Improving Consultation Processes between Mining Companies and First Nations in BC

by

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Abstract

British Columbia's Premier Christy Clark has promised eight new mines by 2015, and upgrades to current mines. Unfortunately, the variety of individual mining company practices for consulting with BC First Nations regarding mining activities on traditional native land contributes to an atmosphere of uncertainty regarding the success of the negotiations. This uncertainty jeopardizes the Premier's plan by raising the constant spectre of litigation, fractured relationships between companies and First Nations, and delayed mine development timelines. This capstone research contributes to the literature in three ways: it provides analyses of the consultation processes used in four BC mineral deposit and mine development cases; identifies positive and negative aspects of the status quo; and recommends effective policy options and implementation procedures for the BC government to reduce the likelihood of litigation, improve First Nations' capacity to respond to mine development projects, and assist mining companies and First Nations in building mutually-beneficial relationships.

Keywords: consultation; uncertainty; capacity; mining; litigation; policy

For my parents, who have given me steadfast love and support from the day I became their son by adoption, and to my godmother, who has always believed in me

Acknowledgements

My interest in contributing toward improving the consultation process between mining companies and First Nations was sparked by litigation cases and road blockades reported in the media. In selecting the topic as my capstone research project, my goal is to provide effective policy options for BC government to consider in resolving the conflicts between First Nations and mining industry. It is my hope that this research will lead to effective consultation processes and mutually-beneficial outcomes for First Nations, mining companies, and the BC government.

This capstone research project has been made possible through the support of many people to whom I owe many thanks: some contributed to this project through interviews and discussions with me; others contributed through literature, reports, media, and presentations at conferences. First, I would like to thank my supervisor Dr. Doug McArthur for his support, my committee for their contribution, and the Simon Fraser School of Public Policy staff and MPP cohort for engaging policy discussions. Next, I would like to extend special thanks to the First Nations leaders who shared their experiences and views through interviews with me: Chief Fred Sam of the Nak'adzli First Nation; Chief Derek Orr of the McLeod Lake First Nation; and Chief Leo Alphonse of the Tsilhqo'tin First Nation. Finally, I would like to express my gratitude to Taseko Mines Ltd. and Imperial Metals Company, Inc. for their contribution to the case studies through interviews and to everyone who supported this project.

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List of Acronyms

AIUS	Aboriginal Interest and Use Study
AME	Association for Mineral Exploration
BC EA	British Columbia Environmental Assessment
BC EAO	British Columbia Environmental Assessment Office
BC MEM	British Columbia Ministry of Energy and Mines
CIA	Community Impact Assessment
EA	Environmental Assessment
EAO	Environmental Assessment Office
ENS	Environmental News Service
IBA	Impact-Benefit Agreement
JCM	Joint Clan Meeting
MOE	Ministry of Environment
MPP	Master of Public Policy
NNTT	Australian National Native Title Tribunal
NOW	Notice of Work
NRT	New Relationship Trust
SCC	Supreme Court of Canada
SNTC	Shuswap National Tribal Council
TEK	Traditional Ecological Knowledge
TML	Taseko Mines Limited
TNG	Tsilhqo'tin National Government
TRFN	Taku River Tlingit First Nation
TSF	Tailing Storage Facility
TWG	Technical Working Group
MABC	Mining Association of British Columbia
MIAC	Mining Industry Advisor Committee

Executive Summary

Premier Christie Clark's plan for fast tracking mine development in British Columbia is hindered as some projects are being delayed because consultations between mining companies and First Nations are resulting in disputes. Although BC has good mineral potential and financial incentives to attract investment, uncertainty concerning native land claims is frequently in the media as a result of litigation and conflicts, thereby discouraging investment in the province. Based on the attractiveness of mining policies, Fraser Institute's *Survey of Mining Companies* ranks BC 31st out of 93 global jurisdictions and tenth out of twelve domestic jurisdictions (Survey of Mining Companies, 2012). Although the provincial government has been working on improving its mining policies to attract investment, the consultation process between First Nations and the mining industry is not making the grade and needs to be addressed. Consequently, the BC government is not meeting its duty to consult First Nations adequately. This research project focuses on identifying existing deficiencies in policies, regulations, and guidelines and developing effective policy options to fulfill the Crown's duty to consult First Nations, thereby reducing the uncertainties perceived by the industry.

This research utilizes literature reviews, legal cases, case studies, and key informant interviews to gather relevant data representing a variety of perspectives, including government, mining companies, First Nations, and legal scholars and professionals. Four BC mineral deposit and mine development projects are selected as case studies through which advantages and deficiencies of the status quo are investigated. Moreover, best practices from other jurisdictions are researched and their application considered in conjunction with lessons learned from BC case studies to develop effective policies.

The research utilizes four selected BC case studies: Mt. Milligan mine (under construction); Ruby Creek project; Prosperity project (mine plan on hold); and Ruddock Creek project. The key outcomes from the case studies regarding the consultation process between the First Nations and mining companies include the following: governmental policy inadequately assists First Nations who have lesser

capacity/resources; consultation process is seen as inadequate where mutually-acceptable agreements have not been reached; government timelines are inadequate for First Nations' governance systems; some First Nations lack mining policies or have inadequate ones; and First Nations with strong mining policies shift from reactive participants in mine development to proactive partners for government and project proponents.

Three policy options are recommended, all of which clarify the consultation process between mining companies and First Nations, help the Crown meet its duty to consult First Nations, and reduce uncertainties that discourage investment in mining. The first policy option involves incentivizing First Nations to develop their own mining policies through the provision of funding by the BC government. The second policy option advises incremental reforms to the current system to address the concerns of project proponents and First Nations regarding timelines for First Nations to respond to notifications of exploration and draft EA reports. The third option advises the establishment of a board/tribunal to provide mediation between proponents and First Nations who cannot resolve disputes on their own. As all three options are necessary for development of best practices, this report recommends that the BC Ministry of Energy and Mines (BC MEM) implement policy options 1 and 2 in the short term, and option 3 in the long term.

1. Introduction

Despite the recent increase in the number of projects entering the environmental assessment stage in British Columbia, and an increase of 1300 percent in annual spending on mineral exploration over past eleven years (Republic of Mining, 2012), the province is still perceived by the mining industry as a relatively-uncertain jurisdiction for investment. The Fraser Institute's *Survey of Mining Companies* ranks BC 31st out of 93 global jurisdictions and tenth out of twelve domestic jurisdictions (*Survey of Mining Companies*, 2012, p. 10) based on the attractiveness of mining policies. Although the ranking is based on a composite index that measure the effects on mineral exploration of more than a dozen government policies, including uncertainty concerning native land claims and protected areas, the fact that litigation cases and conflicts between mining companies and First Nations are frequently in the media suggests that this uncertainty contributes significantly to discouraging mining companies from investing in BC. While some of this negative perception is due to the other measures in the composite index, the uncertainty surrounding consultations with First Nations needs to be taken seriously.

A number of BC mining projects have been rejected or put on hold because the consultation process between mining companies and the First Nations has failed to satisfy the concerns of the First Nations affected by the projects. In some cases, the mining companies have failed to address all the concerns of the First Nations, whereas in others, differing First Nations that would be impacted by the mine development could not reach an agreement regarding the costs and benefits of the proposed project.

Considering that the estimated economic impact of mining in BC was $8.9 billion in total output for 2010, and that the industry contributed 45, 703 direct, indirect, and induced jobs (*Economic Impact Analysis*, 2010, p. 3), improving the consultation process with First Nations would support Premier Christie Clark's economic agenda for fast tracking mine development in the province, thereby benefiting all British Columbians.

1.1. Problem Statement

The fact that some of BC's advanced projects ready for mine development have been rejected or put on hold because mining companies and First Nations have failed to reach mutually-acceptable agreements is discouraging investment and hindering Premier Christie Clark's economic agenda for fast tracking mine development in the province.

1.2. Research Objective

This research project focuses on the consultation process between mining companies and First Nations in BC for the purpose of identifying existing deficiencies in policies, regulations and guidelines. The goal of the project is to develop effective policies and implementation procedures for the BC Ministry of Energy and Mines to use to improve the quality and success of consultations with First Nations regarding investment in mineral exploration and mine development.

1.3. Research Approach

This research utilizes literature reviews, legal cases, case studies, and key informant interviews to gather relevant data representing a variety of perspectives, including government, mining companies, First Nations, and legal scholars and professionals. Four BC mineral deposits and mine development projects are selected as case studies through which advantages and deficiencies of the status quo can be investigated, not only based on what is available in the literature and the media, but also by interviewing the representatives of the mining companies and the First Nations affected by the projects. Moreover, best practices from other jurisdictions are researched and their application considered in conjunction with lessons learned from BC case studies to develop effective policies.

1.4. Data Sources and Limitations

This research uses primary data from interviews with stakeholders to complement secondary sources of information where these sources are incomplete. Although interviews can provide insight on actions taken and decision made by different stakeholders, the validity of the data can be compromised by inherent limitations due to personal biases of key informants, possible non-representation of the majority's interests, existence of confidential agreements, secrecy regarding motives, and the degree of willingness of the selected representatives to be interviewed and to share fully their knowledge. While these limitations could misinform the research on the one hand, they could provide a meaningful signal that different views exist within the same stakeholder group.

1.5. Summary

The remaining chapters of the research project are organized as follows: Chapter Two establishes the economic importance of mining in the province, and examines financial incentives to encourage mining, the industry's view on investment opportunities in the province, and the provincial government's interest to fast track mine development. Chapter Three examines the origin of the consultation process with First Nations regarding land use. Chapter Four reviews literature and discovers strong evidence of deficiencies in the status quo and inadequacies in the legal framework. Chapter five presents the research methodology and the rationale for selected case studies and key informants. Chapter Six examines Mt. Milligan case study and the consultation process involving First Nations affected by it. Chapter Seven presents the Ruby Creek case study and the outcomes for the First Nations and the mining company. Chapter Eight focuses on the Prosperity Mine, challenges it and the First Nations face, and lessons learned that could guide future policies. Chapter Nine examines the Ruddock Creek case study and the outcomes of the consultation process. Chapter Ten presents policy options, criteria, analysis, and recommendations. The final chapter provides concluding comments for this report.

2. Mining Industry in British Columbia

2.1. Introduction

British Columbia is Canada's largest producer of copper, its only producer of molybdenum, and the largest exporter of coal. According to data from the Mining Association of British Columbia (2011), there were 11 operating metal mines, 9 operating coal mines, and 26 industrial mineral operations across the province in 2011. In addition to operating mines, there has been a recent boom in the province regarding new mine proposals. There are 23 metal mines, 9 coal mines, and 5 industrial minerals operations in either advanced exploration or in the permitting/environmental assessment phase for 2011 (MABC, 2011).

The estimated economic impact of mining in BC is $8.9 billion in total output for the year 2010. As a joint Price-Waterhouse-Cooper (PWC) and Mining Association of British Columbia study notes, “expressed as a ratio, each dollar spent in the BC mining industry can be said to have generated $1.73 of total impact (direct, indirect and induced)” (*Economic Impact Analysis*, 2011, p. 3). Expressed in terms of value added, the mining industry and its direct suppliers contributed $4.7 billion to the BC GDP.

In 2010, the mining industry contributed an estimated 45, 703 direct, indirect, and induced jobs (*Economic Impact Analysis*, 2010, p. 3) to the BC economy. The direct employment created by the mining industry accounted for 2% of the BC labour force. Clearly, mining is important to the BC economy as it provides a significant amount of government revenue. In recent years, the provincial government has focused more effort on attracting and retaining mineral exploration and mine development in BC. According to the Ministry of Energy and Mines (BC MEM), there are four cornerstones to its Mining Plan: access to land; protecting workers and environment; global competitiveness; and focus on communities and First Nations.

To be globally competitive, BC provincial government offers to the mining industry an attractive package of financial incentives that include the BC Flow-through Share Tax Credit, the BC Mining Exploration Tax Credit, Property Tax Exemptions, and a Separate Class Election for Depreciating Machinery and Equipment. According to the Ministry of Energy and Mines, "the British Columbia and federal non-refundable tax credits, when added to the regular 100% deductions are equivalent to a 141% exploration expense deduction for income tax purposes" (BC Ministry of Forests, Mines and Lands and Ministry of Natural Resource Operations, 2010, p. 1). Although BC is considered to have an excellent potential for mineral exploration and mine development, uncertainties regarding access to land and consultation process with First Nations are suppressing its global score.

2.2. The Mining Industry Rates BC's Potential

An examination of the Fraser Institute's 2011/2012 *Survey of Mining Companies* clearly shows that BC needs to improve to attract more mining investment. The Fraser Institute ranks BC 31st out of 93 global jurisdictions and tenth out of twelve domestic jurisdictions (*Survey of Mining Companies*, 2012) based on the attractiveness of mining policies. It is noteworthy that the Fraser Institute's survey does not take into account the fact that there has been an increase of 1300 percent in annual spending on mineral exploration over past eleven years in BC and that the province's share of spending nationally compared to the other 11 jurisdictions has gone up from 5.7 percent to 15.2 percent ("Fraser Institute's Survey of Mining Companies Shows British Columbia's Steady Improvement", 2012). The ranking is based on the Policy Potential Index, a composite index that ranks based on mining companies' perceptions of a jurisdiction's environmental regulations, regulatory duplication, taxation policy, native land claims, infrastructure, political stability, regulations regarding labour, geological database, and security.

While this ranking is low for BC, it should be stressed that this does not mean that BC's mineral potential is lacking, but rather that its "mineral potential *under the current policy environment*" (*Survey of Mining Companies*, 2012) causes the enthusiasm on the part of mining companies to be muted. Therefore, it is clear that British Columbia

has much room to improve to score as high as the jurisdictions in the top 10 positions in the world. A particularly critical quote from one of the mining industry representatives summarizes the deficiencies in British Columbia:

> British Columbia suffers from land claims issues, environmental uncertainties, permitting problems, political problems on several fronts, and a history of defaulting to a dictatorial Supreme Court. (*Survey of Mining Companies*, 2011, p. 35).

While this is the strongly-worded opinion of one individual, it does suggest deficiencies in the status quo. Even AME BC acknowledges that "land access and use matters" are one of very important challenges that need to be addressed ("Fraser Institute's Survey of Mining Companies Shows British Columbia's Steady Improvement", 2012). The scarcity of signed land agreements with First Nations and the uncertainty of the consultation procedures further complicate the situation for First Nations, mining industry and the Crown.

2.3. Premier Christie Clark's Economic Agenda for Mining Industry

In September 2011, Premier Clark announced a new job creation plan that involved the creation of eight new mines and the expansion of nine others. The government plans to achieve its goals by speeding up approvals and cutting bureaucratic 'red tape'. The government states that it is encountering 'regulatory delays' such as a backlog of 'notice of work' application reviews for mines (Olivier, 2012). In September 2011, the government had a backlog of 229 notices of work and has since narrowed it down to 85 (Olivier, 2012). The government is hoping to reduce the number further to 46 by September 2012. Premier Clark sums up the government's plan by stating: "Government is a big problem if we get in the way. We are going to get out of yours and we are going to make sure that government isn't the instrument that slows you down" (Olivier, 2012). Nevertheless, mining industry and First Nations activists remain skeptical about the government's ability to deliver on its mine creation plan.

2.4. Summary

Although BC has good mineral potential and financial incentives to attract investment, the mining industry's Policy Potential Index, which includes land claims, for BC indicates that there is room for improvement is some of the policy area. Considering that mining industry makes an important contribution to the provincial economy, improving the policies to mitigate the uncertainties that the sector perceives regarding land claims and the consultation process with First Nations would be beneficial to the BC economy. The next chapter deals with the consultation process.

3. Origin of the Consultation Process and the Status Quo

3.1. Introduction

Considering that Treaty 8 (1899), the Nisga'a Treaty (2000), the Tsawwassen Treaty (2009) and the Maa-nulth Treaty (2011) are the only treaties in BC, this leaves large tracts of land open to title claims by First Nations. The scarcity of treaties in BC means that a large portion of mineral exploration is happening on land that can be subject to native claims. This creates challenges, including litigation over Aboriginal rights and title, complicating the situation for First Nations, mining industry, and the Crown. The consultation process between the mining companies and the First Nations originates from the Supreme Court of Canada rulings that the Crown has the duty to consult and accommodate First Nations.

3.2. Consultation

The Crown's duty to consult and, where appropriate, accommodate First Nations is rooted in Section 35(1) of the *Constitution Act, 1982*, which asserts that the honour of the Crown requires that the Aboriginal rights embedded in Section 35 be "determined, recognized, and respected" (Devlin, 2010, p. 2). Consultation is a mechanism by which Aboriginal rights can be reconciled with Crown sovereignty. Where the Crown has knowledge of the potential existence of Aboriginal rights and can see that a proposed project may negatively impact them, the duty to consult and accommodate arises (*Sparrow*). Each instance of a proposed project has unique characteristics that impact the level of consultation necessary. In general, as the number of negative impacts on Aboriginal rights increases, so too does the level of consultation and accommodation on the part of the Crown. However, "reasonable accommodation will involve a balancing of Aboriginal and societal interests, which may include the interests of industry proponents"

(Devlin, 2010, p. 2). Over time, case law further clarified the Crown's duty to consult and accommodate and permitted the Crown to delegate procedural aspects of consultation to project proponents. The next section summarizes the legal principles outlined by the SCC judges in *Delgamuukw, Haida* and *Taku River Tlingit* cases that further shaped the consultation process.

3.3. The *Delgamuukw*, *Haida* and *Taku* Cases: Industry as Negotiators

The overall legal principles set in the Supreme Court of Canada cases, *Delgamuukw, Haida and Taku River Tlingit V. British Columbia,* jointly have shaped the consultation with First Nations. The *Delgamuukw* case established the principle that Aboriginal consent is a requirement for development projects on lands subject to Aboriginal Title. The *Haida* case went further, stating that this consent is appropriate only in cases of established rights. However, the *Taku River Tlingit* rulings state that the Crown has the duty to consult even in the case of First Nations who have only asserted, but not proven Aboriginal rights or title. Notably, the *Haida* case also stated that while First Nations have a legal right to be consulted, they do not have a right of veto over a project. Moreover, the court also stated that the Crown could delegate procedural aspects of consultation to project proponents (Robinson & Clark, 2010), which is why the mining companies seek to fulfill their delegated consultation duties by accommodating First Nations through negotiated Impact Benefit Agreements (IBAs) or Mineral Exploration Agreements (MEAs) before projects proceed. However, the Crown has a duty to consult when contemplated Crown conduct could have a potential adverse impact on potential or established aboriginal or treaty rights recognized in section 35 of the *Constitution Act*.

3.4. Status Quo: Regulations on Consultation Process

The status quo is summarized through an examination of the BC *Mining Tenure Act*, the BC *Environmental Assessment Act*, and the Ministry of Energy and Mines' *Updated Procedures for Meeting Legal Obligations When Consulting First Nations*

(2010) regulations. For clarity and concision, this report divides the regulatory system into three phases—Claim registration, Exploration, and Environmental Assessment. Although this is not a detailed discussion, it is adequate for providing facts about the status quo relevant to this research project.

3.4.1. Claim Registration

In this phase, mining companies utilize BC's free mining system to stake their claims online. At this stage, there is no need to consult with First Nations. However, the Ministry of Energy and Mines does provide a Tenure Overlap Report, which advises mining companies on First Nations who may claim the project area as traditional territory. Mining companies are encouraged, but not formally required, to engage in dialogue with these First Nations.

3.4.2. Exploration

To conduct exploration activities on claimed areas, mining companies must receive a number of permits relating to drilling, timber clearing, or road construction. At this stage, the Ministry issuing the permit determines if the project proponent must consult with First Nations about the proposed exploration work and how intensive the consultation must be.

The BC Ministry of Energy and Mines requires project proponents to submit a Notice of Work (NOW) outlining proposed exploration activities and whether the proponent has engaged in any consultation with affected First Nations. If the proponent has, it is also required to summarize the consultation activities within the NOW application. In fulfilling its responsibility to consult and accommodate, the BC MEM refers the NOW to the affected First Nations. It typically allows them around 30 days to respond with any concerns or objections. However, if there is no response from First Nations within the 30 day time period, government decision-makers review their actions to determine whether their consultation efforts were sufficient. If they determine their efforts were sufficient, the province can provide the proponent with the relevant permits.

3.4.3. Environmental Assessment Process

Certain criteria determine whether a project undergoes the EA process. If a project produces more than 75,000 tonnes of ore per year or disturbs over 750 hectares of land in excess of permitted limit, the project must undergo environmental assessment. The first formal de facto panel review of a project's impacts on Aboriginal rights occurs during the Environmental Assessment (EA) process. The EA process was not created specifically to contribute to fulfilling the Crown's duty to consult and, where appropriate, accommodate First Nations. Rather, it was designed to take into account effects of projects on the environment. Nevertheless, the SCC has ruled that consultation occurring as part of an EA process can amount to deep consultation (Fasken-Martineau, 2011) because of the multiplicity of opportunities for First Nations to participate in the review process.

The EA process is the first major comprehensive examination of First Nations traditional knowledge, current use of the project area, and impacts of the project on First Nations way of life. Under the EA process, individual Indian bands are invited to attend working groups alongside other First Nations, but if they do not wish to participate, a separate consultation forum can be set up if the band requests it. However, there is no mechanism to prevent a First Nation from withdrawing entirely from the EA process and negotiating in confidence with the proponent.

The Environmental Assessment Act limits the BC Environmental Assessment Office (BC EAO) to 180 days to review the proceedings and arrive at a decision. For this reason, once the EA panel has concluded hearings and written the draft report, First Nations are provided with 3 weeks (BC EAO, n.d.) to respond/object in writing to the EAO's analysis. If First Nations do submit an objection, it is sent to the Ministry of Environment and the Ministry of Energy and Mines along with the report. Because First Nations often lack technical capacity for specifying concerns about the project or commenting on the draft EA report, the EAO provides them with limited funding and invites proponents to supplement as proponents deem necessary.

3.5. Summary

This section has summarized the key court decisions that have set out the duty to consult and provided for the involvement of third party mining companies as delegated consultants with First Nations. It has also provided a summary of current provincial regulations regarding consultations with First Nations that incorporates the precedents developed through the court decisions. The next chapter offers some legal critiques of the effectiveness of the status quo regulations in ensuring adequate consultation and accommodation of First Nations' rights by project proponents.

4. Literature Review

4.1. Introduction

The literature review provides normative legal and academic arguments that will be used to inform the development of appropriate policy options. As the focus of this research is the consultation process component of the status quo, two critiques of the status quo presented from a legal perspective are reviewed. The first is a report produced by the Harvard Law School that examines how the status quo impacts First Nations. The second is a presentation by Vancouver legal firm that argues that project proponents and the provincial government incorrectly regard the Environmental Assessment process as the keystone consultation arena.

4.2. *Bearing the Burden*: The Harvard Law School Conclusion

In *Bearing the Burden*, scholars from the Harvard Law School put forth an argument that BC's current legal framework is inadequate to protect fully the rights of First Nations throughout consultations with mining companies. The authors go so far as to accuse BC's laws of favouring rather than regulating the mining industry and giving token safeguards for First Nations and the environment. In supporting their argument, the Harvard legal analysts draw upon both domestic and international law. They examine the case of BC's Takla First Nation as a typical example of the unfair burden placed upon First Nations at each phase of mineral exploration and development.

The problems for Takla started with BC's free-entry institution that allows "almost anyone to register a claim without consulting landholders" (Harvard, 2010, p. 8).

This led to exploration and development of underground and open pit mines in their traditional territory, but without adequate consultations with Takla. Abandoned mines, such as Bralorne-Takla and Ogden Mountain, pose lingering risks of contamination, but is seems unclear who is responsible for cleanup. As the report notes, "[m]embers of Takla widely report destruction of habitat, a decrease in wildlife, and a fear of health problems from contaminants…these effects cause cultural as well as environmental injury" (Harvard, 2010, p. 2). Moreover, the inability of the Takla to secure long-term direct economic benefits from the various mining projects on their lands is also an ongoing problem. As the report notes, "[m]any members of Takla said they would like to see revenue and/or profit sharing, but most mining in the region is…not a profitable venture" (Harvard, 2010, p. 15). Despite the 2008 revenue sharing plan by the province whereby revenue generated through permitting and regulation procedures will be shared with affected First Nations, Takla have seen little benefit from it. Moreover, even when mining companies sign ad hoc employment agreements with Takla, the jobs are seasonal, do not provide health benefits, and are limited in number as they require skills the Takla do not possess. Clearly, the status quo is not working for the Takla First Nation.

4.2.1. Key Findings of the Harvard Law School

Having determined that mining places a hardship on BC's First Nations and that BC's laws have little effect in upholding their rights, the report concludes that urgent law reform is needed. This does not mean that BC lawmakers need to invent new guiding principles for law reform. Rather, they need to incorporate international human rights principles. The Harvard Law School lays out the following list of broad changes needed:

- Recognize aboriginal rights in any development decisions on First Nations' lands.
- Incorporate explicit reference to aboriginal rights, including international human rights, into reformed legislation and policies.
- Provide more funding for independent studies on the effects of mining.

- Reform mining permitting laws and procedures to clarify and enhance meaningful consultation with First Nations.

- Legally obligate mining companies to undertake human rights impact assessments, similar to the already required environmental impact assessments prior to mine development.

- Coordinate and consolidate oversight of the effects of mining across government agencies.

In conclusion, the Harvard Law School states that "[i]nternational and constitutional standards thus provide a framework for the protection of First Nations that calls for heightened scrutiny of projects affecting these indigenous peoples and the incorporation of aboriginal rights into domestic mining law" (2010, p. 4). By implementing these recommendations, First Nations can be given both a louder voice in decision-making and "an assurance that the environment with which they are linked is healthy" (Harvard, 2010, p.4). As they stand now, however, BC's mining laws fail to do either.

4.3. Anatomy of a Resource Project: The Impact-Benefit Agreement Process from Exploration through Implementation

This was a presentation given by Michael J. McDonald of McDonald and Company at the 19th Annual Canadian Aboriginal Minerals Association Conference in Vancouver (November 2011). In the presentation, Mr. McDonald outlined a strong argument as to the obstacles inherent in the EA process and challenges presented by the ability of the Crown to delegate procedural aspects of consultation to project proponents. In this speech, the IBA was defined broadly as any "agreement between [a] resource development company and First Nation" (McDonald, 2011). It is also referred to in the industry as a 'Participation Agreement', a 'Development Agreement', and an 'Accommodation Agreement'. Regardless of the name assigned to it, the nature of these agreements is threefold:

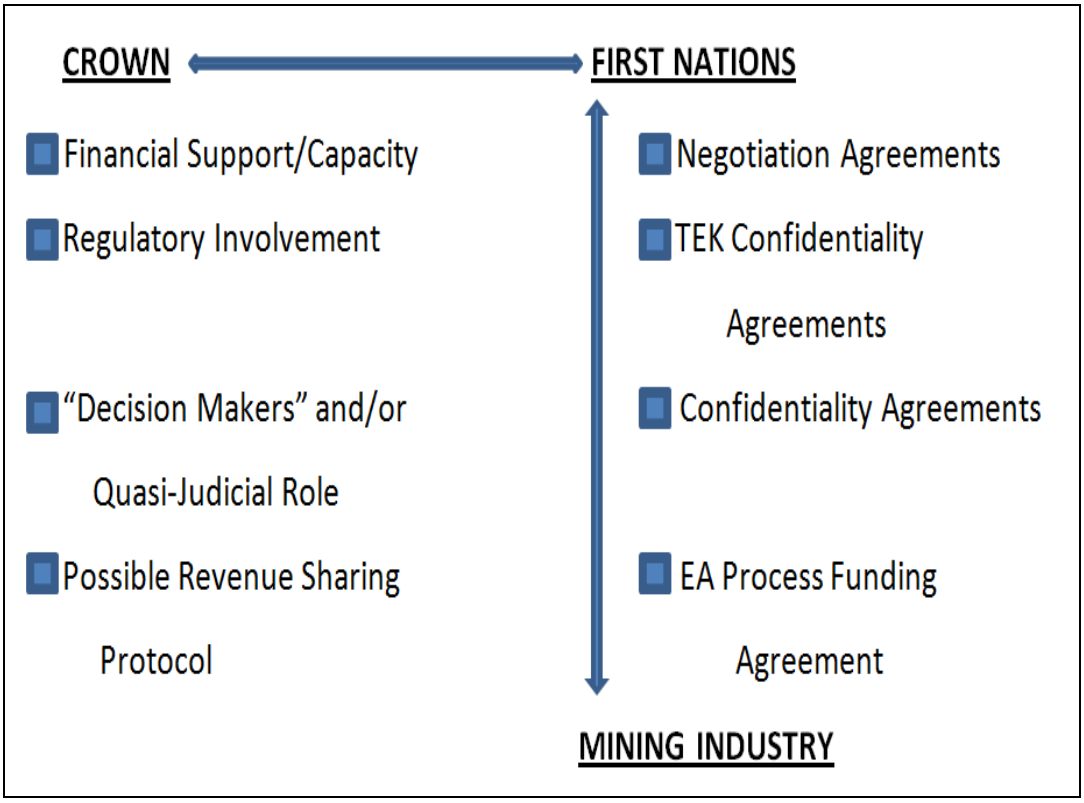
- To minimize adverse social and environmental impacts of a project
- To maximize economic benefits from a project, including business opportunities, employment, and training benefits
- To provide a framework for cooperation between the First Nation group and the company

While the principles underlying the IBA are clear, there are conflicting opinions as to how an IBA can and should be developed and implemented.

One of the first challenges in developing an IBA is determining when the dialogue should be initiated. As these are not legally required and no written standards regarding IBA development are in place, there is a variety of opinions within the mining industry and First Nations. Many academics, consultants, and lawyers urge constructive dialogue between mining companies and relevant First Nations to begin from the outset of exploration. However, some industry members express concerns about the implications of an IBA should the property be acquired by a different proponent in the future. They say that signing such types of IBA agreements could "tie future owner/major's hands" (McDonald, 2011) should changes occur in the project. Another school of thought insists that IBAs cannot be completed until the project proponent is certain that a mine is technically feasible. This entails waiting until after the exploratory phase and the environmental assessment process is complete before beginning any discussions pursuant to negotiating an IBA. This has been a particularly dominant mindset among the mining industry and one that continuously presents major obstacles to building a trusting, constructive relationship between mining companies and First Nations. However, it is first necessary to understand the tripartite relationship existing between the Crown, First Nations, and project proponents.

As McDonald notes, although there is a tripartite relationship featuring the Crown, First Nations, and industry, it is not a true three-way relationship. Rather, the First Nations can be thought of as a central node connecting the Crown to the Industry as illustrated in Figure 1.

Figure 1. Relationship among the Three Participants



Source: Adapted with permission from McDonald & Company, PowerPoint presentation at the 19th Annual Canadian Aboriginal Minerals Association Conference in Vancouver, BC, November 2011.

The Crown has a duty to consult and accommodate First Nations where projects infringe Aboriginal rights and title. It is responsible for developing consultation/accommodation policies and granting third party interest. Throughout the negotiation process, it provides financial support to First Nations and involves itself in a regulatory role as governmental decision-makers in providing project approval. Simultaneously, Industry interacts with First Nations throughout the negotiation process by creating negotiation agreements and undertaking Traditional Ecological Knowledge (TEK) confidentiality agreements, which will lead to the creation of an IBA. However, the relationship is not as simple as the theoretical model presents it.

The case law permits the Crown to delegate procedural aspects of consultation to project proponents. Unfortunately, this has two unintended consequences: first, this provides the appearance that Crown and project proponents can cooperate with each

other to minimize the level of accommodation given to First nations. Secondly, because most of this consultation occurs as a part of the environmental approval process, consultations are often limited to focusing on environmental concerns from First Nations. However, this ignores other important socio-economic implications of mineral exploration and mine development for First Nations. Furthermore, mining companies often end up waiting until the EA process is complete and approval given before beginning the IBA accommodation process. McDonald states that this places First Nations at a disadvantage since they do not have an ability to veto the project. Instead, he argues that First Nations must take initiative and engage mining companies in an IBA-process dialogue well before the EA process begins.

5. Methodology

The methodology used in this project has two components: case studies and key informant interviews. The case studies form the most important basis of the analysis as they provide the majority of the data from which lessons learned can be applied to the formulation of policy options. Secondary to the case studies are the interviews, which either supplement knowledge gaps in existing secondary data or provide keen insight in regards to future consultations.

5.1. Case Studies and Rationale for Selection

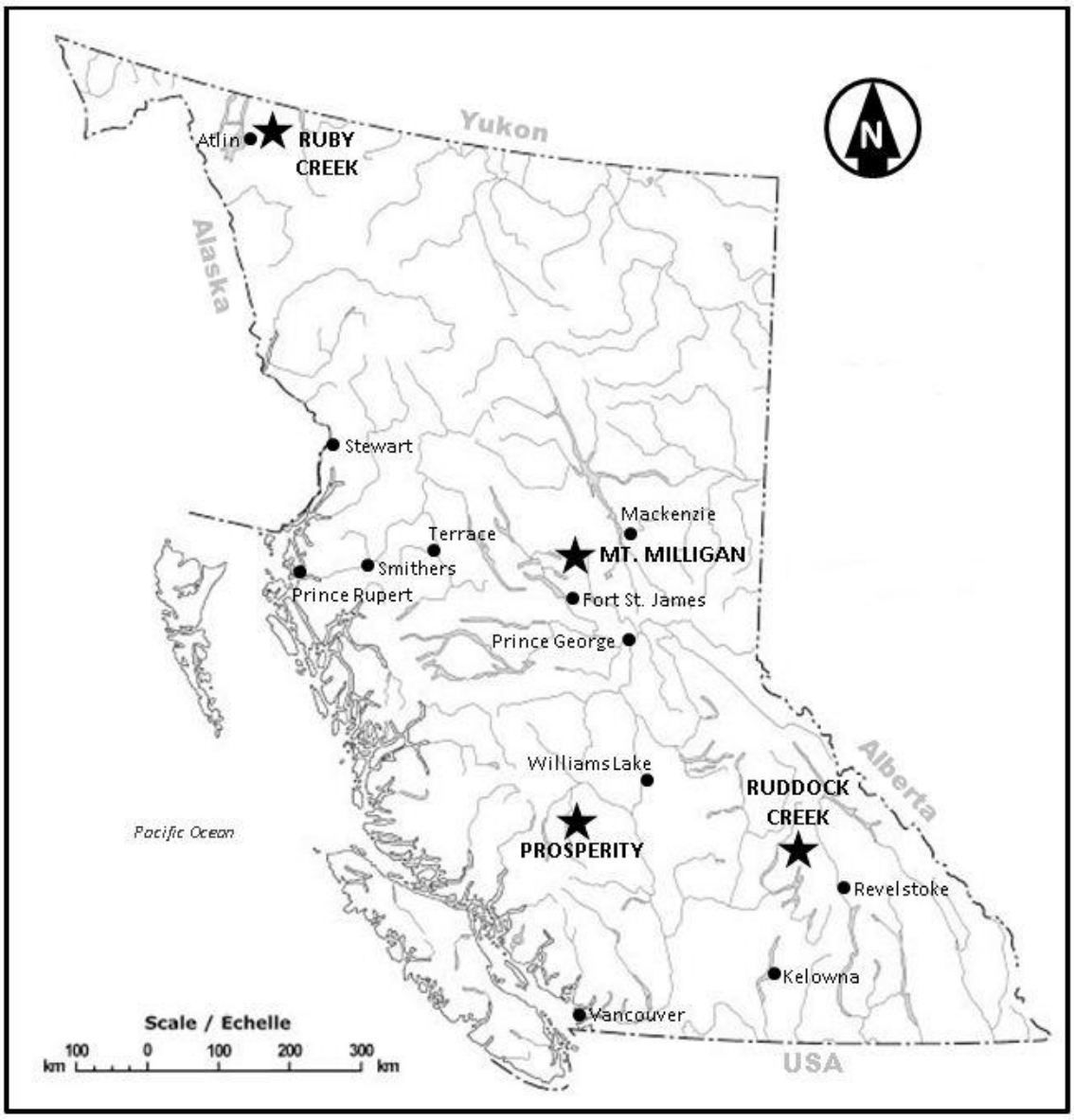
The research utilizes four case studies, which can be separated into two groups. The first group comprise two cases where mining companies and First Nations have successfully reached agreements permitting mining exploration. The other group of two cases examines instances where negotiations have been unsuccessful and proposed projects have not gone ahead.

Success is defined as occurring when a mining company has signed a mining exploration agreement or otherwise reached consensus on a project with First Nations. Actual production from an operating mine is not a required element for inclusion as a successful case. Failure is defined as occurring when a mining company does not acquire the consent from First Nations affected by the project. Likewise, failure also occurs in a case where multiple First Nations affected by a proposed project do not all agree to a mining company's proposed exploration project. Selected projects are summarized in Table 1 and their locations shown in Figure 2.

Table 1: Selection of Case Studies

Rationale	Ruddock Creek	Prosperity	Ruby Creek	Mt. Milligan
Proposed Project impacts First Nations	Yes	Yes	Yes	Yes
Successful Engagement with First Nations (Signed Agreements)	No	No	Yes	Yes
Mining Company Name	Selkirk Metals Corporation acquired by Imperial Metals Corporation	Taseko Mines Limited	Adanac Molybdenum Corporation	Thompson Creek Metals Company Inc.
First Nations affected by project	Simpcw, Neskonlith, Adams Lake	Tsilhqot'in	Taku River Tlingit	Nak'azdli and McLeod Lake

Figure 2. Location Map of Case Studies



Source: Adapted from Natural Resources Canada,
http://atlas.nrcan.gc.ca/site/english/maps/reference/outlineprov_terr/bc_outline/map.pdf

The overall goal of analyzing case studies is to identify consultation practices that are likely to yield successful negotiations and use them to guide the development of effective policies for improving the consultation process. The analysis of each case study will aim for the following objectives:

- Address the key issues of concern for First Nations in each instance of proposed exploration and mine development;
- Identify ways in which mining companies seek to ensure representation of First Nations' interest in the final decisions;
- Identify methods of consultation that First Nations consider to be 'adequate'; and
- Examine the extent of the role of provincial/federal government policy in each case

5.2. Key Informant Interviews

The purpose of key informant interviews is to provide the primary data on the key variables selected for the case studies. The rationale for using interviews is that they complement secondary sources of information where these sources of information are incomplete. The interviews are semi-structured to allow for two-way communication and flexibility in the discussions. Interviews can also provide insight on actions taken and additional information on motives which help to explain different approaches to a similar problem. The objective was to interview representatives from the mining companies involved in the four selected case studies; First Nations Chiefs or their designates who represent First Nations affected by the project development; and staff from relevant provincial ministries. Unfortunately, the author found that some of the selected individuals/organisations did not respond to telephone messages and emails requesting interviews. The author completed five interviews. The interviews were recorded and will be retained for two years as required by the Simon Fraser University Department of Ethics. Table 2 (Appendix B) lists the representatives whom the author interviewed as well as the ones who did not respond to the requests for an interview. The analysis of the key informant interviews for each case study is incorporated later in the chapters dedicated to individual case studies.

6. Case Study 1: Mt. Milligan

6.1. Introduction

The Mt. Milligan case study (Figure 2) is an example of successful mine development but with a split positive-negative outcome for the two First Nations whose traditional territories overlap the Mt. Milligan project area. The project proponent, Terrane Metals Inc., passed the Environmental Assessment (EA) approval process and consulted with all the First Nations considered to be affected by the Mt. Milligan project. As Terrane's consultation report and the federal EA report note, the two First Nations groups that would bear the most impact by the project were the McLeod Lake First Nation and the Nak'azdli Nation. Although the mine is already under construction, the Mt. Milligan case provides an example of a combination of inadequacies on the part of governmental policy, First Nations' governance, and project proponent's behaviour that contribute to uncertainty and difficulties for the consultation process. The first two sections of this chapter provide the background on Mt. Milligan, while the last two highlight the policy deficiencies.

6.2. Mt. Milligan Project Description

Mt. Milligan mine is situated about 155 km north of Prince George, BC, between the communities of Mackenzie and Fort St. James. It is accessible by an existing road from Fort St. James and from Mackenzie and receives electricity through a 92-km power line. The mine received its EA approval in 2009, and construction began in 2010. Commercial production is not expected until the end of 2013. The original owner of the property was Terrane Metals Corporation, who was also the project proponent throughout the consultation process up to environmental certification in 2009. In July 2010, Thompson Creek Metals Company acquired Terrane Metals and the Mt. Milligan mine project and is now in charge of mine construction.

The Mt. Milligan gold-copper mine is a conventional truck-shovel, open-pit mine that includes three open pits, two of which will be merged by the end of the mine's expected twenty-two year lifespan in 2031. The mine includes the following:

- The open pits and processing plant, and other mine site facilities
- Tailings Impoundment Area in the King Richard Creek Valley, Meadow Creek water supply pond, Rainbow Creek pump station, and other water management facilities
- Ore stockpile, waste rock dumps, overburden and topsoil storage areas
- Explosives factory and magazine facilities
- 92km transmission line from the mine site to Kennedy substation near Mackenzie, and access roads

The EA assessment report undertaken by Natural Resources Canada and Fisheries and Oceans Canada found that the mine site and off-site facilities affect a total of 1,820 hectares.

6.3. Environmental Assessment Process

6.3.1. EA Panel Decision

In 2009, the joint federal-provincial Environmental Assessment review panel ruled that the Mt. Milligan project would have no significant adverse effects on the environment. However, the report stated that by itself, the construction of the mine would cause "harmful alteration, disruption or destruction of fish habitat…in Meadows Creek, Alpine Creek, and King Richard Creek" (Canada Fisheries and Oceans & Natural Resources Canada, 2009, p. 69). It also ruled that Terrane's plans would sufficiently preserve the productive capacity of the fish habitat. The panel also implicitly ruled that, in environmental terms, Terrane's level of consultation with affected First Nations was sufficiently accommodated in the mine plan. However, while McLeod Lake agreed with the panel decision, the Nak'azdli condemned it, arguing that the consultation process

was inadequate and that the BC government breached its duty to consult and accommodate. The next sections provide evidence of Terrane's extent of consultation and reaction from First Nations to the Mt. Milligan project approval.

6.3.2. Terrane's Consultation

In 2008, the BC EAO provided Terrane with a Section 11 Order that directed the company to consult with the Nak'azdli, McLeod Lake, West Moberly, and Halfway River First Nations. The West Moberly and Halfway River First Nations did not pursue consultations beyond attending a few Technical Working Group (TWG) meetings as part of the EA process and so did not get involved to the level of McLeod or Nak'azdli. According to the EA report, "the Proponent conducted site visits, held community open houses, met with First Nations, funded studies of traditional and contemporary uses of the area by First Nations and reviewed previous research and documentation" (Canada Fisheries and Oceans & Natural Resources Canada, 2009, p. 100). Terrane states that it "diligently carried out its public and First Nations consultation obligations…issued…by the BC Environmental Assessment Office" (Terrane, 2009, p. 1).

6.3.2.1. Terrane's Consultation with Nak'azdli

Chief Fred Sam objected to the project on the basis that it "includes permanently destroying much of King Richard and Alpine Creeks" (Kennedy, 2010). He said that the two open pits and the mine site with a "foot print of 367 hectares and a tailings pond with a foot print of 813 hectares…will eliminate an area of relatively untouched land and water that is three times the size of Stanley Park in Vancouver" (Kennedy, 2010). The 2008 Nak'azdli Aboriginal Interest and Use Study highlighted the following concerns:

- Impacts from the use of cyanide and xanthate in the project's ore processing facilities
- Contamination from acid rock drainage, the possibility of leakage from the Tailings Impoundment Area
- Fragmentation of wildlife ecosystems
- Impact to future economic growth (sale of plant material and tourism)

The Nak'azdli asserted that they would not support the Mt. Milligan project without being properly consulted about plans to address the concerns that they raised about the project. Terrane, the project proponent, undertook consultation and adjusted the mine plan accordingly in the early months of 2008.

Terrane reported that it responded to Nak'azdli concerns by modifying its project design to avoid negatively impacting certain areas of land that were integral to local ecosystem and to the Nak'azdli way of life. Terrane states that it made the following modifications to the mine plan:

- Moved the water storage pond location from upper Rainbow Creek to Meadows Creek, "adjacent to the Tailing Storage Facility (TSF). This greatly reduced the size of the water supply pond and the project footprint, while avoiding direct impact on Rainbow Creek" (Terrane, 2009, p. 9).

- Re-aligned the TSF southern dam further away from Rainbow Creek to minimize impact on the creek.

- Optimized the water balance to make the TSF a "zero surface discharge facility, greatly reducing the potential for the water quality effects on Rainbow Creek" (Terrane, 2009, p. 10).

- Making replanting of native species and plant species used historically by First Nations as part of mine closure plans.

Terrane tracked the ecological footprint of the original 1993 project plan and compared it to the 2008 plan that included First Nation's input. The proponent concluded that the "project footprint had been reduced by 28%" (Terrane, 2009, p. 10). Terrane provided its adjusted mine plan to the Nak'azdli in April 2008, prior to submitting its EA application. In June, the Nak'azdli responded with more comments to the EA application. Terrane offered to meet to discuss the new comments on July 11, 2008, but there was no response. Terrane submitted the application six days later on July 17, 2008. In answer to subsequent protest by the Nak'azdli regarding the extent of consultation, Terrane offered in October to pay for an independent moderator of the Nak'azdli's choice to repair the relationship. However, both parties did not agree to this option until December

2008. After the EA decision, discussions between Terrane and the Nak'azdli were irregular.

6.3.2.2. Terrane's Consultation with McLeod Lake

As far back as 2006, Terrane and the McLeod Lake Indian Band engaged in a number of discussions to establish a process for collecting and using Traditional Knowledge for the project. By early 2007, they had entered into an agreement which set out how Terrane would "respect and utilize confidential information concerning traditional use and knowledge, as well as current use and practices, provided by the McLeod Lake Indian Band" (Terrane, 2009, p. 7). For their part, the McLeod Lake provided Terrane with information and participated in site visits with Terrane employees. In addition, the McLeod Lake also compiled an independent report concerning its traditional use area. The report, entitled *Report from the McLeod Lake Indian Band Respecting Their Traditional use and Occupation of Territory in the Vicinity of the Mount Milligan Mine Project, June 2008*, incorporated a review of the band's western boundary, interviews with the elders, and legal submissions concerning its traditional use of the area. It was submitted to the BC EAO in October 2008. According to the company's report, Terrane provided funding to assist the McLeod people in compiling this report.

Terrane also engaged in detailed discussions with Chief Derek Orr and the Council of the McLeod Lake regarding "potential agreements relating to business and employment opportunities for the Band, and its companies and members through the various phases of mine development" (Terrane 2009, p. 7). In 2008, McLeod Lake and Terrane had several private meetings in Mackenzie to discuss business interests of Mcleod Lake owned Duz Cho Construction company related to the proposed mine. In addition, McLeod Lake and Terrane agreed to include direct Band involvement in environmental monitoring as well as to keep the lines of communication between both parties open throughout the mines lifespan. However, in a talk at the 19th Annual Canadian Aboriginal Metals Association Conference in November 2011, Chief Derek Orr stated that Duz Cho Construction worked in partnership with Ledcor MCI to complete early earthworks for the Mt. Milligan mine. In addition, members of McLeod Lake hold positions at the mine site offering camp services as well as undertaking work on a water and sewer contract for the mine. Lastly, Chief Orr stated that the revenue sharing

agreement with the province would generate approximately $60-120 million (Orr, 2011) over the next 20 years subject to the price of gold and copper. In contrast to the Nak'azdli, the McLeod Lake was able to move quickly through environmental concerns related to the project and successfully acquire significant economic benefits for the band community.

6.3.3. First Nation Reaction to EA Decision

6.3.3.1. McLeod Lake

McLeod Lake's vision has, for the past decade, been focused on development as a way to economic prosperity. In their view, Terrane was not a proponent to be viewed as a 'threat' to environmental integrity. Rather, McLeod Lake viewed Terrane as a business partner who could assist them in acting on their fundamental belief—that "Our economic stability will be the primary factor in the success of our Future" (Orr, 2011). Chief Orr expressed satisfaction with the consultation process, stating that "the mine is situated in the traditional territory of the McLeod Lake Indian Band, and both the federal and provincial governments have affirmed our treaty rights over the Project area in recognition of our historic use and occupation of the area" (McLeod Lake Band Issues Public Support for Mt. Milligan Mine, 2010). He also stated that Terrane successfully addressed McLeod Lake's concerns. McLeod Lake's goals and objectives matched well with those of Terrane. It is a mutually-beneficial partnership in the eyes of both Chief Derek Orr and the mining company.

6.3.3.2. Nak'azdli

In contrast to McLeod Lake's reaction, the Nak'azdli felt that the government was not interested in listening to their concerns, but instead focused on approving the Mt. Milligan mine. With little faith in government, the band created an agreement with Terrane to negotiate in confidentiality and to not publicize any agreements that Terrane and the Nak'azdli reached. However, as a mining company, Terrane's main goal was to move the project through the assessment stage as fast as possible. As this became apparent to the Nak'azdli, they also lost trust in Terrane. In short, the Nak'azdli ended up in a position where they felt that no party was interested in listening to their concerns and that Terrane and the province were only interested in pursuing the easiest route to

mine development. As Chief Fred Sam said, “we have been patient, we have been reasonable, but…What BC is doing is unacceptable and they will be challenged on their irresponsible, bad faith approaches toward us” (Nak’azdli, September 2009).

6.3.3.2.1. Chief Fred Sam’s Rebuttal

Chief Fred Sam was questioned in the interview about the consultations between Terrane and the Nak’azdli in order to ascertain the reasons why his band felt that the consultation was inadequate and withdrew from the EA process. The Chief spoke on two key points: first, he answered why the Nak’azdli boycotted the entire EA process and created their own AIUS, which McLeod Lake did not. Chief Sam indicated that the Nak’azdli’s disagreements with Terrane occurred because of a consistent perceived trivialization of Nak’azdli’s strength of claim to Aboriginal rights and title on the Mt. Milligan project area. The Chief stated that, in his opinion, the federal government, the province, and project proponents do not have a right to determine an Indian band’s strength of claim to traditional territory. In his view, government and Terrane took the view that McLeod Lake had a stronger claim to the area and that it was more important to satisfy their concerns than those of the Nak’azdli. As a result, McLeod Lake and Terrane signed jobs agreements for McLeod’s Duz Cho company, and McLeod and the province negotiated a revenue sharing agreement that would greatly benefit Chief Orr’s community. Chief Sam viewed this as extremely unfair and a breach of law by the provincial government. Regarding the BC government’s conclusion that the Mt. Milligan mine would not cause ‘significant’ adverse environmental effects, the Chief said “who gets to define what is a significant effect? Nak’azdli has not been asked by the federal government what is significant to us” (Kennedy, 2010). In fact, loss of trust in government was the reason for Nak’azdli’s withdrawal from the EA process. Chief Sam stated that “for more than three years, the Nak’azdli attempted to address concerns with the environmental review process and the entire time the province agreed to talk, but BC continued with its unilateral…assessment” (Nak’azdli, September 2009).

Secondly, the Chief explained why the Nak’azdli were dissatisfied with Terrane’s offers for additional consultation and independent moderator after the submission of the EA application to the BC EAO. In regards to the ‘independent facilitator’ mentioned in the Terrane Report, Chief Sam disputed the term ‘independent’, noting that since the

moderator was actually recruited by Terrane, he worked for the proponent and could not have been completely impartial. The Chief stated that even though the trust between Nak'azdli and Terrane had been broken, the fact that Terrane had since been acquired by Thompson Creek Minerals opened the possibility for a renewed relationship. It was the Chief's hope that he could engage in another consultation process with Thompson Creek to acquire a fair share of revenues to be generated by the mine.

6.4. Policy Inadequacies Contributing to Uncertainty

6.4.1. Traditional Territory Overlaps between McLeod Lake and Nak'azdli

The Mt. Milligan case highlights one significant problem that allows uncertainty in the consultation process: government policy inadequately assists project proponents in dealing with First Nations who have overlapping claims in the project area. Additionally, it unintentionally places any First Nations without formal treaties to support their claim at a disadvantage in the consultation process.

Both the Nak'azdli and the McLeod Lake Indian Band claim the Mt. Milligan project area as traditional territory. The Nak'azdli complained that the overlap placed them in the unfair position of having their strength of claim implicitly decided by the EA process. Throughout the consultation process, the Nak'azdli insisted that their claim was stronger than McLeod Lake's, pointing to historical evidence that the Nak'azdli were a settled band whereas McLeod Lake were nomadic. For example, ethnographic sources demonstrate that "prior to British assertion of sovereignty there was a trail from Nak'azdli to a permanent settlement at Nation Lakes that was used to regularly access the project area [Mt. Milligan mine site] for hunting, gathering and other resource use" (Nak'azdli, March 2009, p. 1). The Nak'azdli still have hunting cabins, traplines, and campsites within the area around the mine site, indicating consistent and frequent use of the area. Furthermore, the AIUS also supplied evidence to show that the mine site is located within the Sam family Keyoh. The Nak'azdli also used the studies to argue that the McLeod Lake people do not have the same strength of claim to the project area lands. They state that "any presence of the McLeod Lake Sekani people in the project area prior to assertion of British sovereignty was short lived and was as a result of their

nomadic hunting and gathering practices only" (Nak'azdli, March 2009, p. 1). In effect, the Nak'azdli asserted that their consent was more integral to the development of the mine than McLeod Lake's consent.

While the Nak'azdli have anthropological evidence to support their claim, McLeod Lake has enjoyed additional formal acknowledgement of its strength of claim. The McLeod Lake Indian Band formally ratified Treaty 8 in 2000. As a result of the Treaty 8 ratification, "New Indian Reserves are being established in Mackenzie and Bear Lake as provisions…As these reserves are developed and housing constructed, it is expected that more band members will move back to Indian Reserve lands" (First People's Language Map of British Columbia, n.d.). In total, Treaty 8 allowed McLeod Lake to receive "approximately 19,810 hectares of provincial Crown land to add to existing reserves, as well as other benefits" (BC Ministry of Aboriginal Relations and Reconciliation, n.d.). More importantly, the treaty formally affirmed the strength of McLeod's claim to the Mt. Milligan project area. Because the Nak'azdli had no such formally-recognized treaty, they felt that the provincial-federal EA process would not consider their claim to the project area and their right to be adequately consulted as equal in strength to McLeod Lake's. The establishment of a revenue-sharing agreement with McLeod Lake also appeared to the Nak'azdli as symbolic that government viewed McLeod's claim to be stronger.

These perceptions are unintended consequences of provincial policy. In this case, it is likely that Nak'azdli, Terrane, and the province could have used a truly independent mediating body that could have helped all parties to come to an agreement that Nak'azdli were viewed as equally-rightful claimants to the Mt. Milligan area. In addition, the Nak'azdli would have undoubtedly benefited from more time to respond to notices of application permits, mine plans, and the EA draft report as they did not have the benefit of a formal treaty structure in place to guide the province and proponents in adequate consultation. However, as distinct nations, Indian bands cannot completely rely on any level of government to protect them and must also take steps to set rules for how they expect to be consulted.

6.4.2. Lack of Evident and Precise First Nations' Policies Regarding Mining Activity on Traditional Territories

Another policy problem that contributed to the difficulties in consulting with the Nak'azdli was the lack of a precise policy outlining Nak'azdli expectations and decision-making protocols. Anne Marie Sam, a member of the Nak'azdli band, has clearly described the Nak'azdli philosophy on the importance of the environment to the band. She has said:

> The land makes us who we are. What identity will my daughters have when our keyoh is a tailings pond? If the land is covered with a mine, then who are we going to be in the future? It's a scary thought, we can't just move to another place. It's our livelihood, our way of life, we still rely on the land for our food; it is a big part of who we are. Our territory is our responsibility' we can't just move around. The land is so sacred we are not supposed to talk about it. We are being forced to talk about it now because we have to defend it. We didn't talk about it before because it is just so sacred. It is the Mother Earth in us (Anne Marie Sam, quoted in Nelson, 2011).

While this statement articulates the sentiment of the Nak'azdli, it does not assist project proponents to know the mechanisms or ways by which they could address these concerns while still progressing on their projects.

The reason consultations with the McLeod Lake were not publically controversial is due to Chief Derek Orr's favourable outlook on development and the existence of Treaty 8, which formally asserts the band's claim to the Mt. Milligan project area. However, project proponents and the province cannot rely on the treaty-negotiation process or on First Nations to view mining development as a welcome opportunity for economic benefit. Rather, First Nations, who view themselves as distinct governments, must take some initiative in protecting their interests in the consultation process by creating clear and specific mechanisms for project proponents to follow.

6.5. Policy Lessons that Contributed to Uncertainty

By analysing the data presented in the Mt. Milligan case study, this research highlights five important realities for provincial policy-makers to consider:

1. First Nations are often unprepared for consultations, lacking clear policies for how decisions will be made within the band and what bands can expect from project proponents.

2. Due to the lack of signed lands claim agreements, mining project areas can fall within overlapping traditional territory claims by First Nations. This places pressure on mining companies to consult with each First Nation on fair basis even when each may present its claim as more worthy than the others.

3. Governmental policy inadequately assists the First Nations with lesser capacity/resources and preparedness for consultations and resolution of core disputes related to territorial claims and required level of consultation.

The next chapter examines another case where a First Nation developed a mining policy to prepare themselves and project proponents for consultation. While First Nations mining policies are not as legally powerful as provincial policies, they do promote improved relationship between bands and companies as well as assist in acquiring First Nations support for proposed projects.

6.6. Summary: Lessons Learned from Mt. Milligan

The Mt. Milligan case demonstrates two challenges that can potentially influence the consultation process in a negative way. First, individual First Nations in BC have differing interests, values, and capacity to negotiate with mining companies. Next, mining companies are focused on profit and return to shareholders. Therefore, they want to push their projects through the permitting and assessment stages as quickly as possible without worrying about bands who are not as prepared to negotiate as others. Provincial policy must mitigate both challenges by incentivizing First Nations to establish consultation procedures that would clearly outline how mining companies are to consult with them. In addition, the province should provide mediating assistance for proponents and First Nations to resolve disputes regarding adequacy of consultation and accommodation.

7. Case Study 2: Ruby Creek

7.1. Introduction

The Ruby Creek deposit (Figure 2) is an example of a more certain consultation process occurring between Adanac Molybdenum Corporation and the Taku River Tlingit First Nation (TRTFN). Even though the TRTFN has not always been supportive of development on its territory, the nation has publically supported the project proponent in its efforts to develop the Ruby Creek mineral deposit. One of the significant reasons for the current support given to Adanac is the existence of detailed Taku policies on land use and, more importantly, on mining. These policies indicate a high level of private preparation on the part of the TRTFN regarding consultations about mining projects on its traditional territory.

7.2. Ruby Creek Project Description

The Ruby Creek Project is situated 24 kilometers northeast of Atlin, BC, and around 80km south of the border between BC and Yukon. The project area is located within the 40,000 square kilometres the TRTFN's claim as a traditional territory. Adanac's project description states that the mine will have the following components:

- Open pit
- Mill complex including crusher, live-ore stockpile, reagent storage, processing plant, warehouse, and office complex
- Waste rock dumps and salvaged topsoil storage sites
- Tailings disposal facility and Seepage Recovery Dam
- Explosives storage
- Haul roads from mine site, and pipe network (pipes to lead tailings to disposal facility)

The life span of the mine is projected to be 21 years, and it will operate at a rate of 23,000 metric tonnes per day. The site currently has little developed infrastructure, owing to its remoteness. Access to the project area is from the Alaska Highway via Highway 7 to Atlin. From there, access is via a gravel road to Surprise Lake, and then by a forest service road, and lastly by a mine access road. While operations will be undertaken as a "fly in/fly out camp accommodation program, with crews working on a two week turn-around basis" (Alexander, 2007, p. 3), there will also be daily trucking of consumables, fuel, reagents, food, and recyclables to and from the site.

7.3. Environmental Assessment Process

While the provincial EA process concluded in September 2007, that the Ruby Creek project will have no significant harmful long-term effects on the environment, the federal EA process is still ongoing. According to the province, "effects from the project will be within acceptable levels, subject to adherence to the application's design components and implementation of mitigation measures and commitments agreed to by the proponent" (BC Ministry of Environment, 2007). The mitigation measures and commitments include the following:

- Implementing monitoring and adaptive management plan for wildlife
- Rehabilitating wildlife disturbed by the mine
- Undertaking fish compensation plan
- Conducting the fly in/fly out operation
- Assisting Atlin and the TRTFN in developing a Community Adaptive Management and Monitoring Plan, and Taku Cultural Enhancement Program

In 2006, the federal government was also of the opinion that the project would have no significant effects on the environment (Canada Fisheries and Oceans, 2006). However, the government changed its conclusion and started a comprehensive review in 2008, to determine the significance of the effects of the Tailings Impoundment Area on local fish stocks. The provincial EAO conclusion implicitly determined that Adanac's consultation

with the Taku was adequate. The next section provides evidence of Adanac's consultation with the TRTFN and the First Nation's reaction to the EA decision.

7.3.1. Adanac's Consultation with the Taku

In 2005, the project proponent and the Taku signed a Phase 1 Memorandum of Agreement, which included a three-month work plan prepared by the TRTFN in July of that year. In 2006, Adanac and the Taku mutually agreed to extend the agreement and signed a Phase 2 Memorandum, which "covers the Environmental Application review period up to the receipt of the Environmental Assessment Certificate for the Ruby Creek Molybdenum Project" (Adanac Molybdenum Corporation, October 2006). According to the proponent, "Adanac and the TRTFN are pleased with their progress…and are looking forward to a long and rewarding relationship as the Ruby Creek molybdenum Project proceeds through development and operation" (Adanac Molybdenum Corporation, October 2006). Throughout the consultation process, Adanac funded Taku independent due diligence reviews of Adanac's consultation efforts. These reviews were conducted by the TRTFN independently of the BC EA process, which served as a way for the Taku to ensure that the proponent also funded a Taku Land Use Impact Study that assessed effects of the project on traditional land use. The consultation process between Adanac and the Taku was not one sided—the Taku had clear demands that Adanac needed to fulfill in order to earn TRTFN's support.

Because fishing is a major contributor to the TRTFN's economy, one of the biggest concerns for the Taku was the quality of fish habitat in the Ruby Creek watershed. Adanac responded to Taku concerns by creating a plan for rehabilitating fish habitat in the lower Ruby Creek area to compensate for effects on the upper Ruby Creek habitat, which would be affected by the proposed mine. Moreover, Adanac promised to obtain leases for neighbouring Pine and Cup Creeks and protect them from placer mining. Satisfying TRTFN concerns was beneficial for Adanac as the rehabilitation plan for the lower Ruby Creek area would help it achieve the Federal Department of Oceans and Fisheries' requirement for a "no-net-loss" (Adanac Molybdenum Corporation, July 2006) fish habitat compensation plan. Even after submission of the EA application to the BC EAO and the federal government, Adanac and the TRTFN continued the consultation process by continuing work to develop an IBA throughout 2007. While

these are just some examples of the different actions Adanac took to consult with the TRTFN, the First Nation's response to the provincial EA decision clearly supports Adanac in its assertion that adequate consultation took place.

7.3.2. Taku Reaction to Provincial Decision

Even though the Taku culture has been based on fishing and hunting wild game across the vast expanse of land they claim as traditional territory, they have decided to balance preservation of traditional territories with mining activity in mineral rich areas. John Ward, spokesman for the Taku, has stated "[w]e realize sooner or later we've got to cough up the minerals to contribute to the whole" (Ward, cited in Hume, 2009). Thus, even though a 2003 TRTFN report, entitled Our Land is Our Future, asserted that "The majority of TRT citizens are opposed to mining in our territory based on concerns over environmental impacts on water, wildlife habitat and other values" (TRTFN, 2003, p. 37), the Taku are supportive of the Ruby Creek project. According to Mr. Ward, "the band can have the best of both worlds. Enough resource activity to provide employment and build the economy…and enough wild places preserved that the Tlingit will still be strong people" (Hume, 2009). The positive reaction by the Taku regarding the provincial approval of Ruby Creek project is evidence that Adanac adequately consulted with the Nation and took sufficient measures to mitigate environmental and social impacts. It is also evidence that the Taku's preparations for consultation were sufficient to hold Adanac to a high level of consultation where both parties could arrive at mutually-beneficial outcomes.

7.4. Policy that Enhanced Certainty of Consultations

7.4.1. Taku River Land Use and Mining Policies

In contrast to the Mt. Milligan case, The Ruby Creek Case highlights one significant factor that contributed to the success and certainty of the consultation process—the existence of publically-available, in-depth TRTFN policies related to mining. These policies include strategic papers such as *Our Land is Our Future* and the TRTFN *Mining Policy*, published in March 2007.

In *Our Land is Our Future* (2003), the TRTFN asserted that while the majority of their population was against mining, the Tlingit national government would support individual projects so long as they were bound by strict environmental regulations. Four years later, the Taku published their *Mining Policy, 2007*, which clarifies the principles laid out in its earlier report. It is a seventeen-page-long document that outlines the procedures that the TRTFN expect mining companies to abide by when consulting with the TRTFN and that the TRTFN use to make decisions for giving consent or support to projects. The three purposes for the creation of this mining policy follow.

- To provide "greater certainty for parties interested in the extraction of mineral resources" (TRTFN, 2007, p. 1) from Taku territory in BC.
- To compensate for the inadequacies of BC's legislated process for "disposing of surface and subsurface rights… [that] does not address TRTFN's participation in decisions regarding mining-related activity in our territory" (TRTFN, 2007, p. 1).
- To explain how the TRTFN plan to deal with proposals for mining-related activity on their territory.

The mining policy explains that while the TRTFN are concerned with protecting their Aboriginal rights, title, and interests, they also seek tangible social and economic benefits for their community. So long as the relationship between the proponent and the TRTFN is based on recognition and respect for Aboriginal rights and title, the TRTFN seek to work cooperatively with proponents. A summary of TRTFN decision-making procedures as stated in the mining policy is provided below.

7.4.1.1. Summary of TRTFN Decision-Making Procedures

The second part of the mining policy details the procedures that the Taku follow when evaluating mining activity proposals as well as the expected information that project proponents must impart to the Nation. For example, whenever a proponent submits a written request for TRTFN consent and support for mineral exploration (phase II of the mining process in BC) or whenever the Crown refers a proposal to the Taku, the mining policy is triggered. The Taku Land and Resources Manager then responds in

writing within a ‘reasonable time’ to confirm receipt and to make available TRTFN government documents covering land and resource use, and to advise “parties…that TRTFN’s consent and support needs to be formally obtained from TRTFN Government” (TRTFN, 2007, p. 3). The policy clearly states that the Land and Resources Manager is the primary contact for project proponents, unless otherwise advised. The Mining Policy appoints the Land and Resources Manager as the preliminary evaluator of the project proposal. The Manager is responsible for identifying any ‘outstanding issues’ with TRTFN families or individuals who might be directly impacted by the project. If the Manager’s preliminary evaluation determines that the initial work proposal will not involve ‘significant site disturbance’ (i.e. creation of new roads, use of heavy equipment, drilling, bulk sampling, or development work), the Manager is authorized to provide a written Support Document to the mining company. However, if there are outstanding issues or the initial proposal involves ‘significant site disturbance’, then the Manager must refer the proposal to the TRTFN national government. This entails a longer wait period for the project proponent to receive consent from the Taku.

If the Land Manager refers a proposal up a level to the TRTFN national government, the policy states that the TRTFN will attempt to negotiate an Exploration Agreement with the proponent. The policy states that an Exploration Agreement must cover terms of entry into Taku territory, a role for the TRTFN in site inspection, compensation if needed, environmental protection, reporting requirements to the TRTFN, economic benefits, and terms for leaving the Territory (closures and reclamation). This allows the TRTFN to ensure a high level of consultation from the proponent and an in-depth assessment of the long-term consequences of mine development for their community. If the TRTFN are satisfied with the resulting Exploration Agreement, support will be given to the project.

Finally, in order to progress from exploration to commercial mineral production, the policy states that the Taku will advance one more level in the decision-making hierarchy from the national government body to the Joint Clan Meeting (JCM). Only through a JCM can the TRTFN make a decision to support both the project and the provincial and/or federal EA process. Even though the TRTFN mining policy only became public six months before the provincial EA decision, the level of thought and

detail within the document indicates that the TRTFN and Adanac had likely been consulting according to the values and procedures laid out in the policy.

7.5. Summary: Lessons Learned from Ruby Creek

In summary, the Taku mining policy represents the potential of many First Nations to shift from reactive participants in BC mine development to proactive partners for government and project proponents. The Taku decided that the Crown's 'duty to consult' and the standards of consultation as explained by the SCC are too vague to guide the relationship between them and project proponents. The TRTFN mining policy promotes certainty in the consultation process by clarifying TRTFN decision-making processes. This creates a set system for the TRTFN and proponents to follow when consulting about mining activity on Taku lands. Because set systems lead to increased certainty for all parties—the province, proponents, and First Nations—involved in the mine development process, other First Nations affected by current or potential future mining activities should create similarly detailed policies.

8. Case Study 3: Prosperity Mine

8.1. Introduction

Prosperity Mine (Figure 2) is an example of how a combination of policy inadequacies on the part of the province, the proponent (Taseko Mines), and the Tsilhqo'tin and Secwepemc First Nations lead to uncertainties in the consultation process and setbacks to mine development. Out of the two First Nations' governments, the Tsilhqo'tin National Government (TNG) was most vocal in its opposition to the proposed mine, arguing that Taseko failed to consult them properly and developed a mining plan that would ruin Fish Lake—a lake they claim is integral to their culture and identity. On the other hand, Taseko argues that it consulted with the TNG multiple times over many years and that its original plan would have resulted in a new and better lake for the TNG. This chapter provides the background story on Prosperity Mine and elaborates on the policy deficiencies that contributed to uncertain consultations and project setbacks.

8.2. Prosperity Mine Project Description

The proposed Prosperity Mine project is located around 125 km south of Williams Lake and approximately 25 km east of the Nemiah Band (Ministry of the Environment Canada, 2009), which is a part of the TNG. In addition, the mine is 1 km north of Fish Lake, 10km northeast of Taseko Lake, and is within the Fish Creek watershed. According to the Taseko website, the Prosperity deposit is a gold-copper porphyry with a "1.0 billion tonne measured and indicated resource containing 5.3 billion pounds of copper and 13.3 million ounces of gold" (Taseko, n.d.). The proposed Prosperity Mine site is situated within the traditional territories of both the Secwepemc and Tsilhqot'in First Nations. It is projected that the mine will be in operation for 20 years. According to the EA reports, the mine will include the following:

- A large-scale open pit, a camp, mill, and necessary supporting infrastructure
- Waste rock stockpiles
- Tailings Storage Facility in the area where Little Fish Lake (Y'anah Biny) and portions of Fish Creek currently exist. The 118 hectare Fish Lake (Teztan Yeqox) would be drained to allow for the creation of the tailings storage.
- Construction of man-made Prosperity Lake, bigger in size than Fish Lake, to compensate for loss of Fish Lake
- A 125 km power line from the mine to a BC Hydro switching station in the Dog Creek area east of the Fraser River
- Road networks to facilitate access to the project area

Taseko and the province asserted that the Prosperity mine would benefit the provincial economy by generating $9.8 billion (Topf, 2011) in tax revenues over next twenty years.

8.3. Environmental Assessment Process

8.3.1. EA Decisions

Despite the request by the affected First Nations for a joint federal-provincial review of Prosperity Mine, the province unilaterally conducted its environmental assessment in 2009. It concluded that the project would not have significant adverse effects on the environment. However, the federal government disagreed and denied certification to Taseko, citing concern over impacts on fish stocks in Fish Lake and questions regarding Taseko's level of consultation with the TNG and Secwepemc. The federal government did decide to allow Taseko to submit another application once it had revised its plans to take into account the federal government's concerns. While the federal government agreed for the most part with the provincial assessment, it found that the "project would result in a significant adverse effect on fish and fish habitat in the Teztan Yeqox (Fish Creek) watershed" (Canada Ministry of Environment, 2010). One reason for this different finding was that, although Taseko planned to offset damage done to Fish Lake by creating a new fish habitat in Prosperity Lake, the federal government had "considerable doubt regarding [Taseko's] ability to meet the

requirements of Fisheries and Oceans Canada's No Net Loss policy" (Canada Ministry of Environment, 2010, p. 97).

While the provincial approval of Prosperity Mine expressed implicitly approval of Taseko's consultation efforts with the TNG and Secwepemc, the federal assessment was more frank, noting that "[t]he Panel…notes that the relationship between Taseko and the Tsilhqot'in Nation was strained and that there was little trust between the parties. Further, the Tsilhqot'in Nation consistently expressed opposition to the destruction of…Fish Lake" (Canada Ministry of Environment, 2010, p. 98). Although the federal government's decision was not explicitly based on the adequacy of Taseko's consultation with First Nations, the issue of Fish Lake was directly related to consultations between Taseko and the TNG. The evidence of Taseko's consultation and the First Nations' reactions to the consultation and EA decision need to be considered next.

8.3.2. Taseko's Consultation

In 2008, Taseko was issued a Section 14 Procedural Order by the BC Environmental Assessment Office (EAO). The Section 14 Order mandated Taseko to consult with the seven bands that comprise the TNG and the five bands that comprise the Secwepemc First Nations. Taseko states in its Consultation Report that prior to the Section 14 Order, "Taseko undertook extensive consultation with First Nations…Throughout this entire period, Taseko made staff and key senior consultants available to all First Nations to discuss the proposed project" (Taseko, 2009, p.5).

Secwepemc concerns were limited to potential impacts of the proposed 125km-long power line that would intersect parts of their traditional territory. However, Taseko expressed a willingness to adjust the location of "the final centreline for the transmission line and the placement of poles to avoid most sensitive areas" (Canada Ministry of Environment, 2010, p. iv). Aside from this, the Secwepemc did not voice major opposition to the project, except expressions of solidarity with the TNG, whose concerns were focused on preservation of Fish Lake.

The TNG expressed the following concerns regarding the Prosperity project:

- Proposed development areas will eliminate opportunities for hunting and trapping. This negatively impacts Aboriginal Rights.
- Prosperity project employees and contractors will cause increased local hunting diminishing hunting opportunities for First Nations.
- A loss of Fish Lake would mean a loss of fish habitat in the area. This means the genetic line of fish will be lost and the loss of the lake will eliminate a portion of the First Nations annual catch.
- Fish from tailings ponds will be inedible. Moreover, pollution from the mine effluent will harm salmon and sturgeon inhabiting the Chilko and Taseko rivers.
- Prosperity Project will negatively impact water quality because of the use of cyanide, mercury and arsenic. Moreover, plans for long-term post mine closure water monitoring are inadequate.
- Mine and tailings dust will impact soils, medicinal plants, wildlife food sources, and human health.
- Options that involve draining the lake are the worst possible options, and multiple account cost benefit analysis failed to consider socio-environmental factors as well as First Nations.
- Prosperity project will be destructive to the land.
- Any impacts on Taseko River will be considered an infringement on First Nations Rights.

Former TNG Chief Roger Williams told the federal EA panel, “[i]t was very clear right from the beginning that we didn’t want to lose Fish Lake” (Canada Ministry of Environment, 2010, p. 45).

To address these concerns, Taseko representatives met 26 times with TNG chiefs, staff, and communities between 2004 and 2008. Prior to the Section 14 Order,

Taseko and the TNG drafted a Letter of Intent in 2006, to establish the terms of their relationship during the project's planning phase. The Letter of Intent would have been the first formal agreement signed with the Tsilhqot'in and was supposed to establish the following items:

- The retention of an internal TNG member as a mining coordinator
- Funding to the TNG to review baseline studies
- Retention of a socio-economic advisor
- TNG participation in the 2007 archaeological study in the mine site area
- TNG participation in 2006 and 2008 biophysical field programs
- TNG participation in the 2007 exploration and drilling program
- Funding for legal counsel for the TNG to protect their rights and title
- Financing community meetings and "per diems" for leadership attendance
- Funding for TNG administrative costs

However, the Letter of Intent was not signed by either party. Nevertheless, Taseko states that it followed through on the Letter and provided funding to the TNG up until the TNG unilaterally withdrew from participating in the provincial EA process.

Also in 2006, Taseko and the TNG attempted to create a Community Impact Assessment (CIA) to provide a summary of TNG current use of lands in the project area. The CIA would have improved upon Taseko's existing knowledge of TNG rights and title in the area as the only previous comprehensive study on the subject—a report entitled *Heritage Significance of the Fish Lake Study Area*—dated back to 1993. However, Taseko and the TNG could not agree on an appropriate consultancy firm to carry out creation of the CIA. The TNG questioned Taseko's choice of Lions Gate Consulting, stating that the company did not adequately understand the TNG's concerns. On the other hand, Taseko did not like the TNG's choice of Symbion Consulting because it's

proposal “did not meet Taseko’s requirements: there were no timelines, no budget, and Taseko was not included as a participant” (Taseko, 2009, p. 21).

In 2007, Taseko indicated that no matter under what conditions the TNG wished to produce the CIA, Taseko wanted to be a recognized participant in the process. Moreover, Taseko claimed that because funding the CIA was a large financial expenditure, it needed an indication from the TNG of their level of support for the project. However, the TNG did not offer support to the project because of the Prosperity Project’s mine plan, which called for a draining of Fish Lake to create the tailings storage facility, despite TNG statements that they would not accept any alterations to the lake. Even though Taseko committed to funding the early phases of the CIA, TNG leadership halted the study in the early scoping phase and withdrew from participation in the provincial EA.

8.3.3. TNG Reaction to EA Decisions and Taseko’s Consultation

The province’s unilateral decision to pursue the EA process entrenched TNG opposition to the proposed Prosperity mine. They were opposed to a province-only EA process as they felt that Taseko’s comprehension of their Aboriginal rights and title was inadequate and that the province was more interested in promoting the project than in listening to First Nations concerns. Moreover, the TNG were angered by their perception that Taseko had privately lobbied the province to pursue a provincial panel. In an affidavit from November 9, 2011, Chief Marilyn Baptiste of the TNG stated that they had tried for months to ensure that the EA process would involve the federal government. However, she stated that “this fell apart when British Columbia ordered a separate provincial EA for the Project, only a few days after TML (Taseko) threatened to pull its application rather than face a joint review panel” (Baptiste, affidavit signed November 9, 2011). The proponent insists no such lobbying occurred.

The TNG welcomed the federal government’s decision to block certification of the proposed mine. In an interview, Chief Alphonse expressed satisfaction with the decision, stating that the TNG had placed their entire hope in the federal government to ensure the protection of their rights and title in the project area. Justifying the federal government’s decision, Environment Minister Jim Prentice said, “[w]e believe in balancing resource stewardship with economic development…[T]he significant adverse

environmental effects of the Prosperity project cannot be justified as it is currently proposed" (Canada Rejects Gold-Copper Mine Over Environmental Concerns, 2010).

8.3.4. Aftermath of EA Decisions

The conflict between the TNG and Taseko has continued in the aftermath of the federal government's decision to block the project. After the federal decision, the BC government awarded Taseko several permits related to exploration drilling, excavation, timber clearing, and road construction for work on modifying the original mine plan. The TNG took Taseko and the province to court arguing that "Crown officials breached their duties to consult and accommodate…and failed to extend even 'the most basic courtesies of consultation'" (Tsilhqo'tin, 2011a). The judge sided with the TNG's argument and issued an injunction against Taseko. However, the judge also recommended that the TNG and Taseko engage in reconciliation talks to kick start the consultation process. However, Chief Alphonse has stated that he's not interested in further discussions with Taseko because the company is "a spoiled little kid not accepting a decision" (Klein, 2011).

Taseko has since revised its mine plan and resubmitted its EA application for New Prosperity Mine, which no longer entails the destruction of Fish Lake. Instead, the plan calls for tailings to be stored underwater in a facility 2 km south of Fish Lake that will be surrounded on all sides with embankments to prevent seepage (Taseko, n.d.). A seepage collection and recycle system will return any seepage back into the storage facility. Nevertheless, the TNG state that this plan is no safer for them than the one before it. Chief Alphonse criticized the new mine plan, stating that it will destroy "80 per cent of the spawning grounds. There's no dam in the world that has never leaked. Seepage is going to happen whether you like it or not" (Rooney, 2012). He states that the TNG is ready to fight against the new proposal in court, if necessary. However, Taseko is confident the new plan will satisfy the federal government as it entails a 94 percent improvement (Taseko, n.d.) over the previous plan in preserving the Fish Lake habitat. Nevertheless, Stewart Phillip, president of the Union of BC Indian Chiefs warns that if the federal government approves New Prosperity, "it will trigger a province-wide and nation-wide backlash that will severely jeopardize relationships between First Nations and the mining industry for years to come" (Klein, 2011).

8.4. Policy Gaps Contributing to Uncertainty of Consultation Process

The Prosperity Mine case study demonstrates three problems that contributed to the uncertainty of the consultation process and the blockage of the proposed mine:

1. Because project proponents conduct consultations under delegated authority from the provincial government, First Nations are justified in believing that province-only EAs are not objective and favour the goals of project proponents.
2. Many First Nations lack clear policies for how decisions will be made within the band or what bands expect from project proponents regarding mining activity on traditional territories. This contributes to uncertainty by preventing mining companies from recognizing inadequacies in their consultation practices. First Nations should play a larger role in holding proponents accountable during the consultation process.
3. The province lacks an impartial mediating institution for proponents and First Nations to utilize when they arrive at disputes that the two parties cannot resolve on their own.

8.5. Summary: Lessons Learned from Prosperity

If the TNG had a detailed mining policy like the TRTFN's, it is possible that Taseko and the TNG would not have conflicted over the creation of the Community Impact Assessment. Likewise, Taseko would not have felt it necessary to quiz the TNG on its level of support for the project prior to funding the CIA. In addition, an independent mediating body would have assisted Taseko and the TNG to resolve their dispute over Fish Lake. Prior to the 2010 EA decisions, Taseko insisted that its original plan regarding Fish Lake was unchangeable as it was the most economically-feasible of all the possibilities. The TNG did not accept this rationale and asserted that the lake had to be preserved. Since both parties' positions were entrenched, an independent tribunal would have provided invaluable assistance in resolving the dispute and preventing the blockage of the project by the federal government.

9. Case Study 4: Ruddock Creek

9.1. Introduction

The Ruddock Creek deposit (Figure 2) provides an example of a recent project still in the exploration phase of mine development, but it has been already interrupted by protests and blockades by First Nations who are affected by it. This case provides more evidence for the policy gaps outlined in the previous case studies. More importantly, it indicates that, unless policies are established to mitigate these gaps, Premier Clarke's plan to advance mine development in BC will encounter significant difficulties related to First Nations consultations.

9.2. Synopsis of Work Completed and Mine Plan

The Ruddock Creek zinc/lead deposit is situated in southeast British Columbia, roughly 155 kilometers northeast of Kamloops, 77 kilometres east of Clearwater, and 45 kilometres southeast of Blue River. The project is still in relative infancy compared to other case studies examined in this report as it is still in the exploration phase and has not undergone environmental assessments. According to Selkirk Metals Corporation (acquired by Imperial Metals Corporation), exploration completed so far includes multiple drilling and sample analysis to confirm the extent of the mineral deposit. Selkirk has concluded that "there is excellent potential to expand the base metal deposit on the Ruddock Creek Property" (Simpson and Chapman, 2009, p. 64) Selkirk wants to undertake more drilling to explore the deposit and continue environmental data collection to prepare for the environmental assessment mandated by the province. The exploration work has shown a deposit with resources of 5 million tonnes at 7.5% Zinc and 2.5% Lead.

Selkirk's proposal for Ruddock Creek is an underground mine, which will have an annual production rate of 700,000 tonnes a year over a lifespan of 10 to 15 years. The province has formally indicated that the project will have to undergo an environmental assessment. Chris Hamilton, Project Assessment Director at the Environmental Assessment Office ordered that "the proposed Project requires an environmental assessment certificate, and the Proponent may not proceed with the proposed Project without an assessment" (British Columbia, 2009).

9.3. Selkirk Consultation and First Nations Reaction

In an interview, the proponent confirmed that, from the claim-staking phase, the company was aware that the project site was located within territory that up to four different First Nations claimed as traditional territory. Additionally, the First Nations had not resolved their territorial claims, indicating that Selkirk's consultation would be challenged by competing strength of claim to the land. As early as 2004, the proponent began discussions with the Neskonlith, Adams Lake, and Little Secwepemc bands in order to establish exploration agreements and address each band's rights and title claims. These bands are part of the nine bands that comprise the Shuswap (Secwepemc) National Tribal Council (SNTC). In 2007, the proponent became aware that the Simpcw First Nation also had a claim to the project area as traditional territory. The Simpcw are also a part of the SNTC. In order to address Simpcw interests, the proponent initiated discussions to notify them of the project and to begin consultation necessary for the EA process. No formal agreements between the proponent and the First Nations have been signed. However, the proponent states that unlike the other SNTC bands, the Simpcw were eager to respond to consultation efforts and that by 2011, the proponent and the Simpcw were ready to sign a formal mineral exploration agreement.

The other three First Nations bands did not support the signing of the mineral exploration agreement as they felt it would weaken their claims to the project area as traditional territory. The Neskonlith and Adams Lake bands say that they have not been consulted adequately and that the project will contaminate the headwaters of the Adams, Columbia, and Thompson Rivers. Neskonlith Chief Judy Wilson stated that they could

not allow the Simpcw to sign the agreement. She said: “Our elders felt it was important to come out today. Traditional protocols are important, especially when another band is moving forward like this. Other communities have…to…talk with us, especially when it involves our sacred headwaters” (McNeill, 2011). Neskonlith band elder Sarah Deneault also stated that “we [Neskonlith] were the first people here…we are supposed to be the keepers of this land and these waters” (McNeill, 2011). According to a release by the Secwepemc, their people collectively hold Aboriginal title to the area. They argue that single Indian bands such as the Simpcw cannot claim title.

Despite these protests, Chief Matthew of the Simpcw and the project proponent planned to sign the exploration agreement on August 9, 2011, at a ceremony. In order to protest the signing of the agreement, members of the Adams Lake Indian Band set up a blockade that restricted access to the Ruddock Creek exploration camp. Also on August 9, approximately 20 members of the Neskonlith Indian Band travelled from the community of Chase to Clearwater to stage a mini-demonstration against the signing. In response, Chief Matthews cancelled the signing ceremony.

The response from the Simpcw to the other First Nations has been both confrontational and conciliatory. For example, Simpcw councillor Fred Fortier said “the Neskonlith can say what they want. We’re clear that the Canoe/Thompson division of the nation has responsibility to be gatekeepers to this area” (Overlapping Claims, 2011). Moreover, he said that the Simpcw had invested 20 to 30 years of research to provide proof of their use and occupation of the areas around the Ruddock Creek project. He stated that “We’re [Simpcw] asking the other Secwepemc bands to provide information about their use and occupancy. As for Ruddock Creek, we’re not saying we had exclusive use, but we have an interest” (Overlapping Claims, 2011). At the same time, the Simpcw do acknowledge that the overlapping claims go back as far as 500 years and that it is important that the First Nations resolve their claim disputes and that Selkirk adequately consult with the First Nations who have an interest in the project area. Chief Matthews said that "if the environmental issues are taken care of and the aboriginal title and rights interests within our traditional territory are taken care of, then we're willing to deal with just about anything that comes along” (Blockade of BC Mine, 2011). He also stated that, at this point, he wouldn’t view the loss of the Ruddock Creek project as a critical blow to the future of his community.

9.4. Policy Gaps Contributing to Uncertainty of Consultation Process

The Ruddock Creek case highlights the following policy inadequacies that contributed to uncertain consultation processes and the cancellation of the exploration agreement between Imperial Metals and the Simpcw Indian Band:

- Due to the lack of signed lands claim agreements, mining project areas can fall within overlapping traditional territory claims by First Nations. This places pressure on mining companies when consulting with First Nations, who each view their own claim as being more valid, thereby making themselves worthy of greater consultation.
- Provincial decision-making guidelines do not clearly establish timelines for First Nations to respond to notification of various types of mining activity.
- First Nations lack clear policies for how decisions will be made within the band or within a Nation that comprises several bands (i.e. Secwepemc, TNG).

9.5. Summary: Lessons Learned from Ruddock Creek

The pace of the provincial lands claim agreement process has been slow, providing uncertainty for project proponents who wish to conduct mining activity in areas that multiple First Nations claim as traditional territory. The province recognizes this and is working to improve the BC treaty negotiation process. This is a long-term strategy, however, which will not benefit the consultation process between proponents and First Nations in the near future.

Additionally, the province notifies First Nations of proponents that will be engaging in consultations with them. BC provides around 30 days for First Nations to respond to notification of exploration permit applications. However, this is not a set deadline, which means that some First Nations may not respond within the allotted timeframe. If the province determines it has done its best to consult with First Nations, it approves exploration permits for proponents. However, this marginalizes First Nations

with little capacity to assess and respond to notifications of exploration. In the Ruddock Creek case, Selkirk (Imperial Metals) has conducted exploration drilling from 2004, for which it needed a provincial permit. Seven years later, in 2011, the proponent was ready to sign an exploration agreement with only one of several First Nations with claim to the area. This indicates that provincial policy has been inadequate to incentivize the other First Nations to respond and engage in the consultation process.

First Nations also share responsibility for the uncertainty of the consultation process. In the case of First Nations that are comprised of several smaller bands, it is worthwhile for the national governments to create mining policies that outline the Nation's decision-making procedures for the creation of agreements throughout the consultation process. In the case of Ruddock Creek, if the SNTC had such a policy, it is likely that the Simpcw band would not have got in trouble with other Secwepemc bands for appearing to assert rights and title unilaterally without consent of the council.

10. Policy Options

10.1. Introduction

Given the lack of certainty within the consultation process between First Nations and project proponents, the BC Ministry of Energy and Mines should consider three policy options that are developed specifically to ameliorate the policy gaps highlighted in the four case studies.

10.2. Objectives

The three policy options are effective because each one satisfies one or more of the following objectives:

1. Reduce litigation before the courts between First Nations, mining companies, and government
2. Improve First Nations' capacity to respond meaningfully to tenure claims from mining companies at the initial permitting stage of mine development: Permit applications, Notices of Work, EA Working Groups, etc.
3. Incentivize mining companies to consult effectively with First Nations from prospecting to mine development

These three objectives contribute to one overall objective of upholding the honour of the Crown and assisting it in fulfilling its duty to consult. While these goals differ from those of industry as highlighted in the case studies, the Crown has an ongoing relationship with First Nations and must ensure that expansion of the mining industry does not negatively impact its duty to First Nations. Nevertheless, the province must also consider the welfare of the entire province and its economy. While some literature suggests that consultation with First Nations should be made mandatory at the mineral

claim-staking phase, the strong support of the free-entry mineral tenure system by the BC mining industry indicates that such policy changes would discourage investment in mining. Since there are other feasible alternatives for improving the consultation process in BC, this report does not advise any reforms to the free-entry system. This report will proceed to discuss the three feasible policy options and their advantages and disadvantages in order to propose a course of action that best improves the consultation process.

10.3. Option 1: Provide Support for First Nations to Develop Individual Mining Policies

This option advises the BC government to share responsibility for improving the consultation process with First Nations by encouraging certain bands or national governments to create mining policies similar to the one of the TRTFN. The province of Ontario is currently piloting a similar policy in partnership with the Ashinabek First Nation. This option provides BC First Nations with a meaningful participation in shaping the consultation process between them and project proponents.

By encouraging and incentivizing First Nations to develop their own mining policies, the province is effectively accomplishing two goals:

- Helping First Nations prepare themselves for future mine development by establishing their decision-making procedures and setting consultation requirements for proponents to follow; and
- Established First Nations' policies will enhance certainty for proponents, and the Crown, in demonstrating that they have diligently undertaken adequate consultation.

Under this policy option, all three parties—the province, First Nations, and project proponents—can benefit.

10.3.1. Implementation

The first implementation issue is to incentivize First Nations to develop their own mining policies by providing them with funding and technical capacity. First Nations

often lack financial resources to undertake all the work necessary to develop a mining policy. This work includes undertaking community consultation within their Nation or band, enlisting the help of experts, and creating the materials necessary to inform the creation of the policy. Without funding, First Nations will not be incentivized to create a mining policy, even if they are interested in doing so. Therefore, this policy option advises the BC government to allocate additional funding for mining policy development through the already-existing New Relationship Trust (NRT), created by the province to support First Nations capacity building.

It is important to note that the amount of money provided to the applicant will depend on whether the applicant is an individual band or a tribal council/national government comprised of several bands. The following, is therefore, an estimate of the potential cost of this option based on available data from the NRT and the province of Ontario. In total, this option proposes that additional funding be in the order of a maximum $500,000 per year to support the funding of up to 10 projects[1] per year. This means that the province would make available a maximum of $50,000[2] in direct funding to a First Nations' applicant for the development of a mining policy. For the 2012 to 2013 fiscal year, the NRT plans to spend $6 million in support initiatives (NRT, 2012). Providing $500,000 per year to support First Nations' mining policy development equates to an 8.3 percent increase in NRT spending.

The second implementation issue is determining which BC First Nations should be prioritized in allocating the funding. The province should prioritize those First Nations

[1] The NRT 2011-2014 Strategic Plan states that they currently have funding to support 8 projects per year in land use planning, traditional land use planning, and economic development planning. Supporting up to 10 mining policy development projects a year is a similar effort and is necessary to enhance certainty in the consultation process as quickly as possible.

[2] The NRT currently allocates a maximum of $25,000 to individual First Nations for capacity-building, but up to $50,000 per project to groups of three First Nations who collaborate on a policy building initiative. This report utilizes $50,000 as the maximum amount available for an applicant based on information from the province of Ontario. For the year 2011-2012, the Ontario Creative Communities Prosperity Fund granted between $35,000 and $73,800 to seven First Nations communities for the creation of cultural mapping and land use planning. The $50,000 figure is a reasonable estimate for this option for BC.

with claimed traditional territories that have the highest numbers of commercial mineral deposits within them. This knowledge is available through examination of the BC MEM Consultative Area Database, which outlines First Nations claimed areas, and available geospatial data, which outlines commercial-value mineral deposits in BC. In order to ensure prioritization, the direct funding will be made available by means of an application system[3]. Of course, any First Nation band or tribal council is welcome to apply; the decision within a tribal council (i.e. the TNG) as to whether a band or the council will develop the policy is a matter to be decided among the First Nations themselves. However, the NRT must evaluate applications to ensure that the ten projects to receive funding meet the prioritization criteria.

The third implementation issue is ensuring that First Nations' policies promote certainty for proponents by being as consistent as possible in terms of content. In other words, the government will have to outline all the areas that a First Nation's policy should cover and how detailed it should be. Some First Nations' current mining policies are broad and inadequate as can be seen in a three-page statement of principles in the case of the Cree. A good model for First Nations to adopt and for the province to support is the TRTFN Mining Policy, which was discussed in the analysis of the Ruby Creek project in Chapter 7. Each First Nations band or national government selected to develop a policy will have different decision-making structures. However, the delineation of both key contacts within the band group and the band's decision-making procedures will provide certainty to future project proponents by allowing them to respond proactively to the band's consultation expectations.

[3] The NRT already has an application form for requesting direct financial support for general policy development as governance capacity initiatives.

10.4. Option 2: Make Incremental Reforms to the Current System

This policy option advises incremental reforms to the current system to address the concerns of project proponents and First Nations regarding timelines for First Nations to respond to notifications of exploration and draft EA reports. This policy option proposes two reforms:

1. Extend allowed response time for First Nations to proponents' permit/lease applications from 30 days to 90 days.
2. Extend the time that First Nations have to comment on the draft EA report from three weeks to six weeks.

10.4.1. Implementation

This option advises increasing the 30 day time period for First Nations to respond to exploration notification to 90 days. Moreover, it advises making the 90 day time period a firm deadline applied consistently by all regional offices of the Ministry of Energy and Mines. Currently, the BC MEM views the 30 day time period as a mere guideline for provincial decision-makers. Mining companies have found this frustrating, stating that "[w]ith regard to project review, the provincial government needs to address the inconsistency that exists between various regional offices with their implementation of the First Nations consultation requirements on exploration permits. It's a firm '30 days' in some cases, a 'soft 30 days' in others, and '45 days' in others" (The Mining Industry Advisory Committee, 2006, p. 27).

The second reform doubles the time allotted to First Nations to respond to draft EA reports from 3 weeks to 6 weeks. Current *Environmental Assessment Act* legislation allots a maximum of 180 days for the EAO to complete its review of all the proceedings and make its decision. EAO staff are concerned that if extra time were allotted to First Nations to respond to the draft report, they would have to reduce time elsewhere in their analysis of all the proceedings necessary to make their decision. Therefore, implementation of the second reform of this policy option would involve an amendment to the *Environmental Assessment Act*, Section 14, to allow for a maximum of 201 days

for the EAO to complete its assessment and make a decision: this equates to a sum of the original 180 days and a recommended extension of 21 days.

10.5. Option 3: Establish Mediation Body for Disputes between Proponents and First Nations

This policy option advises the establishment of a mediation board/tribunal similar to the Australian National Native Title Tribunal (NNTT), to provide mediation between proponents and First Nations who cannot resolve disputes on their own. The tribunal will be able to mediate all disputes up until the provincial and federal EA process. The BC government already has a mediating body for proponents and private landholders—the Surface Rights Board. This option advises establishing a similar body for First Nations claimants and proponents.

NNTT procedures are fully discussed in Appendix A. The NNTT allows a period of 3 months for native title claimants to object to permits for exploration on their traditional territory. It allows an additional 3 months for proponents and native title claimants to resolve a dispute on their own through negotiation of exploration agreements or IBA-type agreements. However, if negotiations are unsuccessful, any party can request NNTT mediation at any point during the 3 month time period. The NNTT then allows a maximum period of 6 months for its mediation before making its final recommendation, which it delivers to the Commonwealth Minister of Aboriginal Affairs. The Minister can override an NNTT recommendation.

10.5.1. Implementation

Option 3 recommends that BC implement a mediation tribunal similar to the Australian NNTT. A BC Tribunal would address all three policy objectives outlined earlier in Section 10.2. Next, it is necessary to clarify how a Tribunal would be implemented in BC.

10.5.1.1. Jurisdictional Issues Governing Legislation

The proposed BC tribunal would adopt the same procedures and timelines as those under the NNTT's Right to Negotiate Procedure. The appropriate provincial ministry to administer the BC Tribunal would be the Ministry of Energy and Mines, which is responsible for exploration permitting. The Minister would be able to overrule tribunal recommendations.

In terms of enabling legislation, this particular Tribunal would look to the BC *Administrative Tribunals Act, 2004*, specifically, Sections 28 and 11. Section 28 of the Act provides that:

28.(1) The chair of the tribunal may appoint a member or staff of the tribunal or other person to conduct a dispute resolution process.

Section 11 of the Act states that:

11.(1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

However, the Tribunal would need specific legislative authority in addition to Sections 28 and 11 of the *Administrative Tribunals Act*. This could be developed by the Ministry of Energy and Mines to ensure that the Tribunal's procedures fit correctly within the current regulatory system.

10.5.1.2. Procedures

The BC Tribunal would adopt the same timelines as the Australian NNTT. This means the same time periods for negotiating agreements and for the Tribunal to make its recommendation. Under this policy alternative in BC, after a mining company submits an application for an exploration permit or a lease, affected First Nations will have a maximum of 3 months to file an objection. If an objection is filed, the BC MEM will allow a maximum of 3 months for proponents to undertake procedural aspects of consultation. If the proponent and First Nation are unable to reach an agreement, the BC Tribunal will have a legislated maximum of 6 months to mediate between the parties and reach a

recommendation as to whether the permits should be granted or refused. A tribunal recommendation to allow a permit would signify that the Crown's duty to consult has been met. Of course, the Minister of Energy and Mines may overrule a Tribunal recommendation to deny a permit if he/she is satisfied that the Ministry (and, by extension, the project proponent) has met the Crown's duty to consult and, if appropriate, accommodate.

In the case where the BC Tribunal recommends that a permit be denied and the Minister agrees, the Ministry must delegate specific procedural aspects of consultation to the proponent that will allow the Ministry to meet the duty to consult and, if appropriate, accommodate. This could involve delegating proponents to acquire letters of consent from affected First Nations or to revise exploration work plans to remove or modify elements causing First Nations' concerns. Once the proponent has carried out successfully delegated procedural aspects of consultation, the application returns to the Minister for review. If the Minister is satisfied that the duty to consult has been met, the permit(s) may be approved. This policy option provides an opportunity for First Nations and proponents to resolve disputes outside the court system where outcomes are not certain and projects could be delayed well beyond the amount of time allotted for the tribunal to conduct mediations.

10.6. Criteria and Measures

This section provides the toolkit that the report uses to determine the relative merits of each policy option. This report utilizes five criteria to judge a policy option's performance. A definition of each of the criteria is provided along with an explanation of how this report will measure an option's performance in meeting each of the criteria.

10.6.1. Effectiveness

Effectiveness means the extent to which the proposed policy option will meet the three objectives outlined earlier in Section 10.1. This criterion will be measured on a qualitative high/medium/low scale with numerical value of 0 for low, 1 for medium, and 2

for high. In measuring the effectiveness of an option, this report will look to the literature and to any jurisdictions with similar policy remedies to similar problems.

10.6.2. Political Feasibility

Political Feasibility means the level of acceptability a policy option would have from government, the mining industry, and First Nations. Political feasibility in the eyes of the government would be something that promotes both First Nations' satisfaction and mine development in BC without causing the government to come into conflict with the standards of consultation laid out in case law. The mining industry would support options that improve the clarity and certainty of the consultation process without excessively increasing their workload in terms of bureaucratic oversight. A policy option is likely to be supported by First Nations if it addresses their concerns, including limited capacity to address exploration and development proposals, inadequate timeline to respond to such proposals, and a need to have their rights and concerns adequately addressed throughout all stages of mining.

Political Feasibility will be ascertained through taking into consideration statements made by representatives of government, mining industry, and First Nations in the media and relevant literature. Specifically, policy papers or statements published by any of the three stakeholders will also provide evidence of an option's level of political feasibility. This criterion will also be measured on a qualitative high/medium/low scale with numerical value of 0 for low, 1 for medium, and 2 for high.

10.6.3. Cost

The cost criterion is a measure of the cost to the provincial government to implement a policy alternative. Providing an exact dollar value for the implementation of each option would require research and cost analysis that is outside the scope of this research project. Instead the criterion provides an option's qualitative ranking—high, medium, low—relative to the other two options. Cost will be measured according to a high/medium/low scale with a numerical value of 2 for low, 1 for medium, and 0 for high cost. Cost is determined through an analysis of publically-available data regarding cost

of programs or policies already in place from government, mining industry, or first nations.

10.6.4. Equity

Equity refers to fairness to First Nations. The report is concerned with determining whether each policy option will be fair to First Nations as a marginalized and under-privileged group. The following two key questions will help ascertain the level of equity of a policy option:

- Does the option put First Nations at a large disadvantage relative to mining industry?
- Does the option place too high a financial burden on First Nations whose capacity is limited and whose operating budgets are focused on other high-priority governance issues besides mining?

Equity will be measured on a high/medium/low with 0 for low, 1 for medium, and 2 for a high level of equity.

10.6.5. Loss of Project Efficiency

This criterion measures the effect of a policy option on the timeline for mine development. It is concerned with whether a policy option is likely to cause a delay in the mine development process and, if so, how long the delay might be. In short, any loss in efficiency will be measured by the maximum number of days or months an option potentially could delay mine development. These estimates will be determined through an understanding of permitting processes and consultation timelines as laid out in the publically-available BC provincial regulations and regulations from other comparative jurisdictions.

Similar to the other criteria, levels of efficiency will be measured on a qualitative scale of low loss in efficiency, medium loss in efficiency, and high loss in efficiency. Similar to cost, a numerical score of 2 is assigned for low losses in efficiency, a score of 1 for medium losses in efficiency, and a score of 0 for high losses in efficiency. A low loss of efficiency is an identifiable delay of 0-3 months for projects. A medium loss is any delay of 3-6 months. A high loss is any delay of 6 months or more.

10.7.Policy Evaluation

10.7.1. Option 1: Incentivize First Nations' Mining Policies

10.7.1.1. Effectiveness—High

This policy option would address goal numbers 1 through 3. It scores high on effectiveness. By clearly outlining the standards of consultation expected from a First Nations band, mining companies are provided with clear information as to how to proceed during consultations. This clarity will lead to both mining companies and First Nations being satisfied that maximum effort to address First Nations concerns is being paid. This option therefore earns a score of high effectiveness in achieving the four objectives laid out in previous sections. Numerically, this translates into a score of 2.

10.7.1.2. Political Feasibility—High

This policy option is politically feasible. On a broad level, First Nations would support being given the opportunity to establish the mechanism by which they respond to exploration and mine development proposals on their traditional territories. Instead of feeling like secondary stakeholders, this policy option would allow First Nations to establish themselves as primary participants in the mine development process.

Mining companies would also support this option to the extent that it aids them in cultural mapping, which is the practice of identifying the power structures and key contacts within an indigenous community. The mining industry also values certainty and predictability as necessary for investment. In 2006, they recommended that either the federal or provincial governments "[d]evelop innovative capacity building and partnership programs with First Nations" (The Mining Industry Advisory Committee, 2006, p. 22). On the other hand, support for this policy would be tempered by the reality that many First Nations have lengthy communal decision-making processes, which could slow down a mining company's project development timeline by several months. However, this would act as incentive for mining companies to live up to the mantra of consulting early and often so as to avoid unnecessary delays. But since the resulting First Nations policies would delineate criteria for deciding which project proposals merit higher and lower levels of band decision-making, mining companies would have certainty regarding that process. Therefore, the mining industry would support this policy overall.

Government would find this policy option to be somewhat politically feasible as it entails no change to the current permitting and environmental review system. This is in keeping with the provincial government's plan to cut 'red tape' and make sure that it is not responsible for slowing the pace of mine development in BC (Olivier, 2011). However, it does entail additional funding.

For all these reasons, this policy option receives a score of 1.5 for medium-high political feasibility.

10.7.1.3. Cost—Medium

This policy options is rated as medium cost relative to the other two options as it advises the allocation of $500,000 per year through the NRT to support First Nations' mining policy development.

10.7.1.4. Equity—Medium

This option scores moderately on equity as it does not fully address all of the improvements First nations feel are necessary. Moreover, rather than government taking the initiative to improve the consultation process, this option shifts the responsibility to First Nations.

10.7.1.5. Losses of Project Efficiency—Low

This policy options entails minimal delays to ongoing and future projects because the province is not changing current regulations. Any efficiency losses would be due to particular decision-making procedures of First Nations. This was visible in the TRTFN Mining policy where certain procedures called for simple decisions by the designated Land Manager, but others required deliberation of the TRTFN government or clans. However, timelines will be specified in these policies, thereby increasing certainty for mining companies. It is expected that efficiency losses will be low, earning this option a score of 2.

10.7.2. Option 2: Make Incremental Changes to the Current System

10.7.2.1. Effectiveness—Medium to High

Because this option addresses 2 of 3 goals, it is rated as moderate-high effectiveness. Increasing time to respond for First Nations contributes to increasing their capacity by allowing more time for expert help and learning. This will also have some impact on reducing litigation because First nations will feel less pressured to rely on the judicial system to provide the necessary recourse for inadequate provincial policy. This option therefore receives a score of 1.5 for effectiveness.

10.7.2.2. Political Feasibility—Medium

This option rates as having moderate political feasibility. The provincial government will consider it feasible as it does not involve grand changes to the current system. First Nations would be somewhat supportive of this option as it would allow them more time, which they insist is necessary. However, this support is tempered because the policy option does not address underlying reasons for the need for more time to respond. Additionally, mining companies would only provide minimal support for this option as it would delay their project timelines. Therefore, this option scores a 1 on this criterion.

10.7.2.3. Cost—Low

This policy option is low cost to the provincial government relative to the other two options. The Environmental Assessment Act allows that the executive director or Minister may "order the proponent of a reviewable project or the holder of an environmental assessment certificate to pay…for all or part of the costs" (*Environmental Assessment Act*, 2002) incurred by the review panel. Any added cost caused by this option could be deflected on to the project proponents. Therefore, this option receives a score of 2 for low cost to the province.

10.7.2.4. Equity—Medium

This option has only moderate equity. This option only marginally improves First Nations capacity to respond by increasing the time allotted to do so. However, it does

not address underlying problems of inadequate educational and financial capacity to negotiate with project proponents. Therefore, this option receives a score of 1 on this criterion.

10.7.2.5. Loss of Project Efficiency—Medium

This option would cause marginally longer timeline delays. Given that current application of the 30 day guideline for First Nations to post objections is applied differently in different situations as 30 days or even 45 days, increasing the time period for objections to exploration permits to 60 days is only marginally longer than before. Secondly, the added time period for First Nations to respond to a joint federal-provincial EA draft report would add 3 weeks (21 days) to the timeline. Therefore, this option adds a total of 51days to the existing system. This is a relatively small increase in possibility for delays to projects and so this option receives a score of 1.

10.7.3. Option 3: Establish Independent Mediation Body

10.7.3.1. Effectiveness—Medium to High

This policy option is moderately effective in meeting the policy goals of this report. First, this option addresses goal 1 of reducing litigation for reasons discussed in the section devoted to this option. By offering an alternative to the judicial system—where neither party can be certain of a ruling—both project proponents and First Nations are incentivized to reach agreement. In this way, this policy option successfully addresses goal 3 of incentivizing mining companies to consult adequately with First Nations. Option 3 also somewhat addresses goal 2 of improving First Nations capacity by providing accredited and impartial mediation services to First Nations who might otherwise not have capacity for negotiation or who might conflict with the proponent over choice of a mediator. Therefore, this option receives a score of 1.5 for effectiveness.

10.7.3.2. Political Feasibility—Medium

The level of political feasibility for this process would be low among the mining industry and within the provincial government. The mining industry has repeatedly stated that additional layers of governmental bureaucracy are not the solution to current problems and could actually result in less investment and less mine development in the

province. They would not be content with a policy option that could cause significant delays to projects. The provincial government would find this option moderately feasible. It will cost the government more to fund the Tribunal. Moreover, the selection of mediators and staff for the Tribunal could present political issues for the current government. However, these political downsides are mitigated by the upside that the government can use the establishment of a Tribunal as evidence of a new commitment to ensuring that BC's First Nations are adequately consulted by project proponents seeking to develop mines in BC.

First Nations would support this option because it creates a formal institutional process for addressing their concerns from the early phases of mine development. This would be reversal of the current process where government waits until the third phase of mine development—the environmental assessment process—to undertake a formal examination of a proposed mine's impacts on both the environment and First Nations' traditional way of life. First Nations would also support increased time allotted for filing objections to proposed exploration permits. Therefore, this policy option merits a score of 1 for medium political feasibility.

10.7.3.3. Cost—High

Establishing a Tribunal would significantly add to provincial expenditures. An examination of the Australian NNTT reveals that for the fiscal year 2010-2011, the Australian parliament allocated $26.92 million (Australia National Native Title Tribunal, 2012). However, the NNTT is a federal body whose scope includes other 'future act processes' besides mine development. Moreover, the 2006 total Aboriginal population of Australia was 517,000 whereas the total Aboriginal population of BC for the same year was 196,075. Based on this pattern, BC will spend significantly less than the Australian government. However, the cost of the proposed tribunal will be the highest of the three policy alternatives presented in this report. Therefore, it receives a score of 0 for high cost.

10.7.3.4. Equity—Medium

This option only scores as medium equity for First Nations since it requires all parties to bear their own costs for mediation. However, having accredited mediators in a

formal institution dedicated to addressing disputes between First Nations and project proponents outside of the judicial system does ameliorate the burdens placed on First Nations as highlighted in the case studies. Therefore, this option receives a score of 1 for medium equity.

10.7.3.5. Loss of Project Efficiency—High

Relative to the current system, this option would create significant losses in efficiency at the second phase of mine development (exploration permitting and lease granting). Under this option First Nations get 2 months (60 days) extra beyond the current 30 day time period for posting objections to permit applications. Then there is an additional 3 months allotted for negotiations between proponents and First Nations. If the Tribunal gets called in, there could be another delay of up to 6 months for mediation, dispute resolution, and the ruling by the Tribunal, which could be overridden by the Minister of Energy and Mines. Therefore, the maximum additional delay caused by the Tribunal could be as high as 11 months. This is a severe loss in efficiency and therefore rates a score of 0.

10.8. Evaluation Matrix

The evaluation of the policy options is summarized in the table below.

Table 2. Policy Evaluation Matrix

	Effectiveness	Political Feasibility	Cost	Equity	Efficiency	Total
Option 1: First Nations Mining Policies	2	2	1	1	2	8
Option 2: Timeline Reforms	1.5	1	2	1	1	6.5
Option 3: Mediating Tribunal	1.5	1	0	1	0	3.5

As stated in Section 10.6, scoring is based on a 0, 1, 2 qualitative scale for low, medium, and high performance on a criterion. The exceptions are the 'Cost' and 'Efficiency Losses' criteria where 2 indicates low cost/loss in efficiency (most favourable), 1 indicates medium cost/loss in efficiency (medium), and 0 indicates high cost/loss in efficiency (least favourable).

10.9.Recommendation

This report recommends that the BC Ministry of Energy and Mines pursue policy options 1 and 2 in the short term and option 3 in the long term. Rather than view the provincial government as having sole responsibility for improving the consultation process, the best solution involves two governments: First Nations' governments and the BC government. Incentivizing First Nations to establish publically-available, detailed mining policies and consultation protocols for mining companies to follow during consultations allows them to be direct participants in improving the consultation process. Increasing the time periods for First Nations to respond to exploration permit notices and to draft EA reports is also a low-cost and politically-acceptable solution. This will diminish the sense among some First Nations that governments seek to rush through the process to establish mines. More trust and more say in the decision-making process for First Nations will improve relations between government, First Nations and proponents. Certainty for companies will increase because the extended time periods for responding to exploration permit notification will be treated as strict deadlines, rather than flexible guidelines for provincial decision-makers.

Option 3 should be implemented in the long term for creating a tribunal where First Nations and proponents can receive mediation assistance for resolving disputes related to consultation. The tribunal would not be responsible in any way for determining First Nations land title. The tribunal is only for specific mining activity disputes between proponents and First Nations already identified by the province as needing notification for exploration. Lastly, implementing these options will assist the Premier in implementing her plan to increase mining activity in British Columbia by decreasing conflict between First Nations and project proponents.

11. Conclusion

There is no solution that will allow the provincial government to improve effectively the consultation process between mining companies and First Nations while simultaneously reducing government involvement. Even though case law precedents allow the provincial government to delegate procedural aspects of its duty to consult to project proponents, it is clear that mining companies cannot be relied upon to consult adequately with First Nations. By their nature, mining companies are more concerned with advancing projects to realize returns on investment than with the Crown's fiduciary duties to BC Aboriginals.

Since First Nations view themselves as distinct governments, responsibility for improving the consultation process cannot rest on the provincial government alone. Therefore, it is prudent for the BC government to incentivize First Nation governments to develop mining policies and procedures to direct mining companies in consulting and to guide First Nations in decision-making on supporting or opposing projects. This will reduce conflict between project proponents and First Nations.

If the provincial government is truly committed to a new relationship with BC First Nations, it is advisable to go a step further and increase the time periods First Nations have to respond to referrals of Notices of Work and draft EA reports. Because many First Nations lack mining-specific technical capacity, these extensions would assist First Nations in participating through the permitting phase and EA phase of mine development. Lastly, since there is always the possibility that project proponents and First Nations will arrive at unresolvable disputes during the consultation process, the establishment of an impartial, mediating tribunal would contribute towards resolving conflicts in order to reduce the likelihood of litigation. In this way, the province can improve effectively the consultation process between mining companies and First Nations, thereby meeting its own fiduciary duty to First Nations and promoting mine development in BC.

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Appendices

Appendix A
Australian National Native Title Tribunal

Introduction

The National Native Title Tribunal is an "impartial, independent and expert body which facilitates timely and effective native title outcomes" (n.d.). It is responsible for carrying out functions under the *Australian Native Title Act 1993*. The Tribunal "administers the *future act processes* [emphasis added] that attract the right to negotiate under the Commonwealth legislation—that is, generally future acts relating to mining" (NNTT, n.d.). Its role includes mediating between parties, conducting inquiries, and making decisions (future act determinations) when parties cannot agree. A more detailed listing of functions includes the following:

- providing assistance in the preparation of applications,
- mediating between parties to native title applications referred to the Tribunal,
- mediating between parties to assist them to reach agreement about certain future acts that might take place on areas where native title exists or might exist (mining)
- notifying individuals, organisation, governments, and the public of native title applications and Indigenous land use agreements
- assisting parties to negotiate Indigenous land use agreements
- maintaining the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements

Notably, the NNTT is *not responsible* for determining native title. However, it does provide a one-stop resource for all parties involved in the future act process.

Granting of Mining Tenements

Future Act Processes revolve around the granting of a mining tenement in Australia, which, in BC, is the equivalent of exploration permits and mine leases. In both Canada and Australia, native title formally exists over some areas of land but not others. In BC, the vast majority of land has no formal native title over it, but is Crown land on which many First Nations claim to have rights and title by way of historical use and occupancy. This type of context is reflected in Part 2, Division 3 of the Australian NTA,

where “the validity of grant of a mining tenement application can be ensured where native title claims have been made (or could be made)…on the assumption that native title does in fact exist in the area” (Hunt, 2009). Under the NTA, a mining tenement which affects native title may be granted if any one of the following conditions is met:

- There is compliance with the right to negotiate procedure or
- The mining tenement has been authorised under an indigenous land use agreement or
- If the mining tenement is only for infrastructure purposes, there is compliance with the infrastructure procedure.

Right to Negotiate Procedure

This section was developed with the aid of Michael Hunt’s 2009 *Mining Law in Western Australia*. In it, he details out the Right to Negotiate Procedure. It is as follows:

- The state is responsible for giving notice of the proposed mining tenement grant to registered native title holders and claimants, representative Aboriginal bodies, the NNTT, the mining company, and the public.
- The notice specifies a notification date from which persons have 3 months to lodge native title claims.
- If a native title claim exists or is lodged within 3 months, the proposal is subject to negotiation amongst the Ministry for Aboriginal Affairs, the native title claimants and the mining company.
- The parties then have a period of 3 months to resolve the dispute.
- Negotiations must be in good faith and any party can request the NNTT to mediate.
- If the parties cannot come to agreement regarding the proposal within the allowed period of 3 months from the date a claim/objection is filed, any of the parties can request the NNTT to mediate and make a recommendation as to whether the proposal can proceed.
- Negotiations can be about payments based on profit, income and production from activities in the area (similar to IBA’s and revenue sharing agreements in BC). The NNTT is not able to mandate the size of the payments; however, it can

function to facilitate such discussions and assist both parties in coming to agreement.

- The NNTT may recommend that the proposal be allowed or refused. It is required to conclude hearings and make its decision within a target period of 6 months.
- The Commonwealth Minister for Aboriginal Affairs may override a NNTT decision.

Appendix B
Summary of Key Informants

Key Informant	Title/Company/Ministry	Responded? Yes/No
Chief Fred Sam	Nak'azdli Indian Band	Yes
Chief Derek Orr	McLeod Lake Indian Band	No
Chief Nathan Matthews	Simpcw Indian Band	No
Chief Nelson Leon	Adams Lake Band	No
Chief Leo Alphonse	Tsilhqo'tin National Government	Yes
John Ward	Spokesperson, Taku River Tlingit First Nation	No
Wes Carson	VP Mt. Milligan Project, Thompson Creek Metals	No
Brian Battison	VP Communications, Taseko Mines Ltd.	Yes
Gordon Keevil	Imperial Metals Company, Inc.	Yes
Leonard Sojka	President, Adanac Molybdenum Corporation	No
None	Ministry of Energy and Mines	No