



MINING

THE CHALLENGE FOR B.C. LOCAL GOVERNMENTS

Commissioned by the Columbia Institute and
prepared by the Sierra Club of BC in consultation
with the Centre for Civic Governance

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Introduction



MINING IN B.C. IS BOOMING. The 2011 B.C. Jobs Plan foreshadowed eight new mines and nine mining expansions in operation by 2015. By mid-2012, the provincial Environmental Assessment Office indicated 26 mine proposals in process: three under review and 23 in the pre-application stage.¹ With the Northwest Transmission Line making inexpensive energy available, B.C. can expect an even greater increase in mine project proposals in the future, particularly in the northwest.²

Such a rapid expansion of mining activity puts local governments in a quandary. Mining operations offer significant opportunities for communities, bringing great potential for jobs, development, and growth. On the other hand, mining operations can affect communities in adverse ways, from compromising drinking water and air quality to reducing property values.

As it stands, mining legislation in B.C. does not allow local governments to be involved in decision-making on major resource projects, even though these projects may impact residents' quality of life and may require budgetary expenditures to mitigate.

So what will it take to build a thriving mining sector in B.C. that is in sync with the concerns of local communities? Decades of experience and front-line expertise suggest that modernizing B.C.'s "gold rush"-era mining laws is in order.

¹ B.C. Ministry of Energy and Mines and Responsible for Housing, "British Columbia Mines and Minerals Exploration Overview 2011," p. 8, www.em.gov.bc.ca/Mining/Geoscience/PublicationsCatalogue/MineralExplorationReview/Documents/EX-OVERVIEW_IC2012-1.pdf

² Organizing for Change, "Modernizing BC's Mineral Tenure Act: The Opportunity," <http://organizingforchange.org/past-successes/2012/mining>



> Outdated B.C. Mining Laws Can Disempower Communities, Residents and Local Governments

Pender Island residents became alarmed in December 2012 when two men appeared on private property with flagging tape and hammers. The duo, searching for fortunes, staked mining claims over most of North Pender and a generous portion of South Pender. In the midst of this flurry of claim staking, North and South Pender residents have expressed anger and worry. Not surprisingly, Islands Trust representatives have fielded numerous calls. Despite the fact the Gulf Islands Trust Policy does not support mineral extraction in the Islands Trust Area, there is little that the Trust can legally do in the face of the “free entry” system that assumes mining is always the best use of land — even in the case of rural residential and agricultural properties.

Once a “mineral claim” is staked in B.C. — often with only the click of a mouse — the provincial government has no discretion to refuse the holder a lengthy mining lease and all the rights that come with it.

> The *Mineral Tenure Act* and “Free Entry”

B.C.’s *Mineral Tenure Act* was created in 1859 during the gold rush and has remained essentially unchanged over the past 150 years. Based on the existing first-come first-served model, B.C.’s *Mineral Tenure Act* gives legal entitlements to mining companies that override other land uses and take precedence over other economic sectors, such as tourism and forestry.

The current process is based on the “free entry” system, established in the late 1800s — a system that has been abandoned by other jurisdictions, including Alberta, which ended “free entry” in 1967. Free entry allows mining companies to pay a minimal fee to stake a claim virtually anywhere in B.C., without first consulting or obtaining approval from the B.C. government, First Nations or adjacent municipalities and regional districts. Once a mining claim is made, it creates legal entitlement that overrides other land uses. As a result, the Act severely limits the power of municipalities and regional districts to make decisions about what type of development happens in their region.



In December 2012, two men staked mining claims over most of North Pender Island. There is little the Gulf Islands Trust can legally do in this “free entry” system.

PENDER ISLAND PHOTO COURTESY ANDREW WALLWORK/FICKR

> How Does “Free Entry” Work?

In 2005, the provincial government moved to an online map-staking process. As a result, the total area staked in B.C. increased from 1.1 million hectares in 2004 to 5.2 million in 2008. The only areas off limits to mining claims are land under a building, land under cultivation, and parkland, which represents a small portion of B.C.’s land mass. The rest of B.C.—including private land, First Nations’ traditional territories and land with special ecological values—is open to mineral staking claims.

If the B.C. government later decides to act to protect ecological or other important value by exempting an area from mining, mineral exploration companies are legally entitled to be financially compensated if they have staked the area. This requirement is triggered by the act of staking, and applies even if the company has not yet done any actual mining or exploration in the area. This came into play in 2011, when B.C. paid \$30 million to Boss Power Corp. in an agreement to surrender claims to exploration and mineral rights in the Kelowna-Kamloops area that had been staked prior to B.C.’s 2008 decision to ban uranium mining.³

The Act can also create economic uncertainty for the mining industry, because areas that are open for mineral claims can later be declared to be off-limits to mining, as happened in the Flathead River Valley.⁴ When claims are staked and pursued in areas that the public deems socially unacceptable, environmentally sensitive or dangerous to public health, the Act can give rise to conflict, legal strife, and long-term uncertainty.



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What do British Columbians Think About Reforming Mining Laws?

Issues around the environmental impacts of mining and community involvement in mining decisions came to the forefront around the proposal to turn central B.C.’s environmentally sensitive Fish Lake (Teztan Biny) into a toxic tailings pond as part of proposed gold mining project.

According to a 2011 public opinion poll:⁵

- 73 per cent of British Columbians believe the Fish Lake case clearly demonstrates that B.C.’s environmental assessment process needs to be strengthened;
- 82 per cent are opposed to the practice of allowing mining companies to fill fish-bearing lakes with mine waste;
- More than 60 per cent support more mining regulations and environmental oversight, even if it slows growth;
- Only 25.5 per cent want to make it easier for mining to expand; and
- Fewer than 10 per cent think mining companies should continue to be allowed to stake claims and explore on private property without permission.

3 B.C. government press release, “Uranium mining claims settled,” October 19, 2011, www.newsroom.gov.bc.ca/2011/10/uranium-mining-claims-settled.html

4 For background on the case, see CBC News, “Environmentalists’ buyout of Flathead Valley mining complete,” September 15, 2012, www.cbc.ca/news/canada/british-columbia/story/2012/09/14/bc-flathead-valley.html

5 The poll questions, conducted by Strategic Communications, involved a random online sample of 850 adult British Columbians and were commissioned in April 2011 by Sierra Club BC. The results are considered accurate to within plus or minus 3.4 per cent 19 times out of 20.

Implications for Local Government

THE CURRENT *Mineral Tenure Act* creates a number of problems for local government jurisdiction and influence over economic development, zoning, land use planning and protection of the local environment.

Mining is under provincial jurisdiction in Canada, and many mining operations occur on Crown land. In conjunction with an outdated mining act, this can lead to serious jurisdictional problems for local governments. While B.C. local governments cannot normally make bylaws that apply to Crown land, there have been court decisions indicating that local land use bylaws can in some circumstances be applied to the operations of private commercial tenants (e.g. mining companies) that are operating on leased Crown Land.⁶

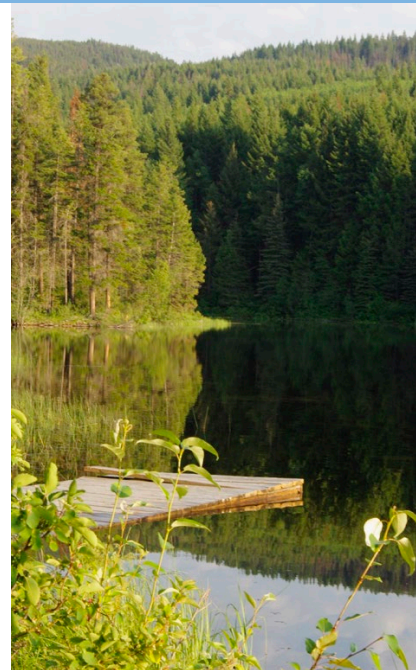
So while B.C. local governments may under the existing framework be able to regulate some of the impacts of mining operations, such as waste management and water use, they nonetheless “cannot regulate a mine’s extraction activities, nor any surface activities so integral to extraction that they are effectively part of the same process.”⁷ This means that although local governments may be able to influence some aspects of a mine’s operations, they cannot through zoning laws regulate the establishment and core extraction activity of a mine within municipal boundaries.

The existing *Mineral Tenure Act* is also a significant obstacle to regional planning, and may create conflicts at the community level between mining interests and other economic interests, such as tourism, forestry, fishing and agriculture. All Crown land can be claimed for mineral exploration unless expressly excluded by provincial law. This makes it difficult “to undertake multi-use land resource planning, which often includes the designation of protected areas, and the balancing of other potential resource users, such as timber, oil and gas, and wilderness tourism operators. Resource management and land use planning initiatives must work around mining claims, where the opposite is true for other natural resource industries.”⁸

6 Krindle, E. and A. Tolliday, “Mitigating Community Impacts of Mining Operations: Options for Local Governments (*Environmental Law Centre*, University of Victoria, 2012), p. 7, www.elc.uvic.ca/press/documents/Apr20.12-Memo-MitigatingCommunityImpactsOfMiningOperations.pdf

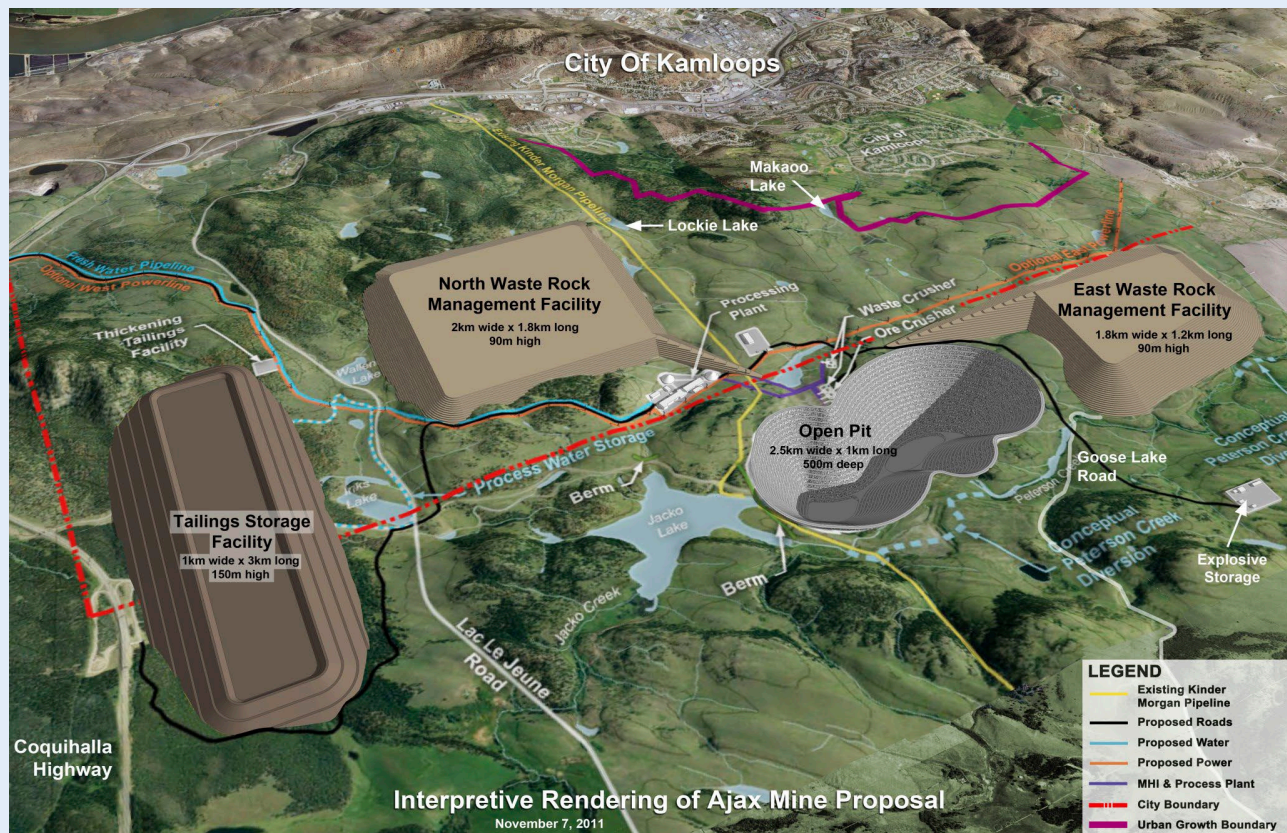
7 Supra note 6, page 6.

8 West Coast Environmental Law, *Undermining Our Future : Mining’s Privileged Access to Land – A Free Entry Backgrounder*, April 2013, p.2, wcel.org/resources/publication/undermining-our-future-minings-privileged-access-land-free-entry-backgrounder



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PHOTO COURTESY PETE TUEPAH



Case Study: The Proposed Ajax Mine Project in Kamloops

KGHM Ajax Mining Inc. is proposing to develop the Ajax Mine Project, a copper-gold mine that would have approximately half of its development within Kamloops city boundaries.

The proposed project has an expected mine life of 23 years with a production capacity of approximately 60,000 tonnes of mineral ore per day. The mine development would be about 6,000 acres and include an open pit 2.5 kilometres long, 1 kilometre wide and 500 metres deep.

The Kamloops Area Preservation Association, a local citizens' group launched to inform and engage their community on this issue, estimates there would be 180,000 tonnes of rock blasted and removed every day, 7 days a week, 365 days per year. They rightfully worry about the public health impacts of a mine so close to the city perimeter, and are concerned about the health and safety of their community and the future for their children.¹

The City of Kamloops has raised concerns about the potential for health impacts on residents from particulate dust, leaching of chemicals from the mine tailings facility, and contamination of drinking water from groundwater wells. Other issues include heavy traffic in close proximity to a school and a negative impact on popular recreation areas near Inks Lake and the fish-bearing Jacko Lake immediately adjacent to the proposed open pit.²

Kamloops is struggling with a difficult public debate. While the mine proponent has identified that over 300 jobs would be created over the life of the mine, there are significant risks faced by the community. The mine site is 1.4 km from the nearest residences and 2 km from an elementary school. Within six km, there are seven elementary schools, four high schools, four senior citizens' residences, the Royal Inland Hospital and Thompson Rivers University — all downwind and/or downstream from the proposed Ajax mine.

1 Kamloops Area Preservation Association: www.stopajaxmine.ca/home

2 City of Kamloops' Letter of Inquiry to the mine proponent, July 11, 2011, kamloops.ca/ajax/pdfs/RequestForInformation.pdf



Case Study: A municipality Takes Action on Mining Reform in Tofino

In April 2013, the Annual General Meeting of the Association of Vancouver Island Coastal Communities (AVICC) endorsed a resolution on mineral tenure act modernization. Originally brought forward by the District of Tofino, the resolution calls on the UBCM to ask the province to initiate a broad-based public engagement process with First Nations and local governments to determine how best to modernize the *Mineral Tenure Act* in a way that ensures that a full range of social, cultural, ecological and economic interests are all given fair consideration. The full resolution is reproduced below.

LR4: MINERAL TENURE ACT MODERNIZATION

WHEREAS British Columbia's Mineral Tenure Act has remained substantially unchanged since the 1800's and is not suited to our modern day land base and the demands of legitimate competing interests and values; the present Mineral Tenure Act gives no weight to other economic activities, current or future, in areas affected by mining claims including tourism, forestry and farming.

AND WHEREAS local governments and First Nations deserve greater latitude to shape their economic development paths and protect the full range of their residents' interests; a modern Mineral Tenure Act could ensure adequate regional planning would take place, recognizing vital water, agricultural and other resources on which all communities depend;

THEREFORE BE IT RESOLVED that the Union of BC Municipalities request that the Province of British Columbia undertake a broad-based public engagement process similar to that being used to amend BC's Water Act and fairly engage First Nations and local governments to determine how best to modernize the Mineral Tenure Act and related legislation in a way that ensures the full range of interests—including social, cultural, ecological and economic—are given fair consideration on BC's land base.

Mining Law Reform Across Canada



In a watershed decision, the Yukon Court of Appeal found the “free entry” system inconsistent with the obligation of the Crown to consult First Nations on decisions that may impact Aboriginal title and rights.

YUKON PHOTOS COURTESY DOUGLAS EVANS (TOP)
AND DAN RICHARDSON (BOTTOM) / FLICKR

OTHER PROVINCES AND TERRITORIES where mining plays an important economic role have modernized legislation and eliminated or modified the “free entry” system.

> The Yukon — A Watershed Decision Against the “Free-Entry” System

In what will likely prove to be a watershed moment, the Yukon Court of Appeal *Ross River Dena Council v. Government of the Yukon* decision, delivered December 27, 2012 may be the long-missing link in a rewrite of B.C.’s mining laws. The landmark decision essentially holds that the “free-entry system” — British Columbia’s current system of allocating mineral rights — is inconsistent with the obligation of the Crown to consult First Nations on decisions that may impact Aboriginal title and rights.

> Ontario

In 2009, the province of Ontario passed the *Mining Amendment Act*, which improved provincial mining laws to mitigate conflicts between the mining industry and private land holders. The modernized *Mining Act* “...addresses the concerns of private land holders while supporting a vibrant mineral industry that will help many Ontario communities realize their economic and social aspirations.”⁹ In the area designated

⁹ Ontario *Mining Act*, www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90m14_e.htm#BK29



as Southern Ontario, in cases where surface rights are held by private land owners and mining rights are held by the Crown, the modernized *Mining Act* withdraws this land from future staking. In Northern Ontario, private landowners can apply to have their property withdrawn from staking. As well, the amendments provide an expanded list of lands not open for staking, and include the consideration of private property owners and cottage properties.¹⁰

> Quebec

In May 2013, the government of Quebec introduced Bill 43 (*Mining Act*). At the time of writing, the bill is going through public consultations before debate in the Quebec National Assembly in the fall of 2013. If passed, the *Mining Act* will give new regulatory rights to municipalities and introduce a range of other measures to modernize Quebec's mining laws. An earlier attempt at mining reform passed first reading in the Quebec Legislature, but died with the September 2012 provincial election.

In addition to empowering municipalities, Bill 43 requires mining companies to post security to cover the cost of rehabilitating and restoring mining sites and includes specific measures to promote local and regional benefits from mining activities. The Bill also makes the public interest a consideration in granting or refusing mining leases and prohibits the expropriation of aboriginal burial grounds.¹¹

If passed, Quebec's proposed *Mining Act* will give new regulatory rights to municipalities and introduce a range of other measures to modernize Quebec's mining laws, including promoting local and regional benefits from mining activities and making the public interest a consideration in granting or refusing mining leases.

QUEBEC'S THETFORD MINE
PHOTO COURTESY DANIELLE
MARTINEAU/Flickr

¹⁰ Province of Ontario, *Ontario's Modernized Mining Act: Mineral Tenure and Private Property Rights*, www.ontla.on.ca/library/repository/mon/23012/297540.pdf

¹¹ Julius Melnitzer, "Quebec tables new mining law," *Financial Post Online*, June 3, 2013, <http://business.financialpost.com/2013/06/03/quebec-tables-new-mining-law/> ; Quebec National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, "Special consultations and public hearings on Bill 43, *Mining Act*," www.assnat.qc.ca/en/travaux-parlementaires/commissions/CAPERN/mandats/Mandat-23441/index.html

Conclusion: Reformed Mining Laws Could Benefit B.C. Communities



MINERAL TENURE REFORM COULD EMPOWER municipalities and regional districts to address mineral exploitation in local land use decisions.

Under an improved *Mineral Tenure Act*, areas off limit to new mineral claims and leases within local government jurisdictions, in particular, could potentially include: private and residential lands; dedicated community amenities, such as recreational areas; watersheds; fish-bearing waterways; ecologically sensitive areas; private conservation lands; and other areas incompatible with mining for environmental or health reasons.

A modern *Mineral Tenure Act* could ensure that regional planning and the tools through which it is implemented address mining together with other activities. It could clearly define areas that are off-limit to new mineral claims and leases, and would end compensation for claims affected by the protection of ecological areas.

Reforming B.C.'s *Mineral Tenure Act* could significantly reduce conflict with First Nations, affected communities, and concerned citizens. It could also save the province from spending more money, could provide a more stable business environment for the mining sector and investors, and could ensure that municipalities and regional districts have a say in mining projects that directly affect them.

Map: Operating Mines and Selected Major Exploration Projects in British Columbia 2012, Ministry of Energy Mines and Natural Gas, download at www.mining.bc.ca/resources/publication/map-operating-mines-and-selected-major-exploration-projects-bc-2012

PHOTOS COURTESY (TOP) NADENE REHNBY AND (BOTTOM) ANITA HART/FICKR

MAP OF OPERATING MINES AND SELECTED MAJOR EXPLORATION PROJECTS IN B.C., 2012





PREMIER MINE, B.C., PHOTO COURTESY STEPHEN ZOPF/FICKR

Columbia

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Sierra Club BC is a non-profit environmental organization whose mission is to protect

British Columbia's rich tapestry of species and ecosystems, especially in light of global warming. For more than 40 years, the Sierra Club of BC has been a leader in many successful campaigns to safeguard BC wilderness and wildlife. We advocate the responsible use of BC's natural resources while promoting a modern, equitable economy that sustains our planet in every way.

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