The Common Law of Subsurface Activity: General Principle and Current Problems

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The land of which a proprietor of an estate has seisin includes the minerals in the land other than gold and silver. *Case of Mines* (1567).

Prima facie the owner of the surface is entitled to the surface itself and everything below it. *Rowbotham v Wilson* (1860).

*Cuius est solum eius est usque ad coelum et ad inferos.*
To whom is the soil, so too is it all the way to the heavens and to the depths.
Devonport, Auckland, Waugh v Attorney General, 2006
Wynyard Station, Sydney,  
Comsr for Railways v Valuer General, 1974
Wynyard Park, Sydney, Comsr for Railways v Valuer General, 1974
Wynyard Menzies Hotel, Sydney, 
Comsr for Railways v Valuer General, 1974
“the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else.”
“the surface means not the mere plane surface but all the land except the mines.”

*Pountney v Clayton* (1883)
Budhill Park,
*North British Railway v Budhill Coal and Sandstone Co* (1910)

The Court has to determine ‘what these words meant in the vernacular of the mining world, the commercial world, and landowners’ at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral.
Edmonton, Little v Western Transfer & Storage Co, 1921

Simplified Geological Map of Canada
Surface and Mineral Rights

The word land is usually used to refer to the surface of the earth. In a legal sense, however, it refers to that which extends from the centre of the earth to the outer edge of the atmosphere. This is commonly referred to as the "heaven to hell" concept.

Someone who owns surface rights to land owns not only the surface but also the air space above it (subject to the rights of others, such as airlines) and any sand, gravel, peat, clay or marl which can be excavated by surface operations. However, surface rights do not include ownership of minerals. Someone who owns mineral rights to land may own one specific mineral, several specified minerals or all of the minerals (except gold and silver, which, with few exceptions, are the property of the Crown).

If the land described on a certificate of title is surface only, the legal description will be followed by a "mineral reservation", a phrase such as "excepting thereout all mines and minerals". If the title includes both surface and minerals, it will not have a mineral reservation. If the title is for minerals only, they will be named in a phrase like "all coal, petroleum and natural gas" or "all mines and minerals".

As minerals represent a great deal of the wealth of this province, it is very important that their ownership be clearly defined. For this reason, the Land Titles Offices are required to issue Mineral Certificates before registering any dispositions (transfers, mortgages or leases of mineral interests). A Mineral Certificate certifies precisely what minerals are owned in a specific parcel of land and by whom, on a specific date, and what mines and minerals are shown in the disposition.

Most titles which previously included both surface and minerals have now been separated into "surface only" titles and "minerals only" titles.
Conclusions

- The principle that the rights of the surface owner extend downwards indefinitely is still valid.
- Mineral owner has no claim on subsurface land (e.g., pore space) except as provided in a grant of minerals etc.
- There is no “English Rule” to the contrary.
- Private mineral ownership has a relatively restricted role.
- Private mineral ownership has been greatly reduced in extent in many common law countries.