*Owen J Morgan**

THE CROWN'S RIGHTS TO GOLD AND SILVER IN NEW ZEALAND

AT common law the limits of the Crown's prerogative right to minerals were defined by a series of cases beginning with the *Case of Mines*[1] in 1568. In the *Case of Mines* the Crown's claim to ownership of the so-called 'royal metals' - gold and silver - was allowed but the claim to base metals - lead, tin, copper and iron - was denied. Counsel for the Queen - it was a civil action involving Elizabeth I and Thomas Percy the 7th Earl of Northumberland - argued that gold should be owned by the Crown on the basis of the innate superiority of the monarch: "for of all things which the soil within this realm produces or yields gold and silver is the most excellent; and of all the persons in the realm the King is in the eye of the law most excellent."[2] This was an adjunct to the real argument, for gold and silver had by then become more readily available. After a number of abortive attempts a gold coinage was established as currency in England in 1351. So by the time of the Tudor monarchs the King[3] required control of the sources of gold and silver, not for personal reasons but for economic and related strategic reasons.

Over time the Crown's prerogative has been increasingly restricted and is now classified under three heads: (i) sovereignty and pre-eminence in its regal capacity; (ii) special privileges in respect of rights of personal property; and (iii) executive powers and authorities exercised in fact by Ministers of the Crown.[4] The first two relate to the person and personal requirements of the monarch, and the Crown's rights to gold and silver fall

---

* B A, LL B (Hons), M Jur (Auck), B Ed Stud (Qld), Dip Tchg (ASTC); Director, Corporate Affairs, Lion Nathan Ltd; former Lecturer, Department of Commercial Law, University of Auckland.

1 75 ER 472; *The Case of Stannaries* 77 ER 1292; *The Case of the King's Prerogative in Saltpetre* 77 ER 1294.

2 75 ER 472 at 479. Whale and sturgeon being the most excellent fish were also reserved to the King by prerogative.

3 References to the King will, unless the context demands otherwise, be references to the monarchy. The term has been adopted because of its use in the judgement in the *Case of Mines*.

4 Lord Hailsham (ed), *Halsbury's Laws of England* Vol 8 (Butterworths, London, 4th ed 1974) p585 para 893.

into the third category. These rights have gradually been curtailed by statute in New Zealand, although the present statutory rights now exceed those formerly claimed under the prerogative. The general rule under the common law as expressed in the maxim *cuius est solum eius est usque ad coelum et ad inferos*,[5] that the owner of the land was entitled to everything above the surface of the land (such as trees and houses) and everything below the surface (such as mines and minerals), has also been largely overtaken.

Thus the present position in New Zealand is determined by reference not to the limits of royal prerogative but to statute, the most recent of which is the *Crown Minerals Act* 1991.[6] Section 10 provides that petroleum, gold, silver and uranium are the property of the Crown, and the section is expressly not subject to any Crown grant or other instrument of title. Generally, ownership of other minerals is also determined by statute, the Crown having progressively reserved title to minerals in land alienated from the Crown. Earlier statutes even provided for the resumption of land for mining purposes.[7] Section 11(1) of the *Crown Minerals Act* is the most recent statutory reservation of title to minerals and ss(2) confirms the effect of previous reservations. However, it is curious that while the Crown's right to ownership of all minerals has continued to increase, the *Crown Minerals Act* denies the Crown access to them - s48 cancels any Crown right of entry that is reserved by statute for the purposes of prospecting, exploring or mining.

The progressive expansion of the Crown's ownership of minerals was, until the enactment of the *Crown Minerals Act*, accompanied by legislation that provided for the Crown's access to its minerals. The prerogative right to ownership of gold and silver was never in doubt, but there was no confidence in an accompanying prerogative right of entry. Together, the *Land Act* 1948 and the *Mining Act* 1971 represented the most extensive examples of such statutory claims.[8] However, the *Crown Minerals Act* embodied a dramatic change in policy: unless Crown-owned minerals lie in Crown land then the Crown, in its own right, must comply with the Act in order to obtain access to its minerals.[9] It has surrendered

5 To whom belongs the soil it is his, even to Heaven, and to the middle of the earth.

6 Unless otherwise indicated, all statutes cited in this article are those of the New Zealand Parliament.

7 For example, the *Resumption of Land for Mining Purposes Act* 1873.

8 *Land Act* 1948 s59; *Mining Act* 1971 s8.

9 Specifically, ss49, 50, 51, 53 and 54. This is the effect of s8(1). Note that s2 defines "person" to include the Crown.

its rights of access and in doing so has empowered the owner of the land, in which the minerals are found, to restrict mining activities.

The distinction between ownership and access is not a new one however. The need to reconcile interests in ownership of and access to minerals was recognised in the *Case of Mines* and in subsequent English developments. Thus in order to understand the evolution of the current New Zealand mining legislation, it is important to review the developments which gave rise to the law received upon European settlement. The origins of the Crown's claims can be traced to the Crown's arguments in the *Case of Mines*, which in turn were presaged by the assertions of various monarchs from the time of the Norman Conquest.

THE GROWTH OF ROYAL CLAIMS TO GOLD AND SILVER

> Whereas in continental Europe ... the exploitation of minerals normally necessitated a concession from the Crown to the finder, in England, in the early stages at least, it was done as a normal part of estate business. There was a close association between the ownership of the land and the working of coal and iron.[10]

Following the Norman Conquest, successive monarchs demanded rights to all minerals, not just gold and silver. In the reign of Henry II the King wrote to the Sheriff of Devonshire commanding him not to permit occupation of a copper mine containing gold until he, the King, had provided for it. Henry III took possession of mines of copper as well as gold and silver in Cornwall and Devon. Edward III granted permission for landowners to dig for gold and silver on condition that the King received two thirds of the silver and one half of the gold and the same King reserved the right to mine if the landowner failed to do so. Any complaint to Parliament by the landowners concerning these royal claims was met by a strong assertion of Crown rights.[11]

To appreciate its significance, the *Case of Mines* needs to be considered in a broader political context, for royal claims to gold and silver were made

10 Habakkuk, "Economic Functions of English Landowners in the Seventeenth and Eighteenth Centuries" in Minchinton (ed), *Essays in Agrarian History* Vol 1 (David & Charles, Newton Abbot 1968) p195. Part of this passage is also quoted with approval in Palliser, *The Age of Elizabeth: England Under the Later Tudors, 1547-1603* (Longman, London 1983) p253.

11 Rogers, *The Law Relating to Mines, Minerals and Quarries in Great Britain and Ireland* (Stevens & Sons, London, 2nd ed 1876) pp166-174.

in support of the governance of the state. The case was not merely a dispute as to ownership of the minerals but had wider significance in determining the existence and the extent of the Crown's prerogative rights within the framework of Tudor-style government. In 1568 Elizabeth I had been on the throne for just 10 years and England was beset by economic and religious turmoil. The legacy of Henry VIII was an economy ruined by conflict between adherents of the new religion and the old, a number of pretenders to the throne of England, and the ever-present threat of war with Spain, France, or the Netherlands. Henry's response to these economic problems had been to debase the currency, first in 1526 and again between 1542 and 1547. About £400,000 of silver coin was reminted as £526,000, each coin containing a lesser quantity of the pure metal. The surplus went into the government's coffers. It was a desperate move.

> [I]n the sixteenth century the only sound currency was one in which the face value of the coins corresponded fairly closely to their intrinsic value, and for a government to interfere with the metallic content was thus to upset not only the currency but the values and prices expressed in it.[12]

Despite these problems it was also a time of economic expansion. Developments were occurring which would result in the transformation of England from an agrarian society into an industrial power. Viewed in this context, the importance of controlling the nation's gold and silver is obvious.

However, Elizabeth faced dangerous threats to her rule, particularly from followers of her cousin, Mary Stuart. One of these was Thomas Percy, the Earl of Northumberland and defendant in the *Case of Mines*. The Queen had granted a licence to Thomas Thurland and Daniel Howseter to mine for copper, gold and silver within an area of land called 'Newlands'. They had successfully extracted six hundred thousand pounds of ore when Percy took possession of the mines, claiming that the land had been granted to him by Mary I and that it had already been mined at his direction.[13] Elizabeth challenged the claim to possession.

---

12 Bindoff, *Tudor England* (Penguin Books, Harmondsworth 1965) p118.

13 Parcell argues that the decision should be restricted to open mines. The point is not taken up elsewhere. Parcell, *A Thesis on the Prerogative Right of the Crown to Royal Metals* (Government Press, Wellington 1960) p75.

It has been suggested of the Tudors that

> state intervention in social and economic affairs was often incidental, selfish, shortsighted and inconsistent. Governments did not consider it their purpose to engage in social or economic engineering, but only to keep the peace, to wage wars and to finance those wars, and to maintain themselves in power.[14]

Thus it is no coincidence that those factors correspond with the arguments put forward by counsel for the Queen in the case for the royal prerogative. There were essentially four arguments: the "excellency of the thing"; the "necessity of the thing"; the "convenience to the subjects in the way of mutual commerce and traffick"; and the "inconvenience to the King".[15] Read in the language of Plowden's Report, these arguments sound unfamiliar and discordant to modern ears,[16] but if carefully analysed they are logical and support a sophisticated theory of statehood:

(1) the King is the most excellent person in the realm and the most excellent things to be found in the soil, being gold and silver, should naturally belong to him. This is a comment on the nature of the monarchy itself;
(2) mines and minerals provide a natural treasure house and this should be available to the King in his executive capacity to enable him to raise an army in defence of the realm and to ensure that good laws were in place;
(3) England was desperately short of gold and silver to maintain the value of its coinage, which in any event should be determined by the King;
(4) withholding sources of finance from the King's subjects who might otherwise be in a position to finance a rebellion was an important means of maintaining power.

The case was heard before the assembled justices and barons of England, who reduced these arguments to three so-called "points of the case":

---

14 Palliser, *The Age of Elizabeth: England Under the Later Tudors, 1547-1603* p320.
15 75 ER 472 at 479-480.
16 Parcell, *A Thesis on the Prerogative Right of the Crown to Royal Metals* p13 describes the arguments for 'excellency' as "plain nonsense".

(1) whether the King (for which read the monarch) has a prerogative right to the mines and ores of gold and silver which are in the lands of his subjects, including a right to dig the land;
(2) whether this prerogative right extends to mines and ores of copper which contain gold and silver;
(3) if the first two points were decided in favour of the Queen, nevertheless was the grant of the land to the Earl sufficient for the ores and mines to pass with the land.[17]

As Plowden's Report indicates, the whole case depended upon the determination of the first point. If this was decided in favour of the Queen then "in the other two points the law is with the Queen".[18] In the event, the unanimous decision of the justices and barons was in favour of the Crown's prerogative right

> that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.[19]

On the second of the three points, whether the prerogative right extended to mines of copper containing gold and silver, three justices dissented but the majority held

> that if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence; and in such a case it shall be called a mine royal, for the records don't make any distinction herein, but they are general, and prove that all ores or mines of copper, or other base metal, containing or bearing gold or silver belong to the King ... [I]f the ore or mine in the soil of a subject be of copper, tin, lead, or iron, in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or

17 75 ER 472 at 479.
18 As above.
19 75 ER 472 at 510.

> mine, and not the Crown by prerogative, for in such barren base metal no prerogative is given to the Crown.[20]

On the third point, the court held that a mine royal could pass to a subject but it must pass by "apt and precise words". The Earl failed on this ground as the words of the grant of the land did not extend to the minerals or mines in the land.[21]

A number of conclusions can be drawn from the decision:

(1) The Crown has a prerogative right to ownership of gold and silver but no prerogative right to ownership of other minerals;[22]
(2) The right is in respect of all mines of gold and silver "within the realm" (which term should be given an expansive meaning), including mines on private land;
(3) It includes "other such incidents ... as are necessary ... for the getting of the ore",[23] if read widely this must include a right of access to private land;
(4) The mere existence of gold and silver, in whatever quantity, in a mine of base metal makes that mine a "mine royal";
(5) The right to a mine royal can only be granted by "apt and precise words". (This limitation can be used to interpret any instrument that purports to transfer title to the mine or the minerals.)

One aspect of the decision, that all mines containing gold and silver in whatever quantity were royal mines, was detrimental for the development of mining. It was widely resented and it led to the existence of some mines being concealed. As a consequence, two statutes were passed to modify the extent of the prerogative.[24] The first, passed in 1688, provided that all gold and silver extracted should be used only for coinage, "for the Increase of Monies", and should be sold to the Mint for their full value. Further, copper, tin, iron or lead mines would not be royal mines even if they contained gold or silver. However, if there was any gold and silver

---

20 At 511.
21 As above.
22 This was confirmed soon after in the *Case of Stannaries* 77 ER 1292. The court held that the prerogative right was limited to gold and silver and did not extend, in that case, to tin mines in Cornwall. The position in Scotland was different, by statute in 1592 the Crown surrendered its prerogative rights in return for a payment of a royalty.
23 75 ER 472 at 510.
24 1 Wm & M c30 (1688); 5 Wm & M c6 (1694).

the Crown's right of ownership remained unaffected.[25] The second act was passed in 1694 to clear up any misunderstandings. It confirmed that the owner of a copper, tin, iron, or lead mine was entitled to work the mine even if it was claimed to be a royal mine. It also protected the Crown's rights by granting an option to purchase the ore at a set price. If the Crown did not take the ore at that price then the mine owner could deal with it as they chose.[26]

The question of whether the prerogative included a right of entry was clarified in *Lyddall v Weston*[27] which was decided some fifty years after the enactment of the statutes. The Lord Chancellor held that the prerogative did not extend that far. The report is short and there are few facts, but the learned judge distinguished between a Crown grant to prospect and open a new mine, and the Crown's right to restrain the working of an open mine.

> No instance where the crown has only a bare reservation of royal mines, without any right of entry, that it can grant a licence to any person, to come upon another man's estate, and dig up his soil, and search for such mines; I am of opinion there is no such power in the crown, and likewise, that by the royal prerogative of mines, they have even no such power; for it would be very prejudicial, if the crown could enter into a subject's lands, or grant a licence to work the mines; but when they are once opened, they can restrain the owner of the soil from working them, and can either work them themselves, or grant a licence for others to work them.[28]

The effect of the decision was anomalous. The Crown had no right of access if the landowner did not work a mine; but should a mine be opened then the Crown could declare it to be a royal mine and licence its working. It was therefore a significant restriction on the extent of the prerogative as it was declared in the *Case of Mines*.

The combined effect of the *Case of Mines* and the statutes was at issue in *Attorney-General v Morgan*.[29] The defendant had taken a lease of the

25 1 Wm & M c30 (1688) ss3, 4.
26 5 Wm & M c6 (1694) ss2, 3.
27 26 ER 409.
28 As above.
29 [1891] 1 Ch 432.

mines on land known as the Gwynfynydd farm in Wales and had worked them but without a licence from the Crown's Commissioners and without accounting for the gold taken from the mines. If Morgan was to succeed it depended upon a favourable construction of the statutes. He argued that as the mines contained copper, iron and lead he was entitled to work them, and that the Crown's rights were limited to purchasing the ore at the statutory prices. In effect, Morgan was trying to stand the *Case of Mines* on its head by saying that, by virtue of the statutes, the mere presence of a base metal in a gold mine was sufficient to vest all proprietary rights in the owner. These rights included the ownership of the gold and silver. His claim was dismissed because the mines were clearly gold mines and Lindley LJ pointed out that: "The object of the statute is not to enable owners of mines to extort money from the Crown, but to protect them from extortion by the Crown."[30] In the case there was no question of the Crown having access, nor did Morgan plead that he had a right of access through the Crown, although to have done so would have put his whole case in jeopardy.

If the *Case of Mines* and the statutes are conclusive of the extent of the royal prerogative as to gold and silver, it is interesting to consider the *Case of Saltpetre*[31] for its decision with respect to the prerogative and strategic war materials. Its relevance is limited today,[32] and certainly the prerogative right to purveyance was different from the Crown's proprietary right to gold and silver.[33] Yet it confirms that the prerogative was created and limited by the common law and that the courts were prepared to inquire into its nature and extent. The case concerned the King's right of access to a subject's land to take saltpetre, an ingredient in the manufacture of gunpowder. Control of the means of production of a war material was essential to the defence and safety of the realm. The King, therefore, had the prerogative right to enter upon his subject's land and dig for saltpetre. This was not an unrestricted right, and some of the conditions are remarkably similar to those imposed on mining operations today. For example, after digging, the land was to be made "as commodious to the owner" as it was before, work was restricted to the hours of sunrise to sunset, and the place where digging was to take place was specified.[34]

---

30 At 457.

31 *The Case of the King's Prerogative in Saltpetre* 77 ER 1294.

32 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 524 per Lord Dunedin; at 571 per Lord Parmoor.

33 Purveyance was the prerogative right to compel the sale of goods to the sovereign at a reduced rate. It was abolished in 1660.

34 77 ER 1294 at 1294-1297.

THE CROWN AND ITS PREROGATIVES

Blackstone defined the royal prerogative as "that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity".[35] This definition conveys some of the aspects of the royal prerogative but does not give a complete picture of the state of the prerogative today. Many prerogative rights are now regulated by statute. In *Attorney-General v De Keyser's Royal Hotel*[36] Lord Dunedin defined the nature of the relationship between prerogative power and statutory power when the latter "covers ground" formerly the precinct of the prerogative. The passage in question is well-known, it was cited by the Court of Appeal in *Simpson v Attorney-General*[37] and quotes Dicey's description of the prerogative:

> None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on the prerogative?"
>
> The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.[38]

The special nature of the prerogative as it relates to matters such as the ownership of gold and silver is highlighted in this extract from Lord

---

35 Blackstone, *Commentaries on the Laws of England* Vol 1 (Garland Publishing, New York, reprint of 9th ed 1978) p239, cited in Lord Hailsham (ed), *Halsbury's Laws of England* Vol 8 p583 para 889.

36 [1920] AC 508.

37 [1955] NZLR 271 at 279, 280.

38 [1920] AC 508 at 526.

Dunedin's judgement. It is no longer the Crown as the sovereign which can exercise a right of ownership of the minerals, as that right must be exercised by the Ministers of the Crown. The right of ownership being "covered by statute" - the seventeenth century statutes and subsequent legislation in New Zealand - the Crown must look to its statutes to determine its rights.

One issue not resolved in Lord Dunedin's judgment is the effect of the repeal of the statute covering the same ground as the prerogative. It has been suggested that in such a case the prerogative power may revive.[39] The special position of the royal prerogative in relation to s20(f) of the *Acts Interpretation Act* 1924 may oust the usual rule that the repeal of a statute does not revive anything not in force or existing at the time of the repeal. Further, the judgment in *De Keyser* made it clear that the prerogative did not merge with the statute. Resolution of this issue is desirable so that mining companies and landowners can have certainty as to government powers and intentions. However, in practical terms it is unlikely that the Crown would depend on an uncertain prerogative power to allocate prospecting and mining rights should the *Crown Minerals Act* be repealed.

It is the Crown in right of New Zealand which may exercise rights of ownership of minerals. While the modern legislative drafting idiom is to refer to "the Crown", early statutes referred to, for example, "Her Majesty".[40] Even then it was not intended that the Sovereign should personally enjoy the legislated rights. But indeed what is the Crown? A recent definition emphasises the executive function:

> The Crown is, legally and in fact, the embodiment of executive government. It is an historical emanation from kingship that has evolved in accordance with (as Lord Simon put it) "the contemporary situation". But it is "the Crown", not "the government", that has legal existence ... The Crown has continuity. Governments come and go, but the Crown exists in perpetuity.[41]

Perpetuity may be beyond even the Crown, and the shape and form of the Crown in right of New Zealand is altered by successive governments. Just

39 Joseph, *Constitutional and Administrative Law in New Zealand* (Law Book Co, Sydney 1993) pp548-549.

40 For example, the *Mining Act* 1891.

41 Joseph, *The Crown as a Legal Concept* [1993] *NZLJ* 126 at 129.

as governments come and go, so do the various ministries which they establish to exercise power. Likewise, any perceived defect that the Crown may have in ownership of or access to its minerals can always be cured by recourse to the ultimate power of legislation.

THE POSITION IN RESPECT OF NEW ZEALAND AS A COLONY

English sovereignty was established over New Zealand in 1840, which along with settlement of the land allowed for the reception of English law. An essential component of that law was the feudal system of tenure which allows of no land without a superior lord - *nulle terre sans seigneur.* This was accepted by the Court of Appeal in *Veale v Brown.*[42] An orderly system of title to land was thereby introduced, which incidentally meant that ownership of minerals could also be managed. It provided the settlers with the certainty of a Crown grant while preventing the worst excesses of a situation which permitted gross exploitation of the Maori.[43] There were three facets to the New Zealand law determining the Crown's rights to mines and minerals including gold and silver: the statutes, the common law and the prerogative. Each requires examination.

Section 1 of the *English Laws Act* 1858 reads:

> The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein and on and after that day, and shall continue to be therein applied in the administration of justice accordingly.

The inclusion of the words "so far as applicable to the circumstances of ... New Zealand" is important. The *English Laws Act* 1908 is a consolidating statute which repeats s1 of the earlier Act with the proviso that the laws relating to usury are deemed not to have extended to New Zealand; certain later Acts were also adopted.[44]

At common law, the judgment of the Privy Council in *Cooper v Stuart*[45] explains the extent to which English law is introduced into a colony and

---

42 (1868) 1 NZCA 152.

43 McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (OUP, Auckland 1991) p104.

44 They are listed in the Second Schedule to the Act.

45 (1889) 14 App Cas 286.

the manner of its introduction. The appellant in that case sought to establish that the rule against perpetuities was operative in the colony of New South Wales:

> The extent to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions ... In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits.[46]

It was further explained that if action was not taken by either the Imperial or the colonial legislature, then the law of England became the law of the colony. New Zealand was regarded as a colony in the second category, although there is some debate as to whether it can be said that there was no established system of law.[47] The genesis of the law as to mining was, therefore, the English law as it stood on 14 January 1840, insofar as it was applicable to New Zealand. The English law having been introduced to New Zealand and the legislature having declared, in terms of the rule in *Cooper v Stuart*,[48] which parts of the law had effect, the courts in New Zealand then had to apply the law.[49]

What rights could the Crown lay claim to in England and hence in New Zealand in January 1840? The prerogative can be said to follow the common law, although it is more correct to say that it travels as part of the common law to those places into which the common law is introduced.[50] In summary, the Crown's prerogative right existed but was defective as to access. This inevitably led to statutory intervention, for ownership for mining purposes without the right of access is largely useless. In respect

46 At 291.
47 McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* pp97ff.
48 (1889) 14 App Cas 286.
49 (1868) 1 NZCA 152.
50 Lord Hailsham (ed), *Halsbury's Laws of England* Vol 8 p585 para 892.

of other minerals in the land, the common law position that the owner of the land owned the minerals applied.

The Crown's prerogative right in New Zealand was acknowledged by statute as early as 1858 in the *Gold Fields Act*: "Nothing in this Act contained shall be deemed to abridge or control the prerogative rights and powers of Her Majesty the Queen in respect of the gold mines and gold fields of the Colony."[51] The same Act embodied another element of the decision in the *Case of Mines* - that gold is deemed to be more than the pure mineral. Section 1 contained an extended definition: "The word 'Gold' shall signify as well any gold as any earth clay quartz stone mineral or other substance containing gold or having gold mixed therein or set apart for the purpose of extracting gold therefrom." This extended meaning is echoed through the successive *Mining Acts*, although the definition in the *Crown Minerals Act* is expressed more simply and clearly: "'Gold' includes any substance containing gold, or having gold mixed in it."[52]

The application of the prerogative right to gold and silver, was confirmed by the Privy Council in *Woolley v Attorney-General of Victoria*[53] and in *Attorney-General of British Columbia v Attorney-General of Canada*.[54] In both cases the point was not whether it was good law that the Crown had the right to the minerals. This was regarded as settled, the prerogative right to the royal metals having been introduced as part of the common law. The point was rather one of statutory construction, to determine whether the statutes in question were explicit in their intention to pass title to "the precious metals". This was, of course, one of the points that fell to be decided in the *Case of Mines*.

The domestic courts readily accepted the existence of the prerogative right to gold and silver. In a decision of the Court of Appeal, *Skeet & Dillon v Nicholls*,[55] Stout CJ commented on the *Mining Act* 1908 in the following terms:

> There is no doubt that the Mining Act proceeds on the presumption that at common law precious metals belong to the Crown, and the Crown has a right to mine for them: See

51 Section 43.
52 Section 2; silver is given a similarly extended meaning.
53 (1876-77) 2 App Cas 163.
54 (1889) 14 App Cas 295.
55 (1911) 30 NZLR 611.

> *Reg v Earl of Northumberland* ... This will explain, no doubt, the interference with private property in mining districts.[56]

Borton v Howe,[57] which concerned the capacities of holders of miners' rights to discharge fouled water, is valuable for ascertaining the limits of the Crown's rights. These were identified but were clearly not absolute, and statute was recognised as prevailing over prerogative. Johnstone J, delivering the judgment of the Court, said: "The auriferous deposits belong to her Majesty, subject to the gold-fields laws of the colony; but her Majesty could not, therefore, be entitled to foul streams beyond the gold-fields to the detriment of grantees of the Crown."[58]

One area not provided for in the English law in 1840 concerned the rights of indigenous peoples. A recent text argues that the Crown's establishment of sovereignty did not displace existing tribal property rights, in effect that there is a common law doctrine of aboriginal title. The argument runs that as a consequence of the introduction of feudalism the Crown took legal title to the land but in terms of a "technical ownership" burdened by the tribal title. "To use an analogy (which these days the courts are reluctant to take too far, if any distance at all) the Crown was like a trustee owning land for the benefit of the tribes. Thus an 'aboriginal title' was recognised by the common law as a burden upon the Crown's feudal title to the land."[59]

If this trustee-like status can be imposed on the Crown then what of the rights to the minerals in the land? Did the Crown's prerogative rights to gold and silver extend to minerals in land being held on behalf of others? The nature of the ownership of the land would mean that even if the minerals belonged to the Crown there would still be difficulty in establishing a right of access. Of course, statutes have given a right of access to Maori land.[60] On the other hand, acknowledgment of a trustee-like status would require the Crown, in accordance with the trust, to return the rights of ownership of gold and silver, and the other minerals reserved under the *Crown Minerals Act*, to the Maori owners of the land, thus

56 At 623.

57 [1874-1875] 2 *NZ Jurist* 97.

58 At 117.

59 McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* p104.

60 *Mining Act* 1971 s37 allowed private land or Maori land to be declared open for mining, as if it were Crown land, if the owner refused or failed to consent to the grant of a mining privilege.

creating a precedent for a total return of all minerals to private ownership. The *Crown Minerals Act* is a formidable obstacle for it is explicit in respect of ownership of gold and silver - those minerals belong to the Crown. Again, the argument would be that this statutory ownership is 'burdened' with the aboriginal title to those minerals.

A similar argument is that the Crown holds land that has not been dealt with by the Maori Land Court on behalf of the Maori under the customs and usages of the Maori people. If this is correct, then the right to gold and silver in that land would remain with the Maori. This proposition was advanced against the Crown's prerogative right, that is, before the statutory claim to gold and silver was made in the *Mining Act* 1971 and repeated in the *Crown Minerals Act*.[61] There is little land still held according to 'customary title' so the practical significance of this argument is greatly diminished. In addition, the Crown's statutory assertion of its rights would seem to be definitive.

It is worth noting that as early as 1852 the Crown was careful in its dealings with the Maori. When gold was discovered near Coromandel Harbour the land was entered under a special agreement with the Maori owners. In addition to a fixed sum based on the number of miners, the Maori were to receive a further sum from the miners' licenses. These are hardly the acts of an administration sure of its rights of ownership and access.[62] Still it would be a leap of some logic to argue that such actions constituted a waiver by the Crown of its rights or an acknowledgment of the overriding rights of the Maori.

THE CROWN'S RIGHTS BY VIRTUE OF LEGISLATION

A significant proportion of the legislation in the first seventy years of the country's existence regulated mining. Such legislation recognised a need to promote mining as an important part of the country's economy. The first charter relating to land laws and regulations, according to Veatch, provided that land should be separated into "such as are supposed and such as are not supposed to contain valuable minerals".[63] Land which had been alienated from the Crown could, from the 1870s, be resumed for mining purposes.[64] A clear example is ss100(3) of the *Mining Act* 1891

61 Parcell, *A Thesis on the Prerogative Right of the Crown to Royal Metals* pp41ff.
62 Veatch, *Mining Laws of Australia and New Zealand* (Government Printing Office, Washington 1911) p145.
63 As above p144.
64 For example, under the *Resumption of Land for Mining Purposes Act* 1873.

which provided that: "In the event of gold being found upon any of the aforesaid lands they shall be subject to resumption for mining purposes."

Whether mining has been in the long-term interests of the country is debatable, but it is undeniable that the mining lobby has been effective in arguing that the industry is an important part of the economy. While gold remained a significant export item, it was, naturally, an industry to be fostered. Mining legislation therefore generally preferred the rights of the miners over those of the landowners.

The history of legislation relating to the Crown's rights to gold and silver focuses on two needs - ownership and access. There was no explicit statutory claim to gold and silver until the passage of the *Mining Act* 1971, with the Crown relying on its prerogative right. However, provisions such as s28 of the *Mining Act Amendment Act* 1896 implicitly recognised the Crown's ownership of gold and silver.[65] The various statutes which empowered the Crown to resume land for mining purposes reflected a recognition by the Crown that its right of access was limited. If the *Case of Mines* established a right of entry as part of the prerogative then this was no longer recognised at law in the new colony. Therefore, it was important to know how and when land was alienated, not to determine the ownership of the minerals, which was clearly the Crown's either by virtue of the prerogative or the later statutes, but rather to determine the Crown's rights of access.

Other than resuming land to ensure access, the Crown could also, until the passing of the *Crown Minerals Act*, obtain a mining privilege in its own right. Such a privilege included access and had the added advantage of not expiring with "effluxion" of time.[66] However, with the notable exception of coal, it has been the Crown's practice to licence others to work its minerals.

Legislation - Ownership

Until the express statutory claim to ownership of gold and silver was first made in 1971, the Crown relied on its prerogative right to those minerals. Prior to this express claim however, mining legislation enacted from 1891 implicitly recognised the force of the Crown's rights.

65 See below for a discussion of the 1896 Amendment Act.
66 *Mining Act* 1926 s97(4); *Mining Act* 1971 s132(3).

The *Mining Act* 1891 contained a number of provisions relating to ownership of gold and silver, the presence of those minerals in the land and the resumption of the land for mining purposes:

(1) s12 - compensation is to be determined in terms of the *Public Works Act* 1882;
(2) s17 - compensation cannot be claimed against the Queen or the Government unless the injury is "one in respect of which such compensation can be legally claimed" (this peculiar provision is the forerunner of a more explicit allowance in the 1896 Amendment); and
(3) ss100(3) - if gold is found on any land alienated after the commencement of the Act the land is subject to resumption for mining purposes.

The *Mining Act Amendment Act* 1891 clarified the import of s17. It seems that between 1873 and 1891 landowners who acquired 'Victorian titles' could claim ownership of minerals,[67] as land was alienated without a general reservation of all minerals to the Crown. In other words the effect of the common law maxim, *cuius est solum eius est usque ad coelum et ad inferos*, was to vest the minerals, except gold and silver, in the landowner. Section 28 of the amending Act introduced a new element in that any person who could establish title to deposits of gold or silver in their land through an action in the Supreme Court could, in the event of the land being resumed, obtain compensation for the "auriferous and argentiferous" value of the land. This makes sense only if it is construed as a recognition by the Crown that it may have lost ownership of the gold and silver, and that ownership under the prerogative had somehow passed with the land. To establish title against the Crown, a claimant would have had to overcome the decision in *Woolley v Attorney-General*.[68] That case affirmed the decision in the *Case of Mines* that "apt and precise" words in the document transferring title are required to sever the right to minerals and mines from the Crown.

Similar sections were included in the *Mining Act* 1908 and again in the 1913 amendment to that Act, although that amendment restricted compensation to land alienated prior to its commencement.[69] When the

67 The significance of the dates relates to the *Resumption of Land for Mining Purposes Act* 1873 and the *Mining Act* 1891.
68 (1876-77) 2 App Cas 613; see also *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 App Cas 295.
69 *Mining Act* 1908 ss291, 292; *Mining Act Amendment Act* 1913 ss9, 10.

consolidating *Mining Act* 1926 was passed the effect of the 1913 amendment was retained including the restriction to land alienated before 1913.[70] These statutes are best regarded as back-ups to the prerogative right and not an abrogation in the sense discussed in *De Keyser*.[71]

Reservation of title to minerals also appears in land legislation passed at the turn of century. The *Land Acts* 1892 and 1908 confirmed that the Crown regarded ownership of gold and silver as separate from the other minerals. Owners of leases in perpetuity were entitled by the 1908 Act to purchase the fee simple of the land comprised in the lease at a price to be determined as the capital value of the land including the minerals (except for gold and silver).[72] The Crown's interpretation of these provisions was that the minerals were not part of the lease because of the effect of the 1892 Act which reserved all minerals in leases in perpetuity. This was tested in the courts in *Commissioner of Crown Lands v Bennie*[73] where the Court of Appeal found for the lessee. The Court held that to do otherwise would mean that the words of the 1908 Act, which included minerals in the capital value, would be "mere surplusage". However, this case was distinguished in *Brighton v McClure and the Minister of Lands*[74] where the Court of Appeal decided that a lessee of a lease in perpetuity did not obtain, under the rights of purchase granted by the 1912 amendment, more than a right to purchase the land without the minerals.

By 1913 the Crown's ownership of gold and silver was almost complete. It was potentially defective in respect of some 'Victorian titles', but otherwise no compensation was payable for land resumed which contained these minerals. In addition, all Crown land was alienated subject to a reservation of the minerals. From that date any land alienated by the Crown was the surface alone. The mines and all the minerals, not just the gold and silver, were reserved to the Crown. The prerogative right to royal metals had been replaced by a statutory right to all the minerals.[75]

---

70 Sections 320, 321.

71 [1920] AC 508.

72 A re-enactment of the *Land Laws Amendment Act* 1907 s20.

73 (1909) 28 NZLR 955 at 961.

74 (1913) 32 NZLR 1073.

75 Note the effect of the decision in *Earl of Lonsdale v Attorney General* [1982] 3 All ER 579 that the term "minerals" has a meaning which relates to the common understanding of what minerals are considered to be at the time of the grant.

Legislation - Access

To ensure access, the Crown first passed resuming legislation, qualified to the extent that compensation would be payable to the landowner, or lessee, who was dispossessed of rights in the land. Such compensation was payable in terms of the relevant *Public Works Acts*, with the exception of the value of any gold and silver in the land. Thus in the *Resumption of Land for Mining Purposes Act* 1873, compensation was payable for land which was resumed apart from the "auriferous or argentiferous" value of the lands.[76] The corollary is that from this point in time the prerogative was further abridged by statute.

The *Resumption of Lands for Mining Purposes Act* and other resumption of land provisions demonstrate that the Crown had no confidence in a prerogative right of entry. In effect it had to buy back the land in order to be able to work the mines. The importance of access led to statutory reservations of entry to land alienated from the Crown. The *Westland Waste Lands Act* 1870 is an example of legislation which retained access on a local scale. Lands sold under the Act were to be "open to entry by miners for the purpose of mining gold" for fourteen years after the sale. Section 121 of the *Land Act* 1892, the subject of litigation in *Brighton v McClure and the Minister of Lands*,[77] established this nationally. Lands on which minerals had been found, or it was probable that they would be found, could be withdrawn from sale. They then became subject to a covenant to be inserted in any lease. This reserved "a right of ingress, egress and regress to all persons lawfully engaged in working any such minerals, mineral oils, gases, metals, or stone".[78] As a forerunner to rights under the *Petroleum Act* 1937, access was not only reserved to gold and silver, but included all minerals, mineral oils and gases. Similar provisions were part of the *Land Acts* of 1908 and 1924.[79]

After a flurry of legislative activity through the 1890s and the first two decades of the twentieth century there was an hiatus until rights of ownership and access were combined in s59 of the *Land Act* 1948. Subsection (1) reserved all minerals to the Crown on any disposition of Crown land, and ss(2) stated that "[i]n every such disposition of Crown land there shall be deemed to be reserved a free right of way over the land" for the purposes of mining the land or "adjacent land of the Crown".

76 Section 2.
77 (1913) 32 NZLR 1073.
78 Section 121(3).
79 *Land Act* 1908 s135(c); *Land Act* 1924 s153(2)(c).

Subsection 165(6) of the same Act had potentially far-reaching consequences:

> The powers conferred on the Board by this section shall authorise the granting of a licence for the working, extraction, or removal of any mineral from any Crown land, notwithstanding that the surface of the soil of the land may have been alienated on any tenure under this Act or any former Land Act.

'Former Land Act' was defined widely to include "any other Act repealed before this Act and relating to the disposal of Crown Land". Thus as most original Crown grants were issued under such Acts the Crown could have licensed mining on almost any land. The point, while of interest, is moot - the provisions were repealed by the *Mining Act* 1971.

The 1971 *Mining Act* contained a dual ownership/access arrangement.[80] The Crown reserved every mineral in any future alienation of land together with extensive rights of entry to work the land and any other adjacent Crown land. The system under the Act was to provide for the opening of private land and/or Maori land for prospecting or mining. Where the landowner refused consent to the opening of land for mining activities it could still be declared open by Order in Council.[81]

Where necessary, the Crown could exercise another statutory right. The *Mining Act* 1926 enabled the Minister to acquire mining privileges, such privileges not being determined by effluxion of time.[82] These provisions were repeated in the 1971 *Mining Act*.[83] The Crown could deal with the mining privileges as if it were a private person and *In Re Perriam's Application*[84] showed that the Crown could even override a licensee's right to renewal of a mining privilege.

The *Crown Minerals Act* 1991 is now definitive of ownership and access. The Crown owns gold, silver, petroleum and uranium outright, prevailing over the 'Victorian titles'.[85] It also retains ownership of those minerals reserved to the Crown by any earlier enactment, and reserves every

80 Section 8.
81 *Mining Act* 1971 s37.
82 Section 97.
83 Section 132.
84 [1949] NZLR 196.
85 Section 10.

mineral in any future alienation of land.[86] The right to ownership of gold and silver is therefore clear, subject to Treaty of Waitangi claims. Access is equally clear. Section 48 cancels those statutory rights of entry painfully built up over the previous one hundred years. There is no provision for the Crown to acquire mining privileges and therefore the Crown's rights of access are limited to any existing prerogative and to the Act itself.

It is apparent that the earlier statutes recognised a defective right of entry. Thus with the cancellation of statutory rights by virtue of the *Crown Minerals Act* it seems possible that a prerogative right can be resurrected. However, apart from the fact that the Crown would be unlikely to try and exercise a long dormant prerogative right of entry (now a private commercial right rather than the public right it was under the Tudors) the prerogative, as it existed in 1840, probably did not extend to entry on land to work the minerals the Crown owned.

CONCLUSION: A COMBINATION OF RIGHTS

With ownership of and access to the vast majority of the nation's mineral resources now to be determined by reference to the *Crown Minerals Act*, the situation is radically different from the days of the Tudors when the common law defined the extent of the royal prerogative to gold and silver and the owner of the soil was deemed to own the other minerals.[87] Ownership of the mineral resource is concentrated in the Crown but without access. Why was access surrendered? Perhaps the answer lies in the intrusive nature of mining. The huge scale of mining activities is something that successive governments may have felt should be open to greater scrutiny. Ironically, the ultimate arbiter of access is the Governor-General, acting on the advice of the Minister of Energy and the Minister of the Environment.[88] As the monarch's representative the Governor-General is appointed under the royal prerogative.

There are now three, possibly four, layers to the Crown's rights of ownership to gold and silver and other minerals:

(1) Crown owned minerals in Crown land;
(2) Crown owned minerals in private land;

86 Section 11.
87 *Cuius est solum eius est usque ad coelum et ad inferos.*
88 Section 66(5).

(3) privately owned minerals in private land and hence not subject to the regime in the *Crown Minerals Act*;
(4) the unsettled question of Maori rights to minerals including gold and silver, where the Crown may own as a trustee.

Layers of ownership are obviously unsatisfactory, but the situation is further complicated by the possibility of multiple ownership as when the gold and silver in private land are owned by the Crown and the remaining minerals by another entity, not necessarily the landowner. There are two solutions to the problem. The Ministry of Energy in 1986 put the case for ownership of all minerals to vest in the Crown with Crown agencies responsible for allocating licences to develop the resources.[89] The review team pointed out the difficulties of multi-layers of responsibility which in practical terms make it difficult to licence the mining of the separate minerals: "For instance it would not be possible in such circumstances to guarantee the right in priority for subsequent licences (ie from exploration to prospecting and mining) which is given by the mining Acts and upon which the industry depends."[90] The team also pointed out that it was impractical to prospect for gold and silver to the complete exclusion of other minerals and that prospecting licences were therefore not mineral specific. The crux of any argument for Crown ownership is that it is in the public interest that the government should own and control a resource such as the nation's minerals.

The other solution to the problem is that minerals, and access to them, should belong to the landowner.[91] The factors in favour of ownership of all rights by the surface owner include the removal of problems of access, protection of the surface owner's interests and the advantage to the miners of being able to contract directly and with certainty with the owner of the resource. Under such a regime the scheme of the *Crown Minerals Act* becomes superfluous. The exploitation of the mineral resources and the management of the industry become a matter for contractual arrangements fettered only by the law that applies to other industries - for example the *Resource Management Act* 1991, and by strategic requirements, for example, to oil and uranium.

89 NZ, Ministry of Energy, *Report of the Review Team on Mining Legislation* (Ministry of Energy, Wellington 1986).
90 As above p8.
91 See Ackroyd, *Property Rights and Minerals Law Reform* (Paper to the Australasian Institute of Mining and Metallurgy Annual Conference, Melbourne 1988).

There is some precedent for returning mineral ownership to the landowner in that the Crown has withdrawn from active involvement in the petroleum industry - although that was a sale, not a return to the landowner without cost. Leaving aside the practicality of transitional provisions for existing mining ventures, there is at least merit in that the vexed questions of the rights of the Maori would, in part, be solved if the Crown was to divest itself of its minerals.

Unfortunately, the time for imaginative action has passed. The opportunity for the Crown to take such radical steps came with the reforms that led to the *Crown Minerals Act* and the *Resource Management Act*. The most probable scenario is that the present confused and unsatisfactory multi-layer arrangement will persist until the next major review of the mining industry and/or the environment.