

**Aboriginal Participation in Mineral Development: Environmental
Assessment and Impact and Benefit Agreements**

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Abstract

In a mineral development scenario, Aboriginal groups rely heavily on Environmental Assessment (EA) and Impact and Benefit Agreements (IBAs) to address their interests and concerns. While EA and IBAs are separate processes – EA is legislated and informed by the Crown, and IBAs operate in the realm of private contract law – together, the two are ostensibly part of a parallel process that connect the Aboriginal group(s), Government and the mining proponent.

Indisputably, IBAs support a more inclusive development based on consultation, partnership and participation. IBAs and EA have the potential to enhance Aboriginal involvement in mineral development and positively influence the design and planning of the mine. This thesis examines the Tahltan Nation's involvement and participation in the Galore Creek Project in British Columbia, and demonstrates the challenges and opportunities that arose during the EA and IBA process. It uses key informant interviews to gain multiple perspectives – from the proponent, Tahltan, and Government, to understand how the Tahltan utilized the EA and IBA to participate in the mineral development.

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List of Acronyms

BC EA	British Columbia Environmental Assessment
BC EAA	British Columbia Environmental Assessment Act
BC EAO	British Columbia Environmental Assessment Office
CEAA	Canadian Environmental Assessment Agency
EA	Environmental Assessment
EAO	Environmental Assessment Office
FPIC	Free, Prior and Informed Consent
GCMC	Galore Creek Mining Corporation
IBA	Impact and Benefit Agreement
IISD	International Institute for Sustainable Development
INAC	Indian and Northern Affairs Canada
PA	Participation Agreement
SCC	Supreme Court of Canada
SIA	Social Impact Assessment
SRI	Socially Responsible Investing
TCC	Tahltan Central Council
THREAT	Tahltan Heritage Resource and Environmental Assessment Team
TK	Traditional Knowledge
TNDC	Tahltan Nation Development Corporation
TNT	Tahltan Negotiation Team
TOR	Terms of Reference

Acknowledgements

In developing this research I have been mindful of the scope of the task and of the challenges associated with attempting to incorporate a range of far reaching issues and perspectives into a thesis. In addition to identifying some of the key issues and challenges arising from the application of *Impact and Benefit Agreements*, my intent is to question and stimulate a wider inquiry on the wholesale direction of mineral development and what this means for Aboriginal people in Canada. It is my hope that this thesis will provide a constructive discussion to advance more inclusive mineral developments in years ahead.

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1 INTRODUCTION

1.1 Research Overview

Accelerated development of mineral resources in Canada follows not only from more efficient mining technologies, but also from the growing demand and expanding potential markets engendered by globalization. Canada is currently one of the world's principal destinations for mineral development – and as mining and exploration increasingly take place on traditional Aboriginal or Treaty lands, there is a sense of urgency to plan for future growth through partnerships. Notwithstanding, Canada possesses world class mineral deposits and abundant opportunities, but challenges exist. Specifically, social risks have increased the need for companies to build their knowledge and experience to form positive long-term relationships with Aboriginal people.

The Crown's role with respect to mining activities is to provide a stable legal and regulatory framework that will encourage responsible mining activities (McMillan, Binch & Mendelsohn, 2007, 1). The Provincial governments regulate mining in Canada's provinces, and the Federal and Territorial governments and Aboriginal organizations regulate mining in Canada's territories. Each of the Provincial, Territorial and Federal governments has its own mining and environmental laws that regulate mining activities. Consultation with Aboriginal peoples *can* involve two distinct but overlapping forms: 1) the Crown's legal obligations, the 'duty to consult', which is acted out by the statutory compliance in Environmental Assessment (EA) and: 2) *voluntary* business initiatives such as Impact and Benefit Agreements (IBAs).¹ Brief descriptions of consultation, EA and IBAs are provided below, with more detailed discussion presented in Chapter Two.

¹ There are some modern land claim settlements in which proponents must negotiate and complete IBAs with the regional government before proceeding with mineral development (e.g. Nunavut). For the purpose of this thesis, in a BC context, IBAs are voluntary and not required by law.

1.1.1 Consultation and the Duty to Consult

Consultation and the ‘duty to consult’ arise from Section 35 of the *Constitution Act* (1982). The scope and content of the required consultation is dependent upon statutory and regulatory provisions, treaties, contractual arrangements and more specific common law requirements triggered in a particular resource development context (Government of Canada: Aboriginal Consultation and Accommodation, 2008, 5).

The duty to consult requires the Crown to participate in consultation and negotiation and, where indicated, accommodate Aboriginal interests. Any consultation conducted by the Crown must be ‘meaningful’ and must maintain the ‘honour of the Crown’ whilst balancing broader societal interests with those of Aboriginal peoples. Effectively, consultation requirements by the Crown guide the statutory requirements found in EA legislation, as the Crown maintains the fiduciary duty to consult but can also delegate procedural elements to industry.

1.1.2 Environmental Assessment

Environmental Assessment is used for determining, avoiding and mitigating the adverse impacts associated with resource development. EA goals and approaches vary, based on project parameters and jurisdictions, but the primary principles are clear: EA seeks to reduce and minimize adverse biophysical and social impacts associated with proposed development. The *Canadian Environmental Assessment Act* (CEAA, 1992) is the legal basis that sets out responsibilities and procedures for carrying out EA at a Federal level.² In addition to the Federal EA, each Province and Territory has separate legislation with environmental standards and administrative mechanisms to guide the process and coordinate decision making.

The evolving participatory framework of EA seeks to expand decision-making to Aboriginal communities through arrangements that reflect local concerns and needs. The settlement of land claims, for instance, has had a significant influence on the way EA is carried out in settlement areas (Valiela, 2006) and provides various degrees of participation in, or control of, EA processes on the part of Aboriginal peoples or Aboriginal institutions.

² In Nunavut and the Northwest Territories (NWT), Territorial laws prevail over CEAA.

The nature, scope and timing of the environmental review and permitting process for a mining project are dependent on the location and parameters of the project and the infrastructure requirements for the project.

1.1.3 Impact and Benefit Agreements

IBAs have become common practice in Canada when mineral development is located within, or adjacent to, traditional Aboriginal or Treaty lands. IBAs are confidential bilateral agreements, negotiated between mining corporations and Aboriginal communities to address a multitude of socio-economic and biophysical impacts and opportunities that can arise from mining development. Although not compulsory in most cases, they are increasingly becoming part of a standard package of agreements – negotiated between an industrial proponent and a representative Aboriginal organization – which can acknowledge Aboriginal peoples' rights and interests with the land (Fidler & Hitch, 2007). The terms of IBAs vary between projects but generally involve accommodation measures and additional means to address adverse impacts on the Aboriginal community through a framework built on communication and partnership between signatories.

1.2 Statement of Problem and Research Approach

The framework to account for environmental³ impacts from resource development often includes these two distinct, but linked processes. First, the EA is employed under Federal, Provincial or Territorial legislation and guided by the Crown's duty to consult, and if appropriate, accommodate Aboriginal interests based on the degree to which mineral development will infringe upon their rights, whether these are potential, or established under s. 35 of the *Constitution Act* (1982). Second, IBAs are negotiated by the Aboriginal group and proponent, with the parameters discussed dependent on the nature of the project, Aboriginal interests, and the strength of the Aboriginal claim to the land.

A great deal has been written about the Crown's duty to consult, and how Aboriginal peoples engage and participate in EA (Isaac & Knox, 2003, Isaac, Knox & Bird, 2005; EAGLE, 2001). However, more recently and with the increased frequency and emergence

³ The term 'environmental' as used in this thesis denotes socio-economic and biophysical impacts.

of IBAs, researchers have begun to address various topics related to EA, IBAs and consultation. To date, little has been written on the three together, particularly in a non-Treaty context. For this reason, the research focuses on the Galore Creek project in British Columbia (BC), on Traditional Tahltan Territory to examine and describe the Tahltans' involvement in the EA and IBA process. Rather than limiting discussion to those arrangements specifically referred to as IBAs, this research defines IBAs generically to include Participation Agreements (PA) and similar binding agreements such as impact management and benefit agreements that aim to determine the relationship and relative responsibilities and obligations between signatories.⁴ From herein IBAs will be referred to generically, but when referring specifically to Galore Creek a PA will be referenced, to respect the terminology selected by signatories.

This research takes a top-down approach to examine the procedural and substantive components of consultation, EA and IBAs. The approach will exclusively examine each of the two topics in a Canadian context and then examine how they overlap to create blurred boundaries and responsibilities. A critical framework for Aboriginal participation in mineral development is described through qualitative primary and secondary literature analysis, and the use of a contemporary mineral case study. This research utilizes key informant interviews to gain a better understanding of the consultation, EA and IBA processes carried out at Galore Creek.

Despite renewed research interest in advancing the utility of EA and IBAs by addressing their advantages and deficiencies, there are still many uncertainties that are underpinned by the broader context of Canadian regulatory regimes and Aboriginal peoples' capacity to engage in development. Furthermore, there is increased recognition that the notion of environmental and social sustainability be employed in all mineral development. The concept of sustainable development and sustainable mining practices are often understood to be counterintuitive when applied to the development of a non-renewable

⁴ The terminology of IBAs in Canada varies: in many cases they represent the contents of the agreement, for example Human Resources Development Agreements, Cooperation Agreements and so forth. In most cases, however, they can be more accurately understood as a 'contract' as they are revised, discussed and debated between signatories and bona fide under contract law.

natural resource.⁵ While acknowledging this contention, this research advocates that there are ways to approach mineral development so that it can contribute to a sustainable development. The roles of consultation, EA, and IBAs to foster Aboriginal participation are central to this endeavor. With an increased call for development, Aboriginal groups, Government and proponents are looking to one another for direction and support. This research topic provides insight by laying the foundations through a procedural and substantive analysis of the topics to consider the broader and wholesale direction of how Aboriginal participation is occurring in mineral development. The objective of this research is to investigate *how Aboriginal people, specifically the Tahltan Nation in the case of Galore Creek, participate in mineral development through EA and IBAs.*

1.3 Methodology

1.3.1 Approach

This research integrates distinctions, frameworks, and insights delivered from a series of research studies. According to Peshkin (2001), research that uses different lenses for the purpose of expanding efficacy of the researcher creates new focal points and unexpected angles to understand what is being studied. By applying a diverse range of qualitative research methods including literature reviews, case law, legislation, and key informant interviews, this research has been able to engage multiple research subjects and apply various perspectives to question and accommodate the complexity of Aboriginal participation in mining development. In retrospect, personal experience working in remote areas with BC Hydro alongside Aboriginal populations, and contributing to the writing of EAs and performing field work in environmental impact assessment while employed by Rescan Environmental Services Ltd., added impetus to this mixed method approach. This approach is arguably the most practical way of moving towards reconciling contrasting intercultural perspectives on mineral development, and providing a meaningful analysis on the research inquiry.

⁵ See Gibson et al., 2005 for additional information.

The goal of qualitative research is to develop concepts that enhance the understanding of social phenomena in natural settings, with emphasis on the meaning, experience and views of the participants. This proposed methodology does not advocate ‘anything goes’ by encouraging pluralism; rather, it explores hitherto uncharted depths of research through a well formulated research process. Lincoln and Denzin (2005, xv) describe qualitative research as “multi-method in focus, involving an interpretive, naturalistic approach to its subject matter”. This multi-method approach is the most suitable for this research as it allows for the infusion of Aboriginal epistemologies and ontologies into a resource development model.

The research also utilizes data sources (O’Faircheallaigh, 1999, 2006; O’Faircheallaigh & Corbett, 2005) from Australia, where Australian Aborigines have similar experiences with national and transnational mining companies encroaching on traditional lands as part of a broader process of globalization (Connell & Howitt, 1991). Both Aboriginal populations experienced the institutional effects of European settler state policies, which subsequently engendered forms of social and political colonialism (Fletcher, 1999).

1.3.2 Data Sources

The multi-method approach and integration of data sources is grounded in, and builds upon, previous research involving interviews with participants in Canadian EA and IBA cases (Baker & McLelland, 2003; Doelle & Sinclair, 2006; Dreyer & Myers, 2004; Galbraith, 2005; Hitch, 2006; O’Faircheallaigh, 2007; Prno, 2007) and practical EA experience in Canada. Data is derived primarily from secondary literature. Literature reviews, applied research, case law, and case study analyses assist in identifying the EA and IBA components associated with comparable projects and environments. The literature review focuses on documents that described Aboriginal perspectives, recommendations and concerns about the EA process. Consultation data sources stem from case law and secondary literature – largely scholarly journal articles and legal bulletins.

1.3.3 Case Study

Key informant interviews are employed in the Galore Creek case study to facilitate an Aboriginal, industry, and Government perspective into the research. In turn, these multiple perspectives sharpen the understanding of the research objective to form the documentation, analysis and lessons learned. By investigating this phenomenon in a real life context and building on existing theoretical literature propositions, these new data create the opportunity to look more extensively at the topic from various viewpoints.

Aboriginal peoples' perspectives are integral to this research. Particular elements of Aboriginal culture – forms of social organization, values and beliefs – influence environmental perspectives and therefore shape how mining development is viewed from that particular vantage point. This research uses the Galore Creek project as a case study to systematically examine the EA and IBA process. The Galore Creek case study was selected because it offered several unique criteria to build the analysis upon:

- recent project that reflects the contemporary resource development climate;
- is situated in BC where little EA and IBA research has been performed;
- involves a tripartite relationship between the Aboriginal group, Government and proponent;
- situated in the Traditional Territory of the Tahltan Nation, and involves a non-Treaty context;
- involves an IBA and Provincial and Federal EA.

The research situates consultation and EA and then uses the case study to yield new qualitative evidence based on key informant interviews. Key informant interviews are employed to gather information on the case study, which are then triangulated with primary and secondary data. Informants were selected based on their knowledge and unique perspective on the topic and direct involvement in the process. The complications encountered and unplanned outcomes amidst the 'planned' development process at Galore Creek provide practical clues to advance more inclusive sustainable mining developments.

1.3.4 Data Limitations

This research has inherent data limitations and assumptions. As with any social study, this research brings forth biases from personal ontological and epistemological experiences and ethics; therefore this thesis reflects only one way of approaching and exploring the topical relationship of consultation, EAs and IBAs in mineral development.

Furthermore, IBAs are voluntary and confidential, taking place outside of the regulatory process, and are therefore difficult to evaluate in terms of how they were negotiated (who was at the negotiation table) and what leverage each party had to work with. IBAs confidentiality thus presents a fundamental problem in learning from, and analyzing agreement processes and provisions (O’Faircheallaigh, 2008, 36). Furthermore, there have been no IBA litigations to date, which raises the question of whether IBAs are truly effective, or if enforceability clauses are weak and have not been challenged in court. Alternatively, IBAs may be evolving to become recognized as living documents, which require amendments and dispute mechanism provisos to reflect and address the dynamics within an intercultural mineral development.

Another data limitation is highlighted by Hitch (2006). IBAs can appear, from a high level, to be functioning efficiently, but at the ground level there is potential for power differential that affects equitable decision-making and the sharing of benefits. Hitch’s research is particularly important as IBAs may be seen externally as a milestone agreement; however, the agreement may have been developed by a few individuals with leadership and decision making powers. Therefore, IBA provisions *may* reflect a few comprador actors’ interests in the community, and not a majority consensus. In effect, this undemocratic feature trumps the instrument’s ability of enhancing equity or sustainability through the sharing of benefits and creation of opportunities. In short, like any organization, power relations must not be ignored. Importantly, this is *not* a critique of Aboriginal governance, *per se*, but a fundamental characteristic of any decision making unit, which may affect and limit the validity of IBAs’ utility.

Another data limitation in respect to this research approach is the biases of key informants. While biases can misinform research they are also useful to support different

views and perspectives that form from different vantage points, access to information and experiences.

1.4 Summary

As exploration and mining increasingly take place on traditional Aboriginal and Treaty lands, there is, undeniably, a sense of urgency to plan for future growth *in partnership* with Aboriginal communities. As Chief Justice Lamer stated in his judgment in the Supreme Court of Canada (SCC) decision *Delgamuukw*⁶ v. *British Columbia*: “*Let’s face it. We’re all here to stay*” (para. 186). Such a statement indicates we are clearly in a different ethos and need to plan in partnership. Aboriginal peoples in Canada view the recognition of their rights to land and resources as a critical way to end dependency and regain control over their livelihood. The role Aboriginal people play in EA and environmental governance programs are often underpinned by a colonial history, and moving away from this structure can be complex (Government of Canada, Royal Commission on Aboriginal Peoples, 1996, 468).

The following four chapters of the thesis are organized in the following manner: Chapter Two examines the procedural and substantive elements of consultation, EA and IBAs. Chapter Three describes the socio-cultural history, current governance and sustainability framework and resources policies of the Tahltan Nation. Subsequently the Galore Creek EA and PA are examined. Chapter Four describes the results from key informant interviews to examine *how* the Tahltan participated in the EA and PA processes. Chapter Five summarizes the research findings and discusses the scholarly and practical contribution of this research and provides recommendations for future research.

⁶ Hereafter referred to as *Delgamuukw*.

2 CONSULTATION, ENVIRONMENTAL ASSESSMENT AND IMPACT AND BENEFIT AGREEMENTS

2.1 Introduction

This chapter has three primary objectives. The first is to discuss consultation – the duty to consult – and relevant case law that influence mineral development. The second objective is to describe EA and the capacity this instrument has to orchestrate Aboriginal participation in mineral development. The third objective is to introduce the context and content of IBAs through an examination of literature which in many extents includes case study analysis. Taken together, the intersection of the three will be examined to investigate how Aboriginal peoples are currently involved and participating in mineral development.

2.2 Consultation

Consultation is an integral component of mineral development. The scope and content of consultation in Canada is contingent on statutory⁷ and regulatory provisions, treaties, contractual arrangements and more specific common law requirements triggered in a particular resource development context (Government of Canada: Aboriginal Consultation and Accommodation, 2008, 5). Consultation and the duty to consult doctrine arises as part of the Crown's justification legislation objective supported by s. 35 of the *Constitution Act* 1982 where Aboriginal and Treaty rights are protected. This area of Canadian Aboriginal law is rapidly developing and has a profound effect on how mining companies plan, develop, and operate projects. The nature and scope of consultation will vary given the circumstances, but at a minimum consultation should be meaningful in order to minimize downstream conflicts (Hipwell, Mamen, Weitzner & Whiteman, 2002, 9). There is now a long string of SCC decisions that recognizes Aboriginal rights and reinforces the requisite for consultation.

⁷ This can include the strength of claim to title, definition of title claimed and strength of Treaty rights.

2.2.1 The Duty to Consult: Crown Obligations

The Government of Canada's duty to consult with Aboriginal people and accommodate their interests is grounded in the honour of the Crown. This duty requires the Crown to participate in consultation and where indicated, accommodate or compensate Aboriginal rights or title. The content of the duty may vary, but its fulfillment requires that the Crown act with reference to the Aboriginal peoples' best interest in exercising discretionary control over the specific Aboriginal right at stake. Any consultation conducted by the Crown must be 'meaningful' and must maintain the 'honour of the Crown' as determined in *Haida v. British Columbia* [2004].⁸ In *Delgamuukw* (para. 168), Chief Justice Lamer held that "[t]here is always a duty of consultation . . . in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue".

The Canadian courts have made it clear that the Crown maintains the fiduciary duty to consult, yet in recent practice, industry has taken consultation further to avoid conflicts with Aboriginal communities over Aboriginal rights. Therefore, it is important for "industry to ensure that the Provinces and Canada observe their obligations, since failures of a Province or Canada to fulfill those obligations may lead to a delay or prevention" of resource developments (Willms & O'Callaghan, 2004, 7).

The proponent's responsibility to consult with Aboriginal people is increasingly complex and cannot be understood in isolation from the Crown's duty to consult, although they are separate processes. The SCC has held that the duty to consult and accommodate is founded upon the honour of the Crown, which requires the Crown to participate in the process of negotiation with the goal of reconciliation between the Crown and Aboriginal peoples with respect to the development at stake. In *Haida* (para. 35), "[t]he duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". It is important to note that industry does not have the fiduciary obligation to consult with Aboriginal communities; however, the "Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development" (*Haida*, para. 53).

⁸ Hereafter referred to as *Haida*.

Industry, however, having the requisite information and resources, is often better equipped to support Aboriginal communities to understand the scope of the project and impacts which may infringe on their Aboriginal or Treaty rights. Furthermore, industry wants to gain greater certainty over the process and its investment, and therefore sees the value of early consultation, before requisite permits or other authorizations from the Crown.

The process of consultation and accommodation varies with circumstances. Key court decisions that have shaped mineral development over the last couple of decades include: *Delgamuukw*, *Haida*, and *Taku River Tlingit v. British Columbia*, Project Assessment Director,⁹ [2004]. This subsequent section's discussion follows in two parts: first, the main findings in the SCC, focusing mainly on the *Haida* and *Taku* – judgments that are supported by the *Delgamuukw* decision – and second, *how* these decisions impact industrial actors and Aboriginal peoples contemplating mineral development on Aboriginal lands.

2.2.2 Case Law Decisions on Consultation

Discussions of the duty to consult and accommodate is at the crux of two SCC decisions with respect to First Nations who have not negotiated treaties: *Haida* and *Taku*. Both cases confirmed that the fiduciary duty to consult cannot extend to third parties and that a positive duty exists with the Crown. Previously, this duty only applied to land claims that were *proven*; however, now the duty extends to Aboriginal groups who have claimed, but not established Aboriginal title. Justice McLachlin stated in *Haida* that the Crown's duty to accommodate arises on a 'case-by-case' basis. In *Haida*, the Court also stated that the Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown which is derived from the Crown's assertion of sovereignty in the face of prior Aboriginal occupancy (Government of Canada, Consultation and Accommodation, 2008: 5). In *Haida* and *Taku*, the courts found that the duty to consult arises when the Crown has knowledge, "real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). Moreover, in these cases the Crown held that in all stages good faith on both sides is required, and Aboriginal groups do not have veto power to stop a project. The landmark

⁹ Hereafter referred to as *Taku*.

1997 SCC decision of *Delgamuukw* established the concept of Aboriginal ‘consent’ of lands subject to Aboriginal title. The Court in *Haida* stated Aboriginal consent “is appropriate only in cases of established rights, and then by no means in every case, rather what is required is a process of balancing interests, of give and take” (para. 48). The SCC in *Haida* stated the consultation process “does not give Aboriginal groups a veto over what can be done with land pending final proof of the claims” (para. 48). The courts have repeatedly recognized that there is a corresponding obligation of Aboriginal groups to identify their rights and participate in the consultation process to reach a mutually satisfactory solution.

In *Taku* the court clarified that the Crown has the legal duty to consult with Aboriginal groups who have asserted, but not proven Aboriginal rights and title. The effect of this decision means that consultation must be in place before infringement. Taken together, with *Haida* and *Taku*, it becomes apparent that the Crown, both Federal and Provincial, has the legal duty to consult, accommodate or compensate First Nations, Métis and Inuit¹⁰ peoples of Canada when the Crown has *real or constructive knowledge*, of an established or potential Aboriginal Treaty right and contemplates conduct that might adversely affect it. As such, the scope and content of the duty will be proportionate to a preliminary assessment of the strength of the claimed right and the seriousness of the adverse effect on that right. Consultation obligations are in relation to effects of resource development on asserted or proven rights.

Consequently, in keeping with these principles and guidelines, appropriate consultation or accommodation measures must take into consideration the nature of the Aboriginal right at issue, and the strength of the assertion as measured against the degree of impact anticipated by the project. The following are key principles that govern the current nature of consultation, as determined in recent case law decisions (*Haida* and *Taku*):

- The trigger of the duty has been liberally construed as it encompasses a wide range of decisions and actions such as passing regulations and authorizing development;
- the Crown maintains that the consultation process must be tailored to the particularities of the Aboriginal people and aim to promote inter-cultural reconciliation;

¹⁰ The Canadian Constitution recognizes three groups of Aboriginal people – Indians, Métis and Inuit. The term ‘First Nation’ replaced ‘Indian’ and for the purpose of this thesis the term ‘Aboriginal’ will be used to describe the Crown’s relationship and fiduciary with the three groups, but when discussing BC, specific ‘First Nation’ terminology will be applied.

- s. 35(1) of the *Constitution Act* recognizes and affirms Aboriginal Treaty rights, stating that the following tenets must be recognized:
 - Aboriginal rights shall be construed in a purposive way, with liberal interpretation; and
 - the Crown can interfere with these rights but only with justification.

The principles within these recent decisions highlight an arena of change in Aboriginal law and a new relationship being forged, incrementally, with the Crown. Building certainty by addressing contentions may in fact be achieved most effectively by moving away from an adversarial approach that is both costly and timely – and sometimes with no end result.

2.2.3 Implications for Industry

The implications of third parties' plans on Aboriginal lands and resources are important. The duty to consult rests with government; however, developers are affected, as government regulatory decisions can affect the exercise of Aboriginal and Treaty rights. Again, the SCC has confirmed that the Crown retains sole responsibility for the consequences of its interactions with third parties that affect Aboriginal rights. In practice, however, mining companies play a crucial role at both the consultation and accommodation stages regardless of what is prescribed or delegated through the Crown.

The Crown is faced with the task of assembling multiple structures for consultation which is in essence procedural in nature but considerably substantive in terms of duty. Here, consultation needs to be organized by the Crown in such a manner that minimizes the bureaucratic overlap, while increases the participation of the Aboriginal community directly affected by the development. Inherently, all these tenets discussed hitherto create no easy solution or framework for industry to approach a mineral development with certainty or stability. Industry may also face insurmountable challenges related to community factions, internal divisions, and unresolved historical grievances – grievances that may not even be directly related to the project. The preceding section illustrates that there is uncertainty when it comes to determining the scope of consultation in relation to the asserted title or right and seriousness of the mining projects' impact on the Aboriginal community.

In 2008, the Federal Government released Interim Guidelines to recognize and provide direction on the challenges encountered between the Crown, Aboriginal communities and industrial actors with respect to consultation and accommodation. This document (Government of Canada, Consultation and Accommodation, 2008) highlighted that further work needs to be performed in scope of duty to consult, defining ‘who is the Crown’, the capacity of government and communities to consult, the relationship to statutory and Treaty consultation obligations, and the monitoring and improving of consultation and accommodation practices across government.

2.2.4 International Driving Forces: Law and Policy

International law and policy standards on consultation and Indigenous rights complement the discussion above on the current arena of change with respect to Aboriginal engagement in resource development. In policy, Free, Prior, and Informed Consent (FPIC) is a new standard proposed (but not generally accepted) for community consultation that is defined as “the right of communities to be informed about exploration, development, and closure activities on a full and timely basis, and to approve operations prior to their commencement” (Sustainability Perspectives, 2008, 2). International declarations such as the International Labour Organization’s Indigenous and Tribal Peoples Convention 169, and the United Nations and Inter-American Declaration on the Rights of Indigenous Peoples,¹¹ provide impetus towards evolving consultation standards. United Nations Agenda 21 (1992), Division for Sustainable Development, promotes environmental and development partnerships using policy to address Aboriginal rights, environmental degradation, and poverty reduction. These measures, which aim to genuinely increase Aboriginal participation in environmental programs, have been argued by some to be a way to secure the basis of Aboriginal livelihood.

Socially responsible investing (SRI) began to acknowledge Aboriginal rights in the 1980s, coinciding with the multilateral development banks' initial policies to manage the impacts of their loans (Richardson, 2007, 9). Financial sponsors (e.g. World Bank, IFC,

¹¹ The International community has adopted the United Nations Declaration on the Rights of Indigenous Peoples, but Canada remains uncommitted as the declaration is, debatably, inconsistent and conflicting with the Canadian Charter of Rights and Freedoms.

Multilateral Investment Guaranteed Agency, European Bank Reconstruction Development, among others) of mining projects have recognized the harm development projects may have on Indigenous livelihood, and increasingly aim to respect Indigenous rights through SRI (Richardson, 2007, 2). These policies and evolving legal frameworks that favor engagement, consent, and participation of Indigenous groups, illustrate a new climate for mineral development.

In sum, the duty to consult arises from the Crown's obligation to protect Aboriginal rights and infringe on them as little as possible while reaching legislative objectives. In principle, therefore, the need for Aboriginal participation in resource development is widely recognized in international standards, and driven in Canada by court case decisions in consultation. This section stated that it is the responsibility of the Crown and not third parties to consult, but in practice it is common for the Crown to discharge some aspects. To bring more clarity to the consultation process, proponents have become more familiar with creating a precautionary and inclusive approach which includes employing proactive tools like IBAs. Before proceeding to discuss IBAs, EA is discussed to exemplify how the Crown's fiduciary duty and recent case law decisions inform the direction of the EA.

2.3 Environmental Assessment

2.3.1 Historical Overview

Environmental Assessment first emerged in Canada as a non-legislated process within the Federal government environment policy framework in the 1970s, with the result that EA was sporadic and unpredictable (Boyd, 2003, 162). Subsequently, in June 1992, Bill C-13 of the *Canadian Environmental Assessment Act* (CEAA) received royal assent and on January 19, 1995 came into force. After extensive cross-Canada public consultations, the Minister of Environment introduced amendments to CEAA in March 2001 to strengthen the process building on areas like public participation and efforts towards more predictable and timely assessments.

The purpose of the CEAA is to ensure that environmental and social factors are integrated into planning and decision making, anticipate and prevent degradation of environmental quality, encourage actions to promote sustainable development, avoid

duplication, and provide opportunities for public participation (CEAA, S.C. s. 37, 1997).

The principle behind participation in EA is to ensure that there are appropriate opportunities to involve and inform the interested and affected groups and to ensure their inputs and concerns are explicitly addressed in the documentation.

The application for a mine generally starts at the provincial or territorial level. Each Province has different administrative mechanisms to guide the process: standards are maintained through the permitting and inspections of the site by provincial officials. In BC, the *British Columbia Environmental Assessment Act* (2002) is administered by the Environmental Assessment Office (EAO). A Federal review is triggered¹² by factors related to the location of the project and the type and scale of the potential impacts.

In this section the Federal EA process is described followed more specifically by the BC EA process. The processes and provisions of EA, both federally and provincially, take shape in an interactive manner to continuously evaluate and refine impact predictions through public and Aboriginal involvement. In 2004, Canada and the Province of BC signed the *Canada-BC Environmental Assessment Cooperation* which sets out a cooperative approach for conducting environmental assessments of projects that are subject to requirements of the CEAA and BC EAA (BC EAO, 2004). At the conclusion, Canada and BC make separate decisions but information is procured and shared throughout the process in a cooperative manner.

Under CEAA, projects receive a level of EA tailored to the potential impacts. There are four EA review options under CEAA: screening, comprehensive study, mediation, and panel review. Six generic stages operate in the Federal EA which include: determining if CEAA applies, determining the type of CEAA assessment, conducting the EA scoping, conducting the EA, generating an EA report, and finally, making an EA decision. Often there is a seventh step which is follow-up. Aboriginal participation throughout EA stages is interactive and on-going: for instance s. 16 (1) of CEAA gives the regulatory authority the discretion to consider traditional knowledge (TK) in an EA; CEAA considers social impacts

¹² The federal EA process is triggered when a federal authority has a specific decision-making responsibility in relation to the project. This can include when the federal authority proposes a project, provides financial assistance or provides a license, permit or approval: namely when the project has regulatory triggers under the *Fisheries Act*, *Navigable Waters Protection Act*, the *Explosives Act* and/or the *Canadian Environmental Protection Act*.

(s. 2) as part of the definition for ‘environmental effects’. Moreover, sustainable development is referenced in CEAA’s preamble and amendments to the *Act* refer to the ‘precautionary principle’, ‘timely and meaningful participation’ and ‘building consensus and resolving disputes’ (Lawrence, 2004): these foregoing clauses illustrate how CEAA is still undergoing reform and will likely continue to do so.

2.3.2 Provincial EA – Framework and Process

The British Columbia EA process is conducted in two stages: pre-application and application. In most circumstances, a Project Description is the first formal document provided to the EAO by a proponent. The Project Description is used by the EAO to determine whether the project: (1) falls within a category of projects that is ‘reviewable’, under the Reviewable Projects Regulation; and (2) meets the EA review thresholds for that category. If the answers to (1) and (2) are yes, then the project qualifies as ‘reviewable’ under the *Environmental Assessment Act*. Where a project qualifies as ‘reviewable’, the EAO must decide pursuant to s. 10 of the Act, whether an environmental assessment is warranted (i.e. the project “...may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project”).

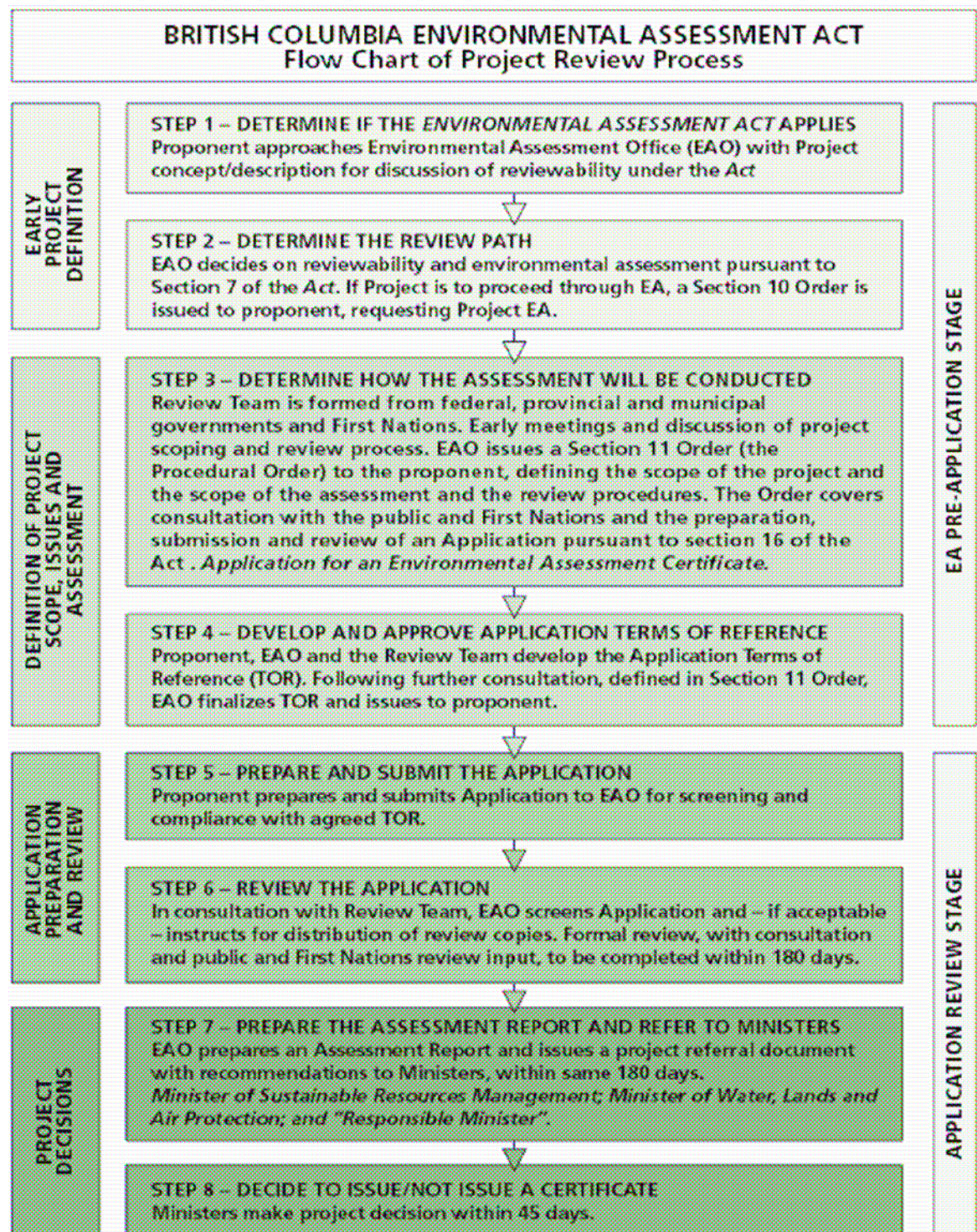
If an EA is warranted, the EAO develops a s. 10 order that sets forth the terms the proponent must abide by to achieve an EA certificate, without which they cannot construct and operate. The EAO posts the project description online and sends notification letters to *all* First Nations within or adjacent to the project area. A s. 11, procedural order, is subsequently developed to outline the scope of the proposed assessment with explicit protocols on First Nation consultation. Like the Federal EA, the BC EA provides a framework to engage First Nations through opportunities that include working groups (Wildlife, Fisheries, Socio-economic, mine closure etc), technical studies, and information sharing protocols. Figure 2.1 below illustrates the nature of this process.

As stated in Section 2.2.1, and determined in case law, the onus of proof of title is on the Aboriginal community and it is up to the community to bring forth the evidence to support their claim. Evidence to substantiate the case can be based on a variety of things, including oral history. The Aboriginal community can refuse to participate, but cannot turn

around and declare an unjustified infringement occurred. There is a reciprocal obligation for both parties to act in good faith: “they cannot frustrate the consultation process by refusing to meet or participate or by imposing unreasonable conditions...” (*Halfway River First Nations v. British Columbia Minister of Forests* [1999] (para. 161)).

The ‘strength of claim’ is the crux of much decision making on behalf of the Crown. A strength of claim analysis is used to determine First Nations title, rights, interests and the activities undertaken in the proposed project area. If per se, the First Nations do not pursue Aboriginal rights and interests near the proposed project area, then they would have a ‘low strength of claim’. Depending on the strength of claim and the circumstances around the First Nations and proposed project, the EAO requires the proponent to gather as much information about the First Nations community in question that they are able to achieve, upon which the EAO uses the baseline information in its own discussions about the First Nation. In effect, the government is responsible to collect information to determine: what activities First Nations conduct in the project area (hunting, fishing, plant harvesting, etc.), where they conduct them, for how long First Nations have been conducting them, where they have lived in the past, and so on. In practice, this ‘requirement’ is often delegated and as an ‘expectation’ for industry to fulfill. Once the strength of the claim has been established, the EAO shares the draft report with the First Nations to ascertain their views on the report. In some instances, the First Nations concur, in other cases, like Galore Creek, there is disagreement, and dissatisfaction is expressed to the Province in writing to contest the claim.

Figure 2.1 British Columbia EA Process



Permission to use this diagram was granted by the owner and source: First Nations Environmental Assessment Technical Working Group

During the pre-application stage, the proponent develops a Terms of Reference (ToR) detailing the baseline studies that will be conducted to describe the existing biophysical and social environmental setting, listing the predicted impacts, and proposing measures that will be employed to avoid, minimize or mitigate those impacts. In developing the ToR, the proponent must consult with Aboriginal groups, government agencies and the public. A comment period follows in response to the draft ToR and the approved ToR is then formalized. Once baseline studies and the subsequent impact assessment have been conducted, the proponent prepares an EA application and submits it to the EAO for review. Once submitted, the application review stage commences.

The application review stage focuses on the adequacy of the information provided and the significance of potential impacts. First Nations, government agencies and the public are asked to comment on the application and the proponent is given the opportunity to address the issues raised. Information on any agreements, like IBAs, reached between the Aboriginal community and proponent is noted in the EA application. A highly edited version of the agreement is sometimes shared with the regulator while in other cases nothing is shared and only the agreement-in-principle is referred to in the EA. Following the review period, the assessment report is referred to two ministers who determine if the project will be issued an EA certificate.

2.3.3 Aboriginal Participation in EA

The evolving framework of EA seeks to expand decision making powers to Aboriginal communities through arrangements that reflect local concerns and needs. The settlement of land claims, for instance, has had a significant influence on the way EA is carried out in settlement areas (Valiela, 2006, 1) and provides various degrees of participation in, or control of, EA processes on the part of Aboriginal peoples or Aboriginal institutions. Where EA processes resulting from land claims agreements allow, or provide for overlap or duplications, EA authorities have developed approaches to reduce the resulting regulatory burden, with varying degrees of success.

Historically, resource extraction interests from the southern metropole dictated and overrode local northern interests. Over the last several decades, Canada has experienced a transition from a paternalistic regime of governance to that of Aboriginal self government,

predicated on shared management between Aboriginal governments and those of Canada (Hitch, 2006, 4). The Mackenzie Valley Pipeline Inquiry (1974) commissioned by the Federal Government and chaired by Justice Thomas Berger, in the Northwest Territories, was a milestone assessment because it was undertaken before irrevocable decisions were made. Public consultation was extensive and meaningful, and the TK of Aboriginal people was given due respect, with the scope of the inquiry broad-ranging (Boyd, 2003, 158). The findings touched on subjects such as the social economic and cultural impacts which at the time were unprecedented, and started the growth of greater consideration in the realm of social impact assessment (SIA) with respect to the need to protect Aboriginal rights in light of industrial developments.

Since the late 1970s, when Justice Berger recommended a ten year moratorium on resource development to promote the settlement of land claims, a growing body of jurisprudence has transformed Aboriginal peoples' relationship with the resource economy. The emergence of values – cultural survival, Aboriginal rights, and the mandate of development banks' raised serious concerns over large scale resource development projects being undertaken (Joyce & McFarland, 2001, 4). These issues, related to cultural survival and the protection of Aboriginal rights, alongside other societal concerns such as the introduction of sustainable development concepts have strengthened the credibility of Aboriginal groups to challenge the dominant economic focus of mineral and resource development. New approaches and procedures in land and resources management can be correlated to the settlement of comprehensive land claims that entrenched public participation and openness into EA criteria. The *Inuvialuit* (1984), *Gwich'in* (1992), and *Sahtu* (1993) specific and comprehensive land claims settlements in Northern Canada addressed unfulfilled historical Treaty obligations and established new treaties regarding Aboriginal rights and practices to land and resources. These claims provided monetary settlements, guaranteed wildlife harvesting rights, and specific Aboriginal participation in decision making bodies regarding land use planning, environmental impact assessment and review (Indian and Northern Affairs Canada, 2006). Legal jurisprudence over the last three decades has transformed the resource sector considerably. IBAs and the enactment of territorial legislation (such as the Nunavut Comprehensive Land Claims Agreement and mandatory

Inuit Impact Benefit Agreements) aim to advance equity and Aboriginal representation within Aboriginal governance structures.

2.3.4 EA Challenges

The role Aboriginal people play in EA and environmental governance programs are often underpinned by the Crown and its ability to allocate land and resources to third parties and regulate their behavior – moving away from this structure can be complex. This history has been countered by oppositions, change to policy as well as Aboriginal peoples taking initiatives to transform their situations. However, layers of institutional arrangements set out by the British Canada, the Dominion, and Canada, from the Royal Proclamation (1763) to the present, have greatly influenced Aboriginal relations with contemporary Canada. Despite the principles of EA being well defined, challenges remain. Since EA is intended to be both “liberal and homogenous”, there are often cases in which EA cannot efficiently and equitably manage the diverse impacts brought about by development (Paci, Tobin & Robb, 2002, 115).

Aboriginal people maintain a close relationship with the land and resources (Berkes, 1999; Feit, 2004; LaDuke 1999, 2005; McGregor 2004). Indeed, the Royal Commission on Aboriginal Peoples (Government of Canada, 1996, 425) states that land is absolutely fundamental to Aboriginal identity and is reflected in the language, culture and spiritual values of all Aboriginal people. Consequently Aboriginal concern about environmental integrity remains strong as they tend to be influenced more directly from the impacts of effects such as pollution, contamination, social break down and economic hardship (Larcombe¹³, 2000).

In spite of Aboriginal rights being protected by the *Constitution Act* 1982, EA requiring consultation with Aboriginal peoples, CEAA promoting long-term sustainability and an apparent recognition that Aboriginal culture is inherently tied to the land; spiritually, socially, economically and politically, Aboriginal peoples, according to Larcombe (2000) still are “offered or afforded only a minor role in the EA process”. Aside from Aboriginal people having the right to a more inclusive process than twenty to thirty years ago, in a larger

¹³ Larcombe was supported by the CEAA to evaluate significant environmental effects from an Aboriginal perspective.

civic arena, Aboriginal groups remain confined to the boundaries of nation-states whose government policies have a considerable influence upon internal decision making processes.

Larcombe (2000) expressed that for the most part the Federal EA process does not respect traditional laws or sufficiently recognize Aboriginal peoples' roles and responsibilities related to environmental protection. This area of ambiguity that Larcombe addresses relates to what the Aboriginal right is, what the affairs of the community are, and what, in this respect becomes the overarching role of the Crown. This impasse is exacerbated by EA parameters that legally require Aboriginal consultation in the process (i.e. ostensibly positive and democratic), but often from the Aboriginal perspective they are deemed insufficient standards. From a policy or top down perspective there is a solid and regulated framework that offers a legitimate 'representative' structure for engaging Aboriginal people. In practice and at the 'ground level', the validity of the EA framework is controversial, as the degree of *required* consultation is subject to interpretation by the Crown, based on its understanding of how a potential or established Aboriginal right, title and interests, may be infringed by the project. The strength of claim model also triggers debate, with respect to the Crown developing and determining behind closed doors, the Aboriginal groups' strength of Aboriginal rights and title and degree of potential infringement. The onus has been placed on Aboriginal people to bring forth evidence to support their claims which are subject to negotiation. Despite recent decisions to recognize rights and title, there is still disparity on the premise of 'interpretation' regarding EA participation and sustainability – where the Crown is appointed to determine at what degree Aboriginal communities may be adversely impacted. On one hand, interpretation, assumption, and mistrust are prevalent themes linked to Aboriginal groups' relationship with the government and proponent in the EA process. On the other hand, there has been a significant break from the past, with more flexible and dynamic EA parameters for inclusion and collaboration.

The growth of the 'public participation' practice is a significant occurrence in mining and natural resources development in the late 20th century. This phenomenon - variously called 'public participation', 'stakeholder engagement', 'Indigenous peoples' rights', 'local community concerns', and 'access to information' – is central to a more sustainable development of minerals and other resources in the 21st century (Pring, 2001, 3). By

encouraging collaboration and giving greater opportunity to interested parties to provide input, a more sustainable mine¹⁴ can operate.

There is no shortage of literature that points to the flaws of EA. Often referred to as critical EA literature, authors, including Armour (1991), Boyd (2003), Mulvihill and Baker (2001), O’Faircheallaigh (1999), and Galbraith (2005), have identified EA deficiencies that include weak and narrow scoping, inadequate consultation and participation for stakeholders, the public and Aboriginal communities, and weak monitoring provisions (auditing, ex-post evaluation, post decision analysis, and post decision management). While EA faces a number of challenges, there are still significant gains and accomplishments the process continues to make. For example, the Voisey’s Bay project in Labrador on the Traditional Territory of the Inuit and Innu became the first EA in Canada to adopt sustainability-based criteria (Gibson et al. 2005). Sustainability-centered assessment exists in Canadian law as stated in the Federal *Act’s* preamble, but Voisey’s Bay was the first to actually employ it. This shift to EA centered sustainability thinking placed more value on incorporating systemic complexity and addressing uncertainty in the areas of social, economic and biophysical components. This example adds greater traction to the notion that sustainability has a place in EA decision making and furthermore that Aboriginal participation can contribute input to create a more sustainable mine.

A review of diverse experiences with EA throughout Canada indicates that there are significant gains for Aboriginal peoples where there is genuine power sharing (Craig, 2002). As the practice and principles of EA evolve to accommodate Aboriginal concerns, Stevenson (1996, 290) stresses that it is “incumbent on government and industry to abandon old concepts and explore new ways to involve Aboriginal people and incorporate their knowledge into EAs”. On similar terms, unilateral governance should be abandoned, with the focus switched to meaningful power sharing relationships with Aboriginal communities.

In summary, this section has provided an analysis of EA, through which government regulations attempt to foster greater Aboriginal participation. It has also served to provide a general introduction to the contemporary state of EA in Canada giving a brief evolutionary

¹⁴ A sustainable mine in this sense, recognizes the contested and ambiguous nature of extracting a non-renewable resource but realizes that there are opportunities to lessen adverse impacts by merging environmental and social concerns with economic decision making.

perspective. This section has also exemplified that the relationship between the proponent, EAO (Crown) and First Nations are intimately linked and the EA process is carried out in an interactive and reciprocal manner. Taking consultation and EA together, the next section discusses how industry and Aboriginal groups are forging contractual relationships without the Crown, to build on legal requirements and address areas of perceived deficiency or uncertainty given the situation. The need to remedy deficiencies perceived in the EA or provide more security of land tenure (certainty) through consent has led many communities and mining proponents towards IBAs.

2.4 Impact and Benefit Agreements

2.4.1 Background and Framework

IBAs have become common practice in Canada¹⁵ when a mineral development is located within, or adjacent to traditional Aboriginal or Treaty lands. IBAs are negotiated between mining corporations and Aboriginal communities to address the multitudinous socio-economic and biophysical impacts and build on the opportunities that can arise from mining development. There is no single legal or policy framework that applies to the negotiation of IBAs; unless however, IBAs are required by virtue of statute or modern land claim agreement as in Nunavut. As such, in some modern land claim settlements, proponents must negotiate and complete IBAs with the regional government before proceeding with mineral development. If required by statute or Treaty, the legislation will typically outline the types of benefits required. In Nunavut for instance, IBAs are a mandatory aspect of the Nunavut Land Claims Agreement and proponents wishing to develop natural resources on Inuit-owned lands are required to complete an IBA with the Regional Inuit Organization (Hitch, 2006). Consequently it is important to realize the case specific nature of IBAs, which are dependent upon the rights and interests at issue, community priorities, the severity of the impact, and the project parameters.

Although IBAs are generally not compulsory for third parties entitlements, they are increasingly becoming part of a standard package of agreements, negotiated between an

¹⁵ IBAs are also commonplace in Australia: see the work of O’Faircheallaigh, 2006 for further information.

industrial proponent and a representative Aboriginal organization, which can acknowledge the rights and interests of Aboriginal peoples. IBAs commonly include preferential employment and business contracts, and can act as an affirmative action plan to initiate a partnership development. Not surprisingly, the reasons why signatories engage in IBAs vary widely according to objectives, circumstances and development opportunities. The preponderance of IBAs today signals that consultation, meaningful engagement and in many cases compensation, with Aboriginal peoples is a normal course of business.

2.4.2 Literary Analysis of IBAs

A decade ago, nearly all literature written on IBAs noted the lack of research carried out in this subject area. Now, and particularly over the last few years, there is an abundance of publication and research on IBAs from multiple disciplinary vantage points, all of which seek to fill the knowledge gaps and question the instrument's utility in Canada and Australia. Researchers have examined IBAs across a range of disciplines, including geography (Galbraith 2005; Prno 2007), law (Gogal, Riegert & Jamieson, 2005; Keeping, 1999; Sosa & Keenan, 2001), and political science (Hitch, 2006; O'Faircheallaigh, 2006; O'Faircheallaigh & Corbett, 2005; Qureshy, 2006). Nevertheless, even with the increased prevalence of research and discussion on IBAs, many questions remain. The use of IBAs is now well-chronicled; however, its emergence and refinement over the years is tied distinctly to legal and political quagmires that have no easy or definitive solutions. Commentary on the theory of IBAs is therefore a mix of positive and negative assessment with IBA optimists and pessimists adding their critique and analysis to the scholarly body of growing knowledge.

The mainstream narrative on IBAs points to corporate achievement, and progress away from historical regimes of development that was consistently insensitive to the interest of Aboriginal communities. In a country that continues to build prosperity through the development of the lands and resources frequently occupied by Aboriginal people, it is becoming clearer that recognition and reconciliation of Aboriginal interests will be the key for safeguarding project certainty. While the shift here is *away* from government dependency, it could be assumed that for Aboriginal peoples to become self-governing, autonomous, and self-sufficient, the Crown needs to recognize such aspirations (Fidler & Hitch, 2007, 53). Indeed, land claim settlements, the transfer of programs from Canada to

local control, and the redistribution of power from federal-to-Aboriginal governance (Slowey, 2008, xv), are the most tangible in-roads to achieve self-sufficiency. Aboriginal groups are advancing their interests vis-à-vis mining companies to compensate for unsettled Crown-related matters.

The emergence of IBAs has been seen to address: corporate social responsibility, EA deficiencies, Aboriginal determination within the Canadian State, and Crown deficiencies – yet perhaps this is a more complexly interwoven combination of all. Certainly, IBAs parallel the emergence of more social and environmentally responsible industrial operations, but as the work of Qureshy (2006, 86) points out, “the impetus for mineral exploration companies to seek Aboriginal approval has come from an absence of government intervention—a political vacuum—rather than the imposition of laws and policies”. Wolfe (2001) and Sosa and Keenan (2001) analyzed the long-term value of IBAs for Aboriginal communities and expressed skepticism on whether Aboriginal people have the capacity to negotiate and develop IBAs to reflect the project being imposed which speaks to the leverage and ultimately experience each party has in the mineral contract climate. Sosa and Keenan (2001) state that Aboriginal peoples’ access to legal protection, government support, financial resources, and access to expertise and information is essential when devising an IBA.

With Canada’s mineral-rich resource lands, rapid advances in technology and Aboriginal peoples gaining greater legal recognition, IBAs have proven one way to support equity in terms of sharing resources and responsibilities and sustainability in the sense of integrating Aboriginal input into the social, environmental and economic decision making processes.

2.4.3 Content and Timing

IBAs generally begin with introductory provisions to clarify the principles and objectives of both signatories in regard to the development. For the proponent, the agreement typically clarifies their rights and interests to explore, develop, and pursue mineral extraction and operation on traditional Aboriginal territories. For the Aboriginal group, their rights, title and interests may be acknowledged, which generally feeds into the proponent’s commitments to working in cooperation, with environmental visions and standards.

Definitions and interpretations are laid out followed by a systematic breakdown of each objective. IBAs ad hoc and project-specific nature owe to different objectives, yet commonly include the provisions listed below.

Table 2.1 Common IBA Provisions

Articles	Exemplary Clauses
Cultural Initiatives	Social Support, Protection and use of TK, Protection of Heritage and Sensitive Sites
Environmental Initiatives	Environmental Policies, Environmental Impact and Protection, Reclamation, Waste Disposal, Monitoring, Land Use Planning
Economic and Education Initiatives	Favoured Trading Partner Status, Aboriginal Representation, Training Plan, Education Fund, Scholarships, Contracting, Revenue Sharing
Consultation	Project Advisory Committee, Public Meetings, Communication Protocol
Legal & General Provisions	Aboriginal, Treaty & Constitutional Rights, Amendment, Intention and Enforceability, Dispute Resolution, Severability, Confidentiality

Source: Compiled from various confidential IBAs, 2008

While IBAs are most widespread in the mineral sector, they are also common in the forestry sector and increasingly in the energy sector, particularly hydroelectric run-of-the-river projects. IBAs are reflective of the industry's recognition that access to land through partnership with Aboriginal peoples is integral to safeguard prosperous development. An IBA framework is beneficial in any kind of mineral development, including: coal, precious metals, diamonds, or construction aggregates such as limestone and gravel.

IBAs have evolved from basic socio-economic contracts to more comprehensive assemblages. IBA analysis performed by Hitch (2006) demonstrates that the criteria employed in IBAs are evolving to incorporate more holistic company policies, Aboriginal partnership and cooperation, training and education, employee participation and well being, community capacity building, and community participation and informed disclosure.

Although IBAs do not have to be confidential, most are. It remains the choice of the Aboriginal group and mining proponent to determine what schedule details are accessible to the public. The confidential clauses for the most part are linked to financial data, such as profit and equity sharing. Yet as IBAs evolve to accommodate concerns beyond economic and business opportunities, to encompass socio-cultural issues, environmental monitoring and so forth, the lack of transparency is problematic as analyzing, monitoring and managing impacts become wrapped up in a confidential agreement.

While the most practical time to negotiate an IBA reflects the situation, one IBA lawyer argues that IBAs are best negotiated early, before EA permits are issued, and before the regulatory processes are too advanced so that the option to say *no* is preserved, but before community opposition has become entrenched, thereby preserving the option to accept (Fidler & Hitch, 2007, 59). Either party can walk away from negotiations at any time and there is no requirement for an agreement to be reached.

2.4.4 Aboriginal Perspective on IBAs

Aboriginal people are influenced by historical, cultural, political and environmental variables that reflect very unique conditions (Paci et al., 2002, 115). IBAs are one way to include these specific conditions into developing a mine design in cooperation with the community. Generally, Aboriginal groups negotiate an IBA to accommodate Aboriginal interests and address social risk factors by ensuring economic benefits, such as royalties flow to the community. IBAs may include provisions to address issues such as the acknowledgment of certain inherent Aboriginal rights and title, employment, training, profit sharing, business development, compensation, and environmental compliance (Kennett, 1999). These issues may arise at any point during the project life (i.e. planning, construction and development, operation, closure, decommissioning and reclamation). Opportunistically, by addressing these issues, IBAs are instruments that *can* contribute to achieving sustainable mining development by ensuring proponents minimally infringe on Aboriginal rights and accommodate Aboriginal interests and concerns with respect to the mine planning and future community goals. Contrarily, and an emerging area of concern, is that the government's absence in IBAs means there is no protection or scrutiny from the state, and Aboriginal

groups could be susceptible or vulnerable to error – particularly if they have no previous experience or internal expertise in mineral developments.

What remains is when Aboriginal groups sign IBAs directly with corporations, their ambitions are recognized through a contractual relationship. This contractual relationship of IBAs provides assurance to signatories on matters that require further advice or attention, often above and beyond the prescribed regulatory process: therefore building on existing statute and legislation, through a private case specific model.

2.4.5 Business Perspective

While profit remains the bottom line, mining corporations frequently use IBAs as instruments to reinforce corporate social responsibility, promoting a positive public perception, while simultaneously managing risk alongside existing legislation (Gogal, et al., 2005). IBAs offer guidance for navigating uncertain territory with a view to creating mutually beneficial relationships that lower the risk posed to resource development. In this light, IBAs signal recognition that engagement is a prerequisite for mining development in Aboriginal communities, regardless of existing legislation concerning infringement onto Aboriginal rights and statutory requirements. In other words, IBAs build a new relationship between Aboriginal communities and corporations by creating more direct linkages through providing sources of revenue that are influenced less immediately by the Crown. In return, benefits to the proponent can include a social license to operate, risk avoidance, an improved reputation with stakeholders, and long-term financial viability.

2.4.6 Links with Government Decision Making and EA

There is tension and potential overlap in how social and environmental matters are carried out between government decision making, prescribed through the EA, and Aboriginal decision making proscribed confidentially vis-à-vis IBAs with industry. Wolfe (2001, 5) attributes economic development as an essential mechanism to improve Aboriginal living standards, and IBAs give corporations a role in policy development that may be responsible for the “blurring of boundaries between government and business”. In this type of scenario, where EA and IBA boundaries blur and legislative accountability is jeopardized, the local community will inevitably experience the effects first and foremost. Furthermore, because of

the confidential nature of most IBAs, the broader public (nearby non-Aboriginal communities, non-Aboriginal trap line holders, etc.) interests may be undermined as a result of confidential clauses.

Just as IBAs are evolving, their original intent of partnership, strictly between the company and Aboriginal community, is frequently shadowed by the government, which is weighing in on what has been negotiated within the ‘confidential’ agreements. This issue remains less clear in literature and practice and for this reason is queried in the case study interviews.

IBAs may serve a role where EA may be unsuitable or unable to accommodate the cultural and spiritual value Aboriginal communities have with the land.¹⁶ Specifically, IBAs can include chapters that address wildlife migration, culturally significant sites, environmental monitoring systems, compliance mechanisms, or obligations to mine closure or reclamation that EA did not sufficiently detail. Indeed both EA and IBAs have deficiencies, yet the flaws in one instrument may be advantageous and more effectively carried out by the other – depending on the context of the situation. While acknowledging Aboriginal peoples enduring challenges with the government, IBAs prove beneficial to support concerns that the EA process or Government cannot, or is not aimed to address, such as social cumulative impacts. Another example is revenue sharing, and hitherto late 2008, when the Province of BC introduced revenue sharing with First Nations on new mining projects (BC Ministry of Mines Energy and Petroleum Resources, 2008), First Nations had to utilize an IBA to garner revenue and monetary compensation. In Galore Creek, for example, the Tahltan are to receive a percentage of the net smelter return as a form of revenue sharing.

2.5 Summary

This section has provided an overview of the duty to consult and EA to exemplify how mineral development and regulatory and legislative regimes have evolved over the last three decades. This was followed by a description of IBAs and their ad hoc nature to exemplify that while in most cases IBAs are not a legal requisite, they are in effect, part of a legal framework that is intrinsically linked to EA and the doctrine to consult. Whether out of

¹⁶ See Larcombe 2000 for additional information on issues raised by Aboriginal peoples about the EA process.

necessity or voluntary, IBAs have emerged into sophisticated comprehensive agreements to serve and address a multitude of issues important to both parties.

From a policy top down perspective this chapter exemplifies what appears to be a solid regulated framework to offer a legitimate ‘representative’ structure for engaging Aboriginal groups. Described above in *Haida* and *Taku*, the Crown has a formal obligation of consultation and in some cases accommodation before an infringement occurs. The level of consultation is determined by a range of thresholds. The duty to consult is broadly encompassing, not just focused on rights and title, but also circumstances where there is a need to accommodate Aboriginal interests. With Canada’s strong economic foothold in resource extraction and a backlog of Aboriginal grievances pertaining to access of the land with the Crown, proponents utilize IBAs as one way to move their economic bottom line ahead. Proponents and Aboriginal communities are taking pro-active steps by developing IBAs. Proponents are increasingly working with the government to scope out consultation needs to avoid infringement. The following chapter on the Tahltan Nation and the Galore Creek case study, supplements this chapter’s discussion on consultation, EA and IBAs to further advance and analyze the processes.

3 CASE STUDY: GALORE CREEK

3.1 Introduction

In order to answer the research question, *how Aboriginal people participate in mineral development through EA and IBAs*, this section begins by reviewing the Tahltan's history hitherto, to understand the dynamics behind the case study and subsequently how participation occurred in the mineral project. To investigate the Galore Creek EA and PA in full, it is necessary to provide the socio-cultural history of the Tahltan Nation to understand how traditional decision making structures influence governance structures today. It is through an examination of the social governance systems of culture prior to European contact, and the influence newcomers had upon Tahltan, that a clear picture can emerge on the current state of Aboriginal affairs and Aboriginal interests alongside mineral development in Tahltan Territory. The Tahltan have never formally relinquished or surrendered the lands and resources within Tahltan Territory, and continue to occupy the land and use resources, exercising title and rights as Aboriginal people and their interests as Canadians. The Tahltan Nation rejected the BC Treaty Model established by the Treaty Commission in the 1990s, through which their rights would have been defined through a Treaty, and have instead chosen to work towards reconciliation with the Province and Canada. This position, and how it influences the interactions of the Tahltan Nation with the government and proponent and how it affects the EA and PA, can best be understood by recognizing the history, culture and traditional governance of the Nation.

3.2 Socio-Cultural History

3.2.1 Territory, Lifestyle and Interaction

The Tahltan Nation encompasses the Stikine River Watershed and surrounding headwaters. The region covers over 93 500 square kilometres from the Coastal Mountains in the west, the lower parts of the Yukon's boreal forest in the north, the Cassiar Mountain range in the east, and the headwaters of the Nass and Skeena in the south. The Tahltan Territory, which constitutes approximately 11% of the Province's land mass, is an area of

significant exploration for minerals, coal and coalbed methane (Davidson & Rattray, 2007, 1). The Tahltan Nation descended from members of the Tahltan Tribe, who collectively and exclusively occupied the Stikine River Watershed and surrounding headwaters before the British Crown asserted sovereignty over Tahltan Territory in 1863.

Historic records demonstrate a continuous process of adaptation; particularly owing to the groups' constant contact with neighbours: the Taku branch of the Tlingit and the Nass Branch of the Tsimshian to the southwest, and the Tlingit at the mouth of the Stikine and the Kaska of the Dease River to the east. In earlier times (Albright, 1984, 10), Tahltan people shared the lower Stikine River below Telegraph Creek with the coastal people of the Tlingit Nation. Part of this interaction included extracting obsidian from Mt. Edziza and trading it with neighboring groups.

The Stikine watershed is abundant with large game such as caribou, moose and bear and together with plentiful salmon from the Stikine River, and berries from the surrounding forests, there are no records that indicate food shortages were an issue. The ecological conditions of the Stikine region permitted a healthy population size and encouraged movement of people with the migration cycles of salmon, caribou and moose.

Ethnohistoric records (Albright, 1984; Teit, 1906, 1914; Emmons, 1911; Dawson, 1889; MacLachlan, 1981) emphasize that the Tahltan people were semi-nomadic, settling in the spring and summer months in larger groups at fishing camps along the lower Stikine Valley and then moving in the fall and winter in smaller groups to established family areas. The Tahltan were, by origin, exploiters of land resources – they consumed large game like mountain caribou, moose, wood buffalo, black and grizzly bear, and mountain goats as well as smaller animals like beaver, and marmot – fish were also an important part of their diet.

In the early 1800s, European trading vessels appeared at the mouth of the Stikine and in 1898-1899 the Klondike gold rush brought thousands of newcomers into the Stikine region. The Tahltan had an elaborate trading economy already established when the Hudson's Bay Company (HBC) arrived in the early 1800s (IISD: Out of Respect, 2004, 34). The Tahltans became active in a commercial network as a middleman between the coastal tribes, and the tribes to the north and east of the Stikine. External relations with the neighboring groups varied in form. Records infer that the relationship with the Kaska was peaceful and commercial, with exploited and elaborate marriages and movements. The

relationships with the Tlingit (inland and coastal) were characterized with competition and endemic conflict. The Tahltan established themselves as intermediaries in the trade between coastal groups and Athapaskans further inland and interacted with the Tlingit through intermarriage and reciprocal potlatching (McMillan & Yellowhorn, 2004, 247). Boundaries changed over the years, most likely due to wars and trade with neighboring nations. Fish, furs and other natural resources, like obsidian, were traded with neighboring groups.

As more newcomers moved into the north, the Canadian government negotiated treaties specifically removing Aboriginal title to the land in exchange for annual annuities, payments reserves, and guarantees of continued hunting, fishing and trapping rights. For the majority of BC, however, treaties were not negotiated – this applies to the Tahltan Territory – meaning there is no specific definition on their rights and title.

On October 18, 1910 the Chief of the Tahltans, ‘Nanok’, and other family representatives signed the Declaration of the Tahltan Tribe (1910) at Telegraph Creek. In part, the Declaration declares that:

We claim sovereign right to all the country of other tribes, from time immemorial, at the cost of our own blood. We have done this because our lives depended on our country. We are still, as heretofore, dependant for our living on our country, and we do not intend to give away the title to any part of same without adequate compensation.

Implicit in this declaration is sovereign right to their claimed territory, a doctrine that is still asserted by Tahltan today.

3.2.2 Governance

Prior to European contact, the Tahltan’s social order consisted of loosely divided bands, each having its own defined hunting territory. Each clan regarded itself as a local unit with definite districts of ownership. Each family and matriclan had a leader; collectively, the leaders of each clan constituted an informal council. Access to resources and trading channels was along lines established between descent groups by marriages. Territorial ownership boundaries were established based on clan rights; hunting grounds were pooled, if necessary, to permit sharing among groups. The Tahltan, organize themselves both by clan membership and by family group. The Tahltan have two matrilineal clans: the Crow Clan (Tsesk’iye) and Wolf Clan (Ch’iyone).

Important and valued rights were exercised by the leaders of families and clans and decisions affecting the Tahltan were done through meetings or councils – usually made up of the headman (Tahltan Nation, source: www.stikine.net). At a council, each person was able to present their point of view or express their concern with the problem being discussed and identified. Solutions and options would be put forth and examined until a consensus was reached. Accordingly, the process the Tahltan used is referred to as ‘collective wisdom’ (Tahltan Nation, source: www.stikine.net). This cooperative process ensured that everyone who had an issue to raise was encouraged to do so, thereby contributing what they valued as important for the group to hear. Through this process, the problem was examined until a solution was reached, and while the solution may not have satisfied everyone, “the one chosen was ‘the best’ for that particular situation” (Tahltan Nation, source: www.stikine.net).

The Tahltan traditional matrilineal system continued until the 1950s, after which chiefs were elected within the guidelines of the *Indian Act*. Today, the Tahltan’s governance structure is comprised of two bands: the Tahltan Band (Telegraph Creek and Dease Lake), and the Iskut First Nation (Iskut). Indian Northern Affairs Canada records (2006) indicate that there are 648 band members registered to the Iskut First Nations and 1,622 to the Tahltan Band (source: http://www.gov.bc.ca/arr/firstnation/tahltan_nation). The Tahltan Band and Iskut First Nations are each governed by a Band Council according to the *Indian Act* Band Council Regulations, which includes an elected Chief and Council. The Tahltan Central Council (TCC) is registered under the BC *Society Act* and was created in 1975 with a purpose to define and protect Tahltan inherent Aboriginal rights and title. The TCC governs both the Iskut First Nations and the Tahltan Band with membership for anyone with Tahltan ancestry. The executive is elected for two year terms at the annual general meeting. The TCC maintains four goals of the Nation: achieving self-determination, economic self-sufficiency, environmental stewardship, and healthy communities.

The Tahltan Nation has always identified itself as a distinct society that is tied to the land both in the past and future. Collectively, however, the Tahltan Nation is quite fractured and undergoing complex resolution strategies to find a common ground for moving forward. Although the TCC is the elected leadership body, there are disenfranchised groups within the Nation that do not support the TCC leadership. One disenfranchised group, the elders of Telegraph Creek – who traditionally were the decision makers, today, do not endorse the

current leadership and governance of the TCC. By law vis-à-vis the *BC Society Act*, the TCC has authority and is the decision making body on behalf of the Nation, however, the ToR for the TCC does not always reflect the collective voice or interest of the Nation. The two constituencies, those maintaining a more traditional lifestyle and those more oriented to the mainstream modern culture are common with many Aboriginal groups, particularly the Tahltan. The internal, polarized views of those who oppose, and approve of the TCC regarding its decision making authority, make it extremely difficult for industry and government to work with the Nation because it lacks unity. These political tensions are intensified by mineral development and the incessant requirement to work with government, industry and environmental groups to ensure Tahltan are key participants with proposed developments within their Territory. Table 3.1 presents *some* of the mineral projects currently in various stages of EA and the mine life cycle within Tahltan Territory.

Table 3.1 Sample of Mineral Projects in the Tahltan Territory

Project	Status
Mt. Klappan Coal: Fortune Minerals	EA Pre-Application
Kutcho Creek: Sherwood Copper	EA Pre-Application
Schaft Creek: Copper Fox Metals	EA Pre-Application
Red Chris: Imperial Metals Corp.	EA Complete
Kerr Sulphurets Mitchell Project: Seabridge Gold	EA Pre-Application
Bronson Slope: Skyline Gold Corporation	EA Pre-Application
Snip Mine: Barrick Gold	Restoration
Eskay Creek: Barrick Gold Mine	Closure and Reclamation
Golden Bear	Restoration (Provincial Initiative)

While some claim the pressures from the mineral industry have prevented the Tahltan Nation from dealing with historical grievances, others claim the mineral industry provides a vehicle, vis-à-vis, the flow of economic resource benefits to pursue the TCC's goals. As the four goals (environmental stewardship, economic self-sufficiency, self-determination, and healthy

communities) are tied to the TCC's mandate, some who neither support the TCC's aims nor means of achieving them oppose this route as a plausible way to move forward. Needless to say, there are multiple opinions and perspectives as to how the Nation will move ahead with resource development.

With the global economy on their doorstep and quite profound differences regarding the Nation's governance and decision making authority, it becomes quite clear that issues designed to be captured in the EA process, and through any adjunct agreement, are underpinned by a much broader complex history with no simple solutions forthcoming.

3.2.3 Tahltan Perspectives on Sustainability

Various initiatives, policies, and goals carried out by the Tahltan Nation reflect *how* the Nation seeks to advance sustainability by being a key participant with current and future mineral development. The term sustainability and its variants sustainable development, sustainable economy, and so forth, will be referred to liberally, to present multiple views and agendas all of which, arguably, make a concerted effort to positively advance the needs and interests of the Nation. A starting point for this discussion comes from acknowledging that the Tahltan existed in a sustainable manner long before the influx of newcomers in the 1800s. The Nation's traditional ways and practices, including their long history of mining obsidian, well established trade networks with neighboring Nations, established governance system, and strong reliance on resource use (wildlife, fish, plants etc) for subsistence, underwent significant changes with the arrival of Newcomers in Tahltan Territory and furthermore, when BC, the Dominion, and Canada administered law and policy to the territory previously managed by the sovereign Tahltan Nation. Newly introduced administrative mechanisms and influence of change, led the Tahltan to proactively develop policies and initiatives that are consistent with their internal ambitions but also with external mandate and legislation.

To advance the Nation's goals, the Tahltan have focused their attention towards using the wealth created by the mineral economy to leverage benefits and ensure development occurs on terms compatible with Tahltan standards. The 'Tahltan Resource Development Policy' (1987) became the first policy statement that Tahltan advocated industry adhere to and is based on 8 principles (See Appendix A for a complete list). Touching on equity participation, business opportunities, and positive impacts outweighing the negative impacts,

this policy document provides a framework to advocate how resource development shall proceed so it does not disrupt or adversely impact the Tahltan Nation.

The Tahltan Mining Symposium (2003) offers another opportunity to examine the Tahltan's' relationship to mining and sustainability initiatives. The symposium coordinated by the International Institute for Sustainable Development (IISD) reviewed the relationship between Tahltan people, their land and the mining industry and built a strategy based on 'Seven Questions for Sustainable Development'.¹⁷ The community-based workshops brought the Tahltan together to discuss legacy issues and the former Resource Development Policy (1987) to determine what strategies need to be in place to guide the Tahltan forward. The Tahltan Mining Symposium (IISD: Out of Respect, 2004, 27) developed three strategy areas:

- (1) send a signal that Tahltan are supportive of mining and mineral activity on their land under conditions that such activities are *done right* from a Tahltan perspective;
- (2) facilitate Tahltan participation in mining and mineral activity – not only through direct and indirect employment but also in terms of overall management/co-management as well as the broad perspectives of seeing fair distribution...of all benefits, costs and risks; and
- (3) ensure that the broad range of concerns raised in the *7 Questions to Sustainability* are addressed, in particular the health/social/cultural implications of mining/mineral activity that continue to receive inadequate attention.

Another recent initiative is the Tahltan Heritage Resource Environmental Assessment Team (THREAT), a group that employs Tahltan expertise to provide direction to industry and government on how to better protect the heritage, culture and resources of the Tahltan Nation. The organization, set up under the TCC in 2005, actively reviews and provides independent technical expertise to the EA process, liaising between government authorities and the Tahltan Nation to ensure Tahltan views and concerns are addressed. The Tahltan's Kime Project (which means 'home' in Tahltan language) has been set up to document and preserve Tahltan heritage. Accordingly, the Kime project facilitates the transfer of local knowledge to inform the environmental assessment process in areas such as TK, land use and

¹⁷ The '7 Questions to Sustainability' is a template, illustrated here in summary form which queries how the following elements are addressed or are to be addressed: engagement processes, peoples' well-being, long-term environmental integrity, economic viability, traditional and non-market activity accountability, institutional arrangements and establishment of government programs, and synthesis and continuous learning.

occupancy, to inform “the proponent, government and the Nation themselves” (Davidson & Rattray, 2007, 4).

On a more formal level, the Tahltan BC Reconciliation Table was established in 2007 to begin discussions around reconciling the assertion of the Crown Sovereignty and Tahltan Sovereignty. This approach is consistent with the views of the SCC, who strongly encourage Aboriginal groups in Canada to resolve outstanding issues through negotiation, rather than litigation. The SCC stated in the *Delgamuukw* case (para. 186) that s. 35 requires the reconciliation of pre-existing Aboriginal title and rights with asserted Crown sovereignty through good faith. One way the Tahltan have approached the reconciliation of title, rights and interest is by means of the Tahltan Government – Provincial Government Reconciliation Table: another example of engaging in consultation with the Crown. The Reconciliation framework is also consistent with the *New Relationship* (BC, Ministry of Aboriginal Relations and Reconciliation, 2008) that consists of new structures and approaches for shared planning, management, and decision making. The visions articulated in the BC Tahltan reconciliation framework are said to be consistent with the TCC’s goals of environmental stewardship, economic self-sufficiency, self-determination, and healthy communities. Specific initiatives in the Tahltan BC Table include: the Tahltan British Columbia Restoration Plan *for* the Tahltan Territory (BC Ministry of Mines, Energy and Petroleum Resources, 2007), a Mineral Working Group and a Land-Use Planning Working Group. Through such joint efforts, the objective of the Reconciliation Table and working groups is to find a united path for reconciliation and negotiation for the Nation, both internally, and between the Crown and Nation.

The Tahltan continue to evolve their mining policies and standards through the above initiatives, to protect the Tahltan Nation in the face of mineral development activities in the years ahead. The Tahltan have witnessed a complex flow of social order over the years. The notion of continuity and reconciliation are also important alongside the notion of sustainability here, as the Tahltan have experienced adjustment and movement over the years and still strive to retain tradition and heritage. The issues and concerns that feed into the EA process, whether relevant or not under EA jurisdiction, often stem from deeply rooted histories and geographies that are still under reform. The following section illustrates the

added value that comes from greater Aboriginal input in the development of the EA and PA, beginning first by reviewing the EA for Galore Creek.

3.3 Galore Creek EA

The Tahltan Nation of northwestern BC has a long history with mining, and substantial mineral deposits extend across their Traditional Territory. The mineral value attributed to this northwestern region of BC lends credence to its name, the ‘Golden Triangle’, as there are many proven deposits of gold, copper, molybdenum, coal, and other valuable minerals.

The Galore Creek copper and gold deposit was initially discovered in the mid-1950s, but the remote access to the site, and absence of grid power created challenges to proceeding with extraction. Extensive exploration work was completed on the property by major mining companies during the 1960s, 1970s and 1990s, and in 2003 NovaGold Canada Inc. (herein referred to as NovaGold) optioned the property and began extensive exploration, engineering and environmental evaluation (source: www.rescan.com).

Today, proponents NovaGold and Teck each hold a 50% partnership and entered into a PA with the Tahltan Nation in January 2006. In 2007, the Galore Creek Mining Corporation (GCMC) was jointly established by NovaGold and Teck with a mandate to manage and control all aspects of project construction and operation.¹⁸ The project involves developing an open-pit mine to extract copper, gold, and silver. However, at the time of research, the proponent has suspended major construction activities due to high capital costs, and is currently reassessing project feasibility and economics. Figure 3.1 below illustrates the location of the project.

¹⁸ The proponent, in this thesis, denotes only NovaGold because the temporal analysis examines the partnership of the Tahltan and NovaGold prior to Teck’s involvement.

Figure 3.1 Location of Galore Creek Project



Permission to reference this image was granted by the document Owner, NovaGold Canada Inc. Source: BC EAO

Galore Creek's EA considered the effects of the project in all mine life cycle stages, including construction, operations (maintenance or modifications), decommissioning, closure and post-closure. The project triggered a Provincial EA and a Federal EA because various aspects of the project required statutory and regulatory approvals by Natural Resources

Canada, Fisheries and Oceans Canada, Transport Canada and Environment Canada. The project's BC EAA and CEAA were harmonized in accordance with the *Canada British Columbia Agreement for Environmental Assessment Cooperation* (2004).

The Tahltan Central Council (TCC), Iskut First Nations and Tahltan Band were first notified about the project by the EAO in February 2004, after which time baseline environmental studies commenced: socio-economic baseline studies began in 2005. The BC EAO provided funding for the TCC to participate in a technical working group and project review, while CEAA provided separate funding to the Iskut First Nation. The proponent provided additional funding to the TCC to participate in the EA as detailed in the following section on the PA. THREAT was funded and established through the TCC (on behalf of the BC EAO and proponent) to work with industry and government to ensure the protection of Tahltan heritage, culture and resources. Working groups discussions were anticipated to “lead to improvements in social cultural effects assessment for reviews and other proposed projects in the Tahltan Territory” (BCEAO Galore Creek Project: Comprehensive Assessment Report, 2007, 25).

A s. 11 order was issued in November 2005 outlining the project scope and the proponent's responsibility in working with the Tahltan. Traditional Knowledge (TK) studies were funded by the proponent and carried out by the Tahltan, which included reviewing and gathering all available background information, such as historical accounts, ethnographic studies and interviews with elders. TK participants involved in the studies included: trap line holders, big game outfitters, hunters, prospectors, matriarchs of high ranking families, and researchers from the Tahltan 1983-1985 Land Use and Occupancy Study (BC EAO Galore Creek Project, Comprehensive Assessment Report, 2007, 21). The project's Provincial EA approval contained some 193 project-specific commitments that NovaGold is responsible to implement throughout the various stages of the project. The joint Federal and Provincial Assessment report concluded that the effects of the project would be within acceptable levels, subject to adherence to the proponent's application design components and implementation of mitigation measures and commitments. In February 2007, three years after initiating the comprehensive review, the Galore Creek Project received an EA certificate from the Province of BC, with Federal CEAA approval following in June 2007.

3.4 Participation Agreement

This section presents the key components of the Galore Creek PA to illustrate its main objectives and timeline in respect to the EA. These substantive and procedural points offer a framework to more rigorously examine the process through key informant interviews, in the following chapter. Data in this section has been procured from the PA, and media releases on the PA.

The Galore Creek PA was established between the TCC, on behalf of the Tahltan Nation, and NovaGold - effective as of January 2006. The PA sets out each party's rights and interests by recognizing the Tahltan's inherent Aboriginal title, rights and interests within the project area, and NovaGold's rights and interests to explore and develop mineral resources. The parties assert their commitment to working in good faith and the principles of the economic sustainability, environmental stewardship and self-determination that the Nation is committed to. In doing so, the parties aim to create certainty in respect to investment, access, extraction and ownership of mineral rights (McDonald & Co. PR, 2006, 1). Through the Tahltan Heritage Trust Fund, money is managed and invested in accordance with the Trust Agreement to ensure transparency, accountability and reporting to all Tahltan Members. Rather than have the company allocate money to different community programs, the funding arrangement lets the Nation decide where money is required.

Amongst other things, the agreement aims to create a framework for long-term cooperation that fosters understanding and awareness of the respective parties' interests. The PA outlines the regulatory approval, financing and development of the proposed mine. Economic opportunities and social benefits are included with measures and commitments set out to minimize negative social and environmental impacts.

The timing of the Galore Creek PA is important in the context of the EA process, as the EA (pre-application stage) began in 2004 and the PA was signed two-thirds of the way through the EA process in January 2006. Table 3.2 provides a chronological summary of the events discussed hitherto, citing the key historical events.

Table 3.2 Chronology of Activity in Tahltan Territory

Date	Activity/Event
1800s	Influx of Non-Natives: Gold Rush and trade
1863	British Crown asserts sovereignty over Tahltan Territory
1900s	
1910	Tahltan Declaration signed: Tahltan Tribe asks for resolution of land and rights issues through the development of a Treaty among the Tahltan, Government of Canada and Government of BC.
1954	Cassiar Asbestos Mine begins: Tahltans begin work in the mineral economy
1975	TCC Formed under <i>BC Society Act</i>
1990s	Tahltan interactions with the mineral economy increases: large mineral projects such as Snip Mine and Eskay Creek operate
2000s	
2003	Tahltan members and NovaGold meet regarding Galore Creek (September)
2004	BC EA (pre-application stage) commences
2005	Galore Creek PA Ratification Vote (November)
2006	PA made effective between the TCC and NovaGold (January)
2007	BC EA certificate awarded for Galore Creek (February) CEAA certificate granted for Galore Creek (June) Construction commences (July) Project suspended (November) Tahltan Nation and Province of BC sign a Reconciliation Framework (November)

The PA was instrumental in defining and scoping out how the two parties would collaborate to achieve EA approval. THREAT's involvement in the EA was solidified in the PA to facilitate communication from the Nation through THREAT to identify environmental

effects and impacts of the project on Tahltan Nation title, rights and interests and to determine how to avoid or minimize such impacts.

From the vantage point of the proponent, the Galore Creek PA effectively created a roadmap to gain regulatory approval by collectively advancing both parties' interests. This premise is particularly advantageous for developing certainty in respect to gaining EA approval, as the partnership demonstrates to the government that support on behalf of the Tahltan has been established. Dispute resolution provisions are in place to set out the steps for any disagreements between the signatories: first via good faith negotiations, then mediation and if the foregoing is exhausted, binding arbitration.

Each party's commitments are codified into the agreement to ensure the process provides the Tahltan with adequate funding and resources to meaningfully engage in the EA. The process is ideal for both parties, granted that there is a collective community agreement behind the TCC as the decision maker and representative voice. While the proponent is guaranteed Tahltan fulfillment of objectives (ostensibly critical for EA approval), the Tahltan are able to identify potentially adverse environmental effects and point out the impact the proposed project may have on title, rights and interests. EA approval is written into the agreement as an objective that both parties seek to attain. Some examples of the issues discussed to achieve this common goal are: amendments to the EA, non-compliance events such as environmental monitoring, heritage resources, traditional knowledge, timeline goals, ongoing review of closure plan, and final closure.

In addition to the PA's procedural and substantive EA schedules, the agreement includes funding for employment training, scholarships, and business opportunities. The PA factored in potential education and employment limitations to provide realistic initiatives and opportunities that reflect the Tahltan Nation. The Galore Creek PA created a human resources inventory that would be helpful in the development of strategies, timelines and obligations to accurately represent the education and technical levels of Tahltan members. Training programs, preferential hiring, employment advancements, "maximizing training and employment for Tahltan members throughout the mine life that create processes for ongoing dialogue regarding advancements" (McDonald & Co. PR, 2006, 2) are additional examples that lend credence to this model as a highly innovative PA for its time. To this end, many of the indicators that depict the current socio-economic state were completed by the Tahltan,

and helped the Tahltan target collective goals. Through consultation, information distribution and working groups, the EA and PA have created a parallel process for Tahltan participation. The PA addressed each party's mutual interests and concerns through commitments to advance a joint partnership and Tahltan input throughout the life of the mine. Broadly, the Tahltan and NovaGold have different priorities and decision making structures: like most corporations, NovaGold's priority is on profit and delivering a fair return to shareholders. Tahltan priorities, loosely speaking also support economic gain, but only as long as those assets do not cause irreparable environmental harm or socio-cultural loss.

3.5 Summary

The Tahltan's stance on sovereignty has shaped their relationship with the Province and has also been used to shape the relationship with the proponent, particularly through objectives set out in the PA. In this sense, the Tahltan have found a position with NovaGold as to how they wanted to be treated, engaged and compensated within the life cycle of the mine. The Tahltan used the PA to supplement the roles afforded to them by the regulatory authorities and build on outstanding concerns above and beyond the parameters set out in the EA. This research provides a useful model to conceptualize how Aboriginal participation occurred informally and proscriptively through the PA, and formally and prescribed through the EA and requisite Crown consultation standards.

Results of the key informant interviews with Tahltan members, government representatives, the proponent, and consultants are presented in the next chapter to examine and capture the various perspectives and opinions as to how the Tahltan were engaged in the EA and PA processes.

4 KEY INFORMANT INTERVIEWS: DATA ANALYSIS

4.1 Introduction

Resource development within northwestern BC is not a new occurrence. What is, however, is the increasing number of Tahltan engaged in developing and implementing strategic protocols to lead development on their own terms. The learning curve is steep, but policies and mandates driven from the ‘grassroots’ community level are moving self-determination ahead.

This analysis is based on 13 interviews, conducted with Tahltan members, government officials, the proponent, and consultants. Profiles of the respondents are contained in Appendix B. Tahltan members interviewed were involved in Galore Creek’s PA and/or EA process and affiliated with the TCC, THREAT, or the Tahltan Negotiation Team (TNT). Government interviewees worked directly on EAs in resource development involving First Nations and held management or director positions. The interviewees for the proponent, NovaGold and subsidiary Galore Creek Mining Corporation (GCMC), were directly involved in the EA process and PA negotiations and held senior ranking director and leadership positions. The consultants interviewed worked specifically on permitting, EA and governance issues. In total, 22 people were contacted to participate in this research.

Interviews lasted for approximately 45 minutes and a follow-up email with the transcript was sent to each respondent so that they could review the material to ensure the data were accurate. Interviews were performed in person and over the phone, in July and August of 2008. A basic template was followed (contained in Appendix C) to structure the interview, but the respondents were able to explain the issues and experiences that were most important from their perspective.

In addition to interviews, the researcher had access to the Galore Creek PA and other agreements negotiated between the Tahltan and industry. The material is confidential and is only referred to in principle to depict the points, whilst preserving confidentiality. Furthermore, in June 2008, the researcher attended a three day Mineral Forum in Telegraph Creek, BC, that involved Tahltan members and council, government (EAO and Ministry of Energy Mines and Petroleum Resources) and mining companies. The Forum’s goal was to

discuss issues of concern, interest, and future directions and let the Tahltan pose questions to regulatory bodies and company personnel. This Forum presented an opportunity to witness the issues being presented first hand at a community level.

Research findings will be discussed based on the responses from key informant interviews. To begin, these responses, with respect to how interviewees understood the objectives of the two processes, EA and PA, will be discussed: this will serve as the starting point to illustrate diverging understandings and expectations of the processes.

4.2 Interpretation of Results

4.2.1 Overview

The purpose of an EA in its current form is less debatable than that of a PA, as it is prescribed and legislated, with its primary aim being to “minimize or avoid adverse environmental impacts before they occur and incorporate environmental factors into decision making” (CEAA). The Galore PA, however, emerged on an ad-hoc basis to address localized issues. As illustrated in Table 3.2, the PA was negotiated and ratified prior to the EA certificate being issued. Bill Adsit, president of the Tahltan Nation Development Corporation (TNDC), and assistant on the three person TNT who developed the PA, explains that “when NovaGold first met with the Tahltan, they were fully aware of the environmental legacy problems in the Traditional Tahltan Territory and therefore wanted to do this project right”. From the proponent’s perspective, “relying on the EA process to communicate and accommodate First Nations...hasn’t always, in practice, turned out so well”.¹⁹ Therefore, NovaGold did not rely on the EA process to work with the Tahltan, and instead engaged locally, early, and frequently, before the EA process began vis-à-vis the PA. From the beginning, the proponent notes, “the whole approach was to engage with the Tahltan and local community, and then go to Victoria...start local to understand the local concerns, then formulate a business plan to carry out and integrate into the EA”. Curtis Rattray, former TCC chairman, refers to the PA alongside the EA process as a double layer of protection, “NovaGold’s PA provides us with benefits, but at the same time it also provides us with

¹⁹ See Kemess North Copper-Gold Mine Joint Review Panel Summary Report (CEAA, 2007) for additional information.

another level of addressing the impacts” identified in the EA process. Similarly, the proponent respondent refers to the PA and EA process as ‘parallel tracks’, with the PA one track, and the prescribed EA process (legislated mandate) on another. As much as they tend to overlap, they are, in theory inherently separate processes with different objectives, as laid out in Chapter Two.

As a high level overview, this is consistent with the Tahltan view, the proponent’s view and the government’s view. When Anne Currie (EAO Director, Respondent) was asked how the PA came about, her response was clear that the PA is beyond the EA perspective and governments are not signatories: “benefit agreements are negotiated by proponents and First Nations”. This is consistent with the First Nations Tracking Comments, an appendix to the EA certificate, where the government only notes the presence of the PA.

Figuratively, for the Tahltan, there *are* two tracks that together create a larger interactive system to address issues and concerns. While the prescribed and proscribed purpose of each mechanism seems clear and the PA is a legal contractual agreement between signatories, hence the government is not party, key informant interviews reveal a different scenario.

4.2.2 Tahltan Involvement in the EA Process

Interviews initially addressed the EA process by asking questions such as: “what resources were the Tahltan provided with to participate in the EA process?”, and “to what degree were the Tahltan included in the EA decision making process?”, with various subset questions to follow, prompting an in-depth response. From these inquiries, responses were fairly consistent with respect to the degree of Tahltan participation in the EA process, along with the challenges tied to relying on the small amounts of capacity funding provided by the Province (BC EAO) and Canada (CEAA). Furthermore, the interviews reinforced the value of NovaGold’s approach of engaging early and often, as well as providing additional monetary compensation for the Tahltan to participate.

The Tahltan received funding from the Provincial government for the two stages of the EA (pre-application and application) as well as additional funding from the CEAA. There remains an obligation for the EAO to provide some funding to First Nations groups participating in the EA to ensure that they have the capacity to participate, review, and

respond to the proponent and government within the prescribed timeframes. The EAO, however, has nowhere near the funding capacity to allocate sufficient monetary compensation to each First Nation group engaged in the process (province wide) and therefore ‘encourage’²⁰ the proponent to supply additional funds. According to the Tahltan Negotiator respondent, what the EAO provides in terms of monetary funding comes nowhere near the Tahltan’s budget to participate in an EA, which requires somewhere between \$150,000 and \$180,000, versus the \$50,000 (\$20,000 in the pre-application stage and \$30,000 in the application stage) the BC EAO provided. Evidently the proponent (Respondent) realized that it would be very challenging for the Tahltan to participate given the resources they had and provided financial assistance to fund the Tahltan in the process, referring to the government’s financial contributions as “*piecemeal*” and nowhere near sufficient. One Tahltan member involved in the EA and working groups was asked, “Would it be possible to work through the EA without funding from NovaGold?” and the response was, “Yes, although the funding certainly helped us to be able to produce better products”. Other responses from the Tahltan community were a mixed result of ‘yes’ and ‘no’ – each highlighted that they *could* but regarded the proponent’s funding as an unsaid necessity.

In particular the Tahltan expressed their frustrations over the Province’s reliance on the proponent to fulfill their legal requisites, and the lack of decision making authority First Nations have in the process. One Tahltan respondent points out that the EAO provided the Tahltan with a ‘low’ ‘strength of claim’ which the Tahltan refuted stating that infringement to Tahltan title, rights and interests is ‘high’. This model, the respondent argues, is “poor practice”, and predicated on the basis of a litigation brief and the chances of being taken to court, “instead of actually sitting with First Nations and getting a report from the First Nations what their interests are, what their concerns are, and actually fully addressing them”. In contesting the Provincial (EAO) strength of claim assessment in writing to Minister of Environment Barry Penner, the Tahltan (TCC) asserted that the EAO cannot fulfill the

²⁰ Government respondent stated that “EAO’s ability to provide capacity funding is spread quite thinly. EAO provides some funding to participate in the process but also lets First Nations know that the proponents should provide their share of the funding as well”. Furthermore, the respondent stated there are “indirect ways to have proponents provide capacity funding...the logic is that if they want their project to move forward through the project review smoothly it is incumbent on them [industry] to provide capacity to First Nations”.

Crown's duty to consult and accommodate. Moreover in writing, TCC leadership reinforced the bi-lateral nature of the PA between the Tahltan Nation and NovaGold that does not lessen the duty owed by the Crown to consult or accommodate. As it stands, according to the Tahltan, accommodation by the Province is still not fulfilled. Another Tahltan (Respondent) cited her frustration in the process:

As a First Nations person working in the mining industry, intimately involved in the EA process, my belief is that First Nations need to be involved from the 'get-go'. The application needs to be developed with a First Nations person sitting at the table. We basically have equal weighting or are treated as a stakeholder.

Another tension that arose in the EA process was *who* received the funding and *how* it was allocated to the Tahltan Nation. The TCC, as the legally recognized administrative body and decision making authority for the Nation, receives the monetary funds. One respondent referenced disenfranchised groups within the community and described how funds channeled through the TCC for EA participation enhanced fractions (see Section 3.2.2). The respondent maintains that the resources provided by the government and industry created “a have and have not situation, where one voice was made more valid than another”. The respondent understands that this increases the complexity of working with a Nation, like the Tahltan, that is not always united or in agreement. This can be contextualized more clearly by referencing certain state influenced policies, like the *Indian Act*, which affected the traditional Hereditary Chief's role, replacing ‘old’ with ‘new’ and implementing state-led programs and structures to administer Aboriginal decision making.

Overall, the EA certificate is seen as an achievement from the perspective of industry, government and the Tahltan. It is also important to acknowledge that it is a product of a particular time and in retrospect is easier to critique. The EA achieved harmonization with CEAA, was completed within its timeframe, engaged the Tahltan in working group meetings, application and assessment reviews, and included TK in the reports. THREAT's involvement increased the Tahltan leadership role in the process, which led to the Tahltan putting forth the expertise and skill to recommend an alternative access road, in lieu of that proposed by the proponent. Curtis Rattray, chairman of the TCC during the time of Galore EA and PA, refers to the Tahltan degree of decision making as “high”, with the Tahltan exemplifying strong internal capacity, skills, and expertise to be organized and address issues

presented in the EA. According to Currie (Respondent), "the Tahltan participated in all aspects of the environmental assessment review process". Participation included having representatives on technical working groups established by the EAO to provide input on the proponent's proposed baseline studies site visits, opportunities to comment on draft ToR; which identified the information to be included in the proponent's application for an EA certificate, and the proponent's Application and draft Assessment Report, which summarized the results of the EA. The inclusive participation Currie describes was supported in discussion by Adsit who remarks, "the Nation was consulted and we [Tahltan] were fully involved". Another respondent, brought in to oversee the integration of the social impact assessment to the EA for Galore Creek brings clarity by addressing the multiple vantage points:

For industry and possibly government, they perceive a very high level of decision making, as compared to many other projects. There was a very conscientious effort made to engage the Tahltan and have a partnership with the Tahltan. The Tahltan responses may be different, as there are different franchise groups, like the Elders in Telegraph Creek, who are feeling the opposite, because traditionally they were the decision makers and now they are disenfranchised from the process. NovaGold chose to engage the Tahltan through leadership...on these grounds the function of that leadership is to represent the community.

Although NovaGold was only working with one First Nation, within this Nation several layers of involvement exist within decision making. The proponent worked through the EA process and took additional steps to engage and appease the Tahltan, mindful that the EA process would not, and could not be the only vehicle to adequately address local concerns.

4.2.3 Emergence of the Galore PA

Discussions around the PA were guided by procedural questions, querying how the PA came about, who participated in the negotiations and what advice and lessons learned could be offered from the process.

NovaGold assumed control of Galore Creek in 2003 and approached the Tahltan Nation that same year with the intent of building a relationship through participation and communication with the local community. At the first meeting between the TCC and

NovaGold the Tahltan Declaration was presented and key issues of importance to the Tahltan Nation were put forth. From the beginning, the proponent notes, “the whole approach was to engage the Tahltan and local community *then* go to Victoria”. The Tahltan developed the TNT under the TCC, with the goal of negotiating a PA with NovaGold. The main components and objectives of the PA include:

- a framework for communication and partnership;
- legally binding enforceable contract;
- benefits to Tahltan from Galore & support from Tahltan to Galore;
- covers all stages of the project; permitting, construction, operation and closure;
- does not define or deny Tahltan title, rights and interests.

The 100-plus page agreement was ratified in late 2005 then finalized in January 2006. A ratification process of acceptance or rejection by simple majority for all Tahltan members of Tahltan ancestry 16 years or older occurred. Balloting was done in person and by mail and counted by an independent authority (KN& V Chartered Accountants LLP). In the end the ratification vote ended up being considerably high, at 85%²¹ with significant representation from the community.

The breadth of the PA reflects many issues protected under EA legislation, but also goes further to provide additional investment security for the proponent and benefits to the Tahltan Nation. According to Rattray, the Galore PA evolved in principle from the belief that mineral “benefits must outweigh the impacts” (Tahltan Resource Development Policy, 1987). Speaking from multiple view points, Ann Ball, Senior Project Coordinator and Community Liaison for the Galore Creek Mining Corporation and a member of Tahltan Nation asserts that, “Tahltan wanted more than just job creation for the Nation: we wanted revenue sharing and to preserve the environment and address reclamation...jobs are nice, and training is nice, but because it’s our land we wanted more”. Offering a similar view, according to the Tahltan Negotiator (Respondent), when NovaGold approached the Tahltan, the TNT knew what they wanted based on the principles that stem from the ‘Out of Respect’ (IISD, 2004) document. This strategic plan in accordance with concerns identified in

²¹ A key informant involved in balloting asserts that the 85% approval reflected significant participation from the community.

meetings with leaders, community members and special assemblies provided the basis for PA negotiations (Tahltan Negotiator).

The Tahltan were able to utilize monetary resources provided through the PA to become more engaged and positively influence the design and planning of the mine. NovaGold proposed two possible access routes into the Galore Creek site: the Tahltan listened to the company rationale and engineering plans, held discussions in the community, and through participatory engagement that included the incorporation of traditional knowledge, were able to identify a third and final route which posed less risk to the Nation and NovaGold. This is one example of the Tahltan participating in the process to make the project more acceptable and favourable to the Tahltan people.

Fundamentally, the PA represents an innovative and sophisticated agreement for its time. Ball, amongst others, refers to the PA as precedent setting; highlighting how it “no way surrenders the rights and title to land”. Another Tahltan respondent concludes that it is precedent setting because it is “a template that will be transferable to other companies operating in the Tahltan Territory”, and as Rattray notes, “will be made into standards for all other companies in our Territory”. Seemingly the responses indicate that the PA is an advantageous model to forward Tahltan aspirations outside a legislated framework. Building on the notion that the benefits have to outweigh the impacts, Rattray explains that the driving force of this PA and other similar type agreements, lies inherently in respecting the Nation’s four long-term goals: self-determination, economic self-sufficiency, environmental stewardship and healthy communities. Using a PA is, from this perspective, one vehicle to incrementally achieve these goals.

In this case, the proponent chose to engage early, in part because the EA does not provide a clear framework or ‘smooth process’ by which the proponent can work with the Tahltan or by which the Tahltan can participate in the EA. From a Tahltan perspective the rationale is obvious; the PA provides an additional layer of protection (alongside the EA) and engages the Tahltan in a process to make changes that are in the best interest of the Tahltan Nation.

In terms of the PA, the two common discussion points and areas of internal contention revolved around community involvement and decision making authority in the negotiation process. The PA process began with the TNT developing a comprehensive

agreement to be taken to the community for a ratification vote. Since the majority of the agreement had already been confidentially established, a lot of criticism was directed at the TNT, and subsequently the TCC, for not having greater community involvement from the beginning.

Aside from this result, several respondents stated that by the time the ratification process took place the community felt alienated as they were not privy to the entire agreement. One Tahltan respondent claimed that many people did not vote because they did not know what they were voting on. Others, according to this proponent, are “people who did not agree, did not vote – they did not vote out of principle”. In the end “some provisions in the PA, we just have the capacity to address” (Tahltan Respondent) – which she argues, goes back to the manner in which it was negotiated, “nobody asked the community what they wanted and so collectively 3-4 people made decisions on behalf of the Tahltan Nation”.

Another stumbling block that Adsit notes was the way in which clauses were negotiated for the TNDC to have preferential treatment. Since the TNDC’s profits are funneled back to the TCC, there was quite strong rationale that this model would be beneficial to the broader community. Adsit advises that future agreements should ensure all Tahltan people and Tahltan businesses can participate in a more open and transparent way. Ball also notes the problematic nature of the preferential treatment clause, and explains that some clauses were “not properly summarized and presented in the community meetings”. When the “Tahltan’s” were asked to sign-off on the PA, they were only signing off on a synopsis of it, an overview, with the highlights – that’s all the people got” (Tahltan Respondent).

Greater community development could, in part, help remedy some of the issues described above by ensuring Tahltan input informed the nature of the PA. In June 2008, the PA was made available to every Tahltan Member at the Annual General Meeting – the confidential nature is seen by many as its undoing. While some aspects should be kept confidential, others, like environmental provisions, should be open for the public to see, argues one respondent. On these grounds, Rattray offers similar advice concerning the requisite for greater involvement “that would be part of the community design and development and ratification process”, but pragmatically points out the current governance and decision making structures in the Nation, and queries “what are the things the Tahltan

membership need to ratify and make decisions on, and what are the things that the elected representatives should be making decisions on?”. Put this way, Rattray’s query reveals the complex nature of PAs – and political ideas of democratic participation at individual and community levels. Similarly the proponent provides insight on the same matter, “like dealing with any community, you try to engage all points of view, but in the end, you need to deal with the governing body that speaks and represents the Tahltan Nation”.

4.2.4 Bringing Clarity to the Parallel EA and PA Process

The focus here considers the utility of EA and PA together. Theoretically, two separate processes exist; however in practice, the interplay between each is creating an increasingly ambiguous climate on issues around consultation, and identifying, mitigating and monitoring impacts. Discussions were guided by questions like “is it clear as to how the EA and PA processes work together?”, “did the PA confuse or add value to the EA?”, “could the project have proceeded through permitting without a PA?” Research describes the answers from the two main vantage points, the Tahltan’s and the proponent’s, and triangulates these responses with consultants.

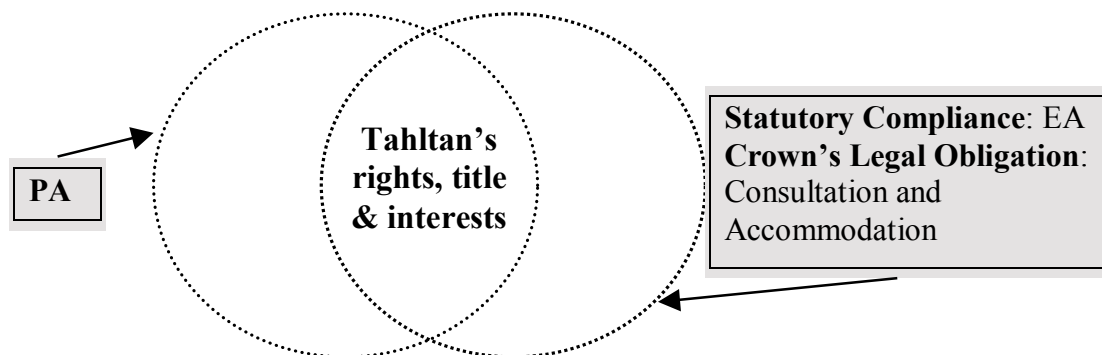
The Tahltan responses as to whether it is clear on how the EA and PA work together consistently maintained that the intent of both processes is clear but too often the government blurred the boundaries by using the agreement as a principle of acquiescence. Respondents expressed concern that the government is admittedly *not involved*, but somehow still view the agreement as a component of consultation even though the duty to consult is judicially confined to the Government. One Tahltan respondent said that by signing the PA the Nation effectively signed off on the EA before it even happened, adding that it is not a clear process and is like “putting the cart before the horse”. Rattray felt the two processes remain clear and provide some positive discussion points on the inquiry. Rattray explains that the PA provides Tahltan with legal authority parallel to the Province on a broad range of issues in the PA:

Tahltan authority is beginning...beginning through PAs that are legally binding with the company. Provides us with small percentage of the overarching and conceivable environmental issues that can occur from a mining project – we have gotten legal authority on very serious environmental issues.

The PA ensures that at the closure of the mine the Tahltan carry out an independent evaluation to ensure obligations of the closure plan have been reached before NovaGold

receives its reclamation security. This is similar to the authority of the BC government regarding closure regulations whereby NovaGold cannot walk away from the mine until the BC government authorizes it. In this case the Tahltan get their authority from the PA and the government get theirs from legislation. Taken together the EA and PA ensure closure meets Tahltan standards. Rattray also acknowledges that the EAO tried to sign off on issues saying they were in the PA, but the “Tahltan have been very adamant to ensure the PA issues are also in the EA”. Several other Tahltan respondents highlighted the value the PA brought to mapping out how the Tahltan were to work together with NovaGold in the EA process. Rattray explains that in areas of restoration and mine closure, the Tahltan have less trust in the Province and prefer to place an extra layer of protection on these issues, through legally binding provision in the PA, as illustrated in Figure 4.1 below.²²

Figure 4.1 EA and PA: Double Layer of Protection



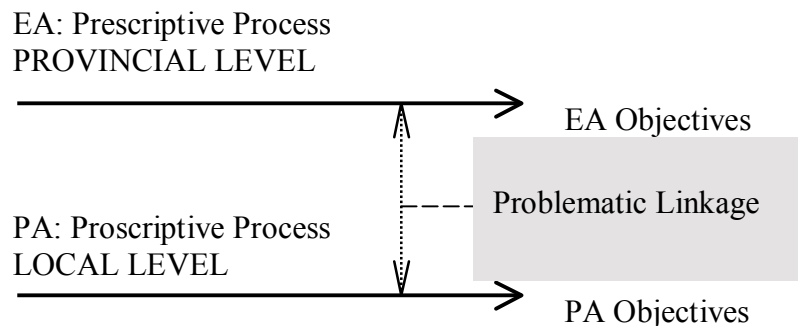
The temporal procedural element of the two processes has a significant impact on how one informs the other. For the Tahltan, the PA determined how the Nation and proponent would collectively work together to obtain an EA certificate. Whereas in the Voisey's Bay Project an EA was completed after which the Innu and Inuit supplemented the EA with IBAs (Gibson et al., 2005; O'Faircheallaigh, 2007). In the latter case of Voisey's Bay, the EA informed the IBAs, whereas for Galore Creek quite the opposite occurred (Reference chronologies in Table 3.2). While respondents expressed the value of the PA

²² Tahltan's rights, title and interests, as referred to in Figure 4.1, are currently being negotiated at the Tahltan-BC Table and outside of the BC Treaty Process.

preceding to create a thorough and stable process, Rattray expressed interest in advocating for a PA to come after the EA certificate to see what administrative struggles occur during the EA process.

Just as Rattray referred to the EA and PA as two layers of protection, they can also be conceptualized as parallel processes on parallel tracks. Both provide an opportunity for Tahltan participation through consultation and inclusive partnership planning. Returning to the question posed on whether it is clear as to how the EA and PA work in tandem, the proponent response to this issue was, with emphasis, that it is a separate parallel process and the “government is the only one who clouds it and views the EA as part of the PA”. The problematic linkage or grey area between the two is illustrated below in Figure 4.2, demonstrating two separate tracks, two separate objectives and unclear linkage between the two.

Figure 4.2 EA and PA: Parallel Process



From the proponent’s (Respondent) perspective, the PA adds value to the EA process, notwithstanding that this feeds into the roles and responsibilities of the government. The proponent maintains that the major problem within the processes is that legally, the Province is responsible for accommodation *but* is increasingly sharing their responsibility by delegating it to industry. “PA discussions are occurring at a local level”, the proponent maintains, and is separate from the provincial level and the Province’s obligation to First Nations. The contention here, from this industry perspective is that EA and PA are separate – this is “consistent with the Tahltan view but inconsistent with the provincial view...that the PA takes care of their requirement to consult and accommodate”. Advancing this, the

proponent says, “if I had to opine and have allegiance somewhere, my allegiance would be with the Tahltan – their view is the correct one”.

Consultant responses within this topic furthered the need for government to address and clarify their role on PAs. One respondent said it is clear about what they are *trying* to achieve (from a high level), but it is not actually clear on how they work together. Another consultant concurred, stating that it is not clear on how the processes are working together and it “needs to be clear for *everyone* and not just for elected council”. On these grounds, the consultant (Respondent) states that IBAs originated as useful tools but with time have evolved to symbolize acquiescence for a project and to this end “IBAs are being viewed by the government as a means to an end for consultation”.

Specific concerns regarding transparency and social impacts within the PA were raised by several Tahltan and consultant respondents as a lot of social management tends to transfer into the PA rather than being made a public document. The onus is then on the First Nations to ensure social impacts are managed, monitored and mitigated: all with the assumption that the PA covers *all* the potential impacts. Without this transparency the consultant maintains, there are no actual “check-in” procedures, and furthermore there is also a risk of excluding other non-First Nations groups like trappers, outfitters, and stakeholders. Despite who is party to the agreement, the consultant concludes, “there needs to be a due diligence process around social impacts and mitigation by the PA to ensure the PA is informed by the impact assessment”. With respect to clarity over the processes, the respondent adds “the PA is with NovaGold, however if Aboriginal rights and title are affected, it is the government’s duty to accommodate...here government is allowing industry to accommodate for them” making it very confusing over who is accountable. Overall, there needs to be more clarity as to how EA and PAs work together. Collectively, the proponent, Tahltan and consultants formulate similar concern on the fact that the PA is with NovaGold and therefore does not lessen the government’s duty to consult or accommodate.

4.2.5 Multiple Views: Lessons Learned

Unequivocally, for its time, the Galore Creek PA represents a sophisticated agreement rich in application and with lessons learned. The Tahltan demonstrated leadership to advance the Nations’ interests through both processes. Furthermore, the proponent was keen to use

‘best practices’ and knew that a ‘social licence’ was important in order to gain the confidence of regulators, the public and the Tahltan. Appendix E: Interview Summary Points includes key excerpts from the interviews. While it is easy to critique the project, in retrospect, based on the lessons learned, it is equally important however, to highlight the uniqueness of this project and the high degree of social complexity, uncertainty, and conflict over inter-cultural values and interests.

The responses to the question, “why do industry and government see Galore Creek as a best practice?” demonstrates a small fraction of opinion regarding the project. Those who concurred with the fact that Galore Creek can be viewed as a best practice underlined the strength of partnership between the two parties, and the new standards the PA created for industry and First Nations to reference nationwide. Industry has realized the Galore Creek project raised the bar, and according to one respondent “in the long run this is not necessarily a bad thing, but it is about helping industry move towards those standards”. A Tahltan respondent added that Galore Creek may be a best practice because a PA was in place which “is the new tool on the radar screen that is an indicator to government that industry and First Nations will work together”. The proponent responded that “it is, and continues to be a partnership” and even though the project is suspended, the agreement is still in effect. Others, more pessimistic of the project or EA process in general, cautioned that it is not a best practice and merely represents the politics of moving a project along to validate that the EA process works (Respondent).

Interviews were concluded by asking respondents to offer “advice for Aboriginal groups who may be working through an EA and PA process”. The advice from the consultants, who were directly involved in the EA, but not privy to the PA in totality, is to be “engaged in the process, even if this is to express dissatisfaction about the process, dissatisfaction about the *Act*”. Even if the First Nations are opposed to the proposed project, the EA will more accurately reflect the potential impacts on the community if they are engaged in the process. Again, although the EA process is defined by legislation, one consultant notes, that “the implementation is subject to human idiosyncrasies... knowing the individuals and understanding their needs, be it regulators or First Nations, smoothes the process”. Additional advice from consultants: make sure there is a community based referendum and ensure the PA is not wrapped up in the EA process and be certain the

government is accountable (Respondent). Transparency is another contentious issue: “IBAs have come in as part of the decision making process, and the government is now taking IBAs and moving the EA process along on a possible falsehood” utilizing the agreement they are not party to as tacit acceptance.

From a Tahltan perspective, advice for other Aboriginal groups was tied strongly to using internal expertise and knowledge. Adsit, Rattray and the Tahltan Negotiator addressed the value of using internal capacity to negotiate the PA and participate in the EA process. That the Tahltan were able to organize themselves and bring “skill and expertise to the table [and] the heart of the Tahltan's working, to do well for the Nation was key to the whole process” (Rattray). Advice from current Tahltan Chief, Rick McLean (Respondent), is to negotiate for more than jobs, adding that jobs create wealth in individual families which does little for the overall socio-economic health of the Nation leaving “no money to house the programs that are needed for social issues”. A key issue of concern for the Tahltan is the “lack of scope within the BCEAA for socio-cultural assessment, management planning and monitoring” (Davidson & Rattray, 2007, 4). McLean’s (Respondent) concern over the explicit absence of socio-economic issues in the EA and governments’ ability to skirt around social issues reinforces the imperative for a PA to pick up on the areas government does not have the capacity to, or is unwilling to address.

Lessons learned have already emerged which can perhaps inform and lead to the improvement for PAs in the future. From the Tahltan’s perspective lessons learned stem from ensuring greater community involvement in the design and ratification of the agreement and using internal capacity and expertise such as THREAT, but also acquire advice externally from consultants. On this note, make the PA more transparent internally and ensure the EA does not feed off any elements already established in the PA. From an industry perspective, the lessons learned come from the government clouding the processes and advocacy towards ensuring the PA and EA are separate processes; PAs occur at a local level and EA at a Provincial or Federal level. This lends credence to the need for greater government clarity over the two processes. Based on key informant interviews and irrespective of case law decisions that affirm third parties are not responsible for consultation and accommodation of Aboriginal peoples, there still remains skepticism on how the Crown is involved and how the Crown fulfilled its duties in Galore Creek. A very important step for

industry and Aboriginal groups is to have a clear understanding of the appropriate boundary between IBAs and EA – and how the model is set up – so that the boundary can be better defended.

Acknowledging again the different objectives of each process, based on the circumstances and evidence provided in the Galore Creek case study, it is indisputable that the PA in this context did not overlap with the EA. Ostensibly, the Tahltan benefited from the PA, but simultaneously just as the Nation chose to address additional concerns that they lacked confidence with the Province, such as areas in the EA, the government's reliance on the instrument can affect the agreements' utility and original spirit of intent parties strived for. From the Tahltan perspective, although the PA is separate from the judicially confided government duty to consult and entails distinct parameters from EA, there remains a systemic and well articulated concern that the agreement, in effect, lessened the Government's obligation towards the Nation.

4.3 Summary

The last thirty years have seen a paradigm shift in the ways of doing business with First Nations. Even with these advancements, the courts have not really opined on the issues they have the fiduciary obligation and the duty to act honourably in (Czarnecka, 2008). Industry and First Nations want clarity from the courts on issues relating to the overlap of EA and IBAs, and how that impacts consultation and accommodation. The theoretical objective of each mechanism remains clear, but in practice, the integrity of IBAs with their once good intent are underpinned by the Crown, and the vagueness that stems from the ability to delegate procedural aspects of consultation (*Haida*). The government is unable to, or not willing to accommodate Aboriginal people and “industry is taking on the responsibility of government and sitting down with specific Aboriginal groups in order to provide the institutional framework” to move projects ahead (Czarnecka, 2008).

Key informant interviews revealed that the proponent's approach of engaging early and being appeased of the history and issues of the Tahltan Nation was invaluable. The Tahltan's experience and expertise in the mining industry has unmistakably led to a well-established PA.

5 CONCLUSION

5.1 Thesis Summary

With the ambiguous administrative climate, the law is somewhat clear, but procedurally unformed. In *Haida* the SCC clarified consultation standards, espousing the distinction between the Crown's *duty* to consult with the voluntary adjunct *option* to consult, which "is open to industry in order to improve community or business relations" (Isaac, et al., 2005, 684).

The objective of this research was to investigate how Aboriginal participation occurred through EA and IBAs. The ad hoc nature of IBAs and the jurisdictional differences of EA create different circumstances for analyzing Aboriginal involvement in the two processes. By examining Galore Creek, in the Traditional Tahltan Territory, and employing key informant interviews, the results indicate that EA and IBAs when applied as a parallel process, *can* add value and enhance Aboriginal participation in a mineral development. However, the processes also have a tendency to overlap and *can* therefore fail to fulfill particular elements of their respective mandates which may have fundamental long-term consequences, though these have yet to be seen. With a long-term outlook in mind, and the increased preponderance of IBAs nationwide, this research comes at an opportune time to analyze IBAs. Data revealed that navigating between the two processes proved somewhat difficult for the Tahltan, because the two processes could not be fully conceptualized, partially because of the document's confidential nature²³ but also because of the Crown being too reliant on third parties' role in consultation and accommodation.

Methodologically, the research was framed by describing the Crown's duty to consult using recent case law decisions, and then describing the evolution of EA in Canada, the CEAA, and followed by a detailed discussion of the BC EAA. Together this approach outlined the fiduciary responsibility of the Crown regarding consultation and described how it folds into EA. This research built on previous literature in the fields of consultation and

²³ The PA was finalized in January 2006 and released to the community in June 2008: over two years after it was effective.

EA; specifically Aboriginal participation in EA, and the growing scholarly body of literature on IBAs. This research examined the evolution of IBAs and discussed their presence in mining developments. IBA discussions revealed that the increasing frequency of IBAs aims to foster goodwill and strong community ties in a bona fide manner to overcome, address, and maneuver through what many perceive as an unclear climate in respect to consultation, accommodation and acquiring consent (social licence) to proceed with development in a stable manner.

The basis behind the key informant interviews was to investigate how the Tahltan participated in the EA and IBA processes. To this extent the interviews concluded that even with a solid regulatory framework and SCC decisions for the government to consult and accommodate First Nations; the government's unacknowledged reliance on IBAs is problematic. Problematic, strictly on the basis that government is not party to the agreement and a great deal of onus is put on the First Nations community to ensure the agreement provides fair benefits, compensation, etc., and that it achieves its goals from beginning to end.

The Galore Creek case study demonstrates that the PA proved valuable next to the EA as it furthered how the Tahltan wanted sustainable mining activities to occur on their traditional lands in accordance with the Tahltan way-of-life. The Tahltan's legacy with mineral development and existing policies and standards such as the Tahltan Mining Policy, Out-of-Respect Document (IISD) and the THREAT committee contributed to an innovative EA and PA. The Tahltan's engagement in the EA process "has resulted in their improved capacity and understanding and ability to participate" (Davidson & Rattray, 2007, 5). Although the EA process did not satisfy or address all of the environmental concerns of the Nation, the Tahltan utilized the process to its fullest, addressing areas of deficiencies, and using a PA to supplement the prescribed process.

5.2 Contribution of the Research

5.2.1 Practical

A valuable contribution of this research is that it is contextualized in BC and adds knowledge to the current mining model and trilateral relationship of First Nations, industry

and government, lending discussion to how roles and responsibilities overlap. Recently, a significant amount of research has been performed on IBAs, albeit in a northern framework, which entails different statutory models to inform consultation, EA and IBAs. Notwithstanding, *this* research addresses contentions, challenges, and opportunities that exist within BC – and provides practical strategic advice for Aboriginal groups and proponents.

As the demand for mineral development in BC increases, and the specialized knowledge and skills required to manage EA is in short supply, the necessity to advance this body of knowledge and practice comes at a critical time. The Galore Creek case study reinforces the value of social capital and requisite for ongoing collaboration and engagement between Aboriginal groups, government and industry. The research findings are valuable to industry and First Nations who are currently operating in a state of flux regarding the government's role in IBAs.

For Aboriginal groups, this research illustrates the value of utilizing an EA to its full potential regardless of whether the community supports or opposes the project. As the courts ruled, Aboriginal people cannot veto a project and cannot frustrate the process: the more engaged the community, then the more the EA will actually reflect the potential impacts. Furthermore, as per advice for negotiating IBAs, it appears necessary to keep the EA and other regulatory requirements as an extra layer of protection. This research addressed some downfalls that stemmed from confidential, closed door negotiations. Therefore, non-confidential agreements that are procured, developed and ratified by the community in a transparent manner point to more favorable intergenerational and intragenerational equity.

For industry, the research reveals the value that comes from early engagement with Aboriginal groups which enhances certainty and creates a more inclusive development with the increased ability to address issues up front. This research illustrates that satisfying government requirements is only part of the 'approval' or 'licensing' process for industry. While Aboriginal groups do not have to consent to a project for the proponent to achieve an EA certificate, without local support and no social licence, industry places itself in a very disadvantaged position. This research helps industry realize that government in BC does

not have the capacity to fully fund the EA process and additional voluntary measures to work in partnership with the local Aboriginal communities are part of an informal process that lends support to achieving formal approval.

The perennial shortcomings of EA²⁴ and the duty to consult have not faded, and IBAs are persistently filling these regulatory and legislative gaps, as seen in the Galore Creek case study. Most notably, the practical advice Tahltan respondents provided based on their experiences in mineral development was to utilize local expertise, keep the community informed, ensure the community designs and provides input into the IBA process and provisions, and to reference and learn from other Aboriginal groups who negotiated IBAs. Considering all this, the underlying premise here is that with regional and provincial differences in EA and in Aboriginal rights and title, the field is rapidly evolving and in need of ongoing analysis. This research examined one particular case study in BC to espouse lessons learned and provide insight for government, industry and First Nations to move ahead with optimism.

5.2.2 Scholarly

Equally important to the practical contribution of literature is the scholarly contribution. This research contributes to the bodies of scholarship associated with (1) EA, (2) IBAs, and (3) consultation.

The theory and practice of EA is well represented in literature (Hanna, 2005; Noble, 2006) and continues to evolve to reflect local demands and international developments in environmental and Indigenous law and policy. Literature on the interplay between EA and IBA are beginning to emerge and this research provides a solid framework to advocate that when examining IBAs, they should not be examined in isolation from EAs. While they have separate objectives, they inherently work in parallel. Thus, by accepting this assertion, research has simultaneously added to the scholarly body of literature on EA and IBAs – focusing on the challenges and opportunities associated with both instruments. The research does not advocate that IBAs have arisen solely on the basis of addressing EA deficiencies; rather it considers a broad range of facets that trigger negotiations. An

²⁴ For example, mine closure standards, weak monitoring enforcement, narrow scoping, etc.

important component of this scholarship is realizing that a solution to the issues of concern will only be achieved by Aboriginal groups, government and industry working together.

To this end, this research has cited EA challenges that prevent Aboriginal peoples from fully engaging in the process. Common critique include narrow scoping (Mulvihill & Baker, 2001), unilateral governance (Craig, 2002), lack of meaningful culturally sensitive consultation (Larcombe, 2000), insubstantial attention towards cumulative social impacts and more largely the inability of EA to afford Aboriginal peoples a role in decision making and authority (Boyd, 2003; Larcombe, 2000). This research supports these findings based on key informant interviews.

This research also supports the work of Gibson et al. (2005) who discuss sustainability in its many forms, and advocate for a greater integration of sustainability criteria into the EA process. The interviews and case study analysis of Galore Creek validate the new and refined objective of merging environmental and social concerns with economic decision making. In principle these research findings support the work of Pring (2001) and Hitch (2006) that greater Aboriginal participation in a mineral development can enhance sustainable project development. Correspondingly, just as IBAs can address EA deficiencies (Galbraith, 2005) this research offers a critique on the government's approach based on the accounts of key respondents.

5.3 Recommendations for Future Research

In the previous chapters, research examined Tahltan participation in Galore Creek. A historical description on the background of EA and IBAs and relevant international standards and court decisions were provided to contextualize how both have arrived at present. One issue worthy of examination is the role of the community in ratifying an IBA. This inquiry could query the most effective way to develop community participation to inform the PA and guide the agreement from the conceptual stages through to implementation and monitoring. Another area that could benefit from scholarly inquiry is the concept of 'confidentiality' and what value a non-confidential agreement could bring. A compendium of IBAs and discussions on their provisions and content could help Aboriginal groups learn from other experiences both in Canada and Australia. As noted in section 1.3.1 there are similarities between the Aborigines' experience with mining companies and the

Government in Australia and Canada; building on and transferring knowledge through comparative research will be invaluable.

Having belatedly realized that Aboriginal cooperation is essential for a project to move along smoothly, both industry and government are moving towards a reality that requires consent from affected Aboriginal groups. A further recommended research area could encompass the concept of FPIC and what it means alongside the regulatory and legislative framework, from the perspective of industry and Aboriginal peoples (Render, 2005, 52). While Aboriginal consent is not legally required and Aboriginal groups cannot veto a project, it is a high risk climate for a proponent to proceed when strict local opposition remains. Thus research in the area of tenure reform, including the standard of FPIC could take into account early engagement strategies, in prospecting and exploration stages (pre-EA), broadening discussion beyond EA to include mineral tenure processes including the free entry and online staking systems.

In this political context, another valuable area of research could examine how IBAs may be tools subject to institutional abuse – who puts them at risk, and why? Reflecting back on the proponent's comments in respect to the Province clouding the EA/PA parallel process, more research would be useful in examining how the Province is actually involved. This inquiry could also consider the original spirit and intent of IBAs and how they have shifted into an unclear potentially problematic realm as Government increasingly weighs in on them.

From key informant interviews two distinct groups emerge: IBA optimists and IBA pessimists. Data identified certain key characteristics of each and explain that in essence both groups are striving for similar goals, but have different approaches and opinions on how to proceed. This builds on the research of Galbraith (2005), who examined EA optimists and pessimists – perhaps inquiry on these categorical viewpoints could yield knowledge and identify common viewpoints and areas of disconnect to assess the most practical way to move the processes forward.

5.4 Concluding Thoughts

Successful mining and metal operations require the support of the community (Render, 2005, 2). This research recognizes the diverse composition of the Province's population and the need to build on policies and protocols that enhance and ameliorate in-depth inclusion of Aboriginal peoples in the early stages of mineral development. The manner in which the Tahltan expressed their interests to the Government and proponent which affected the EA and PA, respectively, reflects their particular culture, background, and set of interests. The Tahltan's extensive history in the mineral economy, and the non-Treaty context, are two of many conditions that tend to set them apart from other Aboriginal groups across Canada. The Tahltan's commitment to achieve the Nation's goals and engage in the EA process, even to express dissatisfaction, symbolizes a considerable level of leadership and determination.

A better and more inclusive approach for Aboriginal participation in mineral development will stem from the government clarifying its *actual* role in the overarching process: not enshrining IBAs in law, rather tending to the outstanding uncertainty over consultation, and related EA and IBA matters. This might, in turn, better enable Aboriginal groups to engage and accurately develop and design community participation modules to move through both processes.

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Appendix A: Tahltan Resource Development Policy Statement 1987

Before a resource development project can commence within Tahltan tribal territory, it will be necessary for the developer and the Tahltan Central Council to enter into a project participation agreement that encompasses the following elements and basic principles:

1. Assurance that the development will not pose a threat of irreparable environmental damage;
2. Assurance that the development will not jeopardize, prejudice or otherwise compromise the outstanding Tahltan Aboriginal rights claim;
3. Assurance that the project will provide more positive than negative social impact on Tahltan people;
4. Provisions for the widest possible opportunity for education and direct employment-related training for Tahltan people in connection with the project;
5. Provisions for the widest possible employment opportunities for Tahltan people with respect to all phases of the development;
6. Provision for substantial equity participation by Tahltans in the total project;
7. Provisions for the widest possible development of Tahltan business opportunities over which the developer may have control or influence;
8. Provisions for the developer to assist the Tahltans to accomplish the objectives stated above by providing financial and managerial assistance and advice where deemed necessary.

Appendix B: List of Key Informants

Respondent	Title/Role with respect to Galore Creek
Bill Adsit	President, Tahltan Nation Development Corporation Member of Tahltan Nation
Ann Ball	Senior Project Coordinator/ Community Liaison Galore Creek Mining Corporation. Member of Tahltan Nation
Anne Currie	Director, Environmental Assessment Office, British Columbia
Gillian Davidson	Former Manager, Rescan Environmental Services Ltd.
Rick McLean	Chief, Tahltan Band
Mike Rae	Consultant
Curtis Rattray	Member of Tahltan Nation Past Tahltan Central Council Chairman
Confidential	Member of Tahltan Nation, Directly Involved in the EA Process
Confidential	Consultant, Directly involved in the EA
Confidential	Management, NovaGold Inc.
Confidential	Government
Confidential	Tahltan Negotiator Member of Tahltan Nation
Confidential	Consultant, Directly involved in the EA

Appendix C: Sample Interview Schedule

A. Background Information

Discuss research overview and objectives as per Letter of Introduction and Letter of Consent.

B. Interview Questions

Clarify subject's Role/Title and Confidentiality Status:

1. To begin, can you please describe your involvement in Galore Creek's EA and/or PA process?
2. In your view, why is Galore Creek viewed as a best-practice?
3. From your knowledge, what *resources* were the Tahltan provided with to make decisions on issues presented in the EA?
4. In your view, to what *degree* were the Tahltan included in the EA decision making processes?

Participation Agreement Questions:

5. In your view, how did the PA come about?
6. In your view, could the project have proceeded through permitting without a PA?
7. Who from the Tahltan participated in the PA, and at what level?
8. In your view, what was the most significant 'lesson learned' from the PA process?

Environmental Assessment and Participation Agreement Questions:

9. In your view, is it clear as to how the EA and PA processes work together?
10. Did the PA confuse or add value to the EA process?
11. In your view, what could make a PA more effective?
12. What advice would you give other Aboriginal groups who will be working through an EA and possibly a PA process?

C. Concluding Remarks

Thank you for your time. Would you be able to recommend anyone else I should speak to?

Appendix D: Participant Confidentiality and Ethics Approval



UNIVERSITY OF BRITISH COLUMBIA
NORMAN B. KEEVIL Institute of Mining Engineering

tel: 604 822 2540 fax: 604 822 5599 517, 6350 Stores Road, Vancouver, BC V6T 1Z4 www.mining.ubc.ca

Consent Form

Aboriginal Interests in Mine Design: Engagement through Environmental Assessment and Participation Agreements

Principal Investigator, Michael Hitch, Norman B. Keevil Department of Mining Engineering, University of British Columbia

Co-Investigator, Courtney Fidler, Graduate Student, Norman B. Keevil Department of Mining Engineering, University of British Columbia

Purpose:

The objective of this project is to obtain key informant information to supplement the co-investigator's thesis research which is a partial fulfillment towards her Masters of Applied Science in Mining Engineering at the University of British Columbia. This research looks specifically at how Aboriginal people participate in mining development and design through the environmental assessment (EA) and participation agreement (PA) processes. The overall aim of the project is to advance more sustainable mining practices in Canada through greater engagement of Aboriginal groups during all stages of mineral development.

Study Procedures:

- If the subject chooses to participate, there will be one interview whereby the co-investigator will ask semi-structured questions regarding Aboriginal participation in the Galore Creek EA and PA process which will take approximately 30 minutes;
- The interview can take place over the phone, or questions can be sent in the mail;
- The subject will determine which interview style he/she would prefer;
- The subject will have access to his/her interview records after the interview is complete and once the data has been transcribed.

Confidentiality:

Information taken from the interviews will be used to supplement thesis research, and will be published as a partial requirement to the co-investigator's Masters of Applied Science in Mining Engineering. If the subject chooses to remain confidential, contact information will not be revealed and all information taken from the interview will be kept strictly confidential and kept in a locked filing cabinet. If the subject chooses to remain confidential, he/she will not be identified by name in any reports of the completed study. Data records will be stored in a private secured file that no-one will have access to.

Remuneration/Sponsorship:

The project is not funded and therefore there will be no remuneration and the subject will participate on a volunteer basis.

Contact for information about the study:

If you have any questions or desire further information with respect to this study, you may contact the co-investigator (Courtney Fidler) or Michael Hitch, Principal Investigator (contact details cited below) or his associate, Malcolm Scoble.

Contact for concerns about the rights of research subjects:

If you have any concerns about your treatment or rights as a research subject, you may contact the Research Subject Information Line in the UBC Office of Research Services at 604-822-8598 or if long distance e-mail to RSIL@ors.ubc.ca.

Consent:

Your participation in this study is entirely voluntary and you may refuse to participate or withdraw from the study at any time.

If you wish to participate, please place these three pieces of paper into the self-addressed envelope.

Your signature indicates that you consent to participate in this study.

Signature of participant

Date

Please circle one:

Subject wants to remain confidential:

YES or NO

Courtney Fidler

Co-Investigator

University of British Columbia

Vancouver, BC

Dr. Michael Hitch

Principal Investigator

University of British Columbia

Vancouver, BC

UBC Behavioural Research Ethics Approval

*The University of British Columbia
Office of Research Services
Behavioural Research Ethics Board
Suite 102, 6190 Agronomy Road,
Vancouver, B.C. V6T 1Z3*

CERTIFICATE OF APPROVAL - MINIMAL RISK

PRINCIPAL INVESTIGATOR: Michael Hitch	INSTITUTION / DEPARTMENT: UBC/Applied Science/Mining & Mineral Engineering	UBC BREB NUMBER: H08-00894						
INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT:								
<table border="1"><thead><tr><th>Institution</th><th>Site</th></tr></thead><tbody><tr><td>UBC</td><td>Vancouver (excludes UBC Hospital)</td></tr><tr><td colspan="2">Other locations where the research will be conducted: N/A</td></tr></tbody></table>			Institution	Site	UBC	Vancouver (excludes UBC Hospital)	Other locations where the research will be conducted: N/A	
Institution	Site							
UBC	Vancouver (excludes UBC Hospital)							
Other locations where the research will be conducted: N/A								
CO-INVESTIGATOR(S): Courtney Riley Fidler								
SPONSORING AGENCIES: N/A								
PROJECT TITLE: Aboriginal Participation in Mine Design								

CERTIFICATE EXPIRY DATE: July 8, 2009

DOCUMENTS INCLUDED IN THIS APPROVAL:	DATE APPROVED: July 8, 2008																																		
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The application for ethical review and the document(s) listed above have been reviewed and the procedures were found to be acceptable on ethical grounds for research involving human subjects.																																			

Appendix E: Interview Summary Points

TAHLTAN	PROPONENT	CONSULTANT	GOVERNMENT
How/why did the PA come about?			
Proponent aware of legacy issues in Tahltan Territory and wanted to work <i>with</i> the Nation to obtain consent and support	NovaGold did not want to rely on EA process to work with Tahltan	Proponent was keen to use best practices: knew a social licence was important	PA is outside Government jurisdiction and is a matter between First Nations and the proponent
Tahltan wanted another layer of protection in addition to the prescribed EA	NovaGold wanted to engage locally & early as infringement can occur well before the EA process begins	EA process flawed and required PA	
Tahltan wanted benefits to outweigh adverse impacts and design mine in accordance with Tahltan values and resource policies	NovaGold employed PA to create an effective approach to the EA	PA affirmed a central role for Tahltan in decision making and mine management: something the Nation wanted	
Could the project have proceeded through permitting without a PA?			
Would have been a challenge - the PA made the EA a success	Without the PA, the process would not have gone smoothly: EAO provides piecemeal monetary contributions for First Nations to participate	PA funding increased the Tahltan's ability to be meaningfully engaged	Yes, they are separate and not dependent on one another
Yes, but the PA enhanced Tahltan involvement in the EA. Tahltan project approval and consent vis-à-vis the PA makes the regulatory process more efficient	The prescribed regulatory process does not always turn out so well for industry: a PA is required	Nominal funding provided by EAO: makes it hard for Tahltan to participate	PA or IBA helps the Ministers' final EA decision because an agreement represents support for the project

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	Is it clear as to how the EA and PA processes work together?		
Yes, but only for those highly involved	Yes, however the Government appears to be the only one unclear and are clouding the process	No, needs to be clear for everyone and not just leadership and elected individuals	Yes, they are separate processes
No, large amount of the community didn't understand how the processes operated together - there needs to be greater transparency	PA occurs locally and EA occurs provincially and federally: they are separate	In theory yes, in practice no.	
	Advice or offerings for an effective PA		
Greater community development and involvement in the ratification process	Early and ongoing communication and collaboration	Ensure the PA is properly informed by the EA baseline data whenever possible	N/A
Get advice - use internal expertise - consult with external consultants - reference other PAs/IBAs	Develop relationships based on transparency and respect: don't rush the process	Work through multiple range of effected groups	N/A