

**LANDLORDS AND POLITICAL TRAPS:**  
**HOW MINERAL EXPLORATION COMPANIES SEEK ACCESS**  
**TO FIRST NATION TERRITORY**

by

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The data and arguments presented in this paper are the responsibility of the author and are completely independent from the research and advocacy conducted by Mining Watch Canada. Any questions or comments can be directed to the author at: [shauna\\_qureshy@yahoo.ca](mailto:shauna_qureshy@yahoo.ca).

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## **ABSTRACT**

While Canadian law grants “free entry” for mineral exploration on Crown land, many exploration companies seek either formal, negotiated agreements or non-negotiated acquiescence from First Nation communities before they begin their exploration programs. Not all companies *obtain* acquiescence/agreement before proceeding, however. Based on 33 interviews the author conducted with junior and major companies and consultants, this paper proposes and tests two hypotheses: 1) companies prefer to seek acquiescence rather than negotiating agreements if they believe a First Nation’s “landlord perceptions” can be weakened; and 2) companies will proceed even if they fail to obtain acquiescence/ agreement if they believe they can detect “political traps” ahead of time and avoid them. This paper finds these factors to be much better predictors for how companies approach First Nations than companies’ size and wealth, their vulnerability to First Nation threats, or pressures for corporate social responsibility.

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## **LIST OF ACRONYMS**

AFNQL	Assembly of First Nations of Quebec and Labrador
CAMA	Canadian Aboriginal Minerals Association
CSR	corporate social responsibility
DFO	Department of Fisheries and Oceans (federal)
EIA	environmental impact assessment
FN	First Nation
IBA	Impact and Benefits Agreement
INAC	Indian and Northern Affairs Canada (federal)
JV	joint venture
KI	Kitchenuhmaykoosib Inninuwug First Nation (formerly Big Trout Lake)
MMSD	Mining, Minerals and Sustainable Development Project (organized by the International Institute for Environment and Development)
MNDM	Ministry of Northern Development and Mines (Ontario)
MNR	Ministry of Natural Resources (Ontario)
MOU	Memorandum of Understanding
MVLWB	Mackenzie Valley Land and Water Board (NWT)
NGO	non-governmental organization
NNTT	National Native Title Tribunal (Australia)
NRCan	Natural Resources Canada (federal)
NWT	Northwest Territories
OGS	Ontario Geological Survey
OPP	Ontario Provincial Police
OSAA	Ontario Secretariat for Aboriginal Affairs
PDAC	Prospectors and Developers Association of Canada
RTN	right to negotiate (Australia)

## **INTRODUCTION: “Free Entry” and First Nations**

In Canada, mineral exploration companies legally have “free entry” on Crown land.<sup>1</sup> Their access is virtually unregulated and mineral exploration is prioritized over nearly all other land uses, including First Nations’ (FN)<sup>2</sup> use of their traditional land. Provincial and federal governments unofficially advise mineral exploration companies to “consult” with First Nations when exploring on traditional territory that is subject to constitutional Aboriginal and treaty rights. There is no question, however, that companies have the right to go ahead with or without First Nations’ approval.<sup>3</sup> Nevertheless, some mineral companies seek approval from First Nation communities before they begin exploration.

Researchers and analysts have paid very little attention to consultation and negotiation between mineral exploration companies and First Nations, partly because it is widely assumed that exploration causes little disturbance to First Nations, and partly because formal agreement-making at this stage has only become widespread within the past five to ten years. The grassroots exploration stage, however, may be of critical importance to First Nations for a number of reasons.

Under the free entry system, exploration projects acquire a momentum that is more difficult for First Nations to stop or slow down as projects get closer to the mine production stage. According to Asp, a spokesperson for the Canadian Aboriginal Minerals Association:

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<sup>1</sup> For a detailed analysis of the free entry system, see West Coast Environment Law.

<sup>2</sup> First Nations are only one segment of the entire Aboriginal population in Canada; the other Aboriginal groups are the Inuit and the Métis. This paper will focus solely on First Nations because they are the overwhelming majority in the free entry jurisdictions being examined (Ontario’s far north and parts of the NWT with unsettled land claims). While Métis groups generally do not have a legally recognized land base, some have been involved in negotiations with the mineral industry. See, for example, “Can’t Live Without Work” by the North Slave Métis Alliance.

<sup>3</sup> Supreme Court decisions such as *Taku River Tlingit* (2004) and *Mikisew* (2005) have clearly and consistently stated that First Nations do not have veto power over mineral development, let alone mineral exploration. See also Justice G. P. Smith’s decision in the *Platinex* case, par. 92.

“The statement that ‘gets my goat’ is the one that says, ‘Our footprint on the land is less than ten acres, how disruptive can that be’? It reminds me of the story of the railroad crossing the Great Plains of America. They told the First Nations that it was only two tracks and a whistle.” (3)

Free entry guarantees those who stake claims the right to develop the minerals they find there. Moreover, a promising discovery by one company can lead to a staking rush. First Nations want a chance to prevent environmental and social damage rather than just accept compensation after the fact. Where issues of land claims, resource co-management and revenue sharing have not been settled with the Crown, First Nations want to avoid prejudicing those of their rights and entitlements that have yet to be recognized. The earlier that a First Nation can establish protocols and negotiate agreements with exploration companies, the better chance it will have of asserting some control over the pace and scale of mineral development.

At its outset, mineral exploration is a game of low stakes. There is only a one-in-a-thousand chance that any of the geological targets first identified will become a producing mine. Thus, the prospect of gains is low, and there are a great number of possible places to explore that are each roughly as good as the next. As companies invest dollars into investigating and narrowing down targets, the prospect of gains increases and stakes rise. For First Nations, this means that companies are most likely to be deterred by FN opposition at the earliest stages when they can easily just pull up stakes and go elsewhere.<sup>4</sup>

Free entry was designed to protect the mineral industry from the uncertainty of political agendas; it assures companies that their efforts to find a profitable mine will pay off if they invest enough. Investing more, however, does not necessarily protect companies from

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<sup>4</sup> Bargaining theorists Bacharach and Lawler state that deterrence is most likely to be effective when there is low mutual dependence (145), which is indeed the situation between First Nations and exploration companies at the outset of mineral exploration.

the risk of FN opposition. In this case, free entry has actually heightened companies' uncertainty by creating a legal and policy vacuum around when and how First Nations can intervene in decision-making. Simmering frustrations on both sides recently erupted into a costly confrontation in Ontario's far north, and wider volatility looms.<sup>5</sup> A major portion of this paper will be devoted to examining why some companies fail to be deterred by FN opposition and proceed in spite of it, while others avoid the risk of confrontation and do not proceed without FN approval. The first question I pose, however, is why many mineral exploration companies bother to seek FN approval at all.

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<sup>5</sup> About eight First Nations who fall under Treaty 9 have unilaterally declared moratoriums on mineral exploration. One confrontation that has received considerable news coverage erupted in February 2006 between Platinex Inc. and the Kitchenuhmaykoosib Inninuwug First Nation (KI, formerly Big Trout Lake) in northwestern Ontario. Platinex attempted to push through with its drilling program despite repeated prior FN warnings and a blockade by the community. Despite hiring a former soldier from a private security firm, the drilling crew was forced to abandon the site after a few days. Platinex launched a \$10 billion lawsuit against the First Nation and others, while KI launched a counter-claim as well as a third-party claim against the Ontario government for failing to consult, in addition to a constitutional challenge against the Mining Act. Porter on Morning North Radio quoted the private security firm as saying it will "be doing a lot more security work as exploration heats up in Northern Ontario." See [www.platinex.com](http://www.platinex.com) for news stories and press releases.

## **CHAPTER 1: TWO PUZZLES**

### ***1.1 Literature review***

The literature on relations between First Nations and the mineral industry provides a number of unsatisfying explanations for why some exploration companies (but not others) voluntarily consult with First Nations. Analysts explicitly or implicitly attribute differences to companies' capacity, their tendency to be reactive or proactive, and/or their cross-cultural communication skills. The emphasis is on individual attitudes and how these translate into "corporate culture" as well as formal company policies promoting dialogue with stakeholders.

MacDonald (3), Downing et al. (27), and Render (51) all emphasize that a lack of resources and personnel is the main barrier facing most mineral exploration companies as they try to engage First Nations. According to Downing et al., the most common approach is the "corporate belly-flop" (27); tactical thinking dominates over strategic thinking (40). Similarly, MacDonald observes that companies tend to be reactive rather than pro-active (13). Fyon and Churchill identify communication barriers as the major problem and outline a "meaningful and pragmatic" communication model designed "to establish mutually beneficial relationships with First Nation people" (4-1). Asp of the Canadian Aboriginal Minerals Association (CAMA) suggests that companies' communication skills make the key difference in avoiding rumours, distrust, and ultimately FN opposition (6-7).

In examining the significance of corporate social responsibility (CSR), Downing et al. are critical of CSR policies that reflect a "monologue" rather than a dialogue with indigenous communities (29), while Indigenous Support Services/ACIL proposes that policies can be more effective if clear commitment exists at all levels of a company (57). Danielson and

McShane assert that larger mining companies in particular “have travelled a long way in integrating the principles of corporate social responsibility into their codes of corporate practice” (4), and Public Policy Forum emphasizes that companies’ desire to “be seen as good environmental stewards and good corporate citizens” should not be underestimated (4). ISS/ACIL (v) and Render (53) propose that a professional network facilitating the research and sharing of best practices within the industry will remedy the current discrepancies in companies’ approaches.

The literature is filled with suggestions as to how effective engagement *could* be achieved—often focusing on the need for governments to undertake policy reform<sup>6</sup>--but the literature is vague as to what *currently* motivates companies to seek FN approval in the absence of government intervention. The most common explanation is “it just makes good business sense,” with no elaboration on how pressure by First Nations and civil society groups actually factor into companies’ business decisions.<sup>7</sup> Where threats such as litigation and direct action are specifically mentioned at all, they are generally presented as a “laundry list” rather than a more systematic analysis of when threats are credible and how they target certain companies’ vulnerabilities.<sup>8</sup> In a speech on behalf of CAMA, Matthews’ message is that First Nations gain greater power by offering companies economic advantages rather than issuing threats, therefore First Nations need job training and business development assistance in order to become indispensable players within the industry.

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<sup>6</sup> See, for example, Weitzner 46-52; Public Policy Forum 28.

<sup>7</sup> See, for example, Miranda, Chambers and Coumans xi.

<sup>8</sup> Hipwell et al. present a long list of case studies but do not attempt to analyze which factors were the most important in successful resistance. Whiteman and Mamen mention lawsuits, direct action, challenging EIAs and general references to international activism as drivers of the general corporate shift toward sustainable mining (18-22). The Public Policy Forum refers in particular to the threat of time-consuming litigation, since companies are especially vulnerable to uncertain timelines (5). O’Faircheallaigh and Corbett list threats of litigation, protests, blockades, and sometimes violence (630).

Many analysts emphasize that indigenous bargaining power is mainly determined by negotiating “skill,” knowledge, resources, and internal unity.<sup>9</sup> The Public Policy Forum claims the single most important factor in determining agreement outcomes is the “quality” of the negotiation teams, including whether negotiators have clear mandates (15). Ritter points out that First Nations with low access to information and weak negotiating skills will be subject to companies’ “divide and conquer” approaches (23). MacKay (29) and Pearse (slide 3) emphasize that building consensus is essential to indigenous community bargaining power. O’Faircheallaigh argues that the capacity of indigenous organizations to maintain unity and legitimacy is especially important in Australia, where agreements are mostly negotiated by Land Councils that represent many communities (“Aborigines,” 7).

The vast majority of analyses focus on the negotiation of Impact and Benefits Agreements (IBAs) during advanced stages of exploration, when mine development is imminent.<sup>10</sup> MacDonald and Gibson’s paper is among the very few that focus on mineral exploration; the authors highlight the increasing opportunities for Aboriginal groups to intervene in regulatory processes such as environmental impact assessments (EIAs). They point out, however, that it is still relatively rare for Aboriginal groups to force exploration companies to face EIAs (18). O’Faircheallaigh suggests indigenous groups can use regulatory levers more effectively by making companies bargain for their input into impact assessments rather than offering it for free (“Negotiation Based Approach”).

In summary, there is a general consensus that mineral exploration companies seek FN approval due to increased pressure to engage in sustainable practices from civil society and

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<sup>9</sup> See, for example, Downing et al. 16; MacKay 29. Sosa and Keenan point out that differences in community bargaining power and negotiating skill lead to inconsistencies in the quality of agreements, which is unacceptable from a public policy perspective (20).

<sup>10</sup> Detailed catalogues of the various provisions commonly found in IBAs are provided by Kennett; Sosa and Keenan.

Aboriginal groups themselves. The literature provides little evidence, however, as to which FN strategies and tactics effectively target which critical vulnerabilities of companies, or why companies would differ in their approaches.

### ***1.2 Two central puzzles***

This year, I conducted interviews with 28 mineral exploration companies and 5 consultants working in “free entry” regions of Canada—mainly Ontario and parts of the Northwest Territories (NWT) with unsettled Aboriginal land claims. As I investigated what motivates companies to seek First Nations’ approval, I encountered two key puzzles.

The first puzzle involves a claim made by a number of companies that they do not and indeed cannot *negotiate* access agreements. At the same time, many of these same companies spend considerable time and money “consulting” with First Nations and making accommodations in order to obtain access for exploration with reduced hassles. I considered how to reconcile this: a professed refusal to explicitly “negotiate,” yet an apparent willingness to make concessions to First Nations. Should I treat efforts to obtain FN acquiescence as unrecognized but *de facto* negotiation over access? Is acquiescence essentially the same thing as an access agreement, only the latter may take slightly more resources and produce slightly more formal legal certainty than the former? I decided that if companies *perceive* that they are doing something fundamentally different by seeking acquiescence rather than negotiating agreements, then this is significant and deserves further examination.

The second puzzle that arose as I conducted my interviews was that some companies who seek either acquiescence or a negotiated agreement proceed even if they do not succeed

in obtaining it. The question is: why would they bother seeking something that they are prepared to do without?

Following from these two puzzles, I pose two main questions in this research paper:

1. Why do some mineral exploration companies seek formal, negotiated **agreements** while others seek only **acquiescence** before beginning their exploration programs?
2. Why do some companies—seeking either acquiescence or agreements—**proceed** even when they do not obtain it, while others **do not proceed**?<sup>11</sup>

### ***1.3 Definitions***

My definition of an *agreement* is an explicit, signed document that is negotiated, so it involves mutual concessions or limitations placed on both sides. At the outset of mineral exploration, an agreement often takes the form of a “memorandum of understanding” (MOU).<sup>12</sup> In an MOU, a First Nation generally makes some sort of pledge granting the company access for exploration. This can be expressed as: a “willingness to cooperate,” recognition that “time is of the essence” and the First Nation shall not delay the project, a promise not to obstruct permit applications, or a formal recognition of the company’s rights and obligations to the Crown under the Mining Act.<sup>13</sup> There are a range of concessions companies can make, including environmental and social protection measures. Agreements may or may not include cash compensation or access fees. A formal notification or “letter of

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<sup>11</sup> Companies that did not proceed without acquiescence/agreement noted, however, that their commitment to obtain a “social license” does not mean they could ever concede as an official policy their legal right to go ahead without First Nation acquiescence.

<sup>12</sup> PDAC’s “E3” best practices guideline advises companies to sign an MOU with First Nations before conducting any major physical work, including drilling or trenching. The E3 model is based on the MMSD Project’s definition of “community engagement,” which is: “A process of contact, dialogue and interaction that ensures all parties of interest are informed and participating, in a way that is satisfactory to them, in decisions that affect their future.” (quoted by E3) This definition falls short of specifying negotiation, but it does contemplate joint decision-making.

<sup>13</sup> See Kennett and O’Faircheallaigh (“Evaluating Agreements”) for criteria on how to rate the strength of agreement provisions regarding indigenous support. Kennett distinguishes between expressions of support that are qualified vs. unqualified, passive vs. active, and specific vs. general or extensive (45).

intent” by a company does *not* count as an “agreement” under my definition. If a First Nation just says “OK” after the company announces what it will do, this is a unilateral approach leading to acquiescence, not a negotiated agreement.

My definition of *acquiescence* is an indication (other than a negotiated agreement) received directly from FN authorities (usually Chief and Council) that the First Nation is at least neutral or not opposed to the exploration program. This indication could be a letter or statement by First Nation officials accepting the program, or FN officials may simply listen to a company explain its plans and raise no objections. If a company made no contact or failed to receive any response from the First Nation, this means the company did *not* obtain acquiescence. In section 4.4, I consider why some companies interpret no response as a reliable signal of an absence of opposition.

A company that seeks acquiescence but not agreement may still try to be sensitive and accommodating, but its efforts are decided unilaterally rather than negotiated. Typical comments from companies who seek acquiescence but not agreement include: “we just notify them of what we’re doing,” “we would call it discussion but not negotiation,” “we just try not to interfere,” and “we make our decisions based on standard best practices.”

I focus on a particular point in time when companies are seeking and obtaining these things (or not)—*before* beginning their exploration programs. I consider this to be the stage at which a company makes its first significant financial expenditure after staking the claim but before doing any drilling.<sup>14</sup> This point in time corresponds to the level of importance to the company rather than the level of disturbance to the First Nation. The latter is a very

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<sup>14</sup> A few companies are willing to consult with First Nations during pre-staking reconnaissance to get the First Nation’s general feedback without telling them exactly where they plan to stake. This is relatively rare, however.

slippery slope, since some in the industry argue that entire exploration period up to production itself is of no real concern to First Nations.

#### ***1.4 Categories***

Using my interview data, I have sorted respondents according to two separate dependent variables: they sought either acquiescence or agreement, and they either proceeded or did not proceed after failing to obtain acquiescence/agreement. Combining these two variables produces four categories:

- 1) Seek **acquiescence**, do not obtain it, **do** proceed  
(10 cases: 1 major, 7 juniors, 2 consultants)
- 2) Seek **acquiescence**, do not obtain it, **do NOT** proceed  
(5 cases: 1 major, 3 juniors, 1 consultant)
- 3) Seek **agreement**, do not obtain it, **do** proceed  
(3 cases: 1 major, 2 juniors)
- 4) Seek **agreement**, do not obtain it, **do NOT** proceed  
(5 cases: 2 majors, 1 mid-tier, 2 juniors)

Two companies that I interviewed sought neither acquiescence nor agreement from First Nations, so they are not included in these categories. These companies took a “fly under the radar” approach that will be discussed as part of the mineral industry overview in chapter 2. Also excluded are 12 cases where companies *did* obtain acquiescence or agreement.<sup>15</sup> Input from these respondents has weaker significance overall because it is impossible to tell what these companies *would* have done if they had not been successful in obtaining acquiescence/agreement (the counterfactual). I will, however, include data from these respondents as part of my analysis in chapter 3 as to why companies seek either

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<sup>15</sup> The companies placed in the “do obtain” segment remain there only because they did not recount to me a case where they did *not* obtain acquiescence/agreement. I do not assume that those companies who did not obtain acquiescence/agreement *never* obtain it; I just sort them according to their behaviour in the case(s) where they did not obtain acquiescence/agreement because this provides the most useful counter-factual evidence.

acquiescence or agreement. All respondents that fit into the above four categories are sorted based on what they have *actually done* in the recent past, not simply on what they say they *would* do.

There are 4 companies that have each taken two distinctly different approaches in different circumstances; 3 were operating in two different jurisdictions, and the fourth was operating in a joint venture with a major and then operating alone as a junior. I count these as eight different cases. In chapter 4, I examine these companies individually to obtain greater insight into what factors led them to take different approaches.

After closely scrutinizing my interview data, I identified two independent variables that each explain one of the two dependent variables and therefore answer my two central questions. In chapters 3 and 4 I lay out the full evidence underpinning my two hypotheses. In this chapter, I briefly explain each hypothesis and the logic behind it, and discuss how the literature supports each of my claims. I clarify the relation between the two independent variables, then systematically outline how to predict which approach out of the four categories a company will take. I conclude this chapter with a discussion of my research methodology and limitations.

### ***1.5 Hypothesis #1: Acquiescence vs. Agreement***

My research results indicate that the reason why some companies seek acquiescence while others seek a formal negotiated agreement relates to their different ideas about how best to shape *perceptions* of the consultation process, rather than discrepancies in the amount of time and money these companies are willing to invest in consultation and/or accommodation of First Nation requests.

In any negotiation, one party's bargaining power is a function of how much its opponent needs what it has to offer. Often, a party will try to manipulate the other's *perception* of need in order to increase the perceived value of its own offer.<sup>16</sup> The mineral exploration context poses a challenge to basic bargaining theory, however, since virtually all companies say they want to *avoid* increasing the First Nation's dependence on the exploration industry. Exploration activity occurs in such short and unpredictable spurts that companies fear a First Nation will feel cheated and angry if the local economy is reoriented and workers are trained for jobs and business opportunities that are only fleeting.<sup>17</sup>

For this reason, and due to the extreme uncertainty about the value of the property at the early stage, consultations at the outset of mineral exploration are much less about tangible up-front benefits than they are a negotiation—whether explicit or tacit—about the *nature* of the bargaining *relationship*.<sup>18</sup> For example, some companies strive to enhance the business aspects of the relationship, while downplaying the political aspects. At a roundtable held by the Public Policy Forum, industry participants emphasized that “the clearer the distinction between political and business imperatives, the better” (15).

It is in this kind of negotiation about what rules, expectations, and roles will frame the relationship that manipulating or managing perceptions become so crucial. Some companies are willing to make concessions but do not want to encourage the perception that they are

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<sup>16</sup> A basic principle of negotiation is that bargaining power depends on the strength of one's non-agreement alternatives; in other words, the side that is more willing to walk away from the table has greater bargaining power. If both sides have little to lose or to gain from each other, or they can easily get what they need elsewhere (low mutual dependence), there is little reason for negotiation to take place at all. If a company seeks FN approval but does not want to offer much in return (whether because of low capacity or because it wants to avoid raising expectations), it will achieve nothing by threatening to walk away; the First Nation may even welcome the company's departure. Bargaining theorists Bacharach and Lawler point out the importance of increasing *perceived* dependence in such a situation: “We portray bargaining as a game of managing impressions or manipulating information...[which] implies an emphasis on tactical action” (42).

<sup>17</sup> One respondent explained that for a temporary job lasting perhaps a few weeks, an Aboriginal labourer might risk losing his or her place in subsidized housing.

<sup>18</sup> See Bacharach and Lawler 59.

*negotiating*, lest First Nations perceive that consultation is akin to a political negotiation over land rights. According to Parr, companies best manage risk by allowing “participation” by non-governmental interest groups such as indigenous peoples, but only as long as participation “does not relegate de facto approval...[or] provide for discretionary denial”(17).

I have coined the term “landlord perceptions” to mean First Nations’ beliefs that they are entitled to grant or revoke companies’ land access rights on a discretionary basis, thereby thwarting the free entry system. First Nations may demonstrate these perceptions by charging an “access fee” and/or issuing “trespassing” notices. Some companies believe it is possible and desirable to weaken a First Nation’s “landlord perceptions” by refusing to negotiate access agreements; others believe it is not possible to weaken this perception and some companies do not necessarily feel it is desirable either.

There is some evidence in the literature to support this proposition. Render’s 2005 survey indicated fundamental agreement amongst industry respondents that they seek indigenous “support,” but respondents were split over whether this meant seeking “consent” on government-owned land (30). This seems to be more than just a matter of semantics. According to Render, some take the “pragmatic” route by negotiating directly with indigenous groups and recognizing their land rights, while others refuse to take on that role since it would be more properly handled by the government (24). It is unclear from Render’s analysis, however, how this latter group of companies continues to conduct exploration programs while waiting for reticent governments to fulfill their role.

Downing et al. cite a 1998 survey by Warhurst that indicated only 13% of major companies would “set up a compensation system for affected communities” or “negotiate with communities over land rights issues beyond the law” (27). Downing et al. attribute this

reluctance to a lack of capacity and personnel dedicated to indigenous issues, but their explanation seems implausible since these are major companies with high levels of resources. Downing et al. also mention that companies tend to approach consultation only as an economic transaction because they “misunderstand” indigenous peoples’ attachment to land and their quest for sovereignty (14).<sup>19</sup> Downing et al. seem oblivious to the possibility that indigenous assertions of sovereignty may be the very reason companies prefer a business-like approach and try to avoid negotiating land access issues.

Based on my research data and anecdotal support from the literature, **my first hypothesis is:** companies will seek **acquiescence** if they believe a First Nation’s “landlord perceptions” can be **weakened**; companies will seek **agreements** if they believe FN “landlord perceptions” **cannot be weakened**.

### ***1.6 Hypothesis #2: Proceed vs. Do Not Proceed***

The second puzzle involves how companies assess the political risk of proceeding without FN approval. Some companies seem to become comfortable enough to proceed once they have initiated dialogue and merely *sought* approval from First Nations, even when they have not actually *obtained* approval.

There are two phases in which companies try to reduce their uncertainty about potential complications involving First Nations. Before deciding where to stake, they conduct “due diligence,” investigating the community and regional political context by soliciting advice from consultants, other companies, and government officials. Secondly,

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<sup>19</sup> Downing et al. also claim that outcomes will only be sustainable if indigenous “[s]overeignty is respected and strengthened” by companies (42); they are oblivious to companies’ concerns about this. Weitzner also urges companies to treat indigenous peoples “as landowners” where land claims are not yet settled, and to respect the indigenous right to “free, prior, and informed consent” (“Through Indigenous Eyes,” 5), but she does not comment on the implications for companies of endorsing extra-legal or even illegal indigenous claims.

companies approach the First Nation directly to find out its concerns; this is usually conducted after staking to avoid unnecessarily “raising expectations.”

There is general consensus within the industry that a main objective of due diligence is to avoid areas with severe political conflict over land rights. MacDonald and Gibson cite a 1999 survey that showed the top three criteria that mineral exploration companies use to select (or avoid) jurisdictions are all political/legal factors related to free entry and the security of tenure; geological considerations come only fourth (4). According to Parr, companies’ biggest fear is the risk of expropriation; they avoid countries with “nationalistic policies” (16).<sup>20</sup> According to Render, land rights and tenure are at the heart of both indigenous and industry concerns. Her survey found that most companies are not opposed to Aboriginal land rights *per se*; their greatest concerns arise when land rights issues are *unresolved* (24). This echoes statements made by Danielson of MMSD and the Public Policy Forum.<sup>21</sup>

Public Policy Forum expresses alarm that “First Nations are in the position of being able to use uncertain legal positions in negotiations to extract agreement from industry”(25).<sup>22</sup> This concern would apply primarily to IBA negotiations shortly before the

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<sup>20</sup> Parr goes on to say that the worst case scenario is to be exploring where the occupants are “squatters holding possession without legal right,” because conflict will arise later if they have to be dispossessed. Indigenous peoples are far from “squatters,” but this how they have been historically treated around the world, including in Canada, and this is effectively their status on Crown land under the free entry system.

<sup>21</sup> Danielson states it is “very difficult” for companies if there are unresolved issues between indigenous peoples and government (xii). Public Policy Forum states that “the central issues for industry are what government bodies are in charge and what the rules are ... Industry is essentially indifferent as to which bodies [ie. Crown or Aboriginal] provide the regulatory oversight so long as the process is clear and regulations are fair and manageable from an economic perspective” (23).

<sup>22</sup> In the Australian context, O’Faircheallaigh explains that indigenous groups were able to obtain advantageous agreements with mineral companies when there was *uncertainty* as to how the government would enforce the Supreme Court’s 1992 native title ruling. Aside from moving operations overseas, companies could not avoid this political uncertainty through due diligence since the ruling applied to the entire country. Once an arbitration tribunal was set up that seemed to consistently support companies’ positions in cases of conflict, indigenous groups had a much harder time obtaining concessions (8). Under the 1993 Native Title Act, indigenous groups can gain the right to negotiate (RTN) if they have a reasonable prospect of satisfying the

mine production stage when a company would be extremely averse to walking away from its investment and regulators might be pressuring both sides to reach agreement. Debate on this issue is currently too polemical to provide a clear picture as to whether and how often First Nations in land claims disputes actually hold superior bargaining power during IBA negotiations. What is fairly clear, however, is that this fear of becoming trapped at the advanced stage by excessive, politically motivated FN demands is precisely what leads most companies to steer clear of land title disputes in the first place.

I use the term “political trap” to refer to a situation where members of a First Nation hassle a company in order to attract attention to political grievances, rather than to express any particular grievance against the company or its exploration program per se. Political grievances may be between the First Nation and the Crown, or between factions internal to the community. Exploration companies usually find it impossible to bargain under such circumstances because they lack any authority to address the underlying grievances, and the multi-party nature of political negotiations creates an unpredictability that is intolerable at the exploration stage.<sup>23</sup>

My research study examined companies operating in regions with a free entry system, which means that technically, all respondents were in danger of encountering land claims disputes and falling into political traps. Some companies, however, believed that traps are only a problem in certain parts of free entry regions, and that through due diligence they

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conditions for inherent title laid out by the 1992 *Mabo* decision. Under the RTN framework, parties must negotiate in good faith for 6 months, then if no agreement can be reached, the case is sent to the National Native Title Tribunal. O’Faircheallaigh and Corbett point out that “the NNTT has not, to date, refused to grant a single mining lease application that has been referred to arbitration, and has generally tended not to attach onerous conditions...”(635). This process can deter companies, however, with the threat of significant delays.

<sup>23</sup> Crozier and Friedberg’s theory of negotiation states that uncertainty is power; that is, bargaining power depends on one’s ability to manipulate issues that are critical to his opponent’s (in)security—the opponent’s “zone of uncertainty.” Crozier and Friedberg also point out, however, that there are limits to this power; if the more vulnerable side is faced with so much uncertainty that it cannot even partially depend on the other to satisfy its expectations, it will prefer to just walk away from the bargaining relationship altogether (52).

would be able to detect potential political traps *a priori* in order to avoid them. These companies apparently relaxed their vigilance vis-a-vis political dangers after choosing their project locations, and as a result, were not as careful to actually obtain acquiescence/agreement before proceeding.

Companies that felt confident they had already avoided political traps would still initiate direct consultation with First Nations to further reduce uncertainty and risk, but these companies sought information mainly about First Nations' non-political concerns; for example, requests for environmental protection or economic benefits and jobs. With this information, companies would try to accommodate these concerns as they proceeded and show a willingness to work towards obtaining an agreement or acquiescence later on. Respondents who took this approach wanted above all to avoid provoking serious unified opposition, so they were looking for and encouraged by signals of division within the community. For them, internal strife meant the glass was essentially half full; they at least had partial support amongst First Nation members.

Other companies believed that they could only be sure to avoid political traps by actually obtaining acquiescence/agreements. Companies that believed they could not detect political traps *a priori* were wary not only of political battles between First Nation and the Crown but political battles *internal* to the community, so they would work towards acquiescence/agreement reflecting a reasonable degree of community consensus.

Therefore, **my second hypothesis is:** companies will **proceed** after failing to obtain acquiescence/ agreement if they believe political traps are **detectable a priori**; companies will **not proceed** without acquiescence/agreements if they believe political traps are **not detectable a priori**.

### ***1.7 Consolidated hypotheses***

My two independent variables—what one would look for to predict companies' behaviour—are: 1) whether or not companies believe a **First Nation's landlord perceptions** can be **weakened** (which determines whether companies seek acquiescence or agreement); and 2) whether or not they believe **political traps** are **detectable a priori** (which determines whether or not companies proceed if they fail to obtain acquiescence/agreement).

Both of these independent variables stem from a company's vulnerability to political uncertainty about land rights and ownership. Both are related to a First Nation's *motivation* for issuing threats and demands—specifically, whether this motivation is political—rather than the *kind* of threat a First Nation can mobilize (eg. blockade, litigation, etc). The difference is that FN landlord perceptions may (or may not) affect what a First Nation seeks to get *from the company*. A political trap, however, reflects what FN members seek *from the Crown or Band authorities* and has nothing to do with what the company can offer per se. Companies disagree about whether and how landlord perceptions are significant. They agree that political traps must be avoided, but disagree about whether they are detectable a priori.

In the course of initiating exploration, a company would (or would not) detect and avoid political traps before it would (or would not) try to weaken FN landlord perceptions, so the variable affecting a company's willingness to proceed would come before the variable affecting whether acquiescence or agreement is sought. Since both variables involve how a company assesses FN motivations for issuing threats and demands, I propose that the first assessment should affect the second. If a company believes it has already avoided political traps, its concern about FN landlord perceptions will not be acute. Conversely, if a company

believes it cannot avoid and therefore could fall victim to a political trap, then it will also be more acutely concerned if it intends to weaken FN landlord perceptions.

If my hypotheses are valid, one should be able to predict which approach out of my four categories a company will take based on these two variables.

*Categories 1 and 3:* If a company perceives it can **detect** and avoid political traps a priori, it will seek acquiescence/agreement in order to obtain information about the First Nation's non-political concerns in order to proceed in a more sensitive manner and avoid provoking serious unified opposition. Its concerns about FN landlord perceptions will not be acute.

If such a company perceives FN landlord perceptions can be **weakened**, it will want to “keep the lid on” these perceptions by seeking acquiescence rather than agreement.

*Category 1:* *If a company believes political traps are detectable a priori and FN landlord perceptions can be weakened, it will seek acquiescence and proceed even if it does not obtain acquiescence.*

Other companies who believe they have detected and avoided political traps will seek a negotiated agreement because they believe they **cannot weaken** FN landlord perceptions, but they will not be acutely concerned about these perceptions anyway.

*Category 3:* *If a company believes political traps are detectable a priori but FN landlord perceptions cannot be weakened, then it will seek a negotiated agreement and proceed even if it does not obtain an agreement.*

*Categories 2 and 4:* If a company perceives it **cannot detect** political traps a priori, it will be committed to obtaining acquiescence/agreement before proceeding in order to avoid falling into such a trap. It will be acutely concerned about FN landlord perceptions.

If such a company perceives FN landlord perceptions can be **weakened**, this company will find it all the more necessary to seek (and obtain) acquiescence rather than agreement.

One should find stronger opposition here to seeking agreements than in category 1.

***Category 2:** If a company believes political traps are **NOT detectable a priori** but FN landlord perceptions **can be weakened**, it will seek **acquiescence** but **NOT proceed** if it does not obtain acquiescence.*

Other companies who cannot detect political traps will seek agreement because they believe they **cannot weaken** FN landlord perceptions, and they may feel most vulnerable of all four categories as a result, walking away more often than those seeking acquiescence.

The primary goal of these companies will be to avoid political traps by obtaining internal consensus, and a FN sense of entitlement to act as landlord may be tolerable if it encourages greater community unity.

***Category 4:** If a company believes political traps are **NOT detectable a priori** and FN landlord perceptions **cannot be weakened**, then it will seek a **negotiated agreement** and **NOT proceed** if it does not obtain an agreement.*

### ***1.8 Research Methodology and Limitations***

This paper is based on 33 interviews that the author conducted, both in person and over the phone, with 28 mineral exploration company representatives and 5 industry consultants during June and July of 2006. See Appendix 2 for the respondent profile. The minerals sought by these companies are: diamonds, uranium, gold, platinum, base metals, and rare metals. The individual respondents from the companies hold either the position of President/CEO, VP Exploration, Lands Manager, or in the case of two majors, Director of Sustainability/ Aboriginal Relations. The consultants interviewed all work directly with exploration companies on issues of Aboriginal negotiations, risk assessment, permitting or environmental assessments, and some actually generate project ideas themselves which they

take to companies that have the capacity to raise the funds and implement the ideas. It is worth noting that the line between exploration companies and consultants is often fuzzy since an individual may hold a management position in one company and simultaneously do consulting work for others.

In total, I contacted about 55 companies and consultants based simply on their region of work. It is likely that the 33 who agreed to be interviewed were interested in this study because they have had more interaction with First Nations than the industry average, but the sample happens to be relatively balanced between those who have had positive and negative experiences. All respondents have exploration projects in areas where the law provides “free entry;” there are 19 cases in northern Ontario, 3 cases in Quebec, and 11 cases in parts of the Northwest Territories where land claims are unsettled. I was able to interview a number of companies who are clustered around the same two communities (5 companies around one, and 7 around the other), which allows me to examine to what extent it is the community itself that determines a company’s approach.

I found these companies by going through the directory of attendees at the Prospectors and Developers Association of Canada (PDAC) 2006 Convention, by browsing through the CLAIMaps records of the Ontario Ministry of Mines (MNDM), and by looking at articles and ads in the *Northern Miner* newspaper. I also contacted companies that had been in the news regarding confrontations or lawsuits involving First Nations; three of these agreed to interviews. In addition to interviews, I also reviewed press releases and confidential Memoranda of Understanding (MOUs) that some companies were willing to show me.

The interviews lasted from one to two hours each and were conducted in a semi-structured format. While I followed a basic template of interview questions (shown in Appendix 1), I also let respondents explain their stories and talk about the issues most important to them. As certain issues that I had not previously considered began to arise with frequency among respondents, I integrated new questions into later interviews. I also gradually became more sensitized to the way respondents could misinterpret certain terms I was using, so I took more care to clarify and explain my questions. For example, I initially asked whether they sought “First Nation support,” but later I asked whether they sought some indication the FN was “neutral or not opposed.” Thus, the process evolved as I went along. At the end I found I was missing crucial information—or was not certain I had correctly interpreted the answers given—from 10 respondents, so I conducted follow-up interviews over the phone.

While I am confident that I gathered enough information to sort the respondents into categories and broadly characterize their approaches, more formal research is necessary to produce reliable statistical data, especially on companies’ vulnerabilities to FN threats. As far as I am aware, this is the first study of its kind, so my emphasis was on identifying new variables rather than on testing an existing theory. Thus, I followed a “logic of discovery” rather than a “logic of confirmation” (George and Bennett 12). I recognize that much further work is necessary to systematically test these variables I have identified.

I do not attempt to provide a complete picture of the bargaining process, since I have not done any interviews with First Nations. I chose to analyze only companies’ approaches for a few different reasons. Certainly, the logistics and costs of visiting Aboriginal communities posed a limitation, and I also needed to narrow my research question to a

manageable focus. A more important consideration, however, was the problematic nature of trying to examine the bargaining strategies and tactics of a “community.” A community inevitably involves multiple agendas, conflicting ideas about the goals of negotiation or resistance, and differing perceptions as to how much the community needs mineral exploration for its economic wellbeing. Whereas a First Nation exists for many other purposes besides mining, it is reasonable to assume that a company’s main *raison d’etre* is to realize profit and raise its share price through mineral exploration, while avoiding unnecessary costs and losses. Since there are already excellent research projects that attempt to examine consultation “through indigenous eyes,”<sup>24</sup> I have attempted to peer through the eyes of exploration companies—especially juniors—to shed a more nuanced light on a crucial side of the minerals exploration story.

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<sup>24</sup> See the collaborative research project by the North-South Institute: “Exploring Indigenous Perspectives to Consultation and Engagement within the Mining Sector of Latin America and the Caribbean” at [www.nsi-ins.ca](http://www.nsi-ins.ca)

## CHAPTER 2: An Overview of the Mineral Exploration Game

This section provides an overview of the mineral exploration game: its players, the bargaining that goes on between those players, the sequence of events, and the rules (or lack thereof). I minimize the technical detail and focus on the aspects that are particularly relevant to a mineral exploration company's approach toward First Nations.

### **2.1 The Players**

In 2005, 1.3 billion dollars were spent on mineral exploration across Canada; about 25% of this was spent in Ontario alone, and 7% was spent in the Northwest Territories (NRCan, "Canadian Exploration").<sup>25</sup> Mineral exploration companies can be grouped into three main categories based on their size and method of financing: **juniors**, who raise money by issuing shares and are capitalized at less than \$370 million; **majors**, who derive income from producing mines and have assets over \$2 billion; and **mid-tiers**, who have small mines producing approximately 0.5 to 2 million ounces per year.<sup>26</sup>

The population profile is shaped like a pyramid, with a vast number of juniors at the bottom who are constantly disbanding and reforming,<sup>27</sup> and a very small set of long-standing majors at the top. While majors have been steadily consolidating over the past decade through mergers and acquisitions, the junior sector expands and contracts with each boom and bust cycle. With the rise of the latest industry boom, juniors have surpassed majors in Canadian exploration expenditures for the past three years. In 2005, juniors accounted for

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<sup>25</sup> According to NRCan, spending in Canada constituted 19 per cent of worldwide exploration spending. Canada is home to more publicly listed mining companies than the rest of the world combined. (MacDonald 2).

<sup>26</sup> Figures used are in Canadian dollars and are taken from MacDonald (33-34). The Metals Economics Group defines junior companies as those capitalized at less than US\$200 million. (Ibid).

<sup>27</sup> According to PDAC data from 2001, as many as 20% of junior companies change their names, addresses, telephone or facsimile numbers every year (MacDonald 43).

58% of total expenditures and constituted 600 of the 736 project operators active in Canada (NRCan, “Canadian Exploration”).

Juniors are a diverse bunch and can have very different goals. At one end of the spectrum, there are “stock promoters” who stake properties, aggressively promote them to the investing public, and then turn them over very quickly to other companies. This is known as the “pump and dump.” Since this requires a minimum of work on the ground, this type of junior might get away with avoiding contact with First Nations, “flying under the radar,” as it is known.<sup>28</sup>

At the other end of the spectrum are large, well-established juniors who may hold millions of acres of property in multiple countries. Most of the companies in between are driven by a single-minded determination to beat the overwhelming odds and find the next mine, even though many are practically shoe-string operations. Juniors pride themselves on their innovation and flexibility, and many are convinced that the junior sector is much more successful at “finding mines” than majors.<sup>29</sup> Regardless of whether or not this is accurate, juniors are “skilled space invaders...as a population, their movements have broken down the barriers to entry throughout the globe” (MacDonald 37).

Juniors raise their money by issuing shares on the venture stock exchange. They may seek public investors or raise private equity through large institutions and private equity

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<sup>28</sup> There is another breed of junior—the “close-ologist”—that also does a bare minimum of work on the ground. The close-ologist specializes in staking claims as close as possible to reputable companies, preferably near waterways and potential transportation routes. Not only does proximity to a well-known company help to sell shares, but if a mine is eventually constructed, the close-ologist can charge a steep price for the right to build water pipelines and access roads across its property.

<sup>29</sup> A 1978 study by Snow and Mackenzie found that while juniors spent only 28 percent of exploration expenditures, their activities accounted for 62 percent of all economic deposit discoveries (MacDonald and Gibson 4). This statistic should not be taken as an unchanging fact, however. Nowadays, exploration in remote new frontiers often involves more high-tech and expensive exploration equipment that is less accessible to juniors. The industry is constantly fluctuating between boom and bust cycles in which majors devote more or less resources to exploration, respectively.

funds. Canada is the world's leading centre for mineral financing; here, over 60 per cent of total global equity is raised (MacDonald 27). One attraction is the "super flow-through shares" program, which awards Canadians who invest in exploration a 15 per cent federal tax credit.<sup>30</sup> Juniors often emphasize, however, that they have difficulty finding extra funds for dealing with Aboriginal groups, since consultation costs are not eligible for flow-through share funding and do not count towards the required annual work expenses they must incur to maintain their claims in good standing with the Crown.<sup>31</sup>

There is a myth that while juniors might be able to make some accommodations and give preferential contracts and jobs to First Nations where possible, juniors could not conceivably afford to offer cash compensation or free equity because they have a legal responsibility to put all of the money they raise "in the ground." Many junior respondents in this study, however, seem to have more flexibility with their budgets than this would imply. Six juniors were willing to offer free or subsidized equity interest to a First Nation, and one offered a 25% interest in its property. Three juniors were willing to pay a \$70,000 compensation fee to a First Nation before reaching the advanced exploration stage.<sup>32</sup> Many juniors say they manage to allocate about 5-10 percent of their exploration budgets to consultation-related expenses.

On the other hand, some respondents from the major sector reported that juniors are apt to short-sightedly "promise the sun, moon and stars and quite unrealistic returns" to win

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<sup>30</sup> This program has just been reinstated in May 2006. There are also provincial tax incentives, such as a 5% provincial credit for funds spent in Ontario.

<sup>31</sup> While the minerals industry has tirelessly campaigned for these two rules to be changed, the Ministry of Northern Development and Mines in Ontario (MNDM) has decided not to respond to the requests.

<sup>32</sup> One of these companies is still waiting to start its first program, but said it would be willing to offer this amount or the equivalent in shares to obtain entry. Another has already been working on the property for over 10 years (but has not yet reached the advanced exploration stage) and this \$70,000 constitutes about 5% of the \$1.5 million dollar drilling program for which it obtained FN acquiescence. The third was attempting to reach an agreement with the First Nation prior to obtaining a bulk sample permit.

FN approval, such as a 30% carried equity interest in the property or a 5% royalty on any eventual mine.<sup>33</sup> As soon as the property were to be bought by any company with a concern for the long-term profitability of a potential mine, these terms would have to be renegotiated and substantially lessened.

Mid-tiers are small-scale producers that have successfully broken out of the juniors' ranks, but they face a perilous journey if they aspire to become majors. Mid-tiers may not have the experience or range of personnel required to manoeuvre through regulatory webs and environmental assessments, or the savvy to manage negotiations with public stakeholder groups that include First Nations. Many either drop back to junior status or get swallowed up by hungry majors looking to increase their reserves.

Majors get their exploration funds out of the revenues from their producing mines. Majors may have an advantage of scale in dealing with First Nations, since they can negotiate one agreement to cover many projects if their exploration is concentrated in one community's territory. One major says it aims to develop relationships that last "20, 50, 80 years," with the expectation that negotiation will get easier each time the company returns to the same area. Thus, it is cost-effective for majors but often impossible for juniors to have an Aboriginal liaison or even an entire Aboriginal relations department.<sup>34</sup> Some majors do their exploration through majority-owned subsidiaries which keep a lower profile and may attempt to pass themselves off to communities as cash-strapped juniors.

The head offices of the largest firms "are to the mining industry what the trading post was to the fur trade" (MacDonald 31). Prospectors and juniors are constantly coming to

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<sup>33</sup> Typically, the maximum royalty that can safely be awarded to prospectors is 0.5-1% or else the mine is likely become unprofitable, especially for base metals which often have slim profit margins. One junior made the unusual assertion that any company who spends a lot of money on Aboriginal relations and offers compensation agreements is just a stock-promoter and is not serious about finding a mine.

<sup>34</sup> Nevertheless, majors emphasize that it does not work to standardize or scale up the process; each First Nation must be approached individually and accommodated uniquely.

majors to sell their wares—their projects—or to sign up for joint ventures.<sup>35</sup> Projects most often flow up the pyramid as they are passed from prospectors to juniors to larger companies—with an entire company sometimes getting swallowed up in the sale—but the industry should not be envisioned as a simple food chain. The industry as a whole must collaborate to achieve the common goal of producing a mine. MacDonald compares the mineral industry to “a propulsion unit, fuelled from below by venture capital and the entrepreneurial fervour of the junior sector, and guided from above by the planning system strategies of the largest firms” (39). This description may exaggerate the amount of organization and harmony between industry actors, however.

Industry relations are characterized by an uneasy mixture of competition and cooperation. Majors jostle elbows with small-time prospectors to get a piece of the staking action, just as mid-tiers vie with majors to run the most technologically efficient mines. Joint ventures provide cooperative benefits—helping both parties to spread project risk, and providing juniors with funding as well as access to expertise—but each would ideally prefer to go it alone to receive 100% of the potential profits. The competitive aspect of industry relations drives companies to seek niche advantages, which could include establishing preferential business ties with First Nations to save costs. The cooperative aspect, however, means that companies are concerned about being ostracized if they set precedents that are seen as too generous to First Nations.

## ***2.2 The Exploration Sequence***

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<sup>35</sup> Parr defines “joint venture agreements” as agreements “whereunder the larger company bears all costs until a stated level of expenditures has been made or the property has been ‘proven up’, i.e., shown to contain a deposit that can be mined economically by virtue of a feasibility study” (7). Rather than selling properties effective immediately, a vendor will often allow a buyer to “option in:” the buyer earns an interest once it completes a specified amount of work on the property.

The exploration sequence starts with pre-staking reconnaissance, which includes airborne surveys and sampling over an area of perhaps 100,000 hectares. Sometimes as much as \$100,000 is spent before even acquiring a claim. This is done in a highly secretive manner to prevent other companies from jumping in ahead to stake claims in those areas of interest. Secrecy also tends to generate suspicion and hostility from local First Nations—an inauspicious start to the relationship.

After acquiring a \$25 prospecting license, a person can go hammer wooden stakes around the boundaries of a 16 hectare patch of Crown land and secure the exclusive right to explore on that claim.<sup>36</sup> When working in very inaccessible areas such as the swamps of the James Bay lowlands in Ontario's far northeast, the costs of helicopter surveys and the transport of people, fuel and equipment can be exorbitantly high even at the early stages, making such areas out of reach for most small-time juniors and prospectors.<sup>37</sup> The Mining Act prevents claim holders from tying up ground needlessly by requiring them to do a certain amount of exploration work annually to keep the claim in good standing; essentially, they must “use it or lose it.” In Ontario, the required annual expense is \$400 per claim.

If a company cannot do the work, which may happen if it is waiting to complete negotiations with a First Nation, then a company can apply to the Mining Recorder for an “exclusion.” This means the Recorder waives the work requirements for one year. An exclusion is only granted if a company can prove it has made exhaustive efforts to resolve the

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<sup>36</sup> Currently in Ontario and the NWT, the prospector is required to be physically present on the ground to stake, but the Ontario Government's 2006 Mineral Development Strategy has introduced electronic map staking, starting in southern Ontario. If implemented in the far north, First Nations may have even less opportunity to monitor who is acquiring rights to their traditional territory. Six other jurisdictions in Canada, including Quebec, Alberta, British Columbia, and three maritime provinces have already introduced map staking.

<sup>37</sup> As one respondent explained, there is “no such thing as a prospector taking a pick axe up there and tripping over a gold nugget.” One return airfare from Timmins to Attawapiskat is over \$1000. This is in addition to an exponential rise across the board in the costs of doing exploration programs due to higher fuel costs, higher drilling costs, and a higher cost of labour.

issue with the First Nation. Exclusions can be renewed year after year as long as the company keeps exerting maximum effort, but this can get very pestersome for a First Nation if it has told the company just to wait until the community takes care of its other priorities.<sup>38</sup> Aside from government requirements, it is often impossible for a junior to delay its project for more than one year because of shareholders' expectations.

In much of the Northwest Territories, companies apply shortly after staking for a land use permit from the Mackenzie Valley Land and Water Board (MVLWB).<sup>39</sup> The MVLWB cannot reject the permit but if it has concerns it can send the project to undergo a full environmental impact assessment (EIA), and higher government officials have no power to quash this referral. While lack of consultation with a First Nation is a valid reason to call for an EIA, the MVLWB does not require FN approval, just documentation showing a company made an effort to consult. Companies certainly want to avoid an EIA since it is an expensive process that takes on average 15 months for small exploration projects (MacDonald and Gibson 18). Many juniors will abandon a project rather than go through the EIA.<sup>40</sup>

In Ontario<sup>41</sup> and Quebec,<sup>42</sup> very few permits are required, even for drilling, until a company reaches the advanced exploration stage. Advanced exploration is triggered when a

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<sup>38</sup> According to the Mining Recorder, there is no time limit or alternate strategy taken by the government if the issue seems at a deadlock or if the First Nation just says 'no': "we assume eventually the parties will come to an understanding." (Pers. comm. R. Gashinski, 10 July 2006).

<sup>39</sup> This permit is required to occupy a camp for more than 200 "man days," bring in a heavy drill rig, or store over 15 barrels of fuel. The MVLWB came into being in 1998 and has jurisdiction over those areas in the Mackenzie Valley not covered by the Gwich'in and Sahtu settlement areas, each of which have their own Land and Water Boards. Before 1998, companies could just fill out an application and receive a permit within 10 days, but now the process may take quite a number of months.

<sup>40</sup> For example, two diamond and two uranium exploration companies withdrew their applications for permits from the MVLWB after being referred to EIAs, due to strong objections by the Lutsel K'e Dene First Nation. (Weitzner, "Dealing Full Force," 12).

<sup>41</sup> In Ontario, permits may still be required before the advanced stage from the federal Department of Fisheries and Oceans (DFO) for drilling over a frozen lake, and from the Ontario Ministry of Natural Resources (MNR) for building a road or a water crossing (for example, a bridge or culvert), and also for storing fuel drums at a camp. In their permit application, companies have to indicate to MNR whether they have done consultation. Copies of the application are sent to affected Aboriginal groups, and the MNR Aboriginal liaison also screens

company wants to strip off more than 10,000 cubic metres of surface material or take a bulk sample of more than 1000 tonnes out of the ground. Soon after this point the company has to show regulators some evidence of consultation with Aboriginal groups as part of its closure plan for leaving the site. It is now considered to be a *de facto*—although unofficial—requirement in Canada that a company must negotiate an Impact and Benefits Agreement with affected Aboriginal communities prior to building a mine (Sosa and Keenan 8).<sup>43</sup>

Mineral exploration is an extremely risky business, since only 1 in 1000 grassroots projects will become an economically viable mine. There is a 100% chance of error during the entire phase before advanced exploration. In other words, millions, sometimes tens of millions of dollars are invested into properties without any guarantee whatsoever there will be any return.<sup>44</sup> While majors are often mistakenly labelled “risk-averse,” it is important to remember that riskiness is determined by the *stage* at which a project is acquired. The further along one joins or buys a project, the more the risk goes down and the price goes up. Majors do stake or acquire very risky grassroots projects; they just balance these out with a portfolio of projects at all the various stages of the exploration cycle.

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applications to see whether activities will affect any of the Aboriginal values that communities have submitted on a list to MNR. (Pers. comm. J. Griffin, MNR Cochrane District, 24 July 2006.)

<sup>42</sup> In Quebec, low-impact exploration work is exempt from the Environmental Quality Act, and is not subject to the assessment and review procedure. Once a project reaches a more advanced stage, it is screened by the tripartite COMEV evaluation committee (2 Cree, 2 federal, 2 provincial representatives)—established in accordance with the James Bay and Northern Quebec Agreement (1975)—which decides whether the project should be subjected to a full environmental impact assessment (EIA). The 2002 “Paix des Braves” settlement between Quebec and the James Bay Crees establishes a Cree Mineral Exploration Board to promote Cree involvement in the mineral exploration business.

<sup>43</sup> According to one respondent (a major), the costs of doing consultation for a full environmental assessment or an IBA may run into the millions of dollars if the company has to pay for the Aboriginal side to participate also. Sometimes equal funds are contributed from government and the company, although government assistance may cause even more unwanted delays for the company.

<sup>44</sup> During appraisal the range of error falls from 100% to 50%, then it decreases gradually to 10% during actual mine development. Misestimation of the mineral itself is a 5% risk during mine development, but the range of error for economic feasibility is 10% (which includes market volatility and costs of access and infrastructure) (MacDonald 17).

The extreme investment risk stemming from geological uncertainty is why the mineral industry insists that—to the greatest extent possible—every other uncertainty must be removed; “free entry” must be guaranteed. Once a deposit is found, government regulators have no discretion to refuse an application for a 21 year lease, provided the basic information requirements are met. Thus, if Aboriginal groups wait to be officially invited for their input at the advanced exploration stage, they then have to swim against a current with a considerable amount of momentum.

### ***2.3 Laws and Policies on Consultation with Aboriginal Groups***

Neither the legal responsibilities of mineral exploration companies toward Aboriginal groups nor the consultation duties of the federal and provincial governments have yet been clearly defined in law or policy. In fact, the system is in utter chaos. The President of one junior remarked: “this is a fantastical situation where there seems to be no rule of law.”

During the last ten years, the Supreme Court of Canada has made a number of landmark decisions on Aboriginal rights to consultation. Governments have either failed or made only preliminary efforts to change laws and policies to reflect these decisions.<sup>45</sup> The most recent of these—the *Taku River Tlingit* and *Haida* decisions of November 2004 and the *Mikisew* decision of 2005—establish both a federal and provincial duty to consult and accommodate all Aboriginal rights-holders, even if their land claims are unsettled or they have surrendered lands through treaties. The duty to consult lies solely with the Crown, but it is unclear to what extent the “procedural aspect” of consultation can be delegated to private

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<sup>45</sup> Justice Patrick Smith of the Ontario Superior Court wrote in his July 28, 2006 decision on *Platinex Inc. vs. KI*: “Despite repeated judicial messages delivered over the course of 16 years, ...the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation” (par. 96). Lawyer Peter DiGangi commented in a 1999 speech: “the Crown's response to each of those developments has been very consistent and you can distill it to a couple of key responses: avoid it, deny it, and delay any response, and if you have to respond then develop a policy that is much less than what the courts say, but looks like it might satisfy the general public.”

companies (Hipwell et al. 9).<sup>46</sup> Neither the Ontario Mining Act, nor the Canada Mining Regulations (which apply to the NWT) make any reference to consultation with Aboriginal groups, although there are rumours of proposed amendments to the Ontario Mining Act.

The Ontario Ministry of Northern Development and Mines (MNDM) currently advises companies unofficially to consult with First Nations as early as possible. MNDM has no policy or mechanism, however, which would alert companies when they record their claims as to which First Nation's traditional territory those claims are on.<sup>47</sup> There is little guidance as to how much or what kind of "consultation" is required and how conflicts should be resolved.<sup>48</sup> At both parties' request, MNDM staff can act as a neutral liaison between companies and First Nations, but they do not act in any decision-making or arbitral capacity.

A number of federal and provincial ministries, including Natural Resources Canada, Indian Affairs, and MNDM, have dedicated considerable resources to "education" initiatives, hoping that conflicts just reflect First Nations' misunderstanding of the industry and a lack of effective communication techniques.<sup>49</sup> Another emphasis is on addressing "poverty" issues;

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<sup>46</sup> Citing two recent court cases, lawyers Gravenor and Mullard emphasize: "It is imperative that private parties be vigilant in ensuring that their governments consult adequately with aboriginal groups and accommodate where necessary—or to risk bearing the consequences for governments' failure to do so" (5).

<sup>47</sup> According to the Mining Recorder, policy is "headed in this direction." Currently, companies can contact MNDM's regional Mineral Development Coordinators or regional MNR offices, which have maps of traplines, although these maps are disputed amongst FN communities. (Pers. comm. R. Gashinski, 10 July 2006.)

<sup>48</sup> The 4-page checklist produced by the Subcommittee of the Intergovernmental Working Group on the Mineral Industry is very vague on how to deal with conflict. It says the purpose of consultation is: "to inform local Aboriginal people of your company's plans" and "to learn of their concerns about the project and consider how to mitigate them." It advises companies to "think about the advisability of entering into a voluntary [IBA] to circumvent false expectations." The checklist instructs companies to "determine if there are any conflicts or potential conflicts with Aboriginal Treaty rights (sic)," an incredible and seemingly inappropriate instruction given that such rights are often still under dispute in the courts and in political negotiations.

<sup>49</sup> The Ontario government, the federal government, and the Ontario Mining Association have recently produced an educational video, "Mining New Opportunities," to "help First Nations communities build a greater understanding of modern mining and its impacts." (Ont. Mineral Development Strategy 11). NRCAN and MNDM have also produced a video entitled "Our Community...Our Future: Mining and Aboriginal Communities"—in English, French, Cree, Ojibwa and Oji-Cree—to explain the mining sequence. See also Fyon and Churchill.

the main concern being “the ability of Aboriginal people to participate fully in the benefits of mineral development” (Ontario Mineral Development Strategy 11).<sup>50</sup>

Both of these approaches ignore central questions of rights and power. First Nations often declare moratoria if they are still in the process of negotiating a land claim, if they believe treaty obligations have not been fulfilled, if they want to expand their reserve, or if they want to introduce and co-manage land-use planning.<sup>51</sup> If exploration proceeds in the meantime, Aboriginal land and power dwindles away even as they negotiate over them, since any existing mineral claims or leases must be protected or “grandfathered” into the eventual settlement.

In the Northwest Territories, the federal government finally managed to negotiate an interim land withdrawal in December of 2005 for the Akaitcho Treaty 8 First Nations, whose land claim negotiations began in 2000.<sup>52</sup> In their press release, the NWT and Nunavut Chamber of Mines welcomed this as a positive step since it added more certainty to an extremely chaotic situation, although there are still disputes about permits issued on the traditional lands that were not withdrawn. The federal Department of Justice has set up a new Consultation Secretariat to advise various ministries.

Ontario claims its policies on consultation are evolving. The province unveiled draft guidelines on consultation on June 27, 2006 and is now soliciting feedback from First

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<sup>50</sup> The Strategy does recognize, however, that economic development requires “effective consultation processes,” as well as “[e]xploring possible approaches to reduce the impact of mineral sector activities on protected rights and traditional activities (e.g., ways to provide for the withdrawal from staking of cultural and spiritual sites)” (12).

<sup>51</sup> There is currently no comprehensive land-use planning in Ontario’s far north. This is one topic that may be discussed at the Northern Table.

<sup>52</sup> The Akaitcho had threatened legal action to stop the federal government from issuing prospecting permits. Although the withdrawal process will not be officially completed until October 2006, the area identified as potential settlement land was withdrawn as a goodwill gesture for the 2005-06 staking season. On traditional lands that were not withdrawn, the government promised consultation before issuing permits. The 3,100 Akaitcho in six First Nations claim about half a million square kilometres of land around Great Slave Lake as their traditional territory.

Nations, although the guidelines were ironically prepared without consulting First Nations.<sup>53</sup> The province has also pledged to set up a “Northern Table,”<sup>54</sup> but refuses to consider interim withdrawals while the talks proceed and does not recognize as legitimate the current moratoria of about eight First Nations.<sup>55</sup> Critics call the new initiatives “a day late and a dollar short” (Thatcher, qtd. in Harries), especially after MNDM did little to prevent or mitigate the February 2006 standoff between a junior platinum explorer and Kitchenuhmaykoosib Inninuwug First Nation (KI), aside from an unsuccessful last-minute attempt to convene a meeting with both sides.<sup>56</sup>

There is an overwhelming sentiment within the mineral industry that governments either prefer to just “run and hide,” or move much too slowly for a business timeframe. As a result, companies and Aboriginal groups have had to take the law into their own hands. Sometimes companies have agreed to bargain directly over land access, but this has become the subject of considerable controversy.

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<sup>53</sup> The guidelines do not specifically relate to mining; they are directed at all Ontario ministries and are thus very general. British Columbia established its entire consultation policy without consulting Aboriginal groups, even saying that it would not be appropriate to do so (Teillet 69).

<sup>54</sup> Exploratory discussions are underway between the province and First Nations; it has not been decided whether the federal government or the mineral industry will participate. The Table is being coordinated by the Ontario Secretariat for Aboriginal Affairs (OSAA) but participation is inter-ministerial. OSAA proposes the general theme should focus on “what are the barriers to prosperity” in Ontario’s far north. (Pers. comm.. B. Silver, 11 July 2006)

<sup>55</sup> The First Nations with moratoriums of which I am aware are: KI, Muskrat Dam, Deer Lake, Wapekeka, Sachigo Lake, Sandy Lake, Wawakapewin, and Wunnumin Lake. As reported by Cameron Smith, MNR Minister Ramsay explained why development should continue while the talks go on: “It would be very disruptive (to allow moratoriums) because...we want to continue...the wealth generation that (development) brings...and as we do that we can discuss how we are going to share that wealth.” (brackets in original)

<sup>56</sup> In his recent ruling, Justice Smith declared: “the evidentiary record indicates that it [the Ontario government] has been almost entirely absent from the consultation process with KI and has abdicated its responsibility” (par. 93). MNDM has attended only 3 meetings in KI over past 7 years that Platinex has owned claims, mainly in order to “explain issues associated with exploration and mining,” according to Assistant Deputy Minister Christine Kaszycki (APTN National News). Kaszycki admitted on Feb. 27: “We have not had a lot of direct communication in respect to that community”(Great Northwest AM). MNDM attempted in early February to convene a meeting with both the company and KI to “confirm” the company’s work program but was rebuffed by KI because MNDM refused to include on the discussion agenda the Crown’s duty to consult. (Letter from A. Fyon of OGS to KI dated Feb. 16 2006; KI Press Release, Feb. 27). The OPP made a controversial decision to send in 7 extra officers; these remained primarily as “neutral” observers (Letter from M. Pilon of OPP to KI, Feb. 23 2006), although KI felt they “increased community tensions” (NAN News Release, Feb. 22).

## **CHAPTER 3: TESTING THE ACQUIESCENCE VS. AGREEMENT HYPOTHESIS**

In this chapter, I test the first of my two hypotheses laid out in chapter 1: companies will seek **acquiescence** if they believe a First Nation’s “landlord perceptions” can be **weakened**; companies will seek **agreements** if they believe FN “landlord perceptions” **cannot be weakened**.

As noted in the literature review, many analysts claim that companies’ behaviour is determined by their vulnerability to threats and/or capacity to negotiate. In order to rule out these competing explanations, I first establish a set of indicators for vulnerability and capacity based on a proxy measure—mitigation efforts—then analyze my survey data accordingly. Next, I compare data from respondents seeking acquiescence and those seeking agreements on their *perceptions* of negotiating access. I supplement these findings with a case study of five companies dealing with the same First Nation community in Ontario’s far north. Finally, I consider an alternate explanation raised by the case study—juniors seek agreements due to pressure by majors—and conclude that overall, this is a marginal factor in why companies seek agreements.

### ***3.1 Testing Vulnerability and Capacity***

I argue that it is companies’ *perceptions* of the merits of acquiescence versus agreement that matter most, but first I am obliged to consider the competing explanation that some companies either do not need to or are not able to negotiate agreements. In other words, companies seek FN acquiescence by default. In this section, I analyze my survey data to determine whether or not the significant variation lies in companies’ vulnerability or capacity to negotiate.

#### ***3.11 Indicators of vulnerability***

A company is “vulnerable” to a certain FN threat if that threat is *credible* and it has the potential to cause *serious damage* to a company. Based on companies’ own claims, I rate both credibility and serious damage as a basic “yes” or “no” rather than grading them on a more nuanced scale. This is a limitation of my research design, but it also reflects companies’ own fuzzy ideas about how to evaluate threats at the outset of mineral exploration. Threats would be considered credible—to give two examples—if a company relied on any access routes that could physically be blockaded, or if it perceived the First Nation had legal grounds for litigation. “Serious damage” refers to costs and delays that could make a project—or even the company itself—unprofitable; this is difficult to precisely define since it varies so much from case to case. I consider a threat to be “high” if it is *both* credible and seriously damaging; if one or both of these conditions is missing, then a threat is “low” or nonexistent.

The six main types of FN threats I inquired about in my survey are: opposition to getting permits, litigation, direct action/blockades, cutting off access to services/infrastructure, physical intimidation/vandalism and a media campaign. To further determine the significance of a media campaign, I inquired about how investors and potential project buyers within the industry—especially majors—would react to conflicts with First Nations.

I return to these direct indicators of vulnerability in section 4.12 when I compare the *types* of threats faced by companies that do and do not proceed. It is much more difficult, however, to assign composite ratings of vulnerability to individual companies using threat measurements. Facing a higher *number* of different threats does not necessarily mean greater *intensity* of vulnerability, and companies’ qualitative claims about how threatened they feel cannot easily be rated against one another.

Instead, I use mitigation “effort” here as a proxy measure for vulnerability. I examine whether those that sought acquiescence made less effort to mitigate threats than those seeking agreement, and consider whether they relied on government assistance to help deliver acquiescence/agreement.<sup>57</sup> “Effort” is measured in: **a)** time spent or delays incurred by a company and/or **b)** percentage of the exploration budget spent on consultation-related expenses. I only consider the effort made by a company *before* it either obtained acquiescence/ agreement or made a decision to proceed or not to proceed. I measure effort as “high” or “low.” “High” effort means consulting with the First Nation for at least three months,<sup>58</sup> and/or delaying the program for at least one season, and/or spending over 5% of the exploration budget on consultation-related expenses.<sup>59</sup>

I assume that companies are “rational” in the sense that they will make mitigation efforts only until their vulnerability is low enough to proceed. Recall that low vulnerability means a threat has either low credibility, or its potential damage to the company is insignificant, or both. One might argue that companies could be irrationally risk-taking and make low mitigation efforts despite perceiving themselves to be highly vulnerable. Indeed, junior mineral explorers have a reputation for being driven by colourful personalities who

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<sup>57</sup> This corresponds to Bacharach and Lawler’s dependence theory of negotiation, which states that parties can gain a stronger bargaining position by either lowering their own need—in this case, for acquiescence or an agreement—or by decreasing their reliance on the other party to get it. Even if a company still needs acquiescence/agreement to the same degree, it will be able to get away with conceding less to a First Nation if it can count on government to help deliver the acquiescence/agreement.

<sup>58</sup> In its “Guide to Mineral Exploration in Attawapiskat Traditional Territory,” the Attawapiskat First Nation advises companies that “consultation and negotiation towards a Memorandum of Understanding could take at least 3 months.”

<sup>59</sup> An initial exploration budget might be around half a million dollars; 5% of this would be \$25,000. Considering that one trip up to a remote community in Ontario’s far north costs about \$5,000-10,000, 5% of an exploration budget would allow for a reasonably high level of consultation (3 to 5 trips). Some FN communities are asking for 10% of companies’ exploration budgets. While a few companies do manage to set this amount aside, the vast majority of companies I interviewed said this would be impossible for them. Some respondents could not estimate the percentage of their budget spent on consultation-related expenses, so I categorize their efforts as high or low based on the amount of time they spent or the approximate number of meetings they held.

can be daring, headstrong, and even confrontational.<sup>60</sup> It is much more implausible, however, that *high effort* could mean companies are irrationally cautious or risk-averse, since the basic profile of all grassroots explorers is a willingness to take risks. Some say that majors are overly cautious—which is a questionable generalization—but even those majors that do make higher than average mitigation efforts likely do so because of a higher vulnerability rather than an indifference to spending money and time wastefully.

Table 1 on page 41 shows the level of vulnerability that should logically correspond to levels of mitigation efforts for each of the three approaches—*obtaining* acquiescence/agreement, *proceeding* without having obtained acquiescence/agreement, and *not proceeding* without having obtained acquiescence/agreement.

For those that **do obtain** acquiescence/agreement, high effort should correspond to high vulnerability, but low effort may not correspond to low vulnerability. Some of these companies claim they perceived a high potential threat (which is difficult to verify), but only needed to make low effort since the FN acquiesced quickly and made low demands.

For those that do not obtain acquiescence/agreement but **do proceed**, I assume a company would only take this approach if it feels threats are either low to begin with or mitigable. In either case, low effort would correspond to low vulnerability, and high effort would mean high vulnerability. There are 5 companies taking this approach that received *no response*. They were all seeking acquiescence; none seeking agreements failed to receive a response. One would naturally expect to see less effort made by these companies, unless they waited a long time before proceeding, which would show high vulnerability since time

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<sup>60</sup> Some juniors also point out, however, that more sophisticated companies could be more confrontational if they are highly influenced by legal consultants, who may insist on an absolute legal right to free entry. Among the respondents I interviewed, even the respondents most hostile to First Nations in rhetoric said that in the end it all comes down to “number-crunching,” which indicates that “rational” decision-making likely prevails.

is often a major sacrifice for mineral explorers. Therefore, one might expect that these 5 would draw lower the average effort among those seeking acquiescence versus those seeking agreement.

For those that do not obtain acquiescence/agreement and **do not proceed**, high effort should correspond to high vulnerability, but low effort is inconclusive. A company might abandon a project after making low effort for many reasons: it might see opportunities elsewhere that require less mitigation,<sup>61</sup> it might have low capacity, or it might quickly encounter threats that are just not mitigable, in which case there would be no point in exerting high effort.

Overall, the most conclusive evidence comes from the “do not obtain but do proceed” approach since both high and low mitigation efforts correspond to high and low vulnerability respectively. For the other two approaches, low effort is more inconclusive.

If a high number of those seeking acquiescence show low effort but also rely on government assistance/intervention, this could indicate that those seeking acquiescence are highly vulnerable but can lessen their vulnerability through their government connections rather than by seeking to negotiate agreements.

Indicators of mitigation effort show that a company has the capacity to make at least those efforts that it did, although a company’s upper limits of capacity are still unclear. If the major limiting factor was low capacity, one should see lower effort overall among those seeking acquiescence, especially in comparing those that **do not proceed** (categories 2 and 4), since they appear to have reached their mitigation limits. For companies that **do proceed** without obtaining acquiescence/ agreement, evidence of capacity can be obtained by

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<sup>61</sup> Some respondents in all categories pointed out jurisdictions with a reputation for being more “mining-friendly.” These included: Nunavut, Quebec, Yukon, and parts of the NWT with settled land claims.

examining whether initial low effort is followed by high effort later on as companies continue to mitigate threats after proceeding. This may indicate that capacity was not the reason for making low initial effort.

**TABLE 1: Expected significance of low and high mitigation effort**

	<b>LOW EFFORT indicates...</b>	<b>HIGH EFFORT indicates...</b>
<b>DO OBTAIN</b>	<i>Unclear</i> CHECK: Whether companies claim they would have made higher mitigation effort—without seeking agreement—if the FN had not acquiesced so easily. WOULD INDICATE: Potentially higher vulnerability in those seeking acquiescence.	<i>High vulnerability</i>
<b>DO NOT OBTAIN and PROCEED</b>	<i>Low vulnerability</i> CHECK: Whether companies made high mitigation effort <i>after</i> proceeding. WOULD INDICATE: Issue is not lack of capacity.	<i>High vulnerability</i>
<b>DO NOT OBTAIN and DO NOT PROCEED</b>	<i>Unclear</i> CHECK: Whether there is lower effort overall in this category among those seeking acquiescence vs. those seeking agreement. WOULD INDICATE: Issue is lack of capacity.	<i>High vulnerability</i>

#### 4.12 Survey results and analysis

The survey data in Table 2 on page 42 show that while a higher percentage of those seeking agreement made a high effort to mitigate (75%), a majority of those seeking acquiescence also made high effort (52%). If the 3 are included that did obtain acquiescence with low effort but claimed they had high potential vulnerability, the percentage of those seeking acquiescence with high vulnerability rises to 65%. Among those that did not obtain acquiescence/agreement and proceeded—the approach with the strongest correlation between mitigation efforts and vulnerability—a *higher* percentage of those seeking *acquiescence* made a high effort (40% or 4 out of 10) compared to those seeking agreement (33% or 1 of 3). This is *despite* the fact that half those seeking acquiescence who proceeded without

obtaining it received *no response*; whereas none seeking agreement failed to receive a response, yet they still made low effort.

**TABLE 2: Mitigation efforts among those seeking acquiescence vs. agreement.**

	ACQUIESCENCE	AGREEMENT
<b>DO OBTAIN</b>	HIGH EFFORT: 4 out of 8 (50%); 1 other claimed high vulnerability but made “special effort.”* Low effort but claims of high potential vulnerability: 2	HIGH EFFORT: 3 out of 4 (75%)  Low effort but claims of high potential vulnerability: 0
<b>DO NOT OBTAIN and PROCEED</b>	HIGH EFFORT: 4 out of 10 (40%)  High effort <i>after</i> but not before proceeding: 2	HIGH EFFORT: 1 out of 3 (33%) High effort <i>after</i> but not before proceeding: 1
<b>DO NOT OBTAIN and DO NOT PROCEED</b>	HIGH EFFORT: 4 out of 5 (80%)	HIGH EFFORT: 5 out of 5 (100%)
<i>Overall Total</i>	HIGH EFFORT: 12 out of 23 (52%) HIGH POTENTIAL VULNERABILITY: 15 (65%) Out of those making LOW EFFORT: 1 would rely on and 2 would expect government assistance. [none have had to rely] INDICATES: Majority have high actual or potential vulnerability and almost all rely on own efforts.	HIGH EFFORT: 9 out of 12 (75%) Out of those making LOW EFFORT: 1 would rely on and 1 would expect government assistance. [neither have had to rely]  INDICATES: Majority have high actual vulnerability and almost all rely on own efforts.

\* The “special effort” made by one company that obtained acquiescence was hiring a Native contractor who did all the communications groundwork and apparently obtained the permission of all the local trappers before proceeding. This did not necessarily take extra effort in terms of time and money, but the company claimed it could be highly vulnerable if it did not make this special effort.

The biggest difference in effort was among those that *did obtain* acquiescence/ agreement: 50% of those seeking acquiescence made a high effort as opposed to 75% of those seeking agreement. This result has the weakest significance, since there is no counterfactual showing how much more effort these companies would have made if they had experienced more difficulty in obtaining acquiescence/agreement.

Nearly all of those that did *not* proceed—4 out of 5 of those seeking acquiescence and all 5 of those seeking agreement—made high effort before giving up, which indicates high vulnerability rather than indifference. It also means they were not quickly daunted and did not perceive threats to be unmitigable at the outset.

The data also suggest that lesser capacity was not the reason companies sought acquiescence, since a majority of those seeking both acquiescence and agreement exerted high effort, and all but one of those that did not proceed made high effort. Two of those that proceeded without obtaining acquiescence made low effort initially but had the capacity to make high mitigation efforts afterwards. It is worth noting that 3 juniors seeking acquiescence and 4 juniors seeking agreement made high time sacrifices—one has been waiting sixteen years!—so the common argument that juniors are hamstrung by time pressures is not always the case. Many get extensions from the Mining Recorder and seem to be able to convince shareholders that it is worth the wait.

Only one seeking acquiescence and one seeking agreement said they would rely on the government to solve the problem if they got into trouble with a First Nation, although neither has had to do this yet. In total, 22% of those seeking acquiescence (5 out of 23) and 33% of those seeking agreement (4 out of 12) said they would expect or push the government to help them if there was a conflict, but they would not count on this assistance and would still have to make their own mitigation efforts. Of those making this statement, 3 out of the 5 seeking acquiescence and 3 out of the 4 seeking agreement *already* exerted high effort.

In summary, a majority of both those seeking acquiescence and agreement exerted high mitigation effort, and very few relied on government assistance. Therefore, companies do not seek acquiescence because they have a lower vulnerability or capacity to negotiate.

### ***3.2 Perceptions of Negotiating Access***

I now examine differences between how companies seeking acquiescence and companies seeking agreement *perceive* the significance of negotiating access agreements and how they expect it to affect their vulnerability.

### 3.21 *Perceptions of those seeking acquiescence*

Out of 23 cases in which companies sought acquiescence, only 5 companies cited no objections to negotiating access agreements. Of these 5, 4 said First Nations have just never asked for agreements or do not care about exploration, and one has now switched over to negotiating an agreement, saying it prefers to know the “rules of the game” ahead of time.

The other 18 cited problems with agreements; most of these concerns had to do with triggering demands and expectations that would move the relationship away from the realm of business and into the realm of politics. In section 1.5, I defined “landlord perceptions” as First Nations’ beliefs that they are entitled to grant or revoke companies’ land access rights on a discretionary basis, thereby thwarting the free entry system. While the term “landlord perceptions” is my own and it was not used by any company I interviewed, in this analysis of my survey data I look for evidence of two major elements of the concept: First Nations feeling *entitled* to benefits rather than having to *earn* them, and First Nations believing they can pre-empt land claims negotiations to displace the Crown as dispenser of mineral rights.

Of those seeking acquiescence, 7 were *adamantly* opposed the idea of negotiating access agreements. Two of these were juniors with low vulnerability that dismissed agreements as “bribery” that they could not afford. More significant responses came from the other 5, who were mostly larger companies and all had high vulnerability. Four of these 5 *did not proceed* after failing to obtain acquiescence (category 2), despite the fact that they made high mitigation efforts before walking away. This fulfills the prediction made in 1.7 that those in category 2 should have the strongest opposition to seeking agreements.

Of these 5, a major and a consultant said negotiating access would ruin the “reciprocal” nature of relationships they work so meticulously to build with FN communities.

For these 2 respondents, “reciprocal” means the First Nation is invested in the project; FN members get involved in training programs and business opportunities, or even just participate in impact assessments since this helps them become “comfortable” with the project. These respondents said they try to avoid at all cost giving “handouts” that would make the First Nation become passive. They emphasized that First Nations must feel like they have to contribute to *earn* their share, rather than feeling entitled to it.

Among the rest of these 5 opposed to agreements, a junior said it is impossible to negotiate under the current political climate because in every agreement First Nations have presented to the company, there have been “illegal” clauses asking the company to recognize FN land rights that are not yet recognized by the Crown. The final 2 respondents were not so concerned about being held accountable in court, but said agreements are harmful because they undermine the Crown’s role in sorting out land claims, and they exacerbate the political chaos plaguing the constantly changing regulatory system in the Northwest Territories.

Twelve of those that sought acquiescence—including 5 that obtained it—said they *might* be willing to negotiate agreements, but most of them expressed caution, saying either: they would want to avoid land rights issues, they would prefer to keep it “just business,” or the purpose of signing a memorandum of understanding would primarily be to help the First Nation “understand” a company’s rights and responsibilities under the Mining Act. Many were wary of promising anything concrete. One expressed great concern that “as soon as you promise even one small thing their demands snowball,” since this would encourage the First Nation to believe that the mineral rights belonged to them.

Six believed that agreements are unreliable, and one junior explained that this is precisely because companies and First Nations have different expectations of what an

agreement means; they disagree over whether it is a business or a political arrangement, respectively. Most did not feel that even signed agreements would be enforceable in a court of law since agreements are necessarily vague about the commitments of both sides, especially the pledge of acquiescence by the First Nation. Essentially, agreements are “not worth much more than the paper they’re written on,” unless there is some kind of incentive structure in place to make the relationship unfold in a predictable way.

I infer from companies’ desire to establish a “reciprocal” business-like relationship with First Nations and their desire for more predictability that they believe a relationship premised on negotiating economic objectives would bring greater certainty than a relationship premised on negotiating political rights to land. Even if a company could not convince a First Nation to respond consistently to profit incentives, the company might at least avoid encouraging a sense of entitlement that could fuel an opposition movement driven by righteous anger. Of course, opposition could also form around more “rational” motives of economic self-interest, but this kind of opposition might be less likely to let the project become unprofitable; companies would expect a First Nation to “cut a deal” in the end.

Companies seeking acquiescence still made concessions to satisfy First Nations, but they maintained the flexibility to do so on their own terms. Three specifically mentioned the concern that agreements would “hamstring” a company; it would become bound a priori to consultation rules and timelines that could end up making an exploration project unprofitable. Some also worried that a company could lose its *raison d’être* by setting up an Aboriginal Relations department. Such a department might become “sloppy” with “slush funds,” since it could become preoccupied with justifying and perpetuating its own existence rather than serving the profit interests of the company. In short, an enterprise could become a

“consultation company” rather than an “exploration company.” All of these concerns relate back to the fear that a political agenda will supersede a business agenda.

There is a particularly important difference between the perceptions of companies seeking acquiescence versus those seeking agreement on the significance of a cash “access fee.” No company seeking acquiescence was willing to pay for access, but 7 companies were willing to pay a fee *as long as* it was for some other “legitimate” reason, like a demonstrable disturbance to hunting. A few were willing to compensate elders for time spent consulting, but this was more controversial since it could imply paying FN authorities to dispense mineral rights.<sup>62</sup> These responses show that those seeking acquiescence were less concerned about the *amount* of concessions than about discouraging First Nations’ landlord perceptions.

In contrast, 8 out of 12 companies seeking agreements were willing to and often did pay an explicit land access fee. Another 2 were willing to pay a fee if it was for something justified; these two both had low vulnerability and proceeded without agreement. Thus, it was the *most* vulnerable companies seeking agreement that had no problem with access fees.

One major seeking agreement argued that there is a need for “up-front incentives” to provide short-term benefits in the absence of immediate job opportunities, and there is little danger of demands snowballing if a company can wean First Nations from cash to business opportunities to equity. In contrast, a number of respondents seeking acquiescence warned that First Nations’ interest would stop at cash if they knew it was indeed available, since the exploration business is transient and it is such a risky form of investment.<sup>63</sup> They saw an

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<sup>62</sup> The most commonly cited “legitimate” reason for compensation was damage to hunting and trapping. Some companies, however, are starting to realize that First Nations require funds up-front in order to generate the capacity to negotiate at all. More are now willing to pay for consultants, lawyers, and administrative expenses, even though they say it is very difficult to convince their Boards to “pay someone to argue against us.”

<sup>63</sup> One junior compared mineral exploration to “throwing your money in a slot machine at Vegas, except at Vegas sometimes you win.”

acute danger that First Nations would become akin to landlords running a glorified extortion racket.

### *3.22 Perceptions of those seeking agreement*

I now examine whether the 12 respondents seeking agreement were concerned about:

- a) First Nations' believing they could displace the Crown as dispenser of mineral rights; and
- b) encouraging a sense of FN entitlement that could diminish the First Nation's incentive to keep the project profitable. In particular, I examine the perceptions of those respondents with highest vulnerability to determine whether they believed seeking agreement would enhance or lessen their vulnerability.

All of those seeking agreements except 3 juniors with low vulnerability believed that First Nations are de facto land-owners. These 3 juniors did not mind negotiating MOUs with clauses recognizing FN land rights, because they did not feel that these clauses were significant or would hold up in court. Thus, those seeking agreements with less vulnerability perceived that negotiating access agreements would not strengthen FN landlord perceptions.

In the 9 cases with high vulnerability, all respondents viewed First Nations as de facto land-owners, and 5 of these believed that affirming unrecognized FN land rights would strengthen their relationship with the First Nation and thereby *lessen* their vulnerability. Some even believed that recognizing FN rights would ultimately put them in an advantageous legal position, since they expected the courts to continue setting new precedents favourable to Aboriginal rights. These companies wanted to be ahead of the legal game rather than playing catch-up like governments and other companies tend to do. One director of a junior observed that the First Nation's "assertions are getting more bold;" he expected "there will come a time when companies won't be able to even stake without First

Nation consent; they may even get fly-over rights.” He said, “we made them feel like they had a lot of latitude and respect” by paying their access fee and observing “Indian law,” insisting it “has nothing to do with the Ontario government.”

Another one of these highly vulnerable five—a major—explained that by negotiating agreements, “we’re parking the Mining Act.” A mid-tier asserted: “if you take the position that it’s Crown land and First Nations have no right to oppose you, you’re shooting yourself in the foot and verging on racism.” An exploration director for a major advised companies not to “hang your hat” on legal rights; “if you did not consult in a manner acceptable to the First Nation, then you haven’t consulted.”<sup>64</sup> He emphasized that the onus is on companies to adjust themselves to FN priorities and timelines, educate themselves about the history of these communities, and understand why First Nations sometimes issue their own permits in distrust of the government’s permitting system.

These highly vulnerable companies seeking agreements did seem to believe that a sense of entitlement can make First Nations demanding, but they attributed this to good bargaining skill rather than to irrational or erratic behaviour. They also seemed confident that First Nations do not want to make projects unprofitable and they will take care not to push companies past their resistance points.

One VP Exploration for a junior explained:

“Before, First Nations accepted simple notification because they knew they couldn’t stop [exploration]. Now they are aware that they can, and good on them...now their demands are higher. This is why they don’t show up for meetings sometimes, to show they have the power. They’ve got you and they know it. You can’t get mad...”

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<sup>64</sup> This director emphasized that First Nation rights and the obligations of companies that follow from these are often ill-defined even by lawyers. He observed that lawsuits could get pushed to the Supreme Court, which often favours First Nations.

Despite this VP's frustration at these power games, he expressed confidence that First Nations generally do in fact want to do business with exploration companies.

An exploration director for a major explained that he knows First Nations are good bargainers because they say: "we 'listen better' with more money on the table." He was confident that First Nations would abide by Supreme Court directives telling them they must bargain in good faith. Dismissing others' warnings that the end of free entry would spell doom for the industry, this major asserted that the industry would still thrive even if companies were required to negotiate consent from First Nations.

A consultant explained that "buying favours is always part of the process" and said he expects First Nations to use negotiating pressure tactics such as digging in their heels if they sense a company is in a hurry. He claimed that although First Nations try to force companies to match precedents set by others, they lower the bar when they realize it is unmanageable because they are interested in economic investment and do not want a company to leave.

A mid-tier and a junior both commented that First Nations have highly organized and sophisticated bargaining apparatus. They both perceived their negotiating experiences to have been remarkably structured and orderly. The mid-tier initially did not proceed when a First Nation declared a moratorium, but upon approaching the community a few years later, was able to reach an agreement because the First Nation had its "ducks in a row" and had built up its negotiating capacity.<sup>65</sup> The junior paid a high price in its agreement but it claimed to be confident that FN demands would not spiral out of control because the price for renewal is

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<sup>65</sup> This mid-tier signed a document similar to an MOU. Included is a promise to follow a iterative consultation process—negotiating at each stage of exploration—and during advanced exploration the company is even willing to sign an IBA before the feasibility study is complete. Effectively, this makes the First Nation *part* of the feasibility consideration, implying that if the FN cannot be accommodated the mine may not be feasible, rather than treating the FN as an afterthought to be dragged along if technical and economic aspects were sound.

written into the agreement itself. Apparently, this junior believes that the terms of the agreement will be respected and “good faith” will prevail.

Another major said that First Nations may not allow “free admission,” but “they can sense what you’re getting out of the project...they tailor their demands to meet the cut of the applicant’s cloth, because at the end of the day, they want that business to go forward and succeed.” In contrast to those seeking acquiescence who insisted First Nations must earn their share of the benefits with an “active” contribution, this major believed that “letting us work on their traditional land” is valid contribution enough from a First Nation.

To summarize the differences in perceptions, most of those seeking acquiescence believed it is dangerous for First Nations to feel entitled to benefits and/or to perceive they can displace the Crown as dispenser of mineral rights. This would create a FN-company relationship premised on negotiating political rights, which could compromise opportunities for a profitable business relationship. Most of those seeking agreements already saw First Nations as de facto land-owners who make high demands due to their sense of entitlement, but these companies believed First Nations would not bargain past companies’ resistance points to make projects unprofitable. The greatest discrepancies in perception were found among the most vulnerable respondents in each segment, which enhances the significance of these findings. Most of those seeking acquiescence believed negotiating access agreements would make them even more vulnerable; whereas those seeking agreements believed negotiating access helps lessen their vulnerability. This confirms my first hypothesis that companies will seek acquiescence if they believe a First Nation’s “landlord perceptions” can be weakened, and companies will seek agreements if they believe FN “landlord perceptions” cannot be weakened.

### *3.23 Case study of a northern Ontario First Nation*

It is useful to compare the ways different companies approached the same First Nation community in order to determine whether companies took a certain approach (seeking acquiescence or agreement, proceeding or not proceeding) because of their own perceptions, or whether the approach was determined by some objective characteristic of the community itself, such as the kinds of threats or severity of damage a First Nation may be able to inflict.

I compare data from 5 companies who were all dealing with the same FN community in Ontario's far north; one did not seek any form of approval at all, one sought acquiescence and obtained it, two sought agreement and obtained it, and one failed to obtain agreement and proceeded anyway (category 3). This case cannot be used to study the second variable—proceed versus do not proceed—since only one of these companies failed to obtain acquiescence/agreement. It does, however, still offer useful evidence about why companies seek acquiescence versus agreement. I examine the vulnerability of each company to the particular threats posed by this First Nation, and the perceptions of each about how seeking acquiescence or agreement would affect this vulnerability.

The first junior did not contact FN authorities because it claimed it only explores in “areas that are not being actively used in any noticeable manner” and stays far enough away from the community so as not to bother anyone. It rated all types of threats as low, which indicates that below a certain threshold of vulnerability companies are unlikely to seek any form of approval from a First Nation.

One junior obtained acquiescence after making high mitigation efforts, especially in order to develop strong personal and business relationships with the Chief and Band Council. It claimed potential vulnerability to all types of threats. Although the First Nation's policy is

to demand formal agreements along with an access fee, the President of this junior claimed the First Nation made an exception for his company because of his long personal history in the region.<sup>66</sup> He said he might be willing to sign a short MOU but would be cautious about promising anything concrete because of the danger of raising expectations.

One major that was highly vulnerable to all types of threats initially reached an MOU with the community. When it reached a more advanced stage and realized it would need the First Nation's support to build access routes to its site, the major signed an agreement granting the community veto power. Despite the danger that this would leave the company "at the mercy of whoever gets elected this week, and the flavour of the month with the radicals of that community," the company was confident that the First Nation would want business to proceed. After a few rounds of posturing, threats, direct action and hard bargaining, the community indeed approved the project. As part of the agreement, if any other company requested to use this major's airstrip and infrastructure, the major would require it to first reach a similar agreement with the First Nation.

One junior indeed reached such an agreement; it paid an access fee and granted the First Nation veto power over each later stage of its exploration activities.<sup>67</sup> This junior already felt vulnerable to FN threats—especially litigation, a media campaign, a blockade, and opposition to permits—and felt that recognizing "Indian law" would be a sign of respect and help to mitigate these dangers. This junior also considered the First Nation to have

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<sup>66</sup> This junior claimed it can avoid getting caught in a political trap by "rattling chains" with the Ministry of Northern Development and Mines if the First Nation has a political grievance. When asked whether the company could become a pawn in a political struggle, the junior's President responded: "I look at [us] as a knight, as opposed to a pawn; I like to be proactive."

<sup>67</sup> This junior reached its first agreement with the FN before starting its drilling project a few years ago, and has since completed a second MOU. In the MOU the company promises "it will not proceed with further exploration, advanced exploration...or with construction and operation of a mine...without the express written consent of the First Nation as expressed through a duly authorized resolution of the council of the First Nation."

sophisticated and reasonable negotiators, and felt reasonably secure knowing that the community had already granted permission to the major.

The final junior wanted to use the major's infrastructure and attempted to reach an agreement with the First Nation, but broke off negotiations when the First Nation demanded veto power and the junior insisted the agreement should be about business issues rather than about access rights. The junior proceeded in defiance of the First Nation's vehement opposition, forgoing the potentially substantial amount it could have saved by relying on the major's infrastructure. This junior was only concerned about the FN threat of physical intimidation, yet it was confident in police protection. It was not worried about falling into a "political trap," since it claimed "greed" was the major issue rather than political grievances. It saw the First Nation's threats as a "paper tiger" and believed it would succumb eventually to the lure of economic benefits and agree to negotiate a more "reasonable" agreement.

This case study indicates that it is not some objective characteristic of the community itself that determines companies' approaches, since companies can vary considerably in how they assess the credibility of a particular First Nation's threats. Companies' vulnerability and mitigation efforts did not correspond to whether they sought acquiescence or agreement. Rather, one of the most important variables was whether or not the company believed it could convince the First Nation to act as a business partner rather than a landlord charging an access fee. The junior seeking acquiescence felt that negotiating an agreement could increase its vulnerability; whereas those seeking agreement believed this would lower their vulnerability and expected the First Nation to bargain hard but reasonably.

This case study also brings up another significant factor that could explain why some juniors seek agreements, a factor that has little to do with perceptions or even First Nations

per se: the juniors were pressured by a major to do so. It could be argued that the one junior in this case sought acquiescence and not an agreement because it was operating further away from the community and did not need to rely on the major's infrastructure. The final section in this chapter considers to what extent pressure by majors could be a competing explanation that would seriously challenge my hypothesis.

### ***3.3 Another Possible Explanation: Pressure by Majors***<sup>68</sup>

There is considerable circumstantial evidence that majors are pressuring juniors into seeking some form of FN approval—if not always agreements—either when they are cooperating as JV partners, or when juniors are the competitors.

Three of the 4 majors interviewed said that the bad practices of juniors pose a threat to the reputation of the industry and can sour projects that majors may want to buy. This is why many majors heavily fund industry association initiatives to promote best practices, and why many majors require juniors to match their policy standards when doing joint ventures.<sup>69</sup> One major said it tries to act as “big brother” to the 35 or so juniors that have recently swarmed into its vicinity. In order to reduce the First Nations' growing anxiety, this major tracks down the juniors and helps arrange meetings between them and the local communities.

Without financial support, however, this pressure may not work. One junior reported that it had to transfer the lead operator role back to its JV partner—a major—because it could not afford the extensive ongoing consultations that the major's policies required. According

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<sup>68</sup> MacDonald and Gibson argue that the major source of pressure on junior exploration firms for engaging in sustainable development practices comes not from civil society, First Nations, or government regulators, but “from the exploration juniors' main customers—producing firms...[which] increasingly cannot accept the liabilities (legal, reputation, or financial) of advanced exploration projects where social concerns have not been adequately addressed” (4).

<sup>69</sup> An additional source of influence comes from the fact that with increasing mergers and acquisitions, many former employees of majors are gaining prominent positions in juniors or starting their own, perhaps bringing a major's mindset to the junior sector. Three juniors in this study are directed by such former employees of majors—two seek acquiescence, and one seeks agreement.

to one major, what is needed is an entirely new industry paradigm where majors take a more active role earlier on in directly funding juniors' consultation with First Nations, but this is still far from the current situation. Some respondents mentioned examples of juniors selecting majors as joint venture partners because of their particular expertise at managing First Nations issues, although two respondents (a junior and a consultant) bristled at the notion that juniors should have to bring in a partner just to deal with native issues.<sup>70</sup>

Looking at the survey responses on how conflicts with First Nations would affect juniors' deals with majors, it seems that majors' strategy to enforce higher standards is inconsistent at best. When asked whether problems with local First Nations would affect later attempts to vend or option out their property to a major, 7 juniors said it would have no effect whatsoever, 7 juniors said it would be one factor but would come after technical considerations, and 9 juniors said it could be a deal-breaker. Of the larger companies interviewed, 4 out of 5 of the majors and 1 out of 2 mid-tiers said they would likely still buy a project with good technical merits from a junior even if there was conflict with the First Nation.<sup>71</sup> Majors seemed confident in their ability to mop up any problems they inherit and convince the First Nation things would be different under their command. This would seem to lessen juniors' incentive to seek FN approval at the outset of mineral exploration.

In addition to exerting pressure over partners, some majors exert pressure on competitors by trying to gain an advantage over those that do not seek FN approval. Some strive to be a "partner of choice," a strategy which counts on First Nations becoming increasingly important players and brokers in the exploration industry. With the mineral

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<sup>70</sup> The junior obtained acquiescence and claimed it was potentially highly vulnerable, and the consultant did not obtain acquiescence and did not proceed (category 2).

<sup>71</sup> One major and one mid-tier were interviewed that did not do any grassroots exploration in the areas covered by this study, so data from these companies could not be included in the rest of this paper.

industry facing a severe nation-wide labour shortage and limited access routes and infrastructure in Canada's most promising new mining frontiers, First Nations potentially offer the best economic solutions: local workers who can tolerate extreme climates, convenient accommodations, and local services and equipment rentals. Moreover, there are a few cases of companies making "exclusive buyer" agreements with First Nation associations that stake their own territory; companies provide training and technical assistance in return for special access to the properties at later stages.<sup>72</sup>

These strategies of cooperative and competitive pressure are not limited to majors seeking agreement, however. One major that seeks acquiescence is also a leading trumpeter of the "partner of choice" philosophy. In any case, for majors taking either approach the opportunities to capitalize on business partnerships are still few and far between because of First Nations' limited capacity and sometimes limited interest to get involved in such a risky business. Even the major cited in the case study readily admitted, "we've still got a ways to go" in realizing significant competitive advantage from Aboriginal engagement.

Some juniors felt that majors could push them out of the industry by making precedent-setting agreements and then helping the First Nation to rigidly enforce these high standards on all companies, as the major did in the preceding case study. One junior claimed that a major (unintentionally) sabotaged its project simply by approaching the local First Nation to seek an agreement. Apparently, this raised the community's expectations to unrealistic levels. As a result, the First Nation suddenly declared a moratorium, forcing the junior to make costly mitigation efforts in order to proceed despite community opposition.

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<sup>72</sup> First Nation allies can also be useful in helping a company expand into other countries; two respondents—a category 1 consultant and a category 2 major—mentioned taking Aboriginal spokespersons to explain the industry to other indigenous groups around the world.

A few juniors proposed that the industry as a whole would be better off if *majors* could be pressured into abstaining from doing grassroots exploration at all. This way, they said, no company would have to seek agreements or make costly concessions at the early stages. If juniors with low vulnerability to FN threats were the only ones to conduct exploration, they could credibly claim they have no cash or benefits to offer.<sup>73</sup> Majors could keep their deep pockets out of sight until much closer to the mine production stage when there would be actual estimated revenues to negotiate over.

This is not a plausible scenario. Majors would never let juniors have a monopoly on grassroots exploration for the simple reason that they would then lose their bargaining power vis-à-vis juniors and have to pay more to buy projects at more advanced stages. While majors do not want to be at the mercy of First Nations, they would not trade this position just to be at the mercy of juniors.

In conclusion, while there is evidence that some companies seek agreements due to pressure by majors, these are outlying cases rather than a satisfactory overall explanation. Majors do not generally require agreements with First Nations—or even acquiescence—as a condition for making deals with juniors, and they have limited opportunities to exert competitive pressure by allying with First Nations in business partnerships. In turn, juniors have little ability to pressure majors *not* to seek agreements. Pressure by majors is not a variable that can disprove my hypothesis that companies seek acquiescence or agreement based on whether they believe they can weaken a First Nation’s landlord perceptions.

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<sup>73</sup> Brandenburger and Nalebuff call this type of strategy “strategic inflexibility,” or negotiating with tied hands (167).

## **CHAPTER 4: TESTING THE PROCEED VS. DO NOT PROCEED HYPOTHESIS**

In this chapter, I test the second of my two hypotheses laid out in chapter 1: companies will **proceed** after failing to obtain acquiescence/agreement if they believe political traps are **detectable a priori**; companies will **not proceed** without acquiescence/agreement if they believe political traps are **not detectable a priori**.

I first consider two competing explanations for why companies proceed without obtaining acquiescence/agreement: they seek FN approval only “for show,” or there is a certain type of threat—either a mode of resistance or a type of damage—that companies that proceed seem to be able to detect and avoid. I establish that it is not a *type* of threat that companies avoid, but rather the political *motivation* behind FN threats that companies are concerned about. I demonstrate this in 4.2 with evidence from three companies that each proceeded in one case and did not proceed in another, as well as evidence from a NWT community case study. In section 4.3, I analyze all the respondents’ perceptions of whether or not they can detect and avoid political traps. In 4.4, I link companies’ beliefs about detecting political traps to the way they deal with no response and internal divisions in FN communities. In 4.5, I consider why the four majors in this study would take different approaches, and I propose an explanation for one outlying major that does not fit my second hypothesis. Finally, I test the overall accuracy of the predictions flowing from both hypotheses.

### ***4.1 Competing Explanations***

#### *4.1.1 Just “for show”?*

It seems possible that companies intending to proceed with or without FN approval seek acquiescence or agreement for appearances’ sake only, rather than to mitigate any threat

posed by the First Nation. To test out this competing explanation, I examine whether or not companies that proceeded were only vulnerable to reactions by regulators, investors, or majors (potential buyers), and were confident that perfunctory effort at consultation would be enough to satisfy these parties. This hypothesis would seem even more plausible if these companies were also trying to promote an image of corporate social responsibility.

Among the respondents that proceeded after failing to obtain acquiescence/agreement, there was only one company—a category 1 junior—that faced *only* the threat of opposition to permits. This junior, however, was not sure whether regulators would grant permits based on a company's "reasonable efforts," or whether they would want to see FN approval. An additional two consultants who sought acquiescence but proceeded without getting a response seemed to be primarily concerned about appearances, since they both emphasized the importance of "crossing our t's and dotting our i's." One was only vulnerable to investor reactions and the other was only concerned about future deals with majors, but both felt that investors or majors could seriously punish a company for stirring up conflicts with First Nations. Overall, most companies that proceeded without acquiescence/agreement faced more complex threats that could not be mitigated just by making an appearance of effort.

There is little evidence that corporate social responsibility (CSR) was a significant factor at all either in whether companies proceeded or did not proceed, or whether they sought acquiescence or agreement. In the interviews I did not ask any direct question about CSR, since I expected that, once prompted, every company would agree it wants to be a good corporate citizen. Most of the majors and consultants that sought either acquiescence or

agreement emphasized the importance of CSR without being prompted,<sup>74</sup> but only 3 juniors in total made CSR-related claims.<sup>75</sup> Two were in category 1 (they proceeded after failing to obtain acquiescence), but neither was the junior described in the preceding paragraph, and neither perceived media campaigns or investor reactions to be significant threats. Most of those that did express vulnerability to investor reactions said investors primarily want to see that a company has secure tenure over its claims; investors are not pushing for corporate social responsibility.<sup>76</sup> As far as reactions within the industry are concerned, one junior that proceeded after failing to obtain agreement (category 3) claimed that if it got into a confrontation with a First Nation, the rest of the industry would applaud it for taking a stand against FN “greed.”<sup>77</sup> It seems clear that most companies that proceeded did not seek acquiescence/agreement just for the sake of appearances.

The question remains: if companies sought acquiescence/agreement before proceeding because they were at least somewhat vulnerable to FN threats, then why were these threats not serious enough to stop companies from proceeding *without* acquiescence/agreement? It must be some information gained through *seeking* rather than the act of *obtaining* acquiescence/agreement that makes proceeding manageable for these companies.

#### 4.12 Types of threats

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<sup>74</sup> One must be careful in examining corporate policies on indigenous consent to note whether they pledge to *seek* some form of consent or approval, or whether they pledge to *obtain* it before proceeding. For example, Anglo American’s policy reads: “Wherever we operate, we **seek** to do so with the co-operation and informed consent of local communities.” (Qtd. in Miranda, Chambers and Coumans 62, boldface mine)

<sup>75</sup> One junior talked about wanting to be a “good corporate citizen;” another described himself as an “advocate for best practices;” the third said “our approach is sustainable development.”

<sup>76</sup> The general consensus among respondents is that ordinary investors “off the street” are oblivious to FN issues. About two-thirds believe that institutional investors such as brokerage firms and equity funds are becoming increasingly aware, especially if incidents make the news.

<sup>77</sup> In addition, three juniors that obtained acquiescence believe the industry is *too* politically correct and should speak out to say that First Nations are being unreasonable.

I now examine whether there is a certain type of threat that companies that proceeded could detect and avoid. Types of threats can be sorted according to the *mode* of FN resistance—listed in section 3.1 and in Table 3 below—and whether the potential *damage* is “discrete” or “open-ended.” Damage to the company is *discrete* when it is limited in time; examples include opposition to a permit or interference when trying to sell the project to a major. The cost of discrete damage may still be high—such as the cost of being forced to undergo an environmental assessment—but it is more predictable, often because it is controlled by an outside party such as a regulator or a potential buyer. This at least allows a company to estimate up to what point it is cost-effective to seek acquiescence/agreement, and when it is more cost-effective just to proceed.

Threats that cause *open-ended* damage—for example, a media campaign or physical intimidation—cannot be completely eliminated, so they require more vigilance and create uncertainty as to how much mitigation effort will be required. In analyzing my data I consider the competing hypothesis that companies will proceed without obtaining acquiescence/ agreement if they detect First Nation threats that cause only discrete damage, and companies will not proceed if they detect FN threats that will cause open-ended damage.

I use the same definition of “vulnerability” explained in section 3.11: a threat is “high” if it is *both* credible and seriously damaging to a company. In this analysis, however, I count the number of companies that *say* that are *potentially* highly vulnerable to a certain mode of threat; in other words, this threat is on companies’ “radar screen” as a serious potential concern. These perceived concerns may arise from past experience, from tales related by other companies operating in the region, and/or from a company’s estimation

about whether a threat can logistically be carried out. Regardless of their validity, these concerns indicate which threats companies would be trying to detect and avoid.

Table 3 on page 64 lays out the survey data on the various modes of threats to which respondents expressed potential vulnerability. Table 4 on page 65 sorts respondents according to whether they face discrete or open-ended damage, or both.

The results in Table 3 show that all modes of threats are a concern among at least some of those that do and do not proceed. Thus, there does not seem to be any particular mode of FN resistance that companies find unmanageable if they were to proceed without acquiescence/agreement.

Certain other patterns emerge, but they do not seem to be related to whether or not a company proceeds or does not proceed. Blockades were a concern for nearly all those operating in Ontario and none of those in the Northwest Territories, perhaps because companies in the NWT relied more on helicopters and float planes as opposed to winter roads or community airstrips. Very few were worried about First Nations cutting off access to services and infrastructure, likely because few companies actually relied on them.<sup>78</sup>

A media campaign was a concern for all the majors and the mid-tier, but juniors often expressed conflicted views. On one hand, positive media attention can be a junior's lifeline, since the company's survival rests on being able to sell its ideas and its properties to investors. On the other hand, there is a saying in the industry that for juniors, "all publicity is good publicity." While somewhat facetious, this indicates that some juniors would not mind a bit of trouble with a First Nation if it got investors to even notice the company exists and therefore boosted the stock price.

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<sup>78</sup> One junior from D wanted to emphasize, however, that in a remote, harsh environment like Ontario's far north, without friends nearby "you could be dead in six hours...people have to look after each other no matter what nation you're from."

**TABLE 3: Potential vulnerability to threats by category; major/midtier/junior/consultant specified.**

	<b>1</b> (acquiescence, do proceed)	<b>3</b> (agreement, do proceed)	<b>TOTAL: DO PROCEED</b>	<b>2</b> (acquiescence, do not proceed)	<b>4</b> (agreement, do not proceed)	<b>TOTAL: DO NOT PROCEED</b>
Opposition to Permits (discrete)	3/10 high vulnerability (3 juniors)	1/3 high vulnerability (1 major)	4 /13	4/5 high vulnerability (1 major, 2 juniors, 1 consultant)	5/5 high vulnerability (2 majors, 1 midtier, 2 juniors)	9 /10
Litigation	2/10 high vulnerability (2 juniors)	1/3 high vulnerability (1 major)	3 /13	1/5 high vulnerability (1 junior)	4/5 high vulnerability (2 majors, 1 midtier, 1 junior)	5 /10
Direct Action / Blockades	2/10 high vulnerability (2 juniors) *1 discrete	2/3 high vulnerability (1 major, 1 junior) *1 discrete	4 /13 *2 discrete	1/5 high vulnerability (1 major)	4/5 high vulnerability (2 majors, 1 midtier, 1 junior)	5 /10
Cut off Access to Services / Infrastructure	1/10 high vulnerability (1 junior)	1/3 high vulnerability (1 major)	2 /13	0/5 high vulnerability	2/5 high vulnerability (1 major, 1 junior)	2 /10
Physical Intimidation / Vandalism	3/10 high vulnerability (3 juniors)*1 discrete	1/3 high vulnerability (1 major)	4 /13 *1 discrete	2/5 high vulnerability (2 juniors)	3/5 high vulnerability (2 majors, 1 junior)	5 /10
Media Campaign	4/10 high vulnerability (1 major, 2 juniors, 1 consultant)	1/3 high vulnerability (1 major)	5 /13	3/5 high vulnerability (1 major, 1 junior, 1 consultant)	4/5 high vulnerability (2 majors, 1 midtier, 1 junior)	7 /10
Investor Reactions	4/10 high vulnerability (3 juniors, 1 consultant)	0/3 high vulnerability	4 /13	1/5 high vulnerability (1 junior)	3/5 high vulnerability (1 majors, 2 juniors)	4 /10
Deals with majors (discrete)	6/ 9 juniors/ consultants (5 juniors, 1 consultant)	0/2 juniors	6 /11	3/3 juniors	0/2 juniors	3 /5

**TABLE 4: Potential vulnerability to threats: discrete vs. open-ended damage.**

	<b>1</b> (acquiescence, do proceed)	<b>3</b> (agreement, do proceed)	<b>TOTAL: DO PROCEED</b>	<b>2</b> (acquiescence, do not proceed)	<b>4</b> (agreement, do not proceed)	<b>TOTAL: DO NOT PROCEED</b>
DISCRETE only	3/10 (3 juniors)	1/3 (1 junior)	4/13	1/5 (1 junior)	0/5	1/10
OPEN-ENDED only	2/10 (1 major, 1 consultant)	0/3	2/13	0/5	0/5	0/10
DISCRETE <i>and</i> OPEN-ENDED	5/10 (4 juniors, 1 consultant)	1/3 (1 major)	6/13	4/5 (1 major, 2 juniors, 1 consultant)	5/5 (2 majors, 1 mid-tier, 2 juniors)	9/10

Table 4 shows that while a higher percentage of companies that did not proceed faced threats with open-ended damage (in combination with discrete damage), 8 of the 13 that did proceed also faced the prospect of open-ended damage. Thus, facing threats with open-ended damage could be a necessary condition for not proceeding, but it is not sufficient to explain the difference between proceeding and not proceeding. It is also important not to assume that all threats besides opposition to permits and deals with majors inherently produce open-ended damage. Most respondents considered a blockade or vandalism to pose open-ended risks, but 2 juniors that did proceed incurred only discrete costs from these threats. They were able to move their camps a short distance away and out of the First Nation's territory, thus incurring a high but one-time expense.

## **4.2 Case Studies**

### *4.2.1 Cases of companies that took two different approaches*

To examine further which threats companies may have been trying to detect and avoid, it is useful to examine why 3 companies each decided to proceed in one case but not to proceed in another case.

One junior said that it proceeded—despite receiving no response from a First Nation with a reputation of being erratic and hostile towards mineral exploration companies—

because it believed that juniors operating alone do not generally become targets of politically motivated FN opposition. In another case, it did not proceed because it was operating in a joint venture with a major and the First Nation was issuing strong threats of physical intimidation.

Looking at the overall data, it does not seem that physical intimidation is a threat that most companies were trying to avoid by not proceeding. While half (5 out of 10) of those that did not proceed were concerned about physical intimidation, 4 out of 13 that did proceed were also concerned (although one claimed to avert this risk by moving its camp).<sup>79</sup> None of these that expressed concern for their physical safety felt they could or would want to rely on police protection for their operations.<sup>80</sup>

Moreover, the junior that left due to physical intimidation emphasized that the situation was greatly exacerbated by unresolved land claims. When operating with a major, it felt much more exposed to political conflicts. The junior explained that with political motivations driving the threats, any mitigation efforts would be futile.

Another junior company that took two different approaches did not proceed after it started to explore in Ontario because it felt there was too much political turmoil there. It said it plans to return when land claims issues have been sorted out. In Quebec, it proceeded despite a lack of response from the First Nation because it felt confident that land conflicts have all been resolved between the Crees and the Quebec government.

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<sup>79</sup> The most common kind of incident reported by respondents was First Nations warning companies not to trespass on their territory or else their “safety cannot be guaranteed.”

<sup>80</sup> According to the Director of MNDM’s Corporate Policy Secretariat, a physical blockade of mineral exploration operations may be an act of civil disobedience rather than a criminal act, and prefers a negotiated solution to police intervention. MNDM states that it is not necessarily breaking the law to deny a company free entry for exploration work “where circumstances involving the interaction between the company and the First Nation have resulted in an impasse and the issue remains under discussion with a reconcilable outcome. However, the Crown does not accept that the First Nation has a veto over mining activities.” (Pers. comm.. B. Smithies, 13 July 2006 and 16 August 2006.)

The final company—a major—cited cases in the Northwest Territories where it proceeded despite FN opposition, and other cases in Ontario where it did not proceed or committed itself to not proceeding without agreement by granting the First Nation veto power. This major seemed to perceive generally the same threats in both jurisdictions, except perhaps a greater reliance on FN access routes and infrastructure in Ontario. This major is a special outlying case that will be addressed further in section 4.5.

In summary, the first two companies' explanations for the difference in their approaches suggest that they chose not to proceed in order to avoid getting caught in the middle of political conflicts over land claims. When they did proceed without acquiescence, they perceived themselves to be safe from such political traps. The first believed it was safe because it was a junior operating alone; the second believed it was operating in a safe region.

#### *4.22 Case study of a FN community in the NWT*

Seven companies that I interviewed were all exploring in the territory of one First Nation in the Northwest Territories: one company did not proceed after failing to obtain acquiescence, 4 companies proceeded without acquiescence/agreement, and 2 companies obtained acquiescence.<sup>81</sup> I focus only on the first 5 that did not obtain acquiescence/agreement. I examine whether the company that did not proceed felt vulnerable to a certain type of threat that was of no concern to the others that did proceed, or whether this company instead sought and obtained a different kind of information than the others.

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<sup>81</sup> Only the one outlying major sought agreement, so it is more difficult to use this case to test why companies seek either acquiescence or agreement. One junior said that this First Nation does not usually ask for agreements or compensation payments upfront. Another junior said it cannot sign agreements because the First Nation insists on illegal clauses recognizing land rights. Two juniors say they are not willing to negotiate access because it is either just bribery or would undermine the regulatory system. The final two say they might be willing to negotiate agreements but are cautious about raising expectations and short-circuiting government efforts to settle land claims.

The one junior that did not proceed felt vulnerable to physical intimidation, opposition to permits, and reactions by majors. After holding community meetings and inquiring as to other companies' experiences, this junior said it decided to leave mainly because it feared becoming a "political football" to be tossed around in disputes both between the First Nation and the Crown, and between intra-community factions.

One junior that did proceed—the same one just described in 4.13—felt potentially highly vulnerable to lawsuits, media campaigns, investor reactions, deals with majors, and opposition to permits. It was conscious that this particular First Nation was known to snare companies in political traps, but it had observed that the First Nation only seemed to create trouble for companies exploring on certain parts of its territory close to the community. Thus, it believed it could avoid political traps by exploring in a different part of the territory, and it also assumed that juniors operating alone would not be likely targets for politically motivated FN opposition. It proceeded after receiving no response because it interpreted this silence as FN indifference.

Another junior got its permit and proceeded despite strong opposition expressed by the First Nation in its presentations to the Mackenzie Valley Land and Water Board. This junior said it is vulnerable to FN opposition to permits, reactions of majors, and lawsuits, but it believed that the FN opposition was driven by environmental concerns rather than political concerns. It has made extensive efforts to continue trying to consult and address these non-political concerns.

A major proceeded despite sensing some opposition within the community; it mainly felt vulnerable to media campaigns. While it seemed to see no danger of political traps in the NWT, this major was cautious about starting new projects in northern Ontario for this very

reason. It said it was waiting and watching for signs of reconciliation between the Ontario government and First Nations before it would launch programs there.

The final major claimed to be vulnerable to every single type of threat except for investor reactions. When the First Nation would not conclude an agreement because it refused to recognize the Crown's right to issue permits, the major got its permit and went ahead with its program. This pressure tactic was successful in getting the First Nation back to the negotiating table. This major's unusual approach will be discussed further in 4.5.

Similar to the northern Ontario case study in chapter 3, this case study from the NWT demonstrates that companies can make quite different assessments about the potential threats posed by the same community. It appears impossible to trace companies' approaches to some objective characteristic of the First Nation.<sup>82</sup> It was not vulnerability to a certain *type* of threat that caused one junior not to proceed, but rather this junior's perception of the First Nation's *motivation* for issuing threats; it detected that the First Nation probably had political motivations. Meanwhile, the others (save the last major) were not seeking information about political motivations since they were confident they could not fall into a political trap with this community.

### ***4.3 Overall Perceptions of Political Traps***

From the above case study, two observations can be made. The first is: companies did not proceed when they detected that FN threats were politically motivated—in other words, they detected a “political trap”—whereas companies did proceed when they were already confident they were not in danger of falling into a political trap. The second

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<sup>82</sup> It may be that companies differ in their perceptions because communities are very inconsistent in who they threaten and how, as well as whether they follow up on these threats. If this is the case, one possible reason is that both of these First Nations have been overwhelmed with a large influx of companies staking their territory all at once. It also could be that the locus of power within the community has been shifting between different factions with different agendas. Another possibility is that the companies' expectations and the manner in which they approach a community may significantly affect the response they get.

observation is: companies that did proceed sought acquiescence/agreement in order to obtain information about non-political concerns rather than information about political motivations behind threats. I now test the validity of these two observations for the wider group of respondents.

All but one major of the 13 that did proceed believed they were not in danger of falling into a political trap. In contrast, 8 out of the 10 respondents that did not proceed *were* concerned about the danger of a political trap. The two outlying juniors will be discussed in section 4.7.

Six out of the 13 that did proceed claimed to be consciously avoiding First Nations or regions that they considered to be political “hot-spots.” Since they were exploring in free entry regions covered by this study, these companies must have believed that the threat of a political trap does not exist in this *entire* area, only in select areas that they claim to be able to detect and avoid. It would take a more extensive research study to track and verify whether companies with this belief are in fact successful in avoiding political traps. All but one out of the 13 respondents in this study that have proceeded despite a lack of acquiescence/agreement have encountered no problems so far. The one that was stopped by FN opposition, however, has incurred enormous cost in dealing with this conflict.

All 8 that did not proceed and were concerned about political traps considered the danger to exist *throughout* the free entry regions covered by this study.<sup>83</sup> Two respondents said they now prefer to stay away entirely from areas with unsettled land claims. Three majors, one mid-tier and a junior said that there is no “escape” from indigenous issues and

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<sup>83</sup> For the junior described in 4.21, the political trap danger exists everywhere as long as it is operating in a JV with a major. For another junior, the danger exists everywhere in Ontario and the Northwest Territories, but not in Quebec.

demands; companies must exercise the same caution and expect the same challenges whenever they explore on First Nations territory anywhere.<sup>84</sup>

The companies that did proceed and were vulnerable believed FN concerns were mainly related to the environment or jobs and business opportunities. They sought acquiescence/agreement in order to obtain information about how to placate these concerns and avoid antagonizing the community as they proceeded. Most said they intend to work towards obtaining acquiescence/agreement later on. Of those that made low mitigation effort, three asserted that First Nations would only launch politically motivated opposition against majors or at later stages. One believed that environmental NGOs and the treaty-wide council were the real instigators of politically motivated opposition and this junior intended to neutralize them by refusing to give in to their demands.

Those that did not proceed were not confident that environmental protection measures or business offers would be effective in mitigating the risk of proceeding without acquiescence/agreement. These companies expected that First Nations could well set aside their short-term environmental or economic objectives for the sake of broader political goals. For example, First Nations sometimes refuse to tell a company where their hunting ground, sacred sites, or proposed land claims areas are, even though a company requests this information in order to avoid damaging those areas. Three companies that did not proceed were conscious that First Nations are on the lookout for violations to take to the Supreme Court in order to set new legal precedents, and even companies that make consultation efforts could get roped in as a test case. Companies that did not proceed believed it is necessary to actually obtain acquiescence/agreement in order to avoid falling into a political trap.

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<sup>84</sup> Across Canada, there are 1200 Aboriginal communities located within 200 km of 2100 exploration properties (NRCan, "Exploration and Aboriginal Communities"). The AFN reports that more than 36% of First Nations are located less than 50 km from one of the primary mines developed in Canada (Hipwell et al. 4).

#### ***4.4 No Response or Divided Communities***

Rarely would a company choose to begin an exploration program if it perceived clear, united opposition and credible threats coming from a First Nation community. One junior remarked: “it may still be the Wild West out there but the time for being cowboys is all over.” A consultant added: “mining groups will quickly back away from an area where there’s strife...nobody in the industry goes out looking for a fight.” In most cases where companies proceeded without obtaining acquiescence/agreement, they either received no response from the First Nation or they perceived mixed feelings and divisions within the community over the issue of mining exploration.

There is a significant difference in the way those that did proceed versus those that did not proceed interpreted **no response**. The five that proceeded without obtaining a response perceived that “no response” provides information; they interpreted this as a lack of concern, or that the First Nation was just too busy. Those that did not proceed said “no response” does *not* provide information about whether the First Nation is either in favour, indifferent, or opposed to the project. The difference seems to lie in whether or not companies were seeking information about FN political motivations.

Companies that did proceed tended to assume that First Nations are primarily interested in environmental protection and/or economic benefits, so they were confident that they could soon entice First Nations to engage and participate in the project. Companies that did not proceed were on the lookout for signs of a political agenda; they were much more wary that no response could signal a refusal to communicate.<sup>85</sup> This could indicate that a

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<sup>85</sup> The Nishnawbe-Aski Nation Handbook on Consultation takes the position that while First Nations should participate in good faith consultation with the Crown, FN consent is required before the Crown can delegate part or all of its consultation duties to private companies (9). Thus, First Nations would have the right to refuse to consult with companies. In contrast, the Consultation Protocol of the First Nations of Quebec and Labrador

community was uniformly opposed and waiting to pounce at the company's first wrong move. Companies were even more terrified that a First Nation would wait quietly in order to sabotage the project *later on*, after large investments had been made into exploration. Thus, companies that believed political traps are not detectable a priori were likely to push much harder to get some kind of response from a First Nation, since even a negative response would be better than the uncertainty of no response.

There is another significant difference in the way those that did proceed versus those that did not proceed dealt with **divisions** within FN communities.<sup>86</sup> Most that did proceed believed that divisions and mixed feelings within the community boded well for obtaining support later on for the exploration program, and they were sometimes apt to enhance these divisions.<sup>87</sup> Most of those that did not proceed believed divisions would increase companies' vulnerability and they all supported consensus-building.

According to bargaining theory, a "weak" leader representing a fractious constituency often has greater bargaining power with outsiders than a "strong" leader who can appeal to community solidarity in order to impose unpopular concessions.<sup>88</sup> The weak leader can credibly convince his bargaining opponents that he is at the mercy of competing interest

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(AFNQL) declares that "First Nations shall not adopt a so-called "zero-tolerance" approach and categorically refuse to participate in any process that contemplates actions that may affect the rights of the Aboriginal party. So doing may subsequently be interpreted as bad faith by a court of law" (16). The Protocol states that First Nations have an "obligation to identify issues as precisely as possible" (17). If a First Nation withdraws or refuses to participate, it must provide reasons.

<sup>86</sup> When traditional territories overlap and multiple First Nations claim authority over the site of the proposed exploration project, companies also have to deal with conflicts between communities. Most companies will negotiate multiple agreements, but one company that obtained acquiescence says it just deals with the group that is "easiest to negotiate with."

<sup>87</sup> According to PDAC's E3 guidelines for best practices on "Community Engagement": "Historically, the mining industry has been particularly guilty of this practice [selective engagement], talking only to those who support the project or are easy to engage. The resulting divide-and-conquer approach has worked in the past but you will find that it is not acceptable today."

<sup>88</sup> See Robert Putnam's "Diplomacy and Domestic Politics: The Logic of Two-Level Games."

groups and cannot concede much because he has little power to enforce a shift away from the status quo.

For companies that perceived a need to obtain acquiescence/agreement in order to avoid falling into a political trap between the First Nation and the Crown, divisions within a FN community would weaken a company's bargaining power, make the process longer and more costly, and would likely mean having to make multiple agreements with various factions.<sup>89</sup>

Moreover, these companies were afraid of getting trapped in internal political battles. A major and a junior that did not proceed both said that before they would even consider seeking acquiescence/agreement, they would need to ascertain that the First Nation had a functioning governance structure, and that internal divisions were reconcilable. All companies that did not proceed sought to build consensus. One junior that granted a First Nation veto power remarked that the First Nation had an effective system of internal consultation that "truly is a very democratic, representative way of doing things." Most other companies did not have such an easy time. The majors described having to meticulously build a support base themselves "from the ground up," going virtually door-to-door to hear all the different concerns and "get the message out." The time and resources required to do this kind of groundwork appears to have been prohibitive, however, for the two juniors that failed to obtain agreement. They were stymied by their attempts to obtain consensus; both have been waiting in vain for a number of years.<sup>90</sup>

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<sup>89</sup> Companies frequently mentioned that after agreements have been signed with the Chief or Council, other families who hold traditional authority would appear and demand that another agreement be negotiated with them. In one case of inter-community divisions, a major reached an agreement with a Tribal Council, but now some bands want individual agreements of their own, denying they were properly represented.

<sup>90</sup> A junior from category 4 that has waited for three years and failed said that it might have been successful if it could have made about four trips to stay in community for a week each time. This small junior, however, does

Divided First Nation communities did not seem to pose such a problem for the companies that did proceed. Five of the 8 that proceeded after receiving a negative response said they were encouraged after talking to individuals within the Band that disapproved of their leaders' decisions. One junior emphasized that even though "part of the leadership" campaigned against its land use permit application, the company was "given high marks by many community members" in their feedback to the Land and Water Board (MVLWB). A few companies justified their decision to proceed by claiming to have received unofficial signals from the Chief himself that he disagreed with the Band Council's resolution to oppose the project. Some emphasized that the rapid flux in the world of Aboriginal politics often works to companies' advantage; they pointed out cases where more mining-friendly Chiefs were elected and their block was suddenly removed.

Some companies that proceeded seem to have intentionally or unintentionally enhanced these divisions. A number of companies established business relationships and hired local individuals, and a few circumvented authorities by offering compensation directly to individuals. This probably worsened political instability by enhancing the wealth and status of a small pool of company allies.<sup>91</sup> Instability may make it easier for companies to justify to themselves, regulators, and the public that community authorities are incapable of making a legitimate and representative decision and therefore "no" cannot really mean "no."

Companies that proceeded did not seem to perceive a danger of getting trapped in internal political struggles, so they may have believed that community divisions could strengthen their bargaining position. While "weak" FN leaders have little power to enforce a

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not have that kind of cash or time: "I do kind of resent the fact that it comes down to your ability to interact in personal relationships for success in these areas."

<sup>91</sup> See Miranda, Chambers and Coumans for a discussion on how companies may generate political instability in indigenous communities (65-66).

shift away from the status quo, this could work to a company's advantage if the status quo means the company proceeding despite FN objections. In this case, the First Nation would likely need community unity in order to launch serious resistance to the exploration project.

This section has presented two new intervening variables that would require further testing. It seems companies that believe political traps are detectable a priori: **a)** interpret no response as a lack of opposition, and **b)** are encouraged by divisions within FN communities; both of which make these companies likely to proceed without having obtained acquiescence/agreement. Companies that believe political traps are not detectable a priori: **a)** suspect that no response may signal a political agenda and push much harder to get some kind of response from a First Nation, and **b)** try to lessen divisions within FN communities; both of which make these companies likely *not* to proceed without having obtained acquiescence/agreement. Companies that believe political traps are detectable a priori are *not concerned* about getting trapped in political battles internal to the community; whereas companies that believe political traps are not detectable a priori *are concerned* about this.

If this hypothesis was valid, it would help to support my explanation for why companies that did not proceed without obtaining agreement (category 4) would tolerate FN landlord perceptions. If these companies were primarily concerned about building consensus to avoid internal political traps, then a sense of FN entitlement might help to unify the community. Companies that sought *acquiescence* and did not proceed without it (category 2) also strove for consensus, but they would try to build this by strengthening FN participation in business initiatives rather than by strengthening FN landlord perceptions.

#### ***4.5 Comparison Amongst Majors***

Majors are usually considered to be at the greatest risk of becoming targets for political traps, since they have a higher public profile and a higher sensitivity to adverse media attention than juniors. If a First Nation has a grievance with the government—regardless of whether or not it is related to mineral exploration—it can sometimes force the government to pay attention by “tugging on a major’s chain.” All four majors in this study said that if they got caught in this kind of political game, they would put pressure on the government to get the issue resolved. While majors’ political connections gave them tools to manage political traps, these traps still posed a great danger since none of the four majors interviewed had confidence the government would solve issues *quickly*.<sup>92</sup> Thus, political traps leave majors highly vulnerable in the short-term. It is necessary to examine, then, why there are 3 cases of majors that did *not* proceed without obtaining acquiescence/agreement but 2 cases of majors that *did* proceed, and why one major takes both approaches.

Two of the majors that did not proceed were concerned about the threat of a political trap and believed they could not detect and avoid political traps a priori within the jurisdictions covered by this study. One of these majors noted, however, that it is particularly concerned because its exploration programs are relatively new in the NWT. In another region where it has been conducting exploration for decades, it is more likely to take political traps “in stride,” since it has confidence that longstanding relationships with local communities and governments would serve as a measure of protection.

One major that did proceed after failing to obtain acquiescence said that the threat of political traps is the very reason it has stayed away from northern Ontario, but it seemed oblivious to this danger in the NWT. This major was unusual among all respondents in its

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<sup>92</sup> One major explained: “The Crown will address its issues in its own timeframe. This is currently measured in decades. The trick is to formulate things so that the Crown is drawn in and cannot wriggle out. This is much easier where both the Aboriginal community and the proponent are on the same side of the table...”

glowing praise for governments' handling of First Nations-mineral industry relations.<sup>93</sup> This may help to explain the discrepancy, although this major added that it would not be able to count on government assistance in the short-term.

The final major is a special case. In some cases it did not proceed after failing to obtain an agreement, and in other cases it did proceed without an agreement. This major claimed to be highly vulnerable to almost all FN threats, especially adverse media attention, so it has often gone to great lengths to avoid antagonizing communities or exacerbating internal divisions.<sup>94</sup> Its strategy is to get a "foot in the door" by staking claims, and then it is willing to wait for up to twenty years before proceeding, all the while persistently urging the First Nation to sign an agreement.<sup>95</sup>

Compared to other majors, this company has set out to do an exceptional amount of grassroots exploration work over vast swathes of territory.<sup>96</sup> It has made over a dozen overtures to First Nations, but only one-third of negotiations have produced agreements that have held or led to new agreements.<sup>97</sup> When First Nations were reticent and the company was worried competitors were gaining ground, it sometimes proceeded without agreement as

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<sup>93</sup> Comments included: "we are well-regulated, well-policed;" "we have good governance; I have great confidence in the federal and provincial track record"; "we can definitely call on the government to do its job."

<sup>94</sup> This major said it is quick to attend to FN requests whenever they "go to the trouble of jumping up and down, whether it's posturing or not." The company also said it is very careful to avoid setting communities off against each other.

<sup>95</sup> Miranda, Chambers and Coumans recommend that once a community has withheld consent for a mining project, "no further requests for consultation by that company or any other should be made within a five-year period unless the community indicates otherwise" (73). In Australia, Part IV of the *Aboriginal Land Rights Act* (1976) establishes such a timing regime.

<sup>96</sup> Exploration for certain kinds of minerals requires deciphering geological trends over vast regions, so if a few crucial missing pieces of the puzzle are found on a certain First Nation's territory, the company may be unwilling to take "no" for an answer.

<sup>97</sup> Over its fifteen years exploring in northern Ontario, this major has spent significant time negotiating with a total of 12 First Nation communities. One-third of these negotiations have produced agreements that have held or led to new agreements. One of these projects was abandoned for geological reasons, so technically, one-quarter of the relationships have proven useful to the company. Three out of the 12 communities have been saying "no" to mineral exploration altogether, and two others are undecided. Out of 7 formal agreements made, 3 have held, 2 were ripped up by the First Nation and had to be renegotiated, 1 project could not be pursued because the neighbouring First Nation objected, and 1 First Nation backed out entirely.

a pressure tactic to get First Nations back to the table and to make them moderate their demands. This sometimes backfired, however, and the major has indeed landed in political traps.

In one case, the major tried to find out from a First Nation the boundaries of its traditional territory just so the company could avoid it, but the First Nation refused to even give this information as part of its no-engagement strategy. The company ended up interfering with the First Nation's hunting activities and suffered a wave of adverse media attention as a result, since it was accused of not even bothering to consult. The major claimed it deals with political traps by "dancing smartly and quickly." Since it has so many grassroots projects, it can quickly back away and "shelve" one project while it focuses on others. Thus, this major proceeded despite the danger of political traps because it had much more short-term manoeuvrability than other majors, and in the long term it was counting on pressuring the Crown to resolve political grievances.

This observation suggests a new explanatory variable that would require further testing. My hypothesis is: companies will proceed despite the danger of political traps if they have **a)** manoeuvrability in the short term; **b)** the ability to put projects on hiatus for many years; and **c)** political tools to pressure the government in the long term. Often, it is only certain juniors that possess the former and only majors that possess the latter two conditions; thus, both usually try to avoid political traps. In special cases, a company may possess all three and be less vulnerable to political traps.

This chapter's analysis has shown that companies proceeded after failing to obtain acquiescence/agreement neither because they were only concerned about appearances, nor because they could detect and avoid a certain type of threat. Rather, those that proceeded

believed they had already avoided political traps and only sought information about non-political concerns; whereas those that did not proceed were wary of political traps and sought information about the political motivations behind threats. This confirms my second hypothesis that companies will **proceed** even if they do not obtain acquiescence/agreement if they believe political traps are **detectable a priori**; and companies will **not proceed** without acquiescence/agreements if they believe political traps are **not detectable a priori**.

I now evaluate both my hypotheses by examining how many of the cases in each category fulfilled the consolidated predictions outlined in section 1.7.

#### ***4.6 Reviewing Overall Predictions***

In category 1 (seek acquiescence, do not obtain, do proceed), **7 out of the 10** respondents fulfilled both predictions; they believed they could detect and avoid political traps a priori, and they attempted to weaken FN landlord perceptions. Three outliers did not fulfill the second prediction; they said they do not negotiate agreements simply because First Nations do not ask. One said First Nations do not want to negotiate because their concerns are environmental rather than political, and two said First Nations are not concerned at all about the grassroots exploration stage. These attitudes, however, do fit the prediction that those in category 1 will not be acutely concerned about FN landlord perceptions.

One company that did fulfill the predictions said that it is now starting to negotiate an agreement. According to my hypothesis, this should mean that the company now believes it *cannot* weaken FN landlord perceptions. The company felt that this negotiation was quite risky because the First Nation has an unresolved treaty land entitlement claim, but it is comfortable negotiating only because the First Nation is interested in a business partnership.

The company claimed it would have to leave if it could not accommodate the First Nation's demands, which may imply it would not be able to weaken FN landlord perceptions.

In category 2 (seek acquiescence, do not obtain, do NOT proceed), all **5 out of 5** fulfilled both predictions; they believed they could not detect and avoid political traps a priori, and they attempted to weaken FN landlord perceptions. Four out of the 5 were acutely concerned about landlord perceptions and were strongly opposed to negotiating agreements.

In category 3 (seek agreement, do not obtain, do proceed), **2 out of 3** respondents fulfilled both predictions; they believed they could detect and avoid political traps a priori, and they believed they could not weaken FN landlord perceptions, but they were not acutely concerned. The third company did not fulfill either prediction; it was the "special case" major discussed in section 4.5.

In category 4 (seek agreement, do not obtain, do NOT proceed), **3 out of 5** respondents (2 majors and 1 mid-tier) fulfilled both predictions; they believed they could not detect and avoid political traps a priori, and they believed they could not weaken FN landlord perceptions. These 3 encouraged First Nations to feel a sense of entitlement to their land, and all 5 respondents sought consensus within the FN community.

The two outlying juniors did not fulfill either prediction; they both sought agreement and chose not to proceed without obtaining it because they believed such an agreement was legally required. One said the Ministry of Northern Development and Mines specifically ordered the company to reach an agreement; this junior also found it physically impossible to proceed since the property bordered on the First Nation's reserve. The other junior said that it could not proceed without an agreement because it feared legal retribution not only from

the First Nation, but from the government, financiers and its joint venture partner. It is not clear on what grounds this junior perceived itself to be legally liable.

Overall, it seems that my two independent variables—whether or not companies believe FN landlord perceptions can be weakened and whether or not they believe political traps are detectable a priori—are strong predictors for categories 1 and 2: those that seek acquiescence. They are slightly weaker predictors for those that seek agreements in categories 3 and 4. To get more conclusive results I would need a larger sample size.

## **CONCLUSIONS AND IMPLICATIONS FOR FUTURE RESEARCH**

Detailed analysis of my survey data confirms that, with the exception of a few special cases, my two hypotheses are valid: exploration companies seek acquiescence or agreement according to whether they believe, respectively, that FN landlord perceptions can or cannot be weakened; and companies proceed or do not proceed after failing to obtain acquiescence/agreement according to whether they believe, respectively, that political traps are or are not detectable a priori.

It is common to hear those in the mineral exploration industry remark: “we don’t care who the land belongs to, just tell us who to pay, and we’ll pay them.” This is somewhat disingenuous since exploration companies do not want just any landlord; they want a landlord who can provide political stability and certainty, as well as a system approximating free entry. Explorers face a dilemma because their traditional landlord—the Crown—has proven itself unable or unwilling to either enforce or change the current Mining Act. The different approaches mineral exploration companies take in dealing with First Nations communities—whether they seek acquiescence or a negotiated agreement, and whether or not they proceed without acquiescence/agreement—reflect companies’ attempts to create predictability out of political chaos.<sup>98</sup>

Seeking acquiescence is not just a default option for those that cannot or are not vulnerable enough to seek agreements. Those that seek acquiescence believe First Nations would act unpredictably if they perceived themselves to be landlords; these companies

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<sup>98</sup> Theorists Crozier and Friedberg point out that even the formation of rules does not eliminate the uncertainty or power imbalance. Uncertainty forms again around the issue of how (or whether) the rules are implemented, and new negotiations can take place about the selective enforcement or bending of rules (43). Companies report that these kinds of negotiations take place with some Aboriginal groups in the Northwest Territories who have settled land claims. Aboriginal authorities control certain permitting procedures, but they are willing to set such procedures aside if companies are willing to sign an “access and benefit agreement.”

instead encourage First Nations to perceive themselves as business partners. Those that negotiate agreements tentatively accept First Nations as their de facto landlords with the confidence they will bargain in reasonable and predictable ways.

While about half of the companies seeking acquiescence said they were willing to negotiate agreements, and some of those that easily *obtained* acquiescence were willing to concede more, most of those that *did not obtain* acquiescence already made substantial concessions and sacrifices to win First Nation approval, and they were strongly opposed to negotiating agreements.

Political traps are the ultimate source of unpredictability that nearly all companies find intolerable and seek to avoid entirely. Those that proceeded without obtaining acquiescence/agreement believed they could steer clear of political traps by detecting them a priori; whereas those that did not proceed protected themselves from political traps only by actually obtaining acquiescence/agreement. One company waded knowingly into trap-laden territory because it possessed both the manoeuvrability usually attributed to juniors and the patience and political connections usually attributed to majors.

Companies select their approach based on their *perceptions* of First Nation political motivations—whether the First Nation will lay a political trap and whether FN landlord perceptions can be weakened—and not based on any objective *type* of threat posed by the community. Nearly all companies say they do “due diligence,” researching an area’s political profile before entering. To predict whether or not a company will proceed without acquiescence/agreement, one must determine not simply *whether* a company does due diligence, but whether it believes that prior due diligence can *protect* it from falling into a political trap.

Neither the choice to seek acquiescence versus agreement, nor the choice to proceed or not to proceed without obtaining it, depends on the size or wealth of a company. Majors were found in all four categories of my framework. Many juniors exerted high effort to obtain either acquiescence or agreement, including substantial time sacrifices and the payment of cash access fees (for those that sought agreement). In some cases, juniors were pressured to seek agreement by majors who were either their partners or their competitors, although this phenomenon is currently relatively rare.

Further research is necessary to test the hypotheses generated in chapter 4: companies that believe political traps are detectable a priori interpret no response as a lack of opposition and are encouraged by divisions within FN communities; whereas companies that believe political traps are *not* detectable a priori suspect that no response may signal a political agenda and they try to lessen divisions within FN communities. It would be particularly interesting to investigate whether companies are more likely to become ensnared in political traps between First Nations and the Crown if there is political strife *within* FN communities, as those companies that did not proceed seemed to fear.

The impetus for mineral exploration companies to seek First Nations' approval has come from an absence of government intervention—a political vacuum—rather than the imposition of laws or policies. It is not corporate social responsibility that has filled the gap, however, as much of the literature assumes. Companies seek FN approval because they are vulnerable to the unpredictable nature of the threats that First Nations can pose. At the same time, however, political risk places limits on what companies will do. Some companies avoid negotiating agreements and only seek non-negotiated acquiescence because they fear strengthening FN landlord perceptions.

The results of this research indicate that if a First Nation wants to deter mineral development altogether on land currently considered to be Crown property, its most effective strategy would be to clearly broadcast to the industry its land claim grievances with the Crown. If a First Nation wants a chance to negotiate rather than having to choose between acquiescence or all-out resistance, then it could avoid making “landlord” demands in order to persuade wary companies to negotiate, although the scope of the ensuing agreement might be limited to business and environmental issues. Alternatively, a First Nation could take a “landlord” approach, negotiate more all-encompassing agreements with those companies that believe they cannot weaken FN landlord perceptions, as long as the First Nation was prepared to resist companies that would refuse to negotiate.

I have attempted to bring attention to an aspect of mineral resource development—early exploration—that is often ignored or dismissed as benign. Although it is too early for either party to know enough about the project’s economic, social, and environmental ramifications to reach conclusive agreements,<sup>99</sup> interactions at this stage may have profound implications for bargaining at later stages. There is much scope for future research to examine whether and how the terms of early exploration agreements affect the terms of later Impact and Benefit Agreements. This study suggests a number of reasons why early exploration could be critical to FN bargaining power:

- First Nations may have greater bargaining power dealing separately with many smaller companies doing grassroots exploration rather than dealing with one larger company at the advanced stage. While it is often assumed that smaller companies are

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<sup>99</sup> O’Faircheallaigh emphasizes that “a purely ex ante approach may be inadequate. A project or development will often have consequences which cannot be predicted at the time of the SIA” (“Negotiation Based Approach,” 1). In Australia, a 1987 amendment to the Land Rights Act granted Aboriginal landowners the right of consent at the initial stage, but prevented them from subsequently denying a mining lease. This “placed Aboriginal landowners in an invidious and indeed ridiculous position, requiring them to approve mining at a stage when virtually no information was available...” (Indigenous Support Services/ACIL Consulting A4-2).

less vulnerable and have much less capacity to concede anything to First Nations, my survey results show that this is not necessarily the case. In cases where juniors do have lower resource capacity, some are willing to concede decision-making power in lieu of cash. To take advantage of this bargaining power, however, First Nations face the considerable challenge of building up enough administrative capacity to bargain separately with many companies.

- As exploration progresses and companies offer more payments, jobs, and business opportunities, wealth may be injected unevenly into communities, creating internal divisions that would hamper unified resistance. First Nations would have stronger bargaining power later on if they could reach consensus beforehand as to how economic benefits should be distributed from the outset, and make agreements with companies before exploration proceeds to ensure these procedures are followed.
- First Nations may be able to secure some bargaining leverage before a staking rush if they can establish a credible threat and make agreements with prominent companies in order to set a precedent for those that follow. This would at least help the community to control the pace of mineral exploration.

On the other hand, if a First Nation chooses *not* to participate in consultation at the early stages, it may gain the chance to extract considerable concessions by “popping up” and asserting unresolved land claims once large investments have already been made. Indeed, this is one of companies’ greatest fears. This appears, however, to be a strategy involving much higher risks and stakes for all sides. If a First Nation plays its political cards wrong it could incur spectacular losses, including lost opportunities for environmental protection during the exploration period.

The mineral exploration industry is in a time of rapid flux; some say it is in crisis. The formal free entry system has become little more than an antiquated fiction, and there is no question that companies require new rules for engagement with First Nations. As governments continue to bury their heads in the sand, companies are forging ahead and creating de facto rules on the ground. Depending on their assessments of First Nations' political motivations, companies may or may not negotiate these rules, and they may or may not make sure they are in place before proceeding with exploration.

## **APPENDIX 1: Interview questions**

1. General characteristics of company: --when formed, minerals sought, locations of projects
2. For those projects in First Nation territory—stage of exploration, status of work programs, any permits required or applied for?
3. Does the company have preference for more or less remote areas; brownfield vs. greenfield?
4. Is company expansionary (aiming to take exploration project right into production) or does it generally sell off or option out its project before that stage?
5. Keeping in mind that all mineral exploration companies, especially juniors, are somewhat risk-taking, do you perceive your company to be more or less risk averse/risk-taking, or just the same as other companies in the industry?
6. What do you perceive to be your minimum legal obligations, if any, toward the First Nations in the area you are exploring?
7. Do you accept costs or limits on exploration beyond these legal requirements? Explain kinds and extent of consultation done.
8.
  - \*a) Before you begin your program, what do you need to know about the FN before you can start your project? How do you find this out?
  - \*b) Before you start a project, do you need some definite indication that FN neutral or not opposed? What if you had no response from the FN?
  - \*c) What would that indication be?
  - \*d) Is this indication reliable or do you expect the FN to change its mind later on?
  - \*e) What can you do to mitigate that risk, and how sure are you that it will work?
  - \*f) Have you started a project if the FN was opposed? Would you in the future?
  - \*g) Do you seek some sort of agreement or understanding before you can go ahead?
  - \*h) What are you willing to do or pay to obtain entry?
  - \*i) Would you say that entry is up for negotiation?
9. With whom within the FN do you consult?
10. Is there a danger of consulting too early if it raises FN expectations unnecessarily?
11. Does your company need something from the First Nation or depend on it in any way?
  - a) Do you need the First Nation's support?
  - b) Do you rely on FN labour, airstrip, accommodations, or services?
12. Does the First Nation pose a potential threat to your exploration activities or share price?

- a) Does the FN pose a threat to your personal security?
  - \*b) How confident are you that the police would back you up if there was a confrontation?
  - c) Is direct action / blockades a threat?
  - d) Is a lawsuit a threat?
  - e) Are media campaigns a threat (getting bad press)?
13. Does the First Nation's support affect the kind or level of financing you can obtain?
- a) Are investors aware of FN issues and do they care?
  - b) Would deals with majors (eg. JVs, selling project) be affected by your level of consultation with the FN or any problems / conflicts that have arisen with the FN?
14. Has it ever carried out its threats or otherwise proven them to be either credible or non-credible?
15. How confident are you that you can achieve the necessary permits without the First Nation's support? *With* FN support?
16. How easy would it be for your company to abandon the project and go elsewhere if a First Nation was making onerous demands or threatening the company?
- \*a) Are there other jurisdictions you could go where you would have less trouble with FN?
17. Have you ever had to ask for an extension from the Minister on the deadlines for completing the required work on your claim? How easy is it to obtain such an extension? How long could you realistically afford to delay exploration work (ie. if First Nations consultation was taking a long time)?
18. Is there any First Nation territory that you stay away from because it is too risky for exploration?
19. Do you perceive the First Nation to need either your company or need the mineral exploration in general? In what ways?
20. Have you tried to enhance this dependence or change their perception of how much they need you?
21. Did you make any donations or offers to the FN on your own accord, without them demanding it?
22. Would you consider any of your payments or time spent dealing with First Nations to be investments? What is the return you expect, and when do you expect it?
23. How high risk is this investment? Have you ever failed to achieve any return?

24. Does the First Nation reciprocate this investment by taking on some of the project risk, participating in joint ventures, or reorienting the community's economy around serving the mining industry?
25. Do you perceive spending on Aboriginal engagement to give some companies a competitive edge within the industry? Eg. Would they be able to explore more areas (get "freer" entry than others) or be the buyer or JV partner of choice?
26. If majors raise First Nations expectations by paying them a lot at early stages, do you think that juniors will have to start spending significantly more on Aboriginal engagement? How can juniors deal with expectations they cannot afford to meet?
27. Given that exploration is risky, and companies need strategies to mitigate that risk, is there any particular party that your company relies on a great deal to reduce its exploration risk? Or do you distribute risk among a variety of parties?
28. Is there any way for companies to prevent themselves from becoming pawns in political struggles between First Nations and government? Would more regulation solve this problem? What safety nets do you want from government?
  - \*a) How confident are you that the government will uphold the company's rights?

*\*Denotes questions added part-way through the study. These issues were brought up frequently by early respondents, and were integrated into later interviews as the study's emphasis shifted. These questions were asked in follow-up interviews with those earlier respondents who had not already offered the information.*

**APPENDIX 2: Respondent Profiles by Category**

TABLE 5: Respondents sorted by category; type of respondent and region specified.

	SEEK ACQUIESCENCE	SEEK AGREEMENT
	<b>Category 1</b> (seek acquiescence, do proceed)	<b>Category 3</b> (seek agreement, do proceed)
<b>PROCEED WITHOUT OBTAINING</b>	<b>10</b> respondents --27% of 37 cases total --1 major, 7 juniors, 2 consultants --4 in Ont., 4 in NWT, 1 in Que.* --5 received no response	<b>3</b> respondents --8% of 37 cases total --1 major, 2 juniors --2 in Ont., 1 in NWT
	<b>Category 2</b> (seek acquiescence, do not proceed)	<b>Category 4</b> (seek agreement, do not proceed)
<b>DO NOT PROCEED WITHOUT OBTAINING</b>	<b>5</b> respondents --14% of 37 cases total --1 major, 3 juniors, 1 consultant --1 in Ont., 3 in NWT*	<b>5</b> respondents --14% of 37 cases total --2 major, 1 mid-tier, 2 juniors --5 in Ont.
<b>OBTAIN</b>	<b>8</b> respondents --22% of 37 cases total --7 juniors, 1 consultant --4 in Ont., 2 in NWT, 1 in Que.*	<b>4</b> respondents --11% of 37 cases total --3 juniors, 1 consultant --2 in Ont., 1 in NWT*

**DO NOT SEEK any kind of approval:**

**2** respondents:  
 --5% of 37 cases total  
 --2 juniors  
 --1 in Ont., 1 in Que.

*\*Numbers for regions may be less than the total number of respondents if the consultant was not working in any one particular region.*

### **APPENDIX 3: Personal Communication with Government Officials**

Gashinski, R. Senior Manager. Mining Lands Section of the Ontario Ministry of Northern Development and Mines (MNDM), Mining Recorder's Office, Sudbury. Phone conversation, 10 July 2006.

Griffin, J. District Planner. Ontario Ministry of Natural Resources (MNR), Cochrane District. Phone conversation, 24 July 2006.

Silver, B. Senior Policy Advisor. Ontario Secretariat for Aboriginal Affairs (OSAA), Toronto. Phone conversation, 11 July 2006.

Smithies, B. Director. Ontario Ministry of Northern Development and Mines (MNDM) Corporate Policy Secretariat, Toronto. Phone conversation, 13 July 2006; email to author, 16 August 2006.

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