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Transformations in Multi-level Regulations and the Role of Stakeholders in the Development of Mineral Resources and Renewable Energy:

Exploring the quest for social
acceptability and the
maximization of benefits

Final report submitted under the
SSHRC Knowledge Synthesis Program

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This research was supported by the Social Sciences and Humanities Research Council of Canada.



Social Sciences and Humanities
Research Council of Canada

Conseil de recherches en
sciences humaines du Canada

Canada

ISBN : 978-2-924762-01-1 (digital publication)

Legal Deposit : Septembre 19th 2016

Bibliothèque et Archives nationales du Québec

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Acronyms and Abbreviations

AGO	Auditor General of Ontario
AU	African Union
BAPE	Bureau d'audiences publiques sur l'environnement (Quebec)
BC	British Columbia
CIRDIS	Centre interdisciplinaire de recherche en développement international et société
CQLR	Compilation of Québec Laws and Regulations (formerly R.S.Q.)
EIA	Environmental Impact Assessment
ENAP	École nationale d'administration publique
FPIC	Free, Prior and Informed Consent
IBA	Impact and Benefit Agreement
IEP	Integrated Enhancement Program
IOC	Iron Ore Canada
KI	Kitchenuhmaykoosib Inninuwug
MERN	Ministère de l'Énergie et des Ressources naturelles (Quebec)
MRNF	Ministère des Forêts, de la Faune et des Parcs (Quebec)
NEB	National Energy Board
PUQ	Presses de l'Université du Québec
RCM	Regional County Municipality (Quebec)
S.Q.	Statutes of Quebec
SLO	Social Licence to Operate
SSHRC	Social Sciences and Humanities Research Council
UNECA	United Nations Economic Commission for Africa
UQAC	Université du Québec à Chicoutimi
UQAM	Université du Québec à Montréal
UQAR	Université du Québec à Rimouski

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1. Key Messages

This knowledge synthesis report produced with the support of a Social Sciences and Humanities Research Council grant covers two major sectors of natural resource development in Canada, mining and the generation of power from renewable sources, namely hydroelectricity and wind energy, and highlights ongoing transformations in current modes of governance of these sectors. Using a selected analytical framework, a review of the issues allowed us to identify three major ongoing transformations: persistently deficient public regulatory capacity; shifts in multi-level governance and the devolution of responsibility for natural resource development to industry. Our dual perspective on the literature based on law and political economy leads to a series of observations, the most important of which can be summarized as follows:

Mining and energy policies generally do little to protect the rights of communities: even indigenous peoples holding Aboriginal rights over affected lands are most often unable to prevent resource extraction projects.

Multi-level resource governance remains a hierarchical type of governance where the top public authorities (federal and provincial) use (or refuse to use) their powers in a manner that tends to promote the interests of private industry resource extraction rather than those of local communities or even the overall population.

As a result, it becomes difficult if not impossible for local communities to put forward alternative development options, and they have often little option but to become partners or agree to projects under circumstances in which they can only marginally negotiate the terms, or resign themselves to missing out on any form of development.

The adoption of more holistic and dynamic approaches has led some authors to consider the key question of the roles and responsibilities of public actors that have long been overlooked and even overshadowed by the country's historical heritage and regulatory frameworks that gave precedence to the role and powers conferred to industry.

The renewal of such approaches reveals that the issues analyzed are part of political processes that should be taken into account to avoid "depoliticizing" the fundamental questions of access, control and development of natural resources in the two sectors studied.

The concepts of social acceptability, social acceptance and social licence to operate do not have any formal legal basis in Canada. These concepts are therefore entirely subject to asymmetrical relations of power, and thus often serve the most powerful actors, including industry, in an approach which has been defined as "negotiated justice".

In fact, the regulatory heritage, the types of agreements negotiated in the mining and wind energy sectors, and a certain perspective arising from the literature on social acceptability or social acceptance that fosters direct negotiation between communities and industry all take for granted or support the withdrawal or selective absence of the public authorities and overlook their potential roles and responsibilities. Such approaches thus close the door to taking into account the potentially central role of introducing public policies to ensure that natural resources serve as a catalyst for structural shifts, both social and economic, that lead to more equitable, environmentally sustainable economic and social development in the long term.

2. Summary

This knowledge synthesis report produced with the support of a Social Sciences and Humanities Research Council covers two key sectors of natural resource exploitation in Canada, mining and the generation of power from renewable sources, namely hydroelectricity and wind energy, to provide a better understanding of the ongoing transformations in governance in these sectors. It seeks to clarify the main governance issues raised by the extraction of these natural resources, as reported and analyzed in the social science literature, particularly in the fields of law and political economy.

Mining and the installation of hydroelectric and wind energy infrastructure both “consume” a lot of territory and create tensions that raise questions about the manner in which the state and industry view development and public interests. Given the difficulty which the formal legal channels have in responding to social and territorial demands for participation in decision-making processes, new concepts and processes are introduced, and serve to highlight the major ongoing transformations in these two sectors, such as social acceptability, social acceptance and free, prior and informed consent, as well as an emphasis on economic benefits for affected communities.

After reviewing these phenomena, we will examine the ongoing major transformations in the governance processes affecting the extraction of natural resources (mining and renewable energy) and do so from three perspectives:

- Changes that are sometimes accompanied by a tightening in the types and modes of public regulation, which we summarize as persistently deficient public regulatory capacity;
- Shifts in multi-level governance (federal, provincial, municipal);
- Devolution of responsibility to private actors.

In the context of Canada’s unique heritage and the reproduction of the structural relations of power, particularly those conferred to industry by regulatory frameworks, some aspects of the current situation warrant special attention. This is the case for the privatization of mandatory consultation by governments and the significant transfer of public roles and responsibilities to private actors. These trends carry the serious risk of reducing political spaces, as communities that sign private bilateral agreements, which are now the norm, become unable to use certain avenues or instruments to manifest disagreement, such as the possibility of appealing to the courts or the media. Even within communities, public debate can be muzzled due to what has been termed “negotiated justice”, which takes place behind closed doors.

Relations between local communities, including indigenous peoples, industry and the different levels of government are changing. The literature review shows that, in the current context of Canadian regulations and the tendency of selective absence of the role of the public authorities, analyses most frequently fall within the existing framework and thus tend to limit possible options and strategies because they overlook alternatives that would require stronger public intervention. The assumption that Canadian governments will stay out of negotiations between communities and companies seems to characterize and define the manner in which issues are addressed.

Contrary to what is happening elsewhere in the world, we must emphasize the limited attention that scientific literature on the Canadian mining sector devotes to the potential for the social and

economic development at the local, regional and national levels that would result from the introduction of public policies that allow the sector to act as a catalyst for structural shifts between sectors (energy, infrastructure, manufacturing, transport) and industrial links, both upstream and downstream, that encourage more local transformation instead of merely exporting materials in a raw or next to raw state.

Territorial development policies focus on the local level while industrial extraction strategies are determined at an entirely different level: transnationally.

Very few analyses address this larger context and its challenges. Moreover, studies which consider the very real potential for resource development through long-term integrated strategies relying on regional development promoted through strong public policies are extremely rare.

The current transformations of investment strategies in the mining sector to increase profits (importing labour into increasingly remote areas, intensive mining of open pit mines, long work hours) are likely to generate fewer benefits for local populations and increase social and environmental costs, exacerbating the issues addressed in this synthesis, including the question of social acceptability, for which no satisfactory solution can be found in a regulatory framework that is characterised by persistently deficient public regulatory capacity.

The mining and energy resource development models are creating tensions due to the asymmetrical relations and regulatory frameworks on which these models are based. The response to these tensions has primarily been articulated in terms of a focus on local economic benefits and increasing concerns over the social acceptability of projects. While these avenues are put forward as solutions, neither is able to tackle the much more complex underlying issues, which are of a structural, legal and political nature and raise questions about territorial control, and the conditions under which resource development takes place and the decisions over competing uses determined.

Our dual perspective based on law and political economy leads to a series of observations, the most important of which can be summarized as follows:

Mining and energy policies generally do little to protect the rights of communities: even indigenous peoples holding Aboriginal rights over affected lands are most often unable to prevent resource extraction projects.

Multi-level resource governance remains a hierarchical type of governance where the top public authorities (federal and provincial) use (or refuse to use) their powers in a manner that tends to promote the interests of private industry resource development rather than those of local communities or even the overall population.

As a result, it becomes difficult if not impossible for local communities to put forward alternative development options, and they have often little choice but to become partners or agree to projects under circumstances where they can only marginally negotiate terms, or resign themselves to missing out on any form of development.

The adoption of more holistic and dynamic approaches has led some authors to consider the key question of the roles and responsibilities of public actors that have long been overlooked and even overshadowed by the country's historical heritage and regulatory frameworks that gave precedence to the role and powers conferred to industry.

The renewal of such approaches shows that the issues analyzed are part of political processes that should be taken into account to avoid depoliticizing the fundamental questions of access, control and development of natural resources in the two sectors studied.

The concepts of social acceptability, social acceptance and social licence to operate do not have any formal legal basis in Canada. These concepts are therefore entirely subject to asymmetrical relations of power, and thus often serve the most powerful actors, including industry, in an approach which has been described as "negotiated justice".

In fact, the regulatory heritage, the types of agreements negotiated in the mining and wind energy sectors, and a certain perspective arising from the literature on social acceptability that fosters direct negotiation between communities and industry all take for granted or support the withdrawal or selective absence of the public authorities and overlook their potential roles and responsibilities. Such approaches thus close the door to taking into account the potentially central role of introducing public policies to ensure that natural resources serve as a catalyst for structural shifts, both social and economic, that lead to more equitable, environmentally sustainable economic and social development in the long term.

3. Context

3.1. Subject

This knowledge synthesis report produced with the support of a Social Sciences and Humanities Research Council covers two key sectors of natural resource exploitation in Canada, mining and the generation of power from renewable sources, namely hydroelectricity and wind energy, and aims to provide a better understanding of the issues raised and the ongoing transformations in the governance of these sectors. Over the last decade, there has been renewed interest in both the mining and renewable energy sectors, fuelled by thriving world markets and the evolution of international norms. The multi-level domestic normative framework of these two sectors is also changing, raising issues that manifest themselves in numerous arenas and on different platforms and which are of concern not only to the public administration, but also to economic actors and civil society. The synthesis addresses the main governance issues raised by the development of these natural resources, as reported and analyzed in the social science literature, particularly in the fields of law and political economy.

The development of natural mineral resources and renewable energy sources in Canada is taking place in a changing world and leading to the transformation or cementing of practices, the roles of different stakeholders and national regulations at all levels of governance. What territorial and governance challenges do these phenomena pose for Canadian society?

3.2. Analytical Framework

The relative decline in the natural resource market over recent years must not be allowed to mask an underlying trend: the increasing strategic importance of natural resources for world economies, and notably Canada, which is a key player in the mining and renewable energy sectors.

Two phenomena are particularly revealing of the major ongoing transformations in these two sectors. We shall start by providing an overview of these two phenomena which are driving significant transformations in natural resource governance:

- A. The search for the social acceptability of projects (and other related concepts);
- B. The negotiation of benefits for local populations.

After reviewing these two phenomena, we will examine, from three perspectives, the major transformations in governance affecting natural resource extraction (mining and renewable energy) by adapting the Brenner (2004) model:

1. Changes are sometimes accompanied by a tightening in the types and modes of public regulation, which we summarize as persistently deficient public regulatory capacity;
2. Shifts in multi-level governance (federal, provincial, municipal);
3. Devolution of responsibility to private actors.

The emergence of these transformations is fostered by phenomena conceptualized by certain authors, such as the selective absence of the state (Szablowski 2007) and the reinforcement of asymmetrical relations (Laforce, Lapointe, and Lebuis 2012, 34).

The analytical framework is a prism through which the transformations and their driving forces (social acceptability and direct benefits) will be discussed. But first, it was necessary to define the contours of a vast body of literature in order to limit it to the body of research in two disciplines: law and political economy.

3.3. Target Audience

This report is intended for various audiences: policy makers and members of the public administration in charge of resource development in the sectors studied; the heads of corporations in these sectors; those in charge of negotiations between communities and companies; members of communities affected by the activities undertaken in these sectors and the general Canadian public; heads of non-governmental organizations involved in monitoring the impacts of the projects in these sectors; researchers, teachers and students, and the media.

3.4. Methodology

We focused on the two strategic areas of natural resource exploitation in Canada, mining and renewable energy (hydroelectricity and wind energy), using an interdisciplinary approach combining political economy and legal sciences, and adopting a holistic perspective that takes into account the territorial intersectoral ramifications of resource exploitation activities, including its impacts on communities, citizen participation and the social and economic benefits for affected communities.

The synthesis relied on an analytical and deductive documentation methodology based primarily on the review of scientific papers, research reports, public authority reports and academic articles on regulatory frameworks, local benefits and social acceptance in the two sectors studied. The selected documents had to focus on case studies in Canadian provinces or territories and examine the situation at different levels of regulation (federal, provincial, municipal). A total of 196 documents were selected and analyzed, of which 58 were the object of a written note of synthesis. Once an annotated bibliography had been created using predetermined keywords, a smaller number of documents was selected using the inter-rater method to produce a two-pronged analytical literature review.

The work was carried out in successive stages, under the supervision of Professors Bonnie Campbell of Université du Québec à Montréal (UQAM) and Marie-Claude Prémont of the École nationale d'administration publique (ENAP). Some forty keywords were identified to cover the themes of the synthesis, allowing the creation of bibliographic lists for each of the two disciplines. This step made it possible to map the available literature according to the concepts used which in turn allowed for the identification of frequently and infrequently examined topics. For example, there is abundant literature on environmental impact assessments, but little on regulatory frameworks for the extraction of natural resources, the development models and strategies, or actors' roles and responsibilities. We then enhanced our research in selected databases, but we mainly oriented it towards grey literature and public administration reports (e.g., Reports of the Auditor General). A final bibliography by discipline and theme was created to prepare fifty-eight notes of synthesis, with the help of two disciplinary sub-teams. The political economy literature was reviewed and summarized by Professor Campbell and Andréanne Martel, while the legal literature was reviewed and summarized by Professor Prémont and Gabrielle Joyce Lupien.

Little emphasis was placed on environmental impact assessments (EIAs) or studies in order to prioritize documents focusing on socio-economic impacts, especially the processes in place. EIA literature is undeniably extensive, but it goes beyond the issues addressed in this synthesis. Our analysis nevertheless took consultation and participatory bodies and processes such as the *Bureau d'audiences publiques en environnement* (BAPE) into account.

Aboriginal law is crucial to natural resource exploitation, but we decided to limit ourselves to the links between this branch of law and the concepts of social acceptability and the negotiation of

benefits for affected communities. As natural resource extraction projects penetrate ever deeper into remote areas of Canada, indigenous communities are called upon, more than ever before, to play a vital role in determining project receptivity and the negotiation and benefit sharing processes. Indigenous peoples require their own specific analysis because of the constitutional protection conferred by their Aboriginal rights. We chose not to focus on other sectors of the population, such as youths and women, knowing that these areas were researched by other teams.

In addition, sustainable development issues are discussed from a social acceptability standpoint and as a means of easing tensions caused by project implementation. This perspective leaves aside the potentially crucial role of resources as a catalyst for the structural transformation of society, which would require the introduction of public policies to ensure long-term, environmentally sustainable, equitable social and economic development.

4. Major Issues

Growing citizen mobilization against large natural resource extraction and public infrastructure projects (Batellier 2015; Batellier 2016) is raising questions about the formal project approval processes provided by law. Legal formalities and administrative authorization procedures are no longer always sufficient to convince populations and obtain their support for projects promoted by developers (Gendron 2014). Indeed, the permits delivered by public authorities no longer guarantee unopposed resource exploitation (Raufflet 2014). Because of the *commodification* of territories (Batellier 2015) often associated with resource extraction, the rights and aspirations of occupants can conflict with the rights that the State wishes to confer on industry and large project developers, whether in densely populated areas or in the Far North. Mining and the installation of hydroelectric and wind energy infrastructure both consume a lot of territory and create tensions, raising questions about the manner in which the state views development and public interests. Given the difficulty with which formal legal channels have to meet social and territorial demands for participation in decision-making processes, new concepts and processes are introduced.

4.1. The Search for Social Acceptability

Four new concepts are proving increasingly popular. The first, social acceptability, is especially present in francophone literature and in countries where renewable energy projects, particularly wind farms, are likely to be undertaken, but also in the mining industry in more densely populated areas. The second, social acceptance is found notably but not exclusively in the English language literature with regard to wind energy projects. The notion has been declined as socio-political acceptance, community acceptance and market acceptance but it is the concept of social acceptance which is by far the most prominent. The third, social licence to operate (SLO), is similar to the concept of social acceptability and is primarily used in English-language literature for mining, wind power and forestry activities, chiefly in developing countries, but also in Australia, Canada and the United States. Because they are quite similar, these three concepts will be examined together. Finally, the concept of free, prior and informed consent is without doubt the earliest, the most robust and is usually reserved for indigenous peoples, particularly for mining activities. It is of a different nature when compared to the former three as it entails obligations. In Canada, this concept translates into the duty to consult and accommodate indigenous peoples, within the meaning it has been given by the Supreme Court of Canada.

4.1.1. Social Acceptability, Social Acceptance and Social Licence to Operate

In light of the number of projects blocked or challenged by host communities and environmental groups, an Ernst & Young (2014) study placed the issue of social licence to operate as the third greatest business risk.¹ It is in this context with a high risk of social opposition (the Ernst & Young report talks about social protest and unrest) that the concept of social acceptability or social licence to operate becomes a mechanism that can be used as a response to the social threat. The concept is increasingly becoming part of the discourse and practices of key stakeholders of large natural resource extraction projects. Indeed, the permits issued by public authorities no

¹ The issue moved into fifth place in the 2015 report with resource nationalism becoming first. The company defines resource nationalism as an increase of the tax burden and transparency measures for industry (Ernst & Young 2015).

longer guarantee the legitimacy of the activities, and the people or groups who are the most inconvenienced are likely to express their opposition in a number of ways. In addition, activities related to mining and the installation of renewable energy infrastructure lead to the closing of spaces and deep scarring of the territory, so companies have no choice but to adapt their activities to local communities and to do so for long periods of time. In short, it is in the best interest of project developers to establish good relations with local authorities from the start and to maintain them (Raufflet 2014). The concepts of social acceptability, social acceptance and social licence to operate thus become very appealing.

It is worth underlining that these concepts do not have any formal legal basis in Canada, not even, for example, in the *Sustainable Development Act* of Quebec.² They are essentially concepts put forward, supported and advocated by companies, but also by a variety of social actors and academics who have seized the opportunity to use them from a different perspective in an attempt to compensate for the shortcomings of the current legal system.

Today, the concept of social acceptability is divided between two major objectives or uses (Gendron 2014) due to its vague and imprecise nature (Batellier 2015). Authors tend to justify the concept's vague nature by talking about its complexity (Fortin, Devanne, and Le Floch 2009) or the obligations it carries. It is important to distinguish between its two major uses, which are associated with two distinct categories of advocates: industry on one hand, and academics or citizens' rights groups on the other.

The concept of social acceptability was first developed in the early 2000s by industry itself, its consultants, and international financial institutions and investment companies. Its primary purpose was to convince active or potential opponents that beyond ensuring the profitability of its projects, industry was also concerned about the impact of its activities on the territory and its populations (Raufflet 2014). The *political* use of the concept by industry is essentially an effort to obtain approval for projects, silence opponents or manage a crisis (Batellier 2015; Batellier 2016). The use of the concept to such an end constitutes an extension of the movement that promotes corporate social responsibility.³

At the other end of the spectrum, academics and citizens' groups are trying to appropriate and develop the concept to increase its use so that it benefits affected populations or improves democratic participation. The focus can be on opening up new democratic participatory processes that would otherwise be unavailable (Gendron 2014), the ongoing sharing of knowledge for collective learning, or assigning to the concept a role that extends beyond the micro or local level of industry to a meso or macro level (Beaudry, Fortin, and Fournis 2014). There is emphasis on the need to initiate a process of dialogue between the developer and the affected population early on in the project, before everything has been decided, to ensure that the concerned population has a real impact on project implementation. With regard to the renewable energy sector, it is recognized that social issues, which can be defined as incomplete knowledge, poor public participation, inconsistent procedures and the need for technical and scientific expertise on the subjects, can impede the diffusion of such energies (Corcadden, Wile, and Yiridoe 2012). Indeed public consultation is seen as an 'essential' component of the planning process in relation to wind farms. Finally with regard to this sector, research confirms that the level of social acceptability of wind energy and the types of energy evaluation indirectly influence strategic energy policy choices (Feurtey et al. 2016).

² CQLR, c. D-8.1.1

³ For an overview of the historical development of this notion, see Goyette-Côté (2016). For a critical analysis by an industry representative, see Harvey (2014) and see also Campbell (2011).

Some call for a degree of institutionalization of the social acceptance processes (Fortin and Fournis 2011) while others oppose the idea (Gendron 2014). Even when they do conceive of some forms of institutionalization, authors tend to limit themselves to François Ost's broad legal vision of the law as a quest for what is right rather than calling for more prescriptive forms. They therefore place more trust in public participation than in reinforcing the powers of the state to obtain more equitable results (Beaudry, Fortin, and Fournis 2014). Other authors argue that the concept of social acceptability will not be able to fulfil its promise and must be rapidly replaced by an emphasis on resilient local development structured around three pillars: economic diversification, local social cohesion and environmental sustainability (Raufflet 2014).

Authors of English-language literature also argue that the notion of social licence to operate has become a key concept that developers must consider when implementing projects, in light of the increasingly strict requirements associated with sustainable development and the respect of communities, in addition to the multiplication of actors involved (Prno and Slocombe 2012). They also draw attention to the fact that local communities now have tools that could well slow down project implementation, and it is therefore worthwhile to properly plan and manage relations to obtain their approval.

Authors have also fully grasped that interest in the concepts of social acceptability, social acceptance and social licence to operate is emerging in a context where public regulation is at times silent or absent. These concepts are also used in a context where governance of natural resources is transferred to non-state actors. They render the role of the state somewhat incidental, limited to guiding, encouraging or inducing private actors to obtain this social permit, without affecting the power relations between industry and territorial communities.

From both perspectives (industry and the host community), the concept refers to a community assessment rather than to individual positioning. Furthermore, we can see that social acceptability, social acceptance or social licence issues usually focus on specific and previously territorialized projects instead of addressing underlying public policy, as suggested by Szarka (2004). Despite what is anticipated, this approach does not allow for a review of the choices made or the exclusion of alternative development trajectories. Instead, the concept leads to concessions by industry or agreements between developers and local populations (Section 4.3). Some authors who have given a lot of thought to the concept and attempted to make it more useful by tilting it in favour of the rights of affected populations have recently acknowledged that the tangible results are few and disappointing in light of the sustained efforts of the last decade (Dumarcher and Fournis 2015). But is this really surprising, considering that local communities have always been fragile when confronted with large industrial interests (Beaudry, Fortin, and Fournis 2014)?

The government of Quebec recently expressed interest in taking a step towards the institutionalization of the concept by launching, in the autumn of 2015, a project on the social acceptability of mining and energy resources, followed by the publication of a green paper in February 2016 and the holding of a parliamentary commission in the spring of 2016 (Assemblée nationale Québec 2016). Through these steps, the province hopes to modernize the tools and practices of the *Ministère de l'Énergie et des Ressources naturelles* (MERN) in order to better reconcile competing uses and promote the smooth integration of projects into host communities. However, the green paper continues to convey a vision of social acceptability as a matter which concerns primarily industry and local communities. The MERN adopts what could be described as a "back seat" position and acts as an aid or referee for the proper distribution of information. The document states that the MERN is a department with an economic mission that is chiefly dedicated to resource exploitation and not its protection. This position has the merit of being clear and is in line with the industrial view of the role that the state and the concept of social acceptability should play in decision-making processes when it comes to resource extraction projects. For example, in its role of accompanying the measures taken by industry, the MERN

simply proposes to remind the developer that it should create a Liaison Committee with the community once the project has been approved.

In short, the perspectives of industry, academics and public authorities all consider that a project's social acceptability or social licence to operate should be negotiated on a case-by-case basis, without any real influence on important public policies, thus confirming a negotiated justice approach which is most likely to be conditioned by the objectives of industry and by existing power relations among the parties concerned.

4.1.2. Free, Prior and Informed Consent and the Obligation to Consult Indigenous Peoples

The principle of free, prior and informed consent (FPIC) for indigenous peoples is a principle of international law enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples*,⁴ which was adopted in 2007 in New York, despite the initial opposition of the United States, Canada, Australia and New Zealand. Three years later, Canada signed the document, stating that it was "an aspirational document which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances" (Government of Canada and Aboriginal Affairs and Northern Development Canada 2011). Yet, even when it signed the Convention, Canada reiterated that it did not see any legally binding obligation for the state, but said it was willing to work in a collaborative manner with indigenous peoples.

Some authors argue for the incorporation of the FPIC principle into domestic law and that it should be applied whenever indigenous rights recognized by the state are threatened by a development project. While indigenous peoples have the right to be consulted, the state is not obligated to include their opinion in its decisions (Farget and Fullum-Lavery 2014). These authors also argue that Canada does not always fulfil its obligations in this respect, and they recommend that Quebec do more, particularly in the context of the *Plan Nord*.

This embryonic principle of international law becomes more precise and restrictive in Canadian constitutional law (Section 35 of the *Canada Act 1982*)⁵ and in changes introduced by the Supreme Court of Canada, which require Canada and its provinces (in other words the Crown, whether it be federal or provincial) to consult Aboriginal peoples when their rights are affected by natural resource extraction activities, particularly since the *Haida Nation* ruling (2004).⁶ In its decision, the Supreme Court stated that the right of Aboriginal peoples to be consulted and to participate in decision-making processes that affect them is based on their right to self-determination, the respect of historical treaties, the Honour of the Crown, and reparation and reconciliation as a result of the violations of rights.

More broadly, the right to consultation of populations is also linked to the field of environmental law, which takes on a special dimension for indigenous peoples given their intimate relation with the land and their traditional knowledge of their environment (Lebuis and King-Ruel 2010).

The right to consultation of Canada's indigenous communities thus becomes a duty of the state. This duty is, however, limited to the obligation to hold a process, without any obligation to produce results and without giving communities a right of veto as they have at the international level where the International Court of Justice recognizes that international human rights

⁴ Resolution by the General Assembly, official document, United Nations, 61st session, UN Document A/RES/61/295.

⁵ Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁶ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

obligations must not undermine the sovereignty of states (Lebuis and King-Ruel 2010). This right is exercised on an ad hoc basis, project by project, and consent, where applicable, should ideally be obtained at the start of a project. However, the question of the precise timing of the consultation and securing of consent remains an unanswered and controversial one. The case of the *Ross River Dena Council*⁷ illustrates this well, with the tribunal ruling that the Yukon had the duty to consult the Dena before allowing the staking of a territory subject to a land claim (Batellier 2015).

The principle clearly calls for an important reform in the governance of natural resource extraction projects by promoting an approach that breaks with the traditional top-down mechanisms in favour of one in which the actors and methods adopted are multiple (Szablowski 2010). In conjunction with other developments, this principle has gradually led stakeholders towards a particular instrument used to formalize, in a tangible document, an indigenous community's consent or adherence to a development project. This is the case of the Impact and Benefit Agreement (IBA), which will be discussed in Section 4.3, along with other instruments, particularly in relation to the sectors of wind energy and hydroelectricity production.

The duty to consult indigenous peoples slowly underwent transformations in the international arena that were reflected at the national level. The obligation under international law to consult indigenous peoples first relied exclusively on states, but it was gradually adopted and implemented by international private actors, such as major multilateral banks and international funding and development agencies. The concept was then extended beyond states, notably through projects sponsored by large international organizations (Batellier 2015, 74).

The same type of transfer from state to industry took place gradually at the national level (Farget and Fullum-Lavery 2014). The state has indeed been increasingly relying on industry to undertake and complete the consultation processes with indigenous peoples, despite its clear legal responsibility that it cannot simply delegate to the private sector (Graben and Sinclair 2015). The state's failure to fulfil its obligations could have serious consequences for indigenous communities because an industry in default cannot be held legally liable for not complying with the Crown's duty of consultation and accommodation.

Let us consider the following example. A treaty signed in 1929 with the Kitchenuhmaykoosib Inninuwug (KI) community of Ontario provided for the consultation of this First Nation in the event of any impact on its lands, or at least that is what the First Nation understood. Because Ontario never established norms for such a consultation process, KI adopted its own process. In 2006, when Platinex began diamond exploration without holding consultations, KI asked the company to leave. Platinex left, but sued KI for \$10 billion. KI replied with its own injunction, which was overturned on appeal, and a counter-claim was decided in favour of the mining company (Ariss and Cutfeet 2011).

The Innu community of Quebec is also caught in this legal limbo with its demands for reparation in relation to mining by Iron Ore Canada (IOC) in the Labrador Trough (Boutros 2015) and the harnessing of the Romaine River for a large hydroelectric project by Hydro-Québec (Rettino-Parazelli 2015).

These examples illustrate the current strong tendency to use agreements between developers and territorial communities (Section 4.3) to secure the consent of indigenous and non-indigenous communities and in so doing demonstrate their participation in the decision-making process.

⁷ *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14.

4.2. Deficient Taxation Systems

Canadian local communities have long maintained that natural resource extraction disproportionately puts the burden of its disadvantages on them, without proportionate compensation for the benefits and revenue generated. Municipal associations are notably calling for the redistribution of royalties obtained as a result of natural resource development. Little progress has been made in this respect throughout Canada. Municipal public services thus remain primarily financed by taxes collected on the territory, notably as property tax. However, the property tax revenue generated by infrastructure used for mining or renewable energy production is small compared to the wealth created. Besides jobs, whose numbers it is suggested, are decreasing (Mousseau 2012), few fiscal benefits remain in the territory hosting resource extraction activities.

For example, no property taxes are paid to municipalities that host Québec's large hydroelectric infrastructure belonging to state-owned Hydro-Québec (Prémont 2014a). Hydroelectric plants and dams belonging to large industry also enjoy tax privileges that deprive host municipalities of revenue that the standard rules of property taxation would grant them (Prémont 2016b). Québec's wind farms, regardless of their owner, are also totally exempt from municipal property and school taxes (Prémont 2016a).

The provinces themselves also receive little revenue from mineral resources even though they are public property. Authors and the Auditors General of several provinces have criticized their governments for their lack of transparency regarding data on mining taxation, the few royalties collected and the generosity of the federal and provincial governments towards industry (Stano 2012; Gouvernement du Québec 2009; Office of the Auditor General of Ontario 2015). Between 2005 and 2011, British Columbia only received an average of 3.5 per cent of the mining industry's operating revenues, which is very low considering that it is a publically-owned, non-renewable resource. The Yukon has the more interesting practice of levying a progressive rate on mining taxes in relation to profit increases, starting at \$10,000. Administrative fees of 10 per cent are also added for the late payment of mining taxes (Stano 2012).

In short, the lax taxation conditions of the central government (federal or provincial) and the fact that decentralized public administrations (municipalities and also school boards) are unable to collect substantial taxes from mining and renewable energy activities must also be considered in the context of the search for social acceptance and FPIC. The pressures thus generated promote a shift towards other types of territorial benefits, taking the form of negotiations that place industry and local communities in direct contact.

4.3. Negotiation of Territorial/Community Benefits

The convergence of three phenomena (the search for the social acceptance of projects or the consent of indigenous communities, the deficiencies in territorial taxation, and the shortcomings of the regulatory framework in setting the conditions of natural resource development) has led to the emergence and proliferation of agreements between industry and territorial communities.

Distinctions must be made between agreements reached with indigenous and non-indigenous communities. When concluded with indigenous communities, such agreements are most often referred to as Impact and Benefit Agreements (IBAs)⁸ in Canada. According to Sosa and Keenan

⁸ Other terms used for such agreements elsewhere in Canada include Human Resources Development Agreements, Socioeconomic Agreements, Participation Agreements and Cooperation Agreements, depending on the emphasis placed on a particular objective.

(2001), despite many years of experience in negotiating such agreements in Canada, the volume of literature on the subject remained very small in 2001. It does not seem to have expanded greatly since. As the agreements are often very private (the federal or provincial governments are sometimes involved), industry often requires that they remain confidential.

The report by Sosa and Keenan (2001) makes it possible to group standard IBA clauses under six headings that will later allow us to analyze the transformations in governance that they reveal:

1. Introductory clauses, including the community's commitment to support industry efforts in obtaining the various administrative authorizations;
2. Jobs for community members;
3. Economic development of the territory and business opportunities for the community;
4. Royalties paid to the community or the acquisition of interests in the company;
5. Environmental protection and, finally;
6. Social and cultural clauses.

These headings show that IBAs cover a very broad scope.

Industry is often forced to negotiate such agreements with indigenous communities. This is notably the case in the Northwest Territories, where the federal government owns the mining rights and makes it a requirement for administrative decisions on resource exploitation. This is also the case in Nunavut, where under the Nunavut Land Claims Agreement the granting of mining rights is subject to the signature of an IBA with affected communities. In 2010, there were a total of 171 IBAs or letters of intent throughout Canada (Knotsch, Siebenmorgen, and Bradshaw 2010). The phenomenon is therefore a very significant one.

IBAs make it possible for industry to secure the approval of the communities concerned with their projects (Shanks 2006), while also attesting to the holding of a certain consultation process prior to the project. Canadian history has clearly demonstrated that the rights of indigenous peoples have largely been ignored, and at times violated, in the granting of natural resource extraction authorizations by Canada or its provinces (Procter 2015; Massell 2011; Bielawski 2003). Legal action was often the only available recourse for changing things. The injunction granted by Judge Malouf of the Superior Court of Québec to stop bulldozers that had already started ravaging Cree territory for the 'project of the century' to harness the La Grande River of James Bay marked the period and its practices (Blancquaert 2011). By resorting to IBAs, indigenous communities are now able, to some extent and in the first stages of a project, to take part in its establishment, negotiate conditions regarding its implementation, influence its impact on the community and obtain tangible financial, social and cultural benefits. IBAs therefore constitute a radical change over Canada's darker history with regard to its indigenous peoples.

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

In the opposing camp are the authors who emphasize the hidden dangers of these agreements, in particular the profound changes they reveal regarding natural resource extraction in Canada. This issue is addressed below in Section 5 on the ongoing transformations.

While public authorities encourage such agreements, the federal government does not provide any clear policy on the subject, notably with regard to the administrative treatment of the royalties paid, and communities risk seeing their federal government-allocated resources reduced proportionally. There is no analysis of the extent to which this uncertainty influences the negotiations or the form royalties can take, such as individual rather than collective benefits.

The negotiation of local benefits can also take other forms for which there are even fewer analyses and publications. For example, Hydro-Québec negotiates agreements with both indigenous and non-indigenous communities when it installs new electricity generation or transmission infrastructure, notably through its Integrated Enhancement Program (IEP). Negotiations are also conducted between Hydro-Québec and indigenous peoples for large development projects (including the recent Romaine Complex), but also with Regional County Municipalities (RCMs) (notably for the construction of the Peribonka IV plant in Saguenay/Lac-Saint-Jean). There is little research available on these various negotiations with local communities. In British Columbia, negotiations between the provincial government and the Federation of Municipalities of British Columbia led to the adoption of an approach through which property tax royalties or alternatives are paid to the municipalities affected by the hydroelectric plants or reservoirs that supply them. We could not find a single academic publication that addressed this subject.

Other mechanisms for negotiated territorial or local benefits are used when wind farms are established. In Quebec, when implementing its wind energy development policy, Hydro-Québec launches calls for tender for the binding, long-term purchase of electricity from wind energy (Fournis et al. 2013). Developers who wish to submit proposals must first reach agreements with municipalities (or indigenous communities) that are somewhat equivalent to IBAs for the development of new renewable energy resources. There is little literature on the contents of such agreements, although they contain categories of clauses that are curiously similar to those found in IBAs (Prémont 2016a).

5. Major Ongoing Transformations

A review of the issues raised reveals three major ongoing transformations: a persistently deficient public regulatory capacity; shifts in multi-level governance and finally, the devolution of responsibility to industry.

5.1. Persistently Deficient Regulatory Capacity

The regulation of mines and renewable energy falls primarily under the responsibility of provinces (Section 92A of the *Constitution Act, 1867*),⁹ except for territories where the federal government plays a key role or where treaties with indigenous peoples constrain the public authorities (Sosa and Keenan 2001). To add to this complexity, the federal government retains powers that can have a varying impact on the jurisdiction of the provinces, especially with regard to indigenous peoples, but also in terms of navigation, fisheries (waterways), exports and environmental assessments. Consequently, even though regulations vary significantly throughout the country, some important similarities allow for a broad outline.

5.1.1. Stalemate of Regulatory Reform in the Mining Sector

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

This type of regime grants mining priority over any other land use. In return, it drastically limits the regulatory and intervention powers of the state, which are subject to the discretionary decisions of industry (Campbell and Laforce 2010). As a result, all levels of government are subject to this priority, including municipalities, where land planning authorities have little leeway in the face of mining rights. Even indigenous peoples remain vulnerable when mining rights are concerned (Laforce, Campbell, and Sarrasin 2012; Campbell and Laforce 2010).

There is increasing opposition to this type of regime, and some provinces have tried to introduce reforms, but the results remain rather mixed. This is notably the case in Ontario and Quebec. Despite the 2009 reform of Ontario's *Mining Act*,¹⁰ the free access to mineral resources remains unchanged (Ariss and Cutfeet 2011; Pardy and Stoehr 2011). Except in the Far North, a mining company can still stake a claim to land subject to Aboriginal claims without notice. The new act does not provide for obligations relating to a joint decision-making process or the sharing of revenue (Simons and Collins 2010). Some changes were made, such as requiring the authorization of private land owners before conducting exploration work in the southern part of the province or the prior consultation of indigenous peoples in the northern part of the province, which has been delegated to industry and included in the *Far North Act*¹¹ of 2010, raising serious

⁹ 30 & 31 Victoria, c. 3 (U.K.).

¹⁰ R.S.O. 1990, c. M.14.

¹¹ SO 2010, c. 18.

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

In response to strong social pressure, the province of Quebec did indeed try to reform its mining regime. Several attempts were needed, including two in a period of eight months for the same government, which in 2013 produced an outcome that did not please many people but was in line with the perspective of industry.¹² The previous government had also tried twice, but was unsuccessful. The duty to consult indigenous peoples was introduced into the Act, but without a right of veto. The minister must merely draw up an indigenous community consultation policy specific to the mining sector (Article 2.3 of the *Mining Act*).¹³ The result is far from the recommendations made by Thériault (2010) for the Quebec mining regime to comply with the constitutional rights of indigenous peoples and translate into concrete terms their capacity to use their ancestral lands.

The legislative review of the Quebec mining sector maintains the logic of direct negotiations between industry and local populations ó notably with regard to local benefits, as shown by the 2015 adoption of a law requiring the transmission of data on amounts paid out under IBA-type agreements for projects reaching a certain threshold (S.Q. 2015, c. 23, or CQLR c. T-11.011).

5.1.2. Renewable Energy and the Return of Private Production

The prominence of the role of hydroelectricity (a renewable resource) is a characteristic of Canada's electricity production that is currently the envy of a number of other countries. However, this hydroelectric wealth is not evenly distributed throughout Canada. Quebec, British Columbia, the Labrador portion of Newfoundland and Labrador, and Manitoba are the most richly-endowed territories. During the 20th century, all of these provinces nationalized their hydroelectric production facilities¹⁴ and implemented a provincial Crown corporation in charge of electricity generation, transmission and distribution.

In the context of global warming and the fight against greenhouse gases, the increased interest in renewable energy of the last two decades has been accompanied by the introduction of new policies at the local and provincial levels in Canada, notably for the development of sites suitable for small hydroelectric plants and wind farms. Contrary to the major reforms of the electricity sector that characterized the 20th century, these new policies promote or impose the transfer of control over a significant part of new renewable energy production to the private sector. In addition to relying on industry, wind energy development in Quebec has essentially been launched as a regional development policy rather than as a component of an energy policy (Fortin, Devanne, and Le Floch 2010).

¹² *An Act to amend the Mining Act*, S.Q. 2013, c. 32.

¹³ *Ibid.*

¹⁴ With the exception of plants belonging to big industry with production used for industrial purposes, such as Alcan (at the time) in British Columbia and in Quebec. The paper, metal and mining industries were also spared.

The introduction of wind energy in Quebec's energy policy is the result of a complex and convoluted legal reform process. Having initially pursued international objectives for access to the North American electricity market, the government of Quebec had to model its policy on the broad guidelines of the United States, even though none of that market's characteristics were present in Quebec at the time. Because of the "green" reputation of wind energy, the radical transformation of Quebec's electricity policy allowed the government to relinquish, without drawing too much attention, one of the key achievements of the 1962-1963 nationalization, namely the nationalization of private electricity production for household consumption. Through a reform undertaken in 1996, the government of Quebec established the *Régie de l'énergie* to help it along the path to deregulation and the introduction of private energy production. The government took advantage of special circumstances that closed the door to other energy sources (there was strong public opposition to the small rivers program and the construction of the Suroît thermal power plant), and of exceptional events that required the urgent intervention of Hydro-Québec (the 1998 ice storm), to amend the legal framework governing energy and impose wind energy development. The province of Quebec transformed its energy policy into a regional development policy financed by Hydro-Québec customers to force the establishment of the private wind-energy production industry (Prémont 2014b). Faced with growing citizen opposition, the legal framework was amended to allow local communities to become industry partners in the creation of wind farms.

The privatization of energy production under the guise of green policy or regional development was criticized by some people (Bouchard 2007), but this perspective was quickly diluted in academic literature dedicated to the promotion of the social acceptance of projects. The authorization of and support for certain community projects produced the intended results, even if they represent less than 5 per cent of the installed capacity, both in the Gaspé Peninsula and elsewhere in Quebec (Prémont 2016a). Some authors argue that the broad parameters of wind energy development as a revitalization measure for the Gaspésie region have been largely accepted and that the main issue concerns its implementation in the field (Fortin and Fournis 2011).

Ontario also turned towards private renewable energy producers and successfully achieved its 2008 production objectives (Northey 2013). The Auditor General of Ontario (AGO) criticized the high cost that Ontario pays private producers of wind energy, who also benefit from government policy favouring their establishment (Office of the Auditor General of Ontario 2015). In short, the penetration of new renewable energy sources in Canada is accompanied by a strong tendency to reintroduce private electricity production.

5.1.3. Access to Information and Public Participation

The breakdown of public regulations is also evident in the gaps in rules governing access to information and public participation. In theory, only environmental assessment procedures allow citizens to express their opinion on certain projects. However, the number of projects subject to these assessments is drastically limited by installed power (for renewable energy) and impact thresholds, not to mention the many exemptions that allow major projects to avoid environmental assessments altogether. Even indigenous peoples must rely on the *Bureau d'audiences publiques en environnement* (BAPE) in Quebec to be heard (Thériault 2010). Environmental assessments certainly do not allow indigenous communities to bring about a shift in the main uses of their ancestral lands to reflect their own societal choices. They also do not allow the possibility of questioning the government's perspective on territorial and natural resource development.

In Alberta, during the environmental assessment of wind energy projects, only those directly affected by a project have the right to be heard. This is very restrictive: it silences a significant number of citizens because only those living within an 800-metre radius of a wind farm can voice their opinion. Even the Alberta Utilities Commission does not have the jurisdiction to examine broad questions such as the relevance of wind energy development (Vlavianos 2011). Fluker (2015) explains that public participation in Alberta is primarily based on two traditional legal doctrines: legal interest and procedural fairness. These two doctrines are rooted in a traditional conception of common law that remains closed to broader conceptions such as pluralism or deliberative democracy. Indeed, these two classical doctrines focus essentially on the protection of owners or residents directly affected by natural resource exploitation projects, and do not allow the general population to express its conception of public interest on which project authorization should be based.

We underlined previously that the contents of IBAs and other agreements between industry and local communities are often kept secret, thus deterring any inclination to turn such agreements into public policy instruments that could be openly debated and subject to democratic discussion.

More broadly, in the mining sector, even when the law provides for the mandatory consultation of indigenous peoples, as is the case in Northern Ontario or under the new provision of the Quebec *Mining Act*, the process remains uncertain and there is no obligation to produce results (Simons and Collins 2010).

The central question of the nature and conditions of public participation remains, as participation is not accessible in the same way for everyone because of the serious imbalances of power and capacity that characterize society. Several models of public participation prevail, depending on the issues and locations (O'Faircheallaigh 2010). More attention deserves to be paid to the fact that the legitimacy of processes involving public participation is contingent upon a series of factors such as the stage when it occurs, the forms it takes and the resources allocated to it. Taking these issues into account could bring about significant change and, in certain circumstances, redefine the objectives and impact of the projects undertaken, in addition to renewing decision-making processes (O'Faircheallaigh and Gibson 2012, 17).

5.2. Shifts in Multi-level Governance

The distribution of powers for mining and renewable energy presents a rather complicated picture. Moreover, focusing on multi-level governance between the federal government and provinces is no longer sufficient; the literature review invites us to also examine the shifts in jurisdiction between provinces and municipal authorities, without neglecting the essential role of indigenous communities.

The presentation of the regulatory frameworks and ongoing transformations must first be placed in a broader context in which Canada is attempting to secure a place on the international stage, in sectors that are increasingly competitive. The normative intervention of the federal government (and of the provinces) seeks primarily to protect investors. In this regard, Natural Resources Canada's website (Natural Resources Canada 2015) describes Canada as having a positive investment climate and its mining regimes as competitive and attractive on a global scale, because of: 1. Public ownership of resources; 2. Competitive mining taxes; 3. The active willingness of governments to promote this industry.

Other tax measures favourable to industry must be added to these factors, such as a 100 per cent tax deduction for exploration costs, a 30 per cent tax deduction for development costs, the

deferral of losses from the three previous years up to 20 years into the future, and the flow-through shares that allow for the transfer of exploration and development losses to investors.

With regard to its larger responsibilities (notably concerning indigenous peoples), the federal government is selectively very present in attracting foreign investment (no entry barriers; and the option of exporting profits and invested capital, including tax-free equity capital), supporting industry through tax incentives and conducting the geodetic surveys that are essential to industry. However, it is rather absent from its role vis-à-vis indigenous peoples in the negotiation of IBAs. Current efforts to ensure the competitiveness of the investment environment at the national and international levels strongly encourage the provinces and the federal government to develop regulatory frameworks and practices that aim above all to be attractive to investment.

As an illustration, the 2015 Annual Report of the AGO cited the 2014 edition of an annual survey of mining and exploration companies by the Fraser Institute, where Ontario ranked ninth out of Canada's provinces and territories in terms of attractiveness as the basis of its criticism (Office of the Auditor General of Ontario 2015, 442). While such a reproach and its economic rationale (which go beyond the auditing of the province's regulatory obligations) may seem surprising, they nevertheless reveal to what degree, from a political standpoint, provincial regulatory frameworks are expected to prioritize the attractiveness and profitability of the sector above all else. This priority clearly has precedence over other objectives that could potentially involve other models or objectives, such as the promotion of the well-being of the entire population on an intergenerational basis, a point to which we will come to later.

The report of the AGO also underlines shortcomings in the consultation of indigenous communities, site management and closure, cleanup costs, and the low level of royalties collected (Office of the Auditor General of Ontario 2015, 443-44), which might in fact, at least in part, be seen as the counterpart to the choice made to privilege a favourable investment framework through policy incentives.

With regard to energy, some authors have criticized the federal government for not playing its role in promoting a pan-Canadian electricity network supplied by the abundant renewable energy (notably through the National Energy Board), thus giving wealthier provinces such as British Columbia and Quebec the freedom to export electricity to the United States (Froschauer 1999). This author laments the ease with which, since its creation, the National Energy Board (NEB) has granted electricity export permits to BC Hydro and Hydro-Québec without first requiring that national needs be met. In doing so, NEB is promoting not the national, but rather the continental integration of the renewable energy network.¹⁵ The federal government subsequently limits its role to providing financial support for policies adopted by the provinces. As an example, the federal government provided significant support to Newfoundland and Labrador for the construction of a high-voltage transmission line to transport electricity from its new hydroelectric facility in Muskrat Falls to Atlantic Canada (Ressources naturelles Canada. 2014). The federal government also supports provincial policies that foster the implementation of private renewable energy through tax incentives.

Provinces attempt to obtain municipal support for provincial policies, as was the case in Quebec, where the law was amended to allow municipalities to invest in hydroelectric and wind energy projects. Elsewhere, such as in Alberta, provincial legislation forbids municipalities from adopting regulation likely to deter a wind energy project. The resource region is often treated as what its name implies a repository from which you can draw resources and leave little behind. The taxation of natural resources is also revealing. For example, Hydro-Québec pays regular

¹⁵ "Either BC Hydro successfully pulled the wool over the NEB's (National Energy Board's) eyes or the NEB was primarily established to facilitate the continental network integration" (Froschauer 1999, 198).

property taxes for its headquarters and administration buildings in major urban centres, but it does not pay any property tax for the large facilities that generate all of its hydroelectric wealth in resource regions (Prémont 2014a).

In light of the relative absence of the federal government and the provinces when it comes to the environmental impacts of natural resource extraction, Canadian municipalities have been given new powers in this area (Northey 2013). However, intervention is proving more difficult in some provinces such as Alberta, where the centralization of jurisdiction over wind energy development prevents municipalities from intervening to determine their regulatory frameworks. Municipalities can, however, try to intervene on the basis of their jurisdiction over public health and safety, notably in the mining sector (Vlavianos 2011).

Other municipalities such as those in Quebec use their jurisdiction over water supply in an attempt to compensate for lax provincial regulations. The case that pitted Pétrolia against the town of Gaspé¹⁶ illustrates the type of conflicts that can arise between provincial regulations that are oriented towards natural resource extraction and municipal regulations that are more oriented towards the protection of that same resource or competing resources (such as water, which the municipality must protect so it can be distributed to its population). Some analysts have tried to find new ways to allow for greater municipal control over the exploitation of natural resources as a means of better exercising its powers to protect another resource (Rousseau 2014).

Tensions between the different levels begin to emerge when policies clash with one another. The municipal level is more likely to respond to public opposition that emerges, which is why reflection and social acceptability measures to deal with the issue develop at that level.

The right to consultation of indigenous peoples can become lost between the cracks in Canada's multi-level governance. For instance, the British Columbia Court of Appeal found that the obligation to consult indigenous peoples did not apply to municipalities (case of the Neskonlith Indian Band).¹⁷ Consequently, a municipal permit may not be revoked because the federal government failed to consult indigenous peoples. Some authors have criticized this decision, which makes it possible to circumvent the indigenous peoples' right to consultation by using the powers delegated to municipalities. According to these authors, the right to consultation should not be limited to the federal Crown, but should also include the provincial Crown, and thus the powers delegated to municipalities. They also refer to Ontario's new *Mining Act*, which forces municipalities to show that they have consulted indigenous peoples or submitted the project to the Minister of Natural Resources for consultation (Imai and Stacey 2014). Two decisions, *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*¹⁸ and *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*,¹⁹ raise serious concerns about whether the law, as applied in the Canadian mining sector, meets the country's international human rights obligations. Some doubts also remain about Ontario's recent mining sector reforms (Simons and Collins 2010). The AGO's reservations regarding the consultation of indigenous communities illustrate some of the implications of what Szablowski describes as the "selective absence" of states in the mining sector. States tend to limit their role to that of investment facilitator, providing tax incentives and infrastructure, while leaving communities on their own to face industry.

¹⁶ 2014 QCCS 360.

¹⁷ 2012 BCCA 379.

¹⁸ [2007] OJ No 3360 (Ont Sup Ct); [2007] OJ No 3361 (Ont Sup Ct); [2008] OJ No 792 8247 (Ont Sup Ct); 2008 ONCA 534; (2008) 91OR (3d) 1.

¹⁹ [2006] 4 CNLR 152 (Ont Sup Ct); [2007] 3 CNLR 181, 29 CELR (3d) 116; [2007] OJ No 2214, 29 CELR (3d) 191; [2008] OJ No 1014, 2 CNLR 301 (Ont Sup Ct); (2008) 91 OR (3d) 1.

In short, in the current context of competitiveness in the mining sector and continental integration in the energy sector, the noticeable shift in Canada's multi-level governance appears to increase alignment with industry-friendly objectives while stalling the demands and opposition of affected populations. Despite the progress made in the past decades, indigenous communities often have no choice but to turn to the courts, which become the setting for the making of important decisions, in an attempt to compensate for the permeability of Canadian public policy to international competition.

5.3. Devolution of Responsibility to Industry

Despite some advances in the consultation of indigenous peoples and in environmental assessments, the Canadian normative heritage of free access to mineral resources (free mining) confirms that situations of selective absence of the provincial and federal governments have largely been perpetuated to this day. The vacancies left by the state are quickly filled by industry. As for the electricity production sector, the introduction of new production methods (small hydroelectric plants and wind energy) has provided an opportunity for the return of state-imposed private production.

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

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

These processes are accompanied by a transfer of responsibilities to industry, even though such responsibilities could be, and elsewhere are, considered to be public responsibilities, not only in relation to the delivery of services (roads, infrastructure), but also in the formulation and implementation of regulations (rule-making) (Szablowski 2007, 45). According to this author, these processes are part a comprehensive regime of negotiated justice that is currently being established. The emphasis for both parties is on autonomy and freedom of choice, along with the right to enter into an agreement. Negotiated justice is derived from a lack of trust in the state's capacity to monitor relations between the actors. It also allows the state to rid itself of its responsibility to deal with conflict and the demands of society (Szablowski 2010). For Cameron and Levitan (2014), IBAs are instruments that confirm the privatization of the federal

government's obligation to consult indigenous peoples regarding resource development on their lands, by imposing solutions put forward by the market for social arbitration. The state's selective absence leaves the door wide open for industry to provide market solutions to social, economic, political and environmental problems. The state only intervenes to ensure the enforcement of contracts, in line with the conception of the state's reduced role in resource management.

The development of new renewable energy sources throughout Canada is also following the tendency to transfer responsibilities to industry. After nationalizing electricity production in the 20th century, provinces began the new century by reforming regulations to speed up the continental integration of electricity transport networks and impose global industry as the new producer of renewable energy with which state-owned companies such as Hydro-Québec and BC Hydro must deal. In Quebec, industry must also reach IBA-type agreements with local communities. However, the putting of communities in competition with one another has been criticized. The Gaspé Peninsula area achieved a *tour de force* by uniting to resist industry and restore the balance of power, which is otherwise always in favour of industry (Fournis et al. 2013). However, on the whole, we know very little about these agreements and their consequences.

Indigenous communities wishing to break with the colonial history of their relations with the state have reacted rather positively to the state's relative absence. This is why many authors have drawn attention to the link between the prevailing economic model in mining and the self-determination movement of indigenous peoples. The state favours signing IBAs between industry and indigenous peoples because they reduce public expenses. Further study of the functions and effects of IBAs in these two sectors and in indigenous and non-indigenous communities is needed. According to some northern indigenous leaders, these agreements are merely a "quick fix" whose main purpose is to obtain project approval. Their long-term effects are not well known, but in the short term they are able to silence their opponents, legitimize the public authorities' abandonment of their responsibilities, delay the conclusion of comprehensive agreements on land claims and disseminate entrepreneurial forms of citizenship and communities (Cameron and Levitan 2014).

Resource extraction raises the acute issue of the asymmetrical relations of authority and power among actors introduced and reproduced by the normative frameworks that govern and legitimize the access to resources, the appropriation of benefits and the attribution of impacts, while also shaping the spaces of discussion and debate.

The mining industry's capacities are far superior to those of indigenous communities. The industry also enjoys the support of governments in the promotion of investments. The populations affected by projects are often far away, poor and marginalized. The imbalance of power between industry and the communities has two effects. The negotiations are asymmetrical and so are the results. Industry has the means to influence and even impose its solutions (Szablowski 2010). These same imbalances of capacity between communities and industry also make it difficult to monitor and assess impacts, especially in remote peripheral areas (notably for diamonds, Hall 2013).

Even if some agreements provide significant benefits for some local communities, they may be accompanied by the muzzling of these communities, who are prohibited from questioning the project or challenging its effects. IBAs can also have the impact of suspending the negotiation of comprehensive agreements on the territorial rights of indigenous peoples, as the signing of agreements forbids communities from pursuing their interests in a manner that could harm industry (Cameron and Levitan 2014).

The new mining projects revived in the context of the *Plan Nord* are a good illustration of the challenges raised by the asymmetrical relations of power between public and private actors. The *Plan Nord* is essentially a publicly-funded financing plan (involving Hydro-Québec) to allow access to the subarctic regions which are the most richly endowed with natural resources (minerals and hydroelectricity): \$60 billion will be invested over the next 25 years, including \$1.2 billion in the first five years (2011-2016). Three multinational companies (Vale, BHP Billiton and Rio Tinto) currently possess about 40 per cent of the world's iron ore production capacity and nearly 80 per cent of the seaborne export capacity (from less than 50 per cent in 1997), demonstrating the rapid global consolidation of production capacity. Such consolidation opens the door to price controls while also reducing the response capacity of governments which have a tendency to back down and no longer be in a position to compel the on-site processing of ore. Both government and industry are committed to the recruitment of 'local' personnel as soon as projects are launched, an objective which will require training programs. Industry supports these ideas as they allow it to reduce costs. The approach also serves to validate industry's willingness to obtain a 'social licence' for its operations. However, it is through the introduction of more affirmative measures from the provincial government (such as through the creation of a sovereign wealth fund, sharing of revenues with First Nations, regional economic diversification or the development of publicly- or locally-owned companies) that some analysts see an opportunity to face the challenges of the past (Boutet 2015).

6. Conclusions/Observations

The relations between local communities (including indigenous peoples), industry and the various levels of government are changing. In the context of the Canadian regulatory system and the withdrawal of the public authorities from their role, most analyses tend to focus on the existing framework and therefore limit the possible options and strategies because they overlook alternatives that would require stronger public intervention. The assumption that Canadian governments will stay out of negotiations between communities and companies seems to characterize and define the manner in which issues are addressed. For example, discussions on the modes of consultation could explore forms of participation that are better defined and do not rely solely on private agreements, and the range of options used to determine tax benefits could include local development agreements²⁰ that would apply to all agreements, as is currently the case in the mining codes of some countries (Article 130 of the Mining Code, see République de Guinée 2011). There could also be a legal obligation to publish all agreements as exists in the Guinean Mining Code. The Quebec act that came into effect in 2015 is a first step in that direction.²⁰

Contrary to what is happening elsewhere in the world, we must emphasize the limited attention that the scientific literature on the Canadian mining sector devotes to the potential for the social and economic development at the local, regional and national levels. Such transformative processes could come about through the introduction of public policies that would allow the sector to act as a catalyst for structural shifts between sectors (energy, infrastructure, manufacturing, transport) and industrial links, both upstream and downstream, as well as encourage more local transformation instead of merely exporting materials in a nearly raw state (United Nations Economic Commission for Africa (UNECA) and Africa Union 2011). This potential for transformation of the sector is overshadowed by a depoliticized formulation of sustainable development which characterises certain debates on social acceptability and excludes the role of public authorities with the result of focusing attention on direct negotiations between industry and local populations.

Territorial development policies focus on the local level while industrial extraction strategies are decided at an entirely different level: transnationally. The vertical integration of industry tends to reduce regions to sources of raw ore for export to international markets (Boutet 2015). Indeed, minerals extracted, at times by fly-in fly-out staff are usually exported elsewhere in the world for the transformation stage (Mousseau 2012). In addition to the challenges posed by such industrial strategies, the multiplication of international commercial treaties makes state intervention to ensure territorial development increasingly difficult.

Very few studies address this larger context and its challenges or the very real potential for resource development through long-term integrated strategies that seek to promote regional development, through the introduction of strong public policies that are not limited to providing unconditional support to the initiatives of industry.

There is a risk associated with manner in which local or community development is approached at present. The tendency to view such development as a private matter between industry and communities limits the opportunities to conceptualize the public interest, even at the community level. The current negotiated justice approach and debates concerning social acceptability tend to divert attention away from the lack of reflection on economic development policies at the local,

²⁰ An Act respecting transparency measures in the mining, oil and gas industries, CQLR c M-11.5.

regional and national levels. Under these circumstances, Canada is facing a serious risk of regression to the position of a supplier of raw materials (Mousseau 2012); we are already witnessing a regression in major social gains through the loss of public control over electricity production (Prémont 2014b).

As recommended by Szarka (2004), the concept of social acceptability should be re-examined to allow for debates over major public policy alternatives rather than focusing only on the conditions governing their implementation. Some authors recommend potential guidelines for future amendments to the existing mining model (Boutet 2015), such as the acquisition of interests in companies to ensure the sharing of revenue, or their takeover to foster more significant territorial benefits, or yet again a requirement to ensure that at least part of the transformation be conducted locally, all of which would entail a readjustment of the distribution of public and private responsibilities, the reaffirmation of the role of public policies in resource development and better coordination between the federal, provincial and municipal levels of government.

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

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

The current mining and energy resource development models are creating tensions due to the asymmetrical relations and regulatory frameworks on which these models are based. The response to these tensions has primarily been articulated in terms of local economic benefits and increasing concerns over the social acceptability of projects. While these avenues are put forward as "solutions", neither is able to tackle the much more complex underlying issues, which are of a structural, legal and political nature and raise questions about territorial control, and the conditions under which resource development and the determination of competing uses take place.

Our dual disciplinary perspective leads to a series of observations, the most important of which can be summarized as follows:

- a) Mining and energy policies generally do little to protect the rights of communities; even indigenous peoples holding Aboriginal rights over affected lands are most often unable to prevent resource extraction projects.
- b) Multi-level resource governance remains a hierarchical type of governance where the top public authorities (federal and provincial) use (or do not use) their powers in a manner that tends to promote the interests of private industry resource development rather than the interests of local communities or even the overall population.

- c) As a result, it becomes difficult if not impossible for local communities to formulate alternative development strategies and they often have little choice but to become partners or agree to projects, under circumstances in which they can only marginally negotiate terms, or else resign themselves to missing out on any form of development.
- d) The adoption of more holistic and dynamic approaches has led some authors to consider the key question of the roles and responsibilities of public actors that have long been overlooked and even overshadowed by the country's historical heritage and regulatory frameworks that gave precedence to the role and powers conferred to industry.
- e) The renewal of such approaches shows that the issues analyzed are part of political processes that should be taken into account to avoid "depoliticizing" the fundamental questions of access, control and development of natural resources in the two sectors studied.
- f) Consideration of the foundations of the notion of social acceptability or of the social licence to operate reveals that these concepts do not have any formal legal basis in Canada. They are likely therefore to be subject to existing asymmetrical relations of power among stakeholders and thus often serve the most powerful actors, including industry.
- g) The particular regulatory heritage, the types of agreements negotiated in the mining and wind energy sectors, and a certain perspective arising from the literature on social acceptability that fosters direct negotiation between communities and industry, all take for granted or support the withdrawal or selective absence of the public authorities and consequently overlook their potential roles and responsibilities. Such approaches thus close the door to taking into account the potentially central role of public policies which might use natural resources as a transformative catalyst to spur structural shifts, both social and economic, in favour of more equitable, environmentally sustainable, economic and social development in the long term.

7. Knowledge Gaps

- a) There is more research on Canadian mining companies operating abroad than on mining companies operating in Canada. There are serious gaps in the research on the overall and long term impacts of mining in Canada (Simons and Collins 2010).
- b) Additional research is needed on public participation in order to take into account the decision-making processes that occur in specific contexts and determine the forms of participation, particularly in environmental impact assessments (O'Faircheallaigh 2010, 26).
- c) Research is required on IBAs, their content and their processes, both for the mining sector, for which some literature exists, and the renewable energy sector, for which there is almost none.
- d) Comparative work should be conducted on the various methods used to define and distribute community benefits, to evaluate the various regulatory practices, including the introduction of mechanisms applicable to all projects, as in the case of Quebec during the latest call for tenders on wind energy, or the implementation of legislation as illustrated by the 2011(amended in 2013) Mining Code of Guinea, for example.
- e) The dynamics between energy, economy and territory pose significant challenges. Social debates force those concerned to reflect, notably on how the energy sector should be developed. Comparative studies on the transition towards renewable energy throughout Canada would prove very useful.
- f) Additional research on the legal dimensions of natural resource development to ensure greater social acceptance, the issues of access to information and the transparency of negotiation processes would be important.
- g) There is a noticeable lack of scientific work on the Canadian mining sector concerning the longer-term territorial development potential (both social and economic, at the local, regional and national levels) that would result from the introduction of public policies that allow the sector to act as a catalyst to promote structural shifts between sectors (energy, infrastructure, manufacturing, transport) and industrial links, both upstream and downstream, that encourage local transformation. In comparison, see (United Nations Economic Commission for Africa (UNECA) and Africa Union 2011).
- h) There is insufficient interdisciplinary research between the fields of law and political or social sciences. Research of this nature would prove useful to permit a better understanding of the relation between social science observations and legal issues and their shortcomings, and vice versa, as transformations in the regulatory framework are not always given sufficient consideration in the social sciences.

8. Knowledge Mobilization

The knowledge mobilization strategy includes the organization of two conferences and measures to ensure that the report, which will be available in both French and English, is widely distributed.

The first conference was held on 11 May 2016 in Montreal during the 84th Congress of ACFAS (*Association francophone pour le savoir*) and focused on the theme: Combining the Perspectives of Law and International Relations in Studies on Natural Resource Development (*Perspectives croisées en droit et relations internationales dans les études sur l'exploitation des ressources naturelles et extractives*). The panel of which the presentation was part was entitled: "The Contribution of Interdisciplinary Approaches for the Advancement of International Development Studies: Focusing on Natural Resources and Land Issues" (*La contribution des approches interdisciplinaires pour faire avancer les études internationales pour le développement : la question des ressources naturelles et territoires au cœur de l'analyse*). An article based on our presentation was published in *Découvrir. Le Magazine de l'ACFAS* (12 May 2016).

A second interuniversity, interdisciplinary conference involving researchers working in other Canadian natural resource sectors, entitled: The Transformation of Multi-level Regulation and Actor Roles in the Development of Mineral Resources and Renewable and Non-renewable Energy (*Mutations de la réglementation multi-niveaux et du rôle des acteurs dans la mise en valeur des ressources minières et de l'énergie renouvelable et non renouvelable*), will be held in October 2016.

These two events will provide an opportunity to share the results of this knowledge synthesis, and in particular the knowledge gaps listed in Section 7, with representatives of the academic community from a variety of disciplines and a number of universities, including UQAM, Université de Montréal, Université Laval, Université du Québec à Rimouski (UQAR), Université du Québec à Chicoutimi (UQAC) and the École nationale d'administration publique (ENAP) and with actors dealing with such issues in Quebec. The second conference will also provide the opportunity to invite representatives of the public and private sectors as well as non-governmental organizations.

On the subject of decision-making and research environments, the Forum *Imagining Canada's Future* on June 1st provided the opportunity to share our findings and exchange views with other researchers and decision-makers who are specialists on these issues.

Our dissemination strategy includes the publication of French and English versions of the report, which will appear online as *Cahiers du CIRDIS*, on the site of the *Centre interdisciplinaire de recherche en développement international et société* (CIRDIS), and will be widely distributed through social networks and the Centre's mailing lists. The report's content will also be the subject of a scientific article in a journal specialized in this area.

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