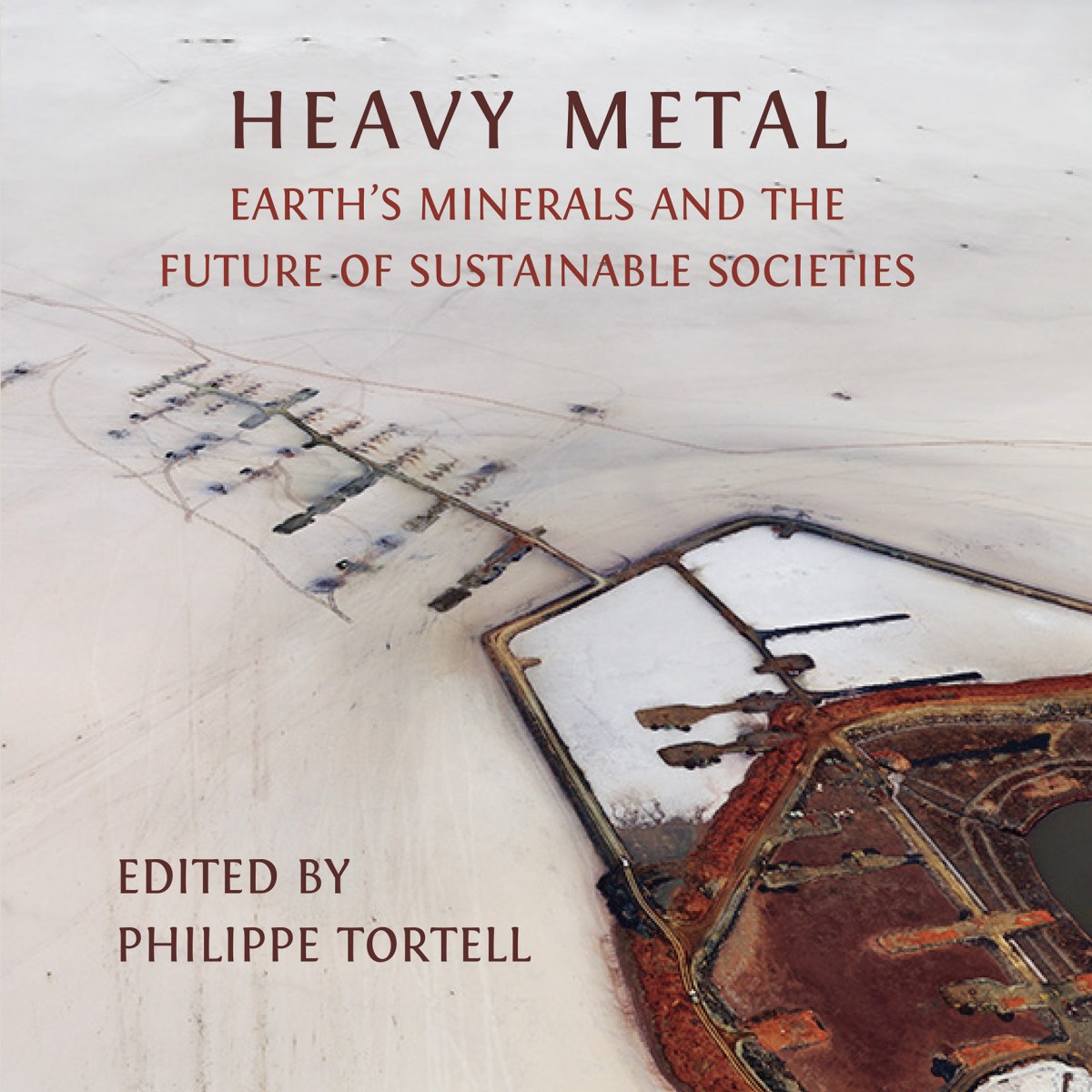
HEAVY METAL

EARTH'S MINERALS AND THE FUTURE OF SUSTAINABLE SOCIETIES



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Colonialism and Mining

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We write these words from the unceded territories of the Stó:lō People to reflect on the history of colonial appropriation of Indigenous resources on Indigenous lands. We write about the past, and also about the present and the future. In some ways, our words tell a long story. But, in others, they tell a short story—a small slice of time against the thousands of years that First Nations have lived on the land and used its resources.

The story of Indigenous land appropriation starts more than five hundred years ago, on 4 May 1493, when Pope Alexander VI (1431–1503) issued the Inter Caetera Papal Bull, forming the foundation of what is now known as the Doctrine of Discovery. The previous year, Christopher Columbus (1451–1506) had 'discovered' America, and the Pope's proclamation was issued to support Spanish and Portuguese claims of exclusive rights to the riches of the New World. The Bull stated that any land not inhabited by Christians was available to be 'discovered', claimed and exploited by Christian rulers, declaring that 'the Catholic faith and the Christian religion be exalted and be everywhere increased and spread'.[1] This 'Doctrine of Discovery' became the basis of all subsequent European claims in the Americas. It would only be officially repudiated by the Catholic Church in 2023, in a formal statement by Pope Francis acknowledging

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that the Doctrine of Discovery 'did not adequately reflect the equal dignity and rights of indigenous peoples'.[2]

As colonization of the New World expanded, European powers jockeyed for position, power and access to valuable resources. In North America, the conflict reached its peak during the Seven Years' War (1756–63), in which Britain and France led opposing alliances seeking to assert global dominance. The war ended with the Treaty of Paris (1763), which was followed that same year by the Royal Proclamation, in which King George III (1738–1820) officially claimed British territory in North America. Importantly, the Royal Proclamation established guiding principles for the European settlement of Indigenous lands in North America. A key element was the explicit recognition of Aboriginal land rights and title, and the stipulation that settlers could only claim land that had been first bought from Indigenous people by the Crown. The Royal Proclamation also asserted that all lands were to be considered Aboriginal unless explicitly ceded by treaty and set out a framework for a treaty-making process.

In 1867, a century after the Royal Proclamation, the British North America Act established the Dominion of Canada. The new consolidated territory was further enlarged in 1870, through Rupert's Land Order, issued by Queen Victoria (1819–1901), which brought in large swaths of land of what is known today as the Northwest Territories. The 1870 Order required the new government to address the 'aboriginee land question' before granting any access to land and resources, effectively beginning the Numbered Treaty process, which is still used today. Over the past one hundred and fifty years, eleven Numbered Treaties have been signed in Canada, but these are not equally distributed across the country. In British Columbia, for example, the majority of Indigenous land remains unsurrendered and unceded.

With the establishment of Canada, the new government began to assert increasing control over the lives of Indigenous people. In 1876, the newly established Indian Act mandated sweeping changes that segregated Indigenous people across the country, re-settling them into reserves, restricting their movements and outlawing their religious and cultural ceremonies. The laws were justified as a means of 'civilizing' Indigenous people under the colonial and Christian society of the new country. But

they also gave the government significant control over unceded Indigenous lands and resources. This set up a pattern of systematic appropriation of Indigenous lands that would play out for more than a century, with devastating social and environmental impacts.

Over the past one hundred and fifty years, Canada has grown into one of the largest mining jurisdictions in the world, hosting more than 75% of global mining and mineral resource companies. On an annual basis, mining contributes around one hundred billion dollars to the Canadian economy, and this is expected to grow significantly, as demand for critical minerals increases over the coming decades. While the economic contributions of the mining sector in Canada are beyond doubt, these benefits have also come at a significant cost—particularly for Indigenous communities on whose land much of the country's mineral wealth is located. From the Pacific to the Arctic to the Atlantic, historical mining operations have left a tragic legacy of environmental disasters, such as the Faro Mine, Giant Yellowknife Mine, Tulsequah Chief Mine, and many gold-rush placer mining areas. These harms are not restricted to the pages of history—they continue into the present day. In 2014, the failure of a tailings pond dam led to the release of about eight million cubic meters of mine waste into Polley Lake, Hazeltine Creek and Quesnel Lake, with significant impacts on the health and livelihood of Soda Creek and Williams Lake Indian Bands.

In the face of ongoing mining impacts on Indigenous lands and people, there has been an awakening of the Canadian legal system (and perhaps of the broader society) around the historical legacy of colonialism in this country. The reckoning stems, in part, from the Truth and Reconciliation Commission of Canada, which shed a glaring light on the legacy of the country's Indian Residential School system.[3] In the legal context, a first landmark case regarding Indigenous rights and title was the 1973 Canadian Supreme Court *Calder* decision, named for the politician and Nisga'a chief, Frank Calder. Calder was the first status Indian to attend the University of British Columbia, and the first Indigenous member of the British Columbia legislature. In 1967, he launched a case with the Supreme Court of British Columbia, arguing that the

Nisga'a's land rights and title had 'never been lawfully extinguished', and challenging the provincial government's failure to recognize Aboriginal rights established under the 1763 Royal Proclamation. The initial case was dismissed at trial by both the provincial Supreme Court and Court of Appeal, eventually landing on the docket of the Supreme Court of Canada five years after it was first launched. On 31 January 1973, the court released its decision. Six of the seven judges supported the existence of Aboriginal title under Canadian law, but there was less consensus around the Nisga'a's specific claim; three of the judges argued that the Nisga'a's title had been invalidated by laws enacted before Canadian Confederation, while three others asserted that the land rights had not been surrendered. The remaining judge ruled against the Nisga'a on a technical point, tipping the balance against their legal challenge. Although the *Calder* case was not successful, it was, nonetheless, a watershed moment for the recognition of Indigenous rights and title in Canadian law. In time, the case would eventually lead to the signing of the 1999 Nisga'a Treaty, through which the Nisga'a achieved self-government and control over a large swath of their ancestral territory.

In the years since the *Calder* case, other legal challenges at the Supreme Court of Canada, including the 1997 *Delgamuukw* and 2004 *Haida* cases, have further clarified the existence of Aboriginal rights in Canada. In the *Haida* decision, the Supreme Court justices wrote: 'To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefits of that resource. That is not honourable'.[4] Many of these legal challenges have made specific reference to section 35 of the Canadian Constitution Act (1982), which recognizes and affirms existing Aboriginal and treaty rights, and imposes a duty to consult and accommodate First Nations when those rights may be impacted. The duty to consult and to obtain free, prior and informed consent (FPIC) is further articulated in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which has been used as a legal instrument to support the rights and interests of Indigenous people around the world. The Canadian government became a signatory to UNDRIP in September 2007, and subsequently passed Bill C-15, which commits Canada to aligning its laws with UNDRIP. In 2019,

British Columbia became the first jurisdiction in Canada to align its own laws with UNDRIP, under the Declaration on the Rights of Indigenous Peoples Act (DRIPA).[5]

The new legal statutes are increasingly being applied in court rooms across Canada in support of Indigenous land rights. The 2014 *Tsilqhot'in* (*Chilcotin*) decision by the Supreme Court of Canada recognized Indigenous title to more than 1,700 square kilometers of land in British Columbia to the Tsilhqot'in Nation. In its ruling, the justices wrote that 'Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult'.[6] In the 2021 Blueberry River case (*Yahey*), the British Columbia Supreme court ruled that the Province had infringed on the rights of the Blueberry River First Nation through inappropriate mitigation of industrial impacts on Blueberry River's traditional territory. And, most recently, in September of 2023, the same court ruled that British Columbia's Mineral Tenure Act, a gold-rush era 'free-entry' mineral claim regime,[7] breached the government's duty to consult with the Gitxaała and Ehattesaht First Nations whose treaty rights were potentially impacted by mineral exploration activities. While this decision was seen as a victory for Indigenous rights, many are concerned about a potential staking frenzy over the eighteen-month interim period as the Province works to overhaul the Mineral Tenure Act in consultation with First Nations. The delay could be longer if the Province decides to appeal the decision, leading to significant uncertainty in the future of mineral prospecting in British Columbia.

Throughout all these years and legal cases, the courts have repeatedly affirmed the message delivered in the 2004 *Haida* case: 'Canada's Aboriginal peoples were here when Europeans came and were never conquered'. The list of precedents is long and growing: *Morris and Olsen*, *Gitanyow*, *Marshall*, *Klahoose*, *Gray and Sappier*, *Jules and Wilson*, *Sparrow*, *Guerin* and *Gladstone*. These precedents create a new legal context for the Canadian mining sector.

Beyond the legal arguments for Indigenous land sovereignty, there is a strong economic and financial incentive to recognize Indigenous rights and title. As

new mining projects come forward, proponents will be making the decision to invest tens of millions, hundreds of millions or even billions of dollars. Such decisions are difficult in the face of significant uncertainty around mineral claims, access to land and permits.

Achieving certainty requires addressing unsurrendered Indigenous rights and title, and aligning legal frameworks to constitutionally mandated statutes. In this context, Indigenous people must play an active role. They must begin to re-establish their Sovereignty and build the capacity to share the decision-making and management of resource development in their territories. In other words, they must govern their lands and resources, in a Nation-to-Nation partnership with the provincial and federal governments. Such a partnership, based on the recognition of Aboriginal rights and title, will give First Nations joint decision-making powers regarding resource development activities, and allow them to act as regulators or co-regulators for resource activities. First Nations must also be able to collect rents and taxes for resource development on their territories and be informed proponents of any new projects. Such a shared governance model will support free, prior and informed consent, as mandated under UNDRIP. It will also provide the best assurance of certainty for First Nations, mining companies and governments in the development of any new resource projects. To help guide this process, the British Columbia First Nations Energy and Mining Council has issued a series of recommendations on how First Nations can work with the Province to achieve greater certainty in the future mining sector.[8]

The mining industry in Canada now sits at a critical juncture. We must hurry up, but we must also slow down. Scientists and environmental organizations have been sounding the alarm about the impact of continued carbon emissions on Planet Earth. We have all watched news stories about severe weather storms, hellish forest fires, scorching summer temperatures and vanishing streams and lakes. We have witnessed the crash of salmon populations, and the displacement of wildlife due to food and habitat scarcity, starving bears and caribou herds nearing extinction. Indigenous traditional knowledge recognizes the interconnectedness of all creatures and provides

a long-term, intergenerational understanding of our rapidly changing Earth. The warnings are now finally beginning to be heard by political leaders around the globe, as they struggle to develop a framework to address global warming by 2050. There is no doubt that critical minerals—copper, lithium, cobalt and others—are central to this effort, as we ween ourselves off fossil fuels and transition to renewable energy.

Canada and the United States are concerned that most critical metals are currently being mined in foreign countries, and the two governments have recently entered into a memorandum of understanding to significantly increase North American production of these metals. This is viewed by many as a 'new gold rush', but this new era of mineral exploration cannot look like the last one. In the new era before us, First Nations must take a leadership role in mineral exploration and mining to protect their lands and maximize their benefits from resource development on their territory. This is the only way to ensure environmentally and socially responsible mining practices.

The path forward requires new kinds of partnerships, built on the sharing of expertise and knowledge. Indigenous people hold a wealth of knowledge about the Earth and its natural resources, developed over thousands of years and countless generations. At the same time, Western science has developed powerful new tools to understand the geological processes leading to the formation of mineral deposits. To fully embrace a leadership role in the future minerals and mining sectors, more Indigenous people need advanced education, not just in Earth sciences and mining, but also in law, politics, economics and public policy. Quite literally, we must engage with the resource sector from the ground up, from mining sites to boardrooms. Working with universities, we must redefine new educational approaches, bringing advanced education to our remote northern communities, with an on-the-ground component that includes our Elders and their traditional knowledge. Such an approach will build Indigenous leadership capacity, while also shifting the perspectives of non-Indigenous people working in government and in the mining industry.

Together, we can (and must) transform the global mining industry, through new technologies and methods, but also through a fundamental culture shift towards collaboration and mutual respect between Indigenous and non-Indigenous people.

As we seek to address the existential threat of climate change, we must consider what we will leave behind for future generations. Yes, we must supply critical minerals for renewable energy, but we must also protect our lands, waters, air and wildlife. It is a sacred responsibility that the Creator has placed upon us. The Elders tell us that the Creator is speaking to us. We must stop and listen.

Endnotes

1 Text of the Inter Caetera Papal Bull is available at *Papal Encyclicals Online*, https://www.papalencyclicals.net/alex06/alex06inter.htm

2 'Joint Statement of the Dicasteries for Culture and Education and for Promoting Integral Human Development on the "Doctrine of Discovery"' (30 March 2023), *Summary of Bulletin: Holy See Press Office*, https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2023/03/30/230330b.html

3 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal: McGill-Queen's University Press, 2015), https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf

4 *Haida Nation v. British Columbia (Minister of Forests)* ([2004] 3 SCR 511), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do

5 Full text available at https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044

6 *Tsilhqot'in Nation v. British Columbia* ([2014] 2 SCR 257), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do

7 Full text available at https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96292_01

8 See *BC First Nations Energy and Mining Council*, https://fnemc.ca/