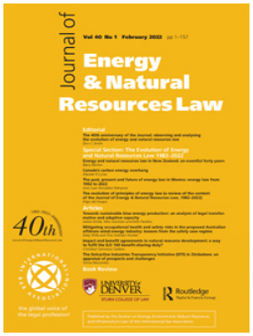

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Indigenous co-ownership of mining projects: a preliminary framework for the critical examination of equity participation

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Negotiated agreements are now a commonplace mechanism for governing the relationship between mining companies and Indigenous peoples. What is not commonplace are agreements in which Indigenous people acquire an equity stake in industrial-scale projects on their land. Recent and powerful calls for greater Indigenous control of mining projects have drawn renewed attention to the question of Indigenous co-ownership and Indigenous equity participation. This paper describes co-ownership arrangements emerging globally and raises critical questions that drive closer examination of the value proposition of Indigenous equity participation for Indigenous groups and other parties.

Keywords: Indigenous rights; equity participation; resource extraction; extractive industries; economic development; self-determination; customary land; shareholding; benefit sharing; impact and benefit agreement; Aboriginal rights; First Nations participation

1. Introduction

The last two decades has seen increased recognition of Indigenous peoples' right to control, co-manage and benefit from resource development on their lands.[1] These rights are in turn part of the fundamental right of Indigenous peoples to self-determination.[2] The formal adoption by states of major international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the voluntary adoption by states and business of the UN Guiding Principles on Business and Human Rights (2011) has catalysed a raft of industry standards that have shaped expectations about the relationship between mining and Indigenous peoples globally.[3] Available data indicates that Indigenous peoples have land tenure or management

1 James Anaya, 'Extractive Industries and Indigenous Peoples' (1 July 2013) A/HRC/24/41 <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf> accessed 15 July 2021.

2 See in particular articles 3, 26 and 32 of the UN Declaration on the Rights of Indigenous Peoples.

3 See eg ICMM, 'Indigenous Peoples and Mining: Position Statement' (International Council on Mining and Metals 2013); IFC, *Performance Standards on Environmental and Social Sustainability: Performance Standard 7 – Indigenous Peoples* (International Finance Corporation 2012).

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rights over one-quarter of the earth's land mass.[4] As mineral and metal extraction is projected to soar in the coming decades,[5] Indigenous peoples' exposure to extractive industries is likewise expected to intensify.

Against this backdrop, negotiated agreements have emerged as a mechanism though which relationships between extractives companies and Indigenous landowners are formalised and governed.[6] These agreements are variously called benefit-sharing agreements, local-level agreements, community development agreements, Indigenous land-use agreements, impact and benefit agreements and other terms.[7] They can cover a wide range of matters, including land rights, compensation, revenue sharing, education, health, employment, consultation processes, and environmental, social and cultural heritage impacts.[8] The relationship between resource extraction and Indigenous rights at the international level is influencing how mining companies and Indigenous peoples negotiate agreements at the project level.

Some negotiated agreements involve Indigenous co-ownership of the project, whereby Indigenous groups acquire an equity stake in a mining company operating on their territory.[9] The global prevalence of Indigenous co-ownership does not appear widespread or well documented, except in a small number of jurisdictions. In Papua New Guinea (PNG), for instance, landowner equity has been an established part of mining and oil and gas since the 1980s.[10] In the research literature, Indigenous equity in mining was described some two decades ago as a model for directing mining benefits to Indigenous communities.[11] Since then, documented instances of Indigenous co-ownership in mining do not appear to have proliferated, and the reasons for this have received scattered academic attention.[12]

4 Stephen T Garnett and others, 'A Spatial Overview of the Global Importance of Indigenous Lands for Conservation' (2018) 1 Nature Sustainability 369.

5 Éléonore Lèbre and others, 'The Social and Environmental Complexities of Extracting Energy Transition Metals' (2020) 11 Nature Communications 4823; Kirsten Hund and others, *Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition* (World Bank 2020); OECD, *Global Material Resources Outlook to 2060: Economic Drivers and Environmental Consequences* (Organisation for Economic Co-operation and Development 2019).

6 ICMM, *Good Practice Guide: Indigenous Peoples and Mining* (2nd edn, International Council on Mining and Metals 2015); Ciaran O'Faircheallaigh, 'Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon' (2013) 44 Community Development 222.

7 Ian Murray, 'Indigenous Benefits Management Structures as Social Enterprises: Key Challenges for Economic Development' (2021) 39 Journal of Energy & Natural Resources Law 137; IPIECA, *Community Development Agreements: Guidance Document for the Oil and Gas Industry* (IPIECA 2019); Jo-Anne Everingham and others, *Why Agreements Matter* (Rio Tinto 2016).

8 Michael Limerick and others, *Agreement-Making with Indigenous Groups: Oil and Gas Development in Australia* (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, The University of Queensland 2012); IPIECA (n 7).

9 See Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (The Gordon Foundation 2015) 143.

10 Glenn Banks, 'Landowner Equity in Papua New Guinea's Minerals Sector: Review and Policy Issues' (2003) 27 Natural Resources Forum 223.

11 *Ibid*; Jon Altman, 'Land Rights and Aboriginal Economic Development: Lessons from the Northern Territory' (1995) 2 Agenda 291; Ciaran O'Faircheallaigh, *Financial Models for Agreements between Indigenous Peoples and Mining Companies* (Centre for Australian Public Sector Management, Griffith University 2003).

12 See Lily O'Neill and others, *Clean Energy Agreement Making on First Nations Land: What Do Strong Agreements Contain?* (Centre for Aboriginal Economic Policy Research, Australian National University 2021); InterGroup Consultants, 'Aboriginal Engagement in Resource Development: Industry

This paper aims to drive closer examination of Indigenous co-ownership of mining projects. It describes cases of Indigenous co-ownership in six countries (Canada, PNG, Australia, South Africa, the United States and New Zealand). Reflecting on these cases, and the debates and discussion that surround them, we offer a framework for critically examining the value proposition of co-ownership for Indigenous people and other parties.

2. Renewed calls for Indigenous control and co-ownership

Recent events have renewed the imperative to critically examine Indigenous control over mining projects and their land-based activities. In May 2021 – a year after the destruction of ancient and sacred rock shelters at Juukan Gorge, in the mining-intensive Pilbara region of Western Australia[13] – the Puutu Kunti Kurrama and Pinikura Aboriginal Corporation called for Indigenous 'co-management' of the mine to ensure 'a traditional owner voice' in project decisions.[14] While co-management does not necessarily imply co-ownership, the Juukan Gorge incident has had a direct influence on mining industry and political discourse in Australia around Indigenous equity participation in mining projects.[15] The widespread controversy of the incident created a 'lightning rod' case that is powering a demand for new and workable models of Indigenous co-management, and sparking renewed interest in Indigenous co-ownership of large-scale projects, in mining and other sectors.[16]

In Canada, other lightning-rod cases have led to co-ownership arrangements. Prior to its cancellation in June 2021, the controversial Keystone XL oil pipeline was the subject of a billion-dollar equity deal with a conglomerate of five Canadian First Nations.[17] Recent reports profile the emergence of Indigenous equity participation in other extractives projects,[18] building on earlier trends seen in the infrastructure

Leading Practices' (InterGroup Consultants for RioTinto 2008) <https://database.atns.net.au/reference.asp?RefID=3546> accessed 5 October 2021.

13 See Commonwealth of Australia, 'A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge' (Joint Standing Committee on Northern Australia, Parliament of the Commonwealth of Australia 2021).

14 *Ibid*; Louise Miolin and Laura Birch, '"It's Something Precious": Traditional Owners Say No Amount of Money Can Replace Blasted Rock Shelters' *ABC News (Australia)* (18 May 2021) <www.abc.net.au/news/2021-05-18/one-year-on-from-rio-tinos-juukan-gorge-blast/100145712> accessed 15 July 2021.

15 Anthony Barich, 'Australian Iron Ore Majors Urge Indigenous Exec Hires to Drive Social Engagement' (*S&P Global Market Intelligence*, 25 June 2021) <www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/australian-iron-ore-majors-urge-indigenous-exec-hires-to-drive-social-engagement-65170932> accessed 9 September 2021; Rachael Knowles, 'Indigenous Procurement Policy Empowers Entrepreneurial Spirit of Mob' *National Indigenous Times* (30 July 2021) <https://nit.com.au/indigenous-procurement-policy-empowers-entrepreneurial-spirit-of-mob/> accessed 9 September 2021.

16 See eg the Western Green Energy Hub, a mega renewable energy project involving the Mirning Traditional Lands Aboriginal Corporation as an equity partner: Government of Western Australia, 'Major New Hydrogen Proposal Welcomed' (13 July 2021) <www.mediastatements.wa.gov.au/Pages/McGowan/2021/07/Major-new-hydrogen-proposal-welcomed.aspx> accessed 5 October 2021.

17 Rod Nickel, 'Canadian Indigenous Deal with KXL Oil Pipeline Took Years, Aims to Unlock Long-Term Wealth' *Reuters* (30 November 2020) <www.reuters.com/article/tc-energy-keystone-idUSKBN28A1I7> accessed 15 July 2021.

18 Heather Exner-Pirot, *Pathways to Indigenous Economic Self-Determination* (Macdonald-Laurier Institute 2021) <www.macdonaldlaurier.ca/resource-sector-crucial-self-determination/>; Tom

and renewable energy sectors.[19] Statutory and civil society organisations have formed to facilitate First Nations co-ownership of major resource projects.[20]

These developments are likely connected to the broader trends described above, namely the increasing international acknowledgement of Indigenous rights to self-determine the use of resources on their lands, and the adoption of agreements to govern the relationship between Indigenous groups, states and mining projects. While not all Indigenous groups may be interested in equity participation, recent calls for Indigenous control over mining renew the imperative to examine what co-ownership entails, how it is implemented in various jurisdictions, and the implications for Indigenous groups and other parties.

3. Research approach

3.1 *A general model of Indigenous co-ownership*

Our research focused on identifying instances of Indigenous co-ownership of mining projects. Figure 1 provides a generalised model of co-ownership through shareholding. Under this model, mining is carried out by a developer company that is locally incorporated and, through regulatory permitting processes, is vested with rights to access, extract and sell a mineral resource. The developer is shown as being owned by several parent entities. In large-scale mining, typically at least one owner is a multinational mining company. Co-owners could also include other private companies, the state and institutional investors.

For our purposes in this paper, Indigenous co-ownership occurs where an Indigenous group or entity, on whose land or territory the project is located, holds shares (equity) in the developer company. As co-owners of the developer company, the Indigenous group can be considered a co-owner of the project. The Indigenous group's shares could be held by individuals, but more likely are held by an incorporated Indigenous entity that administers the shareholding on behalf of the Indigenous landowner group, as Figure 1 shows.

This model provides a conceptual basis for examining Indigenous co-ownership of mining projects. We recognise that other forms of co-ownership in mining companies can exist. Indigenous groups could hold shares in the developer's parent companies (eg the multinational mining company), or a diversified share portfolio that includes equity in several mining companies.[21] Indigenous groups could form an unincorporated partnership with the developer instead of acquiring an equity stake.[22] There are also 100 per cent Indigenous-owned mining companies, and Indigenous-owned businesses that provide labour hire, land management, catering and other services to

Flanagan, *First Nations and the Petroleum Industry: From Conflict to Cooperation* (Fraser Institute 2021) <www.fraserinstitute.org/sites/default/files/first-nations-and-the-petroleum-industry-from-conflict-to-cooperation.pdf>.

19 Moody's Investors Service, *Canada: Indigenous Involvement in Large Infrastructure Projects Is Set to Grow* (Moody's Investors Service 2017) 1076110 <www.moodys.com/research/Moodys-Indigenous-involvement-in-large-Canadian-infrastructure-projects-set-to–PR_371732>.

20 See Jason Calla, *Improving Access to Capital for Indigenous Groups to Purchase Equity Stakes in Major Resource Projects* (First Nations Major Projects Coalition 2021).

21 See Gibson and O'Faircheallaigh (n 9) 143.

22 Such an arrangement would likely be governed by negotiated agreement.

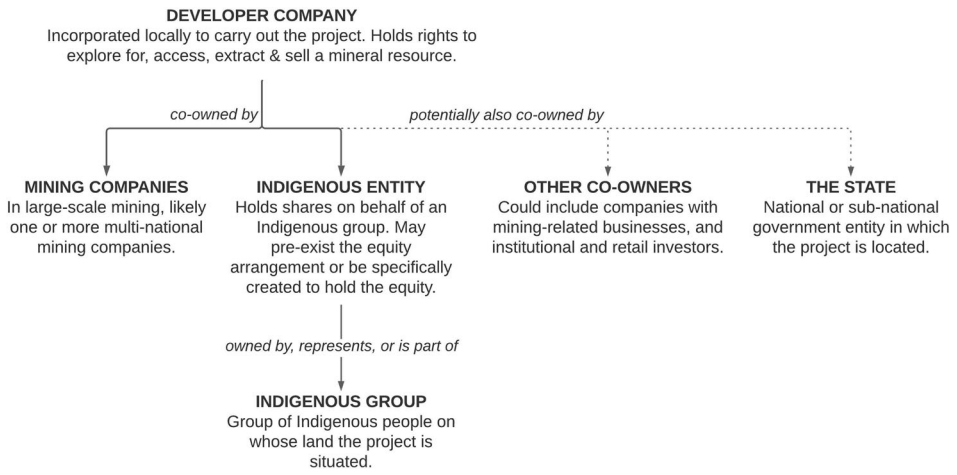

Figure 1. A general model of Indigenous co-ownership through shareholding.

mining operations. These scenarios represent diverse potential arrangements with the mining sector that could drive self-determination and economic development. The focus of this paper, however, is on a particular model of co-ownership, where an Indigenous group holds an equity share in a company that is developing or operating a mining project on their land.

3.2 *Co-ownership and equity participation in Indigenous contexts*

Terminology drawn from corporate governance and finance is frequently used to describe Indigenous co-ownership of resource projects. The term 'Indigenous equity participation'[23] is analogous to the corporate finance term 'equity participation'. In this sense, shares in a company are an *equity* stake, and a shareholder *participates* in the business by contributing funds, sharing profits, risking losses and voting in general meetings.

These terms take on different meanings when used outside corporate finance. 'Participation' is deeply connected to internationally recognised rights of self-determination. For example, the UNDRIP acknowledges Indigenous peoples' right to 'participate fully … in the political, economic, social and cultural life of the State' (Article 5), and to 'participate in decision-making in matters which would affect their rights' (Article 18). In mining, Indigenous 'participation' refers *at least* to financial benefits, employment, agreement-making, and meaningful engagement in decisions – and can extend to wider explorations of Indigenous peoples' rights, values, knowledge, and aspirations for sustainable development.[24] The word

23 See eg Calla (n 20); InterGroup Consultants (n 12); O'Faircheallaigh, *Financial Models for Agreements between Indigenous Peoples and Mining Companies* (n 11).

24 Diane Ruwhiu and Lynette Carter, 'Negotiating "Meaningful Participation" for Indigenous Peoples in the Context of Mining' (2016) 16 Corporate Governance 641; Sarah Holcombe and Deanna Kemp, 'From Pay-out to Participation: Indigenous Mining Employment as Local Development?' (2020) 28

'equity' similarly carries multiple meanings, including technical denotations in law, property, corporate governance and accounting. For many Indigenous people, 'equity' also implies a moral dimension, including fairness and justice, and may be interpreted against a continuing history of settlement, injustice, colonial dispossession, trauma and structural disadvantage.

We are mindful, therefore, that 'Indigenous equity participation' is a term heavily laden with meaning beyond its corporate finance analogue. This observation provides a backdrop for thinking critically about the value proposition of Indigenous co-ownership. An Indigenous shareholding might constitute 'Indigenous equity participation' in a narrow commercial sense. A critical view would examine whether the shareholding represents fair, just and equitable participation in a human rights-based sense. Two contrasting scenarios provide an illustration. First, consider a developer company owned by a few equity holders, including an Indigenous shareholder, with roughly equal stakes. The relationship between owners may have the spirit of a joint venture partnership, with the different parties bringing complementary strengths. The Indigenous co-owner could expect to participate closely in company decision-making, potentially at the board level. By contrast, consider a developer company co-owned by numerous shareholders, each holding a small percentage of perhaps millions of shares issued. Participation in company decision-making may be limited to voting rights at shareholder meetings, although a minority shareholder may be able to persuade other shareholders to vote a particular way. The second scenario might be acceptable for Indigenous groups seeking primarily to make an economic return, but would likely fall short of meaningful participation for an Indigenous group seeking to control resource development on their land.

These scenarios highlight two key points. Firstly, there is no archetypical model of Indigenous co-ownership, given the range of possible ownership structures available across jurisdictions globally. The rights and benefits conferred to an Indigenous group by virtue of equity ownership are not fixed and can be negotiated and tailored in any given case. Secondly, examining the value proposition of Indigenous co-ownership requires a multi-dimensional approach. As a commercial arrangement, it involves questions about the investment value and financial risk of the shareholding. As a mechanism for self-determination, it involves foremost the goals of the Indigenous group, and the extent to which those goals are achieved through co-ownership of a mining project. These broad points provide a frame for this paper.

3.3 *Data sources and limitations*

Data collection for this paper comprised a search of academic and grey literature relating to Indigenous co-ownership, Indigenous equity participation, Aboriginal equity shareholdings, First Nations equity stakes, and synonymous permutations. Examples and discussions of co-ownership were collected, focusing on mining but also including other resource sectors such as petroleum and renewable energy. Our search was restricted to English-language sources.

Sustainable Development 1122; Ciaran O'Faircheallaigh and Tony Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14 Environmental Politics 629.

Results came primarily from Canada, Australia and PNG, with some results coming from South Africa, the United States and New Zealand. These jurisdictions are reported herein. We also scanned the literature relating to jurisdictions with well-documented interactions between mining and Indigenous peoples (eg Brazil, Chile, India, Norway and Sweden). This literature typically focused on conflict between Indigenous interests and mining; models of Indigenous co-ownership were not prominent, and are not reported in this paper.

Importantly, our results are limited to cases of Indigenous co-ownership that are publicly reported or academically published. We expect many Indigenous equity arrangements to be confidential or commercial-in-confidence. The examples discussed in this paper must be taken as illustrative, and not representative of the state of Indigenous co-ownership in a given jurisdiction. Conversely, a null set of results in other jurisdictions does not imply an absence of Indigenous equity arrangements.

4. Results: cases of Indigenous co-ownership

4.1 *Canada*

Canada has seen accelerating uptake of Indigenous co-ownership in the last decade, particularly in the renewable energy and petroleum sectors.[25] The formation in recent years of multiple organisations whose purpose is to facilitate Indigenous investment into resource projects points to the growing interest of (some) Indigenous groups in equity participation.[26]

The uptake in Indigenous co-ownership is part of a broader set of political and legal developments in Canada. Judicial decisions in 2004–2005 significantly expanded the Crown's constitutional duty to 'consult and accommodate' First Nations, Inuit and Métis peoples.[27] Resource companies seeking regulatory approval for projects on Indigenous land were consequently encouraged to negotiate agreements with Indigenous groups.[28] The establishment of Indigenous self-government agreements,[29] and the devolution of federal land and resource responsibilities to territorial governments,[30] has facilitated interactions between Indigenous groups, resource companies and the

25 Moody's Investors Service (n 19).

26 Such organisations include civil society organisations like the First Nations Major Projects Coalition, and statutory entities like the Alberta Indigenous Opportunities Corporation and the First Nation Finance Authority.

27 Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Publishing Limited 2014).

28 Exner-Pirot (n 18).

29 Government of Canada, 'Indigenous Self-Government in Canada' *(Crown–Indigenous Relations and Northern Affairs Canada, 25 Augus*t 2020) <www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314> accessed 15 July 2021. Note: sometimes referred to as 'modern treaties' or 'comprehensive land claim agreements'.

30 Devolution is operating in Yukon and Northwest Territories; an agreement-in-principle is in place for Nunavut: Government of Canada, 'Yukon Devolution' (*Crown–Indigenous Relations and Northern Affairs Canada*, 4 June 2013) <www.rcaanc-cirnac.gc.ca/eng/1352470994098/1535467403471> accessed 15 July 2021; Government of Canada, 'Northwest Territories Devolution' (*Crown–Indigenous Relations and Northern Affairs Canada*, 24 July 2013) <www.rcaanc-cirnac.gc.ca/eng/1352398433161/1539625360223> accessed 15 July 2021; Government of Canada, 'Nunavut Devolution' (*Crown–Indigenous Relations and Northern Affairs Canada*, 10 November 2020) <www.rcaanc-cirnac.gc.ca/eng/1352471770723/1537900871295> accessed 15 July 2021.

government.[31] More recently, Canada formally endorsed the UNDRIP in 2016 (after initially opposing it, alongside Australia, New Zealand and the United States), and in 2021 passed the UNDRIP Act, which requires federal laws to be consistent with the UNDRIP.[32] These developments provide a conducive space for Indigenous co-ownership of resource projects to be negotiated.

Although not all Indigenous groups may be interested in co-ownership,[33] economic independence and self-determination appear to be key motivators for some groups. The East Tank Farm Development (a petroleum facility in Alberta) involved a C$503 million share purchase in 2016 by the Fort McKay First Nation and Mikisew Cree First Nation, securing a combined 49 per cent equity.[34] For the Fort McKay First Nation, this represented an avenue for economic development independent of 'government largess'.[35]

In mining, the Tahltan Central Government announced in March 2021 a C$5 million share purchase in Skeena Resources,[36] giving the Tahltan a minority stake.[37] The subsequent establishment of an environmental conservancy on Tahltan land, in support of which Skeena Resources relinquished mineral tenures,[38] suggests that the share purchase was part of a broader collaboration between the Indigenous group and the developer company. The Tahltan Central Government described the shareholding as creating a partnership that offers influence over decision-making and opportunities for economic development:

> In partnering with Skeena, the Tahltan Nation is evolving and taking significant steps forward by becoming meaningful equity partners in these projects … . Ownership provides [us] with a strong seat at the table as we continue our pursuit towards capacity building and economic independence.[39]

Recent examples indicate a trend towards consortia of Indigenous groups pooling resources to acquire equity in high-value projects. In late 2020, Natural Law Energy

31 See Christopher Alcantara, Kirk Cameron and Steven Kennedy, 'Assessing Devolution in the Canadian North: A Case Study of the Yukon Territory' (2012) 65 Arctic 328.

32 Government of Canada, 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada' (*Department of Justice*, 13 August 2021) <www.justice.gc.ca/eng/declaration/index.html> accessed 2 October 2021. The adoption of UNDRIP into law was driven by the respective outcomes of the Truth and Reconciliation Commission of Canada (2008–15), and the National Inquiry into Missing and Murdered Indigenous Women and Girls (2016–19).

33 See Calla (n 20).

34 OGJ, 'Suncor, Mikisew Cree First Nation Sign Deal for Tank Farm' *Oil & Gas Journal* (18 October 2016) <www.ogj.com/pipelines-transportation/article/17250732/suncor-mikisew-cree-first-nation-sign-deal-for-tank-farm> accessed 15 July 2021.

35 Fort McKay First Nation Chief Jim Boucher, quoted in: Matthew Bradford, 'Investing in Infrastructure' [2016] *The Aboriginal Business Report: Canadian Council for Aboriginal Business* 6.

36 Skeena Resources, 'Skeena Welcomes $5 Million Investment From Tahltan Nation' (*Skeena Resources Limited*, 31 March 2021) <https://skeenaresources.com/news/skeena-welcomes-5-million-investment-from-tahltan-nation/> accessed 10 September 2021.

37 MarketScreener, 'Skeena Resources Ltd (SKE)' (*MarketScreener – Toronto Stock Exchange*, 2021) <www.marketscreener.com/quote/stock/SKEENA-RESOURCES-LTD-1411674/company/> accessed 15 July 2021.

38 BC Government, 'Tahltan Land to Be Protected in Partnership with Conservation Organizations, Industry and Province' (*British Columbia Government News*, 8 April 2021) <https://news.gov.bc.ca/releases/2021ENV0025-000657> accessed 10 September 2021.

39 Tahltan Central Government President Chad Norman Day quoted in: Skeena Resources (n 36).

(a coalition of five First Nations) secured an option to purchase up to C$1 billion equity in the now-cancelled Keystone XL pipeline project.[40] Another example is the proposed Trans Mountain pipeline project, in which several Indigenous organisations expressed interest in acquiring equity as a way of controlling project decisions and managing environmental impacts: 'The only way we're able to mitigate the environmental impacts is through ownership and having a say in these projects'.[41] More recently, 75 communities from Alberta and British Columbia discussed equity participation with the Canadian government in relation to the pipeline.[42] An Indigenous organisation, Project Reconciliation, is also seeking full ownership of the project,[43] as a way to 'have a seat at the table as decision-makers, for shared responsibility in project impact, environmental monitoring and protection with the benefits of economic development'.[44]

These examples illustrate the high-value, sophisticated co-ownership arrangements that are emerging in Canada. Some Indigenous groups have the capacity to negotiate and manage complex equity deals; others may require support to assess project and financial risk or to coordinate a consortium of Indigenous investors.[45] Access to loan financing is a major barrier to Indigenous co-ownership, with some Indigenous groups seeking to purchase equity but reportedly unable to secure capital,[46] although new approaches to financing are emerging.[47]

4.2 *Papua New Guinea*

PNG legislation provides mechanisms for landowners to negotiate equity in extractives projects on their land. In the Mining Act 1992 (PNG),[48] the approvals process for large-scale mines includes a 'development forum', in which the Minister consults stakeholders that would be affected by the grant of a special mining lease.[49] Attendees include landowners, the applicant mining company, and national and provincial governments.

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40 Emma Graney, 'Indigenous Group Strikes Deal for Equity Stake in Keystone XL Pipeline' *The Globe and Mail* (Edmonton, 17 November 2020) <www.theglobeandmail.com/business/article-indigenous-group-strikes-deal-for-equity-stake-in-keystone-xl-pipeline/> accessed 10 September 2021.

41 Athabasca River Métis president Ron Quintal quoted in Leyland Cecco, 'First Nations Look to Buy Equity in Pipeline to Have Say in Project's Future' *The Guardian* (15 June 2018) <www.theguardian.com/world/2018/jun/15/trans-mountain-pipeline-first-nations-offer-buy-shares> accessed 15 July 2021.

42 Kyle Bakx, 'Plans to Sell Trans Mountain Pipeline to Indigenous Groups Take Another Step Forward' *CBC News* (19 February 2021) <www.cbc.ca/news/business/bakx-tmx-pipeline-negotiations-1.5918712> accessed 15 July 2021.

43 Robert Tuttle, 'Indigenous Group Seeks Full Ownership of Trans Mountain Pipeline' (*BNN Bloomberg*, 8 June 2021) <www.bnnbloomberg.ca/indigenous-group-seeks-full-ownership-of-trans-mountain-pipeline-1.1614289> accessed 15 July 2021.

44 Project Reconciliation, 'Project Reconciliation: About' (*LinkedIn*) <www.linkedin.com/company/project-reconciliation/about/> accessed 15 July 2021.

45 Calla (n 20) 31.

46 Jesse Snyder, 'A Fair Stake: First Nations Seek Equity Positions in Northern Mining Operations' (*Financial Post*, 7 March 2017) <https://financialpost.com/commodities/mining/a-fair-stake-first-nations-seek-equity-positions-in-northern-mining-operations> accessed 15 July 2021.

47 Calla (n 20).

48 See also Oil and Gas Act (PNG), Part IV.

49 Mining Act 1992 (PNG), s 5. Note: smaller mining projects that require other types of mining leases do not involve a development forum. See generally Colin Filer, 'Development Forum in Papua New Guinea: Upsides and Downsides' (2008) 26 Journal of Energy & Natural Resources Law 120.

Specifically, the Act provides an option for the state to acquire a 'participating interest' in a mining project.[50] The state's equity is managed through the Mineral Resources Development Corporation (MRDC), a state-owned company. Historically, the state's equity has ranged from 9 per cent to 30 per cent.[51] The development forum provides landholders the opportunity to negotiate for a share of the state's equity. Landowner equity has historically ranged from 2 per cent to 7 per cent, although recent negotiations indicate the potential for it to reach 15 per cent.[52] There is no defined, regulatory structure for the management of landowner equity. In practice, the MRDC can and does administer landowner equity, although some landowner groups choose to form their own equity-holding entity.

Landowner equity is a long-standing practice in PNG dating back to the 1980s,[53] and is linked to uniquely Papua New Guinean ideals of nationhood that were articulated as part of securing independence from Australian colonial administration in 1975. PNG's constitution seeks to 'achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization', and consequently recognises customary law ('the customs and usages of the indigenous inhabitants') as part of the law of the land.[54] The vast majority of land in PNG is held under customary tenure and not formally registered.[55] Development forums can ignite disputes, since entitlement to negotiate for equity and other benefits is predicated on proving landownership.

Our literature review uncovered one published paper, written almost 20 years ago, that specifically focuses on landowner equity.[56] It reports 'broad public sentiment in PNG that equates ownership with profits'.[57] Equity also carries symbolic significance for landowning communities, providing 'a sense of project ownership and control'.[58] The paper describes two mines, Lihir and Porgera. In each case, landowners formed a representative company to interface with the MRDC, which arranged loan financing to purchase the equity from the state. Landowner equity at Porgera continues to be

50 Mining Act 1992 (PNG), s 16A.

51 Banks (n 10); Kip Keen, 'Nautilus CEO Opens up on PNG Dispute' *Australian Mining* (25 February 2013) <www.australianmining.com.au/features/nautilus-ceo-opens-up-on-png-dispute/> accessed 15 July 2021.

52 Reuters, 'Papua New Guinea Wins Majority Stake in Barrick–Zijin Gold Mine' *Reuters* (9 April 2021) <www.reuters.com/business/energy/barrick-sign-pact-friday-re-open-papua-new-guinea-gold-mine-2021-04-09/> accessed 15 July 2021.

53 Banks (n 10).

54 Constitution of the Independent State of Papua New Guinea, s 1(6); Underlying Law Act 2000 (PNG), s 1.

55 Estimates place the figure at over 90 per cent customary land; see Tim Anderson and Gary Lee, 'Understanding Melanesian Customary Land' in Tim Anderson and Gary Lee (eds), *In Defence of Melanesian Customary Land* (AidWatch 2010); Michael Manning and Philip Hughes, 'Acquiring Land for Public Purposes in Papua New Guinea and Vanuatu' in Australian Agency for International Development (ed), *Making Land Work: Volume 2, Case Studies on Customary Land and Development in the Pacific* (Department of Foreign Affairs and Trade 2008).

56 Banks (n 10).

57 *Ibid* 224.

58 *Ibid* 231.

negotiated,[59] while Lihiran landowners divested in 2005, redirecting funds to non-mining investments.[60]

The PNG experience of co-ownership highlights several challenges. Firstly, in both Porgera and Lihir, the financial proposition for communities has not been clear. Landowners paid interest to the creditor and administration fees to the MRDC prior to dividends being distributed, and the actual return from the shareholding did not match community expectations, particularly in contrast to the much larger revenues from royalties, employment and compensation for land use.[61]

Secondly, other PNG experiences highlight the financial risks borne by equity holders. For example, the state purchased a 15 per cent equity stake in the deep-sea mining project Solwara 1, the collapse of which left the state with some US$100 million in losses.[62] Although not an example of landowner equity, it provides a tangible precedent for losses arising from equity purchases in PNG resource projects.

Thirdly, the PNG model highlights challenges in managing and administering the equity. Management responsibilities are split between the MRDC and the landowner company (controlled by community leaders). The MRDC provides expertise and capacity to navigate commercial arrangements that landowner communities generally do not possess. The landowner company is responsible for distributing dividends to the community. In PNG, corruption by both community leaders and the state (which owns the MRDC) is well documented.[63] In 2017, an assessment of PNG corruption risks in mining approvals considered the risk that community leaders do not represent community interests when negotiating with a mining company, and assigned the highest possible risk rating.[64] In Porgera, the distribution of dividends 'caused intense community acrimony', and there has been 'debate about the willingness, even the possibility, of traditional leaders equitably distributing revenues from foreign-operated mining'.[65]

Finally, landowners may seek equity as a way of gaining influence over the project, but a minority shareholding confers little control: 'at no stage have either the Lihir or Porgera landowners become involved in the planning or operational side of the mining

59 Reuters (n 52).

60 Hitelai Polume-Kiele, 'The Governance of Natural Resources: Issues Affecting Better Management of Revenues and Distribution of Benefits within Papua New Guinea' (2014) International Journal of Rural Law and Policy 1; Richard Jackson, *The Development and Current State of Landowner Businesses Associated with Resource Projects in Papua New Guinea* (Papua New Guinea Chamber of Mines and Petroleum 2015).

61 Banks (n 10) 231.

62 Ben Doherty, 'Collapse of PNG Deep-Sea Mining Venture Sparks Calls for Moratorium' *The Guardian* (15 September 2019) <www.theguardian.com/world/2019/sep/16/collapse-of-png-deep-sea-mining-venture-sparks-calls-for-moratorium> accessed 29 October 2019.

63 Nicholas Bainton and Martha Macintyre, 'Being Like a State: How Large–Scale Mining Companies Assume Government Roles in Papua New Guinea' in Nicholas Bainton and Emilia Skrzypek (eds), *The Absent Presence of the State in Large-Scale Resource Extraction Projects* (ANU Press 2021); Michael Main, 'Absence as Immoral Act: The PNG LNG Project and the Impact of an Absent State' in Nicholas Bainton and Emilia Skrzypek (eds), *The Absent Presence of the State in Large-Scale Resource Extraction Projects* (ANU Press 2021); Polume-Kiele (n 60).

64 John Burton, *Corruption Risks in Mining Awards: Papua New Guinea Country Report* (Transparency International PNG 2017) 74, 122 <https://transparency.org.au/publications/papua-new-guinea-corruption-risks-in-mining-awards/> accessed 15 July 2021.

65 Banks (n 10) 232.

enterprise'.[66] As such, equity participation in PNG appears largely to be a speculative economic prospect that has not historically met landowner expectations.

4.3 *Australia*

The publicly available literature documents several attempts at Indigenous co-ownership in Australia. In an early case from the 1990s, a joint venture agreement was negotiated between a mining company and an Aboriginal Corporation holding freehold land title on behalf of the Jawoyn people. The latter had an option to acquire a 10 per cent share in the Mount Todd gold mine,[67] later relinquished in favour of royalties.[68] In another case, a mining company had provisionally agreed to confer 10 per cent equity of a project to the Martu people, who held native title over a proposed mine site at Lake Disappointment, Western Australia.[69] A legal dispute led to a decision by the Native Title Tribunal to refuse a mining lease, on the basis of cultural heritage impacts.[70] A third case involved the proposed Koongarra uranium mine in the Northern Territory, which was never developed.[71]

A current case of co-ownership is the Galalar Silica Sand Project in Queensland. Under an agreement between a mining company and the Thiithaarr and Gamaay Native Title holders, the latter holds 12.5 per cent free-carry equity in the project, which is currently in an approvals phase.[72] In June 2021, the company reported that

66 *Ibid*.

67 Altman, 'Land Rights and Aboriginal Economic Development' (n 11); Jon C Altman, 'Reforming Financial Aspects of the Native Title Act 1993: An Economics Perspective' (Centre for Aboriginal Economic Policy Research (CAEPR), The Australian National University 1996) 105. Note: the signatory in the original agreement is named as the Barnjarn Aboriginal Corporation. Subsequent agreements also include the Jawoyn Association Aboriginal Corporation. While separate corporate entities, membership of the former is eligible to all members of the latter, and at time of writing their respective boards appear to comprise the same set of individuals. For corporate documentation of the Barnjarn Aboriginal Corporation, see ORIC, 'Documents for Barnjarn Aboriginal Corporation' (*Office of the Registrar of Indigenous Corporations, Australian Government*) <https://register.oric.gov.au/document.aspx?concernID=101776> accessed 17 December 2021. Agreements with the current operator, Vista Gold, are publicly available: SEC, 'Vista Gold Corp – Filings with the United States Securities and Exchange Commission' (*United States Securities and Exchange Commission*, 6 March 2006) <www.sec.gov/Archives/edgar/data/783324/0001104659-06-014356-index.htm> accessed 17 December 2021.

68 Vista Gold, 'Vista Gold Corp. and the Jawoyn Association Modify Agreement to Include a Royalty and Mutual Cooperation and Support Commitments' (*Vista Gold: News*, 30 November 2020) <www.vistagold.com/news/news-2020/663-istaoldorpandtheawoynssociationodifygreemen20201130114500> accessed 14 December 2021.

69 Mark Davis, 'Indigenous Mining Share Deal' *The Sydney Morning Herald* (1 April 2008) <www.smh.com.au/national/indigenous-mining-share-deal-20080401-gds7m5.html> accessed 15 July 2021.

70 John Southalan, 'Australian Indigenous-Resource Developments: *Martu People v. Reward Minerals*' (2009) 27 Journal of Energy and Natural Resources Law 671. Note: this project is continuing to undergo approvals processes – see Michael Philipps, 'Reward Earns Major Project Status for Lake Disappointment' (*Australian Mining*, 30 June 2021) <www.australianmining.com.au/news/major-project-status-a-reward-for-disappointment/> accessed 17 December 2021.

71 Irene Wilson, 'Impact of Uranium Mining on Aboriginal Communities in the Northern Territory' (Department of the Senate 1997) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/uranium/report/c11> accessed 15 July 2021; Clare Rawlinson, 'A Long Battle Won: Koongarra Added to Kakadu' *ABC News (Australia)* (6 February 2013) <www.abc.net.au/local/stories/2013/02/06/3684748.htm> accessed 15 July 2021.

72 Diatreme Resources, 'Australian Stock Exchange Announcement: Mining Lease Application Lodged for Nob Point Export Solution' (10 June 2021) <https://diatreme.com.au/media/1476/drx_mla-nob-point_10-jun-21.pdf> accessed 17 December 2021.

a 'Memorandum of Co-operation' has been signed with the Native Title holders and the Hopevale Congress Aboriginal Corporation, and that a Mining Project Agreement is being negotiated.[73] Neither the terms of the equity agreement nor the memorandum are publicly accessible.

Our review uncovered no other prominent reported examples of Indigenous equity in the Australian mining context. There are likely to be other cases that are commercial-in-confidence, and the paucity of information makes it challenging to characterise the Australian experience overall. The above examples indicate that Indigenous equity participation in Australia is ad hoc, and not systematised through regulation or commercial practice. As an alternative model of Indigenous economic participation in mining, Australian cases of wholly Indigenous-owned mines and contracting companies are more prominently reported in the literature.[74] Following the Juukan Gorge incident, Indigenous equity participation in large-scale mining has been receiving greater attention from both industry and political actors,[75] and in the energy sector, there are emerging proposals for Indigenous equity in major energy projects.[76]

4.4 *South Africa, United States, New Zealand*

In the post-apartheid period, South Africa has adopted legal provisions for landowning people to acquire equity in mining projects. In particular, Black Economic Empowerment (BEE) laws and policies[77] mean that mining projects must generally confer 25 per cent equity vested in Black individuals or wholly Black-owned companies.[78] The landmark *Richtersveld* case[79] affirmed the right of customary landowners to restitution of dispossessed lands, and to subsurface mineral rights where evidence indicates pre-colonial claims of rights (eg evidence of customary mining). The customary landowners in *Richtersveld* ultimately acquired 49 per cent equity in a diamond mine.[80] Other examples exist of traditional and customary co-ownership of mining projects in South Africa.[81] However, the unique history of South Africa's land ownership (from pre-colonial times through apartheid to post-apartheid

73 *Ibid*.

74 See eg Cecil AL Pearson and Klaus Helms, 'Indigenous Social Entrepreneurship: The Gumatj Clan Enterprise in East Arnhem Land' (2013) 22 The Journal of Entrepreneurship 43.

75 WA Mining Club, 'Traditional Owner Partnerships a Win–Win for Miners' (*WA Mining Club*, 13 July 2021) <www.waminingclub.asn.au/traditional-owner-partnerships-a-win-win-for-miners/> accessed 9 September 2021; Knowles (n 15).

76 Government of Western Australia (n 16).

77 Note eg Broad-Based Black Economic Empowerment Act 2003 (South Africa).

78 See also Andrew Bowman, 'Black Economic Empowerment Policy and State–Business Relations in South Africa: The Case of Mining' (2019) 46 Review of African Political Economy 223; Sixta R Kilambo, 'Black Economic Empowerment Policy and the Transfer of Equity and Mine Assets to Black People in the South Africa's Mining Industry' (2021) 24 South African Journal of Economic and Management Sciences 1; Lee Godden and others, 'Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability' (2008) 26 Journal of Energy & Natural Resources Law 1, 14.

79 *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA).

80 ATNS, 'Alexkor–Richtersveld Joint Mining Venture' (*Agreements, Treaties and Negotiated Settlements*, 8 August 2007) <www.atns.net.au/agreement?EntityID=3923> accessed 15 July 2021.

81 See also Royal Bafokeng Nation Operations Room, 'Who Are the Royal Bafokeng Nation?' <www.rbnoperationsroom.com/home/static/en_US/id/6/title/who+are+the+royal+bafokeng+nation.html> accessed 15 July 2021.

reforms) makes it a challenge to analyse these examples in the same frame as other jurisdictions. As Judge Gildenhuys of the High Court of South Africa noted, 'indigenous title, as developed in countries such as the United States, Canada, Australia and New Zealand, has limited, if any, application in Africa'.[82] The concept of Indigenous co-ownership as adopted in this paper does not have straightforward application to South Africa.[83] South Africa remains a potentially illuminating jurisdiction for further research, particularly in light of recent and contentious legal developments.[84]

In the United States, recognised Native American tribes control land designated under federal law as 'Indian reservations'. Reservations have typically had low-income populations, despite substantial energy and mineral resources within these lands.[85] Legislation from the 1980s has authorised tribes to enter agreements with mine developers, subject to federal approval.[86] Further legislation in 2005 authorised tribes to undertake mineral development on their own lands.[87] However, Native American tribes are hampered by the 'morass of federal offices … involved in managing the Indian mineral estate'.[88] Although there are a number of tribes managing extractives projects (mostly oil and coal),[89] equity participation is 'concentrated within a relatively small number of tribes', and most tribes 'do not have the infrastructure to manage their own extractive activities effectively, even though legislation increasingly supports tribal autonomy'.[90]

In New Zealand, our review found one unsuccessful example of Indigenous co-ownership. Taharoa Mining Investments (ultimately Maori co-owned) was to acquire an iron sands project from Bluescope Steel Limited in 2017, but the deal did not proceed.[91]

5. Discussion

The examples above highlight key considerations in negotiating and managing Indigenous equity arrangements. In this discussion, we critically examine how these

82 Antonie Gildenhuys, 'Indigenous Peoples' Rights to Minerals and the Mining Industry – Current Developments in South Africa from a National and International Perspective Special Issue: Indigenous Peoples and the Development of Natural Resources' (2005) 23 Journal of Energy & Natural Resources Law 465.

83 There are also debates about whether the word 'indigenous' applies meaningfully to South Africa: Laura Secorun, 'South Africa's First Nations Have Been Forgotten' *Foreign Policy* (19 October 2018) <https://foreignpolicy.com/2018/10/19/south-africas-first-nations-have-been-forgotten-apartheid-khoisan-indigenous-rights-land-reform/> accessed 15 July 2021.

84 Jan Gerber, 'Ramaphosa Signs Contentious Traditional and Khoi San Leadership Bill into Law' *News24* (29 November 2019) <www.news24.com/news24/SouthAfrica/News/ramaphosa-signs-contentious-traditional-and-khoi-san-leadership-bill-into-law-20191129> accessed 15 July 2021.

85 Shawn Regan and Terry Anderson, 'The Energy Wealth of Indian Nations' (2014) 3 LSU Journal of Energy Law and Resources 195; Maura Grogan, 'Native American Lands and Natural Resource Development' (Revenue Watch Institute, 2011).

86 Indian Mineral Development Act 1982 (USA).

87 Indian Tribal Energy Development and Self-Determination Act 2005 (USA).

88 Grogan (n 85) 18.

89 eg RWPC, 'Red Willow Production Company – Southern Ute Indian Tribe' <www.rwpc.us/> accessed 15 July 2021.

90 Grogan (n 85).

91 ShareChat New Zealand, 'BlueScope Loses Bid to Toss out $506M Claim by Unsuccessful Taharoa Iron Sands Buyer' (18 July 2018) <www.sharechat.co.nz/article/431fbd90/bluescope-loses-bid-to-toss-out-506m-claim-by-unsuccessful-taharoa-iron-sands-buyer.html> accessed 15 July 2021.

considerations may affect the value proposition of co-ownership for Indigenous peoples and other parties.

5.1 *Objectives of seeking an equity stake*

In any given case, the goals of the parties (the Indigenous group and the developer company) would determine the scope and terms of the equity arrangement. Drawing from the results of the literature review, Indigenous groups appear to seek equity participation in pursuit of several main goals: economic development, a sense of ownership over a project, and control of project decisions (in particular relating to employment and procurement, and impacts to environment, community and cultural heritage).

Two questions arise. First, is equity participation apt to achieve these goals? The PNG experience suggests that equity largely did not achieve landowners' goals because, aside from the local elite, landowners do not necessarily reap the financial return they expected, nor do they acquire the ability to influence project decisions as equity partners.[92] In several of the Canadian cases, Indigenous groups emphasised a desire to influence company decision-making on their lands. Whether a minority stake would enable meaningful participation in decision-making is discussed below.

The second question is whether co-ownership is the best way to achieve the parties' goals. Agreements between Indigenous groups and resource companies can and do target objectives similar to those listed above,[93] even if they do not involve equity transfer. Economic development, for example, may be advanced through contractual commitments with respect to royalties, rents and other project payments, as well as preferential procurement and employment for the Indigenous group. An agreement may also bind the company to abide by certain impact management measures. Co-ownership would likely be more apt where the aim is to exert influence over the full spectrum of company decisions (since contractual commitments are specifically defined), or where symbolic ownership is valued by the Indigenous group. Some of the goals of Indigenous co-ownership might be adequately covered under an agreement that does not confer equity. If so, the value proposition of co-ownership may not be any better than that of a non-equity agreement – and if co-ownership brings additional risks (discussed below), then the value proposition may well be worse.

Finally, a deeper question arises as to the relationship between Indigenous co-ownership of a project and consent to the project by the Indigenous community. Co-ownership has been described as a 'politically useful'[94] way of demonstrating community support, perhaps even as a step towards regulatory approval.[95] However, obtaining consent for a mining project is not straightforward, and cannot be assumed from the mere fact of co-ownership.[96] The views of the Indigenous equity holder may not

92 Banks (n 10).

93 See eg Norah Kielland, 'Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements' (Library of Parliament (Canada): Legal and Social Affairs Division 2015) 2015-29-E; Limerick and others (n 8); Ciaran O'Faircheallaigh, *Evaluating Agreements between Indigenous Peoples and Resource Developers* (Melbourne University Press, 2004).

94 Flanagan (n 18) 20.

95 Moody's Investors Service (n 19) 6; Exner-Pirot (n 18) 27.

96 John R Owen and Deanna Kemp, '"Free Prior and Informed Consent", Social Complexity and the Mining Industry: Establishing a Knowledge Base' (2014) 41 Resources Policy 91.

represent those of the broader Indigenous group. In PNG, for example, landowner equity is seen as a default part of large-scale resource projects,[97] and owning equity does not negate opposition to, or grievances about, the project. Consent also cannot be inferred where Indigenous groups seek to control project decisions through co-ownership. Wanting to steer the project in a particular direction, or to significantly change the project's ownership structure,[98] could be considered prima facie indicators that the project *as proposed* is not fully consented to. Co-ownership therefore does not necessarily indicate consent to the project.

5.2 *Negotiation dynamics and policy context*

In the jurisdictions reviewed, co-ownership was negotiated and developed in a variety of ways: as a commercial share-purchase transaction, as part of a package of negotiations to access Indigenous land, and as part of a statutory process of negotiation that facilitates customary landowners' claim to equity. Under all of these models, the capacity of the Indigenous entity to negotiate with the other equity owners would influence the workability of the co-ownership arrangement. Complex and high-value negotiations would necessitate access to commensurate legal and financial expertise. The Canadian experience has included equity deals in the hundreds of millions of dollars, and multiparty deals involving consortia of Indigenous groups. The transaction costs of complex negotiations can be high, and could exceed the resources and expertise available. In PNG, for example, many landowners do not have ready access to advice and expertise. Unless another equity manager is appointed, PNG landowners' equity would likely be managed by the MRDC. The MRDC plays an important role in constructing equity arrangements, but questions of corruption risk and conflict of interest arise, as landowners' equity is carved from the state's share, and the MRDC is a state-owned company.

The broader policy and legal landscape heavily influences the negotiation position of the parties. A suite of developments in Canada created an environment conducive to project-level negotiations between resource companies and Indigenous groups. This is particularly true where an Indigenous group controls land access to a proposed mine (eg through Treaty rights and self-government arrangements), and where regulatory approval requires demonstrating compatibility with Indigenous rights (eg through the duty to consult and accommodate). Land access can also be controlled at a more local scale, such as where an Indigenous group holds freehold title. By contrast, customary landowners in PNG do not have power to grant or reject mining applications; however, their ability to negotiate for equity is improved by legislation that specifically envisages equity to be shared among the developer, the state and landowners. These contextual factors influence the leverage held by an Indigenous group and other potential co-owners during negotiations for equity participation.

97 Banks (n 10) 226.

98 See eg Project Reconciliation's goal to achieve full ownership of the Trans Mountain project in Canada: Project Reconciliation (n 44).

5.3 *Acquiring equity and financial risks*

Our literature review demonstrated multiple modes of equity acquisition. Loan-financed purchases were documented in Canada and PNG. In Canada, equity has been granted as a settlement of historical claims.[99] The terms of the deals in the Australian context are not generally accessible, although they appear to be part of broader benefit-sharing agreements.

Accessing capital to purchase equity can be a significant hurdle for Indigenous groups. It has been argued that shares should be free or discounted, at least where equity is negotiated as part of a broader benefit-sharing agreement: offering to sell shares at undiscounted market prices is a standard commercial transaction that does not require any special agreement.[100] A market transaction would not undermine the objectives of financial return on investment, or gaining influence over a project. In these situations, issues of access to capital might be resolved in other ways, such as government grants and loan guarantees set aside for Indigenous groups, like those emerging in Canada.[101] Other arrangements may also be structured with the mining company as creditor, in ways that allow for access to capital and reduced risk. The company could pay for the shares initially, with the Indigenous group's repayments drawn out of dividends. This would delay the burden of loan repayment until the project is profitable, but would also delay the return from the investment, as shown in the PNG cases.

Once capital is invested, the investor is exposed to a degree of financial risk. The equity could depreciate, or be entirely lost if the project collapses. The Solwara 1 example in PNG demonstrates that this is not merely a hypothetical risk for Indigenous equity owners. A share purchase also carries opportunity costs: capital committed to the purchase cannot be spent on other initiatives. For Indigenous co-owners, the expectation would be that the long-term gains will outweigh the opportunity cost, the actual costs and the risks.[102] The Canadian experience shows that equity purchases are reaching values of C$1 billion. The high-value nature of these transactions, coupled with the tendency of mining projects to operate for decades, means that assessing the economic proposition of equity acquisition requires care, due diligence and technical expertise.

If shares are acquired free or at less-than-market rates, a question arises as to what is traded away in exchange for the equity.[103] In situations where equity participation is part of a broader negotiated agreement, it is conceivable that equity is acquired at the expense of other project benefits (eg lower royalty rates). The acceptability of any such trade-off to an Indigenous group would require careful assessment and commercial analysis. For example, royalties are typically contingent on production, with none payable during potentially years-long approval and construction phases. Dividends

99 Moody's Investors Service (n 19).

100 O'Faircheallaigh, *Financial Models for Agreements between Indigenous Peoples and Mining Companies* (n 11).

101 Calla (n 20).

102 For example, an Indigenous group requiring funds in the short or medium term might not be able to wait for long-term appreciation of the equity, making another form of payment structure more attractive. This point, framed in terms of risk tolerance, is discussed in Ciaran O'Faircheallaigh and Ginger Gibson, 'Economic Risk and Mineral Taxation on Indigenous Lands' (2012) 37 Resources Policy 10.

103 JR Owen, D Kemp and L Marais, 'The Cost of Mining Benefits: Localising the Resource Curse Hypothesis' (2021) 74 Resources Policy 102289.

from shareholdings can also be uncertain: depending on the shareholder agreement, companies may reinvest funds into the business rather than paying dividends.[104] Dividends are typically payable when the company makes a profit, whereas many (though not all) royalties are based on gross revenue,[105] with the latter providing some protection against rising production costs. Anticipated appreciation in the value of the shareholding over mine life may be more attractive than royalty payments during production. Agreements may provide for both royalties and equity (or an option to acquire equity at a later date). These commercial factors would also be weighed against non-financial considerations, such as the ability of an Indigenous shareholder to influence company decisions. Whether a trade-off is acceptable to an Indigenous group would depend on the rights and interests of the Indigenous group, the commercial outlook of the project, and the full suite of terms on the negotiation table.

5.4 *Influence conferred by equity*

Having a 'seat at the table' is a common objective for Indigenous groups seeking co-ownership of projects. That is, equity participation is seen as a way to achieve greater control over mining developments. The literature review suggests that the Indigenous share is often a minority stake. Being a minority shareholder may provide some avenues for influence, such as rights to vote in meetings where the Indigenous entity can voice its perspectives. The size and structure of the equity is a factor here: a joint venture partner bringing expertise, resource or business advantages may be able to exert significant influence, despite a minority position. Indigenous groups that control land access (such as a landowner or a First Nations government) may also exert influence greater than its strict minority shareholding, although it would be difficult to separate the influence attributable specifically to the shareholding. An Indigenous shareholder may also benefit from being able to access information about the project that is not distributed externally.

Minority co-owners can be outvoted, and the value proposition of equity needs to be assessed against this possibility. There may be ways to boost the influence of a minority shareholder – for example, by making some decisions subject to a supermajority approval, or to veto by a special class of shareholder. The types of decisions that are ideally made subject to such provisions would be for the Indigenous group to determine, and developed during the negotiation process. Decisions relating to the shareholding itself may be a more natural subject of veto or supermajority provisions (eg when and how shares can be sold). Decisions relating to operational matters (eg cultural heritage, environmental management, employment policies) might not require protection through shareholders' voting mechanisms, where substantially the same effect is achieved through a contractual agreement separate from the shareholding.

An equity agreement may also involve appointing an Indigenous representative to a company board (or executive), allowing an Indigenous voice to directly enter company decision-making at the highest levels. A question arises as to what

104 Other payments might also take precedence over dividends, further delaying the return on investment for an Indigenous co-owner. See O'Faircheallaigh and Gibson (n 102) 13.

105 See generally James Otto and others, 'Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society' (World Bank 2006) 37258.

happens if an Indigenous board member is outvoted on a critical, contentious issue. This situation places the Indigenous entity in an uncomfortable and potentially compromising position. By agreeing to board membership, the Indigenous entity effectively accepts the decision-making processes of the company. As such, the Indigenous entity might be seen to have endorsed the overall decision, notwithstanding a dissenting vote.

A number of implications arise from this perceived endorsement. The Indigenous entity might suffer reputational and relational damage between itself and the broader Indigenous group it represents. It might be seen as ineffective, or having 'sold out' to business interests. There is, after all, a potential conflict of interest that arises as a result of being on a company board. Board members are generally obligated to act in the best interest of the company. While this usually means best commercial interest, Indigenous equity participation would generally aim to advance the interests of the broader Indigenous group.[106] There is potential for Indigenous representatives on the board of the developer company to be exposed to conflicting interests not faced by other parties, where commercial interests of the company are inconsistent with the interests of the Indigenous group, or seen as such.

There are also implications for the broader Indigenous group seeking judicial remedy for grievances. Consider a situation where the developer is involved in a major incident affecting the environment or cultural heritage. Litigation is one avenue of redress that affected Indigenous groups may pursue. Having the Indigenous entity represented on the company board could be seen as an authorisation of the decisions that led to the incident, diminishing the prospect of success in court. There may also be issues with bringing a legal claim in the first place. Indigenous entities often represent the collective interests of the broader group, and play an important role in supporting the group to navigate state institutions such as courts. In the event of an incident, an Indigenous entity would ordinarily act as the claimant, bringing a legal action against the developer on behalf of the group. If the Indigenous entity is represented on the board as well, that board member could also be one of the defendants. This may disqualify the entity from representing the group, depriving it of an important institution that would usually be central to facilitating access to justice.[107]

Overall, Indigenous equity participation is often seen as a way to exert influence and control over a project. But such influence is not automatically granted as a result of co-ownership, especially where the Indigenous stake is a minority. Other factors play a part, such as the size and structure of the developer company, the status of the Indigenous entity as a landowner or regulator, and any special rights conferred on Indigenous shareholders. For Indigenous entities that represent a broader group, there may also be risks associated with being connected to the company via shareholding or membership of the board. Control and influence are not automatic and unproblematic outcomes of Indigenous equity participation.

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106 See O'Faircheallaigh, *Financial Models for Agreements between Indigenous Peoples and Mining Companies* (n 11) 19.

107 Whether such disqualification would happen in practice would depend on the specific corporate structure in place, and the applicable laws of the jurisdiction. For example, a separate company might be formed for the specific purpose of holding the equity. Whether this company is sufficiently separate from the Indigenous representative body for the purposes of litigation would depend on the circumstances.

5.5 *Governance of the Indigenous equity stake*

If an objective of Indigenous co-ownership is to benefit the broader community group, then the Indigenous entity holding the equity must be capable of making and trusted to make decisions for the benefit of the group. It would have to make decisions about buying or selling shares, whether and how to disburse dividends, and the level of reporting to group members. The PNG cases demonstrate the potential for acrimony in the distribution of equity revenues. At Lihir, half of the net dividends were to be paid to individual Lihirans over the age of 18, and the other half set aside for 'community projects'.[108] Both aspects of this approach require careful consideration and good governance by Indigenous groups considering similar arrangements. What community projects are funded, who counts as a member of the group, and who gets to participate in decisions about the disbursements – these questions require fair, accountable, and transparent decision-making by the Indigenous equity holder.[109]

The qualities of the Indigenous entity itself warrant scrutiny. Merely having an Indigenous co-owner does not guarantee that the broader Indigenous group supports or has consented to the project. Questions arise as about the legitimacy and representativeness of the Indigenous entity. Does it represent the whole of the Indigenous group? Who really participates in the Indigenous entity's decisions? Which individuals sit at its management table, and how are they chosen? Does the entity's governance structures exclude the voices of some members of the Indigenous group, such as women,[110] or of other Indigenous groups who may be affected by the mine? These are issues of governance that are central to effective and meaningful co-ownership.

5.6 *Disposal and dilution of shares*

The Lihir case is an example of a landowner group divesting of the mining project. This situation recalls the deeper questions around Indigenous consent to a project (discussed above), and particularly when divestment could imply a withdrawal of consent to a project. It also raises questions about when an Indigenous group can dispose of its equity, has a right to retain equity, or otherwise influence the composition of the shareholder cohort. For example, where a major, non-Indigenous shareholder sells its stake to a third party, the Indigenous entity may find itself collaborating with new equity partners that do not have the same vision, respect, relationship, or understanding as the previous co-owners. The equity agreement may provide some protection for an Indigenous equity holder, for instance by establishing a sale process where Indigenous shareholders' approval of a new co-owner is required. The agreement may also provide protection against the issue of new shares, which could dilute the percentage shareholding of the Indigenous entity, reducing both the market value of the shares and its voting power within the business.

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108 Banks (n 10).

109 Further analysis on Lihir is included in Julia C Keenan and Deanna Kemp, *Mining and Local-Level Development: Examining the Gender Dimensions of Agreements between Companies and Communities* (Centre for Social Responsibility in Mining, Sustainable Institute, The University of Queensland 2014).

110 Julia Keenan, Deanna Kemp and Rebekah Ramsay, 'Company–Community Agreements, Gender and Development' (2016) 135 Journal of Business Ethics 607.

5.7 *Legacy issues on Indigenous land*

The general model we have described recognises that Indigenous co-owners are not just commercial investors, but are also part of the Indigenous group that has rights and responsibilities on the land on which the project is situated. For most Indigenous groups, equity participation will carry considerations beyond commercial and operational aspects. The global experience of mine closure, for example, demonstrates that transitioning to post-mining land uses is fraught, uncertain, and costly.[111] If a mine is abandoned, the mined land may be left unrehabilitated and liabilities left unresolved.[112] The Indigenous entity may divest its equity, but the physical, environmental, social and economic aspects of closure would still be relevant, given that Indigenous groups remain connected to the land. The practice of selling nearly exhausted mines to smaller developers at token, 'peppercorn' prices (thereby transferring closure obligations to another)[113] would add complexities of closure to the issues of disposal discussed above.

Mining also carries the risk of major incidents, like a tailings dam breach or the destruction of cultural heritage. For Indigenous groups, such incidents would be a tragic and serious lived experience, whether or not the Indigenous group owned equity in the project. However, equity ownership may add financial harms, as the cost of rectifying a major incident can extend to the billions of dollars.[114] A major incident could depreciate the value of the equity, or even push the project to collapse. These commercial risks would be borne by the Indigenous group on top of the physical, social and cultural harms inflicted by the incident.

5.8 *Synthesis*

The discussion highlights that Indigenous co-ownership arrangements warrant careful and critical examination. Synthesising the discussion, the questions in Table 1 form a framework that provides a starting point for critically examining the value proposition of co-ownership.

6. Conclusion

This paper was written at a time when recent 'lightning rod' events have illuminated the relationship between mining and Indigenous peoples, refreshing demands for workable models of Indigenous co-management of mining projects. These recent events also coincide with wider trends: the international recognition of Indigenous peoples' rights, the likelihood that future metals demand will impact Indigenous peoples, and the continuing adoption of project-level agreements between mining companies and Indigenous groups.

111 See Nicholas Bainton and Sarah Holcombe, 'A Critical Review of the Social Aspects of Mine Closure' (2018) 59 Resources Policy 468.

112 Vlado Vivoda, Deanna Kemp and John Owen, 'Regulating the Social Aspects of Mine Closure in Three Australian States' (2019) 37 Journal of Energy & Natural Resources Law 405.

113 *Ibid*.

114 See eg BBC, 'Vale Dam Disaster: $7bn Compensation for Disaster Victims' *BBC News* (4 February 2021) <www.bbc.com/news/business-55924743> accessed 15 July 2021.

Table 1. Critical framework for examining Indigenous co-ownership.

Theme	Critical questions
Objectives of co-ownership	• What are the parties' objectives in seeking co-ownership of a project? • Would co-ownership meet these objectives? • Are there other mechanisms that would better meet these objectives? • Is Indigenous co-ownership intended to demonstrate consent to the project (noting that co-ownership does not automatically imply consent)?
Negotiation capacity	• How complex is the proposed equity arrangement? • What capacity, resources and expertise are required to fairly negotiate the arrangement? • Do all parties have access to independent legal and financial advice commensurate with the complexity of the proposed deal? • What is the legal and political context of the negotiation, and how does it affect the negotiation positions of the parties?
Financial risks	• Are the shares to be acquired at market prices, discounted or free? • Does the Indigenous entity have access to finance to effect the purchase? • How does loan financing (if required) affect the expected financial returns to the Indigenous group? • What are the financial risks associated with an equity investment, considering interest, fees and the risks of depreciation or project collapse? • If shares are acquired as part of a broader agreement, what is traded away in exchange?
Influence conferred by equity	• What influence is gained by the Indigenous equity owner through shareholding? • Does a minority stake offer meaningful participation in company decision-making? • Can the shareholding be structured to confer additional rights to Indigenous shareholders? • Would a conflict of interest arise if the Indigenous shareholding entity had a representative on the board of the developer company? What are the legal, commercial and social consequences?
Governance	• How is the Indigenous entity governed? Which members of the broader Indigenous group participate in the entity's governance? Which voices are excluded? • Is the Indigenous entity legitimate, accountable, trusted and transparent, in relation to the broader Indigenous group? • Are there clear rules relating to how the equity is to be managed? What rules govern how financial returns are distributed to the broader Indigenous group? • Does the Indigenous entity have the resources, capacity and capability to administer the equity holding?
Disposal and dilution of shares	• Who can sell their shares to third parties? To what extent can the Indigenous entity control who buys into the company as a co-owner? • What commercial, relational and practical risks are there if a new co-owner were to join or replace an existing co-owner?
Legacy issues on Indigenous land	• What rights and responsibilities do the co-owners have in relation to mine closure, major incidents and other legacy issues? • Does the equity arrangement clearly set out these rights and responsibilities, and were they discussed at the time of negotiating the co-ownership?

This paper offers a working conceptual model of Indigenous co-ownership. We note the wide variability of co-ownership arrangements, which can occur in a vast array of cultural groupings, governance structures, land tenure systems, corporate arrangements and historical, social, political and economic contexts. In any given case, the value proposition of Indigenous equity participation must be defined with close attention to its specific pre-conditions and circumstances.

This paper also provides a critical framework through which Indigenous co-ownership can be analysed, based on a scan of the literature in six jurisdictions. Subsequent research should be anchored in real-world cases of Indigenous equity ownership, which would enable deeper, critical application of the framework to a specific mining project, Indigenous group (or groups), set of commercial parties, negotiation process, agreement terms, and regulatory and policy context.

Crucially, future research must also engage Indigenous perspectives and experiences, including perspectives on the application of the UNDRIP in local terms. This paper has purposefully included comments about co-ownership from Indigenous people as quoted in publicly available sources. Direct engagement with Indigenous people, including through co-designed research, will be essential to developing a fulsome and comprehensive exploration of co-ownership, and the risks and opportunities it presents for promoting self-determination.

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