

## SECTION 4

# Conducting Negotiations and Reaching Agreements

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

# Conducting Negotiations and Reaching Agreements

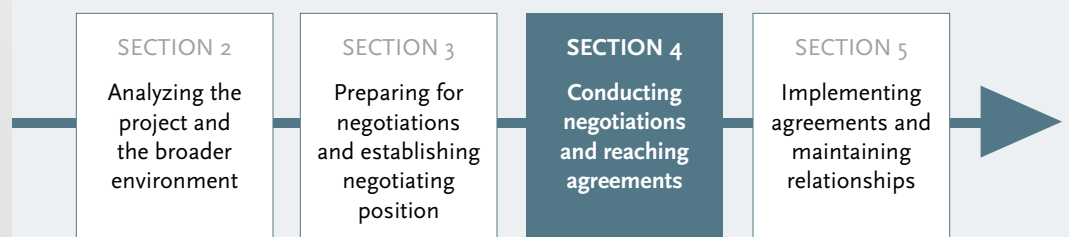
Information gathered and decisions made in the preparation phase should feed into this next phase: conducting negotiations and creating agreements.


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

This negotiation phase will allow you to:

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

## Structure of the Toolkit





# Negotiation Processes and Procedures

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

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

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

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

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

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

## Roles for Advisors and Community Negotiators

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

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

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

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

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

# Running Meetings

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

**Table 4.1: Key Tips for Managing Negotiations**

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

## Shaping the Negotiation Agenda

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

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

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

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

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



## Managing Offers

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

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

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

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

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# Tactics

## *At the negotiation table*

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

## Principle of Equivalency

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

## Walking Out

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

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

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



PHOTO: RICHARD HARRINGTON/NATIONAL ARCHIVES

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

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

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

## Bringing in ‘Power Figures’

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


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

## Removing Harmful People

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

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

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

## Meeting Locations

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

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

## Meeting Language

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

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## Outside of the negotiation room

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

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

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

## Documentation and Communication

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

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

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

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

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

## Keeping Things on Track

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

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

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

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

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

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# Budgets

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

A few pointers that can assist in managing budgets:

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



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## Relationship Building

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

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

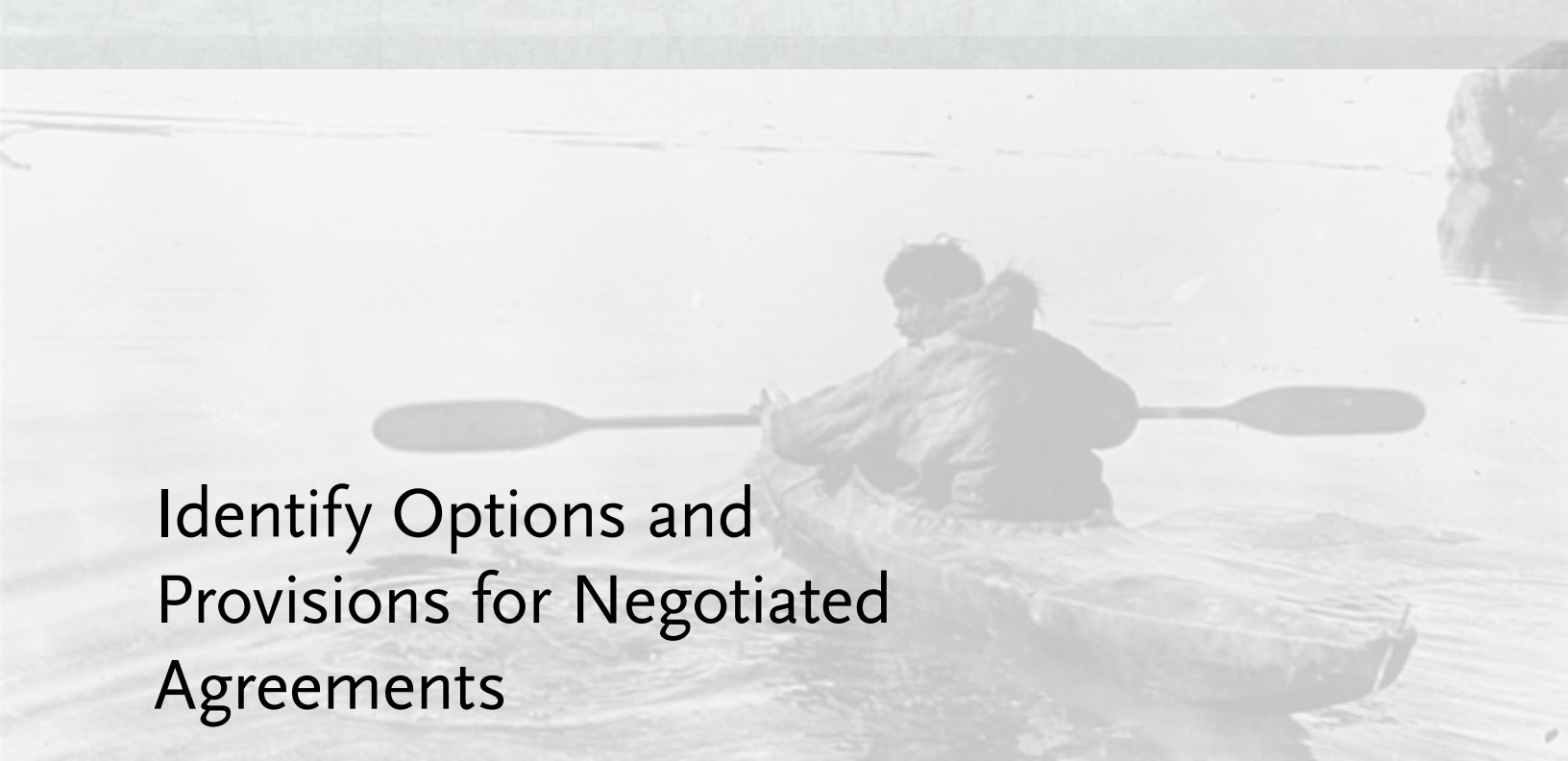
*You need to shift their worldview into an Aboriginal paradigm. In the Innu Nation, where stuff gets done is in the bush, away from the boardrooms. It actually does change outcomes.* — Innu advisor

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

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

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

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



# Identify Options and Provisions for Negotiated Agreements

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

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

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

W. MCKINLAY/NATIONAL ARCHIVES OF CANADA PHOTO

## Legal Provisions

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

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

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

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

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

Table 4.2: Checklist of Legal Provisions

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

## Background Information, Recitals, Preamble or Objectives

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

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

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

The preamble may include:

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

## Parties

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

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





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

PHOTO: TED OSTROWSKI

## Definitions and Interpretation

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

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

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

## Principles and Goals

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

## Consent

Consent is a critical part of an agreement because it indicates a key component of what the Aboriginal community promises to do, or not to do, in return for the benefits it will receive under an agreement. Clauses requiring a First Nation not to oppose a project can seriously restrict its freedom of action. For example, some First Nations (in Alberta in particular) have withdrawn their statement of concern from the public record as a condition of signing agreements, and agreed to say very little in public hearings. This affects the input that a First Nation can give in environmental assessment. The consent and support a community offers can vary greatly.

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

If a company is going to provide substantial financial and other benefits to a community, it is reasonable for it to demand community support for grant of mining leases without which a project cannot proceed. However, it may be entirely unreasonable of it to expect unqualified support for anything it wants to do. So this is an area that requires careful consideration and expert legal advice, to ensure that Aboriginal communities

do not bind their hands in ways they did not intend. For example, the relevant provisions should not limit the ability of the group to freely participate in public regulatory forums. Nor should they interfere with the rights of individual community members to join unions, or engage in organizing workers on site, or during a strike.

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

## Independent Legal Advice

This states whether parties received independent legal advice.

## Liability for Expenses

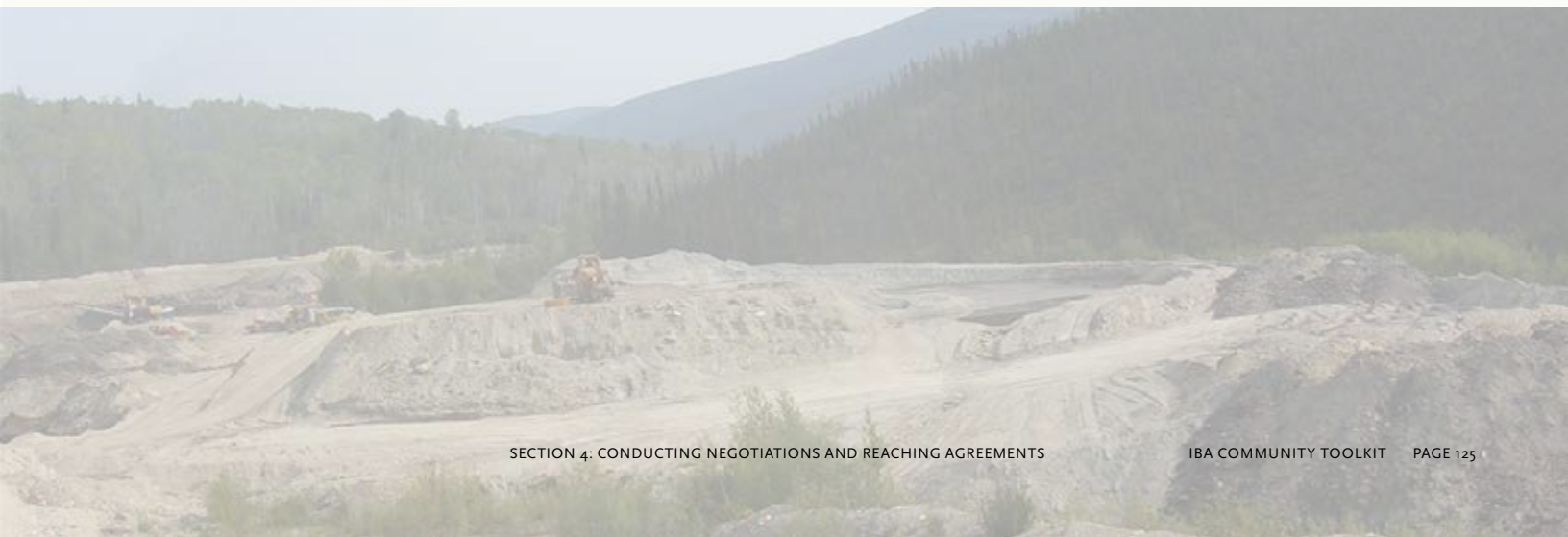
This section may specify that one party assumes legal or negotiation costs, that each party pays its own expenses, or that a party receives a payment for administrative costs on execution of agreement. Often this detail is dealt with in a Memorandum of Understanding (MoU) — see *Consider Precursor Agreements* in Section 3, on page 78.

## Commencement and Expiry

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

## Warranties and Authorities and Succession

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



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

## Dispute Resolution

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

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

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

## Confidentiality

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

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

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

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

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

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

## Obligations of Contract Law

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

### Enforceability

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

## FREE PRIOR AND INFORMED CONSENT

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

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

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



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

PHOTO: TED OSTROWSKI

### **Assignment: Sale or Transfer of Project or Company**

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

### **No Mining**

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

### **Unforeseen Circumstances and Force Majeur**

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

### **Suspension or Termination of Agreement or Operations**

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

### **Notice**

The notice clause sets out addresses of parties, means for giving notice and timeframe for receipt, and procedures for amending notice obligations.<sup>25</sup>

### **Change in Law**

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

### **Waiver**

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

### **Severability**

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

## Indemnity

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

## Non-employment or Relationship of Parties

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

## Attorneys

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

## Counterparts

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

## Execution of Agreement

This clause names and signatories of parties to agreement, witnesses and date of agreement.<sup>32</sup>

## Further Action

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

## Review

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

## Amendment

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

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

# Substantive Issues and Provisions

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

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

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

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


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

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

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

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

Table 4.3: Substantive Issues for Negotiated Agreements	
Topic area	Relevance to community
Communication among parties	
Aboriginal and public access to mining tenures	
Mining payments	
Mining payment utilization	
Construction Employment targets for construction period Employment Matching labour supply and employment opportunities Recruitment Employment targets Hiring preferences Penalties for non-achievement Measures for employment of women Education and training Retention Employment policy, resource and implementation supports Career advancement Workplace environment Family and community supports Provision of appropriate accommodation	
Union relationships	
Business development	
Environmental management Acknowledgement of permits and licenses Research on environmental issues Monitoring and management systems Mitigation measures Toxic materials and substances	
Culture and cultural heritage	
Harvester compensation and traditional use	
Social measures to mitigate impacts	




# Communication

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

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

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

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



# Aboriginal and Public Access to Mining Tenures

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


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

This clause may include:

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

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

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



# Mining Payments

**The rationale for financial benefits may need to be spelled out to companies.**

**First, that these funds compensate Aboriginal people for the negative social, cultural and environmental impacts of mining, and funds can be targeted to avoid or minimize impacts. Second, that these funds represent a return to Aboriginal people as owners of the land.**

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

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

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

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

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

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

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

## Fixed Cash Payments

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

## Royalties Based on Volume of Outputs

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

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

## Royalties Based on Value of Production

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

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



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

## Mining Payments Based on Profits

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

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

## Equity

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

### Mining Payment Administrative Details

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

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

### DIVERSIFIED EQUITY

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

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


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

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

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

Table 4.4: Advantages and Disadvantages to Communities of Different Mining Payments		
	ADVANTAGE	DISADVANTAGE
Fixed payments	<ul style="list-style-type: none"> <li>Guaranteed payment amounts at agreed upon times</li> <li>Easy to administer</li> <li>Not dependent on profitability</li> </ul>	<ul style="list-style-type: none"> <li>As production amount and scale of disturbance increases, there is no increase in payments</li> <li>As commodity price increases, no corresponding increases in payments</li> <li>Community may feel the mining payment (royalty) is too low in hindsight and internal and community-corporate conflict may ensue</li> </ul>
Royalty based on volume of outputs	<ul style="list-style-type: none"> <li>When company ramps up production, community gains benefits</li> <li>As impact on environment changes with production increase, so do funds to mitigate harm</li> <li>Reduced commodity price does not affect payments (provided company keeps up production level)</li> <li>Not dependent on profitability</li> </ul>	<ul style="list-style-type: none"> <li>If price of commodity rises, there is no additional benefit to the community</li> <li>If production costs decline during the life of the mine, the community does not benefit and may indeed lose jobs associated with downsizing and automation</li> </ul>
Royalty based on value of production	<ul style="list-style-type: none"> <li>Community shares in benefits whenever the commodity price increases or production levels rise</li> <li>Not dependent on profitability</li> <li>Payment is not dependent on operating, financing or capital costs</li> <li>Simple definition and relatively easy to administer</li> </ul>	<ul style="list-style-type: none"> <li>If commodity price falls, the payments decrease and often extremely quickly</li> <li>If there is dependence on payments for services or programs, hardship may result when prices fall</li> <li>Transportation and smelting costs (e.g., concentrate impurities) must be taken into consideration for some metals</li> </ul>
Royalties based on profits	<ul style="list-style-type: none"> <li>Value can increase if mining costs are lowered through efficiencies</li> <li>Value increases if price of commodity increases and costs are stable</li> </ul>	<ul style="list-style-type: none"> <li>Not all projects are profitable</li> <li>Income changes with the price of the commodity – if the price of a commodity slumps during a recession, this can dramatically affect the payments made to a community</li> <li>Operating costs can change yearly and not always for the better</li> <li>Deductions before profits measured can be manipulated by the proponent</li> <li>The agreement must be very clear, and it can be hard to administer because of need for accounting oversight</li> <li>If payments are delayed until after capital costs are recouped, communities can wait a long time for any income</li> </ul>
Equity	<ul style="list-style-type: none"> <li>Increases in value if the project is profitable</li> <li>Can provide access to information and input to the senior management team and decision making</li> <li>Potential to provide greater control over use of traditional lands and environment</li> </ul>	<ul style="list-style-type: none"> <li>May need to raise capital for investment</li> <li>Project might not be profitable or have comparable value to other investments forgone</li> <li>Subject to all the same risks that the company is subject to, like cost overruns or change of commodity price</li> <li>May be required to share operating losses or capital expenditures</li> <li>May have liabilities as part owner</li> <li>Legal costs can be high</li> <li>Funds may not flow early or readily back to the community – may not be short term upside</li> </ul>

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



# Assessing Risk Tolerance for a Financial Model

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

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

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

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

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

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

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

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

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

### What is the nature of the mine plan?

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

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

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

### What is the experience of the mining company?

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

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



# Mining Payment Utilization

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

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

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

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

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

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

Mining payments can be used in four general ways.

### Payments to Individuals

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

### Services and Infrastructure

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

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

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

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

### **Business Enterprise**

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

### **Portfolio Investment**

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

## **Structures for Managing Mining Payments**

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

### **THE IMPORTANCE OF COMMUNITY INPUT ON PAYMENT ISSUES**

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

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



# Employment

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

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

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

## Matching Labour Supply and Employment Opportunities

IBAs may provide for the collection and dissemination of information regarding the demand for and supply of labour in relation to the project. This information is important, because it can be tough to match supply of labour in a community to the demand for labour in a project. The mining company may be required to provide a labour force development plan or human resources strategy that the community can then use for planning and for identifying potential workers. The plan can be revised annually. Government can also be drawn into the relationship, providing useful data on current and future expected labour supply and demand.

A labour force development plan can include:

- Job opportunities at the project;
- Pool of potential Aboriginal employees and their skills;
- Barriers that must be removed to increase Aboriginal participation;
- Training programs to be developed in connection with the project;
- Apprenticeship programs at the project; and
- Costs of implementing the plan and funding for its implementation.<sup>56</sup>

## Recruitment

A primary focus for ensuring Aboriginal employment involves creating awareness in communities of the possibility and reality of jobs at the mine. Many agreements establish mechanisms for alerting people to jobs, such as a requirement to post notice of jobs in locations that people will visit (e.g., band, health or government offices), or making radio announcements or advertising jobs in local newsletters or newspapers. At the outset of mining, mine staff can be asked to visit communities, attend job fairs, or visit schools to let people know about jobs. Sometimes early notice of jobs is required, so that Aboriginal employees have a head start in applying for them. Further, a register of Aboriginal people who want to work can be built by community liaison staff (with both the liaison positions and database funded by the company), ensuring that the local skills and experience of people are easily accessible. In the NWT, indigenous groups impacted by the diamond mines joined together to form a human resources business (I&D Management), which hosts a resumé building website and staff to assist in maximizing Aboriginal employment opportunities. This business holds the contract to provide all the heavy equipment operators for the Diavik Diamond Mine.

When it comes to hiring, agreements can include measures for companies to employ Aboriginal people through specific targets, rolling targets, or hiring preferences.

## Employment Targets

Targets are often opposed by industry, because they can be difficult to reach, especially in places where there are many mines competing for labour, or where people simply lack the skills or interest in a mining occupation.<sup>57</sup> Targets can also cause industry to focus on setting very modest goals that are easily achieved, and they may remove any incentive to change and grow once they are achieved. Further, they may cause industry to focus on non-core, peripheral or unskilled areas of work where the targets are easily filled.<sup>58</sup>

That said, targets have been used to great effect in some locations. For example, in the NWT diamond mines, more than 30 per cent of employment needs are met by indigenous people from the region. Just 10 years previous, gold mines in the area operated with very low levels of indigenous employment. The targets have certainly influenced the mines to hire locally and train constantly.

It is also important to establish targets for the construction phase. Construction should be seen as a training ground for the operating mine. It can be useful to secure positions or percentages of the workforce dedicated to the indigenous group. In cases where there were no targets for construction in an IBA, there was a shortage of people with heavy equipment skills during operation, certificates in the required trades, as well as the necessary hours on the appropriate machines and equipment.

Targets can be set out in agreements in a number of ways. First, they can be firm numbers, such as in the Moordijt Booja Community Partnership Agreement (Australia), which requires 100 Gnaala Barja Booja people be hired. They can also specifically name targets for different stages of the mine life cycle, namely during construction and operation. So for example, the Dona Lake Agreement (Ontario) calls for 55 people during construction and 30 during operations. The labour forces in these two stages of



**Employment targets set out in agreements can be firm numbers (often specific to the stage in the mine life cycle), percentages, or rolling targets based on various criteria.**



In the Voisey's Bay agreement, hiring preference is given first to members of the Labrador Inuit Association and the Innu Nation residing in the two communities closest to the project; then to residents of other Inuit or Innu communities; then Inuit or Innu residing elsewhere in Labrador; and finally Inuit or Innu residing in Newfoundland.

mining are quite different, so they merit different targets. Other agreements have set out percentages for employment, such as the BHP Diamonds Project Socio-Economic Agreement, which suggests that:

*Northern Resident employment throughout the phase will be 33 per cent of the total employment associated with the Construction Phase of the Project, including Contractors. Aboriginal employment will make up at least 44 per cent of the Northern Resident employment during this period ... and Northern Resident employment throughout the Operation Phase will be 62 per cent of total employment associated with the Operation Phase of the Project, including Contractors, and 72 per cent during the period of operations at 18,000 tpd (tones per day). Aboriginal employment will equal at least 50 per cent of the Northern Resident employment.<sup>59</sup>*

It can be tricky to track compliance with percentage figures, for example because companies often use the total number of employees and person years in reports. In the NWT, this figure (person years) has caused a certain amount of friction. While the indigenous party wishes to see the names of people who are employed at the mine, the company provides only the figure of person years, which can make it hard to determine just how many people are working. This is because privacy laws require that companies obtain permission from workers before their names are released.

Targets will also need to be considered in relation to union negotiations (see page 154).

## Rolling Targets

Another approach involves rolling targets, which involve rising objectives for Aboriginal employment and training over time, creating incentives for meeting these targets, and providing automatic adjustment mechanisms if they are not met. Targets can be evaluated and re-set, for example every three years. Failure to achieve the goal can require the project operator to progressively increase spending on employment and training programs beyond a base level specified in the agreement.<sup>60</sup>

This approach avoids many of the pitfalls, mentioned above, associated with static, single targets, for example the danger that initial targets will be set at too modest a level.

## Penalties for Non-achievement of Targets

Penalties for non-achievement of targets or hiring preferences have been built into some agreements. For example, money may have to be allocated to a training fund if there are shortfalls. Another measure involves analysis of the ongoing or existing barriers to hiring Aboriginal populations and measures to address these barriers.

## Hiring Preferences

In some agreements, hiring preferences are included, so that people in impacted communities are given first consideration. Following what is called the “adjacency principle,” the Voisey’s Bay mine gives first preference to members of the Labrador Inuit Association and the Innu Nation residing in the two communities closest to the project; then to residents of other Inuit or Innu communities; then Inuit or Innu residing elsewhere in Labrador; and finally Inuit or Innu residing in Newfoundland.

The Troilus agreement (Quebec) prioritizes Cree trappers whose trap lines are directly affected, followed by Cree beneficiaries of the signatory community, Mistissini, and finally by Cree beneficiaries generally.<sup>61</sup>

Measures can also be included to ensure Aboriginal people are least affected in lay-offs (see section on unions on page 154).

## Measures for Employment of Women

Aboriginal women face additional barriers when it comes to mine employment. There can be strong stigmas against employment of women in non-traditional jobs. Sexist attitudes of non-indigenous and indigenous men can cause women to feel unwelcome and make it difficult for them to excel in their work. Where sites are fly-in-fly-out, women can also have a very hard time securing childcare. As a result, there may need to be specific measures in place to guarantee that female workers will be able to access to mining jobs. These measures can include:

- Employment targets for Aboriginal women, especially in non-traditional jobs;
- Specific training initiatives designed for women;
- Measures to ensure the security and safety of women in work camps;
- Gender sensitivity training and anti-harassment policies;
- Reporting requirements on employment and training by gender, particularly for Aboriginal women;
- Provisions for childcare and flexibility in hours to accommodate family needs (e.g., medical and dentist appointments, sick children);
- Specific training and scholarships to facilitate entry of women into areas dominated by men; and
- Gender-based analysis during environmental and social impact assessments.



**There can be strong stigmas against employment of women in non-traditional jobs. Sexist attitudes of non-indigenous and indigenous men can cause women to feel unwelcome.**

## Education and Training

Company-funded scholarships and support for schools can be established to encourage and enable Aboriginal students from communities to stay in school or undertake post-secondary studies. These scholarships can be administered by the company, or through the education agency in the community. For example, the Tłı̨chǫ Community Services Agency in the NWT administers \$500,000 from IBA funds to Tłı̨chǫ students each year and graduation rates have skyrocketed since this initiative was established.

Other educational support can include:

- Targeted scholarships (e.g., mining and metallurgical engineering, environmental science); and
- Skills development centres in the mine site with fully trained educational staff.

Training is essential to Aboriginal retention and advancement within the mines. There are many possible elements to be negotiated, including:

- Specific targets for apprenticeships and trades training;
- Pre-employment training targeted to skills needed at the mine site, such as accounting, administration, planning, geology and exploration, and positions as supervisors;<sup>62</sup>
- Pre-employment training, often including literacy and numeracy programs, as well as trades or education-specific training;
- On the job training during work hours;
- A budget for employment and training programs, including whether there will need to be a review of the budget amount, what happens if expenditure is below budget, reporting and reviews, and independent audit;<sup>63</sup> and
- Off-the-job education and training support.

## Retention

Some studies have found very high levels of turnover among Aboriginal mine workers,<sup>64</sup> and thus attention to the factors that can help to ensure the longer-term retention of indigenous workers are important. These include:

- Measures to make the workforce environment a positive one for indigenous people (see page 151).
- More experienced workers may be appointed to act as mentors for Aboriginal trainees and recruits. Some agreements also provide for elders to act as mentors, which can help support workers back in their communities. Elders may also be able to help sort out problems being encountered in the workplace.
- There may be a prohibition on termination or disciplinary action due to an inability to speak English.

Some studies have found very high levels of turnover among Aboriginal mine workers, and thus attention to the factors that can help to ensure the longer-term retention of indigenous workers are important.

- Involvement of the Aboriginal employment coordinator in cases where Aboriginal employees are subject to disciplinary measures, and provision of second chances to people who lose their positions.
- Disciplinary measures for mining company employees who discriminate against Aboriginal people or exhibit discriminatory attitudes or behaviour.<sup>65</sup>

## Employment Policy, Resource and Implementation Supports

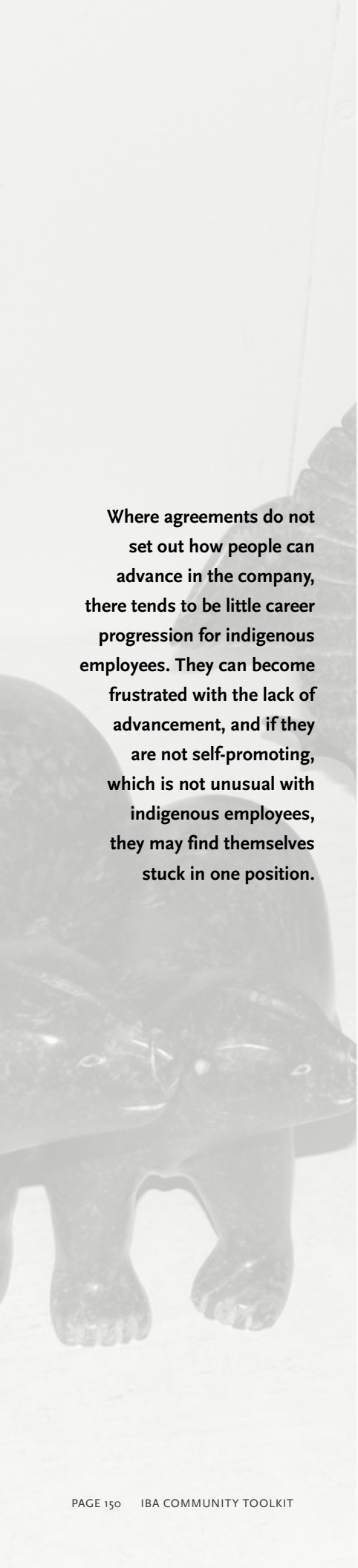
Many agreements specify the type of policies, programs and resources that need to be in place to ensure that agreement provisions are implemented. These include:

- Anti-discrimination policies and cross-cultural training. For example, the Raglan Agreement specifies that the company must take all reasonable steps to prevent employees from experiencing discrimination, take prompt disciplinary action against any employee who behaves in a negative or discriminatory fashion, and evaluate all candidates applying for work for their sensitivity to inter-cultural contact.<sup>66</sup>
- Aboriginal training and employment policy.
- Policies on consumption and use of alcohol and drugs. Often remote sites are “dry.”
- Cultural policies to meet specific needs, such as bereavement leave. Often standard bereavement policies are based on “immediate family” models (father, mother, sister, brother) and may not recognize extended family models of kinship.
- Goals and incentives for managers for hiring and retaining Aboriginal employees (e.g., key performance indicators to include Aboriginal recruitment and retention).
- Reporting requirements on employment and training programs and outcomes, including independent audits.
- Employment of an employment and training coordinator (also called an “Aboriginal employment coordinator” or “liaison officer”).<sup>67</sup>
  - At Voisey’s Bay, the company’s implementation coordinator, working with Innu and Inuit implementation staff, communicates the company’s employment plans and advertises open positions; recruits community members into jobs; develops employment orientation programs; sits in on interviews, upon request, and conducts exit surveys; designs work schedules that recognize cultural needs; develops training programs that advance the Aboriginal labour force into higher skilled positions; creates cross-cultural training for non-Aboriginal employees and contractors; and provides periodic summaries of progress. During construction, there were two coordinators (one for training and one for employment), but during operation this was reduced to an employment coordinator.

### ABORIGINAL EMPLOYMENT COORDINATORS

The company can employ staff specifically to help it implement Aboriginal employment targets. At Voisey’s Bay, for example, the company implementation coordinator, working with Innu and Inuit implementation staff:

- Communicates the company’s employment plans and advertises open positions;
- Recruits community members into jobs;
- Develops employment orientation programs;
- Sits in on interviews, upon request, and conducts exit surveys;
- Designs work schedules that recognize cultural needs;
- Develops training programs that advance the Aboriginal labour force into higher skilled positions;
- Creates cross-cultural training for non-Aboriginal employees and contractors; and
- Provides periodic summaries of progress.



**Where agreements do not set out how people can advance in the company, there tends to be little career progression for indigenous employees. They can become frustrated with the lack of advancement, and if they are not self-promoting, which is not unusual with indigenous employees, they may find themselves stuck in one position.**

- Other roles may be to maintain relationships between managers and community leaders, solve problems on site, review resumés, act as a liaison to families and communities, and help with workplace conflict resolution.
- Resource commitments that may include an annual company budget for training and employment, in some cases subject to regular review; funding for specific numbers of scholarships, apprenticeships or traineeships; or funds for particular training positions or for pre-employment and on-the-job training programs.

## Career Advancement

Where agreements do not set out how people can advance in the company, there tends to be little career progression for Aboriginal employees. They can become frustrated with the lack of advancement, and if they are not self-promoting, which is not unusual with Aboriginal employees, they may find themselves stuck in one position.

Some agreements specify the measures, programs, and resources that need to be in place to ensure that Aboriginal employees can progress within the company. Measures in agreements can include:

- Funding for a specific career development and progression plan for Aboriginal employees.
- Clearly set out steps for advancement in each work unit or employment category. This reduces confusion and increases transparency about how promotion occurs.
- Inclusion of clear procedures for employee evaluation and advancement, and clear rules for workplace behaviour and employee discipline.
- Preference for Aboriginal employees in promotional opportunities, similar to those described for recruitment.
- Employment and training initiatives aimed at placing Aboriginal people in skilled and supervisory positions throughout the organization. This is particularly important because having Aboriginal people in senior positions can influence prospects for retention and advancement of other Aboriginal employees.
- A ladder-based hiring program or succession program to identify the skills of Aboriginal employees and identify measures to promote them to higher skilled positions (including into management positions).<sup>68</sup>
- Establishment of a minimum number of training positions for Aboriginal people for supervisory or managerial positions.
- Guarantees of positions for those who complete education or training programs.

## Workplace Environment

The transition to a work site can be difficult for indigenous people. Most work site environments are built around the preferences and values of the dominant society, and many accommodations may need to be made in order to acknowledge and respect the culture of indigenous peoples. Where this is not done, alienation and loneliness arising from the unfamiliarity of industrial environments and distance from home communities can lead to failure to complete training and education programs, irregular work patterns and high turnover.<sup>69</sup> Measures can include:

- **CROSS-CULTURAL TRAINING**, essential if all employees are to work together in a remote site. The Argyle Diamond Mine agreement (Australia) requires all workers and contractors to undertake cross-cultural training on arrival and at intervals of two years thereafter, while managers must take a more intensive course that includes camping in the bush with elders.<sup>70</sup>
- **FOOD FROM THE INDIGENOUS CULTURE**. At one site, people can prepare their own wild meat and fish as they would normally in a country food kitchen.
- **ROTATION SCHEDULES** are often built around the needs of harvesters, so they do not miss a migration of animals and so they can spend equal time in the community with elders, families and children. Rotation schedules are most sustainable for families when they involve equal time “out of” and “in” the site (e.g., two weeks on and two off).
- **CULTURAL LEAVE**. Some IBAs include this option. For example, the Diavik agreements allow for one week of unexplained cultural leave, so that harvesters or drummers can attend to duties as needed.
- **FAMILY ACCOMMODATION** and spousal visits are sometimes negotiated, so that children and spouses have a sense of the life of the miner at the site. Sometimes this includes a provision for yearly family visits, while other agreements allow for empty seats on commuter flights to be taken up by family members.
- **SITE VISITS BY ELDERS** and conduct of **CULTURAL ACTIVITIES ON SITE**. For example, indigenous women at the Argyle Diamond Mine practice *mantha*, a welcoming and spiritual cleansing ceremony for every person that comes on site. Other possibilities include sweat lodges, healing ceremonies, shake tents, and the practice of ceremonies such as “paying the land” and naming of the land using Aboriginal place names.
- Maintenance of **COMMUNICATION CHANNELS** between the project site and home. This may require training in electronic communications and online services (e.g., banking), guaranteed access to these services, as well as direct phone lines to communities.
- **LANGUAGE MEASURES** for accommodating Aboriginal employees who lack a good knowledge of the working language. The company may give unilingual Aboriginal employees opportunities to work in jobs where lack of knowledge of the working language does not compromise the safety or efficiency of others.<sup>71</sup> There can be provisions for English language training, bilingual signs, safety training in Aboriginal languages, and employment of bilingual Aboriginal employees who can serve as translators.<sup>72</sup>

The transition to a work site can be difficult for indigenous people, and many accommodations may need to be made.

The Argyle Diamond agreement, for example, requires all workers and contractors to undertake cross-cultural training on arrival and at intervals of two years thereafter, while managers must take a more intensive course that includes camping in the bush with elders.

A background image showing a snowy mountain landscape. In the foreground, there's a small, light-colored building with a dark roof, possibly a cabin or a small house, nestled in the snow. The mountains in the background are covered in snow and have some rocky outcrops visible. The overall scene is quiet and wintry.

## Family and Community Support

Many of the measures outlined later in the section on social and cultural impacts will relate to this discussion of family and community support. It is clear that much support is required from a family in order for a miner to be away from home, either for 12 hour shifts or for two week or longer rotation periods. Special clauses to provide support to family can include:

- **SPECIAL LEAVE** for family or community crises.
- **WORKER-COMMUNITY LIAISON** staff assignments, with company staff acting as a liaison between workers and communities, and providing support to workers and families. In the Cameco Agreement, for example, an employee relations counsellor provides support to families and employees (see also the earlier discussion of employment and training coordinators on page 149).
- **COMMUNITY-CORPORATION RELATIONSHIP MECHANISMS** to promote inter-cultural learning, such as family visits and “out on the land” trips. Under one Snap Lake IBA, mine managers are to visit families of workers in their homes and attend cultural events.
- **RETURN TRAVEL ARRANGEMENTS** for workers. For example, many agreements require workers to be flown directly to their home communities. In the NWT, this measure has ensured that wages make it home before they are spent in Yellowknife. This also ensures that workers are not paying extra to work at the mine, and make it home directly after their rotation.

## Provision of Appropriate Accommodation

Where a mine is fly-in and fly-out, accommodations are generally not a problem. However, when a mine is near to a community, there can be difficulty in getting rental accommodation, or housing can be below standard. Thus, some IBAs call for cost sharing between the company and community for new accommodations to alleviate housing pressure. For example, the Faro Mine IBA shared costs of 25 new trailers for the indigenous community.<sup>73</sup>

## Other Employment Measures

Many other measures have been included in agreements to ensure that indigenous people can be recruited. Each one of these measures is created to manage a barrier to indigenous employment. For example:

- **MINIMUM HIRING STANDARDS.** A key barrier is often lack of education, training and fluency in the working language. Measures to address this include hiring provisions that relax or adjust standard requirements (e.g., fluency in working language and acceptance of skills in lieu of diplomas). For example, the BHP Diamonds IBAs allow previous, on-the-job experience to be recognized in lieu of minimum Grade 12 schooling requirements, on a case by case basis.<sup>74</sup>
- **CRIMINAL RECORDS** are a frequent barrier to mine site employment, and often these records are for minor or old offenses that can be pardoned. Agreements may provide support to help people to go through the process of attaining a criminal pardon.
- **SUMMER JOBS AND INTERNSHIPS** can be allocated preferentially to Aboriginal students and in particular to post-secondary students.
- **TRANSPORTATION TO THE MINE SITE** can pose a barrier to employees, if workers do not have a license and a vehicle or if there are substantial travel costs associated with fly-in-fly-out operations. Potential employees may be assisted to acquire driver's licenses, or provided with transportation, or subsidized transportation and relocation packages to assist workers to travel or temporarily move between communities and the mine site. For example, De Beers offers relocation packages to subsidize the cost of moving workers' residences closer to the mine, and provides round trip air transportation to the impacted communities.



A key barrier is often lack of education, training and fluency in the working language. Measures to address this include hiring provisions that relax or adjust standard requirements (e.g., fluency in working language and acceptance of skills in lieu of diplomas).





# Union Relationships

It is critical to communicate and build relationships with unions early, both for the construction phase and during the operations phase.

Navigating the construction trades can be particularly challenging, because of the number of unions that may represent workers at a site. For example, the Inuit worked with 16 construction unions during the construction phase of the Voisey's Bay mine. There is often an umbrella organization for building and construction, such as a provincial or territorial building and construction trades councils. However, organization and legislation on the construction and building trades will vary in each jurisdiction.

One complication of working with the construction trades unions is that they have rarely done membership drives in rural and Aboriginal areas, making it almost impossible to surface Aboriginal members for work when it becomes available. Aboriginal people must be on the call lists for these trades unions in order to access work at the site during construction. However, membership drives have to be done early by the appropriate trades, and this requires the formation of an early relationship by the Aboriginal leadership.

Unions rarely have conditions or requirements for hiring, employment or retention of Aboriginal employees. Further, provincial regulations rarely require unions to work toward agreements with Aboriginal groups. Also, it can often take provincial (or territorial) attention to ensure that unions abide by the agreements that are made.

Another important issue may be overcoming barriers to membership. Some unions have requirements for formal educational qualifications (such as high school diplomas) for their apprenticeships. One solution to overcome those barriers is to negotiate provisions that enable Aboriginal workers with no formal qualifications, but years of experience in a trade, to qualify on the basis of "equivalent skill and experience."

When it comes to the unions involved in operating mines, it is often fairly predictable which union will negotiate a collective agreement. For example, the United Steelworkers, the Public Service Alliance of Canada, and the Canadian Auto Workers are some of the more prominent unions. A well-formed relationship developed early with labour can be helpful when challenges arise.

One hurdle to negotiating with a union is the confidentiality clause in the IBA itself. There may be reluctance on the part of either the company or the Aboriginal group to give the union consent to review the IBA in its entirety. This can be overcome by permitting the legal counsel of the unions to review and give opinions on IBA clauses relevant to the collective agreement. These lawyers themselves can sign confidentiality clauses.

Another hurdle is that unions may resist the idea that the community's IBA with the company takes precedence over the union's collective agreement with the company. This can be overcome by constantly reminding the union of the fact that the mine would not be operating in the region if they did not have the consent of the Aboriginal party. Several Aboriginal groups have prevailed over unions by maintaining that position.

Specific IBA provisions may be included to deal with labour relations legislation, and to recognize the relationship between an IBA and any collective agreements at the project.

Important commitments to secure – either with the company and/or with the unions – include:

- Requirement that the IBA take precedence over the collective agreement;
- Promotion of Aboriginal employment and training in company and union programs, particularly for Aboriginal workers who are IBA beneficiaries (members of the communities that are signatories to the IBA);
- Requirement that membership drives be done in the places where Aboriginal people live;
- Acceptance of training in lieu of some educational requirements for Aboriginal workers;
- Negotiation of a first call for jobs to qualified internal and external Aboriginal beneficiaries;
- Thorough orientation and training for Aboriginal workers on the collective agreement, their rights and responsibilities as union members, and the role of unions – preferably by Aboriginal shop stewards and experienced union members;
- Provisions to mentor, train and promote the election of Aboriginal workers as shop stewards, and in other union roles including the executive, in particular to increase capacity of Aboriginal workers who understand both the collective agreement and the IBA;
- Flexibility around issues such as seniority to deal with job sharing or other non-traditional arrangements; and
- Provision that Aboriginal workers are the last to be laid off in the event of slow-downs or closures;



Although unions can also be powerful allies, they may resist the idea that the community's IBA with the company takes precedence over the union's collective agreement with the company. This can be overcome by constantly reminding the union of the fact that the mine would not be operating in the region if they did not have the consent of the Aboriginal party.





# Business Development

Mining agreements can contribute to community economic development by creating opportunities for Aboriginal businesses to provide goods or services to the project. Just as with employment, there can be significant barriers to business development, such as high transaction costs involved in tendering and contracting arrangements, scarcity of capital, lack of relevant skills, and difficulty in competing with large, well established non-Aboriginal businesses.<sup>75</sup>

While every IBA contains some provisions for support of Aboriginal business, they vary widely. Analysis of business capacity in the region, possibly emerging from the baseline study, combined with an understanding of what opportunities will be available, can help to craft appropriate business development clauses. A profile of business capacities and opportunities can be used by the community to target areas where there are already strengths, and areas where there is a need to partner with neighbouring communities to set up joint ventures.

Provisions can be included to address each barrier to Aboriginal business, as follows.

## Provisions to Address Barriers to Aboriginal Businesses

### High Transaction Cost

**Right of first refusal of contracts for goods or services can be offered to companies controlled by the communities. Sometimes companies are required to pre-qualify for this condition.**

- Right of first refusal of contracts can be offered to companies controlled by the communities. Sometimes companies are required to pre-qualify for this condition. For example, the Inuvialuit Final Agreement provides that business opportunities are to flow to the IBA beneficiaries in the first instance, “which effectively provides the beneficiaries with first opportunity status.”<sup>76</sup> The Inuvialuit Regional Corporation has created a business list, so that the developer must source first with Aboriginal businesses. It is only when local companies cannot provide the services that the company can go to outside companies.<sup>77</sup>
- Contracts below a certain size can be offered first to Aboriginal businesses, and if they meet the criteria, contracts can go to these businesses without going to tender.
- Contracts can be broken up (unbundled) so that they are accessible to smaller businesses.
- Evergreen contracts (which automatically renew unless either party provides advance written notice) are sometimes negotiated.

- Information on upcoming contracts is provided to the community well in advance, so that potential bidders have time to put tender packages together.
- Performance bonds and tender deposits can be waived.

## Scarcity of Capital

- Some agreements provide Aboriginal businesses with assistance to raise finance, for example by providing documentation regarding the contract award or purchase order to financial institutions.
- A loan fund can be established, as in the Voisey's Bay IBAs for Innu and Inuit businesses to meet start-up costs.
- Joint ventures can be established between project operators and Aboriginal businesses during the start-up phases.

## Lack of Relevant Skills and Experience


- Proponents can hold workshops on bidding procedures and safety management, and host annual business opportunity seminars.
- Access to technical and financial expertise can be provided by company staff and through management training programs, or other “in kind” support can be provided, such as reduced rate equipment leases and technical support.
- Joint ventures between project operators and Aboriginal businesses can be established.
- Parties can appoint an Aboriginal business development coordinator or establish a business opportunity implementation committee<sup>78</sup> to forecast contract needs of the project and the capacities of local businesses.<sup>79</sup> This individual or group can assist communities in identifying business opportunities, help to improve methods of bidding, support efforts of mining companies to obtain government funds for management training, and make recommendations to the company regarding specific contracts.<sup>80</sup>

## Competitive Disadvantage

- Evaluation of contract proposals can include a defined weighting for Aboriginal content (as in the Voisey's Bay IBAs), as well as other standard criteria such as quality, cost competitiveness, ability to supply and deliver the goods and services, timely delivery, and safety and environmental record.<sup>81</sup>
- Preference clauses can be agreed on for competitive Aboriginal businesses. The definition of “Aboriginal business” and “content” needs to be clear. DIAND has defined Aboriginal business as having greater than 51 per cent Aboriginal ownership and control, and if there are more than six employees, at least 33 per cent Aboriginal employment.<sup>82</sup>



The company and community can appoint an Aboriginal business development coordinator or establish a business opportunity implementation committee to forecast contract needs of the project and the capacities of local businesses.

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- A registry of Aboriginal businesses can be established so that companies unfamiliar with a region can work with local businesses. Often this registry is paid for and is the responsibility of a business promotion branch of government.
  - Failing the identification of an appropriate Aboriginal business, an IBA can require the successful contractor to comply with employment commitments made by the project operator and require contractors and sub-contractors to include an Aboriginal content plan as part of their proposal.
  - A margin in favour of Aboriginal businesses can be assigned when assessing tenders (e.g., price tolerance of 10 per cent in favour of Aboriginal tenderers).
  - When Aboriginal tenders are not successful, the project operator can be required to inform the Aboriginal business in writing about reasons for failure and what can be done to do improve their bids.

## Other Business Development Strategies

### Joint Ventures

As discussed above, joint ventures can be used to provide Aboriginal partners with access to capital, skills and business experience. In some cases, joint ventures may provide for non-Aboriginal partners to supply the bulk of startup capital and take the major role in contract management, and then, as Aboriginal participants gain experience, they can increase their stake.

### Research and Development

Market niches might be developed<sup>83</sup> and this can be fostered through research and development projects relating to technologies and practices relevant to the project. For example, the Tłıchǫ in the NWT have specialized in remediation of contaminated sites and now use this business skill in remediation and closure of abandoned sites. When closure is a reality in the NWT diamond industry, these companies will be able to assist in this effort and gain substantial economic opportunities from doing so.

# Access to and Transfer of Infrastructure and Facilities

Major mining projects typically involve investments of tens or even hundreds of millions of dollars on infrastructure facilities such as ports, roads, airports, power lines, water supply, industrial workshops, worker accommodation and health and training centres. Particularly in remote regions where such infrastructure and facilities are often scarce, the ability to utilize them, and eventually to own them, can be valuable to Aboriginal communities. They may be useful both in establishing businesses, including in areas such as tourism that are unrelated to mining, and may allow a community's basic service needs (power, transport, water, health) to be met at a lower cost.

Recent IBAs in Australia, for example, have tended to provide both for community access to project infrastructure and facilities, under certain conditions, and for the transfer or sale of fixed infrastructure (items a mining company can't take away and use somewhere else) at the end of project life, or when that infrastructure is no longer needed. Typically, access to infrastructure for the personal use of community members is open, subject to rules designed to ensure people's safety and that mining operations are not interfered with. Use of infrastructure by community-owned businesses usually requires separate approval by the project operator to ensure, for example, that there is not competition for facilities required for the project.

In relation to transfer of infrastructure assets at the end of mine life, a common approach is for the project operator to notify the community, in advance, of when it will no longer require assets, allowing the community to indicate which assets it wishes to retain. These are typically either sold to the community for a nominal amount (\$1 under one Australian IBA), or at the value to which they have been written down for depreciation purposes, which will often be close to zero.

A number of potential issues and risks can be associated with use of company facilities and asset transfers, and legal expertise is essential in ensuring that these are addressed in an agreement. They include the danger that companies will be relieved of liability even if they are responsible for injury incurred by community members using their facilities; and the need to address any government requirements for the company to remove infrastructure when mining ends, to ensure that assets are in good condition when transferred, and that they do not have any liabilities attached to them (for instance the need to remove toxic substances) that could impose significant costs on the community.



Companies may build significant infrastructure for the mine, ranging from roads and airports, to power and water supply lines, to buildings such as housing or health care facilities. The ability to use them, and eventually to own them, can be valuable to Aboriginal communities. However, these transfers can also involve some risk.



# Environmental Management

If Aboriginal communities negotiate environmental provisions in IBAs, emphasis is often placed on creating the greatest possible indigenous influence over environmental management of mining and related activities.

IBAs generally deal with environmental management of mining projects during their construction, operation, decommissioning and rehabilitation. As mentioned earlier (see page 36), we recommend that if a community wishes to participate in the environmental management of advanced exploration, this be dealt with in a stand alone or precursor agreement, as the community will not have enough information to negotiate effectively for an IBA at the exploration stage.

If Aboriginal communities negotiate environmental provisions in IBAs, emphasis is often placed on creating the greatest possible indigenous influence over environmental management of mining and related activities. “Often the central purpose of including environmental provisions in negotiated agreements is to place *indigenous people themselves* in a position where they can ensure the protection of their ancestral estates.”<sup>84</sup>

There are many possibilities for involvement in this area, depending on the vision of the indigenous group, and a range of principles to guide engagement. These include:

- Use the precautionary principle, which states that absence of complete scientific understanding of an environmental problem is not grounds for failing to act to deal with it (often used when there is potential for serious, irreversible, or cumulative environmental and/or social damage);
- Employ an adaptive approach to environmental management, which involves ongoing refinement of management procedures and policies to reflect lessons learned;
- Involve indigenous people in defining and managing environmental issues and impacts;
- Comply with environmental laws and industry codes of practice;
- Ensure indigenous people are able to practice traditional laws and customs and exercise the full range of connection to their territory;
- Provide financial guarantees to meet the cost of environmental remediation, including closure costs, in the immediate and long term; and
- Integrate indigenous knowledge and land management practices into rehabilitation plans and works.<sup>85</sup>

## Responsibility of Proponent

Agreements may state that the proponent retains overall responsibility and liability for maintenance of environmental quality in the area affected by the project. This is important so that the proponent can be held accountable, and so that indigenous groups are not held liable, because of their participation in environmental management, for any damage caused by a project.

It may also be stated that the company must comply with the terms of their permits and with environmental legislation. This can be helpful for the indigenous party, because government authorities may fail to take action when there has been a breach of a permit condition or of environmental law. If the company has made a contractual commitment *to the indigenous party* not to commit a breach, this can give the indigenous party the ability to directly seek legal remedies if this does occur.<sup>86</sup> Specific categories of licenses and permits may be referred to in addition to general environmental legislation, such as water management, waste handling and disposal, and wildlife.

## Monitoring and Management Systems

The nature of Aboriginal involvement in environmental management can vary considerably, reflecting the outcome of negotiations. At the low end of the spectrum, some agreements commit the company only to consult on some aspects of project management.<sup>87</sup> More substantive engagement occurs when there is collaborative management, as described in this clause:

*The Company will make best efforts to accommodate X First Nation's views, concerns and traditional knowledge with respect to environmental, social, cultural and heritage matters related to the Project and to the extent practicable and reasonable, incorporate them into Project planning and operations.*<sup>88</sup>

Joint environmental management may be established, but these are primarily in the northern treaty regions and are established through separate agreements. These environmental agreements are often negotiated between the company, the government and the communities. There are a range of structures for joint environmental management, such as co-management boards with senior corporate staff and Aboriginal representation, or using expert panels. These monitoring boards may have an equal number of representatives from each party, may be co-chaired, and may operate by consensus. A range of models is provided by an overview of boards established by the Diavik Diamond Mine (Environmental Monitoring Advisory Board), EKATI Diamond Mine (Independent Environmental Advisory Board), Snap Lake Mine (Snap Lake Monitoring Agency), and Voisey's Bay Project (Environmental Monitoring Board).<sup>89</sup>

Specific provisions regarding Aboriginal participation in environmental monitoring can include:

- Provision of Aboriginal access to company monitoring locations on project lands;<sup>90</sup>
- Guidelines and mechanisms to ensure Aboriginal participation in environmental review, monitoring, and assessment;

Agreements may state that the proponent retains overall responsibility and liability for maintenance of environmental quality in the area affected by the project. This is important so that the proponent can be held accountable, and so that indigenous groups are not held liable, because of their participation in environmental management, for any damage caused by a project.



- Processes for discussing concerns arising from environmental monitoring information, through an advisory, liaison or management committee;
- Provision for Aboriginal environmental monitors;
- Mechanisms for ongoing review of environmental management, such as independent monitoring studies;
- Independent environmental audits at regular intervals;
- Funding for Aboriginal parties to gain access to independent technical advice; and
- Inclusion of traditional knowledge in monitoring and follow-up studies, perhaps with specific mechanisms or procedures to plan for integration of knowledge.

## Mitigation Measures

Specific mitigation measures, monitoring, and follow up programs may be included in relation to the environment, people's health, and safety issues. These may include:

- Measures to deal with environmental damage, pollution during construction, or post-closure impacts (e.g., performance bonds, insurance policies);
- Indigenous parties have the right to require project activity to cease where the company is in default of an environmental regulation or protection measure established in the agreement, until such a time as the default is cleared up to the satisfaction of the indigenous party;<sup>91</sup> and
- Habitat compensation and enhancement initiatives – for example, Polaris Minerals Corporation spent over \$1.6 million to clean up an abandoned dump site near a fishing river as part of a cooperation agreement with the Namgis and Kwakiutl First Nations.<sup>92</sup>



**The issue of toxic material and substances will be covered extensively in the environmental assessment, but it can also be treated in the IBA**

## Toxic Material and Substances

The issue of toxic material and substances will be covered extensively in the environmental assessment, but it can also be treated in the IBA (though this is rare). The key consideration is what materials are on site, how they are managed, and what will be done in the case of an emergency. Provisions may require:

- An inventory of toxic materials and products, as well as risk management plans (sometimes with prohibitions on certain substances, e.g., pesticides or PCBs), plans for use, storage and handling of these materials and products, and emergency plans for spills, leaks or discharges.
- Notification of the Aboriginal party if particular materials, chemicals, or products that are restricted, or under consideration for restriction, are to be used.
- Commitments to not use particular products or materials, such as pesticides.

## Specific Measures for Exploration, Operation and Closure

It can be helpful to identify specific environmental measures for the various stages of mine life. For example, for the exploration phase details on the reclamation of exploration sites can be suggested. For operations, the agreement may provide for alternative methods and locations for carrying out components of the project (e.g., new locations for waste dumps or tailings).

Closure and reclamation provisions may include:

- Abandonment and rehabilitation plans;
- Involvement of Aboriginal people in closure plan development and implementation;
- Reclamation throughout the life of the project;
- Compliance with all requirements in regulatory approvals; and
- Monitoring following closure and permit inspection by the Aboriginal party.<sup>93</sup>





# Culture and Cultural Heritage

Protection or mitigation measures can apply to two aspects of cultural resources. The first area is cultural heritage, or the material manifestations of Aboriginal occupation during earlier periods of time. This includes burial sites, middens created by discarded shells and other food debris, rock and cave paintings, and scatters of tools. The second involves places, sites, areas, or landscapes that have contemporary spiritual significance, and other aspects of living culture, which can include language, values, relationships, and the ways that people express culture (e.g., art, dance, ritual).<sup>94</sup>

## Cultural Heritage

Provisions for protecting cultural heritage can include a description of what might be protected, a protocol for how research or surveys will be undertaken, strategies for managing cultural heritage in an area, and notification procedures. For example:

- A principle of avoiding damage as a first objective, followed by the possibility of minimizing any damage and, if damage or destruction of sites or artifacts cannot be avoided, a process for mitigation and compensation;
- Measures and protocols to avoid damage to cultural sites, including protocols for site or object management and site clearances, timeframes and, if sites are to be identified in reports, who will have access to this information;
- Provision of resources and funds for Aboriginal people to undertake heritage assessments and develop management plans on the basis of agreed standards, or funding traditional knowledge studies;
- Employment of a cultural heritage consultant, and terms of reference for choosing one;
- Creation of monitoring guidelines that are defined by Aboriginal peoples;
- Confidentiality of culturally sensitive information;
- Aboriginal access to areas of importance for social, religious or cultural purposes and prohibition on access of non-Aboriginal project personnel to the sites (e.g., access to the mine pit, which has sites that are sacred, for culture holders in the Argyle Diamond Mine);
- Employment of local cultural heritage protection monitors, e.g., involvement of elders or land users in heritage resource impact assessments before, during, and after exploration or mining; and
- Processes for consultation with the Aboriginal party.

Provisions for protecting cultural heritage can include a description of what might be protected, a protocol for how research or surveys will be undertaken, strategies for managing cultural heritage in an area, and notification procedures.

## Cultural Practices and Language

Culture is, of course, much more than “stones and bones.” It is a living, continually adaptive system, not a remnant of the past. It is also highly complex, which makes precise or exhaustive definition of the concept impossible. A simple, general definition of culture we use is “a way of life; a system of knowledge, values, beliefs and behaviour, passed down between generations.”<sup>95</sup> Mitigation for impacts on the culture of the people who work in remote sites can therefore be defined.

Mitigation can include:

- Management strategies and mitigation measures to prevent impacts on traditional land uses and culture;
- Community involvement in defining, monitoring and analyzing cultural impact;
- Support for cultural practices or celebrations, such as festivals, events, assemblies, cultural media and archive activities (e.g., radio stations, magazines, photography, audio or video projects, archaeological or oral history projects), and support for cultural activities (e.g., traditional food activities, ecotourism, and cultural practices); and
- Support for cultural programs, such as literacy or education in the Aboriginal language.
- Training and operation of facilities with allowances for indigenous languages.



# Harvester Compensation and Traditional Use



Compensation can include lost revenues from trapping and fishing caused by damage to equipment, loss of animals, including direct loss if animals are no longer present in the project area, or for increased cost associated with additional travel.

Compensation can include lost revenues from trapping and fishing caused by damage to equipment, loss of animals, including direct loss if animals are no longer present in the project area, or for increased cost associated with additional travel. For example, Cominco and Anvil Range Mining in northern BC both contributed to a trappers' trust fund. This was used to make annual payments of \$1,500 to 30 elders, supplements to Ross River Dena trappers, training, hunting trips, and provision of meat to elders.<sup>96</sup>

Another fund for harvesting and traditional activities helped finance:

- Trapper cabins, including new ones, and renovations;
- Communications (e.g., satellite radio hookup);
- Trap line management, wildlife monitoring, harvesting monitoring, and relocation of animals;
- Transportation, including bush planes, roads, and skidoo trails;
- Traditional activity enhancement, such as habitat improvement or equipment repair;
- Other works and programs or replacement of loss of traditional activities; and
- Any other use of the fund deemed appropriate by the indigenous party related to socio-economic measures or development.<sup>97</sup>

Agreements often seek to minimize disruption of Aboriginal harvesting and prevent damage to wildlife and habitat. For example, they may specify whether fishing or hunting by non-Aboriginal employees is permitted, and if so, under what conditions.

In some agreements (e.g., IBAs for both the Diavik and EKATI diamond mines), limits are placed on the access of Aboriginal harvesters to lease areas. In other cases, such restrictions are prohibited. For example, the Nunavut Land Claims Agreement states that "Any term of contract that attempts to limit the rights of access of harvesting by an Inuk during the leisure hours of that employee shall be null and void against Inuit" (section 5.7.23).



# Social Measures

Many of the measures identified here will need to be tailored to the local context, in response to issues emerging from social impact assessment work or other community consultations. They may include:

- Measures to control interactions of “outside” workers housed in large camps with small, primarily Aboriginal communities;
- Broader support for cultural and social activities;
- Sustainability funds, such as that developed by the Innu Nation;
- Obligations to develop social programs, such as counselling for workers and families, addictions programs, money management training, healing workshops, and stress and anger management, held both in the communities and at the project site; and
- Establishing financial, technical or human resource assistance to improve community infrastructure, implement community programs, or establish a community development fund.<sup>98</sup>



# Establish Agreements that Reflect Community Goals

When a draft agreement is ready, the negotiators can test whether there is acceptance of the measures, any new measures that are required, or any significant changes that must be negotiated.

Once an agreement is in draft form, the negotiating team will need to gauge consent to the issues covered and to proposed commitments, responsibilities, and benefits. As discussed in Section 3, there are a series of points at which to obtain community consent. Each of these points can require different levels of community engagement (see Figure 3.3 on page 96).

Early on, there needs to be broad engagement to establish community views about a proposed project. It may be narrower at the MoU stage (see page 78), and then become broad again for consideration of a draft agreement. The pulse of public opinion can be taken by the negotiating team or by a broader body such as a community government, and it may need to be taken in different ways throughout the process.

When a draft agreement is ready, the negotiators can test whether there is acceptance of the measures, any new measures that are required, or any significant changes that must be negotiated.

Each indigenous community will have a particular way that consultation and public decision making occurs. To establish standard rules for seeking approval for agreements (i.e., there must always be a referendum) would go against the spirit of respecting local practices. There are a number of issues, however, that should be considered in designing a forum to attain consent. First, outside agencies may misunderstand how decisions are made locally, and thus the authority of the wrong people may be accepted. Second, there are often plural systems for decision making, and this can provide the opportunity for community members or outsiders to go “forum shopping”<sup>99</sup> to get the decision they want. Finally, agencies can also manipulate local authorities and sow conflict between them to gain their own ends.<sup>100</sup> Appropriate principles for gauging consent are perhaps the best safeguard in dealing with these concerns, such as:

- Being thorough and transparent in the process of consultation, so that all affected community members and groups have an opportunity to provide input into the process; and
- Citizens should be provided with multiple opportunities to express their needs and perspectives and to inform negotiators and decision-making processes.<sup>101</sup>

There are many ways to get the informed consent of a community to an agreement, including running a plebiscite, vesting authority in the chief negotiator to reach an agreement that reflects goals established by the community, asking community leaders for approval, and running community meetings. Each possibility will have positive and negative sides to it, as indicated in the paragraphs below, and ultimately the community should use a process that is both culturally appropriate and robust in terms of getting wide feedback and broadly-based consent.

## Plebiscites or Referenda

Plebiscites or referenda have become quite popular in Canada. These involve the whole community voting on whether to give “in-principle” support for a mine, or to approve an agreement. To avoid claims of illegitimacy, they have to be carefully organized, advertised well, run by an independent official, and follow accepted procedural rules. The positive side to this process is that everyone can have a say in the decision. Also, if a substantial majority approves an agreement, this gives industry the clear support of the indigenous group. The threshold for approval does not have to be 100 per cent, but some other level that is defined locally. Anything below 60 per cent in favour of a project or agreement may be defined as too low of a threshold, given the long-term and serious implications of approving major mining projects.

A number of drawbacks can be associated with plebiscites. They can cause fractures and lack of unity simply because the process allows only a “yes” or “no” outcome, with no room for internal discussion to seek a compromise that might be broadly acceptable (for instance, a different agreement or a smaller project). They may not be an appropriate approach to decision-making for indigenous people, who may rely instead on consensus building and deliberation to make decisions. Further, if people are not well informed about the nature of the agreement or project, they can misrepresent the real level of support. This could mean that people withdraw their support as they become more informed.

A number of drawbacks can be associated with plebiscites. They can cause fractures and lack of unity simply because the process allows only a “yes” or “no” outcome, with no room for internal discussion to seek a compromise that might be broadly acceptable (for instance, a different agreement or a smaller project).

## Vesting Authority in a Lead Negotiator

If a lead negotiator and the negotiating team have consulted with people throughout the process and clearly established what needs to be in an agreement to satisfy the community, then authority can be placed in the team to sign off on the agreement. This options assumes that:

- The lead negotiator and the team have consulted with diverse people in the community, have listened to the people who don’t agree with the project as proposed, and have negotiated an agreement and/or negotiated modifications to the project that allow community goals to be met;
- The lead negotiator and the team can communicate clearly and well about what the agreement means, and how it binds the community; and
- Community members place their trust in the lead negotiator and will abide by the commitments made on their behalf in the agreement.

Community meetings or assemblies to obtain consensus are often more congruous with indigenous ways of making decisions. These meetings can go on for days, and as people listen (and sleep on things), they can move towards a shared decision.

## Leadership Review and Approval

The agreement can be reviewed by a representative political body or a group vested with authority (e.g., hereditary chiefs). These elected or ceremonial and traditional leaders may have the authority to ratify the agreement. They are, in any case, often the key signatories to an agreement, and thus need to be included in the decision-making process.

## Community Meetings to Obtain Consensus

Community meetings or assemblies to obtain consensus are often more congruous with indigenous ways of making decisions. They give everyone a chance to hear all opinions, and to work toward consensus (general agreement and group solidarity). These meetings can go on for days, and as people listen (and sleep on things), they can move towards a shared decision.

The big advantage to this form of decision making is that everyone who disagrees can be heard by the community, which cannot happen in the privacy of a ballot box used in a referendum. When disagreements arise, it may be possible to change agreements to accommodate conflicting views. Even just allowing people to be heard can make all the difference to keeping the peace after an agreement is ratified. It is a mechanism for gaining consensus, rather than leaving a community fractured where, for instance, a referendum indicates that 45 per cent of the population is against the agreement.

# Returning to the Negotiating Table

There can be huge pressure on negotiators and the community's political leadership to ratify a draft agreement that is recommended by both negotiating teams. This can lead negotiators and leaders to downplay community opposition or to argue that issues raised by the community can be resolved as an agreement is implemented. It is very difficult for negotiators to return to the table and say they have been unable to obtain community support for a deal they endorsed. But it is absolutely essential that they do so if community concerns are real and broadly based. Pressing a community to approve an agreement or downplaying concerns that people raise is likely to cause ill feeling and conflict in the longer term. This is not in the community's interests, nor in the company's, because the company may face opposition later in project life when it has invested hundreds of millions of dollars.

At this stage, community negotiators should be open and transparent with the company, providing clear evidence of the existence of major concerns in the community, for instance dates and times of community meetings and resolutions they pass. This helps counter any suggestion that community negotiators are exaggerating community concerns or opposition as a tactic to wring a few more concessions from the company.

Once the community has determined what it needs to sign the agreement, negotiators should set this out clearly to the company, and wait for its response. If the result is deadlock in the negotiations, this is still better than the alternative of signing an agreement that lacks genuine community support. If the company is seriously committed to the project, it will return to the negotiating table at some point and seek to address outstanding community concerns.

**It is very difficult for negotiators to return to the table and say they have been unable to obtain community support for a deal they endorsed. But it is absolutely essential that they do so if community concerns are real and broadly based.**

# Signing and Launching an Agreement

**Holding a ceremony can be a very powerful way to ritually engage the directors and senior managers of a company, so that they witness the strength of culture, become embedded in the community, and are ritually made into friends and relatives, rather than outsiders.**

The formal signing of a final agreement can involve only the appointed negotiators and signatories from the community and the company, or it can be a public event. This will depend on the protocol agreed upon by the negotiating teams.

Even if formal ratification involves only a small group of negotiators, it can be valuable to “launch” the agreement through public ceremonies with senior company personnel and the community present. For example, the board of directors of Polaris Minerals was invited to the ratification ceremony in a traditional lodge of the Namgis First Nation. Everyone was robed in traditional dress and then ceremonies and rituals were performed to bless the agreement. This can be a very powerful way to ritually engage the directors and senior managers of a company, so that they witness the strength of culture, become embedded in the community, and are ritually made into friends and relatives, rather than outsiders. A public ceremony also makes the community fully aware of the agreement, cementing the relationship between the company and the wider community.



# Summary of Section 4

- Define roles for the negotiation committee and the people within it;
- Create rules for negotiation that can guide the negotiating team;
- Form a negotiation agenda based on community goals and aspirations;
- Agree on negotiation tactics and strategies;
- Document all negotiations, conversations and verbal agreements;
- Pay attention to what happens between meetings;
- Focus on relationship building with the company in the community;
- Craft legal provisions, making sure you have specialist legal input;
- Identify options on all substantive provisions that will be needed to meet community goals and protect community interests;
- Agree on substantive provisions that obtain the maximum benefits for the community and minimize any costs it must bear;
- Ensure there is broadly-based community support for a draft agreement – if there isn't, return to the negotiating table; and
- Ratify the agreement, using the occasion to cement community-company relationships.

A complete list of references  
is available in the final  
section of the toolkit,  
which can be downloaded at  
[www.ibacommunitytoolkit.ca](http://www.ibacommunitytoolkit.ca)

## SECTION 4

### Notes

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- 2 Weitzner 2006.
- 3 Wilkinson 2001.
- 4 Christenson 1999.
- 5 Woodward & Company 2009.
- 6 Ibid.
- 7 FNEATWG 2004, 13.
- 8 Woodward & Company 2009, II-11.
- 9 Woodward & Company 2009.
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- 11 O'Faircheallaigh 2004.
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- 13 Woodward & Company 2009, 11-44.
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- 15 Quinn 2005.
- 16 O'Faircheallaigh and Ali 2008.
- 17 UNDESA 2004.
- 18 Woodward & Company 2009.
- 19 Cited in Kennett 1999, 104.
- 20 Nunavut Land Claims Agreement Article 26.9.1.
- 21 Quinn 2005.
- 22 Ibid.
- 23 Ibid.
- 24 Ibid.
- 25 Ibid.
- 26 Quinn 2005; Woodward & Company 2009.
- 27 Woodward & Company 2009.
- 28 Quinn 2005, 27.
- 29 Quinn 2005.
- 30 Ibid.
- 31 Ibid.
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- 33 Ibid.
- 34 O'Faircheallaigh and Corbett 2005, 643.
- 35 O'Faircheallaigh 2006a.
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- 41 Tłıchǫ Land Claims Agreement 2003.
- 42 FNEATWG 2004, 20.
- 43 O'Faircheallaigh 2006c.
- 44 Ibid.
- 45 For services or programs, they could suffer significant hardships during periods of low prices, O'Faircheallaigh 2006c.
- 46 O'Faircheallaigh 2006c.
- 47 Kennett 1999, 85.
- 48 Ibid.
- 49 O'Faircheallaigh 2007a.
- 50 O'Faircheallaigh 2006a.
- 51 O'Faircheallaigh 2004.
- 52 Ibid, 49.
- 53 O'Faircheallaigh 2007a.
- 54 Gibson 2008.
- 55 O'Faircheallaigh 2006c, Gibson 2008.
- 56 Kennett 1999, 50.
- 57 O'Faircheallaigh 2006c.
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- 59 Government of the Northwest Territories and BHP Billiton 1996.
- 60 O'Faircheallaigh 2006c, 83.
- 61 Wilkinson 2001, 7.
- 62 Kennett 1999, 53-54.
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- 64 Barker and Brereton 2005; Gibson 2008.
- 65 Kennett 1999, 58.
- 66 O'Faircheallaigh 2006c, 85.
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- 69 O'Faircheallaigh 2006c, 82.
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- 72 Kennett 1999.
- 73 Dreyer 2004.
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- 76 Gogal et al. 2005, 150.
- 77 Ibid, 150.
- 78 Woodward & Company 2009, 11-35.
- 79 Hennessey 2007, 19.
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- 81 Gogal et al. 2005, 149.
- 82 Ibid, 149.
- 83 Kennett 1999, 73.
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- 85 O'Faircheallaigh 2002, 5; FNEATWG 2004, 13.
- 86 Woodward & Company 2009, 11-24.
- 87 Ibid, 20.
- 88 Ibid, 11-21.
- 89 O'Faircheallaigh 2006b.
- 90 Kennett 1999.
- 91 Woodward & Company 2009, 11-27.
- 92 Ibid, 11-28.
- 93 Kennett 1999, 95.
- 94 O'Faircheallaigh and Ali 2008.
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- 98 FNEATWG 2004, 17.
- 99 Colchester and Ferrari 2007, 7.
- 100 Ibid, 7.
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