Book Review – *Canadian Law of Mining, by Barry Barton, 2nd Edition, Toronto, LexisNexis, 2019, liii + 1030 pp., $350 (Hardcover), ISBN 978-0-433-46580-5*

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After much waiting, Professor Barry Barton has finally provided a rebranded and information-packed second edition of the *Canadian Law of Mining*, first published in 1993 by the Canadian Institute of Resources Law. As in the first edition, Barton assiduously ensures that the book's academic grandeur and high standard of quality are left intact, which is a sure way to maintain its relevance in its area of law in Canada. Of course, achieving a near-excellent mark does not mean that there are no shortcomings.

Presented in one of the best academic literary styles, the *Canadian Law of Mining* has 34 chapters that are divided into 6 parts, each with an abundance of explanations that are clear and easy to understand, even for laypeople unfamiliar with mining law. The addition of 14 chapters in the current edition of the book improves upon the first edition, which has 20 chapters. The additional chapters (some of which cover environmental regulation, social licence to mine, financing and securities, and international transactions) reflect the scope and nature of some of the recent developments in this area of law. The book is also supported with a table of cases and an index that aids in the search for specific subjects discussed in the book.

In his signature style, Professor Barton is meticulously detailed in structuring the introductory chapter 1, the lone chapter of part 1. That is a departure from the style in the first edition, which included the first four chapters in part 1. Beginning with the importance and place of the mining sector in the Canadian economy, as well as the proportion of contributions to that economy by different provinces and territories of Canada, in terms of mining exploration expenditures,[1] he introduces the mining sequence (i.e., mining life-cycle

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phases), which explains the various phases involved in a mining enterprise in progressive order.[2] The traditional mining sequence begins with the acquisition of mining claims, then moves to early exploration, advanced exploration, mine development, and production, before concluding with mine closure and rehabilitation. Interestingly, Professor Barton introduces "regional survey and area selection" as the first phase in the mining sequence. He explains it as the stage in which:

> A company's strategy and expertise lead it to examine a region, using airborne geophysics, geochemistry and desktop reviews of previous work to identify anomalies that may represent mineralizations. Prospecting to sample surface showings may be carried out but the impact on the land will be transient. Many of the sites examined will not justify further investigation. Mineral exploration permits may not be required.[3]

However, stating that "regional survey and area selection" is the first stage in the mining sequence is at variance with the two well-established methods of acquisition of mineral rights in Canada – the free entry system and the ministerial discretion methods that the author discusses in chapter 17 of the book. The two methods presuppose that the first stage in the mining sequence is the acquisition of mineral rights by first staking a claim under the free entry system or securing a ministerial grant under the ministerial discretion method. The manner of activities involved in the regional survey and area selection stage, as explained by Barton, are intrinsically done as part of the early exploration phase following the acquisition of mineral rights.[4] Perhaps Professor Barton writes with an awareness of what mining corporations do before deciding to acquire a claim at a particular location. In any event, this unusual approach will not affect the already established way of reckoning the mining sequence, which is embedded in the methods by which mineral rights are acquired.

Within the body of chapter 1, Professor Barton also clarifies his purpose for writing this second edition, which is to conceptualize mining law as a distinctive field like other popular fields of law.[5] He explains that while the book is concerned for the most part with mineral exploration and development rather than simply mining operations, its core coverage includes property law principles relating to ownership and acquisition of mineral rights, analysis of key mining law statutes and regulations of the Canadian provinces and territories, issues touching on the social and environmental contexts in which the law governs the relationships between mining and other land uses, and of course, the transactional, financing and international aspects of mineral development.[6] He further discusses the legislative authority over minerals based on the Canadian constitution[7] before rounding off this discussion with an overview of the structure of the principal mining legislation in the provinces and territories of Canada.[8]

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1 See Barton, *Canadian Law of Mining*, 2nd ed, (Toronto: LexisNexis, 2019) at 5—6.

2 *Ibid* at 6.

3 *Ibid*.

4 See Dwight Newman, *Mining Law of Canada* (Toronto: LexisNexis, 2018) at 75—88, 52—57.

5 See Barton, *supra* note 1 at 9.

6 *Ibid* at 13.

7 *Ibid* at 14.

8 *Ibid* at 27.

Indeed, chapter 1 is structured in a way that puts it beyond doubt that this book is designed for a readership beyond mining law scholars and practitioners.

Part 2, titled *Ownership and History*, consists of chapters 2 to 5, which discuss the law concerning private ownership of minerals, Crown ownership and Crown grants, Indigenous ownership and interests, and the history of mining legislation, respectively. Apart from clearly explaining the overarching meaning of mineral rights as being part of land rights, drawing from both the common law and civil law in his exposition, what this part achieves, for the most part, is to exhaustively discuss the three main categories of mineral ownership in Canada and their ramifications. Concerning Aboriginal ownership or title to minerals, Barton acknowledges the uncertainty in the case law, which provides little clarity as to whether or not the Aboriginal title includes mineral rights.[9] That perhaps is the reason for an existing disagreement in academic circles on this very issue.[10] Helpfully, with his authority as Canada's leading scholar in mining law, Barton weighs in on the side of arguing that Aboriginal title encompasses mineral rights, based on a relatively recent decision of the Supreme Court of Canada in *Tsilhqot'in v British Columbia,*[11] where the apex court made a declaration of Aboriginal title over 1,700 square kilometers of land in central British Columbia. Paraphrasing the court's decision, Barton argues:

> More definite is the growing clarity of *Tsilhqot'in* that under the Aboriginal title Indigenous owners are indeed owners of the land. It vests the land in the Indigenous group, which has the right to determine the use to which the land is put, and the right to enjoy its economic fruits…Aboriginal title in *Tsilhqot'in* included the land's timber resources, and there seems to be no reason for mineral resources to be treated differently. These points lead very clearly to the conclusion that the Aboriginal title must include mineral resources. No doubt the point will be put to rest in due course.[12]

Given the continued uncertainty in this area of the law, Barton's statement is a welcome contribution.

A further highlight in part 2, particularly in chapter 4, includes a comprehensive analysis of the federal and provincial rights to minerals on reserves as well as the control of minerals in reserve lands under the *Indian Act*.[13] Barton also integrates within the body of this chapter other important issues such as the duty to consult and accommodate and mineral revenue sharing and impact agreements, in a way that makes it a one-chapter stop for all matters concerning Indigenous peoples and their mineral rights in Canada.[14] In particular, he comments on the implementation of the duty to consult under Ontario's reformed *Mining Act*, a topical

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9 *Ibid* at 129.

10 See Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5:2 Tulsa J Comp & Intl L 253 at 268, n 92 (arguing that Aboriginal title includes mineral rights); Dwight Newman, *Natural Resources Jurisdiction in Canada* (Markham: LexisNexis, 2013) at 91(arguing otherwise).

11 See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

12 Barton, *supra* note 1 at 130.

13 *Ibid* at 142, 151.

14 *Ibid* at 157, 179.

subject that has elicited various academic commentaries.[15] Although he acknowledges in a commendatory tone that Ontario has imbued the duty to consult in its mining procedures in a way that no other province in Canada has done, he opines that gaps in the law still exist where the new duty to consult process may prove to be inadequate.[16] This issue has been researched upon and written about more exhaustively elsewhere,[17] with the assertion that the *Mining Act's* compliance with the constitutional requirement of the duty to consult has scored a passing mark notwithstanding any different academic view. Although not particularly germane to this part, readers may be curious to know that British Columbia's *Environmental Assessment Act*[18] and Yukon's *Quartz Mining Act* (as amended)[19] are other instances where efforts have been made to align legislation with the duty to consult. In finalizing part 2 with chapter 5, Barton provides a detailed chronological account of the development of mining legislation in each of the Canadian provinces and territories and includes therein a section that discusses the main legislative themes in a manner that is encyclopedic in breadth and tone.

Part 3, titled *Acquisition of Mineral Title under Mining Legislation*, is the largest part of the book in terms of the coverage of topics. This part encompasses chapters 6 to 17, featuring themes surrounding the acquisition of, retention of, and disputes over mineral titles that are discussed generally as well as particularized to different Canadian provinces and territories. Expectedly, the online acquisition of mineral claims, which is a recent innovation in mining practice in Canada, is featured in chapter 11.[20] Barton explores the advantages and disadvantages that come with online staking.[21] It is not in doubt that the key impetus for online staking is to make staking less intrusive, particularly with respect to lands with surface owners.[22] However, online staking comes with other inherent gains such as efficiency, greater accuracy and security of title, diminished if not complete erosion of boundary disputes, lowering of exploration costs, and easier management of mineral title holdings. Barton specifically discusses these gains.[23] He also raises two arguments concerning the disadvantages of online staking. The first is the reduction of ground staking contract opportunities for local communities. The second is the opportunity that online staking provides for some miners to acquire a monopoly of claims with blanket staking.[24] However, he fails to discuss one important disadvantage manifest in online staking, which is the problem that can arise with

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15 See e.g. Bruce Pardy & Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2011) 23:1 J Envtl L & Prac 1; Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 11:2 JSDLP 183.

16 See Barton, *supra* note 1 at 179.

17 See Martin-Joe Ezeudu, "The Unconstitutionality of Canada's Free Entry Mining Systems and the Ontario Exception" (2020) 20 Asper Rev Intl Bus & Trade L 156.

18 See *Environmental Assessment Act,* SBC 2018, c 51, s 2(2)(b).

19 See *Quartz Mining Act,* SY 2003, c14; amended by SY 2008, c.19; SY 2013, c.18; SY 2016, c.5; SY 2016, c.12, s. 133(1)(b).

20 See Barton, *supra* note 1 at 361.

21 *Ibid* at 364.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

the failure or malfunctioning of the online systems as a result of technical problems, especially where a system shutdown prevents a claims' owner from making a timely renewal of the claims online, as happened in *Valterra Resources Corp v British Columbia (Chief Gold Commissioner)*.[25] Although Barton discusses this case in connection with opportunistic mining[26] and a new administrative power conferred on British Columbia's Chief Gold Commissioner to manage online staking in the province,[27] arguably, the fundamental issue raised by that case — the technical problems associated with online staking — is a legitimate disadvantage of online staking and should have been discussed as such.

Unlike in the first edition of the book, Barton gives two topics, "Exploration Permits" and "Assessment Work and Cancellation", full chapter attention in chapters 12 and 13, respectively. Perhaps this change may be attributed to the increasing attention given to issues surrounding these topics and a desire to address some of the deficiencies in the first edition. As a whole, the layout of part 3 suggests an attempt to structure the book in such a way to facilitate the learning of mining law and further advances Barton's aim to conceptualize mining law as a distinct field of law.

In part 4, Barton covers another broad topic, *The Lands and Social Framework,* which encompasses chapters 18 to 26. With both the part's title and the contents of specific chapters therein, Barton conveys to the reader that the mining industry is aware of the importance of sustainable development. The idea of "lands and social framework" itself underlies the existence of policy considerations for ensuring that mining is done in a way that respects other legitimate social needs for lands, such as timber production and recreational purposes. In discussing the legal basis and character of rights to use public or Crown lands for mining purposes across Canadian provinces in chapter 18,[28] Barton notes that rights are often subject to cancellation by the Crown upon misuse, such as where mining lands are converted for non-mining purposes.[29] That is a clear indication that mining law recognizes the need to ensure that lands designated for mining are only used for that purpose so that proper management of Crown resources can be achieved to meet other sustainable developmental goals. Further, the detailed analysis of surface rights issues in chapter 19 features the compensation element, which applies in instances where mining operations inevitably require encroachment upon a third party's surface rights.[30] By implication, where mining operations require expansion on or acquisition of non-mining lands, such expansion attracts an adequate compensation to counterbalance the loss of lands for other purposes. Also, the "parks and protected lands" topic covered in chapter 20 is another subject that speaks directly to the intersection of mining and sustainable development law, to the extent that those protected lands in any part of Canada are legally off limits for mineral exploration and development.[31]

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25 See *Valterra Resource Corp v British Columbia (Chief Gold Commissioner)*, 2013 BCSC 1172.

26 See Barton, *supra* note 1 at 377.

27 *Ibid* at 376.

28 *Ibid* at 543—550.

29 *Ibid* at 550.

30 *Ibid* at 588—595.

31 *Ibid* at 601.

In chapter 22, Barton examines the environmental regulation of mining activities, a complex topic, the contours of which are often difficult to delineate. He covers the vital aspects of mining-specific environmental law that every miner should pay attention to, particularly the environmental impact assessment,[32] both under the federal and provincial statutes, as well as some aspects of municipal regulations touching on the environment.[33] Implicit in the regulations are processes designed to ensure that mining corporations align their operations with sustainable environmental management practices. Closely connected to the environmental sustainability regime is mine rehabilitation, discussed in chapter 24.[34] The importance of mine site reclamation or rehabilitation to sustainability hinges on the understanding that mining activities inherently breed environmental havoc. It thus becomes necessary that after mines exhaust their useful cycle, the lands should be restored to their original pre-mining state so that they are available for other developmental needs. Having provided enough background discussions in the preceding chapters, Barton strategically introduces the issue of "social licence to mine" in chapter 26 to complete this part. He also sheds light on sustainable development issues in the mining industry in the context of corporate social responsibility.[35] The chapter features discussions around the involvement of Canadian mining corporations in human rights abuse, environmental degradation, and corrupt practices abroad.[36]

Part 5 covers the transactional segment of mining activities. It consists of chapters 27 to 33 and discusses a range of commercial-contractual aspects of mining, including recording and transfer of mineral title, transactions in mining properties, and the conventional mining agreements concerning options and joint ventures, royalties, and confidential information. Mining financing is also featured in this part and is one of the significant additions that come with this new edition. Generally speaking, mining financing has not been widely written about and the available literature is written from an academic perspective, even when the subject requires a practice-oriented approach.[37] With Barton's contributions in this book, one hopes that subsequent works may build on what is now available. Chapter 33, which is the last chapter of part 5, is another significant addition to this new edition, discussing what Barton titles "International Transactions." However, the chapter is an attempt to combine two topics that ought to have been separate chapters, notwithstanding their common international outlook. Anti-corruption and conflict of laws issues arising from mining activities abroad, and the possibility of extra-territorial litigation in Canada surrounding potential torts committed abroad by Canadian mining corporations, should have been discussed in conjunction with the subject of corporate social responsibility. This would have provided a clearer foundation upon which to discuss the investor-state dispute issues and arbitration, which are, on their own, an aspect of foreign investments law.

In the concluding sixth part's lone chapter 34, Barton expresses his thoughts on the future of mining law in Canada with prognostications regarding where he anticipates changes

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32 *Ibid* at 644.

33 *Ibid* at 654.

34 *Ibid* at 681.

35 *Ibid* at 739.

36 *Ibid* at 745—751.

37 See Newman, *supra* note 4 at 143—158.

occurring in the years ahead. For instance, he suggests that mining contracts will likely be affected by the recently enunciated duty of contracting parties to maintain good faith in the performance of a contract.[38] He also highlights that the finding that fiduciary duties exist now depends upon the existence of an undertaking of one party to act in the best interests of the other party.[39] Further, he acknowledges the continuing uncertainty in law regarding indirect expropriation and the possibility of a single Canadian capital market existing in the future.[40] While he also acknowledges that the introduction of online staking of claims across Canada is the biggest innovation to happen in a century in the mining industry,[41] he further projects that the way mining claims are acquired will continue to develop because that is the basic aspect of mining that is constantly impacted by social licencing, Indigenous relations and permitting process considerations.[42]

A particularly insightful contribution of this book is the discussion from a historical perspective. Barton does this in a manner that provides a reader with fulsome background knowledge of issues and case law, leaving the reader with a sense of context and a minimal need to look elsewhere for more details. Because legislative authority in Canada over mining falls within both the federal and provincial powers, Barton ensures that all Canadian provinces and territories receive appropriate coverage of their mining law and policy issues in a detailed, historical context.

One distracting problem with this book is the complex arrangement of its chapter topics, which unnecessarily interrupts a smooth transition from one topic to another in a properly coordinated sequence. For instance, chapter 2 on private ownership of minerals should have been discussed after chapters 3 and 4 on Crown ownership and Indigenous ownership, respectively. The reason for this is that minerals in Canada are generally owned by the Crown, and therefore, private ownership of minerals is an exception to the rule. As such, it may not be the better approach to begin the teaching of this subject with an exception instead of the rule. Further, "mining and the environment" deserved to be discussed in a separate part. Despite such problems, this book is indeed indispensable for in-house counsel in mining corporations and government ministries, firm lawyers, university scholars and their libraries, and, of course, any organization or individual with an interest in mining.

Within the broad domain of natural resources law, mining law (unlike oil and gas or energy law) has not received the pedagogical attention it deserves, despite the economic strength of the mining industry and its importance to the Canadian economy. Apart from mining law's nature as a complex assemblage of diverse legal issues, the lesser attention to this subject matter can be attributed to the scarcity of books on mining law, which makes it frustrating for instructors who want to teach a course on this subject. A book such as the *Canadian Law of Mining*, given its comprehensive treatment of law in this area, will continue to fill an otherwise unmet need. Moreover, this book provides the groundwork for new

38 See Barton, *supra* note 1 at 981 (more specifically, Barton refers to *Bhasin v Hrynew*, 2014 SCC 71).

39 See Barton, *supra* note 1 at 981 (more specifically, Barton refers to *Galambos v Perez*, 2009 SCC 48).

40 See Barton, *supra* note 1 at 981.

41 *Ibid* at 986.

42 *Ibid* at 991.

frontiers in mining law research given its coverage of issues such as the investor-state dispute settlement and the social licence to mine, a concept not yet widely explored within the mining law circles except to the extent that it is discussed under the wider concept of corporate social responsibility. Nevertheless, Professor Barton missed an opportunity to discuss the legal issues surrounding space mining, the scientific and operational aspect of which has captured the attention of geologists for some time now. He also missed the opportunity to explore an important but seemingly isolated topic — the regulation of markets for mineral products and minerals' supply and demand chains. These missed topics are areas that will surely gain prominence in the future and should therefore be dealt with in a book such as this, at least to some extent.

To conclude, despite the book's topics not being presented in what I consider to be the best pedagogical order, the *Canadian Law of Mining* leaves no one in doubt that it is designed to be an essential reference for everything about modern-day mining law and will be relevant for a long time to come. To the extent that Canada is a global mining superpower,[43] this book advances global legal scholarship with respect to mining law. With this new edition widely available, it now means that together with Dwight Newman's insightful work,[44] there are now two complete and comprehensive Canadian mining law works. Indeed, Professor Barton deserves commendation for this work of scholarship and for again rising to the occasion to bridge a gap in Canadian mining law literature that has existed for more than two and a half decades.

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43 See Newman, *supra* note 4 at 1—2.

44 *Ibid.*