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## **Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements**

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(In Brief)

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# **SUPPORTING ABORIGINAL PARTICIPATION IN RESOURCE DEVELOPMENT: THE ROLE OF IMPACT AND BENEFIT AGREEMENTS**

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## **1 INTRODUCTION**

In the coming decade, the Government of Canada anticipates that current and planned resource development projects across Canada will yield total investments estimated at \$650 billion.<sup>1</sup> Many of these projects will occur on or near the traditional territories of Aboriginal people.<sup>2</sup> Approximately 1,200 Aboriginal communities are located within a 200-kilometre radius of 180 producing mines and over 2,500 active exploration sites.<sup>3</sup>

These resource development projects have the potential to create new social and economic development opportunities for Aboriginal communities. Securing the support from affected Aboriginal communities to proceed with planned developments, and fostering their meaningful participation in such projects, will be an important part of realizing these potential benefits.

Impact and benefit agreements (IBAs) have emerged as one mechanism to encourage Aboriginal participation in resource development projects. This paper briefly provides an overview of IBAs in Canada, describing their content and legal, regulatory and policy framework, and selected issues affecting the negotiation and implementation of IBAs.

## **2 WHAT ARE IMPACT AND BENEFIT AGREEMENTS?**

IBAs are privately negotiated, legally enforceable agreements that establish formal relationships between Aboriginal communities and industry proponents. With a few exceptions, governments are not directly involved in the development or negotiation of these bilateral arrangements.<sup>4</sup> Importantly, IBAs are distinct from resource revenue-sharing arrangements between governments and Aboriginal groups, which share public revenues, such as royalties and taxes, generated from resource development. Policies on resource revenue-sharing vary by province and territory. In some jurisdictions such as British Columbia, both IBAs and resource revenue-sharing arrangements may be required for a given project. Other jurisdictions do not require either.<sup>5</sup>

Broadly, IBAs serve two primary purposes. First, they seek to address the potentially adverse effects of development activities on Aboriginal communities, with a view to providing some compensation for these activities. Second, IBAs help to ensure that Aboriginal communities acquire benefits from resource development activities occurring on their traditional territories.<sup>6</sup>

IBAs are quickly becoming standard business practice among prospective developers. From an industry perspective, IBAs can provide certainty and support for development projects.<sup>7</sup> From the perspective of many Aboriginal communities,

IBAs can support local economic development opportunities as well as offer a greater role in environmental protection and resource development. Further, Aboriginal communities approach the negotiation of IBAs on the basis that they hold inherent rights in their traditional territories, and thus should share in employment and financial benefits from development projects on those lands.<sup>8</sup>

Natural Resources Canada estimates that since 1974, a total of 335 IBAs have been signed for 198 mining projects. Of these IBAs, 265 remain active and cover various stages of project development, from exploration to reclamation (see Figure 1).<sup>9</sup> Recent research from the Northern Development Ministers Forum indicates there has been a significant increase in the number of IBAs signed in the past two decades. Notably, the number of IBAs signed between 2001 and 2005 and between 2006 and 2010 grew from 23 to 102, representing a fourfold increase.<sup>10</sup>

**Figure 1 – Impact and Benefit Agreements Between Aboriginal Communities and the Mining Sector, 2014**



Source: Natural Resources Canada [NRCa], "[Interactive Map of Aboriginal Mining Agreements.](#)" The NRCa map shows the location of Aboriginal communities and provides specific information on the types of agreements signed between communities and mining companies.

### 3 WHAT BENEFITS DO IMPACT AND BENEFIT AGREEMENTS PROVIDE?

IBAs are private contracts, so they are, for the most part, confidential. Broadly, the elements common to most IBAs are:

- **introductory provisions** that define the purpose of the agreement and identify the underlying objectives and roles of the parties;

- **employment provisions** that help Aboriginal community members get jobs, such as training opportunities and preferential hiring practices;
- **economic and business development provisions** that promote the establishment and development of Aboriginal businesses, such as preferential procurement practices and business capacity-building opportunities;
- **financial provisions** that ensure local communities receive economic benefits such as royalties, profit shares or fixed cash amounts, and equity interests;
- **environmental protection provisions** that supplement environmental laws and regulations; and
- **social and cultural provisions** that reduce the potentially negative effects of increased commercial activity, such as the establishment of social programs, community infrastructure and recreational activities.<sup>11</sup>

IBAs are dynamic arrangements, and the nature of the benefits included in these contracts has continued to evolve. For example, prior to 2005, IBAs focused primarily on benefits relating to jobs, training and procurement opportunities. Since 2005, IBAs have increasingly emphasized economic benefits such as royalties and direct payments.<sup>12</sup>

#### 4 WHY ARE IMPACT AND BENEFIT AGREEMENTS NEGOTIATED FOR RESOURCE DEVELOPMENT PROJECTS?

The increase in the negotiation of IBAs has been influenced, in part, by the evolving jurisprudence surrounding Aboriginal and Treaty rights. Recent Supreme Court of Canada decisions require that the federal and/or provincial Crown consult with and, where appropriate, accommodate Aboriginal groups when it contemplates activities that could adversely affect their potential or established Aboriginal and Treaty rights.<sup>13</sup> Although the legal duty to consult rests with the Crown, procedural elements of consultation are often delegated to industry proponents for specific projects.<sup>14</sup> While bearing no legal obligations to consult and accommodate, proponents often use IBAs to secure local support and reduce the likelihood of legal action on the basis of inadequate consultation.<sup>15</sup>

The terms and conditions for the negotiation of IBAs may also be stipulated in comprehensive land claims agreements. Commonly referred to as modern treaties, these agreements typically provide signatory Aboriginal communities with rights to land, resources and, since 1996, self-government. Certain comprehensive land claims agreements, particularly those in the North, specifically require IBAs when development activities are pursued on settlement lands. As shown in Table 1, under these agreements, IBAs may be signed with proponents for resource development activities or with the federal government for the creation of conservation areas and parks.<sup>16</sup>

**Table 1 – Provisions Relating to Impact and Benefit Agreements and Resource Development in Comprehensive Land Claims Agreements**

Comprehensive Land Claims Agreement	Provision(s)
<i>Nunavut Land Claims Agreement<sup>a</sup></i>	Article 26 requires the proponent of any major development project on Inuit-owned lands to finalize an Inuit Impact and Benefit Agreement.
<i>Inuvialuit Final Agreement<sup>b</sup></i>	Chapter 10 requires the proponent to conclude a Participation Agreement with the Inuvialuit Lands Administration.
<i>Labrador Inuit Land Claims Agreement<sup>c</sup></i>	Chapters 6, 7 and 8 require prospective developers and the Nunatsiavut Government to sign an Inuit Impacts and Benefits Agreement.
<i>Tlicho Agreement<sup>d</sup></i>	Chapter 23 requires proponents of major mining projects or oil and gas exploration activities to consult with the Tlicho Government in order to develop an agreement on these activities.
<i>Eeyou Marine Region Land Claims Agreement<sup>e</sup></i>	Chapter 19 states that no major development project may begin until an Impact and Benefit Agreement is finalized.

- Notes:
- a. [Nunavut Land Claims Agreement: Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada.](#)
  - b. [The Western Arctic Claim – The Inuvialuit Final Agreement.](#)
  - c. [Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada.](#)
  - d. [Tlicho Agreement.](#)
  - e. [Agreement Between the Crees of Eeyou Istchee and Her Majesty the Queen in Right of Canada Concerning the Eeyou Marine Region.](#)

While usually not directly involved in IBA negotiations, governments are interested in the outcomes of those negotiations. Accordingly, to varying degrees, federal, provincial and territorial governments support the negotiation of IBAs through different regulatory regimes.

At the federal level, applicable legislation in Nunavut, the offshore region, and part of the Northwest Territories requires oil and gas proponents to develop benefits plans that maximize employment and business opportunities for Northern residents.<sup>17</sup>

At the provincial and territorial level, there are significant variations in regulatory requirements regarding IBAs and the sharing of resource benefits with local communities. For example, in Alberta, the negotiation of IBAs is voluntary, while in Saskatchewan, mining companies operating in the northern part of the province are required to sign surface lease agreements.<sup>18</sup> Acknowledging that labour development opportunities are more limited in northern Saskatchewan, these surface lease arrangements are designed to improve employment and economic opportunities and are required as a condition for granting long-term leases.<sup>19</sup>

Federal and provincial policies also support the participation of Aboriginal communities in resource development and, more specifically, the negotiation of IBAs. Federally, Aboriginal participation in resource development is a pillar of the Responsible Resource Development strategy.<sup>20</sup> The priorities of this strategy are,

among other things, to ensure that federal government fulfils its duty to consult and to leverage economic development opportunities with Aboriginal communities. Through employment and procurement provisions, IBAs play an important role in supporting these priorities.

Certain provincial policies also support the development of IBAs. For example, the *Québec Mineral Strategy*<sup>21</sup> and Ontario's mineral development policy guidelines both expressly encourage mineral development companies to negotiate IBAs with Aboriginal communities.<sup>22</sup>

## 5 NEGOTIATING AND IMPLEMENTING IMPACT AND BENEFIT AGREEMENTS: ISSUES AND CHALLENGES

Confidentiality clauses are among the principal challenges affecting the negotiation and implementation of IBAs. Confidentiality provisions are included in most IBAs and limit the parties' ability to publicly discuss IBA negotiations, sensitive information (such as financial data) or project development concerns.<sup>23</sup> These provisions may be requested by industry proponents – to protect legitimate corporate interests – or by Aboriginal communities.<sup>24</sup> Aboriginal communities have expressed concerns about potential decreases in government funding, should the financial elements of an IBA become known.<sup>25</sup> Potential implications of confidentiality provisions can include a lack of transparency surrounding the use and distribution of IBA benefits among members and communities,<sup>26</sup> as well as limited opportunities to learn from others and develop capacity for IBA negotiations.<sup>27</sup> Further, these provisions can restrict opportunities to assess the overall implementation and effectiveness of IBAs.<sup>28</sup>

The type of benefits included within the scope of IBAs may also affect the negotiation process. Many Aboriginal communities view resource development as a means to address ongoing community needs, such as deficits in infrastructure and social services.<sup>29</sup> Further, investments in social benefits, such as housing, family counselling and child care, can offset the potentially adverse effects of resource development on the community.<sup>30</sup> However, IBAs tend to place greater emphasis on economic benefits, such as employment and business development opportunities, rather than strictly on social benefits. Some project proponents have been reluctant to include social benefits in IBAs as these are often viewed as a government responsibility.<sup>31</sup> Differences in the parties' expectations regarding the content of an IBA can lead to drawn-out negotiations. These delays can be especially challenging when there is no obvious recourse for negotiations that reach an impasse.<sup>32</sup>

Community capacity challenges can also affect the implementation of IBAs and the transfer of long-term benefits to Aboriginal communities. As mentioned, IBAs can include training and business procurement provisions to help communities achieve long-term prosperity and economic well-being.<sup>33</sup> However, educational attainment levels in Aboriginal communities have meant that many of the jobs available to Aboriginal employees are entry-level or unskilled labour positions. Lack of advanced formal education further affects opportunities to advance into senior positions, thus limiting labour development prospects offered through IBAs.<sup>34</sup> Further, business capacity challenges, including barriers to accessing capital, have limited the

development of local Aboriginal businesses, thus affecting the ability of some Aboriginal communities to take full advantage of IBA-related procurement provisions.<sup>35</sup>

## **6 DISCLOSING PAYMENTS MADE UNDER IMPACT AND BENEFIT AGREEMENTS**

On 14 December 2014, the Government of Canada's *Extractive Sector Transparency Measures Act* received Royal Assent. The Act establishes a reporting framework that requires certain foreign and domestic oil, gas and mineral companies to report payments made to all levels of government. Specifically, the Act requires companies to publicly report payments over \$100,000 on a project-by-project basis, or payments in specific categories. This includes payments made to Aboriginal governments, including organizations established by two or more Aboriginal governments and organizations performing Aboriginal government functions, as part of an IBA.

The federal government has deferred the application of the Act to Aboriginal governments for two years in order to continue engaging with Aboriginal people on the mandatory reporting requirements.<sup>36</sup> This deferral period was among the key issues raised during the framework's engagement sessions with industry representatives and Aboriginal organizations. In these sessions, industry organizations suggested that more time was needed to consult with Aboriginal communities and to assess both the potential implications of publicly disclosing IBA payments for Aboriginal communities and proponents, and the potential effects on Aboriginal–industry relations.<sup>37</sup> For their part, Aboriginal organizations expressed concerns about the application of public reporting standards to own-source revenues generated through IBAs and any possible associated reductions in federal transfer payments.<sup>38</sup>

## **7 CONCLUSION**

Over the past few decades, IBAs have become increasingly prevalent and are considered to be standard business practice among many project proponents. While the primary purpose of IBAs is to compensate Aboriginal communities for the adverse effects of development, Aboriginal groups have negotiated a variety of benefits as one means of facilitating their participation in the resource development sector. These benefits have continued to evolve to include not only employment and local business development opportunities, but also royalties and direct payments. Further, IBAs are viewed by governments as evidence that Aboriginal and Treaty rights have been accommodated. Moving forward, the popularity and use of IBAs in resource development activities could potentially be affected by new legislation requiring the disclosure of IBA payments.

## NOTES

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4. *Ibid.*, p. 10.
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8. *Ibid.*, p. 6.
9. Mining Association of Canada (2014), p. 64. Since IBAs are privately negotiated contracts, the precise number of IBAs in Canada is not known. The figures included in this paper are estimates based on the number of publicly known IBAs and are sourced accordingly.
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12. Northern Development Ministers Forum (2013), p. 24.
13. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
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16. For example, [Nunavut Land Claims Agreement: Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada](#), art. 8.4; and [Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada](#), c. 9.2.
17. AANDC, "[Benefits Plan](#)," *Northern Petroleum Resources*.
18. Northern Development Ministers Forum (2013), pp. 10–16. Please refer to these pages for more information on jurisdictional approaches.
19. Government of Saskatchewan, [2013 Northern Benefits Summary - Saskatchewan Mine Surface Lease Agreements](#), July 2014.

20. Government of Canada (2014).
21. Government of Quebec, Ministry of Natural Resources and Wildlife, [Preparing the Future of Québec's Mineral Sector: Québec Mineral Strategy](#), 2009.
22. Ibid., p. 43; and Government of Ontario, Ministry of Northern Development and Mines, [MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration](#), September 2012, p. 5 and p. 13.
23. Ginger Gibson and Ciaran O'Faircheallaigh, [IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements](#), The Gordon Foundation, June 2011, p. 79.
24. Sosa and Keenan (2001), p. 19.
25. Public Policy Forum (2006), p. 10.
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35. Ibid.
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