

# Origins of Mining Regimes in Canada & The Legacy of the *Free Mining* System

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*Conference Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims*

*The Centre for Research on Latin America and the Caribbean (CERLAC)*

*And the Extractive Industries Research Group (EIRG)*

*York University, Toronto, 5-7 March 2009*

*[A PowerPoint presentation accompanies this text]*

## **I. Introduction**

*[PowerPoint slides 1 & 2]*

Why is it that most mining<sup>2</sup> laws and policies in Canada do not allow for local populations to consent (or not) to mining projects affecting their communities and environment? Why is it that the vast majority of mining projects in Canada are not subject to public environmental impact assessments which, even if imperfect, still allow for a level of public cross-examination and consultation prior to mining<sup>3</sup>? And, perhaps more importantly, why is it that mineral extraction often has priority over other possible land uses, even when the value and merit of these alternative uses have been established (e.g. historically, culturally and/or ecologically significant areas; municipal development plans; recreational and customary activities; etc.)?

These questions are somewhat dissonant with what we often hear about Canada, a country believed to have some of the best mining regulations in the world for promoting environmental protection and ensuring community long term benefits.<sup>4</sup>

It is true that the Canadian mining industry, as a whole, has come far since the late 1970s, with the most significant progress probably taking place in the area of workplace health and safety issues, air pollution reduction from refineries<sup>5</sup>, safer mining waste management systems (yet still not free from long term risks), reduced water pollution<sup>6</sup>, and, since the mid-1990s, the requirement in most provinces and territories for reclamation once mining stops, usually accompanied with some form of financial assurance prior to mining.<sup>7</sup>

Yet, many of these regulatory improvements over the last 30 years are not free from significant limitations<sup>8</sup>, and as the above questions suggest, current Canadian mining regulations still fall short in terms of meeting adequate social and environmental rights and standards, such as those now promoted in international law and by a multitude of voluntary norms and initiatives<sup>9</sup>, or even by ‘sustainability’ principles that can be found in various provincial and federal laws and policies.<sup>10</sup> No public scrutiny of most mining projects, lack of clear and functional consultation processes for affected communities, and legislations which often favour mining over other possible land uses clearly do not meet growing concerns for transparent, equitable, and inclusive development approaches.

Since the mid-1990s, there has also been an increase in the number of negotiated mining agreements between (primarily) First Nations communities and mining companies (e.g.

Impact and Benefits Agreements –IBAs). Although many of these agreements include sections on social, environmental and economic issues, the negotiation processes leading to the conclusion of such agreements still, for the most part, remain unregulated, and are subject to regulatory regimes and their historic antecedents that continue to shape power relations.

Susan Strange, a heterodox political economy theorist, invites us to question not only the nature of institutional arrangements – that may act as power structures within which some actors may be more privileged than others - but she also invites us to question the history and origins of these institutions, both in time and space, and the context under which they were established, including an analysis of who participated in the formation of these institutions, which values and objectives they hold (both the people and the institutions), and how the interrelationships between these actors and the institutions evolved over time.<sup>11</sup>

When applying this framework to map the evolution of Canadian mining regulatory regimes since their inception in the late 1800s – as our research group at the UQAM attempts to do for Quebec and the Northwest Territories – we begin to notice a continuity of certain rights, principles and practices. These trends may help to explain why contemporary Canadian mining regimes are at odds with values that call for more equitable and participatory approaches to the development of lands and resources.

One distinct feature of past and current Canadian mining regulations that, in our opinion, merits particular attention in terms of current public policy is that of the ‘free entry’ system (or principle), which can also be referred to as the ‘free mining’ system.

Free mining is basically a normative system that describes how mineral resources can be accessed in a given territory. While its application may have varied through time and space, with origins probably going back as far as Ancient Greece and Medieval Europe, free mining can be defined, in its simplest form, as the *right of any person to freely access lands and resources for mining purposes*.<sup>12</sup> A free mining system can be recognized in a modern mining regime if, as described by Barton (1993), it includes the following three rights: “(i) a right of free access to lands in which the minerals are in public ownership, (ii) a right to take possession of them and acquire title by one’s own act of staking a claim, and (iii) a right to proceed to develop and mine the minerals discovered.”<sup>13</sup> In its most “orthodox” form, the free mining system confers little to no government discretionary powers, and mining entrepreneurs can exercise these three rights without ‘fearing’ government or third-party intervention.

Arguably, while these rights of free access to lands and resources have become more limited today in Canada (most notably because of environmental regulations and increasing recognition and affirmation of First Nation rights), they still are relatively (if not remarkably) intact and at the source of many contemporary issues and conflicts between communities, mining entrepreneurs and government (see examples below).<sup>14</sup>

As we will hear from Professor Bonnie Campbell later today, the reach of free mining issues does not only extend to Canada. It appears that the sets of rights, principles and values that free mining embodies have also been adopted in various African mining code reforms, particularly since the 1990s. It would also be interesting to investigate and compare with

Latin American mining code reforms during the last two decades or so. According to Warhurst and Bridge (1997), “Over 90 countries have reformed their mining investment laws and mining codes in the past two decades”.<sup>15</sup>

Tracing the path of past and recent expansions of the free mining system in various countries, and its consequences in terms of individual and collective rights to lands and resources, is a research area that probably deserves closer attention from researchers, organizations, and policymakers concerned about mining issues. In this sense, I agree with Hoogeveen when she suggests that “attention to sustainability discourses and best practice procedures [tend to obscure] the law of free-entry and power of mineral rights regulations.”<sup>16</sup> Hoogeveen also claims that “the origins of free-entry and its importance to the current resource regime” need to be given more attention:

It is true that the mining industry has improved immensely in their practices and relationships with First Nations communities. But, the law of free-entry has not changed, despite the vast increase in regulations such as the rise of IBAs and Environmental Assessment [EA] procedures and nor have the fundamental conflicts over land and property rights. Many parties outside of industry, such as activists and non-governmental organizations, and private landowners... believe the law of free-entry needs an overhaul.<sup>17</sup>

Mineral rights tenure and disposition system may have a significant impact on the subsequent power relationships between communities, corporations and governments in both EA and IBA processes.

In the next part of this presentation, I will briefly trace the historical path of free mining in Canada, and refer to contemporary issues and conflicts that arise because of free mining’s persistent presence in most Canadian mining laws. For this, I will largely refer to Barry Barton’s work in the 1990s on Canadian mining law, as well as on Jean-Paul Lacasse and Pierre Paquette’s work on the history of mining laws and policies in Quebec.<sup>18</sup> For a review of recent conflicts relating to the free mining system in Canada, I will refer mostly to the work of nongovernmental organizations, as well as my own experiences in Quebec.

## **II. Free mining in Canada**

*[PowerPoint slides 3 to 11]*

There are very few authors who write *specifically* on the origins and evolution of free mining in Canada (e.g. I only know of Barton 1993). There are, however, a few more authors who write more generally about the history of mining laws and policies in Canada and the U.S., and their work usually refers to, more or less extensively, to the free mining system<sup>19</sup>.

In Canada, perhaps the best comprehensive work on the history and evolution of mining laws and policies is Barry Barton’s book *Canadian Law of Mining* published in 1993 by the Canadian Institute of Resources Law<sup>20</sup>. Based on a thorough review of legislations, case law (nearly 800 cases, mostly since the mid-1800s), and on a substantial literature review on the topic, Barton covers a wide range of issues.

Like many of its predecessors who wrote on the history of mining laws in Western countries<sup>21</sup>, Barton is particularly interested in questions of *ownership of*, and *access to* minerals resources. Central to his work are questions such as: Who owns mineral rights in Canada? How can such mineral rights be acquired by individuals or corporations? What do these rights entail, how did they evolve over time, and what do they mean today in terms of rights of access to lands and resources?

Barton dedicates a large section of his book to the origins and evolution of free mining system in Canada, and, as such, his work remains a unique and comprehensive review on the topic. Barton makes three key observations in his review of free mining that I would like to emphasize.

### *1. Free mining in Medieval Europe*

First, Canada's mining laws still bare resemblance with customary laws that prevailed in parts of medieval Europe, including, most notably, mining communities in the district of Cornwall, Devon and Derbyshire in England, where miners, usually with the permission of the Crown, had a right of entry and mining on most categories of land, irrespective of who owned the land (i.e. the Crown or a landlord/baron).<sup>22</sup> This right of free entry was limited by only a few exceptions, such as lands used for cultivation, churches, cemeteries, and the like. Though the landlords in these mining districts could not forbid miners to access their lands, they usually were entitled to a portion of the ore extracted (i.e. a form of revenue sharing).<sup>23</sup>

### *2. Free mining expanded with gold rushes in the second half of 19<sup>th</sup> century, in regions with little to no mining regulations at the time, and primarily designed by mining entrepreneurs themselves*

Second, Barton emphasizes that the free entry system took its modern form and expanded significantly during "the great gold rushes which swept through the western world like a fever in the second half of the nineteenth century," including California in 1849, Australia in 1851, New Zealand in 1857, and eventually Canada with British-Columbia in 1858, Quebec and Nova-Scotia in the early 1860s, and the Yukon Klondike in the late 1890s<sup>24</sup>. In other words, Canada's early mining laws were largely influenced by pre-existing laws and customary mining practices, particularly those of California, Australia and New Zealand. Barton makes this lineage quite explicit with the first mining laws passed in British-Columbia and in Quebec/Ontario (United Province of Canada at the time<sup>25</sup>).

The Californian gold rush had a significant influence in the expansion of free mining in Canada and beyond. The gold rush began just after the Mexican-American War ended in 1848 and, for the first two to three years, California basically did not have any formal mining laws or territorial State government. In the meantime, more than 40 000 miners rushed to the region in 1849 alone<sup>26</sup>. The miners and prospectors found themselves in a legal vacuum with little to no governmental authority; thus, they had to establish their own system of rules and laws to regulate their mining activities. Similar to what had happened to some of the isolated medieval mining communities referred above, this created sets of rights and obligations with regard to access to land and resources that imposed little constraints on the miners, and, overall, were quite favourable to their interests. In this regard, self-appropriation of resources

(without governmental intervention) with the claim staking system and the ‘first discoverer’ principle quickly became the norm. These rights and principles are fundamental to the free mining system, and are still found in many contemporary mining regimes, including most of Canadian’s provinces and territories.

It is worth noting here that by the time the first U.S. mining legislations were introduced in 1866<sup>27</sup>, nearly 20 years after the gold rush, the government, according to Lacasse, was “facing ‘*a fait accompli*’ of well established customary mining norms and was basically forced to sanction them,”<sup>28</sup> otherwise running the risk to confronting resistance from mining promoters.

With the decline of the Californian gold rush in the early 1850s, and the news of new gold discoveries in Australia, New Zealand and eventually Canada, these norms travelled with the miners and the prospectors; as Barton notes: “The gold rushes were a truly international phenomenon,”<sup>29</sup> attracting people from all regions and nationalities.

In Canada, the first significant gold rushes were in British–Columbia (1858) and Quebec (1863).<sup>30</sup> At the time, however, both regions were still British colonies (or about to be - BC became a colony in 1858), and neither had mining legislations in place, only ‘imperial instructions’ and some form of Crown reservations of gold and silver inherited from British common law.<sup>31</sup> But because these rushes suddenly brought influxes of thousands of miners, governments at the time felt that they had to act quite swiftly to keep some degree of order, to regulate mining activities, and to assert and maintain their authority (and sometimes even their sovereignty) in the affected regions.<sup>32</sup> Government authorities from both British-Columbia and Quebec, therefore, turned toward existing mining laws, mainly those of Australia and New Zealand.<sup>33</sup> As Barton points out, governments also “found it desirable to accommodate the miners,”<sup>34</sup> and usually maintained a relatively close dialogue with prospectors and miners in the goldfields while drafting early mining laws.

One of the best examples to illustrate this process comes from the Quebec gold rush in 1863. As soon as the gold rush affected the Beauce region, the Commissioner of Crown Lands sent one of his representatives to report on the situation and propose, upon his return, a set of mining regulations. The first workable regulations were introduced a few months later with a system by which miners had to buy Crown lands and acquire a licence to be able to mine gold. The miners, many of whom had worked in California, disapproved the newly proposed regime and, as reported by the Commissioners’ representative who went back to the goldfields, the miners preferred:

... the Australian and British Columbia systems, by which the individual miners would be licensed and have the right to work everywhere on the unsold Crown Lands, subject of the staking out and recording of claims...<sup>35</sup>

Barton concludes that the government “took this advice to heart,” and the first Quebec mining act in 1864 established precisely this system.<sup>36</sup>

A similar picture could be drawn for British-Columbia’s early mining regulations. In both cases, the early mining acts in British Columbia and Quebec are events of lasting significance to this day, and largely mark the introduction of the free entry system in Canada, a system that

allows a miner free entry to prospect lands, acquire mineral rights by staking a claim, and mine discovered ore deposits, often irrespective of who occupies, uses or owns the lands.

### *3. Free mining continues until present times, and is at the source of contemporary conflicts*

The third key observation made in Barton's review relates to the effects and consequences of the free mining system in Canada's current regulatory context, and how free mining can limit or even create conflicts with the rights, principles and values embedded in parallel Canadian public policies and laws. His main examples include how the free mining system imposes clear limitations on the rights of private property owners, who usually have little to no say with regard to who/when/how miners can access the minerals below their property.<sup>37</sup> Barton also identifies how free mining can limit the implementation of effective land use policies because free mining's rights of access to lands and resources are often prioritize over competing rights and interests (e.g. parks and biodiversity protection policies; municipal land use planning; etc.). This is partly why the Environmental Commissioner of Ontario (ECO) raised the following concerns in 2007:

The existing regulatory structure [in Ontario] treats public land as freely open to mineral exploration. The consideration of other interests, such as the protection of ecological values, is reactionary, and the question of whether mineral development may be inappropriate is not answered upfront. Instead, it is assumed that mineral development is appropriate almost everywhere and that it is the "best" use of Crown land in almost all circumstances.<sup>38</sup>

But perhaps the most convincing examples about how free mining creates distinct difficulties in terms of public policy relates to: 1) the potential conflicts that free mining may create with regard to Aboriginal rights and title to lands, particularly in parts of Canada where treaties were never made or where land claim settlement is absent or ongoing<sup>39</sup> and 2) how the free mining system limits the authority and discretionary powers of governments, and as such, governments' abilities to discharge some of their responsibilities.<sup>40</sup> For instance, under free mining, governments usually a) cannot decide where, when, and how mining claims will be acquired and worked (except for withdrawing large portions of lands from mineral staking, which is difficult to do for many reasons – e.g. creation of parks); b) cannot impose extra terms and conditions that are not already specified in legislation; and c) cannot refuse the right of a mining entrepreneur to mine its discovery if the basic preconditions are met.<sup>41</sup> This puts governments in a vulnerable position and leads Barton to observe that one of the main difficulties that the free mining presents in terms of public policy "is the expectation that it raises that mineral activity will be permitted if one has complied with the mining legislation." Barton adds:

Certainly, the mining legislation does not exempt mineral operations from the environmental and land use legislation... But it is sometimes assumed that restrictions will only affect the way that they proceed, and will not actually bring a project to a stop. [...] To some extent, regulators acquiesce in expectations that they will not actually prevent mining.<sup>42</sup>

Below are a few examples of contemporary conflicts in Canada related to land and resources access and the free mining system.

### **III. Examples of contemporary Canadian conflicts related to free mining**

[PowerPoint slides 12 to 18]

#### *1. Free mining issues in the Northwest Territories*

As a result of the diamond rush and of increasing mining activities in the Northwest Territories (NWT) and Nunavut in the 1990s, the Canadian Arctic Resources Committee (CARC) undertook to publish a series of seven research papers on mining issues. Three of these papers related specifically to mining regulation issues, including critiques on the effects of the free entry mining system.<sup>43</sup> These reports also explored possible solutions, or alternative mineral rights disposition systems, which may be respectful of indigenous rights and interests, as well as more in tuned with contemporary concerns for community development and environmental protection.

In 1997, Kevin O'Reilly, then director of CARC in Yellowknife, and Nigel Bankes, a Law Professor at the University of Calgary and also CARC board member, submitted a petition to the Canadian Auditor General. O'Reilly and Bankes denounced the Crown's mineral rights disposition system, as applicable in the NWT, and argued against the "free-entry mining regime", deeming it "unsustainable" for many of the reasons stated above.<sup>44</sup> In response to the Canadian Arctic Resource Committee petition, the Department of Indian Affairs and Northern Development (DIAND - also responsible for mining regulations and policies in the NWT) essentially stated in a letter that the 'free entry' mineral rights staking system, in combination with many other applicable regulations, was, in DIAND's view, consistent with the principles of sustainable development.<sup>45</sup>

CARC disagreed with DIAND's interpretation and continued pressuring the government for changes. CARC argued that, among other issues, free-entry law was a potential infringement on aboriginal title because, as Hoogven phrases it, "free-entry dispossesses First Nations of title rights without [adequate] prior consultations."<sup>46</sup> Bankes and Sharvitt, after providing evidence based on case law focusing primarily on *Sparrow* and *Delgamuukw*, argued that "the [free-entry] regimes constitute a *prima facie* infringement simply because they allow third parties to gain access to aboriginal title lands and assert a property interest that is inconsistent with the aboriginal title interest."<sup>47</sup> This interpretation seems to hold even stronger today with recent Supreme Court decisions (e.g. *Haida* and *Taku* in 2004)<sup>48</sup>, which oblige governments to properly consult and, where necessary, accommodate First Nations prior to development on lands with outstanding Aboriginal rights and/or title.

Little has changed in the NWT since the mid-1990s, except for the adoption of the Mackenzie Valley Resource Management Act (MVRMA)<sup>49</sup> in 1998, which allows for some land use planning (LUP) to be established in areas covered by the act, and which supersedes the primary rights of mining that usually characterizes free mining systems. Only one LUP process has been established so far. The MVRMA also includes an environmental assessment process prior to development projects. Some First Nations have gained control over both surface and underground mineral rights in portions of their lands following agreements with the government (e.g. Tli'cho First Nation since 2005). In such cases, mineral rights can be accessed at the discretion of local communities, through a cash-bid system or through stricter conditions (e.g. revenue sharing, environmental considerations, etc.).<sup>50</sup>

## 2. Free mining issues in Ontario

Free access to lands for mineral exploration has also led to conflicts and issues in south-eastern Ontario over the last few years, where, in one example, both Aboriginal and non-Aboriginal communities joined together to resist uranium exploration in the Ottawa River valley. More than a dozen communities passed resolutions requesting a moratorium on uranium exploration and a reform of the free entry system in the Ontario Mining Act, including Ottawa, Perth and Kingston. Together, these communities represent more than a million people. They are claiming that the long term risks appear too high compared with the potential short term gains. They are also concerned about potential contamination of their immediate environment and ground water systems. Finally, they claim that traditional and alternative economic avenues (e.g. farming, tourism, wind energy, industrial and service economies in cities, etc.) are more appropriate than uranium mining in this area. However, because the free mining system provides companies with a right of access to their claims to conduct mineral exploration work, it becomes legally very difficult for citizens and communities to stop such work from happening. For this reason, the struggle led in 2008 to the imprisonment of Robert Lovelace, retired Chief for the Ardoch Algonquin First Nation and adjunct professor at Queen's University (and presenter at this conference), who participated in refusing the company's access to the land.<sup>51</sup>

A very similar case took place during the same time period in Northwestern Ontario with the struggle of Kitchenuhmaykoosib Inninuwug (KI) community members to protect their homelands from unwelcomed exploration work. After blockading the company's access to the land (an action contrary to a Court order) KI was brought to court by the junior company Platinex, who sued the community for 10 billions dollars. In March 2008, six members of the Chief and Council were imprisoned for contempt of Court while trying to resist free access of mining companies to what they claim to be their traditional lands.<sup>52</sup>

Mostly as a result of these cases, the Ontario government triggered during the summer of 2008 a public process for the review and reform of the Ontario Mining Act, including a review of the free entry system. This review and reform process is ongoing.<sup>53</sup>

## 3. Free mining issues in Quebec

Free mining and easy access to mineral claims also create constraints on the creation of protected areas for ecologically and culturally significant areas. One example is the case of the community-driven Biodiversity Reserve Paakumshumwauu Project on the customary lands of the Cree Nation of Wemindji (James Bay, Quebec). Despite nearly two years of efforts, the significant Old Factory Lake area (*Paakumshumwauu*) is still to this date excluded from the proposed protected area because of existing mining titles. Old Factory Lake is central to the proposed protected area and highly valued by community members and university partners for its cultural and ecological significance. The importance of Old Factory Lake was explained and communicated on a number of occasions to both government representatives and companies holding claims in the area. Nevertheless, at the time of this writing, the mining titles are still present and neither the company nor the ministry capable of nullifying these claims appears willing to change the situation anytime soon.<sup>54</sup>

The free mining system also limits the power of local and regional governments in terms of land use planning. Similar to what has happened in southeastern Ontario over the last few years, a growing number of regions and municipalities in Quebec do not want uranium exploration/exploitation taking place near their communities. There are now elected representatives from nearly 15 municipalities, representing more than 75 000 people, as well as two of the three main provincial opposition parties who endorse a moratorium on uranium exploration and mining. And yet, uranium mineral exploration is still allowed today near these communities, and local and regional governments have little to no legal means to stop it because of the sets of rights provided to companies by the Mining Act and the free mining system.<sup>55</sup>

Limited rights for citizens and municipalities also means, for instance, that a junior company is currently able to relocate nearly 1/5 of the community of Malarctic in Northwestern Quebec (200 houses and 5 public institutions) before an environmental impact assessment is completed (with public hearings) and before obtaining governmental authorizations for the mining project. The company proposes to develop the first large-scale, low-grade, open pit gold mine in Quebec, a project which has raised many concerns amongst the local and regional population.<sup>56</sup>

#### **IV. Conclusion**

Despite a few variations from one jurisdiction to another, free mining in Canada essentially allows mining entrepreneurs to prospect most lands, acquire mineral rights by staking claims, and mine discovered ore deposits, often irrespective of who occupies, uses or owns the lands. With roots in the Californian gold rush and mining districts of Medieval Europe, today's free mining system appears fundamentally at odds with principles and values that call for greater environmental protection and more inclusive, equitable and participatory approaches to the development of lands and resources.

Many of free mining's proponents, however, maintain that "free-entry is the only way that mineral exploration can function," and that "opposition to free-entry is associated with those who simply do not 'get' the mining industry".<sup>57</sup> For these proponents, the free mining system provides for *easy*, *low-cost* and *secured* access to mineral resources over vast territories, criteria deemed as essential to 1) find the new (and rare) mineral resources that society demands, 2) allow small and large entrepreneurs to equally access mineral resources (greater competition), and 3) reduce investment risks by securing the right to mine discovered resources (i.e. low and predictable conditions).<sup>58</sup> From this perspective, it is difficult for mining entrepreneurs to imagine a 'better' system than the free mining. As Barton notes: "Because of the promises made by the free entry system, mineral operators have high expectations of being able to proceed without regulatory obstruction."<sup>59</sup> Entrepreneurs thus fear changes may reduce their flexibility, autonomy and authority, and bring higher uncertainty with regard to their capacity to access lands and resources, and move projects from the exploration stage to the actual mining stage. This uncertainty is often perceived as unacceptable on a financial level, since it may render fundraising for their projects

impossible, or much more difficult, or worse, it may lead to significant losses in investments if, for example, entrepreneurs are unable to mine discovered deposits after spending millions of dollars in exploration and development work.

On the other hand, it can be argued that the continued application of the free mining system in our contemporary context can also lead to significant uncertainties and financial losses for mining entrepreneurs – not to mention the possible prejudices and wrongs endured by local people. The few cases stated above are clear examples. They illustrate how free mining can lead to conflicts with local citizens, governments and First Nations, which then can delay, jeopardize or even nullify the implementation of mining projects.

The public now has greater expectations in terms of environmental protection and of more inclusive, equitable and participatory approaches to the development of lands and resources. No public scrutiny of most mining projects in Canada, a lack of clear and functional consultation processes for affected communities, and legislations that often favour mining over other possible land uses clearly indicate that current mining practices and legislations do not meet these growing concerns. By failing to address these issues and ‘rethink’ the free mining system, as Bankes and Sharvit argue, “governments may [also] be faced with expensive compensation claims if they subsequently decide that mining ought not to be permitted in a particular area.”<sup>60</sup>

Alternatives to the free mining system do exist. Prior, comprehensive land use planning (with clear no-go zones, zones with specific conditions, and opened zones), permitting systems (with local or government authorities able to refuse or impose specific conditions prior to exploration or mining work), bidding systems (by which mineral rights are granted according to a bidding system), “free, prior and informed consent” (FPIC), are all models that currently exist in one form or another in various parts of Canada –although not at all widespread<sup>61</sup>. It may be time Canadian provinces and territories where free mining is applied<sup>62</sup> give more serious consideration to these alternate models and modernize their mining acts accordingly, by making them more inclusive to individual and collective rights to lands and resources. As Barton points out:

At one extreme, it is hardly credible to say that all mining is unacceptable, or to say that it can only take place in some other jurisdiction. At the other extreme, it is hardly credible to say that mining activity is always acceptable where ever it is economic, regardless of the impact on non-mineral values.<sup>63</sup>

Campbell concludes that while free mining laws may have been viable in the past, “when there were relatively few other uses for land, when mining [often] occurred far away from human settlement, and when it did not occur in the large scale industrial manner in which it is now conducted,”<sup>64</sup> it clearly appears anachronistic with today’s values and expectations. A reform of free mining laws based on existing alternate models thus appears both realistic and necessary and, in my view, beneficial in the mid-term for both the industry and society at large.

*Thank you.*

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## Annotations

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<sup>1</sup> B.Sc. degree in economic geology (Queen's University). The content of this presentation draws on my current Master degree research at the Institute of environmental sciences/studies at the University of Quebec in Montreal (UQAM), as well as on my involvement in two research groups: the *Groupe de recherche sur les activités minières en Afrique* ([www.er.uqam.ca/nobel/grama/](http://www.er.uqam.ca/nobel/grama/)) and the Pakumshumwau-Matuskau Protected Area Project, a community-university research alliance project between the Cree community of Wemindji and McGill University ([www.wemindjiprotectedarea.org](http://www.wemindjiprotectedarea.org)). Both of these research projects received support from the Social Sciences and Humanities Research Council of Canada (SSHRC). The former is directed by Prof. Bonnie Campbell (Faculty of Law and Political Sciences at UQAM), and the latter is co-directed by Prof. Colin Scott from (McGill University's Department of Anthropology) and the Cree Nation of Wemindji.

<sup>2</sup> By mining, I mostly mean metal mining and diamond mining and do not refer to quarry mining (e.g. sand, gravel, marble, etc.), nor to oil and natural gas extraction.

<sup>3</sup> In Southern Quebec (with the main mining regions of Abitibi-Témiscamingue and Côte-Nord), only 2 mining projects went through a full public environmental impact assessments (with public hearings) since the establishment of the first environmental laws in the late 1970s (see the public registries from the *Bureau d'audiences publiques sur l'environnement-BAPE*- and the *Ministère de l'environnement et du Développement Durable-MDDEP*:- [www.bape.gouv.qc.ca/sections/rapports/](http://www.bape.gouv.qc.ca/sections/rapports/) and [www.mddep.gouv.qc.ca/evaluations/index.htm](http://www.mddep.gouv.qc.ca/evaluations/index.htm)). In Ontario, Declaration Order MNDM-3 ([www.ene.gov.on.ca/en/eaab/Documents/mndm\\_3\\_NoE2006.pdf](http://www.ene.gov.on.ca/en/eaab/Documents/mndm_3_NoE2006.pdf)) exempts most mining projects from provincial environmental assessment, while federal assessments very rarely lead to public hearings (see also: [www.miningwatch.ca/index.php?EA/Declaration\\_Order](http://www.miningwatch.ca/index.php?EA/Declaration_Order)).

<sup>4</sup> See, for example, the *Extractive Industries Review* report from the World Bank in which it refers to partnerships between the Canadian mining industry, governments, First Nations, workers and environmental groups (EIR 2003).

<sup>5</sup> E.g. Sudbury and Noranda smelters, respectively, in Quebec and Ontario. See also: Lapalme 2003.

<sup>6</sup> Because of improved provincial and federal norms, including at the federal level the Metal Mining Effluent Regulations (MMER) (<http://laws.justice.gc.ca/en/showtdm/cr/SOR-2002-222>) and the Environmental Effects Monitoring (EEM) program for mining ([www.ec.gc.ca/eseec-eem/Default.asp?lang=En&n=034E4EF1-1](http://www.ec.gc.ca/eseec-eem/Default.asp?lang=En&n=034E4EF1-1)), both put in place for the mining sector in 2002. At the provincial level in Quebec, the *Directive 019* norms were first put in place in 1989 ([www.mddep.gouv.qc.ca/milieu\\_ind/directive019/index.htm](http://www.mddep.gouv.qc.ca/milieu_ind/directive019/index.htm)). One of the main critiques of these norms is the fact that MMERs still allow mining companies to dispose mining wastes in natural lakes ([www.mining.ca/www/media\\_lib/TSM\\_Publications/TSM\\_2007\\_Eng/13\\_mmer\\_eng.pdf](http://www.mining.ca/www/media_lib/TSM_Publications/TSM_2007_Eng/13_mmer_eng.pdf)).

<sup>7</sup> In Quebec the new dispositions were introduced in the Quebec Mining Act in 1991 and implemented starting in 1995 (L.R.Q., M-13.1, a.232).

<sup>8</sup> For examples: (1) weak obligations for mining reclamation assurance in Quebec and Ontario, which still do not entirely protect governments from companies' bankruptcy, i.e.: not 100% of restoration costs covered by these assurances, and possibility for companies to delay payments until well after projects are started (see for examples: Côté 2008, Laquerre 2009, Provost 2008 and VGQ 2009); (2) limited environmental impact assessments and limited public consultations (see note 3 above and for other examples: Bouchard 1998, Galbraith 2005, Halley 1998, Lapointe 2008b, Peters 1999, Simard et Lepage 2004, Verreault 2000); (3) no conservation strategies for mineral resources and (4) priority often given to mineral industry over other possible land uses (see for examples ECO 2007: 65).

<sup>9</sup> For examples: Brundtland Commission Report (1987), Rio Declaration (1992), Global Reporting Initiative (1997), Kyoto Protocol on Climate Change (1998), International Labour Organization's Convention 169 (1999), Global Compact (2000), OECD Guidelines (2000), ICMM Sustainable Development Framework (2001), Johannesburg Summit (2002), Mining Association of Canada's initiative Toward Sustainable Development (2004), Global Reporting Initiative for the mining sector (2005), Framework for Sustainable Mining (2005), Mine Certification Evaluation Project (2006), U.N. Declaration on the Rights of Indigenous Peoples (2007; still not ratified by Canada), etc.

<sup>10</sup> See for examples the Federal Sustainable Development Act (S.C. 2008, c. 33), the Manitoba Sustainable Development Act (C.C.S.M. c. S270), the Quebec Sustainable Development Act (R.S.Q. c. D-8.1.1), the Nova Scotia Environmental Goals and Sustainable Prosperity Act (S.N.S. 2007, c. 7), Newfoundland Sustainable Development Act (S.N.L. 2007, c. S-34).

<sup>11</sup> See Strange 1996, 1998, 2004; see also Chavagneux 1998.

<sup>12</sup> For a general historical overview of the free mining system, see: Leshy 1987, Barton 1993, and Lapointe 2008a. See also Laforce et al. (In Press).

<sup>13</sup> Barton 1993: 115. The Quebec Ministry of Natural Resources and Fauna describes free mining almost in exactly the same words: "*Le régime minier inscrit dans la loi actuelle repose sur un principe de base fondamentale le « free mining ». Ce principe, qui est bien connu des gens du secteur minier, détermine les règles d'attribution des droits miniers. Il signifie : [i] que l'accès à la ressource est ouvert à tous, sans égard aux moyens du demandeur; [ii] que le premier arrivé obtient un droit*

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*exclusif de rechercher les substances minérales qui font partie du domaine public ; [iii] que ce premier arrivé a l'assurance d'obtenir le droit d'exploiter la ressource minérale découverte dans la mesure où il s'est acquitté de ses obligations, c'est-à-dire essentiellement qu'il a réalisé des travaux d'exploration"* ([www.mrnf.gouv.qc.ca/presse/discours-detail.jsp?id=1053](http://www.mrnf.gouv.qc.ca/presse/discours-detail.jsp?id=1053), March 4, 2009).

<sup>14</sup> See also Bankes 2004 and Hoogeveen 2008.

<sup>15</sup> See also Bridge 2004 and Naito, Remy and Williams 2001.

<sup>16</sup> Hoogeveen 2008: 17

<sup>17</sup> Hoogeveen 2008: 17

<sup>18</sup> Barton 1993, Lacasse 1976, Paquette 1982.

<sup>19</sup> Including Eggart 1994, Hoover and Hoover 1912, Lacasse 1976, Laforce et al. (In Press), Lapointe 2008a, Leshy 1987, and Paquette 1982.

<sup>20</sup> According to Barton (1993: vii), there has been no general study on Canadian mining laws since W.D. McPherson and J.M. Clark in 1898, and A.B. Morine in 1909.

<sup>21</sup> From Georgius Agricola's famous treatise on mining in 1556 to Curtis Lindley's treatise on American law of mining in 1914, to John Leshy's more recent study of mining law in the United State in 1987.

<sup>22</sup> Barton 1993: 115-16

<sup>23</sup> The interested reader is invited to read an overview I presented about the history of free mining in the Western World, starting with Ancient Greece to the present mining laws of Quebec (Lapointe 2008a). For more information on the history of mining laws in medieval Europe and England, see Barton (1993: 114-117, and associated references); see also Hoover and Hoover 1912: 82-86.

<sup>24</sup> Barton 1993: 115-116. For a review of these gold rushes and their importance in contemporary mining laws, see Veatch 1911 and Fetherling 1988 referred in Barton 1993: 115.

<sup>25</sup> Formerly Upper- and Lower Canada, which then became the provinces of Ontario and Quebec with the Confederation of Canada in 1867.

<sup>26</sup> Following James Wilson Marshall's discovery in Coloma, in the Sierra Nevada: Marshall was a 'simple' carpenter and sawmill operator who apparently made the discovery in January of 1848 while digging an exit waterway for the sawmill he was building for John Sutter. Marshall, who was living in the same area, would soon be forced out of his own land by the wave of gold seekers, and apparently never profited from his discovery.

<sup>27</sup> *An act granting The Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes (14 U.S. Statutes 251)*. The first section of this Act states: « ... the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation ». The first legislation fully dedicated to mining was passed only in 1872: *An Act to promote the Development of the Mining Resources of the United States (17 U.S. Statutes 91)*.

<sup>28</sup> Our translation, Lacasse 1976: 39-41

<sup>29</sup> Barton 1993: 116

<sup>30</sup> There was also a small gold rush which resulted with early mining legislations in Nova Scotia, but it seems that this episode and these acts did not have the same significant influence as have had the British-Columbia and Quebec/Ontario acts.

<sup>31</sup> Barton (1993: 66-71, 126-128). See also Lapointe (2008a: 7): "The colonial legacy left mostly two marks on Canadian mining regimes: the split between surface and underground rights and the Crown ownership of minerals" (translated). See also Lacasse 1976: 29, and Lamontagne et Brisset de Nos 2005.

<sup>32</sup> For instance, Governor James Douglas of the Colony of British Columbia, along with other officials apparently had some fears to see the government authority dismissed, or worse, to loose sovereignty over these lands, as had happened a few years earlier when "British claims and interests in Oregon had been lost after an influx of American settlers." (Barton 1993: 118)

<sup>33</sup> Barton 1993: 119

<sup>34</sup> Barton 1993: 117

<sup>35</sup> Lacasse 1976: 48, in Barton 1993: 128

<sup>36</sup> Which was, however, only limited to Mining Divisions selected specifically for gold mining purposes (Barton 1993: 128)

<sup>37</sup> Barton 1993: chapter 8

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- <sup>38</sup> ECO 2007: 65. See also Barton 1993: chapter 6 and 7; Bankes and Sharvit 1998: 13.
- <sup>39</sup> See Bankes and Sharvit 1998, Bankes 2004, Campbell 2004, and Hoogeveen 2008.
- <sup>40</sup> Barton (1993: 80-81; 162-165). See also Barton 1998: 39 and Laforce et al. (In Press).
- <sup>41</sup> In Quebec, the main conditions to obtain a right to mine are 1) to demonstrate that there is potential for profitable mining in a given area, 2) to file a site restoration plan with its associated 70% financial assurance, and 3) to obtain a licence from the Ministry of Environment and Sustainable Development (Quebec Mining Act s.101 and s.232, Quebec Environmental Quality Act, s.22). These conditions are fairly easy to meet and there are no known cases of refusal in history of mining in Quebec, except for the Niobium Oka project near Montreal in the early 2000s (there are well over 100 mines in the history of Quebec, and at least 30 to 40 since the first environmental regulations in the late 1970s). The Quebec Auditor General noted recently that the second condition was even omitted in some cases (i.e. not applied, see VGQ 2009). Conditions in northern Quebec are, however, somewhat different and give slightly more authority and discretionary powers to regional and provincial governments prior to authorizing mining.
- <sup>42</sup> My emphasis, Barton 1998: 45 and 46
- <sup>43</sup> Barton 1998, Nigel and Sharvit 1998, and Taggart 1998.
- <sup>44</sup> Petition No. 6, Canada Mining Regulations, Office of the Auditor General, In Hoogeveen 2008: 1
- <sup>45</sup> [www.carc.org/resource/petresp.html](http://www.carc.org/resource/petresp.html), in Hoogeveen 2008: 2
- <sup>46</sup> Hoogeveen 2008: 60
- <sup>47</sup> Bankes and Sharvit 1998: 91
- <sup>48</sup> Haida Nation c. British-Columbia (Ministry of Forest) [2004] 3 R.C.S. 511. Taku River Tlingit First Nation c. British-Columbia (Evaluation Project Manager), [2004] 3 R.C.S. 550.
- <sup>49</sup> For more details, see: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/M-0.2///en>
- <sup>50</sup> Kevin O'Reilly, personal communication, March 3<sup>rd</sup> 2009. For a critical perspective, see also Hoogeveen (2008: 40).
- <sup>51</sup> For more information, see [www.ccamu.ca](http://www.ccamu.ca) or search for main media records in Ottawa.
- <sup>52</sup> For more information, see [www.miningwatch.ca/search.php?query=platinex](http://www.miningwatch.ca/search.php?query=platinex), see also Ontario Superior Court decision on July 28<sup>th</sup> 2006: *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 (CanLII 26171 (ON S.C.)).
- <sup>53</sup> For more information, see the Ministry of Northern Development and Mines (MNDM) website: [www.mndm.gov.on.ca/miningact/miningact\\_e.asp](http://www.mndm.gov.on.ca/miningact/miningact_e.asp)
- <sup>54</sup> This a research project in which I participate as a graduate student researcher.
- <sup>55</sup> For more information on citizen organisations against uranium exploration in Quebec, see for examples: COQEU (<http://no-uranium.blogspot.com/>), APEHL ([www.apehl.ca/uranium.htm](http://www.apehl.ca/uranium.htm)), RADON ([www.radon-uranium.ca/](http://www.radon-uranium.ca/)) and Parole citoyenne (<http://citoyen.onf.ca/blogs/category/mon-coeur-est-dor-mais-ma-cote-est-dacier/>). See also examples of media coverage: Paquet (2008, 2009a, 2009b) et Radio-Canada 2009.
- <sup>56</sup> See for examples: Ataman 2009, Ballivy 2009 and Francoeur 2009.
- <sup>57</sup> Hoogeveen 2008: 6 and 56
- <sup>58</sup> This section is mostly based on my personal observations made through the years as both a working geoscientist and as an advocate for improved social and environmental practices in the mining sector. It also draws on observations made by Barton 1993: 163-67; Barton 1998: 40-42; Hogeveen 2008: 6, 49, 56; Szablowski 2007: 151-155, 162; Taggart 1998: 28-29.
- <sup>59</sup> Barton 1998: 47
- <sup>60</sup> Bankes and Sharvit 1998: 13. See also Campbell 2004 on potential conflicts with Chapter 11 of the North American Free Trade Agreement (NAFTA).
- <sup>61</sup> For examples, see Barton 1998 and Carter-Whitney and Duncan 2008. See also legislations applicable in Alberta, Greenland, as well as in parts of Yukon, NWT, Nunavut and Northern Quebec, where consent may be required prior to certain mining development projects. See also current reform of Ontario Mining Act (note 53 above).
- <sup>62</sup> e.g. Ontario, Quebec, British-Columbia, NWT, etc.
- <sup>63</sup> Barton 1998: 37. As indicated in note 42 above, while there have been well over 100 mines in the history of Quebec, only one was refused for non economical reasons.
- <sup>64</sup> Campbell 2004: 37.