

Aboriginal Consultation for the Ontario Mining Act Modernization Process: Varying  
Perceptive on Whether the Consultation Process Works

By

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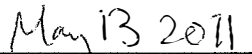
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## ABSTRACT

Attempts to engage Aboriginal peoples in resource and environmental management decision-making process, for the most part, have been characterized as tokenism (Bowie 2007). This has left Aboriginal peoples frustrated and disillusioned. This thesis uses a theory of civil engagement, Arnstein's (1969) ladder of citizen participation, as a framework to interpret the level of Aboriginal consultation conducted during the Ontario Mining Act Modernization (MAM) process. This case study gauged the current state of public participation practices by examining Aboriginal peoples' participation and influence in decision making. In August 2008 the Ontario Ministry of Northern Development Mines and Forests (MNDMF) initiated a consultation process to modernize the Mining Act. The MAM sought to find a balance between the wants of the mining industry, Aboriginal peoples, environmental organizations and private landowners. My case study focused solely on the consultation processes conducted with Aboriginal communities and organizations between August 2008 and December 2010. To gain insight into this process I did a documentation review and I conducted 26 interviews with Ontario political leaders, Aboriginal leaders, lawyers, elders, economic developmental officers and MNDMF staff. My analysis found the MAM Aboriginal consultation was flawed and I positioned the level of participation in decision making ranging from *Informing* to *Partnership* rungs on Arnstein's ladder. Arnstein's framework was not entirely compatible to judge Aboriginal consultation in Ontario. I added detail to the ladder to make it more pertinent for Aboriginal case studies in resource management. I provide recommendations to improve consultation processes, such as, setting realistic timeframes, addressing capacity issues and including Aboriginal peoples in designing the consultation process. Unfortunately, I am doubtful they will be instituted because of the different interpretations of treaties and a governmental lack of interest in power sharing. I believe until such time as the provincial government is prepared to make major systemic changes to how they interact with Aboriginal peoples, consultation processes will remain unsatisfactory from an Aboriginal and citizen engagement perspective. Consequently, civil activism and legal action will be options for Aboriginal groups in the push to change specific legislation.

**Area of Research:** *Arnstein's ladder, natural resource management, Crown's duty to consult and accommodate, Aboriginal consultation, Ontario, mining*

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## ACRONYMS

AIAI- Association of Iroquois and Allied Indians  
AFN- Assembly of First Nations  
AAFN- Ardoch Algonquin First Nation  
EBR- Environmental Bill of Rights  
ECO- Environmental Commissioner of Ontario  
EIA- Environmental Impact Assessment  
ER- Environmental Registry  
FN- First Nation  
GC- Grand Chief  
GCT3 - Grand Council Treaty # 3  
IBA- Impact Benefit Agreement  
KI- Kitchenuhmaykoosib Inninuwug First Nation (formerly Big Trout Lake)  
KI6 – Chief Donny Morris, Deputy Chief Jack McKay, Councillors Sam McKay, Darryl Sainnawap, Cecilia Begg and staffer Bruce Sakakeep of KI FN were found in contempt of court and spent over 2 months in jail as a result of the KI-Platinex conflict.  
MMAAC-Minister’s Mining Act Advisory Committee  
MAM- Mining Act Modernization  
MNO- Metis Nation of Ontario  
MVLWB- Mackenzie Valley Land and Water Board  
NAN- Nishnawbe Aski Nation  
NRM- Natural Resource Management  
NWT-Northwest Territories  
PDAC- Prospectors Developers Association of Canada  
PTO- Political Territory Organization  
OMAA- Ontario Ministry of Aboriginal Affairs  
OMNDMF- Ontario Ministry Northern Development Mines and Forestry  
OMNR- Ontario Ministry of Natural Resources  
OPA- Ontario Prospectors Association  
RCAP- Royal Commission on Aboriginal People  
RS- Revenue Sharing  
TEK- Traditional Ecological Knowledge  
TC- Tribal Council  
UOI-Union of Ontario Indians  
WMI-Whitehorse Mining Initiative

## TERMINOLOGY

Aboriginal people: “The descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people – Indians, Metis and Inuit. These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs” (INAC 2010).

Anishinabe: “Is what the Ojibwa people call themselves, usually translated into English as ‘the people’”(Casselmann 2011).

Cree: “A Native American people inhabiting a large area from eastern Canada west to Alberta and the Great Slave Lake. Formerly located in central Canada, the Cree expanded westward and eastward in the 17<sup>th</sup> and 18<sup>th</sup> centuries, the western Cree adopting the Plains Indian life and the eastern Cree retaining their woodland culture” (TheFreeDictionary 2011a).

First Nation: “A term that came into common usage in the 1970s to replace the word ‘Indian’, which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term ‘First Nations peoples’ refers to the Indian peoples of Canada, both Status and non-Status. Some Indian peoples have also adopted the term ‘First Nation’ to replace the word ‘band’ in the name of their community” (INAC 2010).

Indigenous: “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system”(United Nations 2004).

Metis: “People of mixed First Nation and European ancestry who identify themselves as Metis, as distinct from First Nation people, Inuit or non-Aboriginal people. The Metis have a unique culture that draws on their diverse ancestral origins, such as Scottish, French, Ojibway and Cree” (INAC 2010).

Ojibwa: “A Native American people originally located north of Lake Huron before moving westward in the 17<sup>th</sup> and 18<sup>th</sup> centuries into Michigan, Wisconsin, Minnesota, western Ontario, and Manitoba, with later migrations onto the northern Great Plains in North Dakota, Montana, and Saskatchewan” (TheFreeDictionary 2011b).

Status Indian: “A person who is registered as an Indian under the Indian Act. The act sets out the requirements for determining who is an Indian for the purposes of the Indian Act” (INAC 2010).



## DEFINITIONS

**PTOs (Political Territory Organizations):** (Also known as Political Territorial Organizations and Provincial Territorial Organizations). In Ontario the four major PTOs are Association of Iroquois And Allied Indians, Grand Council Treaty #3, Nishnawbe Aski Nation and Union of Ontario Indians

**Association of Iroquois and Allied Indians (AIAI):** “In 1969 was established primarily as a political organization to represent its member Nations in any negotiation or consultation with any level of government affecting the well-being of the member Nations as a whole. The Association currently represents eight member First Nations of status Indians in Ontario with a membership of 20,000 people. The First Nations include Batchewana, Caldwell, Delaware, Hiawatha First Nations and Oneida Nation of the Thames, Mississaugas of the New Credit, Mohawks of the Bay of Quinte and Wahta Mokawks. AIAI provides political representation and policy analysis in health, social services, education, intergovernmental affairs, Treaty research and tax immunity” (AIAI 2011).

**Grand Council Treaty #3** “is the historic government of the Anishinaabe Nation in Treaty #3 and is the political organization for the 28 First Nations in the treaty area. It operates under the mandate in which their direction of the leadership and benefit/protection of the Citizens are carried out by the administrative office of GCT3 to protect, preserve and enhance Treaty and Aboriginal rights” (GCT3 2011).

**Nishnawbe Aski Nation (NAN)** is a political territorial organization representing 49 First Nation communities in an area covering the northern two-thirds of the province of Ontario. The majority of the First Nations are signatories to Treaty No. 9, with a few signatories to Treaty No. 5. “Nishnawbe Aski Nation has a mandate to represent the legitimate socio-economic and political aspirations of its First Nation members to all levels of government in order to allow local self-determination while establishing spiritual, cultural, social and economic independence” (NAN 2011).

**Anishinabek Nation:** “The Anishinabek Nation incorporated the Union of Ontario Indians (UOI) as its secretariat in 1949. The UOI is a political advocate for 42 member First Nations across Ontario. The Union of Ontario Indians is the oldest political organization in Ontario and can trace its roots back to the Confederacy of Three Fires, which existed long before European contact” (Anishinabek Nation 2008).

**Tribal Council:** “A regional group of First Nations members that delivers common services to a group of First Nations” (INAC 2010). Within the NAN territory the Tribal Councils are Independent First Nation Alliance, Keewaytinook Okimakanak Council, Matawa First Nations, Mushkegowuk Council, Shibogama First Nations Council, Wabun Tribal Council, and Windigo First Nations Council.

**Matawa First Nations** is a Tribal Council with a membership of nine Ojibway and Cree First Nations communities in the Nishnawbe Aski Nation territory. Matawa First Nation communities are situated within the James Bay Treaty #9 and the Robinson Superior Treaty 1850 areas and consist of remote and road access communities with a total population of approximately 8000 people. The road access communities are Aroland, Constance Lake, Ginoogaming, Long Lake #58 First Nations, and the remote access are Eabametoong, Marten Falls, Neskantaga, Nibinamik and Webequie First Nations. Matawa First Nations provides policy and direction to all Matawa organizations and provides advisory services and program delivery to Matawa First Nations. They have other non-profit and for-profit corporations which assist the organization's guiding principles to support our Matawa First Nations to build strong and self-sufficient communities (Matawa First Nations 2011).

**Mushkegowuk Council:** "has the mandate to respond to and carry out the collective will of all Mushkegowuk members (Attawapiskat, Kashechewan, Fort Albany, Moose Cree, Taykwa Tagamou, Chapleau Cree, Missanabie Cree and Weenusk First Nations). They provide political leadership and are dedicated to providing quality, equitable and accessible support and advisory services to respond to and meet the social, economic, cultural, educational, spiritual, and political needs of First Nations, thereby improving the quality of life for their people" (Mushkegowuk Council 2011).

**Metis Nation of Ontario:** "Founded in the early 1990's, by the will of Ontario Metis, the Metis Nation of Ontario represents the collective aspirations, rights and interests of Metis people and communities throughout Ontario. The MNO has a democratic, province-wide governance structure.... It delivers a range of programs and services in the area of health, labour market development, education and housing, to approximately 73,000 Ontario Metis and other Aboriginal groups" (MNO 2011).

## CHAPTER 1: INTRODUCTION

Internationally, there is a trend for marginalized people to not be involved in natural resource management decision making that directly or indirectly affects them. This is the case for a majority of indigenous people around the world. Despite good intentions and efforts to include indigenous people through many different tools, including international declarations, national laws and policies, the resounding reality is that most are not involved in a meaningful manner (Baker and McLelland 2003; Bowie 2008; Sinclair and Diduck 2005; Whiteman and Mamen 2002). Nor do they have the capacity to challenge the *status quo*. The literature indicates many reasons and benefits to involve the public in decision making, such as strengthening of democracy and benefits of pluralism. Notwithstanding, the literature reveals that failed public involvement is the norm.

### PURPOSE AND OBJECTIVES

This study sought to examine a recent consultation process by interviewing participants, and evaluating its effectiveness in integrating Aboriginal people and their perspectives into new legislation regarding natural resource management. I employed Arnstein's (1969) classic theoretical framework on citizen participation as an evaluation tool. Arnstein's ladder, discussed in more detail in Chapter 2, has eight rungs that correspond to eight levels of participation and power sharing. As one moves up the ladder the level of involvement and influence increases.

My case study examined the Aboriginal consultation process for the Ontario Mining Act Modernization (MAM) from August 2008 to December 2010. This event was chosen as an indicator of the current status of Aboriginal involvement and influence

in decision making because it was a major recent Aboriginal-government event surrounding natural resource management and land rights. This event provided a unique opportunity to critique and analyse the level of Aboriginal participation in one of the most comprehensive Aboriginal-government consultation processes to date in Ontario. Moreover, this case study provided a chance to gauge how Aboriginal participation influenced decision making by comparing what proposed changes that Aboriginal people offered regarding Bill 173 (An Act to Modernize the Mining Act) to the actual amendments found in the new Mining Act. These observations show how much Aboriginal people were able to influence the final decision and, thereby, demonstrate a location on the ladder of public participation.

The main objectives of my research are:

- 1- To explore the major themes deriving from Aboriginal and government perspectives.
- 2- To evaluate the MAM Aboriginal consultation process, including identifying strengths and weaknesses and interpreting the effectiveness in relation to Aboriginal participation.
- 3- To place the MAM Aboriginal consultation on Arnstein's ladder based on the data from the first two objectives.
- 4- To provide recommendations from the data that might facilitate Aboriginal movement up Arnstein's ladder to a higher level of involvement to promote citizen engagement in a democratic society.

To get a better understanding of the MAM procedures that occurred I did a documentation review and interviews were conducted with people who participated

directly in the process. The MAM consultation process was complex. It spanned two years, and included thousands of stakeholders. I participated in various aspects of the consultation process including two Union of Ontario Indian (UOI) consultation sessions, Minister of MNDMF's official announcement of Bill 173, and four out of five Standing Committee hearings. Speaking with people directly was the most valuable source of information. I conducted semi-structured face-to-face interviews with a variety of informants. They included: politicians, bureaucrats, lawyers, consultants, various forms of First Nation leadership, FN community development officers, political advisors, activists, and FN elders who participated in the MAM consultation processes. I interviewed key politicians representing the Ontario government and Aboriginal governments. They included the Minister of MNDMF, NDP Member of Provincial Parliament (MPP) representing Timmins-James Bay, Ogichidaakwe of Grand Council Treaty 3, Grand Chief of Mushkegowuk, and CEO of Matawa First Nations, among others. I relied heavily on the interview data to analyse perceptions of the quality of the consultation. Respondents also provided suggestions on how to improve consultation procedures.

The results section will show the majority of respondents found the MAM consultation was a failed process, and there was low level of Aboriginal engagement. During the course of obtaining peoples' perceptions on the MAM process the main areas of concern from both Aboriginal and government perspectives were exposed through the major themes identified from the research findings. The core-categories were: capacity issues, comments on the MAM consultation process, complexities of consultation, differences in ideologies, lack of trust, and comments on the new Mining Act.

I chose to evaluate the effectiveness of Aboriginal peoples' participation using Arnstein's ladder as a framework, rather than on how the courts have defined 'meaningful consultation'. Arnstein's ladder is based on power sharing that applies not only to Aboriginal peoples, but also the broader public while the duty to consult is based on the recognition and protection of Aboriginal and Treaty rights. I chose a non rights-based approach instead of addressing if the Crown met its legal duty to consult for MAM. In the discussion section I do however acknowledge where on the improved ladder I believe the duty to consult and international indigenous agreements should be placed.

## RELEVANCE OF THE RESEARCH

As a case study addressing provincial natural resource governance, this research offers essential insight into the successes and failures of the MAM Aboriginal consultation process. This process was the first time any Ministry in Ontario underwent an extensive effort to seek advice on how to reform legislation. Also it was the first time Aboriginal people had the opportunity to participate to the extent that they did.

Theoretically, this research contributes to the growing literature that illustrates a need to improve the involvement and consultation with Indigenous peoples, and to describe enduring flaws in that process. Andrews (1998) states that the need for effective consultation is generally agreed upon, but the practical details of the process are unclear. Research in this area can address the unanswered question on the 'how' of effective consultation. Whiteman and Mamen (2002) state that there is a pressing need to improve current consultation processes, and to move beyond consultation into greater levels of participation. They also find that while mechanisms and processes for meaningful participation are required, meaningful consultation on its own is not enough to resolve the

power imbalances and recognize Aboriginal peoples' rights. They also point out that the literature on consultation has focused heavily on company-community consultation and less on government-community consultation, which is the void my research attempts to fill. The lack of research directed towards Aboriginal-government consultations related to mineral development is in part the same reason Qureshy (2006) finds there is a lack of research focused on mineral exploration companies' consultation and negotiations with Aboriginals. She believes that this is due to the novelty of this type of formal procedure and the widely held assumption that exploration has little impact on First Nations.

On a broader scale, my research can help foster discussion and bring attention to the larger issues surrounding consultation and power structures within government systems. Improved awareness and understanding may contribute to more effective future engagement that will foster the building of trust between Aboriginals and government and minimize conflict in the future. As Aboriginal people are increasingly becoming engaged in political and legal discourse, it is important to reflect on how Aboriginal people and government agencies perceive their roles in this changing landscape.

## THESIS STRUCTURE

This thesis is divided into 6 Chapters. Chapter 2 begins by situating Aboriginal people's involvement in natural resource management in Canada and how it has improved over time. This is followed by an examination of the literature regarding public participation and an explanation of Arnstein's ladder. Chapter 3 provides historical information and contextualization of mineral development in Ontario and describes the causes and procedures of the MAM process. Chapter 4 covers the methodologies used. Chapter 5 presents and discusses the major themes from the

research findings. It reviews the MAM Aboriginal consultation process and the new Mining Act. Lastly, Chapter 6 summarizes the results, comments on the application of the case study to the framework, and adds detail to Arnstein's ladder for future application with Aboriginal involvement in governmental resource management decisions. Finally I provide recommendations on how improve Aboriginal participation and make concluding remarks.



## **CHAPTER 2: LITERATURE REVIEW**

### **HISTORY OF ABORIGINAL PARTICIPATION IN NATURAL RESOURCE MANAGEMENT**

Lack of meaningful Aboriginal participation in public decision-making is not only a current trend, but dates back to the establishment of colonial governments and industrial resource development. The following section offers a brief history of how Aboriginal people have advanced in their ability to influence natural resource management decisions over time. Throughout much of Canada's history Aboriginal peoples have not been given a voice in decision making while their lands have been appropriated in the name of nation building. The extraction of natural resources has not only altered their environments, but also their economies and societies. The government, along with resource industries, decided the specific parameters of development (Pring 2001).

Aboriginal Peoples generally have not been consulted about development activities; usually they have not been guaranteed, nor have they obtained, specific economic benefits from such activities on their traditional lands; and they have had difficulty protecting their traditional use from the effects of development (RCAP 1996).

In the recent past however, there has been a shift and Aboriginal people have become actively involved in negotiating development decisions that affect them. Larose (2009) believed the changing roles of Aboriginal people in natural resource management was the result of the convergence of changes at various levels, including shifts situated in the international indigenous rights movement, the erosion of colonial assumptions in the post-colonial era, the revolution of the civil rights movement, and the expansion and shift in environmental philosophy and global economic systems. She also pointed to the Supreme Court decisions on Aboriginal rights, the demand for self government, the

settling of land claims and community development as factors in the changing landscape of resource management in Canada. Hipwell et al. (2002) believe the change in the past fifty years was a result of a combination of increasing conflict over resource use, pressure from development, and assimilation policies that pushed First Nations to take legal and political action to protect their rights under the treaties. To achieve this new position in the power relationship, Aboriginal people have undertaken a variety of approaches that include lawsuits, mobilization, protests, and community protocols for negotiation and collaboration with industry (Whiteman and Mamen 2002).

One of the first instances of this new found activism was displayed during the protest of the Trudeau government's White Paper in 1969 (Bowie 2008). The White Paper proposed to eliminate the Indian Act, which is the basis of Aboriginal rights. Buoyed by the success of the rejection of the Trudeau government's 'White Paper', Aboriginal people then went on to protest several large development projects occurring around the same time. The central assumptions surrounding progress, development and civilization began to be questioned and Aboriginals began to demand a greater say in matters directly affecting their Aboriginal and Treaty rights.

The moratorium put on the Mackenzie Valley pipeline is an example of how Aboriginal people were successfully involved in resource development decisions. This event "exemplifies how Aboriginal peoples have changed the context for development in Canada" (Bowie 2008, p. 25). Before this development project, Aboriginal people and their way of life were not central to the debate in the decision-making process.

Starting in 1974 and spanning three years, the Berger Inquiry into the proposed Mackenzie Valley pipeline heard evidence from 300 experts on northern conditions,

environments and people. Tom Berger visited 35 communities and listened to the evidence of almost one thousand northerners (Berger 1977). The inquiry provided a forum for Aboriginal people to express their concerns with the project. It also became a critique of the notions of development and ‘progress’. Aboriginal people presented extensive testimony on their way of life and their unique relationship with the environment and their experience with colonization (Bowie 2008). Berger (1977) decided to set a 10 year moratorium on the development. He claimed the pipeline would bring limited economic benefits and have devastating social impacts. He also recommended that land claims be settled before development could occur. This inquiry gave Aboriginal people an arena to voice their opinions and be heard. The Berger Inquiry was the first of its kind and was hailed as a major innovation in creating a new kind of public forum to hear from individual citizens. The Inquiry funded public interest groups, held formal preliminary and community hearings, hired an independent Commission Counsel and made information available to all identified participants at the onset (Smith 1982).

Subsequent inquiries, such as the West Coast Oil Ports Inquiry, the Pearse Commission on Pacific Fisheries Policy, the Alaska Highway Pipeline Inquiry, the Hartt Commission on the Northern Environment in Ontario and the Porter Commission on Electric Power Planning in Ontario followed Berger’s general procedure (Smith 1982), however, the model the Berger Inquiry established was never used again in Canada. Its legacy has instead been to create expectations of what an assessment process should be and it influenced subsequent deliberations in environmental assessments (Gibson and Hanna 2005).

Other noteworthy initiatives that allowed Aboriginal people to participate in resource management include the Whitehorse Mining Initiative (WMI) and the Mackenzie Valley Land and Water Board (MVLWB). The WMI was a multi-stakeholder initiative in the early 1990s. Draper (2002) stated the goals of the WMI were to resolve land use issues by recognizing and respecting Aboriginal and Treaty rights and to guarantee stakeholder participation where the public interest was affected. It was called to meet Aboriginal concerns by ensuring their participation in all aspects of mining. The MVLWB, a co-management board established in 1997-98, meets the obligation under land claim agreements between the Crown and three Aboriginal groups. Through the board the three communities have direct participation in resource management, planning and regulatory approvals.

In 1982, shortly after the Berger Inquiry, the federal government repatriated the Constitution. This act was paramount because it built the foundation that technically should ensure Aboriginals a minimal level of participation on the decisions that would affect their Treaty rights. Section 35 (1) states: “the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed” (Department of Justice Canada 1982). The recognition of Aboriginal and Treaty rights entrenched in the Constitution led to a critical re-examination and restructuring of power and responsibilities regarding natural resources management. It was recognized that Aboriginal peoples needed separate consideration and involvement based on the Crown’s fiduciary relationship with them. Although Aboriginal rights were now protected, they were left undefined. It took court decisions to attempt to clarify the nature and scope of Aboriginal rights and outline the Crown’s requirements regarding consulting Aboriginal

peoples on actions that might infringe upon their rights, lands, traditional land uses or interests (Hipwell et al. 2002).

The first time Canadian law acknowledged that Aboriginal title to land existed was the *Calder v. British Columbia* case in 1973. Other important cases on Aboriginal rights are the *R. v. Delgamuukw*, *Taku River Tlinglit First Nation v. British Columbia*, *Mikisew Cree First Nation v. Canada*, *Haida Nation v. British Columbia* (Hipwell et al. 2002; Pote et al. 2007; Labeau 2007). The *R. v. Sparrow* decision in 1990, held that government actions that interferes with Aboriginal rights must meet a strict justification test. “One component of the justification test is that the Crown must consult with Aboriginal Peoples prior to interfering with their rights” (Ross and Smith 2003). In the B.C. Court of Appeal in *Halfway River FN v. B.C. (Minister of Forests)* found the Crown must first provide the FN with notice and full information on the proposed activity; it must fully inform itself of the practices and views of the FN; and it must undertake meaningful and reasonable consultation (Smith 2006).

Recent case law that adds clarity to the duty to consult include: *Wii'litswx v. British Columbia (Minister of Forests)*, *Ahousaht First Nation v. Canada*, *Little Salmon/Carmacks First Nation v. The Gov't of Yukon*, *Ka'a'Gee Tu First Nation et al. v. The Attorney General of Canada and Paramount Resources Ltd.* Other key consultation and accommodation litigation include: *Tsilhqot'in Nation v. BC*, *Musqueam First Nation cases*, *Mantioba Metis Federation et al. v. Attorney General Canada et al.*, and *R. Labrador Métis Federation Las'Kwalaams*. Significant cases related to mining, forestry and energy sectors are the *Dene Tha' First Nation v. Canada (Minister of Environment)* and *Chipewyan Prairie First Nation v. Lieutenant Governor in Council of Alberta*

(Canadian Institute 2009). The most recent case law dealing with Ontario, mining and the Duty to consult was the *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, which will be looked at in detail in the background section.

Chamberlain (2007) acknowledged “there has been an increase in political concerns regarding First Nations’ issues and their impact on project development” (Chamberlain 2007, p.1). He believes events such as the Oka standoff in 1990<sup>1</sup>, the death of Dudley George<sup>2</sup>, the standoff at Caledonia<sup>3</sup> and the KI-Platinex conflict have all increased the tension surrounding First Nation issues. Chamberlain claimed that these events affect the degree to which consultation processes are scrutinized by the public, government and stakeholders. These events also sparked the government to work towards building stronger relationships with Aboriginal communities. The Oka conflict led to the establishment of the Royal Commission on Aboriginal People (RCAP), the most comprehensive study of Aboriginal peoples ever to take place in Canada. RCAP’s five-volume report in 1996 laid out numerous recommendations for a new relationship with Aboriginal peoples. It was the death of Dudley George that led to the Ipperwash Inquiry. In its Report, released in 2007, natural resources were addressed with numerous recommendations to improve consultation (Ministry of Aboriginal Affairs 2010). Next will be an examination of the literature on public participation.

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<sup>1</sup> The Oka Crisis was a land dispute between the Mohawk nation and the town of Oka, Quebec. The dispute was over a planned golf course development on lands traditionally used by the Mohawk, including a burial ground. There were blockades, violence, and a death. The Federal government would finally purchase the land for 5.3 million dollars.

<sup>2</sup> In 1995 Dudley George was killed by an OPP during an occupation of Ipperwash park while protesting the destruction of burial grounds and an unsettled land claim. The origins of the dispute dates back to 1942 when the Federal government expropriated land to build a military camp- Camp Ipperwash.

<sup>3</sup> The Caledonia conflict was brought to people’s attention after demonstrations by Six Nations of the Grand River. The demonstrators claimed a parcel of land in Caledonia, which Henco Industries Ltd. wanted to develop into residential subdivision.

## PUBLIC PARTICIPATION

“Citizen Participation is Citizen Power”- Sherry Arnstein

The advancement of public participation is a relatively recent research field, and has been evident in the academic literature for only about 50 years. Phillips and Orsini (2002) stated that the public participation ‘explosion’ since the 1960s arose out of democratization trends, organization of indigenous peoples and local communities, and improved technology. Particularly important has been the increasing information exchange capabilities of the Internet. Campbell (1996) pointed to the increased public concerns about environmental integrity and the sustainability of resource development. Whatever the stimulus was, public participation is now part of the norm. Governments and industry can no longer act unilaterally, but to be successful need to include a myriad of other concerned parties including local communities, indigenous groups, citizen groups, environmental non-governmental organizations, etc.

One of the first models that attempted to manage the complexity of the lexicon and the degrees of participation and power sharing is Arnstein’s ladder of citizen participation. Arnstein’s classic article published in 1969 uses examples from her experience with US federal social programs— urban renewal, anti-poverty, and Model Cities— condemn token approaches to involvement. She categorized participation into eight different levels. The lowest rung is citizen *Manipulation* and the top rung is *Citizen Control* (Figure 1).

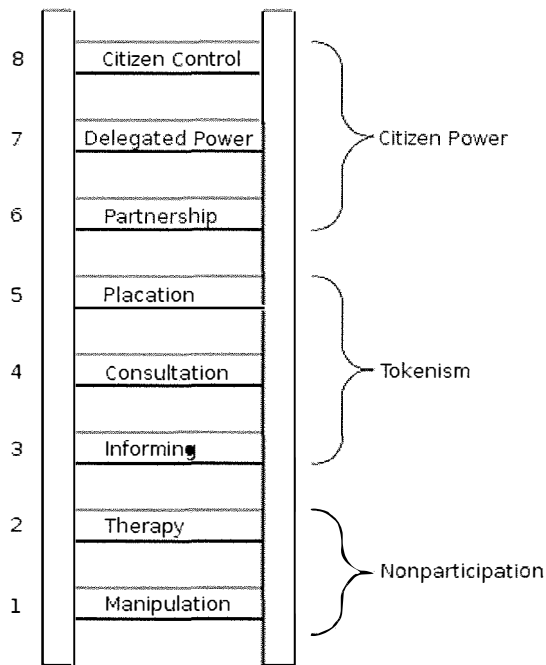


Figure 1: Arnstein’s ladder of citizen participation including eight rungs and three categories (Source: Arnstein 1969)

The first (lowest) rung represents a coercive form of agency-driven involvement that satisfies only the most basic participatory requirements (Stewart 2007). Moving up the ladder, citizen involvement increases as citizens become more informed and have more influence in decision making. The *Manipulation* and *Therapy* rungs are examples of citizen nonparticipation. This could take the form of rubberstamp committees, or power holders seeking to educate or cure the citizens (Mitchell 2002). The *Informing* and *Consultation* rungs represent a form of tokenism. There would be a one-way flow of information from managers to citizens and although the citizens would be given a voice, it would not necessarily be heeded (Mitchell 2002). On the first four rungs there is no follow through and there is no assurance of changing the *status quo*. At the *Placation* rung citizens’ advice is received, but not necessarily acted upon, while at the *Partnership*



rung trade-offs are negotiated. At the *Delegated Power* rung citizens are given management of selected or all parts of programmes (Mitchell 2002). Finally, at the top of the ladder, *Citizen Control* is where 'have-not' or otherwise disenfranchised citizens obtain the majority of decision-making seats, or full managerial power (Arnstein 1969). Arnstein argued that the main goal of participation was to gain control, and participation was judged by the power to make decisions.

Arnstein ensured "the typology of the ladder [can] be easily illustrated in other circumstances as long as the underlying issues are essentially the same: 'nobodies' are trying to become 'somebodies' with enough power to make the target institutions responsive to their views, aspirations, and needs"(1969, p.217). Citizen participation is the means by which the have-nots can induce significant social reform, which enables them to share in the benefits of the affluent society (Arnstein, 1969).

Arnstein identified factors that hinder genuine levels of participation for both 'haves' and 'have-nots'. On the 'have' side, such barriers include racism, paternalism, and resistance to power redistribution. On the 'have-not' side, limits on participation include political power, access to socioeconomic infrastructure and knowledge base, plus difficulties in organizing a representative and accountable citizen's group in the face of futility, alienation and distrust.

Berkes et al. (1991) applied Arnstein's ladder to Aboriginal people in reference to levels of co-management of living resources in Canada. He gives examples of situations where resources, such as the beaver, can be managed with full community control and other examples of resources, such as migratory species like the caribou, which cannot be

managed locally. Berkes (1994) later created an adopted version of Arnstein's ladder that illustrates a similar continuum of power and responsibility sharing (see Figure 2).

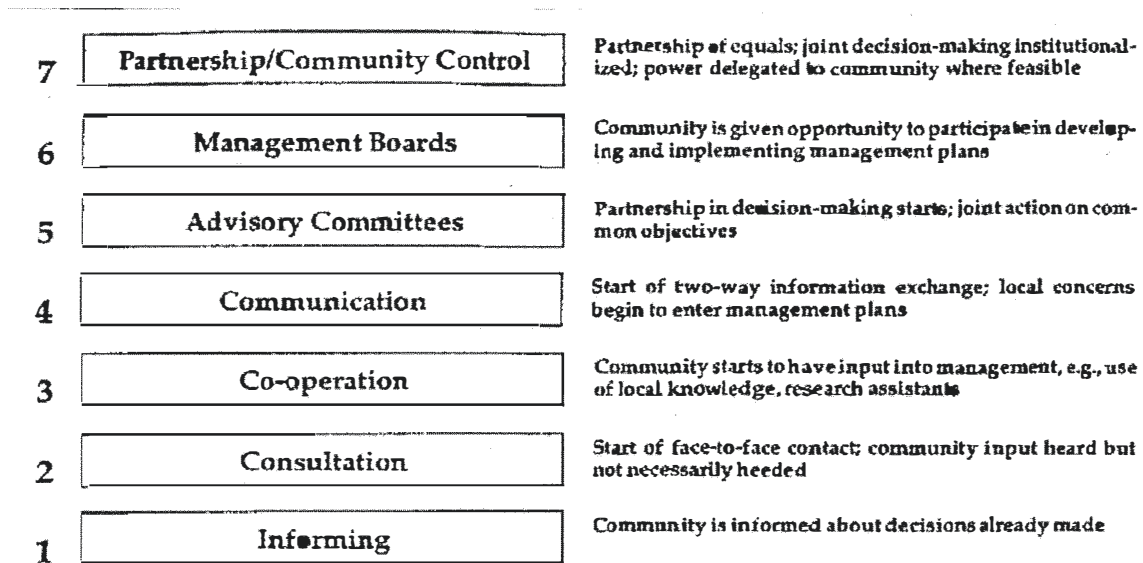


Figure 2: Levels of Co-management (Source: Berkes 1994).

Another framework, developed by the International Association for Public Participation (IAP2) uses a horizontal format to order different levels of participation. Their Public Participation Spectrum starts on the left of Figure 3 with the lowest level of public impact being to *Inform*, followed by *Consult*, *Involve*, *Collaborate* and *Empower* as terms representing an increase in the participation impact (IAP2 2007).

<b>Inform</b>	<b>Consult</b>	<b>Involve</b>	<b>Collaborate</b>	<b>Empower</b>
<b>Public Participation Goal</b>				
To provide the public with balanced and objective information to assist them in understanding the problem, alternatives and opportunities and/or solutions	To obtain public feedback on analysis, alternatives and/or decisions	To work directly with the public throughout the process to ensure that the public concerns and aspirations are consistently understood	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution	To place final decision-making in the hands of the public
<b>Promise to Public</b>				
We will keep you Informed	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision	We will look to you for direct advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible	We will implement what you decide

Figure 3: International Association of Public Participation: Public Participation Spectrum (Source: IAP2 2007)

Arnstein’s ladder, Berkes’s ladder and IAP2 Public Participation Spectrum are three of many frameworks that classify different degrees of public participation. I chose to use Arnstein’s ladder because of its simplicity and the imagery it created of climbing the ladder to gain more power. As you can see, the frameworks above used a variety of words describing different levels of engagement. At times, in practice, the terms can be confused, used interchangeably and other times have a different intent. Furthermore, the term ‘consultation’ has an additional layer of complexity due to its legal implications in Canada.

## ABORIGINAL CONSULTATION

Since my case study addresses consultation with Aboriginal people in Ontario it was important to look at the provincial consultation guidelines (see Appendix A). The Ontario government, as part of their new approach to Aboriginal Affairs, released draft guidelines on consultation in June 2006. The report answered questions such as, ‘What determines the extent of consultation required?’, ‘What must the Crown do to fulfill the duty to consult?’, ‘What is meant by accommodation?’. It is now almost five years after the guidelines were released and they remain in their draft form (Ontario 2006). In March 2011, INAC released its Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. It clarified that,

the duty to consult is a constitutional duty; applies in the context of modern treaties; officials must look at treaty provisions first; and where treaty consultation provisions do not apply to a proposed activity, a “parallel” duty to consult exists. The Court has also clarified, that depending on their mandate, entities such as boards and tribunals may also play a role in fulfilling the duty to consult; that high level strategic decisions may now trigger the duty to consult; and, that the duty applies to current and future activities and not historical infringements (Government of Canada 2011).

In November 2007 the Government of Canada, to uphold the Honour of the Crown and their commitment to act in good faith, launched an Action Plan on Aboriginal consultation and accommodation. Sixty-eight First Nations, Inuit and Metis communities participated in the engagement process to give their specific views on consultation and accommodation. In the Summary of Input from Aboriginal Communities and Organizations report some of the issues brought up include the need for clearer standards for the pre-consultation period, the need for the Crown to initiate consultation as soon as they have

knowledge of potential and established Aboriginal and Treaty rights. The Summary report mentioned consultation timelines must be reasonable, and take into account factors such as nature, scope and complexity of the activity. It continued,

The participants further believe that government to government consultation requires that the Crown should provide human and financial resources, support and access to information and expertise. The Crown must listen with an open mind and provide feedback during the consultation and reasons with respect to any decision. The Crown must be willing to revise the original proposal before a final decision is made. Many participants feel that a meaningful consultation is conducted within a comprehensive context including elements of self-government, social policy and legislation (INAC 2011).

“The Handbook on Citizen Engagement: Beyond Consultation” released in March 2008 by the Canadian Policy Research Networks was also a valuable tool that provided an overview of concepts and various methods of citizen engagement. In Chapter VI ‘Engaging Aboriginal Communities’, Sheedy (2008) provided practical reasons to consult First Nations before making and implementing policy on matters that impact Treaty and Aboriginal rights. She claimed that prior consultation could avoid problems, delays and resources required to mediate conflict. As well, prior consultation can avoid legal action, civil disobedience, and further tensions between Aboriginal and non-Aboriginal groups. She believed that First Nations are excluded because of a trend for experts to be dismissive of Traditional Ecological Knowledge and that “deeply engrained cultural beliefs and biases about Aboriginal people continue to erect barriers to genuine engagement and listening” (p. 19). To ensure First Nations’ inclusion in program and policy development in a meaningful way, she believes there needs to be respect for their cultural differences. Furthermore, the differences in power and history must be

acknowledged, and both sides must “work to overcome preconceptions about each other and attempt to find common ground” (p. 18).

Other relevant literature dealing with Aboriginal consultation in reference to mineral development was Whiteman and Mamen (2002). They developed a chart that deals directly with Aboriginal consultation. They identified key dimensions such as principles/values, goals/objectives and mechanisms to differentiate between strong and weak consultation (see Appendix B). The Prospectors and Developers of Canada set out best practices guidelines for the exploration industry. E3 Standards (Environmental Excellence in Exploration) promotes discussion and sensitivity to Aboriginal concerns requiring companies to demonstrate recognition and respect for Aboriginal rights. They also recommend a memorandum of understanding be signed between the company and the First Nation before any work begins (Smith 2006).

The literature provided a plethora of examples of failed cases of Aboriginal participation. Phillips and Orsini (2002) examined individual involvement in policy processes at the Federal government level, and found that although the public service undertook considerable public consultation, the consistency and manner in which it is carried out varied enormously across departments. They found when the standard template of public consultation was deployed on major policy issues, there was a one-way flow of information and the processes were episodic and *ad hoc*. Whiteman and Mamen (2002) highlighted many negative examples of participation including BHP’s consultation done for the Diavik mine in the NWT and for the Shell’s Camisea oil and gas project in Peru. In the latter case they found the consultation time frames and deadlines were too strict, identified leaders were not locally deemed to be representative

spokespeople for their groups, some groups were under-represented, and some negotiation agents were not transparent or objective.

Sinclair and Diduck (2005) found that meaningful public participation carried out for Environmental Impact Assessment in Canada has proven elusive. The Minister of Indian Affairs and Northern Development criticized the EA conducted for BPH's development of the Ekati Diamond Mine in the NWT. He stated the 60 days to address the EA Panel's report did not give participants enough time, especially while land claim negotiations were also underway. He wrote: "The tight time frame put all participants under much pressure to work out detailed agreements" (Dearden and Mitchell 2009, p. 453). Baker and McLelland (2003) found the British Columbia's environmental assessment process for First Nations' participation failed to meet overall effectiveness and the environmental assessment reflected a poor integration of First Nations people in the decision-making process.

Bowie (2008) critiqued the traditional knowledge and environmental assessment done for the Victor Diamond Project saying it was flawed and did not meaningfully consult Attawapiskat FN. The community felt they received a token consultation process, and were unsuccessful in their attempts to a) settle any land claims before development occurred, b) get the Department of Indian and Northern Affairs Canada (INAC) appointed as the responsible authority (RA) for the EIA, c) campaign for a panel review to challenge the Comprehensive Study Report (CSR) and d) have an adequate evaluation of the socio-economic effects. Bowie hinted that First Nations participation in the EIA process was a way to placate them and to secure their homeland for industrial development and believes Aboriginal participation and the inclusion of traditional

knowledge in the environmental assessment process is a way for industrial development projects to proceed in areas with a strong indigenous presence.

Nadasdy (2003) criticised the EIA processes for not being conducive to First Nations participation because the proceedings were formal and adversarial in nature, the discourse was highly technical, Traditional Ecological Knowledge was often not valued or included into the process, there was a lack of translation facilities, and there were short time frames. There is a plethora of negative examples of participation in the literature, but there are considerably fewer positive examples. Indian and Northern Affairs Canada (INAC) 2010 Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation highlighted several consultation best practice examples. Among them was the Nunavut Impact Review Board, the Bell Fiber Optic Transmission agreement signed in 1998 with GCT3, The Keewaytinook Okimakanak project team in Ontario that developed a capacity-building approach and the interim Metis harvesting accommodation agreement made between the MNO and the Ontario Government in July 2004 (INAC 2011).

A frequent suggestion in the public participation literature was that no one right technique exists, but rather, it is situation-dependent and a range of public involvement techniques should be used (Higgelke and Duinker, 1993; Sinclair and Diduck 2005; Sheedy 2008). Each context, policy or program development process requires a unique approach and adapted tools to address its specific needs (Sheedy 2008). The literature recommends for effective participation there needs to be: early access to background information in an accessible, neutral language, two way dialogue, willingness to listen, openness, trust, respect, honesty, a willingness to change attitudes and actions, capacity



building and follow-up. Bedford and Warhurst (1999) insist the indigenous calendar, which accounts for Aboriginal people's different conception of time, has to be included in consultation planning.

Whiteman and Mamen (2002) believe the process must be jointly defined prior to the community consultations, and the mining company or the State should be held accountable to the jointly agreed goals. They also recommended an effective process should include: stakeholder identification, capacity building, consultation topics, consulting on and incorporating traditional ecological knowledge. When the very purpose of the process is unclear, or if there is a misunderstanding of the anticipated level of participation practitioners will end up cynical and dissatisfied with their participation experience (Shepard and Bowley 1997; Petts 1999).

Moreover, there are many international agreements outlining indigenous peoples' special rights to land and resources and to participation in decision making that provide guidelines for participation best practices. Some example include the Agenda 21, the Rio Declaration on Environment and Development, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Universal Declaration of Human Rights, the International Labour Organization (ILO) Convention 169, the UN Declaration on the Rights of Indigenous Peoples, the OAS (Organization of American States) Declaration on the Rights of Indigenous Peoples and the UN Convention on Biological Diversity (CBD).

The UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly in 2007. Canada ratified it in 2010. Article 32 of the Declaration states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. □
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (UN 2007).

The International Labour Organization (ILO) Convention No. 169 is a legally binding tool to get countries to align their legislation, policies and programmes to the Convention principles. Today, 20 countries have ratified it. Canada has not. Article 6 (1) (a) of the Convention obliges government to consult indigenous peoples through appropriate procedures and through their genuine representatives whenever it is considering legislative or administrative measures that may affect them directly (Henriksen 2008). Similar to Article 32 of the UN Declaration, the main principles are that indigenous peoples should be able to engage in free, prior and informed consent in policy and development processes that affect them. The Convention stipulates that consultation should be undertaken in good faith, with the objective of achieving agreement. The parties involved should seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation. Effective consultation is consultation in which those concerned have an opportunity to influence the decision taken. This means real and timely consultation (ISO 2010).

Despite the existence of these international standards, achieving informed consent or engaging in meaningful consultation is not common, even when countries have ratified

❖ ILO 169 (Whiteman and Mamen 2002). Indigenous people criticized ILO 169 for avoiding the issue of self-determination and focusing on consultation and participation rather than informed consent. Governments are reluctant to enact tough regulation forcing the compliance of ILO 169 because as, Whiteman and Mamen (2002) believe, they prioritize economic development and foreign direct investment over the well-being of indigenous communities, and consequently development continues to infringe upon indigenous rights. The idea of indigenous rights was a relatively new concept and illustrated that Aboriginal people have won struggles to be able to fight for their rights to be considered. The next sections highlight two struggles in particular while presenting a brief history of Aboriginal people and their experience with mineral development in Ontario.

## **CHAPTER 3: BACKGROUND**

### **HISTORICAL CONTEXT: SITUATING THE CASE STUDY**

The thesis case study examines Aboriginal peoples' involvement in the consultation done for the Ontario Mining Act modernization process. To contextualize Aboriginal peoples' involvement in mineral development decisions in Ontario in the past, both the events leading up to the Mica Bay conflict and the KI-Platinex conflict are covered in detail. In Ontario, flowing from the Royal Proclamation of 1763, First Nations signed treaties pre-confederation such as the Robinson Superior and Robinson Huron in 1850 and post-confederation treaties including Treaties 3,5 and 9 and the Williams Treaties in 1923 (INAC 2008). The Robinson Superior Treaty was specifically examined based on its connection to the Mica Bay conflict, which will be discussed below.

Before 1850, and subsequent to the decline of the fur trade, mineral exploration and mine development was taking place. This development created conflict and disrupted the Aboriginal people's ways of life (Manore 2000). Mining development encroached upon Aboriginal populations and was a catalyst for colonization and exploitation. Mining entrepreneurs, prospectors and surveyors arrived on the land to exploit mineral deposits. In the nineteenth century the Ojibway/Anishinabe of the north shore of Lake Superior were viewed by prospectors as an obstacle to unrestricted mining (Wightman and Wightman 1997). The influx of miners into the region was the cause of economic hardships for the Anishinabe. The Anishinabe claimed, "the incomers restricted their access to saleable timber, building materials, and firewood on mineral locations and the fires that miners set in the forest and the noise of their blasting drove

away game” (Haig-Brown and Nock 2006, p.92). Others maintained they were forced to move their traplines and their families (Manore 2000). These activities were the grounds for the Anishinabe to react stubbornly to the colonial ‘theft’ of traditional lands and resources (Wightman and Wightman 1997).

The Aboriginals from the north shore of Lake Superior did not have much leverage against the mining activities, but they did not remain quiet and submissive to the changes taking place either. They protested in several different ways. They confronted surveyors, telling them to get off their lands, sent petitions and delegations to the governor general, hired lawyers, demanded compensation and shut down mining operations (Wightman and Wightman 1997).

One of the greatest Anishinabe activists was Shinguacouse<sup>4</sup>, an elderly and respected Chief of Garden River First Nation. He vigorously advocated for territorial and resource rights, and was a strong opponent to any property usurpation by European colonizers (Wightman and Wightman 1997). In 1840 Shinguacouse petitioned the governor general protesting non-Aboriginal use of food resources and the cutting down of timber (Telford 2003). In 1849 in a speech to Thomas Anderson, the Superintendent of Indian Affairs for Canada West appointed to investigate the Indian claims, Shinguacouse declared:

The miners are intruding upon our lands, without securing us compensation. The Great Spirit, we think, placed rich mines on our lands for the benefit of his red children so that their rising generation might get support from them when the animals of the woods should have grown too scarce for our subsistence. We will carry out, therefore, the good object of our Father, the Great Spirit. We will sell you [our] lands if you will give us what is right and at the same time we want pay for every pound of mineral that has been taken off our

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<sup>4</sup> Also spelled Shinguaconse, Shinguakonse and Shingwauk

lands, as well as for that which may hereafter be carried away (Telford p. 74).

Shinguacouse raised another reason the Anishinabe protested mining as they had a strong spiritual connection to the minerals. They believed that minerals had special powers, and most mineral locations were sacred (Telford 2003).

Shinguacouse asserted that the minerals given to the Anishinabe by the Creator needed to be protected for their survival as a people. Minerals and their potential to generate wealth were important to the Aboriginal people. Allen Macdonell, a lawyer and founder of the Lake Superior Company, was sympathetic to the Anishinabe because Shinguacouse had shown him the location of promising mineral deposits and he helped the Anishinabe seek compensation from the Crown (Telford 2003).

In the summer of 1849, Shinguacouse and Macdonell initiated a legal case to gain railway and mining leases that would give Aboriginal people a share of profits, employment and training in mining for those Aboriginal people who held the territory. Macdonell also arranged a potential Treaty claim that would cover all mineral locations in the area as part of the Anishinabe's reserve. Their initiatives received wide colonial press coverage and increased public awareness about Aboriginal concerns. However, the colonial government of Canada West turned down the proposal.

In November 1849, a group of several hundred frustrated Ojibwa and Métis led by Shinguacouse and Macdonell forcefully closed down the mining operations of the Québec Mining Company at Mica Bay. The company agents surrendered without resistance. On December 4, Macdonell, Shinguacouse and other Chiefs were arrested for

their part in the uprising. They were to face trial in Toronto, but were later released (Surtees 1986). The Mica Bay incident intensified the urgency to sign a treaty.

The Robinson-Superior Treaty is essentially a resource treaty, initiated from the conflict over mineral rights (Surtees 1986). The signing of the Robinson-Superior Treaty in 1850 was a monumental struggle for power. In the spring of 1850 William Benjamin Robinson took on the task of negotiating the treaties with the Chiefs of Lakes Superior and Huron. Robinson's initial Treaty offered a one time payment of \$32,000 or \$16,000 with an annuity of \$4,000. This was not much considering \$400,000 was already collected from the original mining leases. He justified the low compensation by countering that the Ojibwa would retain hunting and fishing rights in the shared areas and the miners would buy Aboriginal goods. Robinson, who could not get consent, inveigled the Chiefs to sign the treaty by including a clause that would bring increased annuity payments from the proceeds of future mining development. The Ojibwa signed the treaty to their detriment. Although the treaty recognized Aboriginal ownership and their beneficial interest in the minerals, it also said they surrendered all their rights, title and interest.

The Robinson-Superior Treaty states, "nor will they at any time hinder or prevent persons from exploring or searching for mineral or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned" (INAC 2008, p.1). The Robinson-Superior Treaty became the model for the remainder of the historic treaties that were signed between 1850-1930. Starting with Treaty 3 in 1873 provided for the taking up of land for mining, lumbering and other purposes:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and

fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government (INAC 2008, p. 4).

Treaty 9 has a similar taking up clause. The Royal Commission on Aboriginal People (RCAP) explains,

it is not surprising that the negotiations of the historical treaties, which were tools to figure out how to share a world, were full of stories of miscommunication and cross purpose as the negotiators had profoundly different cultural and world views, no common language or frame of reference (RCAP, 1996, p. 33).

It was not only the Robinson-Superior Treaty, but also the signing of Treaty 9 that shares the same story of manipulation and oral promises that did not match the written Treaty (Long 2010). While First Nations hold the view that the treaties were about sharing lands and resources, the Province takes the position that treaties ceded lands and resources (Cornish 2006). This important difference in understanding is the underlying issue that is the source of many conflicts, including the Kitchenumaykoosib Inninuwig (KI)-Platinex conflict which will be discussed below.

The conflict between (KI) First Nation and Platinex Inc., a junior mining exploration company, which erupted in 2006, reflects similar themes to the Mica Bay conflict that occurred over 150 years earlier. Again, Aboriginal people protested unilateral mineral exploration on their traditional territories. In 1999 negotiations took place between KI and Platinex. The conflict later erupted because Platinex assumed they had verbal consent from KI and informed their investors of this (CBERN 2011). KI did not accept the drilling crew presence and established a blockade that prevented any



drilling and ultimately forced the drilling crew to abandon the site after a few days. Platinex later sued KI for \$10 billion (later reduced to \$10 million) for loss and damage (Podur 2008). In the ensuing court proceedings, the courts exposed the Ontario government's failure to consult and accommodate First Nations as stipulated under Supreme Court rulings. Several reasons exist why efforts to gain Aboriginal participation initially failed, but fundamental was because mutually defined goals were not established. KI had established a Development Protocol that entails: 1) initial discussion with Chief and Council; 2) discussions with the community; 3) consultation with individuals affected by the development; 4) follow-up discussions with the community; 5) referendum; and 6) approval in writing. This process was not followed. Instead the Ontario government was "almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex" (Smith 2006, p. 14, para 92).

In July 2006, the courts ruled in favour of KI. They recognized that the Crown breached its duty to consult. Platinex was ordered to cease drilling and a temporary injunction required negotiations to take place over the next six months while the parties were to engage in a proper consultation process. In May 2007, after the province and Platinex engaged in 'reasonable' consultation with KI, the court permitted Platinex to resume drilling while requiring on going consultation (ECO 2007). KI launched a counter-claim as well as a third-party claim against the Ontario government for failing to consult in addition to a constitutional challenge against the Mining Act. They also defied a court order to stay away from part of the land slated for mining. On March 18, 2008 the Ontario Superior Court Judge Patrick Smith sentenced Chief Donny Morris and five

other council members to six month in jail for ‘contempt of court’. The KI6, as they became known, received tremendous support and international attention. They received brokerage from over 36 groups and organization including ENGOS, church groups, unions and political parties. Amnesty International Canada, Christian Peacemaker Teams Canada, CPAWS, The Council of Canadians, David Suzuki Foundation, Forest Ethics, and the Green Party of Canada were among the many names that signed a letter to the Premier entitled, ‘Stop the injustice: overhaul Ontario’s mining laws and policies’.

The KI6 spent over 2 months in jail and eventually had their sentences reduced to time served (Podur 2008). This conflict was a huge expense of money and time to all involved. Although the courts are a costly and adversarial procedure, it did bring public awareness of the provincial government’s failure to consult Aboriginal people. Justice Patrick Smith of the Ontario Superior Court wrote in his *Platinex Inc. v. KI* 2006 decision, “Despite repeated judicial messages delivered over the course of 16 years, ...the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation” (para. 96). In effect, the case law says the Crown’s current level of consultation failed to meet the legal duty to consult.

After that decision the Environmental Commissioner of Ontario in his 2006-2007 report “seriously questioned the existing approach to consultation in the context of mining exploration and development in Ontario... [and] [called] for the province to develop and apply appropriate consultation policies or regulations in relation to resource decisions”(ECO 2007 p. 70).

After almost ten years, the conflict had still not been resolved, and on August 28, 2009 Platinex attempted to return to KI to resume mineral exploration. They were unable

to land their float plane as Chief Morris used a small motor boat to keep the company from landing. This action put more pressure on government to find a solution. The Ontario government eventually bought out Platinex. In return, Platinex ‘withdrew’ its claims and dropped its lawsuits against both the Province and KI.

## THE OLD MINING ACT

Because Aboriginal consultation for MAM was evaluated, it is important to provide background information on the old Mining Act and what led to its reform. The old Mining Act was out dated and did not account for Aboriginal rights. In the past the purpose of the Mining Act was “to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario” (Mining Act 1990, Chapter M.14). The old Mining Act focused mainly on activities that occur before and after mineral production such as claim staking, prospecting, mineral exploration and mine development related to mining land tenure and the safe closure of mining operations (Northwatch 2008). The old Mining Act assumed mining development was appropriate almost everywhere and was the ‘best’ use of Crown land in every circumstance. Its consideration of other interests such as the protection of ecological values was reactionary (ECO 2007). The Mining Act treated Ontario as a vast frontier freely open to mineral exploration that could be undertaken through the free entry regime. With free-entry, prospectors did not have to inform government of their activities before a claim was recorded. This meant a prospector could walk into someone’s backyard or a First Nation’s traditional territory and not tell anyone. The mining industry will always support free entry and affirms it is vital due to the secretive

nature of the industry. For aboriginals the free entry regime is a major point of contention.

A major reason legislative reform was necessary was specifically related to the uncertainty associated with the scope and meaning of the Crown's duty to consult aboriginals. Nothing in the old Mining Act required the government to consult FNs when taking actions such as granting mining claims or leases that affected aboriginal interests (ECO 2007). It was not until amendments made in 2000 that Aboriginal people were given mention in Part VII which required Aboriginal consultation on mine closure and reclamation plans (Northwatch 2008). Under Schedule 2, Item 14: 'Consultation with Aboriginal peoples' stated "the consultations carried out with all Aboriginal peoples affected by the project, including a description of their comments and responses, if any, to the proposed closure plan" (ServiceOntario e-laws 2007,p.1). Despite the amendment made and the requirement of Aboriginal consultation, it was not an effective avenue to ensure meaningful consultation. In one example, Sagamok First Nation received a 400 page technical mining closure plan and was given 45 days to respond. The delivery of the plan was the first time the First Nation had heard of this new mine which was to be built on their traditional territory. The community had minimal capacity and had to rush to hire an expert to review the plan and had to pay the cost to do so (Anishinabek Nation 2009).

In the past there have been attempts to lobby the government to reform the act. Even before the Environmental Commissioner of Ontario (ECO) in the 2006/2007 report called the Mining Act illegal and called for a major overhaul (MiningWatch 2007) other groups called for reform. In January 2002 The Citizens' Mining Action Group called for

change in response to Graphite Mountain Inc. staking over 100 mining claims in the Bathurst, Burgess, Sherbrooke and South Frontenac townships (OPA 2002). As a result the Minister of the MNDM charged his Mining Act Advisory Committee with recommending potential changes to the Mining Act that would protect prospectors' and surface rights holders' rights. The Minister's Mining Act Advisory Committee (MMAAC) created a sub-committee that included the Ontario Prospectors Association (OPA), Northwatch, Federation of Ontario Cottage Association, Canadian Aboriginal Mineral Association and Ontario Mining Association. The recommendations that came out of the committee included a method of Notice of Staking and Notice of Exploration.

## MINING ACT REFORM

There was consensus the Mining Act needed reform, but there was disagreement on the impetus. Some looked to the KI-Platinex conflict and the tremendous media response it generated as a major cause (MiningWatch Canada 2009; Amnesty International Canada 2008). They believe the government's actions in terms of MAM were reactionary. It would not be the first time a government has been accused of being reactionary. For example, many believe it took the Walkerton tragedy to pass the Clean Water Act (MOE 2006), or it took the Mica Bay conflict to stimulate the signing of the Robinson Treaties (Surtees 1986). Often it is the case that major legislation does not get enacted in ordinary times, but takes conflict to open the policy window for reform.

David Peerla, a former mining advisor for NAN found,

The KI campaign catapulted the Mining Act reform issue from relative obscurity to a place of prominence on the Ontario government decision agenda. Until there was a crisis, Mining Act reform was just one of many issues (pers. comm. Peerla, Jan. 27, 2009)

Alternatively, the government stated Mining Act reform has been in the works for several years. The Ministry claims its review arose from Ontario's Mineral Development Strategy released in 2006 as part of the government's Northern Prosperity Plan. The Ontario Mineral Development Strategy's purpose was to serve as a blueprint for the future of mineral development in Ontario. The Strategy was a commitment to sound management, effective stewardship and responsible development of the province's mineral resources. Its goal was to 'clarify and modernize mineral resources stewardship' by implementing effective consultation protocols and fostering positive Aboriginal-government-industry relation (Ontario Government 2008, p.4). The Ministry held extensive consultation on the Strategy and received input from 38 organizations including First Nation and Metis leadership, FN communities, Tribal Councils (TCs) and (Political Territory Organizations (PTOs). The main message received was that there is the need for better communication and stronger relationships between Aboriginal communities and the mineral sector (Ontario Government 2008). Table 1 provides a chronology of events that were part of Mining Act modernization process.

*TABLE 1 Chronology of Mining Act Reform*

Events	Date
KI-Platinex Inc. conflict erupted	2006
Ontario's Mineral Development Strategy released	2006
MNDM's 'Toward Developing An Aboriginal Consultation Approach for Mineral Sector Activities' discussion paper released	February 2007
MNDMF's 'Fining a Balance' discussion paper released	August 2008
MAM public consultations	August 2008-September 2008
MAM Aboriginal consultations	September 2008-January 2009
Bill 173 (Act to Amend the Mining Act) was tabled	April 30, 2009
Bill 173 received second reading	May 4, 2009
Standing Committee Hearings	August 6, 2009-August 13, 2009
Bill 173 received third reading	October 21, 2009
Bill 173 received royal assent	October 28, 2009
MNDMF's 'Ontario New Mining Act: Workbook on Development of Regulations' released on ER for comment	December 21, 2009- April 30, 2010
MNDMF held stakeholder, industry and Aboriginal community workshops	January 2010-June 2010
Regulation implementation Phase 1 (paper staking in S. Ontario, criteria to withdraw Crowing mineral rights under privately held surface rights in N. Ontario)	Within 1 year
Regulation implementation Phase 2 (exploration plans and permits, awareness programmes)	Next 2-3 years
Regulation implementation Phase 3 (online map staking)	Next 3-5 years

In February 2007, the MNDM released the discussion paper ‘Toward Developing An Aboriginal Consultation Approach for Mineral Sector Activities’ (see Appendix C). The document was made available on their website and the Environmental Registry in English, French, Cree, Ojibwa and Oji-Cree. The discussion paper aimed to foster communication and outlined possible consultation approaches. The Ministry also launched a comprehensive engagement process with communities, Aboriginal organizations and industry through a series of facilitated discussions and working groups (MNDM 2007). Things the Ministry heard during what they called ‘Consultation on Consultation’ was similar to what Aboriginal communities requested during the MAM consultations. Aboriginal communities identified three central priorities: 1) they wanted to be consulted and accommodated at all stages of the mining sequence, including preliminary exploration; 2) they wanted to participate meaningfully in land use decision making and economic development; and 3) they wanted a measure of control over development within their traditional territories and assistance to build capacity to allow them to fully participate (Ontario Government 2008). According to the Ministry’s website they subsequently implemented a pilot project to protect cultural and spiritual sites of significance from staking, they notified new claim holders on when and how to engage Aboriginal communities and provided quarterly maps and reports to First Nations showing any recent claims recorded near by. The Ministry also signed MOU with three far north communities (Ontario Government 2008). In a 2007 press release, the MNDMF lists other initiatives it undertook to foster productive relationships with Aboriginal communities and organizations, and to develop more effective consultation processes for the mining sector. Some of those initiatives included: engaging several FNs in projects



under the Far North Geological Mapping Initiative, FN prospecting training, sponsoring Aboriginal participation at technical tables, marketing and industry events, partnering with Confederation College in Thunder Bay to implement a 'Basic Line Cutting Course', and ensuring Aboriginal representation on ministry committees and advisory councils (MNDM 2007).

In July 2007 the Ministry proposed several changes to the Mining Act and posted them on ER for comment. The input received was incorporated into their next discussion paper. In August 2008 the MNDMF released its 'Finding a Balance Discussion Paper' officially launching the multi-year MAM process (see Appendix D). The 'Purpose for Review' section stated,

Ontario is modernizing its Mining Act to ensure that this legislation promotes fair and balanced development that benefits all Ontarians in a sustainable, socially appropriate way, while supporting a vibrant, safe, environmentally sound mining industry. Modernization will bring the Mining Act into harmony with the values of today's society while maintaining a framework that supports the mineral industry's contribution to Ontario's economy (p. 4)

The discussion paper also pointed to the Premier's July 14, 2008 Far North Planning announcement, the Premier's 2007 election promise and the need to ensure appropriate consultation and accommodations to Aboriginal people as reasons for review. In the July 14<sup>th</sup> speech McGuinty was quoted: "We're going to modernize the way mining companies stake and explore their claims to be more respectful of private land owners and Aboriginal communities" (Ontario Government 2008, p. 6).

The first round of MAM public consultations ran from mid-August 2008 to early September 2008 and was held in Timmins, Thunder Bay, Sudbury, Kingston and Toronto. In total, there were over 700 plus in attendance (Reid 2009).

Phase 1 of MAM Aboriginal specific consultation was held over a period of five months. There were 15 workshops and regional sessions held with various First Nation communities, Treaty organization, TCs and the MNO between September 17, 2008 and November 14, 2008. Between October 9<sup>th</sup> 2008 and November 7, 2008 there were 11 individual FN community visits done by request. This included visits to the Matawa TC remote and road access communities and several other communities. There were also 12 community visits hosted and delivered by the UOI between December 2, 2008 and January 8, 2009 (see Appendix E for a full list of communities and organizations engaged). The MNDMF also provided support to PTOs and some Tribal Councils for legal/technical review of the Mining Act. The specific dollar amount for that was not made available due to confidentiality agreements in place (see Appendix F for information related to general MAM expenditures). There were approximately 100 First Nation/ Metis communities and organizations that participated in MAM in some manner (Reid 2009). The discussion paper, after two time extensions, was open for comment until January 15, 2009. The Ministry received 209 comments: 52 in writing and 157 online (Environmental Registry 2010). Three and a half months after the consultation period closed, on April 30, 2009, Bill 173- An Act to Amend the Mining Act was tabled. On that morning Minister Michael Gravelle gave a speech in Toronto introducing Bill 173 to stakeholders and to the public via webcast (see Appendix G for a photo). Bill 173 received second reading on May 4, 2009. In between second and third reading Bill 173, along with Bill 191- Far North Land Use Planning (in-between first and second reading), went to legislative committee. The fact that the two Bills were bundled together was a contentious issue. The Standing Committee on General Government convened meetings

in Toronto August 6, 2009, Sioux Lookout August 10, Thunder Bay August 11, Chapleau August 12, and Timmins August 13 (see Appendix H for a list of presenters at all Hearings and Appendix I for a list of MPPs that were on the committee). The Bill received third reading on October 21, 2009 and royal assent on October 28, 2009.

The new Mining Act is what enables regulations. Consultation on the development of regulations was done by the MNFMF with Aboriginal communities and organizations and stakeholder groups. The MNDMF developed a workbook, 'Ontario's New Mining Act: Workbook on Development of Regulations' to help interested members provide guidance on the development of regulations. The workbook was posted on the Environmental Registry on December 21, 2009 for a period of 130 days ending on April 30, 2010. Over the next three years the MNDMF plans to continue working with key stakeholder committees to refine approaches and implementation strategies through the Minister's Mining Act Advisory Committee and the Political Confederacy of Ontario. From January to June 2010 there were stakeholder, industry and Aboriginal community workshops. The MNDMF has indicated a three-phased approach to regulations. It is their goal after one year to introduce paper staking<sup>5</sup> in southern Ontario, and develop criteria for application to withdraw Crown mineral rights under privately held surface rights in northern Ontario. Phase 2 within the next 2-3 years will lead to the development of exploration plans and permits and awareness programmes. Finally, phase 3 within the next 3-5 years will be the implementation of online map staking (MNDMF 2009), but until the regulations are passed there will be uncertainty.

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<sup>5</sup> Paper staking is when prospectors submit an application form describing the land to be claimed rather than physically staking it. It is a less intrusive process (Ontario 2011)

The 2009 Ontario Budget committed \$40 million for three years for initiatives to support Mining Act modernization (MNDMF 2009).

In Part 5 of its 2009/2010 report, the ECO, concluded that the amended Mining Act found a reasonable balance between the interests of the mining industry and private property owners (ECO 2010), but noted that extremely divergent views were offered by the general public, property owners, municipalities, ENGOS, conservation authorities, the prospecting industry, the mining industry, lawyer's associations, agriculture associations and others. Interestingly, the ECO report does not mention if a balance was found between the mining industry and Aboriginal people. They praised the MNDMF for undertaking extensive consultations, but displayed disappointment related to several issues. They found the registry postings had insufficient information that seriously hindered the public's ability to comment. They were frustrated that the MNDMF took four months to send the ECO the written comments the ministry had received on Bill 173. The ECO state "Such delays hamper the ECO's ability to effectively review the ministry's consideration of public input and meet our responsibility under the EBR to report to the Ontario Legislature" (ECO 2010 p.120). ECO was also concerned that pre-existing claims were unaffected by community-based land use plans and that it could undermine land use planning.

The ECO described the public participation and EBR process and their opinion on the amended act, but nowhere in their report did they comment on the consultation process itself and this is the gap my research attempts to fill. The information on the MAM process that was conducted and the historical information to contextualize Aboriginal relations with mineral development in Ontario assisted in the understanding of

the case study and was a necessary background information for my objectives.

Following will be a description and explanation of the research methods used in my research.

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## CHAPTER 4: METHODOLOGY

### GROUNDED THEORY

My research's methodological approach was grounded theory (Glaser and Strauss 1967). With this chosen methodology, research is not designed to test a theory, rather categories are discovered by examining the data and explanations are given afterwards. As such, grounded theory was well suited to the inductive exploratory nature of this study. Glaser and Strauss (1967) offer systematic strategies, but also allowed for openness and flexibility. For example, in my study, sampling was not designed to assure population representativeness and a literature review was done after developing independent analysis. Glaser and Strauss aimed to move qualitative theory beyond descriptive studies to the realm of explanatory theoretical framework (Charmaz 2006).

Grounded theory was useful to discover the main themes in the data in an 'efficient' way and to contend with the difficulties and complexities that exist within Aboriginal-government relationships, power structures, and consultation processes. I used *selective coding* (Gray 2009) to identify core categories from the data through which the 'story' of MAM consultation and Aboriginal-government relationships were told. This required coding segments of data that depict what each segment was about, then coding and sorting to allow for comparisons to be made. This involved relating sub-categories to the core categories. In grounded theory the research was complete when 'theoretical saturation' was reached and no new properties, categories or relationships are coming from the data and an adequate theory has emerged (Gray 2009). I agree with Bryman (2007) who questioned if grounded theory actually produces theory itself or if it may just generate concepts. I do not believe that my study contributed to theory

development *per se*, but did establish key concepts. Grounded theory methodology was nevertheless useful in my case study as a means of handling and interpreting data.

## CASE STUDY

Yin (2003) found the case study method can be used in a variety of ways, including the evaluation of training programmes, organizational performances, project design and implementation, policy analysis, and relationship between different sectors of an organization or between organizations. Choosing the MAM Aboriginal consultations as a case study I was able to evaluate the implementation of the process and also analyse the new Mining Act. My interviews with Aboriginal people sought to evaluate their sense of power and engagement in the process, and where on the 'ladder' they might place themselves in terms of their ability to influence the development of the new Mining Act.

In addition, using a case study allowed me to explore many themes and subjects from a selected range of people and organizations. Yin (2003) found case studies beneficial because they investigated a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context were not clearly evident. Furthermore, case studies explore subjects and issues where relationships were uncertain and tried to attribute causal relationships and not just describe a situation. Case studies attempted to answer 'how' and 'why' questions, and do not require control over behavioural events, but rather, focused on contemporary events (Yin 2003). To answer the 'how' and 'why' my source of evidence included a variety of sources. My primary sources included interviews, stakeholder submissions made to EBR, the standing committee hearing minutes from Hansard (Ontario Legislature),

various web pages and publications from the MNDMF and First Nations organizations, case law from CanII and direct observations. Examples of secondary sources utilized are textbooks and media coverage. The benefits of using documentation was it can be reviewed repeatedly, it contained exact names, positions, and events, and it provided a broad coverage of events, settings, and timelines. However, the researcher must always be conscious of biases when using documentation.

Direct observations were another advantageous source of data because they were contextualized and enabled observation of events in real time. I participated in two types of MAM consultations: two Ontario Union of Indians led consultations (at Fort William First Nation on January 6, 2009 and at Lake Helen First Nation on January 7, 2009) as well as the Legislative Committee Hearings (in Thunder Bay on August 11, 2009 and at Chapleau on August 12, 2009). At times, I participated in the activities I was observing. I asked questions and spoke with other participants. I was conscious of the participants' prejudices and I acknowledged the risk of bias that exists when observers become involved with the participants. Combining the various sources of evidence with personal interviews provided me with a rich and varied data set for my analysis.

Interviews, which were my main source of data, were targeted directly to those who were actively involved in the case study. They provided focused and original data revealing individual perceptions of the 'how' and the 'why'. When conducting interviews it was important to be wary of the weakness of this type of research. I made myself aware of the dangers of the interview method and sought to minimize them. This included contributing to biased outcomes with poorly worded questions, response bias,



inaccuracies due to poor recall, and the risk of asking the interviewee leading questions (Gray 2009).

The interviews were semi-structured and consisted of open-ended questions. This allowed the respondent's knowledge and understanding on various issues to be explored (Bryman and Teevan 2005). Information gathered during the interviews provided people's opinions, experiences and perceptions on the various MAM consultation processes. My interview guide is in Appendix J. Most interviews lasted between 30 to 45 minutes and were audio recorded. I tailored my interviews slightly based on the respondents' role in the MAM process. Throughout the study, experiential learning occurred and I adjusted the research approach to better reflect what previous participants taught me and by the participants' observations of the proceedings (Creswell and Plano 2007). As I learned more from the interviewees I was able to ask more specific and informed questions.

## ETHICS

Before I initiated my interviews I applied for and received ethical approval from the Lakehead University Board of Ethics. Ethical approval was received on condition I received letters of support from the relevant PTOs and TCs. NAN and Matawa First Nations both gave free, prior, and informed consent to participate in my research project (attached as Appendix K). These organizations were chosen because their head offices are located in Thunder Bay, and they represent communities that participated in the MAM processes. I met with the Executive Director of NAN and the Head Economic Development Department of Matawa First Nations and they both provided letters of support (see Appendices L and M). Prior to an interview, each interviewee was required

to fill out a consent form (see Appendix N). The consent form explained the nature and purpose of the study and the procedures. It informed each interviewee that they could withdraw or decline to answer any question at anytime. I also informed them that the data would be stored for five years. All respondents agreed to reveal their names and requested a copy of my final thesis

## DATA COLLECTION

The MAM consultation process began August 2008, and I began my MES-NECU program in September of that year. I conducted my first interview in June 2009 and continued until December 2010. During this time I spoke to a wide range of people including politicians, bureaucrats, lawyers, consultants, various forms of FN leadership, community development officers, political advisors, activists, and elders. Although I had discussions with many people, there were three or four government representatives that refused an interview. In total I conducted 26 interviews with key informants who all took part in some capacity in a MAM consultation process. The breakdown includes: six Government representatives, 18 First Nation representatives, one Metis representative, one media representative, and one lawyer (see Appendix O for a full list of names, titles and dates). It should be noted that the media representative and the lawyer both represented Aboriginal organizations. The media representative was instrumental in organizing the Matawa First Nations sessions and provided valuable information on the process. The lawyer was interviewed to ascertain NAN's perspective on the legal duty to consult. I interviewed fewer government officials in comparison to First Nation representatives as the government respondents' replies were more homogenous and therefore fewer interviews were required to reach data saturation. The First Nation

respondents presented more heterogenic information and to capture the variability of their experiences, more were interviewed (Palys 2003).

In addition to personal interviews, I also included 10 peoples' presentations either made during a Standing Committee Hearing meeting or during Question period in the Ontario Legislature. The breakdown includes one Government representative, six First Nation representatives, one media representative and two industry representatives.

To meet people who participated in the MAM consultation I attended a number of relevant events (see Appendix P). 'Opportunistic' and snowball techniques were used to find potential participants (Creswell and Plano 2007) and I was lucky that most of the contacts I made were enthusiastic and willing to take part in my research. Since the MNDMF has an office in Thunder Bay, I had access to interview their local employees. Personally requesting letters of support from NAN and Matawa was a good initial contact as from there I was directed to other relevant people to be interviewed. Two events that provided great access to First Nations respondents who participated in MAM consultation sessions was the Matawa First Nations 21<sup>st</sup> General Annual Meeting held in Ginoogaming FN on July 28, 29, 30, 2009, and the NAN election/ XXVIII Keewaywin Chiefs Conference held in Chapleau Cree First Nation on August 11,12,13 2009. Attending these events was beneficial as I was able to access various FN leadership from several communities who were all in one place at the same time. All the interviews were in English. They were recorded and later transcribed.

## ANAYLSIS

To acquire a solid understanding of the participants' comments I read the interview transcripts and documentation several times and identified the most common themes. From these common themes core categories were selected that told the case study's 'story' about how the MAM consultations unfolded. My personal observations were not a factor in establishing the core themes, but were beneficial in revealing the general feeling of the 'story'. The core categories were 'capacity issues', 'comments on the MAM consultation process', 'complexities of consultation', 'differences in ideologies', 'lack of trust', 'comments on the new Mining Act'. These categories allowed for comparisons and connections to be made. It is interesting to note several of the core categories link my work to the historical context. The history needs to be acknowledged even if it is contentious and the parties do not agree on the meaning of events. As I went through my transcripts whenever I came across a core theme, I would cut and paste the passage into a new document. Each category had its own document and all quotes relating to that particular theme were grouped together. Quotes that dealt with more than one theme were pasted in all the corresponding documents. I then analyzed the quotes. Next I established sub-categories from the core categories. For example, 'comments on the MAM consultation process' was divided into sub-categories one of them being 'rushed timelines' and then the sub-categories were broken-down even further. I used the categories and themes to judge the MAM consultation. I then placed this event on Arnstein's ladder, based on the requirements from the literature.

## CHAPTER 5: RESEARCH FINDINGS

The purpose of my study was to evaluate the effectiveness of indigenous involvement in government decisions that affect them to see if the trend of poor public participation practices holds true in an Ontario setting. The interview data exposed the failure of the MAM Aboriginal consultation process. The main areas of concern from both Aboriginal and government perspectives were exposed through the major themes identified from the research findings. Table 2 summarizes the core categories that were brought up by each type of respondent. The core-categories are:

- a) capacity issues
- b) comments on the MAM consultation process
- c) complexities of consultation
- d) differences in ideologies
- e) lack of trust
- f) comments on the new Mining Act.

Directly and indirectly I included the views of 36 respondents. Out of the 36 respondents 24 were Aboriginal, seven representing government, one lawyer, and two media and two industry representatives. Rushed timelines, a sub-theme of comments on the MAM consultation process, was the most common issue raised and the only theme brought up by each type of respondent. Thirteen FN, five government, one lawyer, two media and two industry respondents identified the tight time frame of the consultation process. Nineteen respondents identified the ‘different views on consultation’ as the second most common sub-theme, and 16 respondents identified ‘lack of influence on the end results’ as the third most common sub-theme. When I asked people’s perceptions on the Aboriginal consultation process, there were 12 negative comments and eight positive comments. The negative comments came from one NDP MPP, one MNDMF, nine FN and the one Metis representatives. The positive comments came from four FN, one

Liberal MPP, and three MNDMF representatives. When I asked people their perceptions on the new Mining Act, there were 11 negative comments and three positive comments. The negative comments came from one NDP and ten FN representatives, while the positive comments come from one Liberal MPP, one MNDMF and one industry representative.

*TABLE 2: Core Categories by Respondents*

	RESPONDENTS								TOTAL
	Government Reps n=7*			Aboriginal Reps n=24*		Lawyer n=1	Media n=2*	Industry Reps n=2*	
<b>CORE THEMES OF RESEARCH FINDINGS</b>	Liberal MPP n=1	NDP MMP n=1 +1	MNDMF rep n=4	First Nation n=17+6	Meti s rep n=1	Lawyer n=1	Media n=1+1	Industry n=0+2	
<i>CAPACITY ISSUES</i>									
Lack of Knowledge			3	7			1		
Lack of Funding			2	8+1		1	1		
Lack of Human Capacity			1	8+1					
<i>COMMENTS ON CONSULTATION PROCESS</i>									
Positive	1		3	4					
Negative		1	1	7+2	1				
Lack of Input in Designing Consultation Process				4+1					
Rushed Timelines		1+1	3	11+1	1	1	1+1	0+2	
Poor Session Planning and Participation			1	4+1			1		
<i>COMPLEXTIES OF CONSULTATION</i>									
Lack of Influence on the End Result		1	1	12		1	1		
Unclear Definition			2	5		1		1	

of Consultation									
Unclear Nature of Consultation		1	4	3		1			9
Challenges for Government	1		1	4	1				7
<i>DIFFERENCES IN IDEOLOGIES</i>									
Different Worldview	1	1	3	5			1		11
Different Relationship with the Land				4					4
Different Interpretation of the Treaties			1	9	1				11
Different Views of Natural Resources			1	5					6
Different Views on Consultation		1	2	14+1		1			19
<i>LACK OF TRUST</i>									
Lack of Trust Based on Past Experiences		1		8	1				10
Lack of Trust in Consultation Process				6		1			7
Lack of Trust in Government		1	1	8	1		1		12
<i>COMMENTS ON THE NEW ACT</i>									
Positive	1		1					0+1	3
Negative		0+1		7+3					11

\*n= the total number of people I interviewed directly (26)+ people whose opinions I included in my results retrieved from Hansard Committee Hearings or Question Period in the Ontario Legislature(10).

## CAPACITY ISSUES

Throughout the interviews, lack of capacity in Aboriginal communities and organizations was a recurring theme. A lack of capacity among First Nations was a limiting factor to effective participation. The topic was thematically divided into three sub-categories in reference to:

- a) lack of knowledge
- b) lack of funding
- c) lack of human capacity

## LACK OF KNOWLEDGE

The Aboriginal-specific consultation sessions were held in many different communities. Both Aboriginal and non-Aboriginal respondents frequently commented on the community members' lack of understanding on the issues discussed during the consultation session. For example, the details of the old Mining Act or the mining sequence. The level of community members' understanding varied greatly from place to place. In Webequie First Nation and Eabametoong First Nation community members had more experience and knowledge of mining compared to communities such as Ginoogaming First Nation or Fort William First Nation, who have not participated or been exposed to mining activity in the same way. Some community members knew the Mining Act clause by clause and the ins and outs of the mining industry, while others were not even aware of mining activities occurring within their traditional lands. When I asked Adolph Rasevych, Economic Development Officer for Ginoogaming First Nation, if the people at the Ginoogaming MAM session felt they provided input on how to reform the Mining Act, his reply indicated a low level of mining knowledge.

They were interested in their trap grounds ...and how maybe they would be affected, but the intricate details you talk about the answer would be no, no, they aren't versed on that.... We are versed in forestry and fishing, but mining is new to us. Webequie is well versed in mining. They have a better idea of how they want to change the Act up north (Pers. Comm., July 30, 2009).

Raymond Ferris a council member at Constance Lake First Nation, also found that there was a lack of understanding related to mining in his community. He stated,

We have to understand the old Mining Act, we know it was no good, but why wasn't it any good? If we can't understand that we can't recommend the necessary changes, a lot of us don't understand it. (Pers. Comm., July 30, 2009).



Peter Moses, Aboriginal Liaison, MNDMF highlighted the challenge his ministry has to educate as part of the consultation process. He said,

People aren't up to snuff or par as to what is actually in the Mining Act, because it's not part of their everyday life, you know. In reality, how can you (government) actually turn around and start educating everyone and then turn around and say let's have your opinion on this. First of all, how can you put an opinion on something you don't know about in the first place? There is actually a lack of knowledge by a lot of people in general, not just Aboriginal people (Pers. Comm., June 12, 2009).

## LACK OF FUNDING

Many respondents in the interviews stated it takes human resources to consult, whether to prepare a community's position to submit to the EBR, or to engage community members to participate meaningfully in a consultation session. Several organizations including NAN, G3T3, Pic River FN, and KI FN prepared a budget for what they would have needed to perform adequately in the MAM consultation. Unfortunately for them, they only received a fraction of what they hoped for from the government. The government had 1.6M to facilitate Aboriginal consultations that meant it prohibited many communities from participating (see Appendix E). The Congress of Aboriginal Peoples<sup>6</sup> requested capacity funding to allow them to be engaged in the process, but received nothing. Kevin Daniels, Chief of the Congress of Aboriginal Peoples, in his statements to the Standing Committee on General Government said,

It is important that Aboriginal peoples have the capacity and resources to participate. The crown obligations...are entrenched in the honour of the Crown (Ontario Legislative Assembly 2009a).

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<sup>6</sup> The Congress of Aboriginal Peoples (CAP) was founded in 1971 as the Native Council of Canada (NCC) it represents the interests nationally of Métis and non-status Indians.

Several respondents also commented that lack of funding made it difficult to participate on equal ground when it was too expensive to hire the same kind of professional advice from lawyers, consultants or mining experts as the government.

#### LACK OF HUMAN CAPACITY

Human capacity in Aboriginal communities varies from community to community. Among other things it is affected by: small populations, low levels of education, lack of funding, language barriers, and efficiency of leadership. In September 2006 Neskantaga First Nation's total population was 373, with 274 living on-reserve, Aroland First Nation had 574, with 328 on-reserve and Eabametoong First Nation had 2116 with 1176 on-reserve (Matawa 2010). All First Nations communities experience extremely low high school graduation rates when compared to the general population. It is often a challenge to fund and to find people in the community with the necessary knowledge and skills to employ. For example, it would require a certain level of expertise for a community to prepare a submission for the EBR pre- and post-drafting of a bill. Arlene Slipperjack, the Chief of Whitewater First Nation commented on the difficulty of critiquing Bill 173,

The fact that the Bill has a long list of amendments to the existing Mining Act, as opposed to a new, consolidated version of the Mining Act, makes it quite inaccessible except to mining law experts and other technicians. The cross-referencing required to the existing Act makes the package impenetrable for most First Nations citizens and even governments (Ontario Legislative Assembly 2009b).

It was noted that a community's leadership, an aspect of human capacity, affects the level of participation and input from a community. Some communities' leadership put more time and effort into informing their members and seeking input than others. Some communities put notices in the paper, advertised on local radio, did door to door visits,

and passed band council resolutions, including Neskantaga First Nation and Nibinamik (Summer Beaver) First Nation. Other communities, such as Ginoogaming First Nation posted a notice for the consultation session less than a week before in the band office and the Northern Store and sent out a circular. A community's level of participation in the MAM consultations was correlated to the human capacity in the community.

Another factor that affected whether or not a community had the opportunity to participate in the MAM process was whether or not they belong to a particular Tribal Council or organization that was given capacity money for consultations such as Matawa TC and the UOI. However, just because consultation was facilitated by a Tribal Council did not ensure consultation was meaningful. Tribal Councils, like communities, are faced with human capacity challenges. For example, UOI was in charge of informing its communities of the sessions they were holding, but because of lack of personnel and limited timeframe, their communities were not well informed and the turn out at the UOI consultation was low.

## COMMENTS ON THE CONSULTATION PROCESS

Aside from government officials and certain First Nation organizations, there was rarely positive feedback on the process. Some First Nations recognized that the MNDMF held an unprecedented level of consultation and were appreciative for the opportunity to participate. Others acknowledged the process was an education for all those involved and it led to greater understanding of the Mining Act and the legislative process. Paul Capon confirmed,

For the first time there was a much higher engagement with FN people into this law. I think this one did have a much greater impact on peoples' understanding on how laws work and are created and the

whole legislative process. I think one of the positive outcomes was a real understanding of that discussion, but the downside once you realize the complexity of how the process operates, you realize all that and the expectations of where the communities are coming from you realize there is a big divide between the two (Pers. Comm., July 14, 2009).

The majority of respondents expressed dissatisfaction with the MAM consultation process. Below are what some people had to say:

It was a sham process [Diane Kelly, Grand Chief of GCT3 (Pers. Comm., August 11, 2009)]

Bill 173 came out and our immediate response was the whole process was just a farce.... So there is a real flaw with the way the government is doing things [David Paul Achneepineskum, CEO of Matawa First Nations (Pers. Comm., August 12, 2009)]

The common complaints were divided into three sub-categories:

- a) lack of input in designing the consultation process
- b) rushed timelines
- c) poor session planning, notice, turn-out and participation.

#### LACK OF INPUT IN DESIGNING CONSULTATION PROCESS

Several organizations and First Nations such as NAN, GCT3, KI FN and Pic River FN wanted to have a say in how the consultation process would be carried out. They were not successful in their requests.

NAN wanted a say in the consultation design. Jason Beardy, from NAN said,

We made a proposal that outlined the process we were hoping to use to conduct our consultations, going and interviewing every community in NAN... the province had different ideas [Jason Beardy, Mining Table Lead NAN (Pers. Comm., August 9, 2009)].

Sarah Mainville, Political Advisor to the GC described GCT3's requests,

We were pro-active and we contacted the Ministry. We had a meeting with Aboriginal Relations Unit, Bernie Hughes in September, in order to secure enough capacity in order for us to facilitate consultations

with our 26 communities. We wanted a much more comprehensive approach than one regional workshop. We said one regional workshop wouldn't work. We said we needed to build understanding of what was going to take place. We needed to advise the communities of threats and challenges of the present regimes, and to look at other regimes and what works in other jurisdictions. So we actually put a budget together of \$300 000 in order for us to facilitate consultation (Pers. Comm., August 11, 2009).

Mainville went on,

Maybe that [\$300 000] was too much? A pre-consultation approach means that we define the process together, and that is always the approach that we take. We initially need to define what are the issues, what are the real issues, and what capacity building is needed, what is the proper approach with our communities, and we always want to facilitate discussions because we know our communities best (Pers Comm. August 11, 2009).

The GCT3 received a portion of what was requested and one regional workshop. The workshop was held on October 2, 2008 and was not successful as the Chiefs walked out reasoning that the MNDMF did not accommodate their rights regarding mutually defining the consultation process as outlined in the Great Earth Law (Manito Aki Inakonigaawin<sup>7</sup>).

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<sup>7</sup> Grand Council Treaty # 3 is the traditional government of the Anishinaabe Nation in Treaty # 3. By treaty with Her Majesty in 1873, the Nation shared its duties and responsibilities and protected its rights respecting 55,000 square miles of territory. The Anishinaabe Nation did not surrender any rights of self-government and so continue to exercise its traditional government. But the Canadian and provincial governments historically have tried to undermine Anishinaabe government based on a denial of its jurisdiction. In recent years however, the Canadian government recognizes that the *Constitution Act, 1982*, supported by recent Supreme Court of Canada decisions, clearly establishes that the jurisdiction of Anishinaabe government continues to exist. Therefore, the Anishinaabe Nation in Treaty # 3 maintains rights to all lands and water in the Treaty # 3 territory commonly referred to Northwestern Ontario and south-eastern Manitoba. Accordingly, any development in the Treaty # 3 Territory such as, but not limited to, forestry, mining, hydro, highways and pipeline systems that operate in the Treaty # 3 Territory require the consent, agreement and participation of the Anishinaabe Nation in Treaty # 3 (GCT3 2011).

## RUSHED TIMELINES

The most common complaint about the consultation process (see Table 2) was rushed timelines. Chris Metatawabin, Economic Development Officer for Fort Albany First Nation addressed the Standing Committee in Timmins:

The rapid pace and timing over the summer months when everyone is away is extremely problematic for First Nations. We don't have enough time to get together, to analyze and to develop a common position. Cree and Ojibway territory relationships are based on principles of a collective rather than private property, and the process undermines the ability for a collective response to be developed. A collective takes longer as it needs to be based on meaningful, community-oriented dialogue where everyone understands the issues using the Cree language (Ontario Legislative Committee, 2009e)

My research showed rushed timeframes was not only an Aboriginal concern, but also a concern of government officials and industry representatives. In my interview with MPP Bisson at the Chapleau Legislative Hearing he explained why he believes the government rushed the process:

What the government [did] with the legislation [was tried] to fast forward the process and to bring it to conclusion, because they have finally understood one thing, which is to do nothing, means to say it adds for confusion for mining companies and others to develop the Far North (Pers. Comm., August 12, 2009).

The specific complaints related to rushed timelines were broken down as follows:

1. Insufficient time to provide comments on the discussion paper on the Environmental Bill of Rights.
2. Insufficient time between the release of the discussion paper and the public/ stakeholder sessions.
3. Insufficient time allocated for the government to inform the communities about the sessions.
4. Insufficient time for consultation sessions, therefore many communities were missed.

5. Insufficient time for Committee Hearings, therefore only a handful of towns were visited.
6. Insufficient time to speak during the Committee Hearings.
7. Insufficient time MPPs were given to submit amendments to the House after the Committee Hearings.

Each one of these items will be discussed individually in more detail.

*Insufficient Time to Provide Comments on the Discussion Paper on the Environmental Bill of Rights.*

Originally there was a 30 day period to provide comments to the EBR. NAN challenged this time allocation and received significant media attention stating the timelines were not culturally appropriate. Eventually the government would extend the period to Nov 14<sup>th</sup>, 2009 and after First Nations continued to request more time to properly review and gather necessary technical expertise the deadline was extended to January 15<sup>th</sup>, 2009. Grand Chief of NAN Stan Beardy felt the government of Ontario did not provide enough time to conduct meaningful consultations in the development of this legislation. For an organization such as NAN to collect input from each of its 49 communities and prepare a submission in 30 days would have been logistically challenging. NAN's original proposal to visit every community did not occur because only a fraction of the funding was received, the strict time restraints and some communities abstained from the process. NAN had hoped to spend 3-4 days in each community and provide them with adequate notice, but that is not how it transpired. NAN consulted only a few communities for a few hours each. Jason Beardy explained,

The challenge was we didn't have enough time to inform people as to what we were doing. They [community members] only had a few days before the workers got to the communities, and once they [the workers] got there they found that lots of people were busy and out on

the land. So right away the number of people that participated was very minimal. That's not to say that the issue isn't important to them. It's just to say that the timing was off. Ideally we would have taken probably between two or three months. It depends on each community. Each community has its own sense of what it means to be properly consulted (Pers. Comm., August 9, 2009).

Jason Beardy continued,

NAN did this work, but we knew we weren't doing justice to the type of consultation people wanted from us. It was kind of a catch 22 for us. We knew we needed to submit something, even if it was something that said we weren't happy with what was happening. We had to deal with a lot of frustrated people (Pers. Comm., August 9, 2009).

Communities have diverse perspectives on consultation and on development may have different suggestions to make to the Act. This put NAN in a challenging position of putting recommendations in one report in a short period of time.

*Insufficient Time Between the Release of the Discussion Paper and the Public/Stakeholder Sessions.*

The public sessions were not part of the Aboriginal specific consultations, but were an early opportunity for Aboriginal people to get involved and to sit down at round tables with other stakeholders and members of the public to gauge the scene. The first public session was held on August 18<sup>th</sup>, 2008 in Timmins. The same day the MNDMF's discussion paper was released. Many people complained that the closeness between the session and the release of the background material did not allow adequate time for people to prepare. Tim Pile from the Metis Nation of Ontario commented,

The ministry goes...here is our booklet, they say read this and be prepared to give us intelligent answers at the end of the day, which there is no preparatory time, that was a real big beef, ... you came there, how do you have time to read it and understand it (Pers. Comm., July 28, 2009)?



• CBC reporter, Jordan Lester described the Thunder Bay session,

Well over one hundred stakeholders were broken off into groups and handed a question sheet prepared by the MNDMF. The groups had about one hour to review and discuss the questions. Then one member of each group was asked to come to the microphone and briefly summarize what they came up with (Pers. Comm., March 19, 2009).

Lester described the displeasure of Todd Keast, a Sudbury-based geologist, with the session. Keast and his group bypassed filling out the questions because there was not enough time to know what the real questions were. James Maxwell, an exploration manager of a silver company, criticized the Thunder Bay session and suggested the ministry should consider holding a second round of consultation. He said,

nobody had enough time to adequately review the ministry's discussion paper. There's been two weeks' notice for this presentation with the discussion paper, only an hour to make our presentation. How are you supposed to come together and make interpretations (Pers. Comm., March 19, 2009).

*Insufficient Time Allocated for the Government to Inform the Communities about the Sessions.*

The MNDMF sessions held with the Matawa Tribal Council were planned last minute and there was not enough time to notify the communities to give them sufficient time to prepare to participate. The communities were responsible for informing and engaging their members. The communications officer for Matawa TC, Kristina Baraskewich claimed she only had two weeks notice that she was going to do these consultations. Peter Moonias, former Chief of Neskantaga, said that Matawa TC and MNDMF gave about two weeks' notice, but it was an unreasonable time for his community to fully prepare. Mark Bell, Aroland First Nation Economic Development Officer, involved in the session agreed,

It was organized so fast that we just found out, I don't even think we put up a notice for 3 days, we found out on Monday that they were going to be there on Wednesday (Pers. Comm., July 28, 2009).

Bell suggested notices need to be up for longer than a week for the community to see it because if it is just up in the band office or in the store, not very many people will read it.

*Insufficient Time for Consultation Sessions, Therefore many Communities Were Missed.*

NPD MPP Howard Hampton expressed his opinion during question period,

While this bill was being drafted, I had the opportunity during January and February to meet with a number of First Nation chiefs and councils. I went to Pikangikum, North Spirit Lake, Poplar Hill, Deer Lake, Keewaywin, Sandy Lake, Muskrat Dam, Round Lake, Sachigo Lake, Bearskin Lake, Big Trout Lake, otherwise known as Kitchenuhmaykoosib Inninuwug, Fort Severn, Angling Lake, Cat Lake, Lansdowne House, Summer Beaver, Wunnumin Lake, Kingfisher Lake, North Spirit Lake, and Webequie-20 First Nations. I asked the chiefs and councils and elders the same question: "Has anyone from the provincial government the Ministry of Natural Resources, Ministry of Aboriginal Affairs, Ministry of Northern Development and Mines, Ministry of the Environment come to your community, sat down with chief and council, sat down with the community in general and raised these issues and talked about proposed amendments and the issues?" Do you know what the answer was in every case? The answer was, "No; no one has come here to consult with us. No one has come here to talk to us. No one has come here to discuss with us any of these issues" (Ontario Legislative Assembly 2009d).

He continued,

The most that happened is there were a couple of information meetings in Thunder Bay and a couple of information meetings in Sioux Lookout, and I think there was one information meeting in Red Lake. That's what they were. They weren't consultation, give-and-take, "What do you think? What do you believe? How do we address this issue?" They were essentially information meetings (Ontario Legislative Assembly 2009d).

From the list of communities Hampton visited, it is clear many communities were by-passed.

*Insufficient Time for Committee Hearings, Therefore Only a Handful of Towns Were Visited.*

Many people wanted to see the Committee travel to northern communities (north of Highway 11) because they are the communities in the areas being affected. Fort Albany made a request for expense reimbursement to attend the hearing, but was denied. NDP MPP Gilles Bisson did not agree. At the Toronto Hearing he stated,

The committee should have accepted that request. We've done it in the past. Again, I'd just on the record say it's wrong. If we're not going to travel by committee to the far north communities, the least we can do is provide assistance where requested (Ontario Legislative Assembly 2009f).

Bisson pointed out that Fort Albany would have had much to contribute to the session:

I think it's really sad that we've said no to this community because it is one of the communities affected by this Bill. In fact, it's one of the communities that negotiated an IBA with De Beers. We might have been able to learn something from their perspective because they were one of the final holdout communities on the IBA that was signed there. So at the very least, we should have paid travel (Ontario Legislative Assembly 2009f).

NAN Elder Louis Waswa stated that the Chapleau hearing...

should be in our communities, in what you call the far north. But instead, for your convenience, they are taking place in your towns and cities, far from our homelands. Yet First Nations are expected to come to you. Travel is expensive where we are from, even by your standards, and by the standards of our communities-communities that face poverty on a daily basis-the travel cost is prohibitive (Ontario Legislative Assembly 2009b).

The decision of where a committee hearing will travel is not made by the MNDMF, but by the members of parliament. Bisson gave insight as to why Bill 173 did not travel to the north.

Some of the members are lazy, it's summer time, ... 'I don't want to take two weeks to travel, let's only do four days' and that goes into it. 'Oh god do I really want to go up to Attiwapiskat and stay at the Okamow? I would rather stay in a nice hotel where there is a bar and a lounge' (Pers. Comm. August 12, 2009).

*Insufficient Time to Speak During the Committee Hearings.*

The following is an excerpt from the Chapleau Hearing:

**The Acting Chair (Mrs. Linda Jeffrey):** Chief Moore, you're approaching the one-minute mark, just so you know, if you want to do some wrap-up.

**Chief Arthur Moore:** Yes, I have four more pages. If you would allow me, I would appreciate that.

**The Acting Chair (Mrs. Linda Jeffrey):** Chief Moore, we have not agreed to that, and right now, you have one minute and three seconds to wrap up (Ontario Legislative Assembly 2009b).

Each presenter had 15 minutes to present their comments on Bill 173, followed by 5 minutes for questions. Often speakers were cut off and did not have time for meaningful dialogue. The discussion led by the Chair followed very strict and tight timeframe and rules. The Chair would interrupt with one-minute warnings and cut off the Speaker at the end of fifteen minutes. At the Chapleau hearing Frank Beardy, the NAN representative, requested to extend the 15-minute time allowance. There was a lengthy debate before it was decided that 45 minutes would be granted. The following excerpts from the Hearing demonstrate the strict timelines the hearings adhered to.

I'm not sure whether I can do it within the 15 minutes. That's not how we do it with my First Nation. When people come to our community we allow them as much time as possible to address their issues, so right away there's the difference of cultures that we face right now. Those are the kind of barriers we experience all the time in our communities and in our lives [Theresa Hall, Chief of Attawapiskat, (Ontario Legislative Assembly 2009e)].

*Insufficient Time MPPs Were Given to Submit Amendments to the House After the Committee Hearings.*

During the Hearings NDP MPP Bisson attempted to pass a motion that would extend the time period the opposition would have to present amendments back to the Legislature on Bill 173. Below is his rationale for the extension,

Being asked, as the opposition, to present amendments to the Legislature by September 8 is difficult because we are still not finished our hearings. We'll be finished tomorrow. Based on what we hear from all of the presentations ... Mr. Ouellette and I—as the government already has their amendments planned I would imagine because it's already in the legislation—are going to have to go back talk to our staff and get legislative counsel to take a first draft at these amendments. Then we're going to have to have discussions with the stakeholders and then bring them back for final draft to be able to present them. To do this before September 8 is extremely difficult.... We understand that the government is going to get this Bill. The question is, 'Do we want the Bill in its present form or do we want a bill that is missing the boat... on a number of points?' All we're asking is, 'give us reasonable time to prepare amendments' (Pers. Comm., August 12, 2009).

The motion did not pass<sup>8</sup>. In actuality there were no major changes as a result of the Hearings. The rushed turnaround of 25 days further brings the process into disrepute.

Bisson continued,

I think this is rather sad. We have people who are here presenting. I'm going to say upfront, it's going to be hard to incorporate what we're hearing into amendments given the short timeline. And I think this looks bad on the government. If you want a Bill, which I want you to have, that deals correctly with the Mining Act—nobody is in disagreement—let's at least get it right. Let's not rush our way through this and make more errors so that at the end of the day we end up with a flawed Bill (Ontario Legislative Assembly 2009b).

It is obvious from the Aboriginal respondents that many aspects of the consultation process were rushed. Several ministry employees acknowledged the tight timeframes,

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<sup>8</sup> The vote was 2 MPPs in favour, and 5 MPPs against. The Ayes- Bisson, Ouellette. Nays- Brown, Dickson, McNeely, Mitchell, Rinaldi

but in my interview with Minister Gravelle he stated the timeframes were appropriate.

When I asked him if he thought the consultation process was rushed, he replied,

Depends on who you talk to, haha The fact is we extended the consultation process out of respect for the fact that there was a real clear desire to have the consultation process extended. We were certainly, before the legislation was brought forward, we were criticised, because people said, 'why are you waiting so long to bring forward new legislation to modernize the act?' We brought forward a draft document and we brought it forward for discussion and consultation and we extended the consultation period, twice. So it was an extensive consultation period. It was unprecedented in terms of the kind of consultation that took place. I wouldn't describe it as expedited at all. I would describe it as a thorough consultation process. There are those... who would have said we need two more years of consultation. I don't agree that we did. I believe there was a great deal of pre-consultation before the legislation was brought forward and there was an extensive period of consultation afterwards (Pers. Comm., December 18, 2009).

#### POOR SESSION PLANNING AND PARTICIPATION

There was criticism about how the consultation sessions were planned. The MNDMF was accused of trying to save money and consult as cheaply as possible. Mainville, specifically found the MNDMF's workshop (the one that GCT3 walked out of) was poorly planned. Sarah comments,

The notice wasn't great. The workshop took place on Oct 2<sup>nd</sup>. There was just so much misinformation out there about what the workshop was about, who was invited to attend and the way that they administered the actual support to community... a lot of community reps went there thinking they were going to get paid travel when they got there.... they were told sit tight and wait 6 weeks until the travel cheques are administered. That's hard for people who actually participated; it was badly organized on their part (Pers. Comm., August 11, 2009).

In my interview with Kristina Baraskewich, Firedog Communication, I asked,

E: Would better notice improve the community turnout?

K: oh most definitely, especially in an Aboriginal community, timing is a big issue. They like a lot of timing for a lot of things. Definitely a

month prior would have been more beneficial to them (Pers. Comm., July 30, 2009).

In addition to inadequate notice, which contributed to low session turn out and low participation, there were other factors mentioned that affected turn-out. For example, community members who disagreed with the process or were not aware of the issues or who could not see the relevance did not attend. Other factors included poor weather conditions, delayed flights, support of Chief and Council, whether a meal was served and the time of day of the session. The Pic River representative Jamie Michano critiqued the UOI session turn-out in their Committee Hearing presentation.

The Union of Ontario Indians, along with the Ministry of Northern Development and Mines officials and their consultants visited 11 of 43 Union of Ontario Indians communities during the month of January 2009. During these sessions, the First Nations were fed 14 questions and were asked to respond to these questions. From my understanding, there were very low turnout rates at each of the communities. At best, I figure about 400 community members attended these union sessions, which translates into about 1% of the Union of Ontario Indians membership. Following these 11 sessions, both the Ministry of Northern Development and Mines and the Union of Ontario Indians declared victory in that First Nations consultation on the modernization of the Mining Act was complete. I do not understand how meaningful and proper consultation occurs when 400 out of 43,000 members have been spoon-fed 14 specific questions (Ontario Legislative Assembly 2009g).

Having been one of the very few people to attend even some of the UOI sessions, I believe 400 in total attendance is an over estimate. The following excerpts describe the Matawa led sessions:

Neskantaga, there was a fair turn-out, lunch was served, a reasonable number turned out for that, but not all of them stayed. Lots of people sat through, but didn't ask any question. I don't know if I would classify it as having less interest in the community maybe there was a fewer number of people who asked questions [Mike Grant, Mineral Development Co-ordinator MNDMF, (Pers. Comm., June 22, 2009)].

Long Lac and Ginoogaming there was a lack of participation and attendance. They probably averaged 6 people per community. And Constance Lake, (there were) 12 that took part, a few council members, but the majority of people that took part was the youth. Age 16-25 [Kristina Baraskewich, Firedog, (Pers. Comm., July 30, 2009)].

## COMPLEXITIES OF CONSULTATION

Recurring sub-categories within the broad theme of complexities of consultation were:

- a) lack of influence on the end result
- b) unclear definition of consultation
- c) unclear nature of consultation
- d) challenges for government

## LACK OF INFLUENCE ON THE END RESULT

Whether or not a participant's recommendations were used in the revised Act was a determinant in their satisfaction with the consultation process. When First Nation respondents were asked their satisfaction with the consultation process the most common complaint was that their participation and input had no influence on the new Mining Act.

Whether they (Ontario government) listen to First Nations is the biggest question...and that is the problem, you can consult, and I think in the past government has consulted reams, and consultation isn't cheap either, but they have consulted, in some ways quite well, but do they have to listen? [ Paul Capon, (Pers. Comm., July 14, 2009)]

So I guess that is one of the biggest flaws, yes consultations can happen, but ultimately they aren't legally obliged to take anything. Because the government or the political process of drafting legislation doesn't necessarily require input from anyone else outside of government. This is a failure on the government side of things, where real public input is not made mandatory [Jason Beardy, (Pers. Comm., August 9, 2009)]

From Mikisew, we know consultation is not supposed to be an opportunity for First Nations to vent, and then the government does



what it means to do all along. But in practice that is often how it goes. Its not just with First Nations, all kinds of consultations will frequently just be an exercise in frustration for the people being consulted. Because the decision makers do what they are going to do anyway [Anonymous, (Pers. Comm., November 26, 2009)].

There was also a lack of faith in the merit of the Hearing Committees process. Grand Chief Stan Louttit in his presentation to the committee in Timmins was doubtful any of the findings would be incorporated. He stated,

At the end of the day if the Acts goes through, will the things that have been most commonly heard and the various positions put forward by people, not only us as leaders—will it be heard and will it change things? Or is there, as we feel a lot of times, some preconceived notion by Ontario that in fact these things are already there; they're drafted by your technicians and you're going through this process for public perception—for the public good, but at the end of the day, what good does it do? So I have concerns. And if, in fact, we are heard and there are legitimate changes based on our cries for help and input, then we will be satisfied, but right now I have questions (Ontario Legislative Assembly 2009e).

NDP MPP Howard Hampton, speaking in the legislature eluded to the fact when First Nations' ideas are not incorporated there will be suspicion the Act was pre-decided by bureaucrats before consultation was held. He stated,

And it will be a repeat of colonialism if the end effect of this Bill is that someone sitting in an office in Toronto says, 'It shall be thus and so'. What First Nations at KI believe, or what First Nations in Neskantaga or Fort Severn believe 'We'll consult about that, but the decision has been made' (Ontario Legislative Assembly 2009d).

First Nations wanted to be able to give consent, the right to say yes or no, to a project before staking. First Nations want government and industry to abide by the UN Declaration on the Rights of Indigenous People and seek free, prior and informed consent before proceeding with mineral exploration. Several respondents commented that they believed the government had made up their mind before any of the consultations started.

Sarah Mainville, Political Advisor to the GC of GCT3 claimed,

There was always a suspicion that the Act was already written. They already knew how far they would go. We heard right at the cabinet it was said there will not be consent in this legislation. There will not be Aboriginal consent so the parameters were already set (Pers. Comm., August 11, 2009).

In several interviews I asked if the government knew before consultation started that consent would never happen, and both David Paul Achneepineskum, CEO of Matawa and NDP MPP Bisson agreed. However, Liberal MPP Michael Gravelle disagreed.

Achneepineskum: yup yup yup...their mind was already made up (Pers. Comm., August 11, 2009).

Bisson: yes you are right, the government already had the fix in and I think they are wrong on this one (Pers. Comm., August 12, 2009).

Gravelle: there is no question that many First Nation communities have indicated they still believe that consent should be required first. This is why we were so direct and honest in our discussion with the First Nation communities. All the way along the consultation process I made it clear that we need to find a balance, so the issue of consent was a discussion point that came up, but no decisions had been made (Pers. Comm., December 18, 2009).

The government apparently felt to give First Nations consent would be to balance too heavily in their favour. The request from industry was clear that to maintain security of investment there had to be continued open access. There are no laws that stipulate mandatory public input or if the government has to incorporate anything. The question that was often raised during my research was ‘Does government have to listen?’, ‘Do they have to accommodate?’, ‘Do they have to incorporate what they heard?’ It is up to the Ministry in charge as to the extent they listen to what the courts say.

#### UNCLEAR DEFINITION OF CONSULTATION

The Supreme Court has made many decisions over the past twenty years which attempted to define consultation. The legal duties and responsibilities are still evolving

and are open to differing interpretations. Many respondents attested to the unclear definition of consultation during my interviews.

The crux of the problem is the unclear definition of consultation. Does consultation mean consent, or accommodation? Or does it mean a check mark on a form? [Jon Feairs, MNDMF Mining Policy Senior Analyst, (Pers. Comm., January 10 2010)].

What do we consider consultation? To us that is, we flew our staff in and provided the opportunity to engage. The Chief however might have a different definition [Jon Feairs, MNDMF Mining Policy Senior Analyst, (Pers. Comm., January 10 2010)].

The province defines consultation a little different than the way First Nation leadership and First Nation communities define consultation. Consultation to the government means bringing people together and having a meeting let's say usually in an urban setting: Timmins, Thunder Bay, Toronto. Consultation to us, as First Nation people, as a Tribal Council, as First Nation organizations means going to the community, going to the community where the impact is going to be felt the most, ie. going to Moose Factory, going to Chapleau Cree FN community, ...and meeting with Chief and Council and meeting with the people and getting opinions and getting thoughts, and that is what consultation means [Stan Louttit, Grand Chief of Mushkegowuk, (Pers. Comm., August 12, 2009)].

## UNCLEAR NATURE OF CONSULTATION

The respondents displayed uncertainties related to the questions, 'Does the government have the duty to consult Aboriginals on the reforming of the Ontario Mining Act?' 'Does the duty exist at the strategic level?' Sarah Mainville, Political Advisor to the GC of GCT3, replied demonstrating that the right to be part of the decision-making process is embedded deeper than the Crown's Duty that has been recently defined by case law. She explained,

There is a Treaty that is established between two parties. There is a sharing of the land. And by necessity if you are thinking you are going to regulate it you cannot do so in a vacuum. You have to discuss how you are going to regulate it with us (GCT3), because we are a Treaty partner. That is the Treaty framework kind of approach.

It's not impact based. The impact based stuff is for industry, it is for development, it is for actors in our territory who want to get an authorization (Pers. Comm., August 11, 2009).

Mark O'Brian, MNDMF stated,

We put ours (Mining Act) out there (to reform it). We are consulting on the Act and that is NOT what the duty to consult actually speaks to when you look at the Supreme Court rulings and the Constitution Act. ...the duty to consult primarily is talking about projects, it's a specific thing ..... What we are doing here is consultation with regards to legislation. To get it to where it should have been pre-1982, actual pre 1867 if you really want to be correct. So we .... have a lot of work to do because this is only one (Act), but there are 100s of pieces of legislation that have to be reviewed to see if they are even lawful in terms of consultation (Pers. Comm., June 1, 2009).

Raymond Ferris, councillor at Constance Lake First Nation, and Arlene

Slipperjack, Chief of Whitewater First Nation give their perspective on the

questions. Ferris said,

we do have to be consulted on the changing of the Mining Act because those policies will have direct effect on our Treaty and inherent rights on the land. They definitely do and the government has a duty to consult which means they should be providing us with resources so we can fully analyze what we want to say (Pers. Comm., July 30, 2009).

Slipperjack to the Hearing Committee said,

The scope of the constitutional duty to consult, accommodate and sometimes seek First Nations consent depends on the nature of the government policy or legislative proposal. As described, Bill 173 clearly engages the provincial duty to consult and accommodate (Ontario Legislative Assembly 2009b).

Jon Feairs, MNDMF Mining Policy Senior Analyst and Mike Grant, Mineral Development Co-ordinator provide their perspective on the questions.

There was no legal requirement to consult the way we did (consultation process for MAM), we just said we were going to do it, and we did it. And arguably other government law say on health or education should also have to consult but, because there is no direct impact like there is with natural resources it has yet to be done. And now because our ministry has gone and done it on a resource piece of

legislation, we have set a standard, and government has to engage [Jon Feairs, MNDMF Mining Policy Senior Analyst (Pers. Comm., January 10, 2010)].

The duty to consult under the Constitution has to do with specific decision and whether they induce an adverse affect on the rights, but there are lots of things that we do that do not have any effect on rights at all because there are parts of the province where rights have been extinguished. With respect to the Mining Act and triggering the crown's duty to consult, whether the legislation does or does not, that's a problem for the lawyers and the constitutional lawyers and the courts to determine what may or may not be [Mike Grant, MNDMF (Pers. Comm., June 22, 2009)].

A lawyer who wished to remain anonymous provided his legal opinion to the questions.

The courts in a decision R. vs. Lefthand out of the Alberta court of appeal considered whether the duty to consult applies in the legislative process and found that the answer is no, it doesn't apply. I think that most other decisions you would find would say the same thing. When it comes to making laws the courts are sovereign. The parliament is sovereign over its own process of law making the courts won't get involved. There is nothing they can even do to the law makers while they are drafting law. Once it becomes law and has royal assent the court can strike it down, but they will not touch law making. They will criticise the meal, but they won't get in the kitchen. That is sort of a Westminster parliamentary tradition. So Ontario is going to say no, there is no duty to consult on legislative development period, with any one First Nation or otherwise. First Nations like NAN do not take that position. It hasn't come to court, but my personal opinion as a lawyer I don't think that is right. A proper understanding of Canada's constitutional structure requires First Nations participation in law making for those laws to be legitimate [Anonymous, (Pers. Comm., November 26, 2009)].

## CHALLENGES FOR GOVERNMENT

When the government is consulting Aboriginal people they are challenged with finding a balance of engagement between the political level and the community level. They are also faced with the fact that not all Aboriginal people want to be consulted in the same way. Since the community members are the actual rights holders, it would be

an affront if the government only consulted at the political level. More often it is easier for government to reach out to political leaders than to the people because they are more prepared, willing and have more capacity to engage. There are no structured guidelines or specific legal precedents that dictate how a ministry conducts Aboriginal consultation for legislation reform of a law that may impact Treaty rights. The MAA did release guidelines back in 2006, but they still remain in their draft form. In light of the lack of clear guidelines, it would appear that the MNDFM took precautions and behaved according to existing consultation case law to minimize the potential of being challenged in court. The scale and scope of consultation done on MAM was at the discretion of the MNDFM. It was their decision about who would be consulted and how. In the question of who needed to be consulted several First Nation spokesperson stated that consultation needed to be done at the political level while others stated the community level. Sarah Mainville, Political Advisor to the GC of GCT3, explained that GCT3 is a traditional institution which pre-existed before Canada and that negotiations need to be with the national government, their traditional institution, and not with individual bands. She stated,

Within our Grand Council we give a lot of reference to the FN Chiefs. But we also have to balance that approach because we know that if we give too much to Chiefs' opinions then we are localizing interests and that is the weakness. That is weakening our nation. We need to build up that national interest, that unique national interest that our traditional government has always represented. That is where we get strength in unity. It's a balancing act (Pers. Comm., August 11, 2009).

During a UOI consultation sessions at Pic River FN, community members voiced their concerns that the UOI, a regional body, was undertaking a consultation process and calling it 'meaningful consultation' without a widespread community involvement or

engagement. It is the opinion of Constance Lake First Nation that consultation and accommodation is with the First Nation and not their affiliated organization. NAN similarly takes the position that the government needs to consult with the individual communities to meet their legal obligation. An anonymous legal council commented,

The rights holders like the person that gets to be consulted is the FN, not necessarily an individual member of the FN, not necessarily a political organization that the FN might belong to. NAN's position to consult always is: that consultation is with the FN, and the Crown's duty is directly with the FNs. We will certainly have discussions with the government when we are deputized by the FNs, but we don't consider those discussions consultation. When the government wants to consult they have to go straight to the communities because the communities are the rights holders. The government would probably argue otherwise, if it ever came to court [Anonymous, (Pers. Comm., November 26, 2009)].

Government has to engage at various levels. The associated challenge is that not all communities have the same ideas of how they want to be consulted. Jason Beardy explains the differences in approaches NAN communities take, and illustrates why a cookie cutter approach would not work. He stated,

some of the communities would prefer to have longer consultation timeframes, other communities would want shorter ones. When these consultations should take place will vary as to when in the year they should be conducted. Who should be conducting them? Should the province come in themselves and do it? Some communities will say yes, the province should be the one to do it, others will say no, let the Tribal Council do it for us... and then send the report to the province, or whatever government body it is. Some other communities will say no we want to do our own internally, and then we will submit a report to the government (Pers. Comm., August 9, 2010).

Sarah Mainville, hopes that the standard that the MNDMF has set will not be the template for a cookie-cutter approach to consultations in the future. She comments,

I think that the sad thing is there is this template that now exists in Ontario. You have your regional workshop, you give some capacity money, or some written work and you can do consultation in the 4

regions which is basically NAN, Treaty 3, UOI, AIAI, and the catch all which is the Chiefs of Ontario Secretariat. You can resource them for about 50-100 000\$ and you can get your consultation done. And that is something that unfortunately other organizations have bought into. (They have) said, 'ok, well we need capacity we will take what we can get'. And we (GCT3) have always been pushing up against it saying this isn't going to work. It doesn't respect our jurisdiction, our process that is already in place (Earth Law). It is just a very shallow cursory survey, that a few people or individuals that happen to read a notice, that is probably not well aimed or targeted at communities, is probably not going to work. It's aimed not to work. It's aimed to fail (Pers. Comm., August 10, 2010).

Aboriginal political organizations, like communities have different histories and rights.

GCT3, a traditional form of government has different rights than a political territorial organization like NAN that has been created much more recently, or than a tribal council like Matawa. NAN for example does not have any Treaty rights as a political organization. The complexity and layers of different types of governments and political organizations dictates the need for different rules, practices and procedures. This stems from the fact that different First Nations were subject to different treaties, depending on history and location. Another example to add to the already complex situation is there are communities like Long Lac # 58 FN that request different treatment based on their claim that they did not sign a Treaty because their people were away at the time of the Treaty signing and therefore did not surrender their land. It would take a lot of time, effort and human resources to meet the various forms of preferred consultation methods requested by different Aboriginal people, First Nations, TCs and PTOs. It is a great challenge for the provincial government to become aware of all the permutations and exceptions to rules, and to consult accordingly and in a meaningful way.

Moreover, a significant challenge facing government relates to consulting community members who have not done their homework and are not yet prepared to



engage. In my interview with Sarah Mainville, Political Advisor GCT3, I asked her about the attendance at the workshop, and if all 26 communities were represented. She revealed that many participants were not prepared. She replied,

little bit more than half, and it wasn't necessarily the proper representatives too right, like there were people who didn't go there with an understanding at all, and was probably not the best representative for that community (Pers. Comm., August 10, 2010).

In my interview with Mike Grant, MNDMF, he noted that this was the case with the majority of sessions he participated in. He also noted that the MNDMF has been holding information sharing for years. Grant stated,

the ones [FN communities] who have been prepared to talk to us and that is not many of them by any stretch, the informing process has been going on for over a decade and that is simply a subset of consultation. There is a level of engagement that the Ministry has undertaken for a long time and in policy is guaranteed we will continue to do (Pers. Comm., June 22, 2009).

## DIFFERENCES IN IDEOLOGIES

While analysing my data, different ideologies between Aboriginals and non-Aboriginals was a prevalent theme. Differences in ideologies was classified into the following sub-categories in reference to:

- a) different worldviews
- b) different relationship with the land
- c) different interpretation of the treaties
- d) different views of natural resources
- e) different view of consultation

## DIFFERENT WORLDVIEW

The origin and history of Aboriginal and non-Aboriginal people in Canada are very different and can explain the divergent ways of life and ways of thinking. The

differences among peoples create many challenges when working together. Randy Kapashesit, the Chief for the MoCreebec Council of the Cree Nation, pointed out that every people in the world, every tradition, every culture has their own unique contribution and gifts, and he finds that non-Aboriginals do not value the contribution of his people. He stated,

We all have a story of where we came from, what our strengths are, how we understand the cosmos, the world... and that has never been valued in the context of your people. That's never been valued in the context even by our own people sometimes, and that is the challenge (Pers. Comm., August 12, 2009).

As a result of colonization and assimilation, many Aboriginal people stopped valuing their worldview. Although more and more Aboriginals are re-connecting to those views and Aboriginals and non-Aboriginals are reconciling their relationship there are still obstacles to working together. Kristina Brasewich, Firedog Communication, suggested,

There has to be greater communication, on MNDMs part with Aboriginal people. It's all about active listening to the people about what exactly they want. I think they (MNDM staff) have to do their homework a bit more and stay in the community. They need to see the cultural aspect, and how community is built, and how they ...[are] people in their community, because it's very different from an average way of life to an Aboriginal way of life, especially in some of the remote access communities, so that there is a better understanding (Pers. Comm., July 29, 2009).

When the MAM consultations were held, MNDMF staff flew in and out on the same day of the session. Gilles Bisson also made a comment that highlights the different operating modes between Aboriginal people and non-Aboriginal people.

What the government fails to understand is that First Nations don't operate in the same mode as we do and the capacity is not equal. So for them to get their heads around, ok, are we prepared to enter into discussions with the provincial government on these issues [such as

RS, access for mining companies on traditional territories, how to consult, how to accommodate], took about a year. Not everyone is on side [for mineral development] and when they finally got a green light from the assembled chiefs at an assembly meeting some years ago, ‘what is it we are prepared to talk about?’ ‘And where are we prepared to go?’ ‘And what questions do we ask?’ And what are we looking for? Were questions the FN had to ask (Pers. Comm., August 11, 2009).

## DIFFERENT RELATIONSHIP WITH THE LAND

Several First Nation respondents made it clear that they have a special relationship to the land. Peter Moonias, former Chief of Neskantaga First Nation, explained inherent rights and how it is impossible to write down what impacts Aboriginal and Treaty rights. He said,

The province can say we recognize Aboriginal Treaty rights, but you have to put it on paper, what impacts Treaty rights. But what they don’t understand is we can’t put anything on paper because the land is us. Whether they expect it this way or that way, it impacts us, the animals, medicinal, and also our traditional activities, powwows, spiritual aspects, every other way. But that’s what they want anyways, when they recognize Aboriginal and Treaty rights they ask what the impacts are, FN can’t do nothing..., we have the inherent right, most of us were born into the land. Burial sites all over our territory, the birth sites all over our territory, ...we are still affected, because the way the wildlife, the moose, the animals, the wolves, the marten, and everything else, because the marten migrate into an area if there is a camp in there somewhere, mining company can say 10 miles, and those old man marten goes over there because there is more food over there. That’s just one very small example (Pers. Comm., July 29, 2010).

Sam Mckay spoke about the spiritual connection to the land when he was asked about his resistance towards Platinex.

I had to uphold the community mandate, and that community mandate is based on our belief and our god given rights to be in that territory and that we were given that territory to utilize not just for this generation or the previous generation, or the next generation, how ever long the Creator will allow us be here (Pers. Comm., August 11, 2010).

## DIFFERENT INTERPRETATION OF THE TREATIES

A fundamental issue affecting Aboriginal and non-Aboriginal relationship is their respective interpretations of the Treaties. First Nations respondents expressed their belief that their land was never surrendered when the Treaties were signed, while non-Aboriginal respondents believe it was. Most First Nations do not accept or acknowledge the concept of Crown Land and believe it is their traditional territory. Stan Louttit, Grand Chief of Mushkegowuk gave his opinion,

We look at that land as our land, we don't look at it as provincial Crown land. We look at it as FN traditional territory lands, and when something is going to happen in that territory we want to be in a position to consent, say yes or no to that particular activity (Pers. Comm., August 12, 2010).

The treaties give several rights to a certain amount of land: the right to fish, hunt or trap in the same lands as before. But when that land is taken up, those lands are not available anymore. Several non-Aboriginals stated certain Aboriginals' rights have been extinguished and the land belongs to the people of Ontario. Mike Grant, MNDFM stated,

There are lots of things that we do that do not have any effect on rights at all, simply because there are parts of the province where rights have been extinguished. To make the suggestion inside the City of Thunder Bay you still have the right to hunt fish and trap, I think is probably the grandest form of wishful thinking, [they] quite literally don't have the right to hunt inside the community (Pers. Comm., June 22, 2009).

In a letter to Premier McGuinty, dated September 2<sup>nd</sup> 2009, from David E. Christianson, Director *emeritus* of the Northwestern Ontario Prospectors Association, stated,

It is my distinct understanding that the lands described by K.I. as being their "traditional" land is in fact Crown land. This land is owned by the Crown and is to be managed for the people of Ontario and Canada by the provincial government. If in fact some other party actually owns the land in question I stand corrected; however, no one is able to provide me with proof that these lands are anything other than Crown land as suggested. I have asked this question many times

and a direct answer has never been forthcoming. The answers have always been typically politically evasive. Why can we not get a direct and concise answer as to the question of who owns the land (Christianson 2009)?

During my interview with Michael Gravelle, I asked him his comments on Mr. Christianson's letter to the Premier and his answer to the question of 'who owns the land?' He replied,

well this is Crown land. This is land that belongs to the people of Ontario, but having said that it is also in many cases traditional lands of FN communities. Who owns the land- is a mischievous term. But Mr. Christianson and others know that this is indeed Crown land, but they also know that indeed we have respect for the Aboriginal and Treaty rights of our FN leadership in the province and we are working close to them, and that is indeed why we work so hard to have a consultation process that respected that (Pers. Comm., December 18, 2009).

#### DIFFERENT VIEWS ON NATURAL RESOURCES

Another example of alternative views that exist between Aboriginals and non-Aboriginals, brought up in the interviews, is their view on natural resources. Sam McKay, articulated this idea thoroughly. His community sees resources as an integral part of their survival, the government and industry only see resources for their own utility.

When government and industry talk about natural resources they only look at what they can- like water- use it for hydro. But when we talk about natural resources from KI perspectives we're not talking about the minerals or the trees themselves. We are talking about everything that surrounds us, those are natural resources, we have spawning grounds for the fish, we have places where we get medicinal plants, we have migration routes fowl that fly and also land animals like moose and caribou. To us those are all natural resources, because when we take what we need and do not exploit it, they naturally reoccur. Those are natural resources. But Ontario and them don't seem to be able to grasp that. Now what's natural about destroying the land just to make a few bucks for a few years? To extract minerals

and leave a contaminated land that's been destructed permanently, what's natural about that (Pers. Comm., August 11, 2010)?

Randy Kapashesit raised an alternative view about the existence of coal and its extraction that is very different from the non-Aboriginals point of view.

An interesting thing about mining, that most people don't talk about, take coal for example, or anything that is valued as a resource in the natural environment, how did it get there, did it fall from the sky? There is a process that some people would say that is a result of human or animal life fossilized, should we be going and digging up our own ancestors (Pers. Comm., August 12, 2010)?

## DIFFERENT VIEWS ON CONSULTATION

As a result of the differences in ideologies mentioned above, there are different views of what constitutes proper consultation.

we don't have the same starting point, we don't see the same picture, yet we are asked to give a response, and that's the challenge, I don't want to legitimize [their] process because I don't think [they] are giving me an opportunity to participate as an equal [Randy Kapashesit, (Pers. Comm., August 11, 2010)]?

Kapashesit believes indigenous people cannot be treated as another interest group and that consultation with them has to be done differently compared to a non-Aboriginal citizen of a country. Bisson reaffirms that Aboriginal people need to be consulted in a particular way because of their special relationship with government.

and what the government failed to do is understand that consultation with First Nations is not a process that is the same as regular consultation we would have with the mining industry or municipalities because there is a very different point of reference (Pers. Comm., August 12, 2010)

There are different points of reference and different capacities. Several First Nations requested to be involved in the planning of the consultation process, but were not included. Kapashesit believes the process has been set up to take advantage of FNs.

we are coming at this from a different sense of urgency, a different starting point, and the system isn't set up from us, its set up to take advantage as us. So we need to tell people when they want to talk to us, 'we don't like your rules', because its never actually been set up where we have been equals in developing how it is we should participate and that is the challenge (Pers. Comm., August 11, 2010).

Kapashesit goes on and stated that even though the government is striving to be honourable, they are not achieving it and disrespecting indigenous rights.

I will sit down with any government official who is interested to have a serious dialogue. And if you can't do that you are just expecting me to buy into a subservient role and to accommodate you with your blindness on how you are violating the human rights of indigenous people. And I'm supposed to be ok with that? You should have more respect for yourself and for me and for the process that you want to create here. Governments are supposed to be honourable and that means that you actually have to have the highest expectation of yourself. And those guys never seem to do that or they never seem to achieve it, even though they say they may be striving for it. I'm not just talking about this government, I'm talking about any government in recent time and that's what the challenge is because when people say this is how we wish to be consulted, this is how we will give our consent, and this is how you will know that we have actually achieved that for our purposes, no one asks that. But those are actually three different processes that are supposed to unfold in the context of something like that. If I choose to be involved in the discussion on mining or if I choose to be involved in any discussion in forestry then I am obligated to participate in that process in some way shape or form. But my community and my people would have made that decision to participate of our own free will. It is not an automatic that you propose legislation and I buy into it. That's not what respecting human rights mean. That's not consultation and accommodation. That's simply government feeling that they have the right to do whatever they want to do (Pers. Comm., August 11, 2010).

## LACK OF TRUST

Trust was another theme coming out of the interviews. Aboriginal and government relationships of the past have been far from positive. In interviews with MNDMF respondents there were comments that alluded to the negative history between government and First Nation communities. There were also comments that hinted that the MNDMF has a stronger relationship than the MNR with First Nations based on the fact that they are a newer ministry. Mark O'Brian, MNDMF said,

In other communities I have consulted with, you bring other government baggage, federal baggage there is always that, but provincial baggage as well, other ministries that they have a real problem with. And I guess us being a new ministry as of 1988, but not having that baggage. So maybe that's one reason it (MAM consultations) was successful (Pers. Comm., June 1, 2010).

O'Brian and Mike Grant, MNDMF, both mentioned 'government baggage'. Sam McKay, KIFN and Judas Beaver, from Nibinamik First Nation, give us an idea of what that means. McKay stated,

For us in Big Trout our experience has always been negative with any development that has happened with outside parties. We went through Sherman Lake Mine, [where] Mike Morris' family grew up, we went there to look at it. They shut it down when WW2 happened. They just abandoned it, and to this day no one has lifted a finger to clean up, and its right smack dab in the middle of traditional territory and our chiefs trap line, maybe one of his cabins is 100 ft from the shaft. Also, my dad worked on the military base on the James Bay coast, and I had the opportunity to go there a few years ago and it's just sitting there, and nobody is doing anything to clean it up. And families from KI have moved to Pickle lake to work the mine until it shut down, and they all came back, basically with nothing, no compensation, a lot of them have died, due to illnesses and diseases that they contracted. We have third parties that have come in to have development and they have long since gone and there is all sorts of contamination. We have 15 confirmed contaminated sites right in our community. And do people wonder why we are so against open pit mines that's going to have a detrimental impact on our water ways, on our lakes, our fish. And what I have told MNDM over and over again, prove to us first,



show us something different from what we have experienced to date. And they haven't showed us anything. They haven't even looked to clean up one of the first thing we ask them to do is clean up all the sites in our community and also clean up Sherman Lake Mine and nothing has been done yet. And how do they expect us to welcome them with open arms to come and destroy our lakes, potentially. The potential is real to us, and they wonder why (Pers. Comm., August 12, 2009).

At the time of the interview with McKay the MNDMF had not yet reached a settlement with Platinex<sup>9</sup>. Beaver also shared past experiences that have led to distrust. He describes,

Back in 1947, when MNR, which was Lands and Forest...set aside the traplines for each trapper. They had several traplines in the area...And what happens is, let's say if a trapper doesn't go in that trapline for a year or two, MNR will take it away. That's what happened here. There is no more trapline that exist here in this area, because everything was taken away (Pers. Comm., July 30, 2009)

More recent events which hindered a positive relationship is seen when Sam McKay described how his community's consultation protocol was perceived.

We have our own consultation protocol in Big Trout and we submitted it to Platinex and Ontario and they just disregarded it. Ontario slaughtered it, basically everything was blacked out and a few 'and(s)' and 'the(s)' was left. They simply did not recognize our consultation protocol, but we still stand by it regardless (Pers. Comm., August 11, 2009).

The current Liberal government stated it wants to foster positive relationships and increase trust. The MNDMF was faced with an extremely difficult task and their efforts have not been totally ignored. Stan Louttit recognizes the government's initiatives, but believes they are falling short. He explains,

I think that the province of Ontario has been trying really hard, right from the Premier right to all the key Ministers in the past couple of

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<sup>9</sup>In December 2009 the Ontario Government settled an 11 year dispute between Platinex Inc., and Kitchenukmaykoosib Inninuwig First Nation. The government paid Platinex Inc. 5 million dollars to drop its lawsuit and surrender its mining claims.

years. They have set up a stand alone Ministry of Aboriginal Affairs... , there has been some Ipperwash Inquiry recommendations saying that certain things have to be done, so they are trying hard. But they are falling short, falling short in reaching out.... They are saying the right things publicly in terms of right from the Premier right from the Minister of AA right from the Minister of MNR, saying things like we wish to foster or improve relations with FNs, but they are not. They will say that one day and on another day they will do things totally opposite or unilateral in terms of perhaps policy, perhaps a piece of legislation, like what we are talking about (MAM), and those types of things, so I think they have a ways to go. They have started, they are trying, but I think they are falling short in terms of fostering a relationship that we think is appropriate (Pers. Comm., August 12, 2009).

## COMMENTS ON THE NEW ACT

MNDMF Minister Michael Gravelle frequently used the word ‘balance’. He made it very clear that the Mining Act needed to find a balance between divergent yet vital interests, that is to say, maintaining a positive investment climate and respecting Aboriginal and Treaty rights. Other stakeholders such as the environmentalist, private land owners, chamber of commerce, and municipalities all had very different requests. Michael Gravelle believed his ministry in the end found a balance and the Mining Act is a major step forward. He said,

There may be no difficulty in finding people who are critical of it, I think if you ask the question, ‘Is this a step forward in terms of legislation in terms of mining in the province of Ontario?’ I suspect that many people will tell you well indeed it is, including those who think there is further to go. There is no question that not everyone is going to be 100% happy, but I think we have done a good job on finding a balance (Pers. Comm., Dec. 18, 2009).

Obviously there is going to be discontent when a group does not get what they were hoping for. Other responses included:

a good compromise... We didn't get everything we wanted, but they did a really good of balancing everybody's concerns [Garry Clark, Executive Director of Ontario Prospectors Association (Ross 2009, p.1)].

Our primary concern is that NAN First Nations must have free, prior and informed consent before any activity can take place in their homelands,... That's the standard expressed in Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples, and that's the standard we expect [GC Stan Beardy, NAN (Wawatay 2009)].

'historic' for marking a new way of doing things. However, we have to move beyond basic consultation towards engagement and signing of impact benefit agreements between mining companies and First Nations [John Beaucage, OUI, (CBC News, 2009)].

Aboriginal peoples' response to the Bill ranged from considerable disappointment to a guarded welcome. The changes made that are seemingly positive from an Aboriginal perspective include: recognition of Treaty and Aboriginal rights in the preamble, an Aboriginal dispute resolution mechanism, withdrawal from staking of Aboriginal cultural sites, implementation of map staking system, prospector training, consultation with Aboriginal people enshrined in the legislation, a requirement for planning and permitting process and environmental remediation.

From the Aboriginal perspective some of the concerns included no 'free, prior or informed consent', free entry not addressed, no consent before early exploration, i.e. First Nations are not given any decision-making powers, no explicit mention of the duty to accommodate as an element of consultation, the absence of the term 'Aboriginal peoples' or 'First Nations' only the consistent use of 'Aboriginal communities', no mandatory IBA, lack of recognition of inherent rights, and the ministers' discretionary powers. Also there was concern the government may permit a new mine to open in the Far North if a

project is in ‘the social and economic interests of Ontario’ (ECO 2010). Capon stated lack of consent was the biggest issue for Matawa First Nations.

What was or wasn’t in the Act, that is where the proof is, not in the process, it’s in the actual Act itself. Did it meet everyone’s needs? And I’ll be honest, I don’t think it really did. I don’t think people’s comments people are found in the legislations. Some people think they are, I don’t think they are, because I think the biggest issue is the whole issue of consent and early prospecting ... ours said they need consent ... and I didn’t see that in legislation. And I don’t think they (provincial staff) chose to listen. You can consult, but as the government, I think they have chosen not to listen to what people told them, ... you can do all the consultation you want to do, but ultimately, do you listen to it, that is where the proof is in the pudding (Pers. Comm., July 14, 2009).

GC Stan Louttit stated the Mushkegowuk First Nations felt the same disappointment. He stated,

This is what we have said to government all along, and this is the Muskegowuk position, and we have told them, you can come and talk to us all you want, you can in your terms consult with us. You may even come to our communities. You can consult with us and have 10 meeting and do all this kind of stuff. You can accommodate some of our needs. You can do certain things, but at the end of the day, the issue that is first and foremost in our opinion, in the Muskegowuk FNs, is consent (Pers. Comm., August 12, 2009).

On April 8<sup>th</sup>, 2010 at the Northwestern Ontario Mines and Mineral Symposium in Thunder Bay, Rob Merwin, Director Mining Act Modernization Secretariat MNDMF, spoke at the open forum about the proposed Mining Act Regulations. When he was discussing the issue of ‘free, prior, and informed consent’, he asserted that the government stood its ground, by saying notification is only after staking. Gravelle explained consent could not happen because the nature of mineral exploration requires ‘free entry’, although those words are no longer used in the new Act, the concept is still there. He said,

To me the proof is indeed in the pudding and they (FNs) will be playing an extremely key role in determining whether a mining venture goes forward, because of the requirements in the Act. The mining industry made it very clear to us that if they were not in a position where they were allowed to stake claims, it would have a very serious impact on investment in the province of Ontario. The mining companies would be much less inclined unless they at least had the right to go in there and at least look at the territory ahead of time (Pers. Comm., December 18, 2009).

As one can see there were many uncertainties and concerns that exist with the MAM consultation process and there are many improvements to make in Aboriginal participation in legislation reform. Recommendations on ways to improve both consultation and relationships will be made in the following chapter.

## **CHAPTER 6: DISCUSSION**

The first objective of this thesis was to explore the major themes apparent in the research data. The second objective was to evaluate the MAM Aboriginal consultation process, identify the challenges and weaknesses and interpret the effectiveness in relation to Aboriginal participation. Several of the main challenges and weaknesses of the process included: a lack of knowledge, financial and human capacities, primarily with Aboriginal communities, but also with PTOs, TCs and the provincial government. Other limits included the rushed timelines, lack of Aboriginal input in designing the consultation process and poor planning of the consultation sessions. These three factors all came into play in the general turnout and quality of the participation. Another limiting factor was lack of trust in the government and in the consultation process by Aboriginal participants. Many respondents indicated they did not think their voices would be heard or their participation would influence the end result. This is in part, because the Federal case law on the duty to consult is left open to interpretation. There is no cohesive vision on how best to implement the court rulings in a meaningful and practical way. The Ontario government has no legally binding guidelines or requirements on consultation and accommodation. This is why there is uncertainty of when and how it should be carried out. For example, does it need to occur for strategic planning or is it only impact based?

Differing worldview was an important core-theme to come out of the results. It illustrates how Aboriginal and non-Aboriginals differ in how they view the bigger picture. A fundamental difference that played out in this case study was the distinctive

interpretation of the treaties. This disagreement will continue to limit the development of trusting relationships. It is difficult to build relationships on shaky foundations.

The majority of themes that rendered the MAM consultation process flawed are consistent with what the literature deemed ineffective participation. In terms of Sheedy's (2008) key guidelines for effective participation, the government missed the mark. For example, there was no early access to background information. There was no two-way dialogue. The consultations lacked trust, openness, and honesty. First Nations did not jointly define the process with the government and there needed to be better capacity building to participate in the process.

Arnstein (1969) accurately labels factors that hindered genuine levels of participation for both the 'have' and 'have not' citizens. In this case study, the government did show resistance to power redistribution and although racism and paternalism were not named in the interviews *per se*, I believe them to be covert underlying issues. Racism presented itself in the many trust issues that exist between Aboriginal people and government. The obstacles for meaningful Aboriginal involvement in this case study equally included a lack of political, social and economic infrastructure and knowledge. In addition, perceived inability to influence the Mining Act and change the *status quo* was another barrier. As well Arnstein found that alienation and distrust hamper participation and they were both prominent themes in the interviews.

Arnstein found citizen control was the main purpose for participation. Based on this fact, the MAM Aboriginal consultation process cannot accurately be applied to Arnstein's framework. The MAM aboriginal consultation was a process where

Aboriginals did not participate with the main goal to gain control. They did want more say in the consultation design process and more power to influence decisions, (i.e. achieving free, prior, informed consent), however control over the entire process or of the Mining Act was not the main objective. There is a big difference between wanting control and the ability to give consent. For example, Baker et al. (2007) highlighted the associated responsibilities that would come with control. Under the current regime this is not something Aboriginals are in a position to attain, given their small populations and lack of technical, administrative and financial capacity. Nor is the current government prepared to relinquish such control.

The third thesis objective was to place the MAM Aboriginal consultation process on Arnstein's ladder. The MAM Aboriginal consultation included various forms of consultation and not every organization or community or Aboriginal person had the same level of involvement or influence. Consequently, the MAM consultations ranged from *Informing* to *Placation* on the ladder. Fort William First Nation is an example of a community whose experience was on the *Informing* rung. Their only involvement was the information session held by UOI. The Matawa Tribal Council is an example of an organization whose experience was on the *Placation* rung. They made submissions to the EBR and to the committee hearing on Bill 173. They received capacity money and each community was visited. Although they were not accommodated on their request for free, prior informed consent, a trade-off was made. Prospector awareness training and dispute resolution made it into the revised Mining Act. These trade-offs fit the criteria under the *Partnership* rung. Other obstacles such as lack of capacity, short time frames and lack of trust brought Matawa TC down to the *Placation* rung.



Arnstein's ladder is relatively simplistic and lacks descriptive detail at each rung. This made it difficult to associate the Aboriginal participation for the MAM consultation process to a particular rung. Tritter and McCallum (2006) accurately found that the framework failed to consider process, outcome or method. This made applying a process to a framework that does not consider process challenging. Therefore I added more details to the different rungs to make it easier to judge future Aboriginal-government engagements in resource management (see Table 3). I took key words from the literature and research findings and associated them to a particular rung based on the descriptions Arnstein provided. I indicate where I believe the recognition of the duty to consult and international laws should be placed on the ladder. For example, I placed 'respecting the UN Declaration of the Rights of Indigenous People including the right to free, prior informed consent' on the *Citizen Control* rung and the Crown duty to consult on the *Partnership* rung. Additionally, I place Aboriginals having a say in consultation design under *Partnership* rung, as this is clearly above the *Placation* rung and below *Citizen Control*.

*TABLE 3: Arnstein's Ladder Improved for Aboriginal Case Studies in Ontario*

RUNGS OF ENGAGEMENT	ARNSTEIN'S DESCRIPTION	MY ANALYSIS OF KEY WORDS FROM RESEARCH FINDINGS
Citizen Control	-Have-not citizens have majority of decision making or full managerial	-International agreements on Indigenous People Rights upheld -Free, prior, informed consent -TEK valued
Partnership	-Trade-offs are negotiated	-Capacity building -Feedback provided -Duty to Consult met -Aboriginals have a say in designing the consultation process -Aim to foster reconciliation -Done in good faith
Placation	-Citizen advice received not acted	-Biased selection of stakeholders -Lack of mutual trust -Limited capacity money provided -Accommodation on lesser requests
Consultation	-No assurance of changing status quo -Consultation is tokenism	-Time frames set by government -zero capacity building
Informing	-One way flow of information from managers to citizens -Citizens given a voice but not necessarily regarded	-One-way flow of information -Citizen voice not listened to -No follow through
Therapy	-Citizen non-participation -Power holders educating citizens	-No transparency
Manipulation	Power holders educating -Rubberstamp committees -Power holders curing the citizens	-Highly technical -Lack of mutual trust -Short timeframe

The fourth objective of this thesis was to provide recommendations to move the position of Aboriginal involvement up the ladder. For consultation to be more than tokenism or lip service, the following section provides respondents' suggestions of how to improve to capacity, timelines and trust.

## RECOMMENDATIONS

### 1) Capacity

Various Aboriginal organizations and communities have a spectrum of capacities. It is essential that pre-consultations occur to assess these levels and to see what is needed to establish meaningful participation. The pre-consultation approach defines the objectives and the process together to see where and if there needs to be education and/or information exchange. Government can do information sharing, workshops and elaborate consultation sessions, but success is dependent on educated and informed participation from the people being consulted. This is not simply a government challenge. First Nation communities and organizations have to be part of the solution to improve the quality of participation. Aboriginal leadership can contribute to this process by improving attendance by putting more effort into ensuring people are aware and informed of scheduled sessions or workshops. It was suggested several times the importance of offering a meal as a way of building social relations between participants.

An effort needs to be made to target the communities that have the most experience with the area of interest and ensure they are included. Those communities will have the greatest knowledge and will provide the most informed input. An in-community coordinator should be hired to organize the sessions and to target people who should be heard and make every effort to include them in the process. It will be important to learn what communications systems a community has in place to organize, disseminate information, and gather people. Does the community have internal media? Ensure that there is enough notice, and word is out in as many forms as possible. For example, local radio, posters, websites, etc.

A pre-consultation can determine what funds are available/required for a community to properly participate. For example, a community may wish to hire technical or legal advice to help them prepare a submission to the government or travel to a consultation session that is not held in their community. Because of the remoteness of Aboriginal communities and the high costs of transportation visiting multiple communities would be logistically and economically challenging. A pre-consultation with Tribal Councils or PTOs can determine the appropriate communities to visit or the best way to bring the people together. In addition, there needs to be adequate resources allocated to them to effectively advertise, and facilitate sessions. Consultation sessions should consider inviting elders to participate to open and close the sessions, provide food, rent a venue, and arrange transportation and translation if needed.

## 2) Timelines

Conventionally, Aboriginal peoples' decision-making process is consensual and cannot be rushed because of the philosophy that future generations must be considered. Because of the different concept of time and decision making than Euro-Canadians, it is essential to set realistic timelines from the beginning so as not to frustrate participants. When government representatives travel to communities for sessions, it is important they go at the right time, arrive early and stay around to debrief afterwards. Too often government officials or outside parties will show up just before the meeting and fly out a few hours later. Relevant documentation should be released and made available on the ministry's website at least two weeks before the session is held and not on the same day.

Further consultation needs to occur if a Bill goes to committee between second and third reading. The text of the Bill needs to be available and a forum for input needs to be arranged. The Committee Hearing process should ensure enough time for stakeholders to provide feedback during a meaningful question and answer period. Unlimited time should not be allowed, but the rules need to be modified to account for the differences in operating modes. Committee Hearings cannot be a token effort. There needs to be adequate time for the opposition to prepare potential amendments to a Bill.

### 3) Trust

Through examination of the MAM process, it is clear that a tremendous lack of trust exists between Aboriginal people and government. Although the government consultative initiative was declared a step forward in building trust, many points came up in the results section that highlight continued lack of trust. Building trust requires more than just saying it is being built. Trust is built with actions. First and foremost, failing to allow Aboriginal participation in designing the consultation process was not a good start to a process that was intended to build a trusting relationship. The most important recommendation of this thesis is to include Aboriginals in designing the consultation process. A pre-consultation approach would allow both parties to define the process together, define the issues, and what capacity building is needed. That would build trust between the parties and in the process. For example, if NAN had been included in the designing of the consultation process they could have ensured that communities with the most experience with mining were consulted. They could have altered their consultation approach to conform to how these communities wanted to be consulted. Finally, there

needs to be active listening and willingness to accommodate. For example, if one sees their requests reflected in the Act that will build trust. If aspects of what was requested are not in the Act, there has to be feedback provided explaining why and some kind of quid pro quo.

## CONCLUDING REMARKS

The outcome of this thesis was that the trend of failed consultation continues in reference to indigenous peoples' involvement in governmental natural resource management decisions. For fair and equitable use of natural resource management in Canada, it is in everyone's best interest that provincial ministries do more to meet the Crown's (meaning both federal and provincial) duty to consult. Although I provide recommendations to improve consultation processes, I am doubtful they will be achieved because of a governmental lack of interest in power sharing. Since overhauling Treaties, which was an RCAP recommendation, is not likely to occur anytime soon, it is most likely that improvements to Aboriginal consultation will come through changes to individual Acts and to the process of developing legislation.

There is much variation amongst First Nations' experiences dealing with different levels of government, but one noticeable trend is that Aboriginal peoples have in some cases achieved much higher participation because of land claims and the fact they never signed a treaty. Aboriginal people who have not signed treaties have achieved higher levels on Arnstein's ladder in natural resource management cases with the Federal government than with Aboriginal people in Ontario who have signed treaties. Figure 4 depicts this by placing Aboriginal peoples' levels of participation and influence in selected case studies of their relationship with the Federal government on the left side of

Arnsstein's ladder. The right-hand side illustrates the varying levels of participation and influence some representative FNs (discussed in the text) had during the MAM consultation process with the Ontario Government.

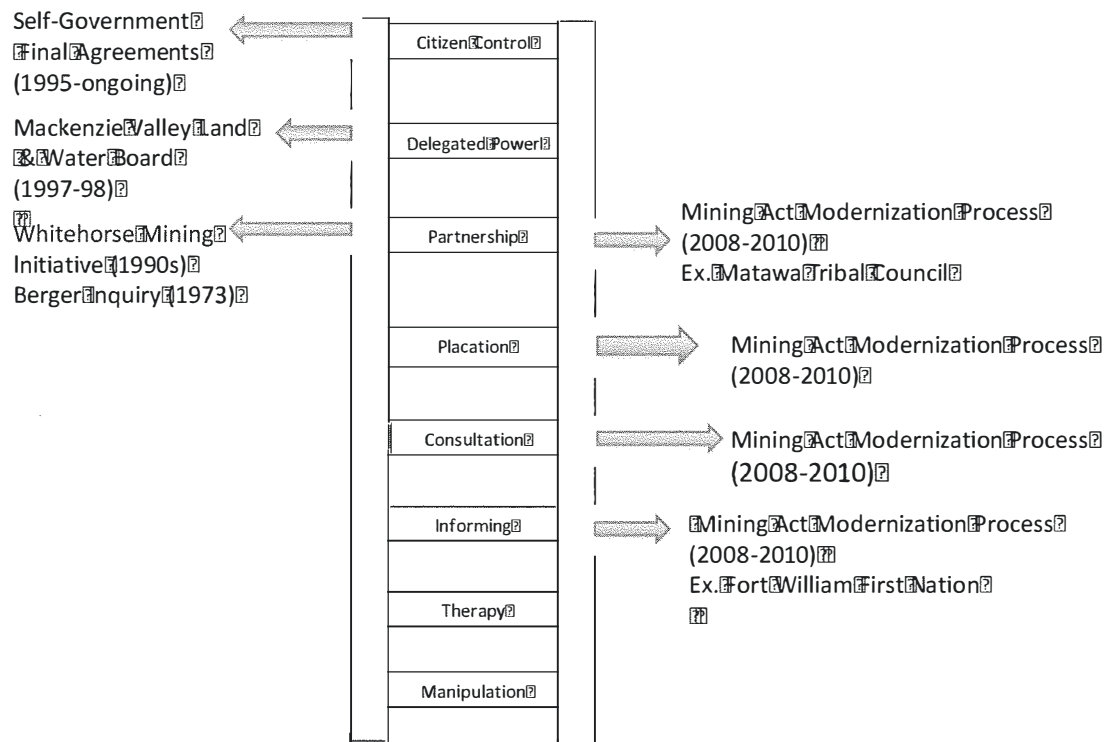


Figure 4: Federal (left) and Provincial (right) events placed on Arnstein's Ladder based on the level of aboriginal involvement in natural resource management

The case study of the MAM suggests that improvements in Aboriginal consultation will be more incremental. Part of the reason for updating the Mining Act was to provide clarity on the duty to consult Aboriginal people. The new Mining Act recognizes Aboriginal and Treaty rights in the preamble, but government has delayed establishing and implementing regulations. Thus far, Aboriginal and Treaty rights have not been respected. The perception is that there is a lack of willingness to change attitudes or actions on the part of the government. It has been less than two years since

the Mining Act was passed and some groups fail to see improvement to the events on the ground. For example, Marten Falls First Nation has protested, for the second year in a row, the Ring of Fire mineral exploration in their traditional territory. Marten Falls First Nation feel they have not been adequately consulted and that the provincial government is not exercising due diligence. This suggests that the government is not willing to relinquish power, and meaningfully consult Aboriginal people.

Since the time of the signing of the Robinson-Superior Treaty, Aboriginal people across Canada have moved marginally up the ladder and are moving towards empowerment. For changes to occur in Ontario to improve consultation process they have to occur by legal means or legislation creation or reform. Consequently, if a First Nation were to challenge a consultation process there is extreme risk involved that a First Nation could lose a case and reduce their rights. Additionally, the process would be extremely expensive and time consuming. The other option to improve the requirements of consultation through legislation creation or reform, such as intended for the Mining Act, thus far remains questionable. Legal action and legislation reform are band-aid solutions aimed at dealing with a specific issue and are therefore of a relatively narrow scope. The reality that Ontario is under treaties is a limiting factor to achieve higher levels of involvement because the real issues of jurisdiction and the meaning of the treaty are not addressed. This facilitates an environment of where future conflict will occur and if First Nations want to move up the ladder, civil disobedience and legal action will be a First Nation community's options.



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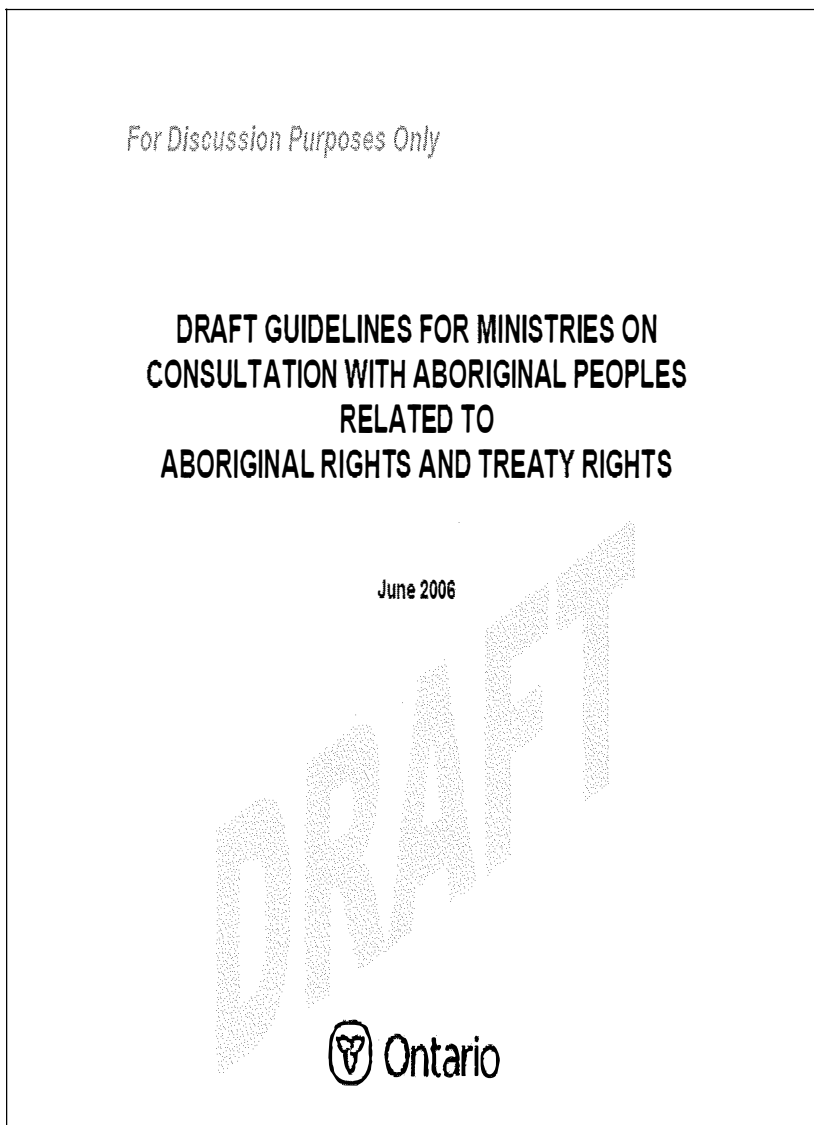


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## APPENDICES

### Appendix A

#### MAA Draft Consultation Guidelines



## Appendix B

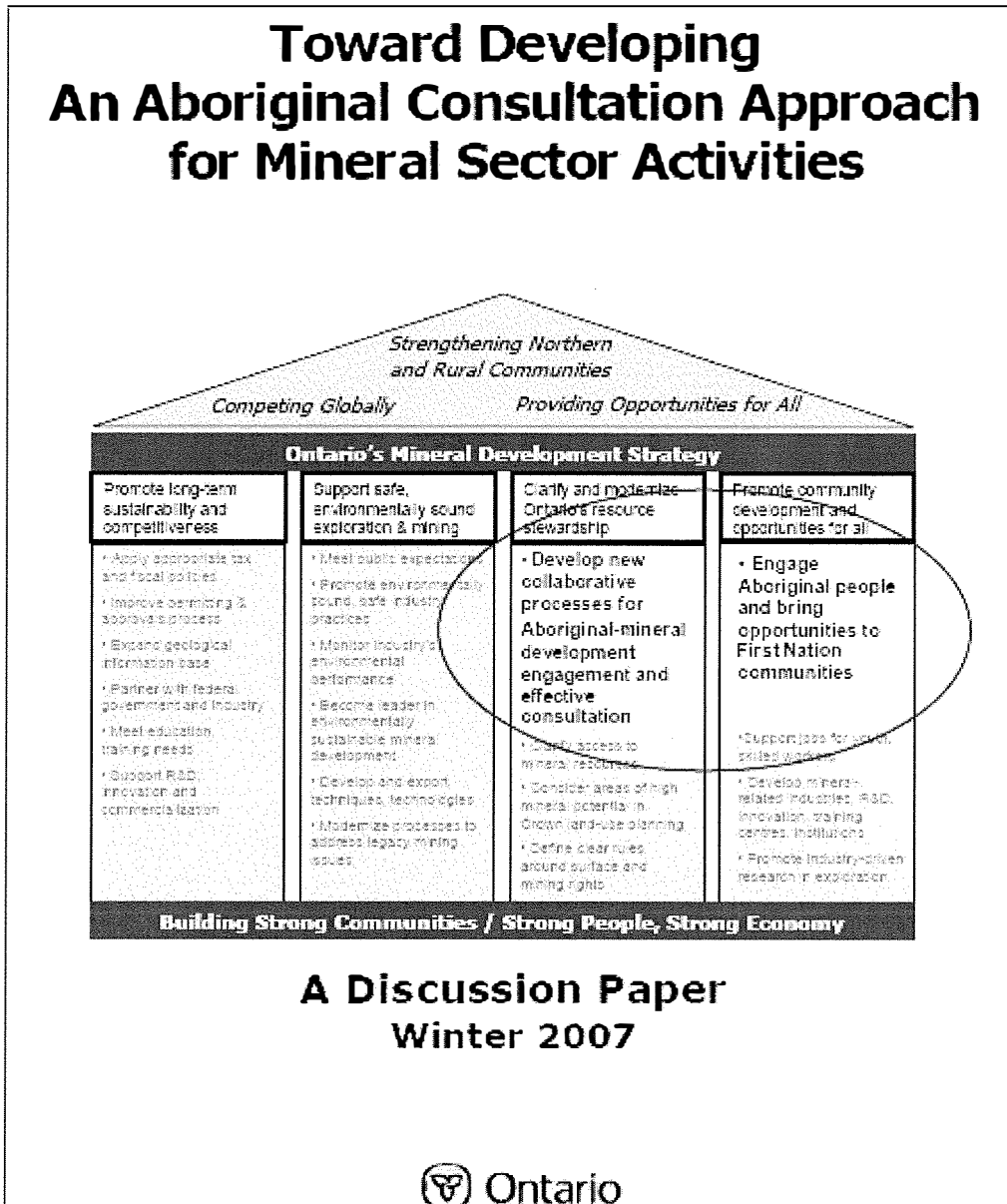
### Whiteman and Mamen (2002) Strong vs. Weak Consultation Processes

<b>Strong consultation Process Principles/Values</b>	<b>Weak consultation process Principles/Values</b>
Recognition of Indigenous Peoples rights to consultation and participation in NRM, and their right to prior informed consent	No recognition of these international rights
Adherence to principles of mutual respect, accountability, transparency, flexibility	Principles may be stated, but not fully adhered to
<b>Goals and Objectives</b>	<b>Goals and Objectives</b>
Goals are jointly developed by Indigenous communities and companies prior to consultations. Goals are binding.	Goals are developed by companies in isolation and are not binding
Possible goals include: increased level of understanding of mutual concerns and goals; to achieve informed consent; to establish co-management regimes; to pursue sustainable development objectives including the protection of the environment and Indigenous culture and land rights; to reduce conflict.	Possible goals: to obtain community consent (sometimes through manipulation or partial presentation of the facts); to reduce opposition; to educate people about benefits of project; to fulfill financing obligations.
<b>Mechanics</b>	<b>Mechanics</b>
Senior management/Board commitment	No senior management/board commitment
Government involvement, particularly if land rights are unrecognized	No government involvement; biased involvement
Detailed pre-consultation planning of mechanics undertaken jointly with Indigenous community (ies)	No pre-consultation planning of mechanics, or plan is developed by company without Indigenous peoples' involvement
Strong stakeholder identification process, with adequate representation of all stakeholders, including perspectives from women, elders, children and other minority groups.	Stakeholders not fully represented at discussion table; biased selection of stakeholders
Consultation process is jointly defined and culturally appropriate; tailored to the local context.	Top-down consultation plan and agenda imposed using a standard corporate process
Consultation topics are jointly defined, including TEK where appropriate	Consultation topics determined by company
Evidence of shared decision-making power between company and community	Power issues not addressed: entrenched power differential between company who are in control and communities who have little control
Education on the part of all parties/mutual capacity-building	One-way learning with Indigenous communities perceived as "ignorant"

Use of a variety of different methodologies for public participation and consultation	Use of only a few narrow methodologies for public participation and consultation
Two-way dialogue, with open and transparent communication using local languages.	Dominated by information transfer; one-way communication
Concrete mechanisms in place to incorporate stakeholder/community feedback into decision-making; Implementation of feedback occurs in plenty of time to affect decision-making	Lip-service; feedback may be solicited after decisions have effectively been made.
Community based problem-solving, joint decision-making processes	Corporate problem-solving and decision-making
Measures in place for dispute-resolution and for managing disengagement	No dispute-resolution or disengagement mechanisms
Timing: Consultation process is ongoing and covers a variety of different stages of minerals development	Timing: Consultation process is discrete—occurs once or twice
Measures in place for dispute-resolution and for managing disengagement	No dispute-resolution or disengagement Mechanisms
Post Consultation follow-up, evaluation and reporting procedures	Little follow-up or evaluation. No reporting
= <i>Meaningful Consultation</i>	= <i>Tokenistic Consultation</i>

# Appendix C

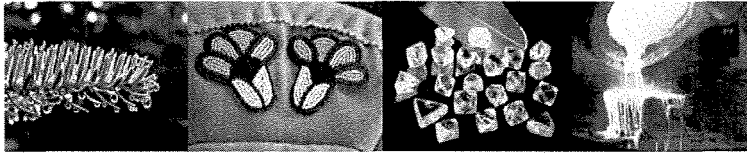
## Consultation on Consultation Discussion Paper



Appendix D

**Finding A Balance Discussion Paper**

Modernizing  
Ontario's Mining Act



Finding A Balance  
Discussion Paper

August 2008



## Appendix E

### **Aboriginal Consultation on Phase I of Mining Act Modernization**

- 15 workshops and regional sessions with First Nation communities, Treaty organization, Tribal Councils and the Métis Nation of Ontario

Northeast Superior Chiefs Regional Resources Forum – September 17, 2008 in Wawa  
Windigo Tribal Council – September 25, 2008 in Sioux Lookout  
Wabun Tribal Council – September 29, 2008 in Orillia  
Grand Council Treaty #3 First Nations – October 2 in Kenora  
Chiefs of Ontario Meeting – October 2 and ongoing  
Metis Nation of Ontario – October 4 in Thunder Bay  
Metis Nation of Ontario – October 5 in Sudbury.  
Union of Ontario Indians (UOI – East) – October 7, 2008 in Orillia  
Union of Ontario Indians (UOI – West) – October 9, 2008 in Sault Ste. Marie  
NAN (West) October 10, 2008 in Sioux Lookout  
NAN (East) October 15, 2008 in Timmins  
Shibogoma Tribal Council – October 21, 2008, in Sioux Lookout  
Matawa Tribal Council – October 22-23, 2008 in Thunder Bay  
Algonquin Nation Secretariat – November 10, 2008 in Timiskaming  
Mushkegowuk Annual Assembly – November 14, 2008 in Chapleau

- 11 individual community visit meetings

Wawakapewin First Nation – October 3<sup>rd</sup>, 2008  
Wunnumin Lake First Nation – October 9<sup>th</sup>, 2008  
Neskantaga First Nation – November 4, 2008  
Webequie First Nation – November 4, 2008  
Eabametoong (Fort Hope FN) First Nation - November 5, 2008  
Nibinamik (Summer Beaver) First Nation – November 5, 2008  
Marten Falls First Nation – November 6 2008  
Aroland First Nation - November 5, 2008  
Constance Lake First Nation – November 7, 2008  
Ginoogaming First Nation – November 6 2008  
Long Lake #58 First Nation – November 6, 2008  
Kasabonika Lake First Nation – November 6, 2008  
Kingsfisher Lake First Nation – November 7, 2008

- 12 additional community workshops hosted and delivered by the Union of Ontario Indians

Garden River First Nation – December 2, 2008 in Sault S. Marie  
Sagamok First Nation – December 3, 2008 in Massey  
Serpent River – December 3, 2008 in Cutler  
M'Chigeeng First Nation – December 4, 2008 in Massey  
Whitefish Lake First Nation – December 5, 2008 in Sudbury  
Curve Lake First Nation – December 8, 2008 in Peterborough  
Mnkikanining First Nation – December 12, 2008 in Orillia  
Aamjiwnaang First Nation – December 15, 2008 in Sarnia  
Fort William First Nation – January 6, 2009 in Thunder Bay  
Lake Helen First Nation – January 7, 2009 in Nipigon  
Pic River First Nation – January 8, 2009 in Marathon  
Chiefs' Caucus Report in Ottawa on December 9, 2008

## Appendix F

### **MAM Expenditures**

Mining Act consultation expenditures are approximately \$1.6M related to consultations over the most recent two fiscal years (ie 2008-2009 and 2009-2010). These expenditures cover transfer payments to First Nation communities and organizations for capacity building and community consultations; workshop costs such as the hiring of facilitators and expenses related to logistics and travel costs for bringing people together for the workshops. There will necessarily be further costs associated with the consultation, development and implementation of the regulations over the next few years. (pers. comm.. John Feairs, MNDMF Mining Policy Senior Analyst Jan. 15, 2010)



## Appendix G

MAM Announcement April 30, 2009

# MINING ACT MODERNIZATION



Minister of MNDMF Michael Gravelle (centre) Gary Clark, ED Ontario Prospectors Association (left) and Ontario Regional Chief Angus Toulouse (right). This photo is symbolic of the balancing of interests that was required for the reform of this legislation.

## Appendix H

### **List of Presenters at Standing Committee Hearings**

#### Toronto Hearing:

Ontario real Estate Association  
Ontario Forest Industries Association  
John Edmond  
World Wildlife Fund Canada  
Bedford Mining Alert  
Nishnawbe Aski Nation  
Ontario Bar Association  
Ontario Waterpower Association  
Windigo First Nation Council  
Canadian Boreal Initiative  
Coalition for Balanced Mining Act Reform  
Ontario Prospectors Association  
Prospectors and Developers Association of Canada  
Citizen's Mining Advisory Group  
Robert Lawrence  
Community Coalition Against Mining Uranium  
Sagamok Anishnawbek  
MiningWatch Canada  
Ontario Nature  
Fight Unwated Mining and Exploration  
Cottagers Against Uranium Mining and Exploration  
Steward Jackson

#### Sioux Lookout Hearing:

Porcupine Prospectors and Developers Association  
Cat Lake First Nation  
Slate Falls First Nation  
Congress of Aboriginal Peoples  
Ontario Coalition of Aboriginal People

#### Thunder Bay Hearing:

Porcupine Prospectors And Developers Association  
Grand Council of Treaty 3  
Municipality of Shuniah District of Thunder Bay  
Ojibways of the Pic River First Nation  
Ontario Nature  
Northwestern Ontario Prospectors Association  
Kitchenujmaykoosib Inninuwug  
Common Voice Northwest  
Ontario Mining Association

Metis Nation of Ontario  
Three Elders  
Central Canadian Federation of Mineralogical Societies

Chapleau Hearing:

City of Timmins  
Mining Act Committee  
Porcupine Prospectors and Developers Association  
Boreal Prospectors Association  
Chiefs of Ontario  
Northwestern Ontario Prospectors Association  
Whitewater Lake First Nation  
Nishnawbe Aski Nation  
Matawa First Nation

Timmins Hearing:

Timmins Chamber of Commerce  
Porcupine Prospectors and Developers Association  
City of Timmins  
Fort Albany First Nation  
Attawapiskat First Nation  
Muchkegowuk Council  
De Beers Canada  
Charles Ficner  
CPAWS Wildlands League  
Northwatch  
Ottawa Coalition Against Mining Uranium  
Steven Kidd  
Dave Munier

## Appendix I

### **Standing Committee on General Governance MPP Participation at the Toronto Hearing (L-Liberal, PC-Progressive Conservative , ND- New Democrat) (The Toronto hearing had the most MPP participation)**

Chair: Mr. David Oraziotti (Sault Ste. Marie L)  
Vince Chair: Mr. Jim Brownell (Stormont-Dundas-South Glengarry L)  
Mr. Robert Bailey (Sarnia- Lambton PC)  
Mrs. Linda Jeffrey (Brampton-Springdale L)  
Mr. Kuldip Kular (Bramalea-Gore-Malton L)  
Mr. Rosario Marchese (Trinity-Spadina ND)  
Mr. Bill Mauro (Thunder Bay-Atikokan L)  
Mrs. Carol Mitchell (Huron-Bruce L)  
Mrs. Joyce Savoling (Burlington PC)

#### Substitutions:

Mr. Toby Barrett (Haldimad-Norfolk PC)  
Mr. Gilles Bisson (Timmins-James-Bay ND)  
Mr. Michael A. Brown (Algoma-Manitoulin L)  
Mr. Mike Colle (Eglinton-Lawrence L)  
Mr. Randy Hillier (Lanark-Frontenac-Lennox and Addington PC)

#### Also taking part:

Mr. Paul Miller (Hamilton East-Stoney Creek ND)  
Mr. Michael Prue (Beaches-East York ND)

## Appendix J

### Interview Guide

- The MAM consultations (Describe, attendance? In what capacity did you participate? where? when? Positive/ negative, did people feel their input was received)
- The Duty to Consult (ie. Does it exist for legislative reform? Differences between consultation on Bill 173 and Bill 191?)
- The legislative process (ie. positives/negatives of committee hearings?)

## Appendix K

### **Letter of Notification**

To whom it may concern,

I would like to invite your organization to participate in a study I am conducting for my Masters of Environmental Studies thesis at Lakehead University. The intent of this research project is to gain insight into the relationship between First Nations and the Ontario government in regards to mining on First Nation's traditional territory. More specifically, I am examining the effectiveness of the consultation processes which took place for the review the Ontario Mining Act. In addition I hope to evaluate how the proposed amendments suggested by various First Nations and First Nations organizations compare to the actual amendments that will appear in the 1st draft of the Mining Act.

To determine the success or failure of the Mining Act Review consultation processes either conducted or funded by the Provincial government, I would like to ask your organization to participate in the research. This would entail, interviewing members of your organization who were involved in the consultation processes. And if possible I would like to request any relevant documentation on the Mining Act consultation processes.

Interview participants would be free to choose not to answer any of the questions asked during the interview at anytime. My findings will be securely stored for five years before being destroyed. The findings of this project will be made available to your organization at your request upon the completion of the project.

In order to obtain ethical approval for this project from Lakehead University, I require a letter of support from your organization. If you are willing to participate in this study please fax a letter of support to (807) 343-8380 attention to Elysia Petrone Reitberger.

If you have any questions or concerns, please do not hesitate to contact me at (807) 345-6069, or at [epetrone@lakeheadu.ca](mailto:epetrone@lakeheadu.ca) or my supervisor Dr. Martha Dowsley at [mdowsley@lakeheadu.ca](mailto:mdowsley@lakeheadu.ca) .

Thank-you for your consideration of my request,

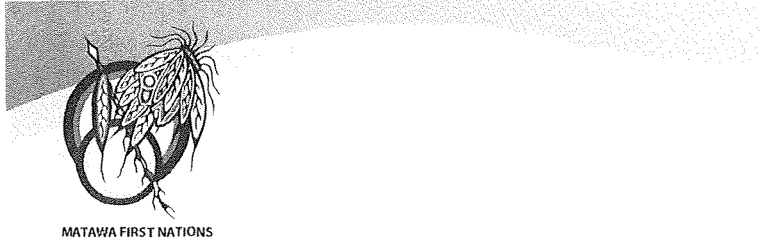
Sincerely,

Elysia Petrone Reitberger



# Appendix M

## Matawa's Letter of Support

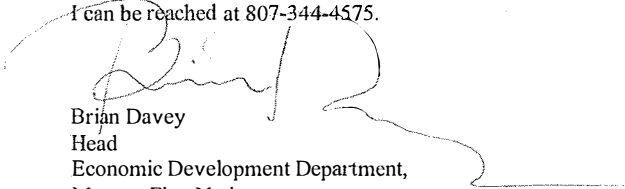


April 15<sup>th</sup>, 2009

To whom it may concern,

This letter is to notify the Lakehead University's Research Ethics Board that we have received notice of Elysia Petrone Reitberger's planned research project. The project will address the consultation processes undertaken to modernize the Ontario Mining Act.

We agree to partake in the research. If you have any questions regarding this notification I can be reached at 807-344-4575.

  
Brian Davey  
Head  
Economic Development Department,  
Matawa First Nations



## Appendix N

### **Letter of Intent and Consent Form**

Dear Potential Participant:

I would like to invite you to participate in a study I am conducting as part of my Master's degree in Northern Environments and Culture at Lakehead University.

The intent of my research project is to gain insight into the relationship between Aboriginals and the Ontario government. More specifically, as a case study, I am examining the effectiveness of the consultation processes which took place for the review the Ontario Mining Act.

I would like to ask you to take part in a recorded interview. I will be inquiring on your participation in the consultation processes and your thoughts and opinions on your experience. This will require approximately 1 hour of your time.

Participation in this study is completely voluntary. If you are uncomfortable with a question, please feel free to decline to answer it. You are also free to withdraw from the study at anytime.

My findings will be securely stored for five years before being destroyed. The findings of this project will be made available to you at your request upon the completion of the project. You must alert me prior to the interview if you wish your name, or any other identifying information not to be revealed in any published materials. Every effort will be made for complete anonymity, if requested, but there is a risk of being identified through the context of published statements.

If you have any questions or concerns, please do not hesitate to contact me at (807) 345-6069, or at [epetrone@lakeheadu.ca](mailto:epetrone@lakeheadu.ca), or my supervisor, Dr. Martha Dowsley (807) 343-8430, [mdowsley@lakeheadu.ca](mailto:mdowsley@lakeheadu.ca). You may also contact the Lakehead University's Research Ethics Board at 343-8283.

Thank you for your cooperation.

Sincerely,

Elysia Petrone Reitberger

My signature on this sheet indicates that I agree to participate in a study by Elysia Petrone Reitberger on the consultation processes which took place for the review the Ontario Mining Act and it also indicates that I understand the following:

- 1. I have received explanations about the nature of the study, its purpose, and procedures.
- 2. I am a volunteer and can withdraw at any time from the study.
- 3. There is no apparent risk of physical or psychological harm. There is the unlikely possibility that a question asked may be upsetting, but I may choose not to answer any of the questions at any time.
- 4. The data I provide will be securely stored for five years.
- 5. I wish to receive a summary of the project following the completion of the project.  
YES / NO (please circle)
- 6. My name, or other identifying information may be revealed in any published materials as a result of this study  
YES / NO (please circle)

---

Signature of Participant

Date

---

Signature of Researcher

Date

## Appendix O

### List of Interviewees, Title and Date of Interview (chronological order by group)

#### Government Representatives (6)

2. Mark O'Brien, Mineral Development Consultant MNDMF, June 1, 2009
3. Peter Moses, First Nations Information Officer MNDMF, June 12, 2009
4. Michael Grant, Mineral Development Co-ordinator MNDMF, June 22, 2009
5. Gilles Bisson, NDP MPP Timmins James Bay, August 12, 2009
6. Michael Gravelle, Minister of MNDMF, December 18, 2009
7. Jon Feairs, Senior Policy Analyst to Minister of MNDMF, January 10, 2010

#### First Nation Respondents (17)

8. Glen Smith, Forest Technicians for Naicatchewenin Development Corporation, June 4, 2009
9. Brian Davey, Economic Development Advisor Consultant Matawa First Nations, June 30, 2009
10. Paul Capon, Policy Analyst Matawa First Nations, July 14, 2009
11. Mark Bell, Aroland FN, Economic Development Officer, July 28, 2009
12. Peter Moonias, Chief of Neskantaga First Nation, July 29, 2009
13. Judas Beaver, Chief of Nibinamik ( Summer Beaver) First Nation, July 30, 2009
14. Adolph Rasevych, Economic Development officer for Ginoogaming First Nation, July 30, 2009
15. Raymond Ferris, Councillor of Constance Lake First Nation, July 30, 2009
16. Jason Beardy, Mining Table Lead NAN, August 9, 2009
17. Sam McKay, KI6 Member, August 11, 2009
18. Sarah Mainville, Political Advisor to the Ogichidaakwe (GC) of GCT3, August 11, 2009
19. Dianne Kelly, Ogichidaakwe (GC) GCT3, August 11, 2009
20. Stan Louttit, Grand Chief of Mushkegowuk, August 12, 2009
21. Terri Waboose, Deputy Grand Chief NAN, August 12, 2009
22. Randy Kapashesit, Mocreebec Council of the Cree Nation, August 12, 2009
23. David Paul Achneepineskum, CEO of Matawa First Nations, August 12, 2009
24. George Hunter, Chief of Weenusk First Nation, August 12, 2009
25. Louis Waswa, NAN elder, August 12, 2009

#### Metis Respondent (1)

26. Tim Pile, Secretary Treasurer Metis Nation of Ontario, July 28, 2009

#### Lawyer (1)

27. Anonymous #2, lawyer, November 26, 2009

#### Media (1)

27. Kristina Baraskewich, Account Manager of Firedog Communication, July 30, 2009

## Appendix P

### List of Events I attended (event, location, date)

- Mineral information session, Prosvita Hall Thunder Bay, September 2008
- OUI consultation sessions at FW FN and Red Rock Indian Band (Lake Helen), January 6 & 7, 2009
- Matawa's Governance and Economic Development Conference, Valhalla Inn March 31, April 1, 2009.
- Viewed the Online MAM announcement webcast, April 30, 2009
- Viewed the Fasken Martineau Law Firm's Online Mining Act Seminar, June 8, 2009
- Visited the MNDMF Toronto Office for an informal interview with the Director, MAM Secretariat, Whitney Block, Friday, June 12, 2009
- Northwestern Ontario Mines & Mineral Symposium, Valhalla Inn, Thunder Bay, April 7, 8 2009
- Luncheon presentation on MAM by Sharon Reid, MNDMF, Valhalla Inn, Tuesday April 7, 2009
- Matawa First Nations 21<sup>st</sup> Annual General Meeting, Ginoogaming First Nation, July 28, 29, 30, 2009
- Legislative Standing Committees Hearings, Sioux Lookout (via webcast), Thunder Bay, Chapleau and Timmins (via webcast) August 10,11,12,13, 2009
- NAN election/ XXVIII Keewaywin Chiefs Conference, Chapleau Cree First Nation, August 11,12,13 2009
- NAN Fall Chiefs Assembly, Victoria Inn, Thunder Bay, November 24-26, 2009
- Matawa Mineral and Exploration Symposium reviewing the Interim Mineral Measures Process, Italian Cultural Centre, Thunder Bay, February 9, 10, 2010
- Northwestern Ontario Mines & Minerals Symposium, Valhalla Inn, Thunder Bay, April 7, 8, 2010
- Open Forum with MNDMF staff and MMAAC rep to discuss Proposed Mining Act Regulations, Valhalla Ballroom, Thunder Bay, April 8, 2010