

THE LATEST RISK TO THE BC NATURAL RESOURCE SECTOR: GOVERNMENT USES LITTLE KNOWN LAW TO FREEZE MINING RIGHTS UNLESS FIRST NATIONS CONSENT

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On March 6, 2024, one of the largest annual mineral exploration and mining conferences in the world ended in Toronto. The very next day, the BC government [announced](#) four Cabinet orders [\[1\]](#) that upended various rights of prospectors and mineral developers in two parts of British Columbia.

The four orders were made under a little-known law called the *Environment and Land Use Act*. They prohibit placer and mineral claim staking on Banks Island and part of Vancouver Island, as well as restricting related mineral exploration activities. The BC Government indicated in a corresponding news release that it may amend the orders if affected parties could reach agreement with local First Nations.

No prior government has ever used these powers so broadly, or said openly that the restrictions may be removed if holders of such rights can reach agreement with First Nations. [\[2\]](#)

While these specific orders are limited to only parts of BC and BC's mining laws, if government truly has the legal authority to make them under the *Environment and Land Use Act*, there is nothing that would preclude their future use in other areas of BC and other sectors. And one might reasonably expect some Indigenous groups will ask government to do exactly that.

What is unprecedented about the orders?

The orders are unprecedented in two ways.

- This is the first time any government has used this power to suspend *previously issued* permits.

While this law has been on the books for decades, and over two hundred orders have been issued, none have ever been retrospective - suspending *previously issued* permits that people had already acquired and invested on. In the prior 200 or so orders, the most any government ever did under the *Environment and Land Use Act* was prohibit people from applying for *new* permits and interests going forward.

- It is the only time as far as we are aware that the government has imposed blanket restrictions on a

resource development activity and then said it is open to relaxing the rules if affected parties can get an agreement with First Nations.

This would seem a form of veto - using the power of the state to prohibit otherwise lawful activity by third parties and then giving local First Nations the ability to decide on what terms the prohibitions may be lifted. At minimum, it provides an enormous amount of leverage in the negotiation of any agreement.

Yet the Supreme Court of Canada has been clear on numerous occasions that while First Nations hold constitutionally protected rights, they do not have a right to a veto.

What exactly is the *Environment and Land Use Act*?

The *Environment and Land Use Act* is a very short law that government describes as being related to “protected areas”.^[3] It establishes an Environment and Land Use Committee with duties related to environmental protection and increasing public awareness of the environment.

The Act allows Cabinet, on recommendation of the Committee, to make orders it “considers necessary or advisable respecting the environment or land use” (s. 7(1)). It also states that statutory decision-makers “must not exercise a power under any other Act or regulation except in accordance with the order” (s. 7(2))

The Act defines “environment” broadly to mean “all the external conditions or influences under which humans, animals and plants live or are developed”.

What exactly will these orders do?

The four orders impose several new prohibitions that include:

- A prohibition on prospectors (i.e. “free miners” registered under the *Mineral Tenure Act*) from exercising their rights to stake new claims for the designated areas
- A prohibition on the right of existing mineral claim and Crown grant^[4] holders to apply for exploration permits under the *Mines Act* in the applicable areas
- A prohibition on the use of existing exploration permits, previously issued to specific private parties.

Some of the prohibitions expire in 2029. Some are indefinite.

While these specific orders relate only to the geographic areas specified, it is clear they raise larger questions for BC. This includes the question of who really owns the minerals rights, and does this foreshadow broader changes coming to BC laws? The answers to those questions may be hinted at by the government’s media release title, which stated:

Orders protect Gixaala, Ehatteshat Nations’ mineral interests, signal Mineral Tenure Act reform.

Do the orders make exceptions based on amount of investment already made, or do they expressly provide for compensation?

No.

Were these orders required by the courts?

No.

While the orders relate in some ways to the B.C. Supreme Court September 2023 decision in [Gitxaala v British Columbia \(Chief Gold Commissioner\), 2023 BCSC 1680](#), the court in that case specifically held that new claims could be staked for 18 months after the decision, while government adjusted its process to consult First Nations on claim staking thereafter. Further, the Court's decision did not in any way restrict or suspend exploration permits (existing or new).

What does this mean for other sectors and other areas of BC?

That remains to be seen. While these orders apply only to the areas specified, the larger issue is the unprecedented use of the *Environment and Land Use Act* power to suspend previously issued permits. If such authority truly exists, it is difficult to conceive of any permit in the natural resource sector (or indeed, any sector that may affect the environment) that government could not suspend, using this legislation, if it wanted to stop activities unless and until First Nation agreement is obtained.

This unprecedented nature of the orders therefore raises the potential for legal challenge. Ultimately the question of whether the government actually has the legal authority to do what it has done will only be conclusively determined if one or more parties affected by the orders decides to challenge them in court.

[1] Order in Council numbers [0110-2024](#), [0111-2024](#), [0112-2024](#), and [0113-2024](#)

[2] The media release states, in part, "The orders pause the limited current mining activities as well as the issuance of new permits in Gitxaala and Ehattesaht territories and prevent the registration of new mineral claims **without agreement by the respective Nations.**" [emphasis added]

[3] [Types of parks and protected areas - Province of British Columbia | BC Parks](#)

[4] The inclusion of Crown grants are especially extraordinary, as they are legally recognized as an interest in land – a stronger legal right than a mineral claim.

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A Cautionary Note

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