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Review article

Indigenous peoples' relationships to large-scale mining in post/colonial contexts: Toward multidisciplinary comparative perspectives

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ABSTRACT

Because of their close relationships to the land, water, and resources therein, and their marginalized social and economic positions, Indigenous peoples living in current or former settler colonies are particularly vulnerable to mining's impacts, yet have the potential to benefit from its opportunities as well. This paper reviews the literature on large-scale mining projects' relationships to Indigenous peoples in post/colonial contexts, focusing on Australia, Canada, Finland, Greenland, New Caledonia, Norway, and Sweden, in the aim of generating insights from comparative perspectives. First, we discuss differences in legal regimes governing Indigenous peoples' rights and implications of those rights for negotiations over mining projects. Next, we examine, in turn, mining activities' various impacts – environmental, economic, social – and how they specifically affect Indigenous communities. Finally, we explore ways that Indigenous communities living in a post/colonial context have addressed large-scale mining projects' impacts by engaging with them, through both negotiation and resistance. We conclude by summarizing our findings on the relationships of Indigenous peoples to large-scale mining projects in the focus countries and identifying what gaps remain in the literature, and we provide thoughts as to how future research could address those gaps.

1. Introduction

Large-scale mining projects inevitably have widespread impacts on local societies and ecologies. Because of their close relationships to the land, water, and resources therein, and their marginalized social and economic positions, Indigenous peoples living in current or former settler colonies are particularly vulnerable to mining's impacts, yet have the potential to benefit from its opportunities as well. These impacts and opportunities are shaped by the nature of the mineral and the surrounding environment; the approach of the extractive company; relevant regulatory regimes; socio-economic conditions, and Indigenous communities' responses, among other factors.

This paper reviews the literature, both published and unpublished, on Indigenous peoples' relationships to large-scale mining in post/colonial contexts. As all authors are members of MinErAL, a Knowledge Network on Mining Encounters and Indigenous Sustainable Livelihoods (http://www.mineral.ulaval.ca/en), we focus on the countries covered within that project: Australia, Canada, Finland, Greenland, New Caledonia, Norway, and Sweden. These nations all encompass important, often remotely located, Indigenous populations as well as economically and politically dominant non-Indigenous groups, and possess mineral resources – often located near Indigenous communities – that attract local and multinational mining companies. Several multinational companies have, or have had, projects in many of these countries, simultaneously or serially. Yet despite the focus countries' commonalities, important distinctions exist in terms of legal, political, social, economic, and ecological contexts. While a comprehensive review of all the relevant literature for each country is beyond the scope of this paper, we offer an outline of some major arguments and debates in order to conduct comparative analysis and identify future research

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directions. In comparing and contrasting the situations in these countries, through the perspectives of a range of disciplines, we aim to generate insights into how large-scale mining projects impact Indigenous peoples in settler colonies, as well as how Indigenous communities respond to such projects. To our knowledge, this is the first interdisciplinary, critical analysis of relationships between mining companies and Indigenous communities that covers such a wide range of developed countries.

In the sections below, we begin with the legal context of large-scale mining projects' impacts on Indigenous peoples in settler colonies. Focusing on the countries listed above, we discuss differences in regimes governing Indigenous peoples' legal rights, and implications of these rights for negotiations over mining projects. Next, we examine, in turn, mining activities' various impacts – environmental, economic, social – and how they specifically affect Indigenous communities. Finally, we explore ways that Indigenous groups have addressed these impacts by engaging with large-scale mining projects, through both negotiation and resistance. We conclude by summarizing our findings as to what gaps remain in the literature, and provide thoughts as to how future research could address those gaps.

2. Methods

MinErAL is a collaboration between Indigenous and non-Indigenous scholars, and Indigenous communities and organizations. Although the authors of the present article are all non-Indigenous researchers, input from Indigenous colleagues has strongly informed our work, facilitated by a panel organized at the International Congress of Arctic Social Sciences in June 2017.

In reviewing the extensive literature on Indigenous peoples' relationships to large-scale mining in the countries listed above, we consulted primary academic as well as legal (e.g. statutes, regulations, case law) sources in English and French, mainly through the major academic and legal databases (e.g. Web of Science, LexisNexis/Quicklaw, Westlaw, HeinonLine, Legal Track). In consulting the gray literature, we developed a modified version of the plan proposed by Godin et al. (2015), incorporating three strategies: a) a customized google search, b) a search of targeted organizations (advocacy groups, NGOs, government agencies, industry websites, etc.) and c) a systematic examination of each report's bibliographies. While academics, industries, governments, and advocacy groups pursue different goals and thus generate data and analyses that are not always easily comparable, our aim was to identify the complete range of topics that had been identified in the various types of literature.

3. Legal contexts

Legal regimes governing mining rights and activities, as well as those pertaining to the recognition and protection of Indigenous peoples' rights, are extremely dense and complex. Therefore, in the limited scope of this section, we focus on Indigenous peoples' rights that may play a significant role in structuring the relationships between Indigenous peoples, the State, and mining companies (O'Faircheallaigh, 2016), specifically land and resource rights and participatory rights in mining decision-making processes.

3.1. Australia and Canada

In Australia and Canada – both former British settler colonies – the judicial recognition of Indigenous peoples' land rights in common law has exerted significant pressure on governments and third parties to negotiate mining development with affected communities. The 1992 High Court decision in Mabo v Queensland (No 2) spurred the Australian Parliament to enact the Native Title Act 1993 (Cth) (NTA), which among other provisions establishes processes and standards through which Aboriginal and Torres Strait Islander people may claim native title where it has not been lawfully extinguished in the past (Bartlett, 2014; Strelein, 2006; Young, 2008). In relation to mineral development more specifically, the NTA provides Aboriginal groups, in addition to the possibility of negotiating Indigenous Land Use Agreements (Bartlett, 2014; Langton and Mazel, 2008), a 'Right to Negotiate' the terms of mining development projects with the mining proponent and the state government responsible for issuing the mining tenements (Bartlett, 2014; Masher, 2013). Under the 'Right to Negotiate', if an agreement is not reached within the six months following the State's notice of the proposed act, either party can refer the matter to arbitration by the National Native Title Tribunal (NNTT), whose decisions can be overturned by the responsible government authority (NTA, sec. 25–44, 237). The literature has emphasized that the 'Right to Negotiate' regime reinforces the inequalities between Aboriginal peoples and mining companies, the latter benefiting from the strict timeline imposed on negotiations, the absence of an Aboriginal veto and the NNTT's limited powers and demonstrated favorable stance toward mining development (Bartlett, 2014; Masher, 2013; O'Faircheallaigh, 2016). In comparison, by virtue of the Aboriginal Land Rights (Northern Territory) Act 1976, Indigenous peoples in the Northern Territory may veto mining exploration on their land (unless granting the licence is deemed by the Governor General to be in the 'national interest'), therefore generating strong incentives for mining companies to negotiate in order to secure Aboriginal consent (O'Faircheallaigh, 2016).

The duty to consult and accommodate in Canadian law has been subject to similar critiques, notably in relation to mining development (Ariss et al., 2017; Ariss and Cutfeet, 2011; Drake, 2015; Lacasse, 2017; Thériault, 2010, 2016). This duty exists when the government contemplates a conduct – such as permitting mining activities – that might adversely affect established or asserted Aboriginal rights or treaty rights, which are constitutionally entrenched by sec. 35 of the Constitution Act, 1982 (Haïda Nation, 2004; Mikisew, 2005; Rio Tinto Alcan, 2010). In addition to resource use rights arising from Indigenous traditional activities, "Aboriginal rights" include Aboriginal title, which the Supreme Court of Canada has defined generically as conferring on the title-holders exclusive rights to possess and use the land (including minerals), the right to benefit from the land, and the right to proactively use and manage it (Tsilhqot'in Nation, 2014, par. 73; Delgamuukw, par. 122), provided that the land should not be developed "in a way that would substantially deprive future generations of the benefit of the land." (Tsilhqot'in Nation, 2014, par. 74). The government formally has to obtain Indigenous peoples' consent prior to authorizing development projects on lands held under Aboriginal title; however, if consent cannot be secured, the government may nevertheless authorize the project provided that the procedural duty to consult was upheld, and that the infringement can be justified under s. 35 (Ktunaxa Nation, 2017; Tsilhqot'in Nation, 2014, par. 76; Haïda Nation, 2004, par. 48). Despite recent mining reforms through which the duty to consult has been integrated in mining laws and policies (e.g. Ontario Mining Act), several authors have argued that free-entry mining regimes in Canada are fundamentally incompatible with Aboriginal peoples' constitutional rights, especially as they allow mining proponents to register mining claims on lands claimed under Aboriginal title without providing for prior consultation and accommodation (Simons and Collins, 2010; Ariss and Cutfeet, 2011; Drake, 2015; Lacasse, 2017; Thériault, 2010, 2016).

Indigenous peoples in Canada may also elect to negotiate their land claims with the State under the federal government's Comprehensive Land Claims Policy. Land claims agreements, which cover most of Canada's Northernmost regions, generally provide the Indigenous party some exclusive surface and sub-surface rights on limited portions of their traditional territories, harvesting rights on vast areas of public lands, as well as rights to participate in the governance of their lands and resources through co-management boards, environmental assessment regimes and specific consultation provisions. Some agreements,