"What is behind the search for social acceptability of mining projects?

Political economy and legal perspectives on Canadian mineral extraction"*

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Abstract

From the dual disciplinary perspective of law and political economy, this papers draws on a select literature to identify (1) two characteristics of Canadian mining rights and regulations which may generate social dissatisfaction; (2) the two main techniques currently implemented in order to answer social demands, including those of indigenous peoples and communities and (3) three important governance "transformations" emerging from these phenomena. It concludes with a number of lessons.

In spite of the ongoing and recent efforts to reform the mining regime in certain provinces or territories, mining rights and regulations in Canada are still based on the free mining principle where mining is paramount to any other activity, be it social or economic. Efforts to respond to dissatisfaction over extraction projects and social demand for changes have focused on strengthening negotiated local economic benefits and a quest for local support in order to ensure the social acceptability of projects in the sector. These phenomena lead to three major ongoing governance transformations: the regulatory stalemate in spite of the need for reform; ongoing shifts in multi-level governance; and the devolution of responsibilities to the private sector. In the context of the stronghold of the free mining principle and negotiated agreements, the focus on social acceptability takes for granted or even reinforces the withdrawal and selective absence of public authorities and overlooks their possible roles and responsibilities.

Key words:

Mining in Canada, social acceptability, IBAs, free mining, regulatory reform, multi-level governance, negociated justice.

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Introduction

There is at present increased interest in the "social acceptability" of mining activities in Canada. This trend has been accompanied by vast amounts of research and debate, as well as the emergence of consultants with expertise in an area which, for many in the industry, has become of paramount and unquestionable importance.

Following a recently completed research project undertaken thanks to the support of a grant from the Social Sciences and Humanities Research Council of Canada (SSHRC) (Campbell and Prémont 2016)[1], this paper questions whether the focus on the issue of "social acceptability" is indeed the appropriate way to get to the root of the growing dissatisfaction of affected populations with the activities of the mining industry.

From the dual disciplinary perspective of Law and Political Economy, we reviewed the literature on two leading and related issues in the mining sector in Canada: the quest for social acceptability and improved local benefits. Three major ongoing governance transformations (or resistance to them) were identified which will be described below: the regulatory stalemate; ongoing shifts in multi-level governance; and the devolution of responsibilities to the private sector. However, in order to provide insight into the roots of the ongoing transformations, two main characteristics of mining rights and the regulatory context in Canada (priority given to mining rights and deficient taxation systems) and two current responses to social unrest regarding mining activities in Canada (quest for local support and negociated justice avenues) must be analysed.

The conclusion presents a series of lessons, some of which reflect the specificity of the Canadian experience. While it is beyond the scope of this contribution to expand in detail

[1] To undertake the research on which this article is based, we applied an analytical and deductive documentation methodology based primarily on the review of scientific papers, research reports, public authority reports and scholarly papers on regulatory frameworks, local benefits and social acceptance in the two sectors studied. The selected documents had to focus on case studies in Canadian provinces or territories and examine the situation at different levels of regulation (federal, provincial, municipal). A total of 196 documents were selected and analyzed, of which 58 were the object of a written synthesis. Once an annotated bibliography had been created using predetermined keywords, a smaller number of documents was selected using the inter-rater method to produce a two-pronged analytical literature review. The work was carried out in successive stages during 2015 and 2016 under the supervision of Professors Bonnie Campbell of Université du Québec à Montréal (UQAM) and Marie-Claude Prémont of the École nationale d'administration publique (ENAP). Some forty keywords were identified to cover the themes of the synthesis, allowing the creation of bibliographic lists for each of the two disciplines. This step made it possible to map the available literature according to the concepts used which in turn allowed for the identification of frequently and infrequently examined topics. For example, there is abundant literature on environmental impact assessments, but little on regulatory frameworks for the extraction of natural resources, the development models and strategies, or actors' roles and responsibilities. We then enhanced our research in selected databases, but we mainly oriented it towards grey literature and public administration reports (e.g., Reports of the Auditor General). A final bibliography by discipline and theme was created to prepare fifty-eight notes of synthesis, with the help of two disciplinary sub-teams. See link to full study in References.

and in light of the conclusions of previous research (Campbell and Laforce 2016), this paper emphasizes that issues of "social acceptability" and hence the question of the legitimacy of the operations of mining companies are directly related to the main characteristics of mining rights and the solutions implemented. We suggest that some of the findings identified may have ramifications and relevance beyond the Canadian experience.

Two main characteristics of mining rights and regulation

The two main characteristics of mining rights and regulations in Canada which may produce or fuel local dissatisfaction concern the heritage of free mining rights and the issue of insufficient mining taxation.

Free mining rights

The history of mining rights throughout the entire country has been marked by the principle of free access to mineral resources which has led to a regime defined as "*free mining*". One need only meet very few administrative requirements to claim a mining title, for both privately- or state-owned lands (with the exception of plots reserved by the state). The power to unilaterally appropriate a mining claim has thus become the emblematic symbol of the Canadian regime (Barton 1993; Lapointe 2008; Bankes and Sharvit 1998). In short, the historical primary objective of Canada's mining laws was and is to maximize the exploration and exploitation of the country's mineral resources.

This particular regulatory heritage of free mining dates from the country's colonial history and efforts to establish a white settlement at the end of the 19th century. It results in priority being given to mining activities over any other land use. Local populations, including local public authorities are therefore nearly powerless or at least very vulnerable when confronting mining rights holders. Because of the nature of the structural relations of power which characterise the mining first heritage and regulation (Laforce M, Campbell B, Sarrasin B 2012), other regulatory powers of the state are also hampered. As a result, to this day, all levels of government, whether federal, provincial, territorial or municipal are subject to this priority given to mining extraction. Indeed, in spite of their recognised land use planning powers, municipalities are powerless in the face of mining rights held by the industry.

Despite advances in the consultation of indigenous peoples and in environmental assessments and in spite of recent attempts to change mining legislation, notably in Ontario and Quebec, the Canadian normative heritage of free mining goes a long way in explaining why situations which Szablowski (2007) has characterised as "selective absence" of the provincial and federal governments have largely been perpetuated to this day.

Insufficient taxation and the transferring of environmental costs to the state

Another dimension which defines the regulation of mining operations relates to the deficiencies of current Canadian provincial tax systems of mining, with regard both to the insufficient magnitude and to the poor distribution of mining revenue. Reports of various Auditors General have emphasized the paucity of public revenue generated by the extraction and the export of natural resources which belonged to the state before mining rights were granted to the industry. Reports also underline the heavy costs shouldered by governments for the restoration of abandoned mine sites. The political economy of mining exemplifies what is known as the privatization of profits while making costs public. While abandoned mine sites are clearly part of a broader concern which involves other human activities and while their restoration raises complex issues in order to permit a full assessment of (1) costs and risks; (2) benefits; (3) responsibilities of effectively managing costs, risk, and benefits; and (4) accountabilities, the magnitude of the sums involved[2] and the number of abandoned mine sites in Canada[3], merit special attention. At the local level, one also finds severe limitations to the capacity of municipalities to benefit from tax revenues from mining projects.

Canadian local communities have long maintained that natural resource extraction disproportionately puts the burden of its disadvantages on them, without proportionate compensation for the benefits and revenue generated. Municipal associations are calling for the redistribution of royalties obtained as a result of natural resources development. Little progress has however been made in this respect throughout Canada. Municipal public services thus remain primarily financed by taxes collected on the territory, notably as property tax while mining assets and equipments are not taxable. The property tax revenue generated by the mining industry is extremely small compared to the wealth created. With the growing use of FIFO (fly-in, fly-out) for workers, even salary benefits do not always remain in the mining area and few fiscal benefits remain on the territory hosting resource extraction activities which must bear all of the negative impacts on its environment.

The provinces themselves also receive little revenue from mineral resources even though activities in this sector take place on public property. Analysts and the Auditors General of several provinces have criticized their governments for their lack of transparency regarding data on mining taxation, the low level of royalties collected and the comparative generosity of the federal and provincial governments towards industry (Stano 2012; Gouvernement du Québec 2009; Office of the Auditor General of Ontario 2015). Between 2005 and 2011, British Columbia only received an average of 3.5 per cent of the mining industry's operating revenues, which is very low considering that mining resources are a publically-owned, non-renewable resource. The Yukon has the more interesting practice of levying a progressive

[2] La Presse. «Mines: Québec réserve 1.25 milliard pour les sites abandonnés », Published February 16 2012 http://www.lapresse.ca/actualites/politique/politique-quebecoise/201202/16/01-4496549-mines-quebec-reserve-125-milliard-pour-les-sites-abandonnes.php

3 Radio Canada, « Près de 10 000 sites miniers abandonnés au Canada ». Published Monday May 30, 2011. http://ici.radio-canada.ca/nouvelle/517670/mines-abandonnees-manitou.

rate of mining taxes in relation to profit increases, starting at $10,000. Administrative fees of 10 per cent are also added for the late payment of mining taxes (Stano 2012).

In short, the lax taxation conditions of the central government (federal or provincial) and the fact that decentralized public administrations (municipalities and also school boards) are unable to collect significant taxes from mining must also be considered in order to understand the current responses developed to answer social demands. The pressures from the taxation deficiencies, together with general increased demands for public participation lead to the experimentation of other types of territorial benefits, which take the form of negotiations that set industry and local communities face to face.

Two main responses to social unrest

Two main responses to the limits of mining rights and regulation are currently applied: the quest for local support and the implementation of negociated justice.

The quest for local support

Given these shortcomings and the difficulty which formal legal channels have in meeting social and territorial demands for participation in decision-making processes, in an attempt to address resulting dissatisfaction, new concepts and processes have been introduced and pushed to the forefront.

If local communities cannot count on a favourable regulatory framework to protect their rights, local support must be sought through other means by the industry and the public regulator. The quest for local support is of course not limited to Canada but as we shall see in this case, it is shaped by a particular institutional and political context. To illustrate this concern more generally and internationally, in light of the number of projects blocked or challenged by host communities and environmental groups, an Ernst & Young (2014) study placed the issue of social license to operate as the third greatest business risk.[4] In this context of a high risk of social opposition (the Ernst & Young report talks about social protest and unrest), the concept of social acceptability or social license to operate becomes a defense mechanism that can be used as a response to social discontent. The concept is increasingly becoming part of the discourse and practices of key stakeholders of large natural resource extraction projects.

Indeed, the permits issued by public authorities no longer guarantee the legitimacy of the activities, and the people or groups who are the most inconvenienced are likely to express their opposition in a number of ways which may hinder or delay projects. Mining activities

[4] The issue moved into fifth place in the 2015 report with resource nationalism becoming first. The company defines resource nationalism as an increase of the tax burden and transparency measures for industry (Ernst & Young 2015).

lead to the closing of spaces and often leave deep scarring to the land, so companies have no choice but to adapt their behaviour to the dissatisfaction of local communities over a period of time which lasts beyond the issuance of formal permits. In short, it is in the best interest of project developers to establish good relations with local authorities from the start and to maintain them throughout the better part of the extraction activities (Raufflet 2014). The concepts of social acceptability, social acceptance and social license to operate thus become not only very appealing, but a necessity to pursue mining extraction.

Consequently, these three related concepts are proving increasingly popular. The first two, social acceptance and social acceptability, are present in both Anglophone and Francophone literature and also in countries where renewable energy projects are likely to be undertaken (particularly wind farms), but they are especially present in the mining industry in more densely populated areas. The third, social license to operate (SLO), similar to the concept of social acceptability, is primarily used in English-language literature and mainly for mining and forestry activities, chiefly in "developing" countries, but also in Australia, Canada and the United States (Batellier and Maillé 2017).

Finally, of a different order as it implies obligations, free, prior and informed consent is without doubt the most long standing of these related concepts, and usually reserved for indigenous peoples, particularly for mining activities. (Lebuis and King-Ruel 2010). The principle of free, prior and informed consent (FPIC) for indigenous peoples is a principle of international law enshrined in the United Nations Declaration on the Rights of Indigenous Peoples,[5] adopted in 2007 in New York, despite the initial opposition of the United States, Canada, Australia and New Zealand. Four years later, Canada signed the document, stating that it was "an aspirational document which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances" (Government of Canada, Aboriginal Affairs and Northern Development Canada 2011). In order to expand adherence to this principle, the FPIC Solutions Dialogue was initiated in 2012[6]. Yet, even when it signed the Convention, Canada reiterated that it did not see any legally binding obligation for the state, but said it was willing to work in a collaborative manner with indigenous peoples. Consequently, in Canada, this concept translates into the duty to consult and accommodate indigenous peoples, within the meaning given by the Supreme Court of Canada.

[5] Resolution by the General Assembly, official document, United Nations, 61st session, UN Document A/RES/61/295.

[6] Free, prior and informed consent (FPIC) – an internationally recognized indigenous right – is enshrined in procedural norms, standards and frameworks such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), policies of financial institutions such as the International Finance Corporation Performance Standards on Social and Environmental Sustainability and the Equator Principles, and in regional and national legal frameworks such as the Mining Directive of the Economic Commission of West African States (ECOWAS) and Peru's recently-approved indigenous peoples' consultation law. The FPIC Solutions Dialogue is a multi-sector initiative to develop practical guidance to support free, prior, informed consent (FPIC) community processes relating to mining, oil and gas projects.

Avenues of negotiated justice

Convergence of various factors such as the search for the social acceptance of projects or the consent of indigenous communities, insufficient territorial taxation, and the shortcomings of regulatory frameworks in setting the conditions of natural resource development has led to the emergence and proliferation of negotiated agreements between industry and territorial communities. Szablowski (2010) has characterized these negotiated agreements as part of a global regime of negotiated justice taking place outside formal court adjudication and administrative decision-making process. Negotiated justice rests on the belief of the individual autonomy principle and freedom of contract obligations. Signed agreements between industry and communities are the main manifestations of the global negotiated justice concept in the context of mining activities.

Distinctions must be made between agreements reached with indigenous and non-indigenous communities. When concluded with indigenous communities, such agreements are most often referred to as Impact and Benefit Agreements (IBAs) in Canada. According to Sosa and Keenan [7](2001), despite many years of experience in negotiating such agreements in Canada, the volume of literature on the subject remained relatively small in 2001. It does not seem to have expanded greatly since. As the agreements are often sensitive and touch upon commercial interests (although the federal or provincial governments are sometimes involved), industry often requires that they remain confidential. However, the report by Sosa and Keenan (2001) makes it possible to group standard IBA clauses under six headings allowing us to analyze below the transformations in governance that they reveal:

1. Introductory clauses, including the community's commitment to support industry efforts in obtaining the various administrative authorizations;

2. Jobs for community members;

3. Economic development of the territory and business opportunities for the community;

4. Royalties paid to the community or the acquisition of interests in the company;

5. Environmental protection and, finally;

6. Social and cultural clauses.

These headings show that IBAs cover a very broad scope. The regulatory framework often imposes the negotiation of such agreements with indigenous communities. This is notably the case in the Northwest Territories, where the federal government holds the mining rights and makes it a requirement for administrative decisions on resource exploitation. This is also the case in Nunavut, where under the Nunavut Land Claims Agreement the granting of

[7] Other terms used for such agreements elsewhere in Canada include Human Resources Development Agreements, Socioeconomic Agreements, Participation Agreements and Cooperation Agreements, depending on the emphasis placed on a particular objective.

mining rights is subject to the signature by the industry of an IBA with affected communities. In 2010, there were a total of 171 IBAs or letters of intent throughout Canada (Knotsch, Siebenmorgen, and Bradshaw 2010). The phenomenon is therefore a very significant one. IBAs become the preferred tool for industry to secure the approval of the communities impacted by their mining projects (Shanks 2006), while also attesting to the holding of a certain consultation process prior to the project.

Canadian history has clearly demonstrated that the rights of indigenous peoples have largely been ignored, and at times violated, in the granting of natural resource extraction authorizations by Canada or its provinces (Procter 2015; Massell 2011; Bielawski 2003). Legal action was often the only available recourse for hoping to change the course of events. The injunction granted by Judge Malouf of the Superior Court of Québec to stop bulldozers that had already started ravaging Cree territory for the "project of the century" to harness the La Grande River of James Bay marked the period and its practices (Blancquaert 2011). By resorting to IBAs, indigenous communities are now able, to some extent and in the first stages of a project, to take part in its establishment, negotiate conditions regarding its implementation, influence its impact on the community and obtain tangible financial, social and cultural benefits. IBAs therefore constitute a radical change over Canada's dark past regarding indigenous peoples.

Similarly to the literature on social acceptability, what has been written on IBAs falls into different camps. Some authors come out more clearly in favour of IBAs. They are often close to indigenous peoples, industry or consultants who take part in the negotiations. They track the remarkable progress made by the agreements since the era when decisions were taken without consulting local populations and when there was no possibility of influencing project development (Gilmour and Mellett 2013). Other analysts maintain that IBAs are perfectly consistent with the tradition of trade and commerce of indigenous nations, while lamenting the fact that certain written promises remain unfulfilled (MacDonald, Zoe, and Satterfield 2014) and objectives unmet, particularly when it comes to employing indigenous workers (Hall 2013). Still others go so far as to recommend the increase of their scope to include the improvement of indigenous peoples' health conditions and welfare (Knotsch, Siebenmorgen, and Bradshaw 2010). Despite the substantial administrative burden that this mechanism imposes to communities, it provides them with the opportunity to adjust the content of the agreements to their specific situation (O'Faircheallaigh and Gibson 2012).

In the opposing camp are the authors who emphasize the hidden dangers of these agreements, in particular the profound changes they reveal regarding natural resource extraction in Canada. This issue is addressed below in the section on the ongoing transformations. While public authorities encourage such agreements, the federal government does not provide any clear policy on the subject, notably with regard to the administrative treatment of the royalties paid, and communities risk seeing their federal government-allocated resources reduced proportionally. There is no analysis of the extent to which this uncertainty influences the negotiations or the form royalties can take, such as individual rather than collective benefits.

Governance transformations or resistance to them

The characteristics of mining rights and regulations and responses given reveal the three important and ongoing governance transformations:

1. The stalemate of regulatory reform in the mining sector
2. Ongoing shifts in multi-level governance
3. The devolution of responsibility to industry

The stalemate of regulatory reform in the mining sector

While other domains of government action have drastically changed over the last decades, mining sector regulation is entrenched in a lasting stalemate from which the state cannot escape.

The regulation of mines in Canada falls primarily under the responsibility of provinces (Section 92A of the Constitution Act, 1867), except for territories where the federal government plays a key role or where treaties with indigenous peoples constrain the public authorities (Sosa and Keenan 2001). To add to this complexity, the federal government retains powers that can have a varying impact on the jurisdiction of the provinces, especially with regard to indigenous peoples, but also in terms of navigation, fisheries (waterways), exports and environmental assessments. Consequently, even though regulations vary significantly throughout the country, some important similarities allow for a broad outline.

As noted above, due to the heritage of the principle of *free mining*, regimes in Canada grant mining priority over any other land use. In return, these enduring regimes and the structural relations of power which they have institutionalised have drastically limited the regulatory and intervention powers of the state, which are subject to the discretionary decisions of industry (Campbell and Laforce 2010). As a result, all levels of government are subject to this priority, including municipalities, where land planning authorities have little leeway in the face of mining rights. Even indigenous peoples remain vulnerable when mining rights are concerned (Laforce, Campbell, and Sarrasin 2012; Campbell and Laforce 2010).

There is increasing opposition to this type of colonial regime, and some provinces have tried to introduce reforms, but the results remain rather limited. This is notably the case in Ontario and Quebec. Despite the 2009 reform of Ontario's Mining Act, the free access to mineral resources remains unchanged (Ariss and Cutfeet 2011; Pardy and Stoehr 2011). Except in the Far North, a mining company can still stake a claim to land subject to Aboriginal claims without notice. The new act does not provide for obligations relating to a joint decision-making process or the sharing of revenue (Simons and Collins 2010). Some changes were made, such as requiring the authorization of private land owners before conducting exploration work in the southern part of the province or the prior consultation of indigenous peoples in the northern part of the province, which has been delegated to industry and

included in the *Far North Act*[8] of 2010, raising serious concerns (Pardy and Stoehr 2011; Simons and Collins 2010). These recent amendments therefore constitute a series of small steps in the right direction, which, however, do not change the basic principles. Indigenous peoples who hold fee simple property rights cannot demand that their lands be exempt from mining rights. The executive branch of government is responsible for the details of the consultation process. History has shown that when indigenous communities opposed to natural resource extraction projects seek court injunctions, the courts tend to give more weight to the financial impact on industry than the impact on the rights of affected populations or the environment. In short, the Ontario reform did little to change the sacrosanct nature of mining rights (Simons and Collins 2010), as would be the case a few years later in Quebec.

In response to strong social pressure, the province of Quebec did indeed try to reform its mining regime. Several attempts were needed, including two in a period of eight months for the same government, which in 2013 produced an outcome that did not please many people but was in line with the perspective of industry.[9] The previous government had also tried twice, but was unsuccessful. The duty to consult indigenous peoples was introduced into the Act, but without a right of veto. The minister must merely draw up an indigenous community consultation policy specific to the mining sector (Article 2.3 of the *Mining Act).*[10] The result is far from the recommendations made by Thériault (2010) for the Quebec mining regime to comply with the constitutional rights of indigenous peoples and translate into concrete terms their capacity to use their ancestral lands. In spite of arduous attempts to reform Canadian mining legislation, results have been mitigated (Ontario & Quebec) and one can only conclude that there have been no significant changes to the principle of free mining.

To compound the situation of stalemate of regulatory reform, there are also important obstacles including a stalemate in public access to information. Even to ensure public participation, access to information is often handicapped by very classical doctrines of Legal interest and procedural fairness, focusing on property ownership or close proximity of residence, two outdated doctrines when native rights or environmental rights are concerned (Vlavianos 2011; Fluker 2015).

As noted above, the content of IBAs and other agreements between industry and local communities is often kept secret, thus deterring any inclination to turn such agreements into public policy instruments that could be openly debated and subject to democratic discussion. More broadly, in the mining sector, even when the law provides for the mandatory consultation of indigenous peoples, as is the case in Northern Ontario or under the new provision of the Quebec Mining Act, the process remains uncertain and there is no obligation to produce results (Simons and Collins 2010).

[8] SO 2010, c. 18.
[9] *An Act to amend the Mining Act*, S.Q. 2013, c. 32.
[10] Ibid.

Shifts in multi-level governance

The distribution of powers to regulate mining presents a rather complicated picture and one marked as well by tensions between federal and provincial jurisdictions, and tensions between provinces and municipalities. The regulatory frameworks and ongoing transformations must however first be understood in a broader context in which Canada is attempting to secure its place on the international stage in an increasingly competitive market. The normative intervention of the federal government (and of the provinces) seek primarily to attract and protect investors. In this regard, Natural Resources Canada's website (Natural Resources Canada 2015) describes Canada as having a positive investment climate and its mining regimes as competitive and attractive on a global scale, because of: 1. Public ownership of resources; 2. Competitive mining taxes; 3. The active willingness of governments to promote this industry.

Other fiscal measures favourable to industry must be added to these factors, such as a 100 per cent tax deduction for exploration costs, a 30 per cent tax deduction for development costs, the deferral of losses from the three previous years up to 20 years into the future, and the flowthrough shares that allow for the transfer of exploration and development losses to investors.

With regard to its larger responsibilities (notably concerning indigenous peoples), the federal government is selectively very present in attracting foreign investment (no entry barriers; and the option of exporting profits and invested capital, including tax-free equity capital), supporting industry through tax incentives and conducting the geodetic surveys that are essential to industry.

However, the federal government is rather absent from its role vis-a-vis indigenous peoples in the negotiation of IBAs. Current efforts to ensure the competitiveness of the investment environment at the national and international levels strongly encourage the provinces and the federal government to develop regulatory frameworks and practices that aim above all to be attractive to investment.

In light of the relative absence of the Federal government and the provinces when it comes to the environmental impacts of natural resource extraction, Canadian municipalities have been given new powers in this area (Northey 2013). Municipalities can, for example, try to intervene indirectly with regard to mining activities on the basis of their jurisdiction over public health and safety. (Vlavianos 2011). Other municipalities such as those in Quebec use their jurisdiction over water supply in an attempt to compensate for lax provincial regulations.[11] Some analysts have tried to find new ways to allow for greater municipal control over the exploitation of natural resources as a means of better exercising its powers

[11] The case that pitted Pétrolia, an oil exploration company active in Quebec, against the town of Gaspé illustrates the type of conflicts that can arise between provincial regulations that are oriented towards natural resource extraction and municipal regulations that are more oriented towards the protection of that same resource or competing resources (such as water, which the municipality must protect so it can be distributed to its population).

to protect another resource (Rousseau 2014). Tensions between the different levels begin to emerge when policies clash with one another. The municipal level is more likely to respond to local public opposition that emerges, which is why social acceptability measures develop at the local level.

The right to consultation of indigenous peoples can become lost between the cracks in Canada's multi-level governance. For instance, the British Columbia Court of Appeal found that the obligation to consult indigenous peoples did not apply to municipalities (case of the Neskonlith Indian Band). Consequently, a municipal permit may not be revoked because the federal government failed to consult indigenous peoples. Some authors have criticized this decision, which makes it possible to circumvent the indigenous peoples' right to consultation by using the powers delegated to municipalities.

In short, in the current context of competitiveness in the mining sector, the noticeable shift in Canada's multi-level governance between central governments and local authorities appears in the end to increase alignment of public decision processes with industry-friendly objectives while stalling the demands and opposition of affected populations. Despite the progress made in the past decades, indigenous communities often have no choice but to turn to the courts. When IBAs have not been contracted out, the judicial system is making important decisions on the ambit of the rights of local communities facing mining rights holders, in a context in which Canadian public policy has become very much driven by considerations of international competitiveness and industry interests.

Devolution of responsibilities to industry

Despite some advances in the consultation of indigenous peoples and in environmental assessments, the Canadian normative heritage of free access to mineral resources (*free mining*) confirms that situations of selective absence of the provincial and federal governments have largely been perpetuated to this day. The vacancies left by the state are quickly filled by industry. This specific aspect speaks to a more general important trend.

In the Canadian mining sector, industry is usually presented as "owner and operator", while the state is relegated to the role of "facilitator and regulator". For instance, the Quebec State plays an almost passive role when it comes to mineral exploration and mining (Thériault 2010). In 2009, the planning capacity of the Ministère des Forêts, de la Faune et des Parcs (MRNF) regarding mineral exploration and mining was described as an issue of concern, in terms of both its economic and its social and environmental dimensions. Fiscal and economic analyses conducted by the MRNF did not allow it to clearly and objectively determine whether Quebec was receiving sufficient compensation from the exploitation of its natural resources, which was left to the discretion of industry. The MRNF had no means or clear policy for resource conservation, even though that is part of its mission. Finally, the control mechanisms for site rehabilitation are described as deficient, so that responsibility is often left to the state, even though it should be handled by the mining industry (Office of the Auditor General of Ontario 2015; Gouvernement du Québec 2009).

The regulatory vacancies left by the state are for the most part filled by industry. IBAs are a part of the shift towards deregulation in many sectors. They encourage the withdrawal of the state in favour of measures negotiated between local communities and mining companies, in which indigenous communities are viewed as business partners rather than holders of Aboriginal rights (Thériault 2010). IBAs are formulated as rights and entail the transformation of the status of indigenous communities from rights holders to stakeholders. In the context of the absence of the public authorities, private agreements are presented as the result of the shortcomings of state regulation with the ultimate goal of enabling the inclusion of communities in the market economy (Graben 2011).

These processes are accompanied by a transfer of responsibilities to industry, even though such responsibilities could be, and elsewhere are, considered to be public responsibilities, not only in relation to the delivery of services (roads, infrastructure), but also in the formulation and implementation of regulations (rule-making) (Szablowski 2007). According to this author, these processes are part a comprehensive regime of "negotiated justice" that is currently being established. The emphasis for both parties is on autonomy and freedom of choice, along with the right to enter into an agreement. Negotiated justice is derived from a lack of trust in the state's capacity to monitor relations amonst various parties. It also allows the state to rid itself of its responsibility to deal with conflict and the demands of society (Szablowski 2010). For Cameron and Levitan (2014), IBAs are instruments that confirm the privatization of the federal government's obligation to consult indigenous peoples regarding resource development on their lands, by imposing solutions put forward by the market for social arbitration. The state's selective absence leaves the door wide open for industry to provide market solutions to social, economic, political and environmental problems, as is revealed by the categories of clauses included in IBAs discussed above.

While situations depend on the enforcement policy and capacity which exist in each province and territory, the interventions of the state are quite circumscribed. Though certainly more present with regard to ensuring the enforcement of contracts and overseeing worker health and safety, state presence is far less consistent and adequate in terms of the enforcement of environmental rules and planning concerning the role of the extractive sector in longer term integrated regional and national economic development. In this sense, it is in line with the conception of the state's reduced role in resource management

Conclusion

In the context of Canada's unique heritage and the reproduction of the structural relations of power, particularly those conferred to industry by regulatory frameworks, some aspects of the current situation warrant special attention. This is the case of the privatization of mandatory consultation by governments and the significant transfer of public roles and responsibilities to industry. These trends carry the serious risk of reducing political space, as communities that sign private bilateral agreements, which are now the norm, may become barred from using certain avenues or instruments to manifest disagreement, such as the possibility of appealing to the courts or the media. Even within communities, public debate

can be muzzled due to negotiated justice processes almost always taking place behind closed doors.

The ongoing transformations of investment strategies in the mining sector to increase profits (importing labour into increasingly remote areas, fly-in-fly-out, intensive mining of open pit mines, long working hours) are likely to generate fewer benefits for local populations and increase social and environmental costs (Mousseau 2012). Such trends will exacerbate the issues addressed in this paper, and notably the issue of social acceptability, for which no satisfactory solution can be found in a regulatory framework that is in a state of stalemate and unable to undergo major reforms.

The current mining development model which continues to encapsulate the past mining priority over other land uses is creating tensions due to the power imbalances, asymmetrical relations and regulatory frameworks on which this model is based. Responses to these tensions focusing on local economic benefits and on social acceptability of projects are a short-term view and such strategies fail to address the much more complex underlying issues which are structural, legal and political in nature and which will continue to create problems of legitimacy for the activities of mining companies. Although aiming to deal with current dissatisfaction and put forward as “solutions”, these avenues tend to mask more fundamental issues and needed regulatory, institutional and political changes. Looking ahead, among the challenges which emerge is that of the political will to engage in debates in Canada, at the provincial and national levels, concerning the issue of territorial control and the conditions under which resource development and the determination of competing uses take place.

It should be underlined that the notions of social acceptability and of the social licence to operate do not have any formal legal basis in Canada. Consequently, those who seek redress do not have the needed legal instruments to do so. They are likely therefore to be subject to existing asymmetrical relations of power among stakeholders and thus the notions often serve the most powerful actors, including industry. The particular regulatory heritage, the types of agreements negotiated in the mining sector, and a certain perspective concerning social acceptability which has developed fostering direct negotiation between communities and industry, all take for granted or support the withdrawal or selective absence of the public authorities and consequently, overlook their potential roles and responsibilities. By failing to strengthen the role of public regulation to protect local populations, on the assumption that private mining companies are better equipped to pursue the public interest, current responses shy away from the potentially central role of public policies which might use natural resources as a transformative catalyst to spur structural shifts, both social and economic, in favour of more equitable, environmentally sustainable, economic and social development in the long term. As illustrated by the innovative work of the Economic Commission for Africa in this area (UNECA 2011) which underlines the critical importance of not side-stepping but rather reinforcing the role state actors, a revisiting of the demarcation between the spheres of public and private authority and responsibility which has developed in the mining sector represents a future area for research. It might offer more promising

avenues for resolving in a lasting manner the challenges to the legitimacy and the power imbalances which accompany mining activities in Canada.

References

Ariss R, Cutfeet J (2011) Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law. Indigenous Law Journal 10 (1): 1–37.

Bankes N, Sharvit C (1998) Aboriginal Title and Free Entry Mining Regimes in Northern Canada. Northern Minerals Program Working Paper 2. Yellowknife: Canadian Artic Resources Committee. http://www.carc.org/pdfs/NMPWorkingPaper2BankesandSharvit.pdf.

Batellier P, Maillé M-È (2017) Acceptabilité sociale: sans oui, c'est non. Écosociété, Montréal

Barton B (1993) Canadian Law of Mining. Calgary: Canadian Institute of Resources Law.

Bielawski E (2003) Rogue Diamonds: The Rush for Northern Riches on Dene Land. Vancouver, Toronto: Douglas, McIntrye.

Blancquaert L (2011) L'impact du jugement Malouf au Québec (1973-1974). Fondation Jean-Charles Bonenfant. http://www.fondationbonenfant.qc.ca/stages/essais/2011Blancquaert.pdf.

Cameron E, Levitan T (2014) Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State Relations in Northern Canada. Studies in Political Economy 93 (Spring): pp 25–52.

Campbell B, Laforce M (2010) La réforme des cadres réglementaires dans le secteur minier : Les expériences canadienne et africaine mises en perspective. Recherches amérindiennes au Québec 40 (3): 69–84. doi:10.7202/1009370ar.

Campbell B, Laforce M (2016) La responsabilité sociale des entreprises dans le secteur minier : Réponse ou obstacle aux enjeux de légitimité et de développement en Afrique ? Québec : Presses de l'Université du Québec.

Campbell B, Prémont M-C (2016) Mutations de la règlementation multi-niveaux et du rôle des acteurs dans la mise en oeuvre des ressources minières et de l'énergie renouvelable : La quête pour l'acceptabilité sociale et la maximisation des retombées. 40 pages

http://www.ieim.uqam.ca/spip.php?page=article-cirdis&id_article=10372

Transformations in Multi-level Regulations and the Role of Stakeholders in the Development of Mineral Resources and Renewable Energy: Exploring the quest for social acceptability and the maximization of benefits. 39 pages

http://www.ieim.uqam.ca/IMG/pdf/report-campbell-premont_english_final.pdf

Ernst & Young (2014) Business Risks Facing Mining and Metals 2014-2015. EYG ER0170. EY's Global Mining and Metals Center. http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014–2015/$FILE/EY-Business-risks-facing-mining-and-metals-2014–2015.pdf.

S. Fluker (2015)The Right to Public Participation in Resources and Environmental Decision-Making in Alberta. Alberta Law Review, 52 (3) 567-603.

Gilmour B, Mellett B (2013) The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations. Alberta Law Review, Energy Law Edition, 51 (2): 385–400.

Gouvernement du Québec (2009) Rapport du Vérificateur général du Québec à l'Assemblée nationale pour l'année 2008-2009. Tome II. Chapitre 2. Interventions gouvernementales dans le secteur minier. Entitée vérifiée: Ministère des Ressources naturelles et de la Faune. http://www.vgq.gouv.qc.ca/fr/fr_publications/fr_rapport annuel/fr_index.aspx?Annee=2009.

Government of Canada, Aboriginal Affairs and Northern Development Canada (2011) Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples. Event; fact sheet; reference material. June 29. https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.

Graben S (2011) Assessing Stakeholder Participation in Sub-Arctic. Co-Management: Administrative Rulemaking and Private Agreements. Windsor Yearbook of Access to Justice 29 (1): 195–221.

Hall R (2013) Diamond Mining in Canada's Northwest Territories: A Colonial Continuity. Antipode 45 (2): 376–93..

Knotsch C, Siebenmorgen P, Bradshaw B (2010) Les 'Ententes sur les répercussions et les avantages' et le bien-être des communautés: des occasions ratées? Recherches amérindiennes au Québec 40 (3): 59–68.

Laforce M, Campbell B, Sarrasin B (2012) Régulation du secteur minier au Québec et au Canada. Québec: Presses de l'Université du Québec.

Lapointe U (2008) De la ruée vers l'or californienne au Québec minier contemporain: Le système du free mining et le pouvoir des communautés locales. Collaboration spéciale. Montréal: Groupe de recherche sur les activités minières en Afrique, UQAM. http://www.ieim.uqam.ca/IMG/pdf/Note_de_recherche_-_ULapointe_FreeMining__dec_2008_.pdf.

Lebuis V, King-Ruel G (2010) Le consentement libre, préalable et informé: Une norme internationale en émergence pour la protection des populations locales autochtones. Recherches amérindiennes au Québec 40 (3): 85–99.

MacDonald GG, Zoe JB, Satterfield T (2014) Reciprocity in the Canadian Dene Diamond Mining Economy. Natural Resource Extraction and Indigenous Livelihoods: Development Challenges in an Era of Globalisation, Gilberthorpe E, Hilson GM. Farnham, Surrey, England: Ashgate Publishing Limited.

Massell D (2011) Quebec Hydropolitics: The Peribonka Concessions of the Second World War. Montreal, Kingston: McGill-Queen's University Press.

Mousseau N (2012) Le défi des ressources minières. Québec: Éditions MultiMondes.

Natural Resources Canada (2015) Canada's Positive Investment Climate for Mineral Capital. Information Bulletin November 2014. Ottawa: Government of Canada. http://www.nrcan.gc.ca/mining-materials/publications/8782.

Northey R (2013) The Role of Municipalities in Canada's Energy Strategies. Journal of Environmental Law and Practice 25: 135–64.

O'Faircheallaigh C, Gibson G (2012) Economic Risk and Mineral Taxation on Indigenous Lands. Resources Policy 37 (1): 10–18. doi:10.1016/j.resourpol.2011.12.009.

Office of the Auditor General of Ontario (2015) Mines and Minerals Program. In Annual Report 2015, 459–95. Chapter 3, Section 3.11. Toronto: Gouvernement de l'Ontario. http://www.auditor.on.ca/fr/rapports_2015_fr.htm.

Pardy B, Stoehr A (2011) The Failed Reform of Ontario's Mining Laws. Journal of Environmental Law and Practice 23 (October): 1–17.

Procter A (2015) Uranium, Inuit Rights, and Emergent Neoliberalism in Labrador. Mining and Communities in Northern Canada, Keeling A, Sandlos J, University of Calgary Press, 233–58. Calgary.

Raufflet E (2014) De l'acceptabilité sociale au développement local résilient. VertigO 14 (2). doi:10.4000/vertigo.15139.

Rousseau G (2014) La prépondérance étatique et les compétences municipales sur l'eau et le forage: Étude de la validité d'un règlement de la Ville de Gaspé. Les Cahiers de Droit 55: 645–84.

Shanks G (2006) Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements. Final Report. Ottawa: Public Policy Forum. http://www.deslibris.ca/ID/204203.

Simons P, Collins L (2010) Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective. McGill International Journal of Sustainable Development Law and Policy 6: 177–216.

Sosa I, Keenan K (2001) Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada. Canadian Environmental Law Association,

Environmental Mining Council of British Columbia, CooperAcción. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.473.2025&rep=rep1&type=pdf

Stano M (2012) Exploring the Mining 'Money Trail': Assessing British Columbia's Mining Tax Regime and Unearthing Legal Tools That Foster Greater Returns for Local Communities. McGill International Journal of Sustainable Development Law and Policy 8: 79–112.

Szablowski D (2007) Transnational Law and Local Struggles: Mining, Communities and the World Bank. First edition. Oxford: Hart Publishing.

——— (2010) Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice. Canadian Journal of Development Studies/Revue Canadienne D'études Du Développement 30 (1–2): 111–30.

Thériault S (2010) Repenser les fondements du régime minier québécois au regard de l'obligation de la Couronne de consulter et d'accommoder les peuples autochtones. McGill International Journal of Sustainable Development Law and Policy / Revue internationale de droit politique du développement durable de McGill 6 (2): 217–45.

United Nations Economic Commission for Africa (UNECA), and Africa Union (2011) Minerals and Africa's Development. The International Study Group Report on Africa's Mineral Regimes. Addis Ababa: Economic Commission for Africa. http://www.uneca.org/publications/minerals-and-africas-development.

Vlavianos N (2011) The Regulation of Wind Power in Alberta: The Case of Municipalities. Journal of Environmental Law and Practice 22 (2): 125–59.