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Lowering the Cost of Conservation: A Call to Reform Mineral Tenure Compensation in BC

Prepared for:
Northern Confluence Initiative

Prepared by:
Law Students: Christopher Hill and Quila Gillott
Articled Student: Lisa Harris
Supervising Lawyer: Charis Kamphuis

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Cover image: Mining exploration activity (Holly Pattison)

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1. Introduction

In this report we argue that the legislative regime governing the mining industry in British Columbia ("BC") is incompatible with Canada and BC's biodiversity protection and Indigenous reconciliation commitments and obligations. Specifically, the report identifies and analyzes the province's mineral compensation regime as a problematic barrier to the realization of these commitments, and it recommends principles and approaches for reform.

In response to the biodiversity crisis, in 2022 the Governments of Canada and BC joined 188 countries around the world and committed to conserving 30% of the land and water in their respective territories by 2030 (the "30 by 30 Commitment"), pursuant to an agreement called the Kunming-Montreal Global Biodiversity Framework (GBF).[1] Both Canada and BC have linked this environmental commitment with their human rights commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (the "UNDRIP"), such as through the creation of Indigenous Protected and Conserved Areas ("IPCAs").[2]

The 30 by 30 Commitment will require BC to nearly double its existing park land.[3] However, a major barrier to achieving this goal is the extensive presence of mineral tenure claims in the province. As of 2022, mineral tenure claims covered approximately 11 million hectares of BC's land base.[4] The owners of these tenures hold a kind of property right to the minerals below the surface.[5] Under existing provincial laws, mineral tenure is extraordinarily easy and cheap to acquire, and, once acquired, it affords the tenure holder powerful rights to explore and develop the property toward the goal of proposing a full scale mine.[6]

When land is designated for a conservation purpose, the Canadian common law may require compensation for any impacted mineral tenure holders.[7] This situation is referred to as a

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[1] Convention on Biological Diversity, Press Release, "Nations Adopt Four Goals, 23 Targets for 2030 In Landmark UN Biodiversity Agreement" (19 Dec 2022), online: <https://www.cbd.int/article/cop15-cbd-press-release-final-19dec2022> [https://perma.cc/P8JA-PWHB] [CBD 2022].

[2] See e.g. Government of Canada, "Government of Canada recognizing federal land and water to contribute to 30 by 30 nature conservation goals" (2022) online: <https://www.canada.ca/en/environment-climate-change/news/2022/12/government-of-canada-recognizing-federal-land-and-water-to-contribute-to-30-by-30-nature-conservation-goals.html> [GoC 30x30]; BC Ministry of Water, Land and Resource Stewardship, Mandate Letter, (2022) online (pdf): <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/wlrs_-_cullen_-_w_ps.pdf> [WLRS Mandate Letter]; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c 44 [*DRIPA*].

[3] Canadian Parks and Wilderness Society British Columbia Chapter, "BC to protect 30% of lands by 2030," online: <https://cpawsbc.org/protecting-30-by-2030/#key-opportunities-terrestrial> [https://perma.cc/QJ82-UN7C] [CPAWS-BC].

[4] Francesca Fionda & Matt Simons, "How digital prospectors are staking First Nations land and private property in B.C." (2022), online: *The Narwhal* <https://thenarwhal.ca/bc-online-mineral-staking/> [https://perma.cc/5NPD-7KVC] [Fionda & Simons].

[5] *Mineral Tenure* Act, RSBC 1996 c 292, ss 28, 28 [*MTA*].

[6] See Part 2(A) of this report.

[7] See Part 2(B) of this report; See *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36, at paras 27, 32-37 [*Annapolis*].

"regulatory taking" or a "constructive taking." In the late 1990s, BC adopted a market value mineral tenure compensation regime which created a binding statutory obligation to compensate tenure holders impacted by certain conservation measures.[8] Market value refers to the hypothetical amount that the tenure holder could have obtained for the sale of the tenure on the open market, had the conservation measure not occurred.[9] Under this regime, some tenure holders in BC have received compensation in the tens of millions of dollars.[10]

Our objective in this report is to make the case for progressive law reform to BC's market valuation system, to show that such reform is achievable, and to offer a foundation for the necessary and more detailed discussion of how this reform can achieve specific goals. We begin in Parts 2 and 3 by outlining the legal and policy context with respect to biodiversity protection and IPCAs in greater detail, as well as the existing legal framework for mineral tenure compensation in BC.

In Part 4, we identify three key problems with BC's market value approach to compensation. Drawing on the available data, we argue that market valuation makes some conservation efforts unfeasible due to the untenably high compensation payouts that they may trigger. We also observe that the ultimate quantum can be highly unpredictable, due to wide variations in expert-driven valuations. This makes it very difficult for policy makers to calculate the cost of a given conservation designation. In addition, we argue that the acquisition and development of mineral tenures is a fundamentally speculative economic activity, given the extremely low probability that a tenure will result in a profitable mine. Not only does this make the market-based approach to compensation unfair, but it violates the well-established principle that the risk inherent in speculative investment activities should not be borne by the public. These three problems (lack of feasibility, predictability, and fairness) reveal that BC's market value approach to mineral tenure compensation is a serious obstacle to the Province's conservation agenda.

Despite this context, provinces like BC with jurisdiction over natural resources have the power to legislate to eliminate or reduce the common law and statutory rights of mineral tenure holders to compensation paid to enable conservation measures. Throughout this report, we argue that reform in this domain is necessary in order to implement conservation measures. To help build the case for reform, we undertook a survey of jurisdictions in Canada and around the world that have passed laws to either eliminate or limit compensation rights in land use and natural resource sectors such as mining and forestry. In Part 5 we report the results of this cross-jurisdictional research.

Drawing on this research and reflecting on the problems with the market-value approach, in Part 6 we propose four general principles that we argue should inform the Province's necessary reforms to mineral tenure compensation. In our view, these high-level principles should serve as reasonable points of consensus between private sector actors and public sector decision makers. We argue that agreement on general principles will help policy makers more effectively chart a

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[8] *MTA*, *supra* note 5, s 17(1); *Mining Rights Compensation Regulation*, BC Reg 19/99, s 5(1) [*Mining Regulation*].
[9] *Mining Regulation*, *supra* note 8, s 5(1).
[10] Examples are provided in Part 4.1.

course to reform. Finally, in Part 7 we draw on these general principles to provide recommendations to policy makers tasked with reform.

2. The Legal Framework for Mineral Tenure Compensation in BC

In this section we describe the most pertinent aspects of BC's statutory approach to regulating the mineral tenure system. We begin by describing generally how mineral tenures are acquired in BC, before setting out the common law rules that apply to determine when a government action has impacted a tenure holder's interests such that they are owed compensation. We then describe the statutory regime created in BC in the late 1990s that displaced this common law rule in determining the quantum of compensation owed in certain circumstances.

2.1 BC'S STATUTORY MINERAL TENURE SYSTEM

BC's free entry mineral tenure system, established by the *Mineral Tenure Act* ("*MTA*"), makes it both straightforward and relatively inexpensive for corporations or members of the public to acquire a mineral claim. To stake a mineral claim in BC, a person must register for a free miner certificate. A person is eligible for this certificate if they are at least 18 years of age and are either a Canadian citizen, permanent resident, or authorized to work in the country.[11] If someone satisfies these requirements, then they can register online to stake a mineral claim for $1.75 per hectare.[12]

Once the mineral claim is registered, the claimholder has a "chattel interest," which is a bundle of property rights attached to the subsurface minerals in that area.[13] Specifically, a mining claim allows the claimholder to enter and use the surface land for the purpose of "exploration and development or production" of the minerals under that land, up to a prescribed limit.[14] This right to enter the land exists even where the surface land is owned by another person or claimed by an Indigenous nation, and even if that person or nation does not consent to the exploration activities.[15]

If the claimholder wishes to carry out production mining over the limit granted by their mineral claim, they must obtain a mining lease. This process is straightforward, and the mineral claimholder has *the right* to convert their mineral claim into a mineral lease. If a claimholder pays a fee, posts the required notices, and if required, has the land surveyed, the Chief Gold

[11] Government of British Columbia, "Natural Resource Online Service – Free Miner Certificate" (last accessed July, 2023), online: <https://portal.nrs.gov.bc.ca/web/client/-/free-miner-certificate> [https://perma.cc/Z4SQ-NPKY].
[12] Fionda & Simons, *supra* note 4.
[13] *Rock Resources Inc v British Columbia*, 2003 BCCA 324 at para 57 [*Rock Resources*]; *MTA*, *supra* note 5, s 28.
[14] *MTA*, *supra* note 5, s 14.
[15] *MTA*, *supra* note 5, s 19.

Commissioner *must* issue a mining lease.[16] Once a mining lease is issued, the leaseholder has a property interest in that land, and specifically, a right to the minerals within and under the leasehold land.[17] Notably, under BC's *MTA*, the term "mineral title" or mineral tenure includes both mineral claims and mineral leases.[18] For clarity, in this report we use the term "mineral titleholder" to refer to those who hold either a mineral claim or lease.

Through the process described above, in December 2022, 11,073,216 hectares of BC's land base had been staked with mineral claims, and another 89,085 hectares had been staked with mining leases. Thus, by the end of 2022, a total of 11,162,301 hectares of land in BC was covered by mineral titles in good standing. As an active mine requires a lease in good standing, these figures consequently include existing mines in operation.[19]

It is important to note that in 2021, the Gitxaała and Ehattesaht Nations, with the support of numerous interveners, launched a constitutional challenge to the statutory regime that enables the acquisition of mineral title in BC.[20] In the recent BC Supreme Court Ruling of 2023 the court agreed with the Indigenous nations that the current regime is an infringement of Aboriginal rights because it transfers interests in land to third party mineral titleholders without notice, consultation or the consent of the Indigenous nation on whose territory the mineral claims exist. The court gave the Province of BC 18 months to align the mineral staking regime with UNDRIP.[21] This legal action is related to the subject matter of this report, but it is also distinct. The lawsuit is an Aboriginal rights challenge to the statutory regime for granting mineral title in BC, whereas this report focuses on the legal and policy problems with the current statutory regime for compensating a mineral titleholder if the value of their interest is affected by conservation measures.

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[16] *MTA*, *supra* note 5, ss 42(1), 42(4); The automatic granting of a claim to a lease upon meeting minimal administrative requirements is one of the aspects of the *Mineral Tenure Act* that Indigenous nations are hoping to change (see The MTA reform resolution tabled by Gitxaała and recently passed by Union of British Columbia Indian Chief ("UBCIC"): Union of British Columbia Indian Chiefs, "Final Resolutions of UBCIC Chiefs Council June 7th – 8th, 2023: Resolution 2023-38," at 52, online: <https://assets.nationbuilder.com/ubcic/pages/132/attachments/original/1686786641/2023June_CC_Resolutions_CombinedPackage.pdf?1686786641> [https://perma.cc/M3X5-WCY6]).

[17] *MTA*, *supra* note 5, s 48.

[18] *MTA*, *supra* note 5, s 1.

[19] Mineral Titles BC, "Title & Reserve Statistics – As of December 31, 2022," (31 December 2022), online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/mineral-titles/mineral-placer-titles-getting-started/forms-maps-publications/general-information/annual_title_stats_for_2022.pdf>.

[20] *Gitxaała Nation v Chief Gold Commissioner of BC et al*, heard together with *Ehattesaht First Nation v His Majesty the King in Right of BC et al* [*Gitxaała Nation*]; Gitxaała Nation, "Legal Backgrounder – Gitxaała's legal challenge to BC's mineral claim regime" online (pdf): <https://gitxaalanation.com/wp-content/uploads/2023/04/2023-04-03-Gitxaala-Hearing-Media-Release-and-Legal-FINAL.pdf> [https://perma.cc/4WXZ-3J9W]; British Columbia's Office of the Human Rights Commissioner, "B.C.'s Human Rights Commissioner appears in court on mineral rights cases with important implications for reconciliation in B.C." (3 April 2023), online: <https://bchumanrights.ca/news/commissioner-in-court-on-mineral-rights-cases/> [https://perma.cc/Q5RT-DM8V].

[21] *Gitxaala v. British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680. September 26, 2023.

2.2 COMMON LAW RULES THAT ESTABLISH MINERAL TENURE COMPENSATION

Under the Canadian common law, property owners have a presumptive right to pursue compensation in the event of a constructive taking.[22] A constructive taking is defined as a situation where a government's actions, decisions or legislation deprive a person of some benefit, control, or ownership of their rights or interests in land, without necessarily divesting them of the property title.[23] The Canadian courts have adopted a two-part test to determine whether or not a constructive taking has occurred.[24] First, the government action in question must cause a public authority to acquire a beneficial interest (i.e., an advantage) in the property itself or flowing from the property.[25] Second, the action must remove all reasonable uses of the property on the part of the titleholder.[26] The courts have held that this test focuses on the effect on the rights of the interest holder, and that government "regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test."[27]

In the case of mineral titleholders, their interest lies in their ability to potentially exploit the subsurface minerals. In this context, a government action that deprives a mineral titleholder of the ability to access, explore or develop their tenured land can be a constructive taking. For example, the courts have held that the creation of a park, which consequently removed a mineral titleholder's opportunity to develop their tenured property into a mine, amounted to a constructive taking.[28]

While the common law creates a presumptive right to compensation for constructive takings, a government with jurisdiction can change or supplant this common law rule by adopting a statute that clearly conveys this intention.[29] In the words of the Supreme Court of Canada (the "SCC") in 2022: "*governments have the power to immunize themselves from liability to pay compensation*

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[22] *Annapolis*, *supra* note 7 at para 17.
[23] Thomson Reuters Practical Law, "Glossary: Regulatory Taking," online: <https://ca.practicallaw.thomsonreuters.com/w-002-6796?transitionType=Default&contextData=(sc.Default)&firstPage=true> [https://perma.cc/9NK8-P6GB]; For the inclusion of interests in land in the discussion of expropriation and constructive takings, see also *R v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1 at para 53 [*Tener*].
[24] *Canadian Pacific Railway Co v Vancouver (City),* 2006 SCC 5 at para 30 [*Canadian Pacific Railway*], affirmed in *Annapolis*, *supra* note 7 at para 25.
[25] *Annapolis*, *supra* note 7 at para 25.
[26] *Ibid*, citing *Canadian Pacific Railway*, *supra* note 23 at para 30.
[27] *Annapolis, supra* note 7 at paras 25, 38, 45.
[28] *Tener*, *supra* note 22 at paras 59-60.
[29] *Annapolis*, *supra* note 7 at para 21.

for a taking."[30] To supplant this common law right, clear statutory language must[31] show that the intention of the Act is to change or remove the common law presumption that the Crown will pay compensation for taking one's property.[32]

In sum, the BC government has the power to displace the common law right to compensation by creating an alternative statutory scheme that clearly delineates its intended approach to compensation in the context of a regulatory taking. In fact, BC's current market value regime is an example of this. When the BC government adopted the relevant provisions of the *MTA* in the 1990s, it replaced the generous compensation regime under the common law with a slightly less generous compensation regime under statute.[33] The next section describes this statutory regime in greater detail.

2.3 THE MINERAL TENURE COMPENSATION STATUTORY REGIME

In 1999, changes to the *MTA* created a detailed compensation system that displaced the common law as an avenue for claiming and evaluating compensation for mineral tenure regulatory takings in the Province of BC. This statutory regime applies when a government wishes to use surface land to create a conservation area or park.[34] In this scenario, a mineral titleholder will be awarded compensation equal to the expropriated claim's value on the open market.[35]

Specifically, the *Park Act* empowers the Minister to expropriate a mineral lease or claim for "the purpose of establishing or enlarging a park, conservancy or recreation area."[36] If the Minister expropriates a mineral lease or claim in this way, then the *MTA* provides compensation "payable to the recorded holder or owner … in an amount equal to the value of the rights expropriated, to be determined under the regulations."[37] The *Mining Rights Compensation Regulation* then states that the "value of an expropriated mineral title must be determined by estimating the value that would have been paid to the holder of the expropriated mineral title if the title had been sold on the date of expropriation, in an open and unrestricted market between informed and prudent parties acting at arm's length."[38] This encapsulates BC's approach to the valuation and compensation of mineral tenures. In this report, we refer to this statutory approach as the "market value approach" to mineral tenure compensation.

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[30] *Annapolis*, *supra* note 7 at para 22 [emphasis added].
[31] *Attorney-General v De Keyser's Royal Hotel Ltd*, [1920] All ER 80, [1920] AC 508 ("The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" at 542).
[32] *Rock Resources*, *supra* note 13 at para 156.
[33] *MTA*, *supra* note 5, s 17.1.
[34] *Ibid*.
[35] *Ibid*; *Mining Regulation*, *supra* note 8, s 5(1).
[36] *Park Act*, RSBC 1996 c 344, ss 11(2)(b)-(c) [*Park Act*].
[37] *MTA*, *supra* note 5, s 17.1.
[38] *Mining Regulation*, *supra* note 8, s 5(1).

In practice, the market value approach has resulted in very high compensation awards at a great cost to taxpayers. For example, in 2011, the BC government arrived at a $9.8 million settlement with Cline Mining for the regulatory expropriation of its coal licence and coal licence applications.[39] In a different case, in 2008, the BC government agreed to a $30 million settlement with Boss Power with respect to its mineral claims.[40] More recently, $24 million was paid to Imperial Metals in a negotiated settlement for its mineral exploration rights to close the Donut Hole in Manning Park. Government and philanthropic sources on both sides of the BC/Washington State border contributed to raise the necessary funds.[41]

Curiously, the *MTA* contains a different provision that allows the minister to generally restrict surface rights without compensation for tenure holders.[42] This provision would allow the Province to restrict mining, without compensation obligations, in circumstances other than for the purposes of creating a park under the *Park Act*. However, it appears that the Province has long adopted a general policy of declining to use this particular provision.[43] For this reason, we focus our analysis in this report on BC's market value compensation regime that applies to regulatory takings for the purpose of creating a provincial park.

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[39] Jessica Clogg, *Modernizing BC's Free Entry Mining Laws for a Vibrant, Sustainable Mining Sector* (Vancouver: West Coast Environmental Law & Fair Mining Collaborative, 2013) at 25 online (pdf): <https://www.wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf> [https://perma.cc/H3EE-PKZ7]; Justine Hunter, "B.C. pays off miner for loss in protected Flathead River area," *The Globe and Mail* (24 April 2014), online: <https://www.theglobeandmail.com/news/british-columbia/bc-pays-off-miner-for-loss-in-protected-flathead-river-area/article18202545/> [https://perma.cc/9T5C-DCGD] [Hunter]; Note also that this compensation is under the *Coal Act*, SBC 2004 c 15, s 4 [*Coal Act*].

[40] Clogg, *supra* note 38 at 26.

[41] British Columbia, Ministry of Energy Mines and Low Carbon Innovation, "Mineral tenures surrendered in ecologically sensitive Skagit River Donut Hole" (19 January 2022) online: <https://news.gov.bc.ca/releases/2022EMLI0002-000076>.

[42] *MTA*, *supra* note 5, ss 17(1)(2).

[43] During oral submissions in the Gitxaała court case, lawyers for the Attorney General of BC said that s. 17 has never been used (*Gitxaała Nation*, *supra* note 20).

3. Key Policy Commitments at Stake

In this report, we argue that BC's market value approach to mineral tenure compensation represents an obstacle to the provincial and federal governments' efforts to achieve important public policy goals. In this section, we continue to build this argument by summarizing the public policy goals at stake with respect to biodiversity, Indigenous reconciliation, land use planning, and mineral tenure reform.

3.1 "30 BY 30": BC AND CANADA'S PROMISE TO CONSERVE 30% OF LAND BY 2030

As described previously, the federal government has made an international commitment to conserve 30% of Canada's land and water by 2030.[44] Similarly, the BC government has declared its intention to protect 30% of the province's land by 2030.[45] These federal and provincial biodiversity commitments reflect agreements made at the December 2022, 15th Conference of Parties to the UN *Convention on Biological Diversity*, where Canada adopted the *Kunming-Montreal Global Biodiversity Framework*.[46] This framework consists of 23 global targets, including the "…effective conservation and management of at least 30% of the world's lands, inland waters, coastal areas and oceans."[47]

To achieve these goals, BC will need to implement conservation measures over significant tracts of land, nearly doubling current protected areas.[48] To strengthen and support the achievement of these biodiversity targets, both governments have entered into a process with First Nations leadership organizations in the province to develop a trilateral Nature Agreement which aims to "explore new ways to protect and restore habitat and strengthen ecosystem resilience to climate change."[49] The terms of the anticipated Nature Agreement will likely require conservation measures to protect and restore habitats.

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[44] GoC 30x30, *supra* note 2.
[45] WLRS Mandate Letter, *supra* note 2.
[46] CBD 2022*, supra* note 1.
[47] *Ibid*.
[48] CPAWS-BC, *supra* note 3.
[49] Canada, Environment and Climate Change Canada, "Canada and British Columbia to launch development of a new Nature Agreement" (2021), online: <https://www.canada.ca/en/environment-climate-change/news/2021/02/canada-and-british-columbia-launch-development-of-a-new-nature-agreement.html>.

3.2 *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT*: BC'S COMMITMENT TO RECONCILIATION WITH INDIGENOUS NATIONS

BC's 2019 *Declaration on the Rights of Indigenous Peoples Act* ("*DRIPA*") established a legislative framework for applying the UNDRIP in the province.[50] DRIPA aims: "(a) to affirm the application of the [UNDRIP] to the laws of British Columbia; (b) to contribute to the implementation of [the UNDRIP]; and (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies."[51] *DRIPA* requires the BC government to prepare and implement an action plan to achieve full respect for the rights recognized by the UNDRIP.[52] On March 30, 2022, the BC government published its DRIPA Action Plan which specified various provincial commitments, such as a promise to reform the *MTA,* discussed in the next subsection below.

Several Indigenous rights recognized by the UNDRIP are impacted by BC's system of mineral tenure compensation. For example, article 26 recognizes that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." UNDRIP further clarifies the right to conservation in article 29, stating that:

> *Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.*[53]

To foster reconciliation in this area, the federal government announced in 2021 that it will provide $340 million to support Indigenous-led conservation efforts nationally, over $166 million of which will specifically support the creation of IPCAs.[54] Provincially, in 2022, the Minister of Water, Land and Resource Stewardship received a mandate to "achieve the Nature Agreement's goals of 30% protection of BC's land base by 2030, including Indigenous Protected and Conserved Areas."[55] However, IPCAs are not yet legally recognized as a formal structure by the BC government.[56]

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[50] *United Nations Declaration on the Rights of Indigenous Peoples,* A/RES/61/295 (13 September 2007) [UNDRIP].
[51] *DRIPA*, *supra* note 2, s 2.
[52] *DRIPA*, *supra* note 2, s 4(1).
[53] UNDRIP*, supra* note 49.
[54] Canada, Environment and Climate Change Canada, "Government of Canada announces $340 million to support Indigenous-led conservation" (2021) online: <https://www.canada.ca/en/environment-climate-change/news/2021/08/government-of-canada-announces-340-million-to-support-indigenous-led-conservation.html> [ECCC 2021].
[55] Government of British Columbia, "Mandate Letter from Premier David Eby to Minister Nathan Cullen" (7 December 2022), online (pdf): <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/wlrs_-_cullen_-_w_ps.pdf>.
[56] CBC News, News Release, "First Nation on Vancouver Island declares marine protected area" (21 June 2023), online: <https://www.cbc.ca/news/canada/british-columbia/first-nation-on-vancouver-island-declares-marine-protected-area-1.6884656>.

In the absence of a federal or provincial official definition of IPCAs, a group called the Indigenous Circle of Experts ("ICE") has provided a helpful definition. ICE is comprised of Indigenous and non-Indigenous experts who work together to help Canada make progress on its fulfillment of various national targets geared towards protecting biodiversity.[57] According to these experts, IPCAs are a term used to encompass various land protection initiatives led by Indigenous governments with a primary goal to conserve parts of their territory.[58] The report by ICE explains that IPCAs tend to share three essential elements:

1. They are Indigenous-led;
2. They represent a long-term commitment to conservation; and
3. They elevate Indigenous rights and responsibilities.[59]

In sum, the UNDRIP and federal and provincial laws and policies all reflect the reality that biodiversity conservation and the recognition of Indigenous rights are interrelated. In this regard, IPCAs will likely play a critical role in BC's efforts to fully respect Indigenous rights recognized under *DRIPA* and the UNDRIP, as well as the Province's biodiversity commitments. The federal government has also explicitly connected IPCAs to Canada's "30 by 30" commitments. In a 2021 news release, it states: "Indigenous-led conservation will play a central role in implementing the Government of Canada's commitment to protect biodiversity and conserve 25 percent of land and inland waters and 25 percent of marine and coastal areas by 2025, working towards 30 percent by 2030."[60]

3.3 BC'S PROMISE TO REFORM THE *MTA*

In September 2021, the provincial Ministry of Energy, Mines and Low Carbon Innovation (the "Ministry of Energy") signed a Relationship Protocol with the First Nations Leadership Council (the "FNLC"), which aims to create a "collaborative and constructive relationship" between the parties on issues relating to mining in BC.[61] Less than a year later, as noted above, the BC government published its DRIPA Action Plan,[62] which promises to "modernize the *Mineral Tenure Act* in consultation and cooperation with First Nations and First Nations organizations" between 2022

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[57] The Indigenous Circle of Experts, "We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation" (2018) online (pdf): <https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf> [https://perma.cc/AN9J-PFCY] at 5.
[58] *Ibid*.
[59] *Ibid*.
[60] ECCC 2021, *supra* note 53.
[61] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 42:3 (7 April 2022) at 5847 (Hon B Ralston), online (pdf): <https://www.leg.bc.ca/content/hansard/42nd3rd/20220407pm-Hansard-n185.pdf> [https://perma.cc/SA7F-GKF3]; See British Columbia Assembly of First Nations Annual Report 2021-2022, at 17, British Columbia Assembly of First Nations, online: <https://www.bcafn.ca/sites/default/files/docs/reports-presentations/BCAFN%20Annual%20Report%202022%20EV.pdf> [https://perma.cc/R2H7-7ZZP].
[62] *DRIPA*, *supra* note 2.

and 2027.[63] In effect, the BC government has recognized that reform to the *MTA* is an essential part of applying UNDRIP to the laws of BC.

The Ministry of Energy is primarily responsible for these intended reforms.[64] In February 2023, the Ministry conveyed that it is working with the FNLC to plan the next steps in the modernization process.[65] Similarly, in April 2023, the Minister of Indigenous Relations and Reconciliation informed the provincial legislature that the Province is committed and on target to modernize the "whole" *MTA*.[66] While neither Ministry has provided specific details about the timeline, substance, scope and process for these reforms, the BC Supreme Court ruling in the *Gitxaała v. British Columbia* case recently mandated the Province to design a new mineral claim regime in the next 18 months that requires consultation or consent with Indigenous nations.[67]

3.4 BC'S COMMITMENT TO MODERNIZE LAND USE PLANNING

Land use plans aim to manage resource use on a given land base. According to provincial estimates, 94% of land in BC is provincial public land, and more that 90% of this land is covered by a land use plan.[68] However, many of these land use plans are outdated and fail to consider the potential impact of the development of existing mineral claims or leases.[69]

The BC government has repeatedly committed to reforming its land use planning regime. In 2018, it "committed $16 million over three years to work collaboratively with Indigenous governments, communities, and stakeholders to modernize land use planning."[70] Then, in March 2022, it incorporated this commitment into the *DRIPA* Action Plan:

> *Co-develop strategic-level policies, programs and initiatives to advance collaborative stewardship of the environment, land and*

[63] Declaration on the *Rights* of Indigenous Peoples Act Action Plan (2022-2027), at 16, British Columbia, online: <http://declaration.gov.bc.ca> [https://perma.cc/9AXA-HFVS] [*DRIPA* Action Plan].
[64] *DRIPA* Action Plan, *supra* note 62; British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 42-4 (6 April 2023) at 10279 (Hon M Rankin), online (pdf): <https://www.leg.bc.ca/content/hansard/42nd4th/20230406am-Hansard-n301.pdf> [https://perma.cc/X8LA-9R4S].
[65] Government of British Columbia, Ministry of Energy, Mines and Low Carbon Innovation, *2023/2024-2025/2025 Service Plan* (2023) at 7 online (pdf): <https://www.bcbudget.gov.bc.ca/2023/sp/pdf/ministry/emli.pdf> [https://perma.cc/H7DP-XS5J].
[66] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 42nd Parl, 4th Sess, No 301 (6 April 2023) at 10279 (Hon. M Rankin).
[67] *Gitxaala v. British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680. September 26, 2023.
[68] Government of British Columbia, "Modernizing Land Use Planning," online: <https://landuseplanning.gov.bc.ca/modernizing> [https://perma.cc/2WXU-DAV5].
[69] West Coast Environmental Law blog, "Modernizing BC's mineral tenure legislation in the wake of its colonial harm" (14 April 2022), online (blog): <https://www.wcel.org/blog/modernizing-bcs-mineral-tenure-legislation-wake-its-colonial-harm> [https://perma.cc/JHJ6-NU4L] [WECL 2022 Blog].
[70] Government of British Columbia, "Land Use Planning for Provincial Public Land," online: <https://www2.gov.bc.ca/gov/content/industry/crown-land-water/land-use-planning> [BC Land Use Planning].

> *resources, that address cumulative effects and respects Indigenous Knowledge. This will be achieved through collaborative stewardship forums, guardian programs, land use planning initiatives, and other innovative and evolving partnerships that support integrated land and resource management.*[71]

The Province has also established a clear link between modernized land use plans and policy initiatives with respect to stewardship and conservation. As noted, the DRIPA Action Plan is one example of this. Elsewhere, the government has stated that land use plans can "guide sustainable resource stewardship and management of provincial public land and waters that meets economic, environmental, social, and cultural objectives."[72] Among the government's intended goals of modernized land use planning are reconciliation; community and stakeholder engagement; the promotion of a strong and sustainable economy; resource stewardship; and a consideration of the complexities that climate change brings.[73]

The BC government has also stated that as part of the modernization of this regime, mining interests will be taken into account when creating new land use plans going forward.[74] On April 4, 2023, the Minister of Energy, Mines and Low Carbon Innovation solidified these commitments in a statement to the legislature stating that the interests and concerns of First Nations can be balanced with those of industry through a "better integration of mining interests into land use planning."[75]

Therefore, it is anticipated that reformed land use planning will involve consultation with Indigenous peoples on new plans, which are expected to balance mining interests with stewardship and sustainability objectives. On this basis, it appears possible that modernized land use plans in BC may include provisions that circumscribe mine-related land uses to achieve sustainability objectives, and in ways that may impact the viability of existing mineral tenures. Modernized land use plans are likely to result in new conservation designations of land that will be off-limits to mining.

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[71] DRIPA Action Plan, *supra* note 62 at 15. Emphasis added.
[72] BC Land Use Planning, *supra* note 69.
[73] *Ibid*.
[74] Government of British Columbia, "Program and Project Engagement," online: <https://landuseplanning.gov.bc.ca/engagement> [https://perma.cc/6FT8-NWX2].
[75] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 42-4 (4 April 2023) at 10168 (Hon J Osborne), online (pdf): <https://www.leg.bc.ca/content/hansard/42nd4th/20230404pm-Hansard-n299.pdf> [https://perma.cc/WT8X-4J8P].

4. The Problems with BC's Market Value Approach to Mineral Tenure Compensation

The research shows that there are three main issues with BC's market value approach to mineral tenure compensation. In turn, these issues hinder the federal and provincial governments' ability to achieve the policy goals outlined above. Specifically, there is evidence that the current market value approach results in compensation awards that are not feasible, are hard to predict, and are unfair considering the highly speculative nature of the mining industry. This section describes each of these issues in greater detail.

4.1 MARKET VALUATIONS CAN MAKE CONSERVATION UNFEASIBLE

BC's market-value approach can result in prohibitively high compensation payments, making conservation efforts, including the creation of IPCAs, unfeasible. Under the current system, there are numerous considerations that inform how much a payment costs the government. According to one BC government official, the average mineral tenure compensation amount is $250 per hectare and can reach as much as $800 per hectare.[76] In addition, the valuation process itself is very expensive due to its reliance on experts. For example, an independent valuator charges approximately $100,000 in professional fees per tenure holder, and legal costs are approximately $5,000. Further valuation considerations can include the quantum of a mineral titleholder's investment in a mineral claim.[77]

The examples of compensation awarded to Boss Power and Cline Mining highlight how the current approach results in excessively high payouts. In 2008, the BC government established a mineral reserve preventing uranium and thorium extraction on all provincial mineral lands.[78] This precluded Boss Power from developing its Blizzard Uranium Deposit in the Kamloops-Kelowna region. Consequently, Boss Power and BC agreed to a $30 million settlement.[79]

Similarly, in 2011, the BC government legislated a ban on mining and energy development in BC's Flathead Valley for conservation purposes.[80] By June 2013, BC had settled with six of the 10 mineral tenure holders in the area, for a total of $4.9 million in compensation. However, Cline Mining initially refused to settle and sued the BC government for the regulatory expropriation of its coal licence and coal licence applications, claiming $500 million in compensation.[81]

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[76] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Tara Marsden at 42).
[77] *Ibid*.
[78] *Uranium and Thorium Reserve Regulation,* BC Reg 82/2008, s 2(1).
[79] Clogg, *supra* note 38 at 26.
[80] Clogg, *supra* note 38 at 25.
[81] *Ibid*.

Subsequently, BC settled with Cline Mining for $9.8 million.[82] While Cline Mining's claims were governed under the *Coal Act*, not the *Mineral Tenure Act*, the statutory provisions involving compensation are almost identical.[83]

In sum, Cline Mining and Boss Power demonstrate the significant payouts that may result if BC takes meaningful steps to pursue its biodiversity, reconciliation, and land use planning objectives without making changes to its market value mineral tenure compensation framework. Given that that such a vast amount of BC's land is subject to mineral tenures, there is a serious risk that if the BC government endeavors to nearly double BC's protected land under its 30 by 30 commitment, it will incur significant liability to mineral tenure holders. The risk of exorbitant payouts, determined through either common law or statute, will undoubtedly deter, or delay the government's achievement of these important policy objectives if reforms are not introduced.

4.2 MARKET VALUATIONS ARE UNPREDICTABLE

The combination of processes and methodologies used to determine mineral tenure compensation in BC's market-value approach can result in highly unpredictable results. This lack of predictability in the final quantum means that policy makers are unable to accurately estimate the public expenditures that may be required to achieve biodiversity objectives. This situation is a result of two key features of BC's market value approach: the constraints placed on the arbitrator's discretion, and the large variations in the results generated by available valuation methods. Both features will be described in greater detail here.

First, BC's market value approach to determining mineral tenure compensation allows the parties to opt into an arbitration process if a negotiated settlement is not possible. Under the *Mining Rights Compensation Regulation*, the minister or the mineral titleholder can request that a single arbitrator determine the quantum of compensation.[84] The regulation further provides that the arbitrator must select either the minister's final offer or the mineral titleholder's final offer.[85] The arbitrator does not have the discretion to negotiate or moderate between the two proposals.

Second, this lack of discretion must be understood in the context of a methodology for determining valuation that is inherently unpredictable. While the *Mining Rights Compensation Regulation* requires a market value approach, within the bounds of this approach, there are a variety of valuation methods that may be adopted depending on the stage of mineral exploration or development that the mineral titleholder has reached.

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[82] Hunter, *supra* note 38.
[83] See: *Coal Act*, *supra* note 38, s 4.
[84] *Mining Regulation*, *supra* note 8, s 9(1).
[85] *Mining Regulation*, *supra* note 8, s 10.

The available valuation approaches are outlined by an industry-funded group called the Special Committee on Valuation of Mineral Properties ("CIMVAL").[86] CIMVAL was created "with the mandate to recommend standards and guidelines for Valuation of Mineral Properties to be used by the mining industry in general."[87] In 2019, the Canadian Institute of Mining, Metallurgy & Petroleum adopted the CIMVAL Code for valuing mineral claims.[88] As such, it has become the primary point of reference for mineral tenure valuation in BC.

According to CIMVAL, there are three generally accepted valuation approaches in the mining industry: 1) the income approach, 2) the market approach; and 3) the cost approach, and typically, more than one approach should be used.[89] It should be noted that the CIMVAL "market approach" is not synonymous with the overall "market value approach" set out in the *Mining Rights Compensation Regulation*. As such, the CIMVAL "market approach" is used alongside the income and the cost approaches to determine the ultimate "market value" of a given mineral title pursuant to the regulations. CIMVAL defines these three approaches as follows:

1. The income approach, which "is based on the principle of anticipation of benefits and includes all methods that are based on the income or cash flow generation potential of the Mineral Property."[90]
2. The market approach, which "is based primarily on the principle of substitution. The Mineral Property being valued is compared with the attributed transaction value of similar Mineral Properties, transacted in an open market."[91]
3. The cost approach, which "is based on the principle of contribution to value. The appraised value method is commonly used where exploration expenditures are analyzed for their contribution to the exploration potential of the Mineral Property and may be adjusted for market conditions."[92] The cost approach appears to blend accounting for expenditures and market value.

CIMVAL suggests that the most appropriate valuation approach is selected based on the mineral property's stage of exploration or development. In general, there are four types of mineral properties: exploration properties, mineral resource properties, development properties, and production properties. According to CIMVAL, the valuation approach that tends to be appropriate for each type is as follows:[93]

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[86] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Nikki Skuce at 2).
[87] Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on the Valuation of Mineral Properties (CIMVAL), "The CIMVAL Code for the Valuation of Mineral Properties" (2019) at 3 online (pdf): <https://mrmr.cim.org/media/1120/cimval_code_nov2019.pdf> [https://perma.cc/A8J2-GRPU] [CIMVAL 2019].
[88] *Ibid*.
[89] CIMVAL 2019*, supra* note 86 at 11.
[90] CIMVAL 2019*, supra* note 86 at 17.
[91] CIMVAL 2019*, supra* note 86 at 17.
[92] *Ibid*.
[93] CIMVAL 2019*, supra* note 86 at 18.

Table 1: Valuation Approaches for Different Types of Mineral Properties.

Valuation Approach	Exploration Properties	Mineral Resource Properties	Development Properties	Production Properties
Income	No	In some cases	Yes	Yes
Market	Yes	Yes	Yes	Yes
Cost	Yes	In some cases	No	No

Given these possibilities, there is evidence that calculations can drastically differ even when valuing the same project. For example, in a December 20, 2016, arbitration decision between Optima Minerals Inc. and BC, the parties offered wildly disparate valuations of the market value of Optima's three mineral claims.[94] BC proposed a valuation of $440,000 and Optima's final valuation was $3.1 million. The arbitrator ultimately selected BC's final offer.

In this case study, the divergence between the two proposals was explained by the fact that the parties adopted different valuation approaches. While BC and Optima Minerals' evaluators both utilized a combination of the market approach and the cost approach,[95] they employed different methods for calculating value under the cost approach. The arbitrator also noted significant differences in the valuations generated between approaches. For example, according to Optima, the cost approach suggested a valuation of $5.29 million, which was significantly higher than Optima's calculation under the market approach, which suggested a range of $993 thousand - $1.627 million. In reviewing the proposals, the arbitrator stated: "[i]t appears that each of the methods used by the parties' respective valuators have their failings."[96] The arbitrator also commented that, "[t]here is always going to be a significant degree of uncertainty when valuing exploration properties."[97] While this case study pertained to exploration properties, it highlights the overall uncertainty in BC's current approach to valuating mineral claims.

The unpredictable nature of the market value method of determining compensation is further evidenced by the Boss Power settlement mentioned above. As noted, the BC government settled with Boss Power, paying them $30 million for their uranium exploration and mineral claims in the Kelowna-Kamloops region. However, this settlement amount was later found to be rooted in a miscalculated valuation. When an independent valuator later assessed the Boss Power's mineral claims, they were valued at only $8.7 million, meaning that the BC government overpaid Boss Power by $21.3 million.[98] While the BC government stood by this settlement amount, the disparity between these two numbers shows that the valuation process is riddled with uncertainty.

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[94] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Nikki Skuce at 2).
[95] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Nikki Skuce at 15).
[96] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Nikki Skuce at 21).
[97] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Nikki Skuce at 21).
[98] Clogg, *supra* note 38 at 26.

These case studies illustrate the inherent uncertainty of anticipating valuation with any degree of accuracy under BC's current market value compensation regime. As described, this is due to two key features of the regime. First, it relies on valuation methodologies (namely the CIMVAL Code) that can generate highly disparate results, and second it forces the arbitrator to select between the parties' proposals, which may vary wildly. The resulting uncertainty makes it very difficult for policy makers to predict the costs of conservation measures, which undoubtedly acts as a deterrent to implementing these measures.

4.3 MARKET VALUATIONS ARE UNFAIR BECAUSE MINERAL CLAIMS ARE INHERENTLY SPECULATIVE

There is strong evidence that mineral staking in BC is an inherently speculative business activity. Speculation, in contrast to investing, is defined as the act of putting money into an endeavour with a "high probability of failure."[99] There are four reasons why it is highly unlikely that investments in any mineral claim in BC will result in a profitable mine. In this section, we describe these four reasons in turn.

First, it is extremely rare for a mineral claim to contain viable deposits. In a 2017 letter, the First Nations Relations Manager of the Ministry of Forests, Lands and Natural Resource Operations recognized the speculative nature of mineral tenures by stating: "the mining sector is driven by speculation premised on information about mineral values generated through geological investigation and mineral exploration."[100] Private sector leaders agree. In 2022, Kendra Johnston, president of the Association for Mineral Exploration BC, acknowledged that only one in 10,000 exploration projects becomes a mine,[101] or a claim has a 0.01% probability of becoming a viable mine. Johnston stated:

> *On average, there are 250 to 300 exploration projects active across the province each year. The hope and intent to find a deposit that is economically and socially viable to be developed into a mine lies at the heart of any exploration investment. But finding a viable deposit is not easy and takes significant risk capital. Discoveries that are capable of becoming a mine are rare and special finds.*[102]

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[99] Joseph Nguyen, "Investing vs speculating: what's the difference?" (2 Jan 2022), online: *Investopedia* <https://www.investopedia.com/ask/answers/09/difference-between-investing-speculating.asp> [https://perma.cc/P7XM-SFGJ].
[100] *Gitxaała Nation*, *supra* note 19 (Affidavit #1 of Tara Marsden, Exhibit D, Letter from Aaron Trowbridge to Tara Marsden (2 August 2017)).
[101] Fionda & Simons, *supra* note 4.
[102] Fionda & Simons, *supra* note 4.

This statement highlights the inherent uncertainty and risk involved in staking and investing in the development of a mineral claim. Note Johnson's use of the terms "hope" and "significant risk capital."

Second, the viability of a mineral deposit is uncertain because it depends in part on global commodity prices which can vary significantly. According to the Bank of Canada, between 2002 and 2022, the overall commodity market, which includes the prices of minerals and metals, experienced significant fluctuations.[103] In this period, the commodity price index fluctuated by a magnitude of 300% or more, on more than one occasion. The same is true for the price index solely for metals and minerals. According to Government of Canada reports, these fluctuations are such that the price index for metals and minerals has fallen below appraised expenditures at least three times in the past two decades.[104]

Third, in addition to the geological rarity of an economically viable deposit, the Canadian legal context adds further uncertainty. There is no guarantee that a mineral titleholder will gain the necessary project approvals and environmental assessment certificates from the federal and provincial governments. For example, in 2017, the BC government denied an environmental assessment certificate for Ajax mine, a proposal for a 1,700-hectare open-pit gold and copper mine near Kamloops.[105] In making its decision, the government considered adverse impacts on Indigenous land uses and Indigenous opposition to the mine. By way of another example, in 2022, the BC government refused to issue an environmental assessment certificate to Pacific Booker Minerals for the Morrison Copper/Gold Project, due to the company's failure to adequately mitigate damage to water quality and fish populations.[106]

Fourth, mineral titleholders can face additional uncertainty with getting consent from an Indigenous Nation to pursue mining activities on their territory. This is a prominent issue in BC as most Crown land is located on the unceded territories of Indigenous Nations. These Nations have strong assertions of Indigenous title, which includes a property interest in mineral resources.[107] An Indigenous nation's consent to mining on their territory is not a given, and without it, mineral titleholders risk encountering strong local and legal opposition.

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[103] Bank of Canada, "Commodity Price Index" (2022), online: <https://www.bankofcanada.ca/rates/price-indexes/bcpi/> [https://perma.cc/J78J-NCRU].
[104] Canada, Natural Resources Canada, "Minerals and the Economy" (29 May 2023), online: <https://natural-resources.canada.ca/our-natural-resources/minerals-mining/mining-data-statistics-and-analysis/minerals-and-the-economy/20529> [https://perma.cc/K664-4XEG].
[105] Carol Linnitt, "B.C. Denies Ajax Mine Permit Citing Adverse Impacts to Indigenous Peoples, Environment" (2017), online: *The Narwhal* <https://thenarwhal.ca/b-c-denies-ajax-mine-permit-citing-adverse-impacts-indigenous-peoples-environment/?gclid=CjwKCAjw__ihBhADEiwAXEazJs7sk1j4wPi46cvcAv_mp9HxN-uXck4AAt5mWhsFPOaJ2qTh_9_pQxoCeZgQAvD_BwE> [https://perma.cc/G8FE-D9B6].
[106] British Columbia, Information Bulletin, "Morrison Copper/Gold Mine not granted an environmental assessment certificate" (7 February 2022), online: <https://news.gov.bc.ca/releases/2022ENV0011-000166>.
[107] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 124.

For example, in 2020 and 2021, Juggernaut Exploration received two permits for exploratory work on claims it held in the Nuxalk Nation's territory.[108] However, Juggernaut had not obtained the Nation's consent and the Nuxalk hereditary leadership ordered an immediate halt to the company's exploratory work on its territory.[109] In another example, Taseko's efforts to gain approvals for Prosperity Mine in Tŝilhqot'in territory were mired in controversy due to the Nation's vigorous opposition. In 2020, the SCC denied Taseko's leave to appeal the federal government's refusal to grant the company an environment assessment certificate for the project.[110] Finally, the legal proceedings brought by the Gitxaała Nation, described above in Part 2, provide another example of the potential significance of Indigenous opposition and the importance of consent. The Gitxaała Nation's constitutional challenge to the *MTA* is based in the fact that there is at present no statutory requirement for Indigenous consent in advance of staking mineral claims.[111]

All of the above makes it clear that acquiring a mineral claim for investment purposes is an inherently speculative business venture. The odds of finding an economically and geologically viable mineral deposit are very low, and even if such a deposit is found, there is no guarantee that the claimholder will acquire the social and legal licence to establish a mine.

In this context, the risk of regulatory expropriation due to a government decision to pursue a conservation objective is no different than the risks that the mining industry already faces for the reasons described above. As such, it is arbitrary to compensate claimholders when their claim is rendered unviable due to conservation decisions. It is also profoundly unfair given that it is highly improbable that the claimholder would have realized a profit had the regulatory expropriation not occurred. Arguably, the uncertainty of the market valuation approach is also a function of the fundamentally speculative nature of the industry. Given all of this, the public and taxpayers should not be backstopping high-risk private investments in mineral claims through generous compensation regimes created by government regulations. The fact that investments in mineral claims are inherently speculative and risky means that they do not warrant significant compensation, if at all, when their viability is affected by conservation measures.

To some extent, the *MTA* includes provisions that compensation regimes should not reward speculative activity. However, this restriction relies on a narrow understanding of speculation, defined as the staking of a mineral claim mainly for the purpose of receiving compensation for expropriation under the *Parks Act*.[112] In this way, the law in its current form sets up a distinction between a claimholder who is speculating on the possibility of a compensation award, and a

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[108] Matt Simmons, "Nuxalk Nation issues eviction notice to B.C. exploration company, igniting calls for mining reform" (2021), online: *The Narwhal* <https://thenarwhal.ca/bc-mining-nuxalk-juggernaut-eviction/> [https://perma.cc/8HX3-GGEH].
[109] *Ibid*.
[110] Judith Lavoie, "Taseko's loss in Supreme Court may not be the end of embattled New Prosperity mine, Tsilhqot'in warn" (2020), online: *The Narwhal* <https://thenarwhal.ca/tasekos-loss-supreme-court-embattled-new-prosperity-mine-tsilhqotin-warn/> [https://perma.cc/8V9T-9YJZ].
[111] *Gitxaała Nation*, *supra* note 19.
[112] *MTA*, *supra* note 5, s 17.1(4).

claimholder who speculates on the possibility of making a profit from developing the mineral claim. In our view, this distinction should not matter for the purposes of a compensation regime. As we describe below, it is a general principle of good public policy that the public should not be made to compensate investors involved in inherently speculative business activities, especially when this compensation would hinder the government's pursuit of important policy objectives such as conservation and reconciliation.

5. Cross-Jurisdictional Review: Statutory Approaches to Removing or Limiting Compensation for Constructive Takings

As described in Part 2, the BC government has the legal authority and the jurisdiction to legislate to address the problems with the market value approach to mineral tenure compensation. There are many examples from other jurisdictions where governments have passed laws to address these issues, by eliminating or limiting compensation for regulatory takings. In undertaking a survey of these examples, we reviewed statutes from other Canadian jurisdictions and other common law countries with a focus on mining. We also sought out BC examples from other natural resource sectors or other areas of public sector decision-making that involve limiting or eliminating compensation for constructive takings.

Our survey of other jurisdictions and sectors was not exhaustive and can be best understood as an instructive sample of other approaches to compensation. Our initial sample revealed four possible approaches to compensation for constructive takings: 1) no compensation; 2) compensation only for certain expenses incurred; 3) compensation for the market value of the tenure or property interest; and 4) compensation for lost profits.

In this report, we do not detail our findings with respect to regimes that compensate for market value or lost profits.[113] As we have argued, these kinds of generous compensation regimes are unnecessary and problematic because they generate obstacles to the BC government's achievement of its stated policy goals of reconciliation, biodiversity and modernizing land use planning. We have also excluded from this discussion jurisdictions that explicitly allow for constructive takings but do not specify a corresponding compensation scheme in their statute. While such jurisdictions often articulate a public purpose to justify the constructive taking, the absence of an explicit statute-based compensation scheme means that these examples were not instructive for the purposes of this report.[114]

After making these methodological choices, we arrived at a sample of 18 statutes that explicitly restrict or limit compensation upon a constructive taking. Specifically, we found 13 statutes that eliminate compensation in this context, and five that limit compensation solely to certain expenses incurred. After reviewing these 18 examples, we created a typology to facilitate our

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[113] See e.g. *Alberta Land Stewardship Act*, SA 2009, c A-26, s 39 for a compensation scheme that compensates for market value. The *Nigerian Minerals and Mining Act, 2007* (Act No. 20), s 112(1) provides an example of a scheme that compensates for lost profits.

[114] See e.g. Tasmania's (Australia) *Mineral Resources Development Act 1995*, s 99, which empowers the Minister to revoke a mining lease if land comprised in the lease is required for a public purpose. If the Minister does, then a lessee is entitled to compensation. It is unclear how compensation is determined.

analysis of the components of each statute. All statutes we reviewed had some or all of the following features:

- A description of the state's objective in pursuing the constructive taking;
- An explicit removal or limit on the interest holder's right to compensation for the constructive taking;
- A prohibition on classifying the government action in question as a constructive taking or an expropriation; and
- A provision eliminating recourse to any civil or administrative cause of action to seek compensation.

In the remainder of this section, we provide a general outline of the language used in each of these categories to implement either a no-compensation or limited compensation approach. In each section, we include a chart that summarizes the main features of each statute reviewed. The appendices to this report then provide more fulsome summaries of the statutory schemes which are the basis of these findings. Appendix 1 summarizes statutes that negate compensation, and Appendix 2 summarizes statutes that limit compensation to only certain expenses.

5.1 REVIEW OF STATUTES THAT REMOVE COMPENSATION

As stated, we identified 13 examples of statutes that preclude compensation for constructive takings in the following five land and resource sectors: land use planning, forest conservation, mining, heritage conservation, and oil and gas. These statutes originated in the following jurisdictions: Alberta, British Columbia, Ontario, Yukon, New South Wales (Australia), Queensland (Australia), and Victoria (Australia).

As a starting point, most statutes described the purposes for which the state may pursue an expropriation of a proprietary interest without compensation. In almost all cases the permitted purpose was broadly defined. The statute gave the public authority in question broad discretion to decide whether the expropriation is in the public interest, or for a public purpose. Notably, in the Yukon, the basis of an expropriation can be "the operation of, or decisions made pursuant to, the laws or policies of any government or entity other than the Government of the Yukon," such as for example, an Indigenous government.[115]

The next prominent feature of the statutes reviewed is the complete removal of any right to compensation. Statutes use language such as:

- "[N]o compensation is payable;"
- "no person is entitled to compensation;"
- "no compensation shall be payable;"

[115] *Oil and Gas Act*, RSY 2002 c 162, s 28(2).

- "no owner of property or other person is entitled to compensation;" and
- "not entitled to compensation for the value of any mineral in or under the surface of any acquired land."

In some cases, the statutes declare that the state action in question is not a taking, with language such as:

- "[T]he Expropriation Act does not apply;"
- "deemed not to be taken;"
- "shall be deemed not to have been taken or injuriously affected;" and
- "nothing under the Act constitutes an expropriation or injurious affection for the purposes of the Expropriations Act or otherwise at law."

In addition, the statutes reviewed often employed the following terminology to remove civil recourse:

- "[A] person has no right of action and must not commence or maintain an action or other proceeding;"
- "no cause of action arises;"
- "a provision precluding a cause of action applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, and declaratory relief;"
- "no proceeding, including but not limited to any proceeding in contract, restitution, tort or trust may be brought;" and
- "no action lies and an action or other proceeding must not be brought or continued against the government for compensation."

As stated, some statutes contained language in all the above categories, in other words, language that removes a right to compensation, declares that the state action is not a constructive taking, *and* removes a cause of action for damages. For example, section 38.4 of Ontario's *Mining Act* is expansive in limiting proceedings and precluding compensation in relation to the conversion of certain mining claims.[116]

The table below shows the statutes surveyed, and highlights the key language used to achieve a no-compensation regime. It also summarizes the stated purpose of the state action that is at issue.

[116] *Mining Act,* RSO 1990, c M14 [ON *Mining Act*].

Jurisdiction	Legislation	Purpose of State Action	Key Language
Alberta	*Metis Settlements Act,* RSA 2000, c M-14	Manage subsurface resources of settlement areas	**Section 237:** "**No person is entitled to compensation by reason only** of the adoption of or the contents of a General Council Policy or a settlement bylaw respecting planning, land use or development control."
British Columbia	*Vancouver Charter*, SBC 1953, c 55	Create zoning by-laws	**Section 569(1):** "…any property thereby affected **shall be deemed as against the city not to have been taken or injuriously affected** by reason of the exercise of any such powers or by reason of such zoning **and no compensation shall be payable** by the city or any inspector or official thereof."
British Columbia	*Great Bear Rainforest (Forest Management) Act*, SBC 2016, c 16	Land use decisions to conserve the Great Bear Rainforest	**Section 63(1):** "…**compensation and damages are not payable** by the government in relation to any of the following matters…" **Section 63(2):** "A person has **no right of action and must not commence or maintain an action or other proceeding**…" **Section 63(3):** "The ***Expropriation Act* does not apply**…"[117]
British Columbia	*Agricultural Land Commission Act*, SBC 2002, c 36	Designate land as agricultural land, which restricts the manner in which an owner can use the land	**Section 37:** "Land is **deemed not to be taken or injuriously affected** by its inclusion in the agricultural land reserve."
British Columbia	*Forest Act,* RSBC 1996, c 157	Designated Area for public interest, can limit current interests in the land	**Section 175.1: "**During and in respect of the **first 4-year period** in which Crown land continues as a designated area, **no compensation or damages is payable by the government** to the holder of any agreement because of or arising out of the designated land status of all or any part of the Crown land to which the agreement relates."

[117] *Expropriation Act*, RSBC 1996 c 125.

British Columbia	*Coalbed Gas Act*, SBC 2003, c 18	Issue natural gas tenures of coalbed rights and to require the disposal of coalbed gas for safety reasons	**Section 6**: "person has no rights of action and must not commence or maintain proceedings, as a result of the enactment of this Act or the exercise by the minister of powers referred to in section 5 or 7…" to claim damages or compensation from the government. **Section 6(2):** "[f]or all purposes, including for the purposes of the *Expropriation Act*, no expropriation or injurious affection occurs as a result of the enactment of this Act or the exercise by the minister of powers referred to in section 5 or 7."
Ontario	*Mining Act*, RSO 1990, c M14	Conversion of mining claims under updated legislation	**Section 38.4(1):** "**No cause of action arises** against the Crown…as a direct or indirect result of…" **Section 38.4(2)**: "[subsection 1] applies to an **action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, including loss of revenue and loss of profit, or any other remedy or relief.**" **Section 38.4(3):** "**No proceeding, including but not limited to any proceeding in contract, restitution, tort or trust,** that is directly or indirectly based on or related to anything referred to in subsection (1), may be brought…" **Section 38.4(6):** "**Nothing** done or not done in accordance with the provisions referred to in subsection (1) or the regulations made in respect of them **constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.**"

Ontario	*Far North Act, 2010*, SO 2010, c 18	Land use planning in the Far North	**Section 19(2):** "**No cause of action arises** as a direct or indirect result of…" **Section 19(3):** "**No costs, compensation or damages are owing or payable** to any person and **no remedy, including but not limited to a remedy in contract, restitution, tort or trust, is available** to any person…" **Section 19(7):** "**Nothing** in this Act and nothing done or not done in accordance with this Act **constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law."**
Ontario	*Ontario Heritage Act*, RSO 1990, c O.18	The council may, by by-law, designate a property to be of cultural value or interest, and the Minister may designate property in the same manner	**Section 68.3(1):** "…**no owner of property or other person is entitled to compensation** in respect of any designation, order or decision made by a municipality, the Minister or Tribunal under this Act." **Section 68.3(2):** "**Nothing** done or not done in accordance with this Act or the regulations under it **constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.**"
Yukon	*Oil and Gas Act*, RSY 2002, c 162	Cancel dispositions that are not in the public interest	**Section 28(2):** "**Regulations…may exclude a right to compensation** in circumstances where the **reason for the Minister's decision…is attributable to or related to the operation of, or decisions made pursuant to, the laws or policies of any government or entity other than the Government of the Yukon.**"
New South Wales (Australia)	*Coal Acquisition Act 1981* (New South Wales), 1981/109 (Austl.)	Vests all coal in the Crown	**Section 6(2):** "…**compensation is not payable**…

Queensland (Australia)	*Mineral Resources Act 1989* (Queensland), 1989/110 (Austl).	Allows for extinguishment of mining tenement	**Section 10AAD(2):** "In assessing any compensation…**allowance cannot be made for the value of minerals known or supposed to be on or below the surface of, or mined from, the land."**[118]
Victoria (Australia)	*Land Acquisition and Compensation Act 1986* (Victoria), 1986/121 (Austl.)	Permits the reservation of land for a public purpose in a planning instrument	**Section 38(1):** "…a licensee under the Mineral Resources (Sustainable Development) Act 1990 is **not entitled to compensation for the value of any mineral in or under the surface of any acquired land."** **Section 43(1):** "In assessing compensation, the following matters **must be disregarded** – (d) in a case where the land in which the acquired interest subsists is **reserved for a public purpose in a planning instrument, any restrictions upon the use or development of that land which are imposed by, or are a consequence of, the reservation…"**

5.2 REVIEW OF STATUTES THAT LIMIT COMPENSATION TO CERTAIN EXPENSES

In our review, we found five examples of schemes that permit compensation for certain expenses in the land use planning and mining sectors in the following jurisdictions: New South Wales (Australia), Quebec, South Australia, Tasmania (Australia), and Cayman Islands.

Similar to those statutes that deny compensation (described above), legislative schemes that allow compensation for expenses also articulate a purpose for the government action. Examples of the kinds of purposes specified are:

- "[P]ublic purpose;"
- "public utility purpose;"
- "the purposes of any other Act;" and

[118] As noted above, this statute provides an example of a partial no compensation regime, wherein compensation is only restricted in connection with the actual value of the minerals. Under this regime, it is possible that compensation may be offered in connection with other expenses, although this is not explicitly mentioned.

- "any purpose considered desirable in the public interest."

Also, the statutes reviewed often contained some language to describe or restrict eligible expenses:

- "[P]ay compensation equal to the amounts spent for all the work performed;"
- "entitled to compensation for any mining improvements made to the land;"
- "compensation for the money expended;" and
- "compensation for improvements effected."

The table below highlights the language employed to achieve a statutory regime that limits compensation to expenses and summarizes the stated purpose of the state action at issue. More detailed information for each statute can be found in Appendix 2.

Jurisdiction	Legislation	Purpose of State Action	Key Language
New South Wales (Australia)	*Mining Act 1992* (New South Wales), 1992/29 (Austl.)	Allows for cancellation of authority or mineral claim if land is required for a public purpose	**Section 203(1):** "…may **cancel a mineral claim**… (f) if the land is **required for a public purpose**…" **Section 205(1):** "…**not entitled to compensation merely because the claim is cancelled**." **Section 205(2):** "…if a mineral claim is cancelled on the ground that the whole or any part of the land concerned is **required for a public purpose**, the holder of the claim is entitled to compensation, of an amount to be determined by the Secretary, **for any mining improvements made to the land**."
Quebec	*Mining Act*, CQLR c M-13.1	Empowers the Minister to terminate a claim for a public utility purpose	**Section 82:** "The Minister may order the cessation of the work if necessary, in his judgment to permit the use of the territory **for public utility purposes.** …if the Minister is of opinion that the cessation of the work must be maintained, he shall terminate the claim and **pay compensation equal to the amounts spent for all the work performed**, on the filing of the reports on that work."
South Australia	*Mining Act 1971* (South Australia), 1971/74 (Austl).	Minister can excise land from an exploration licence if requires for a public purpose	**Section 30AB(1):** "If, in the opinion of the Minister, any land comprised in an exploration licence is required for a **public purpose**, the Minister may…excise that land from the total area comprised in the licence…" **Section 20AB(2):** "…the tenement holder may apply to the appropriate court for an order that the Minister pay compensation…**for the money expended by the tenement holder in prospecting for minerals** in the area excised from the total area comprised in the exploration licence."

Tasmania (Australia)	*Crown Lands Act 1976* (Tasmania), 1976/28 (Austl.)	Empowers the Minister to cancel a lease for Crown land if required for a public purpose or in the public interest	**Section 37(1):** "Where… any land subject to a lease granted by the Minister under this Act– (a)…is **required for any public purpose**; or (b) is **required for the purposes of any other Act**; or (c) should be made available for **any purpose which he considers desirable in the public interest**– the Minister may…cancel the lease…" **Section 39(1):** "Where any lease is cancelled…the Minister shall pay to the lessee **compensation for the lessee's interest in the improvements effected by the lessee** for the purposes for which the lease was granted including those paid for by him and taken over from the previous lessee of the land but no compensation shall be paid to the lessee in respect of any improvements effected on or to the land after the service of the notice on him under that section."
Cayman Islands	*Mining Law* (Cayman Islands), 1997	Empower the Governor to determine a mining lease if required for any public purpose	**Section 14(1):** "Whenever any land, being the whole or part of the area of a mining lease, is required by the Governor for any **public purpose…**such mining lease shall, in respect of the land required, be determined…" **Section 14(2):** "… shall be entitled to receive out of general revenue **compensation for any disturbance of passageways, works, buildings, plant or other property belonging to him, but not for disturbance of his mining rights**…"

In Parts 6 and 7 we return to the compensation for expenses approach and provide an analysis of this option considering the general principles that we propose in the next section. We set out the reasons why we conclude that a compensation for expenses approach could risk replicating many of the problems that we have identified in the market value approach.

6. General Principles to Guide Reform

This report has described the problems with the market value approach to mineral tenure compensation in BC. We have explained why we believe that this regime creates obstacles to key policy commitments, at the federal and provincial level, with respect to biodiversity, respect for Indigenous rights, and land use planning. We have also explained that the Province has the power to reform its approach, and we have reviewed comparable statutes in BC, in Canada and abroad that have limited or removed compensation rights in a variety of contexts, including in the mining sector.

Drawing on this information and analysis, we identify four general principles that should inform statutory reforms to mineral tenure compensation in BC. In our view, these principles have the potential to attract reasonable consensus across stakeholder groups and Indigenous Nations, and to create the foundation for a new regime in BC for mineral tenure compensation. They draw on public policy objectives that have already been endorsed by leaders in the public and private sectors and respond to the problems with the market value approach (outlined in Part 4).

Specifically, we argue that a modern mineral tenure compensation regime in BC should:

1. Enable federal and provincial governments to meet their international, national, and provincial biological diversity commitments;
2. Enable federal and provincial governments to meet their Crown-Indigenous reconciliation commitments;
3. Ensure that compensation amounts are predictable and fiscally feasible; and
4. Prohibit the use of public funds to compensate for losses that are derived from an inherently speculative investment activity.

In the remainder of this section, we discuss each of these principles in turn.

6.1 ENABLING BIOLOGICAL DIVERSITY COMMITMENTS

BC's mineral compensation regime should enable the provincial and federal governments to meet their commitments to address the current biodiversity crisis. This includes the steps required to fulfill their 30 by 30 Commitment and the Nature Agreement noted in Part 3.

As previously described, the Province must nearly double its existing park land to meet its "30 by 30" commitments. However, approximately 11 million hectares of land in BC are the subject of mineral claims. Therefore, it is highly likely that mineral tenures are staked on the tracts of land that will need to be designated for conservation. These conservation designations will likely preclude mineral titleholders from further developing their claims, which would amount to

constructive takings under the common law. Further, the government may also directly expropriate these mineral interests to create a conservancy under section 11 of the *Park Act*.[119]

Given the 30 by 30 Commitment and the anticipated Nature Agreement, the Province needs a mineral tenure compensation regime that will enable rather than dissuade these conservation measures. Passing a statute that limits or prohibits compensation owed to mineral titleholders in these circumstances would effectively remove this significant obstacle to conservation.

6.2 ENABLING COMMITMENTS TO PURSUE RECONCILIATION WITH INDIGENOUS NATIONS

BC's reformed mineral tenure compensation regime should enable the federal and provincial governments to pursue their commitments to reconciliation with Indigenous nations in BC. Specifically, the regime governing mineral tenures should foster the Province's capacity to fulfill its commitments under *DRIPA*.[120] It should also support Indigenous nations in exercising their jurisdictional authority, should they choose to do so, for the purposes of conservation, such as through the creation of IPCAs.

Unfortunately, there is evidence that the current market value compensation approach for mineral titleholders is dissuading provincial authorities from supporting proposed IPCAs.[121] This potential conflict between IPCAs and the market value approach to mineral tenure compensation is a serious issue.

We argue that BC's obligations to respect Indigenous rights are of a higher order, ethically and legally, than the Province's obligations to mineral tenure holders. As such, it is unjust to allow mineral tenure compensation to continue to create a barrier to the recognition of IPCAs. As we have already described, a mineral titleholder's right to compensation for a regulatory taking is a private law right that governments can modify or eliminate through statute. Moreover, the importance of mineral tenure rights is arguable diminished by the inherently speculative nature of the industry.

On the other hand, IPCA's are one possible expression of Indigenous nations' inherent right to self-govern and exercise jurisdiction over their territory, especially where nations have claimed or established Aboriginal title. This right is recognized in international law instruments like UNDRIP, in BC's constitutional obligations to respect Indigenous peoples' rights, as well as in DRIPA, whereby BC professes to implement UNDRIP. Respect for Indigenous rights engages solemn international and constitutional obligations, and reconciliation aims to address Canada's colonial legacy of dispossession and profound injustice.

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[119] *Park Act*, *supra* note 35, s 11.
[120] *DRIPA*, *supra* note 2.
[121] *Gitxaała Nation*, *supra* note 20 (Affidavit #1 of Tara Marsden 12).

In fact, existing mineral tenure laws are a reflection of that very colonial legacy. Specifically, the *MTA* has not changed drastically from its 1859 predecessor, the *Gold Fields Act*.[122] Various organizations such as West Coast Environmental Law and the BC First Nations Energy and Mining Council have noted that the *MTA* is rooted in colonial ideologies that continue to ignore the land claims of Indigenous peoples.[123] In this light, BC must act to change this history of injustice by prioritizing its constitutional and international law obligations to Indigenous peoples over private law obligations to investors.

South Africa offers an important example of a jurisdiction that has recognized its obligations to remedy the harms of past injustice in the context of its mineral compensation regime. South Africa's *Mineral and Petroleum Resources Development Act*[124] provides that the determination of compensation for expropriated property must consider, among other factors, "the State's obligation to redress the results of past racial discrimination in the allocation of and access to mineral and petroleum resources."[125] This statutory provision is consistent with South Africa's constitutional provisions with respect to the expropriation of property, which state that property may only be expropriated "for a public purpose or in the public interest,"[126] but that this limit may not "impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."[127]

The South African example is instructive because it illustrates two interrelated ways in which past colonial injustice might be considered in present day decision making with respect to resource allocations. First, it shows that the history of colonial injustice should be a factor in determining compensation for a regulatory taking, and second, that expropriation laws should not prevent the state from remedying such injustice. This orientation is directly supportive of our argument that BC should act to reform mineral tenure compensation to ensure that it does not continue to act as a barrier to provincial recognition of IPCAs. Mineral tenure laws are part of a legacy of colonial injustice in BC. Failure to reform the law in this area will serve to continue this injustice insofar as it impedes provincial respect for Indigenous rights.

6.3 ENSURING PREDICTABILITY AND FISCAL FEASIBILITY

To achieve the first two principles described above, BC must remove the barrier that unpredictable and prohibitively high mineral tenure compensation creates to conservation and the recognition of IPCAs. This can be done through reforms to BC's mineral compensation regime to ensure that

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[122] WECL 2022 Blog, *supra* note 68.
[123] *Ibid*; BC First Nations Energy and Mining Council, "Indigenous Sovereignty: Consent for Mining on Indigenous Lands" (2022), online (pdf): <http://fnemc.ca/wp-content/uploads/2022/01/FNEMC_mining_consent_FinalReport.pdf> [https://perma.cc/EQJ4-K3LA].
[124] *Mineral and Petroleum Resources Development Act, 2002,* No 28 of 2002, s 12(3)(a) of Schedule II (S Afr).
[125] *Ibid*.
[126] *Constitution of the Republic of South Africa, 1996,* No 108 of 1996, s 25(2)(a) [*SA Constitution*].
[127] *SA Constitution*, *supra* note 125, s 25(8).

compensation is predictable and feasible. As described previously, this will require a regime that does two things. First, it must not rely on hypothetical valuations that are difficult to predict (i.e., the market value approach). Second, it must eliminate compensation or limit it to a reasonable quantum.

Obviously, a statutory regime that removes any right to compensation and removes legal recourse to the courts will easily achieve this goal. As we described in Part 5, there are many precedents for this kind of a regime in Canada and abroad. On the other hand, if BC decides to create a regime that allows compensation for expenses, it must take great care to ensure that such a system achieves the values of predictability and feasibility. This might be achieved through strict limitation on compensation for expenses. However, given the speculative nature of mineral tenure and related investments, it is possible that any compensation for expenses is problematic. We turn to this issue in the next section.

6.4 PROHIBITING THE USE OF PUBLIC FUNDS TO COMPENSATE FOR LOSSES THAT ARE DERIVED FROM AN INHERENTLY SPECULATIVE INVESTMENT ACTIVITY

In Part 4 we explained that mineral tenure and related investments are an inherently speculative business activity. There is a very low probability of a return on these investments due to a wide variety of geophysical, economic, environmental and social factors, including: the geological rarity of a viable deposit, the volatility of commodity markets which impacts viability, the challenge of obtaining the necessary environmental authorizations from provincial and federal authorities, and the possibility that the Indigenous nation on whose territory the tenure is located may withhold their consent. Arguably, all four of these factors must align for a project to move forward and for the tenure holder to finally earn a return on their investments.

We argue that it is unfair and inappropriate for the public to backstop risky investments like mineral tenure claims. This form of compensation amounts to a regressive subsidy for industry, to the determent of conservation and respect for Indigenous rights. It would be difficult to find another industry where investors expect governments to compensate them for the risks and potential losses that a changing public policy environment creates.

Moreover, compensation for mineral tenure in the context of a regulatory taking for conservation purposes creates arbitrary results. For example, had the Province decided not to authorize a particular project following an environmental assessment, it would not owe the company compensation. However, if the Province endeavors to create a conservation area before a project gets to the environmental assessment stage, then, under the current market value system, it owes the tenure holder compensation. This is arguably an arbitrary distinction and cannot be consistent with good public policy.

In our view, the inherently speculative nature of mineral tenure militates strongly against any form of compensation for a regulatory taking, including compensation for expenses. This is especially the case where the counter-veiling public policy objectives are of a high legal and ethical order, such as is the case with conservation and Indigenous reconciliation, both of which engage Canada's international obligations, as well as serious existential (biodiversity) and justice (reconciliation) considerations.

7. Conclusion and Recommendations

Throughout this report, we have described how BC's current market value mineral tenure compensation regime is in tension with BC and Canada's commitments to reconciliation, biodiversity, and conservation. The uncertainty regarding the quantum of compensation awarded, as well as the financial burden of large rewards, creates serious barriers to these public interest objectives. In addition, we have made the case that mineral tenure and related investments are an inherently speculative business activity, and that any public compensation to mitigate private risk, including for expenditures, is inappropriate, unfair, and arbitrary. Finally, we have shown that a non-compensation regime is relatively common in Canada and other jurisdictions with respect to a variety of tenure and property rights, including mineral rights.

As a result, we recommend that the Province of BC take the following steps:

Recommendation #1. Repeal the Province's market value approach to mineral tenure compensation.

Repeal the Province's market value approach to mineral tenure compensation, as set out in section 17.1 of the *MTA* and related regulations.

Recommendation #2. Create explicit, broad statutory power under the *Mineral Tenure Act* for the Province to vacate mineral claims for public interest purposes.

Create explicit, broad statutory power under the *MTA* for the Province to vacate mineral claims for public interest purposes. These amendments could build on subsections 17(1) and 17(2) which already give the Minister a similar power. The purpose of these amendments to the *MTA* and related regulations and statutes should be to eliminate the common law right to compensation for a regulatory taking. These new provisions should address the following:

a. Define the public interest as: conservation measures; the protection of biodiversity; and respect for Indigenous rights, including meeting the objectives of *DRIPA* and any related Action Plan, the protection of Indigenous cultural heritage resources, remedies for past colonial injustice, and enabling Indigenous-led land management decisions.
b. Explicitly remove a right to compensation for constructive takings in the public interest, with clear statutory language such as, "no compensation is payable."

c. Declare that the state action in question is not a taking. This can be done by limiting the applicability of the *Expropriation Act.* For example, the statute could state: "the *Expropriation Act* does not apply."
d. Create an explicit statutory bar to any common law right to compensation or cause of action by a tenure holder whose claims are vacated for public interest purposes. For example, the statute could state: "a person has no right of action and must not commence or maintain an action or other proceeding."

Recommendation #3. In the alternative, ensure that eligible expenses are strictly limited and that they comply with the general principles described above.

In the alternative, if the Province decides to adopt a compensation-for-expenses regime for constructive takings in the public interest, it must ensure that eligible expenses are strictly limited to ensure that they comply with the general principles described above. Such a regime should also provide the Minister with statutory power to deny or reduce compensation for any eligible exploration expenses if, in the Minister's opinion, such compensation would unjustly enrich the tenure holder or unduly obstruct the fulfillment of the public interest purposes for which the mineral claims were vacated. This power would be in addition to the Minister's existing statutory power to deny compensation where a claim is acquired for a purpose other than mining (nuisance claims), or mainly in the expectation of obtaining compensation.

Appendix 1: Jurisdictions & Statutes that Remove Compensation Rights

This Appendix provides detailed summaries of the statutes used for the above analysis that negate compensation for constructive takings.

ALBERTA

Metis Settlements Act[128]

The *Metis Settlements Act* allows the Metis Settlements General Council to make land use decisions and removes the right to compensation for anyone impacted by those decisions.

The *Metis Settlements Act* establishes various Métis settlements as corporations in Alberta.[129] Section 214(1) also establishes the Metis Settlements General Council (the "General Council') as a corporation. Section 222(1) empowers the General Council, after consultation with the Minister, to make, amend or repeal various General Council policies, including General Council policies "respecting the co-management of the subsurface resources of settlement areas and the distribution of the proceeds from exploration for, and development of, those resources."[130] These policies are "binding on the General Council and every settlement."[131] Section 237 provides that "[n]o person is entitled to compensation by reason only of the adoption of or the contents of a General Council Policy or a settlement bylaw respecting planning, land use or development control."

BRITISH COLUMBIA

Vancouver Charter[132]

The *Vancouver Charter* gives the city Council power to make zoning by-laws. If such regulation affects any property, then the property is deemed not to have been taken or injuriously affected and there is no right to compensation from the city. While issues relating to mining are not addressed in the *Vancouver* Charter, this example provides an insight as to how a no-compensation regime may be constructed more generally.

Section 6 of the *Vancouver Charter* continues the incorporation of the City of Vancouver.[133] Section 565 empowers the city Council to make zoning by-laws with respect to various issues,

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[128] *Metis Settlements Act,* RSA 2000 c M-14, s 2(1) [*MSA*].
[129] *MSA*, *supra* note 127, s 222(1)(b).
[130] *Ibid*.
[131] *MSA*, *supra* note 127, ss 219(2), 227(1).
[132] *Vancouver Charter*, SBC 1953, c 55 [*Vancouver Charter*].
[133] *Vancouver Charter*, *supra* note 131, s 6.

including "regulating, within any designated district or zone, the use or occupancy of land and land covered by water for or except for such purposes as may be set out in the by-law."[134] For example, pursuant to s. 565A(a), the Council may make by-laws "prohibiting any person from undertaking any development without having first obtained a permit therefor." Regarding compensation, section 569(1) states:

> [w]here a zoning by-law is or has been passed, amended, or repealed …, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this Part [Part XXVII – Planning and Development], any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of such zoning and **no compensation shall be payable** by the city or any inspector or official thereof.[135]

Great Bear Rainforest (Forest Management) Act[136]

The *Great Bear Rainforest (Forest Management) Act* empowers the government to make land use decisions in the Great Bear Rainforest. In relation these decisions, compensation and damages are not payable by the government.[137] Moreover, recourse to the common law is precluded, and the *Expropriation Act* is inapplicable.

Unless the Act indicates otherwise, section 63(1) provides that compensation and damages are not payable by the government in relation to any of the following matters:

i. the enactment of this Act or a regulation or order under this Act;
ii. the exercise or intended exercise of a power under this Act including, without limitation, the following:
    (i) the power of the Lieutenant Governor in Council under Part 4 [Adjustments to Affected Forest Licences] to specify allowable annual cuts and harvesting areas for affected forest licences and to impose restrictions on timber harvesting under those licences;
    (ii) the power of the Lieutenant Governor in Council under Part 7 to designate land as a special forest management area;
    (iii) the power of the Lieutenant Governor in Council under section 66 [regulations respecting Forest and Range Practices Act] to make regulations.[138]

Moreover, to preclude recourse to the common law, section 63(2) states, a "person has no right of action and must not commence or maintain an action or other proceeding" to claim compensation

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[134] *Vancouver Charter*, *supra* note 131, s 565.
[135] *Vancouver Charter*, *supra* note 131, s 569(1) [emphasis added].
[136] *Great Bear Rainforest (Forest Management) Act,* SBC 2016 c 16 [*Great Bear Rainforest Act*].
[137] *Great Bear Rainforest Act*, *supra* note 135 (note: some compensation may be permitted "to the extent contemplated under Division 3 [*Application of Forest Act and Compensation]* of Part 7 [*Special Forest Management Areas*]," s 63(1)).
[138] *Ibid*.

or damages in relation to the abovementioned matters. Finally, section 63(3) provides that the *Expropriation Act* does not apply in relation to the abovementioned matters.

Agricultural Land Commission Act[139]

The *Agricultural Land Commission Act* empowers the Commission to designate land as agricultural land, and thereby restrict the way such land can be used. Land designated as agricultural land is deemed not to be taken or injuriously affected.

The *Agricultural Land Commission Act* establishes the Provincial Agricultural Land Commission.[140] The Commission aims:

> … [T]o preserve the agricultural land reserve; to encourage farming of land within the agricultural land reserve in collaboration with other communities of interest; to encourage local governments, first nations, the government and its agents to enable and accommodate farm use of land within the agricultural land reserve and uses compatible with agriculture in their plans, bylaws and policies….[141]

Under section 15(1), if the Commission is satisfied that land is suitable for farm use, then they may designate the land as agricultural land. Section 20(1) provides that a "person must not use agricultural land for a non-farm use unless permitted under" the Act or the regulations. With respect to compensation, section 37 states: "[l]and is deemed not to be taken or injuriously affected by its inclusion in the agricultural land reserve." Therefore, inclusion in the agricultural land reserve does not result in a constructive taking or compensation.

Forest Act[142]

The *Forest Act* states that neither compensation or damages are payable to "any holder of any agreement because of or arising out of the designated land status of all or any part of the Crown land to which the agreement relates."[143] This no-compensation regime is limited to the first four years of designation and compensation equal to "the value of the harvesting rights under the agreement" is permitted during the fifth and subsequent designation years.[144]

Part 13 of the *Forest Act* provides for the creation of designated areas. These sections of Crown land are specified by the Lieutenant Governor in Council by regulation if they believe it is in the public interest to do so. These areas can exist for a maximum of ten years and can impact existing interests and agreements on the land.[145]

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[139] *Agricultural Land Commission Act,* SBC 2002 c 36 [*ALCA*].
[140] *ALCA*, *supra* note 139, s 4.
[141] *ALCA*, *supra* note 139, s 6(1).
[142] *Forest Act,* RSBC 1996 c 157 [*Forest Act*]
[143] *Forest Act, supra* note 142, s 175.1.
[144] *Forest Act, supra* note 142, s 175.2.
[145] *Forest Act, supra* note 142, ss 169, 170.

Coalbed Gas Act[146]

The *Coalbed Gas Act* empowers the Minister to issue natural gas tenure of coalbed rights and to require the disposal of coalbed gas for safety reasons. Compensation is precluded for these ministerial actions, and for certain actions that took place before the act came into force.

The *Coalbed Gas Act* clarifies who owns coalbed gas (i.e., methane). Section 5 states that the Minister may issue natural gas tenure of coalbed rights to "any person with respect to specified coal deposits underlaying a parcel." Section 7 permits the Minister to authorize coal owners or holders of Crown coal dispositions to vent or dispose of coalbed gas, if deemed necessary for "safety reasons." The Act removes any right to compensation. Section 6 states: "[a] person has no rights of action and must not commence or maintain proceedings, as a result of the enactment of this Act or the exercise by the minister of powers referred to in section 5 or 7…" to claim damages or compensation from the government.[147] Additionally, section 6(2) states: "[f]or all purposes, including for the purposes of the *Expropriation Act*, no expropriation or injurious affection occurs as a result of the enactment of this Act or the exercise by the minister of powers referred to in section 5 or 7." The limits on right of action and compensation extend to the natural gas owner or person with the coalbed gas rights for the "extraction, production or removal of coalbed gas" if that removal happened before the act came into force.[148]

ONTARIO

Mining Act[149]

The *Mining Act* precludes a cause of action for a wide variety of government action and its potential impacts on mineral claims. Section 38.4(1) provides, "[n]o cause of action arises against the Crown, a member or former member of the Executive Council or an employee or agent or former employee or agent of the Crown as a direct or indirect result of" various actions.[150] For example, section 38.4(1)(2) precludes a cause of action for the "conversion of a legacy claim into a cell claim or boundary claim under section 38.2 or regulations made in respect of the conversion of legacy claims."[151] This limitation focuses on the various ways in which the updating of Ontario's mining legislation might require the conversion of certain rights under the old mineral tenure scheme to the new scheme.[152] The Act states that section 38.4(1)'s preclusion of a cause of action "applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, including loss

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[146] *Coalbed Gas Act*, SBC 2003 c 18, s. 6(1) [*Coalbed Act*].
[147] *Coalbed Act*, *supra* note 146, s 6(1).
[148] *Coalbed Act*, *supra* note 146, s 6(3).
[149] ON *Mining Act*, *supra* note 115.
[150] ON *Mining Act*, *supra* note 115, s 38.4(1).
[151] ON *Mining Act*, *supra* note 115, s 38.4(1)(2).
[152] See section 38.2(2), which sets out the conversion of legacy claims to mining claims registered in the mining claims registry. Depending on a legacy claim's location on the provincial grid, it converts to either a cell claim, or a boundary claim (ON *Mining Act*, *supra* note 115, s 38.2(2)).

of revenue and loss of profit, or any other remedy or relief."[153] Additionally, section 38.4(3) provides, "[n]o proceeding, including but not limited to any proceeding in contract, restitution, tort or trust, that is directly or indirectly based on or related to anything referred to in subsection (1), may be brought or maintained against any person referred to in subsection (1)."[154] Finally, section 38.4(6) states, "[n]othing done or not done in accordance with the provisions referred to in subsection (1) or the regulations made in respect of them constitutes an expropriation or injurious affection for the purposes of the *Expropriation Act* or otherwise at law."[155]

Far North Act, 2010[156]

The *Far North Act, 2010* allows for community-based land use plans that prospectively prohibit certain mining-related activities. However, it protects the validity of pre-existing mineral claims and leases from those plans. Nevertheless, under s. 14(2)2, there is a possibility that a land use plan could result in a prohibition on opening a mine, and in this scenario, the Act prohibits compensation under s. 19.

The *Far North Act*, *2010* aims to:

> [P]rovide for community based land use planning in the Far North that, (a) sets out a joint planning process between First Nations and Ontario; (b) supports the environmental, social and economic objectives for land use planning for the peoples of Ontario that are set out in section 5; and (c) is done in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult.[157]

Section 5 sets out the following objectives to inform land use planning in the Far North:

1) A significant role for First Nations in the planning.
2) The protection of areas of cultural value in the Far North and the protection of ecological systems in the Far North by various means, including the designation of protected areas in community-based land use plans.
3) The maintenance of biological diversity, ecological processes and ecological functions, including the storage and sequestration of carbon in the Far North.
4) Enabling sustainable economic development that benefits the First Nations.[158]

First Nations with reserve(s) in the Far North can indicate an interest in initiating the land use planning process, referred to as a community-based land use plan.[159] The Minister must "work with [the First Nation in question] to prepare terms of reference to guide the designation of an area in the Far North as a planning area and the preparation of a land use plan…."[160] Section 14(1)

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[153] ON *Mining Act*, *supra* note 115, s 38.4(2).
[154] ON *Mining Act*, *supra* note 115, s 38.4(3).
[155] ON *Mining Act*, *supra* note 115, s 38.4(6).
[156] *Far North Act*, *2010*, SO 2010, c 18 [*Far North Act*].
[157] *Far North Act*, *supra* note 157, s 1.
[158] *Far North Act*, *supra* note 157, s 5.
[159] *Far North Act*, *supra* note 157, s 9(1).
[160] *Ibid*.

stipulates that community-based land use plans control activities within the planning area they apply to, which provides: "no person shall make any decision under an Act respecting the allocation, disposition or use of public land and natural resources in the area or carry on any activity in the area that is related to that allocation, disposition or use," unless it is consistent with the community-based land use plan's designations and permitted uses.[161]

Protected areas can be designated by a community-based land use plan.[162] Persons are generally prohibited from conducting certain kinds of development in a protected area. Pursuant to section 14(2), these prohibited developments include (1) Prospecting, mining claim registration or mineral exploration; (2) Opening a mine if: (i) the person is required to file a closure plan for a mine under s. 141 of the *Mining Act* to commence or recommence mine production, and (ii) the Director did not acknowledge receipt of a closure plan for the mine under section 141 of the *Mining Act* before January 31, 2011.[163]

Section 14(3) provides an exception to protected area restrictions if mineral interests exist in an area where a community-based land use plan is being developed. This section states: "[i]f a community based land use plan is made or amended after a mining claim, mining lease, patent or licence of occupation for mining purposes is registered, recorded, issued or granted in an area to which the plan applies," then the prohibited developments above (other than section 14(2)(2)) do not effect:

a) the validity of the mining claim, mining lease, patent or licence of occupation for mining purposes; or
b) any of the following if the mining claim, mining lease, patent or licence of occupation for mining purposes is in good standing at the time the plan is made or amended:
    i. obtaining a lease of the mining claim pursuant to the *Mining Act*,
    ii. obtaining a mining lease with respect to any lands subject to the licence of occupation in accordance with the terms of the licence,
    iii. pursuant to the *Mining Act*, obtaining the necessary approvals and permits or making the necessary filings for mineral exploration and development activities in relation to the land subject to the mining claim, mining lease, patent or licence of occupation,
    iv. pursuant to the *Mining Act*, undertaking mineral exploration and development activities in relation to the land subject to the mining claim, mining lease, patent or licence of occupation.[164]

To limit compensation and damages, section 19(2) provides that no cause of action arises as a direct or indirect result of:

(a) the enactment or repeal of any provision of this Act;
(b) the making or revocation of any provision of the regulations made under this Act;
(c) the preparation of a community-based land use plan or the preparation of an amendment to such a plan;

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[161] *Far North Act*, *supra* note 157, s 14(1).
[162] *Far North Act*, *supra* note 157, s 9(9)(c).
[163] *Far North Act*, *supra* note 157, s 14(2).
[164] *Far North Act*, *supra* note 157, s 14(3)(a)-(b).

(d) anything done or not done in accordance with this Act or the regulations made under it; or
(e) any act done in good faith in the performance or intended performance of any duty or in the exercise or intended exercise of any power under this Act or the regulations made under it or any neglect or default in the performance or exercise in good faith of such duty or power.[165]

In relation to anything mentioned in section 19(2) above, section 19(3) provides "**[n]o costs, compensation or damages are owing or payable** to any person and no remedy, including but not limited to a remedy in contract, restitution, tort or trust, is available to any person…."[166] To ensure that compensation is not available for a constructive taking, section 19(7) states: "[n]othing in this Act and nothing done or not done in accordance with this Act constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law."[167]

Ontario Heritage Act[168]

The *Ontario Heritage Act* empowers the Minister and municipalities to designate a property in a manner that restricts an owner's ability to alter the property. The Act precludes compensation for certain designations and highlights the *Expropriation Act*'s inapplicability.

Under section 29(1), "[t]he council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest…."[169] Section 33(1) provides that this designation by council restricts the owner of a property's ability to alter the property in a manner that is likely to affect the property's heritage attributes. Additionally, section 34.5(1) empowers the Minister to "designate any property within a municipality or in unorganized territory as property of cultural heritage value or interest of provincial significance…."[170] According to section 34.5(2), doing so restricts an owner's ability to alter the property.[171]

The Act restricts a property owner's right to compensation. Section 68.3(1) provides: "[e]xcept as may be provided under this Act, **no owner of property or other person is entitled to compensation** in respect of any designation, order or decision made by a municipality, the Minister or Tribunal under this Act."[172] Additionally, section 68.3(2) states: "[n]othing done or not done in accordance with this Act or the regulations under it constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law."[173]

However, if the Minister determines that a property is archaeologically or historically significant, then section 63 states that the owner is

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[165] *Far North Act*, *supra* note 157, s 19(2).
[166] *Far North Act*, *supra* note 157, s 19(3) [emphasis added].
[167] *Far North Act*, *supra* note 157, s 19(7).
[168] *Ontario Heritage Act*, RSO 1990, c O.18 [ON *Heritage Act*].
[169] *Ontario Heritage Act*, *supra* note 169, s 29(1).
[170] The Minister must consult with the Trust and then may make the designation order.
[171] *Ontario Heritage Act*, *supra* note 169, s 34.5(2).
[172] *Ontario Heritage Act*, *supra* note 169, s 68.3(1) [emphasis added].
[173] *Ontario Heritage Act*, *supra* note 169, s 68.3(2).

entitled to compensation for personal or business damages for the period provided for in the order designating the property, and the *Expropriations Act* with respect to the determination of compensation applies with necessary modifications as if the designation and resulting restrictions imposed by this Act were an expropriation of rights.[174]

YUKON

Oil and Gas Act[175]

The *Oil and Gas Act* empowers the Minister to cancel a disposition if development is not in the public interest. Moreover, in circumstances where the notion of public interest is not rooted in the laws or policies of the Government of the Yukon, the regulations can preclude compensation; however, they currently do not.

The *Oil and Gas Act* provides the Minister with the power make regulations to limit or preclude compensation.[176] Section 28(1) empowers the Minister to cancel a disposition "when the Minister is of the opinion that any or any further exploration or development of the oil and gas…is not in the public interest, subject to the holder of the disposition being compensated in accordance with the regulations for the holder's interest."[177] As noted above, section 28(2) of the act allows the Minister to create regulations to exclude a right to compensation "in circumstances where the reason for the Minister's decision … is attributable to or related to the operation of, or decisions made pursuant to, the laws or policies of any government or entity other than the Government of the Yukon."[178] The act provides that if the Minister's determination of the public interest is grounded in the laws or policies of a government or entity other than the Government of the Yukon, such as an Indigenous government, the Minister can make regulations to exclude a right to compensation. At the time of writing, the regulations do not discuss compensation.

NEW SOUTH WALES (AUSTRALIA)

Coal Acquisition Act 1981[179]

The *Coal Acquisition Act 1981* vests all coal in the Crown and precludes compensation unless the Governor decides to make compensation orders.

Section 5 of the *Coal Acquisition Act 1981* vests all coal "in the Crown freed and discharged from all trusts, leases, licences, obligations, estates, interests and contracts."[180] According to section

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[174] *Ontario Heritage Act*, *supra* note 169, ss 52, 63.
[175] *Oil and Gas Act*, RSY 2002 c 162 [YK *Oil and Gas Act*].
[176] YK *Oil and Gas* Act, *supra* note 176*,* s 28.
[177] YK *Oil and Gas* Act, *supra* note 176*,* s 28(1).
[178] YK *Oil and Gas* Act, *supra* note 176*,* s 28(2).
[179] *Coal Acquisition Act 1981* (New South Wales), 1981/109 (Austl), s 5 [NSW *Coal Acquisition Act*].
[180] *Ibid.*

6(2), this vesting does not result in compensation; however, the Governor can determine compensation pursuant to section 6(1).[181]

VICTORIA (AUSTRALIA)

Land Acquisition and Compensation Act 1986[182]

The *Land Acquisition and Compensation Act 1986* precludes compensation for licensee under the *Mineral Resources (Sustainable Development) Act 1990* "for **the value of any mineral** in or under the surface of any acquired land."[183] Further, section 38(3) provides that a mineral licensee "is not entitled to claim compensation if the licence contains a condition or power enabling the Governor in Council to resume the whole or any portion of the land covered by the licence without compensation if it is required for public purposes."[184] Section 43(1)(d) states that in assessing compensation for land reserved for a public purpose in a planning instrument, one must disregard "any restrictions upon the use or development of that land which are imposed by, or are a consequence of, the reservation…."[185] Therefore, even if compensation is available under the act, the effects of a public purpose in a planning instrument do not contribute to compensation.

Therefore, where there is a mineral interest in land and there is a reservation for a public purpose in a planning instrument, the impacts of that reservation on the mineral interest are not compensable. Additionally, the value of any mineral on or under the land acquired by a licensee is not compensable.

QUEENSLAND (AUSTRALIA)

Mineral Resources Act 1989[186]

The *Mineral Resources Act 1989* empowers the Crown to extinguish mining tenement interests without compensating for the value of minerals related to such interests. Section 10AAA(5) of the *Mineral Resources Act 1989* provides, "[a] mining tenement interest may be (a) wholly extinguished; or (b) partially extinguished…." Compensation is permitted for this change in mining tenement interests; however, in assessing this compensation "allowance cannot be made for the value of minerals known or supposed to be on or below the surface of, or mined from, the land."[187]

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[181] NSW *Coal Acquisition Act*, *supra* note 180, s 6(2).
[182] *Land Acquisition and Compensation* (Victoria) *1986* 1986/ 121 (Austl) [Vic *Land Acquisition Act*].
[183] Vic *Land Acquisition Act*, *supra* note 183, s 38(1) [emphasis added].
[184] Vic *Land Acquisition Act*, *supra* note 183, s 38(3).
[185] Vic *Land Acquisition Act*, *supra* note 183, s 43(1)(d).
[186] *Mineral Resources Act 1989* (Queensland), 1989/110 (Austl) [Qld *Mineral Resources Act*].
[187] It must be noted that this statute provides an example of a partial no compensation regime, wherein compensation is only restricted in connection with the actual value of the minerals. Under this regime, it is possible that compensation may be offered in connection with other expenses, although this is not explicitly mentioned (QLD *Mineral Resources Act 1989*, *supra* note 187*,* ss 10AAD(1), 10AAD(2)).

Appendix 2: Jurisdictions & Statutes that Limit Compensation Rights

This Appendix provides detailed summaries of the statutes consulted for the above analysis that limit compensation to expenses in the case of a constructive taking.

QUEBEC

Mining Act

The *Mining Act* empowers the Minister to terminate a mineral claim if the area is necessary for public utility purposes. If the Minister does so, then the Minister must pay compensation equal to the amounts spent to work on the claim.

Section 82 of the *Mining Act* empowers the Minister to order the cessation of work "if necessary in his judgement to permit the use of the territory for public utility purposes."[188] The Act does not define a "public utility purpose" and we could not find a definition of the term in our review of the case law. Section 82 provides that if, after six months, the Minister determines that the cessation of work must be maintained, the Minister "shall terminate the claim and pay **compensation equal to the amounts spent for all work performed**…."[189]

NEW SOUTH WALES (AUSTRALIA)

Mining Act 1992

If land is required for a public purpose, the *Mining Act 1992* empowers the Minister to cancel an authority and the Secretary to cancel a mineral claim. This results in a right to compensation for any mining improvements made to the land, and the amount is determined by the Minister or Secretary.

The *Mining Act 1992* allows for the cancellation of an authority (i.e., a exploration licence, an assessment or mining lease) or mineral claims under various conditions, including if the land is required for a public purpose.[190] Section 125(1)(i) states, "[t]he decision-maker may cancel an authority as to the whole or any part of the land to which it relates … if the decision-maker is satisfied that the land is required for a public purpose."[191] Regarding a mineral claim, section 203(1)(f) provides: "[t]he Secretary may cancel a mineral claim, as to the whole or any part of the land to which it relates … if the land is required for a public purpose…."[192] According to sections

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[188] *Mining Act,* CQLR c M-13.1, s 82 [QC *Mining Act*].
[189] QC *Mining* Act, *supra* note 189, ss 8, 82 [emphasis added].
[190] QC *Mining* Act, *supra* note 189, ss 125(1)(i), 203(1)(f).
[191] QC *Mining* Act, *supra* note 189, s 125(1)(i).
[192] QC *Mining* Act, *supra* note 189, s 203(1)(f).

127(1) and 205(1), mere cancellation does not necessarily result in a right to compensation.[193] However, if the reason for cancellation of an authority is that the land is required for a public purpose, then sections 127(2) and 205(2) provide that the holder of the authority or claim is "**entitled to compensation**, of an amount to be determined by" the Minister or Secretary, "**for any mining improvements made to the land.**"[194]

SOUTH AUSTRALIA

Mining Act 1971[195]

The *Mining Act 1971* empowers the Minister to excise land from an exploration licence, if the Minister determines that the land is required for a public purpose.[196] If the Minister exercises this power, then the tenement holder can apply to be compensated for the money expended in prospecting for minerals in the affected area.

Under the *Mining Act 1971*, if the Minister determines that land comprised in an exploration licence is required for a public purpose, then section 30AB(1) empowers the Minister to excise land from the total area comprised in the licence. As a result, the licence will cease to apply to the land.[197] If the Minister excises land from an exploration licence, then s. 30AB(2) empowers the tenement holder to apply to the appropriate court for an order that the "Minister pay compensation … for the **money expended by the tenement holder in prospecting for minerals** in the area excised from the total area comprised in the exploration licence."[198] Consequently, as per section 30AB(3), the "appropriate court may … determine an amount that would fairly compensate the tenement holder…."[199]

TASMANIA (AUSTRALIA)

Crown Lands Act 1976[200]

The *Crown Lands Act 1976* empowers the Minister to cancel a lease granted under the act if the land is required for a public purpose, for the purposes of another act, or for a purpose desirable in the public interest. If the Minister exercises this power, then the Minister must pay compensation improvements made to the land.

Section 29 empowers the Minister to lease Crown land "to such persons, for such purposes, at such rent, and on such terms and conditions as he thinks fit."[201] However, section 29(5) provides

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[193] QC *Mining* Act, *supra* note 189, ss 127(1), 205(1).
[194] QC *Mining* Act, *supra* note 189, ss 127(2), 205(2) [emphasis added].
[195] *Mining Act 1971* (South Australia), 1971/74 (Austl) [SA *Mining Act*].
[196] SA *Mining Act*, *supra* note 196, s 30AB(1).
[197] *Ibid*.
[198] SA *Mining Act*, *supra* note 196, s 30AB(2) [emphasis added].
[199] SA *Mining Act*, *supra* note 196, s 30AB(3).
[200] *Crown Lands Act 1976* (Tasmania), 1976/28 (Austl) [TS *Crown Lands Act*].
[201] TS *Crown Lands Act*, *supra* note 201, s 29(1).

"[n]o lease of Crown land under this Act confers on the lessee any right to, or interest in, any minerals or mining products or, except as otherwise provided, any timber or forest products upon or in the demised land."

Under section 37(1), if the Minister determines that "any land subject to a lease granted by the Minister under this Act (a) is required for any public purpose; or (b) is required for the purposes of any other Act; or (c) should be made available for any purpose which he considers desirable in the public interest," then the Minister may cancel the lease. However, section 39(1) requires the Minister to pay

> **[C]ompensation for the lessee's interest in the improvements effected by the lessee for the purposes for which the lease was granted** including those paid for by him and taken over from the previous lessee of the land but no compensation shall be paid to the lessee in respect of any improvements effected on or to the land after the service of the notice on him….[202]

CAYMAN ISLANDS

Mining Law[203]

Section 14(1) of the *Mining Law* provides that if the Governor determines that land subject to a mining lease is required for any public purpose, then "such mining lease shall … be determined…."[204] Consequently, section 14(2) provides that the holder of an impacted mining lease is "entitled to … **compensation for any disturbance of passageways, works, buildings, plant or other property** belonging to him, but not for disturbance of his mining rights…."[205] This is not a provision that requires compensation for all expenses; however, it does require compensation for losses occurring if there was "disturbance" to property. However, there is no compensation for lost value in the disturbance of the mining rights.[206]

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[202] TS *Crown Lands Act*, *supra* note 201, s 39(1) [emphasis added].
[203] *Mining Law* (Cayman Islands), No 19/1975 [CI *Mining Law*].
[204] CI *Mining Law*, *supra* note 204, s 14(1).
[205] CI *Mining Law*, *supra* note 204, s 14(2).
[206] *Ibid*.