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Pashukanis at Mount Polley: Law, eco-social relations and commodity forms

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ABSTRACT

On August 4, 2014 the tailings pond failed at the Mount Polley copper, gold, and silver mine in British Columbia. The dam failure was amongst the largest recorded, and led to widespread debate in the province concerning weak environmental law and the effects of deregulation. This paper examines the changing role of the law in British Columbia around mining and the environment in relationship to the Mount Polley disaster. It draws on the work of the early Soviet legal theorist Evigny Pashukanis to help understand law's role in the commodification of nature. Pashukanis suggests a legal analysis of the commodity form and a study of laws role in commodification. However, contemporary law departs from the rigid and formal property and contract principles that Pashukanis considered, and now responsible to shifting social conditions, technologies and environmental concern. Yet even today, Pashukanis remains relevant, and provides a starting point for analysis of how nature is commodified. His work points to a study of the multiplicities of, and variegated legal geographies of, commodity forms.

1. Introduction

The Mountain Polley copper, gold and silver, mine ("the Mine") is owned by Imperial Metals and located in the Cariboo Mountains of British Columbia ("BC"). On August 4, 2014 the tailings storage facility ("TSF") failed, releasing 25 billion litres of waste water and toxic slurry. Hazeltine Creek, downstream from the mine, became a washed out tailing dump. Toxic contaminants flowed from there into the 100 km long Quesnel Lake, threatening salmon runs across the broader Fraser Basin (Denham, 2015). Worldwide, there are many examples of mine disasters and tailings dam breaches with significant damage to communities and watersheds. These stand as a testament to how the economy involves more than monetary exchange but is also "a powerful, pulsing engine for mobilizing and transforming materials" (Bridge, 2009, 1222) that can be destructive to local environments. The Mount Polley disaster stands out for how it triggered a rethink of local mining law: In the aftermath of the breach there was significant public outcry, and some limited action by the local state to respond through investigations, expert panels, and some modest mining law reform. Mount Polley represents an entry point for understanding the ways that law, capitalism, and the non-human world intersect. To understand this nexus, I want to draw on the work of Evigny Pashukanis.

Pashukanis was an early Soviet legal theorist and the first to draw together Marx's disparate comments to show law is central to commodity production and so capitalist economies. Pashukanis has been marshalled to help in the construction of a Marxist theory of law (Hunt, 2010) and been widely read in critical socio-legal theory by Marxist and non-Marxist alike (as Koen, 2011 and Bhandar, 2015a document). Pashukanis suggests law mediates and shapes social relationships and so forged "a critical method of legal analysis, one which asks how formal law contributes to the generation of value from human activities" (Fletcher, 2013, 139). Pashukanis saw ownership and exchange as central to capitalist economies and social relations, and suggested these were not simply enabled but *constituted* by laws of property and contract.

I want to draw on more contemporary scholarship on law, capitalism, and nature to suggest Pashukanis is relevant to understanding eco-social relations. Many researchers have worked to show that law and capitalism emerged together: Law provides the enabling conditions, and often the requisite regulation, to ensure capital accumulation (Tigar and Levy, 1977; Hunt, 2010; Barkan, 2013; Christophers, 2014). Other scholars have pointed to a long-standing co-productive and evolving relationship between capitalism and nature (Moore, 2015) or pointed to how contemporary capitalist economies are built on the commodification of nature (Castree, 2003; Liverman, 2004; Himley, 2008; Prudham, 2009). I am interested in political ecology research that describe how "the law inscribes and codifies human–nature boundaries and translates these meanings into material outcomes"

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(Jepson, 2012, 615; see also Delaney, 2003; Andrews and McCarthy, 2013; Collard and Dempsey, 2013). In particular, I look to work that links law and the commodification of nature to understand "how private, exclusive rights to socio-nature originate and are reproduced" and serve as "extra-economic preconditions to accumulation" (Prudham, 2015, 433; see also Robertson, 2006; Bridge, 2008, 2009; Hoogeveen, 2015; Prudham, 2015; Kay, 2016). Reading Pashukanis can help us advance these inquiries. He suggests an inquiry of how law shapes commodities and commodification processes, and how the laws of commodities embody relationships, normative values, and discursive framings. His work can be extended to consider the specific legal principles and institutions that shape nature's commodification.

The Mount Polley disaster and the subsequent changes to BC law are a way of both applying and challenging Pashukanis' ideas in the context of the politics of nature. As this paper will argue, Pashukanis suggests we can move from an abstract idea of the 'commodity form' through examining particular laws and material practices—in the present case that of mineral production, mining regimes and environmental protection in British Columbia. But when we examine state action after the Mount Polley disaster, we see a dynamism in the laws of commodities that Pashukanis overlooked. Yet Pashukanis retains relevance. His work helps us consider not simply *whether* ecosystems and socio-natures are being commodified: We need also ask *how*, and consider the many variations, contradictions, conflicting values and legal rules involved.

This paper is not meant to tell the complete story of the Mount Polley Mine disaster. Rather, I seek to uncover the relevance of an oft ignored but interesting theorist. I draw on publicly accessible reports, submissions, press releases, and blogs from journalists, civil society groups, and government. I seek to couple Pashukanis to Mount Polley and thereby create "diagnostic stories for the development of essentially theoretical claims" (Christophers, 2010, 95). In what follows I first outline Pashukanis's main claims and then outline key events around the Mount Polley mine disaster. I then draw out various ways Pashukanis's theorizing can be used to understand contemporary processes around commodification and ecologies.

2. Pashukanis

Evigny Pashukanis wrote in the 1920s in the Soviet Union, drawing on scholarship and legal practice from European capitalist economies and liberal legal structures of the time. He sought to extend Marxian analysis to situate law as a historically contingent and evolving social system: He saw law as a "social relationship in the same sense in which Marx termed capital a social relationship" (Pashukanis, 1923, 55). Law is the "basis of social organization" and the "means for individuals to be . . . integrated in society" (Pashukanis, 1923, 70). Pashukanis, like many Marxists, takes the dominance of market life to have a far reaching and transformative effect on society. However, Pashukanis saw capitalism as involving not only an economic system but also a legal system. Together they create a particular form of social relationship: "As the wealth of capitalist society assumes the form of an enormous accumulation of commodities, society presents itself as an endless chain of legal relationships" (Pashukanis, 1923, 62).

Pashukanis drew from Marx the idea that private property rights were a necessary condition of capital flows. Marx had identified a commodity as something with independence, individuality, and privateness in a legal sense—a worker 'owns' his labour, tools, and materials and exchanges his commodity for money, and the money in turn for a whole range of other people's commodities (Kennedy, 1985, 977). Pashukanis broadens this approach. He argues that markets necessarily demand social choices and structured practices. In capitalist societies legal institutions do much of this work. He identifies the laws of contract and property with the commodity form, which he called the 'cell-form' of law. Property backs and defines ownership, and contract does the same for the exchange process. Together, these legal categories embody principles, a vision, and a practice of social life as one of commodity owners engaged in trade for self-interested gain. Some argue that Pashukanis prioritizes exchange and so misses the central role of production (Fudge, 1999). However, Pashukanis is better understood as concerned with the historical transformation to a market society and in providing an abstract typification of the most basic economic and legal elements involved (Koen, 2011).

For Pashukanis, commodification involves questions of how persons relate to both each other and material goods. The 'commodity form' was not only a feature of the economy. It could also be found in law, legal theory, and ideology which came to 'reflect' underlying economic processes (Pashukanis, 1923, 55). Under capitalist law, persons become legal subjects who are owners and holders of objects—capital, physical goods, or their own labour power—which can be traded in markets. Pashukanis defines law as involving conflicts between arms length individuals, and he excludes from the category of law so called 'technical regulation' such as bureaucratic codes within organizations.

Pashukanis differentiates his position from what he identified as a binary opposition operative in the legal theory of his time. On the one hand, Pashukanis rejected what he called an 'internal' approach, common in nineteenth century liberal thought, that saw law as grounded in basic principles and standing independent of society. On such an account, law is viewed as normative, as either reflecting a just order or provided the basis for building such an order. On the other hand, he also rejected what he called the 'sociological' approach, then present in Marxist theorizing (and which continues to this day in law and society scholarship). This focused on how the law was constantly being reshaped as an instrument of social forces—Pashukanis' contemporaries focused on how the bourgeois class could influence and change public law such as criminal norms. Pashukanis rejected the idea that law is simply an instrument of class power or an ideological force that mystifies and legitimizes the social order. He focused on how law embodies, reflects, and gives structure to underlying social relations and actively contributes to a new world. Pashukanis emphasizes the active role of law in forming capitalist social relations and changing the way people think of themselves and their social relations. To appreciate this, Pashukanis argued, we need to engage with law's particular language, mode of communication, and argument styles and examine how it penetrates social and economic life.

Pashukanis focused on how the law had evolved. He focused on natural law theory of the eighteenth and nineteenth century and saw it as a force that had remade the law. Law had come to reflect the ideals of individual will, personal freedom, and impartial adjudication of claims. Pashukanis rejected this as a theory of how law ought to be structured and recognized it as strongly tied to classical economics and liberal political theory. However he initiated socio-legal study of how that normative vision shaped actual legal regimes and so played a social role. He adopted a similar position to that taken by E.P. Thompson, who argues that the law " has its own characteristics, its own history and logic of evolution" evidenced, for instance, in the appeal to "standards of universality and equity" (Thompson, 1975, 262).

Pashukanis's treatment of law's normativity led to what we would now call a study of *discursive effects*—law shapes agents' understanding of themselves and social space. We come to think of ourselves as legal subjects, with rights of ownership and exchange, and this becomes concretized through social action. For Pashukanis, law's influence on us goes beyond the fact that

we are under the spell of its normative vision. We enact the law as participants in an interlocking practical system that mixes discourse and material practice—and which defines persons, the exchange process, and the objects exchanged. He describes this in *ontological* terms – legal subjects become who they are through the joint working of legal ideas and actual exchange processes: "A commodity is an object: A man is a subject who disposes of the commodity in acts of acquisition and alienation" (Pashukanis, 1923, 79). He posits a structured coherence in which persons as autonomous and willful work in concert with a world of 'things' as inert and ready at hand to be dominated.

Likewise, Pashukanis suggests the fetishism of classical political economy (as discussed by Marx in *Capital*) has a correlate in the *legal fetishism* created by normative legal theory (and its embodiment in capitalist law). Pashukanis does not interpret commodity (or economic) fetishism as simply ideological obfuscation. Instead he sees it as a problem endemic to classical economics: Value is seen to inhere in the object – or "attributed to an object" (1923, 79) – rather than in the social process whereby capital employs labour to produce goods for market. As such, fetishism is not merely a problem of illusion, but points to the historical process whereby the economy has been transformed to conform to the image of classical political economy. Likewise 'legal fetishism' points not to law as an ideological superstructure which hides the truth, but to how law is "a mystified form of some specific social relationship" (Pashukanis, 1923, 58). Law both imagines and works to ensure that social agency is "attributed to the individual" (Pashukanis, 1923, 79) rather than the workings of economy, social class, and institutions.

Pashukanis's theory is far from perfect. He continued to accept much of the natural law picture of law as a stable and unchanging order. It was on that basis that he saw the law as constituting and reflecting the basic social conditions of capitalism. Pashukanis thus argued that Soviet communism would be able to function without, and so would evolve beyond, law: It would make do instead with the non-legal codes of bureaucratic organization. He was wrong to hold a teleological view of law by which it reached its apotheosis under early twentieth century capitalism, and was wrong to predict that law would wither away in communist countries. He over generalized from economic law and downplayed the relevance of criminal, administrative, and other legal systems (Fudge, 1999). He ignores non-capitalist legal orders such as might be found in Canadian indigenous communities (Borrows, 2002). His analysis operates at too high a level of abstraction (Jessop, 1990). He posits a totalizing reach of commodification, and in doing so overlooks the role of social norms and non-economic social systems in shaping identity and self-understanding (Fletcher, 2003). He failed to give due credit to the degree to which some legal concepts, such as that of equality before the law, could inhibit arbitrary exercise of power and spawn broader emancipatory political movements. He thus failed to predict diverse ways law could evolve, overlooking "struggle about law" (Thompson, 1975, 265). However, many socio-legal scholars continue to draw on Pashukanis and apply his work to contemporary contexts (such as Fudge, 1999; Gavigan, 1999; Fletcher, 2003, 2013; Mieville, 2004; Bhandar, 2015b). Bob Jessop draws on Pashukanis to argue that the rule of law is a formal feature of the capitalist state (Jessop, 1990, 2002). Alan Hunt argues Pashukanis "correctly identified law as a social relation" (210, 356). In what follows I want to suggest ways his ideas might be relevant to understanding law as an *eco-social relation*. His work can help us understand the twists and turns of resource regulation and state action in relation to the environment.

Some writers argue Pashukanis was mistaken in overemphasizing the commodity form (Fudge, 1999; Hunt, 2010). However, his work might still be drawn on to understand the role of law in capitalist commodification. Writers on commodification at times focus on how markets expand into new domains, displacing prior indigenous, feudal or state owned production systems (Prudham, 2009, 125, see also Castree, 2003; Henderson, 2009). But commodification encompasses the ongoing, routine and very material processes of capitalist metabolism whereby forests are felled for timber or mountains levelled into copper mines—where specific ecological systems and their components are "extracted, cultivated, refined, processed, represented and made to circulate in the commodity-form" (Prudham, 2009, 129). As Gavin Bridge, notes, there is "extensive socio-political work that must be done to commodify the invisible space of the underground and produce it as a bankable mineral deposit" (Bridge, 2007, 74). Pashukanis helps us see how law does much of this work, and is central to the "management of biophysical processes for the provisioning of capitalist societies" (Bakker and Bridge, 2006, 6). Pashukanis shows how the intertwined effects of rules governing ownership and exchange enable, facilitate, and also shape commodity production.

One way to understand commodities is as the constituents of 'commodity networks'—as very much material processes of linked chains whereby material resources are extracted, manufactured into marketable products, distributed, and consumed (Hughes and Reimer, 2004; Bakker and Bridge, 2006; Hudson, 2008): Indeed, such networks are themselves part of the daily routines of commodification as well embodying material throughput and social metabolism. Networks are chains of legal relationships. Each node in a commodity network involves ownership, exchange, and—expanding in the twentieth and twenty-first centuries—forms of state regulation. Law is a key institution that contributes to and defines what geographers and science and technology scholars have referred to as the 'mode of ordering' of commodity networks (Whatmore and Thorne, 1997; Law and Mol, 2008; Quastel, 2009; Baird and Quastel, 2015). Law—not simply environmental law but rather the mundane laws of daily market exchange—are a major force in how social interaction, and societal relations with nature are now shaped. In what follows I first describe the Mount Polley Mine, and then further develop ways Pashukanis's work might apply generally to the legal politics of commodification, commodity networks, and nature, and in particular to the Mount Polley disaster.

3. Mount Polley

Copper mining involves separating out concentrate, with a global average of 37 tonnes of waste per tonne of concentrate (Ayres et al., 2002, 27). In 2013 the Mine produced 17,200 tonnes of copper (Lamb-Yorski, 2014). To dispose of its enormous waste production—which included arsenic, lead, and mercury (NPRI, 2015)—the Mine relied on an extremely large (four-km square) tailings pond built with an earthen dam, at some points reaching 50 m in height. The mine ran from 1997 to 2001, closing due to low copper prices (MINFILE Record No 093A 008). However, in 2005 it re-opened after new deposits were discovered and prices improved, but began producing much more volume—and creating much higher volumes of tailing—then originally planned for or permitted (Lamb-Yorski, 2014). The enlarged Mine had problems with water management and raised the dam to create a larger pond. Finally, on the night of August 3–4, 2014 one of the walls gave in, leading to a massive breach and release of materials. Large amount of sediment and debris flowed into Quesnel Lake, raising copper concentrations, water levels and temperature and creating an extensive plume at depth of about 25 m (Petticrew et al., 2015).

The Cariboo Regional District was quick to impose a water ban, and begin testing the water. The Canadian Red Cross delivered bottled water to area residents (MoEM and MoE, 2014). The Mine was temporarily closed, and the Ministry of Environment ("MoE") quickly issued a Pollution Abatement Order, requiring the Mine

to draft, submit, and then carry out remediation plans (MoE, 2014b). Local First Nations—the T'exelc First Nation (or Wiliams Lake Band), Xatsull First Nation (Soda Creek Indian Band) and Lhatko Dene First Nation – suffered direct impacts, including emotional stress due to damage to their lands, and loss of access to sacred land and territory, traditional food sources such as salmon, and medicine. Some Downstream First Nations fishers—members of the Tsilhqot'in National Government and Lilloet Tribal Council—closed their fisheries for food, social and ceremonial purposes. The summer sockeye harvest is a staple of their diet and the closure would cost millions of dollars (Shandro et al., 2016). As Chief Darrell Bob of the Xaxli'p First Nation (downstream of the spill site, in Lillooet) reported "It's been devastating. It's like losing a close family member. That's how close we are to our fish," he said (Hume, 2014a). There was no reported loss of human life or injury. After two weeks the water ban was rescinded and fishing declared safe (Dhillon and Woo, 2014; MoE, 2014a).

There was large scale popular interest and uproar and the government initiated a number of diverse investigations. The Freedom of Information Office began to investigate if relevant Ministries had failed to warn the public about the Mine's risks and whether it was wrong to have kept secret from the public routine mine inspection reports (Hume, 2014b; Denham, 2015). The Chief Inspector of Mines began reviews of other tailing ponds in the province (MoEM, 2015). Both an Independent Engineering Expert Review Panel, and an Investigation by the Chief Inspector of Mines largely exonerated the company and engineers (IEEIRP, 2015; Chief Inspector of Mines, 2015). Here the central explanation was that the dam was built on relatively weak glacial tills: The underlying weakness in the soil was not known and neither the engineers nor company exhibited negligence in not detecting the problem. Investigators found an over-reliance on engineering expertise, a lack of regulatory inspections, and a lack of attention by MPMC to key features of the dam that might have minimized or avoided the breach.

By July 2015 Imperial Metals reported it had spent 67 million dollars on cleanup (Burgmann, 2015). The government issued a new conditional permit. It allowed the Mine to extract four million tonnes of ore and dump the liquid waste stream into an unused hole in the mine area called Springer Pit (Hoekstra, 2015a). Soon thereafter the Mine started up at half capacity, but by November 2015 the pit was already filling. Imperial Metals was granted the right to build a water treatment plant and discharge water directly into Quesnel Lake (Hoekstra, 2015c). The apparent collusion of the state appeared even worse in early 2016 when despite costly investigations, the Ministry of Energy and Mines ("MoEM") announced that it had no power to issue administrative fines under existing BC mining law, and there was insufficient evidence of criminal wrongdoing to prosecute Imperial Metals in court (Stokes, 2016). The Mine was also allowed to return to full operation, even without a clear water management plan (BC Government, 2016; Hoekstra, 2016). No compensation was paid to downstream water users, such as Lilloet and Tsilhqot'in fishers (Shandro et al., 2016).

4. From abstraction to transformations of commodity forms

Mount Polley was a watershed moment in which there was widespread outrage at the mining law system and hopes the regime would change: But the final result was only very modest adjustments. As I will now explain, Pashukanis leads us to examine the broader framework of BC mining law and how it embodies an abstract formal logic. As commentators on his work have also suggested, Pashukanis also leads to an analysis of how legal forms changes over time.

A key feature of Pashukanis' writings is his historical thesis concerning how European derived property and contract law were reshaped through the nineteenth century along principles of formal equality and abstraction. Many writers continue to find inspiration in this. For instance, Brenna Bhandar invokes Pashukanis to understand the Torrens system of property registration, arguing that it embodies a process whereby land is "abstracted from prior relations of ownership, and to whatever degree possible, from particular and individualized characteristics or traits" (Bhandar, 2015b, 258, see also Fudge, 1999). This type of analysis has correlates in geographical analysis of the commodification of nature (Castree, 2003; Prudham, 2009, 2015). This work offers an analogous type of form analysis, based on analysis of the exchange process and the effects of ecosystems being rendered resources to be transformed into goods for profit. Considerable attention is paid to analyzing a unitary logic of abstraction implicit in monetary exchange. Noel Castree describes how commodification involves a process whereby "the qualitative specificity of any individualized thing, (a person, a seed, a gene or what-have-you), is assimilated to the qualitative homogeneity of a broader type or process" (Castree, 2003, 281). Particular sites (such as Mount Polley) becomes treated as just any site to make 'stuff' (e.g., copper) that is similar to stuff that can come from many other places. The result is mine sites that are ecologically reductive, where old growth forest and natural hydrological systems are replaced by machinery and risky infrastructure designed to best facilitate profit-making from mineral extraction (see also Prudham, 2009). And, as Kay (2016) shows, law establishes private rights to property and so identifies and individuates what can be owned.

Pashukanis shines the analytical lens on the laws behind the making of things. When we bring this lens to contemporary socio-legal contexts such as Mount Polley, we can also see that the laws of commodities can now deviate from formalism and abstraction. For instance, property ownership does not now allow an owner to simply do as s/he desires, but rather involves a shifting field of responsibilities provided by public law that extend, inter alia, to city zoning, anti-pollution, and wildlife protection (Blomley, 2013). While broad classifications of property may at times be useful, we can see how "actual property rights are typically much more complex and hybrid in character, and that the more closely we look, sometimes the more complex the situation becomes" (Prudham, 2015, 438).

We do not need to discard Pashukanis. As Ruth Fletcher suggests, once we drop Pashukanis's insistence that law will wither and die, "It becomes possible to reformulate Pashukanis's account of legal form so that it is dialectical and susceptible to change" (Fletcher, 2003, 224). We need a detailed analysis of the shifting ensembles of laws that shape the making of things for markets—an analysis of the multiplicity of commodity forms. As Shelley Gavigan (1999) suggests Pashukanis might be relevant for understanding 'contradictory results' as abstract categories (such as formal equality or a generic commodity form) grapple with substantive social conditions (and, we might, add the contingencies of place and the dynamism of the natural world) (see also Fudge, 1999; Fletcher, 2013). Resource regulation (such as fisheries and forest management or rules on mine site reclamation) responds to and incorporates contradictions and dilemmas involved in turning nature into commodities (McManus, 2002; Prudham, 2005). Mineral resources face their own specific tensions. Economies of scale consume deposits and create larger and so more risky waste streams and tailing storage facilities. Communities that depend on local ecosystems struggle against individuals who seek capital accumulation through mine exploitation, socio-political opposition to new mine development. There are deep social divisions concerning how national spaces should articulate, through capital and resource flows, with the global economy (Bridge, 2000, 2007, 2008). Law deviates from a unitary logic as it grapples with the dilemmas of both advancing, and ameliorating

the effects of, commodification. Pashukanis helps us consider "contrived symmetry where asymmetry is in fact the norm" (Gavigan, 1999, 156; see also Fudge, 1999; Fletcher, 2003, 2013).

Pace Pashukanis, BC mining law is replete with abstractions and individuation from local context. The enabling framework has been in place since the mid nineteenth century when British colonial law replaced and sidelined indigenous peoples and traditions. Mining legislation in BC gives prospectors the right to search for deposits and stake claims on both Crown land and private property, rendering most of the province open for mining exploration, despite thousands of years of First Nations occupancy of, and rules for the use of, the land. Through the 1860s and 1870s new laws were developed (and have remained largely unchanged from after the province joined Canada up to this day): The Crown is to grant mineral rights for claims that had been surveyed and 'improved'. These would then operate as a freehold estate, a form of private property that could be sold, often for considerable profit (Barton, 1993, 124). 'Free entry' was written into the *Goldfields Act* (1859) and remains in the current *Mineral Tenure Act*: Developed in medieval England and Germany it become part of miners' self-regulation during the California Gold Rush and later travelled north (Barton, 1993, 116). It allows a prospector to access lands, stake a claim and thereby gain exclusive right to Crown-owned mineral substances, independent of the right of owners of the surface of the land. To this day, mining claims do not require consent of owners of the surface, notifications to local municipalities or First Nations, or broader land use planning. This has the effect of prioritize mining over other land use plans (Stano and Lehrer, 2013, 84). Customs and laws of free entry embody nineteenth century economic liberal ideals—of an 'ownership model' of property that eviscerates prior First Nations claims or community values (Hoogeveen, 2015). The Mount Polley mine area was staked in the mid 1960s and the claim owned and transferred between multiple companies through the 1960s to 1980s who did exploratory testing, mapping and surveying (Imperial Metals, 2016). Yet I could find no evidence that the T'exelc or Xatsull First Nations supported or approved of these leases at the time.

By 1989 Imperial Metals held the claim to Mount Polley and became serious about developing the mine (MINFILE Record No 093A 008). Imperial Metals proceeded with studies and applied in 1990 to MoEM for permitting. However, by this time, mining and environmental regulation had changed from earlier decades. Additional, protective legislation was now layered on top of the resource extraction regime. The Mount Polley mine was the first to come in under new mining rules introduced in the 1990s in the name of sustainable development. The New Democratic Party provincial government of the time heralded the Mine as an example of how its new regulatory regime would couple environmentally responsibility with economically successful mines (Danielson, 1992). A close analysis of the normative commitments embedded in the laws of commodities suggests analyzing competing logics that might ameliorate some of the excesses of abstraction.

At the time the Mine was permitted, a proponent had to submit an application to MoEM and MoE in order to receive a Mine Development Permit. A variety of laws and codes—the *Mines Act*, and the *Health, Safety and Reclamation Code for Mines* ("The Code") gave MoE responsibility for oversight and regulation of the structural integrity of the Mine's TSF. Section 10.1.5 of the Code requires that major impoundments, and their water management facilities, be designed in accordance with the criteria provided by the Canadian Dam Association Dam Safety Guidelines. MoE, in turn, was to conduct annual inspections. There was also a requirement for Imperial Metals to submit an Environmental Impact Statement ("EIS"). Imperial Metals did this and received a certificate in 1992 (MoE, 1992). The EIS included studies and maps on the geology, on baseline data and plans to accommodate fish and animals in nearby watersheds, and on water balance. Projects also needed to clear a wide array of licensing and approvals as specified in diverse legislation including the *Environmental Management Act*, *Fisheries Act*, *Heritage Conservation Act*, *Waste Management Act*, and *Water Act*. Therefore, the Mine, while embodying the abstractions latent in extracting copper for profit, was also, by law, designed with some (even if limited) attention to the specifics of the location and local habitat (see, for instance, MPMC, 2013). The amalgam of laws that apply to mineral resources enact competing *ontologies* as new provisions recognizing, inter alia, heritage values, fisheries, and ecological processes are stacked upon older ones (Benson, 2012). These forces would come into conflict with profit-oriented management decisions that would take risks or neglect local environmental features. The ameliorative environmental provisions, proved insufficient to thwart the disaster.

5. Neoliberalization: commodification discourses

Pashukanis emphasized that law operates as a discourse, shaping our self-understanding. This is also central to his idea of legal fetishism—the idea that law makes people think of themselves and the world in certain ways—as rational subjects engaged in exchanging commodified things. He thus suggests that what is often understood as economic doctrine—such as a belief in the 'free market'—is reinforced and seeps into popular consciousness by way of the law. We can link Pashukanis' concerns with those of Margaret Radin, who suggests neoliberalism voices nineteenth century liberal-legal ideology in the guise of twenty-first century public policy discourse. She refers to 'commodification in rhetoric' to refer to logics that would apply the market to all social interactions (Radin, 1996). Neoliberalism (whether in Chicago School or other guises) operates as a mobile policy, moving across space and struggling to be implemented in diverse places and contexts (Peck et al., 2013). It strengthens private claims to discrete socionatures (Prudham, 2015) and so its implementation is often linked to improving the use of nature for capital accumulation (see Castree, 2008; Himley, 2008; Bakker, 2010, 2015; Collard et al., 2016). In mining, neoliberal reforms have sought to ensure the underground as an attractive site for foreign investment, driving competition between locales for inward capital flows (Bridge, 2007). Pashukanis might be enlisted to trace the mobilities of neoliberalism as an (outdated) legal imaginary, analyzing its abstractions and ameliorations as it moves into concrete 'actually existing' forms.

Since regaining power in the early 2000s, the BC Liberal Party has instituted wide ranging legislative reform across resource sectors in the name of market flexibility and competitiveness (Young, 2008). In turn, Canadian civil society organizations such as MiningWatch Canada and the David Suzuki Foundation saw the Mount Polley spill as evidence of a broken regulatory system—an "unprecedented dismantling of Canada's environmental regulations" that encouraged mining firms to take risks (cf. Suzuki and Stark, 2014). However, when we look for signs of pure market ordering under a night watchman state, we see that in fact most laws did remain on the book. Instead, a more business friendly environment was created through changing a range of procedures. Clarified land-use rules allowed mining through most of the province—everywhere that was not specifically protected. The government also simplified the claim-staking process and introduced tax incentives to encourage investment. A pro-business environment was created in large measure through changing the process of enforcement. Principles of regulatory discretion enabled laxer enforcement in the mining sector (Campbell et al., 2001). There was greater use of written warnings rather than tickets or charges (WCEL, 2007).

Governments significantly cut budgets to Ministries, with the number of engineers and geologists at the Ministry of Energy and Mines declining 21% from 2004 to 2014 (Mccannel, 2014).

The result was not a close approximating to laissez faire, but a backdoor introduction of forms of 'governance' – a distinct model of regulation developed from the 1990s onwards that promoted forms of state-industry agreement. As researchers on governance stress, shifts away from traditional state command did not necessarily mean more 'market'—they differed in important respects from pure market ordering, often involving agreement over social and environmental standards (Jessop, 2002; Gunningham, 2009). As the BC Ministry of Environment's Compliance Framework argued, "Instilling a sense of shared stewardship assists in increasing voluntary compliance rates" (MoE, 2007, 1). Through the 2010s there was mounting criticism of the voluntary compliance framework. Another dam in the province had failed, and a subsequent government review called for greater enforcement (Davidson, 2010; Hunter, 2016). Government reports had warned that the province's dam safety inspection program was "understaffed," there were concerns about the province moving away from "audits" of dams to relying on private operators to self-monitor (MiningWatch, 2014). The Environmental Assessment Office was not evaluating the effectiveness of its environmental assessment mitigation measures (Doyle, 2011). Diverse organizations such as the Environmental Law Centre at the University of Victoria and West Coast Environmental Law in Vancouver have argued for strong environmental laws with a deterrence logic rather than a voluntary compliance system. The Fair Mining Collaborative has emerged as a mining specific advocacy organization and its *Fair Mining Practices: A New Mining Code For British Columbia* sets out a wish list for progressive transformation of mineral production in the province (Stano and Lehrer, 2013). The Collaborative advocates for increasing enforcement budgets, drafting regulation in ways that avoids ambiguous language, stronger and independent monitoring and enforcement, improved environmental assessment, land use planning in place of free entry, and separate tribunals for prosecution of firms (Stano and Lehrer, 2013, 313–316).

The governance model contributed to the accident. While the spill was at root caused by the dam being built on the weak silt layer, there were faults with how the dam was expanded that government inspectors might have detected. The Mine was inspected in 2013, but not 2009, 2010 or 2011 (IEEIRP, 2015). The design of the dam was an example of 'performance based regulation' whereby the state would 'steer' through providing minimum 'factor of safety' guidelines—the private sector would 'row' as project engineers created designs in light of their assessment of loading conditions, material strength and consequences of failure (IEEIRP, 2015, 133; *Health, Safety and Reclamation Code for Mines in BC* s. 10.1.5). MEM geotechnical inspectors did not critique the professional design once they were satisfied that certain key elements had been addressed (Chief Inspector of Mines, 2015, 31). The state was absent not because there were no rules, but because the policy was to trust Imperial Metals.

A further wrinkle in neoliberalization in BC is the resurgence of First Nations rights. When the mine was being discussed in 1992, there was little effort made to consult the First Nations landholders. Mine development took place without their permission and over their vociferous objections (MiningWatch, 2014, 10). However, the 1990s saw an increase in First Nations demands to have claims recognized. Canadian courts have begun, even if in halting and uneven fashion, to give greater recognition to First Nation title (such as in the Supreme Court of Canada ruling in *Haida Nation, 2004*). In 1995 resource revenue sharing was included in the "New Relationship" between the government of BC and First Nations. It would provide special economic benefits to aboriginal people and applied specifically to mining projects. First Nations were to receive a portion of taxes paid under the *Mineral Tax Act*. First Nations groups began to see they could have a stake in the Mount Polley Mine. In 2011 the T'exelc First Nation and Xatsull First Nation hired environmental consultants to conduct independent reviews of the Mine (Olding and Associates, 2011). By 2012 the T'exelc First Nation signed a participation agreement and in 2013 revenue sharing agreements were signed between the Mine and both the T'exelc and Xatsull First Nations. The two Nations will share 35% of the incremental mineral tax revenue collected each year by the province (MiningWatch, 2014, 11).

The participation agreements have not proved to be a significant sum (only 4500 dollars after the first year) and appear as much an admission of defeat as a victory given the pre-existence of the Mine and the current regulatory climate (MiningWatch, 2014, 11). Both the T'exelc and Xatsull First Nation governments have engaged in extensive consultations with Imperial Metals and the Province since the Mine Disaster. This includes a series of roundtables and committees that are meant to oversee a government-to-government response to the Disaster and guide shared decision-making over the future of the mine (Shandro et al., 2016, pp. 37–38). Concerning any future mines, the *Northern Secwepemc te Qelmucw Mining Policy* (of which the T'exelc and Xatsull are included) codifies demands for consultation and accommodation and lays out principles of ecological stewardship to guide negotiations over benefit agreements (NStQ, 2014).

However, the spill also led some activist First Nations groups to split from their formal (Canadian state sanctioned) governments and take recourse in protests. There was a resistance camp at the entrance to the Mine and at other mines in the province run by Imperial Metals (Berman, 2014). The Secwepemc Women Warriors Society called for a National Day of Action to Stop Mount Polley from Reopening (for April 29, 2015) arguing that by "Allowing this corporation to reopen the Mount Polley mine is a violation of sovereignty and opens the territory up to further damage. Imperial Metals has no consent from the Secwepemc." In May 2015 street protesters in Vancouver sought to enter the Imperial Metals annual general meeting, and to give the corporation a notice of eviction from Secwepemc lands (Young, 2015).

Pashukanis guides us to trace neoliberal discourse and its attempts to recreate a market order. While intermixed with 'market fundamentalism' and 'utopian ideology' (Peck et al., 2013, 1093), neoliberalism remains pragmatic and often non-theoretical. Pashukanis helps us analyze the partial realizations and pragmatic adjustments endemic to neoliberalization processes. Actual instantiations employ values, ontologies and regulatory features at a distance from a pure property and contract order. Through contrast with a laissez faire legal ideal, Pashukanis helps flesh out how "neoliberalization is accompanied by an intensification of regulatory intervention by the state" and "facilitative government activity" (Bakker, 2015, 450).

6. Autonomy and path dependency of the law

In positing a static and formally rigid ideal of the law, Pashukanis did not see that law might be influenced by social movements and be changed (even if only partially) to promote welfare and environmental goals—that is, common goals in the name of the public interest (Fletcher, 2013). However (and as state response to Mount Polley shows), law often remains relatively unchanged. Balbus (1979) frames Pashukanis's ideas of law's dual normative and economic role in terms of the "relative autonomy of law": Law functions and develops independently of particular economic and social actors. At a higher level there are degrees of fit and concordance as law and the capitalist economy evolve together. Others have theorized that the laws of markets are prone to recursive

process of stabilization as market actors rely on particular legal frameworks and come to protect them (Fligstein, 2002). We might understood some areas of law—and the laws of commodities in particular—in terms such as *path dependency* and *momentum*. Laws are institutional configurations that are made stable because they shape the possibilities for social actors to retain their power (Martin and Sunley, 2006). Bob Jessop describes a process he refers to as 'form determined strategic selectivity' (and which he in part draws from Pashukanis) (Jessop, 2002, 37). By this he means that capitalist states undergo a constant process of innovation and change, but do so on the basis of preexisting structures and institutions which set the stage for strategic action and shape outcomes. He identifies one such institution as the rule of law, which in turn includes formal equality, a private law of property rights and contract law. This sets up the state as playing a key role in securing condition for economic exchange and tax collection. We should consider not only variation amongst commodity forms, but also their ongoing retention, stability and path trajectories.

Mining law in BC does not now follow strict contract and property principles, and Pashukanis may have overlooked the relevance of so called sociological approaches in explaining state regulation as a reflection of industrial interests. Many groups in BC have suggested there is a problem by which the government regulators work in the service of Imperial Metals and the mining industry. This includes the provinces' auditor general, who in 2016 argued weak regulation created an atmosphere of regulatory capture, a position that opposition Members of the Legislature Assembly also raised (Leyne, 2016; See also Bellringer, 2016, 44). The local press reported that Imperial Metals was a significant donor to the ruling provincial Liberal Party—$234,000 from 2003 to 2014 if its subsidiary companies were included (Ball, 2014). Murray Edwards, who has a controlling stake in Imperial Metals, is a strong supporter of the BC Liberals, helping organize a $1 million fundraiser for the BC Liberal Party at the Calgary Petroleum Club in 2013 (Sinoski, 2014). Moreover, week campaign finance laws mean Premier Christy Clark receives, on top of her normal salary, an extra "stipend" from the Liberal Party. The Party received five million dollars in corporate donations in 2015, and the fifty thousand dollars she received that year appeared to be a clear 'cut' from her efforts at fundraising, including attending private fundraising dinners (Mason, 2016). Even after the Mount Polley disaster the state provided special budget allocations to maintain or improve turnaround times for the mine permitting process, and a suite of tax credits for exploration (Office of the Premier, 2015). The mining watchdog group MiningWatch Canada felt prosecution efforts after the Mount Polley disaster were so lax that they filed in court to force the government to prosecute Imperial Metals under the *Fisheries Act* (MiningWatch, 2016b).

The so-called sociological approach can also accept that industrial interests are not the only social forces at play: The Mine spill prompted the provincial government to introduce new legislation that in part addresses public interest concerns. Legislation was brought in to address problems with tailing ponds. As such new rules would ensure environmental assessments and tailing management applications would consider the possibility of a tailings disaster, evaluate the environmental, health, social and economic impacts of an accident, and use best-available technologies (Smallbridge, 2015). After the failure of the Chief Inspector to find fault or prosecute under the Mines Act, changes were made to increase existing penalties available for court prosecutions under the act (MoE, 2016a). The BC government has launched a new online platform where the public now has access to mine inspection reports, permits and their amendments, and dam safety reports (MoE, 2016b). Minister Bennett created a Code Review Committee which would help implement recommendations of the Geotechnical Review and Chief Inspector of Mines. These included modifying tailings ponds to use best available technology, with oversight from independent tailings review boards, companies to have certified dam safety managers, education of all mine personnel on risk recognition and communication, and strict compliance with, and new guidelines for, the design of dams (Bellringer, 2016, 16).

In all this, we might still consider Pashukanis's concerns about continuity in the law. On the one hand there are normative commitments contained in the multiple laws stacked on top of each other which make up BC's mining regulatory system. These give some (new) attention to environmental considerations and risk mitigation. On the other hand, when we look to the entirety of the mining regime, we see that the law promotes development and ensure projects pass environmental assessment. As Laforce et al. (2009) argue, free entry sets the stage for private developers to promote mining development, and later stage environmental assessment provides for only superficial concessions to address environmental and social concern. They thus argue "a regime's rules and procedures may be amended without necessarily being transformed if the founding principles and standards of these rules and procedures remain intact" (68). A such "mining regimes remain, to a considerable extent, unchanged" (68). Neoliberal reforms minimized the effects of public law through watering down enforcement. And the new changes after the Mount Polley spill were narrowly focused on mitigating the risk of TSF disasters. Civil society groups remain skeptical concerning the ongoing willingness of the mining industry and government to sacrifice environmental, community and First Nations values in the furtherance of mining activity. Groups including Amnesty International, MiningWatch Canada, the Sierra Club of BC, the Fair Mining Coalition, West Coast Environmental Law and Northern Confluence have been denied a formal role in the Code Review Committee (Hoekstra, 2015b). Long standing civil society demands, such as changes to environmental assessment rules, an independent regulatory agency and stronger community participation mechanisms were not on the table (MiningWatch, 2015, 2016a).

Pashukanis also suggests that the issue is not simply of stasis in the law, but that the law contains underlying, formal features that remain untouched. As Jessop notes, the state as *Reichstaat* seeks to impose the rule of law, use law to facilitate commodity production and exchange, and collect revenue to strengthen the tax state (Jessop, 1990, 2002). This translates, in the context of BC mining, into to a legal regime that is pro-mining. BC features unique twists: A colonial legacy which saw the state convert most of the territory from Native use into "Crown lands"; a mineral rich geology; and a sparse settler population ensuring mining exploitation at a distance from population centres. These underlying principles shaped a view of the land as a resource for profitable exploitation, mining law regimes, and industries that developed out of them. Through the late nineteenth and much of the twentieth century, the BC economy was organized around resource extraction for sale to key markets in the United States and Asia. This created a reliance on a 'staples' and state efforts to promote resource development (Wellstead, 2007). To be sure, BC now has a variety of 'new economy' industries, such as film and computer software. Yet the symbiosis between capital, state, and resources continues. The province maintains a dependence on natural resource revenues, in the amount of 511 million in taxes annually (PWC, 2014, providing 2013 numbers). Pashukanis suggests this reliance does not simply arise from the embedded force of resource industries as political interests, but inheres in the deep structures of our legal inheritance.

We can also draw on Pashukanis to explain why ecological voices remain largely excluded. State and law seek to promote commodity production. But one result is that the local state cannot extract too much rent if it seeks to attract increasingly mobile

mining invest and rely on it for tax revenue (Bridge, 2008). Regulation cannot drive up costs too high. To be sure, producers can use economies of scale and new technologies to remain profitable while meeting environmental standards. As the Geotechnical Review indicated, there remains scope for technological advances that can reduce environmental risks. However, firms are quick to view environmental regulation as a grab by the state, a way to force firms to pay more costs—and so a form of rent allocation akin to corporate taxes and royalties. Mining firms can locate around the world, while BC producers primarily for export (with a value of 2.9 billion dollars in 2014) (BC Stats, 2015). Copper remains volatile, and prices fell from highs in above US $4 in 2012 down to US$ 2.55 in 2015 and $US 2.12 in early 2016 (Nasdaq, 2016)—prices at which some mines might need to close (Waslander, 2014). The global quest for foreign direct investment and export led development has led to many new mines being opened worldwide, and created strong pressures against costly regulation (Bridge, 2007). BC exercises little control over copper networks as a whole and have little power to change their overall mode of ordering. BC does not try to raise the playing field by coordinating with other states to impose environmental regulation.

The normative thrust of a liberal, extractivist vision works to marginalize civil society voices. Law seeks to position itself as a neutral arbiter between legal subjects. As Pashukanis helps us to see, this works to exclude non-property or non-commodity owning voices. In the normative picture of private law, legal subjects are understood as persons with private interest claims—as primarily commodity owners. Civil society organizations and ecologists are seldom have property or other direct claims in the areas that concern them. Claims concerning ecosystem integrity and cultural values do not sit easily within a private law vision of commodity ownership and exchange. Instead, civil society advocates press for changes to public law institutions (such as environmental assessment, fisheries, waste management and other laws). Public interest law however, is not as easily positioned to maintain neutrality. State managers, in writing such laws, needs to adjudicate between diverse, contested and often incommensurate values. The state falls back on balancing power relations, which all too often means only modest amelioration that does little to shift background private law ordering. The result is not simply the 'ecological dominance' (Jessop, 1990, 2002) of resource industries in guiding policy, but the continuation of the core features of the legal systems upon which such industries have been built.

7. Conclusion

Pashukanis does not simply help illustrate the way law and regulation facilitates extractive industries, but helps us see that law shapes material outcomes and so mediates and directs eco-social relations. Political ecologists have tended to see exploration licences and mining claims as 'technologies of state power' (Bridge, 2007, 78). Pashukanis helps us link mineral rights back to the logics of a legal order which evolves along with the state. He helps us see where law works together with commodification processes to effect abstractions and individuations that devalue the natural world. Yet his directive to look at the details of the law that shapes commodification also helps us see how law shifts and transforms: There is not a singular legal order, and so not simply one commodity form.

The Mount Polley featured an extremely large tailing storage facility, and the broad question of designing tailings pond regulation and mining law extend beyond BC. But we can also treat such regulation as saying something interesting about law and commodification. Over time the BC government has changed the law—creating new kinds of asymmetries through changing legal forms (from purely extractive, to sustainable development) or by reducing enforcement (to realize neoliberal norms). The BC government moved to reform the law, and Pashukanis needs to be updated to handle new state regulation. The Mount Polley tailings pond was very large, reflecting increasing economies of scale in the mining industry, but this brought on new ecological risks. When the dam broke and the state responded with re-regulation, legal forms shifted in response to shifts in capital accumulation, new technologies and conflicts with local ecologies. Commodity laws provide overlapping and often contradictory ontologies and are prone to transformation over time. The commodity form is far from stable but replete with contradiction and dilemmas. We are faced instead with a multiplicity of commodity forms.

Pashukanis has further relevance because change is for the most part non radical, but follows well worn groves laid down by the past—this was evident in the legal changes Mount Polley initiated in BC. While there is a shifting array of social forces, the forces of capital accumulation are dominant. This provides a new way to find continuity in the law: For such actors often seek to protect the very legal structures that helped them achieve dominance in the first place. Pashukanis helps us see how law structures eco-social relations and his work points to the underlying formal features of law. Law shapes the mode of ordering of commodity networks, and through such networks, the way we—through society and economy—relate to the world's ecologies.

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