IBA COMMUNITY TOOLKIT

Negotiation and Implementation of Impact and Benefit Agreements

By Ginger Gibson
and Ciaran O'Faircheallaigh

March 2010

Walter & Duncan
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Commissioned by
the Walter & Duncan
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This toolkit provides general information on negotiation of impact and benefit agreements. It should not be construed as legal advice to be applied to a specific situation. As the law differs in each jurisdiction and may be interpreted or applied differently depending on a specific situation, the information in this toolkit should not be used as a substitute for the advice of a lawyer.

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11 Church Street, Ste. 400
Toronto, ON M5E 1W1
Tel: 416-601-4776 | Fax: 416-601-1689
info@gordonfn.org | www.gordonfn.org

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A glossary of terms and acronyms is also provided at the back of the toolkit.

About the Authors

GINGER GIBSON works with indigenous governments and communities in Northern Canada and Latin America on negotiation, consultation and implementation of agreements with mining companies. For the past 15 years she has researched and worked in the fields of social and cultural impact assessment, resource policy and negotiation. She is an Adjunct Professor at the University of British Columbia in Mining Engineering.

CIARAN O'FAIRCHEALLAIGH is Professor of Politics and Public Policy at Griffith University, Brisbane. He has published numerous articles and books in the fields of public policy, resource economics and resources policy, negotiation, impact assessment, corporate social responsibility and indigenous studies. For nearly 20 years he has worked with indigenous organizations on negotiation of mining agreements, and has acted as an advisor and negotiator for many of Australia's leading Aboriginal organizations. He is currently advising the Kimberley Land Council on negotiations in relation to natural gas development in the Kimberley region of Western Australia.

Acknowledgements

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Premier and Dene Nation President

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Introduction to the Toolkit

Contractual agreements between mining companies and Aboriginal communities now play a critical role in shaping the terms on which minerals will be extracted from Aboriginal lands in Canada. The capacity to negotiate and implement such agreements is critical to ensuring that resource extraction generates substantial benefits for Aboriginal communities, and that the negative impacts that can be associated with large-scale resource development are avoided or minimized.

In simple terms, an Impact and Benefit Agreement is a contract made between a community and a company that provides Aboriginal consent or support for a project to proceed. These agreements can also be known by other names: participation agreements, benefits agreements, supraregulatory agreements, benefits sharing agreements, etc. In the toolkit, we also briefly discuss forms of agreement that might be used during the project life cycle (for example, exploration agreements).

This toolkit is designed for communities engaged in negotiating these agreements with mining companies. It is written for community negotiators, members of community negotiating teams, and consultants working with Aboriginal communities and organizations.

The goal of the toolkit is to provide materials, tools and resources for communities to help them address the process and content issues relevant to negotiating agreements in Canada. The focus is on private commercial agreements, where the parties are Aboriginal communities and mining companies.

We hope this toolkit will find its way into many people's hands, be used in all sorts of ways to aid the process of negotiations, and help achieve positive agreements.

While the toolkit focuses on the mining industry, many of the issues and processes addressed in the toolkit are relevant to agreement making in other industry sectors and contexts, including protected areas, oil and gas, and forestry.

Similarly, while Canada provides the specific context for the toolkit, many of the issues discussed and the strategies proposed are highly relevant in other jurisdictions where indigenous peoples negotiate with resource developers.

Before You Start: Making the Decision to Negotiate

This toolkit is written from the perspective that a decision to proceed with a negotiation has already been made.

However, in some contexts, an Aboriginal community may decide not to negotiate with a corporation wanting to extract resources from its traditional lands. The community may simply want to prevent resource exploitation and decide that negotiation is pointless. The community might then pursue other strategies to pursue its goal, such as litigation, direct political action, media campaigns, or political alliances with non-Aboriginal groups.

We stress in the toolkit that, while such strategies can in some cases be alternatives to negotiation, they may also be critical parts of an overall negotiating strategy. These strategies can be especially important in strengthening an Aboriginal community's overall negotiating position, and in putting pressure on a company to compromise where negotiations are deadlocked.

To achieve success in negotiations, Aboriginal communities need to develop and implement broad strategies across a range of issues, including a legal strategy, political strategy, media strategy, and communication strategies focused both internally on the community itself, and externally on all stakeholders with the capacity to influence the outcome. This toolkit is designed to help Aboriginal communities develop appropriate strategies in each of these areas.

CAPE DORSET, NUNAVUT

Once a decision to negotiate is made, a community and its leaders need to undertake a hard-headed assessment of their position in relation to the company, the government authorities that will approve or reject the project, and the wider economic and political context. From there, the negotiating team must identify the overall strategy most likely to achieve a successful outcome.

Negotiation is Not Consent

A decision to begin negotiations does not imply community consent to a proposed project or a decision to reach an agreement.

At the start of negotiations, communities have only limited information about a proposed project and the developer's willingness or ability to meet community needs. As more information becomes available, the community may decide a project is not acceptable in principle, or that the conditions that would make it acceptable cannot be negotiated with the developer. In either case, and at any point in the negotiation, a community has the right to terminate the negotiation process. If the issue is the willingness of a developer to meet the community's conditions, care should be taken to end negotiations in a way that leaves the way open for them to resume, should the company involved change its position in fundamental ways or a new developer takes over the proposed project.

Information is Power

Once a decision to negotiate is made, a community and its leaders need to undertake a hard-headed assessment of their position in relation to the company, the government authorities that will approve or reject the project, and the wider economic and political context. From there, the negotiating team must identify the overall strategy most likely to achieve a successful outcome. Critical to such an approach is a sound and comprehensive information base. Development of this base is a central focus of Section 3 of the toolkit.

A Focus on Process as Well as Outcome

It can be tempting to focus solely on the content of agreements, on the issue of what people achieved, for example the financial benefit they gained.

Through our experience as negotiators and researchers, we have learned that the process of negotiating and implementing agreements is absolutely critical in shaping the content of agreements and whether their potential benefits are realized.

Through our experience as negotiators and researchers, we have learned that the process is absolutely critical. Some communities with little legal leverage have achieved successful agreements because they took the time to work out exactly what they wanted and then stayed united, even when things got tough.

We argue that a good outcome to a negotiation will reflect a range of factors, including:

- The wider context (e.g., legal and regulatory);
- The nature and extent of community involvement;
- The character of the community;
- The strategies and negotiating positions the community develops;
- The way the community structures its negotiating team;
- The legal position of the community in relation to the project; and
- The nature of the project.

All of these factors are addressed in the toolkit.

Two specific factors – a community's clarity regarding its goals and its ability to stay united and to plan collectively – are perhaps the most powerful explanations for the success of negotiations. Some communities with little legal leverage have achieved successful agreements because they took the time to work out exactly what they wanted and then stayed united, even when things got tough. If negotiations do get tough, communities that are united can dig in and use other strategies to enhance their bargaining power, such as direct action, litigation and forging political alliances. Without unity, the company can often divide and conquer, consulting with the people they find easiest to deal with and ignoring and isolating the tougher ones.

Against this background the toolkit focuses heavily on the process of negotiation and the implementation of agreements, as well as their content.

The Importance of Forming Networks

While the toolkit provides information and resources, it is not a substitute for exchange of information among networks of negotiators and expert advisors.

Such networks can involve a range of activities, from large-scale, formal and systematic information exchange between groups of leaders and advisors across a broad range of issues, to informal discussion between two individuals on a specific, technical issue.

For example, in 2007 a group of James Bay Cree leaders and advisors visited the Kimberley region of Western Australia, hosted by the regional land organization, the Kimberley Land Council Aboriginal Corporation (KLC). Over the previous five years, the KLC had assisted communities in negotiating a series of mining agreements; the Cree group was just about to embark on its first negotiation with a mining company. The Cree had extensive experience in negotiating self-government agreements, an area where the KLC had limited experience but planned to become more active. The Cree and senior KLC staff spent a week travelling through the Kimberley region and meeting with Aboriginal leaders and negotiators, a unique opportunity to share expertise and experiences across a wide range of matters, including fundamental issues regarding Aboriginal governance and political strategies for dealing with companies and governments.

Without unity, the company can often divide and conquer, consulting with the people they find easiest to deal with, and ignoring and isolating the tougher ones.

At the other end of the spectrum, in 2000 one of the authors was encountering problems in finding a mutually acceptable way of dealing with the specific, technical but important issue of indexing payments under an agreement between a major multinational mining company and an Aboriginal group in Australia. He spoke briefly by phone with technical advisors in both Australia and Canada who had dealt with the same issue in earlier negotiations between Aboriginal communities and the company involved. This assisted greatly in identifying an approach that would both meet the needs of the Aboriginal group and be acceptable to the company.

Between these two ends of the spectrum, endless opportunities for networking and information exchange exist. We hope the toolkit will support and encourage the further growth of such networks.

Toolkit Research and Development

In developing the toolkit, we reviewed all publicly-available literature on agreements in Canada and Australia, and drew extensively on our own experience in negotiation and agreement formation.

There may be a bias towards the communities and regions where we have worked. For example, Ginger Gibson has worked on these issues primarily in northern Canada and Latin America, while Ciaran O'Faircheallaigh has been involved in negotiations mainly in Australia. We used our review of the literature to ensure a broader perspective.

The manual was tested in two stages with a group of Aboriginal people who negotiate and implement agreements, as well as consultants and lawyers who work with them. In the first meeting, we presented a discussion paper setting out the proposed content of the toolkit to 20 negotiators and experts to ensure that all key issues were covered. In the second meeting, five negotiators and experts reviewed the full toolkit and provided helpful feedback and advice both on its content and presentation.

How to Use this Toolkit

Use the index in the final pages of the toolkit to quickly find the information you need.

The toolkit is designed to be useful to readers in a number of capacities. For example:

- A community about to start a negotiation might use the toolkit as a basis for information-gathering and training, possibly with the assistance of an experienced trainer;
- A newly-appointed negotiating team member might read through the toolkit from beginning to end as a guide to the entire process of negotiations;
- A negotiator working on a specific provision might read through the sections of the toolkit dealing with that particular topic; and
- Consultants might revisit the guide on numerous occasions as they help a community through the lengthy negotiation process.

Structure of the Toolkit

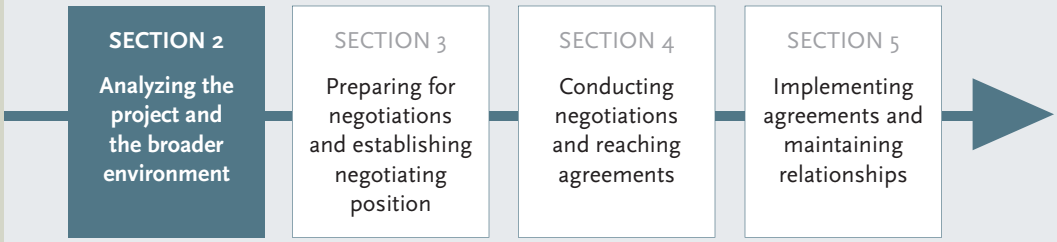
The toolkit starts with an overview of the wider legal, political and regulatory environment in which agreements are negotiated (Section 2). This is followed by three phases of negotiation (see figure below).

- Preparing for negotiations and establishing a negotiating position (Section 3);
- Conducting negotiations and creating agreements (Section 4); and
- Implementing agreements and maintaining relationships (Section 5).

The toolkit is designed as a practical guide to negotiating agreements. It is not an account of theoretical approaches to negotiation and their merits. Nor does it offer a prescriptive template for agreements, given that the goals of communities will differ, as will the appropriate content and structure of agreements. Rather, the toolkit is designed to provide a range of options for dealing with issues that arise in negotiations between Aboriginal communities and mining companies.

We hope the toolkit can support Aboriginal communities in Canada and elsewhere in maximizing the benefits they receive from agreements, and that it helps ensure that the processes used in negotiation adds to their capacity, unity and well-being.

Structure of the Toolkit



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Analyzing the Project and the Broader Environment

This section sets out the context in which negotiations occur. This context must be carefully analyzed in order to understand the levers that exist for the community in negotiating an Impact and Benefit Agreement. We consider:

THE MINE LIFE CYCLE From conception to post-closure, stages are described so that negotiators can identify the stage of development a project has reached, the issues and opportunities associated with different stages, and how the project is likely to progress.

INTERNATIONAL RIGHTS Increasingly, Aboriginal people in Canada may be able to draw on international recognition of rights that extend to all indigenous people, regardless of the laws that apply in the countries in which they live.

CANADIAN RIGHTS Certain aspects of the Canadian context will be relevant to all Aboriginal peoples, while the specific relationship an Aboriginal group holds to the federal government – through an historic or modern treaty, or through the absence of any treaty or recognized land claim – will impact on the position of individual groups.

LEGAL, REGULATORY AND POLICY LEVERS Some legislation, regulations, policies and permits include clauses that require negotiation of IBAs with communities. These provide negotiation leverage to the community.

CANADIAN ENVIRONMENTAL REGULATIONS Each jurisdiction is governed by different environmental assessment and approval processes, so negotiators need to know which government is the lead on an assessment, what levels of assessment are possible, and the nature of the triggers to a higher level of assessment. This section also considers the timing of environmental impact assessment (EIA) processes and IBA negotiations and outlines three possible approaches.

IMPLICATIONS OF AGREEMENT MAKING This section highlights how negotiation of project-based agreements between Aboriginal groups and mining companies (and in some cases, government) affects the wider legal and political status of Aboriginal groups and the nature of their relationship with other elements of the political system.

COMMUNITY GOALS, POLITICS AND UNITY. To achieve success, IBA negotiations must be undertaken with a keen awareness of wider community goals and priorities. Political unity is one of the most significant factors that predicts the strength of a negotiation effort and the resulting agreement. When there is no unity among or between Aboriginal nations, agreements are often weak, and communities and nations become further divided.

Prospectors or exploration geologists out on the land will likely be the first indication of corporate interest in the region.

The Mine Life Cycle

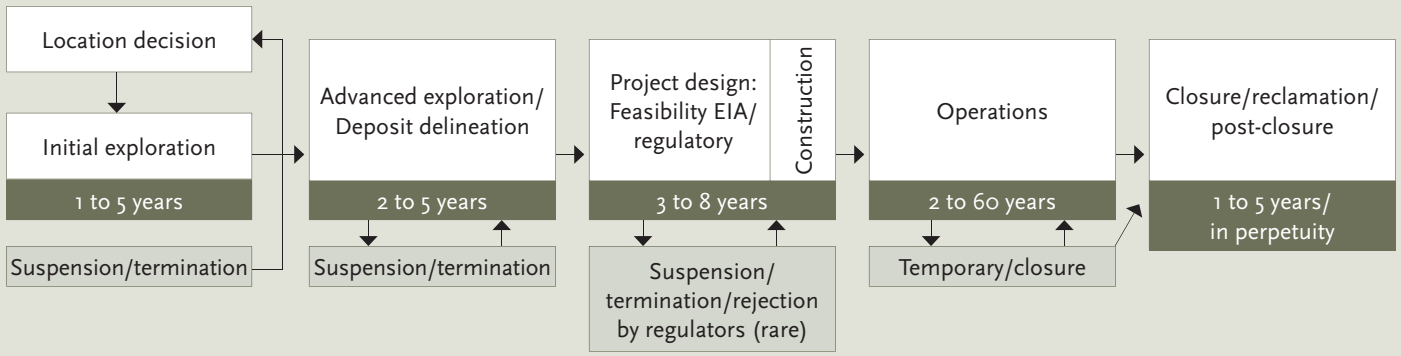
The mine life cycle typically breaks down into a series of phases. Figure 2.1 indicates a linear process from a location decision to full-scale operations. However, for each phase in the mine life cycle, the decision may be made to suspend or terminate the project. Most exploration projects – some 99.9 per cent of them – never become full scale mines.[1]

Location and Investment Decision

A company's decision to invest in a location is made based on a variety of factors, only some of which are related to the chance that there is a viable mineral resource in the ground. The decision on where to focus investment dollars relies on a consideration of the risks and rewards associated with investing in, say, western Argentina compared to northern British Columbia. Companies typically consider the geological and political climates, among other factors, before making these initial decisions. Companies first consider the geology and mineral prospects. If these prospects are not promising, they will go no further.

However, even if there are good prospects, companies may still not invest because of other risk factors, such as political or social risk. The initial location decision often involves no direct relations between the developer and communities.

Figure 2.1: Mine Life Cycle



Early Exploration

Early exploration occurs in one of two ways: looking for mineral deposits in an area that has had little or no previous exploration or mining (grassroots or greenfield exploration); or looking for new deposits, or extensions of existing deposits, in areas where mining is occurring or has previously occurred (brownfield exploration). It is very rare to find a mineable deposit through greenfield exploration, but the upside is that if a find is made, it may be extremely large. The chances of finding a mineral resource in a brownfield area are much higher, but the risk is that the best deposits have already been mined. Brownfield exploration may continue alongside more advanced exploration and/or mining by the same company.

BROWNFIELD exploration involves searching for new deposits, or extension of existing deposits, in areas where mining is already underway or has already been completed.

Prospectors are the first people involved in exploration. They choose where to look for minerals by understanding the geology of a region, walking and observing an area, and relying on samples they collect. Prospectors often work with a company, but many operate on their own. They start by looking at the regional and large-scale geology and glacial history of a region to identify where they want to start looking. For example, the Canadian Shield is rich in minerals, such as nickel, copper, zinc, silver and gold, as it is part of an ancient volcanic belt that had conditions favourable to economic mineral development. Following this, a prospector will work out on the land, mapping rock types and collecting samples. Sometimes they use satellite imagery, global positioning systems, or surveys from planes or helicopters to identify geological variances.

GREENFIELD exploration involves searching for mineral deposits in areas that have had little or no previous exploration or mining.

When something promising is found by a prospector, an early exploration program will be developed. This usually involves small groups of workers, typically about 10 people in temporary camps, who are engaged in helicopter mapping or river sampling. It is during this time that clues indicating the existence of minerals might be found. If they are found, this usually leads to more permanent camps, more people and more intensive work. Geologists will begin to sample larger amounts of material from more localized areas. This can also involve all-season work using airplanes to fly over an area to create maps that allow people to visualize the geological structure of the rocks below the surface. They can also use physical methods (which might include seismic, gravitational, magnetic, electrical and electromagnetic methods) to measure the physical properties of rocks, and in particular, to detect the measurable physical differences between rocks that contain ore deposits and those that do not. The point of this activity is to identify targets for drilling.

A typical early exploration program costs between $500,000 and $3 million.

Early investment usually involves small groups of workers, typically about 10 people, engaged in helicopter mapping and esker or river sampling, in temporary "fly" camps. If minerals are found, this usually leads to more permanent camps and more people.

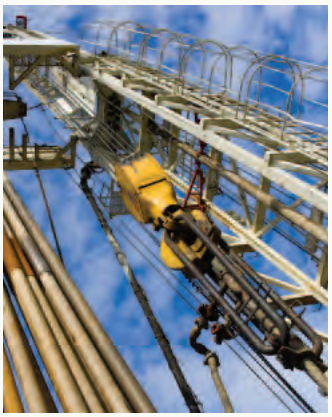
Advanced Exploration

Advanced exploration includes drilling designed to confirm that ore is in fact present and, when it is, mapping out the size of the ore body and the minerals it contains. At this point, more sampling, geophysics, and drilling may continue elsewhere as the company continues to look for more ore, while further investigation of what it has found takes place.

The decision to drill on a claim is not a small one – the expenses to the company far exceed that of all previous work. However, there is no other way to delineate the mineral trend. The size of the drill bit will vary: larger diameter drills will be used in areas where the geology is well known and promising, whereas smaller drills will be used where there is little information on the host rock. Companies do not usually drill deeper than 300 metres, because doing so is very expensive. Depending on the ease of getting to the location (i.e., the presence of roads), drilling can be done either by wheeled drills or heli-portable drills. These diesel run machines drill one hole at a time into the ground to determine whether, and the extent to which, there is a viable mineral deposit. Anywhere from one to 100 or more holes may be drilled, with core samples initially examined on-site and shipped off for further examination (assaying) at a laboratory.

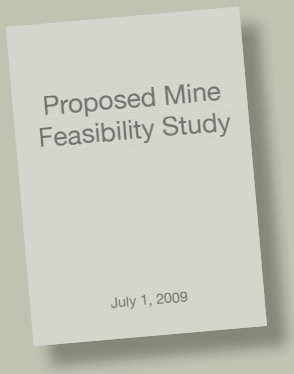
An early phase of drilling will include small diamond drills and small drill cores. The company will increase work as warranted by increasing sample sizes, drill sizes, and core sizes. Eventually, the company may collect bulk samples to determine the grade and whether minerals can be easily extracted. However the phases of drilling are not linear. Small-scale drilling to cut a core of rock (called *diamond drilling*) will likely continue in other potential areas throughout the mine life. For example, many operating mines continue sampling while they are running an operating mine.

For those projects with strong drilling showings, larger drills will be used in order to map the extent of the deposit (called *deposit delineation*). Information from the drill logs will be used to map the nature of the deposit underground. The company will map the ore body using software programs and drill log data. At this point, the potential for an actual mine is becoming apparent. Activities on the ground may include: more drilling to determine the depth, length, geometry and grade of the mineral deposit; bulk sampling of 2,000 to 20,000 tonnes of the ore body to determine its qualities and what metallurgical or other processes can be used to extract the metals from the ore; setting up of a permanent camp with more people; and environmental baseline work in preparation for the environmental impact assessment and regulatory stages.



People in communities will notice drilling programs more than previous activities because they are more invasive. They are noisier, and involve more ground and air transport, setting up of mobile or set camps outside of communities, visible clearings, new spur roads, and the physical presence of the drills themselves on the landscape.

The number of people involved will increase as a project progresses. Whereas most initial exploration programs can function with about 10 to 20 personnel, advanced exploration may bring anywhere from 50 to 100 or more people into the permanent camp location at any one time. Local people will often have access to seasonal or full-time employment at the site.



Feasibility studies are often a powerful tool communities can use to idenfity exactly what a developer is proposing for a mine – for example its size, life time, infrastructure and employment requirements.

Financial investment accelerates quickly at this point. Bulk sampling and other advanced exploration activities may increase the annual budget into the $20 million to $50 million range. Some estimates place the total costs of deposit appraisal anywhere between $5 million and $100 million.

People in communities will notice drilling programs more than previous activities because they are more invasive. They are noisier, and involve more ground and air transport, setting up of mobile or set camps outside of communities, visible clearings, new spur roads, and the physical presence of the drills themselves on the landscape. It is during drilling that word often starts going around the community that a mine is or may be developed on the land (although even the tents at exploration camps raise suspicions with hunters). Despite this common idea, a large majority of drill programs end in project suspension or termination because the mineral discovery cannot be shown to hold an economically viable mineral deposit.

Where there are promising results from advanced exploration, mine engineers come to rival the geologists as the driving forces behind what is now a fledgling mine site. Pilot plants may be developed to determine the proper mine process system, environmental work escalates, and everything from wildlife management to water processing needs to be assessed on a cost and environmental impact basis.

At some point, the geologists, engineers and accountants get together and determine project economics. This typically requires estimating the size of the extractable mineral resource, calculating the cost of infrastructure, employment, and transport associated with the required mine plan, making assumptions about production levels and mineral prices, and determining whether the return on investment is adequate to take the risk associated with sinking between $200 million and over $1 billion into the capital costs of building a mine. The results are typically reported in a feasibility study. These studies are often one of the most valuable tools a community can use to determine exactly what is proposed at the mine – for example its size, life time, infrastructure and employment requirements.

During deposit delineation and project design, there may be very little happening on the ground. Further, the project may be bought out by another company. This may result in a lull in activity as the new owner assesses a range of projects and decides where to focus its attention.

The "Free Entry" Mining System

Some provinces and territories have a "free entry" system, meaning that anyone can purchase a prospector's license and prospect on Crown Land as long as no one else already holds a claim over it. This includes land traditionally owned by Aboriginal people.[2]

However, systems of free entry are currently being challenged in Ontario and BC, so that new systems may apply in the future. For example, pressure to change may result in new legislation that establishes a permit regime that promotes government discretion before rights are granted, and this could apply through the whole mining cycle, from prospecting to development. With a new permit-based tenure system, permit holders would acquire permission to carry out activities instead of acquiring rights to minerals as they do under a free entry system.

At other points in the mine life cycle, there will be frantic activity in the region by the company. This should not necessarily be seen as perverse on the company's part, as it reflects the nature of the mine life cycle. On the other hand, communities should not allow company pressure to make it rush key preparatory work or decisions. Also, the community can use "slow" periods in project activity to get organized.

The community will need to make judgments on how much energy is put into project analysis and IBA negotiation strategy at different points in the cycle. While the community needs to be ready, too much investment of resources too early may be wasted if the project does not go to the next stage.

If the decision is to go ahead, the permitting process begins (see *Licenses and Permits* below). Permitting happens at various points in the process, and often begins as early as advanced exploration and then continues throughout the mine life. At this point, the company will need to apply to government bodies for approval and undergo an environmental assessment of the proposed mine (see page 36).

Licenses and Permits

Throughout the mine life cycle, a variety of licenses and permits will be required. These will vary according to the jurisdiction, and in some cases also the resource to be mined. Laws and regulations change frequently, so it is important to check the governing body (usually the province or territory's mining ministry) for updates.

Here are examples for mining in Nunavut.

- A *prospector's license* is required to prospect for minerals, or to record or acquire a claim. Anyone over 18 years of age can apply.
- A *prospecting permit* gives exclusive right to explore for minerals in a large area for a set period of time. Companies usually apply for a large area so they can work without competition, while narrowing in on a smaller area that shows good geology. Applications are accepted by the Mining Recorder's Office only in December, and are given to whoever is first in line. Permits are for three years, or five years north of 68 degrees. There are no surface rights associated with prospecting permits.
- A *mining claim* establishes the exclusive right to explore for minerals in a certain "staked off" location (up to 2,582.5 acres) for up to 10 years. They cost much more than prospecting permits, and are usually made only where the company has fairly solid knowledge of the scope and scale of the minerals in the ground.
- *A mining lease* is required once a company plans to operate a mine. These leases last for 21 years, and are renewable.

Many other specific permits and licenses may be required, such as water usage, destruction of habitat, use of explosives, or transportation of hazardous waste, and some will include conditions of operation. Certain licenses will only be issued once the regulator is satisfied there has been sufficient consultation, and in some cases, only once there is a completed IBA.

SURFACE VERSUS SUBSURFACE RIGHTS

There may be large areas of land where surface rights are owned by Aboriginal people, but the subsurface is managed by the Crown. In these areas, companies are generally required to attain permission to access the land before they can stake a claim. If the intent is to prospect or stake a mineral claim, the company must include relevant authorization from the property holder concerning access, along with the applications.

The timeline from initial exploration to operations can be anywhere from six to almost 20 years. Expediting the process, particularly during the regulatory stage, is a priority for companies that communities need to be aware of and that they can turn to their advantage (see *Assess and Improve the Bargaining Position* on page 99).

Construction

Construction is one of the most intensive – and expensive – phases of mine life.

During a two to five year period, hundreds of millions of dollars are invested in building the mine, including the processing plant, accommodations, transportation and other infrastructure. Anywhere from 200 to upwards of 2,000 full-time construction jobs may be available, although most people on-site will work for independent specialized contractors rather than for the mining company itself.

Construction is a critical time for Aboriginal people to gain skills that will be needed when the mine is operating, including building certifications and developing critical problem-solving skills.

This is a time of great economic boom potential and excitement in communities, but it also brings worries about impacts and rights infringements. This will involve immediate concerns about construction noise, dust and emissions, an increased project footprint, and more outside influences in the community, as well as concerns about long-term impacts – what will happen to people, land, water and wildlife once extraction starts.

Part of the mining construction process may include the removal of large amounts of waste material above the economic ore body. This removal of overburden or other waste rock will often make the development look like a full-scale mining operation even before ore extraction starts.

Operations

Operations typically consist of three phases, excluding temporary closures if they occur (when a mine is on a "care and maintenance" status), or changes in the mine plan that might occur due to fluctuations in the prices for the mineral in question. The phases are:

- RAMP UP – At the outset of mining, where the "kinks" are worked out of the mining and processing systems. This typically takes from six months to a year.
- FULL PRODUCTION – Which will constitute the bulk of mine life, when the ore and concentrate throughput will be at 90 per cent or more of planned maximum tonnage.
- DECLINE – When ore reserves are in decline toward the end of the mine life and costs per tonne are increasing as deeper or lower grade ore is mined. Mill throughput can decline as well, and the number of jobs at the site may

fall. However, given that the majority of costs went in at the front end during construction, it is often in the interest of the mining company to stretch out the extraction period as long as possible.

The operations phase will see a big reduction in the number of jobs on-site compared to the hectic construction period, but the jobs that remain (anywhere from 150 to well over 2,000, depending on the size and type of mine and milling operations) will be longer-term and high paying. It is generally cheaper for the mining company to employ people who live near the mine, rather than use long-distance commuters or import and house workers from outside the region. Where issues typically occur is in making sure that potentially-affected communities have the capacity and opportunity to take full advantage of employment and business opportunities during both construction and operations (see Section 4 for a detailed discussion of these issues).

During operations the mining company is likely to have continuing exploration programs on-site and in nearby claims. Almost all mines add to their ore reserves over the course of their mine life, in part to take advantage of new technologies, or to optimize the amount of ore processed using highly expensive machinery. Therefore, barring changes in mineral prices or other issues that make the mine less competitive, mine life will likely extend beyond what was originally envisaged.

Money from mining companies is held by the government as a guarantee that a mine will restore land to an agreed-upon state once the mine is closed. These security deposits are meant to avoid the legacy issues (environmental problems left behind by mining companies) that have often plagued large-scale mines across the world.

Closure and Reclamation

This last phase of the mine life cycle may be the longest, as it often entails ongoing environmental management over substantial periods of time (particularly of surface stockpiles and water bodies). Closure plans must be put forward during permitting and money must be given to the government and retained by it as a guarantee that the operator will restore land to an agreed-upon state once the mine is closed. These security deposits are meant to avoid the legacy issues (environmental problems left behind by mining companies) that have often plagued large-scale mines across the world. Reclamation typically requires removal of all on-site infrastructure, rehabilitation of soils and vegetation, and long-term water monitoring and management systems. The goal is to return the site as close as possible to its original state, or to some other state agreed with regulators. An example of an alternate arrangement is the former Kimberley lead/zinc mine in BC, which is now a tourist destination with mine-train tours.

A different type of closure planning may be required for communities that have come to rely on employment and business opportunities from the mines. There, a major shift in employment focus may be required in order to avoid the "boom-bust" cycles that have so often occurred in the Canadian natural resources sector.

Indigenous Rights: The International Context

In the next section, we discuss recognition of indigenous rights in the Canadian context, and the ways in which this recognition can provide a basis for IBA negotiations. It is important to remember that, increasingly, Aboriginal people in Canada may also be able to draw on international recognition of rights that extend to *all* indigenous people, regardless of the laws that apply in the individual countries in which they live. This can be significant for a number of reasons. First, if an Aboriginal group has limited rights under Canadian law, it may be able to draw on international recognition as a basis for negotiating IBAs. Second, many mining projects are developed by multinational corporations, which can be sensitive to their international image and will therefore feel a need to respond to international developments in relation to indigenous rights. Being aware of these developments can provide Aboriginal communities with added leverage in dealing with these companies.

Aboriginal people in Canada may also be able to draw on international recognition of rights that extend to *all* indigenous people, regardless of the laws that apply in the individual countries in which they live.

As we will see, international laws and conventions are different from domestic law in that they generally cannot be used to *force* companies or governments to act in certain ways. However, they can still be useful in adding to the bargaining position of Aboriginal communities involved in negotiations.

There are two foundations for the international recognition of indigenous rights. The first involves the relationship between the ancestral lands of indigenous peoples and their cultural, economic and social survival as distinct peoples and societies. The second relates to international human rights law.

There is growing international recognition that the ability to live on, care for and utilize resources from ancestral lands is central not only to the economic and social well being of indigenous people, but also to their survival. Land is critical to:

- Physical sustenance;
- Social relationships that are bound up with relations to land;
- Law and culture, which are interwoven with use of the land and its resources; and
- Spirituality and religion, which have as their basis beliefs about the creation of the land, the ways in which creation spirits continue to occupy the land and influence contemporary life, and the ways in which ancestors and future generations are tied to the current generation through the land.

For example, as the Inter-American Court of Human Rights has stated:

> *The close ties of indigenous people with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival.*

Of particular importance are conventions and covenants related to the right to equality and non-discrimination, the right to property, the right to practice and maintain culture and religion, and the right of self-determination of peoples.

The *Universal Declaration of Human Rights*, passed unanimously by the United Nations General Assembly in 1948, sets out certain rights and freedoms that apply to "all peoples and all nations." These include the right "without any discrimination to equal protection of the law" (Article 7); "the right to own property alone as well as in association with others" and the right not to be "arbitrarily deprived" of that property (Article 17); and the freedom "either alone or in community with others ... to manifest his religion or belief" (Article 18).

The right of peoples to self-determination and their "permanent sovereignty over natural resources" is enshrined in Article 1 of both the *United Nations International Covenant on Civil and Political Rights* (ICCPR) and the UN's *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966), where Article 1 states:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
>
> *All peoples may, for their own needs, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence.*

The principles established in United Nations covenants have increasingly been reflected in regional human rights initiatives, including the *American Declaration of the Rights and Duties of Man*, which binds Canada as a member of the Organization of American States. Article XXIII of the Declaration, for instance, provides that "Every person has a right to own private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."

The right to equality before the law and to property is guaranteed in the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 provides:

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law notably in the enjoyment of the following things:

> *(d) (v) The right to own property alone as well as in association with others;*
>
> *(e) Economic, social and cultural rights.*

The United Nations Committee on the Elimination of Racial Discrimination, in its general Recommendation XXIII, has highlighted some specific implications of ICERD for indigenous peoples:

> *The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized ... The Committee especially calls upon States Parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.*

Article 27 of the UN International Covenant on Civil and Political Rights states:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess or practice their own religion, or to use their own language...*

There is growing evidence of international acceptance of principles regarding indigenous rights, including the indigenous right to exercise Free Prior Informed Consent regarding development on their ancestral lands. This latter point is very important in relation to IBAs.

In commenting on Article 27, the UN Human Rights Committee has stated:

> *... one or other aspects of the rights of individuals protected under this article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of indigenous communities constituting a minority.*[3]

There is growing evidence of international acceptance of these principles regarding indigenous rights, including the indigenous right to exercise Free Prior Informed Consent (FPIC) regarding development on their ancestral lands. This latter point is very important in relation to IBAs.

One specific indication of this growing acceptance is the acknowledgement of indigenous rights in general and the right of FPIC in particular in international conventions and declarations, including the International Labour Office Convention 169 on the Rights of Tribal and Indigenous Peoples (1989); the Convention on Biological Diversity (1992), which has been ratified by more than 170 countries; and the United Nations General Assembly's Declaration on the Rights of Indigenous Peoples (2007). The Declaration states that indigenous peoples "have the right to self-determination" and to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions," and repeatedly affirms the right of FPIC (Article 10, 11, 19, 28, 29, and 32). For example Article 32 states:

> *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *States shall obtain the free and informed consent [of indigenous peoples] prior to the approval of any project affecting their land or territories or other sources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.*

Other indications of the growing acceptance of indigenous rights include:

- A number of national governments (the Philippines, Nicaragua, Ecuador, Columbia) have enacted legislation that recognizes indigenous interests in land and, in some cases, explicitly recognizes FPIC.
- In South America, the Inter-American Court of Human Rights, established by the American Convention on Human Rights, has handed down a number of decisions requiring national governments to abide by human rights principles set out in the Convention in their dealings with their indigenous populations.
- A number of international organizations have explicitly recognized the principle of FPIC. For example, in 1998 the Inter-American Development Bank adopted a policy requiring prior informed consent in the case of indigenous people possibly affected by involuntary resettlement as part of a bank-financed project, and the World Commission on Dams has also endorsed the principle.

- Individual commercial enterprises have effectively acknowledged the principle of FPIC in deciding to not proceed with investments in the absence of support from indigenous landowners. For example, in 2005 Rio Tinto signed an agreement with the Aboriginal traditional owners of land containing the Jabiluka uranium deposit and undertook not to develop it except with their consent. Two other leading international mining companies, Anglo American Corporation of South Africa Ltd. and BHP Billiton Ltd., are reported to have made similar undertakings in relation to specific projects.

However, it must be stressed that despite these positive developments, it is by no means the case that acceptance of indigenous rights is a settled matter. Major obstacles still exist to their recognition, and especially to their recognition in practice, rather than on paper. These include:

- Some key covenants (for example ILO 169) have not been ratified by many states, which are not therefore bound by relevant provisions;
- Many governments do not consider themselves bound by the findings of United Nations bodies such as the UN Human Rights Committee;
- Key declarations that endorse indigenous rights, such as the UN General Assembly's Declaration on Indigenous Rights, are not binding on members, and a number of countries with large indigenous populations, including Canada, voted against them; and
- Some international financing bodies and governments acknowledge only free, prior and informed *consultation*, which provides less onus on the government or funders to achieve consent.

Even where governments ratify international conventions or introduce national legislation designed to protect indigenous rights, there is no guarantee that government agencies or commercial interests operating in their jurisdictions will actually respect these rights (see case study below for the Awis Tingi in Nicaragua, where it took over seven years of advocacy to have the government act on the court's decision).

International financial institutions, with the exception of the Inter American Development Bank, have not been prepared to commit to the principle of FPIC. The World Bank requires only that clients seeking loans engage in "free, prior informed *consultation*." The World Bank's private investment arm, the International Finance Corporation, in 2006 rejected the principle of FPIC even where developments involve potential

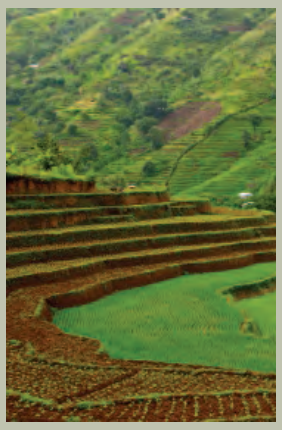
Rio Tinto Mine, Australia

Individual commercial enterprises have effectively acknowledged the principle of Free Prior Informed Consent in deciding to not proceed with investments in the absence of support from indigenous landowners. For example, in 2005 Rio Tinto signed an agreement with the Aboriginal traditional owners of land containing the Jabiluka uranium deposit and undertook to not develop it except with the consent of the traditional owners.

CASE STUDY

International Court Victory for Nicaragua's Awas Tingni People

In December 2008, the government of Nicaragua gave the Awas Tingni community the property title to 73,000 hectares of its territory, located on the country's Atlantic Coast. This marked a critical step forward in the resolution of a case heard by the Inter-American Court on Human Rights in 1998, the first case on indigenous peoples' collective property rights heard by the court. The judgment handed down in August, 2001 became an historic milestone in the recognition and protection of the rights of indigenous peoples around the world, and an important legal precedent in international human rights law.



At present, international recognition of indigenous rights cannot, on its own, provide an adequate basis for negotiation of agreements with mining companies.

damage to "critical" cultural heritage or require involuntary resettlement of indigenous peoples. The Canadian government, in 2009, made a decision that similarly rejected the principle of free, prior informed consultation in a review of extractive companies operating in other countries.

Industry has also been reluctant to embrace recognition of FPIC. For instance, the International Council for Mining and Metallurgy, an international organization representing large mining and mineral processing companies, has rejected the principle of FPIC. Individual companies have also specifically rejected the principle, indicating their willingness to consult, but reserving the right to determine whether a project will proceed.

Some companies are not consistent in seeking indigenous consent. This suggests that any willingness to embrace FPIC involves a tactical response to specific contexts rather than a principled position. However, the fact that they do recognize indigenous rights in some cases shows that they are vulnerable to pressure on the issue, a point we made at the start of this section.

In summary, at present international recognition of indigenous rights cannot, on its own, provide an adequate basis for negotiation of agreements with mining companies. But where Aboriginal groups lack clear legal rights in domestic law, it may still allow them to 'get a seat at the table' with mining companies and start a process of engagement that may eventually allow them to achieve significant benefits from, and a say over, development on their land.

More generally, international recognition of indigenous rights provides one more basis on which Aboriginal peoples can push for a just outcome from development on their land. This is especially so when they are dealing with large multinational companies that are very conscious of their international image. Also, international recognition of indigenous rights has been steadily increasing over the last 20 years. As this process continues, they are likely to become more important as a foundation for negotiating just agreements.

Indigenous Rights: The Canadian Context

In this section, we discuss the recognition and protection of Aboriginal rights in Canada that are relevant to the negotiation of IBAs. This recognition and protection occurs through the enshrinement of rights in the *Constitution Act*, Aboriginal-Government treaties or agreements, and interpretations by the courts of the relationship between Canada's indigenous people and the Crown.

The *Constitution Act* of 1982 recognizes and affirms the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada."[4] This affirmation has paved the way for court challenges on the nature of the relationship between the Crown and Aboriginal peoples, and the possibility of modern land claim agreements. These court challenges have begun to establish the expectations of the Crown on the *duty to consult and accommodate* Aboriginal people, all of which is based in "the honour of the Crown." A number of significant cases exist, but two central cases for establishing the nature of Aboriginal rights are:

- 1990 *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1008 [*Sparrow*] surfaced four questions to assist in determining the nature of the fiduciary role the Crown holds towards Aboriginal peoples: whether there is as little infringement of Aboriginal rights as possible in order to effect the desired result; whether priority in the allocation of the right has been given to the Aboriginal group; where expropriation occurs, that fair compensation is made available; and whether the Aboriginal group concerned has been *consulted* with respect to conservation measures.

- 1997 *Delgamuukw v. British Columbia* (1997) 3 S.C.R 1010 described Aboriginal title, confirmed the legal validity of Aboriginal oral history and clarified the nature of the Crown's duty to consult and accommodate in the context of infringement of Aboriginal rights. The test for establishing Aboriginal title was set out in the Court's decision, requiring exclusive occupation of land by a community at the time of British sovereignty. This case also defined consultation and laid the foundation for the goal of accommodation: "the minimum acceptable standard is consultation (that) must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation."[5]

These two court decisions set the ball rolling for the interpretation of what is expected of consultation and accommodation. There will be ongoing interpretations of these two duties.

Court challenges have begun to establish the expectations of the Crown on the *duty to consult and accommodate* Aboriginal people, all of which is based in "the honour of the Crown."

Duty to Consult

The duty to consult arises in specific instances, the first when the "Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (arising from a case where there was no treaty guiding relationships, *Haida Nation v. British Columbia)*.[6] The second involves situations in which the Crown contemplates conduct that might adversely affect treaty rights (arising from a case of an historic treaty, *Mikisew Cree First Nation v. Canada)*.[7]

It has been established that the Crown cannot delegate its authority to consult, so that corporations cannot negotiate IBAs and thereby fulfill the duty to consult that the Crown holds. However, the possibility exists of the Crown delegating procedural aspects of consultation to corporations. In practice, much of the obligation to consult falls to the industrial proponents.

Herein lies the link between the duty to consult and the negotiation of IBAs. If a developer cannot demonstrate that it has consulted, it faces the possibility that the Crown will refuse to issue or will revoke permits under challenge by Aboriginal peoples until its duty has been fulfilled (as happened in the case of *Taku River Tlingit v. British Columbia*[8]*)*. The practice of some corporations has therefore been to reduce the risk of challenges by proactively negotiating IBAs as a measure of consultation with Aboriginal groups.

This discussion highlights the need for communities in IBA negotiations to keep a solid record of meetings, negotiations, and discussions. This audit trail is essential if the Aboriginal group needs to go to court to prove inadequate consultation by the Crown. Consultation must be seen to be done by all of the relevant audiences: Aboriginal groups themselves, environmental impact assessment bodies and regulators, and the federal and provincial governments that issue project authorizations. If it wishes to object to the issuing of permits and licenses, the Aboriginal group needs to be able to demonstrate that it made a reasonable effort to resolve issues through dialogue. Simply avoiding meeting with the developer may not constitute a lack of consultation by the company. Developers need to be able to meet the test traditionally applied by the Courts, which is to show that they have made "all reasonable efforts" to consult with all potentially affected Aboriginal groups.

Section 35 rights are special rights to lands and entitlements that aboriginal people in Canada have had legally confirmed in the *Constitutional Act*, 1982 under Section 35.

The goal of consultation by the Crown, as set in *Haida*,[9] is to substantially address the Aboriginal group's concerns. It has also been established that all parties have to negotiate in good faith, meaning that relevant information and impacts should be shared from Aboriginal communities, as well as by the proponent and government. This does not exclude "hard bargaining" as a strategy for negotiation. However, the Supreme Court has emphasized that the consultation process does not give Aboriginal groups a veto over decision making.[10]

Lower levels of impact on rights and low severity of harm on Section 35 rights may require notice of the proposed decision and an opportunity to discuss the issues. In cases of deep impact on rights and high severity from the proposed decision, there will be a need for "deep consultation" moving toward a requirement of meaningful accommodation (see below).[11] The Crown must share information openly with the Aboriginal group about the proposed decision or action, including timing of the project, location, duration, nature of disruption, and impacts, among other details. Aboriginal groups do not need to share their information with the Crown, but the extent to which they do so will influence the level of consultation in which the Crown chooses to engage.[12]

Duty to Accommodate

When there is considerable potential that a project will adversely affect a strongly held Aboriginal right, accommodation by the Crown is required. Accommodation is a process of "seeking compromise in an attempt to harmonize conflicting interests."[13] The duty to accommodate will not exist in every case, but may emerge where there is a distinct impact on Section 35 rights, and a high degree of severity of impact from the proposed project. Accommodation by the Crown, interpreted also in the case taken by the Taku River Tlingit,[14] tends to include implementing or requiring implementation by others of measures for avoidance of the impact, minimization or mitigation of the impact, or as a last resort, compensation for an impact. The law is much less highly developed in this area.[15]

While the duties to consult, accommodate and in certain circumstances seek consent form the basis for the general relationship of the Crown to Aboriginal groups across Canada, the specific legal context for an IBA negotiation varies from region to region.

Legal cases have collectively begun to establish a spectrum of consultation and accommodation (as suggested in *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 and by Nouvet 2009[16]) which depends on the level of risk that the proposed decision carries for Section 35 rights. In essence, where there is a strongly substantiated claim and where the proposed decision will cause serious harm, there is a stronger need for consultation and accommodation. These conditions will provide a significant basis for the negotiation of IBAs.

When there is considerable potential that a project will adversely affect a strongly held Aboriginal right, accommodation by the Crown is required. Accommodation is a process of "seeking compromise in an attempt to harmonize conflicting interests."

Historic and Modern Treaties

Treaty rights are those granted through specific agreements entered into by some First Nations and the federal government. While there is no reference to Impact and Benefit Agreements made in the historic treaties, court cases have ruled that treaty rights cannot be infringed on, and that consultation must be undertaken, and as such create a lever for consultation and the possibility of an IBA. Historic treaties continue to be re-interpreted by the courts, as in the challenge to issuance of rights in the case of Mikisew Cree. This case established that consultation requirements from historic treaties are similar to those of modern land claims agreements, namely that there be adequate notice, information, time and opportunity to express concerns, and serious consideration of those concerns.[17]

Modern Land Claim Agreements

Modern land claim agreements are much more explicit in their support for negotiated agreements. The federal government introduced its first land claims policy after the *Calder v. the Attorney General of British Columbia* (1973) decision, which established the Nisga'a title to lands they traditionally used and occupied. In this claim, it was established that unfulfilled treaty rights and claims of groups who demonstrated traditional use and occupancy that had not been extinguished by treaty or superseded by law had to be respected.[18] The ensuing federal land claims policy has resulted in many modern land claim agreements.

Many modern land claim agreements expressly identify the need for IBAs, or similar agreements. This makes their requirement very strong, given that most land claim agreements, where they disagree with other legislation, are to prevail.

Although each agreement has unique structural and procedural arrangements, there is a common approach to modern land claim agreements, which is to have:

- A specific tract of land identified and confirmed as land held by the group in fee simple;
- A larger tract of land identified to be co-managed with the federal government and the territorial or provincial government;
- A larger area within which Aboriginal land use rights, such as hunting, fishing, trapping and gathering, continue to apply; and
- Conditions for the negotiation of IBAs in relation to extractive industries and protected areas, among other industries.

Many modern land claim agreements expressly identify the need for IBAs, or similar agreements. This makes their requirement very strong, given that most land claim agreements, where they disagree with other legislation, are to prevail.[19] Once a land claim or settlement agreement is executed and ratified, federal legislation and provincial or territorial legislation can be brought into force, and the claim is then protected under Section 35 of the *Constitution Act, 1982.* Examples of agreements with IBA requirements include:

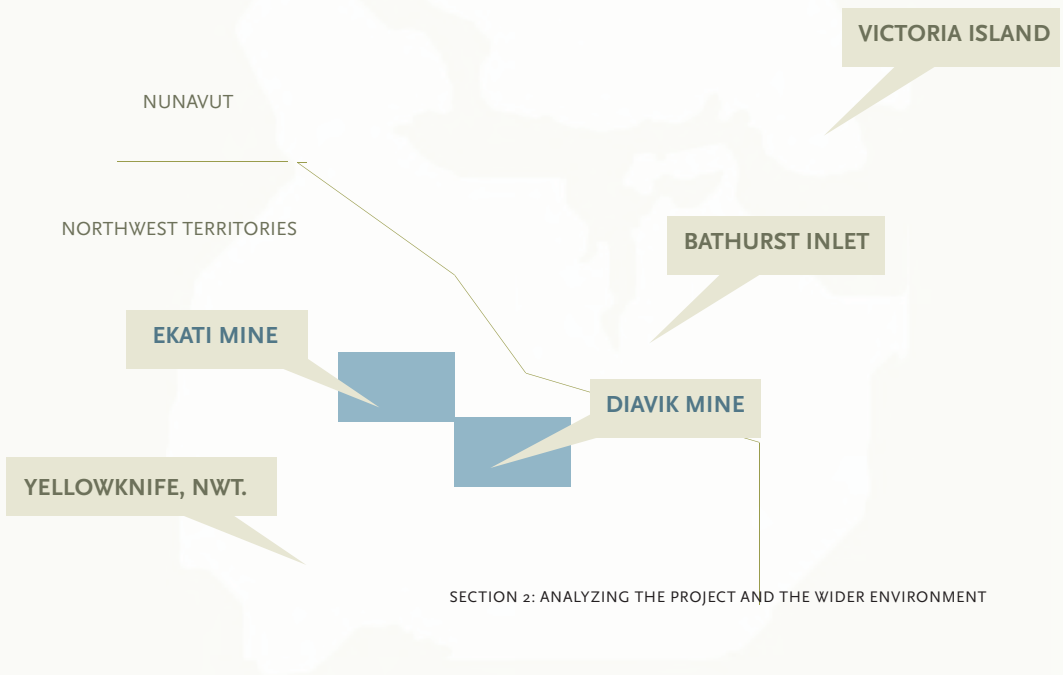
- The Nunavut Land Claims Act requires an Inuit Impact and Benefit Agreement (IIBA). In Article 26 of the agreement, the procedures, substance, parties, and linkages to the overall regulatory process are identified for "major development projects."[20] Further, IIBAs are negotiated within a broader land claims context, including specific provisions for matters such as wildlife compensation, surface access and surface rights adjudication, and the sharing of resource royalties between Inuit and the Crown. The Nunavut Lands Claim Agreement is the most extensive of all land claim agreements in its requirement of an IBA, as Clause 26.2.1 states that, subject to certain limitations, "no Major Development Project may commence until an IIBA is *finalized* in accordance with this Article." Clause 26.4.1 of the Nunavut Agreement deals with the start of negotiations, stating that: "At least 180 days prior to the proposed start-up date of any Major Development Project, the DIO [Designated Inuit Organization] and the proponent, unless they otherwise agree, will commence negotiations, in good faith, for the purpose of concluding an IIBA."
- In the NWT, there is no single IBA regime. Each settled land claim deals with agreements, but not to the same level of detail as in Nunavut. The Inuvialuit Final Agreement requires three agreements that hold functions similar to

IBAs. The first, participation agreements, must be negotiated where the use of the surface is more than casual or temporary. These agreements include provisions governing access and land use, as well as measure for sharing of economic benefits.[21] While these are voluntary agreements, the federal government may establish timetables and negotiation procedures when agreement is not reached. Cooperation agreements may also be entered to address social and economic interests, including employment, education, training and business opportunities. Finally, concession agreements cover subsurface resources owned by the Inuvialuit, and again deal with employment, training and goods and services.

- The Sahtu and Gwich'in comprehensive land claims agreements include provisions on impacts and benefits, where the Crown owns surface and subsurface lands. Where surface access to Aboriginal-owned land is required to develop mineral rights issued by the Crown,[22] access agreements are negotiated, which usually occur in construction and give leverage to the land claim authority, as they are tied to the exploration license. These agreements rely on the Canada Mining Regulations, which do not require benefits agreements, but do require consultation that can include discussion of benefits.

- The Tłı̨chǫ Agreement requires negotiation (but not completion) of an IBA for major mining projects. As well, the Tłı̨chǫ receive yearly royalties. The Tłı̨chǫ Agreement requires that the government "develop the measures it will take to fulfill this obligation, including the details as to the timing of such negotiations in relation to any governmental authorization for the project." There is no guidance on timing or requirement for completion of the IBA before permits are issued.

Where land claims are still unresolved, Aboriginal rights and mineral rights may be unclear and there may be conflicting Aboriginal claims to areas of land where mining projects are being developed.[23] This was the case in the NWT throughout the negotiations for the EKATI and Diavik diamond mines in 1996 and 2001. This uncertainty can also create an incentive for corporations and governments to negotiate IBAs so that development may proceed. However, competing claims may also undermine the community and regional unity that is critical to the beneficial outcomes of IBAs, an issue discussed in the final section of this chapter.



Legal and Policy Levers for IBAs

IBAs or similar contracts can be required through legislation, regulation and through policy. There is no single legislative or policy framework that drives the negotiation of IBAs in Canada.

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Two major federal acts governing resource development in Canada call for benefits agreements or consultation.

- The *Canada Oil and Gas Operations Act* (COGOA) (Section 5(2)) requires approval of benefits plans by the company by the Minister of Indian and Northern Affairs before any work or activity is authorized. A benefits plan is "a plan for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan." There is a specific requirement that benefit plans include provisions for disadvantaged individuals or groups.

- The *Canada Petroleum Resources Act* references the requirement in COGOA[25] for benefits plans on Crown-owned land. This statute requires that "no work or activity on any ... lands that are subject to an interest [granted pursuant to the Act] shall be commenced until the Minister has approved ... a benefits plan, pursuant to subsection 5.2(2) of the *Canada Oil and Gas Operations Act*" (section 21).

Provincially, each jurisdiction sets out its own mining regulations, most often dealing with aspects such as procedures for making a claim, environment, and reclamation. Current provincial and territorial acts and regulations should be reviewed for benefits provisions as they relate to a specific region or project. For example, Saskatchewan requires employment and training plans in the land leases issued for mining projects.[26] Surface leases require that a company enter into a Human Resource Development Agreement, and later file annual employment plans. The employment plan covers the corporate plan to recruit, train and hire northern workers each year. As a result of these agreements, northern Saskatchewan mines have hired more than half of their workforces from the North. The province then works with the data from all Saskatchewan companies to develop a multi-party approach to training and employment in the sector.

Where they are empowered to do so, regulatory boards with responsibility for land management or project or environmental approvals can require extensive consultation with Aboriginal communities. For instance, the National Energy Board requires a proponent to file a copy of its Aboriginal consultation protocol, along with documented policies and principles for collection of traditional knowledge or traditional use information.[27]

The Alberta Energy and Utilities Board considers traditional economic knowledge and environmental and socio-economic assessments in advance of oil and gas permitting.

In the absence of any explicit federal policy or legislation on IBAs, the context of negotiation of agreements has often been set in the North through the intervention of a federal minister. The Minister of Indian Affairs and Northern Development conditionally approved permits for the EKATI Diamond Mine in the NWT, and created the leverage needed by communities to negotiate IBAs by setting a 60 day limit. The minister required "satisfactory progress" towards agreements with the impacted groups before licenses and permits could be issued. This intervention signalled a policy decision by the federal government that IBAs were an important part of the regulatory and benefits package for this project. This threat has loomed over Canadian mining projects ever since.

Even in the absence of a clear legal and regulatory regime or ad hoc policy measures by the federal government, agreements between project developers and Aboriginal organizations may still be concluded. In some cases, Aboriginal groups have local policies that require consultation and agreements to win community approval for proposed projects. In BC, the Taku River Tlingit Mining Policy creates a basis for negotiation of agreements and more generally for establishment of relationships with developers. It sets out content and process requirements for IBAs, including consultation procedures. The policy suggests an IBA cannot be concluded by the Taku River Tlingit First Nation until the environmental impact assessment is completed, an accommodation agreement is reached with BC or Canada, and the draft IBA has been ratified by a joint clan meeting.

In other cases, an IBA happens in response to the pressure applied to the company by the community, as was the case in Labrador with the Voisey's Bay nickel project. In this case, the communities applied pressure to the company resulting in a change in their corporate policy. Inco's policy originally was not to negotiate an IBA prior to project approval, but community pressure resulted in significant agreements. Other alternative ways to influence development are discussed in the section on the wider political context.

Even in the absence of legislation or policy, corporations are often motivated by their own practices elsewhere (e.g., an IBA negotiated with traditional owners in Australia), or by their own corporate policy.[28] However, in some cases corporations do not engage in any negotiation of IBAs, as a matter of policy. For example, in Alberta, no IBAs have been negotiated, despite massive industrial development of the tar sands. This is likely a result of the political climate in Alberta, which is strongly supportive of resource development and antagonistic to Aboriginal rights. Corporations use this climate to reinforce a policy of non-negotiation.

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TAKU RIVER

Canadian Environmental Approval and Regulation

Environmental assessment is a process designed to predict the environmental effects of a proposed project before it is carried out.

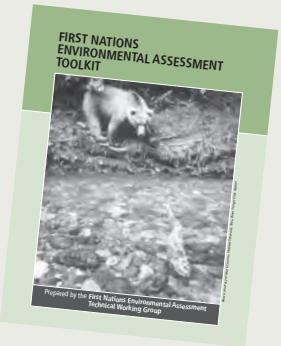
Environmental impact assessment (EIA) is a process designed to predict the environmental effects of a proposed project before it is carried out. Assessments identify possible environmental effects, propose measures to mitigate adverse effects, and predict whether there will be significant effects, even after mitigation is implemented.

EIA in Canada in relation to mineral development focuses overwhelmingly on assessment of, and possible approval for, the commercial development of mineral deposits that have already completed advanced exploration work. Advanced exploration work can itself have significant environmental impacts, as it can involve extensive ground-breaking activity such as drilling. Therefore, Aboriginal communities may feel exploration should be subject to environmental assessment. If so, provision for an assessment would have to be negotiated either as part of an IBA, a precursor agreement such as a Memorandum of Understanding (MoU), or a stand-alone agreement dealing specifically with this issue. Including such a provision in an IBA would require completion of the agreement before advanced exploration – at a time when the community had little information on the proposed project. It is therefore preferable to deal with this issue as part of an MoU or stand-alone agreement.

EIA under federal jurisdiction in Canada is governed by the 1995 *Canadian Environmental Assessment Act* (CEAA), and is administered by the Canadian Environmental Assessment Agency. However, because the *Constitution Act* of 1867 did not specifically assign the environment to any one jurisdiction (federal or territorial) there is no exclusive authority to enact legislation over the environment. As a result, environmental assessment legislation falls under the jurisdiction of the federal, provincial and territorial governments. This means there is often overlap of jurisdictions, and consolidation to avoid duplication often occurs.

For in-depth information about the environmental assessment process, see the *First Nations Environmental Assessment Toolkit,* available at www.fneatwg.org

The Canadian Environmental Assessment Agency also provides materials on the nature of the process and public involvement, at www.ceaa-acee.gc.ca



It is critical for communities to understand:

- Which branch of the government or agencies will be the lead in an assessment and which acts will apply;
- What the possible levels of environmental assessment are in the region, and the nature of the triggers to different levels of assessment;
- Provisions for minimizing impacts and creating benefits of the applicable assessment; and
- Sequencing of the EIA and the IBA.

EIA Requirements

The *Canadian Environmental Assessment Act* requires that an environmental assessment be carried out for proposed projects under four conditions:

- The federal authority is the proponent of the project;
- Grants or other financial assistance to the proponent for the purpose of enabling a project are given;
- A federal authority grants an interest in land to enable a project to be carried out; or
- A federal authority exercises a regulatory duty in relation to the project, so that the authority must issue a permit, license or approval regarding a project.

A range of federal regulations guide whether the Act applies, what type of environmental assessment is required, and inclusion and coordination of federal departments.

It is possible to trigger an EIA under the *Canadian Environmental Assessment Act* for a project that is also subject to an EIA by another jurisdiction (provincial, territorial, or Aboriginal). An example of this is where a proposed mine will impact on federal jurisdiction (water or fish habitat), but also on natural resources (which are under the jurisdiction of the provinces).

When multiple jurisdictions are involved, a single lead will be identified, generally an agency or review panel with delegates from each jurisdiction. Where both federal and provincial laws apply, a "harmonization" process may occur to facilitate an integrated approach.

Harmonization is guided by the 1998 *Canada-wide Accord on Environmental Harmonization* and its *Sub-agreement on Environmental Assessment*. It is achieved through bilateral agreements, commonly termed *Canada-(name of Province) Agreement for Environmental Assessment Cooperation*. For provinces or territories where there are no bilateral agreements, arrangements on a project-specific basis are made to prevent duplication of effort. These agreements typically include: early notification of projects, establishment of a single window, coordinated EIA using a single process, integrated information requirements, coordinated decision-making and guidelines for joint review.[29]

Projects may require both federal and provincial/ territorial assessments – for example, when a proposed mine will impact on water or fish (federal jurisdiction) but also natural resources (provincial jurisdiction). When multiple jurisdictions are involved, a single lead will be identified.

SINGLE WINDOW: A facility that allows parties involved in environmental impact assessment to lodge standardized information and documents with a single entry point to fulfill all related regulatory requirements. *For other definitions see the glossary on page 203.*

Each province and territory has a particular environmental agency, and EIA is guided by a range of legislation, regulations, and guidelines. Given that each affords unique levers for environmental protection, citizen engagement, environmental follow-up or inclusion of Aboriginal knowledge, it is critical for community negotiators to understand the context for each project assessment.

Each province and territory has a particular environmental agency, and EIA is guided by a range of legislation, regulations, and guidelines. Given that each of these instruments can afford unique levers for environmental protection, citizen engagement, environmental follow-up or inclusion of Aboriginal knowledge, it is critical for community negotiators to understand the context for each project assessment.

Legislation may apply in a provincial context to environmental protection and enhancement, EIA, natural resources conservation, energy resources conservation, and waste management.

Regulations may guide the process of EIA, dealing with areas such as licensing procedures, participant assistance or timelines. For example, Manitoba has regulations on licensing procedures, participant assistance, and joint environmental review, while Ontario has issued regulations on deadlines (e.g., *Regulation 616/98 Deadlines*).

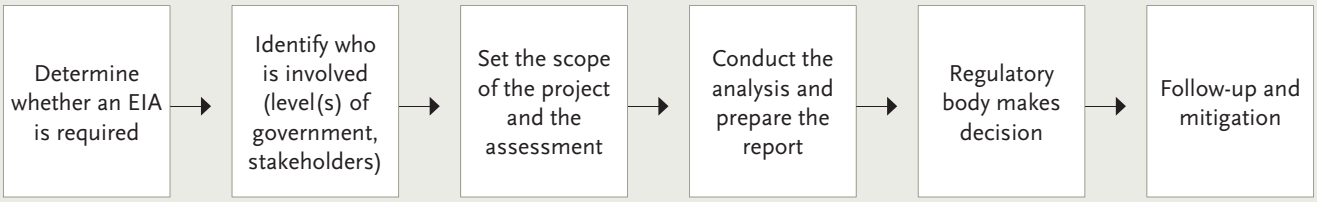
Policies may also be issued, such as BC's *Public Consultation Policy*, as well as the *New Relationship*[30] document, which commits the BC government to jointly establish effective procedures for consultation and accommodation with Aboriginal people. Policy instruments, such as environmental or socio-economic agreements, may also be a tool for capturing regional, provincial or territorial benefits and mitigating impacts (*see Legal and Policy Levers for IBAs* on page 34).

Finally, regulatory boards have the power to issue guidelines. For example, the Mackenzie Valley Review Board has guidelines for traditional knowledge, socio-economic impact assessment,[31] and cultural impact assessment. Other guidance is often issued by the appropriate boards on the review and approval process, as well as on how to participate in assessments (e.g., *Guide to Interested Person and the Public to Participate in Assessments* by the Yukon Environmental and Socio-Economic Assessment Board).[32]

This situation is clearly complex, and while we offer an overview, communities will need to go in depth into the legislation, regulations, policies and guidelines that will guide assessment at the federal, territorial and provincial level.

Figure 2.2: Environmental Impact Assessment Process

While every jurisdiction (federal, provincial/territorial) has different formal stages, most follow a typical process.



Levels of Environmental Assessment

While each jurisdiction is different, there are generally three levels of EIA involving increasingly comprehensive assessment and increased opportunities for public participation. Progression to a higher level depends on a variety of triggers. Each piece of environmental legislation will include unique triggers, so that the *Canadian Environmental Assessment Act* (CEAA) differs slightly from provincial legislation, and for example, the *Mackenzie Valley Resource Management Act* (MVRMA). It is critical to understand what it is that triggers the next level of assessment.

Table 2.1 on page 40 summarizes levels of assessment and relevant triggers for Canada and for the NWT under the MVRMA. Levels in these cases are:

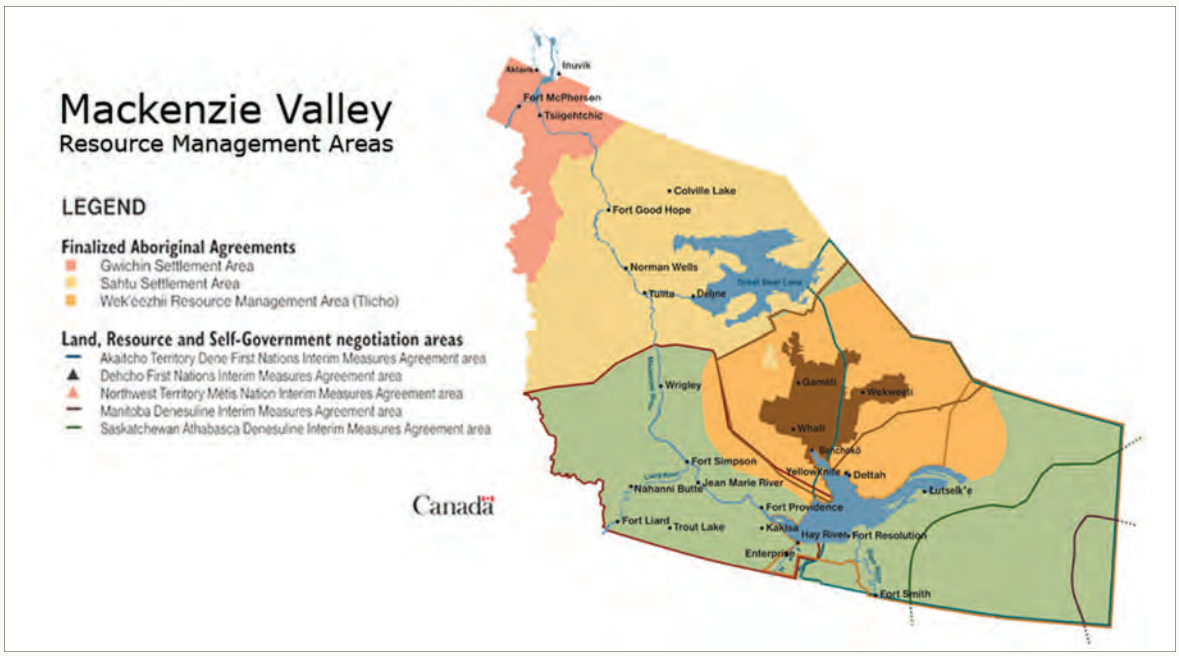
- Screening/preliminary screening;
- Comprehensive study/environmental assessment; and
- Independent panel review/environmental impact review.

Environmental impact assessment (EIA) refers to any assessment that is done, while environmental impact review (EIR) refers to the most comprehensive level of assessment that can take place for major development projects.

Public concern registered with the appropriate authority is often a trigger for sending an assessment to the next level. In the Mackenzie Valley, for example, an advanced exploration project for uranium was assessed at the level of environmental assessment primarily because of the level of public concern. The project application was denied after review at the second most comprehensive level of study (EA, see Table 2.1).

The CEAA contains a progression from lowest to highest levels of effort, but phases do not necessarily have to be sequential and some may be omitted. This means that a panel review might be established initially, rather than having screening trigger a panel review.

There are often requirements in land claim agreements for environmental assessment to occur with any major development permit application. For example, Article 12 of the Nunavut Land Claim Agreement sets out an environmental review process for development applications as well as the establishment of a review board. Similarly, Chapter 11 of the Labrador Inuit Land Claims Agreement sets out a process for environmental review.



As a result of land claim agreements, Aboriginal authorities have the right to move a project proposal to the highest level of assessment.

Further review will occur when:

- It is uncertain whether the project is likely to cause significant adverse environmental effects;
- The project is likely to cause significant adverse environmental effects and it is uncertain whether these effects are justified; or
- Public concern warrants it.

In contrast, under the MVRMA, the process is always sequential, so that every project has to undergo all these phases, but triggers to the possible next phase are assessed in each stage.

Table 2.1: Comparison of the Levels and Triggers of Assessment in the Canadian Environmental Assessment Act and the Mackenzie Valley Resource Management Act

Canadian Environmental Assessment Act	Mackenzie Valley Resource Management Act
SCREENING is a self-assessment by the responsible authority, with a systematic approach to documenting environmental effects, determining the need to eliminate or mitigate them, and modifying the project plan to recommend further assessment through mediation or assessment. Public participation and follow-up programs are discretionary in screening. TRIGGER TO SCREENING: When a project must be reviewed (see four conditions outlined on page 37), but does not fall into any of the categories below.	**PRELIMINARY SCREENING** is a review of proposed developments that require a license, permit or authorization to determine whether the development might have significant adverse impacts on the environment, or cause public concern. If neither of these triggers are in place, the applicant can be sent to the regulator for permitting and licensing. TRIGGER TO PRELIMINARY SCREENING: When a proposed project requires a license, permit or authorization
COMPREHENSIVE STUDY is also a self-assessment as the responsible authority ensures the conduct of the EA. However, there is scope for public comment on the report, and the Environment Minister makes recommendations regarding the decision-making process. TRIGGER TO COMPREHENSIVE STUDY: When there is the potential for significant adverse environmental effects or when there are public concerns (e.g., large scale oil and natural gas, nuclear power). Projects with the potential to cause significant adverse environmental effects will be reviewed this way, such as construction and operation of a metal mine, over 3,000 tonnes per day. There are *Comprehensive Study List Regulations*. Early on, the minister will decide whether a project should be dealt with through comprehensive study, or referred to a mediator[a] or review panel.	**ENVIRONMENTAL ASSESSMENT** involves thorough study of a proposed development application by MVEIRB to decide whether the development will have significant adverse impact or is likely to cause public concern. If so, the board can recommend to the federal minister to: proceed with permitting and licensing as is; proceed with some measures in place; or reject the project. Or the board may order an EIR. TRIGGER TO ENVIRONMENTAL ASSESSMENT: Might be a source of significant environmental impact or public concern.
INDEPENDENT REVIEW PANEL involves assessment by a group of experts appointed by the Environment Minister to assess environmental effects. Review panels have the opportunity to encourage wide discussion and exchange. The final decision rests with the government. TRIGGER TO INDEPENDENT REVIEW PANEL: When there is uncertainty about whether the project is likely to cause significant adverse environmental effects, or it is likely to cause significant adverse environmental effects that might be justified in the circumstances, or public concerns warrant it. It is up to the Environment Minister to choose between mediation or assessment by review panel.	**ENVIRONMENTAL IMPACT REVIEW** follows an environmental assessment when MVEIRB needs a more comprehensive examination by an independent panel, appointed by the Review Board. Final decisions rest with the government. TRIGGER TO ENVIRONMENTAL IMPACT REVIEW: MVEIRB decides it needs a more focused review, given the possible significance of environmental impacts or public concerns.

Note: [a] *Mediation* is another option available for independent review, considered at the same level as a comprehensive study. It involves voluntary negotiation run by a mediator appointed by the Environment Minister.

Source: CEAA drawn from the Canadian Environmental Assessment Agency, "Environmental Assessments" accessed at www.ceaa-acee.gc.ca/default.asp?lang=En&n=4F451DCA-0. MVRMA drawn from the Mackenzie Valley Review Board, "About the Review Board" accessed at www.mveirb.nt.ca/about/

During an Environmental Impact Review, a proposed project undergoes a full evaluation of its potential impacts on the biophysical and human environment. This toolkit does not include a detailed review of EIR, the steps, the nature of indigenous engagement, or the possibilities for influencing this process. Rather, readers should refer to other documents on the process, such as the *First Nations Environmental Assessment Tool Kit* (see page 36).

Depending on the jurisdiction, communities may be deeply involved in the EIA and traditional and local knowledge may be weighed alongside scientific evidence. The extent of this involvement is a matter of negotiation, mainly with government; in some cases, communities have been able to push and get a much stronger role than they were originally offered, as occurred with the EKATI Diamond Mine in the Northwest Territories and the Voisey's Bay nickel mine in Labrador.

Communities need to be engaged early in EIA at any level so they can identify the scope of what is reviewed and ensure that all appropriate issues are studied. This is typically done at the scoping stage. An Environmental Impact Statement (EIS) done by the developer will include information that the responsible authority requires the project proponent to review. This key document should detail all of the development components envisioned and how alone, in combination with each other, and in combination with other human activities, they are expected to affect the environment. This EIS will be a critical document for communities to study and understand, given that it may review many of a project's potential impacts and benefits.

Communities may be deeply involved in the EIA and traditional and local knowledge may be weighed alongside scientific evidence. The extent of this involvement is a matter of negotiation, mainly with government; in some cases, communities have been able to push and get a much stronger role than they were originally offered.

Minimizing Impacts and Maximizing Benefits

Under every level of environmental impact assessments, there are mandatory factors that must be considered. The negotiating team can consider how these factors can be influenced by the communities, and how specific issues of concern to Aboriginal parties can be included in the particular EIA, as well as how mitigation (measures to lesson severity) and follow-up can be optimized. This is relevant to IBAs, as is made apparent in the next section on the relationship between EIAs and IBAs. Suffice it to say, important measures not achieved in the EIA can be attained in IBA negotiations.

Factors considered in EIA include:

- Environmental effects of the project;
- Significance of these environmental effects;
- Comments from the public;
- Mitigation measures that are technically and economically feasible; and
- Other matters relevant to the EIA that the responsible authority or minister may require to be considered (such as the need for the project, or alternatives to the project).

It may be useful to review what are considered to be the recent cutting edge assessments, in order to understand the factors that may be considered in the particular review the community may face. For example, the 1997 Review Panel of the Voisey's Bay mine and mill considered for the first time the sustainability effects of the proposed

undertaking. This was done despite the fact that there were no special criteria or process rules for sustainability assessment in the relevant legislation.

In 2008, the Joint Review Panel of the Kemess North mine expansion proposal used a sustainability model to assess the project. The panel rejected the proposal based on:

- Cost to future generations—waste rock water treatment management issues that would need to be managed in perpetuity; and
- Cultural impact—submarine tailings were to be placed in a culturally significant lake.

The developments in Kemess North under a Joint Review Panel set new precedents that can be used as models for communities. Further, panels can be models of local power and engagement in decision-making. For example, the Innu and Inuit used "multiple strategies and venues to become powerful players in decision-making"[33] using the panel hearings, the media and the courts (see Section 2 on the wider implications of agreement making).

Review of other EIAs can help negotiating teams identify cases where development proposals are rejected or accepted with significant mitigations. In the cases where the mitigations are unusual or innovative, knowledge of them will serve the communities well in negotiations with the responsible authority and with the company.

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At the end of an EIA, the responsible authority releases a report (e.g., "Report of Environmental Assessment") that details the mitigation measures required before permitting and licensing occurs. Understanding the weaknesses and strengths, as well as the possibilities for mitigation, will help expand the options considered by the communities, and help to avoid pitfalls, such as general wording of mitigations, mitigations that have no teeth or are too general to be implemented, or repetitive or weak mitigations.

Specific policy tools are often used to ensure EIA follow-up, and understanding the measures they include will be relevant to IBA negotiation. For example, environmental agreements and socio-economic agreements (SEAs) may be used to continue data collection, monitoring and ongoing management of mine-related issues. These new policy instruments have been established to enhance the follow-up and implementation of measures required under environmental assessment, and to maximize local or regional (not just Aboriginal) benefits from resource projects. For instance, a specific issue may be covered under a socio-economic agreement, and thus not need to be covered in a benefits agreement. Because the SEA for Diavik established the relevant employment targets for impacted Aboriginal groups, the Diavik Participation Agreement with one Aboriginal group did not develop employment targets.

If the decision-maker deems that the proposed development is not likely to have significant adverse impacts on the environment (with or without mitigation measures put in place), the project will proceed to the regulatory, or permitting, phase of approvals. During this phase, the specific land use permits and water licenses required by government will have conditions attached to them, designed to minimize impacts on the environment and set up monitoring and management protocols.

Timing of the Negotiation of IBAs and EIAs

As there is no specific provision in environmental legislation dealing with IBAs, there is no legislative basis for dealing with the interaction between the IBA and the EIA. A critical challenge for Aboriginal communities lies in how to align the process of EIA with that of negotiating IBAs, and in particular how to integrate the flows of information that arise from each; how to manage the opportunities that surface in each; and how to maintain negotiation leverage in the face of multiple time pressures. Analysis of the stages in each process and the time constraints they generate is essential. The points of maximum leverage and potential loss of leverage can then be identified and managed.

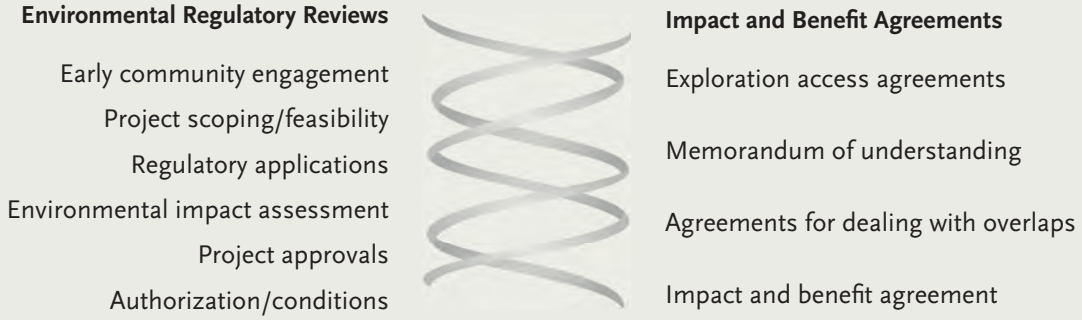
A critical challenge for Aboriginal communities lies in how to align the process of environmental impact assessments with that of negotiating impact and benefit agreements.

Critical tasks for the Aboriginal community team include the need to:

- Identify clear overall goals for both processes;
- Be aware of overlaps and possible trade-offs;
- Track the resource implications of different approaches; and
- Work through which strategies hold the greatest advantage, given available resources.

Figure 2.3 shows the stages of an environmental regulatory review next to those of an IBA. The use of the double coil suggests the flexibility of timing. Given that each region has a unique context, there is no formula for when agreements are reached. The timing of the regulatory process can impact heavily on the negotiation of an IBA. For example, if it is likely that regulatory review in project scoping will reveal only a low level of impact and thus trigger a low level of environmental review, the leverage for an IBA may be impacted. Thus it may have been best to negotiate an IBA before the environmental assessment level is selected. An early agreement on communication protocols and funds can make reference to the future negotiation of an IBA.

Figure 2.3: Stages in Environmental Regulatory Reviews and IBAs



Some issues may need to be dealt with within both IBAs and other policy instruments. For example, EIAs often guarantee opportunities for increased participation of Aboriginal people in environmental planning and management, with membership in monitoring boards, direct involvement in monitoring, and application of traditional knowledge to environmental planning. However, these agreements rarely give regulatory power or authority to Aboriginal people. As a result, negotiators have sought greater environmental powers in their IBAs. For example, the Innu and Inuit IBAs for Voisey's Bay require environmental monitors and project-level joint monitoring committees "on the ground."

Given that each region has a unique context, there is no formula for when agreements are reached. Further, one form of agreement can stipulate that future agreements will be negotiated.

Thus, a variety of policy instruments can be used in combination with the IBA to pursue goals. For example, the Innu and Inuit aimed to have the maximum control over identification and management of environmental issues. As they were dealing with two players, Inco and the Newfoundland government, they used an Environmental Management Board (EMB) established under the EIA to deal with issuance of permits by the government, facilitating a role for themselves in the environmental permitting system. Inco was not engaged in this EMB, except as an applicant for the permits, and the EMB was not involved in day-to-day management of environmental issues. Thus, the EIA gave no ongoing oversight role to the Innu and Inuit. This is why they used their IBAs with Inco to secure funding to have Innu and Inuit monitors permanently on site, and to establish a joint environmental committee with Inco.

Timing the EIA and IBA: Three Scenarios

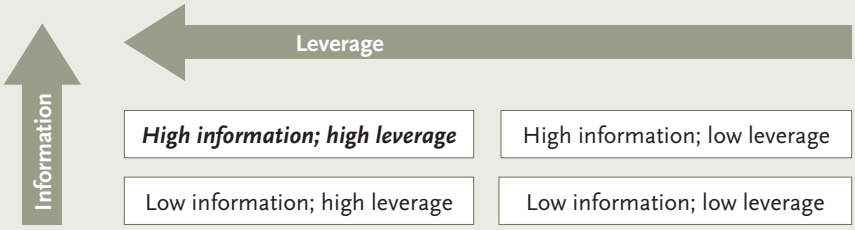
There are three scenarios for phasing IBA negotiations with EIAs:

- Negotiation of the IBA before the EIA;
- Negotiation of the IBA after the EIA; and
- Negotiation of the IBA and EIA at the same time.

In this section, we consider the benefits and drawbacks of each scenario, paying particular attention to the points where an Aboriginal community has the most information, highest leverage, or greatest ability to link the IBA to the EIA process. Figure 2.4 illustrates what community negotiators ought to plan for. In an ideal process, the community will negotiate an IBA at the time when there is maximum leverage, and the most information available.

Figure 2.4: Ideal Timing for EIA and IBA Negotiations

In an ideal process, the community will negotiate an IBA at the time when there is maximum leverage, and the most information available.



Scenario 1: Negotiation of IBA Before EIA

Implications for IBA:

- Leverage held by the community is high at this point, because the company does not yet have the approval it needs.
- There is a premium for the company on the certainty derived from completing an IBA. The company can also make representations to the regulatory authorities that it has achieved the consent of the impacted communities.
- Little information is available on the potential impacts and benefits of the project for use in the negotiation, because there is no EIA to rely on. Often, a bankable feasibility study, another key source of information, has also not been completed.
- There may be no certainty on the nature or level of EIA the project will undergo. As a result, the community may negotiate an IBA at this stage, and then find they gain very little in the way of mitigation if the project triggers only screening and then receives permits, rather than undergoing a full EIA.
- The potential for an IBA that is not adaptive is high. There will be little information available for designing mitigation measures to protect the cultural, social or environmental environment. Any mitigation measures in the agreement will likely be vague and possibly not protect against what impacts are felt from the project. This option thus relies on a substantial commitment by all parties in the EIA to design strong measures for protection given that the lack of certainty on the EIA process is so high, and the available information for designing effective mitigation is so low.

Implications for the EIA:

- The community may negotiate resources in the IBA to support its participation in the EIA. This is often the only upside of negotiating an IBA before an EIA.
- By giving consent to the project, the community may negatively affect the responsiveness of the proponent in the EIA process, so that it may be less responsive to community concerns. The proponent may feel that it has negotiated consent already, and therefore pay much less attention to the impacts identified through the EIA.
- A completed IBA may positively affect the EIA decision-makers and the minister's view of the project, influencing them to approve the operation given that the company has attained "consent."
- The community may limit its ability to really push on key issues in the EIA, especially if people feel they must now support the project or if they have agreed in the IBA not to "frustrate or cause delays" to the project.
- The community will not be able to seek appropriate protection for critical environmental areas, given that they do not know what protections will be achieved through the EIA.

KEY POINTS FOR SCENARIO 1 – IBA BEFORE EIA

Implications for IBA:

- Leverage after signing is low
- Certainty for the company is high
- Little information available
- No protections for environment or society
- No certainty on environmental assessment process

Implications for EIA:

- Can negotiate resources for environmental assessment
- With community consent given, company and regulator may pay less attention
- May represent consent to minister
- May limit input into the environmental assessment

Scenario 2: Negotiation of IBA After EIA

KEY POINTS FOR SCENARIO 2 – IBA AFTER EIA

Implications for IBA:

- Information is high
- May be loss of leverage (unless IBA is required by land claim)
- Ability to design adaptive mitigation is high

Implications for EIA:

- No information on mitigation from the IBA that regulatory authorities can use

Implications for the IBA:

- Much more information is available on the project and its impacts. This information can be used to design strong mitigation measures in the IBA.
- Unless conclusion of an IBA is a legal requirement for the project to be approved, there is a major loss of leverage to negotiate the IBA once the company has environmental approvals. The extent to which leverage is lost depends on the legal context; in Nunavut, for example, leverage is provided by the requirement in the Land Claim Agreement for an IIBA. It also depends to a lesser extent on what the EIA says about IBAs. For example, the Voisey's Bay panel recommended that IBAs be concluded before the project was approved. The Newfoundland government initially rejected this recommendation, but later accepted it under pressure when faced with project delays due to opposition from the Innu and Inuit.[34]

Implications for the EIA:

- There is no information on mitigation in the IBA that regulatory authorities can use in determining what protective measures should be sought through the EIA process.

Scenario 3: Negotiation of IBA and EIA at the Same Time

KEY POINTS FOR SCENARIO 3 – IBA AND EIA AT THE SAME TIME

Implications for both:

- Heavy burden on resources, which must be managed carefully
- Progress or design problems in one place affect another
- Environmental assessment identifies issues, IBA builds mitigation to address them
- Less leverage until IBA is done

Implications for the IBA:

- The EIA can identify issues, and the IBA is able to build mitigation measures to address these issues concurrently.
- The need to mount an effort on the EIA and IBA fronts simultaneously creates heavy demands on resources, which as a result must be carefully managed. For example, in Voisey's Bay the Inuit and Innu maximized use of resources by dividing responsibility for environmental assessment issues: the Inuit dealt with maritime issues and especially impacts of shipping, while the Innu took responsibility for terrestrial impacts. They covered both issues well and at the same time managed resources wisely. Another way to manage pressure on resources is to negotiate a memorandum of understanding setting out how responsibilities will be shared with an environmental group, or several environmental organizations. A third approach is commissioning reports in a way that feeds into both processes. The question of sharing resources and jointly deciding on the topics and coverage arises.
- The community maintains its leverage until the IBA is finalized.
- Any lack of progress or poor design in one process can affect the other process.

Implications for the EIA:

- There is a need to manage resources carefully. Even where this occurs, the community's ability to maximize its input into the EIA may be compromised by the need to also focus on IBA negotiations. For example, only a limited number of personnel with the skills required to participate effectively in EIA and IBA processes may be available.

The Wider Implications of Agreement Making

While negotiation of project-based agreements with mining companies can generate substantial benefits for Aboriginal communities, it can also have unforeseen and far-reaching impacts on the political, social and economic positioning of Aboriginal groups. It is important to consider these wider implications in balance with what can be achieved through an Impact and Benefit Agreement and to manage them effectively. Strategies for doing so are discussed below.

The negotiation of project-based agreements with mining companies can have unforeseen and far-reaching impacts on the political, social and economic positioning of Aboriginal groups.

In a recent publication, the wider implications of agreement making were identified by comparing Aboriginal groups that had contracts with mining companies, and those that did not.[35] This research highlighted how negotiation of project-based agreements affects the legal and political status of Aboriginal groups and the nature of their relationship with other elements of the political system.

These broader impacts can be highlighted by considering the effect IBAs can have on Aboriginal groups in four specific areas:

- Access to the courts and government regulators;
- Freedom to pursue political strategies;
- Implications for agreements and land claims with the state; and
- Freedom to influence corporate social responsibility.

Access to the Courts and Government Regulators

In the absence of an agreement, Aboriginal access to components of the judicial and regulatory system that are relevant to project approval and management is unconstrained by any contractual obligations to a mining company. Aboriginal people can exercise rights available to citizens generally or rights arising from any specific property or other Aboriginal interests they hold. Those rights may allow them, for instance, to challenge the level of environmental assessment proposed for a project; to take legal action to prevent damage to Aboriginal cultural heritage or the environment; or to sue for compensation if such damage occurs.

Using these legal and procedural rights, Aboriginal groups may be able to influence the terms of contractual and regulatory instruments negotiated between the state and the developer, for instance by helping to shape the conditions attached to environmental approvals and mining leases.

Aboriginal groups may be contractually constrained in their ability, for instance, to object to government approval of a project either in principle or in its current form. In one case, a company used the existence of such clauses to argue that an Aboriginal signatory to the agreement was prohibited from objecting to the grant of a water license required to allow expansion of the project.

At least three features of negotiated agreements can constrain Aboriginal access to the judicial and regulatory systems.

First, recent agreements in Australia and Canada almost always involve Aboriginal support for the project concerned, and/or for the grant of specific titles or approvals required for the project to proceed. For example, many agreements in Canada contain specific provisions that commit the Aboriginal party either to support the project involved or to refrain from opposing it in environmental assessment or regulatory proceedings. A number of agreements commit the Aboriginal parties to not oppose projects in the event that they become subject to an environmental assessment as a result of actions taken by non-signatories to the agreements.[36]

It follows that Aboriginal groups may be contractually constrained in their ability, for instance, to object to government approval of a project either in principle or in its current form. Thus, for example, the operator of one project in Canada used the existence of such clauses to argue that an Aboriginal signatory to the agreement was prohibited from objecting to the grant of a water license required to allow expansion of the project.

Second, some agreements contain provisions preventing Aboriginal groups from using specific legal or regulatory avenues that would otherwise be available to them. For example, under one recent Australian agreement the Aboriginal parties undertook to not "lodge any objections, claims or appeals to any Government authority ... under any [state] or Commonwealth legislation, including any Environmental Legislation..."

Third, agreements may contain dispute resolution processes that preclude the parties from initiating legal proceedings to resolve disputes, or require all other potential avenues for resolving disputes to be exhausted before they do so.

In combination, such provisions can create a fundamental shift in the ability of Aboriginal groups to exercise legal rights they would otherwise have available and more generally to access legal and regulatory regimes relevant to resource extraction.

Freedom to Pursue Political Strategies

In the absence of an agreement, Aboriginal people are unconstrained in pursuing political strategies designed to halt project development or change the nature or timing of development. They can, for instance, seek public support through the media, build political alliances with NGOs such as environmental or social justice groups, lobby government, and mobilize pressure on corporations and their shareholders. For example, Innu and Inuit landowners in Labrador used a number of these strategies to delay the development of the proposed Voisey's Bay nickel project in the late 1990s.[37] The Mirrar, Aboriginal traditional owners of the land on which the proposed Jabiluka uranium project in Australia's Northern Territory is located, used a combination of all of them to oppose development of the deposit. They were ultimately successful, with Rio Tinto agreeing to refill a portal that had been constructed to start mine development and committing not to re-commence development without the consent of the Mirrar.[38]

The common requirement for Aboriginal groups to support a project immediately limits their capacity to manoeuvre politically, particularly in relation to environmental and other groups that might otherwise be valuable political allies. In addition, agreements very commonly (indeed almost universally) include confidentiality provisions that prevent Aboriginal groups from making public information about negotiations and

agreements. Confidentiality provisions can severely constrain the capacity of Aboriginal groups to communicate with the media and with other stakeholders. Confidentiality clauses may be included not only in final agreements, but also in negotiation protocols under which companies provide funds to support negotiation processes – and they may continue to be legally binding even where the parties agree to terminate a negotiation protocol or an agreement as a whole.

The requirement to support a project, combined with confidentiality provisions, can also significantly constrain an Aboriginal group's ability to lobby or otherwise place political pressure on a government in relation to a project. In dealing with government, most Aboriginal groups have two fundamental strengths, often used in tandem. The first involves any capacity they have to delay or halt a project, either by accessing the legal and regulatory systems and, for example, obtaining injunctions on project construction or delays in project approvals; or through direct action aimed at halting or delaying development activity on the ground. The second involves the ability to embarrass government politically by using the media to appeal to its constituents.[39] If contractual agreements preclude or inhibit the use of both strengths, this may substantially reduce Aboriginal capacity to influence government decision-makers.

Implications for Broader Agreements and Land Claims with the State

This last point raises the broader issue of the relationship between Aboriginal groups and the state. The legal and constitutional basis for this relationship varies considerably in settler states such as Australia, Canada, New Zealand and the United States, and in some cases also varies within individual countries depending on the legal status of particular Aboriginal groups. However, it is clear that, in general, negotiation of agreements between Aboriginal groups and mining companies have the potential to influence Aboriginal relations with the state in a number of ways.

States may seek to reduce their budgetary allocations to Aboriginal communities on the basis that the latter now obtain revenues from commercial sources as a result of their agreements with mining companies.

First, states may seek to reduce their budgetary allocations to Aboriginal communities on the basis that the latter now obtain revenues from commercial sources as a result of their agreements with mining companies. This has certainly occurred in Australia,[40] and the prevalence of confidentiality provisions in agreements may reflect, in part, a desire by Aboriginal groups to withhold information on their revenues from government and so reduce the likelihood of a cut in government funding.

Another area in which significant impacts can occur involves attempts by Aboriginal peoples to win legal recognition from the state of their inherent rights to their ancestral states. Both Canada and Australia, for instance, have been and continue to be extensively involved in negotiations and/or litigation with Aboriginal groups regarding either recognition of their rights for the first time through negotiation of comprehensive land claim settlements (Canada) or determinations of native title (Australia); or regarding implementation of treaty obligations that the state has historically ignored. The discovery of a major mineral deposit on an Aboriginal group's land often focuses state attention on land tenure issues, in many cases in response to corporate pressure on state agencies and on political leaders to have these issues resolved as a precondition for undertaking major capital investments. The implications of a stronger state focus on resolving land tenure issues as a result of major mineral discoveries are unclear and require further research.[41]

Freedom to Demand Corporate Responsibility

Agreement provisions regarding Aboriginal support and confidentiality can also result in fundamental changes in the ways in which Aboriginal groups relate to mining companies. The willingness of corporations to undertake corporate social responsibility (CSR) initiatives in relation to any social group depends, in large measure, on the capacity of that group to inflict damage on the corporation by threatening its social license to operate.[42] Groups must apply "an ever-present threat of the loss of social license to operate to ensure that companies recognize and address [their] demands ...civil society organizations need to maintain surveillance and pressure to ensure it is always in the corporate interest to respond to community demands."[43] The capacity of groups to threaten the reputation of corporations is a "crucial lever."[44] Where agreements bind Aboriginal groups to support corporate activities and silence them through confidentiality provisions, they have substantially surrendered their ability to threaten a company's license to operate.

The willingness of corporations to undertake corporate social responsibility initiatives in relation to any social group depends, in large measure, on the capacity of that group to inflict damage on the corporation by threatening its social license to operate.

It may, of course, be the case that this threat is no longer needed, because agreements contain legally-enforceable provisions that ensure the ongoing performance by a company of certain CSR obligations. Two points remain. First, the nature of the relationship between Aboriginal groups and companies has profoundly changed. Second, the question of whether obligations taken on by corporations through agreements with Aboriginal groups are both substantial and enforceable and so represent a "fair trade" for the forbearance promised by those groups cannot be resolved a priori, but only through an examination of the provisions of individual agreements. Another important issue here involves the length of time over which agreements apply, which is typically for the whole life of a project and for major projects this is often measured in decades rather than years. If Aboriginal groups discover after the event that the trade-off they have made is not to their advantage, it may be a very long time before they have an opportunity to change the situation.

Community Goals, Planning and Politics

IBAs are not, and should not, be negotiated in a vacuum, separate from the political life of a community and from its wider economic, social and cultural goals.

Community negotiators must be constantly mindful of the potential impact of political disunity on negotiations with developers and governments, an issue dealt with in detail below. They must also be keenly aware of broader goals being pursued by a community, and ensure that an IBA contributes to these goals, rather than undermining them.

Often negotiators can refer to community planning exercises or consultations undertaken in relation to other processes, such as land claims, to identify key priorities, and use these to identify the issues they should prioritize in negotiations. If a community has not had an opportunity to establish and articulate its goals, negotiators should insist on a community consultation and planning exercise as part of the preparation for negotiations. This does not always occur, with the result that IBAs may contain provisions that are not highly valued by community members. This results in lost opportunities, and can lead to recriminations and social tension in the longer term.

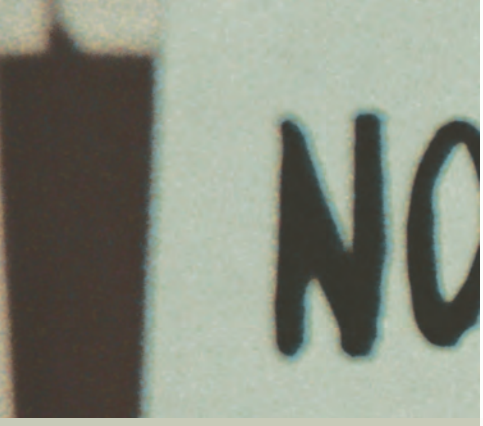
For example, if a community has identified that education and health services are sub-standard because of critical skills shortages in these areas, and that community members have little prospect of gaining and holding industrial jobs until these services are improved, an IBA that focuses heavily on creating employment opportunities in a mining project will be of limited benefit. However, if an IBA creates a substantial, company-funded, scholarship scheme that allows students to study in areas identified as community priorities, the IBA may play a key role in meeting community needs.

Community negotiators must be constantly mindful of the potential impact of political disunity on negotiations with developers and governments. They must also be keenly aware of broader goals being pursued by a community, and ensure that an IBA contributes to these goals, rather than undermining them.

Unity Within Communities

There is a saying that in negotiations, as in war or sport, disunity is death.

If Aboriginal people are fighting among themselves, they will use up time, energy and resources that could be employed negotiating a better agreement. People on the company side, if they are unscrupulous, will use the division against the community. They will encourage the conflict and use it to get concessions, for example by getting some community members to take the deal the company is offering and then pushing the rest of the community to accept it. Even if a company behaves in a principled way and doesn't interfere in community politics, it is likely to feel that an openly-divided community is not much of a threat, won't be a very useful partner, and may later go back on an agreement. For these reasons, the company is unlikely to offer the best possible deal.



If Aboriginal people are fighting among themselves, they will use up time, energy and resources that could be employed negotiating a better agreement. People on the company side, if they are unscrupulous, will use the division against the community.

Internal conflict poses a problem not only because communities not united behind their negotiators are unlikely to get a good deal. Lack of unity for an agreement also means the community is unlikely to put in the effort needed to make it work after it is signed.

This is not to say that there cannot be differences of opinion in communities about the matters covered in a negotiation and an agreement. There will always be differences, as in any community. Some people may want to focus on employment, while others want more emphasis put on the environment or maintaining traditional ways of life. Most people would like to have all of these things and more, but given that this is not always possible or easy, communities will need to work toward unity on what the balance should be.

Communities should do their best to build unity before they start negotiations with a company. Often, it is possible to do this. For example, one community in Australia reached a unified position when people who were strong on protecting culture and the environment and those who were strong on employment and business development agreed that no one would accept an agreement if it didn't have BOTH strong provisions to protect culture and the environment AND strong provisions to promote Aboriginal employment, training and business development. They kept up a united front throughout the negotiations, and in the end, got a strong agreement that delivered what both groups wanted.

Often conflict can arise because of tension between local and regional governance structures. For example, a common source of tension in BC emerges between traditional forms of governance and organizations that are funded and created through the *Indian Act*. These tensions often spill over into IBA negotiations. In Nunavut, conflicts can arise where regional organizations control some permits and royalty provisions, while local organizations control questions of land access. These kinds of problems are best solved privately and in advance of negotiations, rather than allowing a corporation to witness the dispute, and possibly use it to weaken the negotiation position of both parties.

Questions of legitimacy can surface as people fight over who should have the right to negotiate agreements. When organizations such as band or tribal councils make decisions about IBAs, they sometimes do so without the informed consent of all community members. This often occurs because agreements are confidential, and people confuse confidentiality with the need to hold the agreements back from citizens. Citizens need access to all the information to ensure informed consent.

If conflict continues, or if it crops up during negotiation, people should keep this within the community and work to resolve it away from the company.

A lot can be done to avoid internal conflict in the first place. One of the most important ways to do this is to make sure that community members are well informed about what is going on. Conflict often erupts because people don't know exactly what is happening, they hear rumours and then get upset. We come back to this issue later in Section 3, when we talk about communication.

Unity Between Aboriginal Nations

While unity *within* a community is critical to negotiating a successful agreement, unity *between* neighbouring communities or nations can be just as important.

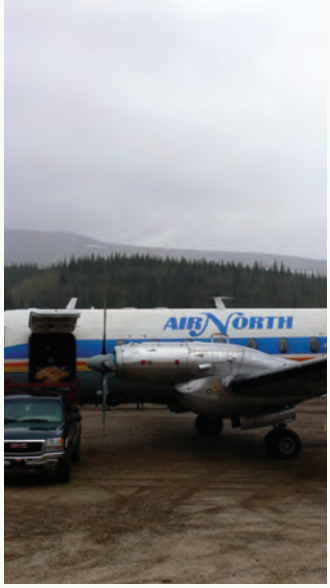
This second area of potential conflict often focuses on boundary disputes and the related issue of which communities has "standing" in relation to a project and therefore has the right to provide input and seek benefits. Such conflicts are often complicated by the fact that they involve much wider issues and interests, some of which may be unrelated to the negotiation. They can be as much a threat to a successful outcome as internal conflicts, and managing them is just as important. But different approaches will be required.

There has been a marked tendency among nations to not share agreements, which has led to disunity nationally and regionally. When communities and nations hold information and agreements close to their chest, rather than openly sharing them with one another, the advantage is given to government and industry, and poor agreements continue to be negotiated. In reality, sharing does not compromise unity, but rather strengthens agreements and outcomes.

Boundary issues are complex and can occur at family, clan, community and regional levels. They are difficult for outsiders to understand, and can become treacherous when they are debated in courts, in land claim agreements, or with companies. Overlapping claims are sometimes used by companies to further undermine unity, to force wedges into wounds, and to decrease the corresponding leverage of each group.

Boundary issues are best dealt with through the protocols and agreements that First Nations have long used to promote peace and unity. Conflict between groups and internally can be managed by elders, through visionary leaders, and through the identification of common visions, histories and goals. Often, elders will draw on long-established cultural protocols and family alliances and marriages to encourage conflict resolution. This has, at times, been the basis of establishing peace and the conditions for strong agreements (as in a conflict of the Tahltan and Tlingits in BC). Elders can also create the conditions for working productively, as they have the capacity to bring people into line, reminding everyone of common goals. In other cases, the development of agreements has set the stage for peace and intermarriage (as in the case of the Tlingit and the Kaska Dene in BC). Another option, if some people are not trusted by all parties, is to involve a respected outside mediator. At worst, these types of claims will be dealt with in the courts, an approach that is likely to breed more conflict.

Agreements can be forged to settle disputes, such as nation-to-nation agreements between First Nations. These can be used, for example, to recognize shared interests, parcel out roles or responsibilities in environmental assessments and other processes, or outline the kinds of roles, benefits and rights that each party will pursue in the IBA with the company.



There may be several geographically separate communities under one First Nation. The communities may be only accessible by plane or in winter on ice roads, thus making communication difficult or costly.

These agreements are often oral, but at times can be written. They create the conditions for unity in advance of an IBA, leaving no room for mining companies to open fractures between groups and fuel disagreement to the disadvantage of all. Structures may be needed to solidify these relationships, such as the creation of a joint task force. In other circumstances, more informal relationships may suffice.

Whatever the process taken, critical elements for building unity include devoting time and resources to good communication and consensus-building through the development of common principles and goals. Splitting responsibility and harbouring resources (as done by the Innu and Inuit in the case of environmental assessment of the Voisey's Bay mine) is another good strategy. At other times, community and nation-to-nation unity can sometimes be built through direct action.

Mining companies, for their part, need to understand the importance of resolving overlap issues or other sources of conflict. Companies do not need to become directly involved, but to create the conditions and allow the space and time for nation-to-nation agreements to emerge. Companies will benefit in the long term from the stability and certainty that will result from such agreements.

Boundary issues are complex and can occur at family, clan, community and regional levels. They are difficult for outsiders to understand, and can become treacherous when they are debated in courts, in land claim agreements, or with companies.

Strategies to Address the Wider Implications of IBAs

A number of strategies are available to Aboriginal groups in seeking to deal with these wider and potentially negative effects of IBAs, while at the same time gaining the benefits that such agreements have to offer. These strategies include:

- MAPPING WIDER RELATIONSHIPS: One obvious but important approach is for Aboriginal groups to undertake, at an early stage in negotiations, a 'mapping' exercise that seeks to identify all of the ways in which negotiations with a mining company may affect their engagement with the political and judicial/regulatory system as a whole, including their existing interaction with government in areas such as service provision and land claim negotiations.[45]
- FOCUSING ATTENTION ON KEY AGREEMENT PROVISIONS: As is obvious from the earlier discussion, agreement provisions in a number of areas, for instance in relation to confidentiality and Aboriginal consent and support, can be critical in shaping the broader implications of agreement making for Aboriginal groups. We discuss these provisions in detail in Section 4.
- AVOIDING THE 'NEGOTIATION BUBBLE': At a broader level, it is important for communities to avoid isolating agreement negotiations from wider community planning and decision making processes. This is critical both to ensure that the wider implications of contractual agreements are considered. We deal with this issue at length in Section 3, in discussing the structure and composition of negotiating teams, community consultations, and communication between negotiating teams and the wider community.

A complete list of references is available in the final section of the toolkit, which can downloaded at www.ibacommunitytoolkit.ca

Notes

1 For a detailed review of the mine life cycle, see a model developed by Natural Resources Canada: Table 17 – Generalized Model of Mineral Resource Development, in *Mineral Exploration, Deposit Appraisal, and Mine Complex Development Activity in Canada* http://mmsd.mms.nrcan.gc.ca/stat-stat/expl-expl/pdf/04_e.pdf

2 There are limits to what areas can be staked, so that no staking can occur in protected areas, national parks, and in some land claim areas.

3 Cited in HREOC 2003, 84.

4 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*] Section 35(1).

5 1997 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168.

6 2004 *Haida Nation v. British Columbia (Minster of Forests) and Weyerhaeuser*, 2004 SCC 73 ("Haida") established an outline of the parameters of the Crown's duty to consult and accommodate Aboriginal peoples interests in circumstances where Aboriginal interests were asserted, but not proven.

7 2005 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 clarified the extent to which the Crown's duty to consult applies in the context of the numbered treaties (covering much of Ontario, western Canada and part of the North). This decision underscored the potential consequences for a project proponent where the Crown fails to discharge its duty to consult.

8 2004 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 S.C.R. 550.

9 2004 *Haida Nation v. British Columbia (Minster of Forests) and Weyerhaeuser*, 2004 SCC 73.

10 Ibid, 2004.

11 Ibid, 2004.

12 Nouvet 2009.

13 *Haida*, supra note 6, paragraph 49.

14 *2004 Taku River Tlingit First Nation v. British Columbia (Project Assessment Directors),* 2004 SCC 74 *("Taku")* established (in a manner similar to Haida) the nature of accommodation, as well as the framework for consultation activity related to potential infringements of Aboriginal rights caused by land and resource development activities (Bergner 2006a).

15 Nouvet 2009.

16 *Haida*, supra note 6; Nouvet 2009.

17 Bergner 2006b.

18 Archibald and Cronkovitch 1999.

19 Keeping 1999.

20 Kennett 1999. A major development project under the Nunavut agreement is any Crown corporation or private sector project that (a) is a water power generation or water exploitation project in the Nunavut Settlement Area, or (b) is a project involving development or exploitation, but not exploration, of resources wholly or partly under Inuit Owned Lands, and either entails, within the Nunavut Settlement Area during any five-year period, more than 200 person years of employment, or entails capital costs in excess of $35,000,000, in constant 1986 dollars, including, where government is the proponent for a portion of a development project or directly related infrastructure, the capital costs and employment projections for the government portion of the project (Inuit of Nunavut Settlement Area and Canada 1993).

21 Kennett 1999.

22 Gogal et al. 2005; Kennett; 1999.

23 Keenan and Sosa 2001.

24 Gogal et al. 2005; Kennett 1999; Sosa and Keenan 2001; Castrilli 1999.

25 Gogal et al. 2005.

26 See Gogal et al. 2005; Keeping 1998.

27 Gogal et al. 2005.

28 Bergner 2006a.

29 Canadian Environmental Assessment Agency 2005.

30 Province of British Columbia, *The New Relationship*, www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

31 http://reviewboard.ca/reference_lib/index.php?section=18

32 Yukon Environmental and Socio-Economic Assessment Board, *Guide to Interested Persons and the Public to Participate in Assessments*, www.yesab.ca/publications/documents/PublicParticipationinAssessmentsv.06.01.05.pdf

33 Gibson 2006.

34 Ibid.

35 O'Faircheallaigh 2008.

36 Kennett 1999: 45-46.

37 Gibson 2006.

38 Katona 2002.

39 Gibson 2006; Trebeck 2008.

40 O'Faircheallaigh 2004a.

41 See O'Faircheallaigh 2008 for a preliminary discussion.

42 A point highlighted in Trebeck 2008.

43 Trebeck 2008: 20.

44 Trebeck 2008.

45 See O'Faircheallaigh 2008b, Figure 1, p. 70, and Figure 2, p. 73 for a graphic representation of such an exercise.

SECTION 3

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Preparing for Negotiations

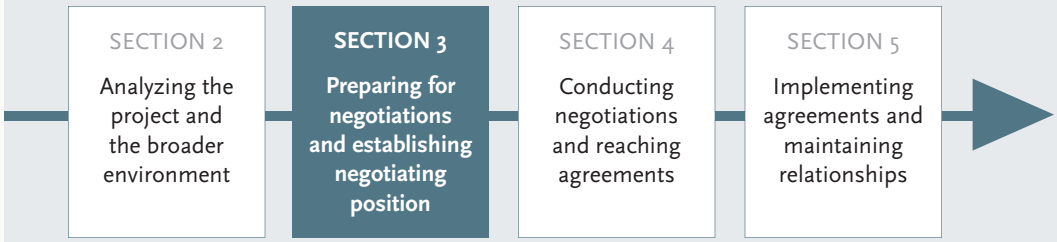
This section is about getting organized for negotiations by developing a structure for managing negotiations, gathering information materials, developing strategies, and establishing negotiation positions. The specific content of negotiation positions is discussed later, in Section 4.

There is no set timeline for this work, because the process is organic. If one part of the process is delayed, such as the social impact assessment, the whole timeline may need to be adjusted. The team will need to adapt time frames constantly.

This preparatory stage will allow you to:

- Establish a structure for negotiations and a negotiating team with specific skills and capacities to support successful negotiation;
- Develop a plan for gathering and managing information;
- Develop a budget and consider precursor agreements;
- Gather information about the project context, commodity and company;
- Establish baseline conditions about the community's socio-economic and cultural environment and understand what the community wants to protect through a negotiated agreement and gain from it;
- Determine how and when to share information with the company and community and consult with the community;
- Assess bargaining positions; and
- Determine objectives and develop a strong negotiating position.

Structure of the Toolkit



Establish a Structure for Negotiations

This section covers various structures for organizing negotiating teams, an important but often neglected topic.

Because information gathering must start immediately, an existing individual or body will need to take responsibility for kicking off the process. This may be a chief, chief and council, a land and environment department, or the CEO of a community council or regional Aboriginal organization. Allocation of this responsibility should result from conscious decisions about what will work best for managing a negotiation. Often, people think the way they organize themselves for other business is going to work for negotiations. This may not be the case.

A well-structured team with a strong plan for managing information will be able to share information with the community at critical times, to form the "right" negotiation position. Much of this phase is an inward-looking time of information gathering and communication locally, rather than an outward-looking time of controlling information flows to the corporation.

There is no one or "best" model for structuring negotiations – structures need to reflect specific local and regional conditions. Rather, our idea is to give people options to use as a starting point for developing their own structure. It is important to think about this issue in advance and make a deliberate decision about how to structure the team(s), rather than just falling into a particular structure by default.

A well thought-out negotiation structure creates the capacity to maintain contact between participants over time; to commission, collate and effectively act on research; and to efficiently run the "business" of negotiation (e.g., signing employment and consultancy contacts, issuing invoices, processing payments).

An appropriate institutional structure is required to permit accumulation of knowledge and expertise, and to ensure lessons learned from one set of negotiations are remembered and applied to the next. It is possible to bring a team of experts together on an ad hoc basis for specific negotiations, but in the absence of appropriate institutional arrangements, the experience they gain is often quickly dissipated with no "corporate" learning and knowledge retention.[1]

There is no one or "best" model for structuring negotiations – structures need to reflect specific local and regional conditions. Rather, our idea is to give people options to use as a starting point for developing their own structure.

Roles and Structures for Negotiations

Here are some examples of how negotiating teams have been organized:

- In Cape York, Australia, during the 1990s the regional land organization, the Cape York Land Council, organized negotiations for major mining agreements with each having a steering committee and a negotiating team. Steering committees were created with representation from key organizations and traditional owner groups. For instance, one steering committee comprised five traditional owners of the land affected by the project, and representatives of a range of specific community organizations, including the elders' group, the cultural resource management group, and the educators' group.[2] Steering committees had the role of controlling the overall direction of the negotiation process, providing political legitimacy to that process, and guiding and facilitating the work of researchers and consultants.[3] Negotiating teams were small, and consisted of the chair or CEO of the land council, a senior legal advisor, and the senior consultant responsible for information collection and community consultation.

- In the Tłı̨chǫ region of the Northwest Territories, the Diavik Steering Committee was formed in 2000 with two members from each community, a researcher, a lawyer, and two members from the Tłı̨chǫ land claim negotiating team who served as the negotiation leaders. The community members were occasionally involved in negotiations to get a feel for the issues. These individuals were then charged with leading discussions locally in the remote communities. Part of the purpose of having the community involved was to demonstrate unity to the company. Out of this steering committee, smaller negotiating teams were formed to deal with particular issues.

Many communities have a steering committee with diverse representation from the community, and then a smaller negotiating team of skilled individuals that acts under the direction of the steering committee.

In the 1990s, Australia's Cape York Land Council organized negotiations for major mining agreements with each having a steering committee and a negotiating team.

If there is to be a community steering committee and a negotiating team, the first group can have the role of acting as a conduit to the wider community. There can be a variety of people on the committee or committees, including elders, youth and women. It can be helpful to have the team look like a miniature version of the community, with all its diversity.[4] Groups or families that may be particularly affected by mining can be included, such as gatherers, and hunters and trappers whose trap lines are in the impacted area, as well as the regional representatives.

Interest mapping (also known as stakeholder mapping) can be used to identify the range of people interested in the issue and affected by it, and then a leader or representative group from each can be drawn into the community steering committee (See Figure 3.1). This discussion can help to define the main groups from which to draw a steering committee. This exercise can be helpful later when the negotiating team identifies how and when to share information with the broader community.

The question will be raised of just how to draw boundaries around an impacted group. One strategy sets out that:

> *The single best way to define the boundary is to get out and ask questions. In the "snowballing" technique, interviewers ask each individual who else they think is potentially affected. Then they try to talk to those people. Eventually they encounter (people) whose stakes are so small that they do not want to be interviewed. By that point the interviewers have probably already interviewed the core of the network.*[5]

Boundaries and the nature of attaining consent of communities are discussed more at the end of this section.

Figure 3.1: Interest Mapping

Negotiating Team Composition

However it is structured, there obviously does need to be a negotiating team. The specific composition of the team will vary, depending on the context and the group. Whatever its composition, its members will need to have all the required skills, including cultural competence, communication, and outreach ability. Roles should be defined for different team members, depending on their capacities and interests.

A head or lead negotiator is often chosen. This person's role often includes ensuring that the team actually works as a "team," there is one channel of communication so that a consistent message is communicated to the company, and the danger of a company seeking to "divide and rule" the community and its negotiators is minimized.

A lead negotiator should be a proud and strong community person, confident in their treatment of outsiders, but humble and skilled in listening to community members and presenting them with informed choices.

A lead negotiator should be someone who is:

- A proud and strong community person, not a consultant or lawyer.[6] It would be beneficial if the person spoke the indigenous language.
- Confident in their treatment of outsiders, but humble in the presence of their own community members.[7]
- Very skilled in working with the community, particularly in listening to community members and bringing them into discussion and negotiations at appropriate times. This will be an important quality because the key role for chief negotiators is not to make final decisions, but to present alternatives and facilitate informed choices by the people they represent.

In choosing other team members – both from the community and outside experts – the following points should be considered:

- It can be useful to have both people who are naturally "hardline" negotiators and people who accommodate, so they can change the negotiation dynamics of a room as needed. Of course, personality traits must be tested in the fire of negotiations, making negotiating experience *and performance* key considerations when developing a new team. It is also important to have people who can be flexible, as a change in a person's approach (from hard to soft and vice versa) can be very effective in sending signals to the other side.
- Political leaders often may not be included in negotiating teams, so that there is another layer of decision-makers to refer to. The need to report back to leaders and gain their support on a negotiation point can also provide a tactical advantage – a reason for much needed breaks from negotiations. Furthermore, political leaders are already managing many responsibilities.
- Consider the composition of the company negotiating team when deciding who should participate in individual negotiations. As a general rule, follow a principle of "equivalency" – having people of roughly equivalent status or seniority on both sides. If the company sends staff or consultants, don't send elders or the chief negotiator. This devalues the position of the people who are sent, and leaves the company with the ability to avoid dealing with issues or proposals the community raises by arguing that they must be considered by more senior company staff. Similarly, if the company is sending a senior decision-maker such as a managing director, don't send less senior community negotiators. To do so may offend the managing director, and may mean that opportunities to make rapid progress are lost because the community negotiators lack the authority to respond to company proposals.

- If community negotiators have limited experience, they should be trained in negotiations or briefed constantly by someone with more experience.
- Negotiators that are confident in their own convictions, but are able to accept the ideas and criticisms of others, are very effective. Negotiating team members should be open and transparent about any preconceived notions they have about the company, the project, and what they think the community should do. If there are internal tensions based on personal conviction or preconceived ideas, there are two options: make sure the person accepts and can act as a team member in the negotiation (abiding with the negotiation stance of the community), or let them go.

Negotiating Team Selection Process

There are lots of options for selecting and endorsing members of the team. Each society will have its own culturally-defined ideas about the best way to find team leaders and team members. They can be elected, or selected by the political leadership based on their expertise, negotiating skills, or reputation. Sometimes elders make decisions about who to appoint or how they should be chosen. In other cases, political decision-makers appoint members to the negotiating teams.

There are downsides to some methods of selection. For example, in cases of political appointees and elections, there can be poor selections made if they are merely popularity contests. This is particularly true for the team leader. When negotiating team leaders are selected by political leaders, favouritism can come into play. While the appropriate way of choosing a team will vary from case to case, it is essential to make sure that the negotiating team, and each one of the negotiators, has strong skills and community support.

Sometimes religious or spiritual leaders are selected to join negotiating teams. It is important to make sure there is support for them and, if possible, that they also have the other qualities already mentioned.

Sometimes religious or spiritual leaders are selected to join negotiating teams. It is important to make sure there is support for them and, if possible, that they also have the other qualities already mentioned.

In some cases, ceremonies or public meetings are held to ensure that the community can ratify appointment of the negotiators. This also impresses on the negotiators the importance of their work and who they work for.

As discussed in Section 2, unity is critical for success in negotiations. But unity does not always come naturally. Communities are often divided by families, by politics, and by their histories. It is not always easy to unify. Therefore, leaders who build and maintain unity are ideal to have in negotiations. On the other hand, if their actions further divide communities, down the road a hard-fought agreement may fall apart.[9]

Negotiated agreements that have community-wide support are very hard to undermine, and maintaining unity after negotiations provides community implementation teams with full support to apply pressure to the company (and in some cases, governments) to implement the agreements (see Section 5).

Regardless of how the negotiating team is chosen, it is critical to have an effective team in place as early as possible. Negotiating teams can always be restructured later, once there is more information and clarity on the interests and issues involved.

Roles of Key People on the Negotiating Team

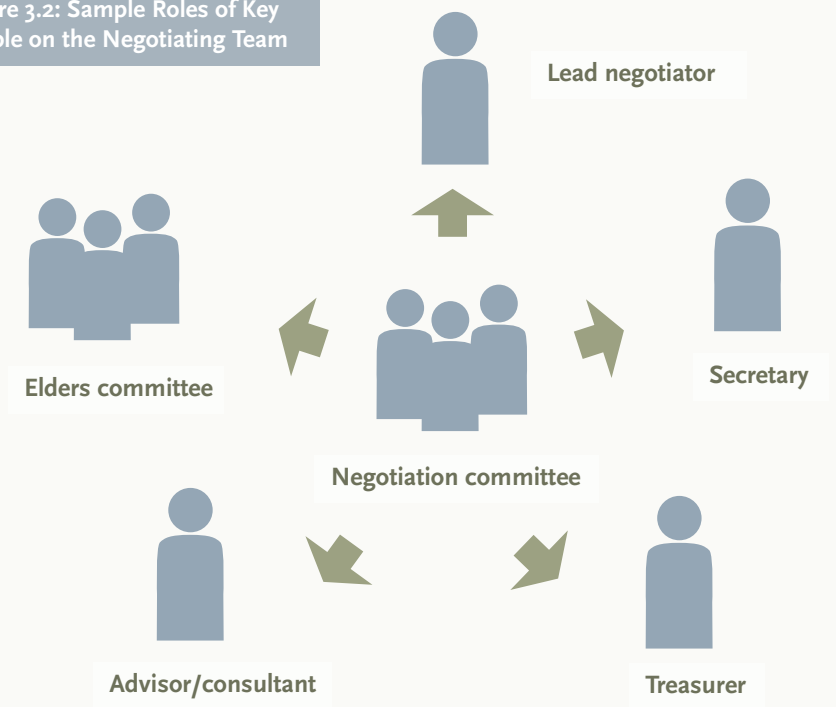
Once people are selected for the negotiating team, roles for the team members need to be outlined (See Figure 3.2). Critical roles will be a lead negotiator, a secretary and a budget manager, although it may be feasible to combine secretarial and treasurer roles.

- The LEAD NEGOTIATOR will have the role of organizing the team, leading in the negotiations, speaking in sessions, and reporting back to the communities.
- The SECRETARY will be responsible for keeping records of meetings and channelling communication between the company, the government and other parties.
- The BUDGET MANAGER will keep tabs on the expenditures, and ensure sufficient funds are available to support the negotiations to their conclusion.

There is no formula for assigning specific roles in negotiations. Rather, the available skills needed to matched up with the various roles that must be performed (see above) in a way that is effective for the team.

The negotiating team will also need to include, or have access to, expert advice on a range of issues that will arise in negotiations. This might range from a lawyer or consultant who plays a central role throughout negotiations, to the occasional need for resource people with specialist skills in geology or economics (among other areas) at different junctures. For example, expert advice may be needed on how money that eventually flows to a community under an agreement should be managed. This issue needs to be addressed in the early phases of negotiations as it often becomes a key conflict issue in communities if it is left until the money has started to flow.

Figure 3.2: Sample Roles of Key People on the Negotiating Team



A NOTE ON CONSULTANTS

Never forget that consultants work for the community! They should be responsive to the law of supply and demand – what is demanded, they should supply. There is a risk that consultants will provide "standard" or "template" materials, rather than what is required to meet the needs of a specific negotiation. The reasons behind this may include time or knowledge constraints on the consultant, but it is equally likely that the client does not expressly identify what information it needs and in which format, leaving this up to the consultant.

Guidelines for the consultant that can be helpful, for example in making presentations, might include:

- Briefing notes and presentations should be focused on one or two topics at a time;
- Where possible, visuals should be used to describe concepts;
- Slides should not be too crowded with information;
- The relationship of the information to the context of the communities should be the focus in each presentation; and
- The main points about the topic should be presented as the last slide or as a conclusion to the briefing note.

Role of Experts on the Negotiating Team

Opinion is mixed about whether the negotiating team should include professional people, such as lawyers and consultants, or whether they should play only a supportive or backup role. Two contrasting views, for example are that:

> *...Too much is at stake in your pending agreement to risk negotiating it without professional support. Invest in professional help from the beginning to ensure that the agreement is well designed and effectively negotiated.*[10]

> *[Both sides should] agree not to have lawyers at the table. I think that's very valuable. Have lawyers review the stuff later. Lawyers can [complicate] the conversation and take away from actually trying to build a relationship.*[11]

Some Aboriginal Nations may wish to have lawyers contribute at critical times to clarify legal requirements relevant to new case law; others may have their First Nation lawyers working in technical capacities on the IBA negotiating team.

Regardless of whether they are formally on the team, it is important that communities have a mix of critical human resources to achieve a good agreement and solid implementation. A person's profession should not determine the team's view of their ability to help the team and community. An insightful lawyer that has worked faithfully and respectfully for a community for a decade and gained their trust may have more credibility and capacity than some community members. Choose people with the mixture of values, credentials, trustworthiness, local knowledge and negotiations experience right for the team.

There are a few rules of thumb that can help in selecting expert advisors. If the expert treats people in the communities as their equal, takes time to explain things in plain language, and does not always agree with the community representatives, they are probably going to work well with the community and help negotiate a good outcome.[12] If an expert delivers huge and unwieldy documents, speaks as though community members are not capable of understanding or with overly technical jargon that ensures that outcome, or behaves as though they are always in agreement, odds are low that they will serve the community well.

"We usually try to involve at least one staff person from the government so that there is a connection to implementation.

If you do it entirely with outside consultants, there will be much less of a chance the implementation will happen effectively."

— Innu negotiator[8]

Cost and Value of Outside Experts Versus Training In-House Staff

In Canada, legal fees average between $250 and $400 an hour. Therefore, having a lawyer lead the negotiating team can be very costly. Consultants can charge anywhere from $100 to $300 per hour. While significant reductions in fees may be negotiable based on the large number of hours involved, a community will need to budget substantially more for hiring a consultant or lawyer than for paying local people. However, it is also important to consider "value for money" in making decisions about hiring and staffing. The quality of the product achieved is critical, and professionals are likely to be able to work much faster than non-experts, so that the real cost of their time is less than it might appear.

The question of whether to invest the resources needed to develop in-house staff, such as training and ongoing salary payments, may be raised. If there are multiple negotiations, the cost involved in building capacity can be spread out, and there may be enough work to keep newly trained in-house staff busy. Where there is only one or two negotiations, there likely won't be enough work to keep skilled staff busy, and thus the work might be better outsourced to consultants.

Aboriginal and non-Aboriginal Negotiator Roles

There are various models for how roles can be allocated to Aboriginal and non-Aboriginal negotiators.

- Non-Aboriginal staff members can hold a backroom technical role, and play no part in direct face-to-face negotiations between Aboriginal team members and the mining company.
- Non-Aboriginal people can take the major role in negotiations and refer matters to Aboriginal leaders for decision.
- There can be a single negotiating team made up of both Aboriginal and non-Aboriginal people with specific roles assigned.
- There can be a two-track system, with non-Aboriginal staff negotiating with less senior company people on detailed issues and referring issues on which they can't agree and or broader technical issues "upstairs" for discussion by the Aboriginal leaders and senior company managers.

The model that works best will depend on the community involved, and will be influenced by a range of factors, including the availability of skilled negotiators within the community, the size of the budget, the scale of the project, the number of negotiations happening at any one time, and the way in which the company team organizes its negotiating team (see the principle of "equivalence" on page 114).

Negotiating Team Role with the Community

The role of the negotiating team and the roles of people within it need to be clearly spelled out. It is essential for everyone on the team to have a clear sense of their own role, including any political leaders, technical staff, and outside experts.

Roles of the negotiating team will change over time. At the outset, common first tasks will be to:

- Help establish community aspirations and priorities related to impact assessment and negotiated outcomes;
- Work to translate community goals and aspirations into clear goals for negotiations, so there is a defined sense of what needs to be in the agreement;
- Establish a process for two-way communication throughout the negotiation process – community to team, and team to community;
- Work with advisors and political leaders to form the negotiation strategy.

Roles will shift as the team enters into negotiations. Team members will need to make sure negotiations are on track and in line with community needs and goals, change strategy as needed, and keep the community up to date. Negotiators may find it helpful to develop "rules for negotiations" that guide them in performing their roles. By way of example, see *Sample rules for negotiations* on page 67.

Sample Rules for Negotiations

These rules were used by a group of traditional owners (TOs) in Australia for the negotiation of agreements with mining companies. (In Australia, the term "traditional owners" has become widely used to mean the people who had stewardship of the land and all on it before the arrival of Europeans.)

1. General Rules

   - The Agreement must be strong for the Traditional Owners (TOs) and clear on what the TOs and the company must do.
   - In exchange for the TOs giving the okay to the company, the company must give the people money and other non-money things and rights.
   - It is in the TOs and company's interests for the mine to keep going for as long as it can, if it is making money in a good way.
   - The company must report in its published annual report on their actions under the Agreement.
   - The Agreement must set up a Committee to look at what happens under the Agreement and to decide on things to make sure the Agreement works.
   - If the Committee can not all agree what to do, the people and the community will work together to find a way to solve the problem.
   - If the people and the company do not agree, someone who has nothing to do with either party will decide. There are some things that person cannot decide on.

2. Rules for the Money part of the Agreement

   - Money payments must cover the impact of the mine, now and into the future, on TOs and on the land, environment, culture and heritage.
   - The TOs should get more money if there are changes from how the company tells the TOs mining is going to be or how the mines affect TOs.
   - The company should pay TOs so many dollars for each hundred that the company gets for the metal.
   - The money must be paid over the life of the mine.
   - There must be a minimum amount of money that the company must pay each year to be in the area.
   - Money payments must start earliest of x date or the date the Agreement is signed.
   - Money must be paid two times a year.
   - The Agreement will cover Money payments and other non-money things.
   - Money for TOs under the Agreement will be kept in a Trust for the TOs.
   - The most important rules for the Trust are: TOs will decide the rules of the Trust; TOs will decide what to do with the money, and TOs may get help to make decisions about the Trust and money.

Other rules are on: *Rules for Work and Training; Rules for Cultural Heritage Protection; Rules for Environmental Land Management and Protection; Rules for Business Development.*

Develop a Plan for Gathering and Managing Information

The process of gathering information will be most fruitful if it is clear what information is needed, when it is needed, and how best to organize and analyze information as it becomes available. The amount of information available to parties tends to increase as the negotiations proceed. A community can become overwhelmed with information as regulatory and other negotiation processes begin (such as the formal environmental assessment process or consultations and negotiations with the government over Aboriginal rights under s.35 of the Constitution). It is therefore critical to set out an information management plan early in the process.

Early in the process, the community needs to develop a work plan that sets out information needs in the short, medium and long term.

Community leadership will need to seek out specific information on many topics relating to the project, the commodity and the company. At the same time, it will also need to collect information on the skills, knowledge, goals and aspirations of community members – for example, specific information on the number of people who would be qualified and interested in working in a mine.

Early in the process, the community needs to develop a work plan that sets out information needs in the short, medium and long term. Realistically, it may not be feasible to collect all of the information discussed below before negotiations start, and it might not be efficient to try to do so, as what transpires in early negotiations always helps define additional information requirements. Hence, this phase should be seen as an ongoing learning time, where new information is always coming in and new areas for further study are being identified.

Data Requirements

Table 3.1 on the following pages sets out a wide range of information that is likely to be relevant. Also, in Section 4 the range of issues likely to arise in negotiations is reviewed in detail, with further implications for information gathering.

We suggest the negotiating team prioritize data gathering based on when information will be needed to support negotiations around specific issues. Data can be collected as it is required, and then summarized in briefing notes for the negotiating team (see *Determining How Data Will be Used* on page 76).

Data Storage

The question of who will store the information as it emerges is critical. Often, information is held and maintained solely by consultants, a questionable practice. There may be real issues with accessing the information in the future, if and when the consultant moves on. Further, there may be questions about the ownership of the information. Another issue is that when raw information is held by consultants, input from these same consultants is required to analyze the data. Information should be archived and managed through an in-house function of the community negotiating team.

Information management should be sorted out early. It is time-consuming and technically challenging to maintain a central depository of information, especially when email is the main form of communication. The question of whether community organizations have the capacity to manage this information has to be asked. If they don't, resources will either need to be re-allocated, capacity built, or additional funds accessed from government or corporate sources.

The lead negotiator should receive all substantive documents, but everything should also be copied to a staff position tasked with archiving all information.

If more than one community organization is involved in negotiations, it is essential to ensure that information is housed by one organization, and managed by one person within the organization, so there is a coherent, comprehensive and accessible archive. Often, this means that all email correspondence has to be copied to one person who manages all communications.

There are pitfalls if the information goes only to the lead negotiator, because the information may not be shared throughout the organization, archived, or acted on if the leader is simply too busy with other responsibilities. The lead negotiator should receive all substantive documents, but everything should also be copied to a staff position tasked with archiving all information. All consultants need to be briefed on information management and corporate communications protocols as they are contracted.

It is most effective if information is in both digital and hard copy folders, archived by subject, and accessible for searches.

If a negotiation lasts for 12 months or more, there will be hundreds of items of correspondence alone, not to mention research files gathered by the advisors or negotiating team members. It will be impossible to check up on something the company communicated early on in the negotiations if a good information management system is not in place.

Data Retrieval and Access

Information can be maintained electronically or in print form – preferably both. It may be appropriate to treat various types of information differently. Critical files, such as feasibility studies, environmental impact statements, terms of reference, and draft agreements may be printed and filed, as well as being stored electronically. Day-to-day organizational details (e.g., dates and locations for meetings) could simply be archived on computer.

The staff person tasked with filing and archiving data should develop an agreed filing structure that allows information to be accessed through both paper and electronic

Table 3.1: Information Needs and Sources, by Topic		
Characteristics	**Resources**	**Some key questions**
PROJECT AND COMMODITY		
Geology, especially grade, commodity mix, impurities Project scope Anticipated economic impacts Mine or oil/gas extraction technology type Other similar deposits and mines Project costs and risks, such as vulnerability to market change or delay, as well as newness or processes or technologies Place of the deposit on the corporation's priority list Net present value and internal rate of return (IRR). These are measures of the profit that a company is expected to get on its investment. Other similar deposits or projects Type of sale (open market; negotiated agreements) Historical and trend price behaviour for the commodity Market for the metals/minerals/commodity Uses of the product and demand estimates	Feasibility and environmental impact assessment studies (difference between bankable and other feasibility studies) Company materials and websites Information filings (sedar.com) Other environmental assessments of similar mines Web searches for detailed economic analysis on the commodity Development description report included with development permit applications Information provided by the company under confidentiality agreements	What could cause key project vulnerabilities? Is this a doable project or is it on the margins? (This can affect vulnerability to early closure or outright project failure.) How big is the pie? Has the company been accurate in portraying the resource? What is the IRR? IRR is generally anywhere from 10 per cent to more than 20 per cent. The higher the rate of return, the greater the community can ask for in financial benefits. (See financial models in Section 4). What are the likely markets for this product? What is the projected price for the metal?
ACCESS TO ORE BODY AND LAND		
Overlapping rights of government or communities Associated infrastructure and other developments needed in order for project to proceed, such as roads or power Geographic barriers to development Legal or political barriers to development (e.g., Species at Risk Act)	Analysis by community representatives	Do we control access through permits, leases, etc. to the ore body? Will new roads be required in order to access the ore body?
ENERGY SOURCES		
Likely source of energy and cost	Feasibility and environmental impact assessment studies	Where will power come from? Is there a way for community power to be used (e.g., dam development)
TRANSPORTATION		
Likely routes for materials into and out from the project	Feasibility and environmental impact assessment studies	How will the company get the ore out of the region?
EMERGENCY AND CONTINGENCY PLANNING		
Hazardous materials that travel into the project Routes and amounts of materials leaving the project	Feasibility and environmental impact assessment studies	What kinds of chemicals will be on site (e.g., cyanide)? What risks do they pose? How will they transport any toxic material away from the site?

Table 3.1: Information Needs and Sources, by Topic *continued*		
Characteristics	**Resources**	**Some key questions**
ENVIRONMENTAL LIABILITIES AND IMPACTS		
Water Animals Air Soil Tailings, etc.	Feasibility and environmental impact assessment studies Technical reviews of any studies completed for feasibility and environmental impact assessment studies	What might be impacted by the development? Are there critical sites, or species that may need to be protected from development?
SOCIAL, CULTURAL AND ECONOMIC IMPACTS		
Labour market and demand Skill profiles needed Cultural meaning of the region (heritage sites, oral history of the region, place names, hunting and trapping or traditional use of the area) Community understanding or narratives of impacts Inventory of business capacity Taxation issues (e.g., Troilus mine is off reserve so that workers have to pay income tax)	Feasibility and environmental impact assessment studies Self assessment Government assessment. Sometimes specific branches of the government (e.g., INAC or Economic Development) will fund studies to understand the range of business opportunities.	How many people might be available to work? Or are employable people already employed? What cultural places or values might be impacted? What is important to the community to build or preserve? What businesses might be developed? What business opportunities exist? Will workers be impacted by taxation if they work off reserve?
CLOSURE AND RECLAMATION PLANS		
Bonds and sureties Plans and linking to mitigation	Feasibility and environmental impact assessment studies Permit applications	What closure plans exist? How could be the community be involved?
CORPORATIONS IN GENERAL		
Legal requirements – reporting, responsibilities to shareholders Main purpose/guiding ethos Planning priorities – short, medium, long-term Negotiation strategies of corporations in general	Corporate responsibility NGOs Texts on corporations, especially extractive industries negotiations	What are the goals of the company? What are the values of the company? How might these relate to us?

Table 3.1: Information Needs and Sources, by Topic *continued*		
Characteristics	**Resources**	**Some key questions**
COMPANY		
CEO history Board of Directors—skills; past project management; number of people Personnel dedicated to project History of community relations with developer Relationship to shareholders Corporate financial records Project financing Corporate structure Nature of company (junior, major) Financing Structure of the corporation—relationships or existence of subsidiaries and holding companies Relationship to other companies Commitment of resources Other agreements Corporate behaviour toward other indigenous people or communities Historical behaviour of company Adherence to guidelines and standards (e.g., IFC, WBG, Global Reporting Initiative)	Press releases Corporate website Other communities Corporate annual reports Annual mining meetings (such as the Canadian Institute of Mining or the Prospectors and Developers Association of Canada) Corporate consultation MiningWatch Canada primer on *Mining Investors: Understanding the legal structure of a mining company and identifying its management, shareholders and relationship with the financial markets* Past interactions with the community	Who is the current point person? What has the history of this company been? How diversified is this company, and therefore how stretched might they be? Or how committed might they be? What kind of company are they? Do they have financing in place? How does the site base staff and operation relate to the parent company? Where in line is this deposit vis-à-vis other deposits they are currently exploring? How have they negotiated with indigenous people in the past? What are the guidelines that the company adheres to? Can they be used to strengthen the community position?
RESOURCES TO SUPPORT THE COMMUNITY'S NEGOTIATION EFFORT		
Resources and key gaps Funding Current human resources	Government departments, specialists, technical experts, and other communities with experience, e.g., Federal Resource Access Negotiation Program may make grants to communities involved in negotiations Dialogue with company Internal assessment	What funds and resources can be directed our way? What are the expenses we anticipate? (see pages 80 and 119)
LEGAL PROCESS AND KEY DECISION POINTS		
Regulatory applications needed Nature of environmental impact assessment process Regulatory and co-management bodies with impact on process (provincial, territorial, federal) Moments of greatest influence (associated with regulatory approvals) Who holds power of decision-making (on this and associated projects) Regulatory, administrative, legal or other guidance on negotiated agreements Regulatory bodies in charge of elements of environment and social elements	Regulatory authorities Legislation Section 2 of the toolkit	What are key decision points? How can regulatory requirements affect leverage?

Table 3.1: Information Needs and Sources, by Topic *continued*		
Characteristics	**Resources**	**Some key questions**
LEGAL, POLICY AND SOCIO-ECONOMIC CONTEXT		
If on Indian reserve, then application of *Indian Mining Regulations* (except in BC) Surface lease agreements may apply Land claim may have been negotiated or under negotiation	Land claim agreement or through discussions with lawyer	What can we influence? What bargaining power do we have through the legal system?
ASSOCIATED AGREEMENTS		
May already be socio-economic or other agreements in place	Government sources	What agreements might already exist that could apply? (e.g., on training)
MINERAL RIGHTS AND REGULATION		
Mineral tenure law Mineral regulation (provincial or federal) Legislative base for consultation or mineral rights Jurisdiction of legislation	Government departments responsible for Aboriginal affairs Mining government departments Legal advisors	What legal or regulatory instruments can support the case for an IBA? Consultation?
COMMUNITY GOVERNANCE		
Self government agreement; governance and consultation structures	Internal discussions	What structures are likely to be needed to manage negotiations? (See section on negotiation structures)
INDIGENOUS AND TREATY RIGHTS ANALYSIS		
Land rights holders Status of land claims of self and others in the region Status with respect to federal government, such as treaty rights, indigenous rights; land claim agreements and modern treaties Impact on ability to secure other rights	Websites Indigenous owners Federal government Legal advisors	What legal rights do we have with respect to the area? What can we gain? Do we have rights pending?
COURT CASES		
Relevant court cases (e.g., *Delgamuukw; Sparrow; Haida; Taku; Williams; Mikisew*)	See Section 2	What court cases can be used to strengthen our case? For example, a court case that has recently been decided on consultation might strengthen the claim.
INTERNATIONAL STANDARDS		
Guidelines and international standards that can be used to guide or apply pressure	International Finance Corporation World Bank Group International Council on Mining and Minerals	What is the best practice in guidelines, even if the company does not adhere to them? Can they be used to strengthen the community position?

searches. Many organizations now have central servers and document management software[13] for archiving memos and files. Informative and appropriate keywords should be used to archive materials (either by date, negotiation topic, or source). Most of these systems can be password protected, so that confidentiality is protected by restricting access to authorized staff members.

Data Access and Authorization

Not everyone in the leadership or negotiating teams may need to have access to all the data collected. A communication structure and protocol will need to be defined and at this point decisions can be made about who has access to what information.

Protocols on information-sharing streamline information flows and create a consistent and transparent system where all people on the team know their role and level of information access.

It is important to have a protocol that everyone understands about flows of information and communication. If there is no protocol, two problems emerge. First, everyone is swamped constantly with information, much of it irrelevant to them, because there is no distinction between information that individual people need and don't need. Second, despite being overrun with information, people on the team may begin to worry they are not getting access to critical information simply because there is no protocol. This may cause tension in the group. Protocols on information-sharing streamline information flows and create a consistent and transparent system where all people on the team know their role and level of information access.

Sometimes, the people doing a "pre-assessment" on culture, for example, may benefit from information gathered during the socio-economic baseline data collection, or from insights gathered in a focus group on wildlife harvesting. If these efforts are too compartmentalized and cut off from one another, the overall information gathering and analysis will suffer. To avoid the creation of "silos," the team manager should hold regular meetings, by phone or in person, between all relevant team members. At these meetings, progress, methods and questions will emerge to the benefit of the whole.

Maintaining Confidentiality

The negotiating team will need to adopt mechanisms that define what confidentiality looks like, in concrete terms. Often, sensitivities emerge around community politics and internal debates, cultural heritage knowledge, negotiating positions, financial deals and information that may be subject to confidentiality agreements. Leaks by someone on commercial data covered by a confidentiality agreement can ruin a deal.

The information protocol should deal with the question of confidentiality, clearly identifying what categories of information are confidential and giving some examples. All consultants should be given a copy of the protocol, and as they collect information they should indicate to the negotiating team what aspects of it, if any, are confidential or sensitive.

Expertise for Data Analysis

Experts will need to be brought on board, or trained in the community, to collect and analyze data. For example, financial and commercial data will need to be reviewed by someone with an economics or business background. Anthropologists may need to be hired for cultural heritage work.

Community-based expertise should, wherever possible, be used or developed, because community members may not have technical training, but they almost always have a better understanding of the local context than outside experts. The input and analysis of community members must be part of issue identification and agenda setting for negotiations. Analysis of a community cannot be delegated to outsiders, and experts from outside must be seen only as tools for the community to use in its self-assessment.

Community-based expertise should, wherever possible, be used or developed, because community members may not have technical training, but they almost always have a better understanding of the local context than outside experts.

It is almost always lack of community capacity that leads to the need for outside experts. However, lack of community capacity will never be overcome if the only people collecting and analyzing data are these external experts. The IBA negotiation process and the EIA process should be seen as on-the-job training opportunities for community empowerment. Getting an expert in to study the community and report on results is expensive, and if they do not contribute to skills development the same experts will have to be hired the next time expertise is needed. Getting experts to train community members as part of their work may cost a little more, but pay large dividends in the long term.

Where existing knowledge on a topic is very limited among negotiating team members, there will be a need for substantial training and capacity building on this topic. Where core knowledge is high, such as in a community or team that has negotiated several agreements in the past and is very savvy about markets and companies, much less "skilling up" is required. The key is to identify how much knowledge is available, who has a lot of knowledge about the issue, and who has less. The re-provision of basic information for negotiators and staff with a lot of knowledge is a waste of resources; not providing enough information or even training on foreign concepts like "feasibility" for people with a small knowledge base on that subject might threaten the success of the negotiations.

Determining How Data Will be Used

Many specific questions to help address this issue are identified in Table 3.1 on pages 70 to73. It is essential to have the capacity to analyze data that is collected, understand it and make sure it is understand*able* to the whole team. Short briefing papers and presentations should be prepared providing synopses of knowledge and issues to help in the design of the negotiation position. Often this role is filled by consultants.

For example, a consultant may analyze a huge amount of data on a particular company and then give a short PowerPoint presentation of four to five slides that pull out the key points so that the negotiators and the steering committee can get a good understanding of the company. If consultants are to be used in information collection and analysis, it is critical that they are given clear direction about the required level of data collection, analysis and communication appropriate for specific audiences (e.g., for community engagement, plain language, non-technical, use of culturally appropriate comparative metaphors, and other tools to make the final product accessible). For example, a consultant can be required in a contract to always provide, along with each report, briefing notes or short memos and PowerPoint presentations.

The focus of briefing notes will constantly change to meet current information needs in the negotiations. For example, at the outset briefing notes may focus on project economics, the company's management team and priorities, and later may change to negotiation strategies. All briefing notes should be filed in an easily accessible central location using a format that allows searching by keyword so that briefings can be reconsidered at a later date. Each memo or briefing note can answer some key questions to help the community position itself with respect to the company. It is often useful to hold a briefing session for relevant negotiating team members once a memo is ready (or more likely a series of memos), so that they are up to speed on the issues they have to deal with, and so that they can add to the briefing with their knowledge, ask questions, and refine the search for answers.

The goal of collecting information should not be to have the biggest pile of paper at the end of the day – don't collect information for information's sake. All information should be collected to answer specific questions.

It will be critical for negotiating team members to take information from the memos developed by a consultant, reflect on them, and figure out how to use the information. All too often, the use of information stops with the consultant, either because the information is poorly assembled and interpreted, or it is not in plain language, or because there is not a strong or experienced negotiating team that meets regularly to interpret the data.

Information gathering can be prioritized over, or confused with, information analysis. The goal of collecting information should not be to have the biggest pile of paper at the end of the day – don't collect information for information's sake. All information should be collected to answer specific questions. And analysis and decisions should not be delayed for too long merely because the entire universe of information hasn't been collected. Don't delegate all analysis of information and decision making to consultants. Remember: all decisions require information. Informed decisions require context. Wise decisions require dialogue, in this case among team members and potentially the wider community.

There is a difference between information and knowledge. The local context *has to be understood*. Only when information is made sense of locally can it become knowledge, and thus useful for strategy, meetings, and action. For example, details of the content of various clauses of a piece of legislation are information. The realization that this

legislation can allow a company to damage cultural sites that are of great value to a community, but that an IBA could be used to win a commitment from the company not to use the legislation, contextualizes the information and converts it into knowledge that allows the community to use it in pursuit of a key goal – protection of its cultural heritage.

Sample Topics for Consultants' Briefing Notes

In preparation for negotiations with a large global mining company, the toolkit authors helped a Canadian Aboriginal group's negotiating team prepare five briefing memos:

- HELPING THE ABORIGINAL GROUP IDENTIFY INFORMATION GAPS. This briefing note was on the range of information (drawn from Table 3.1 on pages 70 to 73) that could be collected. This table was used by the group as a checklist to prioritize the type and order of information it needed.

- MAINTAINING UNITY. The second briefing note was on maintaining unity. At the time, there were questions about royalties, land tenure and leases to solve between the business arm and the political arm of the overarching Aboriginal group. These issues had to be settled before negotiations with the company, as the company could very well have used these fractures to weaken the negotiation position of both arms. The memo served as a warning to the organizations of the threats posed by lack of unity. It provided examples where unity between organizations led to much stronger agreements.

- THE COMPANY'S PLACE IN THE GOLD SECTOR, AND THE PLACE OF THE DEPOSIT IN THE PROJECT PIPELINE. A third briefing note was on the place of the mining company within the global gold mining industry, and then the place of this specific project in the holdings of the mining company. This briefing note led to the surprising finding that the advanced exploration deposit on the community's land was likely not as high a priority as the Aboriginal group previously thought. It also identified the factors that would influence the corporation to prioritize this project above others, many of which could be influenced by the Aboriginal organization.

- THE COMPANY'S APPROACH TO COMMUNITIES. The fourth briefing note focused on the company's approach to community relations around the world, with the nature of its engagement with other indigenous groups a key focus. Through this research, it was found that the company had a much higher conflict profile than other equally-sized mining companies. Contact names and organizations for potential global allies for the Aboriginal group were researched, contact were made, and existing agreements involving the company were reviewed.

- CORPORATE IBAS IN OTHER REGIONS. This briefing note reviewed the only existing IBA the company had signed with an Aboriginal group, in Australia. It also provided contact information for the Traditional Owners there.

This briefing note led to the surprising finding that the advanced exploration deposit on the community's land was likely not as high a priority as the Aboriginal group previously thought.

Consider Precursor Agreements

Before formal negotiations for an Impact and Benefit Agreement begin, the company and community may find it mutually beneficial to reach early agreements or written "understandings."

These "precursor" agreements fall into two general categories: first, those that allow the company to proceed with early exploration activities; and later, when there is more certainty that a project will go ahead, an agreement that sets out the manner in which the two parties agree on how negotiations will proceed.

Exploration Agreements

Exploration agreements usually require that any successor company also adheres to the terms.

Exploration agreements (or staking agreements, drill sampling agreements, etc.) for initial or advanced exploration usually spell out the relationship (including defining terms and activities) so that there is the possibility of an economic and business relationship early on. The agreements contain legal clauses (just as the IBAs do, see Table 4.2 on page 122). These agreements usually require that any successor company also adheres to the terms.

These agreements may include other specific clauses, such as requiring the company to provide proposals and timetables in advance, or agreements on the employment of Aboriginal members in field work.

Memorandums of Understanding (MoUs)

Memorandum of understanding (MoUs) (which may also be called cooperation agreements, negotiation agreements, etc.) set out the manner in which community and the company agree to move forward. They can range from a single page or two in very general terms, to lengthy documents with many specific, detailed clauses. They often serve as an interim agreement while an IBA is being negotiated. MoUs may not be legally binding, because they occur early in a negotiation process at a time when the parties are exploring both the desirability of a project and their relationshiop with each other, and so they may not want to make binding commitments. However, the parties may agree that certain parts of an MoU that are essential if a negotiation is to proceed, for instance clauses on confidentiality and on funding for the community, will be legally binding.

Topics often covered in an MoU include:

- Legal information, such as definition of the parties, the purpose of the agreement, recognition of rights, representation, the nature of the relationship, etc.
- Negotiation principles;
- Assistance (financial and other resources);
- Steps to be taken to reach an agreement, including a preparation phase, a negotiation phase, and a drafting and documentation phase, as well as a consultation and negotiation period;
- Contact between the parties (e.g., the parties agree to have single points of contact for communication; each party may have appropriate advisors present; outside experts may be called upon) – see *Information-sharing and Consultation with the Company* on page 94;
- Location and timing of negotiations;
- Substantive issues for negotiation and sequence for negotiation; and
- Confidentiality, including such provisions as negotiations will be conducted in private and will not be discussed in public without agreement (see also *Corporate Confidentiality Clauses* below);
- Funding arrangements (see *Assessing and Reducing Risks Associated with Company Funding* on page 81); and
- Dispute resolution process.

Some Memorandums of Understanding are publicly available on-line. For example, see MoUs from Australia at www.atns.net.au

For descriptions of other topics or clauses that may be included in an MoU, see the section on legal provisions on page 121.

Corporate Confidentiality Clauses

MoUs may have distinct confidentiality clauses that deal solely with the access to information from the company.

The decision to agree to corporate confidentiality needs to be fully understood and considered carefully. If the company is going to limit release of corporate data, for example on financials, to the wider community, the advisability of going down this track may be open to question. The team needs to consider carefully whether it is better to do its own calculations based on publicly available information, because then there are no restrictions on its use. On the other hand, an important advantage of using company information is that the company can't argue with it. These concerns will need to be carefully weighed before deciding whether to agree to this type of clause in order to attain confidential company information.

MoUs with the company at the outset of negotiations can cover other issues as well, such as funding (see next sections on funding negotiations and gathering information). MoUs will often cover some of the same legal territory as an IBA (see Table 4.2 on legal issues on page 122), such as definition of the parties, the purpose of the agreement, recognition of rights, representation, the nature of the relationship and the process for dispute resolution.

Develop a Budget

Estimating Costs and Determining Funding Sources

It is difficult to accurately estimate the costs involved in any set of negotiations, and the cost can vary substantially from case to case, depending on the nature of the project and the community affected by it, the duration of the negotiations, and the extent of legal proceedings.[14]

Funds can be requested from government or industry, or both. Many companies have funded the process of negotiation, impact assessment, and community consultation. The Canadian federal government may have funds available to support consultation and negotiation. Some private foundations will support the cost of research, consultation, or negotiation. Communities can also build longer-term community-academic relationships, which can often bring "in kind" support and expertise to a project analysis. Finally, a community can partner with NGOs or apply to other funding agencies.

Common reasons for companies to provide funds to communities include:

- There is a need for the developer to fund community engagement as part of any initial framework agreement (i.e., companies fund communities to engage).
- Funds can speed up the IBA negotiation phase, because adequately resourced communities can respond to requests and review materials faster.
- When community based and controlled research occurs, with consultants chosen by the community, this research can be used by the developer as part of their required EIA submissions. For instance, in the mid-1990s the Canadian company Alcan funded a community-controlled social impact assessment (SIA) and used the report produced by the community as the SIA component of the environmental impact statement it had to produce for government.

The Voisey's Bay Nickel Company, for example, provided the Innu Nation with $500,000 to determine the Innu people's goals and objectives over a six month consultation process.[15] The Tłı̨chǫ Nation used corporate and federal government funds to conduct its consultation activities with constituents in advance of negotiations for IBAs for the EKATI and Diavik diamond mines.

Developers and governments may prove reluctant to provide funds. Reminding them that effective community engagement is a miniscule portion of total costs with an extremely high upside (eventually, a more effective mine plan, a social license to operate, a functioning partnership with communities) can help leverage the required funds.

Assessing and Reducing Risks Associated with Company Funding

There are risks for communities in relying on company funding of negotiations. Companies may try to influence the community's choice of advisers, indicating a willingness to fund specific advisers and refusing to fund others. This has occurred in a number of negotiations in Australia. While the Aboriginal organizations concerned initially insisted that they retain complete control over who they employed in negotiations, eventually one of them decided that, in the absence of any alternative source of funding, it had no choice but to agree to a company's demand that a particular adviser not be retained. A second potential problem is that if and when negotiations are deadlocked, the company may threaten to withdraw funding for the community, placing it under pressure to accept the company's offer and undermining the Aboriginal negotiating position. That pressure can be extreme, given that in the absence of funding a community may not be able even to meet its advisors or bring community members together. The last point is especially relevant if community members are spread over a large geographical area. A third issue is that lack of predictable and secure funding can undermine a community's ability to plan negotiations and retain competent staff and consultants.

A number of strategies are available to address the risks associated with company funding of negotiations. Communities should avoid a "drip feed" funding approach where a company agrees only to provide funding on a piecemeal basis, for instance only paying for one set of meetings, or provision of a single piece of advice. This leaves the community particularly vulnerable to pressure. A much better alternative is to agree funding arrangements for the whole negotiation process before substantive negotiations commence, for instance through a Memorandum of Understanding. This may require making assumptions about the duration and nature of the negotiation process, which may turn out to be incorrect. But this possibility can be addressed through a commitment by the company to fund completion of negotiations on a "reasonable cost" basis, with a provision for dispute resolution if there is no agreement on what is "reasonable."

While MoUs are usually not legally binding, it is possible to make specific parts of them binding on the parties. Such an approach is advisable in relation to funding as it limits a company's capacity to use the threat of withdrawing funding as a bargaining tool.

It is also important to set aside a proportion of funds received as an emergency fund that can be used if a company cuts off funding. This can be done, for instance, by incorporating an administration charge into budget estimates, but retaining this charge to use in "emergencies."

There are risks for communities in relying on company funding of negotiations. Companies may try to influence the community's choice of advisors, threaten to withdraw funding during an impasse, or fail to provide the funding certainty needed to plan negotiations and retain staff.

A community should always seek additional sources of funds or other resources to support negotiations, for instance by supplementing corporate funding with funds from governments or private foundations, and/or by locating legal advisers or researchers who will be willing to undertake voluntary "pro bono" work if company funding is exhausted. University-based advisers, for instance, may be in a position to continue to support a community through a crunch period in negotiations, even if the community does not have the funds to pay them, or faces delays in obtaining these funds.

Budget Needs

Budgets for information gathering usually need to cover:

- Access to legal, technical, economic, and negotiating expertise;
- Fieldwork for socio-economic work and consultation;
- Travel costs;
- Information management and dissemination (printing and distribution of key documents);
- Consultation activities, such as renting meeting rooms, the cost of refreshments, per diems for anyone who will need them;
- Research, analysis, and team preparation for the negotiations;
- Translation and transcription fees;
- Staff salary costs; and
- Public outreach costs (e.g., production of a focused newsletter, public service announcements, etc.)

Budget Management

It is advisable to be conservative in estimating what a negotiation will cost, and then rigorous in monitoring and controlling expenditures, especially early in process when it may appear the funds are more than sufficient. In combination, this will help reduce the possibility that a community will run out of funds as negotiations enter their final and crucial stages, when insufficient funds can undermine the community's negotiation position.

For the negotiating team, typical budget responsibilities are to:

- Keep track of funding sources, amounts, reporting and accounting requirements, deadlines for applying for funds (if applicable), availability of funds in a timely manner, and any limitations on the use of funds established by the provider;
- Establish a clear and transparent accounting system, especially a system for approving, accounting for and justifying expenditures; and
- Identify overall budget requirements early and then maintain a working budget.

Gather Information About the Project, Commodity and Company

Table 3.1 on pages 70 to 73 sets out a detailed list of questions and data to gather for establishing the context for the project, commodity, and company, including likely project impacts, and legal and regulatory processes. Some of the information will not be publicly available, and most will require specialized analysis to fully understand and act upon the information gathered.

A critical starting point is to find out whether there are IBAs or negotiated agreements between this corporation and other indigenous people. Even if there are no negotiated agreements, there are still tools that can help understand what kind of relationships this company has with other indigenous communities, in Canada and across the world. Consider for example websites like www.minesandcommunities.org, which tracks all news stories and press releases from a variety of media containing reference to individual corporate-community conflicts. This type of investigation will help to reveal how the corporation might respond in negotiations, what kind of precedents exist, and the likely approach of the corporation to the community. If the company holds no relationship to indigenous communities, a community that has experience with the same commodity on a similar scale might also have valuable lessons to share.

The negotiating team should work to identify the key issues and information needs about the project, commodity and company. For example in relation to the company, they may want to know:

- What is the corporate culture of the people who will be sitting across the table?
- What are the company's priorities?
- What are their strengths and weaknesses? Where are their pressure points for change?
- Where does this project fit in with the company's overall plans?
- What is the company's history in negotiating agreements? How can they be expected to act?
- What kinds of benefits might the industry offer?
- What does the company know about us and think of us? What have we learned about them in our early interactions?

LEARNING FROM OTHERS' EXPERIENCES

Other existing agreements may be tough to acquire, but "tactful and informal" communication between First Nations can often overcome this obstacle. If the actual agreement cannot be obtained, you should be able to acquire information about the main terms or text of the agreement.[16] The implementation status of the agreement and satisfaction with outcomes is also relevant. Did the company deliver on commitments? If not, what happened? What does the community have to say about what they would do the same or differently next time? Do they have suggestions for negotiations? For outcomes? And for implementation?

Establish Baseline Conditions in the Socio-economic and Cultural Environment

Baseline conditions are a "snapshot" of the community as it exists now – before the project.

Information gathered might include *quantitative* data (numbers that can be measured), such as population, education, employment, housing, and poverty. Just as important, *qualitative* data (gathered through open-ended survey questions, interviews, meetings, etc.) can provide an in-depth understanding of cultural, social, political and family norms and values in the community.

Social impact assessments can include many different studies, such as economic, cultural or cultural heritage work. These studies try to predict how things might change – for the better or worse – if the project goes ahead.

A key part of preparing for negotiations involves having a clear picture of:

- Existing economic, cultural and social conditions in one's own community ("baseline data");
- The likely impacts a project will have;
- What actions need to be taken to maximize positive impacts and minimize negative outcomes;
- How a negotiated agreement can help in this regard; and
- How this should shape negotiation positions.

For some major developments in other parts of the world, such as Australia, indigenous communities undertake a formal, community-controlled social impact assessment (SIA)[17] to identify qualitative and quantitative indicators of baseline social, economic and cultural conditions, likely changes over time, and people's aspirations and concerns. These SIAs can also be used to predict how a proposed project is likely to impact the community. An SIA of this sort can be a critical input for establishing a negotiating position. Further, it can be used to inform the environmental assessment process.

In Canada, developers are required to conduct some form of socio-economic and cultural impact assessment as part of the environmental impact statement for a project. In most cases, the developer runs a "top-down" impact assessment of the project's likely impact on the human environment, involving some consultation with the community, but often using a generic set of largely quantitative indicators collected for the most part from government statistical agencies. The extent of community involvement varies greatly, but it can be rare for communities to control the social impact assessment process. The result is that many SIAs do not generate the sort of information that is useful for communities in helping them prepare for negotiations.

The following paragraphs offer some guidance for communities that want to undertake independent, community-controlled social impact work and use it to support their negotiation effort.

A number of approaches to establishing baseline conditions exist. Sometimes, research will be done to identify categories of people affected and rights and interests in the project area, and to review current socio-economic realities. Specific research might include areas such as heritage resources and traditional knowledge studies. Also, basic organizational assessment can be done, so that the strengths, skills, and weaknesses of various social infrastructure organizations can be determined.

There are a number of effective tools to determine how a project may impact on your community that are well documented in the literature on environmental impact assessment.[18] Community-controlled SIAs can be designed so they can contribute to the statutory (government) environmental impact assessment (EAI) process. This can reduce the cost burden on the developer, as studies for a statutory EIA can often leverage federal funding support.

Research methods for an SIA can include archival research, public meetings, interviews, focus groups, meetings on the land, household meetings, and surveys. The methods used can be quantitative and qualitative, and the planning and administration of research can be external (by consultants or academics), internal (by a local research team), or a combination thereof.[19] It is best not to rely on only one form of data gathering, as in some cases many youth, elders and women may not attend public meetings (and may be too shy to actively voice their opinions in them). To meet the needs of these potentially under-represented sub-populations, it may be better to run focus groups for women, elders, and youth.

Effective intra-community consultation and information dissemination about a proposed development is time-consuming and can be expensive from the perspective of a small, indigenous community. In Australia the cost of studies range from $100,000 to $500,000, depending on the scale of the project, the number of communities affected, and availability of funding. To put these numbers in context, an entry level (small) metallic mine in Canada cannot be developed for a capital cost lower than about $200 million. A large scale mine will typically tip the scales above $800 million, or about 1,600 times the cost of a $500,000 study.

A large amount of data may become available from SIAs. The task of community teams or negotiators is to make sense of the data and use it wisely in decision-making, which means using it to address the *key* issues for a community. "Bottom line" questions include:

- Is the project as proposed credible (is it economically, social, technically and financially *viable*)?
- Is it *desirable* for the community in its present form, based on what we can predict about its beneficial and adverse impacts?
- What size and type of *benefits package* can the proposed development support, and what sort of package is required to make the project desirable for the community?

To put the cost of this research in context, an entry level (small) metallic mine in Canada cannot be developed for a capital cost lower than about $200 million. A large scale mine will typically tip the scales above $800 million, or about 1,600 times the cost of a $500,000 study.

Impact Assessment Questions

The kinds of questions that can be asked of community members in impact assessment studies include:

- What do we know about where the community is now? For example, how many people fall into age and gender groups most likely to be impacted by mining? How many people rely on harvesting from areas that may be affected by mining?
- What are education, health and housing conditions, and how are these likely to affect, for instance, people's capacity to take up employment opportunities? What capacity do community organizations have in key areas such as land management, education, and dealing with possible negative social impacts such as substance abuse?
- What are the elements of culture, society, economy, and the environment our people want to protect the most?
- What sort of shape are those valued components in, how are they changing, how fast, and why? Valued components are any part of the environment considered important by the people with the communities (or other people involved in the regulatory process).
- What are our most resilient features, and where are we most vulnerable to change?
- What do our prior experiences with similar developments and negotiation processes teach us ("lessons learned")?
- What do we know about where the community wants to be? Are there existing reports that talk about people's aspirations? What other work needs to be done to establish community goals and aspirations?
- What key characteristics are likely to affect the community's capacity to negotiate and implement an agreement and to take advantage of it once it is signed?

Potential Socio-Economic Impacts

Typical social, economic and cultural impacts that need to be thought about during IBA negotiations can range widely, depending on the nature and stage of the development project and the status of the community. Some potential impacts are provided below; they are not listed in order of likelihood or severity of outcome because they will differ on a case-by-case basis.

- INCREASED RISK TO PUBLIC SAFETY AND POPULATION HEALTH – e.g., through increased traffic in and around the community, increased dust and other pollutants in the air;
- INCREASED PRESSURES ON SOCIAL AND PHYSICAL INFRASTRUCTURE – e.g., through increased population, which can cause old municipal water and sewage systems to require upgrading or fail outright, increased classroom sizes and doctor wait times;
- INCREASED PRESSURES ON FAMILY COHESION – e.g., via pressures associated with long-distance commuting of one partner which can lead to increased marriage breakdown and single-parent families;
- REDUCED TIME ON THE LAND PRACTICING THE BUSH ECONOMY – This can have a variety of social, economic and cultural outcomes, including loss of traditional skills and knowledge, reduced inter-generational ties, loss of sense of self and sense of place;
- INCREASED INCOME DISPARITY – The creation of "haves" (those who work at the well-paid mining jobs) and "have-nots" (those who choose to retain their bush economy reliance or who cannot work in the wage economy) can have major repercussions for social relations in and between communities. In addition, the high paid jobs of the wage economy also are often followed by price inflation, which makes it increasingly hard for the "have-nots" to afford store-bought food, housing and services;
- POPULATION CHANGES – It is typically assumed that increased economic activity will bring with it population growth and all of the adverse and beneficial impacts on small communities that come with it. This is a legitimate concern. However, it is also increasingly possible that modern fly-in, fly-out mining operations will bring population flight from smaller communities to larger regional centres. This can occur when increased wages make living in larger communities viable, when social divisions emerge in smaller communities, or when it makes sense to move because of travel logistics. The outcome can be depopulation of smaller communities, often of its brightest stars and leaders of the future.
- LOSS OF CULTURAL ASSETS – A development may physically alter a spiritually significant site, trail or landscape. It may also, sometimes regardless of the level of physical damage, change the way a location or space is perceived by the culture holders. When this is the case, it is part of the many different ways that Aboriginal cultural resilience can be tested by changes associated with the overall shift from a traditional economy to a wage economy. Other loss of cultural assets might include decreased practice of the bush economy, decreased use of Aboriginal language, and a decreased role for elders and traditional practices (such as sharing), in day to day life.

One example of a social impact involves the creation of "haves" (those who work at well-paid mining jobs) and "have-nots" (those who choose to retain their bush economy reliance or who cannot work in the wage economy). This can have major repercussions for social relations in and between communities.

Because social impact assessment covers all of the potential changes that may occur as a result of the mining operation, it can seem complex and even overwhelming for the uninitiated. Luckily, there are many tools, case studies and experts available to assist communities in the conduct of a social impact assessment. Guidance documents that lay out the steps in a social impact assessment and principles of social impact assessment are available.[20]

Certain impacts are more likely to occur during different stages of the project life cycle. The next sections set out some your community may need to think about during any social impact assessment.

An important part of impact assessment at the advanced exploration stage is to closely examine the likelihood of the project moving forward, clearly express this to the population, plan accordingly and not put all the economic development eggs in one basket.

Impacts During Advanced Exploration

During advanced exploration, it is often the response to perceived future opportunities that can lead to real impacts on the ground. For example, businesses faced with the prospect of a mining development are understandably excited about the economic benefits that can arise. However, planning to take full advantage of future business and employment opportunities needs to be linked to an understanding of:

- The likelihood the project will go ahead (still quite uncertain during advanced exploration);
- The current ability of the community and region's Aboriginal workforce and business sector to compete for jobs and business opportunities if and when they do come; and
- How best to take advantage of future prospects through strategic infrastructure and training initiatives.

If a community or region over-invests in mining-specific business and training upgrades at the advanced exploration stage, it opens itself up to increased adverse economic impacts if the project does not move forward. At the same time, starting focused strategic investments in people and capital improvements too late may reduce the "capture" of economic benefits when they are available. An important part of impact assessment at this advanced exploration stage, then, is to closely examine the likelihood of the project moving forward, clearly express this to the population, plan accordingly and not put all the economic development eggs in one basket.

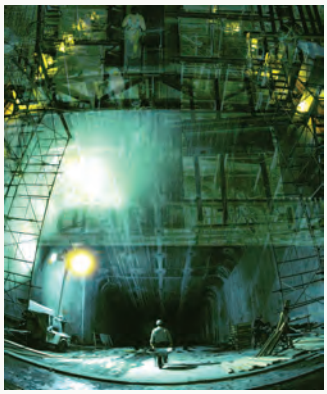
Impacts During Construction

Construction is the most capital and employment intensive stage of mining project development. The construction workforce may be many times larger than the eventual operations workforce, and project development costs may range from $200 million to upwards of $1 billion. All of this money and employment will hit over a short, two to five year time period, which can have major social impact outcomes for communities.

For most Aboriginal communities, there simply won't be enough trained labourers, let alone skilled trades, available to meet the construction requirements. Therefore, there will likely be an influx of outside, almost entirely male, workers to the region. This has, in the past, had many adverse impact outcomes on Aboriginal communities – including increased access to drugs and alcohol, increased road traffic and potential for impacts on public safety, change in community demographics and therefore socio-cultural

dynamics, and increases in sexually transmitted diseases, among many other negative changes. Today this is often dealt with through the use of a "closed camp" system in which outside workers have little, if any, contact with the Aboriginal communities. This does not deal with all potentially adverse impacts, however. The closed camp environment also requires that community members who work in the construction phase be away for extended periods of time in an industrial, settler-culture dominated work camp. This can be a very isolating experience with impacts both for the worker and their recruitment, retention and advancement opportunities and for their social interactions when they go home.

Luckily, many strategies are available to minimize the impact of so-called "fly-in, fly-out" on Aboriginal workers.[21] For example, bush food menus, cross-cultural sensitivity training, elder (and even family) visits to the worksite, video-conferencing opportunities with families, and counseling available both at the worksite and the home community for family members can all minimize negative outcomes of long-distance commuting. The real question for Aboriginal communities will be "which of these strategies work for our people?" and "how can we require these mitigation strategies be put in place for this development?"



The influx of outside, almost entirely male, workers has, in the past, had many adverse impacts on Aboriginal communities. Today this is often dealt with through the use of a "closed camp" system. But these too need strategies to avoid negative impacts for Aboriginal workers and their families.

Impacts During Operations

During operations, many of the same social impacts may still be ongoing. While the workforce will be much smaller than during construction, it still may be substantial and represent the single largest employment and business opportunity provider in the community and region. There are many beneficial impacts that can be identified and planned for. However, communities need to be prepared for what adverse social, economic and cultural impacts can come with this increased economic activity. For example, a common socio-economic impact on Aboriginal communities from mining developments is the loss of key municipal and other infrastructure workers to higher paying mining jobs. This can lead to reduced functioning of existing social and physical infrastructure at the community level if other locals are not trained to take over. While this is not something a mining company should be blamed for, the possibility of such a "brain drain" should be fully assessed well in advance and contingency planning put in place in case it occurs.

Impacts During Closure

The closure phase can lead to a rapid reduction in gainful employment among community members as the mine ceases operations. High unemployment can lead to economic distress that moves from individuals through families and into the community as a whole – as disposable incomes reduce, so does overall economic activity. Social change can occur as well, as the sexual division of labour changes. For example, women tend to become the primary wage earner in a post-closure environment. This can lead to social stresses that can culminate with increased domestic violence and family breakdown.

However, these are by no means necessary outcomes. Communities should be working with government and developers to recognize that a mining operation has an inevitable closure point.[22] Planning for a transition to a post-mining economy that maximizes the use of available skills and provides a minimum of "bust" effects after the mining "boom" is the responsibility of all.

Mitigating Impacts

Additional discussion on the type of measures than can be used to mitigate social impacts is found near the end of Section 4 of this toolkit.

As part of the process of mitigating impacts, data from a community based social impact assessment can be used to:

- Inform the negotiators of community wishes, aspirations and concerns;
- Understand organizational weaknesses of the community organizations, and plan to avoid them, as well as pinpoint key assets and build on them;
- Inform a wide range of community members of the negotiation process, and the possibilities for the negotiated agreement, as well as the timeline for negotiation; and
- Develop negotiation positions on key issues. For example, Table 3.2 provides examples of concerns raised in one community controlled SIA, as well as the mechanisms used to address these concerns in the IBA.

Table 3.2: Community Concerns and Aspirations of the Hope Vale/Cape Flattery Silica Mines (CFSM) Agreement in Australia

People expressed concerns about access to mining leases, environment management, accommodation and arrangements for visitors, township administration, and worker health. The agreement contained provisions to address each of these. Two examples are:

Hope Vale people's concerns and aspirations	Provisions of the Hope Vale/CFSM Agreement
ROYALTY PAYMENTS	
People saw a number of problems regarding the 3 per cent profit royalty paid by the company: · Payments were low; · They were based on profits, and if the company made no visible profit, Hope Vale received no money at all; · The payments were made to a central Aboriginal group in Brisbane, and there were long delays before the money reached the community.	The agreement provides for: · A much higher level of payments; · Payment is based on the value of minerals, not on profits; · Most royalty payments are made direct to the community.
EMPLOYMENT AND TRAINING	
Hope Vale residents and workers at the mine had concerns about employment and training: · Employment preference at the mine · Employment being limited to mining and milling; · Access to education and training; · Procedures for promotion;	Under the agreement: · Preference was given to Hope Vale people; · Training programs were designed so all positions could be won; · Apprenticeships and scholarships were provided; · A formal promotion process was designed.

Source: Selected from O'Faircheallaigh 1999, 71.

Other examples of community-led studies include:

- In the Voisey's Bay instance, the Innu Nation hired a coordinator who used action research methods[23] to review baseline social, economic and cultural conditions in the communities. Young Innu researchers, along with a sociology professor, worked to develop a summary of Innu knowledge, socio-economic conditions, and a documentary video on the conditions in the communities as the Innu understood them.[24]

- In contrast, for the same development, the Labrador Inuit Association formed a panel of Inuit experts who knew the area well, and the panel addressed some key questions, discussing the effects of the project until there was consensus.[25]

- In one case in Australia, an SIA undertaken to help prepare for negotiation of a new agreement for an existing mine involved meetings with specific groups in the communities (e.g., wives of workers at the mines, workers themselves, and community staff responsible for land and culture management). All told, individual interviews were conducted with fully half of the adult population of the region. The interviews were used to gain information about concerns and aspirations about the project, and to get information about the project's existing impacts across to people. In combination with desk-based research in response to issues raised by community members, a report was issued that included a community profile, factual information about the operations, a series of recommendations with concrete strategies for dealing with concerns, and a monitoring program for measurement and review.[26]

In one case, fully half the adult population was consulted, and this input was supplemented with desk-based research. A final report was issued including: a community profile, factual information about the operations, a series of recommendations with concrete strategies for dealing with concerns, and a monitoring program for measurement and review.

The key is to adopt an approach appropriate to the desires, cultural priorities and values of a community, rather than following an unfamiliar or inappropriate template. Different culture groups will have different social systems for collecting and sharing information and making decisions, different socio-political mechanisms defining who needs to get involved and when, and different priorities among the universe of potential valued components of the human and biophysical environment. These socio-cultural values need to be reflected in community-led assessments.

This is one example. The key is to adopt an approach appropriate to the community, rather than following any one template.

Develop a Communications Strategy

The importance of communication between the negotiating team and the community cannot be overstated. It is critical to have a clear understanding of how and when the community will be consulted and when information on negotiations will be shared.

Communication strategies will evolve at various stages of the process. At the outset, community leaders will need to provide as much information as possible about the proposed project, and widely encourage community input. This consultation helps negotiators understand community concerns and aspirations, and develop the support and mandate they need to deal with the proponent and government agencies. This consultation can be done at the same time as the socio-economic studies or baseline work discussed in the previous pages.

Maintain constant communication. **Communication is important even when there is little to report. Explanations for the lack of progress can be especially important (see *Keeping Things on Track* on page 118).**

During later stages of negotiation, the negotiating team will need to update the community about progress. Also, as more information becomes available, the team will want to share information, gauge the pulse of community support, and continue an ongoing dialogue about community concerns and priorities.

As specific provisions of the agreement are being negotiated, the team may consult and share information with smaller affected groups. Because of the risks involved in the negotiating team "showing its hand," the flow of information at this stage may be more tightly controlled.

The following guidelines can help to form an effective communications strategy.

- CONSULT THE COMMUNITY FIRST. Internal consultation should happen *first* and *before* any negotiation with a company begins.[28] Even if very little is known about the proposed project, a public meeting (or other consultation process) should be called as soon as possible. From the outset, information must be accessible for people to make an informed decision, using information about mining's impacts and community rights,[29] to decide whether they support the project in principle. All too often, people receive information too far along in the process and are then able to discuss only how to mitigate impacts.

- CREATE AN INCLUSIVE CONSULTATION STRATEGY. An important first step in communication is to set out an inclusive process. Questions to ask include: Who is the community? How is the geographic, ethnic, or scope of community defined? Who legitimately represents the community? Is it simply representatives from local community organizations, or is it necessary to reach out to more diverse groups to ensure all elements are consulted?[30] The definition of "community" should be inclusive enough to promote equity and avoid future conflict resulting from lack of inclusion.[31]

- CONSULT THE COMMUNITY AWAY FROM THE COMPANY. It is critical to consult the community without the presence of mining company representatives, as their presence can change the community dynamic – for example, making people reluctant to openly express concerns or inhibiting them from sharing ideas for possible strategies.

  If a company presentation is deemed useful and appropriate, the community should only listen and ask questions, and then meet "in camera" afterward, first to hear a critique of the information the company provided, and then to raise concerns and priorities in a safe environment that encourages everything to be put on the table.

  The community should be constantly informed of the importance of keeping community discussions and conflicts away from the company (see *Information-sharing and Consultation with the Company* on page 94).

- ANALYZE AND CRITIQUE INFORMATION FROM THE COMPANY. Information from the company can be unfairly tilted toward mining interests,[32] and is usually framed to discuss mine and community benefits, avoiding discussion of impacts. Information from the company should always be accompanied by critical analysis.

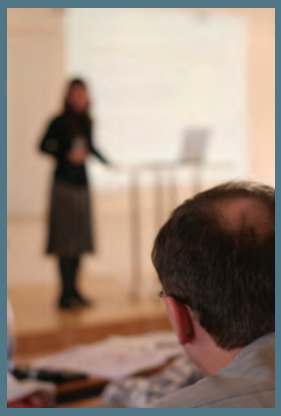
- CONSIDER MULTIPLE COMMUNICATION TOOLS. Community consultation and information-sharing may require a range of communication strategies. Possibilities to consider are to:

  - Hold public meetings, or presentations and discussions at band meetings;
  - Conduct house-to-house visits for those perceived as being the most impacted, such as trappers and hunters active in the proposed area of the development, or key community members who may be unable to attend public meetings;
  - Use radio, television or print media, by encouraging a news piece, or by writing editorials or letters to the editor, or purchasing advertising;
  - Access existing communication networks, such as community mailing or email lists;
  - Create a website, or use social networking sites (such as Facebook), particularly with younger generations; and
  - Post information or create a strategically-located notice board.

- BE BRIEF. While key players, such as those on the negotiating team, may need to review hundreds of pages of documents, too much information can overwhelm some community members, leaving them feeling *less* informed. Consider one-page summaries of critical documents, or quick synopses or "briefing notes" – while making more extensive information available for those who want it. Consider how plain language, multiple languages, and the use of visuals can increase the chance that information will be easily absorbed.

- USE VISUALS. Pictures say a thousand words. Use maps, photos, diagrams, organizational charts, posters, videos, or scale models to convey key messages.

- USE SKILLED COMMUNICATORS. Rely on local educators, liaison officers, skilled communicators from the negotiating team, or consultants to make public presentations using appropriate tools. These people will need to be well informed about the project to reply to questions, backed up by key people available to answer technical questions. For print materials, consider hiring (or building capacity) for graphic designers, plain language copy editors, or translators to make materials accessible.



TIPS FOR SUCCESSFUL PUBLIC MEETINGS

- Consider a series of meetings (each with the same material and topic) at different times, so those with different work shifts or commitments can attend;
- Schedule wisely, not competing with other events or periods such as harvest;
- Post maps, photos, etc. on walls with "open house" times;
- Choose accessible locations;
- Provide play areas or childcare; and
- Serve snacks and refreshments.

Identifying Those Who Can Affect the Process (for Better or Worse)

It can be important to identify how certain sub-groups in the community might impact on negotiations or relationships. Sometimes, there are important groups that need to be included at critical times, in order to move ahead on certain issues. In other cases, there are overly aggressive, self-promoting, pandering or adversarial people who can "poison" the process who need to be carefully controlled in relation to negotiations and community consultation.

Information-sharing and Consultation with the Company

Expectations will need to be established with the company regarding ongoing communications. This is normally covered early in the process with a memorandum of understanding on an agreed communications protocol. The rules set out in an MoU can help avoid situations where a company is talking to individual members of a community, creating potential for "divide and conquer," where the company supports community members who are favourably inclined to their project.

The MoU should cover what information will flow from the community to the company and the company to the community, and how that communication will occur. It may also cover timelines for review of documents, forums in which information will be made public, and the format information will take, such as languages, lengths, plain language requirements, use of images, etc. The MoU usually establishes a single point of contact, such as the negotiating team secretary.

Within the community, it is important to ensure all members of the team and, indeed, all adult members of the community (if this is feasible) know of the protocol. Unauthorized or inappropriate release of information to the company, for example about the community's priorities for the negotiations, can seriously undermine the community's negotiation position. No one should ever meet alone with the developer. All First Nation government departments, business corporations and other entities should be informed about and comply with the communication protocol.[27] The MoU should be considered publicly (e.g., at a public meeting) prior to finalization, and information about its content should be disseminated again after its finalization.

Some communities have developed consultation policies, standard exploration agreements, or other documents setting out pre-development contractual obligations, which they share with companies in advance of giving approval to begin work and/or beginning negotiations. These policies (e.g., the Lutsel K'e Exploration Policy, or the Taku River Tlingit Resource Consultation Policy, available on request from the Taku River Tlingit) clearly and consistently lay out a community's early expectations of the developer during the early phases of engagement.

Involving Vulnerable or Important Groups (e.g., Elders, Women, Youth)

Women, youth and elders are often pointed to as the groups most likely to be excluded or vulnerable. For example, youth interviewed in a retrospective study on the negotiation of an IBA in the NWT said they felt frustrated and disappointed at not being "included seriously in decision-making."[33] This, despite the fact youth are often pointed out by community members as being the primary reasons for negotiating good agreements and protecting land. Sometimes youth are too shy to speak up, or scared they will be "shut down" by others.[34]

- Leaders can include youth by meeting with them in schools, running workshops at times and places suitable to them, or including them in negotiating teams.
- Women can be brought onto negotiating teams, or teams can meet with women in places where they work or spend time, such as schools, health centres, or women's shelters or organizations.
- Elders can often be brought together to discuss issues that affect them or they feel are important for the broader community. Protocol is important to follow for asking permission and knowledge of elders. In Cree society, for example, tobacco (often wrapped in white linen or cotton) is presented to an elder to indicate a request for knowledge.

The situation with elders is unique. Elders are the most honoured members of most Aboriginal communities, deserving of respect and deference. Their words and wisdom are the key to knowledge transfer between generations. Despite this, their values, experience and insights may not translate into the modern negotiation and planning process very easily because of their distance from corporate negotiations, language barriers, different conceptual understandings, or different approaches to time management.

Issues often raised by elders include:

- Maintaining relationship to the land and traditional cultural tools and activities;
- Lack of respectful relationships in companies and government, especially because of previous bad treatment;
- Retention of treaty rights, unsurrendered title and rights; and
- Passing on a healthy land, special places, animals, and cultural values to future generations in as unaltered a fashion as possible.

Elders are the most honoured members of most Aboriginal communities, deserving of respect and deference. Their words and wisdom are the key to knowledge transfer between generations. Despite this, their values, experience and insights may not translate into the modern negotiation and planning process very easily.

Information-Sharing with the Community: Determining When and on What Issues

Often, the lead negotiator can become a central point person who talks with people at events and in their homes about the main details of the agreement. If there is one person who people in the community can talk to, it can help to have this person identified as a key contact for anyone to go to with concerns or needs.

Community consultation leading up to the negotiation phase is quite different from that of the outset of the process, when the emphasis was on whether, in principle, a community wants a project to proceed. In this phase, the negotiators will be establishing community priorities, and checking that draft negotiating positions are in line with these.

Because of time constraints and limited funding, it is impossible to have constant interaction between the communities as a whole and land council staff, negotiators and consultants.[35] Therefore, the negotiating team must be strategic in its use of community engagement, indicating the importance of having an explicit consultation plan. This is something the negotiating team will have to define, but some of this work may have been undertaken earlier, if interest mapping of the community was done.

Now, the critical question is: When and on what topics is information-sharing and community participation in priority setting, or planning appropriate? Decisions will have to be made about how broadly to consult at each decision point. At some points, it will be critical to have very broad consultation, while at others it may be appropriate to narrow the circle of advisors.

There should be a phased approach to assessing whether there is consent to the project, to elements of the project, and to a negotiated agreement (see Figure 3.3). In the community outreach plan, critical milestones where sharing of progress and/or gaining of acceptance from the community is required should be identified. In each case, the negotiating team needs to be clear on what decision it is asking for, and it needs to provide the right information so this decision can be made well.

Often, the lead negotiator can become a central point person who talks with people at events and in their homes about the main details of the agreement. If there is one person who people in the community can talk to, it can help to have this person identified as a key contact for anyone to go to with concerns or needs.

Figure 3.3: A Phased Approach to Communication

To gauge consent throughout the process, the negotiating team may need to:

- ATTAIN INFORMED CONSENT to consider the project (see Section 2), which will require the community to weigh in on whether they support the principle of negotiation of an agreement (and ultimately of a development project). The team should provide information on community rights and mining impacts. If there is consensus to consider the project, the negotiating team will have the green light to undertake negotiations.

- UNDERSTAND KEY CONCERNS AND INFORMATION NEEDS, which will require the community to express all ideas about possible impacts. The community will need information on the potential effects, and possibly case studies from other similar sites. The Tlingit, for example, as they prepared for negotiations and the EIA for the Tulsequah Chief Project in BC, prepared a document called *What We Need to Know*, which outlined the information the community would require to make a decision regarding the project.[36] This was based on community consultations, as well as review of materials provided by the company. The discussion paper reviewed the assets of the community, and then requested information on community impacts, wildlife impacts, wildlife populations, road plans and barging options, and on the mine itself (among other issues).

- TEST WHETHER THE RIGHT ISSUES ARE ON THE TABLE when it comes to the negotiation of an MoU, and determine the strengths and weaknesses of the community. The negotiating team will need to inform the community of the negotiation positions and topics to cover in precursor agreements, IBA negotiations or EIA forums. The community will need to understand the nature of what is being negotiated and what the implications of the agreement are for them. The community will need summaries of the MoUs or issues, and presentations about them. Consultations on the agreement(s) may need to occur many times, on different topics, and at different stages of negotiations.

Consent may be attained through: a band council decision; a government decision (i.e., under self-government context); by a group or by elders through consensus-building; and by community ratification or voting.

Tracking and Responding to Community Concerns

With time and new information, community members may change their opinions on key issues. Leaders and negotiators can keep track on an ongoing basis of the pulse of the communities on key issues.

In some cases, community concerns have been carefully identified in a community issues record (or "log") that can be used to develop core issues of dispute, concern, and agreement.[37] With time and new information, community members may change their opinions on key issues. Leaders and negotiators can keep track on an ongoing basis of the pulse of the communities on key issues. Briefing notes on any meetings that happen in communities can help to track issues and concerns over time. It is important for the sake of unity and maximizing community negotiating leverage that these issues and concerns not be made public without community consent.

This internal community issues log should not be confused with the community engagement or consultation logs compiled by developers, often required by regulatory or environmental assessment agencies. The developer is required to submit a summary of every consultation they have held locally, including the names and signatures of people involved, the issues covered, the date, and the time. The regulatory agency uses these logs to ensure that consultation has been sufficient.

Assess and Improve the Bargaining Position

Some self assessment needs to be done to determine the strengths and weaknesses that contribute to the community's overall bargaining position against that of the developer. Strategies need to be put in place to maintain "strengths" from which bargaining leverage can be generated, and to bolster those areas that are current weaknesses.

The negotiating team can collectively assess the bargaining strength, posing a number of questions together. People need to be able to share their views frankly if this exercise is to work. They also need to be able to raise issues that are sensitive without fear of repercussions. For example, if there is conflict in the community that will be a weakness in the bargaining position, then people need to be able to discuss this conflict and how it can be managed in relation to the negotiations. This internal discussion will help to build consensus and agreement on the possible objectives and strategies of negotiation.

The first focus should be to assess whether the community is well prepared. At another level, the team needs to carefully consider what specific aspects of the project create bargaining weaknesses or strengths (See Table 3.3).

Table 3.3: Bargaining Strengths and Weaknesses

Question	Yes	No
Is the community well prepared for negotiations?	Sign an MoU and expedite start of negotiations with developer.	Quickly develop strategies to: keep the company from expediting negotiations; speed up baseline assessments; advance community preparations, including development of a negotiating position.
Is the community united on views on project and agreement?	An ongoing communication strategy needs to be put in place to help maintain that unity.	Time should be allowed and a process set in place to allow the community to work through its differences prior to entering the negotiation process. The best time to begin negotiations is when the community finds itself in a unified position of maximum strength.

Most of the time, the answer will be somewhere between weak and strong on a spectrum, and may rely on a variety of factors rather than a single one. For example, the bargaining position may seem relatively weak if it looks only at the fact that the proposed project is far away (e.g., 200 km) from the nearest Aboriginal community, making it difficult to argue that the community has a major interest in, and will be

Some self assessment needs to be done to determine the strengths and weaknesses that contribute to the community's overall bargaining position against that of the developer. Strategies need to be put in place to maintain "strengths" from which bargaining leverage can be generated, and to bolster those areas that are current weaknesses.

affected by, the project. However, the picture may be very different if the community is the primary land user in the proposed development area for traditional harvesting, has treaty rights specifically identifying the area as traditional territory, there are no other closer communities, there is an outstanding land claim (or better yet, a finalized one) by the group over the territory, and archaeological records support the group's use of the area since pre-history.

Questions that help assess the strength of the community bargaining position include:

- Is the community physically close to the site? Is it on traditional territory?
- Does the community control access to the site? (Legal advice may be needed on this front).
- Will the project have adverse effects on people, lands, interests or rights?
- Is the community united in its views of the project and agreement?
- Does the community have experienced legal counsel and technical advisors? What preparations (legal and technical) undertaken by the team and community in preparing for and conducting negotiations will impact on the success?
- Is there a stated need for traditional knowledge or land use information in the environmental assessment process or the Crown approval process?
- Is there a land claim clause requiring an IBA?
- Is there unsurrendered title, rights and interests?
- Is there Crown support for a formal agreement with the proponent before the project is approved?
- Is there a statutory or common law duty for the proponents or regulator to consult with and accommodate indigenous interests?
- Do the community and the negotiating team have a clear sense of the project and its impacts?
- Are funds in place to manage this work? The financial capacity of the proponent or other funders to fund research or negotiation processes can influence preparedness.
- Does the proponent have the financial capacity to fund programs or processes required?
- Does the proponent show good will in negotiating fair terms and implementing agreements?
- What other stakeholder groups are likely to be negotiating with the company? What is likely to be their approach? What are the pros and cons of being in touch with them? How might their rights and interests impact on the community? What are their relationships to each other and to the company? What roles do they have in assessing projects)?
- What powers does government have and when and how will it apply them?
- What powers does the company have and when and how will it apply them?
- What powers does the community have? When? And how should it apply them?
- What time constraints exist? What is causing them? Can they be shifted? Can they be turned to the community's advantage?

Improve the Community Bargaining Position

There are two key factors that determine the extent to which Aboriginal people can maximize their bargaining position in order to benefit from negotiations.

The first is the innate bargaining power available to them, the established bargaining "chips," which is largely influenced by the status of the land involved, the legal context within which projects are developed, and the specific nature of the project.

The second is the extent to which the Aboriginal community mobilizes the bargaining power they possess and takes advantage of opportunities to enhance that power.[38] For example, even communities that don't have advantageous legal bargaining leverage can attain increased leverage through strong unity, focused goals, and a multi-pronged approach to engaging with the developer (e.g., direct action, strategic alliances with other Aboriginal groups or NGOs, and use of the media).

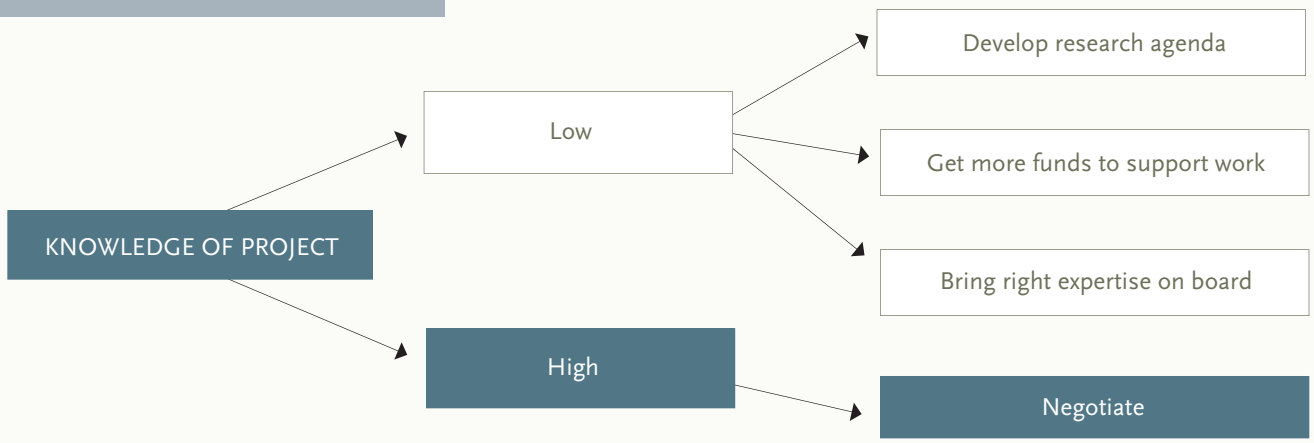
To improve the community's bargaining position, the team must look at each of the components of the bargaining position and determine which are within the control of the community.

There are some things that can't be influenced. So, the first step is figuring out what can and cannot be influenced. For example, if the community is not well prepared for negotiations, then the question becomes: What needs to be done to become better prepared? If it is a weakness that a community doesn't have access to experienced advisors or lawyers, what does it need to do in order to improve access? This may involve pursuing additional funds, but will also involve carrying out a search for appropriate technical people. This line of investigation is drawn out in Figure 3.4.

If the community and team do not have a clear sense of the project, a research agenda needs to be developed to fill those gaps. For example, if there is low or no information about how the company deals with indigenous people, information will need to be sought from indigenous groups in the region of the company's other projects. If the company hasn't had relationships in the past with indigenous people, then their policies on corporate social responsibility or community engagement should be reviewed. Statements about their approach or values can be used in negotiations as leverage. If

There are two key factors for maximizing the bargaining position: the innate power available from the status of the land and its legal context, and the power that can be gained through strong unity, focused goals, and engagement such as direct action, strategic alliances with other Aboriginal groups or NGOs, and use of the media.

Figure 3.4: Changing Bargaining Power



alliances with stakeholders are weak, support can be built from larger organizations that the community is part of (e.g., Assembly of First Nations, international environmental groups or indigenous rights groups).

If young people in particular are not engaged, their interests can be identified. For example, the negotiating team can develop a newsletter for young people that emphasizes issues important for them or reach out to them on social networking sites (such as Facebook), if that is where they are likely to engage, to find out their concerns and bring them into the process (see *Develop a Communications Strategy* on page 92).

There will be some weaknesses in the bargaining position that can't be changed. For example, the community may have a non-negotiable election date coming up, creating political uncertainty. The key point is to be aware of a potential weakness and manage the negotiations as best possible to avoid the pitfalls associated with it.

For managing weaknesses, two strategies are available:

- One is to hide the weaknesses from the other side. For example, a communication protocol with the company can help keep information about the weakness confidential to the community.
- The second involves putting something in place to deal with the weakness. For example, if there is a vulnerability because of reliance on company or government funding, set up a contingency or emergency fund and hold back a proportion of funds within it so that, if funds are not renewed as expected, there is something in place to carry the community over.

Strengths that communities commonly have are:

- Elders are a key strength, but they may be few in number, and some may be dealing with health challenges. To bring them into the process as a negotiating strength, the participation of elders may need to be conserved carefully, making sure they are always fully informed, but not actively involved at every point in the process or present at every meeting, so they are not in every little battle. Their energies may need to be preserved for critical points in the process, or critical meetings or hearings.
- Traditional and oral knowledge is often held about an area or region. This is something the company will not have access to and may not know about. The community holds all the information in this area, and can carefully control access to information and decide how it will be used, for example in public hearings.
- Where the project may have a strong effect on Aboriginal rights, Crown policy on consultation and accommodation is a source of strength. A strategy should involve knowing the Crown position, and then designing consultation and accommodation requirements to share with the company, instead of waiting for proposals to be brought by the company or the government.

Elders are a key strength, but they may be few in number, and some may be dealing with health challenges. To bring them into the process as a negotiating strength, the participation of elders may need to be conserved carefully, making sure they are always fully informed, but not actively involved at every point in the process or present at every meeting.

Determine Objectives and Develop a Strong Negotiation Position

Questions to consider in terms of forming the negotiation position are:

- Where do we want to be?
- How can this project help us get there, given what we know about it?
- What is it that we are trying to protect from harm? (i.e., what are we absolutely not willing to trade away?)
- What types of benefits are most important to us? Why?
- What sort of process for decision-making, consultation and governance is likely to be required to get us to where we want to be?
- What can be realistically achieved, given what we know about our bargaining position?
- Given what we know, how can an IBA help us to pursue the communities' objectives?
- The final question: What position should we put to the company in order to achieve this?

The negotiating team needs to link information on community based needs and baseline conditions to the negotiating position. For example:

- The Yellowknives Dene First Nation in the NWT held community meetings to establish key concerns and priorities in the area during the negotiations with the EKATI diamond mine. In these community meetings, a list of 76 concerns were identified and then prioritized. The negotiators used these concerns to create their objectives.
- The Tłı̨chǫ Nation in the NWT pursued a different approach each time it negotiated an agreement with the three diamond mines in the area, based on community priorities. For example, during negotiations for the second agreement, business was identified as the top priority through outreach, and this was the main objective of the negotiation of the agreement. In the third agreement, the focus was entirely on the traditional economy, so the negotiators focused primarily on attaining funds for a harvester program.

In some cases the community position will be very clear and leave no room for compromise. For example, if the community has decided that it simply will not accept mining if it involves use of a particular lake for tailings disposal, then this is the only position that can be put on the table. In other areas, there will need to be some compromise to get an agreement. This often occurs in relation to financial payments. In these cases, a bargaining position will need to be put out that is more ambitious than expectations. However, it is important not to put demands on the table that are unrealistic given what is known about the project. This may lead the company to adopt an entrenched position around a low offer or even walk away from the negotiations completely because they just don't think they will be able to reach a deal.

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Summary of Section 3

- Form a structure(s) for negotiations.
- Develop a long-term strategic research plan and know how your community goals fit in.
- Decide on what kind of data you will need in the short, medium and long term.
- Make a plan to manage, file and store incoming data.
- Decide who will have access to data, and how confidentiality will be maintained.
- Give clear guidance to consultants on how you want information analyzed, presented and brought back to the negotiating team and community.
- Develop a budget for the work. Seek the funds from the project proponents, the government, and/or foundations.
- Determine what information will be collected, using Table 3.1 on pages 70 to 73 as a starting point.
- Establish baseline conditions on the community to address needs and capitalize on resources.
- Define how information will be communicated.
- Establish a single point of contact.
- Never let a single individual meet alone with the proponent to discuss the issues. Always bring at least another person or note taker.
- Assess and improve your bargaining position.
- Determine objectives and develop a strong negotiation position.

A complete list of references is available in the final section of the toolkit, which can downloaded at www.ibacommunitytoolkit.ca

Notes

1 O'Faircheallaigh 2000.

2 Ibid, 7.

3 Ibid, 7.

4 Barsch and Bastien 1998.

5 Boutillier 2009.

6 Weitzner 2006, 21.

7 Barsch and Bastien 1998.

8 Innu negotiator in an interview for this toolkit.

9 Barsch and Bastien 1998.

10 FNEATWG 2004, 7.

11 Speaker in Weitzner 2006, 22.

12 Barsch and Bastien 1998.

13 There are many free software programs that provide users the ability to manage files among a group of users.

14 O'Faircheallaigh 1995b, 9.

15 See Innu Nation Task Force on Mining Activities 1996.

16 FNEATWG 2004, 21.

17 We use the term SIA as a catch all phrase to cover all considerations related to social, economic and cultural well-being, including wildlife harvesting, access to and relations to land, and physical heritage resources. Elsewhere, you may have seen the terms socio-economic impact assessment, cultural impact assessment, heritage resources impact assessment used for these types of studies.

18 See FNEATWG 2004; MVEIRB 2007.

19 For Socio-Economic Guidelines see MVEIRB 2007.

20 For example, MVEIRB 2007; FNEATWG 2004.

21 For example, Gibson 2008; Storey, Shrimpton and Clark 1989; Beach, Brereton and Cliff 2003.

22 Although guessing when this is, given increasing or decreasing mine lives based on a variety of geological and economic factors, is an inexact science at best. In addition, communities need to be aware of the likelihood and risks associated with temporary as well as permanent closures. Temporary closures may have similar "boom-bust" effects on society and economy.

23 Action research or participatory research involves communities actively in the definition of the research questions, the research methods and process, and in the interpretation and implementation of findings. Some key goals are to build internal research capacity, ensure that local context is integrated into the study, and to ensure that findings are acted upon locally.

24 FNEATWG 2004, 10.

25 Ibid, 11.

26 O'Faircheallaigh 1995a, 4.

27 FNEATWG 2006.

28 Henessey 2007, 2.

29 Bass et al. 2003.

30 Ibid.

31 Sweeting and Clark 2000, 51.

32 Bass et al. 2003, 34.

33 Weitzner 2006, 13.

34 Ibid.

35 O'Faircheallaigh 2000, 7.

36 FNEATWG 2004, 7.

37 Innu Nation Task Force 1995; Taku River Tlingit 1995.

38 O'Faircheallaigh 1995b, 1.

SECTION 4

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SECTION 4

Conducting Negotiations and Reaching Agreements

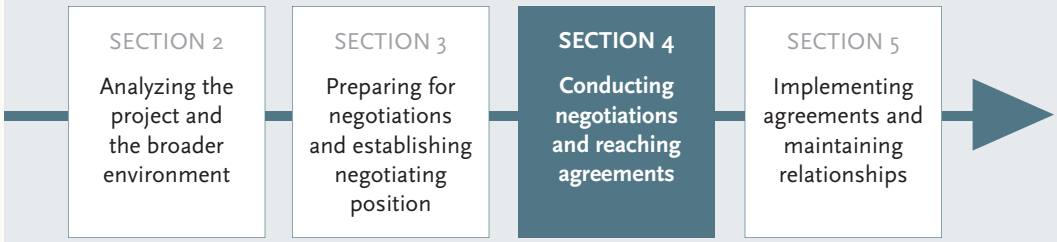
Information gathered and decisions made in the preparation phase should feed into this next phase: conducting negotiations and creating agreements.

Information gathered and decisions made in the preparation phase should feed into this next phase: conducting negotiations and creating agreements. The first part of this section covers strategies and tactics of face-to-face negotiation. It also deals with issues such as timing, negotiation forums, keeping negotiations on track, and critical 'back up' functions such as budget management. For example, how do you make sure that everyone on the negotiating team knows what they should be doing, that they do it when they're supposed to do it, that there are lines of authority in place to compel people to deliver if necessary? How do you keep track of resources and make sure you don't find yourself running out of money and so undermine your negotiating position? The second part covers many legal and substantive clauses that can be included in agreements. It does not present template agreements, but rather a range of ideas and options gathered from the literature and existing agreements. No discussion can cover every substantive item that could be included in agreements, and we focus on the major areas that tend to be of primary concern for almost all indigenous communities. Finally, the third part discusses keeping agreements in line with community goals and finalizing them.

This negotiation phase will allow you to:

- Effectively manage negotiation processes and procedures;
- Identify the full range of issues and options for negotiated outcomes; and
- Create an agreement that reflects community goals and protects community interests.

Structure of the Toolkit



Negotiation Processes and Procedures

Good faith negotiations require both parties to talk together in a way that is agreed to from the start. The company should show that it responds quickly to issues, regularly and clearly. It should provide all the information the community needs to make an informed decision and give leaders enough time to discuss proposals, and agree on things in their customary way.[1] Communities also have to engage in good faith negotiations. As discussed in Section 2, if the company attempts to consult through every feasible manner, but is frustrated through lack of community response, the Crown may still consider the company to have consulted and accommodated the community and thus issue permits for a project. Therefore, negotiation should be done in good faith. This does not mean hard bargaining cannot occur.

If the company attempts to consult through every feasible manner, but is frustrated through lack of community response, the Crown may still consider the company to have consulted and accommodated the community. Thus, negotiation should be done in good faith. This does not mean hard bargaining cannot occur.

A successful negotiation is one in which indigenous people get the things they really want. (This is why implementation is so important – see Section 5. If the agreement doesn't work well, people cannot get what they want.) Since all Aboriginal groups may not want the same things, successful negotiations can lead to agreements that are very different.

Negotiation can be very challenging. A few examples of the challenges are:

- A community has to come up to speed on a tremendous amount of technical information in a very short time.
- People can feel excluded because they don't understand the technical language that is used to describe the mining process and its potential impacts.
- People may not have the capacity to cover all the issues that need to be reviewed.
- The schedules that are created often force decisions on people, and they feel they have no power to change the timeframes for decision-making. There is commonly a difference between the timeframe that communities need to make informed decisions, and that of the developer and regulator.
- Often information is brought to people without allowing for informed decisions to be made, so that when a developer consults on a proposed development, they may negotiate the tonnage but not the principle of whether there ought to be a project or not.

It is with these challenges in mind, and the principle that negotiations will be done in good faith, that negotiation relationships, roles, strategies and budgets can be considered.

Roles for Advisors and Community Negotiators

The roles of advisors changes with the stage of the negotiation process. At the outset, advisors are critical in helping to secure funds for consultations and negotiations, in ensuring that the community knows what is happening, in locating specialist expertise, and in providing information on other agreements. During negotiations, roles for advisors may include to:

- Back up the political leaders and the community in dealing with the company and government;
- Organize the negotiations, for example through arranging meetings, keeping records of meetings, and managing correspondence;
- Carefully analyze offers from the company;
- Make concise briefings for the Aboriginal negotiators about offers, comparing these offers to other agreements, analyzing how far these offers go to meet community goals, and developing alternatives to put back to the company;
- Do the hard talking with the company when it is better for Aboriginal leaders not to talk hard;
- Help get support for the community from the government and political groups; and
- Help prepare for after the agreement, for example by helping to set up trusts to manage income flows.

Do the hard talking with the company when it is better for Aboriginal leaders not to talk hard.

Roles for community leaders and team members during negotiations will include:

- Step in to support staff and negotiators if the company attacks them;
- Do hard talking when needed;
- Deal with the bosses in the company and the government; and
- Prepare for after the agreement is signed, for example by getting rules in place for managing money.

After the negotiations, the advisors will often help monitor the agreement to make sure things are happening as they should, and back up community leaders or community representatives on implementation committees in taking action if things are not happening (see Section 5).

Running Meetings

A great deal of the work involved in negotiations (some people think up to 80 per cent) should be done before you arrive at the table. Once you are in negotiations, much depends on how the negotiators behave at the table, how they manage offers, and on how they manage the dynamics of the group and analyze the behaviour in the room. Much has been written on how to manage negotiations. Some key tips are summarized in Table 4.1.

Table 4.1: Key Tips for Managing Negotiations

DO	DON'T
Remain united, regardless of the issue or the cracks that can emerge in discussions or dynamics of a negotiation. Argue and disagree if need be, but do it in private.	Never show disunity to the other side. Never argue with someone or disagree with someone from your team in front of the government or company.
Always demonstrate proper respectful protocol in meetings. For example, if you always shake hands with the people you respect in your culture, shake hands with everyone in the room.	Never make personal insults or disregard your own cultural protocols in a negotiation.
Take the time needed to be well-prepared and keep all interested parties informed. Keep other parties advised of progress.	Don't let yourself be rushed by the other side. Hasty decisions are often bad decisions.
Make a plan for the meeting and stick to it. If things are going off track or if you think it would be good to change the plan, take a break and talk about it.	Never change course midstream and move to a topic you don't have agreement on among the negotiating team.
Agree on who will speak on issues (often the lead negotiator) and on the issues to be discussed.	Don't let speakers who have not been briefed or that could interrupt the flow have the floor.
Make sure the positions put forward have been carefully thought out. If the company brings brand new material to the table, don't react until there is time to consider it together.	Don't talk about half-baked ideas or proposals that the company brings forward. When in doubt, ask more questions.
Make sure proposals are understood, ask questions if need be, then consider the proposals in private with the negotiating team. If anyone doesn't understand something, or feels uncomfortable, ask for a break and talk about it.	Don't respond if the company or government puts an offer on the table, whether you think it is good or bad. Don't make snap decisions without consulting.
Be clear about the jobs that different people have and support people in the jobs they have been given.	If someone has been told to play a friendly role, don't pull them into an argument.
It may be effective for people's jobs to change over time.	Don't leave someone who is ineffective in their role in that position. Change them to a new position, or remove them altogether.
Take notes on every meeting, and always have more than one person at a meeting.	Don't let anyone meet alone with the company.
Listen carefully to what people on the other side say and watch them carefully.	Don't 'turn off' because you don't like what they are saying.
Look out for any disagreements on the other side. It may mean that the company has not worked out exactly what it wants, which may provide you with an opportunity to encourage company negotiators in a direction that is positive for the community.	Don't ignore their disagreements and not think about what it could mean for your position or negotiations strategy.
Always have a debriefing session after each negotiation. Bring up anything anyone noticed during the meeting. Even small things are important so make sure you bring up anything you notice. Keep notes of the discussion. Review notes from the last negotiation session in preparing for the next one.	Don't miss debriefing sessions or hold none at all.

Shaping the Negotiation Agenda

Many negotiators say that the key to a successful agreement for a community is to always be proactive, playing offence rather than defence. This is certainly the case with the creation of the negotiation agenda, and the ordering of the issues. If the community negotiating team does not get the community's key issues on the table, or give them priority, the company won't do so.

When tackling tough issues, it may be advisable to begin by seeking agreement at the level of principle first, rather than beginning by putting a specific proposal on the table. For example, the negotiating team can begin talking about money in terms of alternative structures for financial arrangements, without mentioning specific dollar amounts. You may present the company with an options paper that canvasses three different approaches, all at the conceptual level, but with no dollar figures.

Often, people are advised to deal with some easy-to-solve issues early. This can create a positive atmosphere and spirit of cooperation among the negotiating teams. This means tough problems may be easier to deal with further along. This model can have pitfalls. People can develop a sense that they are coasting and that everything is easy, and then they hit really hard issues and are shocked. Another option is to start with some easy issues, deal with them in detail, then introduce harder issues at the level of principle, without discussing details. For example, if it becomes clear that both parties are on the same page when it comes to training because the community wants jobs and the company needs local labour, this issue can be treated early. One of the toughest issues is usually the question of money. So while you are agreeing on provisions for employment and training, the negotiating team can begin talking about money in terms of a structure of a financial arrangement, without mentioning dollar figures. The point here is to focus the discussion on options, rather than setting out a specific position. For example, you may present the company with an options paper that canvasses three different approaches, all at the conceptual level, but with no dollar figures. As negotiators deal with the details of employment and training, the team can develop a common understanding of the issues around financial structures that means when the agenda moves to money, there will already have been a substantial amount of in-principle discussion, paving the way for an agreement.

Another option is to start with the tough issues, but experience suggests that until some shared positions are agreed on important (but not 'hard') issues, there may not be enough trust to resolve difficult negotiation topics.

Another option is just to start with negotiation of principles on every topic. This might involve canvassing a proposed set of principles that will ensure that the key issues for the community are addressed. For example, a principle may hold that both groups share the objective of avoiding damage to cultural heritage. If you can get agreement on that, the structure will be in place for subsequent detailed discussion of specific aspects of cultural heritage and ways to avoid damage.

Managing Offers

The negotiating team will need to make and receive offers. As a general rule, it is better for indigenous people if their proposals can form the basis of negotiations. As one indigenous negotiator said, "you have to hold the pen." This helps define the agenda for negotiations and ensures the most important issues receive priority in the negotiations. Companies will of course put their issues on the table, but it is better if this occurs within a framework that has been established by the Aboriginal side.

When it comes to money matters, a flag should be raised if the company is the first to put a proposal on the table. It may start with a poor offer and this requires the Aboriginal side to put a very large effort into shifting the company away from that low position. Even if it manages to shift the company away by a substantial amount, the offer may still not be very good.

When it comes to money matters, a flag should be raised if the company is the first to put a proposal on the table. It may start with a poor offer and this requires the Aboriginal side to put a very large effort into shifting the company away from that low position.

If a company does put an offer on the table, there are a number of courses of action you can take. If you believe the offer is a poor one, you can simply refuse to consider it. You can argue that you are not sufficiently prepared to respond so that you want to delay considering an offer from the company. If you do consider the offer, and you are very dissatisfied with it, an effective strategy is to refuse to respond. Instead of responding, the negotiating team can table a set of principles to serve as the basis for negotiation. This takes the focus away from the company's offer and provides a basis for discussions from quite a different starting point.

Whatever offers are made by a company, it is essential to analyze them carefully. Technical staff must focus on ensuring that the offer is properly understood, check back with the company if there is any ambiguity and, if the offer is in a highly technical or legal form, prepare a summary of it in plain English and/or have it translated. Aboriginal negotiators can then assess the offer in terms of the objectives that have been established for the negotiation.

Tactics

At the negotiation table

The tactics referred to here are about how to enhance bargaining power and influence the dynamic of an ongoing negotiation through actions inside the negotiation room. The next sub-section refers to 'out of the room' tactics, things that community members or other organizations might be involved in to create outside pressure to change the in-room bargaining power.

Principle of Equivalency

Negotiations should be structured so that people on the Aboriginal side are always dealing with equivalent people in the hierarchy of the company. For example, if the company sends junior staff to a negotiation, senior Aboriginal negotiators or elders should not be in attendance. This is important for a number of reasons. First, companies have to come to understand and respect the authority held by Aboriginal leaders and elders. Second, if senior Aboriginal people are dealing with junior company people, the company people can, if they want to reject a proposal appeal to the higher authority. If the senior Aboriginal leaders are in the room, they cannot appeal to any higher authority. Also, the company has in effect held ammunition in reserve which it can draw on in the final and tough stages of the negotiation, whereas the Aboriginal side has already used its best weapons. If you follow the equivalency principle, then the community always has something in reserve when the company has something in reserve. This can also reduce costs, in that if a number of senior people are sent to the table when a junior company member is there, the price tag (for time and salaries) of the community is much higher than need be. The negotiating team should always ask who the company is sending to the next meeting. This way the team can choose the right community team each time.

PHOTO: RICHARD HARRINGTON/NATIONAL ARCHIVES

Negotiators should make the basis for a walk-out very clear, emphasizing that the step is not taken lightly and setting out the specific reasons for it. This should be followed up by a letter to the company CEO or board of directors setting out the circumstances involved and reiterating the willingness to engage in negotiations if the company ceases the offending behaviour and generally displays its good faith.

Walking Out

Walking out should never be done without very good reason and without the authority of senior negotiators. It signals a serious rejection of whatever position the company has put on the table, or whatever behaviour it has engaged in. Walking out has the potential to seriously derail the negotiations. Also, it can be used only very rarely, or it loses impact. On the other hand, if it is very rarely used and if it is obviously the result of careful consideration it can be very effective in causing a company to reconsider its position.

A walk-out might be justified, for example, where a company has:

- Blatantly disregarded undertakings it has made in an MoU;
- Undermined community solidarity by communicating inappropriately with individual members of a community;
- Broken major commitments made earlier during a negotiation; or
- Persistently displayed a lack of willingness to work towards agreement.

Given the seriousness of a walk-out, it is usually only triggered after break-out discussions involving senior negotiators or in response to a prior decision by the negotiating team to walk out if the company behaves in a particular manner.

In order to leave a basis to resume negotiations, Aboriginal negotiators should always make the basis for the walk-out very clear, emphasizing that the step is not being taken lightly and setting out the specific reasons for it. This should be followed up by a letter to the company CEO or board of directors setting out the circumstances involved and reiterating the willingness to engage in negotiations if the company ceases the offending behaviour and generally displays its good faith.

Bringing in 'Power Figures'

It can be particularly powerful to bring in people who hold special roles within the community, such as elders, women or children. Such interventions on key issues have been very influential, when used carefully. In one case, women negotiators spoke to a mining company CEO about youth suicide in their community, and led him to a very different understanding of the demands that community negotiators were making. The classic case is to have elders talking about culture and environment, about their responsibility to look after their traditional lands, when negotiating environmental provisions. These groups can be immune to attack from the company, unlike negotiators or staff.

In one case, women negotiators spoke to a mining company CEO about youth suicide in their community, and led him to a very different understanding of the demands that community negotiators were making.

Just like the tactic of walking out, bringing in important figures isn't something the negotiating team can do frequently. Indeed, as discussed in detail in Section 3, elders may have limited energy, and their energy needs to be harboured carefully (see pages 95 and 102).

Removing Harmful People

Sometimes a person on your negotiating team will be hampering progress, or behaving so poorly or rudely that they may need to be taken off of the negotiating team. One negotiator referred to these people who can derail negotiations through their behaviour as "poisonous people." As a negotiator suggested, "You can't do much about their personalities, but for your own side you need to think carefully about the mix of personalities you put together."

If a "toxic" person is kept on the negotiating team, they may poison the relationship beyond repair. The first thing to do is identify clearly if the person is indeed threatening to derail negotiation or if their role is being misrepresented by company negotiators trying to marginalize them or as a result of internal tensions. In other words, ensure you have an accurate and complete picture of the situation, rather than acting on hearsay. Look at the record of conversations, observe a negotiation, and then talk to the people who work most closely with the negotiator. Are they really toxic, or do they bring an element of power and forcefulness to the negotiation? Sometimes, an intransigent person can be a great negotiator, as long as there are other negotiators that are more flexible. This can work in your favour, as the other members of the negotiating team will seem increasingly reasonable to the company team.

However, if an individual is indeed toxic to the negotiation, then a range of possibilities emerge. You can talk with the individual and ask for them to change their behaviour and attitude. If this doesn't seem likely or feasible, the individual can be transferred laterally to another position, but one in which they can do less harm. Sometimes the negotiating team can work this kind of conflict out, as suggested by one negotiator: "We need to balance interests and approaches of negotiating team versus leadership. I've been told, 'you're way out there,' and they have reigned me in, which was really important." Regardless of the approach used, this can be a difficult internal matter that has to be managed diplomatically.

Meeting Locations

The location of meetings may appear to be a matter of organizational detail, but can have subtle but powerful effects. Use of an inappropriate location, for example, a windowless office, can make Aboriginal negotiators uncomfortable. Meeting consistently on company territory can make Aboriginal negotiators feel like they have less power, are not with their own people, and can shift the balance in favour of corporate priorities.

On the other hand, being on people's traditional lands can reinforce community messages to the corporation, and take corporate negotiators outside their comfort zone. It can also remind Aboriginal negotiators of the importance of their job and keep them connected to their base. Meeting in the community is an excellent way to communicate information back to community members on the negotiation, and may also allow company negotiators to come to know more about a community and what it cares about. This helps, for example, to develop corporate understanding of what lies behind Aboriginal proposals in relation to environmental and cultural protection and can therefore make those proposals more acceptable. The right setting can help make for the right meeting outcome. If the meeting is in the community, the cost usually is assumed by the company.

Meeting Language

Meeting in the community is an excellent way to communicate information back to community members on the negotiation, and may also allow company negotiators to come to know more about a community and what it cares about.

The choice of language to use is particularly important if the meeting is in the community. Meetings can be held in the indigenous language, with translation for the company, so that there is solid understanding on both sides of concepts and proposals. It is very useful to conduct the meeting in the indigenous language if outside community members are permitted into the meetings, or are attending to attest to the importance of an issue. If meetings are run in English (or French), make sure to prepare the translators well, and ensure that things are said simply so they can be translated and understood.[2] Sometimes translators work with key negotiators to understand the critical terminology (e.g., acid rock drainage), so they are prepared for negotiation sessions in advance.

Outside of the negotiation room

Much of Section 3 focuses on what can be done to enhance a community's bargaining position before negotiations start. Once they are underway, there will usually be restrictions on a community's freedom of action – for example if there is an MoU that states that the negotiations will not be discussed in the media. Negotiations in one case in Canada were ended when a chief negotiator spoke on the radio about the nature of impacts that were expected from the company's operations.

But this is not to say that nothing can be done to influence negotiations. For instance, one indigenous community set up a summer and winter camp near an advanced exploration site, in order to keep an eye on things and establish a continuous presence. This emphasized to the company the significance of the site.

More generally, a community can continue to form alliances, raise its profile in the media both nationally and globally, cooperate with other groups in environmental assessment processes, and engage in litigation or direct action in relation to other proposed developments (see Section 2). All of these actions emphasize to company negotiators the strength of the community and the costs likely to be imposed on the company if it does not reach agreement, strengthening the community's bargaining position.

Agendas should be prepared and circulated well in advance of meetings. There should be no situations in meetings where Aboriginal negotiators have to respond without adequate preparation.

Documentation and Communication

Agendas should be prepared and circulated well in advance of meetings. There should be no situations in meetings where Aboriginal negotiators have to respond without adequate preparation. Agenda items should be specific and lead toward outcomes – not just provide a basis for a *meeting for the sake of meeting*. At a broader level, it is useful for both parties to try to maintain an ongoing schedule of future meetings so that people are aware of the commitments they have to make and see how individual meetings fit into the broader scheme of negotiations.

Minutes should be taken of every meeting. This can be done separately or jointly. One person should be appointed as the note taker. Notes should be reviewed and corrected or commented on by both negotiating teams, especially in situations where critical issues or agreements have been recorded. Any joint positions arrived at should be reiterated at the end of the meeting in a form agreed to between the parties. Where the matters agreed are significant to the negotiations, it is advisable to follow up with a letter to the other party setting out one's understanding of the position reached. Copies of such letters should always be kept in the community.

Information and evidence from meetings may need to be used in future meetings, so all meeting notes should be transcribed, and then carefully filed. Further, if decisions are made to pursue legal action in the future, it is important to have a record of negotiations and of communication between the company and the community. This may also be used in the environmental assessment process to determine whether the community has been adequately consulted and accommodated.

Communication outside of meetings also needs to be carefully documented. All significant communications should be in writing. In particular, all exchanges of draft materials, especially negotiating positions, need to be carefully documented with

every version of agreement text retained and filed. Phone calls of significance should be documented. Oral communication between individual staff can be important in maintaining communication between meetings and in canvassing proposals that can form the basis developing for agreement. However, where individual staff members engage in significant verbal discussion of negotiation issues, they should maintain file notes because attempts may later be made to misrepresent the verbal communications.

Keeping Things on Track

Meetings constitute only part of the work of negotiations. A great deal of work has to continue between meetings. This includes follow up correspondence from the previous meeting, preparations for the next meeting, tracking of negotiation budgets, work on securing ongoing funding, updating information on the project, preparing briefings, maintaining media and stakeholder contacts, and also maintaining contacts among affected Aboriginal groups. A vital part of this work involves maintaining communication among the negotiators and between the negotiating team and the community. Communication is important even where little substantive progress has been made in the negotiations. Indeed it may be particularly important at such times in order to ensure that the community stays united behind the negotiation effort. Updates on the efforts of the negotiating team to push ahead and explanations for the lack of progress are especially important.

There has to be a constant reappraisal of negotiation issues in the context of the ever-increasing information that is available. For example, negotiators may need to reassess what is realistic in terms of community objectives. This doesn't mean that you have to reduce what you are asking for. It may mean the opposite: you become aware of additional opportunities that weren't obvious at the beginning of the negotiations. This may also result in some reordering of priorities.

A quick survey of the amount of time taken for agreement making reveals vast differences: the Troilus agreement was negotiated in four days, the EKATI agreement in 90 days, the Musselwhite agreement in three years, and the Cominco-NANA agreement took nine months. The key issue is to avoid a worst-case scenario of rushed and uninformed negotiations.

A quick survey of the amount of time taken for agreement making reveals vast differences: the Troilus agreement was negotiated in four days, the EKATI agreement in 90 days, the Musselwhite agreement in three years, and the Cominco-NANA agreement took nine months.[3] The key issue is to avoid a worst-case scenario of rushed and uninformed negotiations, resulting for instance from poor negotiation preparation, lack of Aboriginal group experience, pressures from government and the speed of permitting, multiple Aboriginal groups and multiple projects in the region, few internal resources, and intra-community tensions about the project.

It is critical to understand government and corporate decision-making points, how these impact on the communities' leverage, and when leverage is at its highest or begins to decrease. There is a need to balance community timing requirements with an understanding of corporate and regulatory needs.

Each jurisdiction will have different timeframes and decision points for the permitting process, and understanding these will help to make decisions about timing for negotiations. Companies will also differ in their time frames, and in some cases may be under substantial time pressure. The trick is to avoid undue pressure on the community's time frame but to exploit pressure on the company's, and indeed even help to create that pressure.

Budgets

Adequate resourcing is fundamental to successful negotiation. It is therefore vital to keep careful track of expenditures, and to ensure that funds are being used efficiently and sufficient resources remain to complete the negotiation. If it seems that funds are not adequate, early action to obtain additional funding is critical. A gap in the availability of funding can seriously undermine a negotiation, especially if it occurs at a crunch point in discussions between the parties. The person on the negotiating team with the role of raising funds (from government, industry or foundations) should develop a forecast of budget needs, a summary of what is available through current funding arrangements and any shortfalls. Shortfalls can then be planned for and new funds raised or activities cut back. If there are multiple Aboriginal groups involved in negotiations, research needs can be split to spread resources.

A few pointers that can assist in managing budgets:

- A budget manager should be included in the negotiating team, so there is a constant reappraisal of funds available, avenues to raise more funds, and spending to date.
- The budget manager should provide regular and ad hoc reports on the state of the budget, emerging issues, and options for addressing emerging issues.
- Internal budget management rules should be in place so that corrupt or inappropriate use of funds is prevented.
- Funds for negotiations should be separately allocated and managed. If these funds are simply allocated to a central account, it can be very difficult to code and track spending, especially if multiple managers are spending and allocating funds.

If it seems that funds are not adequate, early action to obtain additional funding is critical. A gap in the availability of funding can seriously undermine a negotiation, especially if it occurs at a crunch point in discussions between the parties.

Relationship Building

Successful negotiations rely on an alignment of interests. Where there is long-term shared vision, this vision and the land and culture that people seek to protect can be brought to the attention of the company. Negotiators speak of how bringing the corporate representatives out "in the bush" changes outcomes and perspectives.

> *You need to go on the land, ideally in an isolated place, so that you can say, 'this is what we are fighting for. This is where we get our moose, our fish.'* — Tahltan negotiator

> *You need to shift their worldview into an Aboriginal paradigm. In the Innu Nation, where stuff gets done is in the bush, away from the boardrooms. It actually does change outcomes.* — Innu advisor

> *Before we actually talk about specific issues, we talk about what we did last weekend. It sounds touchy-feely, but it does add value. It creates respect, empathy and mutual interest. You want to get corporate people to the point where they are curious about your trap line. Developers need to recognize that they are in traditional territory and recognize rights of the community.* — Cree negotiator

Corporations are able to forge better agreements when they realize what is deeply cared for, and this generally occurs if the company executives respect the people they are negotiating with. Relationship building can lead to the creation of a shared vision.

Corporations are able to forge better agreements when they realize what is deeply cared for, and this generally occurs if the company executives respect the people they are negotiating with. Relationship building can lead to the creation of a shared vision.

It is important to keep in mind that if an agreement is concluded, the agreement is not the endpoint. It is only the start of a process that is likely to last for many years, and involve substantial challenges if the potential benefits of the agreements are to be realized. Agreements only work well if they form a basis for a living relationship between the parties.

The way in which a negotiation happens has a major bearing on the prospects for developing such a relationship. If a negotiation is bitter and involves long, drawn-out conflict between the parties, this may make it difficult to build a productive relationship over the longer term. On the other hand, even though negotiations are hard fought, if they occur in a spirit of respect and involve an element of joint problem solving, it will be much easier to establish. For this reason, experienced negotiators will not push an advantage to the utmost where this would undermine relations between the parties. One senior Aboriginal negotiator in Western Australia talks about "always leaving something on the table" for the company because of the need to secure the commitments of mining companies to agreement implementation.

Identify Options and Provisions for Negotiated Agreements

This section covers a wide range of provisions that may be included in agreements. We deal first with the legal components of agreements (see Table 4.2 on page 122 for an overview of legal issues) – for example, how people are bound in these agreements or what happens if ownership of the project changes hands. We then review the substantive components of an agreement, such as education, training, financial provisions, among others (see Table 4.3 for a full listing of the substantive issues addressed in the toolkit).

As noted above, each community has different goals and resources, and thus each will have unique requirements in negotiating agreements. Also, there is no way that a review of content options at one point in time can anticipate the creativity with which negotiating teams will approach agreement making. Even now, new measures are being invented that we cannot include in this overview. Therefore, we need to repeat a point made earlier: This discussion is designed to outline the issues covered by IBAs and some approaches in dealing with them, not to suggest a specific template that must be followed to obtain positive results.

Agreement language should clearly and precisely spell out obligations, and avoid loose terms such as "when possible" or "if feasible" or "where reasonable." If "slippery" words like these are suggested, the negotiating team should push for concrete and exact language.

W. MCKINLAY/NATIONAL ARCHIVES OF CANADA PHOTO

Legal Provisions

Legal clauses set the boundaries of the agreement, the manner of dealing with disputes, and define a range of other aspects of the relationship between parties to an agreement. Many legal provisions are discussed here, but no agreement is likely to contain all of these. Legal advice will be essential in crafting an agreement that works well for your community.

A basic rule is that language should clearly and precisely spell out obligations, and avoid loose terms such as "when possible" or "if feasible" or "where reasonable." If "slippery" words like these are suggested, the negotiating team should push for concrete and exact language.

Precise, crisply-worded agreements lend themselves to implementation, because it is clear who is required to do what and when they have to do it, making it easier to identify implementation problems and act to correct them. Some negotiators argue against tightly crafted provisions, arguing this may place limits on flexibility.[4] However, flexibility can be built into tightly crafted and precise agreements, for example by providing for alternative approaches where problems are encountered, or including mechanisms that adjust automatically to changing circumstances. We provide examples of such approaches later in the discussion. A well drafted document can provide a foundation for a workable relationship between the parties. A poorly drafted one can result in a constant struggle over the meaning of an agreement and the responsibilities of the parties under it.

Precise, crisply-worded agreements lend themselves to implementation, because it is clear who is required to do what and when they have to do it, making it easier to identify implementation problems and act to correct them.

Table 4.2 provides a full list of the legal provisions described in this section. After reviewing these, the negotiating team can use this table to indicate the relevance and importance of individual issues and provisions to the community.

Table 4.2: Checklist of Legal Provisions

Topic area	Relevance to community
Background information or recitals or preamble or objectives	
Parties	
Definitions and interpretation	
Principles and goals	
Consent and consultation	
Independent legal advice	
Liability for expenses	
Commencement and expiry	
Warranties and authorities and succession	
Dispute resolution	
Confidentiality	
Enforceability	
Assignment: sale or transfer of project or company	
What happens if no mining occurs	
Unforeseen circumstances and *force majeur*	
Suspension of agreement or operations	
Notice	
Amendment	
Change in law	
Waiver	
Severability	
Indemnity	
Non-employment or relationship of parties	
Attorneys	
Counterparts	
Execution of agreement	
Further action	
Review	

Background Information, Recitals, Preamble or Objectives

Introductory provisions such as background information, recitals, preamble, or objectives set the scene and provide the background and motives of the parties. They help in understanding and interpreting the agreement.

This section is not usually considered legally binding, but it is potentially important if the agreement has to be interpreted in the future by new implementation teams or team members, or if the courts are asked to resolve a dispute in relation to the agreement.

These clauses are usually listed alphabetically (A, B, C, D), not by numbers, so as to keep them separate from the terms of the agreement. Immediately after this preamble, there is usually a clause stating that the rest of the agreement is legally binding.[5]

The preamble may include:

- Reasons for entering agreement;
- Intent of the parties – sometimes there can be different views, which can be expressed so that each party's view is laid out;[6]
- Description of rights, commitments and interests (e.g., mining company is holder of listed mining leases;[7]
- Description of type of agreement;
- References to other agreements previously held by the company and the community;
- References to other related processes, such as treaty or other land claims settlement negotiations, court cases, assessments or legal actions;[8] or
- Reference to government policies that underpin its commitments in the agreement[9]

Introductory provisions set the scene and provide the background and motives of the parties. This section is not usually considered legally binding, but it is potentially important if the agreement has to be interpreted in the future.

Parties

These are the people, companies, associations and government who, upon execution of the agreement, are to be contractually bound to the terms of the agreement. The parties from the First Nation side can be the band, tribe or nation, but there are many options for who enters into the agreement.[10]

Definitions and Interpretation

This clause will typically include a description of the area and mining or other leases covered by the agreement. A key issue is whether the agreement will cover all future mining in the lease area, or whether newly discovered ore (or resource) will be the subject of further negotiations.

Though they can appear technical or rote, definitions of terms can have huge implications for the future. For example, project descriptions may be critical to dispute resolution if new ore bodies or pipes or deposits are discovered. Arguments have arisen about whether an agreement covers the entire territory of the Aboriginal group rather than the specific surface or underground mines initially discussed in negotiations.

Further, the timing for phases of mining, tonnage, duration of the project, estimated ore reserves, and project infrastructure might all be defined, and hence if they change there may be scope for renegotiation. A major concern arises if the Aboriginal group unintentionally agrees to a scope of development beyond what it anticipated.

Principles and Goals

This section can be used to set the tone for both the agreement and the ongoing relationship, and may include: respect for each other; respect for traditional practices, cultural activities and language; respect of proponent's legal interests and obligations; sharing information, including traditional knowledge; and working cooperatively to solve problems. These may reflect principles that parties negotiate at the outset, before tackling the tough issues.

Providing unlimited support can seriously limit a community's independence and ability to protect its interests, for example by preventing it from participating in environmental impact assessments or dealing with environmental groups that oppose a project.

PHOTO: TED OSTROWSKI

Consent

Consent is a critical part of an agreement because it indicates a key component of what the Aboriginal community promises to do, or not to do, in return for the benefits it will receive under an agreement. The consent and support a community offers can vary greatly.

Toolkit author O'Faircheallaigh, for example, in developing criteria for evaluating IBAs, identified seven different points on a spectrum, from supporting only the grant of specific leases required for a particular project, to open-ended support for anything a company wants to do.[11] Providing unlimited support can seriously limit a community's independence and ability to protect its interests, for example by preventing it from participating in environmental impact assessments or dealing with environmental groups that oppose a project.

If a company is going to provide substantial financial and other benefits to a community, it is reasonable for it to demand community support for grant of mining leases without which a project cannot proceed. However, it may be entirely unreasonable of it to expect unqualified support for anything it wants to do. So this is an area that requires careful consideration and expert legal advice, to ensure that Aboriginal communities do not bind their hands in ways they did not intend. For example, the relevant provisions should not limit the ability of the group to freely participate in public regulatory forums. Nor should they interfere with the rights of individual community members to join unions, or engage in organizing workers on site, or during a strike.

For example, Article 26 of the Nunavut Land Claims Agreement explicitly precludes the requirement that Aboriginal parties refrain from participating freely in regulatory proceedings in relation to proposed projects. On the other hand, many agreements involve broad commitments that cut off this option, stating for example that "Subject to (the mining company) performing its obligations pursuant to this Agreement, the (Aboriginal parties) shall not institute any legal proceedings or engage in or undertake any other actions or activities to prevent or delay authorization of the (mining project)."[12]

Independent Legal Advice

This states whether parties received independent legal advice.

Liability for Expenses

This section may specify that one party assumes legal or negotiation costs, that each party pays its own expenses, or that a party receives a payment for administrative costs on execution of agreement. Often this detail is dealt with in a Memorandum of Understanding (MoU) — see *Consider Precursor Agreements* in Section 3, on page78.

Commencement and Expiry

This section specifies: when the agreement starts; whether particular rights and obligations under the agreement start and stop at the same time; how long the agreement lasts; timeframe to negotiate an extension; which events trigger commencement or expiry of agreement; and which clauses, if any, continue after the expiration of the agreement.

Warranties and Authorities and Succession

This section usually states that the group has the authority to enter the agreement, that all persons identified have authorized the making of the agreement, and that the agreement is binding to successors to the parties. As Canadian law firm Woodward & Company note, "this may be a unique matter of customary governance for a First Nation and may require an express representation that the First Nation signatories have the ability to bind their members and respective heirs."[13]

Dispute Resolution

Dispute resolution provisions usually set out a staged process that begins with party to party discussions and moves to provisions for mediation or arbitration in case of ongoing disagreement. They deal with how dispute resolution will be triggered and who bears the costs. These provisions also include protocols for dealing with disputes, including:

- How to make notice in relation to existence of a dispute (usually written) and a timeframe for this (e.g., a period of time to resolve the issue, such as 30 days);
- A notice of dispute usually triggers an obligation for both parties to discuss or negotiate in good faith to resolve the matter to their mutual satisfaction;[14]
- Appointment of a mediator or facilitator (and process for deciding on this person);
- Good faith negotiations with a mediator (where, when and for how long);
- Arbitration if mediation fails; and
- The court process, usually to be used only if all else fails.[15]

Very little has been written about how dispute resolution provisions have worked in practice. It is an area that deserves much more attention by negotiators, as resolving disputes quickly and to the satisfaction of all parties can be critical in ensuring effective implementation.

Very little has been written about how these agreement provisions have worked in practice to resolve disputes, and whether and how people have used the processes and for what kind of disputes. It is an area that deserves much more attention by negotiators, as resolving disputes quickly and to the satisfaction of all parties can be critical in ensuring effective implementation.

Confidentiality

All parties to a negotiation are likely to elect to keep certain categories of information confidential, for instance information on Aboriginal cultural heritage or commercially-sensitive financial data. A key issue involves what information is kept confidential and from whom.

One critical matter involves release of information on negotiations to community members. In Australia, Aboriginal negotiators are usually free to inform communities about all aspects of negotiations, except for any commercial information provided by companies (see *Corporate Confidentiality Clauses* on page 79). In some cases, Aboriginal leaders have chosen to restrict access to such material to their commercial advisors, who are free to offer advice to community leaders and members on the basis of confidential information, but not to disclose it.[16] This means that the leaders are unconstrained in communicating with community members and cannot be accused of withholding information from them.

In Canada, some negotiators have accepted restrictions on informing communities about the contents of proposed agreements, and this has caused problems. For example, in the Deh Cho in 2009 a plebiscite was held to ratify an Access and Benefit Agreement with respect to the Mackenzie Gas pipeline. The community was not able to review the agreement, because it was confidential. Very few people ended up voting, and the plebiscite had to be disregarded. Confidentiality tied the hands of the leadership, and denied the community critical information.

There are obvious dangers in withholding information on an agreement from the community. First, it is likely to cause suspicion, friction and disunity in communities, which both itself constitutes a negative social impact from development, and is likely to undermine the community's negotiation effort. Second, it runs contrary to democratic principles and to the norm of indigenous free prior informed consent, and adherence to the latter is widely regarded as critical if indigenous people are to benefit from mineral development on their traditional lands.[17]

Reasons that communities may wish to keep agreements confidential include concern that federal funds will be clawed back on the basis that communities can pay for services from agreement income, and that the government may rely on the agreement as proof of consultation about, and accommodation of, Aboriginal concerns.[18] This does not, however, provide a justification for "blanket" confidentiality provisions, especially as these can have wider implications for a community's ability to protect its interests. For example, the community may no longer be able to lobby government decision-makers, and its ability to communicate with potential political allies, such as non-governmental organizations or the media, may be limited (see *The Wider Implications of Agreement Making* on page 47 for a discussion of this point).

Confidentiality provisions do not have to apply throughout the negotiation process. Further, they sometimes only apply to the financial section of an agreement. It is important to consider at what time they take effect, and how long they stay in place. It may be inadvisable, for instance, for Aboriginal groups to accept confidentiality provisions in a negotiation protocol, as this may prevent mobilization of the media and of political allies during the negotiation process. Further, certain information will need to be public during implementation of the agreement. Similarly, it may be inadvisable to accept that they stay in place after an agreement is terminated, because this may prevent Aboriginal groups from putting "their side of the story" in relation to the reasons for termination, or reduce their capacity to take legal action to address issues arising from termination.

Obligations of Contract Law

Most agreements are by definition contracts, and contract law is applied to them. Thus there are a fairly standard range of provisions that are typically utilized, including the following clauses.

Enforceability

This clause states that if something goes wrong under the agreement, the party that suffers the damage or loss is able to do something about it. For example, the contract may say, "This Agreement is a legally binding contract and is subject to general laws of application ... of the (jurisdiction) as amended from time to time...."[19] This is linked to implementation, discussed in Section 5, as it may be necessary to take legal action to enforce an agreement where implementation problems arise from a party's failure to honour its commitments. The language of this clause needs to be specific. In some jurisdictions, the enforceability of agreements will be provided for by regulation or legislation. For instance, the Nunavut Land Claims Agreement specifies that Inuit Impact and Benefit Agreements (IIBAs) will be enforced by the parties in accordance with the common law of contract.[20]

FREE PRIOR AND INFORMED CONSENT

Some principles of attaining free prior and informed consent (FPIC):

- Do not accept imposed deadlines, use of coercion or manipulation;
- Have clear and acceptable mechanisms for participation in decision-making and a clear consultation plan that identifies the points for consent;
- Use culturally appropriate mechanisms to ensure participation;
- Provide timely information in the right forms and right languages and build community awareness through training in human rights law, development options, and environmental assessment;
- Use a staged process that allows plenty of time to consult;
- Provide for costs of consultation but avoid a "compensation culture" and allow for the "no" option at all stages of negotiation;
- Refuse negotiation until satisfied that complete information has been provided; and
- Develop peoples' own indicators of impact.

Source: Colchester and Ferrari 2007; Colchester and MacKay 2004.

Assignment: Sale or Transfer of Project or Company

This deals with what happens to the obligations of the parties when a deposit or mine is sold. For example, this clause may set out what liabilities and obligations are transferred to the new owner, notice requirements when a sale is planned, and whether consent is required of the Aboriginal party.[21] This is another area where expert legal advice is critical, to ensure that the community continues to receive all the benefits promised under an agreement, regardless of what happens to ownership or control of a project. The standard approach is that the purchasing company must honour all commitments made in the agreement, though there are cases where agreements have been unclear on this point and arguments have arisen.

Assignment is an area where expert legal advice is critical, to ensure that the community continues to receive all the benefits promised under an agreement, regardless of what happens to ownership or control of a project.

PHOTO: TED OSTROWSKI

No Mining

A "no mining" clause describes the process if mining does not proceed or is unlikely to proceed in the immediate future. It may include notice periods, and how and when obligations expire.[22] It may also describe the process to amend the length of notice required.

Unforeseen Circumstances and Force Majeur

This clause refers to events out of the control of the parties. It usually provides that normal penalties will not apply if a party is unable to carry out its duties or obligations due to circumstances outside its control. The party involved must give written notice (including details of duration, duties and obligations, steps taken to remedy situation), and also give written notice of resumption of normal conditions.[23]

Suspension or Termination of Agreement or Operations

This clause may specify the conditions under which a project or agreement may be suspended or terminated, indicating periods of notice, effects on payments, period of notice for re-commencement of operations, the process for project termination, and which clauses survive termination.[24]

Notice

The notice clause sets out addresses of parties, means for giving notice and timeframe for receipt, and procedures for amending notice obligations.[25]

Change in Law

The clause explains the process if there is a change in law that impacts on monetary payments, is beyond the reasonable control of the parties, could not have been foreseen, or that changes the mining party's liability.

Waiver

A waiver clause specifies whether failure to enforce an obligation under the agreement means the obligation is waived

Severability

A severability clause specifies that if part or all of a provision of the agreement is illegal or unenforceable, it can be severed and remaining provisions continue in force. It may identify whether the failure of certain clause constitutes a fundamental breach that then requires termination of the agreement.[26]

Indemnity

Indemnity clauses cover the issue of whether one party agrees to assume legal responsibility for the other party's loss in relation to an issue under the agreement.[27] An indemnity clause may also specify details of insurance against loss, such as the type of insurance, how the insurance will be funded, and whether parties may be named in the policies.[28]

Non-employment or Relationship of Parties

This clause specifies that the agreement does not create particular relationships between the parties, for example that between an employee and employer or between joint venture partners.[29]

Attorneys

This clause specifies that each person who executes the document on behalf of another party under a power of attorney declares they are not aware of anything that might affect that authority.[30]

Counterparts

A counterparts clause specifies whether different copies of the agreement can be signed, constituting the same agreement (meaning, for example, that an agreement can be executed in more than one location).[31]

Execution of Agreement

This clause names and signatories of parties to agreement, witnesses and date of agreement.[32]

Further Action

This section may specify that each party is to use best efforts to ensure agreement is given full effect and to refrain from hindering performance of agreement.[33]

Review

To ensure agreements remain relevant, a review clause is often included. This usually includes a time frame for review (e.g., after two years the implementation of the agreement will be reviewed), and may also indicate a cap for the cost of the review, as well as the identity of the reviewer. Sometimes the reviewer is an external auditor, but is required to get input from the implementation teams of the parties. In some agreements, there are multiple review periods, with different financial caps. For example after two years, a review by an independent reviewer may be undertaken with a small budget, and then at four years a more extensive review is done with a larger budget. The question of how the review findings will be acted on can also be included. So, for example, if the review identifies that the mine is creating unexpected impacts, the agreement might require a meeting of all parties, and the triggering of some spending for social or cultural mitigation.

Amendment

This area will describe the process for amending the agreement. Review and amendment are also treated at length in Section 5 of this toolkit.

To ensure agreements remain relevant, a review clause is often included. This usually includes a time frame for review (e.g., after two years the implementation of the agreement will be reviewed), and may also indicate a cap for the cost of the review.

Substantive Issues and Provisions

In approaching substantive issues, it can be useful for negotiating teams, including technical experts, to review all available data and options and then select a best outcome, a "next-best" alternative, and a worst case scenario. This helps to establish the "deal breaker" — the point at which the negotiators would prefer to abandon the negotiations than sign an agreement. Trade-offs also need to be considered and indeed are at the heart of negotiations, so that a group determined to secure a major role in environmental management may decide to make concessions to developers in other areas, such as financial benefits or employment.[34]

Agreements vary considerably in the topic areas they focus on. Some agreements concentrate on Aboriginal employment, while others focus on business development. Yet other agreements focus on a range of substantive areas, and have strong clauses in each.

It is critical to review the literature that is available, study the lessons learned from other agreements, and then negotiate clauses that can deliver what the community hopes for.

The key point is to review options critically and to be wary of using standard or template approaches. For example, there is much written about the obstacles to indigenous employment in mining, yet this material is rarely used as a basis on which to negotiate employment provisions of agreements.[35] This is why it is critical to review the literature that is available, study the lessons learned from other agreements, and then negotiate clauses that can deliver what the community hopes for.

There is no match between the size of the company and the nature of outcomes of agreements for communities. Don't assume that because you are not dealing with a big company or project that it is not possible to get a strong agreement. If a community is united and negotiates well, even medium-sized mines can yield substantial benefits in financial, employment, business, environmental and other issue areas.[36]

We begin by briefly covering some general issues that negotiators may need to consider, as they prepare positions on the substantive components of an agreement, then lay out some possibilities for each substantive area. Critical thinking is needed. Why choose to negotiate on this issue, and what are the possible limits on outcomes? What does the community want to achieve on the issue? How important is it for the community? How does it rank compared to other issues? Are some issues more important than others?

The negotiators must ensure that adequate attention is paid to implementation during the negotiation process. Three possibilities arise here. Individuals on each negotiating team can be given a specific responsibility to consider, raise and pursue relevant implementation issues at each stage of the process. Alternatively, specific time can be set aside to consider implementation of each issue. A third possibility is to compile a standard set of questions about implementation directed at a number of key issues and to establish a commitment by the parties to address those question at each stage of the discussions.[37] We return to these options in discussing implementation (Section 5).

Table 4.3 provides a full list of the substantive provisions discussed in this section of the toolkit. After reviewing these, the negotiating team can use this table to indicate the relevance and importance of individual issues and provisions to the community.

Table 4.3: Substantive Issues for Negotiated Agreements

Topic area	Relevance to community
Communication among parties	
Aboriginal and public access to mining tenures	
Mining payments	
Mining payment utilization	
Construction Employment targets for construction period Employment Matching labour supply and employment opportunities Recruitment Employment targets Hiring preferences Penalties for non-achievement Measures for employment of women Education and training Retention Employment policy, resource and implementation supports Career advancement Workplace environment Family and community supports Provision of appropriate accommodation	
Union relationships	
Business development	
Environmental management Acknowledgement of permits and licenses Research on environmental issues Monitoring and management systems Mitigation measures Toxic materials and substances	
Culture and cultural heritage	
Harvester compensation and traditional use	
Social measures to mitigate impacts	

Communication

The agreement will set out a structure for effective communication between the community and the company during the life of the agreement.

The communication section of an agreement provides for the effective communication between the parties during the lifetime of the agreement, usually describing:

- Principles for communication and reasonable expectations for responses;
- A formal process for communication (e.g., the parties will meet four times a year with two of the meetings in the communities);
- What information is to be exchanged, how often, and how gaps in knowledge will be addressed;
- Process for sharing confidential or sensitive information;
- Record keeping and reporting during communication events;
- Expectations for community consultation, locations, and timelines of consultation by company with communities;
- Establishment of liaison positions or formation of committees that meet at certain intervals to manage communications (see also the role of the Aboriginal employment coordinators on page 149 – these roles may be combined);
- Financing and management of committee or liaison position, and
- Duties of a liaison officer (if appointed).

In Section 5 on Implementation, structures and clauses for consultation and relationship building are identified.

Aboriginal and Public Access to Mining Tenures

Some agreements will specify that there are continuing rights for Aboriginal signatories to access the mining lease and other project areas. This will usually be subject to limitations on access to operational areas for safety reasons and on the companies' liability if harm occurs to visitors.

The following two contrasting examples illustrate the wide range of provisions in this area. Aboriginal women are allowed access to the open pit at the Argyle Diamond Mine to perform spiritual ceremonies that are their sacred duty. On the other hand, a request to one mining company in Canada to run a summer canoe trip by the Aboriginal owners through an area of the mining lease was turned down.

This clause may include:

- How to provide notice of visits;
- Restricted access areas;
- A list of purposes for access;
- Use of roads;
- Use of mining party facilities and infrastructure (see also page 159);
- Indemnification, insurance coverage, and public liability; and
- Safety issues as a basis for refusing access.[38]

There may also be limits to access by non-Aboriginal parties, and the effects on any existing permit systems for access by tourists may be addressed.[39]

The right of community members to continue to access the mine site will usually be subject to limits for safety reasons, together with limits on the company's responsibility if harm occurs to visitors.

Mining Payments

The rationale for financial benefits may need to be spelled out to companies. First, that these funds compensate Aboriginal people for the negative social, cultural and environmental impacts of mining, and funds can be targeted to avoid or minimize impacts. Second, that these funds represent a return to Aboriginal people as owners of the land.

Most agreements include a clause on financial benefits, which in some cases include an equity interest in the project. The rationale for such payments may need to be spelled out to companies. The first rationale is that these funds compensate Aboriginal people for the negative social, cultural and environmental impacts of mining.[40] Thus, mining funds can be targeted to avoid or minimize impacts. The second rationale is that these funds represent a return to Aboriginal people as owners of the land.

Our focus here is the financial arrangements between community organizations and companies. However, other payments may be made, such as harvester compensation payments (discussed below) or, where governments are parties to agreements, a share of government royalties.

Where there is a settled land claim that includes ownership of subsurface minerals, Aboriginal governments may be entitled to royalties from either the mining company or the government. Such payments may be specified in the IBA or separately through mining payment and land management regimes. A modern land claim treaty usually sets out a specific formula for revenue sharing tied to government revenues receipts, ranging from 7.5 per cent to 50 per cent. For example, the Tłı̨chǫ Government receives 10.429 per cent of the first $2 million of mineral royalties received by the government annually, and then 2.086 per cent of any additional mineral royalties.[41] Project-specific mining payment sharing has been negotiated in some cases, such as by the Labrador Inuit who signed an agreement with the government of Labrador and Newfoundland to receive 5 per cent of government royalties from the Voisey's Bay mine. These sums are distinct from the negotiated payments from mining companies.

It can be challenging to negotiate financial benefits, and the extent of benefits often depends on the strength of your bargaining position. Often, a sole focus for negotiators is on the financial mechanism to use to extract payments from the company and the size of the payments. Our experience shows that use of funds by the Aboriginal community should also be an early and critical focus. When payments are made before there is

Many people are familiar with the term "royalties"; however, we use the term "mining payments" because there are so many different kinds of payment types.

a mechanism in place to allocate and manage them, the result can be disputes and social disruption as individuals and groups compete with each other to get as large a share as possible. In addition, payments can be quickly frittered away on consumer goods, including alcohol, if structures are not in place to ensure they are invested or allocated to family and community priorities (see next section on fund utilization).

A range of financial models is summarized here. Table 4.4 on page 138 summarizes the advantages and disadvantages of each model. There is a trend to combine a number of these models in individual agreements, because there are advantages and disadvantages associated with each model. For example, for a community there is very low risk associated with fixed cash payments, because they will continue as long as a mine operates and regardless of whether it makes a profit. However, they will not go up if, for example, a mine expands (see below). There is a very high risk associated with the equity model, but on the other hand if a mine is highly profitable the community will do very well. Some communities have managed risk by combining models, as in the case of the Raglan Agreement. This agreement provides fixed annual payments over the lifetime of the project, plus a profit-sharing contribution amounting to 4.5 per cent of annual operating cash flows (see discussion below for details).[42]

When payments are made before there is a mechanism in place to allocate and manage them, the result can be disputes and social disruption as individuals and groups compete with each other to get as large a share as possible. In addition, payments can be quickly frittered away on consumer goods, including alcohol, if structures are not in place to ensure they are invested or allocated to family and community priorities.

Fixed Cash Payments

Under fixed cash payments, the project operator makes fixed payments that provide a guaranteed minimum amount to the beneficiary. Payments may be made on specific dates, such as the signing of the agreement, the beginning of production, as well as on an annual basis. These payments are dependable, and do not relate to the profitability of the mine. They are simple to administer and are not at all dependent on the project achieving profitability. The diamond mines in the NWT have primarily negotiated this kind of payment with Aboriginal communities (with some recent exceptions). However, when the operators ramped up production significantly in the early years of the mines, there was no corresponding benefit for the communities. This is one of the significant disadvantages to these types of payments, as they never adjust to the scale of the profit or production of a project. If a project turns out to be much more profitable than was anticipated or if the price of the commodity increases, there is no mechanism for extracting higher payments, which can create conflict between the company and the community, as well as within the community. Strong arguments can be made for alternative approaches.[43]

Royalties Based on Volume of Outputs

One alternative is to charge a fixed sum on each unit of mineral produced by a project (e.g., dollars per tonne). The advantage of this approach is that if the company ramps up production significantly, the communities get more revenue. This model can be important for communities who are concerned about the impact of the project on their lands, and who believe that as project scale grows so should the amount of financial benefit. However, if the price of the metal or mineral rises or falls there is no corresponding benefit (or loss). In addition, unless the mining payment (or royalty) is tied to inflation rates, there is the possibility that the actual value (the purchasing power) of the payment will reduce over time.[44]

Royalties Based on Value of Production

In this *ad valorem* (in proportion to the value) approach, the payment is a percentage of the sales value of the minerals produced by the project. This amount is determined by multiplying the volume of output by the price received by the company per unit sold. A specific and commonly-used form of this mining payment is a net smelter return (NSR), which is a percentage of the amount of money the smelter or refinery pays the mine operator for concentrate, usually based on the *spot*, or market price of the mineral, with deductions for the cost of processing. In addition, the mining company will reduce the NSR based on transport costs to get the product to the smelter.

In 2009 the price of most base metals decreased significantly, and communities that depended on royalties based on value of production received significantly less than in recent years. If people depend on these funds for services or programs, they could suffer significant hardships during periods of low prices.

For a business operator, this approach is useful because the mining payment changes with a critical business parameter: the price it receives for its output. However, the cost of production is another major business factor, and if these costs increase dramatically, the operator still has the same mining payment obligation. These royalties have the advantage for a community of getting a share of the benefits whenever the price of the mineral increases. A downside is that its income does not increase in value if the mine is able to reduce its operating costs. And, of course, the price of the mineral may also fall. For instance, in 2009 the price of most base metals decreased significantly. This meant that any communities that depended on these payments received significantly less than in recent years. If people depend on these funds for services or programs, they could suffer significant hardships during periods of low prices.[45]

Mining Payments Based on Profits

Profit royalties are a charge on the funds that remain after a company has deducted, from its revenues, costs that can be defined to include a range of operating and capital charges. Different profit royalties rely on a different moment in the process of accounting in calculating costs. The Raglan Agreement (Quebec) has a profit-sharing mining payment (royalty) applied each year to the amount by which aggregate project revenues exceed the aggregate of a range of operating and capital costs. The Argyle Diamond agreement (Western Australia) uses a profit-based mining payment charged on annual Earnings Before Interest, Tax, Depreciation and Amortization (EBITDA).

This type of mining payment allows a community to benefit from rising prices and any cost savings that are made by project operators through increased efficiency. They are beneficial to companies, because they move in line with both price and costs, unlike the other models discussed above. Thus when a company has increased production costs or weak mineral prices, leading to an unprofitable year, it will not be bleeding additional red ink by having to pay Aboriginal beneficiaries. The downside for communities is that not all mines turn out to be profitable, and as most mines lose money during at least part of their lives (often through the first years until capital costs are recouped), the communities will receive very little for at least a part of project life. Some projects never achieve profitability. This means there can be substantial delays to communities in receiving any benefits, or they may receive no benefits at all from mining on their lands. There are also administrative complexities, because Aboriginal authorities will need to verify that deductions allowable in calculating profits have been made appropriately and fairly.[46] Companies may have incentive to use creative accounting to find deductions to reduce the mining payment rates. If a community is interested in, or is presented with, the option of a royalty-based on profits, the accounting practices used to determine profits will need to be very clearly spelled out in the agreement.

Equity

Communities can take equity in a project, becoming its part owner and thereby receiving entitlement to the dividends that flow to shareholders. Provision may be made for Aboriginal representation on the mining company's board of directors when there is an equity interest in the company. The risks of the last model also apply here, in that dividends only get paid after a project becomes profitable. This means that Aboriginal groups have to wait a considerable time before receiving income, especially if, as often occurs, bank loans have to be repaid from profits before any dividends are distributed. Obtaining equity creates the possibility of capital gain for the community, if its shares are sold for much more than the initial cost. Also, with shares in a company, the community may gain a seat at the management table, greater access to information, and commercial experience. This model comes with additional risks if a community has to pay for its equity, as projects can fail or costs change and shareholder dividends shrink, with the result that the investment may be lost or yield little return.

Mining Payment Administrative Details

There are a number of administrative details to consider with mining payments. These include:

- PAYMENTS DURING TEMPORARY CLOSURE – The agreement may provide for a situation in which the mine is closed temporarily, and whether payments will continue during shutdowns. Usually only fixed payments may continue.
- TAXATION – Mining companies may want payments made to the Aboriginal party to be treated as deductions for purposes of calculating income tax or mining duties. They may seek an explicit commitment of the Aboriginal party to support this position.[47] Some agreements have included clauses that provide the parties' position on taxation of the project. Also, provision may be made for offsetting payments to the Aboriginal party under the IBA against specified taxes that may be levied against the project by local or Aboriginal governments.[48]
- ADJUSTMENTS FOR INFLATION – The agreement may contain provisions for adjusting fixed dollar amounts in line with the consumer price index or another measure of inflation ('indexation'). While this may be regarded as an administrative or technical issue, and is often dealt with in the definitions section, it is a major issue as the value of an agreement to a community can decline rapidly during periods of high inflation if payments are not indexed. They may also decline substantially if there is a long delay in developing a project. As a matter of principle, all fixed dollar payments should be fully indexed.

DIVERSIFIED EQUITY

It may make more economic sense for Aboriginal communities to invest in diversified investment funds with shares in many projects rather than investing in one mine on their own territory.

For example, an Aboriginal owned not-for-profit organization, Native Trade & Investment Association, recently worked with RCI Capital in Vancouver to launch two hedge and investment funds worth a total of $2 billion to investments in resources in Aboriginal lands.

Hedge funds allow a group to buy or sell position in a futures market opposite to a position held in the cash market to minimize the risk of financial loss from an adverse price change.

This fund will allow Aboriginal groups to invest in equity and debt opportunities in the Canadian resource sector, and become partners in corporate structures. Trade missions of more than 100 Aboriginal people from across Canada have been made to China and South Korea to encourage investment in these funds, and relationships more broadly with Aboriginal people in Canada.

Table 4.4 summarizes the advantages and disadvantages associated with the alternative models discussed in this section.

Table 4.4: Advantages and Disadvantages to Communities of Different Mining Payments

	ADVANTAGE	DISADVANTAGE
Fixed payments	• Guaranteed payment amounts at agreed upon times • Easy to administer • Not dependent on profitability	• As production amount and scale of disturbance increases, there is no increase in payments • As commodity price increases, no corresponding increases in payments • Community may feel the mining payment (royalty) is too low in hindsight and internal and community-corporate conflict may ensue
Royalty based on volume of outputs	• When company ramps up production, community gains benefits • As impact on environment changes with production increase, so do funds to mitigate harm • Reduced commodity price does not affect payments (provided company keeps up production level) • Not dependent on profitability	• If price of commodity rises, there is no additional benefit to the community • If production costs decline during the life of the mine, the community does not benefit and may indeed lose jobs associated with downsizing and automation
Royalty based on value of production	• Community shares in benefits whenever the commodity price increases or production levels rise • Not dependent on profitability • Payment is not dependent on operating, financing or capital costs • Simple definition and relatively easy to administer	• If commodity price falls, the payments decrease and often extremely quickly • If there is dependence on payments for services or programs, hardship may result when prices fall • Transportation and smelting costs (e.g., concentrate impurities) must be taken into consideration for some metals
Royalties based on profits	• Value can increase if mining costs are lowered through efficiencies • Value increases if price of commodity increases and costs are stable	• Not all projects are profitable • Income changes with the price of the commodity – if the price of a commodity slumps during a recession, this can dramatically affect the payments made to a community • Operating costs can change yearly and not always for the better • Deductions before profits measured can be manipulated by the proponent • The agreement must be very clear, and it can be hard to administer because of need for accounting oversight • If payments are delayed until after capital costs are recouped, communities can wait a long time for any income
Equity	• Increases in value if the project is profitable • Can provide access to information and input to the senior management team and decision making • Potential to provide greater control over use of traditional lands and environment	• May need to raise capital for investment • Project might not be profitable or have comparable value to other investments forgone • Subject to all the same risks that the company is subject to, like cost overruns or change of commodity price • May be required to share operating losses or capital expenditures • May have liabilities as part owner • Legal costs can be high • Funds may not flow early or readily back to the community – may not be short term upside

Source: Adapted from FNEATWG 2004 and O'Faircheallaigh 2006c

Assessing Risk Tolerance for a Financial Model

At some point, the negotiating team will face the question of how to choose a financial model or a combination of models. The negotiating team must understand how soon funds are needed, the risk tolerance of the community, and the risk profile of the developer and the proposed development itself.

A community's risk tolerance is basically its willingness to trade short term gain for long term gain, given that greater uncertainty is attached to the latter, as well as their willingness to gamble for potentially higher returns with a possibility of no wealth creation, versus lower but guaranteed returns.

A development's risk profile is related to the project's feasibility, how much the commodity price fluctuates, and other factors that determine the potential margins for the proposed development.

Community risk tolerance and the time profile of the need for funds can be assessed by asking a few questions.

A community's risk tolerance is basically its willingness to trade short term gain for long term gain, given that greater uncertainty is attached to the latter, as well as their willingness to gamble for potentially higher returns with a possibility of no wealth creation, versus lower but guaranteed returns.

What will you do with any monies that come from mining? And when is it needed?

- If the funds are to be used for vital programs that require secure and consistent funding, or if there is strong pressure from citizens for individual payouts (and the team thinks this is the best use of funds), then there is likely to be low tolerance to risk in the form of reduced annual mining payments or a complete absence of payments (as in the case of a profit royalty or an equity stake). This would mean the team would want to negotiate using a more conservative model that guarantees annual income.
- If the funds are for the short term, there will be a strong preference for fixed cash payments, which tend to start as soon as an agreement is signed, compared to a profit royalty or equity, which may not generate income for many years.
- If the funds are to be used as a trust fund for the longer-term future to develop a community capital base, there is likely to be a higher tolerance to short-term fluctuation risk.

What is the nature of the mine plan?

- If the plan is well defined and quite certain, and there is little chance that production schedules will change dramatically (e.g., the reserves are very well delineated and likely a discrete ore body rather than the thin edge of a larger trend), the community may have some certainty that the figures won't change too much, and may choose a fixed cash payment or a volume-based mining payment.
- If the plan is not certain, the reserves are not well delineated, and the company is constantly exploring in greenfield areas, the chances of change in the mine plan, reserves, and production plan are high. This could lead a community to see a fixed cash payment as a losing proposition in the long term. In particular, the potential for increased volume of production and potentially shorter mine life may be a strong reason to avoid fixed cash payments.
- Trends in operating costs may also need to be considered. If operating costs are likely to fall over time, net revenue or profit royalties may be advisable. If operating costs are likely to trend upwards, a volume-based mining payment will be safer.

The negotiating team will need to do some research looking at price trends, demand, and supply curves for the commodity in question.

It may be also be useful to look at previous similar developments and run scenarios of how much wealth would have been created for the community given different royalty types.

What sort of stability does the commodity(ies) price have?

- With a metal that has a relatively stable price curve over time, a strong demand curve, and relatively limited competition from other producers, the community may be more comfortable that commodity prices are not going to rapidly fluctuate. If this is the case, the community may want to go with a mining payment linked to the price of the commodity, like an NSR.
- With a metal with a very unstable price history and trend, the community could opt for a financial model less dependent on commodity prices, e.g., a mixed model that does link to prices, but also provides for "floor" or minimum payments.
- In either case, the negotiating team will need to do some research looking at price trends, demand, and supply curves for the commodity in question.

What is the experience of the mining company?

- If the company has very little experience in bringing a mine to life, there will be many risks associated with investing in a high stakes model (e.g., equity or profit-based) because it could make costly mistakes that affect its profit margins.
- If the company is a "major" (meaning it has multiple mines around the country or world), there will be less risk associated with investing in a profit or equity-based model. It will know how to use technology, labour and innovation to reduce costs.

It may be also be useful for the negotiating team to look at previous similar developments and run scenarios of how much wealth would have been created for the community given different mining payment types.

Mining Payment Utilization

There is a choice to be made whether to "tie the purse strings" – to lay out how income generated by a project will be used – at the time negotiations are undertaken. This can help avoid the conflict that, as mentioned above, can result if payments start to occur before decisions have been made about how to allocate and manage them.

Discussions on payment utilization can be undertaken with the company and relevant provisions included in the agreement, or a community can make decisions separately and have arrangements in place by the time an agreement is signed. Including payment utilization in negotiations does create the risk that the company may seek to impose its views on the community, an outcome strongly opposed by most indigenous communities who regard the issue of how they use payments as a matter solely for them. However, while affirming this principle, some Australian Aboriginal groups have chosen to deal with the issue in their agreements, for two reasons. First, this requires that the issue of payment utilization *must* be resolved before the agreement is signed and payments commence. Second, because amending an agreement usually requires the consent of the community, it ensures that community decisions on how to use payments cannot be subverted by individuals or groups in the community for short term political benefit or personal gain.

There are advantages for the community in deciding how the money will be spent *before* the agreement is finalized.

To assist communities that do wish to address payment utilization at the time an agreement is negotiated, we briefly discuss some relevant issues below.

First, a number of tensions can emerge regarding fund utilization, including: allocation to individual or to community needs; addressing today's acute needs, which could mean immediate consumption or investment in current commercial activity to generate jobs, versus setting aside resources for future needs; and seeking long-term cash flow through investment in commercial activities in the community or region (which can be more risky), versus generating long-term cash flow through investment in diversified capital investment funds (portfolio investment), which can be less risky.[49]

Mining payments can be used in four general ways.

Payments to Individuals

Sometimes, funds are allocated to individuals through cash payouts, but this can be a messy and complicated practice. Messy, because many people may emerge from across the country and claim to be community or group members when payouts occur, and complicated because administrative support is needed to manage such a process. On the other hand, this practice can ensure that everyone benefits from mining, assuming funds are distributed equitably, and people can make their own decisions about how to use the money. However, funds are typically spent in a very short time, leaving little for collective impact mitigation or future generations. Also, since they must declare all income, elders and individuals on income support often suffer the claw back of funds from their government allowances. Further, windfall funds can have terrible social outcomes. On one reserve in southern Canada, a substantial coming of age payment has caused trauma in youth because these funds are often spent on socially destructive activities. Individual payments can also cause distrust and jealousy between recipients and non-recipients.

There are many serious implications to consider with simple payments to individuals. For example, funds are typically spent in a very short time, leaving little for collective impact mitigation or future generations.

Services and Infrastructure

Funds are also used for local services and infrastructure because of deficiencies that are typically present in the services provided by government or because there is no funding at all for Aboriginal priorities. For example, the Tłı̨chǫ Government uses IBA funds for cultural programs for harvesters, addictions programming and 'out on the land' programs. However, there are two problems with using funds for services or infrastructure. First, mining payments can be highly unstable, and where there is dependency created this can pose a problem when shortfalls emerge as the mines close or the price of the commodity slumps. Second, there is the danger that funds will be clawed back, just as happens with individuals, but this time at the level of government programs.[50]

There are a number of policy criteria for selecting the conditions under which it will be beneficial to apply mining payments to programs and services:[51]

- If the services involved are highly valued by beneficiaries, and government cannot or will not provide funds for them or is very unlikely to do so.
- If mining payments are spent in ways that attract additional government expenditure to the activity concerned, either because government will take over funding the service once established or because a willingness to cost share brings forth government funds.
- If payments are used to fund a *form of service* provision (such as appropriate housing design, Aboriginal medical services) that will create substantially greater benefits than the services provided by government.
- If the use of mining payments permits a level of service provision higher than the standard level provided by government in the same situation, and the difference in service levels is much better for recipients.

- If payments are spent to ensure access to a service sooner than the government can provide.
- If mining payments provide opportunities to enhance Aboriginal organizational skills and governance capacity.
- If mining payments are stable (through some base amount that is guaranteed).
- If a proportion of current income is invested in a capital fund to allow future maintenance and replacement of assets with mining payments.[52]

Business Enterprise

Mining payments can be used as capital to establish business enterprises. These can be contracted by the project operator, employing Aboriginal people, and it can help create a new and real economy that is controlled by local business people. If there is some business diversification, there is the possibility of sustainability after the mines are closed. However, there can be limited markets and business opportunities in the remote regions where many Aboriginal communities are located. In addition, there can be very limited skill sets in communities for business management, which can lead to non-Aboriginal people occupying the skilled and managerial positions or to business failure.

Portfolio Investment

Portfolio investment involves the use of mining payments to build up income generating assets selected for their ability to maximize returns and minimize risk. Typically, portfolio investments can include blue chip shares, real estate, and government bonds (all of which combine to reduce level of risk and increase level of financial return). Investment can be spread across a wide range of sectors, thereby increasing the likelihood that mining payments will generate income that will be stable and long lived. Portfolio investment can generate an economic base independent of mining and, especially if income is reinvested for a number of years, can eventually build up an asset base and income stream that is substantial.[53] However, these investments tie up funds that could be used in other ways, until the capital base is large enough to generate a substantial income.

Structures for Managing Mining Payments

A variety of legal and institutional structures can be established to manage mining payments, including trusts, corporations and incorporated associations. The choice of an appropriate structure raises complex legal and taxation issues that cannot be adequately addressed without specialist advice. It is strongly recommended that negotiators make substantial provision in negotiation and/or implementation budgets to obtain this advice.

THE IMPORTANCE OF COMMUNITY INPUT ON PAYMENT ISSUES

The whole area of mining payment utilization can be contentious within communities, often requires substantial community discussion to achieve a satisfactory resolution, and has a major role in determining the final impact of projects and agreements on communities.

Thus, negotiators should ensure that, whenever the issue is addressed, sufficient time and resources are available to deal with it properly.

Employment

The benefits associated with gaining employment in the mining industry are large. First, where there is little other employment in a community, mining can offer the possibility of a job and the benefits that come of it, such as high self esteem and the ability to contribute productively to the family and the community.[54] Second, the salaries are often much higher than alternative employment in the communities.

The benefits associated with gaining employment in the mining industry are large. However, while almost all IBAs deal with employment, they rarely address barriers to this employment in a systematic way.

There continue to be many barriers to the employment of indigenous people in the mining industry, starting with recruitment, but also affecting retention and advancement of Aboriginal employees. Many of these barriers have been well documented, and include lack of a skill base, the tendency for managers to hire outsiders and people who are more like themselves, the lack of community awareness of opportunities, the strangeness of the remote work site environment, and the absence of suitable accommodation or failure to accommodate indigenous women's needs.[55] While almost all IBAs deal with employment, they rarely address these barriers in a systematic way.

Matching Labour Supply and Employment Opportunities

IBAs may provide for the collection and dissemination of information regarding the demand for and supply of labour in relation to the project. This information is important, because it can be tough to match supply of labour in a community to the demand for labour in a project. The mining company may be required to provide a labour force development plan or human resources strategy that the community can then use for planning and for identifying potential workers. The plan can be revised annually. Government can also be drawn into the relationship, providing useful data on current and future expected labour supply and demand.

A labour force development plan can include:

- Job opportunities at the project;
- Pool of potential Aboriginal employees and their skills;
- Barriers that must be removed to increase Aboriginal participation;
- Training programs to be developed in connection with the project;
- Apprenticeship programs at the project; and
- Costs of implementing the plan and funding for its implementation.[56]

Recruitment

A primary focus for ensuring Aboriginal employment involves creating awareness in communities of the possibility and reality of jobs at the mine. Many agreements establish mechanisms for alerting people to jobs, such as a requirement to post notice of jobs in locations that people will visit (e.g., band, health or government offices), or making radio announcements or advertising jobs in local newsletters or newspapers. At the outset of mining, mine staff can be asked to visit communities, attend job fairs, or visit schools to let people know about jobs. Sometimes early notice of jobs is required, so that Aboriginal employees have a head start in applying for them. Further, a register of Aboriginal people who want to work can be built by community liaison staff (with both the liaison positions and database funded by the company), ensuring that the local skills and experience of people are easily accessible. In the NWT, indigenous groups impacted by the diamond mines joined together to form a human resources business (I&D Management), which hosts a resumé building website and staff to assist in maximizing Aboriginal employment opportunities. This business holds the contract to provide all the heavy equipment operators for the Diavik Diamond Mine.

When it comes to hiring, agreements can include measures for companies to employ Aboriginal people through specific targets, rolling targets, or hiring preferences.

Employment targets set out in agreements can be firm numbers (often specific to the stage in the mine life cycle), percentages, or rolling targets based on various criteria.

Employment Targets

Targets are often opposed by industry, because they can be difficult to reach, especially in places where there are many mines competing for labour, or where people simply lack the skills or interest in a mining occupation.[57] Targets can also cause industry to focus on setting very modest goals that are easily achieved, and they may remove any incentive to change and grow once they are achieved. Further, they may cause industry to focus on non-core, peripheral or unskilled areas of work where the targets are easily filled.[58]

That said, targets have been used to great effect in some locations. For example, in the NWT diamond mines, more than 30 per cent of employment needs are met by indigenous people from the region. Just 10 years previous, gold mines in the area operated with very low levels of indigenous employment. The targets have certainly influenced the mines to hire locally and train constantly.

It is also important to establish targets for the construction phase. Construction should be seen as a training ground for the operating mine. It can be useful to secure positions or percentages of the workforce dedicated to the indigenous group. In cases where there were no targets for construction in an IBA, there was a shortage of people with heavy equipment skills during operation, certificates in the required trades, as well as the necessary hours on the appropriate machines and equipment.

Targets can be set out in agreements in a number of ways. First, they can be firm numbers, such as in the Moordijt Booja Community Partnership Agreement (Australia), which requires 100 Gnaala Barja Booja people be hired. They can also specifically name targets for different stages of the mine life cycle, namely during construction and operation. So for example, the Dona Lake Agreement (Ontario) calls for 55 people during construction and 30 during operations. The labour forces in these two stages of

mining are quite different, so they merit different targets. Other agreements have set out percentages for employment, such as the BHP Diamonds Project Socio-Economic Agreement, which suggests that:

> *Northern Resident employment throughout the phase will be 33 per cent of the total employment associated with the Construction Phase of the Project, including Contractors. Aboriginal employment will make up at least 44 per cent of the Northern Resident employment during this period ... and Northern Resident employment throughout the Operation Phase will be 62 per cent of total employment associated with the Operation Phase of the Project, including Contractors, and 72 per cent during the period of operations at 18,000 tpd (tones per day). Aboriginal employment will equal at least 50 per cent of the Northern Resident employment.*[59]

In the Voisey's Bay agreement, hiring preference is given first to members of the Labrador Inuit Association and the Innu Nation residing in the two communities closest to the project; then to residents of other Inuit or Innu communities; then Inuit or Innu residing elsewhere in Labrador; and finally Inuit or Innu residing in Newfoundland.

It can be tricky to track compliance with percentage figures, for example because companies often use the total number of employees and person years in reports. In the NWT, this figure (person years) has caused a certain amount of friction. While the indigenous party wishes to see the names of people who are employed at the mine, the company provides only the figure of person years, which can make it hard to determine just how many people are working. This is because privacy laws require that companies obtain permission from workers before their names are released.

Targets will also need to be considered in relation to union negotiations (see page 154).

Rolling Targets

Another approach involves rolling targets, which involve rising objectives for Aboriginal employment and training over time, creating incentives for meeting these targets, and providing automatic adjustment mechanisms if they are not met. Targets can be evaluated and re-set, for example every three years. Failure to achieve the goal can require the project operator to progressively increase spending on employment and training programs beyond a base level specified in the agreement.[60]

This approach avoids many of the pitfalls, mentioned above, associated with static, single targets, for example the danger that initial targets will be set at too modest a level.

Penalties for Non-achievement of Targets

Penalties for non-achievement of targets or hiring preferences have been built into some agreements. For example, money may have to be allocated to a training fund if there are shortfalls. Another measure involves analysis of the ongoing or existing barriers to hiring Aboriginal populations and measures to address these barriers.

Hiring Preferences

In some agreements, hiring preferences are included, so that people in impacted communities are given first consideration. Following what is called the "adjacency principle," the Voisey's Bay mine gives first preference to members of the Labrador Inuit Association and the Innu Nation residing in the two communities closest to the project; then to residents of other Inuit or Innu communities; then Inuit or Innu residing elsewhere in Labrador; and finally Inuit or Innu residing in Newfoundland.

The Troilus agreement (Quebec) prioritizes Cree trappers whose trap lines are directly affected, followed by Cree beneficiaries of the signatory community, Mistissini, and finally by Cree beneficiaries generally.[61]

Measures can also be included to ensure Aboriginal people are least affected in lay-offs (see section on unions on page 154).

Measures for Employment of Women

Aboriginal women face additional barriers when it comes to mine employment. There can be strong stigmas against employment of women in non-traditional jobs. Sexist attitudes of non-indigenous and indigenous men can cause women to feel unwelcome and make it difficult for them to excel in their work. Where sites are fly-in-fly-out, women can also have a very hard time securing childcare. As a result, there may need to be specific measures in place to guarantee that female workers will be able to access to mining jobs. These measures can include:

- Employment targets for Aboriginal women, especially in non-traditional jobs;
- Specific training initiatives designed for women;
- Measures to ensure the security and safety of women in work camps;
- Gender sensitivity training and anti-harassment policies;
- Reporting requirements on employment and training by gender, particularly for Aboriginal women;
- Provisions for childcare and flexibility in hours to accommodate family needs (e.g., medical and dentist appointments, sick children);
- Specific training and scholarships to facilitate entry of women into areas dominated by men; and
- Gender-based analysis during environmental and social impact assessments.

There can be strong stigmas against employment of women in non-traditional jobs. Sexist attitudes of non-indigenous and indigenous men can cause women to feel unwelcome.

Education and Training

Company-funded scholarships and support for schools can be established to encourage and enable Aboriginal students from communities to stay in school or undertake post-secondary studies. These scholarships can be administered by the company, or through the education agency in the community. For example, the Tłı̨chǫ Community Services Agency in the NWT administers $500,000 from IBA funds to Tłı̨chǫ students each year and graduation rates have skyrocketed since this initiative was established.

Some studies have found very high levels of turnover among Aboriginal mine workers, and thus attention to the factors that can help to ensure the longer-term retention of indigenous workers are important.

Other educational support can include:

- Targeted scholarships (e.g., mining and metallurgical engineering, environmental science); and
- Skills development centres in the mine site with fully trained educational staff .

Training is essential to Aboriginal retention and advancement within the mines. There are many possible elements to be negotiated, including:

- Specific targets for apprenticeships and trades training;
- Pre-employment training targeted to skills needed at the mine site, such as accounting, administration, planning, geology and exploration, and positions as supervisors;[62]
- Pre-employment training, often including literacy and numeracy programs, as well as trades or education-specific training;
- On the job training during work hours;
- A budget for employment and training programs, including whether there will need to be a review of the budget amount, what happens if expenditure is below budget, reporting and reviews, and independent audit;[63] and
- Off-the-job education and training support.

Retention

Some studies have found very high levels of turnover among Aboriginal mine workers,[64] and thus attention to the factors that can help to ensure the longer-term retention of indigenous workers are important. These include:

- Measures to make the workforce environment a positive one for indigenous people (see page 151).
- More experienced workers may be appointed to act as mentors for Aboriginal trainees and recruits. Some agreements also provide for elders to act as mentors, which can help support workers back in their communities. Elders may also be able to help sort out problems being encountered in the workplace.
- There may be a prohibition on termination or disciplinary action due to an inability to speak English.

- Involvement of the Aboriginal employment coordinator in cases where Aboriginal employees are subject to disciplinary measures, and provision of second chances to people who lose their positions.
- Disciplinary measures for mining company employees who discriminate against Aboriginal people or exhibit discriminatory attitudes or behaviour.[65]

Employment Policy, Resource and Implementation Supports

Many agreements specify the type of policies, programs and resources that need to be in place to ensure that agreement provisions are implemented. These include:

- Anti-discrimination policies and cross-cultural training. For example, the Raglan Agreement specifies that the company must take all reasonable steps to prevent employees from experiencing discrimination, take prompt disciplinary action against any employee who behaves in a negative or discriminatory fashion, and evaluate all candidates applying for work for their sensitivity to inter-cultural contact.[66]
- Aboriginal training and employment policy.
- Policies on consumption and use of alcohol and drugs. Often remote sites are "dry."
- Cultural policies to meet specific needs, such as bereavement leave. Often standard bereavement policies are based on "immediate family" models (father, mother, sister, brother) and may not recognize extended family models of kinship.
- Goals and incentives for managers for hiring and retaining Aboriginal employees (e.g., key performance indicators to include Aboriginal recruitment and retention).
- Reporting requirements on employment and training programs and outcomes, including independent audits.
- Employment of an employment and training coordinator (also called an "Aboriginal employment coordinator" or "liaison officer").[67]
    - At Voisey's Bay, the company's implementation coordinator, working with Innu and Inuit implementation staff, communicates the company's employment plans and advertises open positions; recruits community members into jobs; develops employment orientation programs; sits in on interviews, upon request, and conducts exit surveys; designs work schedules that recognize cultural needs; develops training programs that advance the Aboriginal labour force into higher skilled positions; creates cross-cultural training for non-Aboriginal employees and contractors; and provides periodic summaries of progress. During construction, there were two coordinators (one for training and one for employment), but during operation this was reduced to an employment coordinator.

ABORIGINAL EMPLOYMENT COORDINATORS

The company can employ staff specifically to help it implement Aboriginal employment targets. At Voisey's Bay, for example, the company implementation coordinator, working with Innu and Inuit implementation staff:

- Communicates the company's employment plans and advertises open positions;
- Recruits community members into jobs;
- Develops employment orientation programs;
- Sits in on interviews, upon request, and conducts exit surveys;
- Designs work schedules that recognize cultural needs;
- Develops training programs that advance the Aboriginal labour force into higher skilled positions;
- Creates cross-cultural training for non-Aboriginal employees and contractors; and
- Provides periodic summaries of progress.

- Other roles may be to maintain relationships between managers and community leaders, solve problems on site, review resumés, act as a liaison to families and communities, and help with workplace conflict resolution.

- Resource commitments that may include an annual company budget for training and employment, in some cases subject to regular review; funding for specific numbers of scholarships, apprenticeships or traineeships; or funds for particular training positions or for pre-employment and on-the-job training programs.

Career Advancement

Where agreements do not set out how people can advance in the company, there tends to be little career progression for indigenous employees. They can become frustrated with the lack of advancement, and if they are not self-promoting, which is not unusual with indigenous employees, they may find themselves stuck in one position.

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Some agreements specify the measures, programs, and resources that need to be in place to ensure that Aboriginal employees can progress within the company. Measures in agreements can include:

- Funding for a specific career development and progression plan for Aboriginal employees.

- Clearly set out steps for advancement in each work unit or employment category. This reduces confusion and increases transparency about how promotion occurs.

- Inclusion of clear procedures for employee evaluation and advancement, and clear rules for workplace behaviour and employee discipline.

- Preference for Aboriginal employees in promotional opportunities, similar to those described for recruitment.

- Employment and training initiatives aimed at placing Aboriginal people in skilled and supervisory positions throughout the organization. This is particularly important because having Aboriginal people in senior positions can influence prospects for retention and advancement of other Aboriginal employees.

- A ladder-based hiring program or succession program to identify the skills of Aboriginal employees and identify measures to promote them to higher skilled positions (including into management positions).[68]

- Establishment of a minimum number of training positions for Aboriginal people for supervisory or managerial positions.

- Guarantees of positions for those who complete education or training programs.

Workplace Environment

The transition to a work site can be difficult for indigenous people. Most work site environments are built around the preferences and values of the dominant society, and many accommodations may need to be made in order to acknowledge and respect the culture of indigenous peoples. Where this is not done, alienation and loneliness arising from the unfamiliarity of industrial environments and distance from home communities can lead to failure to complete training and education programs, irregular work patterns and high turnover.[69] Measures can include:

- CROSS-CULTURAL TRAINING, essential if all employees are to work together in a remote site. The Argyle Diamond Mine agreement (Australia) requires all workers and contractors to undertake cross-cultural training on arrival and at intervals of two years thereafter, while managers must take a more intensive course that includes camping in the bush with elders.[70]
- FOOD FROM THE INDIGENOUS CULTURE. At one site, people can prepare their own wild meat and fish as they would normally in a country food kitchen.
- ROTATION SCHEDULES are often built around the needs of harvesters, so they do not miss a migration of animals and so they can spend equal time in the community with elders, families and children. Rotation schedules are most sustainable for families when they involve equal time "out of" and "in" the site (e.g., two weeks on and two off).
- CULTURAL LEAVE. Some IBAs include this option. For example, the Diavik agreements allow for one week of unexplained cultural leave, so that harvesters or drummers can attend to duties as needed.
- FAMILY ACCOMMODATION and spousal visits are sometimes negotiated, so that children and spouses have a sense of the life of the miner at the site. Sometimes this includes a provision for yearly family visits, while other agreements allow for empty seats on commuter flights to be taken up by family members.
- SITE VISITS BY ELDERS and conduct of CULTURAL ACTIVITIES ON SITE. For example, indigenous women at the Argyle Diamond Mine practice *mantha*, a welcoming and spiritual cleansing ceremony for every person that comes on site. Other possibilities include sweat lodges, healing ceremonies, shake tents, and the practice of ceremonies such as "paying the land" and naming of the land using Aboriginal place names.
- Maintenance of COMMUNICATION CHANNELS between the project site and home. This may require training in electronic communications and online services (e.g., banking), guaranteed access to these services, as well as direct phone lines to communities.
- LANGUAGE MEASURES for accommodating Aboriginal employees who lack a good knowledge of the working language. The company may give unilingual Aboriginal employees opportunities to work in jobs where lack of knowledge of the working language does not compromise the safety or efficiency of others.[71] There can be provisions for English language training, bilingual signs, safety training in Aboriginal languages, and employment of bilingual Aboriginal employees who can serve as translators.[72]

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The Argyle Diamond agreement, for example, requires all workers and contractors to undertake cross-cultural training on arrival and at intervals of two years thereafter, while managers must take a more intensive course that includes camping in the bush with elders.

Family and Community Support

Many of the measures outlined later in the section on social and cultural impacts will relate to this discussion of family and community support. It is clear that much support is required from a family in order for a miner to be away from home, either for 12 hour shifts or for two week or longer rotation periods. Special clauses to provide support to family can include:

- SPECIAL LEAVE for family or community crises.
- WORKER-COMMUNITY LIAISON staff assignments, with company staff acting as a liaison between workers and communities, and providing support to workers and families. In the Cameco Agreement, for example, an employee relations counsellor provides support to families and employees (see also the earlier discussion of employment and training coordinators on page 149).
- COMMUNITY-CORPORATION RELATIONSHIP MECHANISMS to promote inter-cultural learning, such as family visits and "out on the land" trips. Under one Snap Lake IBA, mine managers are to visit families of workers in their homes and attend cultural events.
- RETURN TRAVEL ARRANGEMENTS for workers. For example, many agreements require workers to be flown directly to their home communities. In the NWT, this measure has ensured that wages make it home before they are spent in Yellowknife. This also ensures that workers are not paying extra to work at the mine, and make it home directly after their rotation.

Provision of Appropriate Accommodation

Where a mine is fly-in and fly-out, accommodations are generally not a problem. However, when a mine is near to a community, there can be difficulty in getting rental accommodation, or housing can be below standard. Thus, some IBAs call for cost sharing between the company and community for new accommodations to alleviate housing pressure. For example, the Faro Mine IBA shared costs of 25 new trailers for the indigenous community.[73]

Other Employment Measures

Many other measures have been included in agreements to ensure that indigenous people can be recruited. Each one of these measures is created to manage a barrier to indigenous employment. For example:

- MINIMUM HIRING STANDARDS. A key barrier is often lack of education, training and fluency in the working language. Measures to address this include hiring provisions that relax or adjust standard requirements (e.g., fluency in working language and acceptance of skills in lieu of diplomas). For example, the BHP Diamonds IBAs allow previous, on-the-job experience to be recognized in lieu of minimum Grade 12 schooling requirements, on a case by case basis.[74]

- CRIMINAL RECORDS are a frequent barrier to mine site employment, and often these records are for minor or old offenses that can be pardoned. Agreements may provide support to help people to go through the process of attaining a criminal pardon.

- SUMMER JOBS AND INTERNSHIPS can be allocated preferentially to Aboriginal students and in particular to post-secondary students.

- TRANSPORTATION TO THE MINE SITE can pose a barrier to employees, if workers do not have a license and a vehicle or if there are substantial travel costs associated with fly-in-fly-out operations. Potential employees may be assisted to acquire driver's licenses, or provided with transportation, or subsidized transportation and relocation packages to assist workers to travel or temporarily move between communities and the mine site. For example, De Beers offers relocation packages to subsidize the cost of moving workers' residences closer to the mine, and provides round trip air transportation to the impacted communities.

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Union Relationships

It is critical to communicate and build relationships with unions early, both for the construction phase and during the operations phase.

Navigating the construction trades can be particularly challenging, because of the number of unions that may represent workers at a site. For example, the Inuit worked with 16 construction unions during the construction phase of the Voisey's Bay mine. There is often an umbrella organization for building and construction, such as a provincial or territorial building and construction trades councils. However, organization and legislation on the construction and building trades will vary in each jurisdiction.

One complication of working with the construction trades unions is that they have rarely done membership drives in rural and Aboriginal areas, making it almost impossible to surface Aboriginal members for work when it becomes available. Aboriginal people must be on the call lists for these trades unions in order to access work at the site during construction. However, membership drives have to be done early by the appropriate trades, and this requires the formation of an early relationship by the Aboriginal leadership.

Unions rarely have conditions or requirements for hiring, employment or retention of Aboriginal employees. Further, provincial regulations rarely require unions to work toward agreements with Aboriginal groups. Also, it can often take provincial (or territorial) attention to ensure that unions abide by the agreements that are made.

Another important issue may be overcoming barriers to membership. Some unions have requirements for formal educational qualifications (such as high school diplomas) for their apprenticeships. One solution to overcome those barriers is to negotiate provisions that enable Aboriginal workers with no formal qualifications, but years of experience in a trade, to qualify on the basis of "equivalent skill and experience."

When it comes to the unions involved in operating mines, it is often fairly predictable which union will negotiate a collective agreement. For example, the United Steelworkers, the Public Service Alliance of Canada, and the Canadian Auto Workers are some of the more prominent unions. A well-formed relationship developed early with labour can be helpful when challenges arise.

One hurdle to negotiating with a union is the confidentiality clause in the IBA itself. There may be reluctance on the part of either the company or the Aboriginal group to give the union consent to review the IBA in its entirety. This can be overcome by permitting the legal counsel of the unions to review and give opinions on IBA clauses relevant to the collective agreement. These lawyers themselves can sign confidentiality clauses.

Another hurdle is that unions may resist the idea that the community's IBA with the company takes precedence over the union's collective agreement with the company. This can be overcome by constantly reminding the union of the fact that the mine would not be operating in the region if they did not have the consent of the Aboriginal party. Several Aboriginal groups have prevailed over unions by maintaining that position.

Specific IBA provisions may be included to deal with labour relations legislation, and to recognize the relationship between an IBA and any collective agreements at the project.

Important commitments to secure – either with the company and/or with the unions – include:

- Requirement that the IBA take precedence over the collective agreement;
- Promotion of Aboriginal employment and training in company and union programs, particularly for Aboriginal workers who are IBA beneficiaries (members of the communities that are signatories to the IBA);
- Requirement that membership drives be done in the places where Aboriginal people live;
- Acceptance of training in lieu of some educational requirements for Aboriginal workers;
- Negotiation of a first call for jobs to qualified internal and external Aboriginal beneficiaries;
- Thorough orientation and training for Aboriginal workers on the collective agreement, their rights and responsibilities as union members, and the role of unions – preferably by Aboriginal shop stewards and experienced union members;
- Provisions to mentor, train and promote the election of Aboriginal workers as shop stewards, and in other union roles including the executive, in particular to increase capacity of Aboriginal workers who understand both the collective agreement and the IBA;
- Flexibility around issues such as seniority to deal with job sharing or other non-traditional arrangements; and
- Provision that Aboriginal workers are the last to be laid off in the event of slow-downs or closures;

Although unions can also be powerful allies, they may resist the idea that the community's IBA with the company takes precedence over the union's collective agreement with the company. This can be overcome by constantly reminding the union of the fact that the mine would not be operating in the region if they did not have the consent of the Aboriginal party.

Business Development

Mining agreements can contribute to community economic development by creating opportunities for Aboriginal businesses to provide goods or services to the project. Just as with employment, there can be significant barriers to business development, such as high transaction costs involved in tendering and contracting arrangements, scarcity of capital, lack of relevant skills, and difficulty in competing with large, well established non-Aboriginal businesses.[75]

While every IBA contains some provisions for support of Aboriginal business, they vary widely. Analysis of business capacity in the region, possibly emerging from the baseline study, combined with an understanding of what opportunities will be available, can help to craft appropriate business development clauses. A profile of business capacities and opportunities can be used by the community to target areas where there are already strengths, and areas where there is a need to partner with neighbouring communities to set up joint ventures.

Provisions can be included to address each barrier to Aboriginal business, as follows.

Provisions to Address Barriers to Aboriginal Businesses

High Transaction Cost

Right of first refusal of contracts for goods or services can be offered to companies controlled by the communities. Sometimes companies are required to pre-qualify for this condition.

- Right of first refusal of contracts can be offered to companies controlled by the communities. Sometimes companies are required to pre-qualify for this condition. For example, the Inuvialuit Final Agreement provides that business opportunities are to flow to the IBA beneficiaries in the first instance, "which effectively provides the beneficiaries with first opportunity status."[76] The Inuvialuit Regional Corporation has created a business list, so that the developer must source first with Aboriginal businesses. It is only when local companies cannot provide the services that the company can go to outside companies.[77]
- Contracts below a certain size can be offered first to Aboriginal businesses, and if they meet the criteria, contracts can go to these businesses without going to tender.
- Contracts can be broken up (unbundled) so that they are accessible to smaller businesses.
- Evergreen contracts (which automatically renew unless either party provides advance written notice) are sometimes negotiated.

- Information on upcoming contracts is provided to the community well in advance, so that potential bidders have time to put tender packages together.
- Performance bonds and tender deposits can be waived.

Scarcity of Capital

- Some agreements provide Aboriginal businesses with assistance to raise finance, for example by providing documentation regarding the contract award or purchase order to financial institutions.
- A loan fund can be established, as in the Voisey's Bay IBAs for Innu and Inuit businesses to meet start-up costs.
- Joint ventures can be established between project operators and Aboriginal businesses during the start-up phases.

Lack of Relevant Skills and Experience

- Proponents can hold workshops on bidding procedures and safety management, and host annual business opportunity seminars.
- Access to technical and financial expertise can be provided by company staff and through management training programs, or other "in kind" support can be provided, such as reduced rate equipment leases and technical support.
- Joint ventures between project operators and Aboriginal businesses can be established.
- Parties can appoint an Aboriginal business development coordinator or establish a business opportunity implementation committee[78] to forecast contract needs of the project and the capacities of local businesses.[79] This individual or group can assist communities in identifying business opportunities, help to improve methods of bidding, support efforts of mining companies to obtain government funds for management training, and make recommendations to the company regarding specific contracts.[80]

Competitive Disadvantage

- Evaluation of contract proposals can include a defined weighting for Aboriginal content (as in the Voisey's Bay IBAs), as well as other standard criteria such as quality, cost competitiveness, ability to supply and deliver the goods and services, timely delivery, and safety and environmental record.[81]
- Preference clauses can be agreed on for competitive Aboriginal businesses. The definition of "Aboriginal business" and "content" needs to be clear. DIAND has defined Aboriginal business as having greater than 51 per cent Aboriginal ownership and control, and if there are more than six employees, at least 33 per cent Aboriginal employment.[82]

The company and community can appoint an Aboriginal business development coordinator or establish a business opportunity implementation committee to forecast contract needs of the project and the capacities of local businesses.

- A registry of Aboriginal businesses can be established so that companies unfamiliar with a region can work with local businesses. Often this registry is paid for and is the responsibility of a business promotion branch of government.
- Failing the identification of an appropriate Aboriginal business, an IBA can require the successful contractor to comply with employment commitments made by the project operator and require contractors and sub-contractors to include an Aboriginal content plan as part of their proposal.
- A margin in favour of Aboriginal businesses can be assigned when assessing tenders (e.g., price tolerance of 10 per cent in favour of Aboriginal tenderers).
- When Aboriginal tenders are not successful, the project operator can be required to inform the Aboriginal business in writing about reasons for failure and what can be done to do improve their bids.

Other Business Development Strategies

Joint Ventures

As discussed above, joint ventures can be used to provide Aboriginal partners with access to capital, skills and business experience. In some cases, joint ventures may provide for non-Aboriginal partners to supply the bulk of startup capital and take the major role in contract management, and then, as Aboriginal participants gain experience, they can increase their stake.

Research and Development

Market niches might be developed[83] and this can be fostered through research and development projects relating to technologies and practices relevant to the project. For example, the Tłı̨chǫ in the NWT have specialized in remediation of contaminated sites and now use this business skill in remediation and closure of abandoned sites. When closure is a reality in the NWT diamond industry, these companies will be able to assist in this effort and gain substantial economic opportunities from doing so.

Access to and Transfer of Infrastructure and Facilities

Major mining projects typically involve investments of tens or even hundreds of millions of dollars on infrastructure facilities such as ports, roads, airports, power lines, water supply, industrial workshops, worker accommodation and health and training centres. Particularly in remote regions where such infrastructure and facilities are often scarce, the ability to utilize them, and eventually to own them, can be valuable to Aboriginal communities. They may be useful both in establishing businesses, including in areas such as tourism that are unrelated to mining, and may allow a community's basic service needs (power, transport, water, health) to be met at a lower cost.

Recent IBAs in Australia, for example, have tended to provide both for community access to project infrastructure and facilities, under certain conditions, and for the transfer or sale of fixed infrastructure (items a mining company can't take away and use somewhere else) at the end of project life, or when that infrastructure is no longer needed. Typically, access to infrastructure for the personal use of community members is open, subject to rules designed to ensure people's safety and that mining operations are not interfered with. Use of infrastructure by community-owned businesses usually requires separate approval by the project operator to ensure, for example, that there is not competition for facilities required for the project.

In relation to transfer of infrastructure assets at the end of mine life, a common approach is for the project operator to notify the community, in advance, of when it will no longer require assets, allowing the community to indicate which assets it wishes to retain. These are typically either sold to the community for a nominal amount ($1 under one Australian IBA), or at the value to which they have been written down for depreciation purposes, which will often be close to zero.

A number of potential issues and risks can be associated with use of company facilities and asset transfers, and legal expertise is essential in ensuring that these are addressed in an agreement. They include the danger that companies will be relieved of liability even if they are responsible for injury incurred by community members using their facilities; and the need to address any government requirements for the company to remove infrastructure when mining ends, to ensure that assets are in good condition when transferred, and that they do not have any liabilities attached to them (for instance the need to remove toxic substances) that could impose significant costs on the community.

Companies may build significant infrastructure for the mine, ranging from roads and airports, to power and water supply lines, to buildings such as housing or health care facilities. The ability to use them, and eventually to own them, can be valuable to Aboriginal communities. However, these transfers can also involve some risk.

Environmental Management

IBAs generally deal with environmental management of mining projects during their construction, operation, decommissioning and rehabilitation. As mentioned earlier (see page 36), we recommend that if a community wishes to participate in the environmental management of advanced exploration, this be dealt with in a stand alone or precursor agreement, as the community will not have enough information to negotiate effectively for an IBA at the exploration stage.

If Aboriginal communities negotiate environmental provisions in IBAs, emphasis is often placed on creating the greatest possible indigenous influence over environmental management of mining and related activities.

If Aboriginal communities negotiate environmental provisions in IBAs, emphasis is often placed on creating the greatest possible indigenous influence over environmental management of mining and related activities. "Often the central purpose of including environmental provisions in negotiated agreements is to place *indigenous people themselves* in a position where they can ensure the protection of their ancestral estates."[84]

There are many possibilities for involvement in this area, depending on the vision of the indigenous group, and a range of principles to guide engagement. These include:

- Use the precautionary principle, which states that absence of complete scientific understanding of an environmental problem is not grounds for failing to act to deal with it (often used when there is potential for serious, irreversible, or cumulative environmental and/or social damage);
- Employ an adaptive approach to environmental management, which involves ongoing refinement of management procedures and policies to reflect lessons learned;
- Involve indigenous people in defining and managing environmental issues and impacts;
- Comply with environmental laws and industry codes of practice;
- Ensure indigenous people are able to practice traditional laws and customs and exercise the full range of connection to their territory;
- Provide financial guarantees to meet the cost of environmental remediation, including closure costs, in the immediate and long term; and
- Integrate indigenous knowledge and land management practices into rehabilitation plans and works.[85]

Responsibility of Proponent

Agreements may state that the proponent retains overall responsibility and liability for maintenance of environmental quality in the area affected by the project. This is important so that the proponent can be held accountable, and so that indigenous groups are not held liable, because of their participation in environmental management, for any damage caused by a project.

It may also be stated that the company must comply with the terms of their permits and with environmental legislation. This can be helpful for the indigenous party, because government authorities may fail to take action when there has been a breach of a permit condition or of environmental law. If the company has made a contractual commitment *to the indigenous party* not to commit a breach, this can give the indigenous party the ability to directly seek legal remedies if this does occur.[86] Specific categories of licenses and permits may be referred to in addition to general environmental legislation, such as water management, waste handling and disposal, and wildlife.

Agreements may state that the proponent retains overall responsibility and liability for maintenance of environmental quality in the area affected by the project. This is important so that the proponent can be held accountable, and so that indigenous groups are not held liable, because of their participation in environmental management, for any damage caused by a project.

Monitoring and Management Systems

The nature of Aboriginal involvement in environmental management can vary considerably, reflecting the outcome of negotiations. At the low end of the spectrum, some agreements commit the company only to consult on some aspects of project management.[87] More substantive engagement occurs when there is collaborative management, as described in this clause:

> *The Company will make best efforts to accommodate X First Nation's views, concerns and traditional knowledge with respect to environmental, social, cultural and heritage matters related to the Project and to the extent practicable and reasonable, incorporate them into Project planning and operations.*[88]

Joint environmental management may be established, but these are primarily in the northern treaty regions and are established through separate agreements. These environmental agreements are often negotiated between the company, the government and the communities. There are a range of structures for joint environmental management, such as co-management boards with senior corporate staff and Aboriginal representation, or using expert panels. These monitoring boards may have an equal number of representatives from each party, may be co-chaired, and may operate by consensus. A range of models is provided by an overview of boards established by the Diavik Diamond Mine (Environmental Monitoring Advisory Board), EKATI Diamond Mine (Independent Environmental Advisory Board), Snap Lake Mine (Snap Lake Monitoring Agency), and Voisey's Bay Project (Environmental Monitoring Board).[89]

Specific provisions regarding Aboriginal participation in environmental monitoring can include:

- Provision of Aboriginal access to company monitoring locations on project lands;[90]
- Guidelines and mechanisms to ensure Aboriginal participation in environmental review, monitoring, and assessment;

- Processes for discussing concerns arising from environmental monitoring information, through an advisory, liaison or management committee;
- Provision for Aboriginal environmental monitors;
- Mechanisms for ongoing review of environmental management, such as independent monitoring studies;
- Independent environmental audits at regular intervals;
- Funding for Aboriginal parties to gain access to independent technical advice; and
- Inclusion of traditional knowledge in monitoring and follow-up studies, perhaps with specific mechanisms or procedures to plan for integration of knowledge.

Mitigation Measures

Specific mitigation measures, monitoring, and follow up programs may be included in relation to the environment, people's health, and safety issues. These may include:

- Measures to deal with environmental damage, pollution during construction, or post-closure impacts (e.g., performance bonds, insurance policies);
- Indigenous parties have the right to require project activity to cease where the company is in default of an environmental regulation or protection measure established in the agreement, until such a time as the default is cleared up to the satisfaction of the indigenous party;[91] and
- Habitat compensation and enhancement initiatives – for example, Polaris Minerals Corporation spent over $1.6 million to clean up an abandoned dump site near a fishing river as part of a cooperation agreement with the Namgis and Kwakiutl First Nations.[92]

The issue of toxic material and substances will be covered extensively in the environmental assessment, but it can also be treated in the IBA

Toxic Material and Substances

The issue of toxic material and substances will be covered extensively in the environmental assessment, but it can also be treated in the IBA (though this is rare). The key consideration is what materials are on site, how they are managed, and what will be done in the case of an emergency. Provisions may require:

- An inventory of toxic materials and products, as well as risk management plans (sometimes with prohibitions on certain substances, e.g., pesticides or PCBs), plans for use, storage and handling of these materials and products, and emergency plans for spills, leaks or discharges.
- Notification of the Aboriginal party if particular materials, chemicals, or products that are restricted, or under consideration for restriction, are to be used.
- Commitments to not use particular products or materials, such as pesticides.

Specific Measures for Exploration, Operation and Closure

It can be helpful to identify specific environmental measures for the various stages of mine life. For example, for the exploration phase details on the reclamation of exploration sites can be suggested. For operations, the agreement may provide for alternative methods and locations for carrying out components of the project (e.g., new locations for waste dumps or tailings).

Closure and reclamation provisions may include:

- Abandonment and rehabilitation plans;
- Involvement of Aboriginal people in closure plan development and implementation;
- Reclamation throughout the life of the project;
- Compliance with all requirements in regulatory approvals; and
- Monitoring following closure and permit inspection by the Aboriginal party.[93]

Culture and Cultural Heritage

Protection or mitigation measures can apply to two aspects of cultural resources. The first area is cultural heritage, or the material manifestations of Aboriginal occupation during earlier periods of time. This includes burial sites, middens created by discarded shells and other food debris, rock and cave paintings, and scatters of tools. The second involves places, sites, areas, or landscapes that have contemporary spiritual significance, and other aspects of living culture, which can include language, values, relationships, and the ways that people express culture (e.g., art, dance, ritual).[94]

Cultural Heritage

Provisions for protecting cultural heritage can include a description of what might be protected, a protocol for how research or surveys will be undertaken, strategies for managing cultural heritage in an area, and notification procedures.

Provisions for protecting cultural heritage can include a description of what might be protected, a protocol for how research or surveys will be undertaken, strategies for managing cultural heritage in an area, and notification procedures. For example:

- A principle of avoiding damage as a first objective, followed by the possibility of minimizing any damage and, if damage or destruction of sites or artifacts cannot be avoided, a process for mitigation and compensation;
- Measures and protocols to avoid damage to cultural sites, including protocols for site or object management and site clearances, timeframes and, if sites are to be identified in reports, who will have access to this information;
- Provision of resources and funds for Aboriginal people to undertake heritage assessments and develop management plans on the basis of agreed standards, or funding traditional knowledge studies;
- Employment of a cultural heritage consultant, and terms of reference for choosing one;
- Creation of monitoring guidelines that are defined by Aboriginal peoples;
- Confidentiality of culturally sensitive information;
- Aboriginal access to areas of importance for social, religious or cultural purposes and prohibition on access of non-Aboriginal project personnel to the sites (e.g., access to the mine pit, which has sites that are sacred, for culture holders in the Argyle Diamond Mine);
- Employment of local cultural heritage protection monitors, e.g., involvement of elders or land users in heritage resource impact assessments before, during, and after exploration or mining; and
- Processes for consultation with the Aboriginal party.

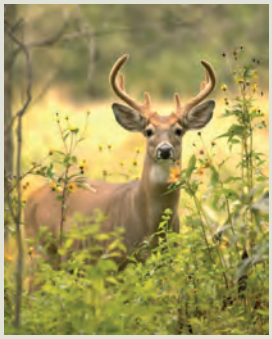
Cultural Practices and Language

Culture is, of course, much more than "stones and bones." It is a living, continually adaptive system, not a remnant of the past. It is also highly complex, which makes precise or exhaustive definition of the concept impossible. A simple, general definition of culture we use is "a way of life; a system of knowledge, values, beliefs and behaviour, passed down between generations."[95] Mitigation for impacts on the culture of the people who work in remote sites can therefore be defined.

Mitigation can include:

- Management strategies and mitigation measures to prevent impacts on traditional land uses and culture;
- Community involvement in defining, monitoring and analyzing cultural impact;
- Support for cultural practices or celebrations, such as festivals, events, assemblies, cultural media and archive activities (e.g., radio stations, magazines, photography, audio or video projects, archaeological or oral history projects), and support for cultural activities (e.g., traditional food activities, ecotourism, and cultural practices); and
- Support for cultural programs, such as literacy or education in the Aboriginal language.
- Training and operation of facilities with allowances for indigenous languages.

Harvester Compensation and Traditional Use



Compensation can include lost revenues from trapping and fishing caused by damage to equipment, loss of animals, including direct loss if animals are no longer present in the project area, or for increased cost associated with additional travel.

Compensation can include lost revenues from trapping and fishing caused by damage to equipment, loss of animals, including direct loss if animals are no longer present in the project area, or for increased cost associated with additional travel. For example, Cominco and Anvil Range Mining in northern BC both contributed to a trappers' trust fund. This was used to make annual payments of $1,500 to 30 elders, supplements to Ross River Dena trappers, training, hunting trips, and provision of meat to elders.[96]

Another fund for harvesting and traditional activities helped finance:

- Trapper cabins, including new ones, and renovations;
- Communications (e.g., satellite radio hookup);
- Trap line management, wildlife monitoring, harvesting monitoring, and relocation of animals;
- Transportation, including bush planes, roads, and skidoo trails;
- Traditional activity enhancement, such as habitat improvement or equipment repair;
- Other works and programs or replacement of loss of traditional activities; and
- Any other use of the fund deemed appropriate by the indigenous party related to socio-economic measures or development.[97]

Agreements often seek to minimize disruption of Aboriginal harvesting and prevent damage to wildlife and habitat. For example, they may specify whether fishing or hunting by non-Aboriginal employees is permitted, and if so, under what conditions.

In some agreements (e.g., IBAs for both the Diavik and EKATI diamond mines), limits are placed on the access of Aboriginal harvesters to lease areas. In other cases, such restrictions are prohibited. For example, the Nunavut Land Claims Agreement states that "Any term of contract that attempts to limit the rights of access of harvesting by an Inuk during the leisure hours of that employee shall be null and void against Inuit" (section 5.7.23).

Social Measures

Many of the measures identified here will need to be tailored to the local context, in response to issues emerging from social impact assessment work or other community consultations. They may include:

- Measures to control interactions of "outside" workers housed in large camps with small, primarily Aboriginal communities;
- Broader support for cultural and social activities;
- Sustainability funds, such as that developed by the Innu Nation;
- Obligations to develop social programs, such as counselling for workers and families, addictions programs, money management training, healing workshops, and stress and anger management, held both in the communities and at the project site; and
- Establishing financial, technical or human resource assistance to improve community infrastructure, implement community programs, or establish a community development fund.[98]

Establish Agreements that Reflect Community Goals

Once an agreement is in draft form, the negotiating team will need to gauge consent to the issues covered and to proposed commitments, responsibilities, and benefits. As discussed in Section 3, there are a series of points at which to obtain community consent. Each of these points can require different levels of community engagement (see Figure 3.3 on page 96).

Early on, there needs to be broad engagement to establish community views about a proposed project. It may be narrower at the MoU stage (see page 78), and then become broad again for consideration of a draft agreement. The pulse of public opinion can be taken by the negotiating team or by a broader body such as a community government, and it may need to be taken in different ways throughout the process.

When a draft agreement is ready, the negotiators can test whether there is acceptance of the measures, any new measures that are required, or any significant changes that must be negotiated.

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Each indigenous community will have a particular way that consultation and public decision making occurs. To establish standard rules for seeking approval for agreements (i.e., there must always be a referendum) would go against the spirit of respecting local practices. There are a number of issues, however, that should be considered in designing a forum to attain consent. First, outside agencies may misunderstand how decisions are made locally, and thus the authority of the wrong people may be accepted. Second, there are often plural systems for decision making, and this can provide the opportunity for community members or outsiders to go "forum shopping"[99] to get the decision they want. Finally, agencies can also manipulate local authorities and sow conflict between them to gain their own ends.[100] Appropriate principles for gauging consent are perhaps the best safeguard in dealing with these concerns, such as:

- Being thorough and transparent in the process of consultation, so that all affected community members and groups have an opportunity to provide input into the process; and
- Citizens should be provided with multiple opportunities to express their needs and perspectives and to inform negotiators and decision-making processes.[101]

There are many ways to get the informed consent of a community to an agreement, including running a plebiscite, vesting authority in the chief negotiator to reach an agreement that reflects goals established by the community, asking community leaders for approval, and running community meetings. Each possibility will have positive and negative sides to it, as indicated in the paragraphs below, and ultimately the community should use a process that is both culturally appropriate and robust in terms of getting wide feedback and broadly-based consent.

Plebiscites or Referenda

Plebiscites or referenda have become quite popular in Canada. These involve the whole community voting on whether to give "in-principle" support for a mine, or to approve an agreement. To avoid claims of illegitimacy, they have to be carefully organized, advertised well, run by an independent official, and follow accepted procedural rules. The positive side to this process is that everyone can have a say in the decision. Also, if a substantial majority approves an agreement, this gives industry the clear support of the indigenous group. The threshold for approval does not have to be 100 per cent, but some other level that is defined locally. Anything below 60 per cent in favour of a project or agreement may be defined as too low of a threshold, given the long-term and serious implications of approving major mining projects.

A number of drawbacks can be associated with plebiscites. They can cause fractures and lack of unity simply because the process allows only a "yes" or "no" outcome, with no room for internal discussion to seek a compromise that might be broadly acceptable (for instance, a different agreement or a smaller project). They may not be an appropriate approach to decision-making for indigenous people, who may rely instead on consensus building and deliberation to make decisions. Further, if people are not well informed about the nature of the agreement or project, they can misrepresent the real level of support. This could mean that people withdraw their support as they become more informed.

A number of drawbacks can be associated with plebiscites. They can cause fractures and lack of unity simply because the process allows only a "yes" or "no" outcome, with no room for internal discussion to seek a compromise that might be broadly acceptable (for instance, a different agreement or a smaller project).

Vesting Authority in a Lead Negotiator

If a lead negotiator and the negotiating team have consulted with people throughout the process and clearly established what needs to be in an agreement to satisfy the community, then authority can be placed in the team to sign off on the agreement. This options assumes that:

- The lead negotiator and the team have consulted with diverse people in the community, have listened to the people who don't agree with the project as proposed, and have negotiated an agreement and/or negotiated modifications to the project that allow community goals to be met;
- The lead negotiator and the team can communicate clearly and well about what the agreement means, and how it binds the community; and
- Community members place their trust in the lead negotiator and will abide by the commitments made on their behalf in the agreement.

Leadership Review and Approval

The agreement can be reviewed by a representative political body or a group vested with authority (e.g., hereditary chiefs). These elected or ceremonial and traditional leaders may have the authority to ratify the agreement. They are, in any case, often the key signatories to an agreement, and thus need to be included in the decision-making process.

Community Meetings to Obtain Consensus

Community meetings or assemblies to obtain consensus are often more congruous with indigenous ways of making decisions. These meetings can go on for days, and as people listen (and sleep on things), they can move towards a shared decision.

Community meetings or assemblies to obtain consensus are often more congruous with indigenous ways of making decisions. They give everyone a chance to hear all opinions, and to work toward consensus (general agreement and group solidarity). These meetings can go on for days, and as people listen (and sleep on things), they can move towards a shared decision.

The big advantage to this form of decision making is that everyone who disagrees can be heard by the community, which cannot happen in the privacy of a ballot box used in a referendum. When disagreements arise, it may be possible to change agreements to accommodate conflicting views. Even just allowing people to be heard can make all the difference to keeping the peace after an agreement is ratified. It is a mechanism for gaining consensus, rather than leaving a community fractured where, for instance, a referendum indicates that 45 per cent of the population is against the agreement.

Returning to the Negotiating Table

There can be huge pressure on negotiators and the community's political leadership to ratify a draft agreement that is recommended by both negotiating teams. This can lead negotiators and leaders to downplay community opposition or to argue that issues raised by the community can be resolved as an agreement is implemented. It is very difficult for negotiators to return to the table and say they have been unable to obtain community support for a deal they endorsed. But it is absolutely essential that they do so if community concerns are real and broadly based. Pressing a community to approve an agreement or downplaying concerns that people raise is likely to cause ill feeling and conflict in the longer term. This is not in the community's interests, nor in the company's, because the company may face opposition later in project life when it has invested hundreds of millions of dollars.

At this stage, community negotiators should be open and transparent with the company, providing clear evidence of the existence of major concerns in the community, for instance dates and times of community meetings and resolutions they pass. This helps counter any suggestion that community negotiators are exaggerating community concerns or opposition as a tactic to wring a few more concessions from the company.

Once the community has determined what it needs to sign the agreement, negotiators should set this out clearly to the company, and wait for its response. If the result is deadlock in the negotiations, this is still better than the alternative of signing an agreement that lacks genuine community support. If the company is seriously committed to the project, it will return to the negotiating table at some point and seek to address outstanding community concerns.

It is very difficult for negotiators to return to the table and say they have been unable to obtain community support for a deal they endorsed. But it is absolutely essential that they do so if community concerns are real and broadly based.

Signing and Launching an Agreement

Holding a ceremony can be a very powerful way to ritually engage the directors and senior managers of a company, so that they witness the strength of culture, become embedded in the community, and are ritually made into friends and relatives, rather than outsiders.

The formal signing of a final agreement can involve only the appointed negotiators and signatories from the community and the company, or it can be a public event. This will depend on the protocol agreed upon by the negotiating teams.

Even if formal ratification involves only a small group of negotiators, it can be valuable to "launch" the agreement through public ceremonies with senior company personnel and the community present. For example, the board of directors of Polaris Minerals was invited to the ratification ceremony in a traditional lodge of the Namgis First Nation. Everyone was robed in traditional dress and then ceremonies and rituals were performed to bless the agreement. This can be a very powerful way to ritually engage the directors and senior managers of a company, so that they witness the strength of culture, become embedded in the community, and are ritually made into friends and relatives, rather than outsiders. A public ceremony also makes the community fully aware of the agreement, cementing the relationship between the company and the wider community.

Summary of Section 4

- Define roles for the negotiation committee and the people within it;
- Create rules for negotiation that can guide the negotiating team;
- Form a negotiation agenda based on community goals and aspirations;
- Agree on negotiation tactics and strategies;
- Document all negotiations, conversations and verbal agreements;
- Pay attention to what happens between meetings;
- Focus on relationship building with the company in the community;
- Craft legal provisions, making sure you have specialist legal input;
- Identify options on all substantive provisions that will be needed to meet community goals and protect community interests;
- Agree on substantive provisions that obtain the maximum benefits for the community and minimize any costs it must bear;
- Ensure there is broadly-based community support for a draft agreement – if there isn't, return to the negotiating table; and
- Ratify the agreement, using the occasion to cement community-company relationships.

A complete list of references is available in the final section of the toolkit, which can downloaded at www.ibacommunitytoolkit.ca

Notes

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100 Ibid, 7.

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SECTION 5

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SECTION 5

Implementing Agreements and Maintaining Relationships

The benefits promised by agreements do not flow automatically once they are signed. A great deal of planning, action and commitment of resources is required to make sure agreements are actually implemented or put into effect, to ensure, for instance, that employment targets specified by agreements are actually achieved or that systems designed to protect cultural heritage work are put in practice.

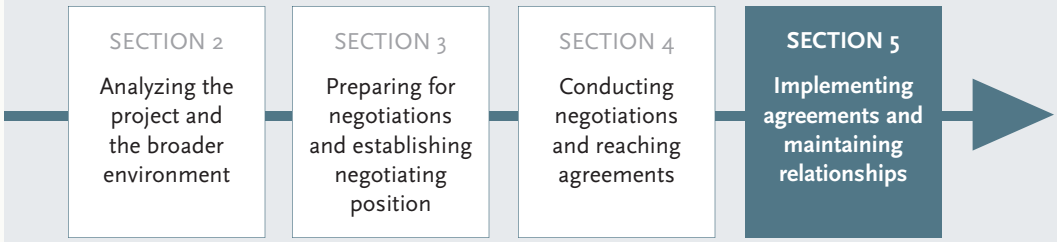
This section covers the challenges of implementing agreements, and identifies keys to effective implementation. Effective implementation is essential if the community is to reap the benefits of all its hard work in planning for and negotiating an IBA, and implementation must be maintained throughout project life. It marks a new relationship among the parties that involves fulfilling the many obligations each party has assumed.

Despite its obvious importance, implementation has typically been the weak element of agreement making.

This section will allow you to:

- Implement agreements in a way that ensures the intent of the parties is being met; and
- Guarantee that agreements will be living documents, with monitoring, reporting and adaptive management used to ensure they remain relevant and continue to meet the needs of the parties.

Structure of the Toolkit



Implementing Agreements

The conclusion of a negotiation with a signed agreement does not automatically bring the outcomes the agreement provides for. This is something that has been learned in the implementation of land claims and self-government agreements, and is illustrated, for example, by a report by the Canadian Auditor General on the implementation of the Inuvialuit Final Agreement.[1] It found that, many years after the agreement was signed, the federal government had not yet developed a strategy for how Canada would deliver on its responsibilities.

Some agreements are working well and have generated substantial benefits,[2] but it cannot be taken for granted that the conclusion of an agreement will ensure the outcome intended by both parties. In some cases agreements have been entered into from completely different perspectives. While the Aboriginal parties are seeking an ongoing and daily relationship, the corporation sometimes treats the attainment of an agreement as the conclusion of the relationship.

What is it that holds an agreement back from being implemented? What issues should be planned for? There are a range of barriers and obstacles to implementation discussed in this section.

One of the most common obstacles is a failure to communicate. Without formal communication protocols and informal and constant communication between project managers and community leaders, agreements are very unlikely to succeed.

Before discussing obstacles and specific strategies for overcoming them, three key concepts need to be kept in mind when discussing implementation:

- Implementation includes the initiatives and activities required to give effect to the provisions of the agreement;
- Monitoring is the ongoing collection and analysis of information regarding implementation or non-implementation; and
- Review is the periodic analysis of relevant information to establish the extent of implementation, and to consider the appropriateness of implementation initiatives and of relevant provisions of agreements.[3]

These concepts are linked. Monitoring helps establish whether an agreement is being implemented. Monitoring can track things like achievement of employment targets or educational goals. If review is built into the process, then analysis can go much deeper and establish the reasons for achievement (or non-achievement) of agreement goals. Through review, parties can also assess the appropriateness of goals, and the need to modify them.

While the Aboriginal parties are seeking an ongoing and daily relationship, the corporation sometimes treats the attainment of an agreement as the conclusion of the relationship.

There are two broad factors that can impact on whether agreements are implemented:

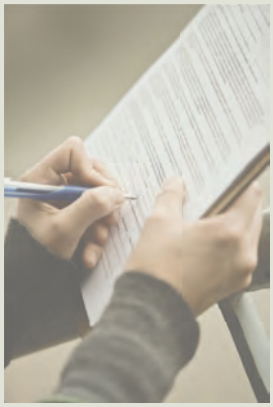
- The presence or absence of factors internal to the agreement that are essential to effective implementation; and
- Factors external to the agreement (for example certain government policies), which cannot be provided for in the agreement, but are essential to its success.

Factors Internal to the Agreement

Clear Goals

The goals for the agreement need to be clearly and precisely identified. This was discussed in Section 4 (see page 121), where it was suggested that "slippery" language such as "where feasible" and "if possible" should be avoided. As the agreement is being drafted and again prior to signing the final document, key questions to ask are:

- Are goals and intended outcomes clear?
- Is there ambiguity? Could different interpretations be reached regarding what has been agreed?
- What are the consequences of any possible difference in interpretation?
- Would people with no involvement at all in the negotiation be able to understand what was intended from the text of the agreement?
- Is language clear and precise?[4]



Implementation units are most effective when they are specifically provided for in an agreement, with relevant clauses dealing with issues such as representation from both parties, and selection criteria for committee members.

Institutional Arrangements for Implementation

Specific institutional structures need to be established to manage the relationship over time. Sometimes only one implementation structure is identified, with (possibly equal) representation from both the company and the community. In other cases there are structures internal to the community as well as this joint committee.

If there is a community-based implementation unit, it can be vulnerable because of pressure to divert resources away to meet other demands. Often, if there are limited resources, the work of implementation may be managed by a staff member with multiple responsibilities, making effective implementation difficult. However, many recent agreements include resources and funds for an implementation officer. Implementation units are most effective when they are specifically provided for in an agreement, with relevant clauses dealing with issues such as representation from both parties, and selection criteria for committee members.

Three examples of implementation committees are:

- The Tłı̨chǫ Nation appointed a community-based mining committee with two representatives from each of the four Tłı̨chǫ communities, so selection was based on equal geographic representation. Company-community meetings included only two delegates from this mining committee, and two from the mining company. With time this has changed, so the mining committee has been dismantled and an implementation officer manages relationships daily, while the political leadership meets with the company on a regular basis.

- In the case of the Kitikmeot Inuit, there have been two community and two company representatives on the implementation committee. Other experts are brought in as needed. When disputes have arisen that can't be managed at the committee level, they have been "bumped up" to senior leadership on both sides.

- Members of the coordinating committee established by an agreement in Western Cape York Communities in Australia were chosen using culturally-specific processes within traditional owner groups, where it was recognized that younger generations of traditional owners were sometimes "better placed to assume such roles."[5]

Other aspects of implementation committees that are often negotiated include:

- Information requirements and information management, for example to track whether commitments are being met. Implementation committee meetings will happen two to four times a year for up to 20 years, and information management will be important so that reviews can tap an archive of historical data and earlier decisions. Meeting minutes will need to be archived, as well as any amendments to the agreements or other crucial documents.

- Schedule of meetings and a timeframe for a first meeting, as well as how often meetings are held, where they are held, and what constitutes a quorum.

- Who is to act as a chairperson, or whether there will be a rotating chair.

- The terms of members and a process for changing them.

- Meeting procedure and rules of order.

- Whether there will be liaison with third parties, for example government agencies.

- Management of costs, administration of budgets, annual reporting, and auditing procedures.

- Decision making arrangements, including the nature of decisions that can be made.

- Responsibilities of any subcommittees and how they are formed (e.g., environmental issues, cultural heritage protection, employment and training, communication).

- Review and recommendation on reports (for example on training, employment, or social impacts).

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Implementation committee meetings will happen two to four times a year for up to 20 years, and information management will be important so that reviews can tap an archive of historical data and earlier decisions.

Clear Commitments and Responsibilities

Implementation often fails because of the lack of definition of team member responsibility and of managerial accountability.[6] In a review of an agreement in Australia, implementation failure was found to be a result of poor understanding on the part of the company leadership of the need to assume personal and line accountability for implementing the agreement. Responsibilities need to be spelled out clearly, and authority vested in senior managers of both the company and the communities in order to fulfil obligations in an agreement.

Another way to support implementation might be a requirement for senior decision-makers to be involved in regular implementation reviews and/or to attend a minimum number of implementation committee meetings each year. Some agreements specifically prohibit delegation of these functions to more junior personnel. A study of the implementation of one agreement found a tendency for line managers and employees to pass responsibility to human resource and community relations departments, which fundamentally limited the success of implementation efforts.[7] Operational managers failed to take responsibility for implementing provisions of the agreement relevant to their work area, leaving all of the work to one department.

It is essential to have both company and community champions of the agreement to maintain momentum for successful implementation. Staff in both organizations can make implementation of the agreement their primary focus.

It is essential to have both company and community champions of the agreement to maintain momentum for successful implementation. Staff in both organizations can make implementation of the agreement their primary focus. If there is an individual from within the community who exerts pressure on the company, more attention will be paid to key issues. This outside voice needs to be matched internally by a champion of the agreement. The insider needs to be backed by senior staff and to understand the internal culture of the company in order to raise implementation issues appropriately. The two voices together can help ensure constant attention to implementation.

Questions to ask to ensure clarity of responsibilities are:

- Is the responsibility for each action or initiative clear?
- Do both parties agree about who is responsible?
- Do those with the responsibility to implement have the legal, regulatory, or policy mandate to carry out the actions they are responsible for?
- Are there senior decision-makers responsible for implementation or at least oversight of implementation?
- Are lines of responsibility clear within many operational units of the company, or are they likely to be passed off to a human resources or community relations department?

Adequacy of Funds and Other Resources for Implementation

Resources must be allocated specifically to implementation. This is in addition to resources that are allocated to fund program activity, such as scholarships. It is very important to have an implementation budget in place in advance of the agreement being signed so that both parties have the same expectations about costs over time.

- FUNDS will be needed throughout implementation, for example to hire technical experts to review environmental reports and monitoring plans, for staff to administer the agreement and programs identified within it, and for legal or consulting fees. Funds for ongoing consultation and communication with implementation committees and the community will be required for meetings, managing disputes, human resources, and environmental monitoring. As well, funds should be allocated to general administrative functions.
- RESOURCES may include staff, as well as access to experts or information that may be required during implementation.
- TRAINING AND CAPACITY-BUILDING are needed to engage in the policy work or implementation of the agreement.

The company itself may also lack skills and capacity in critical areas, such as cross-cultural engagement. For example, senior staff can make comments or act in ways that cause negative reactions among indigenous people, which can affect implementation.[8]

Questions to pose on company skills and capacity may include:

- What skills will be required to implement the agreement?
- What programs, policies or procedures might be needed?
- What training or courses might be required internally to build capacity, or for the company to orient staff to the local context so that implementation can occur smoothly?

Questions to help identify the adequacy of funds and other resources for effective implementation include:

- What are the resources required to support implementation? Do the resources exist now?
- What funds will be required and who will provide them?
- What skills will be needed on both sides of the agreement?
- How long will these resources need to be available?
- What information is required to ensure that commitments are being met?
- If resources are not available, how are they going to be mobilized by the time implementation is due to occur?
- Will these resources continue to be available in the future? With what frequency will they arrive, and how will they be managed?
- What mechanisms are needed to ensure adequate funds are made available?

Funds will be needed throughout implementation, for example to hire technical experts to review environmental reports and monitoring plans, for staff to administer the agreement and programs identified within it, and for legal or consulting fees.

Penalties and Incentives

Agreements should, where possible, creative incentives for success and provide for automatic penalties if implementation is slow or is failing.

For example, under some Australian agreements companies have to spend more on indigenous employment and training programs if employment falls below agreed targets. The greater the gap between actual and target employment, the steeper the increase in company spending.

Agreements should, where possible, creative incentives for success and provide for automatic penalties if implementation is slow or is failing.

This type of adaptive management is important. It is not about blaming the company, but about ensuring an appropriate response if the intent of the agreement is not being met. At a more strategic level, adaptive management will involve using agreement reviews to understand the underlying factors that are leading to ineffective implementation, and then structuring responses to deal with those causal factors first.

Monitoring

It is critical that monitoring of key indicators for implementation performance be developed from the start and maintained throughout project life. If this is not done, it is very difficult to know the extent of implementation success or failure, or to develop strategies to deal with implementation problems. Monitoring can be both quantitative (using close-ended survey questions, monitoring targets and other numeric commitments) and qualitative (using data gained through open-ended survey questions, interviews, focus groups, meetings or discussions).

Some of the monitoring provisions will be obvious, and will be based on targets that are established in the agreement. So, for example, an employment target of 25 per cent indigenous employees will either be achieved, or not. However, it is important to look beyond obvious indicators. Just because a company achieves the target does not guarantee a strong relationship is in place or that people have worthwhile jobs. There may, for example, be a very high hiring rate that allows the company to meet targets, but turnover rates may be just as high. In an implementation review of the Troilus mine, the authors note that a "more structured approach to tracking the employment experience is needed and that a close (and sustained) working relationship between the community and the company is ... essential."[9]

Provisions for monitoring often indicate:

- How often reports will be made.
- What variables (e.g., criteria and indicators like employment, retention, and turnover rates) will be tracked.
- How results will be used. For example, where monitoring results indicate implementation failure, there may be a requirement for the parties to meet and plan how to address the problem.

Institutional Arrangements for Review

Review involves the periodic analysis of relevant information to establish the extent of implementation, and to consider the appropriateness of implementation initiatives and of relevant provisions of agreements. Many agreements include provisions for regular review of the agreement, such as this one:

> *Three (3) years after the Effective Date, the Parties shall in good faith consider whether the terms of this Agreement are appropriate in light of circumstances of the [project] at the time and, if either Party is of the view that such terms are not appropriate, the Parties will in good faith negotiate adjustments. The Parties agree to provide such disclosure of information as is required to address the negotiation of any adjustments.*

Critical questions will be:

- When will reviews happen?
- Who will conduct them?
- Who will pay for them?
- What will be done with the findings? (i.e., Will there be agreed upon thresholds that will trigger commitment of additional funds?).

Amendment of Provisions

The requirements for amendment should not be too onerous, or problems with agreements will not be addressed. Companies can be extremely risk averse in this area and in some cases insist on sticking with the original terms of the agreement because they see changing any part of the agreement as opening up a Pandora's box.

Some recent agreements in Australia have avoided the complexities (perceived or real) of amending agreements by having fundamental issues and the overall working relationship and principles between the parties set out in a core agreement that is not easily amended. Separate management plans are attached to the core agreement and deal with issues such as employment, training, cultural heritage, and environmental management. A much simpler procedure is set out for amending the management plans.

Amendments can be important for a few reasons. First, the relationship between the company and community is dynamic, which can result in unanticipated situations that need to be addressed through amendment of certain provisions. Failure to do so can undermine the trust and confidence of parties with each other. Second, the body of knowledge, understanding and approaches to IBAs is changing as more and more IBAs are negotiated and more participants continue to hone the approaches used.[10] Finally, the alternative to amendment may often be dispute resolution, which can be expensive and disruptive of relationships.[11] Revisiting and revising sections of the IBA is a proactive way to avoid the need for formal dispute resolution, and the potential for erosion of the relationship.

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Some examples of clauses that have been amended include:

- Changes to start-up times and skills training. If it becomes apparent that construction delays will change the start-up date or there are changes to the businesses or skills needed, training or business development commitments can be revised to meet new operating conditions, and potentially to trade some post-construction benefits for other benefits.[12]

- Significant expansion of the project or development of a new project in the same geographic area. For example, one agreement provides that, "This Agreement shall be renegotiated if the proven and probable ore reserves on the [project] claim block increase to a level equal to, or in excess of, [a threshold quantity]. Proven and probable ore reserves, for the purposes of this Agreement, will be defined in accordance with [mining company] corporate policy, which may change from time to time."[13]

- The establishment of terms or conditions through the regulatory processes that are either inconsistent with the IBA or make it desirable for the parties to rethink certain provisions in the agreement.[14] This possibility would arise if the agreement is concluded before the start of the environmental assessment or permitting process. One IBA negotiated under the Nunavut Land Claims Agreement has a renegotiation clause as follows: "the parties recognize the final environmental review and approvals of the [mining project] will be subject to the environmental assessment process of the Nunavut Impact Review Board... The parties agree that they will, if necessary, renegotiate this Agreement in order to ensure that it is consistent with the terms and conditions of final project approvals."[15]

- Contractual details, such as when a company changes its name, or when the indigenous group gains extensive new expertise and wishes to change business development clauses.

Factors External to the Agreement

There are many factors outside of the agreement that can impact on success. For example, if the general education system is not working effectively, getting Aboriginal people into skilled jobs can be tough. Or, if housing in the region of the mine is poor and overcrowded, there may be pressure on families to leave the area. It may not be possible to manage these wider issues through an IBA, but they can be recognized as possible barriers to implementation, and the parties can agree to work jointly to minimize their negative effects on implementation.

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Some general external factors that can impact on implementation are discussed below.

Political Agency

Implementation mechanisms often fail to recognize indigenous political agency and so fail to engage indigenous political actors in the design of institutions. As a result, even though agreement provisions exist on paper, they do not become a reality. Implementation mechanisms may be designed by non-indigenous people and be modelled on similar structures at other projects or in different contexts. They may not take shape in the way intended or have the intended effect because they have no organizational fit with local cultural values and governance norms.

For example, the negotiation and consultation model of the corporation can be inappropriate if the social unit in which people organize and identify is through the family, the clan, or the church.[16] The result is a failure to engage with Aboriginal political actors to achieve a mutually acceptable approach to implementation issues,[17] a lack of transparency, an exclusion of indigenous people from decision-making, and a less effective relationship.

Support of Key Actors and Groups

It may take the political support of many different groups to effectively implement agreements. At the Troilus Mine in Quebec, the support of the Cree Nation of Mistissini through active promotion of employment in the mining industry is cited as one of the key factors in achieving success.[18] In one case in northern Canada, the failure of an Aboriginal executive to work as a team led to neglect of implementation meetings for more than two years. If the provincial government is responsible for training and education changes priorities, and no longer supports capacity building, this can also impact on success.

Change in Policy or Government

Government policy shifts can also erode the basis for an agreement. For example, new administrations can dismantle legislation or institutional apparatus critical to effective implementation of agreements.

Rivalry Between Government Departments

In some cases, many government departments end up having some responsibility for training or education. As a result, considerable turf protection and jockeying can occur that interferes with the implementation of the agreement.[19]

Lack of Information on Agreements and Related Policy and Legislation

If there is rapid turnover in organizations of people knowledgeable about and critical to the implementation of the agreement, the history, spirit, and intent of agreements and any related or relevant legislation can be lost. Agreements are often established with legislative or policy frameworks that support their implementation, but a lack of information in place to familiarize staff with these frameworks can lead to actions inconsistent with the goals of the parties. (For strategies, see *Build Mechanisms to Deal with Staff Turnover* on page 191).

The community may also need to develop policies on mineral exploration, development, or closure (or traditional knowledge and so on) in order to clarify expectations in the region on particular topics. Also, if more than one project is operating or is likely to operate in the region, there may be a need to develop programs and procedures for managing licenses or research applications, engaging in environmental monitoring, or other issues.

Further, the community may need to engage in legal and regulatory processes as changes occur in the region or nationally, and staff and capacity may need to be developed in order to do so. Also, the community will need administrative support in order to track funds and manage the agreement.

Two First Nations have created their own policies on exploration and mining. In the NWT, the Akaitcho have developed a "Mineral Exploration in the Akaitcho Territory: Guidelines for respect" document (contact 867-370-3217). In BC, the Taku River Tlingit First Nation has created a "Mining Policy" (http://trtfn.yikesite.com/downloads/mining-policy.pdf). These two policies create the framework for mineral exploration and development, and give certainty to developers on how they should consult and engage in the specific regions.

Project Viability and Margins

Expectations about implementation may not be met if the project doesn't start on time, is mothballed or closed for an extended period, or if low commodity prices or other factors reduce operating margins.

While some protections against these problems can be built into agreements through the type of royalty chosen and provisions for minimum annual payments, problems with project viability will minimize the upside potential for revenue streams to support implementation, may affect the ability to meet employment and training goals, and can interfere with the priority given to implementation of the IBA.

Ongoing Relationships

This section discusses ongoing relationships for parties to the agreement, focusing on three key questions:

- How do you actually use the agreement to build a relationship?
- How is trust built between the parties?
- What are major barriers to maintenance of trust over time?

Using the Agreement to Build a Relationship

Often companies and communities can pay close attention to agreements in the first few years of operation, but then steadily decrease their attention to implementation as the project becomes well established or towards closure. Attention to the following areas helps maintain agreements as living documents, with adaptations made as needed.

- Keep communication alive. Communication channels need to be constantly reinforced, so that informal contacts and formal meetings are taking place.
- Maintain careful records of meetings, discussions, correspondence, reports, and data, such as the tracking of commitments.
- Commit to quick and ongoing action on issues that arise before they become disputes. A fundamental goal of the agreement should be to solve problems as early as possible through effective communication and early warning systems. It is important to support this goal with training for employees in dispute management.[20]
- If disputes do occur, companies and communities should train their personnel to view them as a source of valuable information that can lead to improved operations, reduced risk, and a supportive relationship within the community.[21]
- Build implementation plans. Even if plans are developed only internally, they can guide people in their commitments over time.

Table 5.1 on page 190 provides an example of how one organization tracks some of the commitments from an IBA. This organization goes through a yearly review of every item of the IBA in order to track actions, status, and timing commitments. This kind of planning (either joint or separately) can include identification of the obligations of the parties, activities, and schedules. Implementation management often includes a plan, the creation of accompanying documents (e.g., financial transfer agreements), and a description of how the new relationship should operate.

Keep communication alive. Communication channels need to be constantly reinforced, so that informal contacts and formal meetings are taking place.

Table 5.1: Sample Yearly Review of an IBA

Section	Requirement	Action	Status	Timing
Schedule A: Implementation Committee	*Membership of the Committee:* Four members with two being appointed by [the company] and two appointed by [the community].	Consider using senior rep and/or outside support. Arrange for orientation of committee reps and staff.	Workshop to orientate reps and staff on agreement and roles and responsibilities.	Orientation workshop – Fall.
Schedule B: Company-Community Liaison	*Intent:* [company] will employ a Liaison Officer. The Liaison will assist with implementation of the agreement (from the company perspective) and may sit on the Implementation Committee.	Hire Liaison Officer in the fall, and orient to the agreement.	Advertise position in local papers and on radio.	Monitor.
Schedule C: Agreement Coordinator	*Intent:* [The community] will hire and/or appoint a Coordinator within 30 days of a [mining] Project Construction Decision. The Coordinator will assist with implementation of the Agreement (from the community's perspective).	Hire Agreement Coordinator. Consider role of Coordinator vis-à-vis overall requirements (e.g., coordinator could be responsible for culture and community development programs only).	Consider use of senior (community) officials or external support to fulfil other aspects.	Coordinator position currently out for competition.
Schedule D: Training and Education Opportunities	*Training – General:* use training and education fund to provide with training and education opportunities in the mining sector (i.e., scholarships, pre-trades training, etc.), with [company] and other agencies.	Develop a training strategy to assist the [community] with decisions relating to training.	Workshop on training.	Monitor and encourage [company] participation in on-site training initiatives.
Schedule E: Employment Opportunities	*Employment Support System:* [The company] will implement a support system comprised of: drug and alcohol rehab, money management, etc; cross-cultural training; Family Assistance Program; serve country foods; prohibit alcohol and drugs; on-site communication services at its cost (for employees to maintain contact with home).	Inform communities and workers, and provide guidance to the company on access to country foods and elders for cross-cultural orientations.	Family Assistance Program and other similar provisions are provided in conjunction with other agencies in the region. It will be important for employees to know they have access to these programs.	Ongoing.
Schedule F: Business and Contracting Opportunities	*Application:* Provisions of this schedule apply to all contracts except an explosives contract and drilling contract.	Monitor.	All other contracts will be available to [company] businesses on a bid basis.	Ongoing – monitor.
Schedule I: Abandonment and Reclamation	*Intent:* To provide for progressive reclamation activities for the [mining] project throughout the life of the project consistent with terms of licenses, permits, etc.	Inform [community] lands department of provisions.	Workshop for lands department on provisions.	Ongoing – monitor.

Building Trust and Tackling Barriers

- COMMUNICATE AND REACH OUT. A major barrier to effective implementation is the failure to communicate, and to build a strong relationship. For example, the Tłı̨chǫ Nation invites mining staff out on the land on annual canoe trips, hunts, and other community gatherings to familiarize senior staff with their culture.

- BUILD MECHANISMS TO DEAL WITH STAFF TURNOVER. As staff leave, there is a loss of institutional knowledge and familiarity with the agreement or legislation, and there is also an absence of policy learning. High turnover makes it difficult to establish and maintain relationships. There is a need for education of new personnel in the company and the community. *It is difficult to overestimate this point.* Vital knowledge can be lost if responsibilities are not clearly defined when transitions occur. The company and community will need to implement strategies such as mentorship, job shadowing, cross-training, and requiring that all new senior managers undertake an orientation on the agreement. Furthermore, indigenous groups can design policies or organizational procedures that describe the relationships and protocols in place. This can ensure there is continuity built in for new staff.

- BUILD STRONG RELATIONS BETWEEN PEOPLE WITH SIMILAR RESPONSIBILITIES within the company and the community, for example between employment and training officers in the company and community liaison officers, or between company environmental staff and community environmental monitors or advisors.

- EDUCATE LOCAL PEOPLE AND THE COMPANY ABOUT THE AGREEMENT. This is an essential and ongoing responsibility. Develop briefing sessions to educate company employees, community staff, and contractors about the nature of the agreement. Briefing sessions can focus on:

    - Why the agreement is in place, including its goals, benefits, achievements and how it operates;

    - Roles and expectations of employees and contractors; and

    - The constructive role of community criticisms of project operations, as complaints and opposition can be a source of valuable information.[22]

- USE DATA FOR ADAPTIVE MANAGEMENT. Successful relationship building requires that attention be paid to changes both in the project itself, in the wider environment, and in the interaction between the two. A key issue here involves collecting data and figuring out how to use it. For example, data on safety, wellness, hiring, and promotion are often collected but not effectively used to make changes. Collection of reliable and appropriate data is one matter, but following up on it is critical.

- CONSIDER CUMULATIVE INSTITUTIONAL FATIGUE, especially if there are multiple projects in the region (e.g., Snap Lake, Diavik and EKATI diamond mines in the NWT). With three operating diamond mines, and a separate environmental management board for each mine, people are burdened with many commitments. This reflects a lack of adaptive management in the region, because the social institutions to manage the mines become carved in stone, with no possibility of institutional change as new mines emerge. The lack of coordination between the three environmental bodies is marked, as is the lack of any effective cumulative-effects assessment regime for impacts on either the biophysical or human environment.

Successful relationship building requires that attention be paid to changes both in the project itself, in the wider environment, and in the interaction between the two.

Summary of Section 5

- Establish clear goals for implementation of the agreement;
- Build strong institutional structures for implementation, based in culturally appropriate models;
- Develop implementation plans and review them often;
- Define who is responsible for implementing parts of the agreement;
- Build in transition plans for turnover of employees;
- Ensure there are strong community champions of the agreement who are matched inside the company by equally influential corporate champions;
- Negotiate resources for implementation of the agreement, including funds, access to expertise, and staff or information resources;
- Anticipate staffing, program, and policy needs and start to build the capacity for them;
- Build in penalties and incentives and then use them to motivate action;
- Develop a system for monitoring implementation of the agreement;
- Build in an easy-to-use system for amending parts of the agreement that are most likely to be affected by changing circumstances;
- Anticipate external factors that can influence implementation success and then plan to deal with them;
- Use the agreement to build a strong relationship; and
- Involve the company in local activities in order to build trust.

A complete list of references is available in the final section of the toolkit, which can downloaded at www.ibacommunitytoolkit.ca

Notes

1 Office of the Auditor General of Canada 2007.

2 O'Faircheallaigh 2002.

3 O'Faircheallaigh 2003a, 6.

4 Ibid, 19.

5 Crooke et al. 2006, 14.

6 Crooke et al. 2006.

7 Ibid, 12.

8 O'Faircheallaigh 2003c, 9.

9 Penn and Croquet 2008, 22.

10 Diges 2008.

11 Ibid, 5.

12 Adapted from Diges 2008.

13 Kennett 1999, 97.

14 Kennett 1999.

15 Ibid, 98.

16 Gibson and Kemp 2008.

17 O'Faircheallaigh 2003.

18 Penn and Croquet 2008.

19 O'Faircheallaigh 2003a, 7.

20 CAO 2008.

21 Ibid.

22 Adapted from CAO 2008, 53.

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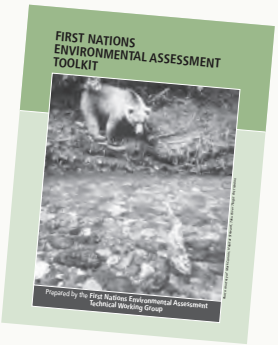

- The FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT provides in-depth information about the environmental assessment process: www.fneatwg.org
- The CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY also provides materials on the nature of the process and public involvement in environmental assessments: www.ceaa-acee.gc.ca
- The IBA RESEARCH NETWORK provides on-line information and resources on IBAs in Canada: www.impactandbenefit.com/
- NATURAL RESOURCES CANADA mining pages provide a wide range of on-line resources, including an Aboriginal participation section (www.rncan-nrcan.gc.ca/smm-mms/abor-auto/index-eng.htm), and the downloadable *Mining Information Kit for Aboriginal Communities* (www.nrcan-rncan.gc.ca/mms-smm/abor-auto/htm/kit-gui-eng.htm)
- The AGREEMENTS, TREATIES AND NEGOTIATED SETTLEMENTS PROJECT in Australia hosts a database of agreements and other resources: www.atns.net.au
- The MINING INDUSTRY HUMAN RESOURCES COUNCIL hosts a portal for Aboriginal communities to learn more about careers in mining including education and training programs, and resources such as job descriptions and a downloadable guide on occupations in mining: www.aboriginalmining.ca
- MININGWATCH CANADA provides news and resources at www.miningwatch.ca, including the primer *Mining Investors: Understanding the legal structure of a mining company and identifying its management, shareholders and relationship with the financial markets* www.wman-info.org/resources/technicalreports/Mining_Investors.pdf
- MINES AND COMMUNITIES also has news and resources about mining, particularly as they affect indigenous and land-based peoples: www.minesandcommunities.org

Natural Resources Canada provides a map of agreements between mining companies and Aboriginal communities or governments, by location and current status, available at www.nrcan-rncan.gc.ca/mms-smm/abor-auto/pdf/agr-ent-08-eng.pdf

Access and Benefit Agreements

Access and Benefit Agreements are very similar to IBAs (and in some cases the term is interchangeable with an IBA), but in certain parts of Canada have specific requirements set out under legislation (e.g., the Yukon Oil and Gas Act), or land claim agreements.

The Government of Yukon and Kaska Nation, for example, have provided a sample Benefits Agreement that is publicly available at www.emr.gov.yk.ca/oilandgas/pdf/template_benefitsagreement.doc

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Glossary and Acronyms

ABORIGINAL — A common, collective name for referring to indigenous people in Canada. In this toolkit, the terms *Aboriginal* and *indigenous* (the more common international term) are used interchangeably, and meant to be inclusive of all indigenous people in Canada, including First Nations, Inuit, and Métis.

ACCESS AND BENEFIT AGREEMENTS — Access and Benefit-Sharing Agreements or Benefits Agreements are often negotiated at exploration stages. In certain parts of Canada, ABAs have specific requirements set out in legislation or land claim agreements.

AGREEMENT IN PRINCIPLE — A verbal or written agreement to proceed in a mutually beneficial manner, normally as an early indication of desire to work toward a formal agreement (see also *MoU*). Written agreements may or may not be legally binding.

BROWNFIELD — Exploration involving searching for new deposits, or extension of existing deposits, in areas where mining is already underway or has already been completed (see also *greenfield*).

CAPITAL COSTS — The costs of establishing or expanding a project, including equipment and building costs, and of replacing equipment (as opposed to ongoing operating costs, such as wages and consumable supplies).

COMMODITY — Physical substances, such as metals, that can be sold or exchanged in a marketplace.

CONSULTATION — Processes that provide meaningful information about mining projects to Aboriginal people, and record their responses, which may or may not be acted upon by mining companies or government.

CROWN LAND — Land owned on behalf of by all Canadians by government and that is administered and regulated by government.

EA OR EIA — Environmental assessment (or environmental impact assessment) is the assessment of project impacts on the environment. There are many levels of assessment, as described in Section 2.

FEASIBILITY — Analysis to determine whether a proposal will be possible and profitable.

GREENFIELD — Exploration involves searching for mineral deposits in areas that have had little or no previous exploration or mining (see also *brownfield*).

IBA	Impact and Benefit Agreement, a contractual agreement between an Aboriginal community or entity and a resource development company, such as a mining company.
IIBA	Inuit Impact and Benefit Agreement, a contractual agreement between an Aboriginal community or entity and a resource development company, such as a mining company. IIBAs are commonly used in parks and protected areas.
INFRASTRUCTURE	The basic facilities such as roads, ports, power and water supplies needed for the functioning of a mine.
JOINT VENTURE	A partnership or conglomerate, often formed to share risk or expertise in relation to a particular project.
JURISDICTION	The territorial range of authority or control.
LEGACY	In mining, this often means that there continues to be environmental damage from an mine that is now closed.
NEGOTIATOR	Person involved in a back-and-forth communication designed to reach an agreement between two or more parties.
MOU	A memorandum of Understanding often sets out the principles for two or more parties to work together for mutual benefit, such as between a community and mining company prior to the negotiation of a formal IBA.
RECLAMATION	Restoration of mined land to a state as close as possible to its original contour, use or condition.
REHABILITATE OR RESTORE	Process used to repair the impacts of mining on the environment.
SINGLE WINDOW:	A facility that allows parties involved in environmental impact assessment to lodge standardized information and documents with a single entry point to fulfill all related regulatory requirements.
SMELTER	Where ores are processed (using heat) to produce metals.
STAKEHOLDER	Any party that has an interest ("stake") in a project.
TAILINGS	Material disposed of from a mill after most of the valuable minerals have been extracted.

This toolkit can be downloaded free of charge at www.ibacommunitytoolkit.ca