19 Between flaws, setbacks, and timid progress

Findings after 25 years of mining-related consultations

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MiningWatch Canada recently reached a 25-year milestone. We launched on 1 April 1999, at the end of a decade marked by an unprecedented global expansion of mining activity driven by economic globalisation. We set out to bring people together to share experiences and expertise, and to work in solidarity to build networks, coalitions and relationships to challenge the power of the mining industry and the policies that serve it. Over the past 25 years, we have worked with dozens of mining-affected communities around the world, intervened in over 200 mining conflicts around the globe, and written and supported the publication of over 100 in-depth reports (MiningWatch Canada [MWC], 2024a).

Over this time, we have seen communities across the world become increasingly aware of the dangers posed by the mining industry. Many are intervening at earlier stages in mine development to defend their rights and interests, with the goal of preventing harm in the first place (MWC, 2024a). While elaboration is outside the scope of this brief discussion, it is useful to consider MiningWatch's experience with developments in other countries. We note that communities globally are far better aware than they were 25 years ago of the long-term harm they may face from mining. There have been strong movements – for example in The Philippines and in Latin America – where mining-affected communities have decided to carry out their own consultations in accordance with their ancestral traditions or political procedures. In The Philippines, these processes have led to moratoriums on mining being declared in municipalities and provinces. In Latin America, people have organised *consultas* at the community and municipal level to demonstrate a clear lack of consent for mining (Coumans, 2011).

Despite this positive shift, there continue to be serious setbacks and obstacles. In the name of meeting the material needs of an energy transition – as currently envisioned by the mining industry, governments including Canada, and international institutions such as the World Bank – global mining production is expected to increase five- to ten-fold by 2050 (Izoard, 2024, pp. 26, 33; Vidal, 2018). In this context, the pressures exerted by the mining industry on local populations

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and ecosystems are bound to increase. At the same time, there continues to be an overwhelming lack of will from authorities across the world and in Canada to guarantee Indigenous Peoples' rights and the rights of civil society to participate in meaningful consultation processes around mining that are legal, dignified, effective, and predictable for all.

In Canada, "consultations" with affected stakeholders are often top-down processes led by a mining developer and/or a government body. Only Canadian federal and provincial/territorial governments carry the legal responsibility to consult and accommodate Indigenous Peoples, and only governments can legally enforce consultation requirements more broadly. Proponents may carry out so-called consultation exercises, but without legal authority in most cases. Nonetheless, provincial governments may attempt to "download" those responsibilities onto proponents (Northern Ontario Business, 2013). While there can be certain legal formalities depending on the jurisdiction, moments of consultation with affected communities typically take place only after companies have been granted the mineral rights over a piece of land. Consultations most often occur right before or during environmental assessment, and while negotiating impact benefit agreements.

While consultation with affected communities is certainly an important component to how mining happens in this country, we don't consider consultation to be the ultimate goal. Rather, we have pushed over these past 25 years for stronger mechanisms to ensure that no mining activity be authorised without the full and ongoing consent of those most affected by mining operations – and in the case of Indigenous communities, consent given in a free, prior, and informed manner as recognised by the United Nations Declaration on the Rights of Indigenous Peoples.

We are far from achieving that goal. No laws or practices currently exist in Canada that can meaningfully uphold rights around consent. However, there are certain conditions that can improve existing processes for consultation, with an eye towards making them more ethical and socially acceptable.

Given the vast nature of this subject, we frame our comments in the context of a *free entry* mining system currently in force in every jurisdiction in Canada with few exceptions, like in parts of the Yukon (Ross River Dena Council *v* Government of Yukon, 2012). *Free entry* is a

> system of 'free access' that allows individuals to acquire mining claims virtually anywhere with a minimum of restrictions, regardless of who lives there or their relationship with the land, and with priority over any other use or occupation of the land.
>
> (MWC, 2024a; Turgeon, 2023; Scottie, Bernauer & Hicks, 2022)

A number of key factors characterise the many processes for consultation on mining issues under this *free entry* system. For starters, there is a tendency to over-complicate in technical terms the presentation of mining projects to the point of making them incomprehensible to the general public for whom they

are intended. There are also significant discrepancies and a lack of coherence between the consultation processes required by various levels of governments across jurisdictions. Affected communities are left facing a maze of possibility for the type(s) and parameters of consultation that may or may not apply to a given project, made more difficult by a context in which communities can be facing large numbers of mining projects under assessment simultaneously in their territories with limited resources to respond.

The requirements for consultation vary greatly between jurisdictions. For instance, in Quebec, exploration companies must hold public information sessions and submit a report to the provincial government prior to applying for an authorisation for "impact-causing exploration work". Following recent reforms to Quebec's *Mining Act*, all new mining projects must undergo an environmental assessment, which can be followed by another opportunity for the public to be consulted and provide input. There may simultaneously be public consultations on land use planning and other mining regulations that have implications for a particular project. Depending on whether the project meets certain criteria, it may also undergo assessment at the federal level by the Impact Assessment Agency of Canada. In Ontario, private projects, including mines, are not required to undergo any kind of provincial impact assessment and the opportunities for public consultation are therefore much more limited.

Faced with these challenges, local communities have made clear their demands for these processes to be fair and equitable – and in the case of Indigenous Nations, that their Indigenous rights be respected and guaranteed.

Consultations must start earlier in the mining cycle, even before mining exploration titles are granted. Sufficient time must be given to communities to develop their understanding of the issues so that they can make informed decisions for their future.[1] Greater transparency is required, both from mine developers about their objectives and particularly about project-related environmental and social risks, and from governments about their political intentions (Roy-Grégoire, Orellana & Poisson, 2024). Consultations must be thorough and comprehensive; they cannot focus on only certain parts or stages of a project.[2] Consultations on mining projects must be carried out by independent agencies, at arms' length from both from the industry and government.[3] The government must uphold and implement the findings and recommendations by these independent agencies, so as to avoid decisions that are influenced mainly by economic considerations. The rules governing industry use of consulting firms specialised in community relations must be regulated. In fact, this business sector – which claims to be neutral, when in fact it is accountable only to its clients – adopts its own procedural practices which, in our view, too often transgress fundamental principles of ethics and respect for local populations.[4]

Furthermore, sufficient financial resources must be made available to local communities to enable them to reach out appropriately to their members for comments and also, in some cases, to retain the services of independent

mining experts capable of providing an informed and unbiased opinion on the true extent of the risks they face. Consultations must be conducted in the language of the populations concerned and in a procedure and environment that is appropriate and culturally aligned for Indigenous Peoples.[5] Since any form of consultation implies the collection of notes, positions, proposals, concerns, and questions, the coordinating body for the consultation must ensure full and honest follow-up with the participants, clearly indicating how their input has been integrated into the analysis of the project and, where appropriate, providing answers to any questions raised. At the same time, confidentiality of sensitive personal and cultural information must be ensured, especially but not only for Indigenous Peoples. Finally, at the end of the consultation process, a financial audit must be published, especially when public funds are involved.

Consultation processes in the mining sector can be improved when people rally to demand it. A good example is the recent reform of Quebec's *Mining Act*, which adopted a measure that civil society had been calling for over 15 years: making all new mining projects subject to independent consultations by the Bureau d'audiences publiques sur l'environnement [Office of Public Hearings on the Environment] (BAPE).[6]

Communities can turn mining-related consultations to their advantage, despite their current procedural flaws. In her report, submitted in conjunction with the Coalition Québec Meilleure Mine's [Better Mine Quebec Coalition] brief to the BAPE hearings on the Horne 5 mining project in Rouyn-Noranda in September 2024, former BAPE commissioner and expert in land-use planning Julie Reid Forget proposed a tool for "planning the integration and costs of a major [mining] project" for municipalities affected by such projects (Reid Forget, 2024). The author asserts that this planning should take advantage of the information obtained during consultations about a mining project. Only when a proper framework for consultation is in place can information be timely used by local communities to formalise agreements with polluters, forcing the latter to compensate the community for the potential impacts of their mining project if authorised by provincial and federal authorities.

However, our greatest hope for structural change in the timing and scope of consultations on mining-related issues lies in the use of the legal system. Given that legal provisions in Canada's various jurisdictions give an advantage to mining companies and stifle the voices of citizens and Indigenous Peoples, and given the general lack of political interest in eliminating these injustices, we find that the best remedy is to legally challenge the validity of consultation processes in the face of the *free entry* mining system. In this respect, going to court to enforce the constitutional duty to consult and accommodate Indigenous Peoples on any project that might adversely affect their Aboriginal rights and title claims represents a fruitful step for those with the time, courage, and resources to take such legal action. In three jurisdictions, the courts have already ruled in favour of Nations who challenged the legality of *free entry* systems that offer consultations only *after* mining claims

have been issued. The Ross River Dena Nation was the first to win such a battle in the Yukon in 2012, followed by the Gitxaała and Ehattesaht Nations in British Columbia in 2023, and the Mitchikanibikok Inik First Nation before the Quebec Superior Court in 2024. A similar battle is being fought by several communities of the Anishinabe Nation before the Ontario Superior Court.[7]

Nevertheless, while British Columbia is subject to a court order to reform its *Mineral Tenure Act* to include Indigenous consultation as required by section 35 of the Canadian Constitution, and has also committed to reform the Act to align with the provincial *Declaration on the Rights of Indigenous Peoples Act*, other territories and provinces such as Yukon and Quebec have chosen to appeal such rulings to higher courts. Other Canadian jurisdictions are opting to maintain the status quo pending future litigation or a decision by the Supreme Court enforceable across the country (Turgeon & Wawanoloath, 2024). Quebec has even rejected any proposed amendments to its recent reforms to the *Mining Act* that would acknowledge the provincial Court's ruling (*Id.*, Assemblée nationale du Québec, 2024).

Beyond these pivotal legal developments, we firmly believe that the Canadian public is ready to move beyond current consultation practices towards the improvements outlined here. Mining-affected communities want project developers to uphold and respect their rights to consent, whether it's a "yes" – and if so, under what conditions – or a "no".[8] So the question should be: how can we ensure that governments move beyond haphazard consultation to truly respect the decisions and consent of affected communities and Indigenous Peoples?

Notes

1 For example, Falco Resources Inc. filed a staggering 30,000 pages of documents to be analysed by civil society as part of the environmental impact assessment of the Horne 5 project in Rouyn-Noranda, Quebec. These documents were posted online in the middle of summer, many just days before the start of the public hearings, and some even after the procedure had begun. This situation was denounced by citizens and described as "tentacular" by the Commissioner during a public preparatory meeting held a week before the hearings began. See Bureau d'audiences publiques sur l'environnement (BAPE 2024, 13 August; MiningWatch 2024b, 27 August).

2 For instance, in 2022, the mining company IAMGOLD presented its new Fayolle open-pit gold mine project in Quebec's Abitibi-Témiscamingue region in such a way as to be considered separate from its operating Westwood mine just a few kilometres away. This approach, combined with the presentation of a project below the threshold to trigger a provincial environmental impact assessment, enabled the developer to avoid independent public consultations. The only consultation that took place was run by the company, presenting a series of hurdles for meaningful public participation. A formal request to the Quebec Minister of the Environment by six organisations and citizens affected by the project to use his discretionary power to require the project undergo independent public consultations was dismissed in the following vague terms: "the concerns expressed by the public are legitimate, but from our point of view, they do not justify it". See, MiningWatch Canada (2022a, 23 June).

3 Quebec's Bureau d'audiences publiques sur l'environnement (BAPE), in operation for over 40 years, is one of the best examples. The commissioners of this organisation, which is independent of the Ministry of the Environment, have the powers of the *Act respecting public inquiry commissions* to carry out their analyses, which give great importance not only to science, but also to the opinions expressed by people directly affected by the projects under review, including many mining projects.
4 To read the comments made on this subject by the Coalition Québec meilleure mine [in the context of the Ministère des Ressources naturelles et des Forêts' [Ministry of Natural Resources and Forestry] consultation on the mining framework, a mandate that was given to one of these outside government consulting firms, see Coalition Québec meilleure mine (2023, 18 May).
5 An example of good practice in this regard is the BAPE's decision to hold public hearings about the Horne 5 mining project in the community of Winneway on 3 October 2024 at the request of the council of the Long Point First Nation, instead of keeping hearings only in the city of Rouyn-Noranda. To our knowledge, this was a first for a mining project located on the unceded territory of the Anicinape First Nation. See, Bureau d'audiences publiques sur l'environnement (2024, 20 August).
6 Unfortunately, even after the review of the *Mining Act*, not all mining projects are subject to the BAPE public and independent hearings. Indeed, projects that increase their size or daily extraction capacity continue to be exempt when their proportion is less than 50 per cent. See *Loi modifiant la Loi sur les mines et d'autres dispositions* [Act modifying the Mining Law and other provisions].
7 The six First Nations are Apitipi Anicinapek Nation, Aroland First Nation, Attawapiskat First Nation, Fort Albany First Nation, Ginoogaming First Nation and Kitchenuhmaykoosib Inninuwug (McIntosh, 2024, 12 August).
8 According to an August 2022 Léger opinion poll, 78 per cent of people living in the province of Québec agree with "requiring the consent of local populations (municipalities and Indigenous Nations) before authorising any mining activity on their territory" (MiningWatch Canada, 2022b, 2 August).

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