

## SOVEREIGN INTENTIONS:

### *Gold Law and Mineral Staking in British Columbia*

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THE FRASER RIVER GOLD RUSH of 1858 was situated within a particular geo-historical moment of gold exploration and extraction that extended throughout the Americas and parts of the Pacific Rim. Colonial gold exploration and conquest travelled through South and Central America and California before it reached what is now known in settler geographies as British Columbia in the 1850s. Gold rush regulations moved both up the Pacific coast and across the Pacific Ocean and were part of the formation of state law and resource governance. While my concern in this article is with a particular historical moment during which gold mining regulations were written, the BC gold rush is part of a much larger phenomenon – one that involved gold seekers exploring many corners of the globe. My focus is on the inherited regulatory devices that continue to create asymmetrical power relations in mining projects in Canada and, particularly, in British Columbia. My aim is not to be deterministic about the power of mining property law but, rather, to illuminate how the legal mechanisms that facilitate mining and have historically negated Indigenous presence on land are bound to gold economies and legal principles that were distilled in the gold rush era.

Daviken Studnicki-Gizbert (2012) traces the history of the gold rush on a much longer time scale than I do here. He begins his analysis during the Spanish conquest of the fifteenth and sixteenth centuries. Explorers travelled to the Americas partly in search of El Dorado, and this colonial European search for gold (and silver) spread from South America to Mexico and later up the Pacific coast to British Columbia.<sup>1</sup> Given the continental trajectory of gold mining through South and North America, the rush for minerals that brought colonial mining interests to British Columbia and further into Canada's North was relatively late. In this article, I contribute to research on the Canadian geographies

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<sup>1</sup> There were other explorers who came for gold earlier, such as Christopher Columbus. My point here is that mining laws travelled with the exploration of gold. As I elaborate further in this article, these were initially colloquial laws recorded by miners themselves before they were legally drafted into law (see also Mills 2016).

of mining, including studies that examine Canada's North (Cameron 2015; Keeling and Sandlos 2016). I also participate in larger conversations around the regional environmental history, including debates around Indigenous space (Harris 2002) and race (Perry 2001; Mawani 2000) as well as discussions of law and order in colonial British Columbia (Loo 1994).

In previous work on mining law, the miners and bureaucrats I interviewed in Canada's territorial North eagerly explained to me how mineral claims came to be staked legally. This included a significant spatial and legal geography as mining law travelled with the gold rushes throughout the Americas. It is, in part, these previous conversations with miners in the Northwest Territories that sparked my interest in the origins of mineral staking in western Canada. The *BC Gold Fields Act, 1859*, was a common referent in these discussions (Hoogeveen 2015). It was the first mining legislation formally recorded and legally enshrined in the Canadian west. The *Gold Fields Act* was signed on 31 August 1859, when James Douglas was the first colonial governor of British Columbia. It replaced or was superimposed on a regime of colloquial laws, largely brought by miners from California (Mills 2016).

The ideological foundations of mining law in British Columbia, as in other colonial claim-staking regimes such as Australia, were based on the tenets of British mineral staking. The gold rush of 1858 was integral to the consolidation of British Columbian sovereignty and marked a central moment in the beginnings of provincial resource allocation laws and the unlawful removal of lands from Indigenous peoples.

Different imperial ties and colonialisms were at work. The gold rush was at once an opportunity for gold seekers and a threat to British control over the North Pacific coast. The sudden influx of prospectors from California quickly encouraged Governor Sir James Douglas to assert lands in the region (including the Fraser Canyon) as being subject to Britain. He did this for fear of losing the area which would become British Columbia to American interests. The rush of miners heading north to the goldfields recalled the influx of American settlers to the lower Columbia in the mid-1840s and the ensuing Oregon Treaty of 1846. The Oregon Treaty resolved competing British and American claims to sovereignty over what had previously been known as the Oregon Territory – the Supreme Court of Canada has used this to mark the beginning of uncontested British sovereignty in British Columbia. However, tensions persisted between American and British interests, and it was in response to the Oregon Treaty and the “loss” of the Columbia that the proprietary

Colony of Vancouver Island was established in 1849. Indigenous peoples were not properly brought into the discussion or consulted on the carving of these settler colonial state borders. Scaling down from the ongoing emphasis on law and treaties such as these, scholars also suggest that settlers embody, and carry with them, claims to sovereignty (Seed 1995; Wolfe 2013). This embodiment can be imagined and is materialized in the ways that past mineral-staking regulations were practised on the land through the maintenance of legal power bestowed upon gold commissioners and licensed miners.

The era prior to British Columbia's entrance into Confederation in 1871 – the “colonial period” – had two regions named by settler colonists: (1) New Caledonia, on the mainland, which was loosely under Hudson's Bay Company control and which became the Colony of British Columbia in 1858; and (2) the Colony of Vancouver Island, which was established in 1849. These two colonies were joined in 1866 to form the Colony of British Columbia, though Indigenous title claims within Western law are dated to the 1846 Treaty of Oregon (which ended joint claims between Britain and the United States) or even earlier to the Treaty of Niagara and the Royal Proclamation (1763). Much has been written on these historic treaties, which is crucial to understanding the regional politics both historically and today (e.g., see Borrows 1997 on the Treaty of Niagara).

In 1858, approximately thirty thousand people passed through Victoria on Vancouver Island, the vast majority travelling from California. That same year, James Douglas, who was soon to become governor, wrote to the Colonial Office in England requesting support from the British Crown to rule the quickly expanding colony (Despatch to London, Douglas to Labouchere, 2084, CO 305/8, p. 271, received 2 March 1858). In response, Judge Matthew Begbie was sent to Victoria from Britain. Begbie travelled to Fort Langley and proclaimed the new Colony of British Columbia subject to the Queen. This is significant to the story of gold-mining regulations in British Columbia because, in the following year, 1859, Begbie drafted the BC *Gold Fields Act* (Williams 1977).

This article discusses the regional origins and legal mechanisms of mineral staking. I introduce the history of mineral law to raise the question of colonial property relations in general and, more specifically, to address the following three questions: (1) How was mineral claim staking regulated in British Columbia during the early colonial era of 1858 to 1861? (2) What were the legal mechanisms adopted during that

period? (3) What is the significance of the adoption of these mechanisms for contemporary mineral tenure regimes?

In order to answer these questions, I begin with a definition of the concept of sovereignty. I then examine the free entry principle in mining legislation and its incorporation into the first gold-mining legislation in the Canadian west: the BC *Gold Fields Act, 1859*. Next, I suggest that, with the emergence of colonial governance there is a link between racialization and the writing of mining law in 1859 and beyond. Last, I summarize the contemporary *Mineral Tenure Act* to explain how the legal mechanisms allow for mineral staking today and the persistence of the principles established in the initial gold rush era.

#### SOVEREIGNTY IN TENSION

The concept of sovereignty helps explain the contestation over lands, between Indigenous peoples, mining companies, and the state that is instigated through mineral claim staking. *The Dictionary of Human Geography* defines sovereignty as “a claim to final and ultimate authority over a community” (Gregory et al. 2009, 709). In the sense of how mining claims are staked, territoriality is also a relevant concept, related to sovereignty. But sovereignty, like territoriality, is not a monolithic force, and claims regarding what constitutes a community are in conflict, including in settler colonial states like Canada. It has been pointed out that sovereignty is not an Indigenous term (Alfred 2002). Yet sovereignty is a concept some Indigenous nations now use to reclaim territory.

Sovereignty is a well-analyzed terrain. Useful to my discussion is the work of Emel, Huber, and Makene (2011), who outline how sovereignty is often “couched in opposition to foreign capital.” They argue for recognition of the forms of sovereignty that are necessary for mining investments and highlight how capital configures sovereignty in Tanzania. According to these authors, sovereignty is much more than control over territory, and it is crucially tied to mineral investments. This delineates a form of sovereign power based on economic markets and the monetization of gold resources: sovereignty underlies these economic claims. Emel et al.’s intervention is that sovereignty is tied to markets through the value of natural resources (and access to natural resources as commodities).

Patricia Seed’s historicization of sovereignty is also relevant. She writes that sovereignty is based on taking possession and she traces property claims in the “New World” to differences in ceremony, particularly when

Britain and Spain declared rights to their colonies (Seed 1995). For Seed, claims to sovereignty are based upon very powerful fictions. Drawing on Seed's notion of "ceremonies of possession," Cole Harris (2002, 48) traces claims to sovereignty further back than the gold mining upon which I focus to the major historical and political treaties and proclamations that shaped the Canada-US border. He does this in order to make a case for how *Native Space* was forged through the British Columbian Native reserve system. The Royal Proclamation (1763) and the Treaty of Oregon (1846) asserted British sovereignty and established the formal political context that continues to underwrite Canadian law and the "land question." British claims to land were transferred to the Dominion of Canada in 1867, and these were extended to British Columbia in 1871, with that colony's entry into Confederation. While the Royal Proclamation and the Treaty of Oregon are significant to legal regional histories, the everyday material act of staking a mineral claim reproduces these instruments of conquest in a less theatrical but also contestable day-to-day way. In short, the ongoing implementation of the principles of mining law, forged during British Columbia's pre-Confederation era, allow for the consolidation of state sovereignty. Yet state-based accounts of sovereignty fail to address how sovereignty is also multiple and lived according to relational politics (Daigle 2017).

#### FREE ENTRY

The initial purpose of this article is to demonstrate how, during the first BC gold rush era, which began in 1858, British claims to sovereignty were, in part, demonstrated through mining regulations. Indeed, there had been the discovery of gold in Haida Gwaii where James Douglas had proclaimed goldfields law (Barman 1991, 63). However, the gold rush of 1858 provided a socio-political and economic climate whereby British claims to territorial sovereignty over Indigenous lands and people, though already established, were *rushed* through the sheer number of mining claims made and licences issued. Colonial administrative powers granted the right to stake claims through mining licences. These licences were issued in the name of the Crown; thus, staking a mineral claim with a miner's licence reasserted British sovereignty over mineral resources. Prior to the drafting of the BC *Gold Fields Act*, the only formal mining legislation in effect was the issuance of five-dollar mining licences. The British Columbia Archives in Victoria have records of the miner's licences that were issued monthly prior to the writing of the *Gold Fields Act*.

The mineral-staking principles written into the BC *Gold Fields Act* established the principle of free entry, or “free-mining.” This principle allowed companies and individual prospectors to stake mineral claims without the consent of, or consultation with, Indigenous people and, later (when more land was pre-empted by settlers), private landholders. Moreover, the free entry principle in mineral-staking laws has a long history and wide geographical scope. Anthony Scott (2008) traces the origins of resource property regimes as far back as Norse times and describes lease-type tenure during the medieval period. Of interest here are the roots in eighteenth-century England, particularly in tin-mining districts (Barton 1993). Barton describes this in detail in *Canadian Law of Mining* (1993). The central point in understanding free entry, he argues, is that mining is presupposed as the highest and best use of land and that staking a claim happens without discussion with anyone else. This includes Indigenous peoples, who often occupy lands upon which mineral staking takes place. Bonnie Campbell extends the argument to late twentieth-century African mining regions. She argues that the ideologies underwriting free entry are responsible for asymmetrical power relations in mining more broadly and links these with the liberalization of mining regimes in Africa during the 1980s and 1990s (Campbell 2010). Not surprisingly, therefore, “free entry” remains an issue of contestation in Canadian mining regions (Laforce, Lapointe, and Lebus 2009) and the United States (Benson 2012; Huber and Emel 2009).

In British Columbia, while there are restrictions placed on where mineral claims can be staked (as outlined in section 11 of the *Mineral Tenure Act* referenced in this article’s final section), the majority of lands in the province, both private property and Crown lands, can be staked using British Columbia’s Mineral Titles Online system. The antecedents of the rules that govern the free entry mining system are embedded in the region’s original mining law, to which I turn now.

#### THE GOLD FIELDS ACT

The content of the *Gold Fields Act* remains relevant because of the claim-staking regime that it inaugurated, enshrining free entry in British Columbian law (even though the need for a licence was part of the proclamation of 1853 regarding mining on Haida Gwaii; also in BC in December 1857). The act required miners to apply for a free miner’s certificate, a licence that allowed the holder to stake mineral claims (and thereby secure a legal right). This system of granting a mining licence

was subsequently copied in jurisdictions throughout northern Canada. Barry Barton traces in detail the trajectory of free entry mineral staking in Canada.

It is evident in the *Gold Fields Act*, however, that settler colonial claims were made to more than simply individual property. Underlying the right to stake a claim was the idea of British sovereignty. The holder of a free miner's certificate had "the right to enter without [let] or hindrance upon any of the wastelands of the Crown not for the time being occupied by any other person, and to mine in the land so entered upon." This regional legislation was thus dependent on ideologies that viewed land as either waste or not waste, and this coincided with the arrival of British common law with the establishment of the colony. There are many assumptions regarding free entry, or "right to enter," and Crown sovereignty made in this legislation (e.g., that relating to wastelands). Similar assumptions based in British law were made in mining legislation enacted in other Pacific Rim colonies, such as New Zealand and Australia (see Trimble 1914).

In addition to defining the free miner and the right to enter lands to mine, the *Gold Fields Act* defines gold commissioners and mining claims. Key clauses from the original act are as follows:

Gold Commissioners to be appointed by the Governor under the Public Seal

It shall be lawful for His Excellency the Governor, by any document under his hand and the Public Seal of the Colony, from time to time to appoint such persons as he shall think proper to be Chief Gold Commissioner or Gold Commissioners or Assistant Gold Commissioners in British Columbia, either for the whole Colony or for any particular district or districts therein, and from time to time in like manner to fix and vary the limits of such districts, and limit new districts, and to revoke any such appointments and make new appointments and vary such limits and sub-divide any such districts into separate and independent districts.

Free-Miner's certificate

It shall be the duty of every Gold Commissioner upon payment of £1 to deliver to any person applying for the same a Certificate, to be called a Free-Miner's Certificate, which may be in the following form

...

To continue in force for one year

The Free Miner's Certificate shall continue in force for twelve calendar months from the date thereof, [*sic*] including the day of issuing the same, and no longer, and shall not be transferable or capable of conferring any rights upon any other person than the person therein named, and only one person shall be named as a Free-Miner in each certificate.

Must be countersigned by the free-miner

Such a Certificate must be countersigned by the Free-Miner therein named before being produced by him for any purpose. And where such Certificate shall be issued to the Free Miner therein named in person, the Gold Commissioner or the person issuing the same shall cause the same to be countersigned by the applicant before himself signing or delivering the same.

Right to enter and mine

Every Free Miner shall, during the continuance of his certificate, have the right to enter without [let] or hindrance upon any of the waste lands of the Crown not for the time being occupied by any other person, and to mine in the land so entered upon.

In many ways, the *Gold Fields Act* and its subsequent amendments may be read as simply another law that reflected the general pattern of British colonial mining legislation. Yet it is the nature of the underlying and unexamined assumptions noted above, and their continuing use in Western mining laws, that contributes to generating contemporary conflicts over territory and resources.

Turning to the specific contents of the 1859 act, the very first clause listed above essentially grants the gold commissioner the authority to make administrative districts however he pleases. Clauses 2 and 3 (omitted) set out the format of the licence, which gave a free miner the right to mine for one year. The licence was to be signed by the gold commissioner (or issuing person) and the miner. Last, in the above quoted items from the original *Gold Fields Act*, is the right to enter "waste lands" of the Crown in order to mine. This grants free entry to mine lands considered "waste" – that is, unoccupied or unused (related to the



notion of *terra nullius*). Implicit references to Locke and working the land, or the value and definition of property, are evident.<sup>2</sup> Further, the meaning of waste here is significant as an analytical category.

In her analysis of the impact of the uranium boom in Diné Bikéyah, where the Diné (or Navajo) live, Traci Voyles writes extensively about waste in the lands that encompass where New Mexico, Arizona, Utah, and Colorado meet. She writes: “Remaking native land as settler home involves the exploitation of natural resources, to be sure, but it also involves a deeply complex construction of that land as always already belonging to the settler – his manifest destiny – or as undesirable, unproductive, or unappealing: in short, as wasteland” (Voyles 2015, 7). Voyles’s analysis of the (un)productivity of so-called empty land relates to the principles distilled in mineral-staking laws, which directly draw on the language of waste.

The gold commissioner was a key figure in the implementation of the *Gold Fields Act*. This official’s power extended well beyond the governance of gold mining; gold commissioners were also charged with a judicial role and water licensing, for example. James Douglas was aware of the usefulness of the gold commissioner in maintaining power as he had been informed of this role in New Zealand and Australia (Bescoby 1967, 62). The act stipulates that “[t]he Gold Commissioner alone without a jury shall be the sole judge of law and fact,” thus granting great power to this figure who, at the time, embodied the colonial sovereign. Gold commissioners further assumed the role of Indian agent, yet the act of 1859 makes no mention of “Indians.” The role of Indian agents demonstrates the early legal stages of the governing of Indigenous peoples in what became the settler region of British Columbia, Canada. Indian agents were placed under federal jurisdiction at the time of Confederation, whereas the governance of mining – particularly concerning property rights – remained, and remains, a provincial jurisdiction. “The powers of a gold commissioner ... were great. Save for right of appeal to the supreme court ... his authority was absolute” (Trimble 1914, 337). Governor Musgrave defined the role of gold commissioners in a report to Lord Lisgar, governor general of Canada, on 22 November 1870. These officials were “not only Justices of the Peace, but County Court Judges, Indian Agents, Assistant Commissioners of Land and Works, Collectors of Revenue in the different Departments of the Public Services at the several Stations hundreds of miles apart and in very extensive Districts” (in Bescoby 1967, 63 in regard to the machinery of colonial government).

<sup>2</sup> See also Locke’s “Of Property” in the Second Treatise (Locke 1952 [1690]).

These diverse and extensive powers illustrate the consolidation of legal power into the hands of a few settlers (see Hendrickson 1980).

#### THE "PRESERVATION OF PEACE AND ORDER"

On 29 December 1857, Governor James Douglas sent copies of his proclamation and regulations for gold mining in British Columbia (Despatch to London, Douglas to Labouchere, 2084, CO 305/8, p. 271). In his covering letter Douglas writes that he took the necessary, preparatory step of proclaiming the mining licences for the "preservation of peace and order." Moreover, the proclamation declared "the rights of the Crown in respect to gold found in its natural place of deposit within the limits of Fraser's River and Thompson's River Districts, within which are situated the Couteau Mines, and forbidding all persons to dig or disturb the soil in search of Gold until authorized on that behalf by Her Majesty's Colonial Government" (Douglas 1858).<sup>3</sup>

To once again cite Douglas's diary, in May of 1858, prior to the establishment of the colony, he recorded a list of the local rules that governed one particular gold bar, Hill's Bar, located on the Fraser River, based on California precedents. During settler colonial gold rushes, men working in mining camps developed the first gold laws locally. Of note is the fact that, at the time, there was a significant number of Chinese gold miners who were subject to racism. The role of miners' meetings was important in that a "simple assembly of miners" would convene and essentially establish both civil and criminal laws (Mills 2016). These customary laws and miners' meetings predated the establishment of formal British law, and, as Mills points out, they travelled with the miners from California, where such rules had developed roughly a decade before the rush to the Fraser. The dimensions of how settler culture travels with resource law is of significance. It may be argued that the customary law of miners, by regulating the staking of mineral claims, asserted the material dispossession of Indigenous peoples from their land. Tensions over land and resources are quite clear in the colonial correspondence generated by the Fraser rush (see, for example, Howay 1926).

Douglas recorded the customary law regulations in the operation at Hill's Bar, just below Yale on the Fraser River, on 26 May 1858:

<sup>3</sup> "The Couteau Mines" was the colloquial phrase for the mining region before the settler population began to more frequently refer to the region as the Fraser River goldfields. See Douglas's proclamation of December 1857, Despatch to London, Douglas to Labouchere, 2084, CO 305/8, p. 271 (received 2 March 1858).

1. No claim on this bar to exceed 25 feet front to each man.
2. Each man can hold 2 claims viz. one by preemption and one by purchase. Provided he works both.
3. Bar claims can be held during absence by partners representing claimant.
4. When workable every claim must have one day's work in every three put on it, except in case of sickness.
5. Any whiteman [*sic*] caught stealing on this bar shall be punished as a Committee appointed by the mines shall direct, and shall if he belongs to the Bar forfeit all his right, title and interest on it.
6. Any white man molesting the Indians whilst in a state of intoxication or otherwise shall be dealt with as a committee of the miners shall direct.
7. No liquor shall be sold or given to the Indians, nor exposed publicly for sale on this bar. Any one violating this law shall be fined \$100 for the first offence and for the second be sent from the forfeiting [*sic*] all his right title or interest in it.

#### For Mutual Safety

There shall be elected a captain and 2 Lieutenants who shall have entire control in case of danger or attack, or whenever they may have reason to apprehend any. Any one disobeying the orders of either shall be subject to a severe penalty.

(Douglas 1858)

There are many details of interest in these customary laws. As Barry Barton notes, miners self-regulated – particularly in California – because the first American federal mining laws were not written until 1866, well after the first California gold rush (Barton 1993, 116). Barton also states that migrating miners brought their assumptions of free entry with them to British Columbia (see also Trimble 1914).

The customary laws recorded by James Douglas at Hill's Bar established free entry, the size of claim areas, and the work requirements

necessary to maintain good standing.<sup>4</sup> It also established consequences for white men who engaged in theft and marked a clear social division between white men and “Indians.” The document demonstrates the gendered, racialized environment of the gold rush. Rule 6, in particular, that “any white man molesting the Indians whilst in a state of intoxication or otherwise shall be dealt with as a committee of the miners shall direct,” is worth contemplating. It indicates not only that there was enough settler abuse of Indigenous people to warrant such a rule but also that this abuse was conceived as a problem. Since these customary laws imitated those from other mining districts, this document also suggests that the racial and gendered division within mining districts was widespread in settler societies beyond British Columbia. Finally, it demonstrates the linkages and borrowings from California in 1858 (for elaboration, see Trimble 1914; Mills 2016).

The final clause, concerning the sale of liquor to Indians, was later formally written into law by the Colony of British Columbia. The “Penalty for Selling Liquor to the Natives” was the colony’s first proclamation, issued on 6 September 1858. This is significant in that it addresses a much larger culture of regulating “Indians” that continues today through, for example, the Indian Act.

In her analysis of “half-breeds,” Renisa Mawani writes on liquor laws concerning Indigenous populations, suggesting the existence of confused racial hierarchies, particularly in Canada, during the late nineteenth and early twentieth centuries. Her work also addresses the social regulation of space and the maintenance of racial/social hierarchies through the governance of sex (“half-breeds”) and liquor laws. She argues that racial segregation through spatial means such as the creation of reserves and liquor laws is based on a desire to “construct white bodies and spaces as ‘pure’” (Mawani 2000, 24). She also suggests that liquor laws were written under the white Eurocentric assumption that Indigenous people lacked the attributes of (good, white) self-disciplined Christians and that these laws were designed to encourage racial segregation (26). The presence of these values can also be seen in the above-listed customary mining laws, particularly in Clause 7, which prohibits the sale of liquor to Indigenous people. Race and gender in “the making of British Columbia” is a topic that has also been extensively explored by Adele Perry (2001), who, like Mawani, analyzes the ways in which Indigenous peoples were

<sup>4</sup> Rules that govern how a mineral claim must be worked are still enshrined in mineral rights regulations. For example, in the Northwest Territories this type of work is referred to as “representation work.”

marginalized. She also points to distinct challenges to Anglo-American norms, including that provided by the significant resistance of Indigenous peoples.

It is clear that gold-mining laws and other early colonial regulations, including those formulated prior to the writing of the BC *Gold Fields Act*, were racially structured. The Hill's Bar mining regulations detailed in James Douglas's diary were not formally or legally enshrined, but they show how racial structuring was embedded in settler society at the time. The Hill's Bar mining code relates to the *Gold Fields Act* in two significant ways. First, the formal enactment of the *Gold Fields Act* enshrined the same principles, with respect to free entry, that were in practice at Hill's Bar. Second, Indigenous resource sovereignty is completely ignored in both the colloquial customary mining code as well as in the *Gold Fields Act*. This occlusion is seen in the ongoing claims to sovereignty over Indigenous lands made on behalf of the settler state through mining property laws and acts. Both informal and formal laws made assertions over Indigenous territory – social space as well as physical space – and were bound to Western, racist ways of thinking and racist legal orders whereby gold was alienated and Indigenous sovereignty and space either dismissed or not considered at all.<sup>5</sup> I am not arguing that there has been no or even only a little integration of Indigenous rights or traditional ecological knowledge in contemporary resource regulation in western or northern Canada, for that would be inaccurate.<sup>6</sup> Significant advances in Canadian case law, like the 2014 *Tsilhqot'in* Supreme Court of Canada decision and the implementation of section 35 of the Canadian Constitution have allowed for gains for Indigenous nations and governments. Yet this does not erase “the land question” and the many conflicts over property that continue to emerge in light of mineral-staking legislation and that continue to fail to adequately engage with Indigenous people and municipalities.

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<sup>5</sup> Relevant to a larger project is how dispossession narratives largely negate racial structuring in discussion of accumulation, yet white supremacy and racism remain central in contemporary law.

<sup>6</sup> I have written about environmental assessment and the integration of Indigenous knowledge into environmental assessment (e.g., Hoogeveen 2016).

## MINING CODE DEBATES

Mining laws have always been debated and updated, but the property relation that grants a miner's access remains the same. There are records in the colonial archive of an active debate, prior to the writing of the *Gold Fields Act*, concerning having the monthly licence amended.

Richard Hicks wrote to Douglas. His correspondence provides further evidence of the active debate over new mining laws during this era. Hicks's position was that licences should be issued quarterly, as opposed to monthly:

Your Excellency stated that alterations were in contemplation with respect to the collection of miners' licenses. I would most respectfully suggest that a quarterly license of five dollars be collected instead of monthly, which will realize a larger revenue because we can then make all pay, rich and poor claims; as it is now, the great bulk of the claims do not pay over two dollars per day to the man. The taxation of claims in Australia was compelled to be given up in consequence of the miners not being able to pay it; and should Your Excellency adopt this course I now propose, I assure you will stand higher still in the estimation of all classes.

(Hicks to Douglas, 17 October 1858, see Hicks in Howay 1926, 4, 5)

As I allude to above, it was not until after Confederation that the gold commissioner's duties were restricted to those established in mining legislation and that the role of "government agent" was created as a separate job. "Gold Commissioner" is a post still held today in British Columbia, as may be seen in the *Mineral Tenure Act* outlined below. Similarly, "free miner's certificates" are also legislated under the current *Mineral Tenure Act*, though the terms of what constitutes a free miner have changed quite dramatically (one of these changes involves the initiation of the online interface Mineral Title Online). Provincial territorial claims to land remain relatively the same, though sovereign power was transferred from one settler state to another.

Also prior to the writing of the *Gold Fields Act*, during his trip to the goldfields that only went as far as Hope, Governor James Douglas wrote in his diary (24 May 1858) of his concerns about miners squatting and suggested that the British settler colonial leadership "ought immediately to commence sales" of mining licences in order to gain legal authority and grant pre-emptions. This provides context to the influx of American miners and the regulations of 1857. In his diary Douglas wrote about

the racialized role of labour: “Indians are getting plenty of gold and trade with the Americans. Indian wages are from 3 to 4 dollars a day. Miners working 2 miles below Fort Yale who are making on an average one and a half ounces a day each man. The place is named Hill’s Bar and employs 80 Indians and 30 whitemen [*sic*]” (Douglas 1858). In this account, the ratio of Indigenous people to white men is 8:3. The degree to which Indigenous people participated in the mining industry during this era was significant (see Marshall 2000).

Yet mainstream narratives of gold continue to celebrate settler histories and bracket Indigenous relations. The scarce accounts of the history of settler colonial mining law participate in this erasure as well, on the assumption that lands were nearly unpopulated. For example, one narrative reads: “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 mainland of British Columbia* were familiar with the rude democracy of the American Frontier” (Howarth in Hovis 1991, 89; emphasis added). Elizabeth Furniss writes about this frontier history as it occurred in Williams Lake, in the central interior of British Columbia. She argues that the “images of cattle, cowboys and the historical Cariboo gold rush [that took place in the 1860s] promote the Canadian wild west.” For Furniss, this imaginary geography of the Canadian west rests on a dichotomy between whites and Indigenous people. She discusses this specifically in light of high school history textbooks in British Columbia and the practice of marginalizing Indigenous history in Canada. She argues that “high-school textbooks remain the most conservative and archaic of the official nationalist histories in the public domain” (Furniss 1997, 20). The writing and rewriting of British Columbia’s frontier history and the celebration of gold mining in popular literature provide a mainstream account of the founding of the province (e.g., Sterne 1998). During the pre-Confederation colonial era, not only did gold commissioners record mining claims, as noted above, but they were also charged with law enforcement and mediating Indigenous-settler conflicts (Sterne 1998, 34). During British Columbia’s colonial era, the gold commissioner was delegated with a disproportionate amount of sovereign power – power over people and territory that was vested in the state.

AMENDMENTS: THE WRITING OF MINING LAWS  
AFTER THE BC *GOLD FIELDS ACT*

Along with the original BC *Gold Fields Act*, the Legislative Library in Victoria houses the following List of Proclamations pertaining to gold (see also Cail 1974 for a summary of mining legislation).

List of Gold Proclamations, 1858-1865:

*Gold Fields Act*, 31 August 1859,

Rules and Regulations Under the Gold Fields Act, 7 September 1859

Rules and Regulations Under the Gold Fields Act, 24 February 1863

*Gold Fields Act*, 1863

*Gold Fields Act*, 1864

An Ordinance to amend the Laws relating to Gold Mining. 2 April  
1867

An Ordinance to facilitate the working of Mineral Lands. 10 March  
1869.

An Ordinance to amend and consolidate the Laws affecting Crown  
Lands in British Columbia. 1 June 1870

This list of mining laws reveals that gold regulation was being actively forged in British Columbia's pre-Confederation era. As the chronology demonstrates, the BC *Gold Fields Act* was amended in 1863 and again in 1864, and there was also the statute known as the Rules and Regulations Under the *Gold Fields Act*, enshrined on 7 September 1859 and recorded again on 24 February 1863.

THE *MINERAL TENURE ACT*

As of 2018 the *Mineral Tenure Act*, 1996, is current legislation in British Columbia. It outlines that, in order to stake a mineral claim, one must have a free miner's certificate. In order to get a certificate, a free miner must be over eighteen years of age and can also be a corporation. The certificate is renewable and non-transferable, though you do not need to have a free miner's certificate to hold mineral tenure. Thus, free miner's



certificates have changed over the years to include corporations and they remain renewable and non-transferable. Though the powers of the gold commissioner have diminished since former governor Musgrave wrote his description noted above, free miner's certificates can still be granted to whomever the gold commissioner wishes (section 8.4). Lands that are out of bounds for mineral staking include those occupied by a building, a house, an orchard, those that are under cultivation, those that are being mined, those that are protected heritage properties (sometimes), and those that are park lands (sometimes).

The Union of BC Indian Chiefs, First Nations Women Advocating for Responsible Mining, and the Fair Mining Collaborative, among other environmental and Indigenous organizations, argue that free entry mining, as a principle that underlies how mining claims operate, should be overturned because it does not require consent prior to the staking of a mineral claim. The Union of BC Indian Chiefs's engagement with the BC government over mining reform is ongoing. The Union argues that free entry mineral claim staking is in conflict with the right to free prior and informed consent (UBCIC 2011, 5). All that is required to stake a mineral claim is a licence for purchase from the British Columbia Ministry of Energy and Mines. In 2005, British Columbia's *Mineral Tenure Act* was amended to include Mineral Titles Online, an online mineral-staking system that incorporates the digital registration of mineral titles (BCMEM 2017). British Columbia was the first jurisdiction in Canada to digitize mineral-staking procedures. This move could be seen as simply keeping up with technology, but the implications, in terms of accelerating conflicts over land, are dramatic.

In 2009, the director at British Columbia's Mineral Titles Office suggested that the move to online staking brought about a sixfold increase in mineral claims.<sup>7</sup> Even if the initial spike has since subsided, online mineral staking results in a larger number of territorial conflicts between Indigenous communities and mineral exploration companies.<sup>8</sup> The principles embodied in the legislation and regulations endure and show how, legally, the erasure of Indigenous land continues to underwrite contemporary mining property law.

<sup>7</sup> Personal correspondence, Mineral Titles Branch, BC Ministry of Energy and Mines, 2009.

<sup>8</sup> There are, of course, many Indigenous people who work in mineral exploration and mining. I recognize the danger in posing these two sides as polar opposites. Nevertheless, cases where local communities and First Nations reject mine proposals continue to exist, such as the Prosperity project at Fish Lake and the Ajax project in Kamloops, both located in the interior of British Columbia. Indigenous territories continue to be staked – now digitally with a new, disembodied mineral-staking system.

A comparison of historic mining legislation with that of today also allows contemplation of how land is valued and by whom and the power dynamics embedded in colonial legal structures. The notion of wastelands, as stipulated in the original *Gold Fields Act*, indicates a lack of tolerance for alternative narratives to those that privilege resource extraction. As seen in section 11 of the current *Mineral Tenure Act*, those ideologies persist, as does the occlusion of the rights of Indigenous people, despite section 35 of the Canadian Constitution and legal advances in the recognition of the rights of Indigenous peoples, such as the United Nations Declaration on the Rights of Indigenous Peoples and the ever-emerging history of case law in Canada, including the 2014 Supreme Court of Canada *Tsilhqot'in* decision, which improved definitions of consent on a variety of levels.

## CONCLUSION

In this article I focused on the active writing of sovereign claims to mineral rights in the mid-nineteenth century and examined how this era is significant to resource law, and particularly the *Mineral Tenure Act* in British Columbia, today. Research is based on the history of mining laws, focusing on the colonial era, when the province's first gold-mining laws were written. In the final section, I juxtaposed contemporary free miner's rights with those of the past and outlined how gold mining and the first mining laws shaped the political and western legal geography of the region through the racialized erasure of Indigenous use of land through the maintenance of settler ideologies rooted in settler colonial sovereignty. These ideologies are present both inside and outside the writing of mineral laws.

A number of environmental and First Nations organizations continue to contest the structure of the mineral-staking regime in British Columbia. On 16 May 16 2018, Jacinda Mack and Loretta Williams began an op-ed in the *Vancouver Sun*, entitled "Time for mining to clean up its act," citing how mining laws lack enforcement that uphold First Nations rights and that this has been the case "since the gold rush, nearly 170 years ago." Indigenous women like Mack and Williams and organizations like First Nations Women Advocating for Responsible Mining, West Coast Environmental Law and the Union of BC Indian Chiefs point out that mining laws are archaic, voicing a common critique of the mineral-staking principles that maintain settler colonial order by allowing miners to stake a claim without Indigenous consent. Mining

laws are not, in fact, archaic as they are routinely updated and can be traced to a governance structure that denies Indigenous territorial rights. Yet, this governance structure remains embedded in racist ideologies of settler superiority. The updates and changes to mineral-staking laws have not altered the erasure of Indigenous laws and histories of and on land.

This erasure, steeped in settler colonial logic and claims to Crown sovereignty, is actively and continually resisted, including in the courts.<sup>9</sup> What do critics mean when they argue that mineral-staking regimes are archaic? They mean that the principles that allow access to lands do so without the approval of Indigenous people or private landowners. The lack of consent is part of what inspires this article, and the argument put forth – regarding the maintenance of the provincial state through mineral staking – remains relevant today. To examine the legal injustices of the past is to interrogate how they have carried forward into the present. These legal injustices are a large part of what continues to form British Columbia today.

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<sup>9</sup> This was demonstrated in the 2012 Yukon Ross River Dena free entry case over the duty to consult and accommodate.

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