Learning from Missibizi: Recognizing Ojibwe Mineral Sovereignty and Decolonizing Ontario's Mining Law Regime

Grace Shin*

This paper provides an overview of the historic mineral interest held by the Ojibwe people living on Treaty 3 territory and critiques the way in which the treaty-making process as well as the Ontario mining regime has completely disregarded Indigenous mineral sovereignty. By connecting the principles of free, prior and informed consent encapsulated in the United Nations Declaration on the Rights of Indigenous Peoples and the customary notion of permanent sovereignty over natural resources with the underlying Indigenous interest in minerals, I propose that a system of legal pluralism could exist in Canada, one which respects the mineral sovereignty of Ojibwe First Nations.

* Grace Shin, B.Sc./J.D., is a settler and recent graduate of Osgoode Hall Law School. The author thanks Professor Jeffery Hewitt, Professor Andrée Boisselle, Luke Hildebrand and William Major for their support and guidance on the direction of this paper. The author is also grateful for the edits and comments by Harrison Myles, the anonymous external editors, and the Indigenous Law Journal's editorial team.

INTRODUCTION

> Before setting out, they loaded themselves with a good many of these stones, large and small, and even with some slabs of Copper; but they had not gone far from the shore when a powerful voice made itself heard to their ears, calling in great wrath: "Who are those robbers carrying off from me my children's cradles and playthings?"
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> - Claude Dablon, "Vol 54", *Jesuit Relations and Allied Documents*[1]

Minerals have been—and continue to be—inextricable from society. Rare metals remain the epitome of luxury and power, while metals such as iron or copper play an indispensable role in the advancement of technologies. Yet minerals, like all natural resources, are finite, and the unfettered extraction of minerals driven by capitalism has led to the desecration of once rich lands and healthy ecosystems. Most directly impacted by these mining activities are Indigenous communities whose lands, abundant with mineral riches, have historically been exploited without seeking their consent resulting in the destruction of their livelihoods. However, a narrative that paints Indigenous peoples as mere casualties of settler-colonial forces has the potential to erase their demonstrated interest in and sovereignty over minerals and the recognized value that flows from them. This depiction of Indigenous peoples lacks insight into the complex relationships Indigenous peoples have with the land and the legal order they have practiced since time immemorial to manage such resources.[2]

The quote at the beginning of this paper is an excerpt from an Ojibwe story that illustrates the ways in which humans ought not to withdraw minerals, and the potential repercussions if such laws are not followed. The story surrounds four men who anger Missibizi—a panther-like creature that resides in Lake Superior and guards the copper found within it and on its islands —after taking an excessive amount of copper from an island that they were stranded on. The men die one by one because of their greed and the Ojibwe take their deaths as a lesson to not extract copper from the lake and the island.[3]

As a non-Indigenous settler, I cannot properly decipher the true significance of this story, especially because I am relying on an account of it written by a non-Indigenous missionary.[4] Having said that, I cautiously draw out three lessons settlers can take from the story. These lessons will subsequently frame this paper. The first lesson is that Indigenous peoples knew the value of their minerals and where they could be found. Despite this awareness, Indigenous peoples chose not to recklessly remove these minerals, as prescribed by Indigenous legal orders. This is the foundation upon which I ground my argument that Indigenous mineral sovereignty exists and continues to exist. Second, the story informs settlers how not to engage with minerals and by extension, Missibizi. Analogizing Missibizi as Ojibwe people, I take this lesson to describe the myriad of ways settlers ought not to engage with mineral management and Indigenous peoples.

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[1] Journal entry of Claude Dablon (1610-1791), reprinted in Reuben Gold Thwaites, ed, *The Jesuit Relations and Allied Documents* (Cleveland: Burrows Brothers Company, 1899), online: <http://moses.creighton.edu/kripke/jesuitrelations/relations_54.html>.

[2] Val Napoleon, "Thinking About Indigenous Legal Orders" in *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229 at 245.

[3] "Great Lynx, the Thunder and the Mortals" (24 February 2019), online (blog): *Mii Dash Geget* <https://miidashgeget.wordpress.com/2019/02/24/great-lynx-the-thunder-and-the-mortals/#6four>.

[4] Dablon, *supra* note 1.

Lastly, the story reminds settlers that to live harmoniously, we must respect the obligations we have to Missibizi. Thus, in the context of this paper, I interpret this to mean that settlers have an obligation to respect Indigenous mineral sovereignty.

The focus of this paper is to explore the significance of these lessons as it applies to the current mining regime in northwestern Ontario, specifically in Treaty 3 territory. Indigenous stories are closely tied to the land they are told on and as such, it is only appropriate that the lessons drawn from the story, which originates from the Lake Superior region, apply to the area it is intended to cover. To further narrow the scope of the paper, I chose not to discuss the sovereignty implications for the Indigenous parties to the Robinson-Superior treaties and the Métis parties to Treaty 3.[5]

Before I delve into the way this paper is structured, I want to make clear that as a non-Indigenous settler woman who has benefitted from the very systems I intend to critique, I am complicit in the continuation of the existing colonial system and its perpetuation of neoliberalist ideologies. I have experienced immense privilege growing up in Toronto, where I have learned and benefitted from Indigenous knowledge systems through my schooling.[6] I am incredibly grateful to the Indigenous knowledge bearers for sharing this knowledge. It is my obligation as a treaty person to ensure that my contribution to the field of Aboriginal law does not exploit Indigenous knowledge and throughout this paper, I try to make note of my limitations in interpreting and relying on Indigenous legal theories.

In the first part of the paper, I attempt to describe Indigenous interests in minerals and illustrate how Indigenous communities governed these minerals for millennia, based on stories and principles found within Ojibwe legal orders which relate to natural resource management, specifically copper. I argue that unbeknownst to early settlers, Ojibwe peoples engaged with copper in a responsible and reciprocal manner for millennia, establishing a unique system of mineral governance that continues to exist today. I tie this to existing works by Indigenous scholars on Indigenous legal orders to argue that this system of mineral governance was in fact an assertion of jurisdiction and sovereignty.

The next section demonstrates how the Ojibwe asserted mineral sovereignty during treaty negotiations and how the Crown repeatedly undermined this sovereignty by breaking treaty promises. I first set out the historical background to the creation of Treaty 3, including the motivations held by both parties in deciding to negotiate the treaty, and recount the promises made by the Crown in light of these motivations. I then turn to the Crown's subsequent violation of those promises, enacted through the imposed delineation of reserves, exclusion of Indigenous voices in the drafting of land agreements between the federal and provincial governments, and the intentional undercutting of Indigenous mineral rights to minerals found on reserve. I argue that in its founding years, Canada intentionally minimized Indigenous mineral rights to derive profit from their land through these actions, which were in line with their attempt to implement the colonial agenda.

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[5] For congruency's sake, the use of the terms "Indigenous" and "First Nations" refers to the Ojibwe signatories to Treaty 3, unless specified otherwise. Further, the choice to delineate does not mean that mineral sovereignty should not extend to them; the argument can be made, but the historical and societal evidence backing this argument would be different from what is discussed in this paper.

[6] Toronto is located on the traditional territory of the Mississaugas of the Credit, the Anishinaabeg, the Chippewa, the Haudenosaunee, and the Wendat peoples. It is governed by the Dish With One Spoon Wampum Belt Covenant, and home to many urban Indigenous individuals. The factual elements of the land acknowledgement is derived from: City of Toronto, "The Land Acknowledgement", online (pdf): <www.toronto.ca/wp-content/uploads/2019/06/90c6-2019-Land-Acknowledgment-Guidance.pdf>.

In the third section, I discuss briefly how the current mining regime in Ontario continues to perpetuate colonization in two ways. First, the *Mining Act* ("the *Act*"), the main legislation that governs mining in Ontario, fails to incorporate Indigenous notions of sovereignty as it permits exploration by settlers onto treaty territory without Indigenous consent. Second, the *Act* has failed to, and continues to fail to, establish an adequate consultation procedure with Indigenous communities in the mine development process.[7] In light of the shortcomings of the *Act* and their consequences, I argue that reconciliation cannot occur without the recognition of Ojibwe mineral sovereignty.

In the final section, I introduce two arguments as to why Ojibwe mineral sovereignty ought to be recognized. The first is that the historical evidence shows Ojibwe mineral sovereignty has existed and continues to exist, through the existence of Ojibwe sovereignty in general. Second, Canada is obliged under international law to recognize Indigenous sovereignty through their treaty relations, the international law principle of permanent sovereignty of natural resources ("PSNR") as well as the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[8]

Throughout the paper, I draw connections between mining and colonization, and they serve as the basis for true decolonization of Ontario's mining regime, meaning full incorporation of Indigenous mineral sovereignty. Instead of viewing decolonization as a metaphor, I call on settlers to reckon with the oppressive nature of the existing mining regime on Indigenous minerals and the land in which they are contained, and to renounce the Crown's right to mineral resources for true decolonization.[9]

1. Indigenous Mineral Management

According to archaeologists and historians, Indigenous mineral extraction and use in present-day Ontario can be traced back millennia.[10] Although Indigenous peoples made use of gold, silver, coal, oil and other minerals, copper was a particularly significant mineral for the Ojibwe, ascribed with religious and ceremonial significance.[11] Early non-Indigenous explorers captured Ojibwe people's relationship with copper as a "veneration, as if the [minerals] were the presents of gods who dwell under the waters; they collect their smallest fragments which they carefully preserve."[12] While small pieces of copper were used as providing power and medicine, removing large pieces of copper was considered offensive to the Great Spirit and could lead to bad fortunes.[13]

Although the spiritual significance of copper is uncontested, to assume that the Ojibwe only left copper in the ground would be wrong. In the nineteenth century, settler anthropologists "discovered" human-made pits and trenches along the coasts of Lake Superior, but they dismissed

[7] *Mining Act*, RSO 1990, c M 14.
[8] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61th Sess, 107th Plen Mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007).
[9] Eve Tuck and K Wayne Yang, "Decolonization is Not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1 at 7.
[10] Rhonda Mae Telford, *"The Sound of the Rustling of the Gold is Under my Feet Where I Stand; We have a Rich Country": A History of Aboriginal Mineral Resources in Ontario,* (PhD Thesis, University of Toronto, 1996) [unpublished] at 24.
[11] *Ibid.* See also, Bernard C Peters, "Wa-bish-kee-pe-nas and the Chippewa Reverence for Copper" (Fall 1989) 15:2 Michigan Historical Review 47 at 48.
[12] *Ibid* at 49 citing Pierre de Charlevoix, *Journal of a Voyage to North America* (London: 1761), 2.
[13] *Ibid* at 50–51.

these findings and did not attribute them as evidence of contemporary Indigenous mining technologies.[14] Yet seeing that copper was in demand for the creation of plates and kettles, which were used in healing and funeral ceremonies, and copper sheets were created to record history and sacred events, Indigenous peoples presumably mined such materials.[15] The mineral was widely traded throughout North America, alongside other minerals used for tools, such as quartzite, nephrite, and obsidian.[16]

Due to the sacred nature of copper, many copper deposits and mines and sites were considered "sacred places on the earth" and the locations remained undisclosed to settlers. These locations also remained hidden because they doubled as healing sites for Anishinaabeg elders and if approached brashly, could lead to dangerous outcomes.[17] Subsequently, Indigenous miners had to engage in ritual fasting and purification before entering a mine, and they had to demonstrate gratitude and reciprocity to the spirits guarding the mines—known as *Memengweshiwuk*—to seek permission to take the minerals.[18]

All this is to say that mineral extraction in Ojibwe culture was strictly governed by legal orders, which involved ceremonies grounded in reciprocity, gratitude, and respect for the land and the spiritual goods it provided. Sākihitowin Awāsis, a Mischif Anishinaabe scholar, expands on the notion of principle-guided natural resource extraction in Indigenous communities and how, contrary to capitalist extractivism, Anishinaabe harvesting protocols require individuals to be guided by egalitarian thinking.[19] According to Awāsis, Anishinaabe harvesting protocols are based on natural law and centered around four themes: rights to land-based practices and life; responsibility to previous and future generations; relationality with the land and those harvesting together; and reciprocity with the land.[20] Ojibwe mining practices embodied these themes, reflected in the intentional and respectful ways of entering mines, disclosing mine locations, and removing minerals. It would not be an overstatement then to promote the Ojibwe mining practices as Indigenous legal orders.

2. Mineral Rights and Treaty Making

Much of the argument that Indigenous peoples have no right to mineral extraction stems from the fact that mineral rights were not included or mentioned in the text of the treaty. This argument, however, paints an incomplete picture. As highlighted above, early Europeans dismissed pre-existing Ojibwe interest in minerals and their knowledge of them. By extension, treaty negotiators and drafters largely ignored the existence of surrounding mineral rights during treaty negotiations. Yet access to minerals were likely discussed leading up to the signing of treaties as settler mining activity increased and conflicts arose between Indigenous and non-Indigenous miners. In the case of Treaty 3, the promise that Indigenous peoples would have mineral rights in treaty territory is

[14] Telford, *supra* note 10 at 30–32.
[15] *Ibid* at 37–39.
[16] Andrew Miller and Evelyn Siegfried, "Traditional Knowledge of Minerals in Canada" (2017) 37:2 The Canadian Journal of Native Studies 35 at 45.
[17] *Ibid* at 42; Telford, *supra* note 10 at 39.
[18] *Ibid* at 42–43.
[19] Sākihitowin Awāsis, "Gwaabaw: Applying Anishinaabe harvesting protocols to energy governance" (2021) 65:1 The Canadian Geographer 8 at 14.
[20] *Ibid* at 15.

made evident in the commissioner and translator's notes.[21] By reviewing the context in which treaty negotiations took place, it becomes clear that Indigenous communities have long held interest in minerals, expressed such interest, and continue to hold such interests regardless of what is stated in the text of the treaty.

a. Leading Up to the Treaties

Settlers were aware of the presence of minerals in present-day Ontario beginning in the sixteenth century. Historian Rhonda Mae Telford notes that when Jacques Cartier met with Chief Donnacona in 1534 and 1535, he revealed that copper deposits could be found in Lake Superior.[22] She also suggests Samuel de Champlain associated himself with the Algonquian military cause in the early seventeenth century so that he could continue reaping the benefits of copper, which was often gifted to the Frenchmen for their assistance.[23] At the time, Ojibwe individuals interacting with French missionaries revealed to them non-sacred locations where copper could be found in the region.[24] Once Britain assumed control of Canada in 1760, the knowledge was disseminated to Alexander Henry, a North West Company trader, and the then Indian superintendent, Sir William Johnson.[25] Notably, Johnson recognized at the time that the minerals in the region ought not to be used without the consent of Indigenous peoples as it was their property.[26]

Despite this initial respect held by early settlers towards Indigenous mineral knowledge, by the mid-nineteenth century, settler miners began to illegally mine in areas known to be rich in minerals.[27] The alarming influx of settler miners did not go unnoticed by Ojibwe Chiefs; they petitioned with regional superintendents that they wished for protection on their land from intruders and "no mineral exploitation without compensation."[28] In 1857, four Ojibwe Chiefs petitioned to the Governor General that the government should not be unilaterally selling their land without treaties in place.[29]

Although there were no treaty negotiations surrounding ownership of mineral rights and land title, Commissioner of Crown Lands Denis Papineau began issuing mining exploration licenses to a few prospectors and allowed them to survey unceded lands.[30] Commissioner Papineau's power to grant licenses originated from order-in-council regulations "to license prospectors, to fix boundaries of claims, and to establish a price for the sale of lands bearing base minerals."[31] Initially, these regulations were accompanied by a pre-existing regulation granting the Crown the reservation of gold and silver in each land patent, but was later abandoned due to objections by mining companies.[32] In its place, Canada's first mining law, the *General Mining Act,*

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[21] Wayne E Daugherty, "Treaty Research Report – Treaty Three (1873)" (1986) at 33, online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028671/1564413174418>.
[22] Telford, *supra* note 10 at 54.
[23] *Ibid* at 56.
[24] *Ibid* at 60.
[25] *Ibid* at 66. The copper veins revealed to the settlers by the Ojibwe were often so abundant that later settler mines were built over those spots.
[26] *Ibid.*
[27] *Ibid* at 122–3. By illegal, I am referring to not legal under Indigenous law.
[28] *Ibid* at 128–9.
[29] *Ibid* at 131.
[30] *Ibid* at 128–9.
[31] HV Nelles, *The Politics of Development: Forests, Mines & Hydro-Electric Power in Ontario, 1849-1941*, 2nd ed (Montreal: McGill-Queen's University Press, 2005) at 20.
[32] *Ibid* at 21.

was enacted in 1869, repealing any Crown reservation on royalties, taxes and duties on all metallic ores.[33]

In effect, the lack of regulation over Ontario's mining industry replicated the "free entry" system which had defined mining legislation in medieval Europe for centuries.[34] In Europe, the free entry system enabled citizens to reap the "free gifts of Nature" and acted as the basis for the evolution of capitalism within the mining industry, argues historian Jeannette Graulau.[35] In medieval Bohemia, private citizens organized as a mining society, or *Gewerken*, and explored the land to discover ores.[36] Once the *Gewerken* or *colonii principalii* received approval from the king to go ahead and develop the mine, they could lease the rights to sink the shaft to second and third colonists, who would in turn hire manual laborers to dig.[37] Therefore, intrinsic to Ontario's mining law at the time—and to great extent, today—was a hierarchical structure which enabled, quite literally, unfettered colonization of the land by private entities.[38] Treaties were arguably the means of legitimizing the active colonization of the land through mining, and the Anishinaabeg, well aware of this fact, took a firm position in protecting their minerals and land during Treaty 3 negotiations, as discussed below.[39]

b. "The sound of the rustling of the gold is under my feet where I stand"[40]: Mineral Value and Treaty 3

In 1869, Canada finally responded to the Ojibwe's demands for a treaty covering the land in present-day northwestern Ontario after the federal government realized that they would need the right of way to swiftly respond to the Red River Resistance in present-day Manitoba.[41] In the summer of 1870, treaty commissioner Wemyss Simpson offered gifts to the Ojibwe, expecting an easy start to negotiations, but this was initially refused by Chief Blackstone.[42] In 1871, upon the discovery of minerals by two Ojibwe men in the proposed treaty area, what began as negotiations for a right-of-way treaty soon evolved to that of a land cessation treaty.[43] Between the summer of 1871 and 1872, treaty commissioners attempted to negotiate the treaty, but to no avail.[44] In letters drafted by the commissioners at the time, the Ojibwe were deemed to be uncooperative as they were aware of the "valuable discoveries of the precious metals within their territory."[45] For instance, the Ojibwe requested an annuity of $15 per head as a counter offer to the treaty

[33] *Ibid* at 23.
[34] Dawn Hoogeveen, "Sub-surface Property, Free-entry Mineral Staking and Settler Colonialism in Canada" (2015) 47:1 Antipode 121 at 126.
[35] Jeannette Graulau, *The Underground Wealth of Nations: On the Capitalist Origins of Silver Mining, AD 1150–1450* (New Haven: Yale University Press, 2019) at 90.
[36] *Ibid*.
[37] *Ibid* at 91.
[38] *Ibid.*
[39] Minerals were not the only resources that was of interest for settler negotiators; timber, hydro-electricity, agrarian land, oil and gas were all a part of the motivation to engage in treaties with Indigenous peoples. For the purpose of the paper, I will not be discussing how these resources affected the positions of treaty negotiators.
[40] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, 10th ed, (2004) 60, quoting Chief Mawedopenais, online: <www.gutenberg.org/files/7126/7126-h/7126-h.htm>.
[41] Telford, *supra* note 10 at 193.
[42] *Ibid* at 194.
[43] *Ibid* at 195.
[44] *Ibid* at 201.
[45] *Ibid* at 203.

commissioners meagre of $3 per head, as they were aware that profits generated by the discovered minerals would be worth far more than what Canada was willing to pay.[46]

After a brief pause in negotiations in 1872, Alexander Morris reopened negotiations with the Ojibwe in 1873 having been appointed Lieutenant-Governor of Manitoba the year prior.[47] Although the Ojibwe were still firm in their position that they were to retain rights to the land and the minerals, the mounting pressure from increased white settlement, unrest due to illegal liquor trading at the American-Canadian border, and a dismal wild rice harvest that year resulted in the Ojibwe eventually relenting to some of the treaty's terms.[48] Throughout treaty negotiations, the Ojibwe orally affirmed the two terms that would constitute their mineral rights: minerals found on-reserve would belong to the Ojibwe residing on those reserves, and any minerals found off-reserve would belong to the Ojibwe who found it.[49] Importantly, these terms were under the condition that the Ojibwe could designate their own reserve locations, which they had strategically mapped out to include land with known mineral deposits.[50] Joseph Nolin, a Métis negotiator retained by the Chiefs, captured these terms in his notes—now referred to as the Paypom Treaty—which he provided to Morris after the Treaty was signed.[51] The notes stipulate: "If some gold or silver mines be found in their reserves it will be to the benefit of the Indians, but if the Indians find any gold or silver mines out of their reserves they will only be paid the finding of the mines."[52]

Notwithstanding the oral promise, Morris only acknowledged the Ojibwe's mineral claim on-reserve, but dismissed the Ojibwe's rights to minerals off-reserve.[53] Even worse, the text of Treaty 3 signed in 1873 did not include *any* provision concerning mineral rights.[54] That being said, the fact that the text of Treaty 3 only authorizes a transfer of surface rights but not subsurface rights makes it difficult for colonial governments to rely on it to ground legitimate mineral claims. Nor can the treaty be interpreted as a document authorizing land surrender, particularly when the document lacks any mention of consideration for the 55,000 square miles of land.[55] In more ways than one, the document referred to as Treaty 3 is incomplete and to gleam its full meaning, one must interpret it in conjunction with the notes recording the oral promises.

c. Promises Broken, Sovereignty Undermined: Government Responses to Treaty 3 Mining Rights

Not long after Treaty 3 was signed, both Canada and Ontario broke their promises with the Ojibwe signatories surrounding mineral rights on reserve.[56] As previously mentioned, the Ojibwe clearly indicated that they had already decided where they wanted their reserves during treaty

[46] *Ibid* at 193.
[47] Brian Walmark, "Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869-73" (1993) at 67, online (pdf): <www.collectionscanada.gc.ca/obj/s4/f2/dsk3/ftp04/MQ52083.pdf>.
[48] *Ibid* at 96, 103.
[49] Telford, *supra* note 10 at 208.
[50] *Ibid.*
[51] Telford, *supra* note 10 at 210.
[52] *Ibid* at 209.
[53] Morris, *supra* note 40 at 70.
[54] *Ibid* at 212. Some theorize that the text of Treaty 3 is from a draft treaty which Simpson wrote in 1872 before the treaty provisions were finalized: Walmark, *supra* note 47.
[55] Kate Gunn, "Agreeing to Share: Treaty 3, History & the Courts" (2018) 51:1 UBC LR 75 at 83.
[56] Although Ontario was not a signatory or party to the treaty, they were aware of the mineral rights implications associated and the promises made with it: see, Telford, *supra* note 10 at 196.

negotiations.[57] Nevertheless, in 1875, the commissioners designated Ojibwe reserves not in accordance with their requests, but "as far as possible from the area of future settlement as well as excluding all known mineral lands."[58] For First Nations with reserves where minerals were found, any benefit arising from the minerals would flow to the government of Ontario, as mineral rights were believed to have been granted to the provincial governments under s. 109 of the *Constitution Act, 1867*.[59] A mere two decades after the treaty was signed, the premier of Ontario declared provincial rights to "Precious Metals and Other Minerals in, and Timber On, Indian Lands and Reserves"; uncoincidentally, Ontario granted upwards of 6,414 mining locations during that period.[60]

Soon afterwards, Canadian courts released judgments affirming this very position, notwithstanding the fact that it was in violation of treaty promises. In *St. Catherines Milling and Lumber Co v R* ("*St Catherines Milling*"), the Judicial Committee of the Privy Council ("the Judicial Committee") held that the lands and resources in Treaty 3 territory belonged to the Province of Ontario.[61] The Judicial Committee reached this conclusion by interpreting the Ojibwe right to land and resource use as usufructuary, and could be extinguished by or surrendered to the Crown.[62] The *St. Catherines Milling* ratio was followed in *The Ontario Mining Company v Seybold et al*, a case which dealt with whether mineral licenses granted by the government of Canada was valid on land surrendered by a First Nation.[63] Of concern was the fact that the First Nation did not receive any profits from the gold mine constructed on once reserve land as it was deemed not to have interest over mineral rights.[64]

Emboldened by the courts' confirmation of mineral rights on treaty land as belonging to the province, Canada and Ontario brazenly ignored their treaty obligations in 1924 when they entered into the *Canada-Ontario Indian Reserve Lands Agreement* (the "1924 *Indian Reserve Lands Agreement*") without obtaining the consent of the Indigenous communities involved.[65] As if mineral rights on reserve did not already belong to respective First Nations, the agreement declared that half of the mineral royalties and benefits would be entitled to the province while the other half would be placed in trust for the benefit of the Indigenous band.[66] The 1924 lands agreement remained in force as *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands* until 1986, at which point, the *Indian Lands Agreement (1986) Act* (the "1986 *Indian Lands Agreement*) replaced it.[67] The

[57] Morris, *supra* note 40 at 60.
[58] Daugherty, *supra* note 21 at 48.
[59] Tim Holzkamm and Leo Waisberg, "'We Have Kept Our Part of the Treaty'- The Anishinaabe Understanding of Treaty #3" (Kenora, ON: Grand Council Treaty #3, 2012) at 34.
[60] Telford, *supra* note 10 at 279.
[61] *St Catherines Milling and Lumber Co v The Queen,* [1888] UKPC 70, 14 AC 46 at 601 [*St. Catherines Milling*].
[62] *Ibid.*
[63] *The Ontario Mining Company v Seybold et al*, [1903] AC 73; "Ontario Mining Company Ltd. and Attorney-General for Canada v. Seybold et al. and Attorney-General for Ontario", online (blog): *Dialog* <https://jurisprudence.reseaudialog.ca/en/case/ontario-mining-company-ltd-and-attorney-general-for-canada-v-seybold-et-al-and-attorney-general-for-ontario/>.
[64] *Ibid* citing Michael Coyle "Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future" (2005) 31 Queen's LJ. A similar conclusion was drawn in the *Attorney General of Quebec v Attorney General of Canada (The Star Chrome Mining Case),* [1920] 90 LJPC 33.
[65] Richard H Bartlett, "Mineral Rights on Indian Reserves in Ontario" (1983) 3:2 The Canadian Journal of Native Studies 245 at 264.
[66] *Ibid* at 265.
[67] *Indian Lands Agreement (1986) Act,* SC 1988 c 39.

1986 *Indian Lands Agreement* allows for Indigenous bands to enter into specific agreements with the Governments of Canada and Ontario regarding unjust land or natural resource claims which had arisen as a consequence of the 1924 *Indian Reserve Lands Agreement*.[68]

3. Current Issues to the *Mining Act*

In addition to the direct undercutting of treaty rights, Ontario's mining regime established by the *Mining Act* inadvertently challenges the ways that the Ojibwe practice mineral sovereignty over Treaty 3 territory. Despite explicit acknowledgement of the "recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982"* in the purpose clause of the *Mining Act,* there are at least two ways that the *Mining Act* contradicts itself and disrupts treaty rights: by enabling free entry of mineral prospectors onto treaty territory and failing to properly implement an adequate consultation process with Indigenous communities in the mine development process.

As previously mentioned, the free-entry system is "a principle, a law, and a regime" originating from medieval Europe which enables the free-entry and exploration of minerals on Crown land.[69] The free-entry system relies on the notion that minerals are objects which could be owned separately from ownership of surface rights, and that in instances where mineral rights and surface rights conflict, mineral rights will prevail.[70] On Indigenous lands, the system favours liberal property ideologies and corporate interests seeking to generate profit from mineral extraction.[71] Consequently, scholar Dawn Hoogeveen argues that "there is nothing free about" the free-entry system and in effect, continues to perpetuate settler colonialism.[72]

Although there has been some effort in the *Mining Act* to limit the prioritization of mineral rights over surface rights, the amendments have been limited in scope. S. 35.1(2) of the current *Act* withdraws Crown mining rights in Southern Ontario from "prospecting, mining claim registration, sale and lease" if there is already a surface rights owner, but this protection is not applied in Northern Ontario.[73] Instead, the Minister has only the *discretion* to withdraw mineral rights from lands with surface rights owners in Northern Ontario, and for lands which have no surface rights owners, which account for most of the mineral exploration lands on treaty territory, there is no protection from free-entry, as long as proponents file a mining claim online.[74] For these lands, mineral rights trump surface rights, with the exception of land which may be deemed sites of "Aboriginal cultural significance", defined narrowly in the *Act*'s regulations.[75] Although these provisions are important in recognizing Aboriginal or treaty rights, they are discretionary, limited in scope and subject to strict regulatory guidelines, ultimately doing little to acknowledge Indigenous sovereignty over minerals. Overall, free-entry is still widely enabled on Treaty 3 lands.

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[68] *Ibid* at s 3.
[69] Hoogeveen, *supra* note 34 at 128.
[70] *Ibid* at 130; Bruce Pardy and Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2010) 23 JELP 1 at 6.
[71] Hoogeveen, *supra* note 34 at 130.
[72] *Ibid* at 133.
[73] *Mining Act*, *supra* note 7, s 35.1(2).
[74] *Ibid*, ss 35.1(8), 28. Issues surrounding the Minister's discretion are well articulated in Pardy and Stoehr, *supra* note 70 at 14.
[75] *Ibid*, s 51(4); *General*, O Reg 45/11, s 9.10. For Aboriginal cultural significance to be made out, the land must meet three priorities: it must be "strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons", it must be in a fixed location, and it must be identifiable by community and documentation; s. 9.10(1).

The second concern surrounding the existing *Mining Act* is its inability to enforce consultation and accommodation as required under s. 35(1) of the *Constitution Act, 1982*. The duty to consult and accommodate was established in Canadian jurisprudence in *Haida Nation v British Columbia (Minister of Forests),* in which the Supreme Court of Canada (SCC) held that "the government has a duty to consult Aboriginal peoples and accommodate their interests [which] is grounded in the honour of the Crown."[76] The duty to consult and accommodate arises when the "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[77] In *Grassy Narrows v Ontario (Natural Resources),* the Court affirmed that this duty exists when governments act under sections 109 or 92A of the *Constitution Act, 1867*.[78] Nevertheless, the duty does not extend to third parties, as the duty to consult and accommodate "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group."[79] Instead, the Court implied that to keep third parties accountable, the Crown ought to utilize its legislative authority.[80]

The *Mining Act,* however, does not govern whether the duty to consult has been satisfied nor does it hold third party mining companies to high scrutiny. This has occasionally led to disputes between First Nations and mining companies: in two instances, mining companies sought injunction orders against Indigenous community members after they set up a blockade opposing mineral development in the region, which the mining company had begun without consultation with the affected First Nation communities.[81] These conflicts led to the *Mining Act* being amended in 2009 to require industry proponents to consult affected Aboriginal groups numerous times throughout the mine development process "in accordance with any prescribed requirements."[82]

Yet it is unclear whether these interim approvals of consultation are sufficient to guarantee that the duty to consult has been satisfied, especially when much of the consultation is undertaken by the industry proponent. Issues in deferring to industry proponents for consultation surfaced in *Wabauskang First Nation v Minister of Northern Development and Mines et al* ("*Wabauskang*").[83] There, the government of Ontario approved a mine rehabilitation plan submitted by Rubicon, a mining company, despite environmental concerns raised by Wabauskang First Nation ("WFN") during impact benefit agreement negotiations with the industry proponent.[84] The facts revealed that throughout the nine months leading up to the plan approval, there were never tripartite discussions held between Rubicon, WFN, and the government of Ontario surrounding the matter; the government of Ontario met Rubicon and WFN on separate occasions, or communicated over email.[85] The reason that Ontario was not involved in negotiations between Rubicon and WFN was because they did not want to become involved in the economic agreement between the parties.[86] Nevertheless, the court found that the institutional process established by Ontario to assess the

[76] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [*Haida*].
[77] *Ibid* at para 35.
[78] *Grassy Narrows v Ontario (Natural Resources)*, 2014 SCC 48 at para 51.
[79] *Haida*, *supra* note 76 at para 53.
[80] *Ibid* at para 55.
[81] See *Kitchenuhmaykoosib Inninuwug First Nation v Platinex Inc.*, [2006] 4 CNLR 152, OJ No 3140; see also, *Frontenac Ventures Corp v Ardoch Algonquin First Nation,* 2008 ONCA 534.
[82] Proponents are required to consult First Nation communities when submitting an exploration plan, applying for an exploration permit, in having a rehabilitation plan approved, and in beginning mine production: see, *supra* note 7 at ss 78.2, 78.3(2), 139.2(4.1), 141.
[83] *Wabauskang First Nation v Minister of Northern Development and Mines et al,* 2014 ONSC 4424 [*Wabauskang*].
[84] *Ibid* at para 163.
[85] *Ibid* at paras 65–155.
[86] *Ibid* at para 72.

impact of a claim was reasonable and that they had met the duty to accommodate by convincing Rubicon to monitor the impact of the mine production.[87] The case can thus be interpreted as deeming consultation according to a protocol and accommodation without the express consent of the First Nation as satisfying the government's duty to consult.

The *Wabauskang* decision is problematic for two reasons. First, the consultation protocol referred to by the government of Ontario is not included in the *Mining Act* or its regulation, meaning that the only oversight of its adequacy is through judicial reviews in court. Second, the mere existence and adherence to a consultation protocol was deemed to fulfill the duty to consult without review of the content or adequacy of the protocol. However, it is difficult to comprehend that the duty was fulfilled when no actual government consultation occurred where all parties were present; the government of Ontario played an advisory role to the parties separately and in confidence. This could result in a conflict of interest, as the government is likely to approve an application as long as the proponent meets its request, which may not necessarily be the same request as that of the First Nation. Considering the capitalistic origins of Ontario's mining legislation, there is a strong possibility that the government's interest would align more closely with the industry than that of the First Nation.

The continuation of the free entry scheme compounded by the lack of sufficient oversight over consultation mechanisms in Ontario's *Mining Act* means that Aboriginal and treaty rights are in danger of being violated, notwithstanding the assertion of Indigenous mineral sovereignty.

4. Making the Case for Indigenous Mineral Sovereignty in Ontario

As evidenced by the history of promise-breaking by the settler-colonial government and the ongoing disrespect of Indigenous sovereignty in Ontario's mining legislation, Hoogeveen's assertion that mining contributes to settler colonialism rings true.[88] Therefore, I argue that to decolonize the existing mining regime, Indigenous mineral sovereignty must be recognized on two grounds.

a. Relationship as Sovereignty—Indigenous Conceptions of Sovereignty

At the time that European settlers arrived in North America, there was little to no recognition of the sovereignty of Indigenous peoples, due to the narrow conception of the term as defined under the *Treaty of Westphalia*.[89] What has since been adopted to international law, this Westphalian conception of sovereignty involves absolute authority figures acting within territorial bounds and defining the nation-state.[90] Yet this definition of sovereignty is strictly European and cannot be universalized as applying to Indigenous communities in North America.[91]

There is no question that Indigenous communities have both *de facto* and *de jure* sovereignty. *De facto* or factual sovereignty refers to an operational notion of sovereignty, which closely aligns with the concept of self-determination: the ability for a people to govern itself and

[87] *Ibid* at paras 230, 234.
[88] Hoogeveen, *supra* note 34 at 130.
[89] S James Anaya, *Indigenous Peoples in International Law*, 2nd ed, (Oxford: Oxford University Press, 2004) at 21.
[90] Kent McNeil, "Sovereignty and Indigenous Peoples in North America" (2016) 22:2 UC Davis J Int'l L & Pol'y 81 at 89.
[91] *Ibid* at 85.

make decisions without external interference.[92] From the political alliance building practices between the "Three Fires" confederacy[93]—the Ojibwe, Odawa, and Potawatomi—to the internalized principles that community members rely on to govern themselves, Indigenous peoples have practiced and still continue to practice factual sovereignty.[94] *De jure* sovereignty, on the other hand, is a relative matter which arises vis-à-vis other sovereign entities.[95] Kent McNeil argues that *de jure* sovereignty arises in the recognition of sovereignty through the principles of a certain legal system.[96] Treaties, whether between First Nations and the settler state, or those that exist between First Nations, are the main legal documents which recognize *de jure* sovereignty.[97]

Pre-Confederation, the Ojibwe residing in what is now Treaty 3 territory clearly satisfied both elements of sovereignty in their everyday lives, including in the ways they chose to manage their minerals. Mineral extraction was practiced with the principles of reciprocity and respect in mind, and even without the presence of authority, Indigenous miners were able to self-govern their extractive practices.[98] *De jure* sovereignty over minerals was also observed: the Ojibwe intentionally disclosed mineral deposits as means of gaining allegiance from settlers but kept sacred sites in confidence in an assertion of conservation and control.[99] Had it not been for the erosion of the true meaning of treaty promises by the settler state and the restraints imposed by the province's mining regime, one could presume that sovereignty would be vociferously practiced today. To a limited extent, First Nations are asserting their sovereignty over minerals today by engaging in mining activities and negotiating with industry proponents; thus, an extension of such control and management to the minerals themselves and the land whereupon it is found is not unimaginable.

b. Respecting International Law: Treaties and Principles

In addition to the intrinsic sovereignty found in Indigenous communities, Canada, as a sovereign state recognized under international law, is obliged to adhere to international treaties and principles. The Crown's nation-to-nation relationship in law began with the signing of the *Royal Proclamation of 1763* whose terms must simultaneously be interpreted with the *Treaty of Niagara*, the two-row wampum dictating the First Nations' principles in engaging in foreign affairs with the British Crown.[100] Read together, the two fundamental documents point to a relationship of peace and friendship, which involves the shared use of resources and land.[101] The historic treaties then must also be read with these underlying intentions in mind. To date, Canadian courts have required treaties to be interpreted liberally and any ambiguities to be resolved in favour of

[92] Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows, and James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) at 294.
[93] Heidi Kiiwetinepinesiik Stark, "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada" (Spring 2012) 36:2 American Indian Quarterly 119 at 121.
[94] McNeil, *supra* note 90 at 92.
[95] *Ibid* at 99.
[96] *Ibid* at 300.
[97] *Ibid* at 126.
[98] Telford, *supra* note 10.
[99] *Ibid* at 52.
[100] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" (1997) at 4, online(pdf): *Simon Fraser University* <www.sfu.ca/~palys/Borrows-WampumAtNiagara.pdf>.
[101] *Ibid* at 6.

Indigenous signatories.[102] Although this is an interpretation adopted within a Canadian legal system, the court's guidance provides support to respecting the oral promises of mineral rights and the spoken intentions of the Ojibwe during Treaty 3 negotiations under international law.

The international law principle of permanent sovereignty over natural resources ("PSNR") also renders support to a claim of mineral sovereignty to Indigenous peoples across Canada. Whereas the discussion of sovereignty so far has referred to a more general notion of First Nation sovereignty, PSNR refers to the notion that a nation-state is free to dispose of natural wealth and resources within its territory, and conversely, has the duty to manage these resources responsibly to take care of the environment.[103] Although this principle emerged in the mid-twentieth century from post-colonial states asserting control over their resources in an attempt to protect themselves from foreign investors, PSNR has since been challenged for upholding capitalist notions of property and criticized for being used to justify a state's exploitation of its land *vis-à-vis* the collective interest of the citizens on that land most affected.[104] Nevertheless, modern iterations of the notion recognized in international law and by legal scholars suggest that PSNR could belong to a collective *people* and can be a means to assert internal self-determination.[105] Taken from this view, Ricardo Pereira and Orla Gough state that, "autonomous governance is not only instrumental but also necessary for indigenous peoples to control the development of their distinctive cultures, including the use of land and resources against undue interference by powerful economic interests or government."[106]

The notion of PSNR is closely linked to the rights to self-determination and resource management enumerated in UNDRIP. UNDRIP was passed as a non-legally binding resolution by the United Nations in 2007 but has since evolved to form a series of customary law principles intended to empower Indigenous peoples to reassert sovereignty within an international law framework rooted in Western notions of sovereignty.[107] The annex of the document provides that "control by Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions", which echoes the arguments made by legal scholars regarding the potential of PSNR promoting Indigenous self-determination and rights.[108] Enumerated in UNDRIP's articles are the various ways this control ought to be afforded: article 25 provides the right to maintain and strengthen

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[102] *R v Badger*, [1996] 1 SCR 771 at para 41, 2 CNLR 77. The courts have provided this reasoning for the purpose of deducing treaty rights under section 35(1) of the *Constitution Act, 1982*. This document operates within the Canadian legal system and as such, would not be considered "law" for First Nations. The position for a more holistic interpretation of treaty has been asserted by First Nations for decades; however, meaning that the court's dicta on a generous interpretation of treaty is a shared idea between both First Nations and the Crown. It is in that sense that I refer to the court's dicta as "guidance."

[103] Amada S Tolentino, Jr, "Sovereignty over natural Resources" (2014) 44:3 Environmental Policy and Law 300 at 300.

[104] See, for example, Oliviero Angeli, "Self-Determination and Sovereignty over Natural Resources" (2017) 30:3 Ratio Juris 290 at 297.

[105] United Nations instruments recognizing PSNR includes the *Resolution on Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17th Sess, 1194th Plen Mtg, UN Doc A/RES/1803(XVII) (14 December 1962) and the *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN GAOR, 29th Sess, 2315th Plen Mtg, Agenda Item 48, Supp No 31, UN Doc A/RES/3281(XXIX) (12 December 1974); Ricardo Pereira & Orla Gough, "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law" (2013) 14:2 Melb J Int'l L 451 at 460.

[106] *Ibid* at 473.

[107] *Ibid* at 472.

[108] *UNDRIP*, *supra* note 8 at Annex 4.

distinct Indigenous spiritual relationships with resources; article 26 provides a right to the resources themselves, as well as a right to use them; and article 28 provides a right to "free, prior and informed consent" of the use of such minerals if restitution is not possible.[109] In June 2021, Canada passed Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, officially recognizing UNDRIP's force into Canadian law.[110] Therefore, in both international law and Canadian law, the Crown is obliged to make space for the creation of Indigenous-led mineral management processes.

CONCLUSION

Just as the story of Missibizi has been passed on from generation to generation, Indigenous sovereignty over minerals has also transcended generations. In this paper, the story of Missibizi acted as a guide to exploring the historic evidence of Indigenous mineral sovereignty, the ways in which treaties initially captured Indigenous mineral sovereignty, and the obligations settlers have in correcting the wrongs perpetuated by the settler state's repeated violation of treaty promises. These obligations are grounded in both Indigenous notions of sovereignty and international legal principles, which is inextricably linked to the Canadian constitution.

I set out to write this paper as a response to concerns I noticed throughout my law school placement over the Indigenous communities' lack of control in the province's mining decisions. As a settler, I believe that my role is to contribute to decolonization by critiquing Western legal systems and repatriating Indigenous land and life.[111] As such, I am not in the position to suggest, if Indigenous mineral sovereignty is recognized in the colonial state, how Indigenous communities ought to apply this sovereignty in their self-governance. Each First Nation has a different relation to minerals and throughout this paper, I may have oversimplified this relationship by framing it as a single definition captured under treaty. Yet, as law is an ever-evolving medium, I take this position as a starting point for Indigenous Elders and knowledge keepers to customize the work for their own needs and legal orders.

I began this paper with the recognition that minerals have defined societies today, including the current settler-colonial society I live in. Detaching settler control of minerals will not be a clean break, similar to how decolonization is never a clean break.[112] However, learning from Indigenous teachings such as that of Missibizi and being reminded of our obligations to our human and non-human kin, I believe that we can transform our settler-society into one that respects Indigenous sovereignty.

[109] *Ibid* at arts 25, 26, 28.
[110] See Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 43rd Parl, 2nd Sess (23 Sept 2020).
[111] Tuck and Yang, *supra* note 9 at 21.
[112] *Ibid* at 20.