

## **MINISTRY OF ENERGY, MINES AND LOW CARBON INNOVATION**

### **BRIEFING NOTE FOR INFORMATION**

**PREPARED FOR:** Fazil Mihlar, Deputy Minister, Ministry of Energy, Mines and Low Carbon Innovation

**ISSUE:** Meeting with Alan Young and Dan Woynillowicz

#### **KEY MESSAGES:**

- The Ministry of Energy, Mines and Low Carbon Innovation (EMLI) appreciates the valuable expertise that Alan Young and Dan Woynillowicz bring to our work supporting British Columbia's (BC) mining sector.
- While the Ministry supports the overarching goals of this report and appreciates the revisions made to the report to reflect progress to date, it would have benefited from clearer framing of its purpose and opportunity for input.
- The timing and content of this report creates issues with Alan Young's role as the co-chair of the Responsible Minerals and Metals Action Plan Advisory Committee (APAC) and its upcoming report. Potentially, it will impact the working relationship with other members of APAC.

#### **MINISTRY RESPONSE:**

- Government is committed to growing a competitive and inclusive mining sector in BC.
- The Ministry recognizes the author's efforts to support the growth of the BC mining sector while considering the priorities of safety, reconciliation, and environmental stewardship
- While the Ministry appreciates the subsequent report updates it is disappointed that the report did not incorporate EMLI comment prior to initial publication, reflect on the progress to date and the Ministry's ongoing demonstrable commitment to action.
- Clearer communication and collaboration between the authors and EMLI will be essential to ensure a continued productive working relationship.

#### **BACKGROUND:**

Alan Young is a co-director of the Materials Efficiency Research Group (MERG), a consultancy with a primary focus on responsible mining practices and cross-sector leadership initiatives. Mr. Young and EMLI have a positive and constructive working relationship, with his membership on the BC Mining Jobs Task Force (2018-19), a consultant supporting delivery of the Responsible Minerals and Metals Summit (2020) and co-chair of the Action Plan Advisory Committee tasked with developing a BC Responsible Metals and Minerals Action Plan (2021-22). Dan Woynillowicz is the Principal of Polaris Strategy + Insight, a public policy consulting firm focused on climate change and the energy transition. He was previously the Deputy Director at Clean Energy Canada.

Young and Woynillowicz co-authored a report in October 2022 entitled *ESG and Responsible Mining in BC: Aligning with Market Demands, Trends and Opportunities* (Appendix 1). The report provides an overview of environmental, social and governance (ESG) relevant market demands and trends and contextualizes how they will impact BC's mining sector. The report lists expectations of best practices (which can be interpreted as recommendations) for addressing challenges in three areas that the authors argue are primary areas of focus for the private sector when it comes to investment and procurement criteria relating to mined materials: climate change performance, tailings dam safety, and Free, Prior and Informed Consent (FPIC) of Indigenous peoples.

The report was shared with the Ministry prior to public release, but the Ministry was not provided with the opportunity to respond and have its feedback reflected in the initial, published version. Through the course of subsequent engagement the authors have agreed to revise the report to include updated information including the findings of the 2022 Auditor General's report and work of the stand code review committee.

## **DISCUSSION:**

The Ministry has several over-arching concerns with respect to the report's release process and content:

- **Opportunity to respond:** There was no follow-up with BC seeking feedback prior to the report's public release. To remain productive partners, it is important that consideration be given to meaningfully engaging each other. Through subsequent discussions the ministry understands authors felt it important to publish the report quickly relative to transition of the premier.
- **Use of the phrase, "best practices":** The report uses the phrase "approach to best practices" to refer to the actions it recommends. This phrase is not well defined among professionals and its use runs the risk of misinforming the public.
- **Impression of government inaction:** The initial report did not mention specific improvements that been made in recent years by BC. The omissions left the reader with the incorrect impression that little action has been taken by government and detract from constructive public discussion. However, we understand that this will be at least partially addressed through revisions to the report.

Ministry comments specific to the report's recommendations around climate change performance, tailings dam safety and FPIC are summarized below. More detailed comments can be found in Appendix 2.

**Climate change performance:** The report references data from BC Business Council and BC Government that states the province is home to some of the lowest-carbon mining and smelting operations in the world, noting that despite this, absolute mining sector emissions in BC have increased. To manage reducing greenhouse gas (GHG) intensity and absolute GHG emissions, the report proposes a series of measures that they recommend should move from voluntary to mandatory.

The report's recommended approach broadly aligns with government's current strategy to reduce GHG emissions.

**Tailings Storage Facility Safety:** The report highlights “failings and oversight of the way tailings are permitted, monitored, and managed,” referring in part to the Auditor General’s report, *An Audit of Compliance and Enforcement of the Mining Sector in BC*, and data from EMLI’s *Audit of Code Requirements for Tailings Storage Facilities in BC*. It recommends that BC establish a precautionary “Safety First” approach to the design, management and closure of tailings facilities.

The initial report did not acknowledge the recommendations that have been completed by BC or are currently underway. For example, no mention is made of the Chief Auditor’s 2021 finding that the 2016 revisions to the tailings sections of the Health, Safety and Reclamation Code for Mines in BC (the Code) are consistent with current best practices, are clear and enforceable, and have a high level of compliance by industry. There was also no reference to the Code Review Committee’s creation of a TSF expert sub-committee to address TSF audit recommendations. The report also demonstrates an apparent lack of understanding of the Code requirements, as several of the recommendations call for measures that are already established.

EMLI staff met with Mr. Young on November 7, 2022 to outline concerns with the report, including omitting references to recent government progress and publication of the report before government provided comment. Following this meeting, the authors have agreed to make revisions regarding implementation of the Auditor General's recommendations and the work of the Code Review Committee.

**Indigenous Consent:** The report states that BC’s alignment with the Declaration on the Rights of Indigenous Peoples’ Act (DRIPA) presents “an unprecedented market advantage, subject to its success in moving forward with implementation of changes to the Mineral Tenure Act.” While, it acknowledges the Province’s March 2022 commitment to modernizing the *Mineral Tenure Act* (MTA), it should also be noted that, subsequent to this, EMLI has started process of developing MTA modernization next steps.

The report does not mention the consultation with First Nations that is mandatory under current mining regulations and parallel legislation, or the direct work with individual First Nations on land-based initiatives – including mining-related land use plans – to support reconciliation, shared economic opportunities, and sustainability.

## CONCLUSION:

- Young and Woynillowicz recently published a report about ESG considerations for BC’s mining sector, in which they recommend actions in areas where they believe BC has opportunities to show leadership and where key challenges remain.
- While the report is helpful in providing context on what key stakeholders are seeing as the market-based expectations for a credible ESG framework it would have benefited from incorporation of feedback prior to publishing and clearer framing of its purpose.

- Subsequent revisions to the report are helpful but its initial release and relationship to the author's role in the APAC process and the upcoming report is problematic.

**Attachments:**

- Attachment 1 - Alan Young and Dan Woynillowicz. *ESG and Responsible Mining in BC: Aligning with Market Demands, Trends and Opportunities*. October 2022.
- Attachment 2 - Ministry Comments on Report Recommendations

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# ESG and Responsible Mining in B.C.

Aligning with Market Demands,  
Trends and Opportunities

October 2022



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**Alan Young** is a co-director of the Materials Efficiency Research Group (MERG) an international consultancy with a primary focus on responsible mining practices and cross-sector leadership initiatives.

# Foreword

The future of mining in B.C. is taking place in a rapidly evolving context, both provincially and in the larger world. The mineral sector is presented with new opportunities but also faces challenges—new and old—that require new thinking and new approaches: one way or another, “business as usual” is not a viable option. The challenges posed by growing social and market demands for strong environmental, social and governance (ESG) considerations are converging with unprecedented opportunities to gain market access and attract investment as a reward for meeting key performance standards. How will the sector respond? And how can the B.C. government shape this response?

This white paper captures this powerful convergence as it relates to the mining sector in B.C. and beyond. With the focus on greenhouse gas emissions reduction, tailings dam safety, and Free Prior and Informed Consent of Indigenous peoples, the authors zero in on areas where B.C. has great opportunities to show leadership, and where key challenges remain to be addressed.

It provides a helpful overview of areas of strategic priority for government, industry and downstream buyers and investors alike. It speaks to a wide range of drivers for responsibly sourced minerals and metals and some key milestones on the path forward, including 1) the need to credibly demonstrate ESG performance on the ground, 2) meaningful inclusion of diverse voices in ongoing ESG reforms, and 3) aligning policy and regulation with evolving global standards to ensure all British Columbians consistently benefit from best practices.

The report was prepared by two independent experts with a strong interest in having B.C. gain long term social and economic benefits from taking a leadership position on ESG for the minerals sector. We encourage you to use the report as a tool to better understand and inform meaningful ESG standards for the sector in B.C.

## *Endorsers:*

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**Jamie Bonham**, Director Corporate Engagement, NEI Investments

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# The Rise of ESG Considerations and Implications for Mining

The B.C. government has a stated goal to “*attract investment in mining and create jobs, advance reconciliation and enhance environmental outcomes in support of a safe and thriving mining sector in British Columbia.*” Furthermore, it has made a commitment to incorporate formalized Environmental, Social, and Governance (ESG) measurement and analysis in the areas of policy, procedures and industry practices moving forward in the province.





“ Through the StrongerBC Economic Plan, our government is securing B.C. as a world leader for championing corporate environmental, social and governance standards (ESG), helping British Columbians to develop, promote, and market environmentally and socially responsible goods and services.<sup>2</sup>

This is consistent with the advice from a recent report by the Canada West Foundation, which found that “*A real opportunity exists for governments in Canada at the municipal, provincial and federal levels to support strong and consistent ESG reporting, raise the bar for performance, communicate success to different stakeholder audiences and provide clarity for investors.*”<sup>3</sup> The report identifies four categories of actions that governments can take to maximize the benefits that come from robust ESG performance (Table 1).





Table 1: Government actions to maximize benefits of robust ESG performance<sup>4</sup>

	<b>Support strong and consistent ESG reporting</b>	There is a role for government in building strong and consistent ESG reporting within the jurisdiction—across companies, sectors, industries and government departments, as well as across multiple levels of government. This provides all parties with a shared language and framework, so that they can more easily talk with one another and tell a common story as they compete globally.
	<b>Raise the bar for ESG performance</b>	Both companies and jurisdictions are judged on their ESG—and the two are closely linked. Raising the bar involves using performance data and policy to incentivize high performance, make conditions more appealing to investors and stakeholders, and send strong signals about continuous improvement.
	<b>Communicate your ESG story</b>	For strong performance to translate into benefits, government needs to ensure that data and information relevant to ESG is accessible to interested audiences, both in terms of being easy to find and being easy to use.
	<b>Provide clarity for investors</b>	ESG is a tool to help investors evaluate financial investment risk and opportunity. Government agencies have a role in providing clarity and setting rules—with ESG just as with other financial claims. This clarity in turn increases investor confidence and attracts further investment.

B.C.’s focus on ESG aligns with the mining sector itself, which sees ESG and decarbonization as the top two business risks and opportunities for mining and metals in 2022 (Figure 1).<sup>5</sup>

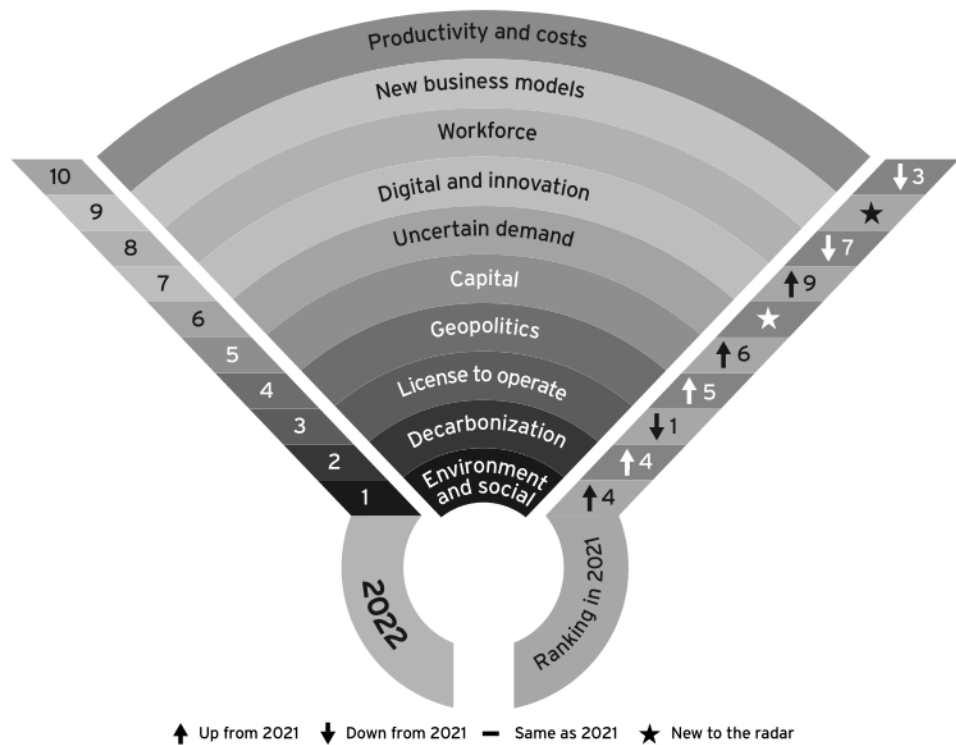


Figure 1: Top 10 business risks and opportunities for mining and metals in 2022 (EY)

There is, therefore, an important opportunity and imperative to align the province's mining laws and policies with market demands and expectations. Supporting strong ESG directions and incentives for responsible mining practices offers the benefits of increasing and/or securing access to expanding markets for responsible mining resources, while also reducing the costs of community conflict<sup>6</sup> and taxpayer liabilities.

A number of trends are converging and putting a spotlight on the mining sector within the context of responsible investment and responsible procurement of critical minerals and metals by sectors like automotive, electronics and clean energy. These include:

- The convergence of affordable, clean energy systems, aggressive government commitments to carbon reduction targets and growing consumer demand is leading to a rapid and dramatic expansion of clean energy generation, transmission and storage technology – and this will result in increased demand for and impacts of minerals and metals;<sup>7</sup>
- Governments in Canada and the USA are also recognizing that this transition, which is in many ways reliant on “critical minerals” supplies, must reflect responsible mining practices if it is to succeed;<sup>8</sup>
- Recent major tailings dam failures have underscored the material risks to investors who have, as a result, organized, in association with the UN Environment Program, to use their financial influence to drive safety improvements in the mining sector;<sup>9</sup>
- The expansion of third party audited, multi-sector defined market-based standards has attracted many of the world's largest metals purchasers and are shaping their procurement and investment policies. Additionally, they are increasingly being recognized as valuable instruments by government;<sup>10</sup> and
- There is growing recognition that doing good is just good business. *“Companies with better ESG credentials perform better than lower credential peers on return-on equity; return-on-assets and on stock market performance. There is a positive correlation between ESG ratings and cost of debt...Companies with high ESG performance had better risk management which reduced volatility. High ESG ratings could result in both lower cost of capital to the company and lower spreads.”*<sup>11,12</sup>

In this context, heightened by growing evidence of climate instability, geopolitical supply chain disruptions and growing investor pressure, responsible sourcing of minerals and metals has shifted from promise to imperative for many companies. Ford, Tesla, GM, BMW, VW, Daimler, Microsoft, Apple, HP, and ArcelorMittal are examples of strong proponents with clear materials sourcing policies. Similarly, a group of over 100 investors representing more than \$20T USD assets under management have launched Mining2030<sup>13</sup> to drive reforms on a range of issues in the sector, including mine tailings, Indigenous rights, biodiversity and the low carbon transition.

“ Investors look to ESG performance and ratings as a proxy for good management and risk mitigation. It is essentially a playbook for decreasing risks a company might face in a country where it plans to build and operate a mine — from carbon emissions intensity and mine tailings management to indigenous relations and worker safety.<sup>14</sup>

This marks an unprecedented moment of convergence in interests and responsibilities for both governments and companies and B.C. is uniquely positioned to contribute to and benefit from these historic times.

## Key ESG Challenges for Mining in B.C.

This white paper provides an overview of where leading investors and minerals and metals buyers are focusing their concerns. It also shows how reforms in B.C. mining policies and regulations could align with this growing suite of ESG policies and expectations in ways that would simultaneously meet market demands, protect communities and ecosystems and improve the performance and competitiveness of the mining sector in the province. It is meant to stimulate interest within both the private sector and government to seize the opportunity to have B.C. demonstrate leadership in a way that serves the long-term interests of citizens and markets alike.

While studies by Clean Energy Canada<sup>15</sup> and the Pembina Institute<sup>16</sup> acknowledge the growing global demand for metals and minerals needed for clean energy

technologies, they also acknowledge that any claims by the mining sector to be a climate-friendly industry must be considered within the broader context of lifecycle GHG emissions (relative to alternatives, including recycling), as well as impacts on biodiversity and communities and other key ESG factors necessary to address the balance of sustainability metrics being called for by the marketplace.

When it comes to explicit investment and procurement criteria for the mining sector, there are three primary areas of focus for the private sector:

1. Climate change performance;
2. Tailings dam safety;
3. Free prior and informed consent of Indigenous peoples.

Each of these areas touches on a range of policies and regulations that can require, enable or impede industry performance relative to best practices standards. In turn, there are practical implications for decarbonization, community engagement, watershed health, taxpayer liability and overall corporate accountability.

# Climate Change Performance

## The Challenge

In its 2022 Budget and Fiscal Plan, the B.C. government notes that *“British Columbia’s mining sector can play a critical role supporting the transition to a low-carbon future both locally and globally. Metals and minerals found within B.C. are used to create green technology such as electric vehicles and wind turbines, and B.C. mining operations stand out as having a lower greenhouse gas intensity than most global competitors.”*<sup>17</sup> The latter assertion is based on an analysis for the B.C. Business Council and the B.C. government — titled the Low Carbon Industrial Strategy — which



found that the province is home to some of the lowest carbon mining and smelting operations in the world largely due to the province's hydroelectricity.<sup>18</sup> As a result of this lower greenhouse gas (GHG) intensity, the analysis found that producing the province's copper, aluminum and steelmaking coal resulted in between 6 million and 8.5 million fewer tonnes of GHG emissions that would have been generated had the same products been supplied by competitors.

**“ A mining company unprepared for the transition to more sustainable practices, as climate change takes hold, is not only putting its reputation and operations at risk, but also jeopardizing future performance and investment opportunities.<sup>19</sup>**

However, absolute mining sector emissions in B.C. have increased 163% between 2007 – the baseline year for the province's GHG emission reduction targets – and 2020, from 274,000 tonnes to 720,000 tonnes of CO<sub>2</sub> equivalent. The three-year trend (2017-20) is a 76% increase or 312,000 tonnes.<sup>20</sup> With B.C.'s industry sector subject to a 2030 GHG reduction target of 38%-43% (relative to 2007 emissions), and a 27%-32% reduction required from the transportation sector (including heavy-duty trucks used in mining), both existing and any new mines will need to demonstrate dramatically superior GHG performance.<sup>21</sup>

## **Market Response to Climate Change Performance**

In light of these trends, policymakers and the mining sector will need to redouble efforts to ensure absolute GHG emissions decrease in line with provincial targets and the relative GHG competitiveness of B.C. mining isn't eroded. With increasing recognition of these risks, investors are increasingly putting pressure on mining companies to demonstrate that they are actively working to align their operations with net zero emissions targets and mitigate climate change risks.<sup>22,23</sup>

**“ Decarbonization is a major industry disruptor and as such needs to be treated like any other strategic risk; dealt with at a board and executive level, and managed as part of the overarching business strategy, not addressed as a separate climate strategy delegated to a discrete team. Sharing a road map to net zero and successes along the way will be key to gaining investor confidence and, potentially, competitive advantage.<sup>24</sup>**

The mining sector faces numerous, significant climate change-related risks that are cause for investor concern: physical, transition and legal and regulatory risks (Table 2).

**Table 2: Climate change-related risks for the mining sector<sup>25</sup>**

<b>Physical</b>	<ul style="list-style-type: none"> <li>• Changing climatic conditions, more frequent and extreme weather events and stresses on the availability of critical resources (e.g., water) can place mine infrastructure (and transport and power infrastructure) and operational capabilities at risk.</li> </ul>
<b>Transition</b>	<ul style="list-style-type: none"> <li>• Transition risks span the entire mining value chain, and include: <ul style="list-style-type: none"> <li>» Evolving political, social and consumer attitudes to high GHG emitting and polluting industries and products;</li> <li>» Evolving expectations of communities, shareholders, financiers and other key stakeholders;</li> <li>» Changing regulatory and legal frameworks; increased political risks (e.g., resource nationalization and trade tensions);</li> <li>» Regional security concerns;</li> <li>» Changing global markets and competition; and</li> <li>» Fluctuating commodity prices.</li> </ul> </li> </ul>
<b>Legal</b>	<ul style="list-style-type: none"> <li>• The mining sector is a potential target of climate-related activism, litigation and regulatory action, which can also pose serious reputational, financial and operational consequences.</li> <li>• As climate impacts (and associated pressures for prioritizing green energy transition metals developments) converge with a range of biodiversity and community safety concerns, it is anticipated that Indigenous organizations will assert FPIC-related legal processes and protections to address mining risks.</li> </ul>
<b>Regulatory</b>	<ul style="list-style-type: none"> <li>• The majority of climate-related disputes are found in routine licensing, permitting and other matters related to obtaining project approvals where it is now common to see climate change-related arguments and science raised and considered by decision-makers.</li> <li>• Approvals may also be prolonged as governmental agencies conduct additional analyses to mitigate their own litigation risk.</li> </ul>

Buyers are also increasingly making procurement choices with climate-performance – and the implications it has for their own corporate climate goals – in mind. For example, Vale signed a long-term contract with Tesla Inc. to supply Class 1, low-carbon nickel in the United States from its operations in Canada.<sup>26</sup>

## **Milestones on the Path Forward to Net Zero**

To manage the twin imperatives of reducing GHG intensity (to meet investor and buyer expectations and minimize exposure to domestic carbon pricing and/or border carbon tariffs) and absolute GHG emissions (to meet B.C.'s legislated and sectoral GHG reduction targets), the mining sector will need to move aggressively to innovate and adopt new technologies and best practices in its operations. A key opportunity in B.C., given access to relatively low-cost hydro power, is the pursuit of fully electrified mines.<sup>27</sup>

The key elements of this approach to best practices — which, if B.C. is to remain at the forefront of ESG and climate performance in the mining sector, must shift from voluntary to mandatory — include:<sup>28</sup>

- Scenario planning the different pathways to net zero, to create a flexible, agile decarbonization strategy.
- Aligning organization design and culture by incentivizing behavior that helps achieve targets Incorporating net-zero achievement into capital allocation methods.
- Determining which tools, technology and innovation to invest in and who to collaborate with.
- Deciding when to sell exposed assets or whether to transition to new energy economy metals.
- Assessing other potential opportunities, including recycling, renewables and carbon-reduced products.
- Reviewing funding and capital models including funding sources, the role of government and internal allocation and how to make best use of tax breaks and incentives.
- Determining how offsets and other financial instruments can be used to help achieve net zero.

# Tailings Dam Safety

## The Challenge

The Mt. Polley disaster — and the subsequent attention to existing and future liabilities — exposed the serious flaws and weaknesses in the way tailings facilities are designed, approved, monitored and maintained in B.C. Given that there are more than 172 existing tailings dams, with several more major dams proposed for new mines, this need to ensure safety for communities and watersheds, not to mention shareholders, is urgent – for ecological, ethical and economic reasons.<sup>29</sup>

The government's own Review Panel on the Mt. Polley disaster predicted that *"if the inventory of active tailings dams in the province remains unchanged, and performance in the future reflects that in the past, then on average there will be two failures every 10 years and six every 30. In the face of this prospect, the Panel firmly rejects any notion that business as usual can continue."*<sup>30</sup>

Subsequent reports from Auditor General<sup>31</sup> and the Mines Ministry's own Mine Audits and Effectiveness Unit<sup>32</sup> detail a range of deficiencies in the way tailings are permitted, monitored and managed. Each includes a series of detailed recommendations calling on the B.C. government to update its regulatory framework to reflect best standards, practices and regulations.<sup>33</sup>

While implementation of several of these recommendations is underway, to be successful and effective these reforms will a) move from policy to performance implementation, b) meet evolving best practices and c) be sufficiently inclusive of civil society and indigenous voices.<sup>34</sup> Additionally, given that the Mt. Polley Panel recommended the reduction of the inventory of tailings facilities by half, more attention is needed on the safe closure/decommissioning/reclamation of facilities no longer attached to an operating mine.





In order to live up to its aspirations of demonstrating best practices and leadership in tailings safety, these recommendations must translate into action and, through ongoing transparent reporting and evaluation, accountability.

## **Market Response to Tailings Dam Risks**

The question of tailings safety touches on a wide range of concerns including health and safety, water and biodiversity protection and Indigenous rights that are addressed in the responsible sourcing codes,<sup>35</sup> investment criteria,<sup>36</sup> and procurement policies<sup>37</sup> of individual companies in the automotive, electronics, steel and investment sectors.

Additionally, an increasing number of buyers and investors are committing to assurance systems (such as the Initiative for Responsible Mining Assurance and ResponsibleSteel),<sup>38</sup> that have specific mining performance standards, including tailings management, which are independently audited by third-party certifying bodies. This approach has the benefit of:

- a. Supporting international best practices that are commonly recognized and validated by a diverse range of business and stakeholders; and
- b. Allowing for the considerably complex and onerous task of evaluating the performance of key criteria to be managed by accredited experts who can provide a reliable and consistent assessment of compliance that can be used along supply chains.

Finally, governments, including the European Parliament and the Office of the President of the United States, are also starting to incorporate market-based responsible sourcing requirements for metals as a reference point for emerging policy and law that deals with mining-related impacts.<sup>39</sup>

## **Milestones on the Path Forward to Tailings Best Practices**

With best practices evolving rapidly and B.C. seeking to carve out a leadership position to attract market attention from ESG-focused buyers and investors, the best way forward to address the high consequence risks of tailings dam failures is to establish a precautionary “Safety First” approach to the design, management and closure of tailings facilities.<sup>40</sup>

This approach will provide companies with the responsibly sourced materials their policies prescribe and will afford B.C. preferential access to this growing segment of the market. Downstream buyers, investors, provincial and Indigenous governments, civil society and industry can all contribute to and benefit from the implementation of this proactive approach. The alternative pathway would allow for ongoing and increasing tailings risk associated with business as usual and would be unconscionably expensive for all parties.

The key elements of this approach to best practices include:

- Engage with Indigenous rights holders, including First Nations that have active or prospective exploration and mining projects in their Territories, to determine applicable Indigenous legal order, laws and protocols with respect to tailings safety regulations and policies;
- Engage with expert stakeholders, including civil society, to design and monitor the implementation of tailings safety regulations and policies that meet market and investor expectations;
- Prioritize safety above cost considerations in the design, construction, operation and closure of mine waste facilities;
- Design facilities to withstand the most extreme meteorological and seismic events;
- Prohibit facilities located immediately upstream from communities and sensitive ecosystems;
- Prohibit the use of upstream dams, especially in high precipitation and seismic areas;
- Require full financial assurances for site closure and post-closure costs, as well as full financial insurance for accidental damages;
- Require accountability, transparency and public disclosure on mine waste risks;
- Commit to a plan/strategy to reclaim, decommission or otherwise seek safe closure of tailings storage facilities in B.C. no longer associated with operating mines.

# Indigenous Consent

## The Challenge

In addition to tailings safety liabilities, a dominant concern reflected in the marketplace is around the application of the rights of Indigenous peoples to applicable projects. Consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), downstream buyers and investors have clearly prioritized Free Prior and Informed Consent (FPIC) in their responsible sourcing/investment criteria.

Optimistically, B.C. is advanced and showed true leadership in introducing the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) in 2019, which requires the Province to “make all BC law consistent with UNDRIP”. This appears to be a trigger across all legislation and policy in B.C. This legal requirement will likely be incrementally fulfilled.

Recently, a group of investors with \$1.1T worth of assets under management noted:

“ DRIPA’s potential embraced by investors in our 2019 letter is a future where the uncertainty plaguing the mining industry today is removed and B.C. is deservedly recognized as a global leader in responsible mining — but that path runs through the successful implementation of DRIPA. Without clear policy direction and amended legislation to ensure Indigenous rights are upheld and respected, the investment climate in B.C. will grow more unstable and uncertain.<sup>41</sup>

A further sign of progress, in terms of provincial promises, is in the Declaration Action Plan,<sup>42</sup> released in March 2022, which commits to “modernize the Mineral Tenure Act in consultation and cooperation with First Nations and First Nations organizations.”



A notable major step in the implementation of the Plan is the first consent-based decision-making agreement under the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act) between the Tahltan Central Government and the Province.

This agreement honours Tahltan's jurisdiction in land management decisions in Tahltan Territory in recognition of the Tahltan's title and rights within its territory. The agreement seeks to advance reconciliation as well as provide clarity and predictability for the Eskay Creek Revitalization Project.<sup>43</sup>

It is important to note that this commitment occurs in the context of a significant, ongoing legal challenge to B.C.'s *Mineral Tenure Act* by the Gitxaala First Nation.<sup>44</sup> Additionally, there are numerous areas that will require significant attention to redress current deficiencies across a range of projects, policies and laws as documented in a recent report by the B.C. Mining Law Reform initiative.<sup>45</sup>

To be successful in resolving the Gitxaala legal challenge and to fulfill the promise under the Declaration Action Plan, the *Mineral Tenure Act* will have to include an FPIC-compatible process for mineral tenure and reconcile existing permitting on lands that are now in dispute with First Nations. Articulating a path forward with tangible solutions and approaches to reforming the *Mineral Tenure Act* will strengthen B.C.'s commitment to land-use policy and planning, and bring more certainty to investors, communities and First Nations by confirming social choice on the land base through inclusive processes.

Last, it is noteworthy that the Action Plan singles out the *Mineral Tenure Act* for legal reform but does not speak to legal changes to the *Mines Act*, *Environmental Assessment Act*, *Reviewable Projects Regulation*, *Environmental Management Act* and other applicable legislation. It is understood that the legal requirement to make all B.C. laws consistent with UNDRIP and the Action Plan are separate legal obligations, but there will be progressive implementation to ensure fuller legal certainty on these co-existing obligations.

By developing a path forward with First Nations to build a co-managed land and resource management regime, the government can ensure B.C.'s natural resources are managed effectively now and in the future.

## Market Response to FPIC

As with tailings dam safety, companies are highlighting expectations of FPIC compliance in a range of ways, including investment criteria,<sup>46</sup> responsible sourcing policies<sup>47</sup> and assurance system standards.<sup>48</sup>

B.C. has a unique opportunity to demonstrate global leadership to investors and buyers keen to recognize and reward companies that are willing to operationalize FPIC. However, as seen in the private sector standards, this market reward will be predicated on demonstrated performance as opposed to policies that simply outline good intentions. B.C.'s head start with DRIPA and now the Action Plan presents an unprecedented market advantage, subject to its success in moving forward with implementation of changes to the *Mineral Tenure Act*.

## Milestones on the Path Forward to Indigenous Consent

- Require that mining exploration and development activities achieve FPIC and conform with Indigenous land-use plans and restrict mining activity where there is no such plan in place.
- Adopt a discretionary mineral tenure regime that incorporates a broad suite of values and interests and ensures that in issuing tenures, decision-makers uphold Indigenous title, rights and interests, including compliance with applicable Indigenous legal orders.
- Enable (at the request of Indigenous governments) revocation of exploration and mineral development rights that are inconsistent with land-use plan designations, duty to consult and DRIPA.
- Establish and fund Indigenous-led community-based watershed monitoring “Guardian” programs with equal application of Indigenous knowledge through government-to-government agreements.
- Develop data collection protocols that comply with applicable Indigenous legal orders on control, protection and confidentiality of Indigenous knowledge and train community-based monitoring staff so that data generated locally can be used for management, governance and statutory decision making.

# A Moment of Convergence and Opportunity

These are unprecedented times of opportunity for a critical convergence of social, economic and environmental interests and values. The combined crises of the pandemic, climate instability and geopolitical factors affecting supply chain security for materials necessary for the clean energy transition have forced a wide range of actors to reassess their contributions to a more sustainable future. They are helping companies redefine what value means in the marketplace and what governments need to reassure their citizens that mining meets globally accepted ESG standards. Business as usual is no longer an option and everyone — from governments and affected communities to investors, buyers and mining companies — need to be involved in practical solutions.

PricewaterhouseCoopers underscored this sentiment as a core message in the most recent report on the state of the industry in B.C.: *“More than ever, we see increasing evidence that those miners that are proactive about ESG issues, and view the ongoing recovery as an opportunity to invest in the transition to a low-carbon economy, are likely to outperform in the long term.”*<sup>49</sup>

This report has attempted to outline some of the key areas of convergence between market demands, community rights, ecosystem health, industry performance and government responsibilities. Whereas previously, governments have been cautious about imposing standards that might render companies less competitive, there is now evidence that a lack of standards poses an even greater risk in the marketplace going forward. A preliminary exploration of these opportunities has been undertaken by B.C. through the Mining Jobs Taskforce and the subsequent Responsible Metals Markets Forum, and the current context should enable key ESG insights and recommendations to be applied for the sector.



By reflecting and anticipating growing demands for higher ESG performance, B.C. can help create competitive advantage by sending clear, consistent messages around best practices through regulatory reform and the associated capacity building inside government and across companies and communities.

For investors and buyers seeking to make good on commitments to responsible sourcing and investing, B.C. represents a relatively unique opportunity as a target for capital investment and procurement. As such, market leverage can be helpful in moving the province from promise to performance.

## Summary and Next Steps

B.C. has the potential to be a key supplier of the metals and minerals needed to support the clean energy transition and is uniquely positioned to be a producer-of-choice for those investors and buyers focused on leading ESG and climate change performance within the mining sector.

As a recent Canada West Foundation report noted: *“Ignoring these questions is not an option. Increasingly, ESG is a point of differentiation that affects competitiveness both for jurisdictions and the companies that operate within them. Sustainability performance has become “table stakes,” and governments that don’t explicitly grapple with these issues risk having others dictate how their performance will be assessed.”*<sup>50</sup>

To capitalize on this opportunity, B.C. must adopt a three-pronged strategy:

- ① Encourage the mining sector operating in B.C. to adopt leading ESG and climate performance measures;
- ② Continuously improve and strengthen regulations, innovation programs and operating requirements to ensure B.C. mines remain at the forefront of ESG and climate performance; and
- ③ Require mandatory ESG and climate performance disclosure, enabling credible, data-driven promotion of B.C.’s metals and minerals to investors and buyers alike, helping secure new markets and attract additional investment.

Such an approach would include indicators such as greenhouse gas emissions (intensity and absolute) backed by net zero transition plans, water use and land disturbed as well as harder-to-measure criteria such as free, prior, informed consent and tailings dam safety. Additionally, B.C. can show the presence of governance frameworks both within the B.C. government and within the mining sector that would drive stronger ESG performance.

Such a strategy would recognize how B.C. government policy could encourage companies to meet ESG objectives and how improved policy and regulatory frameworks would provide credibility for ESG performance claims. As one very good example, the announcement of B.C.'s interim reclamation policy has clearly created a stronger foundation for bonding and elevates the province's approach to clean-up of mines after their operating lives.

To further develop the three-pronged strategy described above, we recommend that the B.C. government:

- Convene ESG and climate performance advisory groups for both Indigenous and stakeholders to advise on both relevant metrics and disclosure;
- Establish a comprehensive and publicly accessible province-wide data collection system for ESG performance at B.C. mines;
- Commit to publishing an annual summary of ESG performance (against these metrics); and
- Encourage companies mining in B.C. to verify their ESG performance via third-party/independent validation or certification to assure performance.

The rationale for engaging a strong ESG and net zero approach for the mining sector is clear; internationally, consumers and the marketplace are demanding stronger ESG measures and climate performance from the mining sector. What was once a focus on a handful of measures has now become a more sophisticated approach that truly reflects the multiple environmental, social and governance issues within this sector and the long-term impacts that remain on the landscape for generations.



# Endnotes

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### Ministry Comments on Report Recommendations

The following are specific elements of the approaches to tailings dam safety and indigenous consent proposed in the report, *ESG and Responsible Mining in BC: Aligning with Market Demands, Trends and Opportunities*, paired with Ministry comments on the ways they are currently being addressed with existing regulations, policies, and requirements.

#### TAILINGS DAM SAFETY

**“Engage with Indigenous rights holders, including First Nations that have active or prospective exploration and mining projects in their Territories, to determine applicable Indigenous legal order, laws and protocols with respect to tailings safety regulations and policies;”**

Ministry comments: TSFs are not typically associated with exploration projects, except in rare cases. They are predominantly only constructed as part of major mines. A Mines Act permit is required to build, operate and maintain a TSF and EMLI ensures that we are meeting or exceeding our duty to consult on all permits prior to their issuance. This includes projects with TSFs.

**“Engage with expert stakeholders, including civil society, to design and monitor the implementation of tailings safety regulations and policies that meet market and investor expectations;”**

Ministry comments: The Code Review Committee, which is a 12 person committee appointed by the Minister of EMLI and comprised of equal representation from Indigenous nations, industry and labour, has struck a sub-committee of TSF experts designed to address the recommendations from the TSF audit. The work of the sub-committee includes consideration of emerging standards and relevant documents, including the Global Tailings Standard and the MiningWatch “Safety First” publication.

**“Prioritize safety above cost considerations in the design, construction, operation and closure of mine waste facilities;”**

**“Design facilities to withstand the most extreme meteorological and seismic events;”**

**“Prohibit facilities located immediately upstream from communities and sensitive ecosystems;”**

**“Prohibit the use of upstream dams, especially in high precipitation and seismic areas;”**

Ministry comments:

- The 2016 revisions to the Health, Safety and Reclamation Code for Mines in BC (the Code) require mines to, amongst numerous other technical requirements, include assessments of Best Available Technology in applications for new TSFs. These

assessments must include evaluation of dry stack and thickened tailings options, as well as dam construction methodologies.

- The 2021 audit by the Chief Auditor found that the 2016 revisions to the tailings sections of the Code are consistent with current best practices, are clear and enforceable, and have a high level of compliance by industry. These revisions are making a positive impact with respect to how tailing storage facilities are managed and operated in B.C.
- The Chief Auditor also provided recommendations to support continuous improvement of the regulatory framework for TSFs. The Ministry has accepted all seven Chief Auditor recommendations and has committed to concrete actions to address them. Progress updates are posted publicly to the Audit Unit's website.

**“Require full financial assurances for site closure and post-closure costs, as well as full financial insurance for accidental damages;”**

Ministry comments:

- As a condition of their Mines Act permit, the permittee must provide financial security in an amount and in a form acceptable to the Chief Permitting Officer. Securities are held until the Chief Inspector is satisfied that all reclamation requirements for the operation have been fulfilled.
- Since every mine site has unique management requirements and operational constraints, the assessment of financial security is performed on a site-specific basis. The security is set at a level that reflects outstanding reclamation, environmental and closure obligations associated with the site. The amount of security may be increased or decreased at the discretion of the Chief Permitting Officer based on the mine's actual reclamation liability at any point in time.
- The Interim Major Mines Reclamation Security Policy was released in April 2022 and outlines the comprehensive requirements for calculating the reclamation liability cost estimate for all major mines in BC.

**“Require accountability, transparency and public disclosure on mine waste risks;”**

Ministry comments: The Code is the regulations that govern the BC mining industry. There are a comprehensive set of requirements for all mines, including those with TSFs. Additionally, there are a substantial number of requirements related specifically to the design, construction, operation, maintenance, and closure of TSFs. All information submitted to EMLI related to the Code, the Mines Act, and individual Mines Act permits are publicly available (<https://mines.nrs.gov.bc.ca/>). Additionally, the Ministry has put significant focus on increasing transparency of TSF information. The BC Mine Information website has been updated with the latest annual reports, and further updates are in progress.

**“Commit to a plan/strategy to reclaim, decommission or otherwise seek safe closure of tailings storage facilities in B.C. no longer associated with operating mines.”**

Ministry comments: A comprehensive Reclamation and Closure plan is a Code requirement for all mines in BC. These plans must be submitted as part of a mines initial application and must be updated a minimum of every five years over the life of mine, including a detailed estimate of the

reclamation liability for the entire site. Additionally, the Code specifically requires that the Reclamation and Closure plan include a closure plan for TSFs. The closure plan must include a detailed construction cost estimate, schedule and monitoring plan for implementation and be prepared by one or more qualified professionals in consideration of the Code.

### INDIGENOUS CONSENT

The following are several of the specific elements of the approach to indigenous consent proposed in the report and the ways they are currently being addressed by government. Please see page 17 of report for the full list of recommendations.

**“Require that mining exploration and development activities achieve FPIC and conform with Indigenous land-use plans and restrict mining activity where there is no such plan in place;”**

#### Ministry comments:

- Under current mining regulations, any significant activities (e.g. mechanized exploration and/or mineral development) require government authorization, which triggers mandatory consultation with First Nations.
- Additionally, certain mineral development activities require authorizations and potential additional First Nation consultation under parallel legislation (e.g. Forest Act, Environmental Management Act, the Water Sustainability Act, and the Environmental Assessment Act).

**“Adopt a discretionary mineral tenure regime that incorporates a broad suite of values and interests and ensures that in issuing tenures, decision-makers uphold Indigenous title, rights and interests, including compliance with applicable Indigenous legal orders;”**

**“Enable (at the request of Indigenous governments) revocation of exploration and mineral development rights that are inconsistent with land-use plan designations, duty to consult and DRIPA;”**

#### Ministry comments:

- The Province committed to modernizing the Mineral Tenure Act (MTA) when we included it in BC’s [Declaration Act Action Plan](#) – released in March 2022.
- We remain committed to finding a path forward that honours our Declaration Act Action Plan commitment, while also sustaining a strong mining sector that supports reconciliation and economic prosperity for all British Columbians.
- EMLI is developing MTA modernization next steps that align with the Declaration Act Secretariat’s [Interim Guidance on Implementing the Declaration on the Rights of Indigenous Peoples Act](#), including early involvement of First Nations.
- During the MTA modernization process, a key topic will likely be greater opportunities for First Nation involvement in decision-making.
- In the meantime, EMLI continues to work directly with individual First Nations on land-based initiatives – including mining-related land use plans – to support reconciliation, shared economic opportunities, and sustainability.

**From:** [Jang, Monica EMLI:EX](#)  
**To:** [Robb, Peter L. EMLI:EX](#); [Amann-Blake, Nathaniel EMLI:EX](#)  
**Cc:** [McCann, Meghan EMLI:EX](#)  
**Subject:** RE: ESG Market Alignment Opportunities – Meeting Request  
**Date:** October 28, 2022 12:55:27 PM

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Thanks Peter,

I've copied Meghan to work on scheduling and will ensure that Peter W is included. We'll need some bullets to support Fazil so we'll assign for that as well.

Thanks,

Monica.

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**From:** Robb, Peter L. EMLI:EX <[Peter.Robb@gov.bc.ca](mailto:Peter.Robb@gov.bc.ca)>  
**Sent:** October 28, 2022 12:53 PM  
**To:** Jang, Monica EMLI:EX <[Monica.Jang@gov.bc.ca](mailto:Monica.Jang@gov.bc.ca)>; Amann-Blake, Nathaniel EMLI:EX <[Nathaniel.Amann-Blake@gov.bc.ca](mailto:Nathaniel.Amann-Blake@gov.bc.ca)>  
**Subject:** Re: ESG Market Alignment Opportunities – Meeting Request

Worth it... he is also a part of our Responsible Metals working group coming out of MJTF and managed by Peter W. he should attend any meeting that takes place

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**From:** Jang, Monica EMLI:EX <[Monica.Jang@gov.bc.ca](mailto:Monica.Jang@gov.bc.ca)>  
**Sent:** Friday, October 28, 2022 7:56:06 AM  
**To:** Robb, Peter L. EMLI:EX <[Peter.Robb@gov.bc.ca](mailto:Peter.Robb@gov.bc.ca)>; Amann-Blake, Nathaniel EMLI:EX <[Nathaniel.Amann-Blake@gov.bc.ca](mailto:Nathaniel.Amann-Blake@gov.bc.ca)>  
**Subject:** FW: ESG Market Alignment Opportunities – Meeting Request

Hi Peter/Nate:

Thoughts on whether Fazil should take with the both of you or if you both would meet first with them?

Monica.

---

**From:** Alan Young <[alanyoung@merg.ca](mailto:alanyoung@merg.ca)>  
**Sent:** Thursday, October 27, 2022 6:31 AM  
**To:** Mihlar, Fazil EMLI:EX <[Fazil.Mihlar@gov.bc.ca](mailto:Fazil.Mihlar@gov.bc.ca)>; Amann-Blake, Nathaniel EMLI:EX <[Nathaniel.Amann-Blake@gov.bc.ca](mailto:Nathaniel.Amann-Blake@gov.bc.ca)>; Robb, Peter L. EMLI:EX <[Peter.Robb@gov.bc.ca](mailto:Peter.Robb@gov.bc.ca)>  
**Cc:** Dan Woynillowicz <[dan@polarisstrategy.ca](mailto:dan@polarisstrategy.ca)>  
**Subject:** ESG Market Alignment Opportunities – Meeting Request



**[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.**

Dear Fazil Mihlar, Nathaniel Amann-Blake and Peter Robb,

I am writing in regard to a new paper myself and Dan Woynillowicz have recently completed entitled, "ESG and Responsible Mining in B.C.: Aligning Market Demands, Trends and Opportunities." A briefing note outlining the key findings is attached below.

Dan and I have been working on this paper for some time and have enlisted the review and endorsement of a range of experts in field including, Merle Alexander, QC - Indigenous Law Group - Miller Titerle, Jamie Bonham - Director Corporate Engagement, NEI Investments, Jason Dion - Mitigation Research Director, Canadian Climate Institute, Nancy Olewiler -Economist & Professor, School of Public Policy, Simon Fraser University and Merran Smith - Founder and Chief Innovation Officer, Clean Energy Canada, in an effort to fully understand the opportunities and the challenges of adopting a comprehensive economic plan within an ESG framework. Our efforts allowed us to take a comprehensive look at opportunities in the mining sector. While the paper focuses on the mining sector, its overall recommendations could be applied across many sectors.

By reflecting and anticipating growing demands for higher ESG performance, B.C. can help create competitive advantage by sending clear, consistent messages around best practices through regulatory reform and the associated capacity building inside government and across companies and communities.

Thank you for taking the time to review this meeting request. On behalf of the team who have written and supported the ESG and Responsible Mining paper, we respectfully request the opportunity to meet with you at your earliest convenience.

Best regards

Alan Young

~~~~~  
Alan Young  
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