



REPORT #2

FINAL

2019 Mineral Tenure Act Regional Forums

What We've Heard Report

April 16, 2019 Forum (Kamloops, BC)

April 17, 2019 Forum (Prince George, BC)

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Introduction

The Ministry of Energy Mines and Petroleum Resources (MEMPR or the “Ministry”) held two (2) engagement forums to discuss *Mineral Tenure Act* (MTA) reforms with Indigenous Nations (the “Forums”) in April 2019. The full-day Forums were held in Kamloops on April 16, 2019 and in Prince George on April 17, 2019. The Forums were planned as a part of the Ministry’s broader commitment to engage meaningfully with Indigenous Nations to develop recommendations that will inform provincial policy, practices, processes and legislation related to mining. The Forums were attended by 37 participants from 26 Nations.

The Forums were in follow-up to a previous engagement forum on MTA held in Vancouver, on February 28, 2019 (“MTA 1”). At MTA 1, participants from fourteen (14) Indigenous Nations and representatives from the BC First Nations Energy and Mining Council (FNEMC) engaged in discussions on the current challenges with the mineral tenure system, and opportunities for improvement focusing on five key concepts. Following MTA 1, the Ministry reviewed participant feedback and produced a summary report of what was heard. This report was used to inform the agenda and session topics at the Forums.

At the Forum held in Prince George, the FNEMC provided feedback related to the engagement process to date. FNEMC raised issues over how the MTA affects Aboriginal Rights and Title and that amendments to the MTA require adequate consultation around Rights and Title. FNEMC indicated that the presence of leadership at the Forums would have been desirable, and that leadership engagement was still required. BC Assembly of First Nations (BCAFN) Regional Chief, Terry Teegee was present during morning discussion at the Prince George Forum. The Regional Chief reiterated FNEMC’s stated concern with the engagement process to date. MEMPR indicated that the process for engagement on the MTA is following a similar model that of the EA legislative review process.

The Ministry understands that discussions regarding potential changes to legislation, such as the discussions regarding the MTA, are of great interest to Indigenous Nations and trigger discussions regarding Aboriginal Rights and Title. The Ministry does not consider discussions with Indigenous Nations participants at MTA 1 nor the Forums in April as consultation. For clarity, these engagements were not planned to fulfill the Province’s legal duty to consult. Rather, the Forums served as an opportunity for the Ministry to gather feedback and information from the Indigenous experts and technicians with experience in the mining sector during early stages of reviewing the mineral tenure system in BC.

The Forums were intended to deepen the conversation around the mineral tenure system in BC and as an opportunity to discuss concerns of Indigenous Nations around mining legislation, policies, and practices in the province. Based on feedback from the MTA 1, the following discussion topics were presented and discussed at the Forums in April:

- Activities under a claim;
- Rights and certainty attached to a claim;
- Mining competitiveness; and
- Opportunities for collaboration

This summary report captures the main themes that emerged from dialogue at the Forums. The notes from the discussions at the Kamloops and Prince George forums can be found in Appendix 1 – Mineral Tenure Act Regional Forum Notes.

The report provides an overview of the discussion topics that were presented by MEMPR at the Forums. This provides some insight into why the discussion topics were selected, and what the Ministry has reviewed and proposed to address some of the concerns from MTA 1. Through the Forums, broader themes emerged that touch on multiple topics. The theme sections below provide an overview of the discussion from the Forums and the main concerns that were shared. For the themes, there were also some key potential areas of actions that were suggested by participants. The suggested areas for action listed below each topic are some of the ideas brought forward by participants that the Ministry is considering.

Overview of discussion topics

Activities under a claim

Most of the laws and regulations surrounding mining activities in British Columbia are captured under the *Mines Act*. The MTA is focused on the rights and interests granted to tenure holders. Permitting is addressed under the *Mines Act* and requires Indigenous consultation before a permit is issued. However, there are a number of activities that proponents can conduct under a claim without having a *Mines Act* permit.

At MTA 1, participants raised concerns related to permissible activities under a claim, including, the lack of clarity regarding what activities were or were not permissible, insufficient communication and awareness to Indigenous Nations about activities occurring on their land-base, and the potential for impacts to the land without prior consultation. Currently, there are no clear definitions around what constitutes a low-impact activity and there are no notification or engagement requirements to Indigenous Nations around these activities. Participants at the Forums were asked to review and provide feedback on draft guidance for permissible activities without a *Mines Act* permit, and to discuss the level of engagement that would be appropriate for low-impact activities and the best mechanism for engagement.

Rights and certainty attached to a claim

Under the MTA, when a proponent stakes a claim, they acquire the rights to the minerals under that claim. Currently, when proponents register claims through the Mineral Titles Online (MTO) system, there are no mechanisms or processes in place to notify Nations that a claim has been registered on territories, and no requirement for proponents to engage with Indigenous Nations. At MTA 1 there were discussions around moving mineral rights from a claim to a lease and adding discretion to the issuance of a lease, which would require consultation before rights are conferred. Although the proposal to shift the disposition of mineral rights from a claim to a lease was well received overall, attendees stated that this proposal inadequately captured the Province's commitment to free, prior and informed consent, and that consultation should occur at an earlier stage. The Ministry recognizes that increasing the number of referrals to include all mining claims would increase the level of

engagement with Indigenous Nations, but it would also increase the strain on both provincial and Indigenous administrations. The Forums provided an opportunity for the Province to get feedback from participants on how best to increase certainty for industry in the tenuring process while respecting Indigenous Nations' rights, and how to best support Indigenous Nations in processing increased referrals.

Mining competitiveness

The Province is committed to supporting renewed commitments to reconciliation while also maintaining British Columbia's position as an attractive jurisdiction for mineral exploration investment. Mining is speculative in nature, which means that proponents often register many claims. Consultation requires capacity and resources; therefore, requiring consultation on every claim would mean an increase in the costs and time required for all parties involved. The Province and FNEMC have conducted a jurisdictional review of mineral tenure systems in other provinces and countries, and while there were benefits in some models – such as Ontario's system, the landscape of Aboriginal Rights and Title in British Columbia is unique, and there are no ideal models with a claims registration system and engagement process that captures the needs and nuances of mining in British Columbia. At the Forums, the Province looked to participants to provide feedback on how to approach working collaboratively to balance the need for early consultation while also maintaining mining competitiveness.

Opportunities for collaboration

In implementing its commitment to the *United Nations Declaration on the Right of Indigenous People* (UNDRIP) and the Truth and Reconciliation Commissions *Calls to Action*, the Province is exploring opportunities to work collaboratively with Indigenous Nations and to support Nations in building stronger relationships with industry/proponents. At MTA 1, the Province proposed to notify interested Indigenous Nations when a claim was registered on their territory which would include the contact information for the proponent; at the time of notification, proponents would also receive the contact information for Nations to facilitate engagement. Although participants at MTA 1 supported increasing the amount of information provided to communities throughout the tenuring process, there were concerns around how the increase of information would actually support early engagement. Generally, Indigenous Nations have expressed the need for processes and mechanisms to encourage more direct collaboration between Indigenous Nations and MEMPR and between Nations and proponents, and the Forums provided an opportunity for participants to discuss opportunities for collaboration and relationship-building.

What we heard

Concerns with current Mineral Titles Online system

Participants at both the Forums were in agreement that consultation should be required for any physical activity taking place on their territory. Reasons were complex and interconnected and centered on the idea that 'free-entry' impacted Aboriginal Rights and Title, and the associated physical activities, also impacted the land-base.

Central to the discussion was that ‘free-entry’ is currently easily accessible to any proponent that meets a basic set of criteria. Participants expressed that the ‘free-entry’ system allows proponents to register claims on Indigenous territory without consultation, setting the tenure system against Aboriginal Rights and Title. Further, participants said that there are larger systemic issues with the free-entry system which allows the Province to confer mineral rights on Indigenous territories without consulting Nations. The fact that a claimant could stake a claim without having to be physically on the land was a major concern for participants.

Further to this, participants were concerned over how easy it was for a proponent to stake a claim with the online system. Some participants suggested revoking the online staking system altogether, while others suggested making a number of adjustments in order to address some of the current concerns. Suggestions included, providing notification to the Nation(s) when a claim is staked on their territory; providing more information about existing Indigenous Nations’ territories to proponents; and increasing the \$25.00 fee associated with registering for a Free Miners Certificate (FMC). Participants also suggested that a portion of this fee should go to Nations to support increased capacity to participate in consultation regarding mineral claims.

Although the discussion on impacts from permissible activities under a mineral claim mostly centered on potential impacts to Aboriginal Rights and Title, several participants also had concerns about potential environmental and cultural impacts. Participants felt that there were no activities that could be considered “low-impact” when they take place in culturally or environmentally sensitive areas. As examples, participants discussed the potential for hand tools to disturb the land in riparian areas, or the impact of the presence of field crews traveling to a mineral claim area. Under the current system, proponents are not required to have any knowledge of whether the areas that they are travelling across or conducting activities in are culturally or environmentally significant to Indigenous Nations.

Another concern cited was the potential for proponents to disturb archeological sites or uncover artifacts without appropriate knowledge, training, or procedures to deal with ‘chance finds’. Participants felt that there is a high-risk for disturbances given that proponents do not need to prove any knowledge of archeological processes or of the land itself before entry. This led to an in-depth discussion of potential procedures and additional training for proponents and is discussed further in the [Baseline assessments and archaeological studies](#) section of this report.

Suggested areas for action:

- Engage further with Indigenous Nations regarding the nature and logistics of consultation that should take place in advance of exploration activities and to determine what activities should be permissible under a claim;
- Provide notification to Nation(s) when a claim is staked on their territory;
- Provide more information about existing territories to proponents via MTO; and
- Increase the \$25.00 fee associated with a FMC.

Land use planning and establishing ‘no-go’ zones

Participants pointed to the need for Indigenous Nations to establish ‘no-go’ zones in their territory to protect areas of cultural and environmental significance. Many Nations have already established ‘no-go’ zones in their territory, typically identified through oral histories and field observations.

Participants emphasized the importance of MEMPR and proponents respecting the knowledge of

Nations and their reasons for identifying areas as ‘no-go’ zones, even in the absence of written documentation. Participants said that some Nations have developed formal land use plans and/or land codes but that some Nations lack the resources to do so, and participants were concerned about how Nations could protect important lands and resources in the absence of land use plans.

Moving forward, many participants were interested in finding a way to work with the Ministry to identify and respect ‘no-go’ zones. Participants felt that doing this could help improve relationships with the Ministry and proponents by reducing the time and resources spent on claims made on land that Indigenous Nations have already determined as culturally or environmentally sensitive.

Suggested areas for action:

- Engage further with Indigenous Nations to discuss and identify ‘no-go’ zones, and discuss how this information might be incorporated into the mineral tenure system; and
- Determine ways for Indigenous Nations without land use plans to protect their lands and resources.

Increasing capacity to Indigenous Nations

Understanding that there is a need for earlier engagement with Indigenous Nations and the time and resources associated with consultation processes, EMPR asked participants for their input on how Indigenous Nations can be supported with a potential increase in the number of consultations. When asked about how the Province and Nations could better work together to handle the large number of claims registered annually in BC (approximately average of 5,500), many participants pointed to the need for core administrative capacity that would help them respond to referrals across a number of different sectors – not just mining and exploration.

Participants not only expressed a need for additional capacity to process referrals and the associated engagements but also to enable their organizations to better participate in the current process to update the MTA and to inform decision-making surrounding changes to mining legislation, policy, and practices.

Suggested areas for action:

The capacity needs shared by participants were both long and short-term in nature. Short term capacity needs included:

- Honouraria or reimbursement for attending engagement sessions, such as the current MTA forums as attendance is an additional strain on participants’ regular duties.
- Funds to support referrals management for MTA claims at the Nation level. Several participants gave the example of a revenue sharing system used by the Ministry of Forest, Lands, Natural Resources Operations, and Rural Development (FLNRORD) to help fund staffing of a referrals position specific to forestry, which some participants agreed was addressing administrative capacity issues.
- Funds to support critical studies and research to be undertaken at the Nation level, including mining policy analysis and cultural heritage studies. In particular, some participants said that conducting cultural heritage studies would help clear up concerns on sites where proponents are proposing exploration.

Long-term capacity needs included:

- Support for land use planning initiatives for Nations of different capacities must be reliable and consistent (land use planning is discussed further in section [Land use planning and establishing 'no-go' zones](#) in this report).
- Increasing data management and mapping capacity in order to digitally tag and track areas of cultural and environmental significance. Some participants noted that they use money from proponents of major projects to get heritage sites registered.
- Supporting training and education for community members to obtain the skills and qualifications necessary to take a more active role in assessments of claims and permits. For example, participants mentioned health and safety and environmental monitoring techniques, in addition, participants said that it is important for training to be brought into communities to make it as accessible as possible. Education and training opportunities are further discussed in the [Education and training for proponents](#) section of the report.

Early engagement between Indigenous Nations and MEMPR

The Ministry acknowledged that the lack of notification regarding mineral claims to Indigenous Nations within the current system needs improvements, and asked participants at the Forums to share their feedback on other ways that engagement within the tenuring system could be improved.

Participants shared that the language and wording in the first engagement from the Ministry, via a Notice of Work (NoW) needed to be updated to ensure that the government is addressing Indigenous Nations in a government to government manner. The timing of the notifications was also discussed and participants expressed that notifying Nations about work that is already set to occur in their territory without consultation as the first means of contact, was not a productive way to begin engagement on a project that has the potential to become a major mine.

Participants suggested that a change of language to better reflect the Province's commitment to UNDRIP and developing productive relationships with Nations would be a positive step. In addition, participants said that they would like to see the Province develop standard communications protocols and commitments for engaging with Nations regarding MTA claims. For example, this might include timelines within which the Province must contact Nations regarding new claims and compensate individuals for their time in reviewing referrals.

Some participants also said that EMPR was not adequately encouraging proponents to engage with Indigenous Nations whose traditional territories overlap with mineral claims. Participants felt that the Ministry simply approved the claim and issued a NoW, simultaneously passing off the engagement to proponents and not monitoring whether or not it actually occurs.

Suggested areas for action:

- Update language used in NoW documents;
- Consider developing standard communications protocols and commitments for engaging with Indigenous Nations regarding MTA claims, with emphasis on early notification; and
- Take an active role in encouraging proponents to engage with Nations and following-up to make sure that engagement occurs.

Early engagement between Indigenous Nations and proponents

The importance of early engagement by proponents was also a common theme throughout the Forums. Participants shared a general sentiment that proponents should not be permitted to freely enter traditional territories to conduct exploration activities without permission or even introductions with Nations.

At a minimum, participants said that early engagement by proponents should involve contacting individual communities and/or visiting in-person to do introductions. Participants emphasized that it is important for proponents to understand who Nations are and their interests. Likewise, it is important for decision-makers and land stewards within Indigenous Nations to understand who proponents are, their interests, and what activities they will be conducting. Participants also commented that many proponents lack knowledge of the history and issues facing Indigenous Nations and how to appropriately engage with them, suggesting that basic sensitivity training be a requirement of making mineral claims (education for proponents is further discussed in section [Education and training for proponents](#)).

Some participants expressed frustration for having to track down information about claimants on their own via MTO or phone calls to different government agencies before a NOW is issued. Instead, participants suggested that this information should be provided to them in a clear and concise manner and as early as possible in the mineral claims process.

Although participants recognized that a proponent's intentions for a site were difficult to know at early exploration stages, participants were concerned that proponents were able to proceed with work and eventually sell mineral rights to larger operators without discussing their intentions with Nations. This in turn sets the tone for poor engagement in the future as new proponents and Nations have to build a relationship with a potentially poor understanding of each other's intentions.

Finally, several participants from larger Nations with substantial mining activity in their territory used the example of agreements between Nations and proponents as a model for creating better relationships. These included agreements with proponents as large as BC Hydro and as small as individual exploration companies. While the content and terms of agreements can vary greatly, they set the stage for a productive bilateral relationship between proponents and Nations, where intentions and objectives are very clearly set out. Some participants felt that agreements provided more certainty for them in terms of roles and responsibilities, decision-making, and relationships with proponents, expressing that "agreements outlast legislation." In addition, it was noted that agreements between individual Nations and proponents were a positive step towards creating a culture of 'good actors' within the mining and exploration sector (further discussion regarding 'good' and 'bad' actors is in the [Education and training for proponents](#) section of the report).

Suggested areas for action:

- Consider basic training as a requirement for making a mineral claim;
- Provide information regarding new mineral claims and the parties who registered them in a clear and concise manner as early as possible in the mineral tenure process; and
- Look at current examples of agreements between individual Indigenous Nations and industry to learn of potential ways to encourage early engagement with proponents.

Education and training for proponents

Participants discussed several opportunities for educating proponents about Indigenous Nations and how to properly engage with them. Participants said that proponents who want to work in an Indigenous Nation's traditional territory should have an understanding of the Nation's culture and way of life, their interests and activities on the land, and who they should contact to begin early engagement.

Participants said it was important for proponents conducting any work in their territory to understand their culture and way of life which is more complex than simply understanding territorial boundaries and the location of sensitive areas. Some Nations have created "First Nation 101" documents to share with all external organizations that they do business with which provides information on the Nation's history, cultural values, and recommendations on how to best work together.

In general, participants expressed support for a knowledge-based test to be required when making a mineral claim. At a minimum, proponents should be able to prove that they have knowledge and capacity to undertake exploration in an environmentally responsible manner. In addition to this, participants suggested that the MTO website be modified to include several educational pieces such as, information about more than one traditional territory overlapping with on a claim and templates for Shared Engagement Records (SER) and/or sample best practice agreements between Nations and proponents.

A key component of education for proponents that participants discussed was the need for a way of identifying 'good actors' and 'bad actors' based on their track record of environmental sustainability and working with communities. Participants were frustrated that anyone could register a mineral claim regardless of their reputation as an operator. Participants expressed interest in engaging with MEMPR further to develop a standards or rating system in which 'good actors' can be rewarded for using best practices and opportunities can be limited for 'bad actors'

Suggested areas for action:

- Require a knowledge-based test when registering a mineral claim to ensure that proponents are aware of their engagement expectations and have the knowledge and skills to conduct activities in an environmentally sound manner;
- Support Nations to develop "Indigenous Nation 101" materials to be shared with proponents who would like to undertake exploration activities in their territory; and
- Further engage with Indigenous Nations to establish a standards or rating system that identify 'good actors' and 'bad actors'.

Baseline assessments and archaeological studies

Participants discussed several components of archaeological studies and procedures as they relate to mineral claims. In general, participants agreed that archaeological studies were necessary in many cases to identify 'no-go' zones. Many participants felt that it was essential for Indigenous Nations to be involved and present for archaeological studies and to be able to take ownership and control of any data that results from them. Some participants also expressed that archaeological information was critical to the development of baseline or initial site assessments during the mineral tenure process.

Participants were also concerned that there was no assurance that proponents had appropriate knowledge and procedures for handling ‘chance finds’, and that there was no coordination between Provincial agencies to enforce the appropriate protocols for ‘chance finds’. Some participants expressed interest in further engagement with MEMPR on this topic.

Suggested areas for action:

- Explore opportunities to include Nation members in assessments and archaeological studies; and
- Consider ways to ensure that proponents have adequate knowledge and procedures in place for managing ‘chance finds’.

Opportunities for relationship building

Throughout the Forums, participants identified several concrete ways in which MEMPR could improve communications and engagement practices with Indigenous Nations.

Several participants noted that human resources and political turnover within the provincial government was frustrating and caused them to need to repeat the same concerns over and over. Participants also expressed frustration with not knowing who to contact for certain issues or contacting the Ministry with an issue and being told that they needed to contact someone else. Participants suggested that a consistent that a specific point of contact would improve communications.

Participants also suggested that Ministry personnel bring engagement sessions directly into communities so that more members and leaders could be involved in these important discussions. Participants expressed that attending training and engagement sessions requires time and resources that not all Nations have access to. Bringing engagement sessions to communities would be less of a strain on Nations, and it would ensure participation by members and leaders.

Participants suggested that SERs were useful tools for improving engagement between the Province, proponents, and Nations regarding MTA-related activities. An SER is an official record of engagement activities shared by two government to government parties wherein engagement activities and associated issues are tracked. Several participants said that a common template for SERs should be made available to Nations across the province.

Suggested areas for action:

- Create a point of contact within MEMPR with whom Nations can contact regarding MTA issues;
- Bring more engagement sessions into communities; and
- Utilize SERs.

Next Steps

The Forums provided an opportunity for MEMPR to engage meaningfully with Indigenous Nations on provincial legislation, policy and processes in light of determining how to bring the principles of UNDRIP into action as it relates to mining in British Columbia.

Indigenous Nations and the BC First Nations Energy and Mining Council (FNEMC) have expressed concerns with the current mineral tenure system, which is currently viewed as providing inadequate opportunities for consultation, and not sufficiently responsive to Indigenous Nations' concerns. MEMPR will continue to engage with Indigenous Nations in order to gather feedback and develop an intentions paper regarding the proposed changes to BC's mining regime, slated for release in 2019.

Findings from the Forums will continue to inform the Ministry's planning and implementation of policy changes, as well as the continued review of legislation, policies, and practices for mining in BC. Some of the initiatives raised at the Forums are already underway and at various stages of planning and implementation.

MEMPR is committed to reviewing the action items within this report and considering their interconnectedness with proposed legislative changes to the MTA. MEMPR continues to engage with Indigenous Nations and FNEMC on this important topic and looks forward to the next engagement forum.