Modernizing Mineral Tenure - Some Examples in Canada

Respecting no-go zones and decisions by local residents, municipalities and First Nations

RECOMMENDATIONS	EXAMPLES
1. Ensure that no mineral tenures or exploration activities can be approved without the free, prior, and informed consent of affected Indigenous peoples.	• Quebec's JBNQA's Modern Treaty requires the consent of the Cree, Inuit and Naskapi Nations on Category I lands and mandatory accommodation on Category II lands, as well as a mandatory joint-EA and consultation process before mining leases for all their traditional territories (64.3% of the province's territory with significant mining activities). • New NWT law requires Benefit Agreements with affected Indigenous communities as a condition to obtain a mining lease. NWT can conduct environmental impact assessments and First Nation consultations before exploration work taking place in areas covered by the Mackenzie Valley Environmental Impact Review Board. • In the Yukon, the Court of Appeal in the *Ross River Dena Council* v. *Government of the Yukon* decision late in 2012 held that the Government of the Yukon "has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising the Ross River Area are to be made available to third parties", as well as prior to allowing mineral exploration activities. • The Yukon's draft Mineral Development Strategy (MDS) Panel report, released December 2020, recommends that the Yukon enact "new mineral resource legislation and regulations [that] are aligned with Yukon's modern treaties, Canada's *Constitution Act*, the *United Nations Declaration on the Rights of Indigenous Peoples* and current case law" explicitly including the principle of free, prior, and informed consent. • Since 2009, Ontario divides exploration work in two categories: one for lower environmental incidence work requiring a mandatory 'Exploration Plan' to be submitted to the Ministry of Northern Development and Mines (MNDM), affected owners and First Nations prior to conducting the work for information and consultation purposes; one for higher environmental incidence (heavy machinery for drilling, etc.) requiring a 'Permit' and a financial assurance, submitted for consultations to First Nations and on a public registry prior to commencing the work. • Internationally, countries or regions legislatively requiring Indigenous consent include Ecuador, Philippines, Guyana, five states in Australia, and New Zealand.

2. 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.	• Since 2013, Quebec requires written consent of landowners prior to exploration work (§ 65, 235, *Mining Act*). • In 2009, Ontario eliminated mining rights under private properties in Southern Ontario and permits northern landowners to request that the Minister issue an order doing the same (*Mining Act*, R.S.O. 1990, c. M.14, § 35.1). • In Alberta, "no person shall conduct exploration on private land, except with the consent of the owner of the land or a person authorized by the owner to give that consent" (*Surface Rights Act*, RSA 2000, c. S-24, § 12(1); *Exploration Regulation*, Alta Reg 284/2006, § 8(1)(a)). • Yukon's draft MDS Panel report recommends that mineral staking and prospecting be prohibited on private lands without the written consent of the landowner.
3. 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. 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.	• Quebec's municipalities and regional county governments can designate no-go zones for mining in their land-use plans (§ 304.1.1 *Mining Act*, §§ 6(7), 53(7) *Land Use Planning & Development Act*). The Quebec government can also designate no-go zones for "public interest purposes" as listed under section 304.1 of the *Mining Act* (e.g., protected areas). • Ontario's *Mining Act* specifies 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 (*Mining Act*, RSO 1990, c. M.14, § 204(2)(a).) • In Nova Scotia, no mining is permitted in protected water areas, including areas surrounding any source or future source of water supply that have been protected by regulation (*Nova Scotia Environment Act,* SNS 1994-95, c. 1, §§ 106(1)(5)(6); see, e.g., *North Tyndal – Designation and Regulations*, NS Reg 200/92, § 12). • NWT's Land Use Planning system can protect cultural, social, economic or ecological sensitive areas from mining, while NWT's new law introduces Temporarily Restricted Zones, allowing Indigenous communities, organizations or members of the public to also request no-go zones for the government to implement. • In the Yukon, all proposed mining activities must be evaluated to determine whether they are in conformity with existing land use plans (*Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c. 7, § 44). Noting that, "Until land use plans are completed in all parts of the Yukon, mining industry proponents and investors will remain uncertain as to whether or not there are potentially un-mitigatable concerns about any given exploration area or mining project", Yukon's recent MDS Panel report recommends expediting completion of Regional Land Use Plans and "establishing time-limited staking moratorium parcels to tightly encompass specific high-value environmental, social and cultural attributes" upon initiation of planning processes. • The Yukon MDS Panel report also recommends that mineral staking and prospecting be prohibited within municipal boundaries without the written consent of the municipality.

5. 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; and • 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. 6. Enable (at the request of Indigenous or local governments) revocation of exploration and mineral development rights that are inconsistent with land-use plan designations.	• Nova Scotia can refuse a mining lease if "not be in the best interest of the Province to do so" (§§ 18, 22(8), *Mineral Resources Act*). • PEI can refuse or defer the acceptance of the application of a mining lease if "not in the best interests of the province" (§ 23, *Mineral Resources Act*). • Quebec's mining lease is conditional to completing an environmental impact assessment and public consultations, submitting a closure plan and financial assurance, and obtaining an environmental permit (§ 101 *Mining Act*; §§ 22, 35.5 *Environmental Quality Act*). • Quebec can also revoke a mining claim for "public utility purposes" with compensation limited "to the amounts spent" by the proponent (§ 82, *Mining Act*). • Alberta can expropriate "any estate or interest in minerals" and "cancel or refuse to renew" a mining lease when "not in the public interest" (§ 8(1) *Mines & Mineral Act*). • Yukon's recent MDS Panel report recommends "the addition of reconciliation to the list of reasons the Yukon Government may use to justify a prohibition of entry order for prospecting, staking and mining".