

The Extralateral Right in British Columbia and the Western United States: A Comparison of the Mining Law, 1850-1900¹

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The precise nature of the legal rights associated with a mining claim is a defining element in the development of the mining industry in British Columbia which sets it apart from the industry in the western United States. Prior to 1893, the rights of a claimant to pursue a vein outside the vertical boundaries of the claim were similar in the two jurisdictions. Thereafter, the right of pursuit, commonly known as the extralateral right, was eliminated in British Columbia in an effort to avoid the litigation which characterized the application of the extralateral right in the United States. In the western states this element of the mining law was frequently seen as an encouragement to lawyers and “the ‘litigating classes’ who used the law for expropriation” rather than to miners and mining companies:

Rocky Mountain miners quipped that the surest way to discover a bonanza was to check the court records, and other local wits insisted that if a mine was not in pay dirt and was not in barren ground then it must certainly be in litigation.

Humour aside, frequent suits based on the extralateral right slowed the pace of development in many mining camps and were a constant drain on the “financial strength of a capital-shy industry.”²

While no claims located in British Columbia after 1893 had an extralateral right, those located prior to the change in the law retained the right. Several attempts were made to use the provision to secure control of valuable mineral deposits in the Rossland and Slocan mining districts — the heartland of the British Columbia hard-rock mining industry — which had been located under the earlier rules. The first and most significant case,

¹ I am grateful to Jeremy Mouat of Athabasca University for his encouragement and assistance in this paper. An earlier version of the paper was presented to the Osgoode Society's Conference on Lawyers and Business in May 1989.

² Joseph E. King, *A Mine to Make a Mine; Financing the Colorado Mining Industry, 1859-1902* (College Station: Texas A&M University Press, 1977), 142-48. The extralateral right is a frequently mentioned and little analyzed aspect of the development of the mining industry in the western United States. Major references to the problems associated with the issue are noted throughout the body of the paper.

heard in 1898-99, involved the Centre Star and Iron Mask mining companies in Rossland. In this case the provincial courts followed a distinctive path, ensuring that the dislocations attending extralateral suits in the United States would not be repeated in British Columbia. Every attempt to introduce American legal procedures and precedents into the proceedings — actions which frequently turned trials into circuses and almost always delayed the development of the mines in question — was denied. Due more to the procedures established during the trials than to the outcome, the extralateral right was eliminated as a source of litigation in British Columbia well before it produced its most spectacular and disruptive cases in the United States. The actions of the British Columbia courts in regard to the extralateral right underscored the intentions of the provincial government to provide a stable legal climate, distinct from that of the United States, to encourage the expansion of hard-rock mining in the province.³

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Despite differing political and legal antecedents, the general structure of the mining laws in the western United States and in British Columbia is assumed to have evolved along similar lines during the second half of the nineteenth century. The one distinction noted by most commentators is the early assertion of the authority of the government of British Columbia over mining activity. Whereas ad hoc miners' meetings were the initial source of authority in the mining districts of the American west, the rules under which the industry developed in British Columbia were established by the colonial and subsequent provincial governments. The content of the law, particularly the methods of acquiring mineral claims and the rights associated with them, was sufficiently similar that individuals and mining companies based in one jurisdiction could operate comfortably in the other.⁴

³ Recent discussions of the writing of Canadian legal history have strongly emphasized the need for research into "the manner in which legal systems dealt with specific economic developmental issues, as well as its connections with economic interests" along interdisciplinary lines. On the role of the courts, Barry Wright has suggested: "The restraint and conservatism of elements such as the judiciary made direct instrumentalism unlikely. However, it is possible that the legal system helped to promote Canada's mode of economic development through legitimation." See his "Towards a New Canadian Legal History," *Osgoode Hall Law Journal* (Summer 1984): 371. Wright's emphasis on interdisciplinary studies echoes David H. Flaherty's arguments in favour of a "comprehensive perspective" advanced in "Writing Canadian Legal History: An Introduction," in his *Essays in the History of Canadian Law* (Toronto: Osgoode Society, 1983), 3-42.

⁴ William J. Trimble, *The Mining Advance Into the Inland Empire*, Bulletin of the University of Wisconsin No. 638 (Madison: University of Wisconsin, 1914), 187-214. See also David Ricardo Williams, "The Administration of Criminal and Civil Justice in the Mining Camps and Frontier Communities of British Columbia," in *Law and Justice in a New Land*, ed. Louis A. Knafka (Toronto: Carswell, 1986), 215-32.

The easy movement of men and capital across the United States border into British Columbia is a central theme in the growth of mining in the province. American placer miners were important players in the Big Bend, Fraser River, and Cariboo gold rushes of the 1850s and 1860s. American mining companies were major participants in the initial development of lode mining in the Boundary and Kootenay districts, the base for the subsequent expansion of the industry. The similarity in the law and the support given to it by the courts in British Columbia allowed one Canadian observer to note in 1893:

The difference of nationality does not appear to have any deterring effect upon the class of men whom we desire to attract from the other side of the line. The Province has made its mining laws almost uniform with those in force in the United States, our political institutions do not trouble them, and our judicial system is to them an object of admiration. . . .⁵

During the 1890s and the first decades of the twentieth century, the corporate and technical structure of the mining industries in British Columbia and throughout the world changed dramatically to reflect the emergence of business enterprises based on centralized administrations and economics of scale. Smaller companies were increasingly supplanted by larger corporations, and the mechanics of mining shifted from the labour-intensive working of relatively small, high-grade veins of gold and silver ores to the mechanized exploitation of massive, low-grade deposits of copper and other base metals. The technical innovations of the previous fifty years were integrated to create mining methods similar to, if not identical with, the mass production systems emerging in manufacturing.⁶

Beyond new managerial structures and engineering practices, the mining of low-grade mineral deposits required secure title to large blocks of ground. Companies without firm control over their basic resource — the mining claims — could be and frequently were held hostage by a succession of court challenges. One of the elements of the law encouraging such adverse actions was the extralateral right: The holder of a mineral claim was

⁵ G. O. Buchanon to W. Laurier, 15 May 1893, National Archives of Canada, Laurier Papers, MG 26-G, vol. 7, 2460.

⁶ For overviews of the changes in the mining industries at the turn of the century, see Harold Barger and Sam H. Schurr, *The Mining Industries, 1899-1939; A Study of Output, Employment and Productivity* (New York: National Bureau of Economic Research, Inc., 1944); Ronald C. Brown, *Hard-Rock Miners: The Intermountain West, 1860-1920* (College Station: Texas A & M University Press, 1979); Mark Wyman, *Hard Rock Epic; Western Miners and the Industrial Revolution, 1860-1910* (Berkeley: University of California Press, 1979); and Christopher Schmitz, "The Rise of Big Business in the World Copper Industry 1870-1930," *Economic History Review*, 2nd ser. 39 (1986): 392-410.

entitled to follow the vein which outcropped within the boundaries of the claim to its furthest extent even if it ran under the boundaries of an adjacent claim and interfered with operations on that claim.

In the United States, the courts were called upon time and time again to address challenges to the ownership of mining claims based on the extralateral right until the significance of the issue was finally reduced through the acquisition of large blocks of mining ground by the emerging mining conglomerates. In British Columbia, the previously established central control of the industry by the provincial government allowed a more expedient solution: the extralateral right was removed from the Mines Act during the early expansion of lode mining in the province. The simple expedient of revising the law encouraged the emergence of large mining companies in British Columbia without the delays and additional costs associated with the same process in the United States. The province's action in 1893 effectively addressed a problem that was not generally resolved in the United States until the 1920s.

In part, the change in the British Columbia mining Act can be credited to the later development of lode mining in the province. The Kootenay region was not rapidly developed until the mid-1880s, twenty-five years after the opening of the mines in Nevada's Comstock Lode. It may be argued that fewer established operations and fewer vested interests were inconvenienced by the elimination of the extralateral right — a frequent explanation for the retention of the practice in the western United States. On the other hand, many of the companies operating in the Kootenays and the boundary district were American-owned and followed American practices. They would have viewed the extralateral right as nothing unusual, perhaps even as a mechanism to be used against their competitors in a mining camp as was common in neighbouring Idaho and Montana. In this light, the decision to eliminate the extralateral right is a significant revision of the rights associated with a mineral claim and an important aide on the part of the government to the development of the mining industries by reducing the opportunity for legal disputes.⁷

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The extralateral right is a fundamental element of United States mining law as applied to public lands. It allows the holder of a hard-rock mineral claim "to pursue a vein on its downward course, outside of and beyond

⁷ Arthur Fleming Crowe, *Mines and Mining Laws of British Columbia; A Practical Reference Book on Provincial Metalliferous Mining Laws and Provisions* (Calgary: Burroughs, 1930), 2.

vertical planes drawn through the side lines of the lode location, into and underneath the surface of adjoining or contiguous lands." The vein need not be exposed at the surface as long as its apex, that is, the point where it comes closest to the surface, is within the boundaries of the claim. The principle has been referred to as the dip right, the right of lateral pursuit, and the law of the apex, as well as the extralateral right. By any name, the purpose of the right is to guarantee to the claimant the full benefits of any mineralization discovered within the surface boundaries of a mineral claim.⁸

The provision has been a source of legal conflict and expense since at least 1863, when the Burning Moscow Mining Company sued the Ophir Mining Company for control of a relatively worthless vein in Nevada's Comstock Lode. The suit eventually resulted in the Burning Moscow assuming control of the Ophir and three other mining companies operating in the same immediate area.⁹ As the mining industry in the western United States expanded during the second half of the nineteenth century, the extralateral right became an "enormously productive engine of conflict and confusion," and a highly specialized field of legal practice: "extralateral rights disputes were infamous among miners, and famous among lawyers, who were often the only ones to reap a benefit from the provision."¹⁰ In many cases, suits brought under the extralateral rights provisions amounted

⁸ Curtis H. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, 2nd ed., 2 vols (San Francisco: Bancroft-Whitney, 1903), 939. An early discussion of the principles involved is available in Rossiter W. Raymond, "The Law of the Apex," *Transactions of the American Institute of Mining Engineers* [hereafter *Trans A.I.M.E.*] 12 (1883-84): 387-444. See also Henry Campbell Black, *Black's Law Dictionary*, 4th ed. (St. Paul: West, 1951), 699. The benefits of this provision were not unlimited. Rectangular claims, usually 1,500 feet by 600 feet, are required to be located with their long axis along the strike of the vein. The extralateral right applies only to extensions of the vein outside the 1,500-foot side lines. It does not convey rights to the entire vein as it might extend beyond the 600-foot end lines. This limitation was designed to discourage monopoly control of a discovery. Prior to 1923, no legal entity was allowed to locate more than one claim on a given vein under U.S. law. Curiously, given the stated anti-monopoly intent of this limitation, acquisition by purchase was not restricted in any way. John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington D.C.: Resources for the Future, 1987), 171-73.

⁹ Eliot Lord, *Comstock Mining and Miners*, U.S. Geological Survey Monograph 4 (Washington D.C.: GPO, 1883), 139-43.

¹⁰ Leshy, *op cit.*, 95. For an overview of the early expansion of the mining industry in the western United States, see Rodman Wilson Paul, *Mining Frontiers of the Far West, 1848-1880* (New York: Holt, Rinehart & Wilson, 1963). There is an extensive body of literature on western mining in the United States. See Clark C. Spence, "Western Mining," in *Historians and the American West*, ed. Michael P. Malone (Lincoln: University of Nebraska Press, 1983); and Peter M. Molloy, *The History of Metal Mining and Metallurgy; An Annotated Bibliography* (New York: Garland, 1986).

to little more than legalized thievery.¹¹ By 1900, the proliferation of often opportunistic and always expensive extralateral suits directly encouraged the professionalization of geology and contributed to the consolidation of mining ground by large, well-capitalized mining companies.¹²

British Columbia adopted the extralateral right from American practice, including it in basic mining law until 1892. To avoid the explosion of extralateral rights litigation that accompanied the expansion of the mining industry in the United States, amendments to the Mineral Act in 1893 substituted vertical claim boundaries for the apex provisions. This occurred fairly early in the development of the province's hard-rock mining industry. Still, valid claims located prior to 1892 retained their extralateral rights, and a number of these were embroiled in court challenges, especially in the rich West Kootenay Mining District. The most famous of these cases, *Iron Mask Mining Co. v. Centre Star Mining Co.*, pitted two American-owned Rossland mines against each other in what became the most expensive and protracted mining litigation in the province prior to 1900.¹³ It was the first such case in British Columbia and established the procedure in all subsequent conflicts based on the principle.¹⁴ In a larger sense, the notoriety surrounding the Iron Mask/Centre Star case ensured that the apex rule would never again be a part of the mining law in British Columbia or Canada.¹⁵ This confirmed the view of an American authority, "that any community which has once experienced the evils of that system, and has escaped from them by abandoning it, would ever dream of returning to it."¹⁶

The extralateral right grew out of the miners' codes of the western United States — codes adopted at public meetings in locally defined and in-

¹¹ Otis Young, *Western Mining* (Norman: University of Oklahoma Press, 1970), 227-30.

¹² L. C. Granton, "Seventy-five Years of Progress in Mining Geology," in *Seventy-five Years of Progress in the Mineral Industry, 1871-1946*, ed. A. B. Parsons (New York: American Institute of Mining and Metallurgical Engineers, 1947), 14-15; and Isaac F. Marcossan, *Anaconda* (New York: Dodd, Mead Co., 1957), 111-35.

¹³ S. S. Fowler, "The Extra-Lateral Right," *Mining and Scientific Press* 113 (16 December 1916): 868-69.

¹⁴ See *Centre Star Mining Co. v. Iron Mask Mining Co.*, 6 B.C. 355 (1898); *Iron Mask Mining Co. v. Centre Star Mining Co.*, 7 B.C. 66 (1899); and *Star Mining and Milling Co. v. Byron N. White Co.*, 9 B.C. 9 (1902).

¹⁵ J. M. Clark, "Canadian Mining Law," *Trans A.I.M.E.* 42 (1912): 616-17. Prior to 1897, a form of the apex rule applied in Ontario, but its use was eliminated before it could be a source of conflict. J. M. Clark, "The Ontario Mining Law," *Journal of the Canadian Mining Institute* 3 (1900): 112.

¹⁶ Rossiter W. Raymond, discussion of Clark, *Trans A.I.M.E.*, 617.

dependently established mining districts.¹⁷ After the Mexican American War, the military government of the territory ceded to the United States generally ignored Mexican mining law, although existing federal law was not extended into this new jurisdiction.¹⁸ With the discovery of placer gold in 1848, the local authorities simply elected to “permit all to work freely” on federal lands. Local regulations created by the miners themselves filled the void and established policies for “civil rights and remedies, crimes and punishments as well as providing for the possession and enjoyment of mineral claims.”¹⁹

The 1850 act of admission which brought California into the union as a state made no reference to mineral lands, and the system of locally established mining codes continued in force.²⁰ Similar practices were followed in new mining areas as gold and silver were discovered throughout the west. These codes usually granted a dip right to the owner of a mining claim. Claim locations were typically described in terms of rectangular surface boundaries, but it was the vein exposed within those boundaries, not the surface area, to which title was granted. A claimant had the right to follow the vein onto adjoining properties, and others could stake unclaimed veins exposed within the surface boundaries of an existing mineral location.²¹

The dip right and the extralateral right which evolved from it embodied a simplistic understanding of geological structures. As long as mining took place in the highly visible and roughly parallel quartz veins common to the early discoveries — likened to “a slice of ham in a sandwich” — the system

¹⁷ There are historic precedents for the apex rule; whether or not they were known to the framers of the miners’ codes is a matter of conjecture. Experiments with the principle date from mediaeval Saxony and Derbyshire. The rule may have been applied in Mexico under Spanish rule, Lindley, *op cit.*, 939; and Lindley, 3rd ed. 33-36. The dip right was a feature of the mining regulations of New South Wales between 1858 and 1866, and a modified form applied in Western Australia at the turn of the century; it may have been introduced by the highly mobile California miners who went to Australia after the California rush. The mining law of Rhodesia, introduced in 1903 and largely copied from the U.S. regulations, contained an extralateral rights provision. William E. Colby, “The Extra-Lateral Right — Shall it be Abolished?” *Mining and Scientific Press* 113 (16 December 1916): 703-04.

¹⁸ The extralateral right was not part of the mining laws in force in other areas of the United States. U.S. statutes pertaining to mineral rights in the eastern part of the country are summarized in Richard H. Bate, “Mineral Exceptions and Reservations In Federal Public Land Patents,” *Proceedings of the Rocky Mountain Mineral Law Institute* (1972): 328-31.

¹⁹ Lindley, *op. cit.*, 1: 71-79. An early study on local government in the mining camps is Charles H. Shinn, *Mining Camps; A Study in American Frontier Government* (New York: Alfred A. Knopf, 1948).

²⁰ Lindley, *op. cit.*, 78.

²¹ Gary D. Libecap, *The Evolution of Private Mineral Rights; Nevada’s Comstock Lode* (New York: Arno, 1978), 37-47; and Lindley, *op. cit.*, 66-69.

worked reasonably well.²² Unfortunately, vein structures are rarely uniform: they fork and twist, double back on themselves, and cross at every angle in the quadrant. They end abruptly at faults and may or may not reappear on the other side. Ore bodies are not necessarily visible to the naked eye or even contained in the popular conception of a vein. The contradictory decisions flowing from attempts to apply the apex rule reflect the complexity of geology. The extensive body of case law which had emerged by 1880 suggests that the conditions necessary to hold claims and the rights associated with them were being continually redefined.²³

United States federal law enshrined the right to pursue ore in continuous leads, as well as many other provisions of the early miners' codes. The Act of 26 July 1866, the first general federal statute on mining, established in principle: "That rights which had been acquired in these lands under a system of local rules, with the apparent acquiescence and sanction of the government, should be recognized and confirmed."²⁴ The subsequent Mining Act of 1872, which forms the basis for current mining law, continued to permit local mining districts to make their own rules but only in so far as these did not conflict with the act and other laws of the United States. It also established uniform rules on the size of claims, methods of location, and patent procedures. Methods to alienate mineral lands restricted but did not eliminate the idea that the claim applied to the lode and not the surface area contained within its boundaries. Section 3 of the Act specified the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended down vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface-locations.²⁵

The mining industry dealt with the discrepancy between a relatively simple concept in law and a complex geological reality in a number of

²² Courtney DeKalb, "Some Defects of the United States Mining Law," *Trans. A.I.M.E.* 51 (1916): 284.

²³ See R. W. Raymond, "Law of . . .", *op. cit.*, 387-443.

²⁴ *Jennison v. Kirk*, 98 U.S., 453; and *Blake v. Butte S. M. Co.*, 101 U.S., 274, cited in Lindley, *op. cit.*, 82. See also *Horace v. Winchell* revised by Archibald Douglas, "Mining Laws," in *Mining Engineers Handbook*, ed. Robert Peele, 2 vols. New York: John Wiley & Sons, 1927), II: 1658. Winchell's article presents a good overview of the development of United States mining law as it applied to the mining engineering profession.

²⁵ General Mining Act of 10 May 1872, section 3 (Title XXXII, Chapter 6, Revised Statutes), quoted in Raymond, "Law of . . .", *op. cit.*, 388. See also Lindley, *op. cit.*, 975-1078; and Winchell, *op. cit.*, II: 1659-64, esp. 1659.

ways. In the copper districts of southern Arizona the ore was contained in large replacement bodies which bore a stronger resemblance to clouds than to veins. By common consent, the mine owners of the region agreed to abide by vertical boundaries and ignore the extralateral right. Such accommodation was the exception rather than the rule. In most jurisdictions the right was vigorously asserted and frequently argued in court. By 1900, an increasing number of lawyers earned their living exclusively from extralateral rights cases, and many mining engineers and geologists specialized as expert witnesses. Whenever possible, precise knowledge of the geological structures in question was demonstrated through three-dimensional models. These quickly became essential elements in the evidence presented at trial, even if they were constructed on less than perfect knowledge. Since the evidence usually consisted of a parade of competing expert witnesses with the attendant opportunities for theatrical displays, the cases were almost always argued before a jury.²⁶

The most famous series of cases was heard in Butte, Montana. The Standard Oil Trust, through the Amalgamated Copper Mining Company, used the extralateral right as a vehicle to establish economic and political control over the copper mines of Butte, the government of Montana, and the administration of justice in the state. The rich copper deposits, the complex geology of the area, and the often casual methods initially employed to locate claims all provided motive and opportunity for suits on a grand scale. Since injunctions granted prior to the resolution of the dispute frequently prohibited working in the contested area, the simple act of launching a suit was often an effective form of legal blackmail. Out-of-court settlements were cheaper than the prospect of waging a protracted court battle in a less than impartial atmosphere. Between 1898 and 1906, the "War of the Apex" pitted F. Augustus Heinze against Marcus Daly, the Amalgamated Copper Mining Company — the predecessor of the giant Anaconda Copper Mining Company — and the Standard Oil Trust. Among other things, Heinze was a "court house miner" who exploited inconsistencies in mining titles and often initiated extralateral rights suits on speculation. He portrayed himself as a David fighting the Goliath of the robber barons for control of "the richest hill on earth." In the end, the antagonists tired of the continuous conflict and the Amalgamated resolved the question by purchasing the majority of the mining companies operating

²⁶ Clark C. Spence, *Mining Engineers and the American West; the Lace-Boot Brigade, 1849-1933* (New Haven: Yale University Press, 1970), 198-201; T. A. Rickard, 26. *A History of American Mining* (New York: McGraw-Hill, 1932), 360-62; and Young, *op. cit.*, 229, 52n.

in the area, including those owned by Heinze. By 1909, the Anaconda company was the largest single corporation in the world copper industry.²⁷

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Title to Canada's mineral wealth has resided with the Crown since colonial times. By the time mining activity became a concern of government, the legal vacuum which in the western United States permitted the emergence of local mining districts with their miners' codes was a thing of the past. Section 109 of the British North America Act continued colonial practice, reserving "all lands, mines, minerals and royalties" to the provinces at the time of union.²⁸ The regalian right was first formally asserted in what is now British Columbia in 1853.²⁹ Nonetheless, American miners and American practice had an impact on the mining law of British Columbia throughout the second half of the nineteenth century.

Colonial regulations to control metals mining were first issued in 1853, to counter an anticipated rush of Californians to the Queen Charlotte Islands in search of gold. On the advice of the Secretary of State for the Colonies, Governor Douglas proclaimed that "all mines of gold, and all gold in its natural place of deposit . . . whether on the lands of the Queen, or any of her Majesty's subjects, belong to the Crown." Based on the mining rules developed in Australia, the provisional regulations issued along with this proclamation established a licensing system for miners. They also reserved to the colonial government the right to regulate "the extent and position of land to be covered by each license."³⁰

The true test of sovereignty over mining lands came during the Fraser River Gold Rush of 1858 and the subsequent Cariboo Gold Rush. The thousands of would-be miners who moved into the nearly unpopulated

²⁷ The War of the Apex spawned strong partisan positions at the time and among subsequent commentators. See Carl B. Glasscock, *The War of the Copper Kings* (New York: Grosset Dunlop, 1935); Sarah McNelis, *Copper King at War; the Biography of F. Augustus Heinze* (Missoula: University of Montana Press, 1968); and Marcossou, *op. cit.*, 111-35. Other, less well known cases were equally protracted and contentious. See, for example, John Fahey, *The Ballyhoo Bonanza; Charles Sweeny and the Idaho Mines* (Seattle: University of Washington Press, 1971), 144-69. Anaconda's position in the larger mining industry is discussed in Schmitz, *op. cit.*

²⁸ The federal government initially retained the rights to natural resources in the North West Territories, as well as the new provinces of Alberta and Saskatchewan when they were created in the early years of this century.

²⁹ Wm. David McPherson and John Murray Clark, *The Law of Mines in Canada* (Toronto: Carswell, 1898), 12.

³⁰ "Proclamation Respecting Gold Mining in Queen Charlotte's Islands, 26th March 1853," and "Provisional Regulations Regarding the Same, 7th April 1853." Quoted in full in Archer Martin, *Reports of Mining Cases*, 2 vols. (Toronto: Carswell, 1903), 1: 536-37.

mainland of British Columbia were familiar with the rude democracy of the American mining frontier. In direct contrast, the colonial governor administered the gold fields through the appointed office of the Gold Commissioner. The Gold Fields Act of 1859 did allow for the election of local mining boards, but they were not independent bodies. Any action they might undertake regarding the holding and working of claims had no force unless and until approved by the governor. The governor could dissolve any mining board at his pleasure.³¹

While the sources of the mining law of British Columbia and the western United States differed, their content was similar, particularly the rights bestowed on quartz or hard rock claims.³² For example, the Gold Mining Ordinance of 1867 associated quartz claims with the strike of the vein as well as with a specific surface area. Under the Ordinance, mineral claims were defined as:

150 feet in length, measured along the lode or vein, with power to follow the lode or vein and its spurs, dips, and angles, anywhere on or below the surface included between the two extremities of such length of 150 feet, but not to advance upon or beneath the surface of the earth more than 100 feet in a lateral direction from the main lode or vein, along which the claim is measured.³³

Following the American miners' codes, the limited extralateral right awarded by this provision was intended to convey significant rights to a discovery while restricting a single claimant's ability to monopolize the entire vein. In line with this, the Ordinance of 1867 limited to two the number of claims that the discoverers could hold.³⁴

The province's Gold Mining Amendment Act of 1872 assigned full and unrestricted extralateral rights to mineral claims.³⁵ The 1884 Mineral Act

³¹ See sections 34 and 37 of the Gold Fields Act, 1859, in Martin, *op. cit.*, 545, 546. For a discussion of the early development of mining law and authority in British Columbia see Trimble, *op. cit.*, 187-214. The problems associated with the imposition of colonial control over the largely American miners in the Fraser River are discussed in Morley Arthur Underwood, "Governor Douglas and the Miners, 1858-1859," Graduating Essay in History, University of British Columbia, 1974. The mining boards were little used after the initial gold rushes due to the obvious limitations on their authority and were eliminated in 1888.

³² One U.S. commentator noted: "From 1884 to 1892 the Mineral Act [of British Columbia] was modeled after that of the United States..." William Braden, "Mineral Lode Locations in British Columbia," *Trans A.I.M.E.* 28 (1899): 538.

³³ Section 53, Gold Mining Ordinance, 1867 (30 Victoria: No. 34).

³⁴ Gifford Turner Stanley, "Some Legal Aspects Relating to the Mineral Industry of British Columbia," ms., University of British Columbia Law School, 1967, 4-5. See also section 55, Gold Mining Ordinance, 1867 (30 Victoria: No. 34).

³⁵ Section 4, Gold Mining Amendment Act, 1872 (35 Victoria. Chapter 14) repealed section 53 of the 1867 Ordinance and gave the holders of quartz claims the "power

reasserted this distinctly American view of the rights associated with a lode claim, in language taken directly from the United States Act of 1872. The extralateral right was fully in force during the initial period of sustained growth in the mining industry of British Columbia.³⁶ By 1890, numerous problems with the 1884 Act led to a major revision of mining laws, but did not alter the Act's language concerning extralateral rights.³⁷

In the spring of 1892, James Kellie, member of the provincial legislature for the predominantly mining riding of Kootenay West, introduced a bill to amend the Mineral Act by replacing the apex rule with vertical side boundaries. There was little debate on the proposal since its other provisions — such as a requirement that all mine employees purchase free miners licences — were more contentious. When the member for Kootenay East, another mining riding, questioned the extinction of extralateral rights, he was told that “the apex system used at present led to litigation.”³⁸ Mineral claims granted after this amendment came into force were bounded by side lines and had no extralateral rights, but existing claims in good standing retained their apex provisions.³⁹

The province's mining industry appears to have welcomed the change; there was certainly no vocal opposition. In 1895 the newly founded *British Columbia Mining Record* applauded the move and referred to the evils of the apex provision in an editorial:

It stopped a fruitful source of litigation. In the United States the law allows the owner of a mineral claim to follow his vein or lode beyond his side lines.

to follow such lode or vein and its spurs, dips, and angles anywhere on or below the surface included between the two extreme ends. . . .” The identification of the claim with the specific mineralized vein is evident in this statute.

³⁶ Cf. section 64 of the Mineral Act, 1884 (47 Victoria, Chapter 10) with section 3 of the General Mining Act of 10 May 1872 (Title XXXII, Chapter 6, Revised Statutes) quoted above. By way of contrast, Ontario's mining regulations provided for the sale of mineral lands based on surface area as early as 1864 while British Columbia and U.S. regulations still identified the claim with the vein or lode. See H. V. Nelles, *The Politics of Development; Forests, Mines and Hydro-Electric Power in Ontario, 1849-1941* (Toronto: Macmillan, 1975), 19-31, esp. 21. The development of the lode mining industry in the Kootenay Region of British Columbia is summarized in Harold A. Innis, “Settlement and the Mining Frontier,” in *Canadian Frontiers of Settlement*, eds. W. A. Mackintosh and W. L. G. Joerg, vol. IX (Toronto: Macmillan, 1936), 270-320.

³⁷ See section 31, Mineral Act, 1891 (54 Victoria, Chapter 25).

³⁸ *Victoria Daily Times* (8 April 1892) contained in B.C. Provincial Library, Sessional Clippings Books, 1891-1972, Provincial Archives and Records Service [of British Columbia], GR 1480, Reel B-254. See also *Victoria Daily Colonist* 67,100 (9 April 1892): 6 and 67, 102 (12 April 1892): 6.

³⁹ See sub-section (b), section 15, Mineral Act (1891) Amendment Act, 1893 (56 Victoria, Chapter 29).

The side lines of a claim are supposed to run parallel with the vein or lode, but often claims are staked before the direction of the vein or ledge is known. The direction is often not known until work on adjoining claims is done. Then comes the dispute as to the ownership of the ore in the vein. In British Columbia, the law is so plain that all disputes can be settled by calling in the services of a surveyor.⁴⁰

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The *Mining Record's* optimistic assessment of the changes in the mining law — and the intent of the Act — was put to the test within two years. A surveyor was called in by the Iron Mask Mining Company shortly after it encountered a tunnel driven by the adjacent Centre Star Mining Company while sinking a shaft near the border between the two companies' claims in late September 1897. Initially, the apparent trespass was dealt with in a congenial manner: the connection was sealed with a door and guards posted to prevent further intrusions by either party. According to the *Rossland Miner*, the disputed area was "a large body of iron-stained rock on each side of the [claim] line and hence an ordinary survey would not settle the dispute, as it might still be an apex question as to which claim contained the true apex of the vein."⁴¹

Despite the newspaper's cautionary note, the Iron Mask completed its survey and began removing ore from the disputed tunnel. The Centre Star responded by seeking and receiving an injunction prohibiting the Iron Mask from interfering with its workings inside the side lines of the Iron Mask claim. On appeal, the Supreme Court of British Columbia upheld the injunction. As part of the ruling, the Centre Star also agreed to suspend operations in the disputed area while ownership of the vein was contested on the basis of the extralateral right.⁴²

The two companies mined the rich copper-gold ores of Red Mountain at Rossland, British Columbia. Since both had been located under the provisions of the 1884 Mineral Act, they possessed full extralateral rights. At the time of the first injunction, the Iron Mask was a shipping mine. The Centre Star, the earlier of the two locations, was in the late stages of development but did not begin regular ore shipments until July 1898. Both were American companies. The Iron Mask, with head offices in Spokane, Washington, was held primarily by the Corbin interests of Butte, Montana. Corbin's other concerns in the Rossland area included the Red Mountain Railway and the smelter at nearby Northport, Washington. The Centre

⁴⁰ *British Columbia Mining Record* 1,1 (October 1895): 5.

⁴¹ *Rossland Miner* 1,252 (28 September 1897): 3.

⁴² *Rossland Miner* 1,262 (3 October 1897): 3; 1,262 (12 October 1897): 3; 1,297 (11 November 1897): 3; and *Victoria Daily Colonist* (16 November 1897): 6.

Star was owned by a Butte-based company until August 1898, when it was sold to the aggressive Toronto-based Gooderham Blackstock syndicate.⁴³

Although the question of ownership of the disputed vein did not come to trial until the spring of 1899, both companies appeared frequently before the Supreme Court of British Columbia prior to the trial date. On 24 December 1898, Mr. Justice Walkem, acting for the Full Court, closed a long series of actions centred around the injunction against working in the disputed ground. He ruled that the Iron Mask had the right to all the ore within the vertical lines of their claim until the extralateral rights claim of the Centre Star was proved or disproved at trial. He stressed the new and unusual nature of the case and ruled on the basis of the rights assigned under the 1884 Mineral Act and the 1892 amendments. "The parties here have equal rights, depending, however, on different titles. The Centre Star has a right to follow a vein into the adjoining claim. The Iron Mask, until that vein is proved, have a right to all the ore. . . ." In the meantime, the injunction prohibiting either party from working in the area remained in force.⁴⁴

The decision gave a strong boost to the already active stock of the Iron Mask. Prior to the hearing, speculation was that either the Corbin syndicate was trying to increase its position in the mine or that the Gooderham-Blackstock syndicate was attempting to gain control of the company. The continued advance of the stock after Mr. Justice Walkem's ruling was taken by many as evidence of the Iron Mask's ultimate victory.⁴⁵

The appeal heard in December rehearsed the arguments advanced during the trial. The Iron Mask claimed that the vein followed by the Centre Star did not have its apex on Centre Star ground and that its continuity — essential to support the extralateral right — was destroyed by a fault. The Centre Star, on the other hand, asserted that it had the apex and that the

⁴³ John Spencer Church, "Mining Companies in the West Kootenay and Boundary Regions of British Columbia, 1890-1900; Capital Formation and Financial Operations," MA. Thesis in History, University of British Columbia, 1961, 81-83, 290, 292; Innis, *op cit.*, 290-93; *Rosland Miner* 2,212 (13 August 1898): 4; 2,213 (14 August 1898): 1; and *Daily Colonist* (23 November 1897): 3. The acquisitive role of the Gooderham and Blackstock syndicate is discussed in Jeremy Mouat, "Mining in the Settler Dominions: A Comparative Study of the Industry in Three Communities From the 1880s to the First World War," PhD. dissertation in History, University of British Columbia, 1988; see Chapter IV, "The Emergence and Growth of Cominco, 1898-1920," 132-81.

⁴⁴ *Centre Star Mining Co. v. Iron Mask Mining Co.*; *Iron Mask Mining Co. v. Centre Star Mining Co.*, 6 B.C. 355 (1898) quoted in Martin, *op. cit.*, 274; *Rosland Miner* 3, 22 (25 December 1898): 1; and *Daily Colonist* 80, 101 (9 October 1898): 6; 81, 8 (20 December 1898): 8; 81, 13 (25 December 1898): 7.

⁴⁵ *Rosland Miner* 2,302 (8 December 1898): 4; 3, 25 (29 December 1898): 3; and *Canadian Mining Review* 17, 10 (October 1898): 281.

fault was merely a fracture. Furthermore, it sought repeatedly to be allowed to do additional underground work in order to prove its contentions. Company lawyers argued that "it is impossible for the case to be properly tried unless this work is allowed to be done, that being the only way in which the true facts can be properly shewn [*sic*]." There was no hard geological evidence to support either argument. Several expert witnesses had been called, including William A. Carlyle, the recently retired Provincial Mineralogist, who supported the Centre Star's argument. Mr. Justice Walkem's decision to deny permission was based on his opinion that he did not have the power to allow the work. That right should be reserved to the trial judge.⁴⁶

As the date for the trial approached, the *Victoria Daily Colonist* noted the increasing level of public interest in the case and speculated that "no case has probably been before the Courts of British Columbia in more ways than [this] now celebrated case. . . ." Perhaps hoping to capitalize on the popular perception that it was fighting against large eastern interests, the Iron Mask petitioned for a jury trial, a common tactic in similar U.S. cases. The request was subsequently abandoned, and the trial was scheduled to be heard before Mr. Justice Walkem in the Miners' Hall at Rosslund on 17 April 1899.⁴⁷

As in the United States, expert witnesses were called upon to play a major role. According to the *Rosslund Miner*, "the best mining talent in the United States has been engaged" by the Centre Star Company. The list was impressive. Clarence King, the founder and first director of the United States Geological Survey, Louis Janin, a noted metallurgist, and Rossiter Raymond, one of the founders of the prestigious *Engineering and Mining Journal* and the president of the United States Mining Institute, were all to appear for the company. The three men were highly respected, and Raymond had frequently acted in a similar role in U.S. cases.⁴⁸

⁴⁶ Martin, *op. cit.*, 269-74. In a dissenting opinion, Mr. Justice Martin noted that under U.S. procedures the right to do further work would probably be allowed as long as it was confined to investigating the vein in question (278-80).

⁴⁷ *Daily Colonist* 81,120 (24 March 1899): 5; and *Rosslund Miner* 3,107 (4 April 1899): 1.

⁴⁸ *Rosslund Miner* 3,120 (20 April 1899): 1. King had extensive personal experience with the western mines and was the geologist-in-charge and a major contributor to the *Report of the Geological Exploration of the Fortieth Parallel*, Professional Papers of the Engineer Department, U.S. Army, No. 18, the third volume of which dealt with the mining industry. Janin had first hand knowledge of the importance of mineralogical identifications through his long employment on the Comstock Lode. Raymond was a legal expert on the extralateral right as well as a German trained engineer. See his "Law of the Apex," *op. cit.* The three constituted one of the most prestigious panels it was possible to assemble.

When the trial finally opened, the Iron Mask's lawyers attacked the Centre Star's title to the claim under the 1884 Act and argued that the Iron Mask was, in fact, the earlier of the two locations on the disputed ground.⁴⁹ Nevertheless, the alleged nature of the Centre Star's vein was the keystone of the Iron Mask's case. Secure in the prohibition against exploratory work in the disputed area, company lawyers argued that no such vein existed, it had no apex on the Centre Star's ground, and that it was not continuous. Given the convoluted geology of the border between the two mines, they asserted the vein in question had its apex on the Iron Mask claim. The Centre Star denied all of the Iron Mask's claims and once again requested leave "to do certain experimental work underground, and in the territory lying under the boundary line of the Iron Mask" in order to transform geological inferences into physical fact.⁵⁰

Arguments pertaining to the defence motion occupied the first full day of the trial, with most of the case law being drawn from the American courts. Finally, Mr. Justice Walkem reserved his decision, and the parade of expert witnesses began with Clarence King at centre stage. After establishing his credentials and describing the general geology and mining history of the Rossland area, he suggested that the contested vein probably had its apex on the Centre Star claim. He also suggested that two distinct veins might intersect in the same area. Neither position was based on direct observation.⁵¹

On 29 April 1899, Mr. Justice Walkem ruled on the Centre Star motion and allowed that company to proceed with the requested experimental work. The Iron Mask immediately demanded an adjournment of sixty to ninety days in which to conduct similar work to bolster its case. Two days later its lawyers announced that the circumstances of the case were so changed by the ruling that they were no longer prepared to proceed. Finally, on 3 May after additional conflicting technical evidence had been presented, the case was adjourned *sine die* with costs assigned to the Iron

⁴⁹ The trial attracted so much attention in the mining community that the *British Columbia Mining Record* serialized the transcript and published much of it between November 1899 and September 1900. Subsequent references to this transcript of Iron Mask Gold Mining Company (Foreign) v. Centre Star Mining and Smelting Company (Foreign), George Gooderham and Thomas Gibbs Blackstock will follow the form *Trans., Mining Record*. E. V. Bodwell and A. H. Macneil appeared for the plaintiffs while A. P. Davis and A. C. Galt acted for the Centre Star.

⁵⁰ *Trans., Mining Record* 6, 2 (November 1899): 57-61; 6, 3 (December 1899): 90-104, esp. 98-100; 7, 1 (January 1900): 17-18; and *Rosslund Evening Record* 3,253 (28 April 1899): 4.

⁵¹ *Trans., Mining Record* 7, 8 (August 1900): 316-17; 7, 9 (September 1900): 348-58, esp. 352; *Rosslund Miner* 3,124 (22 April 1899): 1; and 3,126 (27 April 1898): 1.

Mask.⁵² While the Iron Mask retired to prepare yet another appeal, the assembled mining experts took their leave. Shortly thereafter, the New York based *Engineering and Mining Journal* passed editorial judgement on their performance:

This case, which had been on trial at Rossland for 15 days, with prominent mining engineers as experts on either side, came to an abrupt end . . . Much of the testimony of the experts summoned was contradictory, and the actual merits of the case are unknown.⁵³

Immediately after gaining the permission of the court, the Centre Star commenced an aggressive development programme in the disputed ore and by mid-May was making small shipments from the vein. Despite unrestricted access to the area, reports in the press continued to state: "Nothing positive as to the continuity of the vein which is alleged to apex on the Centre Star ground has been established yet."⁵⁴ Even though the case was technically unresolved, the general opinion in the mining industry was that the Iron Mask had lost.⁵⁵ The final hearing on the Iron Mask's appeal of the inspection order was held in late November 1899. The order was upheld, and a variation in the assignment of costs was granted.⁵⁶

A piece of doggerel entitled "The Red Star and the Iron Cask; A Resume" published in the *Mining Record* satirized the anticlimactic conclusion of the industry's cause célèbre. After presenting an image of the court's clerk utterly confused with the array of evidence, the two final verses leave little of the writer's opinion to the imagination.

Leaving him with his delusion
 We must haste to our conclusion,
 The judge's wise decision when the last long speech was said,
 Well, to give it a trice — he
 Took the matter sub-judice
 While the lawyers went to Europe and the litigants — to bed.

L'Envor

Doe and Roe, much out of pocket
 Each by a leg loose in its socket

⁵² *Rossland Miner* 3,128 (29 April 1899): 1; 3,129 (30 April 1899): 5; 3,131 (3 May 1899): 1; and *Daily Colonist* 81,120 (29 April 1899): 1; 81,122 (3 May 1899): 1; 81, 124 (5 May 1899): 1.

⁵³ *Engineering and Mining Journal* 57, 19 (13 May 1899): 571.

⁵⁴ *Engineering and Mining Journal* 57, 18 (6 May 1899): 541; 57, 21 (27 May 1899): 632; and *Mining Record* 5, 6 (June 1899): 34.

⁵⁵ *Engineering and Mining Journal* 57, 23 (10 June 1899): 691.

⁵⁶ *Iron Mask Mining Co. v. Centre Star Mining Co.*, 7 B.C. 66 (1899).

Came together by appointment and here my language fails
 For I tell it to my sorrow
 Roe and Doe from me did borrow
 A silver dol. to arbitrate with good old heads and tails.⁵⁷

Precedents set in the case were important, despite the disappointment felt by the public audience. The way in which the case was handled greatly reduced the potential success of other speculative suits launched on the basis of inferred extralateral rights, since orders allowing or even requiring exploratory work to establish hard geological evidence were confirmed. Of equal importance, the opportunity to manipulate expert testimony for the amusement of jurors was also precluded.⁵⁸ As a result, a number of similar conflicts raised in the Rossland area and elsewhere in the province were simply abandoned by mutual consent of the parties. Those that did come to trial were handled with dispatch.⁵⁹ As to the facts in the *Iron Mask v. Centre Star* case, a geologist acceptable to both sides finally examined the source of the problem and concluded that "The Iron Mask and Centre Star veins intersect."⁶⁰ A private settlement was subsequently arranged.

* * *

The emergence of larger mining companies during the first decades of the twentieth century reflected fundamental changes in the structure of the mining industries. Control over large and often ill-defined low-grade ore bodies replaced the nineteenth century emphasis on high-grade vein structures as the basis for continued expansion in the industry, and became the precondition for profitable operations.⁶¹ In the western United States, the continuance of the extralateral right in the mining law was a common problem associated with the acquisition of large blocks of ground. Court house miners, small claim holders, and larger competing interests were frequently able to frustrate or delay efforts to assemble the extensive ore reserves necessary for mass mining. Consequently, the cost of establishing a large mining operation was substantially increased. Only after the First World War were the rules of procedure in the state and federal courts

⁵⁷ J. H. McG., "The Red Star and Iron Cask; A Resume," *Mining Record* 7, 12 (December 1900): 453.

⁵⁸ *Star Mining Co. Ltd. v. Byron N. White Co. (Foreign)*, 9 B.C. 9 (1902).

⁵⁹ *Annual Report of the Minister of Mines for British Columbia*, 1913, 136.

⁶⁰ Arthur Lakes, "The Ore-Bodies and Geology of Rossland Camp," *Mining Record* 7, 9 (September 1900): 344-45.

⁶¹ For a discussion of large-scale operations in the copper industry — the dominant mining enterprise for twenty years after 1900 — see A. B. Parsons, *The Porphyry Coppers* (New York: American Institute of Mining and Metallurgical Engineers, 1933).

revised to the point where extralateral rights suits became difficult to launch. Despite repeated calls to reform the mining law by doing away with the extralateral right, it remains a part of the mining law in the United States.⁶²

In British Columbia, the elimination of the extralateral right from the mining law during the early stages of the expansion of the lode mining industries and the establishment of much stricter rules in the provincial courts eliminated a major impediment to the consolidation movement. During the course of the *Iron Mask v. Centre Star* case, the Toronto-based Gooderham Blackstock syndicate purchased the Centre Star mine and subsequently merged its operations with adjacent mines. Over the next ten years, declining ore grades, lower revenues, and increased costs led to the acquisition of many of the previously independent mining companies in the district. By 1911, all the mines on Rosslund's Red Mountain were controlled by the Consolidated Mining and Smelting Company of Canada (Cominco). Unlike the birth of Anaconda in the United States, the emergence of Cominco was not hindered by numerous legal challenges based on the extralateral right.⁶³

⁶² Colby, *op. cit.*, 701-04; Horace V. Winchell, "Why the Mining Laws Should be Revised," *Trans. A.I.M.E.* 48 (1914): 361-85, esp. 368-74; John L. Neff, "The Law of the Apex — A Continuing Enigma," *Proceedings of the Rocky Mountain Law Institute* 18 (1973): 387-414; and Terry S. Maley, *Mining Law; From Location to Patent* (Boise, Idaho: Mineral Land Publications, 1985), 376-96, esp. 394. The very brief treatment of apex litigation in a recent U.S. guide to the relationship between geologists and the law underlines its relative unimportance in recent years; see Ronald W. Tank, *Legal Aspects of Geology* (New York: Plenum, 1983), 372-73.

⁶³ Innis, *op. cit.*, 291-93; Mouat, *op. cit.*, 145-49; and Charles Wales Drysdale, *Geology and Ore Deposits of Rosslund, British Columbia*, Geological Survey of Canada Memoir 77 (Ottawa: Government Printing Bureau, 1915), 9-11, 95, 96.