

Free Entry Access To Mineral Rights In Canada's North

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1 BACKGROUND¹

1.1 Principles of free-entry

The rights to **hard rock minerals**² in Nunavut and the Northwest Territories are issued under a **free-entry system** pursuant to the Canada Mining Regulations (CMR)³. The free-entry system is based on the principle of free entry for prospectors to lands open for mineral activity, with a right to acquire a mineral claim by one's own actions (claim staking), which claim can be upgraded to a lease of mineral rights through application, meeting specified criteria. That is, the federal government, through the Department of Indian Affairs and Northern Development (DIAND), as the owner of the mineral resource on public lands, has limited discretion in the issuing of mineral rights on lands open for mineral activity.

The free-entry system relates only to acquisition of mineral title. The acquired rights do not extend to actual permission for the activities of exploration, development or mining. These industrial activities remain subject to land use, environmental and other regulations.

1.2 Issues

The government and the mining industry have traditionally supported the free-entry system as fair, equitable, simple to use, and promoting interest in mining, which creates economic development and provides returns to government and the public through employment and royalties.

Over the last decade, however, the free-entry system as applied in the North has come under challenge from various groups, including First Nations and environmental organizations (ENGOS), on the basis that it is outdated and no

¹ This review of the free-entry system of mineral rights acquisition has been prepared under contract for the DIAND by Gladwin & Associates.

² Words or phrases in bold face type are further described in the Glossary.

³ The Canada Mining Regulations, enacted under the Territorial Lands Act (TLA), provide the regulatory framework for mining in Nunavut and the Northwest Territories.

longer the best approach for the issuance of mineral rights. It is said to unnecessarily bias a presumption in favour of mining activity to the detriment of environmental protection and other land uses. Acts of vandalism have been committed to several staked claims in the southern Mackenzie Valley, allegedly in protest of government policies on mining and/or land claims.

There have also been concerns expressed by territorial governments that the free-entry system has not kept pace with political and technical developments, and that the regime should be modernized to include electronic staking or other approaches which might overtake the free-entry principles.

The acquisition and tenure of mineral rights, and the conditions attached thereto, are vitally important to the mining industry, affecting fundamental decisions about how, where and if they will undertake exploration and development activities. It is opportune to review the continued applicability of the current free-entry regime of the CMR while work is underway to develop a mining regime for the newly created territory of Nunavut.

1.3 Scope of review

The Mineral Resources Directorate (MRD) of the Northern Affairs Program of DIAND is, accordingly, considering the continued applicability of the free-entry system as the foundation for the mineral rights regime in Nunavut and the Northwest Territories. MRD commissioned this report to provide an overview of the free-entry system, addressing:

- its background;
- key principles and objectives as relate to mineral rights;
- the perspectives of key stakeholders and interested parties;
- a comparison of mineral rights approaches in similar jurisdictions within Canada and around the world;
- the potential for new technological approaches; and
- recommendations.

2 KEY PRINCIPLES AND OBJECTIVES

2.1 Crown Ownership of Minerals in the North

Mineral rights in Nunavut and the Northwest Territories have developed under a "regalian" system of ownership: the Crown (represented mainly by DIAND) owns virtually all mineral resources, and leases or assigns rights to exploit

these resources to private developers under set conditions. DIAND administers these rights, and assigns such pursuant to the CMR.

Subsequent to land claim settlements with First Nations, return from mineral exploitation (royalties) across much of the territories are shared with several First Nations, but title to and administration of the mineral resources remains with the Crown.

There are, however, some limited areas of privately owned mineral rights, where mineral resources are tied to ownership of the land surface which has been vested in First Nations. For example, the Nunavut Land Claims Agreement vested ownership of mineral rights to approximately 38,000 km² of land, about 2% of Nunavut, to the Inuit of Nunavut through Nunavut Tunngavik Incorporated. Future land claims settlements are expected to result in expansion of involvement by First Nations in mineral resources, perhaps including additional tracts of private ownership.

This discussion of free-entry addresses areas of Crown owned resources only, it does not address privately owned mineral resources.

2.2 Elements of the Free-Entry System

The free-entry system of mineral title, in the Canadian context, comprises three main principles:

- the right to freely enter lands in pursuit of Crown-owned minerals;
- the right to obtain a mineral claim by one's own actions; and
- the right, upon satisfactory application, to obtain a lease securing tenure for ultimate production.

That is, a prospector, explorer or mining operator (a miner) can enter upon lands where minerals are owned by the Crown and oblige the government to grant exclusive exploration and development rights, if the miner applies for them in the prescribed manner.

The regulating authorities, the provincial governments in the case of the provinces and DIAND in the case of the territories, usually require that a prospecting, or free-miner's, licence be obtained before pursuing mineral prospecting or exploration. Where required, this licence is available automatically on application, usually at only nominal charge. If a free-miner's application to record a claim or a lease meets all the pre-requisites for that claim or lease, the regulator has no discretion, but has to issue the disposition.

It is important to recognize that the privileges and rights acquired through free-entry system apply to title to the minerals, and tenure of that title. The activities of mineral exploration, mine development and exploitation remain

subject to over-riding commercial, land use and environmental regulation. Mineral rights do not guaranty ability to mine, specified regulatory conditions for any activity must be met.

Right of Entry to Prospect

The right of a miner to pursue Crown owned minerals extends to Crown land and private land alike, excepting lands which have been designated as withdrawn from mineral activity. Governments in Canada have, in recent years, regulated some prospecting and development activities through mineral regulations, however, this is done cautiously with regard to the free-entry principle that work will not be impeded if it meets required standards.

The access to and use of Crown land during exploration and mining is regulated through land use (surface access) and environmental regulations. The Territorial Land Use Regulations, for example, control use of public lands by requiring permits for various activities, including exploration, development and exploitation of minerals, excepting work done in the course of prospecting, staking or locating a mineral claim which does not involve the use of equipment.

Access to and use of privately owned land during exploration for Crown minerals requires that permission of the land owner be secured, and the payment of compensation to the owner or occupier for the access. If a prospector and a land owner cannot freely come to an acceptable arrangement, the government has to authority to impose conditions for access.

Right to Obtain a Mineral Claim

The right of a miner or prospector to stake a claim enables the securing of mineral rights in priority over other miners, so that an interesting mineral occurrence can be further explored without interference. The right to stake a claim is traditionally effected by the staking of a promising mineral occurrence as a claim, erecting posts, inscribing essential information on them, running blazed lines between corner points to the claim in accordance with regulations governing claim-staking. The staking establishes a claim, official recording follows as an essential formality, but the recorder has no discretion to refuse a properly staked and applied claim.

More recently, several jurisdictions, including some in Canada, have begun implementing map staking – through description of claims in terms of a system of accepted map co-ordinates. This removes the requirement for actual placement of stakes on the ground, but retains the requirement for eventual survey in the event the claim holder wishes to proceed to lease. Map staking is seen as a continuation of free-entry, because it still depends on the miner's act of designating the claim description, limits government discretion in granting the claim, and results in an exclusive right to explore and develop.

Right to Obtain a Lease

The procurement of a claim is an intermediate step in securing mineral tenure. It provides an exclusive right to explore and develop, but not to mine. That is achieved through the acquisition of a lease. When a miner locates an economic (or promising) deposit on a claim, they are entitled to apply for and receive a lease, which secures title to the minerals for eventual production, if all required conditions are met. As with the securing of a claim, the government retains no discretion in the issuance of a lease – if a claim holder has fulfilled the requirements of the claim, including initial staking and recording, payment of fees and performance of the required assessment work, a lease must be issued.

The holder of a lease is required to pay rental on the lease and also, usually, royalties on eventual production.

The lease provides security only in exclusive access to minerals. Development and eventual exploitation remain subject to regulatory requirements. Activity on a lease is also subject to land use, surface access and environmental regulations, and development and operation of a mine requires compliance with further mining regulations, including worker health and safety.

2.3 Acquisition of Mineral Rights Under the CMR

Prospecting Licence: The Right to Prospect

An individual or company wishing to prospect, record a claim or acquire an interest in a claim must hold a **prospecting licence**, which is available on application, with very limited discretion, for a nominal fee (\$5 for an individual, \$50 for a company) and is valid to March 31st following the date of issue.

A prospecting licence does not allow the holder to mine, it provides only the right to prospect and to stake a **claim** or apply for a **prospecting permit**.

Claim: An Exclusive Right to Prospect and Develop

Mineral rights can be acquired by the holder of a prospecting licence by staking a **claim** on the ground, by marking each corner of the claim on the ground by erecting a post or a stone or earth cairn. The claim must, as nearly as possible, be rectangular and may cover an area of up to 2,582.5 acres.

A locator of a claim must apply to record the claim with the Mining Recorder within 60 days of locating the claim. Every application for a claim must be in the appropriate form, and must be accompanied by a plan and the applicable fee (\$0.10 per acre contained in the claim). Identification tags, supplied by a Mining Recorder, must be affixed to the corner posts or cairns.

The priority for recording a claim is on the time of staking, "first-past-the-post" applies. Where two applications covering the same ground represent equal time of staking (to the day and hour), then priority is allocated by the time of application for recording.

A claim is accepted if it is not challenged within one year of recording.

The holder of a recorded claim acquires the exclusive right to prospect for minerals and to develop any mine on the land within the boundaries of the claim. The right can be held for a period of 10 years if sufficient, qualified assessment work is done on the claim (\$4 per acre contained in the claim during the first 2 years, and \$2 per acre per year thereafter). The holders of recorded claims may group adjacent claims to an aggregate total area of up to 5165 acres for the purposes of applying assessment work.

All data obtained from geological or other similar work done on a claim and submitted as assessment work must be filed with the Mining Recorder annually.

Claims can be cancelled by the Mining Recorder for failure to meet regulatory conditions, or surrendered by the claim holder.

A claim does not allow the holder to mine, it provides only exclusive exploration rights and, on satisfactory further application, entitlement to a **mining lease**. Ongoing exploration activity and other site work to advance the claim are subject to land use, environmental and other regulations.

Prospecting Permit: An Exclusive Right to Prospect and Claim

A prospecting permit provides an exclusive right to explore and to stake claims on the prescribed lands over a term of three years in the southern parts of the territories and five in northern parts. It represents an intermediate step between open access lands and staked claims, enabling a prospector to more systematically evaluate a large area over an extended period, with a view to identifying only the more prospective portions, which would then be staked in the normal fashion to secure continuing mineral rights. The prospecting permit protects a prospector's identified interest from competitive claim staking within the area for the permit period.

The holder of a prospecting licence may apply in December of a year for a prospecting permit for between 20,000 and 72,000 acres (one-quarter of a National Topographic Survey mineral claim staking map sheet), enclosing the applicable fee (\$25), full particulars of the proposed exploratory work, and a deposit equal to the amount the applicant is required to undertake to spend on work in the area during the first period (\$0.10 per acre in the permit area per year). Prospecting permits are issued once yearly, during January.

The first-past-the-post rule of free-entry is only partially applied as regards prospecting licences. When two applications are received for the same area, the first to be received has priority. If more than two are received for the same area, the area is considered to be too competitive to allow provision of exclusive exploration rights through permitting, all applications are denied, and prospecting must be done by staking claims.

A permittee must make additional, annual deposits equal to the amount required be undertaken to spend on work in the area during each subsequent year (\$0.10 to \$0.40 per acre in the permit area per year). Up to 4 prospecting permit areas may be grouped for the purposes of application of exploratory work against required amounts.

A report of the exploratory work done under a permit must be filed annually.

A prospecting permit does not allow the holder to mine, it provides only exclusive rights to explore and to stake a claim within the designated area. The rights do not provide permission for ongoing exploration or staking, which remain subject to land use, environmental and other regulations.

Mining Lease: An Exclusive Right to Exploit

The holder of a recorded claim may apply for a lease. The application must be granted if the claim is in good standing, if representation work on the claim of at least \$10/acre has been recorded (or an undertaking to commence production has been made), and the applicable fee has been paid (\$25).

A lease is granted for a term of 21 years, which may be renewed indefinitely for 21 year terms on application of the lessee and payment of the appropriate fees. An annual rent of \$1 per acre under lease is applied for the first 21 year term, increased to \$2 per acre per year for renewals.

Leases can be cancelled by the Minister (of DIAND) for failure to pay the rents due, or surrendered by the claim holder.

Claims or leases in good standing (with annual fees, rents and royalties paid) may also be transferred to another prospecting licensee, subject to filing of appropriate application forms and fees.

A mineral lease does not allow the holder to mine, it provides only exclusive rights to the minerals within the designated area. The rights do not provide permission for ongoing exploration, mine development or mining, which activities remain subject to land use, environmental and other regulations.

3 THE FREE-ENTRY DEBATE

3.1 Benefits of Free-Entry

The federal government and the mining industry have traditionally supported the free-entry system, principally because it promotes interest in mining, which creates economic development and provides return to the public and to government through employment and royalties.

Free-entry allows virtually unrestricted access to crown lands designated as open for mineral activity, where not otherwise withdrawn from activity, while minimizing interference or discretion from government officials. It allows the Crown to retain the ownership of minerals and land, establishing a basis for economic policy, while encouraging the implementation of such policy through leasing of the rights to develop and exploit the minerals, which generate economic value.

The free-entry system is open, transparent, equitable and simple to use. The bureaucracy to administer mineral rights is minimized, stakes in the ground establish the claims, rather than paper in files. Staking of claims on the ground provides clear, on the spot, visibility of mineral ownership. Priority is generally accorded those who find and stake minerals on a first-come, first served (first-past-the-post) basis.

Tenure limitations on prospecting permits, claim and lease holding serve to return mineral rights not being actively explored or developed to the public domain. Individual companies cannot preserve exclusivity over large tracts of land indefinitely, without moving projects forward to development. When a mineral right returns to the public domain, geologic information gained from previous prospecting becomes available. This facilitates continued expansion of the resource base knowledge, and can contribute to eventual discovery of a deposit, perhaps by subsequent prospectors, on land which may have been gone over many times before by others.

It also allows for the progressive withdrawal of lands from prospective mineral activity as governmental priorities on land stewardship develop.

Free-entry respects the notion that those who invest in the effort to prospect for minerals will, on finding economic resources, have security of tenure, providing an exclusive right to develop the resources, enabling benefit from the prospecting investment. It provides an inexpensive and straight forward entry to the mineral industry, allowing individual miners and small operators to explore for and secure prospective ground within their own means, which has led to the development of a strong junior mining industry in Canada. The junior mining industry has discovered many, if not most, of the greenfields mineral deposits on which Canada's senior mining producers are based, including the diamond fields in Nunavut and the Northwest Territories.

While most prospecting efforts do not result directly in an economic discovery, geologic science is advanced by the resulting increased knowledge of Canada's land base, which miners must share with the government, and which becomes public after a set confidentiality period. Such knowledge may contribute to the direction of future exploration by others, which may indeed have more success.

Development of minerals discovered through free-entry has been responsible for opening up Canada, creating economic development, extending the nation's infrastructure and providing a continuing employment base.

3.2 Limitations of Free-Entry

Over the last decade, the free-entry system as applied in the North has come under challenge from various groups, including First Nations and ENGOs. While these groups make varied arguments, most can be distilled down to a fundamental challenge of the basis that free-entry presumes a priority in favour of mineral activity (both exploration and development/mining) over environmental protection and other land uses, and even over land surface ownership. That is, free-entry provides for granting of mineral rights, the exploitation of which might affect or preclude other potential land uses, without comparative review of the merits of alternate potential uses.

Mineral rights guaranty only that the holder has exclusive rights to the minerals should they be developed, all exploration and development activity is subject to legislated review and scrutiny. However, the process and resulting decisions relating to mining development are driven by the interests and schedule demands of the mineral claim or lease holder, wanting to develop an attractive mineral deposit. Information on environmental protection or alternative, potentially competing land uses may not be available, or may be immature or undeveloped in comparison to that for the minerals. Indeed, investigations about specific land areas in support of mineral development can often be the first scientific and socio-economic look at the subject lands. This is particularly true in the North, where there is relatively little baseline scientific environmental and socio-economic data on which to base advance land use planning over large tracts of land.

By comparison, other, sometimes competing, land uses and resource rights, such as for timber development, are typically subject to more discretionary approval by government. Before a decision to issue is made, there is opportunity for consultation on land and resource use issues, and for minimization of resource use conflicts.

Under free-entry, if it wishes to preclude mineral activity on certain lands, the government must use the power of law to withdraw land from staking. This legislative requirement, when coupled with free-entry to mineral rights, imposes a difficult hurdle to those wanting lands excluded from mining for environmental preservation or other land use development.

The non-discretionary nature by which licences, claims and leases must be issued under free-entry by government is said to constrain the discharge of other governmental responsibilities. This is amplified by the limited ability of government to impose terms and conditions on mining claims and/or leases, excepting as regards work requirements and duration of tenure. Other than that, all work must comply with land use and environmental regulations. Such objectives have to be achieved indirectly, through the land access and environmental regulation.

Finally, the first-past-the-post priority of issuing claims on the basis of time of staking or time of recording is a particular issue to some First Nations, who want to take a more active role in managing the resources within their respective claim areas. It prevents the government, even as the owner of the mineral resources, from choosing among possible mineral developers on any other basis, including competitive bidding. It also prevents the government from developing resources within a claim or lease area on its own. Free-entry provides only very limited and strict provisions whereby a licence, claim or lease application may be rejected.

4 CURRENT ADMINISTRATION IN OTHER JURISDICTIONS

4.1 Main Variants Of Free-Entry In Use Today

Traditionally, free-entry acquisition and maintenance of mineral tenure was effected through staking of claims on the ground. Different jurisdictions, while following the same basic free-entry principles, have developed variants on the requirements for staking a claim. While the CMR requires, for example, a four-post system, whereby each corner of a claim must be staked, other jurisdictions follow a two-post system where one side of the claim is so-demarcated, and some a single post system, where only one corner has to be staked.

There are also staking differences with respect to required minimum and maximum sizes of claim (usually between 500 and 5000 acres), shape of a claim (usually rectangular, often preferred to be square but sometimes elongated, and occasionally allowed to be irregular following a mineral occurrence within the topography), and the ability to group and/or block stake claims. There are also differences in recording requirements, principally respecting the allowed time lapse between staking and recording (10 to 90 days), and allowances for and settlement of challenges to a claim. Competing claims are usually resolved in favour of the first one to have been staked, but some jurisdictions assign priority on the time of recording.

Most jurisdictions require the staking to be done by or under the supervision of a person having a, freely available, prospecting licence, while some do not require a licence to prospect or stake.

4.2 Across Canada

All provinces and territories, excepting Alberta and PEI, utilize forms of free-entry. Staking requirements vary, from 4-post, to 2- and 1- post, to map and electronic staking. Duration of tenure for claim varies from 6 to 10 years, and for tenure of lease from 10 to 21 years, renewable.

Most provinces and territories also have some privately owned mineral rights, attached to surface land ownership. These include remnants of long past land grants, generally pre-dating the 20th century, and/or recent vesting in First Nations through comprehensive land claim settlements.

Most provinces and territories also have some exploration concession provisions, the Alberta and PEI systems are fully concession-based. Alberta has the most developed concession system, with routine open tenders, and have varied over time from cash-bonus based bidding, to work based bidding, all subject to prior land use review before tender.

Newfoundland, Quebec and Manitoba are implementing **map staking**. Quebec's is the newest and most advanced, providing electronic staking over the internet with real-time feedback.

In summary, across Canada most jurisdictions maintain multiple regimes of mineral rights.

4.3 Other Countries

Most developed countries use variants of free-entry for publicly-owned mineral rights. Many countries also have tracts of privately held mineral rights, often the result of long ago land grants. The current trend, when mineral codes are updated, is towards more automated systems of mineral rights administration, including map and electronic staking, and away from ground staking requirements.

The USA

In the USA, much of the mineral rights are privately held, in association with surface ownership, and also some on including First Nations lands. Government-owned minerals, both federal- and state-owned, are largely located in the west and in Alaska, and mainly implement free-entry with ground staking. The filing of claims is decentralized and straight forward; in some states (e.g., Utah and Alaska), mineral claims are filed routinely at land registry offices. Recent trends in the USA have been to simplifying the ground staking requirements and claim filing processes.

Australia

In Australia, as in Canada, mineral resources are a state responsibility (i.e., generally not federal). The Australian states predominantly manage their minerals through a concession approach, issued in response to industry application. Australian states also provide for free-entry, ground staking on non-concession held lands, a provision which is generally intended for use by small prospectors. There are also some remnant privately held mineral rights dating back to early colonial development era.

Mineral concessions are granted in response to both solicited and unsolicited industry applications. Applications for mineral rights through concession agreements are advertised as received by the government for local input prior to issuance of a concession agreement, however, government discretion to deny the issuing of concession agreements is very limited. This essentially implements the key principle of free-entry – issuance of mineral rights in response to the initiator's (miner's) actions, without government discretion in the issuance.

The scope of discretion in issuing concession agreements comes mainly where multiple applications are received within the same application time window for overlapping land areas. In general, the governments encourage competing interests to resolve the overlaps themselves. Where overlapping interests are not able to be resolved by the interested parties directly, the government may allocate the mineral rights (through a concession agreement) to the submission filed earlier within the specified application time window. If competing applications have equal time of filing merit, a competitive tender process restricted to the overlapping applicants is generally instituted. The competitive process will stipulate a decision based on "merit" of proposed mineral exploration and/or development program, or on a cash (bonus) proposal.

Concession agreements usually cover large tracts of land, upwards of 50 square kilometres. They generally require specified assessment work to be done over the concession lands area, and usually require the holders to return 50% of land area under the agreement to the government after 3 years and annually thereafter, until the remainder is converted to mining lease.

New Zealand

New Zealand, similarly to Australia, administers access to mineral rights through a (concession) system of prospecting, exploration and mining permits. The government exercises virtually no discretion in the granting of permits: the first person who applies for a permit with respect of a specific area has their application considered in priority to any other applications, provided it contains an acceptable work program.

Permits confer exclusive rights to the designated minerals to the permit holder. The permits do not, however, confer any right of access to land.

Norway

Norway utilizes map staking, and graduated claim system to administer rights to claimable minerals (greater than specific gravity of 5.0g/cm³). Initial staking is done from maps, which establish pre-claims, providing right to explore deposits and probable deposits for seven years. There is no minimum assessment work requirement on pre-claims.

Once reasonable assurance of economic mineral has been achieved, the pre-claim can be upgraded to a claim through application. Claims are issued on a non-discretionary basis, and provide tenure for 10 years.

On submission of a statement of economic viability of a deposit, and the owner's qualifications to mine the deposit, a Mining Concession will be issued. Further work in development and mining requires planning permission, and an environmental impact assessment.

Great Britain

The rights to non-fuel minerals in Great Britain are mainly in private ownership, with the exception of gold and silver which are reserved for the Crown. Exploration and mining licences for gold and silver may be granted on application to the Crown Mineral Agent.

South Africa

The most dramatic changes in mineral rights administration in recent years is the current effort in South Africa to repatriate to government ownership mineral titles currently vested with land ownership. Current holders of mineral rights will have a specified period to make certain development progress or rights will revert to the government. If mineral discoveries are made subsequent to reversion, the original owner will receive residual royalty. This is being done in concert with a move away from free entry, to a concession system.

Mineral rights will be granted, subsequent to an application being filed for exploration access to mineral lands, only after full environmental and land use evaluations are completed by the government. This process, it is estimated by government officials, will take up to 2 years from the receipt of an exploration application. No prospecting or development work can be done until the governmental evaluation is complete and the concession issued. The stated intention is that once a concession is granted, all conditions that a project will have to meet for development and exploitation will be stipulated, and a mine project will not be subject to further environmental or land use review processes.

This new mineral code is in the early stages of implementation. It is too early to make conclusions on its impact on the industry or mine development, although it has met with substantial industry unrest.

4.4 Privately Held Lands

Most privately held lands, if available for mineral development, are developed directly by, or for the benefit of, the owners, or on a concession-based program, i.e., NTI lands in Nunavut.

5 ALTERNATIVES FOR FREE-ENTRY

5.1 Mineral Concessions

Mineral rights can be granted, as Alberta, Australia and certain other states do, on a concessionary basis. That is, the resource owner (government) implements a process of application or competitive tender for mineral rights which would preserve a degree of government discretion on when mineral rights might be issued, under what financial terms and conditions, to what interests, after what review process. Most concession systems require an expressions of interest by a miner or miners to trigger a disposition process, however, some are government initiated based on government-held geologic information and interest in development.

Concessionary based systems can be as simple as the current prospecting permit process as applied under the CMR, or as straight forward with limited government discretion as in Australia, or requiring as complex a review as proposed in South Africa. Particular approaches to concession systems include:

- Priority to time of application, discretion provided on basis of competing land uses.
- First applicant receives concession, if multiple applicants on equal priority (applications received within specified time interval or by a set deadline), encourage private parties with overlap to reach an accommodation, possibly a joint venture or farm-in. If unable to agree amongst themselves, restricted competitive tender. Decision on award priority based on "merit" of proposed mineral exploration and/or development program, or cash (bonus) proposal.
- Application triggers review. If mineral development determined to be an accepted land use, then restricted, or open tender. Decision

on award priority based on "merit" of proposed mineral exploration and/or development program, or cash (bonus) proposal.

A key determinant required for timely responses to make a mineral concession system effective, as it is in Alberta, is the existence of a solid base of knowledge of the lands, to the effect that potential land use limitations can be expeditiously assessed, in response to industry request for concessions. Industry becomes most unhappy with administration systems that are cumbersome, slow to respond, or tending to be unpredictable. Such conditions would tend to make a jurisdiction uncompetitive.

5.2 Technological alternatives

GPS positioning for ground staking

Modern GPS positioning capabilities can provide improved locational data during the actual process of staking. This can be coupled with virtually immediate registration of claims during ground staking, through internet hook-up to a mining recorder. It provides an immediate, reproducible position for ground posts, reducing the reliance on subsequent land surveys to resolve staking irregularities and conflicts.

Map staking

In recent years, many jurisdictions, including some in Canada, have shifted away from traditional ground staking as described above, and implemented map staking systems whereby a prospector can stake a claim through describing it in terms of an accepted system of map co-ordinates. Within map staking, there are further variants, relating to: the map co-ordinate system available for use, in Canada **NTS** or **UTS**; requiring staking to be done for pre-defined map segments or allowing specific claim description; map staking to be done at an official location, such as a mining recorder's office, or enabling electronic map staking from anywhere having internet access to the map staking system.

Most map staking follows traditional staking in that priority is granted based on time of staking; some jurisdictions control staking conflicts by requiring all map staking to be done in the mining recorder's office, with priority given to order of line-up at the office; still other jurisdictions treat all applications filed within a specified time interval, usually an hour or a day, equally and requires the applicants to resolve priority. Quebec has introduced real time map staking, over the internet, with immediate response to claim requests.

Map staking has been challenged in some quarters as not embodying the essential element of free-entry that the claim be acquired by one's own act, traditionally represented as prospecting in the field to identify prospective ground. Most people, however, now acknowledge that the act of describing

the desired ground in terms required for map staking fulfills the self action condition.

Map staking systems isolate the in-situ aspect, however, in return, provide virtually immediate location updates to central registries.

Concession agreements

Some would present that acquisition of exploration rights through concessionary prospecting permits, which may be issued without effective discretion by governments also represent free-entry, such as is the practice in much of Australia. The key issue here is the extent to which, if any, discretion the government has in issuing the permits. If there is essentially none, then the concession system effectively becomes a variation on free-entry, similar to map staking.

6 COMMENTARY

The free-entry system of acquiring and asserting mineral rights has developed and been effectively applied over an extended period of time. Over that period, it has evolved from its medieval roots as a straight forward mechanism for self-regulation amongst free-miners, to codified regulations, and most recently has been adapted to modern, internet-based, real time electronic staking. That is to say, it has provided effective regulation of a competitive economic activity under a wide variety of circumstances, and has shown flexibility to adapt to changing economic and technical realities.

Its strength as a regulatory tool is its simplicity: the principle that a prospector has the right to acquire a mineral claim by his/her own actions (claim staking), which claim can be upgraded to a lease of mineral rights through application, meeting specified criteria. It encourages investors to provision prospectors in a quest that almost always ends in failure, by providing certainty that, if minerals of value are discovered and the stipulated regulatory process followed, title will follow, bringing with it the potential to recoup those expenses plus earn additional return.

Free-entry is also important for what it does not do, mineral rights embodied in a claim or lease are just that: title to minerals in the ground. Mining claims and leases do not provide permission to undertake any activity (prospecting, exploration, development or mining) that might impact the land or broader environment. Such activity remains subject to the full suite of land use, environmental and economic regulation in effect. This is a point that most opposition to free-entry seems to miss: virtually all of the impacts of mining derive from the activities of mining (including prospecting, exploration, development and mining) which are regulated, and not from the acquisition of title.

Free-entry administration of mineral title can be viewed synonymously with real property transactions. In most parts of Canada, an individual can freely purchase

real property (acquire land title) without reference to ultimate activity they may wish to pursue on that property. It is the proposed activity, be it farming, ecotourism, forestry or mining that may be proposed for a property that is required to satisfy land use planning and environmental regulations. So it should be with respect to mineral title under free-entry.

7 RECOMMENDATIONS

There is clearly a gulf in appreciation of the merits of free-entry between the government and industry on the one hand, and First Nations and ENGOs on the other. It is not clear that this gulf is due to lack of understanding or something more fundamental. This should be further investigated and clarified through direct dialogue with stakeholders.

At least some of the opposition to free-entry relates to the lack of discretion available to the government (or others) in the dispensation of mineral rights. This has been stated to be a real concern to First Nations group which have negotiated, or are in the process of negotiating land claims. To the extent that this concern is related to the activities of prospecting and mining, there is need to demonstrate that mineral rights do not embody permission for mining activities, that the full land use and environmental regulatory regime continues to apply.

Concerns regarding the activities of mining should be directed to the appropriate regulatory review forums on land use planning and environmental regulation.

To address concerns regarding the intrusion on lands for early stage prospecting and staking activities, the merits of alternatives such as electronic or map staking, that remove the need for impact on the ground, should be further evaluated with respect to potential legal, cost and environmental impacts. Industry may be supportive of such systems – the cost of ground staking is not trivial, and savings from implementation of electronic staking could be re-directed to more effective use in actual exploration, or environmental assessment work.

8 APPENDIX: HISTORICAL PERSPECTIVE

Mineral Code Development History in the NWT

In 1869, Canada acquired the rights to mineral resources in Nunavut and the Northwest Territories through its acquisition of Rupert's Land from the Hudson Bay Company. In 1887, the federal government reserved to the Crown all mines and minerals in the lands west of the Third Meridian, under the Dominion Lands Act. This reservation of mineral rights was extended in 1889 to the remainder of Nunavut and the Northwest Territories. The policy of reserving all mines and minerals continues to apply.

Regulation of hard rock mining in the territories began with the Quartz Mining Regulations, made under the Dominion Lands Act in 1898. These described and implemented the free-entry system, including need for a free miner's certificate, ground staking (two-post system), a certificate of improvement for (\$500) work on the claim, and Crown grant (ownership) of a mineral claim. In 1917, the right to obtain a Crown grant of a mineral claim was removed, and substituted by a right to obtain a renewable 21 year lease. This amendment also removed the requirement for a discovery to validate a claim.

These regulations have been continued to this day as the Canada Mining Regulations under the Territorial Lands Act. However, they have been subject to much additional adjustment and amendment over the years. The most recent amendments, in 1999, updated certain administrative and royalty aspects of the regulations.

Canadian perspective on mineral title as distinct from land title

Three principle forms of mineral ownership have developed over time around the world:

- alienated ownership of minerals tied to ownership of the land above.
- regalian system whereby the Crown (or state) owns all or virtually all minerals and leases or assigns rights to exploit these resources to private sector developers under set conditions;
- inalienable Crown ownership, where resources are developed either directly by state-owned entities or under contract by the private sector; and

By far, the majority of mineral resources in Canada are owned by the Crown.

Minerals ownership in Canada, in keeping with our English common law heritage, initially followed a combination of the first and second systems above, where ownership of minerals was tied to ownership of the land surface, with the exception of certain, "noble" or precious, minerals (gold and silver) which were reserved for the Crown.

This changed with the discovery of sizeable base metal mineral resources in Ontario, and indeed in response to the gold rushes of the 19th and early 20th centuries, which prompted introduction of free-entry rules to regulate the overwhelming pace of activities. Initially, mineral rights were granted or sold outright to applicants. In the 20th century, this changed to broad reservation of all mineral resources by provincial and federal governments across Canada to the Crown, with a system of leasing and set term tenure, not outright grants.

The development of Free-Entry

Modern free-entry mineral title systems derived from medieval German practices. Feudal title to surface lands did not generally extend to mineral rights. Free-miners were able to mine where they found minerals, and sometimes, but not always, paying rent to the surface, feudal, owner of the land. Miners developed self-regulation in the form of staking claims to establish exclusive working privileges. In the 1700s, free-entry type of staking to establish priority mineral title migrated to the tin mining districts of England.

Free-entry and ground staking made its entry to North America, again as self-regulation by miners during the Californian gold rush in the mid-19th century. This was followed by similar application in Australian, Alaskan and Canadian gold rushes. Free-entry was codified into regulations in British Columbia, then elsewhere.

Early free-entry staking of claims in British Columbia was based on:

- registration as a free miner;
- requirement for a discovery;
- staking corners on the ground;
- priority to time of staking, not recording, although recording had to be effected within set time;
- payment of substantial registration fees;
- claims provided exclusive exploitation rights;
- also provided for royalties;
- requirement for continual working – rules limited non-working periods to 72 hours in season;
- regular renewal required; and
- different rules for placer mining vs. vein mining.

Over time changes have been made to free-entry, principally:

- further separation of placer from vein mining rules, size of claim, etc.;
- a claim became an exclusive right only to explore and develop, a lease, freely available, became necessary to mine;
- fixation on vertical claim boundaries, as opposed to extra-lateral claims which can follow a vein down beyond vertical boundary;
- continuous work requirement was replaced by assessment requirement on claim and rent on a lease (and the relative intensity of work on a claim required to maintain tenure has been substantially reduced);
- initial discovery base for claim replaced by promising ground, or prospect;
- tenure period before renewal required extended;
- staking requirements change from 4 corner posts, to 2 and/or one in different jurisdictions; and
- most recently, map staking has been introduced without a requirement for actual effort on the ground.

9 REFERENCES

To be added

10 GLOSSARY

CMR: The Canada Mining Regulations, enacted under the Territorial Lands Act, provide the regulatory framework for mining in Nunavut and the Northwest Territories

concession: A system of assigning mineral rights whereby rights are acquired by the private sector through application to the owner (the Crown) which may assign rights in designated areas on a discretionary basis.

Crown: The federal government.

DIAND: The (federal government) Department of Indian Affairs and Northern Development.

free-entry: A system of assigning mineral rights. In the context of current regulation in Nunavut and the Northwest Territories, it comprises three critical elements:

- the holder of a licence to prospect (which is freely available) has a general right (with some exceptions) to enter most lands for mineral purposes;
- the holder of a licence to prospect has a right to acquire a mineral claim by his/her own actions; and
- when a claim holder applies in proper form and has a claim surveyed, he/she is entitled to a lease.

ground staking: A method of acquiring mineral rights under the free-entry system, where a prospector places posts, or stakes, at the corners of the desired prospective ground, then records the claim with the designated title recorder. Staking requirements vary amongst jurisdictions from the need to place posts at each corner of a claim plus clear and mark the boundary lines; to indicating a claim by a single corner post, which assumes specified offsets to the remainder of the claim. Corner posts usually are required to have official tags or designations indicating the owner and registration. Claims are usually expected to be rectangular in area, and may extend under inland waterways. Additional recording conditions and fees may apply.

