WHAT IS AT STAKE? DIAMONDS, MINERAL REGULATION, AND THE LAW OF FREE-ENTRY IN THE NORTHWEST TERRITORIES

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ABSTRACT

Mineral staking regulations determining exploration processes in the Northwest Territories are guided by a historically based assumption called the free-entry principle. This assumption is fundamental to mineral staking legislation and is criticized because free-entry mineral staking can take place prior to consultation with aboriginal communities with active claims to land title. When free-entry is challenged, property rights questions arise, particularly during onset of exploration ventures. This is pertinent because of diamond exploration, especially during the 1990s boom. This thesis explains how free-entry works in Canada's north and examines mineral rights and aboriginal title. Research is based on interviews in Yellowknife in 2007. The mineral staking process is analyzed through the framework formerly called the *Canada Mining Regulations*. Canadian mining standards are promoted as among the best in the world. However, the law of free-entry may still be understood as part of the process that dispossesses land from First Nations.

Keywords: diamonds, mineral rights, free-entry, dispossession, ownership

Subject Terms: Geography of Northern Canada, Mining, Resource Politics, Aboriginal Law

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If someone thought that there were diamonds in your backyard in Vancouver, and kept coming back trying to dig a hole in your backyard and you kept on going "No I don't want you to" . . . eventually you are either going to run out of money, run out of time, run out of patience, but you are going to run out of something, and they win.

Interview Transcript

1.1 What Is At Stake?: The question of land ownership in the NWT

On April 15 1997, Kevin O'Reilly and Nigel Banks submitted a petition on behalf of the Canadian Arctic Resource Committee, a citizen's organization, under section 21 of the federal *Auditor General Act.* O'Reilly and Banks attacked the federal system of Crown mineral rights disposition in the Northwest Territories (NWT). They argued against what they refer to as an "open-access" or "free-entry mining regime," and deemed free-entry unsustainable (Petition No. 6- Canada Mining Regulations, Office of the Auditor General). At the time, sustainability discourse was on the rise. Relating free-entry to sustainability can be viewed in light of the political climate and an explicit effort to lobby the government under the terms of relevant (sustainability) policy. 1997 is only three years after the peak of the rush for diamond-rich kimberlite pipes in the NWT, one of the largest staking rushes in Canadian history.

In response to this petition, the Department of Indian and Northern Affairs wrote a letter that in conclusion stated: "the licensed staking regime, which the petitioners call

"free entry", supported by the overall regulatory framework, is consistent with the principles of sustainable development."[1] The Indian and Northern Affairs defended this statement, by suggesting that the mining regulations in place did not work alone and there is a "multitude of legislation in the NWT that regulates the mining industry in a sustainable manner." Over the course of this thesis I illustrate some of the conflicts that arise due to free-entry mineral staking, and that the free-entry debate is deeply entrenched normative liberal ideologies of property.

What both the response from the Department of Indian and Northern Affairs and the authors of the petition fail to critically engage with is the fact that prior to the implementation of the "multitude of legislation" there are unresolved land rights issues between the Canadian state and aboriginal people. In terms of property ownership, the Indian and Northern Affairs response asserts that O'Reilly and Bankes were incorrect in their use of the term land "grant" in their petition. There is one use of the word grant in the petition, located in the introductory statement under the title "Particulars of Petition" which reads: "The current regime for granting third parties rights to Crown owned minerals in the NWT is found in the Canada Mining Regulations."

"Grants," the Department of Indian and Northern Affairs argues, should not to be associated with mineral rights. Granting of land, according to the federal government, is the "permanent ownership of an interest in land" and when mineral rights are staked, ownership is an improper frame for land use because "permanent ownership" is not granted. Mineral rights after recorded, assure the security of mineral tenure for a two-year period, provided "representation work" (discussed in chapter two) is performed. If

[1] http://www.carc.org/resource/petresp.html

mineral speculation results are strong and further exploration work is deemed lucrative, the mineral rights holder must then apply for a surface lease. There are many obligations that go along with staking a mineral claim. The very frame of ownership, as pointed out by the Department of Indian and Northern Affairs, is incongruent with the legal requirements involved in the granting of mineral rights. Nevertheless mineral rights are frequently discussed under the frame of ownership. It is when opposition to regulatory frameworks result in legal language that the definitions of words such as "grant" become of strategic importance. In chapter four I discuss that private property ideals and liberal ownership are actually quite congruent with the understandings of mineral rights and especially free-entry mineral staking.

Non-governmental organizations, such as the Canadian Arctic Resource Committee, argue that the free-entry regime practiced in parts of Canada deems mining as the highest and best use of land. This enables mineral rights to be staked to the majority of Canada's "sub-surface." Exceptions to the law of free-entry exist in Newfoundland and Labrador, Nova Scotia, Alberta and Manitoba (Barton 1993; Campbell 2004). These governments require prior consultation take place with affected actors. In the NWT, like in Ontario, governments regulating mineral tenure encourage prior consultation with aboriginal groups. At the same time however, all that is formally required to stake mineral claims in the NWT is a prospector's license. Licenses are available to anyone over the age of eighteen at a cost of five dollars.[2]

In light of the free-entry principle, I suggest the links to state power and control during mineral staking are paramount in their facilitation role and argue that current

[2] Sec.7 Northwest Territories and Nunavut Mining Regulations (NWTNMR). See Appendix 1: NWTNMR for a list of the NWTNMR Fees. Granted after staking a claim it must be recorded and there are fees required (Also listed in Appendix 1).

mineral staking regulations dispossess land from First Nations. Though the Department of Indian and Northern Affairs, in their response to the Canadian Arctic Resource Committee's petition discussed above, state that "ownership" is the wrong frame under which to consider mineral rights, they articulate this on behalf of the Canadian state. Indian and Northern Affairs regulate Crown owned land and decide who uses land and how. Under free-entry, the state's claim to land ownership remains contested and according to non-governmental organizations, preferential treatment is given to mining interests.

As I discuss in chapter two, Treaties 8 (1899) and 11 (1921) legally dispossessed native people in parts of the NWT of land rights. In more recent times, land claim processes reconsider this dispossession and aboriginal title rights during land claim negotiations. The federal government, in their response to the anti-free-entry petition, stipulate that mineral rights cannot be conflated with ownership; ownership is not what is at stake in the granting of what, to the government, can only result in the "lease" of land. This provokes questions: Why is it that Bankes and O'Reilly use the word "grant"? Why do opponents of free-entry tend to criticize free-entry under the terms of ownership? The federal government is the landowner and prioritizes mineral rights over aboriginal rights. How does this coincide with the way we understand property? What is the significance of the negation of the frame of ownership, given that it comes from the Canadian state and as landowner? Apart from the legal terms of ownership, how, precisely, are O'Reilly and Bankes 'wrong' when they call on the language of "granting" mineral rights?

There are three elements I draw on to critique what I see as the continued dispossession of land from aboriginal people in the NWT through the enactment of free-entry mineral staking:

1. In chapter two I provide a brief history of mining and aboriginal land claims in the NWT, with a focus on the history of gold and diamond discoveries.

2. I explain the meaning of free-entry and what this mineral tenure regime entails. In chapter three, I examine the history of the free-entry principle and the resultant battle between mineral rights interests and aboriginal land rights. I draw on interviews to demonstrate that the implementation of legal rights prioritizes capital investment. Explaining free-entry shows how current mineral regulations and mineral rights take precedent over aboriginal rights.

3. I analyse elements of the classical model of ownership (Singer 2000; Blomley 2004) and link free-entry to ideologies of property. In chapter four I compare the practice of free-entry mineral staking to the fundamental liberal ideal of private property ownership (Blomley 2004).

In sum, a historical analysis of free-entry mining in the NWT with a detailed discussion of elements of the classical and liberal model of ownership, demonstrate that free-entry participates in the organization of the legal dispossession of land from First Nations. This analysis is organized around the following research questions:

Primary Research Questions

1. How are diamonds significant in debates about free-entry?

2. How does the right to minerals conflict with the right to aboriginal title?

3. How are understandings of property relevant to free-entry mineral staking and aboriginal title?

1.2 Possession and Dispossession

The objective of this thesis is to examine the politics of diamond exploration in the NWT. My focus remains on diamonds, mineral regulations and free-entry mineral staking. Many people active in the minerals industry and/or with the federal government

suggest that the right to free-entry mineral staking should remain in practice, as it is crucial to northern economic development. It is also suggested that free-entry is the only way that mineral exploration can function. In contrast to this belief, which is largely supported by the minerals industry and members of government in the north, I argue that the free-entry mineral regime does not simply promote development, but in effect is part of the organization of further land dispossession from any interests apart from those whose central concern is mining.

In the first instance, this dispossession may be explained straightforwardly. First Nations have a historical right to land and this right to land is taken away by capital interests through the Canadian state and the organization of mineral staking. The Oxford English Dictionary defines dispossession as to "deprive someone of something that they own, typically land or property." Dispossession requires the assumption that First Nations are the 'owners' of this property in the first place. This presents complications in that land has indeed already been legally dispossessed through the process and arrival of European law, and again through the numbered Treaty process. The idea of an individual owner that is bound to the settlement and legal foundations of Canada presents many complications.

What I argue to be the dispossession of land through mineral regulation is not as simplistic as an analysis of staking regulations or an examination of the language present in these regulations. The regulations and staking law that result in the process of staking a mineral claim are seemingly straightforward. This requires that mineral regulations are ostensibly neutral. I demonstrate regulations practiced are understood as 'normal' by the very administrative process involved in staking mineral rights. But the messy, non-

ownership of sub-surface properties and the effects of mineral regulations that grant mineral rights, even if those rights are temporary and delineated from a surface lease, are far less straightforward than the utilitarian characteristics of staking a mineral claim. Ownership and the legal dispossession of land does not unfold a zero-sum equation, nor does the relational nature of property result in the simple binary whereby the Crown owns sub-surface land and leases these rights to industry. Staking mineral claim is a highly political act and creates conflict and oppositional claims to aboriginal title.

What mineral rights and aboriginal title share in common is the legal right to land that translates into conflicting rights to minerals and the "surface" of land itself. The stratification of this land into "sub-surface" and surface rights obscures the fact that mineral development is prioritized when mineral staking takes place. The stratification of land is active in the legal processes that naturalize land dispossession. The normative nature of Ward Churchill's (1997) notion of "resource expropriation " complicates the potentially reductionist idea that land can be, and is, possessed by the Crown in the first place. By potentially reductionist, I refer to the fact that property is legally reduced to an either/or, have/have not equation. This is a necessary trait of the liberal legal understandings of ownership and property rights.

The dispossession thesis I offer does not follow the liberal simplification that land is and can be owned by the Crown, who then has free-right to lease minerals. I do, however, place emphasis on the very root of ownership that is reliant on binary categories of possession and dispossession. Dispossession is complicated by the very possession/dispossession dualism. This tension is especially important when calling on notions of dispossession. My argument aligns with liberal and normative understandings

of ownership to the extent that land is still being taken away by the state. Even if land is already dispossessed, through the initial numbered Treaty process, what can be accomplished if we stray so far from ownership that we dismantle possession completely? More is possible by the arguably bold assertion that free-entry mineral staking dispossesses land, than the denial of any clear boundaries to property. Complications arise largely due to the historically powerful underlying ideologies of property. Dispossession remains an important part of the environmental politics of mineral exploration in northern Canada.

As defined by the Oxford American dictionary, property is "a thing or things possessed by someone or collectively." The reification and 'thingafication' of property into categories of mineral rights or aboriginal title is problematic. At this point property as "things" suggested by the standard definition of property, cited above, have the effect of creating categories of material commodities. This requires material qualities that "rights" and "title" simply do not possess. As such, understandings of "property" are essentially contested, which I further explore in chapter four. The normative rendering of property as a thing plays out in rights language and a struggle expressed in two different ways: Overlapping claims to land manifest legally as i) aboriginal title, and ii) mineral rights. Though dispossession is defined in terms of the possession of a 'thing' or a reified 'right', property relations and dispossession are more complicated than this dualistic frame. The social complications of property are not reflected in the individualistic terms of how we have come to understand ownership.

The complicated state of property and recognition of its social nature does not render the dispossession thesis false. Property is far more complicated than the reduction

that is proffered in the leasing of surface lands or the staking of "sub-surface mineral rights." Due in part to the high value of gold and diamonds as commodities, and the federal prioritization of economic growth, the power of mineral rights ultimately trumps aboriginal land rights. The politics that promote mineral exploration are in practice legally superior to the right to aboriginal title. Both legal and normative ideologies of property are at the very core of mineral rights decisions. This is important context to what essentially manifests in the alienation of land from aboriginal people. That mineral rights and aboriginal title exist on the very same pieces of property is the tension that frames this thesis project about the conflict over the right of free-entry and the right to aboriginal title in the NWT.

Throughout this thesis where the focus is on diamonds is not explicit, it should be read as implicit. Without the diamond, the story of property rights and mineral tenure would be different and would not take place on a scale comparable to the terms of the staking rush in the 1990s. The diamond economy in the NWT is of such large economic significance that the diamond shapes disputes over mineral rights legislation and aboriginal rights conflicts, as the diamond industry has increased the intensity of development. The significance of diamonds, the demand for diamonds, and the geological research that resulted in the discovery of diamonds, are critical to the following analysis of property and free-entry because of their importance in the context of the NWT. During chapters three and four diamonds fall from the centre of attention and are addressed in more abstract terms, as mineral rights and free-entry come to the fore. But, the commodity remains integral to the practice of mineral rights and property relations in the NWT.

1.3 Free-entry in a Canadian Context

In 2004 the Minister of National Revenue and Natural Resources John McCallum boasted Canada's federal mineral investment reached $1 Billion and the demand for commodities was strong and getting stronger. He also pointed out that diamond mining is the largest private sector employer in the NWT.[3] Mineral tenure law that underlies this investment is governed provincially or territorially. In the NWT, though mineral rights are governed within the territorial boundaries, mining laws and mineral rights are still governed from Ottawa. The federal Department of Indian and Northern Affairs is responsible for mining legislation and mineral tenure in the NWT. The law that governs mining has changed in name from the *Canada Mining Regulations* to the *Northwest Territories and Nunavut Mining Regulations*. Despite this deceptive name change, legislative power over mineral rights remains federal. This is different than in the provinces where mineral-staking law is provincially governed. Also of note is that despite the deceiving name, when the *Canada Mining Regulations* were called such, they were still only the regulations in the NWT. The legal lineage of these regulations and relation to the *Yukon Quartz Act* is presented in chapter three and is also available in a legislative timeline (Appendix 2).

Free-entry is also protected by the *Ontario Mining Act.* There, on March 17th, 2008, thirty-six non-governmental and political organizations published an open letter to Premier Dalton McGuinty. The letter, entitled "Stop the injustice, overhaul Ontario's

[3] Speech November 22, 2005. NRCan http://www.nrcan-rncan.gc.ca/media/spedis/2005/200592-eng.php

mining laws and policies", was precipitated by a conflict over uranium developments in the Sharbot Lake area, near Kingston. Uranium exploration raises a completely different imaginary and area of concerns than the exploration of diamonds. But the law or free-entry is similarly contested. The conflict in central Ontario raised controversy that is less visible in the media, for example, than on Canada's northern resource periphery.

In a heated battle over the uranium project, private landowners referring to themselves as "settlers", community groups including activist organizations, and the Ardoch Algonquin First Nation, have rallied together to oppose the project on land for which mineral tenure is secured, by the mineral exploration company Frontenac Ventures. Six Algonquin protesters, including Queens University Professor Robert Lovelace, were sentenced to six months in prison for staging protests at the exploration site. At the legislative scale various elements of civil society have called on the province to "Comprehensively reform the *Mining Act*, including the free-entry system, in consultation with indigenous peoples and with affected stakeholders" (letter to Premier McGuinty, 2008).

The free-entry principle, the unconditional right to explore for minerals, may currently be the cause for much public controversy in central Ontario, but the radicalism expressed in newspapers and protests in southern Canada over the free-entry principle is much less visible in contrast to that in the NWT where mineral development is a strong force. The territorial capital, Yellowknife, has a population of 20 000 which is small in comparison to the population of Kingston which is several times that. What opposition does exist however, is similar to that in central Ontario in so far as it is politically framed by aboriginal rights-based arguments.

John Agnew suggests politics are "struggles for power to exercise control over others and self ... and express or gain recognition for identities" (2002: 20). Given this definition, mineral rights and land claim agreements are indeed quite political. The act of staking a mineral claim, the focus of this thesis, is an exercise of power bound up in systems that ultimately manifest in uneven divisions of land. At the core of the minerals industry are economic and development priorities that motivate mineral exploration. The economic considerations are privileged in the structure of mineral rights law. This is especially apparent when viewed relative to aboriginal title. This leads to the politics of land dispossession by government and industry through the practice of mineral rights law and the institutionalization of property.

1.4 Methods and Participant Overview

This study is limited to the NWT, where diamonds were discovered in approximately 1990. Field research was undertaken in Yellowknife during July and August 2007. Principal methods include semi-structured interviews and a review of relevant literature. I received ethics clearance from Simon Fraser University (Application No. 38053) and a research license from the Aurora Institute in the NWT (License No. 14197).

The fifteen participants of this study signed a consent form granting confidentiality. A list of names of interviewees is thus not included with this study and interview discussion and analysis does not attribute quotations to specific informants. Participants included a range of key informants who use the *Canada Mining Regulations* or participate in the regulation process. They include five employees of the Department of

Indian and Northern Affairs Canada and five industry actors. Interviewees also include five people active in regulation debate, such as representatives from the Dene and Métis communities and aboriginal or environmental consultants. During interviews I used an interview guide that included the following topics:

1. Participant's employment background
2. Perceptions of the function and process of the *Canada Mining Regulations*
3. Economic considerations relevant to exploration projects
4. The impacts and benefits of exploration

Given the strength of the diamond industry in the north, and my original research focus on diamonds, interviews often drew on this commodity as an example. Interviews were approximately forty minutes to an hour in length and conversational in nature. They were recorded if appropriate permission was granted with transcriptions of recordings done by myself. A field journal was also kept which includes interview notes.

This study is not anthropological in nature and does not go into detail about northern societies or First Nations history. I spoke with Dene and Métis organization representatives and these interviews were different in nature than those with government and industry in that neither the Dene Nation nor the Métis Nation as organizational bodies are as intimately familiar with the *Canada Mining Regulations* as those who use these mining guidelines. Hence there is somewhat of a disjuncture between what information is available to and from whom. My conversations reflected this accordingly and the interview guide above for the most part served as just that— a guide.

The opinions expressed by individual informants do not represent the opinions of all "aboriginal people", "government" or "industry." Many aboriginal people are active in

industry and government. Similarly many governmental representatives are concerned with aboriginal rights. There are weaknesses in discussions that are limited to such categories. This is part of the reason I have not written about a particular case study as I would not be able to do so without reducing information to what one informant referred to as the 'puppet show' of northern resource politics where it is assumed the various aforementioned actors will abide by a particular role and express a uniform opinion. One interesting part of performing this research is the way that opinions expressed by various actors overlap in complex ways.[4] For example, not all in government or industry are pro-free-entry, as my fieldwork discussion generally conveys. Similarly not all aboriginal people and environmental consultants are anti-free-entry. That this research relies on the creation of such binary categories is a shame that within the scope of this project I have found unavoidable. In this light there is significant literature on situated knowledge (Haraway 1991). Feminist geographers, in particular have written on issues of positionality (Skelton 2001) that are not absent from any study, including this one.

1.5 Rationale for research

I focus on the power structures during the practice of mineral rights legislation where there is an evident gap in current literature. Though free-entry is well critiqued in the context of the American Mining Law (Leshy 1987) and by the Canadian Arctic Resource Committee Papers during the late 1990s (especially Bankes and Sharvitt 1998 and Barton 1998), current emphasis in the north is predominantly on the regulatory regime discussed

[4] I used Limb and Dwyre's (2001) *Qualitative Methods In Human Geography* that provides articles to explain positionality issues that arise in performing qualitative research.

below. The regulatory regime and emphasis on Environmental Impacts Assessment obscures the power relations active over property.

Decisions regarding what lands to stake are made based on the premise of geological speculation regarding mineral potential. In this light, socio-cultural concerns are framed primarily as regulatory issues. These are framed a variety of ways in the mining sector. For example, debates about mining and corporate social responsibility unfold as "best practice" procedures and issues such as "social contracts" or "licenses to operate" and Impact Benefit Agreements (IBAs).

The majority of policy research as well as attention within the social sciences surrounding diamond mining in Canada's north focuses on the regulatory process involved in the operation of mines. This is *ex post facto* in so far as exploration and staking themselves involve the conceptualization of mineral development and future mines. Exploration activity and the regulations that govern staking are the first steps involved in potential mining.

Though exploration is the beginning of mining processes, much current literature and regulatory emphasis is placed on Environmental Assessments and IBAs that take place after access to minerals is already determined. Mineral claim staking and the law that governs mineral tenure are fundamental to both Environmental Assessment and IBA processes in that Environmental Assessment and IBAs can only take place subsequent to staking.

IBAs are agreements made between companies and communities with existing claims to land where mining will take place. In the NWT these contracts are made with First Nations and agreements are often confidential and legally binding, though there has

been considerable concern regarding First Nations access to legal aid if mining companies do not abide by the terms set out in IBAs (Weitzner 2006). These terms include things such as financial, social and employment benefits. All of the diamond mines in the NWT currently extracting minerals have signed IBAs with First Nations.[5]

During the implementation of mines in the north, parallel to IBAs that are becoming increasingly standard, Environmental Assessments also take place. Environmental Assessments are required for some exploration projects and all mines in the NWT. Galbraith notes Environmental Assessment began in Canada over thirty years ago with the goal to "reduce adverse environmental and social impacts of proposed human actions" (2005: 10). The Berger Inquiry is an Environmental Assessment that is considered a "model of Environmental Assessment excellence" (Galbraith 2005; Nikiforuk 2007) and more recently the role of the Mackenzie Valley Environmental Impact Review Board (MVEIRB) has become key to the Environmental Assessment process. Both the Berger Inquiry and the MVEIRB are discussed in further detail in chapter two.

Central to this thesis is the fact that the Environmental Impact Assessment processes are separate to staking mineral claims that requires no consultation under the current free-entry regime discussed in chapter three. This is not to negate the significant shift to corporate social responsibility. MacDonald and Gibson trace the rise of sustainability discourses within the mining industry (2006). They view the contemporary mining industry in light of progressive change that has been made, such as the rise in

[5] Ekati (BHP Billiton), Diavik (Aber and Rio Tinto), and Snap Lake (De Beers Canada) have signed agreements with Lutsel K'e Dene First Nation, Dogrib Treaty 11, The North Slave Metis Alliance and the Yellowknife Dene First Nation. Ekati's IBA also include the Inuit of Kugluktuk and Kitikmeot Inuit Association (Galbraith 2005: 109).

Environmental Impact Assessment and best practice policies. 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 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 (or "settlers" in the Sharbot Lake case) believe the law of free-entry needs an overhaul.

In this project, I further to the central dispossession thesis, I aim to show that attention to sustainability discourses and best practice procedures obscures the law of free-entry and power of mineral rights regulations. Free-entry can ultimately facilitate the dispossession of land from private landowners, and in the north in areas of unsettled land claims, from First Nations. A second part of the dispossession argument is that the origins of free-entry and its importance to the current resource regime are not given adequate attention by governments, industry or mining debate in academia. The very practice of the free-entry principle as it operates in the NWT requires attention.

In the NWT staking regulations require that individuals or companies laying mineral claims have a valid prospector's license. With this license it is possible to go out and "stake a claim." The claim area staked provides the first stage in securing sub-surface hard rock mineral tenure to the person or company who marks and dates corner posts, and records the claim at the mining recorder's office, explained further in chapter two. In the NWT that office resides in part of the Department of Indian and Northern Affairs Canada, and as such remains federal (as opposed to provincial or territorial) jurisdiction. This is an indication of the scalar and uneven power relations at play. Bone

points out that Ottawa provides the territories with most of their budgets and thus political control poses a divide between the territory itself and Ottawa (2003: 4). This divide in governmental power is augmented by the vast resource sector in the NWT that produces the majority of wealth in the region. This economic and governmental context illustrates the complexities of tensions over mineral rights.

While mining is well critiqued by non-governmental organizations and in some academic circles (eg. Smith 1987, Bridge 2004), this criticism tends to focus on the *outcomes* of mining and mining regulation, rather than the process of regulation and mineral tenure itself. This is a significant distinction for several reasons. The regulations governing mineral staking practices contribute greatly to the outcomes of wealth distribution and land use planning decisions. Throughout this work I illustrate that those without mineral title rights, or who do not have ties to the mining industry are placed in a position of opposition to mineral rights holders. Mineral regulations, thus, place those who have no interest in staking mineral claims at a disadvantage. This may in extension be argued as an act of land and subsequent wealth dispossession.

This is particularly significant in Canada, especially on the country's resource periphery. Together, Canadian junior exploration projects are the largest segment of mining exploration globally. There are three tiers of mining exploration: 1) the individual prospector, 2) the junior exploration company, of which there are many in Canada, and 3) the major (multi-national) company such as BHP Billiton, Rio Tinto, Barrick Gold, etc. Small mining companies also undertake exploration, but not to nearly the same extent as junior exploration companies. Small mining companies are primarily concerned with funds made from extraction, whereas exploration company revenues are

derived solely from exploration work. Mining companies may use funds from their mines to explore, however, junior exploration companies rely completely on equity financing in the stock market. Generally junior companies have a market capitalization under 200 million dollars and are involved in the speculative/exploratory side of mining. In 2003 the Department of Foreign Affairs and International Trade estimates that more than half of the 2,300 exploration companies in the world were listed on Canadian stock exchanges.[6]

In Canada the staking process initiates the use of regulations that encourage drilling and exploration work. This is important because during staking the land is stratified and sub-surface mineral claims have a higher priority than pre-existing surface rights. This stratification and the regulations in place encourage development and prioritize mining. During this procedure rights to Crown minerals and the recording of mineral claims are rendered an administrative task. This administrative act is part of what defines free-entry. Much of the mining sector view this process as the only way mineral exploration can function. This highlights how the law can be seen to naturalize what may be viewed as the dispossession of land from aboriginal land title interests. Ideological conflicts over the free-entry principle are about the (seemingly neutral) law that allows for exploration and staking activities without prior consultation with communities.

There is increasing awareness of contentious mineral exploration projects in Latin America, much of it by Canadian companies (Paley 2008; Gordon and Webber 2007). In Canada, in comparison, regulation is heralded as the most stringent in the world.

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[6] "Canada in a World of Mineral Exploration" http://canadainternational.gc.ca/dbc/documents/SR_MME_Exploration_March2003_e.pdf

Diamonds in particular are of interest for 'conflict free' marketing, as opposed to 'conflict diamonds' from countries such as Sierra Leone (Le Billon 2006). Diamonds are particularly contextually relevant in the NWT because of contemporary economic significance to the local economy.

The relations that matter before material commodities, such as diamonds and gold, materialize on the market represent struggles actively regulated by mineral tenure law. These relations are overwhelmingly determined by investment and property rights decisions are ultimately practiced through state law. The Canadian state has a history of prioritizing the interests of mining industry and facilitating the privatization of sub-surface minerals.

The legal history of mineral ownership can be viewed in correspondence with settlement patterns in North America. Northern Canada's settlement, similar to that in much of the "new world" is highly influenced by mineral discovery. Particularly significant to the NWT is this history in British Columbia, California, and the Yukon, discussed in the following chapter. Recognizing the history of mineral development in the north situates how the Canadian state continues to control mineral tenure in the NWT. The Canadian state has been involved in mineral tenure since the very first mineral exploration ventures in the region during the 1930s. In order to provide background on gold during the 1930s and the comparative significance of diamonds, next I turn to an explanation of the context of these commodities and history relevant to mineral tenure legislation in the north of Canada.

CHAPTER 2: BACKGROUND

2.1 Introduction

The goal of this chapter is to provide the resource development context to mineral law and aboriginal title in the NWT. A second, larger purpose is to frame current mineral regulations in light of the longevity of the free-entry principle. The free-entry principle is more directly addressed in chapter three. In this chapter the history of gold and diamonds in the region is traced. This is relevant because it is difficult to imagine the history of Canada and especially the Canadian north without mining. The guiding research questions I pose regarding mineral rights would not exist if it were not for mining in the region. Much of Canada's hard rock mineral economy is derived from its northern regions. To give some indication of the economic significance of Canada's mining industry, according to the Canada Minerals Yearbook the total value of all mineral commodities mined in 2006 set a record at 33.6 billion dollars (2006: 3). That same year the *Vancouver Sun* reported that thirty-three of British Columbia's fifty fastest-growing publicly traded companies were mining companies (October 26, 2006). This strength of the mining industry affects contemporary discussions about mineral rights. Equally important is the history resource politics on Canada's resource periphery.

The NWT has seen mineral development since the 1930s. Below, I outline a brief account of the first exploration ventures in the NWT. It was at this time that mining law developed in the region. I then move to contemporary context and the discovery of

diamonds that is explained and related to the marketing of the particularly "Canadian" diamond. Gold and diamonds share similar discovery stories. I highlight the increase in activity, demonstrated in the number of claims staked in the NWT during the 1990s. I also present political background relevant to resource management in the NWT which includes the pertinence of Treaties 8 and 11 as well as the more recent land claim agreements beginning with the establishment of Inuvialuit in 1984. But first, a brief outline of the stories and history that formed settler society in Canada's NWT and the stories that contribute to the creation of Canada's northern diamond.

2.2 The Northwest Territories Golden Past and Brilliant Future

A 1900 Geological Survey of Canada expedition is the first recorded geological history in the north east of the Yukon. J.M. Bell travelled to Great Bear Lake in the northwest of the NWT by canoe, led by Dogrib Indians (Hodgins and Hoyle 1997). In the late 1920s Ontario prospector Gilbert LaBine researched Bell's trip. This research led to LaBine's mineral exploration work in 1930, near Great Bear Lake. LaBine's work and his discovery of radium resulted in the Eldorado mine which opened in 1932, operated by LaBine's company that at the time was named *Eldorado Gold Mines Limited.*[7] In *North Again for Gold: Birth of Canada's Arctic Empire* (1939), Laytha writes of Radium city: "It is on the Arctic Circle not far from the arctic coast, in a bay of Great Bear Lake. Between Radium City and civilization the map had nothing to show but barren lands and

[7] The remediation project resulting from the aftermath of mining at Port Radium is of continued controversy. LaBine's company and mine, was bought by the Canadian state under the new name of *Eldorado Mining and Refining Limited.* CBC reports the federal government is spending 7 million dollars in a second attempt to clean up radioactive waste ("Cleanup Starts on NWT's Port Radium" July 30, 2007).

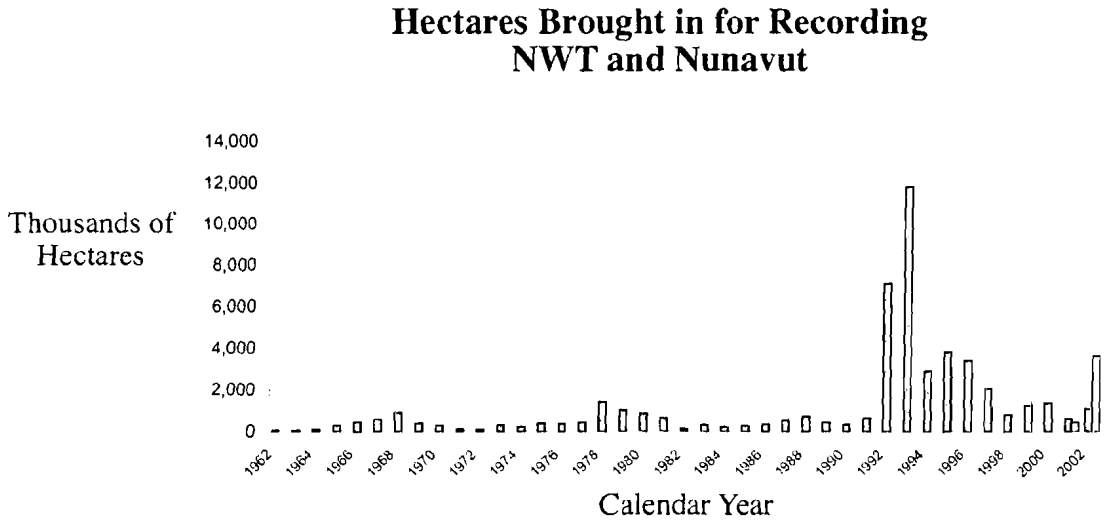
lakes large and small ... Radium City is beyond the Great Beyond" (3). Similar stories conjuring images "beyond the great beyond," give heroic descriptions and reproduce northern mythology that is somewhat particular to this era of mineral discovery (see Finnie 1942). There were also important legal decisions made on the new frontier Laytha describes as "beyond civilization."

LaBine's mineral discovery in the 1930s was followed by a larger scale gold rush in the region, roughly forty years after the Klondike gold rush in the Yukon. The NWT Mining Heritage Society dates the first gold mining camp to impact settler society in the NWT to Yellowknife in 1937. Con mine, outside Yellowknife, began operation at this time, with the first brick of gold poured in 1938. During the 1940s there was a gold staking rush in the region and in 1948 Giant mine, the second large-scale gold mine in the Yellowknife area, opened.

In the following chapter I discuss the evolution of mining law and particularly free-entry in more detail. It is significant that mining law followed the gold rush. British Columbia, California and the Yukon saw the first mining legislation in the West and it was not until the discovery of gold in the NWT that mining law was required in the region. "One thing that is sure about the path of development is that free-entry took its modern form in the great gold rushes that swept through the western world like a fever in the second half of the nineteenth century" (Barton 1993: 115). Since the gold rush at the turn mineral extraction and the economic climate that supports mining has changed dramatically. An examination of exploration trends is an indication of this change.

The Mining Recorder's Office at the Department of Indian and Northern Affairs in Yellowknife, records claim staking peaks during the mid-1960s and mid 1990s during

the diamond rush. During the recession in the 1980s economic development was particularly stagnant. The relatively low claim-staking and economic activity in the region is evident in 1982, for example, when only 287 claims were recorded. This is stark in comparison to 13,907 claims recorded in 1993 at the height of the diamond staking rush. These trends are highlighted below (Figure 1). In 1982, a mere 157 000 hectares were recorded as staked, whereas in 1993, 11 813 000 hectares were brought into the Mining Recorders Office. With the new diamond economy, the city boasts, Yellowknife's golden past was transformed into a brilliant future (COY 2004).



(MRO, INAC, NWT)

Figure 1: Hectares Recorded 1962-2002

Since the 1930s, the waves of exploration and mine opening and closure generally follow those of the wider economy and prices of minerals. Also significant is road building. In the 1950s the Canadian state initiated a policy to 'modernize' the north, and in 1958 the Conservative government's Roads to Resources program funded the

provinces to augment transportation networks. The federal government completely covered the costs for roads to the territories and "roads were built to help private companies reach world markets" (Bone 1992: 216). During this time the Mackenzie highway from Edmonton to Hay River was extended to Yellowknife.

Diamond Discovery and Staking in the NWT

The level of mineral exploration and the amount of land staked in the NWT during the diamond staking rush is unprecedented. With the rise of multi-national investment and globalization more generally the minerals industry has expanded dramatically since the era of gold discovery during the 1930s and 40s. The highway built to Yellowknife is still the only road to the territorial capital, but the discovery of diamonds has resulted in increased traffic and new ice roads that lead to advanced facilities at diamond mines. This was previously impossible in the sub-arctic. Advancements in mining and transportation technologies put diamond exploration in a completely different category than early gold exploration. What gold and diamond discovery do share are origin tales of heroic characters and the emphasis on capital investment.

During the early to mid-1980s, DeBeers launched a worldwide search for kimberlite pipes, diamond's "host" rock. The largest diamond mining company in the world, DeBeers embarked on a continent-wide search of North America that included sampling the major river systems. After processing samples, diamond exploration focused on several areas. One area where there were strong diamond indicator minerals was the Mackenzie River, in the western NWT. Diamond prospecting information was

confidential and was contained by DeBeers up until this point. However, DeBeers geologists started leaving the company and information began to filter out.[8]

This led to the discovery of diamonds at Lac de Gras, approximately three hundred kilometres north of Yellowknife, by Charles Fipke, a geologist from British Columbia. Fipke "deduced the indicator minerals had been pushed up by the glaciers at some point further east"[9] and continued to sample eastward until the mineral indicators disappeared, at which point he eventually discovered their source. This is the beginning of the story of Canadian Diamond mining and the exploration rush that followed.[10]

Lac de Gras became the site of Ekati, Canada's first diamond mine that began extraction in 1998. Ekati is owned 80 per cent by Australian mining company Broken Hill Proprietors and 20 percent by Fipke and Blusson, who discovered Canadian diamonds. Ekati is now one of four active diamond mines in the north, with others being developed.[11]

The discovery of diamonds precipitated one of the largest staking rushes in history, and at its height of the rush 60 million acres were under mineral claim. "In the 1990s mineral claims were staked in a large area of Canada's central Northwest Territories, covering a region the size of France" (Coumans 2002: 95). This conjures images of discovery, expansion and conquest that parallel the settlement of the north during the NWT gold rush.

Diamond exploration and extraction in Canada's north is now a major industry. In

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[8] Personal communication/Interview

[9] Interview transcript

[10] Diamond discovery is not only associated with Fipke but also his partner Stuart Blusson. Fipke and Blusson are often depicted as heroic characters. This is exemplified in *Fire Into Ice* (1999) where Frolick illustrates the conquest of diamonds in Canada's north (see also Krijick 2002).

[11] Snap Lake (DeBeers) is Canada's third producing diamond mine located in Nunavut. Others in the development stage include Victor (Ontario, DeBeers)and Gacho Kué (DeBeers)

2005, 251 million dollars was spent on diamond exploration in Canada.[12] The largest portion of that expenditure took place in the NWT, followed by Nunavut, Saskatchewan (Fort la Corne), northern Ontario and the Otish Mountains in northern Quebec. The NWT portion was roughly 30% of Canada's total exploration.[13] The economic benefits for Canada's north are quite significant. The diamond industry's contribution to the GDP of the NWT in 2005, for example, was estimated at 25%,[14] and in 2006, Perron of Natural Resources Canada estimated that the diamond industry contributes 50% to the Gross Domestic Product in the NWT, including contractors working on diamond mining projects under construction. He also reports that globally 13.5% of diamonds by value come from Canada.[15]

Yellowknife's municipal government is understandably keen to encourage the industry's growth, and has launched a city logo that boasts that it is the "diamond capital of North America."™ The 2006 Yellowknife Community Profile explains the city's new diamond logo as follows: "The City of Yellowknife officially registered the trademark Yellowknife - Diamond Capital of North America™ in 1999 to establish itself throughout the national and international diamond industry ... Local businesses and not-for-profit groups are invited to use this logo for marketing and promotion, and to share our vision as the Diamond Capital of North America."™ [16] Statistics Canada also reports the positive benefits of diamonds in Canada: as a "relative latecomer," they note, "Canada is

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[12] Natural Resources Canada 2005 Minerals Yearbook

[13] *Overview of Trends in Canadian Mineral Exploration* 2006. This percentage is based on a total of $239.6 million dollars incongruent with the recorded total in the 2005 Minerals Yearbook, that values Canadian total diamond exploration expenditure at $251 million

[14] Government of the NWT, 2006

[15] Natural Resources Canada 2006 Minerals Yearbook

[16] Yellowknife Community Profile, 2006

now a major player in the international diamond scene." [17] In 2008, Canada is the third largest producer of diamonds by value[18] and, this being the case, "diamond mining is adding a new lustre to the Canadian economy and dazzle to that of the NWT."[19]

Diamond History

The discovery of diamonds NWT would not have taken place were it not for the wealth historically produced from diamonds. The discovery of diamonds in 1867 on the northern Cape of South Africa is critical to the global diamond economy. The Kimberly mine was discovered in 1871, when the region was annexed by Britain. Between the years of 1869 and 1888, diamonds valued at 46, 0131, 190 British pounds were exported from the Cape Colony (Turrell 1987: 10). This was prior to the registration of DeBeers consolidated mines in 1888 by Cecil Rhodes and paid vast contribution to the increase in economic activity in the South African region. Rhodes, a British Imperialist committed to the colonial cause, dreamed to expand the colonial empire throughout the world (Epstein 1982: 67, Carstens 2001:16). Rhodes is the only man to have two nations named after him: Rhodesia (now Zimbabwe) and Northern Rhodesia (now Zambia) (Epstein 1982: 66). This is symbolic of the political and economic power of DeBeers that currently controls 60-80 percent of diamonds worldwide.

Sir Ernest Oppenheimer became heir of Cecil Rhodes and is argued to have brought reality to Rhodes dream of a British political and economic Empire in South Africa (Jessop 1984). Oppenheimer founded the largest mining finance domain in the world, the Anglo American Corporation of South Africa (Jessop 1979: 3). Turrell (1987)

[17] Stats Can http://www.statcan.ca/english/research/11-621-MIE/11-621-MIE2004008.htm#ftnt13 accessed June 28, 2008

[18] "Arctic Economics" http://benmuse.typepad.com/arctic_economics/2008/06/canadian-diamonds.html

[19] Stats Can see footnote 9

tells the story of capital and labour on the Kimberly diamond fields, that predates the critical role of Rhodes and Oppenheimer. The biographical accounts of Rhodes and Oppenheimer are significant. But an overstatement of these biographies can lose sight of the political and economic context of colonial project in South Africa. The significance of the British Empire was acted through Rhodes and continued by Oppenheimer. This produced the economic wealth that is instrumental in DeBeers continued dominance on the world diamond market and the continued high value of diamonds. The history of the diamond cartel is a significant factor in the rush for diamonds that took place in the NWT in the 1990s.

Pure As Ice: Northern Canadian Diamonds

The myth of the diamond also dates back further than the history of the Canadian diamond industry. The diamond is significant, for as both Ingrid Tamm (2004) and Le Billon (2006) have argued, it is the purity and romance of diamonds that allow them to garner so much attention, in contrast to commodities like timber or oil. Two key popular culture landmarks include slogans such as "Diamonds are a Girl's Best Friend" made famous in 1953 by Marilyn Munroe in the film *Gentlemen Prefer Blondes*, and the DeBeers slogan "Diamonds Are Forever."

The romance of diamonds can be traced to De Beers marketing efforts: during the post-depression period N.W. Ayer, an American marketing firm asked people why they buy diamonds. Their findings showed diamonds were perceived to symbolize love and

the slogan "a diamond is forever" came out of this market research.[20] Marketers for Canadian diamonds quickly capitalized on existing diamond marketing and supplemented ideals of purity, whiteness, and northernness to distinguish their product. These themes are relevant given the area of extraction and parallels to idealized Canadian northernness.

Canada's north has historically been a crucial force in establishing Canadian national identity. The country's early years of exploration, discovery, expansion and colonization and expeditions into the Northwest Passage, sowed the seeds for a 'terra nullius' vision of the 'Canadian' landscape. These imaginative geographies are still vivid today in popular Canadian consciousness. Visions, such as that presented by national icon and author Pierre Berton in *The Arctic Grail: The quest for the northwest passage and North Pole, 1818-1909* encourage and actively illustrate this northern mythology.

In the book *National Dreams* Daniel Francis examines "myth, memory and Canadian Experience." In a chapter devoted to the way Canada is constructed as a northern entity, Francis writes:

> To a Canadian, North is more than a point on the compass. It is a region, a territory, a vast intimidating part of the country somewhere beyond easy comfort. Officially, the North extends from the 60th parallel of latitude all the way to the Pole: the Yukon, the Northwest Territories, Nunavut, the Arctic archipelago. Unofficially, it occupies our imagination, filling it with dreams of high adventure and fabulous wealth. To a Canadian, North is an idea, not a location; a myth, a promise, a destiny (Francis 1997:71).

Hulan's (2002) work, *Northern Experience and the Myths of Canadian Culture*, explores a similar theme. In essence, Hulan argues that northern spaces of representation are masculine in their colonial conception and that "Canadians are surrounded by imagery presenting northern experience as national symbol" (2002: 179). She argues that

[20] http://www.debeersgroup.com/DeBeersWeb/Html/Iframe/HFOReflects.html accessed June 28, 2008

national ideology is based on northern representations of Canada that are deeply constitutive of Canada's national character. It is significant to tie these northern imaginaries to the Canadian diamond.

The ethical marketing strategy is a symptom of the imaginary geography of pure, white northernness that runs through Canadian diamond marketing. Byrant and Goodman (2004) combine consumption studies with political ecology to provide a glimpse of the relationship that works well for strategies and fair-trade products such as cereal and coffee. Their emphasis on the 'edenic myth making' at work in campaigns to market these products can be easily seen in parallel strategies to market Canadian diamonds. Byrant and Goodman argue that the notion of ethical consumption enables consumers to "tune in and drop out"—that is, neutralize their senses of political responsibility by conflating political action with consumption. Thus, shoppers are able to commend themselves for engaging in conscious consumerism while, in reality, only scratching the surface of issues lying beneath eco-products. This is often read as a sort of greenwashing or superficially green consumerism. In the case of Canadian diamonds, it is a specifically whitewashed consumerism—in both senses—that is being advertised.

'Edenic myth making' and the sale of pure Canadian diamonds associated with images of whiteness, mountains and harmonious nature provide the raw materials for a strong marketing campaign that the Canadian diamond industry enthusiastically embraces. *Brilliant Earth*, "conflict-free diamond jewellery" promotes "luxury with a conscience." Other examples include *Polar Bear Diamonds, Polar Ice Diamonds* and *Igloo diamonds. Igloo Diamonds* go the distance to boast that they sell diamonds to "better the world". These marketing tactics overlap with the same geographical

imaginary evident in the mineral staking regulations and free-entry policy that facilitate the diamond industry. This is not to dismiss the economic benefits that come from diamond mining, nor the importance of job creation, but to highlight the fact that it is presented as a consequence-free industry.

Images of the north easily produce and maintain notions of the romance of Canadian diamonds. LeBillon ties these marketing tactics to ethical consumption strategy:

> Cast in an icy northern landscape, advertisements suggested that the flawless purity of Canadian diamonds would guarantee for fiancés the wedding "promise arrives pure" through a "Canadian white diamond." This association of the "white" stone with "white" Canada (as both imagined landscapes and model consumers) easily resonates with contrasting racist imagery of "dark" Africa (2006: 793).

Without digressing into the discourse that surrounds 'conflict' or 'blood' diamonds, it is of note that consumers, when presented with a pure, white, 'conflict free' product through Canadian diamond marketing strategy, are also being sold Canadian national sentiment. The intersection between marketing strategies and the economy that supports diamond mining highlights the commercial and government dependence on rhetoric of Canadian whiteness and purity.

Having provided some context on mineral exploration with a brief focus on gold and a more developed glance at Canadian diamonds, next political context relevant to mineral development in the NWT is provided. This includes the Berger Inquiry and the formation of the Mackenzie Valley Environmental Review Board. As illustrated below conflict over property and resources in this region is by no means a recent phenomenon.

2.3 The Mackenzie Valley

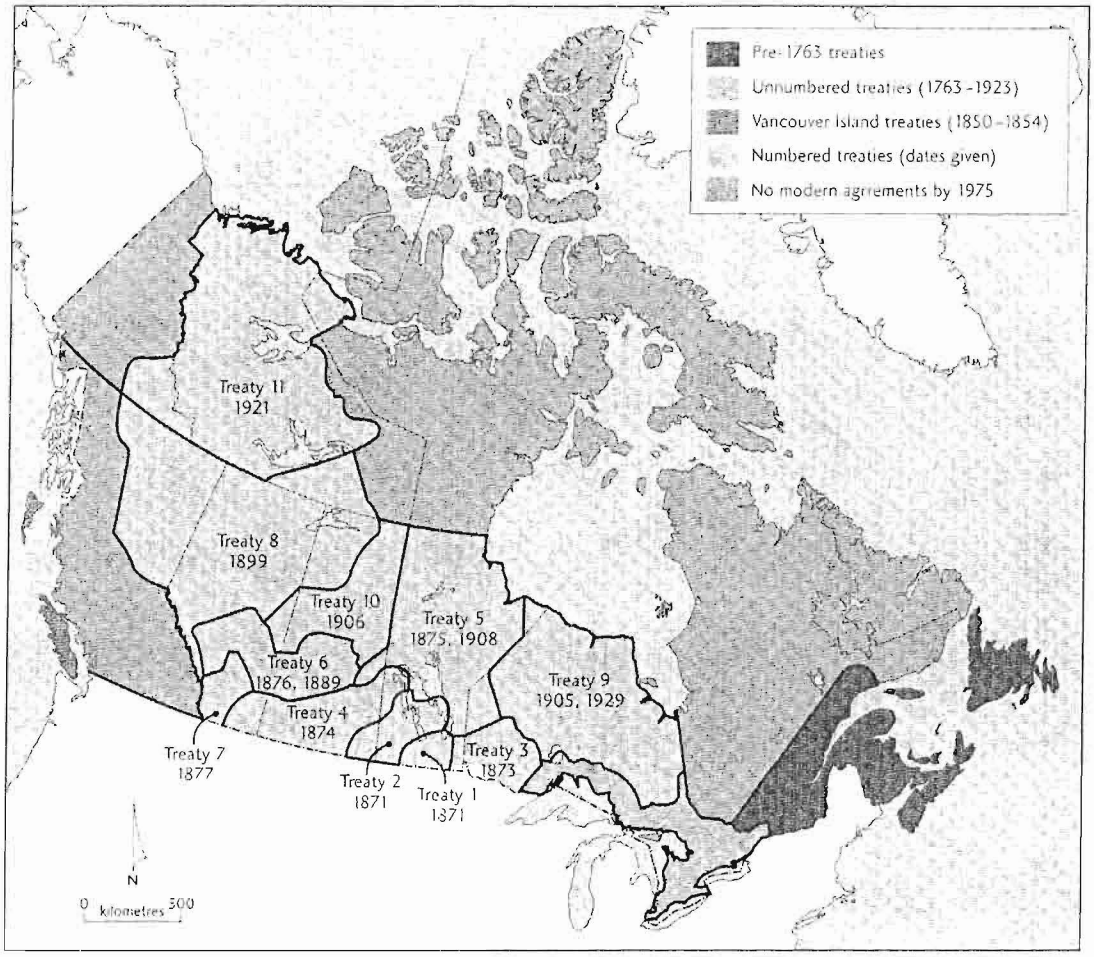
Aboriginal Title

Robert Bone states that aboriginal title is, in effect, the "legal basis for attaining benefits from resource development" (Bone 2003: 190). This perspective is not immediately what comes to mind when considering aboriginal rights issues. But there is a strong case that Aboriginal title functions in order to make way for resource development. This is apparent in terms of the historical treaty process. Fumoleau historically documents the negotiations of Treaties 8 (1899) and 11 (1921) that stretched into the NWT (see Figure 2). Treaty 11 was drafted because of the discovery of oil at Norman Wells (also stated in Bone 2003: 191) and Treaty 8 was developed largely in tandem with mineral discoveries in the region (Fumoleau 2004: 37).

> "[Many] words of the treaty text, their meaning and their consequences, were beyond the comprehension of the northern Indian. Even if the terms had been correctly translated and presented by the interpreters, the Indian was not prepared, culturally, economically or politically, to understand the complex economics and politics underlying the Governments solicitation of this signature... in their minds the treaties primarily guaranteed their freedom to continue their traditional lifestyle, and to exchange mutual assistance and friendship with the new comers" (Fumoleau 2004: xxvi).

Fumoleau points out that in signing of Treaties 8 and 11 the Canadian government intended to extinguish land title to an immense region of northern land. He also notes that until 1967 very few people had ever read the treaties, and "with the discovery of oil in the Arctic" similar to the discovery of minerals, "old treaties, land claims and broken promises become everyone's business" (2004: xxvii). Though it is outside of the scope of this work to provide an in-depth analysis of these treaties and the intricacies of treaty

development, the historical significance and legal importance of the treaty process is fundamental to land claim processes (INAC 2003).



(Bone 2003: 191)

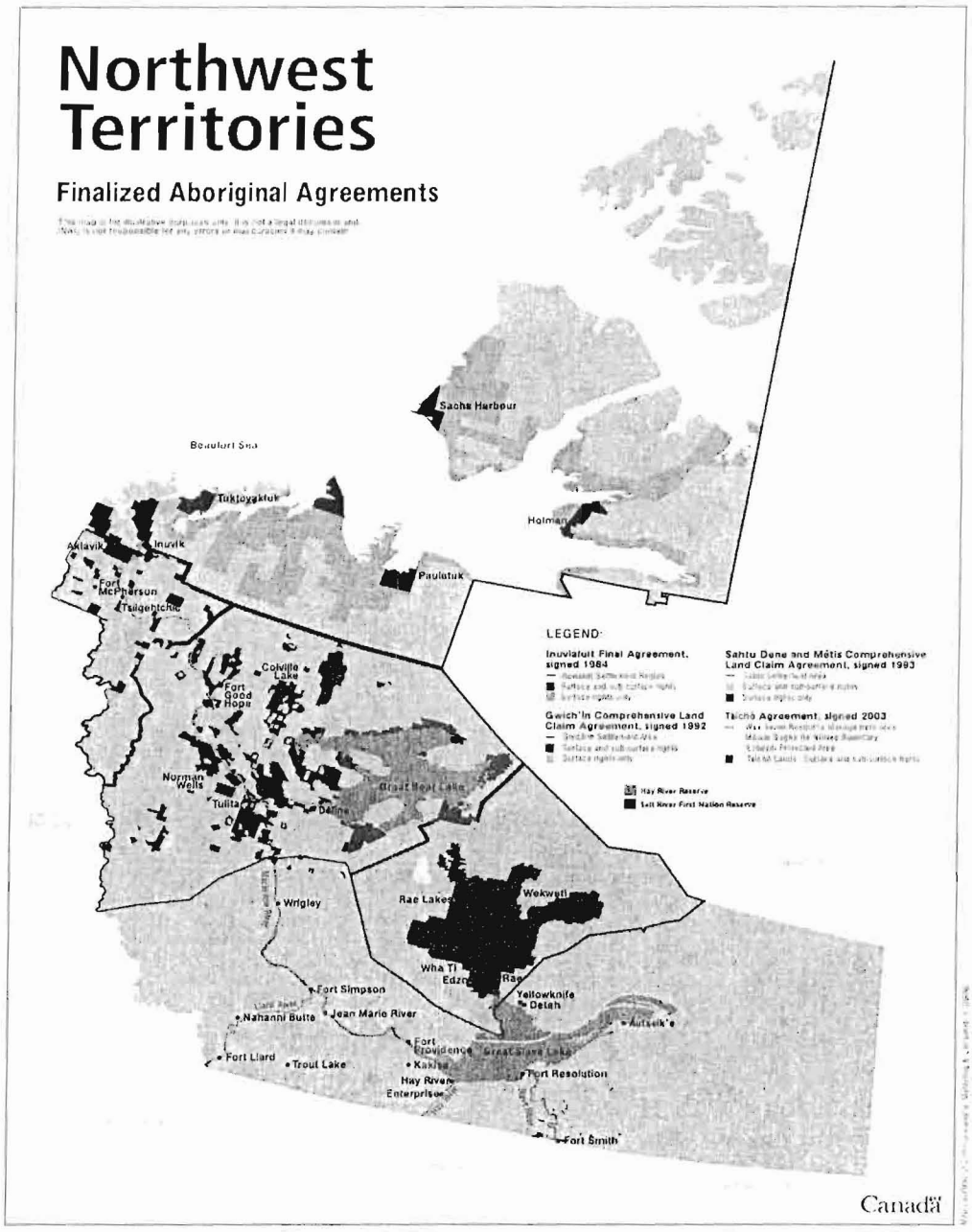
Figure 2: Map Historic Treaties

The dispossession of land in Treaty 8 is significant: "the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits..." (INAC 1899). This surrender of "rights, titles and privileges" suggests the scope of what the colonial treaty

process legally made (and continues to make) possible. Treaty 11 reads exactly the same, with the exception of the change in monarchical power: "the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for His Majesty the King and His Successors forever, all their rights, titles, and privileges whatsoever to the lands included within the following limits ..." (INAC 1921).[21] Land claims continue to be controversial from this point up until and during and after the first Environmental Assessment in the north.

In *Northern Frontier Northern Homeland* (1978), Justice Thomas Berger suggests that gas pipeline development in the Mackenzie Delta would be best postponed until land claims are settled. Thirty years later, mineral development projects continue to escalate despite the unsettled status of particular land claims processes in the NWT. There are four settled land claim areas in the NWT (Figure 3): The Inuvialuit (1984), the Gwich'in (1992), Sahtu (1994) and the Tli' Cho (2005) settlement regions. Of the four settled land claim agreements in the NWT, the Tli'Cho agreement is the sole settlement region where both surface and sub-surface of land rights are secured. The other three agreements, Inuvialuit, Gwich'in, and Sahtu, grant pockets of sub-surface rights to First Nations but the majority are still controlled by the Crown. Unsettled regions include the Deh Cho Territory and the Akaitcho Territory Dene First Nations. Controversy over the Mackenzie Valley Pipeline continues in the Deh Cho region. The Deh Cho region is located south along the Sahtu Dene and Métis Comprehensive land claim agreement border and stretches along the south-western side of the Tli'Cho agreement and then directly south to the perimeter of the NWT.

[21] Treaty Texts accessed August 2008 at: http://www.ainc-inac.gc.ca/pr/trts/hti/site/trindex_e.html l



(INAC 2005)

Figure 3: Map of NWT Finalized Aboriginal Agreements

Justice Berger begins his report with a letter to the Minister of Indian and Northern Affairs and Development. The letter opens with "we are now at the last frontier" and later continues to suggest that "Euro-Canadian society has refused to take native culture seriously... given the native people's use of the land- the Europeans had no difficulty in supposing that native people possessed no real culture at all" (1978: xix). It is politically incorrect (not to mention racist) to state that native people possess no real culture. Is there a parallel between what Berger is saying about European attitudes and the sense of apathy among multi-national and Canadian investment interests towards claims to aboriginal title? It is the case that attitudes amongst those making mineral exploration investment decisions are less blatantly racist than in Berger's historical world, when Euro-Canadian society supposed native people possess no real culture at all.

It is of course problematic to create a binary between culturally essentialized northern indigenous peoples and whites. The two communities overlap in complex ways and the history of aboriginal and Métis people in the mining industry is significant. Many aboriginal and Métis people work in mining, but most in lower wage jobs. Gibson (2008) reports that aboriginal people hold a mere six per cent of professional diamond mining jobs in the NWT, but forty six percent of entry level and semi-skilled jobs.[22]

The Berger Inquiry may be criticized for calling on an idealized pre-modern notion of indigeneity that is even more inadequate in a contemporary context. The significance of this report lies in the fact that for the first time natives in the north were given a legal voice and agency with which to speak to southerners. Though the history of

[22] See Gibson 2008, "Negotiated Spaces: Work, Home, and Relationships in the Dene Diamond economy" Table 1.4 for a detailed breakdown of diamond mine employment in the NWT.

First Nations and Métis in the mining industry is significant, of particular relevance is the fact that many of the problems documented by Berger thirty years ago still hold today.

For example, Berger asks 'who lives in the north?' and flags the significance of a population which, though socially and economically 'southern,' nonetheless work and reside in the north for extended periods of time:

"A large part of the white population consists of public servants, employees of the mining industry and oil and gas industry and their families. Most of them do not regard the north as their permanent home, and usually return south ... the future of the north ought not to be determined only by our own southern ideas of frontier development. It should also reflect the ideas of the people who call it their homeland" (1978: xix).

One aim in referencing the Berger report is to highlight the uniqueness of northern places and differences between northern and southern communities in Canada. Historically, in both a legal and social sense it is important to bear in mind whose homeland and whose resources are at stake. Though the devolution process in the north is changing the political atmosphere, despite the carving out of Nunavut (1999) and the Mackenzie Valley Environmental Management Act (1998) the federal decision making power still largely resides in the hands of the Department of Indian and Northern Affairs.

There has been an active process of devolution taking place with power becoming localized as seen in the creation of the Mackenzie Valley Environmental Impact Review Board discussed next. This power is largely in the form of regulation and as opposed to the absolute right to sub-surface property, with the exception of the previously mentioned the Tli'Cho land claim agreement. As evident now as during the Berger inquiry and the original Treaty processes is mining's influence on property rights. The fact is that free-

entry mining rights supersede aboriginal title remains, this is evident with a glance at how little sub-surface control aboriginal groups in the north have even after land claims are settled.

The Gwich'in land claim agreement did pay particular attention to free-entry and the Mining Regulations and the Tli'Cho agreement guarantees sub-surface rights.[23] These agreements do not outweigh Crown ownership and privatization of mineral rights in the rest of the NWT. The Mackenzie Valley Environmental Management Act established a process to transfer power historically located in Ottawa to Yellowknife and regional aboriginal groups within the NWT. The power of the Mackenzie Valley Environmental Review Board is regulatory power.

Mackenzie Valley Environmental Impact Review Board

The Mackenzie Valley Environmental Impact Review Board (MVEIRB) was created under the Mackenzie Valley Environmental Resource Management Act (1998) legislated to foster a locally based decision making process. "The MVEIRB's mission is to conduct quality environmental impact assessments that protect the environment and the social, economic and cultural well being of the residents of the Mackenzie Valley and of all Canadians."[24] It is a joint review panel, whereby First Nation actors are given more say in development decisions. Thus the MVEIRB participates in Environmental Impact Assessment procedures.

[23] The significance of the Tli'Cho agreement and the mineral claims negotiations is a notable because it is the first (and only) land claim that assures both surface and sub-surface land rights.

[24] http://www.mveirb.nt.ca/, accessed July 2008

As MacDonald and Gibson note, review panels such as the MVEIRB are not unique to the NWT. Joint review boards are either established or being established in the United States, Finland, Australia and New Zealand. "The combined trends of the assertion of aboriginal rights and a lack of public trust in corporate industry regulation has contributed to the creation of co-management boards, such as in Canada's Mackenzie Valley" (MacDonald and Gibson 2006:16). The MVEIRB oversees Environmental Impact Assessments for development and resource extraction projects in the NWT.

Development proposals are sent to the MVEIRB for a thorough assessment if a project is deemed uncertain by a regional water board in the NWT. Regional water boards are the regulatory bodies that branch out under the MVEIRB. In rare cases the MVEIRB decides to disallow development, but more often provides advice on improving Environmental Impact Assessment plans, and grants water and land use permits. The Minister of Indian and Northern Affairs Canada must sign and approve decisions subject to full environmental review, and it is not until this approval that decisions are final.

Christensen and Grant (2006: 115) argue that requiring the authority of the Minister of INAC acts as a barrier to "genuine involvement" of Indigenous Knowledge and that "true capacity building in the NWT cannot succeed without the devolution of power from the federal government to territorial and First Nations governments". Further, given that the developer is able to reapply for required work permits and potentially vetoed projects, decisions to disallow development are effectively temporary.

I suggest the crucial stage of mineral rights allocation in all mineral development projects takes place prior to the MVEIRB review process. This is important because it is mineral rights that govern land use through the prioritization of exploration and

subsequent benefits that arise during the mineral development process. Next I explain the NWT and Nunavut Mining Regulations with a focus on laws that govern staking procedures.

2.4 Mineral Tenure Regulation in the Northwest Territories

The initial stage of all mineral exploration work and potential mine development is securing minerals through staking sub-surface mineral rights, governed by the Department of Indian and Northern Affairs. Battles over diamonds are contingent on the fundamental issue of access to and control over land. Diamonds are transferred through a series of stages of ownership before they reach the market. The very first stage in the transfer of ownership of minerals to private interests begins with staking sub-surface mineral rights. A firm understanding of how minerals such as diamonds come to be "owned" requires an explanation of the regulations that govern mineral tenure in the NWT and the free-entry principle. The regulations are important because they act to naturalize or in effect legally neutralize the privatization of minerals in the north. I come back to the notion of 'legal neutrality' in chapter four through the discussion of liberal notions of property.

The land and rights to land are divided by the legal creation of sub-surface properties, and then further divided to include minerals within the sub-surface. This powerful act of stratifying land, as we see below in mineral staking regulation, is in large part rendered an administrative task. Though recording a mineral claim may require expensive geological exploration work, the rules governing this process are relatively

straightforward. The fact that staking a mineral claim may in fact alienate land from historical landowners is distanced from the claim-staking process through regulations.

The Law of the Land: Staking Regulations

Until January 2008 the *Canada Mining Regulations* regulated exploration activities in the NWT. The *Canada Mining Regulations* did not regulate mining activities in all of Canada, but only in the NWT and Nunavut. The title of *Canada Mining Regulations* is deceiving, as is the fact that the title change in January 2008 to the *NWT and Nunavut Mining Regulations*[25] does not represent a jurisdictional change. Further, though there was a name change, the fundamental principles and basis of the regulations remain the same. Federal control over sub-surface land still holds in the NWT. As previously stated, this is even the case in areas where land claims have been settled, since the Crown retains sub-surface property rights (apart from the Tli'Cho agreement).

Where can mineral claims not be staked? Claims are legally excluded from cemeteries.[26] However, archaeological work must be undertaken in order for aboriginal burial grounds or cemeteries to be recognized, and much of the NWT has yet to have land use plans negotiated. Without land use plans, culturally significant areas like burial grounds are left unrecorded. First Nations do not have the same access to legal advice nor funds necessary to draw requisite lines on maps to signify areas of cultural significance. Thus, areas such as burial grounds may be left unrecognized. Under the law it is much easier to stake a mineral claim than to ensure that an aboriginal "claim" or land use decision is recognized.

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[25] http://laws.justice.gc.ca/en/T-7/C.R.C.-c.1516/ last accessed August 2008

[26] Sec.11, NWTNMR

Also excluded are places where mineral claims exist in good standing and areas where minerals are already granted or leased. Land withdrawal orders are out of bounds and cannot be staked.[27] First Nations have the right to withdraw lands in the interim in areas where land claims have yet to be settled. Such interim land withdrawals are limited. It is a difficult, expensive and lengthy process to withdraw land for First Nations who may be interested in (surface and/or sub-surface rights to) land that has yet to be settled in land claim agreements. There are also restrictions on the amount of land that can be withdrawn. These restrictions are negotiated with the federal, territorial and First Nation governments, and are specific to individual land claims.[28]

Claim areas also exclude lands that "are subject to a grant by her Majesty."[29] Section 11 in the *Canada Mining Regulations* was worded differently then the current *Northwest Territories and Nunavut Mining Regulations.* Section 11 no longer directly stipulates that areas of parkland cannot be staked. However, it is my assumption that this is still secured as this land is subject to a grant by her Majesty.

Landowners in Canada do not own sub-surface mineral rights to their own property. As one journalist writes, free miner's rights trump trespassing rights (Salcito 2004). This is part of what defines free-entry. The Department of Northern Affairs Mineral Development Division reports that notification is encouraged prior to claim staking.[30]

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[27] Sec.11, NWTNMR

[28] For example the Akaticho Treaty 8 process has land claims explained by INAC in "plain language." http://www.ainc-inac.gc.ca/nr/spch/2007/nov2107-ailw-faq-eng.asp accessed August 2008

[29] Sec. 11 NWTNMR. Section 11 is notably different then the newly amended NWTNMR compared to the *Canada Mining Regulations.* The current Section 11 is seemingly vague in contrast to the old Sec.11.

[30] personal communication/Interview

This highlights the ambiguities that arise over the distinction between surface and sub-surface properties. As the free-entry discussion in the following chapter suggests, the legal stratification of property into sub-surface and surface rights creates problems that are especially apparent in light of the free-entry principle that prioritizes right to mineral claim-staking. The maps that make the staking process straightforward for exploration companies in the NWT are highly technologically advanced.

Digital maps are available online in the form of spatially integrated dataset (SID viewer)[31] and can also be purchased from the Department of Indian and Northern Affairs. The government thus actively makes electronically based maps available online for industry use. The spatially integrated dataset provides imagery for the different legal factors that may affect the ability of a claim to be staked or a mine to be built. This includes things such as different land claim areas, other mineral claims still in good standing, parks and government operated land. In order to stake a claim there are regulations as to the length and width requirements of claim areas and legal parameters for the posts used and signage on the posts (eg. date time and company and corner demarked).[32]

Once a claim is staked, a form, sketch claim, and any authorization from the surface rights holder must be submitted to the mining recorder's office. The fee is $0.10 per acre. In order for a claim to remain active, "representation work" must be completed.[33] This includes activities such as drilling, geological, geochemical or geophysical work and road or airstrip construction to provide access. This work is

[31] SID viewer: http://nwt-tno.inac-ainc.gc.ca/ism-sid/index_e.asp. Last accessed August 2008
[32] Sec. 12-19 NWTNMR
[33] Sec. 38-42 NWTNMR

measured by the "cost per acre." There is a preliminary two-year period, where $4 per-acre, per year must be spent. Then a ten year lease from the recording date is available requiring representation work valued at $2 per acre per year.[34]

2.5 Conclusion

Central to debates surrounding free-entry is the right to aboriginal title. The first treaties in the NWT were Treaty 8 (1899) and 11 (1921), and in a contemporary context there are four settled land claims in the NWT with others under negotiation. Berger's report and his analysis of the relation between of aboriginal rights and development in the NWT were critical. Many of his comments are still relevant. However, some believe this report is a small step in providing northern aboriginal people with a legal voice in issues such as land title. In recent years, the formation of the Mackenzie Valley Environmental Review Board marks an important attempt by the federal government to incorporate aboriginal rights into development decision-making processes. Even so, ultimately mineral rights in the majority of the NWT continue to be held by the Crown and thus regulatory procedures such as the involvement in the Environmental Impact Assessment processes can only provide limited "localized power."

[34] See Appendix 1 for NWTNMR fee chart.

CHAPTER 3: FREE-ENTRY

CHAPTER 4: FREE-ENTRY

The aim of this chapter is to show how free-entry prioritizes capital investment under the pretext of neutrality and ties to my larger dispossession thesis. The historical context relevant to free-entry in the NWT has been provided, and I continue by connecting this with the history of mineral rights law in the area. Free-entry is defined and the concept is traced from the tin-mining district in Britain, referred to as the stannary district, to Canada's northwest. In the second part of this chapter there is a discussion of interview data that especially explores four themes: 1) the dated nature of free-entry 2) the polarized debate over free-entry 3) aboriginal rights and 4) the rapid increase in development in the north.

Free-entry is partially defined as the right to explore for minerals. Its origins have been traced back to Roman understandings of private property and free-mining laws in medieval Europe (Morine 1909: 57; Barton 1993: 114). In North America free-entry is tied to the history of mineral discovery and subsequent early mineral regulation laws. Regardless of the chosen frame of context, free-entry is a concept of continued controversy. The *American Mining Law* (1872) was written after the *BC Goldfields Act* (1859), the first Canadian mining legislation in the west. Leshy writes on the *American Mining Law*: "Though many regard [free-entry] as a sorry anachronism, influential interests are swift to rise fiercely to its defence" (Leshy 1987: 25). The *American Mining Law* raises the same concerns discussed below: "Nearly all of the public debate ... is over just one part of the Law rather than its entirety ... what preoccupies friend and foe alike is the idea of free-self-initiated access to the federal lands" (1987: 25). This

preoccupation is the topic of this chapter.

Many industry representatives support free-entry. But questions continually arise about the duty to consult aboriginal groups. Debate in the NWT is generally polarized, with much of industry insisting on the right to free-entry. The Department of Indian and Northern Affairs supports this mineral rights regime with regulations reflecting the unconditional right to mine. Some, especially those outside of industry, do not believe free-entry is the best way to govern mineral staking. Aboriginal and environmental groups, for example, generally disagree with an unconditional right to stake minerals.

During interviews the free-entry debate often surfaced at the onset of an initial question about the *Canada Mining Regulations*, which suggests its importance and controversial nature. Below, during the examination of free-entry principle and interview data, I argue the most important way in which free-entry creates conflict is by alienating First Nations from mineral rights. The free-entry principle and the institutionalization of "sub-surface rights" pre-determines mineral ownership, and this discriminates against aboriginal title rights leading to continued dispossession of land facilitated by the Canadian state from aboriginal groups.

3.1 Free-entry: The right to explore

Free-entry is the right to explore for minerals. Entry to lands is 'free' in that individuals or companies can stake a mineral claim without consulting anyone. In the NWT this means that by following mining regulations and literally staking land (by dating and marking corner posts), sub-surface mineral rights are secured. A mineral staking map must then be recorded at the Mining Recorders Office (Department of Indian

and Northern Affairs Canada). There are also work requirements that must be filed in order to keep these claims in 'good standing.' However access to lands, apart from those 'withdrawn', is unlimited, hence the term *free-entry*.

Barry Barton analyses the legal groundwork of the free-entry principle in *Canadian Law of Mining* (1993), providing a strong foundation for Karen Campbell's work. Campbell (2004: 2-3), who is an opponent of free-entry, outlines the premises that define the law of free-entry as follows:

- Mining prevails over private property interests.
- Mining is the best and highest use of Crown lands.
- All Crown lands are open for staking and mineral exploration unless they are expressly excluded or withdrawn by statute.

It is important to re-emphasize that all minerals are legally Crown minerals in Canada, unless otherwise stipulated.[35]

- Mining prevails over aboriginal land rights.
- Mineral tenures are appropriately granted on a first come first served basis.
- Mineral potential is so valuable that it warrants leaving the staked area potentially unusable for other resource interests.

Campbell further states there are three rights associated with free-entry:

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

Free-entry has been referred to as a 'principle' (McPherson 2003), or a law (Campbell 2004), or as a 'regime' (Bankes and Sharvit 1998). Campbell traces the origins of free-entry to feudalism and the British land system, a system based on the principle that the Crown has title to all land. In North American mining law free-entry

[35]At risk of its overstatement, I cannot help point out that the classic example of Crown right to minerals is that private landowners do not hold title to the sub-surface mineral rights below their houses.

originated during the gold rush in the mid-nineteenth century. The history of mining law in Canada and the US respectively is also tied to the gold rush sweeping through California and up to present day British Columbia (Barton 1993, Smith 1987: 23-24). Appendix Two lists the key legislation tracing the law of free-entry throughout western and northern Canada. It was not until the 1930s, when gold was discovered in the NWT, that mining and thus mineral tenure law became an issue in the north, east of the Yukon.

Regulations have evolved to specify more stringent work requirements than at the discovery of gold in the north. Several amendments have been made in the NWT with regard to "representation work," for example.[36] However, prospectors continue to adopt a distinctly 'frontier' mentality even in contemporary times, insofar as they feel they have an "unconditional right to explore for minerals" (McPherson 2003: xix). "Over time, the details of legal title have evolved but the concept of free-entry has persisted; it is at the root of Canadian mineral administration and is responsible for the prosperity and long reach of the mining industry" (McPherson 2003: xix). Those who strongly believe in the right to free-entry assume that, without this way of governing minerals, Canada would not be what it is today as the sheer economic benefits that have resulted would never have been possible. As such, macro-economic considerations in industry interests have historically trumped all other considerations. This development-driven argument prioritizes capital investment. Under this logic, the primary use of land is resource extraction, which is defended by the prioritization of job creation.

Bearing in mind the antiquated context of mining law and its North American roots in the gold rush, parties opposed to free-entry, such as environmental non-

[36] Kate Hearn (1993) reviews this representation work in the NWT

governmental organizations like the Canadian Arctic Resource Committee, lobby for a rewrite of mineral tenure law. A Vancouver based non-profit environmental law organization, West Coast Environmental Law, has also protested against free-entry laws. Campbell, writing for West Coast Environmental Law, states: "the world has changed rather dramatically since the 1850s, but free-entry laws have not. These laws were passed at a time when the scope and scale of hard rock mining that exist today would not even have been contemplated" (2004: 4).

Critics of free-entry argue the principle deems mining the highest and best use of land, and that this is problematic (Barton 1993; Bankes and Sharvit 1999; Campbell 2004). Morally, free-entry is a problem not just because of conflicting property rights, but also because the prioritization of capital interest stresses on the environment and exacerbate uneven distributions of wealth.[37]

According to several industry representatives, free-entry, or the right to explore for minerals, is fundamental to a vibrant economy. Many in industry cannot imagine an alternative that allows the competitive climate that drives mineral exploration. This is not the only reason industry generally insists on free-entry in the north. Compounding the controversy, mineral exploration is often quite secretive in nature. Prospectors and exploration crews keep staking locations quiet in order to obtain some advantage over the

[37] It is of course, not just free-entry that produces uneven power and wealth distribution in the north. "the economy of the NWT remains extremely unbalanced, fundamentally dependent on federal largesse, and vulnerable to swings in federal attitudes regarding continued support of the northern bureaucracy, as well as in markets for the primary products which represent the bulk of the NWT's exports" (DiFrancesco 2000: 114).

competition, often from other Canadian southern industrial interests; again, exhibiting similarities to the frontier mentality.[38]

Legal Context: From the British Stannaries through California to Canada

There is a shortage of literature directly tracing the lineage of mining regulation to the NWT, though Barton (1993) and Morine (1909) have written detailed accounts of Canadian mining law, with historical context outside a legal frame. Barton (1993:114) lists the three categories of law that governed mining in England. The first was "the common law of ownership", in which the proprietor of the surface owned their sub-surface minerals. The second is the "royal prerogative to gold and silver" in effect during the sixteenth and seventeenth centuries when precious metals were the prerogative of two companies with monopoly rights to royal mines. The third consists of special mining laws that were local customary law. These laws were active in the stannary districts throughout England: Cornwall and Devon, the Mendip Hills, the Peak District, the Forest of Dean and the Alston moor in Cumberland.

It is this third category of mining regulation that Barton argues has the most in common with Canada's mining legislation.[39] These English districts "preserved an ancient concept of free-mining" of great importance in Germany and medieval Europe (Barton: 115). English tin-mining law is an important antecedent of free-entry and is similar to the *Northwest Territories and Nunavut Mining Regulations*. Corner posts were used to demarcate claims. These posts were mounds of rocks or cut turf, and claims had

[38] "The lords of yesterday" is a phrase used by Wilkinson (1992) in Bankes and Sharvitt (1998: 12) that describes free-entry and other policies that seem appropriate to frontier mentalities.

[39] Barton writes this may seem "arcane ... at first sight" (1993: 114).

to be registered at the stannary court. This is similar to the *Northwest Territories and Nunavut Mining Regulations* that require boundaries to be staked and clams recorded at the Mining Recorders Office, as described in chapter two.

The gold rushes beginning in California in 1849 and British Columbia in 1858 are key to the development of Canadian mining laws, including those in the NWT. "The California gold rush was remarkable for the complete lack of governmental authority or mining law until well after the rush had peaked" (Barton 1993: 116). In the initial California camps the miners themselves would meet to establish a "simple code," as to who had rights to gold and how this was decided. The miners, who travelled up through British Columbia following gold discoveries, decided the laws in each mining camp. Free-entry travelled into Canada with the miners who brought their mining camp knowledge and familiarity with free-entry systems (Barton 1993: 116).

The *BC Goldfields Act* was signed on September 1, 1859 and up until this point mining regulations were decided locally, like in the Californian camps by many of the same miners. British Columbia became a colony in 1858 and the new government had two concerns with the lack of gold rush regulation. One was respect for British sovereignty. The other was that "miners would take the law into their own hands" (Barton 1993: 118). The community of miners was international, and the local laws were similar in gold mining camps in Australia and New Zealand.

The gold rush and locally developed mining rules were vital to Canadian mining law. Government in British Columbia found free-entry suited the needs of public policy since it encouraged mining and accommodated miner's free-entry tradition (Barton 1993: 117). Governments today, including the Department of Indian and Northern Affairs,

continue to accommodate the mining industry's demand for free-entry even though a lot has changed since the time of the gold rush.

The *Dominion Lands Act* came into effect in 1872, and the formation of Canadian territories ensued. In 1897 the Yukon became a territory and the first placer regulations were written. These only accounted for placer mining in the Yukon. The Quartz Mining Regulations were made under the *Dominion Lands Act* in 1898 for hard rock mining. They were a copy of the Mineral Act of 1896 active in British Columbia. These were changed in 1917 when the twenty-one year renewable lease was established.[40] Mining regulations in Canada's territorial north changed to the *Yukon Quartz Act* in 1924 and Barton points out they remain the least amended mining legislation in all of Canada. He also stipulates that they still functioned in the NWT under the title the *Canada Mining Regulations* (1993: 147). However by 1993 this is not necessarily entirely accurate, because informants discussed a difference in the placer mining regulations in the Yukon than those present in the *Yukon Quartz Act.* This likely predated Barton's 1993 rendition of mining legislation in the NWT. But what is certain is that the *Canada Mining Regulations* were very closely based on the *Yukon Quartz Act* of 1924. The name change in January 2008 from the *Canada Mining Regulations* to the *Northwest Territories and Nunavut Mining Regulations* is a result of amendments that primarily served to update regulations and were made in consultation with mining industry representatives. The following section presents a discussion of the *Canada Mining Regulations* that outlines the main controversies expressed over the law of free-entry and how the politics over free-entry are framed. This includes the problem that ideology underpinning the

[40] There are many leases still active in the NWT passed on from one generation to another with the twenty-one year lease.

regulations is dated, and that debate over free-entry is polarized. How aboriginal land title factors into free-entry debates is also outlined with a final comment on the speed of development. This section is based on interviews concerning mining regulations in July and August of 2007, prior to the name change that took place in January 2008.

3.2 An antiquated system?

As one correspondent put it: "The free-entry system is a problem. It's a hundred and some odd years out of date. In my view it conflicts directly with the aboriginal rights issue." Similarly, two interviewees compared free-entry directly to the 'dinosaur ages.' "They've got to adapt just like the forestry industry has done and the oil and gas industry has done to a certain degree ... And, you know, they're the dinosaurs of industry at this point." Though there is an attitude of general frustration amongst those who oppose free-entry, there is an understanding as to why many in industry still believe in the right of free-entry:

> Why wouldn't they want to continue essentially access to 90 or so per cent of the land in NWT? I mean that's pretty hard to give up, once you've got it. So, they are fighting pretty hard to maintain that. They've got to move into the 20th Century. I mean these guys are still in the 19th Century, 18th Century, some of them. Let alone the 20th Century. And it is just so arrogant.

Informants from all sides of the debate, from Department of Indian and Northern Affairs to environmental and aboriginal consultants to mineral industry representatives, noted the regulations were out-dated. Though some things have changed with the implementation of amendments and the title change from the *Canada Mining Regulations* to *Northwest Territories and Nunavut Mining Regulations,* the dated free-entry principle that backs the

regulations remains the same.

As an industry representative stated, prior to the amendments and this change in the name of the regulations:

> [The regulations are] still in feet and inches. We wanted [the regulations] in metric. Some minor changes to eliminate some of the administrative problems ... We weren't asking for nor did we really consider it a good idea to do a major revamp of the regulations, because really they've served the industry pretty well. And I think they've served the north pretty well ... they're quite fair, and the major reason for them really is to keep mining companies from squabbling with one another. [The regulations] had some advantage of having that longevity without any subsequent changes. So, we were pretty comfortable with them- the industry.

The changes that have been made to what were the *Canada Mining Regulations* have done just as this informant says and are predominantly administrative. There has been no major overhaul of the free-entry principle. So, though all informants concur that the regulations are dated, the perceived problems this poses are divided. For some (mainly the mining industry and the Department of Indian and Northern Affairs) it is an administrative problem. For others, the power to privatize minerals without consulting aboriginal people is what needs to be changed.

Polarized Debate

The person just quoted mentions the regulations have served industry and the north "pretty well." They are "fair" and as I shall explain in more detail shortly, "they keep mining companies from squabbling with one another."

People are generally either quite strongly for or strongly against free-entry. An anti-free-entry correspondent put it:

> Free-entry is a system by which interested parties with a prospecting license can go in and stake mineral rights without prior authorization ... without even notifying nearby aboriginal people. And then go register those claims, and acquire rights to develop the sub-surface and obligations to do work. Is there something wrong with that picture? Yes, I would suggest so!

Others I interviewed agreed. Lack of adequate land-use planning was another complaint about free-entry mentioned more than once. "The *Canada Mining Regulations* still allow exploration anywhere- anywhere. In other words there is no land use planning recognition. That is absurd. They can go stake in your backyard, if they want. They can. If you were downtown Toronto they could stake it."

Some believe opposition to free-entry is associated with those who simply do not 'get' the mining industry. One industry representative stated: "What we're hearing now, of course, is everybody wants to review free-entry and all that stuff, but frankly we're not interested... they're really called for by people who don't understand the mineral industry." Here, there is no recognition that all people do not value mineral development in the same way northern development interests do, only that there are people who "get it" and people who do not. This belief is generally held by many in mining that point to job creation as justification for fast regulatory processes and the continued application of free-entry staking.

In sharp contrast, a correspondent active in the NGO community does not find the mineral staking law in the NWT "fair." He said:

> There are other ways of administering the mineral system ... Whether it's map staking or cash bid system or a concessions system. The mining industry will tell you 'no, we can't go to that system because there is just too much uncertainty about what's actually out there and no one would want to bid on a piece of property.' Well, there may be some element of truth to that where there has been relatively little exploration. But, that's

> just bullshit ... they just like to be able to go wherever they want whenever they want.

This person hints at a recognition of industry's argument about the uncertainty of other types of mineral rights allocation. They address the fear industry holds, that mining will not prosper without free-entry because of a loss in the competitive atmosphere. There is the general dismissive comment, "that's just bullshit," in reference to the so-called uncertainty about mineral availability. Continuing with the examination of the stark differences between industry's pro-free entry argument and its opposition, another person in industry put the free-entry principle as follows:

> Basically there's nothing free about it. You have to pay aircraft, you have to pay recording fees, you have to pay, you have to pay, you have to pay. So, it's not really properly worded as free-entry. But, having said that, just to keep the term similar so everyone recognizes it- that which keeps the industry working best, is free-entry... And I think that if industry is not careful what's going to happen is they're going to have free-entry qualified by the courts and there going to say this is what it is going to be from now on, you're going to have to do it like this, this, this and this. And part of the problem with our industry is that I don't want my neighbour to know where I'm going staking claims because he might go over there and try and get there before me.

In support of free-entry, the frontier like quality of rushing to get land with the fear of others staking claims first continually surfaces. Industry representatives use the competitive nature of mineral exploration to explain the need for free-entry. The secretive nature of mineral exploration makes them unable to envision any other way of claim staking. This is especially true amongst older industry players. There are two reasons for this. One, free-entry is normative customary right. The nostalgic appeal of prospectors doing geological work and staking claims has not escaped the romantic imaginations of many northern mineral development interests. In fact, they hold on to

this imaginary quite rigidly and some explicitly associated this right with freedom and democracy. Secondly, the fear of mineral claims being discovered by competition ("my neighbour") before the rightful discoverer has staked all of their claims is part of this frontier imagination. To give one last indication of how the customary right of free-entry figures into political imaginations:

> Usually it's the ecologists or some group, they present this [alternative] idea [to free-entry] and it's like how in god's name would this work? That's communism, that's dictatorship, that's not democracy and ah, that's not what our system is built on. So, if you want to do that for mining are you going to do that for everything else? Where the government just takes over everything and there's no private enterprise?

This fear of the loss of private enterprise is tied to understandings of the way that free-entry should function. In the above, spoken by a person active in Yellowknife's mining community, the freedom associated with private enterprise is an element associated with "what our system is built on." Liberal ideals of freedom and democracy dominate. This matters to the discussion in chapter four, which describes the classical model of property ownership. The legal framing of aboriginal rights is drawn on next.

3.3 Aboriginal Title and Section 35

Focus on Environmental Impact Assessments displaces attention from the fundamental property regimes in operation. The institutionalization of property in the form of "sub-surface mineral rights" is fundamentally a dispossession of land from aboriginal people by the Canadian state. In order to illustrate this, below I focus on understandings of politics and the political and how these understandings may explain the normative legal rights to mineral regimes in the NWT. What rights, apart from mineral rights, are at stake in the practice of free-entry?

Opposition to mineral rights is most often framed in terms of the violation of the right to aboriginal title. During interview discussions about potential legal battles, Section 35 of the Canadian Charter of Rights and Freedoms (1982) came up often. Section 35, in Part Two of the Charter, states the following under "the Rights of the Aboriginal Peoples of Canada":

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35 of the Charter is frequently called on in defence of aboriginal rights. Among the more important precedents is the *R. v. Sparrow* judgement of the Supreme Court of Canada of May 31, 1990. *Sparrow* involved an aboriginal British Columbian claiming the right to fish with a larger net than permitted by the Fisheries Act. The right to fish was claimed as an aboriginal right. "In *Sparrow*, the court gives a broad interpretation to section 35(1) and thereby provides some satisfaction and hope to the aboriginal people of Canada in their struggle to have the recognition and affirmation of their rights" (Isaac 1993: 201). Sparrow won his case based on the "recognized and affirmed" right to aboriginal title.

The meaning of "aboriginal treaty rights," and how in practice they are "recognized and affirmed," remains legally uncertain (see Morse 1998:). The relative weakness of legal claims to aboriginal title arose during interviews. This is especially relevant in contrast to the staking and claiming of mineral rights. One informant pointed out that when calling on Section 35, the aboriginal party must explain: "title for what?" This sentiment was expressed in a voice of frustration. Section 35 claims were dismissed apparently due to the ambiguity of aboriginal title.

In contrast, during the same interview, the *Canada Mining Regulations* were referred to as "the bible." The right to mine, if understood as the right to claim minerals owned by the Crown, is therefore interpreted and represented in regulations as a clearly defined right. Mineral staking regulations are straightforward to interpret. Is it a wonder that mining regulations are interpreted as a firm rule of law whereas, Section 35 remains "ambiguous"?

Many powerful actors in the north support the free-entry regime. But section 35 provides critics with an important weapon in the free-entry debate. Bankes and Sharvitt, after providing evidence based on case law focusing primarily on *Sparrow* and *Delgamuukw*, argue: "We think 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" (1998: 91).

Section 35 case law presents a legal argument that the law of free-entry dispossesses First Nations of title rights without prior consultation. Free-entry

dispossesses aboriginal people from land that they have historical rights to in areas of unsettled land claims, in that there is no prior consultation with existing rights holders.

Those interviewees who support free-entry do not want to see it before the courts, perhaps because they know it could be deemed as unconstitutional. Those who wish to end free-entry are of course anxious that the principle be subject to judicial scrutiny: "[Free-entry] is a problem and it's going to have to be resolved. And it is probably going to have to be resolved through the courts themselves... It would probably be in the light of section 35," said one interviewee.

Interviews revealed some industry members and representatives fear free-entry being brought to court. There is however, also common expectation of a legal examination of the law of free-entry.

> Somehow at some point some aboriginal group will say you can't do this. We're taking you to court and they win. And the *Canada Mining Regulations* get tossed out ... that is what it's going to take. Because government is not going to willingly make the mechanical linkages over the strong opposition of the mining industry. They are just not going to do it until it is forced on them ... I have been waiting for that test case.

The 'mechanical linkages' refer to the legal steps that could put an end to free-entry. Some informants predict the precedent will be set first in Ontario, where there is currently active opposition to the *Ontario Mining Act*.[41] Free-entry legislation could then change across the country, including in the NWT.

There is a possibility then, that the right to aboriginal title might trump free-entry. However, aboriginal title is ambiguous, as is the Charter itself. Bakan writes that the Canadian Charter of Rights is "just words." "Recasting the 'living tree' metaphor so

[41] Concern has led to scheduled "public and stakeholder" meetings to modernize the *Ontario Mining Act* in September 2008. Included first on the list of policy discussion topics is "the mineral tenure system, including free-entry." *Press Release, August 11, 2008. Ministry of Northern Development and Mines*

often used to describe [the Charter] is only paper, dead tree, with ink on it. It's fine sounding words of justice are only words..." (1997:3). He suggests the legal system is fundamentally liberal, which results in a conservative institution. This is an important contribution to understanding how mineral staking regulations have a stronger utilitarian appeal than aboriginal title rights. It is the very institution of mineral rights that guide claim staking. The regulations that set forth this process are simple arithmetic in contrast to messy "aboriginal title."

Since the early years of gold mining in the NWT there has been some substantial progress in aboriginal law, with increasing recognition of land rights and the need for treaty negotiations. Throughout, free-entry has remained fundamentally unchanged. The dated nature of this principle is apparent when contrasting Section 35 of the Charter to mineral rights regulations. When free-entry was initiated in North America during the 1800s the dispossession of land from aboriginal people was common, as seen in the numbered Treaties. Nevertheless the law safeguards free-entry. Differences in priorities over land use come to light in discussions that contrast industry interests with land claims.

Land Claims

Land claim negotiations and mining determine land rights, whether surface or sub-surface. The conflict between the right to aboriginal title and the right to mine is crucial. The judgment that staking is a priority is accepted as correct until proved otherwise. This judgement prioritizes mining, in effect determines property relations and has an immense impact on land use. It also alienates land from First Nations interests in areas where land

claims have yet to be settled.

Sub-surface rights are negotiated separately from surface rights in NWT land claim negotiations. In Nunavut, the Crown still holds rights sub-surface to 89.2 percent of Inuit owned land (McPherson 2003). As a reminder, of the four settled land claim agreements in the NWT, the Tli'Cho agreement is the sole settlement region where both surface and sub-surface of land rights are secured. An employee of the Department of Indian and Northern Affairs explained it like this:

> In these three regions [Inuvialuit region, the Gwich'in and the Sahtu region] there is the sub-surface we call it and then there is the surface lands, where the First Nation or the Inuvialuit people have ownership to the surface of the land-- but Canada still owns the sub-surface rights. So, we [Canada] are allowed to issue mineral tenure on those surface lands, whether it be a mineral claim, a claim taken to lease a leased claim or a prospecting permit.

The Canadian state stratifies property rights into the sub-surface and surface. Staking sub-surface rights largely determines property decisions for two years, which can then be extended. Through the process of recording of mineral claims, property rights are necessarily demoted to administrative process. This is done through the institutionalization of property and the stratification of property rights for the purpose of resource development. As regulations stipulate, staking a mineral claim involves marking corner posts and recording a claim sketch at the Mineral Recorder's Office at the Department of Indian and Northern Affairs. This is part of how free-entry is in essence an act of dispossession of land from anyone other than minerals industry interests. To reiterate Bakan's recognition of the law as a conservative institution, it is the regulations that keep this mineral rights regime in place. This power in effect results in the dispossession of land, which is especially apparent in areas of unsettled First Nations land

claims.

Industry support for land claim negotiations is expressed in a succinct fashion here:

> That's a way of stopping everything until [aboriginal people] have a claim... the mineral industry generally is very supportive of land claims. We just want them to move along and find out what areas they have claims [slams desk], find out who the landlord is, what the rules are, and let's get back to business! It's a great frustration to us how long they're taking and we understand the political nature of it.

Industry in the north is supportive of land claims because they establish the rules for business. Land claims, however, can "stop everything" so industry "wants them to move along ... find out who the landlord is, and let's get back to business." The "political nature" of the land here is a great frustration. What is the political nature of land claims according to this informant?

> What is happening we [Industry] believe is that people are using the Mackenzie Valley Resource Management Act for political reasons. It's got nothing to do with the environment. It's got nothing to do with socio-economics. It's got nothing to do with the cultural impacts of the project. It's all about land claims.

Is it assumed that the assessment processes involved in environmental and cultural-decision making should not be part of "politics"? The mineral industry in the north understands the political nature of anti-development interests using 'land claims' as a way of slowing down business as usual, but it does not see the regulatory process involved with environmental and social issues as something that should be deemed "political" in nature.

Land claims are of course political, and property rights are at stake. The assumption of the political nature of the Mackenzie Valley Environmental Resource Act begs questions as to whose politics are enacted during mineral development projects in

this region?

Does politics, according to the informant quoted above, exclude the environment, socio-economics, and culture? According to this logic land claims are political because of their capacity to slow development. This narrow definition of what constitutes the political illustrates one problem with mineral development politics. Industry has much strength in the political arena of mineral rights law. In the north, is the assumption that the role of formal politics is to enable development? Are land claims "political" because they reflect "special interests" in the face of the status quo? The Mackenzie Valley Environmental Management Act has a historically unprecedented amount of environmental assessment decision-making power and is slowing development. But land rights and property ownership are still outside this 'Management' Act.

Decision making bodies that require aboriginal participation, like the Mackenzie Valley Environmental Review Board, strengthen aboriginal voices in formal political decision-making. But they may also be seen to mask resource appropriation by giving the impression of aboriginal consent, which may not always be the case. The Mackenzie Valley Review Board only has the right essentially to give the okay (and with enough problematic evidence temporarily veto) development projects.

3.4 The Rapid Speed of Development

For industry, the interruption of rapid development is a problem. Not all agree the speed of development under the current Environmental Assessment legislation in the NWT is a problem: "[Industry is] always complaining about how difficult the regulatory system is, but to go from grassroots discovery to full production in eight years for a

diamond mine, now that is world class. That's not slow, I mean it's just not." Contrary to industry's belief in development as saviour, another informant points out that slowing down development is not necessarily a bad thing: "The level of activity is so intense right now, that if it were to slow down, it would be probably very healthy for the environment and for the people." The "faltering economy" argument, so often employed by industry, instils fear, "which is no way to make sound decisions about humans and their environment."

There are polarized opinions about the rush for development and the role of land claims. The industry representative quoted above states that settling land claims is important to maintain the speed of business. But many disagree:

> If Canada wants more development in the north, give more land to the aboriginal people ... They will develop it, they will get benefits from it and they will develop it faster, I hope better, and certainly faster, than if development is imposed on them. And they get minimal benefits as a result. It seems so blindingly obvious to me.

To others the idea of giving more land to First Nations is less "blindingly obvious":

> There is an increasing call from aboriginal groups to be consulted at the early stage exploration. We [industry] are dealing with the people who have land claims in place. Who therefore have an advantage in having their land developed in terms of revenues to their band, employment for their people, etc. We're finding those discussions go relatively easy. But the places that don't have settled claims, they don't see the advantages. I don't understand why not but they don't really understand the advantages of having development on their land.

It would seem the differing opinions about free-entry, development and land claims come down to power and profits. And this gets represented in a legal battle over rights where the institutionalization of property via mineral rights pre-determines the outcomes:

> Fundamentally, what it comes down to is you have two conflicting rights ... In the case of the Yellowknife Dene the existing right is historical

> cultural use and spiritual as well. What you end up with is one body of rights in Canada infringing on another body of rights both of which are important. Which is more important: aboriginal rights or mining rights? Up until now it's been mining rights.

Or as another interviewee said:

> It's a colonial system, administered out of Ottawa, by and large, and there is no colonial system that didn't feel that it's doing the right thing for its colony. But there is probably no colonial system where its colony felt anything but oppressed. I mean this is a modern colonial context, and we're fighting value. That value based argument. It's all about values. It's all about who has what rights. My view is that the people in whose backyard something is happening have the right, the absolute right, to be involved and to have a significant say in what happens.

Aboriginal people do gain employments benefits and do have an increasing voice in development decisions, as seen with the implementation of the Mackenzie Valley Environmental Resource Management Act. Yet, is the very framing of these decisions skewed by the decisions made by Canadians who have historically governed the north? Some say this system of governing is colonial. Ward Churchill states the wealth of the US is absolutely dependent on it's "internal colonies." Could this also be part of the story that provides both a historical and contemporary context to mineral rights in the NWT? And further how may this history be understood as part of normative understandings of property?

CHAPTER 4: THE PROPERTIES OF PROPERTY

That property is reducible to private property appears commonplace.
Blomley 2004: 3

Many rules of property law are not only geared to protecting particular individual interests but are designed to sustain the system of personal and market relationships that allows those interests to flourish.
Singer 2000b: 16

I have presented two dimensions relevant to the context of diamonds and mineral exploration in the NWT: 1) The historical significance of mining and specifically the importance of gold in the settlement of the NWT, and the shift in the 1990s to a new diamond economy; 2) The legal history of free-entry mining, Treaties 8 and 11, and the contemporary aboriginal land claims process, in order to further explain the significance of resource development during land claim negotiations. The fact that both mineral rights and aboriginal title exist on the same lands remains of central concern. Overlapping claims result in active conflict over the same material spaces and these conflicts are exercised through rights based arguments. I now explain these conflicts in terms of some of the underlying ideologies of property.

Of primary importance is the legal practice of mineral staking, which pre-determines decisions regarding the distribution of land and which favours mining interests over aboriginal and private property rights. Mineral rights and capital investment are prioritized by the Canadian state, thus dispossessing land from anyone who may lay claim to a staked area, apart from the mineral rights title holder.

In this chapter, I define the classical model of ownership. This follows the work of Blomley (2004) and Singer (2000), who provide extensive critiques of the classical ownership model.[42] The elements of property I focus on may be enumerated as follows: 1) property as a *thing*, 2) property as a *right*, 3) property is associated with *clear boundaries* and, 4) property is allied with *individual freedom.* These elements of property contribute to the long standing right of free-entry, still practiced throughout much of North America.

Singer makes an argument that is particularly useful. He argues that the aforementioned elements of the classical ownership model obscure an understanding of property as necessarily relational. Singer may also be critiqued for failing to take into account the importance of the historical, legal lineage of property. Thus, I will define the social relations model (Singer 2000b), while both applying and critiquing its relevance to free-entry mineral regulations. My argument here is that given the ownership to sub-surface in much of the NWT is retained by the Crown, and there are overlapping claims from different groups to the same property, the Crown mediates social relations between contending interests. Singer's social relations model is able to explain these overlapping claims. However, it is not able to account for the material history that produces these relations in the first place.

[42] Blomley (2004) and Singer (2000) provide closer examinations of the classical model. This discussion is especially well covered in Chapter One of Blomley's *Unsettling The City* where classical ownership is used in reference to understanding gentrification in downtown Vancouver.

4.1 The Classical Model of Ownership

According to Blomley, under the classical ownership model property is "almost exclusively private property" and:

> A bright line is drawn between the owner and the state and although the state may intervene to limit the right of the owner if they threaten to harm others, such interventions are seen as secondary to the core rights of the owners. Property rights are negative rights in that sense. The ownership model also assumes a unitary, solitary, and identifiable owner, separated by boundaries that protect him or her from nonowners and grant the owner the power to exclude (2004: 2).

Classical conceptions of property describe a particular liberal model of ownership. I elaborate on four key characteristics of concern that define the classical model in Table 1, below, and relate them to free-entry mineral staking.

Table 1: The Classical Ownership Model and Free-entry Mineral Staking

Element of the Classical Ownership Model	Free-Entry Mineral Staking
Property is viewed as a *thing* (Cohen 1925; Macpherson 1978). There is a reification of property (Blomley 2004).	The thing in the case of mineral staking is the mineral commodity, such as gold or diamonds. Minerals are accessed through staking "sub-surface minerals rights."
Ownership involves a legal *exclusion* and is represented as an individual *right*. Focus is placed on particular rights, such as the right to autonomy, security and privacy (Singer 2000 b). This involves the presumption of *individual superiority*. Individual claims are deemed more important than collective claims.	Mineral rights exclude others from claiming minerals. They also largely deter any other land use priority by effectively seizing activity, apart from mineral development, on staked land.
Clear *boundaries* are drawn to ensure clear title. Clear title is emphasized (it is either mine, or yours) and requires property, to be either possessed or not; Under the classical model, ownership is a zero sum equation.	Staking a claim involves regulations, whereby staking posts are dated, and claim maps ensure the claim is proper size. There is a legal and clearly identifiable owner to recorded mineral claims.
Ownership is associated with *freedom* (Waldron 1991; Singer 2000 b). Again, this freedom is presumed as an individual freedom.	Individuals laying claims are required to have a prospector's license. Companies or individuals have the free, unconditional right to stake mineral claims, thus further reifying property as mineral rights.

Property: A thing, a right, or neither?

Macpherson (1978) writes that there is a difference between the common usage of property as a thing, and the legal usage of property as right. He argues that the state understands property as "rights" and that individuals understand property as "things." Thus, property understood as a thing produces a problematic reification of property. This reification is particularly relevant to minerals, such as diamonds, and the very bounds of a mineral right. Mineral rights are obtained through staking, at which point leases are granted to sub-surface property. Sub-surface minerals, such as gold or diamonds, are the

material "thing" technically at stake. Mineral leases can lead to conflict over land and a battle between mineral rights and claims to aboriginal title. But mineral rights have the advantage of being much more clearly defined, in terms of their utility, than 'ambiguous' aboriginal title. One disjuncture between these two rights is that the claim to aboriginal title faces more legal challenges than staking a mineral claim. This was made apparent in discussion of Section 35 in chapter three. Minerals can be understood as things to be owned, whereas aboriginal title and socio-historical land use arguments lack the material properties of a sub-surface commodity.

Blomley articulates this rather succinctly when he argues: "People who do not own property (insofar as the ownership model is concerned) are treated with a good deal of ambivalence, suspicion, and even hostility" (2004:4). By extension, we can begin to understand why First Nations, with no real claim to "own" land for mineral extraction, but merely a historical and cultural "claim" to land.[43] The fact that this land was dispossessed through the numbered treaty process, and then ostensibly given back (in some cases) through contemporary land claim agreements obscures the continued expropriation of resources by development interests. First Nations interests in land are not necessarily going to "improve" the land through mineral development as readily as mineral development interests that are primarily invested in strengthening markets.

The very creation of "sub-surface" as a category creates a binary relationship that gives preference to an individual rights holder. This is necessary to the classical model of ownership, in that it renders a legally just and particularly private property. Through the regulation of sub-surface property, individual mineral claim holders essentially exclude

[43] Blomley discusses this distinction between the claims to private property and aboriginal title (2004: 4).

anyone else. Recording mineral claims and the very mapping of geological areas requires land be viewed in light of its economic potential. The social realm is obscured by an understanding of property, strictly in terms of monetary worth. Critics of the liberal property doctrine argue that understandings of property are taken for granted, as property is pre-supposed as private and exclusive.[44]

Clear Boundaries and Spatial Orderings

The classical ownership model is bound to a particular spatial ordering, whereby lines are drawn to exclude all others. This reification of the mapping process is seen in stark example through the very drawing of mineral claims. Mapping mineral claim boundaries requires clear spatial representations of property. There is irony in the very legitimacy and seemingly ordinary and perhaps even mundane nature of this process. Maps are used solely for the purpose of facilitating mineral development and the practice of staking sub-surface mineral claims is legitimized through clearly definable representations, boundaries and regulations.

During claim staking there is the assumption of objective neutrality, contingent on legal ordering. The spatialized boundaries created by drawing mineral claims rely on a finite space that in turn appears apolitical. Mineral claims bound to a neatly drawn, material space are however, a powerful participator in the staking process. It is through the mapping of claims that the state facilitates claim staking and provides preferential treatment to the mining industry; the state not only backs the autonomous mineral rights-holder, but also gives mineral development interests priority by enacting free-entry regulations. Regulations allow mineral rights to be available prior to consultation with

[44] Blomley (2004:7) provides a more detailed chart of the ownership model. His geographic emphasis on space is of particular interest, as is his emphasis that a private property owner has priority over the state.

anybody and provide the tools for staking land, such as corner-post tags. Staking claims and the resultant clearly demarcated boundaries obscure the necessarily relational aspect of property that I turn to following this discussion of the classical model.

Individual Property

For Blomley, "the tendency to view property as essentially private, and periodically public, reproduces the wider tendency to view legal orderings as binary, with a privileging of one pole" (2004: 5). In the case of mineral rights, the pole that is privileged by the state is mineral industry interest. This was evident in the discussion in the previous chapter about how opinions about free-entry are polarized and the mineral industry, for the most part, views free-entry as a fundamental right.

Freedom to own is often understood as an individual, autonomous and hence free right. Mineral rights regulations follow this regime of free individual ownership, in that they are given to one unitary legal entity. This in turn excludes any other claims, most notably to aboriginal title. Freedom of ownership and exclusion is especially apparent in a northern legal context and is central to the problem of free-entry, which in no uncertain terms, favours development interests over all others.

Mineral rights law requires utilitarian and functional regulations, whereas unregulated land is associated with a commons that needs to be controlled. Political ecologists question this necessitated privatized space and critique Hardin's 1968 "Tragedy of the Commons" where it is argued that the commons will overextend its carrying capacity and this will result in "tragedy" (Robbins 2007: 43). The cadastral map can be seen as part of this taming of otherwise unregulated Crown land, which, as I have argued, is so explicit during the mineral claim staking process. Crown land is in fact not

unregulated, but highly regulated through state law that is written for the express purpose of resource extraction, as seen in mineral staking regulations.

To establish a clear identifiable owner, individual, private title, trumps collective oversight. One of Fumelou's (2003) primary arguments is that aboriginal people involved in Treaties 8 and 11 did not view the land as something that could be "owned."[45] The right to minerals require land and resources to be viewed under the terms of individual liberal notions of ownership. This negates any alternative to the ideologies of individual private property. The law of free-entry may be read as a normative enactment of particular elements of classical property.

Liberal Freedom

Mineral rights are associated with individual freedom. The Crown owns the sub-surface to land in most of Canada and exercises free-entry over much of this area. This is relevant to Waldron (1991) and Macpherson's (1978) suggestion that property is connected with freedom and even indicative of the most fundamental freedom or basic human right.[46] People active in the minerals industry in the north feel that their freedom is associated with the right to stake claims and claim-staking is understood as a free unconditional right (McPherson 2003).

Private rights are important to free market enterprise and associated with entrepreneurial freedom. The entrepreneurial agent associates him or herself with the freedom and even obligation to produce wealth. The same can be said for mineral rights, where the mineral rights holder sees it as their right and even duty to produce geological

[45] There is a large body of literature about both the commons and common property ownership. Hardin's (1968) "Tragedy of the Commons" is well critiqued (eg. Anderson and Simons 1993). My focus is on liberal property ownership and I do not examine debates over collective ownership, as worthwhile as they may be.

[46] Macpherson writes about property as a "basic human right" (1978)

data. The economic entrepreneurship inherent in mineral staking is thought of as good and morally right in its promotion of a 'free' state where market interests trump all other claims to land. Thus private property is an ideal with heavy consequence in its exclusionary power, which is conditioned by the notions of economic freedom, liberty and justice. This freedom is presumed under free-entry mineral staking. Liberal notions of property present ownership as a bastion of individual freedom. This participates in the reification of private ownership of mineral rights that again, obscures the ways in which property is relational through emphasis on a free, exclusive and individual right.

4.2 Social Relations

In critique of private, exclusive property, Singer (2000 b) highlights that property is not as straightforward as the law dictates. He outlines that judges, policymakers and scholars have a classical conception of property that focuses on the full and absolute control of the owner, who is backed by the state. The classical model creates boundaries that protect the owner from the non-owner. Singer believes this system is flawed: "The classical model misdescribes the normal functioning of private property systems by vastly oversimplifying both the kinds of property rights that exist and the rules governing the exercise of those rights. It also distorts moral judgment by hiding from consciousness relevant moral choices about possible property regimes" (Singer 2000a: 5). The judgement that sub-surface commodity value is more important than any other claim to land obscures moral decision-making. This is bound to the processes involved in mineral rights law, that is presumed neutral through legal representation. Singer's model is therefore useful in that it brings moral consideration to property relations.

Property is a much more complex set of relations than expressed through the stringent legal framing of property rights that calls on an individual claim-staker.[47] Singer describes a social relations model in which he envisions property rights outside of the elements of classical ownership. His social relations argument is based on the scholarship of legal realists who, in Singer's words, "analyzed property rights in terms of human relationships" (2000a: 8). Noting that the legal realist model is incomplete, Singer proposes a model that "reconceptualizes property as a social system composed of entitlements that shape the contours of social relationships. It involves, not relationships between people and things, but among people, both at the level of society as a whole (the macro level) and in the context of particular relationships (the micro level)" (2000 a: 8). The social relations model places emphasis on the fact that property relations are not dyadic, but in fact exist as a multitude of social relationships.

Singer gives four reasons to explain his social relations model (2000a: 13):

1. He suggests property rights are bundled, but the clear borders associated with property are misrepresented. For Singer, the bundle of rights does not fit neatly together. There are many variations on the single owner with consolidated rights and therefore the classical model is misleading.

2. Property rights are contingent and "contextually determined." The classical model assumes rights are fixed, whereas Singer suggests property may change over time.

3. Property rights have an "inescapable distributive component." Calling on Waldron, Singer notes the liberal, classical model of property assumes property rights are a critical component of liberty. With property rights, one can distribute justice and this is

[47] Yes, this individual can be a company, and thus collective. But it is more accurate to draw parallels to the liberal emphasis on individualism because of the functioning prospector's licence and the regulations required to stake claims. The company is viewed as an individual when framed in legal terms.

done individually. Singer notes this is problematic because power is also based on things such as the capitalist order.

4. The fourth element Singer draws on is that "property law helps to structure and shape the contours of social relationships." Here he draws on Jennifer Nedelsky who suggests property is not fixed. Singer notes property is a social system, designed to "promote equal access" for human life. Property owners have obligations instead of tightly bound rights and owners have duties to "not cause harm or let others down" (2000a: 13).

Singer suggests the very nature of ownership excludes the social, conflictual and overlapping elements of property relations that negate moral decision making processes. The law of free-entry can be logically extended as a legal manifestation of certain elements of the classical model of ownership. According to Singer, property should also entail obligations to others. A large reason for the lack of moral obligation connected to ownership is a fixation on capital investments that is, in relative terms, absent from Singer's social relations critique. Singer fails to highlight the economic and class considerations that are pertinent to property relations.

During interviews some minerals industry and federal government representatives expressed the view that private enterprise must reign over any other land use decision. Under this logic, the best way of governing is a laissez-faire system where the primary function of the law is to allow business to proceed "as usual." There are prominent implications that centre on business and development. Land claims are deemed important in order to establish, in no uncertain terms, who owns the land. As referenced in chapter three, one interviewee said on behalf of industry: 'let's find out who the

landlord is, and get on with business.' Sub-surface mineral rights are privately held, participating in the maintenance of development as priority. This obscures overlapping claims to land from other interests, such as First Nations or conservationists who prioritize the creation of parks.

To call on an interview discussed in the previous chapter, anything other than the laissez-faire, free-entry regime was expressed as "communism" or a "dictatorship." In this case the interviewee went even further to suggest alternatives to free-entry are "not democracy" and "not what our system is built on." This attitude fails to take into account Singer's social relations model, where property is not "fixed." On the contrary, 'our democratic system' is based on static notions of property ownership. However, what the social relations critique fails to critically engage with is the dominance, power and history of the capitalist system. For example, Singer claims to be aware of race, gender and disability in the distribution of property ownership: "The owner's right to exclude and power to transfer may conflict with and be limited by the public's right of access to the market without discrimination based on race or sex or disability" (2000b: 3). He goes on to draw on the metaphor of a "family" in order to explain class. Here, he presents familial disputes as congruent with the dimensions of class, where by people do not get along. There is no mention of the patriarchal dimensions of family and similarly, the power relations involved in class dimensions are mysteriously absent. The same can be said for the examples Singer draws upon, in that he fails to engage with the historical and material dimensions fundamental to property relations.

Social relations, "is a question about what form of social life we are going to have" (2000b: 15). Absent from this critique are circumstances, such as the history of the

slavery in the United States or legal processes such as the expropriation of land during the treaty process. These are relevant to the way social lives are formed, yet absent from Singer's social relations model. The social relations existing outside Singer's model that are involved in mineral regulations are evident in the role of settlement and the gold rush in the NWT. This was described with the placer gold miners that carried free-entry north from California during the nineteenth century. Gilbert LaBine fought for the right to free-entry during the 1930s when mining regulations had yet to be adopted in the NWT.[48] Singer's social relations argument negates which social groups create the powerful and active conceptions of a classical model of property in the first place. In this way, his emphasis on how property is relationally structured and ought to include obligations, as opposed to entitlements, does not take into account "race or sex or class" as he stipulates (2000b).

This critique of Singer's social relations model, aligns more closely to the legal realist approach as to how the law is written, by the people who have the social status and economic means to be involved in formal politics.[49] Though Singer claims to follow the tradition of the legal realists and emphasizes the confines and even morality of private property ownership that is decided by very specific members of society, his critique fails to actively step outside the liberal bounds of ownership he aims to deconstruct.

[48] Personal communication. To my knowledge there is no written account of LaBine's interactions and playing part in securing free-entry.

[49] Morris Cohen (1925) a legal realist, theorized property through the Roman distinction between *dominium* (the rule over things by the individual) and *imperium* (the rule over all individuals by the prince). This differentiation also cited in Blomley (2004: 12) and Mitchell (2004: 70).

4.3 Dispossession and free-entry opposition

Those who do not support free-entry also call on elements of the classical model in order to explain the dispossession of land. Critics of free-entry generally believe something (land) is being taken away. Non-governmental organizations frequently begin their definition and critique of free-entry by describing mining as the highest and best use of the land. Mining is not only assumed the highest and best use of land, but land is also viewed in terms of free access and the exclusive right to clearly defined minerals. It is not merely that land is viewed primarily for mining, but rather the landscape becomes a site for capital investment. This is facilitated through mining law to the extent that mineral rights are rendered administrative through staking regulations that prioritize free-market enterprise.

This is especially problematic in areas where there are historic and culturally significant ties to land. One such area is Drybone Bay, located thirty-five kilometres outside of Yellowknife on the shore of Great Slave Lake. Below the bay there is a potentially diamond-rich kimberlite pipe. Diamond exploration interests have largely staked the area. Notwithstanding the staking of the area for mineral claims, the area has not been mapped to show aboriginal burial grounds,[50] a process that for administrative purposes often requires archaeological work. This staked area has received significant attention from the Mackenzie Valley Environmental Review Board and a hearing was held with the Yellowknife Dene First Nation, represented by Steve Ellis. Ellis is quoted below and explicitly states that Canada continues to alienate land from First Nations. The review board is actively monitoring mineral claims in this area because of the

[50] personal communication

conflict and First Nations historical ties to the site. In the region of contention (Drybone Bay) there are currently ongoing unsettled land claim negotiations. First Nations are given the ability to 'withdraw' a certain amount of land until negotiations are finalized:

> It's important to note that if the area between Wool Bay, Drybones Bay and Gros Cap had not been already *alienated* through the issuance of mineral claims and mineral leases that there be absolutely no question that the Yellowknives Dene would have insisted that those areas be contained within the interim land withdrawals. But as it stands, interim land withdrawals do not -- well, existing rights are not affected by interim land withdrawals. So those lands were *alienated* prior to the Yellowknives being able to identify them for protection ... Nothing's been done. So as it stands, continued exploration in the shoreline zone necessarily prejudices the outcomes of conservation and land and resource governance planning by effectively removing lands and resources from identification and consideration by First Nations.
>
> (MVEIRB 2007, transcript of hearing, emphasis my own)

According to Ellis, and given the current state of unsettled land claim negotiations in parts of the NWT, when mineral rights are staked they are "alienated" from aboriginal rights holders. Ellis concludes, that when development interests take control of mineral rights under the free-entry regime this is essentially an act of dispossession. If there are multiple interests in land use and mineral rights interests trump all others, the area may be read as an area that is disowned, expropriated, or alienated for any use other than mineral development. Here, property relations are contextually determined, like Singer's model suggests. But Ellis' statement on behalf of the Yellowknife Dene First Nation states that land is in fact alienated.

Mineral Rights as Ownership?

Is 'ownership' the wrong frame for mineral rights? Further, are understandings of mineral rights outside of the parameters of normative ideas of property? Mineral tenure law requires that land is available to be leased from the Crown for a fee, provided work claims are filed showing the land is in use. This not only calls on Lockean notions of mixing land and labour to own property (1967), but also the presence of an individual (whether person or corporate) owner. Mineral rights exist within the bounds of the key elements of classical ownership and the rights required to 'own' minerals are at stake. Singer would argue there are many other relational aspects present in staking a mineral claim. I extend this by suggesting that the historical dimension relevant to mineral rights law and mining in the north must be brought to the fore to provide context.

When a mineral claim is staked the regulatory process begins. There are many environmental assessment regulatory procedures that happen before minerals can be extracted. This is of course significant. But prior to staking, would it not be better to have already negotiated who has claims to territory that is open for 'free' staking? Theoretically, mineral rights are already dispossessed from anyone other than the mineral rights holder, on the onset of staking in that they are on Crown owned land. On a material level, it is difficult to zone land for any other use if it is already staked. Industry and the federal government hold the power to exclude First Nations organizations from claiming sub-surface property rights and sub-surface rights translate into land-use decisions. The owner of a mineral claim is an identifiable individual, and there are legal boundaries, set up by the state to keep others from staking any other claim.

Barton traces the roots of free-entry to the gold rush, and while recognizing the weaknesses of overstating the frontier thesis (1993: 118), nonetheless argues that the impact of gold mining legislation on mining laws is critical. Is the lineage to the gold rush as powerful as the classical model of ownership? Though this is not an either or scenario, there is a lot more assumed under the law of free-entry than mining is an anachronistic land use priority. The manifestations of classical ownership are bound in mineral regulations, which, I suggest, is a large part of how the free-entry regime remains active.

The right of free-entry comes to be realized as logical extension of property rights preserved through mineral regulations. Under the examination of property as an absolute right that excludes others, mineral rights are normalized. Part of this normative assumption is the utilitarian appeal of materially staking boundary posts. At this point the individual claim-staker is able to exclude competitors from land that is otherwise assumed vacant.

There are several historical events that played a part in the establishment of mineral regulations. These include the numbered treaty process and the prominence of British property law, particularly tin mining law in the stannery district. When viewed in this light, liberal understandings of property are an important part of how mineral regulations were originally written. The concept of private property is crucial to the gold and diamond staking rushes that continue to highly impact northern settlement. The very concept of liberal ownership makes dispossession possible.

When the assumption is made that free-entry requires a view of mining as the best use of land, perhaps it is more accurate to suggest that privatizing sub-surface minerals is

the highest and best use of land. The links to economic growth are united with the state's active regulation of sub-surface minerals, granted to particular market interests. The stratification of land into sub-surface and surface rights is a large part of this process that obscures that mineral development is prioritized during the federally administered act of staking a mineral claim. This leads to tensions because of the necessarily relational nature of property. The key elements of the classical model of ownership I focussed on are an emphasis on rights to clearly demarcated boundaries and the association of freedom with individual private property. These elements of the classical model are by no means absent from the process of staking mineral claims in the NWT.

CHAPTER 5: CONCLUSION

Diamonds have fallen from my initial primary focus and were replaced by the importance of debates over free-entry and property. But these debates do not take place without the rush for diamonds. In the case of the NWT diamond exploration in the 1990s created an unprecedented amount of mineral staking. This is bound to the aura of the diamond and the NWT "diamond economy" (NRCan 2007, Gibson 2008). The diamond rush shares parallels with discovery stories and the accumulation of wealth that took place during the gold rush. But the scale of the gold rush is incomparable to the amount of land staked during the diamond rush in the 1990s.

Free-entry mineral exploration travelled up to Canada with the gold miners during the nineteenth century and is largely presumed to be a "sorry anachronism" in the United States and Canada (Leshy 1987: 25). How this principle remains in place I have traced to state power and mineral rights law since European settlement in the NWT that continues to deem capital investment a priority over aboriginal title rights. Mineral development requires the institutionalization of mineral regulations through which land is dispossessed from aboriginal title-holders. This relationship is complicated by the defining principles of the classical model of ownership with the power of industry and government predetermining property relations. Minerals are presumed as a thing that private enterprise has a 'free' right to.

There is much attention given to the environmental assessment regulatory process and corporate social responsibility. For the most part the (normative) facilitation of

mineral rights is left unquestioned in the NWT and unfolds administratively. Yet we may still ask: does this deem the existence of free-entry morally right? Mineral rights, practiced in the act of staking mineral claims, reduce property rights negotiations to the function and application of mere administrative processes. Through the act of physically staking land and recording mineral claims at the Mining Recorders Office at the Department of Indian and Northern affairs, mineral rights are secured and this process in practice, dispossesses minerals and land title, or at the very least "sub-surface mineral rights" from aboriginal titleholders. The practice of mineral rights allocation is naturalized by and through mining regulations. The Canadian state continues to benefit immensely from free-entry mineral staking, as does capital. In contrast aboriginal people in Canada have arguably been subject to alienation of land they historically have title to and mineral wealth they otherwise may also claim a larger portion of.

In chapter three I traced free-entry principle in Canada to Britain's tin mining district. The logic behind this path of mineral regulation development is of course important. More shocking though are the ideologies of property that remain in place and participate in free-entry practice. Marx writes about the dimensions of what Singer terms the social relations model, but replaces capital with what Singer views as a property relation: "capital is not a thing, but a social relation between persons, established by the instrumentality of things."[51] The strength the Canadian state has to dispossess land is explained through the importance of capital, that places a legal right and economic value on property. The intersection between capital and property is practiced in the act of

[51](Marx 1967: 717) Here, Marx is discussing the work of E.G Wakefield on colonisation.

mineral privatization through the current staking and leasing system regulated by the Department of Indian and Northern Affairs in the Northwest Territories.

European settlement brought property law to North America, a lineage not experienced until the 1930s in the NWT. Staking minerals requires an emphasis on individualism that prioritizes entrepreneurial freedom and is a small part of the larger liberal fixations that determine property rights. The history of the free-entry regime may be reduced to a simple explanation of gold rush legislation. But what is less straightforward is that this history results in the dispossession of land that this dispossession is normalized by and through the institutionalization of property.

APPENDICES

Appendix 1:
Northwest Territories and Nunavut mining regulations: fees

SCHEDULE I

(Sections 5, 6, 8, 9, 19, 24, 29, 32, 36, 37, 39, 41, 44, 51, 56, 58, 59, 60, 62, 63, 86 and 89)

FEES

Item	Column I License, Service, Certificate or Permit	Column II Fee
1.	Individual Prospector's License	$ 5.00
2.	Company Prospector's License	50.00
3.	Duplicate Prospector's License	2.00
4.	Application to record a claim, per acre contained in the claim	0.10
5.	Grouping Certificate	10.00
6.	Certificate of Representation Work, per acre contained in the claim or claims	0.10
7.	Certificate of common anniversary, per acre contained in the claim or claims	0.10
8.	Recording any document affecting a claim, per entry	2.00
9.	Notice of Surrender, per claim	10.00
10.	Prospecting Permit	25.00
11.	Copies or certified copies of any document, per page	1.00
12.	Lease of a claim or renewal thereof	25.00
13.	Recording a transfer of a lease or Prospecting Permit	25.00
14.	Recording a survey of a claim, per claim	2.00
15.	Changing the name of a claim, per claim	25.00
16.		2.00
	(*a*) Identification tags, per set	
		2.00
	(*b*) Reduced area tags, per set	
17.	Certificate of Extension, per acre contained in the claim or claims	0.10
18.	Rental under lease, per acre per year	
		1.00
	(*a*) for the initial 21 year period	
		2.00
	(*b*) for each 21 year renewal period	

Appendix 2: Timeline

Regulations generally follow mineral discovery and especially the gold rush. Of particular relevance to the history of the NWT mining regulations is the *Yukon Quartz Act* (1924), which the *Canada Mining Regulations*, now the *Northwest Territories and Nunavut Mining Regulations* are based on.

1859- *Goldfields Act* of BC

1860s -concept of the claim introduced

1872 -The *US General Mining Law.*
-The Mining Law also practices free-entry (Leshy 1987)

Circa.1910 - concept of claim became standard in Canadian mining acts

1896- *British Columbia Mineral Act.*

1898- *Dominion Lands Act.* This act copied BC Mineral Act.
The successive laws that followed the *Dominion Lands Act* are based on the BC legislation in the Yukon and later the NWT.

1917- The right for prospectors to gain ownership of a claim (Crown grant) is revoked in favour of right to retain renewable twenty-year lease.

1924- *Yukon Quartz Mining Act*, deliberately made it difficult to amend mining laws
- NWT continued to operate under the *Dominion Lands Act* regulations that evolved into the *Canada Mining Regulations.*

2008- The *Canada Mining Regulations* change to *The Northwest Territories and Nunavut Mining Regulations*, though this is not a major overhaul of the *Canada Mining Regulations.*

(adapted from Barton 1993, Campbell 2004)

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