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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.

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.



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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.

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.

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.

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.

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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

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.

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

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

