



A BREACH OF HUMAN RIGHTS

THE HUMAN RIGHTS IMPACTS OF THE MOUNT POLLEY MINE DISASTER, BRITISH COLUMBIA, CANADA

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May 2017
Original language: English
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THE WORST MINING DISASTER IN BRITISH COLUMBIA'S HISTORY

“We were woken up from a deep sleep in the middle of the night. It sounded like a low-flying airplane or an earthquake—I couldn’t fathom what it was. We took the grandkids and ran for higher ground. We didn’t know what was happening.”

-Resident of Likely, BC

The Mount Polley copper and gold mine is located in an interior rainforest in the province of British Columbia (BC) in western Canada; full of cedar and alder trees, devils club and mountain huckleberries, and home to grizzly bear, wolves, endangered Mountain Caribou, and various fish species. It is also home to Quesnel Lake, one of the deepest fjord lakes in the world. Up to 25% of all salmon in British Columbia return to spawn in Quesnel Lake and its tributaries. The annual salmon return is of economic, social, cultural and nutritional significance to Indigenous peoples within the Secwepemc Nation¹ and surrounding Indigenous territories.

Picturesque Likely, BC is a tiny rural community² located at the mouth of Quesnel Lake, 60 kilometres from the city of Williams Lake on the interior plateau of BC's Cariboo Region. The area is a popular destination for outdoor enthusiasts and its economy relies on both ecotourism and mining. Many families in Likely and surrounding communities rely on the Mount Polley mine for their income.

As morning dawned on August 4, 2014, residents of Likely awoke to the devastating news that the Mount Polley mine's four-square kilometre tailings pond had failed. It was the first catastrophic mine failure in the province's history.

The breach released over 24 million cubic meters of water and mine tailings into surrounding waterways, depositing tailings silt up to ten metres thick at the bottom of pristine Quesnel Lake. Hazeltine Creek, only four feet wide before the breach, became a 150 foot-wide canyon scoured down to bedrock. Some residents raced out onto the lake in the morning hours to warn campers and backpackers of the danger and recall watching the water seem to boil out of the mouth of Hazeltine Creek into Quesnel Lake.³

Residents of nearby Indigenous communities said they were notified of the disaster by media reports or over Facebook, but not by the company or the province.⁴ Other residents were notified when volunteer firefighters knocked on their doors to inform them of the disaster and warn them to stay indoors.

On August 5, provincial government officials issued the operator, the Mount Polley Mining Corporation (MPMC), a pollution abatement order under the *Environmental Management Act* to stem the discharge, carry out an impact assessment and begin remediation work. Federal government officials, through Fisheries and Oceans Canada, issued a precautionary closure on a portion of the Chinook and Sockeye salmon fisheries.⁵ Fish eggs and juvenile salmon are vulnerable to some of the chemicals found in mine tailings,

¹ BC is home to 201 First Nations where 32 languages and 59 different dialects are spoken. The Secwepemc people occupy a large area of the central interior of British Columbia. There are currently 17 bands within the Secwepemc Nation. In the late 1800's under colonialism, the Crown established land reserves where the lives of Indigenous peoples were and continue to be administered through band administrations governed by the Indian Act. Secwepemc traditional territory was vast, but colonization whittled it down to several small reserves scattered throughout what was once a large territory. Indigenous lands today account for only 0.36% of British Columbia.

² Likely has a population of about 350 people, <http://likely-bc.ca/>.

³ Cariboo Regional District, August 4, 2014: <https://www.youtube.com/watch?v=xAltFxc8bME> and CBC The National, August 5, 2014 <https://www.youtube.com/watch?v=VYYwzAvQIF8>.

⁴ CBC Radio Canada – the lessons of the worst mine spill of Canadian history. By Francis Plourde, April 2017.

⁵ Fisheries and Oceans Canada, 2014. Advisory FN0753 Recreational, August 5, 2014, accessed at. http://www-ops2.pac.dfo-mpo.gc.ca/fns-sap/index-eng.cfm?pg=view_notice&DOC_ID=161980&ID=all. FOC later re-opened the chinook fishery on August 13 and the Sockeye fishery on August 19

particularly copper which interferes with salmon olfactory systems which they need for migration to their spawning grounds. At the time of the breach, Quesnel sockeye salmon were returning up the Fraser River and young salmon born during the 2013 spawning cycle were rearing in the lake.⁶

The breach deposited tailings waste containing nickel, arsenic, selenium, copper, aluminium and lead into Quesnel Lake.⁷ Homeowners along the lake reported a dramatic increase in turbidity (meaning that water appeared cloudy because of the number of large particles suspended in the liquid) and the appearance of a green plume. Turbidity is an indicator of water quality: the more turbidity, the greater the concern that large particles can harbour micro-organisms and heavy metal toxins.⁸ Trees along the breach site were coated in tailings. MPMC's post-breach environmental impact assessment reported that most of the trees in the "halo"⁹ zone died as a result of suffocation from the deposited tailings sediment.¹⁰

The region's local authority, the Cariboo Regional District (CRD) declared a State of Local Emergency; and drinking, bathing, fishing and swimming in the lake were immediately banned by the province's Interior Health Authority. Community showers were temporarily set up for residents and the Red Cross, local businesses and MPMC provided them with drinking water.

"People were confused, hurt and angry. They were traumatized. People stopped trusting the authorities."

– Al Richmond, Chair, Cariboo Regional District.

BC's Premier Christy Clark said she was committed to returning Quesnel Lake, one of the "most pristine, cleanest lakes in the world", to its pre-breach state. She said those responsible would be held accountable and that taxpayers would not be on the hook for the clean-up costs.¹¹

By the end of August the provincial Ministry of Environment (MOE) reported that water in Quesnel Lake met all drinking water and aquatic life guidelines.¹² However, the extent of the

pollution and long-term health impacts of the disaster remain unclear, prompting University of Northern British Columbia researchers to note that, "the nature of waste materials now present in Quesnel Lake presents a potential hazard to the metal content of aquatic food webs and the growth, survival and behaviour of important fish species".¹³

The CRD called on the provincial government to conduct a socio-economic impacts study in order to fully assess the impacts of the spill on people and economies within the Cariboo. The Province and MPMC agreed to conduct a study and to release it at the end of February 2017 but, to date, the report has not been made publicly available.

⁶ Petticrew, E.L., et al (2015), The impact of a catastrophic mine tailings impoundment spill into one of North America's largest fjord lakes: Quesnel Lake, British Columbia, Canada, *Geophys.Res.Lett.*, 42, 3347-3355, doi:10.1002/2015GL063345, pg 1.

⁷ There is no agreement about how to safely remove tailings from the lake, but residents are concerned about the toxicity of the tailings sediments and their long-term impact on Quesnel Lake. Mine tailings are a concentration of toxic substances. According to company records filed with Canada's MOE, in 2012 the Mount Polley tailings pond contained, "326 tonnes of nickel, over 400 tonnes of arsenic, 177 tonnes of lead and 18,400 tonnes of copper and its compounds".

⁸ Guidelines for Canadian Drinking Water Quality – Summary Table, February 2017, http://www.hc-sc.gc.ca/ewh-seMount/pubs/water-eau/sum_guide-res_recom/index-eng.php.

⁹ The 'halo' zone refers to the area along the forest floor where tailings were deposited: "Later studies conducted as part of the risk assessment problem formulation found that there were physical impacts to the terrestrial ecosystem where the tailings deposited on the existing forest floor (referred to as the 'halo') blocked air exchange and led to the loss of standing trees in the 'halo' area along Hazeltine Creek". Post-Event Environmental Impact Assessment Report, Golder and Associates, June 3, 2016, pg.4.

¹⁰ Post-Event Environmental Impact Assessment Report, Golder and Associates, June 3, 2016. P.4 and as reported in the media: Michael Mui, Vancouver 24 Hours, <http://vancouver.24hrs.ca/2016/06/22/majority-of-trees-dead-near-Mount-polley-spill>, June 22, 2016, Accessed April 6, 2017.

¹¹ <http://globalnews.ca/video/1498093/raw-christy-clark-speaks-about-mount-polley-mine-disaster> Accessed March 2017.

¹² MOE, 2014. Information Bulletin: Latest Mount Polley water-quality results.2014ENV0073-001248 August 25, 2014, available at http://www.env.gov.bc.ca/epd/mount-polley/pdf/20140825/IB_Aug13-water-quality-results-Aug25.pdf. However, an MOE Bulletin noted that samples collected from the Quesnel River showed ongoing problems with turbidity levels above the B.C. drinking water guidelines and total aluminum above Health Canada drinking water guidelines, and exceedances for total suspended solids, total iron and total phosphorus.

¹³ Fisheries and Oceans Canada, 2014. Advisory FN0753 Recreational, August 5, 2014; FOC later re-opened the chinook fishery on August 13 and the Sockeye fishery on August 19.

¹³ Petticrew, E.L., et al (2015), The impact of a catastrophic mine tailings impoundment spill into one of North America's largest fjord lakes: Quesnel Lake , British Columbia, Canada, *Geophys.Res.Lett.*, 42, 3347-3355, doi:10.1002/2015GL063345, pg 9

1.1 OUR TRADITIONAL ECONOMIES SWIM IN THE WATERS AND WALK ON THE LANDS¹⁴

The rights of Indigenous peoples are recognized in treaties between Indigenous peoples and the state, in the Canadian Constitution and its interpretation by Canadian courts, and in international human rights law. Indigenous peoples have ongoing rights to harvest wild foods, hunt, fish and practice their customs throughout their broader traditional territories. However, a half century of intensive resource development throughout BC has meant that there are fewer and fewer places left where it is possible to exercise those rights. In an April 7, 2017 public statement the MOE acknowledged that the Secwepemc people extensively used the land and Quesnel Lake for traditional uses such as hunting, fishing, harvesting medicines and berry picking.¹⁵

According to Secwepemc elders, certain plants only grow within their territory around Quesnel Lake. They report that the sites they used to visit to pick plants to treat specific health conditions now no longer exist. They question whether any plants picked from the area are safe and according to Jacinda Mack, a Xat'sull First Nation community member, this has had an enormous emotional impact on the community. Elders say they now question whether they should pick mountain huckleberries from the area at all. She told Amnesty International that the tailings waste deposited in the forests during the breach dry out, creating a heavy metal-laden dust that settles on the plants. She says the dust residue is nearly undetectable, but people are afraid to pick and eat berries from the area for fear of getting sick.¹⁶

Salmon and human health could also be at risk. The Mount Polley disaster occurred at the start of the annual salmon fishery, which is vital to Indigenous peoples throughout the Province. It immediately raised fears about eating fish from the area. In the days following the disaster, Secwepemc elder Jean Williams said, "The loss of the salmon for us as Secwepemc people is a matter of life or death for our culture. Can our salmon survive this devastation?"¹⁷ Chief Wayne Sparrow of the southern Musqueam First Nation called the interior territories the "incubators" of the eggs that will eventually become salmon and feed downstream Indigenous communities.¹⁸

At the request of Indigenous leaders who identified the need to look beyond the technical and environmental aspects of the disaster, the First Nations Health Authority commissioned a study to identify the probable community level impacts of the disaster on determinants of health in 47 communities (including the non-Indigenous community of Lillooet). It released its findings in August, 2016 and found:

- Emotional stress and trauma as a result of the spill was shared across the 22 communities which participated in the study.
- Direct impacts to traditional territory, such as loss of access to sacred land, traditional foods and medicines, in three First Nations – Xat'sull First Nation, Williams Lake and Lhatko Dene First Nation. Impacts were immediate and ongoing.
- A decrease in individual fishing practice reported by almost all communities, resulting in changes to diet composition, physical activity and cultural practices.
- Impacts to commercial fisheries in six communities, leading to reduced economic income and employment opportunities for community members.

The report outlined the financial burden the disaster placed on families resulting from the loss of salmon. For example, the average household in the Lillooet Nation consumes 200 fish per year. The direct financial costs for an Indigenous family to catch their own fish are approximately \$3-\$4 per fish. A replacement salmon in the grocery store can cost anywhere from \$20 (for a pink) or \$45 (for a sockeye). The severe economic marginalisation of Indigenous peoples in British Columbia makes it virtually impossible to spend upwards of \$4000-\$9000 annually on replacement fish from a grocery store.¹⁹ The FNHA estimated the replacement

¹⁴ Public talk by Bev Sellers, President of First Nations Women Advocating Responsible Mining and former Chief of the Xat'sull First Nation, Comox Valley, March 2017.

¹⁵ Indigenous knowledge and traditions are often associated with specific places. For example, a location where women have picked plant medicines and berries for generations may be associated with particular stories and teachings that are integral to the culture. Loss of these specific places can erode traditional knowledge and teachings.

¹⁶ Interview with Amnesty International, April 10, 2017.

¹⁷ Video, Doreen Manuel, Mount Polley Imperial Metals Disaster: <https://player.vimeo.com/video/107550322>.

¹⁸ Government takes heartless stand against efforts to help First Nations devastated by Mount Polley tailings pond catastrophe, Musqueam Indian Band press release, August 9, 2014. http://northernshuswaptribalcouncil.com/?page_id=765.

¹⁹ Compared to other Canadians, Indigenous peoples experience poorer health outcomes due to the ongoing impacts of colonization, racism and social exclusion, dispossession from traditional territories, loss of access to traditional food sources, poor infrastructure and limited access to adequate mental and

cost of fish for families living on reserve in the five communities that make up the Lillooet Nation in St'at'imc territory (downstream from Mount Polley) to be in the range of \$1.7 to \$3.8 million per year.²⁰

Some communities, such as the Stswecem'c Xgat'tem, are more than two hours away from the nearest grocery store²¹ and roads out of communities are often unpassable during harsh winter weather. Remote communities rely on having freezers and cupboards stocked with frozen, dried and canned salmon for the months until the next fishing season.

The halt to fishing in some of the communities had a negative impact on community practices related to catching, processing and preserving fish. Fishing is a physical, cultural and social activity. The FNHA scoping study concluded that, "salmon fishing plays a central role in a wide variety of determinants of First Nations health, ranging from physical exercise to social cohesion, building and sharing cultural identity and a wide range of factors affecting emotional health."

At the time of the disaster, the Lhtako Dene – Red Bluff Indian Band closed down its main fishing camp and recommended community members not fish. The report identified the community as one of the three most affected by the disaster and recommended members be provided with support, access to meetings and inclusion in high-level MOE and MPMC decision-making related to the disaster.

The study called on industry and government to support a full health impacts assessment of the Mount Polley disaster and, at the request of the St'at'imc Nation, called for urgent steps to protect the Fraser River system from further degradation.²³

Four lawsuits have been launched by Indigenous nations over the provincial government's failure to protect the salmon fisheries from harm resulting from the Mount Polley disaster.²⁵

ROLE OF SECWPEMC COMMUNITIES IN DISASTER RESPONSE

The Williams Lake (T'exelc) Indian Band and Xat'sull First Nation First Nation are broadly supportive of mining and in 2013 signed revenue-sharing agreements with MPMC. These agreements were in place at the time of the breach.²⁷ Some members worked at the mine at the time of the disaster and others participated in clean-up operations. The disaster caused shock and deep distress in the communities.

Chiefs from both communities did not trust early water testing results which showed Quesnel Lake water fell within Canadian drinking water guidelines. Xat'sull First Nation First Nation used its own funds to pay for independent water testing.²⁸ Testing results from the First Nations Health Authority in late August showed water samples were within BC and Health Canada Drinking Water Guidelines for known health effects but exceeded allowable 'non-health' or 'aesthetic' limits for phosphorous, aluminum, iron and manganese.²⁹ The monitoring and analysing of water quality data, remediation work, meetings with the Province and company, support for community members, and worry over the long-term implications of the disaster caused significant emotional, administrative and financial stresses for the two communities.

physical health services. Amnesty International has noted that resource extraction on traditional lands can exacerbate these factors. First Nations Health Authority; *Mount Polley Mine Health Impact Assessment Screening and Scoping Phase Report*, January 2016, pg.26. and Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights and Resource Development in Northeast British Columbia, Canada, 2016*

²⁰ Lillooet traditional territory of the St'at'imc people is approximately 200 kilometres south of the Mount Polley Mine. In 2016, the St'at'imc Chiefs Council filed a civil lawsuit in BC Supreme Court over the Mount Polley spill. Notice of Civil Claim: *St'at'imc Chiefs Council on behalf of the St'at'imc vs Mount Polley Mining Corporation, Imperials Metals Corporation, Imperial Energy Inc, Bethlehem Resources Corporation and Her Majesty the Queen in Right in the Province of British Columbia*, August 2, 2016.

²¹ First Nations Health Authority; *Mount Polley Mine Health Impact Assessment Screening and Scoping Phase Report*, January 2016 pg.32.

²³ First Nations Health Authority; *Mount Polley Mine Health Impact Assessment Screening and Scoping Phase Report*, January 2016 pg.66.

²⁵ The St'at'imc, Williams Lake, Soda Creek, and Tsilhcot'in Indigenous nations have filed notices of civil claim against the Province and companies. At the time of writing, several of the Nations were waiting for the results of a criminal investigation before taking next steps in the legal process.

²⁷ The agreements mean the two Nations will share 35 percent of the incremental mineral tax revenue collected by the Province. Xat'sull/Soda Creek will receive 16.5% and T'exelc/Williams Lake will receive 18.5%. The revenue they were promised from the mine is a percentage of the mining tax (tax based on profit) and has returned very little. According to media reports, the Williams Lake Band received \$4500 as their first compensation payment from the mine. <https://news.gov.bc.ca/stories/mine-revenue-sharing-agreements-benefit-first-nations-and-the-cariboo>.

²⁸ CBC News, 2014. Belle Puri, First Nations worry Mount Polley impact not as benign as claimed. Aug 11, 2014, <http://www.cbc.ca/news/canada/british-columbia/first-nations-worry-mount-polley-impact-not-as-benign-as-claimed-1.2733429>.

²⁹ First Nations Health Authority Communique #6, August 29, 2014.

On August 18 2014, the Province announced an agreement had been reached to address aspects of the tailing pond breach. It provided \$400,000 in funding to Xat'sull First Nation and Williams Lake Indian Band to cover immediate costs caused by the spill and "to be incurred in responding to the Mount Polley Mine incident". The funds were used for clean-up and related administrative activities, but quickly ran out.

The agreement established a government-to-government Principals Table of Chiefs from Williams Lake Indian Band and Xat'sull First Nation, and the Ministers of Environment, Aboriginal Relations and Reconciliation, and Energy and Mines. The purpose of the Principals Table is to oversee a number of activities related to the spill, including future permitting of the mine, assessing the adequacy of existing laws, and identifying opportunities for First Nations to participate in response efforts. The Principals Table meets four times per year.³⁰ Chiefs from the two northern Secwepemc communities regularly engage with the province and MPMC regarding remediation and ongoing operations at the mine.

However, the relationship does not have the support of all members of the Secwepemc Nation. Some members believe all mining activity in Secwepemc traditional territory is illegitimate, including the Mount Polley mine. Some Secwepemc activists and their supporters attended the Imperial Metals AGM in 2015 and 2016 to demand the company leave the territory. Chief Judy Wilson of the Neskonlith Indian Band said the Mount Polley disaster showed that parent company Imperial Metals was unable to manage water concerns and announced her intention to serve an eviction notice on Imperial Metals regarding its proposed Ruddock Creek zinc and lead mine.³¹ She said, "Our elders have stated very clearly they do not want anything poisoning our water or our salmon."

The Mount Polley disaster exposed divergent views on mining and development held within the Secwepemc Nation and exacerbated internal tensions regarding decision-making that could affect the rights of the Nation as a whole. But there is agreement that Secwepemc rights were deeply impacted by the spill, and the protection of the land and waters, and the cultural rights that flow from being Secwepemc, must be upheld and protected.

TRANSBOUNDARY CONCERNS

The southeast border of Alaska, USA lies approximately 1000 km northwest from Mount Polley and a number of major resource projects in BC. Alaskans have long raised concerns about leaking and abandoned mines and the BC government's perceived lack of urgency in preventing transboundary harms from Canadian mining operations. Days after the Mount Polley disaster, on August 8 2014, Alaskan Senator Lisa Murkowski wrote to then US Secretary of State, John Kerry, to voice her concerns about the "spectre of environmental impacts from large-scale hardrock mineral developments in Canada that are located near transboundary waterways" and asked the State Department to safeguard US interests in the wake of the disaster.³²

Prominent environmental groups like Rivers Without Borders Alaska and Salmon Beyond Borders have raised concerns about BC's culture of weak compliance enforcement. They say that Alaskan residents, fishermen, Alaskan Native Tribes and tourism operators have little faith in BC's ability to hold companies accountable for transboundary environmental and human rights harms, particularly when companies operating in BC are not required to post full financial sureties in the form of cash or bonds as they are required to do in Alaska. They do not believe BC's mine permitting process will protect the transboundary region from the long-term ecological and economic impacts of large-scale potentially acid-generating mines, such as the recently approved Red Chris mine. For the last 60 years, the abandoned Tulsequah Chief mine on the BC side of the border has been leaking acid runoff into the Taku River which flows into Alaska, prompting Alaskans to demand BC do a better job of securing financial sureties for mine remediation.³³

³⁰ Ministry of Aboriginal Relations and Reconciliation, Media Advisory: *Letter of Understanding between Soda Creek Indian Band, Williams Lake Indian Band and the Province of British Columbia*, 18 August 2014.

³¹ Eviction Notice, August 14, 2014 http://miningwatch.ca/sites/default/files/eviction_notice_.pdf

³² Letter from Lisa Murkowski, US Senator for Alaska to Secretary of State, John Kerry; 8 August 2014. <http://riverswithoutborders.org/wp-content/uploads/2014/08/Murkowski-Letter-to-Sec-Kerry-Protect-AK-Fisheries-2014-08-08.pdf>.

³³ Red Chris is an Imperial Metals mine located in northwest BC. Newsletter, Rivers Without Borders; Dangerous Dams: Mount Polley mine report shows inherent risks of watershed tailings impoundments; Transboundary Taku, Iskut-Stikine and Unuk Rivers at Risk of Worse Disaster, Spring 2015.

1.2 INVESTIGATIONS INTO THE CAUSES OF THE FAILURE

“The company knew what they were supposed to do, but they didn’t do it because they didn’t really think the breach would happen. Would the mine have blown if it had been inspected properly? The company would have done a better job with the mine had they been watched.”

-Mine worker³⁴



July 29, 2014



August 5, 2014

To understand the technical causes of the tailings pond failure and to make recommendations to prevent such failures in the future, the Province and the Xat’sull First Nation and Williams Lake First Nations convened an Independent Expert Engineering Panel. MPMC paid the costs of the Panel Review. The Panel was not mandated to investigate company oversight and management leading up to the disaster and noted that it was “unable to ascertain the circumstances that contributed to key decisions.”³⁵ On January 30, 2015 it released its findings.³⁶ The panel found:

- Poor design of the tailings pond was the primary cause of the disaster. The tailings dam was built on relatively soft glacial silt which was unable to support the four kilometer square pond.
- The walls of the pond had been raised by MPMC several times without adequate buttressing and perimeter beaches to stabilize the increased height of the dam wall. The engineering firm contracted by MPMC, Knight Piésold, warned the company about increasing the dam wall height without adequate buttressing and perimeter beaches, but says the company ignored its warnings and did not renew its contract in 2011. It has been sued by MPMC and has filed a counter-suit.³⁷
- The construction of a downstream rock zone at a steep slope was a contributing factor and the Expert Panel noted that had the downstream embankment slope been flattened in recent years as proposed in the original design, failure would have been avoided.

³⁴ Interview with Amnesty International, July 2015.

³⁵ The report notes, “The Panel did not conduct its process according to formal legal procedures. To do so would have extended the length of this investigation and would have entered into an assessment of roles and responsibilities, which is beyond the Panel’s authorization. As a result, the Panel is not able to offer an adequate assessment of the role of management and oversight in its contribution to the cause of the failure. In particular, the Panel has not explored the relationship between the designers and owner, contractual or otherwise. Accordingly, the Panel is unable to ascertain the circumstances that contributed to key decisions.” Pg 111 .

³⁶ Independent Expert Engineering Investigation and Review Panel Report on Mount Polley Tailings Storage Facility Breach; January 30, 2015 <https://www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf>.

³⁷ Stockwatch Daily, Mike Caswell, Mount Polley Engineer Says its Warnings Went Unheeded: Imperial Metals lawsuit sees much finger-pointing; September 27, 2016.

- The Panel concluded that the failure could not have been predicted.³⁸

Parallel to investigating the causes of the tailings breach, the Panel was tasked with investigating current tailings storage practices in BC to ensure that another failure like Mount Polley never happens again. It found current practices severely lacking.⁴⁰ It recommended the Province reduce the number of existing dams from 120 to 60 in order to reduce the risks of dam failures. Alarmingly, it noted:

“If the inventory of active tailings dams in the province remains unchanged, and performance in the future reflects that in the past, then on average there will be two failures every 10 years and six every 30. In the face of these prospects, the Panel firmly rejects any notion that business as usual can continue.”⁴¹ ”

The Panel recommended the province eliminate water storage dams and require companies to design dams using Best Available Technologies to reduce the risks associated with ‘wet’ tailings impoundments (i.e. using large bodies of water to cover and store mining waste). It also recommended that dam designs be overseen by an independent panel.

“The Panel does not accept the concept of a tolerable failure rate for tailings dams. To do so, no matter how small, would institutionalize failure. First Nations will not accept this, the public will not permit it, government will not allow it, and the mining industry will not survive it.”⁴²

The government said it would act immediately to implement the recommendations and launch review of the BC Health, Safety and Reclamation Code (HSRC) and Mines Act.⁴³ In July, 2016, MEM announced it had implemented all of the Panel’s recommendations, including new design and operation criteria for tailings storage facilities throughout the province.⁴⁴ However, critics note that the revisions to the Code don’t go far enough: there is no clear strategy to retire approximately 60 existing dams or ensure that new mines use dry disposal facilities, as recommended by the panel.⁴⁵

INVESTIGATION LAUNCHED BY CONSERVATION OFFICER SERVICE

In February, 2015, Imperial Metals and MPMC offices in Vancouver and Williams Lake were raided by the BC Conservation Officer Service as part of a joint investigation with Fisheries and Oceans Canada, the Royal Canadian Mounted Police and Environment Canada into possible violations of the Environment Management Act and the Fisheries Act.⁴⁷ According to an email received by Amnesty International from the provincial MOE on March 31, 2017, the investigation is ongoing. Despite investigating for more than two years, no charges have been laid nor have the investigations’ findings been made public. In fact, the Province is not required to publicly release the findings.

³⁸ However, panel member Norbert Morgenstern described the failure as an accident waiting to happen. “We have gone ahead and built on this weak layer [of glacial silt], loading the gun,” Mr. Morgenstern said. “Building the steep slope pulled the trigger.” <http://www.theglobeandmail.com/news/british-columbia/design-failure-caused-mount-polley-tailings-breach-expert-panel-concludes/article22719967/> accessed 17 April 2017. This point was elaborated on in the Review Panel Report, pg 116.

⁴⁰ Independent Expert Engineering Investigation and Review Panel Report on Mount Polley Tailings Storage Facility Breach; January 30, 2015, Appendix 1: BC Tailings Dam Failure Frequency and Portfolio Risk.

⁴¹ Independent Expert Engineering Investigation and Review Panel Report on Mount Polley Tailings Storage Facility Breach; January 30, 2015, pg 118.

⁴² The province has continued to approve applications for wet storage impoundments. Despite the panel’s recommendations, recent updates to the Reclamation and Closure sections of the government’s *Health, Safety and Reclamation Code for Mines in British Columbia* do not require companies to build alternatives to wet impoundments, but rather call on companies to ‘make efforts’ to reduce the use of water and to ‘consider’ alternatives. http://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/health_safety_and_reclamation_code_2017.pdf. This runs contrary to the Expert Panel’s clear recommendations on the issue. The Panel report states, “Safety attributes should be evaluated separately from economic considerations and cost should not be the determining factor.” Independent Expert Engineering Panel Investigation and Review Panel, Report on Mount Polley Tailings Storage Facility Breach (Province of British Columbia, 2015), p. 125.

⁴³ The government launched a Code review chaired by the Chief Inspector of Mines and representatives of First Nations, mine labour unions and industry. The public provided written submissions on implementing the independent panel’s recommendations to the Code Review Committee.

⁴⁴ Province of British Columbia, Ministry of Energy and Mines, News Release, BC completes implementation of all independent panel recommendations, July 20, 2016 https://archive.news.gov.bc.ca/releases/news_releases_2013-2017/2016MEM0017-001317.pdf

⁴⁵ For more, please see: University of Victoria, Environmental Law Centre; Fixing Systemic Failures in BC’s Mining Regulation: The Urgent Need for a Judicial Inquiry; March 2017 pgs.17-19

⁴⁷ Conservation officers are Special Provincial Constables under the Police Act with a wide suite of powers associated with that designation. Although part of government, the Conservation Officer Service (COS) is unfettered in its investigations as it has the power to investigate and forward recommendations for charges, when warranted, directly to provincial crown counsel. <https://news.gov.bc.ca/stories/mount-polley-tailings-pond-situation-update-2Investigation-Report-of-the-Chief-Inspector-of-Mines.-p.-22-See-also-Conservation-Officer-Service-Investigation-Overview,-September-19,-2014.http://www.env.gov.bc.ca/epd/mount-polley/pdf/20140919/RAPP-Handout-4Sept2014.pdf>.

In October 2016, the advocacy group MiningWatch Canada launched a public-interest private prosecution against the provincial government and MPMC for the Mount Polley disaster, arguing that it was ‘unacceptable’ that two years after the accident the Crown had not released the results of the criminal investigation or laid charges. The case alleges violations of the Federal *Fisheries Act*, which prohibits “serious harm to fish” and the deposit of “deleterious substances” into fish-bearing waters that sustain commercial, recreational, or aboriginal fisheries. MiningWatch claims that the spill was caused by the negligence of both MPMC and the Province. The prosecution presented the Crown with evidence in support of the claim that two articles of the Federal Fisheries Act were violated in the course of the disaster. The Crown prosecutor argued it was not in the public’s interest to continue a private prosecution because there was an ongoing comprehensive investigation being conducted by three different agencies (the B.C. Conservation Officer Service, Environment Canada, and Fisheries and Oceans Canada). The Provincial Court granted the stay of proceedings in March 2017. It is unclear if the Crown intends to lay its own charges before the statute of limitations for doing so is reached in August 2017.⁴⁸

CHIEF INSPECTOR OF MINES INVESTIGATION

On December 17, 2015 the Chief Inspector of Mines released his report on the Mount Polley breach and his findings confirmed the findings of the Expert Panel regarding the technical causes of the breach. He also examined management practices by MPMC. He found the following, with respect to the company’s water management activities:

- a lack of long-term planning for water management;
- no qualified individual on staff to take responsibility for water balance risks;
- no integration of water planning across the entire mine site; and
- an inadequate water management plan despite a growing awareness of the urgency of water discharge planning.

The report found MPMC and its engineering consultants failed to recognize geotechnical and water management risks and had not met generally accepted standards of practice for tailing pond embankments. He did not, however, assign liability for management decisions or omissions which contributed to the breach.⁴⁹

BC’s Energy and Mines (MEM) Minister Bill Bennett accepted the Chief Inspector’s 19 recommendations for improvements and promised to introduce stronger regulations. But shortly after receiving the report, the Minister announced MEM had no power to issue administrative fines under BC’s current mining law, and there was insufficient evidence on the basis of criminal wrongdoing to prosecute Imperial Metals in court.⁵⁰

In February, 2015, Minister Bennett introduced Bill 8, the Mines Amendment Act which, on March 15, 2016, was enacted by the BC Legislature. The Amendment stipulates that fines and penalties can be imposed within a period of three years of the act or omission being brought to the attention of the Chief Inspector of Mines. Penalties of \$1,000,000 can now be sought, up from the previous level of \$100,000; and the maximum jail term was raised from one to three years.⁵¹

BC’S AUDITOR GENERAL: “A DECADE OF FAILED EXPECTATIONS”

In May 2016, the Auditor General of BC, Carol Bellringer, raised a number of concerns in her audit of compliance and enforcement of BC’s mining sector. Her investigation included the Mount Polley disaster and examined not only on how the dam failed but why it failed and whether MEM met its overall compliance and enforcement obligations.⁵² The report, *An Audit of Compliance and Enforcement in the Mining Sector*, concluded that:

⁴⁸ Under the Fisheries Act, any citizen may initiate a private prosecution if the person has reasonable grounds to believe that a person has committed an indictable offense. MiningWatch Canada lawsuit briefing, October, 2016. WOULD BE BETTER TO CITE THE ACTUAL ACT.

⁴⁹ Decision and Reasons for Decision of the Chief Inspector of Mines on whether to submit a Report to Crown Counsel to assess if charges should be laid and a prosecution commenced for contravention of the Mines Act., December 8, 2015. http://mssi.nrs.gov.bc.ca/1_CIMMountPolley/T0229_TAR431_ANALYSIS_Decision%20DocumentCIM_20151208.pdf

⁵⁰ Mount Polley Mine Tailings Storage Facility Breach Investigation, Report of the Chief Inspector of Mines, November 30, 2015

⁵¹ The Mines Act, R.S.B.C. 1996, c. 293.

⁵² Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), pg.8.

“We found almost every one of our expectations for a robust compliance and enforcement program within the MEM and the MOE were not met. We found major gaps in resources, planning and tools. As a result, monitoring and inspections of mines were inadequate to ensure mine operators complied with requirements.”⁵³

The Auditor General also found: *“Overall, we concluded that compliance and enforcement activities of the two ministries are inadequate to protect the province from significant environmental risks.”⁵⁴* She found that the MOE and MEM were not routinely and adequately informing the public or legislators of the long-term risks associated with mining, nor how well the agencies were providing oversight of the sector or reporting on the overall performance of companies.

Specific to Mount Polley, Carol Bellringer found that “the Ministry (of Energy and Mines) did not ensure that the tailings dam was being built or operated according to the approved design, nor did it ensure that the mining company rectified design and operational deficiencies. MEM continued to allow the mine to operate and to approve permit amendments to raise the tailings dam.”⁵⁵ The report noted that MEM had sole responsibility for making sure MPMC completed and maintained the dam as designed and while it could have compelled the company to comply, it failed to do so.⁵⁶



Photo by Kieran Oud, Hazeltine Creek

In order to address, *“a decade of neglect in compliance and enforcement program activities within the Ministry of Energy and Mines, and significant deficiencies within the MOE’s activities”*, the Auditor General made 17 recommendations for improvements to compliance and enforcement activities.

Crucially, she found that the Ministry of Energy and Mines is in a conflict of interest and at risk of ‘regulatory capture’ (promoting industry interests over those of the public) because of its dual role as both regulator and promoter of mining activities in the Province. Her priority recommendation was to move compliance and enforcement duties out of MEM to an independent agency.⁵⁷

⁵³ Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), pg.3

⁵⁴ Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), pg.11.

⁵⁵ Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), pg.8.

⁵⁶ Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), pg.78.

⁵⁷ Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016) pg. 11.

In a lengthy response⁵⁸ MEM agreed to adopt all but one of the Auditor General's recommendations. The Minister rejected the finding that MEM is unable to separate compliance and enforcement duties from promotion. Instead, the Minister set up a Compliance and Enforcement Board within the Ministry to "address the need for greater integration between the Ministries as well as with the Environmental Assessment Office."⁵⁹ In rejecting this recommendation, the government essentially failed to implement the Auditor General's primary recommendation.

REGULATORY AND OTHER FAILURES OF THE BC GOVERNMENT

Among First Nations and non-Indigenous people interviewed by Amnesty International in surrounding communities, few people want to see the mine shut down. Rather, many believe it is simply too risky for the Province to allow the mine to discharge waste water that is not fully treated into Quesnel Lake. They are calling for the Province to put a number of strict conditions in place. Those safeguards are detailed in this section.

APPROPRIATE AND ROBUST EFFLUENT TREATMENT

During public consultations prior to the approval of initial operations, local residents were told that no effluent would ever be discharged to Quesnel Lake. Mount Polley was initially licensed as a zero-discharge mine. However, subsequent permit applications before the disaster for relatively small volume water discharges into Polley Lake or Hazeltine Creek were approved by the Province. These discharges were treated on site using reverse osmosis, considered a robust best available technology. However, in April 2017, despite significant objections from community members, MOE approved large volume effluent discharge directly into Quesnel Lake and allowed MPMC to use a comparatively less expensive and less robust water treatment technology.

MPMC is permitted to discharge the equivalent of approximately 21 Olympic-sized swimming pools of treated waste water into Quesnel Lake every day for over 5 years. However, MPMC's water treatment process will not meet BC Water Quality Guidelines (WQGs) because the treatment process MPMC will now use is not capable of treating water to BC WQG standards. Rather, to meet the WQGs, the treatment process requires additional fresh water dilution once waste water enters Quesnel Lake, making Quesnel Lake in effect part of MPMC's water treatment process. MPMC's discharge permit requires it to make "continual improvements" to its treatment processes until the end of the mine's operating permit in 2022.

Despite requests by local residents to fully study other options, according to the MOE in its 'reasons for decision' notice, alternatives to discharge via pipeline into Quesnel Lake were not fully investigated in MPMC's application because, in the company's view, the dilution capacity of Quesnel Lake is sufficient for dealing with the effluent.⁶⁰

Local water defenders presented evidence to suggest that the water quality of Quesnel Lake is higher than that of BC's WQGs and argue that it should in fact be Quesnel Lake's pre-breach water quality which forms the basis of allowable effluent limits, not BC's WQGs.⁶¹ Critics, including Indigenous leaders, say the province should have explored other treatment and discharge options and, if none were reasonable, only permitted fully treated water that met BC's WQGs for discharge into Quesnel Lake.

⁵⁸ "Response from Government" to Auditor General of BC, 2016. An Audit of Compliance and Enforcement of the Mining Sector, https://news.gov.bc.ca/files/Government_responds_to_OAG_report_An_Audit_of_Compliance_and_Enforcement_of_the_Mining_Sector.pdf?WT.cg_n=Hoot_suite, pg. 5.

⁵⁹ "Response from Government" to Auditor General of BC, 2016. An Audit of Compliance and Enforcement of the Mining Sector. In July, 2016, the MEM issued its Terms of Reference for the C&E Committee. http://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/board_tor.pdf accessed April 8, 2017.

⁶⁰ Reasons for Decision Memo File 11678, MOE, April 7, 2017.

⁶¹ Technical Memorandum, Existing and Proposed Effluent Discharge Permit Limits for the Mount Polley Mine Environmental Management Act Permit 11678; Golder and Associates, November 15, 2017. The Memorandum, requested by the public during MPMC's application for its long-term water management permit, provides current and proposed EMA effluent discharge limits for Quesnel Lake. Likely Chamber of Council member, Doug Watt, provided Amnesty International with an amended data table he shared with MPMC which includes water quality data available for Quesnel Lake. The table compares allowable levels of metals and compounds under BC's WQGs with Quesnel Lake pre-breach water quality data and predicted site water concentrations of untreated mining effluent.

In Amnesty International's view, it is unusual that the province would approve mine effluent discharge that does not, at a minimum, meet BC's WQG when outstanding studies such as the Socio-Economic study, the Human Health Risk Assessment study and the Ecological Risk Assessment study,⁶² are still pending.

TRANSPARENT AND INDEPENDENT TESTING

Currently, the province relies primarily on MPMC to carry out most of the water sampling, site investigations and reporting. In March, 2017, MPMC published its first community update newsletter which included site monitoring information for Mitchell Bay on Quesnel Lake.⁶³ However, many residents say they do not trust the testing results and this has caused significant anxiety about drinking the water and eating fish from the region.

The MOE told Amnesty International in an email that it is carrying out 'compliance verification sampling' and working with institutions such as the University of Northern British Columbia (UNBC). UNBC confirmed that the MOE paid for some metal sampling tests and researchers shared the results with them. However, groups like the Concerned Citizens of Quesnel Lake (CCQL), which search for, analyze and share the company's water sampling results on its blog, say that testing results are infrequently updated and have historically been difficult to find. They are concerned that MPMC's new reporting requirements allow the company to post three months-worth of sampling results within 45 days of the end of the sampling period, leading CCQL to fear that the public will only become aware of water quality problems months after they are detected.

Governments increasingly rely on companies to regulate themselves and the implications of this on the right to a remedy for harms suffered are serious. When a State allows a company to monitor key environmental parameters this removes independent oversight and is potentially open to abuse. People are deprived of impartial information and may be unaware of the harmful consequences of corporate operations because information is not disclosed or is manipulated. In some cases people may be well aware of the harms they are suffering but there is no official data to support their efforts to seek a legal remedy, or the official data is compiled by the company and undermines their claim.

ACCESS TO MEANINGFUL INFORMATION

At least four different websites provide information and updates about Mount Polley: MOE⁶⁴, the province's Mineral Exploration and Mining site⁶⁵, MEM's BC Mine Information site⁶⁷, and Imperial Metals.⁶⁸ People seeking information say they must regularly search all sites for pertinent news and updates. They also say that it is difficult to find new information without knowing in advance the keywords or titles of reports, and that reporting formats are often technical and difficult to interpret. They say that over the last two years, documents which were once available have disappeared or have been archived in ways members of the public find difficult to access or need particular software to open. Internet service is slow in some communities around Quesnel Lake and some homes lack computers or internet service. Residents are calling on the province to create a single, user-friendly site with regularly updated information, including testing results and compliance enforcement-related documents.

FULLY-FUNDED FINANCIAL SURETIES FOR REMEDIATION AND POST-CLOSURE

Under the BC Mines Act, financial securities in British Columbia are established on a case-by-case basis by the Chief Inspector of Mines. The Chief Inspector estimates reclamation costs for cleaning up the mine site after decommissioning, but negotiates the actual amount with the mining company. The province relies on policy rather than law and the Chief Inspector's discretion to decide whether or not a security is required, when it is due, and the amount of financial security required.⁷⁰ Other jurisdictions, such as Alaska and

⁶² The Pollution Abatement Order Amendment lays out the requirements MPMC is required to fulfil or face fines and possible imprisonment. The Amendment requires the provision of these reports and their due dates. The order notes that failure to comply with the Environmental Management Act could result in legal action. To date, none of these reports have been made public. Environmental Protection Division, MOE, File # 107461, Pollution Abatement Order Amendment, November 30, 2016. http://www2.gov.bc.ca/assets/gov/environment/air-land-water/spills-and-environmental-emergencies/docs/mt-polley/p-o-r/2016-11-30_pao_amended.pdf

⁶³ Community Update Newsletter, MPMC, Volume 1, Issue 1. March 2017 <https://www.imperialmetals.com/assets/docs/mt-polley/2017-03-update.pdf>.

⁶⁴ BC Ministry of Environment, Mount Polley Tailings Dam Breach: Key Information; <http://www2.gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-incidents/past-spill-incidents/mt-polley/mount-polley-key-information>.

⁶⁵ BC Mineral Exploration and Mining; Mining Compliance & Enforcement; <http://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/compliance-enforcement>

⁶⁷ . British Columbia Mines Information; <http://mines.nrs.gov.bc.ca/> and <http://mines.nrs.gov.bc.ca/p/mount-polley/overview>

⁶⁸ Imperial Metals, Our Operations, Mount Polley Mine; <https://www.imperialmetals.com/our-operations/mount-polley-mine/overview>

⁷⁰ Fair Mining Collaborative, <http://www.fairmining.ca/guide/securing-the-cost-of-mine-clean-up/>; accessed 5 April 2017.

Quebec, require companies to post full surety bonds for 100% of anticipated clean-up costs.⁷¹ The Auditor General noted these concerns in her report.⁷²

Under-funded liabilities for authorized environmental harms⁷³ are a significant concern in British Columbia. BC has adopted the Polluter-Pays Principle⁷⁴ which is generally accepted as good public policy because it puts the burden on the company to pay for remediation, rather than on regulators, residents and First Nations who typically bear the administrative, financial, and emotional burden of environmental harms. The Polluter Pays system also requires companies to put in place best available technologies and practices when designing, operating and remediating their mines. A good mine permitting process builds in mechanisms to ensure the Principle will be enforced. However, in British Columbia the Principle is undermined by the province's lack of financial assurances for unauthorized environmental harms. Critics say without fully funded financial sureties and mechanisms to enforce the Polluter Pays Principle, there is little incentive for companies to adopt best practices and, in Amnesty International's view, this puts human rights at risk.⁷⁵

At the time of the disaster, details about MPMC's financial sureties were not publicly available. However, based on a MEM document, by 2013 MPMC had only posted a portion of its estimated financial surety, \$7.05 million out of an estimated \$38 million in normal reclamation costs. The costs of remediating the tailings pond breach were not included in MPMC's expected remediation costs. MPMC's cost of emergency remediation was expected to be \$67 million. Fortunately for British Columbians, the company was able to pay for these costs. BC taxpayers, however, paid for \$23 million of that total because the company was able to write off clean-up costs against its 2014 taxes.⁷⁶

CURBING POLITICAL DONATIONS TO PREVENT REGULATORY CAPTURE

Donations totalling over \$400,000 by Imperial Metals and its major shareholders to the incumbent BC Liberal Party, as well as a \$1million private fundraiser for the BC Liberal Party organized by Imperial Metals' controlling shareholder, N. Murray Edwards, in 2013 as part of the party's successful re-election bid, have sparked concern that these donations may have unduly influenced the Province's decision to not seek charges against the company over the Mount Polley disaster. At a minimum it has certainly left that impression in the community and more widely with the public in BC, significantly eroding trust and confidence in oversight and enforcement of mining and environmental laws. In March 2017, the RCMP announced an investigation into political contributions in BC after journalists alleged that lobbyists made indirect, illegal donations to the two main political parties. The Premier was criticized for accepting a \$50,000 yearly stipend, raised through political donations, on top of her salary.⁷⁷

The effect of corporate influence over governments can be difficult to determine. Channels of corporate influence can be indirect, but phenomena such as regulatory capture are well known in the mining sector. Essentially, the relationship between the regulator and the regulated entity becomes overly close to the point where there is little meaningful oversight. In such a context, companies may gain leverage over government policy. Although it is often difficult to prove the existence of these privileged channels of influence, they can become patently obvious in the way in which governments behave toward certain companies or to a whole industry. Corporate influence on domestic policy processes can be legitimate. However, that advocacy can too often become an undue influence on the state and may lay the ground for human rights abuses. Donations to political parties are certainly not illegal. But large donations to political parties can sometimes result in decisions and policies that favour corporate interests at the expense of the public good. Regulatory effectiveness can also be undermined by conflicts of interest that arise when a public official or agency is unable to discharge their responsibility impartially because they are facing competing interests. This is often the case when a government department is responsible for the promotion of a given industry as well as enforcing regulatory standards for that industry.

⁷¹ Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Sector*, (Union of BC Indian Chiefs, 2016), pgs.35, 47, 86, 87.

⁷² The Auditor General noted that "MEM is not holding an adequate amount of security to cover the estimated environmental liabilities at major mines. The Ministry has estimated the total liability for all mines at more than \$2.1 billion, yet has obtained financial securities for less than half that amount (\$0.9 billion). Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016),pg.6.

⁷³ Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Sector*, (Union of BC Indian Chiefs, 2016); Authorized environmental harms include expected harms to the environment in the course of metals mining, such as disturbances to soil, water contamination, loss of biodiversity, etc. Their costs are built into companies' reclamation funds and strategies. Unauthorized environmental harms as a result of mining activities, such as catastrophic tailings dam breaches, are currently not built into remediation liability calculations.

⁷⁴ Under the Polluter Pays Principle, the party responsible for the damage is responsible for cleaning up the environment.

⁷⁵ Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Sector*, (Union of BC Indian Chiefs, 2016), pg 5

⁷⁶ *Fixing Systemic Failures in BC's Mining Regulation: the Urgent Need for a Judicial Inquiry* (March 2017), pg.47 and Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Sector*, (Union of BC Indian Chiefs, 2016), pg 49.

⁷⁷ *Globe and Mail*; Dhillon, Sunny; *Special Prosecutor Joins Fundraising Probe in BC*, March 30, 2017.

1.3 CARTE BLANCHE TO RESUME OPERATIONS

“Two years later, it is still unknown what the long-term effects will be, and numerous local families and businesses have suffered great losses and hardship. Many of us doubt we can be made whole again, by the mine or the province”

-Jacinda Mack and Richard Holmes, area residents⁷⁸

Since the disaster, MPMC has applied for a number of permits and amendments in order to clean up the damage caused by the disaster and seek a return to full operations. Public consultations have been part of these permit applications.

In a letter to Amnesty International⁷⁹ the MOE states that it, “has been engaged with local First Nations and local residents in a meaningful, consent-seeking process regarding all aspects of decision making around permitting and ongoing remediation for the Mount Polley Mine. This work has included a Government-to-Government Technical Working Group with local First Nations, a Public Liaison Committee with the local community, a transparent Mine Development and Review Committee process, sharing of monitoring information with the public on the Ministry web site, and numerous public meetings.”

Without exception, BC regulators have approved each permit application sought by MPMC (some with amendments), including:

- June 2015: partial re-opening of the mine;⁸⁰
- December 2015: short-term permit to discharge treated mine effluent down Hazeltine Creek into Quesnel Lake;⁸¹
- June 2016: return to full operations using a repaired and reinforced tailings dam; and
- April 2017: long-term water management and water discharge plan.⁸²

In the face of these approvals, activists point out that these permits were granted over the objections of affected Indigenous and non-Indigenous communities.⁸³ For example:

- Indigenous leaders from Xat’sull First Nation and Williams Lake Indian Band report that the Province has ignored their concerns about water pollution. In 2015, the Williams Lake Indian Band and Xat’sull First Nation Chiefs argued that the partial re-opening of the mine was premature. “I strongly feel they are not listening. We had a team of experts working on our behalf. They continually put forth our concerns and I don’t see any long-term plans (to address those concerns),” Williams Lake Chief Ann Louie told the media. Xat’sull First Nation Chief Donna Dixon said there were still too many unanswered questions to issue a restart permit and that First Nations were ‘shocked’ the government would make this decision while investigations (by the Conservation Officer Service and the Chief Inspector of Mines) were ongoing.⁸⁴ Chiefs Louie and Dixon regularly voiced their concerns about the

⁷⁸ Victoria Times Colonist, *Comment: Communities Still Reeling from Mount Polley Disaster*, 7 August 2016 by Jacinda Mack and Richard Holmes <http://www.timescolonist.com/opinion/op-ed/comment-communities-still-reeling-from-mount-polley-disaster-1.2317590>.

⁷⁹ Email received on March 31, 2017 from Deputy Minister of Environment Wes Shoemaker, Reference 308915.

⁸⁰ Letter from Diane Howe, MASc, P.Geo, Deputy Chief Inspector of Mines, Reasons for Decision regarding permit no. M-200, Mine No. 1101163. July 9, 2015.

⁸¹ Prior to the breach the BC Ministry of the Environment warned Mount Polley that it had exceeded the permitted level of waste water in the tailings pond. The public wrote letters opposing the application out of concern that effluent discharges would add to the toxicity burden of Quesnel Lake. However, despite being initially permitted as a zero-discharge mine, in December, 2015 MPMC received a short-term permit to discharge treated mine effluent into Quesnel Lake. <http://www.cbc.ca/news/canada/british-columbia/Mount-polley-williams-lake-1.3335897>, accessed 6 April 2017.

⁸² Long Term Water Management Plan Approved for Mount Polley, April 7, 2017 <https://news.gov.bc.ca/releases/2017ENV0038-001156>.

⁸³ First Nations Women Advocating Responsible Mining noted a number of concerns with the public comment period: “The only method for receiving comments from the public was to submit an e-mail to you with the subject line “comments on technical assessment report” by December 23, 2016. This limits comments to technical issues only, ignoring the myriad of other concerns not addressed in their current application. Also, this process limits comments to people with access to a computer, Internet, and the technical knowledge of how to use them to submit comments. Your method for receiving public comments excludes many First Nation and public citizen comments in this region and beyond”. Comments on Technical Assessment Report, December 22, 2016.

⁸⁴ Hoestra, G. 2015. Mount Polley restart ignores water concerns: First Nations. Vancouver Sun July 13, 2015 <http://www.vancouversun.com/news/Mount+Polley+restart+ignores+water+concerns+First+Nations/11208937/story.html>.

long-term water treatment and discharge plan, but did support a temporary water discharge permit in July 2016 when water build-up at the mine site became a serious concern, requiring discharge.

- In December 2015, neighbouring Tsilhqot'in National Government Chiefs issued a press release⁸⁵ about the downstream effects of the breach on, "our people, our food, our social and ceremonial rights to fish." Chiefs Joe Alphonse and Roger William expressed concern that Quesnel Lake would be contaminated as part of the dilution zone. The Tsilhqot'in National Government maintained that any discharge should be treated to a level that meets water quality guidelines prior to the discharge entering the environment, and raised concerns that current treatment does not meet those guidelines. A spokesperson from the MOE responded to the media that the water in the dilution zone would meet BC Water Quality Guidelines.⁸⁶ Ultimately, however, the MOE approved water discharges that do not meet BC's WQG's. In August 2016, the Tsilhqot'in filed a civil claim against Imperial Metals, MPMC, engineering firms Knight-Piesold and AMEC and the Province of BC for negligence and failure to protect the public and the Tsilhqot'in people.⁸⁷
- In November 2016, members of the NGO First Nations Women Advocating Responsible Mining (FNWARM) went door-to-door in the Secwepemc communities of Xat'sull First Nation, Williams Lake, Canim Lake and Canoe Creek to gather support for a petition to the Province calling for the discharge of only fully treated mine waste water into Quesnel Lake. The petition read:

I do not support Mount Polley Mine in its application to discharge mine wastewater to Quesnel Lake and Bootjack Lake as proposed in their current Long Term Water Management Plan. This plan depends on partial water treatment onsite, and extensive dilution by clean water sources to meet BC Water Quality Guidelines. I support FULL WATER TREATMENT for all mine water leaving the Mount Polley Mine.

Over two hundred people signed the petition, including one adult from every home but two in Xat'sull First Nation.

The province acknowledged in its *Reasons for Decision* statement that MPMC's water discharge permit was granted even though Xat'sull First Nation and Williams Lake negotiators asked that effluent discharge meet BC's WQGs.⁸⁸

- Researchers noted in the First Nations Health Impacts Report that despite experiencing serious impacts from the Mount Polley disaster, the Lhtako Dene -Red Bluff Indian Band has been left out of high-level discussions with the province and company about the impacts on their rights or the remedies they are seeking for harms they experienced.

Canadian and international law requires a rigorous standard of protection for the human rights of Indigenous peoples. This high standard of protection responds to the long history of colonialism, forced assimilation and racism that has marginalized and impoverished Indigenous families and communities and left them especially vulnerable to further abuses.

Consultation is part of this framework for protection but consultation has to be meaningful. No amount of consultation is adequate if, at the end of the day, the concerns of Indigenous peoples are not seriously considered and their human rights remain unacknowledged or unprotected. Furthermore, consultation is only meaningful if there is genuine willingness to abandon a proposal or explore alternatives to ensure that human rights are protected and fulfilled.

The 2007 *United Nations Declaration on the Rights of Indigenous Peoples* sets out minimum global standards for the "survival, dignity and well-being of Indigenous peoples." The *UN Declaration* generally calls on states to do much more than consult with Indigenous peoples. Where the *UN Declaration* refers to consultation, it also calls on the state to "collaborate" with Indigenous peoples. Where there is a risk of serious harm, the *UN Declaration* and other international human rights standards generally require that

⁸⁵ Press release, Tsilhqot'in National Government, 7 December 2015 http://www.tsilhqot'in.ca/PDFs/Press%20Releases/2015_12_07_mnt%20polley%20discharge.pdf.

⁸⁶ Williams Lake Tribune, December 8, 2015, <http://www.wltribune.com/news/361087001.html>.

⁸⁷ Tsilhqot'in National Government press release, August 8 2016 http://www.tsilhqot'in.ca/PDFs/Press%20Releases/2016_08_08_PolleyNOCC.pdf

⁸⁸ Ministry of Environment, Environmental Protection, Mining Operations; FILE 11678 Permit Amendment, April 7, 2017 *Reasons for Decision*, pg. 6.

projects such as dams, mines, and other resource development go ahead only if the affected peoples grant their free, prior and informed consent (FPIC).

Non-Indigenous residents living along Quesnel Lake have also raised concerns about lack of access to clean water. On the second anniversary of the disaster, local biologist and Likely area resident Rick Holmes and Xat'sull First Nation member, Jacinda Mack, voiced these concerns in an op-ed published in the Victoria Times Colonist:

It has left local residents fuming. Have we really come to the point where wanting clean water makes us dissidents?⁸⁹

Residents were extremely concerned about the July 2016 temporary approval of discharge of untreated water into the lake. "We do not want this discharge into Quesnel Lake. It's horrible. It's terrible," resident Kim Goforth told the media. Christine McLean, another homeowner in Mitchell Bay on the lake said, "We just want the lake to be clean again."⁹⁰

In a secret ballot, Likely's Chamber of Commerce membership voted against the company's 2016 long-term water management plan which included a proposal to discharge waste water into Quesnel Lake. Chamber Director, Doug Watt told the Canadian Broadcasting Corporation's (CBC) Daybreak Kamloops radio show that Chamber of Commerce members opposed discharges because the effects on the lake from the initial breach have not yet been identified and, as University of Northern BC researchers reported, it will likely take decades to know the full extent of the damages.⁹¹

In October 2016, MPMC applied for an amendment to its permit under the Environmental Management Act. The CCQL launched a public information campaign, calling on residents to make their thoughts known to the province and demand it keep 'toxic mine waste' out of Quesnel Lake.⁹² On February 28, 2017, MPMC published a Public Consultation Report which included submissions made by the public to the MOE and MPMC. The majority of comments sent to the MOE opposed discharges of mine water into Quesnel Lake. When the permit was granted, the CCQL released a statement expressing their anger over the decision and making a number of recommendations for restoring public confidence.⁹³

⁸⁹ Victoria Times Colonist, *Comment: Communities Still Reeling from Mount Polley Disaster*, 7 August 2016 by Jacinda Mack and Richard Holmes <http://www.timescolonist.com/opinion/op-ed/comment-communities-still-reeling-from-mount-polley-disaster-1.2317590>

⁹⁰ Hume, M 2016. Mount Polley Mine resumes effluent discharge into Quesnel Lake. The Globe and Mail, April 27, 2016

⁹¹ Daybreak Kamloops, interview with Likely Chamber member Doug Watt, November 16, <http://www.cbc.ca/news/canada/kamloops/likely-chamber-against-mount-polley-waste-water-plan-1.3853285>

⁹² Billboards erected at the entrance to Williams Lake read: *Save Quesnel Lake. Help Protect Quesnel Lake and surrounding watershed from further discharge of toxic mine waste water.* <https://www.ccql.ca/>

⁹³ Press Release, Concerned Citizens of Quesnel Lake, April 2017. <https://www.ccql.ca/single-post/2017/04/18/CCQL-Press-Release>

1.4 CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS MUST BE ENFORCED IN BRITISH COLUMBIA

It is easy to take our human rights for granted. Events like the Mount Polley disaster remind us why it is so important that we have in place international laws which enable us to hold States and people to account when they commit human rights harms⁹⁴. Canada's human rights obligations regarding economic, social and cultural rights, as well as other human rights standards guaranteed internationally, are at stake under British Columbia's weak regulatory regime for extractives industries. Some of these rights include: health, water, livelihood, freedom of information, the right to remedy and reparations, and to cultural practices.⁹⁵

Further, the *UN Declaration on the Rights of Indigenous Peoples*, which Canada has unequivocally endorsed, sets out minimum standards for the "survival, dignity and well-being" of Indigenous peoples. The Declaration builds on existing human rights standards, many of which represent established, legally-binding obligations of states, and applies these standards to the specific needs and circumstances of Indigenous peoples. The Declaration provides guidance to governments, a roadmap for non-Indigenous peoples to better understand the rights of Indigenous peoples, and a powerful tool to advocate for the rights of Indigenous peoples before courts and tribunals.

Under international human rights law and the UN Guiding Principles on Business and Human Rights, Canada has a duty to protect human rights from abuse by non-state actors, including companies. This duty includes taking appropriate measures to prevent human rights abuses by private actors and to respond to these abuses when they occur by investigating the facts, holding the perpetrators to account, and ensuring effective remedy to those affected. Canada is further obligated to ensure the rights of Indigenous peoples are fulfilled in all government policies and decisions.

All victims of human rights violations have a right to an effective remedy when things go wrong. This right is at the very core of international human rights law. It also stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy. Around the world, victims of corporate human rights abuses strive, sometimes for decades, to get justice for the harms they suffered.

In correspondence with the BC government, Amnesty International underscored the relevance of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The obligation to protect includes the duty to '*[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law*'.

The actual reparation that should be provided will depend on the nature of the right violated, the harm suffered and the wishes of those affected. The essence of reparation, however, is that it must seek to remove the consequences of the violation and, as far as possible, restore those who have been affected to the situation they would have been in had the violation not occurred. The *UN Declaration* calls for means of redress to be determined in collaboration with Indigenous peoples (art. 11.2) and elaborates a specific objective of maintaining Indigenous peoples' relationships to the land (art. 28).

Moves by the Province to improve mining regulations, compliance and enforcement mechanisms, and oversight are important steps in this direction, but do not address the demands for reparation and remedy identified by rights-holders in the area. Focusing on regulatory reforms alone neglects the human rights abuses suffered by residents, such as access to a healthy environment, access to water and livelihoods, and to cultural practices which form the foundation of Indigenous identities.

⁹⁴ United Nations General Assembly, *Universal Declaration of Human Rights* 1948 Articles 19, 22, 25, 27; UN General Assembly, 28 July 2010, *The human right to water and sanitation*; Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, 1966; UN General Assembly *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005

CONCLUSION AND RECOMMENDATIONS

The 2014 Mount Polley disaster has exposed the weaknesses of BC's mining regulatory framework and the vulnerabilities of Indigenous and non-Indigenous communities in the province to human rights harms from mining disasters, such as potential violations of economic, social, cultural, Indigenous and universal human rights. The disaster left the public deeply shaken and diminished public confidence in the government's ability to effectively regulate the mining industry and rectify the harms caused. It also raised fears about corporate interests trumping human rights.

The disaster also revealed how poorly equipped the Province is to tackle potential corporate crimes under current mining regulation and raised concerns about the potential for corporate capture in BC. Questions remain about why prosecutors have yet to enforce the Environmental Management and Federal Fisheries Acts or prosecute those responsible for wrongdoing.

The Province's decision to allow the company to discharge mine waste that currently does not meet water quality guidelines into Quesnel Lake has eroded rights-holders' hopes that the Province will fulfill its promise to return Quesnel Lake to pre-disaster conditions.

Amnesty International has raised these issues with the BC Government, including the concern that it approved a return to full operations and permitted effluent discharge into Quesnel Lake although a number of regulatory and investigative issues remain outstanding. Amnesty noted that, "allowing the mine to re-open and return to full operations without exhausting all investigative avenues is highly irregular and could put people and the environment at further risk."⁹⁶ In response, the MOE outlined a number of actions it has taken since the disaster, but did not address in detail any specific questions about water testing, public consultation, health impacts on Indigenous peoples, or financial sureties. Most disappointingly, it did not explain its reasons for allowing the mine to return to full operations before the results of the Conservation Officer Service investigation or several other impacts reports were known.⁹⁷ In Amnesty International's view, this could put human rights at further risk and at a minimum, warrants a fuller examination.

Amnesty International does not take a position for or against mining. We call for rigorous protections of human rights throughout the life-cycle of a project, including assessing its human rights impact, upholding the duty to consult and meaningful consultation and compliance with the presumed requirement that the free, prior, informed consent of Indigenous peoples will be required. In light of the Mount Polley disaster, it is Amnesty International's view that BC's mining regulatory framework must be urgently reformed and brought into compliance with Canada's international human rights obligations. Harms resulting from mining disasters must not be compounded by the State's failures to uphold rights, including the right to remedy and reparations. The rights of Indigenous peoples must be at the centre of these reforms.

Amnesty International calls on the province of British Columbia to:

RESTORE PUBLIC CONFIDENCE

- In order for the public to truly assess the human rights impacts of the Mount Polley disaster and determine necessary remedy and reparations, make public the results of the Socio-Economic Study, the Human Health Risk Assessment and the Ecological Risk Assessment of the Mount Polley disaster and, crucially, the Conservation Officer Service investigation.
- Appropriate charges should be laid where there is evidence of wrongdoing, such as violations of the Federal Fisheries or BC Environmental Management Acts. If charges are not warranted, the public must be informed of the reasons.

⁹⁶ Letter from Amnesty International to the BC Minister of Environment, 20 March, 2017.

⁹⁷ Email from the Deputy Minister of Environment, 31 March, 2017.

- Create an independent compliance and enforcement office for the mining sector independent of the Ministry of Energy and Mines as recommended by the Auditor General, in order to avoid potential conflicts of interest in a Ministry tasked with both compliance enforcement and mining promotion.

CARRY OUT ROBUST REFORMS OF BC'S MINING REGULATORY FRAMEWORK

- Hold a public inquiry into BC's mining regulatory framework in order to make substantive reforms designed to bring British Columbia's mining law, regulation and policy into compliance with Canada's international human rights obligations.
- Ensure Canada's obligations to respect and uphold the rights of Indigenous peoples are fulfilled in all government policies and decisions in respect to resource development; in particular by incorporating the standard of free, prior informed consent in all decision-making processes related to resource development where the rights of Indigenous peoples may be affected.
- Require full financial sureties for mine remediation, closure, and post-closure period. Require that companies post sufficient emergency response funds to ensure thorough clean-up of any disaster event, fund studies into on-going impacts and conduct transparent monitoring.

MONITOR THE MEDIUM AND LONG-TERM IMPACTS OF THE MOUNT POLLEY DISASTER

- Publicly and widely share the results of MPMC, MOE and independent sampling and monitoring of mine effluent, and the waters and aquatic life in Quesnel Lake and Quesnel River and surrounding waters, including aquifers in the region, and conduct independent testing to ensure discharged mine effluent and tailings sediment from the disaster do not harm the environment and lead to future human rights harms.
- Ensure that all environmental and operational reports and studies, and monitoring and testing results, including compliance verification, are posted in a timely fashion on a single, publicly accessible website.
- Fund an analysis of the long-term health impacts of the Mount Polley disaster on Indigenous peoples including but not limited to: cultural healing processes, access to information, access to traditional foods and medicines, and the overall health of the Fraser River, which is of vital importance to downstream Indigenous communities. Provide funding and resources for further study and implement without delay any recommendations aimed at improving the long-term health outcomes for Indigenous peoples affected by the Mount Polley disaster.

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TO ONE PERSON, IT
MATTERS TO US ALL.**

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THE HUMAN RIGHTS IMPACTS OF THE MOUNT POLLEY MINE DISASTER, BRITISH COLUMBIA, CANADA

The Mount Polley tailings pond breach on August 4, 2014 is the worst environmental mining disaster in BC's history. The disaster shook the public's confidence in the province's ability to protect their human rights and the environment from possible harms caused by the Mount Polley tailings dam failure. In Amnesty International's view, the disaster raised serious questions about the ability of the province under current mining regulations to protect British Columbians' economic, social, cultural, Indigenous and universal human rights. In this briefing, Amnesty International makes recommendations to the province aimed at restoring public confidence in its ability to regulate its mining sector and comply with its human rights obligations.