

## SECTION 3

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# Preparing for Negotiations

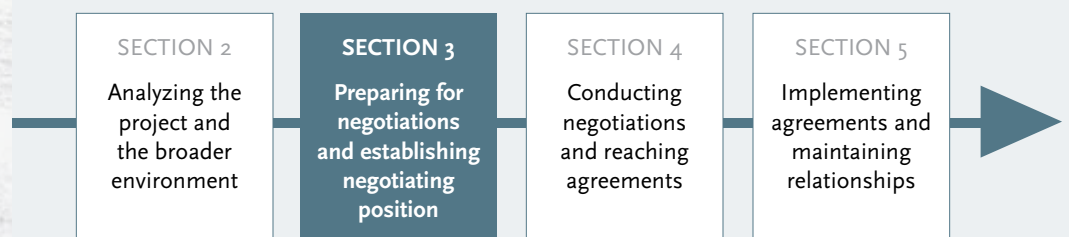
This section is about getting organized for negotiations by developing a structure for managing negotiations, gathering information materials, developing strategies, and establishing negotiation positions. The specific content of negotiation positions is discussed later, in Section 4.


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

This preparatory stage will allow you to:

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

## Structure of the Toolkit





# Establish a Structure for Negotiations

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

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

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

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

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

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

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

# Roles and Structures for Negotiations

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

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

- In Cape York, Australia, during the 1990s the regional land organization, the Cape York Land Council, organized negotiations for major mining agreements with each having a steering committee and a negotiating team. Steering committees were created with representation from key organizations and traditional owner groups. For instance, one steering committee comprised five traditional owners of the land affected by the project, and representatives of a range of specific community organizations, including the elders' group, the cultural resource management group, and the educators' group.<sup>2</sup> Steering committees had the role of controlling the overall direction of the negotiation process, providing political legitimacy to that process, and guiding and facilitating the work of researchers and consultants.<sup>3</sup> Negotiating teams were small, and consisted of the chair or CEO of the land council, a senior legal advisor, and the senior consultant responsible for information collection and community consultation.
- In the Tłıchǵ region of the Northwest Territories, the Diavik Steering Committee was formed in 2000 with two members from each community, a researcher, a lawyer, and two members from the Tłıchǵ land claim negotiating team who served as the negotiation leaders. The community members were occasionally involved in negotiations to get a feel for the issues. These individuals were then charged with leading discussions locally in the remote communities. Part of the purpose of having the community involved was to demonstrate unity to the company. Out of this steering committee, smaller negotiating teams were formed to deal with particular issues.

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



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

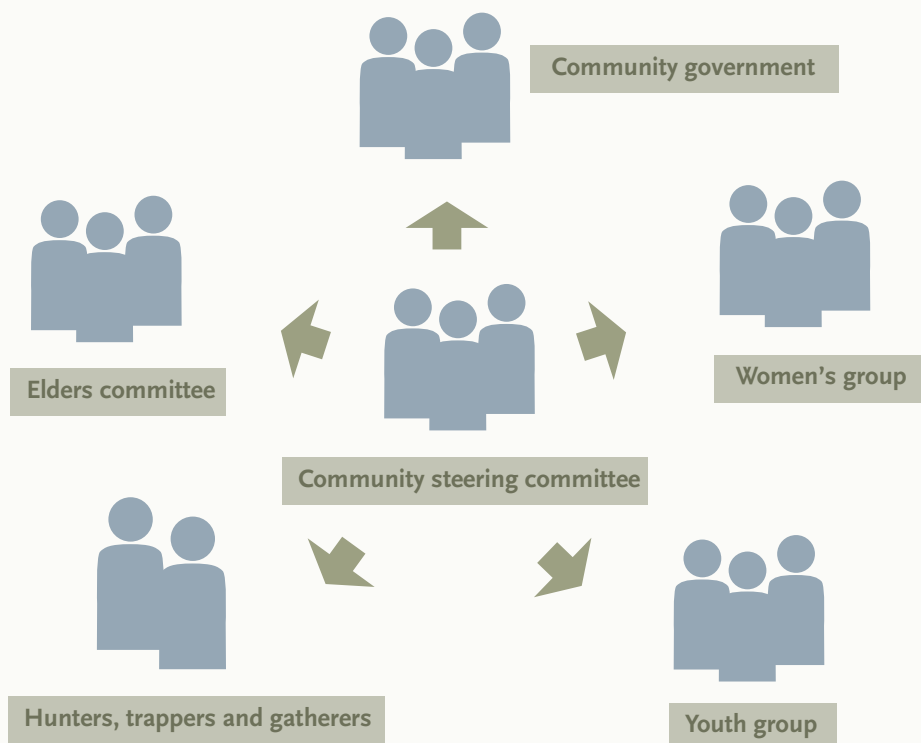
Interest mapping (also known as stakeholder mapping) can be used to identify the range of people interested in the issue and affected by it, and then a leader or representative group from each can be drawn into the community steering committee (See Figure 3.1). This discussion can help to define the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

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

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

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

Figure 3.1: Interest Mapping





## Negotiating Team Composition

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

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

A lead negotiator should be someone who is:

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

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

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

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

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

## Negotiating Team Selection Process

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

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

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

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

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

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

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

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

## A NOTE ON CONSULTANTS

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

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

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

## Roles of Key People on the Negotiating Team

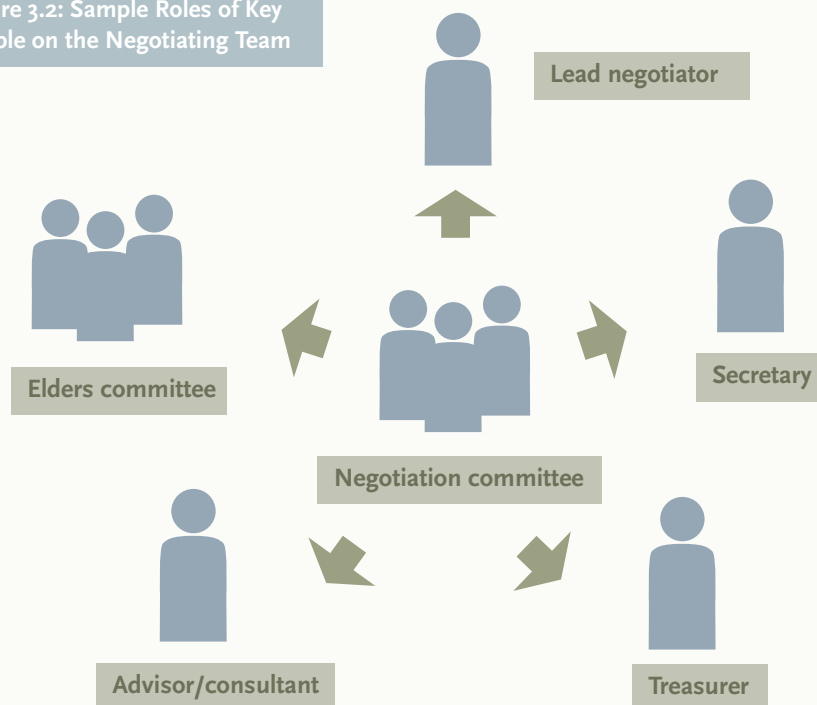
Once people are selected for the negotiating team, roles for the team members need to be outlined (See Figure 3.2). Critical roles will be a lead negotiator, a secretary and a budget manager, although it may be feasible to combine secretarial and treasurer roles.

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

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

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

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





## Role of Experts on the Negotiating Team

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

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

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

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

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

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



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

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

**— Innu negotiator<sup>8</sup>**

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

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

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

## Aboriginal and non-Aboriginal Negotiator Roles

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

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

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

## Negotiating Team Role with the Community

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

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

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

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

# Sample Rules for Negotiations

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

## 1. General Rules

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

## 2. Rules for the Money part of the Agreement

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

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

# Develop a Plan for Gathering and Managing Information

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

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

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

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

## Data Requirements

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

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

## Data Storage

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

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

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

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

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

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

## Data Retrieval and Access

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

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

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



**Table 3.1: Information Needs and Sources, by Topic**

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

**Table 3.1: Information Needs and Sources, by Topic** *continued*

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

Table 3.1: Information Needs and Sources, by Topic *continued*

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



**Table 3.1: Information Needs and Sources, by Topic** *continued*

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

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

## Data Access and Authorization

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

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

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

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



## Maintaining Confidentiality

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

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

## Expertise for Data Analysis

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

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

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

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

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



## Determining How Data Will be Used

Many specific questions to help address this issue are identified in Table 3.1 on pages 70 to 73. It is essential to have the capacity to analyze data that is collected, understand it and make sure it is *understandable* to the whole team. Short briefing papers and presentations should be prepared providing synopses of knowledge and issues to help in the design of the negotiation position. Often this role is filled by consultants.

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

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

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

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

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

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

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

## Sample Topics for Consultants' Briefing Notes

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

- **HELPING THE ABORIGINAL GROUP IDENTIFY INFORMATION GAPS.** This briefing note was on the range of information (drawn from Table 3.1 on pages 70 to 73) that could be collected. This table was used by the group as a checklist to prioritize the type and order of information it needed.
- **MAINTAINING UNITY.** The second briefing note was on maintaining unity. At the time, there were questions about royalties, land tenure and leases to solve between the business arm and the political arm of the overarching Aboriginal group. These issues had to be settled before negotiations with the company, as the company could very well have used these fractures to weaken the negotiation position of both arms. The memo served as a warning to the organizations of the threats posed by lack of unity. It provided examples where unity between organizations led to much stronger agreements.
- **THE COMPANY'S PLACE IN THE GOLD SECTOR, AND THE PLACE OF THE DEPOSIT IN THE PROJECT PIPELINE.** A third briefing note was on the place of the mining company within the global gold mining industry, and then the place of this specific project in the holdings of the mining company. This briefing note led to the surprising finding that the advanced exploration deposit on the community's land was likely not as high a priority as the Aboriginal group previously thought. It also identified the factors that would influence the corporation to prioritize this project above others, many of which could be influenced by the Aboriginal organization.
- **THE COMPANY'S APPROACH TO COMMUNITIES.** The fourth briefing note focused on the company's approach to community relations around the world, with the nature of its engagement with other indigenous groups a key focus. Through this research, it was found that the company had a much higher conflict profile than other equally-sized mining companies. Contact names and organizations for potential global allies for the Aboriginal group were researched, contact were made, and existing agreements involving the company were reviewed.
- **CORPORATE IBAS IN OTHER REGIONS.** This briefing note reviewed the only existing IBA the company had signed with an Aboriginal group, in Australia. It also provided contact information for the Traditional Owners there.

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



# Consider Precursor Agreements

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

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

## Exploration Agreements

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

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

An exploration agreement is likely to be smaller in scale than an IBA and cover fewer issues. There are large uncertainties associated with exploration, such as amount of work to be done on the ground, which is dependent on the availability of exploration funding to the company and positive early exploration results. There are comparatively fewer jobs and lower expenditures, and there is uncertainty about the revenue that may be generated by any discovery. Exploration agreements generally set the ground rules for work in indigenous lands, and establish the expectation for relations between the parties. They can be used to establish basic relationship principles, for example company adherence to the norm of FPIC, and to identify economic benefits expected to flow to the FN. Financial formulas can include:

- One-off fixed payments;
- Annual fixed payments during the exploration life span;
- Cash per metre of exploration drilling;
- % of spending on exploration activities; and
- % equity interest in the parent company.

As with IBA financial formulas, each option has pros and cons that depend on both the company and the community situation.

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

## Memorandums of Understanding (MoUs)

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

Topics often covered in an MoU include:

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

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


## Corporate Confidentiality Clauses

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

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

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





# Develop a Budget

## Estimating Costs and Determining Funding Sources

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

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

Common reasons for companies to provide funds to communities include:

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

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

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

## Assessing and Reducing Risks Associated with Company Funding

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

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

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

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



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

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

## Budget Needs

Budgets for information gathering usually need to cover:

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

## Budget Management

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

For the negotiating team, typical budget responsibilities are to:

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





# Gather Information About the Project, Commodity and Company

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

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

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

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

## LEARNING FROM OTHERS' EXPERIENCES

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

# Establish Baseline Conditions in the Socio-economic and Cultural Environment

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

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

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

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

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

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

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



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

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

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

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

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

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

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



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



## Impact Assessment Questions

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

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

## Potential Socio-Economic Impacts

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

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



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

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

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



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

## Impacts During Advanced Exploration

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

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

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

## Impacts During Construction

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

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



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

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

## Impacts During Operations

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

## Impacts During Closure

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

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



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



## Mitigating Impacts

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

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

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

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

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

Hope Vale people's concerns and aspirations	Provisions of the Hope Vale/CFSM Agreement
<b>ROYALTY PAYMENTS</b>	
<p>People saw a number of problems regarding the 3 per cent profit royalty paid by the company:</p> <ul style="list-style-type: none"> <li>• Payments were low;</li> <li>• They were based on profits, and if the company made no visible profit, Hope Vale received no money at all;</li> <li>• The payments were made to a central Aboriginal group in Brisbane, and there were long delays before the money reached the community.</li> </ul>	<p>The agreement provides for:</p> <ul style="list-style-type: none"> <li>• A much higher level of payments;</li> <li>• Payment is based on the value of minerals, not on profits;</li> <li>• Most royalty payments are made direct to the community.</li> </ul>
<b>EMPLOYMENT AND TRAINING</b>	
<p>Hope Vale residents and workers at the mine had concerns about employment and training:</p> <ul style="list-style-type: none"> <li>• Employment preference at the mine</li> <li>• Employment being limited to mining and milling;</li> <li>• Access to education and training;</li> <li>• Procedures for promotion;</li> </ul>	<p>Under the agreement:</p> <ul style="list-style-type: none"> <li>• Preference was given to Hope Vale people;</li> <li>• Training programs were designed so all positions could be won;</li> <li>• Apprenticeships and scholarships were provided;</li> <li>• A formal promotion process was designed.</li> </ul>

Source: Selected from O'Faircheallaigh 1999, 71.

Other examples of community-led studies include:

- In the Voisey's Bay instance, the Innu Nation hired a coordinator who used action research methods<sup>23</sup> to review baseline social, economic and cultural conditions in the communities. Young Innu researchers, along with a sociology professor, worked to develop a summary of Innu knowledge, socio-economic conditions, and a documentary video on the conditions in the communities as the Innu understood them.<sup>24</sup>
- In contrast, for the same development, the Labrador Inuit Association formed a panel of Inuit experts who knew the area well, and the panel addressed some key questions, discussing the effects of the project until there was consensus.<sup>25</sup>
- In one case in Australia, an SIA undertaken to help prepare for negotiation of a new agreement for an existing mine involved meetings with specific groups in the communities (e.g., wives of workers at the mines, workers themselves, and community staff responsible for land and culture management). All told, individual interviews were conducted with fully half of the adult population of the region. The interviews were used to gain information about concerns and aspirations about the project, and to get information about the project's existing impacts across to people. In combination with desk-based research in response to issues raised by community members, a report was issued that included a community profile, factual information about the operations, a series of recommendations with concrete strategies for dealing with concerns, and a monitoring program for measurement and review.<sup>26</sup>

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

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

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





# Develop a Communications Strategy

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

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

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

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

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

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

- **CONSULT THE COMMUNITY FIRST.** Internal consultation should happen *first* and *before* any negotiation with a company begins.<sup>28</sup> Even if very little is known about the proposed project, a public meeting (or other consultation process) should be called as soon as possible. From the outset, information must be accessible for people to make an informed decision, using information about mining’s impacts and community rights,<sup>29</sup> to decide whether they support the project in principle. All too often, people receive information too far along in the process and are then able to discuss only how to mitigate impacts.
- **CREATE AN INCLUSIVE CONSULTATION STRATEGY.** An important first step in communication is to set out an inclusive process. Questions to ask include: Who is the community? How is the geographic, ethnic, or scope of community defined? Who legitimately represents the community? Is it simply representatives from local community organizations, or is it necessary to reach out to more diverse groups to ensure all elements are consulted?<sup>30</sup> The definition of “community” should be inclusive enough to promote equity and avoid future conflict resulting from lack of inclusion.<sup>31</sup>



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

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

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

- **ANALYZE AND CRITIQUE INFORMATION FROM THE COMPANY.** Information from the company can be unfairly tilted toward mining interests,<sup>32</sup> and is usually framed to discuss mine and community benefits, avoiding discussion of impacts. Information from the company should always be accompanied by critical analysis.
- **CONSIDER MULTIPLE COMMUNICATION TOOLS.** Community consultation and information-sharing may require a range of communication strategies. Possibilities to consider are to:
  - Hold public meetings, or presentations and discussions at band meetings;
  - Conduct house-to-house visits for those perceived as being the most impacted, such as trappers and hunters active in the proposed area of the development, or key community members who may be unable to attend public meetings;
  - Use radio, television or print media, by encouraging a news piece, or by writing editorials or letters to the editor, or purchasing advertising;
  - Access existing communication networks, such as community mailing or email lists;
  - Create a website, or use social networking sites (such as Facebook), particularly with younger generations; and
  - Post information or create a strategically-located notice board.
- **BE BRIEF.** While key players, such as those on the negotiating team, may need to review hundreds of pages of documents, too much information can overwhelm some community members, leaving them feeling *less* informed. Consider one-page summaries of critical documents, or quick synopses or “briefing notes” – while making more extensive information available for those who want it. Consider how plain language, multiple languages, and the use of visuals can increase the chance that information will be easily absorbed.
- **USE VISUALS.** Pictures say a thousand words. Use maps, photos, diagrams, organizational charts, posters, videos, or scale models to convey key messages.
- **USE SKILLED COMMUNICATORS.** Rely on local educators, liaison officers, skilled communicators from the negotiating team, or consultants to make public presentations using appropriate tools. These people will need to be well informed about the project to reply to questions, backed up by key people available to answer technical questions. For print materials, consider hiring (or building capacity) for graphic designers, plain language copy editors, or translators to make materials accessible.



#### TIPS FOR SUCCESSFUL PUBLIC MEETINGS

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

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

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

### Information-sharing and Consultation with the Company

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

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

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

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





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

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

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

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

Issues often raised by elders include:

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

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

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



Often, the lead negotiator can become a central point person who talks with people at events and in their homes about the main details of the agreement.

If there is one person who people in the community can talk to, it can help to have this person identified as a key contact for anyone to go to with concerns or needs.

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

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

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

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

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

Figure 3.3: A Phased Approach to Communication



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

- **ATTAIN INFORMED CONSENT** to consider the project (see Section 2), which will require the community to weigh in on whether they support the principle of negotiation of an agreement (and ultimately of a development project). The team should provide information on community rights and mining impacts. If there is consensus to consider the project, the negotiating team will have the green light to undertake negotiations.
- **UNDERSTAND KEY CONCERNS AND INFORMATION NEEDS**, which will require the community to express all ideas about possible impacts. The community will need information on the potential effects, and possibly case studies from other similar sites. The Tlingit, for example, as they prepared for negotiations and the EIA for the Tulsequah Chief Project in BC, prepared a document called *What We Need to Know*, which outlined the information the community would require to make a decision regarding the project.<sup>36</sup> This was based on community consultations, as well as review of materials provided by the company. The discussion paper reviewed the assets of the community, and then requested information on community impacts, wildlife impacts, wildlife populations, road plans and bargaining options, and on the mine itself (among other issues).
- **TEST WHETHER THE RIGHT ISSUES ARE ON THE TABLE** when it comes to the negotiation of an MoU, and determine the strengths and weaknesses of the community. The negotiating team will need to inform the community of the negotiation positions and topics to cover in precursor agreements, IBA negotiations or EIA forums. The community will need to understand the nature of what is being negotiated and what the implications of the agreement are for them. The community will need summaries of the MoUs or issues, and presentations about them. Consultations on the agreement(s) may need to occur many times, on different topics, and at different stages of negotiations.

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





## Tracking and Responding to Community Concerns



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

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

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





# Assess and Improve the Bargaining Position

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

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


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

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Table 3.3: Bargaining Strengths and Weaknesses

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

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



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

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

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

# Improve the Community Bargaining Position

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

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

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

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

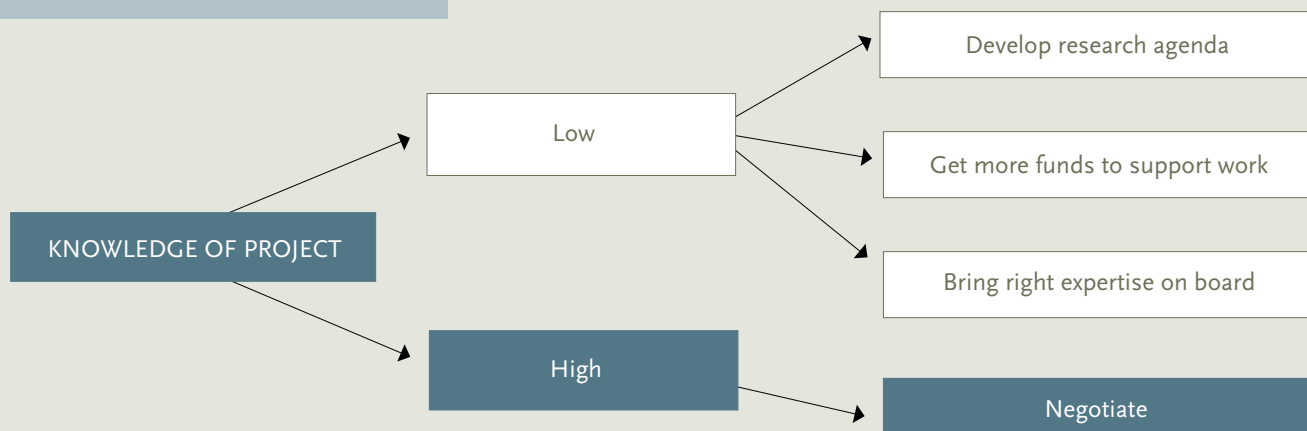
There are some things that can’t be influenced. So, the first step is figuring out what can and cannot be influenced. For example, if the community is not well prepared for negotiations, then the question becomes: What needs to be done to become better prepared? If it is a weakness that a community doesn’t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

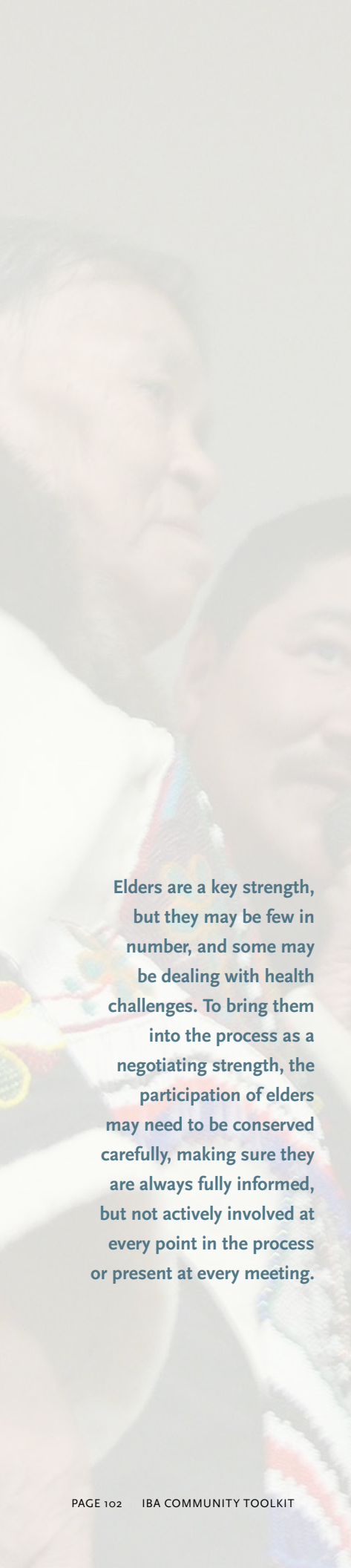
If the community and team do not have a clear sense of the project, a research agenda needs to be developed to fill those gaps. For example, if there is low or no information about how the company deals with indigenous people, information will need to be sought from indigenous groups in the region of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



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

Figure 3.4: Changing Bargaining Power





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

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

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

For managing weaknesses, two strategies are available:

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

Strengths that communities commonly have are:

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

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# Determine Objectives and Develop a Strong Negotiation Position

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

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

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

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

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

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## Summary of Section 3

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

# Notes

- 1 O'Faircheallaigh 2000.
- 2 Ibid, 7.
- 3 Ibid, 7.
- 4 Barsch and Bastien 1998.
- 5 Boutillier 2009.
- 6 Weitzner 2006, 21.
- 7 Barsch and Bastien 1998.
- 8 Innu negotiator in an interview for this toolkit.
- 9 Barsch and Bastien 1998.
- 10 FNEATWG 2004, 7.
- 11 Speaker in Weitzner 2006, 22.
- 12 Barsch and Bastien 1998.
- 13 There are many free software programs that provide users the ability to manage files among a group of users.
- 14 O'Faircheallaigh 1995b, 9.
- 15 See Innu Nation Task Force on Mining Activities 1996.
- 16 FNEATWG 2004, 21.
- 17 We use the term SIA as a catch all phrase to cover all considerations related to social, economic and cultural well-being, including wildlife harvesting, access to and relations to land, and physical heritage resources. Elsewhere, you may have seen the terms socio-economic impact assessment, cultural impact assessment, heritage resources impact assessment used for these types of studies.
- 18 See FNEATWG 2004; MVEIRB 2007.
- 19 For Socio-Economic Guidelines see MVEIRB 2007.
- 20 For example, MVEIRB 2007; FNEATWG 2004.
- 21 For example, Gibson 2008; Storey, Shrimpton and Clark 1989; Beach, Brereton and Cliff 2003.
- 22 Although guessing when this is, given increasing or decreasing mine lives based on a variety of geological and economic factors, is an inexact science at best. In addition, communities need to be aware of the likelihood and risks associated with temporary as well as permanent closures. Temporary closures may have similar “boom-bust” effects on society and economy.

- 23 Action research or participatory research involves communities actively in the definition of the research questions, the research methods and process, and in the interpretation and implementation of findings. Some key goals are to build internal research capacity, ensure that local context is integrated into the study, and to ensure that findings are acted upon locally.
- 24 FNEATWG 2004, 10.
- 25 Ibid, 11.
- 26 O'Faircheallaigh 1995a, 4.
- 27 FNEATWG 2006.
- 28 Henessey 2007, 2.
- 29 Bass et al. 2003.
- 30 Ibid.
- 31 Sweeting and Clark 2000, 51.
- 32 Bass et al. 2003, 34.
- 33 Weitzner 2006, 13.
- 34 Ibid.
- 35 O'Faircheallaigh 2000, 7.
- 36 FNEATWG 2004, 7.
- 37 Innu Nation Task Force 1995; Taku River Tlingit 1995.
- 38 O'Faircheallaigh 1995b, 1.