Finally, as to ministerial discussion, the North American practice with respect to oil and mining privileges is to specify work requirements in advance, sometimes in the statute, itself, more often in regulations, and on occasion through calling for tenders on a work commitment basis. In all these circumstances, the entrepreneur knows in advance what his minimum investment must be to retain his privilege, and he knows that other entrepreneurs will face the same commitment. With this background of experience, North American mining men are bound to oppose clause 59 (4) of the Bill which gives the Minister discretion in any particular case to prescribe the amount of work expenditures required to maintain a prospecting licence in good standing. The question for New Zealand in this instance is whether the discretion to decide work commitments in each case rather than prescribing them in a general way in advance is worth the adverse effect this discretion will unquestionably have on the willingness of North Americans to invest in mineral exploration in New Zealand.

SURFACE RIGHTS AND COMPETING LAND USES.

Characteristic of the free miner tradition is open access to the publicly-owned minerals even where the surface of the land is owned or occupied by someone else or for some other purpose. The New Zealand Bill has two kinds of classifications for determining what lands are open and what the terms of entry will be. One classification pertains to the use to which the land is currently applied; for example, as a house or garden, etc. (49) The other derives from legal title to minerals. More specifically, this classification separates cases where the surface is privately owned and minerals are reserved to the Crown with the right to enter and work from cases where the surface is privately owned and minerals are reserved to the Crown but without the right to enter and work. These latter cases are lumped together with cases where a private person owns both the surface and the minerals and together they are called "private land" (51) as distinguished from "Crown land".

(a) The Use Classifications.

The "use" classifications represent the priority assignments made by the Bill between mining and other land uses. Generally speaking, the Bill gives priority to mining. Compensation must be paid to surface owners and

TAXATION OF MINING COMPANIES IN NEW ZEALAND.
by Peter Rowe, LL. M., J. D. (Chicago).

The development of a mineral industry is of great importance to New Zealand's economy. One of the ways in which it is encouraged is by special taxation provisions and incentives.

Mining operations have three factors which require special treatment:
(a) the high cost of mineral exploration and exploitation;
(b) the speculative nature of mining including prospecting;
(c) the depletion of the minerals.

In New Zealand, a fourth factor is the need to attract overseas capital and know-how.

The first factor is met by permitting a mining company to write off all classes of expenditure, whether capital or revenue, over the life of the mine (Section 91). This is a usual sort of provision and applies also to the timber and flax industries.

However, New Zealand's tax legislation has some unusual features applicable to a mining company which mines for specified minerals of importance, or for petroleum. Such a company is not taxed on the basis of profits made, but on the basis of dividends paid to shareholders. As a result, the company's taxable income is reduced by at least 33 1/3% and can be reduced by a much greater percentage if the company retains earnings to carry out prospecting and development activities.

These allowances are of great benefit once a mining company has begun to make profits.

Provisions also exist to encourage investment in mining companies before they have reached the profit-making stage. Shareholders are entitled to a deduction of up to 33 1/3% in respect of payments for the allotment or meeting of calls on shares in companies mining the specified minerals or petroleum. Companies may write off loans, up to a certain limit, which they have made to mining exploration companies in which they hold shares.

14
Foreign companies may derive the benefit of the incentives by forming New Zealand subsidiaries. In addition there are provisions aimed at making New Zealand's tax no more onerous than the tax payable in the home country.

In the above ways, the tax legislation seeks to meet the special requirements of the mining industry.

An unexpected problem has arisen with respect to ability of profits or gains received on the sale of shares in a mining company. This has been met by a new provision which exempts such profits or gains from taxation so long as they are being used for mining purposes.

The legislation will now be discussed in more detail.

Companies engaged in mining for certain minerals (Section 152 Companies):

(a) that its sole or principal source of income is the business of mining in New Zealand any one or more of certain specified minerals, or

(b) that its undertaking is in New Zealand and comprises solely or principally the carrying on in New Zealand of exploring searching for or mining any one or more of the said minerals or the carrying on of any development work relating to such exploring searching or mining.

Clause (a) above relates, then, to companies which are engaged in actual mining operations, whereas Clause (b) relates to companies which are engaged in prospecting or development work. Clause (b) was inserted by Section 20 of the 1969 Amendment (No.2) to the Act, and it is subject to the rider set out in the Amendment (inserted as subsection 1A of Section 152), namely that a company shall not be eligible if its prospecting or development activities are performed as a service to any other person for reward, unless the Commissioner is satisfied that the main purpose of the undertaking is to provide that service for a reward which is solely or principally related to and dependent upon the production of any one or more of the said minerals or the participation by that Company in any profits from the production of any one or more of the said minerals. The purpose of this rider is to exclude companies which provide a prospecting or development service for other companies.

New Zealand prospecting licence, would have to take into account that under New Zealand law the Minister could decide not to grant additional mining licences because of uncertainty about the matter, the entrepreneur would offer much less for an otherwise equivalent New Zealand prospecting licence than he would for the Saskatchewan claim block. Should someone comment that no one pays for mining privileges in New Zealand, he must understand that my reference to what the entrepreneur is willing to offer is a reference to what investment, whether in fees, rentals, or exploration or otherwise, he is willing to make. Another way of stating this argument is to say that New Zealand pays heavily in reduced mining investment for the opportunity of deciding in each individual case whether a prospecting licensee should receive mining licences over all or merely over a portion of his acreage. This uncertainty discount would disappear altogether if the Bill provided a system for determining in advance of taking out a prospecting licence what proportion of the acreage could be retained under mining licences.

The reason for the second consideration needs no elaboration. However equitably the Minister may believe he is treating different entrepreneurs, when exercising his discretion as to the grant of licences or as to terms and conditions to be imposed in licences, the entrepreneurs, themselves, will believe that he is unfairly discriminating between them. The comment is often heard among North American business men that they do not object to justifiably harsh measures in the public interest so long as their competitors have to operate under the same terms and conditions. This possibility of discrimination does not exist if terms and conditions are made known in advance and the mining privilege is awarded to the highest bidder in open competition.

A clause in the Bill providing for ministerial discretion that I must criticise as strongly as possible is clause 229 providing for granting of concessions in respect of new mineral discoveries. The reasons for my vehemence are that it is the experience of most resource administrators in the United States and Canada that rewards after discovery of this uncertain nature are ineffective as incentives and hopelessly difficult to administer. (48)
guide the exercise of discretion as to the terms and conditions to be imposed in licences so that these provisions give no assurance that advocates for competing resource uses and for a quality environment will be heard with respect to exploration and development decisions. In fact, this injection of ministerial discretion into the granting of mining privileges is, in my opinion, and it is a North American viewpoint, almost entirely the wrong kind of decision-making to introduce into the mineral disposition system, and this subject is my next main heading.

MINISTERIAL DISCRETION

I am not opposed to ministerial discretion. On the contrary, I am entirely pragmatic about the decision-making process and realize that the diversity of matters about which decisions have to be made obviously requires variety in the methods of decision, including the exercise of ministerial discretion. My concern is to match the right decision-making process with the right set of circumstances calling for a decision. With respect to the grant of mining privileges, I believe there are two over-riding considerations - one is that the method of decision as to the grant of a privilege should reduce rather than increase uncertainties at the time the person desiring the privilege has to make his decision as to the investment he is willing to make; the other is that the method of decision should provide, so far as possible, for equal treatment of all those who seek the privilege. The reason for the first consideration is an economic one - the entrepreneur who has a choice of various investment opportunities will, in deciding among them, apply a high discount factor for uncertainties. Therefore uncertainties should be avoided. (45) For example, under the Saskatchewan law, the holder of a claim block (up to 15,360 acres) can acquire all the acreage under mining leases if he so elects. (46) Under the New Zealand Bill the holder of a prospecting licence (up to 10,000 acres) is entitled to only one mining licence up to 1000 acres, with the grant of any additional licences being at the discretion of the Minister. (47) The Minister might decide that it would be appropriate to grant mining licences over the entire acreage of the prospecting licence, he might announce his intention to do so in advance, and it might be highly probable that would do so. Nevertheless, the entrepreneur, choosing between a Saskatchewan claim block and a New without assuming part of the risk of the mining venture.

The specified minerals are as follows:

(a) Antimony, asbestos, barite, bentonite, bituminous shale, chromite, copper, dolomite, feldspar, gold, halloysite, kaolin, lead, magnesite, manganese, mercury, mica, molybdenite, nickel, perlite, phosphate, platinum group, pyrite, silver, sulphur, talc, tin, titanium, titanomagnetite, tungsten, uranium, wollastonite, zinc, or zircon; or

(b) Any other mineral which is declared in the Gazette by the Minister of Finance to be a qualifying mineral. Factors to be taken into account by the Minister are the importance of the mineral in the industrial development of New Zealand, or as a means of reducing the quantity of industrial minerals or industrial rock required to be imported into New Zealand, or as an item of export from New Zealand.

If a mining company meets the above requirements, then its taxable income is a notional one based on the amount of dividends paid to shareholders. The taxable income is one half of the dividends paid to shareholders during the year until total dividends paid since the company began exceed twice the amount of the paid-up capital of the company. From then on it is the full amount of the dividends paid to shareholders during the year.

To find the company's paid-up capital, contributions of property or other assets are taken into account at a true value. Bonus shares and other forms of capital issues which do not require payment of fully adequate consideration are excluded.

The effect of taxation under Section 152 may be seen from the following examples. The tax is calculated at maximum rates.

Company A is a Section 152 company which has not paid out dividends of twice the amount of its paid up capital,

Company B is a Section 152 company which has paid out dividends of twice the amount of its paid up capital, and

Company C is an ordinary trading company which is not eligible for taxation under Section 152.
Example 1: All of the companies earn a profit of $100.00; the total amount of which, less tax, they decide to distribute as a dividend.

<table>
<thead>
<tr>
<th>Company A</th>
<th>Company B</th>
<th>Company C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profit</td>
<td>$100.00</td>
<td>$100.00</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>$40.00</td>
<td>$66.66</td>
</tr>
<tr>
<td>Tax</td>
<td>$20.00</td>
<td>$33.33</td>
</tr>
<tr>
<td>Dividend</td>
<td>$80.00</td>
<td>$66.66</td>
</tr>
</tbody>
</table>

Example 2: All of the companies earn a profit of $100.00 and decide to put $20.00 in reserves, and distribute the balance less tax, as a dividend:

<table>
<thead>
<tr>
<th>Company A</th>
<th>Company B</th>
<th>Company C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profit</td>
<td>$100.00</td>
<td>$100.00</td>
</tr>
<tr>
<td>Taxable income</td>
<td>$32.00</td>
<td>$53.32</td>
</tr>
<tr>
<td>Reserve</td>
<td>$20.00</td>
<td>$20.00</td>
</tr>
<tr>
<td>Tax</td>
<td>$16.00</td>
<td>$26.66</td>
</tr>
<tr>
<td>Dividend</td>
<td>$64.00</td>
<td>$53.32</td>
</tr>
</tbody>
</table>

These examples show that Section 152 contains allowances of considerable value for the risk and depletion factors inherent in any mining venture.

The risk factor is allowed for by providing a very low rate of tax until the company has distributed profits which exceed twice the company's paid up capital, and thereafter an effective deduction of one-third of the company's profits (that is, assuming the company pays out its total profits as in Example 1 above). A tax advantage clearly flows from the company having a large paid-up capital. Accordingly, investment in the company by way of share subscription rather than loan advances may be preferable.

The depletion factor is allowed for by permitting the company to retain profits tax free to be used for further exploration or development work (as in Example 2 above).

Three further taxation features should be noted:-

(a) Mining companies eligible under Section 152 (here-
in 1969 (40) has authorised the granting of two extensions of
one year each, indicating that even three years is not al­
ways adequate time for completion of an exploratory pro­
gram.

In summation, as to mining privileges the New Zealand
Bill takes a step forward towards a stronger intrusion of
public policy in the initiating stages of mining activity, but
it in no way represents the kind of bold new approach being
advocated by many outside the industry in North America.
The miner's right is gone from the New Zealand Bill in
name only. The new exploration licence recognises changes
taking place in the mining industry. But mining still has
a priority position without need to justify its claim other
than with respect to national parks, public reserves,
orchards, cemeteries and the like, (41) The mining privi­
lege remains free, not only for the individual pros pector,
but also for the large mining company. By now you will
appreciate that I do not believe in any historically-justified
miner's right. If this right is to be justified in terms of
supporting a population of prospectors and developers in
New Zealand, or of overcoming deficiencies in the supply
of minerals needed in New Zealand, or of increasing
earnings and revenues in New Zealand, or of overcoming
balance of payment difficulties, I would ask that these
benefits be examined and weighed against all the costs of
development - the social and public costs of providing
roads and schools and hospital services in remote areas,
the displacement costs of alternate resource uses pre­
cluded by the mineral development, and the environmental
costs of diminished wilderness, recreational and aesthetic
values; (41) and I would ask that this weighing be done, not
all at once in advance when this Bill is dealt with by the
New Zealand Parliament, but at the times when develop­
ment decisions are being made. I would also insist that
this weighing take place, not behind closed doors in neg­
otiations between officers of the Mines Department and
mining men, but in some kind of open forum where the full
range of affected interests can be heard. Of course, this
philosophy of approach must accommodate practical con­
iderations when it is put to practice, and changes of this
kind proceed slowly. I will only say now that the system
I envisage is one where mining must be justified ad hoc
as a land use in the same way that the establishment of a

(b) Section 152 companies are not liable to excess reten­
tion tax. But Section 152A of the Act imposes some
limitations on their freedom to retain profits. If in
any income year a Section 152 company earns profits,
and does not pay them to its shareholders as dividends
within the succeeding five income years, then the Com­
mis sioner may deem the company, as at the last day
of the first income year, to have paid out of such pro­
fits such a dividend as the Commissioner considers
reasonable, and the company shall be taxed under
Section 152 accordingly. (If the company does in fact
subsequently pay a dividend which represents any
amount already deemed to be a dividend, then double
tax is not payable). However, the Commissioner can­
not treat retained profits as deemed dividends, if the
retained profits are being held or used by the company
for certain purposes, including expenditure on furthering
prospecting, development, or mining operations relat­
ing to the specified minerals.

(c) A current point of controversy is whether a company
ceases to be a Section 152 company when it commences
smelting or other working distribution or transportation
of mineral products. The problem is, when does the
undertaking of the company cease to be one of mining
and become one of manufacturing? At this stage it
can only be said that it may be necessary to form a
separate smelting or distribution company if the actual
mining operations are to retain their tax concessions.
This would of course mean that the smelting or dist­
ribution company would not be entitled to the concessions.
It is hoped that this point can be satisfactorily resolved
with the Commissioner.
Petroleum Mining Companies (Section 153 Companies):

Under Section 153 of the Act, taxable income of companies which mine or explore for petroleum or carry on development work in respect thereof (other than service companies) is based on the amount of dividends paid to shareholders. The basis of assessment is similar, then, to that of Section 152 companies, but with the following important differences:

(a) To be eligible, the petroleum mining company must be a New Zealand company.

(b) The taxable income is, subject to (c) below, the amount of dividends paid to shareholders, and not half the amount until the dividends paid exceed twice the paid-up capital of the company.

(c) Tax is not payable at all, until the aggregate amount of dividends paid exceeds the aggregate amount of the company's "irrecoverable expenditure". The term "irrecoverable expenditure" means the amount spent by the company in development work reduced by the selling value of assets (excluding petroleum under the ground) resulting from that expenditure. Thus in any income year, the taxable income of a Section 153 company cannot be more than the amount by which the total dividends to date exceed the total irrecoverable expenditure plus the total taxable income to date.

The Section 153 concessions are not available to a company which carries on refining, distribution or transportation of petroleum or any other business not incidental to mining for petroleum. If a Section 153 company should commence such activities, then in the year of commencement it would be liable to income tax as if all the receipts theretofore derived by the company, reduced by the sum of its irrecoverable expenditure and aggregate taxable income in former years, were taxable income. Thus the risk and depletion allowances would be lost, and the company would be no better off than if it had always been taxed under Section 91.

The excess retention tax provisions of the Act do not apply to Section 153 companies, but Section 152A (discussed when dealing with Section 152 companies) does apply. Part VI B of the Act, relating to bonus issue tax, does not apply all, it was his investment in exploitation activity that established the mineralization of the area. The answer given by clause 63 (3) of the Bill is to confer on the licence holder a priority right to receive any additional mining licences that might be granted during the continuation of the prospecting licence. My mind cannot grasp the circumstances in which the additional mining licences could fairly be withheld from the prospecting licence holder who decides to claim them. The effect of this provision, in my opinion, is to thwart the licensee's development plans by leaving doubt as to the acreage he can acquire for mining purposes and to place the officers in the Mines Department in the invidious position of having a discretion, - the exercise of which by withholding acreage is bound to lead to changes of nepotism and unfair dealings. If the purpose of these provisions is to gain for the Crown a portion of the fruits of a mineral discovery by withholding some of the proven acreage which might then be sold to the highest bidder or exploited by a Crown corporation, their purpose can more soundly be achieved by permitting the prospecting licensee to select a stated proportion of the acreage over which he will have the right to receive mining licences.

The most significant change with respect to mining privileges is the introduction of the exploration licence. This licence is a recognition of the institutional changes in the mining industry to which I have referred. The privilege of exploring over an area up to 200 square miles with the right to take prospecting licences over the entire portion of the area that is open to mining and not already taken up by existing mining privileges gives a large company the incentive to deploy its technology and capital in highly sophisticated exploratory programmes. The short two-year term is appropriate to ensure that large areas will not be tied up too long by any one company. In fact, the two-year period is probably too short, considering that such programmes quite usually encounter severe access and operating conditions entailing unavoidable delays. This type of prospecting incentive is also a relatively new feature in Canadian mining legislation, having been introduced in the Canada Mining Regulations (38) applicable in the Northwest Territories in 1962 and, in the Saskatchewan Mineral Disposition Regulations, 1961 (39) about the same time. The Saskatchewan permits cover up to 300 square miles and are valid for three years. An amendment in
Mines and subject to the terms and conditions this gentle­
man imposes. (28) Obviously, at least as to areas of 100
acres or less (29), the exercise of the Minister's discretion
and the terms and conditions he imposes will soon, if not
at the beginning, be institutionalised so that obtaining the
licence, will from a practical point of view, be a matter
of right. At this point, the New
Zealand provisions seem
to depart from the tradition of the miner's right more in
name and in from than in substance.

With respect to prospecting licences exceeding 100
acres and up to 10,000 acres, the Bill appears to require
that applications be given closer scrutiny, with specific
information to be supplied by the applicant as to the kind
of minerals sought and the method and programming of
operations. (30) The conditions to be imposed by the Min­
ister can then be tailored from these operations. The six
year duration of prospecting licences (with renewals) (31)
are similar to the maximum terms allowed for mineral
claims in Canada, (32) but the provision for licences of
large areas over 100 acres and up to 10,000 acres has a
counterpart only in the Saskatchewan legislation where a
claim block up to 15,360 acres may be staked out. (33)
The enlargement of an area for the performance of work
obligations is normally accomplished in the Canadian juris­
dictions by the claim holder exercising a privilege of group­
ing or aggregating his contiguous claims up to a maximum
number (e. g. 18 in the Northwest Territories). (34)

More significant differences are introduced in the New
Zealand Mining Bill with respect to the mining licence.
The Canadian practice is to give the claim holder the right
to convert all his claims to mining leases provided he has
performed the stipulated work requirements and otherwise
complied with the legislation. The New Zealand provision
strikes me as an old and unworkable compromise,espec­
sially since a majority of the exploitable discoveries today
will be low-grade deposits covering large areas. (35) The
Minister is to decide how large a mining licence the pros­
specting licence-holder is to obtain up to a maximum of
1,000 acres. (36) However, because the prospecting lic­
ence might have covered up to 10,000 acres, the licence
holder will naturally assert that he should have a claim
on any exploitable portion of the acreage in excess of the
mining licence acreage allowed by the Minister. After
to a Section 153 Company.

Companies holding Shares in Exploration Companies (Section
153A):

Section 153A provides tax concessions for companies
(referred to as "holding companies") which hold shares in
companies mining or prospecting for minerals or petroleum
(referred to as "exploration companies"). A company need
hold only one share in an exploration company to be a holding
company for the purposes of the section. An exploration
company is a New Zealand company engaged in exploring or
searching for or mining in New Zealand any of the minerals
specified in Section 152 or petroleum.

The section enables a holding company which makes loans
to an exploration company to claim a deduction for any of
such loans which it writes off, but the deduction is limited
by the amount of the holding company's own taxable income,
and by the amount which the exploration company has in fact
spent on development work in New Zealand in relation to pro­
specting or mining for any of the specified minerals or for
petroleum (referred to as "development expenditure").

In more detail, the limit of the holding company's ded­
uction in any year is the smaller of:-

(a) Half its own taxable income for the year, or
(b) The total amount for all years of the development ex­
penditure of the exploration company, reduced by the
total of all amounts allowed to the holding company as
deductions under the section in any earlier year or
years;

PROVIDED that where an exploration company has more
than one holding company, then the limit of each holding
company, under this paragraph (b) is a "prescribed proportion" of the total amount of the development ex­
penditure of the exploration company, the amount eq­
uivalent to such proportion to be reduced by previous
deductions under the section as aforesaid. The 'pre­
scribed proportion' is the proportion which the holding
company's total loans (less repayments) bears to the
total loans (less repayments) made by all the holding
companies.
Where the exploration company repays or is deemed to have repaid a loan which a holding company has written off and claimed a deduction for, then the Commissioner may amend any assessment made on the holding company. The amendment may be made at any time, notwithstanding the 4 year limitation for amendments imposed by Section 24.

A holding company is deemed to have been repaid in two situations:

(a) Where the holding company disposes of shares in the exploration company in consideration of an amount in excess of the amount paid up on such shares, then the amount of the excess is deemed to be a repayment in part of a written off loan.

(b) Where it appears to the Commissioner that the exploration company would have derived assessable income if it had not received the tax concessions available to it under the Act, then the Commissioner has a discretion to deem the prescribed proportion of such assessable income as a repayment in part of the holding company's written off loan.

The effect of Section 153A is to enable a holding company to loan half its profits to an exploration company and to claim such loans as a deduction if the exploration company is unsuccessful. The section, then, provides a further allowance for the 'risk' factor of mining ventures.

Concessions to Shareholders:

Under Section 129c a shareholder of a mining company (i.e. a Section 152 or 153 company) may deduct one third of the amount paid by him in respect of his shares in the company, provided that the payment is used for and is necessary for the purposes of the company. If the payment is not used by the company for its purposes within a reasonable time, then the Commissioner may disallow the deduction and alter the shareholder's assessment.

It will be noted that the deduction only applies to payments made to the mining company, whether on allotment or payment of calls, and is not applicable to the purchase of shares from a third party. Another feature of the exploitation of natural resources. (20) The ideology of this management requires that a full range of options be examined and weighed in the decision-making process. If miners, or any other resource users, have priority right to appropriate the public lands for their purposes, the options are limited and the opportunity for planned management is frustrated. In day to day terms in Alberta, for example, planning for recreational use of forest land and mountainous regions is at a standstill because any such plans can be frustrated at the whim of current exploration activities for coal and oil. (21)

There is also resentment that this disruptive and ubiquitous miner's right is without payment to the state. In the United States, not only is a leasing system advocated, but it is also urged that leasing be competitive. (22) From the standpoint of economic theory, it is said that pricing the mineral claim is the only way of assuring an economic allocation of resources that is, the market system, with mining rights being awarded to the highest bidder is the only likely way of ensuring that the most efficient entrepreneur will acquire the right to exploit the minerals. (23) In a 1969 study entitled Mining and Public Policy in Alaska, the authors say

"Nowhere have the authors encountered a respectable argument for giving away mineral rights...... which do have a market value when there are..... parties who are willing to pay...... for these rights.

In the light of these issues, how do the provisions of the New Zealand Mining Bill measure up? The first significant difference is that the Bill has reduced the traditional miner's right to a prospector's right. (25) While the prospector's right carries no mining rights, it does confer a right to enter and prospect. (26) Because this right is exercisable over the full range of Crown lands with few exceptions, (27) it violates the precept of sound resource management to which I have referred. On the plus side, because it continues the conditions under which prospecting has traditionally been carried out, the individual prospector should remain a viable contribution to the industry. In fact, the only difference now is that what he stakes out will be called a prospecting licence rather than a claim, and, instead of being entitled to hold it by reason of his staking, he will receive the licence only in the discretion of the Minister of
to affirm that the individual prospector continues to make an important contribution to the mining industry (13). The only objective evidence I have seen does, indeed, indicate that the individual prospector, with his rudimentary tools for taking rock samples at the surface, will continue to make significant mineral finds, though on a substantially diminishing scale (14). Thus, an analysis of principal discovery methods, to be credited with the finding of new mines brought into production in Canada since 1955, shows that of the deposits found prior to 1950, which form about half of the list, 85% were found by conventional prospecting. In the next sixteen years up to the present, the proportion of "conventional" discoveries dropped to 37 percent. (15)

The prognosis for the future in Canada is this: (16)

"Considering the shrinking proportion of the rock surface of Canada that remains to be examined or geologically mapped, we must assume that we will rely increasingly on sophisticated methods, of which geophysics will play the major part, for the next ten or fifteen years. During this period, we might expect 60 to 70 percent of all new discoveries to be made by geophysics and/or geochemistry...."(15)

It is the remaining 30 or 40 percent of discoveries to be made by conventional prospectors that explains why the free miner tradition still holds sway in Canada (17), and why in the Province of Saskatchewan, where the mining legislation has had up-to-date treatment under a socialist government, the free right to stake mineral claims is still maintained. (18)

What the institutional changes toward bigness in the mining industry has meant in the Saskatchewan legislation has been new provisions for combining with the traditional small claim a prospecting permit covering up to 300 square miles so that large scale geophysical and geochemical examinations can be feasible. (19)

The evils associated with the miner's right stem from the current concept that sound resource management requires that all values - aesthetic, recreational and wilderness, as well as oil, minerals and forest be taken into account in a planned effort to maintain a quality environment along with Section is that no time limit is specified within which the company must use the payment for its purposes, thereby giving the Commissioner a very wide discretion. A final point is that if the company does not use the payment for its purposes within what the Commissioner regards as a reasonable time, it is the shareholder who is penalized directly, and not the company.

Under Section 129BB a similar deduction of one-third may be claimed by a shareholder making payments to a "mining holding company" (i.e. a company which in the opinion of the Commissioner is engaged exclusively or principally in the holding of shares in, or the making of loans to, any mining company). In this case, the one-third deduction only applies to such part of the payment as is:-

(a) used by the mining holding company for the purpose of subscribing for, or paying calls on shares in a mining company, or paying calls on shares in a mining company, or making loans to a mining company for the purpose of enabling the mining company to carry on in New Zealand prospecting or mining of the specified minerals or petroleum or development work in respect thereof; and

(b) used by the mining company for its purposes within a reasonable time.

Section 88D provides that the deductions allowed under Sections 129C or 129BB are to be taken into account in calculating the profit or loss made on the sale or other disposition of shares in a mining or mining holding company. Convertible notes are not 'shares' for the purposes of these Sections.

Foreign Companies and Experts:

In order to derive the benefit of Section 153 a foreign company interested in prospecting for or mining petroleum must form a New Zealand subsidiary to carry out the operations. It would probably do the same in the case of mining any of the minerals specified in Section 152, since to qualify under that Section a company's principal source of income or principal undertaking must be in New Zealand.

Other Sections of the Act endeavour to encourage overseas capital and know-how by reducing New Zealand taxation to or near to the amount of taxation that would be payable in the home country if the capital or know-how were employed
Section 78B provides a rebate for a "non-resident investment company" of such part of the New Zealand tax on interest and dividends derived from "development investments" as is in excess of the tax that would be payable on such income in its country of residence.

A non-resident investment company is defined in Section 2A. Briefly, it is a company which is not incorporated or does not have its head office in New Zealand, and which:

(a) derives no income from New Zealand except interest; or
(b) has 50% of its total New Zealand assets in "development investments". These are investments by way of loans or shareholding in undertakings declared to be development projects by Order in Council.

Section 78F extends the general principle to the total taxable income of a non-resident company which, through a branch office, is carrying on an industrial undertaking declared by Order in Council to be a special development project for the purposes of the Section. The Governor-General is empowered to make such a declaration where he is satisfied that the undertaking is of major importance in the development of New Zealand. To qualify the undertaking must comprise the purchase, processing, marketing and disposal of a mineral and primary metal produced from it. If a company qualifies, then it is entitled to a rebate of the amount by which the New Zealand tax on its income exceeds the lesser of:

(a) 42½% of its taxable income in New Zealand, or
(b) the tax that would be payable on such income in its country of residence plus 7½% of such income.

Taxation of the company on such a basis may not exceed fifteen years. After the expiry of such period, the company may for a further period of ten years be entitled to a rebate of such tax as is in excess of the tax it would pay if it were a company resident in New Zealand.

Section 78K provides a rebate of tax to visiting experts in respect of approved services on a particular project for a period of not more than two years. The rebate is, roughly, the excess of New Zealand tax over 35% in respect of the

and in the Northwest Territories of Canada which lie north of the 60th parallel across the Canadian mainland. (9)

Unlike the position in the United States, there appears to be no articulate opposition in Canada urging an end to the miner's right. Rather, current pressures on the industry in Canada pertain to White Paper proposals for eliminating Tax incentives that the industry now enjoys, and to pollution and environmental concerns respecting prospecting, open-pit mining, tailings-disposal and other mining and processing operations. In my opinion it will not be long before this anti-pollution, environmental-protection sentiment in Canada will focus on the miner's right as one of the major impediments to sound natural resource management.

In Australia, too, it is said by a mining man that; (10)

"We see thus that the authority to mine at an early stage in our history passed from a licence to take up a claim, to the Miners' Right, and this Miners' Right remains today as the most important single document with which practical mining is concerned, and it may well be that although it was a desirable, if not an essential requirement in the late 19th Century its survival in the present day may be anachronistic...."

What are the factors that have made the miner's right an obsolete concept in the opinions of many, and what are the evils associated with it that have aroused such strong opposition, at least in the United States?

The obsolescence factors are institutional changes in the mining industry itself. An Australian way of expressing these changes is (11):

"The digger is the symbol of the mining industry and although the individual prospector was an essential figure in mining one hundred years ago, today, he is a vestigial remnant of the pick and shovel and wheelbarrow days."

That is the voice of an Australian legal officer of a major, international mining concern. It would certainly not be the voice of the Prospectors' and Developers' Association of Canada, or even of the Mining Association of Canada, for, while these voices would agree with the Australian (12) that "mining under modern conditions must be carried out on a very large scale", they would be quick
In the United States the gospel of the mining men is the "free miner tradition". It signifies that the self-regulation of the miners who found gold in California in the 1840's was enshrined in the first general mining law enacted by Congress in 1869.(4)

This law, which survives in main outline today, grants free access to the public domain to miners who are entitled to receive freehold patents including the surface as well as minerals of the 40-acre locations on which they discover minerals in marketable quantities. This mining law is generally considered to be hopelessly out-of-date, and as inhibiting to the mining industry as it is to the efficient administration of the public lands. Nevertheless, the mining industry vehemently stands for a re-tooling of the existing law that will preserve the miner's right to locate a claim on the public lands and to perfect ownership in the minerals, rather than its replacement by a leasing system, as has been advocated by the United States Department of the Interior, at least while former Secretary Udall held office (5).

In British Columbia the gospel of the free miner tradition has legal authority as well as divine right. Section 114 of the Land Act, (6) which is the primary statute dealing with the administration of Crown-owned lands, reads as follows:

**Free Miners' Rights.**

114. Nothing herein contained shall be so construed as to interfere prejudicially with the rights granted to free miners under the Mineral Act or the Placer-mining Act, or to exclude free miners from entering upon any land in the Province, except, however, all lands reserved or used for naval or military purposes, and searching for and working minerals;

No other land use is afforded such exalted treatment in British Columbia. It is true that the miner's right does not lead to freehold patent as in the United States, but it does entitle the miner to hold his claim from year to year (7) with the right to a 21-year renewable mining lease when mining work to the value of $500 has been done(8).

A similar miner's right pertains in the Yukon Territory of the services qualifying for the rebate.

Section 78C provides a rebate of 5% of so much of the taxable income of a non-resident investment company as consists of interest from development interests.

Section 78E provides a rebate for non-resident companies paying dividends to shareholders resident in New Zealand.

Section 203 S (2) (f) exempts Section 152 and 153 companies from payment of non-resident withholding tax. This exemption is of little benefit, since a Section 152 company will usually be a New Zealand resident company, and a Section 153 company must be a New Zealand company. A more sensible exemption, and perhaps the one that was in fact intended, would be an exemption of overseas shareholders in Section 152 and 153 companies from payment of non-resident withholding tax on dividends and interest paid by such companies.

Section 203 S (2) (g) provides an exemption from non-resident withholding tax in respect of interest derived by a non-resident investment company from development interests.

"Capital" gain

The mining industry encounters a peculiar problem with respect to taxability for gains normally regarded as of a capital nature. An example is now given.

If Company A is not a Section 152 company, is interested in mining and makes a significant discovery, then it will probably form a separate subsidiary to explore and mine the mineral. It will do this for normal business reasons, and also, if the mineral is a Section 152 mineral, for the purpose of obtaining the tax concessions provided by that Section. Company A may form several subsidiaries to develop its various mineral prospects. If Company A decides that further prospecting or a commercial mining operation is justified, it may well find that it does not have the necessary capital or know-how to undertake the work required. One answer to this problem is to obtain the services of a large and experienced mining company, probably an overseas company. The large company, Company B, may then under-
take the work required in exchange for acquiring a proprietary interest in the mining venture. This is commonly referred to, from the point of Company A, as a "farm-out agreement." Company A may receive a money payment from Company B, or it may sell some of its shares in its subsidiary or float a public company in order to raise sufficient finance to pay its way in the mining venture.

A problem now arises as to the taxability in the hands of Company A of the money payment from Company B, or the money received for the sale of the shares in the subsidiary. The problem may become more difficult for Company A if there is a history of farm-out agreements, and sales of shares in subsidiaries to other companies.

The Commissioner might argue under Section 88(1) (a) that Company A was in the business of exploiting mineral interests in one way or another, and that the gain derived from the sale of shares in a subsidiary or the sale of a mineral right, was not a capital gain at all, but ordinary income from its business. In the alternative, the Commissioner might argue that Section 88 (1) (c) was applicable: that Company A was in the business of selling mineral rights or shares in mineral companies, or that the shares or rights were acquired by Company A for the purposes of resale, or that the profits were derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit.

Company A might argue that the subsidiary was originally formed, or the mineral rights originally acquired, for the purpose of exploiting the minerals and not for the purpose of later selling part of the shares or mineral rights; that the sale of shares or rights was only made because Company A did not have sufficient finance to further the mineral operation and that the sale was necessary if Company A was to obtain sufficient funds to maintain at least a partial interest in the mineral operation; in short, that Company A was in the business of mining, not the business of selling shares or mining rights, and that any gain which was realised by the sale of the shares or rights was gain of a capital nature, and one that did not come within Section 88 (1) (c).

There appears to be no authoritative case law on this problem.

These considerations lead me to give full acknowledgment to the diseconomies of natural resource development, and to insist that they be weighed against the benefits before development decisions are made, however difficult the process may be.

When I referred to the Prudhoe Bay discovery as having a mind-expanding effect on me, I wanted to convey to you the idea that my entire thought processes about oil and mining took on new perspectives, and I began to question the traditional dogma of oil men and mining men. For example, what justifies the continuance of the privileged status that mining enjoys over all other resource uses? Why should the dogma of "the miner's right" give the mining men free access to public resources when all others pay? Why should miners be subsidized? What enormous risk-taking justifies the privileged tax position of the oil industry when it is predominantly an industry of major, integrated oil companies whose steady record of earnings at higher than average corporate levels shows that they are successfully containing the risk by the scale of their operations?

My asking these questions should not lead you to imply what my answers are - at least at this point in my paper. My purpose in asking them, and in making this confession of biases, is to initiate the widest scope of inquiry into the New Zealand Mining Bill that we are capable of pursuing. My purpose for the rest of this paper will be to assess the strengths and weaknesses of the Bill in the light of such a wide-scale inquiry.

THE MINING PRIVILEGE.

In Canada, in recent years, the introduction of driver demerit systems culminating in suspensions of driving licences has been accompanied by a semantic shift so that the driving licence is now referred to as a "privilege" rather than as a "right". New Zealand's Mining Bill must use the terminology of "mining privilege" with a like intention to show a break with the traditional "miner's right". In this respect, the New Zealand Bill is more progressive than its counterpart legislation in Canada and the United States, and in Australia, too.
influential. For western Canada, and particularly for Alberta and British Columbia, the past two decades have brought tremendous economic growth, and social development as well, and I have seen that the exploitation of oil, minerals and forests has provided the motive power for growth and development. Therefore I have a due sense of the significance of natural resource industries in the economy of a country, and I am aware of the factors of risk and uncertainty in investment decisions, of the need to increase the gross national product annually with new job opportunities for an expanding population, and of fiscal problems such as balance of payments, to name only a few of the pro­fuse and complex interests that must be accommodated in the formulation of public policy about natural resources.

In recent years, a new dimension has been added to my conceptual framework for natural resource policy. For me, the Prudhoe Bay oil discovery in northern Alaska where, until now, the migrant Eskimo and polar bear have shared the earth in natural accommodation to each other and to their fellow creatures, has had a mind-expanding effect. I have begun to see the exploitation of natural resources in a global sense and to understand some facets of man's relationships with the natural world enough to realize that the taking of oil, or of coal, or of mineral ores, cannot be viewed in isolation, one from the other, but that all must be seen in the total perspective of man and his environment. To be frank, the scientists are scaring me with their mathematics of population growth, their graphics of the closed energy cycle, and predictions of the end of life on earth as we know it within the lifetimes of our children.

(1) Even discounting the mathematical formulations as scare tactics, no reasonable person in North America today can remain indifferent to environmental problems as the exponential effects of increasing population and increasing per capita consumption blight cities and countryside alike. After all, it is startling to be told that the electrical generating plants now being planned and likely to be operating by 2000 A.D. in the United States will produce enough waste heat to raise the temperature of every drop of water that runs off the United States about 20°F. (2) It is also startling to learn that more of the forest is cut and wasted in Alberta for the running of seismic lines for oil exploration than is cut and used for the pulp and paper and lumber industries in that province. (3)

It should be noted that the problem will seldom arise in the case of Section 152 or 153 companies, since they are taxed on the basis of dividends paid. The problem could, however, arise if a Section 152 company asserted that a payment to its shareholders was not taxable as a dividend because it represented the realisation of a capital asset - Section 4 (3).

The problem has not been resolved, but a complex new section was enacted last year which safeguards the company against tax liability so long as the profit derived is re­invested in mining activities. The new section is Section 152B.

Profit or Gain from Sale of Mining Shares. (Section 152B)

Section 152B only applies to profit or gain which is taxable under Section 88(1) (a) and (c) of the Act. It is still open to the taxpayer to assert that the profit or gain from the sale of mining shares is a capital gain outside those Sections and accordingly not taxable at all.

If, however, a taxpayer company derives profit or gain from the sale or other disposition of shares in a mining company or a mining holding company which would normally be taxable, then such profit or gain shall not be included in the assessable income of the company in that income year to the extent that the Commissioner is satisfied that the consideration received from that sale or other disposition is used, or is to be used, within the prescribed period (6 years from the end of the income year) for mining purposes.

"Mining purposes" means: -

(a) Subscribing for, or paying calls on, shares in any mining holding company or any mining company; or

(b) Making loans to a mining company for the purpose of enabling the mining company to carry on in New Zealand exploration or mining or development work in respect thereof; or

(c) Making loans to a mining holding company, where the loans are to be used to finance exploration or mining to be carried out by a mining company in New Zealand.
or to finance development work in relation to such exploration or mining.

The Section also applies where the taxpayer company sells the shares to a mining holding company or to a mining company in consideration of shares in such mining holding company or mining company.

The profit or gain which is excluded from the assessable income of the taxpayer company under the provision of the section, is referred to as "reinvestment profit." If any part of the reinvestment profit is not used for mining purposes, then it shall be taxed by the Commissioner. So long as the reinvestment profit continues to be used by the taxpayer company for mining purposes it will not be taxable, but so soon as the reinvestment profit ceases to be so used, tax is payable.

The section contains involved provisions as to calculation of the reinvestment profit, the cost of a mining share, and the consequences of winding up.

Conclusion.

The Taxation Review Committee (Ross Committee) considered that a Section 152 or 153 company had too much power over its tax liability, since the liability was based on the decision to pay a dividend. This criticism has been met by Section 152A of the Act which enables the Commissioner to deem the company to have paid a dividend, if the company has not been using its income for certain purposes.

The Ross Committee also thought that Section 152 and 153 companies should be taxed on a uniform basis whereunder all costs of exploration, development, normal outgoings and running expenses would be accumulated; the company would not be liable for tax until such time as its gross revenue from sales exceeds the accumulated costs to date; and the taxable income would be chargeable with income tax at a rate equal to two-thirds of the rate applicable to ordinary companies.

Such a basis of assessment would produce results very similar to those of the present legislation, and would remove the somewhat arbitrary element of tax being based on a

CANADIAN TRENDS IN MINING AND PETROLEUM LEGISLATION: SOME NEW ZEALAND COMPARISONS.

by Prof. A. R. Thompson, LL. B. (Manitoba), LL. M. (Toronto), J. S. D. (Columbia), Professor of Law, University of British Columbia.

THE SETTING.

The critic's role is often blithely assumed and as blithely discharged. Nor is performance improved by the fact that the critic is a foreigner. Nevertheless, I assume the role, and shall criticize the New Zealand Mining Bill without fear or favour, or with even a decent modesty or forbearance, because that is what I have been invited to do. I rely on you to recognize my limitations and my shortcomings even if I do not.

An expert witness is cross-examined, if not to disparage his qualifications, at least to reveal his biases; lawyers and judges know that only with awareness of biases can expert opinion be given an adequate evaluation. Critics should be subjected to cross-examination, too. Since they are not, my rule when a critic is to begin with a confession of biases - at least of the grosser ones of which I'm aware.

My first bias is really a non-bias. I am not a mining man. My learning and experience derive from association with mining's more sophisticated cousin, the oil industry. I shall have more to say about comparisons between these industries and need now only comment that the oil industry is more predominantly characterized by bigness - by huge capital investments, massive deployment of technology and multi-faceted corporate and political institutions than is the mining industry. While I once was a member of a prospecting party and staked mineral claims in Manitoba, I have had no abiding relationships with the mining industry and do not have the religious views of the miner's right that is the gospel of mining men throughout the common law world.

Second, I have never been an industry man - oil industry or otherwise - and I try to function as an independent observer and critic, seeking to interpret the public interest and to inject it into the mining and petroleum legislation of my own country on the few occasions when I have opportunity to be
decision to pay a dividend (subject to Section 152A).

The suggested basis would also be capable of application to individuals and partnerships, and in this regard it should be noted that the Minerals Committee of the National Development Conference recommended that the tax incentives granted to mining companies and investors in mining companies should be extended to individuals and partnerships who prospect or mine.

No doubt further improvements are possible, especially in the encouragement of overseas capital and know-how, but New Zealand's tax legislation has gone a long way towards providing the allowances and incentives required to encourage our mining industry.

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