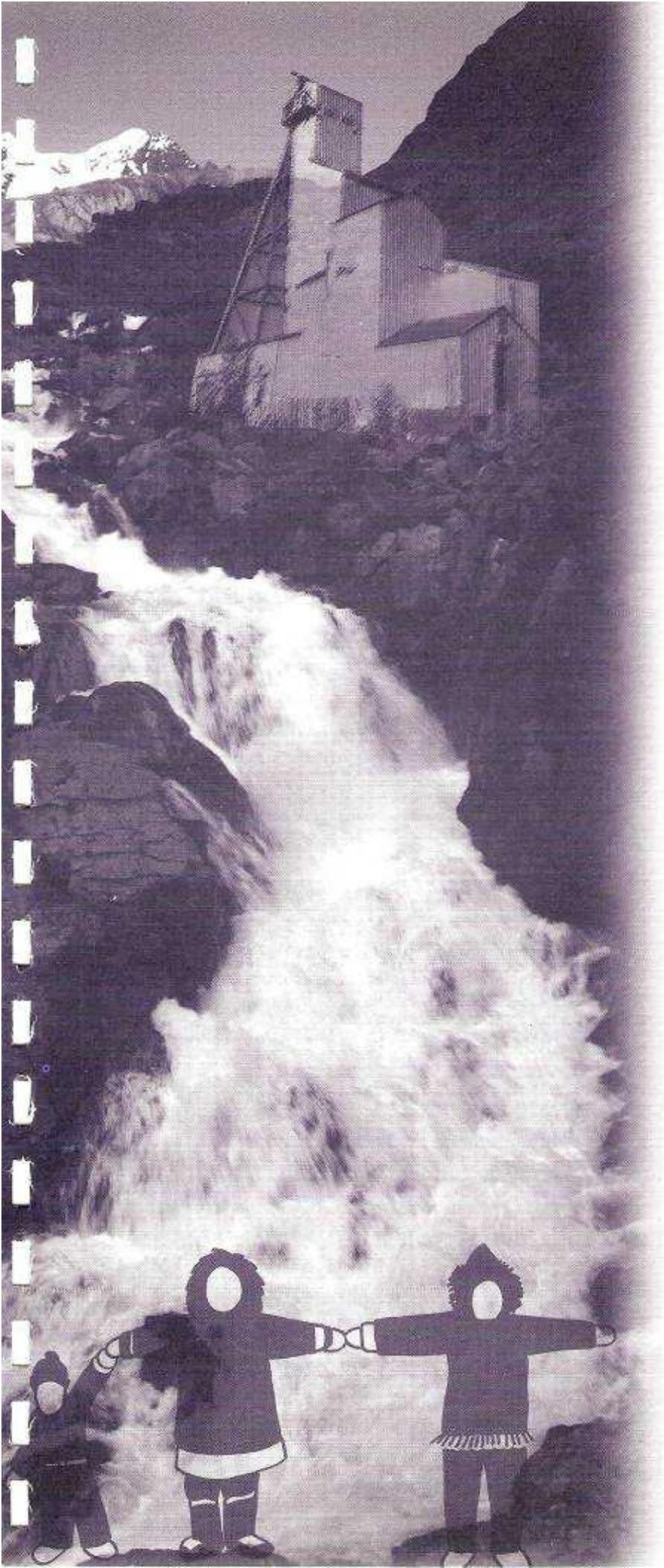

Thinking About Benefits Agreements: An Analytical Framework

Janet Keeping

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Thinking about benefits agreements: an analytical framework

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FOREWORD

The Canadian Arctic Resources Committee (CARC) embarked upon a research and advocacy initiative in 1995 known as the Northern Minerals Program (NMP). This series of Working Papers sets out the results of the research that was undertaken as part of this program. We are grateful to the following foundations for providing financial assistance in one form or another over the duration of the NMP.

The Audrey S. Hellyer Charitable Foundation
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CARC has examined mineral development across the North for many years. Most of this work focussed on environmental and socio-economic impacts and benefits, and conformity with law and policy. The NMP envisioned a more proactive approach to linking sustainability and mining across the North. In particular, the NMP has taken aim at the manner in which current policies, regulation and monitoring practices reflect the principles of sustainability. As well, CARC examined the challenges and opportunities that 'impact and benefits agreements' bring to Aboriginal governments.

The following is a list of the NMP Working Papers (an order form for these publications is found at the end of each paper).

1. "Mine Reclamation Planning in the Canadian North" by Brian Bowman and Doug Baker.
2. "Aboriginal Title and Free Entry Mining Regimes in Northern Canada" by Nigel Bankes and Cheryl Sharvit.
3. "Reforming the Mining Law of the Northwest Territories" by Barry Barton.
4. "Thinking About Benefits Agreements: An Analytical Framework" by Janet Keeping.
5. "A Guide to Community-Based Monitoring for Northern Communities" by Brenda Parlee.
6. "The Free Entry Mineral Allocation System in Canada's North: Economics and Alternatives" by Malcolm Taggart.
7. "Aboriginal Peoples and Impact and Benefit Agreements: Report of A National Workshop" by Kevin O'Reilly and Erin Eacott.

These papers are 'works in progress'; much of the research continues. While we believe that the findings offer important opportunities for reform, the views and opinions presented are those of the authors and do not necessarily reflect those of CARC.

CARC will continue to press for changes to mining practice and policy. The findings and recommendations in these papers will be used by CARC to build an agenda for major reforms to northern mining law, better environmental management of mineral development, and fairer relationships amongst northern communities, governments and the mineral industry.

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Thinking about benefits agreements: an analytical framework[1]

1.0 Introduction

The purpose of this paper is to provide a common background for participants in a workshop on benefits agreements in the Northwest Territories. The author of the paper suggests that, in order to put a benefits agreement into proper perspective, there are several, general questions that should be asked. They are:

1) What purpose is the agreement meant to serve?

2) How does the agreement fit within the applicable legal and regulatory framework?

3) Are the specific provisions of the agreement appropriate in the circumstances?

4) Could the agreement be enforced?

Five benefits agreements are examined in the paper. The discussion of each will focus on four aspects:

1) The nature and scale of the project with which the agreement is connected;

2) The legal or regulatory framework within which the agreement fits;

3) The contents of the agreement; and

4) How the agreement works, or has worked, in practice.

Following analysis of the individual agreements, the paper will briefly discuss some of the most significant issues that are common to them, for example, the question of whether the agreements are enforceable. The paper will conclude with some thoughts on the issues that may prove to be the most pressing for the negotiation of benefits agreements in the future. A comparative chart in the appendix of the paper is helpful as an indicator of potential contents of benefits agreements.

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[1]This paper has been prepared by Janet Keeping who is a Research Associate with the Canadian Institute of Resources Law at the University of Calgary.

2.0 What agreements are called

This paper discusses agreements whose role is to ensure that local communities benefit from resource development projects. They appear under a variety of labels: one is called a "Human Resource Development Agreement", two are simply called "Agreements", one is an "Inuit Impact and Benefits Agreement" and the fifth is a "Socioeconomic Agreement".

For legal purposes, it does not matter what a document is called. What is important is the terms of the agreement, that is, the various things that the parties have promised to do. However, it may be useful to say something about some of the names which are used to refer to benefits agreements.

"Socio-economic agreement"

The label "socio-economic" is most likely to be associated with older agreements, which used to be negotiated by industry and government, not by a company and a local community. For example, the agreement concerning the Nanisivik mine was between Mineral Resources International (MRI) and the federal government, although the agreement itself was called the "Master Agreement".

The term "socio-economic agreement" is still used. BHP's agreement with the Government of the NWT is called a "Socio-economic agreement", but so are the agreements which have been negotiated between BHP and some of the local communities, the model version of which is examined in this paper.

"Benefits agreement"

At least in conversation, the agreements that are discussed in this paper are often called simply "benefits agreements". This name leaves open the possibility that such an agreement may cover a whole range of benefits -- social, economic, environmental, cultural, and so on. "Benefits agreement" is the term used in this paper because it is more neutral than some of the others.

"Impact and benefits agreement"

A lot of current discussion of this topic uses the term "impact and benefits agreement". This seems to have grown out of the belief that the benefits a community should receive from a project and the expected impacts of the project on the community should be addressed in the same agreement. One reason for not using this label in this paper is that it is used in Article 26 of the Nunavut Land Claim Agreement which applies only to the negotiation of benefits agreements in Nunavut.

"Participation Agreement" and "Cooperation Agreement"

Similarly, there are two terms which are used in the Inuvialuit Final Agreement to describe benefits agreements negotiated under that land claim. A Participation Agreement is the basic benefits agreement required under the IFA. It is called a "Participation Agreement" because in addition to other benefits that may be included, this type of agreement may also include "equity participation or other similar types of participatory benefits". The other type of benefit agreement under the IFA is the "Cooperation Agreement" which is negotiated in circumstances where the Inuvialuit and the company in question are on sufficiently good terms that they can "voluntarily" reach agreement on benefits. Companies can be forced through arbitration to enter into participation agreements, but they cannot be compelled into cooperation agreements.

"Participation Agreements" are not unique to the IFA. For example, the sample documents included in the Canadian Aboriginal Minerals Association's materials on benefits agreements include reference to the possibility of participation agreements between companies and local communities.[2] Still, one does not seem often to run across participation

[2]See the Canadian Aboriginal Minerals Association's January 1996 publication entitled "Aboriginal Community and Mining Company Relations, Sample: Aboriginal Community Mining/Participation Policies; Memorandum of Understanding; Impact and Benefits Agreement".

agreements (other than under the IFA and these will not necessarily include equity participation) and this may be because there have not been very many projects in which local communities have been included as part-owner.

The term "Cooperation Agreement" is also used apart from arrangements involving the Inuvialuit. Diavik Diamonds has entered into agreements bearing this name with the Treaty 11 Dogrib Tribal Council and the North Slave Metis Alliance and hopes to conclude a similar agreement with Akaitcho Treaty 8. The purpose of these agreements is to financially support Aboriginal participation in the scoping and consultation phase of Diavik's project, which occurs before a description of the project is submitted for scrutiny under the Canadian Environmental Assessment Act.

It should be stressed that, even when a benefits agreement is negotiated with the beneficiaries of a settled land claim, the actual name of the agreement is irrelevant to its legal status. An agreement that is called something other than a benefits agreement, or participation agreement, or whatever, may still function as such. For example, as will be seen below, the Darnley Bay Agreement which was negotiated between the Inuvialuit and a mining company is called a "letter agreement" because it forms part of a letter. It has also been referred to in press releases as a joint-venture agreement, and also as a concession[3] agreement. But there is no question that, amongst other purposes, it also serves to assure benefits to the local community.

"Revenue-sharing agreement"

When a document is called a revenue-sharing agreement one would expect it to address primarily, and perhaps only, that one issue -- the division or sharing of revenues. Of course, any other kind of agreement could also include a revenue-sharing provision. But if revenue-sharing is only one of a package of local benefits, then it would likely be referred to as some other kind of agreement. This is the case, for example, with the Gwich'in and the Sahtu land claims agreements, which include sections dealing with "Resource Royalties", but of

[3]The Inuvialuit have chosen to grant rights to work their mineral resources through "concessions". This is an interesting choice of name because concessions are usually thought of as rights issued by governments.

course many other types of provisions as well. It is also true of recently negotiated agreements for access to Sahtu surface lands which include a 5% net profits interest for the Sahtu.

In conclusion here, it would seem useful only to emphasize that there is no legal significance in the name of an agreement. The names given to agreements can be more or less informative, convenient or fashionable. But other than that, they do not matter.

3.0 How benefits agreements have evolved

Early benefits agreements were negotiated between government and the company wanting to develop minerals. For example, the agreement regarding the Nanisivik mine, already mentioned. However, the legal position of Aboriginal Peoples has been strengthened by the settlement of land claims and the amendment of the Constitution in 1982 to "recognize and affirm" Aboriginal rights. As a result, increasingly Aboriginal communities are expected to protect their own interests through direct negotiations with resource development companies. Many communities welcome this change and the opportunity to articulate their own desires regarding benefits from development projects. On the other hand, there are reasons to wonder whether the interests of the local communities and the region can ever be fully protected without some kind of government involvement. And at least in connection with large-scale mineral development projects, such as the BHP diamond mine, we see a return to government-industry agreements, not to substitute for the community-company agreements but to supplement them.

The content of benefits agreements is also changing. Early agreements focussed almost exclusively on commitments to ensure employment and training. Now, a much broader range of matters is often included. These range from employment support programs, such as cross-cultural counselling and the hiring of Aboriginal employment coordinators, to revenue-sharing arrangements. Increasingly, agreements include environmental provisions, such as commitments to monitor impacts and processes to resolve disputes over environmental protection. While many welcome the inclusion of environmental provisions in benefits agreements, there is growing worry that their presence in agreements with local communities

may serve to weaken government's commitment to protection of the public interest in environmental matters.

There seems to be a growing need to think very carefully about which impacts -- both positive and negative -- of resource development should be handled through public processes and the mechanisms of government, e.g. regulation and taxation, and which may be left completely to negotiations between local communities and industry. Of course, there may be issues which span both categories and need to be dealt with in both ways.

4.0 Some general questions

It is assumed in this paper that a structured approach would be useful to thinking about benefits agreements. From the point of view of the author of this paper, such an approach can be taken by asking (and answering) the following, four general questions.

4.1 What purpose is the agreement meant to serve?

It is impossible to decide whether a benefits agreement is a good one without first identifying its purpose, or purposes. A particular agreement may be brilliant for one purpose but hopeless for another. An agreement may serve one party's purposes (or interests) well, but may serve another party's purposes (or interests) poorly.

Of course, all benefits agreements, as their name would suggest, are intended to benefit the local community. But the question of their purpose does not stop there. For the question really needs to be made more precise. For example, exactly how is the community to benefit? Or, exactly which groups in the community are to benefit? And so on.

Further, it is clear that benefit to the community is not the only type of purpose contemplated by a benefits agreement. Some agreements, as we will see below, state expressly that one of their purposes is to get the community to support the project in question. Such support cannot be seen as a benefit to local people.

It is true too that any particular agreement may serve more than one purpose. The point in this paper is not to say which purposes are good or bad, but to stress that only in light

of the purpose of an agreement can it be decided whether the agreement looks to be a good one.

4.2 How does the agreement fit within the applicable legal and regulatory framework?

In order to evaluate any particular agreement, it is also necessary to know how that agreement fits into the applicable legal or regulatory framework. It may look as if an agreement is weak on a certain point, for example, on the need to collect data on the skills and levels of training and education of people in the community. But it may be that this issue is covered under a related agreement -- such as a socio-economic agreement between the company and government -- and thus does not need to be covered in the benefits agreement between the company and the local community.

The type of benefits agreement used in connection with mining in northern Saskatchewan provides an example. The Annual Human Resource Development Plan between the Saskatchewan Ministry of Education and the Cigar Lake Mining Corporation does not need to establish extensive obligations regarding training. Training is part of a closely related, but separate, process.

4.3 Are the specific provisions of the agreement appropriate in the circumstances?

This question gets to the heart of the matter: are the terms of the agreement what they should be? As said above, this question can only be answered in light of the purpose, or purposes, the agreement is intended to serve.

The question here is not only whether the particular benefits promised in the agreement -- the employment, the training, or whatever -- are sufficient, but whether other types of terms in the agreement are appropriate. For example, is it appropriate that, in exchange for the benefits promised, the local community agree not to object to further regulatory proceedings

concerning the project? Is it appropriate that the parties to the benefits agreement agree to keep the terms of the agreement confidential? It could also be asked whether certain types of benefit are appropriate, for example, cash payments.

Modern benefits agreements contain a wide variety of provisions. Different types of provisions give rise to different sorts of questions.

4.4 Could the agreement be enforced?

In an ideal world, this question would not have to be asked: all commitments would be fulfilled. But we do not live there. Experience has taught that promises made in benefits agreements are often not kept.

Not all responsibility for these failures can be laid at the feet of one party or the other. Allocating blame is in any event not very productive. Much more useful is to ensure that future benefits agreements can be enforced, should the need arise.

5.0 Analysis of five benefits agreements

5.1 The Cigar Lake Human Resource Development Agreement (1988)

5.1.1 The Cigar Lake Project

The Cigar Lake Project consists of an uranium mine and possibly a mill. It has been under development for several years. A test mine was successful and the company wants to proceed to production. However, further development has been delayed by a federal/provincial environmental review of the project. The panel conducting that review has recommended that the mine go ahead, subject to certain conditions. In April 1998, the government responded positively to the panel's recommendation.

In thinking about the approach used in northern Saskatchewan, it may be useful to have a brief socio-economic description of the region:

> The northern area of Saskatchewan covers approximately 50% of the province's total land surface but supports only 3% of its total population. Thirty-seven communities have a total population of about 20,000 and the 12 Indian bands have an on-reserve population of about 10,000. The bulk of the population (68%) resides in villages, hamlets, settlements or reserves of less than 1,000 people. About 75% of the people of the north are identified as being of Aboriginal

descent -- Metis or Indian. The registered members and the Aboriginal population is comprised of Woodlands Cree and Dene, each with distinct cultural and linguistic traditions. The population of northern Saskatchewan is also very young and it is estimated that in five years the labour force under age 30 will reach almost 10,000. Living in small, remote settlements, traditional lifestyle, or the bush economy, is mingled with limited exposure and participation in the wage economy. Apart from government and transfer payments, the mining industry is the most significant source of monetary involvement in the north. Wages at uranium mine sites average
$43,000 per annum.[4]

5.1.2 The Saskatchewan surface lease system

In order to proceed to development of a mine in Saskatchewan, a company must obtain a surface lease from the provincial government. Part IV of the Surface Lease Agreement requires that the company enter into a Human Resource Development Agreement with the province. Human Resource Development Agreements, in turn, require the mining company to file annual employment plans. Such an employment plan provides detailed information on the state of the workforce at the mine at the beginning and at the end of the year in question, a list of the job classifications for which "it is feasible to attempt the recruitment of Northerners as vacancies occur" and a statement as to which employment opportunities for the year are temporary and which are more permanent.

These Human Resource Development agreements and annual plans must be put into a broader context. For at least twenty years the province has been working with other levels of government, northern residents and mining companies to develop a "multi-party" approach to the provision of the training necessary for employment in the mining sector. The same kind of approach has been used to promote business opportunities for northerners.

5.1.3 Contents of the Lease and the Agreement

5.1.3.1 The Surface Lease Agreement

The term of these surface leases is long, on the order of 30 years, and the leases are

[4]This description is taken from p. 58 of the 1992 Report on Native Participation in Mining which is called "Aim for the Moon".

difficult to change once approved by the provincial Cabinet. Therefore, the detailed provisions regarding benefits are contained in the Human Resource Development Agreement and the annual plans, rather than the lease itself. The Cigar Lake Surface Lease is indicative of the benefits-related provisions in these surface leases.

Articles 9.2 and 9.3 of the Cigar Lake Surface Lease say that "it is the intent of the parties to provide a co-operative atmosphere for the Lessee to establish practices to maximize the employment and economic opportunities for the people in northern communities. The Minister and the Lessee agree that the provisions of this Part of the Agreement are to establish a mutually agreed upon framework of reasonable expectations and measurable objectives in sufficient detail to allow effective monitoring and evaluation of performance".

Article 10 of the Lease addresses "Employment Policies and Practices". In consultation with the listed provincial, government agencies, the company commits to using the following techniques to further local employment: "(a) northern information and recruiting activities; (b) an employee orientation course; (c) negotiation and submission of a Human Resources Development Plan to be re-assessed annually; and (d) special recruiting efforts in northern communities will be undertaken in cooperation with local government, Indian Bands, and federal and provincial agencies". The company also promises to ensure that companies contracting to do work on the project take similar approaches to recruitment of employees.

Article 11 of the Lease addresses training in a fairly general way. Most of the efforts in Saskatchewan to provide the training necessary to enhance the employment of northerners in mining are focussed on processes that involve the whole industry, as well as several levels of government, educational institutions and the communities themselves. So the provisions of the surface lease regarding training are not very extensive.

The Lease Agreement also contains some provisions related to commercial opportunities. The company agrees that under suitable conditions it will "encourage the participation of local northern businesses". This will be accomplished in part by preparing annual forecasts of commercial opportunities, by keeping contract opportunities small in scale, and, where it can, by requiring contractors working on the project to follow the same practices.

(See Article 12 of the Lease for further details.)

5.1.3.2 The Cigar Lake Human Resource Development Agreement (1988)

The Cigar Lake Human Resource Development Agreement distinguishes between two stages of the project. Stage 1 consists of temporary, pre-development activities which are set out in careful detail, as follows:

During 1987:
1. Establishment and operation of a temporary camp with its related facilities
2. Installation and operation of a concrete batch plant and associated facilities
3. Erection of a temporary warehouse and shop
4. Installation of fuel storage facilities

During 1988 - 1989:
1. Shaft sinking
2. Construction and operation of water management treatment facilities
3. Installation of diesel generator sets
4. Drift and stope development
5. Test mining

Stage 2 consists of activities related to the on-going operation of a uranium mine. (Initially, the company planned a mill as well, but that is likely not to proceed.) When the Agreement was negotiated in 1988, it was not known whether Stage 2 would occur, and in fact it is still uncertain whether the project will proceed to production.

The Agreement carefully defines who is a resident of northern Saskatchewan for the purposes of the Agreement. The definition is based primarily on length of residency in the region. It does not depend upon whether the person is Aboriginal.

According to Articles 1.1 and 1.2, the intent of the Agreement is "to enhance the economic climate" of the region and "to maximize the direct employment opportunities available to residents" of the region. The parties agree that the terms of the Agreement apply to Stage 1 of the project and to Stage 2, if it goes ahead. They also agree that the Agreement is to provide for the "establishment of a mutually agreed-upon statement of responsibilities, expectations, and measurable objectives in sufficient detail ..." and "an effective and ongoing

means of assessing the achievements" made pursuant to the Agreement.

The company agrees that it will "continue to require its contractors and subcontractors to make all reasonable efforts to maximize their employment of residents" of the region (Article 2.3). One of the company's key responsibilities is, in collaboration with the Province, to put together annual Human Resource Development plans. The main purpose of these plans is to establish the "mutually agreed-upon goals" of the company regarding "recruitment, hiring, training, and advancement" of regional residents. There are time limits set out for the filing of annual plans. Each plan is also to include a list of "Impact Communities" (Article 3.3). This list forms Appendix I to an Annual Plan. The residents of "Impact Communities" are those people who are to receive "where feasible, priority in recruitment". Appendix II consists of a summary of the types of employment then currently in use on the project. Appendix III consists of a listing of the types of employment for which the company will be recruiting and those for which northern residents will be given priority during the year.

Article 3 of the Agreement also imposes information filing requirements on the company and a time-frame within which those must be accomplished. As well, it makes clear that the company must retain the managerial flexibility to run the project as required by law and according to good mining practice and that the company "shall have the sole and final responsibility for recruiting its employees and for determining the positions in which its employees can best use their present skills and trainable potential".

The topic of training, including opportunities for apprenticeships, is handled in a fairly general fashion and the undertakings are quite softly worded. For example, they speak of a "cooperative planning process" and of agreements "to enter into discussions with the goal of identifying and developing" needed programs (see Articles 5.1 and 5.2). But it should not be concluded that training issues have been neglected in the Saskatchewan process. It would seem that quite the opposite is the case.[5]

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[5]See "Training Programs in Northern Saskatchewan" in "It Can be Done", a Report on Native Participation in Mining, prepared by the Sub-Committee of the Intergovernmental Working Group on the Mineral Industry, November 1991, pp. 71-76.

There is also a provision regarding confidentiality: “All information exchanged between the Parties hereto is confidential except that information which is agreed, in writing, not to be confidential” (Article 7.0).

5.1.4 How the Cigar Lake Human Resource Development Agreement works in practice

The Cigar Lake mine has not yet gone into production, so there has not been as much employment on the project as would have been expected at this point. Nevertheless, the company has been honouring its commitments under the Agreement. It has been submitting annual plans and trying to achieve the human resource development objectives of the Saskatchewan system.

The cooperativeness of the mining company in the Cigar Lake case is not unique. Years of hard work have gone into building a system for the development of human resources in northern Saskatchewan. According to a government employee working within the system, at first government tried to coerce the mining companies into compliance with employment quotas. But there has been an evolution in the process since then and now the effort to nurture northern employment opportunities in mining is more collaborative. It was reported in 1991 that

> Since 1985, the proportion of northern residents employed at northern mining operations has increased from 32% to almost 40% and the number holding supervisory and technical positions has increased substantially. Almost all of the northerners involved in the mining and exploration industry training programs have gained employment. Industry reports that retention rates are very high; after 2 years, 85% of trainees are still employed in the industry.[6]

Some Saskatchewan based companies have used their success at recruiting and keeping local employment as an argument in favour of obtaining rights to mine from the governments of foreign countries.[7]

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[6] “It Can be Done”, at p. 71.

[7] For further information on the Saskatchewan process contact may be made with Carol Rowlett, Program Liaison Coordinator, Northern Affairs, Government of

5.2 The Raglan Agreement (1995)

5.2.1 The Raglan Project

A subsidiary of Falconbridge Ltd., Société Minière, is in the process of developing a mine to produce nickel, copper and cobalt concentrate in northern Quebec, at a site that is about 1800 km. north of Montreal. "Raglan is expected to have a 15-year life beginning in 1998. One of the biggest nickel deposits in the world, it is expected to produce over 800,000 tonnes annually."[8]

5.2.2 The applicable legal framework

Although the Raglan mine is located within an area covered by the James Bay and Northern Quebec Agreement, there was no requirement for a benefits agreement with the affected communities in the land claim or any other applicable laws. However, the company planned to use Deception Bay as a port in its operations and also to use "Deception Bay and adjacent waters for intermittent shipping of supplies and mineral products" (see p. 3 of the Agreement). At the same time, Inuit beneficiaries under the Agreement claimed to have "rights, titles, claims and interests in the offshore area surrounding Quebec and Labrador, which [were] ... the subject of negotiations with the Government of Canada".

The Inuit's claim to the offshore is still under discussion with the federal government. It was this fact, along with the Whitehorse Mining Initiative, that brought Falconbridge to the bargaining table with the Inuit.

5.2.3 Contents of the Raglan Agreement

The Raglan Agreement is lengthy: 69 pages long. As well, there are several quite

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Saskatchewan, telephone (306) 425-4205, fax (306) 425-4349.

[8] "Northern Mining Notes", Published by the NWT Chamber of Mines, Volume 6, Number 1, February 1995, at 10.

substantial appendices. In places it is highly detailed, especially section 7, which deals with financial issues, and the appendix to the Agreement dealing with environmental matters.

Section 2 of the Raglan Agreement lists seven objects. Three are concerned with environmental goals (ss. 2.1.1, 2.1.4, 2.1.5). The others read as follows:

> 2.1.2 To facilitate equitable and meaningful participation for Inuit Beneficiaries and, in particular, the Inuit Beneficiaries of Salluit and Kangiqsujuaq, with respect to the Raglan Project;
>
> 2.1.3 To ensure that Inuit ... derive direct and indirect social and/or economic benefits during both the Development and Operations Phases of the Raglan Project;
>
> 2.1.6 To secure the support of the Inuit Parties for the development and operation of the Raglan Project;
>
> 2.1.7 To provide an efficient ongoing working relationship between the Parties prior to the Development Phase and during the Development and Operations Phases of the Raglan Project.

Section 3 of the Agreement sets out how the terms of the Agreement will apply if the company decides that it wants to develop additional sites within the defined area or wants to develop sites beyond that area but still within the region. Throughout the rest of the Agreement there are references to how the parties will proceed if such new areas are to be opened up.

Section 4 of the Agreement addresses environmental concerns. This section requires mitigation by the company where the environmental impacts can be foreseen. Where unforseen impacts occur, additional mitigation may be required. If mitigation is not good enough, then other solutions, such as compensation, must be considered. If agreement cannot be reached on these measures, then the arbitration process laid out in s. 9.3 of the Agreement applies.

Section 5 of the Agreement relates to employment and training of Inuit on the project. The objective of the section is “to promote the training and employment of Inuit Beneficiaries during the Development and Operations Phases of the Raglan Project”. The company

commits itself to cooperating with regional training programs, as well as to training at the mine site. Section 5.3.4 requires that the company shall hire according to the following list of priorities: Inuit beneficiaries from Salluit and Kangiqsujuaq, Inuit beneficiaries from any other northern village, other Inuit beneficiaries, any other person of Inuit ancestry and finally Southerners. There is recognition by the Inuit that the company "will need to employ a reasonable number of Southerners with the necessary skills and experience". Using language that is stronger than in some agreements, the company undertakes to "require" that companies dealing with it adopt similar hiring practices.

The usual work schedule for the Raglan Project is a rotation of four weeks on and two weeks off. But Inuit are to have the option of a two weeks on/two weeks off schedule. Various other forms of employment support are to be provided by the company. These include an Inuit employment and training officer, free transportation between the mine site and the northern villages, cross-cultural training and the facilities needed to provide country food to Inuit workers. In s. 5.7 of the Agreement, the company promises that "upon the permanent closing of the Raglan Project, [it will] strive to find suitable alternative employment elsewhere for the Inuit Beneficiary Employees either within Société Minière or in an Affiliate".

The objective of section 6 of the Agreement is "to promote the utilization of Inuit Enterprises whenever possible in supplying goods and/or services required during the Development and Operations Phases of the Raglan Project". Section 6.2 provides a list of the goods and services that are expected to be required for the mine. Some of these are agreed by both parties to be unsuitable for preferential Inuit contracting. In connection with the remaining goods and services the company agrees that "within a reasonable period prior to the need for any such goods and/or services, [it will] enter into good faith direct contract negotiations solely with an Inuit Enterprise, provided that a suitably qualified Inuit Enterprise has been identified" pursuant to the Agreement (s. 6.3.1). These negotiations will not necessarily result in a contract being awarded to an Inuit Enterprise (s.6.3.9). The Agreement lists the criteria that the company will apply to the award of all contracts. They are: cost

competitiveness, continuity of supply, quality of work, timeliness and the promotion of business opportunities to Inuit enterprises and Inuit training and employment.

Every company providing goods or services to the project will be required to file a quarterly report to the company regarding the details of Inuit employment and the engagement of Inuit enterprises on the project. The company may be required to "take appropriate action to remedy the situation" if such a company is not living up to its contractual obligations regarding these matters (see 2. 6.10).

Section 7 of the Raglan Agreement contains extensive financial provisions. In s. 7.1, these payments are said to be made by the company to the Inuit in order to:

> (a) ensure that Inuit Beneficiaries ... derive direct economic benefits from the Raglan Project;
>
> (b) compensate[9] Inuit Beneficiaries ... for the foreseen impacts of the Raglan Project, taking into account their level of significance following mitigation ...
>
> (c) secure the support of the Inuit Parties for the development and operation of the Raglan Project ...
>
> (d) obtain the Inuit Parties' support for and cooperation with Société Minière in its seeking to have amounts of Money Transfers and Additional Payments paid pursuant to this section treated as taxable deductions ...

Three types of payments are planned under the Agreement. The "Guaranteed First Allocation" consists of one payment ($1 million) payable when the company receives approval to go ahead with the mine, as well as several substantial payments to be made once the mine starts "Commercial Production". The "Guaranteed Second Allocation" is a series of $275,000 payments made annually in each year of commercial production. The third type of payment is a profit-sharing arrangement, which is 4.5% of the annual operating cash flow during the

[9]The moral and political foundations of compensation versus benefits are quite different. The author of this paper feels quite strongly that conceptually the two must be kept distinct, although it may be appropriate in some circumstances that both matters be handled in the same document.

period of commercial production. The Agreement very carefully defines how the "Annual Operating Cash Flow" is to be calculated. These provisions cover more than eight pages of the Agreement.

There is to be a "Raglan Committee" which will facilitate communication between the parties and implementation of the Agreement. As well, the committee will carry out the tasks that are specifically given it in the Agreement. Section 9 of the Agreement is concerned with the resolution of disputes. Most disputes go first to the Raglan Committee. Others go immediately to binding arbitration (see sections 3.2.5, 3.3.6, 4.3 and 4.6 of the Agreement). If a dispute is still unresolved, then it is sent to the presidents of both the company and Makivik, the regional Inuit organization, and from them to the courts, if necessary.

5.2.4 How the Raglan Agreement works in practice

Overall, Makivik and the two northern villages which signed the Raglan Agreement are satisfied with the way in which it is being implemented. As reflected in the activities of the Raglan Committee, the relationship with the company is going smoothly. For example, environmental monitoring studies have been undertaken on both water quality and arctic char. When the communities sought changes to the studies, the company agreed to those changes.

It is also felt that the relationship with the company is good regarding training and employment, although it is not without its problems. A special committee has been formed to deal solely with those issues. But here too the company has been cooperative. The Agreement requires that one Inuit employment officer be hired, but there are now two.

The three years since the signing of the Agreement have been devoted to construction. During the summer of 1997, the 60 Inuit working on the site made up 10 -20 % of the workforce. There have not been many opportunities to date for Inuit to progress to positions of greater responsibility, but it is hoped that with the mine soon to go into operation, those opportunities will be greater.[10]

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[10]For further information on the Raglan Agreement, contact may be made with Bernard Pennee of Makivik Corporation, telephone (514) 637-4687, fax (514) 634 - 9730. For information on how the Agreement is working out in practice, contact may be made with Robert Lanari, telephone (819) 964 - 2925, fax (819) 964 - 2613.

5.3 The Darnley Bay Agreement (1995)

5.3.1 The Darnley Bay Project

It has long been known that there is a significant mineral anomaly in the vicinity of Darnley Bay which lies within the Inuvialuit Settlement Region near the community of Paulatuk. “The anomaly is larger in size, and five times stronger than the Sudbury Basin, and is widely interpreted to be caused by a large intrusion which could host copper, nickel, gold, silver, platinum and/or other minerals”.[11]

On October 6, 1995, by means of a letter agreement, the Inuvialuit Regional Corporation and the Inuvialuit Mining Corporation entered into a joint venture with a Toronto based mining company called “Darnley Bay Resources Limited”. The lands to be covered by the joint venture include both Inuvialuit and Crown owned minerals.

5.3.2 Inuvialuit concession agreements

Pursuant to the Inuvialuit Final Agreement, the Inuvialuit became legal owners of a certain amount of both surface and subsurface lands. Not long after the Final Agreement went into force, the Inuvialuit decided they would dispose of rights to their minerals by means of concession agreements. Section 12 of the Inuvialuit Land Administration's "Rules and Procedures" ("Rules") sets out the guidelines for "Concessions for petroleum, coal and minerals and reconnaissance permits". As s. 12(7) of the Rules makes clear, the Inuvialuit want to receive benefits from all grants of rights to their minerals, including exploration rights.

5.3.3 Contents of the Agreement with Darnley Bay Resources

Because Inuvialuit resources, as well as Crown minerals, are part of the Darnley Bay project, from the Inuvialuit point of view, the agreement is basically a concession agreement. The October 6, 1995, agreement refers to itself as a letter agreement, and calls for the execution of a "formal concession agreement ... on or before December 31, 1995". The letter

[11]“Northern Mining Notes”, Published by the NWT Chamber of Mines, Vol. 6, No. 1, February 1995, at 8.

agreement also states that “DBR [Darnley Bay Resources] will negotiate a cooperation agreement with the IRC and the Paulatuk Community Corporation which will describe the business, training and employment opportunities and benefits to be provided to the Inuvialuit in association with DBR's operations within the Inuvialuit Settlement Region.”

As of January 1998, a final version of the formal concession agreement had not been finished, and the cooperation agreement had not been negotiated. At that point, the Inuvialuit and Darnley Bay were operating on the basis of the informal, letter agreement, and Inuvialuit benefits were being incorporated in the licence and permitting process of each stage of work on the project.

For example, in the summer of 1997, the ILA gave Darnley Bay approval to carry out an airborne, magnetic reconnaissance of the area. The application for a reconnaissance permit was made subject to the following three conditions: 1) that “Aklak Air, Arctic Wings and IPI/Canadian Helicopters have preference in providing for all rotor and fixed wing aircraft”; 2) that “Stanton Distributing Ltd. have preference in providing for all foodstuff requirements” and 3) that “Inuvialuit businesses, employment and training are given preference on the project by Darnley Bay Resources Ltd. and any Contractors and Subcontractors”. These conditions are contained in a letter accompanying the permit. In the body of the permit, there is also the statement that “The Holder has the obligation to provide Inuvialuit employment and opportunities for Inuvialuit businesses, as well as arrangements for education and training programs for Inuvialuit”.[12]

5.3.4 How the Darnley Bay agreement has worked in practice

The company was pleased with the results of its aerial survey and is proceeding to the next phase of exploration. In November 1997 it received approval from the ILA to enter Inuvialuit lands for the purpose of collecting samples. The company has hired several Inuvialuit, for example, as technicians and as a human resource coordinator for the project.[13]

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[12]The permit contains a reference to those sections of the Rules that impose these very obligations.

[13]For further information on the draft Darnley Bay concession agreement, contact

5.4 The ULU Agreement (1996)

5.4.1 The ULU Project

Echo Bay Mines Ltd. intended that the ULU Project extend the life of its Lupin gold mine which first went into production in the early 1980s. The ULU mine is located southeast of Coppermine and lies within the Nunavut Settlement Area. In late December 1997, Echo Bay announced that low gold prices required that it suspend operations at the Lupin mine as of April 1, 1998, and as of January 1998 the ULU Project was on indefinite "hold".

5.4.2 The Nunavut Land Claim Agreement

The land claim agreement applying to Nunavut went into effect in 1993. Article 26 of the Nunavut Agreement (which is included as an Appendix to this paper) tries to ensure that Inuit will receive meaningful benefits from "Major Development Projects". The benefits agreements negotiated under the land claim are referred to as "IIBAs" (Inuit Impact and Benefit Agreements). According to the land claim, IIBAs are supposed to:

> - be consistent with and promote Inuit cultural goals;
> - contribute to achieving and maintaining a standard of living among Inuit equal to that of persons other than Inuit living and working in the Nunavut Settlement Area, and to Canadians in general; and
> - be related to the nature, scale and cost of the project as well as its direct and indirect impacts on Inuit.

Benefits should not undermine the "viability" of a project and should not reduce the likelihood that other residents of Nunavut benefit from such projects.

At the end of Article 26, there is a long list of topics that the Inuit and federal government agreed are "appropriate for Inuit benefits". This list is very extensive and ranges from employment training, to the language used at work, to enforcement of the IIBAs.

Because the Nunavut Agreement is a land claim agreement, the rights that the Inuit have received under it, including the right to IIBAs, are protected by s. 35 of the Constitution.

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may be made with Paul Voudrach, Assistant Administrator, Inuvialuit Land Administration, telephone (867) 966-2202, fax (867) 977-2467.

These rights have legal priority over any inconsistent laws which would otherwise apply in Nunavut.

5.4.3 The ULU Inuit Impact and Benefits Agreement (1996)

The ULU agreement was the first IIBA to be negotiated pursuant to s. 26 of the Nunavut land claim. The parties to the Agreement are Echo Bay Mines Ltd. and the Kitikmeot Inuit Association (KIA). The Agreement plus appended schedules is relatively long (35 pages) and sophisticated, all the more so because its provisions are backed-up by the Nunavut land claim agreement. As is said in the Preamble to the Agreement, “this Agreement will be guided by the Nunavut Land Claims Agreement and the principles, obligations and schedules set out [t]herein”.

The ULU agreement states that it is "a legally binding contract". Most benefits agreements are not legally binding. However, the Nunavut agreement provides that "An IIBA may be enforced by either party in accordance with the common law of contract", and this should override ordinary contract law.[14]

The IIBA provides for the creation of an implementation panel which has three Inuit members and two from the company. The responsibilities of the panel are listed in Article 3.8 of the IIBA and include monitoring the progress of the agreement and assisting with dispute resolution.

As an IIBA, the ULU agreement says more about the impacts of the project on the community than do many other benefits agreements. Article 4 of the agreement, which is concerned with environmental issues, illustrates this. Article 4.1 is especially interesting. It contains a promise by the company that it will “comply with all environmental conditions contained in its operating licences and permits”. This would seem to give the Inuit the right to sue the company for breach of contract if it fails to live up to its obligations under those licences and permits.

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[14]However, in order to be enforceable as a contract, the wording of an IIBA must be sufficiently clear that a court could understand what the parties to the agreement promised to do.

Article 5 of the IIBA is concerned with opportunities for Inuit to contract and subcontract on aspects of the mine's operations. This article, along with Appendix "D" to the agreement, very carefully sets out how Inuit businesses can become involved as contractors and subcontractors to the project. Appendix "D" describes how the "Inuit Content" factor in contracts with the company is to be measured. As is often the case in benefits agreements, the company still has the right ultimately to refuse any bid, whether from an Inuit source or not: “After making all reasonable efforts to negotiate contracts directly with Inuit businesses, or to secure proposals or tenders from Inuit businesses and giving fair consideration to those submissions, ECHO BAY has the right to refuse any and all proposals or bids.” (See Article 5.15)

Some of the other parts of Article 5 address issues that have been raised earlier in this paper. For example, Article 5.9 provides that "Where ECHO BAY deems it practicable, all multi-component contracts will be broken down into discrete tendering packages, which can be bid as a group or individually". Echo Bay also promises to provide letters of intent or in some cases conditional contracts to Inuit businesses in order to facilitate financing of the Inuit business opportunity. Article 5.21 of the IIBA provides a more direct form of financing assistance:

> For contracts less than $50,000.00, ECHO BAY may provide the successful Inuit Business, excluding joint-ventures, a 5% advance payment to assist the business in start-up. ECHO BAY may elect to provide the 5% advance payment through in-kind services, such as transportation to the work site or in the form of mobilization payments.

Training and education are addressed by Article 6 of the IIBA. The preamble to Article 6 says that "...training and education are a shared responsibility of ECHO BAY as employer, the KIA as facilitator of opportunities that benefit the Inuit, the individual who desires to improve his skills and the governments at the territorial and federal levels". However, Article 6.1 puts the duty on ECHO BAY "in consultation with the KIA" "for initiating action" on training and education.

Article 6 contains provisions to support apprenticeships and scholarships in mining.

There is also a provision about the company's participation in the development of curriculum about mining for schools in the region. Article 6.11 requires ECHO BAY to conduct "tendering workshops" in order that Inuit become aware both of specific bidding opportunities and of the company's expectations for the submission of bids.

Article 7 of the IIBA addresses employment. The preamble sets a target of 60% Inuit employment in the project: "... it is desirable to reach a level of Inuit employment equal to sixty percent (60%) of the total man[sic]-hours then being worked on the ULU Project by all personnel, whether employed directly by ECHO BAY, or by its contractors or subcontractors". Article 6.9 of the IIBA provides that Inuit engaged in a training program at any of the company's facilities, not just the ULU Project "will be deemed to be employed" on the ULU Project. Several provisions of Article 7 attempt to spell out how to determine whether the 60% goal has been achieved. Article 7.5 requires that the goal be met within 24 months from the date of execution of the IIBA "provided that if in any one year ECHO BAY is unsuccessful in meeting this target, and it can demonstrate that employment of Inuit has been consistent with the capacity of the labour market in the Kitikmeot Region to supply qualified applicants for the available positions, ECHO BAY will then be deemed to have met the intent of this Agreement in that year".

Articles 8 through 14 deal with some of the other topics that are set out in the list of “Matters Considered Appropriate for Inuit Benefits” in Article 26 of the Nunavut claim, such as “Conservation of Archaeological Sites”.

An arbitration style dispute resolution mechanism is provided for in Article 15 of the agreement.

5.4.4 How the ULU agreement has worked in practice

Because the ULU Project was shut down not long after the IIBA was signed, there has been so far little opportunity for its implementation. While the Project was still active, the Implementation Committee was formed and was meeting as required by the Agreement. Although the Committee did not have a chance to accomplish much before its activities were suspended, the feeling of people with the KIA is that both sides to the Agreement had

demonstrated a willingness to make the Agreement work, that during negotiations that willingness had been evident and that there were "good expectations" that the Agreement would have worked well (and will work well when the Project is revived). The company had been active in the region before the signing of the land claim and had shown that it could work with both the KIA and the people of the region. Accordingly, the optimism about future dealings appears to be well founded.

5.5 The BHP Model Socioeconomic Agreement (1996)

5.5.1 The BHP Project

BHP (Broken Hill Proprietary Diamonds Inc.) is in the process of developing Canada's first significant diamond operation. The Ekati mine "is expected to extract $12 billion worth of diamonds over a 25-year period, resulting in seven billion dollars in profits and $2.5 billion in revenues paid to federal and territorial governments".[15] The mine is located about 300 km. northeast of Yellowknife, in an area which is not yet covered by a settled land claim.

5.5.2 The Canada Mining Regulations and the NWT Water Act

There is no requirement in the Canada Mining Regulations that a company negotiate a benefits agreement with local communities. Nevertheless, the federal Cabinet decided that significant progress had to be made on the negotiation of benefits agreements, before BHP would receive a licence under the NWT Water Act. It is questionable whether the federal government had to the legal authority to impose this requirement. Regardless, before the water licence was issued, BHP had signed benefits agreements with two of the affected communities -- the Dogribs and Akaitcho Treaty 8. Since that time, BHP has continued to negotiate with the Metis and with the Kitikmeot Inuit Association.

BHP also negotiated a socio-economic agreement with the GNWT which covers such matters as target levels for the employment of northern residents and the involvement of

[15]Susan Wismer "The Nasty Game", (1996) 22 Alternatives, p. 10.

northern businesses on the project. The primary role of the GNWT under the Agreement is to establish programmes whose purpose is to increase the likelihood that northern residents have the education or skills necessary to take advantage of the employment and training that BHP commits to making available. The Agreement addresses a series of very important matters, but the vague language used throughout means that it is unlikely to be enforceable.

5.5.3 Contents of the BHP Model Socioeconomic Agreement

The BHP Socioeconomic Agreements contain confidentiality clauses. Although it is possible to obtain copies of signed agreements, it is perhaps better to discuss the model agreement used by BHP. The signed agreements do not differ a great deal from the model, except that they contain an appendix which sets out the cash to be paid by BHP to the community in question.

The Agreement states that its purpose is to create "conditions under which the community will be involved in, and support the Project". Support for the project is made a term of the agreement: the agreement says that,

> In consideration for BHP entering into this Agreement, the community will not object to the issuance of any licences, permits, authorizations or approvals to construct or operate the Project required by any regulatory body having jurisdiction over the Project.

The agreement addresses implementation. A community representative is supposed to work with BHP on a programme of consultation with the community. BHP also promises to hire an Aboriginal Employment Coordinator whose duties are set out in the agreement.

BHP's promise regarding employment is that it "agrees to take all reasonable steps to employ the greatest possible number of [community people] in the Project ... assuming there are sufficient qualified and interested [people] to fill available positions". The agreement also contains a list of specific obligations regarding employment: for example, Yellowknife is made the point of hire, BHP promises to provide transportation to and from work from the local communities and the work rotation schedule is two weeks on/two weeks off with some additional flexibility to accommodate "traditional hunting or other traditional pursuits". BHP is

supposed to “take all reasonable steps to ensure” that its contractors adhere to the same employment policies.

BHP states that it will “take all reasonable steps” to provide business opportunities to local people. It is supposed to provide information on such opportunities in a timely fashion and is supposed to ensure that contracts with BHP are small enough in scale that local people can take advantage of them “provided there will be no adverse economic effect on the cost of the Project”. Section 5.4 of the agreement lists BHP’s “competitive bid criteria” which includes “northern content”, but that term is not defined.

There is a section on “Environment” which includes a commitment that “BHP also agrees to meet the requirements and be bound by the terms of any licences, permits, regulations and laws of general application”.

Although there is a section on “Settlement of Disputes”, there is no mechanism for resolution of disputes other than a promise to “commence meetings” for that purpose when the need arises. There is no reference to a formal arbitration process, for example.[16]

5.5.4 How the BHP agreements have worked in practice

The emphasis in the communities which have signed benefits agreements with BHP is on taking advantage of the business opportunities promised in the agreements. But so far there has been little success in this area. There have been some contracts awarded during the construction phase, but as to on-going operations, the communities have not been able to enter into contracts with BHP. With the help of government, the communities are developing another strategy and plan to return to BHP in the hopes of getting better results, having formed joint-ventures with other companies.

6.0 Common issues

This part of the paper will very briefly discuss several issues that are relevant to any

[16]For further information on implementation of the BHP agreements with local communities, contact may be made with Altaf Lakhani, DIAND, Yellowknife, telephone (867) 669-2623, fax (867) 669-2711.

consideration of northern benefits agreements.

6.1 The enforceability of benefits agreements

The negotiation of benefits agreements may require a great deal of time, energy and money. The benefits promised may be of great importance to the community in question. The expectations of local people may have been raised during the negotiations surrounding the agreement. One has to hope that the promises made are honoured. But if they are not, it is simply imperative that such agreements be enforceable. Steps, such as those outlined below, can be taken to ensure that this is the case.

6.2 The usefulness of formal agreements

While an enforceable agreement is necessary, if the community is to be guaranteed benefits from a project, such a document is not enough. A constructive relationship amongst all the parties involved, including government, is crucial. Even if an agreement is enforceable, bad feelings amongst the parties can still lead to significant frustration. Resorting to the courts, or even arbitration, can be costly, stressful and ultimately unsatisfactory. The experience in northern Saskatchewan shows that a truly respectful and cooperative spirit goes a long way.

6.3 Regulatory support

Many northern communities are very small. In order that they receive as full benefit as possible from resource development projects in their regions, they need the support that only government in some form or another can give. For example, there are provisions in the socioeconomic agreement between the GNWT and BHP that could not or would not appear in an agreement with any particular community.

Except in Nunavut, regulatory support is needed in order to ensure the enforceability of agreements. This could be achieved through legislation which states, as does Article 26 of the Nunavut Agreement, that benefits agreements are enforceable as contracts. The other enforcement related provisions of Article 26 could also be incorporated in such legislation if they were thought generally useful.

The support of government would also be required in order that benefits agreements be required under the Canada Mining Regulations, or some other regulatory instrument. The ad hoc approach taken in the case of BHP may not be the best way to ensure that local people benefit from mining projects. Legislation could also lay out a process within which the negotiation of local benefits could take place, such as is included in Article 26 of the Nunavut Agreement. Was it acceptable that the communities had to face negotiations with BHP without the support of a government sanctioned framework? Was it fair that those negotiations were forced to take place within a period of time chosen on an ad hoc basis by the federal Cabinet? These and other procedural matters could be established by regulation or legislation, thereby creating a fairer environment for the negotiation of benefits agreements.

It also needs to be asked whether government has a duty to assist communities with implementation of the agreements they have signed, or is it appropriate that communities be left exclusively to their own devices to put in place the institutions that will allow them to benefit from the projects in question?

6.4 Clarity

It would be difficult to over estimate the importance of clarity in the negotiation and drafting of benefits agreements. Communities must be clear as to what they are trying to accomplish and clear as to how their agreements fit with other elements of the regulatory process, such as environmental review or monitoring. And the language ultimately used in the agreements must be clear enough that a court, if ever the need arises, could determine what was in fact promised. What does it mean to say that the company shall “make all reasonable efforts”? What does it mean to say that the company is obliged to break contracts down into smaller units “provided that there is no adverse economic effect on the cost of the project”? How big does the effect have to be before it becomes an “adverse economic effect”? The vague expressions often used in benefits agreements could provide many more examples of language that is not sufficiently clear.

6.5 Learning from experience

It would be extremely useful to include monitoring and programme evaluation provisions in every benefits agreement. With reliable information about how specific benefits agreements have worked out in practice, all parties could learn from past experience.

7.0 The future of benefits agreements

Three issues are likely to dominate future debate on benefits agreements. First, how do benefits agreements fit within the regulatory framework applicable to projects and what role do they play in that framework? For example, where should the negotiation of benefits agreements fit in the regulatory sequence? Before or after the issuance of rights to develop resources? Before or after public regulatory processes, such as environmental assessment?

Second, is there a role for government in establishing the parameters within which benefit agreements are negotiated? Much of the focus here would be procedural, such as whether there should be precise time periods laid out for negotiation of agreements and whether dispute resolution mechanisms should be imposed when negotiations break down. But at least some of the important issues touch upon the actual terms of the agreements. For example, should government prohibit the inclusion of confidentiality and "gag" clauses in benefits agreements?

Third, how can benefits agreements be made enforceable in a way that is both practicable and fair to all parties? If the matter of enforcement is not addressed, then much of the rest of the debate over benefits agreements is for nought. Benefits agreements either are, or are not, meant to be taken seriously. If intended to be taken seriously, then they must be made enforceable.

Appendix A

Comparative Chart

Comparative Chart[17]

		Cigar Lake	Raglan	Darnley Bay	ULU	BHP model
1.0	**Introductory provisions**					
1.1	Purpose / Intent	•	•			•
1.2	Definitions	•	•	•	•	•
1.3	Identification of parties and specification of beneficiaries	•	•	•	•	•
1.4	Coming into effect of the agreement	•	•		•	•
1.5	Term of the agreement		•	•	•	•
1.6	Overall description of the project	•	•	•	•	•
1.7	Project phases	•	•	•		•
1.8	Aboriginal support for the project		•			•
2.0	**Employment and training**					
2.1	General employment goals	•	•	•	•	•
2.2	Identification of employment opportunities and labour supply	•	•		•	•
2.3	Labour force development plan	•	•		•	
2.4	Community consultation and information	•	•		•	
2.5	Recruitment and hiring	•	•		•	•
2.6	Hiring priorities	•	•			

[17]The listing of types of terms found in benefits agreements was compiled by Steven Kennett, Research Associate, Canadian Institute of Resources Law.

2.7 Contracting and subcontracting	•	•		•	•

	Cigar Lake	Raglan	Darnley Bay	ULU	BHP model
2.8 On-the-job and other training	•	•		•	•
2.9 Apprenticeship programs	•	•		•	•
2.10 Employee evaluation and advancement	•	•		•	•
2.11 Work rotations		•		•	•
2.12 Transportation		•		•	•
2.13 Work site conditions (Accommodation, food and recreation)		•		•	•
2.14 Labour relations and discipline					•
2.15 Counselling and employee support		•		•	•
2.16 Language of work		•		•	•
2.17 Cross-cultural issues		•			•
2.18 Restrictions on employees		•		•	•
2.19 Traditional economic and cultural activities		•			
2.20 Educational and scholarship programs		•		•	•
2.21 Employment-related community outreach (Youth awareness program)		•		•	•
2.22 Committee on employment opportunities/issues					
2.23 Aboriginal employment coordinator		•		•	•
2.24 Evaluation of aboriginal employment		•		•	
3.0 Economic development and business opportunities					
3.1 General provisions regarding contracting and business	•	•	•	•	•

	opportunities					
3.2	Identification of businesses and business opportunities	•	•		•	•
		Cigar Lake	**Raglan**	**Darnley Bay**	**ULU**	**BHP model**
	3.3 Preferences for aboriginal businesses		•		•	
	3.4 Procedure for securing contract goods and services on a competitive basis		•		•	
	3.4a Competitive bid criteria		•			•
	3.5 'Unbundling' of contract requirements	•			•	•
	3.6 Monitoring of contracting		•		•	
	3.7 Assistance for local business development		•		•	•
	3.8 Research and development				•	
	3.9 Right of first refusal on equipment and property		•		•	
	3.10 Committee for economic and business development					
4.0	**Social, Cultural and Community Support**	n/a	n/a	n/a		
	4.1 Communication and consultation				•	
	4.2 Social and community assistance — Counselling					
	4.3 Community projects and physical infrastructure					
	4.4 Aboriginal cultural and economic activities					•
5.0	**Financial provisions and equity participation**	n/a			n/a	n/a
	5.1 Rationales for cash payments		•			
	5.2 Fixed cash payments		•			
	5.3 Variable payments		•			
	5.4 Suspension of payments					
	5.5 Development and remedial fund					
	5.6 Adjustments for inflation					

	5.7 Tax implications		•			
		Cigar Lake	**Raglan**	**Darnley Bay**	**ULU**	**BHP model**
	5.8 Compensation provisions		•			
	5.9 Security deposit					
	5.10 Equity interest (joint ventures)			•		
	5.11 Expenses for administration, management and implementation of the IBA		•			
	5.12 Reimbursement of negotiation expenses		•			
6.0	**Environmental protection and cultural resources**	n/a				
	6.1 General provisions regarding environmental compliance				•	•
	6.2 Specific environmental protection and monitoring provisions		•			
	6.3 Wildlife / Wildlife compensation		•	•	•	
	6.4 Abandonment and reclamation		•	•	•	
	6.5 Protection of cultural resources and areas of cultural significance				•	•
7.0	**Other substantive and procedural provisions**					
	7.1 Amendment and renegotiation of the agreement		•		•	
	7.2 Anticipation of project expansion and other projects or activities		•	•		
	7.3 Confidentiality and release of information	•	•	•		•
	7.4 Implementation committee		•		•	
	7.5 Monitoring of agreement implementation	•	•		•	•
	7.6 Formal evaluation of the agreement					
	7.7 Dispute resolution		•	•	•	

7.8 Enforceability and remedies					

Appendix B

Article 26 of the Nunavut Agreement

Note: “DIO” represents Designated Inuit Organization

ARTICLE 26

INUIT IMPACT AND BENEFIT AGREEMENTS

PART 1: DEFINITIONS

26.1.1 In this Article:

"capital costs" shall consist of expenditures for designing, procuring, constructing and installing all buildings, housing, machinery and equipment and infrastructure associated with a project, including any such costs incurred outside of the Nunavut Settlement Area in relation to the project; but shall not include financing costs;

"Crown corporation" means those Crown corporations that are not subject to Article 24;

"infrastructure" shall be considered as any transportation facilities directly in support of a project, such as a marine port, airport, road, railway, pipeline or power transmission line;

"Major Development Project" means any Crown corporation or private sector project that

(a) is a water power generation or water exploitation project in the Nunavut Settlement Area, or

(b) is a project involving development or exploitation, but not exploration, of resources wholly or partly under Inuit Owned Lands,

and either entails, within the Nunavut Settlement Area during any five-year period, more than 200 person years of employment, or entails capital costs in excess of thirty-five million dollars ($35,000,000), in constant 1986 dollars, including, where Government is the proponent for a portion of a development project or directlyrelated infrastructure, the capital costs and employment projections for the government portion of the project;

"parties" means parties to an IIBA or negotiations leading thereto.

PART 2: OBLIGATION TO FINALIZE

26.2.1 Subject to Sections 26.11.1 to 26.11.3, no Major Development Project may until an IIBA is finalized in accordance with this Article.

PART 3: PARAMETERS FOR NEGOTIATION AND ARBITRATION

26.3.1 An IIBA may include any matter connected with the Major Development Project that could have a detrimental impact on Inuit or that could reasonably confer a benefit on Inuit, on a Nunavut Settlement Area-wide, regional or local basis. Without limiting the generality of the foregoing, the matters identified in Schedule 26-1 shall be considered appropriate for negotiation and inclusion within an IIBA.

26.3.2 An IIBA shall be consistent with the terms and conditions of project approval, including those terms and conditions established pursuant to any ecosystemic and socio-economic impact review.

26.3.3 Negotiation and arbitration of IIBAs shall be guided by the following principles:

(a) benefits shall be consistent with and promote Inuit cultural goals;

(b) benefits shall contribute to achieving and maintaining a standard of living among Inuit equal to that of persons other than Inuit living and working in the Nunavut Settlement Area, and to Canadians in general;

(c) benefits shall be related to the nature, scale and cost of the project as well as its direct and indirect impacts on Inuit;

(d) benefits shall not place an excessive burden on the proponent and undermine the viability of the project; and

(e) benefit agreements shall not prejudice the ability of other residents of the Nunavut Settlement Area to obtain benefits from major projects in the Nunavut Settlement Area.

PART 4: NEGOTIATIONS

Commencement

26.4.1 At least 180 days prior to the proposed start-up date of any Major Development Project, the DIO and the proponent, unless they otherwise agree, will commence negotiations, in good faith, for the purpose of concluding an IIBA.

Written Contract

26.4.2 Where the proponent and the DIO agree on the contents of an IIBA, the agreement shall be written in the form of a contract. Once agreement has been reached, the parties shall send a copy to the Minister.

PART 5: VOLUNTARY ARBITRATION

26.5.1 At any time during the negotiations, the DIO and the proponent may submit any or all questions relating to the content of an IIBA to an arbitrator, in those cases where they can agree on the scope of the questions to be submitted and the identity of the arbitrator.

26.5.2 Where the parties reach agreement through voluntary arbitration, the agreement shall be written in the form of a contract and a copy sent to the Minister.

PART 6: COMPULSORY ARBITRATION

Application to Minister

26.6.1 Where full agreement has not been reached, within 60 days after negotiation has been commenced, and where the DIO and the proponent are not engaged in voluntary arbitration, either party may apply to the Minister for the appointment of an arbitrator. The scope of the arbitration shall include the full range of benefits possible in an IIBA, unless the parties agree the range should be restricted.

Obligation to Negotiate in Good Faith

26.6.2 In the event that a proponent or the DIO consider that the other party is not negotiating in good faith during the initial 60 days negotiation period referred to in Section 26.6.1, that party may immediately apply to the Minister for the appointment of an arbitrator. The arbitrator shall, within seven days of appointment, determine the validity of the allegation of bad faith. If the arbitrator upholds the allegation, the arbitrator shall proceed immediately in accordance with Section 26.6.4.

Appointment of Arbitrator

26.6.3 Within 15 days of an application to the Minister for the appointment of an arbitrator, an arbitrator shall be appointed with the approval of the parties negotiating the IIBA. If the parties cannot agree on the appointment of an arbitrator, the arbitrator shall be appointed by the Minister from a standing list of arbitrators which has been approved jointly by the DIO and by those industry organizations determined by Government to be relevant.

Decision of Arbitrator

26.6.4 An arbitrator, within 60 days of his or her appointment, or within 60 days of upholding an allegation of bad faith, shall:

(a) ascertain the views and proposals of both the DIO and the proponent;

(b) submit a decision in the form of a contract to the parties; and

(c) send a copy of the decision to the Minister.

26.6.5 Costs of the arbitrator and the parties shall be borne equally by the parties, unless otherwise determined by the arbitrator. Costs of the DIO incurred in arbitration dealing with compensation pursuant to Section 26.11.4 shall be borne by the proponent of the Major Development Project, unless otherwise determined by the arbitrator.

PART 7: EXTENSIONS OF TIME

26.7.1 The parties negotiating an IIBA may agree to waive any of the time periods referred to in Parts 4 and 6, and the arbitrator may apply to the Minister for an extension of the time provided for in Section 26.6.4.

PART 8: COMING INTO EFFECT

26.8.1 An IIBA shall take effect 30 days after its receipt by the Minister unless the Minister has determined within that time that the IIBA does not conform to the provisions of Section 26.3.2 or the principles of Subsections 26.3.3(a) to (e), or that, with respect to an IIBA pursuant to Parts 5 or 6, an arbitrator has exceeded the arbitrator's jurisdiction.

26.8.2 If the Minister makes a determination pursuant to Section 26.8.1, the Minister shall provide written reasons and may provide direction for achieving conformity or remedying the excess of jurisdiction.

26.8.3 The parties with respect to a negotiated agreement, and the arbitrator with respect to an arbitrated agreement, shall take into account the Minister's reasons and revise the IIBA implementing any direction by the Minister to achieve conformity or to remedy the excess of jurisdiction.

26.8.4 The parties with respect to a negotiated agreement, and the arbitrator with respect to an arbitrated decision, shall submit the revised IIBA to the Minister and the parties within seven days of receipt of the Minister's written reasons.

26.8.5 The revised IIBA shall take effect seven days after its receipt by the Minister.

PART 9: ENFORCEMENT

26.9.1 An IIBA may be enforced by either party in accordance with the common law of contract. The parties may negotiate liquidated damages clauses for the eventuality of default and such a clause, however phrased, shall not be construed as

constituting a penalty. In any deliberation as to the remedy of specific performance, due regard shall be given at all times to the desirability of protecting Inuit lifestyle and culture and providing Inuit with opportunities for economic advancement.

26.9.2 The negotiation and conclusion of an IIBA shall be without prejudice to the participation by the DIO, any other Inuit organization, and any Inuit in any hearings or other proceedings of NIRB, the National Energy Board, or any other administrative agency, or to the enforcement or contesting of any decision or order of such agency.

PART 10: RENEGOTIATION

26.10.1 Except where otherwise agreed by the proponent and the DIO, an IIBA shall provide for its renegotiation.

PART 11: OTHER MATTERS

Agreement Not Required

26.11.1 The DIO and the proponent of a Major Development Project may agree that an IIBA is not required.

Military or National Emergency

26.11.2 In cases of military or national emergency, the Minister may allow commencement of a Major Development Project prior to the conclusion of an IIBA.

Early Project Start-up

26.11.3 If, once negotiations have begun on an IIBA, the proponent finds it necessary for the project to start sooner than the projected start-up date, the Minister may, if the project has received approval from the appropriate agencies, authorize the project to commence:

(a) if the parties agree; or

(b) if the delay would jeopardize the project.

Where the Minister proposes to exercise this authority, the Minister shall consult with the parties and, where one has been appointed, the arbitrator.

26.11.4 If, pursuant to Section 26.11.2 or 26.11.3, a Major Development Project commences prior to an IIBA being concluded, the arbitrator shall ensure that benefits received by Inuit shall include compensation, which may be in the form

of replacement benefits, for the benefits lost through the early commencement of the Major Development Project.

Other Government Requirements

26.11.5 Where an IIBA has been concluded which is at least equal to government requirements respecting the mitigation of impacts or provision of benefits for aboriginal peoples, Government may accept the IIBA as sufficient to satisfy those requirements.