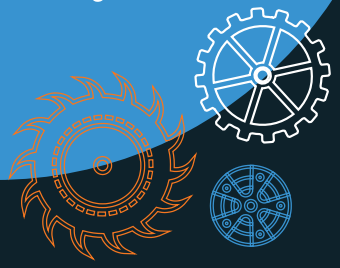
TRANSPARENCY INTERNATIONAL CANADA

MINING FOR SUSTAINABLE DEVELOPMENT

National Report

National Researcher
Invenient Solutions Consulting Ltd.
Daniela Chimisso dos Santos

Assistant National Researcher
Sophie Langlois



About Transparency International and Transparency International Canada

Transparency International (TI) is the world's leading non-governmental anti-corruption organization. With more than 100 chapters worldwide and an international secretariat in Berlin, TI has helped put corruption on the agendas of governments and businesses around the world. Through advocacy, research and capacity building work, TI strives toward a world that is free of corruption.

Transparency International Canada (TI Canada) is the Canadian chapter of Transparency International. Since its foundation in 1996, TI Canada has been at the forefront of the national anti-corruption agenda. In addition to advocating legal and policy reform on issues such as whistleblower protection, public procurement and corporate disclosure, we design practical tools for Canadian businesses and institutions looking to manage corruption risks, and serve as an anti-corruption resource for organizations across Canada.

Table of Contents

List of Tables and Figures

Acknowledgements

TI Canada and the author of this report would like to thank the BHP Billiton Foundation and the TI-Secretariat for the generous financial support that made this publication possible. We would also like to thank the Mining for Sustainable Development Programme team based at TI Australia for all their guidance and support in carrying out this research. We would also like to thank all the government, private sector, and civil society representatives who provided their time to give inputs and feedback to this report.

We are particularly grateful for the support and guidance offered by the members of TI Canada's Mining Working Group: Bruce Moore, Joe Ringwald and Claire Woodside

Author: Daniela Chimisso Dos Santos, Invenient Solutions Consulting Ltd.
Assistant Author: Sophie Langlois
Design: Deana Oulianova, DIMA Design Studio

A Executive Summary

Transparency International has launched a global programme to complement efforts to improve the contribution of mining to sustainable social and economic development. The Mining for Sustainable Development (M4SD) Programme focuses on enhancing transparency and accountability in the award of mining-related permits, licences and contracts across national jurisdictions. Twenty national chapters of Transparency International are participating in M4SD. This report summarizes key findings from Transparency International Canada's (TI Canada). The purpose of the report is for it to be included as part of the basis of a global advocacy strategy and to inform domestic audiences.

TI Canada assessed the approval of mine closure plans within the Province of Ontario (Ontario). Therefore, the report does not consider all the remaining approval processes within the mining cycle, such as obtaining mining tenure and environmental impact assessments. Furthermore, the report does not assess the *Ontario Environmental Bill of Rights* process for public participation. As it is a pilot project, the report has focused only on the Ontario *Mining Act*, and the approval of mine closure plans prescribed therein.

In the assessment, two main risks were identified and prioritized by the researchers. These risks highlight uncertainty about the likelihood and impact of events that could have a negative effect on the lawful compliance and ethical awarding of mine closure plans. The first is the risk of manipulation of negotiations with Indigenous Peoples, and the second is that certain steps of the award process are not publicly knowable. Both risks point to a lack of transparency in the award process.

The risk of manipulation of negotiations with Indigenous Peoples is not specific or unique to the mine closure plans process. It is a much larger component of the relationship between Indigenous Peoples, provincial and federal governments, and the mining industry. Intermingled with other licenses and contracts, such as the Environmental Impact Assessments and Impact Benefit Agreements (IBAs), the duty to consult is at the heart of Indigenous Peoples' rights, government relations with Indigenous Peoples, and the survival of the mining industry. The correlated risks with unregulated negotiations with Indigenous Peoples are that the risk of corrupt behaviour can flow in many directions, and within each of the institutions of the principal actors. Recommendations in this report highlight the need to approach this risk in a holistic manner.

The lack of transparency of certain parts of the mine closure plans may be mitigated through various actions, which include lobbying to amend mining regulations and other existing statutes to require transparency.

Canada is a global mining powerhouse. It is both a home and host country for the mining industry, and it is a hub for mining finance. As such, Canada can lead in the implementation of processes that are transparent, and that allow for full accountability. Mine closure plans approval processes are only one step within a myriad of complex processes throughout the mine development cycle. From the research undertaken it is clear that there is space for improvement.

B Transparency International Canada

Transparency International Canada (TI Canada) is the Canadian chapter of Transparency International (TI). TI Canada was established in 1996 and is Canada's leading anti-corruption organization.[1] As a not-for-profit organization governed by a volunteer board of directors, TI Canada is supported financially by its annual membership program, donations, official sponsors, and program grants.

TI Canada is one of 20 national chapters participating in Transparency International's global *Mining for Sustainable Development* (M4SD) *Programme*. The Programme is coordinated by TI Australia. The M4SD Programme complements existing efforts to improve transparency and accountability in extractive industries by focusing specifically on the start of the mining decision chain: the point at which governments grant and award mining permits and licences, negotiate contracts and make agreements.

Based on a consensus of initial feedback on the scope of the report, TI Canada's research focused on the filing of certified mine closure plans.

Phase 1 of the Programme (2016-2017) focuses on identifying and assessing the corruption risks in the process and practice of awarding mining licenses, permits and contracts. This report presents the main findings from the corruption risk assessment in Canada.

With an understanding of the nature and causes of corruption risk, national chapters will develop and implement solutions to tackle priority corruption risks in Phase 2 (2018-2020). They will work with key stakeholders from government, the mining industry, civil society and affected communities to improve transparency, accountability and integrity in the decisions about approving mining projects.

The participation of TI Canada in Phase 1 of the Programme is supported by the BHP Billiton Foundation. Globally, the M4SD Programme is also funded by the Australian Department of Foreign Affairs and Trade.

1 Transparency International Canada, "Who we are." Retrieved June 2, 2017, from www.transparencycanada.ca/who-we-are/about-TI Canada

C National Report

1 Introduction

This corruption risk assessment was conducted as part of TI's M4SD Programme. The aim of this study is to identify the systemic, regulatory and institutional vulnerabilities to corruption in awarding mining and mining-related licences, permits and contracts and to assess the specific corruption risks created by these vulnerabilities. This report presents the main findings from the study and the results of the corruption risk assessment.

2 Background

Mining in Canada

Socio-Economic Significance of Mining Industry

The mining industry contributes to the economic growth, employment and government revenue in Canada.[2] On average, for the past five years (2012-2017), mining and quarrying account for approximately 1.5 percent of Canada's total GDP.[3] As of February 2016, Canada had more than 200 producing mines, which produced over 60 minerals and metals. The sector employs approximately 563,000 workers across the country, which includes approximately 373,000 employees who work directly for mining companies and 190,000 employees who indirectly service mining operations. Mining employees are highly compensated; the average income of a mining employee in 2015 exceeded $115,000, greater than the average incomes received by employees in the forestry, manufacturing, finance, and construction sectors.[4]

The mining sector also contributes to government revenue at the federal and provincial/territorial levels. For example, from 2003 - 2012, the sector contributed approximately $71 billion in government revenue from royalties, corporate income tax and personal income tax.[5] However, low mining levies and complicated tax systems burden the governments' total benefit from mining activities.[6] Nevertheless, mining makes up a significant portion of Canadian export. In 2015, mineral exports accounted for 19% of total goods exported from Canada to other countries.[7]

2 Taylor Jackson and Kenneth P. Green, *Fraser Institute Annual Survey of Mining Companies: 2016*. Fraser Institute, February 2017, (p. 3). Retrieved from www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2016

3 Statistics Canada. Retrieved from www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/prim03-eng.htm

4 Mining Association of Canada, *Facts and Figures of the Canadian Mining Industry*. 2016 (p.6). Retrieved from mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf, [*MAC Facts and Figures*]

5 *Ibid* at 15.

6 Duanjie Chen and Jack Mintz, "Repairing Canada's mining-tax system to be less distorting and complex," *SPP Research Papers*, 2013, [6(18)]. Retrieved from www.ceaa-acee.gc.ca/050/documents_staticpost/63928/90971/2.pdf

7 *MAC Facts and Figures*, supra note 4 at 6.

Legal Framework

General

Canada is a constitutional monarchy, a parliamentary democracy and a federation comprised of provinces and territories.[8] The division of powers between the provinces and the federal government is set out in Canada's *Constitution Act*; the result is that mining projects are governed by a collection of legislation at all levels of government: federal, provincial or territorial.[9] For example, the federal legislation regulates the rights of Indigenous Peoples, trade and commerce, railways, and environmental matters that relate to issues under federal jurisdiction, such as fisheries.[10] Provincial legislation regulates the prospecting, registration of mining claims, exploration, development (including construction, management), reclamation and closure of mines.[11] Therefore, all ten Canadian provinces, and one territory, have their own *Mining Act* and mineral tenure system.[12]

Indigenous Peoples

First Nations, Inuit and Métis (Indigenous Peoples of Canada) have constitutionally protected rights.[13] Such constitutional rights protect and affirm the Canadian government's duties and obligations towards Indigenous Peoples. Indigenous rights may also arise from treaties entered between the British Crown and Indigenous Peoples since colonial times (1701-1923), as well as from land-title rights.[14] Modern-day treaties are known as comprehensive land claim settlements, which are still in the process of being settled.[15] To date, the federal government has settled 15 comprehensive claims with Indigenous Peoples.[16]

8 *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [*Constitution Act*].

9 *Ibid*.

10 *Ibid* at s. 91.

11 *Ibid* at s. 92.

12 Note that Canada has three territories where mining was federally regulated. This system is now being changed, and for example, the Yukon is now the first territory with its own mining act. See for example, the *Quartz Mining Act*, SY 2003, c 14 and the *Placer Mining Act*, SY 2003, c 13. See also: Khaled Abdel-Barr and Karen MacMillan, "Canada" in Global Legal Group, *The International Comparative Legal Guide to Mining Law: A Practical Cross-Border Insight Into Mining Law* (London: Global Legal Group, 2016) at p. 68. Referenced from www.lawsonlundell.com/media/news/496_The%20International%20Comparative%20Legal%20Guide%20to%20Mining%20Law%202016.pdf [*Comparative Legal Guide to Mining*]

13 *Constitution Act*, *supra* note 6 at s. 35; *Comparative Legal Guide to Mining, ibid* at 73.

14 See for example, *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44. In the unanimous decision by the Supreme Court of Canada, Chief Justice Beverly McLachlin states that, "The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada…. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown." *Ibid* at para 69.

15 Indigenous and Northern Affairs Canada, *Treaties with Aboriginal People in Canada*. Referenced June 3, 2017, from www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292 [*INAC*]

16 *Ibid*. The first comprehensive land claim settlement was the *James Bay and Northern Quebec Agreement*.

The Crown (federal, provincial and territorial) has a constitutional duty to consult and accommodate (duty to consult) Indigenous Peoples when proposed projects can potentially adversely impact their constitutionally protected rights.[17] Two concurrent decisions by the Supreme Court of Canada: *Haida Nation v. British Columbia (Minister of Forests) (Haida)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (Taku River)*, represented a turning point in the duty to consult process.[18] In the *Haida* decision, the Supreme Court of Canada recognized that the duty to consult must also consider potential, but yet unproven Indigenous Peoples' interests.[19] In the *Taku River* decision, the Supreme Court of Canada determined that the government may decide how best to integrate consideration of Indigenous interests into government-decision making, and therefore, the government may determine how aboriginal consultation and accommodation should be carried out.[20]

The common law sets out when the Crown's duty to consult is triggered.[21] Since *Haida*, the Supreme Court of Canada has stated that operational and procedural aspects of the duty to consult may be delegated to third parties. In fact, the Ontario Attorney General, in its 2015 Annual Report, specifically notes that compared to other jurisdiction, such as Quebec and British Columbia, Ontario delegates to a greater extent to the private sector.[22] But, ultimately, it is the Crown's duty to be fulfilled. Therefore, and for example, initial contact, discussions around project effects, mitigation measure and IBAs can be delegated to industry proponents (for e.g. prospectors, mining companies).[23]

The duty to consult can be statutorily determined. In the case of the *Mining Act (Mining Act)* and the mine closure process, which is the focus of this report, the duty to consult is statutorily required, and further determined by common law.[24] In fact, the substance of the duty to consult is still evolving under the common law, and how the duty to consult is fulfilled depends on the rights and context where it is triggered.[25] At a minimum, the duty to consult appears to include: (i) receipt of notice, (ii) disclosure of information, and (iii) some ensuing discussion through written correspondence at least.[26] There is no statutory guidance in Ontario on the substance of the duty to consult.[27] The government has published operational policies on the duty to consult at early exploration.[28]

The United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. Canada was one of the four nations that voted against the declaration.[29] In 2016, the new Liberal government officially adopted UNDRIP, which encompasses the principle of free, prior and informed consent (FPIC). FPIC is one of the most contentious issues surrounding the application of UNDRIP principles in Canada. The substance of FPIC can ultimately translate into a veto right, i.e. consent can be withheld, while in Canada such veto right is still debatable When and how the UNDRIP principles will enter Canadian law statutorily is questionable. The judiciary is taking an active role in clarifying the rights and duties of Indigenous Peoples and the Crown, and the evolution of Canadian law on this matter is on-going.

---

17 The Canadian Chamber of Commerce, *Seizing Six Opportunities for More Clarity in the Duty to Consult and Accommodate Process*, September 2016 (p. 3). Referenced from www.chamber.ca/media/blog/160914-seizing-six-opportunities-for-more-clarity-in-the-duty-to-consult-and-accommodate-process/ [*Canadian Chamber of Commerce*]

18 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku River*].

19 *Haida, Ibid*.

20 John M. Olynyk, "The Haida Nation and Taku River Tlingit decisions: clarifying roles and responsibilities for Aboriginal consultation and accommodation." Lawson Lundell LLP, February 21, 2005. Referenced from www.lawsonlundell.com/media/news/236_Negotiatorarticle.pdf

21 See *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 [*Rio Tinto*].

22 Office of the Auditor General of Ontario, *Annual Report 2015* (465). Referenced from www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf.

23 *Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424 [*Wabauskang*].

24 *Mining Act*, RSO 1990, c M 14, at ss. 140(1)(c), 141(1)(c) [*Mining Act*].

25 See Martin Olszynski, "The duty to consult and accommodate: an overview and discussion," June 2016,. Appendix 1 to *Seizing Six Opportunities for More Clarity in the Duty to Consult and Accommodate Process*, The Canadian Chamber of Commerce, September 2016 (p. 33). Referenced from www.chamber.ca/media/blog/160914-seizing-six-opportunities-for-more-clarity-in-the-duty-to-consult-and-accommodate-process/

26 Olszynski, *Ibid* at 41.

27 Ravina Bains and Kayla Ishkanian, *The Duty to Consult with Aboriginal peoples: A Patchwork of Canadian Policies*. Fraser Institute, May 2016 (pp. 12-13). Referenced from www.fraserinstitute.org/sites/default/files/duty-to-consult-with-aboriginal-peoples-a-patchwork-of-canadian-policies.pdf

28 *MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration*. Referenced from www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf. However, it should be noted that this guide is for "early exploration." As seen, mine closure plans and consultation requirements are triggered at "advanced exploration" and at "mine development."

29 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNDESA, 66th Sess, (2007).

Ontario's Environmental Bill of Rights

Enacted in 1993, the *Ontario Environmental Bill of Rights'* (EBR) goals include the protection, conservation, and restoration of the integrity of the environment, including its sustainability, as well as protecting the rights of every Ontario resident to a healthy environment.[30] To fulfil its purpose, the EBR provides the processes by which Ontario residents can participate in the environmentally significant decisions taken by the government of Ontario, which are prescribed by legislation.[31] The various ministries that are subject to the EBR are set out in the regulations. The ERB also looks to promote increased accountability of the government by giving residents of Ontario the right to: comment on government decisions that may have an environmental impact; ask a ministry to review an existing law, or ask for it to create a new one; obtain whistleblower protection; ask a ministry to investigate harm to the environment.[32]

To ensure participation by the residents of Ontario, the EBR created an environmental registry that requires certain ministries, like the Ministry of Northern Development and Mines (MNDM) and the Ministry of Natural Resources and Forestry, to post for public comments information on forthcoming decisions on approvals of licences, including mine closure plans.[33]

Due to the limited scope of this report, it does not review the reporting processes under the EBR itself, and the adequacy of the EBR from an accountability and transparency perspective.

30 *Environmental Bill of Rights*, 1993, S.O. 1993, c.28. See also: Ontario's Regulatory Registry. Referenced from www.ontariocanada.com/registry/view.do?postingId=22182

31 The *Bill of Rights* set out the Ministries and the types of decisions taken by those Ministries that fall within the category of environmentally significant decisions. See for example, the Environmental Commissioner of Ontario's guidelines, "What you need to know." Referenced from eco.on.ca/your-rights/what-you-need-to-know/.

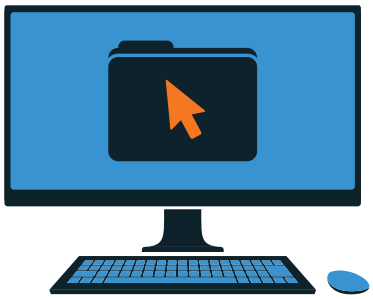
32 The Environmental Commissioner of Ontario, "What you need to know." Referenced from eco.on.ca/your-rights/what-you-need-to-know/

33 See: Environmental Registry. Referenced from www.ebr.gov.on.ca/ERS-WEB-External/

Obtaining a Mining Lease in Ontario

In Ontario, there are two main types of mining tenure that can be acquired: a mining claim and a mining lease.[34]

A mining claim grants owners the exclusive right to explore for minerals on a designated piece of land.[35] Recent amendments to the *Mining Act* will have the effect of modernizing the registration and management system for mining claims in Ontario. On May 10, 2017, the *Aggregate Resources and Mining Modernization Act*,[36] (the *Modernization Act*) received royal assent[37] and amends the *Mining Act* to implement a new electronic mining lands administration system in Ontario. The new process will (i) move Ontario's mining lands administration systems from ground staking and paper map staking to online registration of mining claims, and (ii) create an online Mining Land Administration System (MLAS) that will provide for better access to Ontario's mining lands data.[38]



A mining lease is required in order for a proponent to extract resources and subsequently sell the extracted resources. A mining claimholder must apply for a lease. The process of applying for a mining lease requires that the mining claimholder (i) perform assessment work on the designated lands, (ii) submit a letter of intent to the Provincial Recording Office's Technical Services Unit indicating what claims are part of the application, (iii) obtain a survey of the lands requested for the lease.[39]

The application must include:

i. the survey of the designated land;
ii. an agreement with the surface rights owner (if any); and
iii. the required fees, including the rent for the first year of the lease.[40]

To maintain the lease, rent must be paid annually and expires every 21 years unless it is renewed by the parties.[41]

---

34 There are other mining rights, such as mining patent and land use permits. See: Blakes LLP, *Mining Tenures in Ontario*. July 2012. Referenced June 29, 2017, from www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1639. These were not considered in this report.

35 Ministry of Northern Development and Mines, *Mines and Minerals – Leases*. Referenced June 7, 2017, from www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/evaluation/advanced-exploration/leases *[MNDM - Leases]*

36 *Aggregate Resources and Mining Modernization Act*, SO 2017 C 6 [*Modernization Act*].

37 Legislative Assembly of Ontario, *Bill C-39, Aggregate Resources and Mining Modernization Act*, 2017. SO 2017, c 6 (Explanatory Note). Referenced from www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4213&detailPage=bills_detail_status.

38 *Modernization Act, supra* note 36.

39 *MNDM - Leases, supra* note 35.

40 *Ibid*.

41 *Ibid*.

Corruption in Canada

In Canada, corruption is defined and regulated by several pieces of federal legislation. Canada's anti-corruption legislation applies to Canadian entities that operate domestically and abroad.[42]

The *Criminal Code*[43] (*Criminal Code*) criminalizes bribery of domestic public officials. Section 121 of the Criminal Code prohibits, among other things, the offering or receipt by a government official of a loan, reward, advantage or benefit of any kind as consideration for cooperation or exercise of influence about a matter of business relating to the government. Violations of anti-corruption provisions in the Criminal Code are punishable by fines at the discretion of the court and imprisonment for a term not exceeding five years, and in some cases 14 years.[44]

The *Corruption of Foreign Public Officials Act*[45] (CFPOA), criminalises bribery of foreign public officials.[46] Section 3 of the CFPOA prohibits any offering or receipt of a loan, award, advantage or benefit of any kind to a foreign public official, or to any person for the benefit of a foreign public official, made to induce the official to use his or her influence or as consideration for an act in connection with the performance of the official's duties or functions.[47] Persons who contravene the CFPOA are guilty of an indictable offence and liable to fines at the court's discretion and imprisonment for a term of not more than 14 years.[48] Currently, facilitation payments, defined as modest payments made for the purpose of facilitating or expediting the performance of routine government actions, are exempt from the acts prohibited by the CFPOA. However, a legislative amendment is in place that will eventually include facilitation payments as a prohibited act.[49]

The Canadian government has also recently introduced the *Extractive Sector Transparency Measures Act*[50] (ESTMA), which came into force on June 1, 2015. ESTMA requires mandatory reporting of payments by Canadian companies that operate in the extractives sector to government-related entities and individuals that are equal to or exceed $100,000. The mandatory reporting requirements apply broadly to Canadian companies listed on a Canadian stock exchange and private companies that meet certain thresholds.[51] A failure to comply with ESTMA is punishable upon summary conviction with a fine of up to $250,000 for every day of non-compliance.[52] The reporting of payments made to Indigenous governments was deferred for two years and is now required as of June 1, 2017.[53] Under ESTMA, companies are not required to disclose the terms of IBAs or other agreements entered into with Indigenous groups.[54]

---

42 Davies, Ward, Phillips & Vineberg, "Anti-corruption legislation in Canada." June 2014, (p. 1). Referenced from www.dwpv.com/-/media/Files/PDF_EN/2014-2007/Anti-Corruption-Legislation-in-Canada-June-2014.ashx?la=en, [*Davies Report*]. See "Scope of Work and Mine Closure Plans and Approval Process" section of this report for the correlation between mining claims, leases and closure plans.

43 *Criminal Code*, RSC 1985, c C 46 [*Criminal Code*].

44 *Ibid* at ss. 119 - 121; *Davies Report*, *supra* note 42 at 3.

45 *Corruption of Foreign Public Officials Act*. SC 1998, c 34, at s. 3 [*CFPOA*].

46 *Ibid*.

47 *Ibid*.

48 *Ibid* at s. 3(2).

49 *Ibid* at s. 4; Public Prosecution Service of Canada, *Guideline of the Director Issued Under Section 3(3)(c) of the Director of Public Prosecutions Act* (Public Prosecution Service of Canada Deskbook). March 1, 2014. Referenced June 7, 2017, from www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch08.html [*PPSC Deskbook*].

50 *Extractives Sector Transparency Measures Act*, SC 2014, c 39, at s. 376 [*ESTMA*].

51 *Ibid* at s. 2.

52 *Ibid* at s. 24(1). It is beyond the scope of this report to analyze the transparency of IBAs.

53 Natural Resources Canada, *Information Sheet – Extractive Sector Transparency Measures Act*. April 2017. Referenced May 26, 2017, from www.nrcan.gc.ca/mining-materials/estma/18184 [NRCAN ESTMA].

54 *Ibid*.

Scope of Project

Due to the prevalence of mining in Canada, the delimitation of the scope of the project, considering budgetary and time constraints, faced challenges. First, TI Canada determined that due to: (a) logistics reasons, such as costs and access to experts, and (b) complexity of the federal and provincial legislative framework, the geographic scope of the project should be limited to one province. Second, the project should focus on the development phase of the mining cycle. From discussions with key stakeholders, TI Canada concluded that there are significant transparency challenges and potential of encountering corruption risks during the development phase. Third, within the mine development phase several alternative project scopes were considered, including for example, the environmental assessment approval process. In assessing which process to use, TI Canada prioritized processes that are streamlined under one legislative framework, which applies to all mines in that jurisdiction.[55] Therefore, and for example, the environmental assessment process in Canada is regulated by both the federal government (*Canadian Environmental Assessment Act*, SC 1992, c 37), as well as provincial governments (e.g. in Ontario, the *Environmental Assessment Act*, RSO 1990, c E 18). The federal government and the province of Ontario (Ontario) have signed an agreement on environment assessment cooperation; however, TI Canada determined that the scope of this pilot project would be simplified by remaining within one legislative framework, without the complexities of multiple legislations. Fourth, discussions with key stakeholders where corruption vulnerabilities were highlighted were taken into consideration and given priority.

A consensus decision was made not to review the process of obtaining mining tenure (claims or leases.) Whilst mining claims are largely administrative exercises, the lack of analysis of claim and mining lease applications in this report does not indicate there are no issues of transparency or risks of corruption. Due to the limited resources of this study they were not reviewed, but they do warrant review in the future.

Considering the factors above, TI Canada defined the scope of the project to be the certification process of mine closure plans within the Ontario.

55 See, for example, an outline of the complexities of the interweaving legislation: Ontario Northern Development and Mines, *Ring of Fire Secretariat – Environmental Assessment*. Referenced May 26, 2017, from www.mndm.gov.on.ca/en/ring-fire-secretariat/environmental-assessment

Ontario

The decision to limit the scope of the project to Ontario took into account numerous factors, including monetary constraints, which restricted travel possibilities. Furthermore, Ontario is a key province for the Canadian mining industry. Ontario is the largest producer in Canada of gold, nickel and platinum groups metals, and second in copper.[56] Ontario is also the largest private sector employer of Indigenous Peoples, where 11.2% of the work force is Indigenous.[57] In addition, the province led in expenditures on mineral resource development.[58]

However, Ontario's tax regime for mining is one of the lowest in Canada.[59] In fact, revenues from mining taxes and royalties has averaged less than 2% of the value of minerals extracted.[60]

Currently, there 39 operating mine sites in Ontario.[61] Extracted minerals and metals include nickel, gold, copper, zinc, platinum group metals, diamonds, salt, gypsum, talc, calcium carbonate, nepheline syenite and other industrial minerals.[62] There are hundreds of active mineral exploration projects underway, including early exploration.[63]

Furthermore, in 2007 a large chromite deposit in Ontario's James Bay lowlands was discovered.[64] Known as the Ring of Fire, the discovery may present an economic opportunity for Ontario even though the difficulties of exploiting the resources, including building corollary infrastructure, remains a challenge.[65]

Scope of Work and Mine Closure Plans and Approval Process

In Ontario, mine closure plans must be presented to the Ministry of Northern Development and Mines (MNDM). The requirement to present mine closure plans applies to proponents entering the advanced exploration phase, as well as at the mine development phase.[66] **Figure 1** sets out the timing for when mine closure plans need approval. Advanced exploration is defined in the *Mining Act*. Neither a mining claim nor a mining lease requires the filing of a certified closure plan. The triggers for filing a mining closure plan relates to the activity undertaken at the site, and are not based on the mining tenure of the proponent.[67]

Furthermore, proponents of all mines (whether brownfield or greenfield) are required to present mine closure plans. Such plans must include financial assurances, which provide for financial guarantees by the proponents of the amount of the estimated cost of rehabilitation. The following section sets out the details of the legislative requirements for both the closure plans, as well as the financial assurance.

56 Ontario Mining Association, "Mining in Ontario: the latest trends and industry outlook." 2017. As provided by the Ontario Mining Association.

57 *Ibid*.

58 *Ibid*.

59 Office of the Auditor General of Ontario, *Annual Report 2015*. (465). Referenced from www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf [OAG].

60 *OAG*, *Ibid*.

61 Ontario Mining Association, *Facts & Figures*. 2017. Referenced September 3, 2017 from www.oma.on.ca/en/ontariomining/facts_figures.asp [*OMA F&F*]

62 *Ibid*.

63 Ontario Investment Office, *Exploration and Mine Development*. Referenced May 28, 2017, from www.investinontario.com/exploration-and-mine-development#intro

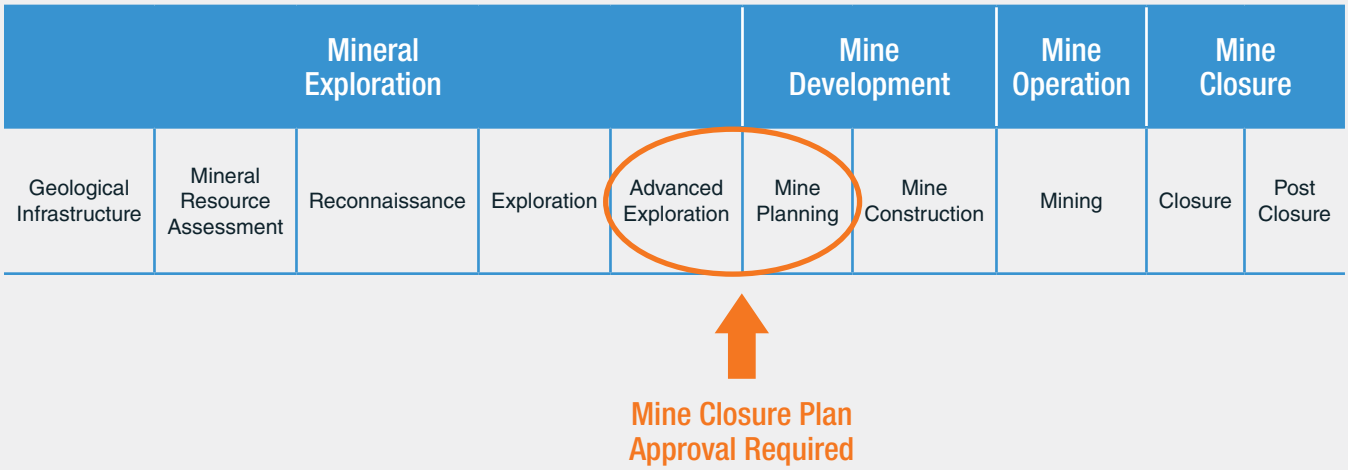
64 Mineral Industry Consultants, "Discoveries in Ontario's Ring of Fire." September 9, 2015. Referenced May 28, 2017, from www.micon-international.com/discoveries-in-ontarios-ring-of-fire/

65 See: Ontario Chamber of Commerce, *Beneath the Surface: The Economic Potential of Ontario's Ring of Fire*. 2014 (p. 4). Referenced from www.occ.ca/Publications/Beneath_the_Surface_web.pdf. See also: Jody Porter, "Ring of Fire mining development still years away from delivering on a decade of hype." *CBC News*, January 30, 2017. Referenced from www.cbc.ca/news/canada/thunder-bay/ring-of-fire-talks-1.3955236

66 *Mining Act*, *supra* note 24 at ss. 140, 141.

67 See, for example, the definition of "proponent" under the *Mining Act*, which includes a holder of a mining claim or a license. *Mining Act*, *supra* note 24 at s. 139(1).

Figure 1 Timing of Mine Closure Plan Approval Process



The scope of work of the project encompassed only the approval process of mine closure plans. Therefore it did not take into consideration corruption risks arising: (i) out of the selection of activities within the closure plans and the actual implementation of closure plans, including and for example, contractor selection[68]; (ii) the possible risks arising from the need to maintain financial assurances in place over time (especially when considering long life of mine projects); and (iii) the adequacy of the values of the financial assurances, and risks arising therefrom.

Also, it is important to note that during the timeframe highlighted in **Figure 1**, proponents are frequently engaged in the process of negotiating community development agreements, as well as IBAs with Indigenous Peoples.[69] IBAs are formal contracts between proponents and Indigenous Peoples that include provisions for revenue sharing, jobs, training, procurement, other protocols, and often include remedial measures.[70] Moreover, during this time proponents are also in the process of undertaking environmental impact assessments (EIA). Obviously, the information provided in EIAs is crucial and necessary for closure plans and the determination of the value of financial assurances. The interrelationships, as well as commingling of corruption risks between these factors were not taken into consideration (i.e. indirect effects, knock-on effects, etc.).

68 See, for example, Michel Nest, *Preventing Corruption in Community Mineral Beneficiation Schemes*. U4 Anti-Corruption Resource Centre, CMI, February 2017, No. 3 (p. 14). Referenced from www.cmi.no/publications/file/6150-preventing-corruption-in-community-mineral.pdf. This sets out the corruption risks when social impact assessments are undertaken. It is possible that the implementation of closure plans also present similar risks as set out therein, for example, the inadequate financial monitoring or contractor selection.

69 See, for example, Ciaran O'Faircheallaigh, "Social equity and large mining projects: voluntary industry initiatives, public regulation and community development agreements." *Journal of Business Ethics 91*, 2015, [132(1)].

70 See, for example, Sandra Gogal, Richard Riegert and Joann Jamieson, "Aboriginal impact and benefit agreements: practical considerations." 2005 (43), *Alberta Law Review 129*; Mining Facts, *What Are Impact and Benefit Agreements*. Referenced May 27, 2017, from www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/

As a final point, it is important to highlight that the Ontario Auditor General (OAG) in its 2015 annual report specifically singled out deficiencies in the mine closure processes.[71] Three main concerns were highlighted by the OAG. The first is that MNMD staff are not reviewing mine closure plans from a technical perspective. Staff lack technical expertise, and even though they can hire experts, there are no guidelines as to when such experts should be consulted. Therefore, and for example, the OAG noted that in their review they encountered some closure plans that posed high-risk threats, but these were not forwarded to experts when it would have been warranted.[72] Second, financial assurances provided by companies may be insufficient to cover mine close-outs. For instance, in the OAG's review, one third of mine closure financial assurances had not been updated since the early 2000s.[73] Third, the OAG noted several additional fragilities with the review by the MNDM of mine closure plans. Such frailties include the conflict of interest of in-house consultants that both promote exploration and development in Ontario, as well as review whether mining companies comply with regulatory requirements, including the adequacy of financial assurances. Additional fragilities include the fact that the MNMD does not regularly conduct site visits to ensure that closure plans accurately reflect the mining activity taking place.[74]

In response, the MNMD created the positions of Closure Plan Co-Ordinator and Surface Water Specialist to ensure consistent review of closure plans, and a five-year inspection schedule for mines.[75]

Mine Closure Legislative Framework

Part VII of the *Mining Act*,[76] Ontario Regulation 240/00, *Mine Development and Closure Under Part VII of the Act (Regulation)*,[77] including *Schedule 1 to the Regulation, the Mine Rehabilitation Code of Ontario (Code)*,[78] and the Closure Plan Boundary & Land Tenure Guideline (Guideline)[79] regulate mine closure plans, and financial assurances.

Various events trigger the need for proponents to file mine closure plans with the MNDM, including whether the mine has entered into advanced exploration or mine development.[80] Other material changes to the mine site can also trigger the need to file amended mine closure plans.[81] It is important to note that MNDM retains the right to request amendments to closure plans, including updated financial assurances, at any point in time of a mining project.[82] This results in the legislation working in such a way that there is a continuous loop of mine closure plans, review from MNDM, and further review of closure plans as the mine progresses through development. **Figure 2** shows an overview of the process, and how the legislation is set up to work between the proponent and MNDM.

71 Office of the Auditor General of Ontario, *Annual Report 2015*. Referenced from www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf, See also 455-459 [OAG].

72 *Ibid* at 444.

73 *Ibid*.

74 *Ibid*.

75 *Ibid* at 445.

76 *Mining Act*, *supra* note 24 at Part VII - *Rehabilitation of Mining Lands.*

77 *Mine Development and Closure Under Part VII of the Mining Act*, O Reg 240/00 [*Regulation*].

78 *Ibid* at Schedule 1.

79 Ontario Ministry of Northern Development and Mines, *Closure Plan Boundary & Land Tenure Guideline*. Referenced from www.mndm.gov.on.ca/sites/default/files/closure_plan_boundary_and_land_tenure_guideline_en.pdf. The *Guideline* is a bulletin published by the Ontario Ministry of Northern Development and Mines to assist proponents when developing closure plans.

80 *Mining Act*, *supra* note 24 at ss. 140, 141.

81 *Ibid*.

82 *Ibid*.

The Director of Mine Rehabilitation (as appointed by MNDM, the Director) has full discretion to exempt a proponent from complying with any requirement in the Regulation, including the Code, if the Director determines that the closure plan meets or exceeds the objectives of the provision in which the standard, procedure or requirement it set out.[83] Therefore, and for example, Schedule 1 is the Mine Rehabilitation Code of Ontario and it sets out a number of technical standards and procedures that are the baseline from which the Director may determine that the closure plan meets or exceeds closure plans.

The process of filing a closure plan, with financial assurances, results in MNDM's written acknowledgment of the plan. Such acknowledgment is to be provided within 45 days. The Act is not clear what happens if MNDM does not respond within the specified timeframe. A "certified" closure plan refers to the fact that part of the closure plan contains a certification by an officer of the company (generally the Chief Financial Officer, CFO) that the closure plan is in compliance with all legal requirements.[84] Therefore, and for clarification purposes:

- A certified closure plan is a closure plan that includes certificates required by the Regulation, as set out in s. 12(2) and (3); the certification is made by either an individual, if the proponent is an individual, the CFO or other senior officer where the proponent is a corporation; the proponent certifies a number of items, including but not limited to detailing which qualified professionals were relied upon, and that the closure plan constitutes full, true and plain disclosure of the rehabilitation work required to restore the site to former use or condition, and that the closure plan complies with all legal requirements. For the sake of expediency, the researchers have used the terminology "closure plan," without differentiation between certified closure plans and closure plans.

- MNDM's approval consists of a written acknowledgment of receipt of the certified closure plan, this is a *de facto* approval of the mine closure plan for that particular point in time;[85] and

- MNDM's rejection of the certified closure plan constitutes in requiring that the certified closure plan be amended; numerous triggers may cause MNDM to require an amended certified closure plan, such as a change in the mine (e.g. from detailed exploration to mine planning), and change in either the size of the mine or life of mine.

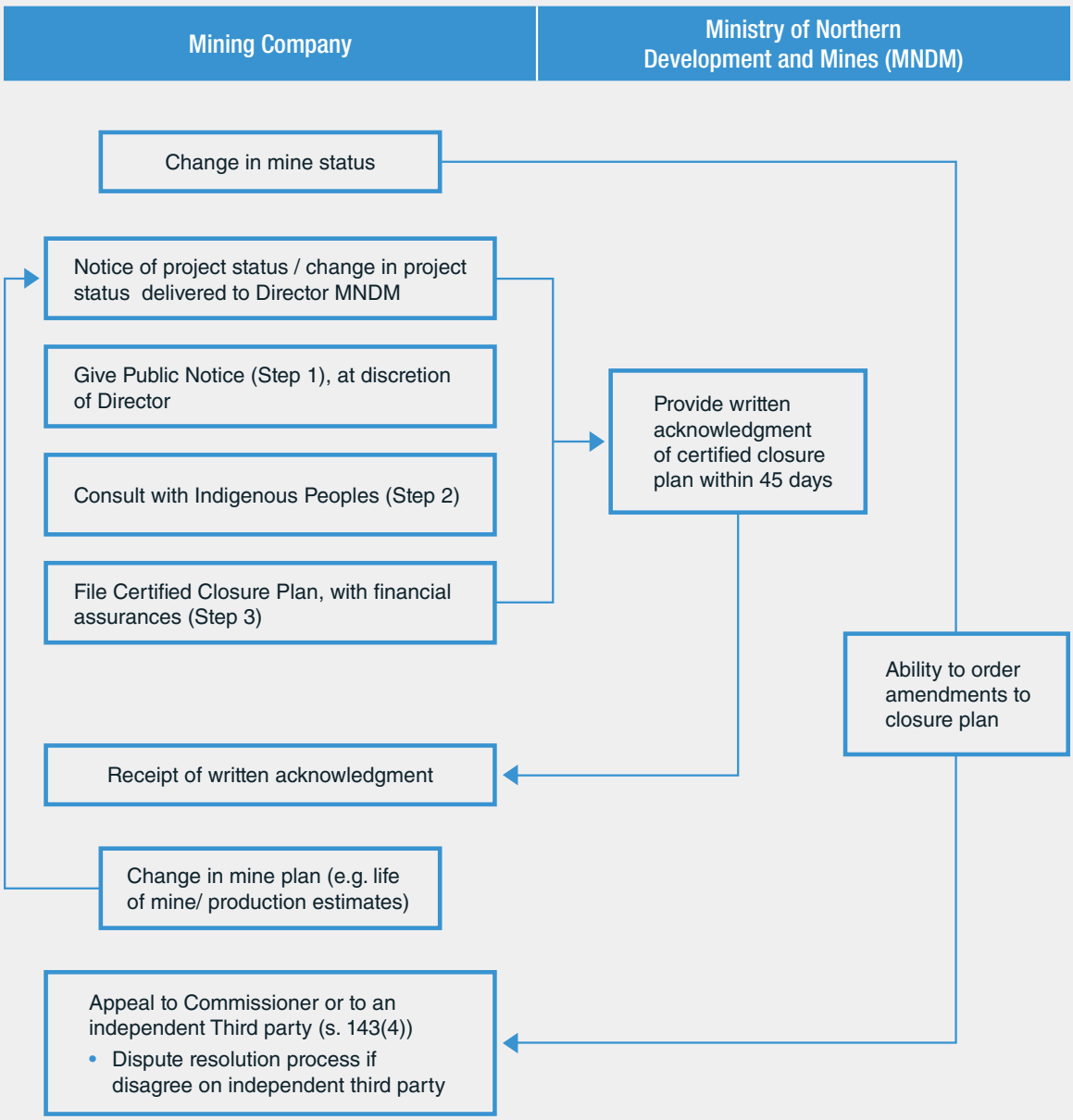
83 *Regulation, supra* note 77 at s. 21.

84 *Ibid*. See also, The Canary Research Institute for Mining, Environment and Health, *Ontario Mining Fact Sheet – Mine Closure Plans – Your Right to Know*. August 2005 (p. 4). Referenced from www.canaryinstitute.ca/publications/Ontario_Closure_Brochure.pdf

85 Comments from MNDM have clarified that formal written notice is the approval for the mine closure plan, even though the Act does not specify this step.

Figure 2 depicts an overview of the mine closure plan filing process.

Figure 2 Overview of Mine Closure Process



Section 4 of the report reviews the mine closure process in more detail, specifically by dividing the mine closure process into three steps: Step 1: Public Notice; Step 2: Indigenous Peoples Consultation; and Step 3: Technical Content and Financial Assurances. As set out therein, the notice of change of status of the mine is an administrative act, and appears to be quite simple, with the Regulation providing sufficient prescriptive guidance. Prior to discussing the methodology undertaken in this report, it is important to highlight that even though closure plan processes are set out in mining regulations, other major areas of law may apply. The "Legal Framework" section of the report noted the importance of constitutional law when analyzing Indigenous Peoples' rights. Below, the researchers provide a brief outline of the importance of administrative law.

Discretion of the Director of Mine Rehabilitation

The Director has extensive discretion throughout the legislative framework, including exempting a proponent from complying with any requirement in the Regulation, if in the opinion of the Director, the proponent's actions either exceeds or meets the requirements set out in the Regulations.[86] Other discretionary power granted to the Director includes requiring proponents to provide public notice of the change in status of the mine and the closure plans; requiring further consultation with Indigenous Peoples; demanding an amended mine closure plans; and even issuing an order enabling the Crown to realize the security provided under the financial assurances requirements as the Director considers necessary, amongst others.

Without oversight, extensive discretion may allow for vulnerabilities that could create circumstances where undue influence, abuse of office, and other corrupt action may be undertaken. Considering the importance of transparency and accountability to this report it is key to highlight that in Canada, the Director's discretion is not unfettered.

The *Ministry of Natural Resources Act* is the enabling statute under which the Mining and Lands Commissioner (Commissioner) is appointed, and the Office of the Mining and Lands Commission is an independent adjudicative tribunal that hears and decides matters under legislation administered by the Ministry of Natural Resources and Forestry and MNDM.[87] An appeal from any decision of the Commissioner is made to the Ontario Divisional Court.[88] Therefore, the judiciary has oversight over the decision of the Commissioner, who has oversight over the exercise of discretion of the Director, as exemplified in **Figure 3**.[89]

Figure 3 Legislative and Judicial Inputs on Discretion of Director

Under the *Mining Act*, the Commissioner has exclusive jurisdiction to decide matters set out therein. But there are numerous exceptions to the Commissioner's jurisdiction, for example, *Construction Lien Act*[90] processes, Crown patent annulments or cancelations, in addition, to dispute resolution and Indigenous Peoples consultation processes, assertion or determination of Treaty rights.[91]

86 *Regulation, supra* note 77 at s. 21.

87 *Ministry of Natural Resources Act*, RSO 1990, c M 31 [*Ministry of Natural Resources Act*]; *Mining Act*, *supra* note 24 at Part VI.

88 *Mining Act, supra* note 24 at s. 133.

89 For example, in *Verdon Gold Inc. v Director of Mine Rehabilitation*, (2003) File No. MA 038-00.

90 *Construction Lien Act*, RSO 1990, c C 30.

91 Ontario Mining and Lands Commissioner, *Annual Report 2015-2016*. Ontario Ministry of Natural Resources and Forestry, 2016. Referenced June 7, 2017, from www.ontario.ca/page/mining-and-lands-commissioner-annual-report-2015-2016

3 Methodology

The analysis in this report uses the research method contained in the *Mining Awards Corruption Risk Assessment (MACRA) Tool*.[92] The MACRA Tool was created by an independent expert engaged by TI to provide a consistent, clear and robust methodology for identifying and assessing corruption risks in the twenty countries participating in the M4SD Programme.

The first part of the risk assessment involves data collection and analysis (see page 21). The MACRA Tool guides researchers to create a map of the awards process as set out in law, official guidelines and policy. It also directs researchers to collect information about the practices in implementing the process and about relevant contextual factors. Researchers then analyse these three aspects of mining awards – the process, practice and context – to identify vulnerabilities to corruption. Vulnerabilities are systemic, regulatory, institutional or other weaknesses that create risks of corruption, that is they create opportunities for corrupt conduct to occur or to pass undetected and thereby undermine the lawful, compliant and ethical awarding of licences, permits and contracts. The second part of the tool instructs researchers to identify and assess the specific corruption risks created by these vulnerabilities (see page 23). The tool contains a list of 89 common risks relating to five different risk factor categories – corruption risks originating in: 1. the process design, 2. process practice, 3. contextual factors, 4. accountability mechanisms, and 5. the legal and judicial responses to corruption.

Researchers can adopt or modify the common risks, or create a new risk that better fits their circumstances. Researchers then assess each corruption risk by analysing evidence of the likelihood of it occurring and of its potential impact. The final stage is risk prioritisation. The chapter's priority risks are those corruption risks the chapter will seek to mitigate or manage. The results of the risk assessment are the primary input into this determination, but other matters such as the national chapter's capacity to take action, the resources required and potential for stakeholder collaboration are also important considerations.

The MACRA Tool builds on TI's experience with corruption risk assessment in other fields such as National Integrity Systems and other mining and extractive sector instruments, indices and resources. Experts from multilateral institutions, major international non-governmental organisations and industry bodies provided valuable feedback in the development of the MACRA Tool.

92 Michael Nest, "Mining awards corruption risk assessment tool." *Transparency International Mining for Sustainable Development Programme*, October 7, 2016.

Part of the process requires researchers to validate the work.
The following four groups were involved in validating this report.

1 Two Validation Workshops

Workshop 1: A Validation Workshop was held on May 8, 2017 at TI Canada's office in Toronto. The experts who attended were:

- An academic;
- An Ontario government representative;
- A civil society representative; and
- A technical consultant

Workshop 2: A Validation Workshop of the draft report was held on July 20, 2015 at TI Canada's office in Toronto. The experts who attended were:

- Several Ontario government representatives;
- Representatives from industry associations;
- An industry representative;
- Several representatives from civil society.

2 Working Group

The Working Group is a group of experts that TI Canada gathered to assist in validating and guiding the work in the report. These experts are:

- **Claire Woodside, National Director, Publish What You Pay Canada.** Ms. Woodside was a leader in establishing Canada's Extractive Sector Transparency Measures Act (ESTMA), and is also a member of TI Canada's Board of Directors.
- **Joe Ringwald, President and CEO, ScoZinc Mining Ltd.** Mr. Ringwald has been involved in a number of Canadian and international transparency and social responsibility initiatives including ISO PC278 Anti-Bribery, the Mining Technical Advisory and Monitoring Committee, the CSR Centre for Excellence, and the CIM Standing Committee on Resources and Reserves Definitions.
- **Bruce Moore.** Mr. Moore is a social activist, international development advisor and former United Nations diplomat. At present, he serves on the Board of Transparency International Canada. He is a member of the C20, the civil society consultative body to the G20. From 1998-2008, he was the founding Director of the International Land Coalition (headquartered in Rome).

3 TI Canada

The Interim-Executive Director of TI Canada was involved throughout the project, providing guidance and direction.

4 Review of Draft Report

The following experts reviewed the report:

- Partner at a law firm that practices exclusively aboriginal law; and
- Representative from MNMD

Part 1: Mapping the Awards Process and Context

As set out above the scope of work was the process of filing mine closure plans. Using the *Mining Act*, the researchers first set out a panoramic view of the legislative requirements, which was then added to information obtained from the Validation Workshop in order to add items of actual practice (See **Figure 2**: Overview of Mine Closure Process).

As defined by the MACRA Tool and TI, the definition of corruption is the "abuse of entrusted power for private gain," which captures corrupt activity by a variety of actors. As such, the researchers have added a section on community/ landowners, and Indigenous Peoples. The reasons for doing so are:

1. To acknowledge that even though neither the community nor Indigenous Peoples have the right to veto a mine closure plan process (i.e. not allow for it to go forward) they are important actors in the process; and

2. Neither community members nor Indigenous Peoples are themselves immune from corrupt practices; therefore, it is critical to include such vulnerabilities in the mapping process.[93]

The Regulation sets out the detailed requirements that proponents must fulfill, in addition to the government's role, and they were the basis for the Figures on public notice (**Figure 6**); Indigenous Peoples consultation (**Figure 7**); and technical content and financial assurances (**Figure 8**). Again, the researchers added information from the Validation Workshop to add items of actual practice of the process. See **Annex 1** for the mapped process without vulnerabilities; see **Annex 2** for the mapped process with vulnerabilities, and **Annex 3** sets out all mapped vulnerabilities.

In addition, as set out in **Figure 4** (see next page), the researchers used the evidence set out therein to support the process of the mapping exercise.

93 Tom Flanagan, "Corruption and First Nations." *Canadian Foreign Policy Journal 15*, 2017 (23:1).

Figure 4 Source of Evidence for Mapping Mine Closure Plan Process

Evidence About the Official Process	Evidence About Actual Practice
Official government websites	Official government websites
Government policy documents	Government policy documents
Practitioner Guidelines	Practitioner Guidelines
Mining Act and *Regulations*	Validation Workshop, May 8, 2017
Academic Research	

After having mapped the process, and as set out the MACRA Tool, the researchers used the guidelines therein to determine areas of vulnerabilities. The researchers then completed a PEST Analysis that is undertaken in a question-and answer format, and involves analyzing political, economic, social and technological factors (i.e. events) that could cause corruption.

Figure 5 sets out the sources the researchers used to complete the PEST Analysis:

Figure 5 Source of Evidence for PEST Analysis

Sources of Evidence for PEST Analysis
Official government websites
Government policy documents
Practitioner Guidelines
Mining Act and *Regulations*
Academic Research
Validation Workshop, May 8, 2017

With the results of the PEST Analysis, the researchers created a list of vulnerabilities to the closure process (see **Annex 5**). The list of vulnerabilities arising from both the Award Process Mapping and the PEST Analysis was then used to assess corruption risks derived therefrom.

Part 2: Assessing Corruption Risks

As per the instructions of the MACRA Tool, the researchers reviewed all the common risks and associated them to the specific vulnerability. Five risks were validated by the Working Group, TI Canada's Interim – Director and the researchers. These five risks were fully analyzed.

Worksheet C, set out in **Annex 6**, was prepared for each of the risks. Then Worksheet D, set out in **Annex 7**, plotted the risk on the matrix provided for in the MACRA Tool, with likelihood and impact as variables. Finally, the risks were prioritized taking into consideration urgency, impact and feasibility of addressing the risk.

The description and analysis of closure planning process is set out in Section 4, and the results are described in Section 5 of this report.

4 Closure Planning Process Analysis

An overview of the mine closure process is set out in **Figure 2**. As set out in the methodology, to detail the process, the researchers subdivided it into three separate steps. The steps are: Step 1: Public Notice; Step 2: Indigenous Peoples Consultation; and Step 3: Content of Plan and Financial Assurances. The reason why the researchers divided the process into these three steps is because each step has its own distinct vulnerabilities.

Process Map and Vulnerabilities

Ten vulnerabilities were mapped out as set out in **Figure 6**. On page 29 of the report, these vulnerabilities will be analyzed against resulting corruption risk. In the MACRA Tool, risk is defined as "the uncertainty about the likelihood and impact of events that could have a corrupt effect on the lawful compliance and ethical awarding of government licensing." In this case, even though the mine closure filing process is neither a licence, permit, nor contract, it is a government act, which is required for the development of mines.

Figure 6 Ten Vulnerabilities Mapped

Step 1: Public Notice

V.1. No clarity on when public notice will be required from proponents.[94]

V.2. Unclear whether public comments are then made public, or only provided to MNDM.

V.3. Unclear as to whether MNDM reviews (i) whether public notice has included relevant interested parties and (ii) content of public comments.

V.4. No third party oversight or community representative that ensures comments are reported to Director and included in report.

Step 2: Consultation with Indigenous Peoples

V.5. How list of Indigenous communities is determined is opaque, and it is questionable whether it is "publicly knowable."

V.6. Adequacy as to whether duty to consult has been fulfilled is at discretion of MNDM.

V.7. Lack of clarity as to when closure plans need to be re-done and re-filed due to impact of consultation.

Step 3: Substance of Report, Including Financial Assurances

V.8. Substance of financial assurances is protected from the Right to Information Act.

V.9. Lack of transparency on what are "reasonable grounds" to exercise security and how funds of security would be used.

Overall Vulnerability

V.10. Discretion - Director has authority to exempt proponent from complying with any procedure, requirement in Regulation and Rehabilitation Code if determined closure plan meets or exceeds objectives of the provision in which standard, procedure or requirement is set out.

94 In Workshop 2 it was brought to the researchers' attention that the issue on lack of clarity for when public notice will be required is much broader than mere timing. It includes issues such as content and access, in addition to timing. A recent example offered at a Validation Workshop related to a case regarding a mine closure plan listed on the Environmental Registry and the lack of supporting documentation, lack of reasonable access (as the documents posted were not in digital form and required a trip of hundreds of kilometres), as well as inadequacy of scientific information in a number of areas.

Figure 7 sets out the vulnerabilities mapped within the mine closure processes, specifically with regards to the provision of public notice, including how and when proponents are required to inform the Director with the names and written comments obtained during the public notice process. Section 8 of the Regulations set out the requirements as to how public notice is to be given, but not in what circumstances. Note that even though MNDM confirmed it reviews whether public comments have been addressed, the lack of clarity remains due to the fact that there is no transparent process setting out as to whether the public has full disclosure of all comments and how proponents have addressed such comments.

Figure 7 Notice to the Public - Step 1

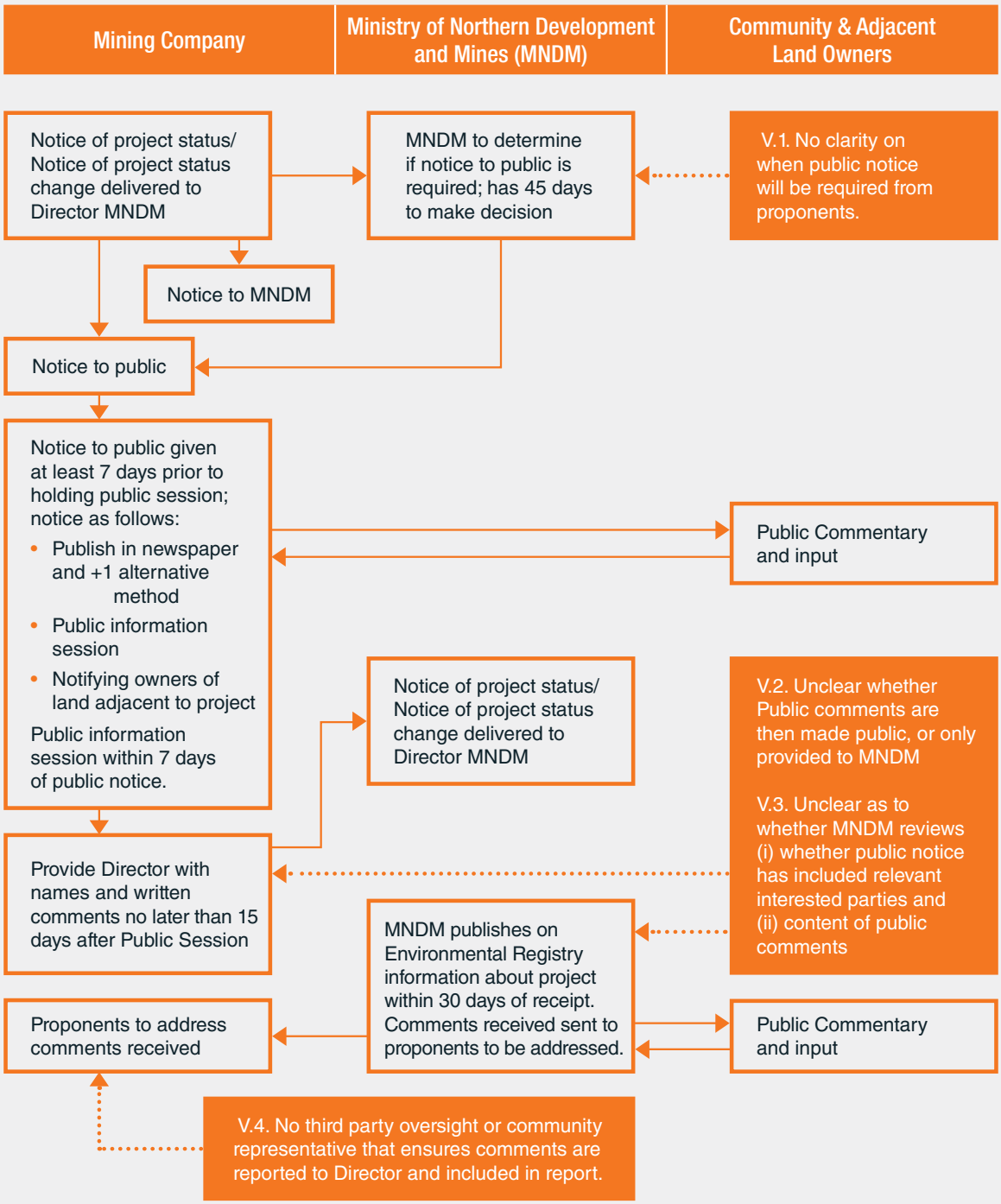


Figure 8 describes how consultation with Indigenous Peoples is to proceed, and what are the steps arising from the consultation process. The process map shows that the consultation process is to be incorporated into a Consultation Report, and how the government may require interim reports and amended reports depending on the consultation process. Even though MNDM may have internal processes that determine which Indigenous communities will be consulted and whether the duty to consult has been fulfilled, this information is not transparent to the public and civil society.

Figure 8 Consultations with Indigenous Peoples - Step 2

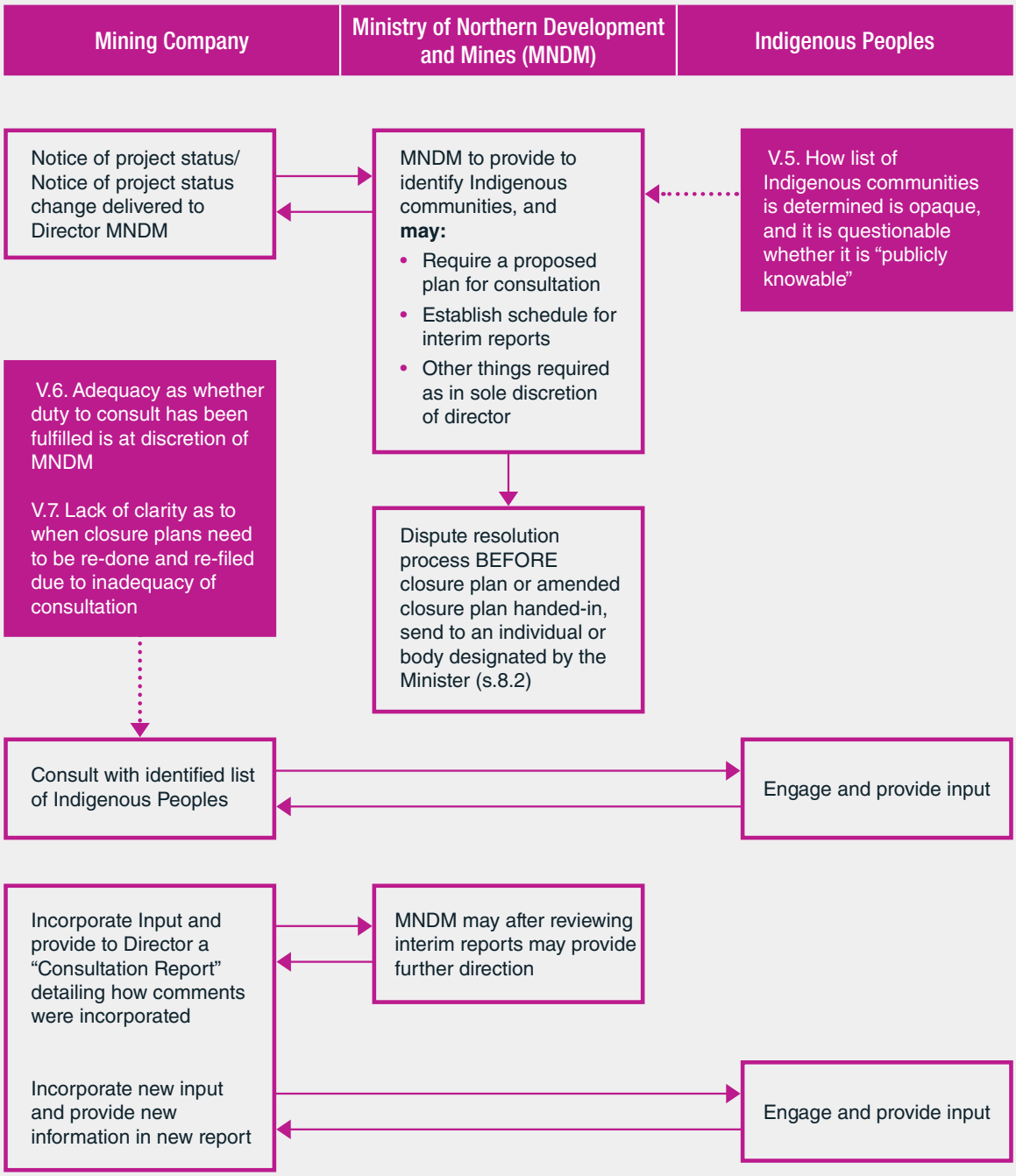
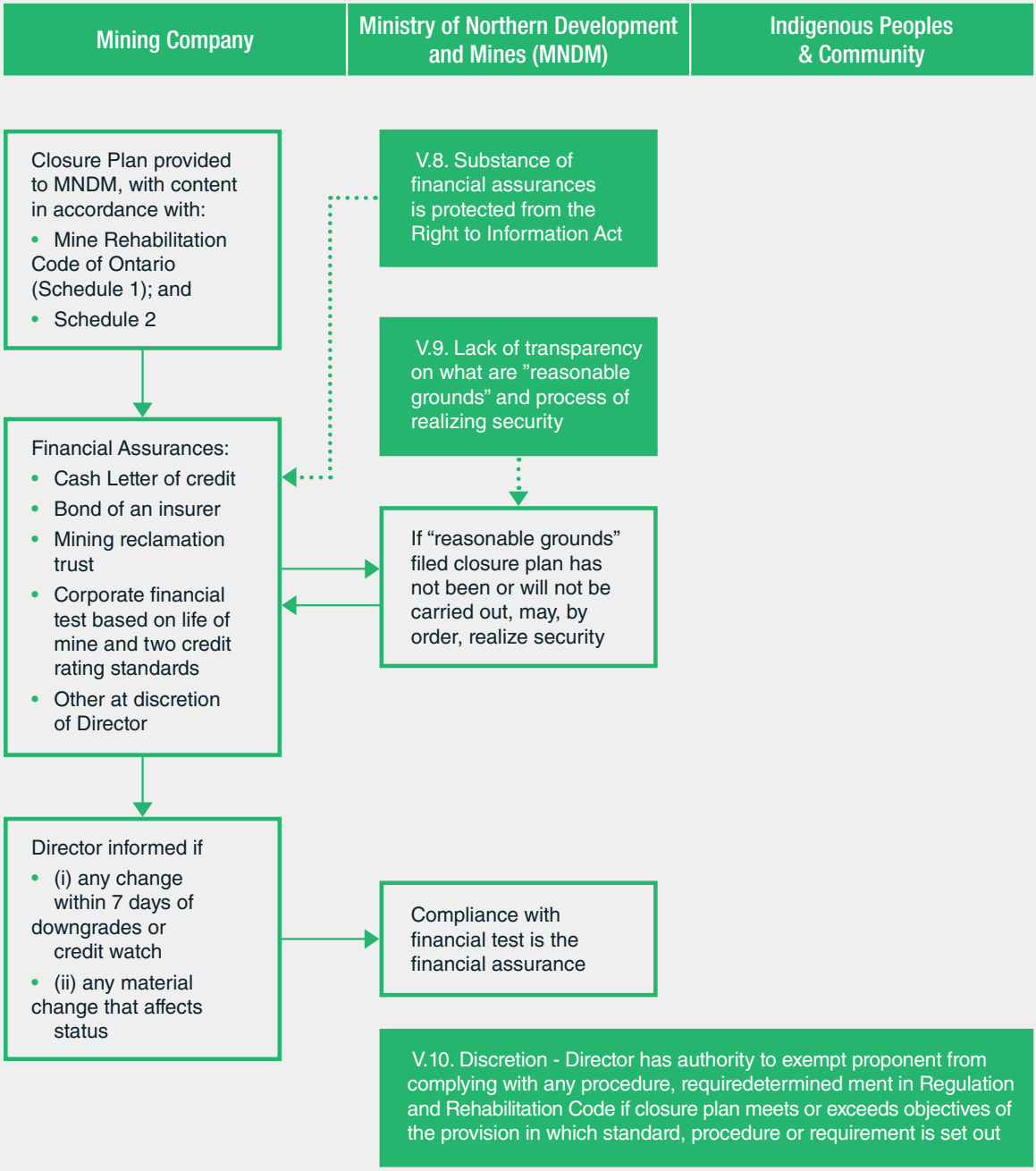


Figure 9 sets out when the submission of the mine closure plan is to be delivered, in addition to how financial assurances are to be given to the government. The issue of lack of transparency of financial assurances encompasses both how the assurance is calculated, as well as the ultimate value. Furthermore, it is important to note that mine closure plans are highly technical. Therefore, the disclosure of the financial assurances, including their calculations as well as their adequacy is difficult to determine.[95]

Figure 9 Submission of Closure Plan and Financial Assurances



PEST Analysis

As outlined in the MACRA Tool methodology the PEST Analysis takes into consideration the contextual factors of the jurisdiction. The results of the PEST Analysis are set out in **Annex 4**.

Political

In the political section, five factors were chosen. The factors are broad in scope and assist in setting out the idiosyncrasies of the Canadian political environment. For example, the questions broached topics that included the limitation of the division of power between federal and provincial governments, including the overlapping importance of federal and constitutional law both in terms of Indigenous Peoples and corruption. The vulnerability that arose from the political section of the analysis was:

- P6. Lack of transparency regarding how government officials decide on certain matters, specifically which groups from Indigenous Peoples need to be contacted to fulfill duty to consult creates lack of ability for oversight.

Economic

Three factors were reviewed in the economic section of the PEST Analysis. The factors highlighted the importance of the mining industry to Canada, the relative misalignment between economic drivers and the mine closing process, and finally the status of disclosure of beneficial ownership in Canada. Three vulnerabilities arose from this analysis:

- E2. The disconnect on timelines, especially with regards to speed of duty to consult compared to project timelines, could lead to undue pressure on Indigenous Peoples.
- E3. Lack of transparency on value of financial assurances.
- E3. Lack of transparency on whether government does any due diligence on corporate entities, and beneficial ownership.

Social

Regarding social factors, the issues included the significance of Canada's accession to UNDRIP, how organized Indigenous Peoples were with respect to the mining industry, and the level of administrative oversight of public officials. The vulnerability that arose was:

- S2. The internal organization of affected Indigenous Peoples and community members may lead to questionable leadership and authority to negotiate with industry.

Technical

Due to the technical complexity of the substance of closure planning process, the following vulnerabilities stood out:

- T2. Technical complexity of substance of closure planning process may create agreement between government and business as to what is necessary, without allowing for third party independent oversight.

Risk Matrix

The following five risks were evaluated:

Risk	Vulnerabilities	Risk Factors Code	Description of Risk Factor
1	V3 Unclear as to whether MNDM reviews (i) whether public notice has included relevant interested parties and (ii) content of public comments.	RA10	**What is the risk that community leaders negotiating with a mining company can remain anonymous?** Mining companies should be required to publicly disclose which community representatives they are meeting to reduce the risk of corruption around who gets consulted and which groups get represented.
2	V3 Unclear as to whether MNDM reviews (i) whether public notice has included relevant interested parties and (ii) content of public comments.	RA11	**Assuming consultation with affected communities is required, what is the risk that breaches of consultation laws or regulations governing consultation will not be prosecuted?** If mining companies (or mining departments) know they will not be prosecuted for ignoring consultation laws around consent, they are likely to (a) ignore those laws, and (b) engage in corrupt forms of 'consultation' if it facilitates obtaining consent.
3	V6 Adequacy as to whether duty to consult has been fulfilled is at discretion of MNDM.	PD16	**What is the risk that negotiations with Indigenous Communities can be manipulated?** Having laws that guarantee and standardise terms and conditions for conducting negotiations reduces the risk of corrupt behaviour, such as the marginalisation of certain landholders, unauthorised contact in breach of terms, or the giving of bribes, gifts and benefits
4	V6 Adequacy as to whether duty to consult has been fulfilled is at discretion of MNDM.	PP6 – N1	**What is the risk that the duty to consult / or public notice will be ignored because of corrupt practices?** Sometimes consent is required on paper and all actors can ignore, manipulate and engage in corrupt practices such as bribery and gift-giving/ receiving.
5	P6 Lack of transparency regarding how government officials decide on certain matters, specifically which groups from Indigenous Peoples needs to be contacted to fulfill duty to consult creates lack of ability for oversight.	PD3	**What is the risk that the steps of an awards process will not be publicly knowable?** When all information is publicly knowable, especially if published in a flowchart or diagram, stakeholders know precisely what to expect and can hold officials to account if proper process is not followed.

The analysis of each risk is set out in Worksheet C - 6. The resulting risk matrix is set out in **Figure 10**.

Figure 10 Risk Matrix

Prioritizing the Risks

To prioritize the risks, the researchers followed the MACRA Tool and took into consideration urgency, impact and feasibility in addressing the risks.

5 Results & Discussion

As stated above, the definition of risk is the uncertainty about the likelihood and impact of events that could have a corrupt effect on the lawful compliance and ethical awarding of licences, permits and contracts.

The results of the research point to two prioritized risks: the risk of manipulation of negotiations with Indigenous Peoples, and the fact that certain steps of the award process are not publicly knowable. Both risks point to a lack of transparency in the award process of mine closure plans. A lack of transparency may result in deficient accountability.

Below, the researchers analyzed the two prioritized risks.

Risk 3: What is the risk that negotiations with Indigenous Communities can be manipulated?

As set out in the MACRA Tool, the concern about negotiations with Indigenous Peoples is to ensure that there are laws that guarantee and standardize terms and conditions for conducting negotiations to reduce the risk of corrupt behaviour.[95] At this time, the substance of the duty to consult in Canada is unclear.[96] The numerous reports, papers, and conferences, prepared by different segments of society demonstrate this lack of clarity.[97] Such obscurity may allow for negotiations to be marred by behaviour that results in abuse of entrusted power for private gain.

95 For example the OAG, the Canadian Chamber of Commerce and the Ontario Mining Industry have all highlighted the need for further clarity in this area. Ontario Mining Association, *Position Paper on Relations with Aboriginal Communities*. May 11, 2016, delivered to the Minister of Northern Development and Mines and the Minister of Aboriginal Affairs.

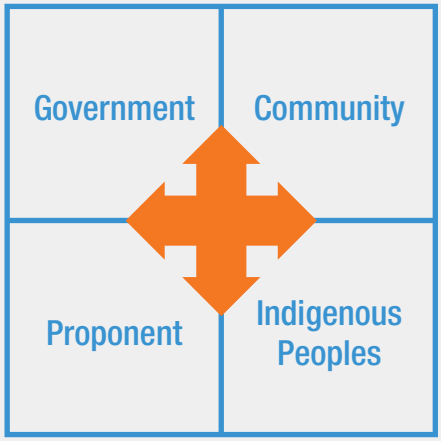
96 For example the Office of the Auditor General of Ontario, *Annual Report 2015*. (443). Referenced from www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf. The OAG Report states, "Lack of clarity on duty to consult with Aboriginal communities slows investment…." "the high cost of travelling to many remote Aboriginal communities, and because it was not possible to anticipate either the length of time required to complete consultation, or the outcome of those consultations" discouraged investments. In s. 4.1.3. the OAG states, "Unclear duty to consult process with Aboriginal Communities impedes investments." (448). Furthermore, the OAG states that in comparison to other provinces, Ontario delegates more aspects of the consultation process to the private sector, and is less involved than other jurisdictions, such as British Columbia and Quebec. *Ibid*, 448.

During the Validation Workshop various comments pointed to the need to make the process of mine closure more transparent and to clarify how to comply with the duty to consult. Recent litigation, such as *Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*[98] *(Wabauskang)*, reinforces the fact that the fulfillment of the duty to consult in mine closure processes is still controversial. In that case, the court found for the Crown; the issue was whether the Director's decision to approve Rubicon's Production Mine Closure Plan amounted to a breach of the Crown's duty to consult and accommodate the Wabauskang First Nation (WFN). Specifically, the WFN challenged, among other things, (i) Ontario's authority and jurisdiction to accept a Closure Plan, (ii) whether the Crown improperly delegated certain aspects of its duty to consult to Rubicon and (iii) whether the Crown breached its duty to consult by failing to share the results of its assessment of the WFN's claim with the WFN.

The lack of clear definition on who, how, what, when, and why (and including with regards to timing) is a serious concern as it leaves open the possibility of manipulation of negotiations through illegal manners, which may translate into corrupt actions between all actors involved. This risk has a potentially severe impact in that the manipulation of negotiations brings disrepute to mining activities in general, and may create a chilling effect for new projects and in communities/ Indigenous Peoples groups, thus limiting the implementation of projects all together and perhaps limiting beneficial results of such economic activity.

The correlated risks with unregulated negotiations with Indigenous Peoples are that the risk of corrupt behaviour can flow in many directions, and within each of the institutions of the principal actors, as depicted in **Figure 11**.

Figure 11
Risk Flow



However, it is important to state that the duty to consult is not specific or unique to the mine closure plans process. It is a much larger component of the relationship between Indigenous Peoples, the government, and the mining industry. Intermingled with other activities such as EIAs and negotiations of IBAs, the duty to consult is at the heart of Indigenous Peoples' rights, government relations with Indigenous Peoples, and the survival of the mining industry.

97 For example, see: *Canadian Chamber of Commerce, supra* note 17. See also: Risa Schwartz, "Realizing Indigenous rights in international environment law: a Canadian perspective." *CIGI Papers, No. 109*, October 2016; Dwight Newman, "Why the duty to consult may be harming Aboriginal communities," *Globe and Mail*, May 6, 2014. Referenced from www.theglobeandmail.com/opinion/why-the-duty-to-consult-may-be-harming-aboriginal-communities/article18482956/; Lori Sterling and Peter Landmann, "The duty to consult Aboriginal peoples." *Public Law at the McLachlin Court: the First Decade*, ed. David A. Wright & Adam Dodek. Irwin Law, 2011. Referenced from www.cba.org/cba/cle/PDF/Constit09_Sterling_paper.pdf; *Bains and Ishkanian, supra* note 24; The Canadian Institute, "Annual conference on environmental law and regulation – the duty to consult." June 21, 2016.

98 *Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*. 2014 ONSC 4424.

Risk 5: What is the risk that the steps of an awards process will not be publicly knowable?

The research shows that there are many steps of the closure plan process that are not publicly knowable, i.e. not transparent, and in some cases not even legally knowable. The opaqueness stems at different moments of the process, and can be summarized as follows:

(a) When public notices are to be given regarding mine closure plans;

(b) How the list of Indigenous Peoples for consultation purposes is arrived at;

(c) When and how the duty to consult has been fulfilled; and

(d) The values of financial assurances.

The opaqueness of how the value of financial assurances is calculated, as well as the value of the financial assurance is perhaps the most severe. Due to the *Mining Act* specifically legislating that this information is protected against the *Right to Information Act*[99], which is legislation that gives the public a right to access records of government institutions subject to that Act. Even though there may be important economic reasons for proponents to desire confidentiality of assurance values, the balance between transparency/accountability and economic confidentiality perhaps has not been struck in this case. Such lack of balance creates a legally acceptable omission of information, and thus, limits the oversight that third parties, including civil society, can have on reviewing the values and, indeed, the sufficiency of such values for the rehabilitation of lands. MNDM has advised TI Canada that it is planning on publishing further clarification on public access to financial assurances. At the time of publishing of this report, such clarification had neither been made public nor provided to the researchers or TI Canada.

The lack of transparency regarding when public notices are required in the process of mine closure plans may be an easy fix. An amendment to the regulations determining when such requirement is due may suffice in clarifying this matter somewhat. Even though the regulations would benefit from a more prescriptive approach in ensuring disclosure by proponents of who was contacted, beyond those that attended public notices. Moreover, from the research, this lack of transparency brings forward questions surrounding non-Indigenous Peoples and the relationship with mining projects. In the research, we found a vast quantity of information on the negotiations with Indigenous Peoples, but little on non-Indigenous Peoples' relationship with mining projects, and possible risks associated with this relationship. Further research is recommended as set out below.
The risks set out in (b) and (c) ought to be dealt with in a holistic approach to the issue of negotiations with Indigenous Peoples, as set out in the recommendations.

The lack of transparency in the various portions of the mine closure process may not only give rise to questions as to whether the proper process is being followed by all parties, but it also may bring confusion and lacunas that may give space to risky behaviour resulting in corrupt actions.

99 *Right to Information Act*, RSC, 1985, c A-1.

6 Recommendations

A number of recommendations arise from the two prioritized risks:

- Negotiations with Indigenous Peoples occur throughout the mining cycle, and it ensues during various processes that proponents must go through during the mining cycle. In order to address this issue, a holistic approach is recommended. It is not recommended to approach either research or policy positioning on the duty to consult under the mine closure process only. Furthermore, as this issue is presently front and center in the mind of industry, Indigenous Peoples, and government, TI Canada action should be taken as soon as possible so that policy can be influenced in favour of transparency and accountability, and bearing in mind the prevention of corruption.

- The opaqueness of the calculation, as well as the value of financial assurances, may be addressed directly in two steps:
  - Amending the regulations so as to remove the protection from the *Right to Information Act*. In order to do so, it is recommended that further research on the policy behind this exception be undertaken, specifically reviewing the amendments to the 2009 *Mining Act*, including debates amongst legislators or commissions that reviewed this issue so that the concerns underlying disclosure may be understood, addressed, and maybe even mitigated.
  - Reviewing the *ESTMA*, which was enacted on December 16, 2014, and brought into force on June 1, 2015, in order to determine whether the value of financial assurances may fall under the terms of the Act. If this is not a possibility, then evaluate *ESTMA* to determine whether it could be amended to ensure that the value of financial assurance becomes public knowable.
- Further research is recommended on aspects of the mine closure plan that were not include in the scope of work, which are the risks arising from: (i) the selection of activities within the closure plans and the actual implementation of closure plans, including and for example, contractor selection; (ii) the possible risks arising from the need to maintain financial assurances in place over time (especially when considering long life of mine projects); and (iii) the adequacy of the values of the financial assurances, and risks arising therefrom.
- Considering the risks that have been raised in this report, further research is recommended so as to map mine closure processes across all provinces and territories in Canada. Comparing and contrasting the various processes may be beneficial, as it would allow for best practices to be shared among provinces and territories, as well as provide clarity and transparency on the differences between the provinces.[100]
- The question of the relationship and negotiations between the industry, government and non-Indigenous communities should be placed on TI Canada's watch-list. The lack of research in this area is curious and should be contemplated when feasible.

100 For example, in May 2016, British Columbia's Auditor General audited compliance and enforcement of the mining sector, which includes mine closure processes, including the addition of a recommendation for government to provide closure management manuals. For example, it perhaps would have been beneficial for Ontario's General Auditor to undertake the same work. See: Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector.* May 2016. Referenced from www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf

7 Conclusion

Canada is a mining powerhouse. It is both a home and host country for the mining industry, and it is a hub for mining finance. As such, Canada has the opportunity to lead in the implementation of processes that are transparent, and that allow for full accountability. Mine closure plans approval processes are only one step within a myriad of complex processes throughout the mine development cycle. From the research undertaken it is clear that there is space for improvement.

8 Reference List

Legislation

Access to Information Act, RSC, 1985, c A-1.

Aggregate Resources and Mining Modernization Act, 2017, SO 2017 c 6.

Canadian Environmental Assessment Act, SC 1992, c 37.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Construction Lien Act, RSO 1990, c C 30.

Corruption of Foreign Public Officials Act, SC 1998, c 34.

Criminal Code, RSC 1985, c C-46.

Environmental Assessment Act, RSO 1990, c E 18.

Environmental Bill of Rights, 1993, S.O. 1993, c.28.

Extractives Sector Transparency Measures Act, SC 2014, c 39.

Mine Development and Closure Under Part VII of the Mining Act, O Reg 240/00.

Mining Act, RSO 1990, c M 14.

Ministry of Natural Resources Act, RSO 1990, c M 31.

Placer Mining Act, SY 2003, c 13.

Quartz Mining Act, SY 2003, c 14.

Tsilhqot'in Nation v. British Columbia 2014 SCC 44.

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNDESA, 66th Sess, (2007).

Jurisprudence

Canada v. Mikisew Cree First Nation, 2016 FCA 311.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511.

Rio Tinto Alcan v. Carrier Sekani Tribal Council, [2010] 2 SCR 650.

Verdon Gold Inc. v. Director of Mine Rehabilitation, (2003) File No. MA 038-00.

Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines), 2014 ONSC 4424.

Secondary Materials

Abdel-Barr, Khaled and MacMillan, Karen. (2016). *The International Comparative Legal Guide to Mining Law: A Practical Cross-Border Insight Into Mining Law*. London: Global Legal Group. Retrieved from: www.lawsonlundell.com/media/news/496_The%20International%20Comparative%20Legal%20Guide%20to%20Mining%20Law%202016.pdf

Anishinabek Nation. (January 15, 2009). *Below the Surface: Anishinabek Mining Strategy Final Report*. Retrieved from: www.anishinabek.ca/wp-content/uploads/2016/07/Mining-Final-Report.pdf

Arshinoff, Noah. (April 6, 2017). "Who's in control? Unmasking the beneficial owners of companies." *Canadian Bar Association National Magazine.*

Auditor General of British Columbia. (May 2016). *An Audit of Compliance and Enforcement of the Mining Sector.* Retrieved from: www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf

Bains, Ravina and Ishkanian, Kayla. (May 2016). *The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies.* Fraser Institute. Retrieved from: www.fraserinstitute.org/sites/default/files/duty-to-consult-with-aboriginal-peoples-a-patchwork-of-canadian-policies.pdf

Blake, Sara. (2017). *Administrative Law in Canada, 6th ed.* Lexis Nexis Canada.

Blakes LLP. (July 2012). *Mining Tenures in Ontario*. Retrieved from: www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=16

"SNC-Lavalin to pay $1.5 Million in African corruption case." (October 1, 2015). Canadian Press. Retrieved from: www.huffingtonpost.ca/2015/10/01/snc-lavalin-settles-corruption-case-brought-by-african-development-bank_n_8226700.html

Chen, Duanjie and Mintz, Jack. (2013). "Repairing Canada's mining-tax system to be less distorting and complex." SPP Research Papers, 6(18). Retrieved from: www.ceaa-acee.gc.ca/050/documents_staticpost/63928/90971/2.pdf

Coates, Ken and Flavel, Blaine. (May 19, 2016). "Embrace of UNDRIP can bring Aboriginal Canada and Ottawa closer together." *iPolitics.* Retrieved from: www.macdonaldlaurier.ca/embrace-of-undrip-can-bring-aboriginal-canada-and-ottawa-closer-together-ken-coates-and-blaine-favel-for-ipolitics/

Davies, Ward, Phillips and Vineberg LLP. (June 2014). *Anti-Corruption Legislation in Canada.* Retrieved from: www.dwpv.com/-/media/Files/PDF_EN/2014-2007/Anti-Corruption-Legislation-in-Canada-June-2014.ashx?la=en>

Deloitte LLP. (May 2014). *Corruption in Canada: Definitions and Enforcement.* Prepared for Public Safety Canada (Report No. 46). Retrieved from: publications.gc.ca/collections/collection_2015/sp-ps/PS18-10-2014-eng.pdf

Department of Finance Canada. (2015). *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada.* Retrieved from: www.fin.gc.ca/pub/mltf-rpcfat/index-eng.asp

Drake, Karen. (2015). "The trials and tribulations of Ontario's *Mining Act*: The duty to consult and Anishinaabek Law." *McGill International Journal of Sustainable Development Law and Policy 183.*

Energy and Mines Ministers' Conference. (August 2014). *Good Practices in Community Engagement and Readiness: Compendium of Case Studies From Canada's Mineral and Metals Sector.*

Flanagan, Tom. (2017). "Corruption and First Nations." *Canadian Foreign Policy Journal 15,* 23:1.

Fontaine, Tim. (May 10, 2016). "Canada officially adopts UN declaration on rights of Indigenous Peoples: Standing ovation at UN greets Indigenous Affairs Minister Carolyn Bennett's announcement." *CBC News.* Retrieved from: www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272

GAN Business Anti-Corruption Portal, *Canada Corruption Report.* Retrieved from: www.business-anti-corruption.com/country-profiles/canada

Golder Associates. (December 2013). *Osikso Hammond Reef Gold Conceptual Closure and Rehabilitation Plan.* Prepared for Osikso Hammond Reef Gold Ltd. Retrieved from: www.canadianmalartic.com/documents/hammond/05-Technical-Support-Documents/Conceptual%20Closure%20and%20Rehabilitation%20Plan%20Version%202.pdf

Gogal, Sandra, Riegert, Richard and Jamieson, Joann. (2005). "Aboriginal impact and benefit agreements: Practical considerations." *Alberta Law Review 129*, 43.

Hawkins, Matthew. (2008). "Rest assured? A critical assessment of Ontario's mine closure financial assurance scheme." *Journal of Energy & Natural Resources Law 499*, 26(4).

Hegadoren, D.B. and Day, J.D. (1981). "Socioeconomic mine termination policies: A case study of mine closure in Ontario." *Resources Policy 265.*

Howe, Adrian. (July 2016). "Canada pushes forward with UNDRIP." *Indigenous Law Bulletin 28*, 8(25).

Indigenous and Northern Affairs Canada. *Treaties with Aboriginal People in Canada*. Retrieved from: www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292

Isaac, Thomas. (2016). *Aboriginal Law, 5th ed.* Thomson Reuters/Carswell.

Isaac, Thomas. (2016). *Aboriginal Law: Supreme Court of Canada Decisions and Annotations.* Thomson Reuters.

Jackson, Taylor and Green, Kenneth P. (February 2017). *Fraser Institute Annual Survey of Mining Companies 2016.* Fraser Institute. Retrieved from: www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2016

Jang, Trevor. (24 July 2017). "Breaking tradition: Why consent from the entire community is crucial when it comes to getting First Nations' approval for resource projects." *Discourse Media.* Retrieved from: discoursemedia.org/power-struggle/breaking-tradition-first-nations

Legislative Assembly of Ontario. Bill C- 39, *Aggregate Resources and Mining Modernization Act*, 2017. SO 2017 c 6 (Explanatory Note). Retrieved from: www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4213&detailPage=bills_detail_status

Mineral Industry Consultants. (September 9, 2015). *Discoveries in Ontario's Ring of Fire*. Retrieved from: www.micon-international.com/discoveries-in-ontarios-ring-of-fire/

Mining Association of Canada. *Facts and Figures of the Canadian Mining Industry.* (2016). Retrieved from: mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf

Mining Facts. *What are Impact and Benefit Agreements.* Retrieved from: www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/

Ministry of Northern Development and Mines. *Mines and Minerals – Leases.* Retrieved from: www.mndm.gov.on.ca/en/mines-and-minerals/mining-sequence/evaluation/advanced-exploration/leases

Ministry of Natural Resources and Forestry. (May 9, 2017). "Ontario passes legislation to modernize resource management." Retrieved from: news.ontario.ca/mnr/en/2017/05/ontario-passes-legislation-to-modernize-resource-management.html

Ministry of Natural Resources and Forestry. *Mining Act Reasoned Decisions.* Retrieved from: www.ontario.ca/page/mining-act-reasoned-decisions

Ministry of Northern Development and Mines. *Modernizing the Mining Act*. Retrieved from: www.mndm.gov.on.ca/en/mines-and-minerals/mining-act/modernizing-mining-act

Munson, James. (July 2016). "Ottawa won't adopt UNDRIP directly into Canadian Law: Wilson-Raybould: Federal Government wants input from First Nations on building new relationship." *iPolitics*. Retrieved from: ipolitics.ca/2016/07/12/ottawa-wont-adopt-undrip-directly-into-canadian-law-wilson-raybould/

Natural Resources Canada. (January 2015). *Canada's Positive Investment Climate for Mineral Capital.* Retrieved from: www.nrcan.gc.ca/mining-materials/publications/8782

Natural Resources Canada. (March 2017). *Information Bulletin - Canadian Mineral Production in 2016.* Retrieved from: www.nrcan.gc.ca/mining-materials/publications/17722

Natural Resources Canada. (April 2017). *Information Sheet – Extractive Sector Transparency Measures Act.* Retrieved from: www.nrcan.gc.ca/mining-materials/estma/18184

Nest, Michel. (February 2017). "Preventing corruption in community mineral beneficiation schemes." U4 Anti-Corruption Resource Centre, CMI. Retrieved from: www.cmi.no/publications/file/6150-preventing-corruption-in-community-mineral.pdf

Nest, Michael. (October 7, 2016). "Mining awards corruption risk assessment tool." Transparency International Mining for Sustainable Development Programme.

Newman, Dwight. (May 6, 2014). "Why the duty to consult may be harming Aboriginal communities." *Globe and Mail.* Retrieved from: www.theglobeandmail.com/opinion/why-the-duty-to-consult-may-be-harming-aboriginal-communities/article18482956/

Olszynski, Martin. (June 2016). "The duty to consult and accommodate: An overview and discussion." Appendix 1 to *Seizing Six Opportunities for More Clarity in the Duty to Consult and Accommodate Process.* (September 2016). The Canadian Chamber of Commerce. Retrieved from: www.chamber.ca/media/blog/160914-seizing-six-opportunities-for-more-clarity-in-the-duty-to-consult-and-accommodate-process/

Olynyk, John M. (February 21, 2005). *The Haida Nation and Taku River Tlingit Decisions: Clarifying Roles and Responsibilities for Aboriginal Consultation and Accommodation.* Lawson Lundell LLP. Retrieved from: www.lawsonlundell.com/media/news/236_Negotiatorarticle.pdf

O'Faircheallaigh, Ciaran. (2015). "Social equity and large mining projects: Voluntary industry initiatives, public regulation and community development agreements." *Journal of Business Ethics 91*, 132(1).

Office of the Auditor General of Ontario, *Annual Report 2015.* Retrieved from: www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf

Ontario Chamber of Commerce. 2014). *Beneath the Surface: The Economic Potential of Ontario's Ring of Fire.* Retrieved from: www.occ.ca/Publications/Beneath_the_Surface_web.pdf

Ontario Investment Office. *Exploration and Mine Development.* Retrieved from: www.investinontario.com/exploration-and-mine-development#intro

Ontario Mining Association, *Facts & Figures.* Retrieved from: www.oma.on.ca/en/ontariomining/facts_figures.asp

Ontario Mining Association. (May 11, 2016). *Position Paper on Relations with Aboriginal Communities.* Delivered to the Minister of Northern Development and Mines and the Minister of Aboriginal Affairs.

Ontario Mining and Lands Commissioner. (2016), *Annual Report 2015-2016, Ontario Ministry of Natural Resources and Forestry.* Retrieved from: www.ontario.ca/page/mining-and-lands-commissioner-annual-report-2015-2016

Ontario Ministry of Northern Development and Mines. *Closure Plan Boundary & Land Tenure Guideline*. Retrieved from: www.mndm.gov.on.ca/sites/default/files/closure_plan_boundary_and_land_tenure_guideline_en.pdf

Ontario Ministry of Northern Development and Mines. *MNDM Policy: Consultation and Arrangement with Aboriginal Communities at Early Exploration.* Retrieved from: www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf

Ontario Northern Development and Mines. *Ring of Fire Secretariat – Environmental Assessment*. Retrieved from: www.mndm.gov.on.ca/en/ring-fire-secretariat/environmental-assessment

Ontario's Regulatory Registry. Retrieved from: www.ontariocanada.com/registry/view.do?postingId=22182

Porter, Jody. (January 30, 2017). "Ring of Fire mining development still years away from delivering on a decade of hype." *CBC News.* Retrieved from: www.cbc.ca/news/canada/thunder-bay/ring-of-fire-talks-1.3955236

Public Prosecution Service of Canada. (March 1, 2014). *Guideline of the Director Issued Under Section 3(3)(c) of the Director of Public Prosecutions Act.* Retrieved from: www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch08.html

Rynor, Becky. (January 27, 2015). "Canada gets soft on bribery: Why rules aimed at cracking down on corruption by mining firms miss the mark." *Maclean's Magazine.*

Schwartz, Risa. (October 2016). "Realizing Indigenous rights in international environment law: A Canadian perspective." *CIGI Papers, No. 109*. Retrieved from: www.cigionline.org/sites/default/files/documents/cigi_paper_no.109_1.pdf

Stantec Consulting Ltd. (January 2016). *Hardrock Project – Conceptual Closure Plan*. Prepared for Greenstone Gold Mines GP Inc. Retrieved from: www.greenstonegoldmines.com/upload/documents/draft-ea-eis-folder/app-i-concept-closur/i_conceptual-closure-plan.pdf

Statistics Canada. Retrieved from: www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/prim03-eng.htm

Sterling, Lori and Landmann, Peter. (2011). "The duty to consult Aboriginal peoples," *Public Law at the McLachlin Court: The First Decade*, ed. David A. Wright and Adam Dodek. Irwin Law. Retrieved from: www.cba.org/cba/cle/PDF/Constit09_Sterling_paper.pdf

The Canadian Chamber of Commerce. (September 2016). *Seizing Six Opportunities for More Clarity in the Duty to Consult and Accommodate Process*. Retrieved from: www.chamber.ca/media/blog/160914-seizing-six-opportunities-for-more-clarity-in-the-duty-to-consult-and-accommodate-process/

The Canadian Institute. (June 21, 2016). *Annual Conference on Environmental Law and Regulation – the Duty to Consult.*

The Canary Research Institute for Mining, Environment and Health. (August 2005). *Ontario Mining Fact Sheet – Mine Closure Plans – Your Right to Know*. Retrieved from: www.canaryinstitute.ca/publications/Ontario_Closure_Brochure.pdf

Transparency International Canada. (2016). *No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts.* Retrieved from: www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf

Transparency International Canada. (November 2015). *Beneficial Ownership Transparency*. Retrieved from: www.transparency.org/files/content/publication/2015_BOCountryReport_Canada.pdf

Transparency International Canada. *Who We Are*. Retrieved from: www.transparencycanada.ca/who-we-are/about-TI Canada/

Van Ert, Gib. (2017) "Three good reasons why UNDRIP can't be law – and one good reasons why it can." *The Advocate 29*, 75(1).

Investment Climate Advisory Services. (2009). *Sector Licensing Studies - Mining Sector.* Retrieved from: documents.worldbank.org/curated/en/867071468155129330/pdf/587890WP0Secto1BOX353819B001PUBLIC1.pdf

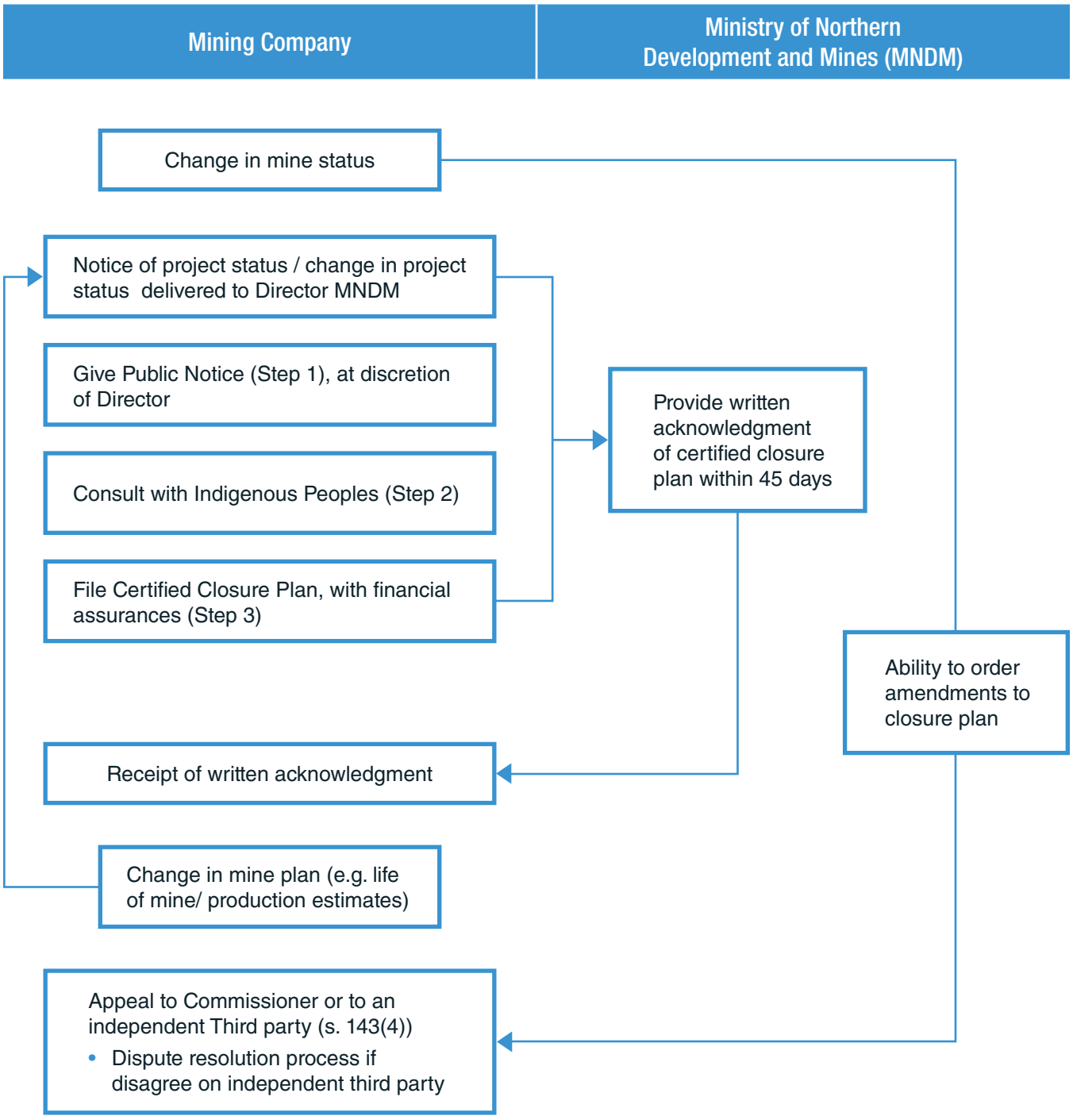
Annex 1

Process Map – Overview

All Proponents:

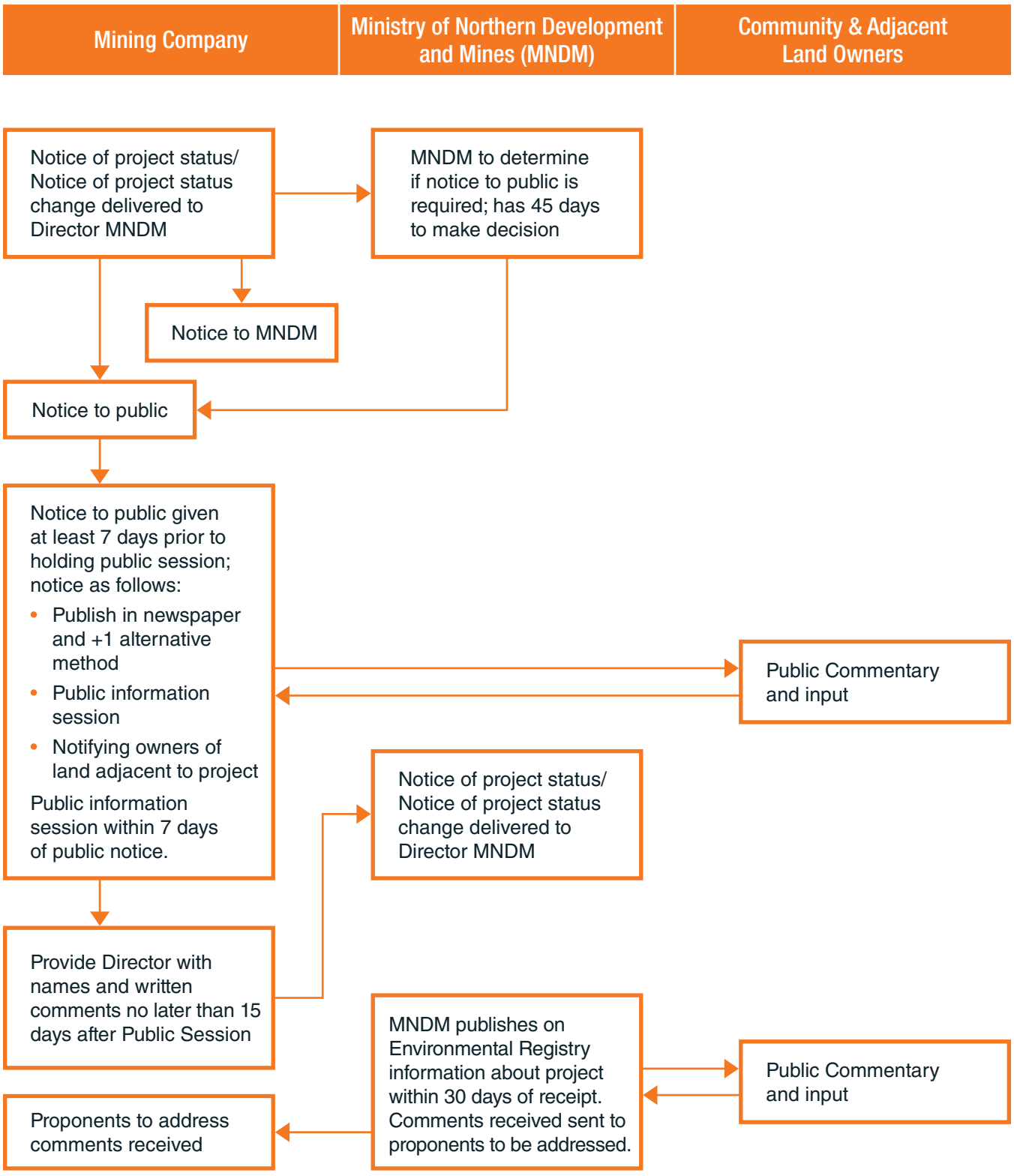
- To Commence or Recommence Advanced Exploration Phase (*Mining Act* at s.140)
- To Commence or Recommence Advanced Production Phase (*Mining Act* at s.141)

MUST undertake the following steps:



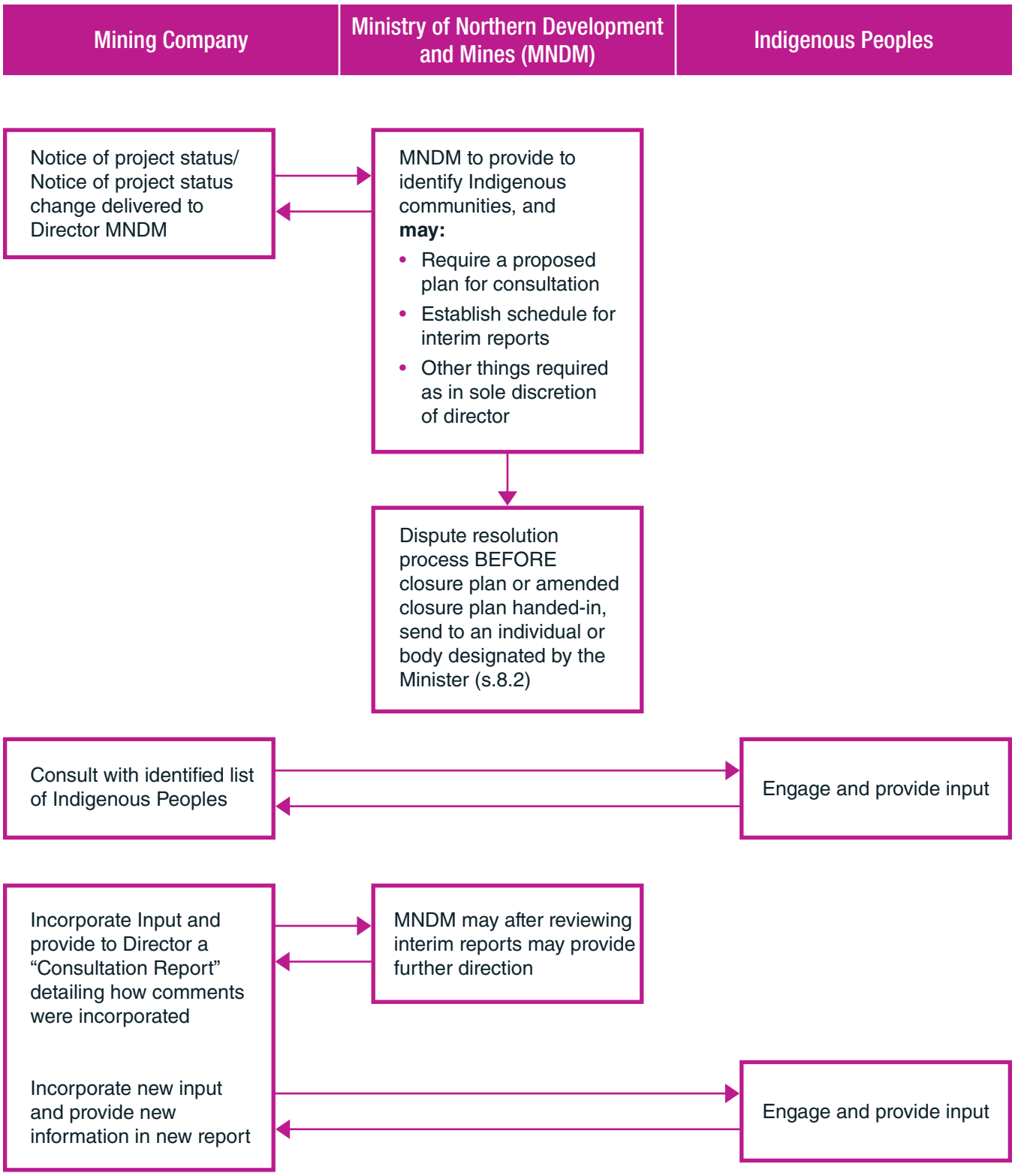
Annex 1

Step 1 – Notice to Public (s.8 Regs)



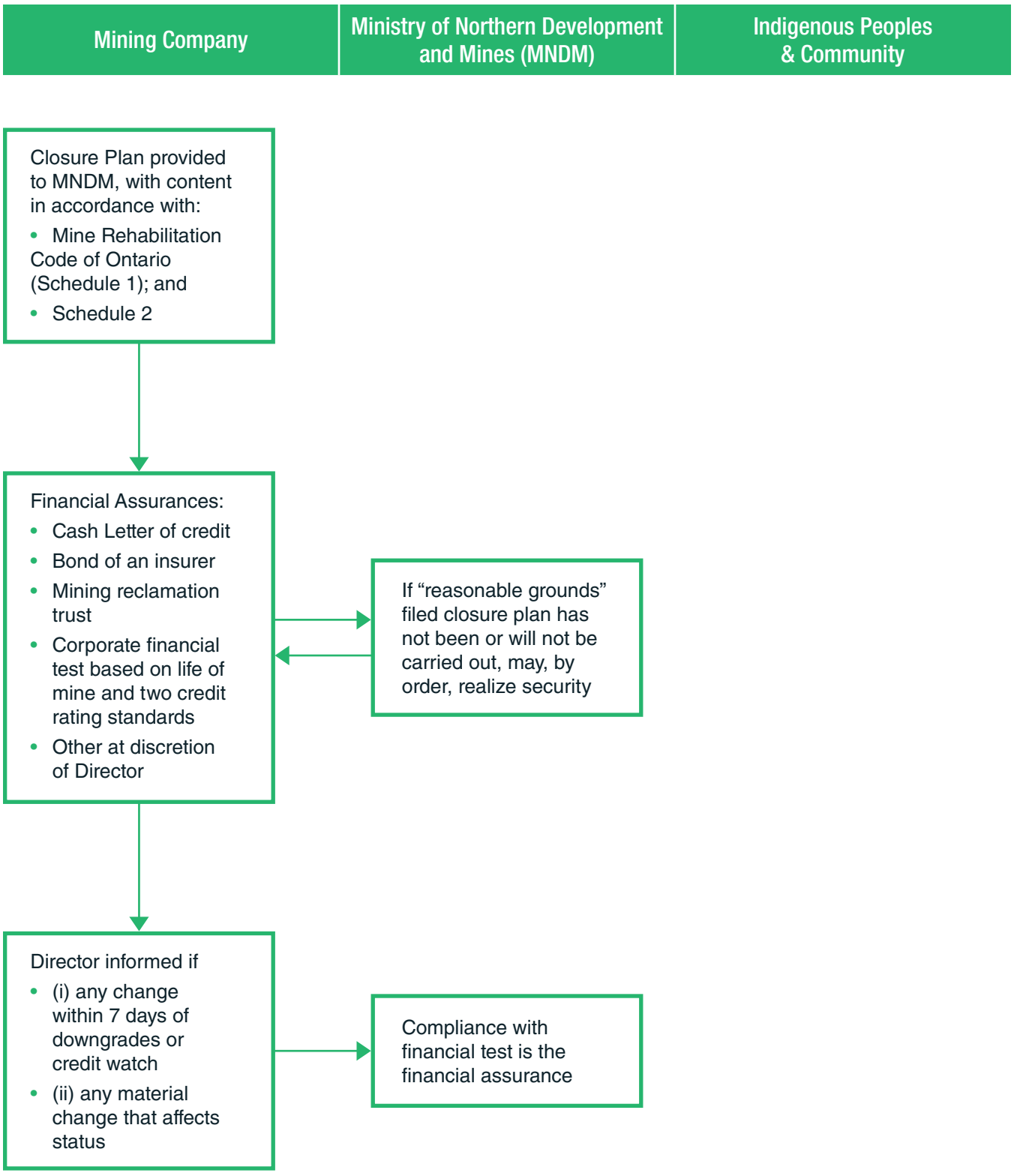
Annex 1

Step 2 – Consultation with Indigenous Peoples (s.8.1 Regs)



Annex 1

Step 3 – Submission of Closure Plan and Financial Assurance, Mining Act ss. 145, ss.13-18 Regs



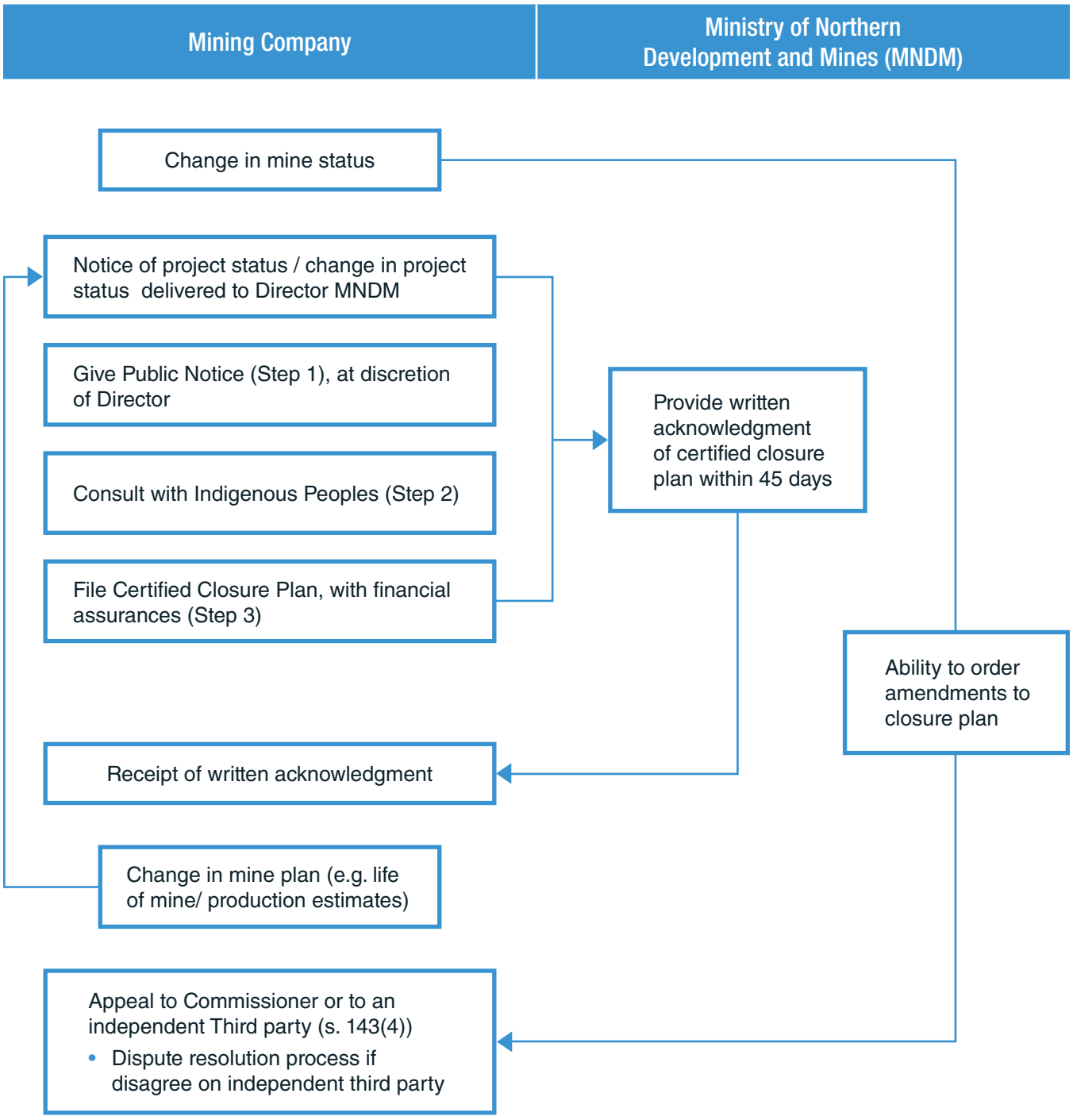
Annex 2

Process Map – Overview

All Proponents:

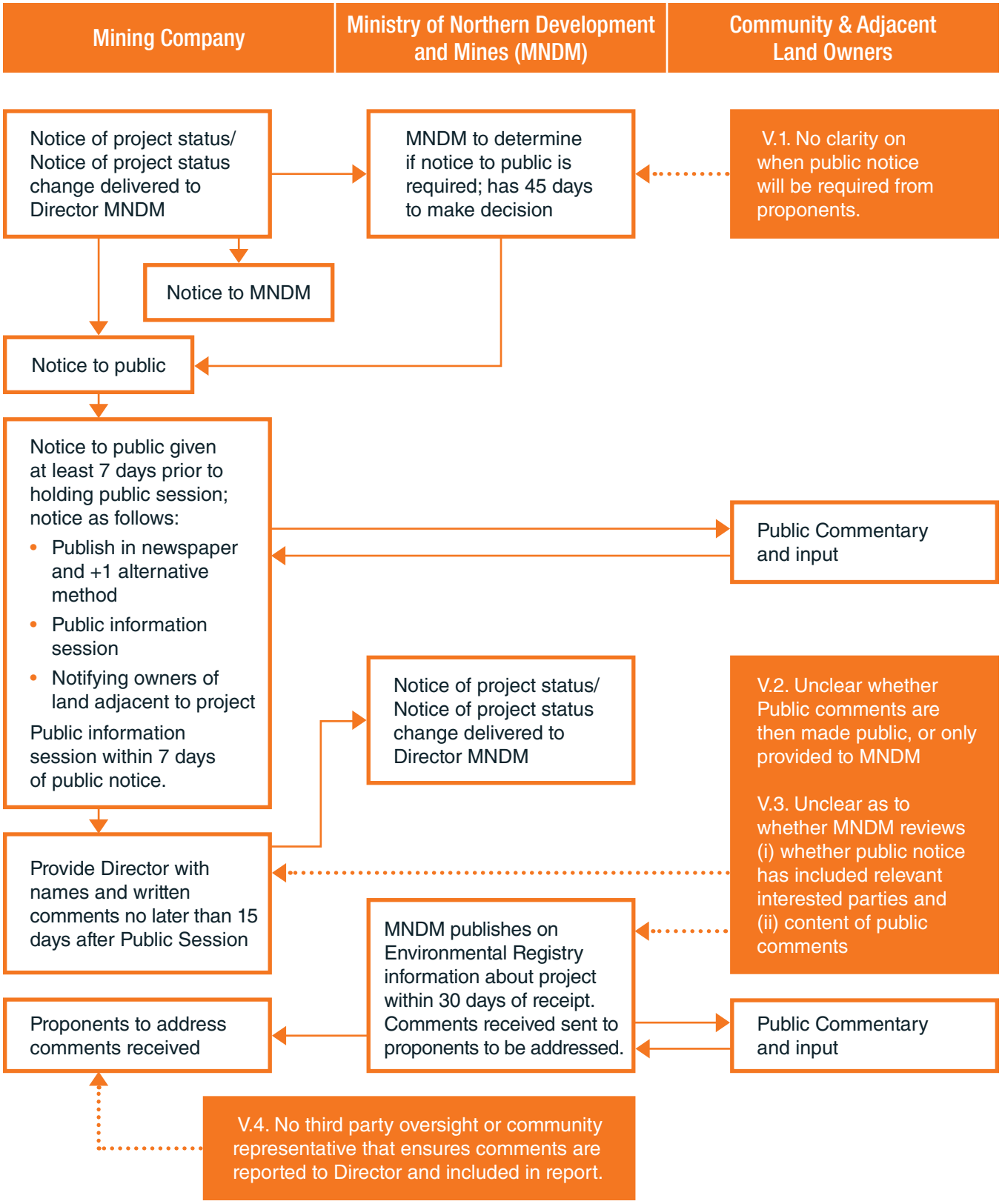
- To Commence or Recommence Advanced Exploration Phase (*Mining Act* at s.140)
- To Commence or Recommence Advanced Production Phase (*Mining Act* at s.141)

MUST undertake the following steps:



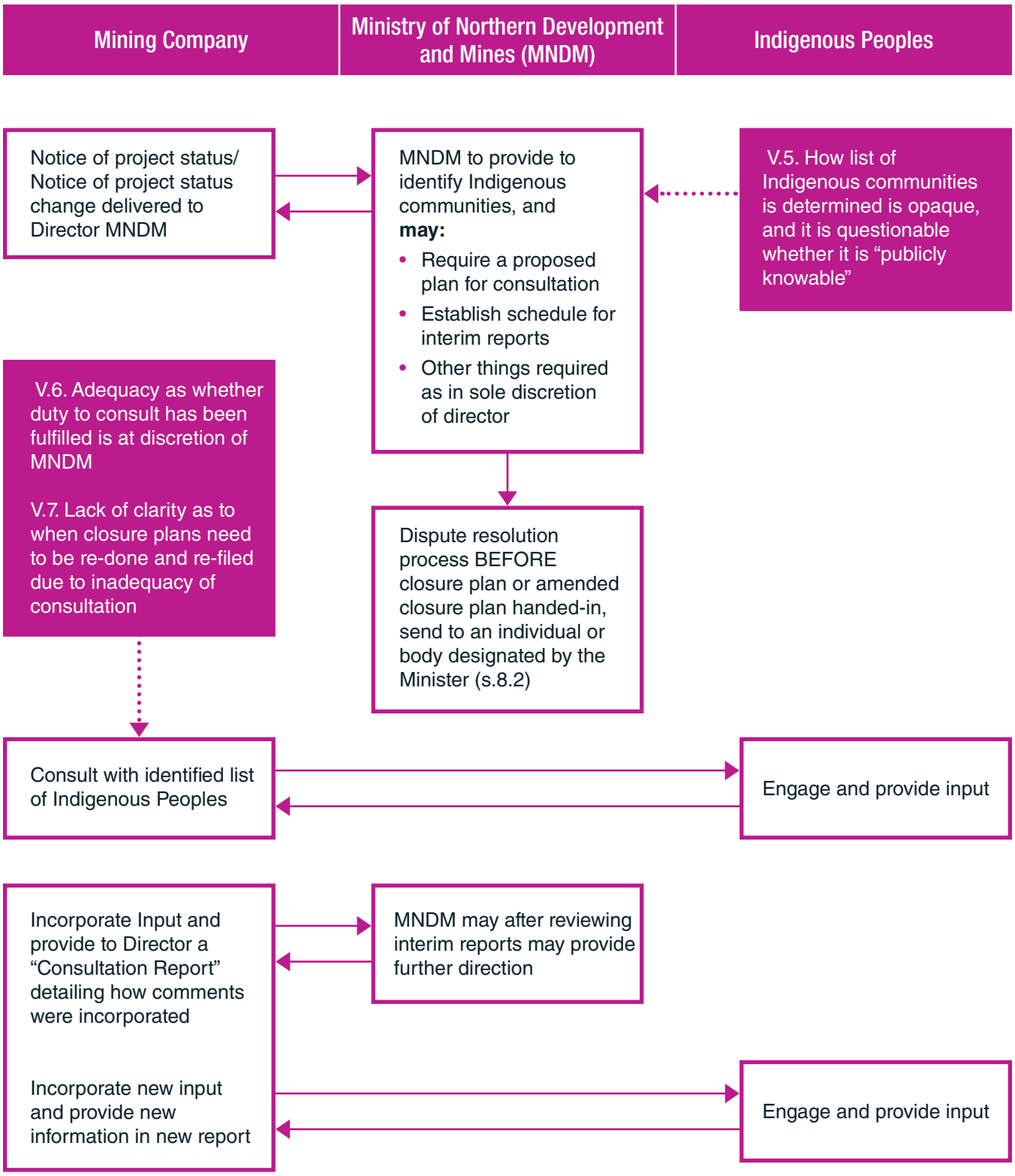
Annex 2

Step 1 – Notice to Public (s.8 Regs)



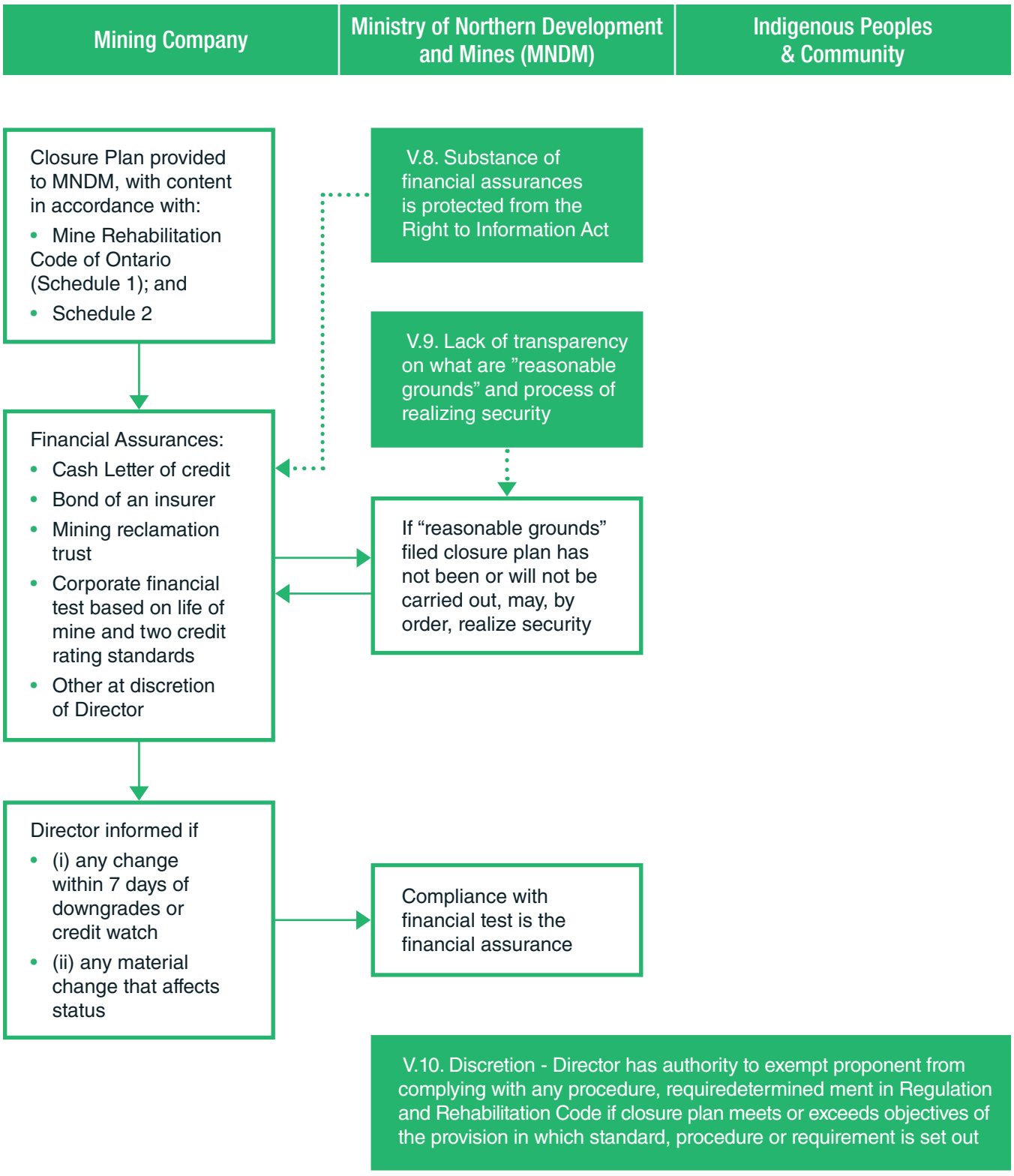
Annex 2

Step 2 – Consultation with Indigenous Peoples (s.8.1 Regs)



Annex 2

Step 3 – Submission of Closure Plan and Financial Assurance, Mining Act ss. 145, ss.13-18 Regs



Annex 3

Worksheet A (1) - Vulnerabilities Identified from Process Map

Vulnerabilities	Resulting Corruption Risks
Step 1: Public Notice	
V.1. No clarity on when public notice will be required from proponents	PD28
V.2. Unclear whether public comments are then made public, or only provided to MNDM	RA10
V.3. Unclear as to whether MNDM reviews (i) whether public notice has included relevant interested parties and (ii) content of public comments	RA10, RA11
V.4. No third party oversight or community representative that ensures comments are reported to Director and included in report	RA10, RA11
Step 2: Consultation with Indigenous Peoples	
V.5. How list of Indigenous communities is determined is opaque, and it is questionable whether it is "publicly knowable" (is this mitigated by dispute resolution process?)	PP7
V.6. Adequacy as to whether duty to consult has been fulfilled is at discretion of MNDM	PD16, PP6
V.7. Lack of clarity as to when closure plans need to be re-done and re-filed due to impact of consultation	RA5
Step 3: Substance of Report, Including Financial Assurances	
V.8. Substance of financial assurances is protected from the *Right to Information Act*	P9, RA2
V.9. Lack of transparency on what are "reasonable grounds" to exercise security and how funds of security would be utilized	RA5
Overall Vulnerability	
V.10. Discretion – Director has authority to exempt proponent from complying with any procedure, requirement in Regulation and Rehabilitation Code if determined closure plan meets or exceeds objectives of the provision in which standard, procedure or requirement is set out	RA5, RL1

Annex 4

Worksheet B - PEST Analysis

P (Political Risk)

- **Q1: How much latitude does the Province of Ontario have in setting the closure plan process?**

- Even though mining closure plan processes fall under provincial powers, the Federal government and Canadian courts can legislate on matters that may affect closure plan processes.

Evidence for answer:

- Division of powers between Federal government, provinces and territories as set out in ss. 91 and 92 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [the *Constitution*];
- Constitutionally entrenched rights and freedoms as set out in s. 52 of the *Constitution*, specifically s. 35 affirming "aboriginal and treaty rights" of the Indigenous Peoples of Canada;
- *Mining Act*, RSO 1990, c M 14 at s. 141(1) [*Mining Act*], Part VII Rehabilitation of Mining Lands, Ontario Mining Regulation 240/00 [*Regulation*], including Schedules 1 and 2, the "Closure Plan Boundary & Land Tenure Guideline" Bulletin published by the Ministry of Northern Development and Mines to assist proponents when developing closure plans;
- In May 2017, the Supreme Court of Canada agreed to hear an appeal of a 2016 Federal Court of Appeal decision which addresses whether the federal Crown's constitutional duty to consult affected Indigenous Peoples applies before legislation is enacted (e.g. while developing and considering policy and legislative objectives, drafting bills and introducing them in the legislature) (*Canada v. Mikisew Cree First Nation*, 2016 FCA 311);
- Expert statement on definition of producing mine, which is dependent on federal regulations (Validation workshop, May 8, 2017);
- Academic research pointing to various levels of government involved (necessarily so) in matters that affect mine closure plans processes, e.g. Matthew Hawkins, "Rest Assured? A Critical Assessment of Ontario's Mine Closure Financial Assurance Scheme" (2008) 26(4) Journal of Energy & Natural Resources Law 499 (re bankruptcy and insolvency matters that are a federal issue,); D.B. Hegadoren and J.D. Day, "Socioeconomic mine termination policies: A case study of mine closure in Ontario" (1981) Resources Policy 265 (federal, provincial and municipal government duties regarding mine closures).

- **Q2: How stable is the *Mining Act*?**

- The *Mining Act* has been modified frequently throughout the last decade. Indigenous Peoples, the public and industry have been consulted with varying degrees of success, and due to the evolving nature of Indigenous rights in Canada, significant changes to the *Mining Act* may occur through court cases.

Evidence for answer:

- Canadian Legal Information Institute, 13 *Mining Act* amendments between 2006 and 2017, with an extensive amendment in 2009;
- Ontario Ministry of Northern Development and Mines re: the modernization of the *Mining Act*, online: http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act/mining-act-modernization;
- Joint submission by the Anishinabek Nation on the proposed amendment to the *Mining Act* of 2009; comments were not fully reflected in legislation and continues to give rise to litigation. "Below the Surface" – The Anishinabek Mining Strategy Final Report, January 15, 2009;

- Academic research questioning constitutionality of *Mining Act* (Karen Drake, "The Trials and Tribulations of Ontario's *Mining Act*: The Duty to Consult and Anishinaabek Law" (2015) McGill Int'l J. Sust. Dev. L. & Pol'y 183);
- In May 2017, the Supreme Court of Canada agreed to hear an appeal of a 2016 Federal Court of Appeal decision which addresses whether the federal Crown's constitutional duty to consult affected Indigenous Peoples applies before legislation is enacted (e.g. while developing and considering policy and legislative objectives, drafting bills and introducing them in the legislature) (*Canada v. Mikisew Cree First Nation*, 2016 FCA 311).

- **Q3: What influence do Indigenous Peoples of Canada have on provincial *Mining Act* and mine closure process?**

- Indigenous People have varying degrees of influence on the *Mining Act*, as well as the mine closure process.

Evidence for answer:

- Closure plan approval process for both advanced exploration, as well as mine development, require consultation with Indigenous Peoples (*Mining Act*, ss. 140(1)(c), 141(1)(c), respectively). Progressive rehabilitation also requires consultation (*Mining Act*, s. 139.2(4.1));
- The *Mining Act* expressly recognizes that all mining activity should be undertaken in a manner that is consistent with the recognition and affirmation of existing Indigenous Peoples and treaty rights in s. 35 of the *Constitution*, including the duty to consult (*Mining Act*, s. 2);
- See Answers to Political Risk - Q2 re: stability of *Mining Act*, and Indigenous People's influence on Act;
- See Answers to Political Risk – Q4 re: academic review of Indigenous Peoples rights and evolving case law;
- Litigation on the failure to meet the duty to consult and accommodate (*Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines*), 2014 ONSC 4424).

- **Q4: Is there open access to government information about mine closure plans?**

- There are various lacunas on the transparency of government information about mine closure processes.

Evidence for answer:

- The government does not clarify when public notices will be required from proponents (Regulations, s.8);
- There is no transparency of how the government arrives to a list of Indigenous Peoples that need to be consulted for the project (Validation workshop, May 8, 2017);
- There is no transparency to determine if and when the duty to consult has been fulfilled (Validation workshop, May 8, 2017);
- Substance of financial assurances are expressly protected against the Right to Information Act, even though some information on values may be obtained through public documents required to be filed by public listed corporations (*Mining Act*, s. 145(10); Validation workshop, May 8, 2017).

- **Q5: How effective is the government's enforcement of anti-corruptions laws?**

- Canada has a comprehensive and relatively well-enforced anti-corruption framework in place, with few exceptions that include the mining industry both nationally and abroad.

Evidence for answer:

- Canada ranks consistently in the top 10 of least corrupt countries in the world according to corruption indices, even though changes are occurring in the corruption landscape in Canada. However, in 2014, Canada ranked second in the TRACE Matrix prepared by TRACE International and RAND Corporation, in 2016 Canada now ranks 12th;
- Canada has ratified the UN Convention Against Corruption and the OECD Anti-Bribery Convention, and is a member of the Inter-American Convention Against Corruption. (GAN Business Anti-Corruption Portal, online: <http://www.business-anti-corruption.com/country-profiles/canada>;
- Report by consultants on how anti-corruption legislation is enforced in Canada (Deloitte LLP, "Corruption in Canada: Definitions and Enforcement" *prepared for Public Safety Canada* [Report No. 46, 2014]);
- Increased risk to corrupt acts occur in public procurement and construction (see for example, *Charbonneau Commission in Quebec*, and SNC Lavalin corruption scandal re: corruption abroad, Canadian Press, "SNC-Lavalin to pay $1.5 Million in African Corruption Case" (October 1, 2016), online: <http://www.huffingtonpost.ca/2015/10/01/snc-lavalin-settles-corruption-case-brought-by-african-development-bank_n_8226700.html>;
- An exception to the Canadian government's response to corruption is claims that Canadian mining companies, whether acting within Canada or abroad, are corrupt (Becky Rynor, "Canada gets soft on bribery: Why rules aimed at cracking down on corruption by mining firms miss the mark" *Maclean's* (January 27, 2015); *Fraser Institute*, Annual Survey of Mining Companies (February 2017));
- Opaqueness of ownership of private companies and trusts creates a risk that Canada may be in the process of becoming a haven for corrupt capital (Adam Ross, TI Canada's lead researcher, Report on Transparency of Beneficial Ownership 'No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts' (December 9, 2016)).

E (Economic Risk)

- **Q1: How Significant is the mining industry in Canada's economy?**

- The mining industry is a significant GDP contributor, taxpayer, and employer in Canada.

Evidence for answer:

- Data provided by Natural Resources Canada - Canada's Positive Investment Climate for Mineral Capital, online: <http://www.nrcan.gc.ca/mining-materials/publications/8782>;
- Data provided by Investment Climate Advisory Services, "Sector Licensing Studies - Mining Sector", World Bank Group (2009), online: <http://documents.worldbank.org/curated/en/867071468155129330/pdf/587890WP0Secto1BOX353819B001PUBLIC1.pdf>;
- Data provided by the Mining Association of Canada, "Facts and Figures of the Canadian Mining Industry" (2016), online: <http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf>.

- **Q2: Are timelines aligned between economic drivers and closure planning?**

- Closure planning timelines are generally aligned with economic drivers, even though fulfilling the duty to consult with Indigenous Peoples may delay the process.

Evidence for answer:

- Director has 45 days to acknowledge receipt of closure plan, *Mining Act*, s. 140(5) re: advanced exploration, and s. 141(4) re: mine production; Director has ability to require changes to closing plan s. 143(3); proponents required to notify Director of changes to closure plan s. 144(2);

- Expert(s) statements that closure plans are "living documents" that are modified when (i) there are changes in the mine; (ii) progressive rehabilitation calls for changes in the plan; (iii) arising from inspectors visits (Validation workshop, May 8, 2017);
- Expert(s) consultation with Indigenous Peoples as there are changes to the site;
- Expert(s) statements that "everyone is in it together", a "joint effort" if establish need for more reviewers government will bring in more staff (Validation workshop, May 8, 2017);
- Consultation takes longer than expected (Validation workshop, May 8, 2017).

- **Q3: What is the status of disclosure of beneficial ownership in Canada?**

- There is concern regarding lack of transparency of beneficial ownership of private companies and trusts, which may create obstacles for law enforcement agencies.

Evidence for answer:

- Report prepared by TI Canada outlining fragilities and lacunas of the system in Canada (Transparency International Canada, *No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts* (2016));
- Article by Transparency International, "Canada: beneficial ownership transparency" (November 2015);
- Article by experts on status of lack of transparency (Noah Arshinoff, "Who's in Control? Unmasking the beneficial owners of companies", *Canadian Bar Association National Magazine* (April 6, 2017));
- Government report on the risk of lack of transparency on beneficial ownership (Department of Finance Canada, "Assessment of inherent risks of money laundering and terrorist financing in Canada," (2015)).

S (Social Risk)

- **Q1: What are the ramifications of Canada's accession to the UN Declaration on the Rights of Indigenous peoples (UNDRIP)?**

- Canada's accession to UNDRIP showed a significant and symbolic step change in the government's policy towards Indigenous Peoples. But the government has decided not to adopt UNDRIP into law which brings into question the commitment of the government to Indigenous Peoples, which is not mirrored in the judiciary, where the evolving case law may provide Indigenous Peoples with the authority envisioned under UNDRIP

Evidence for answer:

- Tim Fontaine, CBC News, "Canada officially adopts UN declaration on rights of Indigenous Peoples: Standing ovation at UN greets Indigenous Affairs Minister Carolyn Bennett's announcement" (May 10, 2016), online: <http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>;
- Article on how Canada will not adopt UNDRIP directly in Canadian Law, James Munson, "Ottawa won't adopt UNDRIP directly into Canadian Law: Wilson-Raybould: Federal Government wants input from First Nations on building new relationship" online: <http://ipolitics.ca/2016/07/12/ottawa-wont-adopt-undrip-directly-into-canadian-law-wilson-raybould/>;
- Article on Canada acceding to UNDRIP and ramifications ("Canada pushes forward with UNDRIP" (July 2016) 8(25) Indigenous Law Bulletin 28);
- Article prepared by public policy think tank, Macdonald-Laurier Institute, Ken Coates and Blaine Flavel, "Embrace of UNDRIP can bring Aboriginal Canada and Ottawa Closer Together: Ken Coates and Blaine Favel for iPolitics (May 19, 2016), online: <http://www.macdonaldlaurier.ca/embrace-of-undrip-can-bring-aboriginal-canada-and-ottawa-closer-together-ken-coates-and-blaine-favel-for-ipolitics/>;

- Academic article providing reasoning as why UNDRIP cannot be law in Canada (Gib van Ert, "Three good reasons why UNDRIP can't be law – and one good reasons why it can" (2017) 75(1) The Advocate 29);
- Academic article outlining UNDRIP and present case law state in Canada (Risa Schwartz, "Realizing Indigenous Rights in International Environment Law: A Canadian Perspective" CIGI Papers, No. 109, (October 2016), online: <https://www.cigionline.org/sites/default/files/documents/cigi_paper_no.109_1.pdf>;
- Examples of evolving cases include: the duty to consult as set out in Supreme Court of Canada decision *Haida Nation v British Columbia* (Minister of Forests), [2004] 3 SCR 51 and application of duty to consult extends beyond individual extraction projects (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650);
- Academic text and compilation of case law on Indigenous Peoples law (Thomas Isaac, Aboriginal Law, 5th ed. (Toronto: Thomson Reuters/ Carswell, 2016; Thomas Isaac, *Aboriginal Law: Supreme Court of Canada decisions and annotations* (Toronto: Thomson Reuters, 2016)).

- **Q2: How organized are affected communities and Indigenous Peoples about mining issues?**

- It depends on the community and the Indigenous Peoples; there are some communities and Indigenous Peoples that are relatively well organized about mining issue, and others that struggle with "community capacity" in dealing with mining projects.

Evidence for answer:

- Most of Canadian land is subject to Crown-Aboriginal Treaties (1763 to date) Martin Olszynski, "The Duty to Consult and Accommodate: An Overview and Discussion" prepared for the Canadian Chamber of Commerce "Seizing six opportunities for more clarity in the duty to consult and accommodate process" (September 2016);
- Indigenous Peoples submission on the 2009 *Mining Act* revision re: strategic position on changes to the *Mining Act* ("Below the Surface," Anishnabek Mining Strategy: Our community engagement process and recommendations to modernize the Ontario *Mining Act* (January 15, 2009));
- Organized and represented in litigation (*Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines*), 2014 ONSC 4424]);
- Certain communities (non-Indigenous and Indigenous Peoples) are not "ready" in the context of capacity to deal with resource development proximity. Energy and Mines Ministers' Conference, "Good practices in community engagement and readiness: compendium of case studies from Canada's mineral and metals sector" (Sudbury, Ontario, August 2014).

- **Q3: What is the level of administrative oversight of public officials in Canada?**

- There is a relatively high level of administrative oversight of public officials in Canada

- Elected representatives, government officials, bureaucrats, agencies, boards, commissions and tribunals that exercise statutory authority are subject to administrative law (Sara Blake, Administrative Law in Canada, 6th ed. (Lexis Nexis Canada, 2017);
- Case law re: judicial review of the Director of Mines Rehabilitation decisions (*Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424);
- In certain cases, the Ontario Mining and Lands Commissioner provides written decisions regarding his/her oversight of Director's decisions, which are publicly available (*Mining Act* reasoned decisions: A list of reasoned decisions made by the Ontario Mining and Lands Commissioner under the *Mining Act*, online: <https://www.ontario.ca/page/mining-act-reasoned-decisions>.

T (Technical Risk)

- **Q1: How accessible are permitting documents and how transparent is the permitting process?**

- Permitting process appears not to be accessible and there is relatively lack of transparency.

Evidence for answer:

- Statement by expert during Validation Workshop re: process, "[Closure plan] is a living document" (Validation workshop, May 8, 2017);
- Statement by expert during Validation Workshop re: process, "For [First Nations Peoples] it is hard to understand when some things fall back to company and government. Throughout the process, engaging with so many people." (Validation workshop, May 8, 2017);
- Statement by expert during Validation Workshop re: transparency "[Community and Indigenous Persons'] struggle is the transparency from the beginning. It takes a lot of time to get relevant documents and 30 days may even elapse before they're even interested to know if they're interested in commenting" (Validation workshop, May 8, 2017);
- Statement by expert during Validation Workshop, that closure plan copies are given to Indigenous Peoples in the list, but no copies are provided to NGOs or other non-aboriginal community groups for engagement." (Validation workshop, May 8, 2017);
- Closure plans, unlike Environmental Impact Assessments, are not posted online by government, but "conceptual closure plans" may be published online by consultants/proponents. Such conceptual plans are prepared for EIAs and used at a later date to submit in furtherance of a "certified closure plan" may be published by company (e.g. National Researcher search on government sites, Osikso Hammond Reef Gold online: <http://www.canadianmalartic.com/documents/hammond/05-Technical-Support-Documents/Conceptual%20Closure%20and%20Rehabilitation%20Plan%20Version%202.pdf >; Hardrock Project – Conceptual Closure Plan (January 2016), online: <http://www.greenstonegoldmines.com/upload/documents/draft-ea-eis-folder/app-i-concept-closur/i_conceptual-closure-plan.pdf>.

- **Q2: Is there clarity and understandability in the closure planning process?**

- Process for the closure planning process is understandable but for the duty to consult, which brings lack of clarity.

- Litigation still arises from lack of clarity of when the Crown's duty to consult has been met when dealing with mine closure plans (*Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424);
- Statement by expert during Validation Workshop re: process, "For [First Nations Peoples] it is hard to understand when some things fall back to company and government. Throughout the process, engaging with so many people." (Validation workshop, May 8, 2017);
- Statement by expert during Validation Workshop re: transparency "[Community and Indigenous Persons'] struggle is the transparency from the beginning. It takes a lot of time to get relevant documents and 30 days may even elapse before they're even interested to know if they're interested in commenting" (Validation workshop, May 8, 2017);
- Statement by expert during Validation Workshop, that closure plan copies are given to Indigenous Peoples in the list, but no copies are provided to NGOs or other non-aboriginal community groups for engagement." (Validation workshop, May 8, 2017).

Annex 5

Worksheet A (2) - Vulnerabilities Identified from Contextual Factors

Vulnerabilities	Resulting Corruption Risks
P6. Lack of transparency regarding how government officials decide on certain matters, specifically which groups from Indigenous Peoples needs to be contacted to fulfill duty to consult creates lack of ability for oversight.	PD3, PD8
E2. The disconnect on timelines, especially with regards to speed of duty to consult compared to project timelines, could lead to undue pressure on Indigenous Peoples.	CF8
E3. Lack of transparency on value of financial assurances.	PD36, PP10
E3. Lack of transparency on whether government does any due diligence on corporate entities, and beneficial ownership.	PD9, PP11
S2. The internal organization of affected Indigenous Peoples and community members may lead to questionable leadership and authority to negotiate with industry.	PP7
T2. Technical complexity of substance of closure planning process may create collusion between government and business as to what is necessary, without allowing for third party independent oversight.	PP1

Annex 6

Worksheet C - Risk Assessment

Risk 1	
What is the risk that community leaders negotiating with a mining company can remain anonymous? Mining companies should be required to publicly disclose which community representatives they are meeting in order to reduce the risk of corruption around who gets consulted and which groups get represented.	**Code** **RA10**

Likelihood Score 2/5	**Evidence to support assessed likelihood** **1.** Legislation requires proponent to provide names and written comments on those community members that attended the public session. The legislation does not provide for any requirements on whether other meetings with members of communities need to be publicized. **Source:** *Mining Act and Regulation* **2.** Legislation does not prescribe if public to be informed of the names and comments that were provided to the Director during public notice process. **Source:** *Mining Act and Regulation* **3.** Corrupt acts are relatively well enforced in Ontario. **Source:** Answers to PEST PQ5
Impact Score 2/5	**Evidence to support assessed impact** **1.** When it comes to non-aboriginal engagement, the *Mining Act* is not specific. **Source:** Expert(s), Validation Workshop [Not enough discussion during Validation Workshop on this top to provide sufficient evidence on impact]

Description of impact

Anonymity of community leaders holding discussions with proponents is concerning as it may lead to (i) community members peddling undue influence with other community members; (ii) proponents engaging in unlawful behaviour (bribes or gifts) with community members; and (iii) the process lacks transparency.

Assessment					
Likelihood x Impact = 2 × 2					**Total Score: 4**
Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	Minor	Moderate	Significant	Very high

Risk 2

Assuming consultation with affected communities is required, what is the risk that breaches of laws or regulations governing public notice requirements will not be prosecuted? Details of compensation should publicly available to reduce the risk of corruption around bribery, gifts and benefits, or unequal and unfair compensation for different groups within the community.	**Code (adapted) RA11**

Likelihood Score 2/5	**Evidence to support assessed likelihood** **1.** Corrupt acts are relatively well enforced in Ontario. **Source:** *Answers to PEST PQ5* **2.** Under mine closure process, deals struck with community members they do not have to be publicized. **Source:** *Mining Act and Regulation*
Impact Score 1/5	**Evidence to support assessed impact** Canadian transparency legislation requires companies (proponents) that are publicly listed and private companies that meet certain thresholds report payment made to government and government-related entities and individuals. It does not mention payments made to community members. **Source:** *ESTMA*, see Legal Framework in National Report

Description of impact

The legislation sets out the obligations and duties for public notice, but it does not provide guidance on whether deals made with community members to either 'smooth' the way, or to assist with other community members have to be made public.

Assessment

Likelihood x Impact = 2 × 1					**Total Score: 2**
Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	Minor	Moderate	Significant	Very high

Risk 3

What is the risk that negotiations with Indigenous Communities can be manipulated? Having laws that guarantee and standardise terms and conditions for conducting negotiations reduces the risk of corrupt behaviour, such as the marginalisation of certain landholders, unauthorised contact in breach of terms, or the giving of bribes, gifts and benefits.	**Code (adapted) PD 16**

	Evidence to support assessed likelihood
Likelihood Score 4/5	**1.** Consultation is required for closure plans and "we don't know who, how, what, when, why". **Source:** Validation Workshop **2.** Consultation takes time and money; for junior companies this is a major financial burden. **Source:** Validation Workshop **3.** Litigation can arise from non-fulfillment of duty to consult, which delays project. **Source:** *Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424 **4.** No timeframe for consultation process in Ontario. **Source:** Ravina Bains and Kayla Ishkanian, Fraser Institute, "The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies (2016) **5.** Corruption indices in Indigenous Peoples Communities may be relatively active. **Source:** Academic Paper by Tom Flannigan; and Working Group notes and comments.

	Evidence to support assessed impact
Impact Score 4/5	**1.** "Consultation takes more time than any party wants and that comes from defensive behaviour". **Source:** Government updated guidelines on duty to consult (2011) **2.** Lack of process definition on how consultation is undertaken, even though government provides guidelines, but not since 2011. **Source:** Government updated guidelines on duty to consult (2011) **3.** Need to clarify and determine how consultation works. **Source:** Canadian Chamber of Commerce submission to government re: duty to consult ("Seizing Six Opportunities for more Clarity in the Duty to Consult and Accommodate Process" dated September 2016) **4.** No legislation around the duty to consult policy. **Source:** Ravina Bains and Kayla Ishkanian, Fraser Institute, "The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies" (2016)

Description of impact

The lack of clear definition on who, how, what, when, and why (and including with regards to timing) is a serious concern as it leaves open the possibility of manipulation of negotiations through illegal manners, which may translate into corrupt actions between all actors involved. Potentially, this has a severe impact in that the manipulation of negotiations brings disrepute to mining activities in general, and may create a chilling effect for new projects and in new communities/ Indigenous Peoples groups, thus, limiting the implementation of projects all together and perhaps limiting beneficial results of this economic activity.

Assessment

Likelihood x Impact = 4 × 4					**Total Score: 16**
Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	Minor	Moderate	Significant	Very high

Risk 4

What is the risk that the duty to consult / or public notice will be ignored as a result of corrupt practices? Sometimes consent is required on paper but companies and officials are able to ignore it by engaging in corrupt practices such as bribery and gift-giving.	**Code** **PP6 – N1**

Likelihood Score 1/5	**Evidence to support assessed likelihood** **1.** Corrupt acts are relatively well enforced in Ontario. **Source:** Answers to PEST PQ5 **2.** Consultation may not occur to the standard required, but then litigation can arise from non-fulfillment of duty to consult, which delays project. **Source:** *Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424 **3.** Corruption indices in Indigenous Peoples Communities may be relatively active. **Source:** Academic Paper by Tom Flannigan and Working Group notes and comments
Impact Score 3/5	**Evidence to support assessed impact** Difficult to *ignore* duty to consult because of attention to duty to consult by government, civil society, Indigenous Peoples, and industry. **Source:** Report by Fraser Institute; Paper by Chamber of Commerce; Government Guidelines; and academic articles

Description of impact

The consequences of the duty to consult not being fulfilled due to corrupt action undermines the efforts the government is undertaking for reconciliation with Indigenous Peoples. This has a potentially severe impact on relationship between industry, Indigenous Peoples and government for all of the mining industry.

Assessment

Likelihood x Impact = 1 × 3					**Total Score: 3**
Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	Minor	Moderate	Significant	Very high

Risk 5

What is the risk that the steps of an awards process will not be publicly knowable? When all information is publicly knowable, especially if published in a flowchart or diagram, stakeholders know precisely what to expect and can hold officials to account if proper process is not followed.	**Code** **PD 3**

Likelihood Score
4/5

Evidence to support assessed likelihood

1. The government does not clarify when public notices will be required from proponents.
Source: *Regulation*, s. 8

2. There is no transparency of how the government arrives to a list of Indigenous Peoples that need to be consulted for the project.
Source: Validation workshop, May 8, 2017 - Expert statement on lack of clarity of Indigenous Peoples' list

3. There is no transparency to determine if and when the duty to consult has been fulfilled.
Source: Validation workshop, May 8, 2017

4. Expert(s) statements that closure plans are "living documents" that are modified when (i) there are changes in the mine; (ii) progressive rehabilitation calls for changes in the plan; (iii) arising from inspectors visits.
Source: Validation workshop, May 8, 2017

5. Substance of financial assurances are expressly protected against the Right to Information Act, even though some information on values may be obtained through public documents required to be filed by public listed corporations.
Source: *Mining Act*, s. 145(10) and Validation workshop, May 8, 2017

Impact Score
3/5

Evidence to support assessed impact

1. The process must be more transparent (repeated).
Source: Validation workshop, May 8, 2017

2. Need to clarify and determine the steps on how consultation works.
Source: Canadian Chamber of Commerce submission to government re: duty to consult ("Seizing Six Opportunities for more Clarity in the Duty to Consult and Accommodate Process" dated September, 2016)

3. The lack of clear definition on who, how, what, when, and why (and especially with regards to timing) allows for gaps and confusion on how to complete the process.
Source: Ravina Bains and Kayla Ishkanian, Fraser Institute, "The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies" (2016)

Description of impact

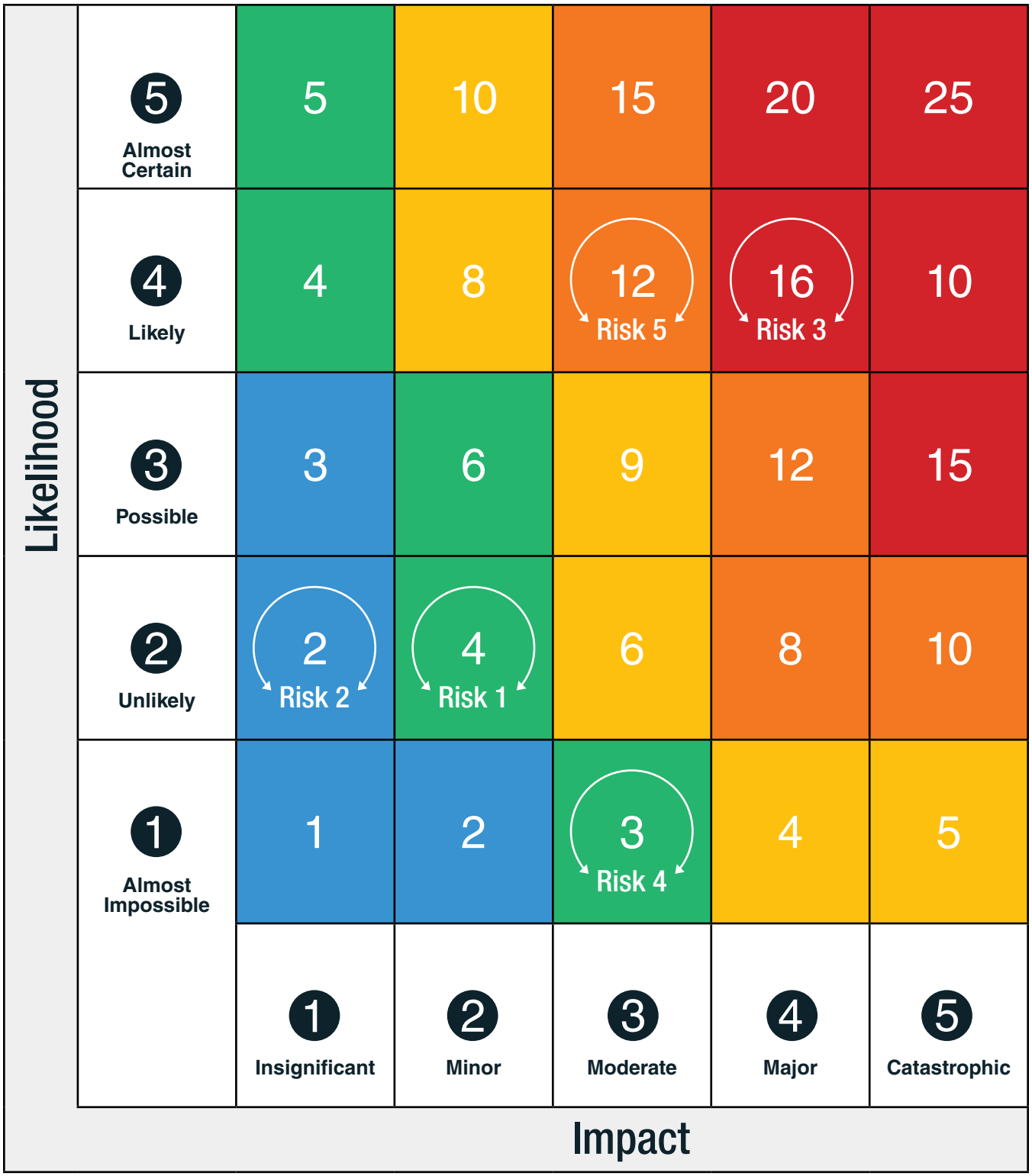
The lack of transparency of the process may cause lacunas in protocol that can permit manipulation of the process in a manner that may foster corrupt action.

Assessment

Likelihood x Impact = 4 × 3					**Total Score: 12**
Colour:	Blue	Green	Yellow	Amber	Red
Risk level:	Very Low	Minor	Moderate	Significant	Very high

Annex 7

Worksheet D - Risk Factors



Photography Credit:
Shutterstock.com

TRANSPARENCY INTERNATIONAL CANADA

Follow us on Twitter @TI_Canada

/company/transparency-intl-canada

/TransparencyInternationalCanada

transparencycanada.ca