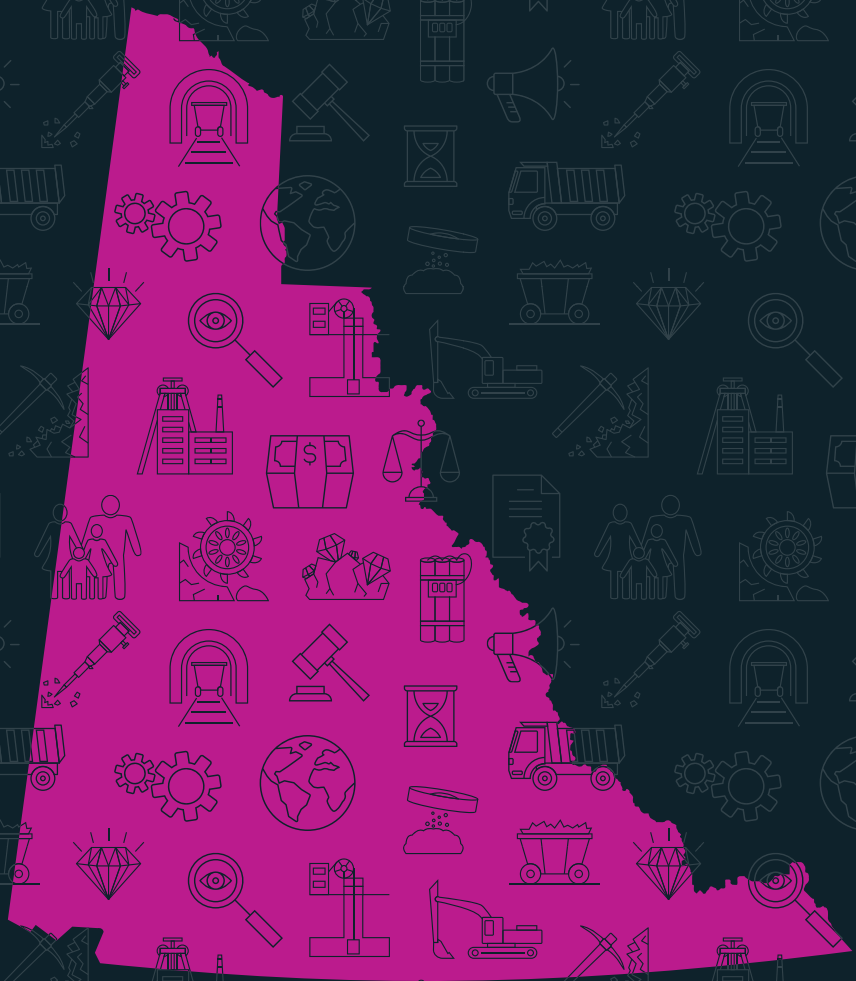




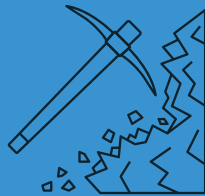
**TRANSPARENCY
INTERNATIONAL
CANADA**



ACCOUNTABLE MINING

**A Risk Assessment of the Environmental
and Socio-Economic Assessment Process**

The Yukon Territory Technical Report



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ABOUT THIS REPORT

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About TI Canada

Transparency International Canada (TI Canada) is the Canadian chapter of Transparency International. Since its foundation in 1996, TI Canada has been at the forefront of the national anti-corruption agenda.

In addition to advocating legal and policy reform on issues such as whistleblower protection, public procurement and corporate disclosure, we design practical tools for Canadian businesses and institutions looking to manage corruption risks, and serve as an anti-corruption resource for organizations across Canada.

About the Accountable Mining Program

Transparency International's (TI) Accountable Mining Program studies transparency and accountability vulnerabilities in mine permitting processes. Funded by the BHP Foundation and the Australian Government through the Department of Foreign Affairs and Trade, this initiative is being implemented in over 20 countries with coordination by the TI national chapter in Australia. The Accountable Mining Program works toward building robust, transparent and accountable processes for obtaining mining permits and licences by working collaboratively with governments, companies, civil society organizations and communities.

Mine permitting and licensing are critical as governments, communities and proponents negotiate if and under which terms mineral resources might be explored and exploited. Mining permits and licences awarded by governments impact current and future generations. Therefore, transparent and accountable permitting and licensing processes are important to ensure:

- all stakeholders and rights holders have the opportunity to be involved in the discussion of if and how mineral resources will be exploited at the early stage of the mining value chain, and
- the development of socially responsible, environmentally sensitive and economically feasible projects by qualified proponents, providing benefits not only to shareholders but also host communities and the public.

Transparency International Canada (TI Canada) is responsible for conducting the program in Canada. This research aims to identify transparency and accountability risks by conducting a risk assessment in mine permitting. The Canadian study focuses on the environmental assessment processes and their legal frameworks in Ontario, British Columbia and the Yukon Territory.

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Acronyms

CEA	Cumulative Effects Assessment
CC	Community Consultation – MACRA tool
CF	Contextual Factor – MACRA tool
CIRNAC	Crown-Indigenous Relations and Northern Affairs Canada
CYFN	Council of Yukon First Nations
CIRDI	Canadian International Resources and Development Institute
DO	Designated Office
EA	Environmental Assessment
EC	Executive Committee
EMR	Department of Energy, Mines and Resources
ESA	Environmental and Social Assessment
ESIA	Environmental and Social Impact Assessment – MACRA tool
FPIC	Free, Prior and Informed Consent
GBA	Gender-Based Analysis
GBA+	Gender-Based Analysis Plus
GDP	Gross Domestic Product
MACRA	Mining Awards Corruption Risk Assessment
MOU	Memorandum of Understanding
PD	Product Design – MACRA tool
PEST	Political, Economic, Social and Technological
PP	Process Practice – MACRA tool
QMA	<i>Quartz Mining Act</i>
SDGs	Sustainable Development Goals
TCPS	Tri-Council Policy Statement
UFA	<i>Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon</i>
YESAA	<i>Yukon Environmental and Socio-economic Assessment Act</i>
YESAB	<i>Yukon Environmental and Socio-economic Assessment Board</i>

1 Introduction

Transparency International's (TI) Accountable Mining Program studies transparency and accountability vulnerabilities in mine permitting processes to evaluate if these vulnerabilities may lead to corruption. The global Accountable Mining Program, funded by the BHP Foundation and the Australian Government through the Department of Foreign Affairs and Trade, is coordinated by the Australian chapter of TI. The global program focuses on jurisdictionally specific processes of obtaining a mining or exploration permit and related processes, and studying to whom and under what conditions the right to mine is awarded. At a broader level, the Accountable Mining Program works toward building a fairer, clearer and cleaner process for obtaining clearances to advance mining projects and activities by working collaboratively with governments, companies, civil society organizations and communities.

The Accountable Mining Program complements existing efforts to improve transparency and accountability in extractive industries by specifically targeting the start of the mining decision chain: the point at which governments award mining permits and licences, negotiate contracts, make decisions and conclude agreements that will shape subsequent mining activities. The program studies transparency and accountability vulnerabilities in the mining awarding processes to evaluate if they may lead to corruption and to advise policymakers, civil society and the mining industry to take precautions to ensure that corruption does not occur.

TI's definition of corruption is "the abuse of entrusted power for private gain" (TI, 2019). Abuse of entrusted power extends beyond government officials. In the Accountable Mining Program, it also includes power entrusted to community leadership, businesses (corporate social responsibility), other professionals who are relied upon and legal representatives. Community leadership is entrusted to represent community interests, not their own personal interests, in negotiations with government and companies. Similarly, business executives are expected to behave ethically during negotiations and not to seek to avoid accountability for the terms agreed during negotiations about permitting.

TI defines transparency as a "characteristic of governments, companies, organisations and individuals of being open in the clear disclosure of information, rules, plans, processes and actions" (TI, n.d.). Transparency matters as decision makers and executives in the public and private sector as well as in civil society organizations have a responsibility to act visibly and predictably to promote participation and accountability, and allow third parties to easily perceive what actions are being performed.

Accountability refers to "the concept that individuals, agencies and organizations (public, private and civil society) are held responsible for reporting on their activities and executing their powers properly. It also includes the responsibility for money or other entrusted property" (TI, 2019). Accountability of the mining industry and public authorities is critical to build public trust and confidence that the sector's impacts on communities and the environment have been thoroughly accounted for and adequate provisions are in place to mitigate any adverse impacts. From a business case perspective, a study by the Mining Association of Canada highlights that building trust in the mine awarding process is essential to attract qualified mining companies and investment to Canada (Marshall, 2018). Furthermore, accountability of the mining industry and public authorities is critical to build public trust and confidence, as a pathway to mitigating social conflict and minimizing permitting risks and project delays.

Lack of transparency and accountability in permitting mining exploration and development can cause negative impacts on the following (TI, 2017):

- Impartiality in decision-making
- Security of property rights
- Environmental, labour and social standards

- Revenue to the state
- Company profits
- Competition in the mining sector
- Fairness to applicants
- Reputation of companies, governments and community leaders
- Innovation in the sector
- Quality of applications
- Accountability of decision makers, and
- Transparency over the management of public resources.

Transparency International Canada (TI Canada) is one of 20 national chapters participating in TI's global Accountable Mining Program. As part of the program, TI Canada's ultimate aim is to engage policymakers, civil society and the mining industry to take necessary precautions and to conduct due diligence to eliminate transparency and accountability risks in mine permitting and licencing in Canada. This report exclusively presents the findings of the risk assessment of the environmental assessment process in the Yukon Territory.

2

Accountable Mining Program in Canada

The Accountable Mining Program in Canada has been implemented in two phases. The first phase of the program was implemented in 2016–2017 and focused on a transparency risk assessment of Ontario’s reclamation and mine closure plan. The second phase of the program, which runs until November 2020, applies TI’s risk assessment methodology to processes for completing environmental and social impact assessments in three selected Canadian jurisdictions — Ontario, British Columbia and Yukon.

OBJECTIVES AND SCOPE

The specific objectives of the global Accountable Mining Program are as follows:

- **Objective 1:** Completing a systematic evaluation of transparency and accountability vulnerabilities and associated corruption risks in the environmental and social assessment (ESA) processes in the context of three selected Canadian jurisdictions, as well as national and global trends.
- **Objective 2:** Strengthening provincial and federal legislation by identifying opportunities and improvements needed to avoid transparency and accountability vulnerabilities and associated risks in permitting processes.
- **Objective 3:** Implementing an advocacy plan for exchanging good practices, raising the bar domestically for transparency and accountability and strengthening public trust and confidence in mine permitting and licensing decisions.

CIRDI’s role and the scope of this technical report is limited to meeting Objective 1 (above) as relevant for the Yukon Territory. The evaluation was conducted by deploying TI’s in-house assessment tool (explained in Section 4) for assessing transparency and accountability vulnerabilities. The scope of analysis was restricted solely to transparency and accountability issues that have a bearing on the process of providing a decision document for assessable mining activities in Yukon. As such, the technical aspects of executing an ESA study, such as data collection methods, quantitative modelling, analysis of air, water, soil quality and socio-economic analyses, are outside of the research scope. Constraints on time and resources also restricted the scope of analysis to large-scale metal mining as covered by the *Quartz Mining Act* (QMA) of 2003.¹

GUIDING RESEARCH QUESTIONS

Questions that guided the research for Ontario, BC and Yukon are:

- How does the mine permitting regime work in each province and territory?
- How is the EA process for a mining project described in the regulation and implemented in practice? Are there differences between the EA process steps described in the legislation and their implementation in practice? If so, how do these differences affect the transparency and accountability of the EA process?
- What are the concerns of Indigenous Nations, mining-affected communities, companies and civil society about current EA processes?
- In what ways is the existing EA permitting process vulnerable to transparency and accountability risks?

¹ The analysis did not cover placer mining, which involves mining for minerals in and near streams and riverbeds. This type of mining activity is very significant in Yukon, and has come under criticism as concerns regarding resulting environmental damage and lack of remediation increase (Thomson, J. 2018), Jones, 2016. It should be noted that placer mining proposals represent over 25% of the assessment undertaken by YESAB (Reviewer 2, n.d.).

3 Mining in Yukon

This section provides a high-level overview of key issues and trends related to mining in Yukon. It is meant to serve as a general orientation for lay or non-specialist audiences. The research team acknowledges that each of these trends and issues is sufficiently complex to warrant a much more in-depth analysis than what is provided here. In keeping with the scope limits of the project, the content below is presented with a view to illustrating key dynamics that shape the contextual climate within which environmental assessment processes are governed and implemented, and to provide a generalized snapshot of related concerns where possible.

SOCIO-ECONOMIC SIGNIFICANCE OF MINING IN YUKON

From the days of the Klondike Gold Rush through the development of major hard rock mines, the mineral industry has been considered an important economic sector for Yukon — serving both as a driver of prosperity and, at times, economic stagnation (Haney, 2009; Tukker, 2016; Yukon Bureau of Statistics, 2019a).

Although the Indigenous Peoples of Canada’s North West were known to collect and trade raw copper, the “soft yellow stone” embedded in the earth along the central Yukon region’s waterways was considered of no value prior to the Klondike Gold Rush (Cruikshank, 1992). The Gold Rush brought approximately 40,000 settlers and prospectors into Tr’ondëk Hwëch’in traditional territory (Green, 2018). This influx shifted the demographic dynamic of Yukon, with non-Indigenous peoples far outnumbering Indigenous populations for the first time (Green, 2018). Between 1896 and 1940, the constant presence of miners and mining companies altered the landscape and waterways of central Yukon, and introduced a new economic structure based on natural resource exploitation and an industrial-based economy (Green, 2018; Deloitte & Touche LLP, 2011).

Gold mining remains the dominant commodity focus in Yukon, and the territory also hosts deposits of lead-zinc, silver, tungsten, iron, molybdenum, nickel, copper and coal. These deposits include the second largest undeveloped iron ore deposit in the world and one of the world’s largest undeveloped zinc-lead deposits (Government of Yukon, 2017a).

The mining industry in Yukon is source of direct and indirect employment, as noted in Table 1.

Table 1: Employment in mining and support activities, 2017

Activity	Number employed
Mining and quarrying	530
Support activities for mining (including exploration)	1,075
Non-metallic mineral product manufacturing (including smelting and refining)	25
Primary metal manufacturing	0
Fabricated metal product manufacturing (including establishments primarily engaged in forging, stamping, forming, turning and joining processes to produce ferrous and non-ferrous metal products)	20
Total	1,650

Source: Natural Resources Canada, 2019b.

Yukon's mining sector is vulnerable to the boom-bust cycle with shifts in commodity prices linked to exploration spending levels (Department of Finance, 2017). Pre-COVID-19 data for Yukon showed a significant decrease in spending on mineral exploration in 2019. Expenditures (spending intentions) on exploration grew by almost \$20 million in 2018, but then dropped from \$186.1 million to \$129.2 million in 2019 (Natural Resources Canada, 2019b). The number of active exploration projects in Yukon was down by nearly 50% in 2019 compared with 2018, alongside a drop in the number of mining claims staked (Croft, 2019).

A Government of Canada analysis (2019a, p. 4) notes that "Yukon's economy has struggled amid falling mineral commodity prices." In the 2018/19 fiscal year, fiscal revenue from the mining industry was \$1.9 million. Preliminary figures also showed that mineral production in Yukon was down to \$217 million in 2018, from \$318 million the previous year (Natural Resources Canada, 2019b). Mining and quarrying accounted for a 5.7 percentage share of Yukon's real gross domestic product (GDP) by industry in 2018, based on current dollars (Yukon Bureau of Statistics, 2019a). However, in 2018, "the largest dollar-amount decrease" in Yukon's real GDP by industry was "in the *Mining, quarrying, and oil and gas extraction* sector with a contraction of \$57.0 million, down 32.1% from 2017" (Yukon Bureau of Statistics, 2019a, p. 1).

Although fiscal revenue and exploration spending decreased significantly in 2019, and mineral production value has been declining since 2012, the value of mineral production prior to COVID-19 was forecasted to climb through to 2023 with production from two new mines — the Victoria Gold Corp.'s Eagle gold mine and the Coffee gold mine, which was slated for development in 2020 (Government of Yukon, 2019b). Timelines for the Coffee gold mine are somewhat uncertain following the merger of Goldcorp and Newmont Mining Corp. and delays could dampen Yukon's GDP growth forecast (Government of Yukon, 2019b, p. 5). The interim forecast did not include Minto Mine's return to production in October 2019, but the outlook noted it would have "a modest increase in employment and would have some positive impacts for local goods and services providers. The most notable impact of a return to production would be reflected in Yukon's GDP, which would be bolstered by increased mineral exports" (Government of Yukon, 2019b, p. 5).

Prior to the COVID-19 pandemic, the Conference Board of Canada forecasted that Yukon's GDP would grow by 10% in 2020, up from 2.2% in 2019, with production from the Eagle gold mine and expected construction of the Coffee gold mine (Jones, 2019). The Casino copper mine project was also expected to give the territory's economy a boost, although the project could also generate significant social costs and the Yukon government has not been able to demonstrate net long-term benefits (Reviewer 2, n.d.).

The Conference Board of Canada forecast in July that the Eagle gold project alone could account for 10% growth in Yukon's GDP in 2020 (Jones, 2019). Over the medium term, there was also potential for Alexco Resource Corp.'s Keno Hill Silver District project, BMC Minerals' Kudz Ze Kayah Project and Golden Predator's Brewery Creek project to move into development, which would bring added economic benefits to the territory (Government of Yukon, 2019a).

Alongside GDP growth, new mining projects were expected to continue to boost construction activity and employment numbers (Government of Yukon, 2019a). The Eagle gold mine, as reported in September 2019, was expected to be the territory's largest non-government employer (Rudyk, 2019). As of July 2019, 800 people were employed in the forestry, fishing, mining, and oil and gas sectors in Yukon, which dropped to 500 in December 2019 (Yukon Bureau of Statistics, 2020). Although there is strong potential for job growth in the mining sector, Yukon's unemployment rate is already the lowest in the country, leaving some employers "struggling to fill job openings" (Government of Yukon, 2019b, p. 6). However, in its *Interim Fiscal and Economic Update for 2019–2020*, the Yukon government noted that it expects "labour market tightness ... to dissipate gradually over the forecast period, as rising wages attract new entrants to the labour market. As a result, the unemployment rate is expected to increase but remain below 5% from 2019 to 2023" (Government of Yukon, 2019b, p. 6). These projects are all likely to be affected by the COVID-19 pandemic.

As production levels grow, resource royalties to government should simultaneously increase. Under the QMA, mining companies are required to pay royalties to the Yukon government at a variable rate depending on the value

of production. From the Minto Mine's first commercial production year in 2007 until 2017, for instance, Capstone Mining Corp. has paid \$33.3 million in royalties to the Yukon government (Government of Yukon, n.d.-d). Other fiscal revenues generated from the mining industry amounted to \$1.9 million for the year ending in March 2019 (Energy, Mines & Resources [EMR], 2019b). Yukon First Nations should see a higher share of mining royalties going forward, following the signing of a new agreement with the Yukon government in May 2018 (Morin, 2018).

There are concerns that the potential economic and social benefits of mining in the territory are not being fully realized by affected communities. For instance, a report on the socio-economic monitoring program for Minto Mine found Selkirk First Nation citizens accounted for about 7% of employees at the mine, but were largely in entry level or semi-skilled positions (Selkirk First Nation et al., 2018). In 2017, the Yukon government and self-governing First Nations signed a mining memorandum of understanding (MOU) agreeing to work together to improve management of the mining sector and to develop the Yukon Mineral Development Strategy (YMDS, n.d.). Among the questions to be discussed through the strategy's public engagement process are:

- “What are some concrete actions that industry, communities and governments can take to maximize positive benefits from mining projects and mitigate negative impacts on Yukon communities?” (YMDS, 2019b, p. 7)
- “What additional education and training activities are needed to help ensure that Yukon people and businesses capture a greater proportion of benefits from mineral development?” (YMDS, 2019b, p. 8)
- “How can a Yukon Mineral Development Strategy help ensure that cumulative effects from development are adequately considered” (YMDS, 2019b, p. 11).

INDIGENOUS PEOPLES AND MINING IN YUKON

First Nations have a long history with mining activity in Yukon. This relationship has been impacted by Canadian colonial systems of resource governance, which “remains an ongoing process, shaping both the structure and the quality of the relationship between the settlers and Indigenous peoples” (Truth and Reconciliation Commission, 2015, p. 49). The early impacts of the Klondike Gold Rush and subsequent development were experienced by First Nations communities in Yukon in the form of alienation of lands and resources in traditional areas (Council of Yukon First Nations [CYFN], n.d.-a). However, modern laws and treaties with First Nations communities in Yukon have “created a foundation for co-relational involvement in the direction and control of land and resource management” (Cameron, 2019). There are varying levels of support and resistance to mining projects across and within First Nations communities in Yukon, which sheds light on the complexity of the issue in the region.

Canada's *Indian Act* (1867) is widely perceived to be a repressive instrument of the state in exercising power and control over First Nations and Indigenous Peoples (Cameron, 2019). The Comprehensive Claims Policy (1973) attempted to correct this power imbalance by facilitating direct ownership of land and resource management, development opportunities, and a recognition of traditional pursuits and lifestyles of First Nations (Cameron, 2019; Alcantara et al., 2012).

In 1973, Elijah Smith and a delegation of Yukon Chiefs presented “*Together Today for Our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People*” to Prime Minister Pierre Elliott Trudeau (CYFN, n.d.-a). This document outlined the grievances that First Nations communities in Yukon had historically experienced due to exploitation from colonial settlers, and started the process of two decades of negotiation for land rights in the region and ultimately set the stage for land claim negotiations between First Nations, the territorial government and the Government of Canada (Cameron, 2019).

Yukon is home to 14 First Nation groupings and eight distinct first languages (see Table 2). *The Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (UFA) was reached in 1988, finalized in 1990 and signed in 1993 (CFYN, n.d.-b). It sought to establish a broad

Table 2: Yukon First Nations and language groups

<ul style="list-style-type: none"> • Carcross/Tagish First Nation • Champagne and Aishihik First Nations • First Nation of Na-Cho Nyäk Dun • Kluane First Nation • Kwanlin Dün First Nation • Liard First Nation • Little Salmon Carmacks First Nation • Ross River Dena Council • Selkirk First Nation • Ta'an Kwäch'än Council • Tr'ondëk Hwëch'in • Teslin Tlingit Council • Vuntut Gwitchin First Nation • White River First Nation 	<ul style="list-style-type: none"> • Gwich'in • Hän • Kaska • Northern Tutchone • Southern Tutchone • Tagish • Upper Tanana • Tlingit
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framework by which individual Yukon First Nations could negotiate a land agreement, as distinct from establishing a territorial marker for one First Nations community (Cameron, 2019; Alcantara et al. 2012). Currently, 11 Yukon First Nations have signed agreements under the UFA and thereby have established ownership of and authority over their respective settlement lands. These agreements include provisions for the creation of processes, boards and committees that ensure First Nations involvement in land, natural resource, water and wildlife management (Government of Yukon, 2019c; Alcantara et al., 2012; Cameron, 2013; UFA, 1993). Certain chapters in the UFA establish the foundation for work undertaken by the Land Use Planning Council and regional planning commissions, YESAB, and the Yukon Water Board.²

The UFA has paved a governance pathway for First Nations and Indigenous Peoples to approach extractive industries and mining rights. Settlement lands include Category A lands, in which the First Nations have surface and subsurface rights, and Category B lands, in which only surface rights are established (Martin & Bradshaw, 2018). Sections 18.3 and 18.4 of the UFA outline when the consent of a First Nation is required in order for a prospective mine developer to access mineral rights, and Chapter 24 outlines broader rights and responsibilities of an individual First Nation government regarding language, culture, and the extension of programs and services (Martin & Bradshaw, 2018). Therefore, in situations where a First Nation has developed its own legislation on land resources and mineral policy, the legislation may establish complementary requirements and procedures to achieve consent around mineral exploration.

While the *Placer Mining Act* does not lay out a royalty regime per se, provisions for an excise tax on placer gold exported from Yukon has not generated a strong value proposition for First Nations communities. An agreement between the Yukon government and the CYFN seeks to ensure that Yukon First Nations will get a higher share of resource royalties (Thomson, J. 2018). Chapter 23 of the UFA already outlines when royalties should be paid to First Nations, by what percentages, and how such payments are to be distributed for both settlement and commissioner's land (Morin, 2018). However, there have been some disagreements over the years over the interpretation of the formulas, which both sides now say have been resolved via the *Chapter 23 Implementation Agreement*. From 2014 to 2017, the combined total amount First Nations retroactively received is \$36,110.71, which the Yukon government says marks an increase of more than \$24,000 to be divided among the 11 First Nations with final agreements (Morin, 2018). However, the agreement also came with an additional \$600,000 payment from the Yukon government, in the spirit of reconciliation (Morin, 2018).

² Chapters 11 (Land Use Planning), 12 (Development Assessment) and 14 (Water Management) are particularly relevant to mineral resources management.

Although the UFA clearly establishes the involvement of First Nations and Indigenous Peoples in land and resource management, they have had to turn to the court to settle disputes as Yukon continues the process of implementing the UFA. Indigenous Peoples in Canada have constitutionally protected rights; yet when it comes to resource governance and mining-related decision-making, it has also been their burden to define the nature and quality of those rights through litigation.

Indigenous land claim issues around mining in Yukon are governed by the *Placer Mining Act* and the *Quartz Mining Act*. Though the UFA clearly establishes First Nations involvement in land and resource management in Yukon, First Nations have had to turn to the courts to settle disputes as the territory continues to move through the process of implementation.

One such case is the Peel Watershed Regional Land Use Plan (Government of Yukon, 2019g). The affected First Nations and two environmental organizations took legal action against the Yukon government over a decision to approve a plan that was created outside the planning process and was substantially different than the one recommended by the planning commission. The case was ultimately heard by the Supreme Court of Canada, which quashed the Yukon government's approval of its own plan. In its ruling, the court said, "Yukon's changes to the Final Recommended Plan did not respect the land use planning process in the Final Agreements and its conduct was not becoming of the honour of the Crown" (*First Nation of Nacho Nyak Dun v. Yukon*, 2017).

Three First Nations, specifically the Ross River Dena Council and the Liard First Nation of the Kaska Nations and the White River First Nation, have not settled final agreements but do assert their Aboriginal rights and title over their traditional territories (Cameron, 2013; *White River First Nation v. Yukon Government*, 2013). These Nations have also been able to "exert authority over development" through the courts (Martin & Bradshaw, 2018, p. 123).

In a landmark case, the Ross River Dena Council challenged Yukon's mining regime, which allowed miners to stake a claim, record it with the mining recorder and then undertake Class 1 mining activities, as detailed in the QMA without notifying the Yukon government or obtaining permission. Ross River argued this policy infringed on their Aboriginal rights and title and that there is a duty to consult the First Nation before a claim can be recorded (*Ross River Dena Council v. Government of Yukon*, 2012).

The Court of Appeal for Yukon ruled not only that "the Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising the Ross River Area are to be made available to third parties under the provisions of the *Quartz Mining Act*" but also that "the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff" (*Ross River Dena Council v. Government of Yukon*, 2012, par. 56). The case resulted in legislative changes to the QMA and, as of April 2020, the requirement for notification and review of Class 1 work applies across the territory. Class 1 notification already applies to the traditional territory of the Tr'ondëk Hwëch'in, the traditional territories of all Yukon First Nations without final agreements, the Taku River Tlingit territory, the Peel Watershed area and on Category A and B settlement lands (Government of Yukon & Council of Yukon First Nations, 2019).

As previously mentioned, in 2017 the Yukon government's Minister of Energy, Mines and Resources, the Grand Chief of the Council of Yukon First Nations, and Chiefs of self-governing Yukon First Nations signed a mining MOU committing to "work collaboratively to improve the management of placer and quartz mining in the Yukon" and, specifically, to create a strategy that would cover all aspects of mineral resources management from exploration to post-closure mine management (YMDS, n.d.).

MINING AND ENVIRONMENTAL IMPACTS IN YUKON

The mining sector is recognized as a major economic contributor in Yukon, although the industry has significant environmental risks. The financial performance of the mining sector as a whole has implications for the management and mitigation of these risks. For example, one research participant noted that costs for care, maintenance, remediation, reclamation and decommissioning need to be considered, along with the challenges faced by governments in dealing with abandoned sites. Although these topics are not covered in detail in this overview, they contribute significantly to the context within which ESAs for mining activities take place in Yukon.

In Yukon, the Faro Mine serves as a stark reminder of the potential risks associated with large-scale mining operations (Haney, 2009). The mine was abandoned by the Anvil Range Mining Corporation in 1998 and remains among the largest contaminated sites in Canada (Crown-Indigenous Relations and Northern Affairs Canada [CIRNAC], 2017). The Faro Mine, which was at one point the world's largest open-pit lead-zinc mining operation, left behind 70 million tonnes of tailings, 320 million tonnes of waste rock, and an estimated 64,000 hectares of contaminated soil and groundwater in south-central Yukon (Commissioner of the Environment and Sustainable Development, 2012; CIRNAC, 2019a). There is concern about instability of tailings dams and waste rock dumps, in addition to ground and surface water contaminated with metals and acids, and soil contaminated by petroleum hydrocarbons (Government of Canada, 2019b). By May 2019, the federal government had already spent \$480 million on maintenance, environmental monitoring, consultation with First Nations, site assessment, development of a remediation plan and other work related to the Faro Mine site (Tobin, 2019b). The Faro Mine Remediation Project proposal was submitted to YESAB for review in 2019, but the federal government has estimated it could take three to four more years before site remediation begins (CIRNAC, 2019b).

In August 2019, the federal government announced a \$2.2 billion investment over 15 years to help clean up abandoned mines across the north, including five mines in Yukon (CIRNAC, 2019b). Funding will also be directed to help remediate the United Keno Hill Mines, a collection of 50 silver mines about 55 kilometres from Mayo; the Mount Nansen Mine, an abandoned gold and silver mine about 60 kilometres west of Carmacks; the Ketza River gold and silver mine located about 50 kilometres southeast of Ross River; and the abandoned Clinton Creek asbestos mine about 100 kilometres northwest of Dawson City (CIRNAC, 2019b).

The Yukon government collects financial security for mining projects in the territory and is currently holding more than \$118 million in security for seven projects (EMR, 2020a). However, the Yukon Conservation Society has raised concerns that the territorial government should be collecting higher securities to protect both the environment and taxpayers (Fox, 2019). Issues of mine security were brought to the fore in 2019. Yukon Zinc, the owner of the Wolverine Mine, was placed in receivership, leaving the Yukon government to try and recoup close to \$25 million in unpaid security for the mine (Windeyer, 2019). The Yukon government has since contracted PricewaterhouseCoopers to explore the feasibility of establishing a mine reclamation fund that could be drawn on to remediate abandoned mines as needed in the future (Government of Yukon, 2019e).

WOMEN, MINING AND ESA ENGAGEMENT

At the macro level, numerous scholars and civil society actors have affirmed that negative environmental, social and economic impacts of mining activities are disproportionately felt by women and girls compared to their male counterparts (CIRDI, 2018; Landau & Lewis, 2019; Oxfam International, 2017; Albury & Laplonge, 2012). Mirroring these macro trends, there is support within reviewed literature for the understanding that women and men in the Canada have traditionally held different roles and responsibilities in the mining sector, and are impacted differently by mining projects (MiningWatch Canada, 2004; Carrington & Pereira, 2011; Hajkowicz et al., 2011; MacTaggart et al., 2016; Keenan et al., 2016; Gibson & Kemp, 2017).

It has also been demonstrated that socio-economic impacts of extractive industries in mining communities can have a disproportionately negative impact on women and girls in Yukon, particularly for First Nations and

Indigenous women (Yukon Status of Women Council, 2000; Manning et al. 2018; Bond & Quinlan, 2018; Gignac, 2020; Dendys et al., 2020).

While resource industries can provide employment opportunities for women, these opportunities may be more prevalent for low-skilled and low-paying roles (Manning et al., 2018). The transient nature of some mining activities can create childcare challenges for families, reduces the time necessary to carry out cultural practices, and has also been linked to gender-based violence in the home and within communities (Manning et al., 2018). The negative impacts of mining activities on women can be compounded in remote rural settings, where social services and critical infrastructure such as physical and mental health care, housing and employment resource centres, food banks and public transportation are inadequately funded or non-existent (Manning et al., 2018).

Differential access to and influence in decision-making about natural resources are also heavily influenced by factors such as gender, race, and class that are embedded within social structures, institutions and norms (Colfer et al., 2018; Kojola, 2018; Roggeband & Verloo, 2006; O'Shaughnessy & Krogman, 2011; Stienstra et al., 2017). Academic work has revealed how structural barriers embedded into the design of ESA processes can systemically disadvantage women from participating meaningfully and on equal footing with men (for example, Peletz & Hanna, 2019; VanClay et al., 2015; Cox, 2015). Although the number of women involved in these processes in oversight functions within government, as project managers and as community coordinators is growing, there are fewer women participating as technical consultants. Further research and analysis are needed on how these structural barriers may present themselves in the context of Yukon's ESA processes.

From an institutional and governance perspective and in terms of gender equality, most members of co-management resource boards in Canada's northern territories are male, which can make it challenging to implement gender-inclusive decision-making (Staples & Natcher, 2015).

The assessment process may not involve or document certain aspects of resource development that have serious impacts on Indigenous women. Factors such as increased traffic on local roads around work camps are considered standard in ESA processes, but aspects such as the influx of migrant workers and their impacts on communities may not be considered to the same degree (Manning et al., 2018). Some critical scholars view impact assessments as a formal, one-sided, power-driven colonial process that can be intimidating and, at times, adversarial toward Indigenous women (Manning et al., 2018).

Such tensions were expressed in an open letter to the YESAB executive committee from two members of the Yukon Legislative Assembly, two First Nations Chiefs and a councillor in February 2020. The letter states:

The legislation, YESAA [the Yukon Environmental and Socio-economic Assessment Act], does not allow First Nation and Indigenous women's concerns and traditional knowledge sufficient voice, and the process through the YESAB is critically flawed ... Critical concerns about the safety and wellbeing of women working in industry exist and must be addressed. Violence against women has also occurred (and continues to occur) in the communities from the first development in the Kaska territory and we want that to stop (Dendys et al., 2020).

In response, personal safety was considered as a valued component in the draft screening report for the Kudz Ze Kayah Project, particularly in respect of Indigenous women (Reviewer 2, n.d.). It was explicitly identified and considered in direct response to the recommendations of the National Inquiry into Missing and Murdered Indigenous Women and Girls. YESAB has now established a working group to set terms of reference for a regional study into personal safety, again with a focus on women and in particular Indigenous women (Reviewer 2, n.d.). The Women's Directorate of the Government of Yukon is also undertaking policy work on this issue. In addition, the period for seeking views on the Kudz Ze Kayah Project was extended beyond the original timelines set out in the rules to accommodate research and views from the Liard Aboriginal Women's Society (Reviewer 2, n.d.).

Within the broader Canadian context, gender-based analysis (GBA) tools have been developed and promoted

within the Government of Canada to provide “a more holistic picture of a project’s impacts on communities to better inform decision-making” (Peletz & Hanna, 2019). The Government of Canada’s Gender-Based Analysis Plus (GBA+) program was finalized in 2015 by the Status of Women. Compliance with the program is mandatory for the Treasury Board Secretariat and civil servants in all departments are expected to implement its key principles, tools and approaches in their work. In June 2019, the *Canadian Energy Regulator Act* was ratified into law, with preamble stating:

And whereas the Government of Canada is committed to assessing how groups of women, men and gender-diverse people may experience policies, programs and projects and to taking actions that contribute to an inclusive and democratic society and allow all Canadians to participate fully in all spheres of their lives (*Canadian Energy Regulator Act*, 2019).

Given its recent adoption, and the absence of a substantive publicly accessible framework for implementation in line with GBA+, it is difficult to assess the impacts of this new legislation. Although the federal Impact Assessment Act (2019) does not apply in Yukon, formalizing and mainstreaming GBA through the federal impact assessment process is a positive move forward with potentially instructive lessons for assessments that occur via non-federal processes. The Native Women’s Association of Canada (2018) produced a policy paper on Indigenous GBA as it relates to the Canadian Minerals and Metals Plan. A key finding is the significant lack of data and information on the experiences of two-spirited and gender-diverse Indigenous persons in conducting robust gender-based analysis of the effects of mining activities on these groups, and that primary research into these effects must be supported.

MINING PERMITTING REGIME IN YUKON

As noted previously, the UFA set the stage for constitutionally protected final agreements between the Yukon government, the Government of Canada and 11 of 14 Yukon First Nations. It forms a critical basis for Yukon’s governance system. The agreements establish First Nations ownership and control over specified settlement lands and outline foundational management processes and provisions for the creation of specific boards and bodies for land, water, natural resource, fish and wildlife management (Haney, 2009; Alcantara et al., 2012). Another key agreement, the Yukon Northern Affairs Program Devolution Transfer Agreement, was signed by the Yukon and federal governments in 2001 and shifted province-like responsibility for managing land, water and natural resources (that is, forestry and minerals) from the federal to the Yukon government.³ This transfer of power came into effect in 2003 with amendments to the federal *Yukon Act* (Alcantara et al., 2012; CIRNAC, 2013).

AGENCIES, STATUES, AND REGULATIONS FOR MINE PERMITTING IN YUKON

YESAA is federal legislation enacted in 2003 to fulfill the requirements outlined in Chapter 12 of the UFA and constitutionally protected final agreements to establish a development assessment process in the territory (UFA, 1993; YESAA, 2003). Mining projects in Yukon are subject to environmental review by YESAB under YESAA. The federal *Impact Assessment Act* (2019) does not apply in Yukon.

The Assessable Activities, Exceptions and Executive Committee Projects Regulations detail the types of projects and activities that require assessment under YESAA and at what level a project proposal should be assessed (YESAB, n.d.-6). Projects are typically evaluated by designated offices (DOs) in one of six communities across Yukon (YESAB, n.d.-4). Larger projects with higher potential adverse impacts are assessed through executive committee (EC) screenings, a more involved process that can take up to 16 months and provides opportunities for the public to comment on both the project proposal and the draft screening report (YESAB, n.d.-2). The highest-level assessments are conducted by a YESAB panel, which may be established to “assess projects that: have potential significant adverse effects; are likely to cause significant public concern; involve the use of controversial technology; or other levels of assessment have been unable to come to a recommendation” (YESAB, n.d.-5).

³ Yukon had gained authority over oil and gas resources in 1993 (CIRNAC, 2013).

YESAB is an advisory body in that it makes recommendations to decision bodies (either the Government of Canada, Government of Yukon, and/or First Nation governments) (YESAB, n.d.-6). It is then up to the decision body to accept, reject or modify the recommendations and produce a decision document that outlines whether a proposed project should proceed, not proceed or proceed under certain conditions.

The Yukon government's Department of Energy, Mines and Resources (EMR) is responsible for permitting hard rock mines in the territory under the QMA and *Quartz Mining Land Use Regulation*. Once a mining project has gone through the Yukon Environmental and Socio-economic Assessment process and been approved, a quartz mining licence must also be obtained.

Mining projects are also required to obtain a water licence from the independent and quasi-judicial Yukon Water Board. According to section 10 of the Waters Act, "the objects of the Board are to provide for the conservation, development, and utilization of waters in a manner that will provide the optimum benefit from them for all Canadians and for the residents of the Yukon in particular."

The Yukon Surface Rights Board has jurisdiction to resolve disputes over access to privately held land, including settlement land. It also has jurisdiction to resolve disputes over the competing rights of surface and sub-surface users of land, including settlement land. The Surface Rights Board will also determine compensation for the expropriation of settlement land. An order of the Surface Rights Board will have the same legal effect as an order of the Supreme Court of Yukon.

OBTAINING A MINING CLAIM IN YUKON

The primary legislation governing hard rock mining activities in Yukon, the QMA provides a system of allocation of exclusive rights to minerals. Specific permission must be obtained where the surface is occupied by others. Mineral tenure is granted under the free-entry system in Yukon. This system gives individuals exclusive right to publicly owned mineral substances from the surface of their claim to an unlimited extension downward vertically from the boundary of the claim or lease. All commissioner's lands are open for staking and mineral exploration unless they are expressly excluded or withdrawn by an order-in-council (EMR, 2018a). Exceptions to permitted areas include active quartz claims, First Nation Category A settlement land, curtilage (yard) or land immediately adjacent to a dwelling, agricultural land under active cultivation, land valuable for water power purposes, church grounds, cemeteries and burial grounds, and any land removed from staking by an order-in-council such as lands withdrawn for settling land claims, special land management areas, parks, airports and historic sites.

Before staking a claim, an individual or company is expected to reference the relevant maps available at a mining recorder's office (also available online) to determine where land is available for staking and where areas have been withdrawn from staking (QMA, ss. 23–33).

Claim tags from the mining recorder are required prior to staking in the field and posts should be placed in the ground according to regulated requirements. The mining recorder's offices have staking guides available, including information such as dimensions of a post and details of the information that must be placed on the claim tag. Yukon uses a two-post system with the claim lying on one side of the line joining the two posts (QMA, ss. 12, 23–40). Once a claim is located, it must be recorded with the mining recorder responsible for the district in which the claim is located. Claims must be recorded within 30 days of staking.

An application to record a claim must be submitted with all fees (\$10 per claim) and a sketch of claims. The application form must be notarized and can be delivered in person, by fax (with the original sent by mail) or mailed to the mining recorder's office. Payment can also be made in person or over the telephone with a credit card. A claim is not considered to be received until the fees have been collected by the mining recorder's office responsible for the district in which the claim is located. The date that the Application to Record form and fees are received is considered the recording date (anniversary date) (QMA, ss. 41–47).

The holder of a claim may abandon or relinquish any rights to their claims. If assessment work is not performed on a claim or payment in lieu is not made, the claim will lapse. There is a 14-day grace period after the expiry of the claim, during which assessment work which was done prior to the expiry date of the claim may be recorded without penalty (EMR, 2018a). Work filed after the grace period but before the six-month anniversary of the claim's expiration is subject to penalty fees. Work cannot be filed more than six months after the expiry date of the claim. If there is a dispute regarding claim boundaries, the holder of a claim may apply to have the claims surveyed. All surveys of mining claims must be completed by a Canada Lands Surveyor. The survey notice form must be completed and submitted to the mining recorder's office (EMR, 2018a).

Quartz leases are the most secure form of mineral title in Yukon (EMR, 2018a). Once a vein or lode is confirmed within the limits of the claim, the proponent may apply to lease the subsurface of their claim(s). Typically, companies contemplating production will take their claims to lease, which provides secure title and relieves them of their annual work requirement. Quartz leases are issued for 21 years and can be renewed for an additional 21-year term, provided that during the original term, all conditions of the lease and provisions of the legislation have been adhered to (EMR, 2018a). Appendix 1 contains a process map of obtaining mineral claims in Yukon.

EXPLORATION AND MINE NOTICE OF WORK PERMITS

Claim holders commence an application for exploration activities depending on the class of exploration. The *Quartz Mining Land Use Regulation* stipulates four categories (classes 1 through 4) for exploration activities with increasing potential to cause adverse environmental impacts.

Criteria considered in the categorization include construction structures, number of person-days in camp, total amount of fuel stored, trenching, number of clearings, new access roads and trails, and use of vehicles (Government of Yukon, n.d.-b) (see Appendix 1).

For classes 2 and 3, the proponent requires an environmental and socio-economic assessment and a mining land use approval. A water use notice and financial security may also be required. Continual monitoring, reporting and amendments to approvals will be issued as necessary. For Class 4, the proponent requires an environmental and socio-economic assessment, a water use license and mining land use approvals. Financial security may be required. Continual monitoring, reporting and amendments to approvals will be issued as necessary.

More details are available in the *Quartz Mining Land Use Regulation*. The following information is drawn from the EMR's previous website (EMR, 2015a).

Class 1 Program (Notification Required)

Activities within a Class 1 program are defined as "grassroots" low-level exploration activities, generally with low potential to cause adverse environmental effects, and where activities and reclamation are completed within a 12-month period. The requires that all placer and quartz claim holders and prospectors notify the Yukon government of their plans to conduct Class 1 mining exploration activities on designated lands across the territory. As part of this process, the Yukon government consults with affected First Nations and stakeholders within the designated Class 1 notification areas. A YESAA assessment is not required for a Class 1 program.

Class 1 programs are subject to random inspections by a natural resource officer from the EMR's Compliance Monitoring and Inspections branch. The natural resource officer will look for compliance with operating conditions and check that the activities fall within the criteria that define the Class 1 program. The Yukon government may collect security from some companies to cover potential liabilities, depending on the location and type of activities proposed.

Class 2 Program (Notification Required)

Class 2 programs represent the upper level of grassroots exploration activities. They typically comprise activities that have a moderate potential to cause adverse environmental effects and therefore require an assessment through YESAA. A Class 2 program must be completed within 12 months, including reclamation requirements and the removal of camps.

Proponents are expected to engage with the mining lands officer prior to submitting their projects to the DO in order to ensure that they are within the threshold of a Class 2. Once this is confirmed, the proponent needs to submit a Class 2 notification, which includes a proposal that describes the work anticipated under the project and how reclamation and decommissioning of the project will take place. The DO then reviews the proposal by seeking input from government agencies, First Nations, interested parties and the public. Key steps in this process are as follows:

- Once the DO has determined that the proposal is complete, it must publish notice of the proposal review on the YESAB Online Registry within six days.
- At that point, a public input period of 14 days begins, which can be extended by up to an additional 56 days if required.
- The DO reviews the proposal based on input received, and produces an assessment report with a recommendation on whether the project should (a) proceed as is, (b) proceed with terms and conditions, or (c) not proceed.
- The Yukon government's decision body for mineral exploration projects, the EMR's Mineral Resources branch, issues a decision document accepting, varying or rejecting the DO's recommendation within 30 days of receipt.
- The decision body can extend the timeline by seven days if consultation with a First Nation without a final agreement is required.
- Once the decision document is issued, the proponent must agree in writing to any additional mitigation set out in the decision document before the application can proceed. The proponent completes a Class 2 notification by including terms of the Yukon government decision document.
- If the notification form is complete, the mining lands officer officially accepts the notification and enters key information into the Mining Lands Public Registry.
- If the chief of mining land use determines that the notification form lacks necessary information, the proponent will be contacted. If the proponent cannot be contacted, the notification form will be returned to the proponent.
- Within 25 days, the chief of mining land use makes a decision on whether to approve the Class 2 notification or redirect it to a Class 3 or 4. If rejected, the proponent is notified. If the chief of mining land use approves it or does not respond to the proponent within 25 days, the proponent may proceed with the Class 2 exploration program.
- The proponent is responsible for checking for a written response from the chief of mining land use. Documents and requests for information will be mailed unless alternative contact methods have been requested, with details provided.

Class 3 or 4 Programs

All Class 3 and 4 programs require the submission of a detailed operating plan to the mining lands officer. The plan must be approved before any exploration activities can proceed. An operating plan package is available at the

mining recorder's office, and plans may entail multi-year exploration programs to allow greater flexibility.

The applicant specifies in the operating plan the proposed timeframe up to a 10-year duration, which the chief of mining land use may approve or alter. The operating plan outlines all the proposed project activities and requirements, as well as what measures will be undertaken to minimize any adverse effects on the environment. For Class 4 programs, the chief of mining land use may require the operator to consult the public. The applicant is responsible for outlining the operating procedures that will reduce potential effects to acceptable limits.

After contacting the mining recorder's office, the proponent fills out an application for a Class 3 or 4 quartz mining land use operating plan and submits it with fees to the office. The proponent then contacts the DO and submits additional paperwork with a copy of the Class 3 or 4 application. Key steps in the application for a Class 3 or 4 quartz mining land use approval are as follows:

- The DO reviews the project proposal by seeking input from government agencies, First Nations, interested parties and the public.
- Once the DO has determined the proposal is complete, it must publish notice of the review of the proposal on the YESAB Online Registry within six days. At that point, a public input period of 14 days begins, which can be extended by up to an additional 56 days if required.
- The DO completes its review based on input received and produces an assessment report, with a recommendation on whether the project should (a) proceed as is, (b) proceed with terms and conditions, or (c) not proceed.
- The EMR's Mineral Resources branch issues a decision document accepting, varying or rejecting the assessor's recommendation within 30 days of receiving the recommendation. The branch can extend the timeline by an additional seven days if consultation with a First Nation without a final agreement is involved.
- Once the decision body issues a decision document allowing the project to proceed, the mining lands officer drafts an approval and the chief of mining land use determines whether to approve the operating plan. Generally, this approval is issued promptly. The regulated timelines are available from the mining lands officer.
- If the operating plan is approved, the approval is issued with terms and conditions that conform to the decision document. If it is rejected, the proponent is notified.
- For Class 4 applications, the chief of mining land use has up to 67 days from the first publication of public notice to review comments, decide whether there is "significant public concern" and inform the applicant whether a public consultation is required and in what manner. The requirement for a public consultation could further increase the approval time period.

ENVIRONMENTAL SOCIO-ECONOMIC ASSESSMENT IN YUKON

ASSESSABLE ACTIVITIES

A mining project requires an assessment if the following conditions are met:

- The project will be located in Yukon.
- The *Assessable Activities, Exceptions and Executive Committee Projects Regulations* lists the intended project activity in schedules 1 or 3, and the activity is not a general exception under Schedule 2.
- One or more of the following circumstances are present:
 - a federal agency is the proponent;

- a territorial agency, municipal government, territorial independent regulatory agency or First Nation is the proponent;
- an authorization by a government agency, independent regulatory agency, municipal government or First Nation is required for the activity to be undertaken; or
- an authorization by the Governor-in-Council is required for the activity to be undertaken.

Under YESAA, a federal agency, federal minister, territorial minister or First Nation can require an assessment, if the project is likely to have significant adverse environmental or socio-economic effects in or outside Yukon or contribute significantly to cumulative adverse environmental or socio-economic effects, in combination with projects for which proposals have been submitted.

An assessment can also be required if an activity is undertaken in an area that contains a heritage resources; is a special management area; or is a habitat for any species or wildlife that is determined to be rare, threatened or endangered.

If it is deemed that the proposed activities are assessable, the proponent develops and submits a project proposal to one of two bodies. The proposal is submitted to a DO if the project or activity is not listed in Schedule 3 of the *Assessable Activities Regulations*, and then proceeds to the DO evaluation process.⁴ Alternatively, the proposal is submitted to the EC if the project or activity is listed in Schedule 3 and proceeds to the EC screening process.

The majority of assessments are conducted in the six community-based DOs located in Dawson City, Haines Junction, Mayo, Teslin, Watson Lake and Whitehorse. The EC typically assesses larger projects that are submitted to it directly or are referred by a DO.⁵

Finally, a YESAB panel may be established to assess projects that have potential significant adverse effects, are likely to cause significant public concern or involve the use of controversial technology. This is a referral by the EC under YESAA (s. 58.2). The other two principal pathways to a panel review are either through a referral as an outcome of a completed screening or upon request (YESAA, 2003, ss. 58.1.d, 60).

EVALUATION BY A DESIGNATED OFFICE

There are four key stages in a DO evaluation: the adequacy review, the evaluation, the recommendation and the decision (see Appendix 1). A project proposal for a DO evaluation contains information about the project, where it will be located, how it will be accomplished, when it will occur and other information that will be considered by the assessor while conducting an evaluation. Proposals for a project that would be located in a single assessment district are submitted to the DO for that assessment district. Proposals for a projects that would be located in two or more assessment districts can be submitted to any one of the assessment districts in which the project would be located.

The key steps in a DO evaluation are elaborated in the *Rules for Evaluations Conducted by Designated Offices* (YESAB, 2010). The following is a brief description, with the section of the DO rules indicated in parenthesis.

The DO completes the adequacy review within eight days of receiving the proposal (s. 12). The period can be extended to 21 days based on the complexity, size and location of the project (s. 15). Proposals are determined to be adequate if the proponent has accounted or matters in section 42 of YESAA, the proposal contains sufficient information for the DO to prepare a statement on the scope of the project, and if the proposal complies with the

⁴ For further detail and threshold criteria that distinguish larger projects, see the *Assessable Activities Regulations*. Sections 1–8 focus on mining activities.

⁵ There may be multiple information requests issued during the adequacy review stage and the time that a proponent takes to respond to a request is not factored in the 8–21 days (Reviewer 2, n.d.).

applicable rules and directives of the board, as outlined in section 14 of the DO rules.

If needed, the DO may request additional information from the proponent. Within 180 days of the date of the request, the proponent must respond or advise the DO when the information will be submitted (s. 18). Failure to meet this deadline without written explanation from the proponent will deem the proposal withdrawn. All supplementary information requested from a proponent should be provided to the satisfaction of the DO within two years from the date the proposal was first submitted (s. 18.3). If the proponent has not submitted the requested supplementary information at the expiry of the two-year period or any extension of time agreed, the proposal is deemed to have been withdrawn, and the DO notifies the proponent accordingly in writing at least 45 days prior (ss. 18.4–5). The DO must review the supplementary information provided by the proponent within 6–10 days from the date received (s. 13). At any time in reviewing the adequacy of a proposal, the DO may establish working groups to provide views and information about the adequacy of the information in the proposal, and may determine the terms of reference and composition of such groups (s. 19).

Once the proposal is accepted for evaluation, the DO is required to notify the proponent, decision bodies, any Yukon First Nation in whose territory the project would be located or may affect, and any person on the notification list. Next, the DO prepares a statement describing the scope project as laid out in Part 4 of the DO rules. Scope determinations are based on activities defined in the proposal and on other sufficiently related activities, considering the spatial and temporal proximity of the original activity to these activities, and whether they would occur with or without the original activity being undertaken. Scope modifications are permitted based on supplementary or other information received by the DO (s. 22), and the proponent and all persons on the notification list must be provided written notice of these changes. At the conclusion of its evaluation, the DO is required to provide a statement of its final determination of the scope of the project considered for the purposes of the evaluation (YESAA, 2003, s. 56).

The evaluation and recommendation commence with the DO publicizing a notice to seek views and information on proposals for a mandatory public comment period that can last from 14 to 35 days (s. 25). The DO can determine if an additional comment period (10–35 days) is required. The DO may hold public meetings and establish working groups to seek relevant information (ss. 32–33). The DO determines the format of public meetings and procedures to be followed at the meeting, including posting adequate notice to the proponent, the public, First Nation and others on the notification list, and preparing a reasonable record of the proceedings. All views and information are posted on the YESAB Online Registry.

Within three days of the close of the public comment period, the DO must determine one of the following next steps: (a) if it has sufficient information to conclude the evaluation, (b) if it requires supplementary information from the proponent to proceed with the evaluation, or (c) if it will provide an additional comment period.

If the DO requests supplementary information, the proponent is required to submit it or advise the DO of the date on which it will be provided, within 28 days of the date of the request (s. 36). Unless agreed to otherwise, the proponent should supply the supplementary information to the DO's satisfaction within one year from the date the evaluation commenced. Failure to do so will deem the proposal to have been withdrawn. In such cases, the DO must inform the proponent in writing at least 45 days in advance of the proposal being deemed withdrawn and discontinue the evaluation.

Within 14 days of determining whether sufficiency thresholds are met to conclude its evaluation, the DO makes a recommendation or referral under section 56 of YESAA. This period may be extended for an additional 21 days, with written notification to the proponent and all persons on the notification list including stakeholders laid out in section 31 of the DO rules.

Typically, one of four recommendations is possible: to proceed, to proceed with terms and conditions, not to proceed, or to refer the file to the EC for screening. In the first three cases, the next stage is initiated.

The decision stage commences when the decision bodies receive the recommendation report.⁶ Decision bodies are expected to carefully consider scientific information, traditional knowledge and other information that is provided with the recommendation. They must prepare a decision document with reasons for accepting, varying or rejecting the recommendation. In the case of accepting or varying the recommendation, the proponent may proceed with the application or a mining land use approval and water use notice (as required).

EVALUATION BY THE EXECUTIVE COMMITTEE

There are four key stages in an EC evaluation: the adequacy review, the scope determination and screening, the recommendation, and the decision (see Appendix 1).

The adequacy review begins when the proponent submits the proposal to the EC according to Schedule A – Project Proposal Requirements of the 2005 *Rules for Screening Conducted by the Executive Committee* (YESAB, 2005). The following is a brief description, with the section of the EC rules indicated in parenthesis unless otherwise indicated.

The EC determines if the proposal is adequate based on section 19 (within 60 days or extended for further 30 days). At this juncture, the EC may establish technical review or advisory committees to seek views on the adequacy of the proposal.⁷ The EC will deem a proposal to be adequate if the proponent has consulted with First Nations communities (YESAA, 2003, s. 50[3]), has taken into account matters referred to in paragraphs 42(1)(b), (c), and (e) to (h) of YESAA. The proposal must also contain sufficient information to enable the EC to prepare a statement of the project's scope (s. 34) and commence screening. In If the EC determines further supplementary information is required, an additional 30 days for review and 30 days for extension are permitted. The proponent has 180 days to respond to the notice or provide supplementary information.⁸ If the proponent does not respond or advise the EC within this period, the proposal is deemed withdrawn and no further action is needed from the EC. If the proposal is adequate, the EC notifies the proponent and decision bodies in writing.

The scope determination and screening commence when the EC publishes a notice of screening. The EC prepares a statement describing the scope of the project as required under section 34 of the EC rules. The scope includes any activity identified in the project proposal, as well as other activities that the EC considers likely to be undertaken that are sufficiently related to the project (YESAA, 2003, s. 51). Furthermore, section 35 of the EC rules state that the EC should consider:

- (a) whether it is reasonably likely that the activity would proceed without the other activity being undertaken;
- (b) whether the decision to undertake the activity makes it inevitable that the other activity will be undertaken; and

⁶ According to the YESAA, a decision body means: a) a First Nation, if the project is to be located wholly or partly on its settlement land and it has the power under the Yukon First Nations Self-Government Act or under its final agreement to issue the required authorization, or if the First Nation is the proponent, and no decision document is required from any federal agency or territorial minister; b) the territorial minister, if any territorial agency, municipal government or territorial independent regulatory agency has the power to issue the required authorization, is the proponent, or is responsible for administering the administration of mines and minerals in Category B or fee simple settlement land or Tetlit Gwich'in Yukon land, where the project involves a right to work those mines and minerals; c) any federal agency that has the power to issue the required authorization or is responsible for the administration of mines and minerals in Category B or fee simple settlement land or Tetlit Gwich'in Yukon land, where the project involves a right to work those mines and minerals; d) the federal minister, if the project is to be located wholly or partly on non-settlement land, and the territorial minister is not a decision body or is a decision body but the Governor-in-Council has the power to issue the authorization or a federal independent regulatory agency is the proponent; or e) the federal minister, if the project is to be located wholly or partly on non-settlement land and the Governor-in-Council or a federal independent regulatory agency has received the application for financial assistance for the project.

⁷ Section 61 of the EC rules states that the EC may determine the format and procedures of public meetings held during the screening stage. Both proponents and the public require reasonable notice of the meeting, the proponent must be invited and a reasonable record of the meeting must be maintained.

⁸ Notwithstanding any other provision, unless otherwise agreed to in writing by the EC and the proponent, all required supplementary information is to be provided to the EC within two years from the date the proposal is first submitted to the EC. Beyond that two-year period, if an extension was not previously negotiated, the proposal is deemed to be withdrawn and no further action is required from the EC.

(c) spatial and temporal proximity of the activity to the other activity.

The EC rules also provide for modifications to the scope of the project and related notifications (ss. 37–38). At the conclusion of its screening, the EC prepares a statement setting out its final determination of the scope of the project, including its written reasons made under section 58 of YESAA.

Within six days of sending notice to the proponent under section 26 of YESAA, the EC publishes a notice that it is conducting a screening of the project on the YESAB Online Registry, and other publicity avenues it deems appropriate. The EC prepares a notification list for each screening that includes any First Nation consulted, any government agency, independent regulatory agency or First Nation that has notified the EC of interest in the project, and any person having an interest in the outcome of screening. After this, the public is invited to submit views and information, including through public meetings, during a 30-day comment period, which may be extended at the EC's discretion (ss. 42–43).

The EC then assesses comments and information within 21 days after the close of the public comment period, which can be extended for further 21 days (s. 44–47). Based on this review, the EC may determine it either needs more information or has sufficient information to proceed. If it needs more information, it will request it from the proponent, who has to respond or indicate when the response will be submitted (within two years or else the proposal will be deemed to be withdrawn).

If the EC has sufficient information to proceed, it prepares a draft screening report, subject to YESAA. The EC will publish a notice of the report's completion on the YESAB Online Registry within 120 days of notifying the proponent under section 44 of the EC rules that it has sufficient information to prepare the draft screening report or under section 46 that the supplementary information requirements have been satisfied.

Following the notice of completion of the draft screening report, the public is invited to submit views and comments on the report for a period of 30 days (ss. 51–52). Within 21 days of the close of the comment period, the EC may determine that it has sufficient information from the proponent to conclude its screening or that it requires supplementary information from the proponent before concluding its screening, and notifies the proponent in writing accordingly (s. 56).

Within 21 days of receiving supplementary information pursuant to a notice, the EC will determine whether the information is satisfactory and notifies the proponent in writing accordingly. If the information provided is not satisfactory, the EC's notice will specify any deficiencies (ss. 54–56).

The recommendation stage takes place within 60 days of the EC's aforementioned notification to the proponent (YESAA, 2003, s. 58). Before making its recommendation or requiring a review of the project under that section, the EC can seek views about the project and information relevant to the screening from any person on the notification list.

The EC may conclude the screening after the 30-day public comment period (s. 42[b]) and require a review if⁹:

(a) after taking into account any mitigating measures included in the project proposal

(i) it determines that the project might contribute significantly to cumulative adverse environmental or socio-economic effects in Yukon, or that the project is causing or is likely to cause significant public concern in Yukon;

or

(ii) it cannot determine whether the project will have significant adverse environmental or socio-economic effects; or

(b) it determines that the project involves technology that is controversial in Yukon or the effects of which are unknown.

⁹ As noted earlier, this is only one pathway to a panel review, and other conditions would apply in those instances (YESAA, 2003, ss. 58[1][d] or 60).

Requests for review can also be made to the EC by the federal minister, the territorial minister, or a First Nation, with consent from the federal or territorial minister.

In the decision stage, a decision body considering a recommendation in respect to a project is required to consider scientific information, traditional knowledge and other information provided with the recommendation.

At this point in the process, decision body can either refer the recommendation back to the EC for reconsideration or move on to prepare the decision document.

If the decision body returns the recommendation to the EC, it publishes a notice of referral. The EC then invites the public and members on the notification list to submit their views about the referral within 21 days, after which it reviews this information and prepares a new recommendation.

If the decisions body chooses to proceed, three outcomes are possible. It may accept the recommendation, advance a varying recommendation or reject it. In the case of accepting or varying the recommendation, the proponent may be required to submit additional plans to the EMR prior to the issuance of a quartz mining licence or mining land use approval. The proponent would also then need to proceed through the process for obtaining a water use licence.

MINE DEVELOPMENT PERMITS

As outlined above, any major hard rock mining project in Yukon requires a detailed ESA and various regulatory approvals. These approvals include, but are not limited to, a water licence and a quartz mining licence. As the scope of the analysis in this report only focuses on the ESA component, the processes to obtain water and quartz mining licences are not covered. In summary, all projects must go through two distinct stages before mining activity can commence. First, an assessment determines whether significant adverse environmental or socio-economic effects are likely to occur as detailed in the EC and DO evaluation processes. Once those are complete, the second phase, which involves a regulatory licensing approval process, needs to take place.

CORRUPTION CHECKS IN YUKON

In Yukon, legislation to control and minimize corruption and transparency issues include the *Elections Act* (2002), the *Conflict of Interest (Members and Ministers) Act* (2002) and the *Public Service Act* (2002).

Unlike other Canadian jurisdictions, YESAB is not part of the Yukon government. It is an independent board, whose seven members are nominated and appointed as per specifications in YESAA (2003). YESAB's governance framework outlines the roles, responsibilities and relationships between the board, executive committee, panels of the board, management, administration and priority setting (YESAB, 2017c). One member of the executive committee is nominated by the CYFN and one member is nominated by the territorial government. The chair is appointed after the federal minister consults with the other two executive committee members. Of the four remaining board members, two are nominated by CYFN, one is nominated by the territorial government and one is a direct appointment by the federal minister.

Some stakeholders suggest that one of the benefits of an independent board is that it is less subject to political influence and regulatory capture. However, others see the need for better disclosure of relationships and potential conflicts of interest between the mining industry, elected officials and other relevant parties.

The *Extractive Sector Transparency Measures Act* (2014), introduced federally in 2015, requires mandatory reporting of payments (such as taxes, royalties, fees, production entitlements, bonus, dividends or infrastructure improvement payments) exceeding \$100,000 by Canadian companies in the extractive sector to government-related entities (including Indigenous governments) and individuals (Natural Resources Canada, 2017). The act targets companies on the Canadian stock exchange and private companies that meet certain thresholds. Failure to meet its requirements can result in a \$250,000 fine per day of non-compliance (Natural Resources Canada, 2019).

4 Methodology

RESEARCH DESIGN

This section provides an overview of the research design choices and rationale underpinning the jurisdictional assessment of transparency and accountability vulnerabilities in the process leading up to the issuance of decision documents for assessable mining activities in Yukon.

Research Design: The project’s overall research design can be best described as a qualitative case study. As Baxter and Jack (2008) convey, rigorous qualitative case studies afford researchers opportunities to explore or describe a phenomenon in context using a variety of data sources. The largely descriptive research questions and research objectives set out in the previous section lend themselves to qualitatively oriented interrogation given their alignment with four criteria identified by Yin (2003). He proposes that this research design should be adopted when: (a) the focus of the study is to answer “how” and “why” questions; (b) the researcher cannot manipulate the behaviour of those involved in the study (unlike some psychological tests for example); (c) the researcher aims to cover contextual conditions because they are relevant to the phenomenon under study; or (d) the boundaries are not clear between the phenomenon (transparency and accountability vulnerabilities) and contextual conditions. The overall research design was closely guided by Transparency International’s Mining Awards Corruption Risk Assessment (MACRA) Tool, which is described in further detail in the section that follows.

Unit of Analysis, Measures and Choice of Field Sites: In line with guidance from Transparency International Canada, the research team conceptualized the phenomenon of concern as corruption vulnerabilities, and operationalized the measurement of this concept as a combination of accountability and transparency gaps and informed by context-specific nuances. The primary unit of analysis is the environmental and socio-economic impact assessment process for mining projects within the case of interest — Yukon. Field sites were chosen based on key characteristics such as access to key informants, ease of geographic access and likelihood of exposure to key concepts of concern. Based on these criteria, field-based research activities were implemented in Whitehorse where a critical mass of academics, ESA experts and mining companies tend to be based, as well as being the seat of government agencies and a number of First Nations governance bodies; and in two areas that serve as illustrative cases for mining-affected communities in Yukon, namely Mayo and Dawson City. A research licence was obtained for conducting the project-based activities in line with the *Scientists and Explorers Act* (2002).

Data Sources and Coding Process: The main data sources used to inform the analysis provided in this technical report included a desk-based literature review of existing policy documents, regulations, legislation, grey literature, media reports and case law. This baseline data was supplemented by semi-structured in-depth interviews with key informants in Yukon, as well as focus group meetings in Mayo and Whitehorse. These data sources were qualitatively reviewed and coded by the research team to corresponding risks in the MACRA Tool. Risks without a corresponding pre-identified risk were identified as context specific in the analysis. The risk matrix approach was used for assessing risks, and a preliminary validation of the risk assessment was done via a multi-stakeholder workshop in Whitehorse.

Sampling Method: Key informants were identified first via the creation of a stakeholder map of diverse stakeholders who would have relevant knowledge on Yukon’s assessment process, based on publicly available information. Potential interview subjects were then approached following best practices for participant recruitment in research studies, such as the provision of an initial contact letter that outlined the research study’s objectives and outputs, information related to confidentiality, incentives for participation, and clarification that monetary compensation would not be provided in exchange for participation, among other issues. Gender disaggregated data for contacted and consenting research participants is provided below (Figures 1, 2, 3 and 4).

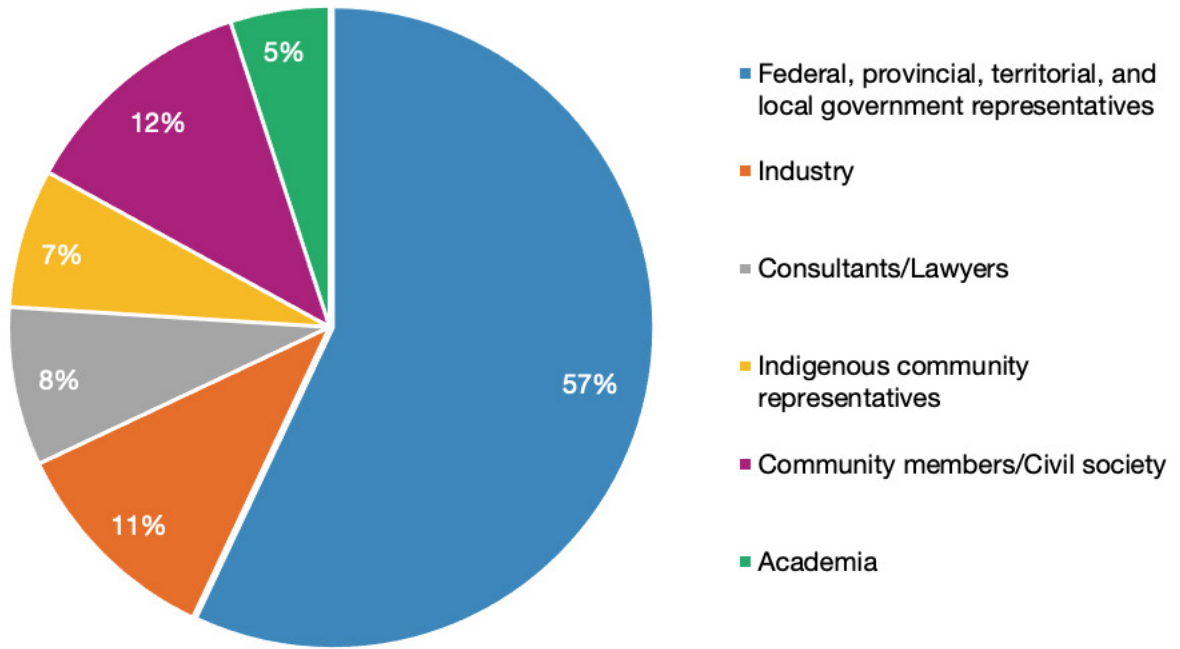


Figure 1: Contacted research participants by stakeholder group [N=101]

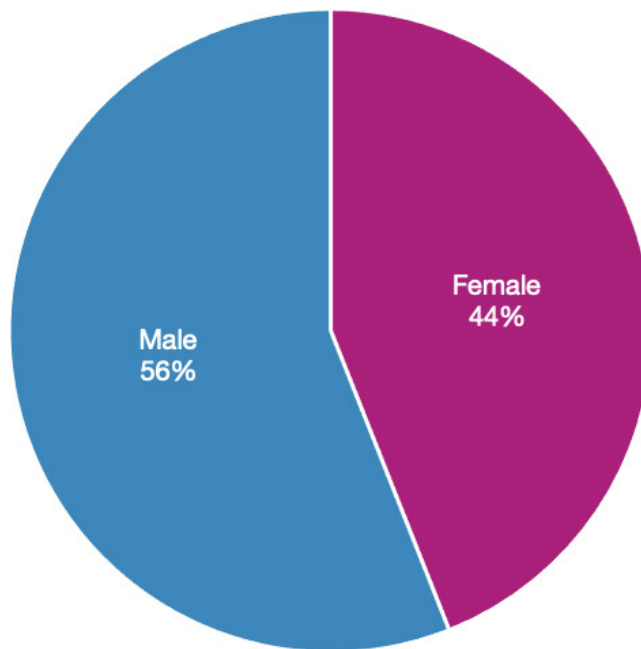


Figure 2: Contacted research participants by stakeholder group [N=101]

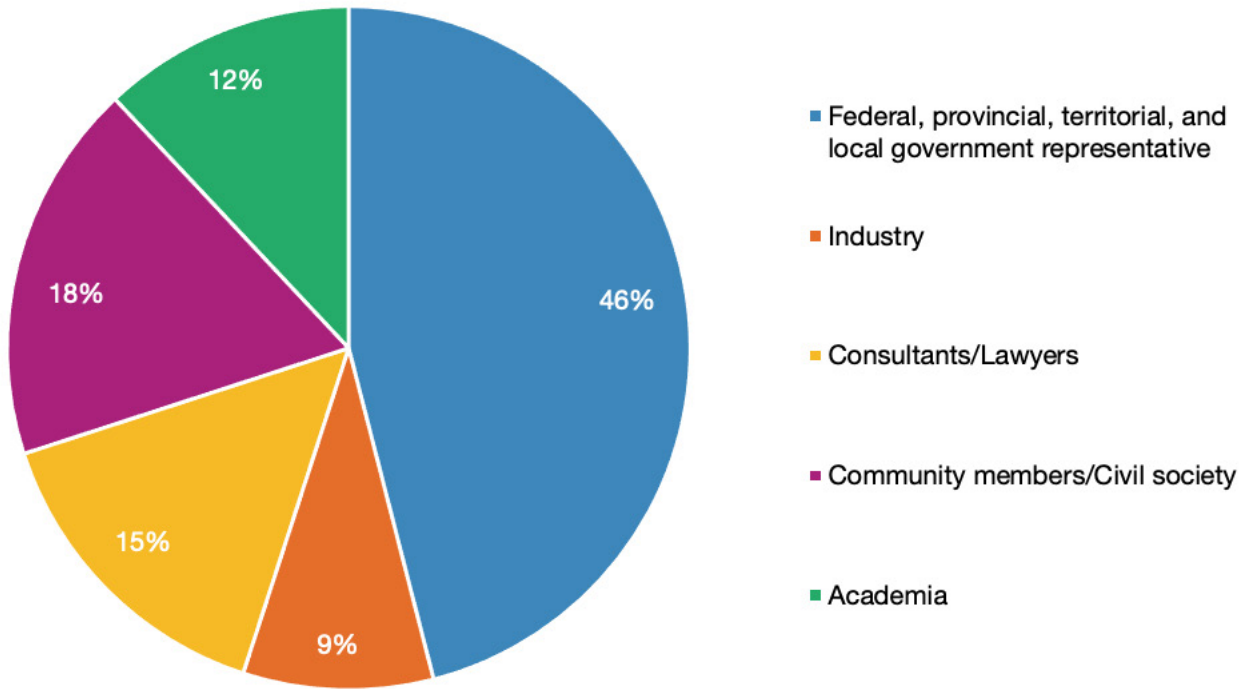


Figure 3: Consenting research participants by stakeholder group [N=33]

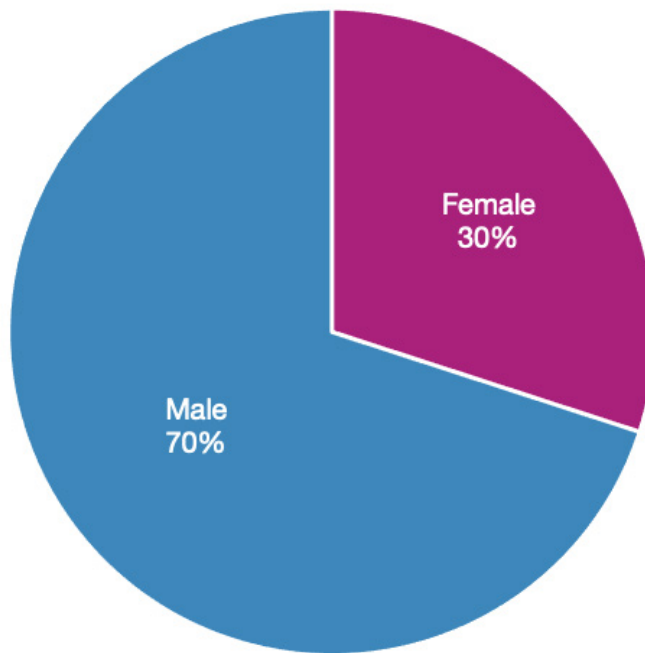


Figure 4: Consenting research participants by gender [N=33]

Risks of the Chosen Research Design and Mitigations: One of the common pitfalls associated with case study-oriented research designs is what is colloquially referred to as “scope creep” — the tendency for researchers to attempt to answer a question that is too broad or a topic that has too many objectives for one study. Following best practices, the report lays out clear scope conditions and objectives in Section 3.1 (Bennett & Elman, 2006; Baxter & Jack, 2008; Palys, 2008; Blatter et al., 2016; Gerring, 2017). In this regard, the establishment of analytical boundaries in a qualitative case study design is similar to the development of inclusion and exclusion criteria for sample selection in a quantitative study.

Some observers may suggest that the chosen research design and sampling strategy resulted in a focus on elites (policy and technical experts, civil society, industry associations and political associations) that may obscure wider or more grassroots perspectives on transparency and accountability risks related to Yukon’s ESA process. This would be a fair critique of the technical report. As with most research design choices, this project involved an assessment of trade-offs across available options.

Two practical issues led to a sampling technique that focused on elites (macro level) rather than a cross-section of stakeholders in mining communities (micro level). First, the relatively short implementation horizon was not conducive for adopting participatory action research methods that could have been more effective in surfacing a broad cross-section of views at the micro level. This is especially true for research partnerships with First Nations that require a number of protocols and engagement practices that should be observed in order to avoid perpetuating the harmful appropriation of First Nations and Indigenous knowledge, and fostering mutual trust-based relations that are aligned with broader priorities of reconciliation in Canada. Second, the lack of additional resources to sustain continuous dialogue with those engaged at a (micro) community level beyond the research timeline was an additional deterrent to adopting a more broad-based localized participatory research process. If pursued, such a process would have been at high risk of being perceived as purely extractive for the benefit of the research team, with low benefits to individual research participants.

Finally, although there is some risk of self-selection bias among the respondents who chose to participate in this study, this bias was moderate given the broad cross-section of stakeholders identified via the stakeholder mapping exercise, and the addition of the snowball or chain-referral sampling method as a complementary outreach method (Lewis-Beck et al., 2004). This method involves requesting initial research respondents to provide recommendations for further key informants.

THE MACRA TOOL

This research was conducted using the MACRA Tool, a methodology created specifically for Transparency International’s Accountable Mining Program for application to legal (regulated) mining activities. By following the methodological steps of this tool, which will be further explained in this section, the research team outlined certain vulnerabilities related to transparency and accountability in the EA process in Yukon. These vulnerabilities create certain risks, which were also highlighted in this research and assessed in terms of likelihood and potential impact.

The MACRA Tool aims to shed a light on where practice diverges from regulation, or where implementation issues that were not contemplated or intended by the legislation arise. It was designed to study legal, regulated mining. It was not designed to assess illegal mining, nor does it take into consideration the oil and gas sector, which has a distinctive set of risks that are beyond the scope of this tool (TI, 2017). In the MACRA Tool, “awards” means permitting or leasing regulations.

METHODOLOGICAL STEPS

The MACRA Tool is a qualitative assessment methodology with nine steps (see Figure 5). TI Canada was responsible for conducting this research in Canada and, thus, for performing all the outlined steps, including defining the scope (Step 1). To better understand the process being assessed, the research team developed a process map

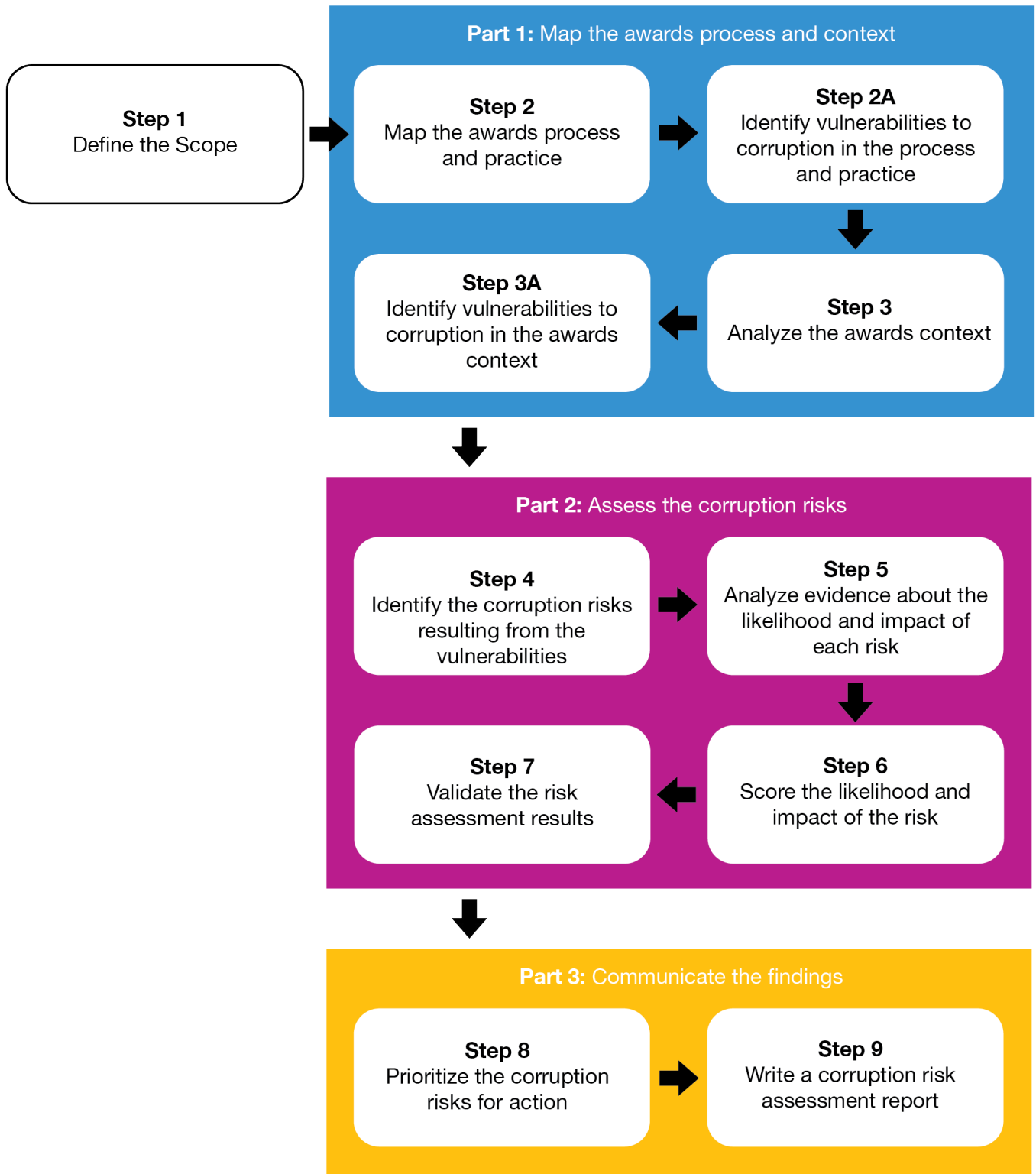


Figure 5: Methodological steps of the MACRA Tool

(Step 2) that shows the steps involved in granting an EA permit for mining projects. This map builds the foundation for the identification of vulnerabilities (Step 2A) that could create opportunities for corruption (TI, 2017).

In addition to the process design and implementation, political, economic and societal factors also influence the mining sector and how the mining awards process is administered and operates (TI, 2017). Therefore, major political, economic, social, and technological factors (PEST analysis) were considered. This contextual analysis is in Step 3, and Step 3A identifies contextual vulnerabilities.

The MACRA Tool is modelled on a qualitative assessment methodology that includes nine steps, as laid out in Figure 5.

Step 1, defining the scope of the analysis, as described earlier was established by TI Canada. Therefore, the research reported in this document starts by developing a process map (Step 2) that shows the steps involved in the issuance of a decision document for assessable mining activities in Yukon. The process map provided in Appendix 1 sets a baseline for the remainder of the risk assessment.

The MACRA methodology provides a systematic framework for assessing areas where practice diverges from the official process, or where implementation issues arise that were not contemplated or intended by the legislation. It also helps researchers to understand and to explain the steps, actors and requirements of the assessment process, while assessing the root cause of divergence between de jure and de facto aspects, and implementation challenges or concerns. Moreover, the process map enables researchers to identify potential accountability or transparency vulnerabilities, creating opportunities for corruption in the process (Step 2A) and recording them on the associated process step for future discussion and analysis (TI, 2017).

In addition to the design and implementation of assessment-related processes, characteristics of the prevailing political, economic and social fabric within which these processes are embedded also influence outcomes (TI, 2017). Therefore, Step 3 involves understanding the sector-specific context in which the assessment process takes place and Step 3A identifies the contextual vulnerabilities. Major political, economic, social and technological factors (PEST analysis) are considered in the contextual analysis in this research.

The next step in the MACRA process involves risk assessment. As shown in Figure 5, the risk assessment is performed in four steps that identify corruption risks resulting from the vulnerabilities (Step 4), analyzing evidence about the likelihood and impact of each risk (Step 5), scoring the likelihood and impact of the risk (Step 6), and validating the risk assessment results (Step 7).

The MACRA Tool lists 80 pre-defined corruption risks that provide a coding framework for the identification of relevant risks resulting from the vulnerabilities, determined in steps 2A and 3A. It groups these risks into four risk categories: contextual factors (CF); process design (PD); process practice (PP); and community consultation (CC). Each risk code is denoted by the category, followed by a number (for example, CF 1).

The research team also considered risks in light of the local context. The team coded any risk that did not have a corresponding pre-identified risk in the MACRA Tool under the corresponding group, followed by the letter "N" to denote a new risk and then the risk number. For example, PD-N30 would be a new context-specific process design risk numbered 30.

In order to conduct the risk assessment, the team determined the score for likelihood and impact of each listed risk based on the evidence collected during the data collection for mapping the process and ascertaining vulnerabilities. Thus, steps 5 and 6 are completed simultaneously.

The team included primary data from interviews and focus group meetings and secondary data from the literature, including peer-reviewed and media articles, reports, as well as deviations from the official process in practice as evidence in the study. In Step 5, likelihood is based on the probability that the identified transparency or

accountability risk will occur, and impact is based on how that identified risk is likely to undermine public trust and confidence environmental and socio-economic impact assessments for mining activities in Yukon.

The team used the collected evidence to understand the impact of transparency and accountability vulnerabilities on:

- Accountability, fairness and efficiency in decision-making about the allocation of public resources
- Rights to ownership and access by communities to land and water
- Standards for the environment and treatment of communities
- Fair benefit sharing and transparency for the public and landholders about the management of their resources
- Competition in the mining sector and attracting investors
- Quality of projects with qualified companies with expertise, experience and resources
- Revenue to the state from application fees, and flow-on effects on royalties and taxes from poor projects that result from a corrupt awards process
- Fairness to firms obeying the law and following proper process
- The reputation of Canada, government and Canadian mining industry
- The legitimacy of public institutions and the mining sector as a whole

Scoring the likelihood and impact of risks is completed in Step 6. Scoring is performed on a five-point scale for both likelihood and impact, as given in Table 3 below:

Table 3: Scoring scale of likelihood and impact of risks

Likelihood Scoring	Impact Scoring
5 out of 5: almost certain an event is going to happen	5 out of 5: significant impact on the entire mining industry in Canada, the entire awards system and/or an entire community
3 out of 5: possible that an event will occur — there is a 50-50 chance	3 out of 5: a moderate impact on the EA process
1 out of 5: an event is unlikely	1 out of 5: insignificant impact

Last but not least, validating the risk assessment results is Step 7. For the purposes of this analysis, steps 6 and 7 were conducted by focus group experts. The risk assessment validation is preliminary in nature, and additional clarification would be needed to build a common understanding and consensus among stakeholder groups about the most pressing and critical vulnerabilities that have a bearing on the ESA assessment process for mining activities in Yukon. The preliminary risk scores are listed from the most critical with the highest score to the lowest score in Step 8, and the recommendations and discussion on these are completed in Step 9.

CIRDI emphasizes that the resulting analysis is not intended to benchmark environmental assessment processes across Canadian jurisdictions, nor should it be interpreted as a rating of Yukon’s ESA process. The findings from the research are meant to serve as a primer for discussion on the identified vulnerabilities and for TI to facilitate these discussions such that a coalition of like-minded individuals and organizations can collaborate to alleviate or mitigate vulnerabilities on a priority basis.

5 Analysis

PROCESS MAPS AND VULNERABILITIES

The MACRA Tool specifies the inclusion of legislated steps set out in policy and law and what happens in practice (TI, 2017). A detailed process map was developed for the YESAA process and is presented in Appendix 1. It covers staking, exploration activities, the determination of assessable activities and evaluation processes carried out by the DOs and the EC.

Seven vulnerabilities were identified for the DO assessment process (Table 4). Eight vulnerabilities were identified for the EC assessment process (Table 5). Vulnerabilities were not assessed either in the claims submission and exploration application phases that immediately precede Yukon's ESA process, or in the issuance of licences and permits that follow the ESA process.

As such, the analysis pertains only to process steps that commence from the point at which an activity is deemed assessable under current ESA provisions (YESAA schedules 1, 2, 3) and is referred to a DO or the EC for review, culminating in a decision document.

The MACRA Tool's step of identifying process map vulnerabilities is usefully followed by an evaluation of vulnerabilities gleaned from a contextual analysis of the ESA process in Yukon. Next, all vulnerabilities are mapped to the 80 risks in the MACRA risk coding tool. The consolidated risks, and the rationale and evidence for why they are flagged as such, are explained in more detail in Section 6 of this report.

Table 4: DO evaluation process vulnerabilities for transparency and accountability

Stage	Identified Vulnerabilities
<p>Adequacy Review</p>	<p>PR-V1. There is a lack of clarity on how relevance is determined when requesting supplementary information from proponents, such that consistency across projects that are similar in scale and scope is maintained. This risk can occur at multiple points in the process where supplementary information is requested.</p>
	<p>PR-V2. There is a gap between legislation and rules in terms of the adequacy review. Section 42 of YESAA stipulates that paragraphs (1) (a)–(f) must be considered. However, section 14 of the DO rules focuses on assessing adequacy based on section 42(1)(b), (c), (e) and (f) of YESAA. The rules do not include 42(1)(a) the purpose of the project, (d) the significance of any adverse cumulative environmental or socio-economic effects, (g) the need to protect the rights of Yukon Indian persons under final agreements, and (h) the interests of residents of Yukon and of Canadian residents outside Yukon as listed in the legislation.</p>
<p>Evaluation and Recommendation</p>	<p>PR-V3. Procedural guidance on the format and process for meaningful public engagement is unclear. Section 33 of the DO rules state that DOs will determine the format and process to be followed, as well as how outcomes are recorded and reported. This risk can occur at multiple points in the process where public engagement is stipulated.</p>
	<p>PR-V4. Stakeholders noted that added mechanisms are needed to ensure proponents present a thorough, balanced and technically sound proposal for assessment.</p>
	<p>PR-V5. Stakeholders expressed a lack of trust in the information (assessment results) presented by proponents.</p>
<p>Decision</p>	<p>PR-V6. There is a lack of clarity among stakeholders as to whether the decision body (in practice) adheres to legislated requirements to make a thorough and fair consideration of public or technical comments noted in the registry, in addition to the recommendation report.</p>
	<p>PR-V7. As delegated by the premier, decision bodies have the final authority to make decisions on the project. For mining, the designated decision body is the EMR (and may also involve federal government departments and First Nations depending on the project’s location). Stakeholders raised concerns about this vested authority on ESA matters due to the EMR’s dual mandate to both regulate and promote mining.</p>

Table 5: EC evaluation process vulnerabilities for transparency and accountability

Stage	Identified Vulnerabilities
<p>Adequacy Review</p>	<p>PR-V1. There is a lack of clarity on how relevance is determined when requesting supplementary information from proponents, such that consistency across projects that are similar in scale and scope is maintained. This risk can occur at multiple points in the process where supplementary information is requested.</p>
	<p>PR-V2. There is a gap between legislation and rules in terms of the adequacy review. Section 42 of YESAA stipulates paragraphs 1(a)–(f) must be considered. However, the EC rules determine adequacy if the proposal considers paragraphs 42(1)(b), (c), and (e)–(h) of YESAA. The rules do not include 42(1)(a) the purpose of the project, (d) the significance of any adverse cumulative environmental or socio-economic effects, (g) the need to protect the rights of Yukon Indian persons under final agreements, and (h) the interests of residents of Yukon and of Canadian residents outside Yukon as listed in the legislation</p>
<p>Screening and Recommendation</p>	<p>PR-V3. Procedural guidance on the format and process for meaningful public engagement is unclear. Sections 61–62 of the EC Rules state that the EC will determine the format and process to be followed, as well as how outcomes are recorded and reported. This risk can occur at multiple points in the process where public engagement is stipulated.</p>
	<p>PR-V4. Stakeholders noted that added mechanisms are needed to ensure proponents present a thorough, balanced and technically sound proposal for assessment.</p>
	<p>PR-V5. Stakeholders expressed a lack of trust in the information (assessment results) presented by proponents.</p>
<p>Decision</p>	<p>PR-V6. There is a lack of clarity among stakeholders as to whether the decision body (in practice) adheres to legislated requirements to make a thorough and fair consideration of public or technical comments noted in the registry, in addition to the recommendation report.</p>
	<p>PR-V7. As delegated by the premier, decision bodies have the final authority to make decisions on the project. For mining, the designated decision body is the EMR (and may also involve federal government departments and First Nations depending on the project’s location). Stakeholders raise concerns about this vested authority on ESA matters due to the EMR’s dual mandate to both regulate and promote mining.</p>

PEST ANALYSIS AND VULNERABILITIES

As outlined in the MACRA Tool methodology, the PEST analysis takes into consideration the contextual factors of the jurisdiction and the sector more broadly. For this reason, some contextual factors that precede or follow Yukon’s ESA process for assessable activities via the DO or EC process are also considered (for example, the staking regime as well as post-assessment compliance activities). The PEST analysis worksheets required as part of the MACRA methodology are presented in Appendix 2. The PEST analysis was informed using literature as well as the interviews and focus group discussions. A summary of transparency and accountability vulnerabilities identified from the PEST analysis is included in Table 6 below:

Table 6: Vulnerabilities identified in the PEST analysis

Political, Social, Economic and Technological Vulnerabilities
PE-V1. Current system for mineral staking in Yukon creates uncertainty about land use.
PE-V2. There is a lack of clarity regarding due diligence that may take place when evaluating companies eligible for staking or developing a mining claim and regarding the veracity of information provided.
PE-V3. Procedural guidance on the format and process for meaningful public engagement is unclear.
PE-V4. Staff turnover and variable technical capacity of YESAB staff raise concerns about the consistency of assessments across projects.
PE-V5. Agreements are negotiated between the proponent and First Nations, communities and landowners and can be closed-door processes that are not made publicly available.
PE-V6. Regulatory overlap between the Yukon Water Board, YESAB and the Yukon government may create uncertainty about lines of accountability and authority.
PE-V7. As delegated by the premier, decision bodies have the final authority to make decisions on the project. For mining, the designated decision body is the EMR (and may also involve federal government departments and First Nations depending on the project’s location). Stakeholders raise concerns about this vested authority on ESA matters due to the EMR’s dual mandate to both regulate and promote mining.
PE-V8. Provisions exist for YESAA to assess cumulative effects at a regional scale on request. The implications of such assessments for environmental assessment considerations at the project level are unclear.
PE-V9: There is little enforcement and compliance stemming from the YESAA process.
PE-V10: The Crown’s formal duty to consult is activated at the decision stage, although procedural aspects of the consultation may be fulfilled through the assessment process. In practice, there is potential for closed-door discussions to be held between First Nations and the Crown in the decision stage, and this may affect incentives for stakeholder participation during earlier phases of the assessment process.
PE-V11: First Nations experience resource constraints that impede their capacity for meaningful participation and/or acting as a decision body.

TRANSPARENCY AND ACCOUNTABILITY VULNERABILITIES AND RISKS

Tables 7 and 8 outline the risks that were evaluated based on vulnerabilities identified in the process mapping and PEST analysis.

Table 7: Risks associated with vulnerabilities identified in the process mapping.

Identified Vulnerabilities	Resulting Corruption Risk	MACRA Risk Factor Code
PR-V6. There is a lack of clarity among stakeholders as to whether the decision body (in practice) adheres to legislated requirements to make a thorough and fair consideration of public or technical comments noted in the registry, in addition to the recommendation report.	There is inadequate due diligence on applicants' claims regarding their capacity and financial resources	PP-12
PR-V7. As delegated by the premier, decision bodies have the final authority to make decisions on the project. For mining, the designated decision body is the EMR (and may also involve federal government departments and First Nations depending on the project's location). Stakeholders raise concerns about this vested authority on ESA matters due to the EMR's dual mandate to both regulate and promote mining.	External interference on ministerial decision making	PD-14
PE-V4. Staff turnover and variable technical capacity of YESAB staff raise concerns about the consistency of assessments across projects.	EA decisions being based on imprecise data	PP-14
PR-V3. Procedural guidance on the format and process for meaningful public engagement is unclear. Sections 61–62 of the EC rules state that the EC will determine the format and process to be followed, as well as how outcomes are recorded and reported. This risk can occur at multiple points in the process where public engagement is stipulated.	The legal framework for consultation with communities is not clear	CC-1b
PR-V1. There is a lack of clarity on how relevance is determined when requesting supplementary information from proponents, such that consistency across projects that are similar in scale and scope is maintained. This risk can occur at multiple points in the process where supplementary information is requested.	Criteria or scope for EA across similar project categories are not defined	PD-N3

Identified Vulnerabilities	Resulting Corruption Risk	MACRA Risk Factor Code
<p>PR-V4. Stakeholders perceived that added mechanisms are needed to ensure proponents present a thorough, balanced and technically sound proposal for assessment.</p> <p>PR-V6. There is a lack of clarity among stakeholders as to whether the decision body (in practice) adheres to legislated requirements to make a thorough and fair consideration of public or technical comments noted in the registry, in addition to the recommendation report.</p>	No sufficient verification of EA reports to ensure an accurate impact description	PD-N5
<p>PR-V2. There is a gap between legislation and rules in terms of the adequacy review. Section 42 of YESAA stipulates paragraphs (1)(a)–(f) must be considered. However, section 19 of the EC rules determine adequacy if the proposal takes into account paragraphs 42(1)(b), (c), and (e)–(h) of YESAA. The rules do not include (1)(a) the purpose of the project, (d) the significance of any adverse cumulative environmental or socio-economic effects, (g) the need to protect the rights of Yukon Indian persons under final agreements, and (h) the interests of residents of Yukon and of Canadian residents outside Yukon as listed in the legislation.</p> <p>PR-V5. Stakeholders expressed a lack of trust in the information (assessment results) presented by proponents.</p>	Delegation of consultation leads to absence of meaningful consultation ¹	PD-N2

Table 8: Risks associated with vulnerabilities identified in the PEST/contextual analysis

Identified Vulnerabilities	Resulting Corruption Risk	MACRA Risk Factor Code
<p>PE-V2. There is a lack of clarity regarding due diligence that may take place when evaluating companies eligible for staking or developing a mining claim and veracity of information provided.</p>	There is inadequate due diligence on applicants' claims regarding their capacity and financial resources	PP-12
<p>PE-V1. The current system for mineral staking in Yukon creates uncertainty about land use.</p>	The restrictions for mineral staking/tenure in the Yukon are uncertain	PD-N9

Identified Vulnerabilities	Resulting Corruption Risk	MACRA Risk Factor Code
PE-V4. Staff turnover and variable technical capacity of YESAB staff raise concerns about the consistency of assessments across projects.	Low compliance, enforcement and monitoring of EA commitments	PD-N8
PE-V8. Provisions exist for YESAA to assess cumulative effects at a regional scale on request. The implications of such assessments for ESA considerations at the project level are unclear.	Gaps in regulatory coverage exist in the EA to integrate cumulative effects	PD-N2
<p>PE-V5. Agreements are negotiated between the proponent and First Nations, communities and landowners, and can be closed-door processes that are not made publicly available.</p> <p>PE-V7. As delegated by the premier, decision bodies have the final authority to make decisions on the project. For mining, the designated decision body is the EMR (and may also involve federal government departments and First Nations depending on the project's location). Stakeholders raise concerns about this vested authority on ESA matters due to the EMR's dual mandate to both regulate and promote mining.</p>	External interference on Ministerial decision making	PD-14
PE-V4. Staff turnover and variable technical capacity of YESAB staff raise concerns about the consistency of assessments across projects.	EA decisions being based on imprecise data	PP-14
PE-V6. Regulatory overlap between the Water Board, YESAB and the Yukon government may create uncertainty about lines of accountability and authority.	Regulatory overlap between the water board, YESAB and the Yukon Government	PD-N11
PE-V3. Procedural guidance on the format and process for meaningful public engagement is unclear.	The legal framework for consultation with communities is not clear	CC-1b
<p>PE-V5. Agreements are negotiated between the proponent and First Nations, communities and landowners and can be closed-door processes that are not made publicly available.</p> <p>PE-V10: The Crown's formal duty to consult is activated at the decision stage, although procedural aspects of the consultation may be fulfilled through the assessment process. In practice, there is potential for closed-door discussions to be held between First Nations and the Crown in the decision stage, and this may affect incentives for stakeholder participation during earlier phases of the assessment process.</p>	Delegation of consultation leads to absence of meaningful consultation	CC-N2

Identified Vulnerabilities	Resulting Corruption Risk	MACRA Risk Factor Code
<p>PE-V2. There is a lack of clarity regarding due diligence that may take place when evaluating companies eligible for staking or developing a mining claim and veracity of information provided.</p> <p>PE-V4. Staff turnover and variable technical capacity of YESAB staff raise concerns about the consistency of assessments across projects.</p>	<p>No sufficient verification of EA reports to ensure an accurate impact description</p>	<p>PD-N5</p>
<p>PE-V11: First Nations experience resource constraints that impede their capacity for meaningful participation and/or acting as a decision body.</p>	<p>Limited integration of social and cultural considerations in environmental assessments as they relate to indigenous communities</p>	<p>CC-N1</p>

6

Results and Discussions

RISK ASSESSMENT

STRENGTHS IN THE APPROVAL PROCESS

A number of key strengths are noteworthy in the YESAA process. There are relatively strong provisions for and ownership by First Nations in the process due to the governance innovation represented by the UFA. Likewise, triggers and thresholds for criteria appear to be more comprehensive compared to other jurisdictions, although there could be more clarity about the procedural application of those criteria. Furthermore, the different levels of assessment between the DO and EC widen the scope of the number of projects that are assessed for impacts. In British Columbia, by comparison, only major projects would enter into the assessment process.

RISKS IN THE APPROVAL PROCESS

Several transparency and accountability risks surfaced during this project. The data points analyzed for this project, once triangulated, narrowed in on 13 risks. The following section explains how the identified risk can affect transparency and accountability, with supporting evidence relevant to the Yukon jurisdictional assessment. The complete risk assessment worksheet required by the MACRA Tool is available in Appendix 3. The phrasing of risks below is aligned with the MACRA Tool. Participants in the risk validation workshop in Yukon consistently expressed the need to rephrase the risks to more precisely reflect the scope conditions for the analysis. These amendments were not made for this technical report, as they would invalidate risk scores, which were based on the original phrasing. However, amended phrasing is strongly recommended for any stakeholder engagement that will follow from this analysis.

1. PP-12. There is inadequate due diligence on applicants' claims regarding their capacity and financial resources

Multiple interviewees raised concerns about the need to ensure a proponent's financial stability, past financial performance and financial records to inform the ESA process in Yukon. Some stakeholders expressed a sense of information asymmetry on this point, noting that if a company is publicly traded in the stock market, some of this financial information will be available, but if companies are privately held that information is hard to source. In addition, the Yukon government requires a security from companies for reclamation and rehabilitation costs, but it is determined internally by government process and not publicly via YESAB.

Interview data also revealed that the vulnerability of some firms to market shocks increases the need for more robust economic feasibility analyses, which should be linked to the firms' capacity for managing environmental risks. Given variable market conditions and commodity prices, firms that are more fiscally able to weather these variations and maintain strong environmental performance would be preferable as more stable industry partners.

In response to this observation, during the risk validation workshop, regulators and industry consultants noted that economic feasibility tests for mining projects as a whole are conducted in other parts of the licensing process (i.e., outside the ESA context). Although duplication of process steps should be avoided, it is not clear why the ESA process does not address the financial capacity of a firm to uphold the 'polluter pays' principle. It is also not clear whether the existing financial assessments are having the desired effect in terms of limiting the approval of projects due to polluter-pays risks rather than their financial viability as a whole.

2. PD-N9. The restrictions for mineral staking/tenure in the Yukon are uncertain

The mineral staking regime in Yukon was raised as a transparency and accountability risk because of the perception that minimal restrictions associated with the current free-entry system can prioritize mining and mineral

exploration over other land uses or value. The removal of areas from staking is coupled with the concern that the Yukon government will be liable for compensating existing claim holders for lost investments, and this potential liability perhaps contributes to an unwillingness to restrict areas from mineral development.

The UFA calls for land use planning to minimize potential land use conflicts. In 2017, the Yukon government and self-governing First Nations also signed a mining MOU to work together on issues related to all stages of mineral development (CYFN, 2017). One interviewee said that only less than a quarter of land in Yukon is not available for staking

Land use planning has taken place in the Peel Watershed and North Yukon, and resulted in permanent and temporary prohibitions on staking in certain areas. The potential for mineral development was a major point of contention during the Peel Watershed regional land use planning process (Yukon Government, 2019g). This led to some uncertainty and legal challenges in terms of potential restrictions in mineral staking as other areas go through land use planning.

In 2011, after several years of regional planning guided by chapter 11 of the final agreements, the planning commission recommended that 80% of the watershed be protected from exploration and resource development (*First Nation of Nacho Nyak Dun v. Yukon*, 2017). The Yukon government opted to modify the plan, and in 2014 approved a plan that instead would protect 29% of the region from development (*First Nation of Nacho Nyak Dun v. Yukon*, 2017). The affected First Nation and two environmental groups challenged the decision in court, and the Supreme Court of Canada ruled in 2017 that “Yukon’s changes to the Final Recommended Plan did not respect the land use planning process.”

In general, the free-entry system in Yukon is likely to persist as a critical public policy issue in the short term. Its significance is heightened due to the development of successor legislation, following devolution. At devolution, the Yukon government mirrored federal legislation for the interim with a promise to revise or develop successor legislation for resource management (for quartz, placer, water, land, etc.). This process and the discussions that have taken place as part of the Mineral Development Strategy have prompted an evaluation of the validity of the free-entry system, so to as to ensure decision-making on land use planning is not done in a piecemeal way.

3. CF-2: Decentralisation of government decision-making will create uncertainty in the EA approval process

A number of interviewees raised concerns about adequate staff capacity at YESAB in assuring quality and consistency across assessments and projects. YESAA triggers a high volume of projects at the DO level, where offices are usually equipped with a staff of one or two. YESAB assessment team members are technical generalists whose expertise focuses on the procedural aspects of how to conduct the assessment process, but technical specialists are needed to match the level of expertise presented by proponents (Reviewer 1, n.d.). One interviewee noted that although YESAB relies on external consultants for technical support, their advice is not necessarily incorporated into recommendations. Given the volume of assessments, there is limited opportunity for YESAB to engage actively even though community meetings and direct First Nation engagement are common (Reviewer 2, n.d.).

4. CC-1b. The legal framework for consultation with communities is not clear

A few research participants affirmed the clear requirements for public consultation at multiple stages of the ESA process in Yukon.¹⁰ However, numerous stakeholders said that additional procedural guidance on threshold criteria and mechanisms for consultation should be examined further. Some contentious issues that were raised included

¹⁰ Reviewer 1 confirmed that screening processes include two periods of seeking views and information, the first for the proposal and the second for the draft screening report, with an option for a third period in the event of a referral from the decision body back to the EC. Further, the EC often invites First Nations and decision bodies to participate in the adequacy review, as well as the review of responses to information request. All of these opportunities are founded on YESAA (e.g., sections 57[3] and [4]).

the lack of opportunities for public hearings, inaccessible information for lay or non-digitally connected audiences, lack of clarity on how comments and information submissions are considered or rejected, limited funding to facilitate meaningful participation and insufficient timelines for consultation.

Some stakeholders felt that a lack of clear guidelines to establish what constitutes meaningful public consultation could lead to frustration for proponents, the public and Yukon, while others suggested that because ideal methods for consultation vary by parties and context, a standardized approach would likely not be possible and, if implemented, would raise other vulnerabilities.

From the community-level perspective, participants distrust the current ESA system as they do not feel their comments or concerns have an impact on recommendations and decisions. If unaddressed, this distrust may result in the public becoming disengaged or seeking other means to be heard on issues related to the ESA process. Although screening processes do seek public views, there needs to be a distinction between information meetings and invitations to provide meaningful feedback.

5. CC-N2. Delegation of consultation leads to absence of meaningful consultation

The Crown has its own duty to consult with affected First Nations on projects.¹¹ Some stakeholder groups are confused by the mechanisms for fulfilling the duty to consult, as the Crown may choose to rely on the assessment process under YESAA to meet its obligation (Yukon Mineral Development Strategy, 2019b; YESAB, 2018a).

The process, as currently practised, means that Crown consultations can be deferred until the decision document stage, which does not invite public review. There is a perception among some interview participants that this leaves room for closed-door discussions between First Nations and the government. Some observe that from a “government-to-government” and reconciliation perspective, this practice should be immune from critique. Others might suggest that although the practice of government-to-government discussions at the decision phase should continue, these discussions should be open to public scrutiny. This practice-based vulnerability should not be interpreted as a vulnerability of YESAB, nor should YESAB bear responsibility for the Crown’s common law duty to consult and achieve accommodation with First Nations. It is imperative that procedural aspects of how the Crown carries out its duty to consult in the assessment process needs to be better clarified and communicated with all stakeholders.

The impact of the current process is that inadequate consultation can generate serious grievances. For example, inadequate consultation was an issue in the case of *White River First Nation v. Yukon Government*. A DO had recommended that a project proposed by Tarsis Resources not proceed out of concern for its potential impacts on wildlife; however, the Yukon government, as the decision body, approved the project (*White River First Nation v. Yukon Government*, 2013). The Supreme Court of Yukon overturned that decision, ruling that the government’s director of mineral resources “breached his duty to consult and accommodate the White River First Nation by failing to provide a meaningful process to provide feedback on the government’s basis for rejecting the recommendation that the White River Project not proceed. The consultation following a rejection recommendation must be deep and meaningful. While the First Nation has no power to require the Evaluation Report to be accepted, it should have an opportunity to address the government’s basis for rejecting it” (*White River First Nation v. Yukon Government*, 2013, para. 128).

¹¹ *The purpose of proponent consultation with First Nations under YESAA is to identify values and interests, to discuss potential effects of a project, to consider views and to take into account these views in the development of a project. The requirement for proponents to consult under YESAA should not be confused with the requirement for the Crown to consult with First Nations. The two requirements are distinct from one another.*

6. CC-N1. Limited integration of social and cultural considerations in environmental assessments as they relate to indigenous communities

In Yukon, the number of activities/projects that get assessed through the DO or EC levels is high. While this number should be viewed positively from a monitoring and governance perspective, there are concerns that First Nations do not have adequate financial and human resources to fully participate in the large volume of assessments that may occur at any given time. The timelines, especially for DO evaluations, are also quite short. Members of the public and First Nations are often provided with 14 days to review a project proposal, which may be one of several proponents requesting a review in their territory at the same time. One interviewee said that one First Nation had approximately 11 significant project assessments underway, with an inadequate tools or financial resources to support their participation. Another noted that First Nations' governments are composed of individuals with multiple jobs and responsibilities, so participation in processes such as YESAA consultations can stretch a First Nation too thin. One interviewee expressed the view that a First Nation might choose not to participate and review documentation submitted under YESAA and instead wait until the proponent applies the Water Board permit or quartz licence to invest their limited time and ensure they have effectively use their technical expertise in advising in the negotiations. Doing so can ensure that their perspectives are integrated directly into permits, which have significant in the compliance and enforcement phase. This type of "venue shopping" by First Nations in deciding which parts of the ESA and permitting process they engage requires further research and review.

In December 2018, the Government of Canada announced the Northern Participant Funding Program (YESAB, 2018b). The program aims to assist Indigenous Peoples and Northerners to participate in environmental and socio-economic assessments of major resources and infrastructure development projects in Northern Canada. Others cite the doubling of funding supports to most Yukon First Nations in 2019 and this funding program as efforts toward mitigating this vulnerability (Reviewer 1, n.d.; CIRNAC, 2019b).

7. PD-N3. Criteria or scope for EA across similar project categories are not defined

Limited or unclear requirements for information and studies to be presented in proposals may result in projects of the same nature and size being held to different requirements. The research revealed very limited likelihood of this risk occurring, although a few stakeholders participating in the validation workshop acknowledged that additional disclosures on assessment criteria may alleviate perceptions that class criteria were misapplied.

Projects have many individual characteristics that inform classifications and emphasizing one or two criteria (such as scope of project or geological features) may contribute to the aforementioned perceptions. Holistic assessments may result in some variation in classification decisions. The EC and DO determine the relevance and validity of supplementary information requested from proponents and information or questions raised by participants. These determinations may be weighted differently across projects, and may also depend on variations in local interests and concerns.

8. PD-N5. No sufficient verification of EA reports to ensure an accurate impact description

The review process provides a number of opportunities to assess the information presented by the proponents, and the current legislation provides criteria that must be followed in determining that a proposal is adequate, technically sound and contains the necessary information. However, local communities and some civil society stakeholders felt that better supports are needed to allow for independent reviews of impact data provided by proponents. There is also a discernable degree of mistrust for information provided by proponents and a continued sense that reviews do not allow for the verification of information presented, which may compromise the system's integrity.

Some participants also noted that environmental issues are emphasized more than social issues in assessing the adverse impacts of mining projects. This could be a flashpoint with regard to Indigenous knowledge and data. Some observed that First Nations communities are reluctant to provide community data for what they perceive to be company purposes. This reluctance is compounded by general distrust of proponents and governments to

protect their information. Therefore, without sufficient data it is challenging to establish the accuracy of the social and cultural impacts of particular mining projects.

9. PP-14. EA decisions being based on imprecise data

The criteria for determining what level of assessment is required is presented in the YESAA schedules. As a result, participants in the interviews and stakeholder engagement efforts clearly understood that there are three levels of assessment depending on the project activities, there are clear rules, regulations and timelines governing the process, and that there is a clear role for affected First Nations.

Nonetheless two grey areas need some attention. The first is how to address cases where a proponent may be involved concurrently in EC and DO processes, and the second is how to increase assurances that projects are not assessed at levels below where they should be. Stakeholders felt that there would be a lack of information flowing between the DO and EC if a company has applications at both levels.

In practice, the likelihood of a proponent being in concurrent EC and DO processes is extremely low (Reviewer 1, n.d.; Reviewer 2, n.d.) due to YESAA provisions (ss. 51–52). Although there are concerns regarding project splitting, there may be reasons, justified by YESAA and related regulations, for projects at the same site to be assessed separately (Reviewer 2, n.d.).

With regard to the absence of assurances that projects are not assessed at lower levels than necessary, government representatives argue that there are two procedural safeguards against this vulnerability. First, when projects are submitted, there is a deliberation on what level the project should be assessed and why. Second, during the assessment, there is continual consideration of whether the project should be assessed at the next level. These procedural safeguards are in addition to the criteria clearly expressed in sections 57(1)(d) and 58(2) of YESAA about when each type of process would be triggered.

Clarifications of criteria for determining whether a project will have significant adverse effects or how controversial technology is defined will strengthen the transparency of the process.

10. PD-N2. Gaps in regulatory coverage exist in the EA to integrate cumulative effects

Significant cumulative effects can result from the interaction between projects – from different sectors – considering both temporal and spatial scales. Limited avenues for scientifically robust cumulative effects assessments could result in misunderstanding impacts among stakeholder groups.

YESAA requires that assessors consider the significance of cumulative effects (s. 41[1][d]). Although the act does not define cumulative effects, the concept is understood to be the combined environmental or socio-economic impacts that accumulate from similar or related individual actions, contaminants or projects (YESAB, 2005).

In this regard, stakeholders differ in their views and expectations of how project-level assessments inform and interact with cumulative effects assessments (CEAs). Exchanging information and data on how YESAA includes cumulative effects considerations when determining the significance of project effects and how these considerations influence assessment outcomes may help in building a common understanding across stakeholder groups. It may also be necessary to clarify that YESAA does not provide YESAB with the authority to undertake CEAs, and that provisions in YESAA for YESAB to undertake CEAs on a regional scale on request (Reviewer 2, n.d.).

11. PD-14. External interference on Ministerial decision making

YESAB recommendation reports to decision bodies are subject to public review. However, decision bodies, as delegated by the premier, ultimately determine whether a project can proceed, as well as the associated terms and conditions of the decision. As the delegated decision body for mining projects, the EMR or major project office

can (and often does) consult with other departments to see if they agree with YESAB recommendations, terms and conditions. In practice, decision-making is vested in one or two people in EMR issuing the final decision document.¹² Any deviation from the recommendation report needs to include a rationale, and subsequent permits need to comply with the terms and conditions presented in the decision document.

From an accountability and transparency perspective, many interviewees observed that despite these provisions the public is not provided with opportunities to comment on the decision document, which makes it potentially subject to external or political influences. Stakeholders said that it is often difficult to follow how final decisions are determined and how possible disagreements with other government departments that have provided input are addressed. There is a perception that the EMR's views typically take precedence over the views of other consulted government agencies.

Stakeholders have an opportunity to bring forward items from a recommendation report that may have been removed from the decision document if the proponent exits the ESA process and applies for a permit from the Water Board.

Interview and validation workshop data provided a strong indication that the high threat of regulatory capture could weaken public trust in the integrity of the ESA process in Yukon. A number of interviewees also flagged concerns about increasing levels of political interference at the decision document stage, the absence of regulations on industry lobbying, the lack of public disclosure of lobbying meetings held between special interest groups and the government, and a perceived conflict of interest given the dual mandate of the EMR in promoting mining investment and overseeing the YESAA process. With regard to this dual mandate, one reviewer observed that this vulnerability could be addressed by transferring responsibility for mining promotion to government agencies responsible for economic development (Reviewer 1, n.d.). This vulnerability could also be addressed by decision bodies articulating their rationale with justifications, thus demonstrating their full and fair consideration of recommendations (Reviewer 1, n.d.).

12. PD-N11. Regulatory overlap between the water board, YESAB and the Yukon Government

Yukon's assessment and regulatory system is composed of two co-management boards and potentially three levels of government, as well as multiple government departments at the territorial level. In practice, the existing institutional complexity in Yukon can be overwhelming for members of the public seeking to participate in the ESA process, and some stakeholders do not clearly understand the differences in roles, processes and authority among them all. Although de jure rules and processes are generally well articulated, some interviewees acknowledged the need to identify and address inefficiencies in cross-agency coordination. Moreover, YESAB invites participation from other government agencies but it decides what is relevant to the assessment process and which issues may be better addressed in other licensing and permitting activities. Improving communication about these processes, expectations and associate roles for participants could help reduce this vulnerability (Reviewer 1, n.d.).

The existing process can also create situations where proponents receive conflicting opinions. For instance, in *Western Copper Corporation v. Yukon Water Board*, 2011, the Supreme Court of Yukon upheld the Water Board's decision to deny a type A water licence for the company's proposed copper heap leach mining project, despite a Yukon government decision allowing the project to proceed. In 2017, the government challenged the decision to add a condition to the water licence to restrict the company from disturbing undisturbed wetlands although it had already determined the company could mine in the area with an approved reclamation plan (Chauvin, 2017; Croft, 2017). The Supreme Court ordered the Water Board to modify the condition (Chauvin, 2017; Croft, 2017).

In 2018, the Water Board and the Yukon government signed an MOU "to clarify their roles with respect to looking after the territory's water" (Government of Yukon, 2018a). They agreed to maintain the "impartiality,

¹² For example, with regard to mining activities listed in Schedule 3 of the Assessable Activities Regulations, the deputy minister of the Executive Council Office is the delegated decision body.

neutrality, fairness and integrity of the regulatory processes in which both parties play a part” (Government of Yukon and Yukon Water Board, 2018). The MOU affirmed that as provided in the Yukon Act, the government has “administration and control of all rights in respect of waters in Yukon, other than waters in federal conservation areas” (Government of Yukon & Yukon Water Board, 2018, 2). The agreement maintains the Water Board’s independence in dealing with water licence application decisions under the *Waters Act*, and clarifies the staffing and administrative relationship between the two bodies (Westcott, 2018).¹³ In carrying out its functions, the Water Board has specific obligations and responsibilities with regards to Yukon First Nations treaty rights and participation in the water licensing process as set out in the UFA (Government of Yukon & Yukon Water Board, 2018, 3). Stakeholders from the government note there have been no disputes between the government and the Water Board. Insist that there is no evidence of disputes between the government and Water Board.

13. PD-N8. Low compliance, enforcement and monitoring of EA commitments

YESAB prepares a recommendation report that is submitted to the decision bodies to use in their preparing their decision document. Although subsequent permits cannot alter terms and conditions of the decision document, neither it nor the recommendation report are binding documents, and the proponent is not responsible for any terms or conditions presented.¹⁴ The proponent is only responsible for terms and conditions presented in the permits and licences issued.

EMR compliance officers are tasked with subsequent inspections and ensure that mitigation measures are implemented.

There was overwhelming evidence from interview and stakeholder meeting data that the monitoring, evaluation and compliance enforcement regime that follows the YESAA process can be greatly improved. Compliance is linked to permits and licences issued after the YESAA process and not linked to YESAB recommendations.

One interviewee said that enforcement is an ongoing issue, especially in terms of security bonds posted. In a few cases, the government waived bonds and subsequently had to cover the reclamation costs. The dissolution of companies (for example, due to market conditions or initiated as a compliance avoidance tactic by a parent company) also poses serious challenges. Some research participants suggested that the Yukon government relaxes requirements associated with compliance and enforcement of permit conditions in order to stimulate investment and the economy.

Some participants also noted that the EMR does not post inspection or compliance reports, and such limited disclosure makes it challenging to get information on the stage of projects and potential impacts or mitigation measures.

After a project is approved and granted a certificate, ongoing compliance oversight is required. The decision document contains the conditions and commitments that must be met by the proponent in order to mitigate potential adverse effects. In that sense, enforcement actions should be put in place to ensure that projects are designed, built, operated, and decommissioned or reclaimed in ways that respect commitments and do not increase the risk of adverse effects. The lack of monitoring and enforcement and the limited follow-up on inspections can result in many environmental, social and economic impacts that are not disclosed or remediated.

In order to fully assess Yukon’s compliance regime with regard to the environmental and social impacts of mining, the analysis conducted for this report would have to be expanded to include the full permitting and licensing regime.

¹³ With regard to administrative functions, the MOU lays out the roles of chair of the Water Board and director its secretariat as well as Yukon government officials. It also stipulates that the Water Board and government meet at least annually to discuss priorities, financial and staffing requirements within the Water Board’s budget. The Water Board chair is the immediate supervisor of the secretariat’s director and therefore responsible for recruitment and performance management issues. The director is responsible for monitoring, reviewing and directing the overall performance and duties of secretariat staff. The Public Service Act and other legislation applicable to other members of the territory’s public service apply to secretariat staff (Government of Yukon & Yukon Water Board, 2018).

¹⁴ There is also a responsibility on the decision bodies to implement decision documents (YESAA, ss. 82–84).

RISKS VALIDATION

During a stakeholder validation workshop in Yukon, a total of 12 research participants completed individual worksheets to assess likelihood and impact scores for each identified risk. The respondent profile for this exercise is as follows:

- Academic: 1
- Non-Indigenous civil society: 1
- Industry: 2
- Indigenous representative: 1
- Did not disclose: 1
- Consultant: 1
- Government: 3
- Practitioner: 1
- Co-management board member: 1

Scoring data is available in Table 9. It bears repeating that stakeholders at the risk validation workshop in Yukon suggested that the risks be phrased ways that more precisely reflect the scope conditions of the analysis.

Table 9: Risk validation scores

Risks	Risk Score
PP-12. There is inadequate due diligence on applicants' claims regarding their capacity and financial resources	12
PD-N9. The restrictions for mineral staking/tenure in the Yukon are uncertain	8
PD-N3. Criteria or scope for EA across similar project categories are not defined	8
CC-N2. Delegation of consultation leads to absence of meaningful consultation	7
CC-N1. Limited integration of social and cultural considerations in environmental assessments as they relate to indigenous communities	14
PP-14. EA decisions being based on imprecise data	8
CC-1b. The legal framework for consultation with communities is not clear	6
CF-2. Decentralisation of government decision-making will create uncertainty in the EA approval process	2
PD-N2. Gaps in regulatory coverage exist in the EA to integrate cumulative effects	10

PD-14. External interference on Ministerial decision making	12
PD-N11. Regulatory overlap between the water board, YESAB and the Yukon Government	6
PD-N8. Low compliance, enforcement and monitoring of EA commitments	15
PD-N5. No sufficient verification of EA reports to ensure an accurate impact description	6

The analysis documented in this technical report serves as a heuristic guide to potential accountability and transparency gaps in Yukon's ESA process. This research is not intended to benchmark these processes across

7 Recommendations

Canadian jurisdictions, nor should it be interpreted as a rating of Yukon's ESA process.

The research findings provide a credible primer on the identified gaps, so that a coalition of like-minded individuals and organizations can collaborate in Yukon to alleviate or mitigate vulnerabilities on a priority basis.

Because the analysis did not cover the complete mining and permitting process in Yukon, the generalizability of some of the findings is limited. The research team acknowledges that some issues identified in the desk research and key informant interviews as vulnerabilities (such as a review of a proponent's financial health) may be addressed elsewhere in Yukon's permitting and licensing regime. Therefore, additional research and stakeholder engagement are necessary before recommending improvements accountability and transparency-related improvements to Yukon's ESA process.

The following areas could be explored further as fertile ground for improvements to the ESA process in terms of corruption:

1. Improving accountability and due diligence

- Resolve conflict-of-interest issues by transferring responsibility for mining promotion to government agencies responsible for economic development rather than the EMR.
- Strengthen financial due diligence with a view to alignment with the polluter-pays principle regardless of whether the proponent is publicly or privately held, specifically during the ESA phase. If such due diligence is addressed in other parts of the licensing and permitting process, there should be a communication feedback loop to inform ESAs.

2. Stronger disclosures to facilitate transparency

- YESAB should issue detailed procedural guidance and disclosures on assessment criteria to reduce perceptions that class criteria may have been misapplied. Likewise, more detailed criteria are needed to inform how YESAB determines whether a project will have significant adverse effects or how controversial technology is defined.
- The EC and DO should disclose, in detail, how determinations of relevance and validity apply to requests for supplementary information from proponents, as well as how these criteria may be weighted differently due to local interests and concerns. These criteria may be integrated into notices issued to the proponent for this purpose, within the existing processes.
- The Yukon government should consider strengthening the territorial regime for disclosing lobbying meetings (among other measures) to reduce the risk of influence by industry and special interest groups on the decision bodies and the premier.¹⁵
- Stakeholders should discuss and evaluate if and how decision-phase meetings between First Nations and the Yukon government should be open for post-hoc public record and review.
- Decision bodies need to commit to concrete mechanisms they can use to demonstrate full and fair consideration of EC and DO recommendations, such as by articulating their rationale with justifications.

¹⁵ In November 2018, the Yukon Government passed the Lobbyists Registration Act (Bill 23), its first lobbying law. However, the act has not been put into force, and the proposed registry did not exist as of July 2020. When interviews were conducted, day-to-day practice had not yet been affected by the Act. Source: Titoras, G. and Esq. (2018) Canadian Territory of Yukon To Have Lobbying Law, LobbyComply. Available at: <https://stateandfed.com/lobbycomply/lobbying/canadian-territory-of-yukon-to-have-lobbying-law/> (Accessed: 8 July 2020).

3. Interventions to strengthen and sustain public trust

- Stakeholders should continue to assess and implement additional financial and technical support mechanisms to sustain meaningful participation from First Nations communities.
- Although the legal framework is clear, the Yukon government should explore developing procedural guidance on public consultation methods and alternatives to digital disclosures. Currently, the EC and DO control the format, substance and reporting of outcomes from public meetings; procedural guidance could alleviate concerns that this practice does not facilitate meaningful consultation (versus information provision).
- YESAB's capacity to integrate GBA+ into EC and DO processes and the broader licensing and permitting regime should be systematically evaluated.
- Although YESAB cannot recommend whether a project should proceed or recommend additional terms and conditions directly based on a determination of the significance of cumulative effects, it does consider cumulative effects when determining the significance of likely adverse project effects. This position on YESAB's assessment methodology came into effect on July 15, 2019 (see YESAB, 2019c). As this change has been relatively recent, stakeholders differ in their understanding of how project-level assessments inform and interact with CEAs. Exchanging information and data on how YESAA considers cumulative effects in determining the significance of project effects and how these considerations influence assessment outcomes may be helpful in building a common understanding among stakeholder groups over time.

8

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