

Indigenous Peoples' Rights and the Future of Mining: Moving Beyond “Free Entry” Systems

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Presentation Outline

- ❖ The origins, rationales, and values of “free entry” mining systems
- ❖ The structural incompatibility between Indigenous peoples’ rights and free entry mining systems
- ❖ Imagining the future of mining laws in the respect of Indigenous peoples’ rights and jurisdictions

Origins, rationales, and values of “free entry” mining Systems

- ❖ The origins of contemporary *free mining* systems: the Californian Gold Rush and the laws of the mining camps
- ❖ The migration of vernacular mining codes from one gold rush to the other;
- ❖ The influence of miners in the development of formal “free entry” legal regimes during the 19th Century.
- ❖ Most Canadian mining regimes are still based on some form of free entry mining systems (except for Nova Scotia, PEI & Alberta).

Generic Understanding of “Free entry” Mining

Barry Barton, *Canadian Law of Mining* (Calgary, CIRL, 1993)

- ❖ “A right of free access to lands in which the minerals are in public ownership”;
- ❖ “A right to take possession of them and acquire title by one’s act of staking a claim”;
- ❖ “A right to proceed to develop and mine the minerals discovered.”

The Generic Legal Structure of Free Entry Mining Systems

- ❖ Crown ownership of mineral rights and the distinction between surface/subsurface property rights
- ❖ The mining claim
 - ❖ “Self-initiated title” (Lacasse: “système d’appropriation libre et unilatérale”)
 - ❖ Exclusive right of the claim holder to explore publicly owned minerals within the perimeter designated by the claim ;
- ❖ The mining lease: the exclusive “right” of the discoverer to access the deposit for mineral extraction.

Free Entry Mining Systems at the Test of Indigenous Peoples' Rights

- ❖ The structural incompatibilities between *free entry mining* systems and the Indigenous peoples' rights protected under section 35 of the *Constitution Act, 1982*
- ❖ Mining claims can be unilaterally acquired on lands claimed under Aboriginal title without any possibility for prior consultation with affected Indigenous communities.

Free Entry Mining Systems at the Test of Indigenous Peoples' Rights

- ❖ “Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.” (*Tsilhqot'in Nation v. BC*, [2014] 2 SCR 256).
- ❖ Aboriginal title encompasses mineral rights: *Delgamuukw v. BC*, [1997] 3 SCR 1010, par. 122.
- ❖ Mining claims (exclusive right to access to a parcel of land to conduct mining exploration) interfere with the exercise of Aboriginal title.
- ❖ Mining claims systems do not allow for consultation prior to the registration of mining claims on lands (potentially) held under Aboriginal title.

Free Entry Mining Systems at the Test of Indigenous Peoples' Rights

- ❖ Some early exploration activities can be exercised by mining claims holders without any prior State authorization, and therefore without prior consultation with potentially impacted Indigenous communities.
 - ❖ Potential impact on Aboriginal title and on the exercise of Aboriginal and treaty rights (e.g. hunting, fishing, gathering, and ceremonial rights).

Free Entry Mining Systems at the Test of Indigenous Peoples' Rights

❖ *Ross River First Nation v. Yukon*, (2012) YKCA 14 (leave to appeal at the SCC dismissed):

“The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown’s right to manage resources. Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.” (para. 37)

Free Entry Mining Systems at the Test of Indigenous Peoples' Rights

❖ *Ross River First Nation v. Yukon*, (2012) YKCA 14 (leave to appeal at the SCC dismissed):

“I fully understand that the open entry system continued under the *Quartz Mining Act* has considerable value in maintaining a viable mining industry and encouraging prospecting. I also acknowledge that there is a long tradition of acquiring mineral claims by staking, and that the system is important both historically and economically to Yukon. It must, however, be modified in order for the Crown to act in accordance with its constitutional duty.” (para. 43).

Free Entry Mining Systems at the Test of Indigenous Peoples' Rights

Mikisew Cree First Nation v. Canada, [2018] 2 SCR 765

“That this is so should not, however, be seen to diminish the value and wisdom of consulting Indigenous peoples prior to enacting legislation that has the potential to adversely impact the exercise of Aboriginal or treaty rights. Consultation during the legislative process, including the formulation of policy, is an important consideration in the justification analysis under s. 35 (*Sparrow*, at p. 1119; *Tsilhqot'in*, at paras. 77-78) [...] (J. Brown, para. 145).

Free Entry Mining Systems and the UN Declaration on the Rights of Indigenous Peoples

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Free Entry Mining Systems and the UN Declaration on the Rights of Indigenous Peoples

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Free Entry Mining Systems and the UN Declaration on the Rights of Indigenous Peoples

❖ Canada's commitment to implement the UNDRIP

Principle 6: "Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their land, territories, and resources."

❖ BC's *Declaration on the Rights of Indigenous Peoples' Act* (2019)

The infographic is titled "PRINCIPLES Respecting the Government of Canada's Relationship With Indigenous Peoples". It features the Canadian flag and the text "Department of Justice Canada / Ministère de la Justice Canada" at the top. The principles are numbered 1 through 10, each with a small image and a brief description.

- 1** All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
- 2** Reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.
- 3** The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
- 4** Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
- 5** Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
- 6** Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources.
- 7** Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
- 8** Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
- 9** Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
- 10** A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

Canada

Free Entry Mining Systems and Indigenous Laws and Governance

- ❖ The protocols pertaining to access and use of another group's land and resources;
- ❖ Decision-making processes and deliberative ethics and practices;
- ❖ The fulfillment of responsibilities to the land and the human and non-human beings.

Free Entry Mining Systems as a Source of Conflicts Between the State, Mining Proponents and Indigenous Peoples

A few examples:

- ❖ Kitchenuhmaykoosib Inninuwig First Nation (KI) v. Platinex
- ❖ Ardoch Algonquin First Nation v. Frontenac Venture
- ❖ Wahgoshig First Nation v. Solid Gold
- ❖ Barrière Lake Algonquin (Copper One inc.)

Recent Mining Reforms in Canadian Jurisdictions: the “Juxtaposition” of Indigenous Peoples’ Rights on Free Entry Mining Regimes

- ❖ Ontario (2009)
- ❖ Québec (2013)
- ❖ Yukon (2013)
- ❖ Northwest Territories (2019)

Protecting the Planet & People Through Genuinely Transformative Reforms of Free Entry Mining Systems

John Borrows et James Tully, *Introduction*, dans *Resurgence and Reconciliation. Indigenous-Settler Relations and Earth Teachings*, UTP, 2018, p. 5

“[...] we distinguish between two forms and meanings of reconciliation and resurgence. The first are those that perpetuate unjust relationships of dispossession, domination, exploitation, and patriarchy. These reconcile Indigenous peoples and settlers to the statut quo [...] The second are those that have the potential to transform these unjust relationships [...] To be transformative they must be empowered by robust practices of resurgence. Robust resurgence infuses reciprocal practices of reconciliation in self-determining, self-sustaining, and inter-generational ways.”

Protecting the Planet & People Through Genuinely Transformative Reforms of Free Entry Mining Systems

- ❖ Shifting the dominant paradigm of free entry mining system: the assumed desirability of mining vs mining as a potential use of the land;
- ❖ Establishing discretion-based systems to grant mineral rights and tenure;
- ❖ The recognition of Indigenous peoples' inherent territorial rights and jurisdiction over their traditional lands;
- ❖ Collaborative land, watershed, and environmental planning and decision-making processes;
- ❖ Implementing FPIC in light of Indigenous peoples' laws and protocols.

Indigenous Notions of Consent

Hayden King & Shiri Pasternak, *Land Back. A Yellowhead Institute Red Paper*,
October 2019, p. 21

- ❖ Restorative: Based on Indigenous models of governance and law.
- ❖ Epistemic: “Accepts Indigenous knowledge frameworks and languages for understanding relationships to the land.”
- ❖ Reciprocal: “Ensures that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent.”; the “active maintenance of Indigenous authority.”
- ❖ Legitimate: Given by “representatives perceived as legitimate by the community.”

Meegwetch. Merci. Thank you.



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