A Historical Institutionalist Understanding of Participatory Governance and Aboriginal Peoples: The Case of Policy Change in Ontario's Mining Sector*

J. Andrew Grant, *Queen's University*
Dimitrios Panagos, *Memorial University of Newfoundland*
Michael Hughes, *Queen's University*
Matthew I. Mitchell, *Saint Paul University*

Objective. Natural resource policy has been a constant source of conflict between "Aboriginal" and "non-Aboriginal" stakeholders in Canada. We employ a historical institutionalist analysis to examine the extent to which changes to the Canadian Constitution in 1982 and Ontario's Mining Act in 2009 enabled Aboriginal communities to become equal partners in participatory governance arrangements in mineral resource sectors. *Methods.* We analyze primary sources consisting of federal and provincial legislation and in-person interviews conducted across Ontario in 2010. *Results.* The existing Canadian mining policy paradigm, while under significant pressure, has not yet been displaced by a new policy paradigm that would better accommodate the interests of Aboriginal stakeholders. Consequently, Aboriginal peoples' mineral resource claims are likely to remain unresolved. *Conclusion.* We suggest how a policy paradigm that both improves Aboriginal-state relations and reduces uncertainty in the mining sector offers a promising political foundation for participatory governance and cooperative engagement between stakeholders.

*Direct correspondence to J. Andrew Grant, Department of Political Studies, Queen's University, 68 University Avenue, Kingston, ON K7L 3N6, Canada ⟨andrew.grant@queensu.ca⟩.
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Prior to the 1960s, very few political scientists expended their scholarly energies to understanding the relationship between "Aboriginal"[1] peoples and the Canadian state (Cairns, 2000:23). Moreover, even when Aboriginal peoples were occasionally included in such analyses, they were rarely treated as political actors with independent interests. In many ways, the Canadian Aboriginal politics literature was in its infancy. Yet the state of this literature has dramatically improved in recent years. Even though a critical mass of political scientists pursuing research in this subfield has yet to emerge, the existing literature has certainly demonstrated the various ways in which Aboriginal peoples are significant actors in Canadian and international politics. Scholars in this field have tended to concentrate on a select number of topics (e.g., Aboriginal rights and self-government), leaving many significant aspects of the relationship between Aboriginal peoples, non-Aboriginal Canadians, and the state unexamined. Canadian natural resource policy is one such area of politics.[2] This is indeed surprising given the multiplicity of ways in which federal and provincial policies on natural resources impact Aboriginal peoples. These policies are of particular significance to Aboriginal peoples as many natural resources—particularly mineral resources—are located in or near Aboriginal communities.[3] Furthermore, the exploitation of these resources can be a source of economic development. Canada's mineral production topped C$50.3 billion in 2011. A similar magnitude of economic activity is generated each year by mineral sector work, such as processing, transportation, and services. Along the same lines, natural resource policies are important to the Canadian state because resource extraction has a significant impact on governments' finances, settlement patterns, and other vital policy areas (e.g., international trade, health and safety, and the environment).[4] However, mineral extraction can also cause serious social, environmental, and cultural degradation. Given the Janus-faced aspects of such activity, policies relating to natural resources have been a consistent source of conflict in Canada precisely because of the important Aboriginal and non-Aboriginal interests at stake.

This article addresses the aforementioned lacuna in the literature by examining the extent to which changes to the Canadian Constitution in 1982 and Ontario's Mining Act in 2009 enabled Aboriginal communities to become equal partners in participatory governance arrangements in mineral resource sectors. Politicians have sought to influence the subsequent discourse

[1]Although this article employs the term "Aboriginal," we are cognizant of the diversity among and within First Nations, Métis, and Inuit groups. Hence, our use of the term Aboriginal reflects its usage in Canadian legal and legislative documents.

[2]Notable exceptions include Abele (1997), Hessing, Howlett, and Summerville (2005), Gordon (2006), McAllister (2007), and Slowey (2008).

[3]For example, 36 percent of Aboriginal communities are situated less than 50 kilometers from one of the primary mines developed in Canada (Hipwell et al., 2002:4).

[4]Natural resources are especially important sources of revenue for the provinces (Cairns, 1992). Our discussion of how mining-related activities are governed in Canada draws upon Panagos and Grant (2013).

through assertions of "empowerment" and "better opportunities" for Aboriginal communities in mining sectors, yet little headway has been achieved in practice. What accounts for the lack of progress on implementing a veritable form of participatory governance that would resolve Aboriginal peoples' mineral resource claims? Drawing upon a careful review of primary and secondary sources[5] obtained through field research conducted in Ontario, Canada in 2010—which involved extensive in-person interviews with key stakeholders from all segments of the province's natural resources sector—the article identifies the primary explanatory factor: the existing Canadian mining policy paradigm, while under significant pressure, has not yet been displaced by a new policy paradigm. As such, Aboriginal peoples' mineral resource claims are likely to remain unresolved, at least for the foreseeable future.

To demonstrate this claim, the article proceeds in five parts. Given our interest in depicting how a policy paradigm can influence institutions, which in turn structures political outcomes, the article begins with a review of the literature on institutionalism. Next, the article provides a historical institutional analysis of Canadian mineral resource policy with an emphasis on its impact on Aboriginal peoples. In the third part of the article, we illustrate how Aboriginal communities, the mining industry, and Canadian governments have responded to the exogenous changes that comprise the post-1982 constitutional landscape. We then reflect on the implications of stakeholder responses to Ontario's Mining Amendment Act for the potential emergence of a new mining policy paradigm in the province. Finally, we assess the policy paradigm's potential for improving the state of Aboriginal-state relations in Canada's mining sector. Through the use of a historical institutionalist approach, the article ultimately contributes to ongoing theoretical debates surrounding the emergence, stability, and shifting nature of policy paradigms. While our analysis reveals that the Canadian mining paradigm has yet to be radically altered, our conclusions nonetheless illustrate the significant ways in which institutions can be affected by exogenous and endogenous pressures—in this case via constitutional and legislative changes that serve to challenge existing policy paradigms.

[5]The primary sources consist of relevant provincial and federal legislation as well as semistructured, in-person interviews that were conducted in 2010. The 30 interviewees who participated in the study were based in different regions of Ontario and represented a wide range of key stakeholder groups in the province's natural resources sector, including representatives from First Nations and Métis communities and associations, local community representatives, nongovernmental organizations, mining companies, mining associations, mining support sectors (e.g., prospectors), and government officials. Portions of these interviews, some of which appear in this article, provide critical insights into the enduring nature of Canada's mining policy paradigm and the state of relations between those actors that are directly involved in the mineral resources sector. The insights provided by the interviews supplement our assessment of secondary sources (such as books, reports, and academic and media articles) and inform our institutional analysis of the impact of exogenous and especially endogenous processes on policy paradigms.

Institutionalism and Policy Paradigms

At the most basic level, an institution can be defined as a set of formal and informal rules that structures human behavior.[6] Within this definition, "human behavior" should be understood in relatively broad terms as encompassing people's actions, interests, and beliefs. Moreover, institutions have important ideational and material components (Thelen, 1999). As a result, institutions are products of particular geographies, histories, and cultures. Over the past several decades, political scientists have highlighted the importance of institutions, referring to them as "enduring features of political and social life" (Mahoney and Thelen, 2010:4) and "fundamental features of politics" (March and Olsen, 1989:16). For a growing number of scholars institutions are not "simple mirrors of social forces," but rather possess their own causal power (March and Olsen, 1989:18).[7] For those who hold this view, institutional analyses are essential tools for understanding political outcomes.

An institutional analysis generally focuses on the following questions. First, it examines the nature and scope of the impact of institutions on political outcomes. That is, it seeks to understand how institutions shape the behavior of political actors, policy outcomes, and policy-making environments. Second, echoing Hall and Taylor (1996:937), an institutional analysis identifies the mechanisms of institutional emergence, stability, and change. Even though many scholars agree that institutions are important, they disagree about the proper way in which to go about conducting institutional analyses. The result is that the literature on institutionalism is characterized by three different—but not unrelated—approaches that are referred to in the literature as sociological institutionalism, rational choice institutionalism, and historical institutionalism (Immergut, 1998; Hall and Taylor, 1996; Thelen, 1999).[8] Given the scope of our review of Canadian mineral policies, historical institutionalism is the most appropriate approach for our analyses.

In order to address the first constitutive question of an institutional analysis—that is, the nature of institutional impacts on political outcomes—we use an important concept: the "policy paradigm." While variations exist, we rely on Peter Hall's ideational understanding of a policy paradigm. According to Hall (1992:91), decisionmakers in complex fields of policy making are often guided by an overarching set of ideas that frame their perceptions of policy problems, goals, and solutions. Hall avers that "ideas about each of these matters" "interlock to form a relatively coherent whole that might

[6]According to Hall and Taylor (1996:938), the term "institution" can apply to a wide variety of things, ranging from national constitutions to bureaucratic rules regulating very specific activities such as labor relations and banking.

[7]Typically, scholars employing an institutional analysis do not rely solely on the causal forces of institutions to explain political outcomes; instead, as Hall and Taylor (1996:942) explain, institutional analyses "seek to locate institutions in a causal chain that accommodates a role for other factors, notably socioeconomic development and the diffusion of ideas."

[8]For a detailed comparison of these approaches, see Immergut (1998) and Hall and Taylor (1996).

be described as a policy paradigm" (Hall, 1992:91). In other words, a policy paradigm is a momentary, identifiable, static ideational phenomenon rendered from the intersection of ideas, perceptions, and discourses on policy problems, and subject to change as such ideational variables transform to produce a new point of intersection.

In what follows, we outline how two principles—"free entry" and "significant government discretion"—have, for over a century, consistently structured Canadian mining policies. In turn, we employ the concept of policy paradigm, which helps illuminate the nuances of mineral resource governance in Canada. The Canadian mining policy paradigm allows us to address the issues of institutional emergence, stability, and change because it depicts how institutions are shaped by exogenous factors and respond to endogenous pressures. According to Mahoney and Thelen (2010), analyses that focus on revealing the causal mechanisms of institutional persistence often overemphasize the role of exogenous pressures for change, and simultaneously underemphasize the role of their endogenous counterparts. Mahoney and Thelen (2010:7) conclude that the uneven emphasis is not unique to historical institutionalism:

> All three varieties of institutionalism ... provide answers to what sustains institutions over times as well as compelling accounts of cases in which exogenous shocks or shifts prompt institutional change. What they do not provide is a general model of change, particularly one that can comprehend both exogenous and endogenous sources of change.

Mindful of Mahoney and Thelen's insights, we are careful to outline the impact of both types of pressure on the Canadian mining policy paradigm, but place due emphasis on endogenous factors. In order to assess the effects of endogenous pressures on the paradigm, we examine the way in which Aboriginal communities, industry, and governments altered (or failed to alter) their behavior during this same period. This analysis illustrates that the institutional actors' reactions to the changed constitutional landscape have created significant stresses for the existing policy paradigm. Put differently, we contend that the Canadian mining policy paradigm constitutes a form of exogenous pressure that excludes consideration of the interests of Aboriginal peoples, thereby reducing participatory governance to little more than a buzzword.

Canadian Mining Policy Paradigm

In contrast to the United States, private land ownership in Canada does not extend automatically to ownership of subsurface minerals. In effect, the Crown (i.e., federal and provincial governments) "owns" nearly all subsurface minerals and other natural resources in Canada, which it can "sell" to interested private parties—a common practice in much of the world. Excluding those rare instances where both surface rights and subsurface mineral rights are privately owned, miners can obtain the latter—usually in the form of leases—from the

Crown by establishing claims (through a process known as "staking") and by performing various mining-related activities outlined in statute. As a result, in cases where the Crown retained subsurface rights, it could sell these rights to third parties such as mineral-exploration firms and mining companies. In turn, the owner of the surface rights would be compelled to provide access to third parties for purposes of exploration and—if perceived to be profitable by the subsurface rights-holder—subsequent mineral extraction. Under such circumstances, mineral development can proceed despite the objections of the owners or occupiers of the land (Chambers and Winfield, 2000:18–20).[9]

However, rather than a purely federal government enterprise, most mining-related activities fall under the jurisdictional authority of the 10 provincial governments, as each province has its own set of laws and policies dealing with mining.[10] Despite the multiplicity of mining statutes and regulations across Canada's provinces, numerous commonalities exist in terms of the approach to governing the sector. Moreover, all provincial mining policies are underpinned by two overarching principles—free entry and significant government discretion—which we describe in this section of the article. Given this high degree of policy convergence across Canada's provincial mining sectors, we can employ the concept of a "Canadian mining policy paradigm" as a useful analytical tool.

The Canadian mining policy paradigm is based on two main tenets (or principles): free entry and significant government discretion. The principle of free entry is mentioned in Canadian mining legislation as early as the mid-19th century. It has been interpreted as providing a guarantee to those engaged in mining-related activities important rights in terms of access to Crown lands, engaging in exploration and claim staking, and ownership of discovered minerals (Blue, 1984:5–7; Campbell, 2004:13–15). Free entry means that miners do not have to obtain permission before accessing public lands and engaging in certain mining-related activities unless access is expressly prohibited (either by government statute or regulation).[11] In contrast, individuals wishing to engage in other land-use activities (e.g., logging or hunting or tourism) generally have to obtain permission from the Crown before lawful access and land-use activities can occur. Significant government discretion, on the other hand, vests government officials with explicit authority in accordance with

[9]In recent years, such cases have given rise to heated debates, complaints, and protests in Ontario over the problematic nature of the province's mining legislation (e.g., surface landowner objections to third-party prospecting and mineral exploration on private lands), drawing national and international media attention (see Austen, 2008; Lawrence, 2008).

[10]The constitutional source of the provinces' legislative authority over mineral resources can be found in Sections 109 and 92 of the Constitution Act, 1867 and the Natural Resources Transfer Agreements of 1930, which obtained constitutional force by the Constitution Act, 1930 (Blue, 1984:5–6). In Canada's three territories, the federal government has devolved a significant amount of its responsibilities concerning mineral resources to the territorial governments (Campbell, 2004:15).

[11]Legislation pertaining to parks in Canada generally includes this type of express prohibition. The result is that miners would not be permitted to engage in claims staking or mineral exploration in provincial parks.

mining statutes to intervene in the mineral resource sector in order to protect the public interest. This principle gives government ministers discretionary decision-making power over a full range of mining activities—from the exploration phase to closure and rehabilitation (Bartlett, 1984; Sossin, 2006). In short, these principles work to reconcile the various and competing interests of these two important stakeholders. We suggest that, in the process, the existing paradigm in this policy-making area has created a substantial degree of legal certainty[12] in the mineral sector by clearly spelling out these stakeholders' rights. Mineral industry advocates view legal certainty as a vital ingredient in creating a favorable climate for investment, which is particularly important for this sector since mining requires a great deal of initial capital and is a very capital-intensive activity overall.

Though an institutional analysis of political outcomes, it is important to acknowledge that institutions do not exist in a vacuum, but rather are a product of history and context. Similarly, the mining policy paradigm exists within a specific context, one that supports reconciliation of similarly divergent and contradictory principles. As a governance principle, free entry privileges mining above all other uses and claims to Crown land. The 1906 legislation "confirmed the right of free entry on all Crown land, and reflected the view that Ontario should offer high security of tenure, should elevate mining rights over other rights [including Aboriginal claims] and should give minerals to the mining industry" (Pardy and Stoehr, 2011:5). This governance structure has helped to facilitate the development of an administrative (government side) and economic (industry side) culture over time that reifies the notion of mining as the highest priority and best use of Crown land. In speaking about the "government side," a representative of an environmental nongovernmental organization disclosed that "for us there was an operating framework that came out of the 1800s that really brings away the way the industry operates, and not only was there this legal framework that was totally inadequate, but there was a culture."[13] On the "industry side," the same stakeholder asserted that "there's a culture that these folks operate in and it is in many cases still that mining is the best and highest use of the land; we are providing a benefit to Ontario, you know we're going to give us some jobs, yes you should be giving us subsidies, yes you should be making our lives as easy as possible, yes ... all the land should be available for mining."[14] Thus while we can speak of the mining policy paradigm as having two elements, the principle of free entry—and the administrative and economic culture that it fosters—can trump the principle of significant government discretion.

[12]By "legal certainty" we mean laws and policies that clarify issues relating to the following: who can do what, where and when, as well as who owns what and under what conditions.

[13]Authors' in-person interview with an environmental nongovernmental organization representative, Toronto, Ontario, July 15, 2010. In accordance with our university research ethics guidelines, we have provided only a general descriptor of our interviewees in order to protect the identity of these individuals.

[14]Authors' in-person interview with an environmental nongovernmental organization representative, Toronto, Ontario, July 15, 2010.

Before proceeding to our discussion of the impact of the mining policy paradigm on Aboriginal peoples, a few reflections are required on what is meant by certainty in the mineral resources sector. Here, the definition of uncertainty might be thought of as changing over time. In pre-1982 terms, certainty can be understood as a set of predictable expectations held by industry regarding outcomes, specifically the primacy of free entry and the mining rights that extend from it. Since mining was the privileged use of the land in Ontario and free entry and discretion were part of the dominant mining policy paradigm, mining companies operated under conditions of legal certainty. However, legal challenges have introduced uncertainty through the legal (re)introduction of recognized claimants (Aboriginal communities whose land was stolen) and new, but as of yet not legislatively defined, duties to consult. As predictability and stability are important for commercial investment, establishing such conditions is one important evaluative criterion.[15] More importantly, the reconciliation of uncertainties within the mining policy paradigm also requires evaluation as to how well the amendments and the adjusted paradigm account for and accommodate Aboriginal rights and claims and consultative structures between Aboriginal communities and industry, as well as intergovernmental relations between Aboriginal communities and the province of Ontario. As such, "certainty" is perhaps best understood in the new legal climate as certainty of process rather than outcome.

Impacts on Aboriginal Peoples

The legal framework that enabled the development of the mining policy paradigm was the result of approximately two centuries of legislation dating back to the 1763 Royal Proclamation, which systematically eliminated First Nations control of and claims to the land. The Royal Proclamation subsumed First Nations' jurisdiction under British sovereignty, creating a paternalistic regime in which First Nations' rights and entitlements only existed at the pleasure of the colonial regime (Thobani, 2007:47). The creation of the reservation system and the category of "Indian-ness" culminated in the 1876 Indian Act. This Act contributed to a legal framework composed of various policies and pieces of legislation that facilitated the removal of First Nations from their lands and their concentration in specific reservations, effectively transferring control of the land to the colonial regime (Napoleon, 2001; Thobani, 2007:47–55). The Indian Act was further amended to create legal barriers to pursuing land claims cases in the courts by banning the solicitation of funds and use of band funds for land claims cases (Lawrence, 2004: 25–44).[16]

[15]This is particularly the case in the mineral resource sector where years and millions of dollars of investment are required before a mining site begins operation.

[16]A detailed history of First Nations experiences in the court system in the early 20th century can be found in Backhouse (1999:18–131).

From 1888 to 1973, the leading legal precedent characterized Aboriginal rights as usufructs, which viewed the Aboriginal interest in land in the following way: "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."[17] In 1973, the Supreme Court of Canada (SCC) handed down what has come to be known as the *Calder* decision. This split decision raised the possibility that some Aboriginal nations did in fact have rights to certain lands (i.e., that Aboriginal title may exist)[18] and was the impetus behind the creation of the federal land-claims process (Kulchyski, 1994:62). The impact of this decision, however, was limited and uneven. It did not lead to the successful settlement of Aboriginal claims—though some land claims were in the "pipeline," not a single claim had been settled before the patriation of the Canadian Constitution (Miller, 2004:264). And, even to this day, only a handful of treaties have been concluded between Aboriginal nations and the Crown (and this number remains small, especially in relation to the number of outstanding claims). Although *Calder* (1973) challenged the vision of Aboriginal rights advanced in *St. Catherine's* (1888), it did not offer an alternative unambiguous statement regarding the nature and scope of Aboriginal rights. In short, the colonial administration/Canadian state used the law to systematically eliminate all land claims and avenues of legal recourse.

The stability of the aforementioned free-entry principle must be considered as part of the production of a Canadian narrative that celebrates Canada's vast and empty land. This narrative has been romanticized by Canadian artists and politicians:

> From the paintings of the Group of Seven to the novels of Margaret Atwood, and to the iconic image of Prime Minister Pierre Trudeau in a buckskin jacket canoeing on a lake ... this relationship of real Canadians to the land, emptied of Aboriginal peoples except as symbolized relics, features prominently in the artistic and mythic representations of their nationality. (Thobani, 2007:60)

To the extent that Aboriginal populations were even acknowledged, such portrayals were productions of a Western-centric colonizing lens. As Thobani (2007:60) notes: "As part of nature, of the landscape, the question of [real Canadians'] sovereign right to proprietorship over the land became quite inconceivable in such narratives." This mythologizing of the land erases the colonial violence upon which it is premised. Moreover, this image of Canada as a vast and empty land opens the possibility to a nation of drawers of water and hewers of wood to draw on a similar narrative to exploit its natural resource wealth.

[17] *St. Catherine's* (1888).

[18] Six of the seven judges advanced that Aboriginal title existed; though three put forward that government action had extinguished the title of the Aboriginal nation involved in the lawsuit (Miller, 2004:154).

Prior to 1982, most Canadian federal and provincial governments denied the existence of Aboriginal rights (including rights to land and natural resources). Aboriginal rights were cast as usufructs, and Canada did not offer Aboriginal peoples an effective *legal* recourse for securing the enforcement of treaties or for protecting their rights.[19] Consequently, Aboriginal peoples had to rely on lobbying governments and politicians, moral persuasion, civil disobedience, and violent protests in order to press their claims. For many decades, these options produced limited results. Importantly, this legal environment contributed to a mining policy paradigm that excluded Aboriginal interests in the Canadian mineral sector.

In 1982, an Aboriginal rights provision, Section 35, was included in Canada's Constitution Act. Although Aboriginal rights and treaties had finally gained constitutional status, Section 35 was deliberately vague in order to mollify both supporters and critics of this legislation during constitutional negotiations in the early 1980s. Subsequent attempts at fleshing out the parameters of Section 35 failed, which meant that the SCC was asked to adjudicate matters relating to Aboriginal rights and treaties. Over the next two decades, the SCC began to clarify a number of important issues relating to the nature and scope of Aboriginal rights and Aboriginal title. In the cases of *Sparrow* (1990) and *van der Peet* (1996), the SCC found that a Section 35 (activity-focused) right is a "precontact" and integral Aboriginal custom, practice, or tradition that has not been extinguished by the Crown. At the same time, the SCC outlined a multistep process for identifying specific Aboriginal rights (*van der Peet*, 1996:paras.45–46; para.60) and what constitutes their prima facie infringement (*Sparrow*, 1990:39). In order to successfully pursue a Section 35 claim, Aboriginal claimants must identify a right and explain how it has been infringed. The SCC also went on to outline a two-step process for justifying the infringement of an Aboriginal right (*Sparrow*, 1990:40–46), which allows the Crown to behave in ways that contradict an existing Aboriginal right. In the case of *Delgamuukw* (1997), the SCC outlined the nature of Aboriginal title; that is, Section 35 rights that are land focused. Specifically, the SCC advanced that Aboriginal title is a right to exclusive occupation and use of traditional territories held collectively by Aboriginal nations that is inalienable (except to the Crown). The SCC's characterization of Aboriginal title makes it unique and the justices are quite correct in calling this proprietary title *sui generis* (*Delgamuukw*, 1997:para.111).

In another set of cases—*Haida* (2004), *Taku River* (2004), *Mikisew Cree* (2005), and *Rio Tinto* (2010)—the SCC found that under certain circumstances the Crown (i.e., the government) had a constitutional duty to consult

[19]In the period from 1973 to 1982, several Aboriginal rights claims did result in the beginning of a body of jurisprudence that would be further advanced after the introduction of Section 35. Culhane (1998:72–89) provides an illustrative example of this jurisprudence in the form of a review of Canadian white papers and legal tests from the 1970s.

and accommodate Aboriginal peoples. The SCC established that this constitutional duty is triggered when either an existing or a potentially existing (or as yet unproven) Aboriginal right may be adversely affected by Crown or third-party activities. In such cases, the Crown is obliged to engage in consultations with the Aboriginal rights-holders. Depending on the severity of the adverse effect, the Crown is subsequently required to engage in a number of activities ranging from merely providing the Aboriginal rights-holder with information to securing a settlement with the rights-holders (*Haida*, 2004: paras.43–44). Hence, the SCC's Section 35 jurisprudence has placed the mineral policy-making paradigm under a modest degree of pressure. Although the SCC has not spelled out exactly how Aboriginal interests can be accommodated, it has insisted that they cannot be ignored (Tzimas, 2005). On balance, given the dominant principles of the Canadian mining policy paradigm, it is still unclear how this "old" paradigm can be reconciled with the legal framework that has emerged over the past three decades.

As the above discussion reveals, the Canadian mining policy paradigm has utterly failed to address Aboriginal peoples' interests. Notzke (1994:2) argues that although "restrictions on Aboriginal peoples' access to natural resources are less blatant" now compared to the past, this segment of the Canadian population is "still operating in an 'environment of constraint.'" Other scholars have made similar observations concerning the legacy of Aboriginal peoples' exclusion from natural resource governance. As Hipwell et al. (2002:4) note, "[s]ince the industrialization of mining in Canada, Aboriginal people have had little say in decision making regarding mining near or on their ancestral lands, and have borne most of the costs and received none—or only negligible—benefits." These assertions explain why mining persists as a contentious issue in Aboriginal-state relations and provide the context for Aboriginal protests, civil disobedience, arrests, violence, and other disputes over proposed and actual mineral developments in Canada.

Two recent high-profile cases in Ontario highlight the enduring discontent concerning Aboriginal communities with respect to the Canadian mining policy paradigm. In 2006, a simmering dispute erupted into a confrontation between the Kitchenuhmaykoosib Inninuwug (KI) First Nation, located approximately 600 kilometers north of Thunder Bay, Ontario, and Platinex, a mineral exploration firm. In response to the unwanted drilling on their traditional lands, KI interrupted Platinex's drilling program and forced the company's workers to leave the area (Hiyate, 2006). As a result of this confrontation, a series of lawsuits were launched from each side, as Platinex attempted to sue KI for damages of C$10 billion (later reduced to C$10 million), while KI launched a countersuit of C$10 million against the company. The acrimonious situation between the company and KI continued to escalate over the next two years, resulting in the sentencing of six leaders of the KI community, on March 17, 2008, to six months in prison (later reduced to approximately 10

weeks by the Ontario Court of Appeal) for contempt of court after the members violated a court injunction requiring them to allow the drilling program to continue. In May 2008, Platinex also filed a lawsuit against the government of Ontario for C$70 million for damages and related costs.[20] Meanwhile, the second incident occurred when members of the Ardoch Algonquin and Shabot Obaadjiwan First Nations in eastern Ontario blocked Frontenac Ventures, a junior mining company, from accessing a prospective uranium site on what they claimed to be traditional Ardoch lands. The company then filed a C$77 million lawsuit against the First Nations groups (which, in response, launched a C$10 million lawsuit against Frontenac Ventures and a C$1 billion lawsuit against the government of Ontario). The dispute also resulted in the sentencing and fining of community leaders, including Queen's University professor Bob Lovelace in February 2008. Although an Ontario Court of Appeal judge later reduced Bob Lovelace's sentence to time served (3.5 months) and quashed the C$25,000 fine, and the government of Ontario was able to negotiate a compromise agreement[21] in November 2008 that would see the lawsuits dropped, the public backlash stemming from these incidents contributed to the growing pressure on the government to overhaul the province's Mining Act.

One possibility is that situations similar to the ones mentioned above will result in future litigation and prompt the SCC to provide further clarity regarding the constitutional right of Aboriginal communities to consent to mineral development on their lands. The changes to the Canadian Constitution in 1982 included a bill of rights (Canadian Charter of Rights and Freedoms, referred to as the Charter), which under the auspices of the SCC, has had a significant impact on Canadian institutions, federal-provincial relations, and areas of social and public policy (Hiebert, 2002, 2010; Clarke, 2006; Smith, 1999). Since 1982, the SCC has signaled its willingness to nullify or amend legislation it deems inconsistent with Charter principles. Some scholars argue that an active SCC coupled with parliamentary response represents a form of ongoing Charter "dialogue" between the two institutions (Hogg and Bushell, 1997; Hennigar, 2004; Hogg, Thornton, and Wright, 2007). For the legislative branch, this in turn has led to the development of a "Charter-proofing" process within the Department of Justice that evaluates and changes proposed legislation so as to avoid SCC nullification (Hiebert, 2002; Kelly, 2005). As Hiebert (2002:9) argues, court decisions have "influenced bureaucratic culture to accept Charter-proofing." What is interesting in this case is that the

[20] In December 2009, Platinex agreed to a proposal from the government of Ontario whereby the company would drop its lawsuits as well as relinquish its mining claims and leases to the property in exchange for a government payment of C$5 million. The agreement also reimbursed Platinex for expenses incurred during the mediation process and promised to pay the firm a 2.5 percent royalty on smelting in the event that mining occurs on the property in the next 25 years (Kirwin, 2009).

[21] Green (2008) and Ministry of Aboriginal Affairs (2008) outline the details of the agreement as well as some of the responses by stakeholders.

SCC-established duty to consult is contained in the Ontario Mining Act, but does not appear to alter the mining policy paradigm.

Political Actors' Responses to the Changed Constitutional Landscape

Aboriginal Peoples

Before 1982, Aboriginal peoples had rarely turned to the courts as a means of pursuing their interests.[22] Given the nature of the pre-1982 legal landscape, it is clearly understandable why the courts did not provide a promising venue for Aboriginal peoples. However, after 1982, Aboriginal peoples turned to the courts with increasing frequency. Lawrence and Macklem (2000:254) observe that between 1982 and 2000 there were "repeated judicial calls for First Nations and the Crown not to tax the institutional competence of the judiciary by excessive litigation of disputes, and instead to attempt to reach negotiated settlements." The constitutionalization of Aboriginal rights and treaties gave Aboriginal peoples the support they had lacked for so long. As a result, government laws and policies that infringed on Aboriginal rights can now be struck down by the courts, and courts can now impose remedies that governments, as well as third parties, cannot ignore. In short, there are now incentives for Aboriginal peoples to appeal to the courts. In light of the above-noted changes to the constitutional landscape, Aboriginal peoples have come to embrace the new opportunities afforded them by the courts—namely, the ability to litigate a rights claim in court—making it potentially costly for governments and industry to ignore Aboriginal interests in land and mineral resources. This new cost, in turn, represents a significant strain on the existing mineral policy-making paradigm.

Mining Industry

Some members of the mining industry have responded to the post-1982 legal realities by negotiating directly with Aboriginal nations and striking Impact and Benefit Agreements (IBAs), which are akin to private contracts and hence exclude the Crown. IBAs commonly contain nondisclosure clauses—especially regarding provisions for various payments, portion of profits, and employment positions allocated to the Aboriginal nation (Galbraith, Bradshaw, and Rutherford, 2007:28). Although more than 120 IBAs have been struck (Fidler, 2010:236), reaching a deal remains difficult. Many Aboriginal

[22]There are some important pre-1982 cases that involved Aboriginal peoples, such as *Calder* (1973). This case led to the creation of the land-claims process in Canada. The number of cases brought before the courts in the three decades after 1982, however, dwarfs the handful of cases heard between 1867 and 1982.

communities have mixed attitudes toward mineral development. Furthermore, as some scholars have noted, there are numerous concerns surrounding IBAs, such as their confidential nature, the distribution of IBA benefits within the community, and the possibility that these agreements serve as instruments for reinforcing domination and control over Aboriginal communities (Fidler and Hitch, 2007; Caine and Krogman, 2010). Consequently, the prospects for IBAs to serve as inclusive instruments that accommodate Aboriginal interests are limited.

We adduce that IBAs place endogenous pressure on the mineral policy-making paradigm. In many respects, IBAs undermine both the principles of "free entry" and "government discretion." By providing alternative avenues for obtaining legal rights to engage in mining-related activities, IBAs "bypass" the free-entry system. Given the opaque nature of these agreements, there is also less certainty, as both Aboriginal communities and industry do not yet have a sense what the "new normal" is. Moreover, the secretive nature of IBAs makes it increasingly difficult for the Crown to protect the public interest, as government is not privy to the details of IBAs. Hence, while these agreements do provide Aboriginals and industry stakeholders with a means through which to meet the SCC's requirements to accommodate Aboriginal interests, they also reduce the Crown's capacity to ensure "government discretion" while undermining the practice of free entry that has been a central feature of the mining policy paradigm.

Governments

Although many in the mining industry have turned toward IBAs as a means of recognizing Aboriginal interests when mineral resources are at stake, there is also evidence to suggest that some members of the mining industry have also pushed for reforms in mining laws so as to improve the legislation governing mining. This is indeed the case in Ontario where industry leaders demonstrated significant support for overhauling the provincial Mining Act.[23] Owing to widespread concerns and complaints about the province's antiquated mining legislation, Premier Dalton McGuinty's government passed Bill 173, the Mining Amendment Act, in 2009. According to the government of Ontario (2009): "The Bill makes numerous amendments to the Mining Act relating to prospecting land, staking mining claims, disputing claims, assessment work, surface rights owners, exploration work, diamond mine royalties and consultation with Aboriginal communities." The Act includes several clauses that explicitly mention Aboriginal peoples. Crucially, Aboriginal and treaty

[23]This sentiment was voiced by several interviewees from mining companies, mining associations, and mining support sectors during in-person interviews conducted in Sudbury, North Bay, and Toronto, Ontario, in 2010.

rights are recognized in the statute—the *first* provincial legislation of its kind in Canada to do so. Section 2 of the Act reads as follows:

> The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment. (Mining Amendment Act, Government of Ontario, 2009)

This section of the Act seeks to modify the mining sector in Ontario so that it is consistent with Aboriginal and treaty rights, as well as other public goods. To that end, the Act creates a dispute-resolution process for Aboriginal-industry conflicts; it provides for the removal of important Aboriginal cultural sites from mineral development; and it requires notification and consultation for certain exploration and mining activities on Aboriginal territories.[24] In the remaining sections of this article we examine and analyze the basic provisions in Bill 173 in the context of free entry, Aboriginal rights, and the duty to consult. In so doing, this discussion serves to illuminate some of the core elements of the new legislation while revealing the enduring problems embedded therein.

The Ontario case suggests that the government has responded to the post-1982 legal environment by recognizing Aboriginal and treaty rights and its duties to Aboriginals in its provincial mining legislation. We argue that the government's decision to revise the province's antiquated mining legislation is indicative of endogenous processes at work in challenging the otherwise entrenched mining policy paradigm. And yet, while these efforts have fundamentally attempted to include Aboriginal interests in policy making in the mineral sector, the two underlying principles of the mining policy paradigm—free entry and significant government discretion—have not entirely disappeared. Rather, free entry and discretion remain embedded in the Mining Amendment Act. Free entry is even mentioned in the section that recognizes Aboriginal and treaty rights. Thus, it would appear that the government of Ontario is essentially trying to stretch the mining paradigm to encompass Aboriginal rights and the duty to consult and accommodate. In the following section, we examine this issue by considering stakeholder responses to the Mining Amendment Act. This discussion ultimately enables us to analyze prospects for the emergence of a new mining policy paradigm in Ontario and offer some conclusions about the mining policy paradigm's potential for improving Aboriginal-state relations in the mining sector in the final section of the article.

[24]The precise details of these measures are not spelled out in the Act itself. These are to be outlined during the regulatory phase of the legislation. That is, the details will be clear once all of the Act's regulations are concretized.

Ontario's Mining Amendment Act: Prospects for the Emergence of a New Mining Policy Paradigm

Although the Mining Amendment Act has been heralded by numerous stakeholders in Ontario's mining sector as a radical improvement from the previous legislation, concerns remain over a number of elements in the Act. First and foremost, it is important to remember that the Mining Act remains a work in progress. Although some regulations were introduced on January 1, 2011, many of the new regulations and policies related to the Act will be phased in over the next several years. Thus, it is fair to say that with respect to the Act, the "devil is in the details." However, what is certain at this stage is that the most contentious issue with respect to the revised Act is connected to the principles of free entry and significant government discretion. More specifically, there is a great deal of concern about the government's decision to include these principles in the amended legislation.

In their review of the changes to the Mining Act, MiningWatch Canada (MWC), a prominent environmental nongovernmental organization, expresses explicit concern over the presence of Crown discretion in the new Act. In essence, MWC argues that the high degree of ministerial discretion is an overarching aspect of Bill 173 that is highly problematic. According to MWC (2009:3):

> An unacceptably high degree of Ministerial discretion is found in most aspects of the proposed amendments. From the very beginning of the mining process the Minister can give consent to staking in areas that would otherwise be off limits, and even if staked without Ministerial consent the prospector may then seek consent retroactively (Section 29). This type of discretionary approval re-appears again and again weakening the amendments and raising concerns about transparency and the potential politicization of the planning and decision making process.

While this is but one example of the concern over discretion in the new Act, it nevertheless points to the tension in Ontario's contribution to a new mining policy paradigm. Ministerial discretion could prove to challenge or contradict Aboriginal rights to be accommodated and meaningfully consulted, if government is able to simply override Aboriginal interests and or decision-making processes. This aspect of the new Act could prove to be destabilizing to the new mining policy paradigm.

Perhaps the most serious concern in Bill 173 (2009) relates to the first dominant principle in the mining policy paradigm: free entry. As many stakeholders indicated in our interviews, the notion of "free, prior, and informed consent" is conspicuously absent in the new Mining Act. This is a particularly alarming issue for many First Nations, who have adamantly argued that First Nations must have free, prior, and informed consent before any activity can take place in their traditional territories. This is a point echoed by Nishnawbe Aski Nation (NAN) Grand Chief Stan Beardy, who states: "Free, prior and informed

consent means that no prospecting, staking, exploration, or mine development can proceed without a written agreement in place with the First Nation.... That is the standard expressed in Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples. That is the standard we expect Ontario to meet" (NAN, 2009). Fundamentally, this means that Aboriginal communities want the option of saying "no" to a prospective development. Although the Act attempts to incorporate Aboriginal consultation in the legislation, there is much concern over the vagueness surrounding "consultation" in the Act, as many First Nations communities have argued that the province needs to institutionalize "free, prior, and informed consent" for affected First Nations. As noted by MWC (2010), "if consultation is to be meaningful then communities must have the right to say no to projects they determine are not in their interest. There is nothing in the new act that requires consent or recognizes First Nations' right to say 'no,'" largely owing to the fact that the details on the requirements for consultation will be determined through the development of the regulations under the Act. Thus, while the new Act purports to promote participatory governance in the mining sector and respect Aboriginal rights and the duty to consult, the mining policy paradigm may struggle to achieve this objective if free entry continues to trump Aboriginal rights to meaningful consultation.

As indicated earlier, one of the evaluative criteria for the new mining policy paradigm is its ability to accommodate Aboriginal rights claims and jurisdictional control, shifting the focus more to certainty of process than certainty of outcome. Coupled with this change, a move toward participatory governance in the mineral resources sector in which Aboriginal communities have the right to be consulted and to exert consent is required. However, the amended legislation includes principles of the original paradigm that run counter to this direction and the government's position on consultation remains vague. Although the government has intimated that its position on consultation will be developed during the forthcoming regulation-development phase, preliminary insights on the government's commitment to consultation—and by extension the prospects for generating a new mining policy paradigm—can be derived from a review of its legislative actions.

While extensive consultation was undertaken in the creation of Bill 173, the specific First Nations consultation component was not part of the initial government consultation plan, but rather was included after extensive lobbying by First Nations groups. As one First Nations leader told us, the government was "initially looking at a very tight timeframe and saying we're going to have these consultations sessions with stakeholders generally ... they identified half a dozen sites ... [for consultation] and that was it."[25] Notably, the proposed consultation process treated First Nations as just another stakeholder group that could be consulted as part of the half-dozen proposed site-specific consultations to be undertaken within a six-month window. First

[25]Authors' in-person interview with a First Nations leader, Ottawa, Ontario, July 13, 2010.

Nations representatives argued that they needed more of a role in the process to make it a joint undertaking that satisfied constitutional obligations and moved toward reconciliation and meaningful engagement with First Nations communities and their concerns. In response, a revised consultation process was eventually established with a First-Nations-specific process that satisfied some of the initial concerns voiced by First Nations representatives. In commenting on the "final product" of the consultation process—the Act itself—a representative with an influential First Nations organization noted, "I think what emerged was far superior to what was going to come out of the process that the government had designed and was simply going through the motions."[26] Though the government in the end established a more participatory and accommodating process, it was the result of extensive lobbying and not the initial process considered acceptable by the government. As such, this illustrates that the adoption of the new mining policy paradigm is a work in progress for the government of Ontario.

Conclusions

We have argued that despite an impressive expansion of the scholarship on Canadian Aboriginal politics in recent years, the topic of natural resource policy remains undertheorized. This article has sought to address this gap by conducting a historical institutionalist examination of the relationship between the state and Aboriginal groups in the mining sector. Following from the historical institutionalist perspective, this article suggests that while institutions structure and organize agential practices, the latter shape and reconfigure existing institutional frameworks. This approach has been applied to free entry and discretion in the mining sector as part of our analysis of major changes in Canada's constitutional landscape and recent legislative changes to Ontario's natural resource sector. Despite the recent efforts on the part of the government of Ontario to "engage" institutional actors in the revision of the province's Mining Act, our research reveals the entrenched nature of the Canadian mining paradigm that fundamentally undermines the interests, most notably, of Aboriginal peoples. In so doing, the article illustrates the rigidity of certain institutions despite the exogenous and endogenous pressures that threaten to destabilize these institutions.

As noted, while there has been significant change in mineral resource governance in Canada and Ontario, both legal/constitutional and policy related, these evolutions, in particular with respect to the development of regulations in Ontario's Mining Amendment Act, remain a work in progress. While endogenous pressure by Aboriginal communities has led to formal institutional changes and challenged the long-standing mining policy paradigm, there has

[26]Authors' in-person interview with an executive member of a First Nations representative organization, Ottawa, Ontario, July 13, 2010.

not as of yet been a significant paradigm shift into alignment with the spirit of the constitutional changes. This intransigence is attributed to the persistence of the mining policy paradigm and its exogenous pressure on mineral regulation.

The historical institutionalist account we offer in this article illustrates the need for cultural—not just legal—change for the mining policy paradigm and mineral resource governance to evolve to include and embrace participatory governance. With the maintenance of both pieces of the mining policy paradigm, free entry and discretion, current changes suggest that legal accommodation of the SCC rulings represents a series of legal and procedural "hoops" rather than a change in decades-old industry culture. Discretion, combined with the failed inclusion of provisions for free, prior, and informed consent, or, put differently, the actual power for Aboriginal communities to say "no" to mineral resource development, means that Aboriginal rights remain at the pleasure of the responsible ministry.

This article contributes an explanation of changes and relationships within and between agents and institutions in Canadian mineral resource governance. This framework opens further opportunities for research, specifically related to the question of change. Institutions and paradigms are products of particular contexts, geographies, histories, and discourses. Agents and institutions are mutually constituted, as we suggest, but are so constituted within and produced by the aforementioned ideational considerations. Similarly, the post-1982 legal context has not translated into significant political and cultural changes regarding the standing of Aboriginal land claims, nor has it erased the continued legacy of centuries of colonial history. Further examination of institutional change requires exploration of connection between the creation, evolution, and persistence of the mining policy paradigm and these ideational variables, as well as the continued unequal power relations between industry stakeholders, Aboriginal peoples, and civil society.

As depicted above, uncertainty continues to afflict Aboriginal groups and industry and civil society stakeholders, despite three decades of jurisprudence by the SCC and much-heralded revisions to Ontario's mineral resource legislation. Intervening factors, most notably the Canadian government's efforts over the past five years to marginalize the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), contribute to this atmosphere of uncertainty. When announcing its "support for" (rather than signing) the UNDRIP in 2010, the Canadian government emphasized that the agreement is a "non-legally binding document that does not reflect customary international law nor change Canadian laws" and that on numerous occasions "Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; [and] free, prior and informed consent when used as a veto."[27] In 2011, Canada (along with the United States, New Zealand, and Australia) tried to persuade the U.N.

[27]Aboriginal Affairs and Northern Development Canada (2010).

Commission on Sustainable Development's Working Group on Mining to have the right to "free, prior, and informed consent" removed from the UNDRIP.[28] These actions also illustrate the continuing tension between the old paradigm—at least as it relates to the federal level—and the development of a new policy paradigm of participatory governance that recognizes Aboriginal jurisdiction. This has important implications for the prevailing mining policy paradigm in terms of participatory governance in Ontario, leading to the potential for conflict rather than positive government-stakeholder relations. As such, the evolution of the mining policy paradigm from certainty of outcome to certainty of process remains in its early stages, while federal and provincial policies in the interim have appeared contradictory to the policy aims of meaningful consultation with Aboriginal groups as highlighted in the changes to the Ontario Mining Act. Ultimately, while government, industry actors, and Aboriginal groups attempt to resolve this tension in accordance with their respective interests, only a policy paradigm that improves Aboriginal-state relations in the mining sector and reduces uncertainty in the policy area can offer a promising political foundation for participatory governance and cooperative engagement between the three groups.

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[28]Union of BC Indian Chiefs (2011).

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