

Advancing the Participation of Indigenous Peoples

INTRODUCTION

The development of the Canadian Minerals and Metals Plan (CMMP) is occurring at a time of positive change in the relationship between Indigenous and non-Indigenous Canada. The Truth and Reconciliation Commission's final report, *Truth and Reconciliation Commission of Canada: Calls to Action*, Canada's acceptance of the *United Nations Declaration on The Rights of Indigenous Peoples* (UNDRIP) and Canada's commitment to creating a new *Recognition and Implementation of Indigenous Rights Framework* ("the Framework") has created a path forward. Renewing the relationship inclusive of the recognition of the rights of Indigenous peoples will positively shape their participation in the development and implementation of the CMMP and in the future of managing mineral resources in Canada.

The challenges in doing so are many and begin with reconciling the past such that history does not repeat itself. This includes addressing the lack of trust amongst the parties and the legacy of contamination from abandoned mines affecting Indigenous communities. All parties (Canada, provinces, mining industry, and Indigenous peoples) must work together to breathe life into the Calls to Action, UNDRIP, and the Framework as they relate to Indigenous Rights, and collaboratively institutionalize Free, Prior and Informed Consent into the development and implementation of the CMMP. Indigenous peoples must be engaged as early as possible in mining projects recognizing that consultation includes accommodation and both the project and community need infrastructure. Capacity building must be interpreted more broadly to move beyond entry level jobs to include career paths, equity investment opportunities, and address the capacity needs of the mining sector as well. For example, the marginalization of Indigenous women in the mining industry and the 'rigger culture' which perpetuates it needs to be ended. An additional challenge concerns the need to understand more about the value of indirect employment created when mining projects procure goods and services from local Indigenous communities. Indigenous procurement policies could bring benefits larger than mining jobs alone.

A DECLARATION OF ACTION

To reconcile these challenges, help implement a renewed mutually beneficial relationship between Indigenous and non-Indigenous Canada in the way mineral and metal resources are managed in Canada and subsequently advance the participation of Indigenous peoples, seven concrete actions have been identified that are linked to key themes raised at the October 5, 2018 National Forum for Advancing the Participation of Indigenous peoples and drawn from the following reports, "Indigenous Gender-based Analysis for informing the Canadian Minerals and Metals Plan" (Policy Paper, Native Women's Association of Canada, September 2018), "What

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We've Heard" (Mines Canada, July 2018), and a third party report on mineral development and Indigenous reconciliation.¹ Each action is presented below, preceded by a brief rationale:

Participating Holistically

Interventions by Indigenous peoples have made it very clear that the Indigenous participants have much to contribute to the CMMP in not only the Indigenous Strategic Direction but as active participants in developing the other five Strategic Directions as well. Such a holistic approach is consistent with ensuring that the development and implementation of the CMMP is inclusive of the participation of Indigenous peoples. The UNDRIP speaks to the need to recognize that respect for indigenous knowledge, cultures and traditional practices can contribute to sustainable and equitable development and proper management of the environment.

The following are examples of how Indigenous interests could be incorporated throughout the CMMP's strategic directions:

- Indigenous environmental perspectives can strengthen the "Respect the Environment" Strategic Direction.
- Traditional knowledge and ways of knowing are scientific methodologies that can contribute to the "Provide Canadian Leadership in Science, Technology and Innovation" Strategic Direction.
- Many times, Indigenous communities are the closest community to a proposed mining project and thus are well positioned to contribute to the "Enable Community Benefits" Strategic Direction.
- Indigenous peoples' traditional economies can be threatened by proposed, ongoing, and past mining projects and as such creating alternative economic development opportunities for Indigenous peoples should be part of the "Enhance Economic Development and Competitiveness" Strategic Direction.
- Indigenous branding could be a distinguishing characteristic of the "Promote Canada as a Global Leader" Strategic Direction.

➤ **Action #1: Include Indigenous peoples' interest within all six (6) Strategic Directions of the CMMP.**

Indigenous Rights Recognition

Collectively, the Calls to Action, Canada's support of UNDRIP, and the new Framework to support the recognition and implementation of Indigenous rights provide a blueprint for what a

¹ This document has been prepared by a consultant under contract with Natural Resources Canada to summarize input from engagement activities with Indigenous peoples to inform the development of the Canadian Minerals and Metals Plan (CMMP). Feedback received through engagement with Indigenous peoples after November 2018 were considered alongside this summary. This document was shared with Indigenous participants from the National Forum for review and comments.

renewed relationship should be between Indigenous and non-Indigenous peoples with regard to mineral resources management in Canada. The blueprint should focus on three key areas: how to make decision-making more inclusive of Indigenous peoples; how to incorporate Indigenous jurisdiction into that decision-making; and reconciling Indigenous Title by advancing self-determination while providing certainty for industry proponents.

Canada's decision to fully support UNDRIP and its commitment to creating a new framework to support the recognition and implementation of Indigenous rights create opportunities for Indigenous peoples to be full partners integrally involved in the decision-making process for mining projects. The exercise of universal human rights and freedoms including being free from discrimination, the right to self-determination, the right to self-government, and the right to distinct political, legal, economic, social and cultural institutions can advance Indigenous participation overall and within decision making processes in particular.

Indigenous jurisdiction needs to be acknowledged and considered as part of the renewed relationship as well. This includes recognizing Indigenous governments' jurisdiction over their surface and subsurface lands. Clarifying the Crown's intention (i.e. federal, provincial and territorial governments) for implementing Indigenous title provides important clarity of decision-making processes for industry proponents.

Indigenous title needs to be recognized within the context of the management of mineral resources to provide clarity for decision-making processes. Reconciliation should include collaborative efforts with Indigenous peoples to fairly and justly clarify Indigenous title as it relates to Indigenous lands that could be impacted by minerals and metals resource projects. If it is reconciled properly, it can help bring certainty to the mining process and mining industry.

- **Action #2: Put recognition of Indigenous Rights at the forefront of a renewed mutually beneficial relationship.**

Early Meaningful Engagement

Building robust and transparent relationships with Indigenous peoples needs to start as soon as possible. The growing examples of collaborative legislative development and policy between the Crown and Indigenous peoples needs to be applied to the minerals and metals sector. These laws and policies will create or strengthen opportunities for Indigenous engagement in areas such as regulations, training, procurement, equity financing, resource revenue sharing, and community capacity building programs. The guiding principles from the Calls to Action can serve as a guide to the development of these laws and policies.

Building the capacity of corporations to learn about the Indigenous community and Indigenous Rights and adapt their decision-making processes to incorporate the importance of the land to Indigenous people is key to creating collaborative approaches. Corporations need to begin or reaffirm their commitment to work with Indigenous peoples to develop cultural competency training programs for their staff and engage with Indigenous peoples. This includes being

prepared to provide financial resources to help Indigenous communities properly assess potential projects, the economic benefits, the environmental risks, and the socio-economic impacts. This can be done with the understanding that the Indigenous community or communities will commit to fairly assessing the feasibility of the project.

Indigenous peoples, elders, Chiefs, and other knowledge holders can add value to project development given their knowledge of their traditional territories. Utilizing local community members in environmental and archaeology studies can save money for project proponents given that pre-existing knowledge. However, it will take time and resources for Indigenous communities to come up to speed with proposed projects so engagement as early as possible becomes more important.

- **Action 3: Meaningful engagement with Indigenous peoples should occur as soon as possible.**

Free, Prior and Informed Consent

Obtaining the free, prior and informed consent (FPIC) of Indigenous peoples should be the new standard for fair and just engagement with them on projects/initiatives that may adversely impact their Indigenous and/or Treaty Rights. One of the clearest articulations rest in the UNDRIP that Canada fully supports:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Article 19, UNDRIP).

Historically, the implementation of the Crown’s duty to consult has long been a source of contention with Indigenous peoples. Its’ implementation was driven by the need of the Crown to “legally” fulfill its responsibility. This approach resulted in minimal ‘legal’ requirements to satisfy the responsibility that rarely included accommodating concerns raised by Indigenous peoples.

The consultation process became further complicated by the Crown increasingly delegating aspects of its consultation responsibility (procedural aspects including project information sharing and feedback) to proponents of natural resource and economic development projects that could adversely impact Indigenous and/or Treaty Rights. Many times, this delegation left Indigenous peoples in a quandary and put them at odds with both the Crown and project proponent as the constitutional duty to consult is not delegable from their perspective.

The CMMP will need to be consistent with any FPIC process developed between Canada and Indigenous peoples as part of the renewed Nation to Nation relationship. The challenge is how to implement FPIC in a manner that is respectful to Indigenous peoples, more inclusive than current consultation processes, lends itself to better, more informed decisions being made, and truly accommodates Indigenous concerns.

Indigenous governments should be encouraged to develop their own FPIC protocols and processes. For example, 'collaborative consent' is a process the Government of Northwest Territories has been recognized as leading, in which Indigenous and non-Indigenous governments work through collaborative approaches tailored to unique circumstances and initiatives to achieve each other's consent. It has been practiced in five areas including the development of legislation, policies and plans, negotiations regarding ownership and use of lands and waters, sector specific agreements for resource management, and resource revenue sharing agreements.

- **Action #4: Make free, prior, and informed consent the standard for Indigenous engagement.**

Capacity Building

There is a tremendous need for support in order for Indigenous peoples to be able to meaningfully participate in the mining industry. It starts with nation building which builds the Indigenous community's capacity to participate more equitably. This includes assisting in the development of community plans and the alignment of proposed minerals and metals projects with those priorities; developing negotiation skills to ensure fair and just company/community agreements; increasing management and/or investment participation within projects; dovetailing Indigenous community businesses with project procurement activities where possible; and encouraging the creation of Indigenous Economic Development Corporations with responsibilities for business project engagement.

Within the mining industry, there are educational and employment gaps between Indigenous and non-Indigenous Canada that will require sufficient funding to close. Funding must cover both trades training and post-secondary education. While entry level jobs are a good start, the vision for Indigenous peoples is evolving to where they want to see career paths for their youth and women in particular such that they can move into supervisory and management positions.

Decision-making processes can be enhanced to be inclusive of Indigenous peoples and that reflect capacity building at a grass roots level. Opportunities for Indigenous participation in archaeological fieldwork as technicians should be promoted. The development of culturally based environmental assessment processes that can be harmonized with federal, provincial, and territorial processes should be encouraged. The undertaking of Traditional Land Use studies by Indigenous peoples should be an option. Traditional knowledge should be given equal value as western science as a tool to assess mining site potentials. Ownership of subsurface rights by Indigenous peoples in their traditional territories and issuing of Indigenous permits should become a common practice and be encouraged.

- **Action #5: Enhance resources for capacity building to support Indigenous participation.**

Indigenous Women

Indigenous women's special relationship with the land as its caretaker places them in a unique position as potential contributors towards the creation of the CMMP. Their knowledge of and responsibilities for the land, their role in traditional gathering practices, and their familial and cultural responsibilities should position them to be an asset in contributing to the future of the minerals and metals industry. However, systemic barriers must be overcome first to realize this possibility.

Previous approaches to mineral exploration and mining marginalized Indigenous peoples and their communities. Within Indigenous society, no one has been marginalized more than Indigenous women. The persistence of a "rigger culture" in mining work sites and work camps perpetuates a form of racism and abuse of Indigenous women that undermines their human worth and can expose them to heinous and entirely intolerable acts of sexual violence and discrimination and threatens their personal safety. There must be a strong commitment, legislatively by governments and policy wise by corporations, to end the rigger culture and end this abuse. A zero-tolerance policy must prevail.

The minerals and metals industry can provide a tremendous opportunity for employment of Indigenous women while bridging the labour gap for skilled workers in mining exploration and operations. Consistent with Calls to Action #92. ii. the corporate sector should help ensure that Indigenous peoples have access to jobs, training, and educational opportunities so that Indigenous communities can gain long-term sustainable benefits from economic development projects. In doing so, it must consider the concerns and interests of Indigenous women so that all of the variables are accounted for and positive outcomes can be achieved as projects move forward. Sensitivity and inclusion training of front-line workers on the issue of sexual violence facing Indigenous women and the need to stop it should be part of the solution. Law enforcement agencies need to be educated to actively support the ability of Indigenous women to report crimes and sexual harassment. The potential of Indigenous women in particular can be realized throughout project implementation, as front-line workers, as part of supervisory staff, engineering staff, and as management. It will take time to achieve, but it is doable.

➤ **Action #6: Empower Indigenous women**

Economic Benefits

There is a growing consensus that Indigenous participation in the economic benefits generated by the development of mineral resources can lead to improved quality of life and contribute positively to Indigenous self-determination. Consistent with Calls to Action #92, Indigenous peoples need to have opportunities to gain long-term sustainable benefits from economic development projects and mining projects in particular. Federal initiatives, such as the Strategic Partnerships Initiative, must be continued and expanded upon to increase Indigenous participation in complex economic development opportunities.

Economic benefits have been improving for Indigenous peoples from participating in minerals resource projects. Increasingly, skills training, employment, business development and financial

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arrangements are being provided to Indigenous peoples. This trend must continue and be expanded upon.

Infrastructure is an area where project proponents and Indigenous peoples can find common ground in building mutually beneficial relationships. Projects require roads, utilities, housing, emergency services, etc. Many times, neighboring Indigenous communities have similar needs and thus, project planning could create win-win solutions through shared infrastructure or cross-training, if planned properly.

There is also a role for corporations as they can step up and help Indigenous businesses to take their businesses to the next level. This can be accomplished by including Indigenous businesses in their supplier networks and procurement plans and/or by providing training and mentoring to help Indigenous business owners be successful.

➤ **Action #7: Share Economic Benefits with Indigenous Peoples**

CONCLUSION

Canada's reconciliation agenda is focusing on improving the relationship between Indigenous and non-Indigenous peoples. Creating a more mutually beneficial relationship between Indigenous and non-Indigenous Canada in how mineral resources are managed is an important part of this reconciliation agenda.

The Canadian Minerals and Metals Plan represents an opportunity to chart a new path forward, one that is inclusive of the rights of Indigenous peoples. To get there will require a commitment from all parties for a collaborative approach. It should include Indigenous peoples contributing to all six strategic directions in the CMMP, putting recognition of Indigenous rights at the forefront, engaging with Indigenous peoples as early as possible, making free, prior, and informed consent the standard for Indigenous engagement, enhancing resources for Indigenous capacity building, empowering Indigenous women, and expansion of sharing of economic benefits with Indigenous peoples.

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Free, Prior and Informed Consent in Action

On October 3, 2018, the Government of Canada announced that it would not appeal a Federal Court of Appeal ruling in August that stopped the Trans Mountain pipeline expansion project after concluding that Ottawa's consultation efforts with Indigenous communities were inadequate. Instead, the government committed to increasing the resources available for consultation with Indigenous groups and would listen, consult and make reasonable accommodations. This decision represents a major break from the past in terms of consultation with Indigenous Peoples on natural resource projects.

Consultation without accommodation has long been a major concern of Indigenous peoples when natural resource projects have been undertaken in the past. Consultation and accommodation or consent is what UNDRIP refers to in calling for the free, prior and informed consent of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them. It is a cornerstone of the new mutually beneficial relationship with non-Indigenous people that Indigenous peoples envision for the future.

The Trans Mountain pipeline expansion project's enhanced consultation and accommodation process has the potential to shape FPIC for Indigenous peoples, the Crown and the mining industry.