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# **Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change**

**Working Discussion Paper**

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Prepared for

The North-South Institute

By

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*“Aboriginal Peoples generally have not been consulted about development activities; usually they have not been guaranteed, nor have they obtained, specific economic benefits from such activities on their traditional lands; and they have had difficulty protecting their traditional use from the effects of development.”*

– Royal Commission on Aboriginal People, Restructuring the Relationship (Volume 2), 1996

*“We give municipalities and industry the option: you can cooperate with us, you can negotiate the kind of relationship you feel we need to have with you, or the option is you could stand to lose it all.”*

– Herb George, Assembly of First Nations regional vice chief from British Columbia (in Frank 2000)

*“No longer is it Aboriginal participation in mining; but it is now mining company participation in the Aboriginal community.”*

– Hans Matthews, president of the Canadian Aboriginal Minerals Association, 1999

## **Introduction**

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Some forty years ago, Canada’s Aboriginal Peoples – First Nations, Inuit and Métis – had no say in decision-making about mining activities on or near their ancestral lands. Today, there has been a proliferation of different mechanisms for including Aboriginal perspectives in decision-making, and a growing body of literature is devoted to examining the issues at the crossroads of mining and Indigenous Peoples in Canada. While some authors highlight the inroads made by industry with respect to changing corporate practices (e.g., Sloan and Hill 1995), others point out there is still a long way to go before Aboriginal views are appropriately integrated into decision-making (e.g., Innu Nation/MiningWatch Canada 1999).

This paper examines some of the factors that led to this ‘flip’ in corporate and government policy, focussing in particular on the topic of consultation. In recent years, consultation has become a hot topic in Canadian Aboriginal, policy, legal, industry and NGO circles as one means of ensuring more community input into decision-making about mining. Multistakeholder processes such as the Whitehorse Mining Initiative (WMI) and the more recent National Round Table on the Environment and the Economy (NRTEE) Task Force on Aboriginal Communities and Non-renewable Resource Development have underscored the need for better consultation processes as a means to defuse potential conflict and ensure more equitable Aboriginal participation in decision-making. The Supreme Court of Canada has also ruled that Aboriginal people whose Aboriginal rights might be infringed should – at a minimum – be consulted. Environmental Impact Assessment procedures now include public participation mechanisms. Mining policies and regulations have undergone an apparent shift toward principles of sustainable development and more inclusive processes. And a handful of exploration and mining companies have developed corporate codes of conduct and policies with regards to activities near Aboriginal territories, some with guidelines for consultation.

Regardless of all these developments, there is a dearth of understanding of Aboriginal perspectives on consultation in relation to mining activities, and what constitutes appropriate and meaningful consultation and participation mechanisms. Some Aboriginal groups have begun to articulate their perspectives to attempt to stop what many of them regard as a looting of the wealth of their land. However, these efforts have been far and few between, and Aboriginal groups are often in a situation where they are reactive rather than proactive.

This paper canvasses the existing literature on these issues – drawing in particular on Aboriginal perspectives found in the literature – as a means to provide the context for deeper discussions, dialogue and analysis. The paper is organized into three sections:

- Section 1 sketches the historical and current context of mining in Canada, with particular emphasis on the confluence of mining activities on or near Aboriginal lands and their socio-economic and environmental impacts. It also presents the advances Aboriginal people have made with regards to legal and constitutional recognition of their Aboriginal and Treaty rights, focusing on rights to consultation, title and management of natural resources. This sets the stage for a discussion of various Aboriginal responses to mining proposals, which range from acceptance and negotiation to ‘strong resistance’.
- Section 2 outlines government and corporate policies and initiatives with regards to Aboriginal people and mining, providing Aboriginal and other critiques. The section also includes a ‘stakeholder identification’ of the major governmental, industry and civil society actors active in this area.
- Section 3 profiles 11 case studies, highlighting where legitimate consultation did or did not take place, and identifying elements that led to – or prevented – successful relationships.

The paper concludes with a summary of Aboriginal perspectives expressed in the literature, and identifies areas where more in-depth research is required.

## **Section 1: *The Lay of the Land***

### **The Historical and Current Context of Mining in Canada, Aboriginal Land Rights and Responses to Mining**

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#### **Introduction: The Lay of the Land**

After a brief description of the historical and current context of mining in Canada, this section maps out the overlap of mining with ancestral lands, and describes the historical and current situation of Aboriginal rights to land and title. The major impacts of mining on Aboriginal Peoples are then described. The section closes with a loose categorization of Aboriginal responses to mining activities in Canada.

#### **Mining: The Historical and Current Context in Brief**

The first prospectors and miners in North America were Aboriginal people who used various minerals for tools, weapons, art and other artifacts. According to the Assembly of First Nations (AFN),

“The First Nations .... were involved in mining development well before the Europeans arrived. In the Lake Superior area, the copper trade was already in existence 6,000 years ago. In the year 2,000 BC, Maritime First Nations inhabitants developed chert beds to make various objects, while silver in the Cobalt area was already being exploited 200 years before our time. Then came the Europeans and prospecting work began as early as 1583, near the location where Halifax now stands. The first mine developed by the Europeans was probably New Brunswick’s Great Lake coalmine in 1639” (AFN 2001a).

A wide range of literature exists demonstrating the important historic role of Aboriginal participation in prospecting across Canada. Of particular note is the role of Aboriginal Peoples in gold discoveries throughout the Pacific northwest (cf., Marshall 1996; Cruikshank 1992; Vaughan 1978) and their attempt to “forcefully defend their lucrative claims through full-scale resistance.” This led to the Fraser War of 1858 and the subsequent formation of Indian reserves in British Columbia (Marshall 1996).

Today, mining represents a large sector in Canada’s domestic and export economy. In 2000, mining contributed \$27.97 billion to Canada’s economy and generated \$49 billion in exports (approximately

12.8% of Canadian exports) of some 60 different minerals and metals (Goodale 2000) – the sector as a whole contributed 3.5% to Canada’s GDP (MAC 2001a). That same year a total of 401,000 Canadians were employed by the minerals industry, with 54,000 directly employed in mining, 61,000 in smelting and refining, and 286,000 in manufacturing (MAC 2001a). There were some 235 major mines, over 3000 sand, quarry and gravel operations and over 50 non-ferrous smelters, refineries and iron plants (NRCan 2001). It is estimated that the mining of mineral resources provides the mainstay of 150 primarily remote, rural and northern communities through direct employment (NRCan n.d.). In addition, “mining sector investment in both new mines and refurbishing or upgrading existing operations is larger than the capital investment by the forestry, logging and fishing industries combined. Investment in research and development...totalled \$323 million in 2000, which was five times the amount invested by the agriculture, fishing and logging sectors combined” (MAC 2001b).

Rank of Canada as world leader in the production and export of minerals and minerals products:

- *First* in potash and uranium
- *Second* in nickel and gypsum
- *Third* in titanium, zinc, asbestos cadmium and platinum group metals
- *Fourth* in aluminum and salt
- *Fifth* in gold, molybdenum, copper and lead

Source: MAC 2001a

According to a recent government report, Canada is currently undergoing a decrease in minerals exploration activity due, among other things, to “low commodity prices, project financing difficulties and international competition for mineral investment” (Canadian Intergovernmental Working Group on the Mineral Industry 2001). This downturn reflects international trends: worldwide exploration fell by 31% in 1998 and a further 23% in 1999, according to the Metals Economic Group (cited in Young 2001). Nonetheless, there have been pockets of increased activity, for example in Ontario (largely due to platinum and palladium exploration) and the Northwest Territories (on account of ongoing diamond exploration). Expectations are that diamonds will soon become “the most sought-after commodity in Canada,” replacing base metal and precious metal exploration (Canadian Intergovernmental Working Group on the Mineral Industry 2001).

From a global perspective, in 1999 Canada attracted almost 11% of the world’s largest companies’ exploration budgets (Canadian Intergovernmental Working Group on the Mineral Industry 2001). There has been a small influx of foreign-owned firms into the Canadian mining industry, including Australia’s Broken Hill Proprietary, Britain’s Rio Tinto, and DeBeers (all active in diamond mining), and the Swedish corporation Boliden active in base metals production.

In addition, Canadian mining companies have been actively internationalising, with over 3000 foreign mineral properties in more than 100 countries worldwide. Canadian companies dominate the exploration markets of Canada, the United States, South America, Central America and Europe. As a means to counter what some fear is a trend towards international investments, several Canadian jurisdictions are actively promoting mineral exploration as a means to “keep mining in Canada.” In October, 2000, a 15% non-refundable federal Investment Tax Credit for Exploration was established to enhance exploration activities in Canada, with exploration tax credits introduced in Ontario, Saskatchewan and British Columbia (industry refers to these as the “Super” Flow-Through Share) (PDAC 2001). Industry is working hard to promote these types of incentives, among other initiatives, such as lobbying for a streamlining of Canada’s security commissions to enhance the process of raising risk capital in Canada.

## Traditional Aboriginal Territories and Mining: Overlap and Impacts

There is a very close correspondence between the location of Aboriginal communities, mining operations and known mineral deposits. Natural Resources Canada (NRCan) estimates that approximately 1200 Aboriginal communities are located within 200 km of mineral and metals activities (NRCan MMS 2001). According to the Assembly of First Nations (AFN), “more than 36% of First Nations communities are located less than 50 km from one of the primary mines developed in Canada” (AFN 2001a). In addition, it is estimated that there are at least 9 abandoned mines on First Nations territory, with many communities living downstream of the other approximately 10,000 “toxic orphans” that exist in the country (AFN/MiningWatch Canada 2001).

NRCan has developed a series of detailed maps showing the overlap between current mining operations and Aboriginal communities; it has also completed a web-site enabling visitors to create tailor-made maps showing, among other things, the overlap between particular types of mining and Aboriginal communities

(<http://mmsd1.mms.nrcan.gc.ca/maps>).

### Aboriginal Employment in Mining

While there are no recent figures on Aboriginal employment in the mining industry, a 1998 survey completed by 53 surface and subsurface operating mines (distributed to 204 mining operations) across Canada indicated that: 18 mining operations had hired Aboriginal employees in 1997; the total number of Aboriginal employees was 422; the most frequent types of jobs filled by Aboriginal people included labourers, miners, truck drivers/equipment operators, trades and maintenance operators. These figures had increased somewhat from an earlier survey administered in 1991/1992 (IGWG 1998). A 1996 report (IGWG 1996) noted that Aboriginal employment in Canada averages 4.2%, with higher rates in Saskatchewan (5.7%), Manitoba (9.7%) NWT (28.3%) and Yukon (12.5%).

Since the industrialization of mining in Canada, Aboriginal people have had little say in decision-making regarding mining near or on their ancestral lands, and have borne most of the costs and received none – or only negligible – benefits. However, this situation is poised to change for a variety of reasons, perhaps most important among these the advances Aboriginal people have made with regards to the recognition of their rights to land and title, and the negotiation of comprehensive land claim agreements.

## Aboriginal Rights and Lands in Canada: A Brief Historical Overview and Current Status

### *Historical Overview<sup>1</sup>*

Between the 1880s and 1920s, several Indian tribes signed treaties with the Canadian head of state. Each First Nation agreed to share its land in return for benefits including small land bases (reserves), housing, medicine and education. As described by one Native leader, the perception among First Nations was that “we would allow Europeans to stay among us and use a certain amount of our land, while in our own lands we would continue to exercise our own laws and maintain our own institutions and systems of government” (Erasmus 1989). These treaties, however, did not set out any provisions for Indigenous input into decision-making about resource use. The result was that the government acted as if it owned the land covered in the treaties, and conflicts emerged over Indigenous Peoples’ subsistence activities in areas outside their reserves. In the 1970s and 1980s, in the face of increasing conflicts about resource use, development pressures and the government’s by then overt policies to attempt to assimilate Indigenous Peoples into the dominant society, First Nations took legal and political action to protect their rights under the treaties. Their “tenacious politics”, which were rooted in the firm conviction “of the rightness of our position” (Guujaaw, pers. comm. 1999) and their “stubborn” commitment to their ancestral rights and responsibilities to the land, the animals and future generations (Erasmus 1989) eventually led to Canada’s highest court recognizing the existence of continuing Aboriginal rights and title to land, irrespective of whether formal treaties had been signed. This 1973 decision paved the way for the recognition and

affirmation of existing Aboriginal rights in the 1982 Canadian Constitution, and the negotiation of compensation for the inadequate implementation of treaties.

In other parts of Canada, however, treaties were not signed. Indigenous Peoples living in these areas therefore had additional challenges in their relationship with the government. One exception was people living in Canada's far North, who came into contact with the Europeans fairly recently, and were left relatively free to carry out their traditional lifestyles (Itinuar 1985). It was not until the 1970s, and under the pressure of large-scale development, that they too felt the need to take action to protect their homeland and traditional way of life.

The result was the negotiation of comprehensive land claims, a process largely made possible by the legal and constitutional recognition of Aboriginal rights. In comprehensive land claims, negotiations take place between the government and Indigenous Peoples who have not entered into treaties, but can show traditional occupancy and use of specific areas and continuation of that use. Outcomes of comprehensive land claims can include financial compensation, a negotiated land base, provisions for self-government (for example the Nunavut [1993] and Nisga'a [1998] claims), protection for traditional resource use, the establishment of regional co-management bodies to manage resources and plan development, and the identification of sections of land in which the land claims beneficiaries have ownership over subsurface rights. While land claims vary in approach, every agreement has provisions regarding benefits from mineral development, with some – such as the Inuvialuit and Nunavut agreements – explicitly requiring the negotiation of impact benefit or participation agreements (Keeping 1999/2000). Since the first such agreement was signed in 1975 (the James Bay Northern Quebec Agreement), 14 comprehensive land claim agreements have been settled. In the future, the number of claims is expected to increase exponentially, particularly in British Columbia (CER&CN 1998).<sup>2</sup>

#### *Current context*

Currently, there are four categories of Aboriginal lands in Canada. Alex Ker identifies these as:

- a) *Reserve Land*: lands set aside for the exclusive use and benefit of Indian Bands, for the most part pursuant to historic treaty making processes, and in some cases under executive order (i.e. government order).<sup>3</sup>
- b) *Provincial and Federal Crown Land*: lands held by the Crown in right of Canada or a province, where title is clear and unencumbered by Aboriginal titles and rights.
- c) *Settlement Lands*: lands where issues of Aboriginal title and rights have been settled through modern treaty making processes, and associated comprehensive land claim settlement agreements.
- d) *Un-ceded Aboriginal Lands*: lands where Aboriginal title and rights have not been settled either pursuant to historic or modern treaty making processes” (Ker 1996: 3).

It is important to point out that the lands Ker describes in d) as “un-ceded” frequently include lands described in b) as “Crown Land”. Ker errs in describing Crown Land as being “unencumbered by Aboriginal titles and rights” since historic treaties typically guaranteed the Aboriginal right to engage in harvesting and other economic activities off-reserve on Crown Lands. Recent court decisions have made clear the federal government’s fiduciary responsibility to safeguard lands outside Reserves upon which Aboriginal Peoples depend for subsistence.

## Aboriginal Peoples and Lands in Canada: Some Facts

### *Peoples (according to 1996 Census)\**

- Total reported Aboriginal population: 799, 010
  - # of North American Indians: 55,4000 (2/3 of Aboriginal Population)
  - # of Métis: 210,000 (1/4 of Aboriginal population)
  - # of Inuit: 41,000 (1 in 20 people of Aboriginal population)
  - # of people reporting they belonged to more than one Aboriginal group: 6,400
- % of Canadian population: 3%
- Provinces with highest Aboriginal population: Ontario, British Columbia and Manitoba
- Highest concentration of Aboriginal population: Northwest Territories, 62% of population.
- # of Aboriginal people living on-reserve: 3 of every 10
- % of Aboriginal people living in isolated communities off-reserve: 20%
- # of Aboriginal people living in census metropolitan areas: 3 of every 10
- Average age of Aboriginal population: 25.15 years, 10 years younger than general population
- % of Aboriginal population under 15: 35% (20% in general population)
- % of children under 15 living with a single parent: 32%
- % of Aboriginal population 65 and over: 4% (12% in general population)
- % of Aboriginal population with an Aboriginal language as a mother tongue: 25%, 15% who speak it at home

### *First Nations (as of December 31, 1998):\*\**

- % of First Nations living on reserve or Crown land: 58%
- % of First Nations living off-reserve: 42%
- Expected population by 2010: 822,200
- Number of Bands: 609 (633 if include 24 First Nations not recognized by the Department of Indian and Northern Affairs)

### *Lands*

- # of settled comprehensive land claim agreements since 1973 (as of April 2, 2001)\*\*\*: 14
- # of specific claims settled (as of September 15, 2001)\*\*\*: 229, with compensation of \$1.2 billion

### **Sources:**

\*Statistics Canada (1996).

\*\* DIAND (2000).

\*\*\*John Day (Pers.Comm., 2001).

### *Legal Issues: Aboriginal Land Title and Rights*

The legal position of Aboriginal Peoples in Canada with regard to land title is predicated on the fact that Aboriginal Peoples, organised in communities, societies, nations and confederacies, occupied, used and governed the lands, waters and resources of North America before European colonisation. Recognition of this use, occupancy and government is variously expressed as “Aboriginal title”, “Indian title”, “Aboriginal land rights”, or “Indian interest”. Aboriginal Peoples and the Canadian judicial system argue that Aboriginal land rights are unique, or *sui generis*, and cannot be compared with Canadian property or real estate law. They include specific rights such as the use of natural resources (including, but not restricted to, hunting and fishing) both on- and off-Reserve, collective ownership of Reserve lands and other lands to which title is transferred under modern treaties and land claims settlements, language, culture, and self-government (Aronson 1997). In general, Aboriginal rights are set out and defined either in the Constitution Act of 1982, the Indian Act or, most prevalently, in case law.

## Canadian Case Law related to Aboriginal Rights and Consultation

Since the enshrinement of Aboriginal rights in the Canadian Constitution of 1982, several Supreme Court decisions have been made to clarify the nature and scope of Aboriginal rights, and outline the Crown's requirements with regards to consulting Aboriginal Peoples on actions that might infringe on their rights.

In the 1990 decision *Sparrow v. The Queen*, the Supreme Court ruled that Aboriginal people have an inherent right to harvest resources for subsistence, and that Section 35(1) of the Constitution Act of 1982 must be read broadly and in favour of Aboriginal Peoples (Meyers 2000: 10). Peter Usher (1991) argues that the *Sparrow* decision calls for the involvement of Aboriginal Peoples in regulation of natural resources management. But, he notes, "recalcitrant administrations may resort to only nominal, or even underhanded forms of consultation with Aboriginal communities in attempting to justify their regulations" (Usher 1991).

The *Sparrow* decision outlines what has become known as "The Sparrow Test" for infringement of Aboriginal rights and consultation:

*"Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented"* (Sparrow, p.1119, f-g, emphasis added).

In short, the Crown would have to consult with First Nations in respect of any proposed infringement on Aboriginal rights, "if it was to satisfy its fiduciary obligations and protect the honour of the Crown" (Woodward and Janes 1999).

The 1997 *Delgamuukw* decision further defines requirements for consultation, particularly in relation to infringement on Aboriginal title. *Delgamuukw* notes that Aboriginal title refers to Aboriginal use and occupancy of the land prior to assertions of British (and later, Canadian) sovereignty and confers a present right to the land itself. Further, Aboriginal title encompasses the right to exclusive use and occupation of the land; it is a communal right protected by the Canadian Constitution that is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. *Delgamuukw* recognizes that Aboriginal people can choose to what uses the land can be put, including modern uses of the land, as long as these uses are not "irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place" (paragraph 128). The decision specifies that Aboriginal title "encompass[es] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation" (paragraph 122). Another innovative aspect of the decision is that it affirms the legal validity of oral histories and traditional knowledge in establishing past occupancy (Meyers 2000: 15-21).

It should be noted, however, that in *Delgamuukw* recognition of Aboriginal title and rights is not equivalent to recognition of sovereignty as it exists in international law (McKenzie in AFN/MiningWatch Canada 2001: 11), and that the provincial and federal governments have a limited right to infringe on Aboriginal rights that exist on Crown lands.<sup>4</sup> This infringement right is subject to a two-pronged

### Excerpt from Canadian Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal Peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal Peoples of Canada" includes the Indian, Inuit, and Métis Peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

justification test: 1) that it be “in furtherance of a legislative objective that is compelling and substantial” (par. 161) and 2) that it be “consistent with the fiduciary relationship between the Crown and aboriginal Peoples demands...[and] that aboriginal Peoples interests be placed first” (par. 162). With regards to the first prong, Chief Justice Lamer notes compelling and substantial legislative objectives for infringement “can be traced to the reconciliation of the prior occupation of North America by aboriginal Peoples with the assertion of Crown sovereignty” in which Aboriginal Peoples are – as was outlined in the *Gladstone* decision – part of a “broader social, political and economic community” (par 165). He adds

“In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims are the kinds of objectives consistent with this purpose and, in principle, can justify the infringement of aboriginal title” (par 165).

With regards to the second prong, Chief Justice Lamer explains that because of the special nature of Aboriginal title – it encompasses the right to exclusive use and occupation of land, the right to choose to what uses the land can be put, and has an inescapable economic component – infringement can take place only if the community is consulted, and if it is appropriately compensated. Paragraph 168 states “there is always a duty of consultation” in decisions regarding potential infringements of Aboriginal title, and outlines the various levels at which consultation could occur, noting that in some cases there cannot be infringement of Aboriginal rights without the full consent of an Aboriginal nation:

*“...Things are moving largely in the direction of First Nations, and when we are talking about **consultation** it is **probably the most potent weapon that First Nations have to control – pending the confirmation of title – to control development in your territory, that you’re unhappy with what’s taking place notwithstanding your outstanding title claims.**”*

– Jeff Rath, March 1999 (emphasis added)

“There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown’s failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. **The nature and scope of the duty of consultation will vary with the circumstances.** In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. **Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal people whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.**” (par 168, emphasis added).

As in *Sparrow*, the decision also specifies that fair compensation must be paid in the case of infringement and that the amount “will vary with the nature of the particular aboriginal title affected and with the nature of the severity of the infringement and the extent to which aboriginal interests were accommodated” (par 169).

In light of the advances in domestic law and the rhetoric from Canadian leaders about recognition of Aboriginal rights to territory and self-government, it is somewhat surprising that Canada has not ratified the International Labour Organisation’s Convention on “Indigenous and Tribal Peoples Convention, 1989 (ILO Convention #169).<sup>5</sup> Article 14 of the Convention explicitly recognises “the rights of ownership and

possession of the [Aboriginal] Peoples over the lands which they traditionally occupy [sic]...”, including not only lands which they exclusively occupy today, but “in appropriate cases”, all lands to which they have traditionally had access for their subsistence and traditional activities (what constitutes “appropriate cases” is not defined). In addition, the Convention clearly outlines Indigenous rights with regards to consultation. Reasons for Canada’s failure to ratify ILO Convention #169 are not clear.

### *Implications for Aboriginal Peoples and the Mining Industry*

The implications of *Delgamuukw* for Aboriginal Peoples are huge. The Algonquin Nation Secretariat (1999), for example, has argued that Canada’s 1986 Comprehensive Claims policy should be revised in light of *Delgamuukw*, as – among other things – the policy does not recognize the existence of Aboriginal title or Aboriginal ownership of surface and sub-surface resources, and caps potential resource revenue-sharing arrangements.

The decision will also likely lead to the re-opening and re-negotiation of past Treaties in order for Aboriginal groups to negotiate stronger settlement packages. As one First Nations lawyer has noted, a strong interpretation of *Delgamuukw* leads to the conclusion that “we have jurisdiction if we have title; we have management rights over our lands” and this can lead to future economic development that lessens First Nations dependency on the government and increases self-determination (Hanna 1999).

Bruce McKnight, Executive Director of the British Columbia and Yukon Chamber of Mines, speculates that as a result of claims uncertainties and throughout the negotiation processes, mineral investments will likely decrease, but these will likely pick up when Treaty processes are completed as Aboriginal governments “are likely to be more pre-disposed towards mining as a means of economic development, than some of the Provincial or Federal regimes” (McKnight 1998).

Overall, then, the body of court rulings on Aboriginal title means that at minimum, Canadian industry and governments should engage in meaningful consultation with Aboriginal communities who traditionally or presently occupy land upon which mineral development is proposed, in order to minimise downstream conflicts, and in that in many instances, such consultation is a legal obligation.

However, it should be noted that while Crown policy often requires private companies to consult with affected Aboriginal communities, the courts have been inconsistent with regards to whether consultations by private companies can fill the Crown’s obligations. According to Macklem (1999), “The duty [to consult] ought to extend to govern actions by third parties exercising authority delegated to them by state action...However, governments should retain an overseeing role in relation to such an obligation; delegation of the duty should occur only insofar as the government retains supervisory responsibility over fulfilment of the delegated responsibility.” The question of roles and responsibilities is key in current conflicts around – and approaches to – consultation.

### **Impacts**

Much literature has highlighted the potential environmental and socio-economic impacts of mining in Canada (Chart 1 summarizes some of these impacts at each mine development stage). These range from broad treatments, such as MiningWatch Canada’s (2001) detailed community primer entitled “Mining in Remote Areas: Issues and Impacts”, to narrower examinations, such as The Yukon Conservation Society’s (Cleghorn et al. 2001) recent booklet on the issues surrounding women and mining activities in the Yukon. In addition, a number of studies are taking place to examine some of the cumulative effects of mining and other development, such as those under the West Kitikmeot/Slave Study (WKSS).<sup>6</sup>

However, even the broadest treatments of the impacts of mining in Canada note there are specific impacts related particularly to Aboriginal communities. This stems from the strong links Aboriginal communities have historically had with the land. Research has shown that contrary to the widely held

myth that the pre-Columbian landscape of North America was “pristine” or untouched by humans, the relationship of Aboriginal Peoples to natural resources on this continent was overtly managerial (Notzke 1994: 1; Swezey and Heizer 1993:300). Moreover, the relationship to the land that evolved over thousands of years means, as the Royal Commission on Aboriginal Peoples puts it, that:

Land is absolutely fundamental to Aboriginal identity... land is reflected in the language, culture and spiritual values of all Aboriginal Peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect (RCAP (2) 1996).

In light of the importance of land to the cultural identity of Aboriginal communities, the potential socio-economic and environmental impacts of mining are particularly devastating.

Despite this, it is critical to note that many Aboriginal people look to mining as a potential driver of economic development in their communities. In Canada, Aboriginal communities have extremely high rates of unemployment, with fluctuations between 80 and 90%. At the same time, their populations are among the fastest growing and youngest: more than 53% of First Nations members are under 25 years old (AFN 2001a). Consequently, mining developments are often seen as a mixed blessing in these communities: on the one hand they provide opportunities for income generation, but on the other hand they can have impacts that will affect many generations to come.

In order to understand the responses of Aboriginal communities to mining development, it is important to get a sense of some of the major impacts.

### *General*

In general, the socio-economic impacts of mining need be assessed in the context of cultural erosion, weakened social structures, endemic poverty, and other social problems common to Aboriginal Peoples in Canada as a result of colonisation.<sup>7</sup> Environmental impacts will in most cases cause or exacerbate these socio-economic difficulties. If a mine, for example, causes traditional economic opportunities to be displaced by opportunities for wage labour and royalties, this must be evaluated in the broader context of the steady erosion of traditional cultural values and opportunities since European contact.

*“Our Peoples are still being harassed by the Province when we attempt to exercise our treaty right to hunt. As if this wasn’t enough of a problem, we can’t hunt where we used to hunt because there are coal plants, coal mines, gas wells and oil refineries, pulp and paper mills, tar pits, timber roads and waste disposal sites along with polluting fumes over our traditional hunting grounds. There are fewer animals. And those we find are sickly. There are lakes and rivers that no longer have fish or the fish are poisonous.”*

– Confederacy of Treaty Six First Nations, 2000

### *Economic*

Economic impacts of mineral development can be positive and also negative for Aboriginal communities, and can differentially affect community members. Positive impacts include royalties from mineral extraction, wages from employment in the mining operation or in sub-sector industries servicing the mine and its employees, and trust funds established through Impact Benefit Agreements negotiated with the companies. However, these benefits may not be equitably distributed through local communities. As well, communities often have higher expectations regarding the potential economic development and employment than is delivered by resource companies. Negative impacts can include the disruption of pre-existing income-generating activities such as trapping or tourism operations, and non-income generating, yet economically important activities such as subsistence hunting and gathering.

## *Social, Cultural and Spiritual*

### *Culture and Economics*

The culture, economics and spirituality of Aboriginal communities are closely intertwined. Systems for wealth redistribution such as the Potlatch ceremonies of the northwest coast of North America clearly play a combination of roles (Lee 1992). In this sense, serious alterations of local economics, even if they are mostly positive (i.e., result in greater average wealth in the community), can simultaneously cause cultural dislocations.

In general, the destruction of the environment is a serious affront to Aboriginal cultures with a strong sense of responsibility to the natural world (Callicott 1989). This is borne out by the remarkable consistency with which Aboriginal Peoples express a central concern about the environmental impacts of proposed developments. It also serves as an albeit tenuous basis for alliances between Aboriginal groups and environmental Civil Society Organizations (CSOs) in countering resource corporations.<sup>8</sup>

### *Access to the Land*

Impeded access to traditional lands resulting from mineral developments can have a subtle, but important impact on Aboriginal cultures in that it goes to the heart of their identity as Peoples. The displacement of Aboriginal Peoples from their traditional lands is a significant causal factor in a myriad of social problems including alcoholism, suicide and interpersonal violence.

### *Sacred Sites*

Mineral exploration and development is often conducted without regard for the possible existence of sites held to be sacred by Aboriginal Peoples. These may include burial grounds, sites of worship, or areas with special significance in spiritual belief systems. When sacred sites are disrupted or otherwise profaned local people suffer emotionally and spiritually, and are likely to adopt a hostile position toward resource companies. This was a key factor in the enmity between the Innu Nation and Diamond Fields Resources in the “Voisey’s Bay” area.

## *Health*

In addition to health impacts on local populations as a result of contamination of air and water by the mining process, numerous other impacts may result from mining development including: increased rates of alcoholism and sexually-transmitted diseases as a result of in-migration of miners from outside the area; increased levels of family violence due to changes in the socio-economic structure of the community; and decreased access to country foods (e.g., wild meat) as a result of ecological degradation and an increase in conflicting human activities in traditional harvesting areas. These issues are addressed in great detail by the North-Slave Métis Alliance (2000) in their report *Can’t Live Without Work*.

## *Gender*

Whiteman and Blacklock (2000) suggest that the differential impacts of mining operations on women fall under three broad categories: a) health and well-being; b) women’s work/traditional roles; and c) gender inequalities in the economic benefits of mining activities. To these impacts might be added changes in relative political power resulting from both c) and from the practice of companies entering into negotiations with Aboriginal communities through the Indian Act-mandated (and often male-dominated) Band Council structure. Such concerns have led the International Development Research Centre to call for more mining-related research in the areas of employment and impacts on family roles (IDRC 2000a, 2000b).

Prior to European contact, women wielded significant political power in many Aboriginal tribes. For example, in the traditions of the Haudenosaunee (Iroquois) Confederacy, women have special

responsibility for selecting and recalling nominal male “leaders”, and exercise a veto over any decision which they feel is not in the interests of the community (Alfred 1995: 78-79). The colonial imposition of the Indian Act on previously sovereign nations meant in many cases that male-dominated Band Councils usurped the traditional political power of women. Consequently, when Land Claims negotiations take place between the Canadian and provincial governments and Band Councils, the voices of women are often marginalised or excluded. This change in political power is

*“So the reality is that mining affects us all, whether or not we benefit from economic development... We the women, keepers of the hearth and home, must be advisors to our young people, our leaders, and our Chief. We must take an active role in determining the future of the lands and resources we have. Our job is to see to the well-being for the generations to come.”*

– Elder (in Cleghorn et al. 2001)

exacerbated when resource corporations conduct specific negotiations with the Band Council rather than with more broadly constituted community structures, or with traditional forms of Aboriginal government. However, there are a number of cases where Aboriginal women have spearheaded efforts to either prevent mining or at least mitigate its environmental impacts; examples include the Dineh grandmothers (cf., Sovereign Dineh Nation 2000) and the Saskatchewan First Nations Women’s Network which actively opposed uranium mining in the late 1990s.

In addition to impacts on political power, mining can have impacts on women’s productive activities, which frequently involve the caretaking and utilisation of the natural environment. Since mining activities always bring with them impacts on the environment, these impacts may specifically affect women as they attempt to carry out their daily labour. Moreover, women’s role in reproductive (domestic) labour means that mine closures or layoffs may have a disproportionate impact on women as they must continue to run households under unpredictable conditions.

The overwhelming majority of mineworkers and employees of industries serving mines are men. This is the result of a variety of factors, including discriminatory hiring practices; the terms and conditions of employment (which make it difficult for women with child-rearing responsibilities to compete for many positions); and in some cases the simple physical requirements of the job (equipment is typically built with specifications designed for the strength of an above-average male). Therefore, though royalties from mining may be distributed equally through communities, men will still earn the lion’s share of wages from mine labour. Unless financial structures are in place ensuring, for example, that trust funds provide special compensation for women, it is likely that the economic benefits of mining will accrue to men more than to women. Overall, it is important that communities and corporations carefully examine the distribution of economic benefits of mining to minimise inequalities.

### *Cumulative Impacts*

Apart from the various impacts related to single mining operations, there is increasing recognition of the importance of the cumulative environmental and socio-economic effects of multiple mining and/or other developments in one area. There will be an increasing role for intersectoral partnerships and regional planning bodies to address these issues in the future. One promising initiative along these lines is the Cumulative Effects Assessment and Management (CEAM) Framework for the Northwest Territories, which will “provide a systematic and co-ordinated approach to the assessment and management of cumulative effects in the NWT, reflecting the needs of various key players, without prejudice to land claims or existing legislation” (NRTEE 2001: 43).

**Chart 1: A Sampling of Major Potential Environmental and Socio-Economic Impacts  
Per Mine Development Stage**

Stage	Environmental Impacts	Socio-Economic Impacts
<b>Pre-exploration</b>	<i>Not considerable</i>	<i>Not considerable</i>
<b>Exploration</b>	<p>Fragmentation of forest habitat</p> <p>Alteration of stream-flow patterns due to road construction; can lead to fish habitat destruction</p> <p>Pollution of landscape by exploration camps and activities</p> <p>Underground exploration resulting in ore and waste rock deposited on surface leading to sediments, heavy metals and acids polluting local water courses</p> <p>Increased road access for hunting and fishing; greater likelihood of future industrial developments</p> <p>Deforestation and erosion</p> <p>Disruption in wildlife behaviour (e.g., migration) due to use of explosives and other seismic activities, motorized vehicles and trails/roads</p> <p>Cumulative effects if there are stake rushes (e.g., in Northwest Territories, Labrador)</p>	<p>Conflict and distrust between junior explorers and Aboriginal communities if the interests and perspectives of Aboriginal communities are not taken into consideration (e.g., staking claims on trap-lines or in cultural heritage areas)</p> <p>In 'claims-rush' areas, large in-migration leading to: increased alcohol consumption, prostitution, violence against women and general population pressure (e.g., Klondike gold rush in the Yukon)</p>
<b>Pre-operation/ Feasibility</b>		<p>Increased levels of anxiety and/or expectation in the community, particularly if local knowledge is not used in gathering data</p> <p>Changes in wealth distribution due to community members' involvement in data gathering</p> <p>Community conflict due to 'divide and conquer' tactics by companies</p>
<b>Operation</b>	<p>Increased wildlife mortality from vehicles on roads</p> <p>Destruction of habitat due to open-pit mining leading to aesthetic and ecological damage</p> <p>Waste material from shaft mines</p> <p>Water pollution: acid mine drainage (ADM); heavy metal contamination and leaching; chemical pollution (usually from tailing pond leakage and/or breaches); erosion and siltation of streams</p>	<p>Health and Safety impacts on workers and local communities</p> <p>Disruption of local livelihood activities</p> <p>Disruption of family life, increased violence against women, substance abuse, increased pressure on women for family responsibilities</p> <p>Increased conflicts among community members</p>
<b>Closure/ remediation/ reclamation</b>	<p>Continued poisoning of the environment, leading to changes in forest health</p>	<p>Long-term health impacts of local people (e.g., Giant Mine in Yellowknife)</p>

## Aboriginal Peoples' Responses to Proposed Resource Development Projects

Aboriginal responses to resource development proposals in or near their traditional territory can take a wide range of forms, from formal “business-like” negotiations to armed resistance, depending on several factors ranging from recognition of their rights to philosophical differences with regards to mining activities.

At the same time, however, there are a number of common elements that characterise Aboriginal priorities with regard to resource development. When faced with a proposal for resource development, Aboriginal communities:

*“Indigenous Peoples have voiced extreme opposition, including the need to take up arms, in order to resist the mining industry’s violation of their human rights and destruction of traditional lands. Yet too often these extreme perspectives are ‘sanitized-out’ of reports through the use of moderate language. This only lends a false sense of security to the mining industry, it also excludes the full spectrum of analysis ranging from acceptance to violence.”*

– Comment by a participant at a Strategy Session to explore ideas towards a Canadian research project on consultation between Aboriginal Peoples and the mining sector (NSI 2001)

- Show an almost universal concern for the protection of the natural environment, and insist that exploration and development be undertaken in such a way as to minimise the impacts on the non-human world;
- Insist that their Local/Traditional Ecological Knowledge (Lo/TEK) be accorded epistemological status in the development of Environmental Impact Assessments and the design of mitigation and remediation measures;
- Demand a share in the financial benefits of resource developments on their traditional territories, especially where these developments may damage traditional economies such as trapping or hunting, and that they be compensated for such damage;
- Where a land claim is outstanding, have a strong preference to resolve the claim, or at a minimum to have signed Impact Benefit Agreements, before any development goes ahead.

Specific forms of community response are described below.

### *Aboriginal and Multi-Party Protocols/Guidelines*

Although protocols and guidelines do not have the force of law, companies will find it in their best interests to abide by guidelines established by the local Aboriginal communities. To ignore them would be to invite resentment, diverse forms of protest and direct action, legal action, sabotage of facilities and equipment, or in extreme cases, armed resistance.

In response to mineral exploration and development in Labrador (of which Voisey’s Bay is the most notorious), the Innu Nation has developed a set of Guidelines entitled *Mineral Exploration in Nitassinan: A Matter of Respect: Innu Nation Guidelines for the Mining Industry* outlining in detail their concerns about environmental and cultural impacts, and the steps that should be taken by companies interested in exploration on Innu territory. Similarly, the Inuit of Nunavik have published, through their Nunavik Mineral Exploration Fund Inc., a *Handbook for Mineral Exploration Companies Operating in Nunavik, Quebec*, primarily a list of contacts for permits required by mining companies operating in Inuit lands.

One promising initiative currently underway is the “Babine Protocol”, created by a number of British Columbia First Nations, First Nations Organisations and mineral-sector companies. The goal of the protocol is “to build long-term relationships based on, [sic] mutual trust, respect and understanding with regards to rights, culture, values and traditions” (Babine Protocol 2000). The agreement “sets out principles for the co-operative development of mineral properties within the First nations’ traditional

territories” in the hopes of generating “greater certainty and investment climate in B.C. while increasing the flow of socio-economic benefits to First Nations” (Babine Protocol 2000). The document attempts to clarify title issues and obtain mineral sector companies’ recognition of Aboriginal title. Especially important is Appendix 1, which advises the B.C. Government, among other things, to require that the Mining Recorder notify all Free Miners whenever their mineral claims fall within Aboriginal traditional territories. According to one industry representative (Stevenson, pers.comm, 2001), the province is somewhat “panicked” about the protocol as it recognizes Aboriginal title and rights; while implementation of the protocol is stalled on account of this government stance, community meetings between industry and First Nations are ongoing, and industry “will have to get ahead of the government on this one.”

Protocols and guidelines are a positive step in creating common understanding between the mineral sector and Aboriginal communities, and it is expected that increasing numbers of such mechanisms will be created. However, they do not always define what constitutes “meaningful consultation” nor provide a detailed process for consultation and participation. One notable exception is the consultation policy developed by the Kitkatla First Nation of B.C. This policy is targeted to federal and provincial government departments, and states, among other things, what *consultation is not*.

- (a) Access to the council and elders will be guaranteed one day per month, but will be limited to that. When there are several items on the agenda, they will be scheduled to fit the one day format.
- (b) There will be no consultations by telephone.
- (c) There will be no consultation with parties other than the Crown.
- (d) All requests for consultation and supporting documents will be sent to the band’s lawyers in the first instance (cited in Woodward and Janes 1999).

Woodward and Janes (1999) argue that being proactive and creating these types of consultation guidelines is one means for First Nations to have more control over consultation processes.

### *Resource-Development Committees*

The Tahltan of British Columbia, the Inuit of Nunavik and the Innu at Voisey’s Bay are among some of the Aboriginal groups that have established Resource Development Committees or corporations. These committees or corporations facilitate a univocal response to resource development proposals, provide a vehicle for the development of guidelines and protocols, and the development of expertise needed to negotiate favourable Impact Benefit Agreements (IBAs). They provide a convenient entry point into communities for companies wishing to embark on a consultation process or solicit other forms of community participation.

### *Aboriginal-led Dialogue with Industry*

The Canadian Aboriginal Minerals Association (CAMA) is a private, not-for profit organization founded in 1992 that “seeks to promote an understanding of the mineral industry among Aboriginal groups, and works with industry to help them understand community issues” (<http://www.aboriginalminerals.com>). CAMA promotes dialogue between Aboriginal groups and mining companies, and holds annual conferences to further this end. It works both domestically and internationally to serve the needs of Aboriginal groups and resource companies. With more than 200 members, the Association is headed by Aboriginal directors and is an important voice for Aboriginal perspectives on mining in Canada. CAMA intends to do future work on applying international lessons to the Canadian mining scene and to study mining company participation in Aboriginal communities. The organisation has the potential to play a key role in developing a comprehensive set of guidelines for consultation between Aboriginal communities and the mining industry.

The Economic Renewal Secretariat (ERS) in Toronto is another Aboriginal-led organization that has actively examined the potential for partnerships among mining companies and Aboriginal communities. Through conferences and workshops (c.f., ERS 2000, ERS 2001), the ERS has proactively brought Aboriginal community representatives, mining executives and government policymakers together to discuss the challenges and opportunities of “partnership” in the mining sector.

### *Co-Management*

Co-management has been defined as “institutional arrangements whereby governments and Aboriginal (and sometimes other parties) enter into formal agreements specifying their respective rights, powers and obligations with reference to the management and allocation of resources in a particular area” (RCAP 2, 1996). These types of arrangements are negotiated particularly under comprehensive land claims agreements and involve the establishment of management committees, usually with 50/50 representation of government and Aboriginal participants. Several land claims agreements include co-management bodies to review potential mining and other developments within land claim areas. Examples include the Environmental Impact Screening Committee and the Environmental Impact Review Board for the Inuvialuit Settlement Region. The Mackenzie Valley Environmental Impact Review Board includes membership of various First Nations, and conducts assessments of developments in the Northwest Territories except for those in the Inuvialuit Settlement Region and Wood Buffalo National Park (c.f., <http://www.mveirb.nt.ca>). Co-management boards provide important vehicles for ongoing consultation and participation in decision-making affecting ancestral lands, and allow a more regional focus that could enable better consideration of cumulative effects.

### *Impact Benefit Agreements*

In Canada, corporate-Aboriginal relations are structured by federal and provincial legislation, community protocols and guidelines and by industry and company guidelines. The most common formal agreements begin as non-binding Memoranda of Understanding which are then later negotiated into full-fledged and legally binding Impact-Benefit Agreements. These IBAs vary from project to project, depending on local needs. Sometimes they are negotiated directly between a company and local communities; sometimes they involve governments. Companies often enter into these agreements voluntarily, though in Alberta, Saskatchewan and Manitoba – and in most areas under comprehensive land claims agreements – IBAs are a requisite part of the permitting process (MAC 1998).

In general, an IBA spells out the projected negative impacts of a mine project, and steps that will be taken to either a) mitigate these impacts, or b), compensate local people for losses they will sustain as a result of impacts which can not be mitigated. IBAs also detail the benefits a project will bring to a local community, and can include guarantees regarding levels of local

*“The legal requirements for benefits agreements [in the Northwest Territories] show that some steps have been taken to try to improve upon the past, but grave deficiencies remain: There is no statutory requirement for local benefits from hard-rock mining projects...benefit requirements vary from land claim to land claim in a way that is difficult to justify; law (on the fiduciary duty of the Crown) that might offer some protection to Aboriginal people living in areas where a claim has not yet been settled is vague and poorly understood and leaves them more vulnerable than those in an area where a claim has been finalized....*

*This list of deficiencies raises questions about the development of this body of law: Is this piecemeal approach yielding satisfactory results? Do the bilateral agreements between local people and industry produce fair arrangements that ensure appropriate benefits for local people? What is the proper role for government in this process? If bilateral agreements are to remain the primary tool for assurance of local benefits, should they be negotiated within a legislated framework that applies across the NWT and to all developments of consequence?”*

— Janet Keeping, 1998

employment, royalty revenues, trust funds, training programs, scholarship programs, sub-contracting opportunities, etc. As Janet Keeping notes in the quote above, there are deficiencies with regards to the legal framework for IBAs, and issues have also arisen with regards to the lack of implementation.<sup>9</sup> In addition, it has been hard for communities to learn from each other's negotiation tactics and experiences due to the lack of a clearinghouse for this type of information and the confidentiality provisions in most agreements.

### *Joint Ventures and Aboriginal-Owned Mines*

Several Aboriginal groups are engaging in joint ventures with companies and negotiating a range of benefits from Aboriginal employment to royalty sharing. One example is Deton'cho Diamonds Inc. (DDI), in which an Aboriginal group has teamed up with a group of private investors to manufacture rough diamonds in the Northwest Territories. The Aboriginal partners are the majority shareholders. Operations began in spring of 2000, and further plans include manufacturing polished diamonds. Of 22 trainees employed by the factory, 16 are Aboriginal (Working Group on Aboriginal Participation in the Economy 2001). There is also a handful of Aboriginal-owned prospecting companies and mines in Canada. Further study might be devoted to a comparative analysis of the levels and methods of consultation employed by Aboriginal owned companies to determine if Aboriginal ownership ensures more meaningful consultation or participation.

### *Discursive Resistance*

Discursive resistance can include media or other public relations campaigns against companies who are infringing on Aboriginal rights as a means to create public awareness and force companies to the negotiating table. The enormous damage done to Daishowa Corporation by a Friends of the Lubicon-sponsored boycott over (de)forestry in Lubicon territory is a recent example, as is the aggressive public relations campaign by the Innu at Voisey's Bay.

### *Legal Resistance*

Legal resistance takes the form of court challenges to mineral-related development. Examples include the Mi'kmaq challenge of Little Narrows Gypsum Company's plans to dredge the Middle Shoals of Cape Breton (Federal Court of Canada Trial Division 1996), and the Innu Nation's challenge of the approval of the Voisey's Bay nickel mine (Innu Nation 1999). Even where a group of Aboriginal people does not have Band status, as in the case of the Smallboy Camp in Alberta, legal challenges are possible. In this case, the group plans to sue the federal government for \$50 million if it allows Cardinal River Coals Ltd. to open the Cheviot Mine in the Rocky Mountain foothills east of Jasper National Park (Canadian Press 1997). Legal resistance has often been the only – or at least the most effective – means of ensuring that meaningful consultation with affected communities occurs.

### *Strong Resistance*

“Strong resistance” refers to desperate attempts by Aboriginal Peoples to protect their land and interests after all other means appear to have failed. This resistance can take the form of sabotage of corporate assets in resource-

“...during the copper boom of the 1840s on Lake Superior, an Ojibwa and Métis war party occupied one of the mines to protest the fact that the provincial government had authorized mining development before making a treaty with them. In this century, Aboriginal communities have gone to court or used direct action -- blockades, boycotts and adverse publicity -- to gain the attention of government....Legal processes and direct action can also delay projects, leading to accusations that Aboriginal people are obstructionist, that they are harming the country's economic interests. **But if Aboriginal people feel they have no alternative to equalize their bargaining power with the government, the choice between doing nothing and direct action is an easy one.**”

– Royal Commission on Aboriginal People, Restructuring the Relationship (Volume 2), emphasis added

exploitation sites, sabotage of roads, or, as in the case of the Kahnsetake Mohawks near Oka, armed resistance which in that case led to the shooting death of a Québec police officer. When faced with a granite super-quarry proposal on a sacred site, the Mi'kmaq Nation mobilised the Mi'kmaq Warriors Society, whose threats of armed action played a role in the eventual abandonment of the proposal (see case study below). Recently, Canadian Aboriginal leaders speaking at the United Nations Working Group on Indigenous Peoples warned that unless Aboriginal people are dealt with in a just and equitable manner, there is the likelihood that "Oka-style" armed confrontations will become more frequent (Ha 2000).

### *International Fora*

Canadian Aboriginal Peoples have often used international fora as a means to advance rights issues. Both the Grand Council of the Cree and the Inuit Circumpolar Conference enjoy special status as non-state members of the United Nations which has allowed the Cree and Inuit of Canada to advance Aboriginal rights issues on the international agenda, and to strengthen their positions with regard to Canadian governments and the corporate community.

## **Section 2: Sectoral Responses**

### **Government, Industry and Civil Society Organizations**

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#### **Introduction: Sectoral Responses**

Government, industry and civil society organizations have responded to issues at the crossroads of Aboriginal Peoples and mining in a variety of ways. This section identifies some of the major players, reviewing major federal and provincial environmental and mining policy and regulatory responses, innovations in industry, and civil society contributions. It culminates with a discussion of multistakeholder initiatives that have taken place to further dialogue on these issues.

#### **Government Agencies, Policies and Responses**

##### *Federal Agencies*

Due to the division of powers under the Constitution Act of 1867 (the British North America Act) and the Canadian Constitution Act of 1982, which grant provinces near-exclusive power over natural resources, there is only a very weak regulatory framework over mining at the federal level. This said, there are several federal departments mandated to develop policies which affect mining activities to various degrees.

Natural Resources Canada (NRC) (<http://www.nrcan.gc.ca>) plays an advocacy role in promoting mining in Canada and improving opportunities for exports of minerals and other mining products. One of the department's key activities is its maintenance of a comprehensive database of Canada's lands and natural resources, including mapping of mineral deposits on or near Aboriginal communities (c.f., <http://mmsd1.mms.nrcan.gc.ca/maps>).

Environment Canada (EC) (<http://www.ec.gc.ca>) is responsible for the administration of the 1992 Canadian Environmental Assessment Act (CEAA), which includes provisions for assessing the impact of developments on Aboriginal traditional lands.

Indian and Northern Affairs Canada (INAC) (<http://www.inac.gc.ca>) administers the Indian Act<sup>10</sup>, and has responsibility to act on behalf of or in co-operation with Indian Bands wishing to sell mineral rights on Reserve Lands in accordance with the Indian Mining Regulations (discussed in the next section).

In theory, INAC should also act in an advocacy role to ensure that Aboriginal interests are upheld by other government agencies in their dealings with Aboriginal communities and mining developments. In practice, however, Aboriginal groups have expressed concern that the Department is increasingly stepping back from its fiduciary obligations and encouraging (frequently disempowered) Aboriginal communities to negotiate directly with (usually powerful) resource corporations.

### *Federal Policies and Legislation*

The Natural Resources Canada (NRCan) Minerals and Metals Sector (MMS) has developed the *Minerals and Metals Policy of the Government of Canada: Partnerships for Sustainable Development*, as the central statement of Canadian government mineral policy (NRCan MMS 1996). The *Minerals and Metals Policy* contains language about the principles of sustainable development, affirms the support of the federal government for the “timely” resolution of land claims to increase certainty of tenure for the mineral industry, and encourages direct collaboration between Aboriginal communities and the mineral industry, partly through mechanisms such as the Aboriginal Participation in Mining Subcommittee of the Intergovernmental Working Group on the Mineral Industry (IGWG) (discussed below under multistakeholder initiatives). In addition, NRCan has started gathering information to “catalogue...social practices in the mining industry to highlight the industry’s significant social contribution to northern and remote communities, and to Aboriginal Peoples” (MAC 2001b).

*“In Canada, it is our aspiration to be known as the world’s smartest mining nation – the most high-tech, the most environmentally friendly, the most socially responsible, the most productive and competitive – a living model of successful sustainable development.”*

– Hon. Ralph Goodale, World Mines Ministries Forum, March 10, 2000

The *Indian Mining Regulations* govern any mineral activity on Indian Reserve lands, most notably requiring that an Aboriginal Band first surrender its sub-surface mineral rights before any mining activity can commence. Ker (1996) notes that Bands have “little or no ability to attach conditions to leasing, permitting, rentals, royalties or other terms of agreements concerning mineral dispositions.” Notzke (1994) echoes his point, arguing that the only effective control that Bands can exercise under the *Indian Mining Regulations* is by refusing to surrender the minerals in the first place, and “thereby vetoing development.”

One of the most important mechanisms for affected communities to voice their concerns and attempt to influence project outcomes is through environmental impact assessments (EIAs). In Canada, EIA legislation is enacted at the federal, provincial and territorial levels. Harmonization agreements are increasingly being signed between federal and provincial governments in order to avoid duplication and streamline EA processes.

Spurred by public concerns and international trends, federal environmental assessment processes started in the 1970s with the 1973 Environmental Assessment and Review Process (EARP). While this process was clarified through the 1984 Guidelines Order, it was not until 1995 that environmental assessment received legislative backing when the *Canadian Environmental Assessment Act* (CEAA) came into force. Thomas Meredith (1995) identifies the critical CEAA regulations as:

- a) the inclusion list of projects and activities that require environmental screening;
- b) the exclusion list of a category of projects known to have acceptable environmental impacts and which do not require individual assessment;
- c) the list of federal laws, regulations, licenses and permits that could serve as triggers for an assessment, and
- d) the comprehensive study list of projects for which an assessment is mandatory under any circumstances.

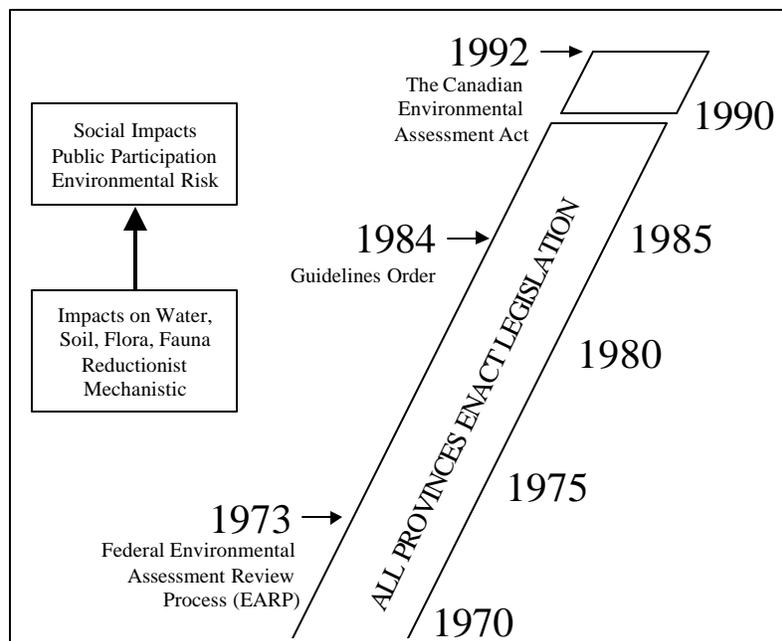
Generally, the Act may be triggered by any project or activity in Canada involving federal government money, taking place on federally-owned lands, or involving a federal license or permit. The Act requires that in many cases (subject to Ministerial decision) an EIA must be conducted; and if the impacts are deemed to be unacceptable, the project not go ahead (in practice this is exceedingly rare). More commonly, the report of the EIA panel or mediator requires that certain mitigation measures be implemented prior to project commencement, and that post-project remediation (e.g., restoration of environmental values damaged by the project) take place. Section 10 (1) of the Act requires Band Councils to ensure that EIAs be conducted for any projects involving federal money and taking place on Reserve land.

The Act does not restrict assessment to purely “natural” factors, but rather states that “environmental effect” means

(a) any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by Aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance... (Parliament of Canada 1992: 2(1))

Given the adjacency of many mining operations to Reserve lands, EIAs are frequently triggered by mining projects, particularly because Section 2(1) states that Aboriginal Bands must be intimately involved in the review process. However, because exploration activities are licensed by provincial governments, they do not trigger an EIA under the CEAA.

### History of EI



(Source: Sadar 1994)

Public participation is one of the cornerstones of the legislation. However, the level of public input and consultation varies depending on what type of environmental assessment process is triggered. There are three main types:

- *Screenings*: Screenings are triggered for small projects that the responsible authorities (RAs) feel will not have major environmental impacts. Public notice and participation is at the discretion of the RA, and the process is not monitored or administered by the Canadian Environmental Assessment Agency (CEAAgency).
- *Comprehensive Studies*: Comprehensive Studies take place for complex projects likely to have public concern (triggers are listed in the Act), and have a formalized process for public consultation and notice administered by the CEAAgency. Public comments are included in the final report. Approximately 99% of all federal EAs since 1995 have been screenings or comprehensive studies (Earl and Bainbridge 1998).
- *Panel Reviews*: Panel Reviews take place for large projects that will have a range of significant environmental effects of public concern. According to Sinclair and Diduck (2001), “panel reviews are not...the preferred decision-making path for assessment in Canada, with certainly no more than 5% of cases going to panels nationally”. An independent panel of people is appointed to instruct the proponent on how to investigate and report environmental effects, and how to consult and inform the public. The Panel develops operating guidelines and administers funding for intervenors. The public is invited to comment at various points throughout the process, and at the Panel’s hearings on the proponents EIA. If the recommendation is that the project proceeds, RAs must consider the need for a follow-up program.

Chambers and Winfield (2000) note that a large gap under the CEAA is the lack of formal mechanisms for ensuring monitoring and enforcement of mitigation requirements if a project goes ahead. The consideration of a follow-up program is left largely up to the discretion of the RA, and the role of monitoring and enforcement has fallen largely on the shoulders of the public. They quote a 1998 Report by the federal Commissioner for Environment and Sustainable Development that found “information regarding the proponent’s actual implementation of the prescribed mitigation measures is seriously lacking” (Chambers and Winfield 2000).

### *Indigenous and Other Critiques of EA legislation*

The bar for the scope of EA and Indigenous involvement in decision-making was set very high with Canada’s first EA process, the 1974 Berger Inquiry into the environmental, economic and social impact of the proposed Mackenzie Valley gas pipeline (Usher 1982). This Inquiry took place over three years, at a cost of \$5 million. There were both formal and informal hearings, adapted to the culture of the people involved, with community hearings taking place in all 35 communities in the Mackenzie Valley and the Western Arctic (Berger 1997). The Inquiry is hailed as a model for EIA in that it examined the linkages between socio-economic and environmental impacts from a regional perspective, and incorporated Indigenous concerns into decision-

“When you are consulting local people, the consultation should not be perfunctory. But when you have such a vast area, when you have people of four races, speaking seven languages, how do you enable them to participate? How do you keep them informed? We wished to create an Inquiry without walls. And we sought, therefore, to use technology to make the Inquiry truly public, to extend the walls of the hearing room to encompass the entire North. We tried to bring the Inquiry to the people. This meant that it was the Inquiry, and the representatives of the media accompanying it – not the people of the North – that were obliged to travel.”

– Chief Justice Thomas Berger, 1977

making: the Inquiry resulted in the first “no-go” decision for a large-scale project in Canadian history. Chief Justice Thomas Berger’s description of the process and the learning involved is excellent reading for anyone interested in appropriate consultation mechanisms with Indigenous Peoples.<sup>11</sup>

Since the Berger Inquiry, critics have noted there has been a demise in the quality of EA (e.g., Nikiforuk 1997).<sup>12</sup> In the 5-year review of the CEAA over 20 Aboriginal groups submitted comments to help strengthen the Act. The contribution by the Assembly of First Nations (AFN) is indicative of the types of comments submitted by other Aboriginal groups. The AFN noted, among other things, that the Act:

- Is based on non-Aboriginal worldviews and does not take into consideration First Nations' own environmental assessment processes.
- Does not ensure that First Nations are adequately involved in all aspects of environmental assessments where their rights and interests may be adversely affected by proposed developments.
- Does not recognize the jurisdiction of First Nations.
- Does not require the use of traditional knowledge in decision-making.
- Does not align with recent court decisions with regards to consultation. "The Act needs to be reworded to provide clear direction on who is responsible for consultation and how consultation with First Nations should occur."
- Except for Panel reviews, does not require the proponent or government to provide funding for First Nations research., which has an impact on their ability to participate meaningfully.
- Does not include ongoing and formal monitoring.

The executive summary of the AFN Issues Paper closes with the statement that "inadequate communication and lack of understanding of First Nations rights and interests results in First Nations not being consulted early enough, if at all, in decisions about the type of environmental assessment undertaken, and the degree of consultation/participation warranted" (AFN 2001b).

Other Aboriginal critiques highlight the importance of addressing:

- The power imbalance between the corporate and government sectors on the one hand, and Aboriginal communities on the other, with regards to capacity to meaningfully participate. According to the Confederacy of Treaty Six First Nations (2001), "It is a serious problem for us that the capacity of the Province and large corporations is so excessive and yet the projects they are responsible for may not have to comply with the CEA Act. Yet we do not have the capacity to properly protect our land on reserve, let alone protect our traditional territory."
- Gender impacts. The Tongamiut Inuit Annait Ad Hoc Committee on Aboriginal Mining in Labrador (TIA) (1997) has argued that the consultants hired to write an Environmental Impact Statement on the proposed Voisey's Bay nickel development had not conducted any

**Recommendations by  
The Tongamiut Inuit Annait Ad Hoc Committee  
on  
Aboriginal Mining in Labrador  
for Improving Assessment of  
Gender Impacts in EIA:**

- 1) *Use methodologies which are sensitive to Aboriginal women, including but not limited to the fact that Aboriginal women are often less proficient in the second language (English) than men, and which are respectful of their world view and traditional ecological knowledge;*
- 2) *Use methodologies that examine the gendered causes of socio-economic impacts and their effects on social change;*
- 3) *Consult the growing literature on feminist research theory and methodologies in order to include women's perspectives and needs in the EIS; and use gender-sensitive methodologies, including but not limited to, the use of gender-sensitive questionnaires and other tools, gender sensitive interviewing especially to research sensitive issues such as violence, women's health and sexuality (i.e. using local women researchers and creating safe forums for discussion of these issues).*

**Source:** The Tongamiut Inuit Annait Ad Hoc Committee on Aboriginal Mining in Labrador, 1997

original research on women or the impacts on women of the project in the first two years of their work.

The TIA underscore that more gender-sensitive and gender-specific research is needed into dozens of areas, including consultation and information needs, mitigation and monitoring. An excellent source on the gendered impacts of the Voisey's Bay nickel project on Inuit women has been published by Status of Women Canada. The report (Archibald and Crnkovich 1999) identifies structural barriers to participation faced by Inuit women in the Comprehensive Claims Process and the Environmental Assessment, and concludes that there is considerable work required by the federal government in addressing the issue of gender equality in these areas.

- Internal conflicts and division of First Nations members at the prospect of a potential project. According to the Tahltan Joint Councils, for example, "for many FN communities confronted with a project and a proponent, not to mention government consultation demands, any division of First Nations members or community conflict must be avoided. Several project reviews under EA with which I have been involved have created some level of community conflict and dissension [sic] ... not to mention conflict between First Nations whose territorial overlaps have created competition for economic benefits versus environmental impact(s) and risk, i.e., the Huckleberry Mine Project" (Tahltan Joint Councils 2000).

It should also be noted that in spite of these critiques, there have been some innovations in recent EIA policy and processes. Regardless of the various shortcomings of the BHP assessment of the Ekati diamond mine in the Northwest Territories, for example, one interesting outcome is that it established an independent monitoring agency. In addition, there have been attempts to incorporate traditional knowledge into decision-making, although this resulted in some heated exchanges in 1997 in the journal *Policy Options*, and the extent to which traditional knowledge has been successfully used is debatable.

### *Provincial and Territorial Legislation and Policies*

Legislation varies between provinces and territories. In general, as previously noted, provinces hold constitutional authority over resources, and are therefore responsible for registering claims and establishing regulations over all aspects of the mining process. Territories fall under federal authority. Of all the provinces and territories, only Prince Edward Island lacks any significant exploration or mining activities (Chambers and Winfield 2000).<sup>13</sup> For a comprehensive examination of the differences in mining regulations and legislation across Canada, see The Canadian Institute for Environmental Law and Policy's extensive review, *Mining's Many faces: Environmental Mining Law and Policy in Canada* (Chambers and Winfield 2000).

### *Public participation*

Environmental Impact Assessment legislation, regulation and policies at the provincial level differ particularly with regards to public participation requirements. In a recent study examining the extent to which EA processes facilitate mutual learning by EA participants, Sinclair and Diduck (2001) assessed processes in 11 jurisdictions (including Canada) through document reviews and interviews. The authors found that while all jurisdictions considered public involvement a central concern, it is a cornerstone of EIA legislation in Manitoba and British Columbia. Only British Columbia, Manitoba and Ontario provide participant funding, with mixed reviews on implementation.

A document review of each of the jurisdictions' web-sites revealed that while all sites referred to public involvement as part of the EA process, only 4 offered detailed information on how members of the public can become involved in the process, and only 3 provided comments that had been submitted. The study showed there is no consistent way of providing notice of public hearings. In addition,

“the data indicated a high degree of proponent control of public involvement programs. In all but one jurisdiction the proponent had largely unfettered authority over how public involvement proceeds, outside of a hearing situation. That is, the proponent was in the drivers’ seat in terms of how the public is consulted and how the information is obtained and assessed and utilized” (Sinclair and Diduck 2001).

This creates a conflict of interest situation in that the proponent controls the input of publics who might be quite critical of the project. Finally, the authors point out that consultation is not required until well on in the planning process –which questions its meaningfulness – and feedback to participating publics is lacking. They cite one EA manager who said: “one concern we hear is that once the public participates and provides their input it is put into a black box.” Continuous information exchange mechanisms such as community advisory committees are rarely used, and instead ‘passive’ information dissemination techniques are favoured.

### *Consultation Guidelines specifically tailored for Aboriginal Peoples at the Federal, Provincial and Territorial levels*

With regards to consultation guidelines specifically targeting Aboriginal Peoples, at the federal level Environment Canada is currently developing consultation guidelines specific to First Nations, and INAC provides some funds to communities for consultation and technical assessment of EIAs.

At the provincial level, several jurisdictions (e.g., Nova Scotia) have policies that refer to encouraging closer ties between the Minerals industry and Aboriginal Peoples through forging better relations across the sectors (cf., Nova Scotia Department of Natural Resources 1996). Manitoba recently held a multistakeholder process involving Aboriginal nations, the mining industry, government and community groups which aimed to strengthen links and facilitate relationships between northern communities and the minerals industry. This process resulted in the provincial government releasing in March 2000, *The Manitoba Minerals Guideline: Building Better Relationships and Creating Opportunities – Guiding Principles for Success between the First Nations, Métis Nation, Northern Community Councils, the Minerals Industry and the Province of Manitoba*. One of the Guideline’s objectives is open consultation: “The parties will work together to establish appropriate forums which encourage and provide opportunity for consultation and meaningful participation in decision-making processes. The parties will endeavour to ensure due process, notification and appropriate and timely participation in the matters of government and corporate policy and program development and decision-making” (objective 3.0).

The British Columbia Ministry of Energy and Mines has published a set of consultation guidelines, which are available on-line at <http://www.em.gov.bc.ca/Aboraffa/Consultation%20Guidelines/Consultation.htm>. The document is complex and lengthy, but it is worth noting the conflicting and slightly antagonistic nature of the B.C. government’s attitude toward Aboriginal rights and the duty to consult, exemplified by the following consecutive passages from the Guidelines:

Consultation is a two way process. If a First Nation does not avail itself of the opportunity to consult, it cannot complain later that consultation did not occur. Conversely, lack of participation by FN does not provide the Mines Branch with the legal justification to infringe Aboriginal rights or title.

In general, the guidelines are disproportionately devoted to explicating the ways in which the moral duty to consult may be legally circumvented, and in emphasising interpretations of legal decisions that downplay Aboriginal rights and title. The guidelines do not include any recommendation that private companies voluntarily consult with Aboriginal communities. In fact, they state that

...the statute does not require consultation between the locator of a claim and recording staff prior to the staking of the tenure. As a result, it is not possible to have consultations with First Nations prior to the location of a specific mineral or placer claim in a Statement of Intent area or in a traditional use area under the current system of claim staking and recording.

It is something of an understatement to suggest that this attitude has probably done little to create an atmosphere of trust and co-operation between the mineral industry and Aboriginal groups in the province.

In Ontario, an atmosphere of deep suspicion and mistrust between the government and Aboriginal groups in Ontario has prevailed since the assassination of Dudley George, an unarmed Chippewa leader, by an Ontario Provincial Police sniper during a protest at Ipperwash in 1995. This atmosphere is darkened by the slow pace of land claim negotiations (Ontario Native Affairs Secretariat 2000), while the pace of resource exploration and exploitation has increased dramatically in the past two years.

Aboriginal policy in Ontario is administered by the Ontario Native Affairs Secretariat, and mining policy by the Ontario Ministry of Northern Development and Mines. In April 1999, the Ontario government launched a two-year, \$19 million "Operation Treasure Hunt", a geo-science and surveying program designed to identify potential mineral-bearing rocks. The Operation Treasure Hunt web-page contains a commitment that the Ministry "will work closely with Aboriginal communities who want to pursue new economic development opportunities revealed by Operation Treasure Hunt." However, this commitment is narrow in that it focuses solely on communities who wish to participate in mining activities, rather than those who may be negatively impacted by mining. The Ontario Ministry has not clearly provide participation mechanisms for all Aboriginal communities, including those who have a concern about potential mining development identified by Operation Treasure Hunt. Such 'divide and conquer' tactics subvert the essence of meaningful consultation and engagement.

Another program, "Ontario's Living Legacy" (originally "Lands for Life") has created a regime where mineral development may now take place in "protected" areas including provincial parks. The "Ontario's Living Legacy" has been opposed by the Nishnawbe Aski Nation (NAN), which represents all Aboriginal nations included in the James Bay Treaty Number 9 and forms an umbrella organisation mandated to guard and advance Aboriginal and Treaty rights. In November 1998, NAN launched a procedural motion to stop the Lands for Life process, and have continued to oppose its subsequent incarnation. Specific concerns revolve around lack of participation by Aboriginal Peoples and disrespect conveyed to NAN in the planning process. The case study in Cleghorn (1999) examines these concerns in detail.

The Ontario government has also recently established a Resource Management Council comprised of Ministry of Natural Resources staff and the Union of Ontario Indians. One of the future tasks for this group will be to gather information on consultation practices in order to develop a process for use in the natural resources sector.

The Ontario Ministry of Northern Development and Mines will, when requested to do so by a First Nation, negotiate mining agreements to waive Ontario's entitlement to 50 per cent of mineral revenues earned on Reserve Lands, and will encourage companies to negotiate Impact Benefit Agreements with local Aboriginal communities (cf., [http://www.Aboriginalbusiness.on.ca/PS/ps\\_body.asp](http://www.Aboriginalbusiness.on.ca/PS/ps_body.asp)). The intention of this program seems to be to encourage increased participation of Aboriginal communities within mining activities rather than increased consultation on potential positive and negative impacts of proposed mines.

The only legislative reference to consultation with Aboriginal Peoples is found in Ontario Regulation 240/00 made under the Mining Act, April 19, 2000. Schedule 2, Item 14 requires companies to submit to the government, as part of their mine closure plans, details of consultation with Aboriginal groups and the

response of these groups to said closure plans. Meeting this requirement is necessary for a company to receive permission to open a mine.

In other areas, such as Alberta (Rand Smith, pers. comm, 2000) and New Brunswick (Ron Shaw, pers. comm, 2000) there are no special policies or requirements for consultations with Aboriginal communities other than those mandated under provincial EA legislation. Under New Brunswick EA legislation, any case where claims are staked in areas “used and enjoyed” by other individuals, those individuals must be notified of the staking and agreement must be reached to accommodate potentially conflicting needs.

The Government of Saskatchewan is the only provincial government to have enacted legislation on Aboriginal participation in mining, and to have set up mechanisms for ongoing participation in decision-making. This was the outcome of recommendations from a Joint federal/Provincial Review Panel on uranium developments in Northern Saskatchewan (1991-1993). Saskatchewan established three regionally based Environmental Quality Committees (EQCs) including representation by the communities affected by uranium mining. The design of the committee structures was based on input from consultations. In order to ensure these committees had access to accurate and credible information upon which to base their recommendations, the Saskatchewan government created the Northern Mines Monitoring Secretariat (NMMS), headed by Cree lawyer, Hon. Keith Goulet and housed by Saskatchewan Northern Affairs. This Secretariat is responsible for “gathering data and reports resulting from environmental, worker health and safety of socio-economic monitoring initiatives, as well as disseminating such information to the EQCs and the impact communities” (Office of Northern Affairs, Government of Saskatchewan n.d.). The EQCs were established via a separate Lieutenant Governor Orders-in-Council under authority of The Northern Affairs Act. They were highlighted by the IGWG as examples of best practice for increasing Aboriginal participation in mining. However, while such ongoing consultation mechanisms are to be applauded, there are still issues with regards to power balancing and effectiveness of Aboriginal participation. With regards to local and regional benefits, Saskatchewan requires mining companies to enter into Surface Lease Agreements and Human Resource Development Agreements. It has also established a Multi-Party Training Plan to support northern Saskatchewan people interested in mining-related opportunities (O’Reilly and Eacott 1999/2000).

Finally, Territorial Governments do not have jurisdiction over subsurface minerals, responsibility for which is constitutionally vested with the federal government. However, according to Gordon MacKay (pers. comm., 2000) Director of Minerals, Oil & Gas in the Nunavut Department of Sustainable Development, although Indian and Northern Affairs Canada owns and administers the land and resources in Nunavut and requires proponents to consult with communities, the Nunavut Land Claim Agreement requires anyone developing a mine to enter into an impact and benefits agreement with the Regional Inuit Association.

The Mackenzie Valley Land and Water Board (MVLWB) is a co-management board established in the Northwest Territories by the Mackenzie Valley Resource Management Act (Bill C-6) of 1997-98. This Act implements obligations under land claims agreements between the Crown and the Gwich’in and the Sahtu Dene and Métis, respectively. Notably, consultation with affected First Nations is required for any project in the valley. The MVLWB guidelines on consultations are included as Appendix 1. As noted in Section 1, several comprehensive land claims agreements in the territories include their own co-management boards for environmental assessment screening and planning.

One issue that has been vigorously debated among various sectors interested in Canada’s North, is Canada’s “free entry” system. Enshrined in the *Canada Mining Regulations*, this system “establishes procedures whereby prospectors can enter most lands containing Crown-owned minerals, acquire mineral rights by staking claims, gain exclusive rights to carry out further exploration and development within the area covered by the claims, and eventually obtain mining leases even the proper procedures have been complied with”(NRTEE 2001). Aboriginal and environmental groups argue this system highlights mining

as the preferred land use activity particularly in Canada's North, and subordinates the interests and values of Aboriginal communities to those of industry, which is inconsistent with Aboriginal title and rights. Proponents of the system note that Canada's mining regulations serve to "monitor and control the 'rights' established through free entry" (NRTEE 2001). In recent multi-stakeholder discussions organized by Canada's National Round Table on the Environment and the Economy, the free entry system was one issue where stakeholder consensus was not achieved.

### *International Commitments*

Internationally, Canada is committed to act on its endorsement of agreements such as the Universal Declaration of Human Rights, the Convention on the elimination of All Forms of Discrimination Against Women, and the United Nations Declaration on Violence Against Women. Given the increasingly gendered nature of the impacts of mining, these commitments require greater attention on the part of the government to the role of women in the mining industry, and the impact of the mining on women. In addition, Canada has ratified the Convention on Biodiversity, which has special provisions for recognizing the importance of traditional knowledge (article 8(j)). International instruments such as these – in conjunction with domestic laws and policies – provide critical leverage for Aboriginal positions.

### **The Mining Industry and Aboriginal Peoples in Canada: An Evolving Relationship**

Mining companies and associations are increasingly recognising the importance of good community relations, especially in obtaining a 'social license to operate'. Several companies now have Aboriginal policies and codes of conduct in place to direct community relations activities, and a number of natural resource-based companies such as Placer Dome, Rio Algom, Syncrude or Falconbridge are actively attempting to position themselves as 'socially responsible.' Some companies have voluntarily brought Aboriginal issues into the realm of corporate policy, and have started actively discussing their activities with Aboriginal groups. However, most are generally lacking with respect to consultation and participation processes for Aboriginal Peoples.

Most initiatives have been on the part of larger multinational companies. For instance, Placer Dome Inc. identifies Aboriginal issues within its Sustainability Policy, which states that Placer Dome operations have to "Recognize and respect the importance of the land, and traditional knowledge, to local indigenous

#### **What informs Ethical Behaviour? Double Standards**

Cragg et al. (1997) have argued that mining companies need to adopt an ethical stance which differentiates between voluntary stakeholders (e.g., Aboriginal communities who are actively participating in mineral development) and involuntary stakeholders (e.g., community members whose lives will be affected by the "externalisation" of risks and costs). Mining companies must deal fairly when entering into contractual relationships with voluntary stakeholders, but involuntary stakeholders must simultaneously be upheld and respected. Equitable distribution of costs and benefits, through mitigation of and compensation for socio-economic disruptions (including disruptions arising from environmental impacts), as well as fair distribution of benefits such as wages, royalties and taxation-provided support for communities, are equally important. Finally, the authors argue there is an overriding ethical obligation *not to proceed* with any activity which causes impacts from which stakeholders will find it difficult or impossible to recover.

Contemporary initiatives by some Canadian mining companies and Aboriginal communities appear to meet most of the above-noted ethical obligations, though the final precept is one which is not readily adopted by mining companies in the absence of some form of coercion. There is also some question as to what motivates/informs mining companies moves towards 'ethical behaviour': altruism or legal, political and/or economic pressures. A case in point is Cameco, a corporation whose interactions with Aboriginal Peoples in Canada have been hailed as examples of best practices, but whose community relations in other countries such as the Krygyz Republic have been severely critiqued. The adoption of lower standards for community consultation in countries with less developed regulatory regimes and weak NGO sectors is unacceptable in a globalized industry like mining, particularly when the industry is attempting to promote "good practice" with respect to social and environmental issues.

or Aboriginal communities and be sensitive to their cultural distinctiveness.” Placer Dome also commits itself to “Provide for the effective involvement of communities in decisions which affect them, treat them as equals, respect their cultures, customs and values, and take into account their needs, concerns and aspirations in making our decisions.” One of the company’s key stated goals is to establish “a formal stakeholder engagement process that will enhance our business strategy with input from a wide variety of sources internally and externally on an ongoing basis.” A key problem with Placer Dome’s policy is where it invites “...all those who share our vision of mining and sustainability to work with us in creating our common future.” This of course does not provide for dialogue with stakeholders who do not share Placer Dome’s vision.

Rio Algom has developed a Statement on Community Responsibility, which commits the company to integrate the following core principles developed by the International Council on Minerals and the Environment (formerly based in Ottawa, Canada):

1. Respect the cultures, customs and values of individuals and groups whose livelihoods may be affected by exploration, mining and processing.
2. Recognise local communities as stakeholders and engage with them in an effective process of consultation and communication.
3. Participate in the social, economic and institutional development of the communities where operations are located and mitigate adverse effects in these communities to the greatest practical extent.
4. Respect the authority of national and regional governments and integrate activities with their development objectives (Rio Algom 2000).

Falconbridge has also publicly recognized the importance of positive Aboriginal relations to business performance though it does not have a formal policy on consultation with Aboriginal Peoples (Falconbridge Ltd. 2000).

In the oil sector, Syncrude’s consultation principles emphasise the importance of developing positive relationships with a fully informed public. The Syncrude Aboriginal Development Strategy seeks to ensure that Aboriginal groups share in the opportunity stemming from oil sands development. According to the company web-site, the strategy has met its targets for the hiring of Aboriginal people, increased the annual volume of business going to local Aboriginal contractors, and implemented several community development programs including a stay-in-school incentive for Aboriginal adolescents. Syncrude claims to have maintained an active, ongoing consultation process for many years with all of the Aboriginal communities in the oil sands region (particularly Fort Chipewyan, Fort McKay, Fort McMurray, Anzac, Janvier and Conklin) (Syncrude Canada 2000).

Despite these advances, many companies do not have codes or principles guiding their relationships with Aboriginal Peoples and minerals development. Most do not report on social aspects of their operations, and no clear set of guidelines or indicators is available to measure good performance. Even when mining companies actively attempt to undertake effective consultation and engagement of Aboriginal Peoples, these practices are often less than successful. Mining executives often struggle with the difficulties of understanding, accepting, and incorporating Aboriginal perspectives into their business management systems.

Furthermore, there is an implicit assumption that the process for consultation and engagement of Aboriginal Peoples can originate from the mining industry and/or from government. Approaches to consultation and engagement that originate from a non-Aboriginal business culture tend to rely heavily on meetings, workshops and negotiated interactions. However, Aboriginal Peoples have their own cultural approaches to decision-making and rely on traditional forms of knowledge to shape consensus building. Perhaps most important, by setting the terms for consultation, these largely non-Aboriginal actors

implicitly determine the scope of discussion and the terms of reference, which often do not include the power to say “no” to development.

In general, codes may represent a step forward but without changes to corporate governance and reporting mechanisms, will likely be unsuccessful. In addition, voluntary initiatives such as corporate codes are not a substitute for regulation.

### *Mining Associations*

There are a number of mining associations in Canada (a list of links to mining associations can be found at <http://www.miningworks.mining.ca/english/Links/index.html>).

The Mining Association of Canada (MAC) (<http://www.mining.ca>) provides a forum for collective action by Canadian mining companies. The MAC formed the umbrella group for the private sector at the Whitehorse Mining Initiative, a multistakeholder initiative discussed below. It was the first mining association in the world to have an environment policy in 1989. The MAC has produced an environmental management framework for use by member companies (1990), a guide for the management of tailings, has supported research on acid rock drainage and has developed a climate change policy and action plan for corporations. It participates in the Metals in the Environment Research Network. The MAC has also embarked on a Towards Sustainable Mining Initiative, which is examining industry successes with regards to productivity, health and safety and environmental performance (MAC 2001b).

The Prospectors and Developers of Canada (PDAC) (<http://www.pdac.ca>) is a national organization representing the interests of the Canadian mineral exploration and development industry. Its mandate includes advocacy, information and networking, and it holds an annual convention. Like other mining associations, PDAC underscores that unsettled Aboriginal land claims and unresolved issues relating to traditional lands are two of the most significant factors creating uncertainty and unpredictability with respect to land access and land tenure in Canada. However, it acknowledges that there are numerous examples where the aspirations and objectives of Aboriginal Peoples and those of the exploration and mining industries converge. PDAC has called on Canada’s Mines Ministers to form regional Aboriginal/Industry/Government working groups “for the purpose of building relationships, identifying needs and opportunities, agreeing on priorities and developing action plans tailored to the individual regions” (PDAC 2001). It is also launching a new initiative entitled Environmental Excellence in Exploration (E3), to promote excellence in exploration for companies operating worldwide. It involves the development of an “e-manual”, a multimedia information repository and management system that “will allow users to identify environmental issues that they should be aware of in their project area and to apply the most effective methods to address them” (PDAC 2001). This initiative is to be applauded, but it would be clearly beneficial to highlight socio-economic issues alongside the environmental issues.

The Conference Board of Canada’s Canadian Centre for Business in the Community (CCBC) (<http://www.conferenceboard.ca>) has formed a Council on Corporate-Aboriginal Relations which is, among other activities, developing a guide to “best practices” in corporate-Aboriginal relations. The Council has at present more than 40 members, including a number of mining and energy sector companies.

### **The role of Civil Society Organisations (CSOs)**

Several CSOs in Canada take an active interest in mining and or Aboriginal land rights, including the Environmental Mining Council of British Columbia, the Canadian Arctic Resources Committee and MiningWatch Canada. As Young (1997) has pointed out, “the reduction of government, and regulatory capacity for environmental monitoring and enforcement has put pressure on NGOs and communities to play a watchdog role, usually without financial compensation.” This has resulted in groups needing to

develop more technical expertise to address this void, and one outcome has been a “reaching out across sectors, between native, environmental and labour organizations for aid in meeting their objectives” (Young 1997).

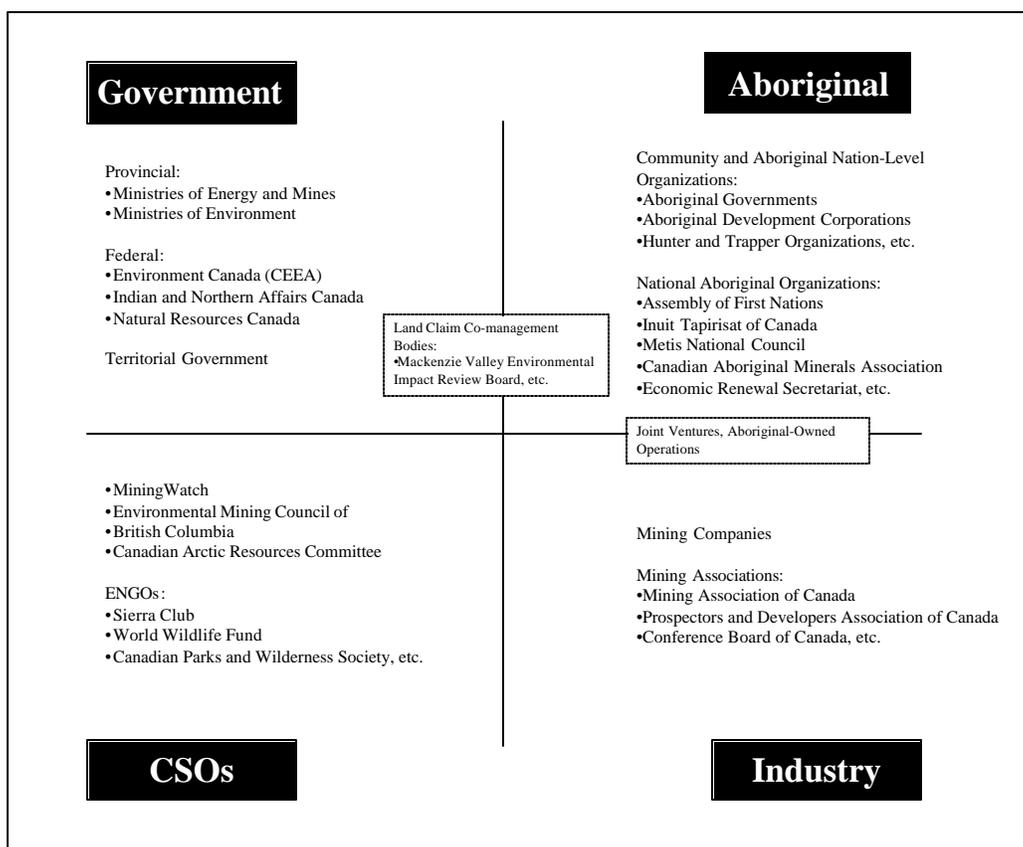
The Environmental Mining Council of British Columbia (EMCBC) (<http://www.miningwatch.org/emcbc/>) participated in the WMI and is currently involved in a coalition of CSOs working on environmental management issues. The EMCBC has expressed concern over the decline in government resources to monitor and enforce environmental regulations, the general trend toward deregulation, limited public capacity to assess environmental risks and heightened regional competition for mining investment. It has published numerous documents and maintains a web-site with a focus on the ecological threats posed by mining and ways of minimising them.

The Canadian Arctic Resources Committee (CARC) (<http://www.carc.org>) provides a “window on the North” for the rest of Canada. Since its foundation in 1971, the organisation has engaged in a wide array of research, analysis, public information and advocacy activities for the people and lands of the North. It has identified large-scale resource development as a principal focus for its “New Century Programs”. CARC has played an active role in mining-related matters, most significantly with a suit brought against Diavik Diamond Mines Inc. and Aber Diamond Mines Ltd. in the Federal Court of Canada in November, 1999. In June, 2000, the two companies and CARC reached an out of court settlement that provides CARC with several hundred thousand dollars (the exact amount has not been publicised) to be used in conducting cumulative effects studies of the impacts of the Diavik diamond mining operations.

Another key CSO is MiningWatch Canada (<http://www.miningwatch.ca>). Founded in early 1999, MiningWatch describes itself as “a pan-Canadian initiative supported by environmental, social justice, Aboriginal and labour organisations from across the country. It addresses the urgent need for a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat and community interests posed by irresponsible mineral policies and practices in Canada and around the world.” MiningWatch has highlighted issues involving Aboriginal communities, and has partnered with Aboriginal groups on a number of occasions. In September 1999, for example, it partnered with the Innu Nation in co-sponsoring a conference entitled ‘Between a Rock and a Hard Place: Aboriginal Communities and Mining’ held in Ottawa. And in May 2001, it co-sponsored a workshop with the Assembly of First Nations in Sudbury, entitled ‘After the Mine: Healing Our Lands and Nations - a workshop on abandoned mines.’ Throughout these and other workshops, Aboriginal participants have underscored some of the major issues around the lack of effective consultation with industry and government, and have stressed the importance of strong negotiation skills.

There are a variety of environmental groups that have on occasion formed alliances with Aboriginal groups on these issues (see stakeholder diagram). In general, however, there are tensions between environmental and Aboriginal groups on account, among other things, of the controversy over seal-hunting in the 1980s which led to a European ban on fur imports and the devastation of the Aboriginal trapping economy. In Canada, environmental NGOs such as the World Wildlife Fund have been key players with regards to lobbying governments – and industry – to establish ecologically integrated protected areas strategies, and have recently called for “no more industrial mega-developments...without first identifying and reserving a properly-buffered and connected representative system of protected areas” (Hummel 2001).

## Principal Stakeholders Involved in Decision-Making about Mining Projects Affecting Ancestral Lands



### Multistakeholder Processes

In recent years, several multistakeholder initiatives have taken place both at the national level led by different sectors.

#### *Whitehorse Mining Initiative (WMI)*

The WMI was a two-year (1992-1994) multistakeholder process spurred by industry, and co-sponsored by the federal and provincial Mines' Ministers to begin a dialogue on the future of mining in the role of sustainable development in Canada. Representatives from the mining industry, senior governments, labour unions, Aboriginal Peoples and the environmental community participated in the process. Four issue groups were formed to discuss the areas of Environment, Finance and Tax, Land Access and Workplace/Workforce, and each of these groups developed a set of principles and recommendations. The process culminated with the signing of the WMI Leadership Council Accord in 1994. The Leadership Accord:

“calls for improving the investment climate for investors; streamlining and harmonizing regulatory and tax regimes; **ensuring the participation of Aboriginal Peoples in all aspects of mining**; adopting sound environmental practices; establishing an ecologically based system of protected areas; providing workers with healthy and safe environments and a continued high

standard of living; **recognition and respect for Aboriginal treaty rights; settling Aboriginal land claims**; guaranteeing stakeholder participation where the public interest is affected; and creating a climate for innovative and effective responses to change” (emphasis added).

However, while there has been an in-depth evaluation of the WMI (McAllister and Alexander 1997), there has been no systematic evaluation of how WMI has changed the way the mining industry incorporates Aboriginal communities into mining operations or how effective WMI has been in promoting meaningful public consultations with Aboriginal Peoples. Some note that “the actual implementation of solutions leading to a reduction on conflicts and uncertainty has been slow and unbalanced” (Young 1997). It should also be noted that one of the two Aboriginal groups who participated in WMI chose not to ratify the Accord. Regardless of the seeming lack of concrete outcomes and implementation, the WMI marks a watershed in Canadian mining history in that it was the catalyst for an ongoing multi-sectoral dialogue.

#### *Intergovernmental Working Group (IGWG) on the Mineral Industry Sub-committee on Aboriginal Participation in Mining*

In 1989 the Intergovernmental Working Group on the Mining Industry formed a Sub-Committee to look into Aboriginal participation in the industry. The sub-committee was composed of representatives from the provincial and territorial governments as well as Natural Resources Canada and Indian and Northern Affairs Canada. However, Aboriginal organizations were not represented.

Since its inception, the Sub-Committee has released a series of annual reports, each focusing on a variety of aspects of Aboriginal participation, including case study profiles of best practices (IGWG 1990; 1991; 1992; 1993; 1994; 1995; 1996; 1997; 1998). The resources developed by the Sub-Committee include a set of small-scale, low resolution maps showing the intersection of reserves and mining operations and lists of federal and provincial policies relating to Aboriginal participation (IGWG 1990; 1995).

The Sub-Committee has also developed a set of checklists and guidelines on the topics of consultation and participation of Aboriginal Peoples in mining (IGWG 1996). The “Checklist to Assist Mining Companies Operating in Areas near Aboriginal Communities” (IGWG 1991: 38-9) highlights the need for companies to:

- Become familiar with rules and regulations affecting relations with Aboriginal groups, including the status of land claims;
- Learn as much as possible about the community in question and initiate contact with appropriate political and cultural leaders; and
- Follow up with public meetings and information sessions in which the company raises issues surrounding potential environmental impacts.

The “Communication Guide for Exploration Companies When Working near Aboriginal Communities” (IGWG 1992: 15-21) includes a checklist, an explanation of the importance of co-operative relationships and key consultation components. The guide suggests that companies prepare an information handout about themselves and the potential for a mine to be developed after exploration, “stressing mine site reclamation and restoration”. It is noteworthy that companies are not advised to provide information or sources for information about the possible ecological or social impacts of a fully operational mine; instead, company representatives should merely “be prepared to answer questions” about the impacts of exploration itself.

The “Checklist to Assist Aboriginal Communities and Groups in Dealing with Exploration and Mining Companies” (IGWG 1994: 15-21) stresses the importance of Aboriginal communities educating mining companies contemplating work in the area about land claims, laws and any agreements in force

that might affect the proposed project. In addition, communities should inform companies of the location of any culturally or economically significant areas near the proposed mine. However, the checklist does not offer any specific advice on how Aboriginal groups might inform themselves about the company's history of interaction with Aboriginal Peoples, its environmental track record or even the broader issue of the impacts of mining on Aboriginal Peoples.

Besides the lack of Aboriginal participation and consistent funding, the IGWG does not have a strong implementation record. Nor is its work particularly accessible: there is to date no IGWG web-site or other on-line repository of the Sub-Committee's work. These problems notwithstanding, the set of annual reports collectively represent a valuable resource for communities and companies, and provide much needed guidance and positive examples of the benefits of consultation.

*The National Round Table on the Environment and the Economy (NRTEE) Task Force on Aboriginal Communities and Non-renewable Resource Development*

In 1998, the NRTEE – an independent advisory body that provides decision-makers with advice and recommendations for promoting sustainable development – established a program to examine the key issues at the heart of non-renewable resource development and the sustainability of Aboriginal

communities in Canada's North. The Task Force held consultations with over 300 key players, and in 2001 issued its final report entitled *Aboriginal Communities and Non-renewable Resource Development*. The report devotes one chapter to consultation, focussing its recommendations on the support of meaningful Aboriginal participation in these processes. "Consultation is the key to the mutual understanding, co-operation and partnerships that are essential if non-renewable resource development is to contribute to the sustainability of Aboriginal communities," the report states (NRTEE 2001). It identifies four principal obstacles to effective consultation, including:

*"Communities need to have confidence that they can participate in consultations on as equal a footing as possible with the much larger corporations or government department sitting across the table. Funding and in-kind assistance from government and industry are therefore essential to ensure that Aboriginal communities have the capacity to participate effectively in consultation."*

– NRTEE (2001: 82)

- "consultation is often too late in the decision-making process for resource development and is too rushed, putting undue pressure on Aboriginal communities and undermining the trust that is required for mutually beneficial relationships;
- Aboriginal communities often lack the human and financial resources to participate effectively in consultation;
- the roles and responsibilities of industry, government and Aboriginal organizations in consultation processes are often ill-defined, leading to uncertainty, delay and frustration; and
- Aboriginal culture and language are sometimes given insufficient respect in consultation processes" (NRTEE 2001).

Requirements for successful consultation include:

- Consult early and often.
- Clarify expectations between the parties.
- Address differences in culture and language.
- Provide funding for Aboriginal participation in consultation.

Even though the report examines these issues in relation to the Northwest Territories, its outcomes regarding consultation are pertinent to Aboriginal communities across Canada. As one member of the

Task Force has commented, however, even though the recommendations in the report were tailored to be very pragmatic and “do-able”, to date not one has been implemented which is causing frustration (Gilday, pers. comm., 2001). This raises questions about the role of multistakeholder processes with regards to tangible outcomes.

In addition to these multistakeholder meetings, every year the Mines’ Ministers from across Canada hold a forum to which they invite other stakeholders, and recently Aboriginal issues have been highlighted as a key concern.

### **Section 3: *How it plays out on the ground***

#### **Case Study Profiles of Aboriginal Nations’ Consultation and Participation Experiences with Mining Companies**

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##### **Introduction: How it plays out on the ground**

In his excellent review of the Canadian experience with the mining sector, Ritter (2000) argues that consultation is frequently nothing more than a form of “pseudo-participation”, frequently characterised by “manipulative or therapeutic” forms of communication rather than enabling real participation which would include co-operative control, partnership and delegation of powers. Ritter elaborates that manipulative communication includes false or misleading claims about the effects of projects, citing as an example false claims by pulp mills that effluent would cause no deleterious health impacts although downstream Aboriginal populations depended on fish for food. In the case of the Placer Dome/TVX Musselwhite project discussed below, claims that vastly increased volumes of ore would result in no appreciable increase in environmental impacts could certainly be characterised as “manipulative communication” according to Ritter’s definition. Therapeutic communication includes exaggeration of the amount of power sharing actually entailed by an agreement. It can be argued that in any case where consultation and negotiations do not explicitly provide the right of refusal by affected communities, communication is therapeutic rather than genuinely participatory.

The following case studies illustrate the issues around consultation and participation as they are played out “on the ground”. Because there is little fundamental difference between mining and other resource industries in terms of the legal and moral rights of Aboriginal Peoples, some of the case studies below do not specifically concern mining.

##### **Mi’kmaq in Unama’ki (Cape Breton Island, Nova Scotia)**

The Mi’kmaq experience with the mining sector in Unama’ki over the past 15 years has run the gamut from militant confrontation, to legal battles, to precedent-setting agreements. Like many Aboriginal nations, the Mi’kmaq have been tirelessly re-building community and political structures after several generations of Residential Schooling, forced relocations and territorial alienation.

##### *Kluscap’s Mountain Quarry Proposal*

One of the first experiences the renewed Mi’kmaq Nation had with the mining sector was a proposal in 1988 by Kelly Rock Aggregates Ltd. to build a granite “super-quarry” on Kluscap’s Mountain (Kelly’s Mountain, Cape Breton Island). The mountain is a site of great significance to the Mi’kmaq, thought to be the final resting place of the Mi’kmaq deity Kluscap, and the site of spiritual pilgrimages throughout Mi’kmaq history. The proposal for the quarry tabled by Kelly Rock Aggregates was done without any consultation with the Mi’kmaq, and at a time when Environmental Assessment guidelines did not require an Aboriginal component. The proponent did not make any efforts to consult with the Mi’kmaq, and

Mi'kmaq efforts to discuss the project with the Proponent met with no success. Eventually, the Grand Chief of the Grand Council of the Mi'kmaq appointed a Warrior to defend Mi'kmaq interests and protect the mountain from exploitation. After militant confrontations including Mi'kmaq Warriors in camouflage attending public hearings and threatening armed resistance, the project proponent failed to submit a revised EIA before a federally-imposed deadline, and the project was shelved indefinitely (Hornborg 1994; Dalby and Mackenzie 1997).

In this case the proponent failed utterly to consult with the Mi'kmaq. What public consultation did occur came in the form of public meetings far from any Mi'kmaq Reserves. It is likely that had the Mi'kmaq been contacted at the outset, and had the proponent demonstrated a willingness to enter into meaningful consultations and negotiations with the Mi'kmaq leadership, an accommodation might have been reached which would have addressed Mi'kmaq cultural and ecological concerns while allowing some form of aggregate extraction to take place. Another important note here is that the non-Native opposition to the quarry was small but vocal, and worked closely with the Mi'kmaq. Mi'kmaq support for the quarry, if it could have been secured, therefore would have almost certainly guaranteed that it go ahead.

### *Middle Shoals Dredging Project*

Seven years later the Little Narrows Gypsum Company commenced dredging of the Middle Shoals at the entrance to the Bras d'Or Lakes in order to increase shipping capacity, once again without consulting with the Mi'kmaq. The Mi'kmaq filed suit with the Federal Court of Canada, arguing that the dredging posed unknown environmental risks to the delicate ecology of the Bras d'Or Lakes ecosystem, and thereby posed a potential threat to Mi'kmaq subsistence fishing. In 1996, the Federal Court ruled that the government had breached its fiduciary responsibility to safeguard Mi'kmaq resources, and ordered the dredging halted (Federal Court of Canada Trial Division 1996). Once again, the failure of the proponent to engage in meaningful consultation with the Mi'kmaq guaranteed the failure of the undertaking, and decreased the likelihood of a co-operative relationship on future projects.

### *Melford Gypsum Mine*

The Middle Shoals case set the stage for more serious corporate attention to the rights of the Mi'kmaq beyond the boundaries of their five Unama'ki Reserves. On November 2, 1998, the Unama'ki Mi'kmaq and Georgia-Pacific Canada, Inc. signed the Melford Gypsum Mine Agreement (Georgia-Pacific Canada and Unama'ki Mi'kmaq 1998). Georgia-Pacific contacted the Union of Nova Scotia Indians, widely acknowledged as the body representing the interests of the five Unama'ki Bands, to ask for any concerns the Mi'kmaq might have about a gypsum mine development near the Malagawatch Reserve. Several months of meetings in which a representative from Atlanta spent hours working with the native chiefs, resulted in Melford Gypsum Mine Agreement.

The agreement, concluded without the involvement of federal or provincial government agencies, includes the following provisions:

- Employment: 25% of the workforce is to be Mi'kmaq, and training and apprenticeships will be provided by the company whenever required for employment objectives.
- Unama'ki Marine Institute: The company has agreed to contribute \$0.05/tonne (approximately \$100,000.00 annually) to the Unama'ki Marine Research Institute, a Mi'kmaq-run not-for profit organisation established as part of the agreement to conduct environmental research and monitoring.
- Sub-contracting: Trucking contracts are to be awarded preferentially to the Mi'kmaq

- Ecological Monitoring: Mine-site monitoring to be conducted by Mi'kmaq Guardians (roughly equivalent to Conservation Officers) with a \$10,000.00/annum contribution by the company, and a further \$5000.00/annum contribution toward wider watershed monitoring by the Eskasoni Fish and Wildlife Commission.
- Scholarships: One \$5000.00 scholarship for a Mi'kmaq student engaged in environmental or technical studies will be provided by the company each year for the life of the project.

In addition, a consultation, liaison and committee structure was established, known as the Unama'ki-Georgia-Pacific Co-ordinating Management Committee. This Committee includes two representatives from the communities and two company representatives. Among other things, its mandate is to ensure provisions of the Agreement are observed and attempt to resolve any disputes; to discuss and resolve matters including those related to the contractor and Company Native Employment policies, environmental monitoring and existing or planned Native hiring and contracts; and to meet at least once every three months, with expenses paid by both parties (secretarial expenses are covered by the Company).

It can be expected that this Agreement will serve as a precedent for future resource development in Unama'ki. Details of the precise consultation process have not been documented. More information in this regard would be useful in revealing what dimensions of the consultation and engagement process helped to ensure a successful relationship. However, a recent feature article by John Stackhouse (2001a) in Canada's national newspaper, the *Globe & Mail*, points to the following elements contributing to success:

*"I would liken it to a very tough negotiation with Teamsters...You're dealing with very well-educated and informed people who probably know how far they could push you, but they don't want you to go out of business because your existence is good for them."*

– Felmer Cummins, overseer of Georgia-Pacific's affairs in Eastern Canada (in Stackhouse 2001)

- Mi'kmaq ability to match the multinational's negotiation style through "savvy" negotiation tactics. The importance of leadership, professional preparedness and organization.
- Mi'kmaq awareness of the economic importance of the mine, and its power to drive a bargain.
- Mi'kmaq awareness of how hard to push (or not to push), and when to compromise.
- The use of "shuttle diplomacy" with the influential environmental organization The Sierra Club, to create alliances and make The Sierra Club aware of Mi'kmaq history and needs. Likewise, The Sierra Club's – Executive Director, Elizabeth May's – awareness of the importance of Indigenous perspectives and the need for compromise. In addition, the Mi'kmaq negotiated with representatives from the labour union, winning the right for Native employees to be exempt of certain seniority rules.
- Georgia-Pacific's overseer of the company's affairs in Eastern Canada's willingness to spend "long hours sitting with Cape Breton native chiefs, and working the phones to build a relationship" (Stackhouse 2001). The overseer also was willing to entertain and negotiate a joint environmental assessment process in which a team from Atlanta worked with a local native team in assessing wildlife and medicinal plants near the proposed site – on account of native concerns re a creek, the site was shifted.

### **Takla (British Columbia)**

On July 27, 2000 the Takla Nation, whose traditional territory is centred northwest of Prince George around Takla Lake, issued a press release announcing the closure of their territory to all resource

extraction. In that release, Councillor Edna Johnny states that “We are tired of watching our resources leave our territory without any benefits to the Takla First Nation.”

In stark contrast to the few “best practice” examples of resource sector consultations with Aboriginal Peoples in Canada, according to Councillor Cheryl George, in Takla territory there have been no consultations and resource corporations have steadfastly ignored the small, impoverished Takla Nation. Takla concerns centre around forestry being conducted by Canadian Forest Products (Canfor), and mining operations by several companies. For example, the South Kemess mine, operated by Royal Oak Mines until its bankruptcy in early 1999, and now run by Northgate Exploration Ltd, has been described by the Environmental Mining Council of B.C. as “an excellent case study of the consequences of ineffective environmental assessment, certification, permitting, enforcement and monitoring” (Environmental Mining Council of B.C. 2000).

According to Councillor George (pers. comm. 2000), all of the resource corporations operating in Takla territory have thus far failed to consult with the Takla First Nation in accordance with the legal requirements laid out in *Delgamuukw*. She adds that resource exploitation by these companies is being carried out in an unsustainable manner, with inadequate replanting of cut areas by Canfor, and contamination of ground- and surface-water by mine tailings and from the use of pesticides in forestry. George asserts that money previously given by Canfor to the Takla Development Corporation (TDC) has been subsequently declared by the company to be a “loan” and further funding has been withdrawn, with the result that the TDC is being forced to close for lack of money. The Takla currently have lawsuits pending against more than one company, are blockading roads and rail lines, and are seeking advice and assistance from neighbouring First Nations and the public.

Details of the various consultation processes over the years between the Takla and different resource industries have not been documented. Further information on these processes would be helpful in clarifying where precisely they got de-railed.

### **Troilus Mine/Mistissini Cree Nation (Quebec)**

During the initial exploration phases of this project, the only contact between the proponent – the Inmet Mining Corporation – and the local Cree involved chance encounters between field crews and Cree hunters and trappers. After deposits were discovered, a review committee was established that included Cree members in order to ensure a flow of information into the Cree communities. Simultaneously a Negotiation Committee was established by the Cree of Mistissini and Inmet.

On October 13, 1994, the Mistissini Cree and Inmet signed an agreement to begin construction of the Troilus open-pit gold/copper/silver mine on traditional Cree hunting grounds 175 km north of Chibougamau, Québec. A final agreement was signed on February 22, 1995. The agreement detailed employment guarantees, training, environmental protection, sub-contracting opportunities, etc. Cree trappers are involved in environmental monitoring. Work schedules have been modified to accommodate traditional hunting activities by Cree mine employees. Employment levels of 25% were chosen to reflect the Cree proportion of the local population. These levels had been slightly surpassed by 1997, with 51 Crees employed out of a total of 203 workers at the mine site.

The Intergovernmental Working Group on the Mineral Industry Sub-committee on Aboriginal Participation in Mining has commented that “what differentiates this mine from others in the region is that, with this project, the Crees are now recognized partners in the development of the region and its resources” (IGWG 1997). While this comment speaks well of the project in question, it also underscores the fact that recognition of Aboriginal Peoples’ rights and interests by the mining industry remains the exception rather than the rule. Indeed, according to O’Reilly and Eacott (1999/2000), “the Quebec government has told companies that they do not need to enter into agreements [with Aboriginal people in the James Bay Agreement area] and has advised them to be cautious in their dealings with Aboriginal

Peoples to avoid setting a precedent for the mining industry in general.” While the James Bay Agreement includes Aboriginal participation in environmental and social impact processes, it does not explicitly provide for participation in mining. In general, this case highlights the potential benefits of a consultation regime being established in the early phases of a project. More details on the actual consultation and engagement process that was implemented may provide insights on how to establish successful and equitable relationships.

### **Innu at Emish (Voisey’s Bay)**

After the accidental discovery in 1994 of the world’s largest nickel deposit in Voisey’s Bay, Labrador, near several Innu communities, by two prospectors from a junior exploration company, a staking rush began in Innu territory. In 1995, more than 250,000 claims were staked, without any consultation with the Innu (Cleghorn 1999; Innu Nation 1996). Voisey’s Bay Nickel Company (VBNC), the owner of the original find, was purchased from Diamond Fields Resources by Inco Ltd. Ltd. for \$4.3 billion, and the Innu nation began to organise a response to the proposed development. The report of the resulting Innu task force is entitled *Between a Rock and a Hard Place*. An excellent overview of the Voisey’s Bay situation is provided by Cleghorn (1999), and a wide variety of documents on the project is available at the Innu Nation web-site (<http://www.innu.ca/mining.html>).

In many regards the resulting political developments were ground-breaking. The Innu nation’s leadership set up a task force with funding from VBNC, which then held a series of community meetings about the project and received a clear mandate from the people. A consensus emerged that the Innu people did not want any mining developments until their land claim agreement was signed. They also would not consent to any mining developments without first negotiating an impact benefit agreement (IBA) with the mining company; this IBA would first require an environmental assessment of the project. A Memorandum of Understanding (MOU) between the Innu Nation, the Labrador Inuit Association, the federal and the Newfoundland governments was signed to outline the requirements for a harmonised Environmental Assessment process. In that MOU, the definition of “environment” was broadened from that given in the CEAA to include “social, economic, recreational, cultural, spiritual and aesthetic” components (cited in Cleghorn 1999). It also gave all the parties to the MOU the right to appoint the EIA panel members. However, as Hanrahan (1999) has pointed out, the Labrador Métis Nation was not invited to be a signatory to the MOU, despite having traditional harvesting grounds in the affected area. Though the EA panel recommended that the project move ahead to permitting only after the conclusion of land rights negotiations and after IBAs had been signed with both the Innu and the Inuit, the government allowed the project to proceed to the permitting stage without meeting either of these requirements.

As noted earlier, part of the community mobilisation sparked by the project included women’s coalitions including the Tongamiut Inuit Annait and the Ad Hoc Committee on Aboriginal Women and Mining in Labrador. These groups issued a joint report highly critical of the Environmental Impact Statement (EIS) commissioned by Inco Ltd. Ltd., primarily because of the ways in which it had failed to pay attention to the needs and perspectives of women (Tongamiut Inuit Annait and the Ad Hoc Committee on Aboriginal Women and Mining in Labrador 1997). In a separate critique published two years later by the Canadian Environmental Assessment Agency, the Tongamiut Inuit Annait (1999) went as far as to charge that the EIS “does not adequately respond to the Panel’s Guidelines”.

*“From our experience with the Churchill Falls power project, we learned that if the government is allowed to do whatever it wants, we would get screwed. We learned that we had to raise our voices effectively in order to be heard. Unfortunately, we find that many government bureaucrats are poor listeners and it has taken them about 30 years to understand what we thought was a simple message: **you have to ask us first if you want to use our land.**”*

– Daniel Ashini, Innu Nation (Miningwatch/Innu Nation 1999, emphasis added)

Internal conflict has also arisen between the Innu Nation and Innu individuals that have been tempted by non-Aboriginal business people into forming joint partnerships in order to obtain contracts at the mine, thus competing against the community-based development corporation, Innu Economic Development. This is characterised by Innu land claims negotiator and environmental specialist Daniel Ashini as a shift from sharing to individualism which compromises community spirit (in Innu Nation/MiningWatch Canada 1999). This may suggest that a collective approach to mine contracts would be preferable in many Aboriginal communities, for instance through development corporations formed for this purpose.

The Innu and Inuit were able to halt some infrastructure development – including an air strip – through legal action. Threats of legal action and protest, combined with the panel recommendations on land rights and IBAs, have allowed the Innu to evict at least one exploration company and lean weight to Innu insistence that Innu-developed guidelines on mineral development be followed.

In June 2000, the Innu Nation filed a lawsuit with the Federal Court of Canada to cancel the permission for the Voisey's Bay Nickel Company pending conclusion of land claims negotiations and the signing of IBAs with the Innu and Inuit, on the grounds that the federal government failed to meet its fiduciary responsibility to the Innu and Inuit when it ignored EIA Panel recommendations that such negotiations and agreements must be concluded before project approval is given. The suit also asked for clear legal measures outlining participation, consultation and compensation in respect of the project (Innu Nation 1999). This highlights the legislative void at both the provincial and federal levels. Further research might be directed at developing a set of minimum, universally applicable standards that could be written into legislation across Canada. However, the lawsuit was stayed and the project was shelved due to a disagreement between the province and the company regarding secondary processing of the ore: Newfoundland wanted a smelter to be built in the province, but the company argued this would not be feasible (Kevin Head, pers. comm., 2000). In recent months, discussions on moving ahead with the mine have been rekindled.

There are some valuable lessons to be learned from this case. First, internal community consultation is critical in order to develop grassroots consensus on issues. That is, the approach of supporting the Innu nation's leadership to set up a task force with funding from VBNC, allowed for a series of community meetings about the project, which resulted in a clear mandate from the people. This is a good dimension of a successful process. However, the community consultation process did not appear to have conflict resolution processes to manage dissent within communities (e.g., to overcome the divide-and-conquer tactics of developers who had succeeded in co-opting some individuals). Additionally, according to Cleghorn's (1999) analysis of this case, "a legal definition of consultation would be valuable in ensuring that when the four parties came together to discuss the panel's recommendations, the playing field would be more level." Secondly, it appears clear from the women's mobilisation that future consultation processes need to adequately address gender dimensions of mining projects. Finally, this case highlights the problems that arise when governments do not engage in meaningful consultation and instead undertake hierarchical decision-making.

### **Tahltan Nation (British Columbia)**

The traditional territory of the Tahltan Nation (<http://www.stikine.net/tahltan.html>) in north-western British Columbia covers approximately 246,000 km<sup>2</sup> of B.C.'s mineral-rich "golden triangle". The Tahltan Advisory Group on Mining (TAG) was formed in reaction to attempts by various mining companies to "divide and conquer" the Tahltan Joint Council, comprised of the three Tahltan communities, and the Tahltan Development Corporation (Cleghorn 1999). In the early 1980s the Tahltan drew up the "Tahltan Development Principles" which have governed their approach to negotiations on mining and other areas. In general the development principles require that:

1. The development not pose a threat of irreparable environmental damage.

2. The agreement not prejudice outstanding Aboriginal claims.
3. There will be more positive social benefits than negative
4. There be opportunity for education, training and employment.
5. There be provisions for equity participation.
6. There be opportunities created for the development of Tahltan businesses.
7. There is a formal commitment by the developer to assist Tahltans accomplish these objectives (American Bullion Minerals 1996).

This proactive approach to development, which includes participation in provincial committees, and a commitment to “speaking with one voice”, has contributed to a favourable relationship with Wheaton River Minerals Inc. (through its subsidiary North American Metals Corporation - NAMC). Presently, more than 35% of NAMC employees are Tahltan, and the Tahltan have also been able to negotiate support service contracts including catering, road maintenance, and security, and secure commitments from NAMC to invest in Tahltan community projects (Belhumeur 1998). Another corporation active in Tahltan territory, Homestake Canada Inc. (HCI), has engaged in public consultations and interviews with Tahltan people in its development of a mine property at Eskay Creek (Hemmera Resource Consultants Ltd and Homestake Canada Inc. 1997). However, the company has made no provisions for providing employment training for Tahltan people, nor any specific commitments to levels of Tahltan employment. In the Environmental Assessment Project Description of the Red Chris Mine Copper/Gold Project being developed by American Bullion Minerals Ltd., considerable attention is paid to the socio-economic needs of the Tahltan Nation as required under the B.C. Environmental Assessment Act (American Bullion Minerals 1996). It remains to be seen how well this rhetorical commitment translates into concrete actions.

The diversity of experiences with various companies highlights the important role that the Tahltan Development Corporation could play if it had a mandate from the communities to act as a front agency in all dealings with resource corporations. However, one key lesson for consultation processes is that the Tahltan have demonstrated the value of developing community based development principles. Such a grassroots proactive approach helps to prevent companies from successfully implementing divide and conquer strategies. Similarly, The Wahnapiatae First Nation has also found that it is useful for local communities to develop a grassroots natural resource policy. The Wahnapiatae have found this helpful as a way of focusing its negotiations with Inco Ltd. over mine closure (Recollet 2000).

### **Taku River Tlingit First Nation (British Columbia)**

In 1998, the British Columbia government hastily approved the Tulsequah Chief mine project after it was reviewed by B.C.’s Environmental Assessment Review Office. During the review, representatives of the Tlingit Nation had raised concerns about the mine’s impacts on fish and wildlife as well as on Tlingit rights and interests. In June 2000, the B.C. Supreme Court issued an injunction temporarily halting work on the project, citing the B.C. government’s failure to engage in meaningful consultation with the Tlingit Nation (Mine Wire 2000).

The chief lesson here is that if meaningful consultation does not occur then there is a strong risk that the court system will intervene. Business risks like work stoppages add incentive for mining companies and governments to honestly and practically engage with Aboriginal Peoples. Hasty decisions are risky decisions if consultation processes are subverted.

### **The Musselwhite General Agreement (Ontario)**

The Musselwhite General Agreement was negotiated in Ontario between Placer Dome Inc. with its partner TVX Gold Inc. on the one hand, and four First Nations groups and two tribal councils, including the North Caribou First Nation on whose traditional land the mine was to proceed, two downstream

nations and one other nation that had asked to be involved. Negotiations began in 1989. The Agreement was signed in 1992 and took effect in 1996. The Agreement was designed to overcome a long legacy of mistrust surrounding the mining industry in the area. It requires that First Nations representatives be involved in decision-making surrounding the mine's environmental issues and have access to all relevant corporate environmental information; outlines treatment of cultural sites, as well as employment and business opportunities; and provides for funding to improve local administration.

The Agreement covers the following areas: funding for expertise in environmental assessment, planning, etc.; early notification; ban on the use of certain chemicals; involvement in decision-making; cultural and heritage issues such as mapping of locations of religious, cultural and subsistence resource areas, and accords on how these sites will be treated, reclaimed or left undisturbed; an Aboriginal employment goal of 25% of total workforce (to date 101 of the 291 jobs are held by Aboriginal workers); provision of training assistance (on the job and pre-employment); support for the establishment of various businesses supporting the mine including road construction; air transportation; freight; laundry, catering, etc.; social issues including an alcohol and drug free camp policy; a voluntary Employee Assistance program; donations to social and youth development; Aboriginal Liaison officers; scholarships; funding for various administrative needs such as, quarterly meetings of parties, use of translators, etc.; and a dispute resolution mechanism (ICME 1999).

The ICME (1999) notes that two years into the negotiation process, the proponents suddenly, in response to market conditions, announced that the output of the mine would have to be increased 3.5 times from 1000 to 3,500 tones of ore per day, and that the quality of the ore extracted would be lower. The proponent then asserted that this change would have no serious environmental impacts. ICME fails to point out that at a minimum, a large increase in output – combined with a lowered ore grade – would certainly increase the risks of acid mine drainage.

While details on the initial consultation process are clear, the outcomes clearly highlight that consultation is an ongoing process particularly with respect to managing and mitigating environmental and social impacts. By accepting Aboriginal input on planning and decision-making throughout the life of a project, there is a greater opportunity for more equitable engagement and reduced conflict over the long term.

### **Eabametoong First Nation (Ontario)**

The Eabametoong First Nation (EFN) is located on a 256 km<sup>2</sup> Reserve in northwestern Ontario's Greenstone geological formation, an area known to contain precious and rare metals. The EFN and its lands were involuntarily included in James Bay Treaty Number 9 in 1905. Gold mining activities earlier this century involved strip-mining, trenching, and blasting both on-Reserve and in adjacent traditional territory. At present, there are three companies conducting exploratory drilling on Eabametoong traditional lands, which encompass a circle centred on the Reserve with a diameter of 240 kilometres (known as the "75 mile trapping circle").

The position of the EFN is that the nation "is not opposed to resource development such as mining on reserve or within its traditional territory **provided there is consultation leading to mutual consent**" (Yesno 2000, emphasis added). In accordance with a protocol developed by the Nishnawbe Aski Chiefs in Council (The Nishnawbe Aski Nation is the umbrella organisation for all Treaty Number 9 nations), the EFN have expressed the following general expectations:

1. That there will be an open dialogue, open communications, and co-operation regarding shared use of lands and resources.
2. That there be on the part of resource companies and governments an acknowledgement of the

*"The Eabametoong First Nation expects to be consulted of all resource development activities within its traditional territory."*

– Yesno, 2000

EFN's Aboriginal and Treaty rights.

3. That any intended resource development be preceded by a letter of intent to the Chief and Council.
4. That there subsequently be a meeting between the resource developer and the Chief and Council, held on the EFN Reserve, to establish open dialogue and co-operation.
5. That following this meeting there be a community presentation to allow the Band members to meet the developer and voice concerns or ask questions.
6. That a Memorandum of Understanding be developed and signed between the EFN and the resource developer, to confirm and outline each party's understanding of the intended activity, but not to be considered a contractual commitment.
7. That developers commit to safeguarding and monitoring the environment from pollution.
8. That trap-lines, caches and equipment be respected as private property.
9. That cultural heritage sites be left alone.
10. That Eabametoong Reserves status as an alcohol and drug-free zone be respected (Yesno 2000).

In what may be taken as either a public service announcement or a veiled warning, the EFN has explained that one important reason for the public disclosure of all resource development activity is the risk of "firearms mishaps".

Guidelines such as those developed by the EFN are useful in clearly outlining community expectations for engagement. However, they should be viewed as the bare minimum and do not adequately describe how ongoing community consultation and engagement should occur.

### **Nunavik Inuit (Quebec)**

The best-known mining development on the territory of the Inuit of Northern Québec is the Raglan Project, located on the Ungava Peninsula in the Nunavik region. The project is a nickel-copper mine operated by Société Minière Raglan Limitée (Falconbridge) on traditional lands of the Inuit, 60 km from the nearest Inuit village of Kangiqsujuaq. In 1995, Falconbridge signed major project agreements ("The Raglan Agreement") with the Makivik Corporation, which represents Inuit interests in Nunavik. The agreement was based on a 1993 MOU which created the Raglan Committee (a mix of company and Inuit representatives) to monitor on-site activities and act as a company-community liaison with a special focus on environmental issues. Detailed examination of this case may be found in Sloan and Hill (1995), Loizides (2000), Cleghorn (1999), O'Reilly and Eacott (1999/2000) and Stackhouse (2001b).

While the Raglan Agreement does not address monitoring of social impacts, it does contain provisions to address the primary Inuit concerns: training and employment opportunities (with priority given to the nearest communities, then to the region as a whole); downstream business opportunities; environmental issues, including a role for traditional knowledge in establishing baseline data and environmental monitoring, and acid mine rock containment and progressive reclamation plans; and established the Raglan Education Fund to provide scholarships to Inuit mining students. The mine began full-scale operations in 1998.

According to Falconbridge's Director of Communications and Public Affairs,

In addition to the formal consultation process, Falconbridge worked hard to inform local people about the project, employing a variety of venues including radio talk shows, site visits with local community leaders, community meetings with Inuit opinion leaders, and a wide range of local events. These efforts helped to develop a relationship of trust and

understanding between the company and local inhabitants and key stakeholders – which laid the foundation for the negotiation of the Raglan Agreement (Casselman 1999: 11).

Other innovative measures have been introduced to resolve difficulties arising from different work cultures. These include cross-cultural training for all employees; prohibition of drugs and alcohol on-site in response to community appeals; prohibition of firearms on-site for safety reasons; provision of “country foods” (wild meat, etc.) in the mine kitchens; and replacement of the typical four-week rotation with a two-week rotation to help workers meet their families’ hunting and fishing needs (Sloan and Hill 1995). However, Cleghorn (1999) suggests there is still an atmosphere of discrimination at the mine, with Inuit workers complaining of being “second-class citizens”. In addition, there are no employment quotas – “there has never been more than 20% Inuit employees” – and social impacts include “a high rate of turnover of Inuit employees – 70% compared with 15% among non-Inuit employees – and the fact that Falconbridge is not hiring older Inuit” (O’Reilly and Eacott 1999/2000). Stackhouse’s (2001b) feature article “Everyone Thought We Were Stupid” also highlights the discrimination and racism Inuit face at the mine.

*“There’s not a lot of overt racism anymore, but subtle discrimination on the site is rampant. I wouldn’t say there’s apartheid on site. There’s a two-tier system. It’s a caste system.”*

– Inuk participant on Raglan Mine’s community steering committee (in Stackhouse 2001b)

The Raglan case highlights the importance of both formal and informal consultation processes. In addition, it emphasises the importance of senior corporate support for effective consultation. It also shows how important it is for a company to cultivate the trust of community members at the grassroots level, and not merely on “community leaders”. Consultation must be honest, direct and inclusive. To accomplish this, proponents will need to employ a variety of communication tools in order to effectively reach and dialogue with local community members. However, it is unclear how Falconbridge’s process incorporated gender dimensions into its consultations and what kind of conflict resolution process it implemented. Finally, it is unclear if there is a mechanism for ongoing community members input into mine operations. Further research into these areas could provide valuable insights for future agreements.

## Conclusion

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Overall, this study has shown that the environmental, social, legal and political aspects of mining require the development of co-operative relationships between mining companies, governments and Aboriginal communities from the exploration stage onwards. Such relationships do not come easily: they are the result of a painstaking process of consultation and negotiation, a process that may take several years, and may be spurred from initial community strategies involving confrontation. For companies and governments, approaching the communities in question with a willingness to listen and a clear understanding of their diverse histories and cultures is imperative. It will reduce the time needed to reach agreements, ensure these agreements remain practicable in the long term, and provide Aboriginal communities with the opportunity to benefit from potential partnerships as much as possible. But it is also key for companies and governments to understand and respect that consultations may lead to communities rejecting a development proposal for compelling environmental, spiritual, cultural and other reasons.

Aboriginal communities have been univocal on several points:

- Aboriginal Peoples have legal, moral and spiritual interests in all development activities taking place on or near the territories that they have used and occupied historic ally and presently.
- In the case of mining, which is a form of economic activity with a history of severe environmental degradation, these legal, moral and spiritual interests are amplified.

- Economic development must not come at the cost of severe or irreparable environmental damage. It must guarantee equitable distribution of benefits to affected Aboriginal Peoples.
- Predicting and monitoring environmental impacts cannot be adequately accomplished without the inclusion, on an equal footing with science, of Local/Traditional Ecological Knowledge (Lo/TEK). Including the Lo/TEK of residents will simultaneously ensure that traditional economic activities are not accidentally displaced or disrupted by the proposed development.
- Consultation must occur very early in the mining cycle, ideally before exploration has commenced, and certainly before any exploration which would require the construction of roads, airfields, camps, etc.
- Consultation must be respectful, fair, honest, inclusive and take into account cultural differences in negotiating and decision-making.
- Companies and governments engaging in consultation must acknowledge the right of affected communities to say “No” to aspects of a project they find unacceptable.
- All members of an affected community must have the opportunity to participate in the consultation process. It must be a democratic, rather than an elite process. This is especially important with regard to women, who have been historically marginalised from political and economic discussions, yet who frequently bear the brunt of negative consequences of poor decisions.
- History matters. An Aboriginal nation’s past experience with governments and companies will profoundly impact its willingness to reach co-operative agreements. This is true both specifically and generally: bad experiences with one company will poison the community’s attitude toward other companies doing similar work. Similarly, a government’s mistreatment of one Aboriginal group will increase the suspicion of other Aboriginal groups toward that government.

While there are a handful of positive examples of companies and governments attempting to engage in meaningful consultation and paying attention to at least some of the above points, it is clear that these examples are the exception rather than the rule. In order to engage in more sustainable business it is imperative that mining companies and governments alike make better efforts to engage in more meaningful dialogue, and involve the participation of local people rather than undertaking cursory consultation. For their part, Aboriginal communities will use whatever means they have – including strategies of confrontation – to attempt to balance power asymmetries and ensure their views are not only heard, but incorporated into decision-making.

There are significant hurdles to be passed in the development of an economically, ecologically and politically sustainable mining industry in Canada: embracing principles of respect and co-operation in dealings with Aboriginal communities is a starting point for beginning to overcome these, and working toward development that is equitable and in keeping with the self-determination of Aboriginal Peoples.

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<sup>1</sup> This section is adapted from Weitzner 2000.

<sup>2</sup> It is estimated that in total, approximately 185 specific and comprehensive claims worth \$800-million have been settled, with about 400 claims still outstanding (National Post 1999). An important aspect of these negotiations is that the federal government provides funds for Aboriginal groups to conduct research. From 1970 to 1983, for example, the federal government provided over \$95 million in the form of grants, contributions and loans to Aboriginal political groups to research treaties, land claims and Aboriginal rights and title (Boldt and Long 1985).

<sup>3</sup> Notzke (1994: 202) points out that surveyors employed to demarcate Indian reserves were instructed by the government to exclude any lands in which known mineral deposits existed.

<sup>4</sup> This was the interpretation provided by the British Columbia Ministry of Agriculture, Fisheries and Food in March, 2000. The document "Guidelines for Avoiding the Infringement of Aboriginal Rights" which contained this assertion has since been removed from the Ministry of Agriculture, Food and Fisheries web-site. A copy can be accessed at NSI archives. No documents containing the phrase "Aboriginal rights" could be found on the Ministry web-site on July 28, 2000. New provincial guidelines published by the Ministry of Aboriginal Affairs (2000)

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reverse this interpretation and state that “Both the federal and provincial governments can infringe Aboriginal title in furtherance of a compelling and substantial legislative objective and if consistent with the special fiduciary relationship between the Crown and Aboriginal people.” However, in a contradictory statement immediately following, the guidelines acknowledge that “There is a duty to consult with Aboriginal people when the Crown by its actions will infringe on Aboriginal title. The scope of the duty of consultation will vary with the circumstances. In most cases the duty will be significantly deeper than mere consultation, and in some cases require consent.” The contradiction here is that of course in cases where Aboriginal consent is required then there cannot exist any federal or provincial right to infringe on Aboriginal title, since infringement implies an absence of consent (Supreme Court of Canada 1990).

<sup>5</sup> The Convention and list of ratifying states are available at <http://www.ilo.org>.

<sup>6</sup> The WKSS is a partnership between Aboriginal, environmental, government and industry players which aims to “provide baseline information, using both scientific and traditional knowledge, to support resource management decisions and evaluate the effects of development in the area from Great Slave Lake to the Arctic Coast” (NRTEE 2001).

<sup>7</sup> “Colonisation” is used here to denote not just the historical event(s) of settlement by Europeans, but the ongoing process which has included forced relocations of Aboriginal Peoples, attempted cultural genocide through legal instruments such as the banning of the Potlach and Aboriginal government structures, the imposition of the Residential School System and the racist marginalisation and alienation from employment and resource wealth suffered today by Aboriginal communities across Canada. Bill Lee (1992) argues that four major Aboriginal community institutions – political, economic, religious/educational and the family – have been devastated by colonialism, which he defines as “the subjugation of one people by another through destruction and/or weakening of basic institutions of the subjugated culture and replacing them with those of the dominant culture.”

<sup>8</sup> The relationship is far from unproblematic, as illustrated by one of the authors in earlier work (Hipwell 1997), but it can greatly increase an Aboriginal group’s relative empowerment with regards to resource companies as is argued by Conklin and Graham (1995).

<sup>9</sup> See, for example, O’Reilly and Eacott’s (1999/2000) description of the Raglan Agreement between Falconbridge and Makivik Corporation.

<sup>10</sup> Lee (1992) points out that “[s]uccessive Indian Acts have undermined the social institutions of Native communities.”

<sup>11</sup> See Appendix I in Berger (1997) for an in-depth discussion of the Inquiry process.

<sup>12</sup> See, for example, the Canadian Arctic Committee’s special edition of its newsletter *Northern Perspectives* 24 (1-4), Fall/Winter 1996, which highlighted issues around diamond mining and the demise of environmental assessment in Canada’s North.

<sup>13</sup> A list of links of the various provincial departments responsible for mining can be found at <http://www.bc-mining-house.com/resources/emdiv.htm#Canada>.