rights of private landowners would not unduly restrict mining in BC. Some owners would consent to certain mining activities on their properties if fairly compensated and, in any case, less than 5% of BC's total land is privately owned.<sup>22</sup> As a result, requiring landowner consent for mining activities on private lands would have a minimal impact on the total amount of land available for staking.

Furthermore, much of the province's private land is clustered in communities; a majority of private land is located in river valleys and riparian areas;<sup>23</sup> and a third of it is agricultural and range land.<sup>24</sup> As a result, a landowner consent rule would curb the potential for disruptive mining operations in precisely those areas where other interests or values *should* be considered—areas where mining conflicts with human settlement, disrupts agricultural productivity, or adversely impacts sensitive riparian habitats or drinking water sources.

Several jurisdictions have enacted legislation that protects private property rights and the reasonable expectations of owners by requiring landowner consent for mining activities. For example:

- Alberta's *Surface Rights Act* requires "the consent of the owner and the occupant of the surface of the land," or an order of the Surface Rights Board;<sup>25</sup>
- Ontario's recently reformed mining laws deem all mining rights to be "withdrawn" on privately owned land in Southern Ontario where there is no landowner consent;<sup>26</sup>
- New Brunswick's *Mining Act* requires that miners provide proof that the landowner "consents to the work being done on the land";<sup>27</sup> and
- Outside of Canada, the Northern Territory of Australia's *Mineral Titles Act* requires written consent from the landowner prior to any "preliminary exploration on the relevant land." If the landowner does consent, they "may impose reasonable conditions on the entry and use of the land."<sup>28</sup>

2. **RECOMMENDATION: Require landowner consent for mining activities on private property and enable landowners to place requirements on exploration or mining activities as conditions of their consent.**<sup>29</sup>

## Mining activities and land-use designations

Indigenous and non-Indigenous communities across BC have developed land-use and watershed plans to ensure that important values are protected; that industrial activities occur in appropriate areas; and that no one resource user unreasonably interferes with others. However, BC's current mining laws purport to allow companies to disregard the official plans developed by First Nations, the province, and local governments.<sup>30</sup> Carefully thought out land use and watershed plans that designate optimal uses of land and water can be unilaterally upended by an individual miner filing a claim.

This undermines rational land use based on 'highest and best use' and 'multiple use' principles. It also runs counter to the UNDRIP principle of free, prior and informed consent that the provincial government has vowed to implement (see "Indigenous Governance and Mining"). It is important to note that BC's local governments have called for reform of mineral tenure laws to better respect local planning.<sup>31</sup>

Other jurisdictions have refined their regulatory regimes to ensure that the important strategic work of land-use planning is not undermined by out-of-date mining laws. Ontario, for example, has adopted specific rules to ensure mining is consistent with community-based land-use plans in the province's north.<sup>32</sup> In that region, claims may not be staked if a community-based land-use plan designates the area for uses "inconsistent with mineral exploration and development."<sup>33</sup> The relevant minister also has the power to withdraw mineral rights if a withdrawal would be consistent with a "prescribed land use designation."<sup>34</sup> Finally, the Ontario *Far North Act* further protects against mining in inappropriate places by barring the opening of a mine when there is no community-based land-use plan in place for the area.<sup>35</sup>

In the NWT, mining regulations have been updated so that claim staking and prospecting must respect land use plans;<sup>36</sup> and in the Yukon, all proposed mining activity must be evaluated to determine conformity with land-use plans.<sup>37</sup>

In Quebec, the *Land Use Planning and Development Act* allows municipalities and regional county governments to "delimit any mining-incompatible territory" as part of their land-use plans.<sup>38</sup> "Mining-incompatible territory"<sup>39</sup> can include inhabited areas, heritage sites, agricultural areas, recreational and tourism areas, areas with biodiversity and conservation potential, and drinking water sources. The relevant minister also has the power to

withdraw lands from mining for any purpose that the minister considers to be in the public interest.<sup>40</sup>

In addition to respecting land-use plans, the law should be changed to ensure that sensitive areas currently subject to mining claims receive general province-wide protection from mining activity. For example, designated Old Growth Management Areas, Wildlife Habitat Areas, and sensitive watersheds should be exempt from mining activity.

By following the recommendations below, BC could avoid the problem of inappropriately sited mines—and move towards a mining regime that is consistent with UNDRIP's principle of free, prior and informed consent.

**3. RECOMMENDATION: Require that mining exploration and development activities conform with Indigenous, local, and regional land-use plans and restrict mining activity where there is no such plan in place.**

**4. RECOMMENDATION: Enable (at the request of Indigenous or local governments) revocation of exploration and mineral development rights that are inconsistent with land-use plan designations.**

**5. RECOMMENDATION: Mandate "no-go zones" to protect all designated Old Growth Management Areas, Wildlife Habitat Areas, domestic-use watersheds, fisheries-sensitive watersheds, and other sensitive areas from mining activities.**



## Indigenous consent and consultation

British Columbia has a history of authorizing mining activities that impact Indigenous peoples and infringe their constitutionally protected rights. Moreover, despite relatively recent commitments from the provincial government to acknowledge Indigenous rights and to implement UNDRIP, the province's *Mineral Tenure Act* still does not even require that miners *engage* with First Nations prior to entering or staking a claim on their territories.<sup>41</sup> BC needs mineral tenure reform that explicitly acknowledges Indigenous rights and jurisdictions and gives substance to the province's commitments.

BC can look to several other jurisdictions for examples of how state governments have adjusted their laws to require Indigenous consent for mineral tenure and mining activities.<sup>42</sup> For example, in Australia's Northern Territory, written consent from Aboriginal landowners is required before any preliminary exploration takes place on their land.<sup>43</sup> In the United States, federal law generally requires the "authority of the tribal council or other authorized spokesmen" and the approval of the Secretary of the Interior before any federally administered Indigenous land is leased for mining.<sup>44</sup> Finally, Ontario's *Mining Act* specifies specific regions where no new mines will be permitted if they are not consistent with a community-based land-use plan that has been approved by the local First Nation.<sup>45</sup>

**6. RECOMMENDATION: Ensure that no mining or exploration activities can be approved without the free, prior, and informed consent of affected Indigenous peoples.**

# Endnotes

- 1 Judah Harrison, *Too Much at Stake: The Need for Mineral Tenure Reform in British Columbia* (Ecojustice, 2010) at p. 5 online: [https://www.ecojustice.ca/wp-content/uploads/2014/11/Ecojustice\\_BC\\_Mining\\_Tenures\\_web\\_final.pdf](https://www.ecojustice.ca/wp-content/uploads/2014/11/Ecojustice_BC_Mining_Tenures_web_final.pdf)) states that "only about 13 per cent" of BC's land is off-limits to mining (without citing a source) (5). The AME Report calculates that 18.59% of BC's land base falls under the "Prohibited Access" category that Hemmera uses. This number includes the 14.97% that is "under conservation or park-related land use designations where no forestry, mining or industrial development is allowed," plus the 4.49% on which the chief gold commissioner has established mineral reserves under section 22 of the MTA, and the 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* (Vancouver: AME BC, 2016), at p. ii and 5 online: <http://amebc.ca/wp-content/uploads/2017/06/AME-BC-Mineral-Land-Access-and-Use-Report-2015-No-AppF-1.pdf>).
- 2 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) online: [http://wcel.org/sites/default/files/publications/WCEL\\_Mining\\_report\\_web.pdf](http://wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf).
- 3 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 89 online: <https://www.fairmining.ca/wp-content/uploads/2018/05/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf>.
- 4 BC Ministry of Energy and Mines, *Mineral Titles Information Update No. 7 - A Guide to Surface and Subsurface Rights and Responsibilities in British Columbia* (2015 March 1) at p. 6; *Mineral Tenure Act*, RSBC 1996, c. 292, s. 14(2); *Mines Act*, RSBC 1996, c. 293, s.10; BC Ministry of Energy, Mines and Petroleum Resources, *Mineral Titles Branch—Title Overlap Report*; Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at p. 4 online: [http://wcel.org/sites/default/files/publications/WCEL\\_Mining\\_report\\_web.pdf](http://wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf).
- 5 Although the claim holder must stay 75 metres away from a residence. *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004, s. 2.1; *Mineral Tenure Act*, RSBC 1996, c. 292, ss. 19 & 11(2).
- 6 Monte Paulsen. "Company Grabs Mining Rights to Premier's Land." *The Tyee*. April 19, 2005. Online at: <https://thetyee.ca/News/2005/04/19/CompanyGrabsMining/>.

- 7 BC Ministry of Energy and Mines, *Mineral Titles Information Update No. 40 - Mining and Placer Leases Explained* (2017 March 28) at p. 1; *Mineral Tenure Act Regulation*, B.C. Reg. 529/2004, s. 17.
- 8 *Mineral Tenure Act*, RSBC 1996, c. 292, s 42(4): "If the chief gold commissioner is satisfied that the recorded holder has met all of the requirements...the chief gold commissioner must issue a mining lease." See also *MTA*, ss 42(5), 48(2).
- 9 "Investing in Quebec's Mining Sector." Government of Quebec. Ministère de l'Énergie et des Ressources Naturelles. 2018.
- 10 Judah Harrison, *Too Much at Stake: The Need for Mineral Tenure Reform in British Columbia* (Ecojustice, 2010) at p. 38 online: [https://www.ecojustice.ca/wp-content/uploads/2014/11/Ecojustice\\_BC\\_Mining\\_Tenures\\_web\\_final.pdf](https://www.ecojustice.ca/wp-content/uploads/2014/11/Ecojustice_BC_Mining_Tenures_web_final.pdf).
- 11 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) p. 24-26 online: [http://wcel.org/sites/default/files/publications/WCEL\\_Mining\\_report\\_web.pdf](http://wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf).
- 12 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at p. 23.
- 13 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) See suggestions made at pp. 21 and 29.
- 14 See the *Mines and Minerals Act*, RSA 2000 c M-17, ss 8(1)(b) and (c), which allow the relevant minister to expropriate "any estate or interest in minerals," and to "cancel or refuse to renew" a lease agreement where she determines that further activity is "not in the public interest."
- 15 *Mineral Resources Act*, SNS 1990 c 18 s 22(8) gives the relevant minister discretion *not* to grant a mining lease if "the Minister deems that it would not be in the best interest of the Province to do so."
- 16 *Mineral Resources Act*, RSPEI 1988 c M-7 s 23 gives the relevant minister discretion to refuse to accept or defer the acceptance of an application for a mining lease if "the acceptance of the application is not in the best interests of the province or would hinder mineral development of any area."
- 17 The New Mexico Mining Act 1978. § 69-36-13(B) states, "[a] person shall not be issued a permit to conduct exploration if that person's failure to comply with the provisions of the New Mexico Mining Act, the regulations ... or a permit issued under that act has

resulted in the forfeiture of financial assurance."

- 18 *Mining Act 1992* (NSW), s 22 [Australia].
- 19 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at pp. 4-5 online: [http://wcel.org/sites/default/files/publications/WCEL\\_Mining\\_report\\_web.pdf](http://wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf).
- 20 Personal communication of Glenn Grande with Keith Robinson, October 27, 2018. For a number of other examples, see Kendyl Salcito, "War Brewing Over Mining Rights in Rural BC (The Tyee, June 14, 2006).
- 21 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at pp. 4-5.
- 22 BC Ministry of Forests, Lands and Natural Resource Operations, *Crown Land: Indicators and Statistics Report 2010* (2011), at p. 12.
- 23 BC Ministry of Forests, Lands and Natural Resource Operations, *Crown Land: Indicators and Statistics Report 2010* (2011), at p. 15.
- 24 BC Ministry of Forests, Lands and Natural Resource Operations, *Crown Land: Indicators and Statistics Report 2010* (2011) at iii.
- 25 *Surface Rights Act*, RSA 2000, c S-24, s. 12.
- 26 *Mining Act* RSO 1990, c M-14, s. 35.1(2).
- 27 *Mining Act* SNB 1985, c M-14.1, s. 68(1)(c)(iv)(B)(II); however, clause 68(1)(c)(iv)(C) allows security from the mining lease applicant instead of consent from the landowner.
- 28 *Mining Act* SNB 1985, c M-14.1, s. 68(1)(c)(iv)(B)(II).
- 29 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 96.
- 30 See for example *Mineral Tenure Act*, RSBC 1996, c. 292 s. 14(5).
- 31 Resolution B80, 2013 Union of BC Municipalities Convention.
- 32 "Far North" in the ON *Mining Act* has the meaning defined in section 2 of Ontario's *Far North Act*, 2010, SO 2010 c. 18.
- 33 *Mining Act*, RSO 1990 c. M 14, s. 30.
- 34 *Mining Act*, RSO 1990 c. M 14, s. 35.

- 35 *Far North Act*, 2010, SO 2010 c. 18, s. 12(1).
- 36 *Northwest Territories Mining Regulations*, SOR/2014-68, s 5(d).
- 37 *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7, s 44.
- 38 *Land Use Planning and Development Act*, CQLR 2017, c. A-19.1, s. 6(7).
- 39 *Mining Act*, CQLR 2013, c M-13.1, s 304.1.1.
- 40 *Mining Act*, CQLR 2013, c M-13.1, s 304.
- 41 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at p. 16 online: [http://wcel.org/sites/default/files/publications/WCEL\\_Mining\\_report\\_web.pdf](http://wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf).
- Also see Robin M Junger, "Aboriginal Title and Mining in Canada—More Questions than Answers," *61st Annual Rocky Mountain Mineral Law Institute Proceedings* (Rocky Mountain Mineral Law Foundation, 2015).
- 42 Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at p. 18 online: [http://wcel.org/sites/default/files/publications/WCEL\\_Mining\\_report\\_web.pdf](http://wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf).
- 43 *Mineral Titles Act 2010* (NT), s 21 [Australia]; however, landowners (including Aboriginal landowners) "must not unreasonably withhold consent" (paragraph 21(5)(a)).
- 44 25 USC Ch 12, §396a.
- 45 *Mining Act* RSO 1990, c M.14, s 204(2)(a).