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Exploration

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A REPORT

The Yukon Quartz Mining Act
and
Its Regulatory Regime's Impact
on
The Free Entry System of Mining Law

by

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About the Author

Andrew James (Jim) McFaull was born in Regina, Saskatchewan on December 14, 1952 and died suddenly at his home in Whitehorse, Yukon on April 14, 2012. He was 59 years old.

Mr. McFaull, an exploration geologist and prospector, was a Fellow of the Geological Association of Canada; a director of Yukon Revenue; a 35-year member of the Yukon Chamber of Mines and Yukon Prospectors' Association (YPA), serving twice as YPA president and one term as president of the Yukon Chamber of Mines as well as sitting for many years as a chamber director.

Further to Mr. McFaull's credentials it should be noted that on November 17, 2000, he debated a City of Whitehorse lawyer over mining laws and land conflicts when he represented the Yukon Chamber of Mines, an intervener in the first quasi-judicial Surface Rights Board hearing where the City was pushing its hand and wasting millions of taxpayers' dollars on legal fees, trying to shaft a harmless prospector who was operating under precedent federal law.

There was no winner or loser between the two debaters. However, Mr. McFaull held his own against the lawyer who was not a mining-law specialist. While the lawyer seemed eager to continue the discussion to pick up pointers from Mr. McFaull's extensive research and his repertoire of references and case law, they ran out the clock. The City lost its case to the strong federal mining law.

This PDF document was prepared by Jane Gaffin in Verdana 12 font for posting online in 2012; she can be contacted at jane@diArmani.com.

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INTRODUCTION

In December 1998, the Yukon began stumbling along under two separate sets of contradictory mining law. In probably an unprecedented move, the federal government jammed Part II Mining Land Use Environmental Regulations into the centrefold of the parliamentary statute known as the *Yukon Quartz Mining Act.* It reduced the mining system to chaos and left exploration geologist Jim McFaull wondering "what happened to miners' rights!" Thus the raison d'être for this report. JG.

The purpose of this report is to examine the effects of the current and proposed regulatory regime on the *Yukon Quartz Mining Act* (YQMA) and the free entry system of mining law. The free entry system of mining law grants certain "miner's rights" to the miner, to authorize his entry onto Crown land, his location of mining claims (which allows him to seize title to the land), his prospecting and his mining.

These miner's rights have been described as "hard rights" in that they are "exclusive and virtually without qualification," according to Alastair R. Lucas' paper, *Natural Resource Use Conflicts: "Hard vs. Soft" Rights. (*in Ross & Saunders, a compilation of essays from the Fifth Canadian Institute Conference on Natural Resources Law, 1992, p.1).

These rights are *"reasonably full and secure rights that often amount to the complete mineral portion of fee simple property interests. The mineral estate, as an element of the bundle of rights making up the fee simple interest in land, could be severed by sale and grant."* (Lucas p.2).

These minerals rights *"were obtained as part of full fee simple land grants from the Crown...of either severed interests in mines and minerals or lesser property interests such as profits à prendre.* (Fr., to take or seize).

"The real-property nature of these interests was considered to be important. They were exclusive; contained no inherent qualifications;

could be sold, bequeathed, or otherwise dealt with by the owners; and could by protected, if necessary, through legal action.

"The contractual character of the acquisition also provided a possible basis for legal action. Because of the importance of mineral development on Crown lands, modern Canadian mineral rights are more likely to be statutory, with exploration tenures leading to leases for defined periods at the development and production stage. Thus, a relatively high order of security remains whether one looks at metallic minerals or at oil and gas." (Lucas p.3).

"On the strength of these rights, the investment required to efficiently explore for, produce, and market the mineral resources could be confidently made." (Lucas p.3).

This is the basis of the concept of "legal security of tenure".

These miner's rights currently appear to be overthrown by the regulatory regime in the Yukon Territory. This is due to the use of licences or permits to operate mining claims under the regulatory regime.

These licences are "discretionary" in nature, in that they can be withheld by the Crown upon application by the miner, or subsequently revoked for failure to comply with the regulations. The regulations have been enacted such that the miner is "prohibited" from mining if he has no licence. There are severe penalties and sanctions against the miner if he tries to operate his claim without a licence, including fines of up to $100,000.00/day.

This flies in the face of the fact that the miner is still in possession of his original statutory free entry miner's rights, which authorize him to enter, locate, prospect and mine on a freehold estate in fee simple with legal security of tenure.

This raises the question of how the miner's rights of free entry, which are supposed to be near absolute, irrevocable and protected by law, can be withheld by the use of a revocable licence?

This revocation prohibits the exercise of those statutory rights, if the licence is revoked. These licences are also used by the Crown to cause undue delay in allowing miners to mine their claims. This is done by running the application process for indefinite periods of time, in some cases in excess of five years and counting.

The Crown seems of the opinion that the miner's rights to mine are not affected by such a delay or prohibition; but the miner who cannot work his claims must believe the contrary. These delays or prohibitions ruin the miner's livelihood and destroy his investment in the land.

This situation would appear to place the Crown in the position of having overthrown the law of free entry. Law professor Barry J. Barton raised this issue in 1993 in **Canadian Law of Mining,** (p. 154-155).

Barton states: *"that caution has been the byword of the government departments implementing these controls on access because of the long-standing assumption of mineral operators that their work will not be prevented if it is done in accordance with required standards.*

"No doubt officials have had pointed out to them the guarantees in the mining legislation of a right to enter and use land for prospecting, staking, and exploration. How those guarantees stand in relation to the regulation of land use has not been explored in the courts. On the one hand, the legislature guarantees free access and use of the land on the other, it prevents land use for many purposes except by permit.

"When judicial interpretation of this point of legislative intention does occur, underlying the inquiry will be some basic policy questions about the place of the free entry system.

"Do these controls spell the end to free entry?

"Whilst in practice they may never be used to stop exploration work, the legislation on its face does appear to give authority to do so. In that sense, access is no longer perfectly free. When we bring into our thinking the effect of withdrawals for parks and the like, we must

conclude that this, the first element of the free entry system, has experienced more attrition than the other two elements. At this stage, however, we cannot say that the free entry system has been altogether overthrown."

Since Barton wrote these words in 1993 the free entry system of mining law in the Yukon would appear to have undergone a near total overthrowing. In spite of the guarantees in the *Yukon Quartz Mining Act* and the *Yukon Placer Mining Act*, exploration work is now being prohibited by withholding licence, access to land is being denied, claims are being refused granting or renewal by bureaucratic fiat and operating mines are being driven out of business by punitive regulation.

It would appear to be past time for the Yukon judicial system to decide whether the free entry system can be overthrown in this fashion or whether the government has entered into unlawful actions in withholding the miners' rights.

These unlawful acts would appear to include: interference with vested rights, violation of the vires doctrine, regulatory taking of real property without compensation, or possibly indictable offences such as Sections 122, 336, 337 and 430 of the **Criminal Code of Canada.**

These include "Breach of trust by public officer", "Criminal breach of trust", "Public servant refusing to deliver property", and "Mischief" (the willful obstruction, interruption or interference with the lawful use, enjoyment or operation of property). (See pages 118-119 of this Report).

STATUTORY LAW

In addition to the above, the Crown appears, through their prohibition of statutory rights, to be overthrowing the legislative intent of Parliament. This "legislative intent" is meant "to refer to the meaning or purpose that is taken to have been present in the "mind of the legislature" at the time a provision was enacted. (Law professor Ruth Sullivan, **Statutory Interpretation**, 1997, p.33).

"*This is because statutes are obviously enacted for a reason, and the language in which they are drafted reflects deliberate and careful choices. Given the sovereign authority of the legislature under constitutional law, these choices cannot be ignored. Courts and other interpreters must at least try to understand, to reconstruct or recreate, the meanings and purposes that motivated the legislation in the first place*." (Sullivan p.34).

"*The current understanding of legislation is assumed not to differ from the understanding of interpreters when the legislation was first enacted. However,where this assumption is challenged, the courts must decide whether to insist on the original meaning of the legislation, which is the meaning the enacting legislature would have had in mind, or to adopt the current meaning, which is the meaning relied on by those whose conduct or interests are currently governed by the legislation.*

"*In the interpretation of ordinary legislation, the original meaning rule prevails. It assumes that the meaning of legislation is fixed when the legislation is first enacted and, once fixed, nothing short of amendment or repeal can change it.*" (Sullivan p.100).

"*Those who defend the original meaning rule emphasize, in keeping with traditional theory, that the job of the court is to give effect to the real intention of the legislature*." (Sullivan p.101).

It would appear that an understanding of the original intent of the legislature in enacting the free entry system of mining law and the

Yukon Quartz Mining Act is essential to the understanding of how far from that intent the current regulatory regime may have deviated.

This is called a "purposive analysis" of the law. Sullivan states that when carrying out such an analysis *"courts sometimes refer to the mischief rule, also known as the rule in Heydon's Case.*

"Heydon's Case was decided in 1584 and has been cited ever since for the following passage:

" 'For the sure and true interpretation of all statutes...four things are to be discerned and considered: -

" '1st. What was the common law before the making of the Act?
" '2nd. What was the mischief and defect for which the common law did not provide?
" '3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
" '4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy…' " (Sullivan p.140).

The regulatory regime being enforced in the Yukon mining industry at this time does indeed appear to overthrow this concept of law. It appears to advance the mischief of interference in the operation of mining claims by the bureaucracy, while suppressing the remedy of free entry mining law, which is supposed to protect the free miner from that interference.

Before the *Yukon Quartz Mining Act*, the common law was a free entry system of mining law going back over 1,000 years in British law and over 2,700 years in Europe.

The mischief that was not provided for in the common law was the corrupt bureaucratic interference with the operation of mining claims, including the taking of bribes by the Mining Recorders and the Minister of the Interior, to break miners' ownership of their claims during the Klondike gold rush.

It also involved the misuse of miners' licences by bribery and corruption of public officers in the Australian gold rushes 50 years before the Klondike. This led to the Ballarat Miners Rebellion in 1854 and the subsequent massacre of miners at the Eureka Stockade by British troops. This was the primary incentive for the creation of free miners "rights" in all subsequent British mining law. It also required the Crown to abolish the use of miner's licences. This was due to the excessive bureaucratic authority found in licences, which leads to excessive bureaucratic corruption.

It would appear that after 150 years of successful operation of free entry mining law in Australia, New Zealand, South Africa and Canada, the 4th rule of Heydon's Case is being overthrown.

The remedy of free entry is now being suppressed and the mischief of licencing is once again being advanced with regrettable but predictable results: the destruction of legal security of tenure; the collapse of the mining industry; the blacklisting of this jurisdiction by the world investment community; and the decline of the economy and the standard of living in the Yukon.

This, in fact, is already taking place in the Yukon. The mining industry is suffering a catastrophic failure as this is being written.

The exploration industry is down by nearly 90% from three years ago. The development of new mines is at a standstill due to licencing problems and regulatory interference. The companies involved in exploration and mining licence applications in the Yukon are losing hope and abandoning the Territory for other jurisdictions.

The stock market investors and brokerage houses have written the Yukon off as a place for mining investment. The second last producing mine in the Territory was shut down and forced into bankruptcy by regulation. The last operating mine is facing a seemingly endless increase in regulatory interference and (the decision makers) are obviously making plans to abandon the Territory as soon as they can.

The Territory has lost 10% of its population in the last 18 months and the economy is moribund.

If this situation is to be salvaged, then the Yukon judiciary must review the mining acts and their regulatory regime.

This review must examine, in the most minute of detail, the rights granted by the acts and the extent to which those rights are now being interfered with, prohibited, withheld or overthrown.

The courts must then decide whether to reinstate the rights of free entry or let them fall. The courts must also determine if the overthrowing of the free entry system has been done lawfully or unlawfully and to what extent it may have been unlawful. This may require additional investigations by the Police authorities.

If this situation is not clarified and rectified in very short order, then the Yukon will sink into the pit of the third world economic collapse; with all the additional social and criminal problems that this sort of situation inevitably brings.

The various local government departments have tried to deny that these problems are the result of excessive regulation. Their excuse for the drop in mining activity is the global drop in metal prices, which are beyond their control. This fails to explain why Canadian mining companies are still flourishing at this time, just not in Canada. Hundreds of millions of dollars of Canadian investment capital are currently hard at work building mines and making jobs in the third world. These other jurisdictions are not suffering economic collapse. Quite to the contrary, their mining industries are booming. The only difference between those jurisdictions and the Yukon is their regulatory regime, and their willingness to allow mining to proceed without undue hindrance.

In attempting to achieve an understanding of miners' rights under the free entry system of mining law, a major obstacle arises very quickly. Barton describes this in the foreword to **Canadian Law of Mining** by quoting J.O. Saunders.

Saunders states that rights granted to miners by statues such as the *Yukon Quartz Mining Act* are *"complex and have been interpreted in literally hundreds of cases. The legislation in each province and territory is comparable but by no means uniform, and has changed considerably over the years. As a result, it is often difficult to determine which authorities or principles are relevant to a given problem. Moreover, a large part of the legal framework consists of common law and equity principles and is not to be found in statutes at all."* (Barton's **Canadian Law of Mining** refers to approximately 900 such cases). *"Mining law therefore poses formidable research problems to the practicing lawyer. To the non-lawyer it is virtually inaccessible."* (Barton p.v).

This virtual inaccessibility of understanding the mining law lies at the root of the problem the Yukon mining industry finds itself facing today. No one in politics, in the bureaucracy, in the mining industry or in the public understands what is being overthrown here or how severely. If this ignorance cannot be overcome, there will be no correcting this problem, and no hope for the future of the Territory. (Emphasis added)

As Barton states *"A clear view of the characterization of the interest granted (as a mining claim) is imperative when one is contemplating a transaction involving a mining claim or lease, whether it is a simple sale, an option, or a security.*

"The legal nature of a mining claim or lease is significant with respect to broader questions as well. It is relevant in any economic analysis of resource rights as property rights, capable of being traded and of being valued through market pricing.

"It is also a vitally important element of the relationship between the private sector and the state. Resource companies come into a relationship with the Crown when they acquire these interests, and the character of that relationship is in no small part determined by its legal nature.

"If a claim is indeed property, the Crown has given a greater interest than it if had merely given a permit to do something that is otherwise unauthorized. Actions by the state that prejudice the position of developers are eventually likely to raise a call that the government is confiscating vested rights acquired in good faith. This can be a powerful form of rhetoric, even though Canada does not have any constitutionally guaranteed right to private property." (Barton p.385). (Emphasis added.)

Barton states: *"Questions about the nature of a claim seem to cause problems if they are left unsettled...What the specific point of analysis requires is the same as what the broader policy issue requires--some hard thinking about what a property right is and about what expectations are made of property rights in resources and environmental management.*

"In a recent report on associated controversies, Schwindt observed that the definition of resource interests (and their status and the principles of compensation for their rescission) should be clarified in order to reduce conflicts amongst resource holders, interest groups, and governments. Whilst it is too much to say that all resource use conflicts would go away if the nature of a mineral claim were clarified, a great deal of difficulty would certainly be avoided." (Barton p.398).

To understand the nature of the mining claim it will be necessary to first understand the free entry system of mining law.

THE FREE ENTRY SYSTEM OF MINING LAW

The history of mining is at least 20,000 years old. The Australian aborigines were mining flint from underground workings at least that long ago. These early mines would have been individual efforts, then family group projects and then tribal workings.

As civilization advanced, the question of ownership of the mineral resource became more complex. Eventually, as political hierarchies developed, the ownership of mineral resources was taken by the leadership of the country, as the King or emperor or whatever. This was the beginning of the "regalian right" to the mines and minerals, which still exists today.

This form of ownership was well established with the first great civilizations such as the kings of Babylon and the pharaohs of Egypt. However, having established that the monarchy owned the mines and minerals left the monarchy with the fundamental problem of how to actually prospect for and mine the ore from the ground.

The monarchs themselves were not about to take up pick and shovel and start digging. This put them in the position of being owners of great wealth which they could not personally acquire. Their solution was typical of the times. They used the manpower that was available to them, such as soldiers, criminal convicts or slaves. These unfortunates could be ordered to mine by force, and this remained the primary method of mining operations for millennia.

Lest we think this is all just ancient history, it would pay to remember that this same system was well used throughout the 20th century by numerous dictatorships. The Soviets and the Nazis were particularly fond of slave labour mining operations, and between these two odious governments over 30 million people were worked to death in mining operations in Europe and Siberia in the last century.

An alternative method of operating mines was fortunately developed by the Greeks about 2,700 years ago, as a by-product of their development of democratic government. This form of government

created the concept of "free men" within the state. Some of these free men were interested in mining the state's ore.

As a result, there was a need to create a legal relationship between the free miner and the state. This relationship would authorize the free man to enter onto state lands and prospect and mine the state's minerals for the benefit of both parties. This was the foundation of the free entry system of mining law. (Emphasis added.)

When the Roman Empire conquered Greece they were wise enough to take the things of value from Greek culture and incorporate them into Roman society. One of these was the free entry system of mining law. The Romans spread this system throughout their empire as they advanced it. Many historians have made the observations that the Romans only conquered countries that possessed mineral wealth. Consequently, the free entry system was well used in their empire as the mining of minerals was of primary importance to the Roman Empire.

Upon the collapse of the Roman Empire and the advent of the Dark Ages, most of Roman knowledge was lost to the western world. However, the free entry system survived intact in various historic mining centres such as Saxony and England. Mining camps such as the great silver mines in Rammelsberg and Freiburg and the Cumbrian copper mines and Cornish tin mines were in operation through the Dark Ages.

On the rebirth of western civilization in the Renaissance period, the free entry system was once again spread throughout the western world as mining became evermore important to the growing civilizations. The British, in particular, were responsible for spreading the free entry system around the world in the mid- to late 19th century.

Throughout this long period of time, the fundamental principles of the system remained basically unchanged. This was due to the fact that the fundamental reasons for having the free entry system had not changed, nor have they to this day.

The primary reason for the free entry system is for the monarchy (or the State) to entice or tempt free men to voluntarily risk their time, their money and their lives in pursuit of the Crown's minerals. If the Crown fails in these inducements, then the Crown is required to go back to the ancient means of mining by force, through the use of soldiers, criminal convicts or slaves.

It was found long ago that men working under force are not particularly efficient, whereas men working freely are extremely efficient. This dictum is as true today as it was a thousand years ago.

The Spanish found this out as they operated their vast silver and gold mines in the New World in the 15th and 16th centuries. They killed off entire populations of native slaves in working those mines. They were eventually put out of business by a combination of a rapid decline in the available workforce and the rise of major free entry mines in Saxony that outstripped Spanish production at far cheaper operating costs.

The Soviet mining industry likewise collapsed in 1991 as their government ended the use of political prisoners as slave labour and the grossly excessive operating costs of these mines bankrupted the industry. They simply could not compete with western free miners. The Soviets had even come to realize the economics of free men within their slave operations.

As far back as the 1970s they were allowing small groups of miners called "artels" to operate in a quasi-free manner. Very rapidly, these small semi-independent cooperatives were producing significant percentages of total Soviet mineral production.

The Crown discovered long ago that the level of inducement required to get free men to voluntarily undertake the extremely high risk of mining ventures was very substantial. These inducements include the granting of very strong legal security of tenure to mining claims, up to and including freehold estates in fee simple in some jurisdictions (such as the Yukon).

The use of these high order property rights gives the miner such things as "unrestricted access to Crown minerals, free acquisition of title" (to the mines and minerals as "land") "and a right to develop and mine" the minerals. (Barton p.149).

These rights are considered extremely powerful in Anglo-Canadian law and give the free miner a considerable legal advantage compared to other land users.

For example*, "minerals are the only resource that can be appropriated and exploited under a title that is obtained from the Crown as a result of one's own acts."* (Barton p.165).

"*In most provinces and territories, individuals and companies may obtain mineral rights by staking claims on their own initiative and subsequently entry system, which prevails throughout most of Canada. It may be distinguished from the system where the allocation of rights is subject to the discretion of the Crown, which prevails only in Alberta, Nova Scotia, and Prince Edward Island.*" (Barton p.1).

It is of interest to note that the free entry jurisdictions of Canada have produced approximately 98.5% of the mineral wealth of Canada, while Nova Scotia, under the discretionary system, has yielded 1.5% and P.E.I. and Alberta have no mineral production.

Once again this shows that free men produce well when they are allowed to be free, and they produce little or not at all when they are not free.

The differences between the free entry and discretionary system (where the Minister of the Crown has the "discretion" to permit mining or not) are at the root of the problem facing the Yukon mining industry today.

<u>While the free entry system allows the free miner a near absolute freedom to carry out his business, the discretionary system of mining</u>

law is just the opposite. The Minister has virtual "absolute power" to allow or not allow mining to take place. (Emphasis added.)

Regrettably, as history has proven time and again, "absolute power corrupts absolutely". The discretionary system places far too much authority in the hands of the Minister and his bureaucrats. They invariably exercise that power to its maximum, to the detriment of the miner.

Examples of this are legion, world wide; but one need look no farther than the B.C. (British Columbia) government's destruction of the Windy Craggy mine, the Newfoundland government's halting of the Voisey Bay mine and now the Federal government's delaying of the Diavik diamond mine in the N.W.T. (Northwest Territories).

These three projects alone are worth in the tens of billions of dollars with potentially hundreds of thousands of man-years of highly paid work. It is doubly galling for the mining industry to see projects of this magnitude destroyed by Ministerial discretion in jurisdictions that are not even supposed to be operating a discretionary system of mining law.

All three of these jurisdictions were theoretically "free entry" when the government shut them down. The Yukon is apparently not the only jurisdiction where the free entry system is being overthrown by the very governments that are supposed to be upholding it. (Emphasis added.)

To better understand the difference between free entry and discretionary systems of mining law, a closer inspection of their history is required.

As previously noted, the free entry system was functioning in Great Britain from Roman times until the mid-1800s. At that time the free entry system was carried around the world by the growth of the British Empire and the chain of great "gold rushes" that occurred during the latter half of the 19th century.

The first of these was the 1849 gold rush to California. This area had only recently been purchased by the U.S. government from the Spanish in Mexico. At the time of the rush there was virtually no U.S. government presence and no established American judicial system in the state.

In particular, there was no mining law.

This posed a serious problem for the 30,000 stampeders who were eager to start digging but had no control over who owned which land. The miners were forced to find their own solution to this problem and they did so in short order.

A series of public meetings was held during which a large number of British and Saxon miners were able to offer their vast working knowledge of the free entry system to the proceedings. These laws were adopted by the Californians and solved virtually all their practical legal problems within the first seven months of the rush.

By the time the U.S. finally established a Californian judicial system, the free entry system was so firmly entrenched and in such widespread use that the U.S. government simply absorbed it into its established form of federal and then state mining law. It has remained there to this day.

Within six months of the start of the California rush, several Australians in California at that time had returned home and started a series of gold rushes in southeastern Australia. The Australian government was in a similar fix to the U.S. government, in that the colony had no local mining law in place.

Due to the long and slow lines of communication back to England, there was no time to request instructions from London. The local miners followed the Californian example and adopted the free entry system by their own initiative. The local government had no general objection to this, as it was common British law.

However, one glaring problem arose right at the outset. The men with Californian experience were used to the American concept of “finders keepers” when it came to gold.

Under British law this is not legal, since Britain had a monarchy and the monarchy had (and still has) a regalian right to all the gold and silver in the land, including its colonies. To deal with this problem the local government started issuing “miner’s licences” to legally authorize the miners to enter, locate, prospect and mine the gold on Crown land.

This worked well, initially, in spite of the very high price the governor put on the licence. However, it was not long before serious trouble arose over the licences. There were many miners, especially the Americans, who were not happy to be forced to buy a licence for something that had been free in the states.

They started ignoring the licence requirements unless they were caught. This forced the Crown to start operating licence inspections using the local constabulary. These men were unfortunately not altogether honest, and very rapidly fell victim to the licence authority’s ability to corrupt.

Large-scale incidents of bribery, extortion and even murder of the miners by the constabulary became commonplace. The licence left the miners at the “mercy” of the constabulary because no legal rights were attached to the licence or the claims.

The miners demanded some better form of claim ownership, granting rights and legal security from the Crown. They were repeatedly ignored.

Finally, in 1854 the miners in the Ballarat camp took up arms in open rebellion and built a stockade at Eureka. A small force took up occupancy in the stockade and sent word to the Governor in Melbourne that they wanted to negotiate for something better than a miners’ licence.

The response from the Governor, Sir Charles Hotham, was to send his entire constabulary plus all the regular troops in the district to Ballarat with orders to put down the rebellion. They arrived at the Eureka stockade to find the entire garrison of rebel miners sleeping off a drunk. They entered the stockade unopposed and proceeded to open fire on the sleeping miners. The stockade was taken in less than 20 minutes with heavy casualties on the miners' side, thirty killed and ninety wounded. Very few miners, about thirty more, escaped the stockade.

Not satisfied with this, the commander of the troops, Commissioner Robert Rede, then turned his men loose on the surrounding mining camp where they ran riot over rebel and innocent miners alike for several days. The carnage was never well publicized but must have been considerable.

"Sir Charles Hotham later had the good grace to say that Rede had acted imprudently," noted Douglas Fetherling in **The Gold Crusades: A Social History of Gold Rushes (1849-1929)**, 1988, p.72).

The rebellion was broken.

When news of the rebellion and subsequent massacre reached London, the government there was horrified. Britain was in no mood for a rebellion in its most distance colony as they were currently at war in colonies covering half the globe. They also had fresh memories of what it was like to lose a major colony to rebellion, as they were still smarting from their second loss of a war with the U.S.A. in 1814.

Consequently, the British government sacked the local governor in Australia and shipped the military commander elsewhere. The replacement governor was a man of considerable diplomacy and his orders were to placate the miners as quickly as possible.

This he did with the result being the abolition of the miners' licence and the creation of legislation granting a "miners' right" by the Victoria Mining Act of 1855. This was the first "modern" free entry law in the British Empire. The intent of parliament was to get rid of the hated

miners' licence and replace it with a legally secure tenure for the mining claim as a form of property.

Mark Twain described the results of the Ballarat Miners Rebellion as *"the finest thing in Australasian history. It was a revolution--small in size, but great politically; it was a strike for liberty, a struggle for a principle, a stand against injustice and oppression. It was the Barons and John, over again; it was Hampden and Ship-Money; it was Concord and Lexington; small beginnings, all of them, but all of them great in political results, all of them epoch making. It is another instance of a victory won by a lost battle. It adds an honorable page to history; the people know it and are proud of it. They keep green the memory of the men who fell at the Eureka Stockade."* (Twain in Fetherling p.74).

The importance of this "right" cannot be stressed strongly enough. It was the end of discretionary licencing for mining throughout the British Empire. This law was passed from gold rush to gold rush, from Australia to New Zealand, South Africa and Canada over the next 50 years.

It arrived in the Yukon in the 1870s with the first prospectors. The grant of right gave the miner the strongest legal protection and the most unfettered rights of entry, location, prospecting and mining that the British government could devise.

This was the British government's repayment to the miners for the bloodshed at the Eureka stockade and the Ballarat goldfields.

The British Crown was repaid in turn, by the miners, with the absolutely unparalleled growth of the mining industry over the next 50 years. Australia, New Zealand, South Africa and Canada grew strong on the enormous amount of mineral wealth the free miners located and mined. The royalties accruing to the British Crown helped make the British Empire the largest and strongest empire the world had ever seen.

As the free entry system traveled from gold rush to gold rush around each country, and around the world, it was improved as experience required. By the time it arrived in the Yukon it had reached the last of the gold rushes and was nearing its present form.

However, problems still arose that required additional correction. During the Klondike gold rush and for the next 20 years, the mining recorder's office in Dawson became infamous for the amount and extent of bribery and corruption that its officers perpetrated against the miners.

Many claim owners found their claims had been "jumped" by individuals who had bribed the mining recorder to strike the original owner's name off the record books.

As the value of the Klondike claims grew, so did the extent of the corruption, until finally it was alleged to have gone all the way to Ottawa, to the office of the Minister of the Interior.

Accusations were widespread at the time of bribery of the Minister by large corporations trying to gain large hydraulic mining concessions overtop of pre-existing placer claims held by individuals.

This problem continued until 1924, when the miners in Dawson staged a "revolt" of their own and elected George Black as their Member of Parliament. Mr. Black was sent to Ottawa with instructions to re-write the quartz mining act so that the claims had an enforceable legal security of tenure.

Mr. Black was a lawyer who had climbed the Chilkoot Pass in 1898 and stampeded into Dawson with the first Kondikers. He had extensive experience in mining law from his practice in Dawson, and he proceeded to re-write the *Yukon Quartz Mining Act* using all his experience. The resulting Act was enacted in 1924. It contained such strong legal security of tenure that there were virtually no further problems with bureaucratic interference with claims until the 1990s.

The federal government found that the Act gave so much security that virtually the only way for federal officers to interfere with the operation of a quartz claim was through expropriation. (Emphasis added.)

Thus, the original intent of the modern free entry system was taken from southeastern Australia to the Yukon Territory. Entire generations of free miners grew up and grew old operating the most legally secure claims in the world over the 75 years following Mr. Black's re-write of the Act.

"*The Yukon Quartz Mining Act now holds the honours as the least-amended mining legislation in Canada.*" (Barton p.147). "*This state of affairs has probably come about, for placer and quartz alike, because Yukoners insisted on a statute rather than regulations, having felt much prejudiced by the order in council legislation for hydraulic purposes. An act would protect them from 'the whims and fancies of Ministers or government officials who may desire to slip something over at the instance of the big business interests who can get to Ottawa overnight--particularly from Toronto.' This concern has not exactly disappeared. Once the law had been enshrined in federal statute, it became hard to amend."* (Barton p.148).

The results of Mr. Black's efforts produced a free entry system in the Yukon with the following attributes.

The Four Elements of the Free Entry Mining System

"The first element of this system is the right to 'enter', which is defined as 'the right to go onto and occupy land'. The free entry system, also called the free miner or location system, permits the mineral operator to enter lands where minerals are in the hands of the Crown and obliges the government to grant exploration and development rights if the miner applies for them. If the applicant has met all the prerequisites for a claim or a mining lease, the Minister has no discretion, but instead has a duty to issue the disposition." (Barton p. 151).

"The use of Crown land during the exploration phase is entirely unrestricted in many jurisdictions. Of this pattern, the Yukon is perhaps the clearest example. The Territorial Lands Act explicitly declares that nothing in it shall be construed as limiting the operation of the Yukon Quartz and Placer Mining Acts." (Barton p.153).

"This freedom from control by the Crown as proprietor of the surface is eroding." (Barton p.153).

"The second element of free entry is the right of the miner to stake a claim in order to secure mineral rights in priority over other miners, so that an interesting mineral occurrence can be explored without disturbance.

"The right to a claim is usually declared in clear terms, which confer upon miners an entitlement to stake, and oblige the mining recorder or like official to record it so as to deny the government any discretion over the creation of claims. It is often part and parcel of the right to enter and use Crown lands." (Barton p.155).

"The right to obtain a claim in order to secure mineral rights is often recognized as a primary purpose of mining legislation. In Tagish Resources Ltd. v Calpine Resources Inc., the Court said of the British Columbia Mineral Tenure Act: 'In applying these statutes, the courts have consistently recognized the difficulties inevitably encountered by those who search for minerals in a wild and inaccessible land. The principal purposes of the Act are to encourage such activity and to provide a reasonably safe tenure for those who take risks and incur the expenses of exploration and development, all to the end that productive mines will come into being.' [1991, 56 B.C.L.R. (2d) 286 at 293 (S.C.) Esson C.J.]." (Barton p.155-156).

"The right to acquire a claim is usually thought of as a right to stake a promising mineral occurrence as a claim, erect posts, inscribe information on them, and run blazed lines through the bush, all in accordance with the law on staking claims. The claim comes into existence when the miner completes the staking, the act of recording is a mere formality in comparison, although an indispensable one. The

miner acquires the title by his or her own act, not by the act of a government official, which leads to this aspect of the system sometimes being called self-initiated title." (Barton p.156).

"In the broader picture of resources law, it certainly is a curiosity, for no other resource is acquired from the Crown by going out and taking possession of it. Likewise, in terms of property law, it is a strange way to create an interest in property." (Barton p.157).

It may seem strange to Mr. Barton, but it was recognized by the Crown long ago as an essential and successful means of convincing free men to risk their time, their money and their lives in pursuit of the Crown's minerals.

Without this, the free men will stay home and the Crown is welcome to go back to the well-tested, but not very efficient, use of soldiers, criminal convicts or slaves in the mines--and good luck to them.

"The third element of free entry is the right to produce from a mineral deposit and win the rewards for which the whole exploration effort is mounted. When an explorationist finally locates an economic deposit, he or she is entitled to recoup the risky investments called for by exploration.

"Because most jurisdictions prohibit mineral production on a claim except for test purposes, this translates into a right to obtain a mining lease of one's claim." (Note: This is not the case in Yukon, where a claim is defined as a lease the day it is staked. JM).

"In earlier times, the right was a right to a crown grant or patent such that the land was held in fee simple, but now the lease is the most perfect and secure form of title that is available." (Note: Except for Yukon, where the claim is a very special form of lease defined as a perpetual lease--which is in fact a freehold estate in fee simple with vested title, in other words a patent. JM).

"The standard pattern is unambiguous entitlement of the claim holder to obtain a lease. Neither the minister nor any other official has any

discretion, and, so long as the application is correctly made and the preconditions have been satisfied, the official must issue the lease." (Barton p.157).

This gives the miner his right to mine as an "entitlement" of his lease conveyance (Section 76(1) *Yukon Quartz Mining Act*). By definition, to "entitle" is to "bestow a right". (Dukelow & Nuse, **Pocket Dictionary of Canadian Law**, 1991).

From these points we begin to see that the miner is empowered with a substantial set of legal rights. In spite of the fact that the government would like to fetter these rights for various reasons, they are themselves fettered by the free entry system and the rights granted by it.

"*Where a discretion is conferred by the statute, its exercise is sometimes open to dispute as a matter of administrative law*." (Barton p.161)."*In this sense, no discretion is altogether unfettered.*

"In another Saskatchewan case [Central Canada Potash Co. v Minister of Natural Resources, 5 W.W.R. 193 at 294-95 (Sask. Q.B.)] the Court struck down licensing decisions that went beyond the statute and imposed conditions for purposes other than the purposes of the statute." (Barton p.161). (Emphasis added.)

This is well worth remembering while examining the fettering of the free entry system in the Yukon Quartz Mining Act by the licensing and permitting requirements of the current regulatory regime.

"It is also possible that a discretionary power to issue a disposition can be subject to duties of procedural fairness owed to parties who will be adversely affected by the decision. Such duties may require letting such parties know the considerations that may weigh against them and giving them a chance to respond." [Island Protection Society v R. in right of B.C. (1979) 4 W.W.R. 1 (B.C.S.C.)]. (Barton p.161).

"Duties of fairness and natural justice are usually imposed on decisions to cancel a disposition or other right." [Bonanza Creek Hydraulic Concession v R. (1908) 40 SCR 281 (Y.T.)].

"It is rare to see them imposed on decisions to grant or refuse applications for such dispositions. Possibly there are situations where an applicant has a legitimate expectation of a grant of disposition that will attract a duty of fairness. The doctrine of legitimate expectations requires that a party whose rights may be affected by an official decision be given a chance to make representations." [Canada Assistance Plan (1991) 2. SCR 525 at 557-58 (B.C.) and Old St. Boniface Residents v Winnipeg (1990) 3 SCR 1170 at 1203-1204 (Man.)]. (Barton p.161-162).

It would appear that the Crown's use of licences to interfere with the operation of mining claims held as free entry properties with statutory rights may not be as simple as the government would have the mining industry believe. (Emphasis added.)

"Corporations seek stability in the regulation of economic activity, while governments are pressed to respond to challenges that keep changing. The mining industry is firm in its loyalty to the free entry system.

"One explorationist has said that the right to acquire absolute title to minerals and the absolute right to mine are essential, and that legislators must be encouraged to provide these rights in order to secure a solid future for mining in Canada.

"Others in the industry stress the need to maintain access to land to assure a continuous supply of economic deposits and the need to prevent land from being frozen or locked up by prohibitions on minerals exploration. 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. (Emphasis added.)

"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." (Barton p.162-163).

Although Mr. Barton has made some very valid observations about the free entry system, he falls into the same pit that has trapped so many in the debate on this issue. It may even be more accurate to say that Mr. Barton did not fall into this philosophical pit, but that he willingly jumped.

It is important to note this problem, as Mr. Barton is a perfect microcosm of the failure of the government, the bureaucracy, the environmentalist and a large part of the public in their lack of understanding of the free entry system.

Barton states openly *"any attempt to appraise the free entry system is complicated by the polarization of opinion that the subject attracts. It is inevitable, and ought not to be concealed, that one's values and politics will colour one's views of the system."* (Barton p.162).

If this subject cannot be debated on its relative merits but must be dragged down into rank emotionalism then rational thought is lost and the whole debate becomes nothing more than an exercise in propaganda. This is no way to create workable law. Once the facts of law become unimportant, then anything goes. Mr. Barton proves this himself.

Barton states, *"It is difficult, however, to demonstrate how far any specific change in the mineral legislation is responsible for a change in business activity."* (Barton p.162).

Barton is completely mistaken in this statement.

Even in 1993 when he wrote these words, over 40% of all exploration investment monies raised in Canada were being spent outside the country. Now in 1999, the amount spent outside the country has risen

to 80% nationally. Exploration expenditures are down by 90% in the Yukon from three years ago.

The writing has been on the wall for years that the Canadian mining industry has lost faith in Canada as a fit jurisdiction for mining investment. This is not my personal opinion, my values or my politics. This is not theoretical or hypothetical. These are the cold hard facts. There are three prime examples of specific changes in mineral legislation that have been responsible for billions of dollars in changes in business activity in Canada: Windy Craggy, Voisey's Bay and Diavik.

The changes were not for the better.

Barton quotes A.R. Thompson who states, "*It can also be argued that Canadian resource industries seem to put more store in political predictability than in the wording of legislation as a measure of security of title."* (Barton p.163).

They are both mistaken.

No miner is fool enough to trust a politician's promise over the written law of the land. If they are, they don't survive long in the business.

The history of mining is a long and sordid litany of graft and corruption by politicians and bureaucrats trying to bilk miners off of their claims. The only security of tenure worth anything for miners, since the Ballarat Rebellion, has been legislation guaranteeing their rights of free entry and granting them legal security of tenure that could be upheld by the courts.

It is ironic that Barton would have made such a comment on the importance of political stability to the free miner. As this report is being written, the *Northern Miner* editorial for the Feb. 21-27, 2000 issue raises this very point.

Commenting on the withholding of a land-use permit by D.I.A.N.D. (Department of Indian Affairs and Northern Development) bureaucrats in the Northwest Territories for the $1.3 billion Diavik Diamond Mine,

the editor of the *Miner* quoted the prestigious *International Mining Review.* This London, England-based publication has recently commented on the similar government policies which have delayed the Voisey's Bay project in Labrador.

The English journal stated, *"Laughably, investors still prefer to invest in North American mining companies because of political stability. This, clearly, is becoming more and more of a joke as the inherent risks, particularly for those in the developmental stage, are becoming increasingly high."*

The *Northern Miner*'s editor summed this situation up by stating, *"Canada's reputation as a fair place to do business has suffered as a result."*

Priority Over Competing Land Uses

Perhaps Messrs. Barton and Thompson and all the rest who wish to put the free entry system to the sword could stand to learn Lord Acton's famous dictum: "Those who fail to learn from the mistakes of history are condemned to repeat them."

It would be a black day if the Yukon free miners were forced to repeat the Ballarat Rebellion to uphold their rights.

"While the free entry system has distinct advantages for the private sector, it creates distinct difficulties in terms of public policy. The rule that a mineral disposition must be granted wherever it is sought constrains the discharge of government responsibilities. There may be excellent reasons why there should be no mineral activity in a given district or particular place." (Barton p.164).

Once again, Mr. Barton misses the entire point of the free entry system. Under this system there is no such thing as an excellent reason for no mineral activity. The point is to have mineral activity everywhere it is required; the only exceptions in the Yukon being churchyards, cemeteries and other miners' claims.

It may very well inconvenience the bureaucrats, but the Crown is supposed to understand the value of their mineral resources. Very few states or monarchies, over the centuries, have failed to appreciate the value represented by the enormous wealth that can be generated by mining. Those governments that did fail to understand it are gone.

"The free entry system assumes that mining is to have priority over competing uses of land and resources." (Barton p.165).

Once again, Mr. Barton misses the mark. The free entry system "assumes" no such priority. The free entry system absolutely has such a priority over competing land uses. It is supposed to have such a priority. The free entry system was designed to grant such priority. Federal mining law does in fact grant such priority. That is the point of the exercise. After 2,700 years, this is the only way governments have found to successfully encourage free men to pursue the Crown's minerals on Crown land. Until such time as someone creates a better system, we are stuck with this one.

Pretending it has outlived its usefulness is a fool's errand. As long as our civilization needs metal it will absolutely need the free entry system. There is no viable alternative.

The free entry system has not survived for 2,700 years because of some obscure philosophical assumptions about land use. It has survived because it succeeds at its task better than anything else devised by mankind.

That is as true today as it was during the Roman Empire, or the Dark Ages, or the Renaissance, or the British Empire. That task is to encourage free men to risk their time, their money and their lives in pursuit of the Crown's minerals; over the maximum amount of land by the maximum number of people possible.

This inevitably results in the maximum success in exploration, discovery and production of the Crown's minerals and in the maximum economic benefit realized for the good of the country.

As previously stated, the alternatives to this system are too grim to contemplate. The economic loss caused by the abandonment of the free entry system is readily apparent; from Australia and New Zealand in the 1980s, to much of the U.S.A. in the 1990s, to British Columbia from the 1970s to the 1990s.

Any government that willingly destroys its own economy is unfit to govern and will suffer a proper fate in due time. Even the most apathetic public will eventually revolt when they get hungry enough.

The government of the Soviet Union discovered that in the fall of 1991. It is a shame that the government of the Yukon Territory appears bent on learning this lesson the hard way.

Misconceptions and Dichotomous Views about Free Entry

Additional misconceptions about the free entry system held by Mr. Barton include the following points:

The "covenant" the free entry system makes between miner and Crown would be that the miner *"would be the pioneer and would open up the wilds, the untamed and forbidding wilderness. The miner would be the first agent of settlement and would push back the frontier, permitting other settlers such as farmers to follow in due course."* (Barton p.167-168).

Another misconception on Mr. Barton's part: The advancement of civilization is a byproduct of the free entry system but is not the primary purpose. The free miner was there to make money, and the Crown was prepared to grant him the freedom to do so in order that the Crown could also make money from its mineral resources. This is a purely monetary transaction. The "covenant" is one of freedom in exchange for money. The "covenant" includes the Crown surrendering ownership of the minerals to the miner, granting legal security of tenure, legal protection from bureaucratic interference, graft and corruption, protection from third party interference and the right to be left alone to mine in peace.

Even Barton partly acknowledges this when he states: *"the miner would seek out and develop the resources of the new lands and would create new wealth. In return, the miner sought little. The main concern was to be left alone by the government…"* (Barton p.167).

Regrettably, Barton then misses the main point by qualifying this statement by saying: "*The main concern was to be left alone by the government, especially (in the early days) in financial terms. The implicit covenant by the government was that the fees and royalties extracted from mining would not be large."* (Barton p.167).

The fees and royalties could be zero and there will still be no active mining if the miners are not free to mine. Barton is putting the cart before the horse. This point has become painfully obvious in the Yukon with the Territorial government's 22% tax break for exploration.

No one in the industry will gain from this if the regulatory regime is so onerous that a mine cannot be put into production. Why spend money (even with a nice tax break) if the exercise is pointless in the end?

"The government's main duty was to provide a stable legal framework and to provide mining laws that would encourage the industry, especially the small prospector." (Barton p.167).

Barton is quite correct in this fundamental statement. It is unfortunate that he repeatedly refuses to acknowledge the obvious--that the stable legal framework and the encouraging mining laws are already embodied in the free entry system.

His apparent desire to see the free entry system brought to an end is in direct conflict with his own analysis of the fundamental requirements of the mining industry. He is not alone in this dichotomous philosophy.

The majority of the federal and territorial governments, the legal profession, the judiciary and the environmental movement as well as most of the public at large appear to be caught up in this desire to

advance the mischief of discretionary licencing and bureaucratic interference and suppress the remedy of the free entry statutes.

Barton's greatest misconception about the free entry system is in regard to the environment. *"The premises on which the parties entered into this covenant in the nineteenth century have changed. Above all, our concept of wilderness has changed. Originally, we thought of Crown lands as the 'waste lands of the Crown'.*

"They were threatening, the antithesis of civilization, and for all practical purposes, infinite. Since they were useless in their present state, they could be readily dedicated to the fostering and nurturing of the mineral exploration industry.

"There was no need to set aside land as parks, and there was no perceived need, in the light of the small scale of mining operations and the simple technology being used, to control pollution or insist on reclamation.

"Now we are aware of the value of wilderness and undeveloped land for a multitude of purposes such as wildlife habitats or recreational and tourism resources. There are other values besides mineral exploration that need nurturing. The public is conscious of its ability to threaten the wilderness and indeed to threaten the welfare of the environment on a planetary scale.

"The wilderness no longer seems infinite; road networks gradually extend further, and there are few places where one person's activities will not be seen as affecting the interests of other persons. The reality is that the frontier is closed." (Barton p.167).

This is about as far from the "reality" of the free entry system as Mr. Barton could possibly get.

The creation of the free entry system never had anything to do with some puerile philosophy of "wilderness" or "frontier" or "the welfare of the environment".

It was found on the concept of a deal, a transaction between state and free miner, in order to extract state minerals by free men without the state having to resort to force. Nothing about that has changed in the last 2,700 years. If the Crown wants its mineral wealth extracted in the most efficient and productive manner, it will need free men to do it. There are no other alternatives capable of doing this job.

If the Crown wishes to end the free entry system for some puerile philosophy about frontier and wilderness, they can only replace it with the pre-existing systems. This means discretionary licencing (which has been totally unsuccessful wherever it has been applied) or the use of soldiers, convicts or slaves.

The other alternative is to stop mining altogether, which is fine as long as the public are prepared to return to the Stone Age.

There are no other alternatives.

Mr. Barton refuses to acknowledge the "reality" of this free entry covenant, as he states: *"To the guardians of other interests"* (i.e. environmentalists) "*the covenant is one that expired along with the world in which it was made."* (Barton p.168).

The "world in which it was made" was a world where civilization required a steady supply of metals in order to survive. That world has changed in the last 2,700 years, in that we now need metals even more than we did then, to maintain our civilization.

Mr. Barton at least has the decency to admit that the mining industry itself acknowledges the reality of the covenant. *"Notwithstanding all these changes"* (i.e. environmental regulation) *"the mining legislation still affirms the covenant of the free miner.*

"It still declares, without reservation, that the miner is entitled to explore, to stake a claim, and as lessee, to mine. To the guardians of mining interests, restrictions such as land withdrawals and discretionary controls on going to lease" (i.e. licencing) *"are breaches of the covenant."* Barton p.168).

Mr. Barton's dichotomous position on free entry is a microcosm of the fundamental problem facing the free miner today. People who should know better, including lawyers, judges, politicians, bureaucrats, environmentalists and the public at large, are unknowingly, knowingly and even willfully overthrowing the law of free entry.

They wish to get rid of the law and replace it with their "politically correct" ideology of state control for the good of the "environment".

* They do this in spite of the fact that the free entry system is the law of the land.

* They do this in spite of the fact that this law has not been repealed and is supposed to still be in full force and effect.

* They do this even though it requires the Crown to breach its legal covenant with the free miner.

* They do this in spite of the fact that some of their actions in pursuit of their goal may be unlawful, illegal or even indictable.

* They do this in spite of the fact that it is destructive to the economy and the standard of living of the jurisdiction.

* They do this in spite of the fact that it destroys private property.

Their only justification for all this ruination is the justification used by tyrants and totalitarians since time immemorial. It is the justification of the 1920s Marxist-Leninist, "the end justifies the means".

Their "end" is the ideology of "pristine wilderness" which must be "protected" from the free miner, and their "means" is the abolition of the free entry system of mining law, by any means they can.

<u>Their lack of regard for the disastrous consequences of such action, or of its blatant illegality, is typical of the totalitarian.</u> (Emphasis added.)

As was quoted previously, "those who fail to learn from the mistakes of history are condemned to repeat them". The history of totalitarianism is full of examples of the state destroying private property before it destroyed its citizens.

The Bolshevik Revolution was followed by the nationalization of all property by the Soviet State. That was followed by 71 years of repression during which 30 million people were murdered by that state.

The rise of the Nazi Party in Germany in 1933 was followed immediately by the infamous Jewish Property Laws. These allowed the Nazi state to steal all property belonging to its Jewish citizens: from homes, to works of art, to jewelry, to bank accounts. This was followed by 11 years of mass murder and barbarity unprecedented in human history.

Fifty years later, the descendants of those victims are still trying to recover their family property from the Swiss banks where the Nazis hid it.

There is a brutal but essential lesson for free people to learn from these odious lessons.

Private Property Means Freedom

"Private property is supposed to promote autonomy. Indeed, some have argued that property is (or should be) the guarantor of every other basic freedom. Without property, one might argue, the ability to participate in democracy, to exercise free speech, etc., is diminished," wrote Bruce Ziff, author of **Principles of Property Law,** 1996.

"Charles Reich, a modern exponent of the view that property brings freedom, has argued that one of the functions of property 'is to draw a boundary around public and private power'. Inside this line the owner enjoys a greater freedom than outside, since within it the state must justify and explain any interference. Likewise, 'the owner may do what all or most of his neighbours decry' even if it is based on whim, caprice

or irrationality. In sum, property performs the function of promoting independence, dignity and pluralism." (Ziff p.19).

"For those who value freedom from governmental interference--and liberals and libertarians certainly do--property is an ideal concept. Private property rights keep the prying eyes of the state away. Indeed, it is no accident that property and privacy share a common etymology, for the private property holder enjoys extensive (if not complete) protection from unwanted intrusions. Property allows for privacy to be enjoyed.

"Reich also spoke of positive freedoms that property can confer; the right to control one's destiny; the right not to be reliant on the state (except to the extent needed to ensure the enforcement of property rights).

"It also involves the right 'to be a subject, not an object'. In short, property can be empowering. It can confer on owners a power to control their own lives and to pursue their conception of the good life. Importantly, this type of empowerment not only allows people to chart their own course; in theory, it can support democratic institutions. Private property works to disperse power wisely. This, then, can serve as a check on totalitarian tendencies that might be harboured by those holding political office." (Ziff p.20).

From these points it becomes readily apparent that the defenses of the free entry system is not just for the benefit of the mining industry. There are broader implications about freedom, and democracy and justice, about private property and the rights which protect it. A government which attempts to overthrow the free entry system is overthrowing a great deal more besides. (Emphasis added.)

If the free entry system is to survive in the Yukon, then the miners, the politicians, the bureaucrats, the lawyers, the judges and the public must all have a clear understanding of what is at stake and what will be lost if the free entry system is overthrown.

If the free miner is to survive, he must understand his rights of free entry.

* He must understand how these rights are being overthrown.

* He must understand to what extent these rights are being overthrown.

* He must understand if the law protecting his rights is being broken.

* He must understand what protection the law gives to his rights and how to apply that protection.

The free miner must be prepared, if necessary, to stand up in court and defend his rights of free entry to the full extent the law allows.

If the free miner is not prepared to undertake these tasks then his only options are to flee the jurisdiction once his freedom is overthrown, or stay and be destroyed.

Without his rights of free entry and the legal security of tenure to protect his claims, the state will inevitably grind his operation to a halt. He will find himself at the mercy of a totalitarian state, where the bureaucrats have given themselves absolute power over his claims, and have become corrupt enough to exercise that power.

These are the choices facing the free miners of the Yukon at this time. This is the choice granted to all free men when confronted with a totalitarian state. Fight or flee.

If a right is to be attempted then the miners must have a clear understanding of their rights.

THE MINERS' RIGHTS

Under the free entry system, since 1855 in the *Victoria State Mining Law*, the free miners in British colonies have been granted a "miners' right" instead of a "licence'. The difference is significant to the free miner's understanding of his rights.

A "right" is defined as "a liberty, protected by law, to act in a certain way". (Dukelow & Nuse). It is also defined as "a power, enforced by law, to compel a certain person to do a certain thing". (Dukelow & Nuse).

A "legal power given by one person to another to do some act" is defined as an "authority". (Dukelow & Nuse).

Therefore, by definition a right is an authority, protected by law, to do some act.

Under Section 12 *Yukon Quartz Mining Act* the free miner is granted a "Right to Acquire Mineral Claims".

This right states: *"any individual eighteen years of age or over may enter, locate, prospect and mine for minerals on (a) any vacant territorial lands in the Territory; and (b) any lands in the Territory in respect of which the right to enter, prospect and mine for minerals is reserved to the Crown."*

The free miner is therefore, by definition, "authorized" to do these things and that authorization is, by definition, "protected by law". It would be beneficial to this regulatory situation to understand just how much "protection" the law actually offers to this right.

This question is far too complex to answer here in any detail. It involves innumerable precedents from Statutory Law, Property Law, Mining Law, Common Law and Criminal Law. The best that can be done here is a very cursory examination of a few points of law.

Since the *Yukon Quartz Mining Act* is an act of the Parliament of Canada, it is, by definition, a "statute" and the rights within it are "statutory" rights. The miners' rights are therefore protected by the rules of statutory interpretation.

One of these is the "original meaning rule" which states that *"interpreters must adopt the meaning the legislation had at the time it was first enacted."* (Sullivan p.28).

A second is the "purposive analysis rule" which states that *"interpreters must take into account the purpose of legislation, including both the purpose of the Act as a whole and of the particular provision to be interpreted."* (Sullivan p.28).

A third rule is the "consequential analysis or absurdity rule" which states that *"interpretations that lead to beneficial consequences are presumed to be intended, while those that lead to irrational, unjust or unacceptable consequences are rejected as absurd."* (Sullivan p.28).

The original meaning and purpose of the *Yukon Quartz Mining Act* are well-documented. This purpose was to grant the free miner a "right of free entry" to enter, locate, prospect and mine on his claim. He was to exercise this right with the maximum legal security of tenure, which granted him the absolute minimum of interference by the Crown or the public.

This can be traced back, historically, to the Ballarat Miners Rebellion and the massacre at the Eureka Stockade in 1854; then to the *Victoria State Mining Law* of 1855, which granted the first "miners' rights" under British law in the modern era; then through the chain of gold rushes from Australia to New Zealand and to Canada from 1855 to 1924, when the current *Yukon Quartz Mining Act* was written.

Throughout this period, the fundamental purpose of these Acts was to establish a free entry system of mining law which granted the miner a "right" to enter, locate, prospect and mine with the maximum legal security of tenure for his claims and the absolute minimum of governmental interference in the operation of his claims.

It is particularly important to understand that there was an intent by the Crown to accomplish this by abolishing the use of miners' licences due to their tendency to lead to excessive bureaucratic power, graft and corruption, which, in turn, led to "irrational, unjust and unacceptable consequences", such as the miners rebellion and the massacre of miners at Ballarat.

The *Victoria State Mining Law* "rejected as absurd" these consequences, and replaced them with the miners' right.

This was repeated in 1924 when George Black found the graft and corruption in the Klondike Mining Recorder's office and the Minister of the Interior's office to be "irrational, unjust and unacceptable".

His rewriting of the *Yukon Quartz Mining Act* upheld the strongest legal security of tenure in the history of the free entry system and put an end to bureaucratic interference in Yukon mining claims for the next 50 years.

The free miners of the Yukon should now be asking themselves how they have come to find themselves in their current situation. The Crown is now telling free miners that they are "prohibited" from entry, location, prospecting and mining for a variety of "good reasons".

These prohibitions are being implemented by withholding the issuance of regulatory licences, by the revoking of licences already issued by "prohibition of entry orders-in-council", etc.

Amidst all these prohibitions of free entry, one wonders where the miner's legal security of tenure has gone? Where is the "protection by law" his rights are suppose to grant by definition? How is the Crown ignoring the rules of statutory interpretation regarding the *Yukon Quartz Mining Act*?

Some of these regulatory "authorities" are so thin that they are operating on nothing more than the "opinion" of the inspector that a problem exists. This is the only justification required for revoking a

mining land-use licence, terminating a mining operation, and overthrowing the free entry system.

Where a junior bureaucrat (such as a mining inspector or land-use inspector) finds himself given the authority to overthrow an Act of Parliament using nothing more than his "opinion", then legal security of tenure has ceased to exist. Under the rules of statutory interpretation this would appear to be "irrational, unjust and unacceptable" and should be "rejected as absurd" by the courts.

Additional statutory rules include those "that introduce values into interpretation" of the statute. (Sullivan p.30).

For example, *"some interpretation rules introduce values into interpretation in a formal and explicit way. These rules are designed to ensure that certain values, those considered important in our legal culture, receive the attention they deserve. The clearest examples of this type of rule are the so-called presumptions of legislative intent, which attributes to the legislature an intention to honour certain values or to avoid producing certain effects.*

"It is presumed that the legislature does not intend to interfere with private property rights. Because the legislature is presumed to honour these values, interpreters must at least take them into account and should be slow to attribute a meaning to legislation that would be inconsistent with them." (Sullivan p.30).

"The doctrine of strict and liberal construction also permits interpreters to invoke cherished values when reading legislative texts. Under this doctrine, legislation that interferes with individual rights and freedoms is strictly interpreted in favour of individuals and their private freedoms and rights." (Sullivan p.30).

The free entry system of mining law embodied in the *Yukon Quartz Mining Act* is built on values of "private property" and "individual rights and freedoms".

The Yukon's free miners should be asking themselves what has happened to these "cherished values" over the last 40 years? The Federal and Territorial governments regulated those cherished values to death. If these rules of law are supposed to protect the miners' rights, where is this protection?

"The rule of law is highly prized in Canada's parliamentary democracy as a bulwark of a free and democratic society.

"The rule of law consists of principles designed to constrain the exercise of governmental power, to ensure that power is exercised in a fair and efficacious way.

"The following rule of law principles are important to statutory interpretation:

"(a) No person can interfere with the freedom, security or property of another person, except in accordance with the law. This principle applies to everyone, including government officials. For an act of a government official to be effective or binding, he or she must be able to point to the law that authorized the act; (Emphasis added)

"(b) A law that is binding on subjects, or that confers benefits on them, must be set out in advance and with sufficient clarity so that subjects can know what is expected of them and others, can achieve a measure of security and can plan for the future." (Sullivan p.35).

"The courts are the primary guardians of the rule of law. They scrutinize the work of all persons purporting to exercise official power, from bureaucrats and police officers to administrative tribunals to Parliament itself.

"They ensure that such persons act pursuant to and within the limits of valid legal rules, whether statutory or common law. They also ensure that power is exercised for a proper purpose in a manner consistent with common law and charter rights.

"Finally, they ensure that the exercise of power is not distorted by whim or prejudice or other abuse. The rule of law thus protects individuals from abuse and society as a whole benefits from the greatest possible measure of certainty, consistency and equality in the interpretation and application of the law." (Sullivan p.35).

The current Yukon regulatory regime appears to overthrow virtually all of these principles and rules to some extent.

The free miners of the Yukon are now being prohibited from their free entry, their right to locate their claims, their right to prospect and their right to mine, their legal security of tenure, their liberties and their protection by law of those liberties.

A single example of the growing list of examples of the overthrowing of the free entry system will serve to illustrate this problem. Until 1991, the *Yukon Quartz Mining Act* Sections 12 to 15 spelled out the free entry rights to acquire a claim.

In 1991, a Whitehorse prospector, Mr. L. Halferdahl, staked quartz mining claims on vacant Crown land and tried to record them, as he was entitled to do. His application for a Grant of Claim was denied by the Whitehorse Mining Recorder and his rights of free entry were withheld.

Mr. Halferdahl was informed by the mining recorder that the area he had staked was involved in a native land claim negotiation. These negotiations were being carried out in secret, so Mr. Halferdahl had no way of knowing this.

Furthermore, this should have made no difference to the rights of free entry, as Section 13 *Yukon Quartz Mining Act* states that the miner is entitled to enter various lands, including *"Indian reserves or other like reservations made by the Government of Canada"*.

It would appear to be blatantly obvious that it should have made no difference whether the lands in question were involved in a land claim negotiation or not. Mr. Halferdahl should have had free entry unless

the Crown had relinquished the mineral rights to the natives prior to Mr. Halferdahl staking the ground.

Mr. Halferdahl filed suit [Halferdahl v Whitehorse Mining District (190), 31 F.T.R. 303] and [(1992) 1 F.C. 813 (C.A.)].

"Halferdahl v Whitehorse Mining District, involving the Yukon Quartz Mining Act, is a recent example of the mandatory kind of legislation in action." (Barton p.160).

"The government wished to set aside certain Crown land because it might be needed for a native land claim settlement. The government did not want alienations of the land to occur in the meantime. It could not reserve the land from mineral activity simply by telling the recorder to stop issuing mineral claims because miners had their statutory right of access to prospect, stake, and explore. It was obliged to find a specific power in the Act to overcome that right.

"The Federal Court of Appeal held that such a power could be found for this purpose in the Act, although it was a close call. The language in issue was difficult, and the Court below had come to the opposite conclusion.

"Had it gone the other way, the result would have been the order that the Court below had made, that is mandamus to require the recorder to act according to law and to record the applicant's claims. The Act imposed upon the recorder a duty to record claims and vested no discretion in him or her." (Barton p.160).

"The Minister's discretionary power to withdraw land is subject to limits imposed by legislation, both as to the procedure to be followed and as to the purposes for which the power may be exercised. Legislation may grant the power to withdraw in broad terms, so that it can be used to fulfill any conceivable government purpose, but that is not always the case.

"In Halferdahl v Whitehorse Mining District, a situation was exposed where the Department of Indian Affairs and Northern Development

came dangerously close to being found without power to withdraw land from staking for the purposes of vital native land claim negotiations.

"The Yukon Quartz Mining Act excepted from the miner's right of entry various lands including 'Indian reserves, national parks and defense, quarantine or other like reservations made by the Government of Canada.'

"The Federal Court of Appeal found it difficult to understand exactly what Parliament intended by 'or other like reservations', but decided from the other words used that it included broad public purposes including the settlement of native land claims.

"The Department has now procured an amendment to invest it properly with the power it needs: 'Where, in the opinion of the Governor in Council, any land in the Territory may be required for a harbour, airfield, road, bridge or other public work or for a national park, historic site or town site, the settlement of aboriginal land claims or any other public purpose, the Governor in Council may, by order, prohibit entry on that land for the purpose of locating a claim or prospecting or mining for minerals except on such terms and conditions as the Governor in Council may prescribe.' " (Y.Q.M.A. Section 14.1(2)). (Barton p.172).

The free miner should marvel at this, and wonder at the simplicity with which the Governor in Council has totally overthrown the free miner's rights, liberties, and protections by law and legal security of tenure.

* How did the rule of law apply here?

* How do free miners find any "clarity" in this?

* How can free miners "know what is expected of them and others" if their legal security of tenure is reduced to "the opinion of the Governor in Council"?

* How can the free miners "achieve a measure of security and can plan for the future" when their property can be overthrown at any time for the most arbitrary, fatuous or whimsical of tyrannies?

The answer is: They cannot.

Where was the rule of law when this was being perpetrated?

It was conspicuous by its absence.

How can this be corrected?

It is a difficult question to answer. *"The responsibility for interpreting the law and ensuring legality rests with the courts."* (Sullivan p.36).

"The superior courts of each jurisdiction review the work of the executive branch to ensure that it has been carried out in accordance with the rule of law. Judicial review is based primarily on the principles of fairness, natural justice and legality." (Sullivan p.11-12).

This is one recourse for the free miner to protect his rights of free entry. A judicial review of the *Yukon Quartz Mining Act* and the *Yukon Placer Mining Act* and the free entry system of mining law may result in the courts upholding those rights.

An additional judicial review of the regulatory regime affecting the mining industry could examine how badly the rights of free entry have been fettered, interfered with, taken, prohibited or withheld.

It could also determine if these acts were done within or without the rule of law, with or without fairness, natural justice and legality. It might help the free miner defend his property.

PROPERTY LAW

The concept of mining claims as "property" or an "interest in land" has caused a great deal of confusion in the operation of the free entry system and its regulation. In particular, there seems to be a good deal of confusion as to whether a Yukon quartz mining claim is a "licence" or a "lease".

Over the last few decades, various courts have actually treated Yukon quartz mining claims as licences, profits à prendre, leases, freehold estates in fee simple or as Crown Grants.

This confusion then spread into the regulatory regime as bureaucrats misconstrued the amount of legal security of tenure a quartz mining claim actually has, and how much they could legally interfere with the operation of the claim.

It is essential, therefore, to understand just what sort of property a Yukon quartz mining claim actually is, and what legal security of tenure it is supposed to be entitled to.

Barton raised this point in his discussion of "the significance of characterization of statutory interests".

He states: *"it is a more purely legal question to inquire into the nature of the interest that is held by a claimholder or lessee. There are a number of different ways that such questions can be asked.*

"Are the rights completely statutory or are they proprietary as well?

"If the rights are indeed proprietary, are they interests in land or simply personal property instead?

"If they are land, into what category of real property do they fit?

*"To say that someone is the owner of a mining claim, of course, is m*erely *the beginning of the process of inquiry, not the end of it."* (Barton p.384).

The free miner must therefore begin his process of inquiry by considering the rights that are acquired and held by his claim.

"Mining legislation invariably describes (and limits) the rights of a holder of a claim to enter, prospect, and explore for Crown minerals, and gives the holder of a lease the right to extract minerals.

"The description of these rights leads to questions about their legal tenure, and, above all, whether the interest acquired is an interest in land. At first sight, these questions have the look of an esoteric kind of lawyers' law, but one soon notices that they raise significant questions of policy." (Barton p.381).

Barton describes the main right involved here as the: *"right to a lease and to enter into production. The third element of free entry is the right to produce from a mineral deposit and win the rewards for which the whole exploration effort is mounted.*

"When an explorationist finally locates an economic deposit, he or she is entitled to recoup the risky investments called for by exploration. Because most jurisdictions prohibit mineral production on a claim except for test purposes" (Note: the Yukon is not one of these. JM*)* *"this translates into a right to obtain a mining lease of one's own claim.*

"In earlier times, the right was a right to a Crown grant or patent such that the land was held in fee simple" (Note: this is the way YQMA claims are granted--as a patent in fee simple. JM) *"but now the lease is the most perfect and secure form of title that is available."* (Barton p.157).

A "patent" is defined as "*a grant by the government of title to public lands; the instrument by which such title is granted and the land so granted".* (**Collins English Dictionary**, Third Edition, 1991).

It is worth noting that the *Yukon Quartz Mining Act* used to issue Crown Grants for mining claims. These gave full patent to the mines

and minerals plus full title to all surface rights, such as, occupancy, building construction, agricultural, homestead, timber, water, etc. The Crown stopped issuing these Crown Grants in the 1920s, but a number of these Crown-granted claims are still in operation in the Yukon to this day.

If the *Yukon Quartz Mining Act* grants "title" to land with a mineral claim, then it is important to understand what "title" is.

Title is defined as "the way in which a landowner possesses property". (Dukelow & Nuse).

It is also defined as *"ownership, or the right to possess a thing".* (Law professor John Yogis, Q.C., **A Canadian Law Dictionary,** Third Edition, 1995).

This introduces the concept of a mineral claim as "property" and an "interest in land" and "real property".

All of these points of law have enormous implications for the overall legal security of tenure granted to a Yukon quartz mining claim.

In studying the modern history of the free entry system, it becomes readily apparent that there has been a continuous progression from the end of the Ballarat Miners Rebellion until today, to increase the amount and strength of the legal security of tenure for mining claims.

This started in 1855 with the abolition of miners' licences and the introduction of miners' rights and continued until the promulgation of the *Yukon Quartz Mining Act* in 1924.

In light of this, it becomes a significant question for the free miner to ask why is the Crown now re-introducing the failed concept of miners' licences?

These are being issued under Part II of the revised *Yukon Quartz Mining Act*, and under the aegis of various other legislation involved in regulating Yukon mining. These would include land-use permits issued

under the *Territorial Lands Act*, and water licences issued under the *Yukon Waters Act*.

The use of these licences raises numerous other difficult legal questions for the free miner.

* What happens to the entire concept of legal security of tenure for a mining claim when these licences are withheld or revoked?

* What happens to the property rights supposedly "protected by law" when the regulators withhold the licence and order the miner to stop work on the basis that he is now "prohibited from mining" without the licence?

* How has a non-discretionary system of mining law become a discretionary system of mining law without repealing the non-discretionary rights of free entry from the Act?

<u>It would appear to be a judicial absurdity to have a law operating in both a non-discretionary and discretionary fashion at the same time and on the same property.</u> (Emphasis added.)

* How can this be anything less than the complete overthrowing of the free entry system of mining law, the destruction of the intent of Parliament and the purpose of the *Yukon Quartz Mining Act*?

To refer once again to Haydon's Case: this would appear to have the Crown advancing the mischief and suppressing the remedy for the "disease of the commonwealth". (Sullivan p.140).

This is not supposed to happen.

THE LEASE v LICENCE QUESTION

The basis of the non-discretionary v discretionary systems of mining law hangs on the nature of the grant given on the claim whether it is a lease or a licence.

It is important to know the differences between a lease and a licence, which are substantial. It is not possible for a lease to be a licence at the same time, in spite of the fact that this is what has happened to the *Yukon Quartz Mining Act* under the Part II Mining Land Use revisions.

"A lease cannot be turned into a licence (or vice versa) just by describing it as such." [New Brunswick v Gordon, (1979), 27 N.B.R. (2nd) 110 at 116 (Q.B.), citing McColl-Frontenac Oil Co. v Hamilton, (1953) 1 S.C.R. 127 at 141 (Alta.); Street v Mountford, (1985) 2 All E.R. 289 at 300 (H.L. Eng.)]. (Barton p.396).

"In the law of property, a licence is a personal privilege or permission with respect to some use of the land and is revocable at the will of the landowner. A licence does not represent an estate or interest in land." (Yogis).

A lease is defined as *"an agreement whereby one party, the landlord, relinquishes his right to the immediate possession of property while retaining ultimate legal ownership (title).*

"The difference between a lease and a licence is that the latter does not create any right or interest in the land itself and does not confer a right to exclusive possession of the party." (Yogis).

For the Crown to appear to take a mining claim as a lease, with irrevocable property rights as an interest in land and say it is nothing but a mere licence, with no rights as property and which is completely revocable, would appear to be untenable at law.

This is, however, what appears to have happened in the revised 1996 *Yukon Quartz Mining Act*, Part II.

This appears to have significant repercussions for the entire free entry system, the miners' rights within that system, the miners' legal security of tenure and the future of the Yukon mining industry.

"Nor may the Crown insert terms that would deprive the licences or leases of their character as licences or leases under the Act." [Baker v Smart (1906), 12 B.C.R. 129 at 143-44 (F.C.), Duff J.] (Barton p. 338-339).

Once again, this appears to be exactly what is happening between Part I and Part II of the revised 1996 *Yukon Quartz Mining Act.* The original leases in Part I are now operated as licences under Part II. This would appear to deprive the original granted leases of their character as leases under the *Yukon Quartz Mining Act.*

The character of a licence or a lease is a vast subject and will only be touched on briefly here.

LICENCE

A licence is distinguished by the following points:

* it does not grant exclusive possession "(this is a key feature distinguishing from a lease)" (Ziff p.252).

* "*in the leading English decision of Street v Mountford [1985] A.C. 809, [1985] 2 All E.R. 289 (H.L.) exclusive possession was found to lie at the heart of the lease-licence distinction. If exclusive possession has been conferred then, generally, the interest granted is a tenancy"* (lease). (Ziff p.253).

* a "grant of licence, without more, does not" create an interest in land (Ziff p.252).

* "a licence is merely a permission to do that which would otherwise amount to trespass". (Ziff p.252).

* a licence does not have standing to sue in trespass" (Ziff p.252).

* "a licence is not binding on a purchaser of the land over which the licence is granted" (Ziff p.252).

* "the right to revoke a licence may (and often will) differ from the principles governing the termination of tenancies" (i.e. leases) (Ziff p.252).

* a licence "does not enjoy the panoply or statutory protections afforded to residential tenants" (i.e. leaseholders). (Ziff p.252).

* "the disparity between the protections given to a tenant" (leaseholder) "and those available to a licencee" can be acute (Ziff p.252).

* "the requirements of exclusive possession is the s*ine qua non*" (indispensable condition) "of a lease" (Ziff p.254).

* “possession” is defined as “the right to custody, dominion and control of property” (Yogis).

* exclusive possession is defined as “the right to occupy premises without any interference by another person” (Dukelow & Nuse).

* “a bare licence, one unsupported by a contract, is fully revocable” (Ziff p.272).

* “even a contracted licence was treated as revocable at will” (Ziff p. 272).

* “a mere licence is definitely not an interest in land.” (Barton p.394).

PROFITS À PRENDRE

Yukon quartz mining claims have, on occasion, been misinterpreted as profits à prendre.

A profit à prendre is an interest in land granted as a "mere liberty to work and take minerals". (Barton p.35).

The profit à prendre does not grant the miner any right to the mines, seams or veins but only an interest in the minerals. This interest is given as *"the right to enter upon the land of another to take something off that land."* (Barton p.37).

"The essential elements of a profit à prendre are: (i) a right to enter the lands of another, (ii) a right to sever minerals (or some other profit of the soil), and (iii) a right to remove the minerals for one's own use.

"It is an interest in land and may be assigned and dealt with in accordance with the ordinary rules of property. A profit may be limited either for freehold or chattel interests; that is, it may be held in fee simple or for a term of years." (Barton p.37).

"A profit allows something to be taken from the land, and this distinguishes it from a bare licence, which merely allows one to do something on land that would have otherwise been unlawful.

"A mere licence does not require a writing or a deed and is revocable.

"A profit, on the other hand, is covered by the Statute of Frauds, must be in writing, and is irrevocable.

"A right to enter land and explore for minerals is likely to be construed as a licence, but if a right to take minerals away is added, the transaction will be regarded as the grant of a profit." (Barton p.38).

"The chief distinction between a profit à prendre and a corporeal interest in minerals" (i.e. an interest in land property) "is that the

proprietor of a profit does not have possession of the minerals in situ. The proprietor of an estate in minerals as a severed corporeal hereditament, as we have seen, is entitled to possession (and indeed is deemed to be an immediate possession) of the mines, or the mines and minerals, as the case may be.

"In certain cases, the possession extends to the spaces left as the minerals are worked" (i.e. the emptied mine workings, the tunnels and shafts etc.) "so as to permit the owner to use the spaces for any purpose he or she chooses. The holder of a profit has possession...of the profit itself, rather than of the land or a portion of it." (Barton p. 38).

"While the legal character of a profit à prendre may be different in some respects from mining leases and other corporeal interests in minerals, for most purposes a profit à prendre is in no way an inferior form of property.

"The powers of a grantee to enter and extract minerals may be just as ample and the rights can be just as exclusive. Questions about possession do not alter the fact that the profit is a real property interest in the minerals in place." (Barton p.40).

"Perhaps the only question that may arise is whether the mining lease is the conveyance of an estate in the minerals (that is, a possessory and corporeal right) or whether it vests in the lessee an exclusive right to extract the minerals without actually putting the grantee in possession of the minerals in situ.

"This would be characterized as a profit à prendre rather than an actual lease, even if the language of lessor and lessee is used.

"However, for most purposes the distinction will be immaterial; both permit the necessary extraction of the minerals and both are interests in land that are freely transferable in fee simple or for a term." (Barton p.386).

It is important to note that the *Yukon Quartz Mining Act* does not grant a profit à prendre.

* The Act defines a "mine" as "any land in which any vein, lode or rock in place is mined for gold or other minerals, precious or base".

* The Act states by definition that "vein" or "lode" "includes rock in place."

* The Act defines "rock in place" as "all rock in place bearing valuable deposits of mineral".

The words "rock in place" in legal Latin would be rock "in situ".

Section 76 *Yukon Quartz Mining Act* states "what entry or lease conveys" as follows:

"The holder of a mineral claim, by entry or by lease, located on vacant territorial lands is entitled to all minerals found in veins or lodes, whether the minerals are found separate or in combination with each other in, on or under the lands included in the entry or lease, together with the right to enter on and use and occupy the surface of the claim, or such portion thereof and to such extent as the Minister may consider necessary, for the efficient and miner-like operation of the mines and minerals contained in the claim, and for no other purpose."

This would appear to be clear in granting the miner all subsurface rights, including everything "in situ".

The Yukon quartz claim is therefore not a profit à prendre; it is an actual lease.

LEASE

A lease may be distinguished by the following points:

* ”a lease can be both a contract and the basis of an estate in land” (Ziff p.345).

* “Security of tenure was provided by treating the lease as a proprietary entitlement, which bound third parties and conferred exclusive possession of the demised lands on the tenant” (Ziff p.245).

* “the issues here involve the dividing line between personal and proprietary rights” (Ziff p.247).

* “a lease is a demise of land” (conveyance of an estate in real property) “under which exclusive occupation is conferred by a landlord on a tenant.” (Ziff p.248).

* “a leasehold estate, as with all estates, delimits the duration of the tenant’s holdings.” (Ziff p.248).

* “As long as the lease continues in force the landlord retains a reversionary interest; the landlord’s right to actual possession is suspended during the term of the tenancy.” (Ziff p.248).

* “This is not a true reversion of the freehold for even while the lease is in existence the landlord remains ‘seized’ of the land.” (Ziff p.248).

* “Seized” is defined as “the condition of legally owning and possessing realty. A person seized of real property has a freehold estate with possession or a right to possession. The phrase imports legal title as opposed to a beneficial interest.” (Yogis).

* “Seisin” is defined as “a term that describes the title of a freehold estate with a right of immediate possession, the term really being

synonymous with possession. Today, seisin is generally considered synonymous with ownership." (Yogis).

* "Ownership" is defined as "the right of enjoying and disposing of things in the most absolute manner. The term has a wide range of meanings but is often said to comprehend both the concept of possession and, further, that of title, and thus to be broader than either." (Yogis).

* "Title" is defined as "the way in which a landowner justly possesses property." (Dukelow & Nuse).

* "The term title means on the one hand the right of ownership and on the other the instrument or evidence of such right." (Yogis).

From this it becomes clear that a lease grants virtually all the rights to property that a freehold estate does, with two exceptions: The lease is only granted for a fixed term of years after which the property reverts to the landlord.

A freehold is granted for an indefinite term of years.

Secondly, a leasehold grants possession but no conveyance of seisin, title or ownership, while a freehold does grant seisin, title and ownership of the property.

* "a lease may exist for a fixed term" (of years). (Ziff p.248).

* a lease "may last for any interval, however irregular of lengthy." (Ziff p.248).

* "the term must be certain as to both its date of commencement and termination." (Ziff p.248).

* "it is the maximum length that must be certain." (Ziff p.248).

* "an unimpeachable lease should contain a demise of exclusive possession, the identification of parties, the property, the term, the date of commencement, and the rent (if any) to be paid." (Ziff p.250).

* "the leaseholder cannot be seized of land" (Ziff p.250). (i.e. no title or ownership of land is conveyed).

* "formal requirements were introduced in the Statute of Frauds, 1677, which provides that leases must be in writing and signed by the lessor (or an agent)." (Ziff p.250).

"MacKay J.A. in Re Algoma Ore Properties Ltd. and Smith [(1953) O.R. 634 at 640 (C.A.)] uses more precise terminology to the same effect: 'there may be a severance of the mines and minerals from ownership of the surface and...the mines and minerals so severed are a separate tenement capable of being held for the same estates as other hereditaments.'

"The minerals and the surface are separate corporeal hereditaments. Indeed, the severance of the surface of the land and the minerals is comparable to the severance of one parcel into two in the course of the ordinary subdivision of land.

"The severance may create a fee simple estate in the minerals, as in Algoma Ore Properties; it may create a fractional fee simple interest; or it may create a leasehold estate by granting a lease of the minerals.

"The owners of estates and interests in such mineral tenements may transfer or encumber their property just as other real property, and may carve out lesser interests that are interests in land."
(Barton p.34-35).

"Care is required to ascertain the true character of an instrument professing to be a mining lease; it may be a leasehold estate in the mineral tenement, but it may be a profit à prendre.

"Equally, the term of a mining lease may be fixed or it may be of indefinite duration. Reference is often made (e.g. Joggins Coal Co. v M.N.R., (1950) S.C.R. 470 (N.S.) to a dictum of Lord Cairns in Gowan v Christie (1873), 2 L.R. Sc. & Div. 273 at 284 (H.L.Scot.) that although we speak of a mineral lease, the contract is in reality a sale out and out of a portion of the land." (Barton p.35).

In jurisdictions where a mining claim is less than a lease "a mining lease offers greater security than a claim". (Barton p.240). Note: In the *Yukon Quartz Mining Act* a claim is a lease from the time it is staked. JM. (See Section 50 YQMA.)

"The highest and most secure form of tenure under modern mining legislation is the mining lease. Often, the acquisition of a lease marks the transition from the stage of mineral exploration to that of mine development.

"The higher level of security that a lease affords is called for at such a time because the claimholder will need to invest substantial sums in sinking a shaft, removing overburden, and constructing a mill, access roads, and other permanent facilities.

"In most jurisdictions, a lease is necessary to produce minerals from a property as a claim only permits exploration and development work to be done.

"The higher security of title that a mining lease offers in comparison to a mining claim derives from several sources.

"First, the term of the lease is often for twenty or more years, whereas a claim usually runs for a year. (Emphasis added.)

"Directly connected with the longer term is the second aspect, the absence of any mechanism for automatic cancellation for default. Together these two attributes protect a lease from immediate oblivion in case of non-compliance.

"A third main source of security is that the interest of a lessee in a lease is undoubtedly a proprietary interest as well as an interest in land.

"The fourth is the usual requirement that a survey of the property be carried out before a lease is granted. The survey eliminates the boundary problems that beset claims that are staked in a rough and ready manner.

"The fifth is a high degree of protection from attack by third parties during the term of the lease and from attack by third parties or the Crown after limitation periods have expired.

"The added security that a lease offers is important to the lessee, who must invest substantial sums and meet relatively high rental or work commitments. It is especially important to the small company that cannot borrow on the strength of its overall corporate position, but must offer its properties as security. Some lenders take a jaundiced view of mere claims and require the better security of a lease." (Barton p.333).

"One of the basic elements of the free entry system is that a miner who has explored for and found a mineral deposit may freely obtain the tenure or disposition needed to exploit the minerals and to obtain a recoupment of the exploration effort.

"In the free entry jurisdictions (that is, jurisdictions other than Alberta), the holder of a claim has a right to obtain a lease. That right is not subject to any discretion to withhold the lease if it has been properly applied for.

"In other words, the requirements are largely formal in nature; if the requirements have been fulfilled, the lease must issue."
(Barton p.333-334).

"The most important right conferred by a mining lease is the right to mine, that is, to extract or produce minerals for one's own account." (Barton p.337).

"Typically, a mining lease is a grant of exclusive rights for valuable consideration, and there is an implied undertaking by the Crown not to act in derogation of its grant during the continuance of the lease." [McLean v The King (1907), 38 S.C.R. 542 (Can.) (Barton p.337).

"The Crown is limited in imposing conditions in mining leases in that it cannot insert conditions that would have the effect of varying any legislative provision. Where public interests are involved, the Crown may not contract out of the statute." [Twin Gold Mines Ltd. v Manitoba, (1985) 1 W.W.R. 546 (Man. Q.B.), affirmed on other grounds (1986) 6 W.W.R. 193 (C.A.). (Barton p.338).

"Nor may the Crown insert terms that would deprive the licences or leases of their character as licences or leases under the Act and actually tend to defeat the object of the Act, for example, in turning a licence intended to be exclusive into a non-exclusive one." [Baker v Smart (1906). 12 B.C.R. 129 at 143-44 (F.C.), Duff J. (Barton p.339).

"A lease cannot be turned into a licence (or vice versa) just by describing it as such." [New Brunswick v Gordon (1979), 27 N.B.R. (2nd) 110 at 116 (Q.B.), citing McColl-Frontenac Oil Co. v Hamilton, (1953) 1 S.C.R. 127 at 141 (Alta.); Street v Mountford, (1985) 2 All E.R. 289 at 300 (H.L.Eng.).] (Barton p.396).

"The basic elements of the rights conferred by a claim are common to most jurisdictions. The first is exclusivity, which is important in a negative sense in that no one else may assert rights to the minerals concerned." (Barton p.383).

"The second basic element of a claim is a right to explore for minerals. Development and actual production in most jurisdictions must wait until a mining lease is obtained.

In the Yukon, such controls are actually absent, and a claimholder who does not wish to get a lease and improve his or her security of title is welcome to mine on it." (Barton p.384).

Barton appears to be somewhat confused on this point, as are most. Section 50 *Yukon Quartz Mining Act* states very plainly that a Yukon quartz mining claim is, in fact, a lease from the time it is first located and staked.

"A similar analysis of statutory provisions demonstrates that the holder of a mining lease enjoys all the rights that the holder of a claim enjoys and, in addition, unrestricted rights to exploit and produce minerals." (Barton p.384).

"The common law also has different rules for real and personal property." (i.e. for leases or claims that are not leases).

"For example, an estate in land is freely assignable whilst a lesser kind of property may not be. [Beaton v Schulz (1934), 49 (B.C.R. 1 (C.A.)]. *A clear view of the characterization of the interest granted is imperative when one is contemplating a transaction involving a mining claim or lease, whether it is a simple sale, an option, or a security."* (Barton p.385).

"Mining leases invariably convey an interest that is undoubtedly property and undoubtedly an interest in land." (Barton p.386). (Emphasis added.)

"In all cases, the words of the lease itself must be considered carefully in addition to the words of the statute. The words of grant and habendum especially call for examination, but so too do the covenants and conditions that contribute to the overall character of the right granted.

"The analysis of the incidents of a lease disclosed by such covenants and wording is likely to lead to precisely the same result as the statutory definitions. The exclusive right, even against the Crown, to develop and (above all) to extract minerals, a right that is granted for a term of years with considerable security of tenure and is freely transferable, is unlikely to be anything less than an interest in land." (Barton p.386).

MINING LEASES AS "CHATTEL INTERESTS"

A point which causes some problems in understanding the nature of a Yukon quartz mining claim is the application of the term "chattel interest".

Section 50 *Yukon Quartz Mining Act* states: *"The interest of the holder of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Act."*

"Other jurisdictions have or had a 'chattel interest, equivalent to a lease' section, similar to the pre-1977 British Columbia section. The Yukon Quartz Mining Act still has the older wording, which has been interpreted consistently enough to indicate an interest in land." [Commissioner of the Yukon Territory v Bedard (27 October 1987), S.C. 392.78 (Y.T.S.C.)]. (Barton p.391).

"The term chattel interest appears to have caused the courts some difficulty. While the more common category of chattels is chattels personal, the law is also familiar with chattels real or a chattel interest in land. The term is used to describe terms of years (i.e. leases) and has its origins in the era when the courts were still reluctant to give remedies in rem to enable a lessee to recover possession of land.

"However, the courts overcame that reluctance and in effect permitted leases to be an interest in land. Even though they have an anomalous classification as personality for purposes such as the old law of inheritance, chattels real have been interests in land since the end of the fifteenth century." [A.W.B. Simpson, Introduction to the History of the Land Law, 2d.ed. (Oxford: Clarendon Press, 1986) at 75; J.H.Baker, Introduction to English Legal History, 3d.ed. (London: Butterworths, 1990) at 340]. (Barton p.392).

"*MacDonald J. in the 1971 case of A.G.B.C. v Westgarde [(1971) 5 W.W.R. 154 at 160-161 (B.C.S.C.)] had no difficulty with chattels real,*

and described them with particular reference to the fact that they are subject to execution:

" 'Terms of years' (i.e. leases) 'are chattels real. Paradoxically, though they are personality in law, they are still interests in land; 32 Hals (3d) 207, para 295; Megarry and Wade, The Law of Real Property, 3rd.ed., pp. 10-11. In my opinion mineral claims do not lose their status as interests in land because they may be taken in execution in the manner provided for in section 11 of the Execution Act.' "
(Barton p.393).

"*Jowitt's Dictionary of English Law says at p.358: 'chattels real are estates or interests in or arising out of lands. The difference between real estate or freehold and chattels real consists for the most part in the fixity or non-fixity of their duration. It is the latter property viz. uncertainty of duration that characterizes a freehold; it is the former, certainty, that characterizes a chattel real or chattel interest in realty' ".* (Barton p.393).

"A somewhat similar discussion is found at p.184 of Wharton's Law Lexicon, 14th ed. 'In the absence of any other authority I would be inclined to accept the above as indicative of the meaning to be placed on "chattel interest" in the regulation and to find therefore that the interest of a recorded owner of a mineral claim was an interest in land.' " (Barton p.393).

These points illustrate well the nature of the Yukon quartz mining claim as a leasehold estate and as real property or an interest in land. They also illustrate the unique nature of the Yukon quartz claim in being a lease from the day it is staked.

Section 50 *Yukon Quartz Mining Act* is saying that prior to the issue of a 21-year quartz mining lease under Section 72 and 101 *Yukon Quartz Mining Act,* the claim is a chattel interest (i.e. a lease) equivalent to a lease for one year, and thence from year to year.

<u>This makes the Yukon quartz mining claim unique in Canada, and possibly in the world, in having the maximum legal security of tenure</u>

from the day the claim posts are set up on the ground. (Emphasis added.)

THE CLAIM AS A FREEHOLD ESTATE

It has been noted previously that the older Canadian mining laws used to grant freehold estates by patent or Crown Grant.

Barton notes that over the past century government *"policy has been that of removing the right to a fee simple patent or Crown grant of mineral rights or mineral lands from the mining legislation. Lands and minerals are no longer completely alienated from the Crown. Instead, the mining lease is now the longest and most secure form of disposition of mineral rights that the mining legislation offers."* (Barton p.65).

This became true in every jurisdiction in Canada except the Yukon.

In the Yukon the use of Crown grants was discontinued in the early 1920s. However, the leases granted by the *Yukon Quartz Mining Act* need very careful scrutiny, for they appear by definition to not be leases at all, but to be freehold estates in fee simple.

Section 50 *Yukon Quartz Mining Act* describes the claim as *"equivalent to a lease of the minerals in or under the land, for one year, and thence from year to year"*.

Section 101 *Yukon Quartz Mining Act* describes the term of the 21-year quartz mining lease as *"leases of mineral claims...shall be for a term of twenty-one years, renewable for a further term of twenty-one years...and renewable for additional periods of twenty-one years…"*.

As noted previously a proper lease must have a "fixed term" and *"The term must be certain as to both its date of commencement and termination."* (Ziff p.248).

As can be readily appreciated, these Yukon quartz mining leases have a "fixed term" of one year or twenty-one years but may then be renewed indefinitely. This gives the claims a "certain" date of commencement" but it cannot provide for a "certain" date of

termination". Therefore, these Yukon quartz leases do not appear to fall within the proper legal definition of a lease.

In fact, these quartz leases appear to be a form of "perpetual lease". (Emphasis added.)

"Generally speaking, a perpetual lease, with no fixed term or stated period, no right of termination on notice, and which can last forever, is not tenable at common law.

"An attempt to confer such an interest is treated as creating either a yearly periodic tenancy or an outright sale of the freehold (to which a rent charge might be attached instead of a leasehold rent). [Wotherspoon v Canadian Pacific Ltd., (1987) 1 S.C.R. 952, 45 R.P.R. 138, 39 D.L.R. (4th) 169, 76 N.R. 241 (sub nom. Eaton Retirement Annuity Plan v Canadian Pacific Ltd.), 21 O.A.C. 79].

"Still, perpetual leases are sometimes found in the law. In some Australian states, the Crown has granted land in the form of perpetual leases instead of fee simple estates and this has produced a wide array of tenures in those jurisdictions.

"The same power to create special forms of tenure exists in Canada. Moreover, a lease for a term of years may validly provide for a perpetual right of renewal." [Clinch v Pernette (1895), 24 S.C.R. 385 ay 393]. (Ziff p.250).

From this it would appear that the Yukon quartz mining claim is either a "yearly (or 21-yearly) periodic tenancy" or "an outright sale of the freehold".

However, a periodic tenancy *"is one that is to be enjoyed for some recurring unit of time (e.g. month by month) that, in the normal course, continues until terminated by notice."* (Ziff p.249).

Under the *Yukon Quartz Mining Act* there is no provision to "terminate by notice" a quartz mining claim. Therefore the quartz mining claims cannot be a periodic tenancy.

Consequently, the Yukon quartz mining leases must be "an outright sale of the freehold". This point is supported by Barton "*Care is required to ascertain the true character of an instrument professing to be a mining lease; it may be a leasehold estate in the mineral tenement, but it may be a profit à prendre.*

"Equally, the term of a mining lease may be fixed or of indefinite duration. Reference is often made (e.g. Joggins Coal Co. v M.N.R., (1950) S.C.R. 470 (N.S.)0 to a dictum of Lord Cairns in Gowan v Christie [(1873), 2 L.R. Sc&Div. 273 at 284 (H.L.Scot.)] that although we speak of a mineral lease, the contract is in reality a sale out and out of a portion of the land." (Barton p.35).

It would appear then, that the one year and twenty-one year quartz mining leases issued under *the Yukon Quartz Mining Act* are a freehold estate in fee simple and an outright sale of the land. This would appear to fit the definition of a "patent" as "a grant from the Crown in fee simple or for a less estate under the Great Seal" (Dukelow & Nuse).

"Patents under the mineral legislation created estates in fee simple in the minerals." The patents *"vested in the patentee all title of the Crown in such lands and all mines and minerals therein, including gold and silver."*

"For patents...with the surface rights held by and reserved to the Crown, the conveyance of 'mining rights' is defined as the conveyance of the ores, mines and minerals on or under the land, together with such right of access for the purpose of winning them as is incidental to a grant of ores, mines and minerals." [Conveyancing and Law of Property Act, R.S.O. 1990, c.C.34, s.16]. (Barton p.343-344).

"Patents or Crown grants were registered in the same way as ordinary grants of land by the Crown, in the Land Titles Office or Registry Office as appropriate. Once so registered, they became governed by the appropriate statute and the general rules that govern ownership of real property." (Barton p.345).

"The very essence of a fee simple right under a patent or Crown grant is a virtual immunity from cancelation. Failure to comply with the few conditions to which a patent is subject may be actionable, but, just as in actions against other freehold owners, the remedy is not revocation of the grant but is likely to be damages or an injunction to enforce compliance." (Barton p.346).

"Disputes about rights under patents cannot be heard by a provincially-appointed tribunal such as the Mining and Lands Commissioner or Chief Gold Commissioner," (Note: perhaps even the Yukon Surface Rights Board. JM) *"even if the legislation attempted to so provide. Such disputes fall squarely within the jurisdiction of the superior court judges,"* (Note: such as the Yukon Territory Supreme Court. JM) *"who are appointed under Section 96 of the Constitution Act, 1867."* (Barton p.346).

This would appear to make the Yukon quartz mining claim the most legally-secure mining property in Canada, and possibly, in the world.

This would also explain another substantial legal anomaly in the *Yukon Quartz Mining Act.* This is the repeated reference in the Act to "title" and the conveyance of "vested title" to the claim from the Crown to the free miner.

As noted previously, licences, profit à prendres and leases do not grant title to property. Only a freehold estate conveys seisin to the land with conveyance of title.

TITLE TO THE CLAIM

Section 63, 64 and 65 *Yukon Quartz Mining Act* refer repeatedly to *"title to the claim", "the title to any mineral claim"* and that *"the court has the power to make all necessary inquiries, directions and references for the purpose of carving out the object hereof and vesting title in the first acquirer in good faith of the claim."*

Section 67 *Yukon Quartz Mining Act* is headed by the term *"Title".* Section 95 *Yukon Quartz Mining Act* refers to a *"document of title relating to a mineral claim".* Section 96.(2) refers to *"other documents in any way affecting title to a mineral claim".*

This title remains vested in the free miner as long as the claim remains in good standing. If, as or when the free miner allows the claim to lapse, then there is also a *"lapse of right"* as described in Section 103 *Yukon Quartz Mining Act*. At this time *"the claim and rights shall immediately be and become revested in the Crown."* (Emphasis added.)

Section 115 *Yukon Quartz Mining Act* refers to *"the title thereto" of a claim.*

Barton states *"the legal framework for mining in Canada comprises numerous statutes, the most central of which are the mining acts that provide for the acquisition of mineral title."* (Barton p.v).

"The central theme of the book is title to minerals, primarily title under mining legislation." (Barton p.vii).

"Four different elements may be perceived in mining law; property law, mining legislation, mining transactions and regulation. Property law is composed of the general principles and rules that govern title to real estate and other property. Real property law is required in order to analyze the rights that the Crown, native nations, and the private sector have in relation to minerals. Its most immediate role is apparent where minerals are held in private ownership as part of the

land, but it also has a role to play in relation to recording systems and the investigation of title." (Barton p.1).

"This book is chiefly concerned with title to minerals." (Barton p.2).

"It is the staking that is the root of title, not any grant from the Crown." (Barton p.366).

"While recording is necessary to perfect title to minerals under a claim, it is the staking that is the root of title and the fundamental source that determines the extent and validity of the rights under the claim." (Barton p.256).

"The same approach was used in Re Timber Regulations [(1936) A.C. 184 (P.C. Can.)] in deciding that an entrant on Crown lands who held a certificate of entry granted under the Dominion Lands Act holds an interest or estate in the land, subject to conditions. The certificate of entry is comparable to a mining claim as a means of acquiring an interest in Crown lands not by contract or grant, but by the exercise of a statutory right." (Barton p.397).

In the *Yukon Quartz Mining Act,* this statutory right is given in Section 12.

"Mining claims are the main point of entry for obtaining title to Crown minerals in all the free mining provinces and territories." (Barton p. 240).

"A lot of ink has been spilled about these mining codes, romanticizing them as a unique and perfect form of frontier democracy. In reality, the concern of the miners was simply to obtain sufficient security of title to get on with what they had come for--mining gold." (Barton p. 116).

"The Yukon Territory and British Columbia have additional requirements in the process of obtaining a lease that require advertising of the intent to apply for a lease, but in return invest the lease with a degree of immunity from attack. In both cases, the public

notice is intended to trigger any adverse action that may be brought to challenge the claim, and to impose a limitation period so as to quiet the title…" (Barton p.336).

These points would appear to confirm beyond any reasonable doubt that a Yukon quartz mining claim is a titled property, and in combination with the possessory interest granted by "lease" it allows the free miner to be seized of the land his claim represents. Seisin means the title of a freehold estate with a right of immediate possession.

Since the estate created by a Yukon quartz mining claim is a *"perpetual lease"* it is *"an estate of virtually infinite duration granted absolutely to a person or his heirs forever"*, which is the definition of "fee simple". (Yogis).

The estate is granted "absolutely" as Section 65 *Yukon Quartz Mining Act* states that *"the object hereof" of the Yukon Quartz Mining Act is "vesting title in the first acquirer in good faith of the claim."*

The definition of "vested" is *"fixed, accrued or absolute...generally used to describe any right or title."* (Yogis).

Therefore the title granted to a Yukon quartz mining claim is an absolute title. (Emphasis added.)

This would then fit the definition of a "patent" as "*a grant from the Crown in fee simple".* (Dukelow & Nuse).

So a Yukon quartz mining claim would appear to be a grant by patent. (Emphasis added.)

"The combination of land withdrawal and ever tighter environmental regulation tends to overshadow the free entry system.

"Writing of precisely the same trends affecting activity on United States federal lands under the Mining Law of 1872, John Leshy comes to a thought-provoking conclusion: 'The inevitable result is that

government discretion and control have displaced free access and private decision-making under the Mining Law to an extent far greater than either the federal agencies or the mining industry now wish to admit.'

"The reality is that the regulatory controls of the modern administrative state often loom larger than the acquisition of proprietary rights from that state.

"However, it is probably correct to conclude, as does Leshy, that the regulatory controls have by no means eclipsed the free entry policy. What we are left with is a tension between regulation and free entry.

"The advocates of each of them feel the other has somehow got an unfair advantage." (Barton p.166-167).

If this was at all true when Barton wrote it in 1993, it would certainly appear to no longer be true now. It would appear in the Yukon that regulatory controls have not only eclipsed the free entry policy, they have totally annihilated the free entry system. (Emphasis added.)

THE OVERTHROW OF THE FREE ENTRY SYSTEM

The overthrow of the free entry system has been carried out by the federal government, and to a lesser degree by the Yukon Territorial government.

This has occurred in small incremental stages over the past 35 years or more. It has occurred by increased regulatory interference in the operation of the *Yukon Quartz Mining Act.* This includes outside regulations such as the Territorial Land Use Regulations under the *Territorial Lands Act* and the water licence requirements under the *Yukon Waters Act.* It includes internal regulations like the Mining Land Use Regulations in Part II of the revised 1996 *Yukon Quartz Mining Act,* and the insertion of "prohibition of entry by order-in-council" within Section 14.1(2) *Yukon Quartz Mining Act.*

It also includes the legitimization of unlawful third party interference in the operation of Yukon quartz mining claims. This would appear to be in violation of the protections against third party interference granted to leaseholders. (Emphasis added.) This includes initiatives such as the territorial government's *Yukon Protected Areas Strategy,* and the Development Assessment Process from the Umbrella Final Agreement of native land claims.

The overthrow of the free entry system also includes the devolution process between the federal government and the territorial government. In this process, title to mining claims appears to be removed from the territorial mining acts.

It has become so pervasive within the government that even the judiciary will have been affected by the bureaucrats drive for absolute power and the overthrow of the law. The recent revisions to the *Yukon Quartz Mining Act* have removed some of the Sections dealing with the use of the courts for adjudicating mining cases, and replaced them with quasi-judicial boards, such as the Yukon Surface Rights Board. This in spite of the previously mentioned requirement for patented rights to be adjudicated only before a judge of the superior court in the jurisdiction. (Emphasis added.)

TERRITORIAL LANDS ACT

The *Territorial Lands Act* contains the Territorial Lands Use Regulations, which apply on vacant Crown land but have never been applied on mining claims.

They were not applied to mining claims because Section 3.3 *Territorial Lands Act* states: *"Nothing in this Act shall be construed as limiting the operation of the Yukon Quartz Mining Act"* or *"the Yukon Placer Mining Act".*

However, a closer examination of Section 3.3 *Territorial Lands Act* is required.

The "operation" of law is defined as *"the determination of rights and obligations through the automatic effects of the law; by or through law".* (Yogis).

The operation of the *Yukon Quartz Mining Act* would include all of the law within that Act. Part of the operation of the *Yukon Quartz Mining Act* is Section 12, which states: *"Any individual eighteen years of age or over may enter, locate, prospect and mine for minerals on (a) any vacant territorial lands in the Territory."*

If the operation of the *Yukon Quartz Mining Act* allows entry onto vacant Crown lands then Section 3.3. *Territorial Lands Act* would appear to clearly state that nothing in the *Territorial Lands Act* shall be construed as limiting the operation of free miners entry onto vacant Crown land.

However, the Lands Branch has demanded that free miners apply for Territorial Land Use Permits in order to enter vacant Crown land. They have been making this demand for decades. They have also been charging free miners substantial amounts of money for these permits.

In recent years, the Lands Branch bureaucrats have started withholding these permits for substantial periods of time (often for several months) for "environmental" reasons. Recently, they have

actually started to refuse to accept some applications for permits altogether, thus refusing the miner entry to his claims, let alone onto vacant Crown land. (Emphases added.)

This is a direct withholding of the miners statutory legal right to enter, prospect and mine, both on vacant territorial lands and on granted mining claims. If this isn't a limiting of the operation of the *Yukon Quartz Mining Act* and the *Yukon Placer Mining Act* by the *Territorial Lands Act*, it would certainly appear to be on the face of it.

All the statutory and property rights and liberties and their protection by law do not appear to have stopped the Lands Branch bureaucrats from effectively prohibiting miners from exercising their rights of free entry under both mining acts.

The fact that their own *Lands Act* denies them the authority to commit such interference has also failed to stop them from the commission of such interference. (Emphasis added.)

This would appear to overthrow the free entry system completely.

THE YUKON WATERS ACT

The *Northern Inland Waters Act* and its replacement, the *Yukon Waters Act,* appear to overthrow the free entry system. This act and its predecessor require the free miner to apply for a "water licence" before they are permitted to mine on their claims. Without the water licence the miner is prohibited from mining.

This is a particularly interesting case of overthrowing the free entry system, as both mining acts have their own "water rights" contained within the mining acts.

These rights were negated when the water acts were promulgated by opening up the mining acts and inserting a new section. The *Yukon Quartz Mining Act* water right at Section 126 was countermanded by Section 127 which states: *"Section 126 ceases to have any force or effect within a water management area on the establishment of such area by the Governor in Council pursuant to subparagraph 33(1)(a)(i) of the Yukon Waters Act."*

The mining industry appears to have believed that its water rights were removed, revoked or repealed by Section 127, so that they were gone completely. This may not be the case.

Firstly, the terminology used in Section 127 is worth closer examination. The phrase "ceases to have any force or effect" is a phrase used in the operation of legislative hierarchy.

"Once in force, legislation continues until expiry or repeal. However, the operation of a provision may be interrupted by conflict with a paramount law. When two valid laws come into conflict and the conflict cannot be avoided through interpretation, it is resolved through hierarchy. The law with the higher status or ranking is said to be paramount, while the law with a lower status or ranking is rendered inoperative. (Emphasis added.)

"When a provision is rendered inoperative, it does not cease to be law, but it ceases to have any force or effect. It remains in this limbo until it or the paramount law is repealed." (Sullivan p.20).

"Conflict is resolved through rules of paramountcy. Paramountcy rules establish hierarchies among different types of law based on their source, subject matter, or other criteria. Canadian paramountcy rules indicate that legislation is paramount over the common law, that federal legislation is paramount over provincial legislation, that human rights legislation is paramount over ordinary legislation, that statutes (usually) are paramount over regulations, and so on. Where one law is paramount over the other, the paramount law applies to the exclusion of the other." (Sullivan p.32).

The water rights in the mining acts were not repealed. They came into conflict with another law, the water acts, and were subjected to the rules of paramountcy. The water rights found in the mining acts were said to be lower in status or ranking than the water licence found in the water acts, and were thus said to "cease to have any force or effect".

However, both mining acts and water acts were federal legislation. Which is truly paramount?

As noted above, the statutes are (usually) paramount over regulations. The water rights found in the mining acts were statutory and were part of the rights of free entry on mining claims. These claims are patented freehold estates in fee simple, with the highest order legal security of tenure available under Anglo-Canadian law. The water licences are issued under the aegis of subparagraph 33 *Yukon Waters Act*, which is, in fact, under the regulations of that act.

Consequently, the water rights under the mining acts should have been paramount over the water licences under the water act regulations.

As noted by Lucas in his paper *Natural Resources Use Conflict*: *"the result is that these statutory mineral rights have generally been*

recognized as rights of the highest order. They are hard rights in the sense that they are exclusive and reasonably secure, free in their essential elements from qualification by government except upon payment of fair compensation. (Lucas p.5).

With regard to water licences, Lucas notes: *"there is at least serious doubt whether water licences are property rights or even vested rights arising under contract. Rather, they appear to be mere regulatory permissions, subject to modification by the water resources authorities so long as statutory powers are not exceeded and fair procedures are used."* (Lucas p.7).

In light of this, it becomes extremely dubious that the rules of paramountcy were properly applied in this case. It would appear on the face of it that the water rights under Section 126 *Yukon Quartz Mining Act* should have been paramount over the water licence of the regulations under the *Yukon Waters Act.*

Additional anomalies arise on closer inspection of this process.

Section 127 *Yukon Quartz Mining Act* states clearly that *"Section 126 ceases to have any force or effect within a water management area*". It could be understood by simple logical reasoning that Section 126 would still have full force and effect outside of a water management area, if such a place could be found.

Subparagraph 33.(1)(a)(i) *Yukon Waters Act* states: *"The Governor in Council may make regulations on the recommendation of the Minister and the Board, establishing water management areas consisting of river basins or other geographical areas."*

The said river basins are then set out in the Yukon Waters Regulations Schedule 1 (Section 3). These consist of six major river basins which, geographically, appear to cover every square inch of the Yukon Territory. It would appear there could be no such place as one outside of a water management areas.

However, these management areas are for the management of "water" under the *Yukon Waters Act*. The definition of those waters is found in the *Yukon Waters Act* as: *"any inland water, whether in a liquid or frozen state, on or below the surface of the land in the Yukon Territory."*

This would still appear to cover every square inch of the Yukon Territory, leaving no place outside a water management area.

However, the "land in the Yukon Territory" is also defined by the *Yukon Waters Act*. That definition is given as the definition of "territorial lands" and *"means lands in the Yukon Territory that are vested in Her Majesty in right of Canada or of which the Government of Canada has the power to dispose."*

This is, by definition, "Crown land". These are the lands over which a water management area can be established under the *Yukon Waters Act*. The question now is whether these Crown lands can include granted quartz mining claims?

As we have seen, Yukon quartz claims are a form of lease from the day they are staked.

The question then is whether a mining lease can be considered as Crown land?

The answer appears to be "no".

"The Ontario definition of Crown land excludes land under lease from the Crown, including a mining lease." [Ackerly v Chance Mining and Exploration Co. (1977), 5 M.C.C. 362 Ont.M.C.)] (Barton p.223).

This would appear to imply that granted Yukon mining claims are excluded as "lands in the Yukon" under the *Yukon Waters Act*. Therefore, they are excluded from water management areas under the *Yukon Waters Act,* and would therefore be excluded from requiring a water licence to use the waters flowing on or under those lands.

Furthermore, Section 127 *Yukon Quartz Mining Act* would cease to have force and effect, since the granted mining claims would not be "within a water management area".

The water rights granted under Section 126 *Yukon Quartz Mining Act* would return to full force and effect on granted mining claims, since they are not subject to Section 127 *Yukon Quartz Mining Act*.

It would appear on the face of this argument that all the water licences issued to the mining industry on granted mining claims in the last 30 years have no legal validity.

Since water licence applications in recent years have become one of the largest and most expensive stumbling blocks to the free miners' ability to exercise his right to mine, this is a very blatant example of the apparent overthrowing of the free entry system of law.

Water licence applications have withheld miners' rights to mine for as much as five years. Some miners have given up on their applications and abandoned their operations in the Yukon.

The cost involved in some of these licence applications has reached into the millions of dollars. There are abundant allegations of these "socio-economic agreements" with third party interests, in spite of the mining claim supposedly granting legal protection from interference by third parties.

Some of these "socio-economic agreements" were rumoured to amount to virtual government-sponsored extortion, where the Minister refused to sign the water licence until the miner paid a seven figure cash payment to a third party interest, after which the water licence was issued to the miner.

No evidence of this was ever made public, but these rumours spread south to the investment community. From Vancouver to Toronto and beyond, investors started to abandon the Yukon as a viable mining jurisdiction on the basis of nothing more than these rumours.

Whether the rumours were true or not didn’t matter; the damage was done.

This appears to be a repeat of the graft and corruption that led George Black to re-write the Quartz Act in 1924, and to the Ballarat Miners Rebellion before that.

History repeats itself; and those who fail to learn from the mistakes of history are condemned to repeat them.

THE MINING LAND USE REGULATIONS (MLUR)

The Mining Land Use Regulations were introduced in 1999 in an attempt by the federal government to regulate land use as a means of environmental protection.

The purpose of these regulations is stated in Section 134 *Yukon Quartz Mining Act* as: *"the purpose of this Part is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Territory."*

It appears to be an utter failure, as the mining industry is neither viable, nor sustainable, nor competitive, nor healthy since the Mining Land Use Regulations were implemented.

The basis for this failure lies in the Mining Land Use Regulations creating what amounts to a "discretionary" system of mining law and trying to meld it into the existing free entry system, which is supposed to be non-discretionary.

This creates a statute based on free entry being overthrown by regulation which is discretionary, all within one piece of legislation.

This would appear to violate all the rules of statutory interpretation and to create a law with fundamentally absurd consequences.

These absurdities include the granting of irrevocable property rights under the Act and then subjecting them to virtual prohibition by regulation.

The use of regulatory terminology such as that found in Section 136 *Yukon Quartz Mining Act* as: *"No person shall engage in a...exploration program except in accordance with an operating plan approved by the Chief…"* would appear to overthrow the free miners' right to enter, locate, prospect and mine without governmental discretion.

The demand in Section 136(4)(c & d) *Yukon Quartz Mining Act* that miners submit their exploration programs to public notification and public consultation violates their statutory protections against third party interference which are supposedly found in the leases granted under the Act.

To use the phrase "*the Chief may if of the opinion that the program as described in the Class II Notification would not result in the mitigation of any adverse environmental effect of the program, notify the person that the program may not commence until the Chief is satisfied…*" as stated in Section 137.1(a) *Yukon Quartz Mining Act* suggests that the entire panoply of rights granted to the free miner and their legal security of tenure are now reduced to the "opinion" and the "satisfaction" of a single bureaucrat.

<u>If this person's "opinion" cannot be "satisfied" then the prospecting program "may not commence".</u> (Emphasis added.)

This overthrows the free miner's right to prospect and mine his claim and totally subverts any concept of legal security of tenure for mining properties. The "opinion" and "satisfaction" of an individual person is about as far from the concept of legal security of tenure as could be found.

On this single point alone the Yukon mining industry will die, as no sane businessman can invest money on such an ephemeral and uncertain tenure.

Section 139 *Yukon Quartz Mining Act* requires the miner to apply for and obtain a "licence" before he is allowed to "engage in development or production" of a mining claim.

Once again, the phrase "no person shall engage in development or production…" without a licence overthrows the statutory right to mine that is granted in Section 12 *Yukon Quartz Mining Act* and gives the bureaucrat an "absolute power" to prohibit the miner to exercise that right, if the licence is withheld or revoked.

This raises the question of how existing "leases" have suddenly become "licences" at the same time. (Emphases added.)

The law states: *"Nor may the Crown insert terms that would deprive the licences or leases of their character as licences or leases under the Act and actually tend to defeat the object of the Act."* [Baker v Smart (1906), 12 B.C.R. 129 at 143-44 (F.C.), Duff J.] (Barton p.338).

It was the object of the *Yukon Quartz Mining Act* to grant claims as perpetual leases and the free miners should be asking how are these now reduced to mere licences?

This would appear to defeat the object of the *Yukon Quartz Mining Act.*

Section 147.(1),(2) and (3) *Yukon Quartz Mining Act* require the Chief and the Minister to authorize the assignment of a licence to a prospective assignee from the current holder of an approved operating plan or production licence.

As stated in 147.(3): "Except as provided in this section, an approved operating plan or a licence is not assignable".

This concept violates the principle that a real property is supposed to be "freely assignable" from the seller to the buyer without interference by the state.

"An estate in land is freely assignable whilst a lesser kind of property may not be." [Beaton v Schulz (1934), B.C.R. 1 (C.A.)] (Barton p. 385).

The Mining Land Use Regulations (MLUR) appear to be overthrowing property law as well as the free entry system of mining law. (Emphasis added.)

Under Section 150.(1) *Yukon Quartz Mining Act*: *"Where an inspector believes on reasonable grounds that an operator has contravened, or may be about to contravene, this Part the inspector may direct the*

operator in writing to take such reasonable measures as the inspector may specify, including the cessation of an activity…"

This gives a single bureaucrat the apparent authority to shut down a multi-million dollar industrial property on nothing more than what he "believes". This is as close to "absolute power" as a person can get, and as far from the legal security of tenure of the free entry system as one could get.

This sort of totalitarian state control of mining claims is absolutely contrary to the principles of the free entry system and will undoubtedly lead to the utter failure of Part II *Yukon Quartz Mining Act* to live up to its stated purpose to ensure a viable, sustainable, competitive and healthy quartz mining industry.

These purposes are, and have historically been, unobtainable under a totalitarian discretionary system of mining law. (Emphases added.)

Only the free entry system of mining law has ever achieved these goals.

PROHIBITION OF ENTRY BY ORDER-IN-COUNCIL (OIC)

One of the most blatant attempts to overthrow the free entry system is the introduction of Section 14.1(1)(2) and (3) into the revised 1996 *Yukon Quartz Mining Act*. These sections allow the rights of free entry in Section 12 *Yukon Quartz Mining Act* to be prohibited to the miner any time the "opinion of the Governor in Council" requires.

This egregious revision of the *Yukon Quartz Mining Act* was justified by the equally flagrant court case of Halferdahl v Whitehorse Mining District [(1992) 1 F.C. 813 (C.A.)].

In this case, Halferdahl legitimately staked quartz mining claims on vacant Crown land as required by the Act. On applying for grant he was refused by the Whitehorse Mining Recorder because the land in question was part of a secret native land claim negotiation, which Mr. Halferdahl had no knowledge of, and which had not changed the land from vacant Crown land at the time he staked his claims.

The lower court had found in Halferdahl's favour and issued a writ of mandamus to force the mining recorder to grant the claims.

The Federal Court of Appeal reversed this decision on what appears to be an incorrect interpretation of the original Section 14.(1) *Yukon Quartz Mining Act*. In this interpretation, the Federal Court believed that "the *Yukon Quartz Mining Act* excepted from the miner's right of entry various lands, including 'Indian reserves and other like reservations' " (Barton p.171).

In other words, the Court mistakenly believed that entry was "prohibited" on native lands.

This interpretation is incorrect because Section 14.(1) goes on to say that this exception from the provisions of Section 12 is itself subject to an exception "as provided by Section 15".

Section 15.(1) states: *"No person shall enter on for mining purposes or shall mine on lands owned or lawfully occupied by another person until adequate security has been given…".*

Section 15.(1) states: *"Persons locating, prospecting, entering on for mining purposes or mining on lands owned or lawfully occupied by another person shall make full compensation to the owner for any loss or damage so caused…"*

In neither of the Section 15.(1) sentences is there any mention of an intent to prohibit entry, location, prospecting or mining.

To the contrary, it is obvious that the Act fully intends for the miner to enter, locate, prospect and mine on the lands described in Section 14. (1) as *"Indian reserves, national parks and defense, quarantine or other like reservations made by the Government of Canada."*

The only proviso stated is the requirement to post a security bond and compensate the surface land owner for any damages.

The Federal Court of Appeal was wrong to deny Halferdahl his right of entry and location, and the Federal Government was even more wrong to use that court decision to justify the introduction of Prohibition of Entry by order-in-council (OIC) under Section 14.1 *Yukon Quartz Mining Act.*

This overthrows the most fundamental purpose and intent of the Act, the granting of free entry without government interference.

YUKON PROTECTED AREAS STRATEGY (YPAS)

The Yukon Protected Areas Strategy is a Territorial government initiative to protect 23 ecoregions for conservation purposes.

Their intent is to terminate all resource development, especially mining, inside these protected areas. This requires a widespread overthrowing of the free entry system of mining law on large tracts of Yukon land.

The operation of so-called "interim protection" from mining, within these protected areas, is described in Technical Bulletin 6 and various other Yukon Protected Area Strategy documents. "*Interim protection refers to the practice of restricting development activities within a proposed area on an interim basis until a final decision on the protection of the area is made.*"

The process to be used to accomplish these interim protections is "through prohibition orders (OIC) pursuant to those acts." (Draft YPAS January 18, 1997).

Once again, the free entry system is overthrown, using the Section 14.1 *Yukon Quartz Mining Act* prohibition of entry by order-in-council (OIC). However, the *Yukon Protected Area Strategy* will institute these orders over huge amounts of the Yukon landmass.

The first protected area developed under this Strategy is Fishing Branch Park, which encompasses approximately 6,500 square km (2,510 square miles).

Another 22 ecoregions of this size will cover nearly 150,000 square km. (60,000 square miles).

This is roughly 33% of the Yukon Territory (207,076 square miles).

The *Yukon Quartz Mining Act* is supposed to grant free entry to the entire Yukon Territory landmass; except for *"any land on which any church or cemetery is situated, and any land lawfully occupied for mining purposes".* (Section 14.1(2) *Yukon Quartz Mining Act*).

To propose the closure of nearly a third of the Territory, or more, to mining is a gross violation of the parliamentary intent of free entry.

The free entry system is supposed to allow the maximum amount of land to be open for mining purposes.

This territorial "strategy" should not be legally capable of overthrowing a Federal mining statute. This would violate the rules of hierarchical paramountcy, which state: *"that federal legislation is paramount over provincial legislation"* (Note: and, one would assume, over Territorial legislation JM). (Sullivan p.32).

DEVELOPMENT ASSESSMENT PROCESS (DAP)

The Development Assessment Process (DAP) is a proposed process for evaluating the effects of proposed developments, including mining. It is intended to apply to projects on all lands in the Yukon, including Crown land.

This process is a requirement of Chapter 12 of the Yukon First Nation Final Agreements.

The Development Assessment Process intends to assess development projects *"through a staged process involving one or both of the two DAP structures that conduct the actual assessments--Designated Offices and the Yukon Development Assessment Board--and the Decision Body, which renders final decisions on development applications. The Decision Body is the federal, territorial or First Nation government that decides whether a project should proceed or not."* (Fact Sheet 2 DAP Fact Sheet Guide).

It is the intent of the Development Assessment Process that *"projects approved by a Decision Body will not necessarily proceed; regulators issuing any required permits and licences may have additional requirements not encompassed by DAP. However, no project that has been turned down by a Decision Body will be allowed to proceed."* (Fact Sheet 2 DAP Fact Sheet Guide).

Proposed projects include *"development activities such as mining...will be subject to assessment under DAP."* (Fact Sheet 3 DAP Fact Sheet Guide.)

"*Activities that could have significant environmental or socio-economic impacts appear on the YDAB Mandatory Project List and must be assessed by the Yukon Development Assessment Board rather than by a Designated Office. Activities on the mandatory list include larger scale electrical generating projects, water projects, pipeline construction and hard rock mining."* (Fact Sheet 3 DAP Fact Sheet Guide).

It is the intent of the Development Assessment Process to allow "community consultation".

"Development activities that pose greater potential adverse effects and which may thus elicit more public concern will be assessed by the YDAB Executive Committee or a YDAB panel. Members of the public will have an opportunity to be informed about these activities even before they enter the assessment process since proponents will be required to consult with an affected community." (Fact Sheet 7 DAP Fact Sheet Guide).

It is the intent of the Development Assessment Process to allow "public hearings".

"Panel reviews of projects will involve public hearings in which interested individuals and organizations will be encouraged to participate." (Fact Sheet 7 DAP Fact Sheet Guide).

The Development Assessment Process also has the intent that *"projects for which the federal government will grant an interest in land will also be subject to assessment under DAP."* (Fact Sheet 1 DAP Fact Sheet Guide).

From this, it is readily apparent that the proposed Development Assessment Process will overthrow the entire free entry system.

The concept of First Nation and and community and public consultation on mining projects violates every legal principle of the protection of property from third party interference. This overthrows a thousand years of legal precedent in British property law and mining law.

The concept of demanding that "the project not proceed" violates the entire free entry system. A free miner is supposed to have an irrevocable right to enter, locate, prospect and mine his claim. The concept of not allowing the project to proceed is utterly foreign to the free entry system.

The concept of allowing First Nations “governments” to govern on the Crown land of Canada raises some serious questions about the overthrow of the sovereignty of the Government of Canada. It also raises the spectre of government without representation, as the First Nations governments do not allow non-natives to vote for their governments.

It also raises the particularly odious spectre of a racially segregated form of government. Fact Sheet 4 DAP Fact Sheet Guide states: “*matters to be considered in DAP assessments* “ include “*protection of rights of Yukon First Nation people.*”

There is no mention made in this document about protecting the rights of anyone else in the Yukon, and it would appear from the previous points that the rights of non-natives are not to be protected under Development Assessment Process legislation.

To the contrary, those rights appear to be overthrown.

Lastly, the Development Assessment Process intends to evaluate mining projects based on the concept of the “need for the project”. (Fact Sheet 4 DAP Fact Sheet Guide).

This is utterly foreign to the free entry system of mining law. If the staking and operation of mining claims is to fall victim to the whimsical concept of the “need” of the government or the native people or the public at large, then the free entry system is overthrown and gone from the Yukon.

DEVOLUTION

For additional information, see Jim McFaull's *Evaluation of the Draft Legislation Required by the Devolution of Power from the Federal to the Territorial Government*, prepared for the Yukon Chamber of Mines, November 1999, and the May 2000 letter of response from the Yukon government's Executive Council Office, attached to this document starting on page 126. JG

The concept of "devolution" involves the intent of the federal government to devolve *"all remaining provincial-type powers and programs of the Department of Indian Affairs and Northern Development to the Yukon Government."* (Devolution of the Northern Affairs Program to the Yukon Government - A Federal Proposal p.ii)

This includes the management of Crown lands and mines and minerals. The process has been described by the Minister of the Department of Indian Affairs and Northern Development (DIAND) as *"the devolution of province-like powers."* It has been further described as *"provincial-type programs"* which *"all pertain to the management and control of land and natural resources".*

Devolution has also been referred to as *"a comprehensive federal proposal to transfer all remaining provincial-like programs to the territorial government."*

Within the mining sector, the process intends to devolve the administration and management of: *"the promotion of mineral exploration, development of regulations, monitoring industry compliance, issuing mineral rights, permits, licences, leases, geological mapping, monitoring mineral exploration activity, levying mineral royalties and collecting revenues."*

It is, however, the expressed intent of the federal government to not transfer ownership (i.e. title) to the Crown lands in the Yukon.

By Section 109 of the *Constitution Act,* 1867, the title to all lands, mines, minerals and resources was given to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick.

Manitoba, Saskatchewan and Alberta acquired rights to the mines and minerals (i.e. title) within their boundaries by the Natural Resources Transfer Agreements of 1930.

British Columbia acquired the rights (i.e. title) under Section 109 when it joined the union in 1871, with the exception of the Railway Belt and the Peace River Block.

The Railway Belt and the Peace River Block were retransferred to British Columbia in 1930 by the Natural Resources Transfer Agreement.

In 1873, when Prince Edward Island joined Confederation, Section 109 was made applicable to the province (i.e. title to mines and minerals was transferred).

Newfoundland is subject to Term 37 of the *Newfoundland Act,* 1949, which is similar to Section 109 of the *Constitution Act*, 1867 (i.e. title is transferred).

The general effect of these provisions is to vest in the provinces, the rights and title for their natural resources. This title gives the provinces their “provincial-like” authority to the administration, management and control of their mines and minerals.

The federal government acquired full beneficial rights over the resources in the Yukon and Northwest Territories when the Hudson’s Bay Co. transferred the land to the Dominion, and this ownership (i.e. holding of title) has not changed to this day.

This creates a significant difference between federal and provincial lands.

"In Canada, title to public (Crown) lands is vested in the federal and provincial governments. Lands vested in the federal government comprise all public lands in Northwest Territories and Yukon. Apart from the above, all public lands in the provinces are vested in the provincial governments, which have administrative control of all natural resources within their boundaries." (Graves, H.A. and Potter, G.R.L., **Digest of the Mining Laws of Canada**, Fifth Edition, (Department of Mines and Technical Services, Ottawa), Mines Branch No. 854, p.xiii).

The foregoing points illustrate that the key to devolution of "provincial-like" authority, administration, management and control of mines and minerals lies in the federal government conveying vested title to the mines and minerals to the province.

Once the province is vested with the title, the administration, etc. follows.

Since the federal government has plainly stated they will not vest title to mines and minerals with the Yukon government, then there can be no such thing as devolution of the actual administration, etc, of the mines and minerals to the territorial government.

The entire process would appear to be a fraud. (Emphases added.)

This leaves the free miner in doubt as to what is to become of his title to his claims if this process of devolution is carried out without the transfer of title to the Yukon government. As has been noted previously, the entire free entry system of mining law is about title to minerals.

If the title is put into question, then the whole system fails, as the miner is left with lack of certainty to his title and a subsequent lack of legal security of tenure for his claims.

All the rights of the miner under the free entry system are tied to his claim as a titled property. If the title is vacated during the devolution

process, then the miners' rights will also be vacated, leaving him with a lesser interest in land.

This derogation of rights would be a violation of the free entry system and a violation of the property law on leases as previously stated in the section on leases above.

In November 1999, the Yukon Territorial Government released a draft of several pieces of proposed legislation affecting mining. These included quartz and placer mining acts, a territorial lands act and a waters act and a Canadian environmental assessment act which would come into effect after devolution.

A review of these draft acts would appear to confirm the probability that title is not intended to be transferred to the territorial government on devolution.

Furthermore, it would appear to confirm that the interests in land created by these territorial acts will be less than the existing federal interests because no title is included.

For example, under the *Territorial Lands Act* the federal definition of "territorial lands" is *"lands vested in the Crown"* (i.e. lands with a title). After devolution the *Territorial Lands (Yukon) Act* will define "territorial lands" as *"lands under the administration and control of the Commissioner"*.

Another example from the *Yukon Waters Act* describes this loss of title more clearly. After devolution Section 3 of the draft act states: *"and subject also to the title that remains vested in Her Majesty in Right of Canada, the property in and the right to the use and flow of all waters are vested in the administration and control of the Commissioner."*

As has been noted above, for the administration and control to be operated by the provincial jurisdictions, it would appear that title to the resource should first be vested in those jurisdictions.

The process being proposed for devolution in the Yukon is not following this procedure.

Consequently, the validity of the entire devolution process is questionable.

The validity of the interests in land created in such a jurisdiction would also appear to be put into doubt. If the Yukon Territorial Government is not going to hold vested title to the land, how valid will the grant of Yukon Territorial Government mining claims be?

Furthermore, what nature of an interest in land will this grant of post-devolution claims be?

It would certainly appear to be less than the patented, titled, freehold estate in fee simple as a perpetual lease that is currently granted by the federal government under the existing *Yukon Quartz Mining Act.*

The draft Yukon Territorial Government quartz mining act appears to confirm this supposition of loss of title as the heading to Section 12 *Yukon Quartz Mining Act* is removed. In the federal act, this heading is "Right to acquire claims". This is changed in the draft Yukon Territorial Government act to read "Entry, location and mining".

Does this indicate the Yukon Territorial Government would no longer consider the acquisition of a mining claim to be a "right"?

Additionally, the heading of Section 67 *Yukon Quartz Mining Act* is changed. The federal act reads "Title" while the draft Yukon Territorial Government act reads "Payments to be made to recorder".

This would appear to confirm once again that devolution is going to cost the free miners their title to their claims as well as their rights under that title.

Once again, the free entry system appears to be threatened with being overthrown.

SURFACE RIGHTS LEASES

A final example of the overthrowing of the free entry system can be found in Section 77 *Yukon Quartz Mining Act*.

This section states that the free miner is authorized to apply to the Minister for a grant of a surface rights lease of his mining claim for a rental of one dollar per acre per year for the term not to exceed that of the mining claim (i.e. one year or 21 years). This section of the *Yukon Quartz Mining Act* has never been repealed.

However, in the early 1970s, the Federal Government advised Yukon miners that they wished the miners to voluntarily surrender their surface rights leases and replace them with leases under the administration of the Lands Branch. These leases were offered at a cheaper rate to entice the miners to surrender their existing leases. Virtually all miners complied.

Upon renewal of these new surface rights leases, the term of years was dropped drastically and the rental rates were raised phenomenally. By the mid-1980s these new surface rights leases were being offered for terms of only three years at rental rates up to and exceeding $100.00 per acre per year.

When queried as to why the miners could not revert to the old Section 77 *Yukon Quartz Mining Act* surface rights leases, the mining recorders simply refused to discuss it. This was in spite of the fact that Section 77 remains in full force and effect in the *Yukon Quartz Mining Act* to this day.

To further confuse this issue, the Lands Branch operates under the aegis of the *Territorial Lands Act* (TLA). Section 3.3 *Territorial Lands Act* states that nothing in the TLA is supposed to limit the operation of the *Yukon Quartz Mining Act.* This should include Section 77 *Yukon Quartz Mining Act* and the issue of surface rights leases on mining claims for 21 years at $1.00 per acre per year.

Once again, the *Yukon Quartz Mining Act* appears to be overthrown in a purely arbitrary manner by bureaucrats who have no legal authority to do so.

IN DEFENCE OF MINERS' RIGHTS

As seen above, the panoply of rights and liberties protected by law that make up the free entry system have been eroded and usurped and overthrown to the point that the miner appears to be prohibited from exercising those rights.

As stated previously, *"actions by the state that prejudice the position of developers are eventually likely to raise a call that the government is confiscating vested rights acquired in good constitutionally guaranteed right to private property."* (Barton p.385).

Barton implies that there are no legal protections for the rights of the free miner.

That, however, is not necessarily the case.

The rule of law and other statutory rules appear to offer a certain amount of basic protection by law for the rights of the individual.

Common law and property law and criminal law also add a degree of protection from the open confiscation of miners' rights.

REGULATORY TAKING

In recent years, this confiscation of miners' (and other resource users') rights, particularly for "environmental" purposes, has led to an examination of parts of this problem by the courts.

An example is found in *"British Columbia v Tener [(1985) 1 S.C.R. 533 (B.C.)] in 1985, where land use regulation in a park was so damaging to certain mineral rights as to amount to expropriation."* (Barton p.39).

In Tener the mining claims were acquired in 1937 and subsequently incorporated inside a park in 1939. At that time there was no restriction on mining inside a park.

Later, *"such restrictions were instituted along with park use permits for natural resource activity."*

Subsequently, *"the Mineral Act was amended in the same year to prohibit exploration in parks.*

"The Parks Branch issued a park use permit to the Teners in 1973, but refused to issue one in subsequent years.

"In 1978, the Teners were advised that no new work would be permitted, at which point they sued the government, asserting that this denial of a permit was an expropriation of an interest in land under the Park Act, or alternatively, that there had been injurious affection of their interest.

"At trial, both contentions were rejected; in the Court of Appeal, injurious affection was found, even though the refusal of the park use permit did not amount to an expropriation." (Barton p.181).

"The Supreme Court of Canada upheld the Teners' claim on the basis that an actual expropriation had occurred. The majority view (per Estey J.) identified two key issues: whether an expropriation had occurred in the circumstances of the case and, if so, at what time.

"Although the interaction of the different statutes was complex, what finally mattered was whether the facts disclosed an expropriation of land.

"He pinpointed the taking as follows: 'This denial of a permit [in 1978] then made the prohibitions in ss. 9 and 18 [of the Park Act] operative.

"The property rights which were granted to the respondents or their predecessors in title in 1937 were in law thereby reduced...The denial of access to these lands occurred under the Park Act and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow.' " (Barton p.182).

"Estey J. did not consider that this taking included title to the minerals themselves; he envisaged that the Crown could still take that last step and expropriate the minerals. What had been lost was the right of access." (i.e. free entry). (Barton p.182).

"The Court relied extensively on its previous decision in Manitoba Fisheries Ltd. v The Queen [(1979) 1 S.C.R. 101 (Man.)], which in many ways was actually more radical.

"The government was held to be liable to pay compensation to a company that had been deprived of its goodwill by legislation that set up a Crown corporation with a monopoly in a business.

"The basis of the decision appears to be a substantive common law right to compensation for property taken, even when done precisely in accordance with a statute that did not contemplate the payment of any compensation.

"This was a considerable extension of a long standing rule of construction.

"In contrast, in Tener, if expropriation was established, a right to compensation could be found in the statute and did not need to be implied.

"The most fundamental point to come out of Tener is that in certain circumstances, regulatory restrictions on mineral activity can amount to an expropriation of title. By no means will all regulatory activity do so.

"Laws and regulations have always limited owners of property and may affect their rights without a cry being raised that Magna Carta has been dethroned or a sacred principle of liberty infringed.

"It appears from Tener that there are two things an owner will have to establish in order to claim compensation. The first is that some extreme must be reached before regulatory in appearance, but a taking in reality.

"Holmes J., in a leading American case, stated as a general rule that <u>while property may be regulated to a certain extent, regulation gone too far will be recognized as a taking. [</u>Pennsylvania Coal Co. v Mahon, 260 U.S. 393 at 415 (1922)]. (Emphasis added.)

"In Tener, the right of access to the minerals, a major part of the rights under the Crown grants, was regulator-expropriator. The notice of 1978 took the value of the claims from the Teners and added it to the provincial park, thus enhancing the quality of the park.

"The presence of this transfer of rights or value distinguishes the case from land use zoning situations...To meet the Tener criteria, the property must be acquired, not just affected." (Barton p.183).

"This position recognizes that access could not be split off from mineral title." (Barton p.183).

<u>"The concept of regulatory taking can be summed up by "the refusal in Tener to issue a park use permit and to reduce the Crown grants to 'meaningless pieces of paper'. </u>" (Barton p.184).(Emphasis added.)

"The courts will need to signal what regulatory actions the government may indeed take to protect public lands without having to compensate resource owners. (Emphasis added.)

"The first criterion, a total taking, will often be met if regulation prevents a producing mine from being built.

"The second, acquisition of the benefit by the taker, will always occur if the government is acting to protect other public resources vested in the Crown." (Barton p.185).

It would appear that most, if not all, regulation of mining for environmental purposes would fall into this category, such as parks, land use, fisheries and water use, protected areas, etc.

With regard to the Tener decision, H. Ian Rounthwaite states in his essay *The Impact of Wilderness Preservation on Resource Development Rights: Expropriation and Compensation Issues*: *"this decision, when read with the Court's decision in the Manitoba Fisheries case, may be an indication that the Supreme Court is taking a broad approach to the question of whether there has been a compulsory taking or acquisition requiring the payment of compensation.*

If the Court is expanding the legal definition of 'compulsory taking', there will be significant financial implications for governments contemplating the withdrawal of land for wilderness preservation." (Rounthwaite in Ross & Saunders, compilation of essays from the Fifth Canadian Institute Conference on Natural Resources Law, 1992, p.69). (Emphasis added.)

"Land may be set aside for wilderness preservation through government acquisition, expropriation, or the exercise of its regulatory powers. If land or an interest in land is acquired by expropriation, compensation will be payable only where the statute authorizing the expropriation contemplates, either expressly or by implication, such payment.

"Where land or an interest in land is actually taken, however, the authorizing legislation will be construed by the courts in light of a presumption in favour of a payment of compensation.

"Thus the question of what amounts to a 'taking' of land or an interest therein, as opposed to the exercise of regulatory powers in the public interest, must be considered.

"At what point does regulation in the public interest cross the line and become a taking requiring the payment of compensation?

"Where the effect of the regulatory activity is to cause a serious derogation of the exercise of private rights, the government will have crossed over the line from regulation in the public interest to an expropriation or taking of those private interests." (Rounthwaite in Ross & Saunders p.77,78,80).

In the Tener case, *"Madame Justice Wilson had no doubt that the respondent's interest should be classified as a profit à prendre, and the essential function of a profit is the right to enter upon the land of another for the purpose of severing the thing that is the subject of the profit. Whether the refusal to issue a park use permit amounted to a taking should be determined by the effect of prendre.*

"Throughout her opinion, Wilson J. lays great emphasis on how the government's regulatory power affects the respondent's ability to exercise its private rights.

" 'While the grant or refusal of a licence or permit may constitute mere regulation in some instances, it cannot be viewed as mere regulation when it has the effect of defeating the respondent's entire interest in the land…

" 'The reality is the respondents now have no access to their claims, no ability to develop them and realize on them and no ability to sell them to anyone else. They are affectively beyond their reach...By depriving the holder of the profit of his interest--his right to go on the land for the purpose of severing the minerals and making them his own--the

owner of the fee' (the British Columbia government) *'has effectively removed the encumbrance'* (the profit à prendre) *'from his land.*

" 'It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense…

" 'Moreover, what in effect has happened here is the derogation by the Crown from its grant of the mineral claims to the respondents predecessors in title.' " [R. v Tener, (1985) 3 W.W.R. 673, 32 L.C.R. 340 (S.C.C.) at 699-700]. (Rounthwaite in Ross & Saunders p.80).

"It seems clear that, in order to decide the question whether there has been a taking of the resource interest, Wilson J. is prepared to look at the function of the nature of the resource interest affected by government regulation and the effect of the regulation on the ability of the holder of the resource interest to develop it.

"Focusing on the inter-relationship of the nature of the resource interest held and the effect of government regulation on the exercise of property rights that accompany the resource interest will yield significant economic considerations for policy makers who wish to use governments' regulatory powers to preserve wilderness. (Emphasis added.)

"Setting aside wilderness areas that are subject to existing resource interest may now be classified as an expropriation or taking rather than mere regulation in the public interest." (Rounthwaite in Ross & Saunders p.81).

Rounthwaite concludes: *"the goal of this paper was to raise and consider some difficult legal questions that will arise when public policies designed to preserve wilderness clash with the proprietary interests of holders of resource rights and interests.* (Emphasis added.)

"The jurisprudence of expropriation law requires that the nature of the resource interest be classified according to traditional proprietary rights recognized by common law.

"It also suggests that the effect of regulations implementing preservationist policies on the exercise of vested common law proprietary rights may be determinative of the question of whether the regulations amount to an expropriation or taking of an interest in land.

"If this is indeed correct, it may be financially prohibitive to set aside large tracts of Crown land for wilderness preservation if the property is subject to pre-existing resource development rights.

"Furthermore, the difficulty in determining the legal nature of many resource interests and the complexity of calculating the measure of compensation payable in the event of an expropriation or taking may act as a strong disincentive for the resource sector to invest the large sums of money necessary to develop forest and mining resources. (Emphasis added.)

"The fact of the matter is that wilderness preservation as a matter of public policy in the 1990s will conflict with resource development founded on public policy formulated in the 1970s and 1980s.

"Security of tenure, a prime concern of holders of resource development rights, may often be negated by preserving wilderness unless the resource sector is confident that adequate compensation will be paid when natural resources cannot be developed.

"Unfortunately, recent legislation and case law is confusing and is not likely to lead to the degree of confidence required to encourage sustainable development of our natural resources.

"One response to this impasse is through the enactment of compensation legislation that deals specifically with the payment of compensation when resource development rights are adversely affected by land withdrawals.

"Although there are several examples of resource allocation legislation that requires the payment of compensation when land is withdrawn from development, little is said concerning the resource holder's

entitlement to compensation or the measure of compensation that will be paid. (Emphasis added.)

"Of course, this may prove to be an exceedingly difficult, but not impossible, task and would at least provide a degree of certainty for potential resource interest investors.

"Alternatively, compensation issues could be negotiated as part of the resource allocation process and incorporated into the licencing and permitting process.

"Again, greater certainty would be the result. Security, (or insecurity) of tenure would be offset by security of compensation." (Rounthwaite in Ross & Saunders p.83-84).

The Crown must be kept aware of this process of regulatory taking in their dealings with patented mining claims. (Emphasis added.)

"As an incursion on private property, any expropriation must be carried out in full compliance with the statutory procedure that authorizes it, otherwise a trespass will occur." [Sandon Water Works and Light co. v Byron N. White co. (1904), 35 S.C.R. 309 (B.C.)] (Barton p.187).

"One final case, New Brunswick (Minister of Natural Resources and Energy) v Elmtree Resources Ltd. [(1989), 101 N.B.R. (2nd) 255 (Q.B.)] illustrates exactly the same kind of frustration that builds between mineral explorationists and park officials, but in the context of a legal regime where the issue of a mining lease depended upon satisfying the government as to environmental concerns.

"The area that Elmtree staked was regarded by the government as a unique and sensitive area. Indeed, the Department of Natural Resources and Energy had identified it as a potential ecological reserve, although it had not yet formally established it as such.

"Consequently, Elmtree was refused a mining lease.

"Elmtree objected, and although it did not get the lease issued, it convinced the Mining Commissioner that the Department owed it a duty of care to inform it, at the time of recording the claim, of the identification of the land as a potential reserve so it would not spend exploration money fruitlessly.

"The Mining Commission awarded over $5,000 compensation." (Barton p.186).

The above case appears to have a great deal of relevance to the Yukon and the governments' method of operating land use planning, native land claims negotiations and protected areas planning in secret, causing many explorationists to spend their money on areas they are subsequently ordered out of, thus wasting their time and money. (Emphasis added.)

JUDICIAL REVIEW

"The key feature of program legislation is the delegation of powers to the executive branch--not only the power to administer but also legislative power to create rules and standards governing the operation of the program, and judicial or quasi-judicial power to resolve disputes.

The exercise of these powers is supervised by the courts through appeal and judicial review.

"The emergence of a significant body of legislation in this century has led to the development of the branch of law known as administrative law.

"Acting pursuant to this law, the superior courts of each jurisdiction review the work of the executive branch to ensure that it has been carried out in accordance with the rule of law.

"Judicial review is based primarily on the principles of fairness, natural justice, and legality. (Emphasis added.)

"The principles of fairness and natural justice ensure that individuals are given fair treatment, including notice and a chance to be heard, when their interests are affected by the exercise of executive power.

"The principle of legality, also known as the vires doctrine, ensures that every exercise of power is authorized by law; any attempt by the executive to exceed its powers by making an unauthorized decision, order, or regulation may be declared 'ultra vires' or invalid and without legal effect." (Sullivan p.11-12).

The process of judicial review in the Yukon is carried out by the Supreme Court of the Yukon Territory or the Federal Court--Trial Division.

Anyone directly affected by the matter in respect of which relief is sought may make application for judicial review to the Supreme Court

of the Yukon Territory for any relief that the applicant could otherwise obtain in respect of the government by way of an application for an order of or in the nature of mandamus, prohibition or certiorari or by way of an action for a declaration or an injunction.

On application for judicial review, the Supreme Court may:

(a) order the government to do any act or thing that it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) prohibit, restrain, declare invalid or unlawful, quash, set aside or set aside and refer back for determination in accordance with such directions as it considers appropriate, any decision, order, act or proceeding of the government.

The Supreme Court may grant relief if it is satisfied that the government:

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or order;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

(The above judicial review process was paraphrased from the draft Yukon Development Assessment Act 15/10/98 Section 78).

THE CRIMINAL CODE OF CANADA

Part IV: Offences Against the Administration of Law and Justice

Section 122: Breach of trust by public officer

"Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person."

"office" is defined as:

"(a) an office or appointment under the government,
"(b) a civil or military commission, and
"(c) a position of employment in a public department"

"official" is defined as a *"person who*

"(a) holds an office, or
"(b) is appointed to discharge a public duty".

Part IX: Offences Against the Rights of Property
Offences resembling theft

Section 336: Criminal breach of trust

"Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, for a public purpose, converts, with intent to defraud and in contravention of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

Section 337: Public servant refusing to deliver property

"Every one who, being or having been employed in the service of Her Majesty in right of Canada or in right of a province, or in the service of a municipality, and entrusted by virtue of that employment with the receipt, custody, management or control of anything, refuses or fails to deliver it to a person who is authorized to demand it and does demand it is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

Part XI: Wilful & Forbidden Acts in Respect of Certain Property Mischief

Section 430.(1)

"Every one commits mischief who wilfully

"(a) destroys or damages property;
"(b) renders property dangerous, useless, inoperative or ineffective;
"(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
"(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property."

Section 430.(3)

"Every one who commits mischief in relation to property the value of which exceeds one thousand dollars ($1,000)

"(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
"(b) is guilty of an offence punishable on summary conviction."

CONCLUSIONS

It is apparent from this examination of the free entry system of mining law that Barton was correct in stating that this law is so complex that the understanding of it is nearly impossible for the layman.

In spite of that, it can be concluded from this report that the free entry system has a long history and an enormous amount of legal precedent behind it.

It can also be concluded that the rights granted to free miners by the *Yukon Quartz Mining Act*, on their claims, are real property rights of the highest order. They are patented claims and freehold estates in fee simple (as perpetual leases), with an immediate possessory interest in land and conveyance of vested title.

These property rights guarantee virtual immunity from cancellation of the property for default, a very high degree of protection against third party interference (including interference from the Crown) and the exclusive right to the mines and minerals plus a right to enter, locate, prospect and mine those minerals.

These rights of free entry, under the *Yukon Quartz Mining Act*, provide what may be the strongest legal security of tenure for mining claims anywhere in the world.

Furthermore, it is apparent that these rights have been subjected to an increasingly onerous regulatory regime in the Yukon, which has led to the virtual overthrowing of this legal security of tenure.

These regulations appear to have crossed the line to a point where interference with vested rights, regulatory taking without compensation, prohibition of the exercise of the rights of free entry by order-in-council, and possibly even indictable offences are being committed on a regular basis by public servants with management or control of this Act.

The consequences of this attack on the free entry system in the Yukon have been severe, and are likely to get worse. The mining industry has suffered a catastrophic collapse in the last five years, with major repercussions to the Yukon economy.

The population base has contracted by over 10% in the last 18 months. The exploration industry is down by 90% and there is only one quartz mine left operating in the territory.

The future of this mine does not look very certain. The brokerage houses and mining investment community worldwide have blacklisted this jurisdiction because of the excessive regulatory regime.

The future of the Yukon is looking extremely bleak, as the last of the free miners give up hope and abandon the jurisdiction. The last corporate exploration office of a major mining company in the Yukon closed its doors in January, 2000.

The government has a choice to make at this juncture. It can choose to continue the overthrowing of the free entry system and its replacement with a discretionary system using revocable permits and licences; or it can reinstate the rights under the free entry system as they exist in the *Yukon Quartz Mining Act*.

The former choice will destroy the Yukon Territory, its economy and the standard of living of everyone in it. The latter choice will give the territory a chance to recover its former standard of living and survive another hundred years.

If the Yukon's mining industry is to survive, the only hope appears to lie in forcing the government to stop overthrowing the free entry system of mining law. The public servants have refused to listen to any rational argument on this subject over the last 30 to 40 years.

They have ignored repeated warnings from the mining industry that overthrowing the free entry system would destroy the mining industry and ruin the Yukon economy. They have ignored the evidence staring them in the face that their actions have in fact succeeded in the near

total destruction of the quartz mining industry in this territory with the attendant destruction of the Yukon economy. They simply will not voluntarily stop the wanton destruction of the mining industry.

If the government is to be forced to stop the destruction of the mining industry, then the miners must use those judicial tools available.

These include: lawsuits for compensation for losses incurred by the government's commission of regulatory taking of mining claims; the application to the Supreme Court of the Yukon for a judicial review of this entire regulatory situation to find whether the Crown has been overthrowing the *Yukon Quartz Mining Act* and the *Yukon Placer Mining Act* in an unlawful, unfair or unjust fashion.

If it is found by the Court that this is the case, then the Court can strike down those pieces of regulatory legislation it finds that have gone too far.

As a last resort, the miners could initiate criminal investigations against public servants if they appear to have committed indictable offences, as described previously, in their pursuit of the overthrowing of the free entry system of mining law.

If none of these are successful, then the free miner is left with the final option of abandoning this jurisdiction as being unfit for mining.

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Respectfully submitted,

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AN EVALUATION

The Draft Legislation Required by the Devolution of Power from the Federal to the Territorial Government

prepared by

Jim McFaull

for

The Yukon Chamber of Mines

November 15, 1999

SUMMARY

The process of devolution of government power from the Federal to the Territorial government will require the amendment of many specific Acts of Parliament to carry out this transfer of power.

Several of these Acts will involve the operation of mining legislation in the Yukon. These include the Y*ukon Quartz Mining Act,* the *Yukon Placer Mining Act,* the *Territorial Lands Act*, the *Yukon Waters Act*, the *Canadian Environmental Assessment A*ct and the *Lands Act* (Commissioner's Land).

The Territorial Government has issued repeated assurances to the mining industry that any such legislative changes would be simple "mirror" copies of the Federal Acts with no substantive changes being made during the devolution process.

The bulk of the legislative changes made to these draft Acts do appear to be "mirror" in nature. This means that all references to the Federal Government, such as: the Crown, the Minister of D.I.A.N.D. (Department of Indian Affairs and Northern Development), the Governor in Council etc. are replaced by the Yukon equivalent, such as: the Commissioner, the Minister of Economic Development, the Commissioner in Executive Council etc.

However, there are some changes being made that appear to go beyond the concept of "mirror legislation" and would appear to actually alter the law in a substantive way. These will be noted as follows.

It is important to note that this writer is not a trained lawyer and these are my personal observations based on my experience with the mining acts as a miner, not as a lawyer.

TERRITORIAL LANDS ACT

1. The definition of "Minister" (of D.I.A.N.D., Department of Indian Affairs and Northern Development) in the Federal Act is replaced by *"the member of the Executive Council to whom the Commissioner in Executive Council assigns the administration of this Act".* This would appear to give Y.T.G. (Yukon Territorial Government) the ability to shift the administration of this Act through various different ministers which could result in chaotic land use, potentially adverse to the mining industry.

2. The definition of "territorial lands" is altered from the Federal Act *"lands under the administration and control of the Commissioner".* The question arising here is whether the federal "title" to the land is not devolved to the Yukon Territorial Government.

If it is not, then what will be granted as a territorial "title" to the mines and minerals as land? If Y.T.G. does not get this "title" from the Crown during devolution, then how will they be able to grant it under Y.T.G. land laws? If Y.T.G. cannot give a grant of "title" then there will be a significant loss of rights to property after devolution.

This concept spills out of the *Territorial Lands Act* into all the other legislation that uses this definition of "territorial lands". This includes both mining acts, the waters act and the environmental assessment act. The consequences to this confusion could be severe.

As Barry J. Barton states in **Canadian Law of Mining** (p.2): "This book is chiefly concerned with title to minerals."

"Title" is of such fundamental importance to the entire scope of mining law that any confusion as to its disposition must be fully and clearly remedied. Otherwise, the miners will be left with doubts as to the legal security of tenure to 60,000 quartz claims and 15,000 placer claims.

3. The federal *Territorial Lands Act* Section 3.(3) states: "Nothing in this Act shall be construed as limiting the operation of the *Yukon Quartz Mining Act*, the *Yukon Placer Mining Act*…".

This is changed in the Yukon Territorial Government Draft to read: "Nothing in this Act shall be construed as limiting the operation of the *Yukon Quartz Mining Act* (Canada), the *Yukon Placer Mining Act* (Canada)...the *Quartz Mining Act*, or the *Placer Mining Act*…"

This seems a simple "mirror" of the Federal law to include the Territorial Mining Acts. However, the *Territorial Lands Act* (Yukon) Section 28 states: *"The Commissioner in Executive Council may, by regulation, (a) order that any territorial lands or category of territorial lands be dealt with, for some or all purposes, as Yukon lands under the Lands Act instead of under this Act."*

The *Lands Act* Section 2.(2) also states that it cannot limit the operation of the Federal Mining Acts. The problem is that there are no amendments to the *Territorial Lands Act*, the *Yukon Quartz Mining Act*, the *Yukon Placer Mining Act* or the *Lands Act* to change *Lands Act* Section 2.(2) to the Territorial Mining Acts.

Consequently, when the federal mining laws are repealed for devolution, Section 2.(2) *Lands Act* will be vacated and the *Lands Act* will become applicable on mining claims. This will include Section 7.(1) *Lands Act* which allows the "withdrawal from disposition" by order. This was certainly not found in the original federal *Territorial Lands Act*.

This would appear to allow all mining claims to be declared as "Yukon lands" and subject to "withdrawal of disposition" by order of the Commissioner. This would appear to be a very significant limiting of the operation of the mining Acts.

YUKON WATERS ACT

The problem of "title" discussed in the previous section also arises in the *Yukon Waters Act.* As the change in the definition of "territorial lands" is the same as in the *Territorial Lands Act* the question of the "title" to water is also raised.

The new *Waters Act* (Yukon) Section 3 tries to explain this situation in more detail than the other Acts. It states: *"...and subject also to the title that remains vested in Her Majesty in Right of Canada, the property in and the right to the use and flow of all waters are vested in the administration and control of the Commissioner."*

This would appear to confirm my previous supposition that the "title" will not be devolved to the Yukon Territorial Government and that they are being granted something less than title by the devolution process. If it can be implied that this process is similar for the other Acts being discussed here, then a significant reduction in the rights being granted by the Yukon Territorial Government after devolution may be occurring.

For example, the quartz mining claims currently granted are a freehold estate in fee simple. After devolution, without the title being in the Yukon Territorial Government hands, the best they may be able to grant is "the property in and the right to the use of" the mines and minerals. This sounds more like an actual leasehold estate in the mines and minerals.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

This Act is almost a "mirror" of the federal legislation. There is one exception.

1. *Environmental Assessment Act* (Yukon) Section 4.(1)(c) the words "to Her Majesty in Right of a province" is dropped from the federal *Canadian Environmental Assessment Act* Section 5.(1)(c).

Consequently, it would appear to change the meaning of the new Act to imply that ANY land transfer (such as staking a claim) would require an *Environmental Assessment Act* (Yukon) screening.

This was not the intent of the Federal Act.

YUKON QUARTZ MINING ACT

1. The question of "title" has been discussed in the previous sections and need not be belaboured here.

2. The definition of "Minister" is changed to include the possibility of ministries other than Economic Development having administration and control of the mining Acts. This could have severe consequences for the mining industry. For example, the current Yukon Territorial Government Ministry of Renewable Resources is not known for its love of the mining industry.

3. The heading to *Yukon Quartz Mining Act* Section 12 is removed. "Right to acquire mineral claims" now reads "Entry location and mining". Does this indicate that the Yukon Territorial Government no longer considers this as a "right"?

4. Likewise, the heading to *Yukon Quartz Mining Act* Section 67 is removed. "Title" now reads "Payments to be made to recorder". Is this another reference to the apparent loss of "title" under devolution?

YUKON PLACER MINING ACT

1. The question of "title" as discussed above is also applicable here.

2. The definition of "Minister" is the same as in the Quartz Mining Act.

3. The heading to *Yukon Placer Mining Act* Section 17 is removed. "Right to acquire claims" now reads "Who may locate Claims". Does this indicate the Yukon Territorial Government no longer considers this as a "right"?

4. Likewise, the heading to the *Yukon Placer Mining Act* Section 40 is removed. "Title" now reads in *Placer Mining Act* (Yukon) Section 41 as "Grant of located claim". Is this another reference to the apparent loss of "title" under devolution?

5. The definition of "lands" drops the word "gold" and the word "stones" and the words "other precious metals" and combines them all into "precious metals" only. It would appear to risk the concept of "regalian right" to gold by not naming it specifically and it appears that placer mining for precious stones will not be allowed after devolution.

6. Under the *Yukon Placer Mining Act* Section 4 the Commissioner will now be able to change mining district boundaries by regulation rather than by statute.

7. Under the *Yukon Placer Mining Act* Section 17.(2) a number of new areas are added to the list of restrictions on mining claims.

8. The *Yukon Placer Mining Act* Section 80 was dropped without any replacement.

9. Part 3 Transitional Provisions adds five (5) new Sections to the Act.

It is interesting to note that amendments are made to the *Miners Lien Act*, the *Securities Act* and the *Workers Compensation Act* which change all references to the *Yukon Placer Mining Act* to *Placer Mining Act* (Yukon). However, no amendment is made for the *Lands Act.* (See discussion under the *Territorial Lands Act.)*

REGULATIONS RESPECTING THE COORDINATION BY TERRITORIAL AUTHORITIES OF ENVIRONMENTAL ASSESSMENT PROCEDURES AND REQUIREMENTS

1. There is a possible legislative drafting error in Section 9(b). The words “Governor in Council” should probably read “Commissioner in Executive Council”.

The remainder of these regulations appear to be “mirror” legislation with no apparent changes except those regarding “federal” terms becoming “territorial” terms.

CONCLUSIONS

It would appear that the bulk of this legislation was more or less a "mirror" of the federal laws by the draft territorial laws.

However, the few exceptions outlined above have the potential to cause serious problems to the Yukon mining industry. In particular, the possibility of loss of titles to mines and minerals in a granted territorial mining claim is a significant change in the law.

The possibilities arising from the application of the *Lands Act* to mining claims, and particularly the application of the "withdrawal of disposition" by order in council calls for a very careful scrutiny by the mining industry. This coupled to initiatives such as the *Protected Areas Strategy* could result in widespread closure of lands to mining and the loss of large numbers of existing claims, all without public debate.

Although the "withdrawal of dispositions" appears to be a territorial replacement for the *Expropriation Procedures Act*, I have no knowledge as to the requirements under the *Lands Act* to pay compensation for the loss of property under this Act.

If the devolution process actually proceeds to the point where this draft legislation may actually become law, the mining industry must acquire a clear understanding of the government's position on these points.

Respectfully submitted,

(original submission signed)

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May 4, 2000 **(retyped from original document)**

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Re: Evaluation of the Draft Legislation Required by the Devolution of Power from the Federal Government to the Territorial Government

Thank you for submitting your comments on the draft legislation prepared by the Yukon Government in support of the devolution of Northern Affairs Program powers and responsibilities in the Yukon to the Yukon Government. We appreciate the effort that you have put into reviewing these 5 pieces of legislation and the identification of changes that you believe may alter the legislation in a substantive way. I wish to assure you that it is and has been the intent of the Yukon Government to make only those changes to the legislation required to ensure it fits into the context of Yukon laws and government institutions. If we have inadvertently made changes which result in a substantive change to the current legislation we will address this prior to the legislation becoming law.

I would like to take this opportunity to respond to some of the points you have raised and provide you with a clear indication of the government's intent with respect to them. I have followed your basic format for this purpose.

Territorial Lands Act

1. the definition of "Minister" is consistent with the practice in Yukon legislation. This allows the government to distribute the portfolios among a limited number of ministers according

to the priorities of the Government of the day. With respect to your concern that the ability to shift the administration of the Act between different Ministers could result in chaotic land use, I would remind you that it is the Act and the regulations which governs the administration of the resource.

2. with respect to the issue of "title", as you may be aware the federal offer was for the transfer of all of its current provincial type programs including provincial type legislative powers to develop, conserve, manage and regulate the natural resource base in the Yukon and to administer and control public lands, including the right to use, sell or otherwise dispose of them. It is the federal position that to transfer ownership from Her Majesty in the Right of Canada to the territory would require an amendment to the constitution. The transfer of the "administration and control" of the government interest from Canada to the Yukon Government and the federal legislation to implement the transfer will give the Yukon Government the authority to make grants of the government interest to private leasehold or ownership. There will be no reduction in the rights being granted by YTG, from those granted by DIAND.

3. The need for a consequential amendment to the current Lands Act s.2(2) to include reference to the territorial mirror legislation is noted. It was not our intent to exclude reference to the territorial Quartz Mining, Placer Mining and Waters Acts. This will be added to the list of consequential amendments required for devolution.

Yukon Waters Act

1. see comments above on the issue of "title".

Yukon Environmental Assessment Act

1. the change in wording in s.4(1)(c) of YEAA is to accommodate the change in responsibilities. The Yukon Government will not be transferring administration and control of territorial lands to a province and thus the specific reference to transfer to a province has been dropped, while maintaining the need for assessment where the Yukon Government transfers the administration and control of

territorial lands to another body or institution, such as a municipality. Regardless, the staking of a claim does not involve the transfer of the administration and control of that land and thus would not be caught by this "trigger". Nor is the staking of a claim included as a physical activity under the Inclusion List Regulation and thus this activity would not trigger YEAA.

Yukon Quartz Mining Act

1. **see comments under Territorial Lands Act on the issue of "title".**

2. **see comments under Territorial Lands Act on the issue of the definition for "Minister".**

3. **The use of headings in legislation is a matter of drafting convention and does not make a difference in meaning or intent. The headings do not have any legal significance, nor are they a part of the Act that has legal effect. They are there to provide a guide to the reader as to the general subject matter of the provisions thereunder. The Yukon drafting practice is to use headings instead of marginal notes and to use them only for sections, not subsections. The heading used in the Yukon legislation for s.12 and s.69 are the same as the marginal notes in the federal legislation in both these examples.**

4. **See comments above on the use of headings versus marginal notes.**

Yukon Placer Mining Act

1. **see comments under Territorial Lands Act on the issue of "title".**

2. **see comments under Territorial Lands Act on the issue of the definition of Minister**

3. **see comments under Yukon Quartz Act on the issue of headings versus marginal notes. In both s.17 and s.41 of the Yukon legislation the federal marginal note has been used as the heading, as per Yukon drafting conventions.**

4. See comments above on headings.

5. The intent of including a definition for territorial lands in the Yukon legislation is to clarify which lands the Act applied to. The intent behind citing "precious minerals" was to ensure that they were included with the lands and minerals. If it is the belief of the industry that the term "precious minerals" may be construed to be limiting, we can use the same terms as are used in the definition of mine, i.e. gold or other precious minerals or stones.

6. The changing of mining district boundaries in the federal system requires proclamation in the Yukon Gazette by the Commissioner. It does not require a change to the legislation, nor are the boundaries of the mining districts laid out in the legislation. The mining districts have been created for administrative purposes. Under the Yukon legislation changes will be done by regulation, which require public notification in the Yukon Gazette. This is at least equivalent to and likely a more stringent requirement than under the current federal legislation.

7. While there has been some reordering of this section in the Yukon legislation, there have been no new areas added to the list of restrictions on mining claims. In fact two of the restrictions from the federal legislation have been removed as they referred to lands which we do not expect to be transferred.

8. S.80 of the federal Placer Act was not mirrored as the territorial Notaries Act already provides for YTG employees to be appointed as notaries public to take affidavits.

9. See comment under Territorial Lands Act on need for consequential amendment to Lands Act.

Regulations Respecting the Coordination by Territorial Authorities of Environmental Assessment Procedures and Requirements (YEAA).

1. the drafting error in s.9(b) (reference to Governor in Council was not changed to Yukon Government equivalent) is noted and will be changed in the final version of this regulation.

It is my hope that this explanation will clarify the governments (sic) position on the points you have raised. I am available if you or other members of the Chamber of Mines would like to discuss these concerns further.

Yours sincerely,

(original document signed)

Angus Robertson
Assistant Deputy Minister

cc. T. Sewell
J. Walsh
Chamber of Mines