



ONTARIO BAR ASSOCIATION NOVEMBER 2012

IMPACTS AND BENEFITS AGREEMENTS: NON-MONETARY BENEFITS AND TIMING

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An Impacts and Benefits Agreement (IBA) is generally based on the recognition that a project will impact a First Nation's Aboriginal and Treaty rights, claims and interests. In an IBA, the company agrees to provide benefits to the Aboriginal community – due to its causing those impacts – and, in exchange, the community provides its approval for the project to proceed. Matters addressed in an IBA can include financial compensation (such as revenue or profit sharing, lump sum payments or possibly equity participation), and can also include non-monetary benefits (such as preferential hiring and procurement, education and training opportunities, and environmental protection provisions). The latter benefits are the focus of this paper.¹

The Context

Resource development often has the most impact on First Nations, due to proximity of projects to Aboriginal communities and due to the effects such projects usually have on the natural environment and consequently on Aboriginal peoples' day-to-day lives, rights and traditional practices. Dealing with those impacts has been a challenge for Aboriginal peoples over the past several decades. In more recent years, some assistance has come through the law recognizing the Crown's constitutional duty to consult and accommodate when First Nations' Treaty and Aboriginal rights are potentially affected by projects and developments.²

This duty requires that the Crown provide a meaningful opportunity for consultation with First Nations *before* engaging in any conduct (such as a approving a permit or licence) that could

¹ This paper is sourced mainly from Chapter 20. 'Protection, Use And Management of Lands and Resources' of *Aboriginal Law Handbook, 4th Ed.*, (Carswell, Thomson Reuters Canada Ltd., 2012), authored by Olthuis Kleer Townshend LLP.

² See e.g. *Haida Nation v. British Columbia (Minister of Forests)* (2004), [2004] 3 S.C.R. 511, 2004 CarswellBC 2656, 2004 CarswellBC 2657, [2005] 1 C.N.L.R. 72; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004), (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, 2004 CarswellBC 2654, 2004 CarswellBC 2655, [2005] 1 C.N.L.R. 366; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), [2005] S.C.J. No. 71, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, [2005] 3 S.C.R. 388; *Rio Tinto Alcan Inc. v. Carrier Sekani*, [2010] 2 S.C.R. 650; *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103.

adversely impact on any existing or asserted rights. While the Crown is the one with the duty, procedural aspects can be delegated to third parties. This makes sense since it is the third party proponents that have design and immediate control over the activities that are affecting the First Nation. In practice, the requirement for consultation and accommodation has often ultimately translated into requiring corporations to engage in the process of reaching acceptable accommodation.

What is an IBA and Why Conclude One?

In the above-described context, IBAs have evolved as a mechanism for building respectful relationships between Aboriginal communities and natural resource development companies. Each party comes to the table with their own unique objectives, and IBAs are a useful tool for both parties to reach those objectives.

Companies often engage in IBAs to secure a First Nation's support for their project. They are motivated in part by similar considerations to those requiring governments to come to the table: the existence of Aboriginal and Treaty rights and claims, and the enforceable legal obligations which can flow from these rights and claims.³ Companies are attempting to reduce legal and business risks to their projects, and may also want to invest in developing good relationships with First Nations, for both business and public relations reasons. An IBA provides a mechanism to realize these goals.

First Nations have their own goals they seek to realize through IBAs. In particular, promoting and supporting economic development on reserve lands and within their traditional territories is a key concern for Aboriginal peoples across Canada. There are high rates of unemployment in many Aboriginal communities, and First Nations have been seeking to develop opportunities and respond to development on their lands. However, they have been faced with the challenge of doing so within the strictures created by the *Indian Act* and a colonial history.

For First Nations, IBAs play a role in overcoming these challenges and for achieving objectives of economic development. Financial benefits, such as from revenue or profit sharing arrangements between the First Nation and the company seeking to benefit from the First Nation's resources, are an obvious means for an Aboriginal community to work towards such objectives. Non-monetary benefits also play a very important role in promoting long-term development for First Nations. That is often because those benefits are focused on acquiring business and employment opportunities during the life of the projects, and securing training and capacity development for First Nations' members that could be employed beyond the life of any particular project. In addition, non-monetary benefits can include involvement of First Nations in the management of resources and the environment. That can include monitoring to ensure projects are done in a way that does not or minimally impacts traditional practices of an Aboriginal community. As such, non-monetary benefits can go a far way to allow a First Nation to ensure their constitutional rights, and other practices that are integral to their members' day-to-day lives are protected.

³ For a review of the evolution of impacts-benefits agreements, see S. Matiation, "Impacts and Benefits agreements between mining companies and Aboriginal communities in Canada" (2003) 7 *Great Plains Nat. Resources J.* 204.

Timing

In advance of entering into a final IBA with a company, a First Nation should likely enter into a series of agreements beforehand, such as a process agreement, which would include provisions for how the IBA will be negotiated, the budget for negotiations and funding obligations for proponents, and information-sharing obligations of the parties. In addition, a First Nation should also ensure that an agreement is in place to address interim measures – that is, measures that will be taken during the months or years it will take to reach a final agreement, or measures that will be taken when a company is still in its exploration phase before the project proceeds to commercial development.

At early stages of project development, such as exploration, First Nations will have the most bargaining power. This is because the proponent is less invested in the project and if met with strong opposition, will either make the appropriate agreements and take the First Nation more seriously as the project moves forward, or will direct its attention to some other location where the First Nation is not opposed to a project. Also, requiring negotiation of an agreement at this stage may also improve negotiating conditions for the First Nation later on. For example, the First Nation may then be better situated to participate in significant decisions as the project develops.

It is also at this point of concluding an interim measures agreement where non-monetary benefits can be included, such as environmental monitoring by the aboriginal community, supervision of any new construction, protections of members' rights to hunt, fish, trap and gather in the project area, immediate training of First Nations members, preferential procurement and hiring during early project phases, scholarships and community grants, cultural initiatives, and participation in the company's decision-making.

Training members is particularly important at the interim stage. Benefits under an IBA can go unrealized if the project ramps up and the First Nation's members or business people are unprepared to take advantage of the sudden rush of opportunities, and unnecessarily sour the company's relationship with the community. What is important to keep in mind is to avoid waiting to implement training and capacity building programs, and consider leveraging the proponent's relationship with training institutions and labour organizations to get these training programs up and running quickly.

This too is an important time to deal with preferential procurement and hiring. First Nations seeking to maximize employment and business opportunities for their members would want to ensure that these opportunities are being made available during each phase of the project, from exploration to completion.

Types of Non-Monetary Benefits

PREFERENTIAL HIRING

First Nations members are given the first opportunity to apply for jobs for which they are qualified, or can be trained to become qualified. In an IBA context, this section should include an Aboriginal hiring policy setting out how the proponent will recruit, hire and train First Nations members. Specific hiring targets may be included, and there should be clear lines of responsibility for implementation. This section can set out programs to assist First Nations members in getting the jobs, or if they did not get the jobs, understanding why and how to improve their chances the next time. There can also be programs aimed at helping the First Nations members to succeed in the jobs once they have got them. The hiring preferences should apply to all the sub-contractors as well as the proponent.

Some ways to help effect a preferential hiring system would include requiring the following information from the company and/or the First Nation, as applicable⁴:

- Job opportunities at the project;
- A pool of potential Aboriginal employees and their skills;
- A list of training programs to be developed in connection with the project (that would be up and running before the labour needs related to the project arises);
- Apprenticeship programs that would be available at the project;
- Mechanisms for recruitment, such as public notices, radio announcements, etc.;
- Specific targets, e.g. specific numbers of people from the community that need to be hired, a percentage of entire workforce;
- Compliance provisions with respect to the company meeting employment targets set out in the IBA, e.g. if the company fails to meet a target, then an amount of money would need to be allocated to a training fund; and
- Costs and funding of implementing a preferential hiring system.

Note, any information about a company's labour needs should be provided well before the need arises, and a First Nation may want to require the company to continue to do so on an annual basis.

Parties should be aware of possible conflicts with unions and the seniority provisions of collective agreements, and/or human rights legislation. Effecting a preferential hiring program may require special government approvals or further negotiations with other stakeholders.

PREFERENTIAL PROCUREMENT

Procurement is the purchase, by the proponent, of goods and services with which to build and run the project. On any major project, the procurement budget will be massive: millions or

⁴ G. Gibson & C. O'Faircheallagh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements*, (Walter & Duncan Gordon Foundation, March 2010) [IBA Toolkit] at p. 144-148.

hundreds of millions of dollars. The proponent may sub-contract out huge portions of the work, such as building the project, building staff housing, maintenance, staffing the project, catering, transportation, providing security for the worksite, handling communications, providing office and other equipment, etc. The businesses that successfully bid for these contracts can make substantial profits. Thus preferential procurement clauses are a source of enormous opportunity for businesspeople and community-owned businesses in aboriginal communities.

In order to make it possible for First Nations businesses to bid on these contracts, the proponent may commit to keep the contracts reasonably small, rather than bundling them all into such a large package that only major companies can bid for them. One strategy that has proven very successful in practice is to allow First Nations to set up joint ventures with other companies, and allow that joint venture to bid, with preferential treatment, on the contract. To the extent that the First Nation business lacks expertise, the joint venture partner can provide it. In turn, the First Nation offers the joint venture partner an advantage in the bidding process, thanks to the IBA provisions. This set-up creates significant incentives for both First Nations businesspeople and non-First Nations businesspeople to co-operate in business ventures.

The preferential procurement provisions should specify the following:

- How advance notice of contracts will be given;
- How businesses from the First Nation can qualify themselves for the preferential treatment, and the parties may want to develop a list of First Nation businesses to be maintained, updated and provided to the company;
- Require the proponent to select the First Nations qualified bidder that provides a bid that complies with the bid criteria;
- Require the proponent to debrief unsuccessful bidders from the First Nation;
- Whether there will be a loan fund created under the IBA and available to businesses from the First Nation to obtain start-up costs⁵; and
- Provisions that, failing the identification of a business from the First Nation, require successful contractors to comply with employment commitments between the company and the First Nation.⁶

EDUCATION AND TRAINING PROGRAMS

As discussed above, early implementation of training programs is essential to ensuring that First Nations members benefit from the preferential hiring provisions in the IBA. While the proponent may want to focus the education and training efforts towards creating a workforce for its project, the First Nation should try to negotiate some independence and flexibility, and make these programs part of the community's long-term plan for education and skills training. The First Nation may take responsibility for creating and updating a list of available workers and skills. Programs can focus on a range of skills, from technical (electrician, mechanic, etc.) to professional (legal, accounting, engineering, etc.). Such education and training programs can take a variety of forms:

⁵ IBA Toolkit, at p. 156.

⁶ IBA Toolkit, at p. 156.

- On-the-job training;
- Apprenticeships;
- Wage supplements;
- Summer jobs for students;
- Scholarships; and
- Cross-cultural facilitation, such as training First Nations members to act as translators and mediators etc.

ENVIRONMENTAL PROTECTION, MITIGATION MEASURES AND MONITORING

Protection of the land is often the First Nation's primary concern. As the IBA negotiations progress, the First Nation should have access to all the information available on environmental impacts, and in some cases will want to commission its own studies. The First Nation may also have opportunities to participate extensively in any regulatory environmental impact assessment process.

Environmental information is generated at all stages of the project. It is important that the First Nation have the capacity to participate in the research used to generate environmental information, and to effectively make decisions about it. This way, the community and negotiating team can plan for appropriate environmental protection measures, and identify specific measures to prevent or mitigate any harm that will occur.

The environmental provisions of the IBA should clearly differentiate the different stages of the project from construction through to closure, and specific measures and programs should be identified for each stage. It is important to note that 'environment' is not just physical infrastructure or issues like water quality and wildlife – it also concerns the social and cultural conditions of communities.

In many IBAs, a committee is established between the proponent and the First Nation to review environmental information as it is generated, to consider whether mitigation and any follow-up programs are effectively working to deal with environmental issues and to make recommendations or set out requirements for improvements. It is important to ensure that the community has a voice in the environmental management of the project, and that effective measures for resolving any disputes are clearly set out.

IBA provisions with respect to environmental protection could include the following:

- A fund for environmental mitigation to be used by the community, or a joint environmental committee, to identify and address issues or impacts that may arise through the indirect or cumulative effects of the project;
- Access to company monitoring locations on project lands, and any other access provisions that will ensure that the First Nation can obtain and provide unfiltered information to the membership about environmental conditions, both on the site and in neighbouring areas that may be affected by project operation;
- Provision for independent environmental audits at regular intervals, and inclusion of traditional knowledge in such audits and any follow-up studies⁷;

⁷ IBA Toolkit, at p. 161

- Clear plans for project closure and adequate financial security to ensure that closure is actually carried out (e.g. performance bonds or reclamation bonds may be required from proponents as a precaution against the proponent becoming bankrupt or being unwilling or unable to carry out reclamation); and
- Mitigation measures, such habitat compensation and enhancement initiatives, protection of cultural heritage and important sites, etc.⁸

WORKING CONDITIONS, SOCIAL OR CULTURAL SUPPORT

First Nations members may have differing needs when it comes to working conditions, as compared to non-First Nations employees. The First Nation can negotiate for terms and conditions that cater to those differing needs, and may also seek to include provisions for other forms of social or cultural support of the community as a whole. IBA provisions might include:

- Long-term leave for hunting or trapping seasons;
- Traditional foods to be served at the worksite;
- Bans on non-First Nations persons hunting or trapping near the project;
- Guaranteed access for First Nations members to sites for hunting, trapping or other practices⁹;
- Requirements for on-site translation and interpretation, and for the provision of materials in Aboriginal languages;
- Cultural awareness programs for non-Aboriginal employees and managers;
- Employee assistance programs such as drug and alcohol rehabilitation to be tailored to meet the needs of First Nations workers (e.g. include access to elders instead of, or in addition to, counsellors);
- Transportation to and from the work site and the use of company facilities by community members; and
- Funding for various programs for cultural protection and advancement, or community strengthening initiatives such as the construction of a community centre or arena. This could include provisions for access and transfer of the company's infrastructure and facilities, such as roads, airports, water supply, employee health and training centres, etc.¹⁰

MONITORING AND IMPLEMENTATION

Agreements can be negotiated over the short term, but the initiatives they create last much longer. The real benefits to the First Nation arise in the implementation of the agreement: in the preference given in procurement and hiring, in the revenue streams, etc. So it is essential to include sections dealing with how performance under the IBA in general will be monitored and reported. Fulfillment of non-monetary benefits, in particular, may require additional attention because they will often also include a qualitative assessment of how well things are being implemented. As such, the parties should negotiate some form of implementation committee to anticipate problem areas, resolve issues at early stages, and to monitor the implementation of all aspects of the IBA.

⁸ IBA Toolkit, at p. 162

⁹ IBA Toolkit, at p. 133.

¹⁰ IBA Toolkit, at p. 159