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Mining's Privileged Access to Land: A Free Entry Backgrounder

What is free entry?

The free entry system is the dominant means of granting mineral tenures in Canada today. It gives mining companies the exclusive right to Crown-owned mineral substances from the surface of their claim to an unlimited extension downwards. There are 3 primary rights associated with the law of free entry:

- the right of entry and access on virtually all lands;
- the right to locate and register a claim without consulting the Crown or First Nations; and,
- the right to acquire a mineral lease with no discretion on the part of the Crown.

How does free entry work?

While each jurisdiction has individual legislated provisions, the basic operation of free entry is as follows:

1. A free miner obtains a licence to prospect; there are minimal requirements, such as being 18 years of age and paying a nominal sum (e.g., in BC the fee for a free miner certificate is \$25 for an individual or \$500 for a company).
2. The free miner has access to any and all private and public lands, subject to minor exceptions that vary province to province (where land has been withdrawn or is covered by statutory provisions that prohibit prospecting and exploration, e.g., lands occupied by buildings or crops, parks).
3. The free miner stakes a claim (provincial laws contain detailed requirements as to how staking occurs; for example BC allows 'on-line' internet staking, which involves registration of claims directly on line).
4. The free miner registers any claims and then maintains this priority by doing minimal exploration and development work annually (in some jurisdictions the miner can pay cash in lieu of doing work to maintain claims).
5. The recorded holder of a mineral claim has the right to use, enter and occupy the surface of a claim area for the exploration, development or production of minerals and all related operations like building roads. Minimal environmental laws may apply (e.g., through a permitting system for exploration activities) but they often leave transient operations untouched.
6. If the miner finds a significant mineral deposit, a mining lease is typically applied for. Under free entry, the government has no discretion to refuse a lease application, provided the basic information requirements are met.
7. Mining leases are significant, they provide security of title that means mining company can invest in mine development. Whereas claims are usually valid from year to year, a lease is often valid for 20+ years.
8. More significant mine operations can begin. Depending on the jurisdiction, these operations may be subject to environmental assessment or permit requirements.

9. At the mine development phase, the miner will usually require surface rights. This may require compensation to be paid to a private landowner.
10. Conversely, if land is subsequently withdrawn (e.g., for park creation) when mineral claims have been staked, the free miner may be entitled to compensation.

What are some of the assumptions and implications of free entry?

- **Mining is the first and best use of lands.** If it were ever true, this gold-rush era assumption does not reflect the realities of the 21st century. Twenty years of strategic land use planning in BC has demonstrated that there are numerous, legitimate competing interests on Crown and private lands, as well as constitutionally protected Aboriginal title and rights.
- **All Crown lands are open for staking and mineral exploration unless they are expressly excluded or withdrawn by statute.** This limits the ability of governments to undertake and implement multi-use land use planning, which often includes the designation of protected areas, and the balancing of other potential resource users, such as timber, oil and gas, and wilderness tourism operators.
- **Mining prevails over private property interests.** A free miner can enter onto private land and make a claim, as well as undertake other mining activities with minimal notice to the surface landowner. Surface owners are entitled to compensation and security for loss or damage to the property from mining activity, but not to stop it. Often tensions arise between surface landowners and mineral claim holder, leading to expensive dispute resolution processes.
- **Mining prevails over First Nations constitutionally protected rights.** The current system does not recognize or take into account Aboriginal title and rights. A recent Yukon court case found the free entry system in that territory was unconstitutional because claims could be staked and mineral rights acquired without First Nations consultation and accommodation.
- **Mineral tenures are appropriately granted on a first come first served basis.** Time priority is the basis upon which mineral rights are obtained. In some jurisdictions this can result in staked claims overlapping, and conflicts between different exploration interests (depending on the system for staking and registration). The ‘first come first served approach’ for granting mining leases may also be contrasted with tenuring systems for other resources where rights are auctioned and the government retains right to refuse all bids (e.g., oil and gas).
- **Mineral potential is so valuable that it warrants leaving the staked area essentially unregulated* and undermining other resource interests.** Once a claim is recorded or a lease obtained, the free miner can hold the claim for extended periods of time, and in some cases indefinitely, by performing and recording a minimal required amount of work on the land every year. The vast areas covered by mineral claims are presently given a ‘free ride’ when it comes to most land use plan requirements, and other natural resource industries increasingly have their operations disrupted by mining activity.

*in the sense that land use plan requirements don’t apply

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