West Coast Environmental Law Association

Comments on Bill 12, the *Mining Rights Amendment Act, 1998*

by

Chris Rolfe
Staff Counsel

April 29, 1998

Bill 12, the *Mining Rights Amendment Act, 1998,* was introduced into the BC legislature on April 22nd and rushed through to Second Reading on April 29th. It appears to have been developed in closed door discussions with the mining industry. No consultation occurred with stakeholders other than industry. Government statements indicate a desire to pass the Bill with no opportunity for meaningful debate or opportunity for sober second thought. In the opinion of West Coast Environmental Law Association, the Bill represents a major step backward in environmental protection and could cost taxpayers heavily and unnecessarily.

New Section 17.1 to *Mineral Tenure Act*

Currently subsection 17(2) of the *Mineral Title Act* states that no compensation is payable for expropriation of mineral title. Subsection 17(2) was part of the *Mineral Title Act* introduced by the Social Credit Government and has been in force for many years during which the mining industry thrived. Bill 12 will amend the *Mineral Tenure Act* by adding a new section 17.1. The new section will provide that if mineral title (mineral claims or leases) is expropriated for the creation of parks, compensation is payable to the holder of a mineral title in an amount equal to the value of the rights expropriated. This raises a number of concerns:

Bill 12 creates a legal right to compensation where none currently exists. In *Cream Silver Mines Ltd. v. British Columbia* the BC Court of Appeal held that no compensation is payable for prohibiting, through the creation of a park and restrictions on issuance of park use permits for mining activities, the holder of a recorded mineral claim (i.e. a claim of the sort established under the *Mineral Tenure Act*) from exploring or developing the claim. Despite the fact that there is currently no legal right to compensation, Bill 12 gives such a legally enforceable right.

Bill 12 awards compensation based on value of the claim, a basis for compensation which is unworkable. Compensation could be paid on the basis of the reasonable expenses incurred by mineral interest holders (with appropriate discounting) or the value of the mineral interest. Bill 12 gives a legislative right to compensation based on value of the mineral interest, not based on discounted exploration and development costs. Value of the interest is an expensive and unworkable basis for compensation.

Compensation based on the value of the mineral interest is unworkable because it means estimating the nature of a mineral deposit, forecasting future commodity prices and estimating business risks. All of these issues are extremely difficult. The Schwindt Commission of Inquiry into Compensation for the Taking of Resource Interests said in its 1992 report:

A majority, but not all, of the submissions emanating from the mining sector (explorationists, mining companies and consultants) advocated compensation based on estimates of market value, notwithstanding the difficulty of calculation. The Commission rejected this alternative on two grounds. First, it is not clear that Mineral Claims do, or should, convey complete property rights to unproven deposits. Second, valuation of such properties is difficult, expensive, and subject to wide variation. To adopt such a policy would insure persistently high settlement costs for both title holders and government.

The principle of compensation based on value of claim will likely mean protracted disputes with extremely high costs to government in sorting through inflated claims.

It is our understanding that government intends to pass regulations which would award compensation on the basis of reasonably incurred exploration costs with heavy discounting to reflect the highly speculative nature of exploration costs. If compensation is payable, this is the best way of measuring compensation. However, Bill 12 states that "compensation is payable ... in an amount equal to the value of the rights expropriated, to be determined under the regulations." Regulations may be able to define some way of measuring value of the interest expropriated, but they must be consistent with the statute.

Thus, there seems to be inconsistency between the statute and the stated intent of government. We trust that this is a result of the hurried way in which Bill 12 has been introduced and brought to Second Reading. If so, it is indicative of the problem of pushing through legislation without a chance for consultation with interested parties (other than those interested parties that would benefit from government unwittingly committing itself to unlimited compensation packages).

Compensating claim holders for the creation of a park significantly extends the right to compensation offered by society to a point that is unfair to taxpayers and the public welfare. There is a continuum of government actions for which compensation could be paid. The public generally accepts that compensation should be paid if government expropriates land purchased by a citizen. On the other hand, as a society we generally do not accept the idea of compensation to landowners for zoning bylaws that restrict their

use of land, or compensation to polluters if a permit to pollute is canceled. In the latter case, nothing has been paid for the permit and there is no legitimate expectation that it will not be canceled. It would be unfair to society as a whole if government were responsible for paying off everyone adversely affected by a government decision such as placing a restriction on mining or restricting or canceling a right to pollute. (Similarly, government does not compensate those adversely affected by mines or pollution).

A right to compensation for mineral claim holders significantly extends the ambit of government activities for which compensation is payable. Mineral claims are given free of charge (other than a nominal recording fee) to exploration companies that stake a claim. To maintain mineral claims, holders need only invest $100 to $200 per year in exploration work for every 25 hectares of claim area. Claims are highly speculative and only a tiny fraction of claims become working mines. Not compensating claim holders for restrictions on their right to mine only marginally adds to the risks faced by claim holders. On the other hand, Bill 12 means that taxpayers have a legal obligation to compensate claim holders for claims in which the claim holder invested little and had little expectation of profit. Bill 12 is unfair to the taxpayer.

Bill 12 sets a bad precedent for compensation for other land and resource decisions. Granting a statutory right of compensation, when no right to compensation would otherwise exist, sets a bad precedent for other provincial land and resource decisions. For example, the policy directive for streamside protection currently under development pursuant to s. 12 of the *Fish Protection Act,* will create riparian setbacks on streams that are important fish habitat. Many landowners mistakenly believe that they should be entitled to compensation if they are required to maintain a riparian setback. Similarly, the proposed federal *Canada Endangered Species Protection Act* will prohibit destruction of the residence of a threatened or endangered species. There is controversy around the issue of a landowner's duty to conserve habitat for species at risk. Many landowners believe that if endangered species laws require them to conserve habitat, they should receive compensation. Passage of Bill 12 will create a precedent for compensation in such cases, stalling the development of regulatory standards such as riparian setbacks or prohibitions on destroying the residences of endangered species.

Compensation based on value of the mineral title is an invitation to claim holders to submit inflated claims. If compensation is payable on the basis of value of the claim rather than discounted reasonable exploration expenses, it will encourage every mining exploration company in the province to stake claims in areas under consideration for protection. Once they have staked their free claim and invested their $100 they can wait for establishment of a park and then concentrate on milking as much compensation as possible from the taxpayers by inflating profitability projections and claiming that their mine is the next Eldorado.

New Section 11.1

Bill 12 will add a section to the *Mineral Tenure Act* which provides that owners of mineral titles (including claims and leases) must be issued special use permits under the

Forest Practices Code for construction of appropriate access to the mineral title. Because special use permits are likely only necessary in the context of building new roads, section 11.1 not only ensures certainty of access, but certainty of access by road, regardless of whether some other, more environmentally benign, method of access is possible. Although, the Chief Inspector of Mines can deny approval of a special use permit, he or she has no mandate to ensure protection of other resources.

Bill 12 will short circuit other ministries' or the environmental assessment processes' ability to determine appropriate access. The intent of Section 11.1 appears to be to separate decisions regarding access from any consideration of environmental harm. Section 11.1 will force issuance of special use permits for roads even if regional land and resource management plans (LRMPs) designate an area for roadless wilderness, if public servants charged with protecting British Columbia's natural resources find that a road is inappropriate, or if environmental assessment processes indicate that road access is inappropriate.

If the intent of Bill 12 is that government will not be bound by LRMPs or other land planning decisions when issueing road permits, Bill 12 is a slap in the face to the thousands of BC citizens who have worked in good faith to develop LRMPs or regional land use plans that are acceptable to all citizens. Often environmentalists have made major concessions in negotiating LRMPs. For government to unilaterally change the rules in favour of one sector is an insult.

If the intent of government is that industry should only need to approach one government agency in getting access approval, that is fine, but that does not mean that there is a need to short circuit other government agencies or processes. The "one-window approach" does not necessitate abrogation of the environmental protection mandate of other government agencies or the short circuiting of processes such as environmental assessment. If Bill 12 is only intended to establish the one-window approach, it should be changed so that is all it does. The Ministry of Energy of Mines can be made responsible for ensuring that access roads are consistent with existing land use decisions, environmental assessment decisions and the concerns of other ministries.

Summary

In its current form, Bill 12 is ill-advised and irresponsible. We urge the BC government to not pass Bill 12 without fully involving all stakeholders in ensuring that the above concerns are dealt