

*Mapping the Road Ahead:
Finding Common Ground
On Resource Revenue Sharing*

Discussion Paper

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Executive Summary

These are unprecedented times in the resource sector. Canada's abundant supply of, coupled with increasing long-term global demand for, resource commodities encouragingly points to a period of sustained prosperity¹. Equally unprecedented is the relatively rapid evolution of indigenous rights jurisprudence and its impact on public policy and aboriginal-state relations, in Canada and around the world². With land as the shared point of intersection for aboriginal, industry, and government interests, significant challenges lie ahead. This discussion paper looks at some of these challenges from the standpoint of the exploration and development sectors of the minerals industry, and suggests strategies for addressing them. Specifically, it looks at the issue of resource revenue sharing (RRS) with Aboriginal people in the context of providing greater certainty over secure and stable access to lands and resources.

Resource revenue sharing is an extraordinarily complex and contentious issue, one which messily intrudes into a broader set of political, constitutional, jurisdictional, economic, and policy considerations. Fiscal relationships, equalization, federal-provincial relations, resource management and ownership, the so-called "fiscal imbalance", interpretation and renovation of historic treaties, modern land claim and treaty processes, self-government, consultation and accommodation, along with a host of governance, program delivery and capacity issues, are but *some* of the areas affected by any serious discussion on resource revenue sharing. Despite these challenges, meaningful resource revenue sharing is an idea that is long overdue. Larger political and economic considerations dictate that it is in our collective national interest the issue be addressed.

In settled and unsettled treaty areas across Canada, aboriginal leaders have long been advocating for a fairer share of the total economic rent derived from their traditional lands, and are increasingly hesitant to embrace further development until the issue is meaningfully addressed³. More to the point, as the recent Platinex decision demonstrates, Aboriginal groups now have the necessary moral and legal leverage to slow or halt development until their priorities and interests are meaningfully reconciled with non-aboriginal interests. As S.C. Justice Binnie wrote recently, "*the fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions*"⁴.

With few exceptions, governments have been content to let industry and aboriginal groups sort out how economic benefits will be distributed⁵ and have resisted calls to share their allotment of the rent with other jurisdictions or parties. From the aboriginal perspective, this is an increasingly untenable position. Their primary relationship is with the Crown, and, for the most part, is financially dependent on that relationship. Unfortunately, private interests find themselves caught in the middle. This poses specific challenges for explorers and developers. At the front end of the process in terms of accessing Crown lands within traditional territories,

¹ *Canadian Outlook Economic Forecast: Autumn 2006*, Conference Board of Canada

² D.W. Elliott, 5 ed. *Law and Aboriginal Peoples in Canada 2005*, Captus Press

³ Russell Banta, *Review of First Nation Resource Revenue Sharing*, , 2005, discussion paper prepared for the Assembly of First Nations

⁴ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

⁵ Gordon Shanks, *Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements*, 2006, Public Policy Forum

they are not in a position to promise or share substantive economic benefits from their activities, given there are few “private” benefits to be shared prior to mineral deposits being proven or commercially viable projects brought into production. Finding some accommodation on resource revenue sharing that can provide incentives for timely access is a critical issue for the exploration sector. Given how high the stakes are, it is incumbent on the exploration industry to take a leadership role in aligning its interests with those of the aboriginal community.

The paper is structured in three parts. The first section frames the issue of resource revenue sharing, explores its underlying principles and objectives, and surveys domestic and international experiences and models. We found a significant chasm exists between what governments are prepared to put on the table, and what the aboriginal community is demanding / expecting from RRS. We also found that revenue sharing with Aboriginal groups in Canada has been, and continues to be conducted on an *ad hoc*, piecemeal basis. In areas where historic treaties are absent or under negotiation, the federal Comprehensive Claims process is the only policy vehicle which can accommodate RRS, though B.C. and Quebec have concluded bilateral RRS arrangements with Aboriginal groups. In settled historic treaty areas (ON, MB, SK, AB) no process exists for negotiating RRS despite First Nations’ view that the numbered treaties contemplated a more equitable sharing of land and resources than currently exists. Given the overlapping jurisdictional issues (Ottawa for treaties, and provincial ownership of Crown lands), it is suggested that the federal government, in consultation with industry, establish tri-partite (federal/provincial/aboriginal) processes to develop consensus around principles and guidelines, that will lead to the establishment of a more harmonized, and regularized and transparent framework in each jurisdiction. While the authors were only asked to survey the RRS, it must be stressed that RRS cannot be looked at in isolation. Treaty implementation, consultation and accommodation, co-management of resources, self-government, and comprehensive claims settlement are all part of the aspirations of aboriginal people, and have a substantial bearing on land access issues for industry.

The second section briefly describes some of the factors and challenges that need to be addressed regarding RRS. Specifically, it examines the various positions and interests of the actors involved (political, jurisdictional, systemic, aboriginal, industry, etc) and the opportunities and barriers that can be expected. It concludes that industry’s objectives can best be achieved by joining efforts with (a) the aboriginal community, as champions on their behalf (i.e. alignment of interests), in genuine partnership, and (b), with other resource sector industries (e.g. Oil & Gas, Forestry, Hydro, etc.) with similar interests in improving access, certainty, and clarity. The pooling of economic and political capital, with the weight of consensus behind it, will make it more difficult for governments to avoid addressing the issue in a purposive way. To illustrate the point, when the BC Treaty process had stalled, it was the mining and forestry sector that took the lead, in concert with the Aboriginal leadership, in getting governments to agree to put sharing economic benefits on the table to reinvigorate negotiations.

The final section builds on the recommendations outlined in the first two sections and suggests options for moving forward. It recommends undertaking a more comprehensive study and analysis on the broader issue of Access, of which RRS is only a part, and recommends the establishment of a cross-sectoral “resource industry associations” roundtable or working group (Oil & Gas, Mining, Forestry, Energy transmission, etc.) to coordinate efforts, develop policy positions, and share best practices on Land Access issues. At the very least the mining industry should continue working with Aboriginal leaders towards developing a credible position on resource revenue sharing, one that will have a positive impact on discussions with

governments. Over the longer term, it is also recommended that a coordinated education, outreach, and lobby campaign be developed which all parties to the effort can use to build momentum within their respective sectors, regions and jurisdictions.

A few caveats are worth bearing in mind. This paper is merely a primer designed to introduce the subject and stimulate discussion and is not a comprehensive in-depth analysis. Time constraints precluded more than a cursory scan of the subject, both in the literature review and the interviews conducted. That being said there remains a general dearth of research and attention being paid to revenue sharing with aboriginal people, which presents the exploration sector with an opportunity to take a leadership role. Aside from addressing industry interests, there are added advantages to championing aboriginal interests. It is about far more than just money; it is about the importance of relationships and the opportunities well nurtured ones can provide.

Highlights

- Sole focus on RRS is potential red herring (danger of getting bogged down); Need to focus on suite of Land Access issues
- Opportunity for industry to align its interests with aboriginal interests but should be mindful of importance of supporting a credible position.
- Significant gap between what governments are willing to share (share of direct rent revenue –e.g. royalties, fees), and aboriginal expectations (a share of total economic rent captured - e.g. income tax)
- Processes for negotiating RRS exist in unsettled treaty areas, not in the numbered historic treaty areas (ON, MB, SK, AB)
- Federal government needs to establish a tri-partite process to deal with Land Access issues in the historic treaty areas
- More work/consultation required on co-developing RRS position with Aboriginal interests
- Recommend coordinated resource industry (mining, forestry, oil and gas) approach to Land Access (e.g. resource-sector associations working group or roundtable) [and pooling of resources for next point]
- Should develop long-term strategic plan/campaign for influencing outcomes and raising profile of aboriginal land access issues –e.g. public education, outreach and lobby campaigns, public policy forum with senior officials, etc.

Introduction

The impetus for this report arose out of a series of discussions with its sponsors around the question of how the mining industry could develop a more robust position on the issue of resource revenue sharing between governments and aboriginal groups.

One of the questions industry is asking itself is how can or should it position itself on the issue of resource revenue sharing and what supporting role, if any, should it be playing in assisting aboriginal proponents in their efforts to secure a greater share of the economic benefit public governments derive from resource exploration and exploitation activities on lands in traditional aboriginal territories?

In their 2006 submission to the 63rd Mines Ministers' Conference, the Canadian mineral exploration industry identified impact and benefit agreements (IBAs) and resource revenue sharing (RRS) as issues supported in principle, to the extent they contributed to a greater degree of certainty and cooperation among all affected parties, and increased aboriginal support for mineral development within their traditional territories⁶. Alignment of aboriginal and mining industry interests appears to be a mutually beneficial for both parties and should be pursued.

However if the objective is to succeed in getting governments and the public to support a more equitable distribution of economic benefits through resource revenue sharing with aboriginal groups, careful consideration of the issue is required. It will take resources and a sustained effort to achieve the outcome, which will be neither quick nor easy. It will require building a *credible* case - that anticipates, accounts for, and accommodates competing demands, and political and policy interests in the public sphere.

A few initial conclusions are drawn in the report that merit further consideration. First, a more regularized and transparent framework for approaching RRS, and land access issues more broadly, is required. Second, more work is required in aligning mining and aboriginal interests towards developing a common position on RRS. Third, greater cooperation and coordination on land access issues are recommended between mining and other resource sector industries. Finally, a long-term strategy (e.g. education, outreach/lobby campaign) to achieve common interests ought to be developed.

The aim of this report is to briefly outline and highlight some of the factors and issues worth considering in developing positions and strategies going forward. It is by no means an exhaustive survey of the issue, though enough ground is covered to give the reader a sense of the magnitude and complexity of the subject under consideration. For the reader interested in pursuing the issue further, a partial source list of the material consulted for this paper is included.

⁶ *A Strategy To Ensure the Long-Term Competitiveness of the Canadian Mineral Industry*, submission to the 63rd Mines Ministers' Conference, August 27-29, 2006

Section I: Framing the Issue

What is Resource Revenue Sharing?

Defining what constitutes resource revenue sharing depends on the perspectives of those with an interest in defining it. In economic terms, resource revenue can be conceptually understood as the total value of the economic rent derived from the extraction and exploitation activities of renewable and non-renewable resources. This definition includes wages, costs, and private sector profits, as well as the aggregate amount of direct and indirect taxes (e.g. corporate, property, income), fees, royalties, and levies. “Sharing” in this instance refers to how the total economic value is distributed amongst all the various stakeholders (investors, owners, employees, & governments, etc.). In layman terms this is the “total pie” definition.

In Canada, the size of the “pie” is significant. For instance, the GDP from the overall mining and metals sector in 2005 was valued at \$42 billion dollars. Corporate income taxes paid to governments alone were \$1.57 billion, without accounting for private income taxes, royalties, fees, and other incremental charges. Add in the total value from all resource dependent industries (forestry, oil & gas, hydroelectric generation and energy transmission, etc.) and the pie grows substantially.

Determining the size of the pie is one thing. Determining which portion is to be shared is quite another. Governments have a narrower view of what constitutes resource revenue than do Aboriginal interests. In the world of public finance, rents are limited to direct revenues derived from royalties, mining taxes, and fees (e.g. leases, licenses, and stumpage). In almost all instances in Canada (and abroad) where governments have agreed to some form of RRS, the size of the pie is circumscribed to these types of direct rents.

Aboriginal proponents on the other hand, adopt a broader view of what constitutes resource revenue, arguing the financial benefits to the Crown are significantly greater once corporate and personal income taxes generated from resource activities on their traditional lands are taken into account⁷. Therefore on the basic question of determining the size of the pie to be shared, a significant gap exists between what governments are prepared to include and what Aboriginal groups are expecting and advocating.

The second critical feature of RRS involves determining with whom revenues will be shared, how they will be distributed, and to what purpose. This is where matters become more complicated and contentious. The revenues in question are captured for collective use and benefit. Decisions regarding their transfer from one jurisdiction to another will inevitably depend on how these questions are answered. Once the process begins, competing public interests and demands intrude, which also need to be anticipated, understood, and managed. The following example illustrates the point.

⁷ *Resource Revenue Sharing Between Government and Ontario Aboriginal Communities: Final Report*, 2006 (OMICC); [see also Banta, 2005, p. 11, and RCAP, Vol. 2, 1996.]

A recent study⁸ called for the establishment of a resource revenue fund for First Nations in Ontario. The revenues would be deposited into a limited partnership trust account to be distributed to all First Nations (FNs) in the province (based on a similar model used for distributing gaming revenues, which stipulates how the gaming profits are allocated between participating FNs and for what purposes). Various options are then proposed as to the source of the funds—ranging from a percentage of GDP, to combinations of a share of royalty and federal, provincial income tax revenues—and whether they should come from just mining, or ought to include forestry and energy as well. The differing options project annual revenues between \$ 74 million and \$444 million dollars, not insignificant sums of money.

The proposal raises a number of issues that the transferring orders of government would need to deal with, not the least of which is the focus on identifying how much revenue can be captured rather than how much is required. For instance, how will this affect the equalization program, and the ongoing disagreements between Ottawa and the provinces on how to treat resource revenue in determining the fiscal capacity of provinces to pay for social programs? Or the so-called “fiscal imbalance” question between provinces and Ottawa, and the division of taxation powers/responsibilities laid out in the Constitution?

How will the transferring orders of government replace these revenues? Or, if fiscal resources are being transferred, would certain responsibilities for delivery of programs and services be devolved as well? And if so, to what order of government or institutional/legal structure (e.g. band governments, tribal councils, sectoral self-government arrangements, etc.)? What aggregation is required to achieve comparable economies of scale? What would the implications be for existing funding arrangements with Band governments under the Indian Act?

Who are the eligible beneficiaries (i.e. on-reserve vs. off-reserve), and how will revenues be distributed internally within the aboriginal community at large? What mandating and consultation processes are required? What institutional and capacity issues need to be addressed prior to transferring powers or funding? What legal and legislative changes and reforms would be required under our Parliamentary system (e.g. Indian Act, ministerial responsibility/accountability for \$ and results)? How will this affect existing self-government, treaty and comprehensive claims negotiations/agreements/policies? What would this mean for the fiduciary obligations of the Crown?

How will the senior levels of government accommodate existing demands for a share of resource revenues by municipal governments? What implications are there, if any, for the unprecedented sharing of income tax based on its economic source? And what implications will this have, if any, on differing understandings of what the treaties imply with respect to taxation arrangements involving treaty First Nations, off-reserve vs. on-reserve, etc.? And lastly, how will all this sell politically?

This list (which is only the tip of the iceberg) is not an argument against resource revenue sharing. The point is to show how an idea that seems to make sense, and on the face of it

⁸ *Ibid.* (OMICC report), p.39

appear relatively simple, is far more complex in reality. Some of these issues can probably be dealt rather easily; some will take a very long time; and others, for either political or practical reasons, not at all. Invariably there will be instances where certain issues will be identified only as pretence for why resource revenue sharing cannot be done.

As the questions above allude to, the third and final feature of resource revenue sharing is how we think about its intended purpose and use. Is resource revenue meant to be “compensation” for loss of access, or as a source of revenue for betterment of Aboriginal people? Who determines the level and degree of autonomy sought, and what are the long-term implications of “donor-recipient” government funding arrangements?

The above illustrates how focusing solely on RRS could easily become bogged down, if it were the only topic that needed to be addressed. RRS should be placed in the larger context of access to land and resources in traditional aboriginal territories.

Resource Revenue Sharing in Canada

The federal government agreed to begin land claims negotiations in the early 1970s, in response to the historic Calder Case, where it was established that aboriginal title had not been extinguished in areas where treaties had not been concluded with the Crown. The James Bay Agreement with the Cree and Inuit of Northern Quebec was the first such agreement signed in Canada, and the following clause best captures governments’ position on “resource revenue sharing” at the time:

“The James Bay Crees and the Inuit of Québec forever and absolutely renounce any and all claims, if any, past, present, or future, against Québec with respect to royalties, mining duties, taxes or equivalent or similar benefits and revenues, derived and resulting from development and exploitation in the Territory⁹”

The situation is quite different today. Resource revenue sharing has been either accepted in principle, is being negotiated, or is actively being applied in certain jurisdictions. In almost every case this only applies to land claim and self-government agreements in areas (mostly in the North) where treaties with the Crown were never concluded, and the resource revenues in question are restricted to the direct resource rents described earlier.

The terms applied follow a relatively standard formula and vary depending on when they were concluded and the degree of autonomy or ownership of settlement lands in each case. Some have clauses that cap the total royalty benefit so as not to exceed the per capita average Canadian income, while in others the royalty income is taxable beyond a certain threshold. The formula ranges from 7.5% of the first \$2 million in royalties collected by the Crown + 1.5% of additional royalties¹⁰, to 50% of the first \$2 million + 5% of additional royalties¹¹. In each of the cases, some form of participation in the co-management of natural resources form part of the agreement, and there are no conditions on how the moneys transferred are to be used.

⁹ James Bay and Northern Québec Agreement and Complementary Agreements (1975)

¹⁰ Gwich'in & Sahtu Comprehensive Land Claim Agreements (1992, 1993)

¹¹ Labrador Inuit Land Claims Agreement (2005)

RRS also exists in areas where treaties have yet to be settled, or negotiations are ongoing. For instance Canada concluded an interim measures agreement with the DehCho in the Mackenzie Valley that provides the DehCho a share of the royalties generated in the settlement area claimed, in advance of a final settlement¹². Similarly, British Columbia and Canada agreed in 2003 to 50-50 cost-share any future resource revenue sharing arrangements concluded under the British Columbia Treaty Process. Finally, the province of Newfoundland and Labrador agreed to share a portion of its royalties (from Crown lands in the settlement area, and the Voisey's Bay project) with the Inuit as part of their final land claim agreement. In each case, governments acted to put incentives in place in order to restart negotiating processes that had stalled, or get agreement on a final settlement.

Resource revenue sharing is also being negotiated between aboriginal groups in the NWT, and the federal and territorial governments under the 2004 Devolution Framework Agreement (over lands and resources) negotiations. While not yet concluded, there is agreement in principle by all parties that some form of RRS arrangement with aboriginal governments and land corporations must be achieved before devolution can proceed.

The trend toward "devolution" over management of resources and royalties has also been under way on reserve lands. For instance the recently passed First Nations Oil and Gas Management Act provides bands with the option of managing and regulating oil and gas development on their lands, and turns over responsibility for negotiating, collecting, managing their own royalties (which are otherwise held in Trust by the Crown, and drawn down at the request of the band and approval of the Minister).

In the mid-1990s, the Federation of Saskatchewan Indian Nations (FSIN) and the federal and Saskatchewan governments established a Common Table to look at a new comprehensive governance relationship for the province's First Nations, without re-opening the numbered treaties in Saskatchewan. In 2000 a Framework Agreement was reached setting out the parameters for future negotiations. The new governance relationship includes coming to terms on a new fiscal relationship. Three points are worth noting here. First, while the process is more or less stalled, it points to a model that could be adapted and applied to a more focused land access discussion or process. Secondly, resource revenue sharing is listed as a topic for negotiation, but it limits the scope of RRS to a "form of benefits, economic programs, and other structures"¹³, and does not contemplate sharing taxation (direct or indirect) revenues from resource activities. Finally, the process has been underway for ten years, which testifies to both the complexity of the issues, the low political priority it has with the federal and provincial governments, and the time it takes to resolve complicated issues.

In 2004, a private member's bill, the First Nations Resource Revenue Sharing Act (Bill 97) was introduced into the Ontario legislature where it was carried and referred to committee for study. The Act as proposed, however, was seriously flawed and could not be supported by the Government. It proposed that private interests must be a party to a "comprehensive revenue sharing agreement" with the Government of Ontario and First Nations prior to

¹² Deh Cho First Nations - Government of Canada Interim Resource Development Agreement (2003)

¹³ Framework for Governance of Treaty First Nations, 2000

undertaking activities, including timelines for reaching agreement. Secondly, in the absence of reaching agreement, measures to impose a binding agreement on the Crown with respect to how it share taxation revenue was proposed –something no government will ever accept. Nonetheless, the hearings were the first serious look at the issue and provided all affected parties with the opportunity to advance their thinking on RRS.

Finally, three more examples are worth noting, given provincial governments are the principal actors. British Columbia has created forestry-related interim measures agreements with First Nations. Close to seventy such agreements have been signed, granting over 60 First Nations (~25% of First Nations in BC) access to economic benefits in the form of revenue sharing and/or short-term timber tenures. In exchange for the economic benefits, the agreements (specifically Forest and Range Agreements) require that the First Nations agree to powerful clauses which aim to ensure legal certainty for the province and their agents of economic development¹⁴

The next example is the Paix Des Braves Agreement in Quebec, where up to \$70 million annually in royalty payments from resource development activities were negotiated with the Cree. The agreement was reached in order to settle outstanding litigation resulting from the failure to implement significant portions of the original James Bay Agreement, without which, further Hydro development in Northern Quebec could not proceed.

The last example is the Athabasca Tribal Council's Long Term Regional Benefits Agreement, currently under negotiation in oil sands-rich Alberta. In this instance the financial benefits/payments being provided by governments are resource revenue sharing in all but name.

What these three examples have in common, is that in each case the legal positions of the Aboriginal communities involved created sufficient uncertainty to incent industry and governments to act. Forestry is the backbone of the BC economy, as is oil in Alberta and Hydro development in Quebec. There is some irony in the fact that the Paix de Braves agreement is the most substantial resource revenue sharing arrangement in Canada, for it is essentially a re-negotiation of the original James Bay Agreement which had the Cree and Inuit swear-off any claim to future resource rents!

The most noticeable feature of resource revenue sharing in Canada however, is that it has only been accommodated within processes designed to settle outstanding land use and ownership questions in areas not covered by treaty (i.e. the Federal Comprehensive Claims process and the tri-partite BC Treaty Process). Secondly, the way in which resource revenue sharing has evolved has been *ad hoc*, piecemeal, and “reactive” to the changing legal landscape.

¹⁴ Jason Forsyth and George Hoberg, *In Search of Certainty: A “New Era” Approach to Forest Policy for First Nations in British Columbia*, unpublished paper, Faculty of Forestry, UBC

The majority of the historic treaty areas fall within provincial boundaries, where provincial Crowns own and manage the lands and resources. However the federal government has jurisdiction over and responsibility for treaty implementation. In order for treaty First Nations to enter into formal resource revenue sharing agreements over their traditional territories, some form of tri-partite process will be required. The Federal government is uniquely positioned to provide the necessary leadership to undertake these processes. The goal should be to develop a harmonized approach, with clearly defined principles and objectives, that would lead to a more regularized and transparent framework for addressing resource revenue sharing arrangements with historic treaty First Nations in each region, jurisdiction, and province. This would send a clear signal to industry that governments are committed to resolving these issues, providing greater certainty and clarity.

Resource Revenue Sharing Internationally

International experience with resource revenue sharing with indigenous populations is somewhat analogous to the Canadian experience to the extent the evolution of jurisprudence and indigenous rights has been moving in a similar direction. Correspondingly, resource-rich countries are grappling with some of the same Land Access issues Canada is.

Two noteworthy examples of RSS are in Australia and Alaska. The Australian experience in aboriginal-state relations mirrors the Canadian experience: colonialist policies of land dispossession and assimilation, leading to lower socio-economic status of aboriginal populations. Unlike in Canada, treaties were never concluded with Aborigine groups in Australia, though reserve lands were set aside for their use and benefit. The primary example of resource revenue sharing exists in the Northern Territory (which, jurisdictionally, is partially comparable to the NWT in Canada).

An Aboriginal Land Rights Commission was established in 1973, followed by the passage of the Aboriginal Land Rights Act in 1976, which provided Aborigines with veto rights over access to and exploration of their lands. Various structures were set up to receive and manage mining royalties in the forms of regionally-based Land Councils and the Aboriginal Benefit Trust Account, as well as incorporated bodies at the grassroots level. The purpose was to raise revenues for financing capital formation, training, and community economic development in aboriginal communities, not social spending. The defining features of the Northern Territory regime are:

- Communities most directly affected (within 60km) by mining have priority of disbursement of funds – 30% of royalty total
- 40% goes to the Land Council for administrative costs
- Remaining 30% of the Trust is dispersed to all aborigines in the Territory
- The Land Councils lead in negotiating royalty rates, which can be revenue-based or output-linked
- The royalty rate has a statutory floor, but access veto allows for negotiated amounts above it.
- Compensation agreements with mining companies are mandatory, with the Minister able to send to arbitration if necessary

- Difficulty forecasting revenue
- Increased certainty for industry

The other notable resource revenue sharing example is closer to home. In the early 1970s, the State of Alaska concluded the Alaska Native Claims Settlement Act following the discovery of the largest oilfield in North America at Prudhoe Bay along Alaska's North Slope. Along with land and cash, the settlement provided for the allocation of 2% of the gross value of the resource to the Alaska Native Development Fund, a deal worth close to a billion dollars for Alaska's 60,000 natives. Alaskan native interests have been aligned with resource development ever since.

Section II: Perspectives on Resource Revenue Sharing

Aboriginal Perspectives

Aboriginal people have much in common in terms of socio-economic circumstances, social and cultural values, and objectives and concerns when faced with both the costs and benefits accompanying mineral development. Here and abroad, the historical experience with mining development in traditional territories, or in proximity to aboriginal communities has not been positive from the aboriginal perspective and partly explains the emergence of impact and benefit agreements, and increased demands for resource revenue sharing: As Ciaran O' Faircheallaigh writes,

*"The international literature, whether it deals with North or South America, the former Soviet Union, Australasia or the South Pacific, is in general pessimistic regarding the impact of large-scale resource exploitation on indigenous peoples. There is a perception that the economic benefits generated by resource projects tend to be concentrated at the national level, and, to the extent that they accrue at the local or regional level, are appropriated by non-indigenous people. On the other hand the economic, social, cultural and environmental costs created by such projects tend to fall disproportionately on the indigenous populations of resource-rich regions."*¹⁵

Russell Banta calls it the "resource paradox" – the contradiction that natural resources can generate enormous wealth, yet regions rich in resources too often have poor economic growth, inadequate investment in health, education, and sanitation and weak social institutions¹⁶. From an aboriginal point of view, resource wealth tends to bypass communities as profits go to outside investors, payments go to outside services and suppliers, wages go to outside labour, public revenues go to central governments, and local people are barred from participation by poor education, social and physical infrastructure.

¹⁵ Ciaran O'Faircheallaigh, "Maximizing Indigenous benefits from Resource Development" in Monique M. Ross & J. Owen Saunders, eds., *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) pp. 226-227

¹⁶ Russell Banta, Presentation to World Mines Ministries Forum, 2006, <http://www.wmmf.org/2006/proceedings.shtml>

Watching the economy from the outside and coping with the ensuing social and environmental disruption brought on by development has been a key driver in demands for private resource revenue sharing arrangements (IBAs) with developers, as has been the demand for public resource revenue sharing. Demand for RRS from public governments is driven by two additional factors. The first stems from decades of government neglect and under funding, and, secondly, the Crown's impoverished understanding of the spirit and intent of the treaties it entered into with the "Indians". Treaty First Nations do not trust non-aboriginal state actors.

The Crown's historical and lingering view that the treaties were "land session" undertakings is viewed by First Nations as a confiscation of their wealth and heritage. Their interpretation of the treaties is that they contemplated equitable sharing of the resources¹⁷. When added to assimilationist policies of the past, and ongoing under-resourcing by governments to equalize socio-economic conditions, First Nations have little reason to trust that private and public non-aboriginal actors have interests other than their own in mind. Consequently, First Nations leaders have been demanding more autonomy (co-management of resources, delivery of services & programs, etc.), and the revenue sources to support it, within the context of their inherent (S. 35) constitutional right to be self-governing¹⁸. In unsettled treaty areas this has been, or is being partially addressed in self-government and comprehensive claims processes, though frustration with these processes, and the financial and policy limits of government mandates, continues to mount.

As a priority issue for First Nations the importance attached to RRS varies across the country, with the strongest demands coming from First Nations in the numbered treaty areas, particularly in the northern regions of Ontario, Manitoba, Saskatchewan, and Alberta. Nonetheless, resource revenue sharing is consistently and increasingly being called for by political and community leaders at all levels and forums¹⁹.

Government Perspectives

As mentioned earlier, governments have approached RRS in an *ad hoc* and piecemeal fashion. Moreover, where they have accepted to negotiate RRS, it has only been in unsettled treaty areas, and the source of revenues available for sharing are limited to direct economic rents such as royalties, leases and fees. Only when aboriginal interests have real leverage over larger economic or public interests are concessions made either in practical or rhetorical terms. Recent examples are the Quebec and Newfoundland governments agreeing to RRS to make way for hydro development in James Bay and the Voisey's Bay projects respectively, and the Canada / BC agreement on RRS under the BC Treaty Process. In some instances, alternative arrangements are put on the table without agreeing to dedicated shares of resource taxation revenue or calling it resource revenue

¹⁷ Kerry Abel, *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, p.4

¹⁸ Royal Commission on Aboriginal Peoples (RCAP), Vol. 2, 1996

¹⁹ E.g. Grand Chief Stan Beardy during Bill 97 hearings in Ontario; Regional Chiefs from AB,SK, & MB threatened court action over the issue in 1999; see also aboriginal submissions to the Canada-Aboriginal Peoples Roundtable – Economic Opportunities (2005), and statements/positions of the National Chief of the Assembly of First Nations (e.g. at Kelowna First Ministers Meeting in 2005).

sharing. For example in 2005 the federal government agreed to create a \$500 million socio-economic development fund for aboriginal communities along the pipeline corridor to advance the stalled Mackenzie Valley gas project in the NWT. The fund is contingent on aboriginal support for the project and understood as an investment in the greater economic interests and returns at stake.

Despite the fact RRS has been accepted and implemented in certain jurisdictions, governments are not enthusiastically embracing the concept, in principle or in practice. Very little *coherent* attention is being paid to the issue institutionally or politically, even if at times it is given expression in policy or political documents²⁰. There are several reasons for this, some political, some bureaucratic.

Governments do not come to the table with a monolithic set of defined interests. Rather, several internal competing interests weigh in on the issue whenever it comes up for discussion or decision. For instance, negotiators and decision makers in line departments responsible for aboriginal affairs know accommodating aboriginal parties' RRS positions is important for reaching agreement. Getting agreement within their own departments is often painstaking and time consuming; reaching consensus or getting a mandate from Cabinet and other departments is even more difficult. Finance, justice, intergovernmental relations, and various other central agency or line departments worry about precedent and/or the implications these decisions may have on their own interests and responsibilities. The higher the stakes, the higher up the power structure contentious issues must go for decision. Generally speaking, whatever accommodations are acceded to are carefully "fenced-in" to limit their impact on wider government interests or priorities.

For instance, as the following examples show, there is a genuine fear of:

- re-visiting the terms of historic treaties given the possible implications this would have on existing modern treaty agreements where RRS terms are less favourable;
- the impact RRS arrangements would have on fiscal demands/relations between orders of government (i.e. the vertical "fiscal imbalance" between federal, provincial, and municipal governments and the treatment of resource revenues as own-source revenue in the equalization program); and
- The political impact or policy precedent of transferring dedicated taxation revenues to aboriginal groups where unresolved or ill-defined institutional and political arrangements remain an issue.

Governments, then, as a result of these competing internal dynamics, tend to be institutionally prone to risk aversion and inertia –two characteristics difficult to overcome even where broader long-term interests are identified and articulated. Aboriginal policy tends to be driven by changes in jurisprudence that forces governments' hand. "Horizontality" is a buzzword in government that is difficult to put into practice. Sustained

²⁰ *Gathering Strength* (1999), Canada's policy response to RCAP, "recognizes" RRS, as did the recent *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments* (2005), but are silent on the definition or form of RRS.

cooperation and compromise among competing interests is easier to achieve once issues become clearly defined priorities of cabinets, ministers, premiers or prime ministers.

This leads to having to keep short and long-term political interests in mind as well, whether positive or negative. Local competition among aboriginal and non-aboriginal interests (e.g. in the fishery, forestry, and mining sector) or corporate pressure of one sector over another, can influence how elected representatives behave. In BC for example, relations between the Campbell administration and the province's aboriginal groups were severely strained once first elected. At the time, the liberals believed the labour unions, the previous NDP government, and aboriginal interests were all aligned against resource development and set out to undo each sphere's influence, promising and holding a referendum on treaty rights. The plan backfired. Once it realized the impact not addressing unresolved treaty issues was having on the economy and investment climate in BC (including jobs and votes), and the legal position of First Nations, the government shifted to a more proactive role in repairing the relationship and quickly came to the conclusion that RRS (from pressure brought to bear by industry) could advance common interests.

Indirectly related to RRS is the cost of government inaction on improving aboriginal-state relations. For instance, a healthy resource economy results in wealth creation and economic benefits (jobs, business opportunities, skills training) that can offset the growing financial and social costs of dependent populations without access to economic opportunities. Not addressing these issues contributes to further uncertainty in the resource sector, resulting in diminished Crown revenues, capital flight, and a weakened economy from falling resource activity.

The task then is to take an inventory of and clearly identify what the interests are of the various political and institutional actors involved when developing strategies to move RRS and land access issues higher up the priority list of decision makers. It will also help industry and aboriginal interests understand their interests and positions more clearly, and shape expectations and trade-offs of what is achievable.

Industry Perspectives

In canvassing resource sector industry perspectives, common themes emerge as well. Industry is cognizant of the impact past practices have had on aboriginal communities' experience with mineral development. Consequently it supports and is practicing more socially and environmentally progressive approaches to how it conducts its activities.

It also understands that the changing legal landscape is considerably shifting the sands in their operating environment, creating uncertainty on several fronts. There is concern increasing tension in the aboriginal-Crown dynamic could effectively restrict access to prospective regions (a situation already playing itself out in the NWT²¹ and Northern Ontario), or result in frozen investment. Evolving aboriginal and treaty rights jurisprudence is contributing to real and perceived challenges to the Crown's stewardship and authority in

²¹ c.f. prospecting permits issue in Akaitcho / DehCho territories, and threatened moratorium in NAN territory

settled and unsettled treaty areas²², leading to unstable operating terms and conditions. Where tensions are highest, exploration interests must also contend with the possibility their crews or contractors may be harassed or their equipment damaged or seized, as was the case recently between Platinex and First Nations at Big Trout Lake in Ontario.

Financial concerns range from unpredictable start-up costs and prohibitive expenses for small operators, unsustainable growth in costs of concluding private benefit sharing arrangements (IBAs), to lost or delayed opportunity costs and the diminishing competitive advantage of Canada's mining industry on the global stage. Taken together, these concerns are only peripherally related to RRS and are more closely associated with access issues borne out of aboriginal-Crown conflict, the consequences of which immediately impact the exploration and development sector.

With respect to RRS, the industry is supportive of seeing progress on the issue to the extent it serves to relieve tension in aboriginal-Crown relations and acts as an incentive for aboriginal support for mineral exploration and development. From industry's perspective, sharing of the public revenues would increase the political stability and economic predictability that support long-term investment in the mining sector. Industry's experience has often been, however, that instead of governments sharing benefits, they deflect aboriginal demands for sharing resource revenues onto industry in the form of equity participation, revenue surcharges, and increased impacts and benefits compensation²³. Therefore industry remains concerned that any future arrangements on RRS not include any increases in the current tax burden²⁴. In fact, current industry efforts are working to secure changes in tax regulations to offset growing expenses related to dealing with aboriginal issues in their development activities.

Clearly there are opportunities where industry and aboriginal interests can be aligned. If progress on RRS, or other issues such as consultation or claims settlement, can improve relationships and access to lands and resources, it makes sense for industry to form strategic partnerships with aboriginal interests.

Section III: Where To From Here?

Considerations and Next Steps

Land access issues are not restricted to the mining sector. Forestry, oil and gas, energy transmission, and fisheries are also grappling with similar issues and concerns, as the following quote from the Canadian Association of Petroleum Producers implies:

"The petroleum industry needs access to land in order to explore for and produce natural gas, crude oil and oil sands. Often, an area of interest to the industry falls under aboriginal control. The complexity of aboriginal issues has proven very difficult for governments to manage, bringing uncertainty to the respective roles and

²² c.f. recent Supreme Court of Canada decisions in Haida/Taku River and Mikisew Cree, on the Crown's duty to consult and accommodate aboriginal interests.

²³ See Shanks, Public Policy Forum report on IBAs

²⁴ OMICC report, p. 43

responsibilities of the energy industry, aboriginal people and governments. CAPP encourages all levels of government to engage in discussions with First Nations people to address long-standing issues.”

In a brief survey of various resource sector associations, we found that while within the sectors (e.g. between CAPP and the Canadian Energy Pipeline Association [CEPA], or between provincial and national mining and prospecting/exploration associations) there has been some cooperation on common issues, no substantive engagement is underway across sectors. Moreover, the range of subjects (e.g. consultation by governments, co-management of resources, land-use planning, access to Crown lands, environmental assessment, benefit sharing, jurisdictional conflict, etc.) each sector is grappling with is similar, and many found the idea of pursuing a more coordinated approach intriguing.

There are several advantages to pursuing such a dialogue. Pooling political, financial, human, and intellectual resources could prove effective in developing common positions with aboriginal interests and would serve to strengthen aboriginal-resource industry relations. Given the importance and size of the resource sector to the Canadian economy, leveraging the collective weight of the resource sector could be a powerful approach for dealing with governments and would send the message that these issues are important to industry and need greater attention. While the primary focus should be on improving aboriginal-state relations and resource access, there are other aboriginal & public policy areas (e.g. skilled labour shortage) affecting resource industry interests that could benefit from more cooperation and coherence.

A secondary consideration is to ensure that positions be co-developed with aboriginal interests, and not simply be endorsed by the mining industry, particularly where those positions are unlikely to succeed with governments. Earlier an example was given where the RRS focus was on determining how big the pie was and staking a position on what was assumed to be a fair share to be captured. It presented an option that saw senior governments' cost-sharing income tax revenue, an unlikely scenario; much more work needs to be done to arrive at positions that will be credible and be given serious consideration by governments. To that end, a more comprehensive analysis of the RRS issue should be undertaken by the mining sector, in consultation with aboriginal interests. Consideration should also be given to broadening the scope of work to include land access issues more generally, particularly as they affect the mining sector. This work could complement and feed into cross-sectoral working groups if so established.

Third, as a starting point, industry should consider calling on the federal government to take a lead role in establishing tri-partite (federal/provincial/aboriginal) processes to develop consensus around principles and guidelines on RRS. There is a need for a more harmonized, regularized and transparent framework in historic treaty areas to deal with these issues. The Saskatchewan Common Table process is one example of a model that could be examined and adapted to the task.

Finally, as noted earlier, in our informal survey sample of political and bureaucratic actors, RRS with aboriginal groups is not a high priority for governments -interest, and support or opposition varies greatly from one jurisdiction to another and, other than within limited circles, is not widely known or understood. Once the work is done to develop common

understandings, positions, and approaches with aboriginal interests, a long-term strategic plan should be developed. Effective education, outreach, and lobby campaigns, which all parties to the effort can use to build momentum within their respective sectors, regions and jurisdictions, need to be developed and executed in a coherent and coordinated manner.

Appendix A: Bibliography

Brian Davey, *Resource Revenue Sharing Between Government and Ontario Aboriginal Communities: Final Report*, 2006 (OMICC).

Canada, *Royal Commission on Aboriginal Peoples*, 1996.

_____, *Gathering Strength*, 1999.

_____, *Canada-Aboriginal Peoples Roundtable: Final Report*, 2005.

_____, Indian Affairs & Northern Affairs Canada, *Index of Final Agreements*, available at http://www.ainc-inac.gc.ca/pr/agr/index_e.html .

Ciaran O’Faircheallaigh, “Maximizing Indigenous benefits from Resource Development” in Monique M. Ross & J. Owen Saunders, eds., *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) pp. 226-227.

Canadian Outlook Economic Forecast: Autumn 2006, Conference Board of Canada.

Danalyn McKinnon, *Review of Literature on Fiscal Relationships*, Indian and Northern Affairs Canada, 1998, available at: http://www.ainc-inac.gc.ca/pr/ra/rev/index_e.html .

David C. Hawkes & Alan M. Maslove, “Fiscal Arrangements for Aboriginal Self-Government” in *Aboriginal People and Government Responsibility: Exploring Federal and Provincial Roles*, David C. Hawkes (ed.), Carleton University Press, Ottawa, 1989, p. 93-127.

David W. Elliott, 5 ed. *Law and Aboriginal Peoples in Canada 2005*, Captus Press.

Gordon Shanks & Sandra Lopes, *Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements*, Public Policy Forum, March 2006, available at: http://www.ppforum.ca/common/assets/publications/en/report_impact_benefits-english.pdf.

Jason Forsyth and George Hoberg, *In Search of Certainty: A “New Era” Approach to Forest Policy for First Nations in British Columbia*, unpublished paper, Faculty of Forestry, UBC, 2005

J.C. Altman *Aborigines and Mining Royalties in the Northern Territory* (Canberra: Australian Institute of Aboriginal Studies, 1983).

Kerry Abel, *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, Kerry Abel & Jean Friesen (eds.), Manitoba University Press, Winnipeg, 1991.

Russell Banta, *Review of First Nation Resource Revenue Sharing, 2005*, discussion paper prepared for the Assembly of First Nations, available at: <http://www.afn.ca/cmslib/general/ResourceRevenueSharing-Eng.pdf> .

Steven A. Kennett, *A guide to Impact and Benefit Agreements*, Canadian Institute of Resources Law, 1999.

A Strategy To Ensure the Long-Term Competitiveness of the Canadian Mineral Industry, submission to the 63rd Mines Ministers’ Conference, August 27-29, 2006, PDAC.