

IBA COMMUNITY TOOLKIT

Negotiation and Implementation of Impact and Benefit Agreements



By Ginger Gibson
and Ciaran O’Faircheallaigh

March 2010
Updated June 2011



Commissioned by
the Walter & Duncan
Gordon Foundation



IBA COMMUNITY TOOLKIT

Negotiation and Implementation of Impact and Benefit Agreements

by Ginger Gibson and Ciaran O’Faircheallaigh

Commissioned by the Walter & Duncan Gordon Foundation

March 2010 | updated June 2011

The contents of this toolkit are entirely the responsibility of the authors and do not necessarily reflect the view or opinions of the Gordon Foundation or the individuals or organizations who contributed to its development.

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.

This report is available under limited copyright protection. You may download, distribute, photocopy, cite or excerpt this document provided it is properly and fully credited and not used for commercial purposes. For more information, visit www.creativecommons.org

Primary photography by James Stauch, with thanks to the communities of Cape Dorset, Nunavut, Behchoko and Fort Good Hope, NWT and Old Crow and Teslin, Yukon.

Copyedit and design: Nadene Rehnby and Pete Tuepah, www.handsonpublications.com

Thanks to Native Counselling Services of Alberta for contributing to the second printing. Third printing sponsored by Teck Resources. **Teck**

© Ginger Gibson, Ciaran O’Faircheallaigh and the Gordon Foundation

This toolkit can be downloaded free of charge at www.ibacommunitytoolkit.ca



11 Church Street, Ste. 400

Toronto, ON M5E 1W1

Tel: 416-601-4776 | Fax: 416-601-1689

info@gordonfn.org | www.gordonfn.org



Contents

About the Authors	8
Acknowledgements	8
SECTION 1: INTRODUCTION	9
Before You Start: Making the Decision to Negotiate	11
Negotiation is Not Consent	11
Information is Power	11
A Focus on Process as Well as Outcome	12
The Importance of Forming Networks	13
Toolkit Research and Development	13
How to Use this Toolkit	14
Structure of the Toolkit	14

SECTION 2: ANALYZING THE PROJECT AND THE WIDER ENVIRONMENT	15
Introduction.....	16
The Mine Life Cycle	17
Location and Investment Decision	17
Early Exploration	18
Advanced Exploration	19
Construction.....	22
Operations	22
Closure and Reclamation.....	23
Indigenous Rights: The International Context.....	24
Indigenous Rights: The Canadian Context	29
Duty to Consult.....	30
Duty to Accommodate.....	31
Historic and Modern Treaties.....	31
Modern Land Claim Agreements	32
Legal and Policy Levers for IBAs	34
Canadian Environmental Approval and Regulation	36
EIA Requirements	37
Levels of Environmental Assessment	39
Minimizing Impacts and Maximizing Benefits.....	41
Timing of the Negotiation of IBAs and EIAs	43
Timing the EIA and IBA: Three Scenarios	44
The Wider Implications of Agreement Making	47
Access to the Courts and Government Regulators	47
Freedom to Pursue Political Strategies	48
Implications for Broader Agreements and Land Claims with the State ...	49
Freedom to Demand Corporate Responsibility	50
Community Goals, Planning and Politics.....	51
Unity Within Communities.....	51
Unity Between Aboriginal Nations	53
Notes for Section 2.....	55

SECTION 3: PREPARING FOR NEGOTIATIONS.....	57
Introduction.....	58
Establish a Structure for Negotiations	59
Roles and Structures for Negotiations.....	60
Negotiating Team Composition	62
Negotiating Team Selection Process.....	63
Roles of Key People on the Negotiating Team.....	64
Roles of Experts on the Negotiating Team.....	65
Develop a Plan for Gathering and Managing Information	68
Consider Precursor Agreements	78
Exploration Agreements	78
Memorandums of Understanding (MoUs)	78
Corporate Confidentiality Clauses	79
Develop a Budget	80
Gather Information About the Project, Commodity and Company.....	83
Establish Baseline Conditions in the Socio-economic and Cultural Environment.....	84
Impact Assessment Questions	86
Potential Socio-Economic Impacts	87
Impacts During Advanced Exploration	88
Impacts During Construction.....	88
Impacts During Operations	89
Impacts During Closure	89
Mitigating Impacts.....	90
Develop a Communications Strategy	92
Assess and Improve the Bargaining Position	99
Summary of Section 3	104
Notes for Section 3.....	105

The toolkit can be downloaded, free of charge, in whole or by chapter, at www.ibacommunitytoolkit.ca

The website also provides a central location for updated links to further resources.

SECTION 4: CONDUCTING NEGOTIATIONS AND REACHING AGREEMENTS	107
Introduction.....	108
Negotiation Processes and Procedures.....	109
Identify Options and Provisions for Negotiated Agreements	121
Legal Provisions.....	121
Substantive Issues and Provisions.....	130
Communication	132
Aboriginal and Public Access to Mining Tenures	133
Mining Payments.....	134
Assessing Risk Tolerance for a Financial Model.....	139
Mining Payment Utilization	141
Employment.....	144
Union Relationships	154
Business Development.....	156
Access to and Transfer of Infrastructure and Facilities	159
Environmental Management.....	160
Culture and Cultural Heritage	164
Harvester Compensation and Traditional Use	166
Social Measures.....	167
Establish Agreements that Reflect Community Goals	168
Returning to the Negotiating Table.....	171
Signing and Launching an Agreement	172
Summary of Section 4.....	173
Notes for Section 4.....	174

SECTION 5: IMPLEMENTING AGREEMENTS AND MAINTAINING RELATIONSHIPS	177
Introduction.....	178
Implementing Agreements	179
Factors Internal to the Agreement.....	180
Clear Goals.....	180
Institutional Arrangements for Implementation	180
Clear Commitments and Responsibilities	182
Adequacy of Funds and Other Resources for Implementation.....	183
Penalties and Incentives.....	184
Monitoring.....	184
Institutional Arrangements for Review	185
Amendment of Provisions.....	185
Factors External to the Agreement	187
Political Agency.....	187
Support of Key Actors and Groups	187
Change in Policy or Government	187
Rivalry Between Government Departments	188
Lack of Information on Agreements and Related Policy and Legislation	188
Project Viability and Margins	188
Ongoing Relationships.....	189
Using the Agreement to Build a Relationship	189
Building Trust and Tackling Barriers	191
Summary of Section 5	192
Notes for Section 5.....	193
REFERENCES.....	194
INDEX.....	201
GLOSSARY AND ACRONYMS	203

An index in the final pages of the toolkit allows specific topics to be located quickly.

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

The development of this toolkit was made possible by grants from the Walter and Duncan Gordon Foundation. We greatly appreciate the Foundation's support. James Stauch deserves particular thanks for his constant encouragement and support, and for his beautiful photographs found on many of the pages of this toolkit. Nadene Rehnby and Pete Tuepah from Hands On Publications provided invaluable assistance with editing and graphic design. Our thanks also to Alistair MacDonald, who contributed his expertise in social and cultural impact assessment, and many hours of editing support.

Many negotiators and community leaders from across Canada provided us with guidance and the benefit of their experience, and reviewed the toolkit at different stages of its development. We are grateful to all of you:

Jason Batise, Wabun Tribal Council

Paul Blom, BC First Nations
Energy and Mining Council

Mike Carpenter,
Attawapiskat First Nation

Florence Catholique,
Lutsel K'e Dene First Nation

Allen Edzerza,
Consultant/Negotiator

Theresa Hollett,
Nunatsiavut Government

Larry Innes,
Canadian Boreal Initiative

Sandra Jack,
Taku River Tlingit First Nations

Stephen Kakfwi, former NWT
Premier and Dene Nation President

Melody Lepine,
Mikisew Cree First Nation

Mark Rodney, Wemindji Nation

Arthur Pape, Pape, Salter and Teillet

Tony Pearse

David Peerla

Alan Penn,
Grand Council of the Crees

David Porter, Kaska Nation

Bruce Uviluq, Nunavut Tunngavik Inc.

Vivianne Weitzner, North South Institute

John B. Zoe, Tłı̨chǫ Government