

BC MINING LAW REFORM



Polluter Pays

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

Mining can do long-lasting damage to entire watersheds—and to fish populations, clean water supplies, wildlife habitat and human health. Mining pollution can also impose direct costs on neighbours, Indigenous Nations, industries that rely on a clean environment, and on taxpayers—who often bear the costs of mine cleanup and pollution abatement.

BC's laws have traditionally not required industry to pay for the costs associated with mining pollution. As a result, there has been little incentive for companies to invest in environmentally sound solutions to avoid pollution. Given a choice between spending money on cleaner technology or continuing to pollute for free, many firms have chosen the "free" option of polluting. If BC's mining laws are going to protect our land, air and water, they must require polluters to pay the true costs of their pollution—and motivate them to reduce harmful practices that create environmental costs.

In efforts to reduce pollution and create incentives to improve industry's environmental performance, many countries have now incorporated the polluter pays principle into their legislative and policy frameworks.¹ "Polluter pays" means that whoever causes environmental degradation should bear the full cost. Although this fundamental principle has been widely accepted by BC and Canadian governments,² in practice polluters are still not paying for the cost of their pollution.

In BC, the mining industry has never been required to fully pay for the damage it does to the environment. Contaminated streams and vanishing fish runs have been treated as "externalities" for which mining companies have not had to take responsibility. Mines that impose pollution on Indigenous Nations, private landowners, tourism operators and other local businesses rarely provide adequate compensation for those damages, and there are few effective options for affected groups or individuals to seek redress.

The following recommendations are intended to address these problems and to support effective implementation of the "polluter pays" principle in BC's mining laws. Their adoption would help ensure that mining companies in this province pay for, at minimum:

- the full costs of mine cleanup/reclamation; and
- damages caused to the environment, Indigenous Nations and third parties as a result of normal operations, as well as accidents and post-closure events.

In addition, these recommendations would powerfully improve the industry's overall environmental performance.

Full financial security for cleanup/reclamation

To implement the polluter pays principle in mining regulation, companies must be required to provide full financial security for the anticipated costs of cleanup before they begin operations. Mining companies are often highly speculative enterprises and insolvency is common within the industry.³ As a result, many mining companies have been unable to pay for cleanup and reclamation at polluting mine sites. When governments have not required adequate security amounts from companies, the unpaid mine cleanup bills have fallen to the taxpayer.

For example, federal taxpayers are already on the hook for more than \$700 million in remediation costs at Yukon's Faro Mine and \$1 billion at the NWT's Giant Mine—with no confirmation yet that these are the full and final costs.⁴ In BC, the remediation of Britannia Mine near Squamish cost taxpayers an estimated \$46 million but also requires ongoing water treatment at a cost of \$3 million per year, payable by the public in perpetuity.⁵

BC's legislation has fallen behind other leading jurisdictions where taxpayers are protected from these risks by requirements that companies provide security for 100% of projected cleanup and reclamation costs.⁶ For example, one Canadian mining company has provided full security for estimated reclamation costs (\$560 million) at its Alaskan mine because the state government requires it. In contrast, the same company's BC mines have *unsecured* reclamation costs of \$700 million dollars because BC's laws are much weaker.⁷ The company fully protects Alaskans from the predicted long-term costs of its mining operations, but is not required to protect British Columbians in the same way.

In total, BC's Auditor General estimated that a \$1.2 billion unfunded taxpayer liability was produced because the province was not taking full security from mining companies for cleanup costs.⁸ This liability rose to almost \$1.6 billion by 2016, according to BC's Chief Inspector of Mines.⁹

Underestimating cleanup and reclamation costs

While BC has not required companies to post full security for estimated cleanup costs, there is also reason to fear that our laws are resulting in dramatic underestimates of what those costs will actually be. That is partly because, in our current system, cleanup and reclamation estimates are prepared by mining companies. These companies have clear incentives to minimize predicted costs (the higher their reclamation estimate, the more money the company must spend on security).¹⁰ On top of that, the company-prepared estimates are reviewed by a regulator that the Auditor General has concluded has an inherent conflict of interest that is rooted in its dual mandates of promoting and regulating the industry. This conflict is particularly problematic when the regulator is determining how much security to demand from a company. The ministry's interest in seeing the

mine proceed may result in acceptance of a company's estimates, where an objective assessment would have produced a much higher projected cost. The public needs to have confidence that BC is accurately estimating cleanup costs and not relying on numbers that are skewed by a desire to minimize costs and encourage mining development.

Returning securities too soon

Beyond concerns about the accuracy of cleanup cost estimates, BC laws create additional risks for taxpayers by allowing securities to be released back to companies prematurely. In BC, securities can be released once the mine has been reclaimed to a satisfactory level, as determined by the Chief Inspector.¹¹ There is, however, a significant risk that environmental conditions will degrade over time after a mine is closed, even where all regulatory and permit conditions are met.¹² By not holding back some security in anticipation of such events, BC exposes taxpayers to all unforeseen long-term costs after a mine has been closed.

Other jurisdictions have laws to protect the public from these potential liabilities. In Wyoming, the *Environmental Quality Act* provides for up to 75% of the security to be released on completion of reclamation, with the remaining 25% held for a minimum additional period of five years to assure proper revegetation and restoration of groundwater. Other jurisdictions like Montana allow public input prior to the release of securities, and some allow affected citizens to appeal security release decisions while the government holds the bond until a decision is made.¹³ These provisions provide some protection against the public being burdened with costs because of a premature security return. BC's laws do not provide these safeguards.¹⁴

Acid rock drainage and security for "forever" cleanup costs

Inadequate security for the costs of remediating acid rock drainage-generating mines is particularly problematic. Acid rock drainage and metal leaching can continue indefinitely and require ongoing water treatment (some European mines from medieval and Roman times continue to pollute today).¹⁵ The province has estimated that approximately 10% of the major mines in BC either have water treatment facilities or will require them in the future.¹⁶ While some jurisdictions (e.g. Northwest Territories, New Mexico, Yukon, Wisconsin, and Manitoba)¹⁷ ban any mine that would require long-term water treatment, BC not only permits these types of mines but routinely allows them to operate without full security. In 2016 the Auditor General estimated there was a security shortfall of \$730 million in BC for these high-risk operations alone.¹⁸

1. **RECOMMENDATION: Require mining companies to provide security for 100% of independently verified cleanup and reclamation cost estimates before operations begin.**
2. **RECOMMENDATION: Protect against the premature return of securities by mandating holdbacks and providing for public input and appeal opportunities for security release decisions.**
3. **RECOMMENDATION: Mandate regular public disclosure of the estimated liability and corresponding security amounts held by the province for each mine in BC.**

Coverage for accidents and disasters

While BC is now taking steps to improve the adequacy of securities taken for projected mine reclamation costs, it continues to ignore the need for financial assurance for unplanned but probabilistic accidents (like Mount Polley). Canada's Ecofiscal Commission calls this a "missed opportunity to lower the risk and potential social costs of mining disasters."¹⁹

Mandatory insurance requirements

Mandatory insurance requirements are one means by which BC could ensure that polluters, not the public, pay for unexpected mining accidents. Insurance requirements can also deter poor environmental behaviour, resulting in fewer accidents and reduced impacts.²⁰ The risk assessment performed by the insurance underwriter during the insurance policy approval process has a disciplining effect on operators, which results in fewer accidents and lower consequences when accidents do happen.²¹ When insurance is required, irresponsible or exemplary behavior is reflected in insurance rates—which strongly incentivizes good behaviour. Overall, mandatory insurance can help reduce pollution and taxpayer cleanup costs.²²

BC does not currently require that mining companies carry insurance to cover the costs of unintended disasters, and many choose not to.²³ Mount Polley mine owner, Imperial Metals Inc., chose not to hold enough insurance to cover the costs associated with its 2014 tailings dam disaster, where 25 million cubic metres of wastewater and tailings were released into Quesnel Lake, one of BC's most important sockeye salmon-rearing lakes.

Imperial Metals' \$25 million in insurance was quickly exhausted, leaving other costs to likely be borne by the public, Indigenous peoples, innocent neighbours and the environment.²⁴

Industry-wide funds for large-scale accident and disaster compensation

While mandatory insurance can provide a significant level of protection against unfunded cleanup costs, insurers may not provide coverage high enough to provide full compensation in an extreme event like the Mount Polley disaster. To protect against the costs of a risk of that magnitude, Canada's Ecofiscal Commission recommends pooling risks and costs across companies or sectors.²⁵ Similarly, a 2016 report for the Union of BC Indian Chiefs recommended the creation of an industry-funded pool to cover catastrophic events if a polluter is unable to pay.²⁶ The report suggested a possible levy on mine production to create an industry-wide fund to finance clean-up of major accidents when the mine operator cannot carry it out and there is insufficient insurance in place.²⁷

There are a number of existing schemes that BC can look to for examples of pooled industry funds to protect the public from large-scale mining disasters—for example, the Canadian Ship-Source Oil Pollution Liability and Compensation Framework sets aside funds raised by a charge on each barrel of oil shipped to cover the cleanup costs of infrequent but massive accidents and spills.²⁸ Similarly, under the new federal *Pipeline Safety Act* regime, pipeline companies will have to show that they can readily access \$1 billion to clean up a spill—and a backup industry fund will be created to further protect taxpayers.²⁹

In addition to insulating the public from the costs of mine pollution, BC's laws need to better compensate parties that are directly affected by mining accidents and pollution. An event like Mount Polley can hurt Indigenous cultures and economies that depend on aquatic resources, ruin local tourism businesses, and decrease water quality and property values for residents. Under the existing system, victims must present their claim to the mining company and, if they disagree with the company's compensation decision, their only recourse is to the courts—a time consuming and expensive affair that may fail because of technicalities or bankruptcy.³⁰

In contrast, victims of oil tanker spills may simply recover for property damage, cleanup costs and certain loss of income from the industry fund created by the Canadian Ship-Source Oil Pollution Framework.³¹

Other jurisdictions have created efficient and fair legal mechanisms that enable victims to seek redress for impacts efficiently, via an independent process—BC can and should follow suit. More specifically, as recommended by the Union of BC Indian Chiefs in a recent report on financial responsibility in the mining sector, BC should follow leading jurisdictions by establishing an arm's-length body to adjudicate compensation claims for losses associated with mining activities or accidents.³²

4. RECOMMENDATION: Require that mining companies carry private insurance to fully cover the cost of unplanned but probabilistic events like tailings spills (i.e. beyond required securities for predicted cleanup and reclamation costs).

5. RECOMMENDATION: Establish a pooled industry fund to cover the costs of disasters that private insurers won't cover.

6. RECOMMENDATION: Establish an independent claims process to adjudicate disputes over third-party compensation for mine pollution impacts.

Civil liability

British Columbia's courts could play a significant role in ensuring that polluters pay for the costs of their mining activities in BC. However, existing civil liability options offer little recourse for groups and individuals impacted by mine pollution or accidents.³³

Theoretically, a company could be sued for "private nuisance" if it pollutes and causes impacts. However, before an individual can sue a company for private nuisance, they have to demonstrate a property interest in damaged land, air or water.³⁴ Those without a property interest can sometimes sue a company for "public nuisance" but there are formidable barriers to success via this approach.³⁵ Generally, citizens can't sue for public nuisance unless they suffered "special damage" that is clearly distinguishable from the damage caused to society at large. Otherwise, the Attorney General controls such lawsuits.³⁶ These strict requirements create significant barriers for citizen plaintiffs and significantly curtail the role of our courts in upholding the polluter pays principle and delivering justice for victims of mining pollution in BC.

Law Reform Commissions in both Ontario and BC have concluded that BC's current approach inappropriately grants the Attorney General control over access to the courts in public nuisance cases involving "public rights."³⁷ These Commissions have recommended expanding the law of standing for environmental issues and public nuisance cases.³⁸

Other jurisdictions provide more public access to civil remedies for environmental damage, and provide examples that BC could follow. In the US, federal laws allow citizens to sue to compel compliance from polluters who are in violation of the law and also allow for suits

against government bodies for failing to perform their duties to protect the environment.³⁹ For example, under the US *Clean Water Act*, citizens are empowered to bring private suits and many have taken advantage of the opportunity, leading to far more comprehensive enforcement of this key environmental law.⁴⁰ Requirements for legal standing are also less strict⁴¹ and citizens have standing to bring claims against violators even after they have come into compliance with the law. This provision promotes justice for victims of industrial pollution and can help in deterring future violations.⁴²

7. **RECOMMENDATION: Expand the civil liability of mining companies to ensure that they pay the full cost of their pollution by:**
 - Liberalizing the rules on legal standing to enable citizens to bring public nuisance cases without having to prove a personal, proprietary or pecuniary interest, or special damage—and without needing permission from the Attorney General; and
 - Enabling "citizen suits" where individuals can sue companies civilly to compel compliance from polluters who are violating the law—and can sue government bodies directly for failing to perform their statutory duties to protect the environment.

Pollution discharge fees

Mining companies in BC are charged a fee for each type of pollutant they discharge onto adjacent lands or into nearby water bodies. These charges are intended to reflect the impact that specific pollutants have on the environment—if done properly they would be an example of the "polluter pay" principle in action. However, current fees are out-of-date and, in many cases, do not reflect the environmental impact or value of ecosystem services harmed by the discharge of specific pollutants.⁴³

For example, MOE classifies selenium as a metal and calculates the selenium discharge fee at the *tonnage* level, even though it is now known to be toxic in trace amounts.⁴⁴ Studies have found that high selenium concentrations in some portions of the Elk River watershed (an intensive coal-mining district) in southeastern BC are resulting in deformities and reproductive failure in trout and fish mortality of up to 50%. Yet, waste discharge fees remain unchanged.⁴⁵

8. **RECOMMENDATION: Revise pollution discharge fees so that they are defensibly proportionate to the environmental impacts and ecosystem costs associated with the discharge of specific pollutants.**

Endnotes

- 1 See *United Nations Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) at Principle 16.
- 2 For example, see Government of Canada, *Canada's Green Plan for a Healthy Environment*, (1990) p. 16; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33; and *J.I Properties Inc. v. PPG Architectural Coatings Canada Ltd.*, 2015 BCCA 472.
- 3 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (8 March 2017) (Victoria: BC).
- 4 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (8 March 2017) (Victoria: BC).
- 5 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016) at p. 50.
- 6 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (8 March 2017) (Victoria: BC) at pp. 13, 43.
- 7 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (8 March 2017) (Victoria: BC) at p. 13.
- 8 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: 2016) at p. 6.
- 9 Annual Report of the Chief Inspector of Mines of British Columbia, 2016. British Columbia Ministry of Energy, Mines and Petroleum Resources. p. 17.
- 10 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 4.
- 11 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016) at p. 42.
- 12 Maya Stano, *The Raven Mine: A Regulatory & Fiscal Black Hole?* (Victoria: Environmental Law Centre, 2011) at p. 28.
- 13 Maya Stano, *The Raven Mine: A Regulatory & Fiscal Black Hole?* (Victoria: Environmental Law Centre, 2011) at p. 28.

- 14 Maya Stano, *The Raven Mine: A Regulatory & Fiscal Black Hole?* (Victoria: Environmental Law Centre, 2011) at p. 28.
- 15 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (8 March 2017) (Victoria: BC) at p. 7.
- 16 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016) at p. 5.
- 17 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (8 March 2017) (Victoria: BC) at p. 44.
- 18 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016) at p.44.
- 19 Canada's Ecofiscal Commission, *Responsible Risk: How putting a price on environmental risk makes disasters less likely* (2018) at v.
- 20 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 63.
- 21 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 63.
- 22 Calvin Sandborn, *et al*, *Preventing Toxic Pollution: Toward a British Columbia Strategy* (Vancouver: Press Gang Printers, 1991) at pp. 124-125.
- 23 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 61.
- 24 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 62.
- 25 Canada's Ecofiscal Commission, *Responsible Risk: How putting a price on environmental risk makes disasters less likely* (2018) at p. vii.
- 26 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016); Also, note that under the New Zealand Resource Management Act, security may be required to address "adverse effects on the environment that become apparent during or after the expiry" of the permit. This ensures that costs for unexpected occurrences that are not considered at the initial permit application stage will also be covered by the company rather than by government; New Zealand Resource Management Act 1991, Public Act 1991 No 69, s.108A(2)(d).

- 27 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 55.
- 28 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 55.
- 29 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p.24.
- 30 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 53.
- 31 *Marine Liability Act*, S.C. 2001, c. 6, ss. 51, 71 and 77.
- 32 Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbia Indian Chiefs, 2016) at p. 55.
- 33 Calvin Sandborn, et al, *Preventing Toxic Pollution: Toward a British Columbia Strategy* (Vancouver: Press Gang Printers, 1991).
- 34 Calvin Sandborn, et al, *Preventing Toxic Pollution: Toward a British Columbia Strategy* (Vancouver: Press Gang Printers, 1991).
- 35 Calvin Sandborn, *Law Reform for Sustainable Development in British Columbia*, (British Columbia: Canadian Bar Association, 1990) pp. 173-178.
- 36 Calvin Sandborn (ed.), *Maintaining Natural BC for Our Children*, (Victoria: Environmental Law Centre, 2012) at, p. 126.
- 37 Calvin Sandborn, *Law Reform for Sustainable Development in British Columbia*, (British Columbia: Canadian Bar Association, 1990) p. 176.
- 38 Calvin Sandborn, *Law Reform for Sustainable Development in British Columbia*, (British Columbia: Canadian Bar Association, 1990) p. 176.
- 39 Karl Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, (Colorado: Pace Environmental Litigation Clinic) at p. 65.
- 40 Karl Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, (Colorado: Pace Environmental Litigation Clinic) at p. 67.
- 41 Karl Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, (Colorado: Pace Environmental Litigation Clinic) at p. 66.
- 42 *Friends of the Earth, Inc. et al. v. Laidlaw Environmental Services Inc.*, 528 U.S. 167 (2000).

- 43 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016), at p. 6, 85.
- 44 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Office of the Auditor General, 2016) at p. 85.
- 45 *Waste Discharge Regulation*, BC Reg 320/2004, Schedule 3.