Northern Perspectives
Volume 25, Number 3, Fall-Winter 1998-1999

Staking Our Claim: Reform of Northern Mining Law

by Kevin O'Reilly

For many years the Canadian Arctic Resources Committee has keenly scrutinized northern mineral development, including the Nanisivik, Polaris, and Faro projects, to name just a few. CARC's Northern Minerals Programme has examined the way government regulates northern mining, deals with community impacts, ensures reclamation is carried out, and improves sustainability in mining. This issue of Northern Perspectives presents summaries of some of the research we commissioned under the Northern Minerals Programme to build the agenda for reform of northern mining law (1).

Claims post on top of Tally Ho Mountain, Yukon, Photo by Kevin O'Reilly

Northern mining law has changed little since the settlement of western Canada in the 1800s. Almost anyone may obtain the appropriate licence and then begin to stake mineral claims on most lands in the N.W.T. and Yukon, regardless of the inherent value of the land or other users. In his paper, Barry Barton outlines several alternative methods for the disposition of mineral rights and evaluates them against a set of criteria that relate to sustainability. Mr. Barton is Associate Professor of Law at the University of Waikato in New Zealand and is the author of Canadian Law of Mining (2). He contends that, even with minor reforms to northern mining law, it is possible for the Department of Indian Affairs and Northern Development (DIAND) to better live up to national and international commitments on sustainability.

Malcolm Taggart's analysis of the economics of free entry in the Northwest Territories and Yukon suggests that the federal government is not managing our public resources well from a financial viewpoint. At least $10 million each year is dissipated through the free-entry system. He suggests this money could be put to better use by mining companies in actually developing properties or might be used by government to generate longer term employment in the renewable resource sector. Mr. Taggart, a life-long Yukon resident, is completing a masters degree through the Environmental Studies department at the University of Victoria with a thesis examining the life cycle of the Faro mine from the perspective of sustainability.

Recent case law on Aboriginal rights undermines the tenuous hold on resources established under our archaic mineral rights disposition system, especially in those areas with unsettled claims. Nigel Bankes, a former CARC chairperson, and graduate student Cheryl Sharvit carefully examine the entry of the N.W.T. and Yukon into Canada and the constitutional framework for mineral dispositions in the North and conclude that current regimes are not consistent with the law. DIAND does not appear to be dealing with this legal uncertainty in a public or transparent manner. Those registering new mineral claims in Labrador are informed by the provincial government that their rights are subject to outstanding Aboriginal land claims and may be subject to new terms and conditions, whereas in Yellowknife and Whitehorse it is "business as usual."

During the course of its Northern Minerals Programme CARC has actively promoted consideration of the changes suggested by our commissioned papers. Recent amendments to the Auditor General Act allowed CARC to file the first petition from-the N.W.T. challenging the consistency of the Canada Mining Regulations with the principles of sustainable development. Highlights of the petition, along with DIAND's responses, are found in several boxes in this issue (3). It is important to note that DIAND will not commit to any substantial changes to northern mining legislation until after all land claims are settled. Given current policies and priorities, we are not optimistic that settlement of outstanding Aboriginal claims will occur in a timely or fair fashion. Serious mining reform appears to have again been pushed off into the future.

Northern Perspectives 1999-2000
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Pursuant to the
Auditor General Act

CARC's Petition

... the Department is failing to make progress towards the goal of sustainable development in relation to the minerals regime of the N.W.T. Indeed, the Department is failing to even ask itself the right questions.

DIAND's Response

Integrating sustainable development into its decision making ... is DIAND's goal....

The current regime is rapidly changing. It creates an opportunity to ... incorporate principles of sustainable development.... The department has a heavy agenda of pending legislation, including the Mackenzie Valley Resource Management Act, the Nunavut Waters Act, the Nunavut Surface Rights Tribunal Bills and is not able to commit resources, at this time, to a comprehensive review of all legislation.

In addition, the North is entering a transitional period.... Conducting a comprehensive review of existing resource management legislation including the Canada Mining Regulations, will be more appropriate after land claims are settled in the N.W.T.

CARC participated in three recent reviews of mining legislation and policy in the N.W.T. Two were related to proposed changes to the Canada Mining Regulations to improve administration and to revise the royalty regime in light of BHP's Ekati diamond mine, and another concerned reclamation policy. These reviews resulted in changes that could be characterized only as "tinkering" rather than fundamentally or comprehensively revising the northern mining regime.

Total federal and territorial government revenues from the Ekati and proposed Diavik mines are estimated to be $190 million per year, while the companies will earn from $700 million to $915 million per year. Even with the minor adjustments made in the latest round of changes, the N.W.T. combined royalty and taxation regimes will remain among the lowest in Canada and the world. The impetus for imposing the royalty came in the 1995 federal budget; DIAND escaped major cutbacks by committing to raise revenues. Yet DIAND officials have admitted that the only "new" revenues to be raised are a result of the opening of Ekati and have nothing to do with Canada Mining Regulations changes.

Records obtained under the Access to Information Act reveal an astonishing example of "regulatory capture"-a term used to describe the phenomenon of industry agenda becoming government agenda-while DIAND was considering how to revise the royalty regime. As early as February 1995 DIAND officials were meeting with BHP executives to discuss the changes. Written proposals were exchanged and visits made to BHP's North American corporate headquarters in San Francisco. DIAND officials accompanied BHP personnel on a visit to the diamond-producing regions of Russia. All of this occurred well before any public discussion or debate or consultation with Aboriginal peoples, in breach of at least three constitutionally entrenched Aboriginal land-claims agreements.

Northerners are understandably upset that the issue of fair distribution of revenues has yet to be dealt with and that their share of those and other benefits is minimal at best. The territorial government share of revenues from Ekati will amount to about only $400 million over its estimated 25-year life; at the same time it will incur significant costs related to social services, environmental monitoring, and infrastructure.

Equally important, if not more important than the issue of royalties, is the question of local economic benefits. What has the federal government done to assist or encourage a greater retention of local benefits? Very little. Most diamond producing countries require valuation within the country but off the mine property, sorting for marketing, and some sales to encourage the development of a domestic diamond-processing industry. Indications are that Canada will not achieve what most other diamond producers have instituted. Federal authorities argue that their hands are tied by current legislation and trade agreements.

It may be too late to achieve greater benefits and fairer distribution of revenues for the North from the BHP project; the federal government has already issued BHP 21-year renewable mining leases that do not require diamond sorting or sales in the North, or even within Canada. In the oil and gas industry-in stark contrast to the mining industry-requirements for local benefits are standard practice, even for northern lands under DIAND's jurisdiction. Northerners deserve changes before Diavik, the North's second diamond gets the green light.

Pursuant to the
Auditor General Act

CARC's Petition

... we do not argue ... that mining is per se inconsistent with the principles of sustainable development. ,.. it is simply our position that it is possible to design a minerals disposition and regulatory regime that is sensitive to principles of sustainable development and ecosystem health.... DIAND has made no attempt to do so.

DIAND's Response

... the Canada Mining Regulations do not work alone. There is a multitude of existing legislation which regulates the mining industry in the N.W.T. in a sustainable manner. The licenced staking regime, which the petitioners call "free entry," supported by the overall regulatory framework, is consistent with the principles of sustainable development.

It's time for a comprehensive review of the Canada Mining Regulations and for changes to make them appropriate for the new millennium. Moreover, it is in the best interest of the mining industry to participate in a review of northern mining legislation and policy to improve certainty of tenure and investor confidence. CARC will continue to press for a full review of the outdated 1986 Northern Mineral Policy, revisions to DIAND's Sustainable Development Strategy, and other changes needed to make mining in the North more consistent with sustainability. We will also continue to be active in the development and implementation of a national environmental mining council and strategy to help focus national attention on these issues. There is a great need to reduce environmental effects from mining, better respect Aboriginal peoples' rights, and redistribute the benefits of development more equitably among all northerners and all Canadians.

Kevin O'Reilly was CARC's Research Director.

Notes

1. The full versions of the seven papers of CARC's Northern Minerals Programme are available under the Mineral Resources Program in the CARCives on our website.

2. Barton. B.J. 1993. Canadian Law of Mining. Calgary: Canadian Institute of Resources Law.

3. The complete versions of CARC's Petition and DIAND's Response can be found on CARC's Web site: www.carc.org.

Ekati Camp, Lac de Gras, N.W.T. Photo by Kevin O'Reilly

Reforming the Mining Law: A Comparison of Options

by Barry Barton

Rights to Crown-owned hardrock minerals in the Northwest Territories are issued under the *Canada Mining Regulations.1* How they are issued plays a role in environmental and resources policy that is attracting increasing interest. This article, comparing the existing law with some possible alternatives, sheds light on the strengths and weaknesses of the possibilities for reform and sharpens our understanding of the existing system.2

Five Options for Mineral Title

1. The Present System: *Free Entry*

Under the Regulations, the holder of a licence to prospect (which is freely available) has a general right to enter and locate (i.e., stake) mineral claims on Crown lands except lands within certain classes (e.g., national parks, cemeteries) or lands withdrawn from mineral activity by Cabinet order. This right to enter does not apply to lands where the mineral rights have been vested in Aboriginal owners under a settlement agreement, and it is modified on those Aboriginal lands where the Crown continues to hold the mineral rights.

Where lands are open, a licensee may stake mineral claims for exploration purposes. A claim is square or rectangular and can incorporate from 51.65 to 2582.5 acres (20.9 to 1045 hectares). It is staked by erecting a legal post in each corner, writing details on the post or a tag on the post, and marking the boundaries with other posts and blazing. The claim is then recorded at the Mining Recorder's office. To maintain the claim, the holder must perform exploration work valued at $4 per acre (0.4047 hectare) on the land for the first two years, then $2 per acre for each subsequent year, up to ten years total. The claim gives its holder the exclusive right to prospect and explore, but not to go into production. For that (and for holding ground for more than ten years) a mining lease is required. Mining leases are issued for 21-year periods, are renewable, and require the payment of royalties on production.

Pursuant to the
Auditor General Act

CARC's Petition

There no evidence ... that environmental factors are integrated in the design of the CMRs. On the contrary, the CMRs are informed by a development ethic in which resource rights are simply given away to the first comer.

DIAND's Response

Integration of the environment and economy is accomplished within the entire regulatory framework governing mineral exploration and development.

An alternative for reconnaissance and exploration is a permit to prospect, for terms of three years (five in the far North), in areas ranging from 20,000 acres to 71,000 acres (8094 to 28,734 hectares). The permit gives exclusive rights to explore and to locate claims to be held for a longer period.

Exploration activities are subject to the *Territorial Land Use Regulations.3* Most work of any substance requires a Class A or a Class B permit issued by the Department of Indian Affairs and Northern Development (DIAND), but staking a claim and related basic activities do not require any land-use permit.

The system under the *Canada Mining Regulations is* called free-entry system because of three elements:

- **Right of Entry.** A miner has a right to enter most lands for mineral purposes
- **Right to Acquire a Claim.** A miner can stake a claim and acquire mineral rights by his or her own actions. No government official decides whether a claim can be issued, and the Recorder must record a claim on receipt of a proper application. Free entry involves self-initiated title or unilateral appropriation of title.

- **Right to a Lease.** When a claim holder applies in proper form and has the claim surveyed, he or she is entitled to a lease. The government has no choice in the matter.

2. The Present System Plus: *Modified Free Entry*

A group of modifications would make slight but significant changes to the existing free-entry system:

- **Map Selection.** Claims could be acquired by designating them on a map rather than by staking on the ground. Map selection is already in use under free entry systems in parts of Manitoba, Saskatchewan, Quebec, and Newfoundland.

- **Improved Withdrawals and Land-Use Planning.** The Cabinet power to withdraw land from mining could be made more open, predictable, and flexible and could be linked with new land-use planning systems as they emerge. This would make withdrawals a more efficient and less intrusive instrument.

- **Clearer Relations with Environmental Law.** Rights under the *Canada Mining Regulations* could be more clearly subject to environmental law- which we should understand includes law relating to land use, pollution, rehabilitation, wildlife protection, etc. At present the Regulations are not clear and there is a risk that regulators will agree that mining legislation confers a right to mine that cannot be denied by action under environmental legislation. In addition, specific changes could link prospecting licences, representation work, and leases with environmental requirements.

- **Agency to Have Discretionary Powers in Specified Cases.** Powers could be accorded an agency to impose terms or conditions, or even to decline to issue claims. Such powers may be constrained by high standards or criteria to be met before the agency exercises them. It is an important general issue that discretionary powers in legislation can be written either in a broad and vague way or in a closely structured way that narrows the purpose for which they can be exercised, the standards that must be met, and matters that must be taken into account.

Pursuant to the
Auditor General Act

CARC's Petition

[There is no] planning mechanism designed to ensure that lands valued for reasons of ecosystem health are withdrawn from disposition or staking.

DIAND's Response

The licenced entry system for mineral disposition contained in the Canada Mining Regulations neither makes it impossible to take into account considerations of eco-system health nor prevents an adequate system being designed....

... [the] environmental assessment process ... involve[s] ... checking proposals against the land use plan.... This will ensure that it is possible, in the early stages of approvals for exploration, to account for ecosystem health.

3. Administrative Title

Under a system of administrative title, the legislation would provide for exploration and mining tenures with specified rights, procedures under which one applies for them, and a power for the minister or an official to grant or refuse applications or to grant them subject to terms. An administrative title system may be elaborated by stating criteria that the decision maker may, or must, take into account. Such systems are the norm in Australia where, in most states, environmental and land-use matters must be taken into account. A similar system is in effect in Alberta.

4. Mineral Leasing

Under a leasing system, a company asks for land to be posted. If the department agrees (it may take environmental and land-use issues into account in deciding), competitive bids are invited for the land; a lease or other disposition is issued to the successful bidder. The most common form is cash bonus bidding, reflecting the premium that companies are prepared to pay the Crown to obtain the ground. Other forms of bidding are by work commitment, royalty, or profit sharing. The system provides some predictability for mining companies. It is most common in the oil and gas industry.

5. Mineral Concessions

Mineral concession agreements are fashioned to meet individual needs and are negotiated separately for each proposal. They may be negotiated under statutory authority and take effect when signed, or they can stand outside the ordinary statutory regime and take full effect when they are ratified by a special act of the legislature. Once ratified, an agreement provides a separate legal code for a project, covering mineral rights and

a range of subjects such as environmental control, water rights, taxation, royalties, local benefits, and infrastructure. Such ratified concession agreements have been used often in Australia.

Evaluation

These five mineral-title systems may be evaluated under seven criteria:

1. Security of Title

Legislation for the disposition of Crown mineral rights should function effectively, provide legal clarity about the status of the disposition, and suit the natural resources in question and the methods used to explore for and develop them.

2. Efficient Procedures

Procedures for the acquisition and maintenance of mineral title should cost the government or the private sector no more than necessary. Waste, delay, and complexity should be minimized.

3. Proper Return to the Crown

Different systems offer the Crown different opportunities to obtain revenues from its natural resources; i.e., to collect economic rents from mineral development.

4. Minimal Disturbance of the Environment

The process of acquiring and maintaining mineral title should muum~ze env~ronmentaHmpact.

5. Appropriate Decision-making Powers

To pursue sustainable development, mineral development should not compromise the ability of future generations to meet their own needs. Because we expect the state to safeguard such values as the environment and the needs of future generations, it is reasonable that a system of mineral title include effective government powers. We expect government to have power to act at the key decision points and to have powers that are flexible enough to respond suitably in different situations. The legislature must allocate discretionary powers carefully; it should state purposes and principles clearly and must make policy choices. Explicit criteria and procedures are needed to reduce uncertainty. Policies should be articulated, proclaimed, and enforced in plain view.

Pursuant to the
Auditor General Act

CARC's Petition

Under an open access regime all Crown lands are open for mineral operations unless they are specifically withdrawn.

DIAND's Response

... the right to enter lands ... is restricted by the requirement for a Prospectors' Licence.... The right is further restricted, once certain threshold activities are initiated, by the requirement for a Land Use Permit. ... the right to produce is regulated and restricted by federal and territorial legislation.

6. Integration of Legislation

The relationship between mineral-title legislation and environmental and land-use legislation should be clear, should not be contradictory, and should not raise false expectations. Environmental and land-use decisions should not be controlled or restricted by the mineral-title legislation.

7. Local Benefits and Other Societal Purposes

There is significant support in the North for local-benefits agreements in connection with mining projects. Different mineral-title systems can be evaluated in relation to the opportunities they present for such agreements.

Application of these Criteria to Different Systems of Mineral Title

Decisions about mineral title and environmental management in the Canadian North are made under conditions of uncertainty that are greater than those in comparable regimes. While the mining industry maintains "minerals are where you find them," others counter with "so are ecosystems, endangered species, and critical habitat." The nature and concealed character of the mineral resource, the lengthy process of mineral exploration and development, and the environmental and land-use constraints appropriate to a particular site contribute to high levels of uncertainty. This demands careful allocation of discretionary powers between developers and regulators at the different stages of mineral exploration and development.

Legislation should send consistent signals; such consistency is not apparent in the relationships between mining and environmental law. The free-entry system presumes that mineral activity is a permitted-in fact a priority-use of land, and present legislation permits entry on land for staking and for low-level activity without any land-use permit. This assertion of primacy influences regulators and fosters an assumption that, in any individual case, mineral activity can be constrained and regulated but not prevented. It leaves land-use managers open to legal claims of regulatory taking.4 It sends signals that compliance with the mining law confers a right to explore and to mine that puts mining law and environmental law into an uneasy and unsatisfactory relationship if one believes that decisions under mining law should not control environmental law outcomes.

The free-entry system embodied in the *Canada Mining Regulations* offers the virtues of speed, simplicity, and connection with the land itself. Its deep historical roots have been modernized considerably in Canada. While it may be particularly appropriate to mineral exploration, it may not reflect current values in its relations with other land-use needs. Free entry affords government agencies no discretionary power over the occurrence of mineral exploration, the location of claims, or the procurement of mining leases for production, except by withdrawing lands from mineral entry altogether.

Title to a recorded claim is not secure. It is difficult to stake a claim exactly in accordance with the law, and regulations give only moderate protection for *bona Ode* errors. "Claim jumping," where another explorationist overstakes a claim and challenges it for deficiencies in the staking or representation work, is quite legal and common. It is not easy to give an assurance to a lender or investor that there has been absolutely no error in the staking of a claim.

There is a tradeoff between the speed and simplicity of the free-entry system and systems that may be slower and more complicated but offer greater clarity in environmental and land-use outcomes. The process under an administrative title system may be slower, but it could give an explorationist a full (or partial) clearance on environmental and land-use matters as well as on mineral title. The ratified mineral concession agreement offers great flexibility and comprehensiveness, but may carry too high a price in uncertainty and opacity. Minor modifications to free entry may be something of a compromise, but carefully focused reforms may actually be able to deliver most of what is needed.

The different options vary considerably in structuring discretionary powers. Mining legislation can be improved in its procedures and in stating the proper considerations to be taken into account and the possible outcomes. Both mining interests and environmental and other land-use interests would benefit from increased certainty. It demands legislative commitment; we as a society would be obliged to decide more clearly the general principles that should govern the allocation of mineral title and the balancing of mineral interests with other interests.

Barry Barton is Associate Professor of Law at the University of Waikato in New Zealand.

Notes

1. C.R.C. 1978 c. 1516, made under the Territorial Lands Act R.S.C. 1985, c.T-7.

2. The full version of this paper is available from CARC's Yellowknife of lice: "Reforming the Mining Law of the Northwest Territories." ISBN: 0-9 1 9996-78-7. 3. C.R.C. 1978 c. 1524. 4. Under *British Columbia v Tener* [1985] 1 S.C.R. 533.

Summary of Application of the Evaluation Criteria

	Security of Title	Efficient Procedures	Proper Return to the	Minimal Disturbance of the Environment	Appropriate Decision-making powers	Integration of Legislation	Local Benefits
Present System: Free Entry	Low security. Ground staking.	Quick and simple. More expense in field.	Royalties on production.	Some disturbance from ground staking.	No power in hands of government to vet claims or leases, to impose terms. Withdrawal powers used more.	Little integration. Conflicting signals from mining and environmental legislation.	No requirements for benefits agreement.
Present System Plus: Modified Free Entry	Map selection offers better security. Not a ground-based system.	Map selection simpler. Not a ground-based system. Referral procedures may lengthen process.	Royalties on production.	No disturbance from map selection.	Better withdrawal procedure. Power to vet claims, to impose terms. Linkage to land-use planning.	Clarified relationship with environmental law. Links to land-use planning.	Act may expressly allow terms to be imposed on claims and leases for a benefits agreement.
Administrative Title	Good security.	Longer an less certain process but higher degree of certainty at end.	Royalties on production.	None.	High degree of discretion. Needs to be structured. Fewer withdrawals. Link with environmental legislation.	Potentially high level of integration. Very high if procedure links mineral title and environmental approval.	Depends whether discretion expressed to permit local benefits to be considered.
Mineral Leasing	Good security.	Predictable procedures; longer than free entry but may be shorter than administrative title.	Bidding on cash bonus (or work, benefits, etc.) at exploration stage. Royalties on production.	None.	Power to decline to post. Discretion over bidding criteria, but criteria and terms fairly fixed. Fewer withdrawals.	Little integration.	Successful bidder can be required to make a benefits agreement. Local benefits can be a criterion for bidding.
Mineral Concessions	Good security especially if ratified. Political uncertainty.	No certainty as to process or resulting rights. Long process. Confidential. Difficult to obtain ratifying Act.	Royalties and other payments the subject of negotiation.	None.	Highest degree of discretion. Flexible. No rule as to priority of applicants. No certainty about process.	Potentially high, especially if agreement ratified by a special Act.	Potentially high opportunity for local benefits. Tradeoffs not explicit.

The Free-entry Mineral Allocation System in Canada's North: Economics, Sustainability, and Alternatives

by Malcolm Taggart

The Free-entry Mineral Allocation System in the Canadian North

The free-entry system of mineral allocation used in the Canadian North grants exclusive rights to the minerals in a given area of public land.' Certain rules must be followed (the staking and registration process) and the claimant must perform a certain amount of work on the area claimed (known as assessment work). The claimant incurs costs, which can be considerable when staking is done on a large scale. The government, as owner of the resource, receives little or no direct benefit from granting these rights. Underlying free entry is the assumption (often unstated) that mining is the highest and best possible use of the land.

The free-entry system consists of three inter-linked rights: the right of entry onto lands containing minerals; the right to acquire a claim on those lands; and the right to lease the land and extract the minerals. Under the free-entry system, the state has only one very crude discretionary power in making allocation decisions: the power to withdraw lands from staking. Nonfree-entry systems (e.g., a leasing or concession system) offer the state far more discretionary power in the process of determining who will develop mineral resources and where.

Is the free-entry system the most economically efficient means of allocating mineral resources? Does free entry help or hinder the achievement of economic rent for minerals and so help or hinder meeting the criterion of sustainability? What are the possible reforms of, or alternatives to, free entry?

Free Entry, Economic Rent, and Sustainability

Over the past several decades, there has been increasing pressure to reform or replace the free-entry system. Competing land uses have increased in economic and political importance; there has been a rise in environmental awareness among the general public; and governments have largely adopted principles of sustainability including the component sustainable development. The federal Department of Indian Affairs and Northern Development, for example, has adopted sustainable development (defined as meeting the needs of today without compromising the ability of future generations to meet their needs) as a guiding principle for the management of the North's resources.

Pursuant to the
Auditor General Act

CARC's Petition

There is no evidence that a free-entry system [based on a developmental ethic rather than an ecological ethic] balances the needs of nature.... it is hard to plan development ... that benefits the residents of the region and avoids a boom and bust economy.

DIAND's Response

Being able to plan long term mineral development in a staged and managed manner is extremely difficult, given that investor interest is cyclic by nature and is driven by a number of external factors such as international supply and demand. DIAND focuses on the management of the mineral industry by ensuring that the "rules of the game" are clear, that the environment tat and social costs are minimized and that benefits are distributed throughout the affected region over time.

For non-renewable resources such as minerals, applying the criterion of sustainability emphasizes the need to collect economic rent for the resource and to invest it in substitutes or in renewable forms of economic activity. For minerals, economic rent can be defined as the surplus above the return required to motivate production; thus the rent of a mineral deposit is the difference between unit extraction costs (including a normal profit and a risk premium related to the risky nature of mining investments) and the final selling price of the product. In Canada's North, mineral resources are publicly owned but privately extracted. In return for the right to extract the resource, companies pay to the federal government the economic rent of the resource. Because of the wide variation in extraction costs from deposit to deposit and in the final selling price of minerals over time, the economic rent available for collection will also vary widely.

Applying the sustainability criterion to mineral resource extraction requires a three-stage process. First, institutional and market structures must be configured to minimize the dissipation of rent; i.e., to leave the maximum possible amount of rent available for collection. Second, the mechanism of rent collection should ensure that the maximum rent is collected. And third, a mechanism is required to allow those

rents to be invested appropriately rather than treated as general revenue. Although all three stages are important and necessary for developing sustainability, only the first stage will be examined in this paper.

The Economic Importance of Mining in the Canadian North

The importance of mining in the measured economies (i.e., excluding non-market and subsistence activities) of Yukon and the N.W.T. is summarized in the following table.

Table 1

The Importance of Mining in the North
Annual Averages 1991-1996 (dollars expressed in millions)

	Yukon	N.W.T.
Mining sector share of GDP (direct and indirect but excluding exploration)	36%	47%
Mining sector contribution to employment (direct and indirect number of jobs excluding exploration)	820	2,219
Mining sector share of total employment	6.9%	9.9%
Estimated total exploration expenditures in the North	$21.1	$98.9
Estimated wage expenditures for exploration (25% of total)	$5.3	$24.7
Number of full-time-equivalent northern jobs in exploration (assuming 75% of wage expenditures go to northern residents at $40,000 average annual salary)	99	463
Territorial income tax from sector (assumes 7% of $40,000 average annual salary)	$2.6	$7.5

Note: GDP and employment figures are arrived at using Statistics Canada input-output multipliers. Exploration figures are drawn from Natural Resources Canada data. Average annual salary and tax percentage are based on Yukon Government's rule of thumb.

Fees, Mining Royalties, and Administrative Costs in the North

The average annual totals for fees and royalties collected from the mining industry in the North are shown in table 2. The current budgets for the federal and the two territorial governments' costs to administer and promote the mineral sector in the North are also shown.

Table 2

Fees, Royalties, and Administration Costs
Annual Averages 1992-1997 (millions of dollars)

	Yukon	N.W.T.	North of 60 Totals
Fees	$1.3	$1.9	$3.2
Royalties	$0.4	$2.1	$2.5
Territorial costs	-$2.3	-$2.0	-$4.3
Federal Costs	-$3.0	-$3.4	-$6.4
Totals	-$3.6	-$1.4	-$5.0

Note: Federal costs are likely understated, as true costs-spread between sections of DIAND and other federal agencies-are difficult to ascertain.

It is clear that the fees and royalties contributed by the mineral industry in the North do not cover the costs of administering, subsidizing, and promoting the industry. Of course, governments also reap direct and indirect tax benefits, including corporate income tax, income tax from those employed in the industry, and taxes from firms and individuals working as suppliers to the industry. The territorial governments are net beneficiaries (see table 1); however, the federal government and the country as a whole do not benefit greatly. While it is impossible to predict the exact proportion, some (and perhaps most) of the capital and labour involved in northern mining would be employed producing similar benefits elsewhere in the country if they were not in the North.

Costs of Free Entry

Some of the costs associated specifically with free entry (exclusive of costs endemic to mining or mineral exploration generally) are direct and easily measured; other, indirect costs are more difficult to measure accurately and have been conservatively estimated for the purposes of this analysis. Environrnental costs, although real, have not been included

because of difficulties in estimating them and in determining to what extent they are linked to free entry rather than to mineral exploration in general. All of the costs shown in table 3 could be wholly or partly eliminated by replacing or reforming the free-entry system.

Table 3

Annual Estimated Costs *of* Free Entry

	Yukon	N.W.T.	North of 60
Field staking	$1,450,000	$7,150,000	$8,600,000
Subsidization of prospectors	$640,000	$132,000	$772,000
Administration costs	-	-	$100,000
Dispute costs	-	-	$100,000
Total	-	-	$9,752,000

The process of staking claims in the field is both expensive and inefficient. The field-staking estimates in table 3 are based on the amount of land staked and the average cost of staking in each jurisdiction. Government subsidization of mineral prospecting is a direct cost of the free-entry system as it is currently practiced in the North.

The indirect costs of the free-entry system include government administrative and inspection costs and the costs to industry and government to resolve disputes over staking and mineral title. Extrapolating from Newfoundland's experience in switching from field to map staking, we can conservatively estimate savings in government field inspection costs in the order of $100,000 per year by eliminating two inspectors' positions.

Disputes over boundaries of staked claims, fractions, and whether or not procedures have been followed are commonplace in the North. Although most are settled outside the formal hearing structures of the mining recorders and the courts, there is a cost. Negotiations between companies, calls on government inspectors to adjudicate, delays, and ill will all impose costs estimated at $100,000 per year.

Environmental Costs

The historical right conferred on miners by the free-entry system to enter onto lands and to do largely as they pleased on their claims appears to have imposed higher environmental costs than those strictly necessary to locate and delineate mineral deposits. Of course, the process of mineral exploration must inevitably lead to some environmental disturbance, and this cost must be accepted as part of the mining equation no matter what form of allocation system is used.

The free-entry system has encouraged poorly financed, speculative exploration efforts that have sometimes resulted in exploration camps and sites being abandoned, with their associated garbage and contaminants. In Yukon, DIANDhas approximately 133 abandoned mineral exploration sites on its files; it has cleaned up 79 of them to date. The average cost of clean-up is given at approximately $10,000 per site, making the total direct cost $1.33 million for Yukon alone. These are the direct costs only. If the costs of identifying the sites and those environmental costs caused by contaminants were to be included, the totals would be much higher.

The Benefits of Free Entry

Proponents of the free-entry system claim two general benefits. The first is that it gives the mineral industry the necessary level of confidence to operate in the North. The second is that it maintains diversity in the industry, encouraging the independent prospector and the small junior companies. Neither benefit is easily quantified.

Representatives of the mining industry often assert that industry confidence is a delicate flower in need of careful nurturing. Security of tenure is usually cited as the most important concern (behind promising geology) in choosing where to invest exploration dollars, and any suggestion of modifying the allocation system quickly raises concerns about tenure. Yet mining companies operate around the world under extremely unstable political conditions and, for senior companies especially, it appears that the free-entry system is not a particularly important requirement. It is, therefore, debatable that a somewhat altered mineral allocation system that continues to grant security of tenure would drive the industry out of the North.

Given that free entry allows and encourages the participation of independent prospectors and small junior exploration companies, the question becomes whether or not this is an economically desirable state of affairs. It has already been argued that small, poorly financed exploration companies can impose unnecessary environmental costs. It has also been suggested that free entry allows every prospector to explore and stake as soon as he or she perceives the value of the claim to equal the outlay. The process is often repeated several times, sometimes over decades, before a deposit is developed. This dissipates the economic rent of the resource, as all of the expenditures plus the interest on them must (in theory at least) be paid out of the producing deposit.

Historically, the prospector and the smaller juniors have played a strong role in the exploration industry, discovering many deposits and generally adding value before deposits went into production. Is this still the case? And will it continue to be the case? It is generally accepted in the industry that the most efficient exploration teams tend to be those in the mid-range between the too small and underfunded and the too large and rigid. This, coupled with the declining discovery rate of mineral occurrences and the increasing cost of exploration, points to a shrinking role for the smallest operators regardless of the mineral allocation system used.

Potential Reforms of the Free-entry System

There are two areas in the current free-entry system where reform can increase economic efficiency and the available mineral rents without fundamentally altering the nature of the system: replacing field staking with paper (map) staking and altering the assessment work process.

Moving from field to paper staking is an easy and obvious means of improving the efficiency of the mineral allocation process. The industry would save millions of dollars in staking costs over the years and that money would be available for more productive uses. Costs related to conflicts over claim boundaries and disputes over staking procedure would also be eliminated. Governments would reduce their costs because staking inspections would no longer be needed. Costs identified in table 3 for field staking, administration, and dispute settlement suggest paper staking in the early 1 990s would have reduced rent dissipation by approximately $8.8 million annually.

Of course, a change to paper staking would not result in universal joy. Staking dollars currently end up in the pockets of local staking contractors and their employees, local helicopter pilots, and various other suppliers. Field staking can be viewed as a tradeoff that governments make between future resource rents and current regional economic stimulation.

Those wishing to hold a claim must do a certain amount of exploration-related work on their claims or pay the equivalent sum. This discourages holding large tracts of land for speculative purposes, encourages the development of mineral deposits into producing mines, and, as a side benefit, creates some employment and economic activity. All of these goals could be better served by expanding the list of eligible "explorationrelated" work to include environmental baseline studies, impact assessments, and perhaps marketing studies, and by raising the required value of that work, which has remained unchanged since the early 1 920s.

Conclusions

The free-entry system as it is currently practiced in the Canadian North is far from ideal from the perspective of long-term sustainability. It is rife with economic inefficiencies, and it hinders the collection of mineral rents. If the commitment by governments to the principles of sustainability is serious, these inefficiencies should be corrected, and far more of the mineral rents must be collected. Even simply moving from field to paper staking would result in a considerable gain in efficiency. And if free entry is to be replaced, the system of mineral allocation used in Greenland offers a possible alternative to the current system in Canada's North.

The Greenland system has a three-stage process for acquiring mineral title: the prospecting licence, the exploration licence, and the exploitation licence. Neither the prospecting nor the exploration licence automatically grants rights to any minerals found, although holders of the exploration licence are entitled to an exploitation licence if they meet all the requirements. Corporations are required to supply information on their technical and financial capabilities (including annual reports) on the licence application, and the government reserves the right to refuse any applicant at either of the first two stages. An exploration licence grants the exclusive right to explore for minerals in the area selected by the applicant for as long as ten years. Exploration licences have work obligations (assessment work), which, at the onset of the ten-year term, are about ten times that required in Canada's North. The scale of work obligations then increases sharply towards the end of the licence period to encourage companies to accelerate their exploration on smaller areas relatively rapidly and free up areas in which new companies may be able to apply fresh geological theories. Work obligations may be met in part with environmental or feasibility studies. All work obligations and licence fees are indexed to allow for inflation. An exploitation licence must be issued before mineral production can commence, and the applicant is required to have an ore body delineated, a "bankable" feasibility study, an environmental assessment report, and a closure plan before the licence will be granted.

Mineral exploration is driven by expected value. In the short term, exploration expenditures vary wildly in response to new discoveries, metal prices, investor confidence, changes to the tax structure, and other factors. The North has seen great surges-and deep slumps-in mineral exploration over the decades. Furthermore, while the discovery rate of new mineral occurrences (any confirmed incidence of a mineral regardless of size or grade) has been in steep decline since the mid- 1 970s, the delineation rate of significant deposits (a deposit with a defined tonnage and grade) in the North has remained remarkably constant at approximately three per year over the past fifty years. The constant delineation rate, together with a high expected value of base metal exploration, suggests mineral exploration in the North will continue at a high level regardless of the precise means of mineral allocation used.

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Notes

1. The full version of this paper is available from CARC's Yellowknife office: "The Free Entry Mineral Allocation System in Canada's North: Economics and Alternatives." ISBN: 0-919996-81-7.

Royal Oak Giant Mine, Yellowknife, N.W.T.

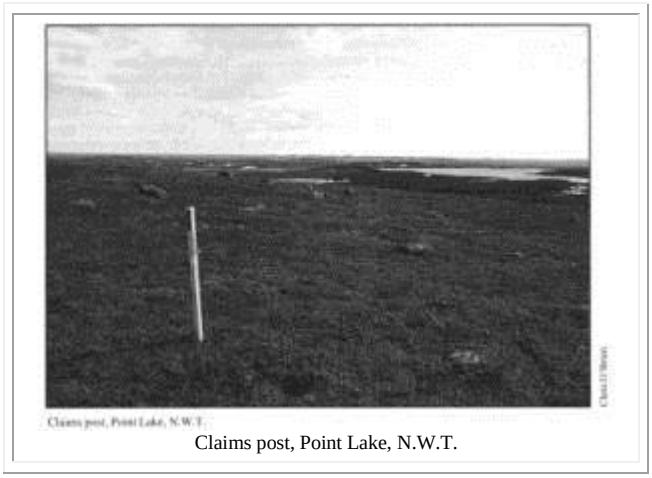
Free-entry Mineral Regimes and Aboriginal Title

by Nigel Bankes and Cheryl Sharvit

Introduction

The administration and control of Crown-owned minerals in both Yukon and the Northwest Territories remain vested in the Crown in right of Canada, and the prevailing disposition legislation is therefore federal. For the last century, the Government of Canada has proceeded on the assumption that mining legislation in both territories allows miners to enter onto the traditional lands of Aboriginal peoples, stake claims, go to lease, and produce and export minerals, all without the consent of the Aboriginal peoples concerned and without compensation to those peoples.

We question the validity of this assumption in light of s. 35(1) of the *Constitution* Act, 1982. In the full version of this paper, published by CARC as Northern Minerals Programme Working Paper 2,i we also question the validity of the assumption in light of the terms of the 1870 Imperial Orderin-Council pursuant to which Rupert's Land and the NorthWestern Territories became part of Canada.



Claims post, Point Lake, N.W.T.

The Elements of a Free-entry System

The analysis of whether mineral legislation is unconstitutional as a result of s. 35 depends to a large extent on the free-entry nature of the *Yukon* Quartz *Mining* Act (YQA) and the *Canada Mining Regulations (CMRs).* Both the YQA and *CMRs* incorporate all three features that characterize a free-entry scheme for disposing of resources. First, there are few, if any, qualifications to be eligible to acquire rights to the resource (YQA, s. 8(7); *CMRs, ss.* 7-8, 11-12). Second, all lands in which the Crown holds mineral interests are presumed open for staking and acquisition of mineral resources *unless expressly withdrawn* (YQA, s. 12;CMRs,ss.3, 11). Thus each regime expresses the default judgement that mining is the highest and best use of the land. While the actual exercise of a withdrawal power by the Crown will be a key defence to any claim that the legislation infringes a constitutionally protected title, the existence of a withdrawal power in itself does not limit the extent of lands open for staking and, in particular, does not preclude staking on title lands.

The third element of free-entry systems is that rights to the resource are acquired by the actions of the staker. One acquires a claim by being first to properly locate a claim (YQA, ss. 31-33; *CMRs, ss.* 13-19). The claim must be recorded within a prescribed time(YQA s. 39; *CMRs, s.* 24(1)).Properlocation requires placing posts and marking boundary lines, which in treed areas is by blazing trees and cutting underbrush *(CMRs,* s. 16; YQA, s. 29). Such staking activities may themselves cause limited, but unnecessary (and avoidable by adopting a map-staking system), environmental damage.

Once acquired, claims may be held in perpetuity in Yukon and for ten years in the N.W.T., provided representation work is performed or a fee paid in lieu. Under either regime a claim holder has a right to obtain a 21 -year renewable lease *(YQA, s.* 72; *CMRs, ss.* 58-59). Both regimes require representation work to maintain a claim and as a prerequisite to going to lease.

Rights acquired through acts of staking and under leases are extensive and include rights to mineral resources and to the surface. Although both the *CMRs* and the *YQA* include provisions to deal with a surface owner or occupier whose lands are damaged or compromised as a result of mineral activities, the relevant sections have not been applied to provide compensation or relief to Aboriginal title claimants. Further, the sections are premised on the assumption that the surface owner has no right to deny access to and use of the surface of his or her land and that he or she is entitled merely to compensation for damages suffered and, perhaps, for loss of use. The mineral regimes therefore accord priority to mineral interests granted under the legislation. Aboriginal peoples with an existing Aboriginal title may not refuse entry to prospectors or prevent them from carrying out mineral activities on Aboriginal lands.

Neither regime provides for revenue sharing with Aboriginal title holders or for Aboriginal involvement in the disposition process. There is no requirement of consultation with Aboriginal peoples in whose traditional territory a claim is located and no opportunity for Aboriginal peoples to object to the staking of claims. Neither disposition scheme provides for Aboriginal involvement at the leasing stage. Finally, even government intervention is kept to a minimum and discretion (or power) strictly confined. Not only do the regimes allow interests to be disposed of on title lands, they actually require such dispositions where demanded by a staker, and there is no discretion on the part of the Mining Recorder to consider Aboriginal interests.

In addition to the proprietary framework established by the *YQA* and the *CMRs,* there is of course a plethora of environmental and regulatory standards (including the *Territorial Land Use Regulations)* with which the proponent of a mineral project must comply. We contend that while consideration of these regulatory requirements may affect the answers to our questions at the margins, it will not alter our primary assessment of the proprietary aspects of the regime. We think that there will usually be an insufficient nexus between the proprietary infringement and the subsequent regulatory control to allow evidence of that regulatory control of activities to be adduced to justify the infringement. The legislation governing land and water uses and deposits of waste is not concerned with protecting Aboriginal title interests or compensating interference with title; nor does it provide Aboriginal peoples with a role in land- and resource-use (i.e., property) decisions affecting title lands.

The Constitutional Protection of Aboriginal Title

Section *35* of the *Constitution Act, 1982* "recognizes and affirms" existing Aboriginal rights, including title. Where there is an allegation of infringement, a court will apply the four steps described by Chief Justice Lamer in *Gladstone:*

[F]irst, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second a court must determine whether that right was extinguished prior to the enactment of s. *35(1)* of the *Constitution Act, 1982;* third, a court must determine whether that right has been infringed; finally a court must determine whether that infringement was justified.

In doing so, the court is entitled to review the overall structure of the disposition regime.

We shall not deal with proof of title or extinguishment; instead we proceed on the assumption that the Aboriginal peoples in Yukon and the N.W.T. who have not executed a modern land-claim agreement can establish an existing title. The *DelgamauLw* decision of the Supreme Court of Canada decides that the content of an Aboriginal title includes the *exclusive* right to occupy and use the territory "for a variety of purposes," and the right to determine the use to which title lands are put. *DelgamauLw* suggests that title is a proprietary right, and Aboriginal property owners can thus avail themselves of the full panoply of protections available to any owner, including trespass and nuisance.

Delgamuukw also suggests that there are two limitations on the exercise of an Aboriginal title. The first is the long-standing restriction that an Aboriginal title is inalienable except to the Crown. Second, Justice Lamer suggests that the exercise of the title "must not be irreconcilable with the nature of the group's attachment to the land" (pare 117) or "inconsistent with continued use by future generations of aboriginals" (pare 154; see also pare 166).

Prima facie Infringement

The individual or group challenging the legislation must demonstrate a *prima facie* infringement of the right or, in the present context, that there has been a limit on the exercise of title rights. Any "adverse restriction" on the exercise of a right or any "meaningful diminution" of rights effected by the legislative scheme as a whole constitutes *a prima facie* infringement.


Miramar Con Mine, Yellowknife, N.W.T.

For present purposes our inquiry focuses on the disposition scheme as a whole rather than on particular dispositions. We think the mineral disposition schemes in the territories clearly limit the exercise of title rights and represent a meaningful diminution of those rights. The exclusivity of title, coupled with the fact that "what aboriginal title confers is the right to the land itself" and the right to decide to what use the lands shall be put, suggests that a scheme that allows others to gain competing proprietary interests within the title area represents an interference with the Aboriginal title.
Although *Delgamuutw* suggests that Aboriginal title will always include minerals, we do not believe that proof of a mineral content to an Aboriginal title is a necessary condition for a successful attack on a free-entry mineral regime. We say that largely on the basis that surface rights granted under a free-entry system may engender significant interference with the surface interests included in an Aboriginal title.

First, the YQA and *CMRs* treat all Aboriginal lands as if they were open for staking and purport to allow others to do things on the surface that only an owner can authorize. Both schemes purport to permit uses of land that would give an ordinary property owner a common law cause of action such as trespass or nuisance. Second, a free-entry regime is premised on the proposition that mining is the highest and best use of the lands in question, thus ignoring entirely the Aboriginal perspective and preventing the exercise of Aboriginal decision-making rights with respect to those lands. The Court's reasoning in limiting the uses that Aboriginal peoples may make of title lands suggests that any similar such use of the land for these purposes by the Crown or a licensee of the Crown (prior to a surrender by the Aboriginal people concerned) is *aprimufacie* infringement, for it too must be irreconcilable with the Aboriginal interest in the land.

Another approach to the question of *prima facie* infringement focuses on the breadth of the statutory powers to grant interests or rights. Legislation that authorizes the issuance of rights or dispositions where such dispositions potentially interfere with the exercise of Aboriginal rights is a *prima facie* infringement unless it is structured to attempt to accommodate those rights. The YQA and *CMRs* require the issuance of a disposition once certain formalities, none of which serve to ensure that Aboriginal title or rights are protected, are met.

The withdrawal provisions in both territories and the practice pursuant to them indicate that the Crown does use these executive powers to ensure that *some* land is available for the settlement of Aboriginal claims. This does not preclude a finding of *primofacie* infringement for two reasons. The first is that the policy is limited to interim withdrawals to preclude new third-party interests once negotiations reach a fairly advanced stage; lands are identified for interim withdrawal pending final selection. In effect, the exercise of the withdrawal power is best characterized as facilitating claims negotiations and not accommodating an existing Aboriginal title. Second, the policy is simply that-a statement of policy. Neither the legislation nor the regulations lay out how these discretionary withdrawal powers will be exercised, and the withdrawal power is not itself a direct limit on legislative dispositions. In several cases the Supreme Court has struck down general discretionary powers that fail to provide guidance to decision makers on how to accommodate Aboriginal rights or title.

We think it is fair to conclude that both the YQA and the *CMRs* dispose of interests in land which may be title land, and that neither regime seeks to accommodate Aboriginal interests or acknowledges that unextinguished title may exist in territorial lands.

Justification

The onus is on government to justify a primo facie infringement once established. There are two steps to this process. First, government must establish that it was acting pursuant to a valid, or compelling and substantial, legislative objective. The Courts have been reluctant to find government objectives to be invalid so long as they are not overly vague.

The second part of the test requires government to demonstrate that the infringement is consistent with the nature of the special fiduciary relationship between the Crown and Aboriginal peoples. This means that government must try to achieve the valid legislative objective in a way that upholds the honour of the Crown and its obligations to Aboriginal peoples. The analysis requires examination of the overall disposition system as well as the particular licenceor incident that brought the conflict to court. To justify an infringement, government must demonstrate that in pursuing the valid objective it has 1) recognized an appropriate priority for the Aboriginal interest; 2) consulted with potentially affected title holders; 3) attempted to ensure that the infringement of the Aboriginal interest has been as small as possible given the legislative objective; and 4) made available fair compensation.

Priority

It is clear that neither the CMRs nor the YQA seeks to accommodate an Aboriginal priority. By failing to reflect that there may be existing title rights to lands in the territories, or that the lands may already be occupied, the legislation does not recognize the prior interests of Aboriginal peoples in their title lands. Neither scheme accommodates Aboriginal participation or removes economic barriers for Aboriginal peoples in the mining sector. In fact, the automatic nature of a free-entry disposition makes it very difficult to trigger an obligation to negotiate an economic benefits agreement. On its own, the withdrawal power or its exercise does not reflect the priority of Aboriginal title, but the Crown may be able to justify an infringement if it has entered into good-faith negotiations with the Aboriginal people concerned with a view to expeditiously identifying and then protecting title lands by withdrawing them from disposition.

Pursuant to the
Auditor General Act

CARC's Petition

There is no requirement that government consult Aboriginal peoples or other land users (i.e. outfitters, forestry operators) prior to opening lands for mineral exploration.

DIAND's Response

... no consultation is required on rights issuance; however, consultation would be done for example, if a land use permit is required. ... it is now the practice of DIAND to consult before issuing prospecting permits which grant exclusive rights to stake claims in specified areas.

Consultation

Delgamuulw requires Aboriginal involvement in all decisions respecting title lands, and in most cases something "significantly deeper" than mere discussion or consultation will be necessary. Where the potential infringement is significant, government may have to gain the consent of the Aboriginal people. While it is possible that in a particular case consultation in the context of a mineral disposition may be adequate, neither territorial mineral regime provides for consultation with Aboriginal title or rights holders for the purpose of satisfying obligations to accord priority to those rights. In neither territory does the legislation provide for any kind of involvement of Aboriginal title holders in "decisions with respect to their land." The mineral disposition schemes in the territories fall short of even the minimal requirements for appropriate consultation.

Minimal Interference

The cases indicate that government must demonstrate that it sought to achieve the valid legislative objective in a manner that would interfere as minimally as possible with Aboriginal rights.

We think that a court might reasonably pose the following questions in the context of justification:

1. Has government re-examined the mineral disposition legislation since the entrenchment of Aboriginal rights in 1982 to see if government has truly taken account of the existence and importance of Aboriginal rights and title?
2. Has government examined other types of disposition regimes to see if they might better take account of the interests of Aboriginal peoples in their traditional territories? Such regimes might include a leasing regime or a negotiated concession regime or a substantially modified free-entry regime that incorporates some elements of ecologically based land-use planning as well as Aboriginal priorities.

There has been no fundamental re-thinking of the free-entry system in either jurisdiction in light of the entrenchment of Aboriginal and treaty rights in the Constitution.

Compensation

Neither the CMRs nor the YQA explicitly contemplates compensating Aboriginal title holders for interference with the mineral content of an Aboriginal title. Although there are several provisions in the YQA, the Yukon Surface Rights Board Act, and the CMRs (ss. 70-72) that deal with the payment of compensation to surface owners, it is not clear that these provisions contemplate payment of compensation to persons claiming under an Aboriginal title.

Conclusion

We have argued that there is a prima facie case for thinking that free-entry mineral regimes are inconsistent with a claim of an unextinguished Aboriginal title. While it may be possible for the Crown to justify such a regime, we think that the justification analysis will have to focus on the extent to which government has actually used its statutory withdrawal power to protect Aboriginal title lands from alienation. In the final analysis, this question can be determined only on a case-by-case basis, but, when one considers the limited use of the withdrawal power, the timing of the exercise of the power in the land-claim negotiating process, and the grandparenting of third-party rights, we think that it will be a difficult case for government to meet.

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Note

1. The full version of this paper is available from CARCives on our website: "Aboriginal Title and Free Entry Mining Regimes in Northern Canada." ISBN: 0-919996-77-9.