



NADF Forum

Impact Benefit Agreements
Leveraging “Free, Prior and
Informed Consent”

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Overview

1. IBAs misrepresent that a single strategy is the proper approach to protecting your interests
2. Impact analysis ensures that you leverage your interests in a meaningful way
3. Benefit agreements are contingent on proper approach to impact analysis, mitigation and monitoring on behalf of your community(ies)
4. Unity is your biggest leverage – build it, protect it
5. The “law” is also contextual – use context wisely



Types of Consultation

- When there is an assertion of an Aboriginal right that has yet to be proven (*Haida Nation*)
- Consultation prior to “taking up” lands in the treaty context (*Mikisew Cree*)
- When (as in *Sparrow*) there is an Aboriginal right, (or in *Clyde River*) a treaty right, where the right has been infringed and requires justification by the Crown – there is a duty to consult



Treaty 9 – Aboriginal tenure

Duncan Campbell Scott wrote, a year after the treaty was signed, this about the Indian understanding of the treaty negotiations:

“What could they grasp of the pronouncement on the Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between the Dominion and the province which had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing. So there was no basis for argument.”

RCAP: During the negotiations required to complete the treaties, it stands to reason that the **Crown should not assert that the Aboriginal title of the treaty nations has been extinguished unless there was clear consent**. On the other hand, the treaty nations, having undertaken an obligation of sharing in good faith, must not take any steps that **contradict the spirit and intent of a partnership** predicated on those principles. *Both parties are therefore under constraints*, stemming from their treaty obligations, in negotiating the completion of the treaties.



Impacts AND Benefits

- An Impacts and Benefits Agreement (IBA) is generally based on the recognition that a project will have an impact on the rights, claims and interests of First Nations and treaties.
- In a process agreement, the company that intends to develop a project agrees to provide benefits to the Aboriginal community - because of its impacts - and in return the community approves the project.
- The benefits obtained in an IBA may include financial compensation (such as the sharing of income or profits, lump-sum payments or possibly financial participation in the project in order to hold part of it).



Balancing the Negotiations

- IBAs may also include non-monetary benefits (such as preferential hiring and preferential contracting, education and training opportunities, and environmental protection).
- Over time, IBAs have evolved as a mechanism for establishing respectful relationships between Aboriginal communities and natural resource development enterprises.
- Each party comes to the negotiating table with their own goals, and IBAs are a useful tool for both parties to achieve their respective goals.
- The goal ? Satisfying both sides and balancing the forces involved. Win – win (different perspectives)



Be Unified by Your Own Goals

- First Nations also have their own goals that they seek to achieve through IBAs. In particular, the promotion and support of economic development on their reserve lands and their traditional territories. In many Aboriginal communities, the unemployment rate is high and First Nations seek to create employment opportunities and take advantage of development on their lands.
- For First Nations, agreements play an important role in overcoming these challenges and achieving economic development goals. Financial benefits, such as income agreements or profit-sharing agreements, are one of the ways the community can use these goals. Non-monetary benefits also play a very important role in promoting the long-term development of First Nations.

Creating Uncertainty

- Uncertainty hurts companies
 - Share prices, financing, agreements to sell products, expansions
- 4 Categories of Uncertainty
 - Legal
 - Financial
 - Social/Moral
 - On the Ground



F P I C

FREE

Free from coercion.

Free from threats.

Free from divide and conquer.

Free from retaliation.

PRIOR

Prior to any part of any project or plan proceeding, all necessary information is provided and shared, according to processes defined by the peoples affected.

INFORMED

All relevant information is made available to those affected, including the resources necessary to enable any further research required to adequately assess potential risks and benefits.

CONSENT

The right to say a definitive “no” or “yes”, with or without conditions. The agreement process must be agreeable to, and consistent with, the decision-making process of the people affected.

IMAGINE you are a member of an Indigenous community...

...a developer enters your community and says,

“We believe there is vast mineral wealth here. We are going to dig it up and you can have jobs and development”

How would you respond?



Do your Homework

- It is often because these benefits are focused on the acquisition of business and employment opportunities over the life of the projects and on the training and capacity development of First Nations over the duration of a given project.
- As such, **non-monetary benefits** can go much further to allow a First Nation to secure its constitutional rights and other practices that are an integral part of the daily lives of its members so that they are better protected. It is also important to note that access to all project-specific information is essential in order to assess the type of negotiation that the community wants to undertake.



Indigenous Engagement v Consultation

Nation to Nation engagement

- Canada's EA agencies, departments and relevant authorities need to understand how each distinct Indigenous Nation's government, laws and procedures work. This should occur as far in advance of an EA as possible and continue on an ongoing basis.

Government to Government engagement

- To develop coordination at the procedural level between the Indigenous jurisdiction with federal EA and any applicable provincial EA processes. Cooperation between Crown and Indigenous jurisdictions can create one seamless integrated process that meets the legal and practical needs of all

Negotiations to reach accommodation

- When a project is proposed, or when regional or strategic initiatives are proposed, impact and benefit agreements and other potential accommodation, if necessary, should be developed through the negotiated means of consultation and review. ...(outside EA)



Protection of Section 35 rights

- *Sparrow* in 1990 stated that section 35 meant the old rules of the game were no longer, and that a new regime or constitutional protection of rights and title was in place.
- But, not much changed..."rights recognition" was left to the Courts and an adversarial system – few negotiations
- *Adams* (1996) the Supreme Court of Canada said that an unstructured, discretionary regulatory regime will fail to meet the fiduciary duty of the Crown to protect rights and that guidance must be provided to decision-makers.
- Justification is to be held to a high standard in legislative regimes (*Sparrow*, *Delgamuukw*, *Tsiliquot'in Nation*)



Key Information Gathering Stage

The information stage is established when the company provides access to project-specific information in a uni-directional manner, ie the community at this point only receives the information.

The consultation initiated by the proponent is the second level leading to the consent or refusal of the project. This phase involves the exchange of information between the parties, from the exploration phase to the closure or dismantling.

Some special rules may therefore apply here. It is also important to focus on internal consultations within your community. Information sessions without the proponent are important in order to leave room for the members of your communities to express their opinion and concern about the project.

Internal consultations and transparency to community members are essential features of unity within your First Nation or with other First Nations with whom you could team up with the Proponent.



Partnering and Alliance Building

The next phase is the search for support and the negotiation and signing of an IBA. Again, the consultation takes a more formal look here as agreements will be signed with the objective of mitigating and offsetting the impacts of the project on your community and your environment.

The community can take a greater role here in decision-making. Of course, the creation of committees (internal or joint) such as an environmental impact monitoring committee will allow a more complete follow-up and will allow a better involvement of the community at the planning level. Ultimately, this phase is characterized by the signing of an IBA between the parties.

To the right of the spectrum is the consent of the community, which must be free (ie free from all constraints and influences), prior (ie, prior to any decision), and informed (based on information Received but analyzed under the supervision of the FN).



Working to Advance Community Interest

What is the opinion of the members of your community on this type of project?
Favorable or completely opposite?

Issues such as:

Who is the company?

Is it a public or private company? That is to say on the stock exchange or not.

What type of project is this? The type of ore or energy?

Even more precisely, how is this type of mineral or this type of energy in the Canadian market, internationally, and so on?

What is the Aboriginal consulting history of this company?

Memorandum of Understanding, which would include provisions on the scope of the project, Negotiated objectives, parties' objectives, budget for negotiations, funding obligations and obligations related to the sharing of information between the parties. The community here must have a clear and precise mandate for its position.



YOU especially are “here to stay”

- It is at the preliminary stage of development of the project, such as when exploring a mining project or at the stage of obtaining data on a wind project, for example, that First Nations will have the most bargaining power.
- It is because the proponent is less invested in the project and if it encounters strong opposition it will have to either enter into the appropriate agreements and take the First Nation seriously for the project to move ahead, or else it will try to develop A project elsewhere.
- But as you probably know, when the resource is in a specific location, such as a mining deposit or a windy site, the company will have no choice but to begin discussions with the local community.
- In addition, negotiating an agreement at this stage may also improve negotiating conditions for the First Nation later.



Interim (pre consultation) Agreements

- The First Nation will also need to ensure that an agreement is put in place to take interim measures - that is, actions that will be taken in the months or years prior to the signing of the final version of IBA and its implementation.
- It may also be measures taken in the course of the company's exploration phase, for example in the context of a mining project, that is, the period before the development and the commercial operation of the project.
- It is also at the time of reaching an interim agreement that non-monetary benefits, such as environmental monitoring by the aboriginal community, monitoring of any new construction, protection of the Hunting, fishing, trapping and gathering, or monitoring work that could impact on ceremonial or cultural sites in the community.



Negotiating the Agreement

- Finally, the final step is the negotiation and ratification of the IBA. This negotiation should be done in parallel with the environmental assessment process.
- In the best of worlds, IBA would at least be signed (not necessarily ratified) at the time of the EA.
- The phase of obtaining environmental permits and other licenses is a key step for the community. In fact, this is an important moment in which the bargaining strength of the community will be very strong.
- Although all licenses are obtained, signing an IBA with the community will be a crucial step for the proponent to move forward.
- A conflict with a local community is a MAJOR risk for the developer, whether legal, financial or even reputational. The signing of the IBA could be a condition imposed in the licenses granted to the company as was the case in the negotiation of the Voisey Bay mine.



Whats in an Agreement

- The section on interpretation and definitions is a fundamental part of the contract. As you can often see from reading such a contract, there are an incredible number of abbreviations.
- The objectives of each party. Often repeated in the Memorandum of Understanding, the objectives of both parties must be clearly articulated in this section.
- Funding provisions will be mentioned in the agreement, but each of the pillars will be detailed in an annex or an independent chapter.
- The Implementation section often provides for the establishment of a joint committee of community members and members of the company.
- An excellent IBA that does not have the means to implement and follow-up can not be useful to the community.
- Monitoring and reporting will help assess the company's performance in terms of its commitments.



Important Agreement Considerations

- The support section aims to document the commitment of both parties to support project operations.
- Protections of your Aboriginal and treaty rights should be added to this section. Experience has shown that communities struggling to recognize their aboriginal rights have often seen the positive impact of a signed agreement on advancing their struggle with the government.
- The Representations and Guarantees section essentially seeks to ensure that the parties to the agreement have the power to commit to each party. Obtaining Band Council resolutions will be provided for in this chapter.
- Dispute settlement is an important section because it is likely to be used. It is clear that the objectives of the parties are not always highlighted, and frictions can lead to disputes that will be sought to be resolved through mediation and arbitration before dealing with the courts.



Planning for Conflict or “the Divorce”

- The duration and factors that may lead to termination will be listed in the section bearing this title. The duration of the agreement is usually based on the life of the mine or project.
- The Substantive Violations section is designed to determine the type of act that is problematic for each party.
- The issue of transfer and transfer is also an important section to be negotiated, especially when one knows the volatility of the mining context.
- The aim here is to protect the community as much as possible in the face of such a possibility. The community must be promptly informed of this type of change and specific provisions in this regard should be negotiated.



Better Agreements Include:

There are many “typical” legal clauses

The pillar of workforce development specifically targets the development of education and training programs.

While the proponent appears to want to focus education and workforce training programs to meet the needs of workers for its project, it is important for the First Nation to negotiate more broadly to Greater independence and greater flexibility within these programs. The idea here is to have a long-term vision that will serve the members of the community.

A managerial job should also be created to manage a list of workers and skills available from the workforce in your community. The list should be updated frequently and made available to the company developing the project.



Ancillary Sections in the Agreement

Training programs can target a wide range of skills from technician (electrician, mechanic) to professional (legal, accounting, engineering, etc.). These programs can take various forms such as:

Field training;

Traineeship;

Summer jobs for students;

Scholarship; and

Cross-cultural facilitation, such as training First Nations members as translators and mediators, etc.

FN members must have the opportunity to apply for a job for which they are qualified or a job where they could be trained to become qualified.



Making the “deal” work

Here are some ways to contribute to a preferred hiring system: what information is required from the company and what information should be provided by the First Nation to the company:

Job opportunities within the project;

Information on the pool of potential Aboriginal workers and their skills;

A list of the training programs to be implemented as part of the project (which would be in place prior to the need for labor related to the project;

Training programs to be offered as part of the project;

Recruitment mechanisms, such as public notices, radio announcements, etc

Specific targets: specific numbers of community members to be hired, percentage of the workforce from the community; etc.



Advancing your Business Interests

- Preferential procurement is one way of encouraging business development in the context of the construction of an industrial project.
- Conducting a preferential hiring program may also require special government approvals.
- The creation of a **FN contract opportunity/business development** position can foster collaboration by identifying the appropriate First National businesses that will be able to participate in the various calls for tenders that the project proponent will make.
- Procurement is the purchase by the proponent of goods and services to construct and execute the project.
- For any major project, the procurement budget will be very large, in the order of millions or hundreds of millions of dollars.



Profit Centre-ing your Project

The proponent can outsource very large portions of work:

- The construction of the project;
- The construction of staff quarters;
- Cafeteria and maintenance services;
- transportation;
- Site safety;
- Communications management;
- Office equipment and more.
- Firms that bid on and win bids for these contracts can make substantial profits.



Manage your Partner

- Requiring the proponent to select the qualified bidder from the FP that is bidding in accordance with the tender criteria;
- Requiring the proponent to inform Aboriginal bidders who are not selected and the reasons for the refusal;
- Require the creation of a start-up aid fund;
- In the event that the selected firm does not come from the First Nation, require the company to comply with the preferential hiring quotas for community members.



Second Strategy: Impact Assessment

- As the IBA negotiations progress, the First Nation should have access to all available information on environmental impacts and, in some cases, may request the completion of its own studies at the expense of the company.
- The First Nation should also have the opportunity to participate in any regulatory process for assessing environmental impacts.
- In many IBAs, a committee is established between the proponent and the First Nation to review the environmental information as generated to determine whether mitigation measures and monitoring programs are effective in addressing these issues.
- The goal is to develop the long-term monitoring and environmental management capabilities of the community, which is the entity best placed to understand the environment and the links between it and community members.



Provisions relating to environmental protection could include the following

- A fund to finance environmental mitigation measures that the community or the joint committee may use to address the direct and indirect or cumulative impacts of a project on the environment.
- Provide community managers with all necessary access to the company's sites in order to assess the information received about the environmental conditions and the environmental impacts of the projects.
- Provide for independent environmental audits at regular intervals, including the concepts of TK;
- Mitigation measures such as initiatives to compensate and improve wildlife habitats, protection of cultural heritage and important sites, etc.



Protecting your Way of Life

- Long-term leave for hunting or trapping seasons;
- Availability of traditional foods to be served on the site;
Prohibition of hunting or trapping near the Project by persons who are not FN;
- The guaranteed access of FN members to hunting, trapping or other traditional practices;
- Requirements for the translation and interpretation of materials in Aboriginal languages;
- Cultural outreach programs for non-Aboriginal employees and managers who are on site or close to the community;
- Employee assistance programs, such as drug and alcohol rehabilitation, need to be tailored to the needs of First Nations workers.



Larger Agreements May Include

- In addition, the creation of a trust fund or trust with the objective of protecting Aboriginal culture, or establishing health and social services programs for Project workers or members of the community.
- Funding for various cultural protection and advancement programs or community building initiatives, such as the construction of a community center, arena, swimming pool, etc.



Summary of IBA contents

- Concluded IBAs express consent on the part of an Aboriginal group to projects that may impact Aboriginal and Treaty rights, in consideration of benefits in the form of:
 - Revenue sharing/profit participation
 - Employment and training
 - Business opportunities
 - Enhanced workplace conditions for First Nations employees
 - Cultural and environmental protection
 - Dispute resolution mechanisms
 - Performance guarantees by company that project will operate within acceptable limits, with provisions for compensation if project does not.



Final Thoughts

The other fundamental aspect concerns the unity within the community(ies). When we talk about unity, we talk about harmony and transparency. There is also consensus among the members of the community(ies). In some cases, one must be sensitive to the potential tactics of the company that might seek to divide the members of the nation or among the multiple FNs party to the project.

The greater the unity, the stronger your leverage.

There are better examples in many regions and in the modern treaty context, but never stop asserting your rights and title in a consistent fashion.



MIIGWETCH!!! QUESTIONS?

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Thank You



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