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Impact and Benefit Agreements: Tools for Sustainable Development?

by Kevin O'Reilly

In this issue of Northern Perspectives we examine impact and benefit agreements (IBAs) and their implications for Aboriginal peoples, mineral development, and sustainability.

IBAs are small but powerful arrangements between Aboriginal communities and developers that have been used increasingly to achieve greater self-determination. Manifestations of the struggle to achieve balance between local and outside interests, they generally contribute to lasting local benefits, greater diversification of local economies, and better prospects for sustainability while minimizing negative impacts of resource development. In some cases, signed land-rights agreements require negotiation of IBAs. In the absence of such agreements, the capacity of a community to bring the developer to the table and the goodwill of the developer will affect the quality of the IBA.

For three decades, with concerns rooted in notions of equity and sustainability, CARC has supported northerners in their struggle to achieve greater self-determination through land-rights settlements, Aboriginal self-government, and constitutional development. We became involved in IBAs when representatives of Aboriginal peoples from across northern Canada came to Ottawa in April 1996 to share their experiences with mining issues at a workshop component of CARC's Northern Minerals Programme. IBAs were one of the major themes to emerge from that session, and participants expressed their desire for another forum in which to discuss the topic further.

CARC asked Janet Keeping of the Canadian Institute of Resources Law in Calgary to prepare a background report comparing several IBAs. It was included in an extensive advance resource kit sent to participants at an IBA-specific workshop held at Yellowknife in May 1998. The participants asked CARC to summarize the discussions at that workshop for broader distribution through this special issue of Northern Perspectives.

The workshop raised several important issues:

Confidentiality and non-disclosure requirements often imposed by developers tie the hands of Aboriginal organizations

The uncertain relationship of IBAs to public regulatory processes

Enforcement of IBA provisions

The need for a legal or constitutional basis to ensure that IBAs are part of the normal regulation of larger projects

Research needs

We asked Janet Keeping also to write on the legal and constitutional basis for IBAs in the Northwest Territories. Janet's overview reveals startling inconsistencies in the degree to which Aboriginal peoples benefit from developments that depend on the type of mineral resource extraction (hydrocarbons versus base and precious metals, or diamonds) and whether Aboriginal land rights have been settled. It is clearly not in the public interest to continue a regime that allows communities to become pitted against each other and that results in uncertainty and lack of clarity for industry.

Ciaran O'Faircheallaigh, a Professor at Griffith University in Brisbane, Australia, contributes a concise review of Australian Aboriginal experience with IBAs for this issue of Northern Perspectives. As in Canada, there is a large variation in Australia in the complexity of IBAs, the capacity of communities to negotiate agreements, and the willingness of developers to "share the wealth." Several mining companies-e.g., Rio Tinto and Broken Hill Proprietary (BHP)- operate in both Australia and Canada. Much of the Aboriginal effort in Australia is in defining the context for IBAs, as is the case in Canada. Finally, more generous agreements-perhaps because of some initial strong judicial decisions in favour of Aboriginal rights-seem to have been negotiated in Australia than in Canada.

IBAs continue to generate controversy despite a trend towards their increasing acceptance as the industry norm and notwithstanding that they have become a legal requirement in many areas where land claims have been settled. The Labrador Inuit Association and the Innu Nation are challenging the federal government's rejection of a Voisey's Bay Panel recommendation that there should be signed IBAs before the project proceeds. At the time of writing, Diavik had not begun to seriously negotiate IBAs with at least five Aboriginal governments although it pressed ahead for government approval for Canada's second diamond mine. Will the new Minister of Indian Affairs and Northern Development require "signed agreements" before Diavik proceeds, or will the result mirror the abysmal process applied to BHP's Ekati diamond mine, where "significant progress" was necessary in an extremely tight timeframe with limited capacity and access to resources for Aboriginal governments expected to negotiate several arrangements all at the same time?

IBAs fly in the face of global trends such as free trade, the free flow of capital, and less regulation. Governments in Canada have been reluctant to support IBAs' role as tools for sustainability, especially where Aboriginal communities are without land-rights agreements. What then is the proper role of government in relation to IBAs? What is the proper relationship between public regulatory systems and privately negotiated IBAs?

This issue of Northern Perspectives ties together some important work and creative thinking on IBAs carried out over the last few years. The last issue highlighted a need to reform mining law in Canada to protect the environment and human health and to ensure that those communities most affected retain benefits. Land-rights agreements are most effective and provide the most appropriate place to balance the needs of Aboriginal peoples and public institutions, but in their absence a level playing field is essential for effective IBAs. Government needs to support communities in their efforts to negotiate with developers. Financial assistance, reform of mining law to require benefits agreements (as is already the case for hydrocarbon developments), and disallowance of confidentiality or non-disclosure requirements should be considered. Industry will benefit through better working relationships with northern communities, a commitment made under the Whitehorse Mining Initiative. Together, these efforts will contribute to diversified local economies for northern communities and more sustainable economic development.

Aboriginal Peoples and Impact and Benefit Agreement: Summary of the Report of a National Workshop

by Kevin O'Reilly and Erin Eacott

The Aboriginal Peoples' Impact and Benefit Agreement (IBA) Workshop, held in Yellowknife in May 1998, attracted more than 35 participants representing 18 Aboriginal organizations from across northern Canada. Chief Fred Sangris of the Yellowknives Dene First Nation and Barney Masuzumi, Research Director of the Dene Cultural Institute, co-chaired the workshop, a component of CARC's Northern Minerals Programme.

Impact and benefit agreements are intended to ensure that Aboriginal peoples benefit from mining projects and are compensated for the negative impacts of mines on their communities, their land, and their traditional way of life.

Originally negotiated between the government and mining companies, IBAs focused on training and employment in the project. More recently, Aboriginal communities and mining companies have negotiated IBAs to include revenue sharing, environmental provisions, reclamation procedures, cross-cultural training, and dispute resolution.

Aboriginal organizations' experience with IBAs ranges from those having negotiated numerous agreements to those anticipating or seeking their first negotiations. Aboriginal organizations have often negotiated in isolation from one another with few opportunities to share experiences and discuss issues. Confidentiality provisions in most agreements are a barrier to greater understanding of IBAs and their effectiveness. With no consistent definitions for IBAs, no record or catalogue of those that have been negotiated in Canada, and little published information on their implementation, CARC planned the workshop to provide a forum to share the experiences available throughout the North.

Cases: Negotiations and Implementation of IBAs

Kitikmeot Inuit Association: the Ulu Project with Echo Bay Mines Ltd. The Ulu project is a proposed underground gold mine with 1.5 million tonnes of reserves at 0.374 troy ounces of gold per tonne. As a satellite operation, it is proposed to truck its ore over a 100-km winter road to the Lupin gold mine in central N.W.T.

By 1996, the Lupin gold mine, which opened in 1982 and employs about 45-50 Kitikmeot Inuit, was no longer extracting sufficient gold to be cost effective. The Ulu project would extend Lupin's life by 6 to 7 years, so the Ulu IBA, signed in September 1996, was important for jobs at Lupin. Lupin had not required an IBA because it is located outside Kitikmeot Inuit land and began production before the Nunuvat Land Claim Agreement; Ulu required an IBA because it is located on Inuit-owned land.

Echo Bay Mines had a good working relationship with the Kitikmeot Inuit Association (KIA) and needed Inuit cooperation to move forward with Ulu. KIA encouraged Echo Bay to speak with and consult the smaller communities. Representatives from KIA and from the affected communities, an advisor, technical experts, and, where needed, lawyers have been involved in negotiations.

Some highlights of the IBA:

creation of Inuit business and industry;

development of an Inuit content formula for contracts;

financial assistance and advance payments from Echo Bay for small businesses;

social and educational Programme assistance from Echo Bay; and

establishment of an implementation panel.

This first IBA negotiated under the Nunavut Agreement established some important principles for future negotiations:

Major developments on Inuit-owned lands would add "value" to affected community/regional economies.

IBAs would be considered a strategic and long-term economic development tool to help build corporate capacity for Inuit.

IBAs should be considered an instrument for fostering goodwill and should provide the foundation for Inuit and developers to "work together" from project inception, through production, and finally to abandonment.

An "Inuit content" factor in considering and evaluating tenders for mine services meant there would be a strong incentive for all potential contractors to maximize Inuit participation.

There have been no implementation issues with the Ulu IBA because Lupin was temporarily closed in April 1998 because of low gold prices. [Editors' note: Reopening is scheduled for mid-2000.]

Makivik Corporation: the Raglan Agreement with Falconbridge The Raglan Agreement covers an underground nickel/copper mine with 17 million tonnes of reserves in northern Quebec. Concentrate from the mine is shipped to Sudbury for smelting and on to Norway for refining. The mine opened in February 1998 and is currently in full operation, employing approximately 300 workers. It has an anticipated life of 15 to 20 years.

The James Bay and Northern Quebec Agreement does not require negotiation of IBAs and the project is not on Inui owned lands. Falconbridge needed the shore for shipping and was concerned that an Inuit offshore claim recognized by the federal government could affect the project. A Memorandum of Understanding outlining a set of principles on the environment, employment, training, and compensation formed the basis for negotiations for an IBA. Makivik sought social and economic benefits, including participation of Inuit in the mining project.

Some highlights of the IBA:

Inuit would receive $14 million plus 4.5% of mine profits, estimated at $60 million over 15 years

Detailed project descriptions to trigger re-negotiation if the project deviated from original specifications

An implementation committee of three Falconbridge representatives and three Inuit. Makivik also got agreement to have a representative appointed to the mine's Board of Directors

A joint committee to oversee training programmes.

Inuit enterprises, such as Inuit Air, are given preference for contracts and Inuit communities or individuals have entered into joint ventures with companies to seek contracts with the mine

With both pros and cons to employment quotas, Makivik believes goodwill on the part of the company is probably the best guarantee of fair treatment. Raglan does not set a quota for Inuit employment; there has never been more than 20% Inuit employees.

There are some implementation problems. Makivik has conducted both environmental and social studies on mine impact. A water quality study found nickel concentrations of 68 parts/billion, a level exceeding the Quebec standard of 25 parts/billion. Social impacts include a high rate of turnover of Inuit employees-70% compared with 15% among non-Inuit employees-and the fact that Falconbridge is not hiring older Inuit.

The Prince Albert Grand Council: the Athabasca

Economic Development and Training Corporation

Several underground uranium mines are either in operation or proposed for northern Saskatchewan. Uranium mining has taken place since the 1940s and accelerated in the early 1980s.

Saskatchewan requires mining companies to enter into a Surface Lease Agreement and a Human Resource Development Agreement to ensure local and regional benefits. The Multi-Party Training Plan, involving the provincial and federal governments, Aboriginal organizations, and mining companies, is aimed at providing and supporting employment, training, and economic initiatives for northern Saskatchewan inhabitants. The Northern Labour Market Committee (NLMC), jointly chaired by the Prince Albert Grand Council, Northlands College, and the Provincial Government Of lice of Northern Affairs, oversees the plan as well as the Northern Apprenticeship Committee and the Athabasca Economic Development and Training Corporation. Local employment in the mining industry grew from nine in 1992 to 276 by September 1997.

The Athabasca Economic Development and Training Corporation, 75% ($45,000) funded by the Saskatchewan government, represents seven communities, three of which are First Nations. It facilitates and co-ordinates economic and training activities that support:

increased job and business creation;

economic development sensitive to local priorities;

partnerships to improve the delivery of programmer from government;

an improved environment for business and economic development;

diversification of the Athabasca economy; and

building and expanding the human resource capacities of the local people.

The corporation is looking beyond the mineral industry, analyzing each community for economic diversification potential. The goal is to match the communities' best attributes with appropriate projects and services.

Little Salmon/Carmacks First Nation: the Mount Nansen Mine with BYG Natural Resources

Mount Nansen, in central Yukon, is an underground gold/silver mine most recently put into production in early 1997. Its relatively small production, along with that of several other properties in the vicinity, is milled onsite. There are also proposals for a coal mine, a copper project, and lime production in the area. [Editors' note: Since the workshop took place, the mine was shut down and abandoned.]

The Little Salmon/Carmacks First Nation has a membership of 600, 170 of whom reside in Carmacks. Since 1997 it has legally managed and governed 1003 square kilometres, with Aboriginal title to the surface and sub-surface, including minerals, of 60% of this land. It has Aboriginal title to the surface of the remaining land with mineral rights vested in the Crown.

In anticipation of a resurgence in mining activity, the First Nation entered a joint initiative with Yukon College to give its people mining skills. When BYG Natural Resources arrived, the citizens had acquired the skills. Prior to a land-claim settlement, BYG chose to sign a basic socio-economic agreement in part because it was financially beneficial for the company to hire locally. The First Nation's constitution-and later its land-claim agreement-states that ownership of the land is vested in the people and because the agreement had been signed only by the chiefs and council, it was not legally binding. A re-negotiated agreement was not ratified because few people understood the agreement, mineral access demands by the company were seen as too high, and citizens had concerns about environmental conditions at the mine.

The company works with the community in employment, training, and community projects. Thirty of approximately 75 people employed onsite are from Little Salmon/Carmacks First Nation, about 10 are employed with subcontractors onsite, and three are being trained in an assay lab. Because of the high percentage of local employees, there are few of the common social issues that occur when large numbers of nonresidents move into the area to work. A satellite Internet system with training in its use, a literacy pilot project, and training for enhanced comprehension and problem solving are supported by the company and other participants. The literacy pilot project helps employees' environmental vigilance by explaining such mining practices as putting chemicals in the tailings pond. The problem-solving aspect of the pilot project is built on "Aboriginal" values.

The First Nation is careful to avoid compromising its governance powers or ability to properly monitor its lands. Its Lands and Resources Department was established with an enforcement and monitoring role and works with federal and territorial agencies. Although the mine is on Crown land, it has a comprehensive training Programme on water quality and mine operations for its staff and is monitoring discharges into a creek that flows through settlement land.

The Lands and Resources Department is legislating land and water use on settlement lands and, in co-operation with the Na-cho Ny'ak Dun First Nation and Selkirk First Nation, is developing a land-use plan for 140,000 square miles (362,600 km) of traditional territory. The Umbrella Final Agreement that applies to all Yukon communities outlines the processes for land-use planning and environmental assessment and sets regulatory and environmental standards that are no less-

and possibly more-stringent than required by general Canadian law. Although similar, the land-management processes differ from community to community to achieve greater community contribution.

Labrador Inuit Association: the Voisey's Bay Project with INCO Voisey's Bay incorporates open-pit and underground mining operations, an airstrip, and roads, with the potential to produce nickel, copper, and cobalt for 25 years. Its 150 million tonnes of ore are to be milled onsite and then shipped by ocean vessels for smelting and refining. It is proposed for an area with no previous major development; an environmental assessment was completed in mid-l999. [Editors' note: The project is now shelved indefinitely.]

The developer, INCO, has agreed to negotiate IBAs with both the Labrador Inuit Association (LIA) and the Innu Nation. There has been progress in education and training, employment, business opportunities, and social and cultural protection. The IBA is likely to address environmental impacts, compensation, and liability provisions, though the company is reluctant regarding the latter. The agreement will not have a specific Inuit employment quota, but will attempt to maximize opportunities. The expected employment level when the mine begins is 420 and this number will probably triple with the underground phase. Currently there are 900 Labrador Inuit interested in working at the mine; most have skills for the surface activities, but few have skills for the underground work. A multi-party training agreement was signed but, in the absence of funding commitments, has not been fully implemented. Joint ventures with Inuit and the company have been successful during the exploration stage.

LIA wants a land-claim agreement and IBA before the project goes ahead. A Memorandum of Understanding for the environmental assessment of the project was negotiated a year ago between Newfoundland, LIA, Innu Nation, and the federal government. INCO has continued drilling exploration; however, a court order prevents it from building roads until the environmental assessment is finished. The company's environmental impact statement was found inadequate by the panel, but Inco has now addressed the inadequacies.

Innu and Labrador Inuit have worked out the principles of an overlap agreement. Because each is involved in numerous large projects-both are negotiating separate IBAs and land-claims agreements and the Innu are in the midst of hydro

development proposals and are trying to build a new community-bringing the agreement to signing is not a priority.

Cree Nation of Mistissini: the Troilus mine with INMET

The Troilus open-pit gold/copper mine west of Mistissini in east central Quebec began production in late 1996. With 46 million tonnes of reserves at 1.2 grams gold and 1.4 grams silver per tonne, the mine is expected to last 15 years producing 10,000 tonnes of ore per day.

In 25 individual mining operations in the James Bay territory in northwest Quebec over the past 30 years, there is essentially no history of Aboriginal employment. In 1994, the Mistissini Cree Nation successfully entered an employment agreement with INMET. INMET agreed to negotiate job descriptions and provided a list of potential contracts, allowing the Cree to plan their own private-sector development. The agreement includes provisions for training, a compensation package for families whose livelihood (i.e., trapping) is affected by the project, and participation of Cree in environmental monitoring. A cultural awareness Programme minimizes communication problems. The turnover rate for Cree is similar to that of other employees. There are 75 Cree employees onsite and 25 on mine-related contract work.

The James Bay Agreement resulted from litigation about hydro-electric development in northern Quebec. While it does not provide for participation in mining, it does have an environmental and social impact assessment process and a provision for protection of wildlife. Cree authorities have used this process to demonstrate their interest in resource development. The Quebec government has told companies that they do not need to enter into agreements and has advised them to be cautious in their dealings with Aboriginal peoples to avoid setting a precedent for the mining industry in general.

Discussion Group Summaries

Revenue Sharing

Differences in resources and forms of governance among Aboriginal communities need to be recognized in IBAs and when negotiating applicable fees or royalties.

For Aboriginal governments without mineral rights, land-claims or self-government agreements may provide for revenue sharing. A few Sabtu community land-holding corporations have successfully negotiated royalty provisions in surface access agreements. Under the Nunavut Agreement, Nunavut Tunngavik Inc. (NTI) retains mineral rights, while surface access is granted through the Regional Inuit Associations (RIAs). Both receive fees and royalties. On Crown lands in Nunavut, NTI receives 50% of the first $2 million royalties, and 5% thereafter.

Yukon First Nations have similar agreements for royalties on Crown lands. There is also an accord among all Yukon First Nations to share mineral, oil, and gas resources and royalties; where a project occurs on one First Nation's lands, a formula distributes some financial benefit to all First Nations.

Crown mineral royalties have remained relatively unchanged since the 19th century and are now being revised.

Precedence of rules may become an issue when mineral deposits are near a boundary between Crown and Aboriginal lands. Differences in regimes-such as taxation-may also give rise to competitive advantage in attracting mineral exploration. Royalties on Inuit-owned lands are tax-deductible for companies whereas royalties on Crown land are not. As well, royalties paid to First Nations are not taxable if used for community benefit.

Saskatchewan First Nations want royalties and fees from two known uranium deposits and other deposits that may be developed in future.

In Waswanipi (Cree)territory in Quebec, mining is in decline, with few opportunities to negotiate revenues. In Mistissini territory, the mining industry will not negotiate revenues. Forestry is the predominant resource in both territories and Cree have received compensation benefits from forestry impacts.

Joint ventures and training with mining companies, governments, or educational institutions can help build local mining capacity; revenues could be provided through preferential contracting or equity in resource development companies.

Creating a sustainable community, providing direct community benefits, investing to generate interest revenues for community projects, and supporting traditional skills and lifestyles are among objectives for Aboriginal management of mining revenues. Communities may make a distinction between individual compensation/benefits and collective compensation/benefits. An Aboriginal development corporation or a trust fund could allow community organizations to access the money or a heritage fund concept might provide for compensation and diversification.

Confidentiality and Non-disclosure

Confidentiality and non-disclosure occur during negotiations and after signing an agreement. Community members need all the information for effective input and for consent where required. Aboriginal organizations also need to be able to use information from IBAs when involved in other negotiations, such as for land claims. New guidelines for post-agreement disclosure are needed.

When more than one Aboriginal organization negotiates with the same company in the absence of overlap agreements, confidentiality tends to benefit the company. In the interests of fairer, more equitable agreements Aboriginal groups should be allowed to work together before and during negotiations.

Confidentiality often limits objections to licences, permits, company policies, and related matters and may not ensure appropriate environmental monitoring and approvals.

Access to corporate financial records and independent analyses or direct involvement in the management of the mine can help inform Aboriginal organizations for negotiations and ensure that obligations in the agreement are being met.

IBAs and Environmental Assessment

The relationship between IBAs and environmental assessment is not clear.

Where land-claims agreements exist, IBAs rely heavily on their objectives and on community consultation, and usually address environmental impacts. Because the recognition of impacts varies among land-claims agreements, a more comprehensive system would require developers to consult the appropriate Aboriginal government(s).

Where no agreement exists, there is no legal requirement for IBAs, and the relationship between the environmental regulatory process and IBAs is even less defined. Greater effort may be required by non-claimant groups to ensure environmental concerns are addressed when negotiating IBAs.

Many IBAs do not specify Aboriginal people be involved in environmental monitoring and review. The BHP environmental assessment process created the Independent Environmental Monitoring Agency (IEMA)-independent of both government and Aboriginal peoples. Now, Lutsel K'e First Nation realizes that IEMA does not make adequate use of traditional ecological knowledge (TEK). The Labrador Inuit Association hopes to develop a similar model to the IEMA, but will want to add a mechanism to expressly include TEK.

Aboriginal people believe environmental monitoring must include TEK.

Because exploration often damages lands beyond the company's area of interest, Aboriginal organizations should become involved in environmental assessment at an early stage. Exploration permits should specify abandonment and clean-up procedures. In Labrador, companies must complete an archaeological assessment before work begins and must clean up after exploration.

Consultation usually improves when an IBA is signed before conducting an environmental assessment. Information in IBAs and environmental assessments is often mutually reinforcing.

Aboriginal organizations need improved capacity to assess resource development projects. Corporations need to see Aboriginal assessment and participation in the public environmental assessment as a "cost of doing business." Government may have a responsibility to ensure that Aboriginal people have the necessary resources to negotiate environmental concerns in IBAs.

Enforcement mechanisms for environmental assessment, monitoring, and reclamation should be included in IBAs.

Under proposed new federal Metal Mining Liquid Effluent Regulations, each mine in Canada will be required to establish a procedure to detect and report ecological effects and will have to make reasonable efforts to involve stakeholders in their monitoring programmer.

Enforcement and Implementation

A few basic principles for successful negotiation and implementation of IBAs have been observed:

- The Aboriginal community must be united by a common purpose.

- Both parties must want to commit to a meaningful agreement.

- Mutual respect, dignity, and trust characterize a good relationship.

Clear ground rules covering all aspects of development, including reclamation, will contribute to greater equality of IBAs.

IBAs should provide for periodic evaluation of performance and need mechanisms for adaptation during implementation.

Responsibilities of senior government often overlap with the objectives of IBAs; certain activities, such as the collection of environmental data, would benefit from harmonizing bodies of law.

IBAs should define enforcement procedures. Dispute resolution should allow parties to resolve problems as they arise, avoiding non-compliance and penalties. The terminology used in IBAs for dispute resolution, penalties, and incentives is very important.

Incentives-often related to money-may hasten progress on implementing IBAs. Compensation adjustments related to shortfall in meeting agreed hiring targets can work both ways.

Aboriginal organizations must recognize the need for flexibility in setting targets. Mines are dependent on markets and government policies and IBAs need to allow for periodic adjustment of targets according to mine activity.

IBAs should use clear and simple language and public communications about them should involve all parties.

General Issues

Process

Aboriginal organizations need a way to access each other's experiences.

Government should stipulate the requirements for IBAs and should prohibit clauses-such as confidentiality-that force Aboriginal communities to waive their rights.

A role for government beyond setting a framework is controversial. Some feel the government should not be involved in actual negotiations between a company and an Aboriginal organization. Others believe the government has certain fiduciary responsibilities, especially where it has treaty relationships with Aboriginal groups.

All members of the community should be given the opportunity to vote on ratification of an IBA.

Employment and Labour

The Saskatchewan Multi-Party Training Plan set a 5-year goal that 50% of available jobs would be filled by Aboriginal people; they are now receiving appropriate training to meet the objective.

A government training Programme was implemented to certify Lutsel K'e First Nation people for work at the BHP mine.

LIA is considering filing for an affirmative action Programme under the Newfoundland human rights legislation in support of Labrador Inuit women interested in more employment, especially in nontraditional jobs.

Social Impact Monitoring

IBAs should address roles and responsibilities for social impact assessment.

A social impact assessment process outlined in the Yukon First Nations' Final Agreement is being drafted into legislation; IBAs will have to reflect this process.

Sustainability

Because mining is inherently unsustainable, Aboriginal communities need a diversified economic development strategy that might include negotiating IBAs and royalties in other resource sectors or investment in education and training.

Future Actions/Closing Recommendations

The final plenary session recommended that

a model IBA be developed for areas that do not have settled land claims;

a forum or committee be established to develop and maintain a bibliography of resources and contacts on IBAs and act as a clearinghouse for information sharing; and

several areas receive further research: Implications of the Delgamuukw decision on IBAs and royalties; contract law; mechanisms/conditions for successful implementation; restrictions on Aboriginal sovereignty; confidentiality issues; the role of government; the implications of international and multi-national trade agreements; and international comparisons.

The Legal and Constitutional Basis for Benefits Agreements: A Summary

by Janet Keeping

Introduction

When deciding whether, when, and how a particular mineral deposit should be developed, it is important to consider the impacts on local communities. People living in the vicinity of mineral developments often benefit little from mining projects-in fact, their communities often suffer. Fortunately, there is now significant widespread support for the principle that local communities should benefit from developments and be protected from-or at least compensated for-damage caused by them. Nowhere is this more important than in parts of the country where there are few other promising opportunities for economic development, for example, the N.W.T.

Legal Requirements for Benefits Agreements

General

In the body of law applicable in the N.W.T. there are provisions requiring the negotiation of agreements to ensure that local people benefit from mineral development. These requirements establish both industry and government obligations regarding local benefits. Law sets out only a minimum standard, however, and other factors influence the level of benefit that will be extended to the local community. For example, public perception can lead to a greater sharing of wealth with local people: When project economics are favourable, companies and governments can be convinced that local people should receive a greater share. An appreciation of the advantages to the company of using local labour, goods, and services can have the same result, as can simple decency.

Sources of Law on Benefits Agreements

Requirements that benefits agreements be negotiated with local people can be found in two areas of law applicable in the N.W.T.: in the statutes governing the development of minerals in the North and in the various agreements resulting from the settlement of land claims. As well, the land-management regimes put into place pursuant to land-claims agreements require the negotiation of benefits with local people.

Whether a benefits agreement is required in a particular instance depends on the project's land-claims settlement region and on whether the mineral is a hydrocarbon (oil or gas) or of the hard-rock variety. Although the land claims differ in approach, every settled claim has some provisions for local benefits from mineral development. The oil and gas legislation applicable in the North requires that benefits plans be agreed, but mining legislation does not.

Oil and Gas Legislation

Canada Petroleum Resources Act

The Canada Petroleum Resources Act regulates the disposition of rights to explore for and work Crown-owned oil and gas in the N.W.T. Although this statute does not impose benefits requirements, it refers to the Canada Oil and Gas Operations Act, which does include such a requirement:

No work or activity on any ... lands that are subject to an interest [granted pursuant to the Act] shall be commenced until the Minister has approved . .. a benefits plan ... pursuant to subsection 5.2(2) of the Canada Oil and Gas Operations Act [section 21].

Although there is no requirement in the Canada Petroleum Resources Act that benefits be negotiated, or even discussed, before the issuance of rights, the "Call for Bids" document issued by the Northern Oil and Gas Directorate of the Department of Indian Affairs and Northern Development (DIAND) serves notice that the bidder will have to comply with the "Northern Benefits Requirements." In the opinion of the directorate, the statement of principles in these requirements "constitutes an obligation which is contracted upon submission of a winning bid." But the wording of the requirements is so vague and the reluctance of government to void licences for failure to fulfil such commitments so great it is unlikely they have any practical import.

Canada Oil and Gas

Operations Act (COCOA)

Section 5.2 of the Canada Oil and Gas Operations Act repeats the prohibition on carrying out work before the approval of a benefits plan. The section defines "benefits plan" to mean

... a plan for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair opportunity to participate on a competitive basis in the supply of goods and services used in any proposed work or activity referred to in the benefits plan.

The section also addresses the matter of preferential treatment of certain categories of Canadians as follows:

The Minister may require that any benefits plan submitted ... include provisions to ensure that disadvantaged individuals or groups have access to training and employment opportunities and to enable such individuals or groups or corporations owned or cooperatives operated by them to participate in the supply of goods and services used in any proposed work or activity referred to in the benefits plan.

COGOA applies to all oil and gas operations in the N.W.T., not just to those exploiting Crown resources. But where Aboriginal peoples own the oil and gas, they will establish the terms and conditions under which others will be allowed to extract minerals. In such cases, there should be no need for a government-approved benefits plan to ensure that "disadvantaged individuals or groups" participate, and it seems likely that the minister would waive the requirement for submission of a benefits plan.

Canada Mining Regulations

Rights to explore for and produce hard-rock minerals in the N.W.T. are acquired pursuant to the terms of the Canada Mining Regulations. There is no imposition-or even mention-of a requirement that Canadians, northerners, or Aboriginal people benefit directly from mining activities authorized by the regulations. Nor is there any other explicit statutory or regulatory source for such a requirement.

Nevertheless, as a matter of political reality, any mining project of significant size is likely to be required to demonstrate that local benefits will flow from it. A settled land claim may impose such a requirement. Where there is no settled land

claim, other means may ensure benefits to the local community. For example, in connection with BHP's diamond mine, the federal government tied the issuance of a water licence under the Northwest Territories Water Act to the achievement of significant progress on the negotiation of benefits agreements.

Land-claims Agreements

The land claims settled in the N.W.T. have given beneficiaries title to some subsoil parcels and to greater amounts of surface lands. Where Aboriginal people own both the subsoil and the surface rights involved in a proposed mineral development, they may, within limits specified in the claim and generally applicable law, set the terms and conditions for the development, including the extent to which local communities benefit from it. An exception would be where mineral rights were granted by government before the signing of the claim. In this case, special provisions of the land claim will guide the actions of the rights holder. The Inuvialuit Final Agreement, for example, provides for such circumstances in the section on Participation Agreements.

As owner, the Aboriginal group may formulate rules and procedures to govern management of the lands. Through their Land Administration, the Inuvialuit have developed a detailed set of such rules and procedures, as have the Inuit. Although there has been less activity in the Gwich'in and Sahtu regions, these groups have developed some procedures to handle requests for the use of their lands for various purposes.

Since the Crown still owns the vast majority of minerals in the North, often only surface indigenous lands will be required for a development. Each of the claims addresses this state of affairs. The Inuvialuit Final Agreement requires that participation agreements be negotiated where the use of the surface is more than casual or temporary. The Nunavut claim requires the negotiation of Inuit impact and benefits agreements in conjunction with what are called "major development projects." The Inuvialuit and Nunavut agreements detail provisions on the content of participation and Inuit impact and benefits agreements, respectively.

The Gwich'in and Sahtu agreements rely upon the Canada Mining Regulations, which do not require benefits agreements for mining projects. These two agreements and the Nunavut claim require consultation in anticipation of mineral developments, and local benefits are among the matters considered suitable for consideration in such consultations.

The provisions of the various land-claims agreements are protected by s. 35 of the Constitution Act, 1982. They are therefore part of the "supreme law" of the country and override inconsistent laws. Each land-claim agreement is enacted by statute; each statute states the land-claims agreements are to prevail over conflicting laws.

Some Outstanding Questions

Aboriginal peoples' experience with mineral development has not engendered confidence that they will benefit from future developments. In April 1997, The Globe and Mail reported the views of local people about the mining developments at Voisey's Bay, Labrador, as follows:

There are deposits of nickel and copper and cobalt so massive that the find may prove to be the largest of its kind in the world. In a poor and barren land of rock and ice, there is now the rich promise of wealth and jobs.

Since the discovery of the mother lode at Emish, which is how the Innu have always pronounced Amos, the assumption elsewhere has been that happy days are here at last. Corporate giants far from northern Labrador traded the deposits at Emish back and forth for a staggering $4-5 billion.

But for the Innu people who have always regarded Voisey's Bay as their own backyard, all of this is something less than great news.

There may be jobs-but not as many as people predict. There may be money-but far, far less than people from far, far away are getting. What there will be for sure, they believe, is trouble-trouble for the people, trouble for their land and trouble for their way of life.

The legal requirements for benefits agreements show that some steps have been taken to try to improve upon the past, but grave deficiencies remain: There is no statutory requirement for local benefits from hard-rock mining projects; oil and gas legislation does not impose benefits requirements until after rights have been issued; benefits requirements vary from land claim to land claim in a way that is difficult to justify; law (on the fiduciary duty of the Crown) that might offer some protection to Aboriginal people living in areas where a claim has not yet been settled is vague and poorly understood and leaves them more vulnerable than those in an area where a claim has been finalized.

This list of deficiencies raises questions about the development of this body of law: Is this piecemeal approach yielding satisfactory results? Do the bilateral agreements between local people and industry produce fair arrangements that ensure appropriate benefits for local people? What is the proper role of government in this process? If bilateral agreements are to remain the primary tool for assurance of local benefits, should they be negotiated within a legislated framework that applies across the N.W.T. and to all developments of consequence?

It appears that the law could do more to ensure that mineral development brings substantial benefit to northern communities.

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An Australian Perspective on Impact and Benefit Agreements

by Ciaran O'Faircheallaigh

The Broader Judicial and Legislative Context

During the past few years both indigenous organizations and academic analysts in Australia have tended ~ to focus less on the details of individual impact and benefit agreements (IBAs) and more on the broader common law and legislative framework of native title rights within which IBAs are negotiated.

Until 1992 no judicial, legislative, or constitutional recognition of inherent indigenous rights had occurred in Australia. Thus indigenous Australians were able to achieve IBAs only where specific legislative enactments created a statutory right to negotiate or where individual mining companies determined that it was politically advisable to enter into such agreements. The result was enormous variation in the scope and content of IBAs, depending on the existence and the terms of relevant legislation and on the capacity of individual indigenous organizations to exploit the available opportunities. For example, agreements negotiated by the Northern Territory land councils under the Aboriginal Land Rights (Northern Territory) Act 1976 and by the Cape York Land Council under provisions of Queensland's Mineral Resources Act 1989 provided for substantial royalty payments, extensive employment, training, and business development initiatives, protection of cultural heritage, participation in environmental management, and, in some cases, equity participation. Elsewhere (e.g., Western Australia), the few IBAs negotiated provided for only modest contributions to community infrastructure.

In its 1992 Mabo judgment, Australia's High Court overturned earlier judicial rulings by determining that indigenous ownership of land, in the form of native title, survived the imposition of British rule in 1788. Native title would continue to survive unless extinguished by a valid and specific act of government or by virtue of the fact that indigenous landowners had been permanently separated from their land and ceased to practice traditional law and custom relating to it. The ruling related to a small island off Australia' s northern coast, but the judgment opened the way for indigenous

people in many parts of Australia to seek common law recognition of their rights in land. In 1993, in response to the Mabo judgment, the federal Labor government introduced the Native Title Act, which

provided for the exercise of a right to negotiate by native title holders in relation to certain future acts, including granting of mining leases. The practical impact of this legislation was greatly expanded in 1996 by a second High Court judgment (Wik), which determined that native title could survive the granting of pastoral leases, a form of tenure in place throughout much of Australia. It appeared that indigenous people were at last gaining a basis on which to negotiate substantive IBAs in many parts of the country.

Since Wik, however, a considerable political backlash has forced indigenous people to struggle to retain the gains made from 1992 to 1996. They received a substantial set back with the passage of the Native Title Amendment Act 1998, which substantially toughened the registration test for native title claimants and removed or diminished indigenous procedural rights in relation to areas such as renewal of mining leases, development of private mining infrastructure, and mineral exploration. The new act also conferred on state governments, traditionally enthusiastic supporters of large-scale resource development, the capacity to develop alternative regimes to the right-to-negotiate provisions of the Native Title Act 1993.

As the nature of the regimes implemented by state governments will greatly affect the capacity of indigenous people to negotiate substantive IBAs, indigenous organizations are now committing substantial effort and resources to try to ensure that the state regimes protect their remaining procedural rights. The outcome will have profound implications for the number and nature of IBAs negotiated in Australia in future years.

While these judicial and legislative developments have been under way, indigenous communities and organizations have, of course, continued to negotiate IBAs. The following sections briefly canvass some issues which, in my experience, have been particularly important and/or contentious in IBA negotiations.

Financial Provisions

Many contemporary IBAs in Australia include substantial ongoing cash payments to indigenous interests, a situation that appears to distinguish Australian IBAs from many of their Canadian counterparts. Aspects of financial provisions that attract considerable attention include the following:

The scale of cash payments. This varies considerably between state jurisdictions and between individual projects within jurisdictions. Critical factors in explaining variations are the specific legislative framework that applies in each case; the scale of the project and whether the agreement involves a "greenfields" development or represents a new arrangement being applied to an existing operation; and the technical and political resources available to the indigenous group concerned. During recent years some regional land councils have gradually built up substantial technical capacity and political skills that are clearly reflected in the scale of payments provided for in IBAs they negotiate.

The use to which cash payments should be put. This debate reflects a belief on the part of some commentators that, while royalty-type payments should be spent for the communal good, they have often been spent on individual consumption. Some recent IBAs have tied payments to specific communally based activities, such as provision of recreation facilities and development of communally owned business enterprises. Other indigenous groups have strongly resisted this trend, however, insisting that payments should come "without strings attached" so that the recipients can make their own decisions about the best way to use them.

The form in which payments occur. There are two aspects to this issue. The first involves whether payments are in the form of royalties, i.e., they move in line with the volume or value of output, or in the form of fixed annual payments that vary only in line with inflation. Some mining companies oppose royalty-type payments in principle, on the basis that only the Crown should have the right to charge royalties. Subsidiaries of the British-based multinational Rio Tinto, for

instance, will not negotiate royalty-type arrangements unless indigenous people can require them to do so under statute (which occurs only in the Northern Territory).

The second issue arises where royalties are paid and involves the type of royalty mechanism used. Traditionally, conventional, flat-rate royalties were calculated as a percentage of the value of mineral production or on the basis of so many cents or dollars per tonne. More recent IBAs have explored more complex and flexible approaches and reveal a growing capacity by indigenous people to devise tax regimes to suit specific circumstances. For instance, one Cape York IBA, relating to a new project strongly supported by the indigenous community and that included a processing facility, involved a modest, flat-rate royalty designed to help ensure the project's viability in its early years. However, the agreement also provided for a substantial royalty on the processed product (rather than the raw mineral) in later years, allowing the community to reap substantial benefits from each phase of the operation once it was established.

Indigenous Participation in Project Management

One of the most contentious issues in recent negotiations has been indigenous participation in project management. Indigenous people have increasingly taken the view that they will achieve their goals in environmental management, employment and training, and cultural heritage protection only with some degree of control over project management. They wish to play a real role in decision making, rather than being "consulted" or informed of decisions after they have been made. Many project developers have jealously guarded their traditional control over operational decisions, yet some have shown an increasing willingness to involve indigenous people in decisions specifically affecting their interests (such as cultural heritage and indigenous employment), while retaining full control over matters such as production levels and the timing of investment.

Negotiations on the issue have resulted in quite different outcomes depending on the attitudes of specific developers and the strength of indigenous negotiating positions. In some cases indigenous people have been able to achieve only more systematic and broadly based consultative mechanisms, with project operators maintaining control over decision making. At the other end of the spectrum, one Cape York IBA provides for a joint management committee, equal representation from the project operator and the indigenous community, that has decision-making (not advisory) powers in relation to issues of central concern to indigenous people. Another Cape York IBA identifies three broad categories of decisions:

Those that are clearly commercial in nature, over which the operator has complete control

Those of specific interest to indigenous people, where a joint management group has full responsibility

Those that are of key concern to indigenous people and also involve wider legal and commercial implications for the project operator, where the joint management group has a strong advisory and policy development role but where the operator retains ultimate authority

Implementation and Enforcement

Indigenous people have always been aware that the signing of an IBA does not, in itself, guarantee the delivery of the benefits it envisages or the protections it offers. Particularly in employment and training and cultural heritage protection, effective systems need to be designed and maintained to ensure that relevant initiatives required to realize those benefits are implemented, monitored, evaluated, and adapted over extended periods of time.

It is now some 20 years since the "first generation" of IBAs was negotiated for mining projects in Australia, and a retrospective evaluation of their implementation shows results that are far from encouraging. An extensive audit of the 1978 Ranger uranium agreement found major failures in implementation, with both the developer and the relevant government authorities failing to deliver on a series of commitments in the agreement.

A number of initiatives are being adopted in IBAs to try to enhance the prospects for successful implementation. These include the following:

Creation of joint indigenous-developer management committees with specific authority on key implementation issues

Provision of resources to support implementation as part of the agreement

Attempts to make the terms of IBAs more specific and explicit to ensure that the nature of the parties' commitments are unambiguous

Negotiation of effective mechanisms allowing parties to seek redress for non-implementation and for settling any continuing disputes

More work is needed in this area. In particular, existing sanctions for non-implementation tend to be "all or nothing" in nature; e.g., legal action leading to the suspension or forfeiture of mine leases or termination of agreements. Because of the serious nature of such sanctions and the expense and uncertainty they usually involve, indigenous groups are often reluctant to pursue them, which seriously undermines their efficacy. Some alternative approaches are being explored. For instance, one draft IBA in negotiation contains a formula under which failure to fulfil employment and training commitments would require the developer to make additional payments into a community business development fund, and payments would rise exponentially for each year the commitments are unfulfilled. An escape clause allows penalty payments to be waived where the project operator can show that the failure to meet commitments resulted from factors beyond its control.

Future Developments

The foregoing matters are only some of the issues that concern indigenous people. Another major question involves the provision of funding to support negotiation of IBAs. Australian governments have generally been very reluctant to fund negotiations, despite the fact that the co-operative approach to resource development that IBAs can allow has major benefits for the state (for example, by minimizing delays to project timetables and so to commencement of government revenue streams). Other issues of concern include employment and training, business development opportunities, the activities of non-indigenous workers, and environmental and cultural heritage management regimes.

However, in the short term, the issue of most concern to indigenous Australians will continue to be the defence of their native title rights, because if they lose the battle on this front, their capacity to negotiate acceptable IBAs will be seriously diminished.

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