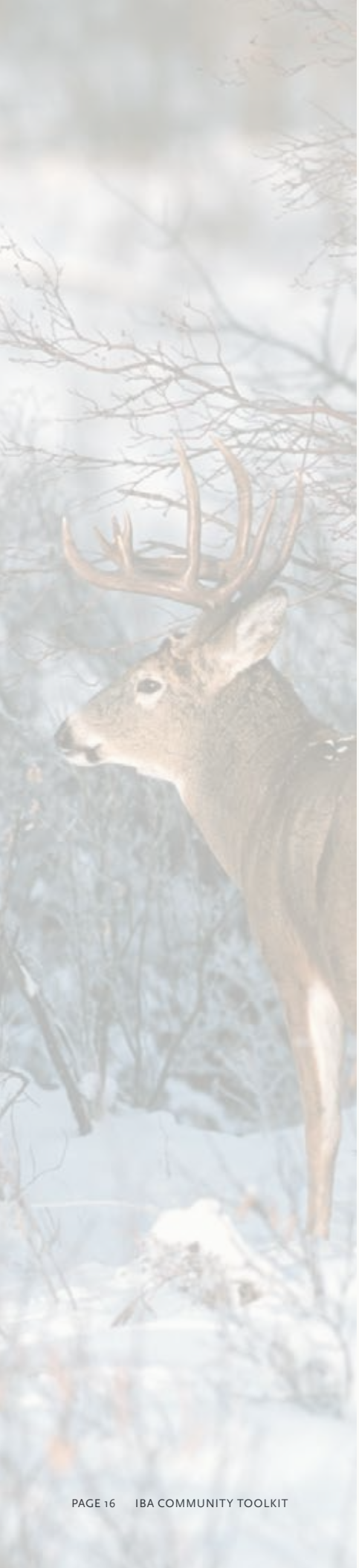
SECTION 2

Analyzing the Project and the Broader Environment



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.

The Mine Life Cycle

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

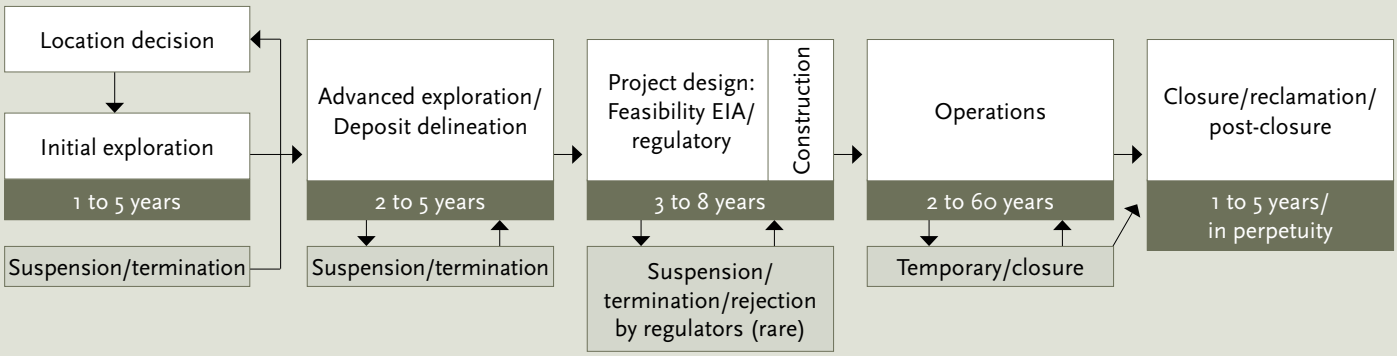
The mine life cycle typically breaks down into a series of phases. Figure 2.1 indicates a linear process from a location decision to full-scale operations. However, for each phase in the mine life cycle, the decision may be made to suspend or terminate the project. Most exploration projects – some 99.9 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.

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.

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.

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

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

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.

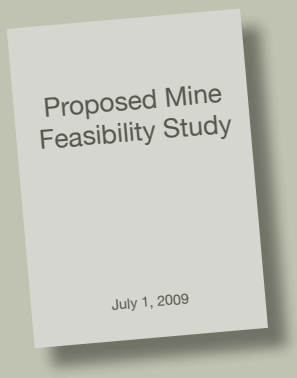
The decision to drill on a claim is not a small one – the expenses to the company far exceed that of all previous work. However, there is no other way to delineate the mineral trend. The size of the drill bit will vary: larger diameter drills will be used in areas where the geology is well known and 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. Regulations anticipated in 2011 include a new paper staking system, and new protections for sites of Aboriginal cultural significance. New legislation is establishing permit regimes that require greater and more in-depth consultation before rights are granted, and this will apply throughout the 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.

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.

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).

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."

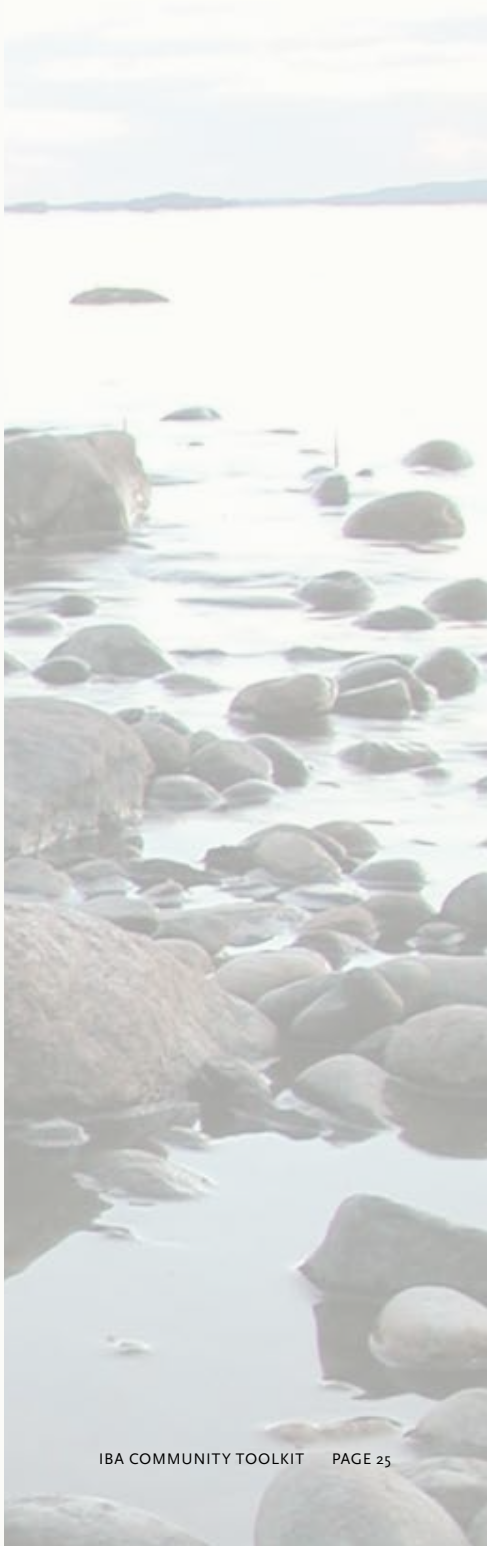
The right to equality before the law and to property is guaranteed in the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 provides:

... 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).

Some international and national financial institutions are currently commissioning research on FPIC in order to provide corporations with guidance on relevant issues. It is likely that over the longer term FPIC will become embedded in management systems and through engagement and consultation with indigenous communities.[4] The World Bank requires only that clients seeking loans engage in "free, prior informed

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.

International law has confirmed that indigenous peoples must have the right to consent to operations in their territory.

consultation." The World Bank's private investment arm, the International Finance Corporation, in 2006 rejected the principle of FPIC even where developments involve potential 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. Many companies are feeling increased pressure to take FPIC seriously, especially since Canada supported the UN Declaration on the Rights of Indigenous Peoples in 2010. A good example of the growing corporate focus on FPIC is research funded by Talisman Energy Inc. which explores the benefits the company might derive and the challenges it will encounter if it adopts a policy to secure the free, prior, and informed consent of indigenous people.[5] 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, international law has confirmed that indigenous peoples must have the right to consent to operations in their territory. Despite growing international recognition of Indigenous rights, at present this recognition cannot, on its own, change the Canadian context. However, financial institutions and lenders are now looking seriously at how companies are institutionalizing this norm. 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."[6] 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."[7]

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. New federal guidelines assert, "In the Haida and Taku River decisions in 2004, and the Mikisew Cree decision in 2005, the Supreme Court held that the Crown has a duty to consult, and where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights... In more recent decisions, the Court further explained that: the duty to consult is a constitutional duty; applies in the context of modern treaties; officials must look at treaty provisions first; and where treaty consultation provisions do not apply to a proposed activity, a 'parallel' duty to consult exists."[8]

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)*.[9] 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)*.[10]

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*[11]*)*. 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*,[12] 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.[13]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).[14] 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.[15]

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."[16]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,[17] 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.[18]

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[19]) 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. Métis people have also taken part in historic treaties, such as in Treaty 3 which has Metis signatories from the Rainy River/Lake of the Woods area. 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.[20]

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.[21] 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.[22] 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:

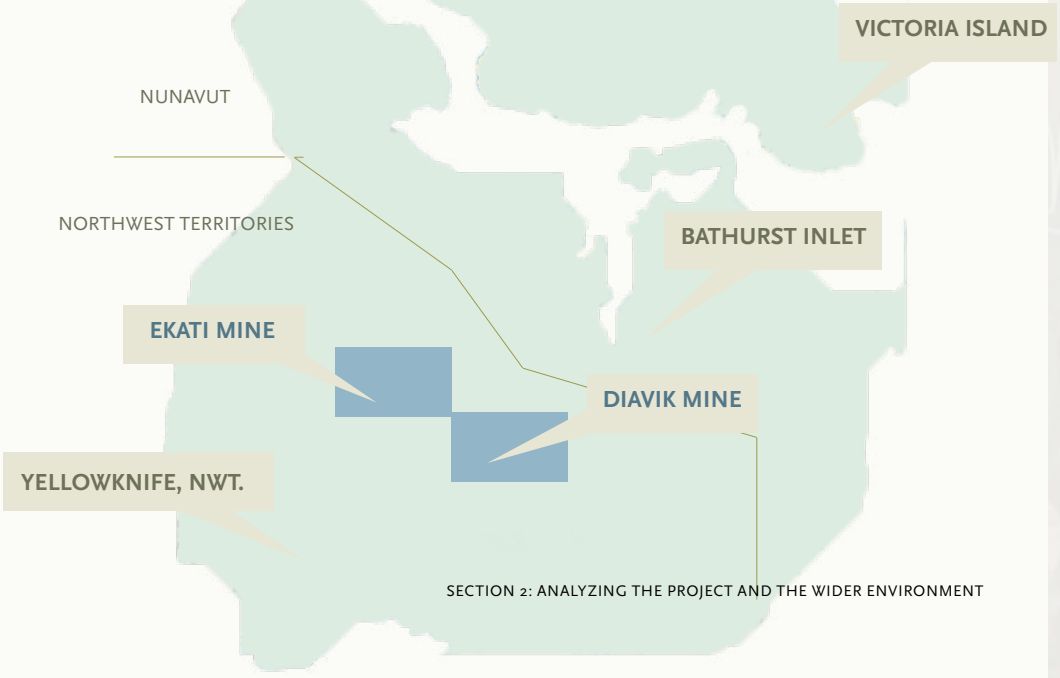
- The Nunavut Land Claims Act requires an Inuit Impact and Benefit Agreement (IIBA). In Article 26 of the agreement, the procedures, substance, parties, and linkages to the overall regulatory process are identified for "major development projects."[23] Further, IIBAs are negotiated within a broader land 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.[24] 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,[25]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.[26] 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[28] 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.[29] 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.[30]

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

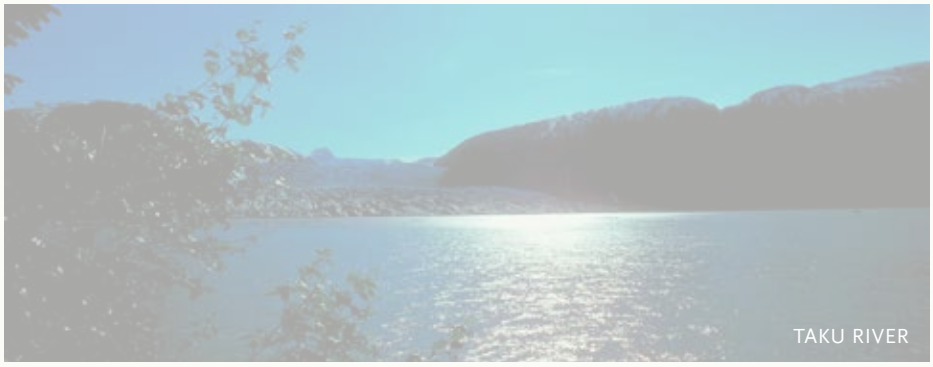
In the absence of any explicit federal policy or legislation on IBAs, the context of negotiation of agreements has often been set in the North through the intervention of a federal minister. The Minister of Indian Affairs and Northern Development conditionally approved permits for the EKATI Diamond Mine 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 Alberta, oil and gas companies have negotiated agreements with aboriginal communities, but these agreements are vastly different from neighbouring jurisdictions.

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.[31] However, in some cases corporations do not engage in any negotiation of IBAs, as a matter of policy. In Alberta, oil and gas companies have negotiated agreements with aboriginal communities, but these agreements are vastly different from neighbouring jurisdictions. Across the board, these agreements adhere to a much lower standard than other provinces and territories, reflecting the political climate of the region, which is strongly supportive of resource development and antagonistic to Aboriginal rights.


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

There are two provincial toolkits, one from BC (fneatwg.org/toolkit.html) and another from Ontario (print copy only), which can be obtained from the Environment Coordinator at the Chiefs of Ontario (http://chiefs-of-ontario.org/Default.aspx).

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.[32] 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

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.

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*).

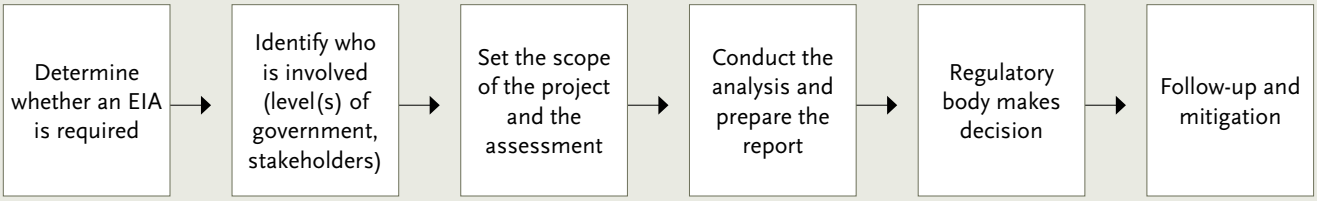
Policies may also be issued, such as BC's *Public Consultation Policy*, as well as the *New Relationship*[33] document, which commits the BC government to jointly establish effective procedures for consultation and accommodation with Aboriginal people. Policy instruments, such as environmental or socio-economic 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,[34] 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).[35] 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.

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.

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:

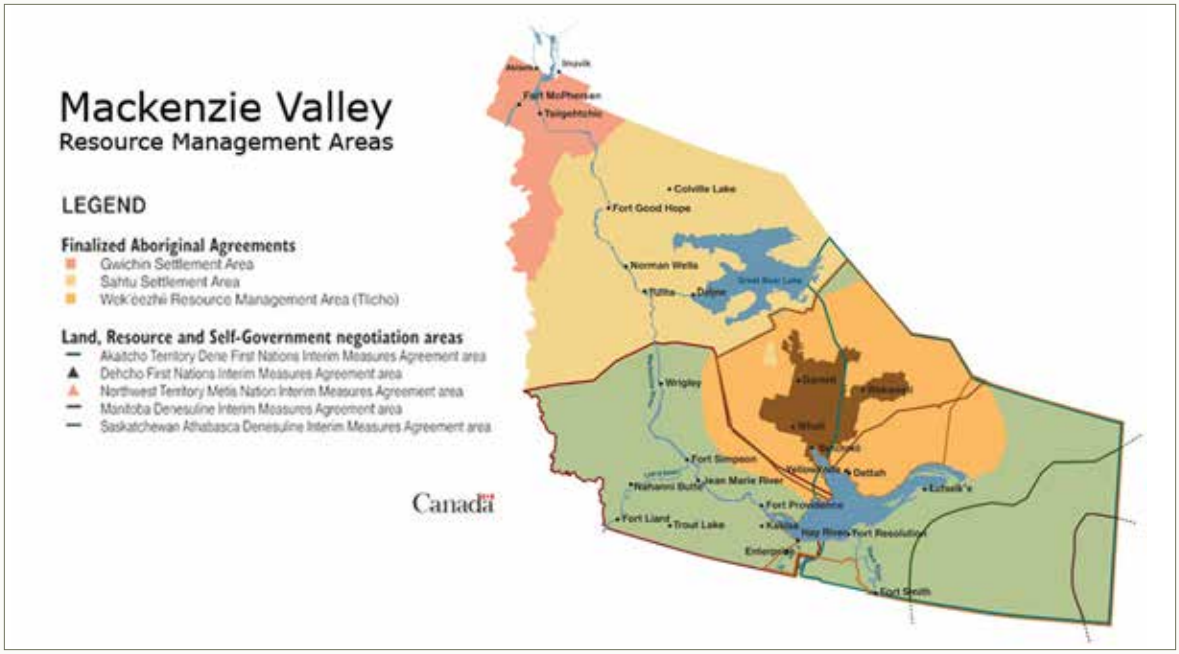
- Screening/preliminary screening;
- Comprehensive study/environmental assessment; and
- Independent panel review/environmental impact review.

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"[36] 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

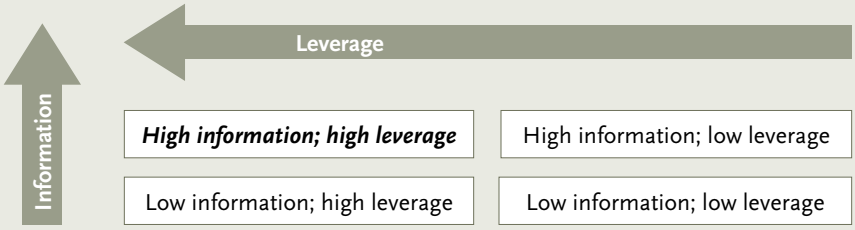
There are three scenarios for phasing IBA negotiations with EIAs:

- 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.[37]

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.[38] 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.[39]

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.[40] 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.[41]

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.[42] 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,[43] 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.[44]

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.[45] 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."[46] The capacity of groups to threaten the reputation of corporations is a "crucial lever."[47] 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.

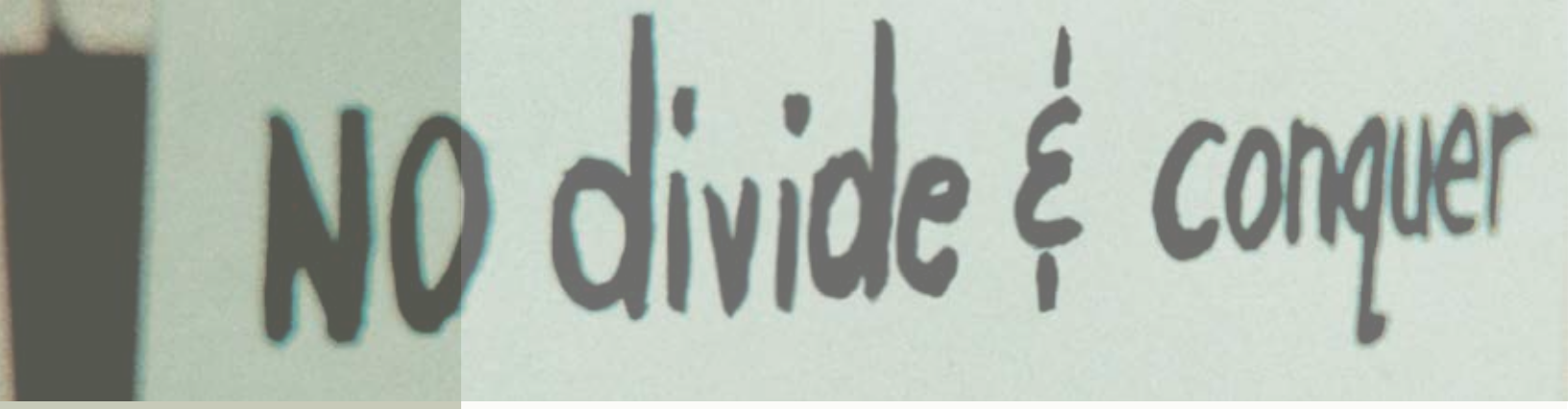
For example, if a community has identified that education and health services are sub-standard because of critical skills shortages in these areas, and that community members have little prospect of gaining and holding industrial jobs until these services are improved, an IBA that focuses heavily on 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

DISUNITY

Signs that a mining company is causing disunity:

- The company brings the concerns of other First Nations to the table and suggests it is negotiating harder with them.
- The company signs an agreement with the weakest First Nation and then tries to get all other Nations to fall in line.
- The company focuses on negotiations with a distant First Nation first.
- The company is consulting the wrong people and Nations.

TACKLING DISUNITY

- Set up a meeting of the First Nations. Agree on how to consult each other, and when.
- Agree on who has priority. If there are many mining and exploration companies, communities can agree to give first priority in negotiation to the community that is closest or has key traditional use or resources.
- Share resources, such as technical people, funds through environmental assessments, and information.

Disunity can be caused by a mining company or by the government. Both parties can be oblivious to the pressures in communities, such as land claim agreements, overlap agreements, and revenue sharing agreements with governments.

In BC, Terrane Metals actively negotiated an agreement with one First Nation, the McLeod Lake Indian Band, and stalled on negotiations with another, the Nak'azdli First Nation. The Nak'azdli brought many concerns about the project to the environmental assessment process, and began to feel marginalized in the environmental assessment, and later in their negotiations with the provincial government for revenue sharing. Attempts made by the Nak'azdli Nation to work with the other First Nation were ineffective.

"The ideal situation would have been if the company and government had given us a chance to discuss the project among the two Nations, so that we could deal with our relationship between the other First Nations in advance." (Interview with member of the Nak'azdli Nation)

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.

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.

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.

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.[48]
- 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 Boreal Leadership Council. 2011.

5 Lehr and Smith 2010.

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

7 1997 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168.

8 Minister of the Department of Indian Affairs and Northern Development 2011, 1.

9 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.

10 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.

11 2004 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 S.C.R. 550.

12 2004 *Haida Nation v. British Columbia (Minster of Forests) and Weyerhaeuser*, 2004 SCC 73.

13 Ibid, 2004.

14 Ibid, 2004.

15 Nouvet 2009.

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

17 *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).

18 Nouvet 2009.

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

20 Bergner 2006b.

21 Archibald and Cronkovitch 1999.

22 Keeping 1999.

23 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).

24 Kennett 1999.

25 Gogal et al. 2005; Kennett; 1999.

26 Keenan and Sosa 2001.

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

28 Gogal et al. 2005.

29 See Gogal et al. 2005; Keeping 1998.

30 Gogal et al. 2005.

31 Bergner 2006a.

32 Canadian Environmental Assessment Agency 2005.

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

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

35 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

36 Gibson 2006.

37 Ibid.

38 O'Faircheallaigh 2008.

39 Kennett 1999: 45-46.

40 Gibson 2006.

41 Katona 2002.

42 Gibson 2006; Trebeck 2008.

43 O'Faircheallaigh 2004a.

44 See O'Faircheallaigh 2008 for a preliminary discussion.

45 A point highlighted in Trebeck 2008.

46 Trebeck 2008: 20.

47 Trebeck 2008.

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