

**Indigenous governance tools for exerting  
sovereignty over traditional territory:  
A case study of mineral development in the  
Stk'emlupsemc te Secwepemc territory**

by  
**Jonathan Martin Boron**

Bachelor of Environmental Studies, University of Waterloo, 2014

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# Approval

**Name:** Jonathan Martin Boron  
**Degree:** Master of Resource Management  
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sovereignty over traditional territory:  
A case study of mineral development in the  
Stk'emlupsemc te Secwepemc territory

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**Examining Committee:** **Chair: Claire Buchanan**  
MRM Candidate

**Sean Markey**  
Senior Supervisor  
Professor

**Evelyn Pinkerton**  
Supervisor  
Professor

**Date Defended/Approved:** December 11, 2017

## Ethics Statement

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## **Abstract**

With an increasingly political and adversarial environment developing in British Columbian resource sectors, this research critiques the usefulness of tools that can be employed by Indigenous governments to assert sovereignty over decisions regarding resource development on their territories. The purpose of this research is to consider the different legal, socio-political, supra regulatory and self-governance tools available in the case of the Stk'emlupsemc te Secwepemc Nation as they make management decisions over mineral development in their traditional territory located in the interior of British Columbia. This insight is particularly important for Indigenous communities in Canada that are considering their options regarding resource development as a path to self-autonomy and self-governance over their territory, resources and economies. As Canada moves towards a relationship built on the precept of reconciliation, it is imperative that resource development decision-making processes increase community capacity, agency, and self-governance, while incorporating indigenous traditions, values and laws.

**Keywords:** Indigenous Sovereignty; Resource Development; Co-management; Resource Royalties

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## Preface

The scope of this research positioned sovereignty discussion within a relational realm as it seems this is the direction that current practice is taking on the ground and in the Courts. There exists valuable discourse on Indigenous sovereignty both within the literature and in the voices of Indigenous communities, not constrained by colonial legal or thought constructs. The thoughts put forward are one way to consider how things are, and is shaped by my own upbringing and experience on the fringes of this Canadian-Indigenous dichotomy.

SSN *Pípsell* Decision on March 4<sup>th</sup>, 2017



# Chapter 1. Introduction

Resource development projects have major implications for rural and Indigenous livelihoods. With the most recent Supreme Court decision regarding Aboriginal title rights in *Tsilhqot'in* (Tsilhqot'in Nation, 2014), the release of the Truth and Reconciliation report (TRC, 2015) and the federal government's official recognition and adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), Indigenous rights and interests have become substantially more prominent in the decisions of the Canadian government as well as processes of natural resource development.

Indigenous communities and their governments have been leveraging these events, and the increasing acknowledgement and recognition of rights and title in their engagement with resource development activities in their asserted territories. Specifically, Indigenous communities have sought, or been required to engage in, (see Heisler and Markey 2013) negotiated agreements and management regimes with state and industry proponents across many resource sectors (Siebenmorgen and Bradshaw, 2011; Fidler, 2010). While some of these supra-regulatory mechanisms have been successful in acquiring significant benefits for Indigenous communities, they often fail to achieve overall objectives surrounding community well-being (O'Faircheallaigh, 2013). Most notably, current consultation and negotiation processes fail to effectively account for Indigenous cultural values due to the inflexibility of the western capitalist system in which these processes are framed (Mills, 2011; Booth and Skelton, 2011; Hitch and Fidler, 2007).

The purpose of this research is to investigate the value of various legal, socio-political, supra-regulatory and self-governance arrangements currently available to First Nations governments in order to determine their usefulness under certain conditions. This is guided by a series of research questions: 1) what governance tools have Indigenous governments employed successfully to exert sovereignty over their land and resources; 2) what are the limitations to current governance mechanisms employed; and 3) how

can these limitations be altered to meaningfully include Indigenous community imperatives in an effort to achieve reconciliation<sup>1</sup>.

This case analysis serves to expand on research in the field of negotiated agreements, specifically Impact Benefit Agreements, leading into questions around Indigenous sovereignty and supporting pathways to Indigenous self-governance. The current federal government has declared that issues affecting Indigenous peoples within Canada are a top priority in their mandate and officially adopted the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) in 2016. While this action is a show of good faith towards Indigenous communities, the implementation of UNDRIP requires creating institutional arrangements that are reconciliatory in nature, that support the principles of self-determination (article 3); self-governance (article 4); and free, prior and informed consent (article 32) outlined by UNDRIP.

The Stk'émłúpsəmc te Secwépəmc Nation (SSN) case offers a revealing opportunity to consider the institutional arrangements that currently exist and how resource management occurs within SSN territory. The case also provides insight into how non-treaty First Nations governments negotiate these resource agreements and exercise their rights through this negotiation process. Principal to this research is an Aboriginal Resource Tax (ART) regime that is currently being created for use in future resource development projects that will occur within the unceded territory of the Skeetchestn and T'kemlups bands. This ART is a way to construct royalty transfer within the supra-regulatory mechanisms that currently exist within mineral and resource industries in Canada, and can be seen as an assertion of sovereignty as the SSN attempt to introduce such a mechanism.

This case also serves as an interesting addition to the community-based research (CBR) experience, as it looks to amplify the voice of Secwépəmc leaders and their continued resistance to colonial powers and assertion of sovereignty. CBR is a context-based approach to research methodology that seeks to empower social change objectives by communicating suppressed or omitted social narratives (Markey, Halseth and Manson,

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<sup>1</sup> Reconciliation in the context of this paper is defined by the Truth and Reconciliation Commission's 2015 report, where "reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country" (TRC, 2015).

2016). CBR also has the power to provide models of self-governance and co-management for others to draw from and expand on (see Sayles and Mulrennan 2010; White 2008). The Secwepemc people have a long and well-documented history of sovereignty declarations (see Ignace, 2008) and this CBR project attempts to highlight their latest experience dealing with colonial and neoliberal forces within Secwépemculecw, their land.

The structure of this report will begin with a description of the research methods employed for this project. Next, a literature review that considers the current resource royalty regimes and socio-political governance mechanisms that exist today, and provide key themes and limitations considered within this literature. Third, a description of the case content is presented, with a background section on the SSN community and the current institutional arrangements that govern resource development within their area of Secwepemc territory. Results of the data collection will then be provided, followed by a discussion of key findings and implications as well as a discussion on challenges and lessons learned from this community-based research project.

## **Chapter 2. Research Methods**

### **2.1 Methodology**

This research employed three core methods. First, an academic literature review was conducted, reviewing articles on existing royalty and resource development regimes with Indigenous communities in BC, across Canada and internationally. These regimes typically manifest in Negotiated Agreements; thus, the review considers the types of Negotiated Agreements that exist, the provisions within these agreements, and the governance structures and legal precedent and jurisdiction (treaty rights; title rights; use, ownership and management rights) directing the agreements. The literature review also considers the nature of resource royalties that may extend from these agreements.

Potential case study communities were identified through the literature review and then the case study community was selected based on 3 factors: the amount and diversity of resource arrangements of which the community was a part, the accessibility of the community to the researcher, and the interest of the community in engaging in the research project. The Stk'émłúpsəmc te Secwépəmc Nation (SSN) were chosen as an optimal case for research because of the multiple resource projects currently being undertaken within their territory and the multiple ways they have been dealing with the province and resource proponents in these cases.

Although much initial time was spent on the literature review considering Impact Benefit Agreements, it became very clear in our first meeting with community leaders that they had no interest in that research path as they have since moved on to alternative avenues of governance and expressions of sovereignty. This experience offers insight into the advantages and disadvantages of various governance options, as an Indigenous elder statesman advised that Impact Benefit Agreements are insufficient tools for First Nations communities. This insight into Impact Benefit Agreements is touched upon further in the results and discussion sections of this project. Rather than a focus on Impact Benefit Agreements, this project has evolved based on the advice of community leadership who have been considering alternative options as they search for solutions that provide greater control and ownership of their territories, economies and thus livelihoods.

After several meetings with community leadership and the SSN joint council, a specific research topic and area was determined and further work to develop interview questions for this different research avenue was done. Semi-structured interviews with key informants involved with resource agreements within British Columbia and specifically the SSN territory were then conducted. Key informants were identified via their work title or identified expertise related to Indigenous governance issues. These key informants included SSN joint council members and band council members from the Skeetchestn and Tk'emlups communities, as well as Canadian government officials and Aboriginal law practitioners. For these semi-structured interviews, individual participant consent was acquired prior to data collection. This consent was obtained through written documentation or through the method of oral consent. Oral consent is an important ethics mechanism for community researchers working with Indigenous communities' due to the fact that written documentation can negatively affect the trust relationship between the outside researcher and Indigenous participants. In these cases, an oral script of the written consent document was read to the participant prior to the interview and their response to consent was recorded in my notes. Data collection from these semi-structured interviews took place over a 2-month period, starting in September 2017 and culminating in October 2017.

The semi-structured interviews considered the following themes: (a) resource and mineral development industry information in the context of SSN territory, (b) aspects regarding the purpose and objectives of the various agreements entered into by SSN with Canadian government actors or industry proponents, (c) the impact (positive and negative) development has had on the community, (d) perceptions on how different types of tools are seen as successes or failures in providing intended benefits, (e) the future of resource development in Indigenous territories. Interview questions surrounding these themes were created and adjusted based on the specific expertise of each individual participant. The interview questions were vetted by my supervisor, Sean Markey, to ensure they were framed appropriately. The questions were then also vetted by the community leaders that have engaged with the research project.

A qualitative analysis of the data gathered was conducted in order to gain insight into the purpose of the governance arrangements, the negotiated agreements structure and provisions, whether the purpose was or is being achieved, and perceived and actualized benefits that may have stemmed from the agreements. The qualitative analysis was

completed using NVivo software, which assisted in organizing the data collected from key informant interviews and provided the ability to conduct theme analysis within this data. The following section will highlight the results and key themes found within the data, which are explored in greater depth in the discussion section.

## **2.2 Framework Development**

Newhouse and Belanger (2001) state that “nimble critiques of modern self-government agreements ... and how academics and community leaders see current Aboriginal self-governance evolving” is vastly missing from the literature (Murphy, 2008). The analysis of the results for this paper is meant to offer a critique of the governance arrangements that have been used in the New Afton and Ajax mining projects, in an attempt to provide some thought to this missing literature gap. This section describes a proposed framework to assist in the analysis of the Secwepemc case study, and to further be used to assess the ability of an Indigenous government to influence resource decision-making based on their exerted rights. Since the issues in this case regarding rights and power operate within the sphere of resource co-management, the framework has been created out of co-management literature. Specifically, Pinkerton and Weinstein (1995) provide a framework for analyzing and comparing co-management agreements in fisheries, focused on a spectrum of rights. Additionally, Berkes and Preston (1991) created a descriptive framework for levels of co-management through the adoption of Arnstein’s (1969) ladder for citizen participation that assists my framework in describing the levels of power at various stages of the Crown-Indigenous engagement process, based on the Aboriginal rights at play.

### **2.2.1 Power spectrum of Negotiated Agreements**

The level of Indigenous consultation and participation within the decision-making process can be viewed on a spectrum of rights that consider access, withdrawal and management activities that range between lower order rights, higher order rights, broader rights that affect other resource users and highest-level rights that include policy making and co-governance (Pinkerton and Weinstein, 1995). This spectrum is prevalent in the differences of power designated to Indigenous groups through negotiated

agreements that may allow for consultation, collaboration, or true co-governance requiring consensus based decision-making.

Agreements centered on the lowest rung of the power spectrum allow only for consultation activities and the exercise of operational rights from the Indigenous group that includes data collection, sharing, and analysis in an effort to provide notification or an opportunity to comment on the resource management activity (Woodward and Company, 2009; Pinkerton and Weinstein, 1995). This level may inform policy or action, but it keeps the decision-making power in the hands of one party (either the government or resource proponent) without providing any binding obligation for that party to change their activity.

The next rung up on the power spectrum involves agreements that allow for collaborative management activities between parties, with provisions that require consultation of Indigenous groups on decisions relating to management activities and an obligation on the part of the governing entity or industry proponent to address the concerns raised (Woodward and Company, 2009). This level of involvement allows for the ability of Indigenous groups to exercise collective-choice rights at a level that influences management plans, rules regarding harvest allocation, and location of harvest activities (Pinkerton and Weinstein, 1995; Woodward and Company, 2009). Localized resource management boards that include all resource users may exist at this level, but primarily operate only in an advisory capacity to management decisions (Hawkes, 1996).

At the highest rung of the power spectrum are co-management agreements that strive for equality in the decision-making process of resource management activities. These types of agreements operate in a co-governance arrangement that sets out the management vision of the resource and develops policy based on the incorporation of the values and interests of all parties (Pinkerton and Weinstein, 1995; Woodward and Company, 2009). These co-management structures are generally comprised of a management board with equal representation of all parties making decisions based on a consensus model that guides these decisions (Woodward and Company, 2009). An example of this type of agreement can be seen with the Gwaii Haanas Agreement of 1993, where a management board that maintains equal representation of the Haida Nation and the government exists. This agreement establishes a decision-making



process that requires consensus, allowing for full and meaningful participation on the part of Haida Nation in planning and managing their ancestral lands (Hawkes, 1996).

It is important to note that this power spectrum of negotiated agreements does not automatically equate to the success or failure of an agreement in reaching its goals of resource management and reconciliation, as each individual agreement has a vast array of specific characteristics that may influence its ability in achieving these goals. Some of these characteristics will be discussed further in relation to the appropriateness of co-management in the SSN case example. The level of decision making power negotiated in these agreements is also heavily influenced by the government's legal duty to consult as well as the level of aboriginal rights asserted by the Indigenous group (Woodward and Company, 2009, Sosa and Keenan, 2001). This legal obligation forces the government into the consideration of co-management regimes and provides Indigenous groups legal power to exert their rights over lands and resources that affect them.

### **2.2.2 Aboriginal Rights in Relation to Agreement Power Structure**

The duty to consult, accommodate and gain consent as outlined in *Haida Nation*, *Delgamuukw* and *Tsilhqot'in* respectively, provide explicit conditions required to be met by the government, and are a source of power for Indigenous groups when negotiating resource management agreements with the government or industry proponents (Sosa and Keenan, 2001). These legal conditions can be viewed as a hierarchy of legal rights for Indigenous groups when negotiating resource agreements with the government or industry proponents, and can be placed along the power spectrum of negotiated agreements dependent on the strength and nature of their claim. When the impact of management activity on Indigenous rights is limited, the duty to consult is on the lower end of the spectrum. This would equate to operational rights for the Indigenous group. As the strength of claim of Indigenous rights increases, or the impact on these rights increases, the duty to consult also increases along the spectrum, providing more legal power to negotiate co-management agreements. If the strength of claim is high, and/or the impact on the rights claim is great, then it is necessary for the government to accommodate those rights by altering its management activities. This would require input, feedback, management changes and a justification for infringement of any rights, indicating collective choice rights for the Indigenous group. If the Indigenous rights claim is at its highest level, i.e., a title claim to the land, then common law predicates that

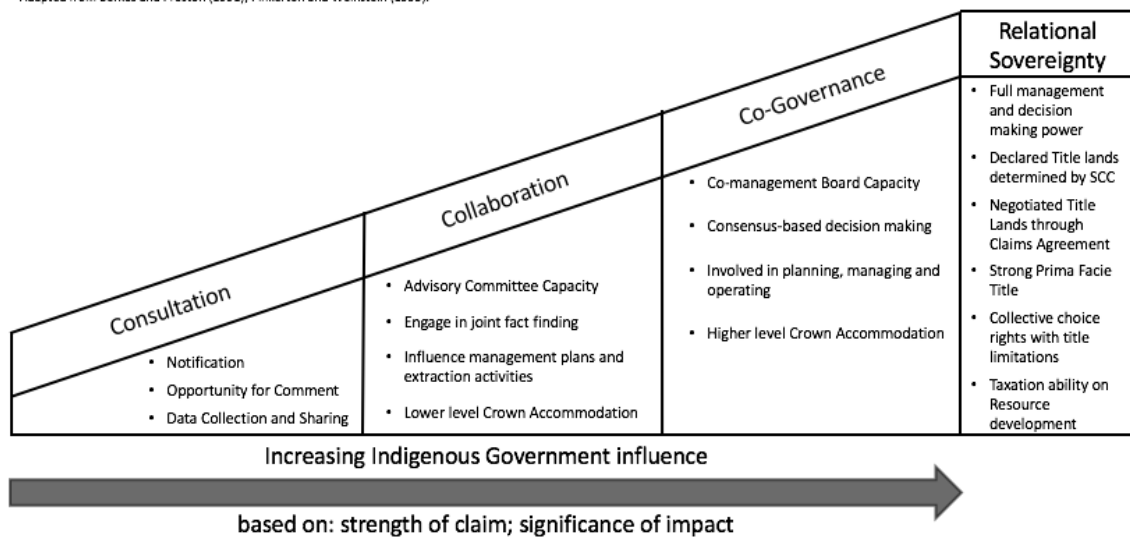
consent for the management activity is required (infringement of title rights cannot be lightly justified) (Tsilhqot'in, 2014; Kyle, 2015). This spectrum of power illustrates the various levels of legal rights Indigenous communities can exercise in order to protect their interests in resource management activities.

### 2.2.3 Power and Rights Spectrum of Negotiated Agreements

Considering the power structure of negotiated agreements, and the incorporation of the spectrum of Aboriginal rights and Crown duties owed, the framework for analyzing these arrangements is shown in Figure 2.1. The final addition to the spectrum is shown through Relational Sovereignty, when Indigenous influence over land-use interests are at their highest. This occurs through proven title within the Courts or through claim agreements that designate specific title land. Relational Sovereignty describes Indigenous sovereignty in relation to Crown sovereignty, as these two systems are balanced by the strength of rights claimed. The SCC has declared that activity on title land requires consent from the Indigenous titleholder, and thus the Indigenous titleholder has full decision-making authority. The figure describes the level of influence an Indigenous government legally has through the exertion of their rights. This power of influence is based on two things: the strength of the claim to the right and the significance of impact upon that right being claimed.

#### Power and Rights Spectrum of Negotiated Agreements

Adapted from Berkes and Preston (1991); Pinkerton and Weinstein (1995).



**Figure i Power and Rights Spectrum of Negotiated Agreements**

## **Chapter 3. Literature Review**

### **3.1. Introduction**

The purpose of this literature review is to identify commonalities and contrasts in the political principles and key structural components of royalty regimes, with a specific interest in the mineral development sector in Canada. It considers the principles and themes that guide the relationship between the state, private companies and local/regional and Indigenous communities. It will discuss the different types of governance and structures of royalty regimes created with regard to mineral development. In addition, it will consider how effective these regimes are at meeting their goals and will discuss the difficulties and challenges present within these regimes for achieving a more equitable dynamic between all parties involved.

Royalty regimes are systems or arrangements set in place that dictate the flow of resource rents and royalties collected from resource development, paid by the developing proponent. These regimes are typically imposed in a top-down governance structure, in which a centralized government collects royalties and distributes shares of these royalties throughout its jurisdiction. Markey, Halseth and Manson (2008) argue that this centralized, top-down approach to royalty collection and distribution has resulted in a decline of rural economies, as these regions have been treated as a 'resource bank' that funds infrastructure and services without rural reinvestment. Thus, it is imperative to explore current royalty regime structures in order to facilitate policy discussion surrounding an increased equitable share of royalties to these regions.

### **3.2. Indigenous Rights, Title and Sovereignty**

The demand for acknowledgement and recognition of Indigenous title and sovereignty over lands and resources has been a major contention throughout the history of Indigenous-Crown relations. While many believe the State's occupation was founded on the premise of *terra nullius*, a legal principle in international law that deems inhabited lands open for occupation on the basis that no social or political organization existed (Doyle, 2015), it is quite clear that Indigenous peoples used, managed and governed their nation's traditional territories prior to settler contact (see Ignace, 2008 for

Secwepemc example). The treaty making that took place upon first encounter is indication that Indigenous title to the land base was respected by colonizing powers and that consent was something of importance (Doyle, 2015). There is historical indication that it has been the Crown's goal to subjugate Indigenous peoples in North America (Doyle, 2015). The following section summarizes the Canadian legal narrative of Aboriginal rights, from before the Royal Proclamation, up to the Supreme Court decision of *Tsilhqot'in* (2014). Further, it will then go on to discuss the methods by which First Nations relations are currently dealt with in British Columbia and issues related to the western colonial perspective of ownership rights that nest Indigenous sovereignty within Crown sovereignty.

The principle of self-determination, "the unconditional freedom to live one's relational, place-based existence and practice healthy relationships" (Corntassel and Bryce, 2012), is a "prerequisite for the exercise of spiritual, territorial, social, cultural, economic and political rights, as well as the practice of survival" (Henderson, 2008). The right to self-determination afforded to Indigenous peoples is a major tenet held in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Article 3 UNDRIP, 2007).

Self-determination ties into the normative conception of Aboriginal nationalism, as Aboriginal nationalism is an expression of the democratic right of Aboriginal peoples to determine their own political destiny free from external domination, and to negotiate relationships with other communities and governments predicated on principles of co-equality and mutual consent (Murphy, 2005). Aboriginal peoples claim a legitimate democratic right to guide their own fate – the very same right that is assumed and already exercised by Canada's non-Aboriginal people (Murphy, 2005). Further, this concept challenges the State to justify its claim to jurisdiction and authority over Indigenous peoples, an authority which Christie acknowledges has consistently been assumed but never truly justified by Canadian courts and governments (2007). By the very existence of organized Indigenous societies, the assertion of Crown sovereignty is challenged (Christie, 2007), which has resulted in the judicial language of 'reconciling Aboriginal interests with Crown sovereignty' and has created a justification for constitutional infringement by the Canadian State (Christie, 2007).

Aboriginal nationalism challenges this assumption, demanding that the State recognize co-equal rights to self-determination of Canada's Indigenous and non-Indigenous populations, noting that neither group holds the right to dictate the will of the other and that consent and free negotiations will determine autonomy and interdependence of the two parties (Murphy, 2005). This intersection of autonomy and interdependence is now the core focus of how self-determination may be realized in practical terms, as Abele and Prince (2002), and White (2002) acknowledge that limitations of community size and capacity affect this relationship. Murphy suggests that a relational understanding of self-determination can be employed, as it comprises levels of autonomy while recognizing the complexity of interdependence at play (2005). This creates a need for co-operative forms of governance to manage the interdependence of self-determining groups in a way that is effective and democratic (Murphy, 2005). Murphy goes on to explain three ways relational self-determination can exist within a federal context:

*Autonomy / Self-Rule* observes an Indigenous group's right to govern itself without external interference or domination, with the qualifier that this is not an absolute right but rather plays out in degrees of autonomy as even federal and provincial governments are constrained to the interdependence and power relations that exist within the Federal system (Murphy, 2005). Self-rule would provide Indigenous groups with the agency to make collective decision-making in determining their own laws, priorities and policies that offers greater engagement than simple consultation on matters that affect them but are 'policy-makers' in such situations (Murphy, 2005).

*Shared Rule* considers the complex geographical, socio-cultural, and economic interdependence of Indigenous groups with their non-Indigenous counterpart communities, especially in rural regions (Murphy, 2005). It recognizes that a practical strategy for self-determining Indigenous groups is to be included, in terms of presence and participation, in shared-rule institutions that are capable of balancing this interdependence in an effective, fair and democratic way (Murphy, 2005). While this combination of self and shared rule institutions are features of federalism, weariness of these institutions exists with thoughts of exclusion, enfranchisement and assimilation in the not so distant past of Indigenous-Settler State relations. The idea of Indigenous participation within federal forms of governance for some may very well represent the antithesis of self-determination (Murphy, 2005). Regardless of these sentiments, shared-rule institutions in practice are still in the developmental stage, but may offer insight into

the potential of co-management arrangements in addressing relational self-determination (Murphy, 2005). This is especially important in considering treaty relations, where power should be shared and distributed with mutual consent of the treating parties (Murphy, 2005).

*Intergovernmentalism* outlines a more pragmatic function of coordinating interdependence and conflict resolution; it may also cultivate a shared, quasi-governmental enterprise founded in mutual benefit and mutual respect (Murphy, 2005). Intergovernmentalism, a key component of the State's interest of reconciliation, is still far from where it needs to be when considering the lack of Indigenous involvement in key intergovernmental forums, key processes of fiscal intergovernmentalism, and in the Federal and Provincial approaches to treaty-making and land claim disputes (Murphy, 2005). If this mode of relational self-determination is to succeed, it must effectively, in design and process, serve the interests of both Indigenous and non-Indigenous partners. This means rejecting relationships based on unilateralism and domination, in which the federal government dictates the terms to Indigenous governments, and promotes a system based on mutual recognition, consent and co-equality (Murphy, 2005; Burrows, 2002).

The form and shape that relational self-determining processes should take into consideration include contemporary assertions of the right to free, prior and informed consent (FPIC) with how consent should be sought by the state and given by the community (Doyle, 2015). These assertions would be considered a manifestation of sovereign decision-making, the precedence for which is found both within and prior to the colonial encounter (Doyle, 2015).

### **3.2.1. Historical Western Legal Narrative of Aboriginal Rights**

In a Canadian legal context, Aboriginal title and treaty rights are constitutionally protected under section 35, which states that "the existing Aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (Sec. 35, Canadian Constitution, 1982). However, the definition of these rights has not yet fully been realized as new determinations and challenges continue to be brought in front of the courts. The Royal Proclamation implicitly recognizes Indigenous interests in their lands through the delineation of boundaries and definition of jurisdictions between

Indigenous groups and the Canadian government, while ensuring lands would not be taken without consent (Calder, 1973). While the Royal Proclamation has been viewed as the “Magna Carta of Indian Rights” (Hurley, 2000), it sets in place a settler-colonial relationship between the Crown and the Indigenous peoples within Canada, one in which the Crown has placed indigenous peoples within its dominion.

Over time, the narrative stemming from the Supreme Court of Canada’s (SCC) decisions on Aboriginal rights cases has been slowly balancing the relationship and defining the responsibility owed to Indigenous groups by the Crown. While this continues to enshrine Aboriginal rights and title within Canadian legal precedent, it maintains the guardianship dogma of the Colonial state.

In *St. Catherine’s Milling* (1888) the SCC determined that aboriginal title is a burden on the Crown (Kyle, 2015). In the decision of *Calder* (1973), three judges found in favour of the Nisga’a’s title claim, stating that ‘Aboriginal title is an inherent right of Aboriginal peoples’ (Calder, 1973). *R. v Sparrow* further cemented the intertwined relationship for resource management between the government and Indigenous groups by stating that section 35 is not a blanket exemption for Aboriginal rights, but rather emphasized that the goal of section 35 is to achieve reconciliation – a guiding principle for future court decisions (1990; Sossin, 2010). *Sparrow* further clarifies the trust-like relationship in discussing the Crown’s fiduciary duty to Aboriginal peoples (Sparrow, 1990). The *Van Der Peet* (1996) decision provided knowledge on claiming specific rights in terms of particular practices, traditions or customs, and specified that these activities must have been a distinctive part of that Indigenous groups’ culture prior to European contact (Kyle, 2015). This decision gave rise to specific Aboriginal rights claims that include (but are not limited to) hunting, fishing, gathering, mining and trade, as well as spiritual practices (Kyle, 2015). In *Delgamuukw* (1997), the SCC affirmed that Aboriginal title exists, and that title represents a right to the land itself and the activities that occur on it (Delgamuukw, 1997). The SCC also confirmed that when title is asserted, the Government must consult or compensate when appropriate and that title can only be interfered with when the government can prove a constitutional infringement (Delgamuukw, 1997). This shows that, in the SCC’s determination, Aboriginal title is nested in Crown title, regardless of prior treaty relations. Further, the SCC put some limitations on Aboriginal title rights, in that title can only be held communally and in perpetuity, so that the uses cannot be inconsistent with the Indigenous relationship with

the land (Sossin, 2010). This duty of consultation described in *Delgamuukw* was further clarified in 2004 when the SCC decided on *Haida Nation* and *Taku River*. The government's duty to consult is triggered if the government has knowledge of an Aboriginal title or rights claim and if their conduct may adversely affect that claim (Kyle, 2015). The scope of this duty is proportionate to the strength of the rights or title claim, and the seriousness of the potential impact of the activity on Aboriginal interests (Kyle, 2015). The SCC also declared that the government must carry out meaningful consultation in good faith; the Aboriginal group must also act in good faith; the requirement for consultation is not a veto, and that it may be infringed with proper justification; there is a duty to accommodate Aboriginal concerns when the title or rights claim is high or there is likely a large adverse impact from the activity (Kyle, 2015). The most recent SCC decision on *Tsilhqot'in* (2014) is one of the most important decisions to date, as it declared title to the *Tsilhqot'in* people for a partial area of their claim. It also further clarified that title gives exclusive use and occupation of the lands within the claim, and that government can only affect title lands if the Aboriginal group consents or they can justify a constitutional infringement (*Tsilhqot'in*, 2014). While the test for consent infringement justification is much harder to prove when dealing with title lands (Kyle, 2015), infringement against the consent of the Aboriginal titleholders means that the Crown's sovereignty is considered the dominant rule of law.

### **3.2.2. The BC Treaty Process**

Although the BC treaty process is often cited by Australian (another settler state) academics as a model of good practice for Indigenous-state relations (Pratt, 2004), it has fallen under considerable criticism, as a process that further solidifies dominant non-Indigenous constructions of nationhood and identity that fundamentally limits the State's approach to its relationship with Indigenous people (Pratt, 2004). The treaty process reinforces rather than challenges colonial ideologies and assumptions upon which its very existence is based (Pratt, 2004; Alfred & Corntassel, 2005). While some First Nations are engaged within the six stage BCTC process, the Union of British Columbia Indian Chiefs (UBCIC) and the nations they represent refuse to participate in the process due to these fundamental shortcomings:



- They reject the ‘release and surrender’ clauses, which demonstrate the conditional nature of the entire process;
- They object to the role of the BC government in the negotiation, as it would affirm the *de facto* displacement of Indigenous governments and their jurisdictions; and
- They believe the process is illegitimate as it involves rights to lands and resources that have never been ceded to the settler state (Pratt, 2004).

Mohawk scholar Taiaiake Alfred shares these sentiments, citing the lack of federal and provincial integrity as the reason the BCTC process fails (2001). Alfred and Cherokee scholar Jeff Corntassel are further critical of the process, indicating that the process has been structured two-fold: to achieve the legalization of settler occupancy of unceded and non-treaty lands in British Columbia, and to achieve legally binding agreements, affording provincial and federal governments supremacy over First Nations’ governments (2005). In fact, the main reason some current First Nations governments continue the negotiations within this process is strictly due to the financial burden they would bear, as the federal government threatens to collect on loans that were extended to these governments to engage in this process in the first place (Alfred, 2001). The UBCIC believe that the BC treaty process is not a framework that will allow for their sovereignty to be meaningfully recognized (Pratt, 2004). These negotiations are fraught with massive power and resource imbalances, while primarily focus on protecting and maintaining the interests of the State. If ‘Treaty’ can be understood as a nation to nation negotiation between equal parties in which the sovereignty and nationhood of each party in the negotiations is recognized, then the discourse surrounding the BC Treaty process shows that there is an apparent need for a more genuinely inclusive approach to negotiations over Indigenous rights (Pratt, 2004).

### **3.3. Socio-Political Environment of Mineral Development**

#### **3.3.1. State Policy**

Over the past few decades, Canada has experienced a policy shift towards a neoliberal economic strategy, employing tenets such as privatization, deregulation, fiscal decentralization, and economic adjustment on a national and state/provincial level

(Heisler and Markey, 2014; Prno and Slocombe, 2012; Scambury, 2009; Slowey, 2005; Miraftab, 2004; Otto, 2001). This shift, employed by senior levels of government, has had a profound effect on the expansion of the mineral development industry through strategies that include: the elimination/reduction of mineral development and exploration taxes; ease of access to land and resources; and the encouragement of private-public partnerships between industry proponents and local communities (Heisler and Markey, 2014; Prno and Slocombe, 2012; Scambury, 2009; Slowey, 2005; Otto, 2001).

With specific reference to resource policies in British Columbia, this neoliberal shift can be characterized through a variety of policy and regulatory mechanisms: the liberalization of property rights as seen in the mineral tenure system; the liberalization of market regulations by the reduction of barriers for increased mobility of resource companies (which has reduced the long-term commitment to regional communities); and the liberalization of spaces by increasing access to natural resources (Heisler and Markey, 2013; Young and Mathews, 2007). The central goal of senior levels of government in these roll-back strategies is to promote a stable and incentivized jurisdictional environment for mineral development to the global market and private international investors (Heisler and Markey, 2014). Senior governments play an important role in promoting and developing the resource economy, as resource activities hold great potential for public fiscal benefit through job creation and resource tax revenue (Heisler and Markey, 2014). However, as senior levels of government promote resource development, they are also reducing their direct financial support for local communities that will inevitably see an increase of activity on social and physical infrastructure due to the nature of mineral development projects (Heisler and Markey, 2014; Heisler and Markey, 2013; Markey et al. 2006; Miraftab, 2004).

This offloading of responsibility has caused problems for local, regional and Indigenous communities, as indicated by staples based economic theory, where single resource dependency and lack of economic diversity have made these communities susceptible to fluctuations in the global marketplace (Heisler and Markey, 2013; O'Faircheallaigh, 2013; Markey et al. 2005; Miraftab, 2004). These communities are now forced to compete, sometimes with other local/regional communities, in the global market in order to attract private investment to support community economic development and fund local infrastructure projects and services (Heisler and Markey, 2013; Markey et al., 2006). The combined impact of off-loading and the need to be globally competitive means that

municipalities and Indigenous communities are now developing local and regional scale economic development strategies in an effort to retain some of the wealth created by mineral development within their jurisdictional boundaries to offset the physical and social costs of these projects (Heisler and Markey, 2014; O’Faircheallaigh, 2013). Three of these strategies include: negotiating commitments from proponents during the environmental assessment process (regarding the nature of impacts on the community); investment attraction for commercial and residential development (for an increase in property tax revenue); and lobbying the provincial government for a share of the resource revenues generated from the mining project (Heisler and Markey, 2014; Otto, 2001; O’Faircheallaigh, 1999). This situation has given rise to the theory of Regionalism, as a focus on the region allows communities to exert more control over the use of surrounding resources and provides more power in terms of capacity to negotiate with proponents and lobby government for a greater share of benefits (Heisler and Markey, 2014; Markey and Heisler, 2011; Slowey, 2005). Two practical examples include the regional Fair Share Agreement in Northern British Columbia as well as the union of the Skeetchestn and T’kumlups Indian Bands under the Stk’emlupsemc Te Secwepemc Nation in the interior of British Columbia.

This neoliberal policy shift has also created an uncomfortable situation for industry proponents, as corporations have increasingly been pushed to fill the role of service delivery, without clear guidance from senior government (CPPF, 2015; Scambury, 2009). Since neoliberal policy has vested considerable ‘state-like’ powers in industry in connection to defining social policy and delivery of services, Corporate Social Responsibility (CSR) has become a paramount concern for both industry proponents as well as the rural communities to which their fate is inevitably tied (CPPF, 2015; Scambury, 2009; Fidler, 2010; Fidler and Hitch, 2007). CSR is understood as voluntary activities undertaken by corporations that promote economic, social and environmental sustainability, as it is seen as their ethical duty to the region and community at large (Cadbury, 2006). Due to the voluntary nature of CSR initiatives, there is no official line of social action employed by corporations and may vary from minimal engagement to increased spending and involvement on social and infrastructure projects within the community (roads, community facilities, etc.) (Esteves, 2008; Cadbury, 2006).

### **3.3.2. Corporate Social Responsibility and Social License**

While the government's role and available funds have shifted from service and infrastructure provision to resource exploration and extraction promotion, they maintain regulation activities through taxation, resource management, safety and environmental protection (Heisler and Markey, 2013; Miraftab, 2004). This can be seen in specific legal and policy instruments federally, that call for benefit agreements or consultation (e.g., Canada Oil and Gas Operations Act; Canada Petroleum Resources Act), and provincially, through mining regulations that focus on aspects of procedures such as making a claim, environmental protection, mitigation and reclamation (Gibson and O'Fairchealleigh, 2015). While consultation of Indigenous groups is a fiduciary duty of the Crown, the government has also utilized proponent interest in specific project development as a reason to further push this responsibility onto the proponent through the Environmental Assessment process (O'Faircheallaigh, 2006). In a social context, the growing premise for the adoption of CSR programs in the mining industry stems from the history of irresponsible mining practice that has created negative public opinion surrounding the sector (Yakovleva, 2005). This has caused an increase of public pressure on the mining sector by environmental, community and Indigenous groups that call for collective action to deal with the social inequities caused by the industry and are not being addressed by the state (Heisler and Markey, 2013).

CSR helps provide certainty for investment (Heisler and Markey, 2014), specifically on or near Indigenous traditional territories where land claim disputes and ongoing treaty negotiations threaten investment and operations (Prno and Slocombe, 2012). Mineral development proponents implement CSR programs in order to avoid legal challenges or lengthy civil action while attempting to meet the growing international demand for improved environmental protection, safety, and community development (Heisler and Markey, 2014; Booth and Skelton, 2010; Yakovleva, 2005; Sosa and Keenan, 2001). The past decade has seen an increase of voluntary CSR standards and toolkits from industry proponents and associations that attempt to educate the importance and the process for engaging communities through CSR in order to gain community approval (Heisler and Markey, 2013). Esteves (2008) provides insight into the various levels of drivers for social investment considered by corporate interests, with major objectives that include: minimized risk, access to land, cost reduction, human capital, and brand value and reputation (Table 1).

**Table 3.1 CSR Industry Objectives (adapted from Esteves, 2008)**

Major Objectives	Higher Level Objectives	Lower Level Objectives
Minimized risk	<ul style="list-style-type: none"> <li>*Absence of interruptions to operations</li> <li>*Stable social environment</li> <li>*Effective community projects</li> </ul>	<ul style="list-style-type: none"> <li>*Reduced likelihood of stakeholder protest action</li> <li>*Resilient, vibrant local community with minimal dependence on operations</li> <li>*Adequate services and infrastructure for population needs</li> <li>*Improved capacity of under-resourced or ineffective government agencies</li> <li>*Stakeholder participation in design and management of community projects</li> <li>*Increased levels of cofunding/ leveraging of community projects</li> <li>*Improved governance and management of projects</li> </ul>
Access to land	<ul style="list-style-type: none"> <li>*Positive relationship with local communities, based on acceptance and trust</li> <li>*Positive relationship with key regional, State or national stakeholders</li> <li>*Access to land for mineral and water resources</li> </ul>	<ul style="list-style-type: none"> <li>*Repaired community relationships affected by past environmental, health and safety incidents</li> <li>*Local community acceptance of expansion to operations</li> <li>*Lower incidence of complaints from affected landholders</li> <li>*Support of key stakeholders for expansion of operations— to existing operations or new areas</li> <li>*Positive legacy post-closure</li> <li>*Successful negotiation of land access agreements</li> <li>*Resettlement of community</li> </ul>

Cost reduction	<ul style="list-style-type: none"> <li>* Access to local suppliers</li> <li>* Reduced costs of closure and post-closure</li> <li>* Reduced costs associated with environmental remediation/mitigation</li> </ul>	<ul style="list-style-type: none"> <li>* Skills and enterprise development in support industries</li> <li>* Development of diverse economies and capacity building to reduce community dependence post-closure</li> <li>* Stakeholder involvement in remediation/mitigation planning</li> </ul>
Human Capital	<ul style="list-style-type: none"> <li>* Attraction and retention of highly trained specialist labour</li> <li>* Access to a pool of local labour</li> <li>* Retention of non-specialist local labour</li> <li>* Access to a pool of non-core contractors</li> <li>* Access to a mobile pool of employees within the region</li> <li>* An ethical corporate culture, through building employees' social awareness</li> <li>* A culture of innovation and leadership</li> </ul>	<ul style="list-style-type: none"> <li>* Contribute to attractive lifestyle with access to housing, services, culture, recreation, etc.</li> <li>* 'Job-ready' programs, e.g., skills development, health promotion programs</li> <li>* Employee retention through, e.g., mentoring, home support, housing</li> <li>* Enterprise development in non-core areas</li> <li>* Regional skills development</li> <li>* Employee involvement in community projects</li> <li>* Employee involvement in addressing complex sustainability problems</li> </ul>
Brand value & reputation	<ul style="list-style-type: none"> <li>* Strengthen company brand and reputation</li> </ul>	<ul style="list-style-type: none"> <li>* Increased awareness of company presence</li> <li>* Building new company brand and identity</li> </ul>

Community approval has become a crucial tenet for successful resource development, as the power to grant or withhold a social license to operate (SLO) can influence the extent to which proponent activities are restricted by societal expectations, forcing them to avoid activities that society deems unacceptable (Prno and Slocombe, 2012). Where mining proponents have failed to satisfy the demands of local communities, shut-downs

and slow-ups frequently occur. Civil action through protests and blockades, non-issuance or retraction of government permits, media and shareholder campaigns and government lobbying, accessing power through the development of coalitions and issue networks and coordinating a consistent vision as an issue consistent with the public interest are examples of tools communities utilize to influence development projects (Pinkerton, 1993). An example of this comes out of Attawapiskat, where the community staged an 18-day road block on the DeBeers Victor Mine in Ontario (Siebenmorgen and Bradshaw, 2011). This example occurred after a negotiated agreement was in place, which demonstrates that social license is a continuous and ongoing relationship that lasts throughout all development phases (Prno and Slocombe, 2012; Siebenmorgen and Bradshaw, 2011). Other significant Canadian examples include: the 'War in the Woods' resulting in the Clayoquot Sound Agreement; and the Haida protest on Athili Gwaii (Lyle Island) that led to the the Gwaii Haanas Agreement and the construction of the Gwaii Haanas National Park Reserve and Haida Heritage Site (Woodward and Company, 2009; Gwaii Haanas Agreement, 1993).

In their study on the social license to operate, Prno and Slocombe (2012) identify literature recommendations for achieving SLO that include: early and ongoing communication; transparent disclosure of information; development of conflict resolution mechanisms (typically stated in negotiated agreements); and culturally appropriate decision making (see also Goldstuck and Hughes, 2010; Social License Task Group, 2009; and Business for Social Responsibility, 2003). In their study, Prno and Slocombe (2008) also provide industry views on success factors that include: maintaining a positive corporate reputation; understanding local culture, language and history; educating local stakeholders about the project; and ensuring open communication among all stakeholders. SLO has four levels that move along a spectrum from withdrawal, acceptance, approval, and psychological identification with the project (Prno and Slocombe, 2012; Thomson and Boutilier, 2011), along with standard components that include: legitimacy, credibility, accountability, transparency and trust (CPPF, 2015; Prno, Bradshaw and Lapierre, 2010).

**Table 3.2 SLO Success Spectrum (adapted from Thomson and Boutilier, 2011)**

<b>Community Action Towards Project</b>	<b>Community Perception of Company</b>	<b>Company-Community Relationship Development</b>	<b>Spectrum of SLO</b>
Withdrawal	No Trust	Limited to No Engagement	
Acceptance	Legitimacy	Low Social Capital	
Approval	Credibility	Medium Social Capital	
Psychological identification (co-ownership over project)	Full Trust	High Social Capital	

There are currently challenges regarding public confidence in mining proponents and the Canadian government surrounding these components, specifically around trust, accountability and transparency (CPPF, 2015; Siebenmorgen and Bradshaw, 2011). A recent example of this was when the Canadian government made changes to the Canadian Environmental Assessment Act (CEAA) in 2012 that allowed for the streamlining of environmental assessments at the cost of regulatory legitimacy and trust that public welfare was in the government’s best interest (CPPF, 2015). To further this, there has been criticism that CSR is often framed from an industry perspective as a corporate public relations exercise rather than a meaningful engagement tool used to build a trusting relationship for the purpose of community development (Prno and Slocombe, 2012).

Dependence on corporate donations or CSR programs to invest in infrastructure and services for rural communities is a precarious development strategy for municipal governments, as CSR practices vary from company to company (Heisler and Markey, 2014) and the interests of shareholders typically take precedence over public interest (Heisler and Markey, 2013). CSR benefits also become perplexing when considering jurisdictional boundaries, as proponents are left to determine which and to what scale should benefits be given to different communities within the project region (Heisler and Markey, 2014; Heisler and Markey, 2013). The question of jurisdiction is particularly



complex within Canada, where municipalities and regional districts fall under provincial jurisdiction and Indigenous communities that govern through the band system fall under federal jurisdiction (Heisler and Markey, 2013). Indigenous communities that continue to follow their traditional systems of governance exert sovereignty and jurisdiction over their traditional territory and maintain that they do not belong under federal or provincial jurisdiction (Heisler and Markey, 2013). Complicating the issue even further while Indigenous land claims fall under federal jurisdiction, authority over land for natural resource development is vested in the province (The Canadian Constitution Act, 1987). Companies have thus typically negotiated social license with communities that hold the greatest political power to interrupt operations or threaten investor confidence (Heisler and Markey, 2014; Heisler and Markey 2012; Caine and Krogman, 2010), and these communities may not necessarily be the ones most impacted by a project or have the most need for infrastructure and services.

The devolution of state responsibility and the increased need to obtain a social license gives rise to various types of negotiated agreements between industry, provincial government, municipalities and Indigenous communities in order to provide more clarity on project expectations, benefits, impacts and outcomes (CPPF, 2015, Prno and Slocombe, 2012; Booth and Skelton, 2011a; Fidler, 2010; Hitch and Fidler, 2007). These negotiated agreements are touted by Prno and Slocombe (2012) and Slowey (2005) as a positive aspect of neoliberal policy, as it empowers local, regional and Indigenous communities to effectively participate in and receive fiscal and physical benefits from mineral development projects that directly impact them. Moving forward, it is imperative that in order to provide effective community development, proponents and governments must focus on transparency, accountability, public engagement, capacity building and mutual benefits, that are negotiated in a meaningful way (CPPF, 2015; Booth and Skelton, 2011a; Fidler, 2010; O’Faircheallaigh, 2010; 2006).

### **3.4. Governance regimes: royalties and benefits for community development**

Prno and Slocombe (2012) provide an effective matrix that explains the various types of governance regimes and arrangements that influence the decision-making process of mineral development while determining how royalties are collected and flow to communities. There are three cornerstone governance institutions: state, market and

civil society, with a fourth, hybrid governance, that constitutes the type of arrangements that occur when the first three interact (Prno and Slocombe, 2012). It is these governance structures, acting simultaneously, that create royalty regimes by enabling (incentivising), or constraining (regulating) development in a formal (de jure) or informal (de facto) manner (Prno and Slocombe, 2012). The neoliberal policy shift that has occurred with respect to the mineral development sector has influenced the political power dynamic, enabling state and legitimizing non-state actors to have a share in decision making (Prno, and Slocombe, 2012; Armitage et al., 2008). This power sharing dynamic is multilevel, with a vertical shift organizationally toward communities and a horizontal shift from government actors to non-government actors (Prno and Slocombe, 2012; Armitage et al., 2008). This shift provides an opportunity for social actors to engage more fully, as they take on a shared ownership of rights and management (Armitage et al., 2008; Slowey, 2005). This has become a modern pattern specifically dealing with environmental governance, as an increase in societal demands for sustainable development paired with the spread of neoliberal policies develops the belief that alternative modes of governance are necessary to derive positive outcomes (Prno and Slocombe, 2012; Slowey 2005). The following sections describe the types of governance as well as the tools utilized to influence mineral development and royalty procurement.

### **3.4.1. State Governance**

While neoliberal policy has off-loaded some of its responsibility, the state still holds considerable power through regulation, dictating how mineral development is to proceed within its jurisdiction. Indeed, the development of laws and regulations are traditionally the best way to ensure compliance by industry actors (Prno and Slocombe, 2012). This power can be seen in environmental, water, natural resource and employment safety acts and regulations.

With respect to Indigenous communities, Canada has policy examples that influence mineral development on Indigenous territory. In 2008, British Columbia became the first Canadian province to introduce a First Nations resource revenue sharing policy, which allows for provincial negotiators to enter into agreements with First Nations claiming territory over land on which new mining projects are to be developed (or existing ones request significant expansion), providing a share in mineral tax revenues collected from

the project (Heisler and Markey, 2013; Clark, 2009). In this example, the province collects a 2% tax on net project revenue until initial project investment expenses have been recuperated by the proponent, at which point the tax rate increases to 13% (Heisler and Markey, 2013; Clark, 2009).

Indigenous communities in British Columbia negotiate a share of the tax collected by the provincial government, with the negotiation process factoring in the impact of the project, the strength of claim over the territory, future project development within the territory and private-social agreements that have been made between the First Nations and proponent (Heisler and Markey, 2013; Clark, 2009). Under this new policy, the Stk'emlupsemc Te Secwepemc Nation (SSN) of interior British Columbia negotiated an Economic and Community Development Agreement in 2010, which secured a 37.7% share of tax revenue collected by the province from the New Afton Mine project (Economic and Community Development Agreement, 2010). In addition, the SSN negotiated an Impact and Benefit Agreement with New Gold Inc., the proponent and developer of the New Afton project. This resource revenue sharing policy shows how state governance can influence the flow of royalties from resource projects, when negotiated agreements are employed.

### ***Mineral taxation***

Taxation is an effective method to turn private capital into public capital, which the government can distribute for the benefit and use of society (Otto, 2001). The following section considers the typical taxation regimes employed by state actors within the mineral development sector. Although tax rates may range variably internationally, the mix of taxation methods that governments impose on resource developers are fairly uniform (Otto, 2001; 1998). These methods, as presented by Otto (2001; 1998) and O'Faircheallaigh (1999) include:

**Unit royalties:** the application of a flat charge to each unit of a mineral produced. While typically employed during the 70's, these royalties failed to adjust for inflation as well as large fluctuations in mineral prices over a short period of time, resulting in inequitable returns. More recently, they have been modified to account for these fluctuations and inflation indexing. This type of income stream is less volatile than others as it is not as sensitive to short term market fluctuations.

**Ad valorem royalties:** the application of a percentage tax to the value of minerals extracted. While more susceptible to volatile market fluctuations, state and Indigenous governments can combine this method with a rental payment set in advance or set a minimum annual royalty payment to which the proponent must pay regardless of revenue generated.

**Profit based royalties:** are charged as a percentage of either gross profits (mineral revenues less operating costs and depreciation) or of economic rents (mineral revenues less operating costs and the supply price of capital). This is the most typical method employed by governments and the preferred method from an industry perspective. The use of this method has high administrative costs due to the complexity involved in operating and monitoring this type of regime, which puts Indigenous governments with limited administrative capacity at a disadvantage.

**Fixed amounts in advance of production:** these are extracted through competitive tendering processes for the right to exploit a mineral resource, or through the imposition of annual surface rents and land use fees, property taxes, and other miscellaneous fees.

### ***Environmental Assessment***

In Canada, environmental assessment (EA) is one of the most useful state imposed mechanisms that influence mineral development, with the federal government legislating the Canadian Environmental Assessment Act, and each province maintaining its own Environmental Assessment Acts as well (Prno and Slocombe, 2012). EA is a process in which a review of a major project is conducted by the project proponent (or third party) to determine the projects potential environmental and social impacts, ensuring it avoids or mitigates actions that contradict economic, social and environmentally sustainable outcomes (Booth and Skelton, 2011a; BCEAO, 2001). The assessment process is meant to ensure consultation occurs and where concerns of the public, Indigenous communities, interested stakeholders and government agencies can be considered (BCEAO, 2001).

In Nunavut and the Northwest Territories, environmental assessment is co-managed by Indigenous and state actors, through decision-making boards, while the federal government holds overriding authority (White, 2008). Decision making boards are also employed in the Yukon, with final decision-making authority being shared between

federal, territorial and/or Indigenous government representatives (White, 2008). EAs and environmental impact assessments (EIA) are recognized as an important tool for highlighting potential environmental and social impacts of a proposed project during the planning phase, which can have the effect of addressing and minimizing these impacts prior to development (Gibson and O'Faircheallaigh, 2015; Prno and Slocombe, 2012; Fidler, 2010; O'Faircheallaigh, 2006). An EA certificate is required for mine development projects that may have short or long term environmental, social or economic impacts on the region (Gibson and O'Faircheallaigh, 2015; Heisler and Markey, 2014; Fidler, 2010). The EA application process requires industry proponents to consult with local stakeholders to address concerns and identify mitigation opportunities (Gibson and O'Faircheallaigh, 2015; Heisler and Markey, 2014).

There are five key elements to the BC EA process that include: opportunities for the involvement for all interested parties, consultation with First Nations, technical studies to identify and examine significant and adverse effects, strategies to prevent or reduce adverse effects, and the development of comprehensive reports summarizing inputs and findings (BCEAO, 2001). This mechanism provides an opportunity for local and Indigenous communities to participate in the assessment. However, the literature has criticized the effectiveness of the process in engaging First Nations in a meaningful and adequate way (Booth and Skelton, 2011a; Galbraith, Bradshaw and Rutherford, 2007).

Gibson and O'Faircheallaigh (2015) and Fidler (2010) see the value that EIAs have when they work alongside or in tandem with negotiated agreements such as Impact and Benefit Agreements (IBAs), as both mechanisms have the ability to simultaneously inform the direction of a prospective development, minimizing or mitigating the impact while creating benefits that flow to the community from the development. The timing of an EIA can also influence the ability of Indigenous local communities to leverage more benefits during the negotiation of these agreements (Gibson and O'Faircheallaigh, 2015). While the EA process is a reactive, legislative mechanism, the Canadian government advocates the use of negotiated agreements (NAs) as a proactive tool that furthers community relations, providing economic benefits to Indigenous and non-Indigenous communities while providing a degree of certainty and stability for the proponent (Fidler, 2010; Galbraith et al., 2007).

Strong criticism of Canada's federal and provincial environmental assessment process has developed since the Canadian Environmental Assessment Act (CEAA) was altered in 2012 in order to streamline the process and ensure that resources were developed in a timely manner. In a study completed by Booth and Skelton through interviews with First Nations Groups in the Peace Region, major process and procedural failures were identified (2011b):

**Table 3.3 Environmental Assessment Failures ( from Booth and Skelton, 2011)**

<b>General Process Failures of EA</b>	
<i>Capacity issues</i>	lack of financial resources; staff resources and data volume of referrals too great for bands to address
<i>Lack of community knowledge of EA process</i>	<p>Community members do not generally understand the consultation process and thus rely on Chief and Council to take care of community responsibilities</p> <p>Chief and Council felt they also lacked the knowledge necessary to feel confident to respond to the demands required of them</p> <p>Felt the government lacked the ability to accurately predict consequences</p>
<i>Poor relationships between governments</i>	<p>Severe concerns regarding the motivations of the government</p> <p>Lack of trust for processes or in the officials for conducting fair and accurate studies</p> <p>Belief in the lack of objectivity for provincial and federal officials</p> <p>Significant concern over offloading of consultation obligation to proponent</p>
<i>The EA process is not neutral</i>	It is not perceived as a neutral process, but rather a way to facilitate development

	<p>EA applications lack objectivity as they are prepared in support of development</p> <p>EA legislation needs to be completely restructured – successful assessments are attributed to the proponent’s efforts in consultation and engagement in spite of the EA process</p>
<i>Consultation is meaningless</i>	<p>First Nations felt that they were not being heard</p> <p>Lack of respect is shown as approvals are made without their input</p>
<i>Culture is ignored in EA</i>	<p>Culture, heritage and spirituality is totally ignored by the EA process</p> <p>These are critical areas of concern for First Nations and thus a major failing of the process</p>
<b>Specific Process Failures of EA</b>	
<i>First Nations are included too late in the process</i>	<p>Consultation consistently occurs far too late in the project development and should include First Nations at the very start of project planning stages</p>
<i>Failure in procedural fairness</i>	<p>Disagreements regarding the quality and completeness of the required supporting studies; they were felt to be inadequate, and incomplete but still approved by the EA process</p>
<i>Mandated timelines are inappropriate</i>	<p>Given the volume of referrals experienced, there is a significant lack of capacity to address all within the timelines set. This is a significant challenge to meaningful engagement.</p> <p>Rushed responses result in poor outcomes</p>
<i>The methodologies used are inappropriate</i>	<p>A lack of adequate information available to aid in decision-making and shown as proof to western decision-making bodies</p>

	Often forced to rely on studies produced by government or proponent consultants, which tend to be culturally inappropriate or significantly inaccurate
<i>BCEAO ignores cumulative impacts</i>	Seen as one of the biggest procedural limitations to making EAs objective

In summary, concerning these failures, Booth and Skelton described the Canadian EA process as ‘institutional sociopathy’, where “the units of government overseeing industrial development and their environmental assessments appear to be unable to view First Nations as having standing and as deserving of fair consideration” (2011b). A full review of CEAA was undertaken by the Federal government in 2016 due to these concerns and criticisms. Recommendations by the review panel were made but it remains to be seen what substantive change to this policy will be made.

### **3.4.2. Market Governance**

Market governance initiatives generally relate to the cost/benefit analysis of specific strategies, as economic motivations drive corporate decisions throughout the lifecycle of a project (Prno and Slocombe, 2012). CSR strategies are the most utilized market-oriented tools for obtaining social license and project approval, and it is understood by industry that social responsibility and profit seeking are not necessarily divergent goals (Prno and Slocombe, 2012; Mills, 2011). Market governance also considers the fact that mineral development projects are impacted by market trends, as shown through the economic downturn in 2008-09, when demand for price of minerals fell significantly which resulted in mine closures, production cuts and project delays (Prno and Slocombe, 2012).

### **3.4.3. Civil Society Governance**

Civil society actors (NGOs, unions, citizen associations, local communities and Indigenous communities, etc.) have become prominent actors in resource and environmental decision making, as denoted by the overwhelming influence of social license restricting the range of behaviours available to economic and state actors that contradict environmental, social and Indigenous justice issues (Owen and Kemp, 2013; Prno and Slocombe, 2012; Booth and Skelton, 2011a; Mills, 2011; Sosa and Keenan,



2001; Pinkerton, 1993). Having become disillusioned with conventional mining practice, civil society actors that have emerged as key actors include Indigenous communities and NGOs (Prno and Slocombe, 2012). Indigenous actors have gained more political power through legal precedents that have supported Aboriginal title and rights claims (CPPF, 2015; Prno and Slocombe, 2012; Caine and Krogman, 2010; Fidler, 2010; Hitch and Fidler, 2007; Sosa and Keenan, 2001; O'Faircheallaigh, 1999), while Indigenous governments are becoming increasingly distinct entities with powers similar to that of provinces (within their traditional territory), which is more power than conventional stakeholders (Prno and Slocombe, 2012; Caine and Krogman, 2010). NGOs are critical actors for instigating greater corporate accountability through their power to influence public opinion and challenge government policies (Prno and Slocombe, 2012).

While playing a key role in the EA consultation process, there are many tools available to civil society governance groups as they create grassroots or social movements that influence mineral development in a manner that is congruent with their interests including: the creation of policy networks that capture and influence political agents and parties, new and expanding forms of political expression (blockades, sit-ins, festivals, marches and conferences), and access to new and developing public forums of debate and dissemination (traditional media, social media, academic journals, etc.) (Pinkerton, 1993).

#### **3.4.4. Hybrid Governance**

Due to the complex nature of the mineral development sector, a number of hybridized governance arrangements have emerged that can be classified into three categories: co-management arrangements, public-private arrangements, and private-social arrangements, (Prno and Slocombe, 2012). It is under these three types of arrangements that most royalty, management, community development and benefit sharing agreements are created, as the three types of governance actors interact to find equitable solutions to mineral development problems.

##### ***Co-management***

Co-management arrangements occur at varying levels of integration between local and state level governance systems that result in the sharing of power, responsibility, ownership and management between local resource users as well as varying levels of

government (Berkes, 1991; Pinkerton 2003). These arrangements are specifically designed to recognize and incorporate local knowledge and traditional ecological knowledge systems within the provisions of the agreement, and thus in the practice of management and use of resource (Prno, and Slocombe, 2012; Agrawal, 2002; Berkes et al., 1991). Common themes throughout these types of arrangements include the encouragement of community based development, decentralizing regulatory power, and reducing conflict through consensus building and participatory principles (Prno and Slocombe, 2012).

A positive example of a co-management agreement is the Gwaii Haanas Agreement, between the provincial government and the Haida Nation. While both parties claim title, ownership and management rights over the territory and refute the others' claim, the parties have organized a management scheme looking past this jurisdictional issue, with the creation of a management board that provides an equal share of decision making power and works to resolve conflict (Gwaii Haanas Agreement, 1993). In Northern Canada, there are also numerous co-management boards created as a result of land claims agreements (Prno and Slocombe, 2012; White, 2008). These boards oversee matters related to EA as well as other environmental regulations and permitting processes (Prno and Slocombe, 2012; White, 2008; Galbraith et al., 2007). White (2008) describes these boards as quasi-constitutional arrangements that incorporate members from federal, territorial and Indigenous governments. The Nunavut Impact Review Board, Mackenzie Valley Environmental Impact Review Board, Yukon Fish and Wildlife Board, and the Mackenzie Valley Land and Water Board are some such examples (Prno and Slocombe, 2012; White, 2008; Galbraith et al., 2007).

### ***New Relationship Vision and Non-Treaty Agreements in BC***

In an effort to repair the relationship with First Nations, the province of BC developed a New Relationship Vision that sets out to reconcile land and resource jurisdiction and governance with the BC First Nations, primarily those that are not engaged with the BC treaty process. These agreements are a way to facilitate a positive government to government relationship, negotiate resource management and co-governance within traditional territories, strengthen BC's project investment climate, establish mutually agreed upon consultation and accommodation procedures and outline community development goals (BC, 2013). These goals are achieved through various types of

agreements that include: strategic engagement agreements, reconciliation agreements, and forestry and/or other major project revenue sharing agreements (BC, 2013).

The 2005 New Relationship Vision was based on three core tenets: respect, recognition and accommodation of rights and title; respect for each other's laws and responsibilities; reconciliation of Aboriginal and Crown titles, and jurisdictions (New Relationship Vision, 2005). This Vision, along with judicial direction to settle sovereignty issues outside of the courts, were the basis for a new set of negotiated agreements within BC that engage First Nations who were not interested in the BC treaty process, and remain uninterested. In 2015, the BC government, BC Assembly of First Nations, and Union of BC Indian Chiefs reaffirmed their commitment to this new government to government relationship.

### **Types of Agreements with the BC Government:**

#### ***Treaties:***

*Final Agreements* are legally binding treaty agreements under the BC treaty process. Final Agreements are the end product of the BC treaty process and describe the agreed upon land area the Nation self-governs and the rights associated with that area.

*Incremental Treaty Agreements* are legally-binding pre-treaty agreements negotiated, under a B.C. generated process, by the Province and First Nation(s) at a treaty negotiation table. An ITA is not a replacement for treaty. Rather, it advances treaty-related benefits for the First Nations and the Province prior to a Final Agreement.

#### ***Non-Treaty Agreements:***

*Strategic Engagement Agreements* establish mutually agreed upon procedures for consultation and accommodation. Initially reserved for Nations involved with the BC Treaty process, they have expanded to encompass any Nation with whom the BC government has interest in clarifying engagement procedures to ensure natural resource development can continue unencumbered while jurisdictional issues are still being sorted out.

*Reconciliation Agreements* collectively these initiatives embody government's commitment to closing the socio-economic gaps that exist between Aboriginal people and other British Columbians. Additionally, they reconcile Aboriginal rights and title and

establish new relationships based upon respect and recognition through setting mutual goals. These goals include collaborative efforts to close the gap in quality of life between First Nations, Métis and other British Columbians. Protocol agreements can lay out the groundwork for how G2G negotiations for co-management will occur, and can prescribe what types of future agreements may be negotiated (and how). They may also include an engagement protocol outlined by Strategic Engagement Agreements, like the Secwepemc Reconciliation Framework Agreement.

*Revenue Sharing Agreements:* The following is a list of typical revenue sharing agreements seen throughout British Columbia.

- *First Nations Clean Energy Business Fund Revenue Sharing Agreements:* provide revenue sharing opportunities for clean energy projects
- *Forest Consultation & Revenue Sharing Agreements:* provide First Nations communities with economic benefits return directly to their community based on harvest activities in their traditional territory
- *Atmospheric Benefit Sharing Agreements:* enable First Nations to sell carbon credits. Specifically, these agreements clarify First Nations ownership and the right to sell tonnes of carbon in local or international carbon markets. These agreements are not stand-alone, they can only be entered into if the First Nation has signed a Reconciliation Protocol Agreement.
- *Economic & Community Development Agreements:* agreements between Government and First Nations for sharing the direct mineral tax revenue on new mines and major mine expansions.

### **Public-Private arrangements**

These types of agreements are typically socio-economic in nature, meant to address territorial economic development and ensure socio-political reporting for mining projects (Prno and Slocombe 2012; Galbraith et al., 2007). Public-private arrangements may also include environmental agreements that focus on mining project mitigation, monitoring, follow-up and closure requirements (Prno and Slocombe 2012; Galbraith et al., 2007). These agreements are formed through private and state actors. However, NGOs have also played an important role in facilitating arrangements internationally (Prno, and

Slocombe, 2012; Grant and Taylor, 2004). Agreements and certification schemes have been signed as a way to ensure greater financial and supply-chain transparency through member legislation and monitoring programs, such as the Kimberley process in the diamond mining sector (Grant and Taylor, 2004). These supra-regulatory agreements work to solve deficiencies stemming from regulatory mechanisms like the EA process, such as: inadequate follow-up, lack of trust, capacity deficiencies, and insufficient and unequal flow of benefits (Booth and Skelton, 2011a; Galbraith et al., 2007; O’Faircheallaigh, 2006).

*Environmental agreements* fulfill federal responsibility to follow through on follow-up recommendations; aim to regulate development in a more holistic manner; provide cooperation through monitoring agencies; improve transparency, public involvement and impartiality; and avoid increasing capacity of government for follow-up (Galbraith et al., 2007).

*Socio-economic agreements* help to fulfill government responsibility to regulate socio-economic impacts; encourage cooperation through monitoring agencies; avoid increased government capacity associated with follow-up, and help to fulfill government responsibility for economic development (Galbraith et al., 2007).

Regarding increasing the amount and promoting fairness of benefit flows, environmental agreements are insufficient, and socio-economic agreements mainly focus on economic development, whereas private-social arrangements such as IBAs and Community Benefit Agreements (discussed below) may be more effective in compensating for adverse impacts, sharing benefits from the mine project, and are more likely to contribute to sustainable development (Galbraith et al., 2007).

### **Private-Social arrangements**

Internationally, these type of arrangements are diverse by name, legal structure, content and scale, but share fundamental characteristics in that they are agreements made between the private sector and local and/or Indigenous communities that typically result in the sharing of physical and fiscal benefits flowing from a resource project to a local community, while in return the proponent typically receives community acceptance of the project through social license (O’Faircheallaigh, 2013; Prno and Slocombe, 2012; Siebenmorgen and Bradshaw, 2011; Fidler, 2010; Hitch and Fidler, 2007). These

arrangements include: Impact and Benefit Agreements, between Indigenous governments and industry proponents, prevalent in Canada and Australia; Community Benefit Agreements, typically negotiated between real estate developers and local groups in the U.S. (Gross, 2007), but have become increasingly used for local and regional communities in wind-farm developments in Europe (Bristow, Cowell, Munday, 2012); Native Title Agreements and Indigenous Land Use Agreements, employed in Canada and Australia; Consent Agreements governing Peru; and Development Forum Agreements in Papua New Guinea (O’Faircheallaigh, 2013).

**Table 3.4 Types of Negotiated Agreements**

Type of Agreement	Geographic Location Used	Purpose	Example
Impact and Benefit Agreement	Canada and Australia primarily, also seen in New Zealand	Provide compensatory and community benefits to Indigenous communities impacted by development projects	Australia: San Hoodia Agreement; Argyle Mine Agreement (Altman, 2009); Canada: Galore Creek Agreement (Fidler, 2010)
Community Benefit Agreement	United States, and Canada; Recent in Europe	Typically used for large real estate development projects (i.e., stadiums); Now seen in Europe for communities impacted by large scale wind farms	Yankee Stadium, Columbia University (Gross, 2007); Wales wind farm projects (Bristow et al. 2012)
Native Title / Indigenous Land Use / Comprehensive Land Claim Agreements	Canada, Australia, and New Zealand	Surrounds Native title, rights and ownership; deals with consent to future acts, compensation, heritage protection etc.	Yandicoogina Land Use Agreement in Australia (Scambary, 2009); Nunavut Land Claim Agreement (White, 2008)
Consent Agreements	Peru	A requirement for development as of 2011 in Peru, requiring state consultation and need for consent from Indigenous	Tia Maria project (Sosa, 2011)

		communities impacted by development	
Development Forum Agreements	Papua New Guinea	Tripartite agreements that outline responsibility and benefits for different levels of governments	Lihir Gold Mine (Filer 2008)
Non-Treaty Agreements: Reconciliation Agreements, Strategic Engagement Agreements, Economic and Community Development Agreements	British Columbia, Canada	Facilitate ongoing Reconciliation with competing rights and title; Develop and maintain joint decision making and management; create a negotiation framework for further Government to Government Agreements	Nenqay Deni Agreement, 2016; Gitanyow Huwilp Reconciliation and Recognition Agreement, 2016

It is common practice that before the negotiation of these agreements, parties will create an agreement that set the terms of the negotiation, or the terms of access to exploration that could lead to a new project proposal and thus a new agreement (Woodward and Company, 2009; Siebenmorgen and Bradshaw, 2011). Pre-negotiation agreements include: Mineral Exploration Agreements (MEAs), Access Agreements (AAs) and Memorandums of Understanding (MOUs). MEAs and AAs set the terms for developers and exploration firms to gain initial access to traditional lands and territory for varying stages of exploration (Siebenmorgen and Bradshaw, 2011). If the exploration stage is successful, then parties turn to MOUs in order to formalize the relationship and signify intent on producing an IBA (Siebenmorgen and Bradshaw, 2011). This is an important stage of pre-development as the MOU offers an opportunity for early engagement, and thus is a critical stage for the proponent to focus on building a positive relationship with the community founded on trust, mutual understanding, and respect for cultural differences (Siebenmorgen and Bradshaw, 2011; Hitch and Fidler, 2007). With these tenets as a foundation for negotiation, then the likelihood of a successful agreement, partnership and ultimately project is improved (CPPF, 2015; Siebenmorgen and Bradshaw, 2011; Bradshaw and Lapierre, 2008; Hitch and Fidler, 2007). A particular case of note is with the Galore Creek Project and Tahltan Nation in British Columbia. “The Galore Creek Project Agreement supports Tahltan principles of environmental stewardship, economic sustainability and self-determination” (Hitch and Fidler, 2007, pg 61) because the Tahltan Nation ensures that all industry proponents sign a participation

agreement based on eight principles defined by the Tahltan Resource Development Policy (1987) (Fidler, 2010; also see Anderson, 1997 for these principles).

### **Impact and Benefit Agreements**

The use of IBAs has become a norm now within the mineral development sector when projects are on traditional Indigenous territory (O'Faircheallaigh, 2013; Siebenmorgen and Bradshaw, 2011; Fidler, 2008). This increase in activity in Canada is supported through the exercise of Aboriginal and Treaty rights that are constitutionally protected and have been further defined and strengthened through common law precedent (Constitution Act, 1982). The Supreme Court decisions in *Delgamuukw* (1997), *Haida Nation* (2004), and most recently *Tsilhqot'in* (2014) have established the duty for government to consult, accommodate and gain consent from First Nations groups whose traditional territory will be impacted by development projects (Gibson and O'Faircheallaigh, 2015).

IBAs can be voluntary or reactive, required by legislation as in Nunavut due to land claims agreements (O'Faircheallaigh 2013; Fidler, 2008). IBAs are encouraged by state governments because of the certainty for development they provide, as they'll receive royalties through taxation, as well as the socio-economic development they provide to the region. Industry proponents use IBAs as a measure of social license within the community that has signed on - and with it, certainty of development (Fidler, 2008; Bradshaw and Lapierre, 2008; Hitch and Fidler, 2007). Indigenous communities interested in resource development view IBAs as an opportunity for self-determination, the exertion of their rights over their territory, improved agency in terms of land use and management, and improved capacity as a community through the royalties that flow from these agreements (Prno and Slocombe, 2012; Mills, 2011; Prno, 2007; Hitch and Fidler, 2007; Slowey, 2005; Anderson, 1997).

There have been numerous studies conducted that consider the types of provisions included in such agreements O'Faircheallaigh, 2013; Siebenmorgen and Bradshaw, 2011; Fidler, 2010; Caine and Krogman, 2010; Hitch and Fidler, 2007; Sosa and Keenan, 2001; Kennett, 1999). IBAs started out with provisions for employment of local residents and sometimes offered local access to business opportunities (O'Faircheallaigh, 2013; Kennett, 1999). Over time, as the social and political landscape changed, IBAs have developed to include provisions covering a wide range of issues



arising from mineral development with the goal now trending towards sustainable development (O’Faircheallaigh, 2013; Siebenmorgen and Bradshaw, 2011).

#### IBA Provisions

Although provisions may vary among different agreements, the following list is a summary of common provisions seen in IBAs as provided by O’Faircheallaigh, 2013; Siebenmorgen and Bradshaw, 2011; Fidler, 2010; Caine and Krogman, 2010; Fidler, 2008; Hitch and Fidler, 2007; Sosa and Keenan, 2001; Kennett, 1999.

*Financial considerations:* monetary settlements to compensate for surface and subsurface development; common provisions include profit sharing, cash payments, equity shares and royalty arrangements, joint venture and development funds;

*Employment provisions:* increase employment opportunities for local community through preferential hiring for aboriginal people, recruitment of employees for long-term work, and offer a flexible schedule to accommodate traditional activities (hunting, culturally significant events);

*Education and training:* to increase opportunities through education training; cross cultural training for both Indigenous and non-Indigenous workers, apprenticeship and scholarship opportunities, partnerships with schools and colleges;

*Economic development:* may include preferential contracting and direct tendering to Indigenous businesses to increase business development opportunities;

*Socio-cultural support:* meant to Support societal challenges, recognize and/or reaffirm aboriginal rights and historical cultural background by monitoring social impacts, fund community projects and physical infrastructure (e.g., wellness facilities), and develop communication structures to facilitate ongoing communication regarding the project and community;

*Environmental provisions:* extending beyond regulatory requirements, with additional environmental protection and monitoring provisions; emphasis to give certain EA clauses particular attention, obligations regarding abandonment and reclamation, minimize activity in spiritually and culturally sacred sites;

*General provisions:* in order to ensure the agreement reflects long-term planning and enforcement; key components of this include conflict resolution mechanisms and information and knowledge sharing mechanisms; confidentiality is a typical provision often seen as well.

### **3.5. Discussion and key themes**

After reviewing the literature, several challenges and limitations to the royalty regimes discussed have become evident. The following section is a summary of these key themes.

#### **3.5.1. Role of Government**

Questions regarding the role of the provincial and federal government in benefit-sharing agreements have emerged. Sosa and Keenan (2001) suggest that the government should be engaged in IBA negotiations to ensure that Indigenous governments have the financial and administrative capacity to negotiate agreements in an equitable manner. This involvement could be through the adopting regulation for IBA development or as an overseeing body to ensure equitable provisions are carried out (Sosa and Keenan, 2001). It could simply mean that the government provides financial capacity to ensure fairness in the negotiating process, which would be more in line with the interests of self-determination from Indigenous governments. Caine and Krogman, 2010; Sosa and Keenan 2001. Markey and Heisler (2011) also discuss the province's role in the FSA, using its jurisdictional powers in a non-traditional manner to facilitate community and industrial stewardship. Although weaknesses in the agreement exist, this agreement shows the value of local municipalities working as a regional coalition for financial gain (Markey and Heisler, 2011).

#### **3.5.2. Provisions do not reflect community goals**

This is especially evident in cases where the community expects a level of responsibility from the proponent to solve social ills within the community that are outside the scope of the IBA. For example, community members from the Attawapiskat First Nation believed that DeBeers Canada was not living up to the terms of their IBA, as it was perceived that increased mine-related employment would reduce domestic violence and substance

abuse (Siebenmorgen and Bradshaw, 2011). The failure of this IBA rather lay in the inability of the community to adequately express its goals for development by negotiating effective provisions that reflected these aspirations (Siebenmorgen and Bradshaw, 2011). The Dona Lake Mine project failed because the proponent took a paternalistic approach to the IBA, and without proper communication and shared decision making, the IBA failed to recognize the limitations of communities' capacity, leading to unrealistic commitments and greater negative impacts to the project and the community (Hitch and Fidler, 2007). IBA provisions can range widely between agreements, as each First Nation has specific needs that reflect their individual values. Siebenmorgen and Bradshaw (2011) stress the importance of negotiating locally significant provisions within the agreement in order to obtain more sustainable outcomes.

### **3.5.3. Capacity issues**

Capacity to negotiate also varies by Indigenous community, and for many, this capacity may be a great limitation to express community development goals during the negotiation process (Caine and Krogman, 2010; Hitch and Fidler, 2007; Siebenmorgen and Bradshaw, 2011). It is important to acknowledge that this limited capacity is not necessarily due to a lack of education or ability, but rather First Nations governments may be dealing with multiple resource negotiations, treaty negotiations, or legal cases regarding title rights at the same time as governing their community and dealing with internal governance decisions (Cornell, 2006; Siebenmorgen and Bradshaw, 2011). In highly active mineral development areas, Indigenous governments are inundated with notifications of mineral exploration and do not have the staffing ability to respond to them all or study them to ensure there is no conflict (Heisler and Markey, 2014). Additionally, small rural municipalities and Indigenous governing agencies may not have the financial or administrative capacity to participate fully in the negotiation process of these regimes, as the location of the negotiations may be far away and the employee may not have the ability to attend due to the multitude of responsibilities associated with their position within small agencies (Heisler and Markey, 2014; O'Faircheallaigh, 2013).

### **3.5.4. Jurisdictional boundary issues**

There are two types of communities that are impacted by resource development: people residing in a location affected by a project and people who share economic, social and

cultural ties to the area that the project is impacting, but may not reside specifically there (O’Faircheallaigh, 2013; Heisler and Markey, 2013). It is difficult to determine who should benefit and to what extent one community should benefit more than the other.

### **3.5.5. Inconsistent with Indigenous world views**

Although Indigenous models of economic development link the capitalism model to political goals (Anderson, 1997), contradictions occur within the literature when development conflicts with traditional activities or values (Mills, 2011). IBA negotiations are based in Western perspectives, limiting the ability of outcomes to reflect the goals and values of the First Nations community (Hitch and Fidler, 2007). This conflict is also seen in the EA process, as Booth and Skelton (2011a) discuss several limitations regarding the incongruence of the process with Indigenous world views; their final recommendation is a reconsideration of the entire EA process itself. This dichotomy of values is a barrier for Indigenous communities in expressing their goals effectively when negotiating IBAs and denotes the necessity of knowledge sharing between the industry proponent and Indigenous government during negotiation proceedings in order to align expectations with results (Caine, and Krogman, 2010).

### **3.5.6. Consent in Canada**

Following the issues regarding the difficulties in reconciling world views, and paramount to the discussion of resource development within British Columbia is how free, prior and informed consent (FPIC) is going to be incorporated ‘within the Canadian Constitution’. Meaningful operationalization of FPIC should effectively address the realignment of the state and Indigenous peoples’ relationship, vesting the process in Indigenous peoples (Doyle, 2015). While the Canadian legal system has developed rights frameworks out of *Sparrow* (1990) and an accommodation spectrum out of *Haida* (2004), there are a lot of questions around how FPIC can be obtained, from whom, and what happens if it is not given within a Canadian legal context.

### **3.5.7. Sustainable development concerns**

While in the short-term IBAs can be successful at achieving their purpose, long-term studies should be conducted on IBAs to assess their ability at sustaining these benefits

and community development over time (Prno, Bradshaw and Lapierre, 2010). Securing sustainable benefits and promoting sustainable development is now an increasing area of focus for IBAs, with Siebenmorgen and Bradshaw (2011) providing an outline of optimal provisions for an IBA and stressing the importance of locally significant provisions that must be the focus of negotiation. O’Faircheallaigh (2013) cites that early IBAs were not successful in contributing to sustainable community development due to the fact that revenues were allocated to short-term consumption, used wastefully or fraudulently, or invested in capital projects which the community lacked the capacity to sustain over time. It is common for Community Development Agreements (CDAs) now to set out in their provisions specifications concerning how the royalties generated through the IBA are to be allocated, often with the creation of a trust or investment fund, or through the development of a community development corporation (O’Faircheallaigh, 2013; Scambury, 2009; Cornell, 2006). For example, the Inuit and Innu communities that signed the Voisey’s Bay IBA for the nickel project in Labrador have allocated shares of their royalties into a sustainability trust, with fixed annual payments flowing into the trust and additional payments made when the price for nickel is favourable (as they obtain more royalty revenue as per profit-based royalty terms in the IBA) (O’Faircheallaigh, 2010). This process is meant to sustain the financial benefits long after the mine closure. Despite some positive examples, more research is needed to determine the long-term impacts of IBAs and their ability to address sustainable development concerns (O’Faircheallaigh, 2013; Siebenmorgen and Bradshaw, 2011).

### **3.5.8. Additional challenges**

Limitations to negotiated agreements may also result from unequal bargaining power, equity and social justice issues involved in benefit distribution, and concerns surrounding enforceability, accountability and transparency (Booth and Skelton, 2010; Mills, 2011; O’Faircheallaigh, 2013; Heisler and Markey, 2013). The long-term effectiveness of many of these arrangements are still yet to be understood, in part due to the recentness of many non-treaty arrangements as well as the confidential nature of public-private arrangements such as IBAs. The lack of transparency and accountability resulting from such arrangements illustrates the inability to prove that benefits from these arrangements actually flow to the community after the agreement has been signed.

### **3.6. Conclusion**

Neoliberal resource and economic policy has led to an influx of supra regulatory agreements that dictate the process by which minerals are developed as well as the flow of revenues and benefits from these development projects. State, private and social governance institutions all influence resource development, and through a set of various arrangements, negotiate the terms of development and royalties. Key themes and challenges emerging from the literature include: the role of government, provisions inconsistent with community goals, capacity issues, jurisdictional boundary issues, inconsistencies with Indigenous worldviews and sustainable development concerns. These are all areas to focus future research.

## Chapter 4. Case Content and Background

### 4.1. Stk'emlúpsemc te Secwépemc Nation

The SSN is comprised of two Indian bands, the Skeetchestn Indian Band and the Tk'emlups Indian Band, whose traditional territory is located in the interior of British Columbia and spans 180,000 square kilometers. The Indian band system is a colonial imposed institution formed through the Indian Act as a way to replace traditional forms of government and control First Nations communities. This imposition of colonial governing systems has negatively affected First Nations communities across Canada in unique and various ways, primarily causing divisions within the communities and provoking questions over legitimacy and power among traditional and Indian Act band governments.

In 2007 the bands decided to re-unite to protect their collective interests and strengthen their socio-economic situations. This union is of historical significance, as these two communities have been intrinsically tied as the southern division of the Secwepemc Nation (Ignace, 2008). Kukpi7 Ronald Ignace discusses this traditional land tenure system that existed within Secwépemculecw prior to and after first contact with settlers in his dissertation, referencing the interior Chiefs 1910 Memorial to Sir Wilfred Laurier: "... the chiefs of the Interior strongly invoke the concept of Aboriginal nationhood, thinking of the Secwépemc, Nlakapamux, St'at'imc, Ts'wenemc (Okanagan), Pesixilemc (Tsilhqot'in) and others as distinct *nations*, and refusing to surrender to the nucleation of our nations into 'bands' imposed by the government during that time" (Ignace, 2008). Ignace goes on, "by referring to the land as a 'ranch belonging to all the people of the tribe' [the chiefs of the Interior] also insisted on the principle of *collective land tenure* at the level of the 'tribe', or nation, rather than village group, or land ownership resting with individuals" (2008). Further, Ignace also refers to ethnographer James Teit's work in 1909, where "Teit argues for a tribal or nation-wide system of land tenure and access to resources, with the chiefs of local bands (communities) acting as resource stewards or caretakers for the benefit of all people of the nation" (Ignace, 2008). Teit's work also describes Secwépemc boundaries with respect to the seven divisions that spanned the nation (Ignace, 2008). Each division comprised a number of ancestral villages with a main village named as its "headquarters" (Ignace, 2008), and in this specific case study

the division of interest is that of Tk'emlúlepsemc, including the people of Skeetchestn and Tk'emlups.

The SSN's mandate is now to collectively manage and negotiate the conservation of resources on their shared territory, as they have done since time immemorial. In 2009, they successfully negotiated a Mining and Minerals Agreement with the government of British Columbia, setting out a government-to-government process for decisions that affect mineral development on their territories (Mining and Minerals Agreement, 2009). From this, a Participation Agreement was reached with New Gold with regard to the New Afton Mine project. They had previously signed an Exploration Agreement with KGHM regarding the Ajax Mine proposal, but as will be shown, these negotiations broke down, resulting in a title claim put forward by SSN to the BC Supreme Court in September 2015 (Secwepemc Nation, 2015).

In 2010, the Skeetchestn Indian Band and the Tk'emlups Indian Band, who together comprise the SSN, signed an Economic and Community Development Agreement with the Province of B.C. in regard to the New Afton Mine Project operated by New Gold Inc. Currently there are several other resource projects being negotiated as well, with resistance to the Ajax Mine project resulting in the filing of a title claim before the B.C. Supreme Court by the SSN in September 2015.

The New Afton mine is an underground copper and gold mine that is being developed on the site of the former Afton open pit mine, located 10 kilometres west of the city of Kamloops, BC and in the traditional territory of the SSN (Schmitt et al., 2008). New Gold Inc. is the proponent of this mine, after purchasing the land and mineral rights from the Teck Corporation, who operated the Afton mine from 1978 until 1991 (Schmitt et al., 2008). The New Afton mineral deposit contains 65.7 million tonnes grading 1.02% copper, 0.77 gram/tonne gold, and 2.59 gram/tonne silver, which will yield approximately 680 million kilograms of copper and 45.4 million grams of gold (Schmitt et al., 2008). The mine has a 12-year life-span with commercial production commencing in 2012 (RPA, 2015; Schmitt et al., 2008).

The KGHM Ajax mine project is a proposed open pit copper-gold mine located approximately 2 kilometres south west of the City of Kamloops, also within the asserted traditional territory of the SSN (EAO, 2017). The Ajax footprint is approximately 1,700



hectares and would operate for an estimated 23 years (EAO, 2017). The expected output of the mine over its lifetime is approximately 140 million pounds of copper and 130,000 ounces of gold annually (KAM, 2015).

## **Chapter 5. Results**

The results of this case study focus on modern Secwepemc, Crown and industry relations and arrangements, from around the time of inception of the modern-day SSN (as referenced in some agreements as Kamloops Division of Secwepemc Nation), until the present. Specifically, the results focus on the development and content of arrangements surrounding two mining projects, the New Afton Mine project currently in production and the KGHM Ajax Mine project that is currently under Canadian Federal-Provincial joint environmental review. The sub-section on the New Afton Project describes pre-negotiation tactics as well as a Participation Agreement, a Mining and Minerals Agreement and an Economic and Community Development Agreement. The sub-section relating to the KGHM Ajax project illustrates different tactics employed by the SSN and describes the Assessment Process they've created to determine whether they give consent to the project. The third sub-section considers key informant interview results surrounding existing royalty regimes within BC that assists in the discussion of options for the financial components of resource agreements.

### **5.1. New Afton Mine Project**

In December 2006, the Skeetchestn community leadership were made aware of the potential New Afton Mine project proposed by New Gold Inc. and “set up a meeting in their gymnasium with Tk'emlups to discuss their options” in dealing with this development (KI4). Initially, the SSN experienced difficulty regarding engagement and consultation on the project. SSN sent a letter to the Province saying that they need to be consulted. However, the Province refused, as the site location designated the project as a ‘brownfield mine’ (KI4). The Province initially granted a mining permit, without adequate consultation, as expressed by SSN leadership and the Union of British Columbia Indian Chiefs (UBCIC, 2007). In a press release from the Union of British Columbia Indian Chiefs, Grand Chief Phillip acknowledged that the BC Government committed to share resource revenues with First Nations under the New Relationship policy. However, there has been a “total policy vacuum” on revenue sharing within the mining industry (UBCIC, 2007).

The lack of consultation also extended to the mining proponent, as KI4 remembers, “we had real difficulty with the various presidents of the mine”. It wasn’t until an Assembly of First Nations (AFN) annual general meeting in Ottawa where a “major investor in the New Gold mine was speaking about a Memorandum of Understanding with AFN on engaging native people across the country on mining. [Kukpi7 Ignace] stood up and said, ‘I would like to meet with you, we’re trying to get an arrangement with New Gold mine, but the presidents there are very obnoxious and so we’re going to launch a title case against the mine you’re investing in unless we sit down and negotiate an arrangement’.” (KI4).

This threat of court action acted as a catalyst for the future negotiated agreements surrounding the New Afton project, as “two weeks later there was a new [consultation person] at the mine” (KI4). “So, we went back with the mine [proponent], we sat down and negotiated a participation agreement” (KI4). “We also brought in Phil Fontaine [acting AFN President] to meet with the provincial cabinet, and he had good relations with Premier Campbell, and from this we were able to negotiate a share of the mining tax [Economic and Community Development Agreement] and become embedded in the mining permit [process] before it was issued” (KI4).

### **5.1.1. Participation Agreement - 2008**

While not technically labelled as an Impact Benefit Agreement (IBA), the New Afton Participation Agreement between New Gold and SSN outlined engagement protocols between the two parties and included a number of benefits for SSN communities. The classification of IBA’s, as pointed out by KI2, has grown into a broader definition where “we keep using IBA’s for a lack of a better term” (KI2). “IBAs are such a broad category because First Nation’s and proponents used to go for the major IBAs that usually considered the whole life of project, even when they didn’t know if the project would go forward. But over the last decade or so, companies and First Nations have adapted to have more incremental types of agreements” (KI2). The New Afton Participation Agreement is one of these negotiated agreements that operate within the realm of an IBA. As discussed by KI4, “[The Participation Agreement] had a number of different components to it that were quite unique for their time and this being a brownfield mine, we didn’t have as much leverage had it been a newer mine. But none the less we were able to create a lot of new arrangements in mining”.

The Participation Agreement established a political hierarchy engagement structure to deal with the ongoing operations of the mine (KI4; Shantz, 2015):

- Chiefs Table: involving the Chief of Skeetchestn, the chief of Tk'emlups and the CEO of New Gold Mine would meet bi-annually to discuss the project;
- Management Committee: made up of council members and New Gold managers, would meet 4 times a year;
- Environmental Committee: the technical level that reviews environmental impacts that would go on in the mine and find remedies, and would meet regularly as needed.

Details of the provisions within the Participation Agreement were provided by KI4, and cross-referenced with data from the document analysis to ensure accuracy of the results. The PA provisions include:

- Economy: [SSN] would have the right of first refusal on contracts for the mine (KI4; RPA, 2015)
- Land Tenure: [SSN] holds the right of first refusal to purchase the 2000 acres of land adjacent to the mine that was owned by New Gold (KI4);
- Employment: [New Gold] would hire 23% of Secwepemc or Indigenous peoples for their labour force (KI4; RPA, 2015);
- Training: [New Gold] and the Federal government would provide financing to train [community members] in mining (KI4; RPA, 2015);
- Education: [SSN] were able to set up a scholarship fund of \$50,000 a year. \$25,000 for Skeetchestn and \$25,000 for Tk'emlups (KI4).
- Governance: the governance tables allowed SSN to be involved in every aspect of the mine (KI4; Shantz, 2015).

The revenue sharing portion of the Participation Agreement is in the form of a Net Smelter Return (NSR) Royalty (KI4; RPA 2015, 2015; Shantz, 2015). For each year of commercial production at the mine, New Gold pays into a trust established for the

benefit of SSN members (RPA, 2015). The payment is a percentage of NSR ranging from 0.5% to 2%, depending on the price of copper and on whether the proponent has recovered its development and construction costs (RPA, 2015; Shantz, 2015). “Going with the NSR allowed the mine to begin to pay us after they paid all their bills off, so we can fairly know what we would be getting annually from the mine. Back then that [amount of revenue sharing] was a lot, and we would be doing things a lot differently today” (KI4). Since 2008, the Participation Agreement has been amended and restated once, and is currently in the process of a new amendment (SSN Negotiator, personal Correspondence. July 16, 2017).

### **5.1.2. Mining and Minerals Agreement – 2009**

The Mining and Minerals Agreement (MMA) is a government to government agreement that describes how engagement on mining and mineral development applications will occur. The MMA was entered into on April 7th, 2009 by the BC government, represented by the Minister of Energy, Mines and Petroleum Resources (MEMPR), and the SSN. With new rules regarding consultation and accommodation stemming out of the *Haida* (2004) SCC decision, along with a commitment to the New Relationship Accord in British Columbia, this agreement was created with the objective of “begin[ning] to reconcile the interests of the Parties, consistent with the Constitution Act, 1982, section 35(1) and with common law” (MMA, 2009). The specific interests of concern for reconciliation and scope of this agreement is the management of all mining activity and mineral exploration on or within SSN traditional territory. The MMA sets up the bureaucratic structure for negotiating the New Afton Mine project, in regard to benefit sharing and co-management of the project.

The co-management structure outlined in the MMA was developed through the creation of the Mines and Minerals Joint Resources Committee to address interests of the SSN, including: tenures issues; processes for the review of major projects; mineral exploration; mine development; mine operations; mine closure; mine post-closure; remediation; industry engagement; compliance and enforcement; protection of cultural and heritage resources of the SSN; development of a Cultural Heritage Management Process for industry direction; capacity development, training and education; and policy development and legislative review (MMA, 2009). The goal of this committee is to provide recommendations to affect the planning and management of mining activities on

SSN Traditional Territory. One main contention that SSN held prior to this agreement was that “SSN [did not] agree with the current process of mineral tenure in the Province and wishes to establish [with this agreement] a forum to discuss options for addressing their concerns” (MMA, 2009). The Mines and Minerals Joint Resources Committee addresses this concern by embedding SSN representatives within all aspects of the mine, “being embedded in the mine permitting, it gave us oversight on the mine itself” (KI4).

Further, “the committee would review the future plans, everything that was going to be coming out for the year ... and that would give us an opportunity to determine ... what opportunities we could take on that might arise from [those plans]” (KI4).

MMA Consultation and accommodation approach:

Consultation is defined in 4 stages of engagement, based on the significance of the mining activity impact and the level of cultural sensitivity of the area facing the mining activity.

1. Notification: MEMPR will notify SSN that they have received a mining application and advise the proponent to contact SSN directly.
2. Consultation Level 1: requires MEMPR to notify SSN regarding a mining application, and SSN will provide a response to the application. MEMPR will then consider the application based on SSN response.
3. Consultation Level 2: requires MEMPR to notify SSN regarding a mining application, and SSN will provide a response to the application. MEMPR will then consider the application, and provide a response indicating how steps will be taken to accommodate SSN concerns.
4. Consultation Level 3: government to government engagement

**Table 5.1 MMA Consultation Table (MMA, 2009)**

Level of Sensitivity	Mining Activity Application – Significance of Impact					
	Initial	Mineral Exploration			Advanced	Major Projects
	Non-mechanized Disturbance	Mechanized Existing Disturbance	New Minor to Moderate Mechanized Disturbance	Mechanized Significant New Disturbance	Sand and Gravel Quarry Operations	Metal and Mine Production
Low	Notification	Notification	Consultation Level 1	Consultation Level 2	Consultation Level 2	Consultation Level 3: Engagement
Moderate/Unknown	Notification	Consultation Level 1	Consultation Level 1	Consultation Level 2	Consultation Level 2	Consultation Level 3: Engagement
High	Notification	Consultation Level 1	Consultation Level 2	Consultation Level 2	Consultation Level 3: Engagement	Consultation Level 3: Engagement
Culturally Sensitive	Notification	Consultation Level 3: Engagement	Consultation Level 3: Engagement	Consultation Level 3: Engagement	Consultation Level 3: Engagement	Consultation Level 3: Engagement
	Low	Potential Impact			High	

### 5.1.3. Economic and Community Development Agreement – 2010

The Economic and Community Development Agreement was signed on August 24th, 2010 between the Province of BC (represented by MEMPR, the Minister of Forest and Range (MFR) and the Minister responsible for Integrated Land Management Bureau) and the SSN for two purposes (ECDA, 2010):

1. To confirm understandings around how BC will meet its legal duty to consult with and accommodate SSN with respect to the New Afton Project.
2. Share the resource revenue received by BC from the New Afton Project with SSN so that they pursue enhancement of social, economic and cultural well-being of their communities.

Royalty Payments: BC will pay to SSN 37.5% of the difference between the total amount of tax paid by the Proponent during the BC Fiscal Year and the total amount refunded by

BC to the proponent during that fiscal year (ECDA, 2010; Shantz, 2015). Annual Payments under this agreement will be used to pursue the enhancement of social, cultural and economic well-being of SSN communities.

Engagement on the Project: MEMPR will engage with SSN through the Mines and Minerals Joint Resources Committee, established in the MMA. Other Province Releasees will follow the Consultation and Accommodation Process outlined in this agreement that follows a similar consultation and accommodation approach established in the MMA under consultation stage 2.

Community Priorities: SSN was required to prepare a Statement of Community Priorities that outlines community priorities, goals and specific outcomes that SSN intends to fund to enhance the communities' social, cultural and economic well-being (ECDA, 2010). Annually, after SSN has received the Annual Payment from BC, they will provide a report identifying expenditures that meet this end (ECDA, 2010). It is estimated that this revenue sharing agreement will generate \$30 million in total for the bands to share (Shantz, 2015).

## **5.2. KGHM Ajax Mine Project**

KGHM Ajax Mining Inc. (KAM) began preliminary negotiations with SSN regarding a mining project located near Jacko Lake, which has been identified by SSN as an important cultural and spiritual site known to them as *Pípsell* (Secwepemc Nation, 2015). These negotiations followed protocol set out by the Mining and Minerals Agreement (2009) and both parties signed an Exploration Agreement as the project assessment progressed (KAM, 2015). SSN concerns surrounding the impact on *Pípsell* as well as a hunting blind complex located in the surrounding site area were voiced immediately, and through numerous consultations KAM attempted to alter the project where appropriate (KAM, 2015). The most recent plan alteration, however, involved the destruction of the north arm of Jacko Lake. This impact, as cited in the SSN title claim, was believed to be too great a concern (Secwepemc Nation, 2015).

It became clear to SSN that concerns were not being appropriately addressed when KAM submitted and BC approved a Notice of Work order to begin initial exploration around the site, against SSN's Joint Resource Committee's recommendation



(Secwepemc Nation, 2015). This indicates the limitations to the decision-making ability afforded to SSN in the Mining and Minerals Agreement. Further, the BC Environmental Assessment Office completed an initial strength of claim assessment of SSN's Aboriginal and title rights within the project footprint and surmised that SSN had a medium to weak strength of title, and strong prima facie rights (KI4). KI4 describes the limitations of this initial approach by BCEAO:

“It started off with an archeological work that employed what I call the ‘stones and bones’ approach, to assess our use of the land and what ultimately led our strength of claim on the land. And the province did that, they made a statement of claim using a stones and bones approach and archival research without interviewing our people. They conducted a strength of claim assessment on us, without even talking to us. [Although] it sounds good that we have a strong prima facie claim of rights, but it only gives you surface rights, to graze on the land, it doesn't give you title rights” (KI4).

KI4 then described the SSN's course of action: “So, we lobbied, and finally got [KAM] to fund a cultural heritage study based on what we call the seasonal rounds, that's looking at what we do on the land in the various seasons to get a full picture of what it is, of how we've lived on the land, utilized that land, thought about that land and managed that land” (KI4). The seasonal round approach to cultural heritage studies considers Aboriginal Title and Rights much more holistically, “as opposed to the stones and bones approach and the check-box approach, it takes in our stories on the land, our medicinal uses, our fishing rights, our hunting rights, our spiritual rights. Not just material aspects of our life but the cultural, social, spiritual aspects of the land and the stories that we have about the land” (KI4). This comprehensive, seasonal rounds approach to the cultural heritage study forced the BCEAO to change their strength of claim assessment (EAO, 2017), as “they had to declare that they could see we had a strong prima facie case of title, and a strong prima facie case of rights on the land” (KI4). After the change to the statement of claim, the SSN lobbied the Federal and Provincial governments to allow them to have “an independent panel review on the assessment of the mine project, and they refused. We also asked the Federal government to do a declaration of title on the land, and they refused” (KI4).

From this point, SSN decided that court action was the best available option to exercise power and get an injunction to stop the project's progress, "what we did was we went ahead and filed a title case and did our own declaration of title to the land and we also [went] ahead and did our own project assessment on the land which had never been done" (KI4). If successful, SSN will gain Supreme Court of Canada recognized title rights over the project site, at which point BC and KAM must gain consent from SSN before any further progress is made on the project, as stated in *Tsilhqot'in* (2014). The Secwepemc title case is unique and potentially precedent setting, as the claim area that has been declared includes private property, to which the SCC has not made any determinations in past title cases.

### **5.2.1. SSN Assessment Process**

Since submitting their title case to the BC Supreme Court, SSN developed a community-based project Assessment Process comprised of a 26-member panel in order to review the KGHM Ajax project. SSN felt that their knowledge and worldview were not considered fairly within the federal and provincial environmental assessment processes and wanted to create a process that incorporated both western and traditional knowledge in a fair and just manner. The 26-member panel was created with the focus of providing a community-based consent mechanism that gave community members greater power to decide whether the project was something they believed would benefit the community. The panel was constructed with specific family representatives, reaching back to traditional kinship and governing systems:

"Our kinships are founded on our Shuswap laws, they're interconnected. So, we got 13 heads of families from Skeetchestn and we got 13 heads of families from Tk'emlups along with elders and youths from each community and our Council to make up a review panel for the project" (KI4).

This panel held a week-long hearing where project proponents, government agencies, non-governmental agencies and community knowledge holders were given opportunity to provide all of their individual expertise:

"We came up with the idea of walking on two legs – by that I mean that we wanted to utilize both western and Indigenous knowledge through the review.

How that worked was that we invited in the National Energy Board, CEAA, BCEAO, to come in and do a presentation to the panel. We invited all the experts that Ajax was using on the mine to come in and do a presentation for the panel. Then we brought in the [NGO] Mining Watch, [Ethnobotanist] Nancy Turner, [and] our traditional knowledge keepers to do a presentation. We brought in nurses and doctors that were concerned about health, [people] that were concerned about air quality, hydrology, all of those aspects and cultural impacts on the land. So, it was a very robust and in-depth review of the mine” (KI4).

On March 4<sup>th</sup>, 2017, based on the assessment panel recommendations, the SSN Joint Council declared that the SSN does not give its free, prior and informed consent to the KGHM Ajax project (EAO, 2017). As part of this EA Panel decision, the SSN joint Council provided a list of land use objectives, recommending that *Pipsell* become a sacred cultural heritage site:

“The panel intensively reviewed all of that [data, along with] the offer that Ajax put on the table in line with the implications of the mine on our land and [the panel] said no. In no uncertain terms, they did not want the mine, they wanted it kept as a cultural heritage site so that we could go there and utilize and teach our next generation about the land; so that they could be told the story, and we would build camps there and we would invite non-native people to come in and join with us in these camps to learn about our stories of the land, our history in that area, about the medicinal plants, the food plants, all of that. And all Canadians could have a benefit from this” (KI4).

On June 20<sup>th</sup>, 2017, a ceremony was performed and the SSN government designated *Pipsell* as a Cultural Heritage site. SSN has also been receiving support from the local community and NGO’s for their Assessment Process and SSN’s decision to not provide free, prior and informed consent to the project, “we’ve had 40 different organizations submit written support in recognition of our rights to that land and supporting our decision to say no to that mine in that place. And those 40 organizations, they come from Kamloops, across BC and Across Canada and they have thousands of members within their organizations” (KI4). Additionally, the SSN Assessment Panel and decision was supported by the City of Kamloops as well as federal and provincial levels of the Green Party, “the City Council of Kamloops voted in favour of our panels’ approach and

the decision to say no to the mine. Elizabeth May from the Green Party supports us whole-heartedly, and the Green Party representatives locally support us, and now we await the EA decision” (K14).

SSN provided their decision and reasoning to the BCEAO joint-review and will be taken into consideration when making their decision (EAO, 2017). “I think that the Federal government is going to leave it up to the provincial government to respond. And now we await the EA decision which will probably come up by November 2017” (K14).

### **5.3. Royalty Regimes**

This section considers interview results from key informants regarding resource royalty regimes that exist within British Columbia. These results are to help inform discussion around options for the financial component of resource agreements. While engaging in institutional arrangements regarding land management and project decision-making, SSN has also been working to redefine the financial and economic interests held by Indigenous communities. This redefinition comes in the form of an Aboriginal Resource Tax, built on the case that Indigenous sovereignty provides for the economic right to tax jurisdiction. This basis will be discussed further in this paper, but it is important to note that the structure of the ART hasn’t been developed as, “[SSN is] still working on that component” (K14).

Currently, there are several ways to organize royalties that are a part of the right to economic benefits from the land. As shown in the ECDA and New Afton Participation Agreement, lump sum payments, mining tax sharing and revenue sharing are common industry mechanisms. Additionally, these agreements see economic opportunities for the community through employment and local contracting provisions, “First Nations that really want lots of contracts, they negotiate IBAs and they simultaneously negotiate and find joint venture partners so they can get all of those contracts. And then out of that, a lot of sub-contracts come, so if First Nations are able to develop a real capacity building initiative around helping entrepreneurs, then they’ll get all of those sub-contracts as well” (K12).

Provincial royalties differ based on commodity, as “they don’t have one preferred system. They use a series of systems depending on the commodity and they try to

design them all so that they reflect the different costs of production: 1) natural gas doesn't really have a profit based royalty, it's an ad valorem royalty, so a revenue based royalty as well as competitive bidding; 2) forestry has a combination of competitive bidding plus a stumpage system that's profit based in a very complex way; 3) mineral royalties have a profit based royalty and its sort of a rate of return based profit model" (K13).

This makes the development of an Aboriginal Resource Tax difficult, as an equitable deal "depends on the project, and the industry. Sometimes there's percentages of revenues tied to certain revenue streams – and that usually happens when the company doesn't have any money. But also, that financial percentage is tied to the value of the commodity that's being taken. So, you might be able to come up with percentages for different types of industries, but, I don't know if there is an agreed percentage of revenue" (K12).

In discussion with Key Informants, progressive royalty schemes were considered. The results exhibit four current systems or contemplates potential systems that could be developed.

### **5.3.1. Competitive Bidding**

As stated by K13, competitive bidding is a system currently employed by BC. Competitive bidding "often isn't defined as a royalty, but in principle, it does the same thing as a royalty. Which is by far the best approach because it adjusts the amount paid to reflect the profitability of the resource development" (K13). In a competitive bidding model, the government agency allocates the rights of the resource to the proponent that offers the highest bid. As K13 explains, "[the competitive bidding] system has the same effect as a royalty, but is superior because it allows the investor to figure out what is required as an investment, and then ... bid the economic rent as a bonus bid for access to the resource. So that actually is a really progressive royalty source, because if the profit is really high, they will make a large payment, and if the profit is really low, then they'll make a low payment. The royalty payment will adjust to the profitability of the resource development" (K13).

Although the province is typically obligated to take the highest bid, specific provisional requirements regarding community amenities could be built into the bid, “In competitive bidding, there are certain other regulations that the companies must comply with. So, for example, they may have requirements to do a certain amount of training of local workers or other kinds of things that they build into the development requirements and then they would take the highest bid” (KI3).

### **5.3.2. Graduated Tax System**

Aside from the competitive bidding model, the Province used to opt for a varied tax rate depending on the profitability of the project. KI3 explains that with this model, “the rate might be 40% if the profit is very high, the rate might be 10% or 15% if the profit is very low” (KI3). This varied tax rate scheme has now evolved into the Rate of Return royalty model. “Rate of Return royalties work so that the royalty rate is relatively low until the investor earns their capital back, and then the rate goes up really high after that on the economic rent portion of the profits” (KI3). This Rate of Return model is exemplified in the Net Smelter Return structure denoted in the SSN-New Gold Participation Agreement, where the royalty rate would start small (0.5%) until development and construction costs were paid off, then would increase (up to 2%) based on the price of copper. KI2 also provides an example of this Rate of Return royalty on a silver mine project they worked on, “[the project started] with a base of 8% of gross revenue and then as the value of silver went above a certain amount, [the royalty payment] could get all the way up to 12%. It had the potential to be a rich IBA” (KI2). Additionally, this royalty system is how LNG royalties in the Province are designed to work, “[It] starts off with a low and moves to a higher rate. The Rate of Return royalty is the best royalty system that tries to adjust the rate of taxation to reflect the profitability of the investment” (KI3).

Although the Rate of Return royalty is structured through revenue generation, KI2 offers another way of looking at a tax that is based on expenditures. KI2’s silver mine project “also had a financial component that was tied to a percentage of the spending – 10% of whatever the company spent on exploration. So, if the company spent \$1 million [the Nation] got \$100 thousand. They were getting a percentage of what the company was investing in the project” (KI2). Further, KI2 recommends looking at development cost taxing, suggesting that “if a company is buying services for exploration, there’s all sorts of GST and PST being paid, and so far, the crown has not opened up [revenue sharing]

on that. The crown is making money on development through this, they made way more money on LNG, [even though those projects have stalled]. If you consider the boom and bust of a cycle, there's money to be made on the boom, even if it does bust" (K12).

### **5.3.3. Project Equity**

Obtaining equity shares in a resource project is another avenue First Nations can take in obtaining economic benefits, as K12 notes,

"You look at a pipeline agreement – the financial component depends on whether the company is willing to do equity or not. There's two different proposals to move crude oil by specialized train from Alberta through the northeast of BC to the Yukon, and then into Anchorage. One is saying up to 35% and the other is saying up to 50% of equity – which totally changes the revenue streams" when compared to lump sum payments" (K12).

K12 also acknowledges how much more lucrative an equity share can be compared to a tax based royalty, as the First Nations become investors: "[an] Aboriginal Resource Tax would be a very small percentage – because then you enter into the proponent realm. If you could get a percentage of equity it would be off the charts – if you could finance it" (K12). The ability to finance equity in resource projects is an obvious limitation for many First Nations dependant on INAC funding and lacking own source revenue. K12 discussed a non-profit agency, the First Nations Major Project Coalition, that are "trying to get the [Federal government] to securitize equity financing – so they basically come in and post security so the First Nations can borrow money in world markets in order to buy a higher percentage in major projects" (K12).

### **5.3.4. Toll Based System for pipeline projects**

In a discussion regarding progressive royalty schemes, K12 suggested the idea of a toll based royalty constructed based on volume of raw material passing through the territory, "I think tolls would be really interesting too ... but I don't think anyone has ever looked at tolls. The [Federal government] doesn't actually have a revenue stream for these pipelines, and I mean tolls are where all the money is right?" (K12). K13 considers the Federal government's tax jurisdiction on pipeline projects: "Most of the taxes that are

applied to a pipeline are: a corporate income tax on the provincial portion of the profits, [and] a property tax based on the assessed value of the pipeline. Or you could even have corporate capital tax, where it's kind of a property tax that's based on the value of the pipeline" (KI3).

In considering the ability to institute a toll based royalty, KI3 questions the legal legitimacy, "I think one of the problems is that the tax would be struck down because it's unconstitutional, a tax applied to an inter-provincial pipeline that's under federal jurisdiction. I can't think of an instance of where [tolls have] been done and it's certainly something, which you might be able to design it in a way that gets you around the constitutional constraint but it would be challenging" (KI3). If a toll-based royalty system were to be used, it would require NEB approval as they obtained jurisdictional control over interprovincial and international pipelines in 1996, and adjudicate toll rates charged by carriers to suppliers (NEB, 2016).

## **5.4. Conclusion**

The results consider two different mining projects that have been proposed within SSN territory and the different governance decisions made by SSN leadership in each case. The New Afton case shows the negotiation tactics that allowed SSN to leverage their position into negotiating the resulting resource agreements and gaining decision-making influence and a share of royalties from both the province and industry proponent. The KGHM Ajax case illustrates how SSN negotiated from a position of power due to their strength of claim to the site of the project. When they determined that the project was too impactful for their community they, chose to use different tools to exert their rights in an attempt to stop the project. Finally, four different resource royalty regimes were described stemming from interview data that will be used to discuss financial component options for future resource royalty arrangements.



## Chapter 6. Discussion

This discussion will center on key themes and findings stemming from the interview data, document analysis as well as current literature. The first section will discuss self-determination and how Canadian legal jurisprudence incorporates Indigenous peoples of Canada, with specific interest in Secwepemc experience. The next section considers the arrangements and institutions established for land and resource management in Secwépemculecw, and evaluates their capacity for co-management. Further, a discussion on the basis of economic rights is provided, with a look at an Aboriginal Resource Tax. Then thoughts on the implications of some of these arrangements for Indigenous communities are added. Finally, as a first-time community researcher, I've provided some notes from the field that describe my time working with Skeetchestn and the SSN and the experience and knowledge gained.

### 6.1. Sovereignty and Self-determination

Before beginning this section of rights-based discussion, it is important to make note of critiques on rights-based discourse. A common argument with respect to this discourse is that strategies premised on state recognition of Indigenous self-determination has shortcomings in their ability to wholly encompass the principles of self-determination (Corntassel and Bryce, 2012). This discussion acknowledges that Indigenous self-determination is a conscious act, an assertion of one's identity through everyday cultural activity, and looks only to engage in rights-based discourse in the discussion of Indigenous government action through the resurgence of self-determining institutions. This is one part of a larger whole that encompasses (but is not limited to): Indigenous grass-roots community resistance to natural resource development (see Secwepemc Tiny House Warriors), language revitalization action (see Billy, 2009), Indigenous food sovereignty movements (see Matties, 2016), and the decolonization of urban environments (see Hildebrand, 2012). While all of these are self-determining activities that facilitate Indigenous resurgence and expressions of sovereignty, they are outside the scope of this discussion.

The purpose of this section is to consider the current Aboriginal and title rights jurisprudence that exists in Canadian law and how this is or can be exercised in practice

to influence resource development within asserted Indigenous territories. As Murphy identifies, there is a wide gap between the theory and practice of Indigenous self-determination (2005). This is primarily due to the historical relationship between the Crown and Indigenous peoples, as their rights and interests have been systematically oppressed in favour of Crown interests such as alienation and assimilation (Murphy, 2008). The Canadian political and judicial conversation regarding this relationship has been considering the idea of reconciliation as a path to rectifying the past and current harms Indigenous people are subjected to, and as a way to clarify Indigenous and non-Indigenous relations with each other and the land we all occupy. In providing clarity to this relationship, Napoleon touches on the fact that “the Canadian state is not going away and the past cannot be undone” (2007). This sentiment is bluntly reinforced in the *Delgamuukw* decision by Justice Lamer’s statement, “let us face it, we are all here to stay” (1997). Now the question remains for all of us, ‘how do we reconcile land and resource interests in a post-colonial Canada’, or as Napoleon asks, “Who are we beyond Colonialism?” (Napoleon, 2007).

Canada, on May 10<sup>th</sup>, 2016, officially adopted UNDRIP “without qualification”, as Indigenous Affairs Minister Carolyn Bennett stated, “We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution” (Bennett, 2016). How Canada chooses to implement this adoption of UNDRIP and Indigenous people’s right to self-determination will define the future of Indigenous-Settler State relations in Canada. The judicial branch of the Crown has been engaged in defining this future by considering the source of Aboriginal title (and the corresponding rights associated) through decisions from *St Catharine’s Milling* to *Calder* (Nichols, 2015). The source of title from these decisions shifts from something vested in and granted by the Crown, to something that precedes and subsists Crown benevolence (Nichols, 2015; Borrows, 2002). The shift of where title rights are founded moves our legal understanding from the “unquestioning recognition of one sovereign rule to a multiplicity of sovereignties” that must consider inter-societal law (Nichols, 2015). The Court, however, encounters a limitation due to the basis of its own jurisdiction, in that it must accept rather than question the nature of the Crown’s right to underlying title (Nichols, 2015). In his book, ‘*Unsettling Canada*’, the late Secwepemc leader and activist Arthur Manuel also identifies the Court’s conflict of interest on issues surrounding title,

and considers that such matters should be taken under an international tribunal rather than be decided upon by a colonial institution (Manuel and Derrickson, 2015).

With regard to the land title question, the Court, recognizing their limitations, continues to insist that the judicial realm is of limited value for this dispute and urges both the parties to sit down and negotiate (Tsilhqot'in, 2014). Regardless of the SCC's direction, "the dispute simply keeps coming back to the Court. Despite all its warnings and reservations, the Court is left with the task of providing judgment" (Nichols, 2015). The reason these cases continue to find their way before the Court might be, as the literature shows, that negotiated agreements surrounding land and jurisdiction in their current form are lacking. In fact, most Canadian institutions that have been put in place to manage land and resources fail Indigenous people of Canada (Booth and Skelton, 2011b). Thus, for proper reconciliation, the path forward lies in getting past the 'institutionalized sociopathy' of these current structures, systems and negotiation patterns into a place where there is genuine intent behind constructs such as engagement, meaningful consultation and consent. Until the power-sharing issues are adequately addressed, these cases will continue to find their way in front of the court, on a case-by-case basis.

### **6.1.1. Relational Self-determination and Secwepemc Sovereignty**

The literature provides some guidance for practical consideration of self-determination through a relational lens that may serve to enhance negotiated agreements in a manner that reflects Indigenous values, laws and worldviews. In respecting the Indigenous right to self-determination, individual and collective control is given back to Indigenous people through the re-negotiation of their relationship with non-Indigenous communities. This renegotiated relationship centers around the principles of co-equality and mutual consent instead of the status quo of paternalism and domination (Murphy, 2008).

Relational self-determination reflects the practical need for effective decisions under conditions of complex interdependence through shared forums of democratic decision making (Murphy, 2008). The relational model acknowledges the limitations of the theoretical perspective regarding autonomous self-governance in regions of complex inter-dependence. It further suggests the need for multiple points of access to political power and decision-making, including having an effective voice in local, regional and national institutions in order to influence their collective futures (Murphy, 2008).

Specifically, their laws must be incorporated during the negotiation of co-management

arrangements and government-to-government agreements. Interview data collected from KI4 describes thoughts on this subject matter through a Secwepemc experience and supports a practical understanding of relational self-determination:

“There is a precedent in which common law accommodated the French civil code here in Canada. So, there’s that precedent, and it’s often been said that we [Indigenous people] are one of the three pillars of this country and we’re one of the three pillars that are invisible at this time. And so, doing this [accommodating Indigenous law] would make us visible and a part of this country and it would make Canada whole. Or, like our Chiefs stated in 1910, it would be a way to make Canada a country that is great and good.” (KI4).

This quote positions Secwepemc sovereignty within the realm of relational self-determination, where there is no political absolutism, but rather a bridging of inter-societal law (Burrows, 2001). Further to this end, Borrows cites the SCC’s acknowledgement that “the only fair and just reconciliation between the [two systems] is... one that takes account of the aboriginal perspective while at the same time taking into account the perspective of the common law” (Burrows, 2001). When KI4 describes how they feel Secwepemc are ‘invisible at this time’, it is a comment on how the current relationship reflects a patriarchal dominance in power, and that, for Indigenous nations such as the Secwepemc to become visible, Secwepemc legal traditions must be upheld to the same level as the French and English sovereigns. This means being held to the same legal standards, set out by the SCC that apply to Secwépemculecw, and specifically to *Pípsell*:

“A pit, a huge hole in the ground in perpetuity also violates what the federal Supreme Court stated, that we as native people could not develop lands that would deny future generations the same experience and use of the land that we had. So, if you dig a big hole, you’re going to obliterate that component – we didn’t want to be party to giving consent to something that violated that Supreme Court ruling” (KI4).

In the view of KI4, if Secwepemc are to be held to one standard for the maintenance and care of their territory as required through the common law assertion described, then all parties should be held to that standard. Also, title Infringement cannot be justified if that

infringement is so damaging to the cultural and legal identity of one group that it will fundamentally change that group's ability to maintain their way of being on the land for future generations. Further to this point is the accommodation of Secwepemc property rights. An example of this within Secwepemc history when dealing with ownership of and access to resources is provided by Ignace,

“Teit cites a case of the northern Secwepemc trying to assert exclusive control of their hunting areas at some point in the past, likely during the early 1800's. The southern Secwepemc challenged them on this, causing the northern Secwepemc to abandon their claim to exclusive ownership of a part of Secwepemculecw” (Ignace, 2008. Pg. 122).

This example illustrates that these communal property rights hold true to the fact that Secwepemc land tenure and access to resources involves joint access and ownership shared by all Secwepemc. In the case of *Pípsell*, where the cultural value of the land is paramount to Secwepemc legal tradition, the same logic can be applied. The oral histories that the Secwepemc associate with *Pípsell* are fundamental to Secwepemc laws that speak on the reciprocal and mutually accountable relationship humans have with the environment (SSN, 2017). The destruction of *Pípsell* will mean the destruction of these principles, to which every Secwepemc, present, past and future, has a right to learn and practice. This is why the SSN declared *Pípsell* a cultural keystone area and designated it a cultural heritage site. Since a cultural heritage study conducted over the territory of *Pípsell* found the Secwepemc to have strong prima facie rights to title, their declaration of cultural heritage must be respected as *Pípsell* is within SSN jurisdiction. Since consent was sought but ultimately not given on Secwepemc asserted title land, the Province and Crown should respect this self-determining act of governance.

## **6.2. Governance Tool Analysis**

This section considers the negotiated agreements entered into by the SSN as well as the various other actions taken with regard to resource development for both the New Afton and Ajax mine projects. These agreements and actions will be analyzed with the use of the Power and Rights Spectrum, the framework that was described section 2.2. Through analyzing document data as well as using interview data collected, we can understand the level of power and influence SSN has over resource decisions

throughout this case example. This analysis will add value to other First Nations governments when assessing their own options in engaging with the Crown or Industry over similar management issues, and offer insight into how Indigenous self-governance is unfolding in practice.

### **6.2.1. Power and Rights Case Analysis**

To begin the analysis, the Mines and Minerals Agreement (MMA, 2009) was created to facilitate the full engagement of SSN in mining activity, and to seek to protect the current and future ability of SSN to meaningfully exercise their section 35 rights within their asserted territory (Mining and Minerals Agreements, 2009). The MMA looks to establish a foundation for shared decision-making, a “clear, certain and timely process for communication”, and to incorporate SSN cultural and heritage values into the consultation process (Mining and Minerals Agreement, 2009). The agreement goes on to state that “this Agreement reflects the spirit and intent of the Province’s New Relationship commitments... the Parties acknowledge the need to develop a Government-to-Government process” that will include developing and defining: a shared decision-making regime; benefit sharing including revenue sharing; pre-tenure consultation; post-reclamation and closure; and remediation of abandoned mining-related sites (Mining and Minerals Agreement, 2009). The ‘shared decision-making regime’ discussed is the establishment of a Mines and Minerals Joint Resource Committee that works to address the concerns for SSN at operational and policy levels (Mining and Minerals Agreement, 2009). The committee, made up of two representatives from each party, address operational rules regarding mineral exploration, mine development, operations and closure, compliance and enforcement as well as policy development and legislative review (Mining and Minerals Agreement, 2009). The Agreement also sets out a knowledge sharing protocol and a consultation approach that has been agreed to by both parties. The consultation approach considers three stages of consultation depending on the nature of mining activity that is set to take place as well as the sensitivity of the area that the activity will take place on (Mining and Minerals Agreement, 2009). This activity and sensitivity analysis follows the consultation-accommodation framework that was set out in *Haida* (2004), in that increased impacts require an increased level of consultation. This framework however, does not address a scenario in which consent must be obtained by the Province for specific sites where

undetermined title rights are affected. The Stage 3 engagement protocol outlines several steps for government-to-government consultation, including joint-fact finding regarding: culture and heritage, environmental impacts and mitigation, socio-economic impacts and mitigation, reclamation and closure, permit development benefits sharing, ethnographic research report regarding strength of claim assessment and accommodation measures. Rather than a consensus based method, the Province decides how it will use the information gathered when making a decision on a mining application; then SSN has an opportunity to respond. Further, this protocol does not address what process would be taken if SSN title was to be found by the strength of claim assessment.

This Mining and Minerals Agreement sets out a good-faith protocol and framework to negotiate and develop resource agreements for specific mining projects as they are proposed within SSN asserted lands. The nature and spirit of the wording of this Agreement maintains aspects of a co-governance agreement based on shared decision-making. However, there are obvious limitations to SSN's ability to influence decisions. In writing, it would seem as though power is shared between the SSN and BC, with the creation of a Joint Resource Committee with the mandate of addressing both operations and policy of mining activity in the SSN territory. The higher order rights that are discussed by the Joint Resource Committee involve the planning and management of mineral development from exploration, through mine development, operations and closure, to post-closure remediation activities. However, the abilities of this Joint Resources Committee only go as far as providing recommendations to the Ministry of Energy, Mines and Petroleum of BC, which drastically affects the power afforded to SSN in this agreement. In considering the MMA on the spectrum of power for negotiated agreements, it is evident that certain actions lay along the spectrum, but only reach a collaborative governing structure. The MMA allows for SSN contributions through information sharing mechanisms, and there is interest in incorporating Secwepemc knowledge and laws into consultation processes. SSN is able to exercise its interests through consideration of collective-choice rights (see Schlager and Ostrom, 1992) that require consultation or accommodation where necessary, as outlined by the Agreement's consultation and accommodation framework. The limitation of the MMA in providing decision-making authority for SSN lies in the fact that the Joint Resources Committee operates in an advisory capacity, providing recommendations, which the BC government can reject through justification. Further, with regard to the highest stage of

consultation (stage 3), the Province ultimately holds decision-making authority on how to address a mining application. Therefore, the strength of their power is limited to the description of a collaborative management scheme upon the Power and Rights Spectrum.

Shortly after this Agreement was finalized, New Gold began a negotiation process with SSN as per the Mining and Minerals Agreement protocol. Early engagement by New Gold was cited as an important step in building a negotiating posture based on trust and mutual respect (AIBC, n.d.). Through allowances resulting from the MMA, the SSN secured its role in the Mining and Minerals Permit process, allowing it to be a part of the planning process for the operation, closure and reclamation of the mine (AIBC, n.d.). As KI4 discussed, being a part of the permitting process was important for SSN leadership as it allowed them to be a part of the decision-making of the mine from the very start of the project. Again, their ability to influence decision-making with respect to participating through the provincial permitting process may be seen as a placation of SSN's interests, as their involvement was relegated to an advisory role through the Joint Resources Committee. In 2008, SSN and New Gold reached a Partnership Agreement, setting out rules regarding communication, conflict resolution and benefit sharing (KI4; AIBC, n.d.). A Joint Implementation Committee was set up with equal representation from SSN and New Gold as well as the Environmental Manager from the Project site, where issues are discussed and worked through (KI4; AIBC, n.d.). A Chief's Table was also created, seating both the Skeetchestn and Tk'emlups Chiefs as well as the New Gold CEO, that meets quarterly to discuss the project's progress and deal with any issues that persist from the Joint Implementation Committee (KI4; AIBC, n.d.). In this case, it is clear that the stance and posture taken by the proponent was extremely important in ensuring the values and interests of the Indigenous community were addressed in a timely manner, and accommodated to the satisfaction of all parties. All parties agreed that trust and open communication has been the most important part of the implementation process (AIBC, n.d.). KI4 notes that "it hasn't always worked as planned or thought; we've fought tooth and nail all along, and still do, but that is the arrangement that we have" (KI4). It would seem, especially considering this agreement's third iteration is currently being re-negotiated, that the parties are trying to satisfy each other's interests and concerns on a consensus basis, with higher levels of accommodation. It is likely due to the need for continuous interaction through the lifecycle of the project that New Gold sees value in



seeking consensus or accommodating to a point of satisfaction when operation or management issues are raised by SSN.

KGHM Ajax Mining (KAM) began preliminary negotiations with SSN regarding a mining project located near Jacko Lake, which has been identified by SSN as an important cultural and spiritual site (Secwepemc Nation, 2015). These negotiations followed consultation protocol set out by the MMA and both parties signed an Exploration Agreement as the project assessment progressed (KAM, 2015). SSN concerns surrounding the impact on Jacko Lake as well as a hunting blind complex located in the surrounding site area were voiced immediately, and through numerous consultations KAM attempted to alter the project where appropriate (KAM, 2015). However, the most recent plan alteration involved the destruction of the north arm of Jacko Lake, an impact that SSN believed to be too great a concern (Secwepemc Nation, 2015). It became clear to SSN that concerns were not being appropriately addressed when KAM submitted and BC approved a Notice of Work order to begin initial exploration around the site, against SSN's Joint Resource Committee's recommendation (Secwepemc Nation, 2015). This example indicates the limitations to the co-management ability afforded to SSN in the Mining and Minerals Agreement. In May 2015, the Environmental Assessment office completed a "strength of claim" assessment of SSN's Aboriginal and title rights within the project footprint and surmised that a strong prima facie case could be made for both aboriginal rights and title (Secwepemc Nation, 2015). As noted by KI4, SSN asked the province to declare the land in questions as SSN title land. However, the Province refused. SSN then decided to exercise its own sovereignty in the absence of Provincial acknowledgement of their rights. SSN made their own title declaration over the territory and decided that court action was the best available option to exercise power and get an injunction to stop the project's progress (Secwepemc Nation, 2015). Next, SSN developed their own Assessment institution that decided the project would have too great of an impact on their culture and livelihoods. SSN then made a declaration that the land known as *Pipsell* is now a cultural heritage site. Considering these actions through the Power and Rights Spectrum, SSN exercises relational sovereignty in this case, showing that they have title until proven otherwise, making land use management decisions to protect the territory from development. This case must still play out within the Courts, but if SSN is successful they will entrench their title rights over the project site.

## 6.2.2. Tools for Translating Rights

Cultural heritage studies (CHS) are valuable tools in recognizing Indigenous title and rights, as they are used to identify traditional and successive lower order rights (use, access, withdrawal) and higher order rights (management, exclusion). In the Ajax case, a more comprehensive heritage study was used by the SSN to show that they maintain strong prima facie rights and title over the area in question. This provided them with the confidence to submit their notice of claim seeking a declaration of aboriginal rights and title, damages with respect to infringements of those rights and title and an interim and permanent injunction to stop the Ajax Mine project (Secwepemc Nation, 2015). This specific CHS identified *Pípsell* as a cultural keystone place, where oral histories associated with *Pípsell* provided accounts of Secwepemc law that outline the reciprocal and mutually accountable relationships between humans and the environment including land, water and atmosphere as well as the animals and earth processes that interact with these resources (Secwepemc Nation, 2015). These oral histories, specifically the Trout Children Story stemming from *Pípsell*, explain the deeds of Secwepemc people on the land and describe a relationship of caretakership with respect to the water, land and atmosphere surrounding *Pípsell* (for more regarding the significance of this site, see Secwepemc Nation, 2015). It is vital that the CHS is holistic in nature, taking in all seasonal accounts of activity and usage on the land in question, as suggested by the case study interview from KI4 (regarding stones and bones studies versus a comprehensive study) and concluded by Booth and Skelton (2011b) in their discussion regarding the limitations of Traditional Use Studies conducted by the BC government for Environmental Assessment.

KI4 further acknowledges the value of cultural heritage studies:

“But we didn’t do a cultural heritage study [on New Afton land base], we’re now trying to lobby to do a cultural heritage study on the new gold mine site even though it’s a brownfield mine” (KI4).

This quote shows that KI4 recognizes the importance a holistic heritage study provided in the Ajax case, and in order to re-evaluate the decision-making ability over New Afton, a cultural heritage study for that site may provide greater claim to rights infringement and thus a greater need for the Crown to accommodate. This accommodation would come

through greater decision-making authority provided to SSN and potentially more financial compensation for the infringement.

Threat of court action in this case study also proved to be an effective method that influenced SSN's power in negotiation processes. As KI4 described, the Province and New Gold were ignoring the SSN during the preliminary stages of scoping the New Afton mine due to the areas status as a brownfield mine site. It wasn't until Kukpi7 Ronald Ignace threatened court action to core investors in the project that SSN finally were consulted, resulting in the MMA and the ECDA with the province, and the Participation Agreement with the proponent.

Pinkerton (1992) also identified the creation of coalitions and issue networks as a key component of ensuring rights are translated into co-management practice. The use of coalitions and issue networks also proved to have some influence in this case study. SSN was formed as a modern governing coalition historically known as the southern division of the Secwepemc nation. They also used organizations such as the Assembly of First Nations (AFN) and the Union of BC Indian Chiefs (UBCIC) to assist in persuading the province to negotiate a fair and equitable resource deal with SSN over the NEW Afton project. Further, the SSN leveraged their position within these networks to garner support from local and Canadian organizations that support their declaration to *Pipsell* and the Assessment Process they created to decide not to give their free and prior informed consent to the project. These organizations have submitted comments to the BCEAO to take into consideration when evaluating their joint-review decision on the Ajax project (KI4).

Concluding the Power and Rights Spectrum analysis of the Secwepemc case study, it is clear that First Nations governments in BC like the SSN experience tremendous difficulty when asserting their rights and ensuring those rights are adhered to by provincial and industry actors. While the general trend over the time period from the beginning of the New Afton Project until present has been positive in SSN gaining more decision-making power in resource decisions, there is still a limitation within negotiated resource agreements regarding decision-making authority that forces SSN to take more extreme measures such as court action. Although these arrangements have notably provided more participation within decision-making processes than typical IBAs might provide, the negotiated agreements made with the Province, such as the MMA, fall into the

collaborative management portion of the spectrum. Further, there is no government-to-government protocol that defines consensus based decision making for land that both governments claim title over, severely limiting the ability of these governments to reconcile interests over resource development for this territory, as the Province continues to make decisions regardless of SSN's opposition. Self-determination requires respect for Indigenous consent, specifically on decisions that will have major implications to lands that are culturally significant, such as *Pipsell* is for the Secwepemc. In order to address this within negotiated agreements, the aspect of First Nations sovereignty must be built into the consultation-accommodation protocol where respect is given to the governance of a First Nation that has a strong claim to title territory.

### **6.3. Economic Rights and Royalties**

This section considers the basis for Indigenous people's right to develop an economy in a manner that is from their land-base, as SSN re-evaluates the current methods of collecting royalties from resource projects within their territory. Further, the Royalty models described in the results section are discussed and then some thought is put toward the considerations of an Aboriginal Resource Tax (ART).

#### **6.3.1. Basis for Indigenous Economic Rights**

In order to build a case for tax jurisdiction, SSN and the First Nation's Tax Commission are considering the basis for economic rights to stem from their right to self-determination and self-governance, but also from title ownership over land and resources.

Article 3 of the UNDRIP states that:

“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNDRIP, 2007).

Elaborating further, Article 4 of the Declaration states that:

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local

affairs, as well as ways and means for financing their autonomous functions” (UNDRIP, 2007).

Although UNDRIP is not a binding document, it is evident that an Indigenous government’s right to self-determination includes the ability to pursue economic development, and this development can be used to finance their ability to govern autonomously. With Canada’s interest in incorporating UNDRIP under the Constitution, they should be amenable to this self-determining economic right. BC, as shown in the ECDA and similar revenue sharing agreements, do acknowledge that First Nation’s deserve a share of the revenue generated from mining royalties, with the ECDA share being 37.5% of tax revenue generated from a project annually.

Further to this argument, the SCC has weighed in on the Indigenous right to an economy that is ascertained through Aboriginal title. The Supreme Court has stated in *Tsilhqot’in*, that Aboriginal title “confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; *the right to the economic benefits of the land*; and the right to pro-actively use and manage the land” (para. 73, 2014. Emphasis added). Further in *Tsilhqot’in*, the SCC states that, “[as] we have seen, *Delgamuukw* establishes that Aboriginal title ‘encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes’, *including non-traditional purposes* (para. 67, 2014. Emphasis added).

Aboriginal title grants to an Indigenous group the right to economically benefit from the land, and their ‘exclusive use and occupation of that land for a variety of purposes’ allows for the consideration of economic development through taxation on title land they maintain jurisdiction over. Taxation is not a new concept for Indigenous governments, as First Nations across Canada create by-laws and levy taxes that include real property tax (through the Indian Act or First Nations Fiscal Management Act), sales tax, income tax and certain provincial-type commodity taxes, typically on tobacco or gasoline (INAC, 2014). First Nations taxation on mineral development and similar resources is a logical method for obtaining economic benefit from resource development within a nation’s jurisdiction. While these tax powers apply within an Aboriginal government’s reserve or settlement lands (INAC, 2014), the extension of a resource tax on title lands would fall within that Aboriginal government’s right to economic benefit from title land. This right

also does not serve to limit federal or provincial taxation powers, as current tax powers operate concurrently with these levels of government (INAC, 2014). The concern here lies in ensuring that the level of taxation does not burden a project's profitability so much that it deters investment. Therefore, there must be cooperation between the taxing jurisdictions, creating a necessity for negotiation between the Province and in this case study, the SSN:

"We want to get the government to sit down and talk, to make room in their resource tax for us. You know, what our Chiefs talked about in 1910 is that we talked about a 50-50 share. We're prepared to give up 50% of our homeland to the government, providing that we can keep 50% of it for ourselves. To manage ourselves as a nation. How far we've gotten on this provincial tax, we didn't get 50-50, we got 37.5%. That's not, you know, it's a move in the right direction, but we're looking to push that concept through the idea of the ART [Aboriginal Resource Tax], which if you're looking at one resource, for example [forestry] being \$1 billion annually, we're looking at a substantial amount that would lead to us having a better lifestyle" (KI4).

Currently, the revenue sharing regime initiated by the province and seen in practice through the ECDA, does not recognize SSN's tax jurisdiction. This is one of the goals that SSN is trying to establish. Further, to push the negotiation of a fairer taxing percentage, it would be of value to stress the strong prima facie claim to title SSN has, as determined by the cultural heritage study that has been conducted for the area identified in the SSN's title case (Secwepemc Nation, 2015). As determined by the SCC in *Tsilhqot'in*, it has been made clear that the Crown, and in the case of mineral and resource development the Province, does not possess beneficial interests in lands subject to Aboriginal title (Borrows, 2015). If the SSN's title case makes its way through the court and title is determined, the Province's ability to financially benefit from resource development will be diminished by the title designation, subject to a high justificatory standard (Borrows, 2015). It would be in the Province's interest, and the public's interest, to negotiate a fair and equitable agreement in the spirit of reconciliation and the relationship denoted in the 1910 chief's declaration described by KI4. It is important to note that the issue of private ownership and Aboriginal title has yet to be determined by the Court, which adds greater complexity and even greater implications for this situation as the SSN's claim area includes private property. As Borrows suggests in a discussion

regarding this issue, “private land ownership may have to give-way to unextinguished Aboriginal title and territorial Aboriginal governance of these lands” (Borrows, 2015).

### **6.3.2. Discussion of Royalty Models**

Before further discussing the idea of taxation, the following sections address the various other royalty models that developed out of the results of this case study (section 5.3 of this paper). The discussion here includes further consideration for competitive bidding, project equity, and the complexity of some royalty schemes.

KI3 identified a competitive bidding model as the preferred royalty method for the Province, as the royalty payment adjusts to the profitability of the development project. Further, it is superior in that it allows investors to base their bid on specific regulations and requirements set out regarding the project. This model could easily incorporate further provisions required by the Indigenous government looking to participate in decision-making aspects of the project, providing the grounds for an effective co-governance arrangement with the province. These provisions could include community employment requirements, community contracting requirements, and environmental monitoring and mitigation requirements throughout the lifecycle of the project. This option is dependent on the province’s will to incorporate Indigenous participation at such a high level, but would advance Indigenous participation to a meaningful level. This option should be explored further, as it provides an effective project design framework for resource projects on territory where jurisdiction is declared by both the province and the Indigenous group.

Obtaining equity shares in a project has the ability to significantly affect the financial component of revenue for a community, as profits stemming from shares in the project offer greater returns than taxation [KI2]. Becoming significant shareholders in a project also provides a greater role in project decision-making. There are, however, two major issues with this option, the first being that First Nations’ financial capacity to provide capital investment is very limited, especially when a community’s entire economy is based on obtaining funding through INAC. The second issue is that, by becoming equity investors, the community is taking on greater financial risk than other revenue generating options. The First Nations Major Projects Coalition is an organization that is currently tasked with addressing these two concerns.

Through this case study it is clear that existing royalty mechanisms and models can become quite complex, while the more progressive types of agreements that draw on best practices may consider several revenue streams as part of the financial component of the agreement. For example, the financial component of the silver mine project KI2 discussed included a rate of return royalty on the commodity, a component based on expenditure, and shares within the project. “[T]he financial contributions are done through different avenues. And that’s a more progressive type of agreement, like drawing into best practices” (KI2). While the discussion is about to transition into the creation of an Aboriginal Resource Tax, KI2 cautions that the “ART is one of the ideas out there of generating revenue, but I think if you’re looking at the bigger picture of economic rights, at the end of the day it’s probably going to be a bit of all of these ideas that will generate the most revenue” [KI2].

### **6.3.3. Constructing the Aboriginal Resource Tax**

The SSN view the ability to collect a tax on resource development within their jurisdiction essential to their economic rights as a sovereign Indigenous government. Further, an argument can be made for the ART that would interest Industry proponents as well. First, royalties collected through the ART would address all financial components of the resource project including lump sum payments and revenue sharing components. By eliminating these components and having a set tax rate, the high financial and timeline costs associated with negotiating the financial components of a resource project are also eliminated. This would include proponent funding that provides for community capacity to engage in these financial negotiations, something that in recent years proponents have been trying to reduce (KI2). The ART would also provide a higher level of certainty for projects in SSN jurisdictional territory, a component that is extremely valuable for proponents trying to secure project investment. BC as a place for investment has a negative view due in part to unresolved land claim issues (Heisler and Markey, 2013). The ART would provide a greater certainty in this respect as the ART, working in tandem with their Assessment Review process, would provide the proponent with a greater understanding of what is required of them to propose a successful project.

By choosing to utilize the ART as the method to collect resource royalties, the Indigenous government does limit the ability to cooperatively develop flexible royalty regimes with proponents that could make a project more economically viable. KI2 cites



one example where the flexibility of the financial components of the agreement contributed to their success. With the Voisey Bay Nickel Mine, the Innu and Inuit were asking for a certain amount per year that was too much for the proponent. The Indigenous groups brought in economists with the capacity funding provided by the proponent, and they were able to figure out that if the proponent initially gave the total sum the Nations were requesting and then the Nations lent it back to them as needed, the Indigenous groups could get the money they were asking for and the proponent could write off all the interest for the life of the project (K12). These types of win-win solutions that come out of the negotiation process would not occur with an ART. This might not totally be a loss, however, as K12 notes that the funding provided to help find the solution in this case may not be provided in future cases: “unfortunately one reason it’s not happening so much is that proponents over time have really been successful in narrowing the budgets and the capacity funding they give to the First Nations in order to negotiate” (K12).

Having a set tax rate may also assist in stopping unprofitable or financially borderline projects from getting approved, as an economic screening mechanism:

“If you can’t afford to carry a project then maybe you have no business trying to build a mine. In some ways, you sort of do want to push out the financially fragile projects and it could be a way of screening. Right now, we’re at the beginning of an exploration mining cycle ... and of course there’s all sorts of money floating around and all sorts of companies that are proposing projects, but when it comes down to whether or not they have the financial wherewithal to build a mine or even finance a substantive exploration, that number probably dwindles quickly” (K12).

This would mean a smaller focus on development projects that produce low financial returns within the territory and allows the Indigenous group to direct resources towards the most economically viable applications and most promising sustainable projects.

The ART will have to be structured based on the resource commodity and industry, as the financial components of royalties are tied to the value of the commodity that is being extracted. “For example, in forestry, you might tie it to the price of raw logs on export. If it was gold you might choose the number, a sweet spot for the value of gold and have a

base number like 5% and then the higher [the price of] gold goes the higher the percentage you get. So, you could also look to set the average around 8-12%” (KI2). In developing the tax rate for each commodity open to development in the SSN territory, research should go into the value of the commodity in international markets, and consider tax rates for those commodities in various jurisdictions across Canada and other resource-based economies.

Further, KI2 cautions that the ART should not be tied to the provincial or federal tax system, as it could be subject to poor policy:

“That whole 50% of what the Crown gets is a pretty unsophisticated approach. It’s understandable but it’s based on a false assumption that the Crown is taxing well; the Crown has a lot of ways to undermine their own tax regime. [For example] you get the BC liberal government undermining its own tax system to encourage mining investment. And then the [First Nation] is negotiating for half of an ever-shrinking number that the Crown itself can manipulate even further by deciding to give the proponent a bit of a tax break. That’s why just looking at the way the Crown taxes is not necessarily the best approach” (KI2).

Based off the results and discussion from the interviews an argument is made for the ability of SSN to create a resource tax as a way to collect economic benefits to which they are entitled within their jurisdiction. For this resource tax to be effective, the interview data suggests that the tax rate be graduated, but research must be done for the SSN when setting individual commodity rates. Implementing the ART will also involve further negotiation with the Province of BC to ensure projects are not over taxed as to deter future project investment.

## **6.4. Community Implications**

The following section considers salient themes stemming from the key informant interviews, which illustrate important implications for Indigenous communities regarding land and resource management issues. These themes include: community development and royalty impacts, legal implications that have yet to be addressed dealing with identifying the true title holder, building community consent mechanisms and land registry issues. These themes are integral additions to a conversation regarding

Canadian-Indigenous legal issues surrounding land title, reconciliation for Canadian and Indigenous communities, and resource royalty flows that affect community welfare.

#### **6.4.1. Community development and Impacts**

Integral to the discussion of economic rights for Indigenous communities is the understanding that fair and equitable royalties provide communities with autonomous financial capacity. The ability to obtain economic benefits from the land allows the community to build their own economy as they work towards self-governance, ending the forced dependency that many First Nations experience through the Indigenous and Northern Affairs Canada (INAC) system, imposed by the Indian Act. This burden of dependency is further described by Cornell as one of the heaviest burdens to bear, resulting from the expropriation of lands, imposed social welfare policies and aspects of the historical relationship between First Nations and the Crown, including residential schools (2006). This collective dependency undermines political autonomy and limits their ability to generate revenues necessary to support their self-governance (Cornell, 2006). The interest in stepping outside the Indian Act and shedding this burden is exemplified by KI4:

“What we need to do as a people is that we don’t have, right now... my community doesn’t have an economy. As a matter of fact, I say that I feel like the Indian Act is nothing but a gerbil wheel, where you’re trying to run faster and faster to get more government hand-outs. We don’t have our own economy, we don’t have our own institutions and this is why we’re looking for an exit strategy” (KI4).

In escaping this ‘dependency leash’, First Nations must develop ways to meet two critical economic goals: provide economic opportunities for First Nations citizens, and secure funding for First Nations governments (Cornell, 2006). Royalties stemming from responsible resource development is the exit strategy the SSN is turning to, as KI4 discusses the softwood lumber industry:

“You know in the free trade agreement with softwood lumber, where the province is paying a [tariff] to the US because the US is arguing that lumber is subsidized. [So, Secwepemc leadership] met with the political attaché, the ambassador to

the US came [to] Kamloops and [SSN leadership explained] that the softwood lumber [was] being subsidized because the lumber, the logs, were being stolen off of us. In essence, that's the subsidy that the BC government has on softwood lumber. So [SSN leadership] met with the new Finance Minister of the Province to say 'why are you paying that tariff to the United States; stop paying them and pay it to us. Then we will go to the US and say this lumber is no longer subsidized because they're paying us for it.'" (K14).

This is yet another example of theft of land and resources that must be rectified if meaningful reconciliation is to be achieved. The softwood lumber dispute is one argument that SSN is making in their effort to build a sustainable economy that will allow them to build their own infrastructure, without reliance on INAC funds: "Paying for our own schools, paying for our own medicines, paying for our own way in the world so to speak, so that we don't have to always go to the government hat in hand" (K14).

Resource royalties, when responsibly administered, have the capability to help alleviate many of the socio-economic issues that Indigenous communities face. K12 points out that, although royalties aren't going to fix things immediately, they are changing community economies, and this has the potential to bring about substantive socio-economic change for community members.

"I don't know if they're transforming communities but they're changing the economies. We have to figure out how we're going to deal with the socio-economic issues of our communities that come from boom and bust economies, but on the whole, it's a better problem to have... than poverty. Being in poverty and having socio-economic issues, there's nothing to fix them" (K12).

While resource development allows for significant economic capacity for many First Nations communities, without strong institutions, and further, community trust in those institutions, large royalties flowing into communities can have a serious negative impact on community cohesion.

"It all depends, how effective [royalty agreements are] has to do with the governance of the nation. It's obviously still unquestionable what the Harvard Project concluded, that strong governance is the main reason that Indigenous people succeed or fail. No matter how large the ART is if it ever does happen,

how the money is spent is going to be the most telling of whether or not the community succeeds” (K12).

The pervasiveness of the *Indian Act* weakens Indigenous governments as political divisions play out between INAC imposed band governments and traditional or hereditary governments that existed prior to colonial imposition. This is a serious hurdle in many communities across Canada, as community members question the legitimacy and governing power of either institution. This complex problem can be exacerbated with an influx of royalty funds, as K11 illustrates with the proposed Pacific NorthWest LNG project in Tsimshian territory:

“The [Liquefied Natural Gas plant] proposal first came to light within the region in 2012 and the federal government essentially told the company to consult with the various INAC bands on the coast, which they did and gave them significant amounts of money. And [the hereditary Chiefs, later] in the process said [they] want to be consulted as well, but the company refused [because they invested time and money in the bands, and gained their consent]. But what’s been interesting is what the effect of those millions of dollars has been on the communities. Peoples’ ideas of what should happen to the money... produces an enormous amount of disruption and dysfunction within the community. And for example, ... a very strong group of hereditary chiefs have suffered an enormous amount of abuse from those that control the money because... [the band] saw [the hereditary Chiefs] intervention and applications of judicial review as potentially disrupting that flow of money. And so, in my mind, the IBA’s create as much dysfunction in a community as the Indian Act, as residential schools, banning of the potlach, 60’s scoop, anything else you care to name that has been done to Indigenous people in the name of colonialism” (K11).

The ability to avoid community division and disruption caused by the influx of royalties is worth considering when negotiating the structure and function of the royalty regimes. “If money is going to flow into a community, much more importantly, thought has to be in terms of how are decisions made as to what that money is spent on, who gets the benefits of it, and so on and so forth” (K11). These considerations are becoming embedded into provincial negotiated agreements to ensure that community development goals are outlined by Indigenous governments and are actively being pursued with

royalty finances. This is seen in the ECDA signed by the SSN, where in section 6.2(d) states:

“...the Annual Payments provided under this Agreement will be used to pursue activities that will help it to enhance and improve the social, cultural and economic well-being of its communities, including governance capacity...”

Section 6.3 further outlines SSN’s agreed upon responsibility to provide the Province with annual reports regarding how the funds have contributed to community priorities, and that each year after the annual payment is received, SSN must update its community priorities (ECDA, 2010).

While these transparency clauses may seem patriarchal to some, it provides accountability and an expectation for the community as to what those royalty funds will be contributing to. Alternatively, KI1 indicates how royalties from some IBA’s flow into communities without such clauses, “the money ends up in the hands of relatively few number of people within the community. And if you actually look at the IBA[s], the cheque is handed over to the band council and then they say nothing about what happens to the money after that so it becomes, essentially, a patronage slush fund” (KI1). KI2 adds that the destination of royalties stemming from IBAs are the responsibility of the Indigenous leadership but financial trusts are typical industry practice: “Usually it’s like a hybrid, the lump sum of the money goes directly into social program investing, and the actual revenue stream almost always goes into some form of trust or some sort of community fund [KI2]. Accountability to the community for the future of their funds should be something built into these negotiated agreements, “because [if] you’re looking at 20 year projects, the current leadership has no idea if they’re going to be there past the next electoral term. If they have any foresight, they’ll put it into a trust” [KI2].

#### **6.4.2. Legal title holders and building community consent**

While discussion surrounding legal rights and consent has primarily focused around the Crown or Proponent’s obligation to obtain consent, there is also the community side of this discussion surrounding who has the legal right to give consent, and how is that consent given. This is “one of the biggest questions in Aboriginal law moving forward” (KI2) states. Who is the actual title holder, the band government or the traditional

government? And further, “do the legal title holders have the organization and the means to actually put that into effect; to figure out how we give consent?” (K11). Most cases seen before the courts are being argued on behalf of the Nation and its people, but is represented by the band government or band leaders.

When discussing the advancement of Aboriginal rights within common law, K12 acknowledges this dilemma within the courts, as “Aboriginal rights are determined [in the courts] on a First Nation by First Nation basis, but they don’t actually determine if the party in front of them is the First Nation or if it’s just an Indian band. Right now, aboriginal law is developing with a pretty significant amount of willful blindness” (K12). This is a major area of study moving forward, and “it’s probably going to be the most controversial area of law” (K12). The solution should be resolved by self-determining First Nation’s communities and leaders, but “the government and proponents probably have to identify [this controversy] as a substantial legal uncertainty before negotiating deals with the Indian band” (K12). This consideration did not occur in the Tsimshian-LNG example previously described by K11. However, K12 provides a case where the proponent was much more proactive in obtaining consent by engaging both the hereditary chiefs and the band: “It was in the Carrier Sekani area; they have different houses and they had each individual house leaders sign admission for the band. [Specifically], the house leaders that were relevant [to the project] because [the proponent and community] really coined down on geography” [K12]. This type of proactive CSR and consent-seeking behavior should be viewed as a best practice for government agencies and proponents alike, as the question of title holder has yet to be answered, but “it may well be the case that in ten or fifteen years from now aboriginal title can only be held by hereditary leadership” [K12]. While the solution is still yet to be determined, K12 provides some insight into how consent mechanisms might develop: “whatever the conclusion is, I mean without any legal certainty, the answer will likely be a hybrid. Like that [Carrier Sekani deal] was probably the best way to deal with it, having them both sign off because the law has created a real ambiguity about it” (K12).

Addressing the controversy of who holds legal title is an area to be addressed within the courts, but must also be determined within Indigenous communities. As K11 discusses, “I think far more important than getting the legal okay from the Supreme Court to exercise title, [is] how do you do it on the ground? ... The issue of legal title has very little effect if you’re not well organized on the ground to implement it in a way that holds the

community together and allows it to function” (KI1). The Secwepemc case study offers an example as to how Indigenous communities can organize and develop community based institutions that have the ability to implement consent through the development and use of their Assessment Process. While only having the power to provide a recommendation to the SSN joint-council, and the Skeetchestn and Tk’emlups band governments on their KGHM Ajax decision, the process itself was inclusive and widely supported by the Indigenous and non-Indigenous community alike. The process was so successful in fact that there is interest in continuing to use it on future resource management projects within the SSN jurisdiction, where the assessment process operates as the first governance tool to determine whether consent is given to the project, and then the ART would be applied to the project if consent is given (Personal correspondence SSN Negotiator, 2017).

While the SSN Assessment Process provides a positive example of a community based consent mechanism, KI2 touches on an important factor to consider as other Nations may not have the financial capacity to create such an institution for their own communities: “Developing assessment processes is sort of a trend right now, and it’s only for those that can afford it. [SSN, Tsleil-Waututh and Squamish all] have their own revenue streams, and they’ve got the money and wherewithal to be able to do these things” (KI2). Financial limitations again remain a barrier for Indigenous communities looking to effectively engage in decision-making processes for resource projects that affect them.

### **6.4.3. Title land registry**

While title has and will continue to be determined through the Courts and through negotiated agreements, First Nations governments are trying to develop ways to ensure that the title land maintains its unique status from now and into the future for the community. Aboriginal title rights, as defined by the SCC are unique – they’re collective but hold similar properties to fee simple land. They must be categorized differently. KI4 describes the issue that the Tsilhqot’in government are tasked with now that they’ve received title designation from the SCC:

“In BC, the Tsilhqot’in’s, they want title to their land but they have nowhere to hang it up. The only place that they can do it, and the province is trying to



convince them, to transform their collective title to fee simple title and register it to the provincial land registry. But that fundamentally alters their rights to the land. And that again is just unacceptable. So, we need to look at how to change that” [KI4].

The protection of the unique nature of title land should be seen as the protection of the community’s collective rights to that land, that must not be altered by western constructs of land ownership. How this will be accomplished is something that First Nations governments are still working out, but a promising avenue may involve “establishing our own national land registry that would recognize our collective rights” (KI4). KI4 suggests a reconsideration of how section 91(24) of the *Constitution Act, (1982)* has been interpreted. S.91(24) provides the federal government with authority over ‘Indians and lands reserved for Indians’. If this section is reconsidered with section 35 of the *Constitution Act (1982)*, that ‘recognizes and affirms’ existing aboriginal and treaty rights, then it can provide a broader interpretation of how lands could be held. “We could interpret [that by hanging] the principles of the [Sir Wilfred Laurier Memorial of 1910] on there as the way we want to see that phrase interpreted” (KI4). This interpretation could allow Indigenous governments the ability to create Indigenous institutions surrounding title land management, protecting the unique rights the collective community holds.

The complex situation regarding true title holders and title land designation are further legal questions integral to resource and environmental management of Indigenous territories that require future consideration. The legal determinations will have immense implications for how Indigenous institutions will engage in and manage their resources for economic and cultural purposes.

## **6.5. Notes from the Field**

This section provides some commentary as a first-time community-based researcher that describes a chronological detailing of how the project evolved through my interactions with the community. I’ll then elaborate on the challenges and lessons learned from this CBR experience, drawing conclusions that link to findings from the discussion and previous literature.

I began this research project investigating the Impact Benefit Agreement literature, as these arrangements have typically been the most widely used methods to ensure that resource royalties flow back into Indigenous communities. This investigation stems from a research interest in Indigenous community and rural community economic and sustainable development. The project began with an introductory meeting with Skeetchestn leadership. When our discussion began, it became evident early on that the leadership were no longer interested in IBAs, as they felt that IBAs could not accomplish what they wanted to achieve. SSN has moved passed these types of agreements because they want to have greater decision-making power over what happens to their lands and resources. This conversation moved to the Economic and Community Development Agreement from the New Afton mine project, looking at the 37.5% share of royalties they were able to negotiate. While SSN saw this as a positive step forward, they wanted to build an argument for a fair and proper share of what the Province and Federal governments collect off the resource extraction industry in their territory. The conversation then transitioned to the Ajax project and the Assessment Process they had developed, as our meeting was just days before the week-long panel review was set to take place. There was interest from all parties at this meeting to move forward with a project that considered their larger aspirations.

After our initial meeting, I began to realize that the project had changed from specifically looking at IBAs and royalty flows to focus on what the community leadership was really trying to achieve: sovereignty and pathways to self-governance. This was being done fully through the development and implementation of their Assessment Process, to coincide with the Federal and Provincial Environmental Assessment processes.

The next step of the research project involved obtaining ethics approval from the University's Research Ethics Board, which provided significant timeline delays due to administrative delays and REB requirements. While I do appreciate the extra steps necessary to document how the study protocol complies with the provisions of Chapter 9, TCPS2, I do raise questions about the necessity of written formal letters required from the band governments to allow the researcher to engage in the research planned in consultation and coordination with that band government. I'm especially critical of this when verbal consent had been given and continued to be given throughout the planning process and during the interview question development period, which was done with band leadership. Further, the significant community consent questions raised in section

6.4.2 of this discussion ask fundamental questions regarding the REB protocol, such as which community governing body should actually be consulted for community consent regarding research projects. Similar to the experience of proponents when engaging the community during the exploratory phase of a resource development project, researchers must be cognizant of the community leadership dynamics at play within their specific community. While in this case study the band governments are the governing body legitimized by the community, this may not be true in areas of Northern BC such as the Gitksan territory, or in my home community of Six Nations in Ontario.

Project delays continued while I was scheduling a time to conduct interviews, as British Columbia experienced one of the worst wildfire seasons on record. As a researcher not living near the community, it was best to monitor the situation and only reach out when appropriate, as everyone in the community was preparing for evacuation. I took the opportunity to reach out to Skeetchestn leadership to express my concern for the community and let them know that my priority rested with their safety. We quickly agreed to push the interviews back until after August when the wildfire season would hopefully be less burdensome. Shortly after this conversation, the Skeetchestn community was evacuated.

This research experienced several challenges and setbacks throughout the various stages of the project. First of all, scoping of the research project should have been done in accordance with the interests of the community from the start, and although the initial literature review on IBAs and EAs provided valuable background knowledge and content for the project, time could have been more effectively focused from the start if the SSN joint-council had been consulted near the beginning of the exploratory phase of the project. This brings in another point regarding the various governing bodies that require consent within Indigenous communities. While Skeetchestn expressed interest in having research conducted on the Assessment Process, the SSN joint-council, that was made up of both Skeetchestn and Tk'emlups members rejected the project proposal due to proprietary ownership concerns. Understanding from whom and where consent should be obtained within a community is a valuable learning experience, along with understanding what is within the scope of the trust relationship established by the researcher with the community. Finally, understanding that the researcher and their timelines must be flexible when conducting community based research is a paramount lesson gained from this experience. Due to capacity limitations experienced by First

Nations communities, it is very likely that a community-based research project will be relegated to a lower level of priority. In this specific case, the SSN government were dealing with ongoing negotiations with KGHM, Kinder Morgan and several other exploration companies, while conducting their Assessment Process review and ensuring community services and needs were being met. Further, community crises should and will always take first priority, and these types of situations, as seen in this case regarding the wildfires that caused Skeetchestn to evacuate, are delays that must be accepted and should demand flexibility from rigid timelines imposed by the Government or by the University.

## Chapter 7. Conclusion

To conclude this study, Chapter 7 highlights key findings from the case study and highlights important research questions that have extensive implications for Indigenous governance of land and resources. The Secwepemc case study offers several key findings that help to contribute to our understanding of Indigenous governance issues in resource management:

1. The nature of negotiated agreements for resource projects has transitioned from an Impact-Benefit transaction to forms which allow more Indigenous participation. Mineral development agreements in BC are still unbalanced in terms of decision making authority, where the BC government offers the ability for SSN to collaborate on decisions, but only in an advisory role. This forces SSN and other Indigenous governments to claim rights they exert through the court system to force the government to respect their land and resource interests.
2. Utilizing tools such as cultural heritage studies, threat of legal action and coalitions and issue networks can assist Indigenous governments in gaining more negotiating leverage and influence decision-making for resource development projects. Further, they can help identify their level of rights and be used as evidence to support claims to land and resources.
3. Resource royalty regimes vary in complexity and returns across industries, but can be an option for Indigenous communities looking to create their own economies separate from INAC dependence. An Aboriginal Resource Tax on resource development projects is one way of exerting Indigenous economic rights. For the ART to be effective, it must consider the value of different commodities in international markets as well as tax rates in similar jurisdictions for each differing commodity. The ART should also be graduated, so that financial returns align with project profits that are susceptible to market fluctuations. Simply tying the ART to provincial and federal tax regimes might not be the best course of action as it would be susceptible to poor policy and tax incentives that limit fair returns.

4. The development and implementation of SSN's Assessment Process is a compelling example of how Indigenous communities can organize and develop community-based consent mechanisms for decision-making on resource development issues. Community-based consent mechanisms are important institutions for self-determining Indigenous communities in Canada, and more community-based research into how communities organize consent may offer support and capacity for communities developing their own consent mechanisms.


This study also identified significant questions that must be answered by the Courts, the Crown, and Indigenous communities, to which further discussion in literature may help develop solutions:

1. Numerous interview participants identified that not knowing who the legal title holders are within an Indigenous community is an extremely important oversight when title cases are brought to the Court. This problem persists due to the implementation of the *Indian Act*, which forced western governing systems on Indigenous communities. Now communities are struggling with this division of power and legitimacy, as both the band system and traditional governing system fight over who should hold the communities collective title and rights. The path forward for this crucial problem requires community-based research that hinges on inter-societal legal thought.
2. Land registry of declared title lands is also an area of future community-based research. The unique nature of title lands and the collective community rights they hold must be exemplified in the way they are held within a land registry and should not be limited to western thoughts of land ownership. Community-based research on this topic could assist in the development of Canadian policy that develops Indigenous institutions for holding title land that coincides with provincial registry systems.

Finally, the analysis framework used in this study offers a method for understanding engagement requirements of Crown agencies as well as an understanding of power and rights for Indigenous governments when engaging in resource development negotiations. The framework utilizes the consultation-accommodation approach identified in *Haida*, where the greater the claim to the right being infringed upon, the

greater the power to influence decision-making of actions affecting those rights. The framework then goes further by clarifying questions surrounding decision-making for asserted title land and declared title land. Government agencies on both sides of the negotiating table are trying to determine the implications of Supreme Court decisions and how this affects the way they should be engaging with each other with respect to resource management. Relational sovereignty offers the understanding of balancing competing interests of interdependent actors, in a move toward reconciliation.

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