

BC FIRST NATIONS ENERGY  
AND MINING COUNCIL



# INDIGENOUS SOVEREIGNTY

CONSENT FOR MINING ON  
INDIGENOUS LANDS

Carving: Myles Edgars, Haida

□ **FINAL REPORT**



BC First Nations Energy  
and Mining Council

JANUARY 2022

# About the cover

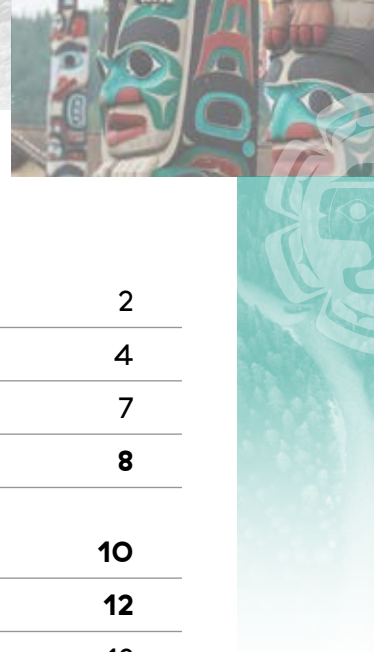
The cover design for this project features the Watchman image. We felt the Watchman conveyed the essence of this project – the Watchman guards and watches over our lands, our People and all our Relations today and for future generations.

Also, this image is carved out of argillite mined on Haida Gwaii. Mining is not new to our People.

Carved by Myles Edgars.



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# Message from the CEO

Dear Reader,

I am pleased to share with you the BC First Nations Energy and Mining Council (FNEMC) final report on our Implementing Consent for Mining on Indigenous Lands Project. The Report is the culmination of a project to articulate a global and regional perspective on free,



prior and informed consent for mining on Indigenous lands located in the province of British Columbia. It incorporates the contributions of international and British Columbia experts, as well as Indigenous community perspectives from those who have first-hand experience dealing with mining projects.

Through this project, the FNEMC has developed recommendations for mining law in BC to recognize and affirm the standards set out in the UN Declaration on the Rights of Indigenous Peoples and to implement the government of British Columbia's Declaration on the Rights of Indigenous Peoples Act. As Indigenous nations in BC re-establish sovereignty over our lands and exercise self-

determination, we need new tools informed by our governance; not the colonial structures modeled on 19th century British law. Fundamental changes are needed to BC's mining laws. In the meantime, the 25 recommendations set out in this report can be implemented in advance of, or in some cases, as part of, the wholesale reforms that we have sought for decades.

The FNEMC is grateful to the experts who graciously provided their time and expertise, and to those who spent time contributing community perspectives over the course of the project. I thank Allen Edzerza, who led the project, and Karen Campbell, who compiled the proceedings and prepared the Final Report.

We are particularly grateful to the University of British Columbia Sustainability Scholars Program, through which we benefited from the contribution of Faculty of Law student Samantha Wex.

## MESSAGE FROM THE CEO

We also wish to recognize the special contributions of Dr. Sheryl Lightfoot, and the thoughtful reviews by Nuskmata (Jacinda Mack), Tara Marsden and Corrine Porter. These perspectives help this project to reflect the lived experiences of Indigenous peoples.

The project was made possible through the generous support of the Law Foundation of British Columbia. We are grateful for the Law Foundation's commitment to Indigenous led efforts to facilitate reconciliation. I would also like to thank the New Relationship Trust for a much-appreciated donation, and I extend a special thank you to Stacey Edzerza-Fox, Merle Alexander, and Mary Ellen Turpel-Lafond for their invaluable efforts to review and provide input to strengthen the report.

For my part it has been an immense privilege to work with a such a talented team of dedicated and committed people. I am proud of the work we did together, and I would like to dedicate this Report in honour of my late Mother, Theresa Tisiga who instilled in me a love for dena kayeh (our land).

I hope the report will help inform the work of your communities and serve as an important tool in re- building Indigenous self-determination.

Sincerely,



Dave Porter

Sastá' ts'éh (Bear Sinew) of the Kaska Nation  
Chief Executive Officer  
First Nations Energy and Mining Council  
January 2022



**BC First Nations Energy  
and Mining Council**





# Message from a Tahltan Elder

My name is Allen Edzerza and my traditional name is Ma-Lah. I am a Tahltan Elder and a member of the Tahltan Elders Council. My parents, who have crossed over to the Spirit World, were George and Grace Edzerza.

I would like to thank Dave Porter for trusting me to lead this very important project. Working with Karen Campbell to merge our perspectives and then collaborating with Roger Handling to design and present the project publications was an interesting and growing



experience for me. We had many lively discussions. I am delighted that the final cover design for this project led us to the Watchman image. We felt the Watchman conveyed the essence of this project – the Watchman guards and watches over our lands, our People and all our Relations today and for future generations. Also, this image is carved out of argillite mined on Haida Gwaii. Mining is not new to our People.

This project's journey allowed me to cross paths with many recognized Indigenous experts that gave their time with the knowledge that this project was advancing human rights through the United Nations Declaration on the Rights of Indigenous Peoples. We all believe this project will strengthen us in exercising sovereignty over our lands and resources. I learned a great deal from them and will be forever grateful they shared their knowledge and experiences with our team.

As we hosted the webinars to explore the ideas set out in the Discussion Paper, the interest of First Nations across BC was apparent through their participation, which has guided the content of our Final Report.

There are many moments that makes this a very important time in history. The confirmation of the graves of our children who did not return from residential schools; the massive wildfires that burned large tracts of forested lands, homes and businesses in BC; a pandemic that never ends, and the destruction of all major highways leading out of the Lower Mainland and damage to communities as a result of unprecedented flooding to name a few. These events will only become more frequent – consent is an important tool as we exercise our sovereignty and take a leadership role in protecting Mother Earth.



## MESSAGE FROM A TAHLTAN ELDER

Our People are again exercising our sovereignty. We are challenging the free entry mining system in court; directing mining companies to leave our territories; and we are standing up against the cumulative impacts of decades of ill considered resource decisions on our lands. It is my hope that this Final Report will be useful as our people exercise self-determination in the years ahead. Being a part of this team is an honour and an experience I will remember forever.

All my Relations. Meduh.



Allen Edzerza

Tahltan Elder



Photo: GTS Productions



Photo: Nick Kwan





# PREFACE

Turning the UN Declaration on the Rights of Indigenous Peoples into practice is one of the many challenges that Indigenous peoples face. Nation–state governments are increasingly committing to decolonization and reconciliation – British Columbia’s 2019 *Declaration on the Rights of Indigenous Peoples Act* is a globally significant development. That the Government of Canada has now passed its United Nations *Declaration on the Rights of Indigenous Peoples Act* only deepens this state commitment. The crucial task now is for these laws to change state behaviour to value and recognize that Indigenous peoples are sovereigns and have the right of self–determination.

I was delighted to be invited to contribute as an expert and to reflect on how this project is situated in the international context. As a member of the UN Expert Mechanism on the Rights of Indigenous Peoples, I’m seeing first–hand how critically important it is that state legal and policy systems transform to adapt to Indigenous laws and cultures. I appreciate that this project – and this report – endeavour to do just that – collect and share steps that Indigenous peoples are taking to self–determine and exercise their sovereignty.

This project has identified practical tools to enable Indigenous peoples to approve and regulate mining activities on their lands. It recognizes that existing provincial mining laws are antiquated, out of alignment with international Indigenous human rights standards, and also, not going to be changed overnight. By proposing practical approaches that Indigenous peoples can use to insert their values and voices into the existing state legal and policy framework, this project makes an important contribution to the assertion of Indigenous laws and sovereignty. I look forward to seeing these recommendations implemented by Indigenous nations throughout BC and by the BC government.

Dr Sheryl Lightfoot

Canada Research Chair in Global Indigenous Rights and Politics  
Associate Professor, First Nations and Indigenous Studies and Political Science  
Member UN Expert Mechanism on the Rights of Indigenous Peoples



# INTRODUCTION

Photo: Sergei Bachlakov

This is a dynamic time. Indigenous resilience is now driving new reconciliation initiatives. Crown governments are acknowledging that reconciliation requires deep legal and structural changes. The United Nations Declaration on the Rights of Indigenous Peoples (**UN Declaration**) is a globally established human rights framework and is one means to advance these overdue changes.



Implementation of the UN Declaration is important for Crown governments in “unwinding centuries of colonialism,”<sup>1</sup> and the rights that it guarantees are the minimum standards for Indigenous peoples. Both Canada and British Columbia (**BC**) have passed legislation to implement the UN Declaration. The *Declaration on the Rights of Indigenous Peoples Act* (**Declaration Act**) is the BC law that implements the UN Declaration.

This *Implementing Consent for Mining on Indigenous Lands Project* is intended to take a complex legal concept — free, prior and informed consent— unpack it and develop options as to how it may practically apply to mining activities on Indigenous lands in what is now BC. It was conceived to bridge academic and international understandings of consent, toward a practical application for Indigenous peoples in BC. This report recognizes that approaches to mining and consent will continue to evolve; the ideas and recommendations here are first steps.

This project has evolved out of three interrelated developments:

- BC’s legal obligation to implement the *Declaration Act*, including the requirement to align BC’s laws with the UN Declaration;
- longstanding needs to update BC’s out of date mining law framework; and
- recognition of the shift toward new legal approaches to Indigenous rights at the international level.

This Final Report is intended as a guide for Indigenous peoples to consider how to revitalize our governance around mining activities, and specifically, support our Indigenous governing bodies (**IGBs**) to exercise sovereignty in advance of mining activities. Our use of the word “mining” throughout this report includes mineral and placer exploration.

The *Declaration Act* requires consistency between provincial laws, the UN Declaration, and Indigenous legal frameworks.<sup>2</sup> This necessitates transformative change in the relationships between the government of BC (**Province**) and Indigenous governments. Our recommendations identify transitional tools that Indigenous peoples and IGBs can employ in the context of the provincial mining framework. The goal of this project is to chart a path for Indigenous oversight of mining on Indigenous lands.





# 2

## FREE, PRIOR AND INFORMED CONSENT IS A GLOBAL HUMAN RIGHTS STANDARD

Photo courtesy of the Indigenous Leadership Initiative)

Free, prior and informed consent, or “**consent**” has evolved through the UN system and through other international instruments. It is a substantive human right that guarantees more than procedural recognition to Indigenous peoples.<sup>3</sup> Consent is woven into the Indigenous right of self-determination and into the exercise of our Indigenous sovereignty.



The UN Declaration is the primary international authority on consent. It was adopted by the United Nations General Assembly in 2007, after two decades of negotiations led by Indigenous peoples. It does not create new rights for us; we have always had these rights under international law.<sup>4</sup>


The UN Declaration affirms our inherent Indigenous rights as they have always existed; these rights have special meaning because of our unique historical, cultural and social circumstances.<sup>5</sup> It reflects the global consensus that human rights standards apply to all. That some states may not have voted in favour of a declaration does not matter; international declarations such as the UN Declaration are a global standard.<sup>6</sup>

Our emphasis in this project is on rights relating to free, prior and informed consent. Consent appears expressly in six articles and is woven throughout the UN Declaration.<sup>7</sup> Consent includes the right of self-determination, the right to be free from discrimination,<sup>8</sup> the right to participate in public life, and the right to own and control lands and resources.<sup>9</sup> Consent is not a veto. It is about implementing “clear, stable, transparent, legally mandated” structures and processes between Indigenous and Crown governments.<sup>10</sup>



Photo: Province of British Columbia Flickr, Creative Commons Licence



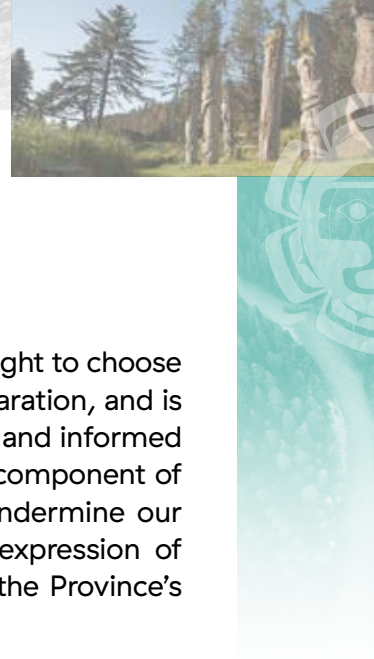


# 3

## CONSENT IS AN EXPRESSION OF INDIGENOUS SOVEREIGNTY

Photo: Kimberly Nesbitt

The UN Declaration expresses the universal, inherent human rights of Indigenous peoples and describes the positive obligations of a state (or country) to Indigenous peoples. The rights and principles in the UN Declaration support the expression of our sovereignty through consent. Some of these rights and principles are described below:



### 1. Self-determination

Self-determination is the right to determine one's status as a people — the right to choose how to self-govern. This right is expressly stated in Article 3 of the UN Declaration, and is grounded in the practices of Indigenous peoples.<sup>11</sup> The exercise of free, prior and informed consent is a key component of self-determination.<sup>12</sup> It is also an important component of decolonization, because it is a shift away from colonial approaches that undermine our sovereignty.<sup>13</sup> We must ensure that self-determination captures the full expression of our Indigenous laws, and is not simply a procedural right to participate in the Province's legal processes.<sup>14</sup>

### 2. Minimum Standards and Human Rights

The UN Declaration

*...is the most comprehensive international instrument on the rights of Indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.<sup>15</sup>*

The rights set out in the UN Declaration constitute the *minimum standards* for our survival, dignity and well-being.<sup>16</sup> They set a low bar and the Province should conduct itself well above the standards in the UN Declaration.

### 3. Self-government

Indigenous peoples are self-determining and make decisions through our own decision-making processes. The right to self-government is in Article 4 of the UN Declaration. Colonialism has dispossessed us of our lands and impeded our ability to exercise self-government. Consent is typically expressed by our governing bodies on our behalf.





## OUR INHERENT AND COMMON LAW TITLE AND RIGHTS

Photo: Pascal Bernardon

Throughout what is now BC, Indigenous title was never ceded and still exists. Our Indigenous identities continue to be tied to land, through our historical occupation and our reliance on it for our physical, spiritual and cultural survival.<sup>17</sup> Our connection to land is critical, and where extractive activities such as mining occur, consent is required.<sup>18</sup>



As Indigenous peoples, we continue to hold our Indigenous title in BC. We possess inherent rights and title, as well as constitutionally protected Aboriginal title and rights. This has always been the case, and now with the passage of the *Declaration Act*, the “functional reality” is that our path to certainty for activities on our lands and territories can only occur where we grant our consent.<sup>19</sup>

We distinguish Indigenous title and Aboriginal title:

- **Indigenous title** exists on land where we have always been, and continue to be, by virtue of our occupation and stewardship of those lands prior to colonization. It is not dependent on recognition by courts or Crown governments; and
- **Aboriginal title** is a Canadian common law right recognized and affirmed in section 35 of the *Constitution Act, 1982* that is a legal interest in the land, and includes the right to use and occupy the land, choose the uses to which the land is put, and which has an inescapable economic component. Canadian courts have established a common law test for Aboriginal title that looks at historic and continued use and occupation.<sup>20</sup>

In practice, there are multiple sources of law that we must consider and apply as we exercise consent over our lands. The primary source to guide us is our own inherent rights and Indigenous governance systems. In many cases we need to rebuild and revitalize our governance.

The UN Declaration – being legislatively implemented by both the Province and the federal government as a framework for reconciliation – requires upholding and respecting Indigenous human rights and requires that Indigenous–Crown relations not be confined to the common law framework.

We briefly describe the distinctions between Aboriginal law and Indigenous law to help put the approach of this report in perspective.

## 1. Canadian Common Law Aboriginal Rights

First Nations in BC have Aboriginal title and rights as the original occupiers of the land. Some First Nations have also entered into treaties with the Crown. Aboriginal and treaty rights are recognized and affirmed in section 35 of the *Constitution Act, 1982*. Decades of court cases have been fought to confirm the existence of these rights and our title; legal battles continue to this day.

Over the years, we have relied on these common law principles to protect our land and support our dealings with the Crown. Two landmark Supreme Court of Canada decisions indicate the standard of consent. Both *Delgamuukw v. British Columbia*<sup>21</sup> and *Tsilhqot'in v. British Columbia*<sup>22</sup> affirm that consent is required for activities taking place on Aboriginal title lands. In *Delgamuukw* the court confirmed that minerals are also part of Aboriginal title.<sup>23</sup> However, a court declaration is not required for Aboriginal title to exist – it has always been there and continues where there is sufficient, continuous and exclusive occupation.<sup>24</sup>





Crown courts also recognize our beneficial interest in our traditional lands even when those lands have not yet been “recognized” by the Crown as having Aboriginal title.<sup>25</sup>

In *Yahey v British Columbia*<sup>26</sup>, decided in July 2021, the BC Supreme Court determined that the cumulative impacts of decades of industrial development interfered with the Blueberry River First Nations’ ability to exercise their Treaty 8 rights. The Court in this case gave the Province six months to develop a plan to address piecemeal industrial activities, in order that the Province can continue to issue permits on Blueberry’s lands.<sup>27</sup> The decision signals deep change in the way cumulative impacts are considered in provincial permitting for resource development.

As helpful as these decisions are, they are not the best place to invoke and express Indigenous governance and laws, because they are based on Crown laws and common law, not Indigenous laws.

## 2. Indigenous Laws are our Inherent Sovereign Right

Indigenous laws have always existed and govern our communities and lands. These laws continue to apply in Canada despite the assertion of Crown sovereignty. The common law doctrine of continuity recognizes that our Indigenous laws still apply, despite the assertion of Crown sovereignty. This doctrine is the basis for the judicial finding of Aboriginal title in the *Tsilhqot’in* decision. It is also another foundation for the exercise of consent. However, it has been obscured and ignored in the provincial and federal legal system.<sup>28</sup>



Photo: Alex Hsuan Tsui





### 3. The BC Declaration Act: Crown Obligations

The commitment and advocacy of Indigenous peoples in Canada and internationally has resulted in new tools to support modern and effective Indigenous–Crown relations that invoke Indigenous laws and jurisdictions. This has come about in part through the Calls to Action of the Truth and Reconciliation Commission, the UN Declaration, and many other processes and forums.

BC passed the *Declaration Act* in 2019 and Canada passed its *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2021.<sup>29</sup> The focus of the rest of this report is on the *BC Declaration Act*.

The *Declaration Act* anticipates deep transformations in Indigenous–Crown relations, and the recognition of Indigenous sovereignty. The purposes of the *Declaration Act* are to affirm the application of the UN Declaration in BC, to contribute to the implementation of the UN Declaration, and to support relationships with IGBs.

The Province has three distinct obligations under the *Declaration Act*, each of which must be met in consultation and cooperation with Indigenous peoples:

- to take all measures necessary to ensure the laws of British Columbia are consistent with the UN Declaration;
- to develop an action plan to meet the objectives of the UN Declaration (**Action Plan**); and
- to report annually to the Legislature on progress.<sup>30</sup>

In addition, section 7 of the *Declaration Act* recognizes agreements between IGBs and the Crown. “Section 7 agreements” enable Cabinet to authorize a minister to make an agreement with IGBs to exercise statutory powers either jointly, or with the consent of an IGB.<sup>31</sup> The *Declaration Act* envisions that an IGB can exercise statutory powers like granting mineral tenures or issuing permits.

#### WHAT IS AN IGB?

The *Declaration Act* defines an Indigenous governing body or IGB as “an entity authorized to act on behalf of Indigenous peoples that hold section 35 rights”. This definition leaves it to Indigenous nations to self-determine who can enter into agreements on their behalf. The first half of this definition speaks to the principle of self-determination; the second half of the definition reflects the principle of the proper title and rights holder.<sup>32</sup>

Section 3 of the *Declaration Act* establishes a positive and distinct obligation on the provincial government to align provincial laws with the UN Declaration. It is in no way contingent on the Action Plan. The *Declaration Act* is to be applied in a manner that does



not delay the application of the UN Declaration to BC laws. It also contains transparency provisions through annual reporting and the requirement that section 7 agreements must be published before they operate.<sup>33</sup>

#### A RETURN TO SELF-DETERMINATION

- All BC legislation and existing agreements need to be reviewed in light of the *Declaration Act*
- There are multiple legal orders in BC; Indigenous laws will operate in this legally plural context
- Indigenous nations determine their own IGBs in accordance with their own processes

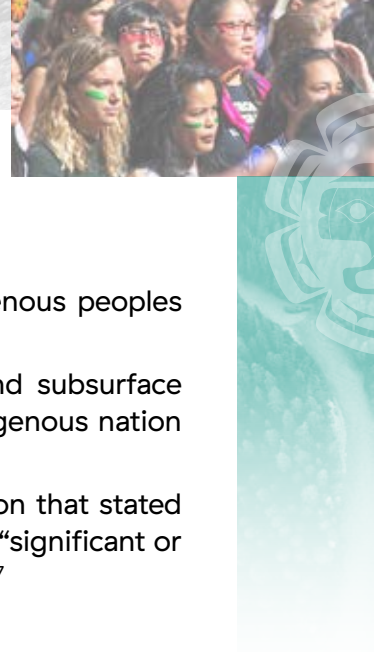
The *Declaration Act* is a significant step on the path to self-determination. Full implementation of the UN Declaration will entail the Province aligning all laws to fully respect our right of self-determination. Until that happens, there are tools enabled by the *Declaration Act* that can support our nations and communities as we revitalize our governance and support the implementation of consent for mining on our lands.

### 4. Examples of Indigenous Peoples Exercising Consent for Mining

Indigenous peoples have always exercised self-determination in dealings with the Crown. Historical treaty making between Indigenous governments and the Crown was approached from this understanding — we are self-determining peoples, with the power to enter into Nation-to-Nation agreements. Over the last few decades these treaties have been diminished and interpreted through Aboriginal rights and common law based on federal and provincial legal frameworks, not on Indigenous legal frameworks and laws. The Crown's emphasis on Aboriginal law has ignored and diminished Indigenous legal orders. This colonial approach has resulted in the Province being apprehensive and obstructionist about Indigenous peoples' right of consent.

That said, there are some narrow examples of Crown recognition of consent in relation to mining and land:

- the Indian Mining Regulations, adopted under the federal *Indian Act* in 1954 require band council consent before mining permits or leases are issued on reserve lands (these regulations do not apply in BC)<sup>34</sup>;



- Treaty 8, concluded in 1899, requires consent for mining where Indigenous peoples inhabit lands<sup>35</sup>;
- Yukon modern land-claims agreements convey ownership of land and subsurface resources. On certain lands, Yukon must obtain the consent of the Indigenous nation before granting any interest in land.<sup>36</sup>
- in 2003, the Kaska Nation entered into a bilateral agreement with Yukon that stated that Yukon is required to obtain the Nation's consent before authorizing "significant or major" exploration or development work on their traditional territories.<sup>37</sup>

In addition to the legislative developments in the provincial *Declaration Act* and the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, Crown law has other tools to support alignment between Canadian law (which includes BC law) and Indigenous law. The principle of cooperative federalism, which is used to achieve harmony between federal and provincial law, must also support alignment between Canadian and Indigenous law.<sup>38</sup> This concept of concurrent jurisdiction — where Crown and Indigenous governments operate in parallel — is not new, and BC's Draft Action Plan on the *Declaration Act* is clear that BC will now operate in a "legally plural" context.<sup>39</sup>



Photo: Michele Bouvhard





# 5

## HOW CAN WE APPROACH A CONSENT FRAMEWORK FOR MINING?

Photo: Chase Clausen

Important goals for Indigenous nations include honouring our customs, exercising our sovereignty, and revitalizing our governance. Deciding whether to grant or withhold consent for mining projects on our land forms part of these goals. While there is no one way to go about establishing a consent framework, there are three general parts of a consent framework – the principles, the process and the content.

As we revitalize our own governance and consent models, we must keep in mind that this rebuilding will require significant capacity and resources. Until this process is complete, our nations may choose to operate through a band council, a tribal council or other structure established under federal or provincial law. How a nation chooses to govern itself is a matter of self-determination. Where there are challenges or different views on this governance, they have often come about as a result of colonial obstacles. It is not technically necessary that all conflicts be resolved before self-determination can be exercised; though, collaborating in solidarity against the Crown will help advance Indigenous sovereignty.

This part provides options for a consent framework that nations can use in respect of mining activities. It anticipates that Indigenous nations will do some or all of the following:

- make, or jointly make, decisions regarding mining activities;
- act as regulators for mine activities, either jointly with the Province or alone;
- collect rents and taxes for mine activities on our territories; and/or
- be mine proponents.

#### IMPLEMENTING LEGAL PLURALISM

The *Declaration Act* supports legal pluralism and government-to-government processes, for example:

- We identify our own IGBs that will act on behalf of our Nations
- New Indigenous led institutions can be created to oversee mining
- IGBs can make regulatory decisions or share decision-making through agreements with the Province
- New approaches will be developed through agreements, and the soon to be issued provincial Action Plan, to enable the Province to share decision making powers
- Agreements negotiated through the *Declaration Act* are to be published before they can operate, meaning that they can be models for other agreements

The exercise of our authority is not dependent on the consent of the Province; it is up to us to decide how to exercise it. The remainder of this report explores the following three questions:

1. What laws, worldviews and principles underlie consent?
2. What process options exist to support the exercise of consent?
3. What practical options are there to achieve consent, based on the five stages of mining in BC?



## 1. Indigenous Foundations of Consent

The underlying laws, principles and worldviews of the nation or community will inform the development of a consent framework. Restoring traditional governance models will naturally support the exercise of consent. The best process may look different for each community.

There are many approaches. The potlatch system applies Indigenous laws and values to consent decision-making; family council systems may also operate at the community level. Nations that depend on salmon would consider anything that poses a risk to salmon as unacceptable. Other non-negotiable values are safety, water and land more generally. Baseline information will contribute to understandings of community assets that include forests, wildlife, marine resources, and harvesting areas. Considering the needs of future generations must inform any approach.



Photo courtesy: M. Hessing-Lewis, Hakai Institute

The following considerations may assist nations in determining their processes and structures for exercising consent:





Photo: Blake Elliott

## 2. Process Models to Exercise Consent

Consent is simple — it is the right to say yes, the right to say no, or the right to say yes with conditions.<sup>42</sup> There are different ways to approach consent-based decision-making. Consent is required continuously throughout the stages of a mining project; it can also be withdrawn at any stage of a mining project.<sup>43</sup>

Consent based decision-making agreements should be developed independent of project proposals to ensure that they operate as exercises of Indigenous self-determination and sovereignty. Other components of consent are that it must:

- Be authorized by the Indigenous legal order and common law or legislation (legally plural);
- Express “how it has roots” in both Indigenous and Crown legal perspectives; and
- Confirm certain outcomes based on clear criteria.<sup>44</sup>

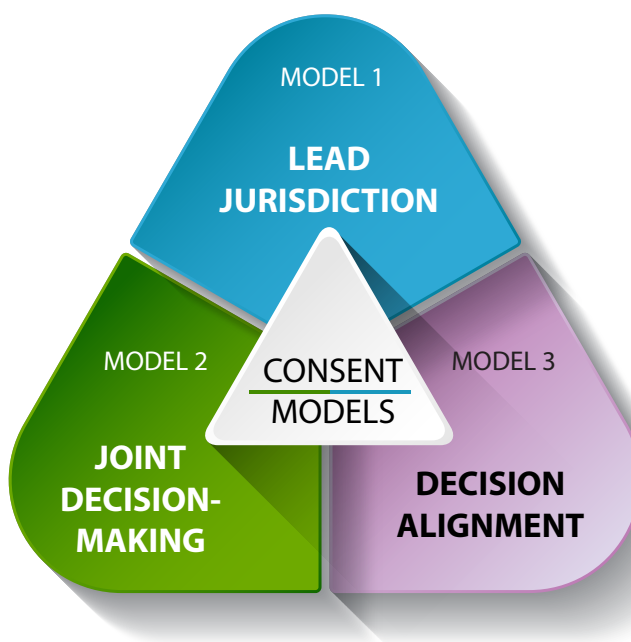
Three models have been previously presented by Doug White:

1. The lead jurisdiction model where one jurisdiction will lead in making a decision; laws and processes of that jurisdiction will apply.



2. The jointly authorized decision-making body, where Indigenous and Crown governments would establish, pursuant to their respective laws, a joint body that has authority to make decisions on behalf of both governments.
3. The decision alignment model where both Indigenous and Crown governments make their own decision and work together on implementation.<sup>45</sup>

## APPROACHES TO CONSENT



### Model 1 – Lead Jurisdiction

In this model, one jurisdiction – either the IGB or the Crown would make the decision, using the laws and processes of that jurisdiction.

### Model 2 – Joint Decision-making

In this model, the IGB and the Crown would establish a joint body that would make the decision on behalf of both governments.

### Model 3 – Decision Alignment

The IGB and the Crown would each make a decision and then work together to implement the decision.

Indigenous nations are not currently expressing a clear preference for any of these three options. What matters most is that steps be taken to put nations on the path to exercising their right of consent in the way that they choose. The goal is for Indigenous nations and the Province to have better government-to-government relationships that recognize the full force of nations' jurisdiction over their respective territories.



# 6 OPTIONS FOR INDIGENOUS NATIONS TO EXERCISE CONSENT FOR MINING IN BC

This part considers ways Indigenous nations can implement consent in the context of the Province's legislative regime for mining. The recommendations in this part are designed to provide practical options on the path to self-determination, as nations exercise sovereignty over our lands. These recommendations include tools that nations can use to ensure that mining projects only proceed where nations provide ongoing consent.

Photo: GTS Productions





## 1. Overview of Provincial Laws Related to Mining

There are two primary mining laws in BC—the *Mineral Tenure Act* and the *Mines Act*.<sup>46</sup> Both are outdated legal frameworks that do not recognize Indigenous self-determination or the constitutional protections for Aboriginal peoples set out in section 35 of the *Constitution Act*, 1982. Neither law acknowledges that mining in BC occurs largely on unceded lands and territories. Both laws are long overdue for reform, and are even more so now as they are inconsistent with the UN Declaration.<sup>47</sup>

The *Mineral Tenure Act* establishes a system to allocate land for mining by issuing mineral and placer claims and mining and placer leases. Much of the *Mineral Tenure Act* involves addressing matters regarding registration and maintenance of mineral and placer claims and leases. Of particular concern to Indigenous peoples are the provisions that allow for mineral and placer claims to be registered through the Province's online mineral title registry with no notification to, or involvement of, affected Indigenous peoples. These provisions do not recognize Indigenous interests, conflict with the *Declaration Act*, and contravene established common law.

The *Mines Act* deals with regulation and oversight of mining activities ranging from exploration and operation, through to mine closure. It is the enabling statute for the Health, Safety and Reclamation Code for Mines in British Columbia (**HSR Code**)<sup>48</sup> and operates with other legislative requirements, for which BC has developed integrated permitting guidance for permits issued by the various Crown ministries.



Photo: Oleg Mayorov



The BC *Environmental Assessment Act* requires that the BC Environmental Assessment Office support the implementation of the UN Declaration and recognize the inherent jurisdiction of Indigenous nations and our right to participate in decision-making. The *Environmental Assessment Act* was passed in 2018, prior to the *Declaration Act*, which means that it too must be interpreted and applied in light of the *Declaration Act*.<sup>49</sup> This Act sets out the Province's environmental assessment process and has a regulation that establishes thresholds for the size of mines that are subject to an environmental assessment.<sup>50</sup> Generally, larger projects will be subject to this process, although the *Environmental Assessment Act* allows for mines to be designated by the Minister for a review. Reviews are to consider environmental, economic, social, cultural and health effects of a mine project.

## 2. Interim Approaches – Consent Recommendations for the Five Stages of Mining in BC

Robust implementation of the UN Declaration requires the Province to align all Crown laws to be consistent with the UN Declaration and to fully respect our self-determination. This may take some time. One of the main goals of this project is to advance near-term practical options for Indigenous nations to exercise sovereignty and grant consent for mining. We provide the following recommendations to help strengthen Indigenous governance over mining while reform of the Province's mining law framework remains pending under the *Declaration Act*. A first step is for Indigenous nations to exercise consent in alignment with the *Declaration Act*.

We have divided mining into five stages that generally follow the key phases in BC mining laws. Mining generally encompasses mineral and metal (hard rock) mines and quarries, placer mining as well as sand and gravel mining. While other large infrastructure projects, such as hydro, pipelines or oil and gas projects may also cause significant land disturbance, they are not regulated through provincial mining laws.

The scope for Indigenous nations is broad. Provincial regulatory oversight for mining is complex, and it makes sense in the near term to implement consent around the features of the existing framework. This is an area where new tools will continuously need to evolve to better engage our sovereignty.



## STAGE 1. MINERAL TENURE AND MINERAL CLAIMS

BC's mineral tenure regime establishes that mineral claims are to be registered through an online registry with no notification to Indigenous nations. The regime, known as the free entry system, has been in place for more than 150 years and gives "free miners" who are issued "free miner certificates" the right to explore for minerals.<sup>51</sup> Claim staking assumes *terra nullius* — that the land belonged to no one before colonizers arrived. The system gives free miners the rights to minerals in a claim to the exclusion of anyone else. This legal framework is outdated, colonial and not aligned with Indigenous human rights. It is inconsistent with self-determination and is an example of the Crown granting land rights it may not have, given the existence of unresolved Aboriginal title or pre-existing Indigenous title.

The size of a claim "cell" (the smallest area that may be registered under the *Mineral Tenure Act*) is roughly 20 hectares and it is common for a free miner to stake multiple adjacent claims. The size of a grouping of staked claims can be quite large, at times exceeding tens of thousands of hectares. Staking often includes rivers, riverbeds and creeks, particularly for placer mining, which can result in food security (salmon) and water (contamination) concerns.

Registration of mineral and placer claims has a domino effect — once a claim is registered, the presumption that a mining project may proceed is established. While there are many other steps in the process to get to an operating mine, claim staking (that is, online registration) with no notice to Indigenous nations begins a process that conflicts directly with self-determination.



Photo: Catherine Jones





## STAGE 1: CLAIM STAKING

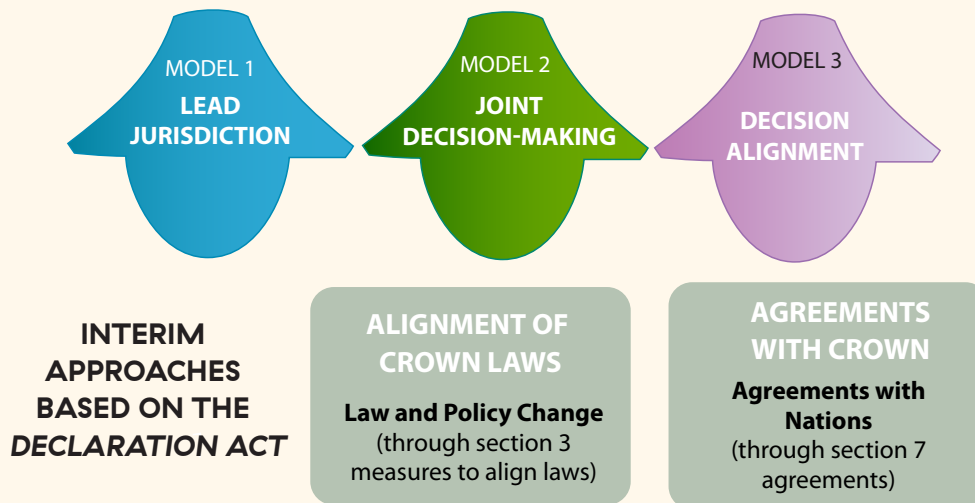
### WHAT HAPPENS NOW

- A free miner can stake claims on Indigenous lands with the click of a mouse and a credit card
- Claim staking gives a free miner the rights to minerals to the exclusion of anyone else, including the nation or community on whose land the claim is staked
- Notice of the claim staking is recommended but not required; notice by a claim owner is exceedingly rare and notice in advance of staking is almost non-existent
- Registering a claim gives access to land which the Crown protects, over and above Indigenous title and rights
- This system acts as a bar to identifying new Indigenous protected or conserved areas because a free miner would likely need to be compensated by the Province if their mineral or placer claim was vested in and reserved to the Province



### OUR FIVE RECOMMENDATIONS TO BEGIN THE REFORM PROCESS

### HOW CAN WE GET THERE?



### RECOMMENDATION 1:



**IGBs should exercise statutory powers under the *Mineral Tenure Act*.** This should be done exclusively by the IGB or jointly with the Province. The main statutory decision maker under the *Mineral Tenure Act* is the “Chief Gold Commissioner”. IGBs could establish an Indigenous equivalent to the Chief Gold Commissioner who could issue free miner certificates, cancel claims, or address conflicts related to claims. Changing the names of these statutory titles should also



be considered. The title Chief Gold Commissioner does not have the same stature as a “Chief” in Indigenous governance. Moreover, the Chief Gold Commissioner is a misnomer as this position is responsible for more minerals than just gold.

### RECOMMENDATION 2:



**Crown free miner certificates should only be issued with IGB consent.** IGBs should require a detailed engagement process be established prior to free miner certificates being issued. This engagement should include a knowledge-based assessment whereby the individual or company wishing to obtain a free miner certificate must demonstrate an understanding of Crown and Indigenous laws. Alternatively, free miner certificates could be abolished altogether, and replaced with an IGBs established knowledge-based assessment for any person seeking to explore for minerals on their lands (see Recommendation 4). If free miner certificates are continued, they should also be renamed.

### RECOMMENDATION 3:



**Registration of a mineral or placer claim should only grant the right to explore for minerals.** IGB consent for a free miner certificate should limit free miner activities to the conduct of basic exploratory activities on Indigenous lands. It should be clear that the free miner certificate does not presume future activity or permits.

### RECOMMENDATION 4:



**IGBs could develop and administer their own claim staking processes.** As IGBs strengthen their role in managing and protecting lands, IGBs could establish their own system for claim staking, which will be based on their own governance and values. This could include issuing their own mining certificates, perhaps by another name, and identifying the activities that will be allowed.

### RECOMMENDATION 5:



**IGBs should restrict the use of surface rights, regardless of who holds a mineral or placer claim.** The Province’s mining laws generally enable a free miner to access surface lands as part of the subsurface claim. IGBs should consider approaches to surface land uses that are consistent with their own values. This could include restricting surface uses on their lands, or for example, expanding the use of Indigenous Protected and Conserved Areas.



## STAGE 2. PLANNING/ENVIRONMENTAL ASSESSMENT

Planning for mine development and mining activities largely takes place through the environmental assessment process.<sup>52</sup> The *Environmental Assessment Act* establishes a process whereby the BC Environmental Assessment Office is to “seek to achieve consensus” with Indigenous nations at various points. While this consensus policy requirement falls short of consent, it nonetheless signifies a shift and must be applied as a “consent” requirement in light of the *Declaration Act*.

Environmental assessment is the primary planning process for a mine — it is where a mine proponent seeks input on its plans and describes the environmental, economic, social, cultural and health effects of the project. This is the stage where Indigenous nations can ensure that the mine will have minimal impact, maximum benefit, and support the community. Applying Indigenous laws and values to mine planning would improve the operating conditions for mines.

There are examples of nations in BC that have applied their own governance to environmental assessments — the Stk’emlúpsmc te Secwépemc and Squamish peoples have each applied a two-pronged approach to environmental assessments for major projects on their lands (mining and liquefied natural gas projects respectively).<sup>53</sup>

Historically, land use planning preceded environmental assessments, and was an opportunity for an Indigenous nation to identify sacred or other areas to remove from resource development. Prior land use planning in BC did not include Indigenous nations as rights holders.<sup>54</sup> More recently, there are examples of Indigenous-led land use planning processes, and land use plans concluded on a government-to-government basis. However, the Province continues to control Indigenous lands, meaning that land use planning does not enable self-determination. Capacity is also a key issue. Land use planning should not be linked to a specific project; fully resourcing these initiatives remains a challenge.



Photo contributed by Nanwakolas





## Stage 2: Planning/Environmental Assessment

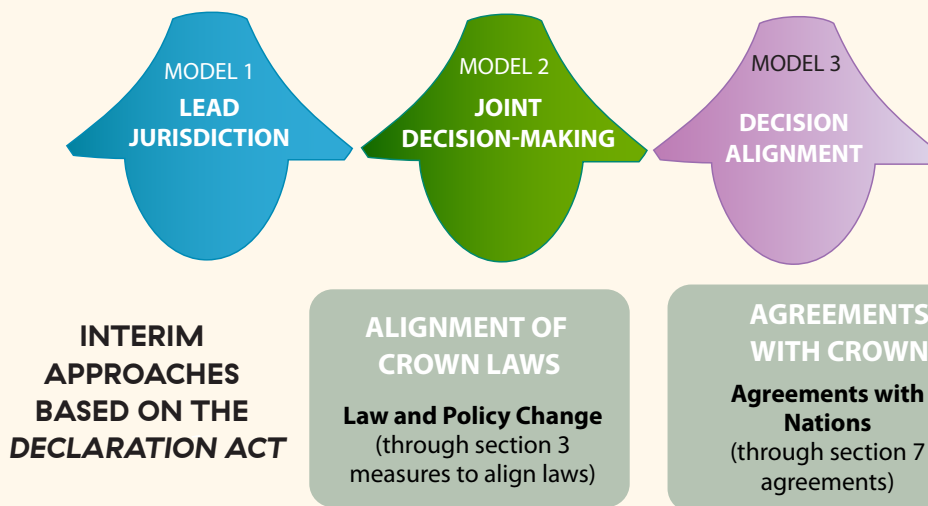
### WHAT HAPPENS NOW

- Some areas have land use plans that guide development
- The BC *Environmental Assessment Act* anticipates that Indigenous nations can lead a legislated environmental assessment review
- The Environmental Assessment Office is to work toward “consensus” with participating Indigenous nations in an assessment
- Placer mines are generally not subject to environmental assessment



### OUR FIVE RECOMMENDATIONS TO BEGIN THE REFORM PROCESS

### HOW CAN WE GET THERE?



**RECOMMENDATION 6:**

**IGBs should lead or co-lead environmental assessments under the *Environmental Assessment Act*.** This would enable IGBs to develop a better understanding of operating conditions and permits. Engaging in a provincial environmental assessment will better position IGBs to oversee projects once operating.

**RECOMMENDATION 7:**

**Regional land use planning should include Indigenous nations and communities as title holders.** This should occur regardless of whether title has been proven or recognized in Treaty. The process should clarify under what circumstances mining may or may not take place.

**RECOMMENDATION 8:**

**IGBs should consider cumulative impacts in land use planning.** The recent BC Supreme Court decision in *Yahey* has made clear that Crown permitting processes on Treaty 8 lands have failed to protect the treaty rights of the Blueberry River First Nations. These cumulative impacts should now be a primary consideration for IGBs, regardless of whether there is a treaty.

**RECOMMENDATION 9:**

**Nations should develop and conduct their own impact assessments based on their governance systems.** The experience of the Stk'emlúpsemc te Secwépemc and the Squamish peoples are instructive examples of this in action.

**RECOMMENDATION 10:**

**Where a Province-led environmental assessment is anticipated, an IGB should require consent-based agreements with the BC Environmental Assessment Office.** Since the *Environmental Assessment Act* preceded the *Declaration Act*, it must be interpreted and applied in light of the *Declaration Act*. The Environmental Assessment Office cannot prescribe or limit the exercise of consent by Indigenous people.



### STAGE 3. LEASING AND PERMITTING

Provincial law contains permitting provisions for exploration activities, for leasing, and for operating mines. Mine permits are issued under the *Mines Act* with conditions unilaterally determined by the Chief Permitting Officer under the HSR Code (this was the responsibility of the Chief Inspector of Mines until 2020). These permits establish the operating conditions throughout the life of the mine. They are “statutory powers of decision” as set out in the *Declaration Act*.

Operating permits should only be issued with Indigenous consent. Permit operating conditions are important and Indigenous nations should ensure that mines do not operate on their territories without understanding what these operating conditions may mean for their lands, waters and communities. In some cases, issues that are not resolved at the environmental assessment stage can be addressed in the permitting process. Also, these processes build on one another — what is determined in planning will be approved in permitting. Further, existing permits and leases that were issued without consent should be reviewed and the consent of the nation should be sought.

Lease and permit conditions need to be broad enough to consider community impacts. Community benefits must outweigh negative impacts from a mining project. While mining projects can bring increased community infrastructure spending, they can also result in problems such as housing shortages and increased rent. There is also concern that transient workers and visitors can bring “discriminatory and intolerant attitudes” to communities.<sup>55</sup>

Financial assurance is a critical tool. Key to the operation of an effective mine regulatory framework is the establishment of financial assurance or security to ensure that there is adequate funding to respond to accidents and to clean up a mine at the end of its life. It is important that these financial matters be addressed prior to a mine commencing operations. The First Nations Energy and Mining Council has published reports recommending that Indigenous nations establish their own financial assurance requirements as a consent condition. Nations should require “hard” financial assurance (such as posting bonds) so that communities are not burdened with mine reclamation costs or clean-up costs after a catastrophic accident.<sup>56</sup>





## STAGE 3: LEASING + PERMITTING

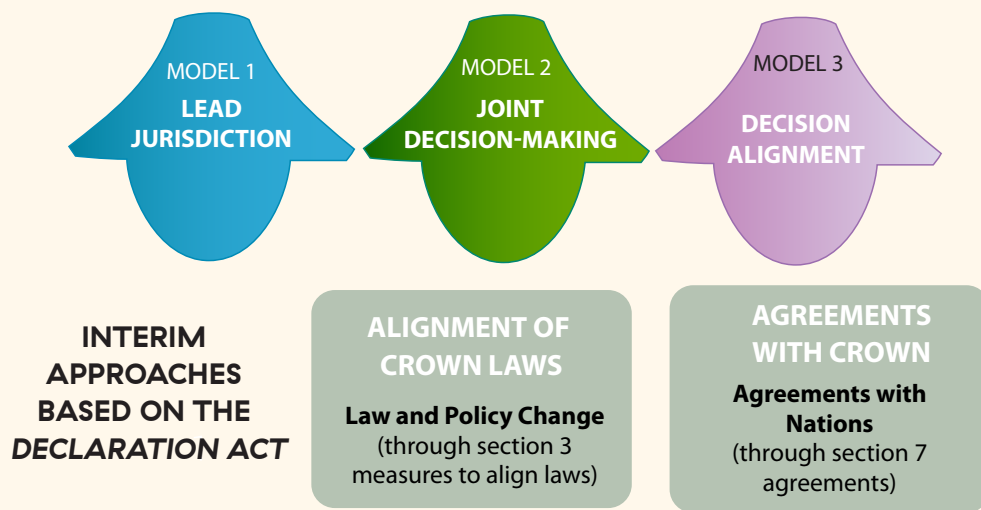
### WHAT HAPPENS NOW

- Exploration permits are issued prior to environmental assessment
- Claims are converted to leases which create legal interests in lands
- Permits to mine are issued once a mine has its environmental assessment certificate
- The Ministry of Energy, Mines and Low Carbon Innovation issues permits that address air and water emissions, fishery and wildlife impacts, worker health and safety matters
- Many of these powers are exercised by the Chief Inspector of Mines, the Chief Permitting Officer or their delegates



### OUR FIVE RECOMMENDATIONS TO BEGIN THE REFORM PROCESS

#### HOW CAN WE GET THERE?





### RECOMMENDATION 11:



**IGBs should require an Indigenous socio-cultural assessment of lease terms.** Rethinking mining to be consistent with Indigenous cultures and worldviews requires changes in the way regulatory decisions are made. Nations should prioritize conducting their own socio-cultural assessment, on terms acceptable to the community, to ensure that the lease conditions are consistent with Indigenous self-determination and governance.

### RECOMMENDATION 12:



**Mining leases should only be issued with the consent of the IGB.** Mineral claims should not be converted to mineral leases without the consent of the IGB. Indigenous perspectives on lease conditions are important so that mines operate consistent with a nation's values.

### RECOMMENDATION 13:



**Leases and permits should prioritize Indigenous employment.** Many Indigenous peoples face barriers to long term, stable positions in mining because policies tend to favour people with previous mining experience or focus on contracts rather than salaried positions with benefits and training opportunities. Article 21 of UN Declaration affirms that Indigenous peoples have the right to improve their social and economic conditions.<sup>57</sup>

### RECOMMENDATION 14:



**Leases and permits must prioritize community benefits.** Socio-impact assessments that are conducted from Indigenous worldviews should inform the development of community benefit approaches.

### RECOMMENDATION 15:



**IGBs should recover resource rents and taxation through leasing and permitting.** IGBs should develop and implement their own resource revenue arrangements or require an agreement with the Crown that will achieve the same outcome. Ensuring a revenue stream for the community in relation to mining projects is critical for long term capacity. The Draft Action Plan anticipates new “distinctions-based policy frameworks” for resource revenue-sharing with Indigenous peoples.<sup>58</sup>



#### STAGE 4. COMPLIANCE AND ENFORCEMENT

Decisions about mine operations will evolve through planning and permitting. In BC, the HSR Code establishes rules and procedures to address mine operations, ensure safety, protect workers, and protect lands and communities around the mine.

Provincial laws must be adjusted to recognize and make space for Indigenous governance. Ensuring a meaningful role for IGBs in protecting land and safety of mining activities is an important exercise of self-determination.

Indigenous-led and independent monitoring should be built in and bolstered by authority to address problems of non-compliance. Indigenous-led monitoring programs are often responsible for mine compliance in the north. Indigenous Guardians, whereby Indigenous peoples undergo training to conduct oversight and compliance activities, are a proven tool. Moreover, this addresses concerns about the “fox ruling the henhouse” and the related problems that presently exist.<sup>59</sup> There are many programs which could be adapted to function through the *Declaration Act*.<sup>60</sup>

Restructuring and reallocating provincial resource rents to enable sovereign oversight of mining should be achieved so that IGBs can develop and fund these programs in the same way that the Province does. For example, a ‘First Nation Resource Charge’ based on self-governing Yukon First Nations powers of direct taxation has just been proposed in the Yukon.<sup>61</sup>



Photo: Vince Lee





## STAGE 4: OPERATIONS

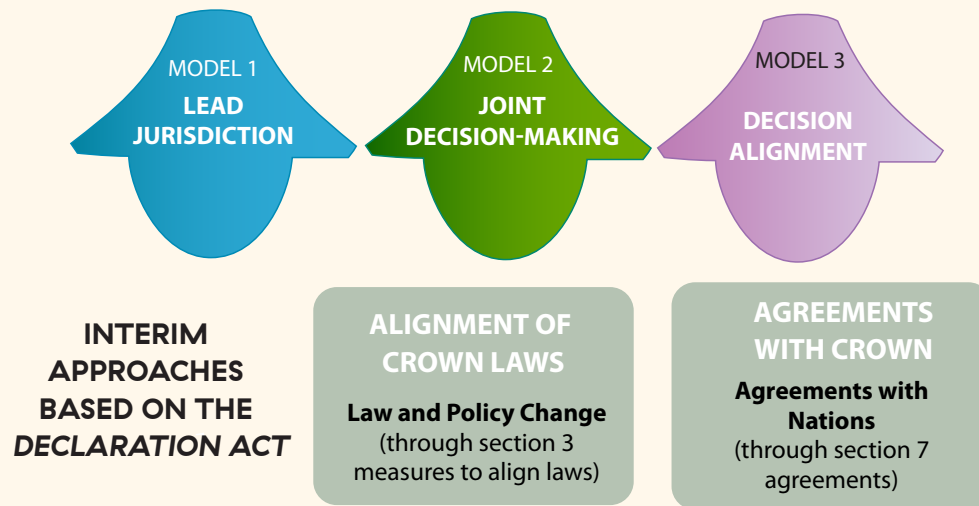
### WHAT HAPPENS NOW

- The Chief Inspector of Mines is ultimately responsible for compliance and enforcement under provincial laws
- In 2016 the Auditor General identified many deficiencies in mine oversight and recommended that there be independent enforcement of mining activities; this recommendation has not yet been implemented
- The Ministry of Energy, Mines and Low Carbon Innovation has an audit unit that works to improve mine safety and performance, but it is not independent
- The financial assurance that is in place to protect against the risk of accidents is largely inadequate



### OUR FIVE RECOMMENDATIONS TO BEGIN THE REFORM PROCESS

### HOW CAN WE GET THERE?



**RECOMMENDATION 16:**

**IGBs should establish Indigenous-led compliance and enforcement units, either province-wide or specific to an IGB.** Indigenous peoples can build on their already significant experience with compliance and monitoring. Indigenous knowledge should be integrated into approaches for enforcement and compliance – such as baseline information, data collection approaches, and evaluation.

**RECOMMENDATION 17:**

**IGBs should require the Province to share all enforcement, compliance, inspection and audit data for mines.** This will ensure that communities are better able to consider and identify potential impacts before they occur and keep track of mine impacts over time.

**RECOMMENDATION 18:**

**IGBs should develop their own standards and requirements for safe and environmentally responsible mine operation.** These standards could guide the approval of mine activities as well as approaches to compliance. IGBs could develop these independently or jointly with other nations. These standards could form the basis of longer-term reforms to Crown mine permitting.

**RECOMMENDATION 19:**

**IGBs should establish hard financial assurance requirements to protect against accidents.** IGBs should not allow mines to operate on their lands without full financial assurance to cover clean up costs for accidents. These funds should not be returnable to companies until all risks have been alleviated. One option to do this could be a superfund model that would pool risk across different mines, to better protect all Indigenous lands.<sup>62</sup>

**RECOMMENDATION 20:**

**IGBs should designate their own Chief Inspector of Mines and Chief Permitting Officer.** These persons should oversee and ensure compliance for mines on different Indigenous lands, exercising statutory powers under the *Mines Act*. An Indigenous Chief Inspector of Mines or Chief Permitting Officer may need broader powers to take a holistic approach and better protect Indigenous cultures and values. Another option is that an IGB could designate its own Chief Inspector of Mines or Chief Permitting Officer.



## STAGE 5. CLOSURE AND RECLAMATION

Mine closure is the final phase of mining activity and can last for generations (and even in perpetuity) after the mine has finished operating. It is also the point at which developers often exit, leaving the legacy and the long-term negative effects of the mine to be managed by others. It is therefore vital that plans to restore and reclaim the land be clear and achievable.

Long term mine reclamation poses many risks to water and wildlife, raising water quality and food security concerns for communities. Indigenous nations are often poorly informed about reclamation and may not have a clear understanding of the long-term implications of reclamation plans. Decades of bad experiences with abandoned mines or catastrophic failures have made this an ongoing concern. Mine closure planning should include alternative closure plans developed by Indigenous nations, that reflect our standards and meet our concerns.<sup>63</sup> Finally, post-approval changes to existing mine reclamation plans can also mean that final closure plans may be very different from the ones that were originally approved – and less effective.

This stage has an intergenerational impact because it has implications for how the land will be reclaimed and used for generations to come. Many nations have legacy, abandoned and orphaned mines on their territories – projects or activities for which there was no remediation, and where, in many cases, environmental problems and contamination continue. It is here that full financial assurance for reclamation, discussed above, should be required. Compensation for past damages and harms is also a real concern for many nations who deal with legacy mines.



Photo by Province of British Columbia, Creative Commons Licence





## STAGE 5: CLOSURE + RECLAMATION

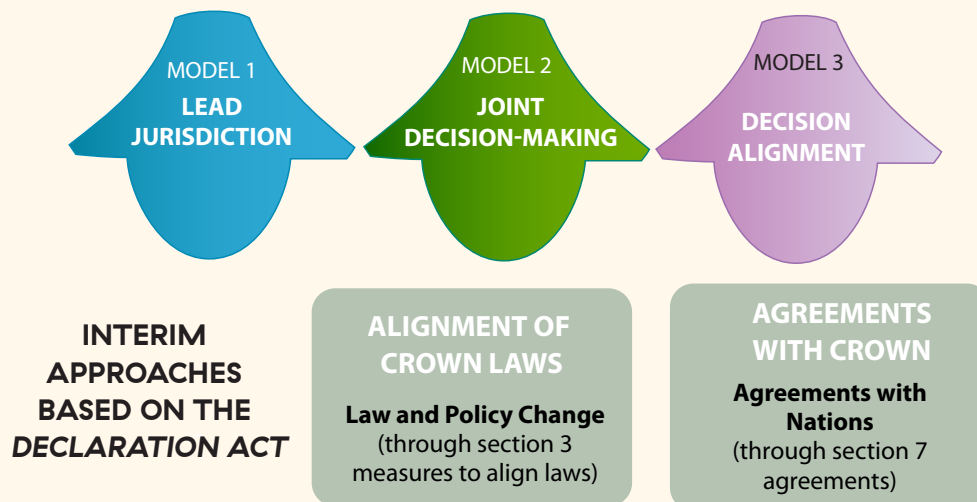
### WHAT HAPPENS NOW

- Mines must have reclamation plans that often require water treatment in perpetuity; this has real implications for how Indigenous nations can use their territories
- Mine legacy is a concern to local communities; when the company leaves, it has no more interest in the land
- Financial assurance is determined by the Chief Inspector of Mines and is rarely, if ever, adequate to cover mine closure and reclamation costs
- Abandoned and orphaned mines are often a result of a mining company declaring bankruptcy
- Downstream communities and nations are not engaged in mine closure and reclamation planning



### OUR FIVE RECOMMENDATIONS TO BEGIN THE REFORM PROCESS

### HOW CAN WE GET THERE?





### RECOMMENDATION 21:



**Impacted or potentially impacted IGBs should consent to reclamation plans prior to mine development activity occurring.** To do this, an IGB will need to have the necessary understanding and capacity to approve a reclamation plan. In some cases, this will need to include upstream or downstream communities, who will also want to protect water quality and food security.

### RECOMMENDATION 22:



**IGBs should require there to be adequate training and capacity to conduct long-term treatment and monitoring once the mine has ceased operating.** As it is the nations that will live with the impacts of the mine in perpetuity, IGBs should ensure training to deal with treatment and monitoring.

### RECOMMENDATION 23:



**IGBs should not allow mines to operate on their territories without transparent and full financial assurance to cover the costs of reclamation and perpetual treatment.** IGBs should require full funding to implement a reclamation plan if the company defaults. At the end a mine's life, funds should not be released without the consent of the affected nation(s). Reclamation bonds should be based on actual mine reclamation data for current and historic mines.

### RECOMMENDATION 24:



**IGBs should investigate and determine whether compensation should be paid for legacy mines prior to approving a new mine on their lands.** This recommendation recognizes that many nations already deal with existing challenges related to legacy mines and that resolving these problems and liabilities is long overdue.

### RECOMMENDATION 25:



**IGBs should consider seeking compensation for legacy, abandoned and orphaned mines and for the impacts from current operating mines and current exploratory activities that were undertaken without consent.** Exercising sovereignty is not limited to future activities but also to existing activities where Crown rights to minerals have been granted without Indigenous consent.



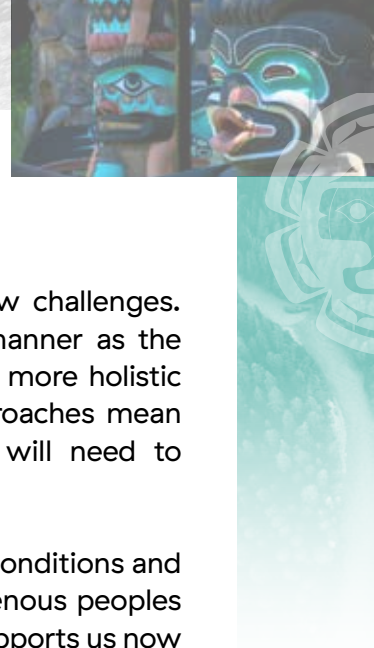
# 7

## CONCLUSION

We are re-exercising our sovereignty through self-determination and self-government. This must include making decisions to approve, permit and oversee mines based on our Indigenous laws. It is our hope that the recommendations in this report will help our peoples to revitalize our governance structures and processes, and to exercise jurisdiction over mining in new ways. Many of these twenty-five recommendations are based on the *status quo* provincial regime – recognizing that the full suite of necessary legal changes required under the *Declaration Act* will take time.

Photo: Raul Rodriguez Arias





Creating opportunities for legal pluralism in mining will present many new challenges. Indigenous legal frameworks are not designed to function in the same manner as the provincial legislative and regulatory framework. Indigenous approaches are more holistic and integrated, applying generations of traditional knowledge. These approaches mean that new ways of designing, approving, regulating and closing mines will need to be established.

While the provincial regulatory framework tends toward specifics – permit conditions and technical requirements set out in laws and regulations – the goals of Indigenous peoples are broader and will focus on sustainable and responsible stewardship that supports us now and for future generations. There is an opportunity through government-to-government decision-making, and consistency with the UN Declaration, to bring together the “best of both worlds” to create robust, defensible and effective mining practices.

The *Declaration Act* is an important step, and we look forward to working with the Province to do the essential work of aligning laws for consistency with the UN Declaration, and taking concrete actions to meet its objectives. We may develop meaningful mining agreements that express and define Indigenous jurisdiction for mining, and develop mining laws that reflect our inherent rights and self-determination.

Some changes will be needed regardless of the design of the mining framework. Enabling resource rents, revenue sharing, community social and economic benefits, long term capacity needs, and training for individuals will need to be part of a legally plural mining law framework. There are also areas where Indigenous capacity and tools exist, such as Indigenous Guardians programs, Indigenous monitoring agencies and Indigenous land use planning. These are “low-hanging fruit” for our revitalization and sovereignty.

The *Declaration Act* is an overdue recognition that the Crown needs to do more to restore and advance Indigenous self-determination. It is our hope that this report will help enable Indigenous nations to exercise our governance and ensure that our values and cultures are built into mining practices in the years ahead. There are many options forward. These recommendations are just the beginning.



# Endnotes

- 1 Minister David Lametti remarks, Indian Residential School History and Dialogue Centre Forum on the UN Declaration (February 4, 2021).
- 2 *Declaration on the Rights of Indigenous Peoples Act [Declaration Act]*, SBC 2019, c 44.
- 3 BC First Nations Energy and Mining Council, “Mining and Consent Expert Roundtable: International Context” recording at <<http://fnemc.ca/category/part-1-expert-issue-papers-and-expert-webinars/>> [International Context Webinar], Dr. Megan Davis at 0:41-0:42.
- 4 Human Rights Council, *Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/39/62 (10 August 2018) [A/HRC/39/62] at para 3.
- 5 A/HRC/39/62 at para 3.
- 6 While conventions or treaties are signed and ratified by a state, declaratory instruments, such as the UN Declaration, that are adopted by consensus at the UN, apply regardless of the position of a state government.
- 7 United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (13 September 2007) [UN Declaration]. Articles 10, 11(2), 19, 28(1), 29(2) and 32(2) reference free, prior, and informed consent.
- 8 A/HRC/39/62 at para 3.
- 9 A/HRC/39/62 at para 14.
- 10 Roshan Danesh, *Expert Paper Indigenous Legal Framework*, BC First Nations Energy and Mining Council, September 28, 2020 [Roshan Danesh Expert Issue Paper] at 9. See: <http://fnemc.ca/wp-content/uploads/2015/07/Roshan-Danesh-Expert-Paper-Indigenous-Legal-Framework.pdf>.
- 11 International Law Association, *Implementation of the Rights of Indigenous Peoples: Final Report by the Committee on the Rights of Indigenous Peoples for the 79<sup>th</sup> Biennial International Law Conference (Kyoto, 2020)* [Kyoto, 2020], at 8.
- 12 Dr. Megan Davis, *UNDRIP International Legal Framework Expert Paper*, BC First Nations Energy and Mining Council, September 28, 2020 [Dr. Megan Davis Expert Issue Paper] at 2. See: <http://fnemc.ca/wp-content/uploads/2015/07/UNDRIP-International-Legal-Framework-Expert-Paper-Prof.Megan-Davis-.pdf>.
- 13 Dr. Megan Davis Expert Issue Paper at 2.
- 14 International Context Webinar, Dr. Megan Davis at 0:41.
- 15 <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>. Indigenous human rights are distinct in part because of our relationship with land, and in part because we have worked to maintain our distinct societies that exist alongside the majority society. See Martin Scheinin & Mattias Ahren, “Relationship to Human Rights, and Related International Instruments” in Jessie Hohmann & Marc Weller, eds., *The UN Declaration on the Rights of Indigenous Peoples: a commentary* (Oxford University Press, 2018), at 63.
- 16 UN Declaration, Article 43.
- 17 The International Law Association’s Committee on the Implementation of the Rights of Indigenous Peoples has recognized the “centrality of the profound relationship that Indigenous peoples have with their environment and their reliance upon the same for diverse economic, social, cultural and spiritual elements of their distinct identity” (Kyoto, 2020, at 2).
- 18 James Anaya, “Report of the Special Rapporteur on the Rights of Indigenous Peoples” (UN General Assembly), [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41\\_en.pdf](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf), at para 27-28.
- 19 Roshan Danesh Expert Issue Paper at 6.
- 20 For a description of the content of and limits on Aboriginal title, see *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, at para 74 [*Tsilhqot’in*] and *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010, at paras 110-117 [*Delgamuukw*].
- 21 *Delgamuukw*.
- 22 *Tsilhqot’in*.



23 *Delgamuukw*, at para 122.

24 Roshan Danesh Expert Issue Paper at 6.

25 In *Guerin v The Queen*, the court referenced the *Star Chrome* case and stated that “it does not matter [...] that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases” (*Guerin v The Queen*, [1984] 2 S.C.R. 335, at 379). However, the court went on to describe the interest as somewhat less than full beneficial ownership of the land.

26 *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].

27 *Yahey*, para 1894.

28 BC First Nations Energy and Mining Council, “Mining and Consent Expert Roundtable: BC Mining Context” recording at <<http://fnemc.ca/category/part-1-expert-issue-papers-and-expert-webinars/>> [BC Mining Context Webinar], Justice Harry Laforme at 0:45. See also Justice Harry Laforme, *BC Legal Context Expert Paper*, BC First Nations Energy and Mining Council [Justice Harry Laforme Expert Issue Paper] at 4-5. See: <http://fnemc.ca/wp-content/uploads/2015/07/BC-Legal-Context-Expert-Paper-Harry-Laforme.pdf>. This doctrine of continuity was also applied by the Supreme Court of Canada in 2001 in *Mitchell v Canada (MNR)* where the Court held that Indigenous laws continue to apply, subject to Crown imposed limits, such as where the laws have been extinguished, surrendered, or are incompatible with Crown sovereignty (*Mitchell v. M.N.R.*, 2001 SCC 33).

29 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020.

30 *Declaration Act*, s. 3-5.

31 As of June 2021, the Tahltan Central Government and the BC government are the first to commence negotiations on a consent-based decision making agreement. See:

[https://tahltan.org/wp-content/uploads/2021/06/Province-of-B.C.-and-the-Tahltan-Nation-begin-talks-on-shared-decision-making-June-15-2021\\_.pdf](https://tahltan.org/wp-content/uploads/2021/06/Province-of-B.C.-and-the-Tahltan-Nation-begin-talks-on-shared-decision-making-June-15-2021_.pdf)

32 BC First Nations Energy and Mining Council, “Mining and Consent Expert Roundtable: Indigenous Context Webinar” recording at <<http://fnemc.ca/category/part-1-expert-issue-papers-and-expert-webinars/>> [Indigenous Context Webinar], Douglas White III Kwulasultun at 0:38.

33 *Declaration Act*, s.5 and s.7(4)(a).

34 Chief Wilton Littlechild, *UNDRIP International Legal Framework*, BC First Nations Energy and Mining Council, November 26, 2020 [Chief Wilton Littlechild Expert Issue Paper] at 2. See:

<http://fnemc.ca/wp-content/uploads/2015/07/UNDRIP-International-Legal-Framework-Dr.-Wilton-Littlechild-Expert-Paper-.pdf>.

35 Chief Wilton Littlechild Expert Issue Paper at 2-3. See also International Context Webinar, Chief Wilton Littlechild at 1:14.

36 Dave Joe, *BC Legal Context Expert Paper Self Determination*, BC First Nations Energy and Mining Council, at 2. See:

<http://fnemc.ca/wp-content/uploads/2015/07/BC-Legal-Context-Expert-Paper-Dave-Joe-Self-Determination.pdf>.

37 Bi-lateral Agreement between the Government of Yukon and the Kaska (2003), s.3.3.

38 Justice Harry Laforme Expert Issue Paper at 14.

39 Declaration on the Rights of Indigenous Peoples Act, Action Plan, Consultation Draft, June 2021 [Draft Action Plan] at 4. See:

[https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration\\_act\\_action\\_plan\\_for\\_consultation.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan_for_consultation.pdf)

40 Roshan Danesh Expert Issue Paper at 7. The Draft Action Plan indicates “legally plural” as a shared understanding, at 4.

41 Dr. Sheryl Lightfoot, *Expert Paper Indigenous Legal Framework*, BC First Nations Energy and Mining Council, October 2020, at 10. See:

<http://fnemc.ca/wp-content/uploads/2015/07/Sheryl-Lightfoot-Expert-Paper-Indigenous-Legal-Framework.pdf>.

42 Paul Joffe, *Expert Paper Indigenous Legal Framework*, BC First Nations Energy and Mining Council, October 25, 2020, at 2. See:

<http://fnemc.ca/wp-content/uploads/2015/07/Paul-Joffe-Expert-Paper-Indigenous-Legal-Framework.pdf>. See also Indigenous Context Webinar, Paul Joffe at 1:27.

43 Any withdrawal of consent should not be arbitrary; and should occur where there has been a good faith process to resolve issues.

44 Roshan Danesh Expert Issue Paper at 8-9.





## ENDNOTES

- 45 Douglas White III Kwulasultun, *Consent*, Union of BC Indian Chiefs, October 21, 2019, at 60-62.
- 46 *Mineral Tenure Act* [*Mineral Tenure Act*], RSBC 1996, c 292; *Mines Act* [*Mines Act*], RSBC 1996, c 293.
- 47 In October 2021, the Gitxaala Nation filed a court challenge to BC's *Mineral Tenure Act*. See: <https://www.gitxaalanation.com/single-post/gitxaa%C5%82a-launches-legal-challenge-to-bc-s-mineral-claim-regime-1>.
- 48 The HSR Code regulates ongoing mine practices in BC. Structural changes to the *Mines Act* would also impact the operation of the HSR Code. See: [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health\\_safety\\_and\\_reclamation\\_code\\_2017\\_rev.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health_safety_and_reclamation_code_2017_rev.pdf)
- 49 *Environmental Assessment Act* [*Environmental Assessment Act*], SBC 2018, c 51.
- 50 BC Reviewable Projects Regulation, B.C. Reg. 67/2020, Part 3 [Reviewable Projects Regulation].
- 51 Allen Edzerza, *BC Legal Context Expert Paper*, BC First Nations Energy and Mining Council, November 7, 2020, at 4-5. See: <http://fnemc.ca/wp-content/uploads/2015/07/Allen-Edzerza-BC-Legal-Context-Expert-Paper.pdf>.
- 52 The *Environmental Assessment Act* does not apply to all mining activities. It only applies to new projects or to modifications to existing projects that meet the “reviewable project” definition in the Reviewable Projects Regulation. For instance, for a new mineral mine, the threshold to trigger an assessment under the *Environmental Assessment Act* is a production capacity of 75 000 tonnes a year of mineral ore, or more. See the Reviewable Projects Regulation, s. 10.
- 53 International Context Webinar, Dr. Sheryl Lightfoot at 1:09. See also BC First Nations Energy and Mining Council, “Recent Experience with Indigenous Led Assessments: A BC Perspective” (2019) at <http://fnemc.ca/2019/11/18/november-2019-recent-experience-with-indigenous-led-assessments-a-bc-perspective-federal/>
- 54 BC Mining Context Webinar, JP Laplante at 2:16.
- 55 Dr. Megan Davis Expert Issue Paper at 6.
- 56 BC First Nations Energy and Mining Council, “Mining Risk and Responsibility: How putting a price on risk can help British Columbia reduce it” (June 2019) at <http://fnemc.ca/wp-content/uploads/2019/06/Mining-Risk-and-Responsibility.pdf>; “Reducing the Risk of Mining Disasters in BC: How financial assurance can help” (August, 2019) at <http://fnemc.ca/wp-content/uploads/2015/07/Reducing-the-Risk-of-Mining-Disasters-in-BC-FNEMC.pdf> [Risk of Mining Disasters]; and “Using financial assurance to reduce the risk of mine non-remediation: Considerations for British Columbia and Indigenous governments” (November 2019) at <http://fnemc.ca/wp-content/uploads/2015/07/Using-financial-assurance-to-reduce-the-risk-of-mine-non-remediation.pdf>.
- 57 Dr. Megan Davis Expert Issue Paper at 5.
- 58 Draft Action Plan, Action 1.4, at 6.
- 59 BC Mining Context Webinar, JP Laplante at 2:11. This issue is clearly set out in the 2016 Auditor General’s report on mining, whose overall recommendation was to establish an independent compliance and enforcement unit for mining activities because the ministry’s mandate includes a responsibility to both promote and regulate mining, thus creating the risk of regulatory capture. This recommendation has still not been implemented by the provincial government. See BC Office of the Auditor General, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016, at <https://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf>, at 11.
- 60 BC First Nations Energy and Mining Council & UVic Environmental Law Centre, “The Case for a Guardian Network Initiative” (2020), <http://fnemc.ca/wp-content/uploads/2015/07/The-Case-for-a-Guardians-Network-July-2020.pdf>.
- 61 Mineral Development Strategy Panel, “Yukon Mineral Development Strategy and Recommendations” (2020) at 18. The final report of this Panel was released in April, 2021. See: <https://yukon.ca/en/yukon-mineral-development-strategy-and-recommendations>.
- 62 Risk of Mining Disasters.
- 63 Jay Nelson and JP Laplante, *BC Legal Context Expert Paper*, BC First Nations Energy and Mining Council, November 6, 2020, at 11. See: <http://fnemc.ca/wp-content/uploads/2015/07/BC-Legal-Context-Expert-Paper-Jay-Nelson-and-JP-Laplante-Mining-Sector.pdf>.





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