Navigating Complex Planning Processes: The Experiences of Two Aboriginal Governments with Large Mineral Development Proposals in their Traditional Territories

By

Caitlin Kenny

A Thesis
presented to
The University of Guelph

In partial fulfilment of requirements
for the degree of
Master of Arts
in
Geography

Guelph, Ontario, Canada
© Caitlin Kenny, September 2015
ABSTRACT

Navigating Complex Planning Processes: The Experiences of Two Aboriginal Governments with Large Mineral Development Proposals in Their Traditional Territories

Caitlin Kenny
University of Guelph, 2015

Advisor:
Dr. B. Bradshaw

In the Canadian north, the impacts of large resource developments are disproportionately experienced by Aboriginal communities. Managing a project’s negative impacts and ensuring capture of its benefits by Aboriginal communities is important to their continued well-being. Environmental Assessment (EA), Impact and Benefit Agreements (IBAs), government-to-government (G2G) agreements, litigation, and modern land claims are planning processes through which impacts can be mitigated and benefits can be distributed. There is a need for increased knowledge surrounding how these complex processes are being navigated by Aboriginal communities, and to what end. This research investigates the experiences of the Taku River Tlingit First Nation and the Nunatsiavut Government with proposed mineral development. Through a mixed methods approach, records of each government’s experience were developed to identify how planning processes were navigated, conceptual maps were developed to highlight how the processes interacted, and factors that seemingly influenced the effective navigation of these processes were analysed.
Acknowledgements

This thesis would not exist without the guidance, help, and input of my supervisor, Dr. Ben Bradshaw, and committee member, Dr. Tad McIlwraith. Thank you both.

This research certainly would not have been possible without the help and contributions of the Taku River Tlingit First Nation and the Nunatsiavut Government. The expertise presented in this thesis is thanks to a large group of intelligent and motivated individuals who were willing to take the time and share their experiences: Isabella Pain, Theresa Howlett, Judy Rowell, Chesley Anderson, Tom Sheldon, William Barbour, Tim McNeill, Jim Lyall, Richard Pamack, Veryan Haysom, John Ward, Melvin Jack, Tina Brooks, Susan Carlick, Peter Kirby, Eric Telford, Julian Griggs, Tony Pearse, Mike Magee, Nicole Gordon, and Mark Connor. Your hard work is inspiring.

Importantly, thank you to Tom, Mom, Dad, my cohort, and my friends who supported me over the last two years.
Table of Contents

Chapter 1: Introduction .............................................................................................................................................. 1
  1.1 Research Context ........................................................................................................................................... 1
  1.2 Research Aim and Objectives ....................................................................................................................... 5
  1.3. Organization of the Dissertation .................................................................................................................. 6

Chapter 2: Research Design ....................................................................................................................................... 8
  2.1. Research Scope and Approach .................................................................................................................... 8
  2.2. Methods of data collection and analysis ...................................................................................................... 9

Chapter 3: Literature Review .................................................................................................................................... 15
  3.1. Aboriginal Communities in Canada .......................................................................................................... 15
  3.2. Large Mineral Developments and their Potential Impacts .......................................................................... 17
  3.3. Legal Climate .............................................................................................................................................. 21
      3.3.1. Mineral Exploration Regulation ........................................................................................................ 21
      3.3.2. Aboriginal Rights and Title .............................................................................................................. 23
  3.4. Historic Treaties and Comprehensive Land Claim Agreements .................................................................. 27
  3.5. Environmental Assessment ......................................................................................................................... 29
  3.6. Impact and Benefit Agreements ................................................................................................................. 34
  3.7. Non-Binding Government-to-Government Agreements ......................................................................... 41
  3.8. Post-colonial theory in modern planning processes ............................................................................... 41

Chapter 4: Navigating the Planning Process landscape: The Taku River Tlingit First Nation .... 44
  4.1. Taku River Tlingit First Nation History, Values, and Governance ......................................................... 45
  4.2. Tulsequah Chief Mine Proposal and Environmental Assessment ....................................................... 48
  4.3. Taku River Tlingit First Nation Concerns and Responses ....................................................................... 51
      4.3.1. Litigation .............................................................................................................................................. 53
      4.3.2. Policy Development ......................................................................................................................... 54
      4.3.3. Government-to-Government Negotiations ....................................................................................... 56
  4.4. The Current Status of the Tulsequah Chief Mine ....................................................................................... 59

Chapter 5: Navigating the planning process landscape: The Nunatsiavut Government ............... 62
  5.1. Labrador Inuit History, Values, and Governance ....................................................................................... 63
  5.2. Voisey’s Bay Proposal and Environmental Assessment ........................................................................ 65
  5.3. Labrador Inuit Concerns and Responses .................................................................................................. 67
5.3.1. Policy Development........................................................................................................ 68
5.3.2. Litigation and Protest...................................................................................................... 69
5.3.3. Impact and Benefit Agreement Negotiations (1995-2001)........................................... 70
5.3.4. Issue-Specific Agreements.............................................................................................. 72
5.3.5. Labrador Inuit Settlement Agreement ............................................................................. 74
5.4. The Current Status of Implementation.............................................................................. 75
5.4.1. Government Agreements ............................................................................................... 76
5.4.2. Impact and Benefit Agreement ...................................................................................... 78

Chapter 6: Analysing the experiences of the Taku River Tlingit First Nation and the Nunatsiavut Government.................................................................................................................. 79
6.1. Conceptual mapping of the process relationships and interactions.................................. 79
6.1.1. Process Relationships for the TRTFN and the Tulsequah Chief Mine........................... 79
6.1.2. Process Relationships for the NG and the Voisey’s Bay Nickel Mine............................. 83
6.2. Identifying factors that impacted effective navigation....................................................... 86
6.2.1. External Factors Affecting Results ................................................................................. 87
6.2.2. Internal Factors Affecting Results .................................................................................. 93

Chapter 7: Conclusions............................................................................................................ 97
7.1. Summary of findings......................................................................................................... 97
7.2. Limitations ..................................................................................................................... 99
7.3. Contributions .................................................................................................................. 99

References............................................................................................................................ 102

Appendix A: TRTFN Timeline of Events.............................................................................. 116
Appendix B: NG Timeline of Events..................................................................................... 117
List of Tables

Table 1: Current Project- and Policy-Level planning processes.......................................................... 3
Table 2: Key Documents for the Taku River Tlingit and the Nunatsiavut Government Case Studies.............................................................................................................................................. 10
Table 3: Provincial Environmental Assessment Legislation.............................................................................. 31
Table 4: Summary of frameworks for evaluating Public Participation as used by Rowe and Frewer (2000), Baker and McLelland (2003), Bond, Palerm and Haigh (2004), Noble (2006), and Andre et al. (2006) (Land-Murphy, 2009)......................................................................................................................... 33
Table 6: Examples of Voisey’s Bay IBA Chapters and provisions (Hollett, 2009) .................................... 71
List of Figures

Figure 1: Taku River Tlingit First Nation Traditional Territory in British Columbia (Taku River Tlingit First Nation, 2015) ............................................................ 46
Figure 2: Tulsequah Chief Mine Project Location and Layout (Chieftain Metals, n.d.) ....................... 49
Figure 3: Cover of Hà tátgi hà kustiyxh siti: Our Land is Our Future, a TRTFN guiding document (Taku River Tlingit First Nation, 2003) ................................................................. 55
Figure 4: Wóoshtin Yan Too.Aat land use plan area overlaid on TRTFN traditional territory (Taku River Tlingit First Nation, 2015) ................................................................. 57
Figure 5: Inuit Occupation of Labrador 1771-1784 (modified from Taylor, 1977) ................................. 64
Figure 6: Location of Voisey's Bay deposit (North of 56, 2014) ............................................................. 65
Figure 7: Nunatsiavut Settlement Region (modified from Tourism Nunatsiavut, n.d.) ......................... 75
Figure 8: Planning processes and their relationships in the case of the TRTFN and Tulsequah Chief Mine ................................................................. 81
Figure 9: Planning processes and their relationships in the case of the NG and Voisey’s Bay Nickel Mine ................................................................. 84
List of Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BC</td>
<td>British Columbia</td>
</tr>
<tr>
<td>CEAA</td>
<td>Canadian Environmental Assessment Agency</td>
</tr>
<tr>
<td>CEAA 2012</td>
<td>Canadian Environmental Assessment Act 2012</td>
</tr>
<tr>
<td>CLCA</td>
<td>Comprehensive Land Claim Agreement/Modern Treaty</td>
</tr>
<tr>
<td>EAO</td>
<td>Environmental Assessment Office</td>
</tr>
<tr>
<td>EIS</td>
<td>Environmental Impact Statement</td>
</tr>
<tr>
<td>G2G</td>
<td>Government-to-government</td>
</tr>
<tr>
<td>IBA</td>
<td>Impact and Benefit Agreement</td>
</tr>
<tr>
<td>JCM</td>
<td>Joint Clan Meeting</td>
</tr>
<tr>
<td>LIA</td>
<td>Labrador Inuit Association</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>NG</td>
<td>Nunatsiavut Government</td>
</tr>
<tr>
<td>NL</td>
<td>Newfoundland and Labrador</td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>TCM</td>
<td>Tulsequah Chief Mine</td>
</tr>
<tr>
<td>TOR</td>
<td>Terms of Reference</td>
</tr>
<tr>
<td>TRTFN</td>
<td>Taku River Tlingit First Nation</td>
</tr>
</tbody>
</table>
Chapter 1: Introduction

1.1 Research Context

Issues around land governance, especially associated with the development of natural resources within traditional Aboriginal territories in Northern Canada, have a long and contentious history. Land and resource use have been a subject of conflict between Aboriginal Peoples and European settlers since the arrival of European colonists, and have resulted in “a backlog of aboriginal grievances” based on the impacts of natural resource development (Fidler and Hitch, 2007). At the level of a specific project, these grievances concern environmental and social impacts generated by developers from outside the region and experienced by local communities not simply during development, but for years after the profitable portion of the project’s life cycle comes to an end (Bielawski, 2004). Environmental and social impacts include measurable effects such as water contamination and highly variable employment rates, but also encompass less quantifiable impacts to Aboriginal traditional values and cultures. Historically, these impacts have been driven by ‘boom-bust’ style projects characterized by rapid economic input and extraction over a short period of time (Couch, 2002).

Over and above these project-level environmental and socioeconomic impacts are higher grievances at the level of governance and policy; largely concerning Aboriginal self-government and traditional land use in the current neo-colonial relationship between Aboriginal peoples and the Canadian government. The conflict around sovereignty of Aboriginal nations continues to play out in the Supreme Court of Canada and at government-to-government negotiation tables nationwide (Tsilhqot’in Nation v. British Columbia, 2014; Asch, 2014; Irlbacher-Fox, 2009). While Aboriginal Rights and Title are recognized by the Canadian Constitution, the authority of federal and provincial governments’ decision-making continues to take precedence over that of Aboriginal governments, affecting goals of self-reliance and self-determination (Delgamuukw v. British Columbia, 1997; Assembly of First Nations 2005).

Given the negative social consequences of resource development expressed by Aboriginal communities and explored in literature, there is increasing focus on management of both negative and positive impacts of development in Canada’s north. The intense but finite extractive activity creates change to the physical landscape that contributes to negative
socioeconomic impacts based in emotional, spiritual, and practical connection to place (Kemp, 2009; Gibson & Klinck, 2005). Given that social and economic disadvantages are often experienced among colonized indigenous societies and that Aboriginal communities living closely to the land tend to suffer impacts to the land more directly, managing negative impacts and distributing benefits of large developments close to Aboriginal communities is of great importance to the continued wellbeing of these communities (Anderson et al., 2006; Langton, 2008; Larcombe, 2000; Booth & Skelton, 2011; Gibson & Klink, 2005).

Parallel to the management of project-specific impacts is the ongoing policy-level negotiation of Aboriginal decision-making authority within traditional territories. Incremental progress has been made over the last three decades with respect to the legal position of Aboriginal peoples in resource development decision-making. These incremental changes are seen in several Supreme Court decisions, starting in 1973 when the court recognized that Aboriginal title in Calder et al v. Attorney General of British Columbia (1973). The landmark Haida, Taku River, and Mikisew Cree Supreme Court cases in 2004 and 2005 further outlined the Crown’s Duty to Consult with Aboriginal peoples with regards to both existing and potential rights (Government of Canada, 2011). This progression in legal standing of Aboriginal rights and title has increasingly produced a redistribution of resource management authority to Aboriginal communities and Aboriginal communities continue to pursue self-government through modern Treaty negotiations and litigation (Hitch, 2006; Berkes et al., 1991).

Due to the many contentious issues surrounding the practical and political impacts of development, Aboriginal communities are often painted as staunchly opposed to projects within their traditional territories. The reality is much more complex; many Aboriginal communities welcome development within their territories so long as it occurs with minimal impact to traditional resources and lifestyles, and respects their Aboriginal rights and title (McIlwraith, 2012, Paulsen, 2007). This argument has well expressed by several First Nation leaders:

“...
partners” - Billy Diamond, Grand Chief of the Cree, 1999 (in Ritter, 2001, p. 228)

“We would support responsible mining, you know, present-day mining where things are done properly.” - Dena Council Chief Brian Ladue, 2013 (CBC, 2013)

For these kinds of developments, the existing planning processes through which impacts can be managed, benefits can be distributed, and Aboriginal resource authority can be exercised are numerous. These processes include Environmental Assessment (EA), Impact and Benefit Agreements (IBAs), government-to-government (G2G) agreements, litigation, and modern land claims/treaties. Table 1 categorizes these processes according to their regulatory nature (binding, non-binding or supra-regulatory) and level (project or policy). While these processes are created by settler society at their core, they represent the tools that are currently used to resolve the fact that “Aboriginals and non-Aboriginals share the same space and the same resources and need to cooperate in their management and use” (Usher, 2003, p. 379).

**Table 1: Current Project- and Policy-Level planning processes**

<table>
<thead>
<tr>
<th>Regulatory, non-binding</th>
<th>Project Level</th>
<th>Policy Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Assessment (company, government, Aboriginal peoples)</td>
<td>Government-to-Government Agreements (Government, Aboriginal peoples)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regulatory, binding</th>
<th>Project Level</th>
<th>Policy Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation (company, government, Aboriginal peoples)</td>
<td>Modern Treaty/Comprehensive Land Claim Agreement (Government, Aboriginal peoples)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Supra-regulatory</th>
<th>Project Level</th>
<th>Policy Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impact and Benefit Agreements (company, Aboriginal peoples)</td>
<td>-</td>
<td></td>
</tr>
</tbody>
</table>
Starting with planning processes at the project level, Environmental Assessment (EA) is a process by which specific project impacts are studied and modeled, in order to inform decisions on if the project should proceed, and, if so, how it should be done. EA is legislated at both the federal and provincial levels. EA is led primarily by regulators and the proponent, although Aboriginal communities are involved to varying degrees as a result of the Crown’s Duty to Consult and sometimes as part of general public participation. Impact and Benefit Agreements (IBAs) are privately negotiated agreements between a company and a community, and are grounded in social license provided by community support of the project. Galbraith et al. (2007) characterize IBAs as ‘supra-regulatory’, noting that “the form and substance of the agreement are not explicitly prescribed in legislation, yet they are typically used alongside regulatory processes” (p.28). Lastly, project-specific litigation at the provincial and federal (Supreme Court) level is possible when unresolved conflict arises over project-specific regulatory processes.

At the policy level, there are two key processes that occur between Aboriginal communities and federal/provincial governments. The first is a non-binding process known as a government-to-government (G2G) agreement. These agreements allow provincial and Aboriginal governments to devise agreements around issues such as land use and shared decision-making in order to formalize procedure and relationships between two governing bodies in the absence of the completion of the second process, which is known as a Modern Treaty or a Comprehensive Land Claim Agreement (CLCA). CLCAs are legally binding agreements between the two governments that set out responsibilities and authorities over settlement areas. As negotiations are known to extend for decades, many other processes occur concurrently.

The implementation and interaction of these processes is not straightforward, and varies from project to project, between jurisdictions, and over time; this creates a highly complex planning process landscape (Fidler and Hitch, 2007, Lukas-Amulung, 2009; Couch 2002). Further, these processes occur in what Nadasdy (2002) calls the “language of property”, which is based on concepts of ownership that can be unfamiliar to Aboriginal cultures. Nonetheless, these processes are the tools currently available to better address impact mitigation, benefit distribution, and Aboriginal resource authority alongside the current sovereign bodies (Noble, 2010; Galbraith et al., 2007). Given the availability and economic potential of mineral resources
in Canada’s north and the likelihood that these processes will remain in use, furthering
knowledge and expertise on the effective navigation of the planning process landscape is of great
importance to Aboriginal communities, and arguably all resource development stakeholders. A
review of literature on the planning process landscape for mineral development in Canada shows
that research has been completed on the overall purpose and effectiveness of each process, both
individually and in parallel (Land-Murphy, 2009; Galbraith et al., 2007; Lukas-Amulung, 2009).
However, research is needed on how the cumulative planning process landscape has been
navigated by Aboriginal governments in the past, how the various planning processes interact
over the course of a proposed development, and how factors internal and external to a
community can affect their ability to exercise their authority.

The research presented herein addresses this knowledge gap based upon the experiences of two
Aboriginal governments that have seemingly navigated through the planning process landscape
effectively. One case study focuses on the recent experiences of the Taku River Tlingit with the
Tulsequah Chief Mine, while a second case study focuses on the recent experiences of the
Nunatsiavut Government with the Voisey’s Bay Nickel Mine. In each case, I visited the
community and interviewed leaders and other key individuals involved with the numerous
planning processes, alongside participant observation and technical document review. The data
garnered from these two case studies is drawn upon to answer the following primary research
question:

> In cases where Aboriginal governments have expressed an openness to development and
a goal of self-governance, how can existing planning processes be navigated to minimize
negative impacts, maximize local benefits, and most effectively exercise Aboriginal
decision-making authority?

1.2 Research Aim and Objectives

Given the growing authority of Aboriginal governments in resource decision-making, the
economic potential of mineral development in Canada’s north, and the growing use of a variety
planning processes to manage development, there is a need for increased knowledge surrounding
how these processes have been navigated by Aboriginal governments, and to what end. In order
to address to this knowledge gap, this research has been conducted with the aim of understanding
how Aboriginal governments have navigated the project- and policy-level processes associated with mineral development proposals and self-governance in order to increase their authority in resource management. In order to achieve this aim, the following objectives were pursued through two case studies in Northern Canada:

1. create a narrative of how each government has navigated the planning processes associated with large mineral development proposed in their traditional territory;
2. analyze the interactions and connections (or absence thereof) between the numerous project- and policy-level processes in each case by creating conceptual maps; and
3. identify the various factors that can affect the navigation of the mineral development planning landscape over the course of a development proposal.

1.3. Organization of the Dissertation

This thesis consists of seven further chapters. In Chapter Two, the research design is outlined, highlighting the scope and approach of the project, the theoretical framework of the research, and the methods used to collect data for analysis. Chapter Three provides a review of literature as it pertains to Aboriginal communities in Canada, the impacts of large mineral developments, the current legal climate surrounding mineral exploration and Aboriginal Rights and Title, historic Treaties and modern Comprehensive Land Claim Agreements (CLCA), Environmental Assessment (EA) purpose and practice, the recent emergence of Impact and Benefit Agreements (IBAs) between companies and communities, and non-binding Government-to-Government (G2G) Agreements between Aboriginal governments and provinces. Following this review of literature, Chapter Four presents a narrative of the Taku River Tlingit First Nation’s (TRTFN) experience with the planning processes used over the course of the Tulsequah Chief Mine proposal, based on document review and interviews with TRTFN leaders and consultants in Atlin, British Columbia. Similarly, Chapter Five presents a narrative of the Nunatsiavut Government’s experience with the planning processes over the course of the Voisey’s Bay Nickel Mine development based on document review and interviews with NG leaders and consultants in Nain, Newfoundland and Labrador. These narratives provide the basis for Chapter Six, where conceptual maps of relationships and interactions between the numerous planning processes in each case study are presented and explained. Chapter Six also uses the narratives
and conceptual maps to highlight and explore eight influential factors that affected the results of the planning processes in each case study. Finally, Chapter Seven presents the conclusions of this research and outlines the project’s practical applications and contributions to scholarly knowledge.
Chapter 2: Research Design

This Chapter outlines the design of the research, highlighting key issues such as its theoretical orientation and methods of data collection. Section 2.1 identifies the scope of, and approach to, the research, addressing research decisions such as the use and selection of two case studies and the informing of the research. This section also explores post-colonialism as an approach to the research. Section 2.2 outlines the mixed methods approach to data collection, consisting of technical document review, key informant interviews, and participant observation. This section also explores the methods by which data was analyzed to produce the results and conclusions of this thesis.

2.1. Research Scope and Approach

In order to address the outlined question, this research draws on the experiences of two Aboriginal governments, the Taku River Tlingit First Nation and the Nunatsiavut Government. These governments were selected for their sophisticated approach in dealing with the planning process landscape. With a sample size of two, this research cannot provide a complete analysis of the Aboriginal experience. Rather, this research is intensive and focused on data that are detailed and nuanced. The result is a narrative of participant voices that creates a record of two specific cases and events. This tight focus allowed me to highlight connections between events, mechanisms, and structures that are essential to navigating the various planning processes. The possibility of these experiences informing those of others follows, even if generalizations are not always possible (Clifford et al., 2012). That said, similarities in experiences between the two case studies are highlighted and compared to other experiences as captured in literature in order to strengthen the discussion of linkages. Each case demonstrates similarly high levels of experience with the planning process landscape; however the cases also present two vastly different contexts with contrasting goals and results.

This research highlights the experiences and perceptions of individuals in leadership positions within representative Aboriginal organizations in two case studies. As there is inherent subjectivity when individuals recount their personal experience, this research remained open to “the constructed nature of the social world” and espouses the opinions, feelings, and beliefs
involved in the interpretation of the planning process landscape that surfaced through data collection as essential to the understanding of that landscape (England, 1994, p.81).

2.2. Methods of data collection and analysis

The analysis of these two case studies used inductive analysis to build understanding as it emerged through collected data, rather than testing a prior conceived hypothesis (Strauss et al., 1997; Thomas, 2006; van Hoven, 2012). In order to accomplish the objectives and achieve the overall aim of this research in each case study, several research methods for qualitative data collection were applied to each objective in a deliberate fashion. This research has three key outputs based on the data collected through methods discussed herein: narratives of how the planning process landscape has been navigated historically, conceptual maps of process relationships in each case, and an analysis of key factors impacting the results of these processes.

In order to collect data on each case, a mixed methods approach of participant observation, key informant interviews, and technical document review was applied to determine how the planning process landscape was navigated by the Taku River Tlingit First Nation and the Nunatsiavut Government. Key informant interviews, participant observation, and document review were chosen for this research as each method contributes unique information towards the key outputs: document review provides context; participant observation provides nuanced detail; and key informant interviews allow for more explicit insight (Bowen, 2009; Mills et al., 2006; Laurier, 2010; Tremblay, 1957). In addition, all three methods examine the problem from a different perspective, which has triangulated the available data (Clifford et al., 2012). This has allowed for multiple measures of the same phenomena, with the expectation that “by measuring something in more than one way, researchers are more likely to see all aspects of it” (Newman, 2003, p.138).

As there is potential for misunderstanding in Participant Observation and Key Informant Interviews as a result of cultural and language barriers, data collected through these two methods were reviewed by willing contributors in order to highlight and revise any misinterpretation, such as sending transcripts to Key Informants for review, as in Booth and Skelton’s (2012) study on First Nation participation in EIA.
The review of technical documents pertaining to each case study was essential to creating understanding of which processes were engaged and to what end. The review explored a large number of documents with varying levels of detail. The primary documents used to construct a record of the Taku River Tlingit and Nunatsiavut Government experiences with the planning process landscape were chosen as comparative documents, and are outlined in Table 22. Other secondary technical documents were also reviewed in order to add additional detail. These included, but were not limited to, additional litigation and presentations on IBA content.

**Table 2: Key Documents for the Taku River Tlingit and the Nunatsiavut Government Case Studies**

<table>
<thead>
<tr>
<th></th>
<th><strong>Taku River Tlingit</strong></th>
<th><strong>Labrador Inuit</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent Report</td>
<td>Hà tₐɪgi hà hustiyxh siti: Our Land is Our Future</td>
<td>Seeing the Land is Seeing Ourselves</td>
</tr>
<tr>
<td>based on internal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>consultation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proponent Report on</td>
<td>Tulsequah Chief Project Report</td>
<td>Voisey’s Bay Environmental Impact Statement</td>
</tr>
<tr>
<td>proposed project</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Environmental</td>
<td>Tulsequah Chief Project Committee Report and Recommendations</td>
<td>Voisey’s Bay Mine and Mill Environmental Assessment</td>
</tr>
<tr>
<td>Assessment Recommendation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Key informant interviews focused on individuals who have extensive experience navigating all aspects of the planning process landscape and individuals who are instrumental in the process,
such as project managers, negotiation team leads, and consultants. These are informants who were expected to hold considerable specialized knowledge and expertise in relation to the planning process landscape in each case (Tremblay, 1957). Informants were chosen based on leadership and participation in the planning processes, and were engaged in a variety of manners. Some key leaders were chosen deliberately based on their significance in past navigation and willingness, others were opportunistic, and others were asked to participate based on suggestions during participant observation or other interviews.

The focus on interviewing leaders within the two communities who have dealt intimately and extensively with all the processes involved was deliberate. The research drew primarily on leaders in order to gain the insight of individuals who have dealt intimately with all processes involved. While some processes do allow for the participation of individuals throughout the community, others (specifically, IBAs and CLCAs) require a decision by leaders that is representative of the group via either concurrent or subsequent expression of community support. In summary, this research operates on the assumption that individuals working towards Aboriginal goals through representative organizations such as band council or government are the most likely to hold knowledge and expertise in navigating the planning process landscape via ‘learning by doing’ and may provide key insights (Krueger, 2009; Fellows and Lui, 2009).

Furthermore, targeting leaders allowed the research to garner the perspective of individuals who participated in events that occurred behind closed doors. This research does include discussion of how leaders identified the wants and needs of their community and ensured that decisions and actions were representative of the majority.

In order to observe and begin to understand the context in which each case occurred, I visited the Taku River Tlingit First Nation in Atlin, British Columbia and the Nunatsiavut Government in Nain, Newfoundland and Labrador for a month in each location. Participant observation allowed for nuanced observations of daily community life, leadership and government culture, and current navigation of the planning process landscape, which helped “build detailed descriptions from ground up” (Laurier, 2010, p.127). Participant observation aims to gain insight to the subjective reality of a phenomenon as it is navigated by ‘insiders’ by becoming competent in appropriate conduct and common knowledge within a particular organization (Jorgensen, 1989;
Laurier, 2012). In my case, my observations of the two cases were generated through spending time in the government offices, attending meetings, living in each town, and seeing both places.

Using the data collected through key informant interviews, document review, and participant observation, I first created narratives of each community’s experience with the planning process landscape. The initial timeline and structure were provided by dates and information recorded in technical documents, and more nuanced contextual details were added through direct quotes from participants. Participants also clarified areas where the documents were missing or complex. These two records served as foundations for the analysis needed to produce the second and third outputs.

The second objective of the research used the narratives created, as well as data from all three methods – participant observation, interviewing, and document review – to create conceptual maps of the planning process landscape. In generic terms, a conceptual map is a knowledge representation tool that depicts a perceived consistency in occurrences (Novak and Canas, 2006; Novak, 2010). These conceptual maps helped organize the thoughts, feelings, and actions of Aboriginal actors in the planning process landscape. These maps also serve to make sense of the TRTFN and NG’s experiences within the planning process landscape and to highlight the links that connect different components of the planning process systems (Novak, 2010). The primary thematic categories for creating the conceptual maps highlighted any statement, interview or document, where two processes were included, noting relationships or influences.

The narratives created and data collected have also been used to analyze the various internal and external factors that can affect an Aboriginal community’s navigation of the planning process landscape. Qualitative analysis is noted to have inherent tension between the use of creative, contingent methods to “to capture the richness of context-dependent sites and situations” and the need for standardized rigour. However, transparency and the use of methods that validate findings contribute to allowing seemingly divergent characteristics to coexist (Baxter and Eyles, 1997, p. 505). Strategies for establishing qualitative rigour that were used in data collection and the presentation of results include the use of mixed methods (Rutherford, 1995; Brown, 1995), the use of direct quotes (Bonnett, 1992; Harrison and Burgess, 1994), immersion in the field of study (Cooper, 1995; Wilson, 1993), and respondent verification (Cooper, 1995; Eyles and Perri, 1993). Baxter and Eyles explore 31 methodological papers on establishing such rigour, and the
use of direct participant quotations was the most commonly noted strategy, mentioned by 27 of those 31 studies and discussions (1997, p. 507).

Further to the abovementioned methods used during data collection and presentation of results, several authors note that strategies for rigour include information on interview practices and information on participants (Cooper, 1995; Dyck, 1989; McDowell, 1994). To this end, over the course of this research, 23 key informants in various roles such as current and former leaders, negotiators, and consultants were interviewed in sessions ranging from 40 to 90 minutes. Information on participants beyond the types of roles they filled is unavailable due to ethical confidentiality restraints. In the case of the Taku River Tlingit, the twelve participants included past and present negotiators, project leads, current and past elected Spokespersons, current staff within the Lands and Resources Department, and consultants. Some participants were formally interviewed in person in Atlin over the course of one month and others were formally interviewed in the Vancouver area. Further, some participants engaged in the research informally, through discussion or meeting invitations, giving permission to observe and record. In the case of the Nunatsiavut Government, the eleven participants included current Ministers, past lead negotiators, past presidents, consultants, lawyers, and current government staff. All eleven participants were formally interviewed in person in Nain or Goose Bay over the course of a month, with the exception of one interview that was done by phone. Interviews in both cases occurred in primarily in government offices. Following any formal interviews, notes or transcripts were sent back to participants for review. Every interview began with a question asking the participant to describe their role in the planning processes involved. From that initial question, the remainder of the interview was oriented towards questions relevant to that persons position rather than from a set list of questions. While there were established question guidelines, such as explicit questions about the relationships between processes that the participant had been involved in, the tone was also at times conversational. The informal portions of interviews were intended to allow participants to bring up information they thought to be important or relevant, in order to somewhat minimize my influence as the researcher and allow participants to more highly influence results.

For the analysis itself, one round of coding documents and two rounds of coding interview notes and transcripts were completed. Coding technical documents for primary themes began in
advance of time spent in each community, and highlighted influential factors and process. This
coding traced the effects of influential factors chronologically, looking at how certain actions and
non-actions manifested over the course of the documented processes. Following document
review and participant observation, the first round of coding interview notes and transcripts
highlighted explicit reference to process relationships, themes from the technical document
review, and new themes brought to light via the interviews themselves. The second round of
coding was to ensure that reference to themes that may have become apparently later in the first
round of interview coding were highlighted throughout.

For the first part of the analysis, when determining the process relationships and interactions, all
reference to interactions in either document review or key informant interviews were highlighted
in the conceptual maps. These maps do not weight relationships that were referred to more than
others, rather operate on a true/false basis. For the second part of the analysis, the eight factors
that were eventually identified were chosen as a cumulative result of several factors. These
included the frequency factors were brought up explicitly in interviews and documents, the level
of involvement of the participant mentioning the factor, and the perceived magnitude of the
impact of that factor. The significance of these factors was reaffirmed by participant review.

My positionality is important to consider throughout the results and analysis in this thesis as
structure is being created by both research collaborators and the researcher (England, 1994). As
a non-Aboriginal individual researching within an Aboriginal organization, it was important for
me to remain aware of the individual lens through which I was observing, recording, asking
questions, categorizing, and understanding over the course of data collection and analysis. The
inclusion of participant voices in creating a record of events aims to minimize my positionality;
however some subjectivity remains as it is I who chose the included quotes. However, my
positionality has also been advantageous, as it has contributed to the outlined knowledge gap by
providing a unique lens that highlights connections and discrepancies in new ways that promote
increased discourse around the complexity of the planning landscape.
Chapter 3: Literature Review

This Chapter reviews a variety of literature as it pertains to resource development, Aboriginal Rights and Title, and the planning processes by which impact management and Aboriginal decision-making authority are pursued. Section 3.1 is dedicated to literature on Aboriginal communities in Canada, exploring the socioeconomic challenges of Aboriginal communities in neo-colonial Canada, homogeneity between Aboriginal communities, and traditional values and knowledge. This section provides important context on the contemporary issues faced by Aboriginal people in Canada, as well as some of the values their governments might seek to maintain through the planning processes available. Section 3.2 explores the nature of large mineral developments, including literature on a variety of biophysical and socioeconomic impacts. This section is essential for highlighting the issues and concerns that a proposal for mineral development carries when presented to an Aboriginal community. Section 3.3 provides an overview of the current legal climate in Canada in relation to the two previous sections; namely, mineral exploration regulation and Aboriginal Rights and Title. These legal foundations are the basis on which each party leverages their land and resource use. The remaining sections explore the history, purpose, and application of the various project- and policy-level planning processes available to Aboriginal communities in their endeavours to reduce negative impacts, maximize benefits, and assert decision-making authority. The literature surrounding historic Treaties and modern Comprehensive Land Claim Agreements (CLCAs), Environmental Assessment (EA), Impact and Benefit Agreements (IBAs) and non-binding Government-to-Government (G2G) Agreements is essential in exploring previous research on the need for such processes as well as their documented effectiveness.

3.1. Aboriginal Communities in Canada

The Aboriginal population in Canada is comprised of 1.4 million Inuit, First Nation, and Metis people (Statistics Canada, 2014). The population of Aboriginal peoples in Canada is increasingly urban, with 54% of Aboriginal people living in an urban center. However, there are also 700 000 individuals who are living remotely or on one of nearly 900 reserves in Canada (Statistics Canada, 2014).
The identity and culture of Aboriginal communities have been irreversibly altered by the arrival of European settlers in the Americas. Colonization of Canada brought with it death from violent encounters and previously unseen infectious diseases, as well as forced assimilation and cultural suppression (Kirmayer et al., 2014). The political, social, and cultural effects of colonization and European rule on Aboriginal peoples in Canada have been tremendously detrimental to Aboriginal peoples and their culture.

Aboriginal communities in Canada face higher unemployment, lower housing quality, higher suicide rates, higher crime rates, and poorer health than the majority of the Canadian population, a situation parallel to the social and economic disadvantages experienced among colonized indigenous societies worldwide (Anderson et al., 2006; Langton, 2008). These communities are also often remote from the large urban centers of southern Canada and based on a mixed economy with varying ratios of subsistence to market economies (Usher, 2003; Prno and Slocombe, 2012; Dreyer and Myers, 2004).

In past literature, Aboriginal communities have been homogenized at the national and international level, and individuals have been grouped together homogenously at the community level. These generalizations have been perpetuated by academics and industry actors alike (Agrawal, 1995; Kemp, 2009). However, the heterogeneity both between and within communities in terms of their cultural norms and values is beginning to be recognized by newer scholarship (Berkes, 2009; Bradshaw, 2003; Kemp, 2009; Ghimire et al., 2004). In the late 1990s, after the resurgence of local knowledge awareness in resource management academia, Agrawal and Gibson noted that there were inherent weaknesses with defining communities as small spatial units with shared norms and homogenous social structures, and that “the multiple interests and actors within communities … influence internal and external institutions” (1999, p.629).

Highlighting the heterogeneity of Aboriginal communities does not mean similar beliefs and values cannot be shared; it means they are not always shared, or can (and often are) shared with variation. Many Aboriginal peoples face similar challenges and dynamics, and share similar histories of subsistence and colonization. Communities face varying integration with the Western economy, while balancing traditional values and lifestyles as an important aspect of community and culture.
The traditional values and knowledge systems of Aboriginal peoples are rooted in subsistence living and were initially passed on orally through generations (Berkes, 2008; Ellis, 2005). Additionally, the transfer of traditional knowledge and values is known anecdotal, and based on metaphor (Rarihokwats, 2011). Storytelling is often highly detailed, as “the description of people, speeches, and clothing puts breath into the story. It is also a way of verifying the story. These details can be checked by other people present” (Venne, 2011, p.175)

Not only are values and cultures of Aboriginal peoples heterogeneous, they are also dynamic and are currently growing to embrace both traditional roots and new channels. Contemporary literature emphasizes that it is important to avoid romanticizing the historic ways of Aboriginal communities, as Aboriginal cultures are dynamic and adaptive, “living, and so constantly changing” (Bradshaw, 2003; Agrawal and Gibson, 1999; O’Faircheallaigh, 2012, p.1792).

These dynamic traditional values are explained as deeply connected to a sense of place, “a framed space that is meaningful to a person or group over time” (Thornton, 2008, p.10). Place often has traditional, emotional, and spiritual meaning to Aboriginal communities, given their lengthy history of interaction with the land (Berkes, 2008). The connection of place and Aboriginal social identity is noted throughout literature from government reports, to anthropology-based and business-based articles (McIlwraith, 2012; Anderson et al., 2006; O’Faircheallaigh, 2012; Berkes, 2008; Royal Commission on Aboriginal Peoples, 1996).

Modern Aboriginal communities generally participate in a mixed economy which includes market and subsistence economies, a model which Usher (2003) notes to be persistent throughout the twentieth century. Specific levels of market and subsistence participation vary based on values, location, and opportunity, but many Aboriginal peoples in Canada operate within such a structure, complementing the wage economy with subsistence living created through shared territory and resources (Usher, 2003). The development of mines within traditional territory contributes to the market participation portion of a mixed economy, but can also threaten the balance with subsistence economy and cultural values.

3.2. Large Mineral Developments and their Potential Impacts

Large mining projects are initiated through exploration for mineral reserves by developers through Canada’s ‘free entry’ claim staking process. This system allows developers to assess
Crown land for mineral potential, and request mineral rights and tenure without regulatory intervention on a “first come, first serve basis” (Fidler and Hitch, 2007; Gibson & O’Faircheallaigh, 2010; Sosa & Keenan, 2001, p.4). Approximately 0.1% of initially explored claims progress through advanced exploration and regulatory approval to become active mines (Gibson and O’Faircheallaigh, 2010). If advanced exploration returns promising results, financial investment and commitment to the project generally accelerates quickly (Gibson and O’Faircheallaigh, 2010).

The lifespan of a large mining projects can range anywhere from 2-60 years following construction (Gibson and O’Faircheallaigh, 2010). Their finite lifespan creates a ‘boom/bust’ scenario of rapid economic and employment growth followed by mine closure and lost employment (Kemp, 2009; Gibson and Klinck, 2005). Mines themselves are often remote, requiring unique workforce strategies. Presently, ‘fly-in, fly-out’ formats, where workers are flown in for weekly rotations, have largely replaced permanent mining towns (Ritter, 2001; Shrimpton and Storey, 1992). The intense but finite extractive activity, rapid and significant change, and remote location associated with large mining projects are among the main causal factors of many of the impacts associated with these projects (Kemp, 2009).

The potential impacts to Aboriginal communities associated with large mines are numerous, and can be categorized into four major categories: the negative biophysical impacts that result from abrupt, large magnitude changes to the natural landscape; the negative socioeconomic impacts that can result from negative biophysical impacts; the positive socioeconomic impacts that can result from job creation and increased in spending in the project area; and the negative socioeconomic impacts that can result from the nature of the jobs created and the manner by which increased income is introduced.

The biophysical impacts of mining consist of the direct impacts of project exploration, construction, operation, and decommissioning on the surrounding natural environment. These impacts can have significant effect on the local and regional ecosystems in the project area, and have been described by the Canadian government as “the most important challenges facing the Canadian mining sector” (Energy and Mines Ministers, 2013, p.44). Potential effects on the natural environment due to mining projects include the destruction of natural habitat, changes in landform, acid rock drainage, sediment runoff, processing and sewage effluent, and oil and fuel
spills. Various degrees of air, water, and soil contamination result from these actions (Hilson, 2003). One of the most commonly encountered biophysical impacts of mining results from acid rock drainage of tailings (Hilson, 2003; Morin, 2003) The Ekati Diamond mine was found to have acid rock drainage due to sulfide oxidation, which led to acidic water in the project area (Morin, 2003). Additionally, fish in northern regions are considered to be sensitive and vulnerable to mining contaminants (Lemly, 2004).

There is high potential for mining projects to affect Aboriginal communities. In 2006, 1200 Aboriginal communities were located within 200 km of active mining projects throughout Canada (PDAC, 2006). The negative socioeconomic impacts experienced as a result of the biophysical effects of mining projects are often magnified by three key factors: the traditional Aboriginal values with regards to the integrity of the land, the subsistence component of mixed economies, and the post-colonial socioeconomic challenges that are faced by Aboriginal communities across Canada (Kemp, 2009; Berkes, 2008; Usher, 2003; Kirmeyer et al., 2014).

Changes to the landscape due to mining can affect traditional values that are based in emotional, spiritual, and practical connection to place. Various authors note the increased concern for environmental integrity in Aboriginal communities as those living closely to the land tend to suffer impacts to that land more directly; there are “significant consequences for indigenous peoples, particularly for those choosing to maintain a traditional relationship with their land” (Larcombe, 2000; Booth and Skelton, 2011, p. 49). There are several anecdotal examples of effects of mining on Aboriginal people, such as one individual who notes that helicopter activity resulted in an extra 10-20 miles of travel to find caribou; a significant change to those relying heavily on subsistence hunting (Folger, 2003).

Despite the clear potential for negative biophysical and social impacts during construction and operation, there is general consensus on the potential for economic benefits from large mining projects (Galbraith et al., 2007; Booth and Skelton, 2011; Bielawski, 2004, Fidler and Hitch, 2007). Regional economic benefits of large mining include increased job opportunities, income, and tax revenues (Fidler and Hitch, 2007). Employment increase is seen in Canada-wide trends, with Aboriginal employment in the mining industry in Canada rising 14% from 2007 to 2012 (Energy and Mines Ministers, 2013). All of these economic factors have the ability to create additional social benefits. Increased income within the project area can create an economic base
on which Aboriginal communities can begin to overcome the disadvantages they face, allowing groups and individuals to invest in their cultural and traditional activities (O’Faircheallaigh & Ali, 2008). Additionally, increased economic means are able to reduce Aboriginal dependency on Government support, which many consider integral to regaining self-reliance and improving subpar socioeconomic conditions, and contribute to the empowerment of marginalized communities (Anderson et al., 2006).

While there is potential for local benefits, realization has historically been identified as relatively small in comparison to the overall profits of a mine (Galbraith et al., 2007; Booth and Skelton, 2011; Bielawski, 2004, Fidler and Hitch, 2007). In addition to the limited regional economic return, Adger (2000) notes that income is not necessarily distributed equitably throughout the community; notably, the role of the income earner is an important factor.

There is also potential for negative side effects caused by increases in employment and income. Gibson and Klinck’s (2005) study of the health impacts of mining projects in northern Canada outlines the mental stress, substance abuse, family stress, dietary changes and cultural changes that can result from the types of jobs created by mining projects. Given the colonial social issues currently experienced by Aboriginal communities in Canada, these potential effects are often occurring in already-vulnerable communities (Kirmeyer et al., 2014). Additionally, the influence of non-Aboriginal co-workers and managers can also affect communities through cultural misunderstanding. In the Nunatsiaq News, Peter Kolit noted that "If you have a boss who's not born up here it makes it harder for us to get out to hunt. If he was born here, going to retire up here, he'd probably understand. But Southerners don't understand our situation. They have a totally different view” (Folger, 2003).

Given the nature of large mineral development, Aboriginal communities, traditional values, and socioeconomic impacts, it is obvious that there are both positive and negative aspects to such developments. Negotiating complexity and uncertainty can be overwhelming, and “taking advantage of the benefits while at the same time coping with adverse mining impacts can be daunting” (Kemp, 2009, p.201). The simultaneous possibility of both positive and negative effects is expressed with imagery by Mike Voisey (in McNish, 1998) prior to the construction of Voisey’s Bay:
“The Voisey’s Bay Mine is like a huge tidal wave coming in bringing good and bad to our communities. Those who can handle it will ride the wave and prosper. Those who can’t will sink deeper into booze and drugs and despair.”

3.3. Legal Climate

Given the potential impacts of large mineral development in traditional territory, it is essential to explore the legal standing of Aboriginal communities in the face of such proposals. The current legal climate in Canada is increasingly in favour of the Aboriginal Rights and Title of Aboriginal peoples nationwide. The following section discusses mineral exploration regulation, as well as the legal foundations of Aboriginal Rights and Title as the basis decision-making authority within traditional territories as it pertains to development throughout Canada.

3.3.1. Mineral Exploration Regulation

In Canada, with some pre-1900s exceptions, mineral rights are separate from surface rights, and are owned by the government, largely falling under provincial or territorial jurisdiction (Natural Resources Canada, 2015). For example, in British Columbia, subsurface rights are dealt with via the Mineral Tenure Act, in the Yukon by the Yukon Quarts Mining Act, and in Newfoundland and Labrador by the Mineral Act. Mineral rights in the territories were initially federal jurisdiction, but are in the process of being transferred to the territories; only the Yukon has completed this process (Hart et al. 2012). As such, mineral rights in NWT and Nunavut remain under the federal Territorial Lands Act. While all provinces and territories require individuals to obtain a prospector’s license to claim mineral rights, only some require that license to be obtained in order to engage in prospecting activities prior to making claims (namely, the Northwest Territories, British Columbia, Manitoba, Ontario, Quebec, New Brunswick, and Nova Scotia) (Natural Resources Canada, 2015).

Mineral rights across Canada are subject to various provincial manifestations of what is called a Free Entry System, which permits licensed prospectors to stake claims to subsurface mineral rights either physically or via online mapping. In a free entry system, any licensed individual is able to stake a claim to the subsurface rights of public land via the jurisdiction’s mining recorder with no further procedure, permitting, or consultation (Ross River Dena Council v. Government of Yukon, 2012). Claims relate only to the acquisition of subsurface title, and do not infer permission to engage in exploration activities or other development. However, if a prospector
stakes a claim properly, they are entitled to apply for and receive a lease upon the completion of
government regulated assessment work. This lease generally includes the payment of royalties to
the government that has jurisdiction over the land (Gladwin & Associates, 2001).

The free entry system as it exists has been supported by government and industry as “equitable,
simple to use, and promoting interest in mining, which creates economic development” (Gladwin
& Associates, 2001, p. 1). Additional arguments in favour of the free entry system note that
secrecy surrounding claims is essential due to the high competition around viable land
(Campbell, 2004). Opposition notes that the same system “effectively compromises other values
in society – environmental protection objectives, the rights of private landowners, and the public
interest … and interferes with the exercise of Aboriginal Title and Rights” (Campbell, 2004,
p.37).

As various provincial and territorial jurisdictions assign subsurface mineral rights to land within
contested traditional territory, it is not surprising that Aboriginal peoples throughout Canada take
issue with those subsurface rights being assigned to various individuals prior to the settling of
any land claims. Recently, continued opposition to the unregulated system and court decisions
with regards to the interactions between the free entry and Aboriginal Rights and Title have
begun to initiate changes (Hart et al., 2012; Ross River Dena Council v. Government of Yukon,
2012). Legally, a notable decision was made in favour of the Ross River Dena in their case
against the Yukon Government, where the provincial court of appeal ruled that the free entry
system outlined by the Quartz Mining Act did not meet the consultation requirements determined
by the 2004 ruling in Haida Nation v. British Columbia. Specifically, Honourable Justice
Groberman stated that “the current regime may allow mineral claims to be granted without
Furthermore, while the initial ruling stated that notification of a claim would be adequate, the
Court of Appeal ruled that in order to meet consultation requirements, the Crown must develop
consultation strategies proportionate to strength of rights and title claim and the extent of activity

In addition to the Yukon’s court-dictated reform, changes are also being made in other
jurisdictions. In Ontario, incremental changes have been made through the Mining Act
Modernization initiative, which includes increased permitting, and the ability to withdraw sites
of ‘Aboriginal cultural significance’ from claim staking (MNDM, 2014). In addition, free entry is increasingly restricted in areas of signed land claims where the signatory nations obtain subsurface rights (Hart et al., 2012).

### 3.3.2. Aboriginal Rights and Title

The first written recognition of Aboriginal Rights and Title occurred the Royal Proclamation of 1763, where King George III outlined that Aboriginal Nations had rights to their ‘hunting grounds’, and that any colonial settlement of those lands must be achieved through treaty-making (Venne, 2002; *Royal Proclamation*, 1763). While the Royal Proclamation was never overturned in court, it was also created pre-Confederation, and the legitimacy and legality of the document in terms of contemporary Rights and Title is unclear.

The current basis of Aboriginal Rights and Title lies in Section 35 of the Canadian constitution, which states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”, and defines treaty rights as rights that “exist by way of land claims agreements or may so be acquired” (*Constitution Act*, 1982). The Crown’s Duty to Consult stems from the existence of Aboriginal Rights and Title and the Honour of the Crown. As such, the Duty to Consult requires that the Crown consult Aboriginal peoples when it “contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights” (Government of Canada, 2011).

The definition and implementation of Aboriginal Rights and Title and the resulting federal, provincial, and territorial Duty to Consult has developed over the course of several landmark Supreme Court Decisions. Court decisions have contributed to defining several keys aspects of Aboriginal authority in the overall planning process, ranging from the specifics of the Crown’s Duty to Consult to determining the strength of a specific nation’s claim to Aboriginal title over a given territory. Aboriginal Rights and Title are of utmost importance in the overall planning process landscape, as they create the basis for Aboriginal consultation, accommodation, authority and decision-making in all other processes.

The obligations to Aboriginal communities are still being shaped through judicial decisions today, most recently in *Tsilhqot’in Nation v. British Columbia* (2013), where judicial progression moves towards a consent-based authority. Decisions of this nature are creating more and more
certainty around what exactly Aboriginal Rights and Title are, and how exactly the Duty to Consult must address these rights. However, as stated by the Auditor General in a 2006 report, “development of policies that respond to these court decisions is slow.” Some of the landmark cases that have contributed to the understanding of the scope of rights, title, consultation, and accommodation are detailed below.

Calder et al. v. Attorney-General of British Columbia (1973)

Brought to court by Nisga’a leader Frank Calder, the British Columbia Supreme Court and later the Court of Appeal would decide that Nisga’a Rights and Title to their traditional territory had been extinguished by general legislation. When brought to the Supreme Court of Canada in 1973, the initial decisions were upheld, although not unanimously. Despite a technical loss, Mr. Justice Emmett Hall’s judgement in favour of the Nisga’a claim to Rights and Title was so persuasive that, even in absence of legal requirement, the Government of Canada to declared in an official Statement on Aboriginal Claims that “it is the basic position of the Government that [Aboriginal claims to Rights and Title] must be settled and the most promising avenue to settlement is through negotiation [and] these agreements will be enshrined in legislation” (Morse, 1985, p. 630; Asch, 2014). This policy created momentum for the 1982 Constitutional recognition of Aboriginal Rights and Title in Section 35(3) (Gilbert, 2006).

R. v. Sparrow (1990)

Following the Constitutional affirmation of Aboriginal Rights and Title in 1982, the first Supreme Court Case to hand down a decision on the meaning of those rights was R v. Sparrow in 1990. In the case, Ronald Sparrow (Musqueam) argued that his Aboriginal right to fish permitted him to use a drift net larger than the Fisheries Act would otherwise permit when charged under said act (R v. Sparrow, 1990; Asch, 2014). In the final SCC decision, the Sparrow Test was created to determine whether or not an Aboriginal Right has been infringed upon, and in which cases infringement is justified through conservation concerns. As such, the questions that must be asked include: “Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right?” (R. v. Sparrow, 1990). Further, if Aboriginal rights are infringed as per the first test, that infringement would be considered justified if there was a valid legislative objective, if
infringement was minimized, if compensation was provided, and “if the aboriginal group in question has been consulted” (*R. v. Sparrow*, 1990).

*Delgamuukw v. British Columbia (1997)*

Seven years after the Sparrow Test on infringement of Aboriginal rights was outlined, the SCC created the Delgamuukw Test to determine strength of claim when deciding on the Gitxstan and Wet’suwet’en claims to the ownership of 58000km² of traditional territory. As such, in order to establish claim, the following three criteria must be met: the land must have been occupied before sovereignty; there must be continuation of occupation between pre-sovereignty and modern times; and at the time of sovereignty, occupation must have been exclusive or jointly exclusive (*Delgamuukw v. British Columbia*, 1997).

However, fulfilling the criteria for Title does not make that title absolute; the Supreme Court also put forward that the federal government is able to infringe on Aboriginal Title if the infringement furthers a legislative objective that is compelling and substantial and if the infringement is consistent with the special relationship between Aboriginals and the Crown (*Delgamuukw v. British Columbia*, 1997). While *Delgamuukw v. British Columbia* led to further interpretation and clarity of Aboriginal Rights in Canada, it maintained Crown sovereignty above Aboriginal Rights and Title in the creation of a test that permits infringement (Borrows, 1999).

*Haida Nation v. British Columbia (2004)*

The Haida decision is considered as one of three landmark SCC decisions that formulated the current interpretations of the Crown’s Duty to Consult (Government of Canada, 2011). The case was based on the Haida Nation’s opposition to Tree Farm Licenses within their traditional territory, stating that license replacements and transfers had occurred without their consent and over their objections. The final decision not a clear-cut victory for the Haida; the SCC maintained that decision-making authority rested with the provincial government, noting that the Duty to Consult “does not require a duty to agree” (*Haida Nation v. British Columbia*, 2004). As Penikett notes, in the Haida decision, some see “the requirement for consultation and accommodation [while] others examining the same decision find the trump care of Canadian sovereignty” (2006, p. 96).
However, the Haida case has also been essential in clarifying the Crown’s Duty to Consult and Accommodate. While overarching Canadian sovereignty was maintained, British Columbia’s appeal was dismissed and the SCC determined that they had not meaningfully consulted the Haida, upholding the part of the decision of the British Columbia Court of Appeal. However, the SCC overturned the British Columbia Court of Appeal’s decision on the license holder’s consultation obligations, noting that project proponents did not have a duty to consult (*Haida Nation v. British Columbia*, 2004; Penikett, 2006). Importantly, in the Haida case, the SCC determined that it is not necessary for an Aboriginal group to prove the legal existence of Rights and Title, but that “the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (*Haida Nation v. British Columbia*, 2004; Olynyk, 2005).

*Taku River Tlingit First Nation v. British Columbia (2004)*

The SCC decision with regards to the *Taku River Tlingit First Nation v. British Columbia* was handed down alongside the above-discussed Haida decision. In this case, the Taku River Tlingit First Nation (TRTFN) had participated in the EA process to re-open an old mine and build a 160km access road within their traditional territory, however argued that consultation in the last few months leading up to the final decision was inadequate. The SCC determined that given the circumstances of the project and strength of claim, the TRTFN was entitled to more than minimum consultation, although “the Province was not under a duty to reach agreement with the TRTFN” (*Taku River Tlingit First Nation v. British Columbia*, 2004). Based on TRTFN participation in the EA process and Project Committee, the SCC allowed the appeal and determined that British Columbia had met the requirements of the Duty to Consult (*Taku River Tlingit First Nation v. British Columbia*, 2004; Pape & Salter, n.d.). While not a victory for the TRTFN, the case included much needed interpretation from the SCC on the Crown’s Duty to Consult and its application.

*Mikisew Cree First Nation v. Canada (2005)*

The third of a group of landmark decisions informing the Government of Canada’s Duty to Consult, the Mikisew Cree case is unique in that it determines the requirements of the Crown’s Duty to Consult in the case of lands surrendered under historic treaty, unlike the untreated cases...
of the Haida and TRTFN. In this case, the federal government approved a winter road through the Mikisew Cree Reserve, an area under Treaty 8 agreement. The Mikisew Cree objected to the original and rerouted road on the basis that it interfered with their treated hunting and fishing rights (Mikisew Cree First Nation v. Canada, 2005). While the government argued that the rerouted road, which did not cross the reserve, was within jurisdiction of “taking up” surrendered lands, the SCC decided that the Duty to Consult was nonetheless breached as the lack of consultation and notification undermined the process of reconciliation (Mikisew Cree First Nation v. Canada, 2005).

3.4. Historic Treaties and Comprehensive Land Claim Agreements

Treaties between Aboriginal peoples and colonial powers began in the early 1700s, well before Confederation. Some of the first treaties recognized as such were the Treaties of Peace and Neutrality and the Peace and Friendship Treaties signed between 1701 and 1779 between the British Crown Aboriginal peoples within boundaries claimed by British and French colonialists, such as the Mi'kmaq and the Huron-Wendat. These first treaties differ from later agreements as they involved no land concessions (AANDC, 2010).

However, in 1763, the Royal Proclamation outlined that land belonging to Aboriginal peoples could not be claimed by individual settlers, but rather had to be bought by the British Crown and then further distributed. As such, further treaties dealt with land ownership (from the perspective of colonial powers). Following the Royal Proclamation, a number of treaties were signed both before and after Canadian Confederation.

As noted by Usher the “areas treatied for between 1860 and 1930 coincided with the imperatives of settlement” and not with the traditional boundaries of the bands involved (2003, p. 336). The Canadian government aimed to expand political power, and strategically chose treaty over war to gain control over land (Asch, 2014; Tobias, 1983; Miller, 2009). Historic treaties generally involved the surrender of “interest in lands in exchange for certain other benefits that could include reserves, annual payments or other types of payment and certain rights to hunt and fish” from the perspective of the colonial powers and current federal government (AANDC, 2010).

The mutual understanding of such treaty agreements is highly contested. Significant cultural and language barriers between the groups involved would later affect the perceived legitimacy of
treaties by Aboriginal peoples. Examples of such miscommunications, intentional or otherwise, included that reserve areas would be almost as large as traditional territories and would include exclusive harvesting rights (Usher, 2003). Further, in some cases Aboriginal culture dictated that promises made during negotiation talks were as binding as promises later written on paper (Penikett, 2006). Beyond such cultural misunderstandings, there was also very clear neglect of treaty commitments in terms of resource allocation; some view this neglect as purposeful while others attribute these failings as a disconnect between the original treaty negotiators and the politicians who would later implement the agreements (Tobias, 1983; Asch, 2014).

After the last Numbered Treaty was signed in the 1920s, there was a hiatus in official land negotiations, a time during which various other policies aimed at assimilation were undertaken (Alcantra, 2007). However, Calder et al. v. Attorney-General of British Columbia (described in Section 3.3.2) initiated policy change from the government of Canada via a Statement on Aboriginal Claims in 1973 and land negotiations were reinitiated. While land claims policy change from government is seen by some scholars as recognition of Aboriginal land rights, several others note that renewed treaty efforts coincided closely with the discovery of mineral and energy resources in previously untreated areas (Saku, 2002; Usher, 2003; Stea & Wisner, 1984). This notion is reinforced by the first of the Comprehensive Land Claim Agreements (CLCAs) with the James Bay Cree, which was initiated by litigation surrounding the James Bay Hydroelectric project. Further, when negotiating the deal, the province’s objective was explicitly to open up the area to economic development (Peters, 1992).

CLCAs comprise of a wide variety of chapters and provisions, which vary from case to case based on the goals of signatories and over time based on political and legal trends and changes. For example, in the early years of CLCA negotiations, signatories needed to extinguish their Aboriginal Rights in order to finalize the agreement, a requirement that would remain until new policy provided alternatives in 1986 (Department of Indian Affairs and Northern Development, 1986). While the detailed content of CLCAs is different in every case, most all include agreements with regards to cash payment, details on land ownership, and environmental management (Saku, 2002). It is important to note that when negotiating land ownership, mineral rights and surface rights are considered separate and are negotiated. For example, in the Nunavut Land Claim Agreement, the Inuit negotiated surface rights to approximately 20% of the territory,
but subsurface rights to only 2% (Hart et al., 2012). CLCA negotiations involve both federal and provincial governments where applicable; in British Columbia, where little land falls under historic treaty, the British Columbia Modern Treaty process has been established for CLCAs in that jurisdiction.

Since 1973, the Government of Canada has signed 26 CLCAs and four self-government agreements (AANDC, 2015). However, Alcantara notes that while early CLCAs were one of the only tools available to Aboriginal peoples with untreatied lands, legal developments via several key court cases and the use of other tools such as self-government agreements and bilateral agreements have changed the options for Aboriginal bands with untreatied land (2007). While CLCAs in the North have been completed, the British Columbia Treaty process has only completed one Modern Treaty (another term for CLCA) with the Nisga’a First Nation. The costs of the British Columbia Treaty program in 2008 had exceeded $1 billion, and some nations have withdrawn from the process due to excessive cost (Alcantra, 2009; Penikett, 2006). Penikett notes further that strict provincial and federal mandates and inflexibility of the British Columbia Modern Treaty process limits the ability of negotiators (2006).

Beyond the inherent difficulties of the negotiations themselves and their motivations, there is also continued difficulty with implementation following a final agreement. The federal and provincial inability to fulfill CLCA obligations has been expressed in academia, in the Auditor General’s reports, and in court (Peters, 1992; Auditor General, 1998; Nunatsiavut Government v. Newfoundland and Labrador (Municipal Affairs), 2013). Given these various limitations and new process options such as government-to-government agreements, the necessity of treaty negotiations from the Aboriginal perspective is unclear.

3.5. Environmental Assessment

By generalized definition, the Environmental Assessment (EA) process is a planning tool that is used to identify and predict impacts of human activity in order to manage risk and uncertainty. Literature on EA describes the process as doing this by integrating science, data, knowledge, values, and priorities through technical and communicative channels in order to bring together multiple stakeholders and analyze the potential impacts of a project (Armitage, 2005; Lukas-Amulung, 2009; Galbraith et al., 2007; Noble, 2010; Lawrence, 2003). Beyond scholarship, the
current federal legislation in Canada states that environmental assessment aims for the “prevention of significant adverse environmental effects” (*Canadian Environmental Assessment Act* 2012). Given the number of different processes and project triggers, the scope, detail, and explicit purpose of EA will vary in every project. Ideal application, regardless of process, ought to include the most accurate available information needed to inform decisions.

Ongoing debate exists surrounding which type of impacts EA ought to focus on. Originally created to assess the biophysical impacts of a project, EA often focuses primarily on the environment (Noble, 2010). Some argue that the increasing inclusion of socioeconomic impacts dilutes and begins to neglect the importance of the “environmental” aspect of EA (Beanlands & Duinker, 1983) Others posit that the socioeconomic impact assessment portion of data collection is greatly neglected (Burdge, 2002). More broad theoretic thought on the matter is articulated by Swyngedouw, who wants to “bring together what has been severed for too long by insisting that nature and society are deeply intertwined” (2010). When considering these two arguments, Cashmore notes that the purpose of a given EA process is intrinsic in defining the scope of environmental and social factors included (2003).

Regardless of academic opinion on the socioeconomic portion of EA, the inclusion of potentially affected Aboriginal communities is legislated at the federal and provincial levels (*Canadian Environmental Assessment Act* 2012, *Environmental Assessment Act*, 2002). As discussed in Section 3.3.2, legislated Aboriginal and Treaty rights were included in Section 35(3) of the Canadian Constitution in 1982. The Crown’s Duty to Consult that stems from constitutional affirmation and continued legal interpretation of these rights requires that the Crown consult Aboriginal peoples when it “contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights” (Government of Canada, 2011). This duty is in part fulfilled via the Aboriginal consultation portion of the EA process, which is outlined by the recently streamlined *Canadian Environmental Assessment Act* 2012. In section 5 of this Act, the environmental effects to be evaluated are defined to include an effect occurring in Canada that may change “health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historic, archaeological, paleontological, or architectural significance” with respect to Aboriginal peoples.
In addition to assessment at the federal level, each province and territory holds their own unique EA process, as seen in Table 33.

**Table 3: Provincial Environmental Assessment Legislation**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>EA Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>Canadian Environmental Assessment Act 2012</td>
</tr>
<tr>
<td>Alberta</td>
<td>Environmental Protection and Enhancement Act, Part 2</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Environmental Assessment Act</td>
</tr>
<tr>
<td>Manitoba</td>
<td>The Environment Act</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Clean Environment Act, Reg. 87-83</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Environmental Protection Act</td>
</tr>
<tr>
<td></td>
<td>Environmental Assessment Regulations 2003</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Mackenzie Valley Resource Management Act (Mackenzie Valley Region)</td>
</tr>
<tr>
<td></td>
<td>Inuvialuit Final Agreement, Section 11 (Inuvialuit Settlement Region)</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Environment Act, Section 49</td>
</tr>
<tr>
<td></td>
<td>Environmental Assessment Regulations</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Nunavut Land Claims Agreement, Article 12</td>
</tr>
<tr>
<td></td>
<td>Nunavut Planning and Project Assessment Act</td>
</tr>
<tr>
<td>Ontario</td>
<td>Environmental Assessment Act</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Environmental Protection Act, Section 9</td>
</tr>
<tr>
<td>Quebec</td>
<td>Environmental Quality Act, Division IV.1</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Environmental Assessment Act</td>
</tr>
<tr>
<td>Yukon</td>
<td>Yukon Environmental and Socioeconomic Assessment Act</td>
</tr>
</tbody>
</table>

Due the potential jurisdictional overlap between processes, the recently released Canada-wide Accord on Environmental Harmonization includes a sub-agreement on environmental assessment in order to minimize review to a single assessment when two processes have been triggered. This sub-agreement also recognizes the EA processes of Aboriginal peoples in the
cases of self-government (CCME, 1998). Additionally, many federal-provincial agreements on EA cooperation have been initiated (Canadian Environmental Assessment Act 2012).

Beyond the differences in provincial and federal processes, various authors note that the differences in application of uniform EA processes leads to additional variation from project to project and over time (Fidler and Hitch, 2007; Galbraith et al., 2007; Booth and Skelton, 2011; Noble, 2010). This variation is likely due to contextual differences created by different projects, communities, landscapes, and regulators.

There are many challenges and limitations in EA application beyond jurisdictional overlap and variety in application. Firstly, the ability of EA to meaningfully consult Aboriginal Peoples affects the accuracy of socioeconomic baseline from which impacts will be assessed moving forward (Land-Murphy, 2009). Secondly, there is continued debate surrounding the ability Western-based policy to accurate reflect oral traditional values and knowledge of Aboriginal peoples (O’Faircheallaigh, 2007). Thirdly, EA has been found to neglect the maximization of benefits in focusing largely on the mitigation of negative impacts (Galbraith et al., 2007). Finally, EA has been found lacking in monitoring and follow-up after a project has been approved, leaving no channels through which the recommendations and requirements of approval can be enforced (Noble & Storey, 2005; O’Faircheallaigh, 2007; Noble 2000).

The inclusion of Aboriginal communities in the EA process generally occurs through consultation process. However, directive policy on what constitutes meaningful consultation is vague (Fidler and Hitch, 2007; Booth and Skelton, 2011). Land-Murphy (2009) offers an effective summary of evaluative criteria for public participation used by several authors in Table 4. While public participation applies to all of the public, and Aboriginal consultation explicitly applies to Aboriginal peoples covered by Section 35, the strategies by which the two are implemented are similar. Of the nineteen participation criteria covered in Land-Murphy’s summary, only transparency and resource accessibility are included in all five sources. The inconsistency of the remaining 17 criteria further emphasizes the lack of unified opinion on what meaningful participation and consultation entails. Fortunately, in the case of Aboriginal consultation, interpretation of meaningful consultation continues to gain interpretation in the SCC (Haida Nation v. British Columbia, 2004; Taku River Tlingit First Nation v. British Columbia, 2004; Mikisew Cree First Nation v. Canada, 2005).
Table 4: Summary of frameworks for evaluating Public Participation as used by Rowe and Frewer (2000), Baker and McLelland (2003), Bond, Palerm and Haigh (2004), Noble (2006), and Andre et al. (2006) (Land-Murphy, 2009)

<table>
<thead>
<tr>
<th>Criterion</th>
<th>Rowe &amp; Frewer</th>
<th>Baker &amp; McLelland</th>
<th>Bond, Palerm &amp; Haigh</th>
<th>Noble</th>
<th>Andre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Early Involvement: public involved as soon as value judgments enter into play, and provide input regarding the consultation forum</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Representativeness: members of the public who participate should be ideologically, geographically and demographically representative of the broader public</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Task Definition: the scope and nature of public participation should be clearly defined</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transparency: the public can see the decision-making process and outcomes thereof</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Structured Decision-Making: appropriate mechanisms are used for displaying and structuring the decision-making process</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Understanding of Process: members of the public actually understand the decision-making process</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Resource Accessibility: participants should have access to appropriate and adequate information, human resources, time and material resources</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Influence: participants should have a discernable, positive impact on decision making outcomes</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Independence: the decision body should be independent from sponsoring agencies, and be seen as such by the general public</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cost Effectiveness: exercise should occur at the most appropriate decision-making level, and be conducted in a timely manner at a reasonable cost</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Cultural Compatibility: participatory exercises should be adapted to the cultural context and include trust-building mechanisms</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Benefits to all Partners: benefits of involvement must be apparent to the public</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Equal Opportunity to Participate: access and opportunity to participate should be evenly distributed</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accessibility: the public must be able to access, and communicate with, project proponents and decision-makers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Legal Right to Participate: the right to participate should be enshrined in legislation</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adaptable: proponents and members of the public must demonstrate willingness to learn and flexibility</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Social Learning: participants should gain new knowledge through their participation</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consensus Building: if possible, the participatory exercise should help build consensus</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Continued Dialogue: the public must have ongoing communication with the decision-makers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>
The degree to which consultation is considered ‘meaningful’ often varies based on the initiative and intention of the proponent. Disagreement over what consultation means and how it should be carried out commonly occurs due to lack of sufficient local understanding on the part of the proponent (Mulvihill and Baker, 2001). In many situations, the only way to determine whether or not consultation has been meaningful is through the court system (Skelton and Booth, 2011; Taku River Tlingit First Nation v. British Columbia, 2004).

Even in cases of optimal consultation processes, some argue the ability of the EA process to accurately and adequately represent traditional knowledge and values through a non-traditional process and perspective. O’Faircheallaigh notes that EA process fails to address “how the structures and activities they establish should operate so as to facilitate Aboriginal participation” (2007, p. 334). Further, participants in Booth & Skelton’s research into Aboriginal consultation in EA stated that the EA process fundamentally and philosophically fails First Nations (2011). While some go as far as stating that all environmental data collection is expropriation, other believe that TEK and the EA process two can coexist with further effort and restructuring (Robbins, 2006; Booth & Skelton, 2011).

Aside from challenges specific to Aboriginal consultation, EA faces criticism in its ability to allocate benefits and to provide rigorous follow-up and monitoring. This largely explains the emergence of Impact and Benefit Agreements, which is the focus of the next section.

### 3.6. Impact and Benefit Agreements

In light of the challenges and limitations of EA, Impact and Benefit Agreements (IBAs) have emerged largely out of social expectation and business sense and not directly out of legislation (Prno and Slocombe, 2012, Lukas-Amulung, 2009). IBAs are private agreements between Aboriginal peoples and project proponents that address various issues, from environmental follow-up to employment rates, among other provisions. Lukas-Amulung (2009) notes that while there are specific legislative requirements to complete IBAs in some cases, other cases include vague requirements or none at all, whereas Fidler and Hitch posit that IBAs are part of the legal framework that is “intrinsically linked to EA and the duty to consult” (2007, p.62). Despite weak legislative standing, IBAs are widely considered as part of the standard package in planning processes for mineral development, and apply to virtually all mining projects in Canada (Fidler
and Hitch, 2007; O’Faircheallaigh, 2012). The signed agreements are considered a form of commercial law, and are noted to be ‘quasi-legal’ (Caine and Krogman, 2010; Fidler and Hitch, 2007). It has also been noted that while the use of IBAs is widespread, there has been no formative litigation concerning this type of agreement to date, which may be reflective of two things: that they are working; or that they have weak legal standing (Caine and Krogman, 2010).

As IBAs are unregulated agreements, the content is not affected by procedural requirements and no two agreements are identical. This variety is beneficial to Aboriginal communities, as the provisions negotiated by one community may not be effective in another (Fidler and Hitch, 2007). Despite the confidentiality and variety of these agreements, broad categories of provisions found in most IBAs can be synthesized based on the work of several authors. IBAs can generally include the goals of the agreement, consent clauses, dispute resolution mechanisms, confidentiality clauses, and a wide variety of economic, environmental, and social provisions. Based on the general outlines noted by various authors on IBA, agreements include provisions for communication, cooperation, land access, payments (in the form of fixed payments, royalties, or equity), employment, business opportunities, education and training, environmental management (such as monitoring and mitigation measures), protection of cultural heritage, community projects, and harvester compensation (Gibson and O’Faircheallaigh, 2010; Hitch 2006; Dreyer and Myers, 2004; Galbraith et al., 2007; Fidler and Hitch, 2007; Bergner, 2006; Kennett, 1999; Shanks, 2006). Table 5 provides further details on some of these general areas.

<table>
<thead>
<tr>
<th>Provision</th>
<th>Objective</th>
<th>Exemplary Clauses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment</td>
<td>Increase employment opportunities</td>
<td>• Preferential hiring for aboriginal people&lt;br&gt;• Recruit and retain employees for long-term work&lt;br&gt;• Flexible schedule to accommodate traditional activities such as hunting</td>
</tr>
<tr>
<td>Education and Training</td>
<td>Increase opportunities through education and training</td>
<td>• Cross cultural training for both aboriginal and non-aboriginal employees&lt;br&gt;• Apprenticeship and scholarship programs&lt;br&gt;• Partnership with local schools and community colleges</td>
</tr>
<tr>
<td>Economic Development</td>
<td>Preferential contracting to aboriginal businesses to increase business development opportunities</td>
<td>• Direct tendering to aboriginal communities&lt;br&gt;• Unbundling contracts into simpler, smaller components</td>
</tr>
<tr>
<td>Socio-cultural support and communication structures</td>
<td>Support societal challenges, recognize and/or reaffirm aboriginal rights and historical cultural background</td>
<td>• Monitor social impacts with developed indicators&lt;br&gt;• Fund community projects and physical infrastructure&lt;br&gt;• Committee meeting to liaise and facilitate on-going communication</td>
</tr>
<tr>
<td>Environmental Monitoring and Protection</td>
<td>Ensure corporations comply with existing laws, regulations and incorporate additional environmental protection provisions into the IBA</td>
<td>• Emphasis to give certain EA clauses particular attention&lt;br&gt;• Obligations regarding abandonment and reclamation&lt;br&gt;• Minimize activity in spiritually and culturally sacred areas, such as archaeologically significant sites</td>
</tr>
<tr>
<td>Finance</td>
<td>Monetary settlements to compensate for surface or subsurface development</td>
<td>• Fixed cash payouts, variable cash payments and suspension payments&lt;br&gt;• Joint venture and development funds&lt;br&gt;• Payout structuring to meet community needs, i.e. not a lump sum</td>
</tr>
<tr>
<td>Commercial Terms</td>
<td>Ensure contract has terms to reflect long-term planning and enforcement</td>
<td>• Dispute resolution&lt;br&gt;• Force majeure&lt;br&gt;• Confidentiality</td>
</tr>
</tbody>
</table>

As IBAs have recently formed as a result of the limitations of the EA process, the body of knowledge surrounding them is still developing and is highly variable and inconsistent.
The use of IBAs in conjunction with the EA process appears to be offering better management of the impacts of mining than EA would alone. The elevation of leverage through land claims and changing political climate increases the decision-making power of communities, through which they are able to demand meaningful consultation and appropriate benefits, creating a private process that bypasses EA in terms of its level of participation and community power on Arnstein’s Ladder. However, these agreements are still not living up to their full potential as a result of the challenges and limitations faced by the process such as confidentiality clauses, overlap with EA, and community articulation of expectations.

The ideal application of IBAs differs between resource developers and Aboriginal communities. For both parties, IBAs are agreements through which acceptable development on Aboriginal land can be pursued, positive relationships can be built, local benefits can be secured, capacity strains can be relieved, and EA follow-up can be ensured (Galbraith et al., 2007). However, the focus of each party in that purpose differs. For resource developers, IBAs are negotiated agreements through which the support of Aboriginal communities can be gained in order to gain a social license to operate, minimize costs, reduce uncertainty over the course of the project, and lower the likelihood of delays through relationships with Aboriginal communities (O’Faircheallaigh and Corbett, 2005; Lapierre and Bradshaw, 2008; Prno and Slocombe, 2012; Fidler and Hitch, 2007; Render, 2005).

Conversely, Aboriginal communities pursue provisions that reinforce minimal negative impact and ensure that positive impacts are distributed within communities and not just redirected away from northern Canada (Fidler, 2008; Fidler and Hitch, 2007; O’Faircheallaigh, 2012). From the community perspective, IBAs should reflect the rights of Aboriginal communities and reinforce the “that it is no longer acceptable to develop natural resources in such a way as to impose costs on those whose land is affected while the benefits are sent elsewhere” (Caine and Krogman, 2010, p.80; Hitch, 2006). In terms of overall decision-making power, O’Faircheallaigh and Corbett posit that the purpose of IBAs is to ensure that Aboriginal people can protect their traditional land, and that the ideal application of IBAs from the community perspective includes provisions that give Aboriginal communities “the capacity to act unilaterally to deal with environmental concerns or problems associated with the project”.

(O’Faircheallaigh, 2004).
Application of IBAs involves two equally important parts: negotiation and implementation. It is worth noting that the negotiation process is an expensive endeavour, and that often, before negotiations even begin, pre-negotiation agreements known as Memorandums of Understanding (MOUs) are signed to address the issue of funding (Gibson and O’Faircheallaigh, 2010). The provision of funding to communities through the MOU process has the ability to increase the capacity of these communities to negotiate (Sosa and Keenan, 2001).

Negotiations involve “representatives of the parties exchange and debate negotiation positions and, over time, reach an agreement that represents the end point of the negotiation” (O’Faircheallaigh, 2012, p.1802). The final negotiated agreement is a product of the leverage and the capacity with which each party has to work (Fidler and Hitch, 2007; O’Faircheallaigh, 1995). Additionally, Gibson and O’Faircheallaigh note that refusing to enter negotiations can be used to increase leverage (2010).

Timing of negotiations can also vary. From the industry perspective, the earlier an IBA is signed, the sooner resource developers are able to secure a higher degree of certainty for the project. As such, this provides communities with a higher degree of leverage in the negotiation process. However, as baseline data and project design are established, a higher degree of knowledge to inform the negotiations is made available. For Aboriginal communities, IBAs should ideally be negotiated at the point where both information and leverage are at their highest (Gibson and O’Faircheallaigh, 2010).

Some authors (Sosa and Keenan, 2001, Wolfe, 2001; Fidler and Hitch, 2007; Caine and Krogman, 2010) have expressed doubt concerning the capacity of Aboriginal communities to negotiate these agreements. This scepticism appears to be based on the reduced capacity of communities with low social well-being to address the complexity of resource development (Fidler and Hitch, 2007; Caine and Krogman, 2010). More optimistically, Fidler and Hitch (2007) note that there is high likelihood for communities to develop increased capacity in the negotiations process as they gain experience over the course of multiple negotiations.

Following the negotiation of a final agreement, the implementation of the agreed-to provisions is equally important in the IBA process, as “it cannot be taken for granted that the conclusion of an agreement will ensure the outcome intended by both parties” (Gibson and O’Faircheallaigh,
Various structures can be set up to ensure the implementation of the IBA such as trust funds, implementation committees, and a mining liaison officer (Dreyer and Myers, 2004, Siebenmorgen and Bradshaw, 2011; O’Faircheallaigh, 2012; Gibson and O’Faircheallaigh, 2010).

Beyond the implementation of the original agreement, there may also be ongoing negotiation and modification over the course of the project in order to capitalize on mutually beneficial improvements (O’Faircheallaigh, 2012). In order to ensure that the provisions of a given IBA are effectively implemented, monitoring and review are essential (Dreyer and Myers, 2004; Gibson and O’Faircheallaigh, 2010).

The overall effectiveness of IBAs can be assessed based on both the negotiated provisions, or content, and the actual implementation of those provisions (O’Faircheallaigh and Corbett, 2005, Dreyer and Myers, 2004). Opinions of IBA effectiveness vary between authors, however all agree that IBAs have not reached their full potential (O’Faircheallaigh and Corbett, 2005; Dreyer and Myers, 2004; Galbraith et al., 2007; Prno et al., 2010). The high variability in this assessment may be the result of increased effectiveness as the IBA process develops, differences in authors’ experience and perspectives, differences in methodology, or variability of opinion among respondents.

The specific reasons behind issues with effectiveness are as variable as the content and context of the agreements. In some cases, provisions for employment are ineffective if there are no Aboriginal people qualified to fill the positions (Sosa and Keenan, 2001) Additionally, the inherently profit oriented nature of businesses mean that, in the scenario where profits are low, community initiatives may face budget cuts (Kemp, 2009). However, despite the imperfect performance of IBAs, they appear to be creating more benefits than would occur in their absence (Prno et al., 2010).

Some of the biggest challenges faced by parties negotiating IBAs include their confidentiality, their conflict with EA, and the articulation of community expectations (Galbraith et al., 2007; Fidler and Hitch, 2007; Siebenmorgen and Bradshaw 2011). The confidential nature of IBAs has been described as challenging to the optimal use of these agreements in several ways. Firstly, the confidentiality of the agreement means there is no way to assess the fairness of provisions
and the effectiveness of their implementation; communities with limited capacity to negotiate have no regulatory review on which they can ensure that these agreements are in fact to their benefit and not reducing their decision-making power (Galbraith et al., 2007). Additionally, confidentiality presents a hurdle to learning, blocking the ability of communities to learn from the negotiations of others (Caine and Krogman, 2010; O’Faircheallaigh and Corbett, 2005). Further, confidentiality can amplify competition among neighbouring communities in the case of multiple negotiations for the same project (Sosa and Keenan, 2001). However, the confidentiality of agreements also holds some advantages for both companies and communities: Aboriginal governments may not want their income from specific project to affect other negotiations and relationships, and companies may not want to see a status quo or continued increase in financial arrangements.

Another source of concern around IBA performance stems from the common failure of negotiations to capture a community’s expectations. This can occur when internal community engagement processes are rushed or simply fail to offer a sufficient opportunity for community members to formulate and then give voice to their goals in negotiations. Commonly, when community members are asked to reflect on the performance of those IBAs, they identify failures that relate to expectations that might have been left implicit at the time of the IBA’s negotiation (Siebenmorgen and Bradshaw 2011). Additionally, the reflection of community goals is dependent on negotiators representing those goals, and there is always the possibility of conflict within communities over the negotiation of IBAs (Paulsen, 2007).

There is also conflict and confusion in navigating IBAs alongside EA. While IBAs are a private discussion of impacts and benefits between the community and the project proponent, the EA process is a public discussion of many of the same issues (Galbraith et al., 2007). Respondents in Lukas-Amulung’s (2009) study agreed that the relationship between EA and IBA is largely uncoordinated, which can cause issues given the overlap of the impacts addressed, the review and negotiation stages, and the finalization of both processes. This overlap leads to problematic interactions with the roles and responsibilities of the developer and Aboriginal community leadership” (Lukas-Amulung, 2009).
3.7. Non-Binding Government-to-Government Agreements

One of the most recent processes available to Aboriginal peoples in Canada is non-binding government-to-government (G2G) agreements. The extent and nature of content in these agreements can vary significantly; they can range from extensive land use planning and shared decision-making agreements to more simple agreements that target specific issues such as forest management (Wóoshtin Yan Too.Aat, 2011; Strategic Engagement Agreement, 2003; Alcantra, 2007). Little research exists on G2G agreements, either because they such a recent development or because there is little standardization between them (Davies, 2010). While G2G agreements can be found across Canada, British Columbia in particular has embraced the concept in light of the CLCA stalemate in the province. With no rigid mandates and the exclusion of federal interests, G2G agreements exist outside of the British Columbia Treaty process, allowing an increase in flexibility (Alcantra, 2007). These advantages have led to the province signing G2G agreements under the name of Strategic Engagement Agreements with several First Nations in the province, including the Tahltan Central Council, the Tsilhqot’in National Government, and the Stó:lo First Nations, among others (British Columbia, 2015).

The widespread use of G2G agreements over CLCAs in British Columbia may be attributed to the general inflexibility in provincial treaty mandates, which according to Penikett, limits the creativity of negotiators (2006). It seems probably that bilateral G2G agreements have been created to fill the gap left by the limitations of the Modern Treaty process in the same way that IBAs have developed to fill gaps left by limitations in the EA process. However, initial research shows that the unlimited flexibility of G2G agreements also poses challenges, such as the lack of formula or starting point may slow down negotiations and the potential for Nations with more natural resources in their territory to receive more favourable agreements (Davies, 2010).

3.8. Post-colonial theory in modern planning processes

The various planning processes explored in this chapter represent channels through which Aboriginal governments are able to pursue minimizing negative impacts, maximizing local benefits, and effectively exercise Aboriginal decision-making authority. However, all of these processes are, to some degree, limited by their foundations in settler society. These limits are
emphasized by post-colonial frameworks, which seek to explore the cultural legacies of colonialism worldwide. Postcolonial is often defined as “after” colonialism; as Canada is no longer under direct colonial rule, by this definition Canada is considered a postcolonial society (Childs & Williams, 1997; Willems-Braun, 1997). An alternative interpretation, defines postcolonialism as “transcending or superseding” colonialism; by this definition, Canada cannot be considered postcolonial, as Canada continues to perpetuate the aims of colonialism (Childs & Williams, 1997, p.4). In short, a “continuity of colonial or neocolonial relationships” remains (Willems-Braun 1997, p. 3). Aboriginal societies today must deal with two facets of colonialism in the present world. First, there are dynamic ‘post-colonial’ legacies that have been explicitly articulated by health literature. To this end, terms such as historical trauma or post-colonial distress have been used to describe the transgenerational relationship between the historic violence, assimilation and cultural suppression of colonialism and current disparities in the health and wellbeing of Aboriginal peoples (Kirmeyer et al., 2014; Sotero, 2006). Second, Aboriginal peoples must navigate current neocolonial relationships, which are a more “indirect and subtle form of domination by political, economic, social, military, or technical means” (Leys, 1975, p.26). The nature of the planning processes explored by this research falls into this second category; Aboriginal governments overcome challenges such as learning to navigate non-Aboriginal processes, and learning to speak the “language of property” in order to represent their interests, rather than through channels more congruent with their own culture (Nadasdy, 2002; Booth & Skelton 2012).

The subtleties of neocolonialism are most prominent in the structure and language of the planning processes themselves. In these processes, European concepts of property and land ownership are fundamental; however, the concept of private property is culture bound and scholars like Nadasdy have argued strongly that the concept did not exist in all Aboriginal languages and cultures (2002). The cross cultural tension in these processes is magnified by the difficulty of translating Aboriginal practices and values into processes based on settler culture and values. To this end, many consider some planning processes to be fundamentally flawed and inherently unable to represent Aboriginal peoples (Booth & Skelton, 2012; Nadasdy, 2002). While many of these planning processes are clearly flawed, it is also evident that some Aboriginal governments have used them to effectively assert their interests, largely based on recognizing the “advantages of using the language of property to defend their interests against
encroaching Euro-Canadians” (Nadasdy, 2002, p.255). So, while planning processes have the potential to empower Aboriginal communities within the current system, as shown through literature on IBAs, those planning processes are also unlikely to completely transcend their neocolonial nature.
Chapter 4: Navigating the Planning Process landscape: The case of the Taku River Tlingit First Nation

This chapter presents a narrative of the Taku River Tlingit First Nation’s experience with the Tulsequah Chief Mine from 1993 to 2014. This narrative was created based on interviews with leaders and consultants over the course of the Tulsequah Chief Mine proposal, a review of technical documents pertaining to the planning processes involved, and participant observation at the government offices through conversation and meetings.

Located in the northwest of British Columbia, the Taku River Tlingit First Nation (TRTFN) has no modern land claim settlement, nor did they sign a treaty during initial colonization. The traditional Taku River Tlingit traditional territory spans the colonial jurisdictions of the province of British Columbia, the Yukon Territory, and the state of Alaska, although the majority of TRTFN territory lies in British Columbia.

The TRTFN contributes to the research aim by offering a case study where an Aboriginal government has purposefully navigated policy- and project-level planning processes using all the tools available to them, but continue to face unresolved issues with regards to a proposed mineral development. Over the last two decades, the TRTFN has navigated the Environmental Assessment of the Tulsequah Chief Mine while participating in IBA negotiations, Modern Treaty negotiations, Government-to-Government negotiations, and extensive litigation.

The TRTFN government has accumulated a large amount of experience with these processes over several decades, and has effectively navigated some policy-level planning despite challenges with project-level processes. In addition to having an active claim in the British Columbia Modern Treaty process since 1993, the TRTFN has successfully completed a two piece government-to-government agreement (G2G) with British Columbia, known as the Wóoshtin Yan Too.Aat Land and Resource Management and Shared Decision Making Agreement (Wóoshtin Yan Too.Aat). The G2G was, in part, a response to the proposed reopening of the Tulsequah Chief Mine, an old lead, copper, zinc, silver, and gold mine originally operated in the mid-1900s.
There has been extensive research done on many of the individual planning processes involved in this research, but no detailed narratives of the communities tasked with navigating all at once have been created. Given the lengthily experiences and many achievements of the Taku River Tlingit First Nation in terms to resource development, such a narrative is of great importance both as a stand-alone account and as information and context contributing towards the overall aim of this research. In order to create a record from the perspective of participants, direct quotes from interviews have been used throughout to create context and highlight experiences.

This chapter combines information from document review with the voices of individuals, collected through interviews, who have taken part in the processes firsthand to create a record of the proposal, assessment, and TRTFN responses to the Tulsequah Chief Mine. The chapter begins by briefly exploring TRTFN’s history, values, and governance structures for the purposes of context. From there, the chapter documents the proposal and subsequent Environmental Assessment of the Tulsequah Chief Mine. The final section of this chapter explores the TRTFN’s concerns with the proposed project and assessment, and their responses via policy development, litigation, and government-to-government negotiations and agreements. A Summarized Timeline of events can be found in Appendix A.

4.1. Taku River Tlingit First Nation History, Values, and Governance

The Taku River Tlingit First Nation (TRTFN) is one of three inland Tlingit nations, alongside the Teslin Tlingit Council and Carcross-Taggish First Nation. The TRTFN originates from the coastal Takuquan, one of 14 coastal first nations the occupied the Alaska panhandle. Based on declining sea otter harvests and increased inland European fur trade, a group of Takuquan and neighbouring Athapascans eventually moved further inland, harvesting and trading with Aboriginal nations and Europeans in the territory similar to that outlined in Error! Reference source not found.1 (Staples & Poushinsky, 1997).

While the TRTFN actively engaged in trade with arriving European settlers, they have always been clear and consistent in voicing their rights to their land. When the Governor General proposed a treaty and tried to negotiate land with the TRTFN, Chief Taku Jack told the Governor General “you’ve got no land to give me” (Melvin Jack, Elder).
The history and culture of the Taku River Tlingit has been well documented through a variety of channels; information is available through the Traditional Land Use study completed by Lindsay Staples and Nick Pouhinsky of NorthWest Resources Consulting Group, ethnographies such as *My Old People Say. An Ethnographic survey of Southern Yukon Territory* by Catherine McClellan (1976), and documents such as *Lingít Kusteeyí: What my Grandfather taught me* by Jackie Williams.

![Map of the Taku River Tlingit First Nation Traditional Territory in British Columbia](image)

**Figure 1: Taku River Tlingit First Nation Traditional Territory in British Columbia (Taku River Tlingit First Nation, 2015)**

“We’re very serious about the wellbeing of our territory”

(Participant 1).

The historic harvesting and trading of the resources within the Taku River watershed has created a culture that highly values the integrity of the land and resources available. Not only is the TRTFN’s traditionally territory a great source of personal wealth in terms of subsistence living, it is also a source of pride and of healing. Leading members of the community have noted that the integrity and quality of the resources available to the community is considered a source of wealth and pride (Participant 5). Additionally, visits to the Taku River are credited with helping community members reconnect with the territory; it is considered a source of spiritual healing for
the TRTFN. Returning to the Taku River is considered beneficial to youth in the community, keeping them on a healthy path in life (Melvin Jack, Elder).

“When I started, nobody sang, nobody drummed, nobody danced … the cultural revival that's gone on in the community is crazy” (Participant 7).

In the past, like many First Nation communities facing the complexities of a neocolonial mixed economy, the TRTFN “didn't have a lot of money, there wasn't a lot of core leadership, there was a lot of dysfunction in the community” (Participant 7). However, through hard work from the community in terms of governance, social stability, and culture, the TRTFN is generally seen as a highly sophisticated organization with “really good professional team, solid leadership, [and] the social fabric is stronger than it was” (Participant 7).

“We’re here today because we took charge of our government” (Participant 1).

In 1993, the TRTFN rejected the federal government’s suggested political structure of Chief and Council, and instead implemented their own constitution. The 1993 *Taku River Tlingit First Nation Constitution Act* outlines a governance structure based on the two traditional Wolf and Crow clans. The Clan system is consensus-based, with decisions made at the clan and joint clan level. Clan meetings occur monthly, and decisions require consensus among present members, with a minimum of ten individuals present. Joint Clan Meetings (JCMs) occur bi-annually and also require consensus among members, with a minimum of ten individuals present for each clan. Should a decision not receive full consensus, it is put back on the table at the subsequent meeting. When considered for the second time, a decision only requires 70% consensus (Participant 1; *Taku River Tlingit First Nation Constitution Act, 1993*).

Clan Directors are elected by members of their respective clans to implement decisions, develop policy, and protect TRTFN rights. Clan directors also appoint Clan Leaders, who run the monthly Clan meetings. Furthermore, the entire membership elects a Spokesperson, who is charged with representing the TRTFN and with pursuing the decisions agreed upon by membership at JCMs (*Taku River Tlingit First Nation Constitution Act, 1993*).
Consistency in leadership and continuity in the community’s message has been credited as essential to the TRTFN’s effectiveness (Participant 1, Participant 5). Since 1993 “leadership is stronger and the leadership turnover is not as significant” (Participant 7). Further, the community support that is garnered by a consensus-based decision-making structure enables leaders to take confidence in their work, as “representing the [TRTFN] people when negotiating, it’s a big responsibility, but it allows you to do more than an individual would” (Participant 3).

“We agree we have to somehow live off the resources of our traditional territory, there’s a responsible way of going about it and the status quo has to change for that to happen” (Participant 1).

4.2. Tulsequah Chief Mine Proposal and Environmental Assessment

In 1993, Redfern Resources Ltd. (Redfern) submitted a proposal to redevelop the Tulsequah Chief Mine, a lead, zinc, copper, silver, and gold mine originally operated by Cominco from the 1920s to 1950s. Despite the closure and later sale of the property, acid mine drainage from the first excavation continues to impact the project area, a liability that was inherited by the new proponent upon purchase (Mark Connor, TRTFN Biologist).

The old mine is located on the Tulsequah River, 14km upstream of its confluence with the Taku River and 100km due south of Atlin, British Columbia (shown in Error! Reference source not found.). Redfern acquired 53 mineral claims and 25 crown granted claims that amount to 100% ownership of the Tulsequah Chief Mine as well as the nearby Big Bull mine and surrounding area. Redfern originally proposed to extract 7.9 million tonnes of ore at approximately 2500 tonnes/day over 9-10 years. The initial project proposal considered several site access and transportation alternatives. One road option and a pipeline option were deemed unfeasible and Redfern studies noted that changes in sedimentation in the Taku River affected the historic barge route option used by Cominco in the 1950s. Given these analyses, the favoured alternative was the construction of a second road option: a new 160km access road from Atlin to the mine site, noted as ‘Alternate Road Route’ in Figure 2 (Redfern Resources, 1997).
In 1994, the application to reopen the Tulsequah Chief Mine was submitted to the now-defunct Mine Development Assessment Act; when the British Columbia Environmental Assessment Act came into effect in June of 1995, the assessment was transferred to the provincial EA process. At the time of application, the project also fell under the 1992 federal Canadian Environmental Assessment Act, as it required both a section 35 authorization from the Fisheries Act and a section 5 permit from the Navigable Waters Protection Act. While both provincial and federal decisions remained separate, the overall review process was harmonized under the Canada-British Columbia Agreement for Environmental Assessment Cooperation.

According to the 1992 British Columbia Environmental Assessment Act (which was revised in 2002), the Tulsequah Chief Mine and access route had to complete the six steps of the British Columbia Environmental Assessment process:

1. Formation of a Project Committee;
2. Project Committee creates Project Report Specifications;
3. Proponent writes Project Report based on Specifications;
4. Committee submits a Recommendation Report to the EAO based on the Project Report;
5. The Director of the EAO and/or relevant Ministers make a decision based on the Recommendation Report; and
6. The project is either given or denied an Approval Certificate

In order to move the Tulsequah Mine proposal through the EA process, a Project Committee including federal, provincial, regional, American, and First Nation representatives was formed. This committee was charged with creating guidelines for the proponent’s completion of a Project Report, which includes biophysical and socioeconomic baseline studies, design details, and mitigation measures for potential negative impacts. Redfern submitted their project report in 1997 for the Project Committee to review and produce a recommendation for the Minister. The final Recommendation Report was completed by a committee that included five British Columbia representatives, one Yukon representative, three federal representatives, one municipal representative, three American representatives, and one TRTFN representative. However, the TRTFN “would have had more reps at the table if we had more funding to do so” (Participant 6).

While the Project Committee was the overarching review group, there were numerous working groups and subcommittees involved throughout, namely the ARD/Metal Leaching/Water Quality Subcommittee, the Wildlife/Aquatic and Access Subcommittee, and the Cumulative Effects Subcommittee (Report and Recommendations of the Taku River Tlingit First Nation Project Committee Member, 1998; Report and Recommendations on the Tulsequah Chief Project, 1997).

Despite the TRTFN positing that “consultation was not meaningful” and that there were several unresolved concerns, the Project Committee concluded in the Recommendations Report that “that the proponent’s notification measures, information distribution and consultation program were satisfactory” (Participant 9; Report and Recommendations on the Tulsequah Chief Project, 1997, p.22). The final Project Committee’s Recommendation Report concluded that the project should go ahead, and the Minister of Environment, Lands and Parks alongside the Minister of Energy and Mines announced the approval of the Tulsequah Chief Mine in March of 1998 (Taku River Tlingit First Nation v. Ringstad, 2002). The only commitment to the TRTFN in the original approval certificate was Redfern’s requirement to “participate with the Province, First Nations and third parties in a joint management process, if established by the Province” (Taku River Tlingit First Nation v. Ringstad, 2002).
4.3. Taku River Tlingit First Nation Concerns and Responses

“The land changes the people, but the mines change the land” (Melvin Jack, Elder).

Despite the work of the proponent and the Project Committee, many of the TRTFN’s concerns surrounding the Tulsequah Chief Mine were not resolved when the Project Committee submitted a Recommendation Report in favour of approving the mine (Report and Recommendations on the Tulsequah Chief Project, 1997). To this end, the TRTFN submitted an independent, dissenting Recommendations Report for the EAO’s consideration. The TRTFN was not against development in their territory; “we were about raising the standards” (Participant 1). The proposal to reopen the Tulsequah Chief Mine was problematic to the nation in several ways (Participant 1). Firstly, the proposed access road cut through undeveloped traditional territory, not only disrupting existing ecosystems but also increasing the likelihood of increased development in the future (Taku River Tlingit v. British Columbia, 2004). To this end, the Report and Recommendations of the Taku River Tlingit First Nation Project Committee Member described this portion of the project as a “harbinger of potential environmental effects that may far exceed those of the mine itself” (1998, p. 7). This was of particular concern at the policy level, as the TRTFN was concerned that the “road [would] preclude the substantial opportunities presently available to TRTFN in shaping their own visions for land use and treaty settlement” (Report and Recommendations of the Taku River Tlingit First Nation Project Committee Member, 1998). Further, the project would be located just upstream of the Tulsequah River’s confluence with the Taku River, which is the namesake of the TRTFN and holds great significance in terms of identity, spirituality, resources, and wellbeing (Melvin Jack, Elder; Participant 5). Based on a wide variety of concerns, “the majority of TRT members did not want the mine, and definitely did not want the access road” (Participant 4). This is not to say that there was full consensus on the matter, as “conflicts within the community surrounding the mine proposal caused divisions and tension” (Participant 4).

“They needed the … opportunity to have a proper land plan and expression of what their interests were going to be, and … the Chief mine was basically being done in the absence of any of that” (Participant 7).
Beyond the territory-wide land use planning issues brought on by Tulsequah, the TRTFN also outlined many specific concerns with the proponent’s Project Report in terms of habitat and wildlife, citing issues such as inadequate baseline studies for wildlife, ignoring habitat fragmentation, and questions regarding ecosystem assessment methodologies (Report and Recommendations on the Tulsequah Chief Project, 1997). While much of the ecological baseline on the project was adequate, other areas were lacking. For example, “it was speculated that the fisheries values in the Tulsequah were fairly low, but actually, there's good overwintering and you get a lot of these peri-fluvial springs, where the river goes underground for a little bit and then pops up on these gravel bars. And you get these little clearwater ponds, and they're full of juvenile Coho in the winter” (Mark Connor, TRTFN Biologist).

“The Elders were against it from day one” (Participant 2).

There were also substantial concerns with the British Columbia EA process through which these issues were managed. When the Project Committee submitted its recommendation to approve the project, they had “never met to discuss the results of the various subcommittees which [had] been reviewing the complex and technical issues to assist in the assessment” (Report and Recommendations of the Taku River Tlingit First Nation Project Committee Member, 1998, 1998). Further, while detailed studies were completed to assess biophysical baseline and potential impacts, “the EA is completely lacking in the area of social impacts. Negative social impacts [are] virtually ignored [while] the EA always makes a point of mentioning any positive social impacts” (Participant 6).

In order to represent these concerns, the TRTFN had “a handful of very smart and motivated people doing a lot” in leadership and negotiator positions who would “analyze and plan, and then take another step” over the course of “the duck and weave” nature of engaging in the EA process, (Participant 9; Participant 1). The channels by which the TRTFN’s team responded to the approval of the Tulsequah Chief Mine were to fight the decision through litigation, to create their own rules with regards to mining via policy development, and to negotiate agreements with British Columbia to address future development in the territory.
4.3.1. Litigation

“It was really validating, and it really kind of changed the dynamic”
(Participant 7).

When the Environmental Assessment Office (EAO) released an Approval Certificate for the Tulsequah Chief Mine in 1998, the TRTFN challenged the approval in court based on their Aboriginal rights and on procedural concerns with the EA process. The TRTFN stipulated that the proposed 160km access road to the mine through otherwise undeveloped TRTFN territory “would cause adverse impacts to wildlife and to the Tlingit's ability to rely on the resources of that area for their domestic economy, culture and well-being” (Taku River Tlingit First Nation et al. v. Ringstad et al., 2000). The TRTFN sought to have the court declare that Project Report and Recommendation, and Project Referral did not conform to legal requirements, and to have the court quash and set aside the Project Approval Certificate (Taku River Tlingit First Nation et al. v. Ringstad et al., 2000).

While the TRTFN argued that the process was “so thoroughly tainted at so many levels [that] the entire process begin afresh”, the original decision made by the Honourable Madam Justice Kirkpatrick dismissed the request for her to declare that the Report & Recommendation and Project Referral did not conform to legal standards (Taku River Tlingit First Nation v. Ringstad, 2002). However, the final British Columbia Supreme Court decision in 2000 quashed the Approval Certificate and required a revised Project Committee Recommendations Report be completed before the decision was to be sent back to the Ministers (Taku River Tlingit First Nation et al. v. Ringstad et al., 2000).

The 2000 British Columbia Supreme Court ruling was sent to the Court of Appeal two years later, based on the Crown’s argument that the Duty to Consult only applies after the First Nation’s aboriginal or treaty rights have been determined. The Court of Appeal ruled against this argument, stating that it was not supported by Supreme Court decisions. The final decision upheld that the Approval Certificate be sent back to the Ministers for reconsideration, but overturned the British Columbia Supreme Court’s ruling to have the committee report revised (Taku River Tlingit First Nation v. Ringstad, 2002). As such, the decision was sent back to the Ministers with the original Recommendations Report.
Following the Court of Appeal’s decision to uphold that the Approval Certificate be sent back to the Ministers, the Province escalated litigation to the Supreme Court of Canada (SCC), arguing that the Duty to Consult was met. The SCC’s final decision overturned the quashing of the Project Approval Certificate, noting that “certification is simply one stage in the process by which a development moves forward” and that subsequent planning processes would continue to consult and accommodate the TRTFN (*Taku River Tlingit First Nation v. British Columbia, 2004*). So, while the final SCC decision has beneficial for First Nations in Canada in terms of providing landmark interpretation of the Crown’s Duty to Consult and Accommodate, the decision was a loss with regards to the approval of the Tulsequah Chief Mine. Despite the loss, the court case did allow the TRTFN “to be recognized, to have a lot more leverage over the land base than they had before” (Participant 7).

### 4.3.2. Policy Development

In response to challenges with the Tulsequah Chief Mine proposal, the TRTFN developed their own policies and processes through which the governance of their lands could be undertaken. Some of the most important of these include a combined vision document and conservation plan, and a mining policy, outlined here in turn.

*Hà t_áti gì hà khustiyxh siti: Our Land is Our Future*

Over the course engaging with the Tulsequah Chief Mine proposal and Environmental Assessment, the TRTFN concluded they “needed a mandate and plan for the territory before being able to move forward on any one project” (Participant 4). In 1999, the TRTFN “partnered with [Round River Conservation] to get things done” (Participant 1) and began community-led work on a vision document and a conservation plan for the territory. The work to create these documents was extensive, and was “compiled as a result of some intense interviews” (Participant 1) for directive and ecological studies “looking at a variety of factors including current habitat and impact tolerance” (Participant 4). Interviews with TRTFN members addressed both the socioeconomic and biophysical, consulting traditional knowledge for wildlife information. Following interviews, “over several summers they'd go out and try to field proof it. And it was dead accurate” (Participant 7).
The extensive community and ecological work resulted in two documents under the title *Hà t_átgì hà khùstìykh sìti: Our Land is Our Future* (Taku River Tlingit First Nation, 2003). The first of these documents was a Vision and Management Direction for Land and Resources (Figure 3) and the second, a more technical document outlining a Conservation Area Design. Both of these documents were “put into the British Columbia provincial language, which made it difficult to ignore” (Participant 4). The documents were formally accepted by the community via the Joint Clan Meeting process outlined in Section Error! Reference source not found.. These documents are still currently used by the TRTFN as a “launching point” for initiatives within the territory (Participant 1).

![Figure 3: Cover of *Hà t_átgì hà khùstìykh sìti: Our Land is Our Future*, a TRTFN guiding document (Taku River Tlingit First Nation, 2003)](image)

*Mining Policy*

Four years after the release of *Hà t_átgì hà khùstìykh sìti: Our Land is Our Future*, the TRTFN publically released the nation’s *Mining Policy*, to “concisely and clearly, [spell] out our determination to protect our land and aquatic resources while, at the same time, providing an accessible and easy-to-understand guide for mining companies who would like to do business with us” (Sandra Jack on Nationtalk, 2007). The release of the TRTFN’s mining policy set up the TRTFN with clear guidelines for any future developers. The Mining Policy is still in effect,
although it “applies mostly to actually operating mines” and “would become more important when a project goes from exploration to mining”, which no project within the territory has done (Participant 10). The *Mining Policy* was “leading edge at the time … but it needs to be updated” (Mark Connor, TRTFN Biologist). With the creation of an official government-to-government (G2G) agreement with British Columbia, the original *Mining Policy* remains in effect, but appears now to have been primarily an important interim document. With the prevalence of placer mining and mineral exploration, TRTFN plans to update the policy are underway.

### 4.3.3. Government-to-Government Negotiations

“This is a story where the TRT turned conflict into opportunity” (Participant 4).

Throughout the pursuit of litigation and development of policy, the TRTFN also looked forward and, with the help of Round River Conservation, engaged with British Columbia to negotiate Wóoshtin Yan Too.Aat, the Land and Resource Management and Shared Decision Making Agreement (2011). This agreement sets in place the structure and the process through which the TRTFN and British Columbia work together and assess all proposed land activities in the planning area. The agreement outlines that the TRTFN and British Columbia will use two parallel processes to evaluate an application, reaching their own, separate decision while sharing recommendations (Mark Connor, TRTFN Biologist; Eric Telford, TRTFN Engagement Coordinator). The Vision and Management Direction for Land and Resources and Conservation Area Design documents produced in 2003 were created with the intent to produce documents “using the technical, provincial language, ensuring that opportunity for misinterpretation was minimized in the process of creating an official document” (Participant 4). These “two documents [that] are separate, but run in parallel” were signed by British Columbia and the TRTFN in 2011 (Participant 4). The agreement makes it so that “if any individual wanted to apply for an activity in this planning area, it’s shared with the TRT”, however how consultation proceeds depends on land designation (Participant 10). The completion of these agreements involved hard work from both the TRTFN and the province, with noted “recognition to BC for the joint endeavour” (Participant 6), as well as a large amount of support from Round River Conservation in helping with high level, technical work and mapping (Eric Telford, TRTFN Engagement).
“The Shared Decision Making agreement includes structure at three different levels: Structure, Initiative, and Process. The Structure level is broad and strategic, and consists of a G2G forum that discusses decisions at the territory level. The initiatives level creates working groups on specific issues and areas, such as Fish & Wildlife and Placer Mining, that report to the G2G forum. The Process level structures engagement on the project level, and includes operational decisions and application review, which replaces the old referrals system” (Participant 4).

While Wóoshtin Yan Too.Aat may have indirectly been born from the need for such policy-level guidance in cases like Tulsequah Chief Mine, during their creation the project was not active and “had just kind of been shoved to the side, and everyone wanted it to go away” (Participant 4). As the rest of the agreement was progressing well, “the solution was to simply create an appendix to the agreements concerning a separate process for if and when access to the territory was proposed” (Participant 4). As a result, “the land use plan wasn’t written to encompass the EA process … that process sort of ends when the EA process starts” (Participant 10). Projects with semi-permanent effects to the land are considered to be Level 4 engagement, which calls for a
working group on the project. While functional to complete the agreement, some consider the “level 4 working group a weak point” (Participant 9). In the final agreement , the Tulsequah Chief Mine falls under the Tulsequah Valley Resource Management Zone, as “resource management zones exist where there were pre-existing mineral claims or mines [as it] holds too much economic potential” (Participant 10).

While the Tulsequah Chief Mine remains a hurdle in the agreements, the “protected areas in LUP the strongest point” (Participant 9) and “all [the land near the Taku River] is basically a protected area, except for the area around the Tulsequah and around the mine” (Mark Connor, TRTFN Biologist). The agreement has also helped improve how the TRTFN accepts referrals from project proponents, providing funding for an Engagement Coordinator and clarifying engagement levels and timelines for different projects based on size and environmental sensitivity (Eric Telford, Engagement Coordinator). Before the agreement was in place, “basically you just kind of leaf through them … and once in a while this one jumps out, maybe we better respond to this one. But there was no systematic review and response to referrals” (Mark Connor, TRTFN Biologist). The sheer number of referrals sent to First Nations in the province led to a process where “the BC government would send a note to the First Nation as consultation, requesting to be informed of any impact. The First Nation either wouldn’t respond because they didn’t have time, sent back a note saying this is our land and we reject the project on principle” (Participant 4). With the revamped process in the G2G agreement, the TRTFN not only has timelines and structure for sending a list of concerns for consideration, but takes it one step further than many other agreements as the “Shared Decision Making Agreement includes the TRT making a decision themselves, and sending that decision to BC” (Participant 4).

Treaty Negotiations

In 1993, just before the application to reopen the mine was submitted, British Columbia approved the TRTFN’s Statement of Intent to negotiate a modern treaty. Following the Statement of Intent, the TRT completed Readiness documents and signed an Agreement Framework in 1995 and 1996 respectively (BC Treaty Commission, 2009). The ongoing nature of the negotiations to reach an Agreement-In-Principle mean that while the TRTFN has a non-binding G2G agreement with British Columbia, they have yet to sign a legally binding treaty with the provincial and federal government. While Treaty negotiations with British Columbia
have been ongoing, the Wóoshtin Yan Too.Aat has been the priority for the TRTFN. “In terms of treaty, at this point the framework that negotiators are sent to the TRT with is of lesser quality than their current shared decision-making agreement” (Participant 4). However, in the absence of a binding agreement, “underground rights to mine are pretty dominant” (Participant 10), which may be impetus to sign a more enforceable agreement.

“The treaty process, it's not a fun process. It's not one that people can really understand externally, but … it is advancing rights and title. Not how it intended to, but if you take it away, what are the consequences?” (Participant 7).

**4.4. The Current Status of the Tulsequah Chief Mine**

“How long ago is too long ago?” (Participant 6).

Despite the Approval Certificate surviving litigation, the project went on hiatus in 2008 when Redfern went bankrupt. The company “spent more than $27 million to bring Tulsequah Chief to the mine development approval stage” and then suffered significant losses in the paper industry during the financial crisis of 2008 (The Northern Miner, 2004; Participant 2). The project remained stagnant until Chieftain Metals Corp (Chieftain), owned by Redfern’s parent company’s CEO, bought the project during bankruptcy proceedings in 2010, creating a new company but with many of the same key individuals involved (Rivers Without Borders, 2011). Chieftain has experienced a consistent decline in share value since that time, peaking at $6 and currently valued at $0.03/share (BloombergBusiness, 2015).

While the TRTFN expressed numerous concerns with the project and process over the course of its planning and approval, they did not express complete opposition until 2012, when a consensus-based Joint Clan Mandate declared that leadership was to “take all steps necessary to ensure that the Tulsequah Chief project, as currently proposed, is not developed on Taku River Tlingit Territory” (Reuters, 2013).

Currently at the Tulsequah Chief Mine site, there is an airstrip, a barge landing, and a short (8-10km) road. The proponent built a water treatment plant to address the acid mine drainage issue, “an issue that’s been going for decades, it hasn’t been meeting water quality standards” (Mark Connor, TRTFN Biologist). However, the treatment plant only functioned for 6 months; there
were technical issues with the treatment itself, and the project proponent stated at a community meeting that running the treatment plant was too expensive in the absence of a functional mine.

A decade after the SCC decision, the Tulsequah Chief Mine returned to the provincial courts. According to the British Columbia EA process, if a project is not declared ‘substantially started’ within 10 years of the issuance of the Approval Certificate, that Certificate is void (Environmental Assessment Act, 2002, s.18). In December 2012, the Associate Deputy Minister made such a declaration. The TRTFN initiated litigation, arguing that the decision was made by the wrong individual, that the project was not substantially started and should not be qualified as such, and that the Crown had a Duty to Consult the TRTFN before making such a decision, and did not (Taku River Tlingit First Nation v. British Columbia (Minister of Environment), 2014).

Honourable Justice Macintosh determined that, while the Associate Deputy Minister was able to make such a declaration, the TRTFN had not been adequately consulted, and, had they been, the decision to declare the project as ‘substantially started’ may have had a different outcome. The Crown was ordered to engage consultation with the TRTFN and reconsider the decision following adequate consultation (Taku River Tlingit First Nation v. British Columbia (Minister of Environment), 2014). Following written submissions from both the TRTFN and Chieftain Metals, the Minister again declared the project substantially started, noting that “the work on any one component of the Project may not stand out, all the physical activity considered cumulatively constitutes a Project that is substantially started” (Reasons for Determination, 2015, p.11).

The TRTFN is not only dealing with the Tulsequah Chief Mine. The First Nation gets “about 60 applications a year for anything from placer mining, hard rock exploration, guide outfitting, trapping, heli-skiing, residential/commercial land developments” via the processes outlined in Wóoshtin Yan Too.Aat (Participant 10). Interpreting the agreement in practice can be challenging at times, especially as “around some of the resource management zones, specifically around mining, the legislative tools to realize the implementation around some of the RMZs appear like they may not even exist” (Mark Connor, TRTFN Biologist). However, more project proponent consult directly with the TRTFN on various activities within the territory, which is “one of the real benefits of having a land use plan, and a shared decision-making agreement” (Eric Telford, TRTFN Engagement Coordinator).
“Since 2011, the working relationship between BC and the TRT has been transformed, all while fundamentally disagreeing over who owns the land” (Participant 4).
Chapter 5: Navigating the planning process landscape: The case of the Nunatsiavut Government

This chapter presents a narrative of the Nunatsiavut Government’s experience with the Voisey’s Bay Nickel Mine from 1992 to 2014. This narrative was created based on interviews with leaders and consultants over the course of planning, construction, and operations of the Voisey’s Bay Nickel Mine, a review of technical documents pertaining to the planning processes involved, and participant observation at the government offices through conversation and meetings.

Located on the east coast of Canada, the Nunatsiavut Government (NG) is the regional Inuit government established through the Labrador Inuit Land Claims Agreement of 2005 (Nunatsiavut Government, 2014a). This modern land claim settlement was achieved by the Labrador Inuit Association (LIA) after 31 years of negotiations with the Crown, and is the first Inuit land claim to achieve self-government (Nunatsiavut Government, 2014b).

The NG contributes to the research aim by offering a case study where an Aboriginal government has purposely navigated policy and project-level planning processes using all the tools available to them, resulting in an operational mine and a finalized Modern Land Claim. Over the last two decades, the NG has navigated the Environmental Assessment of the mine while participating in IBA negotiations, CLCA negotiations, Government-to-Government negotiations, protest, and litigation.

At the project level, the Voisey’s Bay Nickel Mine EA and IBA are considered exemplary, and the profitable operations of the mine alongside revenue sharing agreements has resulted in increased equity of benefit distribution (Mills, 2011; Gibson, 2006). The Voisey’s Bay Mine consists of the mine, a concentrator, and a processing plant. These facilities employ approximately 450 people and are located approximately 35 km southwest of Nain, NL (Vale, 2014). Over the course of the project-level processes for Voisey’s Bay, the NG also effectively negotiated with the provincial and federal governments to finalize a Comprehensive Land Claim Agreement (CLCA).

There has been extensive research done on many of the individual planning processes involved in this research, but no detailed narratives of the communities tasked with navigating all at once
have been created. Given the lengthily experiences and many achievements of the Nunatsiavut Government in terms to resource development, such a narrative is of great importance both as a stand-alone account and as information and context contributing towards the overall aim of this research. In order to create a record from the perspective of participants, direct quotes from interviews have been used throughout to create context and highlight experiences.

This chapter combines information from document review with the voices of individuals, collected through interviews, who have taken part in the processes firsthand to create a record of the proposal, assessment, and NG responses to the Voisey’s Bay Mine. The chapter begins by briefly exploring the NG’s history, values, and governance structures for the purposes of context. From there, the chapter documents the proposal and subsequent Environmental Assessment of the Voisey’s Bay Nickel Mine. The final section of this chapter explores the NG’s concerns with the proposed project and assessment, and their responses via policy development, litigation, and CLCA negotiations. A Summarized Timeline of events can be found in Appendix B.

5.1. Labrador Inuit History, Values, and Governance

The Labrador Inuit are descendants of the prehistoric Thule and historically lived a nomadic lifestyle on the northern coast of Labrador harvesting resources. The Labrador Inuit had little contact with European culture until the 1760s when Moravian missionaries arrived and began to discourage the nomadic lifestyle of the Inuit. Community life where missionaries could oversee the Inuit was encouraged, while time on the land was considered a return to heathen life (Brody, 1977). Between encouraged community living and available trade opportunities, the Labrador Inuit became more connected to the Western trade economy (Kaplan & Woollett 2000; Brody, 1977; Nunatsiavut Government, 2014a).

Following European contact, the Labrador Inuit continued to practice traditional livelihoods, while engaging in trade with European, moving “European-made goods north and Inuit commodities south” (Kaplan & Woollett, 2000). The Inuit occupancy of the northern coast during this time period can be seen in Error! Reference source not found. Figure 5. The 1800s saw a large influx of European settlers in the Newfoundland and Labrador region due to the attraction of a rich cod fishery. While settlement was more intense in the south, several European families were established along the northern coast by the 1860s (Brody, 1977).
“When you have a relationship to the land, and the land is a means of getting or providing food for your family, and it’s destroyed by mining of any type, you can’t get it back” (Participant 21).

The Nunatsiavut settlement region is “where people live, that's where food is, that's your lifestyle, that's your culture” (Participant 18). The Labrador Inuit value the land and are pragmatic about resources and the land’s provision of economy. For the Inuit “it’s about the balance of protection of the environment and employment for our people” (Participant 21).
Traditional foods are highly valued, particularly the caribou that are “huge part of your culture and your diet” (Participant 21).

In 1973, the Labrador Inuit Association (LIA) was “formed to promote Inuit culture; improve the health and well-being of our people; protect our constitutional, democratic and human rights; and advance Labrador Inuit claims with Canada and the province to our land and to self-government” (Nunatsiavut Government, 2014b). Furthering this purpose, the LIA filed a Comprehensive Land Claim Agreement (CLCA) with the Government of Canada four years later. The Government of Canada would not select the claim for active negotiation until 1984 and by “the mid-90s, a decade in, very little substantive progress had been made in the negotiations” (Participant 20). However, with the arrival of a large project proposal, CLCA negotiations were fast-tracked, and were ongoing until after the project was approved.

5.2. Voisey’s Bay Proposal and Environmental Assessment

In 1993, a deposit of Nickel, Copper, and Cobalt at Voisey’s Bay, known as Tasiujatsoak by the Labrador Inuit, was discovered. The deposit consisted of a rich 31 million tonne ore deposit surrounded by an additional 100 million tonnes of less mineral rich ore (Gibson, 2006; Memorandum of Understanding, 1997). The deposit was located approximately 35km southwest of the community of Nain, as seen in Error! Reference source not found.. Two prospectors taked 288 claims in order to cover the deposit area (McNish, 1998).

![Figure 6: Location of Voisey's Bay deposit (North of 56, 2014)](image)
From 1994 until 1996, the area was further explored and the project was registered. The initial project proponents, made up of Diamond Fields Resources Ltd., Archean Resources Ltd, and Teck Resources Ltd. initiated talks with the Inuit and Innu. These initial meetings were described as difficult, as the need to consult the Inuit and Innu was not taken seriously by some parties who “just didn't think there should be a land claim or anything else” (Participant 15). However, protests and site disruption initiated by the Innu caused the proponents to rethink their approach and one of the companies, Teck Resources, brought in an experienced IBA negotiator and the relationship with the LIA began to improve (Participant 15). This relationship was reset in 1996, when Inco Ltd. bought Voisey’s Bay from the original prospectors and investors and quickly began planning development (McNish, 1998). Inco took over the EA process and IBA negotiations at this point.

Inco began an accelerated Environmental Assessment process in order to begin extraction as quickly as possible, and as a result “the process was very rushed” (Participant 17). The EA process took just two years from the initiation of the assessment to the province’s approval, and Vale completed the environmental and socioeconomic studies within the first year. Despite the rapidity of the assessment process, “they did have a lot of information, and it was collected from local people, so it was good traditional knowledge” (Participant 15).

In 1997, the Government of Canada, Government of Newfoundland and Labrador, Labrador Inuit Association, and the Innu Nation signed a Memorandum of Understanding regarding the Environmental Assessment of the Voisey’s Bay project, four years after the initial discovery (Memorandum of Understanding, 1997). The MOU outlined how an independent panel would address both the federal Canadian Environmental Assessment Act (1992) and the provincial Newfoundland Environmental Assessment Act (1990). The Labrador Inuit and the Innu were included as equal signatories of the MOU in the assessment process, although the assessment itself was based only on federal and provincial tools (Gibson, 2006; Memorandum of Understanding, 1997). The EA process precluded the conclusions of Land Claims negotiations, as a finalized CLCA may have included “the right for the Inuit to have their own EA legislation in place” for such a project (Participant 15). However, being equal signatories allowed the LIA an equal say in choosing the independent panel members who would review the project, and “whether they were appointed by the province or whoever, I think we agreed that this was a good
panel” (Participant 14). This was greatly beneficial to the end result, as by “choosing the people, you put people in place who are going to look at things favourably from the Inuit side” (Participant 15).

Following the creation of the independent panel, the five members of the panel were charged with drafting the Environmental Impact Statement (EIS) Guidelines for the project proponent. The creation of the guidelines was an extensive process, involving 21 public scoping sessions in April to May of 1997, during which 140 written and oral submissions were received (Inco, 1997). Following the release of the draft guidelines and the public review, the panel released the final EIS Guidelines in June of 1997.

The proponent released its Environmental Impact Statement (EIS) to the panel in December of 1997, as environmental baseline studies had begun much earlier (Inco, 1997). Public hearings were held in the fall of 1998 and the Panel Review of the EIS was sent to MOU parties in March 1999 (Griffiths et al., 1999.) The five panel members produced an eighteen chapter report that concluded with 107 recommendations for Voisey’s Bay project, ranging from the establishment of environmental co-management to the conclusion of CLCA negotiations prior to project approval. The first of these recommended that Voisey’s Bay proceed, subject to the additional recommendations of the panel. Unfortunately, while the Voisey’s Bay EA is considered to be an exceptional application of the process, the federal and provincial governments “didn't accept the panel recommendations. So that's the sad part, because you've gone to all this time and expense” (Participant 14). Despite the disappointing conclusion, the EA process is still considered “valuable as a process in and of itself because of the education, the information, the learning, and the discussion” prior to the recommendations (Participant 14).

5.3. Labrador Inuit Concerns and Responses

The Voisey’s Bay Nickel Mine proposal and EA brought with it several concerns for the Labrador Inuit. Prominent among these were the potential issues around sea ice breakage for winter shipping, as well as potential environmental impacts that could affect both traditional subsistence lifestyles and culturally important species like the caribou. Over the course of planning for the Voisey’s Bay Nickel Mine, the Labrador Inuit wanted to ensure that their land was protected, their economy would benefit, their people stayed safe, and that their decision-
making authority in the region was respected. In order to accomplish these goals, the LIA engaged in the many different channels discussed in this section. Over the course of several decades, the LIA engaged in policy development in order to accurately represent community concerns to other parties, litigation to ensure that the established procedures were followed, private negotiations with the company to build a beneficial relationship, and government-to-government (G2G) negotiations in the form of several issue-specific agreements and a Comprehensive Land Claim Agreement (CLCA).

5.3.1. Policy Development

“You need to understand what your community expects, what your community expectations are … what is it that you want out of this? Why are we doing this? And what are some of the things we want to see?” (Participant 14).

When Inco took over the project in 1996, exploration and planning for Voisey’s Bay was progressing rapidly, and an increase in staking and drilling in the surrounding area had been triggered by the initial discovery. However, with this flurry of activity the Inuit had only a 3 page project description providing information about the Voisey’s Bay to inform their participation in consultation surrounding the proposed project. Beyond the lack of information, the LIA was also wary of participating in a study that would be based on Inco’s definition of the project footprint. Rather than use Inco’s projected project footprint, the LIA decided that “Inuit use and occupancy on the land should be what defines the footprint” (Participant 16).

“So what we said was give us some money and we’ll do our own thing, we won’t be part of the EIS, because their view of participating in the EIS is that you just have one or two people who play very minor roles in it and then all of a suddenly the LIA would be shackled to contributing to a process they really had no control over” (Participant 16).

The LIA’s participation through that funding took the form of the 1996 report prepared by Tony Williamson called Seeing the Land is Seeing Ourselves. This report included sections for all of the Labrador Inuit communities in face of impacts from increased drilling throughout the traditional territory, and was completed in addition to the standard EA consultation process (Williamson, 1996; Inco, 1997). The goal of producing the document was to create a “substantial
body of Inuit knowledge and move away from the tendency that consultants and companies have for incorporating Inuit knowledge in footnotes or bubbles in the margin” (Participant 16). By creating a strong, stand-alone document, the Inuit were able to increase their confidence that their concerns would be represented clearly and accurately. Seeing the Land is Seeing Ourselves provided important information for Voisey’s Bay that “became a reference point all the way through” project-level planning processes (Participant 16). However, consultation with the community did not end with the creation and use of Seeing the Land is Seeing Ourselves. Throughout the EA, IBA and CLCA negotiations, “whatever we had done, we would always check and make sure we were still on the right track” (Participant 14).

“That document – it continues to have a life today” (Participant 16).

5.3.2. Litigation and Protest

“I think it was quite a surprise to a lot of people that Inuit were actually protesting, because that's not traditionally our nature” (Participant 14).

In 1997, before the EA for Voisey’s Bay was complete, Inco began constructing extensive infrastructure including airstrips and roads at the project location in advance of the completion of the EA process. While Inco called the infrastructure temporary at the time, “the Project Description Report also included roads and an airstrip in the same locations as those identified in the Advanced Exploration Infrastructure registration but described them as permanent” (Labrador Inuit Association v. Newfoundland, 1997).

“It was their exploration infrastructure and they weren't supposed to start it before they’d got certain approvals and they hadn't, and they'd gone ahead anyway” (Participant 16).

The LIA organized a protest at the project site and began litigation proceedings simultaneously, at which point “the LIA informed the company, province, and RCMP that they would be blocking the road, and they did” (Participant 17). The court ruled against the LIA in the original decision, however “I don't think we had a doubt for a second that we were going to appeal” (Participant 14). In the appeal, the court ruled in favour of the LIA, ordering Inco to stop infrastructure construction until the EA was complete. The final decision brought an end to the
protest, although community members who were participating “figured we'd be there for much longer” (Participant 19).

The litigation and protest changed relationships with both the province and the company, sending “a couple of messages that the company, governments heard finally” and “changed the nature of the negotiations in terms of the tone” (Participant 14). While these messages were needed, as a result of the court case “everything stopped with the company and IBA discussions” (Participant 15). However, “we sat down and discussed it, and then we took it back to our respective groups, and we agreed we would go for a mediator” to get negotiations to resume (Participant 15). While some effort was required to maintain relationships after such a disruption, the court case “made everybody realize that you know what, in order to move [the project] forward we have to be very serious about this” (Participant 14).

5.3.3. Impact and Benefit Agreement Negotiations (1995-2001)

Impact and Benefit Agreement negotiations between the LIA and the project proponent began in 1995, although they were suspended in 1996 pending the Inco Ltd. takeover of Diamond Fields Resources (Williamson, 1996). The IBA is an extensive agreement between Inco (now Vale) and the Labrador Inuit, covering a wide range of subjects such as Education and Training, Inuit Employment, and other chapters and provisions that can be seen in Table 6. The IBA was essential for ensuring that Inuit employment be maximized, as “the char fishery had declined severely and the cod fishery was gone, and that’s why the training and employment piece was such a big deal” (Participant 21). Additionally, the less quantifiable benefits, like employment benefits, were considered, as “young people need to go to work and be useful” for their own wellbeing (Participant 17). Other negotiations included revenue sharing, as “the province said we have no money to give you for compensation, so you have to get the money from the company … So we had to then negotiate the financial aspects directly with the company and that was the toughest part to deal with.” (Participant 15).

As IBAs do not follow a prescribed process or structure, the flexibility of the agreement allowed the Labrador Inuit to address many issues that fell outside the scope of other planning processes such as EA. To this end, during EA proceedings, at a certain point the company’s “answers were that when we had issues, that this is going to be resolved in the IBA, so we had to be there to
make sure that everything that was going to be resolved in the IBA was actually picked back up” (Participant 14). While the IBA was a more direct channel for the resolution of some issues between the Labrador Inuit and Inco, the LIA had to be meticulous in ensuring that any and all of those issues were in fact resolved through the IBA process as was promised. Further, negotiators had to account for the increased level of concern from residents closest to the project. In the end, “IBA is kind of structured that way, Nain and Hopedale come first” (Participant 19).

“They’re the ones with limited job opportunities, should benefit more because they’re closer to the project, the land that is impacted is nearest them” (Participant 21).

Table 6: Examples of Voisey’s Bay IBA Chapters and provisions (Hollett, 2009)

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Examples Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inuit Education and Training</td>
<td>• career counselling</td>
</tr>
<tr>
<td></td>
<td>• student site visits</td>
</tr>
<tr>
<td></td>
<td>• scholarships</td>
</tr>
<tr>
<td></td>
<td>• student summer positions</td>
</tr>
<tr>
<td></td>
<td>• Training Authority</td>
</tr>
<tr>
<td>Inuit Employment</td>
<td>• minimum and overall objectives</td>
</tr>
<tr>
<td></td>
<td>• Inuit Human Resources Strategy</td>
</tr>
<tr>
<td></td>
<td>• Inuit Employment Coordinator</td>
</tr>
<tr>
<td></td>
<td>• contractor responsibilities</td>
</tr>
<tr>
<td>Workplace Conditions</td>
<td>• Employee Advisory Committee</td>
</tr>
<tr>
<td></td>
<td>• Employee Family Assistance</td>
</tr>
<tr>
<td></td>
<td>• Cultural Leave</td>
</tr>
<tr>
<td></td>
<td>• availability of country foods</td>
</tr>
<tr>
<td></td>
<td>• Sensitivity Training</td>
</tr>
<tr>
<td>Business Opportunity</td>
<td>• Minimum and overall contract objectives</td>
</tr>
<tr>
<td></td>
<td>• Business Development Committee</td>
</tr>
<tr>
<td></td>
<td>• Consideration of degree of Inuit ownership</td>
</tr>
<tr>
<td></td>
<td>• Guaranteed country food contracts</td>
</tr>
<tr>
<td>Environmental Protection</td>
<td>• Use of Inuit knowledge</td>
</tr>
</tbody>
</table>
Importantly, each IBA chapter begins with objectives in order to allow for the original intent of the agreement to remain as clear as possible over time. These objectives were of particular importance as “we knew at time we weren't going to be able to identify every single thing, it wasn't an exhaustive list of what we could do” and that way “when you're trying to do something that's not specifically written in, you can say well, it does meet the objectives” (Participant 14).

IBA came into effect in 2003 after being ratified with 80% support from 75% of eligible voters within the Labrador Inuit. The IBA contains 16 sections that address subject ranging from employment to environmental protection (Hollett, 2009). To bring the negotiated agreement to ratification, “between when we finished and when we voted, we did two complete rounds of information sessions and I did presentations day and night in every community including St John's” (Participant 14).

“As time goes on, more and more people are seeing the benefit of the IBA, and they feel that without the IBA we probably wouldn’t have had the same successes with training and employment and things like that” (Participant 21)

5.3.4. Issue-Specific Agreements

Winter Shipping Agreement

“What a lot of people outside of Nunatsiavut don’t understand is that where the winter ship was crossing, there’s Nain, and that ice is like our winter road. People have cabins on the south side of the track and they didn’t necessarily want a ship coming in in the winter and destroying their road” (Participant 21).
One of the LIA’s biggest concerns with the project was winter shipping to and from the project, which would involve breaking a track of sea ice near the community of Nain. The importance of sea ice for transportation, combined with deaths in relation to previous icebreaking made the proposed winter icebreaking extremely contentious. However, in order to address the issue, Inco organized conversations with the community and with leadership to explain the need for winter shipping in order for the project to be feasible. Based on these meetings, “once people started to understand there was a technical need as well as a financial need … then people took it on as something to solve” (Participant 14). The LIA was clear that the problem needed to be resolved to the satisfaction of the Inuit, and as such a separate shipping agreement in relation to the project was created. The resolution of winter shipping “was a tough call at the end of the day” (Participant 15) but “while we did have concerns, our people were also telling us they wanted to work” (Participant 14). The winter shipping agreement allows for icebreaking, but “we did have to have a limit, so it's not whenever they want, however much they want, you know there's a timeframe, there's a closure period, and also no fuel” is shipped in the winter (Participant 14).

Environmental Management Agreement

Over the course of EA process, the LIA, the Innu Nation, and provincial and federal governments spent three years negotiating an Environmental Management Agreement (EMA). The EMA’s “purpose is to provide effective, responsible, and coordinated environmental management of the Voisey’s Bay mine and mill” (NG, 2015). The province ensured that the Voisey’s Bay Environmental Management Board (VBEMB) would “play a very important role in the overall development of Voisey’s Bay” (Government of Newfoundland and Labrador, 2002). The board would consist of 2 appointees from each signatory for a total of 8 members, plus one independent chair (Government of Newfoundland and Labrador, 2002). While the VBEMB was lauded as an exemplary case of co-management, it was highly focused on permitting during the construction phase of the project (Participant 21). Initially, there were technical environmental review committees for various permits involved that “worked fairly well”, however the board is no longer active (Participant 21).
5.3.5. Labrador Inuit Settlement Agreement

“It typically takes a large project to ignite any interest in bringing these negotiations to a conclusion. It’s sad, but it’s true … We wouldn’t have had a deal when we did without the Voisey’s Bay project chomping at everybody’s heels, because that was the bargaining chip” (Participant 16).

After decades of negotiation, the final CLCA between the Labrador Inuit and Canada is more than three hundred pages long, with twenty-three chapters that include Lands and Non-Renewable Resources, Harvesting Compensation, Environmental Assessment, Taxation, Self-Government, Implementation, and Dispute Resolution (Labrador Inuit Land Claim Agreement, 2005). The CLCA was negotiated with the attitude that “this is going to be an agreement forever. So we can't just think about the immediate future, we had to look at the long term and make sure that we hadn't closed doors” (Participant 14). Despite the efforts of the Labrador Inuit, “we ended up with no objectives because the province wasn't going to go anywhere near it” (Participant 14).

“One of the reasons why we have the agreement we have, negotiated in the time frame that it was negotiated, with all of the bits and pieces that were put in to it - the only reason that happened was because there was a pending development” (Participant 15).

The relationship between the LIA and the province fluctuated throughout the process. For example, both sides went out on the water together “and that was just to build the relationship. And after you do that, after a while things start getting easier to do, but these are long and cumbersome agreements” (Participant 15). Despite these positive efforts, “there were a couple points where it really got nasty, and certainly we had a time where there was a 2 year hiatus because the feds and the province weren't talking to each other, and we couldn't get to the table while they were playing no-speak” (Participant 16).

Despite the many hurdles of negotiations, an Agreement-In-Principle was signed in June 2001. From there, the Labrador Inuit ratified the Final Agreement in May 2004, leaving the agreement to pass through provincial and federal process, where it was finally officially enacted through Bill C-56 in June 2005. The settlement area, outlined in Error! Reference source not found.,
includes roughly 72,500 square kilometres of northern Labrador and 48,690 square kilometres of adjacent ocean zone extending to the limit of Canada's territorial sea” (AANDC, 2005).

Figure 7: Nunatsiavut Settlement Region (modified from Tourism Nunatsiavut, n.d.)

5.4. The Current Status of Implementation

Implementing the various agreements surrounding Nunatsiavut and the Voisey’s Bay project has involved as much hard work as negotiating the agreements themselves. Over a decade after the agreements were signed, the NG is constantly working with Vale and with the province to bring life to both the CLCA and the IBA. There have been natural hurdles, such as “some real [climate] anomalies since winter shipping started … it was extremely mild and totally unlike our weather” (Participant 21). Throughout the negotiation of the agreements, the Inuit were forward thinking, and this attitude has remained.
“Part of why the 10 year review is being done, is to determine how we can improve” (Participant 21).

The Voisey’s Bay project has had both negative and positive impacts. For example, increased income affects the Inuit in different ways. “People predicted drugs and alcohol. Yeah we have drugs and alcohol. Now is it all project related? Probably some of it, people have disposable income, people have the money to spend. but at the same time, you see a lot of people with boats, trucks, skidoos, able to go harvesting, able to go off on the land” (Participant 14). Further, Voisey’s Bay is “entering a new phase now, underground, so there's going to be more opportunity there.” (Participant 19)

Winter shipping has not been simple, but the Inuit and Vale have worked together to overcome climate anomalies and scheduling hurdles. “For example, last year, Easter was going to fall right when shipping was going to reopen, Easter is when people go back and forth to communities, so we called up the company and asked can you delay your ship? … and sure, we can delay it by a week” (Participant 14).

5.4.1. Government Agreements

The Nunatsiavut CLCA implementation is still a work in progress. Many of the “early stages [were spent] putting staff in place, ministers in place” (Participant 18). Given the number of provisions made with the long-term future of the Labrador Inuit in mind, “there's more jurisdiction that we can take, we haven't done that yet because it does take a lot of time and planning” (Participant 14). There are “all kind of competing priorities, really important priorities” (Participant 16), and as such, efforts must be chosen strategically.

“So it's this constant protecting your right, protecting your agreement, and ensure that people are living up to their obligations, you can't just sign off and put it on a shelf, it's something that you have to do every day” (Participant 14)

In terms of development, the Land Claim has changed how business is done in the Nunatsiavut region. While the completion of an IBA with Inco was not a given or a requirement at the time of the Voisey’s Bay proposal, incoming companies now “have to negotiate an IBA with us” (Participant 21).
There are some provisions in the Land Claim that are more difficult to adhere to. Most prominently, the province has recently put a five year moratorium on caribou hunting, and “if the province puts in place a total allowable harvest of zero, we have to abide by it” (Participant 14). While the Nunatsiavut Government had been discussing a self-imposed moratorium, “it's being told you can't as opposed to we're making this decision” (Participant 14). Further, it is unlikely the NG would have imposed a full 5 year ban, but rather something akin to “a year with constant scientific monitoring. Five years is a lot when you consider losing a huge food source” (Participant 21).

The current caribou ban is not the only hurdle faced in post- CLCA Nunatsiavut. The relationship with the province has been particularly tumultuous in relation to the Land Use Plan that was “supposed to be done within three years of the final agreement coming into effect” (Participant 14). However, the NG completed a plan and “was prepared to send it to the assembly, and get it actually approved for Labrador Inuit Land [but the province] said they went and got their own plan developed and now they're deciding what to do about that” (Participant 14). To this end, Nunatsiavut Government took the provincial government to court based on the slow pace at which the CLCA Land Use Planning was progressing. President Sarah Leo noted in a CBC interview that the Nunatsiavut Government “felt, when we filed it, that the province had not been honouring our agreement as it was intended” (CBC, 2013). In November 2013, the court ruled that Newfoundland and Labrador was in violation of the CLCA because of the unreasonable delay (Telegram, 2013).

The Voisey’s Bay environmental co-management initiative, while lauded for its exemplary approach, has not seen continued implementation. The Environmental Management Agreement is virtually “non-existent right now” although it still technically exists (Participant 21). While provincial and federal government provided funding for the first 5 years of the agreement, the EMA was up for renegotiation in 2009 and no further funding was provided under the rationale that fewer permits were being issued (Government of Newfoundland and Labrador, 2002; Participant 21). However, some view the core issue to be that governments “don’t believe in them as real tools for management” (Participant 16).

“It’s a huge missed opportunity” (Participant 16).
5.4.2. Impact and Benefit Agreement

After finalizing the IBA and gaining project approval through the EA process, Vale “accelerated the project, during the construction, so they could actually start operating earlier” (Participant 21). This meant that ensuring the implementation of IBA provisions in relation to the construction phases was hard work. Inuit employment rates “usually around 25% during construction” despite hurdles with unions and collective agreements interfering with targets (Participant 21). Now operational, Voisey’s Bay has “very little turnover” and Inuit employment hovers around 52-56% (Participant 21). Implementing the employment provisions of the IBA requires a long-term plan, as it’s necessary “to work with the younger people now too, to start getting ready, get the courses in high school that you need” (Participant 21).

“We still consult and do information sessions on an annual basis, and talk about what has transpired throughout the year, what’s upcoming as far as we know. Then we also go around with the company to talk about the previous year and results and things. It’s a working together relationship that is quite a good one” (Participant 21).

Throughout the implementation of the IBA, Inco/Vale has proven to have a good working relationship with the Labrador Inuit. The intent of the IBA appears to be stronger than the provisions themselves, as “there's stuff that is happening, that we really didn't write in very specifically, in terms of the IBA, but we're doing it and the company's doing it because it's the right thing to do and it actually makes sense” (Participant 14). There has been “a lot of work on both sides” (Participant 21) with specific positions dedicated to implementation, as “the IBA really does work when you put the effort into it” (Participant 18).
Chapter 6: Analysing the experiences of the Taku River Tlingit First Nation and the Nunatsiavut Government

This chapter aims to make sense of the numerous project- and policy-level processes used by the TRTFN and the NG in their endeavors to maximize local benefits, minimize negative impacts, and assert their decision-making authority. It does so first through the development of two conceptual maps that highlight how the various processes influenced each other as they progressed over time. While these conceptual maps are an inherently simplified representation of the planning processes used, such simplification aims to create a better understanding of the events and factors in a very complex multi-variable landscape. In the second half of the chapter, an analysis of factors influencing the results of planning process is discussed, highlighting external factors that are beyond the control of Aboriginal governments as well as internal factors that are within the control of Aboriginal Governments. The external factors discussed include the procedural equality in Environmental Assessment application, the attitude of the proponent and the financial value of the project, the available financial funding and human capacity, and the current political and legal climate. The internal factors discussed include strengthened social and cultural community foundations, consensus-seeking decision-making and strong leadership, self-governing policy based on community consultation, and willingness to litigate when necessary.

6.1. Conceptual mapping of the process relationships and interactions

This section will demonstrate conceptual maps of the planning process landscape and how it is perceived within each case study. These maps were created by highlighting relationship in the data from all three methods – participant observation, interviewing, and document review.

One participant noted that any effective navigation of the entire process landscape could be considered “a fluke” (Participant 9, TRTFN). While this may very well be true, studying both purposeful and reactive navigation of process interactions highlights what might be repeated strategically in the future.

6.1.1. Process Relationships for the TRTFN and the Tulsequah Chief Mine

The processes at play in the case of the TRTFN and the Tulsequah Chief Mine include Environmental Assessment, Treaty negotiations, Litigation, Government-to-Government
Agreements, and policy creation. As none of these processes operate in a vacuum, and were ongoing simultaneously, it is important to understand the relationships between each and how they have affected the TRTFN’s ability to manage impacts and assert decision-making authority.

A conceptual map of the processes and relationships in the TRTFN’s navigation of the Tulsequah Chief Mine and self-governance can be seen in Figure 8. In this figure, each process progresses from left to right, while vertical arrows highlight relationships between various stages of these processes. While the continuum of stages from left to right is in order of occurrence, it does not correlate with a specific temporal scale. A date-specific timeline of events can be found in section Appendix A.
Figure 8: Planning processes and their relationships in the case of the TRTFN and Tulsequah Chief Mine
In this case study, Modern Treaty negotiations and the EA for Tulsequah Chief were initiated at a similar time. There are no explicit relationships between the two, but the EA process did initiate response within the TRTFN with regards to their preparedness for such a project in absence of a signed Treaty. To this end, the EA instigated the consultation for and eventual creation of the Hà tátgi hà khustiyxh siti: Our Land is Our Future guiding documents, as the TRTFN needed “the opportunity to have a proper land plan and expression of what their interests [and] the Chief mine was basically being done in the absence in any of that” (Participant 7, TRTFN). Hà tátgi hà khustiyxh siti: Our Land is Our Future would go on to guide both Treaty and G2G negotiations. Large mineral developments were also covered by addressed by the TRTFN’s Mining Policy, however that policy does not apply to placer mining or mineral exploration, which constitutes a large amount of the activity in the area. As such, the two-party Wóoshtin Yan Too.Aat agreement has become the primary directive, as it addresses exploration and placer mining.

That “EA’s actions (and non-actions) impact our other tables and processes” (Participant 6, TRTFN) is most explicit in the first Approval of the project. This approval significantly affected G2G negotiations, as “BC approved the Tulsequah Chief Mine, and joint planning talks evaporated … the approval caused the TRT to question whether or not the BC government was negotiating in good faith” (Participant 4, TRTFN).

As the TRTFN had concerns with the EA Approval Certificate, they initiated litigation against the decision at the provincial level. This litigation continued through the court of appeals and eventually the Supreme Court of Canada. While the TRTFN did not successfully have the approval overturned by the SCC, “one really positive outcome of the court case was that it set up the conditions for a really sophisticated conservation design and land plan” (Participant 7, TRTFN) as the “the SCC did include accommodation conditions, one of which was to negotiation a joint decision-making agreement and land use plan with the TRT” (Participant 4, TRTFN).

The impetus from the SCC decision brought joint planning talks back to the table. However, the effects of Tulsequah’s approval were still felt as many environmentally sensitive areas that may have otherwise been protected are categorized as resource management zone in the final agreement. For example, the project currently aims to use a wetland area called Shaza Slough as
the project’s tailings pond. However, “if you're looking at high value wetland in the lower Taku, Shaza Slough jumps out as one of the best” (Mark Connor, TRTFN Biologist). Due to high cultural and environmental values in the area, in absence of the project it is highly likely that these areas would have been classified differently.

At the time of the final G2G negotiations, the Tulsequah Chief Mine had an EA Approval Certificate from the province but the proponent was insolvent. As the EA approval had to be considered in land use planning, “the solution was to simply create an appendix to the agreements concerning a separate process” (Participant 4) known as a Level 4 working group. As such, “the land use plan wasn't written to encompass the EA process” (Eric Telford, TRTFN Biologist). Some consider the Level 4 working group to be “a weak point” (Participant 9) in an otherwise strong agreement.

The project approval also inherently affects Treaty negotiations, as the decision to construct the mine pre-empts negotiations around that land. To that end, Modern Treaty negotiations are still ongoing and there is currently “no overlap between G2G/Land Use and Treaty” (Participant 9, TRTFN), as “the treaty is binding, and needs all new language” (Participant 12, TRTFN).

6.1.2. Process Relationships for the NG and the Voisey’s Bay Nickel Mine

The interacting processes at play in the case of the NG and the Voisey’s Bay Nickel Mine include Environmental Assessment, Modern Land Claim Agreement (CLCA) negotiations, Litigation, Government-to-Government Agreements, Impact and Benefit Agreements, and policy creation. As none of these processes operate in a vacuum, and were ongoing simultaneously, it is important to understand the relationships between each and how they have affected the NG’s ability to manage impacts and assert decision-making authority.

A conceptual map of the processes and relationships in the NG’s navigation of Voisey’s Bay Nickel Mine and self-governance can be seen in Error! Reference source not found.. In this figure, each process progresses from left to right, while vertical arrows highlight relationships between various stages of these processes. While the continuum of stages from left to right is in order of occurrence, it does not correlate with a specific temporal scale. A date-specific timeline of events can be found in Appendix B.
Figure 9: Planning processes and their relationships in the case of the NG and Voisey’s Bay Nickel Mine
In the case of the Labrador Inuit, CLCA negotiations began when the Labrador Inuit Association was formed, well before the discovery and assessment of the Voisey’s Bay project. However, these negotiations had made little progress prior to the discovery of the mineral deposit; “things slowed down a bit and then Voisey's Bay came along” (Participant 14, NG). With the Environmental Assessment came the leverage for the Labrador Inuit. At this point, the provincial and federal governments began addressing “things that had been lying around on the table forever. All of a sudden we have to resolve them” (Participant 16, NG). The early EA process also initiated a three-year negotiation for an Environmental Management Agreement between the LIA, the Innu, the province, and Canada, which would set up the four parties to co-manage the permitting and monitoring of the construction and operation of the project.

When Inco begin consultation for their Environmental Impact Statement (EIS), they “approached both the Innu and the Inuit to see if they would be involved somehow … so what we said was give us some money and we’ll do our own thing” (Participant 16, NG). The Seeing the Land is Seeing Ourselves policy document “became a reference point all the way through” the EA process (Participant 16, NG). The consultation process would highlight the major concerns around Winter Shipping for the project, and lead to a specific agreement on that issue alone in order to adequately address the issue. Seeing the Land is Seeing Ourselves, amid continued consultation with communities, would also inform negotiations for the CLCA and IBA.

Not long into the EA process, Inco began construction on project infrastructure and disagreement arose over whether this infrastructure was temporary and permitted or permanent and part of the currently incomplete EA. When Inco did not stop construction, the LIA brought Inco to court. While the NL Supreme Court initially allowed the construction, the LIA won on appeal and the infrastructure was deemed to be part of the EA process. While this victory did create leverage for the LIA to be taken seriously for the remainder of the planning for Voisey’s Bay, the strained relationship with Inco led to a pause in IBA negotiations that would eventually need mediation.

The IBA and the EA had to be closely coordinated, as throughout EA consultation, Inco’s “answers were that when we had issues, this is going to be resolved in the IBA, so we had to be there to make sure that everything that was going to be resolved in the IBA was actually picked back up” (Participant 14, NG). To this end, the IBA and EA had to be closely coordinated to ensure that no issues were dropped between the two.
The IBA negotiations were also closely linked with the CLCA negotiations and agreement. Not only did the two agreements need to be compatible for implementation purposes, but “we knew what was going on at each of the tables and so we were able to try and maximize … what we were getting” (Participant 14, NG).

The interaction between the Voisey’s Bay project-level processes and the CLCA is undeniable; “obviously in one sense the CLCA was impacted, because we have a chapter on Voisey's Bay” (Participant 14, NG). The existence of the project at the time of negotiating the CLCA means that Voisey’s Bay was grandfathered in to the process. While the project’s approval does, to some extent, preclude Land Claim negotiations, negotiators dealt with the challenge in a unique fashion. The Voisey’s Chapter of the CLCA was finalized and implemented via MOU before the remaining chapters were ratified. Further, the CLCA terms for the Voisey’s Bay project area are only in effect for the project’s lifespan, at which point the land reverts to part of the Nunatsiavut settlement and the agreed-upon terms.

The final Voisey’s Bay Mine and Mill Environmental Assessment Panel Report included over 100 recommendations for the project to proceed (Griffiths et al., 1999). While none of these recommendations were binding, they were extremely influential. Two of these recommendations were that a CLCA and IBA be finalized before the project proceeded. This increased the pressure on Inco and provincial and federal governments to complete agreements, and in a timely fashion. To this end, “our IBA came into effect on July 29, 2002, and our land claim didn’t come into effect until Dec 1, 2005.” (Participant 21, NG). However, when “the project was approved, the Inuit were satisfied that they were going to end up with a land claim agreement … they knew that they were removing the leverage” (Participant 20, NG).

6.2. Identifying factors that impacted effective navigation

Using the historic record and conceptual maps created, the final output of this research explores the various factors affecting the Taku River Tlingit First Nation and the Nunatsiavut Government’s end results in these processes. While a sample of two case studies is not large enough to make statements of generalization for this mineral development planning process across Canada, the level of detail provided by reducing the number of cases investigated provides a significant amount of insight into the process. The comparative analysis of the
Voisey’s Bay Nickel Mine and the Tulsequah Chief Mine provides several interesting points of similarity and difference. Both the similarities and differences between these two case studies highlight influential factors equally in this analysis.

Four of the highlighted influential factors are qualified as external factors, which comprise of variables that are beyond the control of the Aboriginal Governments. These external factors include procedural fairness of the Environmental Assessment process applied, the attitude of the project proponent and the financial value of the project itself, available financial funding and human capacity, and the current political and legal climate. The remaining four factors are qualified as internal factors, and comprise of variables that are, to various degrees, within the power of an Aboriginal government to influence: strengthened social and cultural community foundations, strong leadership and consensus-based decision-making, self-governing policy creation based on community consultation, and willingness to litigate. This analysis has been completed based on trends and themes in the narratives and the conceptual maps produced as outputs of this research.

### 6.2.1. External Factors Affecting Results

Both the TRTFN and the LIA used all the tools available to them in order to work towards minimizing negative impacts, maximizing local benefits, and respecting Aboriginal decision-making authority. However, despite being very similar in their sophisticated approach to a multitude of processes, the current status of self-government and mineral development in the two case studies is quite different. Thus, it can be assumed that the results of using these tools were also affected by factors outside of the Aboriginal governments’ control. The four external factors were highlighted in the analysis of technical documents and the emphasis of key informants during interviews: procedural equality in Environmental Assessment application, the attitude of the proponent and the financial value of the project, the available financial funding and human capacity, and the current political and legal climate.

**Representative Equality in Environmental Assessment Application**

One external factor that differs between the two case studies is the level of recognition given to Aboriginal governments participating in the EA process. In the case of Voisey’s Bay, the federal, provincial, Inuit, and Innu governments were given equal procedural representation in
deciding how the EA process would proceed via a four-party Memorandum of Understanding (MOU). This MOU gave Labrador Inuit equal input with regards to the EA’s Terms of Reference and a deciding voice in determining the members of the Independent Panel. The inclusion of the Inuit and the Innu in shaping the EA process itself ensured that they would be fairly represented throughout the assessment; according to one participant, “in choosing the people [on the panel], you put people in place who are going to look at things favourably from the Inuit side” (Participant 15). The panel chosen by the Inuit, Innu, provincial, and federal governments advised that the project go ahead, subject to many additional recommendations that would contribute to minimizing impacts and maximizing local benefits. These extensive recommendations included local training programs in coastal communities, monitoring Aboriginal employee satisfaction with language and culture in the workplace, and the creation of an environmental protection plan for caribou (Griffiths et al., 1999). Beyond these direct environmental and economic recommendations, the panel also looked to influence planning processes beyond EA, recommending that both a CLCA and an IBA be completed with the Inuit prior to approving the project (Griffiths et al., 1999).

Alternatively, the Tulsequah Chief Mine went through BC’s EA process, which involves the creation of a Project Committee to produce a Recommendation Report to inform the Minister’s decision to approve the project or not. In the case of Tulsequah Chief Mine, the decision to approve was made within one day of the Minister receiving the Recommendations Report; as such, it can be assumed that the report is the primary informational document informing that decision (Taku River Tlingit First Nation et al. v. Ringstad et al., 2000). The Project Committee is not an independent panel chosen by the parties involved, but rather a collection of representatives from those parties; namely, British Columbia, Canada, the TRTFN, and Alaska. However, the Tulsequah Chief Project Committee included ten representatives from various provincial and federal bodies and just one representative from the TRTFN, due to funding constraints. As a result, TRTFN concerns with the project were underrepresented in the final Recommendations Report, to the point of submitting a separate, dissenting report on behalf of the TRTFN following the project approval (Report and Recommendations of the Taku River Tlingit First Nation Project Committee Member, 1998). This dissenting report highlighted several TRTFN concerns that were not addressed or resolved in the original Recommendations Report, demonstrating that those concerns were not given the same procedural consideration as
in the case of Voisey’s Bay and the Inuit, where such concerns were explicitly addressed in the final recommendations. As a result of the unequal representation in the EA process, the procedure by which issues and impacts were considered by the Committee and presented in the final Recommendations Report is similarly unequal. As such, one of the conditions for a successful EA process in the case of Voisey’s Bay was to represent Aboriginal governments equally in the process. Further, the absence of equal representation in the case of the Tulsequah Chief EA process contributed to a highly contested EA process and a lack of Aboriginal decision-making authority within that Aboriginal government’s traditional territory.

Proponent-Community Relations

One of the conditions that contributes to effective EA and IBA is the relationship between the proponent and the community. In the case of Voisey’s Bay and Tulsequah Chief, the capacity and willingness of the proponent to engage with the community was often related to the financial worth of the project and associated size of the company holding the mineral rights to the project. As the relationship with the company proposing the mineral development plays a key role in the Environmental Assessment, IBA negotiations, and general climate for both communities and companies over the course of the project’s planning, construction, and operation, it is essential to explore the context of this condition in each case.

In the case of Voisey’s Bay, a large mineral deposit was discovered by a junior exploration company and then picked up by a major for development. The ownership of Voisey’s Bay has changed hands several times since the initial discovery. The claims were made under the names of the original prospectors, who went by Archean Resources, Ltd, but who were employed by Diamonds Fields Resources Ltd. In 1995, Teck Resources Ltd. bought 10% of Diamond Fields, in part to fend off a hostile takeover initiated by Falconbridge Ltd. Following this defensive move, Falconbridge and Inco Ltd., both leading nickel producers in Sudbury, would bid against each other to buy the Voisey’s operation. In the end, Inco Ltd. bought out Diamond Fields Resources at $4.3 billion, making it the largest single-property mining takeover to date (McNish, 1998). Later, Brazilian major Vale South America bought out Inco at $20 billion (Koven, 2014).

When Voisey’s Bay ownership changed from a junior exploration firm to a major extraction company, community-proponent relations improved. Initially, representatives from Archean
“just didn’t think there should be a land claim or anything else” (Participant 15, NG). However, when Inco bought the project, the company brought with it the increased awareness and capacity needed to improve the relationship between the developer and communities. Inco has devoted specific employees and financial capacity to ensure that the IBA was both finalized and implemented for the project.

Alternatively, Tulsequah Chief Mine is still owned by a junior mining company with a handful of executive employees managing the project. Many are suspect of Chieftain’s capacity and willingness to negotiate in good faith with the TRTFN. The general sentiment among participants is that Chieftain Metals continues to market the project to investors and to search for a major buyer, however maintains reticent in terms of investing in community relations themselves.

“There's always the hope that at some point a bigger player would come in behind Tulsequah. In a way, somebody with more capacity and reputation; there are other players in the mining sector that are big and credible with deeper pockets that are willing to make the investment to do it properly. The fact that nobody has is always [telling] of the Tulsequah Chief Mine itself” (Participant 7, TRTFN).

The reputation of junior companies throughout the mineral development world is not generally a positive one, in some cases described as “scheisterism” (Participant 8, TRTFN). Participants in both case studies noted that juniors were difficult to work with, with some going as far to describe the entire junior operation as an investment scam trying to sell off inflated prospects to majors. It is possible that Teck Resources Ltd. was originally cautious of Voisey’s Bay and dealing with Diamond Fields Resource Ltd. because of the company’s reputation of risky ventures and poor management (McNish, 1998). While the deposit at Voisey’s Bay was large enough to attract a reputable international mining company to purchase the deposit from the less reputable junior, Tulsequah Chief has not obtained such investment.

Available Financial Funding and Human Capacity

The breadth and depth of participation required of Aboriginal communities who wish to participate in these processes is enormous. The ability to participate meaningfully and
effectively, inasmuch as the nation can when trying to communicate values in the language of property, has capacity issues in both human and financial realms.

The vast majority of the LIA’s funding is loan money, from both the project proponent and the federal government. While the access to such funds is essential in being able to participate in the process, it also creates a need for income to repay those loans. In the case of Voisey’s Bay, the project moved forward, providing revenue to repay those loans. However, lent financial capacity has the potential to create serious debt in communities already struggling should a project face challenges in the construction and operation phases. Further, that debt may create a feeling of obligation to support the project’s approval in order to obtain the funds to pay off debts incurred through planning.

Funding for financial capacity was not the only challenge; human capacity is also an issue. Over the course of the many planning processes, many individuals worked long, difficult days. Negotiations were long for all parties, such as when the NG “went to Ottawa for three days of negotiation and we came back eleven days later” (Participant 15, NG). However, the amount of work was more strenuous on the NG, as “government or corporation can just add more people, we weren't able to do that we just had to keep doing … everything.” (Participant 16, NG).

“Doing the IBA negotiations we were there until 1:30, 2:30 sometimes in the morning and you'd get up and go right back at it again. You just - worked. That was your life, was just working. It's pretty exhausting, but when you can see the light at the end of the tunnel, you just want to get it done” (Participant 14, NG).

The TRTFN has funded a large amount of their participation through money from Environmental Non-Government Organizations (ENGOs) that have interest in conserving the mountainous wilderness of northern British Columbia. These funds are certainly helpful, but do not come without their own set of challenges. With ENGO interest and funding comes a separate agenda that does not always align with nation interests: “The support for a lot of this work came from US conservation foundations. The source of funding caused tension between Round River and the non-Native community of Atlin, who saw the conservation initiatives as unwanted influence from outside.” (Participant 4, TRTFN). TRTFN representatives had to remain adamant that the
funding would not be coupled with constraints around future development that was planned to the TRTFN’s satisfaction.

“Every funder that comes to the table has their own idiosyncrasies”  
(Participant 7, TRTFN).

Current Political and Legal Climate

The influence of the current political and legal climate is best demonstrated through the state of Comprehensive Land Claim Agreements, or Modern Treaties. Depending on location, jurisdiction, and recent court decisions, there are arguments for and against signing CLCA/Treaty documents. In this research, the NG demonstrates a case with the legal/political climate in which the Aboriginal government effectively used a project as leverage to complete a binding CLCA. Alternatively, the TRTFN demonstrate a situation in which the Aboriginal government, however willingly, has not yet signed a binding agreement. In the TRTFN’s case, rights and title within a traditional territory may be less defined, however they encompass the entirety of a nation’s traditional territory, allowing for continued leverage over more land than might otherwise be included. Signed Land Claims or Treaties increase the definition and enforcement agreed-upon provisions giving a higher degree of leverage, however this is applicable to a smaller percentage of a nation’s traditional territory.

There are benefits to signed binding agreements as they provide certainty around many provisions that are otherwise negotiated individually for each large development. In the case of the Labrador Inuit, IBAs are now required within the Nunatsiavut Land Claim area, essentially requiring the consent rather than consultation. Furthermore, the nature of Resource Revenue Sharing is now defined within that area, and Protected Areas will be established. These trade-offs are further affected by every progressive court case that either increases the Rights and Title of an Aboriginal community in absence of a binding agreement, or influences content of provisions in any future binding agreements.

Of course, similar provisions can be agreed upon through G2G Agreements as the experience of the TRTFN suggests. However, these agreements are non-binding, and are enforced largely through a mix of procedural obligation and goodwill. Furthermore, these agreements run the
danger, as occurred in the TRTFN’s Wóoshtin Yan Too.Aat Agreement, of having the province agree to provisions that it is unable to enforce.

The likelihood of a finalized binding agreement can also be influenced by their prevalence in nearby nations. In the case of the Labrador Inuit, several Comprehensive Land Claim Agreements had been finalized throughout the coastal regions, often as a result of a large development proposal. Alternatively, only one Modern Treaty has been completed in British Columbia, which has led to the development of non-binding agreements throughout the province in the interim. The political climate around such negotiations is likely to affect the priority these particular processes are given in the overall planning process landscape.

6.2.2. Internal Factors Affecting Results

While no two cases in Canada will be the same, the Taku River Tlingit First Nation and the Nunatsiavut Government were chosen for this research because of their sophisticated approach to planning processes. As such, the factors within their control are important to consider as the possibility of transferring linkages purposefully repeated achievements in the future. These internal factors influenced results and contributed to minimizing negative impacts, maximizing local benefits, and respecting Aboriginal decision-making authority. The internal factors discussed include strengthened social and cultural community foundations, consensus-seeking decision-making and strong leadership, self-governing policy based on community consultation, and willingness to litigate when necessary.

Strengthened Social and Cultural Community Foundations

The first, and most broad, internal factor that influences results is the existing general wellbeing of an Aboriginal community. While this factor is by no means simply achieved, both the TRTFN and the NG have made substantial positive change within their communities over the last three decades. In the case of the NG, after several years of socioeconomic struggle following the collapse of the fur trade and pressures of Western socioeconomic systems, the Labrador Inuit had begun to reshape their communities, using government funding to establish a housing association and working to establish jobs through a nearby quarry. While the economic benefits the Voisey’s Bay development are inarguable, it is essential to recognize that the Inuit began working towards bettering their communities long before Voisey’s Bay began.
Similarly, it has been noted that the cultural revival of the TRTFN has contributed to the foundation from which they have moved forward in these planning processes. As one participant noted, “when I started, nobody sang, nobody drummed, nobody danced. There was nothing on the cultural side of the community was pretty bankrupt ... now there's song, dance, carving. The cultural revival that's gone on in the community is crazy” (Participant 7, TRTFN).

**Consensus Seeking Decision-Making and Strong Leadership**

“If you can achieve full support then implementation is quite swift” (Participant 1, TRTFN).

Both TRTFN and LIA leadership operate on either a majority or full consensus decision-making structure. While 100% consensus is often impossible, having the vast majority of community support behind major decisions implemented by leadership is noted as an important factor in the effectiveness of those initiatives, and creating consensus through understanding is an internal factor that greatly affects the results of planning processes. Leadership in both communities has described the support of community members as one of the biggest motivators in working to ensure that concerns and interests in relation to the developments are addressed. The structure of obtaining community support in each case was different; the TRTFN make decisions with their own consensus-based Joint Clan decision-making process, while the LIA sought support through ratification processes upon completing negotiations with other parties. This type of leadership and decision-making can be seen in other traditional government systems, such as the Cree, where leaders are “only empowered to implement decisions made by their citizens” (Venne, 2011, p.179).

“I think to make it work, you need the right people .. the right chemistry between people” (Participant 8, TRTFN).

Leadership is also essential in maintaining a long temporal perspective when navigating the various processes. Leadership in the TRTFN has been credited with consistency in their message and remembering that “everyone has to think about what would happen when Chieftain was gone, which would only be 9 years and that isn’t that long”. Similarly, leadership amongst the Labrador Inuit consistently asked themselves “what does that mean a hundred years from now? We always have to remember that this is going to be an agreement forever” (Participant 14, NG).
Self-Governing Policy based on Community Consultation

“How do you explain the holistic nature of life and the connection to the land to those who don’t understand? Is it possible?” (Participant 5)

An essential product of both the TRTFN and the NG has been the creation of policy based on community consultation. These internally-led initiatives allowed both communities to take control of the information and language around local issues, ensuring that messages were clear and less likely to be misinterpreted in cultural translation.

The LIA and the TRTFN approached the challenges inherent to communicating impacts and benefits to non-Aboriginal parties in nearly identical fashion. Leadership in both communities systematically consulted members to determine needs, values, and interests within the community. With the help of external consultants, the results of this internal community consultation was translated into policy documents that served two purposes: firstly, the reports served as directing documents for leadership, and secondly, the reports were translated into the “language of property” as to be informative for non-Aboriginal parties such as industry and government.

Many Aboriginal communities are faced with the challenge of maintaining their culture and traditional values whilst simultaneously engaging in contemporary changes. This challenge is made explicit when large developments are proposed within a community’s traditional territory and communities are required to both make value-based decision and learn how to speak the “language of property” of settler policy in order to communicate those values and decisions (Nadasdy, 2002). As these decisions have long-term repercussions for a community’s culture well beyond the lifespan of the development, communicating them effectively is essential to long term wellbeing.

Willingness to litigate when necessary

The final influencing factor within the control of an Aboriginal Government is the willingness to litigate when it is necessary. Both the TRTFN and LIA initiated litigation when their concerns with the project were ignored. While the necessity of litigation in response to particular issues will always vary from community to community based on context and values, the important
factor is the willingness to engage in litigation when there is consensus surrounding the need to do so.

In both case studies, litigation has been credited with changing the tone of relationships in other associated planning processes. In the case of the TRTFN, the final SCC decision in 2004 set the tone for the eventual completion of the Wóoshtin Yan Too.Aat Agreement, which “which pushed the province to return to the negotiation table that was left in 2003” (Participant 4, TRTFN). Beyond the more pragmatic outcomes, the court decisions on the Tulsequah Chief Mine also contributed to the attitude of the TRTFN as “it was really validating, and it really kind of changed the dynamic, they felt their power, that they could do things” (Participant 7, TRTFN).

The litigation for Voisey’s Bay remained at the provincial level and had fewer pragmatic conditions at the policy level. However, it was a win at the project level, stopping infrastructure construction. The litigation also set the tone in IBA and CLCA negotiations, with both the company and the province taking the LIA more seriously moving forward.

“It was an exciting day when we won in court!” (Participant 14, NG).

To this end, despite misgivings about the long-term effectiveness of EA, it plays an integral role in the pre-approval planning landscape: it is the only project-level process that can be brought to court. While this use is exclusive to pre-approval strategies, it is nonetheless the leverage through which both the TRTFN and LIA were able to progress their goals. So, while some think that “Environmental Assessment is more or less useless for anything” (Participant 22, NG), it has had a key role when enforced through court decisions.
Chapter 7: Conclusions

This chapter concludes the dissertation. The first portion of the chapter summarizes the key finding of this research and briefly discusses some of its broader implications. In doing so, this section addresses the complexity of the planning process landscape, how various project- and policy-level processes influence each other to both negative and positive ends, and how factors influencing the results of these processes exist both within and beyond the control of Aboriginal governments. The second portion of the chapter highlights the key contributions of this research to scholarly knowledge, to the Taku River Tlingit First Nation and the Nunatsiavut Government, and to Aboriginal governments across Canada.

7.1. Summary of findings

This research presented herein has sought to make sense of two Aboriginal Governments’ navigations of extremely complex procedural landscapes. Through the narratives of the Taku River Tlingit First Nation and the Nunatsiavut Government, this research has shown that maximizing benefits, minimizing negative impacts, and furthering Aboriginal decision-making authority through the available planning processes is an immense and complex task. The narratives demonstrate that the two governments have achieved different types of accomplishments, ranging from keeping an unwanted development at bay, creating a shared decision-making agreement in the presence of land use conflict, finalizing a Comprehensive Land Claim, and achieving a 50% Aboriginal employment rate at an operational mine. While there are still challenges to overcome, the Taku River Tlingit First Nation and the Nunatsiavut Government have demonstrated how, in our current neocolonial world, Aboriginal governments are able to balance traditional and contemporary values all while having learned to speak the provincial and federal governments’ language of property in order to protect those values.

Project- and policy-level processes interact and influence each other

In this research, it was demonstrated through conceptual maps that project- and policy-level processes can have significant effects on each other. In the TRTFN’s first court case contesting the approval of the Tulsequah Chief Mine, they argued that “the construction of the road, in advance of an established regional land use plan and a treaty, will prejudice and limit the options available to the Tlingits in both land use planning and treaty negotiations” (Taku River Tlingit
In the case of the TRTFN, it appears as though proceedings at the project level were perceived as detrimental to the policy-level treaty and land use negotiations. The negative effect of the Tulsequah Chief Mine on policy-level processes was emphasized in 2000, when negotiations for the Wóoshtin Yan Too.Aat Agreement came to a halt in light of the sudden approval of the mine. The approval set back policy negotiations and agreements significantly; the Wóoshtin Yan Too.Aat Land and Resource Management and Shared Decision Making Agreement would not be signed by the two parties until 2011.

This research also showed that interactions between policy- and project-level processes are not always negative. In the case of the LIA, the project was rightly credited with enabling the completion of a modern Land Claim in the region and creating the Nunatsiavut Government. Many participants noted that without the project, the LIA may have never concluded Land Claim negotiations.

There is no doubt that issues exist surrounding the approval of projects before the completion of higher level agreements. In the case of the TRTFN, infrastructure for the Tulsequah Chief Mine was built on what would have likely been declared a protected area in the current Land Use Plan, due to its high ecological value. Had the Land Use Plan been established before any project approvals, it is possible that the highly valuable area would have been better protected. Similarly, while no exact numbers are available, “now that the Land claim exists, the royalties for a mine within Labrador Inuit land wold be significantly higher than those currently in place at Voisey’s Bay” (Participant 17, NG). In addition, Inco’s motivation to sign an IBA for Voisey’s Bay could be credited to reducing uncertainty, gaining social license to operate, and social responsibility. Now that the Land Claim is in place, IBAs are now a requirement, not a logical option.

There are factors affecting results both within and beyond the control of Aboriginal governments

Importantly, the analysis of factors that impact results of these processes shows that there are factors both within and beyond the control of the Aboriginal governments involved. Further, the narratives created for each case study demonstrate that the navigation of these processes over several decades is extremely nuanced and detailed. The analysis of the two cases has shown that factors beyond the control of an Aboriginal government can affect the results of their efforts, such as the procedural equality in Environmental Assessment application, the attitude of the
proponent and financial value of the project, the availability of financial funding and human
capacity, and the current political and legal climate. However, the analysis also demonstrates that
certain factors within the control of Aboriginal governments can also affect results such as
strengthened social and cultural community foundations, consensus-seeking decision-making
and strong leadership, self-governing policy based on community consultation, and willingness
to litigate when necessary.

7.2. Limitations

Due to the nature of the key informants selected for this research, the design is limited to the
perspective of the leadership of both Aboriginal governments. One primary limitation of this
research is that it does not represent a community-wide perspective through representative
sample sizes. The research was designed to focus on leadership in order to better understand the
strategic engagement of planning processes from the government level; communication between
leadership and membership was initially outside the scope of this project. However, community
support was explicitly highlighted by key informants as necessary for informing negotiations,
supporting decision, and implementing agreements. This aspect of community support is
discussed herein, however only from the perspective of leadership.

In order to enhance the amount of detailed data collected for each case study, the number of case
studies was limited to two. This sample size limits the ability of the analysis to make broad
generalizations, as it only explores two out of hundreds of cases across Canada. However, the
Aboriginal governments that participated in this research were not engaged at random; they were
deliberately chosen to explore exceptional cases of planning process navigation. By choosing
two cases where Aboriginal governments have demonstrated sophisticated and strategic
approaches to the various planning processes involved in resource development and self-
governance, the aim is to highlight the context of these cases and explore the potentially unique
conditions of cases where planning process navigation was so effective.

7.3. Contributions

The knowledge garnered through the completion of this research contributes to both scholarship
and practice. Existing scholarship provides extensive review of each individual planning process,
as summarized in the literature review. However, little to no previous analysis of how the various
processes interact had been completed. As shown through the results of this research, interactions between project- and policy-level processes greatly influence the outcomes of those very processes and must be considered when assessing the application and results of Environmental Assessment, Impact and Benefit Agreements, Government-to-Government agreements, and Comprehensive Land Claim Agreements. This research has contributed to scholarly knowledge by providing an effective conceptual map simplifying and explaining those relationships in two cases. This research also provides methodological contributions, as the combination of document review and participant voices creates a novel method of recording an Aboriginal government’s experience that is both accurate and genuinely reflective of their experience.

Further, this research provides a distinction between factors that are within the control of an Aboriginal government and can be acted on, and factors that are beyond the control of an Aboriginal government and cannot be controlled from that position. The practical contributions of such findings will help direct support and capacity in the most effective fashion possible. To this end additional support to the community for internally controlled factors and increased pressure on other actors such as proponents, provinces, and the federal government may best affect the external factors beyond the control of Aboriginal governments. While a sample size of two limits the applicability of categorizing such factors for every case, it provides a starting point for increased effectiveness and further research.

Most practically, the two Aboriginal Governments involved in this research, the Taku River Tlingit First Nation and the Nunatsiavut Government, will continue to benefit from the collected data and summary reports and presentations that are currently being developed. These reports and presentations will provide a record of events that is accessible to both Aboriginal government workers and the membership at large; the advantages of such documentation include increased communication between leadership and membership, and accessible organizational memory within the government.

Finally, reports for Aboriginal governments across Canada have potential to provide a practical resource for those who are new to the planning process landscape and need to develop their own strategies in their own contexts. Again, with a sample size of two, applicability is limited to learning from the experience of others. Additionally, the importance and functionality of various
planning processes within the landscape to Aboriginal organizations may help inform both regulators and proponents on how to more meaningfully engage the Aboriginal communities affected by resource development. In disseminating the experiences of two sophisticated Aboriginal governments to others, this research aims to contribute to the increased effectiveness of Aboriginal resource management authority, impact mitigation, and benefit distribution through the planning process landscape.
References


Redfern Resources (1997). *Tulsequah Chief Project Report*


Siebenmorgen, P. and Bradshaw, B. (2011) Re-conceiving Impact and Benefit Agreements as instruments of Aboriginal community development in northern Ontario, Oil, Gas, Energy Law Intelligence

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


Taku River Tlingit First Nation (2003). *Hà t_átgi hà khustiyxh sitï: Our Land is Our Future.*


Appendix A: TRTFN Timeline of Events

Summarized Timeline of Landmark Events 1993-2015

1993  TRTFN releases Constitution
1993  Statement of Intent to negotiate Treaty approved
1994  Application to reopen Tulsequah Chief Mine submitted
1994  Work begins on *The Land is Our Future*
1995  Readiness Documents to negotiate Treaty completed
1995  Draft Project Specifications for Tulsequah Chief Mine completed
1996  Agreement Framework for Treaty signed
1996  Final Project Specifications for Tulsequah Chief Mine completed
1996  Redfern Resources Ltd submits original Project Report to EAO
1997  Redfern Resources Ltd submits revised Project Report to EAO
1998  Tulsequah Chief Project Committee submits Recommendation Report
1998  TRTFN submits dissenting Recommendations Report
1998  Approval Certificate issued for Tulsequah Chief Mine
2000  Approval Certificate overturned by British Columbia Supreme Court
2002  Court of Appeal upholds first decision
2002  Ministers reissue Approval Certificate for Tulsequah Chief Mine
2003  *Hà tátgi hà hustiyxh siti: Our Land is Our Future* completed and released
2004  Supreme Court of Canada maintains Approval Certificate
2007  *Mining Policy* released
2008  Redfern Resources stops construction as a result of financial crisis
2010  Chieftain Metals buys project from Redfern Resources
2011  G2G Agreement finalized
2012  EAO declares the Tulsequah Chief Mine ‘substantially started’
2014  The British Columbia Supreme Court sent the ‘substantially started’ decision back
2015  Minister again declares the project ‘substantially started’ following consultation
Appendix B: NG Timeline of Events

Summarized Timeline of Landmark Events, 1973-2013

1973  Labrador Inuit Association formed
1977  Land Claim filed with Government of Canada
1984  Land Claim selected for active negotiation
1990  Framework Agreement for Land Claim negotiations is signed
1993  Voisey’s Bay Nickel deposit is discovered
1995  IBA negotiations begin
1996  Land Claim negotiations fast tracked
1996  Completion of Seeing the Land is Seeing Ourselves
1997  Memorandum of Understanding for the EA of Voisey’s Bay signed by Canada, NL, LIA, Innu
1997  Independent panel issues guidelines for EIS
1997  Infrastructure construction stopped by Supreme Court of Newfoundland and Labrador
1997  Project proponent submits EIS to panel
1999  Panel review of the proponent’s EIS released
1999  Provincial Government Approval of Voisey’s Bay
2001  Agreement-in-Principle for CLCA signed
2003  Ratification of Impact and Benefit Agreement
2004  Ratification of Comprehensive Land Claim Agreement
2005  CLCA enacted via Bill C-56
2013  Nunatsiavut brings NL to court over Land Use Planning