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UNDERMINING OUR FUTURE:

**HOW MINING'S PRIVILEGED ACCESS
TO LAND HARMS PEOPLE AND
THE ENVIRONMENT**

**A DISCUSSION PAPER ON THE NEED TO REFORM
MINERAL TENURE LAW IN CANADA**

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Author's Note and Acknowledgments

Free entry is a complex issue. This paper is not a comprehensive review of mineral tenure law, but should provide a good sense of how it operates in Canada. Errors are my responsibility. I am grateful for the excellent research support provided by Aaron Tilley and Shawn McColm, and to Colin Chambers, Marilyn Crawford, Roger Flynn, Peter Griesbach, Mac Hislop, Jim Jensen, Kevin O'Reilly, Susan Rutherford and Greg Yeoman for reviewing drafts of this paper. Cover photo and inside detail are of a claims post on top of Tally Ho Mountain, Yukon, taken by Kevin O'Reilly.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
1.0 OVERVIEW OF FREE ENTRY.....	2
1.1 Origins of the Law of Free Entry	3
1.2 How Does Free Entry Work?.....	5
1.2.1 Licensing.....	5
1.2.2 Land Access	5
1.2.3 Staking.....	6
1.2.4 Priority of Rights	7
1.2.5 Work Requirements	7
1.2.6 Exploration	7
1.2.7 Mineral Leases	8
1.2.8 Mine Development.....	8
1.3 The Effects of Free Entry.....	8
2.0 FREE ENTRY IN SELECT JURISDICTIONS ACROSS CANADA	10
2.1 Free Entry in BC.....	10
2.1.1 Free Entry Reform in the 1970s.....	10
2.1.2 Recent Legal Changes: Strengthened Access to Private and Public Land.....	11
2.1.3 Chattel Interest or an Interest in Land?.....	12
2.2 Free Entry in Ontario	12
2.2.1 Proposed Changes: Responding to Private Landowners.....	13
2.2.2 Public Lands: Future Land Use Planning Issues	14
2.3 Northern Free Entry Laws.....	14
2.3.1 Devolution, Self-Government, and the Fragmentation of Land Management in the North.....	15
2.3.2 Back to the Drawing Board: Proposed Changes to the Canada Mining Regulations Tabled.....	16
2.3.3 Mineral Tenure in Nunavut.....	16
2.4 Mineral Tenure in Other Canadian Jurisdictions.....	17
3.0 RELATED LEGAL AND POLICY ISSUES.....	19
3.1 Surface Rights and Subsurface Rights	19
3.2 Ground Staking and Map Staking	19
3.3 Land Use Planning and Land Withdrawal.....	20
3.3.1 BC's Limitation on Potential Park Establishment	21
3.4 Expropriation and Compensation.....	22
3.4.1 Compensation for Private Landowners.....	22
3.4.2 Compensation for Miners	24
3.4.3 NAFTA Chapter 11 Claims?	26
3.5 The Mining Industry's View.....	26
Summary Ranking of Canadian Jurisdictions by the Fraser Institute	28



4.0 THE US GENERAL MINING LAW OF 1872.....	29
4.1 Problems with the 1872 Mining Law.....	30
4.1.1 Claim Manipulation through the Millsite Provisions	31
4.1.2 No Discretion.....	31
4.1.3 Lost Resource Rents and Revenues.....	32
4.2 Distinguishing Factors about the 1872 Mining Law.....	33
4.3 A Ray of Hope: Minor Reforms	33
5.0 ABORIGINAL LANDS AND LAW	34
5.1 Land Claims and Land Settlement Agreements	34
5.2 Aboriginal Case Law and Constitutional Rights.....	34
5.3 Other Aboriginal Legal Factors	36
6.0 CONCLUSION	37
ACRONYMS	38



*The meek shall inherit the earth,
but not its mineral rights.*

John Paul Getty, a.k.a Oklahoma Crude
and founder of Standard Oil

EXECUTIVE SUMMARY

Over the past few years, momentum to ensure that the activities of the mining industry are more consistent with modern land use and activity has been increasing. The public is becoming more concerned with the environmental impacts of mining, and the privileged access that the mining industry receives.

The allocation of mineral tenures, or the law of free entry, is a key structural issue that contributes to the preferential treatment enjoyed by the mining industry. The original purpose of free entry laws was to encourage mining activity; the underlying philosophy was that mining was the best use of land. In exchange for obtaining resource development and a “taming of the wilderness,” the government did not interfere with miner activity. Although times and values have changed dramatically, the system remains in place and in use. Its application in the 21st century is, however, inequitable and poses great risks for the environment: it permits mining to occur on private lands, even in people’s back yards without their consent; it allows virtually unregulated access to Crown land; and it acts as a bar to sound land use planning.¹

Structural reforms must be achieved in order to ensure that mining does not unduly harm our environment and our communities, and to place mining on a level playing field with other industrial land uses.

In order to increase public awareness of this important issue, West Coast Environmental Law (“West Coast”) has prepared this discussion paper, which provides an overview of the law of free entry as it exists in Canada. It includes a discussion of how free entry operates in certain jurisdictions, and the experience with free entry’s US counterpart, the General Mining Law of 1872. BC examples are used frequently, given that we work primarily in BC; these examples apply elsewhere as well. Some jurisdictions in Canada have moved away from free entry by allowing government to deny the granting of mineral tenures under certain circumstances. The solutions are not complex; the challenge is that information about this arcane legal system is not widely available. Public awareness is a first step; and considerations for reforming this anachronistic system are woven throughout the paper.

¹ This paper assumes that the reader is knowledgeable about the environmental impacts of hard rock mining. For further information, see for example, <http://miningwatch.org/emcbc/index.htm>.



1.0 OVERVIEW OF FREE ENTRY

The free entry system, also known as the free miner or location system, is the dominant means of granting mineral tenures in Canada today. It gives miners² the exclusive right to Crown-owned mineral substances from the surface of their claim to an unlimited extension downwards.³ In order to claim a right to mineral access, the law of free entry says that a miner need only stake a claim and pay a minimal annual fee in exchange for unlimited access to the minerals on the land. There are three primary rights associated with the law of free entry:

- the right of entry and access on lands that may contain minerals;
- the right to locate and register a claim without consulting the Crown; and
- the right to acquire a mineral lease with no discretion on the part of the Crown.

A core difficulty with free entry lies in the non-discretionary way it provides priority to mining rights over others, including private landowners, and other resource users, such as timber, oil or gas, and tourism operators. These other users are governed by a discretionary system, whereby the Crown decides how and whether tenures should be granted, and retains the ability to decline allocating these rights for a particular policy reason. The lack of discretion in the free entry system means that no consideration of environmental values occurs when mineral tenures are granted, and the environment is left unprotected.

For example, oil and gas companies cannot operate in BC unless they obtain the subsurface rights to land, either by direct acquisition, or most frequently through the acquisition of subsurface rights to Crown land through an auction process by government. In the forestry context, the decision to invite applications for timber tenures is discretionary, and even after applications have been received, the Minister of Forests may choose not to accept any of them. Historically, in the BC forestry context, timber tenures were granted in exchange for companies taking on certain social obligations such as operating mills. Later this social contract was expanded to include limited tenure reallocation provisions and environmental regulation. More recently, changes to the BC forestry legislation have eliminated much of this social contract in the interests of enhanced industry flexibility and security.

The law of free entry is based upon the following premises:

- Mining prevails over private property interests. A free miner can generally enter onto private land and make a claim without giving notice to the surface landowner. Surface owners are only entitled to compensation and security for any loss or damage to the property (with minor differences between free entry jurisdictions). The free miner is also not legally obligated to consult or inform a surface owner of his or her plans even after written notice has been given (Ontario may consider some change to this as a result of recent clashes between landowners and mining companies). Often tensions arise

² For ease of reference, the term “miner” or “free miner” is used to refer to an individual or company who could be undertaking mining activity.

³ [www.em.gov.bc.ca/Mining/Titles/Publications/web-book/b\)chap1.htm](http://www.em.gov.bc.ca/Mining/Titles/Publications/web-book/b)chap1.htm).

between surface landowners and mineral claims holders, leading to expensive dispute resolution processes.

- Mining is the highest and best use of Crown lands. While this may have been the policy view at one time, this is no longer the case. As experience with land use planning processes in BC has proven, there are numerous, legitimate competing interests for Crown lands.
- All Crown lands are open for staking and mineral exploration unless they are expressly excluded or withdrawn by statute. This limits the ability of government to undertake multi-use land resource planning, which often includes the designation of protected areas, and the balancing of other potential resource users, such as timber, oil and gas, and wilderness tourism operators.
- Mining prevails over Aboriginal land rights. The current system does not recognize or take into account Aboriginal Title and Rights. Current federal free entry laws do not require consultation with, or protection for, First Nations. Nor do they provide First Nations with a role in land use decisions or an ability to ensure that First Nations Rights and Title can be accommodated as required by recent court decisions.⁴ In general, exploration activities and the nature of free entry have a disruptive effect on indigenous land rights.
- Mineral tenures are appropriately granted on a first come first served basis. Time priority is the basis upon which tenures are obtained, which can result in staked claims overlapping, and conflicts between different exploration interests.
- Mineral potential is so valuable that it warrants leaving the staked area essentially unregulated and potentially unusable for other resource interests. Once a claim is recorded or a lease obtained, the free miner can hold the claim for extended periods of time, and in some cases indefinitely, by performing and recording a minimal required amount of work on the land every year. Resource management and land use planning initiatives must work around mining claims, whereas the opposite is true for other natural resource industries. For example, timber tenure licensees usually will be issued the right to harvest trees (and only trees) from a particular area of land; yet under the BC *Mineral Tenure Act*, a mineral claim or lease holder who is preparing for production must be issued a licence to cut under the *Forest Act*.⁵

1.1 ORIGINS OF THE LAW OF FREE ENTRY

The origins of free entry lie in the British land system, which is based on the “fiction” that the Crown has underlying title to all land, although other parties may have tenures, estates or interests in it.⁶ This approach dates back to feudal times.⁷ Free entry in North America

⁴ Nigel Bankes and Cheryl Sharvit. *Free Entry Mineral Regimes and Aboriginal Title*, Northern Perspectives, Vol. 25, Number 3, Fall-Winter 1998-99; see also www.miningwatch.org/emcbc/primer/mineral_exploration.htm; and discussion of Aboriginal case developments, *infra*.

⁵ BC *Mineral Tenure Act*, R.S.B.C., c. 292, s. 14.

⁶ In Canada, Crown title is also subject to unextinguished Aboriginal Title.



originates from the gold rush days in the mid-1800s. It was based on a belief that mining is a way to create wealth and encourage settlement of the land. This frontier mentality influenced much of the settlement in North America. Barry Barton, author of “The Canadian Law of Mining” has noted, the “risks of overstating the impact of the frontier in North American history are well known, but the effect of the gold rush legislation is still unmistakable.”⁸

Free entry in Canada started in the West, and was first written into the *Goldfields Act of BC* in 1859. Thereafter, it was written into the laws of other jurisdictions, and now forms the basis of federal mining laws, and most provincial mining laws. According to Barton:

It is possible to see a pattern of a spread from west to east of the legislation based on free mining or free entry principles. Free entry appeared first in British Columbia. Its principles were soon adopted in a limited way in central Canada and later copied directly (in the form of the British Columbia law) in the Dominion lands legislation. The successors to the dominion lands legislation still show these origins distinctly in the Yukon Territory and the Northwest Territories. Saskatchewan and Manitoba retain its general principles; only Alberta has made a clean break. Nova Scotia may have flirted with free entry, but not in any lasting way. The free entry system was adopted by Ontario, the example of British Columbia being mentioned both in 1864 and 1906. In turn, Ontario had a prompt influence on the law of Quebec, and later, on that of New Brunswick and Newfoundland.⁹

Mining was very different when free entry laws were established. Mines were smaller, less intrusive, and left much less of an ecological footprint. Modern day hard rock mining is a large scale, mechanized, industrial activity that has significant environmental impacts. Further, technological ability means that there are virtually no physical restrictions on access or where mineral exploration can occur. In addition, most high grade underground mines have been mined out, thus the future of mining could well lie in open pit, rather than underground mining, as being the most economic way to mine the low grade deposits which now comprise a major portion of the reserves of many minerals.¹⁰ Thus it is possible that the mine projects of the future could have an even more significant impact on the land.

The world has changed rather dramatically since the 1850s, but the free entry laws have not. These laws were passed at a time when the scope and scale of hard rock mining that exist today would not even have been contemplated. Incremental changes have modernized the law of free entry, but the underlying philosophy of free entry has remained intact. Again, Barton summarizes it best:

The removal of the discovery rule, the removal of Crown grants or patents and their replacement with mining leases, and the improvement of staking systems to give better security to large blocks of land, particularly stand out. Equally significant has

⁷ Sir W. Blackstone, *Commentaries on the Laws of England*, vol. 2 (Oxford: Clarendon Press, 1762-69), 51.

⁸ Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993), at 117.

⁹ Barton, *Law of Mining*, at 149.

¹⁰ Roger Flynn, “*The 1872 Mining Law as an Impediment to Mineral Development on Public Lands: A 19th Century Law Meets the Realities of Modern Mining*”, (1999), 34 *Land & Water L. Rev.* 303.

been the gradual improvement and updating of work requirements so that they should continue to prevent land from being held without exploration and development. In making changes of this kind, one notices that the legislators no longer looked to the United States Mining Law, which was showing its weaknesses and was not being kept up to date. Instead, they appear to have looked to each other's handiwork. An experiment with the law that worked in one province was often copied in other provinces. Equally, no province was willing to have its legislation perceived to be less welcoming to mining than other provinces. The comparisons made were within Canada with little apparent reference to any external context. The different jurisdictions have therefore developed their mining laws in parallel, and the direction they have taken has, since the period that ended in 1910, owed little to sources outside Canada.¹¹

1.2 HOW DOES FREE ENTRY WORK?

While each jurisdiction has individual legislated provisions, the basic operation of free entry laws in Canada is described below. We have chosen to not summarize each of these regimes individually; rather, our focus is on the overarching characteristics of primarily the BC, Ontario, and northern mining regimes. Each jurisdiction has established its own free entry regime, with minor variations. For example, in BC, a miner must obtain a free miner certificate, whereas in Ontario, the same requirement is called a prospector's licence.

1.2.1 LICENSING

In most jurisdictions, a free miner must obtain a licence to prospect. Licenses are usually available without proof of qualifications or skills to any person over 18, upon payment of a nominal fee (usually in the range of \$25). Alberta, Saskatchewan, Nova Scotia and the Yukon have no licence requirements.¹² This licence entitles the free miner to prospect for minerals on any lands in the province or territory in which the licence has been granted.

1.2.2 LAND ACCESS

The free miner has access to any and all private and public lands, subject to some exceptions. There are three major exceptions:

1. Private lands where the mineral rights are not owned by the Crown.¹³ In most cases across Canada, Crown grants reserved or retained subsurface or mineral rights for the Crown.
2. Legislated withdrawals that indicate uses that rank higher than mineral activity as a land use. Examples of such statutory prohibitions against prospecting include land that is occupied by buildings; the curtilage of a dwelling house (construed by courts to be a 75

¹¹ Barton, *Law of Mining*, at 150.

¹² Barton, *Law of Mining*, at 211.

¹³ Barton, *Law of Mining*, at 152.



metre distance around a residence¹⁴); orchard lands or lands under cultivation; cemeteries; heritage lands and properties; land that is already occupied for mining purposes; and lands in parks or recreation areas.

3. Withdrawal by ministerial order. The mining laws in each jurisdiction contain some provisions whereby governments are able to withdraw certain lands from mineral exploration, by order in council or cabinet decision, often for park creation.

1.2.3 STAKING

The free miner prospects, and stakes claims on the land. Staking is a technical process, and each legislative scheme contains detailed requirements (either in the law or in the regulations) as to how staking occurs. The four post system, where the miner stakes a post in each corner of the claim, is most widespread across Canada. The two post system is used in BC and the Yukon. It requires two posts to be staked and creates a “location line” in between; the posts will indicate how much of the claim lies on each side of the location line. A third, modified grid system, has also been used in BC.

Because of the detailed work and challenges of technical accuracy with the physical staking process, the rule of interpretation is “substantial compliance” with the requirements of the statute.¹⁵ If there is a discrepancy, ground staking prevails over what is recorded in the mineral titles office.¹⁶

As well, the legal regimes establish dispute resolution mechanisms, whereby complaints between free miners about the staking process are to be resolved by the mineral recorder’s office. In BC, disputes are taken to the Gold Commissioner; in the Yukon and NWT, the Canada Mining Regulations require that a dispute be heard before the Chief Mining Recorder. Claim jumpers, those who seek to assert that their claims prevail over those of others, are vilified by the industry, and claim-jumping is generally an ill-perceived course of action.¹⁷

Staking is the root of acquiring mineral rights and the fundamental source that determines the extent and validity of the rights under the claim. Recording is a means to perfect and prioritize title to a mineral claim.¹⁸ The free miner registers any claims, and then maintains this priority by doing minimal assessment work annually.

This method of mineral rights acquisition is self-activated through the process of claim staking, and contributes to a philosophy of self-regulation on the part of the industry. The government is considered to be there to establish rules of acquisition, record claims, clarify title and rule on any conflicts. In contrast, in systems of resource rights acquisition that are based on ministerial discretion, such as oil and gas, or forestry tenures, the government plays more of a role in decisions regarding exploration and development of the resource.

¹⁴ Barton, *Law of Mining*, at 198.

¹⁵ Barton, *Law of Mining*, at 163; see also s. 43(1) of the Ontario *Mining Act*.

¹⁶ Barton, *Law of Mining*, at 267.

¹⁷ Barton, *Law of Mining*, at 303.

¹⁸ Barton, *Law of Mining*, at 256-258.

1.2.4 PRIORITY OF RIGHTS

A validly staked claim provides the free miner with the right to enter onto the surface of the land to explore for minerals. It acts as notice to any other miner that mineral rights in a particular area have been claimed. And this priority prevails over the rights of the surface owner, who cannot deny access to the free miner, but can demand compensation. In BC, a free miner cannot enter onto the land with mechanical equipment unless the surface right holder is first notified; there are currently no legislated notice requirements in Ontario. Where there is a dispute as to access or compensation, the laws contain dispute resolution provisions to be followed. A free miner can also force the disposition of unallocated surface rights to the holder of the mineral rights.¹⁹

1.2.5 WORK REQUIREMENTS

Once a mineral claim has been staked, there are basic work requirements that must be met. These usually consist of about \$100 worth of work per year, or cash in lieu. This basic assessment work is required to maintain a claim on an annual basis, and many claims can be held indefinitely provided that these minimal work requirements are met. The failure to perform this work is the most common reason for the abandonment of a claim.²⁰ In Ontario, no one can dispute the validity of the assessment work once it has been undertaken.²¹

The effect of these work requirements is to encourage small-scale mineral activity, whether warranted or not, and can result in unnecessary environmental impacts, as the miner undertakes work on the land merely to maintain his claim, not necessarily to develop mineral resources. In BC, the government is considering a gradual increase to the amount required to maintain claims annually in order to ensure that free miners are not holding onto claims unnecessarily and impeding mineral development.

1.2.6 EXPLORATION

The use of Crown land during the exploration phase is generally unregulated. Minimal environmental laws may apply, but they often leave transient operations untouched, and no effort is made to manage the impact of exploration operations on other resources.²² Whereas some jurisdictions require permits for exploration activities, others don't. In BC, a miner can move up to 1,000 tonnes of waste rock in the exploration process, without requiring a permit. As noted above, private surface rights holders cannot deny access for exploration activity, but can require compensation for damage to property.

¹⁹ BC *Mineral Tenure Act*, R.S.B.C., c. 292, s. 15.

²⁰ Barton, *Law of Mining*, at 313.

²¹ Ontario *Mining Act*, R.S.O. 1990, c. M-14, s. 65(5).

²² Barton, *Law of Mining*, at 153. Some jurisdictions require land use permits for mineral exploration activities. The Mackenzie Valley Land Use Plan and the Territorial Land Use Regulations identify the use of vehicles, drills and machinery, and the establishment of campsites, but specifically exempt anything done in the course of prospecting, staking or locating a mineral claim unless it requires use of equipment or material that normally requires a permit. Stated more clearly, controls on exploration activity only exist where other uses could be impacted, such as tree felling, or effluent discharges into water – so where other permit or approval requirements must be met.



1.2.7 MINERAL LEASES

If a miner finds a significant mineral deposit, a mineral lease is applied for, and may be required prior to commercial production. Again, under free entry, there is no discretion to refuse a lease application, provided the basic information requirements are met. Whereas the basic rights conferred by a claim are exclusivity (in the sense that no one else can assert rights to the minerals concerned) and the right to explore for minerals, a mineral lease builds on the rights of the claim holder by adding restricted rights to exploit and produce the minerals.²³ Mineral leases offer greater security than a mineral claim. Their term is often 20 or more years whereas a claim often runs from year to year. There are generally no mechanisms for automatic cancellation for default.

The fact that mineral leases provide greater security means that a mining company can invest in mine development. The mineral lease provides the certainty that a mining company will seek before it is prepared to invest in mine development. Surveys are to be done before the lease is granted, eliminating boundary problems. In earlier times, the right to mineral production used to be given through a grant or patent in fee simple, but due to relatively recent changes to mining laws, mineral leases are now the most secure form of rights.²⁴

For example, the BC *Mineral Tenure Act* defines the interest of a mineral claim holder as a chattel interest, and the interest of a mineral leaseholder as an interest in land, that conveys the minerals to the lessee.²⁵ In BC, mineral leases are likely more secure than timber tenures such as tree farm licences, as they appear to convey the minerals themselves, rather than simply an interest in the nature of a *profit à prendre* (or the right to enter on to the land of another and extract resources from it). In the case of a *profit à prendre*, ownership of the resource does not transfer until it is extracted. In the forestry context, this means that trees are owned by the Crown, subject to Aboriginal Title, until they are harvested and scaled (also the point at which they are paid for through “stumpage”).

1.2.8 MINE DEVELOPMENT

At the mine development phase, the miner will usually require surface rights. This may require compensation to be paid to a private landowner. Conversely, if land is subsequently withdrawn (e.g. for park creation) when mineral claims have been staked, the free miner may be entitled to compensation. Once these preliminary issues have been resolved, more significant mine operations can begin. Depending on the jurisdiction, these operations may be subject to environmental assessment, mine approval or permitting requirements.

1.3 THE EFFECTS OF FREE ENTRY

Free entry compromises environmental protection objectives and threatens environmental integrity in a variety of ways:

²³ Barton, *Law of Mining*, at 383-4.

²⁴ Barton, *Law of Mining*, at 157.

²⁵ BC *Mineral Tenure Act*, ss. 28(2) and 48(2) respectively.

- The staking process impacts the land: miners have been known to leave trash and mining debris on the land. This issue will be less significant as governments move toward map staking;
- The access provided as a result of free entry results in the creation of new roads that will lead to increased fragmentation of habitat, hunting pressures and poaching activities;
- Access for exploration has an environmental impact and may create environmental damage which is unnecessary if the mineral deposits are not economic; basic exploration activity can result in acid mine drainage, whereby toxic metals will leach into soil and watercourses; and
- Given that government has no discretion to refuse a mine application, it cannot, as is the case with other resource users, choose amongst preferred applicants to evaluate the alternative and preferred means of conducting mining activity so as to reduce the impact on the land.

From a resource revenue perspective, the free entry system defers the possibility of government royalty collection to the time of production. By giving pre-eminence to mining interests, the free entry system limits the land from being allocated for other uses and prevents governments from collecting royalties and rents associated with the development of the resource.

Whereas the oil and gas process guarantees that licences will be granted and royalties collected in a timely way, the government will not collect royalties from staked land unless and until a mine is developed. For example, the BC *Petroleum and Natural Gas Act* establishes clear provisions whereby provincial oil and gas rights are to be publicly auctioned, for a fee, and royalties are charged to tenure holders.²⁶

²⁶ BC *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, ss. 71 and 73. See also sections 39 and 51.



2.0 FREE ENTRY IN SELECT JURISDICTIONS ACROSS CANADA

2.1 FREE ENTRY IN BC

In BC, there are three different means by which a person may hold mineral title – freehold, Crown granted mineral claims, and located mineral title. There are very few freehold mineral tenures; these would have been granted as part of another tenure such as the surface or railway grant. The last Crown granted mineral claims were issued in 1957, are administered under the *Land Act*, and were originally staked mineral claims that were subsequently surveyed and issued as Crown granted tenures. The only method of acquiring new mineral rights today is by located mineral title using the free entry process.²⁷

Crown mineral ownership may not be obvious from the title, thus title searches can be complex. The result is that before development can occur, the Crown and the public must do a historic title search to determine mineral ownership (this is currently happening with respect to mineral ownership on Vancouver Island). Given the changes over the years, the true extent of a grant over the surface and the various minerals can only be construed by referring not only to the grant itself, but the mining legislation in force at the time of the grant.²⁸ Proposed policy changes and a Mineral Title Review Process were expected to get underway in mid-2003. This process will confirm ownership of minerals by mineral type based upon site-specific searches. It will enable the government to make declarations regarding various mineral ownership issues, and then permit parties to challenge these declarations within a certain time period. Title will then be confirmed as it has been declared, unless there are challenges.²⁹

The BC government currently operates under a two-zone system: protected zones, which identify where mineral exploration cannot occur; and mineral zones, which allow mineral exploration and mining on the remainder of the land base. Within the mineral zones, certain lands can still be withdrawn through the No Staking Mineral Reserve provisions of the *Mineral Tenure Act*.³⁰

2.1.1 FREE ENTRY REFORM IN THE 1970S

Efforts to reform the free entry system were made, and failed, in the 1970s. In 1973, Premier Dave Barrett's NDP government removed the right of the free miner to enter lands to mine, and the automatic right of the claimholder to obtain a lease and to mine, though it retained the right of the free miner to explore and develop minerals. It installed a requirement for a

²⁷ *A Guide to Surface and Subsurface Rights and Responsibilities in British Columbia*; Mineral Titles Information Letter No. 15; <http://www.em.gov.bc.ca/Mining/Titles/InfoLetters/info-15.htm>.

²⁸ Barton, *Law of Mining*, at 124.

²⁹ BC Ministry of Energy and Mines consultation session on *Coal Bed Gas Act and Mineral Title Review and Resolution*, January 2003.

³⁰ BC *Mineral Tenure Act*, s. 22(2), and <http://srmwww.gov.bc.ca/rmd/ecdev/mog/twozone/index.htm>.

production plan to be approved by a Minister as being the best possible method of producing minerals, and to consider environmental, social and economic issues. These changes were “greatly disliked by the mining industry”, and when Bill Bennett’s Social Credit government came to power in 1975, these amendments were removed and the automatic rights to go to lease and to mine were restored.³¹

2.1.2 RECENT LEGAL CHANGES: STRENGTHENED ACCESS TO PRIVATE AND PUBLIC LAND

The current government is dramatically altering the province’s legal framework, in order to respond to industry demands for a more flexible regulatory atmosphere. One of the ways in which it is so doing is by strengthening the rights of the mining industry to enter onto private land and explore for minerals. The most significant changes to date were housed in Bill 54, the *Miscellaneous Statutes Amendments Act* introduced in 2002. Bill 54 has had an impact on how free entry rights are exercised in BC in three ways:³²

- First, it repealed a section of the *Mineral Tenure Act* that prohibits mining companies from obstructing or interfering with activities on private land, including existing buildings, in pursuit of mineral development. This had been one of the few provisions that gave landowners an opportunity to limit the actions of mining companies on private land.
- Second, the Bill strengthened the position of the mining industry in disputes with private landowners over access. It prevents the Mediation and Arbitration Board from denying access to mineral claim holders even where it determines there would be undue interference with a landowner’s buildings or operations. Instead, the Board must now grant a right of entry order and is limited to specifying the conditions on which access must be permitted and the compensation to be paid in exchange for the access.
- Third, Bill 54 amends section 14 of the *Mineral Tenure Act* to increase mining industry access to public land by specifying that a land use designation or objective does not preclude application by a mineral claim holder for any form of permission, or approval of that permission, required for mining or exploration activity. The only exceptions listed are for parks, ecological reserves, protected heritage property or areas specifically prohibiting mining under the *Environment and Land Use Act*. The rationale is that it increases the certainty that mineral claim holders (and their investors) will be allowed to proceed to the application phase for further work. In practice it means that any future exclusion of mineral development activities through land use zones will have to be formally legislated under a designation that prohibits mining.³³

These amendments are part of a broader agenda for change. Some of these changes include reducing the regulation of mineral exploration through the “streamlining” of the Mineral

³¹ Barton, *Law of Mining*, at 125-126.

³² <http://www.wcel.org/deregulation/bill54.pdf>.

³³ Bill 46, tabled in 2003, will create the authority for the BC Cabinet to establish additional designations and objectives that could preclude mineral claims.³³ Legally this new designation power could be used for ecological or cultural designations. It is expected that these new powers will be used primarily to establish the so-called “working forest”, which is intended to signal that all Crown land outside of parks and protected areas is “open for business.”



Exploration Code, and moving from claim staking to map staking. As discussed earlier, a shift to map staking could mean that most of BC could be subject to some form of mineral tenure. We are advised that the government is also considering gradual increases to the annual work requirements, or the amounts payable in lieu, particularly as the shift to map staking occurs in order to ensure that free miners are not holding onto claims unnecessarily and are not standing in the way of mineral exploration for competitive reasons. This would have the effect of encouraging mine developers to move more quickly to develop resources.

2.1.3 CHATTEL INTEREST OR AN INTEREST IN LAND?

Currently, a holder of a mineral claim has a chattel interest, which cannot be registered as an interest in real property. In 2002, the BC government was actively considering a proposal that would elevate the nature of this interest from a chattel interest to a real property interest. The proposal could have serious implications, should it require the government to pay compensation to miners should they not be able to pursue their claims due to a land withdrawal for parks or other uses. This proposal has been shelved for the time being, but it may well reappear at some point in the future. In a report prepared for the BC government in 1993, Richard Schwindt discussed the issue and concluded that there was no evidence or rationale to justify a mineral claim being in the nature of a property interest.³⁴

2.2 FREE ENTRY IN ONTARIO

The BC legislation is also the basis for the Ontario mining regime. When mining initially began in Ontario, a second system, the location system, was also in place, a system whereby a miner applied for and purchased a location after the land had been surveyed. However, this second form of tenure was replaced by free entry in 1906, and free entry has been the dominant mining law in Ontario ever since.³⁵ In the 1960s, leases became the main kind of production tenure when patent issuances were restricted to the holder of a lease who could demonstrate that the property had been in substantial and continuous production. However, leases issued then were no longer perpetually renewable.³⁶ 1989 saw the first overhaul of the Ontario legislation for many years. Among the archaic features that were removed were mining patents, but the reforms did not interfere with the basic structure of the Act.

The Ontario government has been forced to respond to a number of issues that have arisen recently with respect to mineral tenures, primarily with respect to private land.

³⁴ Richard Schwindt, *Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests* (Vancouver: Resources Compensation Commission, 1992), at 128-30.

³⁵ Barton, *Law of Mining*, at 130.

³⁶ Barton, *Law of Mining*, at 135.

2.2.1 PROPOSED CHANGES: RESPONDING TO PRIVATE LANDOWNERS

*In my own personal humble opinion if you are co-tenants,
you should be at least communicating.*

Mike Leahy, Director, Ontario Northern Prospectors Association³⁷

The issue of staking on private land has gained some profile. In the past couple of years, a number of different conflicts have arisen as a result of mining companies staking on rural residential lands in Ontario. Surface right owners in Ontario are not notified of staking, and only have one year to file a dispute against a claim.³⁸ It is often by chance that a landowner finds out that a claim has been staked, and according to one landowner, those who have filed disputes are often left with the sense that the system was developed to settle arguments between miners, not miners and landowners.³⁹

At one point in 2002, there were 36 disputes before the Provincial Mining Recorder from the Bedford-Perth municipality alone. At another point, a group in Ontario managed to have 47 of 61 mining claims cancelled on private property through pressure on the provincial Ministry of Northern Development and Mines.⁴⁰

In response, the Ministry of Northern Development and Mines Minister's Mining Act Advisory Committee (MMAAC) established a Surface Rights/Mining Rights Working Group, which developed a set of recommendations and reported to the Minister in December 2002. The Report contains recommendations for a number of reforms to the *Mining Act* with respect to activity on private lands, including:

- **Notice of Staking.** The prospector is to provide notice of staking to surface right holders by registered mail within 90 days of recording the staking; failure to do so may result in cancellation of the claim. Environmental representatives argued for notice prior to staking, but this was voted down by the Committee.
- **Notice of Exploration Work.** The prospector is to provide 30 days notice prior to the commencement of any ground exploration; material changes to exploration plan would require a new 30 day notice period. Environmental representatives wanted the failure to provide notice to result in cancellation of the claims, but this recommendation was voted down.

As of spring 2003, the Minister had not indicated how the government would respond to these recommendations.

³⁷ Article from Kirkland Lake Local News, web version, January 6, 2003.

³⁸ Ontario *Mining Act*, s. 48(5).

³⁹ Personal communication with Marilyn Crawford, October 2003. In addition, the dispute mechanism operates such that the onus is on the person disputing the claim to establish that the lands are not open for staking, not on the mining company to prove that the lands were open for staking.

⁴⁰ Copy of email shared among members of the Black Lake Association in April 2003, shared by Maureen Towaij. In this case, all claims that had disputes filed were abandoned by mining companies; other claims were cancelled by the Ministry of Northern Development and Mines as a result of failure to perform assessment work.



The cases before the Provincial Mining Recorder elaborate on certain principles, including:

- That Ontario law adopts the principle of balanced multiple use, and there have not been any amendments that demonstrate a departure from this principle;
- That a claim is not invalid because it may encompass land not open for staking; and
- That the effect of not gaining consent of the surface rights holder where there are buildings or dwellings will cause areas within a mining claim to be excluded from a claim.⁴¹

2.2.2 PUBLIC LANDS: FUTURE LAND USE PLANNING ISSUES

The mining industry is now seeking to set aside land for future mining development, and the Ontario government has proposed to identify “provincially significant minerals”. This designation would be akin to conservation area or parks designations. One challenge in this regard is the criteria by which provincially significant minerals would be designated and how they will be incorporated into municipal and land use plans. This is an issue of concern to some municipalities in Ontario. In any event, while a “provincially significant mineral” designation will effectively set aside lands for mineral development, it will not guarantee that mineral development will not occur elsewhere unless the free entry system is modified in the process.

2.3 NORTHERN FREE ENTRY LAWS

Free entry also exists in the north, although its operation in each jurisdiction is based upon a different combination of laws. The Yukon is governed by the *Yukon Quartz Mining Act*⁴²; the Northwest Territories are subject to the Canada Mining Regulations under the *Territorial Lands Act*⁴³, and in Nunavut, all federal legislation in force continues provided that it is consistent with the Nunavut Land Claims Agreement and its implementing legislation. The operation of free entry in the north is substantially the same as elsewhere in Canada, with one minor distinction. Under the *Yukon Quartz Mining Act* and the Canada Mining Regulations, a miner automatically has the right to acquire a mining lease and go into production once a claim has been established. Thus whereas free entry in the south provides a right to obtain a Crown grant of a mineral claim, the mineral right holder in the north is automatically entitled to a 21 year mineral lease.⁴⁴ Thus in the north, a miner can go from exploration directly to production; the government has no choice in the matter and must issue the lease.⁴⁵

⁴¹ Decision of the Provincial Mining Recorder, In the Matter of Mining Claim SO 1246263 between *Tracey L. Griesbach v. Graphite Mountain Inc.*, dated 21 December 2001, para. 17 and summary conclusions.

⁴² *Yukon Quartz Mining Act*, R.S.C. 1985, c. Y-4.

⁴³ Canada Mining Regulations, C.R.C., c. 1516; parent provision for the Canada Mining Regulations is found in the *Territorial Lands Act*; R.S.C. 1985, c. T-7, s. 12.

⁴⁴ Barton, *Law of Mining*, at 147. S. 101 of the *Yukon Quartz Mining Act*.

⁴⁵ Barton, *Reforming the Mining Law of the NWT*, CARC paper, at 9.

2.3.1 DEVOLUTION, SELF-GOVERNMENT, AND THE FRAGMENTATION OF LAND MANAGEMENT IN THE NORTH

Many changes are currently underway in northern Canada. Two in particular that will have an impact on free entry are devolution, whereby the federal government is devolving many of its responsibilities to the territorial governments, and the conclusion of aboriginal land claim and self-government agreements.

As of April 2003, the Federal Government devolved many of its responsibilities, among them, its jurisdiction over mining, to the Yukon Territorial Government. Plans are underway for similar devolution to occur in the NWT by 2006.⁴⁶ This process of devolution removes some of the predictability of the free entry process, and opens up the door for independent political arrangements. One example is a recent agreement that was concluded between the Yukon Government and the Kaska Nation, which after devolution, was able to be concluded without federal government participation. Among the provisions of this bilateral agreement is a commitment by the Yukon Government to provide subsurface rights to certain lands on Kaska Territory on reasonable commercial terms.⁴⁷

Overall, this move away from the consistent application of free entry is a positive sign, as it means that individual First Nations will be able to make decisions in their own long term best interests, and it represents a crack in the foundation of the free entry system. The down side is that it may be more difficult to keep track of how subsurface rights are being allocated to enable resource development: there may no longer be a central mining recorder that keeps track of mineral claims, and subsurface rights will be able to be allocated not just through regular legal mechanisms but also through political processes, as described above.

A similar issue is arising with regard to land claim negotiations by different First Nations that are either underway or completed in the NWT.⁴⁸ As these agreements are being concluded, it is becoming clear that aboriginal land use planning processes are not necessarily consistent with the CMRs, which may result in a fragmented approach to mineral tenure in the NWT. It is therefore possible that for lands in the north there will be a patchwork of surface and subsurface rights ownership systems, as between the federal Crown, the territorial Crown, and different Aboriginal governments.

For example, one such issue has arisen with the Gwich'in Land Use Plan (GLUP). Currently the federal government is proposing to work cooperatively with the Gwich'in to ensure that the GLUP is consistent with the CMRs, by negotiating a land use plan that will identify where protected areas will be withdrawn from subsurface mineral exploration. The federal

⁴⁶ The Yukon Devolution Transfer Agreement came into force on April 1, 2003.

⁴⁷ Highlights of the Bilateral Agreement, attached to Yukon Government Press Release, "Kaska, Yukon Government sign Bilateral Agreement", May 9, 2003. Other provisions of the agreement include a commitment by the Yukon Government to not agree to any significant or major dispositions of interests in lands or territories without the consent of the Kaska; an agreement that revenue sharing arrangements from exploration and resource development on Kaska Territory will be established; an agreement by the Kaska to adjourn their legal proceedings against the devolution agreement; and their further agreement not to challenge the Devolution Transfer Agreement for the 2-year duration of the bilateral agreement.

⁴⁸ Inuvialuit, Gwich'in and Sahtu plans are completed; Deh Cho and Akaitcho plans are not completed; details of the Dogrib plan are finalized but the land settlement agreement is in force.



Department of Indian Affairs and Northern Development will approve the revised plan and provide funds to complete mineral and energy assessments on the withdrawn areas. In addition, the CMRs will amend the definition of a prospecting licence to exclude areas under an approved land use plan, which means that such identified areas will be off limits for mineral development.⁴⁹ The CMR changes, combined with declarations in the LUPs to declare areas off limits to mineral development should be sufficient to protect these areas from mineral development for the duration of the LUP, which is usually 5 years. This means that LUPs in the NWT will become mechanisms to protect lands for 5 year periods, and every 5 years the amount of land protected can be increased or decreased. In the context of the Gwich'in, defined "protected areas" will be withdrawn from subsurface mineral dispositions for five years after the revised LUP is received, but oil and gas rights will not be withdrawn, because the GLUP disallows this activity, so this LUP disallowance provides all the protection necessary.

2.3.2 BACK TO THE DRAWING BOARD: PROPOSED CHANGES TO THE CANADA MINING REGULATIONS TABLED

Early in 2003, the Department of Indian Affairs and Northern Development released a comprehensive package of amendments to the CMRs which, in their view, were intended to improve efficiency and remove loopholes to clarify the certainty of mineral tenure. Our review of these changes revealed the following concerns:

- the loss of application of the offence provisions for prospecting without a licence,
- the loss of certainty provided by a clear national parks exemption,
- the extension of free entry over lands where the surface rights have been leased, and
- the loss of the prohibition against environmental damage, with no replacement identified.

Shortly after our comments were submitted, the federal government announced that in response to concerns expressed by the mining industry, it was going to rewrite these changes. We have been assured that all stakeholder comments will be considered as the next iteration of changes are developed. A revised package of amendments, being developed primarily in consultation with the industry, is scheduled to be released before the end of 2003.

2.3.3 MINERAL TENURE IN NUNAVUT

As mentioned above, free entry operates in Nunavut except to the extent that it is inconsistent with the Nunavut Land Claims Agreement. In Nunavut, land use decisions are governed by the Nunavut Planning Commission, which obtains its powers from the Nunavut Land Claims Agreement. The intent of this structure is to facilitate self-government by the Inuit of the Nunavut Settlement Area. Among the powers of the Nunavut Planning Commission are the ability to develop and implement land use plans, which could impact the operation of free entry in Nunavut. To date, some land use plans have been concluded,

⁴⁹ Conversation with Greg Yeoman, based on his conversations with Adrian Boyd and David Livingstone (DIAND).

but these plans have not addressed zoning issues.⁵⁰ In other areas, the Territorial Land Use Regulations are still the primary regulator of land use in Nunavut.

A report prepared by Barton for the NPC opines that the powers of the Nunavut Planning Commission to impose land use restrictions will prevail over mining laws, and should prevail over the free entry provisions of the Canada Mining Regulations. Barton notes that the possession of mineral title does not give immunity from land use controls under the Territorial Land Use Regulations; that the powers to restrict land use under the Nunavut Land Claims Agreement and the *Territorial Lands Act* overlap without conflict, with the exception of the free entry rights under the CMRs; but, that “the ratification of the Nunavut Land Claims Agreement plainly disclosed an intention to change the status quo under the *Territorial Lands Act*, and confer powers on new land and resource management institutions.” Thus, Barton’s view is that a court would likely accept a purposive analysis of a potential conflict and hold that Parliament must have been willing to accept another limitation on the free entry rights in the CMRs.⁵¹

In addition to this legal distinction, other new approaches are underway in Nunavut, as a result of the land claims agreement: royalties now accrue to the Inuit; the Inuit are provided an opportunity to determine employment conditions; and they also have an opportunity to determine where and how mining can occur on their lands through land ownership and through the co-management bodies that are established through Impact and Benefit Agreements.

It is noteworthy that while Nunavut has been operating under a modified mineral tenure system, which may not guarantee free entry rights to the same extent, it is nonetheless experiencing a boom in exploration. In 2000, Nunavut experienced the largest Canadian increase in mineral exploration expenditure – 67 percent – or a \$25 million gain in a one year period.⁵²

2.4 MINERAL TENURE IN OTHER CANADIAN JURISDICTIONS

Some provinces have either moved away from free entry, or have modified it considerably. Elements of these approaches could be used to inform consideration of alternatives to free entry. The following brief observations are drawn directly from Barton’s excellent synopsis of the evolution of free entry laws in Canada⁵³:

- Alberta, Nova Scotia and Prince Edward Island only issue mineral dispositions if the designated Minister decides to do so. The fact that the system in these provinces is discretionary does not mean that mineral resources are disposed of unpredictably. The way that discretion is exercised may be entirely consistent; a licence or lease may be

⁵⁰ Plans for Keewatin and North Baffin are approved (conversation with Kevin O’Reilly, CARC).

⁵¹ Barton, *The Powers of the Nunavut Planning Commission to Regulate Land Use in Relation to the Use of Land for Mineral Purposes*, Report Prepared for the Nunavut Planning Commission, 4 December 2001. See in particular, at 14, 24-25.

⁵² *2001 Overview of Trends in Canadian Mineral Exploration*, at 2.

⁵³ Barton, *Law of Mining*, at 148 to 159.



granted in every case. The fact remains that the power being exercised is a discretionary one.

- In Nova Scotia, the Minister can reject or defer an application for an exploration licence “if in the opinion of the Minister, the acceptance of an application for an exploration licence is not in the best interests of the Province or would hinder mineral development.”⁵⁴
- When Alberta, Saskatchewan and Manitoba acquired control of their mineral resources in 1930, they all adopted the dominion or federal regulations with little change. In Saskatchewan and Manitoba, changes have been gradual, the most notable feature being the introduction in both provinces of discretionary exploration permits for large areas.
- In 1967, Alberta dispensed with free entry altogether and the physical staking of claims. Instead, a person could apply for the grant of a “certificate of record” of land identified by legal description. No doubt oil and gas procedures were an influence.
- New Brunswick does not guarantee mineral leases. The Minister can deny a lease pending the approval of a program for protection, reclamation, and rehabilitation of the environment.
- Newfoundland’s *Minerals Act* prohibits a person from prospecting, exploring for minerals or staking claims on Crown land without the consent of the Minister; its *Mining Act* makes financial assurance mandatory.⁵⁵
- Newfoundland, Nova Scotia, PEI and Newfoundland have all shifted over to map staking instead of ground staking. The trend is for other jurisdictions to follow suit.
- Manitoba’s *Mines and Minerals Act* contains a number of modern provisions that make it progressive relative to many of the other jurisdictions. Notably, a miner must obtain the consent of the surface right owner or occupant if he wishes to explore for crown minerals on privately held land,⁵⁶ and mining in Manitoba must be conducted consistent with the principle of sustainable development, which is defined and elaborated upon at the beginning of the Act.⁵⁷ Where disputes occur, the Mining Board has the authority to hold public hearings, and in some cases, Manitoba’s *Planning Act* can prevail over the mineral laws.

⁵⁴ Nova Scotia *Mineral Resources Act*, S.N.S. 1990, c. 18, s. 32(3) and Barton, *Law of Mining*, at 158.

⁵⁵ *Mineral Act*, R.S.N.L. 1990, c. M-12, s. 12(1)(b); *Mining Act*, S.N.L. 1999, c. M-15.1, s. 4.

⁵⁶ Manitoba *Mines and Minerals Act*, C.C.S.M., c. M162, s. 154(1).

⁵⁷ Manitoba *Mines and Minerals Act*, s. 2(2). The object and purpose of the Act is to “provide for, encourage, promote and facilitate exploration, development and production of minerals and mineral product in Manitoba, consistent with the principles of sustainable development”, s. 2(1).

3.0 RELATED LEGAL AND POLICY ISSUES

The operation of the free entry system is complex. There are a number of related legal and policy issues with which one should be familiar, in order to understand how free entry functions and affects other land uses, private property rights, and the environment.

3.1 SURFACE RIGHTS AND SUBSURFACE RIGHTS

The distinction between surface and subsurface rights is an important one in the context of natural resource tenures. Generally speaking, while landowners hold title to their property, this does not include the subsurface rights. Original Crown grants often ensured that subsurface mineral rights remained vested with the Crown. For example, in BC, all grants of Crown land to private landowners after 1891 retained the right to enter onto the land and extract resources for the Crown. Where Crown land is at issue, the matter is more clear, as the Crown owns both the surface and the subsurface rights. The earlier BC discussion outlined some of the issues around distinguishing surface and subsurface rights.

While the concept of Crown ownership of the subsurface is not altogether foreign to landowners (for example, landowners in Alberta have been accustomed to dealing with oil and gas companies exercising access to privately held subsurface lands for years), the concept comes as a surprise to many. And unfortunately, in such cases, landowners often learn the hard way that they do not own the subsurface rights.

One example of this is in Ontario, where, recently, mining companies have been staking claims in rural residential and cottage communities in south-central Ontario. *Canadian Geographic* covered this issue last year, highlighting the shock of residents who learned that they did not own the subsurface rights to their land only after the mining company appeared at their door; and their outrage, when they further learned that they have no right to say no to this activity, but are merely entitled to compensation for any damage done in the course of mining exploration.⁵⁸

3.2 GROUND STAKING AND MAP STAKING

Traditionally, mineral claims can only be established pursuant to the physical staking of the site where the claim is located. This places real physical restrictions on claim staking. Ground staking favours small prospectors, whose ease of staking access provides them with an advantage.

However, governments are increasingly looking to map staking, a form of on-line GPS-based staking as a means of remedying the problems associated with ground staking. To date, Newfoundland, Nova Scotia, Prince Edward Island and Alberta have replaced ground staking with map staking. Map staking is viewed as administratively more efficient; it obviates the need for an administrative entity to resolve disputes between claimholders, as the claims will be identified on maps and cannot overlap or conflict; and it also eliminates the need for a



⁵⁸ *Canadian Geographic*, July/August 2002, pp 31-32; www.bedfordminingalert.ca.

physical on-site presence, as well as the associated impact on the land caused by the staking process.

3.3 LAND USE PLANNING AND LAND WITHDRAWAL

Withdrawal is one of the primary ways to protect land from mineral exploration. Generally, withdrawal must be done before the land is staked. In situations where land is withdrawn where mineral claims exist, a withdrawal order will suspend operations on claims but will not actually cancel the claims themselves. Barton is of the view that withdrawal is clumsy because it generally prohibits all mineral activity, even though in some cases, limited mineral activity will not interfere with the other values being protected.⁵⁹

As mentioned earlier, there are three ways to withdraw land from free entry: by statutory prohibition, by ministerial order, and by outright expropriation of the mineral rights. Ministerial order provisions are fairly straightforward. They enable the Minister, or in some jurisdictions, the Cabinet, to withdraw land from exploration by order. In situations where claims have already been staked, but the land is needed for another purpose, the government will need to buy out the claim holder or expropriate the mineral rights. In such cases, once the statutory authorization is exercised, the primary issue will be compensation. Entitlement to compensation and the amount of compensation will depend on the legal nature of the mineral rights and the relevant statutes.

The most frequent use of withdrawal is to protect planned or existing infrastructure such as electrical transmission lines and pipelines. This is particularly so in BC, where such “protection” is achieved through regulations establishing mineral reserves.⁶⁰ This fact is interesting because the mining industry in BC has generated much public debate about the government policy of withdrawing lands from mineral exploration for park or protected area purposes. In 1992, 18.2 percent of land in BC was inaccessible (parks, ecological reserves) or severely restricted (agricultural, Indian, mineral and placer reserves, Class 1 watersheds, populated areas). However, at the same time we have been advised by the BC government that withdrawal for the purposes of generating electricity is considered a “conditional” withdrawal; that efforts are made to accommodate the interests of a miner with the needs of the powerlines or a highway; and that consideration could be given to re-routing a line in order to develop a mining operation.⁶¹

It seems that many of the specific issues and sources of conflict with respect to free entry relate to the compatibility of land use planning processes with free entry. For example:

⁵⁹ Barton, *Law of Mining*, at 164 – 66.

⁶⁰ Barton, *Law of Mining*, at 169 – 170; *Mineral Tenure Act*, s. 22 (2)(d).

⁶¹ Email correspondence with representative of Ministry of Sustainable Resource Management, August 2003. According to BC Parks, 11.79% of BC land is in this category; several years ago, the Land Use Coordination Office quoted 0.64% of BC in national parks; recent announcements have mostly been in marine areas. Currently, there are about 6.7 million hectares of no staking reserves, and possibly as much as 3 million hectares designated as parks/protected areas. An additional 2.5 million hectares are in conditional staking reserves which set conditions for certain activities (i.e., under hydro lines or adjacent to highways). These numbers are approximate.

- In BC, the Mining Association of BC has sparked a huge debate by demanding that the provincial government review the previous government's decision to declare the South Chilcotin wilderness area a park. Negotiations to declare this area a park had been underway for decades; the Mining Association wants the size of the park reduced from 70,000 to 3,000 hectares. The mining industry chose not to participate in the land use planning process that had been underway for this region; they raised their concerns after this process was completed. Their demand effectively undermines the result of this consensus-based plan.
- Northern groups have been working to ensure that as land use plans are developed on northern aboriginal territories, the conservation or special management area designations are respected by the CMRs. Amendments proposed to the CMRs early in 2003 (that were subsequently withdrawn because of mining industry concerns) would actually have done less to ensure that these designations are respected than the current regulatory regime.
- The Lands for Life process, a province-wide land designation exercise underway in Ontario several years ago also addressed the issue of withdrawing land from potential mineral development and setting it aside for conservation purposes. At the outset of the process, lands that had already been staked were not "on the table", and if a mining claim conflicted with Lands for Life designated lands the area became a "forest reserve", which did not exclude the possibility of mines. In the event that a mining claim was to be advanced, it would be taken out of the reserve.

The issue of aboriginal land claims adds another layer of complexity to the land use planning process and withdrawal issues. It will be discussed in more detail below.

3.3.1 BC'S LIMITATION ON POTENTIAL PARK ESTABLISHMENT

BC's *Mineral Tenure Act* permits staking, exploration and development in recreation areas designated under the *Park Act*.⁶² Once an area is designated as a recreation area, the government will then evaluate its mineral potential. This begins a ten year period where staked mineral claims will not be expropriated under the *Park Act*. If a major deposit appears, park plans will likely be shelved. This system is a response to the mining industry's concern that land is "locked up" before the mineral potential has been ascertained, and the concern that investment in a claim should not be wasted by the sudden gazetting of a park.⁶³ Barton notes that "the government may expropriate a person's home, farm, or other land, but may not touch a mineral claim within a recreation area for 10 years, nor one outside a recreation area at all."⁶⁴

As the situations above demonstrate, as long as free entry rights prevail, the mining industry can essentially flout processes that bind other resource users. And further, the law operates to ensure that any land withdrawals for park purposes are not done without first evaluating the mineral potential of an area.

⁶² BC *Mineral Tenure Act*, s. 23.

⁶³ Barton, *Law of Mining*, at 178-80.

⁶⁴ Barton, *Law of Mining*, at 181.



3.4 EXPROPRIATION AND COMPENSATION

The expropriation and compensation issue cuts two ways. First, a mining company can be required to compensate a private landowner for loss of property (where the land is completely expropriated) for mine development, or for loss of right to enjoy property where mineral exploration occurs. Second, where land is withdrawn from mineral exploration, the government can be required to compensate a miner for loss of mineral claims or mineral rights. Each of these perspectives is discussed in turn.

Throughout this discussion, it should be kept in mind that an appropriate, guaranteed compensation regime is essential in circumstances where private property rights of surface land owners are affected by mining activity. There also may be good public policy reasons for limiting compensation to tenure holders when rights to access resources on or under public land are reallocated to other uses society deems appropriate, especially when only minimal payment was originally made for the rights. For example, if full compensation is guaranteed, it can lead to over-investment because it allows mineral tenure holders to ignore the risk that their interest in minerals or their access to them will be reallocated to a public use. The argument has been made that businesses should simply have to live with this risk along with other forms of “government risk” in their decision-making.⁶⁵

3.4.1 COMPENSATION FOR PRIVATE LANDOWNERS

In Canada, there is no absolute right to compensation when the government interferes with property rights. Unlike the US, property rights are not entrenched in our Constitution.⁶⁶ There is, however, a common law presumption that compensation will be paid when private property is taken by statute, unless the statute clearly indicates that no compensation will be paid. Legislation will prevail over this common law presumption. Therefore, legislation can take away, or provide for, entitlement to compensation at any time.

Free entry laws authorize private property to be taken by statute; and generally in Canada, the laws require that compensation be paid to landowners whose surface rights are expropriated for mineral use. In Ontario and BC, the laws require that compensation be paid, and establish mechanisms – the Mining and Lands Commissioner, and the Mediation and Arbitration Boards respectively - to resolve disputes regarding compensation.⁶⁷

Since mining activity in Canada has historically occurred away from settlement areas, this has not been a significant issue. However, the recent rush of staking in Ontario cottage country has resulted in an increase in the number of disputes being heard before the Provincial Mining Recorder both on the basis of the validity of the claims and on the approach to compensation. In one case, the Recorder observed that major changes to the “business of

⁶⁵ Schwindt, *Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests*, at 25. The Supreme Court of Canada has confirmed this view in the *Tener* decision, where it held that in determining compensation, only the regulations under the *Mineral Act* are to be considered in valuing the expropriated mineral rights: see *R. in Right of BC v. Tener*, [1985] 3 W.W.R. 673 (S.C.C.).

⁶⁶ A valid mining claim is a constitutionally protected property right in the US. It cannot be taken away without just compensation, or be declared invalid except in accordance with due process. Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 306.

⁶⁷ *BC Mineral Tenure Act*, s. 19; *Ontario Mining Act*, R.S.O. 1990, c. M.14, s 79.

surface rights compensation” were made in 1991, and stated that compensation in Ontario is no longer “once and for all”. The current compensation provision in the Ontario *Mining Act* requires compensation for damages sustained by prospecting, staking, assessment work, and mining operations. There is no longer a reference to past and future damages. “The result is that the current Section 79 provides for ongoing compensation and, in most instances, may eliminate the need to compensate for market value.”⁶⁸ Further, it is clear that compensation in Ontario is for more than mere physical damage to the property; the Act provides that compensation be paid for damages sustained to the surface rights of the land, and the Act defines surface rights to mean “every right in land other than the mining rights”. “Those rights include the right to peaceable possession, the complete liberty to decide which trees are to be cut down and which are to be left to grow (heedless of the economic elements), and to take the profits of occupation. There is nothing at all here to restrict compensation to physical damage alone.”⁶⁹

In BC for example, the process for determining compensation amounts is set out in the *Petroleum and Natural Gas Act*. The Act sets out a list of factors that are to be considered by the Mediation and Arbitration Board (MAB), which hears disputes arising from access requests. As a result of legislative changes in 2002, the MAB can no longer deny entry, it can merely determine amounts of compensation when it is issuing a right of entry order to a company. The factors in making this determination include the compulsory aspect of the entry, the value of the land, loss of rights or profits associated with the land, and compensation for nuisance.⁷⁰

The principle that surface right holders are to be compensated is sound, but beyond that, these issues must be determined on a case by case basis, using the mechanisms determined by the legislation in each jurisdiction. In addition to the body of decisions that have developed through the resolution of disputes in Ontario and BC processes, the Alberta Queen’s Bench and Court of Appeal each have a large body of judgments arising further to the liberal rights of appeal from the decisions of the Alberta Surface Rights Board. Any in-depth consideration of compensation issues could also examine this avenue.

Also, it is worth keeping in mind who is eligible for compensation. In most cases, persons entitled to compensation are the actual owners of the surface, not necessarily those who have a legal right to make use of land. For example, the BC *Mineral Tenure Act* restricts compensation to the owner of land, but the Ontario *Mining Act* states that owners as well as occupiers could be entitled to compensation. Such distinctions can be critical where someone has a legal right to make use of land, in particular Crown land, where the use falls short of occupancy. For example, an outfitter will only be an occupant of the land around his or her camp, but his or her business would be affected if mining activity was conducted in nearby hunting areas.⁷¹

⁶⁸ Ontario *Mining Act*, s. 79; and Decision of the Provincial Mining Recorder, In the Matter of Mining Claim SO 1246263 between Tracey L. Griesbach v. Graphite Mountain Inc., dated 21 December 2001.

⁶⁹ Barton, *Law of Mining*, at 205.

⁷⁰ *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, s. 21.

⁷¹ Barton, *Law of Mining*, at 209.



Two recent cases highlight the operation of the law in this regard, affirming that private property can, and will, be expropriated, in exchange for compensation.

In a recent ruling in Ontario, the Mining and Lands Commissioner dismissed the appeal brought by landowners to limit a mining company's access to their farm. The Commissioner dismissed the appeal, finding that the crop damage could be readily compensable. The Commissioner further ordered that once exploration is complete, and "(i)n the event that a production decision is made, Wollasco (the company) will have the option to purchase and Price has the obligation to sell the Price farm ... if Wollasco gives notice of its intent to make an offer for two hundred (200%) of its fair market value."⁷²

Similarly, in BC, West Coast Environmental Law is providing support to a family in the BC interior whose land has been staked by a kitty litter company for mineral exploration. Western Industrial Clay Products has claimed the right to explore for diatomaceous earth and bentonite for kitty litter production. After a 10 year protracted legal battle, the BC Supreme Court has finally confirmed earlier orders forcing the landowners to provide access to the company in exchange for compensation limited to the assessed value of the property alone.⁷³ However, unlike the Ontario situation above, the Court has not required that the company purchase the land from the family, who are now appealing this decision to the BC Court of Appeal. West Coast continues to support the family in the hope that it will clarify the principles surrounding compensation in these types of cases.

3.4.2 COMPENSATION FOR MINERS

The second situation arises where mining companies have staked claims and/or obtained mineral leases, and these rights are subsequently expropriated by government for other purposes, such as park creation.⁷⁴ This issue has arisen in BC on different occasions over the years, resulting in Supreme Court of Canada rulings, and changes to the *Mineral Tenure Act* to clarify how these rights are to be exercised.

The baseline case for this issue is *BC v. Tener*. In 1985, the Supreme Court of Canada ruled that the BC government's refusal to issue a park use permit authorizing mineral exploration in Wells Gray Park gave rise to a right of compensation to a miner.⁷⁵ In this case, the initial grant of mineral title had been made in 1937. Wells Gray Provincial Park was established in 1939. Successive changes to the *Park Act* effectively banned mineral exploration from occurring within the park, for which the plaintiffs claimed, and ultimately received, compensation. The Supreme Court decision indicates that the 1985 value of the lost opportunity to exploit the minerals was assessed at around \$3 million.

⁷² *Wollasco Minerals Inc. v. Ronald Price*, Decision of Ontario Mining and Lands Commissioner, MA 004-03, 24 October 2003.

⁷³ For a discussion of this case, see "Land Grab" in *The Georgia Straight*, November 27, 2003, Vol. 37, Number 1875, <<http://www.straight.com/?defaultarticle=18773&defaultnode=&layout=227&pagefunction=Load%20Layout>>

⁷⁴ Another possibility is that if the government decided that oil and gas licences would be a far more lucrative means of gaining provincial revenue, but it had already granted mineral tenures, it would have to pay compensation to the holder of the mineral tenure.

⁷⁵ *R. in Right of B.C. v Tener*, [1985] 3 W.W.R. 673 (S.C.C.).

In the *Tener* decision, the court affirmed the distinction between regulation (for which no compensation is required), and expropriation. However, the case held that constructive expropriation can occur where: there is an interest in land; this interest has been “completely extringuished”, “defeated” or “effectively taken” from the subject, rendering its property interest “meaningless”;⁷⁶ and the value of the interest is transferred to or acquired by government. The BC government has ensured that this situation will not occur again by establishing provisions to enable staking to occur within 10 years after an area is declared a recreation area.

Shortly after the decision in *Tener*, the BC Supreme Court ruled on a much more narrow issue in the *Cream Silver* case, holding that a mineral claim is not “land” according to BC’s *Park Act*.⁷⁷ Because the wording of the then *Mineral Act* stated that the interest of a mineral claim holder was a chattel interest (similar to the current s. 28(2) of the *Mineral Tenure Act*), it could not be an interest in land. In its ruling, the court reviewed the history of changes to mineral title over the years. From 1896 to 1959, the legislation stated that mineral claims were an interest in land, but by 1977, the *Mineral Act* stated that the interest of a holder of a mineral claim is deemed a chattel interest. The judge found that since the *Mineral Act* deliberately used the term “chattel”, mineral claims were not an interest in land. It follows then that no compensation would be payable if the mineral claim were negatively affected.⁷⁸ This decision was affirmed by the Court of Appeal.⁷⁹

This decision placed a cloud over the issue of whether or not a miner would be entitled to compensation in the event that a park was placed on top of a mineral claim. Thus, in 1998, the government passed the *Mining Rights Amendment Act* to remedy industry concerns over the *Cream Silver* decision. Among the changes implemented by this legislation are the clarification that compensation is payable to the holder of a mineral claim in situations where government expropriates land under s. 11 of the *Park Act*, to an amount equal to the value of the rights expropriated.⁸⁰ Thus in BC, there is a right to compensation where rights under mineral claims and leases are expropriated for the limited purpose of park creation.

⁷⁶ *Manitoba Fisheries Ltd. v. The Queen*, [1979] S.C.R. 101 at 107; *Tener*, at 550; *Casamiro Resource v. BC* (1991), B.C.L.R. (2d) 346 at 355, respectively.

⁷⁷ *Cream Silver Mines Ltd. v. B.C.*, [1986] 4 W.W.R. 328 (B.C.S.C.).

⁷⁸ Section 28(2) of BC’s *Mineral Tenure Act* defines the legal nature of a mineral tenure as a chattel interest, or personal property, which is distinct from real property. In property law, there are two types of property: personal property includes all property other than real estate; and real property is land, or real estate.

⁷⁹ *Cream Silver Mines Ltd. v. B.C.*, (1993), 75 B.C.L.R. (2d) 324 (C.A.) at 333. Justice Southin was of the view that to accept an argument that a mineral claim was an interest in land would “be an impermissible intrusion by the courts into the domain of the Legislature under the guise of applying a rule of construction which owes its origin to a far different times from our own. Here, over the last 36 years, the Legislature has evinced an intention to put the question of development within parks into ministerial control and it has evinced no intention to impose, except as expressly provided in the *Park Act*, any burden on the public purse from the exercise of that control no matter what form that control may take.”

⁸⁰ Bill 12, 1998, *Mining Rights Amendment Act*, 1998; this provision is currently s. 17.1 of the *Mineral Tenure Act*.



3.4.3 NAFTA CHAPTER 11 CLAIMS?

When considered more broadly, the theme of compensation gives rise to questions about the potential application of the investor state dispute provisions found in Chapter 11 of the North American Free Trade Agreement (NAFTA). In this context, combined with proposed changes, such as map staking, it is possible that an American mining company could stake and obtain mineral title to Canadian crown land, find that it is unable to pursue the claim because environmental or municipal developments wouldn't permit it, commence a Chapter 11 claim for compensation, and seek millions of dollars from the Canadian government, all without leaving its office.

Such a situation is already occurring in the US. Canadian company Glamis Gold Inc filed a notice of intent to sue under Chapter 11 of NAFTA on the basis that California environmental laws restricting open pit mining have destroyed the value of its proposed gold mine. The company will be seeking to recover at least \$15 million. The mine proposal would see the excavation of 1,571 square miles in a federally designated desert conservation area, the exposure of an 880-foot deep open pit and the deposit of some 280-foot high piles of waste rock in an area of cultural significance to the Quechan Indians.⁸¹

3.5 THE MINING INDUSTRY'S VIEW

Despite the preferential treatment accorded to miners through the free entry system, the mining industry is consistently of the view that government regulation inhibits mineral development in Canada. Barton notes that while free entry is a source of dissatisfaction to people outside the mining industry, "... people inside the industry are also dissatisfied and feel anything but privileged over other land users." He is of the view that much of the industry's discontent can be traced to land withdrawals and environmental regulation, and that somehow, the advocates of each side are of the view that the other has somehow got an "unfair advantage".⁸²

Recent statistics by the federal-provincial/territorial Survey of Mineral Exploration, Deposit Appraisal and Mine Complex Development Expenditures verify that mineral exploration is declining. The Overview of Trends in Canadian Mineral Exploration 2001 shows that "all-inclusive exploration and deposit appraisal spending has declined significantly since 1997". In 1997, the Canadian total amounted to \$921 million; in 1998, expenditures dropped by 29 percent to \$656 million, and in 2001, expenditures were predicted to total \$458 million, an historical low. Governments have responded by introducing new exploration incentives and improving existing ones.⁸³

And while there have been a number of high profile contentious disputes in the past that clearly have contributed to this perception on the part of the industry, environmental

⁸¹ "Gold firm plans suit under NAFTA", Los Angeles Times, August 20, 2003. Interestingly, the Glamis case is the first time that the Interior Secretary has ever said "no" to a mine on public lands in the US (personal communication with Roger Flynn).

⁸² Barton, *Law of Mining*, at 165 and 167.

⁸³ All of this information is taken from the Canadian Intergovernmental Group on the Mineral Industry, *Overview of Trends in Canadian Mineral Exploration 2001*, at vii.

regulation and land withdrawals are not the primary cause of these downturns. There are other causes; the same 2001 Overview of Trends states that declining metal prices are the main reason for the industry's downturn.⁸⁴ With respect to environment-related expenditures by mineral exploration companies (which include costs incurred for characterization, permitting, protection, monitoring and restoration), the Overview notes that these expenditures have been decreasing significantly. Environment-related spending dropped by 41 percent between 1998 and 1999 (from \$31.7 to \$18.5 million) and by another 58 percent drop in 2000 (down to \$8 million). Thus between 1997 and 2000, there was an 83 percent decline in environmental spending at the exploration phase.⁸⁵

According to Barton:

It is entirely reasonable to argue that the business climate for mining can be chilled by adverse government action, and that the introduction of unpredictability into the legislation is a serious kind of intervention. Further, the removal of a block of land from mineral exploration involves a cost in terms of the opportunity foregone to develop its mineral potential. Indeed, there can be no doubt that the free entry system is more completely designed to encourage mining activity than are other resource disposition systems. It is difficult, however, to demonstrate how far any specific change in the mineral legislation is responsible for a change in business activity. It can also be argued that Canadian resource industries seem to put more store in political predictability than the wording of legislation as a measure of security of title.⁸⁶

Between 1998 and 2001, exploration and deposit appraisal expenditures by junior and senior mining companies in Canada were invested primarily in Quebec, Ontario, Northwest Territories, Nunavut, Saskatchewan, BC, and then Newfoundland. Investment occurred primarily in this order, with some variations from year to year.⁸⁷

As between different jurisdictions in Canada, the Fraser Institute's Annual Survey of Mining Companies provides an indication of how different jurisdictions are perceived by companies. The survey ranks 47 different jurisdictions, including countries such as Chile, China and Kazakhstan, US states, and Canadian provinces and territories.⁸⁸ The study identifies two primary categories: policy potential, or the attractiveness of the regulatory environment to mining investment; and mineral potential, a function of the region's geology. The survey uses these two factors to evaluate the investment attractiveness of the jurisdiction. For example, it is notable that while Alberta ranks first in terms of policy potential, it is third from last in terms of its mineral potential.

⁸⁴ 2001 Overview of Trends in Canadian Mineral Exploration, at vii.

⁸⁵ 2001 Overview of Trends in Canadian Mineral Exploration, at 11.

⁸⁶ Barton, *Law of Mining*, at 163.

⁸⁷ 2001 Overview of Trends in Canadian Mineral Exploration, at 4.

⁸⁸ *Fraser Institute Annual Survey of Mining Companies, 2002/2003*. The Fraser Institute, Vancouver, BC.



SUMMARY RANKING OF CANADIAN JURISDICTIONS BY THE FRASER INSTITUTE

	Policy Potential	Mineral Potential	Investment Attractiveness
BC	45	13	20
Yukon	27	19	18
NWT	24	11	9
Nunavut	31	9	11
Ontario	8	7	7
Alberta	1	45	36
Newfoundland	21	35	35

The mining industry is also of the view that free entry is essential in order for it to have access to the land. For their part, miners maintain that the right to establish a mineral claim without consulting the Crown, and the attendant secrecy associated with the staking process, are both important in their sector, because competition for land can be intense.⁸⁹

⁸⁹ BC Government Document, 1993, at 55.

4.0 THE US GENERAL MINING LAW OF 1872

Efforts to reform the US equivalent of Canada's free entry laws, the General Mining Law of 1872, have been underway for decades with little success. It is one of the models on which Canadian free entry laws are based. The shared purpose of each system is to create incentives for westward expansion. Many of the same problems exist under both regimes. Inadequate environmental protection, lack of government discretion and massive government subsidies are just a few of the shared concerns. It is helpful to provide an overview of the US law in order to better understand how it operates, and whether there are any lessons that can be applied to efforts to reform free entry in Canada.

The General Mining Law of 1872 is the fundamental statute governing hardrock mineral development on public lands in the US. Its central tenet is that "all valuable mineral deposits in lands belonging to the federal government, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase..."⁹⁰ The law makes all government lands not explicitly reserved available for exploration and purchase.⁹¹ In the United States approximately 662 million acres are held by the public; of these 590 million are open to mining exploration.⁹² There is no limit to the number of claims an individual may make, nor is there a requirement that mineral production ever commence. Each claim is limited to 1,500 x 600 feet, totaling approximately 20 acres centered over the minerals.⁹³ As with Canadian free entry laws, the mineral estate is dominant, regardless of other competing land or resource uses, or the area's environmental sensitivity.

Oil, gas, gravel and many of the other original materials included in the 1872 Mining Law have been subsequently removed by statute.⁹⁴ In the 1960's and 70's general environmental laws were passed addressing protection, multiple use, and management of federal lands. These laws imposed new requirements on agency actions and withdrew some federal lands from development, but did not amend the mining law or fully address the problems associated with mining.⁹⁵ From 1995 to now, Congress has enacted a series of one-year moratoriums on mining patents.⁹⁶ This action prevents the sale of public land but not mineral production.

⁹⁰ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 302.

⁹¹ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 303.

⁹² Mineral Policy Center Position Paper, *Mining Law Reform*, June 1999.

⁹³ 30 USC 23 (1994).

⁹⁴ Marc Humphries, Carol Hardy Vincent, "Mining on Federal Lands," Congressional Research Service Issue Brief for Congress, (2001) at 4.

⁹⁵ Humphries and Vincent, "Mining on Federal Lands", at 4. The *Multiple Use Sustained Yield Act*, *Wilderness Act*, *National Forest Management Act*, *National Environmental Policy Act (NEPA)* and *Federal Land Policy Management Act (FLPMA)* are a few of these statutes.

⁹⁶ Humphries and Vincent, "Mining on Federal Lands", at 4.



A miner has the right to possession of a claim only once the miner has made a mineral discovery on the claim.⁹⁷ The discovery of a valuable mineral deposit is necessary to possess a valid mineral claim. The term “valuable” is determined by the ability to show a profit after taking into account the costs of complying with all applicable laws (federal, state and environmental). If a claimant cannot prove that the deposit is valuable, then the BLM has the authority to reject the plan of operations and invalidate the claim by filing a mining contest.⁹⁸ Once a valid claim is established, the land may be purchased, or patented, for \$5.00 an acre. This per-acre price appears to be based on the value of farmland and grazing land in the western US before the enactment of the law in 1872.⁹⁹ Once patented, lands enjoy the same constitutional protections as any other property.¹⁰⁰

As a result of legal changes in 2001, the Interior Department acquired the right to say “no” to mine development proposals where they could result in “unnecessary or undue degradation of public lands. Thus, there is some discretion to reject mine developments, which has been narrowly applied by the Bush Administration.¹⁰¹

The millsite claim provisions are perhaps the most notorious aspect of the 1872 Mining Law. These provisions enable a miner to occupy or use non-mineral lands for mining or milling purposes. The claims are allowed on a one-to-one ratio up to a maximum of 5 acres. Millsite claims are to be used or occupied explicitly for mining purposes in connection with the associated lode claim. However, in practice, millsite claims have been used by miners to expand the area of a mining claim so that these lands cannot be staked by other miners or be used for other purposes. Prospecting, exploration, gathering samples for lode claims and storing tools all do not qualify as occupancy.¹⁰² A millsite claimant must show continued compliance with mining laws from the date of withdrawal until the date validity is determined.¹⁰³ These provisions have remained essentially unchanged since their creation, with only minor revisions in the 1960s.¹⁰⁴

4.1 PROBLEMS WITH THE 1872 MINING LAW

Because the 1872 Mining Law has not evolved, despite the fact that the industry has changed, difficult problems exist. Modern mining practices pose major threats to the environment, which the law is unable to regulate. For example, no federal statutes address the problems of groundwater pollution, acid mine drainage or non-point source pollution of streams.¹⁰⁵ Nor is industry held accountable for abandoning old mines. Cleaning up these

⁹⁷ *Lara v. Secretary of Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) (finding that “a mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim”).

⁹⁸ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 318.

⁹⁹ Humphries and Vincent, “*Mining on Federal Lands*”, at 6.

¹⁰⁰ 30 USC 29 (1994).

¹⁰¹ Personal communication with Roger Flynn, October 2003.

¹⁰² *United States v. Werry*, 81 Interior Dec. 44, 48-49 (1974).

¹⁰³ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 355.

¹⁰⁴ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 312 and 321.

¹⁰⁵ One example of the inadequacy of existing environmental laws is the *Clean Water Act*. This statute covers only surface water pollution, leaving mining operations that pollute groundwater completely

mines is estimated to cost anywhere between \$32 to 72 billion.¹⁰⁶ Not surprisingly, the Environmental Protection Agency has identified the hardrock mining industry as the nation's largest toxic polluter, responsible for over half of all reported toxic releases in the US and for the pollution of 40 percent of western watersheds.¹⁰⁷ The 1872 Mining Law gives rise to a number of specific issues.

4.1.1 CLAIM MANIPULATION THROUGH THE MILLSITE PROVISIONS

Claim manipulation occurs frequently and is the most widespread violation of the law. The 1872 Mining Law contains a one to one millsite ratio, and non-mineral lands up to a maximum of 5 acres can be claimed. However, this 5-acre limit is impractical in the context of modern mining operations, as industry needs significantly more land for waste material and other mining uses. Since each mining claim must bear profitable amounts of minerals in order to be valid, this practice covers large land areas with invalid claims. In order to fit modern land needs within the antiquated claims provisions, it has become standard practice to lay mining claims on land used for millsite purposes.

As late as 1999, the BLM had not formally acknowledged the fact that these types of claims are in violation of the 1872 Mining Law.¹⁰⁸ Yet the occupancy of a millsite for prospecting or exploration purposes does not satisfy the mining use requirement in the law.¹⁰⁹

4.1.2 NO DISCRETION

As with free entry, the priority given to mining claims makes it virtually impossible to reject a claim that meets the statutory requirements. The US Forest Service, the Bureau of Land Management and other public land managers have no discretion to block irresponsible mine proposals. Although courts have upheld government authority to suspend approval of a plan of operations until a claim's validity has been determined, and although deliberate attempts to acquire excess public acreage can, and have been, invalidated by US agencies such as the Interior Board of Land Appeals, other agencies have consistently argued that they cannot deny hardrock mining proposals.¹¹⁰

The lack of discretion on the part of government agencies to reject mining claims means that if the government wishes to prevent a mine from opening it must negotiate a buy-back or

unregulated. Mineral Policy Center, "*The General Mining Law of 1872 Polluter of Water, Provider of Pork.*"

¹⁰⁶ Mineral Policy Center Position Paper, *Mining Law Reform*, June 1999. The unregulated nature of the mining industry has resulted in 60 mines qualifying for the Superfund National Priorities List covering the most toxic sites in the United States; James S. Lyon, Thomas J. Hillard, and Thoman N. Bethell, *Burden of Gilt*, Mineral Policy Center, June 1993. In a Congressional report delivered in 1992, the EPA found that methods resulting in many of the Superfund listings are still used today. Mineral Policy Center Fact Sheet, "*The Last American Dinosaur: The 1872 Mining Law*", at 4. (EPA/530-SW-85-033).

¹⁰⁷ Mineral Policy Center, "*The General Mining Law of 1872 Polluter of Water, Provider of Pork.*"

¹⁰⁸ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 316.

¹⁰⁹ For a discussion of this, see Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 334-335.

¹¹⁰ See Robert Cornett, 36 I.B.L.A. 84 (1978) at 87.



buy-out agreement with the mining company. Compensation is based not on the patent price, but includes the value of the minerals in the land.¹¹¹

4.1.3 LOST RESOURCE RENTS AND REVENUES

The 1872 Mining Law essentially amounts to a giveaway of public land. Since the law's enactment in 1872, more than 3.5 million acres have been sold to mining companies containing minerals worth over \$240 billion.¹¹² Companies wishing to mine on public lands are not subject to royalties or taxation. Industry is paying between \$2.50 and \$5.00 per acre of land but nothing at all for the gold, silver, and other minerals buried in that property. The General Accounting Office estimated that for the 20 patents it reviewed since 1970 it has received approximately \$4,500 for lands ranging in value between US \$13.8 and \$47.9 million.¹¹³ Environmental groups estimate subsidies to be even higher.

The push to charge industry a fair financial return on public lands and mineral deposits is one of the most supported reforms and is subject to heated debate.¹¹⁴ Net smelter rates are the primary royalty regime promoted by reformers, with rates similar to the oil and gas industries at 5 to 8 percent. Net rates are favoured by industry over gross rates because they allow companies to write off expenses before assessing royalties. Environmentalists argue this enables companies to hide profits under counterfeit expenses, or rewards inefficient operators. US industry representatives cite BC government attempts to assess gross rates, and blame them for decreasing exploration, lack of new mine development, closure of existing mines, and 5,000 lost jobs.¹¹⁵ To date, the only successful reforms have been those that marginally increase the fees required to maintain claims.¹¹⁶

Enforcement is sought through the means of strengthening the rights of citizens to act and through financial reform. Communities where projects will be located want real power to affect the approval of development. Citizen suits are considered vital in that they allow interested groups to guard against government complacency or collusion with industry violations. Finally, reformers are suggesting that in addition to requiring reclamation bonds, maintenance fees and royalties should be earmarked for reclaiming abandoned mines. Reform efforts in the US are gaining ground, but on a glacial scale.

¹¹¹ Mineral Policy Center Position Paper, *Mining Law Reform*, June 1999.

¹¹² Mineral Policy Center Position Paper, *Mining Law Reform*, June 1999.

¹¹³ Humphries and Vincent, "*Mining on Federal Lands*", at 7.

¹¹⁴ Industry opposes any royalties whatsoever claiming they will increase dependence on foreign mining and eliminate incentives for developing rare minerals critical to national defence. US House of Representatives Committee on Resources, Subcommittee on Energy and Mineral Resources (1999) at 4.

¹¹⁵ American Geological Institute, "*Mining Law of 1872 Reform Update*," (2000) at 6.

¹¹⁶ Beginning in 1989, a fee of \$250 per application plus \$50 per claim within each application is required. The claimants must pay an annual maintenance fee of \$100 per claim to hold a claim on public land.

4.2 DISTINGUISHING FACTORS ABOUT THE 1872 MINING LAW

Elements of the 1872 Mining Law should be distinguished from the Canadian situation, to clarify where the US experience can be of value in our context. For example, in order to maintain a mineral deposit, an American miner must prove that a mineral deposit is “valuable”, which is determined by the ability to show a profit after taking into account the costs of complying with existing laws. There is no equivalent requirement in the Canadian system. Similarly, there is no equivalent in the Canadian system to the millsite claim provisions, which allow a miner to expand the area occupied by the claim, and which have been the focus of much of the reform efforts in the US.

In this context, the BLM has to ascertain whether the mining rights have any merit before a mine is approved; and the courts have upheld the federal government’s authority to suspend approval of a plan of operations until a claim’s validity has been determined.¹¹⁷

Another distinguishing factor about the US is the interface of other laws. For example, where approvals are sought under the *National Environmental Protection Act* (NEPA), there is a requirement that an agency afford meaningful consideration to reasonable alternatives. Because a mining claim is presupposed to be valid under the 1872 Mining Law (as is the case with free entry), one author asserts that the US courts have frowned upon this kind of biased approach to examining alternatives.¹¹⁸

4.3 A RAY OF HOPE: MINOR REFORMS

New BLM regulations have been promulgated to address the lack of discretion. These regulations grant the BLM authority to reject proposals with the potential to cause “substantial irreparable harm” to significant resources.¹¹⁹ Unfortunately, a deluge of legal challenges has forced the government to suspend the new regulations pending the outcome of the challenges.¹²⁰ Efforts are also underway to establish environmental performance standards, such as requiring all operators, on both public and private lands, to post adequate reclamation bonds in advance of any work commencing on a site.¹²¹

¹¹⁷ “In order to satisfy its statutory and regulatory duties to protect public lands from undue degradation and to minimize adverse environmental impact, the BLM must independently ascertain the nature of the “rights” at issue in its decision-making process.” Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 321.

¹¹⁸ Flynn, *A 19th Century Law Meets the Realities of Modern Mining*, at 325, footnoting *Citizens for Environmental Quality v. United States*, 731 F. Supp. 970, 990 (D. Colo. 1989), which held that a “result-biased decision-making process prevented the Forest Service from establishing a legitimately broad range of reasonable alternatives as required by the statutory and regulatory scheme.”

¹¹⁹ Humphries and Vincent, “*Mining on Federal Lands*”, at 9.

¹²⁰ Humphries and Vincent, “*Mining on Federal Lands*”, at 2.

¹²¹ Humphries and Vincent, “*Mining on Federal Lands*”, at 9.



5.0 ABORIGINAL LANDS AND LAW

The role of Aboriginal peoples in long term land use planning and decision-making is becoming increasingly important. Recent legal and political developments demonstrate that First Nations and Aboriginal communities are playing a role in efforts to limit industrial development and to ensure responsible development. There are two areas in particular where Aboriginal interests alter the situation. The first is in situations where treaties and land claims agreements are being negotiated or have been concluded, as it is in this context that opportunities may arise to withdraw lands from availability for mineral activity. The second is where First Nations seek to exercise their constitutionally guaranteed Aboriginal Rights and Title, independent of any treaty or land claim settlement process.

5.1 LAND CLAIMS AND LAND SETTLEMENT AGREEMENTS

Land claim settlement processes present an opportunity to designate areas that are to be withdrawn from mineral exploration and activity. With the exception of Nunavut, which is substantially subject to a land claims agreement that identifies the Inuvialuit Settlement Area, and Ontario, which is already subject to land claims agreements, these negotiations are occurring on a nation by nation basis. Under the BC Treaty Commission process, only one modern treaty has been concluded in the ten years that the Treaty Commission has been in operation. The most active land claims negotiations processes are underway in the NWT and the Yukon, where resource development is occurring at a rapid pace concurrently with the negotiation of land claims agreements (and with federal devolution of powers to the territorial governments).

Reconciling Aboriginal interests with those of environmental groups and industry is a challenge. A recent report by the National Roundtable on the Environment and the Economy which made a series of recommendations about resource development in aboriginal communities, was unable to reach a consensus recommendation on the issue of free entry because of the range of perspectives on this issue.¹²²

5.2 ABORIGINAL CASE LAW AND CONSTITUTIONAL RIGHTS

In addition to the land claims processes, the assertion of Aboriginal Rights and Title is increasingly becoming a tool by which First Nations can ensure that industrial activity on their traditional territories is consistent with aboriginal values and uses of the land. Canadian constitutional law requires that aboriginal people be meaningfully consulted where alienation of resources on their traditional lands and territories may occur; it is questionable whether the principle of free entry is consistent with aboriginal case law.

¹²² *Aboriginal Communities and Non-Renewable Resource Development* (Ottawa: National Roundtable on the Environment and Economy, 2001), at 95-100.

The legal framework for this issue arises out of a series of cases successfully argued by BC First Nations before the Supreme Court of Canada and the BC Court of Appeal.¹²³ This framework begs the question of whether the registration of a mineral claim or the issuance of mineral leases is an unjustifiable infringement of aboriginal rights. The very basic principles are as follows:

- Recent BC Court of Appeal decisions in the forestry context have held that the granting, replacement and transfer of timber tenures constitute *prima facie* infringements of Aboriginal Title.
- Infringements of Aboriginal Title and Aboriginal and Treaty rights must be justified by the Crown. Unjustifiable infringements are unconstitutional.
- The justification analysis considers factors such as whether priority in both the allocation of the resource and the process of allocation reflects the prior interest of Aboriginal peoples.¹²⁴ It also considers whether the government is pursuing a compelling and substantial objective, whether the government action interferes with the right as minimally as possible, whether consultation and accommodation have occurred, and whether compensation has been paid.¹²⁵
- Aboriginal people must be meaningfully consulted and accommodated where alienation of resources may occur on lands where Aboriginal Rights and Title are at issue.
- This consultation and accommodation must occur regardless of whether these rights have already been proven in a court of law, provided the Aboriginal people can provide evidence of a good *prima facie* case of Aboriginal Title or Rights, including evidence that the Aboriginal people exclusively (or shared exclusively) occupied the land in question at the time the Crown asserted sovereignty.
- The duty to consult and accommodate originates from the Crown's fiduciary relationship with Aboriginal peoples.
- Private third parties, such as forestry or mining companies, also have a legally enforceable duty to consult and to accommodate Aboriginal peoples.

¹²³ The primary cases are the Supreme Court of Canada's ruling in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, and two recent decisions of the BC Court of Appeal involving the Haida Nation: *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 147 and *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 462. Other cases have elaborated upon these principles to a certain extent; this level of detail is not necessary for our purposes.

¹²⁴ *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, 2001 FCT 1426 (Federal Court of Canada).

¹²⁵ Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and provincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples. The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose. Headnote from *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.



- The Crown or the company are required to accommodate Aboriginal interests where alienation of resources is involved; accommodation can include implementation of environmental and cultural protections, allocation of rights to First Nations, compensation, creation of jobs, or creation of other opportunities that are consistent with the goals of the affected Aboriginal peoples.

Where meaningful consultation and accommodation have not occurred it will be very difficult for the Crown or third-party tenure holders to justify infringements of Aboriginal Title and Aboriginal and Treaty Rights. The *Mikisew Cree* decision holds that the nature of the fiduciary duty is that Aboriginal rights must be placed first.¹²⁶ Thus, for a case to be successful, a First Nation would have to establish that the exercise of free entry, in enabling mineral exploration, constitutes an unjustifiable infringement that cannot otherwise be overcome.¹²⁷

5.3 OTHER ABORIGINAL LEGAL FACTORS

There are a number of other legal factors that could be relevant to a consideration of free entry on Aboriginal lands and territories. These are included for reference and background.

- Where treaties are concluded, such as for example, Treaty 8, the timing of the treaty and the timing of various adhesions to the treaty means that some reserves may have mining claims staked within their boundaries;
- A recent Federal Court of Appeal decision has held that Treaty 8 (concluded in 1899) guaranteed the aboriginal right to hunt, fish and trap, subject to two limitations: that the activity had to occur within Treaty 8 territory, save and except lands that were taken up for settlement, mining, lumbering, trading or other purposes; and that this right can be limited by government regulations passed for conservation purposes.¹²⁸
- The *Yukon Quartz Mining Act* contains a power for the Government to stop issuing mineral claims so that alienation of the land ceases while Crown lands are being set aside for Aboriginal land claim settlement.¹²⁹

¹²⁶ *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, 2001 FCT 1426 (Federal Court of Canada), para. 127.

¹²⁷ For a discussion of this issue, please see Bankes and Sharvit, *Free Entry Mineral Regimes*.

¹²⁸ *Mikisew Cree*, para. 58.

¹²⁹ *Halferdahl v. Whitehorse Mining District* [1992] 1 F.C. 813 (C.A.), confirming the application of s. 14(1) of the *Yukon Quartz Mining Act* (now repealed) for this purpose.

6.0 CONCLUSION

Free entry effectively compromises other values in society – environmental protection objectives, the rights of private landowners, and the public interest. It does not allow for the exercise of discretion in granting mineral tenures, or allow for the consideration of factors extraneous to the right to mine to be considered in mine exploration. Further, once mine exploration has occurred, and there is a desire to build a mine, industry pressure is such that it is virtually impossible to prohibit this development in order to respect other land uses and objectives.

Free entry thwarts sensible land use planning and elevates miners to a form of extraordinary privilege. It has negative fiscal implications for governments, it interferes with the exercise of Aboriginal Title and Rights, and the exercise of private property rights. While free entry may have been viable in the 19th century, when there were relatively few other uses for land, when mining occurred far away from human settlement, and when it did not occur in the large scale industrial manner in which it is now conducted, it is clearly anachronistic in the 21st century.

Reforms have been undertaken in other jurisdictions in Canada, where mining activity continues to occur. If we are to ensure that we protect our lands and our communities into the future, we must find a way to bring mining activity into balance with other competing, legitimate needs, such as clean water, clean air, protecting unique landscapes, protecting Aboriginal peoples and lands, or protecting private property interests. It is our hope that this discussion paper will be a first step in this direction so that mining in Canada no longer undermines our future.



ACRONYMS

BLM	Bureau of Land Management (US)
CMR	Canada Mining Regulations
GLUP	Gwich'in Land Use Plan
IBLA	Internal Bureau of Land Appeals
LUP	land use plan
MMAAC	Ontario Mines Minister's Mining Act Advisory Committee
NAFTA	North American Free Trade Agreement
NEPA	National Environmental Protection Act (US)
NPC	Nunavut Planning Commission
NWT	Northwest Territories

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