



MiningWatch Canada

Mines Alerte

Suite 508, 250 City Centre Avenue, Ottawa, Ontario, Canada K1R 6K7
tel. (613) 569-3439 — fax: (613) 569-5138 — info@miningwatch.ca — www.miningwatch.ca

Canadian Mining Law and the Impacts on Indigenous Peoples Lands and Resources
Backgrounder for a presentation to the North American Indigenous Mining Summit, July 28, 2005
by Joan Kuyek, National Co-ordinator, MiningWatch Canada.

There is no one “Canadian Mining Law”. Mining is largely provincial and territorial jurisdiction, so there are effectively 13 different laws. Coal, uranium, and quarries all have separate and different laws from metal mining.

Mining laws have been set up to protect the interests of the mining industry and to minimize the conflicts between mining companies by giving clarity to who owns what rights to mine. They were never intended to control mining or its impact on land or people. We have to look to other laws to protect these interests.

Canada’s legal structure relies on four kinds of law: criminal law, constitutional law, administrative law, and civil law. Under the Common Law system in English Canada, the interpretation of any of these kinds of law depends on the decisions of cases that went before, or “precedent”.

Aboriginal rights and title issues are part of the constitutional law of Canada, and are found in specific Supreme Court decisions: *Delgamuukw*, *Sparrow*, the *Haida/Taku* case. These cases restrict the rights of the Crown and mining companies on traditional Indigenous lands, and assign a “fiduciary responsibility” to the Crown to protect the rights and interests of Aboriginal people.

Federal Structure:

Canada has a federal government, ten provinces, and three territories. The Constitution Act of 1867 sets out that the provinces are not subordinate to the federal government. Provinces have full power over mineral exploration, development, conservation and management. Territories increasingly have the same powers as provinces when it comes to mining, although some are still in a process of “devolution”.

The federal government retains powers to legislate ocean and inland fisheries, navigable waterways, criminal law, inter-provincial trade and commerce and “Indians and land reserved for Indians” (including Métis and Inuit). It can also spend federal funds as it wishes and engage in any form or mode of taxation. Regulation of uranium mining falls under the federal government. The Canadian Environmental Protection Act regulates mercury, asbestos emissions, and some other toxins, and is currently putting forward a regulation for smelter emissions.

In January 1998, the federal government and the provinces (except Québec) signed the Canada-Wide Accord on Environmental Harmonization. This accord devolved even more responsibility to the provinces for Environmental Assessment and – through sub- agreements – has diminished federal powers.

I have organized this presentation of law as follows: claim staking and exploration, permitting and environmental assessment, pollution prevention and control measures, and opportunities and resources for public participation. I have also included a short note on investment and taxation laws.

Claim Staking and Exploration¹

There are a number of assumptions underlying mineral tenure law in Canada:

- Mining is the first and best use of lands.
- All Crown lands are open for staking and mineral exploration unless they are expressly excluded or withdrawn by statute.
- Mining prevails over Aboriginal land claims. The current system does not recognize or take into account Aboriginal land claims. Current federal free entry laws do not require consultation with, or protection for First Nations. Nor does it provide them with a role in land resource decisions as required by *Delgamuukw*. In general, exploration activities and the nature of free entry have a disruptive effect on native land claims.
- Mining prevails over private property interests.
- Mineral tenures are appropriately granted on a first come first served basis. Time priority is the basis upon which tenures are obtained
- Mineral potential is so valuable that it warrants leaving the staked area essentially unregulated and unusable for other resource interests.

In Canada, with very few exceptions, mineral rights (also called subsurface rights) belong to the government (the Crown), and are leased by the Crown to prospectors for exploration and to mining companies if and when mineable minerals are found. Generally, the right to stake mining claims in Canada, is given to anyone who holds a prospector's licence – obtained by paying a small fee to the province or territory. In most cases, it is first come-first served. Mining claims are usually for one year and have to be maintained by carrying out a minimum of work on the property. If claims are adjacent to each other, then work on one claim can usually stand for work on neighbouring claims.

The work of exploration and prospecting can be very damaging, and includes trenching, studies, moving heavy equipment and so on.

A few provinces require some approvals before exploration can take place:

- Newfoundland requires a security deposit;
- the Yukon requires a permit for “Stage 2 and 3” exploration.
- In Alberta, no permit is required unless the surface will be disturbed, and then an exploration permit (which costs \$50-\$100) is needed.

Different provinces have different rules for staking the claim: Internet staking, map staking, or ground staking with wooden posts or markers of some kind.

¹ <http://www.wcel.org/wcelpub/2004/14094.pdf>

Mining claims are not allowed in national parks, nor in other “lands withdrawn from staking” by one of the governments. Some provinces, like Québec, allow staking in provincial parks. In BC and Alberta, compensation is paid to claims holders when a park is established.

Staking is not allowed on reserve lands without the permission of the First Nation, although staking can take place on Crown lands that are of traditional Aboriginal use and interest. The Haida/Taku Supreme Court decision makes it clear that the Crown has an obligation to meaningfully consult with First Nations on these lands before it makes decisions about resource allocations.

Permitting

When and if the mining company feels there is a sufficient resource and wants to proceed with a mine, there are different requirements in different provinces. Since most provinces bend over backwards to encourage mining, most Ministry of Mines web sites set out the rules quite clearly. They can be found by internet searching, eg. through Google. For example, the Alberta information is set out at <http://www.energy.gov.ab.ca/2805.asp>.

- In Ontario, once the mining lease is secured, the proponent files a closure plan with the Ministry of Northern Development and Mines, and then begins applying for permits to build the mine from other government ministries. There is no actual mine permit required. (http://www.mndm.gov.on.ca/mndm/mines/mg/advex/prequirements_e.pdf)
- In BC, proponents need a Major Mines permit under the Mines Act after obtaining an Environmental Compliance Certificate (<http://www.em.gov.bc.ca/Mining/MinePer/permreq.htm>)
- In the Yukon, proponents need a Mining Licence under the Quartz or Placer Mining Acts
- Alberta requires a Metallic and Industrial Minerals Licence or Lease

There are many different permits required from the province and the federal government before a mine can be built, and it is the permitting stage that provides the most levers to stop the mine going ahead, or impose specific conditions or requirements on the project. The Deh Cho have used permit challenges to try to confront the Prairie Creek Mine on their territory, opposing a land use permit for a road in to the mine.²

The land-use planning acts in different provinces almost all exempt mining from most land use plans and treat it as the highest and best use of land. In Ontario, in areas of significant mineral potential ideas for other kinds of economic activity or development have to get special approval to proceed.

In many provinces, there has to be some kind of public notice that the permit is going to be considered. For example in the Yukon and the NWT, permits for advanced exploration are subject to public consultation, as are water permits and land use permits. In Ontario, applications for permits with environmental impacts have to be posted under the Environmental Bill of Rights.

Kinds of permits that may be required to develop a mine:³

- 1) permits for exploration work
- 2) permits to destroy fish habitat
- 3) amendment to federal regulation to use fish-bearing waters for tailings disposal

² [A Disaster Waiting to Happen: Prairie Creek Mine, www.miningwatch.ca](http://www.miningwatch.ca)

³ Ontario provides a chart of permits required federally and provincially at http://www.mndm.gov.on.ca/mndm/mines/mg/advex/prequirements_e.pdf

- 4) permits for works in navigable waters
- 5) for uranium – construction and operation permits from the Canadian Nuclear Safety Commission
- 6) permits for storage and use of explosives
- 7) permits for archaeological disturbances
- 8) transboundary shipment of hazardous waste
- 9) permits to take water
- 10) mine closure plan
- 11) approvals for roads and transmission lines (which may also require some of the other permits also)
- 12) work permits
- 13) approval of fuel handling
- 14) aggregate permit
- 15) permits to discharge toxins into water
- 16) industrial/private sewage works
- 17) approval of waste management system
- 18) registration of generators
- 19) approval for air emissions
- 20) approval of drinking water system
- 21) migratory bird convention act
- 22) permits for land use (can include approval from agricultural commission in Quebec)
- 23) approval under a municipal official plan

Environmental Assessment

Before permits can be issued, all federal, territorial and provincial laws require that an Environmental Assessment be done. The EA is used to determine if there are likely to be “significant adverse environmental effects”. Some provinces require a *certificate of environmental compliance* before a project can proceed. Most don’t. Federal EA and most provincial EAs are not legally binding, but are an important step in exposing any problems with the mine proposal. In most cases, the information that the mine proponent has to produce for the EA sets out most of the things the community should be worried about. There has never been a mine refused based on EA, as there is an assumption that all environmental effects can be “mitigated”. Generally speaking, mines are only as good as the opposition to them during the permitting process.

There are different levels of EA, which are determined by a “scoping” process: at the federal level the options are screening, comprehensive study, and panel review and/or mediation. Which level will be used is determined by a determination by the relevant authority, or in some cases by a list that is part of the Environmental Assessment Act of the jurisdiction. Most EA Acts provide for public participation at different stages of the review, and the federal government does have a provision for intervenor funding at the comprehensive study and panel review levels. The EA Act is “triggered” by the need of the proponent for a permit, authorization or funding of some kind from government. Ontario only allows review of privately owned projects if designated by the Environment Minister; the BC Act applies only to projects of a certain size. Federally, the department that has to issue the permit becomes a “Responsible Authority” for the EA. There is a registry of all the documents submitted regarding the EA, which is supposed to be open to the public.

Guides to federal Environmental Assessment are found at http://www.ceaa.gc.ca/012/newguidance_e.htm#4

EA is also required before cleanup of large abandoned mine sites.

Although most EA Acts have provisions for monitoring and follow-up on mitigation measures, there have been such substantial cuts to the government departments that monitor and enforce compliance, that we do not even know how effective the mitigation measures have been.

Pollution Prevention and Control Measures

There are a number of Acts and regulations in all jurisdictions that set limits for pollution from mines, mills and smelters. In general, Canadian law is quite mushy and difficult to enforce. The key laws federally are the Fisheries Act and the Canadian Environmental Protection Act.

The Metal Mining Effluent Regulations (MMER) under the Fisheries Act set limits for nine pollutants to water from mines, at the point where the effluent leaves the mine site. It includes an “acute lethality test”: if more than 50% of fish die when exposed to the undiluted mine effluent for 96 hours. Any plan to dispose of tailings into fish-bearing waters requires an amendment to the Regulations, and so be approved by Cabinet. The MMER also requires that companies conduct Environmental Effects Monitoring (EEM) and report the results.

The Canadian Environmental Protection Act (CEPA) sets limits for emissions of toxins such as mercury. CEPA also includes emissions from smelters, although there is not yet a regulation for enforcing this provision. Under CEPA there is also a public-right-to-know instrument called the National Pollutant Release Inventory⁴ (NPRI), which reports on pollutant releases in Canada. At present, the NPRI does not require reporting of CEPA toxins disposed to waste rock and tailings.

Provincially, the rules differ considerably. For example, in Ontario mines are covered by the Metal Mining Sector Regulations (part of MISA, the Municipal Industrial Strategy for Abatement), which set limits on discharges from mining operations, the Ontario Water Source Protection Act⁵ and the Environmental Protection Act. In British Columbia, the Waste Management Act, the Environmental Management Act, and the Water Act are all significant. (There is an excellent resource from EAGLE and the Environmental Mining Council of British Columbia about law and mining.)⁶

Investment and Taxation Laws

There are a number of other laws and regulations that affect mining:

- The Securities Acts for each province
- The various federal and provincial tax acts
- International Treaties and enforcement bodies like the International Joint Commission and the Commission for Environmental Cooperation.
- Public Access to Information

⁴ see www.pollutionwatch.org

⁵ see Protecting Your Water Rights in Ontario at www.canaryinstitute.ca

⁶ Environmental-Aboriginal Guardianship through Law and Education (EAGLE). [Beneath the Surface: Aboriginal Rights and Mining Law in British Columbia](#), 2001. For copies, e-mail eagle@eaglelaw.org

Canadian provinces and the federal government provide generous subsidies and tax incentives to stimulate exploration and mine development.⁷

Opportunities for Public Participation

- Interventions during EA (funding may be available through INAC's Resource Access Negotiation program or via CEAA)
- Interventions during permitting processes (see above)
- Complaint to enforcement bodies
- Private prosecutions (can be usurped by the Crown and "stayed")
- Request to Minister of the Environment for investigation of CEPA violations under Section 17, appeal under Section 22
- Auditor-General Act process for Environmental petitions (<http://www.oag-bvg.gc.ca>)
- Judicial review of CEAA or other administrative decisions – will require legal help
- Law reform: lobbying, input into legislative processes (testimony before committees), responding to comment periods, documented cases and complaints, focused campaigns.

Sources of information:

Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) is one of the best texts on mining law in Canada

Canadian Institute for Environmental Law and Policy (CIELAP): [Mining's Many Faces](#) provides a good summary of mining law

Environmental-Aboriginal Guardianship through Law and Education (EAGLE). [Beneath the Surface: Aboriginal Rights and Mining Law in British Columbia](#), 2001. For copies, e-mail eagle@eaglelaw.org

Government web sites set up for the mining industry: check out www.nrcan.gc.ca/mms/lien/ptd_e.htm and www.mmsdl.mms.nrcan.gc.ca/maps/intro_e.asp

Access to Information applications (provincially and federally)

The National Pollutant Release Inventory (NPRI)

The Ontario EBR and other provincial registries

Environmental Assessment registries

Securities and Commission filing web site (www.sedar.com)

Non-governmental and industry web sites: www.miningwatch.ca provides links

Good industry-written primer on mining methods and definitions:
<http://www.chamberofmines.bc.ca/primer1.htm>

⁷ see [Understanding Mining Taxation in Canada](#), and [Looking Beneath the Surface: Assessing the Value of Public Support to the Metal Mining Industry in Canada](#) at www.miningwatch.ca