SURFACE RIGHTS UNDER THE MINERAL ACT
OF BRITISH COLUMBIA

by

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We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

October, 1984

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Date 12 October 1984
ABSTRACT

The subject of this thesis is the rights of mineral operators under the British Columbia Mineral Act to enter and use the surface of land for the purposes of mineral exploration and development. The particular objective is to ascertain whether surface rights questions are to be decided by reference to the Mineral Act alone, or whether common law principles and real property rights can be relied upon to clarify, enlarge or restrict the legal position of the mineral operator or the surface owner. The Mineral Act is compared with the common law rules on the working of minerals and with the oil and gas surface rights arbitration system.

The thesis begins with a description of the mineral industry in British Columbia and the patterns of land ownership and mineral ownership within the province. The longstanding policy of reserving all mines and minerals to the province on the occasion of a Crown grant of land is an important part of this pattern, and attention is given to the judicial interpretation over the years of the words "mines" and "minerals", as those words are used in such reservations. The general purpose and scheme of the Mineral Act is then described. Particular consideration is given to the evidence that indicates that the holder of a mineral claim has a right that is in the nature of an interest in land.
Chapter III is a review of the common law principles governing the rights of mineral operators to enter and work minerals where the minerals and the surface are owned separately. These rights are found to depend on the terms of the instrument that severed the ownership of the minerals and the surface, as construed by the courts in accordance with certain well-defined presumptions. The right of support of the surface is one of the main presumptions.

The surface rights provisions of the Mineral Act are studied in depth in Chapter IV in order to understand the legal rights of the surface owner and mineral operator. In turn, attention focusses on the ways in which land is made open or closed for mineral purposes, the extent of the rights granted to the mineral operator to use and possess the surface, his obligation to compensate the surface owner for loss or damage caused by his entry, his right to take possession of the surface and the implications of that possession. The brief surface rights sections of the Act are found to establish a system characterized by inflexibility and absoluteness of effect.

Chapter V analyzes the surface rights system established under the Petroleum and Natural Gas Act. Similar to procedures in other western provinces, this system is more adaptable, resorting to the flexible powers of a special Board of Mediation and Arbitration.

The Mineral Act is then compared with each of these other systems so that their characteristics may be better understood.
Chapter VII investigates the possibility of using the common law surface rights principles to supplement the Mineral Act, but concludes that, for Crown minerals within the definition of the Act, the better view is that the common law principles have been completely extinguished by the statute. Chapter VIII ends with a brief consideration of factors that would bear on any reform of the Mineral Act.
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ACKNOWLEDGEMENTS

I wish to express my thanks to Professor A.R. Thompson, not only for the supervision of this thesis, but also for his guidance and assistance generally; to Professors A.J. McClean and D. Vaver, the other members of the Committee, for the useful ideas they have provided; and to Mrs. M. Ewers, for her kindness and exceptional typing skills.
CHAPTER I

INTRODUCTION

The subject of this thesis is the rights of mining operators to enter and use land under the British Columbia Mineral Act.[1] Sharp conflicts about land use are often caused by mineral exploration or development where the land is also of interest to other resource users or which is in private ownership. Our objective is to inquire into the law regulating these conflicts. In particular, we will ascertain whether surface rights questions are to be decided by the Mineral Act alone, or whether common law principles and real property rights may be relied upon to enlarge or restrict the rights of either party.

The study will include a review of the law of surface rights under the common law and under oil and gas legislation as well as under the Mineral Act.

1. THE MINERAL INDUSTRY IN BRITISH COLUMBIA

Mining, including metals, industrial minerals, structural materials and coal, but excluding oil and gas, is a major component of the economy of British Columbia. Even in the severely depressed conditions of 1982, it contributed 5.6% of the gross provincial product (compared to 8.9% in 1980).[2] It is a significant contributor to provincial government revenues,[3] employment,[4] and exports.[5] The relative importance of the
various mineral products, with oil and gas, is compared in Table I for 1980, a good year, and 1982, a year of recession.

The major mining operations in British Columbia as at the end of 1982 were estimated to be 62% effectively owned by Canadians and 76% effectively controlled by Canadians.[6]

Most production comes from mines designed on a very large scale. Many mines have an annual milling capacity over 1,000,000 tonnes; the largest, Lornex, milled 27,843,000 tonnes in 1982.[7] Economies of scale are necessary for the profitable working of deposits which are difficult of access and low in grade. Such deposits are used more as richer deposits are worked out. For instance, in 1920 the average grade of copper mined in British Columbia was about 20%, compared with less than 0.5% which is common today.[8] However large operations call for large amounts of capital. Reopening the Kitsault molybdenum mine, for example, cost $150,000,000 [9] and the new Quintette coal mine has cost Denison Mines Ltd. $900,000,000.[10] As a result, mining is capital intensive rather than labour intensive; it creates relatively little direct employment per dollar of output or per unit of capital employed in comparison with most other industries.[11] Its indirect effect on employment by supporting jobs elsewhere in the economy is disputed but is thought to be similar to that of other industries.[12]

In order to understand the land use needs of the mineral industry, it is important to understand the differences between the various stages of the mineral development process. The stages
<table>
<thead>
<tr>
<th>METALS</th>
<th>1980 Actual</th>
<th>1982 Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copper</td>
<td>$254,674,830</td>
<td>$267,513,000</td>
</tr>
<tr>
<td>Gold</td>
<td>$7,477,416</td>
<td>$458,000</td>
</tr>
<tr>
<td>Iron concentrates</td>
<td>$653,324</td>
<td>$772,000</td>
</tr>
<tr>
<td>Lead</td>
<td>$76,709,447</td>
<td>$83,119,000</td>
</tr>
<tr>
<td>Molybdenum</td>
<td>$11,179,501</td>
<td>$14,942,000</td>
</tr>
<tr>
<td>Silver</td>
<td>$203,801,811</td>
<td>$458,015,000</td>
</tr>
<tr>
<td>Zinc</td>
<td>$67,481,328</td>
<td>$63,955,000</td>
</tr>
<tr>
<td>Others</td>
<td>$13,622,538</td>
<td>$4,274,000</td>
</tr>
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<td>Total Metals</td>
<td>$1,429,001,180</td>
<td>$1,038,530,000</td>
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<tr>
<td>INDUSTRIAL MINERALS</td>
<td></td>
<td></td>
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<tr>
<td>Asbestos</td>
<td>$100,089</td>
<td>$78,000</td>
</tr>
<tr>
<td>Sulphur</td>
<td>$359,413</td>
<td>$460,000</td>
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<tr>
<td>Others</td>
<td>$12,524,712</td>
<td>$9,195,000</td>
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<tr>
<td>Total Industrial Minerals</td>
<td>$115,926,007</td>
<td>$109,867,000</td>
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<td>STRUCTURAL MATERIALS</td>
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<tr>
<td>Cement</td>
<td>$1,351,320</td>
<td>$776,000</td>
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<tr>
<td>Sand and Gravel</td>
<td>$45,278,202</td>
<td>$29,193,000</td>
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<tr>
<td>Others</td>
<td>$52,778,471</td>
<td>$22,227,000</td>
</tr>
<tr>
<td>Total Structural Materials</td>
<td>$242,325,657</td>
<td>$156,814,000</td>
</tr>
<tr>
<td>Coal</td>
<td>$10,823,530</td>
<td>$11,236,000</td>
</tr>
<tr>
<td>PETROLEUM AND NATURAL GAS</td>
<td></td>
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</tr>
<tr>
<td>Crude oil</td>
<td>$2,002,128</td>
<td>$2,040,000</td>
</tr>
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<td>Natural gas to pipeline</td>
<td>$8,931,833</td>
<td>$7,300,000</td>
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<tr>
<td>Others</td>
<td>$26,196,040</td>
<td>$34,082,000</td>
</tr>
<tr>
<td>Total Petroleum and Natural Gas</td>
<td>$828,302,626</td>
<td>$912,905,000</td>
</tr>
<tr>
<td>GRAND TOTAL</td>
<td>$3,077,049,327</td>
<td>$2,791,149,000</td>
</tr>
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of the process differ not only in their use of land, but also in techniques, operations, expense, financing, corporate organization and risks.

Mineral exploration is in effect a resource inventory procedure, but since the mineral resource is hidden, exploration is different from other inventory procedures, such as timber cruising. It is very expensive [13] but it is also very risky. The probability that any one prospect will be developed into a new mine is very low indeed. However, if the find is good enough, it is almost certain that mining will be the best economic use of the land. A further feature is that the finding of a deposit of an acceptable grade is many steps removed from production. Sufficient reserves must be proved, and the extractive metallurgy for the particular deposit must be established. A long lead time therefore results between discovery and production decision. Ten years is typical. In these features hard rock exploration is different from onshore petroleum exploration, where a successful well may be put into production with little more ado.

The stages of the mineral development process may be briefly outlined.

The reconnaissance stages of the process involve selection of regions of favourable geology, and regional field surveying by geological, geophysical or geochemical methods. Airborne remote sensing is used as far as possible. If these methods disclose promising geology and an anomaly (an area with abnormal geophysical or geochemical values), the next stage is more
detailed ground work. At this point mineral claims may be located, at least temporarily. A surveyed grid is established, and geophysical and geochemical techniques are used to investigate the anomaly. Geological investigation may call for surface stripping or trenching to expose the bedrock. If the results are good, the most likely areas are selected for the next stage, a drilling programme. Diamond drilling, using highly portable rigs, secures a core of rock which may give the first direct proof of mineralization. It may take a number of holes to find economic mineralization, and many more to determine its size, shape and grade. Even an intensive drilling programme may have to be followed by small open pits, adits or a pilot plant. A feasibility study evaluates the geological data thus obtained, along with technical, environmental, marketing and financial factors, and on its strength a production decision may be made.

Little disturbance to the land is caused by geophysical techniques, such as induced polarization and resistivity, or by geochemical techniques, sampling soils, sediments, water or vegetation to detect traces of elements showing underlying mineralization. A grid survey, however, may require linecutting through vegetation. Stripping and trenching of course create major disturbances, while drilling requires the clearing of access routes and drill sites. All work on a property results in some level of disturbance from the provision of access and accommodation facilities.
Thus, during the mineral exploration process, the extent of land under examination is rapidly reduced. Many claims are staked but dropped after a season or two of investigation.[14] The effort spent on favourable areas is intensified, and the techniques used have progressively more impact on the surface.

The surface impact becomes extreme when a mine goes into production, although the area directly affected is relatively small. The subject has recently been reviewed in an Environment Canada study by I.B. Marshall.[15] He estimates that the total land area disturbed, utilized and alienated by mining activities in Canada is 284,327 hectares, of which 15% is in British Columbia.[16] This excludes exploration[17] but includes a lot of disturbance for extracting construction materials such as sand and gravel.[18] More helpful are figures for the area covered by individual mines; a typical open-pit copper-silver mine in British Columbia may cover 1,298 hectares, including the pit, mine wastes, mill, facilities and alienated lands.[19] Underground mines use less land, but are often not as advantageous economically. In 1982, only 9 out of the 29 largest mines in British Columbia were underground.[20] One must also note the high potential of a mine for impact on land beyond the mine site through air and water discharges.[21]

2. **LAND OWNERSHIP AND MINERAL OWNERSHIP IN BRITISH COLUMBIA**

The environment of the British Columbia mineral industry has always been dominated by Crown ownership as the source of rights...
to lands and minerals. Upon joining Confederation with Canada in 1871, British Columbia took the benefit of section 109 of the British North America Act, ensuring that "all lands, mines, minerals and royalties" belonging to the province remained in provincial ownership.

However British Columbia's contribution towards the railway which was to join the nation was the transfer to Canada of a strip of land twenty miles on either side of the railway. After years of uncertainty the Settlement Act of 1884 set the location of this Railway Belt. It also conveyed the Peace River Block. The jurisdiction of the federal government over the strategically located Railway Belt caused much inconvenience and vexation to all. Some of the major disputes were over minerals. It was not until 1930 that the unalienated portions of the Belt, and the Peace River Block, were returned to the province.[22]

Land and resource policy was always the foremost issue in early British Columbia politics. In his major study, Land, Man, and the Law: The Disposition of Crown Lands in British Columbia, 1871 - 1913,[23] R.E. Cail identified three constant factors of land policy; the wish to encourage settlement, the desire to prevent speculation in public lands, and the acute need to provide an adequate revenue with which to administer such a large territory. These objectives applied to mineral lands and mineral rights as much as to any other lands. They were reflected in legislation of many years' standing which permitted a miner to obtain a grant of mineral lands which conveyed the whole fee
simple estate to him.[24] But most miners of the time, especially placer miners, were transitory users of the land. Cail estimates that the area of land alienated for mineral purposes by 1913 was considerably less than 1560 km².[25]

Even today, Crown ownership of land is dominant. Table 2 shows how much of the surface of the land of the province is still in public ownership, notwithstanding decades of settlement and the prodigal railway land subsidy grants of the last two decades of the nineteenth century.[26]

The figures on land tenure can be related to the figures for land use. In 1956 it was estimated that rock and barren areas comprised 53% of the province; forest, 39%; arable and grazing, 5%; and water, 2%. [27]

3. MINERAL OWNERSHIP AND MINERAL RESERVATIONS

With Crown ownership of land goes Crown ownership of minerals. At common law, all minerals in their original position, other than gold and silver, are part of the land.[28] Prima facie, the owner of the surface is entitled to the surface itself and all below it. Thus it is ownership of the land, and not any regalian theory of state ownership, that is the origin of Crown ownership of most minerals in British Columbia.

Two provisos must be added to the general statement. First, the royal metals, gold and silver, belong to the Crown by prerogative right and are not regarded as partes soli or as incidents of the land, as the Precious Metals Case of 1889 [29]
### TABLE 2

**TOTAL AREA OF BRITISH COLUMBIA CLASSIFIED BY TENURE - 1978**

*(Canada Year Book 1980-81, p. 27)*

<table>
<thead>
<tr>
<th></th>
<th>km</th>
<th>%</th>
<th>km</th>
<th>%</th>
</tr>
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<tbody>
<tr>
<td>Federal Crown land</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>except as below</td>
<td>904</td>
<td>.095</td>
<td></td>
<td></td>
</tr>
<tr>
<td>National Parks</td>
<td>4690</td>
<td>.494</td>
<td></td>
<td></td>
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<tr>
<td>Indian Reserves</td>
<td>3390</td>
<td>.357</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>8984</td>
<td>.947</td>
</tr>
<tr>
<td>Privately owned land</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>or land in the pro-</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>cess of alienation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>from the Crown</td>
<td>55040</td>
<td>5.802</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provincial Crown land</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>except as below</td>
<td>539280</td>
<td>56.852</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provincial Parks</td>
<td>41629</td>
<td>4.388</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Provincial Forests</td>
<td>303663</td>
<td>32.012</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>884572</td>
<td>93.251</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total area</td>
<td>948596</td>
<td>100.000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
held with respect to the Railway Belt. The second proviso relates to oil and gas. The courts of Canada have taken a cautious approach to the ownership of these substances. Borys v. Canadian Pacific Railway [30] held that there is no remedy for the loss of oil and gas draining towards a well on other land, thereby establishing the rule of capture as the basic legal characteristic of Canadian oil ownership rights. In the leading case of Berkheiser v. Berkheiser [31] the Supreme Court of Canada held that the grantee of an oil and gas lease has a real property interest in the nature of a profit a prendre.

The ownership of the surface of the land and the underlying minerals may be severed, just as other real property may be divided. Nothing is more common than to sell or lease a piece of land, excepting the minerals, or to sell or lease a piece of land, excepting the surface. Many Acts of Parliament have severed the ownership of a surface from that of the underlying minerals.[32] The severed mines and minerals may be held in fee simple,[33] for a leasehold estate or for a lesser interest.[34] The typical severance of "all mines and minerals" will be discussed in detail below, but a severance may specify one or more minerals, or one particular stratum. It may work as a grant of the spaces left after the minerals have been removed, as well as being a grant of the minerals themselves.[35] Usually the surface is referred to in contrast to the minerals, but in this context "surface" means not mere plane surface but all the land except the mines or minerals severed.[36]
A severance of minerals on the occasion of a grant of the land is generally called a reservation of the minerals. This is a usage of long standing,[37] but it is strictly inaccurate. A "reservation" is of a thing not in being, but newly created or reserved to the grantor,[38] such as a right in the nature of rent,[39] or an incorporeal right such as a profit a prendre in favour of the grantor.[40] In this sense, the reservation operates as a regrant of the new right back to the grantor. An "exception", however, is of a part of the thing granted and must be a thing in being when the grant is made. It remains always with the grantor.[41] Thus mines and minerals are properly the subject of an exception, but where they purport to be reserved, they are in fact excepted.[42]

The most common and the most significant severance has been the reservation of mines and minerals to the Crown on the occasion of a grant of public land to an individual. This reservation has had a formative influence on the petroleum and mineral industries of western Canada.[43]

However, it took some time for the policy of reserving all minerals to become entrenched in British Columbia.[44] The precious metals were declared to belong to the Crown as early as 1857,[45] and were inevitably reserved from Crown grants.[46] All other minerals were included in Crown grants of mineral lands or agricultural lands. Between 1882 and 1884, coal was reserved from dispositions of agricultural lands, but this policy was eliminated with retrospective effect.[47] It seems that it was in 1891 that Crown grants under the Lands (Crown) Act first reserved
"all minerals, precious or base, other than coal".[48] This appears to be the ancestor of the present section 47 of the Land Act.[49] The Railway Belt was a further complication, and federal policy changed several times. After the Precious Metals Case of 1889[50] the Dominion agreed that all minerals (other than coal) were to be administered under the provincial law.[51] The policy established in 1891 did not of course affect specific Crown grants of minerals, which continued until 1957.

As a result of the different policies that have held sway, the mineral rights which attach to a piece of land in British Columbia are governed by two main factors; the date of the original Crown grant, and whether it formed part of the Railway Belt or were granted as railway subsidy lands.

4. THE MEANING OF "MINES" AND "MINERALS"

When "mines and minerals" are reserved, it is often difficult to say exactly which substances are included. This is a question of ownership of the minerals. It is one that must be settled before questions of right to work the minerals may be settled.

In the modern world it is likely that some legislation will have a bearing on the construction of the words "mines and minerals" in a reservation. If a statute prescribes what is reserved, even a total omission of the reservation from the grant will not necessarily vitiate the effect of the statute.[52] Or the word "minerals" in a Crown grant may be given the meaning that is given to it by a definition in a Crown Lands Act.[53] In other
cases, reference to a statute in a grant may not affect the substance of the reservation. In private deeds, the meaning of terms is unlikely to be ruled by statute, but the vernacular meaning of "minerals" may be better understood by turning to the definitions in statutes.[54]

There is an enormous body of case law on the meaning of "mines" and "minerals".[55] Fortunately, the main common law principles were settled with authority in two major decisions, Glasgow Corporation v. Farie [56] in 1888 and North British Railway Co. v. Budhill Coal and Sandstone Co. [57] in 1910.

Earlier cases construed the terms in a variety of ways. The state of the law was analyzed in Hext v. Gill [58] in 1872 by two particularly learned judges. Mellish L.J. put it thus:

But the result of the authorities, without going through them, appears to be this: that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning.[58a]

James L.J. concurred entirely, but then added an observation which in due course swept this principle aside:

But for these authorities I should have thought that what was meant by "mines and minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century [when the grant was executed]; upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.[59]

This observation was adopted by the House of Lords in 1888 in Glasgow Corporation v. Farie [60] as the proper test of the meaning of the term "minerals" in waterworks compulsory purchase.
legislation. The cases following Farie produced inconsistent results.[61] It was not until Budhill [62] in 1909 that the House of Lords was able to re-assert the primacy of Farie and to establish the law in the form that it now takes in both Britain and Canada.

The issue in Budhill was whether sandstone was a mineral within a reservation of "any mines of coal, ironstone, slate or other minerals" as that expression was used in section 70 of the Scottish Railways Clauses Consolidation Act 1845.[63] Because the authorities propounded a whole variety of contradictory principles,[64] the House put them aside and found the matter at large. The two main judgments, by Lord Loreburn L.C. and Lord Gorell, were in substantial agreement.

The first step was to consider the purpose of the severance and the object of the legislation effecting it. Lord Loreburn said:

In considering whether sandstone is a mineral within the meaning of s. 70 of the Act of 1845 it is as well to look at the purpose which was in view when that Act was passed. The purpose was to enable a railway company to acquire land and build a railroad thereon to carry passengers and goods. Minerals, however, were not to be acquired (except by express agreement).[65]

He then related this purpose to the exception of minerals that was found in the Act:

In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed
altogether, unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there is anything exceptional in this sandstone, either in point of higher value or rarity. It was agreed at the Bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. I am aware that there are expressions of great judges favourable to such a contention. There are also other expressions in a diametrically opposite sense. Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House, from which there is no escape. There is no such decision.[66]

Thus, the purpose of the severance was looked at, and the exception of sandstone was found to be inconsistent with it.

The second step was to accept that decisions as to the meaning of the word "minerals" in private conveyances were of the greatest importance in interpreting the statute.

It would be very strange if a Court, having before it two conveyances with a reservation of minerals in both, were obliged to treat the reservation as meaning one thing in the first and a quite different thing in the second, merely because the one was a voluntary conveyance by agreement and the other was compulsory under the Act. The Act does not say this. Why should it be said by the Court?[67]

It was only then that Lord Loreburn concluded with his view on the meaning of the term;

It is impossible to give an exhaustive definition of the meaning of the much debated words that are to be found in s. 70. But I hope your Lordships may assist in their interpretation. In the first place, I think it is clear that by the words "or other minerals" exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in Lord Provost of Glasgow v. Farie. The Court has to determine "what these words meant in the vernacular of the mining world, the commercial world, and landowners" at the time when the purchase was
effected, and whether the particular substance was so regarded as mineral.[68]

Budhill was followed one month later by Great Western Railway v. Carpalla United China Clay Co. [69] and in 1911 by Caledonian Railway v. Glenboig Union Fireclay Co.[70] and Symington v. Caledonian Railway.[71] In these cases the House of Lords clarified and stood fast by the principles of Budhill. As far as they were concerned that case had decided the law and they were not going to keep repeating those propositions.[72]

Only a year passed before the vernacular test in Budhill was followed in Canada in Farquharson v. Barnard Argue Roth Stearns Oil and Gas Co.[73] The evidence was that in 1867 neither oil nor gas was regarded as a mineral, so gas was not included in a reservation in that year of "all mines and quarries of metals and minerals, and all springs of oil". In many cases since then, however, oil and gas as well have been held to be included in reservations of minerals; for example, Creighton v. United Oils Ltd. [74] and Landowners Mutual Minerals Ltd. v. Registrar of Land Titles.[75]

The principles stated in Budhill and the associated cases continue to be applied in Canada. The most useful way to describe the modern law in a summary fashion seems to be to propose the main rules and then to mention several secondary points.

The three main principles seem to be:

1. In deciding whether or not in a particular case a substance is a mineral, the true test is what that meant in the vernacular of the mining world, the commercial world and landowners at the
time when the severance took place, and whether the particular substance was so regarded.[76] This test has been accepted in every Canadian case but one,[77] and it has prevailed on occasions where the other two main rules, below, have not been applied.[78] The test has been invoked to prefer the vernacular meaning of words over the scientific, although the distinction is not a rigid one.[79] It will be assumed that the vernacular meaning at the time of the transaction was the same as at the present, unless sufficient grounds to the contrary are given.[80] In the most recent case, Mastermet Cobalt Mines v. Canadaka Mines [81] substantial weight was given to the definition of words in the mining legislation of the time in order to ascertain the vernacular meaning.

2. In construing a reservation of mines and minerals, regard must be had, not only for the words employed to describe the things reserved, but to the relative positions of the parties interested, and to the substance, leading purpose or object which the deed or Act embodies.[82] "Mines" and "minerals" are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used.[83] Such evidence varies the prima facie meaning of the word "minerals".[84] Circumstances including such purposes or intentions have included the granting of land for agricultural purposes, with the grantee covenanting to cultivate,[85] and the taking of land to build a railroad.[86]

3. From this second rule derives a third, that "minerals" in a reservation does not designate the ordinary rock of the
district,[87] but exceptional or rare substances,[88] that is, exceptional in use, character or value,[89] or in occurrence.[90] A grant of the common rock or subsoil will usually defeat the purposes and intention of the severance of ownership of surface and minerals. This test was applied by Egbert J. in Western Minerals Ltd. v. Gaumont.[91] He found that sand and gravel were rare and exceptional substances on the prairies near Edmonton; less than one-thirtieth of the land for twenty-five miles around contained gravel. Because there was no evidence to prove that at the time of the transaction the parties intended not to include sand and gravel in the reservation of minerals, he held them to be therefore included. The result was a surprise to all; even the Judge suspected that the parties would not have intended it.[92] It was annulled by the Legislature [93] and reversed by the Appellate Division and the Supreme Court of Canada.[94] The test of exceptional occurrence was ignored in the decision of the Supreme Court of Canada. It was only with the greatest caution that Egbert J. applied it again (and then only on top of the vernacular test) in Williamson v. Hudson's Bay Co. [95]

In distinguishing "minerals" from ordinary rock, the courts are avoiding the geological meaning of the word, and in so doing lean towards preservation of the surface. This tendency recurs in the context of the right of support.[96] The "exceptional occurrence" test is on the decline, and is perhaps best taken as an offshoot of the "purposes and intentions" test. Nevertheless, it has good authority behind it, and it has not fallen into disuse.[97]
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The cases have also made the following points.

(a) The question of what is meant by "mineral" is a question of fact, in which the evidence taken is most important.[98] This is because the term is not a definite one, and is to be understood from the vernacular.

(b) The same principles of construction are to be applied to deeds, other instruments, Crown grants, and a variety of different Acts.[99]

(c) The onus of establishing that a substance is within a reservation of minerals is always on the person alleging it to be within the reservation.[100]

(d) Whether a substance can be worked for the purpose of a profit can still be relevant to the meaning of "minerals".

The purpose of profit may have a bearing upon the question whether certain substances have been recognized as included in the term "minerals," but does not necessarily determine that they have been ordinarily understood to be so included.[101]

This is a throwback to the judgment of Mellish L.J. in Hext v. Gill.[102] It re-appears with a new twist in Seymour Management Ltd. v. Kendrick [103] a recent British Columbia case. The court had to decide whether old mine tailings - and the newly valuable minerals still in them - fell within a reservation of "any minerals, precious or base". Munroe J. held that they did not.

The intention of the parties to the Crown grants could not have been to reserve title in the Crown to minerals in tailings which were then regarded as of no practical value, placed on the land by man, and which later may have become practicable to treat at a profit by a new process resulting from technological advances.[104]
It may be that in this analysis Munroe J. is declaring what the parties would have intended to have written, rather than declaring the plain meaning of the words they did use. It was admitted that the tailings were part of the land, and that the materials sought in the tailings were minerals. If the materials are indeed minerals, and were minerals at the time of the grant, the economics of working them should not control the question when minerals were in plain words reserved.

The "profit" test is linked with the "exceptional occurrence" test, and, like it, is best taken as a offshoot of the "purposes and intentions" test.

(e) The meaning of "minerals" is not restricted by the facts that the substance cannot be worked except by destroying the surface, and that there is no right to work in that manner.[105] This need not contradict the "exceptional occurrence" test. Equally, the reservation of working rights appropriate to one kind of minerals does not prevent the word "minerals" from including other minerals.[106]

(f) If no limitations are imposed in the severance, "minerals" is to be construed in its widest sense.[107] However the cases are not consistent in deciding whether this prima facie wide sense is varied or narrowed by the addition of other specific substances. In some cases the _ejusdem generis_ rule may apply.

"Minerals" in its very widest sense may include all things not animal or vegetable, but if it is used with "metals" or "springs of oil", which would be included in that sense, it has been given a narrower interpretation.[108] "All mines, minerals,
petroleum, gas, coal and valuable stone" has been held to provide a context showing that "minerals" is not used in its widest sense, but as meaning exceptional substances only, not sand and gravel.[109] Similarly, the particular words in "all mines and minerals, coal or valuable stone" have been held to have a decided tendency to narrow the meaning of the word "minerals".[110]

On the other hand, "mines" was held not to restrict "minerals" in the phrase "mines and minerals";[111] the general words in "all coal and other minerals" could not be construed ejusdem generis with coal without rendering them meaningless; it would be impossible to single out a genus of minerals to which the general words could be confined;[112] and in "minerals, precious or base (other than coal)" the word minerals was free from ambiguity and not restricted to metallic substances.[113]

The principles of interpretation of reservations that have been briefly reviewed here are generally congruent with normal principles of construction of instruments.[114] Although the means to the end have varied from time to time, the basic object of the leading cases seems always to have been to ascertain the intention of the parties by giving ordinary meanings to the words they have used.[115] It seems erroneous to assume (as does Stewart in his article "The Reservation or Exception of Mines and Minerals"[116] that in the period up to and around Hext v. Gill[117] in 1872 the courts disregarded the intention of the parties to a deed.[118] While this general congruence prevails, the interpretation of the words "mines and minerals" has led to the growth of special rules as well.
These common law rules governing the ownership of minerals have been evolving for some time, but they are still directly applicable in Canada and in British Columbia in particular. [119] At the present, the most contentious and difficult area for their application seems to be with respect to the rights of mineral owners or surface owners to old mine tailings.[120]
FOOTNOTES - CHAPTER I

1. RSBC 1979 c 259.


3. B.C. Ministry of Energy, Mines and Petroleum Resources, Annual Report, 1979, p 19; Mining Association of B.C., The British Columbia Mining Industry in 1982, 1983, pp 18, 42. As well as the difference in the figures quoted by the two sources, one should note that the MABC figures show that government revenues from mining dropped precipitously with the recession.

4. The companies participating in the Mining Association of B.C. survey, op. cit. p 16, employed 17,902 persons in 1982.

5. The participating companies obtained 90% of their net revenues from sales outside Canada; ibid, p 9.


13. Expenditures for mineral and coal exploration in 1981 were estimated to be at least $125,000,000: Ministry of Energy Mineral Petroleum Resources, Summary of Mining and Exploration in B.C., 1981.

14. The total area in BC held for mineral exploration under various claims and licences in 1981 was 6,000,000 ha, or 6% of the surface of the province. However in that year 71,666 new units of claims were recorded, being 1,791,650 ha. Levels in the previous two years were similar. In 1981 only 30,000 ha, or 0.5% of existing claims were held under leases which are almost always acquired if mining production is to


17. Ibid p 127.
18. About one half of the total: ibid p 134-5.
19. Ibid p 139.
20. Mining Association of B.C., op. cit.
23. Ibid p 245.
24. Eg SBC 1873 c4, 1877 c 14.
29. AG of BC v. AG of Canada (1889) 14 App Cas 295, 302; Case of Mines (1567) 1 Plowd 310, 75 ER 472.
33. Re Algoma Ore Properties and Smith [1953] OR 634.
35. Little v. Western Transfer and Storage Co. [1922] 3 WWR 356 (Alta App Div).


37. Eg Lord Campbell LC in Bowser v. MacLean (1860) 2 DeG. F. &J. 415 at 420, 45 ER 682; Eardley v. Granville (1876) 3 ChD 826.


40. Sutherland v. Heathcote [1892] 1 Ch 475.


42. Ibid.


44. RE Cail, op. cit. chap 5, is very useful on this point.

45. Proclamation of 28 Dec 1857 (see 1 Martin's Mining Cases 537).

46. Eg CSBC 1887 c 98 Form 9.

47. SBC 1882 c 6 s 6 and 1884 c 16 s 72.

48. SBC 1891 c 15 s 11. Also see 1890 c 39 s 21 reserving minerals from lands purchased by locally chartered railways unless specified in the conveyance.

49. RSBC 1979 c 214.

50. (1889) 14 App Cas 295.

51. Cail, op. cit, p 88.

52. AG v. Young [1975] 2 WWR 49.


55. See MacSwinney, op. cit.; Lewis and Thompson, Canadian Oil and Gas #71; and Walter Strachan, "A Conveyance of Mines and Minerals" (1933) 49 LQR 413.
56. (1888) 13 App Cas 657.
58. (1872) 7 Ch App 699.
58a. Ibid at 712.
59. Ibid at 719.
60. (1888) 13 App Cas 657.
61. See for example the angry remarks of Lord Halsbury, arguendo, in re Todd Birlleston & Co and NE Ry Co [1903] 1 KB 603 at 607, about the treatment of his own judgment in Farie at the hands of other judges.
63. The language is similar to that in the English Railway Clauses Consolidation Act 1845. This legislation changed its form in Canada - see Davies v. James Bay Ry [1914] AC 1043, and Chapter IV.
64. Lord Gorell listed six different tests; [1910] AC 116 at 130.
65. Ibid at 125. The railway had the right of compulsory purchase of the minerals if the mineral owner wished to work them. Accordingly there was no right of support in the ordinary sense. MacSwinney, op. cit., covers these statutes in great detail.
66. Ibid at 126.
67. Ibid at 127.
68. Ibid at 127.
69. [1910] AC 83. The first paragraph of Lord Macnaughton's judgment is too wide. It contradicts what he said himself in Farie and in the latter part of Carpalla. Glenboig in effect remedied this lapse. See MacSwinney, op. cit., pp 18, 48.
70. [1911] AC 290.
71. [1912] AC 87.
72. Ibid at 92, per Lord Loreburn.
73. (1911) 25 OLR 93 affirmed [1912] AC 864.
74. (1927) 23 Alta LR 175.
75. (1952) 6 WWR 230.
76. Budhill [1910] AC 116 at 127, 133. This is a return to the principles that were expounded in the earliest cases. MacSwinney, op. cit., pp 11 at 17.
80. Glenboig [1911] AC 290 at 299; Western Minerals v. Gaumont (1951) 1 WWR 369 at 400.
81. (1979) 91 DLR (3d) 283 (Ont CA) approved without comment [1980] 2 SCR 119.
83. Farie (1888) 13 App Cas 657 at 675. Re MacKenzie and Mann Ltd. (1909) 10 WLR 668.
84. MacSwinney, op cit at 24.
87. Ibid at 127.
88. Carpella [1910] AC 83 at 86.
91. (1951) 1 WWR 369.
92. Ibid at 402.
93. The Sand and Gravel Act 1951, SA 1951 c 77.
94. (1951) 3 WWR 434, [1953] 1 SCR 345. In the higher courts, the costs in the proceedings were being fought over. It is
therefore wrong to say, as does Stewart (1962) 40 CB Rev 324, 360, that remarks in those courts on the position apart from the new Act were obiter.

95. (1956) 19 WWR 337.
96. Infra Chapter III.

98. Symington [1912] AC 87; Gaumont (1951) 1 WWR 369 at 375.


102. (1872) 7 Ch App 699.
104. Ibid at 204.
105. Hext v. Gill (1872) 7 Ch App 699 at 713; Carpalla [1910] AC 83 at 86.

111. Farie (1888) 13 App Cas 657 at 690.

115. Eg Budhill [1910] AC 116 at 127.


117. (1872) 7 Ch App 699.

118. Eg Harris v. Ryding (1839) 5 M & W 60 at 70, 151 ER 27; Hamilton v. Bentley (1841) 3 Dunl (Ct of Sess) 1121; Proud v. Bates (1866) 35 LJ Ch 406; see also Hext v. GIII supra note 117 at 717.


CHAPTER II
THE SCHEME OF THE MINERAL ACT

This chapter will outline the general scheme of the Mineral Act of British Columbia,[1] before we proceed to a detailed study of surface rights. Surface rights problems under the Act, and indeed comparisons with other surface rights systems, must be seen in the context of the operation of the Mineral Act as a whole. In particular, we will find it useful to find out whether the rights granted under the Act have any of the attributes of property rights.

The scope of the Mineral Act may be conveniently described by quoting the definition of "mineral" in section 1:

"mineral" means ore of metal and every natural substance that can be mined and that
(a) occurs in fragments or particles lying on or above or adjacent to the bedrock source from which it is derived, and commonly described as talus; or
(b) is in the place or position in which it was originally formed or deposited, as distinguished from loose, fragmentary or broken rock or float which, by decomposition or erosion of rock, is found in wash, loose earth, gravel or sand,

but does not include coal, petroleum, natural gas, building and construction stone, limestone, dolomite, marble, shale, clay, sand, gravel, volcanic ash, earth, soil, diatomaceous earth, marl or peat; [2]
These other minerals are covered by other legislation, or are specified to prevent the difficulties of definition that have been encountered in Chapter 1. The Coal Act [3] and the Petroleum and Natural Gas Act [4] cover their particular substances, and the Mining (Placer) Act [5] covers the mining of minerals (especially gold) in alluvial deposits. Compared to Mineral Act mining (or quartz, lode, or hard rock mining as it is also called), placer mining in British Columbia is minor both in overall output and in scale of individual operations.

Section 6 restricts the scope of the Act to minerals vested in the Crown, even though sections 2(1) and 64(b) are couched in terms which could affect private minerals.

The history of British Columbia's mining legislation may be traced back to origins in Australian mining law.[6] In 1852 Governor Douglas received instructions from London to frame regulations for gold mining upon the principle of Australian licensing procedures.[7] The first proclamation was 1853. The Cariboo rush began in 1858, and the first detailed legislation followed in 1859. That was the Gold Fields Act and its regulations, drafted by Judge Begbie on the model of the New Zealand mining laws which themselves had had the benefit of the previous legislation in Victoria and New South Wales.[7A] Mining legislation was subject to scrutiny and amendment by the Legislature almost every year, as befitted regulation of the main activity of the Colony and early Province.[8] Several provisions of the laws of the United States were introduced, particularly the practice relating to adverse actions.[9] The rule that a person
locating (i.e., staking) a claim had to have found rock in place probably had American origins. The same influence is seen in extralateral rights, which may still persist under old Crown-granted claims. These rights were the rights of the holder of a claim to the whole of a vein or lode the apex of which outcropped on his claim, even if the vein extended underground beyond the boundaries of the claim. "Rock in place" and extralateral rights have now disappeared from the legislation, but the modern Mineral Act still shows signs of its Australian and American heritage. It is surprising how many provisions have endured, affected only by changes of language, from the earliest enactments.

1. **TENURES UNDER THE MINERAL ACT**

   The main objective of the Mineral Act is to allocate the mineral resources of the Province to mining operators. It is framed with a view to making this disposition of mining rights in an orderly, consistent and convenient manner. The objective of securing a return to the Government for these resources is met by different legislation. The Act provides for the titles, or tenures, under which the resources are allocated.

   (a) **Free Miner's Certificate**

   The first requirement for any person who proposes to "prospect or explore for, locate, mine or produce minerals or acquire title to a mineral claim or leasehold" is that he obtains a Free Miner's Certificate (section 2(1)). A certificate is available as of right to any Canadian resident or Canadian
corporation for a nominal annual fee. A Certificate cannot be transferred (section 2(4)) and may be suspended on notice for contravention of the Act (section 61). It no longer functions as a significant control over mineral operators.

(b) **Mineral Claim**

If a miner wishes to secure a promising area to himself, he may locate it as a mineral claim. A modern claim must be square or rectangular in shape, aligned with boundaries running north-south and east-west. Its area is a minimum of 25 hectares, and a maximum of 500 hectares, in 25 hectare units. A claim is located by marking it on the ground with a legal corner post bearing full particulars, corner posts, identification posts and blazing. The claim is located and effective once this marking is completed. Other procedures allow location of fractional mineral claims, and of mineral claims by witness posts where the ground is covered by water or ice or is otherwise inaccessible.[15]

A two-post claim may be located by an individual miner in a less rigorous fashion, with a maximum size of 1500 feet square (section 45), and carries all the rights of a mineral claim. A miner may only locate eight two-post claims in a year.

A large body of cases has developed on location of claims and on defects in location. They are reviewed in a very useful article by J.N. Lyon, "Security of Mineral Title in British Columbia".[16] Lyon analyzes them by postulating two broad legal policies which pull on the judicial mind in staking disputes; (a) the promotion of order and stability in the acquisition and
development of minerals and (b) the protection of the honest, conscientious free miner.

Following location, a claim must be recorded in the office of the Gold Commissioner for the Mining Division within thirty days. Otherwise the claim is void from the beginning (section 20).

In order to keep a mineral claim on foot once it has been recorded, the holder must perform minimum levels of exploration and development work on the claim each year, or pay the equivalent cash in lieu. Otherwise the claim is forfeit (section 27). The work must be valued at $100 per unit per annum for the first three years, and at $200 thereafter. The type of work that is acceptable and the form in which it must be reported is subject to detailed regulation. The reports submitted have confidential status for a period of one year from the date of submission, and thereafter form part of the resource data collection of the Geological Division.

Other provisions enable a claim holder to group up to 100 units of claims for the purpose of applying work done on one or more of the claims in the group to maintain any of the other claims in the group (section 22(3), (4), (5)). In this, the legislation recognizes that exploration and development of an anomaly or an orebody for which claims are located can most efficiently proceed as a single programme, not one programme for each claim. Further, excess work may be recorded for up to 10 years in advance (section 24), and an operator may establish a Portable Assessment Credit Account, to which excess approved work value may be credited, to be withdrawn later to make up the
assessment work requirements on another claim of the operator.[19]

The mineral claim is the main tenure under the Mineral Act. Under section 21(1), "the holder of a mineral claim is entitled to those minerals and only those minerals that are inside the boundaries, continued vertically downward, of his claim". He also has, under sections 6 and 10, the right to use and possess the surface of the claim for mineral purposes, as Chapter IV will demonstrate. A mine may go into production on the title afforded by a mineral claim, with much the same rights as a mining lease would offer. The advantage is that assessment work is much lower (s. 33), and if ore production stays below 1,000 tonnes per annum, no survey costs are incurred (s. 41, s. 1). But a project of any size will necessitate a survey, and the stronger title of a mining lease then becomes desirable.

It is important to note that the government has no say in whether or not a free miner may take up a mineral claim on land open for entry. If the miner complies with the Act and Regulations, and correctly follows the procedures for locating the claim and for having it recorded, he is entitled as of right to the tenure. If he complies with further requirements for the recording of work or cash in lieu, he can maintain the claim indefinitely.

(c) Mining Lease

The holder of a mineral claim is entitled to a mining lease of his mineral claim under section 29, on condition that he has the claim surveyed, and gives the prescribed public notice of his application. Just as in procuring a mineral claim, this
entitlement to go to lease is not subject to ministerial discretion, although it could be subjected to an adverse claim by another miner. No more than 40 adjoining units may be included in one lease. The maximum term is 21 years. Higher levels of exploration and development are required. Under section 32, "a mining lease conveys to the lessee the minerals within and under the leasehold, together with the rights the lessee held as holder of the mineral claim". This is certainly a better title to the minerals than is held under a mineral claim. It appears to create a corporeal leasehold estate in the minerals. The lease gives the advantage of security of title through the survey and through the protection of section 36 which provides that a lease shall not be impeached in any court on any ground except fraud (although this does not protect defects in locating and recording[20]).

Once a property comes into production, the lease may be certified, upon which the assessment work obligation is exchanged for an annual rental of $10 per hectare (s. 42).

(d) Crown-Granted Mineral Claims

Since 1957, Crown grants of mineral claims have not been available, the mining lease being the highest form of tenure now granted.[21] Many Crown-Granted claims subsist, however. Under a Crown grant of a mineral claim, the right to all minerals was transferred and passed to the grantee, subject, in the case of lawfully occupied lands, to the right of the prior occupant.[22] The fee simple estate thus created in the minerals is registered as a charge under the Land Titles Act, against the certificate of title for the remainder of the land.[23] For some surface rights
purposes a Crown-granted mineral claim may be treated on the same basis as an ordinary mineral claim.[24]

2. **ADMINISTRATION, ENFORCEMENT AND DISPUTES**

Gold Commissioners are appointed, under the supervision of the Chief Gold Commissioner, one for each of the Mining Divisions into which the Province is divided (ss. 55, 56). A Commissioner issues Free Miner's Certificates, fixes securities for surface damage, and records all claims, leases and assessment work (ss. 2, 9, 20, 22). Any document of title relating to a claim, lease or interest therein must be recorded with him (ss. 43, 44).

The Chief Gold Commissioner may hear and decide certain complaints against location or assessment work (s. 50) but more serious disputes, or adverse claims, are controlled by section 51. Non-compliance with the Act may be penalized by cancellation of a Free Miner's Certificate, a claim or a lease.[25] A few contraventions are subject to criminal sanctions (s. 64).

3. **EVIDENCE OF A CLAIM HOLDER HAVING PROPERTY OR CONTRACT RIGHTS**

The courts are often prepared to assume that mineral claims are real property interests,[26] but the question needs to be clearly settled before the role of the common law can be approached. Evidence of proprietary and contractual elements in claims and leases comes from several different sources.[27]

(a) **The Natural Resource Transfer Agreement Cases**

These cases arose in a situation which emphasized the very different capacities of the Crown. The first is the power, in the
Legislature or by regulations, to legislate. The second is the power to enter into property dealings or contracts like anyone else. When the federal government transferred Crown lands and resources to the prairie provinces in 1930, Alberta made this undertaking:

"The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar arrangements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto."[28]

Subsequent to this transfer, Alberta introduced changes by legislation, and this savings provision was invoked by the grantees affected by these changes. The cases which ensued involved a number of major questions,[29] but for the present all that matters is that their whole premise was that the rights in issue were contracts or arrangements granting interests in lands or in the resources. There would have been no issue unless that were the case.[30] It is helpful to compare the leases and grants in those cases with Mineral Act tenures and to observe what the courts had to say about them.

In Spooner Oils Ltd. v. Turner Valley Gas Conservation Board,[31] the interest was a petroleum and natural gas lease which seems to have been a grant directly comparable to a mining lease. However, it seems unwise to extend the comparison to a mineral claim. It is plain that the Supreme Court of Canada took
the petroleum and natural gas lease to be "the contract between the lessor and the lessee" [32] and to confer an "existing status".[33] Property and contract elements were definitely present.

Attorney-General for Alberta v. Majestic Mines Ltd.[34] and Attorney-General for Alberta v. Huggard Assets Ltd.[35] both concerned freehold Crown grants of mineral rights which bear no relation to mineral claims or mining leases. They were most comparable with Crown-granted mineral claims, about which there can be little dispute that they convey a property interest.

Re Timber Regulations[36] concerned a "certificate of entry", entitling a homesteader to occupy, use and cultivate land, to have exclusive possession thereof, and to cut and sell timber. In many ways the right is similar to a mineral claim. The Privy Council would not go as far as to call it a contract or a demise of land, but strongly affirmed that "the holder does acquire an interest or an estate in the land, subject to conditions".[37] This case indicates that a mineral claim would also be an interest in land, even if the contractual basis is doubtful. Spooner Oils indicates both contractual and property elements at the lease stage.

(b) The Wording of the Instruments Issued by the Crown

The standard form of mining lease under the Mineral Act has all the indicia of a conveyance inter partes. It is very brief, but it demises the minerals themselves for a fixed term, and is executed by both parties. To argue that it does not create real property rights by agreement would call for some proof that it is other than what it appears to be.
The mineral claim, however, is not created or granted under any instrument at all. All that the Gold Commissioner does is receive and receipt the miner's affidavit, and record the claim. The Crown is scarcely involved at all. No contract is indicated, and there is no particular evidence of the creation of proprietary rights.

(c) Sections 21 and 32 of the Mineral Act

Two sections declare the nature of the rights under claims and leases. Section 32 reads:

"A mining lease conveys to the lessee the minerals within and under the leasehold, together with the rights the lessee held as the holder of the mineral claim, but is subject to a valid charge recorded against the record of the claim."

The key word "conveys" stands out, leaving little doubt that a property interest in the minerals is vested in the lessee. The legal effect of this provision does not appear to have been questioned in any case.

Section 21 reads:

"(1) The holder of a mineral claim is entitled to those minerals that are inside the boundaries, continued vertically downward, of his claim.

(2) The interest of a holder of a mineral claim shall be deemed to be a chattel interest."

The entitlement under this section is to the minerals themselves. It may be no more than an entitlement to enter land and take minerals, like a profit a prendre.[38] However, it may be a right which falls short of an absolute conveyance of the minerals in situ. The deeming of the interest to be a chattel interest is more difficult. Is it a "chattel interest in land", a term well
known in real property law to describe an estate less than freehold? Or is it an interest in the more common category of chattels, chattels personal? These alternatives pose a difficulty of statutory interpretation.

For decades before 1977, the language used in the Mineral Act was clearer:

"The interest of a person in his mineral claim shall ... be deemed to be a chattel interest, equivalent to a lease, other than a mineral lease or mining lease, for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Act."[39]

This provision was construed in many cases to specify that the interest of a claim holder was a chattel real and an interest in land. These cases are consistent notwithstanding a variety of contexts; the Statute of Frauds in Fero v. Hall [40] and McMeekin v. Furry,[41] conflict of laws in Barinds v. Green [42] and Chassey v. May,[43] "lands" in the Forest Act in Attorney-General v. Westgarde, [44] and court procedure in Beakhurst v. Williams.[45]

The new language, without the words "equivalent to a lease", has not yet been considered in the courts. The question is whether the language intends a different effect from before 1977. One may not refer to the Hansard record in court, but one may do so here. The sponsoring Minister said that the Bill clarified many obscure sections, and the Opposition called it housekeeping legislation.[46] In committee, section 21 was approved without discussion.[47] Parliamentarians, at least, were not attaching any significance to the change. Unfortunately, the new language
is truly ambiguous as being capable of sustaining two meanings with what, on the face of it, is equal force.

Several arguments support the proposition that the section still deems a mineral claim to be an interest in land. The main argument is that apart from a few changes of substance, the revision of the Mineral Act in 1977 was intended to simplify and modernize the drafting of all parts of the Act. This becomes plain in a section-by-section comparison of the old and the new Acts. This is internal evidence to show that only language polishing was intended.[48] Secondly, this seems to be a proper case to hold that the legislature, in re-enacting a provision, did have in mind the construction that had already been placed upon it,[49] and did not intend to make any change in the existing law beyond that which is stated or necessarily implied in the language.[50] This approach seems very useful for the case of doubtful words; in making a choice, no straining of the language is involved.

Neither of these two arguments offends against the Interpretation Act, section 37,[51] which merely removes common law presumptions.[52]

Thirdly, reliance may be placed on cases where an interest in land was held to be created primarily on the basis of the words "chattel interest" even though the words "equivalent to a lease" were also present.[53] Fourthly, a number of texts explain the real property meaning of "chattel interest".[54]

There is one authority that the words of section 21(2) deem a mineral claim to be personal property, and that is an Australian
High Court case, Adamson v. Hayes.[55] Western Australian legislation contained a provision strikingly similar to section 21(2), and in deciding whether or not the mining tenement was under the Statute of Frauds, all members of the Court rejected a real property interpretation, although only two members went as far as to say that the words meant personal chattels. The case is strongly persuasive authority.

The preferable view, in the writer’s eyes, is that the section deems a mineral claim to be a chattel real, and that Canadian courts should not follow Adamson v. Hayes in its decision to the contrary. The intention of the legislature, as far as any can be imputed, does not seem to have been to overturn the previous position. The real property interpretation is more harmonious with other available evidence.

Adamson v. Hayes [56] points out one valuable alternative for a court having to decide if a mineral claim is an interest in land. The court can take an overall view of the rights bestowed upon a claim holder, especially the entitlement to extract minerals, without depending upon section 21(2) alone to define what is land or an interest in land in the context concerned. The surface rights given in sections 6 and 10 would, under this method, be considered without reference to the difficulties of section 21(2).

(d) Mining Cases Indicating Property or Contract Rights

Two groups of mining cases substantiate property or contract elements in claims or leases.
The first group demonstrates that the courts are willing to apply conventional property law principles to mining tenures. Relief against forfeiture is the prime example, and the most striking example in *Morris v. The Queen*. The plaintiff held two mineral claims and in 1972 paid recording fees which would have been sufficient to keep the claims in good standing until 1985. However, in 1972 the fee requirements were amended, and in 1974 the claims were declared forfeit by reason of non-compliance with the new requirements. The plaintiff claimed that the mineral claims were not forfeited, and in the alternative, that he was entitled to relief against forfeiture. The relief was granted.

Should a statutory instrument be treated differently than an ordinary lease? Should the court treat the Crown as having special rights not available to an ordinary lessor? The answers to these questions must be, in my opinion, in the negative. We are not living in a feudal age, we are living in a civilized, democratic society where the Crown plays a large part in business and economic affairs. While no one questions the fact that the legislature has supreme powers over all matters falling within its jurisdiction, one must question the submission that a statute dealing with a contract made between a subject and the Crown should be interpreted in a different manner than if the statute was dealing with a contract between subject and subject.

Anderson J.'s attitude is very clear. He also referred to other mining cases where relief against forfeiture was granted.

Another principle which has been regularly applied to mining leases is that clauses in leases declaring in terms however strong that they shall be void on breach of conditions by the lessee mean that they are only voidable at the option of the lessor.
These cases show that the courts will deal with claims and leases in the manner that they would deal with normal property rights, unless the legislation specifies other rules.[61]

The second group contains cases where the title of one miner is attacked by another miner who has overstaked the ground. If the newcomer can prove that the prior title is void, then his subsequent location will be valid. Some variations of this well-worked theme establish that the holder of a mining lease (at least) has acquired something which is not open to interference by any member of the public, being a matter between him and the Crown. For example, a breach of the terms of the lease cannot be relied upon by the subsequent locator; the title to avoid it is not a general one in the public: Seguin v. Boyle.[62] Only the Crown, as lessor, could re-enter for conditions broken: Canadian Co. v. Grouse Creek Flume Co.[63]. Even if a subsequent locator can lodge a complaint against the prior location under section 50, the validity of that staking is a matter between the prior locator and the Crown; the disputant is before the tribunal only as he is permitted by the statute.[64]

Further, an attack on a prior lease in an action cannot succeed unless the Crown is a party to the action, so that it may defend its conduct under the lease and to safeguard its rights as lessor.[65]

The first group of cases showed that the courts are willing to treat the holders of claims and leases in the same way as the holders of real property. The second group established that the
claim or lease is essentially an arrangement between the holder and the Crown.

4. **EVIDENCE AGAINST PROPERTY OR CONTRACT RIGHTS**

Even though no court has held that the holder of a mineral claim or mining lease has no property or contract rights therein, there are three items of evidence to that effect which ought to be considered.

(a) **Formation of the Relationship**

A free miner is entitled as of right to locate a claim on unoccupied Crown land and to have the claim recorded; [66] and the Minister must issue a mining lease to the holder of a mineral claim who goes through the formalities.[67] These entitlements are statutory and in no way contractual. (Whether or not they grant property interests is another question.) In themselves the pertinent sections of the Act do not constitute offers by the Crown or by the Legislature, available for acceptance by performance of the conditions laid down.[68] In the case of the creation of a mineral claim, it seems impossible to say that there is any consensus or agreement.[69] The applicant for the recording of a claim has already created his title, and the Crown's officers perform no more and no less than their statutory duty.

In the case of a mining lease, there is a difference. Not all terms of the lease are fixed by legislation. Terms such as rent are fixed,[70] terms cannot contradict the Act or regulations,[71] and terms cannot go as far as to nullify the
obligation to issue a mining lease; but within these limits, there must be some flexibility in settling terms. The Mineral Act contains no express abolition of the Crown's contractual power in the area. Nothing in the Land Act touches this Mineral Act question. Nor can it be argued that the necessary implication of the Act is to abrogate the Crown's capacity, relying on _Attorney-General v. DeKeyser's Royal Hotel Ltd._[72] There is no question of the Crown disregarding the limitations of the Act and falling back on contract. The better view seems to be that the duty to grant a lease must mean a lease with terms.[73] It follows that this limited flexibility to set terms can be called a contractual power. The situation is similar to that of a common carrier or public utility, making contracts in circumstances where it cannot refuse to make a contract with a member of the public and where the terms of the contract are circumscribed.

(b) Termination of the Relationship

It is well settled that where mining legislation gives a government officer the authority to cancel or forfeit mineral claims or leases, then he must perform his duties in a judicial manner and in accordance with the rules of natural justice.[74] The rules of natural justice are normally not available to protect private rights, but are more typically the hallmarks of statutory licences and procedures.

(c) Duties For the Public Benefit

Finally, certain requirements of the legislation have been held to be enforced not as an allocation of rights between the Crown and the individual, but in the public interest. One example
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is the detailed set of rules for the marking out of mineral claims.[75] Similarly, work requirements have been held to be imposed for the benefit of the public.[76] These are matters which do not go to the heart of mineral title, but they demonstrate that some parts of the statutory scheme are more regulatory and less proprietary in character.

The main point arising from this evidence against proprietary and contractual rights is that no contract is formed on the location or recording of a mineral claim. It also becomes apparent that some of the rights and duties created under the Act are unlikely to be proprietary or contractual.

5. PROPERTY AND CONTRACT RIGHTS - SUMMARY

The mineral claim may be dealt with first. The Timber Regulations case,[77] and more particularly the complete absence of any consensus in the formation of the tenure, militate against the existence of any agreement or contract. Only in Morris v. The Queen [78] are there comments indicating a contract between the Crown and the claim holder, but those comments seem to be ill-founded.

As for property rights under a claim, section 21 at the least deems some kind of property interest to be present. The great preponderance of evidence indicates that a real property interest is meant. Apart from that troublesome section, the rights exercisable by the holder of a claim are aptly considered as an
interest in land. The fact that there is no contract does not preclude an interest in land.

Respecting mining leases, both the instruments and the rights of the parties in the formation of the arrangement indicate a contract. Spooner Oils,[79] re Timber Regulations [80] and numbers of mining cases buttress this conclusion. The creation of a real property right in the conveyance of minerals is beyond dispute.

However, in both claims and leases there are components which seem to be entirely statutory or regulatory, in that they are imposed without agreement - save in the "compliance with laws" clause which will next be considered - and are of general public interest rather than purely a matter between parties. This mixture is to be expected when mineral tenures combine statutory and private law characteristics.

6. THE "COMPLIANCE WITH LAWS" CLAUSE

The standard mining lease provides:

"The lessee hereby covenants and agrees at all times to perform, observe, and comply with the provisions of the Mineral Act, and amendments made thereto from time to time, and the provisions of any regulations which may from time to time be made under authority thereof, and all such amendments or regulations as are from time to time made shall be deemed incorporated into these presents and shall bind the lessee in the same manner and to the same extent as if the same as made, or amended, were set out herein as covenants on the part of the lessee.[81]

This kind of clause has received detailed analysis in several cases and articles.[82] By accepting a mining lease containing this covenant, the lessee not only agrees to the incorporation by
reference of the Act and Regulations, but also agrees to be bound by any amendments made to them in the future. These clauses are strictly construed [83] but the "crucial words", [84] that is, "from time to time" are used no less than three times. There are limitations on what the government may impose under this type of clause, but they are very slight or tenuous ones. [85] One limitation is that the passing of an entirely new Mineral Act may not fall within the words of the clause.

There is no provision in the standard mining lease for forfeiture in the event of a breach of a covenant. Nor can the power to forfeit the lease for a breach of covenant be derived from the Mineral Act, [86] the Land Act, [87] or the common law. [88] The only remedies available to the Crown would appear to be damages or an injunction.

It will also be noted that there is no "compliance with laws" clause affecting a mineral claim. After all, there is no document in which it could be inserted. The claim holder creates his title by location. The lease holder is therefore paradoxically in a worse position, accepting future legislation as an agreed contingency, while the claimholder is subject to it simply by legislative force.

The significance of "compliance with laws" clauses in surface rights matters will be seen in due course. Not only are they relevant to changes in parks and mineral reservations legislation, but they also demonstrate that a Mineral Act tenure is entirely a creature of that Act, and brings with it only those rights which the Act specifies.
1. RSBC 1979 c 259. In this chapter, section numbers not otherwise referenced refer to this Act.


3. RSBC 1979 c 51.

4. RSBC 1979 c 323.

5. RSBC 1979 c 264.

6. For a modern comparison see Crommelin, "Mineral Exploration in Australia and Western Canada" (1974) 4 UBCLR 38. For Australian background, see O'Hare, "A History of Mining Law in Australia" (1971) 45 Aust. L.J. 281.

7. See 1 Martin's Mining Cases, p 536. Volumes 1 & 2 of MMC are a valuable collection of cases, legislation and commentary.

7A. D.R. Williams, "...The Man for a New Country": Sir Matthew Baillie Begbie, Gray's Publishing Ltd. Sidney, B.C., 1977, p 150

8. For a schedule of legislation see 1 MMC 531. Also see R.E. Cail, Land, Man, and the Law, Vancouver, UBC Press 1974, Chapter 5.

9. See 1 MMC 536, Clark v. Haney (1899) 1 MMC 281, 8 BCR 130.

10. See Nelson and Fort Sheppard Railway v. Jerry (1897) 5 BCR 396, 1 MMC 161; Crommelin, supra, note 6 at 43.


12. Introduced by SBC 1872 c 14 s 4.


17. S 22 (SBC 1980 c 26 s 2).

18. B.C. Reg. 587/77 Part C.


20. Manley v. Collom (1902) 32 SCR 371: See Chapter IV, "Remedies".

21. SBC 1957 c 37; 1958 c 30; 1959 c 53. But for one residual situation see s. 65(c) of the present Act.

22. Eg RSBC 1948 c 213 ss 67, 68.

23. RSBC 1979 c 219 s 175.


25. Ss 27, 33(2), 47, 61, 65(b).


28. 20-21 Geo V c 26 (U.K.); RSC 1970 Appendix II no. 25.


30. Harrison, supra note 27 at 500.


32. Ibid, at 642.

33. Ibid, at 638.

34. [1942] SCR 402.


37. Ibid, at 192.

39. RSBC 1960 c 244 s 16 as amended by 1965 c 26 s 4, 1976 c 30 s 8.

40. (1898) 6 BCR 421.

41. (1907) 2 MMC 432.

42. (1911) 16 BCR 433.

43. [1925] 2 WWR 199.

44. [1971] 5 WWR 154.


48. To adopt the words of Laskin J. in Bathurst Paper Ltd. v. Minister of Municipal Affairs (1971) 22 DLR (3d) 115 at 119.


51. RSBC 1979 c 206.

52. Canadian Acceptance Corporation, supra. In any event s 37(2) only applies to amendments - the omission of revisions, etc., cannot be accidental in the Interpretation Act, of all places. Further, the argument here is for no change: s 37(2) deals with inferring a change.


54. 32 Hals (3d) 207; Megarry & Wade, Law of Real Property, (3d) pp 10-11; Challis, Real Property (3rd ed. 1911) at 66; Black's Law Dictionary (4th ed.).

55. (1973) 130 CLR 276.

56. Ibid, at 294.

57. (1977) 3 BCLR 240.

58. Ibid, at 263.
59. **Williams Creek Bed Rock Flume & Ditch Co. v. Synon (1867)**  
1 MMC 1; (Begbie J); **Clark v. Chutorian (1955)** 14 WWR 1.  
For a different recent example, see **Morche v. The Queen (1981)** 40 BCLR 249.

60. **Canadian Co. v. Grouse Creek Flume Co. (1867)** 1 MMC 3;  
**Quesnel Forks Gold Mining Co. v. Ward [1920]** AC 222.


62. [1922] 1 AC 462.

63. (1867) 1 MMC 3.

64. **Dupont v. Inglis [1958]** SCR 535.

65. **Contact Mining and Development Co. v. Craigmont Mines Ltd. (1960)** 26 DLR (2d) 35, aff'd without reasons by SCC, 24 DLR (2d) 592.

66.  
S 6, s 20.

67. S 29(1).

68. **A.G. for B.C. v. Esquimalt and Nanaimo Ry [1950]** AC 57;  
**Wisconsin and Michigan Ry v. Powers 191 US 379, 48 L. Ed. 229 (1903).**

69. Contra, see **Morris v. The Queen (1977)** 3 BCLR 240.

70. S 46.


72. [1920] AC 508.

73. Maxwell on Interpretation of Statutes (12th ed., 1969) at 93.

74. **The Klondyke Government Concession v. The King (1908)** SCR 294;  
**Re Kasal and Morgan (1966)** 55 DLR (2d) 758.

75. **Coltom v. Manley (1902)** 32 SCR 371 at 377.

76. **Grevas v. The Queen (1957)** 10 DLR (2d) 500.


78. (1977) 3 BCLR 240 at 264.
79. [1933] SCR 629.
81. See B.A. Abraham, Mining Law, Vancouver, Continuing Legal Education Society of B.C., 1980.
82. Thompson, supra, note 29 and Harrison, supra, note 27.
86. Ss 42 & 47 only cover rent and assessment work.
87. RSBC 1979 c 214 s 40 - it appears to require restriction to the subject-matter of that Act.
A large body of common law has developed on surface rights, that is, the rights of miners to enter and use the surface and to work minerals. The amount of damage that mining operations can cause has often brought disputes between surface and mineral owners before the courts. We find an instance being discussed as early as 1378,[1] but the main growth of this area of the law was in the nineteenth century, just as with the law on the meaning of "mines" and "minerals". It too culminated in the years 1906 to 1911. Indeed from July to November 1909, the House of Lords was considering the arguments it had heard on three of the most important cases on these matters to come before it; Butterley Co. v. New Hucknall Colliery Co.,[2] North British Railway Co. v. Budhill,[3] and Great Western Railway Co. v. Carpalla Co. [4] The principles then laid down continue to apply, with only minor modifications, as the common law of England and Canada.[5]

1. THE INSTRUMENT OF SEVERANCE

The rights of the mineral owner to enter, win and work minerals and the rights of surface owners to enjoy the surface in its supported state must depend upon the terms of the instrument of severance.[6] The cases which follow all turn on the construction of the original document, and they all approach its
construction in a similar manner. The approach is essentially the same whether the grant is in fee or for a term of years.[7] Perhaps surprisingly, in the light of the rule of construing a grant more strongly against the grantor, the approach is precisely the same where there is a grant of lands with an exception of mines, as where the minerals are granted with an exception of the surface, for "what will pass by words in a grant will be excepted by like words in an exception."[8] In all cases the effect of the words of the instrument must be sought; with deeds, the intent of the parties must be ascertained,[9] and with statutes, the intention of the legislature. On some occasions it is necessary to discover the circumstances surrounding the making of the grant to explain the intention of the parties.[10] The general principles of construction of deeds and statutes apply to cases of surface rights and support rights, although it will be seen that the subject is distinct in its application of those principles and in the use of particular presumptions of intention.

2. **EXPRESS AND IMPLIED POWERS OF WORKING**

The instrument of severance may provide the mineral owner with detailed and comprehensive powers to carry out the whole range of necessary operations, and it may deal with subsidence and compensation. In such cases the parties' rights will be clear. If the express powers of working are narrower than those which the common law would imply, then the intention of the parties may be taken to have been to restrict the mineral owner to those express powers.[11] Similarly a court will not construe a deed as
implying a power to do something if other parts of the deed indicate that the parties know how to express that power.[12]

However, surface use questions must often be decided in the absence of express powers of working. The instrument of severance may make insufficient provision for working, it may contemplate obsolete methods of working, it may not mention working powers at all, or it may be lost. The principle that is relied upon in these cases is an old one:

When any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words cum pertinentibus, or any such like words. Cuicumque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit ... By the grant of mines, is granted power to digg them...[13]

This has developed as the main rule on the rights of a mineral owner to use the surface. Its best modern statement is in the words of Lord Porter in Borys v. Canadian Pacific Railway:

Inherently the reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the existence of power to recover it and of the right of working.[14]

Where the occasion of severance is unknown, but it is merely known that the mines and the surface are in separate ownership, similar principles apply, on the basis that an owner of land has a right to use it in the natural course of user, and that the natural course of user of minerals is to take them away.[15] The right of the Crown to enter private lands to open mines for the royal metals is subject to conflicting opinions, the better view
being that the Crown should be no worse off in this respect than an ordinary mineral owner.[16]

The authorities are consistently ready to make a necessary implication of a right to work minerals.[17] The leading cases usually cited are Earl of Cardigan v. Armitage,[18] Ramsay v. Blair [19] and Rowbotham v. Wilson.[20] In Cardigan, for example, the "incidental power which the law would imply"[21] included, as Bayley J. saw it, use of the surface, excavation, at least temporary deposits on the surface, attendance of necessary persons, and all things necessary for the obtaining of the minerals. In Marshall v. Borrowdale Plumbago Mines and Manufacturing Co. Ltd. [22] Kekewich J. took a Crown grant of minerals which did not express any privilege to dig and carry away as equivalent to later deeds that did.

More common than grants bare of any express rights of working are grants that do give a right of working, but where the extent of the right is uncertain. Dand v. Kingscote [23] is the leading case on the principle that with an express right are reserved all things depending on that right and necessary for the obtaining of it. Mines of coal were there reserved, "together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking pit and pits". ("Wayleave" is a right of way to carry minerals, whether above or below ground.) Parke B. held that the coal owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines and draw the coal from the pits. This included a steam engine,
engine-house and pond. The right of wayleave brought with it the right to construct a reasonably sufficient railroad in a convenient direction. Coal from that property could be conveyed over the surface, but coal from an adjoining property could not, even though that adjoining property was subject to a like reservation. This is an instance of "outstroke", which we shall return to shortly.

The courts have responded to changes in mining technology by allowing modern mining methods to be used under generally phrased rights of working, rather than trying to turn back the clock to the time of the instrument of severance and only imply rights to work by methods known then. This is in accordance with the general principle of statutory and deed construction which extends the original language to new unanticipated things when the original language deals with a genus and the new thing is a species of it.\[24\]

In \textit{Dand v. Kingscote},\[25\] the grant was made in 1630, and the case was heard in 1840. The fruits of the Industrial Revolution were not ignored; the right to work was held to entitle the mineral owner to use steam-powered pumps, and the wayleave allowed the making of a railway line. So, too, in \textit{Welldon v. Butterley Co.} modern systems and techniques were sanctioned:

\begin{quote}
Equally under the Act of 1791 [an Inclosure Act which reserved coal] I think these coal owners were given the right to work and carry away the coal, not limited to the slow and primitive method known in those days, but according to the light and knowledge of the world from time to time, provided that they did no more than what is included in the act of working and carrying away.\[26\]
\end{quote}
In Marshall v. Borrowdale Plumbago [27] modern methods were just as acceptable in a situation where there was not express right of working. Indeed from the judgment of Parlee J.A. in Borys v. C.P.R. [28] it would seem that in such cases the mineral operator is required to adopt modern methods.

Instroke and outstroke are methods of working underground mines. The right of instroke is the right to work the granted mine from an adjoining mine, by conveying the minerals from the granted mine to the surface through a shaft in the adjoining mine. A lessor may wish to compel a lessee to sink a shaft, to enhance the value of the property, but working by instroke is not improper per se, and will not be prevented except by a specific provision.[29] Phillips v. Homfray [30] was a case of working minerals by instroke, but with no right to work them at all.

The right of outstroke is the right to work an adjoining mine from the granted mine, by conveying "foreign" minerals from the adjoining mine to the surface through a shaft in the granted mine.[31] Whether or not a miner, typically a lessee, may work by outstroke depends on the extent of the demise. If the demise is of the land generally, including surface and shafts as well as minerals, then the lessee has a clear right to work by outstroke. But more often the lessee of a mine is not the lessee of the surface, in which case he is not entitled, prima facie, to carry foreign minerals from the shaft's head across the surface. His rights over the surface are only for the working of the demised
Implied and incidental working rights therefore assist the use and recovery of the subjacent minerals only, unless they are widened expressly for the benefit of other minerals in the vicinity.

In contrast to the rights or liberties which a miner has to work on the property of another (that is, the surface owner), his right to work by instroke or outstroke or to use the mines for the transport of foreign minerals, or for any other purpose, is unrestricted if his operations are carried out only on property which he possesses himself, whether as owner or lessee. (Unless, of course, a lessee is restricted by a stipulation in his lease.)

Following dicta in Bowser v. Maclean,[33] Wood V.C. established this principle in 1865 in Proud v. Bates,[34] where an exception of mines and quarries, from a lease of a term of 1,000 years, meant that as the mines had never been demised or parted with the mine owner was at liberty to use them as he saw fit. He could use the mines and the carriage ways through them for the working of his adjoining mines, without paying any wayleave rent to the proprietor of the surface. Duke of Hamilton v. Graham [35] in 1871 was a very similar case in the House of Lords. It followed Proud v. Bates very closely, more closely than Stewart in his 1962 article implies.[36] It was held that the Duke, in bringing foreign minerals through the excavated strata of his mines, was carrying them through his own property and not through that of the surface owner.
It is obviously necessary in these cases to ascertain the extent of the property held by the mineral owner under his lease or grant. Proud v. Bates, Hamilton v. Graham and a later case, Batten Pool v. Kennedy,[37] turned on the extent of the word "mines", which (unlike "minerals") is generally held to include the chamber created by the removal of minerals.[38] A second necessary question is whether the grant to the miner actually conveys an estate in the land or mines; or whether it only creates a profit a prendre or bare licence, either of which only gives a right to take certain minerals and to enter the grantor's land for that purpose. In Hamilton v. Graham Lord Colonsay emphasized this as "the distinction between a right of property and a right of servitude".[39]

Both these points are illustrated in Little v. Western Transfer and Storage Co.,[40] an Alberta decision in 1922. An owner of land leased "all the said coal together with the right to work the same and together with such portion of the surface rights as may be necessarily interfered with in the working of the mine", and the lessee was working his adjoining coal properties through the mine on this land; that is, he was working by outstroke. On the authority of the above three cases, the lease was held to be a grant of the stratum of coal, rather than the grant of a mere right ("a servitude or easement") to take coal. It was also held that the demise extended to include as much of the surface as was required. The lessee was therefore entitled to work by outstroke and carry foreign minerals over the property.
3. **LIMITATIONS ON THE RIGHTS OF WORKING**

The common law rules that have been outlined above favour the mineral owner with a generous implication of surface rights. To this extent the courts show a concern for the mineral owner and the mineral entrepreneur. However, there is another side to the coin. The courts are also willing to protect the interests of the surface owner, the landowner.[41]

(a) **Reasonable Means of Working**

The common law view of how mining operations should be carried out was expressed in *Borys v. Canadian Pacific Railway* [42] by quoting an earlier Privy Council decision, *Barnard-Argue-Roth-Stearns Oil and Gas Go. Ltd. v. Farquharson*, where it was said:

> The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which may be caused to the respondent or the owners of the estate of the grantee in the conduct of their operations in the manner mentioned.[43]

The views of the Appellate Division in *Borys* were also in accordance with this statement. Parlee J.A. said:

> In my opinion, the defendants are entitled to extract all the petroleum from the earth, even if there is interference with and a wastage of the plaintiff's gas, so long as in the operations modern methods are adopted and reasonably used and the provisions of the relevant statute and regulations are observed which, of course, must be observed.[44]
The question in *Borys* was what means of extraction could be used by the owners of severed "petroleum". Specifically, could they waste the natural gas which was in solution in the petroleum, and which was necessarily extracted when the petroleum was produced but for which there was no market at that site? The rule applied was that production had to be carried out in a manner that was reasonable and as little injurious as practicable. This rule must apply whether or not there is an express right of working. The Courts in *Borys* were persuaded that the flaring of natural gas could be brought within this rule. Although this is not a happy result from the standpoint of resource conservation, the Courts were aware of the regulations which provided for permissible gas to oil ratios.

There are other authorities for the rule. *Marshall v. Borrowdale Plumbago* turned on what structures and spoil-banks were reasonable means of working. In *Honeywell Cotton Spinning Co. v. Marland* an injunction was granted to stop a mineral owner claiming surface rights over land not bona fide required for the usual and reasonable course of working the mines. A more careful separation of "usual" and "reasonable" was made in an older case, *Harris v. Ryding*. The law gives the mineral owner the right to get the mines and minerals in a reasonable manner, and the ordinary and usual mode of getting them would be evidence, though not conclusive, of what was reasonable.

A different test is found in some old cases, the mineral owner's powers of working being limited to what is necessary. In
Earl of Cardigan v. Armitage [51] it was said "The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals". Similar pronouncements can be found in Lord Darcy v. Askwith [52] in 1618 and (along with a formulation in terms of whether reasonable and proper) in Durham and Sutherland Ry. Co. v. Walker [53] in 1842 where a right of wayleave was confined to the object of the grant, the mines, not being granted for other purposes.

There is a big difference between these two formulations of the limitation on working rights. What is reasonable may not be necessary. The criterion of reasonableness, giving more latitude to the mineral owner, has the authority and modernity of Barnard-Argue [54] and Borys [55] on its side. The criterion of necessity, guarding the surface interests more jealously, has the blessings of Halsbury [56] and MacSwinney.[57] It also has a closer harmony with one of the underlying principles of implied rights, that when something is granted, also granted is that without which the thing itself could not exist. All that needs to be implied is that necessary to the existence of the thing granted. However necessity has not been used as a test in any case since 1842. The courts have made little effort to find and follow precedents on this point, so the authorities lack cohesion. Further, it must be admitted that none of the cases indicates how the different tests would produce different results. There is little need now to look further than the reasonableness test laid down in Borys.[58]
The next limitation on a mineral owner is the right of the support of the surface. This is one of the most important principles in the common law of mining. It operates differently from the law's restraint of implied working rights to reasonable methods. As long as the miner avoids letting down the surface, the rule does not interfere with his working or his methods. But it will prevent the miner from removing the support of the surface even if express working rights are thereby made worthless. The leading case is *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* Lord Davey expressed the principle:

> It cannot now be disputed that prima facie where the surface is in one owner and the minerals in another the latter cannot work the minerals so as to destroy the surface.[59]

Lord Macnaughten described the principle in these words:

> The result seems to be that in all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication.[60]

By "of common right", Lord Macnaughten was pointing out that the right is naturally incident to the ownership of the surface. It is a right to the ordinary enjoyment of one's own property.[61] In this it is different from an express or implied easement of support which the surface owner must establish to secure the same protection for buildings and other artificial structures on his land.[62] It has been said that only the mode of acquisition is
different; the character of the rights, when acquired, is in each case the same,[63] although of course the rights conferred by express grants may well vary from case to case.[64]

The rationale or basis of the rule has been variously explained. One justification of it has been that a grantor cannot derogate from his own grant. The grantor of the surface cannot render his grant nugatory by destroying the surface,[65] although this reasoning would not cover the case of a grant of minerals, reserving the surface. A more general basis for the rule was found in the maxim _sic utere tuo ut alienum non laedas_; the owner of one property, the mines, is to use his property so as not to injure his neighbour, the surface owner.[66] However a yet broader rationale is that the right of support is simply a necessity for the secure enjoyment of the surface property. This appears in _Humphries v. Brogden_,[67] in 1850, perhaps the most valuable exposition of the rationale of the rule, of the precedents for it to that date, and on comparable principles in other legal systems. Lord Campbell C.J. laid the doctrine down by analogy to the lateral right of support:

Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation: greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner, and
the minerals to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and to the public.[68]

Ten years later in Rowbotham v. Wilson [69] the House of Lords established that the right of support is vested in the surface owner irrespective of who granted or reserved or excepted which property in the instrument of severance. The justification for the right of support in the principle of not derogating from one's own grant was eclipsed. By the same token it was said in Hext v. Gill [70] that the right prima facie exists where the instrument of severance is not before the court, just as where it is.

Over time, decisions strengthened the right of support by refusing to qualify it by one circumstance or the other. The mineral owner could not argue that the right of support prohibited unreasonable subsidence only, and allowed a reasonable degree of letting down.[71] Nor could he escape the rule by proving that he had worked without negligence.[72] It was eventually settled that it exists in the case of a lease of minerals wherein the lessee covenants to work in the usual and most approved way; it is "an implied term of that contract."[73] It applies to the support of one underground stratum by a lower one, a reminder that "surface" is usually a shorthand expression describing the whole of the land minus the minerals, or particular stratum, specified to be severed.[74] (Yet it is notable that land and buildings are so strongly differentiated for support purposes.) The right of support prevents the quarrying of stone even when that stone had always been worked by quarrying in that district.[75] And - most
significantly - if it completely blocks the working of minerals at
a profit, it prevails nonetheless.[76] Admittedly, this would be
a disturbing result in the case of a grant of minerals for
consideration, reserving and excepting the surface to the
grantor.

(ii) Excluding the Presumption by Express Words or
Necessary Implication.

The only way that the right of support can be qualified is by
the agreement of the surface owner, in the instrument of severance
or otherwise. Most disputes on the right of support are about the
authority granted by the instrument. The burden lies on the owner
of the minerals to prove that the instrument gives him authority
to destroy the inherent right of support of the surface
owner.[77] An especially high standard of clarity is demanded of
the draftsman seeking the right to let down. Two House of Lords
decisions bring together and settle propositions which have
stood unchanged since then, Butterknowle Colliery Co. v. Bishop
Auckland Industrial Co-operative Co. [78] in 1906 and Butterley
Co. v. New Hucknall Colliery Co. [79] in 1910. The locus
classicus is Lord Loreburn L.C.'s statement in Butterknowle:

Whenever the minerals belong to one person and the surface
to another, the law presumes that the surface owner has a
right to support, unless the language of the instrument
regulating their rights, or other evidence, clearly shews the
contrary. In order to exclude a right of support, the
language used must unequivocally convey that intention,
either by express words or by necessary implication. For the
same presumption in favour of a right of support which
regulates the rights of parties in the absence of an
instrument defining them will apply also in construing the
instrument when it is produced. If the introduction of a
clause to the effect that the mines must be worked so as not
to let down the surface would not create an inconsistency
with the actual clauses of the instrument, then it means that
the surface cannot be let down.[80]

Words of Lord Macnaughten enlarge upon this statement, and deal
with a number of circumstances, especially compensation, which
have been put forward to justify a "necessary implication" that it
was intended to exclude the right of support:

This presumption in favour of one of the ordinary and most
necessary rights of property holds good whether the
instrument of severance is a lease, or a deed of grant or
reservation, or an inclosure Act or award. To exclude the
presumption it is not enough that mining rights have been
reserved or granted in the largest terms imaginable, or that
powers and privileges usually found in mining grants are
conferred without stint,[81] or that compensation is provided
in measure adequate or more than adequate to cover any damage
likely to be occasioned by the exercise of those powers and
privileges.[82] Nor is it enough, in the case of a lease,
that the lessee is bound to work out the minerals or to work
the minerals in a prescribed manner,[83] or, in the case of
an inclosure Act or award, that the lord in whose favour the
mines are reserved or regranted may be authorized to work the
minerals and enjoy the property as fully and freely as if the
inclosure Act had not been passed. The difficulty of
applying such an hypothesis to the altered condition of
things brought about by an inclosure Act has, as it seems to
me, led this House to treat the provision in which it is
found, and of which it would seem at first sight
to be the keynote, as a dead letter for any practical
purpose.[84]

Although provision for compensation is not of itself
sufficient to shew that the mine owner working in the usual
and proper manner is at liberty to let down the surface,
the absence of any provision for compensation is some
indication [85] that the ordinary rights of the surface owner
were intended to be left untouched. On the other hand, the
presence of a provision for compensation, which is obviously
inadequate or plainly inappropriate if applied to damage by
subsidence, is cogent evidence to prove that subsidence was
not contemplated.[86]

In the passage quoted from Lord Loreburn, a practical test is
formulated - whether "the introduction of a clause to the effect
that the mines must be worked so as not to let down the surface
would not create an inconsistency".[87] This test has been used
as a "touchstone". Useful though it is, it could give a false proof where the language of the lease gives no indication on its face whether the surface may be led down, but where evidence proves that the parties, at the time of the making of the lease or severance, contemplated and intended subsidence.

This is evidence of surrounding circumstances, which is admissible for certain purposes in construing an instrument in mining cases just as in other cases. The words of an instrument are of course generally the sole guide to the intention of the parties who made it, and extrinsic evidence of that actual intention is inadmissible. However, so that the court may construe the written document, it is entitled to have all the facts relating to the document and which were existing and known to both parties at the time it was made. In the words of Lord Wilberforce, "what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were". One may see what is the intention of the parties expressed in the words, used as they were with regard to the particular circumstances and facts.

This sort of evidence was crucial in Butterley Co. v. New Hucknall Colliery Co., a 1910 case which has lent itself to misapplication. A lease of minerals was granted, with full powers of working. Evidence was given at the trial "to shew what the parties to the contract were really contracting about and in what sense they used the language employed in dealing with this matter of business". It was proved that only one method of working the coal was contemplated, and that everyone knew that it caused
subsidence. The arrangement between the parties by necessary implication allowed subsidence as a consequence of this working of the coal as it was intended by both parties to be worked.[94]

*Butterley v. New Hucknall* is a case where the facts clearly implied permission to withdraw support, and as such it is in accordance with *Butterknowle*, which it expressly affirmed.[95]

*Butterley v. New Hucknall* can only be understood, in terms of doctrine by then well established, if it is observed that evidence showing that the minerals could not be extracted without subsidence is relevant for one purpose only. That purpose is finding what intention must necessarily be implied into the language of the parties. The only relevant evidence is that which demonstrates the knowledge and contemplation of the parties at the time of the grant.

A different tack was taken in 1919 in *Welldon v. Butterley Co.* [96] Astbury J. took *Butterley v. New Hucknall* to mean that if the instrument of severance gives a clear and definite right to work the minerals, then as soon as it is ascertained, in the light of modern knowledge, that there is no possible way of exercising it without subsidence, then "it is irrelevant to discuss what the parties knew, or did not know, at the date of the instrument as to the effect of exercising the right, provided it is clearly given".[97] He did not consider it necessary to show knowledge of the impossibility of working without letting down at the date of the severance; modern knowledge would do.[98] In this he moves away from what the parties knew, or must have known, at the date of the severance.
This false heading was rejected without hesitation by the Court of Appeal in 1932 in *Warwickshire Coal Co. v. Coventry Corporation*.[99] The proposition was unnecessary for the matter before the Court, and was contrary to authority, *Thomson v. St. Catharine's College* [100] in particular. But in 1921, before it was overruled, *Welldon v. Butterley Co.* was followed by the Supreme Court of Canada in *Fuller v. Garneau*,[101] a vendor and purchaser case. The purchaser claimed recission for misrepresentation. The agreement of sale expressed the reservation of minerals as "reserving unto His Majesty, his successors and assigns, all mines and minerals". The purchaser claimed that this was not the same thing as the Crown grant, since a short power of working was expressly reserved there:

....together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals, pits, seams and veins containing the same.[102]

The vendor relied upon the implied powers of working to argue that the agreement authorized everything that the grant itself did. Davies C.J. and Idington J. accepted this contention, but Duff, Anglin and Mignault JJ. did not. They did agree that powers of working would be implied, but they went further and held that the express right to work might, according to the circumstances, involve the right to work notwithstanding subsidence.

But where it is established that the mines cannot be worked or the minerals extracted without entailing such consequences [subsidence], an express power to work the mines and get the minerals necessarily implies the right to cause subsidence and destruction of the surface.[103]
The majority did not hold that there was a right to cause subsidence, merely that the purchaser should have an opportunity to show by evidence that the minerals could not be removed without destruction of the surface. They plainly had in mind the effects of modern mining, not mining at the date of the grant.

The writer's view is that this decision is not good authority. If the rules formulated in Britain were inapplicable to the conditions of Canada - as Idington J. intimates [104] - then that would have been a sound reason for departing from them. However the reasoning is in fact a misapplication of those rules. It was the result of following erroneous dicta in Welldon v. Butterley Co. [105] which were later disapproved in Warwickshire Coal Co. [106] It is more than likely that Fuller v. Garneau would have been overturned if it had reached the Privy Council.

4. REMEDIES

We may usefully examine the consequences of breaches of the rights of surface owners and mineral owners. Mining cases have often given rise to novel questions of legal principle, but our purpose here is simply to outline the remedies available to surface owners and mineral owners under the common law system of surface rights.

(a) The Nature of the Surface Owner's Actions; His Proper Defendants

Where a miner uses the surface beyond his express or implied powers of entering, working or using rights of way, he is in trespass, and suits against him usually proceed on that
Unauthorized use may also be a breach of covenant, if the minerals are severed by lease, or it may be a nuisance.

It is not very clear what is the true category of an action in which damages are claimed for loss of support. There is authority for treating it as an action for nuisance, but a claim for withdrawal of support, simpliciter, may be brought on its own, even though the same facts will often also give rise to claims in trespass, nuisance and negligence. It is at least clear that an action for loss of support does not depend on negligence.

The cause of action does not arise till the subsidence takes place; it is not the removal of the minerals by the mineral owner that gives rise to the cause of action, but the combination of that element with the damage resulting from the removal. The surface owner has no right to insist on minerals being left in place or worked in any particular way. Each fresh subsidence gives rise to a new cause of action, even where the subsidence has taken place by fits and starts, or was continuous over a period. The leading case is *Parley Main Colliery Co. v. Mitchell*. Some time may elapse between mining operations and the appearance of subsidence on the surface. In that time there may be changes of ownership which will complicate the selection of a proper defendant. The mineral owner who carried out the mining may transfer the mineral property to a successor before subsidence occurs; does that successor then become liable? G. Banks argued that the successor is liable, on the basis that every person is liable who is in possession of the mine cavity while it amounts to
a nuisance, that is, while it is causing subsidence; each such person being liable for not having provided against the consequences of that condition.[116] But this depends on equating loss of support with nuisance, on inferences from the circumstances of the Darley Main Colliery case rather than on actual statements made there, and on the cause of action being the damage alone, rather than the removal of support and damage.[117] The contrary view has prevailed since 1897, it being held that there is no liability on a person who takes no part in the working of mines but who happens to be in possession of them when subsidence happens.[118] However the cases were taken in McGillivray v. Dominion Coal Co.,[119] a Nova Scotia decision in 1962, to be authority only for the proposition that a succeeding operator cannot be made liable merely by virtue of his occupation of the mine; the prior working does not exonerate him for damage caused by his own working.

There appears to be no authority on the liability of the preceding mineral owner, but he must be liable (if he can be found) if the surface owner is to have any redress at all after a transfer of the minerals.

The other main problem caused by a lapse of time between mining and the onset of subsidence is the liability of a miner who owns both surface and minerals while mining, and then transfers the surface before subsidence occurs. The authorities on the point are inconclusive.[120] It is stated that where land containing old workings is sold and subsidence occurs after the sale, the purchaser takes the property at his own risk if there is no
fraud or concealment and the fact of the existence of the workings is known to the purchaser at the date of the purchase,[121] citing Spoor v. Green. [122] But that case was a claim by a purchaser on the vendor's covenants for title and quiet enjoyment, rather than an action for wrongful removal of support, and nothing in the judgments suggests that such an action would not have succeeded had the true facts been stated in the pleadings.[123]

A better general principle is stated in Petrofina Canada Ltd. v. Moneta Porcupine Mines Ltd.,[124] a judgment of Laskin J.A. in 1969. The surface and minerals of the property were owned by Moneta until 1955, and were used for mining until 1943, when the mine opening was filled in. Moneta sold the surface to Cartier, who sold to Petrofina, while Moneta kept the mines and minerals. Petrofina had no awareness or notice of the previous mining operations, but that was not the basis of the finding for the surface owner.

Again, the right of natural support arises by implication upon the severance of his estate by an owner, unless the deed or instrument of severance shows the contrary. Thus, the mere fact that an owner of land has conducted mining operations thereon, or therein will not relieve him of the obligation to provide natural support where he severs his land and sells the surface rights without excluding or limiting the right of natural support: see Dixon Ltd. v. White.[125] The purchaser of the surface is entitled to have the surface kept to its natural level unless he has agreed to a limitation or unless a limitation has been annexed to his title. In brief, he who retains subjacent rights cannot, in the absence of any reservation, derogate from his grant: see Humphries v. Brogden.[126][127]

This seems to be a suitable approach, although the surface owner here lost on another point. A purchaser should be entitled to the same support as other surface owners; the previous owner of
surface and minerals is more likely to know if subsidence is a possibility, and is at liberty to limit his liability for it if he chooses to do so in express terms.

(b) The Surface Owner's Remedies

(i) Damages for Injury to the Surface of the Land.

The normal measure of damages for wrongful injury to land was long said to be the diminution of the value of the land, but there is now more authority for the cost of reinstatement (potentially a much greater sum) to be awarded. MacGregor on Damages cites a subsidence case *Lodge Holes Colliery Co. v. Wednesbury Corporation* to support a test of the reasonableness of the plaintiff's desire to reinstate the property. Both measures were allowed in another subsidence case *Tunnicliffe and Hampson Ltd. v. West Leigh Colliery Co.*, for even after the expenditure of the amount allowed for repairs, the appearance and condition of the property would have been very different from what they were before the subsidence.

The natural right of support of land under discussion here does not extend to buildings or other artificial structures for which an express or implied easement of support must be shown. But if it is shown that land that is built on would have been injured by a subsidence even in its natural state, then the surface owner will be entitled to recover for the injury to the building. On the other hand, if subsidence begins only after the imposing of artificial burdens on the surface, there may be an inference that the surface would not have subsided but for those burdens, moving the onus of proof from the mineral owner.
to the surface owner. This was the decision in Petrofina Canada Ltd. v. Moneta Porcupine Mines Ltd. [134]

No allowance can be made for prospective injury for future subsidence, even from the same withdrawal of support; the damage, not the withdrawal, is the cause of action. [135] Future damage is open to inquiry in future actions, the limitation period running from the date of the damage. [136] Petrofina Canada Ltd. v. Moneta Porcupine Mines Ltd. [137] demonstrates that this rule can work to the detriment of the surface owner. There, evidence was given that the land had no present value even though the surface was restored to the owner's satisfaction. This appraisal was taken to be a depreciation estimate based on prospective subsidences and the loss was held not to be compensable. Likewise, there could be no claim for the expense of moving a business operation because of an apprehension of future subsidences.

Damages have been awarded for loss of profits caused by subsidence, [138] but most cases are scanty in details of assessment. [139] Exemplary damages are available for tortious conduct of mineral operators calculated to make a profit, [140] the one reported case of injury to the surface being an Alberta case, Wasson v. California Standard Oil Co. [141].

(ii) Damage for Occupation and User of the Surface.

Where the mineral owner wrongfully makes use of the surface, he is liable for that use as well as and apart from any physical damage he causes. In Whitwham v. Westminster Blymbo Coal and Coke Co., [142] the defendant mining company had trespassed on the plaintiff's land by using it as a spoil tip. Damages for
permanent injury to the land were admitted, but a further remedy was available. Lindley L.J. said:

Let us consider what the defendants have done. They have done two things. They have, first of all, so used the plaintiffs' land as to diminish its value, say by 200 pounds. Mr. Russell admits that the defendants must pay that, but contends that they are to pay no more. That leaves out of sight what more the defendants have done. What they have done more is this - they have been using the land for years. Why are not the plaintiffs to be entitled to some compensation in respect of that user? The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such uses.[143]

McGregor on Damages [144] states that the normal measure of damages is the market rental value of the land used, but that there is a departure from that in the wayleave cases such as Jegon v. Vivian [145] and Phillips v. Homfray [146] and followed in Whitwham. The plaintiff is in these cases allowed to recover the rental value even though he would have not let out the use of the land and cannot be said to have lost this amount. Hence in Whitwham the surface owner recovered damages on the basis of the value of the land for tipping, not some less valuable use like grazing.[147] (Damages for the land not covered by the tip were also to be paid on the basis of diminished value, and an injunction was granted.)
(iii) Restitution - Waiver of Tort and Accounts.

The surface owner may seek a better remedy than damages by "waiving the tort" and bringing an action to recover the profits received by the mineral owner through his trespass.[148] However, this effort to capture the profits made by abuse of his rights is blocked by a principle that "a quasi-contractual action does not lie to recover from a trespasser of land the value of its use and occupation during the period of his adverse possession."[149] The main authority is Phillips v. Homfray (1883),[150] carrying on the wayleave litigation. The principle has been criticized as being contrary to the basic principles of restitution.[151]

(iv) Injunctions and Declarations.

Injunctions are always claimed and virtually always granted where the mineral owner's unlawful entry or withdrawal of support has not been discontinued.[152] An injunction may be granted even if the defendant has gone no further than claiming a right to do the thing complained of,[153] although a declaration may be granted instead.[154] An injunction against further letting down is usually directed to the mineral owner in general terms, without even prohibiting him from working, although that will often be its effect. The mineral owner cannot prevent the granting of an injunction by arguing that it would halt effectual working [155] or that damages would suffice.[156] Plainly the surface owner has very ready access to injunctive relief.

(c) The Mineral Owner's Remedies.

It is almost always the surface owner who initiates proceedings and seeks remedies. The rights of the mineral owner are therefore usually described in terms of the lawful
justification he could demonstrate for his actions. This circumstance probably says less about any reluctance of the mineral owner to go to law [157] and more about his ability to take direct action. This circumstance does not prove that the mineral owner's rights are merely defences. There seems to be no reason in principle why he cannot enforce his rights of entry, winning and working by declaration or injunction. By analogy with easements, surface rights could be enforced by an action for interference or an action for nuisance, as well as by direct action as abatement.[159]

A concluding question is whether a mineral owner might obtain an injunction against a surface owner proposing to use the surface for a purpose which would interfere with mining or even make mining illegal. A cemetery would be a case in point. There appears to be no authority and the question is at large.

5. DISTINCTIVE FEATURES

Two preliminary points of a general nature may be made about the common law of surface rights. First, these common law principles form part of the law of Canada, as we have already seen from Borys,[158] Little v. Western Transfer and Storage Co.,[160] McGillivray v. Dominion Coal Co.,[161] and Petrofina v. Moneta Porcupine Mines;[162] but also see Davies v. James Bay Railway,[163] Alberni Land Co. v. Registrar General[164] and Coniagas Mines v. Town of Cobalt.[165] We may note, though, that there have been relatively few such cases in Canada, even allowing for the amount of Crown ownership of minerals. These
common law principles also form part of the law of Australia [166] and New Zealand.[167] In the United States, the law of surface rights reflects the same heritage, although there is a greater diversity in the rules that the courts there will use to interpret instruments of severance, especially if the destruction of the surface is at issue.[168]

Second, mining everywhere is now subject to statutory controls, and common law rules can only be applied after considering whether legislation affects the point in question. In case any confusion arises from the circumstance that nearly all the precedents are English or Scottish, it should be pointed out that the Coal Mining (Subsidence) Act 1957, the Opencast Coal Act 1958, the Mines (Working Facilities and Support) Act 1966 and other legislation have had a major impact on working rights in Britain. The last mentioned Act enables certain mineral owners to obtain working rights by making an application to the Minister for ancillary rights for the proper and convenient working of the minerals, including the right to let down the surface, to erect buildings and to dump waste. The application is referred to the High Court which may make an order and fix compensation for the surface owner.

Some distinctive features of the common law system can be singled out for attention. First and foremost there is the dominance of the instrument of severance over all aspects of the minerals - surface relationship. If the instrument makes clear provision for some point, then it is conclusive, irrespective of its age, obsolescence or inconvenience. The law will only imply
rights of working or rights of support where the instrument fails to deal with them. The rights which the law will give are merely prima facie rights. Thus the common law system may be said to be based on the agreement and consent of those affected, rather than on externally imposed regulation.

Further, the instrument of severance is to be understood by the intentions that it discloses. Those intentions are to be sought initially from the document itself, and then if needs be from evidence of circumstances (such as the practice of mining) at the time that the parties entered into their arrangement. However, the proposition that one must seek the intention of the parties is one thing, and the ways in which the courts will go about ascertaining that intention is another. There are divergences in this area: for example, parties are presumed to intend that the mineral estate is to be worked in whatever is a reasonable and modern method from time to time.[169] But they are not presumed to intend subsidence - even if that is the result of the best modern methods of working.[170]

Another matter dominated by the instrument of severance is compensation for the surface owner. The only sort of compensation that the common law gives is damages. Damages are awarded only when the acts of the defendant are unlawful. If a mineral owner's operations are not unlawful, but are justified by express or implied rights to work to let down the surface, then there is no cause of action. A right to compensation for lawfully caused loss or damage has never been implied, although it is often expressly provided for in the instrument of severance.
A second distinctive feature is the width of the principles that comprise the common law system. The rules as to rights of working, rights of support, and the like, are expressed in the most general terms, without laying down any sort of legal code in an attempt to cover diverse mining problems. The rules are also remarkably few in number. This may be said to lead to uncertainty, but that is a problem which few detailed codes escape either. Rather, this width seems to enable the peculiar circumstances of each case to be considered within a flexible framework.

The most striking feature of the common law system of surface rights is the careful preservation of the mineral property and the surface property as two separate entities. Each is to be used and enjoyed as a distinct object of ownership as far as possible without interfering with the use and enjoyment of the other. On the one hand, the mineral property, or tenement, is protected by the presumption of implied rights of working which allow use of the surface so that the minerals may be used. On the other hand those rights, which will interfere with the surface, are presumed not to go beyond what is reasonable for the use of the minerals; and the surface is protected by a very strong presumption of a right of support. These presumptions may be regarded as similar and mutual rights.

Where the use of one property does not affect the enjoyment of the other, the law upholds their separateness. This is nowhere better seen than in *Duke of Hamilton v. Graham*.[172] It is also seen in the rule that mining which may cause subsidence is not
actionable until the subsidence occurs, and in the general terms in which an injunction against letting down is granted. Where the use of one property does affect the other, the problem is one of reconciling, or adjusting, the competing interests in the land. The policy of the common law is perfectly conveyed by the judgment of Alderson B. in *Harris v. Ryding*:

The case therefore stands thus: here are two persons, one who has the land above— one who has the mines below, with the power of getting those minerals; they are each to enjoy their right of property, and each is to act in respect of those rights of property, upon the maxim that he is to use his own property so as not to injure his neighbour. Then the question is, whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy? It appears to me that that is the reasonable construction of the exception, and the reasonable adjustment of the rights of the parties derived out of that exception.[173]

2. [1910] AC 381

3. [1910] AC 116

4. [1910] AC 83

5. The customary laws governing the free-mining areas of the Stannaries, Derbyshire, the Forest of Dean and Alston Moor were different from the common law on a number of points, but they will not be considered separately here.


7. Proud v. Bates (1865) 34 LJ Ch 406; Davis v. Treharne (1881) 6 App Cas 460. The case of a profit a prendre, however, will often be substantially different.


9. Harris v. Ryding (1839) 5 M & W 60 at 70, 151 ER 27

10. Butterley Co. v. New Hucknall Colliery, supra note 2

11. Re Wilson Syndicate [1938] 3 All E.R. 599. An express power to work one way, eg by sinking a pit, will not be read as an obligation to do so; Jegon v. Vivian (1871) 6 Ch App 742

12. General Accident Fire and Life Assurance Corp. Ltd. v. British Gypsum Ltd. [1967] 3 All ER 40

13. Sheppard's Touchstone, 89. The same principle is also to be found in Saund's Case (1599) 5 Rep 12a, 77 ER 66 and in notes to Pomfret v. Ricroft (1679) 1 Wms. Saund. 321 at 323, 85 ER 454.

14. [1953] AC 217 at 227

15. Wilson v. Waddell (1876) 2 App Cas 95

16. MacSwinney, op cit, p 455, cf. Lydall v. Weston (1739) 2 Atkyns 19, 26 ER 409
17. But for dicta to the contrary, see Lord Abinger CB in Harris v. Ryding, supra and Porter JA in Murphy Oil Co. Ltd. v. Dau (1969) 70 WWR 339

18. (1823) 2 B & C 197; 107 ER 356

19. (1876) 1 App Cas 701

20. (1860) 8 HLC 348, 11 ER 463

21. Supra note 18 at 211

22. (1892) 8 TLR 275

23. (1840) 6 M & W 174, 196; 151 E.R. 370

24. For Statutes, see Maxwell on the Interpretation of Statutes 1969 (12th ed.) p 102; and for deeds, see cases of the permissible extent of easements, eg Keewatin Power Co. v. Lake of the Woods Milling Co. [1930] AC 640

25. Supra note 23

26. [1920] 1 Ch 130 at 152. The decision was disapproved by Warwickshire Coal Co. v. Coventry Corp'n [1934] 1 Ch 488 (CA) (see below) but the statement quoted is submitted to be sound.

27. Supra note 22

28. (1952) 4 WWR 481 at 503

29. Jegon v. Vivian (1871) 6 Ch App 742 at 756

30. (1871) 6 Ch App 770


32. Jegon v. Vivian supra note 29 at 755; MacSwinney, op cit p 239

33. (1860) 2 De Gex F & J 415, 45 ER 682

34. (1865) 34 LJ Ch 406

35. (1871) LR 2 HL Sc & Div 166

36. "The Reservation or Exception of Mines and Minerals" (1962) 40 Can B Rev 329 at 336. The Lord Chancellor, who had been
Wood VC before he was created Lord Hatherley, expressly followed his own decision in Proud v. Bates, the law in England and Scotland being the same. Nor is it accurate to suggest that state of mind or intention were not considered in Hamilton; see pp 174, 178, 1979. Also see Chapter I.

37. [1907] 1 Ch 256
38. MacSwinney, op. cit., pp 8, 28
39. Supra note 35 at 180
41. It is not correct to regard these cases, en masse, as a contest between the landed gentry and the industrial capitalists of the eighteenth and nineteenth centuries. Where mineral rights were severed from the surface, they usually belonged to the Church or the great landowner families. The enclosure movement in particular concentrated mineral rights in the hands of the lords of the manors. Thus in a surface-mineral dispute the mineral owner was frequently a member of the gentry, in dispute with another land owner, often a smaller one. Most mineral owners exploited their property by granting leases to mineral entrepreneurs, who were indeed men of commerce. But a number of the gentry worked their mineral properties themselves, managing major mining enterprises directly. See J.U. Nef, The Rise of the British Coal Industry London, Frank Cass, 1932; D. Spring, "The English Landed Estate in the Age of Coal and Iron: 1830 - 1880" 11:1 J. Economic History 3, and "The Earls of Durham and the Great Northern Coalfield, 1830 - 1880" (1952) 33 Canadian Hist. Rev. 237.
42. Supra note 14 at 231
43. [1912] AC 864 at 871
44. (1952) 4 WWR 481 at 503
45. Supra note 14 at 229
47. (1952) 4 WWR 481 at 496
48. Supra note 22
49. [1875] WN 46
50. Supra, note 9 at 69 per Parke B.
51. Supra note 8 at 211

52. (1618) Hob 234, 80 ER 380

53. (1842) 2 QB 940 at 969, 114 ER 364. Cf dicta at 963.

54. Supra note 43

55. Supra note 14


57. Op cit p 456

58. Supra note 14

59. [1906] AC 305 at 315. G. Banks, A Treatise on the Law of Support, London, Sweet and Maxwell, 1894, is a useful guide. Support problems have also been analyzed by W.N. Hohfeld under his scheme of legal concepts: "Faulty Analysis in Easement and License Cases", (1917) 27 Yale L.J. 66

60. Ibid at 314

61. Backhouse v. Bonomi (1861) 9 HLC 503 at 513, 11 ER 825


63. Ibid at 655; approved in Dalton v. Angus (1881) 6 App Cas 740 at 792

64. Banks, op cit p 35

65. Harris v. Ryding supra note 9 at 71; Proud v. Bates supra note 7 at 412.

66. Harris v. Ryding supra note 9 at 73; Humphries v. Brogden (1850) 12 QB 739, 116 ER 1048

67. Ibid

68. Ibid at 745

69. Supra note 6

70. (1872) 7 Ch App 699 at 713

71. Humphries v. Brogden supra note 66 at 745
72. Ibid at 757
73. **Davis v. Treharne** supra note 7 at 469
74. **Dixon v. White** (1883) 8 App Cas 833
75. **Bell v. Wilson** (1866) 1 Ch App 303
76. **Thomson v. St. Catharine's College** [1919] AC 468 at 483
77. **Hext v. Gill** supra note 70; **New Sharlston Collieries Co. Ltd. v. Earl of Westmorland** (1900) [1904] 2 Ch 443n.
78. Supra note 59
79. Supra note 2
80. Supra note 59 at 309
81. See **Proud v. Bates** supra note 7 at 412
82. See **Harris v. Ryding** supra note 9 at 70
83. See **Davis v. Treharne** supra note 7
84. This is said with respect to two virtually irreconciliable decisions on Inclosure Acts, **Duke of Buccleuch v. Wakefield** (1870) LR 4 HL 377 and **Love v. Bell** (1884) 9 App Cas 286. The latter is preferred in **Butterknowle** supra note 59 at 311, 314, 316
85. Lord Davey in his speech at 315 described it as "almost conclusive".
86. Supra note 59 at 313
87. **Butterknowle** supra note 59 at 309
88. **Warwickshire Coal Co. v. Coventry Corporation** [1934] 1 Ch 488 at 504
89. **Lewis v. Great Western Railway** (1877) 3 QBD 195 at 208
90. **Reardon Smith Line v. Hansen Tangen** [1976] 3 All ER 570 at 575
91. **Inglis v. Buttery** (1878) 3 App Cas 552 at 577 per Lord Blackburn. Generally, see Norton on Deeds, (2nd ed) 1928, pp 64 - 74; Halsbury (4th ed) vol 12 p 622; **River Wear Comrs v. Adamson** (1877) 2 App Cas 743 at 763, per Lord Blackburn; and **Toronto Ry. v. City of Toronto** (1906) 37 SCR 430
92. Supra note 2
93. Ibid at 388 per Lord Atkinson
94. Ibid at 384 per Earl of Halsbury
95. Ibid at 385 per Lord Macnaughten
96. [1920] 1 Ch 130
97. Ibid at 142
98. Ibid at 143
99. [1934] 1 Ch 488
100. [1919] AC 468
101. (1921) 61 SCR 450; see also Barber v. Shell [1923] 2 WWR 675
102. Ibid at 451
103. Ibid at 460 per Anglin J.
104. Ibid at 455
105. [1920] 1 Ch 130
106. [1934] 1 Ch 488
108. Newton v. Nock (1880) 43 LTNS 197
110. Banks, op. cit. p 70; Salmond on the Law of Torts discusses the action under the heading of nuisance, at least in older editions; 8th ed, 1934 p 267
111. Graff Bros. Estates supra note 109 at 325, 327
113. Backhouse v. Bonomi supra, note 61; Darley Main Colliery Co. v. Mitchell (1886) 11 App Cas 127; McGillivray v. Dominion Coal Co. (1962) 35 DLR (2d) 345 (NS)
114. Backhouse v. Bonomi, supra note 61
115. Supra, note 13. Also see McGillivray, ibid, Crumbie v. Wallsend Local Bd. [1891] 1 QB 503

116. Banks, op. cit. pp 70, 80, 85

117. Ibid p 70


119. (1962) 35 DLR (2d) 345

120. See Blewman v. Wilkinson [1979] 2 NZLR 208 at 217 for a summary of some of the dicta; also Banks, op. cit. pp 80, 85.

121. Halsbury (4th ed) v 31 p 77, MacSwinney, op. cit. p 293

122. (1874) LR 9 Exch 99

123. The main reason for the decision was a variance between the declaration and the evidence, and the Court refused to amend. It was recognized that if the evidence was immaterial, then Backhouse v. Bonomi, supra note 61, could well apply; see pp 108 and 115

124. (1969) 9 DLR (3d) 225

125. Supra note 74

126. Supra note 66

127. Supra, note 124 at 229

128. MacGregor on Damages, (14th ed) 1980, p 762

129. [1908] AC 323

130. Macgregor, op. cit. p 763

131. [1905] 2 Ch 390; aff'd [1908] AC 27

132. MacSwinney, op. cit. p 304


134. Supra note 124
135. Darley Main Colliery Co. v. Mitchell supra note 113
136. Tunicliffe and Hampson Ltd., supra note 131 at 29.
137. Supra note 124
138. Stroyan v. Knowles (1861) 6 H & N 454, 158 ER 186
139. Eg, Lotus Ltd. v. British Soda Co. [1972] Ch 123
140. Ie Lord Devlin's second category; Rookes v. Barnard [1964] AC 1129 at 1226. In Broome v. Cassell & Co. [1972] AC 1027 at 1129 there is a reference to underground trespass cases, eg Livingstone v. Rawyards Coal Co. (1880) 5 App Cas 25, and the question of refusing to allow the trespasser the cost of getting the minerals. These are cases of incursion on the right of mineral ownership rather than surface ownership.
141. (1964) 47 DLR (2d) 71. See Chapter V, "Remedies".
142. [1896] 2 Ch 538
143. Ibid at 541
144. (14th ed) 1980, p. 774
145. (1871) LR 6 Ch App 742
146. (1871) LR 6 Ch App 770
147. Supra note 142 at 539
148. Generally, see Goff and Jones, Restitution, (2nd ed) 1978 p 469; and Beatson, "The Nature of Waiver of Tort" (1979) 17 U.W.Ont. L.R. 1
149. Goff and Jones, op. cit. p 471
150. (1883) 24 Ch D 439; also see Phillips v. Homfray [1892] 1 Ch 465
151. Goff and Jones, op. cit. pp 474 - 78
152. Examples are Honeywell Cotton Spinning Co. v. Marland [1875] WN 46 and Lotus Ltd. v. British Soda Co. supra note 139
153. Hext v. Gill supra note 70 at 699, 711
154. General Accident Fire and Life Assurance Corp. v. British Gypsum Ltd. supra note 12
155. Wakefield v. Duke of Buccleuch (1867) LR 4 Eq 613, aff'd (1870) LR 4 HL 377
156. Siddons v. Short (1877) 2 CPD 572

157. The one example is Re Wilson Syndicate supra note 11 - an unsuccessful originating summons by the mineral owner.


159. Supra note 14

160. Supra note 40

161. Supra note 113

162. Supra note 124

163. [1914] AC 1043

164. [1918] 2 WWR 537

165. (1910) 20 OLR 622

166. Wade v. NSW Rutile Mining Co. (1969) 121 CLR 177


168. See Twitty, "Law of subjacent support and the right to totally destroy surface in mining operations" 6 Rocky Mountain Mineral Law Institute 497 (1961); Ferguson, 19 RMMLI 411 (1973); Lopez, 26 RMMLI 995 (1980).


170. Butterley Co. v. New Hucknall supra note 2: Warwickshire Coal Co. v. Coventry supra note 26

171. Rowbotham v. Wilson supra note 6 at 360

172. Supra note 35

173. Supra note 9 at 73.
This chapter describes the central subject matter of this thesis, the system by which the Mineral Act [1] allocates right to the surface of the land to the mineral owner. The scheme of the Act was outlined in Chapter II without emphasizing sections 6 to 13 which form the core of the surface rights system. The working of these provisions will be examined in detail in the first three sections of this chapter, which describe how lands are open or closed to mineral activity, what rights to the surface the miner obtains, and how the miner is obliged to pay compensation to the surface owner for those rights. The next three sections deal with possessory rights over the surface, transactions separately affecting the mineral rights and the miner's surface rights, and remedies. The last section, by way of review, picks out what seem to be the distinctive features of the Mineral Act system.

It may be useful to reiterate that it is not intended to survey all the legal rules, statutory and common law, which touch upon the use of land for mineral purposes. It is intended to investigate the rights and obligations of mineral operators and surface owners only in the context of their relations with each other. Nonetheless, in order to round the picture out to a
degree, some attention will be paid to restraints such as the Mines Act [2] and the Water Act.[3]

1. LAND OPEN FOR ENTRY BY A MINER

The first step taken by the Mineral Act to regulate surface use is to restrict the lands available for mineral activity. It will be seen that this type of restriction is a very significant one.

(a) Land Open Generally

Section 6(1) reads:

6. (1) Subject to this section a free miner may enter
(a) Crown land and land in which minerals are reserved to the Crown and prospect and explore for, locate, mine and produce minerals; and
(b) land in which gold or silver is reserved to the Crown and prospect and explore for, locate, mine and produce gold or silver.

There are three classes of lands here.

"Crown land" is not defined in the Act, but guidance may be sought in the Land Act which defines it to mean "land, whether or not it is covered by water,[4] or an interest in land, vested in the Crown" i.e., "Her Majesty in right of the Province".[5] Previously, only "waste lands" of the Crown were open,[6] but this restriction no longer applies, at least in respect of the Mineral Act.[7] "Crown land" includes land subject to various dispositions, such as forest tenures, falling short of absolute Crown grants.
Land, such as national parks or military bases, vested in the Crown in right of Canada, is not open for entry, but a major exception must be made for Indian reserves. Proprietary rights in Indian lands have been the subject of a complex history of transactions between Canada and British Columbia, although management has never been in question. Under the McKenna-McBride Agreement of 1912 the Province agreed to transfer its proprietary rights in Indian lands to Canada. The transfers which were then made included rights to the base minerals in the lands, but not rights to the precious metals, gold and silver, which are in a sense not incidents of land. Because precious metals are invariably found in ore with base metals, an agreement was reached in 1943 that development of all minerals in Indian reserves would be subject to the Province's laws, but that both provincial and federal officials would have to approve any mineral activity on a reserve. This agreement is confirmed by the Indian Reserve Mineral Resource Act making reserves available for entry under the Mineral Act with the consent of the Indian Agent. (It might be added here that it is not proposed to discuss the major issue of the impact of aboriginal land claims upon mineral title.)

It has already been described in Chapter I how much privately owned land is land in which minerals are reserved to the Crown. However, there are many lands, particularly those granted in the earlier days of the Province, where the Crown did not reserve mineral rights. Such lands are therefore immune from entry under
section 6(1)(a). Also free from entry under section 6(1)(a) is land the minerals in which are privately owned pursuant to a Crown-granted mineral claim.

The third class is land in which gold and silver are reserved to the Crown. It has just been mentioned that the Crown's right to these precious metals stands on a title different to its title to other minerals, and it could be said that strictly these minerals need not be reserved. Crown grants of land have never used the apt words necessary to dispose of gold and silver, so virtually all land will be open to entry under section 6(1)(b). The only exception that must be made is for Crown-granted mineral claims which undoubtedly did dispose of gold and silver.[11]

(b) Protected Land Uses

Section 6(2) restricts the miner's rights of entry by protecting certain land uses:

The right of entry under subsection (1) does not extend to:
(a) land occupied by a building;
(b) the curtilage of a dwelling house;
(c) orchard land;
(d) land under cultivation; or
(e) land lawfully occupied for mining purposes other than placer mining.

The legislature has in effect chosen that these land uses are to have priority over mining. "Land occupied by a building" is clear enough,[12] but the other uses call for some amplification.

(i) Curtilage

Cofrin v. Bicchieri [13] considered the extent of a curtilage in detail. This decision is the leading case on surface rights.
It merits careful study in a number of different contexts, even though it was governed by the Placer-mining Act [14] rather than the Mineral Act. The plaintiff was the owner of some 200 acres on the Quesnel River. Mineral rights were reserved to the Crown. In the trees on the land were four separate cleared areas or meadows. It appears to have been a very beautiful place. The plaintiff developed the concept of the property as a residential and recreational project, and he invited friends to rehabilitate or build cabins and live there. Mr. Addy moved into one cabin 100 yards from the river, in one clearing, and Mr. Matthews moved into another cabin, 150 yards further back from the river, in another clearing. They renovated the cabins, planted gardens, ran chickens and horses and planned farming in the clearings. At the same time as these two were getting established, and knowing of their intentions, the defendant moved in and began his placer mining operation, using a backhoe, cat, large truck, truckloader, and a trommel, which is a machine for the separating out of coarse materials by shaking and sifting in a cylindrical screen. He built a laboratory for the extraction of gold and a cabin, which his family moved into. Work involved the digging of large numbers of pits for recovering gold-bearing gravel and for settling ponds. All this was carried on within 50 yards of Addy's cabin, between it and the river, at first. Later, operations took place at a location between Addy's cabin and Matthews'. It must have been grossly offensive to the residents.
The surface owner (but not the residents) commenced proceedings against the placer miner, attacking on several fronts. He sought to invalidate the placer mining leases, to invalidate the reservation of rights on the certificate of title in favour of the miner, to obtain ejection and damages for trespass, and to obtain an injunction to halt the mining operation altogether. He did not win an order to halt the operation, but he did win a large measure of success.

The Placer-mining Act [15] prohibited mining within the curtilage of a dwelling house in the same way as the Mineral Act. In deciding whether mining had taken place within the area, Fulton J. found no Canadian or English cases directly applicable, and referred to law dictionaries.

On the basis of this authority I consider that in our law the curtilage is not confined to the garden, but may extend to an area which is used for the comfortable enjoyment of a house, and need not be fenced or enclosed. As indicated, I consider that in a wild rural area such as this, where the house in question is occupied for the purpose of running a farm or semi-agricultural pursuit, as well as for purely residential purposes, the area encompassed by its "curtilage" is of necessity wider in concept than the "yard" of a house in an essentially residential area.[16]

As a result,[17] the miner was enjoined from trespassing on the clearings and on any additional areas within 75 yards of any of the cabins used or formerly used as dwelling houses.

Other cases may help to delimit the curtilage. There is one Canadian case, Thompson v. Jose,[18] in a farming area, confirming that fencing is unnecessary. "It is enough that it serves the purposes of the house or building in some necessary or
reasonably useful way".[19] The purposes are probably those of the house and not the particular occupier.[20] Land shared by more than one dwelling may be within a curtilage,[21] although a public thoroughfare may not.[22] Building and curtilage must be occupied together; they must belong together in a physical sense; their titles need not be the same but must not conflict with them belonging together.[23]

(ii) Orchard Land and Land Under Cultivation

The latter was briefly considered in *Cofrin v. Bicchieri*. Fulton J. said that "these words clearly denote not a past state or a potential or planned use, but a present actual state of being cultivated".[24] "Orchard land", however, is not the same thing as "land under orchard", and the words may be wide enough to include land suitable for orchards.

(iii) Land Lawfully Occupied for Mining Purposes other than Placer Mining

*Amalgamated Resources Ltd. v. Belliveau* [25] explains that "...this includes land properly located as a mineral claim whether or not there be physical occupation", and was following a long line of precedent in doing so.[26] Indeed, a title system conferring exclusive rights to minerals require such a result as a matter of course. Section 48, giving priority in title according to priority of location, is aimed in the same direction. Title disputes involving overstaking depend on the effect of these provisions on location of the same ground by two or more persons. (See Chapter II, and below under "remedies".)
What is less obvious is the extent of protected "mining" beyond mining under the Mineral Act. The word is not defined in the Act, but plainly it extends some distance if placer mining had to be mentioned. There is no reason why it should not include the working of coal, petroleum or even aggregate.[27]

The exception of placer mining means that land held and worked under the Mining (Placer) Act may be entered, staked and developed by a miner under the Mineral Act. (It will be recalled that each Act defines "mineral" so as to exclude the subject-matter of the other Act.) Concurrent operations for rock ore and for alluvial deposits by different operators on the same ground would inevitably create tension, so it is perhaps just as well that the geological likeliness of such proximity of worthwhile deposits is low. Indeed the two cases of this kind of concurrent staking both reek of harassment, bad faith and fraudulent purpose. In Smith v. Yukon Gold Co.,[28] the defendant held placer claims on the fabulous Bonanza Creek. The plaintiff located overlapping claims for quartz mining, and applied for an injunction to prevent the placer miner from entering his quartz claim, depositing debris on it and otherwise interfering with his surface rights. It was held that the ground granted as a placer claim was not thereby occupied as a mineral claim within the meaning of the quartz regulations. But the injunction was refused. "He staked after the Placer Mining Act grant, and, of course, took his grant subject to all the powers, privileges, and rights given under the Placer Mining Act to the holder of placer mining claims".[29] The
reverse occurred in *Tanghe v. Morgan*; a placer claim was located on land already located as a lode (i.e., hard-rock) claim. Martin J. held that this was something contemplated, and recognized by both Acts, and the Gold Commissioner could not interfere with the placer miner's right to locate, no matter what bad faith that official suspected.

The present-day situation appears to be the same. Ground may be located under both Acts, (although placer locations and leases lie more in the discretion of the Minister), but the working rights of the later locator are limited by those of the prior one.

(c) **Parks**

Mineral exploration and development in parks is strictly controlled. In many cases it is prohibited outright. Section 7 reads:

> Notwithstanding an Act, agreement, free miner certificate, mineral claim, mining lease or licence, no person shall locate, prospect or explore for, mine or produce minerals in a park created under an Act unless authorized by the Lieutenant Governor in Council on the recommendation of the person, corporation or government that is responsible for the park.

New claims in parks are subjected to further restrictions. Existing claims are not cancelled, but without an authorization the claim holder may make no use of his claims at all. Section 7 must be read alongside the legislation governing the individual park. The most important Act is the Park Act which prohibits
the taking of natural resources (including minerals) or the exercise of any right under the Mineral Act without a park use permit. Park use permits may be issued by the Minister subject to fees, terms, undertakings and deposits.[34] Park use permits are restricted in their availability according to the class of park. None may be issued for a park smaller than 2,023 ha or for a nature conservancy area. Permits may be issued for Class A or Class C parks only if necessary to preserve the recreational values of the park. All these parks are effectively immune from mining. Permits may be issued for Class B parks only if issuance will not be detrimental to recreational values.

A number of other Acts establish parks or similar protected areas.[35] Some, such as the Ecological Reserve Act,[36] prohibit mining activity; others, such as the Municipal Act,[37] do not mention it.

The controls under parks legislation can, upon creation of a park, virtually sterilize mineral claims pre-dating the park. Recent litigation in *Tener v. The Queen* [38] has considered whether a claim owner is entitled to compensation when he is refused a permit to develop the claim. In 1937, the predecessor in title of the plaintiffs obtained sixteen Crown-granted mineral claims, which under the Mineral Act of 1936 [39] gave him rights to the minerals and to the use and possession of the surface of the claims for the purpose of winning the minerals and getting them out of the claims. In 1939, under the Provincial Parks Act,[40] Wells Gray Park was gazetted by setting aside all vacant
Crown lands within an area of 1,164,800 acres. The Crown-granted mineral claims were situated in this area, but they were not expropriated. Moreover, neither the Mineral Act nor the Provincial Park Act at the time restricted mining activity, so the owner's rights to the claims were left unaffected. The park use permit requirement was introduced in 1965,[41] and at the same time Wells Gray Park was classified as a Class B park. In 1973 the predecessor of section 7 was added to the Mineral Act [42] and in the same year, Wells Gray Park was reclassified as a Class A park.

In 1973 the claim owner first asked for a park use permit, but the Parks Branch demurred, especially as the request involved the construction of nine miles of road across the Park to the claims. The owner pressed the request, getting a variety of inconclusive answers until in January 1978 the Branch finally refused to issue a permit.

On the strength of this refusal the plaintiffs issued their writ seeking compensation. They asserted that an interest in land had been taken from them by expropriation (in which case the Park Act applied), or in the alternative that an interest in land owned by them had been injuriously affected by an act of the Crown (in which case the Land Clauses Act [43] applied). This taking or injurious affection was brought about by the refusal of a permit in January 1978.

The trial Judge rejected both assertions. As to expropriation, "[w]hat the plaintiffs seek here really is to be
compensated in damages for loss alleged to flow from a statutorily - authorized withholding of a permit, under the guise of its being an expropriation". [44] Nor could injurious affection be claimed as the Park Act (incorporating by reference the Ministry of Highways and Public Works Act) [45] was a complete code to exclude the Land Clauses Act.

All members of the Court of Appeal agreed with the trial Judge that refusal of a park permit did not amount to expropriation within the meaning of the Park Act. In conferring the power for the purpose of establishment or enlargement of a park, the Act conveyed the idea of land rights being acquired by the Crown, not simply being taken and destroyed. However the majority, in the decision of Lambert J.A., differed from the trial Judge on the Land Clauses Act and injurious affection. The Park Act, far from being a complete code to exclude the Land Clauses Act and its injurious affection provision, was part of a legislative scheme in which both acts played a significant role. Taken together, the two Acts provided a complete scheme without anomalies and without conflicts. There was no good reason why the Land Clauses Act should not apply on its terms, and no good reason why the Court should strain to deny compensation. The Land Clauses Act not being excluded, the Court decided that the Act indeed applied to the plaintiffs and that the refusal of a park use permit did in this case damage the plaintiffs' rights in land within the meaning of the Act. It was not disputed that the claims and the associated surface and access rights were all rights with respect to land for compensation purposes.
The Court of Appeal plainly leaned towards an interpretation of the law that would allow the claimholders to be compensated for their losses. In holding that there was a right to compensation here, the decision has raised a number of issues of law and policy. In law, the unhappy state of British Columbia's expropriation legislation was clearly illustrated.[46] The very difficult question of whether or not the withholding of a statutory permit can amount to expropriation or injurious affection of rights was directly confronted. (This may be the most interesting issue in the judgment of the Supreme Court of Canada on the appeal in this case which it has heard but, at the time of writing, has not disposed of.) In policy, the case demonstrates the complexities arising from the fundamental incompatibility of mining with park values. Parks do require full protection but it is hard to pretend that that protection can be obtained without prejudice or damage to existing mining rights. Suitable legislation would make it clear how far the prejudice is not compensable as being merely one of the many government actions which affect different interests.

(d) Mineral Reserves

A mineral reserve may be established by the Lieutenant Governor in Council by regulation under section 8.[47] It is now a very flexible instrument for the restriction of mineral exploration and development. Section 8 was previously simpler and narrower, but the sudden imposition of the uranium moratorium in April 1980 must have exposed a need for a more elaborate provision.[48]
A mineral reserve may prohibit the locating and recording of claims, the exploration and development of mining properties or the obstruction of works on the reserve. It may do so absolutely or conditionally; it may apply to one mineral or to all. Work requirements may be relieved. Nothing is said about the paying of compensation for losses arising out of the creation of a reserve, but section 8(3) places interesting restrictions on entitlement to compensation.

Several variables may be observed in the regulations creating mineral reserves. The land included may be described by a surveyor's legal description of the parcels,[49] by reference to "lands...described in the mineral claims listed in the attached schedule as those claims were recorded in the office of the Gold Commissioner on August 27, 1980",[50] or as being "an area 1500 m wide being 750 m on each side of the centre line of the right of way of the proposed B.C. Hydro and Power Co. Vancouver Island Gas pipeline...."[51] The reserve usually affects operations for all minerals under the Act, but it may be limited to one - as was the Uranium Moratorium Regulation.[52] The reserve may be permanent or it may be of limited duration.[53] The reserve may simply prohibit the location or recording of further mineral claims on the reserved area;[54] it may prohibit locating except on terms not to interfere with the transmission line, pipeline, dam or other works specified;[55] or it may prohibit all free miners, whether claim holders or not, from interfering with the works.[56]
A large number of reserves are created every year. The number seems to be the corollary of the virtual absence of other limitations upon mining as a land use. The procedure has the advantages of speed and effectiveness for the implementation of government decisions. However, the procedure does not benefit the government only. For example, a company with a mine at the design stage may request a reserve to secure areas for ancillary facilities such as tailings ponds. This is a valuable kind of protection. The unattractive features of the procedure for the creating of reserves are that it is discretionary, that the issue is not considered in an open forum, and that there are no criteria to ensure fairness between different users of the surface and between surface users and mineral owners.

In summary it may be said that land in which the minerals are owned by the Crown is almost always open to mineral activity, unless its use is one protected by the Mineral Act, by parks legislation or by an ad hoc mineral reserve. Certain uses are protected, rather than certain persons or certain owners; and by and large protection, if given, is given in a complete manner.

2. **THE SURFACE RIGHTS CONFERRED ON A MINER**

   (a) **Rights Granted by the Act**

   Two sections give the miner the right to use the surface. Section 6 has just been discussed in relation to the land open to entry. If land is open, "a free miner may enter [the land] and prospect and explore for, locate, mine and produce minerals".
Section 10(1) provides:

The holder of a
(a) mineral claim,
(b) 2 post claim,
(c) lease,
(d) mining lease, or
(e) certified mining lease
may use and possess the surface of his claim or leasehold for
the purpose of exploring for, developing and producing
minerals, including the treatment of ore and concentrates,
and all operations related to the exploration, development
and production of minerals and the business of mining.[57]

Every question on the right of the miner to use the surface
must be referred to sections 6 and 10. The usual form of mining
lease makes no provision for these rights, and of course there is
no equivalent documentation for a mineral claim. The right to
enter and operate is conferred directly by the Act, not by virtue
of the claim or lease. It necessarily follows that if the right
to enter and operate is changed by an amendment to the Act, the
fact that the claim was granted under the old legislation does not
hinder the immediate effect and application of the change.[58] It
may also be noted that there is no need to discuss surface rights
under a mining lease independently; they are the same as under a
claim.

Sections 6 and 10 obviously overlap, but there are
differences in their functions. Section 6 confers rights on the
free miner without requiring him to have located a claim or other
tenure. At the reconnaissance and exploration stages, before he
locates a claim, the miner may rely on section 6 only, but it is
most unlikely that he would need anything authorized by section 10.
that is not authorized by the general words of section 6. Section 6 is also the instrument for protecting buildings, curtilages and the like. On the other hand, section 10 provides in more detail for operations which under section 6 might be marginal. Section 10 also confers the right to "use and possess the surface" of a claim. This right of possession will be considered later.

The miner's rights under section 6 and 10 are stated in extremely wide terms. The miner's rights are not qualified by the nature of the ownership or occupation of the surface. Sections 6 and 10 grant the same working rights whether the surface is unoccupied Crown land, land held under a forest tenure or other licence, or land held by a private person in fee simple.

Nor are the miner's rights greatly qualified by the fact that the miner's operations are only at the initial stages of the exploration and development process. It has been seen that only section 6 is available until a claim is located, and below it will be seen that timber rights are narrower until preparations are being made for production, but these are not substantial matters. Nothing in the Act distinguishes between the impact which may be justifiable at the initial reconnaissance stage and that which may be justifiable on going into production on an established orebody. Naturally, many more areas are affected by exploration operations than ever reach production.

On their face, the general words of sections 6 and 10 allow open pits, surface subsidence or stripping, storage dumps, tailings dumps, mills concentrators, workshops and the like. Even
the most severe impact on land seems to be authorized. If the legislative policy is to grant surface rights which allow absolutely any kind of mineral operation, then it is not a new policy. The same policy was discerned in placer-mining regulations in old Klondike cases such as [Day v. Klondike Mines Ry.](59) and [Smith v. Yukon Gold Co.](60)

(b) Restrictions on Surface Use

Although the miner's rights under sections 6 and 10 are stated in extremely wide terms, there are certain restrictions which should be considered at this point. However, the restrictions do not narrow the miner's surface rights very far.

The first restriction is section 11 of the Mineral Act:

1. Notwithstanding this or any other Act, the minister may restrict the use of surface rights by a person who holds a mineral claim, mining lease or certified mining lease where, after inspection and giving reasonable notice to that person, he is of the opinion that the surface is so situated that it should be used for purposes other than mining.

2. Where surface rights are restricted under this section
   a. the minister shall serve the holder with a notice of the restriction; and
   b. the holder may appeal to the Lieutenant Governor in Council at any time within 30 days after service of the notice.

This section originated in 1959, and has been altered several times since then.[61] At first sight, it may be thought that here is a method for the evaluation of conflicting land uses and for curtailing the general words of sections 6 and 10. But a closer consideration of the words "that the surface is so situated that it should be used for purposes other than mining" reveals that the
Minister's powers are not so extensive. Surface rights may be restricted only on the basis of the situation of the land. Proximity of the land to an urban area, or to an environmentally sensitive area may be examples of "situation", but the fertility, slope, historical significance or sensitivity of the land itself may be excluded. Spatial location may be the only criterion for the restriction of surface rights under section 11. It may also be noted that even if the section is not so narrow in its scope, it contains no procedural safeguards, such as a hearing or an appeal by the surface owner, to ensure that the interests of the surface owner and the public are properly considered.

The second restriction is section 65(b):

The Lieutenant Governor may

order the cancellation of the record of a mineral claim where it has been proven that the claim has been acquired or held for purposes other than a mineral claim;

In the context of surface use, this inelegant expression is clear enough; holding the surface for purposes other than those permitted in section 10 will lead to cancellation.[62] Given the width of the surface rights granted, a genuine mineral operator has little to fear from this restriction. Section 65(b) is now directed against the locating and buying of claims for holiday homes and residences.

A third restriction, which poses a larger threat to a miner's activities, also acts by restricting the miner to the purposes allowed by section 10. However, it does not depend on statutory
procedures, but on the general jurisdiction of the courts. In Attorney-General v. Morris, [64] the government sought an injunction to stop the claimholder from building a 35-kilometre road, and from cutting timber to do so, in order to gain access to his two claims. He had staked the entire route of the road with 44 additional claims. He contended that under section 10 he had the right to use and possess the surface and to cut timber to build the road. This contention was rejected. The building of an access road to the first two claims did not fall within the permitted purposes for the use of a claim as indicated by section 10. To some extent this decision touches on the matter of the use of one claim for the benefit of another. More generally, it is the first case of a miner's use of the surface being tested against the purposes authorized by section 10. The extreme scope of the purposes authorized will frustrate many attempts to challenge surface activities in this way, but no doubt some will succeed. Construction of a smelter, for example, may not fall within "the business of mining" as that expression is used in section 10.

Two less certain means of restricting surface rights may be mentioned in conclusion. The first is a prior grant by the Crown of rights with which the later grantee (under the Mineral Act) may not interfere. This priorities question was visible in the context of a quartz-placer dispute in Smith v. Yukon Gold Co.[65] but any significance it may have in the mineral-surface context will be better discussed along with the question of possession.
The other possible limitation lies in prohibiting the use of the surface of one claim, as a tailings dump for example, for the purposes of mining carried out not on that claim but on another claim of the holder. The validity of such use of a claim was seriously doubted in Day v. Klondike Mines Ry., [66] but circumstances and legislation have both changed since then. The Mineral Act plainly contemplates that a number of adjoining claims will be grouped for the exploration and development of the one property. [67] If such a use is invalid, then every separate claim or lease would have to have its own complete set of working facilities. The proposition seems to be untenable, and fortunately so, for it is not uncommon for title to tailings dumps and ponds to be taken by mining leases.

(c) Timber, Access and Purchase of the Surface

In these three areas, the holder of a mineral claim has rights which are subordinate but significant elements of his rights over the surface.

As well as granting rights to use and possess the surface, section 10 grants rights to timber to the claim holder:

(2) Subject to the Forest Act, the holder of a
(a) mineral claim,
(b) 2 post claim,
(c) lease, or
(d) mining lease
that is not in production shall be issued a free-use permit or a licence to cut under the Forest Act.

(3) The holder of a
(a) mineral claim,
(b) 2 post claim,
(c) lease, or
(d) mining lease
that is in production or being prepared for production, and the holder of a certified mining lease shall be issued a licence to cut under the Forest Act.

Reference must be made to the Forest Act [68] to explain these rights. A free use permit under section 45 of that Act is for a term not exceeding one year, and for an area not exceeding 65 ha. No stumpage or royalty is due on the timber cut, nor is there any rent to pay. However, it can only authorize the taking of timber for specific uses:

(i) from land within the licence, claim or lease for the purpose of exploring for and developing minerals or coal, including all operations related to the exploration and development of minerals or coal or the business of mining but excluding operations and business respecting preparation for production; or

(ii) on any Crown land, for use during the development stage of a mining operation on that land for stulls and props for underground use or for the construction of buildings.

A licence to cut, on the other hand, includes any terms and conditions, including obligations to pay stumpage as determined by the regional forest manager. It can authorize timber cutting for any purpose.

If a claim or lease is "not in production", then either a free use permit or a licence to cut is available - although the legislation fails to specify whether the choice is that of the miner or the forest manager. If a claim or lease is "in production or being prepared for production", then only a licence to cut will be issued. Attorney-General v. Morris [69] emphasizes the importance of whether or not the claim is in production, even though the term is not defined in the Act. Morris also emphasizes
the need for proper observance of the Forest Act formalities; up until 1973 a claimholder did not have to make applications under that Act.[70] One other point that is unclear from the legislation is the effect of these timber rights on the holder of an existing forest tenure such as a tree farm licence.

Access rights are another important component of the miner's surface rights. Apart from granting the general right of entry, the Mineral Act does not provide for road access for the carrying out of mineral exploration and development. The issue of access has been a major cause of friction between mineral operators and surface users, and it has caused occasional episodes of confrontation, especially with the forest industry.[71]

The Mining Right of Way Act [72] permits an owner of a "mining property" to take and use land for a right of way without the consent of the owner, on filing plans, obtaining government approval, giving notice and paying compensation. Showing its age, the Act defines "mining property" as

"...land in which a vein or lode or rock in place or natural stratum or bed of earth, gravel or cement is mined for gold or other precious minerals or stones or for any base mineral or mineral bearing substance, including coal, petroleum and natural gas..."

This Act is much less useful than it might appear at first sight, and in practice is hardly ever resorted to.[73] All the criticisms made by Anfield [74] in 1963 are still relevant; the Act does not cater for exploration, temporary access needs, or shared use; it imposes few restraints on the title or use of the
way that may be taken; and by incorporating the Railway Act it insists on a cumbersome and unsuited procedure. Even if it was useful legislation when first enacted in 1911,[75] it is now plainly inadequate.

Where access is required over Crown land, the miner may apply for a permit under the Land Act,[76] section 10, to construct a road, but the road will be open to use by other persons. If more secure rights are required, section 37 of the same Act enables the granting of a right of way or easement. Approval under the Mines Act does not dispense with the obligation to comply with these sections. Nor can the miner obtain access to his claim by staking a line of new claims and building a road on their surface![77]

Where access is required over forest land, the Forest Act [78] may be relevant. A miner must apply to the Forest Service Regional Manager for a road permit to use a Forest Service road, and must apply for a determination of the issue if he cannot obtain an agreement with the "deemed owner" of a road deemed to be owned under section 95. Co-ordination of road construction, road use and timber use is desirable for all concerned, and to some degree it is the responsibility of the Forest Service. However, the Forest Service naturally identifies more closely with forest operators than with mineral operators, and is not well placed to act as an impartial arbiter when the two lock horns. Attorney-General v. Westgarde [79] is an example of the Forest Service lending its full support to a logging company in a dispute between the company and a claim owner.
Section 12 and 13 control the disposition of the surface of Crown land on which a mineral claim has been located but which is otherwise unoccupied. A claimholder intending to go into production generally finds it advantageous to obtain the fee simple (or a lesser interest) of the surface occupied by permanent improvements. Security for capital works is enhanced; investments are protected against changes in mineral legislation; and lenders and shareholders are shown that the claimholder is making a firm commitment to the project.[80]

The disposition of the surface depends on whether or not the minister certifies that the "surface rights" (an awkward expression for the surface of the land [81]) are or will be required for the purposes of mining, including the treatment of ores and concentrates. If the claimholder's application for the surface is so certified, after circulation through the government's referral system, the claimholder has a right to purchase the surface. If the Minister does not so certify, the claimholder may appeal to the Cabinet; but otherwise the Minister of Lands, Parks and Housing may dispose of the surface to any applicant if he considers it to be in the public interest. The claimholder's right to purchase the surface, upon certification, is subject to the rights of an applicant under the Land Act if that applicant obtains priority by applying for the land (or by staking it, if it is unsurveyed) before the location of the mineral claim. This is provided for in section 13, which at first sight seems to have a much greater effect than it has in fact.
(d) **Scope of Surface Rights**

An analysis of the scope of the surface rights of the miner under the Mineral Act comes down to a question, are the rights conferred by sections 6 and 10 really as wide as they seem to be? We have considered the extent of those rights in detail, along with the restrictions that limit them. The restrictions have turned out to have little impact on the wide powers granted to mineral operators carrying out genuine operations. There are no procedures (apart from the narrowly-framed section 11) which can be resorted to by the surface owner, or even the government, to challenge the use of land for mining purposes if it is open to mining. The surface rights granted by sections 6 and 10 are indeed absolute and devoid of qualification for all practical purposes. Furthermore, the granting of a mineral claim cannot be withheld; the area or the operations to be used cannot be restricted; and the miner need not even notify the owner or occupier in advance of operations.[82] It will be remembered that, in contrast, the wide common law surface working rights are tempered by obligations to use reasonable means of working, and not to cause subsidence. There are no equivalents on the face of the Mineral Act, although in Chapter VII we will consider whether such limitations can be implied from the common law.

(e) **Mines Act and Water Act**

These two Acts strictly lie to one side of the path of discussion of this thesis, but they so influence mining activity, surface use of land in particular, that they deserve brief consideration.
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The Mines Act [83] regulates two aspects of mining: safety (which is in fact its primary concern) and the protection and reclamation of the surface of the land. In its concern for the surface, it affects both the public interest and the interest of the surface owner.[84] Compliance with its requirements is important, but the Minister's approval by no means circumvents the necessity of complying with other statutes.[85]

The procedure required for a mine going into production may be contrasted with that for exploratory work. Before production, "a program for the protection and reclamation of the surface of the land and water courses affected by the mine" must be filed. The program is referred to the Reclamation Advisory Committee for recommendations. The Minister may approve or reject the program. If it is approved, its proper performance is ensured by the deposit of a security of up to $2,500 per hectare and by the power to cancel the approval and close down the mine. The owner is obliged to reclaim the surface continually and progressively throughout the entire period of production. Mines Act approval is part of the Province's "Procedures for Obtaining Approval of Metal Mine Development" [86] which establish a non-statutory review process as a vehicle for overall project approval and regulation.

The application of the Mines Act to exploratory work is restricted. Generally the Act applies to a "mine", which is defined;
...an underground, open pit or quarry working, or other working of the ground, for prospecting, exploring, mining, opening up, developing or proving a mineral or mineral bearing substance...[87]

"Other working of the ground" must be read *ejusdem generis* with the specified workings. The definition would cover stripping, trenching or adits, but could scarcely be read to cover geophysical work, drilling or access roads. This reading is in harmony with section 10(3):

Sections 8 and 9 [on the Minister's approval of a program] do not apply in respect of all placer mining operations other than hydraulic monitoring, and in respect of all mines in the exploration stage, but where the chief inspector considers that the employment of mechanical equipment is likely to cause significant disturbance to the surface of the land in clearing, stripping, trenching or other operations.... he may require a simplified compliance with those sections.

The Ministry of Energy, Mines and Petroleum Resources requires a "Notice of Work on a Mineral Property" to be filed before carrying out exploration work,[88] ostensibly under the authority of the Mines Act.[89] This Notice also requires the Forest Service to be advised and requires a reclamation program if applicable. In practice, these requirements for exploration work are generally ignored. Operators who foresee no benefits in drawing the attention of the District Inspector of Mines to them usually do not do so. Enforcement by Inspectors, who are oriented more towards safety matters, is usually minimal, although it varies greatly from district to district.[90]

The Water Act [91] of British Columbia regulates the use of water in rivers and streams. It is concerned with the allocation
of water resources to domestic and industrial consumers rather than with the pollution and quality of water. Property in and rights to all water in streams and lakes is vested in the Crown unless rights to it have been issued under the statute.\[92\] However, the Act does not apply to water below the surface of the ground unless a proclamation is made to that effect. Common law rules apparently still apply to ground water as no proclamation has been made. The owner of land or a mine, or a public body, may apply to the Comptroller of Water Rights for a licence to take and use water and the Comptroller may determine the application after objections and hearings. Unrecorded water may be used without a licence for domestic purposes or mineral prospecting. As a result, a mineral operator has no rights to water, other than at the prospecting stage, except through compliance with the statutory procedures which regulate all users.

3. COMPENSATION

The next subject, compensation, is the quid pro quo for the surface rights which have just been discussed. Section 9 reads:

(1) Where a free miner enters land that is lawfully occupied for other than mining purposes and that is not land granted to and held by or for a railway company under a railway subsidy Act, he shall, where required by the owner of the land, give security in an amount and form satisfactory to the gold commissioner for loss or damage that may be caused by the entry and he shall not again enter the land until he gives the security.

(2) Where a free miner causes loss or damage by his entry he shall, except with respect to entry on the
railway land referred to in this section, compensate the occupant or owner or both.

Compensation is one of the major components of the Mineral Act's scheme for adjusting conflicts between the mineral industry and surface interests. There are three aspects to be considered in turn; procedure, including the giving of security, criteria for fixing compensation, and the range of persons entitled to compensation.

(a) Procedure

The miner's duty to give security under subsection 9(1) and his duty to compensate under subsection 9(2) are both triggered by his "entry" onto land. The word "entry" seems to be used in two different senses in the two subsections. In the first, the meaning seems to be a narrow and conventional one of an act of passing over the boundary of the land. It is a specific occurrence. However, in the second subsection, and perhaps in the second use of the word in subsection 9(1), the meaning must be wider, including any act of the miner to assert his surface rights or to use the land. This specialized use of the word is also seen in section 6(2) where the "right of entry" does not extend to the protected land uses. This wider meaning of "entry" seems necessary to give effect to section 6(2) and to give substance to the miner's obligation to compensate for loss or damage caused "by his entry". The entry and re-entry described in subsection 9(1) may, on the other hand, be more specific.

Section 9(1) seems to require two things to happen before a duty to give a security arises;[93] (i) an entry by a free miner
on lawfully occupied land and (ii) a requirement by the owner for security to be given. The prohibition against further entry applies immediately without any third condition that the Gold Commissioner fix the amount and form of the security. The Commissioner's stipulations have effect as a condition on the lifting of the prohibition against further entry. The prohibition imposed by the Act must, for its duration, suspend all of the miner's surface rights under sections 6 and 10.

The procedure allows the miner at least one entry before he must go through the paperwork and negotiations for giving security. The policy may be as explained in *Nelson and Fort Sheppard Railway v. Jerry*;[94] the miner is not delayed in staking a discovery, but before he can go further and damage the surface by exploring and mining it, he must give security.[95]

The Gold Commissioner may not always be well qualified to fix the security. In many mining divisions, the Commissioner is a government official holding a variety of different statutory appointments, as well as that of Gold Commissioner. There is no reason to expect that the appointee will always be someone with a knowledge of mining or of the impacts of mining on other land uses. Furthermore, governmental powers are no substitute for the individual vigilance of the landowner. *Cofrin v. Bicchieri* [96] reveals how the Gold Commissioner there demanded the security requested by the landowner, but neither he nor the Ministry in Victoria pursued the matter further once the miner asserted that he had a right to mine without paying compensation.
The penalties for not giving security when required are a prohibition on further entry, as noted above, and the criminal sanction of section 64(d). Additionally, proceedings could no doubt be launched for trespass and (under section 61) for the cancellation of the free miner's certificate. However, under the Mineral Act, the mineral claim is not invalidated or cancelled by failure to comply.[97]

The Mineral Act is altogether devoid of procedures for the fixing of the compensation to be paid. A dispute calls for proceedings under the mining jurisdiction of the County Court.[98]

(b) Criteria for Compensation

The taking of security is basically a precaution. The substantial obligation - indeed, the only real obligation of the free miner to the surface owner - is to compensate the owner or occupant or both for loss or damage caused by the entry. One decision, Gardi v. Bow River Resources Ltd.[99] lays down the main principles for determining compensation, and Cofrin v. Bicchieri [100] assists in applying those principles.

Gardi v. Bow River Resources Ltd. is an admirably terse judgment of the British Columbia Court of Appeal. The facts were that in June 1972 the resource company obtained permission from Gardi to carry out exploratory drilling on his property, the Duffy Creek Ranch. It deposited a $5,000 security with the Gold Commissioner in Kamloops and made arrangements for water use. Ten days' drilling took place. At the end of the work, the company had the site inspected by an expert. The expert found that the
only damage to the land was two-wheel tracks, made by rubber-tired equipment, and that adequate compensation would be $100. Gardi claimed $2,000 for the extra work of removing his neighbour's cattle which had entered his land through gates left open, and also for the effects of the drilling on the grazing habits of his cattle. The company applied for the return of the security and for the fixing of compensation.

In the lower court,[101] Dohm Co. Ct. J. held that compensation under the Mineral Act was only available for loss or damage to land and improvements, not for mere inconvenience. His first reason was that the Act is designed to regulate the use of land insofar as mineral exploration and recording is concerned. Land use being the key, "the words 'full compensation' must be read with the words 'loss or damages' and together they must be restricted in their meaning to include loss or damage to land and improvement to that land".[102] The second reason was in effect that mere inconvenience was not loss or damage. It might be noted that these reasons were not based on expropriation cases, as the Court of Appeal said. Only one such case was cited and Dohm Co. Ct. J. plainly saw that the case before him was not one of that kind.[103]

The Court of Appeal refused to limit compensation to loss or damage to land and improvements. The Court turned to an important oil and gas surface rights case, Re Pacific Petroleums Ltd.[104] That case held that compensation under this kind of legislation is not compensation for land taken or any interest in land taken. It
is compensation for entry and for the loss or damage caused by the
operations carried on. From this case the Court took the
principle that nothing in the Mineral Act suggests that the
limitations flowing from statutes authorizing expropriation were
intended to apply.

The Court then turned to the words of section 12(3) of the
1960 Act which was different from the present Act:

(3) After such entry the free miner shall make
full compensation to the occupant or owner (not being a
railway company as aforesaid) of the lands for any loss
or damages which may be caused by reason of the entry;
such compensation, in case of dispute, to be determined
by the Court having jurisdiction in mining disputes,
with or without a jury.

Of which Seaton J.A. for the Court said:

The words "full" and "any" indicate that the
Legislature intended complete compensation for loss or
damage regardless of its type or class, so long as it
arose out of the act of entry. It is not necessary to
define the extent of the compensation other than to say
that the appellant is entitled to "full compensation ...
for any loss or damages which may be caused by reason of
the entry".[105]

The labelling of the loss as "inconvenience" was a diversion from
the proper issue, which was really causation:

I do not think that the use of the label ousts the
claim or assists in assessing its validity. The loss is
one for which compensation is payable if it falls within
the statute. The time the appellant was required to
spend in order to remedy matters created by the entry on
the lands constitutes loss or damage "caused by reason
of the entry".[106]

In consequence, Gardi's appeal was allowed and the question of
assessment was referred back to the trial Judge.
Cofrin v. Bicchieri [107] assists in applying Gardi to the present Mineral Act which does not include the amplifying words "full" and "any". The Placer Mining Act in Cofrin did not contain them either.

I do not consider that the omission of these words from the 1974 Act is of any significance. The root derivation of the word "compensate" makes clear that which to my mind the word connotes: the one act or thing (payment) fully offsetting or counter-balancing the other (the causing of loss or damage). If compensation is not full it does not compensate: if the legislature had intended it to be less than full - to be partial - it would have said so. So with the absence of the word "any": in my view, the words "compensation...for loss or damage caused" contemplate and intend compensation for any loss or damage that the plaintiff can prove that he suffered as a consequence of the entry, occupancy and use.[108]

This passage may be compared with words of McGillivray J.A. in Re Faraday Uranium Mines Ltd. dealing with the same kind of issue in Ontario:

"As the effect of the statute is to terminate the common law rights whereby the owner can secure protection of his property and to confer in its place a right to recover in damages for the injury to the property, it is but just and proper to assume that full compensation is intended."

(Naturally, this allusion to the fate of the common law rights will be taken up again.[110]) In Cofrin, compensation was held to be payable not only for damage to the land but also for frustration of the legitimate plans of the owner for development and use of the property, loss of use, and loss of aesthetic enjoyment. These losses were difficult to quantify, but they were direct consequences of the actions of the miner.
Gardi and Cofrin establish the principle that the compensation section of the Mineral Act is to be construed broadly and not narrowly. They indicate that a surface owner claiming compensation must prove, firstly, some loss or damage suffered by him, and secondly, that the loss or damage was caused by the entry of the miner. To date, compensation has been ordered for physical damage to land, time spent by the owner in order to remedy situations created by the entry, frustration of plans, use of the land and loss of aesthetic enjoyment. Claims for future damage, however, have been denied.[112]

The use made of Pacific Petroleums in Gardi suggests that other Mineral Act cases may be decided by an application of oil and gas compensation cases. As Chapter V will demonstrate, these cases are numerous. Application of such authority calls for a careful appreciation of the differences between the statutes involved. These differences will receive some attention in Chapter VI. Oil and gas cases may also be harbingers of difficulties not yet met under the Mineral Act. Examples which come readily to mind are periodic payments of compensation during the term of the miner's occupation, and damage to lands not "entered" by the miner.

(c) Persons Entitled to Compensation

Compensation is payable to the occupant or owner or both, except for land held by a railway under a Railway Subsidy Act. The right to compensation is wider than the right to demand security for compensation in three respects; the land need not be
lawfully occupied land, it may be land occupied for mining purposes [113] and occupants as well as owners are entitled.

Both "occupant" and "owner" are familiar terms but they do not have precise and consistent definitions. They do not relate directly to real property concepts of estate, interest and possession, and there is often difficulty in ascertaining just what relationship between the person and the land is meant by them. Some cases present no difficulty - the proprietor of a freehold or a leasehold estate will certainly be an owner, and so will many holders of lesser interests.[114] Similarly, a resident proprietor will be an occupant. But what of persons with forest tenures, placer leases, licences of occupation under the Land Act,[115] registered traplines, or easements? What of the Crown itself as owner of unoccupied land?

The meaning of "occupant" and "owner" has been considered in innumerable cases in a wide variety of fields. "Owner" is familiar in insurance and liens, for instance; "occupant", or "occupier", is used in negligence and narcotics; both are common in laws relating to liquor and, above all, in municipal taxation. However, it is suggested that the meanings ascribed in those contexts ought not be relied on to construe the Mineral Act. In those contexts, they are generally used in very different environments, predominantly urban ones.[116] Further, there is some danger in importing principles evolved in one area of the law into another, particularly where statutes are to be interpreted. In some areas, established doctrine attaches specialized meanings to
words. One example is the principle in municipal taxation law that "occupation" means "exclusive occupation". If that rule were to apply here, there might not be any compensation for damage done to grazing permit holders, pipeline owners or even forest licence holders. An even stronger reason for not applying the use made of "owner" and "occupant" in other areas of law is that almost without exception a person held to be an "owner" or "occupant" in those other contexts has some liability imposed on him as a result. In contrast, the Mineral Act enables such a person to recover recompense for damage sustained by him.

The proper view seems to be to regard qualification as "owner" or "occupant" under the Mineral Act as a question akin to standing; and to treat the claimant's standing liberally in accordance with the wide view of compensation expressed in Gardi. After all, the claimant must be a person who has suffered loss or damage. It seems desirable that the main questions should be that loss or damage and who caused it, rather than the precise category of the relationship of the claimant to the land.

(d) **Summary**

Section 9 is not complex, and it contains no procedural provisions to speak of. Yet it has a sweeping effect. The right to compensation is a very wide right. This width matches the width of the right vested in the miner to use the surface. Compensation is not immediately comparable with other remedies. It is not damages for trespass, nuisance or negligence, for it does not arise from any wrong. And it is not compensation for the
expropriation of real property. Section 9 could be improved in several ways without undue burden on mineral operators. Notice could be required before entry on occupied lands; some penalty could be put in place to discourage entry on protected lands; restoration rather than compensation could be appropriate in some cases; and the rights of adjacent owners and those who are affected but are neither owners nor occupants could be better catered for. Nonetheless, the generality of the right to compensation is the mainstay of the surface user's rights against mineral operators.

4. **POSSESSION OF THE SURFACE OF THE CLAIM**

The next matter to be discussed is the right of a holder of a mineral claim to possession of the surface of his claim. Section 10 provides that "the holder of a mineral claim, post claim, lease, mining lease or certified mining lease may use and possess the surface of his claim or leasehold" for mineral purposes. Thus, while in an earlier part of this chapter we considered the uses and the purposes intended by this section, we may now focus on the authorization to "possess". The matter entails a number of interesting questions; does the miner have possession? Must it be exclusive possession? What does he have to do to prove possession? Does the surface owner still have some sort of possession too?

These are questions of consequence in several fields. First and foremost is the right to restrain interference with property by means of the actions for trespass and nuisance. Criminal
offences relating to trespass also depend upon the concept of possession. Possession is similarly significant in questions of occupation of land, the distinction between bare licensees and the holders of interests in land, and in municipal taxation, where it arose recently in the case of \textit{The Queen v. Newmont Mines Ltd.} All these in turn contribute to our understanding of the nature of the interest acquired under a mineral claim.

It may clarify the issues if we distinguish our subject-matter here from some similar matters. There is no question here of the claimholder's right to possession of the Mineral Act minerals or of his right to exclude other miners from them. Nor are we dealing with the protection of a right to enter and go onto land to work minerals, such as under a profit a prendre. Possession of the surface of the land itself is the issue here. Further, the conflicting claims of miner and surface owner are different in kind to the claims of co-owners or of landlord and tenant to the one piece of land, even though useful analogies may be drawn from such situations.

The Province's early mining legislation did not always speak of possession when granting the miner rights to the surface. The Gold Mining Ordinance of 1867, section 35, read:

\begin{quote}
Every free miner shall...have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, ... but he shall have no surface rights therein."
\end{quote}

("Surface rights" is used here in the sense of title to the surface, a sense which is different from that of the miner's rights to the surface. The former usage still occurs in the Mineral Act,
in section 12, while the latter is more frequent now, as in the section heading for section 10 and in section 11.

The Mineral Ordinance 1869,[123] for minerals other than gold, simply gave licensees exclusive authority to enter, prospect, search and work.

Possession made a one-year appearance in the legislation in 1877,[124] but came to stay in the Mineral Act of 1884.[125] Section 55 brought forward the miner's exclusive right of entry upon his own claim, but in section 77 gave additional rights for claims on veins or lodes, as opposed to placer ground:

The lawful holders of mineral claims shall have the exclusive right and possession of all the surface included within the lines of their locations, and of all veins or lodes...

There was a confusing and contrary series of amendments to these provisions between 1891 and 1897 in relation to rights under Crown-granted mineral claims as well as ordinary mineral claims, but by the latter year the grant of rights to the miner was as follows:

26. Notwithstanding anything to the contrary contained in any Act, every Crown grant hereafter issued of a mineral claim shall convey, and be deemed to convey, only the right to the use and possession of the surface of such claim, including the use of all the timber thereon, for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining, and the lawful holder by record of a claim shall, during the continuance of his record, be entitled to the same surface rights and no others, and all remaining surface rights shall be deemed to be vested in the Crown, and may be granted and disposed of as is provided by the Land Laws for the time being in force, but subject always to the rights of free miners as aforesaid.[126]
Sections 10 and 12 of the present Act are directly descended from this provision, with the main intermediate changes in form occurring in 1977.[127]

(a) Common Law Principles

This legislative history does not shed much light on the miner's right to possess the surface. Little more information comes from construing the Act as a whole, and the cases are too few to add up to any overall judicial analysis of the subject. In these circumstances the best perspective comes from a review of the known common law principles on the possession of property. For these we may refer to the authority of F. Pollock and R.S. Wright, An Essay on Possession in the Common Law,[128] "a very learned work on Possession".[129] We will draw on Pollock's part of the composite essay. He emphasizes that the following three elements of possession are quite distinct in conception, and, though very often found in combination, are also separable and often separated in practice.[130]

(i) Physical control, detention, or de facto possession.

This, as an actual relation between a person and a thing, is a matter of fact. Nevertheless questions which the court must decide as a matter of law arise as to the proof of the facts. This de facto possession may be paraphrased as effective occupation or control. Absolutely exclusive occupation or control is not called for, because in reality there is no such thing - all physical security is finite and qualified. Rather, we may say that an occupation is effective if it is sufficient as a rule and for practical purposes to exclude strangers from interfering with the
occupier's use and enjoyment. Much less than this, however, will often amount to possession in the absence of any more effectual act in opposition. What acts are sufficient will depend on the circumstances and the nature of the thing dealt with. We must also ask whether those acts were done with the intent to assert dominion over the property. Finally, we may include a point made by D.R. Harris, that where other factors do not clearly show whether a person is in possession, one may ask whether the social purpose, or policy, of the particular rule of law in question will be carried out by a conclusion that the person was in possession.

(ii) Legal possession, the state of being a possessor in the eyes of the law.

This is a definite legal relation of the possessor to the thing possessed. In its most normal and obvious form, it coexists with the fact of physical control, and with other facts making the exercise of that control rightful against the world at large. But it may exist either with or without detention, and either with or without a rightful origin.

When we once have an apparent de facto possessor, it is convenient and almost inevitable to ascribe to him possession in law so far as nothing appears to the contrary. However, the legal possession is not acquired by a de facto possessor who holds a thing or who is in occupation merely by the owner's consent, as in the case of a servant. Another way in which possession in law may exist independently of de facto possession is that it continues even though the object is out of immediate active control, so long as that control can be reinstated. Similarly, legal possession can
be had without de facto possession in a case where something is so closely disputed that neither claimant can be said to have de facto possession; the law makes the legal possession follow the better right to have it. Finally it is legal possession that has attached to it the definite legal incidents and advantages which make it a kind of title itself.

To say that a person has legal possession of an object is not to say that the possession has been rightfully acquired. Indeed, it may have a completely wrongful origin. In that case the possessor cannot maintain his possession against the owner, anyone claiming under the owner or, more exceptionally, anyone claiming under an act of law which supersedes the owner's rights. The law will help the owner obtain actual control; in other words, the owner, as part of his title, has the right to possess. But meanwhile the other person may have actual possession in law, that is, he may be entitled for the time being to repel and to claim redress for all and any acts of interference done otherwise than on behalf of the true owner.[132]

(iii) Right to possess or to have legal possession.

This includes the right to physical possession. It can exist apart from both physical and legal possession; it is, for example, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed. It is a normal incident of ownership of property, and the name of "property" is often given to it.

A wrong done to an existing legal possession is remediable by an action for trespass, whereas a right of possession is more
generally protected by an action for the recovery of land, being
the successor to ejectment.

Trespass is an injury to a possessory right, rather than a
proprietary right. The plaintiff in an action of trespass to land
must prove that he had legal possession at the time of the
trespass. Thus a landlord cannot maintain an action by a mere
trespass to land in the possession of his tenant; unless there is
harm that affects the landlord's reversionary interest, only the
tenant can sue. However, as against a wrongdoer the law is
understandably more liberal in its treatment of an owner with an
immediate right to possess.[133]

The plaintiff's possession to maintain trespass need not be
lawful; actual possession is good against all except those who can
show a better right to possession in themselves. Thus even a
trespasser in possession can sue a person who interferes with
him.[134] Just as a legal title to land without the possession of
it is insufficient for this purpose, so conversely the possession
of it without the legal title is enough. In other words, jus
tertii is no defence.[135] By the same reasoning, the plaintiff
may be challenged on the ground that he does not have actual
possession in the eyes of the law; and it is on this point that the
position of a mineral claimholder is an interesting one.

(b) Newmont and the Application of Common Law
Principles of Possession.

(i) The Newmont case.

The Queen v. Newmont Mines Ltd.,[136] decided in 1982, is the
main case in which the courts have dealt with the miner's right to
possess the surface. The plaintiff company operated its Similkameen mine, a large open pit copper operation, on a group of Crown-granted mineral claims, mining leases and mineral claims, all of which could be treated as mineral claims for these purposes. Land uses on these claims included open pits, waste rock dumps, tailings ponds, roads, bridges, conveyors, and buildings. Some parts of the claims were in a state of nature. As is usual, the company had procured surface title to the land on which the major buildings and structures were located, and that land was not in dispute.

The company was assessed and levied for municipal taxes on all its claims except those where it was not using the surface in any way, on the basis that it was an occupier of Crown land on those claims. The significant part of the definition of "occupier" in the Assessment Act read:

occupier means

(a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;

(b) the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land;

The company disputed its liability and succeeded in the Supreme Court. Mackoff J. held that since the company did not have the exclusive right of occupation of the claims it could not maintain an action for trespass and was therefore not an "occupier" under paragraph (a). Similarly, it was not in possession or
occupancy within the meaning of paragraph (b) because for the purpose of municipal taxation there must be an element of exclusive occupancy. On these points the Judge followed a B.C. Court of Appeal case, Construction Aggregates Ltd. v. District of Maple Ridge. His holding that the company did not have "an exclusive right to use or occupy the land" was based on three points. First, the rights granted by section 10 of the Mineral Act were only for certain restricted purposes; second, the Crown could grant contrary rights over the land within the claims, and in fact had done so, under the Mining (Placer) Act and the Range Act; and third, under section 11 the Minister could restrict the use of surface rights by the claim holder.

In the Court of Appeal, Newmont as the respondent adopted this reasoning, while the Crown's argument was that tax liability on each claim should be judged on the basis of paramountcy of occupation. The Court of Appeal rejected both approaches and instead emphasized elements which had previously escaped notice. First, Lambert J.A., giving judgment for the Court, pointed out that section 10 of the Mineral Act states that a miner may use and possess the surface of his claim.

In short, the ownership of the mineral claims, no matter of which type, confers on Newmont a right or a power to use the surface, and a right or a power to possess the surface. There is no deemed possession or use. Possession and use remain questions of fact. Ownership of the claims only puts Newmont in a position where it can take possession of the surface if it wishes to do so. The ownership does not put Newmont into possession.
Second, the Assessment Act's definition of occupier in paragraph (b) concerns the actual state of affairs rather than the rights or powers given in the Mineral Act. The correct position is that possession in fact, or occupation in fact, based on an exclusive or on a non-exclusive right to possession or occupation, or even on no right at all, is sufficient to make the person in possession or occupation subject to assessment and taxations.[141]

Third, the paragraph (b) definition says nothing about land that is part of the same parcel for registration purposes under mining legislation but which is not possessed or occupied by the person who has the right to possess or occupy it.

That is, Newmont should be assessed and taxed only on that part of the surface of the claim that it actually occupies. If part of the remainder of the surface of the claim is actually occupied by someone else, then that someone else would be taxed on the part which he actually occupies. If the remainder of the surface of a claim is not possessed or occupied by anyone, then no one should be assessed or taxed on that remainder, even though Newmont or others may have a right to possession or occupancy, exclusive or non-exclusive.[142]

Several general points may be made about this case and the light that it sheds on possession of the surface. It tends to confirm that the Mineral Act's use of "possess" in section 10 is not different in any sense from the normal use of the concept. It confirms the validity and usefulness of Pollock's analysis in this context. Especially highlighted is the difference between possession and the right to possess. The distinction may seem to be perfectly obvious, but we should note that its significance was not appreciated in the proceedings at first instance or in the parties' arguments on appeal. The case also makes it clear that the question of possession and the question of occupation, in this
instance within the meaning of the Assessment Act, are questions of fact to be determined from the actual circumstances on the ground.

Because of the emphasis in Newmont on the actual facts of possession and occupation rather than the right to do so, one is drawn to consider the case of an unlawful possession or occupation. Just such a case was referred to in Newmont, namely, Sammartino v. Attorney-General,[143] another B.C. Court of Appeal judgment on municipal taxation. There, the taxpayer occupied land on an Indian reserve under a lease which did not comply with the Indian Act, but he was held to be an "occupier" and a "person in possession of land of the Crown" nonetheless.

No doubt proper authority could remove him at any time, but while in actual use and possession given in fact by a person who had some right to possession, he could maintain his possession against all others than those who would have a right to have him ejected. In the interim, the appellant has possession in a legal but limited sense.[144]

To the extent that it was applicable, Sammartino was followed in Newmont.[145] The decision is of course entirely in accordance with the common law principles discussed earlier. Applied to the Mineral Act, it indicates that a miner in actual possession will still be regarded as having possession for the purposes of taxation and of trespass even if his title to his mineral claim is defective. Given that the miner has rights under section 6 of the Mineral Act to enter land and prospect and explore for, mine and produce minerals, without needing to locate a claim, he may be able to establish possession "in a legal but limited sense" even without locating a mineral claim.
On this subject, there is one part of the *Newmont* judgment which needs to be read with caution. In distinguishing between the different definitions of "occupier" the Court stated that if possession was based on an exclusive right of possession, then an action in trespass could be maintained if the possession was disturbed.[146] This is quite true, but it should not be taken to suggest that a right to possession is necessary to maintain trespass against all except those who do have a better right.

(ii) "Exclusive" Possession.

Possession is often spoken of in terms of exclusive possession. Indeed, the Supreme Court decision in *Newmont* [147] turned entirely on the issue of the mineral claim holder's exclusive possession or occupancy of the surface. In this it followed the Court of Appeal in *Construction Aggregates Ltd. v. District of Maple Ridge*,[148] which in turn followed *Re Oshawa and Loblaw Groceteria Co. Ltd.* [149] in holding that "occupancy" for municipal taxation purposes means "exclusive occupancy". To the extent that this proposition was not followed by the Court of Appeal in *Newmont*,[150] it cannot now be regarded as correct. The law on the taxation of mineral claims is thereby clarified, but the idea of exclusive possession is frequently encountered elsewhere. It is generally required of a plaintiff in trespass.[151] There is a consequent tendency to ask whether the right to possess that is given by section 10 is for exclusive possession or non-exclusive possession. But this question seems to be based on faulty reasoning. There is no sense in any idea of a non-exclusive possession.
Pollock again provides a concise exposition.

Possession is single and exclusive. As the Romans said, 'plures eandem rem in solidum possidere non possunt.' This follows from the fact of possession being taken as the basis of a legal right. Physical possession is exclusive, or it is nothing. If two men have laid hands on the same horse or the same sheep, each meaning to use it for his own purposes and exclude the other, there is not any de facto possession until one of them has gotten the mastery. 'Contra naturam quippe est, ut cum ego aliquid teneam, tu quoque id tenere videaris.' This is no reason against ascribing legal possession to one person in preference to another when physical possession is in suspense..., but it is a reason against ascribing it to more than one.

The rule is fundamental in English as well as in Roman law.[152] [153]

Pollock goes on to clarify apparent exceptions, including joint tenants or tenants in common, who do not have plural possessions but a single possession exercised by or on behalf of several persons.

Thus, when linked with "possession", "exclusive" is no more than an epithet descriptive of what is understood by possession when the word is being used as a technical term. It is not an indication that some other type of possession is also known to the law. If a person's use and control of land falls short of exclusive possession, then he will be considered to be merely a user or occupier of the land, unless of course he also has a better right to possess it. The one piece of land may well be subject to multiple use or even multiple occupancies, but there can be only one possession of it.

The requirement of exclusiveness should not be taken beyond its proper limits. Just as we have seen that there is no such thing as absolute physical control over property, there is,
especially in the modern world, no such thing as absolute legal power to exclude all persons from land. Innumerable statutory rights of entry affect landowners in various circumstances, but it cannot be said that the landowners concerned thereby lose their exclusive possession. The same goes for a landowner who grants someone a bare licence, or for that matter even an easement, to enter or cross his land. Equally, a tenant whose lease restricts him to using the premises for one kind of activity, such as commercial offices, or even cutting timber, has exclusive possession nonetheless.[154] However, factors of this very kind were used by Mackoff J. in *Newmont* [155] to prove that the miner's possession or use was not exclusive. He pointed to the restriction of the miner's rights in section 10 to mining purposes only, and to the power of the Crown to grant other rights for the use of the lands, such as for placer or range purposes. With respect, neither of these proves the matter at all. The power of the Minister under section 11 to restrict the use of surface rights by the miner was also advanced for the same purpose; but the section can be used even more persuasively by arguing that the extent of the miner's control of the surface necessitated the express reservation of the power.

(iii) Evidence of Possession

What, then, is sufficient evidence to establish possession of the surface of a mineral claim, given that it must be exclusive possession? Land, especially wilderness land, is not capable of possession or control in the same way as money in one's pocket. There can only be a more or less discontinuous series of acts of
dominion. In general terms, all that a person claiming possession can do is to show that he has been dealing with the land as an occupying owner might be expected to do, and that no one else has done so.[156] Certainly this general statement meets the case of those areas in Newmont where the company had removed the surface completely and dug a hole in the ground, or completely covered the surface with a pile of waste rock, or cleared the land and built a road, a conveyor, a construction camp or the footings for a bridge; and indeed the Court felt that it was absurd to suggest that these uses amounted to anything less than exclusive possession and occupation in fact.[157]

The unusual nature of the mineral claim as a type of property, and the wildness of the lands in which they are often located, may be taken into account when considering what acts will be sufficient to prove possession. "By possession is meant possession of that character of which the thing is capable."[158] "The type of conduct which indicates possession must vary with the type of land."[159] This principle has often been applied to uncultivated lands in Canada: Legere v. Cassie,[160] Shea v. Noseworthy.[161] Hence a miner locating a claim on land which is unoccupied, unenclosed and incapable of cultivation may be able to indicate his possession by even the slightest acts. Another way that the character of the subject-matter is taken into account is seen in incorporeal rights over land. A person can establish possession of a profit a prendre so far as the subject matter admits of possession: Mason v. Clarke.[162] Trespass will then lie to protect fishing rights[163] or rabbitting rights.[164] With this
type of case in view, we can see that proof of possession of the surface can readily be accommodated to the case of a claim under the Mineral Act.

Especially in open areas, it may be possible to prove use and control of parts of the land only. Such acts may establish possession of the whole if there is "such a common character of locality"[165] as would raise a reasonable inference that if a person possessed one part he possessed the whole.[166] The weight that can be placed on such an inference has been considered in many Canadian cases dealing with forest and other unoccupied lands,[167] often by using an idea of constructive possession.[168] However, the possession of a mere squatter is limited to the area which he actually occupies.[169]

In Newmont we may detect a comparable unwillingness to extend the miner's possession of the surface beyond those areas which he actually occupies. In particular, use of part of a claim is not evidence of possession of the whole parcel of land within its boundaries.[170] This attitude may largely derive from the terms of the Assessment Act, but it may well carry over into other questions on possession. The prescribed procedure for locating a claim, by erecting posts, affixing tags and blazing boundary lines, is itself an assertion of continuous, open and notorious possession, but in the light of Newmont it can be regarded at most as an assertion of a right to possess the minerals covered by the Mineral Act.

There was no reason in the Newmont case to doubt that the land use and works of an operating mine were in the possession of the
mining company. More difficulty would be caused, though, in cases where the miner is only carrying out exploratory or development work. How much of a claim, if any, is in possession during geophysical operations, or a diamond-drilling programme? If there is activity on a claim for each of several summers, does a possession, if any, persist throughout the year? In each case the evidence would have to be considered with care. At least one can be fairly sure that tunnels and other underground workings, being part of the mines and minerals, will always be in the possession of the claim holder.[171]

(c) The Miner's Possession In Relation to Others

(i) Interlopers

We may now consider how these principles apply to different classes of persons. The most straightforward is the bare interloper entering or interfering with the land possessed by the miner. We have seen that against such a person, with no right to possess, the person in possession can maintain an action for trespass, even though his own title may be deficient. Two cases, both from the mining camp of Sandon, B.C., show how mineral claim holders may use this rule. Spencer v. Harris,[172] a Full Court decision in 1899, decided that a person entering without any title could not challenge a lease granted to him by the holder of a Crown-granted mineral claim on the grounds that the surface rights under the Crown grant were inadequate or uncertain.
He originally came in, not under anyone, but as a squatter, and was liable to be ordered off. The defendant, the Crown grantee, has a right, whatever it is; a right to ask the plaintiff to move off the premises. It is not the case of one squatter versus another ... but the case of a superior right to any claim of the plaintiff, who is a trespasser." [173]

The second case, Sandon Water Works and Light Co. v. Byron N. White Co.,[174] a Supreme Court of Canada case in 1904, was an action for trespass. The plaintiff had a mineral claim, and the defendant entered upon it and built a tank and pipeline purportedly under the powers of a private Act to enter and expropriate land, but actually in excess of those powers. Part of the defendant's case was that because part of the land was merely a mineral claim, the plaintiff had no surface rights on the same, hence could not object to the taking of possession by the defendant. The argument was rejected and the Court held that the plaintiff claim holder was entitled to the use and possession of all the property in dispute, and that there had been a trespass for which it was entitled to recover.[175] The plaintiff seems not to have been using the land, judging by the nominal damages awarded, but it alleged that it required the space for the deposit of tailings, etc. There was no argument whether the plaintiff was in actual possession at the time of the trespass, but as the defendant had no rights at all and the plaintiff had at least some right to immediate possession, the point was not
significant.[176] This lack of any right at all in the defendant may also explain why there was no argument at any stage about the plaintiff's right under the legislation to possess the surface of the claim. The case is therefore no authority for construing the legislation. In fact it was by no means clear what surface rights legislation applied to the claim in question.[177]

(ii) Surface Owners

The second class of person we may consider in relation to the miner's possessory rights is the surface owner. The idea of a surface owner being removed from possession of his land by the holder of a mineral claim may displease surface owners as much as the destruction that may take place on the claim, but such is the inevitable conclusion if section 10 of the Mineral Act is to be interpreted with any faithfulness to the expressed intention of the legislature. It is another aspect of the Act's effect in prevailing over other land uses and property rights.

There seems to be little legal merit in any of the arguments that conceivably could be raised on behalf of a surface owner to limit the miner's right to possess the surface. There is nothing in section 10 to indicate that it does not apply to private lands, or that it is subject to any existing possession. There is no ambiguity to be construed against interfering with vested rights; indeed, it is plain from the Act as a whole and the compensation section in particular that just that effect is intended. Nor is it open to the surface owner to suggest that the miner's possession must somehow be shared with that of the surface owner; we have seen that two people cannot have possession at once and...
that a shared possession is a contradiction in terms. All these contentions seem to claim that the Act says something different from its plain words, or to ask for restrictive words to be implied into it.

Although the surface owner may lose his possession because of an entry under the Mineral Act, he does not lose his right to possess. That right is simply subordinated for the time being to the miner's better right to possess.

The surface owner's right to possess, coupled with his indisputable possession previous to the appearance of the miner, combine to give him distinct advantages when there are questions about the transfer of possession from the owner to the miner, and back again. Plainly, the taking of possession by the miner is not by a willing act of the owner, even if it is not opposed. Rather, he is involuntarily dispossessed, although by entirely lawful means. The case is readily distinguished from one of voluntary transfer, or delivery of possession. Pollock [178] shows that there is a great difference in the legal treatment of the facts in such cases. The voluntary transfer of possession is made easy in many ways, and often takes place with little physical evidence at all. However, without consent the presumption is reversed. Not only must the newcomer have at least as much actual control as would be evidence of possession if there were nothing to the contrary, but he must effectually exclude the former possessor. The burden of proof is therefore definitely on the miner where he seeks to prove against a surface owner that he has acquired possession in exercise of his rights under section 10.
The surface owner is probably also favoured where he wishes to prove that the miner is no longer in possession:

Where a person entitled to possess a thing seeks to resume the possession of which he has been deprived, the presumption is in favour of his right, and possession in law follows the right though de facto possession be in suspense.[179]

The surface owner is always poised to step back into possession.

The burden of proof on the miner will not only assist the surface owner in terms of the existence or the timing of the taking of possession, but also in terms of the area claimed. In this the miner taking without consent is in a similar position to a squatter, whose possession is limited to the area which he actually occupies.[180]

The consequence of the miner's right to possess is that he must be able to take possession from the surface owner, by an action for the recovery of land if needs be. Once he has taken possession of land within his claim he may use an action for trespass to prevent the surface owner from interfering or even entering, whether or not there was any effect on the mining operations. But because of the surface owner's continuing (though subordinate) right to possess, the miner could be challenged to prove his better right. By this route could be opened up a wide range of issues concerning proof of possession, validity of the title to the mineral claim and compliance with the Mineral Act generally.

(iii) The Crown

The Crown may seem to be rather different from other classes of surface owner, but in terms of mineral claims and possession
of Crown lands, its situation is comparable.[181] As owner of
Crown lands, it is regarded as being in possession and may sue to
recover possession.[182] With the authority of the Mineral Act a
miner may take possession, with the apparent corollary that he may
then treat the Crown and its agents as trespassers if they should
interfere. In a cognate case, the Crown was recently held liable
for disturbing a placer lessee's quiet enjoyment by depositing
fill on the leased land.[183] Nevertheless, one must bear in mind
that many statutes, including mining acts [184] authorize entry by
public officers. Under other acts the Crown may expropriate
"lands", which encompass mineral claims, allowing the Crown to
regain possession and sue the miner as a trespasser, as in
Attorney General of B.C. v. Westgarde.[185]

(iv) Others with Rights from the Crown; Priorities.

Lastly, the miner's possession of the surface may be
considered in relation to others who obtain rights from the Crown
to use the land for various purposes such as forestry, grazing, or
oil and gas extraction. If these persons' rights were created
purely by grant from the Crown as owner, then those rights could
be no greater than the Crown's; but there is inevitably a
statutory basis for the rights too. In these cases a contest for
possession becomes a dispute for priority between the Mineral Act
and one of a number of other resource statutes. These issues were
foreshadowed in Newmont:

There is no reason in this appeal to explore the
question of what happens when the very same land is
occupied simultaneously by two different occupiers for
two different purposes. There are no cattle grazing in
the open pits or browsing on the waste dumps. No placer
miner is hosing away the foundations of the bridge towers. I would leave that question until it arises.[186]

Priority of rights to the surface cannot be understood solely in relation to possession. We should consider three components: Priority of title, priority of possession and priority of use.

As to title, there should be no difficulty. The notion of different persons holding tenures over the one parcel of land presents no conceptual problem because each Act entitles a tenure holder to exploit some separate resource. The overlapping of mineral and placer claims, for example, was recognized in Smith v. Yukon Gold Co. [187] and Tanghe v. Morgan [188] as something contemplated by both Acts. Such Acts are not inconsistent or incompatible in their primary objectives.

In this it does not seem correct to follow Attorney-General of B.C. v. Westgarde,[189] the 1971 case on a mineral claim and a subsequently authorized forest road. That case applied the old rule in Alcock v. Cooke [190] that a later inconsistent grant from the Crown, not reciting the earlier Crown grant, is held absolutely void; unless the subject had no notice of the previous grant, in which case it would be good to the extent to which it may be consistent with the first grant, though void as to the rest. This rule was applied to hold that a letter of consent under the Forest Act to build a forest road was void to the extent that it gave consent to the construction and use of the right of way across the mineral claim. Alcock v. Cooke was a case of two grants which both purported to give rights to take certain objects (actually wreck, on the foreshore; the action was trover for a
The grants were irreconcilable as to a matter of title. *Westgarde* may be distinguished as a case of conflict over the exercise of rights which were not inherently inconsistent. Even if *Alcock v. Cooke* is good law, and that is open to doubt,[191] it should be confined on this ground; it should not apply to modern administrative authorizations that are in substance different from royal grants; and it should not be given an effect which contradicts the intention of the legislation which now always controls such matters.

The nub of the matter is really priority of right to enter, use and control the surface of the land. The legislation should be the first point of reference, and in fact the various Acts provide a number of answers. Just as the Mineral Act prescribes the lands on which a miner may enter, as we saw earlier, so too do the Acts governing other resources and other land uses. The Coal Act,[192] the Forest Act,[193] and the Highway (Industrial) Act [194] are examples. Each Act has its own way of granting tenures and of describing a person's rights to enter and use land under it. Thus we can see that a placer miner cannot enter or acquire a location on land that is occupied by a building or is otherwise not waste land. Similarly, an applicant under the Range Act [195] may well be granted a grazing licence or permit that overlaps with a mineral claim, if that is in accordance with the multiple use plan in force, but land that is required for a use that is incompatible with grazing may be withdrawn from the licence or permit. In the meantime, the right to graze cattle
depends on the terms of the licence or permit. (These are the two problems contemplated in Newmont.)

Section 47 of the Land Act [196] may give mineral and water resource users an overriding right of entry which is not held by other land users. That is the section which excepts and reserves certain rights on the disposition of Crown lands, including the right to enter use and enjoy land for mineral purposes, and the right to take water privileges and carry water across the land. Express words in the disposition may vary these terms, but if the disposition is silent, then section 47 applies. This section ensures the reservation of mineals from Crown grants, but in point of fact it must affect many other tenures. It applies to any disposition of Crown land "under this or another Act", and "disposition" is defined to include interests less than the fee simple.[197]

Leases and licences under the Forest Act and the Range Act are only some of the Crown land rights that would be affected. Section 47 may even affect dispositions under the mining Acts as well. The general result seems to be that all mineral operators will have priority over all non-mineral users of Crown land in being able to enter and use land. However it does not protect miners from entry by others, it does not deal with conflicts between miners under different Acts, and it says nothing about control and possession.

If there are cases which cannot be resolved by perusing the legislation, and as there is no general ranking of land uses to be had, then we are compelled to resort to general principles. First
we may borrow from the law of nuisance, where the courts have often restrained unreasonable and unnecessary uses of land that cause inconvenience to others, on the basis of the principle sic utere tuo ut alienum non laedas. Nuisance cases are usually disputes concerning neighbouring parcels of land, but the use of nuisance to prevent interference with an easement demonstrates how the same rules apply equally well to simultaneous lawful use of one parcel of land, as in the case of a mineral claim. In this way a court could keep each party's operations within reasonable bounds in order to interfere with the other's operations as little as possible.

Ultimately, there will be cases where this sort of balancing will not determine whose operations are to prevail. The principle that then comes to mind is priority in time; qui prior est tempore potior est jure. There is authority for its use in Smith v. Yukon Gold Co.; "He staked after the Placer Mining Act grant, and, of course, took his grant subject to all the powers, privileges, and rights given under the Placer Mining Act to the holder of placer mining claims."[198]

On occasion it may be necessary to inquire into the good faith of the contesting parties; or to hold one party to account for the other party's resources affected or extracted in the course of operations. However any blanket rule that the "highest and best use of the land" had priority would probably be a usurpation of the legislative function.

These rights to enter, use and control land under the different Acts, as exercised in the given case, will govern any
question of priority of possession. A miner's possession may in some cases be subject to the right of entry conferred by another Act, such as the Geothermal Resources Act [199] or the Coal Act.[200] The new entrant's use and control of the land could lead to a conclusion that he had taken possession from the miner, even though few other Acts expressly grant rights to possess in the same way as the Mineral Act.

(d) Possession in Review

We cannot conclude this discussion of the miner's right to possess the surface without admitting that there are many questions for which no exact answers have been suggested. We have seen, at least, that the common law principles of possession and a close reading of the legislation together offer a framework in which the difficulties may be approached.

Significant questions of policy are involved in possession of the surface of a mineral claim. First, exclusive possession of land for the purposes of one resource withdraws that land from multiple use management and prevents the use of its other resources and attributes. The power under the Mineral Act so to dedicate land should not be available restrict the use of land beyond what is necessary for mineral purposes, because that Act is only concerned with regulation of mineral activity, not with land use generally. A second policy point, one that needs no explanation, is the desirability of protecting the pre-existing rights of surface owners and others from the taking of possession as far as possible.[201] The third point is the importance of physical security to a mining operation. Uninvited visitors
minesite. Moreover, the hidden character of the mineral resource and the uncertainties of mineral exploration make the mineral operator more privacy-conscious than his counterpart in, say, forestry. To him the right to deal with intruders as trespassers will always be important.
5. SEPARATE DEALINGS IN THE MINER'S RIGHT TO THE MINERALS

AND THE MINER'S RIGHT TO THE SURFACE

Some useful points come out of situations where the owner of a mineral claim tries to split his surface rights off from his rights to the minerals themselves, or where use of the surface is prohibited or expropriated without like effect on the mineral ownership.

Re Reliance Gold Mining and Milling Co. [202] and Nelson and Fort Sheppard Railway v. Jerry [203] are authority against the holder of a mineral claim transferring the surface rights of the claim other than by a transfer of the claim itself. Nelson and Fort Sheppard Railway does not deal with the point at any length. All that appears in the reports is that the Court issued an injunction to the effect that the claim owners did not have "a right to sell, etc., the surface etc., and to deal with the same as if owners in fee, etc." Probably this and knowledge of the pleadings brought the reporter to a conclusion in the headnote:

Holders of mineral claims are not entitled to deal with any portion of the surface, except in accordance with the mining laws, and are not entitled to sell or dispose of the same.

The Reliance Mining case is a better case. The holder of a Crown-granted mineral claim had surface rights in terms which are now familiar; "the right to the use and possession of the surface ... for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining". The owner purported to convey his right to the surface of part of the claim.
The District Registrar of Land refused to register the grant under the Land Registry Act. On this Wilson L.J.S.C. said:

Now it must be borne in mind that all the grantors could transfer was a right to the use of the surface, but it must also be borne in mind that that right under the Crown grant,[204] as I view it, was to be used only in connection with the working of the mineral claim in question. Can such an easement therefore be the subject of transfer, apart from a transfer of the mineral rights? I do not think it can. It seems to me that this right to the use of the surface is a right running with the mineral rights and must and does follow their transfer and is not a transferable right apart from that. [205]

Further, the Mineral Act provided a mode for the acquisition of the surface; there could not be allowed to be two outstanding transferable and registrable interests in the land. Section 10 of the modern Mineral Act sustains exactly the same construction, and sections 12 and 13 are the modern mode for the acquisition of the surface. The right to the use of the surface runs with the mineral rights because it is given for the purpose of exploring for, developing and producing those minerals.[206]

Whether a claim holder may transfer his surface rights to another miner for mining purposes seems to be an open question. It was argued earlier that a miner may use the surface of one claim when the operations are actually being carried out on one of his other claims.[207] The fact of separate ownership, however, may distinguish that situation from the present one.

Expropriation laws deal with minerals variously. Most general Expropriation Acts [208] use expressions wide enough to authorize the taking of minerals or mineral claims; for example, "real property" in Farrell v. Vancouver [209] or "lands" in Byron
N. White Co. v. Sandon Water Works Co. [210] and Attorney General of B.C. v. Westgarde.[211] Other expropriation laws distinguish between the minerals and the rest of the land, allowing the owner to keep his mineral rights if they are not needed. In this situation, the importance of surface rights stands out clearly.

Davies v. James Bay Railway [212] exposes the value of surface rights to a mineral owner. It concerned railway legislation, the main example of expropriation laws distinguishing between the surface and the minerals. [213] Then as now, the federal Railways Act [214] provided that the railway company is not entitled to the mines and minerals in the lands it purchases or expropriates, unless the same are expressly purchased. The mineral owner is forbidden from working the minerals within 40 yards of the railway without the consent of the Canadian Transport Commission, which may give its consent subject to conditions for the safety of the public. In Davies, the question was whether compensation for the value of underlying shale had to be paid to the owner immediately upon the taking of the land, or later, in the event that consent to working was refused. The Privy Council held that the Railways Act was very different from the British "Code". [215] The owner was held to retain title to his minerals subject to the natural right of support of the surface which the railway acquired with the surface, and subject to the regulation of the Board (now the Commission). The owner had an immediate claim for compensation for the value of the lands taken and for injurious affection of any other hereditaments the title to which was affected, such as subjacent or adjacent mines and minerals.
In the circumstances this "injurious affection" was held to entitle the owner to be awarded compensation for a loss substantially equivalent to the value of the shale.

[Their Lordships] think that the arbitrators were right in holding that the mineral owner suffered immediate damage as the consequence of the duty of support which on severance the law imposed on him, and that so far as the shale under the railway track was concerned, he substantially lost the value of his shale, the more plainly so because it could only be worked from the surface. It is no answer that the owner probably did not desire to get at his minerals at once. His title to them was practically, so far as it was possible to foresee, destroyed, and he suffered immediate loss accordingly.[216]

The loss was the same whether or not title was actually taken.

Davies emphasizes that if surface rights are taken, the value of the minerals is lost. Surface rights, or working rights, are an indispensable part of mineral ownership.

A few years later the federal Railways Act was amended to ensure that compensation is paid for minerals that cannot be worked by reason of the construction of the railway.[217]

Davies has interesting parallels with Tener v. The Queen,[218] the Wells Gray Provincial Park case. In both cases, title to the minerals was not taken, but the right to work the minerals was drastically curtailed, and compensation was payable for injurious affection. The act causing injurious affection in Davies was the railway company bringing the mineral rights into a status in which the law restricted their use, subject to the consent of the Board. In Tener, the act was the final refusal to issue a park use permit.
There is another aspect of Tener to be noticed in respect of the connection between the mineral rights themselves and the surface rights. The trial judge agreed that, apart from the mineral claims, the right to mine and to enter upon the surface of the mineral claims for that purpose was itself an interest in land, being of the nature of a profit a prendre.[219] This separation seems difficult to sustain,[220] and the Court of Appeal was a good deal more circumspect, agreeing that "the mineral claims themselves and the associated rights to the surface and to access are all rights with respect to land of such a nature that they may found a claim for compensation if they are taken or injuriously affected."[221]

The situations considered here shed some further light on the nature of the surface rights of a miner. Surface rights are ancillary to mineral rights, and are for some purposes distinct from them. They run with the mineral rights and cannot exist separately from them. Mineral rights, or title to minerals, can exist without surface working rights if the latter have been extinguished or suspended. However, the working rights are so important that without them the mineral title may be valueless.

6. REMEDIES
   (a) Remedies of the Surface Owner

   The surface owner whose rights have been infringed by a claimholder has various enforcement options open to him. Some remedies are conferred by the Mineral Act, while others are available under the general jurisdiction of the courts. A number
of restrictions imposed by the Act upon the mining operator have already been noticed. The surface owner benefits from some of these restrictions; examples are the general prohibition against mining without statutory authorization and the prohibition against the use or sale of a claim for purposes other than mining purposes.[222] These restrictions are variously enforced by prosecution or loss of the free miner's certificate, after an inquiry; but the most important mode is cancellation of the claim.

(i) Cancellation under Section 50.[223]

Under section 50,

An interested person, including an employee of the ministry, may complain to the chief gold commissioner that
(a) a mineral claim has been located or recorded contrary to this Act or the regulations, or
(b) a person has filed a false statement under section 22(1)(a), 45(4)(a) or in the course of making application to record excess exploration and development under section 24(1).

The complaint must be made within one year of the recording or filing. The Commissioner may order an investigation and a report. After hearing submissions, the Commissioner may dismiss the complaint, order the cancellation of the record of the claim or the record of the work, or make any other order he considers to be appropriate. An appeal lies to the County Court or the Supreme Court, "on the merits, ...and the court has the same powers as the chief gold commissioner".[224] Amalgamated Resources Ltd. v. Belliveau [225] is such an appeal, and the evidence that the Court received indicates that the hearing is indeed de novo.
Published summaries of complaints under section 50 disclose only one complaint brought by a surface owner; Complaint by Bellos re Carol and Ramon Claims.[226] The surface owner complained that the claims were invalidly staked on his cultivated land. Investigation revealed that fence posts were used in staking the claims and that a survey would be required to determine if the staking took place on cultivated land. The Minister (who at that time decided complaints) decided to cancel the claims and to declare them void ab initio for not being staked properly, so the question of staking on cultivated land was not pursued.

A section 50 complaint raises a question of standing. There is no lis between the parties, and the complainant is before the Commissioner only as he is permitted by the statute to have the claim of another person put in question.[227] Fortunately, "an interested person" is a wide expression, and either in a proprietary sense or in a more general sense would include a surface owner. There can be little question of his standing if his challenge is to the location of a claim as being contrary to the Act. A purported location on ground on which the Act has prohibited location of claims is a complete nullity; the claim simply never had any existence.[228] This principle was clearly pronounced by a series of major decisions culminating in Coplen v. Callahan [229] and Collom v. Manley.[230] These were disputes with other miners rather than with surface owners, but it makes no difference whether the prohibition is under section 6(2)(b) or section 6(2)(e);
Hence, a re-location on lands actually covered at the time by another valid and subsisting location is void; and this is not only against the prior locator, but all the world, because the law allows no such thing to be done.[231]

However a breach of work requirements does not concern the surface owner so directly. It is the sort of breach which may lead to voidability rather than voidness, and that only at the suit of the Crown. Collom v. Manley [232] and Seguin v. Boyle [233] could be cited as authority, but it is possible that the provision in section 50(1)(b) is just the kind of statutory right of challenge envisioned in the latter case.[234]

The complaint procedure has several disadvantages. It allows no more than one year to lodge a complaint against staking. As between miners that may be reasonable, but a surface owner who does not see the stakes or misinterprets the information on them, perhaps more through the miner's fault than his own, has no reason to be searching titles at the Gold Commissioner's office. The procedure does not include complaints that the claim holder is using the claim for purposes other than mining purposes.[235]

Thirdly, the government exacts a fee of $200 for each mineral claim in respect of which a complaint is made.[236] Given that a complaint may involve more than one claim, the fee seems unduly heavy.[237] Fourthly, the Gold Commissioner suffers from at least the appearance of identification with mining interests rather than surface interests, just as with the fixing of security for compensation.

(ii) Adverse Proceedings under Section 51.

This provision reads:
(1) Where a person claims an adverse right of any kind, either to possession of all or part of a mineral claim referred to in an application for a mining lease or to the minerals contained in the claim, he must commence his proceeding in a County Court or the Supreme Court within 80 days after the date of posting of the notice under section 29(1)(b) unless the court orders otherwise on being satisfied that the failure to proceed in time was not within the plaintiff's control.

Adverse proceedings are an important matter, but section 51 does not assist or affect the surface owner, who does not assert rights to the claim itself, or to the minerals. Obiter dicta in Nelson and Fort Sheppard Ry v. Jerry [238] confirm this view.

(iii) Court Proceedings to Void the Claim.

The general jurisdiction of the courts may be resorted to by the surface owner. This section will describe the mining jurisdiction of the courts and the surface owner's rights to use it to have an invalid claim set aside, while the next section will deal with torts and similar claims.

The County Court has long had a special mining jurisdiction. The usual $25,000 limit on the Court's jurisdiction does not apply to matters arising out of the business of mining, mineral claims, other mining property, or land entered upon for mining purposes and falling within section 41 of the County Court Act.[239] On such matters the County Court has all the powers of a court of law and equity in proceedings for debt or damages, trespass and ejectment on claims or other land, agreements, charges, partnerships and the like. The fixing of compensation under section 9 must also fall within this jurisdiction. The Supreme Court has concurrent jurisdiction. In addition the Supreme Court has its general powers as the superior court of record, and
specifically, jurisdiction under the Judicial Review Procedure Act.[240]

An improperly located or improperly recorded mineral claim may be struck down by a surface owner applying to the Court for an order in the nature of a declaration or judicial review. A declaratory action will be allowed even if a statutory procedure is also open to the applicant. Relevant factors are convenience and the range of remedies available under either procedure.[242]

The surface owner will always have standing to challenge a mineral claim, even though the claim's validity may have the appearance of an issue between the Crown and the claim holder only. The miner must rely on his claim to justify acts which would otherwise be trespasses against the owner's possession. If the claim is invalid, then so is the justification. In Cofrin v. Bicchieri [242] the surface owner's standing to challenge the placer lease was never even raised.

In Chapter II it was seen that in Contact Mining Development Co. v. Craigmont Mines Ltd.,[243] it was held that a mining lease from the Crown, under the Act, could not be impeached without joining the Crown as a party to the action. Fortunately, suing the Crown is not now the problem that it was in 1960. [244]

Another problem that is more apparent than real is section 36:

After the issue or renewal of a mining lease, and during its term, it shall not be impeached in any court on any ground except fraud.
Collom v. Manley [245] and a number of other cases establish that this section protects validly located and recorded claims only; it does not include any area not duly located.

(iv) Court Actions for Wrongful Entry, Damage and Use of the Surface

Cofrin v. Bicchieri,[246] that most versatile case, is the only instance of proceedings by a surface owner against a claim holder for damages in tort. The cause of action was trespass; it can only be presumed that nuisance and negligence would be established in other situations.

The relief granted in Cofrin v. Bicchieri deserves close study. (It is indeed fortunate that Fulton J.'s judgment in the only case in the area to date is at once so comprehensive and so lucid.) The award of damages against the placer miner was overshadowed by the statutory right of compensation.

The plaintiff seeks damages for trespass, as well as for the physical harm to the property and the frustration of his plans for development and use thereof as a recreation-residential area. It is to be noted, of course, that the owner of the surface is entitled to compensation for damage caused by the entry, occupation or use of the surface by the miner regardless of whether the miner is in trespass or not. But as to damages for the trespass itself, looked at apart from the claim for compensation for loss or damage arising from the actual use of the surface, I do not consider that the plaintiff is entitled to an award of more than a nominal amount under this head. He was not living, and had no plans to live, in any of the cabins or at any of the clearings where mining and refining operations have been carried on. Addy and Matthews have moved out, partly as a result of operations which were carried on in trespass (but partly as a result of the flood): they, however, are not plaintiffs and no claim is made for interference with their occupancy. They were not paying rent to the plaintiff. The elements of frustration or interference with the plaintiff's plan for development and use and for loss of its aesthetic enjoyment are, I believe, constituents of the claim for damages generally and do
not fall to be dealt with under the head of trespass. Accordingly I award $1 for damages for the trespass. [247]

The claim for loss or damage by reason of the occupancy and use of the surface was then considered, as a matter governed by the compensation provisions. (This part of the judgment has been discussed in the context of compensation.)

Fulton J. distinguished between injury compensable under the statute, and other injury, and measured the damages in accordance with that distinction. It might be pointed out that the plaintiff did not claim for an award of statutory compensation, but only for damages for trespass; but it is plain that Fulton J. intended to deal with rights to compensation at the same time as damages at common law, describing them generally as "damages". [248]

More attention to the issue of damages could have won the plaintiff a higher award. He led no evidence at all, even by estimate, of the diminution of the value of the land or of the cost of restoring the surface. Nor did he make any claim for the market rental value of those areas occupied and used by the placer miner in trespass.[249] Statutory compensation is just the same whether the miner keeps out of protected areas or not,[250] but this last head of damages would have made him pay more for the land he occupied in contravention of the Act. No doubt in other instances there could also be justification for substantial awards of general damages for aggravation, or even exemplary damages.

Other relief was also granted in Cofrin v. Bicchieri. For the areas where the mineral operator was in trespass, the plaintiff obtained an order for the ejectment of the miner and a
permanent restraining injunction. [251] Additionally, he won a declaration that the purported reservation of mineral rights and working rights created no interest in land and were unregistrable.

(b) Remedies of the Claim Owner

We have already observed that, in relation to the area that he has in his possession, the holder of a mineral claim must have a right to sue even the surface owner for trespass. A miner succeeded in trespass in Sandon Water Works Co. v. Byron N. White Co., [252] although the defendant there was not altogether in the situation of a surface owner. In relation to areas not actually reduced to possession by him, the miner has a right of entry which protects him from being a trespasser himself, and which he could probably enforce by declaratory or injunctive remedies.

It is interesting to speculate on the position of a miner whose plans are threatened by a surface owner proposing to use his land in a manner that is incompatible with mining; by planting an orchard or dedicating a cemetery, for instance. A very nice balancing of rights and interests is involved, and authority on the point may not be lacking indefinitely.

7. DISTINCTIVE FEATURES

This survey of the Mineral Act will be reviewed here by isolating the distinctive features of the Mineral Act system for the allocation of surface rights. These features will form the basis for discussion in later chapters.
The first notable feature is the procedural inflexibility of the system. Most of the rules which prescribe whether a mineral use or another use of land will prevail are contained in the Act itself. Land use decisions are made in accordance with a rigid and pre-set series of terms. No real use is made of mechanisms such as delegated legislation, special-purpose tribunals or of discretionary powers vested in appropriate officials. The discretionary powers to control park use, to establish mineral reserves and to restrict surface rights cannot by any stretch of the imagination be said to turn the system into an adaptable one. Each of these powers is limited in scope and limited in practice.

The second characteristic is absoluteness. Either the mineral operator obtains all the rights he could ever need, or he obtains no rights whatsoever. There is not a great deal of middle ground between the two extremes. This absoluteness appears in several different forms. The main one is the working rights granted under sections 6 and 10. Those rights are couched in the widest language. There is little that a bona fide operator would be unable to do under them; and the Minister's power to restrict surface rights and the obligation to use a claim for mineral purposes, or the business of mining, are not serious threats. If operations require total destruction of the surface, the surface rights seem wide enough to authorize it. To cap it all off, the miner is entitled to take possession of the land, and exclude the surface owner from entry on it. The rights are not restricted by the nature of the land, if the land is open for staking; they are not restricted by the ownership of the land; and they are not
restricted to any degree by virtue of the fact that operations are only at a reconnaissance or exploratory stage.

The same absoluteness is reflected in the scope of the surface owner's right to compensation. The statute and the case law make it plain that a restrictive interpretation is inappropriate.

Further, the means by which the surface is protected are also absolute ones. If land is given protection, it is usually reserved from all mineral activity. This holds true for the land uses under section 6(2), and also for mineral reserves and for parks. A total prohibition on all mineral activity is quite common. The Mineral Act does not seek to modify or to accommodate the impact of mining in the light of other land use demands. If land is protected, it is protected completely, just as, if land is unprotected, it is open to the whole range of operations.

The third feature is that the system is prescribed by statute. The Mineral Act imposes rights and duties on the miner and on the surface owner with a framework that is self-contained. There is no reference to agreements between the two parties, to the terms of the reservation of minerals and working rights in the Crown grant of the land to the surface owner, or to the rules of the common law. Not only are there no references to such things, but there are no situations where they must be depended upon to make the Mineral Act system function. It is true that when it comes to the enforcement of rights, common law principles operate, but they do not govern the allocation of the rights which are to be enforced.
Some of the implications of this statutory character are interesting. For one, it is a feature of the Act that it offers protection to prescribed land uses, not land tenures or land owners. For another, compensation is awarded in disregard of the reserved working rights to which the surface owner's title is subject. Further, the Act provides working rights and compensation obligations independently of the mineral tenures. Surface rights are not granted as terms of mineral claims or mining leases, but directly by force of statute. Similarly, the duty to compensate is not a proviso on any tenure.

One other significant aspect of the statutory formulation of the rights and duties of the parties is that the Act proceeds in a fashion typical of regulatory legislation. First it prohibits an activity, i.e. mining, and second it permits it, subject to the terms prescribed. This will be relevant when the fate of the common law principles comes to be discussed.

Finally, two minor features may be isolated. For one, surface rights, or working rights, are ancillary to mineral title. They have their entire raison d'être in the ownership of the minerals. However they are scarcely subordinate; without them, the mineral title is of little value.

The other feature is the sketchiness of the surface rights provisions of the Mineral Act. The seven sections which deal with surface rights are merely an appendage to the main function of the Act, which is allocation of rights to the mineral resource. This brevity is a consequence of the low level of land use conflict in the times when the Act took shape. Although these provisions have
been adequate for some time, increasing levels of conflict may bring forward more and more problems that need to be dealt with in a more elaborate fashion.
FOOTNOTES - CHAPTER FOUR

1. Mineral Act, RSBC 1979 c 259. In this chapter, section numbers not otherwise referenced refer to this Act.

2. SBC 1980 c 28

3. RSBC 1979 c 429

4. Locating and mining in or upon land forming part of the continental shelf under tidal waters has been prohibited by Order in Council - B.C. Reg. 100/68

5. RSBC 1979 c 214 s 1

6. RSBC 1960 c 244 s 12

7. Cf. Mining (Placer) Act RSBC 1979 c 264 s 3

8. Terms of Union 1870 clause 13. (RSC 1970, App)


10. RSBC 1960 c 187, and RSBC 1979 c 192

11. See Mining (Lode) Act RSBC 1936 c 181, s 2 ("mineral" defined), and s 67.

12. But for an example see Sunshine Ltd. v. Cunningham (1899) 1 MMC 286. The record of the claim was altered to remove that ground.

13. (1977) 3 BCLR 122 SCBC Fulton J.

14. RSBC 1960 c 285

15. Ibid, s. 10

16. Supra note 13 at 140

17. And as a result of the finding that these areas, and all the other clearings, were not "waste land" within the meaning of the Placer-Mining Act.

18. (1907) 10 OWR 173

20. Steele v. Midland Ry (1866) LR 1 Ch 275
23. Re St. John's Church [1966] 2 All ER 403
24. Supra note 13 at 139
25. (1965) 53 WWR 160 at 165
26. Eg, Atkins v. Coy (1896) 5 BCR 6, 1 MMC 88, (FCBC)
27. Between 1873 and 1878 the situation was complicated to the point that separate Crown Grants could be obtained for the same parcel of land for gold, for coal, and for other minerals; Cail, Land, Man and the Law, UBC Press, 1974, p 81.
28. (1911) 19 WLR 8, aff'd (FC) at 68
29. Ibid at 71
30. (1904) 11 BCR 76; 2 MMC 178 (FCBC). For the placer miner, more was in the balance than the validity of his claim; three months' imprisonment had been imposed for refusing to obey the order of the Gold Commissioner to remove his posts: R. v. Tanghe (1904) 2 MMC 139.
31. But see Att-Gen. v. Westgarde [1971] 5 WWR 154 and other cases referred to below under "Possession".
32. BC Reg 377/59
33. RSBC 1979 c 304
34. Ibid s 24, 25, 26, 27. As a matter of procedure, it seems that as well as obtaining this part use permit, an operator would have to obtain the authorization of the Lieutenant-Governor under the Mineral Act, s. 7.
35. See J.E. Ince, Land Use Law, 1977
36. RSBC 1979 c 101, BC Reg 335/75
37. RSBC 1979 c 290 ss 679-686
39. RSBC 1936 c 181
40. RSBC 1936 c 211
41. SBC 1965 c 31
42. SBC 1973 c 52
43. RSBC 1960 c 209, now the Expropriation Act RSBC 1979 c 117
44. (1981) 23 BCLR 309 at 320
45. RSBC 1960 c. 109
46. Changes urged by the Royal Commission on Expropriation, 1961-3 (the "Clyne Commission") have yet to be made. The Land Clauses Act is virtually unchanged from 1845.
47. SBC 1980 c 26 s 1
48. A brief prohibition was gazetted under the old section on 24 April 1980; BC Reg 154/80. It was replaced by a much more comprehensive regulation, BC Reg 382/80 on 11 September 1980, the same day that the new s. 8 was proclaimed effective.
49. BC Regs 576/80, 19/82
50. BC Reg 459/80
51. BC Reg 103/81
52. BC Reg 382/80
53. BC Regs 103/81, 242/81
54. BC Reg 576/80
55. BC Reg 266/80
56. BC Reg 102/81
57. As amended (entirely for the sake of appearances) by SBC 1979 c 22 s 23
58. Cofrin v. Bicchieri (1977) 3 BCLR 122 at 142
59. (1905) 2 WLR 205 at 211
60. (1911) 19 WLR 68
61. SBC 1959 c 53 s 13, SBC 1973 c 52 s 12
62. For an example of a cancellation, see Order in Council No. 1531, 2 June 1964, BC Reg 117/64 (Vemey 1 Mineral Claim). More than a mere suspicion of the claim holder's intentions may be necessary: Re Lovell (1947) 3 MCC 96 (Ont.)
63. It is the successor of the old requirement that the locator find a mineral deposit or (up to 1938) "rock in place": see Lyon, "Security of Mineral Title in British Columbia" (1968) 3 UBC L Rev 38 at 41.

64. (1979) 107 DLR (3d) 580

65. (1911) 19 WLR 68

66. (1905) 2 WLR 205 at 214

67. ss 22, 29 (2), 31

68. RSBC 1979 c 140. Other provisions of the Forest Act are also relevant to mining and exploration; eg, s 138, authorizing the damaging of timber to locate a claim.

69. (1979) 107 DLR (3d) 580

70. Cf RSBC 1960 c 244 s 21(2) with SBC 1973 c 52 s 12


72. RSBC 1979 c 266

73. Anfield, supra note 71 at 318

74. Ibid

75. SBC 1911 c. 35: substantially rewritten in SBC 1925 c 30, but virtually unaltered since then.

76. RSBC 1979 c 214

77. A.G. v. Morris supra note 69 at 583, 586

78. RSBC 1979 c 140, ss 91, 97, 98

79. [1971] 5 WWR 154. See Chapter II.

80. In the early years, the Crown Grant of a mineral claim included the fee simple of the surface – eg CSBC 1888 c 82 s 82, and Spencer v. Harris (1899) 1 MMC 294

81. Cf its use in s 11(2)

82. Cf Mining (Placer) Act, Coal Act, Yukon Minerals Bill, 1970, c-187 (Never enacted) ss 52, 53
83. SBC 1980 c 28
85. AG v. Morris (1979) 107 DLR (3d) 580
87. SBC 1980 c. 28 s 1
88. See EMPR, Guidelines for Mineral Exploration, Victoria, 1982, p 35
89. s 36(1) - see Guidelines, supra, p. 3. If the authority of the Mines Act is insufficient, then at least for information gathering the Ministry could rely on the Ministry of Energy, Mines and Petroleum Resources Act RSBC 1979 c 270 s 9.
90. One obvious method for the improvement of enforcement would be to link Mines Act programs and reclamation obligations with the Mineral Act recording of exploration and development expenditure. This link would make it simple to correlate work done with Notices of Work given, or not given, and reclamation carried out, or ignored. The Mineral Act Regulations 587/77 do not even allow reclamation expenses under s 22(1) of the Act.
91. RSBC 1979 c 429
92. S 2. There is some dispute the extent to which the Act abolishes common law riparian rights; whether in full, or only on the issuance of a licence; and whether in respect of water quality as well as water quantity: Armstrong (1962) 1 UBC L Rev 583; Lucas (1969) 4 UBC L Rev 56.
93. Following the reasoning in Cofrin v. Bicchieri (1977) 3 BCLR 122 at 134. Care should be taken to observe that the statute there, and in Nelson and Ford Sheppard Ry v. Jerry (1897) 5 BCR 396, is very different in procedure.
94. Ibid at 439
95. The present Mineral Act is unusual in not requiring the miner to give notice and security before any entry on occupied land; cf Mining (Placer) Act RSBC 1979 c 264 s.3; Yukon Quartz Mining Act, RSC 1970 c 301 s 14
96. (1977) 3 BCLR 122 at 127
97. See Nelson and Fort Sheppard Ry v. Jerry (1897) 5 BCR 396; but contrast the 1960 Act, s. 12(2)

98. See infra, "Remedies"

99. [1974] 1 WWR 761

100. (1977) 3 BCLR 122

101. [1973] 4 WWR 527

102. Ibid at 531

103. [1973] 4 WWR 527 at 530

104. (1958) 13 DLR (2d) 161

105. [1974] 1 WWR 761 at 761

106. Ibid at 762

107. [1977] 3 BCLR 122

108. Ibid at 143

109. (1962) 32 DLR (2d) 704 at 718 (Ont. C.A.)

110. Infra Chapter VII

111. (1977) 3 BCLR 122 at 143-45

112. Ibid at 145

113. A placer miner must be entitled to compensation now, although a Mineral Act miner will not have the reciprocal right under the Mining (Placer) Act RSBC 1979 c 264 s 3 unless he is an "owner". Curiously this is the inverse of the position in 1963: Anfield (1963) Can BJ 304 at 311.


115. RSBC 1979 c 214 s 36


117. Re City of Oshawa & Loblaw Groceteria Co. (1963) 38 DLR 2d 216; see infra, "Possession".

118. Criminal Code, RSC 1970, c 34 s 41; Trespass Act RSBC 1979 c 411

120. [1982] 3 WWR 317

121. See ss 6(2)(e), 21, 64(b)

122. 1 Martins Mining Cases: 551; also RSBC 1871, s 47. The Gold Fields Act 1859 (1MMC 538) contains no comparable provision.

123. RSBC 1871, No 123, s 12

124. SBC 1877, c 14 repealed in SBC 1878 c 13

125. SBC 1884 c 10

126. SBC 1897 c 18 (RSBC 1897 c 135 s 26)

127. SBC 1977 c 54


129. Per Davey L.J. in Ramsay v. Margrett [1894] 2 QB 18

130. Supra note 129 pp 11-28


133. Any entry by him gives him possession in law, and against mere wrongdoers the slightest acts indicating an intention to obtain possession will suffice: Portland Managements Ltd. v. Harte [1972] Q.B. 306. The possession will be related back to the time at which his right of entry accrued, making trespasses since then actionable; Ocean Accident and Guarantee Corpn. v. Ilford Gas Co. [1905] 2 KB 493

134. Swaile v. Zurdayk [1924] 2 WWR 555 (Sask. C.A.). This seems to be the case directly on point that could not be found by Halsbury (3rd edn) vol 38 p 744 n(b).


137. RSBC 1979 c 21 s 1, am 1980 c 18 s 15

138. (1981) 124 DLR (3d) 710

139. [1972] 6 WWR 355

140. [1982] 3 WWR 317, 319

141. Ibid at 322

142. Ibid at 323. In this the Court followed the approach of City of Westminster v. Southern Ry. Co. [1936] AC 511

143. [1972] 1 WWR 24

144. Ibid at 36, citing Bentley v. Peppard (1903) 33 SCR 444

145. [1982] 3 WWR 317 at 325

146. Ibid at 322

147. (1981) 124 DLR (3d) 710

148. [1972] 6 WWR 355

149. (1963) 38 DLR (2d) 216

150. [1982] 3 WWR 317 at 325

151. Halsbury (3d edn) Vol 38, p 743; Salmond, supra note 135 at 42

152. Co. Litt. 368a, "For the rule is, Duo non possunt in solido unam rem possidere"; Vaughan, 189

153. Pollock & Wright, op cit, p 20


155. (1981) 124 DLR (3d) 710

156. Pollock op cit, p 30

157. [1982] 3 WWR 317 at 322

158. Lord Advocate v. Young (1887) 12 App Cas 544, 556; Pollock, op cit p 31

159. Wuta-Ofei v. Danquah [1961] 3 All ER 596 (PC)

160. (1958) 15 DLR (2d) 424 (N.B. App Div)
162. [1955] AC 778, 790
165. Jones v. Williams (1837) 2 M & W 326, 150 ER 781
166. Lord Advocate v. Lord Blantyre (1879) 4 App Cas 770, 791; Pollock, op cit, p 31
167. Legere v. Cassie (1958) 15 DLR (2d) 424
168. Wood v. LeBlanc (1904) 34 SCR 627. Note that "constructive possession" has also been used to mean the right to possess; Pollock, op cit, p 27.
169. Bentley v. Peppard (1903) 33 SCR 444
170. [1982] 3 WWR 317 at 324
171. Indeed, they were expressly exempted from taxation in the Taxation (Rural Area) Act; Newmont [1982] 3 WWR 317 at 326.
172. (1899) 1 MMC 294; partially reported at 6 BCR 466
173. Ibid at 299
174. (1904) 35 SCR 309; 2 MMC 240
175. Ibid at 317, 318, 326
176. On this, see Portland Management Ltd. v. Harte [1977] QB 306 and Danford v. McAnulty (1883) 8 App Cas 456
177. Probably the 1896 Act (SBC 1896 c 34 s 26) and then the 1897 amendment (SBC 1897 c 28 s 6). The surface rights granted are noticeably different. The 1897 Amendment seems to have come into force on 8 May 1897. The reports of the case indicate that the trespass began some time in 1897. Further, the claim was Crown-granted on 26 January 1898.
178. Op cit, pp 43-44
179. Ibid p 44
180. Bentley v. Peppard (1903) 33 SCR 444
182. A.G. Can. v. Lees (No 2) [1977] 5 WWR 581 at 591

183. Manson Bar Placers Ltd. v. The Queen SCBC 27 Oct 1983 C 821592 Vancouver, Sheppart CCJ

184. Ministry of Energy, Mines and Petroleum Resources Act RSBC 1979 c 270 s 8(1)

185. [1971] 5 WWR 154

186. [1982] 3 WWR 317 at 325

187. (1911) 19 WLR 8, 68

188. (1904) 11 BCR 76

189. [1971] 5 WWR 154

190. (1829) 5 Bing 340, 130 ER 1092

191. The case was approved but distinguished in Vancouver v. Vancouver Lumber Co. [1911] AC 711, but the principle was strongly disapproved by Lord Selbourne L.C. in Great Eastern R'y v. Goldsmid (1884) 9 App Cas 927, 940 as being laid down entirely obiter to the matter in issue.

192. RSBC 1979 c 51

193. RSBC 1979 c 140

194. RSBC 1979 c 168

195. RSBC 1979 c 355

196. RSBC 1979 c 214

197. Ibid s 2

198. (1911) 19 WLR 68 at 71

199. RSBC 1979 c 154. Geologically, it is a more likely example than the Petroleum and Natural Gas Act.

200. RSBC 1979 c 51

201. But if the miner is going to pay taxes as occupier, some surface owners may be delighted to have as much land as possible taken to be in the miner's possession!

202. (1908) 13 BCR 482
203. (1897) 5 BCR 396; 1 MMC 161. The same point was argued but not decided in AG v. Westgarde [1971] 5 WWR 154

204. Ie, of the mineral claim.

205. (1908) 13 BCR 482 at 483.

206. A similar attempt at separating the mineral and surface rights was made in Cofrin v. Bicchieri (1977) 3 BCLR 122 when it became obvious that the grant of minerals was bad. However the grant at best purported to be a profit a prendre, so the case tells us nothing about mineral claims in this respect.

207. Supra, "Restrictions on Surface Use"


209. (1964) 47 WWR 41

210. (1904) 35 SCR 309

211. [1971] 5 WWR 154

212. [1914] AC 1043

213. For a different example, see Expropriation Act, SA 1974 c 27, s 4.

214. RSC 1906 c 37 now RSC 1970 c R2, ss 135 to 139.

215. The Railways Clauses Consolidation Act 1845, which did not secure a right of support to the railway until the railway took the minerals.

216. [1914] AC 1043 at 1054

217. SC 1919 c 68 ss 197 and 198, adding what are now ss 138 and 139. These additions have not been made to the BC Act; RSBC 1979 c 354. Also see Pipeline Act, RSBC 1979 c 328.

218. [1982] 3 WWR 214 (BCCA)


221. [1982] 3 WWR 214 at 228
222. Ss 2(1), 60, 61, 64, 65 (b)

223. Inserted by SBC 1980 c 26 s 30

224. S 50(11)


226. Dated 10 October 1972. There may be other surface owner complaints, but in recent years the summaries have become terse to the point of vacuity.


228. Gelinas v. Clark (1901) 8 BCR 42 at 52 per Martin J.

229. (1900) 30 SCR 555

230. (1902) 32 SCR 371; a more comprehensible statement of the principles governing Coplen v. Callahan.

231. Belk v. Meagher 104 U.S. 297, 26 L.Ed. 735 (1878), approved in Gelinas v. Clark supra note 228 at 49, and in Amalgamated Resources supra note 225

232. (1902) 32 SCR 371

233. [1922] 1 AC 462

234. Ibid at 475

235. Instead the surface owner must seek a cancellation by the Lieutenant Governor in Council under s 65(b).

236. BC Reg. 438/80

237. A successful complainant could argue for an order for costs to cover it, relying on the general power of s. 50(10)(c).

238. (1897) 11 BCR 396 at 443 per McColl J.

239. RSBC 1979 c 72

240. RSBC 1979 c 209

242. (1977) 3 BCLR 122

243. (1960) 26 DLR (2d) 35 BCCA, aff'd without reasons by SCC, 29 DLR (2d) 592

244. Crown Proceedings Act RSBC 1979 c. 86 c 2 - no fiat is necessary.

245. (1902) 32 SCR 371

246. (1977) 3 BCLR 122

247. Ibid at 143

248. Ibid at 145

249. He could have relied on Whitwham v. Westminster Brymbo Coal and Coke Co. [1896] 2 Ch 538 - see Chapter III

250. As Fulton J. was aware - at 143

251. The injunction obtained by the Crown in AG v. Westgarde [1971] 5 WWR 154 was in a sense an injunction for a surface owner.

252. (1904) 35 SCR 309
CHAPTER V

SURFACE USE OF AN OIL AND GAS LOCATION

In order to draw certain comparisons with the Mineral Act, this chapter will describe the surface rights legislation contained in Part Three of the British Columbia Petroleum and Natural Gas Act. Some points will be discussed with reference to the Alberta Surface Rights Act, which is a similar Act, but more complex, more heavily used and more often considered in the courts. The legislation of British Columbia, Alberta and Saskatchewan has been described in several articles.

As well as oil and gas operations, the British Columbia legislation covers geothermal resources, petroleum underground storage and flowlines connecting wells with treatment and storage facilities. Whether or not it extends to control surface entry on land to work privately-owned oil and gas is doubtful. The words of Part Three of the Petroleum and Natural Gas Act are sufficiently general to include private oil and gas as well as the Crown's; but the rest of the Act, dealing mainly with the allocation of rights to Crown oil and gas, may provide a context that indicates a narrower meaning, and from which Part Three cannot be severed.

The Surface Rights Act in Alberta extends to the exploitation of all minerals, clearly including private minerals, and also covers pipelines, power lines and telephone lines.
1. **LAND OPEN FOR ENTRY**

   (a) **Land Open Generally**

   For the purposes of entry by oil and gas operators, a distinction is drawn in the British Columbia Act between Crown land and other land, as section 7 allows entry on Crown land simply with the written consent of the Minister and the filing of a plan of the land concerned. However section 6 defines "Crown land" narrowly, excluding land used or occupied by the Crown or subject to a disposition under the Land Act. Those cases may be handled in the same way as private land. Lands vested in Canada are not within the definition of "Crown land", and further the Indian Reserve Mineral Resource Act [6] does not apply to petroleum and natural gas.

   Oil or gas exploration or development in parks is not restricted under the Petroleum and Natural Gas Act. The legislation governing the individual park must be referred to. The Park Act, [7] Ecological Reserve Act, [8] and other such acts apply to oil and gas activity in the same way as they apply to activity under the Mineral Act.

   Areas may be closed to exploration and development under the Petroleum and Natural Gas Act by being designated Crown reserves under section 88, but this category is also used for purposes other than protection. Tenures may be allocated from Crown reserves under certain conditions, although the Minister may withdraw them from disposition under section 89.

   Lands in which the oil and gas rights are privately owned are not open for entry, in the sense of entry to explore for and
acquire rights in minerals of the Crown.[9] In those cases an operator must obtain rights from the mineral owner. But private ownership is uncommon, as there were few Crown grants of land in the producing areas of the Province before petroleum and natural gas were regularly reserved to the Crown. The critical date under British Columbia law was 1891.[10]

(b) Allocation of Tenures

The tenures available under the Petroleum and Natural Gas Act are the geophysical licence, exploration permit, petroleum and natural gas lease and drilling reservation. Under sections 33 to 36 and under the Geophysical Regulations,[11] a geophysical licence is necessary to carry out geophysical exploration. The licence does not grant exclusive rights, it lasts for one year only, and may be issued by the Division Head.

Under Sections 37 to 54, an application for an exploration permit may be granted or refused by the Minister. If issued, the permit gives an exclusive right to do geological and geophysical work and exploratory drilling within the specified location. It may be held for one year and may be renewed indefinitely, subject to minimum work requirements. A petroleum and natural gas lease under sections 63 to 82 gives an exclusive right to produce petroleum and natural gas from a location. The Minister may issue a lease only in accordance with the Act and Regulations. The Minister "may refuse to issue a lease to a person other than a permittee or licensee who has complied with this Act". The intention of the Act seems to be that he may not refuse to issue a lease to a permittee. A permittee may apply for a lease for
one-half the area of his permit. Additionally, a permittee who has discovered petroleum may be required to take up a lease. The Act provides in detail for the rights and obligations of a lessee.

The petroleum and natural gas rights in certain areas, including reversions, abandoned areas, and designated areas, fall into Crown reserves. Rights from Crown reserves may be disposed of by public tender or auction, in order to secure to the government some of the benefits of exploration work. The Minister may issue an exploration permit or petroleum and natural gas licence, or he may issue a drilling reservation, requiring prompt drilling, or a drilling licence.[12]

In summary, the government retains full discretion in authorizing geophysical work, in issuing exploration permits and in releasing rights from Crown reserves. It has a certain amount of discretion in issuing leases, but apparently must issue a lease to a permittee who seeks one and who has complied with the Act.

(c) **Well Authorizations**

To drill or operate a well, a person must not only have rights under one of the above tenures, but must also obtain a well authorization under sections 95 to 100. Under section 109, the Division Head or a person authorized by him may in his discretion grant or refuse the authorization. Nothing in the Act indicates what principles are to guide the official's discretion, unless it is in some implicit general purpose of the legislation. An authorization may be cancelled or suspended for any contravention of the Act, Regulations, or any order made under them.
In Alberta, the equivalent is a well licence, [13] which is similar in its effect to the British Columbia well authorization, but the Alberta licence is granted after a public hearing of all interested parties by the Energy Resources Conservation Board (the ERCB). Under the Oil and Gas Conservation Act [14] the ERCB exercises general regulatory powers over oil and gas operations in Alberta. Landowners have often objected to well licence applications; and the ERCB has taken account of a number of aspects of surface impacts under its jurisdiction over safety, efficiency and pollution control. [15] However the ERCB is careful to acknowledge that it has no authority to consider compensation for the landowners, which is a matter for the Surface Rights Board. [16] The ERCB usually influences the operator's use of the surface by changing the exact location of the well or by imposing conditions as to use, but it does contemplate the possibility of denying a well licence on the grounds of surface impact, [17] and has done so in one case at least. [18]

2. **PROCEDURE**

The British Columbia legislation prescribes procedures which must be followed to obtain a right of entry. The jurisdiction of the Mediation and Arbitration Board is at the heart of these procedures. Section 9(1) reads:

9. (1) A person may not enter, occupy or use land, other than Crown land, to explore for, develop, produce or store petroleum and natural gas unless
(a) he makes, with each owner of the land, a surface lease in the form and content prescribed authorizing the entry, occupation or use;
(b) the board authorizes the entry, occupation or use; or
(c) as a result of a hearing under section 20, the board makes an order prescribing terms of entry, occupation and use, including payment of rent and compensation.

In so prescribing the conditions for entry, the Act allocates surface rights without reference to the original reservation of minerals and the working rights that may be found there. The right of entry is available by the present owner's consent or by Board order, and not otherwise. The Alberta Act uses express words to override the original reservations:

If there is a conflict between this Act and anything contained in any grant, conveyance, lease, licence or other instrument, whether made before or after the coming into force of this Act, with respect to right of entry in respect of the surface of any land incidental to any operations concerning mining, drilling, pipelines, power transmission lines or telephone lines, this Act prevails. [19]

If there was an equivalent section in British Columbia, then there would be no room for doubt about the Act's application to privately-owned oil and gas.

(a) **Surface Leases**

In the great majority of cases, the parties negotiate and agree upon a surface lease, rather than resorting to formal hearings and determinations. The operator is obliged to try to negotiate an agreement with the owner, [20] and Board mediators may assist the process.[21] A typical surface lease leases the specified lands to the operator for 25 years "for any and all purposes and uses as may be necessary or useful in connection with all its operations." It provides a rental, with different sums
for the disturbances of the first year and for subsequent years. Rent reviews and compensation for damage are also provided.

The Surface Lease Regulations [23] require surface leases to contain four specific clauses relating to permitted land use, reduction of surface area, termination for default and termination by the lessee. These clauses were adopted to provide a basic level of protection to landowners. Parties may agree on other clauses not inconsistent with them, but the Regulations are not suited to geophysical work, which is covered by the Act. [24]

Rental or compensation rates under a surface lease (or an existing Board order) may be re-negotiated, effective at five-year intervals. If negotiations fail to produce agreement, the rate may be set by the Board. [25]

(b) **Mediation and Arbitration Hearings**

Cases which cannot be resolved by negotiation are referred to the Mediation and Arbitration Board established under the Act. The Board has the advantages of specialized knowledge, experience in agriculture and the oil and gas industry, and flexible proceedings which often include site inspection. [26] Proceedings must nevertheless comply with the rules of natural justice; for instance a party has been held to be entitled to see and bring evidence on a government agency report which the Board used in reaching its conclusions. [27]

Either the owner or the operator may apply to the Board for mediation and arbitration, under section 16. The application initially goes before one Board member acting as a mediator to resolve the complaint. The mediator may, under section 18,
dismiss the application, hold more mediation hearings, or refuse to mediate further. He may order compensation to be paid. If a right of entry is sought, he may grant it under section 19, upon the posting of a security and payment of part of the compensation.

Unless the mediator's orders satisfy all parties, the matter goes to a full arbitration hearing by the Board under section 20. The Board may review and vary the mediator's orders, and make orders as to entry and compensation.

(c) Appeals

The Board may submit a question of law to the Supreme Court during a hearing; alternatively, an appeal lies from an order of the Board "on any point or question of law raised before the board".[28] The Court cannot reconsider the facts of the case and strictly it cannot even consider a question of law unless the party raised it during the Board hearing. In the light of other mineral legislation and expropriation legislation, this is unusually restrictive of access to the ordinary courts. The Alberta Surface Rights Act permits appeals from compensation orders, the most usually disputed part of the Board's jurisdiction. [29] The appeal is in the form of a new hearing, with all the evidence being heard de novo, but the courts have always recognized the knowledge and experience of the Board and will not lightly disturb its decisions. [30] It seems desirable to allow similar appeals in British Columbia.
3. **SURFACE RIGHTS CONFERRED**

(a) **Powers of the Board**

Unless the surface rights are negotiated in a lease, the rights which an operator acquires are entirely subject to the discretion of the Mediation and Arbitration Board. Mediators, under section 19, and the Board, under section 20, may make entry orders subject to the terms they may consider proper. With this power, the Board can vary surface rights from case to case, and tailor the operator's rights to fit the needs of the particular operations contemplated and the particular land affected. A high degree of flexibility is the result.

The Board's authority, although not clearly stated, is to grant an order to the operator to permit him "to enter, occupy or use the land".[31] However, its order may have much more force than a mere right in the nature of a bare licence. Under section 26(1),

> An order of the mediator or board granting the right to enter, occupy or use land may be enforced in the same way as a writ of possession issued by a court.

Subject to the exact terms of the order, then, the operator may acquire a right to possess the surface, with all the incidents we discussed in Chapter IV.

The purposes for which these rights may be acquired are stated in very general terms:

> to explore for, develop, produce or store petroleum and natural gas or for a connected or incidental purpose.[32]

As we noted earlier, Board orders may also, under the Pipeline Act, [33] extend to flowlines and necessary works and
undertakings connected with them. These provisions are wide enough to encompass virtually any activity for which an operator could seek authorization, subject to restrictions imposed in the Board's discretion.

Rather than using such general language, the Surface Rights Act of Alberta describes in specific detail the various purposes for which surface rights may be acquired. It also makes specific provision for oil sands and enhanced recovery techniques. However, the general words of the British Columbia Act seem to be quite sufficient to cover all the operations contemplated.

Little is said about which lands may be the subject of an order of the Board. The Board's discretion to impose terms allows it to determine the size of the wellsite and the location of the access road which the operator requires. The Board is not specifically empowered to grant rights over lands other than those in which the applicant operator has mineral rights, but there is no restriction in the operator's right to apply wherever he "requires land".

(b) Restrictions on the Board's Powers

The Board's wide powers to grant or qualify right of entry orders are in practice subject to significant restrictions. We saw earlier that before a surface rights dispute comes before the Board, the operator has had to obtain a well authorization from the Petroleum Division. To obtain it, the proprietor has had to justify the desirability and the precise location of the well in terms of spacing and reservoir engineering. Nothing in the Act
gives this well authorization any binding effect on the Board's discretion, but in fact the Board always checks the well authorization and follows it with a conforming entry order. [38]

In practice the Board does not refuse to grant a right of entry for the precise location that has been chosen for the well.

The Board seems to have legal power to refuse a right of entry application notwithstanding this practice. The power to do so is not expressed in as many words, but sufficiently appears from section 19 under which a mediator may make an order for entry, and section 20 under which the Board shall review an order under section 19 and may confirm or vary the order. [39]

One of the changes made in the revision of the Surface Rights Act of Alberta in 1983 was to resolve this divergence between law and practice by requiring the Surface Rights Board to ensure that its right of entry order is not inconsistent with the well licence issued by the ERCB. [40] This would be a desirable change to the British Columbia Act, but only on the basis that the procedure for the issue of a well authorization is expanded to include surface rights issues and submissions from the surface owner.

As well as this limitation of the Board's power in practice if not in law, we should note that several requirements of the Drilling and Production Regulations [41] restrict the impact of operators on the surface. Sections 5 and 9 prohibit the drilling of test-holes or wells within specified distances of roads, buildings, airfields, or waterbodies, and section 10 calls for special approval of drilling within 3 km of any subsurface mine workings or underground storage facilities. Section 59 requires
restoration of the surface and certificates of restoration. Similar controls are found in the Regulations Governing Geophysical Work [42] in relation to exploratory work.

4. **COMPENSATION**

(a) **Criteria for Compensation**

The obligation to pay compensation is imposed by section 9(2):

A person who enters, occupies or uses land to explore for, develop, produce or store petroleum and natural gas is liable,

(a) to pay compensation to the land owner for loss or damage caused, up to the date stated in the certificate of restoration for that land, for the entry, occupation or use; and

(b) if the board so orders, to pay rent for the duration of the occupation or use.

The Board fixes compensation along with a grant of a right of entry, and the Act gives the Board a detailed list of factors to consider in section 21:

(1) In determining an amount to be paid periodically or otherwise on an application made under section 12 or 16(1), the board may consider

(a) the compulsory aspect of the entry, occupation or use;

(b) the value of the land and the owner's loss of a right or profit with respect to the land;

(c) temporary and permanent damage from the entry, occupation or use;

(d) compensation for severance;

(e) compensation for nuisance and disturbance from the entry, occupation or use;

(f) money previously paid to an owner for entry, occupation or use;

(g) other factors the board deems applicable; and

(h) other factors or criteria fixed by regulation.

(2) In determining an amount to be paid on an application under section 12, the board shall consider any change in the value of money and of land since the date the surface lease, order or authority was originally or last granted.
The Alberta Act includes a comparable list of factors to be considered. [43]

There is a wealth of case law on the determination of surface rights compensation, especially under the appeal procedure by way of rehearing in Alberta. The principles emerging from this case law have been well analyzed in several articles. [44] It is suggested that these articles be referred to if general information is needed on these cases, because it is intended here only to discuss those aspects of the cases which bear on the nature and effect of a right of entry order.

(b) Compensation Cases on the Effect of a Right of Entry Order

The first issue which focussed attention on the effect of a right of entry order was the Board's power to make a compensation order directing that a sum was to be paid periodically during the term of the entry - as a sort of rent. The legislation now puts this power beyond doubt, [45] but it did not do so in 1957. In that year an order for periodic payments was challenged in Re Pacific Petroleums Ltd. [46] Counsel for the mineral operator relied on cases dealing with expropriation for the principle that compensation must be fixed in full as a definite sum calculated and determined at the time of the award, no matter what the period of occupancy, or how uncertain the term might be. The British Columbia Court of Appeal rejected this argument and upheld the award. The principle relied on in expropriation cases did not apply, and the Board's power under what is now section 20 was wide
enough to include an order for compensation payable from year to
year. Such an award was useful where the duration was uncertain.

Where an interest in land is taken, as in expropriation cases, whether the fee or some lesser
interest, the compensation is readily determinable on
the principles laid down in these cases. In such cases
the owner is deprived of some interest in the affected
land either permanently or for some predetermined term.
Its value can be ascertained with some certainty. This
however is not a case of compensation for land taken or
for any interest in land taken. It is compensation for
entry and for the loss and damage caused by the
operations carried on thereon, and the time during which
this entry may be maintained and the operation carried
on is uncertain. [47]

These words touch upon interesting themes. It will be recalled
that Pacific Petroleums was followed in the context of the Mineral
Act by Gardi v. Bow River Resources Ltd. [48] However, it was
not followed, or even referred to, in a later British Columbia
petroleum case, Anadarko Petroleum of Canada Ltd. v. Syd Johns
Farms Ltd., [49] which struck down periodic payments although the
legislation by then had plainly authorized them.

Pacific Petroleums was guided by the terms of the British
Columbia Act, requiring an operator to pay compensation for loss
or damage caused and for his entry, occupation or use of the land.
Alberta cases have been strongly influenced by a section which has
no equivalent in British Columbia, section 16(1):

A right of entry order vests in the operator,
(a) unless otherwise provided in the order, the
exclusive right, title and interest in the surface of
the land in respect of which the order is granted, other
than
(i) the right to a certificate of title issued
pursuant to the Land Titles Act, and
(ii) the right to carry away from the land any
sand, gravel, clay or marl or any other substance
forming part of the surface of the land,
and
(b) to the extent necessary for his operations, the right to excavate or otherwise disturb any minerals within, on or under the land without permission from or compensation to the Crown or any other person with respect to those minerals. [50]

The first significant Alberta case is *Twin Oils Ltd. v. Schmidt*. [51] Feir C.J.D.C. was reviewing a compensation award of the Board, and considered the effect of the legislation, particularly of the predecessor of the above quoted section.

The Act has provided for the forced acquisition by the appellant of an interest in the surface of the land. The acquisition is not permanent. It does not carry with it the right to obtain a certificate of title, does not alter the municipal tax roll so as to shift the burden of taxes from the respondent nor, in my opinion, does it remove from him the obligation to pay water rates and water rights. The appellant may retain his dominion over the surface for the purpose of removing oil, gas and other minerals only so long as his undertaking is producing. In the Taber field a well may continue to produce for one year or for 25 years, or even longer in some cases. It is in accordance with this state of facts that the board is required to set, not a purchase price, nor even a rental, but compensation from the appellant to the respondent. In my view "compensation" in this setting means recompense for loss or damage. [52]

These views have been well received, both by commentators [53] and in the Court of Appeal of Alberta in 1981 in *Nova v. Will Farms Ltd.*, [54] where it was pointed out that Feir C.J.D.C. was speaking of all heads of compensation under the Surface Rights Act, not just the property interest taken. This case also shows how the Alberta courts have consistently seen right of entry orders as a taking of some interest in the land less than the fee simple.

In 1970, *Dau v. Murphy Oil Co.* [55] went from the Alberta courts to the Supreme Court of Canada. Again, the question was
the propriety of using expropriation cases, this time to construe "the value of the land" as meaning value to the owner, rather than value to the taker in its proposed use for oil and gas production. In the Appellate Division Porter J.A., with whom Smith C.J.A. concurred, decided that the surface rights legislation did involve a kind of expropriation.

The Act does not contemplate the expropriation of the entire estate of the owner in the land taken but authorizes the board to permit the use by the operator of a designated area for the period of the estimated production of the underlying oil and gas. It will thus be seen that upon exhaustion or abandonment of the oil and gas belonging to the operator under the owner's land, the estate reverts to the owner. It follows, however, that there is a compulsory taking of part of the owner's right of enjoyment of the affected lands which must be regarded as an expropriation of the rights of which he is thus deprived. [56]

However he distinguished expropriation cases on the ground that they involve public expenditure while this Act benefited the operator only. McDermid J.A. agreed that the statute unquestionably provided for expropriation but did not agree with the distinction. [57]

The Supreme Court of Canada reversed the decision. In a short judgment delivered for the Court, Martland J. approached the expropriation issue more circumspectly, not identifying the right of entry with expropriation, but merely accepting that one could reason from one procedure to the other by analogy.

In my opinion, when s. 20 of the Act provided that the Board of Arbitration, in determining compensation, might consider "the value of the land", this meant value to the owner of the land. The procedures provided for in this Act are similar in nature to expropriation procedures, even though an order of the Board does not give outright title to the surface of the lands affected; the rights granted by the order may, in
certain events, be terminated by the Board; and
jurisdiction is given to the Board to review, rescind,
change, alter or vary its orders.

It is well settled, in expropriation cases, that the
value to be paid for is the value to the owner, and not
the value to the taker. Reading the Act in question
here, as a whole, I see no basis for interpreting the
words "value of the land" in s. 20(2)(a) as involving a
different meaning. The value which the Board may
consider is, in my opinion, value to the owner. [58]

The divergence between *Pacific Petroleums* and the Alberta
cases is largely explained by differences in legislation,
especially Alberta's section 16, deeming a right of entry order to
vest exclusive right, title and interest in the operator. Yet the
cases can be reconciled to some extent as Berger J. shows in *Dome
Petroleum Ltd. v. Juell*, [59] where arguments were made on whether
the procedure under the Act is by way of expropriation. He held
that it "authorizes a trespass for an indefinite period on a
farmer's land", [60] and that the compensation is not a purchase
price or rental, but is compensation for loss and damage. In this
he followed *Twin Oils Ltd. v. Schmidt*. [61] *Re Pacific Petroleums
Ltd.* [62] was quoted to establish that the operator's entry and
occupation is not an act of expropriation, and that no land and no
legal interest in the land is taken from the landowner, who
continues to hold the fee simple. Then,

The question is, if the procedure is not by way of
expropriation, is it error in law to apply expropriation
principles? No, it is not, but they must be applied
correctly if the board makes use of them. *Dau v. Murphy
Oil Co.* requires as much. Indeed, it can only be
reconciled with *Re Pacific Petroleums Ltd.* on that
footing. [63]

It will be evident that these cases all focus on the fixing
of compensation rather than on characterization of the right of
entry for its own sake. Whether or not the Act's procedure is expropriation, a question often posed in these cases, is usually asked as an intermediate step with a view to the application of a specific principle to the fixing of compensation. The decision about expropriation seems often to depend really on the consistency of the principle with the terms of the legislation. It is well settled now that expropriation principles may be used to interpret the compensation provisions, but only as far as is compatible with the Act. [64] They have been especially used where the value of the land has been in issue, such as in cases of valuing reversions or small parcels. [65] However the terms of the legislation, and the courts' interpretation, have been moving steadily away from ordinary expropriation, and towards a frank recognition of the possibility of double compensation being paid, [66] and with express statutory requirements to allow reversions to be disregarded, [67] to implement a home-for-a-home policy, [68] and to allow an entry fee or payment as a solatium for the compulsory aspect of the proceedings. [69] As a result, the surface rights legislation is inevitably becoming more attractive to landowners.

Very little has actually been said judicially about the nature of a right of entry and about the effect of an order on the surface owner. Everyone agrees with the obvious, that it is not a taking of the fee simple. It is also plain that the legislation does not actually describe its effect as the taking of any lesser interest in land such as a leasehold or an easement. At the other extreme, it is generally accepted that some taking or diminution
of the surface owner's interest occurs. Even Pacific Petroleums allowed that the owner's right to sue for trespass had been taken away by the statute. [70] Normally, where a wellsite is taken, the owner also loses the use, enjoyment and profit of that part of his land. The extent of the loss will depend on the terms of the individual order.

Between the two extremes, the main question is whether or not the right of entry order can be said to give the operator an interest in the surface of the land. We have seen how the Alberta cases state or infer that an interest in land is taken from the surface owner and given to the operator. [71] No other conclusion is really possible in the light of section 16 of the Alberta Act, expressly providing that a right of entry order vests in the operator all right, title and interest in the surface of the land. With no comparable section in the British Columbia Act, Juell [72] has closely followed Pacific Petroleums' firm statement that no interest in land is taken.

Bearing in mind that the interest in land question has always arisen in the context of compensation in these cases, we could find that it will appear in a very different light if some day it arises in different contexts. One might be a vendor and purchaser dispute, where land subject to a right of entry order is sold without any actual or constructive notice of it to the purchaser. Would this be a defect of title allowing recission? Or, can an operator caveat the surface title to protect his right of entry as an alternative to the registration provided under section 25(3) of the Petroleum and Natural Gas Act?
In such situations, the character of a right of entry may be open for further scrutiny. Even if it is not an interest in land, as Pacific Petroleums [74] and Juell [75] state so firmly, then it may have most of the attributes of one. The terms of the individual order of the Board must be inspected, especially in the absence of any general description of an order's effect such as that provided by section 16 in Alberta. If the Board uses its jurisdiction to the full, its order may have incident to it a right to take and keep possession (something that has not been considered in any of the cases), free assignability under section 29, presumably with binding effect on successors in title to the land, and a form of registration in the land titles office under section 25(3). It is true that the sum of these rights is an interest that is circumscribed and dedicated to one particular type of land use, and that in certain events it may be terminated or modified by the Board; but these sorts of restrictions are often part and parcel of interests in land such as leases, profits and easements. In some situations there may be a good case for distinguishing the compensation cases and acknowledging the presence of some of the characteristics of an interest in land.

5. **REMEDIES**

(a) **Remedies of the Surface Owner**

There is no British Columbia case law on the redress available for breaches of the surface rights legislation, but the situation can be illustrated to some degree by reference to cases from other provinces and to the legislation itself.
(b) to the extent necessary for his operations, the right to excavate or otherwise disturb any minerals within, on or under the land without permission from or compensation to the Crown or any other person with respect to those minerals. [50]

The first significant Alberta case is *Twin Oils Ltd. v. Schmidt*. [51] Feir C.J.D.C. was reviewing a compensation award of the Board, and considered the effect of the legislation, particularly of the predecessor of the above quoted section.

The Act has provided for the forced acquisition by the appellant of an interest in the surface of the land. The acquisition is not permanent. It does not carry with it the right to obtain a certificate of title, does not alter the municipal tax roll so as to shift the burden of taxes from the respondent nor, in my opinion, does it remove from him the obligation to pay water rates and water rights. The appellant may retain his dominion over the surface for the purpose of removing oil, gas and other minerals only so long as his undertaking is producing. In the Taber field a well may continue to produce for one year or for 25 years, or even longer in some cases. It is in accordance with this state of facts that the board is required to set, not a purchase price, nor even a rental, but compensation from the appellant to the respondent. In my view "compensation" in this setting means recompense for loss or damage. [52]

These views have been well received, both by commentators [53] and in the Court of Appeal of Alberta in 1981 in *Nova v. Will Farms Ltd.*, [54] where it was pointed out that Feir C.J.D.C. was speaking of all heads of compensation under the Surface Rights Act, not just the property interest taken. This case also shows how the Alberta courts have consistently seen right of entry orders as a taking of some interest in the land less than the fee simple.

In 1970, *Dau v. Murphy Oil Co.* [55] went from the Alberta courts to the Supreme Court of Canada. Again, the question was
the propriety of using expropriation cases, this time to construe "the value of the land" as meaning value to the owner, rather than value to the taker in its proposed use for oil and gas production. In the Appellate Division Porter J.A., with whom Smith C.J.A. concurred, decided that the surface rights legislation did involve a kind of expropriation.

The Act does not contemplate the expropriation of the entire estate of the owner in the land taken but authorizes the board to permit the use by the operator of a designated area for the period of the estimated production of the underlying oil and gas. It will thus be seen that upon exhaustion or abandonment of the oil and gas belonging to the operator under the owner's land, the estate reverts to the owner. It follows, however, that there is a compulsory taking of part of the owner's right of enjoyment of the affected lands which must be regarded as an expropriation of the rights of which he is thus deprived. [56]

However, he distinguished expropriation cases on the ground that they involve public expenditure while this Act benefited the operator only. McDermid J.A. agreed that the statute unquestionably provided for expropriation but did not agree with the distinction. [57]

The Supreme Court of Canada reversed the decision. In a short judgment delivered for the Court, Martland J. approached the expropriation issue more circumspectly, not identifying the right of entry with expropriation, but merely accepting that one could reason from one procedure to the other by analogy.

In my opinion, when s. 20 of the Act provided that the Board of Arbitration, in determining compensation, might consider "the value of the land", this meant value to the owner of the land. The procedures provided for in this Act are similar in nature to expropriation procedures, even though an order of the Board does not give outright title to the surface of the lands affected; the rights granted by the order may, in
certain events, be terminated by the Board; and jurisdiction is given to the Board to review, rescind, change, alter or vary its orders.

It is well settled, in expropriation cases, that the value to be paid for is the value to the owner, and not the value to the taker. Reading the Act in question here, as a whole, I see no basis for interpreting the words "value of the land" in s. 20(2)(a) as involving a different meaning. The value which the Board may consider is, in my opinion, value to the owner. [58]

The divergence between Pacific Petroleums and the Alberta cases is largely explained by differences in legislation, especially Alberta's section 16, deeming a right of entry order to vest exclusive right, title and interest in the operator. Yet the cases can be reconciled to some extent as Berger J. shows in Dome Petroleum Ltd. v. Juell, [59] where arguments were made on whether the procedure under the Act is by way of expropriation. He held that it "authorizes a trespass for an indefinite period on a farmer's land", [60] and that the compensation is not a purchase price or rental, but is compensation for loss and damage. In this he followed Twin Oils Ltd. v. Schmidt. [61] Re Pacific Petroleums Ltd. [62] was quoted to establish that the operator's entry and occupation is not an act of expropriation, and that no land and no legal interest in the land is taken from the landowner, who continues to hold the fee simple. Then,

The question is, if the procedure is not by way of expropriation, is it error in law to apply expropriation principles? No, it is not, but they must be applied correctly if the board makes use of them. Dau v. Murphy Oil Co. requires as much. Indeed, it can only be reconciled with Re Pacific Petroleums Ltd. on that footing. [63]

It will be evident that these cases all focus on the fixing of compensation rather than on characterization of the right of
entry for its own sake. Whether or not the Act's procedure is
expropriation, a question often posed in these cases, is usually
asked as an intermediate step with a view to the application of a
specific principle to the fixing of compensation. The decision
about expropriation seems often to depend really on the
consistency of the principle with the terms of the legislation.
It is well settled now that expropriation principles may be used
to interpret the compensation provisions, but only as far as is
compatible with the Act. [64] They have been especially used
where the value of the land has been in issue, such as in cases of
valuing reversions or small parcels. [65] However the terms of
the legislation, and the courts' interpretation, have been moving
steadily away from ordinary expropriation, and towards a frank
recognition of the possibility of double compensation being paid,
[66] and with express statutory requirements to allow reversions
to be disregarded, [67] to implement a home-for-a-home policy,
[68] and to allow an entry fee or payment as a solatium for the
compulsory aspect of the proceedings. [69] As a result, the
surface rights legislation is inevitably becoming more attractive
to landowners.

Very little has actually been said judicially about the
nature of a right of entry and about the effect of an order on the
surface owner. Everyone agrees with the obvious, that it is not a
taking of the fee simple. It is also plain that the legislation
does not actually describe its effect as the taking of any lesser
interest in land such as a leasehold or an easement. At the other
extreme, it is generally accepted that some taking or diminution
of the surface owner's interest occurs. Even *Pacific Petroleums* allowed that the owner's right to sue for trespass had been taken away by the statute. [70] Normally, where a wellsite is taken, the owner also loses the use, enjoyment and profit of that part of his land. The extent of the loss will depend on the terms of the individual order.

Between the two extremes, the main question is whether or not the right of entry order can be said to give the operator an interest in the surface of the land. We have seen how the Alberta cases state or infer that an interest in land is taken from the surface owner and given to the operator. [71] No other conclusion is really possible in the light of section 16 of the Alberta Act, expressly providing that a right of entry order vests in the operator all right, title and interest in the surface of the land. With no comparable section in the British Columbia Act, *Juell* [72] has closely followed *Pacific Petroleums*’ [73] firm statement that no interest in land is taken.

Bearing in mind that the interest in land question has always arisen in the context of compensation in these cases, we could find that it will appear in a very different light if some day it arises in different contexts. One might be a vendor and purchaser dispute, where land subject to a right of entry order is sold without any actual or constructive notice of it to the purchaser. Would this be a defect of title allowing recission? Or, can an operator caveat the surface title to protect his right of entry as an alternative to the registration provided under section 25(3) of the Petroleum and Natural Gas Act?
In such situations, the character of a right of entry may be open for further scrutiny. Even if it is not an interest in land, as Pacific Petroleums [74] and Juell [75] state so firmly, then it may have most of the attributes of one. The terms of the individual order of the Board must be inspected, especially in the absence of any general description of an order's effect such as that provided by section 16 in Alberta. If the Board uses its jurisdiction to the full, its order may have incident to it a right to take and keep possession (something that has not been considered in any of the cases), free assignability under section 29, presumably with binding effect on successors in title to the land, and a form of registration in the land titles office under section 25(3). It is true that the sum of these rights is an interest that is circumscribed and dedicated to one particular type of land use, and that in certain events it may be terminated or modified by the Board; but these sorts of restrictions are often part and parcel of interests in land such as leases, profits and easements. In some situations there may be a good case for distinguishing the compensation cases and acknowledging the presence of some of the characteristics of an interest in land.

5. **REMEDIES**

(a) Remedies of the Surface Owner

There is no British Columbia case law on the redress available for breaches of the surface rights legislation, but the situation can be illustrated to some degree by reference to cases from other provinces and to the legislation itself.
The Petroleum and Natural Gas Act contains several provisions to ensure compliance with its general scheme. Geological, geophysical or drilling work must be carried out in accordance with the Act and regulations, on pain of criminal conviction or cancellation of permits or leases; sections 126, 142, 143 and 144. These provisions are not directly accessible by the surface owner, but the general procedures of judicial review are available to challenge any failure of the operator to comply with the terms of the Act, including its right of entry requirements.

In Alberta, there have been several cases of claims against operators in various circumstances. One situation has been where the operator has caused damage to the farmer's land outside the wellsite to which he has a right of entry. In *Girletz v. Bailey Selburn Oil and Gas Ltd.* [76] an operator was held liable in negligence for allowing crude oil to escape and be consumed by cattle which died as a result. A claim of breach of the right of entry order and the surface lease and a claim in nuisance were also made, but failed on the facts. Another farmer was successful in *Taylor v. Pacific Petroleums Ltd.*, [77] recovering for the escape of sheep, destruction of trees, damage to the land surface and pollution of a pond caused by an operator and his agents. The judgment concentrated on the evidence concerning the many occurrences in dispute rather than on the causes of action involved, but it did find that acts of trespass, acts of negligence, breaches of the terms of the surface lease and breaches of the terms of the right of entry order had all been
committed. Damages and a declaration of the surface owner's rights were awarded.

There is an unresolved conflict, or overlap, in Alberta of the ordinary jurisdiction of the courts, exemplified by the above cases, with the jurisdiction of the Surface Rights Board over damage on or to the land of the landowner other than the land granted to the operator. The Board has statutory authority to award compensation for such damage and to hear and determine disputes between operators and surface owners involving less than $5000. [78] Obviously the Board cannot hear trespass actions or award damages or injunctions, and there would be a problem under section 96 of the Constitution Act if it was given such powers. That the courts' jurisdiction is not curtailed in these cases is indicated by section 41 of the Surface Rights Act, deeming any use of land in exercise of a right of entry, but in contravention of the Act, to be a trespass; and by cases such as Girletz [79] and Taylor [80] and also Twin Oils Ltd. v. Schmidt, [81] in which the courts' jurisdiction was not questioned. On the other hand, there is an early decision of the Appellate Division, Ratz v. Strawberry Creek Coal Co. [82] in 1952, where the Court refused to hear an action for trespass in a situation which the statute intended to cover by giving full power to the Board to award compensation for what would otherwise give rise to a multiplicity of actions for trespass and nuisance.

The other main situation is interference and damage by the operator within the area to which he has been granted a right of entry order. The legislation clearly provides compensation as the
only remedy for the exercise of a right of entry. The right of
entry order precludes the operator from being liable in trespass,
[83] or presumably any other remedy for disturbing possession of
the area concerned. The one question is the remedy where the
operator exceeds the authority of his right of entry, by using the
land in an unauthorized manner, or for an unauthorized purpose, or
by failing to comply with a term of the order. In Alberta these
would be deemed to be trespasses, under the section noted above.
The same result must appear in British Columbia, the general
principle being that abuse or excess of a power of entry will
amount to a trespass. Taylor v. Pacific Petroleums Ltd. [84] also
indicates that a breach of a term of a right of entry order is
actionable, but without describing the exact nature of the cause
of action.

The last situation where surface owners have obtained
remedies against oil and gas operators is geophysical work, which
in Alberta is beyond the purview of the Board. [85] In Wasson v.
California Standard Co. [86] the surface owner won exemplary
damages as well as special damages against an operator who
deliberately trespassed and cut timber for a seismic line. In
Phillips v. California Standard Co. [87] and Reilly v. Pan
American Petroleum Corporation [88] there was no physical entry,
but seismic explosions ruined the plaintiffs' water supply wells.
Because the injuries were consequential and not direct, the
vibrations were held to be nuisances and not trespasses. Special
damages were recovered in both cases.
The main remedy open to a mineral operator, apart from self help, is by enforcing a right of entry order in the same manner as a writ of possession issued by a court, pursuant to section 26(1). There are no cases on the subject.

6. DISTINCTIVE FEATURES

As with the common law and the Mineral Act, we may identify several distinctive features of the oil and gas surface rights system by way of a summary.

The first feature is the flexibility of the system. The legislation prescribes a framework within which decisions on surface use are to be made; it does not embody the decisions themselves. For example, little land is closed off by statutory protection of specified land uses; rather, wide discretionary powers regulate the allocation of mineral rights, well authorizations and surface rights.

Second, the surface rights that are granted are very adaptable. The surface rights that the operator is to receive may vary widely from case to case, depending on the circumstances. This is the result of the flexibility of the system, allowing surface rights to be determined by negotiation or by exercise of the Board's discretion. Thus the amount of land required is tailored to minimize the area affected. The terms and conditions of the entry are adapted to the operations contemplated and to the special concerns of the surface owner. The rights that are granted for a pipeline, for instance, are very different from the rights of exclusive control that we have seen in the case of
wellsites. There is a wide range of rights from which specific surface rights may be adapted. Virtually any land can be subject of a right of entry order, without reference to mineral ownership. Virtually any exploration or production operations, along with access and transport rights, can be permitted. At the other extreme there is the possibility that no rights at all will be granted.

The next feature of the oil and gas surface rights system is its statutory nature. The legislation is self-contained and stands free of the working rights conferred or implied by the common law in the instrument of severance. The Act describes the right of entry as "compulsory". [89] The Alberta statute is even more explicit about prevailing over rights of entry contained in grants, conveyances or leases. [90] The legislation clearly operates in the usual manner of statutory regulation. First it prohibits an activity, and then makes it legal again once a certain consent or permit is obtained. Even though the legislation encourages the negotiation of private entry agreements, the negotiations are necessary because of the statute's insistence on them. Statutory though this allocation of surface rights may be, the rights, once obtained, seem to be capable of enforcement in the same way as real property rights.

The fourth distinctive feature, in contrast with the Mineral Act, is the comprehensiveness of the legislation. A special tribunal is established, guidance is given on the exercise of discretion, and detailed procedures are described. The system has evolved to meet special needs, and its elements are sufficiently detailed for it to do so in a clear and fair manner.
FOOTNOTES - CHAPTER V

1. RSBC 1979 c 323
2. SA 1983 c S-27.1
4. Geothermal Resources Act, SBC 1982 c 14; Petroleum Underground Storage Act RSBC 1979 c 325; Pipeline Act RSBC 1979 c 328
5. In addition to the surface rights provisions, there are other parts of the Act that are apparently intended to cover private oil and gas as well as that held from the Crown; particularly Part 12 on conservation.
6. RSBC 1979 c 192, RSBC 1960 c 187
7. RSBC 1979 c 309
8. RSBC 1979 c 101
9. The words of some of the surface rights sections of the Act, eg s 9, are at first sight wide enough to include all lands, but that would require an untenable presumption of a confiscatory intent, and sections such as ss 126 and 128 also show that the Act does not mean to go so far.
10. SBC 1891 c 15 s 11, reserving "all minerals precious or base (other than coal)" which included petroleum: Crow's Nest Pass Coal Co. v. The Queen (1961) SCR 750. Petroleum was first expressly reserved in SBC 1899 c 38 s 14. Other regulations governed the Peace River Block while it was in the hands of the Dominion.
11. BC Reg 57/66
12. BC Regs 212/65 and 10/82
13. Oil and Gas Conservation Act, SA c 0-5, s 11
14. Ibid.
16. Application by Consolidated Oil and Gas (Canada) Ltd. for a
Licence to Drill in the Ghost Pine Area (1977) ERCB decision 77-18.

17. Ibid; and see Canada Energy Law Service, supra note 15, pp 30-3030

18. Application by Golden Eagle Oil and Gas Ltd. to Reinstate a Well Licence at Flat Field (1979) ERCB decision 79-6

19. Supra note 2 s 2(2)

20. S 16(1)

21. Ss 18, 19

22. Lewis and Thompson, Canadian Oil and Gas, vol 2 form A 12. This form is very similar to that adopted by the Canadian Association of Petroleum Landmen.

23. BC Reg 497/74

24. In contrast, geophysical exploration in Alberta is not covered by the Surface Rights Act. Because of the road allowances of the universal prairie survey system, the owner's consent is rarely needed.

25. Ss 11 and 12.


28. S 24

29. Supra note 2 s 26


31. The mediator's power is clearly so expressed in s 19(1); the power of the Board can only be inferred from the nature of the applications it may hear (s 16(1)), its power to review the mediator's decision (s 20) and other incidental sections, eg ss 26 and 26

32. S 16(1), referred to in s 19(1)

33. Supra note 4

34. Supra note 2, s 12(1)
35. Ibid. s 12(3)

36. Ibid. s 13

37. S 16. The Alberta Act provides for these matters in individual detail; supra note 2 s 12(3), (4)


39. "May" is to be construed as permissive and empowering, rather than imperative; Interpretation Act, RSBC 1979 c 206 s 29.


41. BC Reg 628/76

42. BC Reg 57/65

43. Supra note 2, s 25

44. Supra note 3

45. Ss 9(2)(b), 21(1)

46. (1958) 13 DLR (2d) 161

47. Ibid at 163

48. [1974] 1 WWR 761

49. [1975] 6 WWR 350

50. Supra note 2, previously s 20

51. (1968) 74 WWR 647

52. Ibid. at 650


54. [1981] 5 WWR 617 at 619


56. (1969) 70 WWR 339 at 341

57. Ibid. at 357
58. [1970] SCR 861 at 863
59. (1982) 41 BCLR 299
60. Ibid at 300
61. Supra note 51
62. Supra note 46
63. Supra note 59 at 302
64. Murphy Oil Co., supra note 55
65. Richards and Price, supra note 3, p 18
66. Lamb v. Canadian Reserve Oil & Gas Ltd. [1977] 1 SCR 517; Richards and Price, supra note 3 p 30
67. Supra note 2, s 25(2)
68. Ibid s 25(3)
69. Ibid s 19. In B.C. there is s 21(1)(a).
70. Supra note 46 at 164
71. In Dau, supra note 55, Martland J. says that an order of the Board does not give outright title to the surface.
72. Supra note 59
73. Supra note 46
74. Supra note 46
75. Supra note 59
76. (1975) 65 DLR (3d) 533
77. (1977) 6 AR 200
78. Ss 25(5), 33
79. Supra note 76
80. Supra note 77
81. Supra note 51 at 660
82. [1952] 3 DLR 820. Also see Re Socony-Vacuum Oil of Canada Ltd. and Atz (1955) 15 WWR 411 (Sask.)
83. Per Coady JA in Re Pacific Petroleums, supra note 46 at 165
84. Supra note 77 at 219

85. See "Geophysical Damage" (1966) 5 Alta L Rev 29


87. (1960) 31 WWR 331 (Alta.)

88. (1964) Lewis and Thompson, Canadian Oil and Gas, Case No. 213

89. s 21(1)(a)

90. Supra note 2, s 2(2)
CHAPTER VI

COMPARISONS

1. MINERAL ACT AND OIL AND GAS SURFACE RIGHTS

A comparison of the systems described in Chapters IV and V can clarify our understanding of the Mineral Act, and can give us some idea of the factors involved in taking the oil and gas system as a model for the reform of the Mineral Act surface rights provisions.

The greatest difference is in procedure. We have seen that the Mineral Act is singularly inflexible in its procedures for ascertaining the rights of surface owners and mining operators. The rules are all spelled out in legislation in the Mineral Act, whereas the Petroleum and Natural Gas Act merely provides a framework for the making of decisions, vesting the appropriate authorities with discretionary powers to handle individual cases. In the Mineral Act there is no equivalent of the Board of Mediation and Arbitration, or of the encouragement in the petroleum legislation of private negotiations between operators and surface owners.

This difference leads to a second one, the absoluteness of surface rights under the Mineral Act compared to the adaptability of those under the Petroleum and Natural Gas Act. There is a potential under either Act for a very wide range of surface rights to be obtained, quite wide enough for the needs of the respective industries; but in the case of the Mineral Act all of those rights
are guaranteed as long as the land does not fall within one of the classes in which all mining activity is prohibited, while in the case of the oil and gas legislation the Board will only grant such of those surface rights as suit the occasion.

Another difference that we have identified is the brevity and sketchiness of the surface rights sections of the Mineral Act in comparison with the more comprehensive provisions of Part Three of the Petroleum and Natural Gas Act. This difference is partly attributable to the number of decades that the Mineral Act provisions have stood without substantial change, while the oil and gas legislation is more recent and more frequently amended. For all that, it cannot be said that the Mineral Act system has proved to be unworkable. The compensation rules under each Act are an example. The simple requirements of section 9 of the Mineral Act have seemed to be adequate enough in comparison with the procedure under the Petroleum and Natural Gas Act. But the former may not provide the surface owner with as much compensation as the latter, which itemizes different heads of compensation and offers the possibility of overlapping awards.

In terms of the legal nature of the surface rights under each Act, there are several interesting points of similarity. Each Act contemplates that possession of the surface of the land may be taken from the surface owner, although the Acts express this in different ways. The rights granted under each Act are such that in certain circumstances the mineral operator or oil and gas operator will be found to be in possession even without any express provision to that effect.
Another similarity displayed by the two Acts is that each operates in a self-contained manner to allocate surface rights without reference to working rights contained in an instrument of severance or implied by the common law. The oil and gas legislation is the clearer of the two in this regard, prohibiting any person from entering land for oil and gas operations unless he obtains either the surface owner's consent or a right of entry order. Further, the surface rights under each Act may be described as ancillary to mineral rights or oil and gas rights; but this is much more strongly shown in the Mineral Act where surface rights under section 10 are part and parcel of a mineral claim, while surface rights under the Petroleum and Natural Gas Act are acquired separately from oil and gas rights. This, and the use of the legislation for pipeline and other rights of way, has led to discussion in Alberta about the right of entry being a separate interest in land.

Since there is some degree of affinity between the two Acts in subject matter and in the substance of the rules they lay down, there seems to be an opportunity to analyze one Act in the light of the other. The only judicial use of this opportunity has been the adoption of Re Pacific Petroleums Ltd., [1] in construing the Mineral Act's compensation provisions in Gardi v. Bow River Resources Ltd., [1] but one may expect to see it used again in the future.

A more significant use of comparisons is by amending the Mineral Act to introduce a system similar to that under the Petroleum and Natural Gas Act. This is tempting in the light of
the deficiencies that can be found in the Mineral Act, and in the light of the smooth and equitable operation of the oil and gas surface rights system. This amendment would be desirable to the extent that the two systems are similar; but it would be undesirable if no heed is taken of the contrasts that exist in the setting and purposes of the two Acts. The land use demands of the two industries are different. In comparison with oil and gas operations, mineral exploration and development varies greatly in its impact on the surface and the surface owner. Early in the process, for example, geochemical work may only require the briefest entry on land, making a minimal impact. At the other extreme, a large pilot plant or a developed mine has an enormous impact. If a more complicated surface rights system is introduced, it may not prove to be as reasonable for minor entries as for major occupations of land. In contrast, it is quite practicable for all entries to drill oil and gas wells to be treated alike by the legislation. Another factor to be considered is the possibility of controlling the impact of oil and gas activity through the processes of granting drilling rights and well authorizations; there are no such controls under the Mineral Act.

2. MINERAL ACT AND COMMON LAW SURFACE RIGHTS
   (a) Differences

   Similar subject matter is virtually the only thing that the Mineral Act and the common law surface rights systems have in common. A comparison must inevitably be an analysis of differences.
To begin with, the statutory system is imposed on all parties ab extra, while the common law working rights are (at least notionally) the embodiment of agreement between the parties. If a person acquires land directly from the Crown, then the working rights are reserved to the Crown along with the minerals themselves as part of the terms of the agreement. If he acquires the land as a successor in title to the person who was a party to the instrument of severance, then the reserved working rights are a title encumbrance which are equally part of the agreement to take the property. It may be said that an owner of land subject to mineral working rights under common law principles suffers the exercise of those rights only by having agreed to them. Moreover, the common law envisages the parties agreeing to their own set of rules, while the statute imposes a uniform set of rules on everyone.

Apart from the difference in the kinds of law involved, there is a major difference in the attitude of the two systems to the mineral property and the surface property. The common law separates them meticulously. The Mineral Act is not so careful to separate them, for example in giving the mineral operator some possessory rights in the surface itself, and in requiring compensation to be paid to the owner and occupier alike.

Another difference of attitude lies in the care which the common law takes to preserve the two properties in existence as far as possible. The common law facilitates the enjoyment of each property while not letting that enjoyment go to the extent of destroying the substance and reality of the other one. Without
implied working rights, the mineral owner could not enjoy the mineral property and would in effect lose it if working rights were not expressly reserved. Without a right of support, the surface owner could have his property so altered as to be worthless. The requirement that the implied rights be no more than those reasonably needed moderates the conflicting demands of the two parties. On the other hand, the Mineral Act facilitates the enjoyment of the mineral property with powers that allow total destruction of the surface if necessary. The only general means provided by the Mineral Act to safeguard the surface from destruction is by a total ban on all mineral activity, imposed by the Act because of the land use subsisting or by a mineral reserve.

It may be said that the effect of the common law system is to adjust or balance the needs of the two properties against each other, while the intention of the Mineral Act is to balance the needs of mineral ownership with compensation of the surface owner for loss or damage. This difference lends support to the proposition that the mineral operator is given a dominant position under the Mineral Act. His activities are unrestricted by the rights of another person in the surface, as long as he is prepared to pay compensation.

It is possible to argue that the payment of compensation puts the surface owner on an equal footing with the mineral operator. However, that argument ignores the fact that the surface owner has no say in the decisions about the use of the surface for mineral purposes. It also assumes that the compensation paid to the
surface owner equals the price at which the surface owner would be willing to suffer the losses and the diminution of his rights that are imposed on him. It has been persuasively argued that compensation fixed by judicial process does not reach such a level, and results in a less efficient method of transferring land resources than the market process. [3]

(b) The Land Act Reservation

In order to make the comparison of the Mineral Act and common law a more specific one, we can compare the Mineral Act's surface rights with the surface rights under one particular instrument of severance, section 47 of the Land Act.[4] We may do so without asking (for the time being) whether the differences between the two have any significance in practice, or whether one set of surface rights or the other applies in any given situation. Section 47 controls the reservation of minerals and surface rights to the Crown in current Crown grants of land in terms that have been used for many years:

(1) A disposition of Crown land under this or another Act
(a) is subject to the following exceptions and reservations of rights and privileges:

(ii) a right in the Crown, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any minerals, precious or base, including coal, petroleum and any gas or gases, which may be found in, on or under the land, and to use and enjoy any and every part of the land, and of its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying
reasonable compensation for the raising, getting and use;

(b) conveys no right, title or interest to minerals as defined in the Mineral Act, coal, petroleum as defined in the Petroleum and Natural Gas Act, or to gas, that may be found in or under the land.

The powers granted by the Mineral Act are somewhat different in language and scope. While the above reservation allows the operator to use and enjoy the land, sections 6 and 10 of the Mineral Act allow him to enter, prospect, explore for, locate, mine and produce minerals, and to use and possess the surface. The Mineral Act encompasses all that is allowed under the reservation, and more, in exploration and in possession of the surface.

In both the reservation and the Mineral Act, the powers are restricted to certain express purposes and then connected or related purposes. In the reservation, the express purpose is the raising and getting of minerals, which is an older way of saying producing. Other purposes must be connected with raising and getting. This presents problems for reconnaissance or exploration activity, especially if no "minerals" are actually found. It presents even more problems for subsequent operations such as milling and concentrating. The Mineral Act, in contrast, expressly embraces the purposes of exploring for, developing and producing minerals, including the treatment of ore and concentrates, and it authorizes use and possession for all operations related to the exploration, development and production of minerals and the business of mining. It authorizes the mineral
operator to carry out a much wider range of purposes and operations than does the reservation in the Crown grant.

Furthermore, there is nothing in the Crown grant to contradict the presumptions that the rights thereby granted are to be exercised in a reasonable manner, and that they are not to be so exercised as to cause subsidence of the surface. The absence of any right to let down or destroy the surface is a significant limitation on the rights granted to the mineral operator by the reservation. The same limitation is of course not expressed in the Mineral Act.

Thus far, it is the mineral operator who reaps the benefits from having rights under the Mineral Act rather than the reservation, but there are some circumstances in which they fall to the surface owner. If he has buildings on his land, or uses it as a curtilage, an orchard, for cultivation, or for mining purposes other than placer mining, the land will be absolutely protected under section 6(2). The land may also have the protection of a mineral reserve under section 8 or a use restriction under section 11. Substantial though these benefits are to the surface owner, they do not perhaps outweigh the extra width of powers which the Act grants to the mineral operator. But the comparison is an inexact one. It cannot properly be said whether the Mineral Act or the section 47 reservation grants wider working rights.

The right of compensation is also cast in very different terms. In the reservation, the mineral operator must pay reasonable compensation for the raising, getting and use; in the
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Mineral Act, he must compensate the owner or occupier or both for loss or damage caused by his entry. Even if the word "reasonable" is thought to be superfluous, there may perhaps be differences in the awards that the different provisions would authorize.

The comparison of the Mineral Act and the common law systems may be summarized by concluding that the two systems treat the same subject matter in very different ways. There are many divergences and inconsistencies in philosophy, in language, and in the operations permitted. One exception may be noted: the remedies available for breaches of rights are broadly similar, although the Mineral Act adds administrative and criminal sanctions to the common law and equitable rights of action enjoyed by the surface owner by severance under the common law.

FOOTNOTES - CHAPTR VI

1. (1958) 13 DLR (2d) 161
2. [1974] 1 WWR
4. RSBC 1979 c 214
CHAPTER VII

THE ROLE OF THE COMMON LAW

In this chapter the interrelation of common law and statute will be discussed. The question is whether surface rights issues are to be decided under the Mineral Act alone, in the manner described in Chapter IV, or whether the common law principles described in Chapter III may be relied upon by the mineral operator or by the surface owner. The question is not immediately resolved by the Mineral Act.

A number of serious consequences could follow from a liberal application of common law principles in an area at first sight dealt with by the Mineral Act alone. The mineral operator could argue for unimpeded rights of access, or wayleave, to his claims, and could even circumvent statutory prohibitions on the exercise of surface rights in protected areas by resorting to his common law rights. The surface owner could take proceedings to prevent destruction of the surface rights in protected areas by resorting to his common law rights. The surface owner could take proceedings to prevent destruction of the surface on the basis of his right of support, or he could argue that statutory working rights were to be confined by a test of reasonableness. In an oil
and gas case, an operator could argue that the common law rights of winning and working are not extinguished, but may be relied upon to construe his right of entry, subject to the terms of any right of entry order. This is the view that is advanced in Lewis and Thompson, Canadian Oil and Gas. [1]

The problem of the relationship of a statute and common law principles not entirely inconsistent with it is one that we encounter frequently. In British Columbia, another example of it is the question of riparian rights under the Water Act. [2]

1. THE QUESTION IN ISSUE

It will be useful if at the outset we separate the particular question of the common law and statute in surface rights from other similar questions with which it is intermingled.

(a) Ownership of Minerals

The rights of a mineral owner to enter upon the surface and work a substance may be distinguished from his rights of ownership over that substance. This distinction applies whether those ownership rights extend to ownership of the substance in situ, or whether the miner's ownership only begins when he reduces it to a chattel in possession, as in the case of a profit a prendre. Keeping this distinction in mind assists us understand the roles played by the various statutes. The ownership question must always come before the surface rights questions.

For one thing, the surface and the particular minerals concerned may turn out not to be separately owned; in which case, cadit quaestio, there are no surface rights questions. For
another, if the minerals are not owned by the Crown, then nothing in the Mineral Act can have any bearing on them. This is plain from section 6(1), which permits miners to enter, locate claims for and mine only those minerals (as defined in section 1) that are reserved to the Crown. Indeed, any other interpretation of the Mineral Act would require an unacceptable presumption of an intention to expropriate private minerals. With no statute applying, the surface rights to work private minerals must be determined by the instrument of severance in accordance with the common law principles. (We noted in Chapter V that the case of privately-owned oil and gas is a lot less clear.) Although Crown ownership of minerals in British Columbia is predominant, the proportion in private ownership cannot be insignificant, especially as it is often located in key places. *British Columbia Building Corporation v. Anderson* [2A] is an example of the significance that even "obsolete" private mineral rights can have.

Ownership is resolved by referring to the instrument which severed the two forms of property, as was seen in Chapter I. It was also seen there that the instrument concerned is usually a reservation of minerals to the Crown in a Crown grant. The meaning of the reservation or other instrument is considered in the light of well-established rules of construction in order to ascertain what substances were vested in each owner. Ownership or title is determined by the law of real property, and depends primarily upon non-statutory law.
It may not be immediately apparent that the role played by the statutes is a secondary one. In particular, section 47 of the Land Act [3] is in a prominent position, reserving "any minerals, precious or base, including coal, petroleum and gas or gases" and also "minerals as defined in the Mineral Act, coal, petroleum as defined in the Petroleum and Natural Gas Act or ... gas".[4] But one must look more widely than these words, and construe the particular reservation in question. The modern Land Act only regulates modern grants, without affecting old ones retrospectively.[5] Moreover, the express words of the reservation may in certain cases differ from the prescription of the Land Act. [6] Further, it is obvious that the Land Act does not apply to minerals which under older legislation have fallen into private hands. Finally, the words used in the Act ("any minerals, precious or base") are a remarkably terse way of describing the substances to be reserved to the Crown. All statutes contain words that must be explained by reference to the common law, but here we see an unusually complete dependence on the judicial interpretation of these words.

The Mineral Act is only slightly relevant to ascertaining ownership in the sense of this discussion. (The Act of course declares the rules for taking and keeping ownership of minerals under mineral claims and mining leases, but these titles are derivative and are predicated on Crown ownership at the outset.) The Mineral Act's definition of "mineral" does not have any general effect in determining the ownership of minerals,[7] even in its incorporation by reference in section 47 of the Land Act.
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It should also be noted that the Mineral Act does not cover all Crown minerals. There is other legislation, such as the Mining (Placer) Act, to cover other minerals. The ambit of each Act must be distinguished, although the question is less one of ownership and more one of statutory jurisdiction over a number of Crown-owned substances. Presumably there is also a residue of substances that fall within the words of the reservation of "any minerals, precious or base", but outside any particular Act. China clay or marble are possible examples.[8] This class of materials comes under sections 15 and 25 of the Land Act, but as those sections are silent on surface rights, the class must be regulated by common law surface rights principles.

In summary, it may be said that, even after a careful study of the statutes, the question of ownership of minerals is primarily determined by the law of real property. The tailings cases, Seymour Management Ltd. v. Kendrick [9] and Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd. [10] are good recent examples of this dependence of most mineral title questions upon common law principles rather than legislation.

(b) Remedies

The other general distinction which may be drawn is between the rights to use the surface and the means of enforcing those rights. It was observed in Chapters IV and V that once surface rights are granted under the statutory process of the Mineral Act or the oil and gas legislation, then those rights are enforceable in the same fashion as real property rights. The familiar common law actions of trespass, nuisance and breach of covenant are
available, and the remedies include damages, injunctions and declarations. The litigation is handled in the ordinary courts.

It was seen that the legislation creates some statutory remedies, such as cancellation of a mineral claim. It also confers limited jurisdiction on special tribunals such as the Board of Mediation and Arbitration. These statutory means of enforcement, however, have not eliminated the common law means. The common law remedies apply to the statutory surface rights as well as the common law surface rights. The subject of remedies therefore seems to need to be kept separate from the subject of creation and allocation of surface rights.

Taking a general view, we may isolate three different steps in a sequence, with different common law – statute relations. The first step is ownership. Assuming that the ownership of minerals and surface are indeed separate, we must refer to the instrument of severance to confirm the entitlement of the different parties to the different substances. This inquiry is mainly based on common law principles. If the minerals are Crown owned, the next step is to determine which Act, if any, regulates them. This is entirely a statutory matter. The second step, in the light of the mineral title, is to ascertain the mineral owner's rights to use the surface to work the minerals. The third step is the enforcement of these rights, and the surface owner's remedies to prevent the mineral owner from exceeding them. At this stage common law is always relevant, and statute is as well in many
situations. But it is to the second step that we must now return.

2. **THE PROBLEM AS A MATTER OF INTERRELATION OF STATUTE AND COMMON LAW**

The attitude of the courts and of common lawyers towards statutes is a curious one. J.F. Burrows has said:

> For the Commonwealth lawyer the common law is the very quintessence of the legal system: it is a body of law built up by the judges from first principles into a set of remarkably detailed rules, certain enough to provide guidance, yet flexible enough to do justice in new cases which arise. It is perhaps not surprising that for centuries statute law, the creation of Parliament received a much cooler reception from lawyers and judges. It was treated as a different kind of law and the judicial tradition was to construe statutes strictly according to their letter, and at times even to give them a narrow interpretation so as to cause as little disruption as possible to the common law. To use the words of Justice Harlan Stone, statute was for a long time treated as "an alien intruder in the house of the common Law". [11] [12]

Even while there is no question of the superior authority of a statute, the courts have been reluctant to conceive of statutes as entering the legal system as a single organic whole. There are some extraordinary examples of the tenacity with which the courts will sometimes hold onto the common law in the teeth of plain statutory words. The reluctance demonstrated in these instances was criticized by Roscoe Pound in 1908. [13] He wrote of four ways that a court may deal with a legislative innovation:

1. They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason,
and hold it, as a later and more direct
expression of the general will, of superior
authority to judge-made rules on the same
general subject; and so reason from it by
analogy in preference to them. (2) They might
receive it fully into the body of the law to
be reasoned from by analogy the same as any
other rule of law, regarding it, however, as
of equal or co-ordinate authority in this
respect with judge-made rules upon the same
general subject. (3) They might refuse to
receive it fully into the body of the law and
give effect to it directly only; refusing to
reason from it by analogy but giving it,
nevertheless, a liberal interpretation to
cover the whole field it was intended to
cover. (4) They might not only refuse to
reason from it by analogy and apply it
directly only, but also give to it a strict
and narrow interpretation, holding it down
rigidly to those cases which it covers
expressly. [14]

The orthodox common law attitude, especially at the time that
Pound wrote, has been the fourth one. The court could say that
the statute does not use the express words necessary to abolish
the common law, or that it merely provides an alternative, or that
it is merely declaratory, or it could simply give the legislation
a restricted interpretation. The third attitude is the one to
which the law is tending. Resolution of the Mineral Act problem
to the prejudice of the common law would require it to go no
further, but striking examples of the second and first attitudes
will deserve mention in due course.

(a) Various Forms of the Problem

The problem of ascertaining the respective rules of common
law and statute occurs in many parts of the law. The increased
use of legislation to establish complex relations in areas not
previously subject to government intervention makes the problem
inevitable. There are many different degrees of encroachment by statute on the common law, as a review along the lines of Burrows's analysis [15] reveals. Three main divisions may be distinguished.

The first is where the Act is a code. The Act is complete in itself, and stands in the place of the rules of the common law and plainly extinguishes those rules. The proper approach to a code is to read its words in their natural meaning, without roaming over or traversing the old law on the matter. [16] Sometimes an Act expressly abrogates the common law and is explicitly a code; the Alberta Surface Rights Act [17] and the Copyright Act [18] are examples. An Act regulating an area previously covered by the common law may still be a code if that is necessarily its intention. The Sale of Goods Act, [19] putting common law rules into statutory form is one example; the mining sections of the English Railway Clauses Consolidation Act 1845, [20] making different provisions from the common law of support, are another. Thus the Mineral Act could be a code, ousting all the common law with a new set of provisions, even though it does not do so expressly.

The second situation is at the other extreme, where the Act depends upon its common law background, and is unworkable and meaningless without it. Some Acts (such as the Limitation Act [21]) expressly protect common law rights. Other Acts obviously presume the continued existence of the common law in the area, subject to the modifications or additions they make. The Land Titles Act [22] and the Libel and Slander Act [23] are
examples. The Mineral Act cannot fall into this category, because it establishes a self-contained system for the allocation of surface rights, functioning independently of common law surface rights. The Act was found in Chapters IV and VI to create novel rights rather than modifying the pre-existing common law rights.

The third category of statutes is found between the first two, and is the most difficult. These Acts do not make their relationship with the common law clear by express terms or necessary implication. In some cases, an Act has been held not to extinguish common law right at all, but to add a new system or set of remedies in tandem with or as an alternative to the common law. [24] Thus it is not enough to rely on the statutory rules being totally different from the common law ones. More significant than differences between the two systems are conflicts between them; any common law principle conflicting or incompatible with the statute cannot stand. No one will suggest for a moment that any common law rule is immune from being so overridden. The crux of the matter is the fate of common law rules which are not directly contradicted by the Act but which apply to the same general topic.

The problem may be seen as a question of how tightly the court will draw the boundary around the area of the common law that is incompatible with the Act; or as a question of how far the court will go toward reducing the common law rules into separate particles in order to save some of them from extinction. The court may hold that all the rules on the topic are abrogated by the Act, or merged in it as has been said of the Patent Act. [25]
In that case the Act is in reality a code. Or the court may refuse to go so far to the prejudice of the common law and instead continue to give effect to common law principles on which the Act remains silent. [26]

The Mineral Act possibly falls into this intermediate category of statutes. The common law rules on surface rights must be analyzed to ascertain whether or not they are compatible with the Mineral Act.

(b) Presumptions of Statutory Interpretation

Two presumptions of statutory interpretation may come to mind at this point, although they offer little real assistance. In the absence of any clear indication to the contrary, the Legislature can be presumed not to have altered the common law further than necessary to achieve its objective;[27] and the Legislature does not intend to limit vested rights further than clearly appears from the enactment. [28]

Pound [29] made a sustained attack upon the presumption against interference with the common law, and upon the related aspects of the presumption against interference with vested rights. The presumption protecting the common law assumes that legislation is something to be deprecated. Pound demonstrates that it cannot be justified as being necessary and inherent in a legal system: that it is not ancient and fundamental common law; that its origins are in matters now archaic and obsolete, the rule being preserved because of judicial jealousy of the reform.
movement; and that it is out of place in a modern world where legislation is gradually developed and carefully deliberated.

These objections on their own might not dislodge either presumption from its well-entrenched position in common law thinking, but there are other objections arising directly from the Mineral Act. Above all, there is no ambiguity in the Mineral Act. While the Act may be faulted for using excessively wide and general expressions, and for failing to deal specifically with many contingencies, it does not suffer from obscurities or double meanings in the present matter. This is apparent from the discussion in Chapter IV. A presumption cannot overrule a plainly expressed legislative intention, for it is no more than a guide to the discovery of that intention.

Further, the presumptions have less force in some cases than in others. If a statute encroaches upon the jurisdiction of the courts, the rules of natural justice or the liberty of the individual, then the presumption against alteration of the common law is very strong and the courts will go to great lengths to resist the alteration.[30] A similar attitude is taken to outright confiscation of private rights or private property. [31] However, encroachment of the Mineral Act on common law surface rights need not for the most part [32] arouse such antipathy. It was seen in Chapter VI that the allocation of surface rights which the Act makes is by no means one-sided, in comparison with the common law. Both benefits and burdens accrue to mineral owner and surface owner alike.
As a result it seems to be preferable to dispense with the two presumptions and to proceed to consider the effect of the Act without depending upon them.

The foregoing discussion has served to clarify the issue in a negative sense, and to indicate the proper means of proceeding. The fact that the Mineral Act neither overrides nor preserves the common law in express terms does not prevent it from having either effect. The possibility that the common law rules are preserved because the Mineral Act depends on those rules for its operation may be eliminated. And the presumptions against interference with the common law or with vested rights may be dispensed with. Definite findings on the issue can only be obtained by ascertaining which common law principles are incompatible with the Mineral Act.

3. **INDICATIONS OF COMMON LAW BEING INCOMPATIBLE**

We may first review the evidence that demonstrates incompatibility of common law rules with the Act, evidence that indicates the abolition of those rules.

It was seen in Chapter VI that the Mineral Act surface rights under sections 6 and 10 are wider than the generally implied surface rights or than the reservation prescribed in section 47 of the Land Act. This greater width makes it difficult to establish that the common law surface rights system is incompatible with the
Act, but there is some firm evidence to be had, both from the statute itself and from case law.

The first point arises from that same width of the statutory surface rights. It will be recalled that section 6 empowers a free miner to "enter ... prospect and explore for, locate, mine and produce minerals" and that section 10 empowers the holder of a claim to use and possess the surface of his claim "for the purpose of exploring for, developing and producing minerals, including the treatment of ore and concentrates, and all operations related to the exploration, development and production of minerals and the business of mining". In their natural and ordinary sense, these words go beyond the restraints imposed by the common law. A mining operation which the common law would disallow as an unreasonable use of surface rights, or as a breach of the duty of support, could often be justified as an operation authorized by sections 6 and 10.

It can be strongly argued that the ordinary grammatical meaning of these words is clear and unambiguous, and that this meaning is in harmony with the entire context of the Act, the intention of the legislature, the object of the Act and the scheme of the Act. Therefore no court should encroach upon the legislative function by reading in some limitation which it may think was probably intended but which cannot be inferred from the words of the Act.

The second point arises from subsection 6(2), which provides that the right of entry under subsection (1) does not extend to land occupied by a building, the curtilage of a dwelling house,
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orchard land, land under cultivation or land lawfully occupied for mining purposes other than placer mining. Section 6(2) only restricts the working rights specified in the statute.[35] It would not abrogate a common law right to enter if such a right in some way or the other continued to exist. (In contrast, section 7, which provides that no person shall mine in a park, must restrict all working rights, whether statutory or common law.) If a mineral operator could argue that section 6(2) curtails his statutory rights but not his common law rights, then the legislation would be thwarted. The necessary implication is that the common law rights are logically inconsistent with the intention and scheme of the legislation. Section 6(2) may be the only section which so clearly demands the demise of the common law rights, but it is a key provision in the very briefly stated surface rights scheme of the Mineral Act.

Thirdly, there is judicial authority for the extinction of common law principles in Re Faraday Uranium Mines Ltd., [36] a 1962 Ontario Court of Appeal case. McGillivray J.A. said:

As the effect of the statute is to terminate the common law right whereby the owner can secure protection of his property and to confer in its place a right to recover in damages for the injury done to the property, it is but just and proper to assume that full compensation is intended. [37]

We can also point to cases where the legislation has been construed to allow a miner to destroy the surface in a way that would plainly be inconsistent with the survival of the right of support. In Nelson and Fort Sheppard Railway v. Jerry [38] Drake J. considered that the Mineral Act, authorizing a free miner to
enter, locate, prospect and mine, implied "digging and destroying the surface". And in *Day v. Klondyke Mines Railway* [39] Craig J., considering similar legislation, [40] said:

...and I am of the opinion that the Crown intends by its grant to give to the miner such use of the surface as is needed in carrying on those various operations in the most economical and miner-like manner, and if necessary that the whole surface of the soil should be disturbed and put through water, then the miner has the right to so use the surface. [41]

The same assumptions are made in *Cofrin v. Bicchieri* [42] and other cases; but some caution is called for in the use of cases where the fate of the common law rights is not expressly under consideration.

Fourthly, we may make reference to the full and complete provision of compensation by section 9, and argue from it that the Act should be construed as intending to take from the surface owner all the protection given to him by the common law rules, and by the right of support in particular.

4. **INDICATIONS OF COMMON LAW SURVIVING**

In spite of this lack of intention in the Mineral Act to be compatible with the common law principles, we must properly consider any indications that those principles are not inconsistent with the Act and continue to survive. There are some such indications in the case of the right of support.

One submission that may be advanced is on the basis of section 10 of the Mineral Act. In authorizing the holder of a mineral claim "to use and possess the surface of the claim", the
Act contemplates the continued existence of that surface. Therefore the mineral operator may not destroy the surface by letting it down or excavating it. However, the argument is a thin one, relying as it does upon one word in the section and diverting attention away from the rest of the section, which goes on to give that right to use and possess for the purpose of exploring for, developing and producing minerals, and all related operations.

An argument this slender might not find any acceptability but for the strength of the common law presumption in favour of the right of support. [43] "In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication." [44] The general policy of the law which finds expression in this presumption could be relied upon in the construction of the Mineral Act. For the sake of completeness, however, it should be pointed out that the presumption has always been applied to instruments of severance [45] and never to general Acts such as the Mineral Act. Further, the presumption itself may be rebutted by evidence showing that words were used with the knowledge, contemplation and intention that surface damage should occur. [46] Evidence of general practices and conditions in the mining industry at the time could have this effect.

These arguments in favour of the right of support can be improved by admitting that the common law rights to win and work are extinguished and pleading that the right of support is entirely different from those rights. In Chapter III both principles were treated as components of the one system; but
arguably they ought not always be so treated. It can be said that the right of support is naturally incident to the ownership of the surface, [47] just as is the lateral right of support, and that therefore in strict principle it is unconnected with mining matters, which are controlled by the Mineral Act. There being no definite rebuttal available to this defence of the right of support, the matter is not free from doubt.

5. **FINDINGS ON THE ROLE OF THE COMMON LAW**

The common law rights to win and work must definitely be taken to have been extinguished by the enactment of the Mineral Act. This is a necessary implication of the Act, nowhere seen better than in section 6(2), and supported by judicial decisions. There is nothing to sustain a contrary argument. The demise of the common law right to win and work must also require the demise of the principle restricting the exercise of those rights to reasonable means.

There are good reasons to believe that the right of support is abolished as well, but it is not possible to be categorical about it. We have the plain meaning of the general words in sections 6 and 10, but general words are restricted by judicial interpretation every day. We have judicial authority, but it is dated and *obiter*. Abrogation of the right of support seems to be the more reasonable conclusion to draw from the Mineral Act, but it is not an irresistible conclusion.

These conclusions, that only the statutory surface rights apply, do not conflict with the many cases holding that the right
of a miner in a mineral claim is a right of real property. (These cases were discussed in Chapter II.) We have only analyzed the law governing surface rights, one ancillary part of the rights granted under the Mineral Act. Nothing in what we have done suggests that the whole of the Mineral Act forms a complete code. We have simply ascertained that those parts of the Act that govern surface rights have superseded common law surface rights. One cannot argue from the common law working rights to increase or decrease the statute's provisions.

The correct stance appears to be that mining rights acquired under the Mineral Act are rights of ownership of real property in the eyes of the common law (even though they have statutory origins); as such they have some of the usual incidents of real property, such as the benefit of the rule for relief against forfeiture [48] and the presumption against the expropriation of property; [49] but these incidents do not include the common law surface rights.

6. **PREFERABLE LEGAL POLICY**

At this stage the matter can be considered as a question of what is desirable policy in the legal system. It is submitted that in this instance the policy factors are all on the side of the statute to the prejudice of common law working rights and the right of support. It appears to be preferable to let the common law principles of this area die a graceful death rather than to put them on artificial life-support indefinitely.
The most important factor is the primacy of legislation. It is hardly original to say that a statute prevails over common law, but in circumstances such as these there is some tendency to forget this factor, and to thwart the patent intentions of the Legislature. It is possible to fall into this trap by being overly ready to make exceptions to statutory rules, especially by making common law-based exceptions or provisos to general statutory words.

Further, a degree of conceptual simplicity is obtained by abrogating the common law over the entire area of the allocation of surface rights, including the right of support. Allowing the common law to remain invites needlessly fine distinctions in order to preserve common law rights where unaffected by the statute. The resulting complexity is undesirable. Although it was suggested above that the right of support could be split off from the other common law principles, it may in fact be more useful to treat it as part of one single system, standing or falling in one piece. From this conceptual simplicity flow the benefits of clarity of respective fields of operation, certainly in the law and the collocating of all the law on the subject in one place.

Another factor is that while the common law uses the methods of real property law, the Mineral Act uses administrative and regulatory devices to control the surface rights of the parties. The latter harmonize better with the methods and procedures of the other provisions (for tenures, recording, adjudication and the like) of the Act than do the former methods. If the Act is interpreted as excluding the common law altogether, as is
suggested here, then any use of the surface for mineral purposes is prohibited except as permitted by the Act.

Finally, one may consider the practical results of applying the principle of the right of support to Mineral Act operations. The results would be absurd. Open-pit mining and surface stripping are normal - even predominant - procedures in the modern mining world. Without the right to use them, the mineral industry of the province would grind to a halt.

It is not safe to advance this absurdity of result as a legal argument for the abolition of the right of support. The Legislature does not always avoid results that some may think to be unreasonable and absurd. In some cases it may be possible to modify the grammatical and ordinary sense of the legislation so as to avoid an absurdity, as Pruden v. Zurich Insurance Co. [50] has shown recently. But in other cases it has been held that if there is no alternative meaning to the words used, the court cannot decline to apply them. [51] "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity." [52] If there is an alternative meaning, it is doubtful whether the court can choose between the alternatives on the basis of the absurdity of one of them. [53]

In any event, we can be sure that a right of support would not be found to be tolerable if it was upheld by the courts, and that it would be given a legislative coup de grace if the occasion arose.
7. **INFLUENCE OF COMMON LAW AND STATUTE ON EACH OTHER**

There is one last aspect of the interrelation of statute and common law which may be considered, and that is the transference of ideas from the one type of law to the other. Pound [54] and Burrows [55] and others have deprecated the unwillingness of the courts to extend a principle found in a statute to a like situation under the common law, or to treat statutory principles as being capable of being absorbed into the legal system as a whole. However, the surface rights area has proved to be a fertile field for just this kind of cross-pollination.

A startling example of a court's acceptance of statutory principles in a common law context is found in the 1910 case *Coniagas Mines Ltd. v. Town of Cobalt*. [56] Minerals and then surface had been separately granted by different Crown patents, which did not provide working rights in express terms. The Ontario Court of Appeal followed the common law authorities to hold that, as an incident to the enjoyment of the mineral patent, there was a right to enter upon the lot to search for and to get out the minerals. To formulate this right, the Court turned to a statutory source, the British Columbia Mineral Act, where the miner had a right to use and possess the surface of the land for mineral purposes. The Court's declaration followed the words of the statute.

Another good example is *Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd.*, [57] one of the tailings cases. In order to give meaning to the word "minerals", used but not defined in the Crown patent, the Court turned to the Mining Act of the time, even
though that Act did not control the meaning of the instrument in question.

I would give substantial weight to this provincial statute governing the mining industry in determining the meaning of the language of mining engineers and other persons engaged in mining - the definition of its words - in the same way that the meaning of the language of other trades and professions is influenced by relevant legislation. This proposition, rooted in common sense, finds confirmation in the evidence of the witness Halstead, a professional engineer. [58]

In the opposite direction, of the common law influencing construction of the statute, there has only been one example, in Day v. Klondyke Mines Railway, [59] where the common law meaning of "open mines" was applied to interpret those words appearing in legislation. Since it is normal practice to turn to the common law where the statute does not define a word, it is surprising that there have not been more examples.
1. Toronto, Butterworths, 1971, vol 1, #76

2. RSBC 1979 c 429; Armstrong "The B.C. Water Act: The End of Riparian Rights" (1962) 1 UBC L Rev 583; Lucas, "Water Pollution Control Law in B.C." (1969) 4 UBC L Rev 56

2A. (1983) 46 BCLR 292

3. RSBC 1979 c 214

4. Ibid. s 47(1)(b). Why has the Mining (Placer) Act been omitted?

5. Old Land Acts usually affected Crown grants made while they were in force, and will often need to be checked.

6. S 47(3) and (4)

7. For an exception, see Sunshine Valley Minerals Inc. v. Reyes (1983) 43 BCLR 374

8. There have been cases in which these have been held to be "minerals"; Great Western Ry v. Carpalla United China Clay Co. [1910] AC 83, Midland Ry v. Checkley (1867) LR 4 Eq 19

9. [1978] 3 WWR 202


11. Stone, "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4


14. Ibid. at 385

15. Supra note 12


17. SA 1983 c. S-27.1

18. RSC 1970 c C-30. See Fox, Canadian Law of Copyright and Industrial Design (2nd ed) p 61

19. RSBC 1979 c 370
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20. Ss 77-85

21. RSBC 1979 c 236 s 2

22. RSBC 1979 c 219

23. RSBC 1979 c 234

24. Burrows, supra note 12 at 594

25. RSBC 1970 c P-4. See Fox, supra, note 18 p 5

26. Eg Nokes v. Doncaster Amalgamated Collieries Ltd. [1940] AC 1014

27. E.A. Driedger, Construction of Statutes (2nd ed) Butterworths Toronto 1983 p 211

28. Ibid. p 183

29. Supra note 13. Driedger, supra note 27 p 211 is also critical of the presumption.


31. Eg Belfast Corpn v. O.D. Cars Ltd. [1960] AC 520

32. The right of support may prove to be an exception. See infra.

33. Adopting the language of Driedger, supra note 27 p 105

34. A.G. for Northern Ireland v. Gallagher [1963] AC 349 at 366 per Lord Reid. This view owes more to Driedger, supra note 27, and his view of literal construction in total context (pp 85, 87) than to Cross, Statutory Interpretation (1976) and his use of A.G. v. Prince Ernest Augustus of Hanover [1957] AC 436; but that is not to say that anything in Cross's view of the use of the object of a statute (p 51) would vitiate the stance taken here.

35. Section 6(2) restricts the s. 10 rights as well as the s. 6(1) rights; see Chapter IV.

36. (1962) 32 DLR (2d) 704

37. Ibid at 718

38. (1897) 5 BCR 396 at 439 (considering SBC 1891 c 25 s 10)

39. (1905) 2 WLR 205
40. The Yukon Placer Mining Regulations, SC xlv.

41. Supra note 39 at 211

42. (1977) 3 BCLR 122

43. This presumption is of course not to be confused with the presumption against interference with the common law.

44. Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co. [1906] AC 305 at 309

45. Although some of those instruments have been agreements embodied in Inclosure Acts. See Chapter III.

46. See Butterley Co. v. New Hucknall Colliery Co. [1910] AC 381. Again, this is a principle for the construction of deeds, not statutes. But if some argument analogous to a presumption in favour of support is to be advanced, the principle could take the form of construction of the Act in the light of its external context.

47. Backhouse v. Bonomi (1861) 9 HLC 503, 11 ER 825

48. Morris v. The Queen (1977) 3 BCLR 240

49. Tener v. The Queen [1982] 3 WWR 214 (BCCA)

50. (1981) 128 DLR (3d) 23 (Alta.)

51. IRC v. Hinchy [1960] AC 748

52. R. v. Judge of City of London Court [1892] 1 QB 273 at 290

53. Cf Driedger supra note 27 at p 47 et seq and Cross supra note 34 pp 82-84

54. Supra note 13

55. Supra note 12

56. (1910) 20 OLR 611


58. Ibid at 287

59. Supra note 39
1. **RIGHTS ARE STATUTORY**

   Our main conclusion in Chapter VII was that the Mineral Act abrogates the common law surface rights, and puts different surface rights in their place. It is wrong to resort to the terms in which minerals, and the right to work them, were reserved to the Crown in a Crown grant of land, or to resort to the general principles that the common law has developed to construe such instruments of severance, and to use them in an attempt to expand or to constrain the statutory rights.

   Yet of course we must still resort to the Crown grant to ascertain which minerals have been reserved to the Crown and which have passed to the land owner. We must also turn to the Crown grant in those situations that cannot be brought within the terms of the Mineral Act or one of its companion resource Acts. One such case is privately-owned minerals. Another is those few Crown-owned minerals that do not fall within the definitions of the substances covered by any of the Acts. In these situations
the rights of the surface owner and the mineral owner are
determined by reference to the instrument of severance in
accordance with the common law rules.

This statutory imposition of new rules tends to indicate that
the Mineral Act expropriates the surface owner's rights. It is
ture that the Act imposes its system of surface rights by
legislative force, while the common law is based on a theory of
express or implied agreement between the parties. But, in
detracting from a surface owner's claim that he has suffered an
expropriation, it can be pointed out that the Mineral Act is
imposed upon the mineral owner as well as the surface owner; or
(really the same thing) that the Act confers benefits on each
party as well as setting burdens on them. The Act most definitely
has this effect, as the comparison with the common law in Chapter
VI revealed, although it is impossible to measure the balance of
benefits assigned to each party. However, the mineral owner and
the surface owner are differently placed in relation to the
prescriptions of the Act's surface rights system.

When the surface owner acquired his land, he took it
acquiescing to the reservation of minerals and working rights
which were specified in the Crown grant. However the allocation
of surface rights thus made between him and mineral operators is
altogether displaced by the Mineral Act's allocation. A modern
purchaser is unlikely to be entirely ignorant of the Act, but the
point is not that he might be caught by surprise. It is that he
has not in any sense agreed to the Mineral Act system, which is
imposed ab extra by the force of statutory law.
On the other hand, it is only under and by virtue of the Mineral Act itself that the miner can obtain any rights at all to minerals or to surface rights. It is the operation of the Act, and the miner's compliance with it, that brings the miner's rights into existence, even though once in existence these rights may properly be said to give the mineral owner a property interest within the understanding of the common law. A mining lease under section 29, for example, is undoubtedly an interest in land but it is obtained only in compliance with the Act.

Since his rights derive from the Act above, the free miner cannot say that the Act has cut across any of his pre-existing rights. Nor is he able to rely on working rights in the Crown reservation of minerals, saying that those rights run with the mineral title, a title which he has obtained from the Crown; for his derivative title is only that which the Act allows him. [1] The free miner acquiesces to the regime of the Act and the surface rights provisions in particular. The "compliance with laws" clause in the mining lease (mentioned in Chapter II) makes this acquiescence explicit. The lessee agrees to the terms of the Act and regulations and to all future amendments of them.

Thus the Mineral Act surface rights may be said to be a statutorily authorized invasion of the real property rights of the surface owner. There is some truth in the description of them as a legalized trespass, even if in their stead the common law and the reservation would allow another form of entry for similar purposes.
2. **OTHER ATTRIBUTES**

We have also had reason to consider some other features of surface rights.

Firstly, we saw that surface rights are ancillary to mineral rights, and cannot be conceived of as existing independently of them. Because of this subordinate role, it seems inappropriate to consider them as interests in land other than as components of mineral ownership. Although they are subordinate, they are vital incidents of mineral title.

Secondly, it has become apparent that the exercise of surface rights by a mineral operator affects a variable number of the ownership rights of the surface owner. Although the range of rights affected may be small and the time may be brief, on occasion virtually all of the owner's proprietary interest may be taken for an indefinite period. The owner may suffer loss of control, loss of profits, damage to the land, and inconvenience, and even the right to enter and hold possession of the land himself. The label of expropriation can be attached to this effect, as is done in many of the oil and gas cases in Alberta. Yet although this label carries somewhat emotional connotations, it does not assist greatly with the legal determination of rights. Compensation, for example, must be fixed in accordance with the statute rather than by virtue of any gloss that expropriation cases may suggest.

Allied to that issue is the third and perhaps most important characteristic of the allocation of surface rights under the Mineral Act; the dominant position given to the mineral operator. Several factors contribute to this dominance. One is the right
of the mineral operator to acquire mineral claims and mining leases automatically. There is no opportunity for the surface owner to object to the granting of mineral rights, except on the grounds that the land was not open for staking or that the Act's procedures were not properly followed. There is also the paramountcy of the Mineral Act over the reservation in the Crown grant and therefore over the real property rights of the surface owner. Another factor is the width of the mineral operator's rights over the surface, especially in comparison with the common law. Finally, the surface owner's right to be compensated for loss or damage does not enable him to negotiate with the mineral operator on terms of equality. Losses are ascertained with reference to the value of the surface to the surface owner rather than to the mineral operator, and the surface owner only has limited influence on the decisions to be made on the use of the land for mineral purposes.

3. **FUTURE OUTLOOK**

The future of the Mineral Act surface rights system is best considered against the historical background and evolution of surface-mineral relations. The common law and oil and gas systems have been analyzed in order to clarify this evolution. The present-day Mineral Act provisions are virtually unchanged since the 1860s. At that time surface use affairs did not require detailed regulation. Surface rights conflicts were unheard of in a little-populated frontier where the only white settlers were the miners themselves. Indeed, competition between mineral interests
and other interests has been slight until very recently. (Before
1970, there were no more than half a dozen surface rights cases
reported from British Columbia and the Yukon.)

However that period of low pressure on land resources has now
passed. (There have been more surface rights cases reported since
1970 than in all the period before then.) In modern circum­
stances, no major mineral development seems to be able to proceed
without having some impact on land users and land owners in the
vicinity, and without needing to find solutions to the inevitable
conflicts that arise. The Mineral Act was not drafted with this
level of conflict in mind.

These increasing levels of conflict will bring closer
attention to bear on the adequacy of the Mineral Act's surface
rights provisions. We have had several occasions to note the
difficulties caused by the sparseness, the generality and the
absoluteness of the surface rights sections. One example is the
way that the Act appears to grant exactly the same surface rights
to operators at completely different stages of the mineral
exploration and development process, giving exactly the same
rights to run a mine and concentrator as to carry out a brief
exploration programme. Another example is the lack of guidelines
and procedural safeguards for the creation of mineral reserves. A
third is the absence of any requirement to seek a consent from the
surface owner, or even to give notice to him.

What is needed is reasonably detailed and flexible legis­
lation which can respond appropriately to the many different
aspects of a complex relationship between mineral operator and
surface owner. There is a lot of room for disagreement about what would be suitable legislation, but we can at least point to several factors which plainly should guide the process of revision.

One factor is the system of free entry and going to lease, which is closely connected to the surface rights system. We have seen how the acquisition of mineral rights under the Mineral Act is almost entirely unrestricted, and also how mineral rights without surface rights are virtually useless. Any question of regulating surface rights inevitably raises the question of whether it can sometimes be done best by regulating the acquisition of mineral claims and leases.

Another factor is the possibility of adapting or incorporating the oil and gas legislation for mining purposes, as we discussed in Chapter VI. There we outlined the basic similarity of the two systems, and the advantages of the oil and gas system, but also the points of difference that militate against following the oil and gas system slavishly.

It is to be hoped that the continuity of the legislation will be maintained as far as possible in the process of reform. The presence of deficiencies does not always call for the complete repudiation of all the existing rules. The existing rules are at least generally known and have in some cases been the subject of useful judicial exposition. The fixing of compensation is an example. The drafting of amendments should take the historical background into account, particularly in order to avoid the pitfalls that previous legislation and cases have revealed. And
some issues, such as the right of a miner to take possession of the surface, will always be in dispute even where the legislation attempts to deal with them directly.

It is probably impossible to devise a surface rights system that can stop landowners and the public from feeling that the taking of land for mining purposes is a kind of trespass. This feeling on the one hand, and, on the other, the need of the mineral industry to have access to mineral lands with the minimum of delay and uncertainty, will no doubt ensure that surface rights laws will always be contentious.

FOOTNOTE - CHAPTER VIII

1. See Cofrin v. Bicchieri (1977) 3 BCLR 122 at 130