Environmental Management (2023) 72:53–69
https://doi.org/10.1007/s00267-022-01679-8

Institutional Determinants of Mining Projects in Canada and Sweden: Insights from the Prosperity and Kallak Cases

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Received: 17 April 2021 / Accepted: 29 June 2022 / Published online: 16 July 2022
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Abstract
Mining has proven to be a controversial form of resource development throughout the circumpolar north. This article compares two mining projects—the proposed Prosperity gold and copper mine in central British Columbia, Canada and the proposed Kallak iron ore mine in Norrbotten County in northern Sweden—that have endured long and protracted approval processes that have caused tensions and disputes between mining companies, Indigenous peoples, communities and state actors. In an effort understand the particular development paths taken by these two mining projects, this article examines the institutional determinants that structure relationships between industry, Indigenous communities and the state in Canada and Sweden. Using an historical institutionalist theoretical approach, the article focuses on the manner in which the structural features of the political systems and the environmental assessment and permitting processes in both countries have shaped the mine approval process. It also identifies particular critical junctures—important events and decisions that influenced the trajectory of the approval processes in profound and consequential ways. The article finds that institutional determinants, both historical and contemporary, have played a critical role in determining outcomes in both cases. In particular, it demonstrates the ways in which the structures of the Canadian and Swedish political systems have historically excluded Indigenous peoples from the decision-making process for resource development projects such as mines. It also shows how broader institutional contexts, as well as specific events and decisions, have complicated and politicized the mine approval processes, a situation that has heightened tensions on all sides.

Keywords Mining · Institutions · Critical junctures · Indigenous peoples · Environmental assessment · Permitting

Introduction

Mining has proven to be a controversial form of resource development throughout the circumpolar north. In countries such as Canada and Sweden, which have long histories of resource development, mining has presented both opportunities and challenges for northern regions that were colonized by the state. For many northern communities with limited options in terms of economic development and diversification, new mines hold the prospect of well-paying direct and indirect employment, as well as revenues for local economic and social development projects. At the same time, these projects also pose significant environmental and cultural threats to northern regions that far outlive a mine's short lifespan and negatively impact land-based activities such as hunting, fishing and herding (Keeling and Sandlos 2015). In many parts of northern Canada and Sweden, mining projects take place on Indigenous territories. Legal disputes regarding questions of Indigenous rights and title and the effects of mines on traditional subsistence and cultural activities in Indigenous communities have added to the contentious nature of these projects.

This article compares the development of the proposed Prosperity gold/copper mine in central British Columbia, Canada and the proposed Kallak iron mine in Norrbotten County in northern Sweden, two controversial projects that have endured protracted and contested approval processes for more than a decade. In the case of the Prosperity mine, the approval process resulted in the rejection of the mine proposal, whereas the Swedish government, after years of

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delays, has recently approved the Kallak mine; it is important to note, however, that the fate of the mine project is still pending because of other necessary approvals. The research for this article was conducted as part of an international project that compares social licensing and the evolving relationships between communities, industry and the state in a number of mine projects in Canada and Sweden. Of particular interest in this project is the ways in which mining projects and the regulatory frameworks that govern them affect Indigenous rights and land use. In both countries, mine projects have evoked strong reactions and opinions on the part of proponents and opponents that are grounded in very different worldviews. A review of the literature analyzing the assessment and permitting processes related to the proposed Prosperity and Kallak mines reveals a number of environmental, economic, and socio-cultural reasons why these projects have been delayed or rejected at various points (Mehdic 2014; Haddock 2011; Raitio et al. 2020; Beland Lindahl et al. 2018; Sehlin MacNeil 2015).

Our aim is not to replicate or contest this analysis.[1] Rather, this article offers a different lens on the two cases noted above by examining the structures, rules and processes that govern resource extraction and environmental assessment, and their impacts on the mine approval process in Canada and Sweden. Alongside factors such as Indigenous agency, we argue that the institutional landscape has also played a significant role in influencing the development of each mine project and, in a more general sense, the relationships between Indigenous peoples, industry, local communities and the state. In particular, we focus on the decision-making authority of government and the political organization of the state, as well as the specific features of the environmental assessment and permitting processes to advance an institutionalist explanation for political outcomes in both mining projects. In addition to situating the two cases in a broader institutional context, our analysis also identifies specific critical junctures, or instances of profound institutional or political change, that influenced the trajectory of the mine approval process. This research draws mainly on primary and secondary source literatures, including academic publications, reports and analysis conducted by non-governmental organizations, legislation and legal documents, government reports and media sources.

Despite the expansion of domestic and international legal norms that have sought to strengthen Indigenous rights and have influenced decisions about mine projects in Canada and Sweden, governments in both countries ultimately hold a monopoly on the approval process for mines. In Canada this involves the environmental assessment (EA) process where an approval provides an EA Certificate for the proponent, whereas in Sweden the threshold is the mining permit. In both cases, these approvals set the terms for other permitting processes that eventually lead to final approval for the mine and adjoining activities (Allard and Curran 2021; Raitio et al. 2020).

In the two cases under examination, the positions of industry (mining companies) and the affected community (Indigenous rights holders) with regards to the proposed mines are clear: the mining companies support mine development, while the Indigenous communities are generally opposed. When we consider the position of the state (government), however, such consistency of opinion is not readily apparent. In theory, state agencies are supposed to maintain a neutral position and assess the merits of the projects based on a variety of environmental, economic, socio-cultural indicators, yet in both cases state actors have been divided in their positions on the mine development and this division can be traced in part to the structures, rules and processes that govern the approval process, as well as the broader political systems in which they are embedded. The contentious relationship between Indigenous communities and mining companies has received a great deal of attention in both the scholarly research (O'Faircheallaigh 2010; Ali 2009; Allard and Curran 2021; Raitio et al. 2020; Beland Lindahl et al. 2018) and popular media (Linnitt 2019; Webb 2019) on these and other mining projects. This article, however, will focus on the important role that state actors at all levels of government have played in the environmental assessment process in Canada and in the mining permit process in Sweden. In doing so it will draw on institutionalist theory to account for the long and complicated development paths followed in each case.

The article is divided into four parts. Part one outlines the theoretical framework that will be used to examine the two cases. Part two provides an overview of the case studies, and part three identifies the particular structures, rules and processes that influenced the development and outcomes of the proposed mine projects. Part four summarizes the main findings from the comparison of the two case studies.

Theoretical Framework

Institutionalist theory has a well-established pedigree in political science (Peters 1998; Hall and Taylor 1996) and other disciplines such as sociology (Scott et al. 1994) and economics (North 1990). The study of institutions, defined by Hall and Taylor (1996:938) as "the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy" has profoundly influenced our understanding of

[1] Other articles in this Special Section look specifically at Indigenous rights and land-use, resistance to and or active participation in mining projects, the legal frameworks that govern mining projects and Indigenous-state relations, and questions relating to corporate social responsibility (CSR) and social license to operate (SLO).

politics and society (see also Steinmo Thelen and Longstreth 1992; Thelen 1999).[2] Political scientists and public policy scholars posit that institutions influence political outcomes in a variety of different ways. In a very general sense, they structure and empower state institutions at the expense of other actors within the political system (Dye 1972). As Howlett et al. (2009: 5) have observed: “Although the activities of non-governmental actors may and very often do influence governments’ policy decisions, and governments sometimes leave the implementation of policy to non-governmental organizations, the efforts and initiatives of such actors do not in themselves constitute public policy.” In democracies, formal institutions such as constitutions and statutory law have provided governments with decision-making authority and, historically speaking, have marginalized the authority of other actors within society. Although these actors have successfully employed other mechanisms, such as domestic legal avenues and international pressure, to challenge the authority of governments, and the norms and values that inform government decision-making are constantly changing, governments still hold ultimate political authority over decisions regarding public policy within democratic systems of government.

It is also important to recognize that the organization of a political system also affects the manner in which states develop and implement public policy (Howlett et al. 2009). For example, authority can be allocated to different levels and branches of government. As Howlett et al. (2009: 59) have noted: “[o]ne of the most significant aspects of the political system affecting public policy is whether it is federal or unitary.” Whereas the centralized and hierarchical nature of a unitary system tends to simplify policy-making, in federal states, the policy-making process is often complicated by jurisdictional and intergovernmental disputes. Of particular relevance to this article is the observation that in federal systems, “different governments within the same country may make contradictory decisions that may weaken or nullify the effects of a policy” (Howlett et al. 2009: 60). Decision-making authority is also divided between different branches of government, primarily between the executive and legislative branches; the specific nature of the division and separation of powers can profoundly influence the policy process (Weaver and Rockman 1993). In parliamentary systems of government, for example, the executive branch plays a particularly important role in policy generation and implementation, a feature “which usually enables the government to take decisive action if it so chooses” (Bernier et al. 2005).

In addition to recognizing the general political context in which governments make decisions, it is also important to consider the specific institutional features that influence decisions made by state officials. To this end, we draw on historical institutionalism, a branch of institutionalist theory that focuses our attention on the evolution of institutional contexts over time and the development options or paths that they establish. This theoretical approach emphasizes the manner in which “institutional choices made early in the development of policy areas” not only influence outcomes but have an enduring impact on policy choices even after those institutional contexts evolve and change (Peters 1998: 210). An important feature that historical institutionalists highlight in explaining outcomes is the notion of *critical junctures* or “moments when substantial institutional change takes place thereby creating a ‘branching point’ from which historical development moves onto a new path” (Hall and Taylor 1996: 942). Critical junctures have been defined in both a general sense as “social, political, economic or environmental crises or dramatic change” that give rise to the development of new institutional contexts (Cardinal and Sonntag 2015: 5) or in a more specific sense as discrete and causally decisive decisions taken by actors that influence the trajectory or path of a particular issue or case (Capoccia 2016).[3] In the former definition, the emphasis is on historical events that shape the development of a set of political (or legal) institutions that, in turn, influence the policy choices of future actors. In the latter definition, critical junctures “are defined as relatively short periods of time during which there is a substantially heightened probability that *agents’ choices* [italics in original] will affect the outcome of interest” (Capoccia and Keleman 2007: 348).

Institutional analysis has been used in a general sense to explore topics relating to resource development and the environment (Young et al. 2008) and by political scientists who study the mining industry and mineral resource development (McAllister and Alexander 1997; McAllister and Fitzpatrick 2010). It has also been employed to examine questions relating to social license to operate (SLO) (Poelzer et al. 2020) and environmental assessment in the Canadian territorial north (Prno and Slocombe 2012). To our knowledge, however, historical institutionalism as a distinct theoretical approach has not been applied to specific cases of resource development projects, nor has it been used to systematically compare and analyze approval processes occurring in particular mining projects. In doing so, this article contributes to a growing body of literature that

[2] According to this definition, institutions can range from formal documents such as constitutions and statutes to more informal conventions (unwritten rules of political/legal behavior) and norms that influence the context in which actors operate and the decisions that they make.

[3] These are referred to in the institutionalist literature as path dependencies where outcomes are structured by previous decisions or events.

emphasizes the importance of institutions in mining related research (Pölönen et al. 2020; Poelzer et al. 2020).

Context: The Two Mine Projects

Before undertaking an institutional analysis of the two cases, we provide an overview of the mine projects, beginning with proposed Prosperity mine. The story of the Prosperity mine project is a long and complicated one. It is a proposed copper-gold mine in British Columbia that has involved two separate mine proposals[4], several environmental reviews by different levels of government, multiple court battles and numerous delays. The approval process has lasted for more than a decade and, during this period, the Tŝilhqot'in First Nation (represented by the Tŝilhqot'in National Government – TNG) and the mining company, Taseko Mines Limited (hereinafter Taseko), have demonstrated considerable resiliency and resolve in terms of achieving their respective goals. This article will focus mainly on the events that shaped the initial development of the proposed mine from 2008 until 2010 and had a profound impact on the development of the project in later years.

The mine site is located 125 km southwest of the City of Williams Lake (population in 2021: 10,947) in central British Columbia, on the unceded territory of the Tŝilhqot'in First Nation. As originally proposed in 2008 the mine project's most controversial feature was the destruction of a lake (Teẑtan Biny or Fish Lake) in order to convert it into a tailings pond for mine debris. Teẑtan Biny is considered sacred by the Tŝilhqot'in and is a traditional source of food for the community (TNG 2020). Taseko submitted applications to the federal and provincial environmental review processes in March 2009. Environmental assessments at both levels of government were necessary because the project impacted both federal and provincial areas of constitutional jurisdiction. Initially, the project was supposed to undergo a joint federal-provincial review panel, but this approach was rejected by the provincial government which decided to conduct its own separate environmental assessment in parallel to the federal environmental assessment, as was its right under the environmental assessment regime at the time.

In December 2009, the provincial Environmental Assessment Office (BCEAO) issued the Prosperity Gold-Copper Project Assessment Report and in January 2010, the provincial Ministers of Environment and Energy, and Mines and Petroleum Resources accepted the recommendations of the BCEAO and issued an Environmental Assessment Certificate for the project (Mehdic 2014). Later that year, however, a federal government review panel came to the opposite conclusion, namely that the project should be rejected. The decision was made by the federal environment minister in November 2010 on the basis that the proposed mine would cause significant environmental and cultural damage. In February 2011, Taseko released a revised plan for the mine project, which did not require the draining of Teẑtan Biny. Instead involved the creation of another tailings pond in a different location and recirculating the outflows of Teẑtan Biny.[5] Again, in 2013, a federal review panel found that the proposed mine would cause significant environmental and cultural damage and in 2014, the project was rejected for a second time by the federal environment minister.[6]

Over the next five years, Taseko and the Tŝilhqot'in National Government and their supporters were involved in several court cases at both the federal and provincial levels, which underscores the level of acrimony and division that exists between them (Linnitt 2019). All along, the TNG fundamentally opposed the contamination and destruction of Teẑtan Biny and the surrounding watershed by the proposed mine project. By December 2019, the mine was still not operational, and the two sides had entered into a dialog in which they "agreed to a standstill on certain outstanding litigation and regulatory matters which relate to Taseko's tenures and the area in the vicinity of Teztan Biny" (Webb 2019). In May 2020, the whole saga appeared to come to an end when the Supreme Court of Canada dismissed Taseko's application for leave to appeal a previous Federal Court of Appeal ruling about the federal environmental assessment of the proposed New Prosperity mine project (MiningWatch 2020; Beers 2020). This meant that, in its current form, the project will not go ahead.

In contrast to the Prosperity mine project, the decision regarding the proposed Kallak[7] mine in northern Sweden is still ongoing at time of writing (May 2022). The project, however, is equally controversial and has become the center of a confrontation between Beowulf Mining PLC, a UK-based mining company, the Indigenous Sami and other local people, and environmental interest groups; it is currently the most controversial and observed mining project in Sweden (e.g. Persson et al. 2017: 20; Ojala and Nordin 2015: 7). For several years, the project has spurred protests and civil disobedience, the extent of which has rarely been seen in Sweden (Sehlin MacNeil 2015: 82; Beland Lindahl et al. 2018). The proposed mine would negatively affect the

[4] The project consists of two separate proposals: the Prosperity Mine (2008) and the New Prosperity Mine (2011). The latter was a revised version of the former, rejected mine proposal and underwent a separate federal environmental review process.

[5] In the cryptic words of one official, this would have effectively transformed the lake into an aquarium.

[6] In 2015, the provincial government granted a one-time 5-year extension of the certificate it had initially granted in late 2009.

[7] *Gállok* in Sami language.

traditional reindeer herding practices of at least two Sami Reindeer Herding Communities (RHCs)[8]: Jåhkågasska tjiellde (hereinafter Jåhkågasska) and Sirges.

The iron ore deposit is located about 40 km from Jokkmokk, a small community in Norrbotten County with a population of 2,766 (2020). Although Jokkmokk's population is of mixed ethnicity, it is also a core Sami area in Sweden and a place of cultural significance for the Sami people. For instance, it is the home of the Jokkmokk Winter Market which, for over 400 years, has been an important gathering place for Sami from all parts of Sweden and more recently, has become a popular tourist attraction. By contrast, the open pit mine would operate for only 14 years.[9] The proposed mine is also situated close to the internationally important UNESCO World Heritage Site, Laponia, a vast area comprising four national parks and several nature reserves.[10]

The Kallak mine project is a politically sensitive case that in March 2022 received the Swedish government's approval for a mining permit (Government of Sweden 2022), an important step on the way to gaining full approval for mine operations to commence. The controversy began when Beowulf Mining started prospecting activities in the area, after being granted an exploration permit in 2006. In 2013, a Swedish affiliated company, Jokkmokk Iron Mines AB (JIMAB), began activities for "test mining" and, in the same year, submitted an application for a mining permit, which is the key threshold for mine developments in Sweden (Raitio et al. 2020: 7).

All things considered, it is a complex case which has gone back and forth between the Mining Inspectorate (the primary permit agency) and the Swedish Government. In addition, there have been several rounds of comments on JIMAB's application by sector agencies and parties to the case regarding aspects of the mine project and its impacts. The Jåhkågasska, Sirges and Tuorpon RHCs and the Sami Parliament oppose the mining plans because of its anticipated environmental impacts and in the interest of protecting Indigenous Sami reindeer herding rights, whereas the Jokkmokk Municipality welcomes the employment opportunities that the mine will generate. The planned mining site is located on land where Jåhkågasska has reindeer grazing and migration routes and, in the event of approval, the reindeer herders would probably need to use the neighbouring Sirges and/or Tuorpon RHC's grazing areas, which would increase land use conflicts among the communities. The mine would also use part of Sirges' grazing area as transportation routes.

Prosperity Mine in Central British Columbia

Turning now to a more detailed analysis of the two cases, the following sections will provide an overview the mine approval processes, starting with the proposed Prosperity mine. This case study reviews the broader political context that governs the mine approval process in Canada and British Columbia. It then identifies some of the key developments and issues that influenced the development of the proposed Prosperity mine, reflecting in particular on the institutional and political factors that affected the path that the mine project followed.

Constitutional and Legislative Framework

The Dominion of Canada was established in 1867 by an act of the British Parliament.[11] The political system of this new country combined the Westminster parliamentary model and federalism. One of the defining features of the Westminster parliamentary model is that the government must maintain the confidence (support) of the legislature. However, the cabinet, which is comprised of the prime minister and ministers, wields a great deal of decision-making authority. The dominance of the executive branch of government is apparent at both the federal and provincial levels of government and in intergovernmental relations between the different orders of government, a system that is referred to as executive federalism (Cameron and Simeon 2002).

Canada's federal system divides power between the federal or national government and ten provincial governments.[12] The distribution of powers between the federation and the provinces is outlined in sections 91 and 92 of the *Constitution Act, 1867*. The federal parliament has responsibility for national matters, such as trade and commerce, national defence, citizenship, fisheries, as well as "Indians and lands reserved for Indians". At the time, the term "Indians" referred to the Indigenous peoples whose ancestors have lived in this territory since time immemorial. Provincial legislatures have generally exclusive powers on all matters of a local or private nature in each province,[13]

[8] In Sweden, reindeer herding is administratively organized into 51 RHCs (*sameby* in Swedish). The RHCs are autonomous legal entities, each constituting a geographical area, a form of economic association, and a social community between the RHC members who practice pastoralism collectively. The right to herd reindeer is a usufruct right and exists regardless of land title; this means that reindeer herders can allow the reindeer to graze freely on land irrespective of the ownership of the land. See Raitio et al., 2020.

[9] If expanded to "Kallak South" it could be run another 10 years, according to the mining company.

[10] See the webpage of Laponia at https://laponia.nu/en/ (Date accessed March 29, 2022). The closest distance from the mine to Laponia is 40 km. Laponia is a mixed site, meaning it is designated because of both its outstanding nature conservation interests and the unique Sami culture.

[11] The British North America Act 1867.

[12] Canada also has three territories and although they have powers that have been devolved from the federal government, their status is derived from federal legislation, not the Constitution.

[13] *Constitution Act, 1867*, s. 92(13).

including the development, conservation and management of forestry and non-renewable natural resources.[14]

Environmental assessment for resource development projects such as mines is complicated by Canada's federal system of government and the fact that environmental matters are not assigned to the exclusive authority of either the federal or provincial governments in the Canadian constitution (Heelan Powell 2014; Bakvis et al. 2009). According to Heelan Powell (2014: 11), the environment "is a matter of overlapping and concurrent legislative authority" in which both levels of government have the responsibility and the authority to conduct environmental assessments. The legislative landscape governing environmental assessment is profoundly shaped by this constitutional framework, as both the federal and provincial governments have adopted their own legislation in this area. The relevant federal legislation in this particular case study is the *Canadian Environmental Assessment Act, 1992* and the *Canadian Environmental Assessment Act, 2012* because the federal environmental assessment of the proposed Prosperity (2010) mine was conducted under the 1992 Act and the assessment of the New Prosperity mine proposal (2014) was conducted under the 2012 Act. The corresponding provincial legislation is the *British Columbia Environmental Assessment Act, 2002*.[15]

Although limitations of space preclude an exhaustive comparison of these different acts, Haddock (2011: 70) has offered the following evaluation:

> The BC Environmental Assessment [Act, 2002] is largely procedural and lacks many of the substantive aspects of the CEAA [1992]. Key impact assessment concepts and terminology are not addressed or defined in the legislation. There are no decision-making criteria such as those that guide responsible authorities under the CEAA. Because so much is not addressed in the legislation, the BC [Environmental Assessment Office] lacks the policies and reference guides that have been developed under CEAA to assist assessment practitioners.[16]

These acts provide legislative guidance for bodies which undertake environmental assessments. At the federal level, this can, and in the case of the Prosperity mine did, involve an independent panel comprised of three appointed individuals. At the provincial level, the process was overseen by the BCEAO. Haddock (2011: 70) further contends that the federal panel was more insulated from political influence and performed its duties more independently, whereas the BCEAO viewed its role as carrying out the obligations of the provincial Crown, as represented by the provincial government. It is important to note that environmental assessment processes are also shaped by the jurisdictional responsibilities of the respective governments. For example, if the mine project under assessment affects fish or a fishery, as it did in this case, the federal Department of Fisheries and Oceans will require that the environmental assessment examines fishery impacts (Kwasniak 2009).

Environmental assessments in Canada can be conducted separately (federally and provincially) or jointly between the two orders of government. Although complicated, legal scholars and experts contend that one of the strengths of conducting separate federal and provincial assessments is that the scope of the assessments is greater and more rigorous (Kwasniak 2009; Heelan Powell 2014). They warn against the growing trend towards procedural harmonization and devolution, arguing that it will result in lower standards. Critics of the current process, including industry and some governments, have complained that the system is inefficient and have sought changes aimed at harmonizing the federal and provincial processes; however, it is also true that in a federal system, some duplication and inefficiencies are expected and even necessary (Kwasniak 2009). Despite the contentious outcome in the Prosperity mine case, however, collaboration in environmental regulation between the federal and provincial governments seems to be the norm (Heelan-Powell, 2014).[17]

The formal legislative and procedural structures outlined above are further elaborated by federal-provincial agreements on environmental assessment cooperation. The 1997 and 2004 Canada-British Columbia Agreements for Environmental Assessment Cooperation outlined the terms of cooperation in environmental assessments and provided for joint federal-provincial review panels.[18] To a certain extent,

[14] *Constitution Act, 1867* ss. 92, 92 A. Municipalities, which are created under provincial laws, can make by-laws to deal with local matters, such as snow removal and parking.

[15] The *BC Environmental Assessment Act, 2002* was replaced by the *BC Environmental Act, 2018*, but to date this newer act has not influenced the Prosperity mine project.

[16] In a 2016 the Auditor General of British Columbia commented that the provincial government should "remove its compliance and enforcement program for mining from MEM [Ministry of Energy and Mines]. MEM's role to promote mining development is diametrically opposed to compliance and enforcement. This framework, of having both activities within MEM, creates an irreconcilable conflict" (Auditor General of British Columbia, 2016).

[17] In the period before and during the Prosperity mine case, there were several environmental assessments of resource projects in British Columbia. As already noted, the Kemess North mine project in northwestern BC was reviewed by a Joint Review Panel and rejected by both the panel and the federal and provincial governments in 2008. The Red Chris mine in northwestern BC underwent two separate environmental assessments and was approved in the mid-2000s; although the Supreme Court of Canada later ruled that the federal review process was flawed. The Enbridge Northern Gateway pipeline project in northern BC was assessed by a Joint Review Panel, as was the Site C Dam project in northeastern BC.

[18] Joint Review Panels are also outlined in the formal legislation.

intergovernmental coordination in environmental assessment is necessitated by the overlapping jurisdictional nature of this particular policy area. The cooperation agreements, however, are only conventions (generally accepted norms of political behavior) and do not force or mandate the different governments to cooperate with each other. A secondary document called the "Operational Procedures to Assist in the Implementation of the Environmental Assessment of Projects Subject to the Canada-British Columbia Agreement for Environmental Assessment Cooperation" was signed in 2004. The main purpose of this agreement was to encourage greater cooperation between the Canadian Environmental Assessment Agency and the BCEAO and, in doing so, "maintain a robust joint approach to continuous improvement in the delivery of cooperative environmental assessments, and to have in place appropriate work planning, monitoring and performance management tools to identify, track and evaluate our joint actions" (Operational Procedures, 1(1)). Again, it is important to note that these are aspirational guidelines that encourage but do not mandate formal cooperation. Still, such conventions are important, especially in a policy area with overlapping jurisdictional boundaries. They are also a result of political pressure from within government and from industry to streamline and coordinate the environmental assessment process (Memorandum of Understanding 2013; see also Haddock 2011).[19]

Given the importance of Aboriginal[20] rights and title in this particular case, it is necessary to situate Indigenous peoples within this complicated institutional context. For many centuries, Indigenous peoples in Canada have suffered at the hands of state governments and their colonialist and assimilationist policies. Historically speaking, throughout much of British Columbia and indeed Canada, development on the traditional territories of Indigenous peoples, including resource development and settlement, was carried out without their consent. Indigenous peoples were excluded from the deliberations that led to the creation of Canada and its political system in 1867, an omission that has had important implications for Indigenous peoples and their governments to this day. Indigenous peoples were not party to the federal compact that divided jurisdictional power between the different orders of government; rather, they were a subject of this division of powers. As noted earlier, section 91(24) of the *Constitution Act, 1867*, grants the federal government exclusive authority over "Indians and Lands reserved for Indians" meaning that the federal government has the authority to pass laws about Indigenous peoples and their lands.

The initial basis of the relationship between Indigenous peoples and the state in Canada was the Royal Proclamation of 1763, a document that is viewed by many Indigenous peoples as an acknowledgement of Indigenous rights and title (Borrows 1997). Later, the Crown (represented first by the British colonial government and later the Canadian government) signed treaties with Indigenous peoples that, in the view of colonial governments, stripped Indigenous peoples of their rights over huge amounts of their traditional territories, thus paving the way for European settlement and development. Despite signing these treaties, Indigenous peoples and their supporters maintain that their rights and title to their lands remain intact, and this view has been supported in several recent landmark court decisions (Miller 2009). Another unique feature of the political context in British Columbia is that treaties were not signed in much of the province, a fact that has complicated land-based development (Penikett 2006).[21]

It is only within the last 50 years that the Canadian constitutional and judicial systems have started to formally recognize Indigenous rights and title. In 1982, constitutional changes, specifically the inclusion of section 35 (1) in the *Constitution Act, 1982*, recognized and affirmed "the existing aboriginal and treaty rights of the aboriginal peoples of Canada." In 1984, the Supreme Court of Canada established that the federal government has a "fiduciary responsibility" for Indigenous peoples and their lands.[22] While provincial governments do not have a specific constitutional responsibility for Indigenous peoples, they still have a constitutionally recognized duty to consult when decisions may infringe upon Aboriginal or treaty rights.

Several other court decisions, from *Calder* in 1973[23] and *Sparrow* in 1990[24] to the ground-breaking *Tsilhqot'in* case

[19] In 2013, the federal and British Columbia governments signed an MOU on the substitution of environmental assessments in British Columbia. This allows for one assessment that meets both federal and provincial requirements. Although neither the Prosperity nor New Prosperity mine projects were assessed under this new regime, which came into being after their environmental assessments were conducted, this new system has been used in a number of projects since 2013 and represents a significant formalization of collaboration between the federal and BC governments.

[20] The term "aboriginal" is a colonial construct and legal-constitutional term that refers specifically to the constitutionally recognized Indigenous peoples in Canada. We use the term Indigenous peoples in this article to refer to the original inhabitants of the territory now known as Canada and their descendants.

[21] The Tŝilhqot'in, for example, have not signed a treaty with the Crown.

[22] *Guerin c. The Queen* [1984] 2 SCR 335. Fiduciary responsibility means a responsibility to protect the interests of Aboriginal peoples. The original inhabitants of Canada are traditionally called Aboriginal peoples, but the term "Indigenous" peoples is becoming increasingly common. Three distinct aboriginal peoples are constitutionally acknowledged in Canada: First Nations, Inuit, and Métis (*Constitution Act* s. 35(2)).

[23] *Calder v. The Attorney General of British Columbia* [1973] S.C.R 313. Through the *Calder* case, the SCC changed the future framework of aboriginal rights in the country by recognizing that aboriginal title was a justifiable right and not solely a moral or political concern.

[24] *R v. Sparrow* [1990] 3 CNLR 160 SCC. In this landmark case, the SCC recognised harvesting rights, such a hunting, fishing and trapping rights

in 2014 have further strengthened Aboriginal rights.[25] In *Tsilhqot'in*, the Supreme Court of Canada held that the First Nation had an Aboriginal title to over 1700 square kilometers land, close the proposed Prosperity mine. In its ruling, the Court also declared that British Columbia breached its duty to consult the Tŝilhqot'in in its land use planning and forestry authorizations. Pressure on federal and provincial governments to meet its obligations to Indigenous peoples has also been strengthened through the influence of domestic and international declarations and commissions such as the United Nations Declaration on the Rights of Indigenous Peoples, the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission.

These changes have given Indigenous peoples some tools to influence resource development projects on their traditional territories, but this influence is not absolute or guaranteed. Governments also have a duty to consult Indigenous peoples in processes such as environmental assessments (subject to specific legislation), and this has been affirmed by the legal decisions noted above. However, as the Prosperity case reveals, governments can interpret and manipulate this requirement to suit their own ends. Governments (and in particular government ministers and cabinets) also have ultimate decision-making authority when it comes to approving mining projects.

Key Issues and Developments

Before discussing the specific issues and developments that influenced the assessments of the Prosperity mine project, it would be beneficial to briefly describe the political and ideological landscape in which these projects were situated. During this period (2008-present), the federal government was controlled by the right–wing Conservative Party (2008–2015)[26] and the centrist Liberal Party (2015-present). Throughout its tenure in office, the federal Conservative government had positioned Canada as an "energy superpower" based on its substantial energy resources (Taber 2006). The party's constituency is based mainly in western Canada and in rural constituencies, places that as a rule are more supportive of resource development. The Conservatives are also critical of what they perceive to be excessive government regulations that hamper business growth. In British Columbia, for most of this period (2008-2017), the government was dominated by the right-wing BC Liberal Party. The center-left New Democratic Party formed a minority government (in coalition with the Green Party) from 2017-2020. The BC Liberals are a decidedly neo-liberal party whose members share a similar ideology as the federal Conservatives. Their base is also situated in the non-metropolitan and northern regions where support for resource development tends to be strongest. It is interesting, therefore, that two separate federal Conservative ministers rejected the Prosperity and New Prosperity projects and that the provincial government at the time supported the projects, decisions which confirm Haddock's argument that the federal process was more independent and arms-length from the government and the provincial process was overtly politicized.

Turning now to the mine project, one of the most important developments in this case was the provincial government's decision to conduct a separate provincial assessment, rather than a joint assessment with the federal government. On the surface, this decision was unusual for several reasons. First, prior to the start of the assessment process, plans had been made for a harmonized or joint assessment. The abovementioned cooperation agreements provided the basic framework for such an assessment and both the government and industry had supported the idea as a means to reduce duplication and inefficiencies (Haddock 2011: 8). In June 2008, however, the provincial Environment Minister unilaterally abandoned the joint process by issuing a section 14 order under the BC EAA (2002).[27] This required the BCEAO to conduct a separate assessment (Mehdic 2014). In a letter to the Federal Review Panel, Chief Bernie Elkins, the Tŝilhqot'in National Government's Prosperity Project Director, argued that the termination of the joint process was done "at the urging of Taseko, only days after Taseko threatened not to proceed with the Project if it was subject to a joint panel review" (TNG 2009). Haddock (2011: 9) speculates that Taseko made such demands in light of the earlier rejection of the Kemess North gold-copper mine in northern British Columbia by the federal and provincial governments, after a joint review panel also rejected the project. Despite the fact that the provincial government intended to conduct its own environmental assessment for the Prosperity mine project, the federal and provincial governments still agreed to a common terms of reference for the separate reviews in December 2009.

This decision by the provincial government dramatically changed the course of the proposed mine development. It initiated two separate environmental assessments (one federal and one provincial) that would ultimately come to very different conclusions regarding the proposed mine and, as

[25] *Tsilhqot'in Nation v. British Columbia* [2014] SCC 44. The term Aboriginal title refers to the inherent right of Aboriginal peoples to land or territory based on cultural connections and protracted use and is a form of ownership of the lands albeit with restrictions.

[26] From 2006-2011, the Conservatives had a minority government which means that they were dependent on the support of other parties in the legislature to stay in government. From 2011 to 2015, they had a majority government.

[27] Under section 14 of the BC EAA, 2002, the provincial Environment Minister may determine the assessment scope, procedures and methods used for the assessment of a project.

such, it was a significant critical juncture that profoundly influenced the assessment and approval process from that point on. It also exposed some of the institutional differences between the two assessment processes, including the scope and focus of the two reviews, and the way that these institutional differences encouraged or discouraged subjectivity and political influence in the process. The federal and provincial environmental assessment processes differed in a number of important ways. As mentioned earlier, whereas the federal assessment was conducted by a separate and independent three-person panel, the provincial assessment was conducted by the BCEAO, a provincial agency. The timelines of the two assessment processes were also different, with the provincial process taking place over a much shorter time period (within 180 days of the proponent (Taseko) submitting an application to the BCEAO). The federal process took considerably longer, in large part because it was more robust in terms of the number of areas and issues it examined and because it involved public hearings. The involvement of First Nations in the assessment process was also different. While several local First Nations, including the TNG, participated in some parts of the provincial assessment process, their involvement in and, more importantly, their acceptance of and opportunities for participation in the federal process were much stronger (Mehdic 2014). Moreover, the differences between the federal and provincial assessments suggest that the latter was more politicized, a concern alluded to in the literature (Haddock 2011) and raised by the TNG, which had supported the original plans for a joint assessment process. Indeed, the decision by the provincial government to conduct a separate assessment "shattered the confidence of the Tsilhqot'in leadership and the Tsilhqot'in people in the integrity of that process" (TNG 2009).

The story of the Prosperity mine project is a long and complicated one, the full details of which cannot be summarized in such a short article. Nevertheless, this case study reveals the significant impacts of a number of general institutional determinants and specific critical junctures that have shaped the manner in which the project has evolved. In the case of general critical junctures, historical events and decisions that influenced the development of Canada's system of federal governance, such as the division of powers between the federal and provincial orders of government, not only excluded Indigenous peoples but subjugated them to the authority of the federal government. This meant that Indigenous peoples had no formal jurisdictional authority, including over resource development or environmental matters. While this situation would evolve over time, mainly due to legal rulings and constitutional changes that would strengthen "Aboriginal and treaty rights" a century later, the political implications of the federal compact of 1867 were clearly evident in the Prosperity case. The reality is that governments in Canada still hold a monopoly over decision-making authority when it comes to approving mines.

The division of powers also made environmental matters an area of *de facto* joint jurisdiction between the federal and provincial governments, a decision that would have important consequences, both generally and in the specific case of the Prosperity mine project. Although some have argued that this is, in theory, a positive arrangement because it encourages more robust scrutiny over the environmental impacts of resource projects (Kwasniak 2009; Heelan Powell 2014), in the case of the Prosperity mine, the unilateral decision of the provincial government to pursue a separate environmental assessment was an important critical juncture that changed the expected trajectory of the assessment process and, in doing so, set the stage for a lengthy, acrimonious and, at times, confusing political and legal stalemate over the next decade. The roots of this critical juncture were not only embedded in the broader institutional context that governs environmental assessment and the approval process for mines in Canada (namely the federal system of government and the ambiguous nature of jurisdictional competencies in the area of resource development). They were also an outcome of the politicized nature of this project and the environmental assessment process in British Columbia at the time. Complicated and politicized approval processes, however, are not limited to federal states such as Canada. As we will see in the following case study of the Kallak mine project in Sweden, critical junctures and institutional determinants also affect mine approval processes in unitary states.

Kallak Mine in Northern Sweden

The Kallak mine project has been the subject of the most controversial and contentious approval process in modern Swedish history. Despite the fact that the Swedish government recently approved the mine project in March 2022, the mining company still needs further approvals, notably an environmental permit. Throughout, the decision making processes has been highly politicized, a situation not fully revealed until after the government was restructured in November 2021. Like the Prosperity case, institutional and political factors played an important role in determining the trajectory of the approval process for the mining permit.

Constitutional and Legislative Framework

In comparison to Canada's federal system of government, Sweden has a unitary political and legal system, and forms part of the Nordic Legal Family, which is considered a distinct legal family aligned to the civil law tradition

(Zweigert and Kötz 2011: 277). That said, Sweden's membership in the European Union (EU), a supranational institution, has challenged Swedish law and legal culture in several respects, not least in environmental matters. Legislative amendments have been necessary to correctly comply with more detailed or progressive EU laws. Also, the neutral language of EU laws means that there is no explicit recognition of the Sami as an Indigenous people. Sweden's government structure is divided between three levels of government: national, regional (County Administrative Boards, CAB) and local (Municipalities). The CABs are tasked with implementing the national government's decisions at the regional level and are, for instance, obliged under law to comment on permit decisions and assessments relating to land use, such as mining permits.

Since the formation of Sweden as a nation-state during the 1500s, the Sami have been marginalized from the country's political system, and to some extent they still are. Until very recently, the gradual colonization process of the Sami homelands in northern Sweden excluded them from effective political representation and influence. When the Sami Parliament was established in 1993 by legislation, the government indicated that the self-determination of the Sami should be strengthened, but only as far as feasible; the Sami Parliament was not to be understood as an autonomous Sami body, recognition which would require formal constitutional amendments (Prop. 2005/06:86, 32, 35-37).[28]

The recognition and protection of Sami rights in the current Swedish Constitution (the *Instrument of Government, 1974*) is rather weak, especially in comparison to common law states such as Canada. Moreover, until quite recently, constitutional provisions have seldom been evoked before courts and, therefore, have played a minor role in the application of law (Allard 2015: 53-54). The *Instrument of Government* was substantially revised in 2010, and for the first time the Sami are now described as a "people", not merely as an ethnic minority. However, this provision (ch. 1 s. 2 para. 6), is not the same as section 35(1) in the Canadian constitution because it does not enshrine any enforceable rights. This constitutional provision does not impose a duty upon the State to consult with the Sami as an Indigenous people, but a recent piece of legislation, the *Act on Consultation in Matters that Concern the Sami People, 2022*, does.[29] However, because the process for approving the Kallak mine project started well before this Act was enacted, there has been no legally mandated duty to consult.

With respect to recognized Sami rights, Swedish law only codified rights to reindeer herding from the late 1800s onwards (Mörkenstam 2002: 116-19). The right to herd reindeer also includes hunting and fishing rights within each RHC (Allard 2011: 165-66). This divide has caused problems, such as local Sami outside the RHCs being denied participation in decisions related to mine developments. As is the case with most other Indigenous peoples, the Sami have historically faced constraints on their ability to practice their culture and have lived through state-sponsored relocation and assimilation policies. They are still dealing with the effects of being marginalized in contemporary Swedish society and many of their customs and customary laws have been eroded. It was not until quite recently that the Swedish Supreme Court has addressed Sami rights; however, only three landmark cases have concerned the recognition of reindeer herding rights (in 1981, 2011 and 2020). In January 2020 the Supreme Court, for the first time, recognized *exclusive* small-game hunting and fishing rights for the Girjas RHC vis-à-vis the State (NJA 2020 s. 3, the *Girjas* case). This exclusive right also includes the right to lease hunting and fishing to third parties. The State had argued that it held independent hunting and fishing rights as the landowner on the claim area, an argument which the Court rejected. Although this case does not deal specifically with mining, it has drawn attention to the issue of Sami rights and the fact that the State has been unwilling to properly recognize Sami rights' claims (Allard and Brännström 2021: 57, 71).

Mining in Sami territories has a longstanding history and northern Sweden, like North America, has been characterized as a colonial "mining frontier" (Broberg and Rönnbäck 2020: 479). Since the 16th century, the Swedish Crown has taken an active role in the metal and mining industries, funding industrial development and new mines (Ojala and Nordin 2015: 12). The *Nasafjäll* silver mine, discovered in the 1630s, and later mines negatively impacted Sami because they were used as forced labor, mostly by providing transportation by reindeer and sleighs due to the lack of roads (ibid). There exists a colonial legacy with respect to the relationship between the Sami and Swedish mining, which helps explain the strong opposition from Sami today. Existing mining-related legislation still only pays minimum attention to Sami rights, culture, and interests (Raitio et al. 2020: 12).[30] Legislatively speaking, Sami reindeer herding is for the most part regarded as an industry and one of several public interests; its role as an Indigenous cultural livelihood, therefore, is seriously downplayed.

[28] A "Prop" is a government bill and is an important legal source in the Swedish legal system. Although directly elected by Sami citizens, the Sami Parliament is a government agency whose task is to monitor and comment on issues related to the Sami culture in Sweden. The government directs its tasks and powers through state legislation and annual decrees. Its function as a representative body for the Sami and its discretion could therefore be questioned.

[29] The Act came into force March 1, 2022 and was drafted with the Norwegian consultation model in mind.

[30] This legislation is also seen as unfair and anachronistic by others, chiefly non-Indigenous landowners.

In November 2020, this issue came to the attention of the United Nation's Committee on the Elimination of Racial Discrimination (CERD),[31] which recommended that Sweden amend its legislation to reflect the status of the Sami as an Indigenous people and incorporate the international standard of free, prior and informed consent (CERD 2020: 16).[32] With respect to the Kallak mine project, a similar strong critique came in February 2022 from two Special Rapporteurs[33] with the Office of the UN High Commissioner for Human Rights based on alleged violations of Sami rights and threats to the Laponia World Heritage Site (OHCHR 2022). The Special Rapporteurs noted that international expert bodies have raised concerns with the Swedish Government over its failure to respect the international standards and rights of Indigenous peoples in the *Minerals Act* and the *Environmental Code*, with one specific criticism being that a mining permit can be approved without consultations with and the consent of the Sami.

In the *Minerals Act, 1991* communications with landowners, stakeholders and Indigenous Sami have legally been restrained. For instance, it was not until 2018 that mandatory consultations relating to environmental impact assessments (EIA) were introduced (Prop. 2016/17:200). The Act is designed to facilitate exploration activities and mine developments related to the "concession minerals"[34] (ch. 1 s. 1; Prop. 2004/05:40, 30, 41; Prop. 1988/89:92, 56, 61). If certain conditions are fulfilled the Mining Inspector *must* grant a permit (ch. 2 s. 2 and ch. 4 s. 2). Exploration and mine development may be carried out regardless of land ownership; the concepts of Crown minerals and freehold mineral rights do not exist in Swedish mining law. Instead, ownership of minerals is connected to land title, although this has little practical meaning while the current legislation is based on a concession system (Bäckström 2015: 49, 101).

As indicated above, EU law is a driver of change and greatly influences domestic environmental law and, increasingly, mining law. The *Norra Kärr* decision (HFD 2016 not. 21) which was delivered by the Supreme Administrative Court (SAC) in 2016 and influenced by EU law, proved to be a critical juncture with respect to the assessment of mining permit applications generally. This case widened the scope of the EIA required under the *Minerals Act* and has impacted all on-going mining permit processes, including Kallak. As a result of *Norra Kärr*, the government sent back pending permit applications to the Mining Inspectorate for a renewed permit assessment, which in practice meant a request to the proponent to expand and revise their EIA. *Norra Kärr* was initiated because of the potential negative impacts of a proposed mine on a Natura 2000 area[35], as mandated by EU law. In essence, the SAC held that it was unlawful under the *Minerals Act* (ch. 4 s. 2) to limit the assessment of the mining permit to the designated (narrow) permit area. Instead, the assessment and the EIA had to include impacts from a larger geographical area with adjoining activities and infrastructure necessary for operating a mine (tailings, dams, etc.), to ensure protection of the Natura 2000 area. The closest Natura 2000 area to the Kallak mine site is Jelka-Rimakåbbå, located only 8 km away (Hifab 2013: 28).

Under the Swedish regulatory system, the mining permit and the environmental permit are significant.[36] The former permit is approved by the Mining Inspector (or government in certain cases, see below) and the latter by the Land and Environment Court, which focuses on the environmental impacts of and conditions for the operating mine. An important difference between Swedish and Canadian mining related legislation is that the Swedish EIA occurs as part of the permit process. As such, information gathered in the EIAs on impacts arising from the mine and its operations form a vital part of the assessment of the permit application. EIAs are governed by Chapter 6 of the *Environmental Code*, with their primary aim being to assess the *environmental* effects of a proposed project, not the effects on the affected Sami community's culture and well-being.[37] Two EIAs are produced, the first during the mining permit phase, and the second in relation to the environmental permit (Pölönen et al. 2020: 118). Due to a recent amendment of Chapter 6, in force from January 2018, *corporate* consultations with stakeholders are now mandatory in the first EIA.[38]

Thus far in the Kallak case, one EIA has been produced for the mining company by Hifab, a leading consulting firm. It was finalized in the spring of 2013 and sent with the mining permit application to the Mining Inspectorate, the agency responsible for issuing permits under the *Minerals*

[31] CERD is a body of independent experts that monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its States parties.

[32] CERD found that Sweden had violated Articles 5 (d) (v) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. This opinion related to the approved mining permits of the Rönnbäck mine, also situated in the Swedish north, which impacted the Vapsten RHCs grazing lands.

[33] Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable development.

[34] These are minerals with economic and industrial value.

[35] Natura 2000 is a network of conservation areas covering Europe's most valuable and threatened species and habitats, established under the Birds and Habitats Directives. They are strictly protected.

[36] Sweden has five basic permitting phases (Raitio et al., 2020: 3): (1) exploration permit with a work plan; (2) mining permit; (3) environmental permit; (4) expropriation of land for the mining site; and (5) permits for associated infrastructure.

[37] These provisions are incorporated from the EU EIA Directive: Directive 2011/92/EU (amendment 2014/52/EU).

[38] It was amended due to changes in the EIA Directive.

Act. The EIA included information on the land uses (grazing, migration routes, etc.) of the Jåhkågasska and Sirges RHCs, but predicted that the Tuorpon, Slakka and Udtja RHCs will also possibly be negatively affected by the transportation networks (road and railroad) servicing the mine (Hifab 2013: v). Corporate consultations for the EIA were held during spring and summer 2011 with the Jåhkågasska and Sirges RHCs, and in autumn 2012 with the Tuorpon and Slakka RHCs (Hifab 2013: 6). It should be noted that the Sami RHCs disputed the company's EIA. The CAB (regional government), as liaison authority for the EIA, stated initially that the EIA was insufficient and did not meet the legal requirements under the *Environmental Code*. Subsequently, the CAB has commented several times on the EIA and the application, thus contributing, along with other agencies, to the prolongation of the permit process.

Only months before the company submitted its permit application, the Geological Survey of Sweden, the sector agency for issues relating to bedrock, soil and groundwater, designated the land covering the iron ore deposit in Kallak as an "area of national interest" (CAB 2017b: 5). This was a significant decision because according to the provisions in Chapter 3 of the *Environmental Code*, areas of national interest shall be prioritized before other public interests in the permit assessment process. In the case of the Kallak mine, designated and overlapping areas of national interest for reindeer herding already existed. The key challenge for the assessment of mining permits is balancing the often opposing "areas of national interest" under the *Code*. Such decisions tend to become "politicized" because of the vague legal language in these provisions, and especially so when decided by the Swedish Government (Raitio et al. 2020: 10). This has been the case for the Kallak mine.

The Kallak project was remitted twice to the government before it finally approved the mining permit in March 2022 (see below).[39] Under the *Minerals Act*, the permit application is normally approved by the Mining Inspector (ch. 8 s. 1) but when the CAB and the Mining Inspector disagree about whether the mine can co-exist with other "areas of national interest" or how to prioritize among them, the decision must be elevated to the government (ch. 8 s. 2). In the Kallak case, the opinion of the CAB has all along been that the application should not be granted due the impacts on reindeer herding (designated as "areas of national interest") and with respect to the impacts on Laponia (CAB 2017b: 11).

Indeed, in the latter stage of the process, a major question for both the CAB and the government has been the potential negative effects of the project on Laponia. The Swedish Environmental Protection Agency (EPA) and Swedish National Heritage Board (NHB) have together expressed their view in the permit process about how an assessment of the potential negative effects should be carried out (e.g., EPA and NHB 2013). A debate has occurred about who should make the actual assessment on the impacts on Laponia; some have argued that it was the CAB's role, an opinion with which the CAB disagreed (CAB 2017a: 4). Following this discussion, the CAB reluctantly made its assessment on Laponia. Ongoing communication has also occurred with the UNESCO Secretariat. In December 2020, the government requested that UNESCO make an assessment as to whether there will be negative impacts on Laponia from the mine and its operations. While Laponia is a mixed site, the RHCs stress the negative effects on migrating reindeers and Sami reindeer herding in general and that these effects could jeopardize the purpose of the site, which is to protect a living Sami cultural landscape. As an international organization, UNESCO can thus be used as leverage by the Sami to reinforce their legal claims. The future will tell whether Laponia, as an internationally recognized area, could be regarded as a critical juncture in the Kallak case because of the introduction of an entirely new variable to the Swedish permit process.

Key Issues and Developments

Clearly, the Kallak mine is a complex, high-profile case that has involved several state agencies, despite being situated in a unitary legal system, and a lengthy approval process that has taken a number of twists and turns. In early December 2020, the Swedish Parliament's Constitutional Committee (PCC) critiqued the Ministry of Enterprise and Innovation's handling of the approval process for the mine, concluding that the prolonged decision-making process was not acceptable, regardless of the complexity of the case (PCC report 2020/21: KU10: 152-53). Since June 2017, the case has been referred twice to the government (Ministry of Enterprise and Innovation) for a decision. JIMAB waited nine years for a resolution and has invested over 8 million Euros in the project (PCC report 2020/21: KU10: 143).

Apart from the affected Sami RHCs, the Sami Parliament and state agencies, non-governmental organizations and private individuals have, over the years, commented on JIMAB's application, presenting divided opinions regarding the mine project. During the first months of 2022, prior to the government's decision, several organizations expressed their opinion on the mine project in media, with one being of particular interest – the Church of Sweden. The Archbishop and the Bishop for the northernmost parish in Sweden formulated an 'open letter' to the government arguing that the Kallak mine was not environmentally, economically, socially or spiritually sustainable (TT 2022). They also reminded the government that it had recently decided to establish a Truth and Reconciliation Commission

[39] The first time, the government remitted the application back to the Mining Inspectorate in 2016 because of the *Norra Kärr* case.

to investigate the historical wrongs and grievances that Sami endured because of State actions and policies; the Church pointed out that if the government was honest in this endeavor, it would be morally wrong to enable large-scale mining in a core Sami area.

Before turning to the content of the government's decision for Kallak and identifying the institutional determinants shaping the process and outcomes thus far, we will first sketch the political landscape around the time the government prepared its decision. First, it should be noted that, with a couple of exceptions, all political parties in Sweden support the growth of the mining industry and Sweden's Mining Strategy. Politically this position will likely be maintained in the future given the fact that Sweden is the premier mining nation in the EU and the biggest producer by far of iron ore. One exception to the generally mining-friendly attitude is the Green Party; it has been—and still is—against the approval of the Kallak mine project because of the negative environmental effects resulting from the project and the fact that it neglects Sami land rights. The Green Party was the junior partner in a coalition government with the Social Democrats following the most recent election in 2018 (Government of Sweden 2019) and until November 24, 2021, when it decided to leave due to approval of a 'right-wing' budget by Parliament (Sveriges Radio 2021). During this time Sweden faced a government crisis, which eventually resulted in the country's first female Prime Minister (November 30, 2022). After the formation of the new Social Democrat government and with the appointment of a new Minister of Enterprise and Innovation, it became apparent that a decision on the Kallak case was imminent. This Minister openly declared in media that the Social Democrats "love mines" and that he "hoped to open new mines and give approval to several more mines", sending a clear and positive message to the mining industry (TT 2021).

The actions of the Green Party clearly influenced the decision on the Kallak mine project. Its skepticism about mining in general, as expressed in its manifesto (Green Party 2018), and its opposition to the Kallak project in particular delayed the approval process while it was in government and revealed the politicized nature of such decisions (cf. Zachrisson and Beland Lindahl 2019: 2, 5, 8). Furthermore, the Party has significant support in Jokkmokk, close to where the proposed mine is located, which gives an indication of the divisive nature of the project at the local level. In many respects, the decision by the Green Party to leave government was a "game-changer" for the Kallak case, paving the way for a prompt and positive (from the perspective of the mining industry) decision on the mine project.

In its decision, the government did not recognize specific Sami reindeer herding rights or international standards relating to Sami as an Indigenous people. Instead, it delivered its decision based on the relevant provisions of the *Minerals Act* and the *Environmental Code*, giving priority to the national interest in valuable mineral deposits in the area (meaning mine development). Nevertheless, it did impose twelve conditions on the mining company, a novelty for a mining permit approval, a majority of which outlined mitigating measures for and consultation obligations with the affected RHCs. These conditions, however, are vaguely written and open for interpretation, meaning that they will be difficult for the Mining Inspector to control and uphold; in essence, they will mean little for the RHCs in practice. Moreover, if approved, the Land and Environment Court will set more specific and detailed conditions with respect to the environmental permit. One of the conditions requires JIMAB to include an In-Depth Impact Assessment concerning the impacts of the mine on Laponia, as part of the environmental permit application. This was requested by ICOMOS, the International Council on Monuments and Sites, and IUCN, the International Union for Conservation of Nature.

Although there is no final resolution at the time of writing, so far, the Kallak case study reveals both general institutional determinants and specific critical junctures that shaped the trajectory of the permitting process. On the question of institutional determinants, under Sweden's colonial legacy and its political and constitutional structure, no authority has been devolved to the Sami over land use decisions and the extraction of natural resources within their traditional territories. The Sami Parliament, for the most part a state agency under the government, has no powers to give or withhold its consent in certain matters, such as mine developments. The same applies to the affected Sami RHCs. The recognition of the constitutional rights of the Sami is weak, and this partly explains why the RHCs turn to the UN Human Rights bodies for support, as they have done in both the Kallak and Rönnbäcken mine projects. Instead, backed by specific legislation (*Minerals Act* and *Environmental Code*), the Mining Inspectorate and the government (when it decides on mining permits) retains ultimate power over the approval process. Prior to the new consultation act, the State did not have the obligation to consult the Sami, leaving it up to the mining company to consult with the Sami concerning the EIA process.

The creation of the institutions of the modern Swedish state excluded the Sami and put in place a centralized, unitary system without processes for meaningful engagement with Sami communities, which has placed the Sami in a very vulnerable and difficult position in terms of their relationship to state institutions and industry. More recently, however, Sweden's membership in the EU has also affected its environmental and mining laws in several ways, not the least regarding EIAs and Natura 2000 areas. A general issue

arising from Sweden's EU membership, which is common to all mining permit applications, concerns the imprecise implementation of EU laws in this area. In addition, there are legal uncertainties relating to unsettled Sami rights, which EU law does not address. In part, this has encouraged a discussion on Sami rights within Swedish society as a whole which, coupled with criticism from different UN human rights' bodies (Raitio et al. 2020: 5), has started to disrupt a previously smooth process for approving mining permits.

The research revealed several instances where decisions by various actors influenced the trajectory of the approval process. For example, the *Norra Kärr* decision from the Supreme Administrative Court in 2016 represented an important turning point since it was the reason why the government sent the Kallak case back to the Mining Inspector for re-review and, in doing so, further prolonged the approval process. This decision has not only impacted the Kallak case, but all mining projects under consideration by the government and, therefore, provides evidence of the type of institutional or procedural change that is often initiated by a critical juncture.

In a unitary system, one would expect that the decision-making process would be less complicated compared to a federal system of government where jurisdictional conflict can lead to delays and indecision. The Kallak case, however, revealed significant internal tensions and conflicts that would ultimately influence the trajectory of the mine project. The role of the Green Party in delaying approval for the project when it was in government has already been outlined. An equally significant source of institutional opposition to the project came in the form of the CAB. Where the Mining Inspector had earlier, in principle, granted all reasonable applications, in compliance with the *Minerals Act*, the CAB in the County of Norrbotten had from the outset opposed the approval of the mining permit for JIMAB. There were differing views between the Mining Inspector and the CAB concerning the mine's negative effect on areas of national importance relating to reindeer herding, which the CAB argued should be prioritized before the national interest in minerals in the same geographical area. The CAB was consistent in its assessments and opinions throughout the process, and its position not only complicated and extended the process but was the reason why the decision was elevated from the Mining Inspector to the government.[40] It is interesting to note that the responsible official at the CAB in Norrbotten was replaced by the government in January 2022, possibly due to the long-standing controversies around the mine development, although the government did not state any particular reasons for his dismissal (SVT 2022).

[40] This is required by law if the CAB and Mining Inspector disagree on the outcome.

Another controversy where the CAB played a major role was in relation to Laponia, the nearby UNESCO World Heritage Site. The CAB first declined to give its opinion on Laponia because it thought that this was the responsibility of the national agencies but, in the end, it was persuaded to declare its opinion that the mine would negatively affect both the Sami culture and the conservation status of the site. The involvement of UNESCO, an international body, not only complicated the process but revealed unclear governmental mandates causing a debate among the different authorities involved in the mine approval process about who had the ultimate responsibility to assess the impacts from the Kallak mine. Furthermore, for the Sami, Laponia helped the RHCs to resist the mine and press their claims for better protection of Sami rights and reindeer herding.

Conclusions

The two case studies in this article illustrate the way in which the general institutional context and specific practices associated with the environmental assessment and permitting processes influenced the trajectory of two contentious mining projects. The general institutional contexts in Canada and Sweden are different in many respects; Canada has a federal system of government and Sweden is a unitary state and this undoubtedly affected the process through which mine projects are assessed and approved. In both cases, however, it appears that the approval process was complicated by the particular institutional features and practices associated with the organizational structure of the legal and political system in question. In the Prosperity case, overlapping jurisdictional authority between the federal and provincial governments contributed to a lengthy and, at times, confusing approval process, with two separate and simultaneous environmental impact assessments being conducted by different levels of government. The fact that these assessments rendered contrasting decisions regarding the mine project set the stage for a long and drawn out series of legal challenges that, in turn, prolonged the decision-making process. In the Kallak case, a key decision in a separate legal case and concerns about the effects of the proposed mine on a UNESCO world heritage site which included unclear mandates for the state agencies involved, delayed a decision on the mine project. It is also important to note that the lack of procedural clarity also contributed to the politicization of these projects, with governments in both countries taking advantage of particular institutional processes and changes in the broader political context to advance their own ideological agendas on mining.

Another important similarity to note between Canada and Sweden is that their respective political systems privilege non-Indigenous institutions and legal traditions at the expense of Indigenous institutions and legal traditions

(Starblanket 2019; Kuokkanen 2020). The institutional architectures of the modern Canadian and Swedish states were never designed to accommodate or include Indigenous governments or peoples. While it is true that over the past several decades, Indigenous land and consultation rights have been strengthened, through a series of legal rulings and political developments at the national and international levels, Indigenous influence in the approval process for resource development projects in both countries is limited and channeled mainly through (and dependent on) state institutions. It is true that the resistance of Indigenous peoples and their allies certainly influenced (and prolonged) the approval process in both cases; however, the hard reality is that non-Indigenous governments continue to exert a monopoly over decision-making authority when it comes to approving mine projects and Indigenous peoples were—and are still—very much "on the outside looking in".

In addition to demonstrating the ways in which the structural features of government and the environmental assessment processes in both countries have influenced decisions on mine projects, our two case studies revealed the importance of specific critical junctures that profoundly changed the trajectory of the approval process. In the Prosperity case, the decision by the provincial government to abandon a joint federal-provincial environmental assessment complicated the approval process and further strained relations between governments, Industry and Indigenous communities. Had the provincial government decided to proceed with the joint review, the assessment process would have likely encountered fewer complications and would have proceeded in a clearer, straightforward and more timely manner. In the Kallak case, one of the main impediments to the approval of the mining permit was the opposition of the Green Party, a junior partner in a coalition government. The departure of the Green Party from the coalition in November 2021 paved the way for a prompt approval of the mining permit.

While the Kallak case still is ongoing, compared to the Prosperity case it is not as easy to identify a single critical juncture, but two candidates should be mentioned here: the Supreme Administrative Court case *Norra Kärr* and the UNESCO World Heritage site Laponia. As said, *Norra Kärr* and Laponia both prolonged and complicated the process, with the *Norra Kärr* case in particular forcing the government to send back the case for reconsideration because it required an extended environmental impact assessment for all mining permits. Laponia, on the other hand, added a supranational dimension to the process, thereby increasing its political and legal complexity, and revealing the unclear mandates of the Swedish agencies involved.

In conclusion, the manner in which a country's institutions and laws are structured play an important role in defining the parameters of decision-making when it comes to mining projects. In particular, Indigenous communities who oppose mining projects on their traditional territories face multiple challenges, not only from financially-powerful mining corporations, but also as a result of the historical legacies built into a country's political and institutional framework. Shedding light on those institutional determinants and the inequities they create is a first step towards developing institutions and processes that are better aligned with the ideals of reconciliation.

Compliance with ethical standards

Conflict of interest The authors declare no competing interests.

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