MINING SECTOR REGULATION IN QUEBEC AND CANADA: IS A REDEFINITION OF ASYMMETRICAL RELATIONS POSSIBLE?

Myriam Laforce, Ugo Lapointe, and Véronique Lebuis

With its long history of mining exploration and exploitation, Canada has been presented as a leader in the mining sector at the international level for many decades. In 2005, of the 1,431 mining companies around the world with mineral exploration budgets of at least $123,000 CDN, 62 percent were based in Canada.¹ On one hand, while Canadian experience in the mining sector is often cited internationally as a standard bearer of the promotion of best practices in the field,² on the other hand, the actual practices of Canadian mining companies abroad have become the object of increased scrutiny.³

For these reasons, it is relevant to examine the industry’s experience on a national scale to learn about the scope of the current challenges concerning how mining projects contribute to the development of the regions involved. This article focuses, from a political economy perspective, on the evolution of forms of regulation and legitimation of mining investment that favour such a contribution. To this end, we explore the nature of the institutional arrangements that existed in Canada in the 1990s, and that led to the emergence of new modes of regulation and legitimation of mining investment, notably in the form of particular agreements between First Nations groups and mining companies. In this context, we are interested in the establishment, the evolution, and the impact Canadian and Quebec mining regimes have had on the emergence of these new negotiation spaces, and on the power relations existing among the participants. We can then question whether the new regulatory frameworks are likely to lead to the recogni-
tion of the perspectives and positions of the Aboriginal populations concerned, and, in this way, participate in the development of the affected regions. The analysis allows us to suggest that asymmetrical relations of power, initially created by the historical development of mining regimes and perpetuated during their evolution from 1980–1990, indeed make it difficult to integrate the positions of Aboriginal people into the decision-making process related to mining activities.

This approach is inspired, in part, by the proposals put forward by Susan Strange in the field of heterodox international political economy (IPE), in particular those concerning the idea of structural power, which is at the heart of our study. It is also inspired by the analysis developed by David Szabłowski on the resolution of mining conflicts through local, national, and transnational legal processes. The latter contribution allows for the grounding of analytical tools from the international perspective of the IPE by updating them within a specifically local, regional, or national dynamic. In both cases, the role, interactions, and relations of power that are established among the parties involved lie at the core of the analysis. The approach put forward allows us to understand Canadian and Quebec mining regimes as the key components of a larger power structure that conditions the relations among the actors, thereby influencing the nature of the new regulatory spaces created (and the results that proceed from them).

In the first part of this article, we look at several aspects of the conceptual and analytical framework inspired by the approaches proposed by Strange and Szabłowski, and then describe the historical processes leading to the institution of Canadian and Quebec mining regimes, as well as the institutionalization of specific core values. We then explore the implications arising from the operationalization of these regimes on the negotiations and power relations that operate among the actors concerned. Finally, we revisit the evolution of mining regimes in the 1990s, notably through the integration of new socioenvironmental values, with a view to understanding the processes leading to the need to introduce new regulations, the implications of these changes on the power structures mentioned above, and the opportunities to broaden decisionmaking processes that these developments created.
Elements of the Conceptual and Analytical Framework

In this article, we use different concepts that are thus necessary to define and put in context. Born of two theoretical frameworks that are distinct but complementary in many respects, the concepts of regime, structure, structural power, and values will be examined, with the emphasis placed on the links between them. Thanks to this framework, it will be possible to turn our attention to the recent evolution in the role of the state — a principal actor in the dynamics under study — as understood in light of the analytical proposals of Susan Strange and David Szabowski. On one hand, we take as a proposition, in keeping with the theoretical elements proposed by Strange, that the state tends to position itself “in retreat,” and in a subsidiary manner in relation to IPE dynamics, which are now also characterized by other influential nonstate actors. On the other hand, in the context of the 1990s and with respect to the specifics of the mining sector, this retreat takes on a particular form that one can qualify, after Szabowski, as “selective absence.”

Regime At the heart of our analysis, we define the concept of regime as an ensemble of legal dispositions that regulate a particular domain, such as, in the case that concerns us, the mining sector. The theory of international regimes, one of the fundamental theories of international relations, refers to this concept as a particular form of international institution that establishes relations of cooperation among different states. Although this theory has been criticized by Susan Strange, we, nevertheless, can use it to enlarge the initial definition of regimes, to understand them not only as a collection of legal dispositions, but also as “sets of governing arrangements [that include] networks of rules, norms, and procedures that regularize behaviour and control its effects.”

Canadian and Quebec mining regimes initially institutionalize an ensemble of norms (i.e., standards of behaviour defined in terms of rights and obligations) and regulations (i.e., more specific prescriptions), then foresee political decisionmaking procedures and, finally, make the principles official, particularly that of free mining, which guide the definition of the preceding categories. Referring to the commercial regime of the World Trade Organisation (WTO), Émilie Revil underlines that “the theory of regimes
reveals how the principles are a central component of regimes. The principles of economic growth, of competitiveness and of trade liberalization are important for the very identity of a commercial regime; they define, with norms, its nature.”

Regime principles depend, in turn, on fundamental values whose identification would be essential, according to Susan Strange’s analysis, to an understanding of the distribution of power conferred on the actors by the regimes. This distribution of power is not unconnected to the processes by which regimes tend to project particular political identities onto the actors affected by their operationalization. David Szabowski defines political identity as “the kind and degree of political recognition that is conferred by a legal order on those who are subject to it.” Thus, these identities could correspond at the same time to those of autonomous political actors, and, contrarily, to those of passive subjects. These differences correspond to different degrees of political recognition that are quite distinct for different actors, and give rise to specific power relations among them.

As Gérard Kebabdjian suggests concerning the question of the transformation of regimes: “If the rules [or regulations] and procedures [of decisionmaking fundamental to a regime] are modified while the principles and norms remain the same, one is justified in arguing while the regime has not changed because its fundamental philosophy remains identical.”

This analysis, which springs from the theory of international regimes, will be useful for our understanding of mining regimes, their foundation, and evolution.

Structure While the theory of international regimes belongs to the orthodox branch of IPE, this analysis comes more from the heterodox branch, which proposes adopting a perspective that places the emphasis on the dynamics created by actors, and relies not only on the study of regimes, as such, but also on the negotiation processes that underlie their establishment and in which lies their potential for transformation. According to this conceptualization, states do not represent the only entities of the international system with authority, and their strategies are not independent of those promoted by other actors, such as transnational corporations, equally capable
of producing norms that orient the structure. Thus, it appears pertinent to look into the power relations (and negotiations) that exist among actors participating in the dynamics implicit in the structure of the mining industry in a more global manner in which the nature and influence of mining regimes on these power relations therefore becomes a factor of analysis among the others.

Susan Strange defines the notion of structure as a specific power framework in which the negotiations among competing actors in confrontation operate in the contemporary economic system with a view to imposing their preferences. A structure will consequently establish, at a given moment and within a particular field of the IPE, the modalities governing the exercise of power by the different actors. Strange, therefore, situates the problem of regulation beyond the level of the state (and the regimes that it defines) and at a level that can encompass the different power relations observed inside structures. Here, we propose to examine the Canadian mining industry as a distinct structure, anchored in a national context, but permeable to international dynamics, which involve a varied range of actors and give rise to the exercise of precise and constantly evolving power relations.

**Structural Power** Such power relations will be examined in their structural form, as proposed by the IPE’s heterodox branch. Structural power refers to the power of an actor to fashion structures and to shape the rules of the game in which the behaviour of the other actors subsequently takes place. Strange proposes a definition of power that is “the most global possible,” understood as “the ability of a person or group of persons so to affect outcomes that their preferences take precedence over the preferences of others,” which refers to a certain diffusion of power, in both its origin and its effect. The concept of structural power may be contrasted with the traditional conceptualization of power promoted in international relations, which depends more on a relational dynamic (i.e., the capacity of the actor, through mobilization of specific means, to directly modify the behaviour or preferences of another actor or to force the latter to act according to his will or interests). Structural power can be intentional or not, and is not necessarily a result of deliberately defined strategies. Thus,
the heterodox approach does not foresee a pre-established hierarchy among the actors, which would be based on their respective capacities, but rather recognizes the expression of multiple and changing power relations among them:

Each economic relation is characterised by a distribution of powers and equilibrium of forces among the participating actors ... All these negotiations are carried out within an economic structure (the state of the world) and a given political structure (the rules and laws in force), but there is an interaction between those who define these structures and those who negotiate in a particular area.23

Structural power, therefore, refers not only to the capacity of actors to create structures, but as well, and, through a double movement, to the potential offered to the actors by the structures so that, in their turn, they participate in the transformation of these same structures in an evolving dynamic.

Values The influence or capacity to shape structures occurs in large part by the promotion, at their core, of fundamental values.24 While numerous currents of political science refer to the concept of values, our reference to the domain of heterodox political economy, as developed by Susan Strange, leads us to treat the fundamental values present in the structures we analyze in discursive terms that aim to reinterpret the relations of power present in these structures. The structures, as well as the actors, may be seen in this perspective as the bearers of values, the sharing of which plays, according to Chavagneux, a central role in political action. “Referring to Bertrand de Jouvenel and Hannah Arendt, Strange defines political action as the aggregate of wills in the service of a common objective in which the hierarchy of values and their distribution are shared.”25 Considering that “politics is inseparable from values, since political actors use authority to resolve value conflicts,”26 the analyst should be able to make explicit, for each negotiation that takes place in a structure, the “preferences in terms of values” held by the different actors concerned. While the actors use their structural power in order to “contribute to the emergence of issue areas in order to be able
Defend specific interests,” in this manner they seek to defend an ensemble of values that are specific to them, and which, in turn, have a determinant effect on their structural power.

**Evolution of the State’s Roles** For Susan Strange, the upheavals observed since the end of the 1970s in the four global structures of IPE that she identifies have led to fundamental changes in world affairs. In contributing to the increase in power of new multinational actors in the private sphere, they have resulted in reducing the autonomy and authority of the state, as well as its capacity to influence these same structures. Owing to the priority accorded to the values of autonomy, flexibility, and freedom of market forces, as promoted for example in the commercial regime of the WTO mentioned above, the evolution of the distribution of structural power has shifted to the advantage of these private actors, particularly transnational firms. In a book published in 1991 with John Stopford and John S. Henley, Strange describes the effects of the growth of foreign direct investment on the structural power of states: “States’ positive power to harness internal resources is decidedly constrained when they try to influence where and how international production takes place. They find they cannot direct; they can only bargain.”

In *The Retreat of the State*, Strange further develops the consequences of this new equilibrium in relations between states and companies, and reaches the conclusion, as the title of her work indicates, that it creates an asymmetry, a weakening of the state’s power to the benefit of companies. Chavagneux further defines the author’s position as follows: “The political authorities of the state have lost power in the face of international economic actors, not that public decisionmaking belongs henceforward to private decision, but the means by which public actors introduce stability and a little equity in the system can be questioned by private actors.”

On the basis of these observations, we are now in a position to adapt this body of thinking to the specifics of the mining industry, but also to broaden the perspective in order to look into the active role of the state in these interactions. In examining the redistribution of authority in the production of norms among private and public, national and transnational actors
in a globalized world, David Szabowski sheds new light on these issues.

Using the example of Peru, Szabowski demonstrates that states that are rich in metals and minerals face (and have faced, since the beginning of the 1990s) contradictory pressures that aim, on one hand, to open up the economy to foreign investment (i.e., external pressure, linked to dominant values in the structure of industry and to competition that accompanies the acceleration of liberalization) and, on the other hand, to satisfy local social demands (i.e., internal pressure). In the face of the constraints imposed by these contradictory pressures, states tend not so much to withdraw, but rather to develop complex regulation strategies that allow them to preserve their legitimacy. These involve the formal granting of rights to mining investors via the regimes that they put in place, proceeding subsequently to an informal delegation or redistribution of part of their local regulatory authority and responsibilities to transnational mining enterprises (notably that which relates to social mediation). Szabowski qualifies this strategy, which illustrates problems pertaining to a very specific time period, as the selective absence of the state from certain key areas of regulation concerning mining investment (in particular, conflicts with affected communities). “While the state plays a clear regulatory role in some areas, it operates through an indirect delegation of authority in others.”

Mining enterprises thereby inherit, according to our approach inspired by Strange, important structural power, while the function of regulation is either transferred upstream, not without consequences, to the transnational level (for example, voluntary corporate codes of conduct, World Bank standards, and so on) or towards new, informal, local regulatory spaces (for example, specific agreements between mining companies and affected communities). We are, therefore, able to observe the creation of new local and transnational legal regimes, whose parameters are defined on a scale beyond the national space, and which will have in turn, as Szabowski allows us to suggest, an important influence on the relations of power at work in the structure of the mining industry.

Before analyzing the recent evolution of the mining structure in place in Canada, a brief foray into the history of Canadian and Quebec mining regimes will shed some light on their foundations, as well as the values and
trends in the distribution of structural power that they have established among the actors concerned since the second half of the nineteenth century. This will help make clear that the asymmetry of power that our approach leads us to associate with the 1990s has deep roots in the history of Canadian mining.

**Mining Regimes in Canada and Quebec**

In order to identify the actors that take part in defining the power structure of the mining regimes in Canada, this section describes the foundations of these regimes, attempting to shed light on the values and principles that underlie the decisions of governments in drafting policies to govern mining development.

Since the second half of the nineteenth century, the privileged means of accessing and disposing of mining resources in Canada has rested primarily on the principle of free mining. While this principle has been applied in different ways, depending on the period and the region, it can be defined, in essence, as a series of measures that permit and even privilege free access to ownership and exploitation of mineral resources. In most contemporary societies influenced by Western law, the notion of free mining includes not only the possibility of freely acquiring ownership rights of the mineral resources of the territory, but also provides guarantees concerning the right to engage in exploration to seek out these resources, and, in case of discovery, the right to extract and use them. Thus, as Taggart observes:

> The free entry system consists of three interlinked rights: the right of entry onto lands containing minerals, the right to acquire a claim on those lands, and the right to go to a lease and produce minerals. Nonfree entry systems (e.g., a leasing or a concession system) give the state far more discretionary power in the process of deciding who will develop mineral resources and where.

On the basis of this remark, it can be suggested that by adopting the principle of free mining, governments in Canada have limited the discretionary power to which they are entitled in decisionmaking processes in the area of mining development.
Studies in Political Economy

**Historical Background on the Free Mining System** Application of the principle of free mining in Canada goes back to the earliest mining legislation enacted during the second half of the nineteenth century. Taking into account the socioeconomic and political contexts of the time mining regimes were established paints a telling picture of a power structure that, in many ways, remains essentially the same to this day. By looking back at the historical origins of the current situation, we also observe that this structure was built largely on a foundation of a British and French colonialist heritage and, more specifically, on the interests of the mining entrepreneurs themselves.

*The Heritage of Colonialism* Prior to the second half of the nineteenth century, there was no specifically Canadian mining policy, nor was there any specific legislation in this area. According to Paquette, there were mercantilist-like economic development plans put forward by the French and British colonial metropolitan powers. French and English administrators, whose primary focus was on the fur trade, gave little attention to the mineral resources of their North American colonies. Nonetheless, Canada's colonial heritage has left two indelible marks on its mining regimes: namely, the divisibility of surface rights (property rights) and subsurface rights, and the principle of the domanial nature of mineral resources (that is to say, ownership of mineral resources ultimately goes back to the state). By virtue of the latter principle, the state enjoys discretionary powers to manage resources in accordance with the values that it seeks to promote and the principles and objectives that may be determined by the state.

*Institutionalization of the Principle of Free Mining in Mining Regimes* As of the middle of the nineteenth century, as mining activity increased exponentially, provincial and territorial governments in Canada, for the first time, began enacting legislation to govern an emerging mining industry. Three laws seem particularly germane to this analysis: the *Gold Mining Act* of 1864, the *Acte général des mines* in Quebec (1880), and the *Quartz Mining Regulations* (1898) from the *Territorial Lands Act* for the Yukon and the Northwest Territories. The *Gold Mining Act* was the first law to institu-
tionalize the claim system as a means of appropriating Crown resources in United Canada. The claim would later become the favoured vehicle for free mining. Quebec’s *Acte général des mines* also instituted a series of measures that facilitated low-cost access to resources for mining entrepreneurs. This law, in a sense, institutionalized the principle of free mining in Quebec’s mining regime and, according to Paquette, would later serve as the linchpin of the province’s mining policy. In the Northwest Territories, the principle of free mining was instituted in the *Quartz Mining Regulations*, which served as the cornerstone for subsequent mining regulations. These mining regulations and laws were themselves drafted on the basis of other legislation that already existed, for example in British Columbia, Nova Scotia, and California, and in close collaboration with mining interests here and elsewhere. The regulations, standards, and principles established by mining entrepreneurs during the California gold rush had a determinant influence in this respect.

*The California Influence* While certain roots of the principle of free mining go back to ancient Greece, it is important to underline that the principle of free mining introduced in Canada in the second half of the nineteenth century was clearly inspired by the California gold rush experience of 1849. The gold rush began just after the Mexican-American War ended in 1848, and, for the first two to three years, California did not have any formal mining laws or territorial State government. During the same period, more than 40,000 miners rushed to the region in 1849 alone. The miners and prospectors found themselves in a legal vacuum with little to no governmental authority; they had to establish their own system of rules and laws to regulate their activities. This situation goes a long way in explaining the creation of a regime that had few constraints and was clearly very favourable to their interests. The possibility of entering lands and acquiring resources without state intervention, using the claim-staking system and according to the principle of the “first discoverer,” became the rule. The system spread, and, as Lacasse suggests, when it came time to introduce the first legislation, the American government found itself facing a fait accompli with regard to the practices set up by the miners, and it was obliged to
recognize them. These practices had gained such credibility that they were, in fact, translated into the Law of 1866, of which Article 1 states that “the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation.”

According to the same author, the system based on free and unilateral resources acquisition, which characterizes the Quebec mining regime, illustrates “the continuing influence of the philosophy of free mining which came from the gold rush in California in 1849.” The authors of the legislation of United Canada in 1864 and of Quebec in 1880 had no reservations about referring to the California model. As for the Northwest Territories, following the gold rush in the Klondike region in 1897, the articles of the Quartz Mining Regulations integrated, in the same way, several of the principles and rules of the California system. The influence of the California principle of free mining was therefore a fundamental component of the mining regimes in Canada.

The Values of the Free Mining System and Structural Relations of Power

The essence of the foundations of the mining regimes inspired by the principle of free mining and introduced into most Canadian provinces and territories at the end of the nineteenth century were to remain in place throughout the twentieth century. The approach privileged by the different governments was generally favourable to private investment and informed by a desire to stimulate economic growth. More recently, Lamontagne and des Nos have pointed out that the modifications introduced to the Loi sur les mines of Quebec during the 1990s in no way modified the past tendency for the state to “encourage the maximum amount of activity with regard to mining exploitation [and on the contrary aimed] to simplify resource allocation regulations [and mining rights and titles] to increase security of tenure.” Barton underlines the fact that the mining regime that was in force in the Northwest Territories also preserved its liberal and attractive character in conformity with the principle of free mining.

According to Paquette, the adoption of the principle of free mining in the nineteenth century resulted from the political objective to generate wealth “within the framework of the ideology of economic liberalism,” and
from the situation of dependence of the state vis-à-vis the capital, the technology, and the expertise of the private mining entrepreneurs.\textsuperscript{60} In this context, political decisionmakers were apparently very receptive to the arguments of the mining entrepreneurs,\textsuperscript{61} and consequently attributed to them a privileged political identity and considerable power in what Strange describes as structural relations of power. “What is the best way to ensure that people exploit our mining resources?” questioned Commissioner Flynn in June 1882. “It is to facilitate,” he answered, “the acquisition of mining rights and to give those with whom we deal perfect security in every single respect.”\textsuperscript{62} This position echoed the basic demands of the mining industry when the Mining Law in Quebec was approved in 1880.\textsuperscript{63} From that time on, the principles underpinning the framework of free mining, and in particular free access to the resource, the right to obtain a mining lease and to extract mineral resources in the event of discovery (with few or no restrictions/conditions imposed by the state) and security of tenure (that is to say, the protection of acquired mining rights) became central elements of most Canadian mining jurisdictions, and remain so. In summary, most provinces and territories in Canada share, to the present day, core elements of the free mining system, also sometimes referred as the free entry system.\textsuperscript{64}

Taken together, these principles refer, in turn, to a principle inherent in free mining: that the development of the mining sector is not only desirable, but a priority with regard to alternative uses of a particular territory.\textsuperscript{65} As Bankes and Sharvit note:

Free entry systems incorporate an ethic of development rather than an ethic of conservation. They begin with the presumption that all land is open for the potential development … since all lands are open for exploration and staking unless withdrawn from entry, this represents a default judgment that mining represents the highest and best use of the lands in question.\textsuperscript{66}

The priority given to mining activities, as encapsulated in the principle of free mining, was seen capable of offering the climate of stability sought by investors. As Szabolowski notes, in the context of the already high financial risks associated with the mining sector: “security of tenure and regulatory stability are of paramount importance” for mining investments.\textsuperscript{67}
Moreover, the right to enter lands and acquire resources without state intervention, and with the claim-staking system and the principle of the first discoverer (or first acquirer), conferred on the mining operator a considerable degree of autonomy and authority that is, in fact, unique compared to other economic sectors. According to Barton, “there can be no doubt that the free entry system is more completely designed to encourage mining activity than are other resource disposition systems.” The liberty of action attributed to the mining entrepreneur constitutes in itself a significant characteristic of free mining, and places in the foreground and gives importance to the political identity and values of the latter. In contrast, most Canadian jurisdictions foresee neither participation nor consultation on the part of affected communities when mining rights are issued (i.e., a claim or other rights). However, these rights attribute to their holders further rights, including those of access to the territory to undertake exploration activity, and, in case of a discovery and under certain conditions, to obtain the right to extract, mine, and exploit resources. The formal process of consultation and participation of affected communities is generally deferred to a more advanced stage of mining projects.

The delegation of authority to mining companies through the principle of free mining takes place as well to the detriment of the authority of the public administration. Referring to the experience of the Northwest Territories during the 1990s, Barton draws attention to the following points:

The leading feature of the free entry system is that government agencies do not have any discretionary power at all over the occurrence of mineral exploration, the location of claims, or the procurement of mining leases for production. Discretionary power over these matters does exist; but it is in the hands of the private sector explorationists and mining company who decide where to locate claims and apply for leases. This affects the work of the Crown land administrators very significantly, in their efforts to accommodate different land uses such as forestry, new parks, recreation, outfitting, wilderness or habitat protection. It affects the third parties who have interests in Crown land use.

Interestingly, in contrast to the situation in the Northwest Territories, the administrative services of the Quebec government have certain discre-
tionary powers and can, for example, proceed to expropriate a claim for “public interest” purposes. However, the interventions of the public administration, as well as the foundations of the regime on which these depend, appear to continue to be characterized by a hierarchy of values that remain dominated by the principle of free mining.

As suggested by Strange with regard to the relations between values and power, it appears that the priority accorded to certain values by the principle of free mining results in structuring the privileges of certain actors over others. Free access to the resource and the guarantee of the right to exploit constitute, according to Karen Campbell, “a key structural issue that contributes to the preferential treatment enjoyed by the mining industry.” The author notes that free mining “elevates miners to a form of extraordinary privilege,” while other groups of actors are obliged to evolve within regulatory frameworks set up according to norms, principles, and values dictated by that particular framework. In this regard, surrounding communities, and notably First Nations, are indeed affected by the structuring effects of free mining.

With regard to the situation in the Northwest Territories, Campbell observes:

The current system does not recognize or take into account Aboriginal Title and Rights. Current federal free entry laws do not require consultation with, or protection for, First Nations. Nor do they provide First Nations with a role in land use decisions or an ability to ensure that First Nations Rights and Title can be accommodated as required by recent court decisions.

The above illustrates how regimes based on the principle of free mining seem characterized by an asymmetrical power structure that has in the past, and continues to constrain and even restrict the negotiating space of local actors with regard to the process of debating the development strategy of their territory. By contrast, free access to the resource, security of tenure of mining rights, and priority of the latter as opposed to other rights concerning the use of the territory represent as many structural conditions that favour the interests of mining operators.

On the basis of these observations, we are now in a position to examine the extent to which these tendencies that characterized Canadian mining regimes have been perpetuated during the 1990s, in spite of the introduc-
tion of regulations aimed at harmonizing mining activities with the social and environmental concerns.

The Evolution of Mining Regimes and Emerging Regulatory Frameworks

If extraction of mining resources has been seen as a means of leverage for development since the mid-1800s, it was not until the late 1980s and early 1990s that noneconomic considerations were gradually introduced into mining regimes. In this section, we focus on the particular evolution of Canadian regimes over the course of this relatively recent period, and in particular, on the integration of new social and environmental values into these frameworks. We then consider the implications of these regime changes on the role played by the state in regulating mining investment in Canada. This approach will lead us, on one hand, to shed light on the new regulatory modes that emerged in this context and, on the other hand, to examine the possibility that these new regulatory modes play an active role in transforming the asymmetrical power structure that is the heritage of the free mining principle.

The Emergence of Social and Environmental Values in Mining Regimes

Although the mining industry was the target of the environmental movement in North America in the 1960s and 1970s, in particular in regard to acid rain, it was not until the late 1980s and early 1990s that environmental concerns and issues of sustainable development achieved real significance in debates on mining in Canada. On a nationwide and even worldwide scale, the increasing concerns with environmental issues, as well as growing recognition of the rights of Aboriginal populations on First Nations’ lands, consequently raised awareness of the need to harmonize mining activities with the social and environmental preoccupations of the context in which they operated.

The rise of such concerns, in light of the theoretical considerations set forth in the beginning of this analysis, provides evidence of the emergence in the structure of the Canadian mining industry of new values that could potentially conflict with those favoured up to that time in mining regimes, and illustrated by the principle of free mining. While development of the
mining industry, historically, has been promoted on the basis of principles of growth, prosperity, and freedom of access to the land, the increase in environmental concerns was likely to contribute to the erosion of the very foundations of the legitimacy enjoyed by this industry. In September 1992, the Mining Association of Canada (MAC) acknowledged the need for this organization to “win the trust of Canadians and show that it could function from a perspective of sustainable development in an ecologically sensitive environment.”

Similarly, in the early 1990s it was recognized that “the mining industry has served as a traditional pillar of the Canadian economy, yet it no longer engenders the same level of support from the general public and the government that it once commanded.” According to the dynamic process of regulation and legitimation described earlier, this trend made necessary certain adaptations by mining regimes so that they conformed to the issues and concerns of the day.

The institutionalization of social and environmental values built on respect for the environment and social justice in mining regimes took place gradually during this period in Canada. First of all, beginning in the early 1980s, some general tightening of environmental checks on industrial activity was introduced, in particular through enactment of new environmental laws and amendments to existing laws. Moreover, implementation and reinforcement of federal and provincial laws governing environmental assessment laid the groundwork for including social concerns and establishing the rights of citizens to take part in decisionmaking processes during the planning of major projects on territorial lands.

Subsequently, in developments more specific to the mining sector, in the middle of the 1990s the Canadian government found it necessary to update some environmental standards affecting the mining sector in the hope of improving the effectiveness of applicable regulations and harmonizing them with provincial measures, as well as to make public, in 1996, a new mining policy entitled Partnerships for Sustainable Development. Similarly, in Quebec, various bills were drafted in the 1990s with the aim of amending the 1988 Mining Act to ensure better environmental protection of affected territories. As for the Northwest Territories, a federal law, the Mackenzie Valley Resource Management Act, was enacted in 1998 to provide for “an integrated
co-management structure for public and private lands” in the region.89

Lawmakers during this period therefore developed a set of political and institutional structures and standards carrying new values aimed at improving the overseeing of the practices of the mining companies with operations in the country. While this new regulatory framework had a significant impact on the way mining projects were to adapt to a particular social and environmental setting,90 it also posed a new challenge for the state, as the privileged agent of the regulation and, indeed, for its very legitimacy. The latter, which had traditionally acted as an “associate” of the industry in developing the nation’s mining potential, was now required to oversee application of environmental standards as well as observance of the rights of Aboriginal peoples, as provided for in the 1982 Constitution Act and by other measures, including court decisions that were increasingly favourable to their claims.91 And yet, the possibility of such discretionary intervention, as we have seen, is extremely limited in the context of mining regimes based on the principle of free mining.

The Evolution of the Role of the State: Towards New Forms of Regulating Mining Investment

In an attempt to reconcile internal and external imperatives with which it is confronted, the state has tended to favour a flexible regulatory approach based on market mechanisms and other voluntary initiatives proposed by companies. By promoting methods such as these, the state is able to maintain its legitimacy with different audiences, while the free mining principle, enshrined in the regimes, tends to limit its discretionary power to intervene in the sector — notably concerning these audiences’ positions or the public interest.92

In spite of relying on frameworks that are more open to new concerns, the state appears, to a certain extent, to be absent from some key aspects of investment regulation. As shown at the beginning of this article, in Szabloski’s analysis, the state plays a clear role in regulating certain areas while operating through indirect delegation of authority in other areas.93 One result is that local responsibility for social issues — such as mediation of the, at times, conflicting interests of mining companies and Aboriginal peoples — is often passed along to private forms of regulation that are, in
essence, managed by the companies. The companies thus inherit a considerable degree of autonomy, informal regulatory authority, and, consequently, structural power.\textsuperscript{94} The state’s support for mining development in the 1990s in Canada, it would appear, was clearly grounded in a management strategy of selective absence.

As a consequence of this situation, establishment of direct relations between mining companies and Aboriginal populations came to represent a new axis of regulation and legitimation for the industry that tends to operate with only marginal involvement of government agencies, when these agencies are involved at all. These relationships are generally formalized through mechanisms ranging from nonbinding memoranda of understanding to Impact and Benefits Agreements (IBAs).\textsuperscript{95} IBAs “are signed between mining companies and First Nation communities in Canada in order to establish formal relationships between them, to reduce the predicted impact of a mine and to secure economic benefit for affected communities.”\textsuperscript{96} At any rate, increasingly informal forms of regulating mining investment are becoming more and more common\textsuperscript{97} in practice; the implications of this state of affairs merit further analysis.

\textbf{Impacts of New Modes of Regulation on the Asymmetrical Relations among Actors Involved — A Break with the Past or More of the Same?}

It is interesting to examine the evolution of mining regimes along with the new modes of regulation generated by these changes because such changes provide an opportunity, in line with elements of Strange’s analysis, of provoking a shift in the operability of these regimes — a shift that, should it prove verifiable, would likely lead to a new state of balance in the distribution of structural power entrusted to the actors involved. Several authors have already examined the implications of IBAs negotiated between mining companies and First Nations’ populations in regard to actual participation by these populations in the management of mining investment.\textsuperscript{98} In a similar manner as these studies, we propose to go beyond the results yielded by the IBAs to look at the structural conditions out of which these results emerge. While mining regimes in Quebec and Canada, historically founded on the principle of free mining, gave the positions of First Nations only secondary
status in decision-making processes, our analysis now leads us to examine whether integrating the measures that arose from the new values of the 1990s and the advent of relatively informal forms of regulation were able to offer these populations the leverage needed to endow them with meaningful structural power likely to give weight to their eventual contribution to defining the terms of these regimes and to making them operable.\textsuperscript{99}

To this end, certain specific conditions of the Canadian mining industry’s structure, identified above, lead us to question whether it is possible that the informal modes of regulation of mining investment that arose in the 1990s might lead to a new state of balance in the distribution of the structural power given to the involved parties. The experiences of several Aboriginal communities that participated in the negotiation of various IBAs with the mining companies tend to suggest that these new, innovative agreements were often signed according to the principles and within the frameworks provided either by the existing management structures of the territory and resources in the region concerned with mining development, or by the company itself, with little room to involve the population in defining the negotiation conditions.

This is, in fact, what we have observed with the process granting authorization that accompanied the diamond mine project of Ekati of BHP Diamonds Inc. in the Northwest Territories at the beginning of the 1990s. It is in the context defined by the \textit{Canada Mining Regulations} that the negotiation of IBAs with four Aboriginal groups of the region, as well as the public consultation held in the context of the environmental assessment, took place. The resulting regulations, which guaranteed to the claim holder the right to exploit the resources that were discovered, did not foresee a right to information, to consultation, or to consent by Aboriginal groups potentially affected by the future project at the time of acquisition of the mining rights and exploration rights.\textsuperscript{100} The principle of free mining on which these regulations are based suggests indeed that Aboriginal groups could not prevent any mining prospector from having access to the territory that they occupy\textsuperscript{101} (independent of the rights they hold on the territory, unless it is the object of a declaration of nonsurrender in the framework of the negotiation for the settlement of land claims).\textsuperscript{102} As stated by representatives of the...
Lutsel K’e nation with regard to the environmental impact assessment of the Ekati project, “although prospecting and mineral exploration has been taking place on our lands at Lac de Gras for several years, we were never consulted or informed about these events on our land. It was not until BHP/Diamet had decided to build a mine that they began to consult with us.”103 This nonetheless concerns a phase in the mining cycle that is crucial in determining the structural power given to the affected Aboriginal peoples as underlined by Shauna Qureshy: “The earlier that a First Nation can establish protocols and negotiate agreements with exploration companies, the better chance it will have of asserting some control over the pace and scale of mineral development.”104 Similarly, Ciaran O’Faircheallaigh suggests that, in the context created by the principle of free mining, “developers and the state usually retain the ultimate power to determine whether resource development proceeds and the broad conditions under which it will occur.”105

In the case of Ekati, it appears that the four Aboriginal communities that entered negotiations with the promoter were recognized above all as business partners, and not as the holders of rights of the territory where the project was proposed. Consequently, in spite of the fact that the recognition of Aboriginal rights and title represented one of the most important motivations for the local population to sign the agreements (and a clear objective, or even the foremost objective of the IBAs in their eyes),106 the scope of the negotiations was generally limited to economic questions. According to Qureshy, this tendency is largely attributable to the values put forward more generally by mining companies, which, by virtue of the structural power with which the legal framework provides them, define the rules according to which negotiation takes place. “I infer from companies’ desire to establish a ‘reciprocal’ business-like relationship with First Nations and their desire for more predictability that they believe a relationship premised on negotiating economic objectives would bring greater certainty than a relationship premised on negotiating political rights to land.”107

As a result, Galbraith suggests that “given that many of these [Aboriginal] groups decisively wish to govern their own land and resources, IBAs act as an unnecessary appendage and, to some extent, a barrier to reaching these larger goals.”108 In this regard, the values favouring autonomy and territo-
rial control to which these groups adhere were more or less put aside due to the structure of decisionmaking surrounding the Ekati project. The signatory Aboriginal groups were integrated into the informal regulatory process as stakeholders who were more or less proactive, holding interests — above all, economic interests — to be defended, not as actors holding rights (that is, as right holders). Their capacity to transform the asymmetric structure of power inherited in the existing regimes through their participation in direct negotiations with the mining entrepreneurs does not appear to have been reinforced through the creation of these new informal spaces for regulations.

On the basis of the theoretical considerations set forth at the beginning of this article, a regime’s rules and procedures may be amended without necessarily being transformed if the founding principles and standards of these rules and procedures remain intact. In the case before us, although the rules and procedures — in particular, environmental assessment procedures leading to the approval of mining projects — may have changed in line with emerging concerns, the principle of free mining was never challenged in Canada. We recognize that, in this sense, mining regimes remain, to a considerable extent, unchanged.

Due to the fundamental values inherent in the principle of free mining, as well as the structural conditions favourable to the interests of mining entrepreneurs that it instils (and which often privilege mining activity as a priority above alternate use of the territory), this principle, in and of itself, tends to compromise true expression of competing values. For example, the integration into the regimes of the values associated with the needs of environmental protection and consideration of the positions of First Nations peoples might imply that, in certain cases, the decision not to mine a project might be considered. However, such an option remains practically unthinkable from an economic standpoint and inadmissible in the free mining mindset in view of the fact that, normally, states cannot refuse the right of a mining entrepreneur to mine a discovery if the basic preconditions are met. In the case of Ekati, the legitimate concerns of Aboriginal groups with regard to the prior clarification of titles and rights on the land identified for the mining project through the rapid settlement of land claims —
concerns that were, in fact, repeatedly formulated during the approval process of the project — were not taken into consideration due to the government decision to grant, without further delay, its conditional approval for the project. In this regard, Barton recognizes that, in view of the system for granting mining rights on the basis of the free mining principle, “there is no opportunity to impose conditions upon the grant of a mining claim to modify the manner in which it is used, for example to take special measures to protect wildlife values in the area where it is located, or to ensure compliance with land claims policies or training and employment policies.”

With regard to the evolution of the regimes, several authors have noted the prominent influence of the preoccupations based on rationalization and economic performance in the processes of regulatory revision introduced in the 1990s, which were nonetheless carried out with the stated purpose of ensuring better environmental protection of the territories affected by the deployment of mining projects. In Quebec, for example, amendments to the Mining Act during the 1990s aimed, in particular, to promote “legislative [and] regulatory measures to ensure restoration of mining sites once they had been shut down for good,” but also to implement actions designed to develop “dialogue with industry representatives … to the accelerate start-up of production deposits while diversifying mineral production in Quebec.”

At the time, the state’s objective was to promote a sustainable mining industry and address the aspirations of affected groups while remaining, first and foremost, prosperous and competitive. Reconciliation of these two major objectives provides a telling illustration of the predicament (as David Szabowski called it) facing most states with high mining potential at the beginning of the 1990s. In the case of Canada, the new situation created by advancement of social and environmental concerns came to light in a context of economic recession, growing transnationalization of the industry, and the emergence of new producer nations, in particular in the South. The imperatives of competitiveness, combined with the growing dependence of governments with regard to private mining entrepreneurship (e.g., capital, technology, expertise), all helped justify the permanency of the principle of free mining in mining regimes, and, consequently, were decisive in determining the ways in which social and environmental values were
institutionalized, as well as the position that these values would hold within these regimes.

As seen in Strange’s work, the values present within a structure may become conflictual and be relegated within a hierarchical structure that is revealing of the state of balance reached in the negotiations at play in this structure. Based on this analysis, we suggest that, despite the adoption of innovative principles, the constraints imposed by the hierarchical ordering of values present in the regimes clearly influenced the negotiations at work in the mining structure in Canada, while playing into the dynamics of power that were very likely not to serve the best interests of affected local populations. We may also, therefore, question the idea that such dynamics give rise to a true convergence of the interests of private mining investors and the interests of the affected regions and communities. In fact, the new forums for negotiation that seem to have opened up in the 1990s, insofar as they are key components of the process of regulation and legitimation of mining investment in Canada, appear to be limited to a large degree by the fundamental dynamics of these structures.

Conclusion On the basis of these observations, we recognize that the introduction of mining projects into a social and environmental setting, along with the issue of their contribution to development of the affected regions, have come to represent major political challenges in Canada and elsewhere, in terms of both regulatory matters and legitimation issues. After setting out the concepts at the basis of the theoretical approach used here, inspired by the work of both Susan Strange and David Szabowski, we have presented a brief profile of the historical processes that led to institutionalization of particular values in mining regimes in Quebec and Canada. We then measured the importance of the heritage left to us by the principle of free mining for these institutions, and its influence on the negotiations at play in the power structure of the Canadian mining industry. This led us to turn our attention to the nature of institutional arrangements, which, in the 1990s, laid the way for the emergence of new forms of regulation and legitimation of mining investment, such as specific informal agreements between Aboriginal groups and mining companies.
In the final analysis, we observed that these new forms of regulation, which have been emerging since the 1990s in the context of the “selective absence” of the state, are part of a structural framework that appears to continue to be highly informed by the values linked to the principle of free mining. The regimes passed down to us through historical trends in regard to contemporary social and environmental concerns were thus adapted in a manner, as Strange has suggested, that paved the way for a hierarchical ordering of the values present. And while the appearance of such concerns might have created the impression that new changes were afoot in the area of redistributing structural power in Canadian mining, this hierarchical ordering ultimately led to the establishment of conditions that enabled some of the parties involved to continue to hold a dominant position in negotiations that deal specifically with the structure of the mining industry to the detriment of other parties — primarily, affected Aboriginal populations. In the experiences on which our research is based, the populations concerned do not seem to have been able to inherit the power needed to influence the standards shaping the mining regimes, nor have they been able to draw power from the evolution of the regimes that might be wielded at a later time in the structure in order to promote new positions concerning mining development. On the contrary, it appears that, as a result of the asymmetry of power relations that seem to still characterize the Canadian mining industry, their claims must be expressed as part of a process that clearly influences the determination of which demands are receivable or which are not.

Notes

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The authors wish to thank John Bluethner and Mark Stout, the translators of this article, as well as Bonnie Campbell, Bruno Sarrasin, David Szabowski, and Djifa Ahado for their valuable contributions.


3. Canada, Standing Committee on Foreign Affairs and International Trade, Fourteenth Report: Mining In Developing Countries — Corporate Social Responsibility, 38th Parliament, 1st session (Ottawa: House of Common, 2005); Advisory Group Report, National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries (29 March 2007).

4. We shall use the generic term “positions,” which implies an active process that is specific to the actors within a political space in which they put forward different strategies that aim to defend what they perceive as their interests, determined in part by the values they hold. These notions are developed more fully in the first section of the article.


7. Szabowski, Transnational Law and Local Struggles, p. 45.


24. Chavagneux identifies, among the fundamental values that can be implemented, the following examples: prosperity and wealth, justice and equality, security, order and stability, liberty and freedom to choose (Chavagneux, “Peut-on maîtriser la mondialisation?,” p. 58).


32. Szabowski, Transnational Law and Local Struggles, p. 27.

33. For David Szabowski, regulation and legitimation represent “the key products of law” (Transnational Law and Local Struggles, p. 11). Regulation depends on two different, but complementary sociolegal phenomena: “1. institutionalized processes of norm generation and associated enforcement, and 2. informal processes in which norm generation and norm compliance are closely bound together through social interaction” (p. 12). In this way, regulation would take the form of regimes which, in order to function, must “project a sense of [their] own legitimacy into particular audiences” (p. 15). The process of legitimation would then represent “a continuous and often imperfect conversation between law-makers and law-takers in which ideology, attention and influence play important roles. Crucially, the process relies upon the existence of legitimating ideas among law-taking populations” (p. 20). Three potential sources of perceptions of legitimacy would exist among these audiences or populations: the extent to which a decision is favourable to their interests; the extent to which that decision seems to lead to a just result according to their values; and the extent to which the decision results from a “right process” (pp. 16–17). This last category would represent, according to Szabowski, the most important one for a legitimation process operating in front of large and complex audiences because it has the capacity of “generating legitimacy even where decisions may conflict with interests and values found within a target audience” (p. 20).

34. Szabowski, Transnational Law and Local Struggles, p. 27.

35. Szabowski, Transnational Law and Local Struggles, p. 28.

36. In this regard, Szabowski’s analysis has the advantage of calling attention to the local implications of the phenomena described earlier. In throwing light on this, he invites us to include a new category of actors in the study of the dynamics intrinsic to the structure of the mining industry in Canada i.e., local communities, for the most part Aboriginal, who are potentially affected by this type of investment.

37. Szabowski, Transnational Law and Local Struggles, p. 58.

38. The content of this section is in large part inspired by a Master’s thesis written by Ugo Lapointe, directed by Bonnie Campbell (UQAM Department of Political Science), and co-directed by Gregory Mikkelson (McGill School of Environment). This thesis is soon to be submitted to the UQAM Institut des sciences de l’environnement.


Jean-Paul Lacasse, Le claim en droit québécois (Ottawa: University of Ottawa, 1976); Denis-Claude Lamontagne and Jean Brisset des Nos, Le droit minier (Montréal: Éditions Thémis, 2005).

The British North America Act (a.k.a. the Constitution Act) of 1867, c. 3 (G.B.) gave provinces ownership of mines and minerals (art. 109), along with legislative authority in this area.

Western Canada (Ontario) and Eastern Canada (Quebec) from 1840 to 1867. Note that before confederation, the claim system was introduced for the first time in British Columbia’s Gold Fields Act in 1859.


Lacasse, Le claim en droit québécois, p. 17.


Lacasse, Le claim en droit québécois, p. 39.

Lacasse, Le claim en droit québécois, p. 40.

Lacasse, Le claim en droit québécois, p. 41.

United States, An Act Granting The Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes (1866); Quoted in Lacasse, Le claim en droit québécois, p. 42.

Lacasse, Le claim en droit québécois, p. 41 (our translation).

Lacasse, Le claim en droit québécois, p. 17.

Barton, Canadian Law of Mining, p. 149.


Lamontagne and des Nos, Le droit minier, pp. 14, 20 (our translation).

Barton, Canadian Law of Mining, p. 149.


“…We are free to say that, if the Government err at all at this juncture, it should rather do so on the side of the liberality to the mining interest than on any other, in view of the vast future benefits which the healthy development of that important interest under favourable conditions may be confidently expected to confer upon the Province as a whole.” (“The Chaudière Valley and Its Mineral Wealth,” The Morning Chronicle de Québec (1880), pp. 60–61, quoted in Paquette, “L’extraction de matières premières,” p. 149).


Campbell, Undermining Our Future, p. 1.


71. It is the Minister of Natural Resources and Wildlife (formerly Energy and Resources) who can exercise this right (*Loi sur les mines*, L.R.Q. Ch. M-13.1, a.82). This disposition, which was added to the *Loi sur les mines* in 1987, aims, it would appear, to put an end, according to Lamontagne and des Nos, “to the jurisprudence which had invalidated a judgment aimed at expropriating mining claims in order to create a park.” (PG du Québec c. Mines Utah Ltée. J.E. 85-49 (C.A.) which confirmed J.E. 84-466 (C.S.) (our translation)). However, to the knowledge of our research team, no Minister has used these powers over the last decades.


76. The elements of analysis presented in this section cover, in essence, the 1980s and 1990s as a key period during which trends observed in the area of regulation of mining investments in Canada underwent changes, the effects of which continue to be felt in the 2000s. It is not our intention to minimize the importance of developments and progress since the end of the 1990s. Rather, we wish to focus on the political processes that made these developments possible.


82. See note 33.

83. The process of reforming environmental legislation in Quebec and Canada was the focus of a great deal of criticism, which focused attention on the impact “deregulation” had in the field. See Paule Halley, “Le droit de l’environnement et la déréglementation au Québec,” in Laurent Lepage and Mario Gauthier, (eds.), *Déréglementation et nouvelle gestion de l'environnement* (Montreal: Institut des sciences de l'environnement, Université du Québec à Montréal, 1998), pp. 19–49; Laurent Lepage, “La déréglementation du secteur de l’environnement au Québec: changement ou continuité ?” in Lepage and Gauthier, *Déréglementation*, pp. 51–54. Other writers emphasized the effect of political pressure on the quality of the resulting environmental standards. See Revil, “L’OMC et le régime commercial multilatéral”; Laurie E. A'dkin, *Politics of Sustainable Development: Citizens, Unions and the Corporations* (Montreal: Black Rose Books, 1998). This deregulation, according to Simard and Lepage, was related to “the option of giving local actors responsibility for environmental management,” which was the
favoured practice beginning in the 1980s in Quebec (Simard and Lepage, "Gestion publique," p. 357 (our translation)).

84. We refer, first of all, to the amendment made in Quebec in 1978 to the Environment Quality Act (Loi sur la qualité de l'environnement (LQE)), for the purpose of giving "citizens the right to take part in the environmental assessment process on major projects" (Simard and Lepage, "Gestion publique," p. 354 (our translation)), and secondly, to the enactment in Canada, in 1984, of the Environmental Assessment and Review Process Guidelines Order (EARPGO), which had the objective of "studying environmental impacts — and social repercussions — of major development projects on Crown lands or sanctioned by the federal government." (Maureen G. Reed, L'évaluation environnementale et les revendications des peuples autochtones: mise en œuvre de la convention définitive des Inuvialuit (Hull, QC: Canadian Environmental Assessment Research Council, CEARC, 1990), p. 11 (our translation)). In 1995, EARPGO was superseded by the Canadian Environmental Assessment Act (CEAA), through which the public's right to take part in the assessment process was officially reinforced. See Commission for Environmental Cooperation (CEC), Le droit et les politiques de l'environnement en Amérique du Nord (Cowansville, QC: Les Éditions Yvon Blais, 1999), pp. 8, 18–20.

85. It is interesting to note that the environmental regime of the James Bay and Northern Quebec Agreement (JBNAQ, Ch. 23) made provisions, as early as 1975, for formal participation of the Cree and Inuit people in the environmental assessment process for mining projects in James Bay and Nunavik.


88. Assemblée nationale du Québec, Les travaux parlementaires. 34e législature, 1re session, Index du Journal des débats (Cahier no 115) (Québec, 24 avril 1991), p. 7559. Unlike the federal government, although the government of Quebec had no official overall sustainable development policy for the mining sector, it proceeded by amending certain provisions of the Mining Act, such as the requirement for a redevelopment plan for mining sites backed by financial guarantees, before mining operations could begin.


91. Boisselle, "De la consultation des peuples autochtones."

92. Barton, Reforming the Mining Law of the Northwest Territories, p. 46.

93. Szablowski, Transnational Law and Local Struggles, p. 28.

94. Ibid., p. 291.

95. Lapalme, La dimension sociale, p. 31.


98. Jason Prino, "Assessing the Effectiveness of Impact and Benefit Agreements from the Perspective of their Aboriginal Signatories" (Master's thesis: University of Guelph, 2007); Michael William Hitch, "Impact and Benefit Agreements and the Political Ecology of Mineral Development in Nunavut" (Ph.D. diss: University of Waterloo, 2006); Ciarán O’Faircheallaigh, Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-Up, and

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99. Beyond the heritage left to us by the principle of free mining, we observe that the political identity of these First Nations’ populations is also determined, in part, by the historical fiduciary relationship that developed between the Canadian state and the First Nations. Still in the 1990s, it seems quite apparent that this relationship generally meant that the involvement of First Nations in drafting development priorities was subjected to arbitration beyond their control, between determination of their interests and those of Canadian society at large, a state of affairs that limited the ability of First Nations parties to play an active role as autonomous political entities. See Christine O’Doherty, “Femmes autochtones et déterminants sociaux de la santé: le rôle du droit” (Master’s thesis: Université du Québec à Montréal, 1999).

100. Consultation generally takes place only when a promoter files a request for a permit in order to exploit the resource, and the project is considered likely to cause significant negative impacts on the area in which it takes place and/or to be the object of specific public concerns, as was the case for the Ekati project (Virginia Valerie Gibson, “Negotiated Spaces: Work, Home and the Relationships in the Dene Diamond Economy” (Ph.D. diss: University of British Columbia, 2008), p. 127). The right to obtain consent does not appear in Canadian legislation, although it is at the heart of current national and international debates concerning the integration of mining projects into the environment in which they take place, and summarized by the expression of free, prior, and informed consent (Steven Herz, Antonio La Vina, and Jonathan Sohn, Development without Conflict: The Business Case for Community Consent (Washington, DC: World Resources Institute, 2007), pp. 7–11.


102. It should be noted that the territories on which mining titles have been already granted are automatically excluded (grandfathered) from the zones that may be classified as nontransferrable or inalienable. According to Virginia Gibson, because it has been instituted as a system for decades, the principle of free mining would continue to favour the concept of terra nullius, which restricts the possibilities of achieving recognition of inalienable lands, such as sought by the Aboriginal groups of the Northwest Territories: “The onus is never on the federal government to prove that there are no relevant land claims in the region before mineral rights are granted. Rather, mineral rights are granted and sizeable chunks of land are then extracted from possible land withdrawals” (Gibson, “Negotiated Spaces,” pp. 161–162). In 1996, at the high point of the negotiations led by BHP Diamonds Inc. with the communities of the Lac de Gras region, it was estimated that only 1.5 to 2 percent of the lands had been withdrawn from mining exploration in Canada, of which 66 percent were due to land claims of Aboriginal groups that had been settled, or were being settled (Alex Ker, Shifting Ground: Aboriginal-Mining Industry Relations in Canada (Compass Consulting, 1996), Summary Report, p. 11).


104. Qureshy, Landlords and Political Traps, pp. 2, 86.


107. Qureshy, Landlords and Political Traps, p. 46.


114. Quebec, Commission permanente de l’économie et du travail, *Secteur mines Bilan et perspective du domaine*, Cahier no. 72 (Quebec, 24 April 1991), p. 3780. Alain Moisan examined, on this subject, the involvement of the private sector in environmental regulation of the mining sector in Quebec. According to this author, the structure of the regulatory measures promoted by the government for environmental protection in this sector were favourable to the emergence of negotiations and partnerships between government and industry to carry out the administrative and political functions of these regulatory measures. See Alain Moisan, “La politique environnementale dans le secteur minier au Québec,” (Master’s thesis: Université du Québec à Montréal, 2000), p. 95.

115. Szabłowski, *Transnational Law and Local Struggles*, p. 27.
