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IBA TOOLKIT

IBA COMMUNITY TOOLKIT

Negotiation and Implementation of Impact and Benefit Agreements

By Ginger Gibson and Ciaran O'Faircheallaigh

April 2026 Pilot Edition

IBA COMMUNITY TOOLKIT Negotiation and Implementation of Impact and Benefit Agreements

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CONTENTS

TOOLKIT OVERVIEW

SECTION 1 INTRODUCTION TO THE TOOLKIT 13

SECTION 2 ANALYZING THE PROJECT AND THE BROADER ENVIRONMENT 25

Understanding project life cycles, Indigenous rights, legal processes, and the power of having unified community goals

SECTION 3 PREPARING FOR NEGOTIATIONS 93

Preparing for negotiations by building structure, gathering information, and strengthening the community's strategy and bargaining position

SECTION 4 CONDUCTING NEGOTIATIONS AND REACHING AGREEMENTS 165

Building negotiation processes, and using these processes to identify agreement terms and options, and finalize and launch agreements

SECTION 5 IMPLEMENTING AGREEMENTS AND MAINTAINING RELATIONSHIPS 267

Building strong structures and capacity, monitoring progress, and strengthening relationships to ensure long-term success

REFERENCES 291

RESOURCES AVAILABLE ONLINE 300

INDEX 303

GLOSSARY AND ACRONYMS 308

DETAILED TABLE OF CONTENTS

SECTION 1 INTRODUCTION TO THE TOOLKIT 13

Before You Start: Making the Decision to Negotiate 16
Negotiation is Not Consent 17
Information is Power 17
A Focus on Process as Well as Outcome 18
Importance of Forming Networks 19
Gender and Impact Benefit Agreements 20
Agreements for Existing and 'Legacy' Mines 21
How to Use this Toolkit 22
Structure of the Toolkit 23
Notes to Section 1 24

SECTION 2 ANALYZING THE PROJECT AND THE BROADER ENVIRONMENT 25

THE MINE LIFE CYCLE 28

Location and Investment Decision 28
Early Exploration 29
Advanced Exploration 30
The "Free Entry" Mining System 32
Project Design 33
Mineral Assessment Tool 34
Construction 35
Licenses and Permits 36
Operations 38
Closure and Reclamation 39

INDIGENOUS RIGHTS: THE INTERNATIONAL CONTEXT 40

INDIGENOUS RIGHTS: THE CANADIAN CONTEXT 46

Duty to Consult 48
Duty to Accommodate 49
Historic and Modern Treaties 50
Modern Land Claim Agreements 51

LEGISLATIVE AND POLICY LEVERS FOR IBAS 53

Indigenous Law 55

CANADIAN MAJOR PROJECTS REVIEW PROCESS AND REGULATION 56

Impact Assessment In Canada 56

Federal Impact Assessment 57

Provincial and Territorial Impact Assessment 59

Level of Impact Assessment Review 60

Impact Assessment Follow-Up 61

Indigenous Participation in Impact Assessment 62

TIMING OF THE NEGOTIATION OF IBAS AND IAS 68

Timing the IA and IBA: Three Scenarios 72

Scenario 1: Negotiation of IBA Before IA 73

Scenario 2: Negotiation of IBA After IA 75

Scenario 3: Negotiation of IBA and IA at the Same Time 76

Considerations on Connections between IBAa and IAs 77

THE WIDER IMPLICATIONS OF AGREEMENT MAKING 78

Access to the Courts and Government Regulators 79

Freedom to Pursue Political Strategies 80

Implications for Broader Agreements and Land Claims with the State 81

Freedom to Demand Corporate Responsibility 82

COMMUNITY GOALS, PLANNING, AND POLITICS 83

Unity Within Communities 84

Unity Between Indigenous Nations 86

STRATEGIES TO ADDRESS THE WIDER IMPLICATIONS OF IBAS 89

NOTES TO SECTION 2 90

SECTION 3 PREPARING FOR NEGOTIATIONS 93

ESTABLISH A STRUCTURE FOR NEGOTIATIONS 95

Mandate, Governance, and Decision Making 96

Negotiation Team 98

Gender and Negotiations 100

Negotiating Team Composition 101

Negotiating Team Selection Process 103

Role of Technical Experts on the Negotiating Team 104

Roles of Key People on the Negotiating Team 106

Community and External Advisor Negotiator Roles 108

Negotiating Team Role with the Community 108

Sample Rules for Negotiations 109

DEVELOP A PLAN FOR GATHERING AND MANAGING INFORMATION 111

Indigenous Data Control 111

Data Requirements 112

Data Storage, Retrieval and Access 112

Information Needs and Sources, by Topic 114

Data Access and Authorization 121

Maintaining Confidentiality 121

Community Capacity Building in Data Analysis 122

Determining How Data Will Be Used 123

PRECURSOR AGREEMENTS 126

Exploration Agreements 128

Memorandums of Understanding (MoUs) or Negotiation Protocols 129

DEVELOP A BUDGET 131

Estimating Costs and Determining Funding Sources 131

Assessing and Reducing Risks Associated with Company Funding 132

Budget Needs 133

Budget Management 134

GATHER INFORMATION ABOUT THE PROJECT, COMMODITY AND COMPANY 134

Strategies to Influence Companies or Bring Companies to the Table 135

Learning from Others' Experiences 136

ESTABLISH BASELINE CONDITIONS IN THE SOCIO-ECONOMIC AND CULTURAL ENVIRONMENT ... 137

Impact Assessment Questions ... 139

Potential Socio-Economic Impacts ... 140

Impacts During Advanced Exploration ... 142

Impacts During Construction ... 142

Impacts During Operations ... 144

Impacts During Closure ... 144

Mitigating Impacts ... 145

DEVELOP A COMMUNICATIONS STRATEGY ... 147

Identifying Those Who Can Affect the Process (for Better or Worse) ... 150

Involving Vulnerable or Important Groups (e.g., Elders, Women, Youth) ... 150

Information-Sharing with the Community: Determining When and on What Issues ... 153

Tracking and Responding to Community Concerns ... 155

ASSESS AND IMPROVE THE BARGAINING POSITION ... 156

Improve the Community Bargaining Position ... 158

Determine Objectives and Develop a Strong Negotiation Position ... 161

SUMMARY OF SECTION 3 ... 162

NOTES TO SECTION 3 ... 164

SECTION 4 CONDUCTING NEGOTIATIONS REACHING AGREEMENTS ... 165

NEGOTIATION PROCESSES AND PROCEDURES ... 167

Roles for Advisors and Community Negotiators ... 168

Running Meetings ... 169

Shaping the Negotiation Agenda ... 171

Managing Offers ... 172

Tactics at the Negotiation Table ... 173

Principle of Equivalency ... 173

Walking Out ... 174

Bringing in 'Power Figures' ... 174

Removing Harmful People ... 175

Meeting Locations ... 176

Meeting Language ... 177

Company Tactics ... 177

Tactics Outside of the Negotiation Room ... 178

Documentation and Communication 179
Keeping Things on Track 181
Budgets 182
Relationship Building 183
Grounding the Agreement in Indigenous Law and Values 184

IDENTIFY OPTIONS AND PROVISIONS FOR NEGOTIATED AGREEMENTS 185
Legal Provisions 186
Substantive Issues and Provisions 198
Communication 200
Indigenous Access to Mining Tenures 200
Mining Payments 202
Assessing Risk Tolerance for a Given Form of Payment 213
Using Benchmarks to Determine Potential Royalty Rates and Mining Payments 215
Mining Payment Utilization 217
Structures for Managing Mining Payments 220
Mining Payment Distribution 220
Employment 221
Union Relationships 235
Business Development 237
Access to and Transfer of Infrastructure and Facilities 239
Environmental Management 241
Culture and Cultural Heritage 250
Harvester Compensation and Traditional Use 253
Social Measures 254
Closure & Long-Term Care 254

ESTABLISH AGREEMENTS THAT REFLECT COMMUNITY GOALS 259
Community Review of Confidential Agreements 260
Plebiscites or Referenda 260
Leadership Review and Approval 261
Community Meetings to Obtain Consensus 261

RETURNING TO THE NEGOTIATING TABLE IF COMMUNITY SUPPORT IS ABSENT 262

SIGNING AND LAUNCHING AN AGREEMENT 263

SUMMARY OF SECTION 4 264

NOTES TO SECTION 4 265

SECTION 5 IMPLEMENTING AGREEMENTS AND MAINTAINING RELATIONSHIPS 267

IMPLEMENTING AGREEMENTS 269

Factors Internal to the Agreement 271

Institutional Arrangements for Implementation 271

Clear Commitments and Responsibilities 274

Adequacy of Funds and Other Resources for Implementation 276

Payments, Penalties, and Incentives 278

Monitoring and Reporting 279

Institutional Arrangements for Review 280

Amendment of Provisions 281

Factors External to the Agreement 282

Political Agency 282

Support of Key Actors and Groups 282

Change in Policy or Government 283

Rivalry Between Government Departments 283

Changing Capacity, Policy and Legislation in Relation to Implementation 283

Project Viability and Margins 283

Examples of Tools For Implementation and Management of Agreements 284

Ongoing Relationships 285

Using the Agreement to Build a Relationship 285

Building Trust and Tackling Barriers 288

NOTES TO SECTION 5 290

SUMMARY OF SECTION 5 290

REFERENCES 291

RESOURCES AVAILABLE ONLINE 300

INDEX 303

GLOSSARY AND ACRONYMS 308

FIGURES + TABLES

Figure 2.1 Mine Life Cycle 28
Figure 2.2 Generic Impact Assessment Process Steps 57
Figure 2.3 Spectrum of Indigenous Involvement in Impact Assessment Process, by Relationship 65
Figure 2.4 Phases of Indigenous-Led Assessments (ILAs) and Impact and Benefit Agreeemnts (IBAs) 66
Figure 2.5 Stages in Impact Assessments and IBAs 71
Figure 2.6 Ideal Timing for IA and IBA Negotiations 72
Figure 3.1 Example of a Negotiation Structure 97
Figure 3.2 Interest Mapping 99
Figure 3.3 Sample Roles of Key People on the Negotiating Team 106
Figure 3.4 A Phased Approach to Communication 154
Figure 3.5 Changing Bargaining Power 159
Figure 4.1 Relative Levels of Risk for Community and Mine Developer 213
Figure 5.1 Three Key Concepts of Implementing an Agreement 270

Table 1.1 Making the Decision to Negotiate 16
Table 2.1 Conventional IA and ILA Tendencies Compared 63
Table 2.2 Contrasting Key Elements of IAs and IBAs 68
Table 3.1 Summary of Types of Agreements 126
Table 3.2 Community Concerns and Aspirations of the CFSM Agreement in Australia 146
Table 3.3 Bargaining Strengths and Weaknesses 156
Table 4.1 Key Tips for Managing Negotiations 169
Table 4.2 Selected Company Negotiation Tactics and Community Responses 177
Table 4.3 Example of Agreement Tracking Table 180
Table 4.4 Checklist of Legal Provisions 186
Table 4.6 Advantages and Disadvantages to Communities of Different Mining Payments 211
Table 4.7 Criteria for Assessing the Strength of Environmental Provisions in Agreements 243
Table 4.8 Criteria for Assessing the Relative Level of Protection Provided by an IBA 251
Table 5.1 Example of a Payment Tracking Table 278
Table 5.2 Sample Yearly Review of an IBA 286

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IBA Community Toolkit Indigenous Reviewer's Gathering, November 19, 2025.

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Front row (L–R): Felicity Rose Chitty, Lilith Wyatt, Ginger Gibson. Not pictured: Melody Lepine.

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SECTION 1

SECTION 1

Introduction to the Toolkit

Before You Start: Making the Decision to Negotiate....16
Negotiation is Not Consent....17
Information is Power....17
A Focus on Process as Well as Outcome....18
Importance of Forming Networks....19
Gender and Impact Benefit Agreements....20
Agreements for Existing and 'Legacy' Mines....21
How to Use this Toolkit....22
Structure of the Toolkit....23
Notes to Section 1....24

SECTION 1

Introduction to the Toolkit

CONTRACTUAL AGREEMENTS between mining companies and Indigenous governing bodies (referred to as "Indigenous communities" in this toolkit) play a critical role in shaping the terms on which minerals will be extracted from Indigenous lands in Canada. The capacity to negotiate and implement such agreements is critical to ensuring that resource extraction generates substantial benefits for Indigenous communities and that the negative impacts associated with large-scale resource development are avoided or minimized.

In simple terms, an impact and benefit agreement (IBA) is a contract made between an Indigenous community and a company that provides Indigenous consent or support for a project to proceed in exchange for defined benefits. These agreements can also be known as community benefits agreements, participation agreements, benefits-sharing agreements, etc. In the toolkit, we also briefly discuss forms of agreement that might be used during the project life cycle (for example, negotiation protocols).

This toolkit is designed for Indigenous communities engaged in negotiating these agreements with mining companies. Becoming familiar with the material in this toolkit early in the negotiation process will contribute to Indigenous communities proactively leading development and ensuring their objectives are met, rather than reacting to the objectives of external companies. It is written for community negotiators, members of community negotiating teams, and consultants working with Indigenous communities and organizations.

The goal of the toolkit is to provide materials, tools and resources for Indigenous communities to help them address the process and content issues relevant to negotiating agreements in Canada. The focus is on private commercial agreements between Indigenous communities and mining companies.

While this toolkit centers on agreements with mining companies, much of the information and recommendations presented in this toolkit can be applied to other types of projects. IBAs originated in the mining industry but have become increasingly common for virtually all new major resource projects, including pipelines, liquefied natural gas facilities, transmission lines, hydroelectric projects, and wind farms. While much of the contextual material in Section 2 relates to Canada, a great deal of

the material in subsequent sections is relevant to negotiations between Indigenous communities and negotiators in other jurisdictions.

An IBA should be negotiated for any major resource project that is proposed within an Indigenous community's territory and/or has the potential to impose significant impacts on an Indigenous community's territory, rights and title, and/or overall wellbeing.

In Canada, requirements for the negotiation of IBAs are frequently included in Indigenous land claims and final agreements, such as the Nunavut Land Claims Agreement, the Labrador Inuit Land Claims Agreement, the Tłı̨chǫ Agreement, and the Eeyou Marine Region Land Claims Agreement. Where such agreements are not mandatory, they have become common practice to gain community support and approval.

We hope this toolkit will find its way into many people's hands and be used in all sorts of ways to aid the processes of relationship building and fair negotiations, to help achieve mutually beneficial agreements.

Similarly, while Canada provides the specific context for the toolkit, many of the issues discussed and the strategies proposed are highly relevant in other jurisdictions where Indigenous communities negotiate with resource developers.

Before You Start: Making the Decision to Negotiate

This toolkit is written from the perspective that a decision to proceed with a negotiation has already been made. However, in some contexts, an Indigenous community may decide not to negotiate with a corporation that wants to extract resources from its traditional territory. The community may simply want to prevent resource exploitation and decide that negotiation is pointless. There may be no mitigations or benefits that they could foresee being sufficient to gain support for the project to proceed, the area may be in an Indigenous Protected and Conserved Area (IPCA), and/or the community may have designated the area as a mining "no-go" zone for spiritual or cultural reasons. In these cases, the community might then pursue other strategies to achieve its goal of stopping a project from proceeding, such as litigation, direct political action, media campaigns, or alliances with Indigenous and non-Indigenous groups.

We stress in the toolkit that, while such litigation and other strategies can in some cases be alternatives to negotiation, they may also be critical parts of an overall negotiating strategy. These strategies can be especially important in strengthening an Indigenous community's overall negotiating position and for putting pressure on a company to compromise when negotiations are deadlocked.

Table 1.1 Making the Decision to Negotiate

Reasons an Indigenous community may decide not to negotiate	Potential benefits entering negotiations
The project is unlikely to proceed to mining, so negotiation is not a good use of community resources (see Mineral Assessment Tool on p. 34).	Early negotiations at the exploration stage can ensure exploration benefits and baseline data collection reflect community priorities.
The site of the project overlaps with a sacred or culturally significant site, a declared mining no-go zone, or an Indigenous Protected and Conserved Area.	**Some project infrastructure may be relocated or redesigned through negotiations.**
The proponent has acted in bad faith in the past, or failed to respect consultation protocols.	Negotiations can sometimes rebuild relationships, and agreements can help enforce accountability.
The community does not have the capacity to negotiate.	**Companies should fund the negotiation process, and agreements can lead to substantial benefits, creating long-term increased capacity.**
The project would result in unacceptable environmental, social, cultural, or economic impacts.	Agreements can hold down mitigation measures, and negotiations can result in the change of location of major project components.

To achieve success in negotiations, Indigenous communities need to develop and implement broad strategies across a range of issues, including legal, political, media, and communication strategies, focused both internally on the community itself and externally on all stakeholders with the capacity to influence the outcome. This toolkit is designed to help Indigenous communities develop appropriate strategies in each of these areas.

Negotiation is Not Consent

A decision to begin negotiations does not imply community consent to a proposed project or a decision to reach an agreement, nor does negotiating precursor agreements, such as a non-binding term sheet or a memorandum of understanding.

At the start of negotiations, Indigenous communities have limited information about a proposed project and the developer's willingness or ability to meet the community's needs. As more information becomes available, the community may decide a project is not acceptable in principle, or that the conditions that would make it acceptable cannot be negotiated with the developer. In either case, and at any point in the negotiation, a community has the right to terminate the negotiation process. There may come a point when the community takes stock and decides it is better off without an agreement with the proponent. If the issue is a developer's unwillingness to meet the community's conditions, care should be taken to end negotiations in a way that leaves the door open for them to resume should the company involved change its position in fundamental ways or a new developer take over the proposed project.

Once a decision to negotiate is made, a community and its leaders need to undertake a hard-headed assessment of their position in relation to the company, the government authorities that will approve or reject the project, and the wider economic and political context.

These considerations are discussed in Sections 2 and 3. From there, the negotiating team must identify the overall strategy most likely to achieve a successful outcome. ■

Information is Power

Once a decision to negotiate is made, the Indigenous community and its leaders need to undertake a hard-headed assessment of their position in relation to the company, the government authorities that will approve or reject the project, and the wider economic and political context. From there, the negotiating team must identify the overall strategy most likely to achieve a successful outcome. Critical to such an approach is a sound and comprehensive information base. Development of this information base is a central focus of Section 3 of the toolkit.

A Focus on Process as Well as Outcome

It can be tempting to focus solely on the content of agreements and on what people achieved, such as the financial benefit they gained.

Through our experience as negotiators and researchers, we have learned that the process of negotiating and implementing agreements is absolutely critical to shaping the content of agreements, including whether potential benefits are realized and potential impacts are mitigated.[1]

We find that a good outcome to a negotiation will reflect a range of factors, including:

- The broader context (e.g., legal, regulatory, political, and economic);
- The nature and extent of community involvement;
- The character of the community;
- The preparatory work the community has completed (e.g., nation building, governance processes, planning exercises, negotiation and implementation of agreements);
- The strategies and negotiating positions the community develops;
- The way the community structures its negotiating team;
- The legal position of the community in relation to the project; and
- The nature of the project.

All these factors are addressed in the toolkit.

Two specific factors — an Indigenous community's clarity regarding its goals and its ability to stay united and to plan collectively — are perhaps the most powerful explanations for the success of negotiations. Some communities with little apparent leverage have achieved successful agreements because they took the time to work out exactly what they wanted and then stayed united, even when things got tough. If negotiations get tough, communities that are united can dig in and use other strategies to enhance their bargaining power, such as direct action, litigation and forging political alliances. Without unity, the company can often divide and conquer, consulting with the people they find easiest to deal with and ignoring and isolating the tougher ones.

Some communities with little legal leverage have achieved successful agreements because they took the time to work out exactly what they wanted and then stayed united, even when things got tough.

A third factor is also important: unity across Indigenous communities through regional political organizations can lead to more resources, greater leverage, and better strategic approaches, resulting in better agreement outcomes.[2] Against this background, the toolkit focuses heavily on the process of negotiation and the implementation of agreements, as well as their content.

Importance of Forming Networks

While the toolkit provides information and resources, it is not a substitute for the exchange of information among networks of negotiators and expert advisors. Such networks can involve a range of activities, from large-scale, formal, and systematic information exchange between groups of leaders and advisors across a broad range of issues to informal discussion between two individuals on a specific technical issue.

For example, in 2007, a group of James Bay Cree leaders and advisors visited the Kimberley region of Western Australia, hosted by the regional land organization, the Kimberley Land Council Aboriginal Corporation (KLC). Over the previous five years, the KLC had assisted communities in negotiating a series of mining agreements; the Cree group was just about to embark on its first negotiation with a mining company. The Cree had extensive experience in negotiating self-government agreements, an area where the KLC had limited experience but planned to become more active. The Cree and senior KLC staff spent a week travelling through the Kimberley region and meeting with Indigenous leaders and negotiators, a unique opportunity to share expertise and experiences across a wide range of matters, including fundamental issues regarding Indigenous governance and political strategies for dealing with companies and governments.

At the other end of the spectrum, one of the authors encountered problems in finding a mutually acceptable way to address the specific, technical yet important issue of indexing payments under an agreement between a major multinational mining company and an Indigenous group in Australia. He spoke briefly by phone with technical advisors in both Australia and Canada who had dealt with the same issue in earlier negotiations between Indigenous communities and the company involved. This assisted greatly in identifying an approach that would both meet the needs of the Indigenous group and be acceptable to the company.

Between these examples, endless opportunities for networking and information exchange exist. We hope the toolkit will support and encourage the further growth of such networks.

Toolkit Research and Development

In developing the toolkit, we reviewed publicly available literature on agreements in Canada, Australia, and internationally, and drew extensively on our own experience in negotiation and agreement formation.

There may be a bias towards the Indigenous communities and regions where we have worked. For example, Ginger Gibson and her Firelight team have worked on these issues primarily in Canada and Latin America, while Ciaran O'Faircheallaigh and his collaborators have been involved in negotiations mainly in Australia. We used our review of the literature to ensure a broader perspective.

This 2026 updated edition of the toolkit reflects the current state of IBAs and considers new trends and literature that have emerged since the last edition of the toolkit was published in 2015. It includes a substantial focus on issues whose importance has become more evident over the last decade, including mine closure, long-term care of mine sites, management of legacy sites, gendered issues, and Indigenous-led Assessments. Like the previous edition, this updated toolkit relied on input from Indigenous reviewers who negotiate and implement agreements. We are deeply grateful to these reviewers for their time, thoughtful input, and insights, without which this toolkit would not be possible.

Gender and Impact Benefit Agreements

In this 2026 edition, the lens through which we view gender dynamics has been informed by Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls, which released its conclusions in 2019.[3] We've integrated this lens throughout the toolkit by considering gender dynamics at all stages of negotiation. This encompasses several key areas: the composition of the negotiating team, including both technical specialists and community representatives; the participants who inform the underlying processes and technical studies; and the thorough assessment of how specific risks or impacts may disproportionately affect women or gender-diverse individuals compared to men, and how they are addressed within the negotiation context.

We also address the differential impacts of large-scale projects from the outset of negotiations. Impacts that disproportionately affect Indigenous women and gender-diverse individuals, such as heightened exposure to violence and economic inequity, are critical considerations. Attending to these risks is vital to maximizing benefits and ensuring equitable outcomes for all community members, particularly those who are typically disenfranchised from large-scale development.

Agreements for Existing and 'Legacy' Mines

Some companies have been operating for decades without agreements with the surrounding Indigenous communities because they obtained their permits and licenses before agreements became the norm in their jurisdiction. There is a growing number of cases in which companies that were previously unwilling to negotiate were brought to the table. Sometimes it takes litigation or the need to seek new permits or licences to get the company to the table. In some cases, the initiative may come from the company, for example, if there is a change in company leadership or priorities, or if a larger firm that has a policy of negotiating agreements with all neighbouring Indigenous communities takes over a smaller company.

Issues to manage in each agreement are unique. Parties may have to reckon with grievances, impacts, and the lost financial value of the already extracted resource. These losses must be acknowledged early, and strategies identified to address them in the agreement. With the project already operating, there may be less on the table to share, with procurement opportunities or jobs often already taken up. There may also be different time pressures, negotiation levers, and information available to support the negotiation. These agreements may still focus on the standard set of benefits; however, a good degree of creativity may need to be applied to identify and share benefits. Notably, as the mine is already in operation during the negotiation of these agreements, it may be beneficial to implement parts of the agreement before the entire agreement is ratified and signed, for example, by launching employment and procurement initiatives as soon as the parties have agreed on terms.

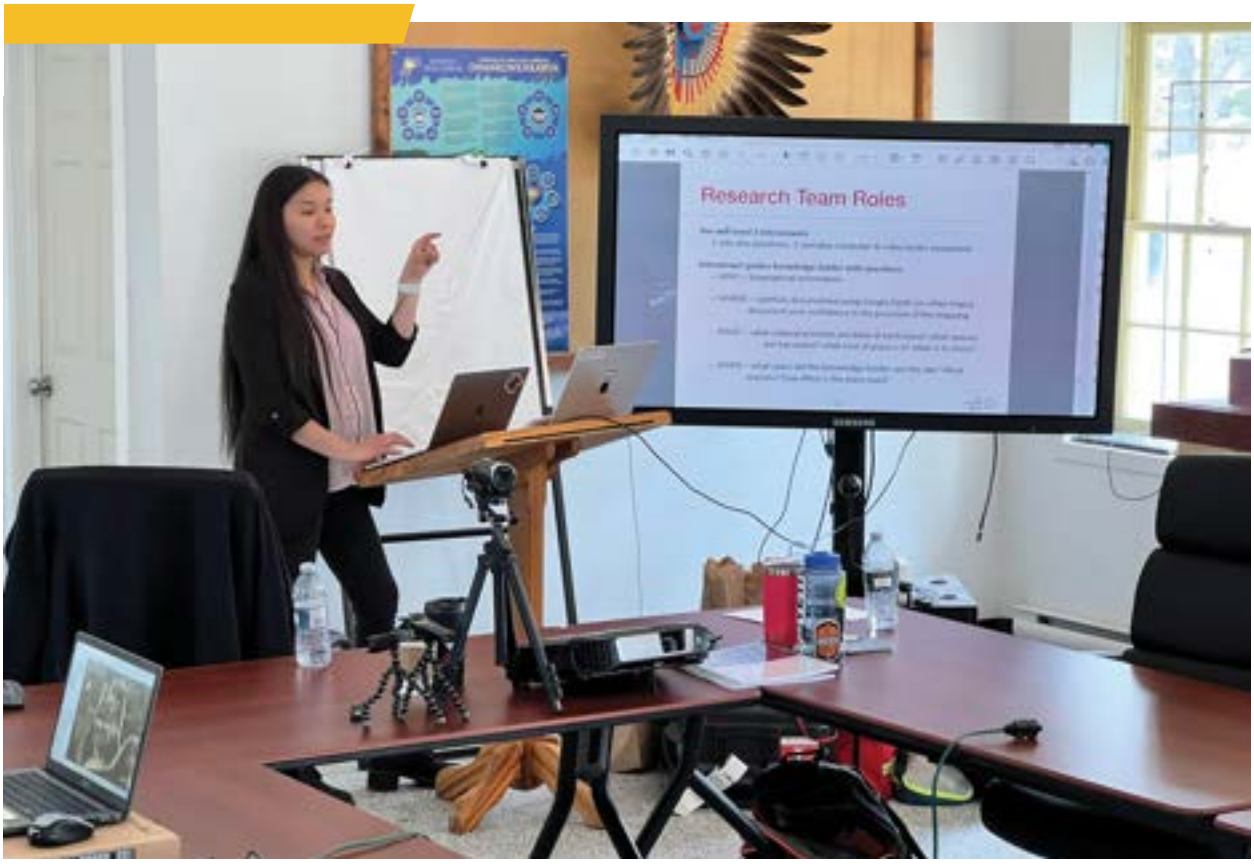
Some companies have been operating for decades without agreements because they obtained their permits and licenses before agreements became the norm. There is a growing number of cases in which companies that were previously unwilling to negotiate were brought to the table.

Another recent development is that some companies have come to the table to negotiate agreements for mines that are permanently closed or in long-term care and maintenance, often referred to as 'legacy mines.' For example, the Kwetᶊı̨ʔaà (Rayrock) mine operated in the 1950s in northern Canada, and the proponent has long relinquished leases to the federal government. The Tłı̨chǫ Government sought reconciliation, environmental and cultural baseline studies, and full participation in restoring the site according to their social, cultural, economic, and environmental standards and objectives. An initial agreement established the terms for this government-to-government collaboration for remediation, which is set to be renegotiated and renewed for the post-remediation phase starting in 2028. An upcoming consideration for some legacy sites is that tailings storage facilities may contain "critical minerals" that were not initially targeted for extraction, and which are now valuable enough to consider reprocessing the tailings, which could reanimate a closed project.[4]

How to Use this Toolkit

The toolkit is designed to be useful to readers in a number of capacities. For example:

- **A COMMUNITY** about to start a negotiation might use the toolkit as a basis for information-gathering and training, possibly with the assistance of an experienced trainer.
- A member of **COMMUNITY LEADERSHIP** might skim the toolkit to inform early decision-making, such as when to mobilize legal and consultant support.
- A newly appointed **NEGOTIATING TEAM MEMBER** might read through the toolkit from beginning to end as a guide to the entire negotiation process.
- A **NEGOTIATOR** working on a specific provision might read through the sections of the toolkit dealing with that particular topic.
- A **COMMUNITY IMPLEMENTATION COORDINATOR** may consult the implementation chapters for advice on specific implementation issues that have arisen.
- **CONSULTANTS** might revisit the guide on numerous occasions as they help a community through the lengthy negotiation process.



Structure of the Toolkit

The toolkit begins with an overview of the broader legal, political, and regulatory environment in which agreements are negotiated (Section 2). This is followed by three phases of negotiation (see figure below):

- Preparing for negotiations and establishing a negotiating position (Section 3);
- Conducting negotiations and creating agreements (Section 4); and
- Implementing agreements and maintaining relationships (Section 5).

The toolkit is designed as a practical guide to negotiating agreements. It is not an account of theoretical approaches to negotiation and their merits. Nor does it offer a prescriptive template for agreements, given that communities' goals will differ, as will the appropriate content and structure of agreements. Rather, the toolkit is designed to provide a range of options for dealing with issues that arise in negotiations between Indigenous communities and mining companies.

We hope the toolkit can support Indigenous communities in Canada and elsewhere in maximizing the benefits they receive from agreements while reducing or avoiding project impacts, and that it helps ensure that the processes used in negotiation add to their capacity, unity, and well-being.

Structure of the Toolkit

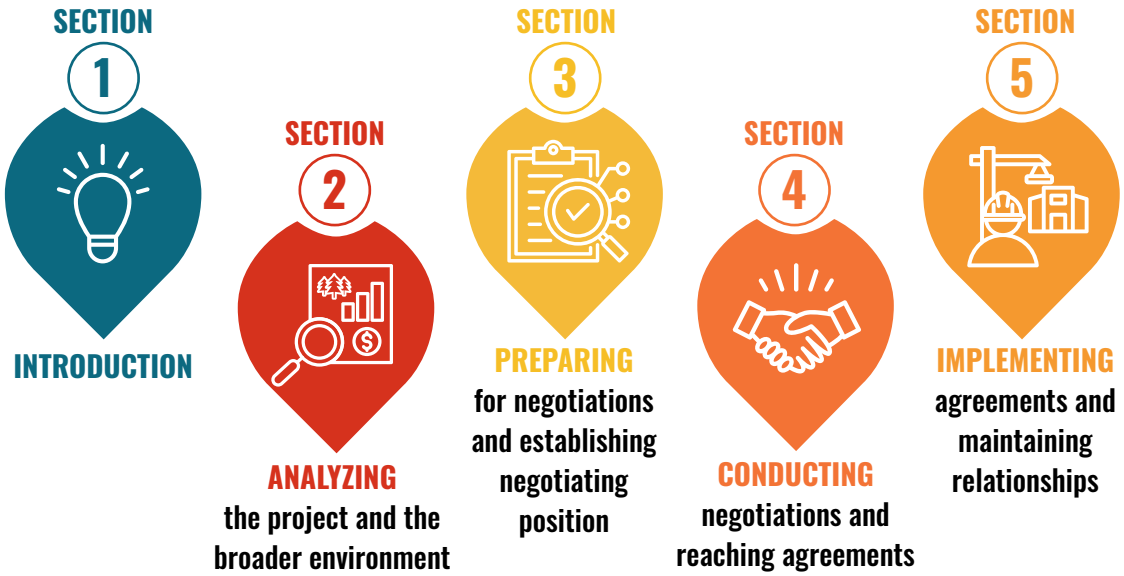


PHOTO JONAKI BHATTACHARYYA

NOTES TO SECTION 1

1 Mitigations of impacts are often required by provincial or federal governments as part of the impact assessment and mine approval process, however, communities may also want to address this issue within agreements to create an additional layer of accountability.

2 O'Faircheallaigh 2021.

3 National Inquiry into Missing and Murdered Indigenous Women and Girls 2019.

4 Vitti and Arnold 2022.

See References on page 291

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SECTION 2

SECTION 2

Analyzing the Project + the Broader Environment

THE MINE LIFE CYCLE 28

INDIGENOUS RIGHTS: THE INTERNATIONAL CONTEXT 40

INDIGENOUS RIGHTS: THE CANADIAN CONTEXT 46

LEGISLATIVE AND POLICY LEVERS FOR IBAS 53

CANADIAN MAJOR PROJECTS REVIEW PROCESS AND REGULATION 56

Impact Assessment In Canada 56

Indigenous Participation in Impact Assessment 62

TIMING OF THE NEGOTIATION OF IBAS AND IAS 68

Timing the IA and IBA: Three Scenarios 72

THE WIDER IMPLICATIONS OF AGREEMENT MAKING 78

Access to the Courts and Government Regulators 79

Freedom to Pursue Political Strategies 80

Implications for Broader Agreements and Land Claims with the State 81

Freedom to Demand Corporate Responsibility 82

COMMUNITY GOALS, PLANNING, AND POLITICS 83

Unity Within Communities 84

Unity Between Indigenous Nations 86

STRATEGIES TO ADDRESS THE WIDER IMPLICATIONS OF IBAs .. 89

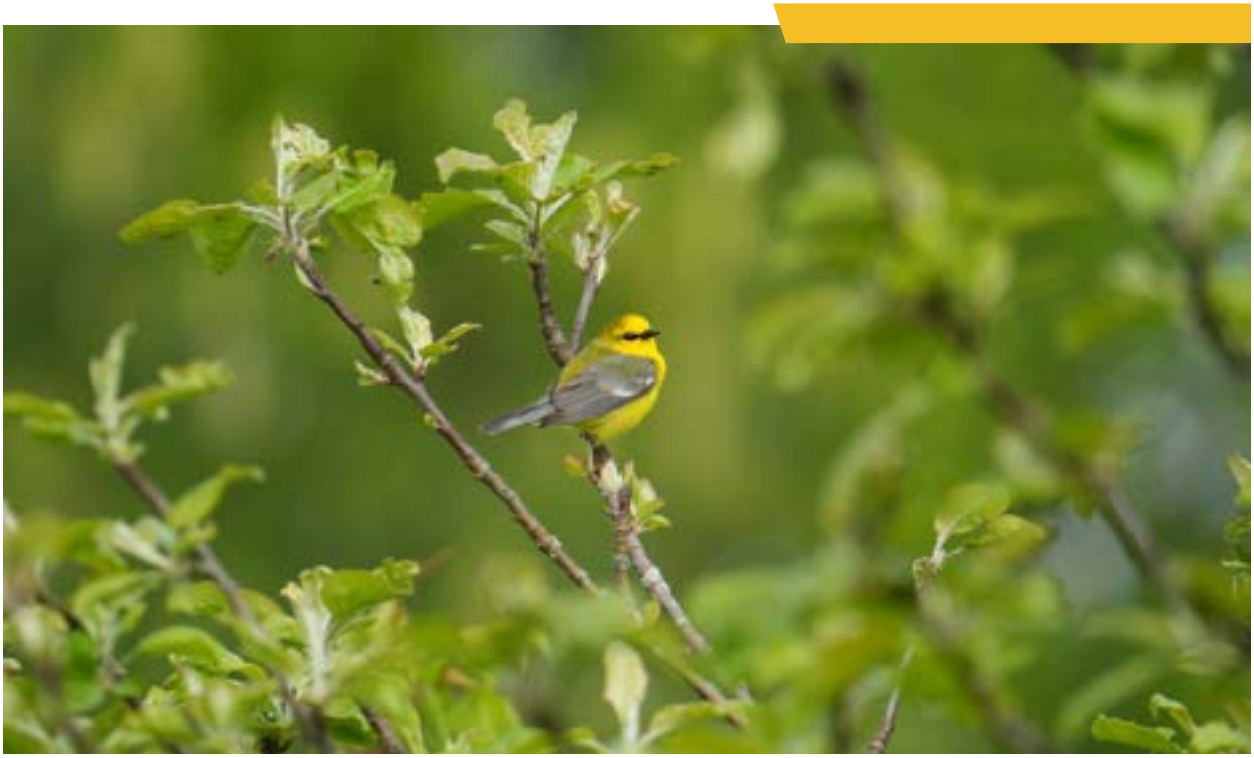
NOTES TO SECTION 2 90

SECTION 2

Analyzing the Project and the Broader Environment

THIS SECTION SETS OUT the context in which the negotiations take place. This context must be carefully analyzed to understand the levers available to the community in negotiating an impact and benefit agreement. We consider:

- **THE MINE LIFE CYCLE** From conception to post-closure, stages are described so that negotiators can identify the stage of development a project has reached, the issues and opportunities associated with different stages, and how the project is likely to progress.
- **INTERNATIONAL RIGHTS** Increasingly, Indigenous people may be able to draw on the international recognition of rights that extend to all Indigenous people, regardless of the laws that apply in the countries in which they live.
- **CANADIAN RIGHTS** Certain aspects of the Canadian rights context will be relevant to all Indigenous peoples. The specific relationship an Indigenous group holds to the federal government — through a historic or modern treaty, or through the absence of any treaty or recognized land claim — will impact the position of individual groups. Provincial and territorial governments also play a role in how Indigenous rights are recognized and implemented in practice, including through legislation such as British Columbia's Declaration on the Rights of Indigenous Peoples Act (DRIPA), which affirms and gives effect to UNDRIP within provincial law.
- **LEGAL, REGULATORY, AND POLICY LEVERS** Some federal, provincial, and territorial legislation, regulations, policies, and permits include clauses that require the negotiation of IBAs with communities. These provide the community with negotiation leverage.



Blue-winged warbler at Rice Lake. PHOTO CHRIS WAGNER/FIRELIGHT

- **CANADIAN ENVIRONMENTAL REGULATIONS** Each jurisdiction is governed by different impact assessment and approval processes, so negotiators need to know which government is the lead on an assessment, what levels of assessment are possible, and the nature of the triggers to a higher level of assessment. This section also considers the timing of impact assessment (IA) processes and IBA negotiations and outlines three possible approaches.

- **IMPLICATIONS OF AGREEMENT-MAKING** This section highlights how the negotiation of project-based agreements between Indigenous groups and mining companies (and, in some cases, government) affects the wider legal and political status of Indigenous groups and the nature of their relationships with other elements of the political system.

- **COMMUNITY GOALS, POLITICS AND UNITY.** To achieve success, IBA negotiations must be undertaken with a keen awareness of the wider community's goals and priorities. Political unity is one of the most significant factors that predict the strength of a negotiation effort and the resulting agreement. When there is no unity among or between Indigenous nations, agreements are often weak because internal divisions reduce negotiating leverage and can be exploited by proponents to narrow commitments.

Political unity is one of the most significant factors that predict the strength of a negotiation effort and the resulting agreement.

The Mine Life Cycle

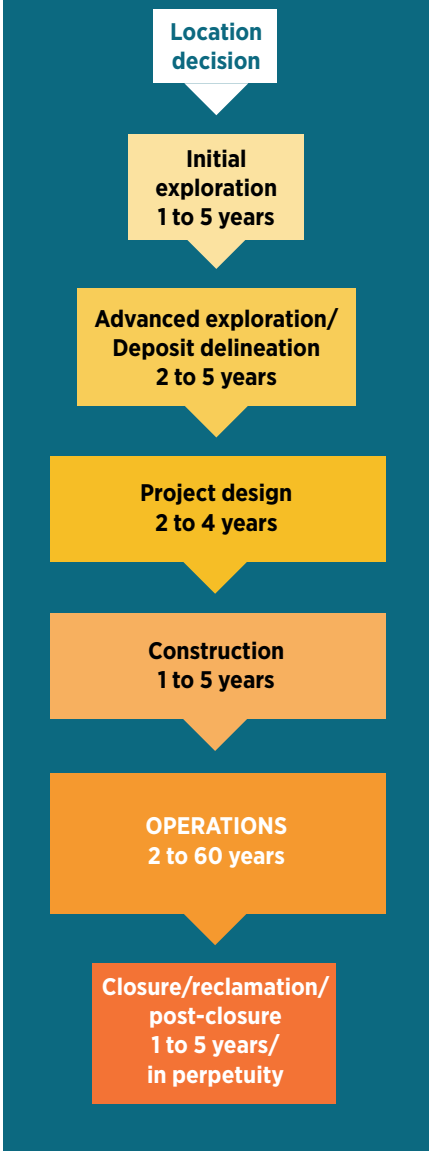
The mine life cycle typically breaks down into a series of phases. Figure 2.1 indicates a linear process from a location decision to full-scale operations. However, for each phase in the mine life cycle, the decision may be made to suspend or terminate the project. Most exploration projects — some 99.9 per cent of them — never become full-scale mines.[5]

Location and Investment Decision

When a company decides where to invest, it looks at many factors — not just whether there are valuable minerals in the ground. The decision depends on comparing risks and rewards between places, for example, western Argentina versus northern British Columbia. First, companies check if the geology and mineral potential look good. If not, they stop there. But even with strong mineral prospects, a mining company might still choose not to invest if political or social risks are too high. At this early stage, companies usually make decisions without any direct contact with local communities.

Figure 2.1 indicates a linear process from a location decision to full-scale operations. However, for each phase in the mine life cycle, the decision may be made to suspend or terminate the project. Most exploration projects — some 99.9 per cent of them — never become full-scale mines.

Figure 2.1 Mine Life Cycle



Early Exploration

Early exploration occurs in one of two ways: searching for mineral deposits in an area that has had little or no previous exploration or mining (grassroots or greenfield exploration); or looking for new deposits — or extensions of existing deposits — in areas where mining is occurring or has previously occurred. It is very rare to find a mineable deposit through greenfield exploration, but the upside is that if a find is made, it may be extremely large. The chances of finding a mineral resource in an already explored area are much higher, but the risk is that the best deposits have already been mined.

Prospectors or exploration geologists out on the land will likely be the first indication of corporate interest in the region.

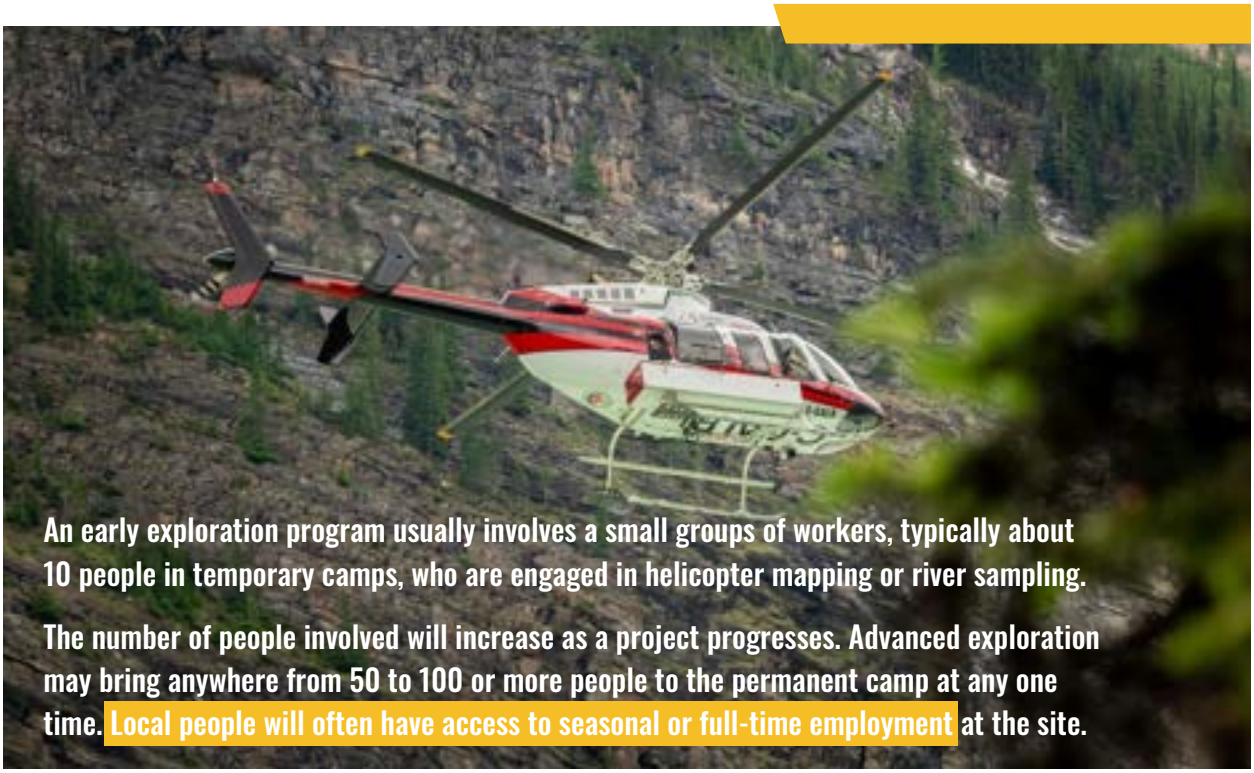
Prospectors are often the first people involved in exploration. They choose where to look for minerals by understanding the geology of a region, walking and observing an area, and relying on samples they collect. They start by looking at the regional and large-scale geology and glacial history of a region to identify where they want to start exploring. For example, the Canadian Shield is rich in minerals such as nickel, copper, zinc, silver and gold because it is part of an ancient volcanic belt that had conditions favourable to economic mineral development. Following this, a prospector will work out on the land, mapping rock types and collecting samples. Sometimes they use satellite imagery, global positioning systems, or surveys from planes or helicopters to identify geological variations.

When a prospector finds something promising, an early exploration program will be developed. This usually involves small groups of workers, typically about 10 people in temporary camps, who are engaged in helicopter mapping or river sampling. It is during this time that clues indicating the presence of minerals might be found. If they are found, this usually leads to more permanent camps, larger crews, and more intensive work. Geologists will begin sampling larger volumes of material

NEAR-MINE exploration, also known as brownfield exploration, often involves searching for new deposits or the extension of existing deposits in areas where mining is already underway or has already been completed.

GREENFIELD exploration involves searching for mineral deposits in areas that have had little or no previous exploration or mining.

SPORISEVIC PHOTOGRAPHY



An early exploration program usually involves a small groups of workers, typically about 10 people in temporary camps, who are engaged in helicopter mapping or river sampling.

The number of people involved will increase as a project progresses. Advanced exploration may bring anywhere from 50 to 100 or more people to the permanent camp at any one time. Local people will often have access to seasonal or full-time employment at the site.

PHOTO: WIRESTOCK

from more localized areas. This can also involve year-round work using airplanes to fly over an area to create maps that show the geological structure of the rocks below the surface. They can also use physical methods, such as seismic, gravitational, magnetic, electrical, and electromagnetic methods, to measure rock properties, especially to detect differences between rocks that contain ore deposits and those that do not. The point of this activity is to identify targets for drilling.

A typical early exploration program costs up to $5 million (in 2025 dollars).[6]

Advanced Exploration

Advanced exploration includes drilling designed to confirm that ore is in fact present and, when it is, mapping out the size of the ore body and the minerals it contains. At this point, additional sampling, geophysics, and drilling may continue elsewhere as the company continues to look for more ore, while further investigation of what it has found takes place.

The decision to drill on a claim is not a small one—the expenses to the company far exceed those of all previous work. However, there is no other way to delineate the mineral trend. The size of the drill bit will vary: larger diameter drills will be used in areas where the geology is well known and promising, whereas smaller drills will be used where there is little information on the host rock. Companies do not usually drill deeper than 300 metres, because doing so is very expensive. Depending on the ease of getting to the location (i.e., the presence of roads), drilling can be done either by wheeled drills or heli-portable drills. These diesel-run machines drill one hole at a time

into the ground to determine whether, and the extent to which, there is a viable mineral deposit. Anywhere from one to 100 or more holes may be drilled, with core samples initially examined on-site and shipped off for further examination (assaying) at a laboratory.

An early phase of drilling will include small diamond drills and small drill cores. The company will increase work as warranted by increasing sample, drill, and core sizes. Eventually, the company may collect bulk samples to determine the grade and whether minerals can be easily extracted. However, the phases of drilling are not linear. Small-scale drilling to cut a core of rock (called *diamond drilling*) will likely continue in other potential areas throughout the mine life. For example, many operating mines continue sampling in adjacent areas while they are running an operating mine.

For projects with strong drilling showings, larger drills will be used to map the extent of the deposit (called *deposit delineation*). Information from the drill logs will be used to map the nature of the deposit underground. The company will map the ore body using software programs and drill log data. At this point, the potential for an actual mine is becoming apparent. Activities on the ground may include: more drilling to determine the depth, length, geometry, and grade of the mineral deposit; bulk sampling of 2,000 to 20,000 tonnes of the ore body to determine its qualities and what metallurgical or other processes can be used to extract the metals from the ore; setting up of a permanent camp with more people; and environmental baseline work in preparation for the environmental impact assessment and regulatory stages.

Exploration expenses can accelerate quickly at this point, reaching $3 to $ 10 million annually or more. Some estimates place the total costs of deposit appraisal anywhere between $6.5 million and $130 million (in 2025 dollars).

People in communities will notice **drilling programs** more than previous activities because they are more invasive. They are noisier and involve more ground and air transport, setting up of mobile or set camps outside of communities, visible clearings, new spur roads, and the physical presence of the drills themselves on the landscape. If these impacts are not fully addressed through regulations, they can be managed through early-stage or exploration agreements with the proponent (see Section 3).

People in communities will notice drilling programs more than previous activities because they are more invasive. They are noisier and involve more ground and air transport, the setting up of mobile or fixed camps outside communities, visible clearings, new spur roads, and the physical presence of the drills themselves on the landscape. It is during drilling that the word often starts going around the community that a mine is, or may be, developed on the land (although even the tents at exploration camps raise suspicions among hunters). Despite this common idea, a large majority of drill programs end in project suspension or termination because the mineral discovery cannot be shown to hold an economically viable mineral deposit.

At this stage, exploration agreements (discussed further in Section 3) become important tools for setting expectations, managing impacts, building relationships, and ensuring that a community's priorities are being respected in relation to the exploration project.

The "Free Entry" Mining System

Provinces and territories in Canada have historically operated under a "free entry" regime, meaning that anyone can acquire a prospector's license and stake a claim on most Crown lands — even where Indigenous nations assert rights or title, without proper information, consultation, or accommodation processes, let alone consent.[7]

This model has been successfully challenged in multiple jurisdictions. In 2012, the Yukon Court of Appeal (Ross River Dena Council v. Government of Yukon) held that mineral claim staking without prior consultation breaches the Crown's duty to consult. In Ontario, the 2012 Wahgoshig First Nation case halted exploratory drilling until "meaningful consultation and accommodation" occurred.

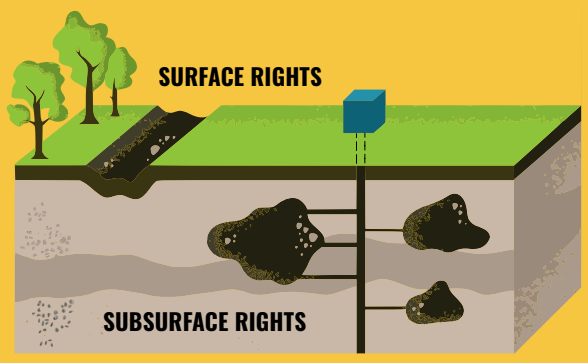
In British Columbia, the Gitxaała (2021) and Ehattesaht (2022) Nations challenged the *Mineral Tenure Act,* arguing that its automatic online claim-staking system violates both the Crown's duty to consult and BC's *Declaration on the Rights of Indigenous Peoples Act* (DRIPA). In 2023, the BC Supreme Court agreed and ordered legislative reform. In response, BC launched the Mineral Claims Consultation Framework (MCCF) in May 2025 and committed to further modernizing the Act through its DRIPA Action Plan, in collaboration with Indigenous peoples. However, the Court of Appeal in 2025 found that provincial laws must be consistent with DRIPA, prompting the BC government to propose suspending portions of DRIPA. As of Spring, 2026, this issue is rapidly evolving.

In Quebec, the Mitchikanibikok Inik First Nation (Algonquins of Barrière Lake) successfully challenged the province's "free entry" mining regime — in October 2024, the Superior Court ruled that new claim registrations require prior consultation. The province has appealed, arguing that a map designation under the *Mining Act* does not, on its own, trigger the duty to consult. Meanwhile, Quebec amended the *Mining Act* to allow government-to-government agreements with Indigenous communities, enabling, at least in theory, land withdrawals or reservations to balance mining development with traditional and cultural uses. In practice, however, these agreements remain difficult to implement, requiring significant time and resources from the Nations.

While these successes in the courts are real, most jurisdictions still do not require Indigenous consultation before a claim is registered; it usually occurs later, during exploration or mining permitting, or through parallel land-use planning processes. Governments have often been slow and hesitant to fully implement consultation-based systems — let alone consent — through the entire mining life cycle. ■

SURFACE VS. SUBSURFACE RIGHTS

There may be large areas of land where Indigenous people own surface rights, but the Crown manages the subsurface. In these areas, companies are generally required to attain permission to access the land before they can stake a claim. If the intent is to prospect or stake a mineral claim, the company must include relevant authorization from the property holder concerning access, along with the applications.



Project Design

Where there are promising results from advanced exploration, mine engineers come to rival the geologists as the driving forces behind what is now a fledgling mine site. Pilot plants may be developed to determine the proper mine process system, environmental work escalates, and everything from wildlife management to water processing needs to be assessed on a cost-and-environmental-impact basis.

At some point, the geologists, engineers, and accountants get together to determine the project's economics. This typically requires estimating the size of the extractable mineral resource and calculating the costs of infrastructure, employment, and transport associated with the required mine plan. It also involves making assumptions about production levels and mineral prices, and determining whether the return on investment is adequate to take the risk associated with sinking between $200 million and over $3 billion into the capital costs of building a mine. The results are typically reported first in a Scoping or Preliminary Economic Assessment (PEA) study, then a Pre-feasibility, and then a Feasibility study — all of which are publicly available for publicly traded companies on stock exchanges. Each study typically takes about one to two years to complete. These studies are often one of the most valuable tools a community can use to determine exactly what is proposed at the mine — for example, its size, lifetime, infrastructure, including access roads, and employment requirements.

During deposit delineation and project design, there may be very little happening on the ground. Further, the project may be bought out by another company, often a larger or more established proponent, but sometimes a similar-sized or smaller company if the asset proves less promising. This may result in a lull in activity as the new owner assesses a range of projects and decides where to focus its attention.

At other points in the mine life cycle, there will be frantic activity in the region by the company. This should not necessarily be seen as perverse on the company's part, as it reflects the nature of the mine life cycle. On the other hand, communities should not allow company pressure to make them rush key preparatory work or decisions. Also, the community can use "slow" periods in project activity to get organized.

The community will need to make judgments on how much energy is put into project analysis and IBA negotiation strategy at different points in the cycle. While the community needs to be ready, too much investment of resources too early may be wasted if the project does not go to the next stage. The Mineral Assessment Tool (MAT) profiled on the following page provides a useful framework for this analysis (also see *Timing of the Negotiation of IBAs and IAs* on page 68).

Indigenous communities may also wish to consider potential ancillary projects that could follow a major development, such as roads, transmission lines, pipelines, work camps, or aerodromes, and the cumulative and regional effects these may create.

If the company decides to go ahead, the permitting process begins (see *Licenses and Permits* on page 36). Permitting occurs at various points in the process, often beginning as early as advanced

exploration and continuing throughout the mine life. At this point, the company will need to apply to government bodies for approval and undergo an environmental assessment of the proposed mine (see *Indigenous Participation in Impact Assessment* on page 62). Indigenous communities may also choose to undertake project-specific, strategic, or regional Indigenous-led assessments to better understand cumulative impacts and support long-term decision-making.

Mineral Assessment Tool

A tool to track mining projects and guide community decisions

Developed by Firelight, the Mineral Assessment Tool (MAT) helps Nations identify which mineral projects are most likely to advance in the near term—so communities can focus their time and resources where they matter most.[8]

Using publicly available information and industry-standard terms, MAT evaluates projects across five pillars:

- Mineral resources;
- Technical studies;
- Financial viability;
- Corporate profile; and
- Indigenous relations.

In 2025, Firelight used the tool with a Tribal Council to assess over 60 projects, allowing leadership to focus attention on eight most likely to move forward while monitoring others.

Firelight used the tool in 2025 with a Tribal Council to assess over 60 projects and mineral tenures within their territory. The assessment highlighted which projects were most likely to move forward—allowing leadership to focus attention on a small number of high-scoring projects (8 in total) while monitoring others with lower potential for near-term development.

The tool is accessible, adaptable, and easy to use, requiring only minimal training and online research skills. It is a *living tool* that can be tailored to reflect each Nation's values, priorities, and governance approaches, helping to prioritize engagement, assessment, and negotiation efforts.

TECHNICAL STUDIES such as scoping, preliminary economic assessment (PEA), pre-feasibility, and feasibility studies are often a powerful tool communities can use to identify what a developer is proposing for a mine—for example, its size, lifetime, infrastructure and employment requirements. ■

Construction

Construction is one of the most intensive — and expensive — phases of mine life.

During a two-to-five-year period, hundreds of millions of dollars are invested in building the mine, including the processing plant, accommodations, transportation and other infrastructure. Anywhere from 200 to upwards of 2,000 full-time construction jobs may be available, although most people on-site will work for independent specialized contractors rather than for the mining company itself. Notably, well-structured agreements can extend Indigenous preference and targets to contractors and subcontractors (see Section 4 of this Toolkit).

Construction is a critical time for Indigenous people to gain skills that will be needed when the mine is operating, including building certifications and developing critical problem-solving skills. This is discussed further in "Employment" in Section 4 of this Toolkit.

This is a time of great economic boom potential and excitement in communities, but it also brings worries about impacts and rights infringements. This will involve immediate concerns about construction noise, dust and emissions, an increased project footprint, and more outside influences in the community, as well as concerns about long-term impacts — what will happen to people, land, water, and wildlife once extraction starts.

While **very few exploration projects make it to the mining phase** (fewer than 1 in 1,000), for those that do, the timeline from initial exploration to operations can range from 6 to 20 years. Expediting the process, particularly during the regulatory stage, is a priority for companies that communities need to be aware of and that they can turn to their advantage (see Assess and Improve the Bargaining Position on page 156).

The construction phase also represents a period of elevated vulnerability for Indigenous populations, as this is when impacts escalate from early design and exploration activities to large-scale land disturbance, coinciding with the peak of workforce and contracting activities. These impacts can disproportionately affect Indigenous women and gender-diverse people. Factors such as the proximity of project activities to a community, the influx of non-local workers, and the establishment of temporary work camps near Indigenous communities increase the potential exposure of Indigenous women and gender-diverse people to harms associated with industrial camps, such as increased access to drugs and alcohol, sexual violence, harassment, and human trafficking. Recognizing these potential harms and ensuring that plans are in place to address the security and safety of Indigenous women and girls is part of the Calls for Justice made by the National Inquiry into Missing and Murdered Indigenous Women and Girls.[9]

Part of the mine construction process may involve removing large volumes of waste material above the economic ore body. This removal of overburden or other waste rock often makes the development look like a full-scale mining operation even before ore extraction begins.

Licenses and Permits

Throughout the mine life cycle, a variety of licenses and permits will be required. These will vary according to the jurisdiction and, in some cases, also to the resource to be mined. Laws and regulations change frequently, so it is important to check the responsible government body (usually the province or territory's mining ministry) for updates.

Most mining jurisdictions in Canada have one or more of the following types of mining titles and permitting processes, each with implications for Indigenous and local communities:

- **PROSPECTOR'S LICENCE OR ID:** This is a basic licence or process that lets a person or company register a claim and search for minerals. It does *not* give permission to disturb land or remove materials, only to look for minerals using basic hand tools.
- **MINERAL CLAIMS:** This gives the holder the exclusive right to explore for minerals in a specific area. It doesn't mean a mine will be built; it just allows testing and exploration. Most claims never become operating mines. Claims are usually valid for two to ten years and can be renewed by paying annual fees and filing work reports. Today, most claims are created online by map, while a few jurisdictions (e.g., Manitoba, Yukon, Northwest Territories) still require on-the-ground staking using posts and tags.
- **EXPLORATION / LAND USE / WATER USE PERMIT:** These allow surface and water uses—such as for drilling, trenching, clearing, trail building, or running temporary camps. They're usually valid for 1–3 years and can be renewed. The company often must reclaim disturbed ground, post a *security deposit* to cover reclamation costs, and engage with Indigenous communities about the exploration work.

Most mining jurisdictions in Canada have one or more of these types of processes, each with implications for Indigenous and local communities.

Laws and regulations change frequently, so it is important to check the responsible government body (usually the province or territory's mining ministry) for updates.

- **CLASSED OR TIERED PERMITTING FOR EXPLORATION:** Many jurisdictions now use a tiered system that links the level of exploration activity to the amount of regulation required. Small, low-impact programs may only need to submit a notice, while larger projects using mechanized equipment require a permit, a security deposit, and consultation with Indigenous communities.
- **MINING LEASE / PERMIT:** Converts an exploration claim into a legal right to *extract and sell minerals*. Leases usually last 20+ years and can be renewed. The company usually must prove that the deposit exists, provide a detailed survey, and pay rent and royalties to the Crown when production starts. The company must also obtain an operating permit before mining begins, typically including a full mine plan, a reclamation plan, and financial security (a bond) to cover cleanup costs.

- **ENVIRONMENTAL ASSESSMENT (EA):** Most jurisdictions require an environmental review to assess how a proposed mine could affect land, water, wildlife, and communities and how the mining company proposes to manage the predicted impacts. These reviews include public input and consultation with Indigenous governments and may lead to approval with conditions, redesign, or rejection (rare). Large projects with impacts on federal interests — such as national parks, reserve lands, migratory birds, species at risk, fish and fish habitat, or navigable waters — may also trigger a federal review. Indigenous-led assessments are also becoming more common, and these help ensure stronger community participation and transparency (see *Indigenous Participation in Impact Assessment* on page 62).

Many other permits and licences may also be required, including those for waste discharge, explosives, or transportation of hazardous materials. Each carries its own conditions for safety, environmental protection, and public reporting. Before final authorization, regulators must be satisfied that all consultation requirements with Indigenous peoples have been met, and they often treat agreements with affected Indigenous communities as an indicator that Indigenous rights and interests have been appropriately addressed. ■

Before final authorization, regulators must be satisfied that all consultation requirements with Indigenous peoples have been met.

Operations

Mining operations generally proceed in **THREE PHASES**, excluding potential periods of temporary closure ("care and maintenance") or adjustments to the mine plan resulting from changes in mineral prices. The phases are:

- **RAMP UP** — at the outset of mining, where the "kinks" are worked out of the mining and processing systems. This typically takes from six months to a year.
- **FULL PRODUCTION** — which will constitute the bulk of mine life, when the ore and concentrate throughput will be at 90 per cent or more of planned maximum tonnage.
- **DECLINE** — when ore reserves are in decline toward the end of the mine life, and costs per tonne are increasing as deeper or lower-grade ore is mined. Mill throughput can decline as well, and the number of jobs at the site may fall. However, given that the majority of costs went in at the front-end during construction, it is often in the interest of the mining company to stretch out the extraction period as long as possible.

The operations phase will see a big reduction in the number of jobs on-site compared to the hectic construction period. Still, the jobs that remain (anywhere from 150 to well over 2,000, depending on the size and type of mine and milling operations) will be longer-term and high-paying. It is generally cheaper for the mining company to employ people who live near the mine, rather than use long-distance commuters or house workers from outside the region. Where issues typically occur is in making sure that potentially affected communities have the capacity and opportunity to take full advantage of employment and business opportunities during both construction and operations (see Section 4 for a detailed discussion of these issues).

It is generally cheaper to employ people who live near the mine. Where issues typically occur is in making sure that potentially affected communities have the capacity and opportunity to take full advantage of employment and business opportunities.

During operations, the mining company is likely to have continuing exploration programs on-site and in nearby claims. Almost all mines add to their ore reserves over the course of their mine life, in part to take advantage of new technologies or to optimize the ore processed using highly expensive machinery. Therefore, barring changes in mineral prices or other issues that make the mine less competitive, mine life will likely extend beyond what was originally envisioned.

FINANCIAL SECURITIES from mining companies are held by the government as a guarantee that a mine will restore land to an agreed-upon state once the mine is closed. These security deposits are meant to avoid the legacy issues (environmental problems left behind by mining companies) that have often plagued large-scale mines across the world. ■

Closure and Reclamation

THIS LAST PHASE OF THE MINE LIFE cycle may be the longest, as it often entails ongoing environmental management over substantial periods of time or in perpetuity (particularly of surface stockpiles and water bodies). Closure plans must be put forward during permitting, and financial securities must be given to the government and retained by it as a guarantee that the operator will restore land to an agreed-upon state once the mine is closed. These security deposits are meant to avoid the legacy issues (environmental problems left behind by mining companies) that have often plagued large-scale mines across the world. Reclamation typically requires removal of all on-site infrastructure, rehabilitation of soils and vegetation, and long-term water monitoring and management systems. The goal is to return the site as close as possible to its original state, or to some other state agreed with regulators. Planning for closure has often been left too late. In section 4, we detail the full slate of issues that should be considered early in negotiations and captured in an agreement.

An example of an alternate arrangement is the former Kimberley lead/zinc mine in BC, which is now a tourist destination with mine-train tours.

Socio-economic closure planning may be required for communities that have come to rely on employment and business opportunities from the mines. There, a major shift in employment focus may be required in order to avoid the “boom-bust” cycles that have so often occurred in the Canadian natural resources sector.

Security deposits are meant to avoid the legacy issues (environmental problems left behind by mining companies) that have often plagued large-scale mines across the world. ABANDONED JEFFREY ASBESTOS MINE, QUEBEC

PHOTO: UNITED NATIONS

Indigenous Rights: The International Context

In the next section, we discuss recognition of Indigenous rights exclusively in the Canadian context, and the ways in which this recognition can provide a basis for IBA negotiations. It is important to remember that, increasingly, Indigenous people in Canada may also be able to draw on international recognition of rights that extend to *all* Indigenous people, regardless of the laws that apply in the individual countries in which they live. Many mining projects are developed by multinational corporations, which can be sensitive to their international image and will therefore feel a need to respond to international developments in relation to Indigenous rights. Being aware of these developments can provide Indigenous communities with added leverage in dealing with these companies.

As we will see, international laws and conventions are different from domestic law in that they generally cannot be used to *force* companies or governments to act in certain ways. However, they can still be useful in adding to the bargaining position of Indigenous communities involved in negotiations.

There are two foundations for the international recognition of Indigenous rights. The first involves the relationship between the ancestral lands of Indigenous peoples and their cultural, economic and social survival as distinct peoples and societies. The second relates to international human rights law.

There is growing international recognition that the ability to live on, care for, and utilize resources from ancestral lands is central not only to the economic and social well-being of Indigenous people, but also to their survival. Land is critical to:

- Physical sustenance;
- Social relationships that are bound up with relations to land;
- Law and culture, which are interwoven with the use of the land and its resources; and
- Spirituality and religion rooted in beliefs about the creation of the land, ways in which creation spirits continue to occupy the land and influence contemporary life, and the ways in which ancestors and future generations are tied to the current generation through the land.

For example, as the Inter-American Court of Human Rights has stated:

> *The close ties of Indigenous people with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival.*

Increasingly, Indigenous people in Canada may also be able to draw on international recognition of rights that extend to all Indigenous people, regardless of the laws that apply in the individual countries in which they live.

Of particular importance are conventions and covenants related to the right to equality and non-discrimination, the right to property, the right to practice and maintain culture and religion, and the right of self-determination of peoples.

The *Universal Declaration of Human Rights*, passed unanimously by the United Nations General Assembly in 1948, sets out certain rights and freedoms that apply to "all peoples and all nations." These include the right "without any discrimination to equal protection of the law" (Article 7); "the right to own property alone as well as in association with others" and the right not to be "arbitrarily deprived" of that property (Article 17); and the freedom "either alone or in community with others … to manifest his religion or belief" (Article 18).

The right of peoples to self-determination and their "permanent sovereignty over natural resources" is enshrined in Article 1 of both the *United Nations International Covenant on Civil and Political Rights* (ICCPR) and the UN's *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966), where Article 1 states:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
>
> *All peoples may, for their own needs, freely dispose of their natural wealth and resources … In no case may a people be deprived of its own means of subsistence.*

The principles established in the United Nations covenants have increasingly been reflected in regional human rights initiatives, including the *American Declaration of the Rights and Duties of Man*, which binds Canada as a member of the Organization of American States. Article XXIII of the Declaration, for instance, provides that "Every person has a right to own private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."

The right to equality before the law and to property is guaranteed in the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 provides:

> *... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law notably in the enjoyment of the following things:*
>
> *(d) (v) The right to own property alone as well as in association with others;*
>
> *(e) Economic, social and cultural rights.*

The United Nations Committee on the Elimination of Racial Discrimination, in its general Recommendation XXIII, has highlighted some specific implications of ICERD for Indigenous peoples:

> *The Committee is conscious of the fact that in many regions of the world Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized ... The Committee especially calls upon States Parties to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources.*

The principles established in the United Nations covenants have increasingly been reflected in regional human rights initiatives.

Article 27 of the UN International Covenant on Civil and Political Rights states:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess or practice their own religion, or to use their own language...*

In commenting on Article 27, the UN Human Rights Committee has stated:

> *... one or other aspects of the rights of individuals protected under this article — for example, to enjoy a particular culture — may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of Indigenous communities constituting a minority.*[10]

There is growing evidence of international acceptance of these principles regarding Indigenous rights, including the Indigenous right to exercise Free, Prior Informed Consent (FPIC) regarding development on their ancestral lands. This latter point is very important in relation to IBAs.

One specific indication of this growing acceptance is the acknowledgement of Indigenous rights in general and the right of FPIC in particular in international conventions and declarations, including the International Labour Office Convention 169 on the Rights of Tribal and Indigenous Peoples (1989); the Convention on Biological Diversity (1992), which more than 170 countries have ratified; and the United Nations General Assembly's Declaration on the Rights of Indigenous Peoples (2007). The Declaration states that Indigenous peoples "have the right to self-determination" and to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions," and repeatedly affirms the right of FPIC (Articles 10, 11, 19, 28, 29, and 32). For example, Article 32 states:

> *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *States shall obtain the free and informed consent [of Indigenous peoples] prior to the approval of any project affecting their land or territories or other sources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.*

Other indications of the growing acceptance of Indigenous rights include:

- A number of national governments (the Philippines, Nicaragua, Ecuador, and Colombia) have enacted legislation that recognizes Indigenous interests in land and, in some cases, explicitly recognizes FPIC.
- In South America, the Inter-American Court of Human Rights, established by the American Convention on Human Rights, has handed down a number of decisions requiring national governments to abide by human rights principles set out in the Convention in their dealings with their Indigenous populations.
- A number of international organizations have explicitly recognized the principle of FPIC. For example, in 1998, the Inter-American Development Bank adopted a policy requiring prior informed consent in the case of Indigenous people possibly affected by involuntary resettlement as part of a bank-financed project, and the World Commission on Dams has also endorsed the principle.
- Individual commercial enterprises have effectively acknowledged the principle of FPIC in deciding not to proceed with investments in the absence of support from Indigenous landowners. For example, in 2005, Rio Tinto signed an agreement with the Indigenous traditional owners of land containing the Jabiluka uranium deposit and undertook not to develop it except with their consent.[11] Two other leading international mining companies, Anglo American Corporation of South Africa Ltd. and BHP Billiton Ltd., are reported to have made similar undertakings in relation to specific projects.

However, it must be stressed that despite these positive developments, it is by no means the case that acceptance of Indigenous rights is a settled matter. Major obstacles still exist to their recognition, and especially to their recognition in practice, rather than on paper. These include:

- Some key covenants (for example, ILO 169) have not been ratified by many states (only 24 at the time of writing); many governments do not consider themselves bound by the findings of United Nations bodies such as the UN Human Rights Committee.
- Key declarations that endorse Indigenous rights, such as the UN General Assembly's Declaration on Indigenous Rights, are not binding on members, and a number of countries with large Indigenous populations, including Canada, voted against them.
- Some international financing bodies and governments impose many limitations on the nature of consent sought, which places less onus on the government or funders to achieve consent.

Even where governments ratify international conventions or introduce national legislation designed to protect Indigenous rights, there is no guarantee that government agencies or commercial interests operating in their jurisdictions will actually respect these rights (see case study below for the Awis Tingi in Nicaragua, where it took over seven years of advocacy to have the government act on the court's decision).

There is growing evidence of international acceptance of these principles, including the Indigenous right to exercise free, prior, informed consent regarding development on ancestral lands. This point is very important in relation to IBAs.

Similarly, while FPIC is recognized in Canadian law, the Canadian government continues to apply policies that are meant to achieve what is legally required by the courts under the duty to consult, rather than a clear adherence to the principle of consent in all resource extraction decisions. In addition, particular jurisdictions in Canada reveal unique approaches to FPIC. For example, in the Northwest Territories, the Tłı̨chǫ Land Claims and Self-Government Agreement has a consent requirement for projects being reviewed through an environmental assessment.[12] This right was enacted in 2013 when the federal minister and the Tłı̨chǫ government reviewed the project description by Fortune Minerals Nico mine, which was applying to construct and operate an open pit and underground mine in an area surrounded by Tłı̨chǫ fee simple lands. Once the recommendation was given to the minister and the Tłı̨chǫ government for the mine to proceed with a series of conditions by the regulatory reviewing agency, the two governments conducted a parallel process to consider whether to accept the recommendation, reject it, or ask for it to be modified. Ultimately, both the federal minister and the Tłı̨chǫ government accepted the recommendation with some modifications.

Industry has increasingly embraced FPIC. For instance, the International Council on Mining and Metals, an international organization representing large mining and mineral processing companies, endorsed the principle of FPIC in a CEO declaration in May 2013, when it adopted an Indigenous Peoples and Mining Position Statement that requires compliance for all new projects and all project changes (but

does not apply retroactively to older projects). The ICMM Statement was updated in 2024 to include nine commitments on Indigenous rights. There is now a commitment to demonstrate consent of Indigenous peoples whose rights are impacted, recognizing that there may be circumstances in which agreement is not obtained.[13]

IN SUMMARY, international law has confirmed that Indigenous peoples must have the right to consent to operations in their territory. Despite growing international recognition of Indigenous rights, at present, this recognition cannot, on its own, change the Canadian context. But where Indigenous groups lack clear legal rights in domestic law, it may still allow them to 'get a seat at the table' with mining companies and start a process of engagement that may eventually allow them to achieve significant benefits from, and a say over, development on their land.

More generally, international recognition of Indigenous rights provides one more basis on which Indigenous peoples can push for a just outcome from development on their land. This is especially so when they are dealing with large multinational companies that are very conscious of their international image. Also, international recognition of Indigenous rights has been steadily increasing over the last 20 years. As this process continues, they are likely to become more important as a foundation for negotiating just agreements.

CASE STUDY

International Court Victory for Nicaragua's Awas Tingni People

In 2008, the government of Nicaragua gave the Awas Tingni community the property title to 73,000 hectares of its territory, located on the country's Atlantic Coast. This marked a critical step forward in the resolution of a case heard by the Inter-American Court on Human Rights in 1998, the first case on Indigenous peoples' collective property rights heard by the court. The judgment handed down in August 2001 became a historic milestone in the recognition and protection of the rights of Indigenous peoples around the world, and an important legal precedent in international human rights law. ■

Indigenous Rights: The Canadian Context

PHOTO PROVINCE OF BC

In this section, we discuss the recognition and protection of Indigenous rights in Canada that are relevant to the negotiation of IBAs. This recognition and protection occurs through the enshrinement of rights in the *Constitution Act*, Indigenous-Government treaties or agreements, and interpretations by the courts of the relationship between Canada's Indigenous people and the Crown.

The *Constitution Act* of 1982 recognizes and affirms the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada."[14] This affirmation has paved the way for court challenges on the nature of the relationship between the Crown and Indigenous peoples, and the possibility of modern land claim agreements. These court challenges have begun to establish the expectations of the Crown on the *duty to consult and accommodate* Indigenous people, all of which is based on "the honour of the Crown." In recent years, Canada has taken steps to align its domestic legal framework with international standards on Indigenous rights through the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The federal UNDRIP Act (2021) required the development and implementation of an Action Plan, released in 2023, which outlines measures to achieve the objectives of UNDRIP, including FPIC, as a guiding principle in decision-making that affects Indigenous lands and rights.[15]

The Canadian courts have played a key role in defining the nature of Indigenous rights in Canada. Four of the landmark cases are:

- 1990 *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1008 [*Sparrow*] surfaced four questions to assist in determining the nature of the fiduciary role the Crown holds towards Aboriginal peoples: whether there is as little infringement of Aboriginal rights as possible in order to effect the desired result; whether priority in the allocation of the right has been given to the Aboriginal group; where expropriation occurs, that fair compensation is made available; and whether the Aboriginal group concerned has been *consulted* with respect to conservation measures.

- 1997 *Delgamuukw v. British Columbia* (1997) 3 S.C.R 1010 described Aboriginal title, confirmed the legal validity of Aboriginal oral history and clarified the nature of the Crown's duty to consult and accommodate in the context of infringement of Aboriginal rights. The test for establishing Aboriginal title was set out in the Court's decision, requiring exclusive occupation of land by a community at the time of British sovereignty. This case also defined consultation and laid the foundation for the goal of accommodation: "the minimum acceptable standard is consultation (that) must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation."[16]

- 2014 *Tsilhqot'in v. British Columbia* (2014) 3 S.C.R. 1010 builds on the Delgamuukw test for establishing title, adding that occupation must not only be continuous and exclusive, but also sufficient. This means that Aboriginal culture and practices must be viewed in a "culturally sensitive way." Unlike common law, which establishes title based on occupation of specific settlement lands, Aboriginal title extends to larger tracts of land used for hunting, fishing, or other activities. This sufficiency of occupation is a "context-specific inquiry" where the "intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted" (at para 37). The significance of this case for IBAs is to ensure that nothing that compromises title claims — certainty clauses are an example — is included. The IBA cannot provide a full and final settlement of any Aboriginal treaty rights. Further, the IBA should not include wording that may compromise a future title claim.

- 2025 *Kebaowek First Nation v. Canadian Nuclear Laboratories* (2025) FC 319 addressed the role of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in the duty to consult. The Federal Court held that UNDRIP and free, prior, and informed consent (FPIC) must inform consultation duties. The Court clarified that consultation must implement the UNDRIP FPIC standard in a robust manner to address Indigenous laws, knowledge, and processes and develop a process aimed at reaching an agreement.[17]

These court decisions are key to the interpretation of what is expected of 'consultation' and 'accommodation.' There will be ongoing interpretations of these two duties. Federal guidelines assert, "In the Haida and Taku River decisions in 2004, and the Mikisew Cree decision in 2005, the Supreme Court held that the Crown has a duty to consult, and where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights… the Court further explained that: the duty to consult is a constitutional duty; applies in the context of modern treaties; officials must look at treaty provisions first; and where treaty consultation provisions do not apply to a proposed activity, a 'parallel' duty to consult exists."[18]

While earlier decisions (Haida Nation, Taku River, Mikisew Cree) confirmed the duty to consult is a constitutional obligation, more recently, the Federal Court has recognized that UNDRIP must inform the assessment of consultation adequacy (*Kebaowek First Nation v. Canadian Nuclear Laboratories* (2025)). These developments demonstrate that the scope of the duty to consult remains dynamic, with future decisions likely to further shape how Indigenous rights and principles of FPIC are implemented in practice.

Duty to Consult

The duty to consult arises in specific instances, the first when the "Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (arising from a case where there was no treaty guiding relationships, *Haida Nation v. British Columbia).*[19] The second involves situations in which the Crown contemplates conduct that might adversely affect treaty rights (arising from a case of a historic treaty, *Mikisew Cree First Nation v. Canada)*.[20]

The Tsilhqot'in decision sets a standard for the highest level of consultation and accommodation on land where title is established: that is, Aboriginal consent. The ruling clearly emphasized the importance of consent: "[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group" (at para 97). This underlines the importance of establishing a strong title claim (continuous, exclusive, and sufficient occupation) before engaging with the Crown and negotiating with mining companies, recognizing that establishing title is a significant and lengthy undertaking. The relevance of this ruling to territories subject to treaty rights is uncertain.

While the Supreme Court has clarified that the duty does not automatically extend to the legislation process,[21] federal and provincial governments are under growing political and policy pressure to engage Indigenous peoples earlier in law and policymaking. Both the UNDRIP Act (2021) and BC's DRIPA (2019) require consultation and accommodation processes to evolve toward stronger inclusion of FPIC.

It has been established that the Crown cannot delegate its legal responsibility to consult, so that corporations cannot negotiate IBAs and thereby fulfill the duty to consult that the Crown holds. However, the possibility exists of the Crown delegating procedural aspects of consultation to corporations. In practice, this means that while the duty remains with the Crown, much of the obligation to consult falls to the industrial proponents, such as submitting a consultation record to a regulator.

Herein lies the link between the duty to consult and the negotiation of IBAs. If a developer cannot demonstrate that it has consulted, it faces the possibility that the Crown will refuse to issue or will revoke permits under challenge by Aboriginal peoples until its duty has been fulfilled (as happened in the case of *Taku River Tlingit v. British Columbia*.)[22] The practice of some corporations has therefore been to reduce the risk of challenges by proactively negotiating IBAs as a measure of consultation with Indigenous groups, as well as in the hopes that assessment and permitting processes will proceed in a smoother and more efficient manner.

This discussion highlights the need for communities in IBA negotiations to keep a solid record of meetings, negotiations, and the collection of evidence of impacts from Indigenous-led assessments and studies. This audit trail is essential if the Indigenous group needs to go to court to prove inadequate consultation by the Crown, or to make arguments to the Crown that the Proponent's record is insufficient. Consultation must be seen to be done by all of the relevant actors: Indigenous

groups themselves, environmental impact assessment bodies and regulators, and the federal and provincial governments that issue project authorizations. Consultation efforts should be made in accordance with policies and protocols put forth by provinces and Indigenous nations. If it wishes to object to the issuing of permits and licenses, the Indigenous group needs to be able to demonstrate that it made a reasonable effort to resolve issues through dialogue. Simply avoiding meeting with the developer may not constitute a lack of consultation by the company. Developers need to be able to meet the test traditionally applied by the Courts, which is to show that they have made "all reasonable efforts" to consult with all potentially affected Indigenous groups.

If a developer cannot demonstrate it has consulted, it faces the possibility that the Crown will refuse to issue or will revoke permits until its duty has been fulfilled (as happened in the Taku River Tlingit case in BC.)

The goal of consultation by the Crown, as set in *Haida*,[23] is to substantially address the Indigenous group's concerns about the impact on Aboriginal or treaty rights. It has also been established that all parties must negotiate in good faith, meaning that relevant information and impacts should be shared from Indigenous communities, as well as by the proponent and government. This does not exclude "hard bargaining" as a strategy for negotiation. However, the Supreme Court has emphasized that the consultation process does not give Aboriginal groups a veto over decision-making.[24] Lower levels of impact on rights and low severity of harm on Section 35 rights may require notice of the proposed decision and an opportunity to discuss the issues. In cases of deep impact on rights and high severity from the proposed decision, there will be a need for "deep consultation" moving toward a requirement of meaningful accommodation (see below).[25] The Crown must share information openly with the Indigenous group about the proposed decision or action, including timing of the project, location, duration, nature of disruption, and impacts, among other details. Indigenous communities do not need to share their information with the Crown, but the extent to which they do so will influence the level of consultation in which the Crown chooses to engage.[26]

Duty to Accommodate

When there is considerable potential that a project will adversely affect a strongly held Aboriginal right, accommodation by the Crown is required. Accommodation is a process of "seeking compromise in an attempt to harmonize conflicting interests."[27] The duty to accommodate will not exist in every case. Still, it may emerge where there is a distinct impact on Section 35 rights, and a high degree of severity of impact from the proposed project that cannot be accommodated. Accommodation by the Crown, interpreted also in the case taken by the Taku River Tlingit,[28] tends to include implementing or requiring implementation by others of measures for avoidance of the impact, minimization or mitigation of the impact, or, as a last resort, compensation for an impact. The law is much less highly developed in this area.[29]

While the duties to consult, accommodate and in certain circumstances seek consent form the basis for the general relationship of the Crown to Aboriginal groups across Canada, the specific legal context for an IBA negotiation varies from region to region.

Legal cases have collectively begun to establish a spectrum of consultation and accommodation (as suggested in *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 and by Nouvet 2009),[30] which depends on the level of risk that the proposed decision carries for Section 35 rights. In essence, where there is a strongly substantiated claim and where the proposed decision will cause serious harm, there is a stronger need for consultation and accommodation. These conditions will provide a significant basis for the negotiation of IBAs.

In contrast, where a proposed project is assessed as posing minimal or no adverse impacts to Section 35 rights, proponents may have less legal and practical incentive to enter into an IBA, as the duty to consult and accommodate will sit at the lower end of the spectrum.

Historic and Modern Treaties

Treaty rights are those granted through specific agreements entered into by some Indigenous Nations and the federal government. While there is no reference to impact and benefit agreements made in the historic treaties, courts have ruled that treaty rights cannot be infringed on, and that consultation must be undertaken, and as such, create a lever for consultation and the possibility of an IBA. Historic treaties continue to be re-interpreted by the courts, as in the challenge to the issuance of rights in the case of Mikisew Cree. This case established that consultation requirements from historic treaties are similar to those of modern land claims agreements, namely that there be adequate notice, information, time and opportunity to express concerns, and serious consideration of those concerns.[31]

NATIONAL ARCHIVES OF CANADA

Modern Land Claim Agreements

Modern land claim agreements are much more explicit in their support for the negotiation of IBAs. The federal government introduced its first land claims policy after the *Calder v. the Attorney General of British Columbia* (1973) decision, which established the Nisga'a title to lands they traditionally used and occupied. In this claim, it was established that unfulfilled treaty rights and claims of groups who demonstrated traditional use and occupancy that had not been extinguished by treaty or superseded by law had to be respected.[32] The ensuing federal land claims policy has resulted in many modern land claim agreements that include economic rights.

Although each land claim agreement has unique structural and procedural arrangements, there is a common approach to modern land claim agreements, which is to have:

- A specific tract of land identified and confirmed as land held by the group in fee simple;
- A larger tract of land identified to be co-managed with the federal government and the territorial or provincial government;
- A larger area within which Indigenous land use rights, such as hunting, fishing, trapping and gathering, continue to apply; and
- Conditions for the negotiation of IBAs in relation to extractive industries and protected areas, among other industries.

In the 2010 *Beckman v. Little Salmon/Carmacks First Nation* case, the Supreme Court confirmed the duty to consult applies where a modern treaty exists. Consultation mechanisms in treaties guide the process, but they do not completely displace the duty to consult. Historic treaties also do not eliminate consultation requirements when decisions may affect treaty rights.

Many modern land claim agreements expressly identify the need for IBAs, or similar agreements. This makes their requirement very strong, given that most land claim agreements, where they disagree with other legislation, are to prevail.[33] Once a land claim or settlement agreement is executed and ratified, federal legislation and provincial or territorial legislation can be brought into force, and the claim is then protected under Section 35 of the *Constitution Act, 1982.* Examples of modern treaties with IBA requirements include:

- The *Nunavut Land Claims Act* requires an Inuit Impact and Benefit Agreement (Inuit IBA, or IIBA). Article 26 of the land claim agreement identifies the procedures, substance, parties, and linkages to the overall regulatory process for "major development projects."[34] Further, Inuit IBAs are negotiated within a broader land claims context, including specific provisions for matters such as wildlife compensation, surface access and surface rights adjudication, and the sharing of resource royalties between Inuit and the Crown. The Nunavut Lands Claim Agreement is the most extensive of all land claim agreements in its requirement of an IBA, as Clause 26.2.1 states that, subject to certain limitations, "no Major Development Project may commence until an IIBA is *finalized* [emphasis added] in accordance with this Article." Clause 26.4.1 of the Nunavut Agreement deals with the start of negotiations, stating that:

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

- In the NWT, there is no single IBA regime. Each settled land claim deals with agreements, but not to the same level of detail as in Nunavut.
- The *Inuvialuit Final Agreement* requires three agreements that hold functions similar to IBAs. The first, participation agreements, must be negotiated where the use of the surface is more than casual or temporary. These agreements include provisions governing access and land use, as well as measures for the sharing of economic benefits.[35] While these are voluntary agreements, the federal government may establish timetables and negotiation procedures when an agreement is not reached. Cooperation agreements may also be entered into to address social and economic interests, including employment, education, training and business opportunities. Finally, concession agreements cover subsurface resources owned by the Inuvialuit, and again deal with employment, training and goods and services.
- The Sahtu and Gwich'in comprehensive land claims agreements include provisions on impacts and benefits, where the Crown owns surface and subsurface lands. Where surface access to Indigenous-owned land is required to develop mineral rights issued by the Crown,[36] access agreements are negotiated, which usually occur in construction and give leverage to the land claim authority, as they are tied to the exploration license.
- The Tłı̨chǫ Agreement requires negotiation (but not completion) of an IBA for major mining projects. As well, the Tłı̨chǫ receive annual royalties. The Tłı̨chǫ Agreement requires that the government "develop the measures it will take to fulfill this obligation, including the details as to the timing of such negotiations in relation to any governmental authorization for the project." There is no guidance on timing or requirement for completion of the IBA before permits are issued.

Where land claims are still unresolved, Aboriginal rights and mineral rights may be unclear, and there may be conflicting Aboriginal claims to areas of land where mining projects are being developed.[37] This was the case in the NWT throughout the negotiations for the Ekati and Diavik diamond mines in 1996 and 2001. This uncertainty can also create an incentive for corporations and governments to negotiate IBAs so that development may proceed. However, competing claims may also undermine the community and regional unity that is critical to the beneficial outcomes of IBAs, an issue discussed in the final section of this chapter.

There may be conflicting Aboriginal claims to areas of land where mining projects are being developed. This was the case in the NWT throughout the negotiations for the Ekati and Diavik diamond mines in 1996 and 2001.

EKATI MINE IN 2010, PHOTO JASON PINEAU/WIKIMEDIA COMMONS

Legislative and Policy Levers for IBAs

IBAs or similar contracts can be required through legislation, regulation, and policy. There is no single legislative or policy framework that drives the negotiation of IBAs in Canada.[38]

Two major federal acts governing resource development in Canada call for benefits agreements or consultation.

- The *Canada Oil and Gas Operations Act* (COGOA) (Section 5(2)) requires approval of benefits plans by the company and the Minister of Crown-Indigenous Relations and Northern Affairs before any work or activity is authorized. A benefits plan is "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." There is a specific requirement that benefit plans include provisions for disadvantaged individuals or groups; however, this requirement is framed in general terms and is not specific to Indigenous nations.
- The *Canada Petroleum Resources Act* references the requirement in COGOA[39] for benefits plans on Crown-owned land. This statute requires that "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).

Beyond these statutory requirements, the federal government is developing a National Benefits-Sharing Framework, which was expected to be finalized in 2025.[40] This framework, co-developed under the UNDRIP Action Plan, seeks to create consistent standards for Indigenous benefit-sharing across natural resource sectors. It plans to include revenue sharing, equity participation, and capacity building with the aim of moving benefit arrangements toward a more predictable national standard. Indigenous communities will be able to use the Framework as a benchmark for IBA negotiations.[41]

Additionally, the Extractive Sector Transparency Measures Act (ESTMA, 2015) requires companies to publicly disclose payments to governments, including Indigenous governments. ESTMA does not require companies to identify specific information about the IBA or its payments, other than providing general classifications and dollar amounts (for example, royalties, taxes, fees, bonuses, dividends, and payments related to infrastructure). While not creating IBA obligations, ESTMA increases transparency and can strengthen Indigenous negotiating positions by clarifying the scale of payments being made across the sector. However, it does not provide all the information required to help evaluate the fairness of the IBA, for example, the type of royalty, royalty rates, procurement provisions, etc.[42]

Provincially, each jurisdiction sets out its own mining regulations, most often dealing with aspects such as procedures for staking a claim, protecting the environment, and reclaiming the land after mining. Current provincial and territorial acts and regulations should be reviewed for benefits

provisions as they relate to a specific region or project. For example, Saskatchewan requires employment and training plans in the land leases issued for mining projects.[43] Surface leases require that a company enter into a Human Resource Development Agreement and later file annual employment plans. The employment plan covers the corporate plan to recruit, train and hire northern Saskatchewan workers each year. As a result of these agreements, northern Saskatchewan mines have hired more than half of their workforce from the North of the province. The province then works with the data from all Saskatchewan companies to develop a multi-party approach to training and employment in the mining sector.

In British Columbia, the Declaration on the Rights of Indigenous Peoples Act (DRIPA, 2019) provides new forms of shared decision-making and benefit-sharing through government-to-government agreements, such as Lake Babine (2021)[44] and Kitselas (2023).[45] These agreements establish joint or collaborative processes for assessments and land-use decision-making.

Where they are empowered to do so, regulatory boards with responsibility for land management or project or environmental approvals can require extensive consultation with Indigenous communities. For instance, the Canadian Energy Regulator requires a proponent to file a copy of its Indigenous consultation protocol, along with documented policies and principles for the collection of traditional knowledge or traditional use information.[46]

At the time of publication, the federal government was developing a National Benefits-Sharing Framework, co-developed under the UNDRIP Action Plan, to create consistent standards for Indigenous benefit-sharing across natural resource sectors.

In the absence of any explicit federal policy or legislation on IBAs, the context of negotiation of agreements has often been set in the North through the intervention of a federal minister. The Minister of Crown-Indigenous Relations and Northern Affairs Canada conditionally approved permits for the Ekati Diamond Mine in the NWT, and created the leverage needed by communities to negotiate IBAs by setting a 60-day time limit. The minister required "satisfactory progress" towards agreements with the impacted groups before licenses and permits could be issued. This intervention signalled a policy decision by the federal government that IBAs were an important part of the regulatory and benefits package for this project. This threat has loomed over Canadian mining projects ever since.

Even in the absence of a clear legal and regulatory regime or ad hoc policy measures by the federal government, agreements between project developers and Indigenous organizations are often concluded. In some cases, Indigenous groups have local policies that require consultation and agreements to win community approval for proposed projects. In BC, the Taku River Tlingit Mining Policy (2019) creates a basis for negotiation of agreements and, more generally, for the establishment of relationships with developers.[47] It sets out content and process requirements for IBAs, including consultation procedures. The policy sets out that the Taku River Tlingit First Nation cannot conclude an IBA until the environmental impact assessment is completed, an accommodation agreement is reached with BC or Canada, and the draft IBA has been ratified by a joint clan meeting. The nation has both British Columbia and Yukon portions of their territory, and the policy is applicable to the

British Columbia portions of their territory, facilitated by the Taku River Tlingit First Nation's *Wóoshtin Yan Too.Aat: Land and Resources Management and Shared Decision Making Agreement* with British Columbia.

In other cases, an IBA happens in response to the pressure applied to the company by the community, as was the case in Labrador with the Voisey's Bay nickel project (ratified in 2002). In this case, the communities applied pressure to the company, resulting in a change in their corporate policy. Inco's policy originally was not to negotiate an IBA prior to project approval, but community pressure resulted in significant agreements. Other alternative ways to influence development are discussed in the section on the wider political context.

Corporations are often guided by their own practices elsewhere (e.g., an IBA negotiated with traditional owners in Australia), or by their own corporate policy.[48] However, in some cases, corporations do not engage in any negotiation of IBAs, as a matter of policy. In Alberta, oil and gas companies have negotiated agreements with Indigenous communities, but these agreements often adhere to a much lower standard than agreements in other provinces and territories, reflecting the political and legislative climate of the region, which is strongly supportive of resource development and antagonistic to Indigenous rights.

Indigenous Law

Indigenous groups are progressively invoking Indigenous laws as a basis for insisting on negotiation of equitable IBAs. Indigenous laws are living systems, principles and legal traditions that continue to govern relationships and stewardship of territories. Indigenous laws are foundational sources of governance and authority that pre-date and continue alongside Canadian common and statutory law. Increasingly, Indigenous laws are being formally recognized under Canadian law; however, they also stand alone as separate legal systems. The Tahltan Nation notes that it will "continue to prioritize agreements and mining initiatives based on the priorities set forth by the Tahltan people, based on the recognition of our Title and Rights and upholding our laws and jurisdictions. Any project in Tahltan Territory hinges solely on Tahltan consent."[49] In Cat Lake and Lac Seul, both Anishinaabe communities in northern Ontario, the negotiators have grounded their review of a gold mine in their law and will make decisions about revenue sharing using traditional law.

Indigenous laws and how they can ground agreements is discussed further on page 184.

Canadian Major Projects Review Process and Regulation

Impact Assessment In Canada

Impact assessment (IA)[50] constitutes the core of major project review and regulation in Canada. IA is the process of reviewing a proposed project to identify potential effects (negative and positive) that the project may have on the environment, on people (e.g., socio-economic conditions, culture, traditional harvesting, and health), and on Section 35 rights. IAs predict likely effects, identify measures to mitigate negative effects and enhance positive effects, and determine whether there will be significant effects, even after mitigation is implemented (often called 'residual impacts'). On this basis, a decision is taken on whether a project should be allowed to proceed and, if so, under what conditions. The IA process is related to Canada's duty to consult, but has a narrower focus as defined by the legislation.

IA in Canada is overseen by government agencies, which determine the level of assessment that must be undertaken (see below) and the extent and focus of impact assessment studies; assess whether those studies are adequate; and determine whether a project should proceed. Much of the design and conduct of impact assessment studies is undertaken by project proponents, who are also responsible for preparing an 'impact statement' which presents the results of the studies undertaken, proposes mitigation strategies and reaches conclusions regarding the acceptability of a project. Given that proponents are, by definition, in favour of projects proceeding, it is unheard of for a proponent's impact statement to conclude that residual negative effects are substantial and that a project should not proceed.

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Members of the public (including Indigenous peoples) are given an opportunity to participate at specific points in the IA process, typically by commenting on draft Terms of Reference that define the scope and focus of an IA; on a draft impact statement; and on conditions a government plans to apply to projects it proposes to approve. There is no guarantee that governments or proponents will accept submissions made by the public on these matters.

While every jurisdiction (federal, provincial and territorial) has different formal stages, most IAs follow a typical process. The steps involved are summarised as a flow chart in Figure 2.2.

A key issue in relation to IA involves the *level of assessment* that will be required. While each jurisdiction is different, there are generally levels of assessment involving increasingly comprehensive reviews and increased opportunities for public (and Indigenous) participation. For instance, at the federal level, an IA may be undertaken by the relevant government agency, the Impact Assessment Agency of Canada (IAAC), or a dedicated Review Panel may be established. A Panel has the benefit of added time, which allows for deeper assessment, independent expert panel members, and guaranteed public hearings. IAAC-led IAs do not include public hearings. Progression to a higher level depends on a variety of triggers, a point we discuss in the next section (page 46).

Figure 2.2 Generic Impact Assessment Process Steps

Federal Impact Assessment

In Canada, IAs are conducted at federal and provincial levels by government agencies and at the territorial level by quasi-governmental independent boards. The IAAC is the primary authority overseeing the federal IA process. However, all federal assessments of oil, gas and electricity energy projects are assessed by the Canada Energy Regulator (CER), and all nuclear energy projects are assessed by the Canadian Nuclear Safety Commission (CNSC) jointly with the Agency.

Federal impact assessments are governed by the Impact Assessment Act (*IAA* or the *Act*). Under *IAA,* the assessment process has been expanded to achieve a greater focus on impacts on people as well as on the biophysical environment. Section 22 of the *Act* reflects this expansion by specifying a wider range of factors that include Indigenous cultural considerations, effects on Aboriginal and Treaty rights, the need for consideration of differential effects based on gender and the need to assess the contribution to sustainability of a proposed project. The *IAA* also better supports the direct involvement of Indigenous Nations in the project assessments through

potential for collaboration agreements, sharing of jurisdiction in some instances, and the mandatory inclusion of Indigenous knowledge systems in assessments. The issue of Indigenous participation in IA is discussed in detail in *Indigenous Participation in Impact Assessment* on page 62). Additional legislation, *the Building Canada Act,* enacted in 2025, allows for the designation of projects within the national interest. This legislation only impacts projects that are listed. The Act states that the designated projects are no longer required to adhere to sections 9 through 17 of the IAA. This effectively removes time for the planning phase of the current IA process. Impact assessment in Canada in relation to mineral development focuses overwhelmingly on assessment of, and possible approval for, the commercial development of mineral deposits that have already completed advanced exploration work. Advanced exploration work can itself have significant environmental impacts, as it can involve extensive ground-breaking activity such as drilling and Indigenous communities may feel exploration should be subject to impact assessment.

Federal and provincial assessment systems do include "project list" regulations that define what types of mining (and other) projects are required to undergo impact assessment. This may allow certain parties, including some Indigenous governments, agents of the Crown or quasi-judicial regulatory or impact assessment boards, to refer any proposed development to a higher-level impact assessment, should the project show potential for significant adverse effects on the environment or people. If this is the case, Indigenous groups can request that the responsible authorities refer a project that is not automatically on a "Project List" to an impact assessment. There are no guarantees in most cases that this "request for referral" will be accepted.

Another option would be to negotiate a provision for an assessment either as part of an IBA, a precursor agreement such as a Memorandum of Understanding (MoU), or a stand-alone agreement dealing specifically with this issue. In such a case, the agreement may require the proponent to voluntarily enter a formal impact assessment. Including such a provision in an IBA would require completion of the agreement before advanced exploration, at a time when the community had little information on the proposed project. It is therefore preferable to deal with this issue as part of an MoU or a stand-alone agreement.

Impact assessments can be subject to strict timelines that may be difficult for Indigenous Nations to adhere to. For example, under *IAA*, 300 days[51] (up to 600 for Review Panels)[52] are afforded for the phase of the process from the time the IAAC accepts the proponent's Impact Statement to the point where the IAAC or Panel issues its Impact Assessment Report to the federal Minister for decision. Indigenous peoples have raised concerns that timelines may be too short, including because they

IMPACT ASSESSMENT is a process designed to predict the environmental effects of a proposed project before it is carried out, to identify ways of managing impacts and to determine if project benefits outweigh impacts that cannot be avoided.

Projects may require both federal and provincial/territorial assessments — for example, when a proposed mine will impact water or fish (federal jurisdiction) but also natural resources (provincial jurisdiction). ■

regard the 180-day 'Planning Phase' at the beginning of a federal IA process as not enough to allow for meaningful engagement of affected Indigenous peoples during this critical scoping stage for the assessment. As noted above, legislation enacted in 2025 will shorten the timelines on projects that have been fast-tracked, removing the "Planning Phase" for those selected projects.

The *IAA* applies to proposed projects under the following conditions:

- When the project or physical activity falls under the federal "Project List" (i.e., the *Physical Activities Regulations*);
- When the Minister designates a project that is not on the Project List for review, if, in the Minister's opinion, the project "may cause adverse effects within federal jurisdiction or adverse direct or incidental effects" (Section 9 of the *Act*);[53] and
- A project that falls within multiple provincial boundaries, such as inter-provincial pipelines.

Where proposed projects fall under federal and other jurisdictions, the federal government has a "one project, one assessment" approach. The *Act* outlines a process for cooperation and coordinated action between jurisdictions, including what the Act calls "Indigenous Governing Bodies." Jurisdictions can:

- Delegate parts of an assessment;
- Coordinate assessment processes;
- Substitute entire assessment processes; or
- Establish joint review panels.

The inclusion of Indigenous Governing Bodies, which can theoretically include any Indigenous Nation that enters into an agreement with the IAAC and automatically includes Indigenous Nations with self-government powers, opens the possibility that Indigenous Nations can take over some or all aspects of the impact assessment process. This possibility is discussed in detail in *Indigenous Participation in Impact Assessment* on page 62.

Provincial and Territorial Impact Assessment

Each Canadian province and territory has its own environmental assessment body, legislation, regulations, and guidelines. In BC, for instance, one assessment process may be run by the province with inputs from the federal government and with two separate decisions and consultation processes by the province and the federal Crown. Some other provinces do not accept the federal government's "one project one assessment" approach, meaning that two separate assessments are run, though attempts are made to streamline these two processes. In addition to specific legislation governing provincial IA, there will be a large number of environmental laws and regulations that cover the licenses, permits and other authorizations required for the project to proceed, should it be approved in the impact assessment process.[54] For example, Manitoba has regulations on licensing procedures, participant assistance, and joint environmental review, while Ontario has issued regulations on deadlines (e.g., *Regulation 616/98 Deadlines*).

Each province and territory has a particular environmental agency, and a range of legislation, regulations, and guidelines guide Impact Assessments (IA). Given that each jurisdiction affords unique levers for environmental protection, citizen engagement, environmental follow-up or inclusion of Indigenous knowledge, **it is critical for community negotiators to understand the context for each project assessment.** ■

Provinces may also adopt policies relevant to the IA process, such as BC's *Public Consultation Policy*. Policy instruments, such as environmental or socio-economic agreements, may also be used in an effort to capture regional, provincial or territorial benefits and mitigate impacts. The same point applies at the federal level. Canada has issued Guidance: Gender-based analysis plus in Impact Assessment, which, while a guide and not a law or regulation, does acknowledge that major development projects require a multifaceted approach to understand how the risks and benefits apply to different cohorts of people.[55]

Level of Impact Assessment Review

As noted above, there are different levels of IA involving increasingly comprehensive reviews and increased opportunities for public (and Indigenous) participation. Progression to a higher level depends on a variety of triggers. Each piece of environmental legislation will include unique triggers, and the *IAA* can differ slightly from provincial legislation. It is critical to understand the triggers for each level of assessment.

There are four types of impact assessments under the *IAA*:

- IAAC-led IAs;
- Review panel IAs;
- Regional assessments; and
- Strategic assessments.

The latter two types of assessment are non-project specific and would not typically be relevant to IBA negotiations. However, in cases like the Ring of Fire Regional Assessment in northern Ontario (underway through 2025-2026), the implications of multiple mine and road infrastructure developments are being considered over a large area, and the results may have implications for future mining project developments.

The federal Minister of Environment decides whether to send an assessment to the highest level of IA, a Review Panel, based on the following:

- The extent of potential adverse effects within federal jurisdiction (including direct or incidental effects);

- Public concerns related to these effects;
- Opportunities for cooperation with another jurisdiction that has powers or responsibilities related to the assessment of project effects (in whole or part); and
- Potential adverse impact(s) the project may have on the rights of Indigenous peoples recognized and affirmed by Section 35 of the *Constitution Act*, 1982.

Indigenous groups can request that a Review Panel be undertaken if they believe a proposed project will impact their Section 35 rights.

The *Mackenzie Valley Resource Management Act* adopts a different approach, and the IA process is typically sequential rather than the level being determined at the outset. Every project undergoes a preliminary screening (phase 1); those projects where it is determined that the project might have a significant adverse impact or cause significant public concern undergo an environmental assessment (phase 2). Where it is determined that a project merits an even higher level of assessment, an environmental impact review (phase 3) can be ordered.

Impact Assessment Follow-Up

It is important for communities to consider what happens after the formal IA process is completed. At the end of an IA, the responsible authority releases a report (e.g., *Report of Environmental Assessment* in the NWT) that details the mitigation measures required to be implemented should the project proceed, often referred to as 'conditions of approval.' Indigenous communities should keep track of all commitments made by the proponent during the IA process and of all conditions of approval. The government often uses specific policy tools to ensure implementation of conditions and IA follow-up, including licensing requirements, environmental agreements and socio-economic agreements (SEAs). These may also be used to continue monitoring and ongoing management of mine-related issues. Measures included in these policy tools may be relevant to IBA negotiations. In some cases, they may mean that an issue need not be covered in an IBA; in others, IBAs may need to reinforce or to plug gaps in regulatory follow-up, for example, IBAs can provide a framework and funding to develop community-led monitoring and guardian programs.

Impact assessment in Canada is complex and frequently changes. We have provided a brief overview current to 2026. Communities should develop an in-depth understanding of the current legislation, regulations, guidelines, and policies that guide assessment at the federal level and in the province or territory in which they are located.

There are guidance documents that can help them achieve this understanding. For example, the Mackenzie Valley Review Board has guidelines for traditional knowledge and socio-economic impact assessment.[56] Guidance is often issued by relevant regulatory boards on the environmental review and approval process, as well as on how to participate in assessments (e.g., *Guide to Interested Persons and the Public to Participate in Assessments* by the Yukon Environmental and Socio-Economic Assessment Board).[57] IAAC also has a number of resources and guidance documents available at its Practitioner's Guide to Federal Impact Assessments website.[58] ■

Indigenous Participation in Impact Assessment

In recent years, Indigenous-led assessments (ILAs) have become an increasingly prominent part of the impact assessment landscape. In cases like the Squamish Nation's assessment of the Woodfibre LNG Project[59] and Stk'emlupsemc Te Nation's assessment of the proposed Ajax Mine south of Kamloops, BC, First Nations have conducted their own independent, parallel assessment processes. With UNDRIP and FPIC implementation federally and provincially, ILAs are increasingly becoming a tool of choice for Indigenous groups to assert their authority and governance of their lands and waters.[60]

Indigenous peoples have always stewarded their lands and waters and considered the impacts of activities and projects within their territories. Unlike governments or proponents, Indigenous communities do not simply assess impacts in the abstract — they live them, often in ways that are more significant and disproportionate than those experienced by the general population. Industrial projects can affect Indigenous peoples' health, cultures, economies, and ability to carry out traditional activities, harvest and share food, maintain cultural practices, and pass knowledge on to future generations. These impacts are often cumulative and intergenerational, and are not fully captured through conventional IA processes. ILAs are a contemporary expression of Indigenous stewardship that respond to these gaps by allowing Indigenous communities to define the scope and methods of assessment in accordance with their own laws, governance systems, and ways of knowing.

ILAs have emerged as a response to the deficiencies of conventional impact assessment processes, which historically have ignored Indigenous interests and restricted Indigenous participation.[61] Further supporting the emergence of ILAs is the recognition of Indigenous rights (including self-determination and collaborative decision making) in Canadian laws and policies. Indigenous knowledges is increasingly recognized as equal and complementary to scientific knowledge, offering continuous, long-term, and historically grounded perspectives that science alone often does not capture. The growing technical and legal capacity within First Nations is enabling communities not just to participate in IA, but also to shape and guide it in ways that reflect their own priorities, values, and aspirations. A comparison between conventional IA and ILA from O'Faircheallaigh & MacDonald (2022) is provided in Table 2.1 on the following page.

Table 2.1 Conventional Environmental Impact Assessment (IA) and Indigenous-led Assessment (ILA) Tendencies Compared (from O'Faircheallaigh & MacDonald, 2022)

Variable	Conventional impact assessment (IA)	Indigenous-led assessment (ILA)
Indigenous participation in IA process	Marginal to secondary	Central rationale and focus
Time frame for conducting IA	Driven by project and regulatory deadlines, often short	Driven by requirements for meaningful Indigenous participation
Time frame over which impacts assessed	Economic life of project and driven by discount rates	Expected duration of impacts based on Indigenous knowledge; multi-generational; strong emphasis on capturing cumulative effects over the entire project life cycle
Sources and nature of knowledge	Short term, primarily quantitative data collection undertaken for IA, written (often secondary) sources	Heavily reliant on knowledge of Indigenous peoples, substantial time depth; experiential and sensory; oral
Legal structures/ orders	Written legislation and regulations; little latitude to expand scope of assessment beyond written norms	Group specific laws and stewardship rights/responsibilities; may be encoded in stories.
Organisation of knowledge and understanding of impact pathways	Disciplinary and siloed (examines separately impacts on water; air; vegetation; flora and fauna; people); use of biophysical proxies instead of socio-cultural perspectives impacting harvesting	Holistic, recognising interdependency of elements of environment and of environment and people
Assessing for...	Avoidance of significant adverse effects from the Project; preventative	Best future uses of Indigenous territory ('net gains'); aspirational
Assessment of significance	Project specific, based on scientific or subjective 'professional opinion' definitions of e.g. acceptable levels of contaminant releases; species 'rarity'	Cumulative, and based on assessment of impact on well- being and sustainability of environments, animals and people; more likely to be highly precautionary
Relative weight attached to economic, environmental and social values	Economic values (local, regional and national) are heavily prioritized	Focus on protecting land-based subsistence economic livelihoods and social and cultural connection to land over the long term

Table 2.1 continued

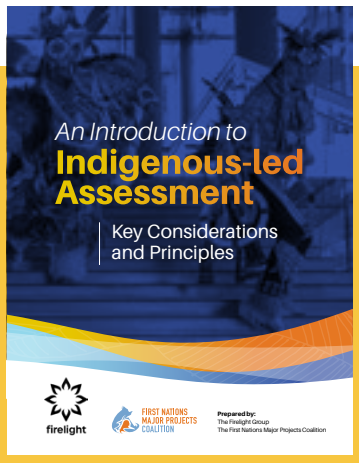
Variable	Conventional IA	Indigenous-led ILA
Role for cumulative effects	Only considered (tangentially) if the Project causes a residual adverse effect on a valued component	Central to the whole process; cumulative change to date helps understand sensitivity to future change, and cumulative effects from all sources drives decisions
Who conducts IA	Consultants selected by and reporting to proponent	Community members supported by technical experts chosen by and accountable to community
Indigenous control over project decisions	Very limited, key decisions lie with regulator, proponent	Control over community level decisions; increased to substantial control over process/project decisions

The practice of ILAs is an area of rapid growth and evolution, and no two ILAs are alike. However, some general principles have emerged, including:

- The scope and priorities will be determined by the Indigenous community;
- Indigenous knowledge will inform the assessment in ways defined by the Indigenous community;
- The severity of impacts will be determined by the Indigenous community;
- Culture, rights, and relationships are emphasized; and
- Long-term cumulative impacts are considered.

ILAs are one of the strongest tools available to Indigenous communities for asserting their rights and priorities within impact assessment processes. However, there are many factors that communities will want to consider before undertaking an ILA.

Published in 2025, **An Introduction to Indigenous-Led Assessment: Key Considerations and Principles**[62] provides an overview of ILAs, guidance for Indigenous communities considering ILAs, and additional resources to help guide the process.



Most importantly, ILAs exist on a spectrum (see Figure 2.3) and after a careful weighing of factors such as governance capacity, funding, community priorities, proponent and regulator relationships, and timelines, a community will need to consider at what level they want to be involved in the impact assessment process. As Indigenous control and responsibilities increase from Indigenous-led studies as part of a proponent's impact statement, to collaborative processes with the government, to full ILAs, the ability of Indigenous communities to define priorities, methods, and outcomes increases, as does the demand on the communities' time, staff, and governance attention.

Figure 2.3 Spectrum of Indigenous Involvement in Impact Assessment Process, by Relationship

	Proponent	Government	Community
LOW Indigenous control / responsibility	Indigenous-led studies as part of impact statement	Review regulator's impact assessment report	Internal decisions based on basic review
MEDIUM Indigenous control / responsibility	Draft sections of impact statement	Co-draft regulator's assessment report	Internal decisions based on comprehensive assessment
HIGH Indigenous control / responsibility	Co-design impact statement	Components of impact assessment will be Indigenous drafted	Binding outcomes based on full ILA

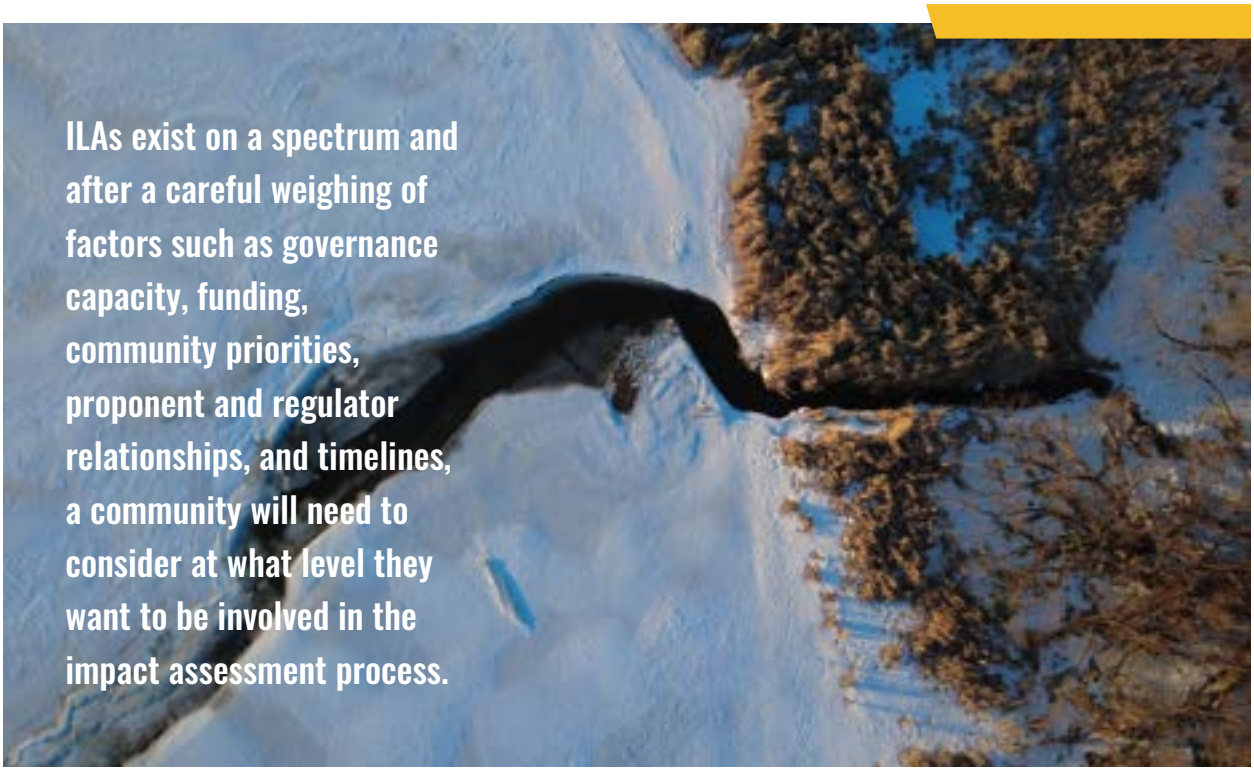


Figure 2.4 Phases of Indigenous-Led Assessments (ILAs) and Impact and Benefit Agreeemnts (IBAs)

It is important to consider how the assessment can be used strategically alongside IBAs.

It is also important to consider how the assessment can be used strategically alongside IBAs to influence project outcomes across the full project lifecycle. ILAs and IBAs can work together to address the gaps and limitations of government regulatory systems. In the **planning phase**, ILAs identify community goals and priorities. During the **assessment phase**, community-based research helps define impact pathways and propose mitigation options. In the **negotiation and decision-making phases**, ILA findings can support Nations in negotiating mitigation measures with proponents and regulators and compensation (where mitigation is not possible), embedding related commitments within IBAs. Finally, in the **implementation phase**, ILAs can provide frameworks for ongoing project oversight and monitoring, ensuring that mitigation measures are effective and that development proceeds in a way that aligns with community values and laws.

ILAs allow Indigenous communities to define their own scope, methods, and priorities, making them an effective tool for Indigenous communities to assess impacts and determine whether, how, and under what conditions development should proceed within their territories, while also providing governments and proponents with a clearer understanding of Indigenous concerns and decision-making processes.

Within the context of conventional IA, the federal government has provided space for Indigenous engagement, though this is limited, not least by constraints on time and financial resources. For example, in Canada's federal IA process, as mentioned above, there is a mandatory maximum 180-day "planning phase" involving the participation of Indigenous communities deemed to be affected by a proposed project. During this phase, the proponent and the Crown must engage with First Nations as early as possible to seek input on the design of the IA process, as well as to identify concerns with the project design. Through increased opportunities for engagement, the current iteration of the *Act* is more in line with the principles of self-determination, decolonization, and Nation-to-Nation co-governance.

Specifically, the *Act* makes greater allowances for Indigenous communities to:

- Provide input and potentially influence how and if a project will proceed;
- Open access to the benefits from proposed developments within Nations' territories;
- Provide greater opportunities to influence decisions affecting their lands and waters; and
- Strengthen consultation and accommodation concerning potential adverse effects.

To support participation, the federal Participant Funding Program (PFP) provides funding for Indigenous consultation during project assessments. The Impact Assessment Agency of Canada (IAAC) typically contacts Indigenous Nations that may be affected by a proposed project to inform them of opportunities to apply for these funds. Nations can use this funding to access internal and external expertise in areas such as legal, scientific, and socio-economic matters, with the goal of asserting and protecting Indigenous rights and negotiating equitable benefits from proposed projects. In both conventional and Indigenous-led assessments, access to financial resources remains a critical factor in determining if and how a Nation can participate in the assessment of a proposed industrial project.

The IAAC is also required to consider studies conducted by Indigenous Nations as a component of the IA. Another key opportunity is for Indigenous governments to take on responsibilities for conducting certain parts of studies related to IAs. Under the *Act*, the IAAC may delegate part of the IA and the preparation of the impact assessment report to an Indigenous government.

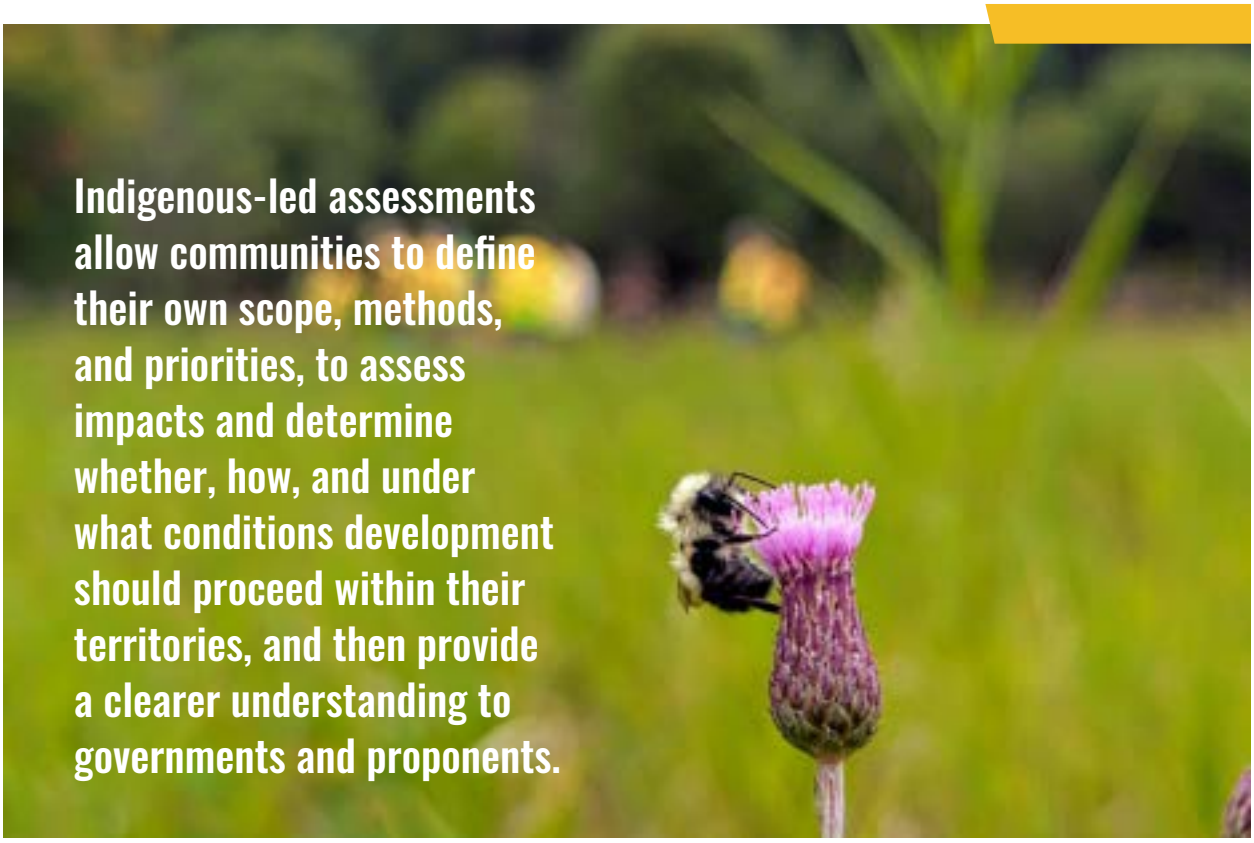


PHOTO ALANNA S MOLARZ/FIRELIGHT

Timing of the Negotiation of IBAs and IAs

In many jurisdictions, there is no legislation requiring that all major projects must have IBAs. That said, the norm is increasingly that IBAs are necessary as part of the social licence to operate, as a relationship builder between Indigenous groups and proponents, and as a risk reduction mechanism for proponents. Thus, in most cases where an impact assessment (IA) occurs, there will be prior, parallel or subsequent IBA negotiations. The relationship between the two processes is summarized further in Table 2.2, which is adapted from Gibson and MacDonald (2024).

Table 2.2 Contrasting Key Elements of Impact Assessments and Impact and Benefit Agreements

Characteristic	Environmental & social impact assessments (ESIA)	Impact and benefit agreements (IBAs)
Responsible parties	Crown government, proponent of development, Indigenous peoples.	Indigenous groups and the proponent of development.
Legal mechanism	Legal permits and licences, derived from legislation.	Bilateral legal contract.
Timeline for review process	Varies, generally from 1 to 3 years, with specific timeframes often set in the environmental impact assessment process and conditions set for the life of the project.	Varies, generally from a few months to several years, depending on how long it takes for negotiation to reach agreement. The desired terms of the agreement might be presented early in the process.
Scope	Project specific, with a focus on avoidance of adverse effects on the environment and people. Sometimes consideration of benefits but this is largely peripheral. Benefits often focused at a wider regional or national scale.	Project specific with focus on stewardship and environmental responsibilities, employment and training, business opportunities, financial benefits, and implementation structures. They are inherently local in focus.
Implementation	Through compliance and enforcement of licence conditions. ESIA follow-up is not generally a strong focus of the regulatory procedures, so the adequacy of compliance depends on the goodwill of the proponent and/or the extent of oversight by a variety of parties.	Most agreements contain an approach to ensuring that the commitments are pursued. The extent of enforcement depends on capacity, funding, and commitment of the parties.

Table 2.2 continued

Characteristic	ESIA	IBAs
Lifetime	Conditions generally apply for the life of the project. However, ESIA follow-up and compliance monitoring is not strong, especially for social issues.	Life of project and potentially after closure with some agreements specifying ongoing responsibilities after closure.
Review of implementation	Rarely conducted or required.	Likely to have an implementation review process and clauses to allow reconsideration of the terms of the agreement to permit adjustments.
Reopening of instrument	If there is a material change in the nature of the project, there may be a new ESIA for the new component parts.	Material change reassessment clauses may be built into agreement, or there may be clauses requiring review on a timed basis, or if expectations not met.
Typical conditions	Conditions typically limited to environmental mitigation and monitoring requirements. Occasionally, socio-economic, cultural, or health protection measures may be required of the proponent or agents of the state.	In addition to monitoring and mitigation measures, there are always requirements around economic and community development, with a focus on employment and procurement. Often there will be benefit-sharing arrangements involving financial transfers to the affected community.
Transparency of process and information	All evidence, decisions, conditions, and sometimes reasons for decision are usually available on a publicly accessible record. Sometimes, provisions allow for Indigenous traditional knowledge to be kept confidential.	Varies by jurisdiction. Typically, a public statement containing general points is made, but details, especially about financial arrangements are kept confidential. In a few jurisdictions, such as within Inuit land claim regions, IBAs are required to be public.
Funding for community engagement	Varies by jurisdiction. However, while most governments provide (or require the project to provide) avenues for community engagement, there usually is not direct support to communities for their involvement, preparation, or independent advice.	Usually, proponents will be required to pay for all costs of engagement, including for the local community to be prepared, and for independent legal and technical advice, in a Framework Agreement negotiated between the Indigenous community and the proponent.
Timing of the processes	Often ongoing in parallel to IBA negotiations.	Often ongoing in parallel to ESIA processes, although ESIA processes usually start before IBA negotiations commence. Preparation for negotiations should begin as soon as an Indigenous community is aware that the project has a likelihood to advance to assessment.

Table 2.2 continued

Characteristic	ESIA	IBAs
Potential to influence the other process	Local knowledge and especially Indigenous traditional knowledge that might be identified in the IBA process should be used to inform the ESIA.	The information from the formal ESIA process could (and should) be considered in the IBA process.
Role in development approval	The ESIA is a mandatory requirement of the state in advance of any approval decision being made. Where an ESIA is conducted as an independent activity (at arm's length from the proponent), the ESIA might make strong statements about whether the project should be approved or not.	IBAs are usually voluntary (although increasingly standard), although some jurisdictions do require IBAs, see Section on Legal and Policy Levers. Completion of an IBA is likely to influence an approval decision. However, depending on the context, an approval decision might still be granted even if an IBA was not yet concluded.

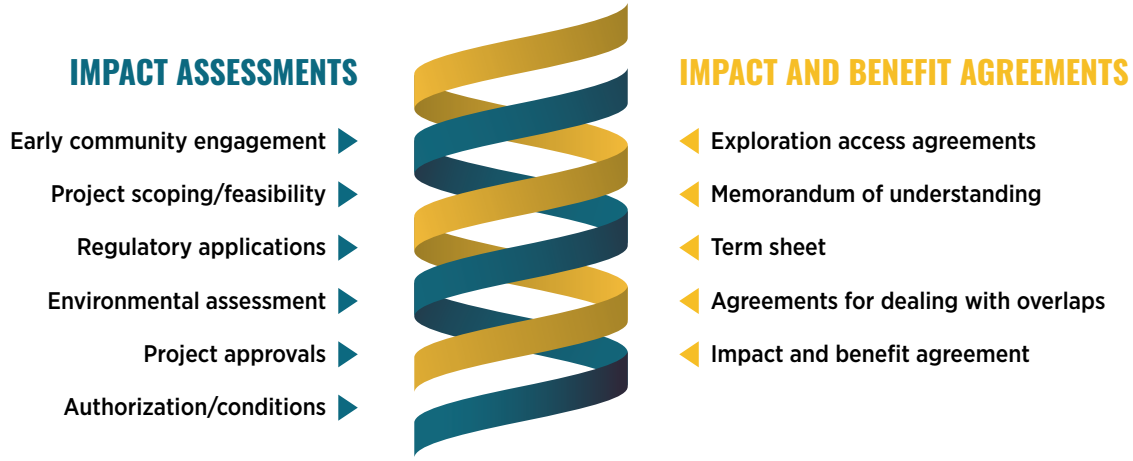
A critical challenge for Indigenous communities lies in how to align the process of IA with that of negotiating IBAs, and how to integrate the flows of information that arise from each; how to manage the opportunities that surface in each; and how to maintain both high engagement capacity and negotiation leverage in the face of time pressures. Analysis of the stages in each process and the time constraints they generate is essential. The points of maximum leverage and potential loss of leverage can then be identified and managed.

Critical tasks for the Indigenous community team include the need to:

- Identify clear goals for both processes, and set mandates for both;
- Be aware of overlaps and possible trade-offs or even contradictory priorities of the two processes (for example, the IA process track may have limited or no focus on financial benefit maximization, whereas this will be one of the foci of the IBA track);
- Track the resource implications of different approaches to create a regulatory backstop in jurisdictions with weak regulations (e.g., seeking specific impact mitigation conditions in IA versus negotiating impact mitigation provisions in an IBA); and
- Work through which approaches are feasible given available resources and which hold the greatest advantage.

Figure 2.5 shows the stages of an environmental impact assessment next to those of an IBA. The use of the double coil suggests the flexibility of timing. Given that each region has a unique context, there is no formula for when agreements are reached. Indigenous communities need to make strategic decisions about when to start entertaining IBA negotiations, balanced with the time required for a community to be prepared. Factors to consider include whether the Indigenous community has enough information about the proposed project to understand its impacts. Only then can the

Figure 2.5 Stages in Impact Assessments and IBAs



commensurate benefits be generated. The IA process is specifically designed to identify potential environmental (physical, biophysical and human environments) impacts that are likely to be caused by the Project. In addition, the IA process can be used to raise the breadth and depth of connection to the would-be impacted locations that the Indigenous communities have, strengthening recognition of the impacts and benefits at stake in IBA negotiations. That said, Indigenous communities that wait until they have perfect information about potential impacts may leave their IBA negotiations too long, putting strong time pressures on those negotiations. It is balancing the increased clarity of impact understanding with the need to have adequate time to complete negotiations, which is at the heart of the intersection between IBA negotiations and IA process engagement.

The timing of the IA process can have a heavy impact on the negotiation of an IBA. For example, if it is likely that IA will reveal only a low level of impact and thus trigger a low level of environmental review, the leverage for an IBA may be impacted. Thus, it may have been best to negotiate an IBA before the environmental assessment level is selected. An early framework agreement or MOU on communication protocols, information sharing and funds can make reference to the future negotiation of an IBA.

Some issues may need to be dealt with inside both IBAs and other policy instruments. For example, IAs often guarantee opportunities for increased participation of Indigenous people in environmental planning and management, with membership in monitoring boards, direct involvement in monitoring, and application of traditional knowledge to environmental planning. However, IAs rarely give regulatory power or authority to Indigenous people. As a result, negotiators have sought greater environmental powers in their IBAs. For example, the Innu and Inuit IBAs for Voisey's Bay require Innu and Inuit environmental monitors and project-level joint monitoring committees.

Thus, a variety of policy instruments can be used in combination with the IBA to pursue goals. For example, in the Voisey's Bay case, the Innu and Inuit aimed to have maximum control over the identification and management of environmental issues, using both the EIA (Environmental Impact Assessment) and IBA. The IBA was used to greatly reduce the scale of the project, shape the approach to shipping through sea ice, and ensure there was site-based monitoring by Innu and Inuit.

The EIA accepted the Innu and Inuit arguments about project scale, and the EIA recommended that the project not be approved until an IBA was signed. The Innu and Inuit used the EIA and the IBA in a coordinated and highly effective way. An Environmental Monitoring Board established through the EIA gave the Innu and Inuit a role in setting the regulatory framework, while the IBA gave them a role in ensuring that this framework is applied on the ground. Voisey's Bay provides an excellent study about how to address issues around EIA and IBA interaction.

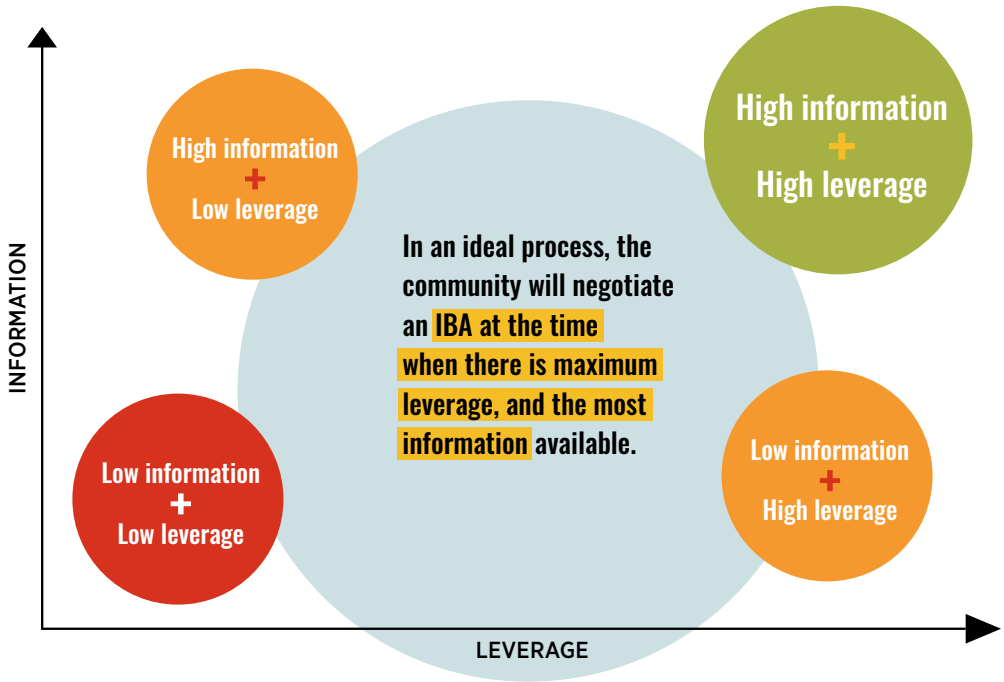
Timing the IA and IBA: Three Scenarios

There are three scenarios for phasing IBA negotiations with IAs:

- Negotiation of the IBA before the IA (page 56);
- Negotiation of the IBA after the IA (page 58); and
- Negotiation of the IBA and IA at the same time (page 58).

In this section, we consider the benefits and drawbacks of each scenario, paying particular attention to the points where an Indigenous community has the most information, highest leverage, or greatest ability to link the IBA to the IA process. Figure 2.6 illustrates what community negotiators ought to plan for. In an ideal process, the community will negotiate an IBA at the time when there is maximum leverage, and the most information available, provided there is a suitable timeline — runway — left to negotiate the IBA within which leverage will remain high.[63]

Figure 2.6 Ideal Timing for IA and IBA Negotiations



SCENARIO 1: Negotiation of IBA Before IA

A community and/or a company may be inclined to negotiate an IBA before an IA process begins, depending on their objectives (e.g., if a company is seeking greater project certainty before investing resources into an IA process or if a community is seeking equity opportunities). Doing so will have implications for both the IBA and the IA. These implications are discussed below.

Implications for IBA:

- Leverage held by the community is heightened at this point because the company does not yet have the project and permit approvals it needs.
- There is a premium for the company on the certainty derived from completing an IBA. The company can also make representations to the statutory environmental authorities that it has achieved the consent of the impacted communities and will expect the Indigenous community to do the same.
- Little information is available on the potential impacts and benefits of the project for use in the negotiation, because there is no IA to rely on. Often, a feasibility or pre-feasibility study, another key source of information, has also not been completed. Leverage may be artificially lowered if the community has not learned enough about the project to determine whether the community will be significantly impacted or not.
- There may be no certainty on the nature or level of IA the project will undergo. As a result, the community may negotiate an IBA at this stage, and then find they gain very little in the way of mitigation if the project triggers only screening and then receives permits, rather than undergoing a full IA.
- The potential for an IBA that is not adaptive is high. There will be little information available for designing mitigation measures to protect the cultural, social, or environmental environment. Any mitigation measures in the agreement will likely be vague and possibly not protect against the impacts felt from the project. In such a case, pushing for adaptive management measures in the IBA is important. If there is an IA, this process can be used to generate protective approaches outside of the IBA.

Implications for the IA:

- The community may negotiate resources in the IBA to support its participation in the IA. This is often the only upside of negotiating an IBA before an IA. It should be noted that capacity funding agreements with the proponent, which can be negotiated separately from an IBA, can also support a community's participation in an IA and do so without the community needing to provide early, and likely premature, consent for the project.
- A community that negotiates an IBA with a company prior to an IA may have the potential to influence the design of the project before an IA application is submitted and could even become a co-proponent if the IBA includes equity opportunities.

- By giving consent to the project, the community may negatively affect the responsiveness of the proponent in the IA process, so that it may be less responsive to community concerns. The proponent may feel that it has negotiated consent already and therefore pay much less attention to the impacts identified through the IA.
- A completed IBA may positively affect the IA body and the ultimate statutory decision maker's view of the project, influencing them to approve the operation, given that the company has attained "consent."
- The community may limit its ability to really push on key issues in the IA, especially if people feel they must now support the project or if they have agreed in the IBA not to "frustrate or cause delays" to the project.
- The community will not be able to seek appropriate protection for critical environmental areas, given that they do not know what protections will be achieved through the IA.
- Early IBA signing may also lead to criticism from other Indigenous communities, who are still actively assessing the Project, as the Indigenous community is forcing their hand. Alternatively, the community may see being "first in" as getting less than the communities that hold out "for a better deal."

Key Points for Scenario 1: Negotiation of IBA Before IA

Implications for IBA:

- Leverage after signing is low
- Certainty for the company is high
- Little information available
- Limited protections for the environment or society
- Minimal certainty on the environmental assessment process
- Minimal time and resources impact on capacity-limited Indigenous communities

Implications for IA:

- Can negotiate resources for environmental assessment
- Can influence the design of the project
- With community consent given, the company and the regulator may pay less attention
- May represent consent to a statutory decision-maker
- May limit input into the environmental assessment

SCENARIO 2: Negotiation of IBA After IA

A community and/or a company may be more inclined to negotiate an IBA after an IA process is concluded (e.g., if a community wants a full understanding of the impacts of a project and which impacts are not adequately addressed in the IA or if a company is seeking regulatory certainty to minimize a community's leverage).

Implications for the IBA:

- Much more information is available on the project and its impacts. This information can be used to design strong mitigation measures in the IBA.
- The Indigenous community may have to complete its own internal IA process before making a decision on whether to finalize or, in some cases, even get to the table for an IBA.
- Unless the conclusion of an IBA is a legal requirement for the project to be approved, there is a major loss of leverage to negotiate the IBA once the company has environmental approvals. The extent to which leverage is lost depends on the legal context; in Nunavut, for example, leverage is provided by the requirement in the Nunavut Land Claim Agreement for an Inuit IBA. It also depends to a lesser extent on what the IA says about IBAs. For example, the Voisey's Bay panel recommended that IBAs be concluded before the project was approved. The Newfoundland government initially rejected this recommendation, but later accepted it under pressure when faced with project delays due to opposition from the Innu and Inuit.[64] As a general rule, Indigenous communities should not assume that IA statutory decisions will require IBAs.

Implications for the IA:

- There is no information on mitigation in the IBA that regulatory authorities can use in determining what protective measures should be sought through the IA process.

Key Points for Scenario 2: Negotiation of IBA After IA

Implications for IBA:

- Information is high
- May be loss of leverage (unless IBA is required by land claim)
- Ability to design adaptive mitigation is high

Implications for IA:

- No information on mitigation from the IBA that regulatory authorities can use

SCENARIO 3: Negotiation of IBA and IA at the Same Time

Many communities may consider this the ideal mix in that the IA table can be used to unearth impacts and their significance, increasing both the leverage and the focus of the IBA table, focusing on avoiding, reducing or compensating for negative changes most likely to occur, and maximizing benefits most likely to be capturable. In practice, it may be difficult to have both the human resources to run both processes at the same time, and have the degree of interconnectedness between IA and IBA tables such that they run in entirely complementary rather than contradictory ways.

Implications for the IBA:

- The IA can identify issues, and the IBA is able to build mitigation measures to address these issues concurrently. The need to mount an effort on the IA and IBA fronts simultaneously creates heavy demands on resources, which, as a result, must be carefully managed. For example, in Voisey's Bay, the Inuit and Innu maximized use of resources by dividing responsibility for EA issues: the Inuit dealt with maritime issues and especially impacts of shipping, while the Innu took responsibility for terrestrial impacts. They covered both issues well and at the same time managed resources wisely. Another way to manage pressure on resources is to negotiate a memorandum of understanding setting out how responsibilities will be shared with an environmental group or several environmental organizations. A third approach is commissioning reports in a way that feeds into both processes. The question of sharing resources and jointly deciding on the topics and coverage arises.
- The community maintains its leverage until the IBA is finalized by not providing the proponent with regulatory certainty until Crown accommodations are addressed.
- Any lack of progress or poor design in one process can affect the other process.

Implications for the IA:

- There is a need to manage resources carefully. Even where this occurs, the community's ability to maximize its input into the IA may be compromised by the need to also focus on IBA negotiations. For example, only a limited number of personnel with the skills required to participate effectively in IA and IBA processes may be available.

Key Points for Scenario 3: IBA and IA at the Same Time

- Heavy burden on resources, which must be managed carefully
- Progress or design problems in one place affect another
- EA identifies issues, and IBA builds mitigation to address them
- Less leverage until IBA is done

Considerations on Connections between IBAa and IAs

IBAs and Environmental and Social Impact Assessments (IAs/ESIAs) are often treated as parallel, standalone processes. In practice, they are ideally interconnected. The IA process generates the information that communities need to understand project risks and benefits, while IBAs create the binding mechanisms through which those findings are acted upon. When these processes are aligned, they can reinforce one another.[65] The following guidance points summarize practical strategies for connecting these processes in ways that protect community interests and improve project accountability:

- Connect the IBA negotiation team and the IA team wherever possible to share information across both tables. Cross-representation avoids duplication, inconsistent conditions, or contradictory commitments.
- Avoid unnecessary overlap between IBA provisions and environmental impact statement conditions (for example, you do not need two separate environmental committees). Do consider the IBA to create "defence in depth" measures, such as clauses that strengthen the community's role in project enforcement, monitoring, and compliance with existing mechanisms. Do not assume statutory conditions will protect all interests; IBA provisions can go further to increase and secure your community's control and agency in project implementation.
- Carefully plan the sequencing of the IA and IBA processes to allow reliable information from the IA to inform the IBA. This can be done through strong collaboration and communication across the IBA and IA teams.

The IA process generates the information that communities need to understand project risks and benefits, while IBAs create the binding mechanisms through which those findings are acted upon.

- IAs are public documents; IBAs are typically confidential (depending on the region). Decide early which issues your community wants on the public record and which are better addressed privately within the IBA.
- Secure early capacity funding from proponents to support IBA preparation and negotiation, but include provisions that allow your Nation to delay or pace the use of those funds until adequate information about project effects, risks, benefits, and the ability for the community to capture those benefits is available. This approach prevents premature commitments and ensures that your community can make fully informed decisions as environmental data and assessments evolve.
- IA is a valuable space to identify problems on a wide range of issues, but it is less effective for innovative solutions. IBAs offer a bilateral and often confidential space where parties can co-design practical and creative arrangements that respond directly to the community's needs.

The IA process provides information about potential project impacts and ways in which these can be managed, while the IBA is where Indigenous communities assert their authority, define priorities, and negotiate terms under which they will accept a project. When these processes are connected through shared values, knowledge, and governance, they form a continuum, from identifying impacts to securing lasting benefits and protection of rights (Gibson & MacDonald, 2024). It is possible to achieve conditions through the IA process that help provide solutions and involve commitments that proponents and governments make. These can be reinforced and added to by IBA provisions. The IA process can be used to identify problems, risks, and ways of managing these. In contrast, the IBA process provides the space for Nations to design their own solutions, establish clear commitments, and set the governance structures needed to make those solutions real.

The Wider Implications of Agreement Making

While negotiation of project-based agreements with mining companies can generate substantial benefits for Indigenous communities, it can also have unforeseen and far-reaching impacts on the political, social and economic positioning of Indigenous groups. It is important to consider these wider implications in balance with what can be achieved through an impact and benefit agreement and to manage them effectively. Strategies for doing so are discussed below.

In a publication examining the wider implications of agreement-making, researchers compared Indigenous groups that had contracts with mining companies with those that did not.[66] This research highlighted how negotiation of project-based agreements affects the legal and political status of Indigenous groups and the nature of their relationship with other elements of the political system.

Agreements can generate substantial benefits for Indigenous communities, but can also have unforeseen and far-reaching impacts.

These broader impacts can be highlighted by considering the effect IBAs can have on Indigenous groups in four specific areas, discussed in this section:

- Access to the courts and government regulators;
- Freedom to pursue political strategies;
- Implications for agreements and land claims with the state; and
- Freedom to influence corporate social responsibility.

Access to the Courts and Government Regulators

In the absence of an agreement, Indigenous access to components of the judicial and regulatory system that are relevant to project approval and management is unconstrained by any contractual obligations to a mining company.

Indigenous people can exercise rights available to citizens generally or rights arising from any specific property or other Indigenous interests they hold. Those rights may allow them, for instance, to challenge the level of environmental assessment proposed for a project; to take legal action to prevent damage to Indigenous cultural heritage or the environment; or to sue for compensation if such damage occurs.

Using these legal and procedural rights, Indigenous groups may be able to influence the terms of contractual and regulatory instruments negotiated between the state and the developer, for instance, by helping to shape the conditions attached to environmental approvals and mining leases.

At least three features of negotiated agreements with companies can constrain Indigenous access to the judicial and regulatory systems.

First, agreements in Australia and Canada almost always involve Indigenous support for the project concerned, and/or for the grant of specific land titles or approvals required for the project to proceed. For example, many agreements in Canada contain specific provisions that commit the Indigenous party either to support the project involved or to refrain from opposing it in environmental assessment or regulatory proceedings. A number of agreements commit the Indigenous parties to not oppose projects in the event that they become subject to an environmental assessment as a result of actions taken by non-signatories to the agreements.[67]

It follows that Indigenous groups may be contractually constrained in their ability, for instance, to object to government approval of a project either in principle or in its current form. Thus, for example, the operator of one project in Canada used the existence of such clauses to argue that an Indigenous signatory to the agreement was prohibited from objecting to the grant of a water license required to allow expansion of the project.

> Indigenous groups may be contractually constrained in their ability, for instance, to object to government approval of a project either in principle or in its current form. In one case, a company used the existence of such clauses to argue that an Indigenous signatory to the agreement was prohibited from objecting to the grant of a water license required to allow expansion of the project. To protect communities' rights and autonomy, the provisions on regulatory certainty should **allow the communities to participate in the review of all permits** and approvals that may come up at a later stage of the project, as well as potential future expansions.[68]

Second, some agreements contain provisions preventing Indigenous groups from using specific legal or regulatory avenues that would otherwise be available to them. For example, under one recent Australian agreement, the Indigenous parties undertook not to "lodge any objections, claims or appeals to any Government authority [...] under any [state] or Commonwealth legislation, including any Environmental Legislation."

Third, agreements may contain dispute resolution processes that preclude the parties from initiating legal proceedings to resolve disputes or require all other potential avenues for resolving disputes to be exhausted before they do so.

In combination, such provisions can create a fundamental shift in the ability of Indigenous groups to exercise legal rights they would otherwise have available and, more generally, to access legal and regulatory regimes relevant to resource extraction.

These issues are discussed further on page 189 (Consent) in Section 4.

Freedom to Pursue Political Strategies

In the absence of an agreement, Indigenous communities are unconstrained in pursuing political strategies designed to halt project development or change the nature or timing of development. They can, for instance, seek public support through the media, build political alliances with NGOs such as environmental or social justice groups, lobby the government, and mobilize pressure on corporations and their shareholders. For example, Innu and Inuit landowners in Labrador used a number of these strategies to delay the development of the proposed Voisey's Bay nickel project in the late 1990s.[69] The Mirrar, Indigenous traditional owners of the land on which the proposed Jabiluka uranium project in Australia's Northern Territory is located, used a combination of all of them to oppose development of the deposit. They were ultimately successful, with Rio Tinto agreeing to refill a portal that had been constructed to start mine development and committing not to re-commence development without the consent of the Mirrar.[70]

The common requirement in IBAs for Indigenous groups to support a project immediately limits their capacity to manoeuvre politically, particularly in relation to environmental and other groups that might otherwise be valuable political allies. In addition, agreements very commonly (indeed almost universally) include confidentiality provisions that prevent Indigenous groups from making public the information about negotiations and agreements, even to regulators or during consultation. Confidentiality provisions can severely constrain the capacity of Indigenous groups to communicate with the media and with other stakeholders. Confidentiality clauses may be included not only in final agreements, but also in negotiation protocols under which companies provide funds to support negotiation processes—and they may continue to be legally binding even where the parties agree to terminate a negotiation protocol or an agreement as a whole.

The requirement to support a project, combined with confidentiality provisions, can also significantly constrain an Indigenous group's ability to lobby or otherwise place political pressure

on a government in relation to a project. In dealing with government, most Indigenous groups have two fundamental strengths, often used in tandem. The first involves any capacity they have to delay or halt a project, either by accessing the legal and regulatory systems and, for example, obtaining injunctions on project construction or delays in project approvals, or through direct action aimed at halting or delaying development activity on the ground. The second involves the ability to embarrass the government politically by using the media to appeal to its constituents.[71] If contractual agreements preclude or inhibit the use of both strengths, this may substantially reduce Indigenous capacity to influence government decision-makers.

Implications for Broader Agreements and Land Claims with the State

This last point raises the broader issue of the relationship between Indigenous groups and the state. The legal and constitutional basis for this relationship varies considerably in settler states such as Australia, Canada, New Zealand and the United States, and in some cases also varies within individual countries depending on the legal status of particular Indigenous groups or sub-national jurisdiction. However, it is clear that, in general, negotiation of agreements between Indigenous groups and mining companies has the potential to influence Indigenous relations with the state in a number of ways.

First, states may seek to reduce their budgetary allocations to Indigenous communities on the basis that the latter now obtain revenues from commercial sources as a result of their agreements with mining companies. This has certainly occurred in Australia,[72] and the prevalence of confidentiality provisions in agreements may reflect, in part, a desire by Indigenous groups to withhold information on their revenues from government and so reduce the likelihood of a cut in government funding.

Another area in which significant impacts can occur involves attempts by Indigenous peoples to win legal recognition from the state of their inherent rights to their ancestral lands. Both Canada and Australia, for instance, have been and continue to be extensively involved in negotiations and/or litigation with Indigenous groups regarding either recognition of their rights for the first time through negotiation of comprehensive land claim settlements (Canada), title cases (Canada), or determinations of native title (Australia); or regarding implementation of

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treaty obligations that the state has historically ignored. The discovery of a major mineral deposit on an Indigenous group's land often focuses state attention on land tenure issues, in many cases in response to corporate pressure on state agencies and on political leaders to have these issues resolved as a precondition for undertaking major capital investment. The implications of a stronger state focus on resolving land tenure issues as a result of major mineral discoveries are unclear and require further research.[73]

Freedom to Demand Corporate Responsibility

Agreement provisions regarding Indigenous support and confidentiality can also result in fundamental changes in the ways in which Indigenous groups relate to mining companies. The willingness of corporations to undertake corporate social responsibility (CSR) initiatives in relation to any social group depends, in large measure, on the capacity of that group to inflict damage on the corporation by threatening its social license to operate.[74] Groups must apply "an ever-present threat of the loss of social license to operate to ensure that companies recognize and address [their] demands …civil society organizations need to maintain surveillance and pressure to ensure it is always in the corporate interest to respond to community demands."[75] The capacity of groups to threaten the reputation of corporations is a "crucial lever."[76] Where agreements bind Indigenous groups to support corporate activities and silence them through confidentiality provisions, they have substantially surrendered their ability to threaten a company's social license to operate. These "corporate activities" can include major issues that have significant and unplanned impacts on the community, for example, discovering that the tailings storage technology is failing, resulting in perpetual water pollution.

It may, of course, be the case that the threat of losing social license is no longer needed, because agreements contain legally enforceable provisions that ensure the ongoing performance by a company of certain CSR obligations. Two points remain. First, the nature of the relationship between Indigenous groups and companies has profoundly changed. Second, questions remain as to whether obligations taken on by corporations through agreements with Indigenous groups will be both substantial and enforceable.

Whether these commitments amount to a fair trade for what Indigenous groups agreed to give up cannot be decided in advance and depends on the specific terms of each agreement. Another important issue here involves the length of time over which agreements apply, which is typically for the whole life of a project and for major projects, this is often measured in decades rather than years. It endures despite changes in leadership within the Indigenous community. If Indigenous groups discover after the event that the trade-off they have made is not to their advantage, it may be a very long time before they have an opportunity to change the situation, and they must continue to devote significant resources towards trying to "work the agreement" to make this happen.

LONG-TAILED DUCK, CHRIS WAGNER/FIRELIGHT

Community Goals, Planning, and Politics

IBAs are not, and should not, be negotiated in a vacuum, separate from the political life of a community and from its wider economic, social and cultural goals.

Community negotiators must be constantly mindful of the potential impact of political disunity on negotiations with developers and governments, an issue dealt with in detail below. They must also be keenly aware of broader goals being pursued by a community, and ensure that an IBA contributes to these goals, rather than undermining them.

Increasingly, Indigenous communities are undertaking significant planning exercises, developing land use plans, comprehensive community plans, economic strategies, and action plans. Once these long-term strategies are in place, the community is able to be more selective and proactive about how they engage with proponents and balance their cultural, economic, and environmental priorities.

Community negotiators must be constantly mindful of the potential impact of political disunity on negotiations with developers and governments.

Negotiators can refer to these community planning exercises and consultations undertaken in relation to other processes, such as land claims and other negotiations, to identify key priorities and key areas of concern for the negotiations. If a community has not had an opportunity to establish and articulate its goals, negotiators should insist on a community consultation and planning exercise as part of the preparation for negotiations. This is discussed further in Section 3: Mandate, Governance, and Decision Making. When this does not occur, IBAs may contain provisions that are not highly valued by community members, resulting in lost opportunities, recriminations, and social tension in the longer term.

For example, if a community has identified that education and health services are sub-standard because of critical skills shortages in these areas, and that community members have little prospect of gaining and holding industrial jobs until these services are improved, an IBA that focuses heavily on creating employment opportunities in a mining project will be of limited benefit. However, if an IBA creates a substantial, company-funded scholarship scheme that allows students to study in areas identified as community priorities, the IBA may play a key role in meeting community needs.

Unity Within Communities

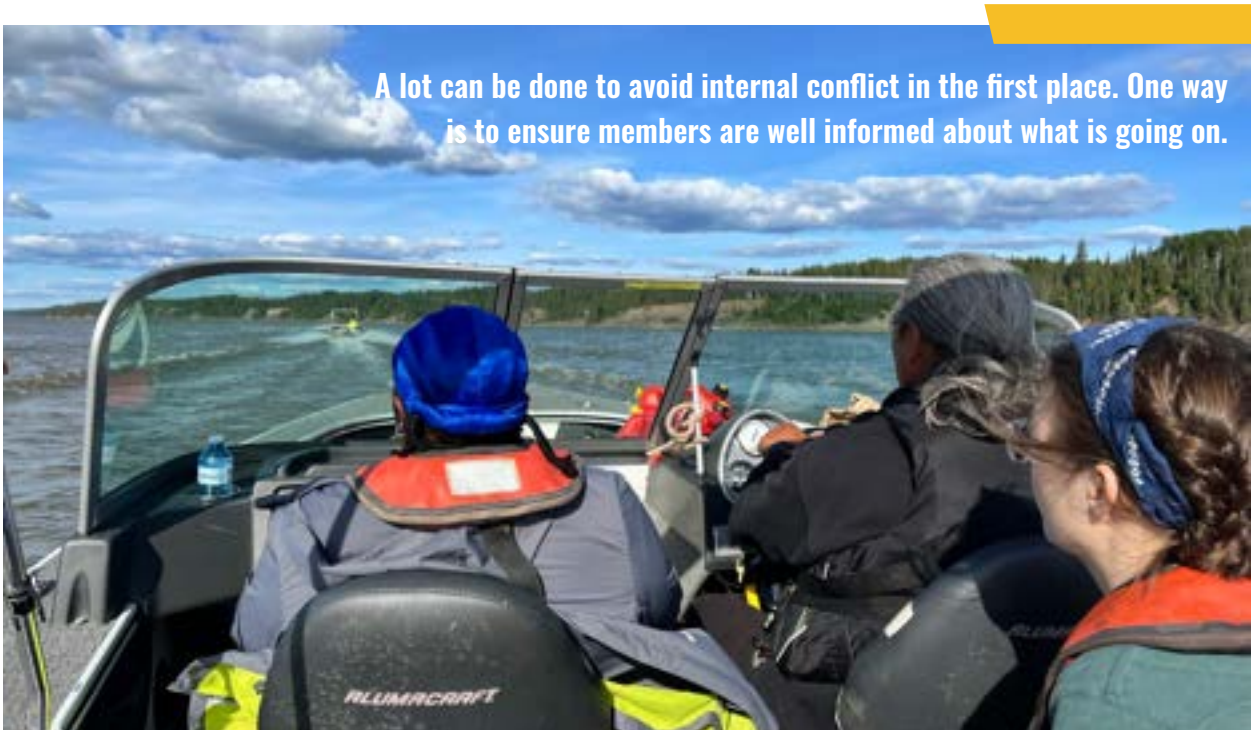
There is a saying that in negotiations, as in war or sport, disunity is death. A community's level of political mobilization, including the community's internal unity and external, regional unity with other communities, is one of the primary influences on the success of IBA outcomes.[77]

If Indigenous people are fighting among themselves, they will use up time, energy, and resources that could be employed in negotiating a better agreement. People on the company side, if they are unscrupulous, will use the division against the community. They will encourage the conflict and use it to get concessions, for example, by getting some community members to take the deal the company is offering and then pushing the rest of the community to accept it. Even if a company behaves in a principled way and doesn't interfere in community politics, the company is likely to feel that an openly divided community is not much of a threat, won't be a very useful partner, and may later go back on an agreement. For these reasons, the company is unlikely to offer the best possible deal. Lack of unity during negotiations also means the community is unlikely to put in the effort needed to make the agreement work after it is signed.

If Indigenous people are fighting among themselves, they will use up time, energy, and resources that could be employed in negotiating a better agreement.

This is not to say that there cannot be differences of opinion in communities about the matters covered in a negotiation and an agreement. There will always be differences, as in any community. Some people may want to focus on employment, while others want more emphasis put on the environment or maintaining traditional ways of life. Most people would like to have all of these things and more, but given that this is not always possible or easy, communities will need to work toward unity on what the balance should be.

Communities should do their best to build unity before they start negotiations with a company. Often, it is possible to do this. For example, one community in Australia reached a unified position when people who were strong on protecting culture and the environment and those who were strong on employment and business development agreed that no one would accept an agreement if it didn't have *both* strong provisions to protect culture and the environment *and* strong provisions to promote Indigenous employment, training and business development. They kept up a united front throughout the negotiations and, in the end, got a strong agreement that delivered what both groups wanted.



A lot can be done to avoid internal conflict in the first place. One way is to ensure members are well informed about what is going on.

Often, conflict can arise because of tension between local and regional governance structures. For example, a common source of tension in BC emerges between traditional forms of governance and organizations that are funded and created through the *Indian Act*. These tensions often spill over into IBA negotiations. In Nunavut, conflicts can arise where regional organizations control some permits and royalty provisions, while local organizations control questions of land access. These kinds of problems are best solved privately and in advance of negotiations, rather than allowing a corporation to witness the dispute and possibly use it to weaken the negotiation position of both parties.

Communities should do their best to build unity before they start negotiations with a company.

Questions of legitimacy can surface as people fight over who should have the right to negotiate agreements. When organizations such as band or tribal councils make decisions about IBAs, they sometimes do so without the informed consent of all community members. This often occurs because agreements are confidential, and people confuse confidentiality with the need to hold the agreements back from citizens. Citizens need access to all the information to ensure informed consent.

If conflict continues, or if it crops up during negotiation, people should keep this within the community and work to resolve it away from the company.

A lot can be done to avoid internal conflict in the first place. One of the most important ways to do this is to make sure that community members are well informed about what is going on. Conflict often erupts because people don't know exactly what is happening; they hear rumours and then get upset. We come back to this issue later in Section 3, when we talk about communication. Ensuring that the negotiation mandate is transparently grounded in community engagement is also important.

Unity Between Indigenous Nations

While unity *within* a community is critical to negotiating a successful agreement, unity *between* neighbouring communities or nations is a key factor in political mobilization and can significantly influence the success of IBA outcomes.[78] The bigger the project and the wider its effects, the more significant this unity can become.

This second area of potential conflict often focuses on boundary disputes and the related issue of which communities have "standing" in relation to a project and therefore have the right to provide input and seek benefits. Such conflicts are often complicated by the fact that they involve much wider issues and interests, some of which may be unrelated to the negotiation. They can be as much of a threat to a successful outcome as internal conflicts, and managing them is just as important. But different approaches will be required.

There has been a marked tendency among communities not to share agreements, which has led to disunity nationally and regionally. When communities hold information and agreements close to their chest, rather than openly sharing them, the advantage is given to government and industry. Poor agreements continue to be negotiated, particularly by those in more rural and remote areas who may only be approached on one or two projects and who have less standing capacity, connections, and resources. In reality, sharing does not compromise unity, but rather strengthens agreements and outcomes.

Boundary issues are complex and can occur at family, clan, community and regional levels. They are difficult for outsiders to understand, and can become treacherous when they are debated in courts, in land claim agreements, or with companies.

Boundary issues are complex and can occur at family, clan, community and regional levels. They are difficult for outsiders to understand, and can become treacherous when they are debated in courts, in land claim agreements, or with companies. Overlapping claims are sometimes used by companies to undermine unity further, to force wedges into wounds, and to decrease the corresponding leverage of each group.

Boundary issues are best dealt with through the protocols and agreements that Indigenous communities have long used to promote peace and unity. Conflict between groups and internally can be managed by Elders, through visionary leaders, and through the identification of common visions, histories and goals. Often, Elders will draw on long-established cultural protocols, family alliances, and marriages to encourage conflict resolution. This has, at times, been the basis of establishing peace and the conditions for strong agreements (as in a conflict between the Tahltan and Tlingits in BC). Elders can also create the conditions for working productively, as they have the capacity to bring people into line, reminding everyone of common goals. In other cases, the development of agreements has set the stage for peace and intermarriage (as in the case of the Tlingit and the Kaska Dene in BC). Another option, if some people are not trusted by all parties, is to involve a respected outside mediator. At worst, these types of claims will be dealt with in the courts, an approach that is likely to breed more conflict.

Ideally, protocols between communities are set up at the outset of negotiations to guide the relationship. Other times, a negotiation team simply seeks a mandate to collaborate with other nations' negotiation teams. Typically, this type of mandate to collaborate requires negotiation teams to work together, but constantly check back in with their own leadership teams to keep on track. Where nations are working collectively, they can carve out issues and inform the project proponent that sensitive overlap issues will be managed internally. For example, nations can agree internally on a split for financing, without the proponent weighing in on the issue.[79]

Nation-to-nation agreements addressing shared Indigenous territories can settle overlap issues before the company is involved, or can reinforce an existing relationship. The Wabun Tribal Council in Ontario has developed a simple formula that is used to determine the sequence and financial share for each nation represented in its Council.[80] The Haida and Heiltsuk Nations formalized a historic agreement in 2014, committing to jointly protect the rights and responsibilities bestowed upon them by their ancestors, and a commitment to protect the environment for future generations.[81] The agreement reinforces the relationship between the two nations, while also defining the ocean boundaries on a map.

Nation-to-nation agreements are often oral, but at times can be written. They create the conditions for unity in advance of an IBA, leaving no room for mining companies to open fractures between groups and fuel disagreement to the disadvantage of all. Structures may be needed to solidify these relationships, such as the creation of a joint task force. In other circumstances, more informal relationships may suffice.

Whatever the process taken, critical elements for building unity include devoting time and resources to good communication and consensus-building through the development of common principles and

goals. The pressures of meeting project timelines and milestones can impact how much time can be devoted to building unity; however, if the nations see it as a priority, it should be built into the project timeline. Splitting responsibility and harbouring resources (as done by the Innu and Inuit in the case of environmental assessment of the Voisey's Bay mine) is another good strategy. At other times, community and nation-to-nation unity can sometimes be built through direct action.

Mining companies, for their part, need to understand the importance of resolving overlap issues or other sources of conflict. Companies should not become directly involved, but create the conditions and allow the space and time for nation-to-nation agreements to emerge. Companies will benefit in the long term from the stability and certainty that will result from such agreements.

Disunity

Signs that a mining company is causing disunity:

- The company brings the concerns of another Indigenous community to the table and suggests it is negotiating harder with them.
- The company signs an agreement with the community with the weakest governance structures and then tries to get all other communities to fall in line.
- The company focuses on negotiations with the Indigenous community that is furthest from the project first.
- The company is consulting the wrong people and communities.

Tackling Disunity

- Set up a meeting of the Indigenous communities. Agree on how to consult each other, and when.
- Agree on which nations have priority. If there are many mining and exploration companies, communities can agree to give priority in negotiation to the community that is closest or has key traditional use or resources.
- Share resources, such as technical people, funds through environmental assessments, and information.
- Commit to a collaborative, long-term and dedicated working group amongst communities to ensure agreements are being followed and commitments from the companies are being met.
- Create a backchannel between the nations, even when the parties decide not to work together. That way, information that the company is providing about the progress of negotiations can be verified.

Strategies to Address the Wider Implications of IBAs

A number of strategies are available to Indigenous groups in seeking to deal with these wider and potentially negative effects of IBAs, while at the same time gaining the benefits that such agreements have to offer.

These strategies include:

- **MAPPING WIDER RELATIONSHIPS:** One obvious but important approach is for Indigenous groups to undertake, at an early stage in negotiations, a 'mapping' exercise that seeks to identify all of the ways in which negotiations with a mining company may affect their engagement with the political and judicial/regulatory system as a whole, including their existing interaction with government in areas such as service provision and land claim negotiations.[82]
- **AVOIDING THE 'NEGOTIATION BUBBLE':** At a broader level, it is important for communities to avoid isolating agreement negotiations from wider community planning and decision-making processes. This is critical to ensure that the wider implications of contractual agreements are considered. We deal with this issue at length in Section 3, in discussing the structure and composition of negotiating teams, community consultations, and communication between negotiating teams and the wider community.
- **FOCUSING ATTENTION ON KEY AGREEMENT PROVISIONS:** Agreement provisions, for instance, in relation to confidentiality and Indigenous consent and support, can be critical in shaping the broader implications of agreement-making for Indigenous groups. We discuss these provisions in detail in Section 4.

NOTES TO SECTION 2

5 For a detailed review of the mine life cycle, see a model developed by Natural Resources Canada: Table 17 — Generalized Model of Mineral Resource Development, in *Mineral Exploration, Deposit Appraisal, and Mine Complex Development Activity in Canada,* mmsd.mms.nrcan.gc.ca/stat-stat/expl-expl/pdf/04_e.pdf.

6 Ontario Mining Association, "Mining 101."

7 There are limits to what areas can be staked, so that no staking can occur in protected areas, national parks, and in some land claim areas.

8 Keewatin Tribal Council (KTC) 2025.

9 National Inquiry into Missing and Murdered Indigenous Women and Girls 2019.

10 HREOC 2003, 84.

11 Energy Resources of Australia Ltd. et al. 2005.

12 Tłı̨chǫ et al. 2005.

13 ICMM 2024.

14 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*] Section 35(1).

15 UNDRIP Act Implementation Secretariat 2023.

16 1997 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168.

17 2025 *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319.

18 Government of Canada 2011, 1.

19 2004 *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 SCC 73 ("Haida") established an outline of the parameters of the Crown's duty to consult and accommodate Aboriginal peoples interests in circumstances where Aboriginal interests were asserted but not proven.

20 2005 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 clarified the extent to which the Crown's duty to consult applies in the context of the numbered treaties (covering much of Ontario, western Canada and part of the North). This decision underscored the potential consequences for a project proponent where the Crown fails to discharge its duty to consult.

21 2018 *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40.

22 2004 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 S.C.R. 550.

23 2004 *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 SCC 73.

24 2004 *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 SCC 73.

25 2004 *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 SCC 73.

26 Nouvet 2009.

27 *Haida*, supra note 6, paragraph 49.

28 *2004 Taku River Tlingit First Nation v. British Columbia (Project Assessment Directors),* 2004 SCC 74 *("Taku")* established (in a manner similar to Haida) the nature of accommodation, as well as the framework for consultation activity related to potential infringements of Aboriginal rights caused by land and resource development activities (Bergner 2006).

29 Nouvet 2009.

30 *Haida*, supra note 6; Nouvet 2009.

31 Bergner 2006.

32 Archibald and Cronkovitch 1999.

33 Keeping 1999.

34 Kennett 1999. A major development project under the Nunavut agreement is 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 $35,000,000, in constant 1986 dollars, including, where government is the proponent for a portion of a development project or directly related infrastructure, the capital costs and employment projections for the government portion of the project (Inuit of Nunavut Settlement Area and Canada 1993).

35 Kennett 1999.

36 Gogal et al. 2005; Kennett; 1999.

37 Keenan and Sosa 2001.

38 Gogal et al. 2005; Kennett 1999; Sosa and Keenan 2001; Castrilli 1999.

39 Gogal et al. 2005.

40 As of March 2026, the National Benefits-Sharing Framework has not been finalized.

41 Natural Resources Canada 2025

42 Natural Resources Canada 2024

43 See Gogal et al. 2005; Keeping 1998

44 Lake Babine Nation et al. 2021

45 Kitselas First Nation and Minister of Environment and Climate Change Strategy, 2023.

46 Impact Assessment Agency of Canada 2021.

47 Taku River Tlingit First Nation Mining Policy 2019.

48 Bergner 2006.

49 Tahltan Central Government 2025.

50 Also known as environmental assessment or environmental impact assessment in some jurisdictions.

51 Timeline can be suspended upon submission of a written request by the proponent to the Minister.

52 In the federal impact assessment system, a small number of larger, more complex projects may be referred by the federal Minister of Environment to a review panel, which will see independent panel members seconded to conduct the review as opposed to a standard IA run by the Agency.

53 IAA, s.9(2) lists factors the Minister may consider in deciding whether to make an order designating a non-listed project, including public concerns, impacts on the Rights of Indigenous peoples, any relevant assessment referred to in s. 92, 93, or 95, whether a means other an impact assessment would permit a jurisdiction to address the adverse impacts within federal jurisdiction, and any other factor that the Minister considers relevant.

54 One fundamental principle of impact assessment that applies in all Canadian jurisdictions is that once a project is referred to an impact assessment, no irrevocable actions (physical works and activities) can start until that project has been approved by the jurisdiction. This means that all regulatory permits, licenses, and authorizations must wait until the IA process is over before they can be approved. It is important to note that permits for relatively non-invasive works like archaeological and geotechnical investigations can be issued during the IA process.

55 Impact Assessment Agency of Canada 2021.

56 Mackenzie Valley Environmental Impact Review Board (MVEIRB), n.d.

57 Yukon Environmental and Socio-Economic Assessment Board, n.d.

58 Impact Assessment Agency of Canada 2026.

59 Bruce and Hume 2015.

60 O'Faircheallaigh and MacDonald 2022.

61 O'Faircheallaigh and MacDonald 2022.

62 Firelight and The First Nations Major Projects Coalition 2025.

63 Gibson and MacDonald 2024.

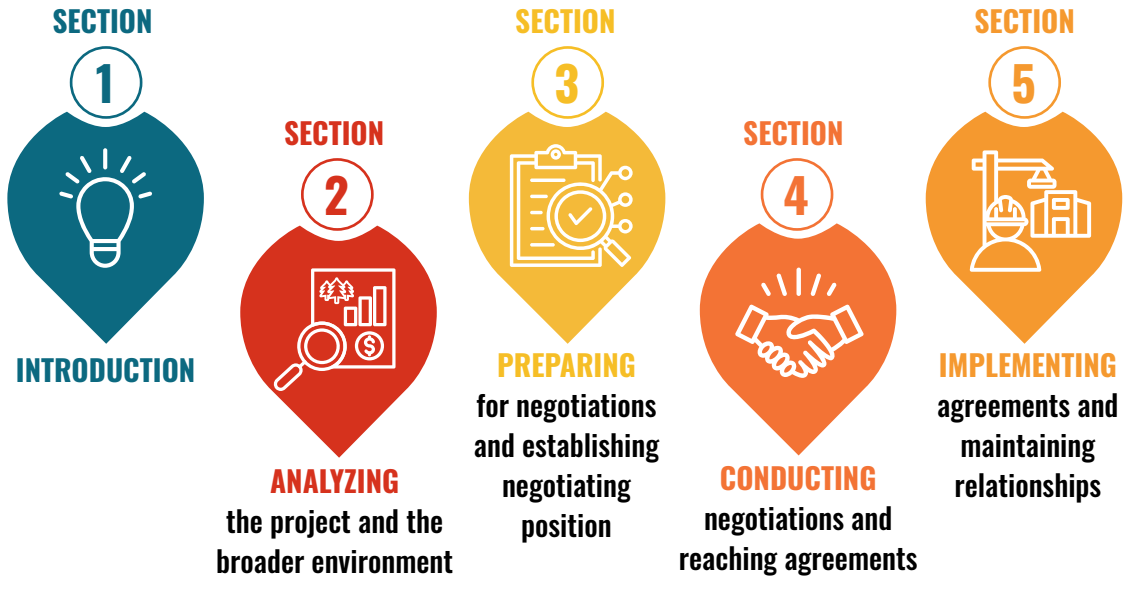
64 Gibson 2006.

See References on page 291

65 Gibson and MacDonald, 2024.
66 O'Faircheallaigh 2008.
67 Kennett 1999: 45-46.
68 Gilmour & Mellet 2013.
69 Gibson 2006.
70 Katona 2002.
71 Gibson 2006; Trebeck 2008.
72 O'Faircheallaigh 2004a.
73 See O'Faircheallaigh 2008 for a preliminary discussion.
74 A point highlighted in Trebeck 2008.
75 Trebeck 2008: 20.
76 Trebeck 2008.
77 O'Faircheallaigh 2021.
78 O'Faircheallaigh 2021.
79 FNMPC 2019.
80 See Forestry and Mining Resource Revenue Sharing Agreement, p. 17-20 for calculation formula.
81 Treaty of Peace, Respect and Responsibility. Haida/Heiltsuk.
82 See O'Faircheallaigh 2008, Figure 1, p. 70, and Figure 2, p. 73 for a graphic representation of such an exercise.

In the next section of the toolkit, we move from analyzing the project and the broader environment into the specific steps of preparing for a strong position in negotiations.

Structure of the Toolkit



firelight

SECTION 3

SECTION 3

Preparing for Negotiations

ESTABLISH A STRUCTURE FOR NEGOTIATIONS 95
- Mandate, Governance, and Decision Making 96
- Negotiation Team 98
- Gender and Negotiations 100
- Negotiating Team Composition 101
- Negotiating Team Selection Process 103
- Role of Technical Experts on the Negotiating Team 104
- Roles of Key People on the Negotiating Team 106
- Community and External Advisor Negotiator Roles 108
- Negotiating Team Role with the Community 108

DEVELOP A PLAN FOR GATHERING AND MANAGING INFORMATION. 111

PRECURSOR AGREEMENTS 126

DEVELOP A BUDGET 131

GATHER INFORMATION ABOUT THE PROJECT 134

ESTABLISH BASELINE CONDITIONS 137
- Impact Assessment Questions 139
- Potential Socio-Economic Impacts 140
- Mitigating Impacts 145

DEVELOP A COMMUNICATIONS STRATEGY 147

ASSESS AND IMPROVE THE BARGAINING POSITION 156

SUMMARY OF SECTION 3 162

NOTES TO SECTION 3 164

SECTION 3

Preparing for Negotiations

THIS SECTION IS ABOUT GETTING ORGANIZED for negotiations by developing a structure for managing negotiations, gathering information materials, developing strategies, and establishing negotiation positions. The specific content of negotiation positions is discussed later, in Section 4.

There is no set timeline for this work because the process is organic. If one part of the process is delayed, such as a social impact assessment, the whole timeline may need to be adjusted. The team will need to adapt time frames constantly.

This preparatory stage will allow you to:

- Establish a structure for negotiations;
- Ensure governance and decision-making roles and pathways are established and understood;
- Build a negotiating team with specific skills, diversities (gender, viewpoint, families, clans), and capacities to support successful negotiation;
- Develop a plan for gathering and managing information;
- Develop a budget and consider precursor agreements;
- Gather information about the project context, commodity and company;
- Establish baseline conditions about the community's socio-economic and cultural environment and understand what the community wants to protect and gain through a negotiated agreement;
- Determine how and when to share information with the company and community and consult with the community;
- Assess bargaining positions, including the alternatives should negotiations fail; and
- Determine objectives and develop a strong negotiating position.

Establish a Structure for Negotiations

This section covers various structures for organizing negotiating teams, an important but often neglected topic.

Because information gathering must start immediately, an existing individual or body will need to take responsibility for kicking off the process. This may be a chief, chief and council, a land and environment department, or the CEO of a community council or regional Indigenous organization. Allocation of this responsibility should result from conscious decisions about what will work best for managing a negotiation. Often, people think the way they organize themselves for other business is going to work for negotiations. This may not be the case.

A well-structured team with a strong plan for managing information will be able to share information with the community at critical times, to form the "right" negotiation position. Much of this phase is an inward-looking time of information gathering and communication locally, rather than an outward-looking time of controlling information flows to the corporation.

There is no one or "best" model for structuring negotiations—structures need to reflect specific local and regional conditions. Rather, our idea is to give people options to use as a starting point for developing their own structure. It is important to think about this issue in advance and make a deliberate decision about how to structure the team(s), rather than just falling into a particular structure by default.

There is no one or "best" model for structuring negotiations—structures need to reflect specific local and regional conditions. Rather, our idea is to give people options to use as a starting point for developing their own structure.

A well-thought-out negotiation structure creates the capacity to maintain contact between participants over time; to commission, collate and effectively act on research; and to efficiently run the "business" of negotiation (e.g., signing employment and consultancy contracts, issuing invoices, processing payments).

An appropriate institutional structure is required to permit the accumulation of knowledge and expertise, and to ensure lessons learned from one set of negotiations are remembered and applied to the next. It is possible to bring a team of experts together on an ad hoc basis for specific negotiations. Still, in the absence of appropriate institutional arrangements, the experience they gain is often quickly dissipated with no "corporate" learning and knowledge retention.[83] Far too often, this expertise is maintained within legal and consultancy firms and is not transferred to the participating Indigenous community.

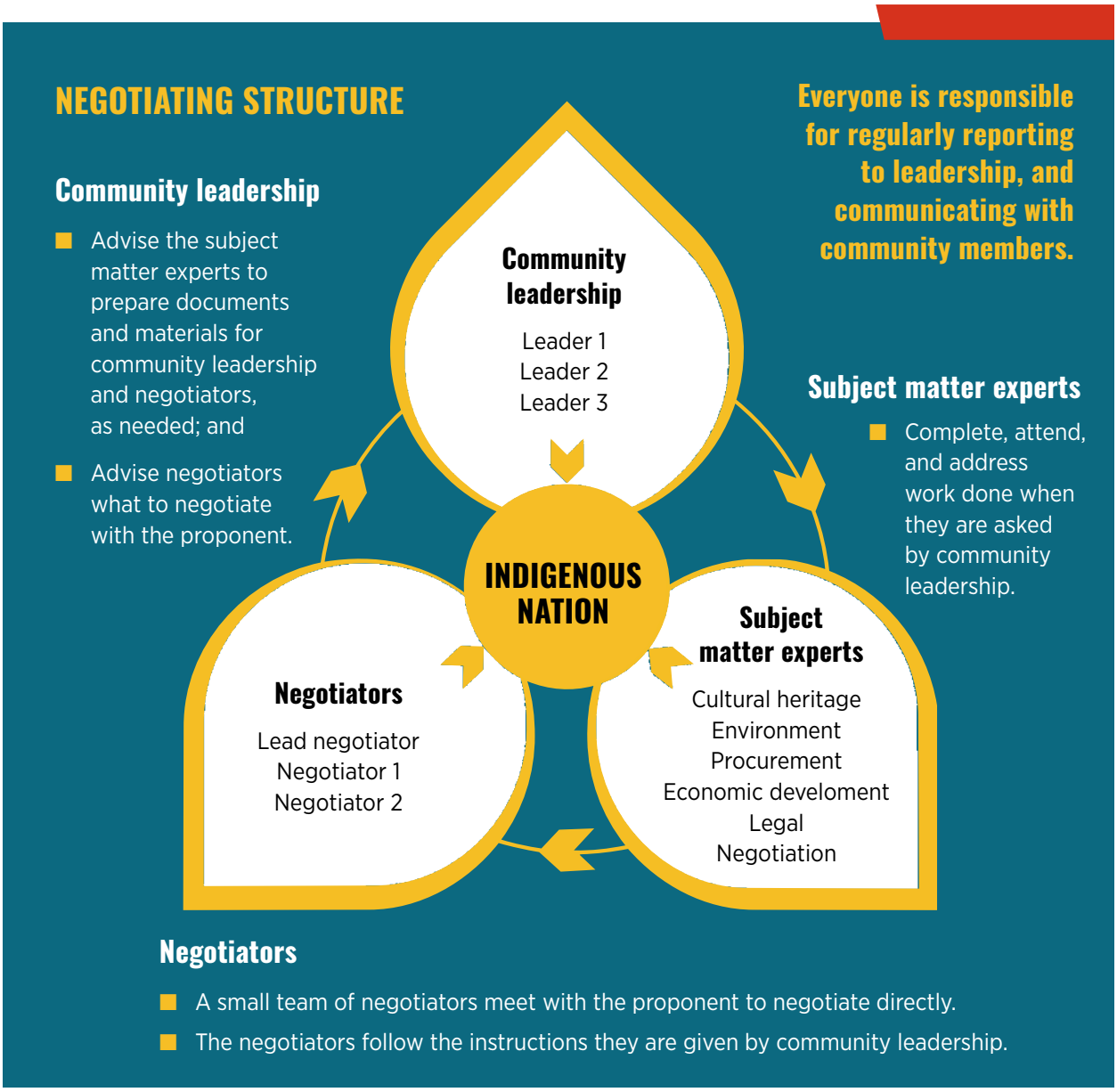
Mandate, Governance, and Decision Making

It is important to understand before negotiations begin how decisions related to the negotiations will be made. This can help inform the composition of the negotiation team, communication strategies, and budgets. The list below provides some important items to consider before negotiations begin:

- Where will the negotiation team's mandate or negotiation position come from? It is helpful to negotiators to have a clear (ideally written) mandate to support their negotiations. If the community has done prior planning work grounded in community engagement, such as strategic plans, land use plans, and comprehensive community plans, these can provide a strong foundation for the negotiation mandate. As mentioned earlier, if a community has not yet identified its goals and priorities, negotiators should insist on a community consultation and planning exercise as part of the preparation for negotiations. The mandate should be reflective of community members' values, priorities, and lived experiences, so the negotiation team can clearly articulate how and why the items they are bringing forward are important. Early community engagement to develop, prioritize, and confirm the mandate is important to build the legitimacy of the negotiation and ensure community members see themselves reflected in the agreement. For example, a West Coast First Nation held a series of community meetings at the beginning of negotiations to establish Community-Based Remediation Objectives, which guided their negotiations with the province regarding an abandoned pulp mill on their traditional territory. In another case, the Tłı̨chǫ Government established an Elders Committee and supported public hearings to guide remediation objectives for an abandoned uranium mine, ensuring that community research and local priorities informed negotiations with the federal government.
- How will the mandate be renewed and/or maintained? The negotiation team and community leadership should be kept accountable to the community through periodic community engagement, as well as checkpoints with leaders to identify when the negotiation team must come back to leaders to expand or manage their mandate.
- Who can provisionally agree to terms as the agreement is being negotiated? (A standard rule in IBA negotiations is that nothing is finally agreed until everything is agreed.) For example, if the company suggests a specific action or activity, can the lead negotiator indicate acceptance, or will they need to take everything back to a governing body like the Chief and Council? If all decisions must be made at the leadership level, this can add significant delays to the negotiation process. On the other hand, leadership will need to be consulted if negotiations move outside of the established mandate, and there may be strategic advantages to return to leadership for specific decisions.
- How will the final agreement be ratified? Community members should know as negotiations begin what the process for ratification will look like. Will there be a plebiscite? Will the governance body or lead negotiator sign off on the agreement? These options are described further in Section 4.

- How will the community manage money flowing from the agreement? For example, will it be invested to create future income or in community development, or fund direct payments to members? (discussed in *Structures for Managing Mining Payments* on page 220). This issue should be addressed within the community early, as people are able to make more considered decisions before any funds flow.
- How will the negotiation team fit within the governance structure of the community? Figure 3.1 shows one model of governance structure for the negotiation team. The arrows indicate how the information flows and reporting occur between different entities. In the next section, examples of other negotiation structures are shared along with strategies to use when building a negotiation team.

Figure 3.1 Example of a Negotiation Structure



Negotiation Team

Here are some examples of how negotiating teams have been organized:

- In **CAPE YORK, AUSTRALIA**, during the 1990s and 2000s, the regional land organization, the Cape York Land Council, organized negotiations for major mining agreements, with each negotiation having a steering committee and a negotiating team. Steering committees were created with representation from key organizations and traditional owner groups. For instance, one steering committee included five traditional owners of the land affected by the project, and representatives of a range of specific community organizations, including the Elders' group, the cultural resource management group, and the educators' group.[84] Steering committees had the role of controlling the overall direction of the negotiation process, providing political legitimacy to that process, and guiding and facilitating the work of researchers and consultants.[85] Negotiating teams were small and consisted of the chair or CEO of the land council, a senior legal advisor, and the senior consultant responsible for information collection and community consultation.
- The **TŁĮCHǪ GOVERNMENT** is an Indigenous government with a land claim that spans 39,000 km^2 in the Northwest Territories of Canada. It has a Resource Management Team composed of Tłı̨chǫ staff from each major department. Research staff also support the negotiation work as needed, and legal counsel are involved on a case-by-case basis. The mandate for negotiations is set through the Chief Executive Council, and the small team identified for project negotiation carefully works to achieve that mandate. The clear structure has allowed for many focused and clear agreements to be negotiated. The leaders set priorities based on community needs, and the staff negotiate based on a clear mandate.

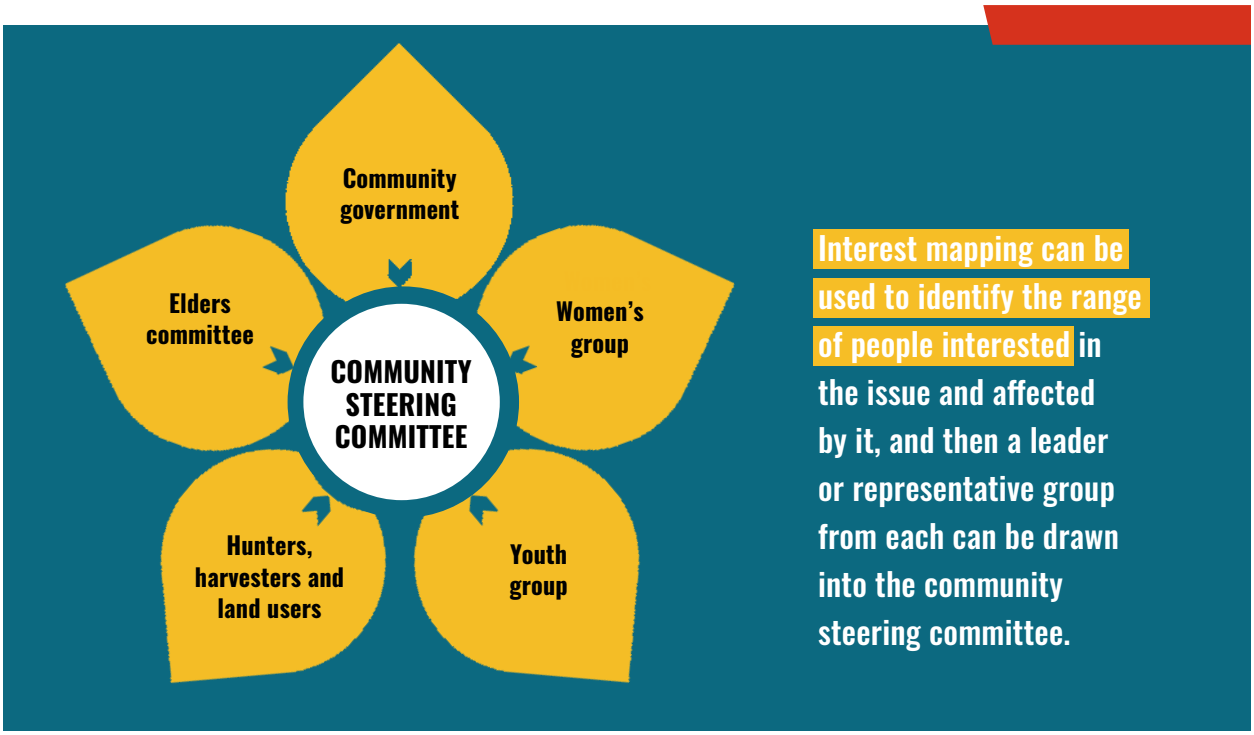
If there is a community steering committee and a negotiating team, the first group can have a major role in acting as a conduit to the wider community. It can be helpful to have the team look like a miniature version of the community, with all its diversity.[86] Groups or families that may be particularly affected by mining can be included, such as harvesters, hunters, trappers whose trap lines are in the impacted area, women and gender diverse people, and regional representatives.

If there is a community steering committee and a negotiating team, the first group can have a major role in acting as a conduit to the wider community. It can be helpful to have the team look like a miniature version of the community, with all its diversity.

YELLOW-HEADED BLACKBIRD, PHOTO CHRIS WAGNER

Interest mapping (also known as stakeholder mapping) can be used to identify the range of people interested in the issue and affected by it, and then a leader or representative group from each can be drawn into the community steering committee (see Figure 3.2). This exercise can be helpful later when the negotiating team identifies how and when to share information with the broader community.

Figure 3.2 Interest Mapping



Gender and Negotiations

The make-up of the steering committee and negotiation team has an impact on the issues pursued in negotiations, the team dynamics, and the accountability of negotiators back to the community. Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls, Calls to Justice (13.3) specifically calls for "all parties involved in the negotiations of impact-benefit agreements related to resource-extraction and development projects to include provisions that address the impacts of projects on the safety and security of Indigenous women, girls, and 2SLGBTQQIA people. Provisions must also be included to ensure that Indigenous women and 2SLGBTQQIA people equitably benefit from the projects."[87]

In our experience, it is vital to ensure that both women and men participate in shaping and conducting negotiations to ensure that agreements include well-designed, community-driven provisions that protect and benefit Indigenous women, girls, and 2SLGBTQQIA people. This is evident, for example, from the Voisey Bay Nickel Project environmental assessment (EA), where strategic female leadership was instrumental in shaping the outcomes of the EA. The Assessment resulted in the development of gender-based criteria and outcomes, such as the proponent's commitment to a women's employment plan. This success was predicated on dynamic female participation throughout the process, including their involvement in public hearings, advisory groups, and technical committees. Also, the fact that an Inuit woman served as the chief negotiator highlights how senior female leadership can drive the incorporation of women-specific initiatives.

The Woodfibre LNG negotiation process provides another instance where diverse leadership yielded robust gender-based outcomes. Negotiations with the Squamish Nation culminated in the development of a comprehensive Culture and Safety Plan, which was subsequently adopted by the province. This plan provides specific, gender-based measures that ensure women's safety is centred at the worksite and on their 'floatel' work camp (such as having female medical staff on site), and that space is held for women to receive training and employment in various roles. Notably, the negotiation teams featured female leadership from all parties, including the proponent, whose top executive was a woman—a rare occurrence globally. This shows that inclusion of women is far from tokenism. It demonstrates that active participation by women from both the First Nation and the proponent directly contributed to the establishment of strong, multifaceted culture and safety mechanisms, which experience shows would not have been developed otherwise.

> Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls Calls to Justice (13.3) specifically calls for "all parties involved in the negotiations of impact-benefit agreements related to resource-extraction and development projects to include provisions that address the impacts of projects on the safety and security of Indigenous women, girls, and 2SLGBTQQIA people. Provisions must also be included to ensure that Indigenous women and 2SLGBTQQIA people equitably benefit from the projects."[88]

In one negotiation focused on a 1,000-person construction camp proposed near a community, women from both sides agreed to unique mitigations to manage the increased threat of sexual violence and harassment that can arrive with industrial camps. For example, a four-person community-based response team became a mobile response unit to concerns flagged in the community. This team intervened when students at a school called regarding a construction camp worker who was looking for drugs. They stepped up their patrols along a main artery when women called them about being solicited for sexual services.

Women often serve as staff in the communities in the service provision departments of housing, social services, administration and economic development. They often have strong information that can be leveraged to support the negotiation of measures to support these areas. Having women on the negotiation team increases the likelihood that these concerns will be communicated to the negotiation team, and increases the negotiation team's accountability back to other women in the region.

Negotiating Team Composition

However it is structured, there obviously does need to be a negotiating team. The specific composition of the team will vary, depending on the context and the group. Whatever its composition, its members will need to have all the required skills, including cultural competence, communication, and outreach ability. Roles should be defined for different team members, depending on their capacities and interests.

A head or lead negotiator is often chosen. This person's role often includes ensuring that the team works as a "team," there is one channel of communication so that a consistent message is communicated to the company, and the danger of a company seeking to "divide and rule" the community and its negotiators is minimized.

A lead negotiator should ideally be someone who is:

- A strong community member, not a consultant or lawyer.[89] It would be beneficial if the person spoke the Indigenous language.
- Confident in their treatment of outsiders, but humble in the presence of their own community members.[90]
- Very skilled in working with the community, particularly in listening to community members and bringing them into discussions and negotiations at appropriate times. This will be an important quality because the key role for chief negotiators is not to make final decisions, but to present alternatives and facilitate informed choices by the people they represent.
- Able to make time for the negotiations. The best potential lead negotiator in a community often has multiple demands on their time. In some communities, the position of lead negotiator is a specific staff position, while in others it may be a councillor or a community member. In all cases, the time commitment required should be clearly communicated and should not be underestimated.

In choosing other team members — both from the community and outside experts — the following points should be considered:

- It can be useful to have both people who are naturally "hardline" negotiators and people who accommodate, so they can change the negotiation dynamics of a room as needed at the direction of the lead negotiator. Of course, personality traits must be tested in the fire of negotiations, making negotiating experience *and performance* key considerations when developing a new team. It is also important to have people who can be flexible, as a change in a person's approach (from hard to soft and vice versa) can be very effective in sending signals to the other side.
- Weigh whether political leaders should be included in negotiating teams. They are already managing many responsibilities. And the need to report back to leaders and gain their support on a negotiation point can also provide a tactical advantage — a reason for much-needed breaks from negotiations and an opportunity to let pressure build on time-constrained proponents.
- Consider the composition of the company negotiating team when deciding who should participate in individual negotiations. As a rule, follow a principle of "equivalency" — having people of roughly equivalent status or seniority on both sides. If the company sends staff or consultants, don't send Elders or the chief negotiator. This devalues the position of the community people who are sent and leaves the company with the ability to avoid dealing with issues or proposals the community raises by arguing that they must be considered by more senior company staff. Similarly, if the company is sending a senior decision-maker, such as a managing director, don't send less senior community negotiators. To do so may mean that opportunities to make rapid progress are lost because the community negotiators lack the authority to respond to company proposals.
- Reflect on how Elders will be involved in the negotiation committee. In some communities, the inclusion of respected Elders on the negotiation team will be necessary for the negotiation process to be seen as legitimate, as Elders bring ethics, spirituality, and legality to the process. In other communities, it may be better for the Elders' views and instruction to pass to the negotiating team through an Elders committee or through leadership. Considerations around including Elders are discussed further in *Involving Vulnerable or Important Groups (e.g., Elders, Women, Youth)* on page 150.
- Examine the gender diversity of the proposed team. As mentioned above, women are needed on the negotiation team to ensure the agreement protects and benefits women and girls. An exclusively male team, on the other hand, may limit the team's ability to thoroughly prioritize, understand, or negotiate for issues that are important to women and fail to capture women's unique experience and perspectives on a project. Including women is not a token gesture but is designed to ensure that negotiation teams have the skills, capacity, and experience to achieve successful outcomes that are equitable across genders.
- If community negotiators have limited experience, they should be given access to negotiation training and be briefed and mentored by experienced negotiators. It is important to consider succession planning, train the next generation of negotiators, and build capacity.

- Inclusion of community-based expert advisors should not be overlooked. Having people on, or advising, the negotiation team who have a deep understanding of the Indigenous laws that govern a community, oral knowledge around treaties, and good political knowledge about community dynamics can be essential to a negotiation.
- Negotiators who are confident in their own convictions, yet are humble and able to accept the ideas and criticisms of others, are highly effective. Negotiating team members should be open and transparent about any preconceived notions they have about the company, the project, and what they think the community should do. If there are internal tensions based on personal conviction or preconceived ideas, there are only two options: insist the person accepts the community's position and acts as a team member in the negotiation, or let them go.

Negotiating Team Selection Process

There are lots of options for selecting and endorsing members of the team. Each society will have its own culturally-defined ideas about the best way to find team leaders and team members. They can be elected or selected by the political leadership based on their expertise, negotiating skills, or reputation. Sometimes, Elders make decisions about who to appoint or how they should be chosen. In other cases, political decision-makers appoint members to the negotiating teams.

There are downsides to some methods of selection. For example, in cases of political appointees and elections, there can be poor selections made if they are merely popularity contests. This is particularly true for the team leader. When political leaders select negotiation team leaders, favouritism can come into play. While the appropriate way of choosing a team will vary, it is essential to make sure that the negotiating team and each one of the negotiators has strong skills and community support.

In some cases, ceremonies or public meetings are held to ensure that the community can ratify the appointments of the negotiators. This also impresses on the negotiators the importance of their work and who they work for.

As discussed in Section 2, unity is critical for success in negotiations. But unity does not always come naturally. Communities are often divided by families, by politics, and by their histories. It is not always easy to unify. Therefore, leaders who build and maintain unity are ideal to have in negotiations. On the other hand, if their actions further divide communities, down the road a hard-fought agreement may fall apart.[91]

Negotiated agreements that have community-wide support are very hard to undermine, and maintaining unity after negotiations provides community implementation teams with full support to apply pressure to the company (and in some cases, governments) to implement the agreements (see Section 5).

Regardless of how the negotiating team is chosen, it is critical to have an effective team in place as early as possible. Negotiating teams can always be restructured later, once there is more information and clarity on the interests and issues involved.

Role of Technical Experts on the Negotiating Team

Opinion is mixed about whether the negotiating team should include professional people, such as lawyers and other technical consultants, or whether they should play only a supportive or backup role. Two contrasting views, for example, are that:

> *...Too much is at stake in your pending agreement to risk negotiating it without professional support. Invest in professional help from the beginning to ensure that the agreement is well-designed and effectively negotiated.*[92]

> *[Both sides should] agree not to have lawyers at the table. I think that's very valuable. Have lawyers review the stuff later. Lawyers can [complicate] the conversation and take away from actually trying to build a relationship.*[93]

Some Indigenous communities may wish to have lawyers contribute only to clarify legal requirements, especially related to new case law; others may have their lawyers working in technical capacities on the negotiating team.

Regardless of whether they are formally on the team, it is important that communities have a mix of critical human resources to achieve a good agreement and solid implementation. A person's profession should not determine the team's view of their ability to help the team and community. An insightful lawyer who has worked faithfully and respectfully for a community for a decade and gained their trust may have more credibility and capacity than some community members. Choose people with a mixture of values, credentials, trustworthiness, local knowledge and negotiation experience right for the team. If bringing in new legal counsel or consultants for the negotiations, ask neighbouring communities and within networks for recommendations rather than just relying on references provided by the lawyer or consultant. There are a few rules of thumb that can help in selecting expert advisors. If the expert treats people in the communities as their equal, takes time to explain things in plain language, and does not always agree with the community representatives, they are probably going to work well with the community and help negotiate a good outcome.[94] If an expert delivers huge and unwieldy documents, speaks as though community members are not capable of understanding or uses overly technical jargon that ensures that outcome, or behaves as though they are always in agreement, odds are low that they will serve the community well.

> **"We usually try to involve at least one staff person from the government so that there is a connection to implementation.**
>
> **If you do it entirely with outside consultants, there will be much less of a chance that the implementation will happen effectively."**
>
> **— Innu negotiator**[95]

Non-disclosure and/or data sharing agreements should be drafted with the advisors to ensure that constraints on data collection, storage, sharing, and use are clearly understood. Although most experienced professionals in this area will understand boundaries and best practices around who can speak for the community and how to frame community experience, community-based negotiators should privately discuss any concerns or friction points with the external advisor, ensuring that the external advisors respect the community's accountabilities and governance structures.

PINE MARTEN, JASPER. PHOTO CHRIS WAGNER/FIRELIGHT

Cost and Value of Outside Experts Versus Training In-House Staff

In Canada, legal fees can average between $300 and $600 an hour. Therefore, having a lawyer lead the negotiating team can be very costly. Consultants can charge anywhere from $150 to $400 per hour. While reductions in fees may be negotiable based on the large number of hours involved, a community will need to budget substantially more for hiring a consultant or lawyer than for paying local people. However, it is also important to consider "value for money" in making decisions about hiring and staffing. The quality of the product achieved is critical, and professionals are likely to be able to work much faster than non-experts, so that the real cost of their time is less than it might appear.

The question of whether to invest the resources needed to develop in-house staff, such as training and ongoing salary payments, may be raised. If there are multiple negotiations, the cost involved in building capacity can be spread out, and there may be enough work to keep newly trained in-house staff busy. Where there is only one or two negotiations, there likely won't be enough work to keep skilled staff busy, and thus the work might be better outsourced to consultants. ■

Roles of Key People on the Negotiating Team

Once people are selected for the negotiating team, roles for the team members need to be outlined (see Figure 3.3). Critical roles will be a lead negotiator, a secretary, and a budget manager, although it may be feasible to combine the secretarial and budget manager roles.

- The **LEAD NEGOTIATOR** will have the role of organizing the team, leading the negotiations, speaking in sessions, and reporting back to the communities.
- The **SECRETARY** will be responsible for keeping records of meetings and channelling communication between the company, the government and other parties.
- The **BUDGET MANAGER** will keep tabs on the expenditures and ensure sufficient funds are available to support the negotiations to their conclusion.

There is no formula for assigning specific roles in negotiations. Rather, the available skills need to match up with the various roles that must be performed (see above) in a way that is effective for the team and mindful of the budget that has been negotiated with the proponent and/or government.

The negotiating team will also need to include, or have access to, expert advice on a range of issues that will arise in negotiations. This might range from a lawyer or consultant who plays a central role throughout negotiations, to the occasional need for resource people with specialist skills in geology or economics (among other areas) at different junctures. For example, expert advice may be needed on how money that eventually flows to a community under an agreement should be managed.

Figure 3.3 Sample Roles of Key People on the Negotiating Team

There is no formula for assigning specific roles in negotiations. Rather, the available skills need to match up with the various roles that must be performed in a way that is effective for the team and mindful of the budget.

A Note on Consultants

Never forget that consultants work for the community! They should be responsive to the law of supply and demand — what is demanded, they should supply. There is a risk that consultants will provide "standard" or "template" materials, rather than what is required to meet the needs of a specific negotiation. The reasons behind this may include time or knowledge constraints on the consultant. It is equally likely that the Indigenous client does not expressly identify what information it needs and in which format, leaving this up to the consultant.

Guidelines for the consultant that can be helpful, for example, in making presentations, might include:

- Briefing notes and presentations should be focused on one or two topics at a time;
- Where possible, visuals should be used to describe concepts;
- Slides should not be too crowded with information;
- The relationship of the information to the context of the communities should be the focus of each presentation; and
- The main points about the topic should be presented upfront, as the last slide, or as a conclusion to the briefing note.

BEAVER RIVER WATERSHED, PHOTO RACHEL FORD

Community and External Advisor Negotiator Roles

There are various models for how roles can be allocated between community-based negotiators and external advisors.

- External advisors can hold a backroom technical role and play no part in direct face-to-face negotiations between community team members and the company.
- External advisors can take a major role in negotiations and refer matters to the community's leaders for decision.
- There can be a single negotiating team made up of both community and external negotiators with specific roles assigned.
- There can be a two-track system, with external advisors and community staff negotiating with less senior company people on detailed issues and referring issues on which they can't agree and/or broader technical issues "upstairs" for discussion by the community leadership and senior company managers.

The model that works best will depend on the community involved, and will be influenced by a range of factors, including the availability of skilled negotiators within the community, the size of the budget, the scale of the project, the number of negotiations happening at any one time, and the way in which the company team organizes its negotiating team (see the principle of "equivalency" on page 173).

Negotiating Team Role with the Community

The role of the negotiating team and the roles of people within it need to be clearly spelled out. It is essential for everyone on the team to have a clear sense of their own role, including any political leaders, technical staff, and outside experts.

Roles of the negotiating team will change over time. At the outset, common first tasks will be:

- Community Engagement — Help establish community aspirations and priorities related to impact assessment and negotiated outcomes.
- Mandate Setting — Work to translate community goals and aspirations into clear goals for negotiations, so there is a defined sense of what needs to be in the agreement.
- Communication — Establish a process for two-way communication throughout the negotiation process — community to team, and team to community.
- Strategy — Work with advisors and political leaders to form the negotiation strategy.

Roles will shift as the team enters negotiations and builds more experience and confidence. Team members will need to make sure negotiations are on track and in line with community needs and goals, change strategy as needed, and keep the community up to date. Negotiators may find it helpful to develop "rules for negotiations" that guide them in performing their roles. By way of example, see *Sample Rules for Negotiations* on page 109.

Sample Rules for Negotiations

These rules were used by a group of traditional owners (TOs) in Australia for the negotiation of agreements with mining companies. (In Australia, the term "traditional owners" has become widely used to mean the people who had stewardship of the land and all on it before the arrival of Europeans.)

1. General Rules

   - The Agreement must be strong for the Traditional Owners (TOs) and clear on what the TOs and the company must do.
   - In exchange for the TOs giving the okay to the company, the company must give the people money and other non-monetary things and rights.
   - It is in the TOs and the company's interests for the mine to keep going for as long as it can, if it is making money in a good way.
   - The company must report in its published annual report on their actions under the Agreement.
   - The Agreement must set up a Committee to look at what happens under the Agreement and to decide on things to make sure the Agreement works.
   - If the Committee cannot all agree on what to do, the people and the community will work together to find a way to solve the problem.
   - If the people and the company do not agree, someone who has nothing to do with either party will decide. There are some things that a person cannot decide on.

2. Rules for the Money part of the Agreement

   - Money payments must cover the impact of the mine, now and into the future, on TOs and on the land, environment, culture and heritage.
   - The TOs should get more money if there are changes from how the company tells the TOs that mining is going to be or how the mines affect the TOs.
   - The company should pay TOs so many dollars for each hundred that the company gets for the metal.
   - The money must be paid over the life of the mine.

- There must be a minimum amount of money that the company must pay each year to be in the area.
- Money payments must start earliest on "x" date or the date the Agreement is signed.
- Money must be paid two times a year.
- The Agreement will cover Money payments and other non-money things.
- Money for TOs under the Agreement will be kept in a Trust for the TOs.
- The most important rules for the Trust are: TOs will decide the rules of the Trust; TOs will decide what to do with the money, and TOs may get help to make decisions about the Trust and money.

Other rules include: *Rules for Work and Training; Rules for Cultural Heritage Protection; Rules for Environmental Land Management and Protection; Rules for Business Development.*

GREAT BLUE HERON, PHOTO CHRIS WAGNER

Develop a Plan for Gathering and Managing Information

The process of gathering information will be most fruitful if it is clear what information is needed, when it is needed, and how best to organize and analyze information as it becomes available. The amount of information available to parties tends to increase as the negotiations proceed. A community can become overwhelmed with information as regulatory and other negotiation processes begin (such as the formal impact assessment process or consultations and negotiations with the government over Aboriginal rights under s. 35 of the Canadian Constitution). It is critical to set out an information management plan early in the process.

Community leadership and the negotiation team will need to seek out specific information on many topics relating to the project, the commodity and the company. At the same time, the negotiation team will also need to collect information on the skills, knowledge, goals and aspirations of community members — for example, specific information on the number of people who would be qualified and interested in working in a mine.

Early in the process, the community needs to develop a work plan that sets out information needs in the short, medium and long term. Realistically, it may not be feasible to collect all of the information discussed below before negotiations start, and it might not be efficient to try to do so, as what transpires in early negotiations always helps define additional information requirements. Hence, this phase should be seen as an ongoing learning time, where new information is always coming in, and new areas for further study are being identified.

Indigenous Data Control

Indigenous principles for data governance are used to assert and respect Indigenous data sovereignty. There are many approaches to Indigenous data governance. A few are included here, with important issues to consider, including how data governance will influence negotiations, and data sharing and management during project construction, operation, and closure.

The CARE principles (Collective Benefit, Authority to Control, Responsibility, and Ethics) were developed by the Global Indigenous Data Alliance to guide Indigenous data governance.[96] The OCAP® principles were developed in the late 1990s by the First Nations Information Governance Centre (FNIGC) to guide how information about First Nations is collected, managed, and shared.[97] Inuit Tapiriit Kanatami (ITK) developed the National Inuit Strategy on Research to guide Inuit-specific research and data management to advance Inuit self-determination in research.[98]

Applying data sovereignty and control principles in negotiations or projects could mean:

- Including clear data-sharing and confidentiality clauses in agreements.
- Ensuring information is stored in systems managed or approved by the community.
- Creating external versions of reports or studies that are reviewed and approved before external release.
- Making sure research processes reflect community protocols and knowledge systems.
- Ensuring the company is clearly informed about how data will be shared, how it can be interpreted, and processes for its use.

Data sovereignty processes help ensure that community knowledge is protected and used respectfully. Data sovereignty supports transparency, self-determination, and Indigenous resource stewardship.

Data Requirements

The section on *Information Needs and Sources, by Topic* on pages 114 to 120 sets out a wide range of information that is likely to be relevant. Also, in Section 4, the range of issues likely to arise in negotiations is reviewed in detail, with further implications for information gathering.

We suggest the negotiating team prioritize data gathering based on when information will be needed to support negotiations around specific issues. Data can be collected as it is required, and then summarized in briefing notes for the negotiating team (see *Determining How Data Will Be Used* on page 123).

Data Storage, Retrieval and Access

The question of who will store the information as it emerges is critical. Often, information is held and maintained solely by consultants, a questionable practice. There may be real issues with accessing the information in the future, if and when the consultant moves on. Consultants, if holding the community's information, should be familiar with and adhere to data sovereignty and control approaches (discussed above). Another issue is that when consultants hold raw information, input from these same consultants is required to analyze the data. Information should be archived and managed through an in-house function of the community negotiating team.

Information management should be sorted out early. It is time-consuming and technically challenging to maintain a central depository of information, especially when email is the main form of communication. The question of whether community organizations have the capacity to manage this

information has to be asked. If they don't, resources will either need to be re-allocated, capacity built, or additional funds accessed from government or corporate sources.

Information is generally stored electronically; however, printed copies of key documents, like speaking notes, MOUs, and work plans, can be helpful to ensure key information is at the negotiation team's fingertips. It may be appropriate to treat various types of information differently. Critical files, such as feasibility studies, environmental impact statements, terms of reference, and draft agreements, may be printed and filed, as well as being stored electronically. Day-to-day organizational details (e.g., dates and locations for meetings) could simply be stored online. If more than one community organization is involved in negotiations, it is essential to ensure that information is housed by one organization, and managed by one person within the organization, so there is a coherent, comprehensive and accessible archive. Often, this means that all email correspondence is copied to one person who manages all communications. The staff person tasked with filing and archiving data should develop an agreed-upon filing structure that allows information to be easily accessed.

There are pitfalls if the information goes only to the lead negotiator, because the information may not be shared throughout the organization, archived, or acted on if the leader is simply too busy with other responsibilities. The lead negotiator should receive all substantive documents, but everything should also be copied to a staff position tasked with archiving all information. All consultants need to be briefed on information management and corporate communications protocols as they are contracted.

There are pitfalls if the information goes only to the lead negotiator, because the information may not be shared throughout the organization. The lead negotiator should receive all substantive documents, but everything should also be copied to a staff position.

In many situations, it is most effective for information to be primarily held in digital form, archived by subject, and accessible for searches. All files should be properly backed up to ensure continued access in case an internal or external server goes down. Many organizations now have central servers and document management software for archiving memos and files. Informative and appropriate keywords should be used to archive materials (either by date, negotiation topic, or source). Most of these systems can be password-protected, so that confidentiality is protected by restricting access to authorized staff members. At the same time, it is important to keep in mind that data storage systems of this type rely on access to devices and knowledge of relevant passwords and other security protocols, which can heavily restrict access to information. Where it is important for information to be widely disseminated in the community, it may still be important to produce and hold information in paper form.

If a negotiation lasts for 12 months or more, there will be hundreds of items of correspondence alone, not to mention research files gathered by the advisors or negotiating team members. It will be impossible to check up on something the company communicated early on in the negotiations if a good information management system is not in place.

Information Needs and Sources, by Topic

PROJECT AND COMMODITY

CHARACTERISTICS:

- Geology, especially grade, commodity mix, impurities
- Project scope
- Anticipated economic impacts
- Mine or oil/gas extraction technology type
- Other similar deposits and mines
- Project costs and risks, such as vulnerability to market change or delay, as well as newness or processes or technologies
- Place of the deposit on the corporation's priority list
- Net present value and internal rate of return (IRR). These are measures of the profit that a company is expected to get on its investment.
- Type of sale (open market; negotiated agreements)
- Historical and trend price behaviour for the commodity
- Market for the metals/minerals/commodity
- Uses of the product and demand estimates

INFORMATION RESOURCES:

- Scoping and Preliminary Economic Assessment (PEA)
- Pre-feasibility and Feasibility studies, including Bankable Feasibility Studies
- Environmental impact assessment studies
- Company materials and websites
- Information filings (e.g. System for Electronic Data Analysis and Retrieval+sedar.com)
- Corporate financial information platforms (e.g. Google and Yahoo Finance, Bloomberg, MarketWatch, etc.)
- Other environmental assessments of similar mines
- Web searches for detailed economic analysis on the commodity
- Development description report included with development permit applications
- Information provided by the company under confidentiality agreements

SOME KEY QUESTIONS:

- What could cause key project vulnerabilities?
- Is this a financially viable project or is it on the margins? (This can affect vulnerability to early closure or outright project failure)
- How big is the pie?
- Has the company been accurate in portraying the resources and the risks?
- What are the Net Present Value (NPV) and Internal Rate of Return (IRR)? For a mining project to be considered viable and resilient to risk, the IRR is generally expected to range from 10–15% to over 20–30%. The higher the NPV and IRR, the more economically robust the project—and the greater the leverage a community may have to negotiate social, financial, and cultural benefits. (See financial models in Section 4.)
- What are the likely markets for this product? What is the projected price for the metal?
- Is the company using conservative (prudent) assumptions or over-optimistic ones?

ACCESS TO ORE BODY AND LAND

CHARACTERISTICS:

- Overlapping rights of government or communities
- Associated infrastructure and other developments needed in order for project to proceed, such as roads or power
- Geographic barriers to development
- Legal or political barriers to development (e.g., Species at Risk Act)

INFORMATION RESOURCES:

- Analysis by community representatives

SOME KEY QUESTIONS:

- Do we have some level of control about access to the ore body (e.g. Indigenous rights, permitting process, etc.)?
- Will new roads be required in order to access the ore body?

ENERGY SOURCES

CHARACTERISTICS:

- Likely source of energy and cost

INFORMATION RESOURCES:

- Feasibility and environmental impact assessment studies

SOME KEY QUESTIONS:

- Where will power come from? Do we have some level of control for the construction or the permitting of this infrastructure? Is there a way for community power to be used (e.g., dam development)

TRANSPORTATION

CHARACTERISTICS:

- Likely routes for materials into and out from the project

INFORMATION RESOURCES:

- Feasibility and environmental impact assessment studies

SOME KEY QUESTIONS:

- How will the company get the ore out of the region? Do we have some level of control for the construction or the permitting of this infrastructure? Could the Nation contribute to the design and construction of this infrastructure?

EMERGENCY AND CONTINGENCY PLANNING

CHARACTERISTICS:

- Hazardous materials that travel into the project
- Routes and amounts of materials leaving the project

INFORMATION RESOURCES:

- Feasibility and environmental impact assessment studies

SOME KEY QUESTIONS:

- What kinds of chemicals will be on site (e.g., cyanide, acids, petroleum products)? What risks do they pose? How will they transport any toxic material away from the site?

ENVIRONMENTAL LIABILITIES AND IMPACTS

CHARACTERISTICS:

- Water
- Animals
- Air
- Soil
- Tailings, etc.

INFORMATION RESOURCES:

- Feasibility and environmental impact assessment studies
- Technical reviews of any studies completed for feasibility and environmental impact assessment studies
- Indigenous Impact Assessments
- Community's Land Use, Traditional Knowledge, Cultural Heritage studies, or equivalent

SOME KEY QUESTIONS:

- How big is the project's footprint?
- How much mine wastes and tailings will be left behind?
- What might be impacted by the development?
- Are there critical sites, or species that may need to be protected from development?

SOCIAL, CULTURAL AND ECONOMIC IMPACTS

CHARACTERISTICS:

- Labour market and demand
- Skill profiles needed
- Cultural meaning of the region (heritage sites, oral history of the region, place names, hunting and trapping or traditional use of the area)
- Community understanding or narratives of impacts
- Inventory of business capacity
- Taxation issues (e.g., Mines off reserve may lead to workers having to pay income tax)

INFORMATION RESOURCES:

- Feasibility and environmental impact assessment studies
- Self-assessment
- Government assessment. Sometimes specific branches of the government will fund studies to understand the range of business opportunities.

SOME KEY QUESTIONS:

- How many people might be available to work? Or are employable people already employed?
- What cultural places or values might be impacted?
- What is important to the community to build or preserve?
- What businesses might be developed? What business opportunities exist?
- Will workers be impacted by taxation if they work off reserve?

CLOSURE AND RECLAMATION PLANS

CHARACTERISTICS:

- Bonds and sureties
- Plans and linking to mitigation

INFORMATION RESOURCES:

- Feasibility and environmental impact assessment studies
- Permit applications

SOME KEY QUESTIONS:

- What closure plans exist? Are the financial securities sufficient to cover long-term monitoring and site care? How could the community be involved?

CORPORATIONS IN GENERAL

CHARACTERISTICS:

- Legal requirements — reporting, responsibilities to shareholders
- Main purpose/guiding ethos
- Planning priorities — short, medium, long-term
- Negotiation strategies of corporations in general

INFORMATION RESOURCES:

- Corporate responsibility NGOs websites and initiatives
- ESG standards and certifications
- Texts on corporations, especially extractive industries negotiations

SOME KEY QUESTIONS:

- What are the goals of the company?
- What are the values of the company?
- How might these relate to us?

COMPANY

CHARACTERISTICS:

- CEO history
- Board of Directors — skills; past project management; number of people
- Personnel dedicated to project
- History of community relations with developer
- Relationship to shareholders
- Corporate financial records
- Project financing
- Corporate structure
- Nature of company (junior, major)
- Financing
- Structure of the corporation — relationships or existence of subsidiaries and holding companies
- Relationship to other companies
- Commitment of resources
- Other agreements
- Corporate behaviour toward other Indigenous people or communities
- Historical behaviour of company
- Adherence to guidelines and standards (e.g., IFC, WBG, Global Reporting Initiative, IRMA, ICMM, etc.)

INFORMATION RESOURCES:

- Press releases
- Corporate website, news releases, policies, and sustainability report
- Other communities
- Corporate annual reports
- Annual mining meetings (such as the Canadian Institute of Mining or the Prospectors and Developers Association of Canada)

- Corporate consultation
- MiningWatch Canada primer on *Mining Investors: Understanding the legal structure of a mining company and identifying its management, shareholders and relationship with the financial markets*
- Past interactions with the community
- ESG standards and certifications

SOME KEY QUESTIONS:

- Who is the current point person?
- What has the history of this company been?
- How diversified is this company, and therefore how stretched might they be? Or how committed might they be?
- What kind of company are they?
- Do they have financing in place?
- How does the site base staff and operation relate to the parent company?
- Where in line is this deposit vis-à-vis other deposits they are currently exploring?
- How have they negotiated with Indigenous people in the past?
- What are the guidelines that the company adheres to? Can they be used to strengthen the community position?

RESOURCES TO SUPPORT THE COMMUNITY'S NEGOTIATION EFFORT

CHARACTERISTICS:

- Resources and key gaps
- Funding
- Current human resources

INFORMATION RESOURCES:

- Government departments, specialists, technical experts, and other communities with experience
- Dialogue with company
- Internal assessment

SOME KEY QUESTIONS:

- What funds and resources can be directed our way?
- What are the expenses we anticipate?

LEGAL PROCESS AND KEY DECISION POINTS

CHARACTERISTICS:

- Regulatory applications needed
- Nature of environmental impact assessment process
- Regulatory and co-management bodies with impact on process (provincial, territorial, federal)
- Moments of greatest influence (associated with regulatory approvals)
- Who holds power of decision-making (on this and associated projects)
- Regulatory, administrative, legal or other guidance on negotiated agreements
- Regulatory bodies in charge of elements of environment and social elements

INFORMATION RESOURCES:

- Regulatory authorities
- Legislation
- Section 2 of the toolkit

SOME KEY QUESTIONS:

- What are key decision points?
- How can regulatory requirements affect leverage?

LEGAL, POLICY AND SOCIO-ECONOMIC CONTEXT

CHARACTERISTICS:

- If on Indian reserve, then application of *Indian Mining Regulations* (except in BC)
- Surface lease agreements may apply
- Land claim may have been negotiated or under negotiation

INFORMATION RESOURCES:

- Land claim agreement or through discussions with lawyer

SOME KEY QUESTIONS:

- What can we influence?
- What bargaining power do we have through the legal system?

ASSOCIATED AGREEMENTS

CHARACTERISTICS:

- May already be socio-economic or other agreements in place

INFORMATION RESOURCES:

- Government sources

SOME KEY QUESTIONS:

- What agreements might already exist that could apply? (e.g., on training)

MINERAL RIGHTS AND REGULATION

CHARACTERISTICS:

- Mineral tenure law
- Mineral regulation (provincial or federal)
- Legislative base for consultation or mineral rights
- Jurisdiction of legislation

INFORMATION RESOURCES:

- Government departments responsible for Aboriginal / Indigenous affairs
- Mining government departments
- Legal advisors

SOME KEY QUESTIONS:

- What legal or regulatory instruments can support the case for an IBA? Consultation?

COMMUNITY GOVERNANCE

CHARACTERISTICS:

- Self-government agreement; governance and consultation structures

INFORMATION RESOURCES:

- Internal discussions

SOME KEY QUESTIONS:

- What structures are likely to be needed to manage negotiations? (See section on negotiation structures)

INDIGENOUS AND TREATY RIGHTS ANALYSIS

CHARACTERISTICS:

- Land rights holders
- Status of land claims of self and others in the region
- Status with respect to federal government, such as treaty rights, Indigenous rights; land claim agreements and modern treaties
- Impact on ability to secure other rights

INFORMATION RESOURCES:

- Websites
- Indigenous owners
- Federal government
- Legal advisors

SOME KEY QUESTIONS:

- What legal rights do we have with respect to the area?
- What can we gain?
- Do we have rights pending?

COURT CASES

CHARACTERISTICS:

- Relevant court cases (e.g., *Delgamuukw; Sparrow; Haida; Taku; Williams; Mikisew*)

INFORMATION RESOURCES:

- See Section 2 and insert on Free Entry

SOME KEY QUESTIONS:

- What court cases can be used to strengthen our case? For example, a court case that has recently been decided on consultation might strengthen the claim.

INTERNATIONAL STANDARDS

CHARACTERISTICS:

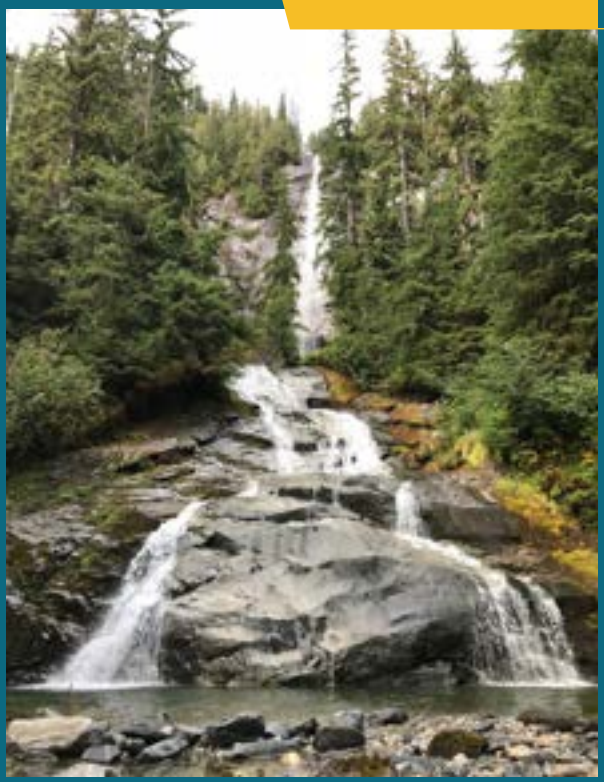
- Guidelines and international standards that can be used to guide or apply pressure

INFORMATION RESOURCES:

- International Finance Corporation
- World Bank Group
- International Council on Mining and Minerals (ICMM)
- Initiative for Responsible Mining Assurance (IRMA)
- Towards Sustainable Mining (TSM)

SOME KEY QUESTIONS:

- What is the best practice in guidelines, even if the company does not adhere to them? Can they be used to strengthen the community position? ■



Data Access and Authorization

Not everyone in the leadership or negotiating teams may need to have access to all the data collected. A communication structure and protocol will need to be defined, and at this point, decisions can be made about who has access to what information.

It is important to have a protocol that everyone understands about the flow of information and communication. If there is no protocol, two problems emerge. First, everyone is swamped constantly with information, much of it irrelevant to them, because there is no distinction between information that individual people need and don't need. Second, despite being overrun with information, people on the team may begin to worry that they are not getting access to critical information simply because there is no protocol. This may cause tension in the group. Protocols on information-sharing streamline information flows and create a consistent and transparent system where all people on the team know their role and level of information access.

Sometimes, the people doing a "pre-assessment" on culture, for example, may benefit from information gathered during the socio-economic baseline data collection, or from insights gathered in a focus group on wildlife harvesting. If these efforts are too compartmentalized and cut off from one another, the overall information gathering and analysis will suffer. To avoid the creation of "silos," the team manager should hold regular meetings, by phone or in person, between all relevant team members. At these meetings, progress, methods and questions will emerge to the benefit of the whole.

Protocols on information-sharing streamline information flows and create a consistent and transparent system where all people on the team know their role and level of information access.

Maintaining Confidentiality

The negotiating team will need to adopt mechanisms that define what confidentiality looks like, in concrete terms. Often, sensitivities emerge around community politics and internal debates, cultural heritage knowledge, negotiating positions, financial deals and information that may be subject to confidentiality agreements. Leaks by someone on commercial data covered by a confidentiality agreement can ruin a deal.

An information protocol can be developed that deals with the question of confidentiality, clearly identifying what categories of information are confidential and giving some examples. All consultants should be given a copy of the protocol. As they collect information, they should indicate to the negotiating team what aspects of it, if any, are confidential or sensitive.

Examples of specific confidentiality practices include:

- Have discussions of sensitive issues, like financial bottom lines, "in camera" where any meeting recording is switched off, and ask the note-taker not to record or send out summaries of these discussions.
- If meetings are on an online platform, turn off any AI note-takers or meeting summary software. This is particularly important if the negotiation team debriefs on the same link at the meeting, as on some platforms, entire meeting summaries may be accessible by all participants even if they have left the meeting early. Similarly, chat logs from online meetings may be accessible to participants after the meeting.
- Have internal-facing documents clearly marked as such.
- Use watermarks with the word "CONFIDENTIAL" or "INTERNAL" and use CONFIDENTIAL as part of the file names.
- Avoid putting highly sensitive information in writing. There are times when a phone call is appropriate, but make sure to ALWAYS keep a file note of calls with company negotiators.
- Use care when emailing, texting, screen sharing, and working in public places.

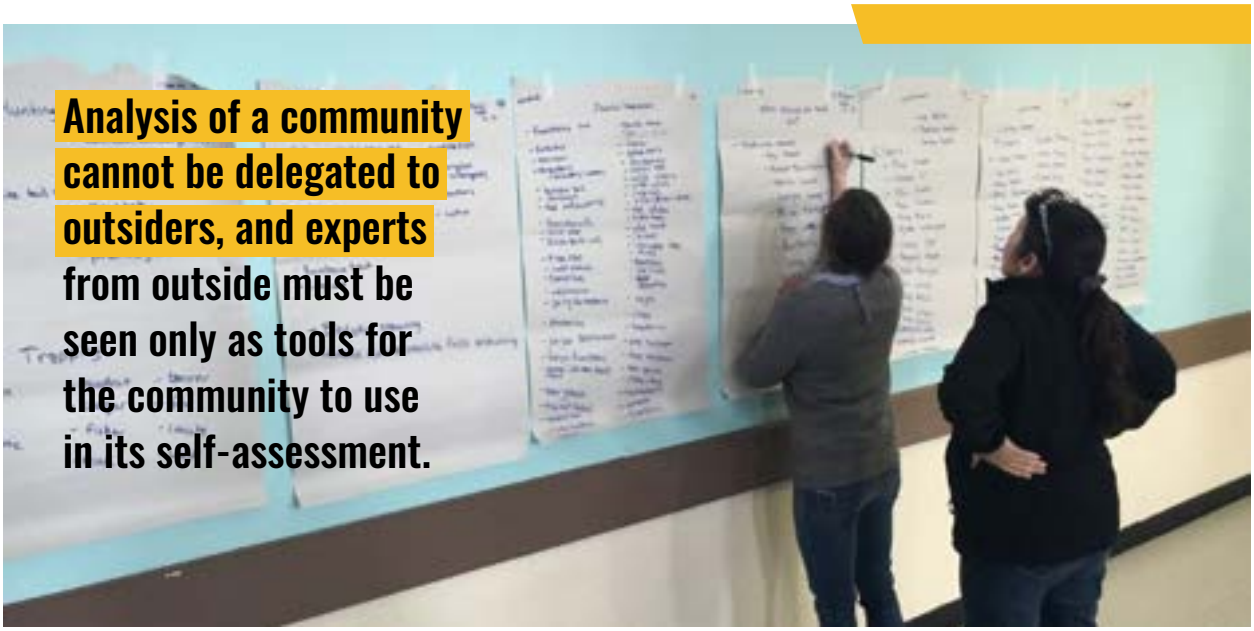
Community Capacity Building in Data Analysis

Experts may need to be brought on board or trained in the community to collect and analyze data. For example, financial and commercial data will need to be reviewed by someone with an economics or business background. Anthropologists may need to be hired for cultural heritage work.

Community-based expertise should, wherever possible, be used or developed, because community members almost always have a better understanding of the local context than outside experts. The input and analysis of community members must be part of issue identification and agenda setting for negotiations. Analysis of a community cannot be delegated to outsiders, and experts from outside must be seen only as tools for the community to use in its self-assessment.

Except in a few highly specialized areas (for example, markets and price setting for a specific commodity), it is usually a lack of community capacity that leads to the need for outside experts. However, the lack of community capacity will never be overcome if the only people collecting and analyzing data are these external experts. The IBA negotiation process and the IA process should be seen as on-the-job training opportunities for community capacity building and empowerment. Using external experts is expensive, and if they do not contribute to skills development, the same outsiders will have to be hired the next time expertise is needed. Getting experts to train community members as part of their work may cost a little more, but it pays large dividends in the long term.

In considering the need for capacity building, it is important to assess existing levels of knowledge in the negotiation team. Where existing knowledge on a topic is very limited among negotiating team



members, there will be a need for substantial training and capacity building on this topic. Where core knowledge is high, such as in a community or team that has negotiated several agreements in the past and is very savvy about markets and companies, much less "skilling up" is required. The key is to identify how much knowledge is available, who has a lot of knowledge about the issue, and who has less. The provision of basic information for negotiators and staff with a lot of knowledge is a waste of resources; not providing enough information or even training on foreign concepts like "feasibility" for people with a small knowledge base on that subject might threaten the success of the negotiations.

Determining How Data Will Be Used

Many specific questions to help identify and fill knowledge gaps are listed in the *Information Needs and Sources, by Topic* section on pages 114 to 120. It is essential to have the capacity to analyze data that is collected, understand it and make sure it is understandable to the whole team. Short briefing papers and presentations should be prepared, providing synopses of knowledge and issues to help in the design of the negotiation position. Often, this role is filled by consultants.

For example, a consultant may analyze a huge amount of data on a particular company and then give a short presentation of four to five slides that pull out the key points so that the negotiators and the steering committee can get a good understanding of the company. If consultants are to be used in information collection and analysis, it is critical that they are given clear direction about the required level of data collection, analysis and communication appropriate for specific audiences (e.g., for community engagement, plain language, non-technical, use of culturally appropriate comparative metaphors, and other tools to make the final product accessible). A consultant can be required in a contract to always provide, along with each report, briefing notes, short memos, and presentations in plain language.

The focus of briefing notes will constantly change to meet current information needs in the negotiations. For example, at the outset, briefing notes may focus on project economics, the company's management team and priorities, and later may change to negotiation strategies. All briefing notes should be filed in an easily accessible central location using a format that allows searching by keyword so that briefings can be reconsidered at a later date. Each memo or briefing note can answer some key questions to help the community position itself with respect to the company. It is often useful to hold a briefing session for relevant negotiating team members once a memo is ready (or more likely a series of memos), so that they are up to speed on the issues they have to deal with, and so that they can add to the briefing with their knowledge, ask questions, and refine the search for answers.

It will be critical for negotiating team members to take information from the memos developed by a consultant, reflect on them, and figure out how to use the information. All too often, the use of information stops with the consultant, either because the information is poorly assembled and interpreted, or it is not in plain language, or because there is not a strong or experienced negotiating team that meets regularly to interpret the data.

Information gathering can be prioritized over, or confused with, information analysis. The goal of collecting information should not be to have the biggest pile of paper at the end of the day — don't collect information for information's sake. All information should be collected to answer specific questions. Analysis and decisions should not be delayed for too long merely because the entire universe of information hasn't been collected. Don't delegate all analysis of information and decision-making to consultants. Remember: all decisions require information. Informed decisions require context. Wise decisions require dialogue, in this case among team members and potentially the wider community.

There is a difference between information and knowledge. The local context *has to be understood*. Only when information is understood locally can it become knowledge, and thus useful for strategy, meetings, and action. For example, details of the content of various clauses of a piece of legislation are information. The realization that this legislation can allow a company to damage cultural sites that are of great value to a community, but that an IBA could be used to win a commitment from the company not to use the legislation, contextualizes the information and converts it into knowledge that allows the community to use it in pursuit of a key goal — protection of its cultural heritage.

All decisions require information. Informed decisions require context. Wise decisions require dialogue, in this case among team members and potentially the wider community.

Sample Topics for Consultants' Briefing Notes

In preparation for negotiations with a large global mining company, the toolkit authors helped a Canadian Indigenous group's negotiating team prepare five briefing memos:

- **HELPING THE INDIGENOUS GROUP IDENTIFY INFORMATION GAPS.** This briefing note was on the range of information (drawn from the *Information Needs and Sources, by Topic* section on pages 114 to 120) that could be collected. The group used this table as a checklist to prioritize the type and order of information it needed.

- **MAINTAINING UNITY.** The second briefing note was on maintaining unity. At the time, there were questions about royalties, land tenure, and leases to be solved between the business arm and the political arm of the overarching Indigenous group. These issues had to be settled before negotiations with the company, as the company could very well have used these fractures to weaken the negotiation position of both arms. The memo served as a warning to the organizations of the threats posed by a lack of unity. It provided examples where unity between organizations led to much stronger agreements.

- **THE COMPANY'S PLACE IN THE GOLD SECTOR, AND THE PLACE OF THE DEPOSIT IN THE PROJECT PIPELINE.** A third briefing note was on the place of the mining company within the global gold mining industry, and then the place of this specific project in the holdings of the mining company. This briefing note led to the surprising finding that the advanced exploration deposit on the community's land was likely not as high a priority as the Indigenous group previously thought. It also identified the factors that would influence the corporation to prioritize this project above others, many of which could be influenced by the Indigenous organization.

One briefing note led to the surprising finding that the advanced exploration deposit on the community's land was likely not as high a priority as the Indigenous group previously thought.

- **THE COMPANY'S APPROACH TO COMMUNITIES.** The fourth briefing note focused on the company's approach to community relations around the world, with the nature of its engagement with other Indigenous groups a key focus. Through this research, it was found that the company had a much higher conflict profile than other equally sized mining companies. Contact names and organizations for potential global allies for the Indigenous group were researched, contacts were made, and existing agreements involving the company were reviewed.

- **CORPORATE IBAs IN OTHER REGIONS.** This briefing note reviewed the only existing IBA the company had signed with an Indigenous group in Australia. It also provided contact information for the Traditional Owners there. ■

Precursor Agreements

Before formal negotiations for an impact and benefit agreement begin, the company and community may find it mutually beneficial to reach early agreements or written understandings. A variety of agreement types are summarized in Table 3.1, with two prominent agreement types — exploration agreements and memorandums of understanding (MoUs) — discussed in more detail on the following pages. For the sake of completeness, the table includes some agreements that are not precursors to IBAs and involve the Crown but may be used to help shape the impacts of a mining project.

Table 3.1 Summary of Types of Agreements

Type of agreement	Agreement parties	Description
Exploration agreement	Indigenous Government to Proponent	Exploration agreements are precursor agreements that allow exploration activities to proceed with the understanding that an IBA will be negotiated in the event that the exploration project develops into a full-scale mine. Exploration agreements set out legal obligations and often provide revenue sharing payments, either through fixed payments or a royalty. Exploration agreements are discussed in more detail in the section below.
Memorandum of understanding (MoU) or Negotiation Agreement	Indigenous Government to Proponent, *or* Indigenous Government to Crown	MoUs set out broad intentions of the parties and provide frameworks for negotiating. MoUs may not be legally binding, though clauses covering provision of financial support often have contractual force. MoUs are discussed in more detail below. A term sheet may also include payments provisions to support negotiation capacity, community engagement activities, relevant studies, and community-led impact assessments, and decision-making.
Term sheet	Indigenous Government to Proponent, *or* Indigenous Government to Crown	Like MoUs, term sheets are precursor agreements that are generally non-legally-binding. A term sheet is often more formal than an MoU and sets out specific provisions that will be included in the IBA.
Revenue sharing agreement	Indigenous Government to Crown	Communities may negotiate agreements that focus on revenue sharing with the Crown. For example, in British Columbia, Canada, the provincial government collects payments from mining companies through a mineral tax and then shares a portion of tax revenue with impacted communities through revenue sharing or economic and community development agreements. These revenue sharing payments are on top of any payments that the company makes to the community.

Table 3.1 continued

Type of agreement	Agreement parties	Description
Stewardship agreement	Indigenous Government or Governments to Proponent	In some cases, a group of communities have worked together on the environmental management of a proposed project. Such is the case for the Ni Xadi Ha agreement. In this agreement, the, Deninu Kųé First Nation, Łutsël K'é Dene First Nation, North Slave Métis Alliance, Northwest Territory Métis Nation, Tłı̨chǫ Government, and Yellowknives Dene First Nation negotiated an agreement with De Beers Canada for the monitoring the Gahcho Kué mine.
Reconciliation agreement	Indigenous Government to Crown	A reconciliation agreement is a relatively new type of agreement that sets out a framework and commitments that guide the relationship between an Indigenous government and the Crown. These agreements often cover several aspects related to relationship building, including, but not limited to, information sharing protocols, engagement and consultation protocols, decision making roles, and resource management goals and objectives.
Strategic engagement agreement	Indigenous Government to Provincial Government	Strategic engagement agreements are negotiated between the Indigenous governments and provincial governments that outline how consultation and engagement on natural resource decisions will take place within a Nation's traditional territory. These agreements are designed to streamline consultation processes, provide greater certainty for both Indigenous governments and provincial governments, and create a more structured approach to addressing Indigenous rights and interests in decision making.
Legacy or Brownfield Agreement	Indigenous Government to Proponent, Indigenous Government to Crown	Legacy or brownfield mine agreements are negotiated to address the impacts of historic mining operations, including environmental damage, remediation, and community wellbeing. Sometimes called collaboration or relationship agreements, these agreements can help communities secure commitments for clean-up, compensation, and future engagement. If the proponent is still active, leverage can be gained through regulatory, reputational, public, and legal pressure. In the not-infrequent situation where the proponent has gone bankrupt, agreements may be negotiated with the caretaker government.

Two prominent agreement types – exploration agreements and memorandums of understanding (MoUs) – are discussed in more detail on the following pages.

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Exploration Agreements

Exploration agreements (or 'staking agreements', 'drill sampling agreements') for initial or advanced exploration generally set the ground rules for work in Indigenous lands, and establish the expectation for relations between the parties. They can be used to establish basic relationship principles, for example, company adherence to the norm of FPIC, and to identify economic benefits expected to flow to the community. These agreements contain legal clauses (just as the IBAs do, see Table 4.2 on page 177), and may also outline processes for technical reviews, community monitoring, community studies, and community meetings, ensuring that information flows both ways and that community input is integrated throughout the exploration phase. These agreements usually require that any successor company also adhere to the terms.

An exploration agreement is likely to be smaller in scale than an IBA and cover fewer issues. There are large uncertainties associated with exploration, such as the amount of work to be done on the ground, which is dependent on the availability of exploration funding to the company and positive early exploration results. There are comparatively fewer jobs and lower expenditures, and there is uncertainty about the revenue that may be generated by any discovery. Financial formulas in exploration agreements can include:

- A one-off payment;
- Annual fixed payments during the exploration life span;
- Cash per metre of exploration drilling;
- Percentage of spending on exploration activities; and
- Percentage of equity interest in the parent company.

As with IBA financial formulas, each option has pros and cons that depend on both the company and the community situation.

Exploration agreements may include other specific clauses, such as requiring the company to provide proposals and timetables in advance, or agreements on the employment of Indigenous members in field work.

Memorandums of Understanding (MoUs) or Negotiation Protocols

Memorandum of Understanding (MoUs) or Negotiation Protocols set out the manner in which the community and the company agree to move forward with negotiations. They can range from a page or two of very general terms to lengthy documents with many specific, detailed clauses. MoUs may not be legally binding because they occur early in a negotiation process at a time when the parties are exploring both the desirability of a project and their relationship with each other, and so they may not want to make binding commitments. However, the parties may agree that certain parts of an MoU that are essential if a negotiation is to proceed or which could expose a party to financial risk will be legally binding, for instance, clauses on confidentiality and on funding for the community.

MoUs may not be legally binding because they occur early in a negotiation process at a time when the parties are exploring both the desirability of a project and their relationship with each other, and so they may not want to make binding commitments.

Topics often covered in an MoU include:

- Definition of the parties, the purpose of the agreement, recognition of rights, representation, and the nature of the relationship;
- Negotiation principles;
- Assistance (financial and other resources);
- Steps to be taken to reach an agreement, including a preparation and consultation phase, a negotiation phase, and a drafting and documentation phase;
- Communications between the parties (e.g., the parties agree to have single points of contact for communication; each party may have appropriate advisors present; outside experts may be called upon) — see *Information-sharing and Consultation with the Company* on page 152;
- Location and timing of negotiations;
- Substantive issues for negotiation and sequence for negotiation;

- Confidentiality, including such provisions as negotiations will be conducted in private and will not be discussed in public without agreement (see also *Corporate Confidentiality Clauses* on this page);
- Funding arrangements (see *Assessing and Reducing Risks Associated with Company Funding* on page 132) for capacity;
- Studies to be completed in the course of the Project review;
- Who will be part of the negotiations (i.e. will Indigenous communities be negotiating collectively or individually with the Proponent); and
- Dispute resolution process.
- In some cases, interim benefits for the community.

For descriptions of other topics or clauses that may be included in an MoU, see the section on legal provisions on page 186.

Corporate Confidentiality Clauses

MoUs may have distinct confidentiality clauses that deal solely with access to information from the company.

The decision to agree to corporate confidentiality needs to be fully understood and considered carefully. If the company is going to limit the release of corporate data, for example, on financials, to the wider community, the advisability of going down this track may be open to question by the community you are representing. The team needs to consider carefully whether it is better to do its own calculations based on publicly available information, because then there are no restrictions on its use. On the other hand, an important advantage of using company information is that the company can't argue with it. These concerns will need to be carefully weighed before deciding whether to agree to this type of clause to obtain confidential company information. ■

Develop a Budget

Estimating Costs and Determining Funding Sources

It is difficult to accurately estimate the costs involved in any set of negotiations, and the costs can vary substantially from case to case, depending on the nature of the project and the communities affected by it, the duration of the negotiations, and the extent of legal proceedings.[99]

Funds can be requested from the government or industry, or both. Many companies have funded the process of negotiation, impact assessment, and community consultation. The Canadian federal government may have funds available to support consultation and negotiation. Communities can also build longer-term community-academic relationships, which can often bring "in-kind" support and expertise. Finally, a community can partner with non-governmental organizations (NGOs) or apply to other funding agencies. Generally, academic and not-for-profit funding is related to discrete research activities and does not extend into the negotiation of agreements.

Common reasons for companies to provide funds to communities include:

- There is a need for the developer to fund community engagement. Without company funding, a negotiation cannot occur.
- Funds can speed up the IBA negotiation phase, because adequately resourced communities can respond to requests and review materials faster.
- When community-based and controlled research occurs, with consultants chosen by the community, this research can be used by the developer as part of their IA submissions.

Commonly, companies will fund active negotiations and studies at amounts that range from $800,000 to well over $1,000,000 annually, especially if the community and company are attempting to negotiate the agreement in a short timeline. For example, the Voisey's Bay Nickel Company provided the Innu Nation with substantial funding (over $900,000 in 2025 dollars) to determine the Innu people's goals and objectives over a six-month consultation process.[100] The Tłı̨chǫ Nation used corporate and federal government funds to conduct its consultation activities with constituents in advance of negotiations for IBAs for the Ekati and Diavik diamond mines, and more recently to support the remediation of contaminated sites in their traditional territory.

Companies and governments may prove reluctant to provide funds. Reminding them that effective community engagement and professional negotiations are a minuscule portion of total costs with an extremely high upside (i.e., a more effective mine plan, a social license to operate, a functioning partnership with communities) can help leverage the required funds. Additionally, providing a well-reasoned budget (discussed further on page 182) can help company negotiators do the internal work to win the funds needed by the community for the negotiation within their own decision-making structures.

Assessing and Reducing Risks Associated with Company Funding

There are risks for communities in relying on company funding of negotiations. Companies may try to influence the community's choice of advisers, indicating a willingness to fund specific advisers and refusing to fund others. They may support data collection only on the issues that they view as relevant, rather than what the community sees as important. Governments may do the same thing. This has occurred in several negotiations in Australia. While the Indigenous organizations concerned initially insisted that they retain complete control over who they employed in negotiations, eventually one of them decided that, in the absence of any alternative source of funding, it had no choice but to agree to a company's demand that a particular adviser not be retained. A second potential problem is that if negotiations are deadlocked, the company may threaten to withdraw funding from the community, placing it under pressure to accept the company's offer and undermining the community's negotiating position. That pressure can be extreme, given that in the absence of funding, a community may not be able to even meet its advisors or bring community members together. The last point is especially relevant if community members are spread over a large geographical area. A third issue is that a lack of predictable and secure funding can undermine a community's ability to plan negotiations and retain competent staff and consultants. A number of strategies are available to address the risks associated with company funding of negotiations. Communities should avoid a "drip feed" funding approach where a company agrees only to provide funding on a piecemeal basis, for instance, only paying for one set of meetings, or the provision of a single piece of advice. This leaves the community particularly vulnerable to pressure. A much better alternative is to agree to funding arrangements for the whole negotiation process before substantive negotiations commence, for instance, through an MoU. This may require making assumptions about the duration and nature of the negotiation process, which may turn out to be incorrect. But this possibility can be addressed through a commitment by the company to fund completion of negotiations on a "reasonable cost" basis, with a provision for dispute resolution if there is no agreement on what is "reasonable."

There are risks for communities in relying on company funding of negotiations... some companies may try to influence the community's choice of advisors, threaten to withdraw funding during an impasse, or fail to provide the funding certainty needed to plan negotiations and retain staff.

As noted above, it is possible to make specific parts of MoUs binding on the parties. Such an approach is advisable in relation to funding as it limits a company's capacity to use the threat of withdrawing funding as a bargaining tool.

It is also important to set aside a proportion of funds received as an emergency fund that can be used if a company cuts off funding. This can be done, for instance, by including an administration charge in the budget but retaining this for "emergencies."

A community should always seek additional sources of funds or other resources to support negotiations, for instance by supplementing corporate funding with funds from governments, and/or by locating legal advisers or researchers who will be willing to undertake voluntary "pro bono" work if company funding is exhausted. University-based advisers, for instance, may be in a position to continue to support a community through a crunch period in negotiations, even if the community does not have the funds to pay them or faces delays in obtaining these funds.

Budget Needs

A well-reasoned budget is often needed to clearly articulate the amount that the community is requesting from a company or government to support negotiations. Such budgets may show the estimated monthly or annual costs of each aspect of the process. Budgets for negotiations usually need to cover:

- Legal, technical, economic, and negotiating expertise;
- Indigenous-led socio-economic, cultural, and environmental studies;
- Community engagement costs, which can include costs for community meetings, advisory committee honorariums, and graphic design for community engagement materials;
- Travel costs;
- Meeting costs, such as renting meeting rooms, catering meals, and per diems for anyone who will need them;
- Research, analysis, and team preparation time for the negotiations;
- Translation and transcription fees;
- Staff salary costs;
- Information management and dissemination (printing and distribution of key documents); and
- Administrative fees.

Budget Management

It is advisable to be conservative in estimating what a negotiation will cost, and then rigorous in monitoring and controlling expenditures, especially early in the process when it may appear the funds are more than sufficient. In combination, this will help reduce the possibility that a community will run out of funds as negotiations enter their final and crucial stages, when insufficient funds can undermine the community's negotiation position.

For the negotiating team, typical budget responsibilities are to:

- Keep track of funding sources, amounts, reporting and accounting requirements, deadlines for applying for funds (if applicable), availability of funds in a timely manner, and any limitations on the use of funds established by the provider;
- Establish a clear and transparent accounting system, especially a system for approving, accounting for and justifying expenditures; and
- Identify overall budget requirements early and then maintain a working budget.

Gather Information About the Project, Commodity and Company

The section *Information Needs and Sources, by Topic* on pages 114 to 120 sets out a detailed list of questions and data to gather for establishing the context for the project, commodity, and company, including likely project impacts, and legal and regulatory processes. Some of the information will not be publicly available, and most will require specialized analysis to fully understand and act upon the information gathered.

A critical starting point is to find out whether there are IBAs or negotiated agreements between this corporation and other Indigenous people. If the company holds no relationship to Indigenous communities, a community that has experience with the same commodity on a similar scale might also have valuable lessons to share. Even if there are no negotiated agreements, there are still tools that can help understand what kind of relationships this company has with other Indigenous communities in Canada and across the world. Consider, for example, non-governmental organization websites and initiatives — such as *Mines and Communities*, *MiningWatch Canada*, the *London Mining Network*, *Earthworks*, and the *Environmental Justice Atlas* — which track news stories and reports from a variety of sources related to corporate–community conflicts. This type of investigation will help to reveal how the corporation might respond in negotiations, what kind of precedents exist, and the likely approach of the corporation to the community.

Environmental, Social, and Governance (ESG) standards and certification frameworks, such as the Initiative for Responsible Mining Assurance (IRMA), Towards Sustainable Mining (TSM), and the International Council on Mining and Metals (ICMM), can also help assess a company's policies and level of commitment to Indigenous relations.

Mining company websites often have public-facing policies or statements on their relationships with Indigenous people. Such statements should also be reviewed carefully and critically, and their potential value in the negotiation considered. The negotiating team should work to identify the key issues and information needs about the project, commodity and company. For example, in relation to the company, they may want to know:

- What is the corporate culture of the people who will be sitting across the table?
- What are the company's priorities?
- What are their strengths and weaknesses? Where are their pressure points for change?
- Where does this project fit in with the company's overall plans?
- What is the company's history in negotiating agreements? How can they be expected to act?
- What kinds of benefits might the industry offer?
- What does the company know about us and think of us? What have we learned about them in our early interactions?

Strategies to Influence Companies or Bring Companies to the Table

There are many ways to influence a company. Possible strategies to influence decision-makers in a company include:

- Conduct research to show how an agreement can benefit the company and reduce its risk, while raising the potential breach in the Crown's duty to consult and accommodate for future impacts if the company does not negotiate.
- Arrange meetings with company representatives "on the land" to build relationships based on mutual understanding and to allow company representatives to see what the community is trying to protect. Meeting on the land also takes corporate people out of their comfort zone, creating opportunities to build relationships.
- Build strong relationships with "change agents" or staff within the company who can facilitate positive change internally. Try to incentivize the right people with the relevant power, expertise, and portfolio to come to the table. Strong relationships across the negotiation table can be invaluable when negotiations become challenging.

- Start litigation to generate an incentive for the company to come to the table. Litigation should not be undertaken lightly, as it can be tough to turn back to negotiation, and the costs associated with litigation generally must be borne by the community. Few external sources of funding will cover these expenses. However, sometimes litigation is the only option.
- Engage the proponent during a permit renewal phase, or remind them that they will need renewals in the future. This involves employing all tools in the regulatory system to exert pressure on the company.
- Press the company on social license issues through media and/or direct contact with company board members and the chair of the board. This type of strategy is often undertaken only when all other strategies have been exhausted.
- Buy shares in the companies, allowing the community to submit questions in shareholder meetings. Investors are wary about the risk of damaging issues being raised in these meetings.

Learning from Others' Experiences

Other existing agreements may be tough to acquire, but tactful and informal communication between Indigenous groups can often overcome this obstacle.

If the actual agreement cannot be obtained, you should be able to acquire information about the main terms or text of the agreement from the signatory Indigenous communities.[101] The implementation status of the agreement and satisfaction with outcomes are also relevant.

- Did the company deliver on commitments? If not, what happened?
- What does the community have to say about what they would do the same or differently next time?
- Do they have suggestions for negotiations? For outcomes? And for implementation?

Establish Baseline Conditions in the Socio-economic and Cultural Environment

A key part of preparing for negotiations involves having a clear picture of:

- Existing economic, cultural and social conditions in one's own community ("baseline data");
- The likely impacts a project will have;
- What actions need to be taken to maximize positive impacts and minimize negative outcomes;
- How a negotiated agreement can help in this regard; and
- How this should shape negotiation positions.

For some major developments, Indigenous communities undertake a formal, community-led or community-controlled social impact assessment (SIA)[102] to identify qualitative and quantitative indicators of baseline social, economic and cultural conditions, likely changes over time, and people's aspirations and concerns. These SIAs can also be used to predict how a proposed project is likely to impact different sub-populations of the community, including women and girls. An SIA of this sort can be a critical input for establishing a negotiating position. Further, it can be used to inform the environmental assessment process.

In Canada, developers are required to conduct some form of socio-economic and cultural impact assessment as part of the environmental impact statement for a project. The conventional, colonial approach is for the developer to run a "top-down" impact assessment of the project's likely impact on the human environment, involving some consultation with the community, but often using a generic set of largely quantitative indicators collected for the most part from government statistical agencies. Some jurisdictions in Canada include a gender-based assessment as part of this process, but this is not a universal requirement. The extent of community involvement also varies greatly, but it is rare for communities to control the social impact assessment process with this approach. The result is that many SIAs do not generate the sort of information that is useful for communities in helping them prepare for negotiations.

The following paragraphs offer some guidance for communities that want to undertake independent, community-controlled social impact work and use it to support their negotiation efforts.

A number of approaches to establishing baseline conditions exist. Sometimes, research will be done to identify categories of people affected and rights and interests in the project area, and to review current socio-economic realities. Specific research might include areas such as heritage resources and traditional knowledge studies. Also, a basic organizational assessment can be done, so that the strengths, skills, and weaknesses of various social infrastructure organizations can be determined.

There are a number of effective tools to determine how a project may impact your community that are well-documented in the literature on environmental impact assessment.[103] Community-controlled SIAs can be designed so they can contribute to the statutory (government) impact assessment (IA) process. This can reduce the cost burden on the developer, as studies for a statutory IA can often leverage federal funding support.

Research methods for an SIA can include archival research, public meetings, interviews, focus groups, meetings on the land, household meetings, and surveys. The methods used can be quantitative and qualitative, and the planning and administration of research can be external (by consultants or academics), internal (by a local research team), or a combination thereof.[104] It is best not to rely on only one form of data gathering, as in some cases, many youth, Elders, and women may not attend public meetings (and may be too shy to actively voice their opinions in them). To meet the needs of these potentially under-represented sub-populations, it may be better to run focus groups specifically designed for women, Elders, and youth.

Effective community consultation and information dissemination about a proposed development is time-consuming and can be expensive from the perspective of a small, Indigenous community. In Australia, the cost of studies ranges from $150,000 to $500,000 or more, depending on the scale of the project, the number of communities affected, and the availability of funding. To put these numbers in context, an entry-level (small) metallic mine in Canada cannot be developed for a capital cost lower than about $300 million. A large-scale mine will typically tip the scales above $1 billion, or about 2,000 times the cost of a $500,000 study.

A large amount of data may become available from SIAs. The task of community teams or negotiators is to make sense of the data and use it wisely in decision-making, which means using it to address the *key* issues for a community. “Bottom line” questions include:

- Is the project as proposed credible (is it economically, socially, technically, and financially *viable*)?
- Is it *desirable* for the community in its present form, based on what we can predict about its beneficial and adverse impacts?
- What size and type of *benefits package* can the proposed development support, and what sort of package is required to make the project desirable for the community?

Baseline conditions are a “snapshot” of the community as it exists now — before the project.

Information gathered might include quantitative data (numbers that can be measured), such as population, education, employment, housing, and poverty. Just as important, qualitative data (gathered through open-ended survey questions, interviews, meetings, etc.) can provide an in-depth understanding of cultural, social, political and family norms and values in the community.

Social impact assessments can include many different studies, such as economic, cultural or cultural heritage work. These studies try to predict how things might change — for the better or worse — if the project goes ahead.

Impact Assessment Questions

The kinds of questions that can be asked of community members in impact assessment studies include:

- What do we know about where the community is now? For example, how many people fall into age and gender groups most likely to be impacted by mining? How many people rely on harvesting from areas that may be affected by mining?
- What are the education, health, and housing conditions, and how are these likely to affect, for instance, people's capacity to take up employment opportunities? What capacity do community organizations have in key areas such as land management, education, and dealing with possible negative social impacts, such as substance use?
- What are the elements of culture, society, economy, and the environment that our people want to protect the most?
- What sort of shape are those valued components in, how are they changing, how fast, and why? Valued components are any part of the environment considered important by the people within the communities (or other people involved in the regulatory process).
- What are our most resilient features, and where are we most vulnerable to change?
- What do our prior experiences with similar developments and negotiation processes teach us ("lessons learned")?
- What do we know about where the community wants to be? Are there existing reports that talk about people's aspirations? What other work needs to be done to establish community goals and aspirations?
- How might different populations within the community (i.e., women, youth, Elders, adults, harvesters, etc.) be affected differently by the proposed project? What needs to be done to ensure that these different groups are well represented in negotiations?
- What key characteristics are likely to affect the community's capacity to negotiate and implement an agreement and to take advantage of it once it is signed?

> **"We call upon all governments and bodies mandated to evaluate, approve, and/or monitor development projects to complete gender-based socio-economic impact assessments on all proposed projects as part of their decision-making and ongoing monitoring of projects. Project proposals must include provisions and plans to mitigate risks and impacts identified in the impact assessments prior to being approved."**
>
> **— Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls, Calls to Justice 13.2**

Potential Socio-Economic Impacts

Typical social, economic and cultural impacts that need to be thought about during IBA negotiations can range widely, depending on the nature and stage of the development project and the status of the community. Some potential impacts are provided below; they are not listed in order of likelihood or severity of outcome because they will differ on a case-by-case basis.

- **INCREASED RISK TO PUBLIC SAFETY** — Where operations include large influxes of workers who are away from the moderating influence of their families and communities, community members, in particular women, girls, and 2SLGBTQQIA people, may be at higher risk. Increased traffic in and around communities can also reduce public safety.
- **INCREASED RISK TO POPULATION HEALTH** — Mines can impact community health outcomes through, for example, air and water pollution or contamination of traditional food sources.
- **INCREASED PRESSURES ON SOCIAL AND PHYSICAL INFRASTRUCTURE** — Increased population, for example, can cause old municipal water and sewage systems to require upgrading or fail outright. Impacts can also include increased classroom sizes, doctor wait times, etc.
- **INCREASED PRESSURES ON FAMILY COHESION** — For example, pressures associated with long-distance commuting of one partner, which can lead to reduced mental health, strained parent-child relationships, increased marriage breakdown and single-parent families.
- **REDUCED TIME ON THE LAND PRACTICING THE BUSH ECONOMY** — This can have a variety of social, economic and cultural outcomes, including loss of traditional skills and knowledge, reduced inter-generational ties, loss of sense of self and sense of place.
- **INCREASED INCOME DISPARITY** — The creation of "haves" (those who work at the well-paid mining jobs) and "have-nots" (those who choose to retain their bush economy reliance or who cannot work in the wage economy) can have major repercussions for social relations. In addition, the high-paying jobs of the wage economy are often followed by price inflation, which makes it increasingly hard for the "have-nots" to afford store-bought food, housing and services. These impacts can be gendered. High-paying jobs, for example, may be more likely to go to men, while price inflation may have a large impact on women. In other cases, reduced numbers of animals may have an overall larger negative effect on young men, who lose access to the intergenerational transfer of knowledge that should occur while fishing or hunting with Elders.

Increased population, can cause old municipal water and sewage systems to require upgrading or fail outright. Impacts can also include increased classroom sizes, doctor wait times, etc.

- **POPULATION CHANGES** — It is typically assumed that increased economic activity will bring with it population growth and all of the adverse and beneficial impacts on small communities that come with population growth. These are legitimate concerns. However, it is also increasingly possible that modern fly-in, fly-out mining operations will bring population flight from smaller communities to larger regional centres. This can occur when increased wages make living in larger communities viable, when social divisions emerge in smaller communities, or when it makes sense to move because of travel logistics. The outcome can be depopulation of smaller communities, often of their brightest stars and leaders of the future.

- **LOSS OF CULTURAL ASSETS** — A development may physically alter a spiritually significant site, trail or landscape. It may also, regardless of the level of physical damage, change the way the culture holders perceive a location or space. When this is the case, it is part of the many different ways that Indigenous cultural resilience can be tested by changes associated with the overall shift from a traditional economy to a wage economy. Other losses of cultural assets might include decreased practice of the bush economy, decreased use of Indigenous language, and a decreased role for Elders and traditional practices (such as sharing) in day-to-day life.

The creation of "haves" (those who work at the well-paid mining jobs) and "have-nots" can have major repercussions for social relations.

Because social impact assessment covers all of the potential changes that may occur as a result of a project, it can seem complex and even overwhelming for the uninitiated. Luckily, there are many tools, case studies, and experts available to assist communities in the conduct of a social impact assessment.

Certain impacts are more likely to occur during different stages of the project life cycle. The next sections set out some of the things your community may need to think about during any social impact assessment.

Many guidance documents lay out the steps in a social impact assessment and the principles of social impact assessment. These include:

- **Spirit of the Land Toolkit**, available on the First Nations Major Projects Coalition (FNMPC) website at fnmpc.ca/wp-content/uploads/FNMPC_SOTL_Toolkit.pdf.
- **Cultural and Rights Impact Assessment: A Survey of the Field,** by Mikisew Cree First Nation and Firelight at firelight.ca/culture-and-rights-impact-assessment-a-survey-of-the-field-2017.
- **Mackenzie Valley Review Board's guidelines on Socio-Economic Impact Assessment** at reviewboard.ca/process_information/guidance_documentation/guidelines.

Impacts During Advanced Exploration

During advanced exploration, it is often the response to perceived future opportunities that can lead to real impacts on the ground. For example, businesses faced with the prospect of a mining development are understandably excited about the economic benefits that can arise. However, planning to take full advantage of future business and employment opportunities needs to be linked to an understanding of:

- The likelihood that the project will go ahead (still quite uncertain during advanced exploration);
- The current ability of the community and region's Indigenous workforce and business sector to compete for jobs and business opportunities, if and when they do come; and
- How best to take advantage of future prospects through strategic infrastructure and training initiatives.

If a community or region over-invests in mining-specific business and training upgrades at the advanced exploration stage, it opens itself up to increased adverse economic impacts if the project does not move forward. At the same time, starting focused strategic investments in people and capital improvements too late may reduce the "capture" of economic benefits when they are available. An important part of impact assessment at this advanced exploration stage, then, is to closely examine the likelihood of the project moving forward, clearly express this to the population, plan accordingly and not put all the economic development eggs in one basket.

Impacts During Construction

Construction is the most capital and employment-intensive stage of mining project development. The construction workforce may be many times larger than the eventual operations workforce, and project development costs may range from $300 million to upwards of $8 billion. All of this money and employment will hit over a short, two-to-five-year time period, which can have major social impact outcomes for communities.

For most Indigenous communities, there simply won't be enough trained labourers, let alone skilled tradespeople, available to meet the construction requirements. Therefore, there will likely be an influx of outside, almost entirely male, workers to the region. This has, in the past, had many adverse impact outcomes on Indigenous communities — including increased access to drugs and alcohol, increased road traffic and potential for impacts on public safety, changes in community demographics and therefore socio-cultural dynamics, and increases in sexually transmitted diseases, among many other negative changes. In 2017, two communities and Firelight issued the Industrial Camps and Communities report, which detailed strategies to manage the impacts and benefits of construction camps.[105]

Today, impacts are often dealt with through the use of a "closed camp" system in which outside workers have little, if any, contact with the Indigenous communities. This does not deal with all potentially adverse impacts, however. The closed camp environment also requires that community members who work in the construction phase be away for extended periods of time in an industrial work camp dominated by settler culture. This can be a very isolating experience with impacts both for the worker and their recruitment, retention and advancement opportunities and for their social interactions when they go home. Other matters to deal with are whether camps are dry, damp or wet, the proximity to communities, and the policies in place to manage complaints. In one recent innovation, a community chose to partner with the Canadian Housing Mortgage Corporation to construct community housing that would accommodate migrant labour and later become a part of the community housing stock.

There will likely be an influx of outside, almost entirely male, workers to the region. This has, in the past, had many adverse impact outcomes on Indigenous communities.

Many strategies are available to minimize the impact of so-called "fly-in, fly-out" on Indigenous workers.[106] For example, bush food menus, cross-cultural sensitivity training, Elder (and even family) visits to the worksite, and counselling available both at the worksite and the home community for family members can all minimize negative outcomes of long-distance commuting. The real question for Indigenous communities will be "which of these strategies work for our people?" and "how can we require these mitigation strategies to be put in place for this development?"

Impacts During Operations

During operations, many of the same social impacts may still be ongoing. While the workforce will be much smaller than during construction, it still may be substantial and represent the single largest employment and business opportunity provider in the community and region. There are many beneficial impacts that can be identified and planned for. However, communities need to be prepared for what adverse social, economic, and cultural impacts can come with this increased economic activity. For example, a common socio-economic impact on Indigenous communities from mining developments is the loss of key municipal and other infrastructure workers to higher-paying mining jobs. This can lead to reduced functioning of existing social and physical infrastructure at the community level if other locals are not available or trained to take over. While this is not something a mining company should be blamed for, the possibility of such a "brain drain" should be fully assessed well in advance, and contingency planning should be put in place in case it occurs.

Impacts During Closure

The closure phase can lead to a rapid reduction in gainful employment among community members as the mine ceases operations. High unemployment can lead to economic distress that moves from individuals through families and into the community as a whole—as disposable incomes reduce, so does overall economic activity. Social change can occur as well, as the sexual division of labour changes. For example, women tend to become the primary wage earners in a post-closure environment. This can lead to social stresses that can culminate in increased domestic violence and family breakdown.

The closure phase can lead to a rapid reduction in gainful employment among community members as the mine ceases operations.

However, these are by no means necessary outcomes. Communities should be working with the government and developers to recognize that a mining operation has an inevitable closure point.[107] Planning for a transition to a post-mining economy that maximizes the use of available skills and provides a minimum of "bust" effects after the mining "boom" is the responsibility of all. A later section (page 209) discusses how IBAs can be used to provide a foundation for dealing with the impacts of Closure & Long-Term Care.

Mitigating Impacts

Additional discussion on the type of measures that can be used to mitigate social impacts is found near the end of Section 4 of this toolkit.

As part of the process of mitigating impacts, data from a community-based social impact assessment can be used to:

- Inform the negotiators of community wishes, aspirations and concerns;
- Understand organizational weaknesses of the community organizations, and plan to avoid them, as well as pinpoint key assets and build on them;
- Inform a wide range of community members of the negotiation process, and the possibilities for the negotiated agreement, as well as the timeline for negotiation; and
- Develop negotiation positions on key issues. For example, Table 3.2 provides examples of concerns raised in one community-led SIA, as well as the mechanisms used to address these concerns in the IBA.

Other examples of community-led studies include:

- In the Voisey's Bay instance, the Innu Nation hired a coordinator who used action research methods[108] to review baseline social, economic and cultural conditions in the communities. Young Innu researchers, along with a sociology professor, worked to develop a summary of Innu knowledge, socio-economic conditions, and a documentary video on the conditions in the communities as the Innu understood them.[109]
- In contrast, for the same development, the Labrador Inuit Association formed a panel of Inuit experts who knew the area well, and the panel addressed some key questions, discussing the effects of the project until there was consensus.[110]
- In one case in Australia, an SIA undertaken to help prepare for negotiation of a new agreement for an existing mine involved meetings with specific groups in the communities (e.g., wives of workers at the mines, workers themselves, and community staff responsible for land and culture management). All told, individual interviews were conducted with fully half of the adult population of the region. The interviews were used to gain information about concerns and aspirations about the project, and to get information about the project's existing impacts across to people. In combination with desk-based research in response to issues raised by community members, a report was issued that included a community profile, factual information about the operations, a series of recommendations with concrete strategies for dealing with concerns, and a monitoring program for measurement and review.[111]

The key is to adopt an approach appropriate to the desires, cultural priorities and values of a community, rather than following an unfamiliar or inappropriate template. Different culture groups will have different social systems for collecting and sharing information and making decisions, different socio-political mechanisms defining who needs to get involved and when, and different priorities among the universe of potential valued components of the human and biophysical environment. These socio-cultural values need to be reflected in community-led assessments.

Table 3.2 Community Concerns and Aspirations of the Hope Vale/ Cape Flattery Silica Mines (CFSM) Agreement in Australia

People expressed concerns about access to mining leases, environment management, accommodation and arrangements for visitors, township administration, and worker health. The agreement contained provisions to address each of these. Two examples are:

Hope Vale people's concerns and aspirations	Provisions of the Hope Vale/CFSM Agreement
ROYALTY PAYMENTS	
People saw a number of problems regarding the 3% profit royalty paid by the company: ■ Payments were low; ■ They were based on profits, and if the company made no visible profit, Hope Vale received no money at all; and ■ The payments were made to a central Indigenous group in Brisbane, and there were long delays before the money reached the community.	The agreement provides for: ■ A much higher level of payments; ■ Payment is based on the value of minerals, not on profits; and ■ Most royalty payments are made direct to the community.
EMPLOYMENT AND TRAINING	
Hope Vale residents and workers at the mine had concerns about employment and training: ■ Employment preference at the mine; ■ Employment being limited to mining and milling; ■ Access to education and training; and ■ Procedures for promotion.	Under the agreement: ■ Preference was given to Hope Vale people; ■ Training programs were designed so all positions could be won; ■ Apprenticeships and scholarships were provided; and ■ A formal promotion process was designed.

Source: Selected from O'Faircheallaigh 1999, 71.

This is one example. The key is to adopt an approach appropriate to the community, rather than following any one template.

Develop a Communications Strategy

The importance of communication between the negotiating team and the community cannot be overstated. It is critical to have a clear understanding of how and when the community will be consulted and when information on negotiations will be shared.

Communication strategies will evolve at various stages of the process. At the outset, community leaders will need to provide as much information as possible about the proposed project and widely encourage community input. This consultation helps negotiators understand community concerns and aspirations, and develop the support and mandate they need to deal with the proponent and government agencies. This consultation can be done at the same time as the socio-economic studies or baseline work discussed in the previous pages.

During later stages of negotiation, the negotiating team will need to update the community about progress. Also, as more information becomes available, the team will want to share information, gauge the pulse of community support, and continue an ongoing dialogue about community concerns and priorities.

As specific provisions of the agreement are being negotiated, the team may consult and share information with smaller affected groups. Because of the risks involved in the negotiating team "showing its hand," the flow of information at this stage may be more tightly controlled.

The community should be constantly informed of the importance of keeping community discussions and conflicts away from the company, the government, and the media.

The following guidelines can help to form an effective communications strategy.

- **CONSULT THE COMMUNITY FIRST.** Internal consultation should happen *first* and *before* any negotiation with a company begins.[112] Even if very little is known about the proposed project, a public meeting (or other consultation process) should be called as soon as possible. From the outset, information must be accessible for people to make an informed decision, using information about mining's impacts and community rights,[113] to decide whether they support the project in principle. All too often, people receive information too far along in the process and are then able to discuss only how to mitigate impacts.
- **CREATE AN INCLUSIVE CONSULTATION STRATEGY.** An important first step in communication is to set out an inclusive process. Questions to ask include: Who is the community? How is the geographic, ethnic, or scope of the community defined? How do we include members of the community who are currently residing somewhere else? Who legitimately represents the community? Is it simply representatives from local community organizations, or is it necessary to reach out to more diverse groups to ensure all elements are consulted?[114] The definition of "community" should be inclusive enough to promote equity and avoid future conflict resulting from a lack of inclusion.[115]

- **CONSULT THE COMMUNITY AWAY FROM THE COMPANY.** It is critical to consult the community without the presence of mining company representatives, as their presence can change the community dynamic — for example, making people reluctant to openly express concerns or inhibiting them from sharing ideas for possible strategies.

If a company presentation is deemed useful and appropriate, the community should only listen and ask questions, and then meet "in camera" afterward, first to hear a critique of the information the company provided, and then to raise concerns and priorities in a safe environment that encourages everything to be put on the table.

The community should be constantly informed of the importance of keeping community discussions and conflicts away from the company, the government, and the media (see *Information-sharing and Consultation with the Company* on page 152).

- **ANALYZE AND CRITIQUE INFORMATION FROM THE COMPANY.** Information from the company can be unfairly tilted toward mining interests,[116] and is usually framed to discuss mine and community benefits, avoiding discussion of impacts. Information from the company should always be accompanied by a critical analysis.
- **CONSIDER MULTIPLE COMMUNICATION TOOLS.** Community consultation and information-sharing may require a range of communication strategies. Possibilities to consider are to:
  - Hold **public meetings,** or presentations and discussions at community meetings;
  - Conduct **house-to-house visits** for those perceived as being the most impacted, such as trappers and hunters active in the proposed area of the development, or key community members who may be unable to attend public meetings;
  - Use **radio, television or print media,** by encouraging a news piece, or by writing editorials or letters to the editor, or purchasing advertising;
  - Access existing communication networks, such as community **mailing or email lists**;
  - Create a **website**, or use **social media** platforms that allow you to reach different audiences and generations; and
  - Post information or create a strategically located **notice board**.

Maintain constant communication, even when there is little to report. Explanations for the lack of progress can be especially important.

- **BE BRIEF.** While key players, such as those on the negotiating team, may need to review hundreds of pages of documents, too much information can overwhelm some community members, leaving them feeling *less* informed. Consider one-page summaries of critical documents, or quick synopses or "briefing notes" — while making more extensive information available for those who want it. Consider how plain language, multiple languages, and the use of visuals can increase the chance that information will be easily absorbed.

- **USE VISUALS.** Pictures say a thousand words. Use maps, photos, diagrams, organizational charts, posters, videos, or scale models to convey key messages.
- **USE SKILLED COMMUNICATORS.** Rely on local educators, liaison officers, skilled communicators from the negotiating team, or consultants to make public presentations using appropriate tools. These people will need to be well-informed about the project to reply to questions, backed up by key people available to answer technical questions. For print materials, consider hiring (or building capacity) for graphic designers, plain language copy editors, or translators to make materials accessible.

TIPS FOR SUCCESSFUL PUBLIC MEETINGS

- Consider a **series of meetings** (each with the same material and topic) at different times, so those with different work shifts or commitments can attend.
- **Schedule wisely**, not competing with other events or periods such as harvest.
- **Post maps, photos,** etc., on walls with "open house" times, and include announcements in community newsletters and social media groups.
- Choose **accessible locations**.
- Include **virtual participation** options.
- Provide **play areas or childcare**.
- Include **youth-focused engagement** activities.
- Consider **raffles and prizes** to incentivize attendance.
- Particularly in smaller communities, determine if **non-member**s will be invited or allowed to attend; and
- **Serve meals,** or at least snacks and refreshments.

Too much information can overwhelm some community members, leaving them feeling less informed. Consider one-page summaries of critical documents — while making more extensive information available for those who want it.

Identifying Those Who Can Affect the Process (for Better or Worse)

It can be important to identify how certain sub-groups in the community might impact negotiations or relationships. Sometimes, there are important groups that need to be included at critical times, in order to move ahead on certain issues. In other cases, there are overly aggressive, self-promoting, pandering or adversarial people who can "poison" the process who need to be carefully controlled in relation to negotiations and community consultation. There may also be community members feeling genuinely worried by the proposed development, and they should be treated with respect and diligence, with their concerns taken into consideration and followed up on.

Involving Vulnerable or Important Groups (e.g., Elders, Women, Youth)

Women, youth and Elders are often pointed to as the groups most likely to be excluded or vulnerable. For example, youth interviewed in a retrospective study on the negotiation of an IBA in the NWT said they felt frustrated and disappointed at not being "included seriously in decision-making."[117] This, despite the fact that youth are often pointed out by community members as being the primary reasons for negotiating good agreements and protecting land. Sometimes, youth are too shy to speak up, or scared they will be "shut down" by others.[118] When engaging with women, youth, Elder, and similar groups, care should be taken to ensure that the process and resulting advice are seen as legitimate by community members. Increasingly, communities are setting up standing councils for these groups, and, for example, an Elders Senate may be appropriate to consult rather than a project-specific group of Elders. In addition:

- Leaders can include youth by meeting with them in schools, running workshops at times and places suitable to them, or including them in negotiating teams.
- Women can be brought onto negotiating teams, or teams can meet with women in places where they work or spend time, such as schools, health centres, or women's shelters or organizations.
- Elders can often be brought together to discuss issues that affect them or that they feel are important for the broader community. Protocol is important to follow for asking permission and knowledge of the Elders. In Cree society, for example, tobacco (often wrapped in linen or cotton) is presented to an Elder to indicate a request for knowledge.

The situation with Elders is unique. Elders are the most honoured members of most Indigenous communities, deserving of respect and deference. Elders bring ethics, spirituality, and legality to

the process. Their words and wisdom are the key to knowledge transfer between generations. The negotiation team will need to consider how to translate Elder's values, experience and insights into the modern negotiation and planning processes. This may include members of the negotiation team helping to bridge the distance arising from language barriers, different conceptual understandings, or different approaches to time management. Elders should be treated the same as other respected advisors and compensated for sharing their time and expertise.

Issues often raised by Elders include:

- Maintaining a relationship to the land and traditional cultural tools and activities;
- Lack of respectful relationships in companies and government, especially because of previous bad treatment;
- Retention of treaty rights, unsurrendered title and rights; and
- Passing on a healthy land, special places, animals, and cultural values to future generations in as unaltered a fashion as possible.

An example of real-time adaptations to ensure women's and Elders' participation occurred during a public hearing for the Fortune Minerals mine in the Northwest Territories. When the project team recognized that women, including female Elders, were not stepping up to the microphone during the public input period, they implemented an immediate corrective measure. The public hearing agenda was adjusted to include a dedicated two-hour session for only women and youth to speak. Concurrently, a facilitator was tasked with circulating the microphone to enable contributions from women who preferred to remain in their seats, which were predominantly Elder women. This active management of the forum was vital, particularly in a local context where men traditionally hold public speaking roles, to ensure that comprehensive and strong gender representation was captured throughout project decision-making processes. Some of the stories and perspectives shared by the women went on to influence the outcomes of the hearing, including targeted measures that addressed social protections and safety measures for women.

Information-sharing and Consultation with the Company

Expectations will need to be established with the company regarding ongoing communications. This is normally covered early in the process with a Memorandum of Understanding (MoU) on an agreed communications protocol. The rules set out in an MoU can help avoid situations where a company is talking to individual members of a community, creating potential for "divide and conquer," where the company supports community members who are favourably inclined to their project.

The MoU should cover what information will flow from the community to the company and the company to the community, and how that communication will occur. It may also cover timelines for review of documents, forums in which information will be made public, and the format information will take, such as languages, lengths, plain language requirements, use of images, etc. The MoU usually establishes a single point of contact, such as the negotiating team secretary.

The rules set out in an MoU can help avoid situations where a company is talking to individual members of a community, creating potential for "divide and conquer," where the company supports community members who are favourably inclined to their project.

Within the community, it is important to ensure all members of the team and, indeed, all adult members of the community (if this is feasible) know of the protocol. Unauthorized or inappropriate release of information to the company, for example, about the community's priorities for the negotiations, can seriously undermine the community's negotiation position. Any one-on-one meetings between individual community workers and staff of the developer should have a clear, limited mandate, for example, a quick phone call with the company to review items on an agenda or to schedule a meeting. No one should ever negotiate alone with the developer. All Indigenous government departments, business corporations and other entities should be informed about and comply with the communication protocol.[119] The MoU should be considered publicly (e.g., at a public meeting) prior to finalization, and information about its content should be disseminated again after its finalization.

Some communities have developed consultation policies, standard exploration agreements, or other documents setting out pre-development contractual obligations, which they share with companies in advance of giving approval to begin work and/or beginning negotiations. These policies (e.g., the Łutsël K'é Exploration Policy, or the Taku River Tlingit Resource Consultation Policy, available on request from the Taku River Tlingit) clearly and consistently lay out a community's early expectations of the developer during the early phases of engagement. ■

Information-Sharing with the Community: Determining When and on What Issues

Community consultation leading up to the negotiation phase is quite different from that of the outset of the process, when the emphasis was on whether, in principle, a community might want a project to proceed. In this phase, the negotiators will be establishing community priorities and checking that draft negotiating positions are in line with these.

Because of time constraints and limited funding, it is impossible to have constant interaction between the communities as a whole and staff, negotiators and consultants.[120] Therefore, the negotiating team must be strategic in its use of community engagement, indicating the importance of having an explicit consultation plan. This is something the negotiating team will have to define, but some of this work may have been undertaken earlier if interest mapping of the community was done.

Now, the critical question is: When and on what topics is information-sharing and community participation in priority setting, or planning appropriate? Decisions will have to be made about how broadly to consult at each decision point. At some points, it will be critical to have very broad consultation, while at others it may be appropriate to narrow the circle of those consulted.

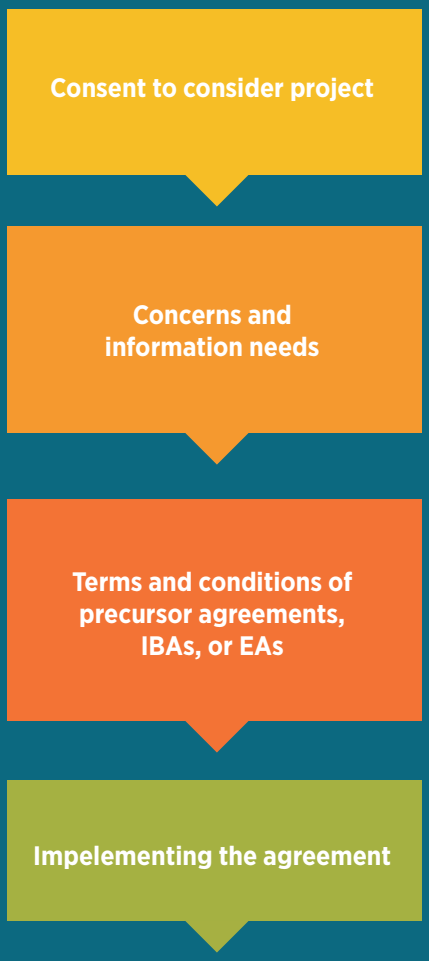
There should be a phased approach to assessing a community's view of a project, of elements of the project, and of what might be included in a negotiated agreement (see Figure 3.4 on the following page). In the community engagement plan, critical milestones should be identified where sharing of progress and/or gaining acceptance from the community is required. In each case, the negotiating team needs to be clear on what decision it is asking for, and it needs to provide the right information so that this decision can be made well. Often, the lead negotiator can become a central point person who talks with people at events and in their homes about the main details of the agreement. If there is one person who people in the community can talk to, it can help to have this person identified as a key contact for anyone to go to with concerns or needs.

Often, the lead negotiator can become a central point person. If there is one person who people in the community can talk to, it can help to have this person identified as a key contact for anyone to go to with concerns or needs.

To gauge community sentiment at key points throughout the process, the negotiating team may need to:

- **ATTAIN INFORMED CONSENT** to consider project negotiations (see Section 2), which will require the community to weigh in on whether they might support negotiations with the company and ultimately the development of a project. The team should provide information on community rights and mining impacts. If there is consensus to consider the project, the negotiating team will have the green light to undertake negotiations.

Figure 3.4 A Phased Approach to Communication



- **UNDERSTAND KEY CONCERNS AND INFORMATION NEEDS**, which will require the community to express all ideas about possible impacts. The community will need information on the potential effects, and possibly case studies from other similar sites. The Tlingit, for example, as they prepared for negotiations and the IA for the Tulsequah Chief Project in BC, prepared a document called *What We Need to Know*, which outlined the information the community would require to make a decision regarding the project.[121] This was based on community consultations, as well as a review of materials provided by the company. The discussion paper reviewed the assets of the community, and then requested information on community impacts, wildlife impacts, wildlife populations, road plans and barging options, and on the mine itself.
- **TEST WHETHER THE RIGHT ISSUES ARE ON THE TABLE** when it comes to the negotiation of an MoU and an IBA, and determine the strengths and weaknesses of the community. The negotiating team will need to inform the community of the negotiation positions and topics to cover in precursor agreements, IBA negotiations or IA forums. The community will need to understand the nature of what is being negotiated and what the implications of an agreement are for them. The community will need summaries of any proposed agreements in an accessible form. Consultations on the agreement(s) may need to occur many times, on different topics, and at different stages of negotiations.

The community will need to understand the nature of what is being negotiated and what the implications of an agreement are for them. Consultations may need to occur many times, on different topics, and at different stages of negotiations.

Tracking and Responding to Community Concerns

In some cases, community concerns have been carefully identified in a community issues record (or "log") that can be used to develop core issues of dispute, concern, and agreement.[122] With time and new information, community members may change their opinions on key issues. Leaders and negotiators can keep track on an ongoing basis of the pulse of the communities on key issues. Briefing notes on any meetings that happen in communities can help to track issues and concerns over time. It is important for the sake of unity and maximizing community negotiating leverage that these issues and concerns not be made public without community consent.

This internal community issues log should not be confused with the community engagement or consultation logs compiled by developers, often required by regulatory or environmental assessment agencies. The developer is required to submit a summary of every consultation they have held locally, including the names and signatures of people involved, the issues covered, the date, and the time. The regulatory agency uses these logs to consider whether consultation has been sufficient.

Assess and Improve the Bargaining Position

Self-assessment needs to be done to determine the strengths and weaknesses that contribute to the community's overall bargaining position against that of the developer. Strategies need to be put in place to maintain "strengths" from which bargaining leverage can be generated, and to bolster those areas that are current weaknesses.

The negotiating team can collectively assess the bargaining strength, posing a number of questions together. People need to be able to share their views frankly if this exercise is to work. They also need to be able to raise issues that are sensitive without fear of repercussions. For example, if there is conflict in the community that will be a weakness in the bargaining position, then people need to be able to discuss this conflict and how it can be managed in relation to the negotiations. This internal discussion will help to build consensus and agreement on the possible objectives and strategies of negotiation.

The first focus should be to assess whether the community is well prepared. At another level, the team needs to carefully consider what specific aspects of the project create bargaining weaknesses or strengths (see Table 3.3).

Table 3.3 Bargaining Strengths and Weaknesses

Question	Yes	No
Is the community well prepared for negotiations?	Sign an MoU and expedite the start of negotiations with the developer.	Quickly develop strategies to: keep the company from expediting negotiations; speed up baseline assessments; advance community preparations, including development of a negotiating position.
Is the community united on views on of the project and the agreement?	An ongoing communication strategy needs to be put in place to help maintain that unity.	Time should be allowed and a process set in place to allow the community to work through its differences prior to entering the negotiation process. The best time to begin negotiations is when the community finds itself in a unified position of maximum strength.

Most of the time, the answer will be somewhere between weak and strong on a spectrum, and may reflect a variety of factors rather than a single one. For example, the bargaining position may seem relatively weak if it looks only at the fact that the proposed project is far away (e.g., 200 km) from the nearest Indigenous community, making it difficult to argue that the community has a major interest in, and will be affected by, the project. However, the picture may be very different if the community

is the primary land user in the proposed development area for traditional harvesting, has treaty rights specifically identifying the area as traditional territory, there are no other closer communities, there is an outstanding land claim (or better yet, a finalized one) by the group over the territory, and archaeological records support the group's use of the area since pre-history.

Questions that help **assess the strength of the community bargaining position** include:

- Is the community physically close to the site? Is it on traditional territory? Was the community relocated from its traditional use areas by the government, but was previously close to the site?
- Does the community control access to the site? (Legal advice may be needed on this front).
- Will the project have adverse effects on people, lands, interests or rights?
- Is the community united in its views of the project and agreement?
- Does the community have experienced legal counsel and technical advisors? What preparations (legal and technical) were undertaken by the team and community in preparing for and conducting negotiations that will impact the success?
- Is there a stated need for Traditional Knowledge or land use information in the environmental assessment process or the Crown approval process?
- Is there a land claim clause requiring an IBA?
- Are there unsurrendered title, rights, and interests?
- Is there Crown support for a formal agreement with the proponent before the project is approved? Is there a statutory or common law duty for the proponents or regulator to consult with and accommodate Indigenous interests?
- Do the community and the negotiating team have a clear sense of the project and its impacts?
- Are funds in place to manage this work? The financial capacity of the proponent or other funders to fund research or negotiation processes can influence preparedness.
- Does the proponent have the financial capacity to fund programs or processes required?
- Does the proponent show good will in negotiating fair terms and implementing agreements?
- What other Indigenous groups are likely to be negotiating with the company? What is likely to be their approach? What are the pros and cons of being in touch with them? How might their rights and interests impact the community? What are their relationships to each other and to the company? What roles do they have in assessing projects?

Self-assessment needs to be done to determine the strengths and weaknesses that contribute to the community's overall bargaining position. Strategies need to be put in place to maintain strengths and bolster areas that are current weaknesses.

- What powers do provincial, federal, or state governments have, and when and how will they apply them?
- What powers does the company have, and when and how will it apply them?
- What powers does the community have? When? And how should it apply them?
- What time constraints exist? What is causing them? Can they be shifted? Can they be turned to the community's advantage?

Improve the Community Bargaining Position

Two key factors determine the extent to which Indigenous communities can maximize their bargaining position.

The first is the innate bargaining power available to them, the established bargaining "chips," which is largely influenced by the status of the land involved, the legal context within which projects are developed, and the specific nature of the project.

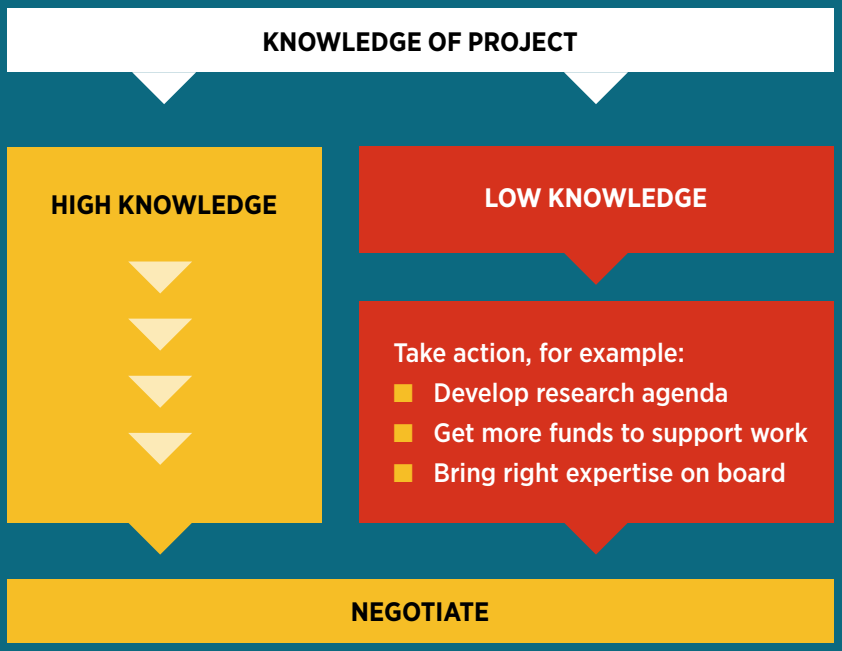
The second is the extent to which the Indigenous community mobilizes the bargaining power they possess and takes advantage of opportunities to enhance that power.[123] For example, even communities that don't have advantageous legal bargaining leverage can attain increased leverage through strong unity, focused goals, and a multi-pronged approach to engaging with the developer (e.g., direct action, strategic alliances with other Indigenous groups or NGOs, and use of the media).

To improve the community's bargaining position, the team must look at each of the components of the bargaining position and determine which are within the control of the community.

There are some things that can't be influenced. So, the first step is figuring out what can and cannot be influenced. For example, if the community is not well prepared for negotiations, then the question becomes: What needs to be done to become better prepared? If it is a weakness that a community doesn't have access to experienced advisors or lawyers, what does it need to do in order to improve access? This may involve pursuing additional funds, but it will also involve searching for appropriate technical people. This line of investigation is drawn out in Figure 3.5.

If the community and team do not have a clear sense of the project, a research agenda needs to be developed to fill those gaps. For example, if there is low or no information about how the company deals with Indigenous people, information will need to be sought from Indigenous groups in the region of the company's other projects. If the company hasn't had relationships in the past with Indigenous people, then their policies on corporate social responsibility or community engagement should be reviewed. Statements about their approach or values can be used in negotiations as leverage. If alliances with stakeholders are weak, support can be built from larger organizations that the community is part of (e.g., Assembly of First Nations, international environmental groups or Indigenous rights groups).

Figure 3.5 Changing Bargaining Power



A key factor is the extent to which the Indigenous community mobilizes the bargaining power they possess and takes advantage of opportunities to enhance that power.

If young people in particular are not engaged, their interests can be identified. For example, the negotiating team can develop a newsletter for young people that emphasizes issues important to them or reach out to them on social media platforms, if that is where they are likely to engage, to find out their concerns and bring them into the process (see *Develop a Communications Strategy* on page 147).

There will be some weaknesses in the bargaining position that can't be changed. For example, the community may have a non-negotiable election date coming up, creating political uncertainty. The key point is to be aware of a potential weakness and manage the negotiations as best possible to avoid the pitfalls associated with it.

For managing weaknesses, two strategies are available:

- One is to hide the weaknesses from the other side. For example, a communication protocol with the company can help keep information about the weakness confidential to the community.
- The second involves putting something in place to deal with the weakness. For example, if there is a vulnerability because of reliance on company or government funding, set up a contingency or emergency fund and hold back a proportion of funds within it so that, if funds are not renewed as expected, there is something in place to carry the community over.

Strengths that communities commonly have are:

- Elders are a key strength, but they may be few in number, and some may be dealing with health challenges. To bring them into the process as a negotiating strength, the participation of Elders may need to be conserved carefully, making sure they are always fully informed, but not actively involved at every point in the process or present at every meeting, so they are not in every little battle. Their energies may need to be preserved for critical points in the process, or critical meetings or hearings.
- Indigenous knowledge is often held about an area or region. This is something the company will not have access to and may not know about. The community holds all the information in this area and can carefully control access to information and decide how it will be used, for example, in public hearings. Having standard methods for collecting and organizing this data in advance of a major project can significantly contribute to this strength.
- Where the project may have a strong effect on Indigenous rights, Crown policy on consultation and accommodation is a source of strength. A strategy should involve knowing the Crown position, and then designing consultation and accommodation requirements to share with the company, instead of waiting for proposals to be brought by the company or the government.

Determine Objectives and Develop a Strong Negotiation Position

Questions to consider in terms of forming the negotiation position are:

- Where do we want to be in the future?
- How can this project help us get there, given what we know about it?
- What is it that we are trying to protect from harm? (i.e., what are we absolutely not willing to trade away?)
- What types of benefits are most important to us? Why?
- What sort of process for decision-making, consultation and governance is likely to be required to get us to where we want to be?
- What can be realistically achieved, given what we know about our bargaining position?
- Given what we know, how can an IBA help us to pursue the communities' objectives?
- The final question: What position should we put to the company in order to achieve this?

Even communities that don't have advantageous legal bargaining leverage can attain increased leverage through strong unity, focused goals, and a multi-pronged approach to engaging with the developer (e.g., direct action, strategic alliances with other Indigenous groups or NGOs, and use of the media).

The negotiating team needs to link information on community-based needs and baseline conditions to the negotiating position. For example:

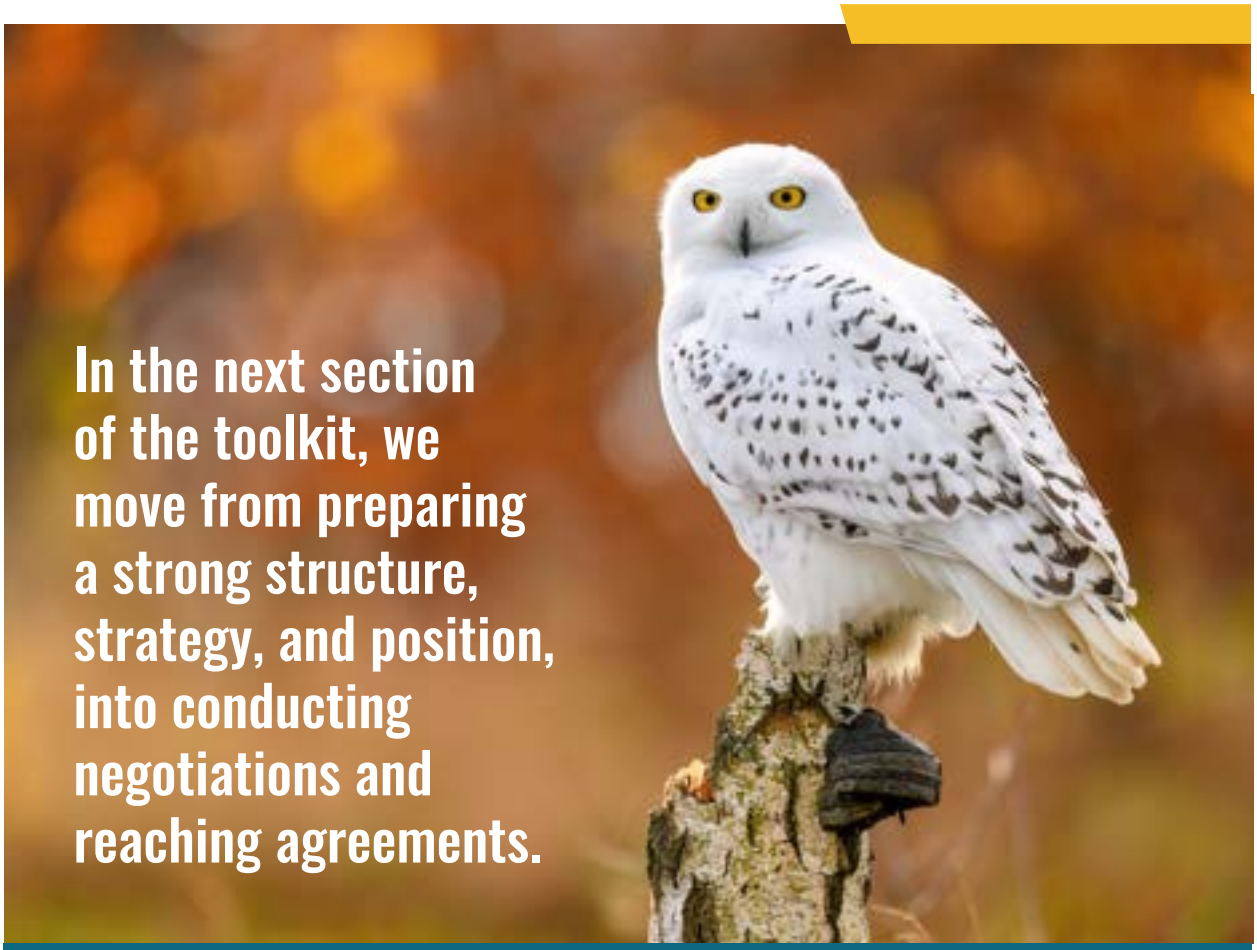
- Cat Lake and Lac Seul First Nations ran an independent Anishinaabe Led Impact Assessment, which identified many proposed conditions set out for a proposed project. These were fed to the IBA negotiations table, along with the community-based studies that had been completed, to form the negotiation mandate and Term Sheet.
- The Tłı̨chǫ Nation in the NWT pursued a different approach each time it negotiated an agreement with the three diamond mines in the area, based on community priorities. For example, during negotiations for the second agreement, business was identified as the top priority through outreach, and this was the main objective of the negotiation of the agreement. In the third agreement, the focus was entirely on the traditional economy, so the negotiators focused primarily on attaining funds for a harvester program.

In some cases, the community position will be very clear and leave no room for compromise. For example, if the community has decided that it simply will not accept a mine project if it involves

the use of a particular lake for tailings disposal, then this is the only position that can be put on the table. In other areas, there will need to be some compromise to get an agreement. This often occurs in relation to financial payments. In these cases, a bargaining position will need to be put out that is more ambitious than expectations. However, it is important not to put demands on the table that are unrealistic, given what is known about the project. This may lead the company to adopt an entrenched position around a low offer or even walk away from the negotiations completely because they just don't think they will be able to reach a deal. ■

Summary of Section 3

- Form a structure(s) for negotiations.
- Set out a clear mandate that is constantly refreshed. Ensure leadership sanctions the mandate.
- Develop a long-term strategic research plan and know how your community goals fit in.
- Decide on what kind of data you will need in the short, medium and long term.
- Make a plan to manage, file and store incoming data.
- Decide who will have access to data, and how confidentiality will be maintained.
- Give clear guidance to consultants on how you want information analyzed, presented and brought back to the negotiating team and community.
- Develop a budget for the work. Seek the funds from the project proponents, the government, and/or foundations.
- Determine what information will be collected, using the section *Information Needs and Sources, by Topic* on pages 114 to 120 as a starting point.
- Establish baseline conditions in the community to address needs and capitalize on resources.
- Define how information will be communicated.
- Establish a single point of contact.
- Never let a single individual meet alone with the proponent to discuss the issues. Always bring at least one other person or a note taker.
- Assess and improve your bargaining position.
- Determine objectives and develop a strong negotiation position. ■



Structure of the Toolkit

SECTION 1
INTRODUCTION

SECTION 2
ANALYZING
the project and the broader environment

SECTION 3
PREPARING
for negotiations and establishing negotiating position

SECTION 4
CONDUCTING
negotiations and reaching agreements

SECTION 5
IMPLEMENTING
agreements and maintaining relationships

NOTES TO SECTION 3

83 O'Faircheallaigh 2000.

84 O'Faircheallaigh 2000, 7.

85 O'Faircheallaigh 2000, 7.

86 Barsch and Bastien 1997.

87 National Inquiry into Missing and Murdered Indigenous Women and Girls 2019.

88 National Inquiry into Missing and Murdered Indigenous Women and Girls 2019.

89 Weitzner 2006, 21.

90 Barsch and Bastien 1997.

91 Barsch and Bastien 1997.

92 FNEATWG 2004, 7.

93 Speaker in Weitzner 2006, 22.

94 Barsch and Bastien 1997.

95 Innu negotiator in an interview for this toolkit.

96 Global Indigenous Data Alliance, n.d.

97 The First Nations Information Governance Centre, n.d.

98 Inuit Tapiriit Kanatami 2018.

99 O'Faircheallaigh 1995b, 9.

100 See Innu Nation Task Force on Mining Activities 1996.

101 FNEATWG 2004, 21.

102 We use the term SIA as a catch all phrase to cover all considerations related to social, economic and cultural well-being, including wildlife harvesting, access to and relations to land, and physical heritage resources. Elsewhere, you may have seen the terms socio-economic impact assessment, cultural impact assessment, heritage resources impact assessment used for these types of studies.

103 See FNEATWG 2004; MVEIRB 2007.

104 For Socio-Economic Guidelines see MVEIRB 2007.

105 Gibson et al. 2017.

106 For example, Gibson 2008; Storey, Shrimpton and Clark 1989; Beach, Brereton and Cliff 2003.

107 Although guessing when this is, given increasing or decreasing mine lives based on a variety of geological and economic factors, is an inexact science at best. In addition, communities need to be aware of the likelihood and risks associated with temporary as well as permanent closures. Temporary closures may have similar "boom-bust" effects on society and economy.

108 Action research or participatory research involves communities actively in the definition of the research questions, the research methods and process, and in the interpretation and implementation of findings. Some key goals are to build internal research capacity, ensure that local context is integrated into the study, and to ensure that findings are acted upon locally.

109 FNEATWG 2004, 10.

110 FNEATWG 2004, 11.

111 O'Faircheallaigh 1995a, 4.

112 Hennessy 2007, 2.

113 Bass et al. 2003.

114 Bass et al. 2003.

115 Sweeting and Clark 2000, 51.

116 Bass et al. 2003, 34.

117 Weitzner 2006, 13.

118 Weitzner 2006, 13.

119 O'Faircheallaigh 1995a, 4.

120 O'Faircheallaigh 2000, 7.

121 FNEATWG 2004, 7.

122 Innu Nation Task Force 1995; Taku River Tlingit 1995.

123 O'Faircheallaigh 1995b, 1.

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SECTION 4

SECTION 4

Conducting Negotiations + Reaching Agreements

NEGOTIATION PROCESSES AND PROCEDURES 167

IDENTIFY OPTIONS AND PROVISIONS 185

Legal Provisions 185

Substantive Issues and Provisions 198

Communication 200

Indigenous Access to Mining Tenures 200

Mining Payments 202

Assessing Risk Tolerance for a Given Form of Payment 213

Using Benchmarks to Determine Potential Payments 215

Mining Payment Utilization 217

Structures for Managing Mining Payments 220

Mining Payment Distribution 220

Employment 221

Union Relationships 235

Business Development 237

Access to and Transfer of Infrastructure and Facilities 239

Environmental Management 241

Culture and Cultural Heritage 250

Harvester Compensation and Traditional Use 253

Social Measures 254

Closure & Long-Term Care 254

ESTABLISH AGREEMENTS THAT REFLECT COMMUNITY GOALS 259

Community Review of Confidential Agreements 260

Plebiscites or Referenda 260

Leadership Review and Approval 261

Community Meetings to Obtain Consensus 261

RETURNING TO THE NEGOTIATING TABLE 262

SIGNING AND LAUNCHING AN AGREEMENT 263

SUMMARY OF SECTION 4 264

NOTES TO SECTION 4 265

SECTION 4

Conducting Negotiations and Reaching Agreements

INFORMATION GATHERED AND DECISIONS MADE in the preparation phase should feed into this next phase: conducting negotiations and creating agreements. The first part of this section covers strategies and tactics of face-to-face negotiation. It also deals with issues such as timing, negotiation forums, keeping negotiations on track, and critical 'back-up' functions such as budget management. For example, how do you make sure that everyone on the negotiating team knows what they should be doing, that they do it when they're supposed to do it, that there are lines of authority in place to compel people to deliver if necessary? How do you keep track of resources and make sure you don't find yourself running out of money and so undermine your negotiating position?

The second part covers many legal and substantive clauses that can be included in agreements. It does not present template agreements, but rather a range of ideas and options gathered from the literature and existing agreements. No discussion can cover every substantive item that could be included in agreements, and we focus on the major areas that tend to be of primary concern for almost all Indigenous communities in Canada.

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

Finally, the third part discusses keeping agreements in line with community goals and finalizing them.

This negotiation phase will allow you to:

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

Negotiation Processes and Procedures

Good faith negotiations require both parties to talk together in a way that is agreed to from the start. The company should show that it responds quickly to issues, regularly and clearly. It should provide all the information the community needs to make an informed decision and give leaders enough time to discuss proposals and agree on things in their customary way.[124] Communities also have to engage in good faith negotiations. As discussed in Section 2, if the company attempts to consult through every feasible manner, but is frustrated by a lack of community response, the Crown may still consider the company to have consulted and accommodated the community and thus issue permits for a project. Therefore, negotiation should be done in good faith. This does not mean hard bargaining cannot occur.

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

If the company attempts to consult but is frustrated by a lack of community response, the Crown may still consider the company to have consulted and accommodated the community.

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

- A community has to come up to speed on a tremendous amount of technical information in a very short time, and high staff turnover can further undermine information transfer and understanding.
- People can feel excluded because they don't understand the technical language that is used to describe the mining process and its potential impacts, especially if there is limited access to trusted, independent technical advice.
- People may not have the capacity to cover all the issues requiring review, and consultation fatigue can further limit meaningful engagement across multiple topics. The schedules that are created often force decisions on people, and they feel they have no power to change the timeframes for decision-making. There is commonly a difference between the timeframe that communities need to make informed decisions and that of the developer and regulator.
- Often, information is brought to people without allowing for informed decisions to be made, so that when a developer consults on a proposed development, they may negotiate the tonnage but not the principle of whether there ought to be a project or not.

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

Roles for Advisors and Community Negotiators

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

- Backing up the political leaders and the community in dealing with the company and the government;
- Organizing and coordinating the negotiations, for example, through arranging meetings, keeping records of meetings, and managing correspondence;
- Carefully analyzing the offers from the company;
- Making concise briefings for the community negotiators about offers, comparing these offers to other agreements, analyzing how far these offers go to meet community goals, and developing alternatives to put back to the company;
- Doing the hard talking with the company when it is better for community negotiators to preserve good working relationships with the company;
- Helping get support for the community from the government and political groups; and
- Assisting with post-agreement planning (e.g., by helping to set up trusts to manage income flows).

Advisors may do the hard talking with the company when it is better for community negotiators to preserve good working relationships with the company.

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

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

After the negotiations, the advisors will often help monitor the agreement to make sure things are happening as they should, and back up community leaders or community representatives on implementation committees in taking action if things are not happening (see Section 5). Maintaining continuity between negotiation and implementation staff can help ensure agreements are implemented as intended, as even well-drafted agreements require ongoing oversight, interpretation, and relationship management to be effective in practice.

Running Meetings

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

Table 4.1 Key Tips for Managing Negotiations

DO	DON'T
Remain united, regardless of the issue or the cracks that can emerge in discussions or dynamics of a negotiation. Argue and disagree, if need be, but do it in private.	Never show disunity to the other side. Never argue with someone or disagree with someone from your team in front of the government or company.
Always demonstrate proper respectful protocol in meetings. For example, if you always shake hands with the people you respect in your culture, shake hands with everyone in the room.	Never make personal insults or disregard your own cultural protocols in a negotiation.
Take the time needed to be well-prepared and keep all interested parties informed. Keep other parties advised of progress. Review notes from the last negotiation session in preparing for the next one.	Don't let yourself be rushed by the other side. Hasty decisions are often bad decisions.
Make a plan for the meeting and stick to it. If things are going off track or if you think it would be good to change the plan, take a break or call a caucus and talk about it.	Never change course midstream and move to a topic you don't have agreement on among the negotiating team.
Try to agree on a way to communicate behind the scenes. This can be a group text that all members of the negotiation team are on, or a google doc that all negotiation team members have up on their computers. If there is a need for caucus, feel free to call for it.	Don't assume that all team members always receive all behind-the-scenes messages. The lead negotiator or meeting chair, in particular, may have a hard time checking these messages, and should be supported by other team members.
Agree on who will speak on issues (often the lead negotiator) and on the issues to be discussed. Establish a protocol amongst the team for how this will be handled in real time, recognizing that preferred approaches may vary among negotiators.	Don't let speakers who have not been briefed or that could interrupt the flow have the floor.

Table 4.1 Negotiation tips continued

DO	DON'T
Make sure the positions put forward have been carefully thought out. If the company brings brand new material to the table, don't react until there is time to consider it together.	Don't talk about half-baked ideas or proposals that the company brings forward. When in doubt, ask more questions.
Make sure proposals are understood, ask questions if need be, then consider the proposals in private with the negotiating team. If anyone doesn't understand something, or feels uncomfortable, ask for a break and talk about it.	Don't respond if the company or government puts an offer on the table, whether you think it is good or bad. Don't make snap decisions without consulting the negotiation team and, where appropriate, leadership or the broader community.
Be clear about the jobs that different people have and support people in the jobs they have been given.	If someone has been told to play a friendly role, don't pull them into an argument.
It may be effective for people's jobs to change over time.	Don't leave someone who is ineffective in their role in that position. Change them to a new position or remove them altogether.
Take notes on every meeting and always have more than one person at a meeting.	Don't let anyone meet alone with the company on any substantive issue.
Ask lots of questions and ask for clarification of any point a negotiator is unsure about.	Don't allow insecurities to silence questions. Attempting to keep up appearances as intelligent, well-informed people can inhibit negotiators from asking important questions which may result in the loss of valuable insight and slower progress.
Listen carefully to what people on the other side say and watch them carefully.	Don't 'turn off' because you don't like what they are saying.
Look out for any disagreements on the other side. It may mean that the company has not worked out exactly what it wants, which may provide you with an opportunity to encourage company negotiators in a direction that is positive for the community.	Don't ignore their disagreements and not think about what it could mean for your position or negotiations strategy.
Always have a debriefing session after each negotiation. Bring up anything anyone noticed during the meeting. Even small things are important so make sure you bring up anything you notice. Keep notes of the discussion. Assign any action items that came up in the negotiation meeting.	Don't miss debriefing sessions or hold none at all.

LARK SPARROW, PHOTO CHRIS WAGNER

Shaping the Negotiation Agenda

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

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

One option is to start with some easy issues, deal with them in detail, then introduce harder issues at the level of principle, without discussing details.

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

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

Managing Offers

The negotiating team will need to make and receive offers. As a general rule, it is better for Indigenous communities if their proposals can form the basis of negotiations. As one Indigenous negotiator said, "You have to hold the pen." This helps define the agenda for negotiations and ensures the most important issues receive priority in the negotiations. Setting the agenda does not necessarily mean that the community's proposal would address every aspect of an agreement or be written in legal language. Rather, communities may want to focus their efforts on those aspects of the agreement that are of high priority to the community, for example, environmental management, procurement, and financial benefits, and let the company propose offers for the lower priority aspects. Companies will, of course, put their issues on the table, but it is better if this occurs within a framework that has been established by the Indigenous side.

When it comes to money matters, a flag should be raised if the company is the first to put a proposal on the table.

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

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

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

Tactics at the Negotiation Table

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

Principle of Equivalency

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

BIG HORN SHEEP, PHOTO CHRIS WAGNER

Walking Out

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

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

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

Negotiators should make the basis for a walk-out very clear, emphasizing that the step is not taken lightly and setting out the specific reasons for it. This should be followed up by a letter to the company CEO or board of directors.

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

In order to leave a basis to resume negotiations, Indigenous negotiators should always make the basis for the walk-out very clear, emphasizing that the step is not being taken lightly and setting out the specific reasons for it. This should be followed up by a letter to the company CEO or board of directors setting out the circumstances involved and reiterating the willingness to engage in negotiations if the company ceases the offending behaviour and generally displays its good faith. Where appropriate, senior political or regulatory officials responsible for permitting or enforcement may also be copied to encourage the proponent to change course.

Bringing in ‘Power Figures’

It can be particularly powerful to bring in people who hold special roles within the community, such as Elders, women or children. Such interventions on key issues have been very influential when used carefully. In one case, women negotiators spoke to a mining company CEO about youth suicide in their community. They led him to a very different understanding of the demands that community negotiators were making. The classic case is to have Elders talking about culture and environment,

about their responsibility to look after their traditional lands, when negotiating environmental provisions. These groups can be less likely to face attack from the company, unlike negotiators or staff.

Just like the tactic of walking out, bringing in important figures isn't something the negotiating team can do frequently. Indeed, as discussed in detail in Section 3, Elders may have limited energy, and their energy needs to be harboured carefully (see page 122).

Removing Harmful People

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

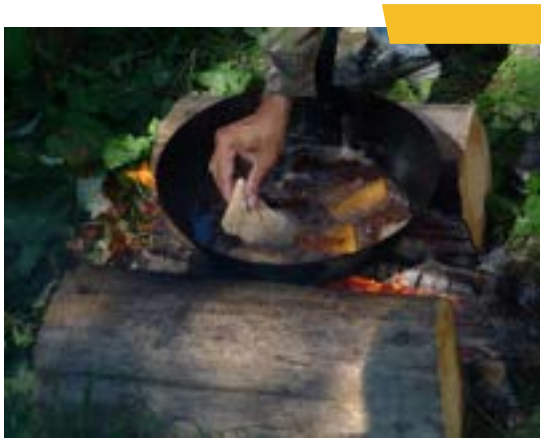
If a "toxic" person is kept on the negotiating team, they may poison the relationship beyond repair. The first thing to do is to identify clearly if the person is indeed threatening to derail the negotiation or if their role is being misrepresented by company negotiators trying to marginalize them, or because of internal tensions. In other words, ensure you have an accurate and complete picture of the situation, rather than acting on hearsay. Look at the record of conversations, observe a negotiation, and then talk to the people who work most closely with the negotiator. Are they really toxic, or do they bring an element of power and forcefulness to the negotiation? Sometimes, an intransigent

person can be a great negotiator if there are other negotiators who are more flexible. This can work in your favour, as the other members of the negotiating team will seem increasingly reasonable to the company team. Sometimes a negotiator isn't toxic, but just isn't the right fit for this particular negotiation.

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

Meeting Locations

The location of meetings may appear to be a matter of organizational detail, but it can have subtle but powerful effects. Being mindful of the kinds of places that people are most comfortable in, including considerations like natural light, sound transmission, and temperature control, can help all negotiators focus on the issues at hand. Meeting consistently on company territory can make community negotiators feel like they have less power, are not with their own people, and can shift the balance in favour of corporate priorities.



Meeting in the community is an excellent way to communicate information back to community members on the negotiation. It may also allow company negotiators to come to know more about a community and what it cares about.

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

Meeting Language

The choice of language to use is particularly important if the meeting is in the community. Meetings can be held in the Indigenous language, with translation for the company, so that there is a solid understanding on both sides of concepts and proposals. It is very useful to conduct the meeting in the Indigenous language if outside community members are permitted into the meetings, or are attending to attest to the importance of an issue. If meetings are run in English or French, make sure to prepare the translators well and ensure that things are said simply so they can be translated and understood.[125] It is a wise practice for translators to work with key negotiators to understand the critical terminology (e.g., acid rock drainage), so they are prepared for negotiation sessions in advance.

Company Tactics

Proponents will also have specific tactics they attempt to deploy to shift the balance in their favour. Potential proponent tactics and community responses to these tactics are listed in Table 4.2.

Table 4.2 Selected Company Negotiation Tactics and Community Responses

Company tactic	Potential community response
Moving to legal language immediately. A proponent may introduce a "draft IBA" at the outset of negotiations, ostensibly to speed up the process. This anchors every single provision to the proponent's favor. It also shifts the discussion immediately from a principled discussion of values and objectives, to a legal-language discussion where lawyers are needed at every moment to translate and interpret clauses and provisions.	Respond with negotiation principles, and set aside the company's IBA. Do not allow any of the community's negotiators to respond to it.
Making statements like "Indigenous businesses are more costly" which may be untrue, but put a community's negotiators at a disadvantage.	Acknowledge disagreement in the moment, and bring facts to the table if/when these are available.
Creating a sense of urgency. Companies are beholden to their internal timelines, and company negotiators will look good if they can get an agreement rapidly.	The company's remarks about urgency should be acknowledged, and some internal work can be done to assess the likelihood that they represent a real deadline.
Divide-and-conquer approaches. The proponent might engage separately with specific leaders, departments, community members, or neighbouring communities to weaken unified positions.	Establish and enforce clear internal communication and decision-making protocols. All communication should go through the negotiation team.

Tactics Outside of the Negotiation Room

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

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

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

One community set up a summer and winter camp near an advanced exploration site to keep an eye on things and establish a continuous presence. This emphasized to the company the significance of the site.

Documentation and Communication

Agendas should be prepared and circulated well in advance of meetings. There should be no situations in meetings where community negotiators have to respond without adequate preparation, including on revised drafts of an agreement. Agenda items should be specific, track progress, and lead toward outcomes, not just provide a basis for a meeting for the sake of meeting. Agendas should generally be discussed at the end of each negotiation session or in interim meetings between lead negotiators. At a broader level, it is useful for both parties to try to maintain an ongoing schedule of future meetings so that people are aware of the commitments they have to make and see how individual meetings fit into the broader scheme of negotiations. This is particularly true where there are side or technical tables, which must report back to the main table before progress on a certain topic can be made.

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

Agendas should be prepared and circulated well in advance of meetings. There should be no situations in meetings where community negotiators have to respond without adequate preparation.

Information and evidence from meetings may need to be used in future meetings, so all meeting notes should be transcribed and then carefully filed. As individual topics are discussed, there is often a lag time between meetings, where one party makes a statement that the other party needs time to consider and respond to. As negotiations become more complicated, a topic-tracking tool should be used to ensure that all notes about a specific topic are compiled in one place, rather than across dozens of meeting note documents. One option is a spreadsheet that records the topics of conversation and progress made on each topic (see example in Table 4.3 on the following page). If the parties are working with a draft agreement, an alternate method is having text boxes with internal notes inserted into an internal version of the agreement for community negotiators, so they have their negotiation position and background of previous discussions on any given topic at their fingertips when it comes up for discussion.

If decisions are made to pursue legal action in the future, it is important to have a record of negotiations and of communication between the company and the community. This may also be used in the environmental assessment process to determine whether the community has been adequately consulted and accommodated.

Communication outside of meetings also needs to be carefully documented. All significant communications should be in writing. All exchanges of draft materials, especially negotiating positions, need to be carefully documented with every version of agreement text retained and filed. Phone calls of significance should be documented. Oral communication between individual staff can be important in maintaining communication between meetings and in canvassing proposals that can form the basis for developing an agreement. However, where individual staff members engage in significant verbal discussion of negotiation issues, they should maintain file notes because attempts may later be made to misrepresent the verbal communications.

Table 4.3 Example of Agreement Tracking Table

Topic	Initial proposal	Meeting notes	Subsequent proposal	Status
Member's ability to protest / legal certainty	Company: Nation will not obstruct or interfere with access to the Project Area by Company, its employees, contractors, agents and assigns.	Internal Meeting January 4: Need to make sure members are free to protest as individuals. Negotiation Meeting June 15: Company: Understand that community members have to retain the right to protest as citizens, but should not purport to represent Nation. If a big protest is happening, we want Nation to say that they officially support the mine.	The parties agree that the Nation's government is not responsible for the actions of its members, but will not support community members if they protest the project.	Have legal draft language.

Keeping Things on Track

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

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

A survey of the time taken for agreement-making reveals vast differences: the Troilus agreement was negotiated in four days, Ekati in 90 days, Musselwhite in three years, and Cominco-NANA took nine months. The key issue is to avoid a worst-case scenario of rushed and uninformed negotiations.

A quick survey of the amount of time taken for agreement-making reveals vast differences: the Troilus agreement was negotiated in four days, a legacy mine agreement in the north in six months, the Ekati agreement in 90 days, the Musselwhite agreement in three years, and the Cominco-NANA agreement took nine months.[126] The key issue is to avoid a worst-case scenario of rushed and uninformed negotiations, resulting, for instance, from poor negotiation preparation, lack of Indigenous group experience, pressures from government and the speed of permitting, multiple Indigenous groups and multiple projects in the region, few internal resources, and intra-community tensions about the project.

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

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

Budgets

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

A few pointers that can assist in managing budgets:

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

PHOTO JONAKI BHATTACHARYYA

Relationship Building

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

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

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

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

"Before we actually talk about specific issues, we talk about what we did last weekend. It sounds touchy-feely, but it does add value. It creates respect, empathy and mutual interest. You want to get corporate people to the point where they are curious about your trap line."

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

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

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

Grounding the Agreement in Indigenous Law and Values

Because IBAs are a legally binding agreement that operates within colonial laws, careful work should be done to shape the IBA in ways that reflect and strengthen the community's Indigenous laws, values, and aspirations. Through this work, agreements can become tools for cultural revitalization and expressions of Indigenous governance. Some potential pathways include:

- Enacting Indigenous laws, and ensuring negotiations respect these laws. Two such examples are the Secwépemc Land and Resources Law Research Project,[127] and Manito Aki Inakonigaawin, a law enacted by the Grand Council Treaty #3 in 1997.
- Working closely with Elders and other knowledge holders to ensure that leadership and the negotiation team are aware of Indigenous laws that apply to the negotiation, land management, and decision making about the land.
- Ensuring that terms are grounded in community engagement and community priorities.
- Naming the IBA in the Indigenous language. This can help ground the agreement in the language and culture, help community members understand what the agreement is about, and assert the Indigenous language.
- Referring to relevant Indigenous laws, treaties, UNDRIP, etc., in the agreement.
- Include Indigenous laws and concepts in their original language, especially where a direct English translation or concept does not exist.

Indigenous laws contribute to the regulation of companies and their projects. With respect to negotiations, Indigenous laws can set a framework and help distinguish between negotiable and non-negotiable items.

An example of a community-based Indigenous law is the Yinka Dene 'Uza'hné Surface Water Management Policy. This policy, together with the Yinka Dene 'Uza'hné Surface Water Quality Standards, was enacted by the Carrier Sekani Tribal Council to protect the waters in Nadleh Whut'en or Stellat'en territory based on standards determined by the Nations. This policy regulates current projects and will also apply to any future projects proposed on Nadleh Whut'en or Stellat'en territory.

Developing community-based laws prior to negotiating an agreement can be an effective strategy in building leverage and ensuring that companies meet standards and requirements set by the community. ■

- Finalizing the agreement only after it has been translated into the community's language and reviewed in that form.
- Recognizing that the process of negotiation, and the community engagement that is done to support negotiations, may open internal community discussions about Indigenous law and hereditary leadership. The community may need to do work to, for example, rebuild traditional governance practices while they negotiate.
- Having a group of Elders or knowledge keepers who were not involved in the negotiation of the agreement review it in its entirety before it is finalized. This can be framed as a wise practice, similar to having an independent legal review of the agreement near the end of negotiations.

Identify Options and Provisions for Negotiated Agreements

This section covers a wide range of provisions that may be included in agreements.

- We deal first with the **LEGAL COMPONENTS** of agreements (see Table 4.4 on page 186 for an overview of legal issues) — for example, how people are bound in these agreements or what happens if ownership of the project changes hands.
- We then review the **SUBSTANTIVE COMPONENTS** of an agreement, such as education, training, and financial provisions, among others (see Table 4.5 on page 199 for a full listing of the substantive issues addressed in the toolkit).

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

Each community has different goals, resources, and unique requirements. This discussion outlines the issues covered by IBAs and some approaches in dealing with them, not to suggest a specific template that must be followed.

Legal Provisions

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

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

Precise, crisply-worded agreements lend themselves to implementation because it is clear who is required to do what and when they have to do it, making it easier to identify implementation problems and act to correct them. Some negotiators argue against tightly crafted provisions, arguing that this may place limits on flexibility and adaptivity as the Parties live the realities of implementation together.[128] However, flexibility can be built into tightly crafted and precise agreements, for example, by providing for alternative approaches where problems are encountered, or including mechanisms that adjust automatically to changing circumstances. We provide examples of such approaches later in the discussion. A well-drafted document can provide a foundation for a workable relationship between the parties. A poorly drafted one can result in a constant struggle over the meaning of an agreement and the responsibilities of the parties under it, particularly as the original negotiators may not stay through to the conclusion of implementation.

Avoid loose terms such as "when possible," "if feasible," or "where reasonable."

Table 4.4 provides a full list of the legal provisions described in this section. After reviewing these, the negotiating team can use this table to indicate the relevance and importance of individual issues and provisions to the community, as well as order them differently based on level of priority.

Table 4.4 Checklist of Legal Provisions

Topic area	Relevance to community
Background information or recitals or preamble or objectives	
Parties	
Definitions and interpretation	
Definition of project area	
Principles and goals	

Table 4.4 Checklist of Legal Provisions continued

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

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

Background Information, Recitals, Preamble or Objectives

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

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

These clauses are usually listed alphabetically (A, B, C, D), not by numbers, so as to keep them separate from the terms of the agreement. Immediately after this preamble, there is usually a clause stating that the rest of the agreement is legally binding.[129]

The preamble may include:

- Reasons for entering into the agreement;
- Intent of the parties — sometimes there can be different views, which can be expressed so that each party's view is laid out;[130]
- Description of rights, commitments and interests (e.g., mining company is holder of listed mining leases);[131]
- Description of the type of agreement;
- References to other agreements previously held by the company and the community;
- References to other related processes, such as treaty or other land claims settlement negotiations, court cases, assessments or legal actions;[132] or
- Reference to government policies that underpin its commitments in the agreement.[133]

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

Parties

These are the people, companies, associations and governments who, upon execution of the agreement, are to be contractually bound to the terms of the agreement. The party or parties from the Indigenous side are usually the rights-holding group.[134] This can be the First Nation, Indigenous community, land-holding corporation, or other governing body, but there are many options for who enters into the agreement. Provisions in an agreement are only binding on the parties who signed it.

Definitions and Interpretation

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

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

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

Definition of the Project and Expansion of the Project

Negotiators should watch for clauses that allow the project to be expanded without amending or renegotiating the agreement. Some agreements seek recourse through clear penalties or automatic increases in benefits for the nation. Other clauses allow the nation to make the decision about whether the agreement will cover expansions and how the nation's interests will be addressed.

Principles and Goals

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

Consent

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

Toolkit author O'Faircheallaigh, for example, in developing criteria for evaluating IBAs, identified seven different points on a spectrum, from supporting only the grant of specific leases required for a particular project, to open-ended support for anything a company wants to do.[135] Providing unlimited support can seriously limit a community's independence and ability to protect its interests, for example, by preventing it from participating in environmental impact assessments or dealing with environmental groups that oppose a project.

If a company is going to provide substantial financial and other benefits to a community, it is reasonable for it to demand community support for the grant of mining leases, without which a project cannot proceed. However, it may be entirely unreasonable of the company to expect unqualified support for anything it wants to do. So this is an area that requires careful consideration and expert legal advice to ensure that Indigenous communities do not bind their hands in ways they did not intend. For example, the relevant provisions should not limit the ability of the group to freely participate in public regulatory forums. Nor should they interfere with the rights of individual community members to join unions, engage in organizing workers on site, or participate in a strike.

For example, Article 26 of the Nunavut Land Claims Agreement explicitly precludes the requirement that Indigenous parties refrain from participating freely in regulatory proceedings in relation to proposed projects. On the other hand, many agreements involve broad commitments that cut off this option, stating for example that "Subject to (the mining company) performing its obligations pursuant to this Agreement, the (Indigenous parties) shall not institute any legal proceedings or engage in or undertake any other actions or activities to prevent or delay authorization of the (mining project)."[136]

Independent Legal Advice

This states that the parties received independent legal advice.

Liability for Expenses

This section may specify that one party assumes legal or negotiation costs, that each party pays its own expenses, or that a party receives a payment for administrative costs on execution of the agreement. Often this detail is dealt with in a Memorandum of Understanding (MoU) — see *Precursor Agreements* in Section 3, on page 126.

Commencement and Expiry

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

Warranties and Authorities and Succession

This section usually states that the group has the authority to enter the agreement, that all persons identified have authorized the making of the agreement, and that the agreement is binding to successors to the parties. As Canadian law firm Woodward & Company notes, "this may be a unique matter of customary governance for a First Nation and may require an express representation that the First Nation signatories have the ability to bind their members and respective heirs."[137] Any internal community discussion required on the decision-making process and what entity is authorized to negotiate an IBA should have been resolved at the onset of negotiations (see Section 3).

Dispute Resolution

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

- How to make notice in relation to the existence of a dispute (usually written) and a timeframe for this (e.g., a period of time to resolve the issue, such as 30 days);
- A notice of dispute usually triggers an obligation for both parties to discuss or negotiate in good faith to resolve the matter to their mutual satisfaction;[138]
- Appointment of a mediator or facilitator (and process for deciding on this person and who pays for this person);

- Good faith negotiations with a mediator (where, when, cost and for how long);
- Arbitration if mediation fails; and
- The court process, usually to be used only if all else fails, and may only be eligible on certain provisions.[139]

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

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

Confidentiality

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

One critical matter involves the release of information on negotiations to community members. In Australia and Canada, Indigenous negotiators are usually free to inform communities about all aspects of negotiations, except for any commercial information provided by companies (see *Corporate Confidentiality Clauses* on page 130). In some cases, Indigenous leaders have chosen to restrict access to such material to their commercial advisors, who are free to offer advice to community leaders and members on the basis of confidential information, but not to disclose it.[140] This means that the leaders are unconstrained in communicating with community members and cannot be accused of withholding information from them.

Negotiators should be cautious about accepting restrictions on informing communities about the contents of proposed agreements, and this can cause problems. For example, in the Deh Cho in 2009, a plebiscite was held to ratify an Access and Benefit Agreement with respect to the Mackenzie Gas pipeline. The community was not able to review the agreement, because it was confidential. Very few people ended up voting, and the plebiscite had to be disregarded because it did not meet the minimum thresholds. Confidentiality tied the hands of the leadership and denied the community critical information. See *Community Review of Confidential Agreements*, on page 260, for strategies to review confidential agreements with community members.

There are obvious dangers in withholding information on an agreement from the community. First, it is likely to cause suspicion, friction and disunity in communities, which itself constitutes a negative social impact from development, and is likely to undermine the community's negotiation effort.

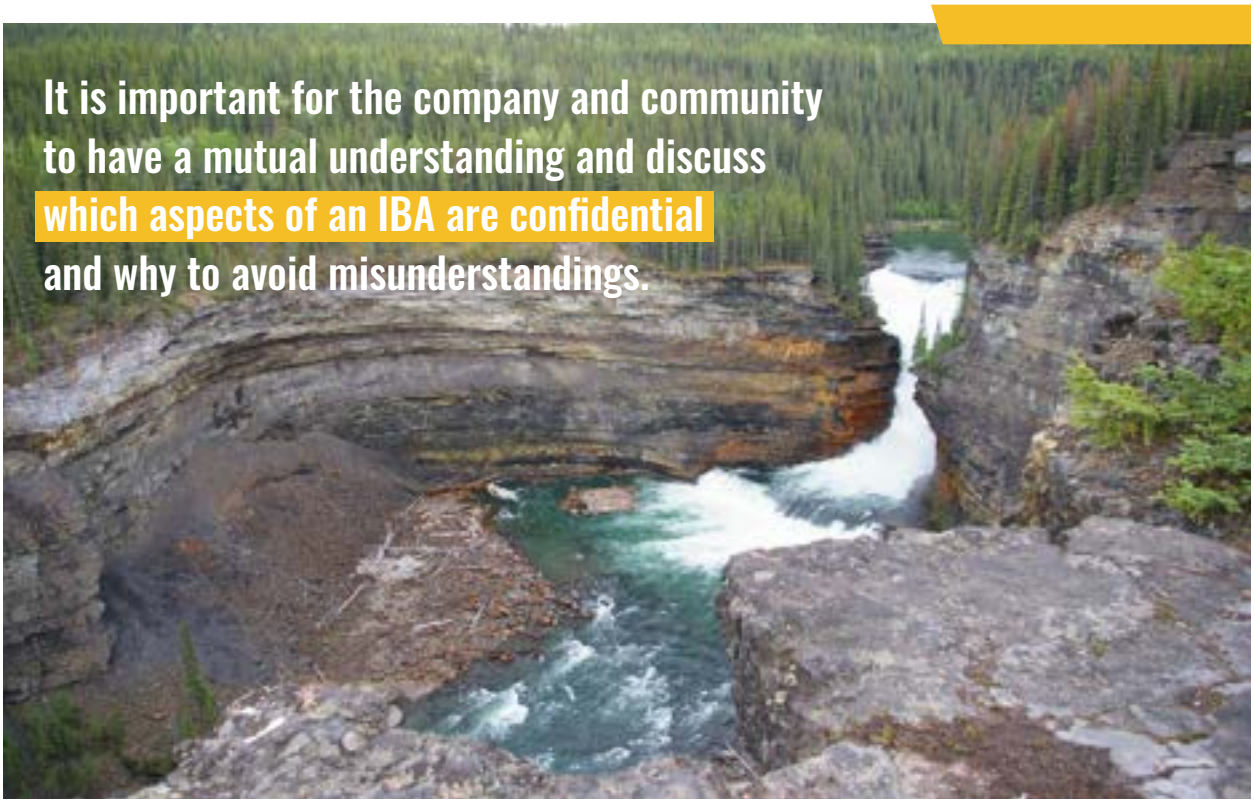


PHOTO JONAKI BHATTACHARYYA

Second, it runs contrary to democratic principles and to the norm of Indigenous free prior informed consent, and adherence to the latter is widely regarded as critical if Indigenous people are to benefit from mineral development on their traditional lands.[141]

Reasons that communities may wish to keep agreements confidential include concern that federal funds will be clawed back on the basis that communities can pay for services from agreement income, and that the government may rely on the agreement as proof of consultation about, and accommodation of, Indigenous concerns.[142] This does not, however, justify "blanket" confidentiality provisions, especially as these can have wider implications for a community's ability to protect its interests. For example, the community may no longer be able to lobby government decision-makers, and its ability to communicate with potential political allies, such as non-governmental organizations or the media, may be limited (see *The Wider Implications of Agreement Making* on page 78 for a discussion of this point).

There are obvious dangers in withholding information from the community.

Confidentiality provisions do not have to apply throughout the negotiation process. Confidentiality in the process of negotiation can be helpful, so that changes in the position are not held against the negotiation team. Sometimes they apply only to the financial section of an agreement: financial information is often what is held closest, and negotiators are required not to release financial data that could be harmful to the company's position, especially for publicly traded companies. Some companies may also require a community to sign a non-disclosure

agreement prior to sharing financial information. However, the December 2014 Canadian *Extractive Sector Transparency Measures Act* requires that all financial payments to governments, including Indigenous governments, over $100,000 be publicly reported online on the Natural Resources Canada's website. It is important for the company and community to have a mutual understanding and discuss which aspects of an IBA are confidential and why to avoid misunderstandings and potential scenarios where one party incorrectly assumes something is confidential because the other party wants it to be.

It is also important to consider at what time confidentiality provisions take effect, and how long they stay in place. It may be inadvisable, for instance, for Indigenous groups to accept confidentiality provisions in a negotiation protocol, as this may prevent mobilization of the media and of political allies during the negotiation process. Further, certain information will need to be public during the implementation of the agreement. Similarly, it may be inadvisable to accept that they stay in place after an agreement is terminated, because this may prevent Indigenous groups from putting "their side of the story" in relation to the reasons for termination, or reduce their capacity to take legal action to address issues arising from termination.

Free, Prior and Informed Consent

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

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

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

Obligations of Contract Law

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

- **ENFORCEABILITY** This clause states that if something goes wrong under the agreement, the party that suffers the damage or loss is able to do something about it. For example, the contract may say, "This Agreement is a legally binding contract and is subject to general laws of application … of the (jurisdiction) as amended from time to time…."[143] This is linked to implementation, discussed in Section 5, as it may be necessary to take legal action to enforce an agreement where implementation problems arise from a party's failure to honour its commitments. The language of this clause needs to be specific. In some jurisdictions, the enforceability of agreements will be provided for by regulation or legislation. For instance, the Nunavut Land Claims Agreement specifies that the parties will enforce Inuit Impact and Benefit Agreements (Inuit IBAs) in accordance with the common law of contract.[144]

- **ASSIGNMENT: SALE OR TRANSFER OF PROJECT OR COMPANY** This deals with what happens to the obligations of the parties when a deposit or mine is sold. For example, this clause may set out what liabilities and obligations are transferred to the new owner, notice requirements when a sale is planned, and whether consent is required from the Indigenous party for the sale.[145] This is another area where expert legal advice is critical, to ensure that the community continues to receive all the benefits promised under an agreement, regardless of what happens to ownership or control of a project. The standard approach is that the purchasing company must honour all commitments made in the agreement, though there are cases where agreements have been unclear on this point, and arguments have arisen.

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

- **NO MINING** A "no mining" clause describes the process if mining does not proceed in a specific area or is unlikely to proceed.[146] It may also describe the process to amend the length of notice required.

- **UNFORESEEN CIRCUMSTANCES AND FORCE MAJEURE** This clause refers to events out of the control of the parties. It usually provides that normal penalties will not apply if a party is unable to carry out its duties or obligations due to circumstances outside its control. The party involved must give written notice (including details of duration, duties and obligations, steps taken to remedy the situation), and also give written notice of resumption of normal conditions.[147]

- **SUSPENSION OR TERMINATION OF AGREEMENT OR OPERATIONS** This clause may specify the conditions under which a project or agreement may be suspended or terminated, indicating periods of notice, effects on payments, period of notice for re-commencement of operations, the process for project termination, and which clauses survive termination.[148]

- **NOTICE** The notice clause sets out addresses of parties, means for giving notice and a timeframe for receipt, and procedures for amending notice obligations.[149]
- **CHANGE IN LAW** The clause explains the process if there is a change in law that impacts monetary payments, is beyond the reasonable control of the parties, could not have been foreseen, or that changes the mining party's liability.
- **WAIVER** A waiver clause specifies whether failure to enforce an obligation under the agreement means the obligation is waived.
- **SEVERABILITY** A severability clause specifies that if part or all of a provision of the agreement is illegal or unenforceable, it can be severed, and the remaining provisions continue in force. It may identify whether the failure of a certain clause constitutes a fundamental breach that then requires termination of the agreement.[150]
- **INDEMNITY** Indemnity clauses cover the issue of whether one party agrees to assume legal responsibility for the other party's loss in relation to an issue under the agreement.[151] An indemnity clause may also specify details of insurance against loss, such as the type of insurance, how the insurance will be funded, and whether parties may be named in the policies.[152]

- **NON-EMPLOYMENT OR RELATIONSHIP OF PARTIES** This clause specifies that the agreement does not create particular relationships between the parties, for example, that between an employee and employer or between joint venture partners.[153]
- **ATTORNEYS** This clause specifies that each person who executes the document on behalf of another party under a power of attorney declares they are not aware of anything that might affect that authority.[154]
- **COUNTERPARTS** A counterparts clause specifies whether different copies of the agreement can be signed, constituting the same agreement (meaning, for example, that an agreement can be executed in more than one location).[155]
- **EXECUTION OF AGREEMENT** This clause names the parties to the agreement, the signatories, the witnesses, and the date of the agreement.[156]
- **FURTHER ACTION** This section may specify that each party is to use best efforts to ensure the agreement is given full effect and to refrain from hindering the performance of the agreement.[157]
- **REVIEW** To ensure agreements remain relevant, a review clause is often included. This usually includes a time frame for review (e.g., after two years, the implementation of the agreement will be reviewed), and may also indicate a cap for the cost of the review, as well as the identity of the reviewer. Sometimes the reviewer is an external auditor, but is required to get input from the implementation teams of the parties. In some agreements, there are multiple review periods, with different financial caps. For example, after two years, a review by an independent reviewer may be undertaken with a small budget, and then at four years, a more extensive review is done with a larger budget. The question of how the review findings will be acted on can also be included. So, for example, if the review identifies that the mine is creating unexpected impacts, the agreement might require a meeting of all parties and the triggering of some spending for social or cultural mitigation.

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

- **AMENDMENT** This area will describe the process for amending the agreement. There are many examples where, absent a clause that requires review, parties agree to do so anyhow. In one case, a new corporate Indigenous engagement team agreed that an agreement was outdated and began negotiations for a new "modern" agreement. Review and amendment are also treated at length in Section 5 of this toolkit.

Substantive Issues and Provisions

In approaching substantive issues, it can be useful for negotiating teams, including technical experts, to review all available data and options and then select a best outcome, a "next-best" alternative, and a worst-case scenario. This helps to establish the "deal breaker" — the point at which the Indigenous community would prefer to abandon the negotiations rather than sign an agreement. Trade-offs also need to be considered and indeed are at the heart of negotiations, so that a group determined to secure a major role in environmental management may decide to make concessions to developers in other areas, such as financial benefits or employment.[158]

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

The key point is to review options critically and to be wary of using standard or template approaches. For example, there is much written about the obstacles to Indigenous employment in mining, yet this material is rarely used as a basis on which to negotiate employment provisions of agreements.[159] This is why it is critical to review the literature that is available, study the lessons learned from other agreements, and then negotiate clauses that can deliver what the community hopes for.

There is no match between the size of the company and the nature of the outcomes of agreements for communities. Don't assume that because you are not dealing with a big company or project, it is not possible to get a strong agreement. If a community is united and negotiates well, even medium-sized mines can yield substantial benefits in financial, employment, business, environmental and other issue areas.[160]

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

The negotiators must ensure that adequate attention is paid to implementation during the negotiation process. Three possibilities arise here. Individuals on each negotiating team can be given a specific responsibility to consider, raise and pursue relevant implementation issues at each stage of the process. Alternatively, a specific time can be set aside to consider the implementation of each issue. A third possibility is to compile a standard set of questions about implementation directed at a number of key issues and to establish a commitment by the parties to address those questions at each stage of the discussions.[161] We return to these options in discussing implementation (Section 5).

Table 4.5 provides a full list of the substantive provisions discussed in this section of the toolkit. After reviewing these, the negotiating team can use this table to indicate the relevance and importance of individual issues and provisions to the community.

Table 4.5 Substantive Issues for Negotiated Agreements

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

Communication

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

- Principles for communication and reasonable expectations for responses;
- A formal process for communication (e.g., the parties will meet four times a year, with two of the meetings in the communities);
- What information is to be exchanged, how often, and how gaps in knowledge will be addressed;
- Process for sharing confidential or sensitive information;
- Record keeping and reporting during communication events; this may include addressing whether the use of artificial intelligence notetakers is permitted.
- Expectations for community consultation, locations, and timelines of consultation by the company with communities;
- Establishment of liaison positions or formation of committees that meet at certain intervals to manage communications (see also the role of the Indigenous employment coordinators on page 230 — these roles may be combined);
- Financing and management of a committee or liaison position, and
- Duties of a liaison officer (if appointed).

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

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

Indigenous Access to Mining Tenures

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

The following examples illustrate the wide range of provisions and practices in this area:

At the Argyle Diamond Mine in Australia (closed in 2020), Aboriginal women were granted access to the open pit to perform spiritual ceremonies that were part of their sacred responsibilities.

Similarly, in Canada, the Nak'azdli Whut'en and the Tłı̨chǫ Government collaborate with mine tenure holders to hold annual land blessing ceremonies at their respective active or legacy mine sites — Mount Milligan and Kwetı̨ɂaà (Rayrock) — within their traditional territories.

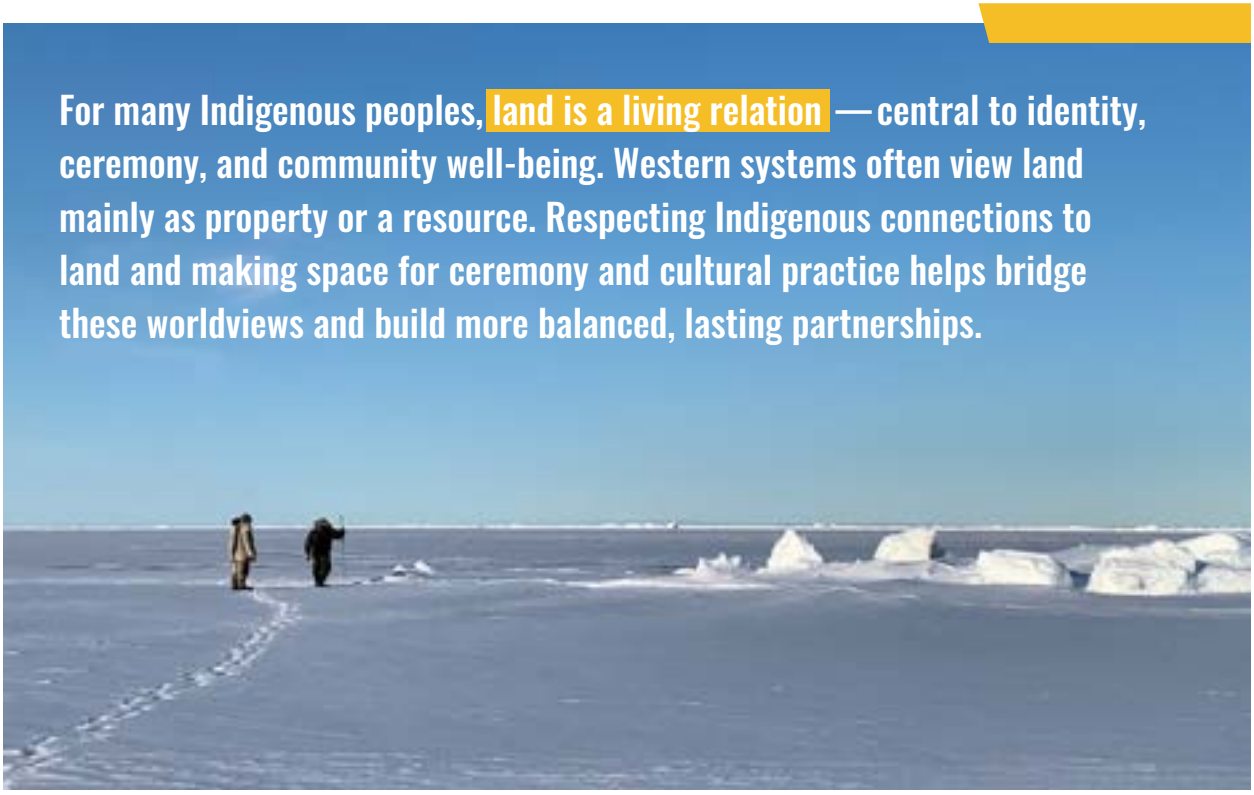
For many Indigenous peoples, land is a living relation — central to identity, ceremony, and community well-being. Western systems often view land mainly as property or a resource. Respecting Indigenous connections to land and making space for ceremony and cultural practice helps bridge these worldviews and build more balanced, lasting partnerships.

This clause may include:

- How to provide notice of visits;
- Restricted access areas;
- A list of purposes for access;
- Use of roads;
- Use of mining party facilities and infrastructure (see also page 196);
- Indemnification, insurance coverage, and public liability; and
- Safety issues as a basis for refusing access.[162]

There may also be limits to access by non-Indigenous parties, and the effects on any existing permit systems for access by tourists may be addressed.[163]

For many Indigenous peoples, land is a living relation — central to identity, ceremony, and community well-being. Western systems often view land mainly as property or a resource. Respecting Indigenous connections to land and making space for ceremony and cultural practice helps bridge these worldviews and build more balanced, lasting partnerships.



CHECKING SEA ICE DEPTH, IGLOOLIK, PHOTO JANELLE KUNTZ

Mining Payments

Most agreements include a clause on financial benefits, which in some cases includes an equity interest in the project. The rationale for such payments may need to be spelled out to companies. The first rationale is that these funds compensate Indigenous people for the negative social, cultural, and environmental impacts of mining.[164] Thus, mining funds can be targeted to avoid or minimize impacts. The second rationale is that these funds represent a return to Indigenous people as stewards of the land. The third rationale could be that, leaving aside issues of impacts, compensation is a necessary, but not necessarily sufficient, condition to secure the consent of the relevant Indigenous community. Securing consent through providing compensation could be perceived as a company recognizing a community's right to free, prior, and informed consent, as affirmed by UNDRIP or could be perceived as a company employing a strategy to reduce its risk and increase project certainty.

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

The rationale for financial benefits may need to be spelled out to companies. First, that these funds compensate Indigenous people for the negative social, cultural and environmental impacts of mining, and funds can be targeted to avoid or minimize impacts.

Where there is a settled land claim that includes defined rights or ownership of subsurface minerals, Indigenous governments may be explicitly entitled to receive royalties from the mining company, the government, or both (specifically in BC, the NWT, Labrador, the Yukon, and Ontario). Such payments may be specified in the land claim agreement itself (as is the case for the Labrador Inuit in their land claim agreement), in an IBA, or separately through mining payment and land management regimes. A modern land claim treaty usually sets out a specific formula for revenue sharing tied to government revenue receipts, ranging from 7.5 per cent to 50 per cent. For example, the Tłı̨chǫ Government receives 10.429 per cent of the first $2 million of mineral royalties received by the government annually, and then 2.086 per cent of any additional mineral royalties.[165] Similarly, the Labrador Inuit's land claim agreement says that their designated representative, the Nunatsiavut Government, is entitled to receive an amount equal to 25 per cent of the Revenue from Subsurface Resources in Labrador Inuit Lands. Project-specific mining payment sharing has been negotiated in some cases with governments, such as by the Labrador Inuit and the Labrador Innu, both of whom signed an agreement with the government of Labrador and Newfoundland to receive 5 per cent of government royalties from the Voisey's Bay mine. These sums are distinct from — and sometimes in addition to — the negotiated payments from mining companies (e.g., the Labrador Inuit and Innu also have IBAs with Vale, the owner and operator of the Voisey's Bay mine).

Many people are familiar with the term **"ROYALTIES"**; however, we use the term **"MINING PAYMENTS"** because there are so many different kinds of payment types. ■

It can be challenging to negotiate financial benefits, and the extent of benefits often depends on the strength of your bargaining position. Often, a sole focus for negotiators is on the financial mechanism to use to extract payments from the company and the size of the payments. Our experience shows that the use of funds by the Indigenous community should also be an early and critical focus. When payments are made before there is a mechanism in place to allocate and manage them, the result can be disputes and social disruption as individuals and groups compete with each other to get as large a share as possible. In addition, payments can be quickly frittered away on short-term consumer goods, including addictive substances, if structures are not in place to ensure they are invested or allocated to family and community priorities (see next section on fund utilization). Mechanisms to avoid this could include requirements that any payments be made into a trust, and the trust's rules can be set to require broad consensus before funds may be withdrawn.

Several forms of payment are summarized in this section. Table 4.6 on page 211 summarizes the advantages and disadvantages of each form of payment. There is a trend to combine a number of these models in individual agreements, because there are advantages and disadvantages associated with each model.[166] For example, for a community, there is a very low risk associated with fixed cash payments, because they will continue as long as the mine operates, regardless of whether it makes a profit. However, they will not go up if, for example, a mine expands (see below). There can be a very high risk associated with the equity model, but on the other hand, if a mine is highly profitable, the community will do very well. Some communities have managed risk by combining models, as in the case of the Raglan Agreement. This agreement provides fixed annual payments over the lifetime of the project, plus a profit-sharing contribution amounting to 4.5 per cent of annual operating cash flows (see discussion below for details).[167]

When payments are made before there is a mechanism in place to allocate and manage them, the result can be disputes and social disruption, and payments can be quickly frittered away if structures are not in place.

Communities should be cognizant of risks related to corporate restructuring, which can significantly impact mining payments. Some examples of restructuring that could affect a community include a third party purchasing a project and refusing to honour an IBA negotiated by the original owner or a corporation restructuring internally and transferring ownership to a subsidiary that does not have the capacity to implement the IBA (e.g., unable to make payments, unable to provide employment or procurement opportunities). Risks related to restructuring can be mitigated proactively by including an assignment provision that explicitly transfers IBA obligations to any company that acquires a project, as noted in the Obligations of Contract Law section of this toolkit.

While an IBA is likely to include other non-revenue benefits in addition to mining payments (e.g., procurement opportunities for local businesses, employment opportunities, training and education funding, social program funding, and investment opportunities), it is important to note that these benefits are separate from mining payments and, therefore, a community should not trade off mining payments in favour of non-revenue benefits.

Fixed Cash Payments (Including Advanced Payments)

Under fixed cash payments, the project operator makes fixed payments that provide a guaranteed minimum amount to the beneficiary. Payments may be made on specific dates, such as the signing of the agreement, the beginning of production, or on an annual basis. These payments are dependable in that they do not relate to the profitability of the mine, meaning a community can more easily and accurately budget for future revenue and allocate funds to long-term community priorities. They are simple to administer and are not at all dependent on the project achieving profitability.

The sooner in the project timeline that these payments are made, the more dependable and certain they are. For example, upfront payments such as signing bonuses or payments tied to key project development milestones (e.g., permitting, construction decision, completion of construction) may still be made even in cases where a project is never developed, is delayed, or is terminated prematurely. Seeking upfront payments can be especially important if a community has low confidence that a project will be developed, or be developed by the company with which the Indigenous community is negotiating.

The Mary River Iron Mine on Inuit lands in northern Canada provides a good example, featuring a series of advanced and fixed payments tied to key project milestones. These included $5 million ($6.7 million in 2025 dollars) upon signing the agreement with the Inuit parties, $5 million ($6.5 million in 2025 dollars) when the water licence was issued, $10 million ($13 million in 2025 dollars) at the construction decision, and $1.2 ($1.6 million in 2025 dollars) quarterly thereafter until operations began, to account for potential delays. The agreement capped advanced payments at $70 million ($94 million in 2025 dollars) in total. It included a "no-clawback" provision, which would ensure that the community would never have to pay back any advanced payments in the event that the agreement was terminated. These advance payments, however, were deductible from royalty payments.

Fixed cash payments are dependable in that they do not relate to the profitability of the mine, meaning a community can more easily and accurately budget for future revenue and allocate funds to long-term community priorities.

The diamond mines in the NWT have primarily negotiated fixed payments with Indigenous communities (with some recent exceptions). However, when the operators ramped up production significantly in the early years of the mines, there was no corresponding benefit for the communities. This is one of the significant disadvantages of these types of payments, as they never adjust to the scale of the profit or production of a project. If a project turns out to be much more profitable than was anticipated or if the price of the commodity increases, there is no mechanism for extracting higher payments, which can create conflict between the company and the community, as well as within the community. If profits end up being less than anticipated, Indigenous Nations are still guaranteed their fixed payment. Strong arguments can be made for alternative approaches and combining various forms of payments.[168]

Royalties Based on Volume of Outputs

One alternative is to charge a fixed sum on each unit of mineral produced by a project (e.g., dollars per tonne of ore extracted). The advantage of this approach is that if the company ramps up production significantly, the communities get more revenue. This model can be important for communities that are concerned about the impact of the project on their lands, and who believe that as the project scale grows, so should the amount of financial benefit. However, if the price of the metal or mineral rises or falls, there is no corresponding benefit (or loss).[169]

Royalties Based on Value of Production

In this *ad valorem* (in proportion to the value) approach, the payment is a percentage of the sales value of the minerals produced by the project. This amount is determined by multiplying the volume of output by the price received by the company per unit sold. A specific and commonly used form of mining payment is the Net Smelter Return (NSR) royalty. It is essentially a percentage—often in the range of 1.5% to 5%—of the gross revenue from the sale of mineral products, minus certain limited and clearly defined deductions for costs incurred between the mine gate and the smelter or refinery. These allowable deductions typically include transportation, freight, insurance, and some smelting or refining charges. Depending on the commodity and the operation, these costs usually represent about 5% to 30% of the mine's gross revenue. NSR and *ad valorem* royalties are relatively simple to calculate and administer compared with profit-based royalties (discussed below).

For a business operator, this approach is useful because the mining payment changes with a critical business parameter: the price it receives for its output. However, the cost of production is another major business factor, and if these costs increase dramatically, the operator still has the same mining payment obligation. These royalties have the advantage for a community of getting a share of the benefits whenever the price of the mineral increases. A downside is that its income does not increase in value if the mine is able to reduce its operating costs. And, of course, the price of the mineral may also fall. For instance, in 2009, the price of most base metals decreased significantly. This meant that any communities that depended on these payments received significantly less than in previous years. The same generally applies to profit-based royalties during price downfalls (see below). If people depend on these funds for services or programs, they could suffer significant hardships during periods of low prices.[170]

Royalties Based on Profits

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

This type of mining payment allows a community to benefit from rising prices and any cost savings that project operators make through increased efficiency. They are beneficial to companies because they move in line with both price and costs, unlike the other models discussed above. Thus, when a company has increased production costs or weak mineral prices, leading to an unprofitable year, it will not further increase its losses by having to pay Indigenous beneficiaries. The downside for communities is that not all mines turn out to be profitable. As most mines lose money during at least part of their lives (often through the first years until capital costs are recouped), the communities will receive very little for at least part of the project life. Some projects never achieve profitability. This means there can be substantial delays to communities in receiving any benefits, or they may receive no benefits at all from mining on their lands. There are also administrative complexities, because Indigenous authorities will need to verify appropriate revenue streams and that allowable deductions have been made appropriately and fairly in calculating profits.[171] Companies may have an incentive to use creative accounting to find deductions to reduce the mining payment rates and may use price transfer schemes to funnel project revenue to parent companies based in jurisdictions with lower tax rates. If a community is interested in, or is presented with, the option of a royalty based on profits, the accounting practices used to determine profits will need to be very clearly spelled out in the agreement, along with financial information requirements that enable a community to verify that it is receiving the correct amount of payments. Further, in cases where a subsidiary owns a project, a community will want to make sure the attribution of revenue and costs between the subsidiary and parent company is transparent and fair.

Equity

Communities can take equity in a project, becoming its part-owner and thereby receiving entitlement to the dividends that flow to shareholders. Provision may be made for Indigenous representation on the mining company's board of directors when there is an equity interest in the company based on a percentage of the equity ownership. For example, Taykwa Tagamou Nation invested $20 million in the Crawford Nickel Mine Project in 2025, securing a 7.9 per cent share in the project and one seat on the board of directors.[172] While equity ownership is becoming increasingly more common for major resource projects, it is not without risks. The risks of the last model (profit-based royalties) also apply here, in that dividends only get paid after a project becomes profitable. This means that Indigenous groups have to wait a considerable time before receiving income, especially if, as often occurs, bank loans have to be repaid from profits before any dividends are distributed. Dividend payments may be further delayed even when a project becomes profitable, as the decision to distribute dividends is often made at the discretion of a board of directors, who may choose not to distribute profits for whatever reason (e.g., to reduce debt, to maintain a healthy cash flow, to prepare for project expansion). Obtaining equity creates the possibility of capital gain for the community if its shares are sold for much more than the initial cost.

In addition to the potential for financial benefits, a community that invests in a project may gain a seat at the management table, greater access to information, and commercial experience. Unless the equity stake exceeds 50% or includes special voting provisions, however, Indigenous groups will rarely have significant decision-making authority. That said, communities can strengthen their decision-making authority even when they have a minority equity share. For example, one IBA negotiated in

northern Australia in 2023 includes a 'shareholder agreement' under which a series of key decisions on matters including the scale of the project, raising of loans, dividend policy, changes in business structure, and financial transactions with the parent company require unanimous board approval. This meant that while the Indigenous community appointed only one of five directors to the operating company, it had an effective veto over many key aspects of project finances and operations. Outside of specific provisions in IBAs, communities that have a minority share in a project may also have their authority protected under corporate law. Under the *Canada Business Corporations Act*, for example, communities can trigger the oppression remedy in situations where the majority shareholders are managing the company in a way that is detrimental to the minority shareholder and against their reasonable expectations. The equity model comes with additional risks if a community has to pay for its equity, as projects can fail or costs change and shareholder dividends shrink, with the result that the investment may be lost or yield little return. It can also expose Indigenous entities to legal, financial, and political risks or backlash if the project fails or causes social, cultural, or environmental harm. This can place Indigenous communities "between a rock and a hard place" when market-driven timelines and interests come into conflict with community and land-based values.

While equity ownership is becoming increasingly more common for major resource projects, it is not without risks.

While the literature often refers to 'free carried equity', it must be stressed that there is always a financial cost to equity. Where a company provides the community's share of project capital, it will seek to recoup the cost of doing so in some other way, usually by insisting on a lower level of royalty. In rare cases, a company will make this trade-off explicit. Whether it does or not, the cost of foregoing the benefits associated with the equity provided to a community will be factored into company calculations regarding other elements of an IBA's 'financial package.'

There are several ways to reduce the risks associated with community equity participation. Upfront costs can be minimized by negotiating for free equity or for low- or no-interest loans that allow communities to acquire shares without jeopardizing other priorities. These types of loans are often

Diversified Equity

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

For example, Nations Royalty, a mining royalty company 77% owned by the Nisg̲a'a Nation, aims to acquire royalty interests across multiple mining and resource projects, many not on Nisg̲a'a land, creating long-term and diversified revenue for Indigenous shareholders. Alternatively, a Nation may invest in lower-risk (but still not no-risk) equity or sole ownership of assets in the energy sector, which benefits from a regulated rate of return, government grants, and established models.

provided by government programs, such as the Canada Infrastructure Bank's Indigenous Community Infrastructure Initiative,[173] which provides long-term loans at favourable rates for infrastructure projects either partially or completely owned by one or more Indigenous communities, or the Canadian Development Investment Corporation's Indigenous Loan Guarantee Program,[174] which provides guarantees to Indigenous groups seeking loans with financial institutions and provides access to lower interest rates. To protect against financial, legal, and political exposure, equity should ideally be held through arm's-length entities, such as development corporations or trusts, which provide an additional layer of community protection. Communities can also diversify revenue sources — for example, by combining equity participation with fixed annual payments or royalty streams — to create a more stable and predictable flow of benefits.

Mining Payment Administrative Details

Administrative details to consider with mining payments include:

- **TAXATION ON FINANCIAL BENEFITS** — IBAs can generate substantial revenues, and there are tax implications associated with different revenue structures and fund management options. Where the amounts involved are substantial, tax advisors should be retained to help identify the best options for corporate structures and fund management. Specialized advice is required due to the complexity of the issues involved, the need for innovation to meet the needs of individual communities, the availability of tax exemptions for Indigenous governments, and the ever-changing nature of this area of practice.
- **TAX DEDUCTIONS FOR COMPANIES** — Mining companies may want payments made to the Indigenous community to be treated as deductions for purposes of calculating income tax or mining duties. They may seek an explicit commitment of the Indigenous party to support this position.[175] Some agreements have included clauses that provide the parties' position on taxation of the project. Also, provision may be made for offsetting payments to the Indigenous party under the IBA against specified taxes that may be levied against the project by local or Indigenous governments.[176] If the Indigenous group also has a revenue-sharing agreement with a local government, the deductibility of IBA costs against tax revenue could reduce the Indigenous group's revenue under its revenue-sharing agreement with the government.
- **PAYMENTS DURING TEMPORARY CLOSURE** — The agreement may provide for a situation in which the mine is closed temporarily, and whether payments will continue during shutdowns. Usually, only fixed payments may continue.
- **ADJUSTMENTS FOR INFLATION** — The agreement may contain provisions for adjusting fixed dollar amounts in line with the consumer price index or another measure of inflation ('indexation'). While this may be regarded as an administrative or technical issue, and is often dealt with in the definitions section, it is a major issue, as the value of an agreement to a community can decline rapidly during periods of high inflation if payments are not indexed. They may also decline substantially if there is a long delay in developing a project. As a matter of principle, all fixed dollar payments should be fully indexed. ■

Despite these risk mitigation approaches, the authors of this Toolkit wish to highlight the real and multifaceted risks that equity deals can represent for First Nations and recommend that Nations seek advice from corporate lawyers and tax experts prior to investing in projects.

Dealing with Company "Windfall" Profits

Mineral prices can be highly volatile, rising sharply during periods of high demand. Indigenous communities may wish to ensure that when this happens, they achieve a higher share of the unusually high profits that are being earned by mining companies extracting minerals from their ancestral lands.

Applying a single royalty rate to the value of minerals produced (for example, 2 per cent, 3 per cent) will result in an increased level of revenue for the community if prices and, accordingly, revenues, increase. However, the share of revenue received by the community will not increase, no matter how high prices climb.

Communities can use a number of different approaches to ensure they share in windfall profits. One approach, applied in several IBAs such as for the Voisey's Bay nickel mine in Labrador, uses a "two-tier" system. The Indigenous communities are guaranteed a set level of income each year, regardless of the nickel price. But if the nickel price goes above the originally forecasted level in the feasibility study, the community receives additional payments in the form of a percentage royalty of nickel income earned by the mine's operator.

Another approach involves a "step-wise" royalty with higher royalty rates applying as prices climb higher. This approach is used for a gold mine in the Kimberley region of Western Australia as well as a nickel mine in northern Canada. For the gold mine, when the price is below $800 an ounce, the royalty might be 1 per cent of revenues. When it is between $800 and $1,000 an ounce, the royalty might be 1.25 per cent; if the price rises to between $1,000 and $1,250 an ounce, the royalty might be 1.5 per cent of revenues; and so on. For the nickel mine, the ad valorem (gross revenue) royalty increases from 2.0% to 2.5% when the nickel price exceeds $4.25 per pound, to 3.0% above $12.00 per pound, and to 4.0% when above $14.00 per pound. In addition to this royalty, the nickel mine agreement also includes step-up fixed payments that rise from $1 million to $2 million per year when the nickel price exceeds $4.00 per pound, to $4 million per year when above $6.00 per pound, and to $6 million per year when above $8.00 per pound (in 2019 dollars).

A third approach, from a negotiation in Queensland, uses a formula to ensure that the royalty rate increases in line with every increase in the metal price, rather than waiting until the next "price step" is reached before an increase in the royalty rate applies. The formula is expressed as follows:

$$RP = \frac{CP}{BP} \times BRR \times VMP$$

Where:
RP = Royalty Payment
CP = Current Price
BP = Base Price
BRR = Base Royalty Rate
VMP = Value of Mineral Production

The "Base Price" would be the mineral value used in the feasibility study and IBA negotiations, while the "Base Royalty Rate" would be negotiated in the normal way between the parties.

One other approach is based on the NWT royalty payment system that uses the value of the output of the mine. For example, if the value of the mine's output for the fiscal year is between $20 and $25 million, a rate of 9 per cent is applied. In this example, the royalty would be as high as $1.7 million. The highest rate applied is 14 per cent for yearly mine outputs of $45 million and higher, while the lowest rates are 0 per cent for a value of under $10,000 and 5 per cent for a value between $10,000 and $5 million. The mine's output is based on the market value of the minerals produced, less the costs associated with transportation, operations, depreciation of assets, expenses incurred, and any policy incentives of the NWT government (e.g., contributions to a mining reclamation trust, investment in mineral processing facilities).

When considering these options, it is important to define what the base price is. This should be defined as a single value of the metal and may be derived from the feasibility study or based on the long-term average of historical prices for the mineral concerned. It could refer to the before-tax net cash flow of a mine, which is more volatile, but higher in value than the gross revenues of the mine (after taxes).

Table 4.6 summarizes the advantages and disadvantages associated with the alternative models discussed in this section.

Table 4.6 Advantages and Disadvantages to Communities of Different Mining Payments

Type	Advantage	Disadvantage
Fixed payments	■ Guaranteed payment amounts at agreed upon times ■ Easy to administer ■ Not dependent on profitability	■ As production amount and scale of disturbance increases, there is no increase in payments ■ As commodity price increases, no corresponding increases in payments ■ Community may feel the mining payment (royalty) is too low in hindsight and internal and community-corporate conflict may ensue
Royalty based on volume of outputs	■ When company ramps up production, community gains benefits ■ As impact on environment changes with production increase, so do funds to mitigate harm ■ Reduced commodity price does not affect payments (provided company keeps up production level) ■ Not dependent on profitability	■ If price of commodity rises, there is no additional benefit to the community ■ If production costs decline during the life of the mine, the community does not benefit and may indeed lose jobs associated with downsizing and automation

Table 4.6: Mining payments, continued

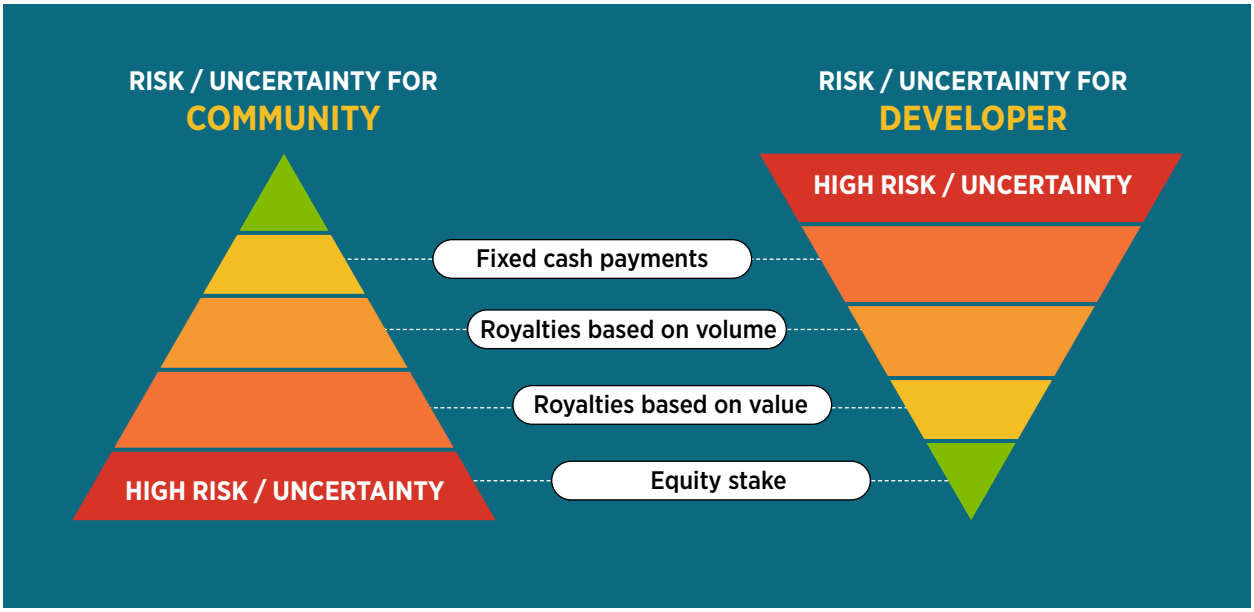
	Advantage	Disadvantage
Royalty based on value of production	■ Community shares in benefits whenever the commodity price increases or production levels rise ■ Not dependent on profitability ■ Payment is not dependent on operating, financing or capital costs ■ Simple definition and relatively easy to administer	■ If commodity price falls, the payments decrease and often extremely quickly ■ If there is dependence on payments for services or programs, hardship may result when prices fall ■ Transportation and smelting costs (e.g., concentrate impurities) must be taken into consideration for some metals
Royalties based on profits	■ Value can increase if mining costs are lowered through efficiencies ■ Value increases if price of commodity increases and costs are stable	■ Not all projects are profitable ■ Income changes with the price of the commodity — if the price of a commodity slumps during a recession, this can dramatically affect the payments made to a community ■ Operating costs can change yearly and not always for the better ■ Revenue and deductions before profits measured can be manipulated by the proponent, as can the attribution of revenues and deductions between related companies (e.g., transfer pricing) ■ The agreement must be very clear, and it can be hard to administer because of need for accounting oversight ■ If payments are delayed until after capital costs are recouped, communities can wait a long time for any income
Equity	■ Increases in value if the project is profitable ■ Can provide access to information and input to the senior management team and decision making ■ Potential to provide greater control over use of traditional lands and environment ■ Can provide rights against oppression if project is managed against a community's reasonable expectations	■ May need to raise capital for investment ■ Project might not be profitable or have comparable value to other investments forgone ■ Subject to all the same risks that the company is subject to, like cost overruns or change of commodity price ■ May be required to share operating losses or capital expenditures ■ May have liabilities as part owner ■ Legal costs can be high ■ Funds may not flow early or readily back to the community — may not be short term upside

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

Assessing Risk Tolerance for a Given Form of Payment

At some point, the negotiating team will face the question of how to choose a form of payment or a combination of forms of payment. The negotiating team must understand how soon funds are needed, the risk tolerance of the community, and the risk profile of the developer and the proposed development itself (see Figure 4.1).

Figure 4.1 Relative Levels of Risk for Community and Mine Developer



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

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

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

What will you do with any money that comes from mining? And when is it needed?

- If the funds are to be used for vital programs that require secure and consistent funding, or if there is strong pressure from citizens for individual payouts (and the team thinks this is the best use of funds), then there is likely to be low tolerance to risk in the form of reduced annual mining payments or a complete absence of payments (as in the case of a sole profit royalty or an equity stake). This would mean the team would want to negotiate using a more conservative model that guarantees annual income.

- If the funds are for the short term, there will be a strong preference for fixed cash payments, which tend to start as soon as an agreement is signed, compared to a profit royalty or equity, which may not generate income for many years.
- If the funds are to be used as a trust fund for the longer-term future to develop a community capital base, there is likely to be a higher tolerance to short-term fluctuation risk, in which case greater reliance on revenue- and profit-based royalties may be appropriate.

What is the financial profile and viability of the project?

- If the feasibility study uses conservative cost and revenue assumptions (for example, cautious commodity price estimates) and still shows a high Net Present Value (NPV) and Internal Rate of Return (IRR), this suggests the project can withstand uncertainty and price downturns while generating strong returns in high-price periods. In such cases, the community may seek a larger share of benefits through a higher proportion of revenue- or profit-based royalties, and equity participation may also be more feasible.
- Conversely, if the feasibility study is based on optimistic or uncertain assumptions — for example, high projected metal prices, unproven resources, or tight operating margins — the project may be more vulnerable to downturns or cost overruns. In such cases, the community may prefer a higher proportion of fixed payments, which provide stable and predictable income even if production slows or the mine temporarily closes. Fixed payments can help ensure a reliable flow of benefits to the community while reducing exposure to market fluctuations and project performance risks. Hybrid options could also be considered.

The negotiating team will need to do some research, looking at price trends, demand, and supply curves for the commodity in question. It may also be useful to look at previous similar developments and run scenarios of how much wealth would have been created for the community, given different royalty types.

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

- With a metal that has a relatively stable price curve over time, a strong demand curve, and relatively limited competition from other producers, the community may be more comfortable that commodity prices are not going to rapidly fluctuate. If this is the case, the community may want to go with a mining payment linked to the price of the commodity, like an NSR.
- With a metal with a very unstable price history and trend, the community could opt for a form of payment less dependent on commodity prices, e.g., a mixed model that links to prices, but also provides for “floor” or minimum payments.

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

What is the experience of the mining company?

- If the company is a "major" (meaning it has multiple mines around the country or world), there will generally be less risk associated with investing in a profit or equity-based model. It will know how to use technology, labour and innovation to reduce costs.

If the company has very little experience in bringing a mine to life, there will generally be higher risks associated with investing in a high-stakes model (e.g., equity or profit-based) because it could make costly mistakes that affect its profit margins.

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

Using Benchmarks to Determine Potential Royalty Rates and Mining Payments

In addition to selecting a form of payment, a negotiating team will have to prepare for negotiations by having a thorough understanding of the quantum of benefits they could reasonably hope to receive from an IBA. Potential IBA benefits can be estimated by conducting a benchmarking analysis: analyzing existing IBAs for current projects that set a precedent for revenue sharing, identifying low and high benchmarks that provide a range of possible outcomes, and applying benchmarks to the proposed project to estimate a range of revenues that the community could hypothetically receive.

Conducting a benchmarking analysis is a critical step in preparing for negotiations, as it can support the development of a negotiating team's mandate, whereby community decision-makers can set financial targets and a minimum acceptable financial offer. Conducting a benchmarking analysis can help a negotiating team make an informed and defensible first offer or, if a company makes the first offer, can help the negotiating team determine if the offer is reasonable and give the team tools and information to make a defensible counteroffer.

Identifying suitable benchmarks can be challenging given that many agreements are confidential, but negotiators and practitioners will increase their access to benchmark data over time as they build experience and networks. Although they may not necessarily be the best benchmarks, publicly available benchmarks can support this type of analysis. Several publicly available examples have already been mentioned in this toolkit, such as the Raglan agreement and the Argyle Diamond agreement. Further, IBAs negotiated in Canada's northern territories, known as Inuit Impact and Benefit Agreements, are made publicly available by law and can also be used as benchmark agreements (e.g., Mary River Project Inuit Impact and Benefit Agreement,[177] and the Meliadine Project Inuit Impact and Benefit Agreement).[178] In addition, government-to-government mine revenue sharing agreements are often made publicly available, as seen in British Columbia, Canada.[179]

Scaling Payment Benchmarks from Project to Project

Royalty benchmarks that are based on percentages (e.g., % of gross revenue) do not have to be adjusted because they automatically scale between projects. For example, if a 2% gross revenue royalty was negotiated for Project A, then a 2% gross revenue royalty could be used as a benchmark for Project B. Rates, however, would need to be adjusted if a different type of royalty is applied to the project. For example, 2% of gross revenue is different from 2% of net cash flow royalty or a 2% of net profit. As the number of deductions increases (e.g., transportation, refining, and operating costs), so too must the royalty rate to result in approximately the same quantum of total payments. Rates should be further adjusted to account for differences in the net present value of payments, as royalties that apply to the bottom line (e.g., a profits-based royalty) often result in payments being delayed until the project breaks even. As payments received sooner are inherently more valuable than payments received later, due to factors including inflation and opportunity cost, bottom-line royalty rates should be further increased so that they have the equivalent net present value as top-line royalties.

Mining Payment Trends: What We're Seeing Across Canada

In early 2025, Firelight presented at the Indigenous Connections Summit on Economic Reconciliation, sharing the results of an analysis of modern mining agreements and Indigenous-led mineral policies in Canada.[180] The review highlighted several key trends and best practices in mining payments (all values in 2025 dollars):

- Most agreements use a hybrid approach, combining fixed payments with royalty-based mechanisms.
- Fixed payments generally range from $1 to $5 million per year.
- Revenue-based or Net Smelter Return (NSR) royalties typically range from 1.5% to 5.0%.
- Profit-based or cash-flow royalties usually range from 3.0% to 5.0%.
- Some agreements include advanced fixed payments tied to project milestones, totalling tens of millions of dollars before production begins (see the Mary River Iron Mine example above).
- Overall, total annual benefits shared with an Indigenous signatory typically range from $5 million to $20 million per year, in addition to employment and procurement opportunities.

A recent review shows most agreements use a hybrid approach, combining fixed payments with royalty-based mechanisms.

Benchmarks that involved a fixed dollar amount, such as milestone cash payments and volumetric royalties (e.g., dollars per tonne), should be scaled to the specific project to make for an apples-to-apples comparison. For example, if a cash payment of $1 million was provided for Project A 10 years ago, one should not automatically assume that a cash payment of $1 million should be provided for Project B. This payment would need to be brought into current-day dollars using a consumer price index (which indicates inflation rates) and would need to be scaled based on size and/or profitability differences between Project A and Project B.

Ideally, payments will be scaled based on the estimated profitability of the two projects. For example, if Project B is estimated to be half as profitable as Project A, the $1 million payment for Project A would theoretically need to be cut in half to $500,000 to be equivalent (before adjusting for inflation). Scaling based on profitability will require access to financial forecasts for the project, such as a feasibility study. The project proponent should be willing to share this financial information directly with the community. Further, in Canada, any publicly traded company that proposes a mine will be required under Canada's National Instrument NI 43-101 'Standards of Disclosure for Mineral Projects' to have all technical reports prepared by a qualified professional and to have all technical reports, including feasibility studies, published on the Canadian Securities Administrators' SEDAR+ website.[181]

If financial information is not available before/ during negotiations (e.g., if information has not yet been published on the SEDAR+ website and the proponent is not willing to share the information ahead of time), cash payment benchmarks can be scaled using more readily available information, such as project capital costs, which indicate the relative size of the project. Continuing with the example above, if the capital costs for Project B are equal to half of the capital costs of Project A, then the Project A benchmark payments should theoretically be half for Project B. Using capital costs as a variable to scale payments is not perfect, however, as the size/ cost of a project is not directly proportional to the profitability of a project. Still, scaling based on capital costs can be useful in the absence of specific financial information.

Mining Payment Utilization

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

Discussions on payment utilization can be undertaken with the company, and relevant provisions can be included in the agreement, or a community can make decisions separately and have arrangements in place by the time an agreement is signed. Including payment utilization in negotiations does create the risk that the company may seek to impose its views on the community, an outcome strongly opposed by most Indigenous communities, who regard the issue of how they use payments as a matter solely for them. However, while affirming this principle, some Australian Indigenous groups have chosen to deal with the issue in their agreements, for two reasons. First, this requires that the issue of payment utilization *must* be resolved before the agreement is signed and payments

commence. Second, because amending an agreement usually requires the consent of the community, it ensures that community decisions on how to use payments cannot be subverted by individuals or groups in the community for short-term political benefit or personal gain.

To assist communities that do wish to address payment utilization at the time an agreement is negotiated, we briefly discuss some relevant issues below. There are many ways to allocate the finances that accrue from projects. Use and management of IBA revenues is ultimately a governance choice with far-reaching impacts on community cohesion and prosperity.

First, a number of tensions can emerge regarding fund utilization, including: allocation to individual or to community needs; addressing today's acute needs, which could mean immediate consumption or investment in current commercial activity to generate jobs, versus setting aside resources for future needs; and seeking long-term cash flow through investment in commercial activities in the community or region (which can be more risky), versus generating long-term cash flow through investment in diversified capital investment funds (portfolio investment), which can be less risky.[182]

Mining payments can be used in four general ways.

Payments to Individuals

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

Services and Infrastructure

Funds are also used for local services and infrastructure because of deficiencies that are typically present in the services provided by the government or because there is no funding at all for Indigenous priorities. For example, the Tłı̨chǫ Government uses IBA funds for cultural programs for harvesters, addictions programming and 'out on the land' programs. However, there are two problems with using funds for services or infrastructure. First, mining payments can be highly unstable, and where dependency is created, this can pose a problem when shortfalls emerge as the mines close or the price of the commodity slumps. Even short-term infrastructure projects are likely to require long-term sources of funding as they will need to be maintained over time. Second, there is the danger that funds will be clawed back, just as happens with individuals, but this time at the level of government programs.[183]

There are a number of policy criteria for selecting the conditions under which it will be beneficial to apply mining payments to programs and services:[184]

- If beneficiaries highly value the services involved, and the government cannot or will not provide funds for them or is very unlikely to do so.
- If mining payments are spent in ways that attract additional government expenditure to the activity concerned, either because the government will take over funding the service once established or because a willingness to cost-share brings forth government funds.
- If payments are used to fund a *form of service* provision (such as appropriate housing design, Indigenous medical services) that will create substantially greater benefits than the services provided by government.
- If the use of mining payments permits a level of service provision higher than the standard level provided by the government in the same situation, and the difference in service levels is much better for recipients.
- If payments are spent to ensure access to a service sooner than the government can provide.
- If mining payments provide opportunities to enhance Indigenous organizational skills and governance capacity.
- If mining payments are stable (through some base amount that is guaranteed).
- If a proportion of current income is invested in a capital fund to allow future maintenance and replacement of assets with mining payments.[185]

Business Enterprise

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

Portfolio Investment

Portfolio investment involves the use of mining payments to build up income-generating assets selected for their ability to maximize returns and minimize risk. Typically, portfolio investments can include blue-chip shares, real estate, and government bonds (all of which combine to reduce the level of risk and increase the level of financial return). Investment can be spread across a wide range of sectors, thereby increasing the likelihood that mining payments will generate income that will be stable and long-lived. If a community needs more time to decide about the use of money, investing in low-risk and liquid assets, for instance, bank term deposits with high interest rates, may be a sound

option. In this situation, or where funds are being allocated to business enterprise or to portfolio investment, it is critical that communities retain the services of expert business and financial advisers.

Structures for Managing Mining Payments

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

Mining Payment Distribution

Many communities now use a mix of funds and mechanisms designed to balance immediate needs with long-term goals. Common purposes include establishing legacy funds to preserve wealth for future generations, stabilization funds to manage revenue fluctuations, and diversification funds to support new businesses and workforce development. For example, a mixed approach is used by Inuit beneficiaries of the Voisey's Bay agreement, whereby a certain percentage of payments is allocated to a trust fund, and the remainder is set aside to fund community-led initiatives that contribute to the well-being of community members.

In early 2025, Firelight presented at the Indigenous Connections Summit on Economic Reconciliation, sharing findings from an analysis of modern mining agreements and Indigenous-led mineral policies across Canada.[186] The review showed that how payments are distributed depends largely on each community's objectives, needs, and governance structure, and that these decisions are best made before agreements are finalized.

Other allocations often go toward community programs — such as culture, environment, health, training, and education — or toward infrastructure and equipment that strengthen long-term capacity and self-reliance.

THE IMPORTANCE OF COMMUNITY INPUT ON PAYMENT ISSUES

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

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

The analysis also found a variety of distribution approaches and criteria. While direct individual payments are generally discouraged, most agreements allocate funds among the main affected community (25–100%), neighbouring communities (10–50%), and regional entities (25–100%).

Distributions are often based on territorial impact or population-based formulas, with flexibility to adjust for fluctuating revenues. In some cases, larger or variable payments are shared regionally to promote fairness and reduce social pressures or potential conflicts within a single community.

Together, these models illustrate the growing sophistication of Indigenous financial management strategies in ensuring that mining benefits contribute to both present and future well-being.

Employment

The benefits associated with gaining employment in the mining industry are large. First, where there is little other employment in a community, mining can offer the possibility of a job and the benefits that come with it, such as high self-esteem and the ability to contribute productively to the family and the community.[187] Second, the salaries are often much higher than alternative employment in the communities.

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

There continue to be many barriers to the employment of Indigenous people in the mining industry, starting with recruitment, but also affecting retention and advancement of Indigenous employees. Many of these barriers have been well documented, and include a lack of skill base, the tendency for managers to hire outsiders and people who are more like themselves, the lack of community awareness of opportunities, the strangeness of the remote work site environment, and the absence of suitable accommodation or failure to accommodate Indigenous women's needs.[188] While almost all IBAs deal with employment, they rarely address these barriers in a systematic way.

Matching Labour Supply and Employment Opportunities

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

A labour force development plan can include:

- Job opportunities at the project;
- Pool of potential Indigenous employees and their skills;
- Barriers that must be removed to increase Indigenous participation, including barriers faced by women, youth, and underrepresented groups;
- Culturally safe and holistic approaches to Indigenous workforce development;
- Training programs to be developed in connection with the project;
- Apprenticeship programs at the project; and
- Costs of implementing the plan and funding for its implementation.[189]

Recruitment

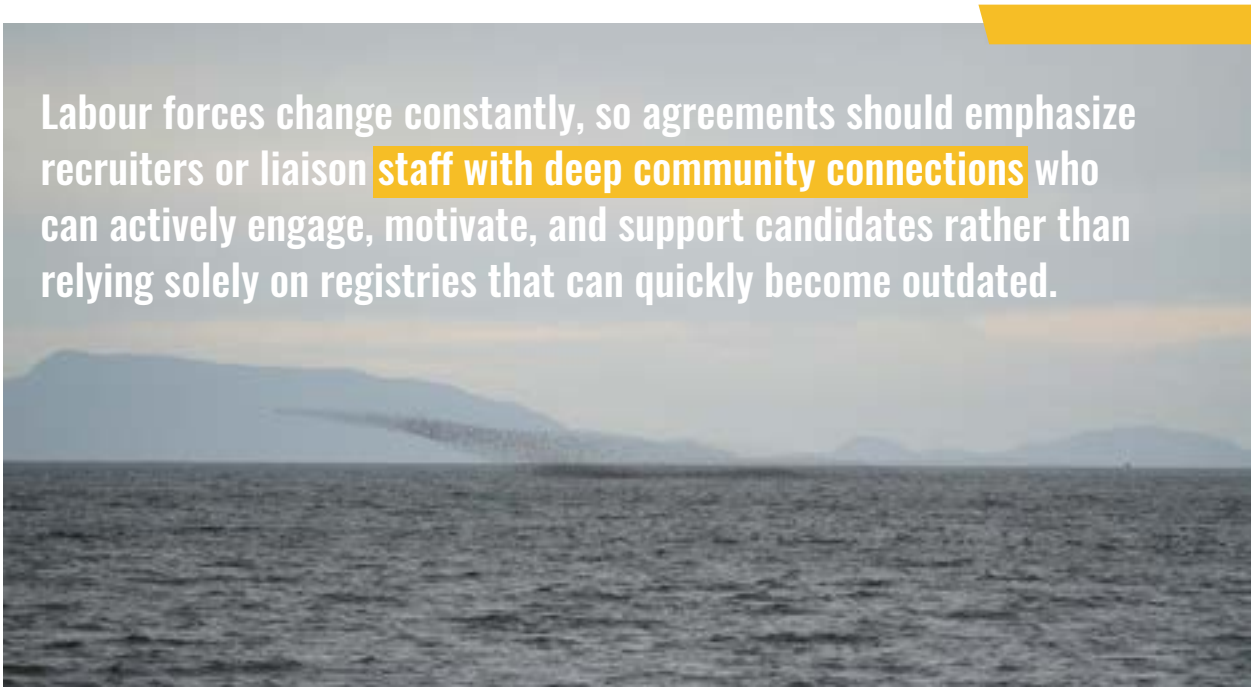
A primary focus for ensuring Indigenous employment involves creating awareness in communities of the possibility and reality of jobs at the mine. Many agreements establish mechanisms for alerting people to jobs, such as a requirement to post notice of jobs in locations that people will visit (e.g., band, health or government offices), or making radio announcements or advertising jobs in local newsletters or newspapers.

A primary focus for ensuring Indigenous employment involves creating awareness in communities of the possibility and reality of jobs at the mine.

At the outset of mining, mine staff can be asked to visit communities, attend job fairs, or visit schools to let people know about jobs. Sometimes, early notice of jobs is required, so that Indigenous employees have a head start in applying for them. Further, a register of Indigenous people who want to work can be built by community liaison staff (with both the liaison positions and database funded by the company), ensuring that the local skills and experience of people are easily accessible.

In practice, effective recruitment is less about maintaining static "hiring pools" and more about mobilizing people through trusted relationships and engagement. Labour forces change constantly, so agreements should emphasize recruiters or liaison staff with deep community connections who can actively engage, motivate, and support candidates rather than relying solely on registries that can quickly become outdated.

In the NWT, Indigenous groups impacted by the diamond mines joined together to form a human resources business (I&D Management), which hosts a resumé building website and staff to assist in maximizing Indigenous employment opportunities. This business held the contract to provide all the heavy equipment operators for the (now closed) Diavik Diamond Mine.



At the Mary River Iron Mine in Nunavut, a dedicated Inuit Recruitment and Selection Program and Human Resource Advisor for Inuit Relations work to increase Inuit participation, supported by annual budgets for travel and engagement. Employment and Contracting Committees oversee recruitment and training to align with community goals. Several mines also maintain community-based liaison offices or employment hubs that coordinate local hiring and align workforce needs with community priorities. Increasingly, recruitment is integrated with training and job readiness programs, linking skills development directly to hiring pathways. Together, these measures reflect a shift toward proactive, relationship-based recruitment that mobilizes Indigenous participation and builds lasting employment capacity.

Employment Targets

Targets are often opposed by industry, because they can be difficult to reach, especially in places where there are many mines competing for labour, or where people simply lack the skills or interest in a mining occupation.[190] Targets can also cause the industry to focus on setting very modest goals that are easily achieved, and they may remove any incentive to change and grow once they are achieved. Further, they may cause the industry to focus on non-core, peripheral or unskilled areas of work where the targets are easily filled.[191]

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

It is also important to establish targets for the construction phase. Construction should be seen as a training ground for the operating mine. It can be useful to secure positions or percentages of the

workforce dedicated to the Indigenous group. In cases where there were no targets for construction in an IBA, there was a shortage of people with heavy equipment skills during operation, certificates in the required trades, and the necessary hours on the appropriate machines and equipment.

Targets can be set out in agreements in a number of ways. First, they can be firm numbers, such as in the Moordijt Booja Community Partnership Agreement (Australia), which requires 100 Gnaala Barja Booja people to be hired. They can also specifically name targets for different stages of the mine life cycle, namely during construction and operation. The Dona Lake Agreement (Ontario), for example, calls for 55 people during construction and 30 during operations. The labour forces in these two stages of mining are quite different, so they merit different targets. Other agreements have set out percentages for employment, such as the BHP Diamonds Project Socio-Economic Agreement, which suggests that:

> *Northern Resident employment throughout the phase will be 33 percent of the total employment associated with the Construction Phase of the Project, including Contractors. Indigenous employment will make up at least 44 percent of the Northern Resident employment during this period … and Northern Resident employment throughout the Operation Phase will be 62 percent of total employment associated with the Operation Phase of the Project, including Contractors, and 72 percent during the period of operations at 18,000 tpd (tonnes per day). Indigenous employment will equal at least 50 percent of the Northern Resident employment.*[192]

Targets can also be skill-based, setting proportions for different occupational levels such as management, skilled trades, and general labour positions. For example, the Kwetıı̨ʔaà (Rayrock) remediation project in NWT sets targets of 7.1% for skilled labour and 61.8% for general labour for Tłı̨chǫ workers, along with a 20% target of procurement contract value for Tłı̨chǫ entities.

These models allow communities and proponents to tailor commitments to local realities, workforce readiness, and long-term capacity-building goals. However, it can be tricky to track compliance with percentage figures, for example, because companies often use the total number of employees and person-years in reports. In the NWT, this figure (person-years) has caused a certain amount of friction. While the Indigenous party wishes to see the names of people who are employed at the mine, the company provides only the figure of person-years, which can make it hard to determine just how many people are working. This is because privacy laws require that companies obtain permission from workers before their names are released. Where appropriate, one solution is to negotiate that all Indigenous workers' contracts include a release clause allowing their names to be shared with the Indigenous signatory for monitoring and statistical purposes.

Targets will also need to be considered in relation to union negotiations (see page 183).

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

Rolling Targets

Another approach involves rolling targets, which involve rising objectives for Indigenous employment and training over time, creating incentives for meeting these targets, and providing automatic adjustment mechanisms if they are not met. Targets can be evaluated and reset, for example, every three years. Failure to achieve the goal can require the project operator to progressively increase spending on employment and training programs beyond a base level specified in the agreement.[193]

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

Penalties for Not Achieving Targets

Penalties for non-achievement of targets or hiring preferences have been built into some agreements and can be important tools for ensuring that communities receive employment benefits that they expect. For example, a penalty provision could require a company to make payments to a training fund or make direct payments to a community for years in which employment targets are not achieved. In situations where employment targets are consistently missed, it is likely in the interest of the miner operator and the community to conduct an analysis to identify the ongoing or existing barriers to hiring Indigenous populations and identify measures to address these barriers.

Penalties for non-achievement of targets or hiring preferences have been built into some agreements and can be important tools for ensuring that communities receive employment benefits that they expect.

Determining a fair value of compensation for missing targets can be a challenge. For the Meliadine Inuit IBA, missed employment results in fixed (inflation-adjusted) payments directly to the community and fixed payment contributions to an employment fund.[194] A fixed payment penalty such as this may be viewed as overly punitive from a company's perspective if targets are missed by a narrow margin and may be viewed as inadequate from a community's perspective if targets are missed by a significant margin. An alternative approach could be scaled based on the extent to which a target is missed. For example, payments could be equal to the value of the lost wages due to jobs not being filled by community members (i.e., the difference between financial benefits that the community would have received if the employment targets had been met and the financial benefits that were actually received).[195] While this approach could be beneficial from a community's perspective since it would, in theory, be receiving the same value in terms of benefits as if a community member had filled the position, it may be onerous from a company's perspective since it would effectively be paying for the same job twice (i.e., paying the non-community member employee and paying the penalty). Ultimately, it is in the interest of both the company and the community for targets to be met, and a penalty should be designed to incentivize meeting these targets and ensuring communities do not miss out on the benefits they expect to receive.

Hiring Preferences

In some agreements, hiring preferences are included, so that people in impacted communities are given first consideration. For example, the Troilus agreement (Quebec) prioritizes Cree trappers whose trap lines are directly affected, followed by Cree beneficiaries of the signatory community, Mistissini, and finally by Cree beneficiaries generally.[196]

Measures can also be included to ensure Indigenous people are the least affected in layoffs (see section on unions on page 235).

Measures for Employment of Women

Indigenous women face additional barriers when it comes to mine employment.[197] There can be strong stigmas against the employment of women in non-traditional jobs. Sexist attitudes of non-Indigenous and Indigenous men can cause women to feel unwelcome and make it difficult for them to excel in their work. Where sites are fly-in-fly-out, women can also have a very hard time securing childcare. As a result, there may need to be specific measures in place to guarantee that female workers will be able to access mining jobs. These measures can include:

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

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

Women in Mining

According to the *Mining Industry Human Resources Council (MiHR)*, women remain significantly underrepresented in Canada's mining workforce — about 16 per cent compared to 48 per cent across all industries.[198] A 2023 MiHR poll found that young women view mining least favourably among eight sectors for safety and opportunities for advancement.[199]

Many women still describe mining workplaces as demanding and inflexible, especially when rotational schedules clash with childcare or family responsibilities. Many women leave within five years, citing limited advancement, poor work–life balance, or unwelcoming environments.

MiHR notes that data on Indigenous women are limited due to small sample sizes and the limited scope of the study. However, Indigenous women often face intersecting barriers — gender inequity compounded by geographic and cultural challenges such as limited access to childcare, training, and accommodation near remote mine sites.

MiHR identifies improving workplace culture, career visibility, and advancement opportunities as the most effective ways to increase women's participation, along with the following best practices:

- Flexible scheduling, hybrid work options, and inclusive site infrastructure;
- Bias and cultural awareness training for managers and supervisors; and
- Targeted recruitment and mentorship programs for women and gender-diverse employees.

Education and Training

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

Other educational support can include:

- Targeted scholarships (e.g., mining and metallurgical engineering, environmental science);
- Skills development centres in the mine site with fully trained educational staff. Community-based delivery models can also make training more accessible;
- Scholarships or stipends to complete high school equivalency (e.g., covering childcare costs for needing to travel to take a course or test); and
- Training funds for Indigenous employees that can be used to offer training that will support career growth.

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

- Specific targets for apprenticeships and trades training;
- Pre-employment training targeted to skills needed at the mine site, such as accounting, administration, mine life and work rotation, planning, geology and exploration, and positions as supervisors;[200]
- Pre-employment training, often including literacy and numeracy programs, as well as trades or education-specific training;
- On-the-job training during work hours;
- Off-the-job education and training support;
- Training and Employment Committees that set annual training plans, monitor progress, and ensure accountability for expenditures; and
- A budget for employment and training programs, including whether there will need to be a review of the budget amount, what happens if expenditure is below budget, reporting and reviews, and an independent audit.[201]

Training is essential to Indigenous retention and advancement. There are many possible elements to be negotiated.

One company offers a job shadow and mentorship program that brings interested community members to the mine site. Participants spend 12 weeks on a two-weeks-on, two-weeks-off rotation, working across different departments (e.g., human resources, operations, warehouse, etc.) to learn

different skills. At the end of the program, participants identify the department they would like to join, and if there is an opening, they apply for the job.

Training and Employment Committees can be established to set annual training plans, monitor progress, and ensure accountability for expenditures.

Retention

Some studies have found very high levels of turnover among Indigenous mine workers,[202] and thus, attention to the factors that can help to ensure the longer-term retention of Indigenous workers is important. These include:

- Measures to make the workforce environment a positive one for Indigenous people (see page 190).
- More experienced workers may be appointed to act as mentors for Indigenous trainees and recruits. Some agreements also provide for Elders to act as mentors, which can help support workers back in their communities. Elders may also be able to help sort out problems being encountered in the workplace.
- There may be a prohibition on termination or disciplinary action due to an inability to speak English.
- Involvement of the Indigenous employment coordinator in cases where Indigenous employees are subject to disciplinary measures, and provision of second chances to people who lose their positions.
- Disciplinary measures for mining company employees who discriminate against Indigenous people or exhibit discriminatory attitudes or behaviour.[203]

Some studies have found very high levels of turnover among Indigenous mine workers.

Employment Policy, Resource, and Implementation Supports

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

- Anti-discrimination policies and cross-cultural training. For example, the Raglan Agreement specifies that the company must take all reasonable steps to prevent employees from experiencing discrimination, take prompt disciplinary action against any employee who behaves in a negative or discriminatory fashion, and evaluate all candidates applying for work for their sensitivity to intercultural contact.[204]
- Indigenous training and employment policy.
- Policies on the consumption and use of alcohol and drugs. Often, remote sites are “dry.”

- Anti-violence and harassment policies and training, which includes culturally and gender-sensitive reporting mechanisms with clear pathways for holding offenders accountable. This can include a zero-tolerance policy.
- Cultural policies to meet specific needs, such as bereavement leave. Often, standard bereavement policies are based on "immediate family" models (father, mother, sister, brother) and may not recognize extended family models of kinship.
- Goals and incentives for managers for hiring and retaining Indigenous employees (e.g., key performance indicators to include Indigenous recruitment and retention).
- Reporting requirements on employment and training programs and outcomes, including independent audits.
- Employment of an employment and training coordinator (also called an "Indigenous employment coordinator" or "liaison officer").[205]
- Other roles may be to maintain relationships between managers and community leaders, solve problems on site, review resumés, act as a liaison to families and communities, and help with workplace conflict resolution.
- Resource commitments that may include an annual company budget for training and employment, in some cases subject to regular review; funding for specific numbers of scholarships, apprenticeships or traineeships; or funds for particular training positions or for pre-employment and on-the-job training programs.

Indigenous Employment Coordinators

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

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

Career Advancement

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

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

- Funding for a specific career development and progression plan and training for Indigenous employees.
- Clearly set out steps for advancement in each work unit or employment category. This reduces confusion and increases transparency about how promotion occurs.
- Inclusion of clear procedures for employee evaluation and advancement, and clear rules for workplace behaviour and employee discipline.
- Preference for Indigenous employees in promotional opportunities, similar to those described for recruitment.
- Employment and training initiatives aimed at placing Indigenous people in skilled and supervisory positions throughout the organization. This is particularly important because having Indigenous people in senior positions can influence prospects for the retention and advancement of other Indigenous employees.
- A ladder-based hiring program or succession program to identify the skills of Indigenous employees and identify measures to promote them to higher-skilled positions (including into management positions).[206]
- Establishment of a minimum number of training positions for Indigenous people for supervisory or managerial positions.
- Guarantees of positions for those who complete education or training programs.

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

Workplace Environment

The transition to a work site can be difficult for Indigenous people. Most work site environments are built around the preferences and values of the dominant society, and many accommodations may need to be made in order to acknowledge and respect the culture of Indigenous peoples. Where this is not done, alienation and loneliness arising from the unfamiliarity of industrial environments and distance from home communities can lead to failure to complete training and education programs, irregular work patterns and high turnover.[207] Measures can include:

- **CROSS-CULTURAL TRAINING**, essential if all employees are to work together in a remote site. The Argyle Diamond Mine agreement (Australia) required all workers and contractors to undertake cross-cultural training on arrival and at intervals of two years thereafter, with managers taking a more intensive course that included camping in the bush with Elders.[208]
- **FOOD FROM THE INDIGENOUS CULTURE**. At one site, people can prepare their own wild meat and fish as they would normally in a country food kitchen.
- **ROTATION SCHEDULES** are often built around the needs of harvesters, so they do not miss a migration of animals, and so they can spend equal time in the community with Elders, families and children. Rotation schedules are most sustainable for families when they involve equal time "out of" and "in" the site (e.g., one or two weeks on and one or two off). Extended absences have caused challenges, so rotation preferences should be discussed with communities and schedules adjusted if issues arise.
- **CULTURAL LEAVE**. Some IBAs include this option. For example, the Diavik agreements allowed for one week of unexplained cultural leave, so that harvesters or drummers could attend to duties as needed.

The transition to a work site can be difficult for Indigenous people, and many accommodations may need to be made. The Argyle Diamond agreement, for example, required cross-cultural training, with managers taking a more intensive course that included camping in the bush with Elders.

- **FAMILY ACCOMMODATION** and spousal visits are sometimes negotiated, so that children and spouses have a sense of the life of the miner at the site. Sometimes this includes a provision for yearly family visits, while other agreements allow for empty seats on commuter flights to be taken up by family members.
- **SITE VISITS BY ELDERS** and conduct of **CULTURAL ACTIVITIES ON SITE**. For example, Indigenous women at the Argyle Diamond Mine practiced *mantha*, a welcoming and spiritual cleansing ceremony for every person who came on site. Other possibilities include sweat lodges, healing ceremonies, shake tents, and the practice of ceremonies such as "paying the land" and naming of the land using Indigenous place names.

- Maintenance of **COMMUNICATION CHANNELS** between the project site and home. This may require training in electronic communications and online services (e.g., banking), guaranteed access to these services, as well as direct phone lines to communities.

- **LANGUAGE MEASURES** for accommodating Indigenous employees who lack a good knowledge of the working language. The company may give unilingual Indigenous employees opportunities to work in jobs where a lack of knowledge of the working language does not compromise the safety or efficiency of others.[209] There can be provisions for English language training, bilingual signs, safety training in Indigenous languages, and employment of bilingual Indigenous employees who can serve as translators.[210]

Family and Community Support

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

- **SPECIAL LEAVE** for family or community crises.

- **WORKER-COMMUNITY LIAISON** staff assignments, with company staff acting as a liaison between workers and communities, and providing support to workers and families. In the Cameco Agreement, for example, an employee relations counsellor provides support to families and employees (see also the earlier discussion of employment and training coordinators on page 230).

- **COMMUNITY-CORPORATION RELATIONSHIP MECHANISMS** to promote intercultural learning, such as family visits and "out on the land" trips. Under one Snap Lake IBA, mine managers are to visit families of workers in their homes and attend cultural events.

- **RETURN TRAVEL ARRANGEMENTS** for workers. For example, many agreements require workers to be flown directly to their home communities. In the NWT, this measure has ensured that wages make it home before they are spent in Yellowknife. This also ensures that workers are not paying extra to work at the mine, and make it home directly after their rotation.

Provision of Appropriate Accommodation

Where a mine is fly-in and fly-out, accommodations are generally not a problem. However, when a mine is near a community, there can be difficulty in getting rental accommodation, or housing can be below standard. Thus, some IBAs call for cost-sharing between the company and community for new accommodations to alleviate housing pressure. For example, the Faro Mine IBA shared the costs of 25 new trailers for the Indigenous community.[211]

Other Employment Measures

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

- **MINIMUM HIRING STANDARDS.** A key barrier is often a lack of education, training and fluency in the working language. Measures to address this include hiring provisions that relax or adjust standard requirements (e.g., fluency in working language and acceptance of skills in lieu of diplomas). For example, the BHP Diamonds IBAs allow previous, on-the-job experience to be recognized in lieu of minimum Grade 12 schooling requirements, on a case-by-case basis.[212]
- **CRIMINAL RECORDS** are a frequent barrier to mine site employment, and often these records are for minor or old offences that can be pardoned. Agreements may provide support to help people go through the process of attaining a criminal pardon.
- **SUMMER JOBS AND INTERNSHIPS** can be allocated preferentially to Indigenous students and, in particular, to post-secondary students.
- **TRANSPORTATION TO THE MINE SITE** can pose a barrier to employees, if workers do not have a license and a vehicle or if there are substantial travel costs associated with fly-in-fly-out operations. Potential employees may be assisted to acquire driver's licenses, or provided with transportation, or subsidized transportation and relocation packages to assist workers to travel or temporarily move between communities and the mine site. For example, De Beers offers relocation packages to subsidize the cost of moving workers' residences closer to the mine and provides round-trip air transportation to the impacted communities.

Union Relationships

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

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

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

One complication of working with the construction trades unions is that they have rarely done membership drives in rural and Indigenous areas, making it almost impossible to surface Indigenous members for work when it becomes available.

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

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

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

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

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

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

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

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

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

Business Development

Mining agreements can contribute to community economic development by creating opportunities for Indigenous businesses to provide goods or services to the project. Just as with employment, there can be significant barriers to business development, such as high transaction costs involved in tendering and contracting arrangements, scarcity of capital, lack of relevant skills, and difficulty in competing with large, well-established non-Indigenous businesses.[213]

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

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

Provisions to Address Barriers to Indigenous Businesses

High Transaction Cost

- Right of first refusal of contracts can be offered to companies controlled by the communities. Sometimes companies are required to pre-qualify for this condition. For example, the Inuvialuit Final Agreement provides that business opportunities are to flow to the IBA beneficiaries in the first instance, "which effectively provides the beneficiaries with first opportunity status."[214] The Inuvialuit Regional Corporation has created a business list, so that the developer must source first with Indigenous businesses. It is only when local companies cannot provide the services that the company can go to outside companies.[215]

Right of first refusal of contracts for goods or services can be offered to companies controlled by the communities.

- Contracts below a certain size can be offered first to Indigenous businesses, and if they meet the criteria, contracts can go to these businesses without going to tender.
- Contracts can be broken up (unbundled) so that they are accessible to smaller businesses.
- Evergreen contracts (which automatically renew unless either party provides advance written notice) are sometimes negotiated.
- Information on upcoming contracts is provided to the community well in advance, so that potential bidders have time to put tender packages together.
- Performance bonds and tender deposits can be waived.

Scarcity of Capital

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

Lack of Relevant Skills and Experience

- Proponents can hold workshops on bidding procedures and safety management, and host annual business opportunity seminars.
- Access to technical and financial expertise can be provided by company staff and through management training programs, or other "in-kind" support can be provided, such as reduced-rate equipment leases and technical support.
- Joint ventures between project operators and Indigenous businesses can be established.
- Parties can appoint an Indigenous business development coordinator or establish a business opportunity implementation committee[216] to forecast contract needs of the project and the capacities of local businesses.[217] This individual or group can assist communities in identifying business opportunities, help to improve methods of bidding, support efforts of mining companies to obtain government funds for management training, and make recommendations to the company regarding specific contracts.[218]

Parties can appoint an Indigenous business development coordinator or establish a business opportunity implementation committee.

Competitive Disadvantage

- Evaluation of contract proposals can include a defined weighting for Indigenous content (as in the Voisey's Bay IBAs), as well as other standard criteria such as quality, cost competitiveness, ability to supply and deliver the goods and services, timely delivery, and safety and environmental record.[219]
- Preference clauses can be agreed on for competitive Indigenous businesses. The definition of "Indigenous business" and "content" needs to be clear. Public Services and Procurement Canada has defined Indigenous business as having greater than 51 per cent Indigenous ownership and control.[220]

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

Other Business Development Strategies

Joint Ventures

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

Research and Development

Market niches might be developed,[221] and this can be fostered through research and development projects relating to technologies and practices relevant to the project. For example, the Tłı̨chǫ in the NWT have specialized in remediation of contaminated sites and now use this business skill in remediation and closure of abandoned sites. When closure is a reality in the NWT diamond industry, these companies will be able to assist in this effort and gain substantial economic opportunities from doing so.

Access to and Transfer of Infrastructure and Facilities

Major mining projects typically involve investments of tens or even hundreds of millions of dollars on infrastructure facilities such as ports, roads, airports, power lines, water supply, industrial workshops, worker accommodation and health and training centres. Particularly in remote regions where such infrastructure and facilities are often scarce, the ability to utilize them, and eventually to own them, can be valuable to Indigenous communities. In addition to acquiring infrastructure and facilities, there may also be opportunities for communities to acquire fee simple land from the mine owner. Acquiring infrastructure, facilities, and/or land may be useful both in establishing businesses, including in areas

such as tourism that are unrelated to mining, and may allow a community's basic service needs (power, transport, water, health) to be met at a lower cost. The issue of land transfer is discussed in the section on Closure and Long-Term Care.

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

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

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

There are a number of potential issues and risks associated with the use of company facilities and asset and land transfers, and legal expertise is essential in ensuring that these are addressed in an agreement. They include the danger that companies will be relieved of liability even if they are responsible for injury incurred by community members using their facilities; and the need to address any government requirements for the company to remove infrastructure when mining ends, to ensure that assets are in good condition when transferred, and that they do not have any liabilities attached to them (for instance the need to remove toxic substances) that could impose significant costs on the community. It is also important to understand the long-term costs of acquiring land and assets, such as the costs associated with ongoing asset maintenance and annual property taxes. Further, it is important for communities to fully understand the legal constraints on the land and how these constraints may impact the community's ability to benefit from the land and its assets. For example, if a community purchases the land on which a mine operated to pursue a non-industrial economic development opportunity, but the land cannot be re-zoned to accommodate the non-industrial economic development opportunity until the land has been fully remediated, then this is a significant hurdle that a community will have to overcome. This type of situation can be avoided by ensuring that all potential constraints are addressed by the mine operator prior to accepting any asset or land transfers.

Environmental Management

IBAs generally deal with environmental management of mining projects during their construction, operation, decommissioning and rehabilitation. As mentioned earlier (see page 21), we recommend that if a community wishes to participate in the environmental management of advanced exploration, this be dealt with in a standalone or precursor agreement, as the community will not have enough information to negotiate effectively for an IBA at the exploration stage.

If Indigenous communities negotiate environmental provisions in IBAs, emphasis is often placed on creating the greatest possible Indigenous influence over environmental management of mining and related activities. "Often the central purpose of including environmental provisions in negotiated agreements is to place *Indigenous people themselves* in a position where they can ensure the protection of their ancestral estates."[222]

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

- Use the precautionary principle, which states that the absence of complete scientific understanding of an environmental problem is not grounds for failing to act to deal with it (often used when there is potential for serious, irreversible, or cumulative environmental and/or social damage);
- Employ an adaptive approach to environmental management, which involves ongoing refinement of management procedures and policies to reflect lessons learned;
- Involve Indigenous people in defining and managing environmental issues and impacts;

- Comply with environmental laws and industry codes of practice;
- Ensure Indigenous people are able to practice traditional laws and customs and exercise the full range of connection to their territory;
- Provide financial guarantees to meet the cost of environmental remediation, including closure costs, in the immediate and long term; and
- Integrate Indigenous knowledge and land management practices into rehabilitation plans and works.[223]

Responsibility of Proponent

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

Proponent responsibility and liability for maintenance of environmental quality is important so the proponent can be held accountable, and Indigenous groups are not held liable, because of their participation in environmental management, for any damage caused by a project.

It may also be stated that the company must comply with the terms of their permits and with environmental legislation. This can be helpful for the Indigenous party, because government authorities may fail to take action when there has been a breach of a permit condition or of environmental law. If the company has made a contractual commitment *to the Indigenous party* not to commit a breach, this can give the Indigenous party the ability to directly seek legal remedies if this does occur.[224] Specific categories of licenses and permits may be referred to in addition to general environmental legislation, such as water management, waste handling and disposal, and wildlife.

An IBA can also act as a governance mechanism designed to strengthen environmental monitoring and accountability where government oversight is insufficient.[225]

Monitoring and Management Systems

IBAs have the potential to play a significant role in monitoring the outcomes of an agreement and the impacts of a project on communities and the environment.[226] The nature of Indigenous involvement in environmental management can vary considerably, reflecting the outcome of negotiations. At the low end of the spectrum, some agreements commit the company only to consult on some aspects of project management.[227] More substantive engagement occurs when there is collaborative management, as described in this clause:

> *The Company will make best efforts to accommodate the First Nation's views, concerns and traditional knowledge with respect to environmental, social, cultural and heritage matters related to the Project and to the extent practicable and reasonable, incorporate them into Project planning and operations.*[228]

Strong environmental clauses in agreements are those that enable Indigenous peoples to play a direct role in how environmental issues are identified and managed — from project design through operation, closure, and site rehabilitation. One of the co-authors of this Toolkit has developed an eight-point scale to assess the strength of environmental provisions in agreements, ranging from -1 (worse than having no agreement) to +6 (full Indigenous control), which is presented in Table 4.7.

Table 4.7 Criteria for Assessing the Strength of Environmental Provisions in Agreements

Score	Criteria
-1	Agreement limits existing legal rights (for example, Indigenous parties agree not to object or appeal under environmental laws).
0	No environmental provisions are included.
+1	The company agrees to comply with environmental laws — this gives Indigenous parties legal standing to enforce compliance but no proactive role.
+2	The company must consult Indigenous peoples on environmental issues.
+3	Indigenous parties have access to environmental information and can review or assess it independently.
+4	Indigenous parties can propose improvements, and the company must respond or implement agreed changes.
+5	Joint decision-making structures are established for environmental management.
+6	Indigenous parties can act independently — for example, suspending operations if serious environmental harm is occurring or imminent.

Source: Adapted from O'Faircheallaigh 2015[229]

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

Environmental Advisory Board), Snap Lake Mine (Snap Lake Monitoring Agency), and Voisey's Bay Project (Environmental Monitoring Board).[230]

Specific provisions regarding Indigenous participation in environmental monitoring can include:

- Provision of Indigenous access to company monitoring locations on project lands;[231]
- Provision of Indigenous access to geospatial data, such as GIS shapefiles;
- Guidelines and mechanisms to ensure Indigenous participation in environmental review, monitoring, and assessment;
- Processes for discussing concerns arising from environmental monitoring information, through an advisory, liaison or management committee;
- Provision for Indigenous environmental monitors;
- Mechanisms for ongoing review of environmental management, such as independent monitoring studies;
- Independent environmental audits at regular intervals;
- Funding for Indigenous parties to gain access to independent technical advice; and
- Inclusion of Indigenous Knowledges in monitoring and follow-up studies, perhaps with specific mechanisms or procedures to plan for integration of knowledge.

Mitigation Measures

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

- Measures to deal with environmental damage, pollution during construction, or post-closure impacts (e.g., performance bonds, insurance policies);
- Indigenous parties have the right to require project activity to cease where the company is in default of an environmental regulation or protection measure established in the agreement, until such a time as the default is cleared up to the satisfaction of the Indigenous party;[232] and
- Habitat compensation and enhancement initiatives — for example, Polaris Minerals Corporation spent over $1.6 million ($2.5 million in 2025 dollars) to clean up an abandoned dump site near a fishing river as part of a cooperation agreement with the 'Namgis and Kwakiutl First Nations.[233]

Toxic Material and Substances

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

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

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

Specific Measures for Exploration, Operation and Closure

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

Closure and reclamation provisions may include:

- Abandonment and rehabilitation plans;
- Involvement of Indigenous communities in closure plan development and implementation;
- Reclamation throughout the life of the project;
- Compliance with all requirements in regulatory approvals; and
- Monitoring following closure and permit inspection by the Indigenous party.[234]

Indigenous Monitors

Indigenous monitors document their observations at project sites and in the region to provide first-hand observations to their nations, essentially acting as the eyes and ears of the Nation at the project facility.

Many Nations have negotiated for financial payments to include environmental monitoring staff and support for their training and equipment. These staff are fully employed in their Indigenous government departments, with the role of serving as environmental monitors at project sites. For example, the Innu Guardians monitor at the Voisey Bay mine site throughout the life of the mine. Similarly, the Ni Hadi Xa Monitoring Program in the NWT, established to monitor effects of the De Beers Gahcho Kué mine in the NT, employs two traditional environmental monitors in the regional area, as well as an environmental monitor.[235]

Many Nations have negotiated for financial payments to include environmental monitoring staff and support for their training and equipment.

Cumulative Effects

Cumulative effects, sometimes referred to as "nibbling loss," "death by a thousand cuts," or the "tyranny of small decisions," occur when discrete decisions are made that together, often unintentionally, result in undesirable conditions. Attempts to understand the total of these cumulative effects, and their implications for the receiving environment, are called cumulative effects assessment (CEA). While the complexity of cumulative effects makes CEA a difficult type of assessment, this does not reduce the urgency of the task. Assessing impacts from discrete projects as if they were the primary source of concern is an increasingly illusory task and one that takes the focus off what should be the primary focus: total effects loading on a valued component (VC). When the matter in question is actually Indigenous rights and interests, the aggregate stresses fit under a wide number of very different categories of things that improve or impede the meaningful practice of Indigenous rights. These "sufficiency resources" go well beyond the biophysical. Indigenous rights are not merely a valued component. They are priority rights protected under the Canadian Constitution, which requires them to be given utmost consideration at the provincial or federal level.

Catastrophic or Unplanned Events

Agreements should contain protections against catastrophic failures and unplanned events. There should be no release of the company from liability in relation to such failures, and there should be protective clauses and land stewardship measures in place to prevent their occurrence.

The Mount Polley mine disaster (see page 205) provides an example of losses that have yet to be fully quantified in the long term on traditional use, culture, and rights downstream of the tailings facility.

Agreement provisions are only now emerging to protect Nations in the case of catastrophic failures and losses. Components include:

- **EVIDENCE:** Part of protection involves having solid evidence illustrating the extent and depth of use in the area surrounding a project. This requires the Nation to negotiate with the proponent for costs of a study that includes Traditional Knowledge and traditional use, or the extent of use, knowledge and the significance of a site to a nation. The resulting evidentiary base can be used in the case of failure as the basis for awarding compensation.
- **PLANNING:** Financial support for the community to develop and implement an emergency response plan.
- **LOSS:** Provisions to ensure that compensation for collective and individual losses occurs swiftly can be negotiated. Loss may be the inability to fully and meaningfully exercise rights during project construction, operation, and the duration of clean-up/recovery. Defining the full range of loss, including cultural, social, and spiritual losses where there is severe environmental impact, is limited under current regulatory law, so IBAs can operate to fill in these gaps.

- **COMPENSATION** should not be only financial, but include ceremonial restoration and extensive engagement of community-based teams in restoration and monitoring. Compensation is typically tied to losses that are suffered by particular harvesters of their equipment, or failure to be able to practice livelihood (and associated market losses); this should be expanded.
- **INSURANCE:** Some IBAs in Australia adopt the alternative approach of an insurance policy with the community as the beneficiary, so they control funds that can be applied for reclamation.
- **RECOURSE:** Efforts should be made to ensure that financial institutions or companies behind a small proponent are liable for remediation costs. This should involve a guarantee from a parent company (e.g. Vale) that if a subsidiary (e.g. Voisey's Bay Nickel Company) did not have access to adequate financial resources for full remediation, the parent will make up the difference.
- **POST-CATASTROPHIC FAILURE RESPONSE ASSESSMENT:** This involves agreeing on an emergency response plan for a failure, including agreement on how to determine the extent of impacts and the adequacy of the compensation. The Mount Polley panel review urged new best management practices, such as more detailed site characterization prior to construction, the use of dry covers and the exclusion of tailings water cover where possible, more robust retention dam design (such as downstream and centre-line design as opposed to upstream-dam design), as well as independent tailings review panels.
- **ENVIRONMENTAL MONITORING:** Environmental monitoring during project life by Nations under IBAs has been happening at mine sites for more than 10 years. If there is strong community-based monitoring, the capacity can be applied to post-disaster monitoring to ensure there is a strong flow of information about impacts.
- **NO WAIVER:** Negotiators should be wary of clauses that waive Indigenous communities' right to legal recourse in the case of catastrophic failure.

Spill Reporting and Protocols

In Alberta, the Mikisew Cree First Nation responded to an industrial spill by triggering water quality monitoring. Following the 2013 Obed coal mine tailing breach, MCFN (and the Athabasca Chipewyan First Nation) argued that they should receive funding from the proponent to monitor water quality downstream after Alberta government water quality data showed contaminant exceedances. This effort was not part of an IBA, as neither of the Nations were included in the original scope of potential impacts of the mine. They were successful in their plea, after the release, and began community-based monitoring of the water. The Mikisew envision that their monitoring of the environment will have long-term funding, encompass many project sites, and build the capacity of Mikisew members to conduct monitoring. Further, they have joined forces with other nations, including the Athabasca Chipewyan First Nation, and train harvesters to identify spills and quickly report their observations as they travel through their traditional territory along the Athabasca River. This example is instructive of how important it is to have spill reporting and protocols in the IBA itself. ■

Mount Polley Mine Disaster

Unplanned events can be defined in IBAs and can involve any disastrous event that was not described in the project description. The 2020 global pandemic is one example of an unplanned event, and the 2014 tailings disaster at the Mount Polley mine is another.

On August 4, 2014, the tailings pond dam at the Mount Polley copper and gold mine in central British Columbia, Canada, breached, releasing about 17 million cubic meters of water and 8 million cubic meters of tailings and other materials into Hazeltine Creek, Quesnel Lake, and Polley Lake.[236] The Mount Polley Mine Disaster highlights the inadequacy of government regulation in protecting Indigenous territories, and the importance of using IBAs as an opportunity to improve the quality and reliability of environmental planning, monitoring and management.

While long-term and holistic health impacts remain to be fully documented, this disaster produced immediate and lasting effects on Indigenous peoples.[237] Secwepemc communities — particularly T'exelc (Williams Lake First Nation) and Xat'sūll (Soda Creek First Nation) — faced immediate restrictions on water use and fishing in Quesnel Lake and River, disrupting food, social, and ceremonial practices, while the Tŝilhqot'in Nation reported salmon fishery impacts along the Fraser (ʔElhdaqox). The breach caused severe habitat destruction in Hazeltine Creek and contamination concerns across culturally significant harvesting areas. Prolonged uncertainty about water and fish safety, documented by the First Nations Health Authority, contributed to chronic stress and eroded community trust. In the years following, T'exelc and Xat'sūll bore significant governance and time costs through ongoing oversight, legal challenges, and consultation processes as directly affected rights-holders.

The BC government ordered a review of the cause of failure of the tailings facility, and in 2015, a panel of experts concluded that "the dominant contribution to the failure resides in the design," which "did not take into account the complexity of the sub-glacial and pre-glacial geological environment associated with the Perimeter Embankment foundation." The panel recommended an improved adoption of best applicable practices (BAP), but also a migration to best available technology (BAT), including the use of dry covers and the exclusion of water covers where possible, as well as independent tailings review panels. These recommendations can be used as measures in future environmental assessments.

In addition to technical failures, both the B.C. Chief Inspector of Mines[238] and the B.C. Auditor General[239] found serious governance failures at both the company and government levels after the Mount Polley disaster. The Chief Inspector reported that the operator failed to meet basic safety and professional standards — overlooking warning signs, conducting poor site investigations, and mismanaging water and risk. The Auditor General found the province's oversight system "inadequate to protect against significant environmental risks," citing weak professional-reliance rules, piecemeal permitting, and limited dam safety capacity. Both reports called for stronger oversight, clearer accountability, and a clearer separation between mine promotion and regulation to prevent future failures.

Source: *Report on Mount Polley Tailings Storage Facility Breach*, mountpolleyreviewpanel.ca/final-report

Culture and Cultural Heritage

Protection or mitigation measures can apply to two aspects of cultural heritage. The first area is tangible, or the material manifestations of Indigenous occupation over time. This includes burial sites, belongings, middens created by discarded shells and other food debris, rock and cave paintings, and scatters of tools. The second involves places, sites, areas, or landscapes that have contemporary spiritual significance, and other aspects of living culture, which can include language, values, relationships, and the ways that people express culture (e.g., art, dance, ritual).[240] Indigenous cultural heritage is inextricably woven into Indigenous ontologies and is essential to cultural continuity.[241] Tangible and intangible forms of cultural heritage are inseparable; physical locations and belongings derive meaning through living knowledge, stories, and practice. The presence of Indigenous peoples in their traditional territories follows on from their original occupation and inhabitation over millennia.

Cultural Heritage

IBA provisions for protecting cultural heritage can include a description of what might be protected, a protocol for how research or surveys will be undertaken, strategies for managing cultural heritage in an area, and notification procedures. General criteria that can be used to assess the relative level of protection provided by an IBA are summarised in Table 4.8. Examples of the sorts of provisions that can be included are:

- A principle of avoiding damage as a first objective, followed by the possibility of minimizing any damage and, if damage or destruction of sites or artifacts cannot be avoided, a process for mitigation and compensation;
- Measures and protocols to avoid damage to community-identified cultural sites, including protocols for site or object management and site clearances, timeframes and, if sites are to be identified in reports, who will have access to this information. This may include communities identifying “no-go” zones in which there is zero tolerance for disturbance of any kind;
- Provision of resources and funds for Indigenous communities to undertake heritage assessments and develop management plans on the basis of agreed standards, or funding Indigenous knowledge studies;
- Employment of a cultural heritage consultant, and terms of reference for choosing one;
- Creation of monitoring and site-specific guidelines that are defined by Indigenous communities, such as stop work protocols in the event of chance finds;
- Confidentiality of culturally sensitive information;
- Indigenous access to areas of importance for social, religious or cultural purposes and prohibition on access of non-Indigenous project personnel to the sites;

- Employment of local cultural heritage protection monitors, e.g., involvement of Elders or land users in heritage resource impact assessments before, during, and after exploration or mining;
- Establishment of a Joint Cultural Heritage Committee to oversee implementation; and
- Processes for consultation with the Indigenous party.

Indigenous communities are increasingly enacting laws, policies, and permitting systems to govern their own cultural heritage (e.g., K'ómoks First Nation Cultural Heritage Policy, 2020). Provisions should affirm and apply those existing standards as a minimum benchmark for project activities.

Table 4.8 Criteria for Assessing the Relative Level of Protection Provided by an IBA

Level of protection	Criteria
Lowest	Company may damage, destroy, or disrupt sites or areas of significance without any reference to impacted Indigenous parties.
Low	Company may damage, destroy, or disrupt sites or areas of significance; Indigenous parties only have an opportunity to mitigate the impact or the damage, for example by removing artifacts, conducting ceremonies, doing remediation.
Medium	Company must minimise and mitigate damage to sites or areas of significance to the extent that this is consistent with commercial requirements.
High	Company must avoid damage to sites or areas of significance to the extent that the project remains technically and financially viable.
Highest	Company must completely avoid any damage to sites or areas of significance.

Source: Adapted from O'Faircheallaigh 2015.

IGLOOLIK, PHOTO JANELLE KUNTZ

Cultural Practices and Language

Culture is, of course, much more than "stones and bones." It is a living, continually adaptive system, not a remnant of the past. It is also highly complex, which makes a precise or exhaustive definition of the concept impossible. A simple, general definition of culture we use is "a way of life; a system of knowledge, values, beliefs and behaviour, passed down between generations."[242] Mitigation for impacts on the culture of the people who work in remote sites can therefore be defined.

Mitigation can include:

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

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

Safeguarding Cultural Heritage

In May 2020, two rock shelters in Juukan Gorge in Western Australia that were sacred to the Puutu Kunti Kurrama and Pinikura Peoples (PKKP) and that contained cultural evidence dating back more than 46,000 years, were legally destroyed by Rio Tinto mining operations under the Western Australian Aboriginal Heritage Act 1972. The losses included deeply significant cultural, spiritual, and archaeological heritage for the PKKP. Public outrage led to the Australian Parliament's inquiries, which called for stronger Indigenous governance and comprehensive reform of heritage laws.[243]

In the aftermath, Rio Tinto and the PKKP began rebuilding their relationship first through a 2022 Heads of Agreement and the creation of the Juukan Gorge Legacy Foundation, followed in 2025 by a Co-Management Agreement that places PKKP decision-making at the centre of heritage governance and site rehabilitation. The Juukan Gorge tragedy stands as a reminder that legal compliance is not protection and that IBAs must embed Indigenous authority, consent, and shared governance to safeguard cultural heritage. ■

Harvester Compensation and Traditional Use

Compensation can include lost revenues from harvesting caused by disturbances from mining activities, such as damage to equipment, loss of animals, including direct loss if animals are no longer present in the project area, or for increased costs associated with additional travel. For example, Cominco and Anvil Range Mining in northern BC both contributed to a trappers' trust fund. This was used to make annual payments of $1,500 ($2,500 in 2025 dollars) to 30 Elders, supplements to Ross River Dena trappers, training, hunting trips, and provision of meat to Elders.[244] Similarly, one community has set up a robust cultural program through which the community is able to provide direct financial support to the experienced harvesters who are teaching the next generation of children and youth traditional activities such as fishing, hunting, berry picking, and food preservation techniques. The funding also provides subsistence support, such as gas distribution to the Elders and meal vouchers to harvesters. The community was able to purchase a community freezer to strengthen food security, and equipment such as boats and snow machines to support cultural continuity. Another fund for harvesting and traditional activities helped finance:

- Trapper cabins, including new ones, and renovations;
- Communications (e.g., satellite radio hookup);
- Trap line management, wildlife monitoring, harvesting monitoring, and relocation of animals;
- Transportation, including bush planes, roads, and skidoo trails;
- Traditional activity enhancement, such as habitat improvement or equipment repair;
- Other works and programs or replacement of loss of traditional activities; and
- Any other use of the fund deemed appropriate by the Indigenous party related to socio-economic measures or development.[245]

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

Agreements often seek to minimize disruption of Indigenous harvesting and prevent damage to wildlife and habitat by mining operations or non-Indigenous mine workers. For example, they may specify that fishing or hunting by non-Indigenous employees is not permitted or is only allowed under certain conditions.

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

Social Measures

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

- Measures to control interactions of "outside" workers housed in large camps with small, primarily Indigenous communities;
- Broader support for cultural and social activities;
- Sustainability funds, such as that developed by the Innu Nation;
- Obligations to develop social programs, such as counselling for workers and families, addiction programs, money management training, healing workshops, and stress and anger management, held both in the communities and at the project site; and
- Establishing financial, technical or human resource assistance to improve community infrastructure, implement community programs, or establish a community development fund.[246]

Closure & Long-Term Care

When an IBA is being negotiated, project closure can seem a long way away and may receive little attention given the many more immediate issues that need to be addressed. Indeed, many IBAs fail to deal with closure in any substantial way. Yet the costs of poor closure planning and deficient long-term care can be enormous. Arn Keeling and John Sandlos in Canada[247] and Ciaran O'Faircheallaigh and Rebecca Lawrence in Australia[248] have documented the serious and long-lasting environmental, social, and cultural costs that can continue long after mineral production ends. Indeed, these costs can exceed the total benefits received by a community from a project over its operational life. The length of the time frames involved must be stressed. For instance, Glencore, operators of the McArthur River mine lead/zinc mine in Australia's Northern Territory, has indicated that it will take 300 years to rehabilitate toxic waste dumps, and has publicly committed to ensuring that the post-mining landscape will be left in a safe condition for 1000 years.[249] How a private company can credibly make such a commitment is another matter.

Indigenous communities cannot rely on government regulators to ensure that mine closure planning and post-mine rehabilitation are effective. Indeed, governments have failed dismally to ensure that extractive companies meet the real cost of closure and rehabilitation. When the existence of serious problems emerges after a mine has formally been 'closed' and the operator has left, the cost of dealing with them falls on the public purse. The huge expense being incurred by Canada (an estimated $3.8 billion) in dealing with the environmental legacy of the Giant mine near Yellowknife is one of many Canadian examples that illustrate this point. First Nations must address issues arising from mine closure themselves, and IBAs represent one of the few tools they can use to do so.

A fundamental principle in considering mine closure is that it is enormously more difficult and costly, and may be impossible, to address environmental problems that emerge after closure than to avoid those problems in the first place. Issues around closure and long-term care, therefore, require careful and serious consideration in any discussion of IBAs and their negotiation. Several key interrelated issues are discussed below. For example, in principle, it may be highly desirable for a First Nation to take ownership of land on which a project has operated. But, if mine planning is poor and the land becomes contaminated, taking ownership of it could result in a First Nation assuming onerous legal and financial obligations.

Closure Planning

Having an impact early in project planning and maintaining it throughout project life is critical. Careful attention should be paid to how closure is addressed in the project draft environmental impact statement and a submission made as part of the public consultation process to address any shortcomings (almost certain to occur) in how closure is dealt with, and to assert a need for the regulator to insist that the Indigenous community be included throughout closure planning. In framing their approach to closure, negotiators should consider how the project area relates to the community's strategic plan for regaining ownership of its traditional lands (if it does not already own the project site), what implications the community's land use planning has for the eventual use of the project area, and the sort and level of rehabilitation and restoration the community would prefer. If these matters are not clear, they should be discussed as part of community consultations about the project.

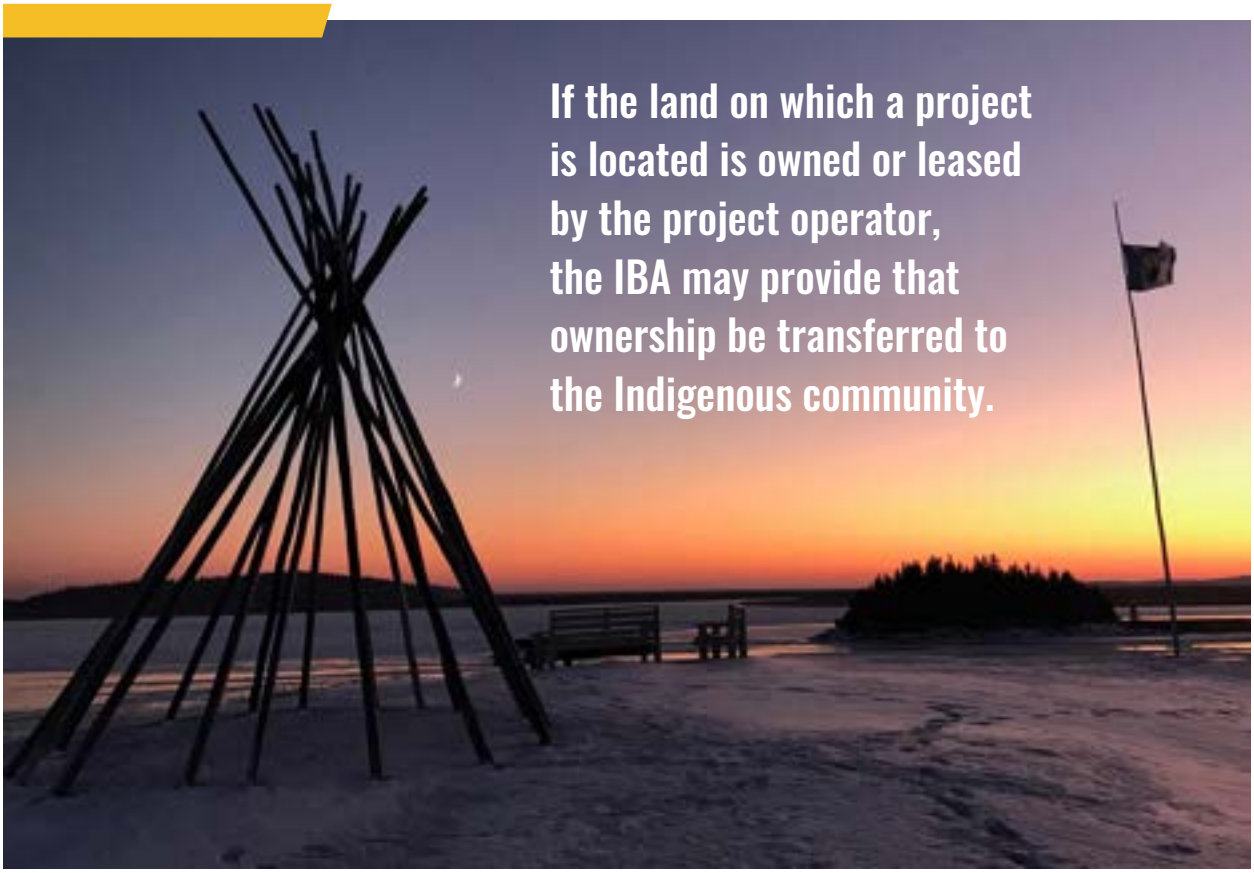
In most jurisdictions, developers are required to submit draft closure plans at the time they obtain regulatory approval, and to regularly update these plans as the project proceeds. Typically, they submit a proposed final closure plan some years before closure is anticipated. An IBA can provide that an Indigenous community has a right to be consulted in relation to draft closure plans and, importantly, the proposed final closure plan. To ensure this consultation is effective, the IBA can provide for the project operator to provide funding for the community to retain specialist technical advice, can ensure that adequate time is provided for the community to assess and comment on draft plans, and can call for earlier preparation of a draft final closure plan if the community believes that the time frame provided by legislation is too short. Five years before closure is often an appropriate timeframe, leaving adequate time for feedback and planning, but at the same time being sufficiently close to project closure to have a clear idea of relevant time horizons and resource needs.

An obvious problem is that a project operator may consult with an Indigenous community on closure planning but refuse to take account of its views. Several IBA provisions can deal with this. One involves requiring a project operator to respond in writing to community proposals on closure, to explain the reason for any refusal to accept these proposals, and to forward community proposals and the project operator's response to them to the government agency responsible for approving closure plans. A second and more effective provision, though one that may require some hard negotiating to achieve, is a requirement that the project operator's draft closure plan cannot be submitted to the environmental regulator until the community has approved it. The impact of this provision arises from the fact that a project operator cannot begin the closure process, and in doing so begin to define the

limits of its financial liabilities arising from closure, until a draft closure plan has been submitted. It is thus likely to engage very seriously with a community's proposals on closure. There is, of course, a possibility that a government regulator might reject closure proposals shaped with input from a community, but this is unlikely given that such proposals are almost certain to go beyond minimum regulatory requirements. Aboriginal Traditional Owners in the Kimberley region of Western Australia have been successful in having a provision of this sort included in IBAs for two projects.

Ownership of Land

If the land on which a project is located is owned or leased by the project operator, the IBA may provide that ownership be transferred to the Indigenous community. This can occur when the IBA is signed, with a 'lease back' to the project operator included in the Agreement, or provision can be made for ownership to be transferred at the end of project life. One recent agreement in Victoria, Australia, provides for ownership of land the company purchased to act as a 'buffer' around a project to be transferred to the Indigenous community immediately, subject to its 'buffer' status being maintained and for ownership of the project area itself to be transferred on completion of mining and rehabilitation. In both cases, the price paid by the community is nominal. As noted above, an Indigenous community needs to ensure that it does not become liable for dealing with contamination that continues after a project is formally 'closed', and an IBA should include rehabilitation criteria that will need to be met before transfer of ownership, and therefore of liability, occurs.



FORT CHIPEWYAN, TERRITORY OF MIKISEW CREE K'AI TAILÉ DENE MÉTIS, PHOTO SUSAN LEECH

Impact Monitoring and Management

Considerable uncertainty may surround the physical and chemical processes that determine whether and how an extractive site continues to affect the environment after production ends. For instance, the behaviour of groundwater may be poorly understood, as may therefore be the transmission routes for toxic material such as acid rock drainage. Water treatment may need to continue in perpetuity, and it is important that there are plans and funding (see section below) in place to ensure this happens. This makes it especially important to ensure that an IBA provides for ongoing monitoring of the environment, with community involvement, to ensure that any expected impacts occur as predicted and that any unpredicted impacts are identified and action taken to deal with them.

Funding of Closure

Project operators are required to lodge bonds with government regulators, in cash or instruments such as bank guarantees, that are supposed to meet the costs of closure. Research and practical experience in Canada, Australia, and other countries consistently demonstrate that the amounts demanded by regulators are nowhere near the actual cost of effective rehabilitation efforts and dealing with ongoing impacts. Problems also arise because, nearing the end of project life, there is a tendency for major companies to 'offload' projects on smaller firms that lack the capacity to meet financial undertakings given to regulators by the original owner.[250] IBAs, therefore, need to include legally binding commitments to the community that can be passed on to new owners in the event that a project changes hands, to provide funds to meet any gap between amounts held in bond by regulators and the actual cost of rehabilitation and dealing with unexpected environmental impacts. In addition to financial commitments for foreseeable closure costs, a mechanism used in several agreements in Australia is for the project operator to take out an insurance policy, in favour of the Indigenous community, which comes into effect if unanticipated environmental impacts must be dealt with.

Community Resourcing

Dealing with the closure issue effectively requires a substantial commitment of resources by a community, and an IBA should provide for the project operator to meet the costs involved. These costs include the time of community staff and leadership to review draft closure plans and help design and implement monitoring programs. They also include technical advice from external specialists to help interpret complex technical documents, to assist in evaluating project operator proposals for rehabilitation and monitoring, and to interpret monitoring data after production ends. Funding for this work should be identified separately from general IBA implementation funding, otherwise it may be allocated to more urgent, but not more important, issues. Funding must also be provided beyond the end of production. Some project operators may resist providing adequate funding, but it is essential that an Indigenous community has the resources to participate effectively in implementing closure plans and to monitor environmental impacts after formal 'closure' occurs.

Asset Transfers

As discussed in the Access to and Transfer of Infrastructure and Facilities Section, communities will often have an opportunity to acquire land and/or project-related infrastructure after the project ceases operations. Where company fixed assets are of potential value of Indigenous groups, and of limited value to the company because a project phase or an operation have been completed, an IBA should facilitate, and minimise the costs involved in, transferring the assets from the company to the Indigneous community. This principle has increasingly been recognised in IBAs in Australia. For instance, a recent agreement in Cape York, Queensland, provides that the project operator will give the Aboriginal signatories 12 months' notice of its intention to complete any significant phase of the project. The Indigenous community has the right to nominate any fixed plant or infrastructure assets utilised in that phase of the project as might generate benefits for the community. The operator is required to give first right of refusal to the Aboriginal community for transfer of ownership of the nominated assets, at a cost that takes into account any saving in decommissioning costs and written down value 'and shall generally be nominal.' An IBA in the Kimberley region of Australia provides that the Aboriginal party can nominate surplus facilities remaining at the end of production, including a training centre and a ship mooring facility, which they wish to acquire and that the project operator will transfer ownership of these facilities for a consideration of $1. Each of these agreements acknowledges the need to either satisfy, or obtain exemption from, any relevant regulatory requirements in relation to facilities on mining or petroleum leases.

In dealing with asset transfers, IBAs need to address any government requirements for the company to remove infrastructure when production ends, to ensure that assets are in good condition when transferred, and that they do not have any liabilities attached to them (for instance, the need to remove toxic substances) that could impose significant costs on the Indigenous community.

Care and Maintenance

There is a growing tendency for mining companies to place mines in long-term 'care and maintenance' where they have no plans to reopen them, so as to avoid the substantial costs involved in formally closing a mine and surrendering tenements to the government. Over 100 mines in Queensland, Australia, are on indefinite care and maintenance, one since 1998, while De Beers' Snap Lake mine in the Northwest Territories has been on care and maintenance since 2015. Indefinite care and maintenance can result in serious harm and loss of opportunity for Indigenous communities. It can mean that ongoing environmental impacts associated with non-operating mines, such as acid mine drainage, are not addressed; that their access to mining leases is restricted; and that ownership of land and infrastructure assets cannot be transferred to them. IBAs can provide for Nations to be involved in decisions about mines being placed on a care and maintenance basis; for time limits to be in place so that if a mine is not reopened after a defined period it must be formally closed; and for provisions on asset and land transfers to take effect once a mine has been on care and maintenance for a defined period.

Establish Agreements that Reflect Community Goals

Once an agreement is in draft form, the negotiating team will need to gauge consent to the issues covered and to proposed commitments, responsibilities, and benefits. As discussed in Section 3, there are a series of points at which to obtain community consent. Each of these points can require different levels of community engagement (see Figure 3.4 on page 154).

Early on, there needs to be broad engagement to establish community views about a proposed project. It may be narrower at the MoU stage (see page 102), and then become broad again for consideration of a draft agreement. The pulse of public opinion can be taken by the negotiating team or by a broader body, such as a community government, and it may need to be taken in different ways throughout the process.

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

The community should use a process that is both culturally appropriate and robust in terms of getting wide feedback and broadly-based consent.

Each Indigenous community will have a particular way that consultation and public decision-making occur. To establish standard rules for seeking approval for agreements (i.e., there must always be a referendum) would go against the spirit of respecting local practices. There are a number of issues, however, that should be considered in designing a forum to attain consent. First, outside agencies may misunderstand how decisions are made locally, and thus, the authority of the wrong people may be accepted. Second, there are often plural systems for decision-making, and this can provide the opportunity for community members or outsiders to go "forum shopping"[251] to get the decision they want. Finally, agencies can also manipulate local authorities and sow conflict between them to gain their own ends.[252] Appropriate principles for gauging consent are perhaps the best safeguard in dealing with these concerns, such as:

- Being thorough and transparent in the process of consultation, so that all affected community members and groups have an opportunity to provide input into the process; and
- Citizens should be provided with multiple opportunities to express their needs and perspectives and to inform negotiators and decision-making processes.[253]

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

Community Review of Confidential Agreements

A common issue with seeking community approval for IBAs is that the agreement itself is often confidential, and its broad dissemination opens the process to eleventh-hour confidentiality breaches.

The following strategies ensure that community members can make an informed decision, without risking breaches of confidentiality:

- Having several numbered copies of the agreement available at the government office, where community members are able to read it;
- Holding one or several community meetings at different times and days to maximize attendance, and having leadership or the negotiation team present on the key aspects of the agreement; and
- Privately briefing family heads, Elders, and interested community members who have not yet had the opportunity to review the agreement.

Plebiscites or Referenda

Plebiscites or referenda are sometimes used to gauge community approval for projects in Canada. These involve offering the opportunity to the whole community to vote on whether to give "in-principle" support for a mine, or to approve an agreement. To avoid claims of illegitimacy and to ensure a community has the opportunity to provide FPIC, plebiscites and referenda have to be carefully organized, advertised well, run by an independent official, and follow accepted procedural rules. The positive side to this process is that everyone can have a say in the decision. Also, if a substantial majority approves an agreement, this gives the industry the clear support of the Indigenous group and thus contributes to social license to operate. The threshold for approval does not have to be 100 per cent, but some other level that is defined locally. Anything below 60 per cent in favour of a project or agreement may be defined as too low a threshold, given the long-term and serious implications of approving major mining projects.

There can be drawbacks with these processes. They can cause fractures and a lack of unity simply because the process allows only a "yes"

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

or "no" outcome, with no room for internal discussion to seek a compromise that might be broadly acceptable (for instance, a different agreement or a smaller project). They may not be an appropriate approach to decision-making for Indigenous communities, who may rely instead on consensus-building and deliberation to make decisions. Further, if people are not well informed about the nature of the agreement or project, they can misrepresent the real level of support. This could mean that people withdraw their support as they become more informed.

Leadership Review and Approval

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

Community Meetings to Obtain Consensus

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

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

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

Returning to the Negotiating Table if Community Support is Absent

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

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

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

Signing and Launching an Agreement

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

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

Ceremony can be a powerful way to cement the relationship between the company and the wider community.

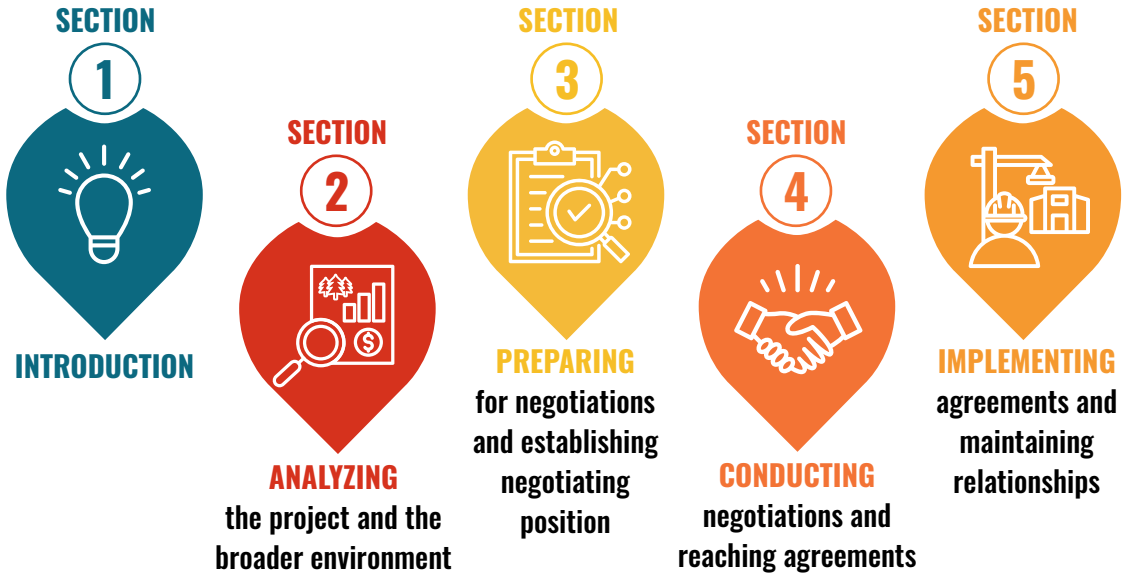
However, ceremony and public-facing meetings are not required. In some instances, the company and community may prefer to sign in counterparts and move on. ■

Summary of Section 4

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

Next, the final section of the toolkit sets out guidance for Indigenous communities on implementing agreements and maintaining relationships.

Structure of the Toolkit



NOTES TO SECTION 4

124 Forest Peoples Programme 2008.
125 Weitzner 2006.
126 Wilkinson 2001.
127 Asch et al. 2018.
128 Christenson 1999.
129 Woodward & Company 2009.
130 Woodward & Company 2009.
131 FNEATWG 2004, 13.
132 Woodward & Company 2009, II-11.
133 Woodward & Company 2009.
134 See Woodward & Company 2009, II-5-10 for a detailed discussion.
135 O'Faircheallaigh 2004.
136 Cited in Kennett 1999, 45.
137 Woodward & Company 2009, 11-44.
138 Woodward & Company 2009.
139 Quinn 2005.
140 O'Faircheallaigh and Ali 2008.
141 UNDESA 2004.
142 Woodward & Company 2009.
143 Cited in Kennett 1999, 104.
144 Nunavut Land Claims Agreement Article 26.9.1.
145 Quinn 2005.
146 Quinn 2005.
147 Quinn 2005.
148 Quinn 2005.
149 Quinn 2005.
150 Quinn 2005; Woodward & Company 2009.
151 Woodward & Company 2009.
152 Quinn 2005, 27.
153 Quinn 2005.
154 Quinn 2005.
155 Quinn 2005.
156 Quinn 2005.
157 Quinn 2005.
158 O'Faircheallaigh and Corbett 2005, 643.
159 O'Faircheallaigh 2006a.
160 O'Faircheallaigh and Corbett 2005, 644.
161 O'Faircheallaigh 2003a, 14.
162 Quinn 2005, 14.
163 Quinn 2005, 14.
164 O'Faircheallaigh 2004, 43.
165 Tłı̨chǫ Land Claims Agreement 2005.
166 Gunton et al. 2021.
167 FNEATWG 2004, 20.
168 For example, see Gunton et al., 2021 & O'Faircheallaigh 2006c.
169 O'Faircheallaigh 2006c.
170 For services or programs, they could suffer significant hardships during periods of low prices, O'Faircheallaigh 2006c.
171 O'Faircheallaigh 2006c.
172 Northern Ontario Business Staff 2025.
173 Canada Infrastructure Bank, n.d.
174 Canada Development Investment Corporation, n.d.
175 Kennett 1999, 85.
176 Kennett 1999, 85.
177 Qikiqtani Inuit Association and Baffinland Iron Mines Corporation 2018.
178 Kivalliq Inuit Association and Agnico Eagle Mines Limited 2017.
179 Ministry of Indigenous Relations and Reconciliation, 2024.
180 Gibson et al. 2025.
181 "SEDAR+ Landing Page," n.d.
182 O'Faircheallaigh 2007a.
183 O'Faircheallaigh 2006a.
184 O'Faircheallaigh 2004.
185 O'Faircheallaigh 2004, 49.
186 The Firelight Group and the First Nations Major Projects Coalition 2025.
187 Gibson 2008.

188 O'Faircheallaigh 2006c; Gibson 2008.
189 Kennett 1999, 50.
190 O'Faircheallaigh 2006c.
191 O'Faircheallaigh 2006c, 83.
192 Government of the Northwest Territories and BHP Billiton 1996.
193 O'Faircheallaigh 2006c, 83.
194 Kivalliq Inuit Association and Agnico Eagle Mines Limited, 2017.
195 Loxley, 2019.
196 Wilkinson 2001, 7.
197 Mining Industry Human Resources Council 2024.
198 Mining Industry Human Resources Council 2024, 19.
199 Mining Industry Human Resources Council and Abacus Data 2023, 13.
200 Kennett 1999, 53-54.
201 Quinn 2005.
202 Barker and Brereton 2005; Gibson 2008.
203 Kennett 1999, 58.
204 O'Faircheallaigh 2006c, 85.
205 Kennett 1999, 63.
206 Kennett 1999, 54, 57.
207 O'Faircheallaigh 2006c, 82.
208 O'Faircheallaigh 2006c, 85.
209 Kennett 1999, 60.
210 Kennett 1999.
211 Dreyer 2002.
212 Wilkinson 2001, 9.
213 O'Faircheallaigh 2006c 87.
214 Gogal et al. 2005, 150.
215 Gogal et al. 2005, 150.
216 Woodward & Company 2009, 11-35.
217 Hennessey 2007, 19.
218 Kennett 1999, 74.
219 Gogal et al. 2005, 149.
220 Public Services and Procurement Canada 2022.
221 Kennett 1999, 73.
222 O'Faircheallaigh and Corbett 2005, 636.
223 O'Faircheallaigh 2002, 5; FNEATWG 2004, 13.
224 Woodward & Company 2009, 11-24.
225 O'Faircheallaigh, 2021.
226 O'Faircheallaigh 2020.
227 Woodward & Company 2009, 20.
228 Woodward & Company 2009, II-21.
229 O'Faircheallaigh, 2015.
230 O'Faircheallaigh 2006b.
231 Kennett 1999.
232 Woodward & Company 2009, 11-27.
233 Woodward & Company 2009, 11-28.
234 Kennett 1999, 95.
235 O'Faircheallaigh (2020) provides a detailed discussion of the role of IBAs in environmental monitoring.
236 Government of British Columbia 2023.
237 First Nations Health Authority 2017.
238 Ministry of Energy and Mines 2015.
239 Office of the Auditor General of British Columbia 2016.
240 O'Faircheallaigh and Ali 2008.
241 Nicholas and Smith 2020.
242 Gibson et al. 2010.
243 Australian Government 2022.
244 Dreyer 2002, 88.
245 Kennett 1999, 84.
246 FNEATWG 2004, 17.
247 Sandlos and Keeling 2015.
248 O'Faircheallaigh and Lawrence 2019.
249 O'Faircheallaigh and Lawrence 2019.
250 O'Faircheallaigh and Lawrence 2019.
251 Colchester and Ferrari 2007, 7.
252 Colchester and Ferrari 2007, 7.
253 Veit et al. 2008.

See References on page 291

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SECTION 5

SECTION 5

Implementing Agreements + Maintaining Relationships

IMPLEMENTING AGREEMENTS 269

Factors Internal to the Agreement 271

Institutional Arrangements for Implementation 271

Clear Commitments and Responsibilities 274

Adequacy of Funds and Other Resources for Implementation 276

Payments, Penalties, and Incentives 278

Monitoring and Reporting 279

Institutional Arrangements for Review 280

Amendment of Provisions 281

Factors External to the Agreement 282

Examples of Tools For Implementation and Management of Agreements 284

Ongoing Relationships 285

Using the Agreement to Build a Relationship 285

Building Trust and Tackling Barriers 288

NOTES TO SECTION 5 290

SUMMARY OF SECTION 5 290

SECTION 5

Implementing Agreements and Maintaining Relationships

THE BENEFITS PROMISED BY AGREEMENTS do not flow automatically once they are signed. A great deal of planning, action, and commitment of resources and capacity is required to make sure agreements are implemented or put into effect, to ensure, for instance, that employment targets specified by agreements are actually achieved, that financial payments are being tracked and reported accurately, or that systems designed to protect cultural heritage are put into practice.

This section covers the opportunities and challenges of implementing agreements and identifies keys to effective implementation. Effective implementation is essential if the community is to reap the benefits of all its hard work in planning for and negotiating an IBA. Implementation must be maintained throughout all phases of a project's life (planning, construction, operations, closure, and post-closure). It marks a new relationship among the parties that involves fulfilling the many obligations each party has assumed.

Despite its obvious importance, implementation has typically been the weak element of agreement-making. This section covers how to:

- Implement agreements in a way that ensures the intent of the parties is being met; and
- Build approaches so that agreements will be living documents, with monitoring, reporting, and adaptive management used to ensure they remain relevant and continue to meet the needs of the parties.

Implementing Agreements

Concluding and signing an agreement does not automatically result in a community receiving the benefits of IBA provisions. This is something that has been learned in the implementation of land claims and self-government agreements, and is illustrated, for example, by a report by the Canadian Auditor General on the implementation of the Inuvialuit Final Agreement.[254] It found that, many years after the agreement was signed, the federal government had not yet developed a strategy for how Canada would deliver on its responsibilities. Similarly, even 50 years after the James Bay and Northern Quebec Agreement (JBNQA) was signed, the lack of a proper implementation plan and budget has led to responsible parties failing to meet obligations and Nunavik Inuit not receiving the benefits they were promised.[255]

There is also potential for communities to miss out on benefits due to not effectively and/or consistently monitoring payments coming in, or not closely reviewing annual project reports to ensure that companies are meeting all their obligations under an IBA. For example, one Inuit organization shared that, in its view, a lack of monitoring the proponent's implementation reports over the years has limited the organization's ability to fully understand whether the organization is receiving all the benefits that it should be receiving based on the requirements of the IBA. While a company should be responsible for ensuring that it is interpreting the IBA correctly and providing the correct value of payments, it is important for the community to verify that all values are correct and hold the company to account if there are any shortfalls. Some agreements are working well and have generated substantial benefits,[256] but it cannot be taken for granted that the conclusion of an agreement will ensure the outcome intended by both parties. In some cases, agreements have been entered into from completely different perspectives. While the Indigenous parties are seeking an ongoing and daily relationship, the corporation sometimes treats the attainment of an agreement as the conclusion of the relationship.

While a company should be responsible for ensuring that it is interpreting the IBA correctly and providing the correct value of payments, it is important for the community to verify that all values are correct and hold the company to account if there are any shortfalls.

What is it that holds an agreement back from being implemented? What issues should be planned for? A range of barriers and obstacles to implementation are discussed in this section, as are strategies to help overcome these.

One of the most common obstacles is a failure to communicate, both internally and externally. Without formal communication protocols and informal and constant communication between IBA managers, proponent representatives, and community leaders, agreements are very unlikely to

succeed. A strong team with strong leadership is important to ensure that the IBA is administered efficiently, challenges are mitigated in a timely manner, and relationships are managed at all levels.

Before discussing obstacles and specific strategies for overcoming them, three key concepts need to be kept in mind when discussing implementation (also see Figure 5.1):

- **IMPLEMENTATION** includes the initiatives and activities required to give effect to the provisions of the agreement.
- **MONITORING** is the ongoing collection and analysis of information regarding implementation or non-implementation.
- **REVIEW** is the periodic analysis of relevant information to establish the extent of implementation, and to consider the appropriateness of implementation initiatives and of relevant provisions of agreements.[257]

These concepts are linked. Monitoring helps establish whether an agreement is being implemented. Monitoring can track things like achievement of employment targets or educational goals. If review is built into the process, then analysis can go much deeper and establish the reasons for the achievement (or non-achievement) of agreement goals. Through review, parties can also assess the appropriateness of goals and the need to modify them.

While the Indigenous parties are seeking an ongoing and daily relationship, the corporation sometimes treats the attainment of an agreement as the conclusion of the relationship.

Figure 5.1 Three Key Concepts of Implementing an Agreement

IMPLEMENTATION Initiatives and activities needed to give effect to agreement provisions, *for example training and hiring efforts needed to meet employment targets*

MONITORING Ongoing collection and analysis of information regarding implementation (or lack thereof), *for example employment targets achieved versus shortfalls.*

REVIEW Periodic analysis of information that comes from monitoring to reconsider implementation initiatives and activities, *for example modifications to training efforts or employment penalties.*

Two broad factors influence whether agreements are successfully implemented:

- The presence or absence of **factors internal to the agreement** that are essential to effective implementation; and
- Factors **external to the agreement** (for example, certain government policies), which cannot be provided for in the agreement, but are essential to its success.

Factors Internal to the Agreement

Clear Goals

The goals for the agreement need to be clearly and precisely identified. The importance of clear goals was discussed in Section 4 (see page 151), where it was suggested that "slippery" language such as "where feasible" and "if possible" should be avoided. Key questions to consider while drafting the agreement and again prior to signing the agreement include:

- Are goals and intended outcomes clear? Could there be an ambiguity?
- What are the consequences of any possible differences in interpretation?
- Is language clear and precise? Would people with no involvement in the negotiation be able to understand what was intended based on the text of the agreement?[258]

Institutional Arrangements for Implementation

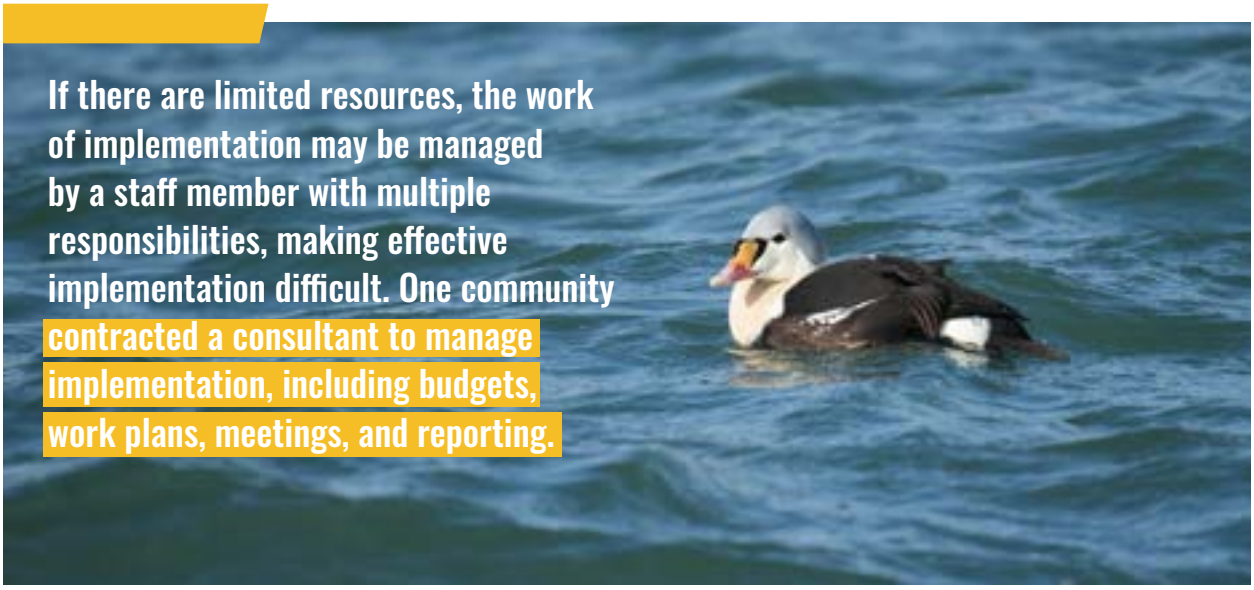
Specific institutional structures need to be established to manage the agreement and the relationship between the parties over time. Sometimes only one implementation structure is identified, with (possibly equal) representation from both the company and the community. In other cases, there are structures internal to the community as well as a newly established joint committee.

While there is no one-size-fits-all approach, implementation units are most effective when they are specifically provided for in an agreement, with relevant clauses dealing with issues such as representation from both parties, funding, and selection criteria for committee members. A strong and meaningful representation from both parties will make it easier to navigate roles and responsibilities for implementing and monitoring the IBAs effectively. Many recent agreements include resources and funds for an implementation manager or officer hired by the community, or more broadly, for implementation units with multiple staff members with different responsibilities. For example, an employment sub-committee consisting of equal representation from both parties could be developed and tasked with overseeing employment obligations. In this case, the community may mobilize an employment or training specialist that is already on their team or negotiate a budget to hire new staff to oversee the relevant agreement obligations.

Examples of implementation committees include the following:

- The Tłı̨chǫ Nation delegated authority for implementation of the four IBAs it holds with senior mining companies to the Kwe Beh Working Group. The role of the Kwe Beh is to implement the existing agreements; manage relationships with exploration companies in the region; manage concerns, complaints, or problems that emerge from the miners; and manage environmental assessment processes as they occur in the region. The Kwe Beh meets every eight weeks and includes 10 members. The team ensures that every branch of government and community is represented and informed. Companies can request to be on the agenda of the Kwe Beh as needed, and are expected to send briefing packets a week in advance. The technical coordinator reviews and prepares an analysis of company materials for internal briefings before companies arrive. Work between sessions is done by a variety of staff people, depending on the portfolio, be it business, employment, or environment.
- In the case of the Kitikmeot Inuit, there have been two community and two company representatives on the implementation committee. Other experts are brought in as needed. When disputes have arisen that cannot be managed at the committee level, they have been "bumped up" to senior leadership on both sides.
- Members of the coordinating committee established by an agreement in Western Cape York Communities in Australia were chosen using culturally-specific processes within traditional owner groups, where it was recognized that younger generations of traditional owners were sometimes "better placed to assume such roles."[259]

If there is a community-based implementation unit, it can be vulnerable because of pressure to divert resources to meet other demands. Often, if there are limited resources, the work of implementation may be managed by a staff member with multiple responsibilities, making effective implementation difficult. In some rare cases, there may be a need to contract a project manager to fill capacity gaps. One community has used this model, where they contracted a third-party consultant to manage implementation of their agreement, including managing budgets, work plans, meetings, and reporting.



Other aspects of **implementation committees** that are often negotiated include the following:

- **INFORMATION REQUIREMENTS** and information management, for example, to track whether commitments are being met and whether actions from meetings are being tracked and shared. Depending on the agreements, implementation committee meetings will happen monthly or two to four times a year for the life of the mine, and information management will be important so that reviews can tap into an archive of historical data and earlier decisions. Meeting minutes will need to be archived, as well as any amendments to the agreements or other crucial documents. It is also important to ensure that information and database management are budgeted in the implementation budget. Also, set clear deadlines for sharing and sending information. Leaving matters open-ended without setting deadlines may lead to disagreements or certain items slipping through the cracks.
- **SCHEDULE OF MEETINGS** and a timeframe for a first meeting, as well as how often meetings are held, where they are held (e.g., in person or virtual), standing agenda, and what constitutes a quorum. It is helpful to set an annual meeting calendar with dates and locations set.
- Who is to act as the **CHAIRPERSON**, or whether there will be a rotating chair.
- The **TERMS OF MEMBERS**, a process for changing them as well as inviting guests to the meetings.
- **MEETING PROCEDURE** and rules of order. This may include whether the use of artificial intelligence notetakers will be permitted.
- Whether there will be liaison with **THIRD PARTIES**, for example, government agencies.
- **MANAGEMENT OF COSTS,** administration of budgets, annual reporting, and auditing procedures.
- **DECISION-MAKING ARRANGEMENTS,** including the nature of decisions that can be made at each committee level and how they will be reported to the executive level.
- Responsibilities of any **SUBCOMMITTEES** and how they are formed (e.g., environmental issues, cultural heritage protection, employment and training, communication).
- **REVIEW, ANALYSIS, AND RECOMMENDATION** on reports (for example, on training, employment, market studies, or social impacts).
- **COMMUNITY ENGAGEMENT COSTS,** for example, honourarium, meals, and per diem for Elders and community members when there are community meetings and events related to IBAs.

Implementation committee meetings will happen monthly or two to four times a year for the life of the mine, and information management will be important so that reviews can tap into an archive of historical data and earlier decisions.

- Developing **ORIENTATION MATERIALS** for internal use, for example, for onboarding new staff or new board members. The orientation material can be a simple presentation with information, such as when the agreement is negotiated, implementation structure, contact information of members from both parties, dispute resolution process, tracking ongoing challenges and how they have been dealt with, and other considerations.

Clear Commitments and Responsibilities

Implementation often fails because of the lack of definition of team member responsibility and of managerial accountability.[260] In a review of an agreement in Australia, implementation failure was found to be a result of poor understanding on the part of the company leadership of the need to assume personal and line accountability for implementing the agreement. Responsibilities need to be spelled out clearly, and authority vested in senior managers of both the company and the communities to fulfil obligations in an agreement. The implementation team members need to know what authority they have and when they need to seek direction from their senior managers.

> **"Having a good backup from my leaders and superiors was key. Our IBA would not have been as successful as it was if I did not have backup from my leadership."**
>
> **— Theresa Baikie, Nunatsiavut Government**

Another way to support implementation might be to include a requirement for senior decision-makers to be involved in regular implementation reviews, to attend a minimum number of implementation committee meetings each year, and to attend regular internal meetings with internal staff. Some agreements specifically prohibit the delegation of these functions to more junior personnel. A study of the implementation of one agreement found a tendency for line managers and employees to pass responsibility to human resources and community relations departments, which fundamentally limited the success of implementation efforts.[261] Operational managers failed to take responsibility for implementing provisions of the agreement relevant to their work area, leaving all the work to one department.

It is essential to have both company and community champions of the agreement to maintain momentum for successful implementation. Staff in both organizations can make the implementation of the agreement their primary focus. If there is an individual from within the community who exerts pressure on the company, more attention will be paid to key issues. This outside voice needs to be matched internally by a champion of the agreement. The insider needs to be backed by senior staff and to understand the internal culture of the company in order to raise implementation issues appropriately. The two voices together can help ensure constant attention to implementation.

Questions to ask to ensure clarity of responsibilities include the following:

- Is the responsibility for each action or initiative clear?
- Do both parties agree about who is responsible for each action or initiative?
- Do those with the responsibility to implement have the legal, regulatory, or policy mandate to carry out the actions they are responsible for?
- Are there senior decision-makers responsible for implementation or at least oversight of implementation?
- What is the process and timeline to get decisions on matters from the senior decision-makers?
- Are lines of responsibility clear within many operational units of the company, or are they likely to be passed off to a human resources or community relations department?
- Are all staff associated with both parties educated and aware of the IBA? Have they received orientation to become familiar with the IBA?

It can be challenging for implementation staff to fulfill their responsibilities without a proper communication channel and clarity on their mandate. Therefore, regular touchpoints to share updates and information with the team become important, particularly at times of review and renegotiation. IBA implementation requires commitment from both sides.

Adequacy of Funds and Other Resources for Implementation

Proper implementation, which ensures a flow of benefits to the community, is a lot of work. It requires capacity-building, employment, and adequate financing. This is in addition to resources that are allocated to fund program activity, such as scholarships and cultural programs.

It is very important to have an implementation budget in place in advance of the agreement being signed so that both parties have the same expectations about costs over time. Some agreements have fixed annual implementation budgets that are set in the agreement, and others have clauses that require implementation budgets to be set annually. There are pros and cons associated with each option. For example, having a set implementation budget allows the communities to plan ahead by knowing exactly where the resources can be allocated and how many people they will have on their staff. Also, in theory, a pre-set implementation budget is unlikely to decrease over time, as the company will not have an opportunity to reduce the implementation budget without renegotiating the IBA. Setting an implementation budget in the IBA, however, may not allow flexibility to accommodate any additional unforeseen activities, such as extra meetings or community engagement sessions.

On the other hand, setting an implementation budget annually may allow for flexibility, such as hiring additional staff to support additional work that may be planned each year, undertaking new studies that address community needs, and purchasing equipment as needed. Negotiating an annual budget, however, may cause delays in the funds being available if negotiations take longer than expected and may create potential for the company to decrease implementation budgets.

Funds will be needed throughout implementation, for example, to hire technical experts to review environmental reports and monitoring plans, for staff to administer the agreement and programs identified within it, and for legal or consulting fees.

A compromise approach, negotiated in an IBA in Victoria, Australia, in 2024, sets a minimum agreed budget, adjusted for inflation, and sets out a process for adding to this budget based on an annual review by the implementation committee.

Regardless of the approach, it is important that implementation budgets are automatically adjusted for inflation to ensure the budgets do not effectively decrease in value over time.

- **FUNDS** will be needed throughout implementation, for example, to hire technical experts to review environmental reports and monitoring plans, for staff to administer the agreement and programs identified within it, and for legal or consulting fees. Funds for ongoing consultation and communication with implementation committees and the community will be required for meetings, managing disputes, human resources, and environmental monitoring. As well, funds should be allocated to general administrative and operational functions.
- **RESOURCES** may include staff, as well as access to experts or information that may be required during implementation. It is vital to ensure there is a staff member who can serve

as an implementation manager (as opposed to staff trying to coordinate implementation off the side of their desk). These people play an important role in linking the consultation or implementation department to the leadership and the community. Additional roles may be identified in the agreement to administer programs and activities, such as a training and engagement specialist, environmental monitors, and administration officers. It is important that equivalent resources are allocated in the company and in the community. If a community appoints a team of three or four implementation staff but they have only one point of contact in the company, delays will inevitably occur in taking advantage of opportunities and addressing problems, causing implementation failure.

- **TRAINING AND CAPACITY-BUILDING** are needed to engage in the policy work or implementation of the agreement. Ensuring such opportunities are available to staff may help in addressing internal challenges such as turnover.

The company itself may also lack skills and capacity in critical areas, such as cross-cultural engagement. For example, senior staff can make comments or act in ways that cause negative reactions among Indigenous people, which can affect implementation.[262]

Questions to pose on **company skills and capacity** may include:

- What skills will be required to implement the agreement?
- What programs, policies, or procedures might be needed?
- What training or courses might be required internally to build capacity, or for the company to orient staff to the local context so that implementation can occur smoothly?

Questions to help identify the **adequacy of funds** and other resources for effective implementation include:

- What are the resources required to support implementation? Do the resources exist now?
- What funds will be required, and who will provide them? Who approves the budget?
- What skills will be needed on both sides of the agreement?
- How long will these resources need to be available?
- What information is required to ensure that commitments are being met?
- If resources are not available, how are they going to be mobilized by the time implementation is due to occur?
- Will these resources continue to be available in the future? With what frequency will they arrive and how will they be managed?
- What mechanisms are needed to ensure adequate funds are made available?
- When will the budget need to be finalized by, and when will it be available?

In the initial meetings, the community and company should discuss the process for setting annual implementation budgets (e.g., who prepares the first draft? When should the budget be submitted? Who approves the budget—the executive committee, senior management, or board?

Payments, Penalties, and Incentives

Recording and reporting on financial payments are integral to effective implementation. Agreements can have many different payments including one time signing bonus payments, milestone payments, royalty payments, penalty payments, and implementation payments. An example of a payment tracking table is provided in Table 5.1. It is important for a community to keep track of all these payments to ensure that they are receiving the correct amounts.[263] Verifying payments should include ensuring that payments have been adjusted for inflation in cases where this is required by an IBA.

It is important for the IBA to include a dispute resolution mechanism that gives a community the ability to challenge a company if it believes that payments have been missed. The Mary River Mine Inuit Impact and Benefit Agreement (Inuit IBA) serves as a good example of the value of dispute resolution mechanisms when it comes to missed payments. In 2016, Baffinland, the mine operator, and Qikiqtani Inuit Association (QIA) went to arbitration because QIA suspected that Baffinland had missed royalty payments. The arbitrator concluded that Baffinland had indeed missed royalty payments and, as a result, Baffinland was ordered to pay QIA $7.3 million.[264]

Agreements should, where possible, create incentives for success and provide for automatic penalties if implementation is slow or is failing.

Table 5.1 Example of a Payment Tracking Table

Type of payment	Fund	Amount due	Paid	Paid on	Adjusted for inflation
Milestone Payment/One Time Payment	Project Start-up Fund (IBA Article X Section X)	$165,000	Yes	November 1, 2015	n/a
Water License		$1.1 million	No	-	-
Quarterly Payment	Scholarship	$10,000	Yes	April 15, 2017	Yes
	Cultural Program	$20,000	Yes	April 15, 2017	No
Annual	Implementation Budget	$1.5 million	Yes	January 1, 2017	Yes

Agreements should, where possible, create incentives for success and provide for automatic penalties if implementation is slow or is failing.

For example, under some Australian agreements, companies must spend more on Indigenous employment and training programs if employment falls below agreed targets. The greater the gap between actual and target employment, the steeper the increase in company spending. One northern

Canadian agreement requires both parties to allocate funds to training each year the employment target is not met. This type of response is important. It is not about blaming the company, but about ensuring an appropriate response if the intent of the agreement is not being met.

A caution using cash payments as penalties — implementation issues can arise if a proponent finds it easier or less expensive to make payments instead of following the agreement. This is an example of an implementation challenge that can arise and requires review through different mechanisms. We have seen parties conduct labour force studies to understand the current employment patterns and barriers, so that the parties can use information to change outcomes.

Monitoring and Reporting

It is critical that monitoring of key indicators for implementation performance be developed from the start and maintained throughout the project life. If this is not done, it is very difficult to know the extent of implementation success or failure, or to develop strategies to deal with implementation problems. Monitoring can be both quantitative (using close-ended survey questions, monitoring targets, and other numeric commitments) and qualitative (using data gained through open-ended survey questions, interviews, focus groups, meetings, or discussions).

Some of the monitoring provisions will be obvious and will be based on targets that are established in the agreement. So, for example, an employment target of 25 per cent Indigenous employees will either be achieved, or not. However, it is important to look beyond obvious indicators. Just because a company achieves the target does not guarantee a strong relationship is in place or that people have worthwhile jobs. There may, for example, be a very high hiring rate that allows the company to meet targets. However, turnover rates may be just as high, or there may not be many opportunities for Indigenous employees to advance in their careers. In an implementation review of the Troilus mine, the authors note that a "more structured approach to tracking the employment experience is needed and that a close (and sustained) working relationship between the community and the company is … essential."[265]

The community and company should be clear on who is responsible for writing the reports, the frequency of reporting, timelines and deadlines, and the report approval process.

Provisions for monitoring often indicate:

- How often reports will be made, and who is responsible for preparing the reports.
- What variables (e.g., criteria and indicators like Indigenous versus non-Indigenous hours worked, headcount, advancement, retention, training hours, contracting values, utilization of funds, and turnover rates) will be tracked.
- How results will be used. For example, where monitoring results indicate implementation failure, there may be a requirement for the parties to meet and plan how to address the problem. Some issues may be addressed at the committee level, while others may need senior leadership.

Agreements will outline different reporting requirements, such as reports related to implementation, specific programs, funding use, procurement, and employment. The community and company should be clear on who is responsible for writing the reports, the frequency of reporting (e.g., quarterly, annually), timelines and deadlines, and the report approval process.

Different communities may set up different methods to monitor IBA implementation and compliance. A good place to start would be to create a tracking sheet that includes all IBA articles (e.g., employment, training, contracting, environment, financials) and lists all provisions under each article. An IBA manager or coordinator can then update the tracker quarterly or annually, depending on how often the implementation reports are published, to show which obligations were met, partially met, or not met. There may be other positions in the community to review the reports and analyze all the information, or technical support may be hired to analyze the IBA and provide an evaluation report.

Institutional Arrangements for Review

Review involves the periodic analysis of relevant information to establish the extent of implementation, and to consider the appropriateness of implementation initiatives and of relevant provisions of agreements. Many agreements include provisions for regular review of the agreement, such as this one:

> *Three (3) years after the Effective Date, the Parties shall in good faith consider whether the terms of this Agreement are appropriate in light of circumstances of the [project] at the time and, if either Party is of the view that such terms are not appropriate, the Parties will in good faith negotiate adjustments. The Parties agree to provide such disclosure of information as is required to address the negotiation of any adjustments.*

Critical questions will be:

- When will reviews happen?
- Who will conduct them? (i.e., jointly by both parties or by an external party?)
- What is the timeline for the review?
- Who will pay for them?
- How will the issues be tracked and managed?
- What will be done with the findings? (i.e., Will there be agreed-upon thresholds that will trigger commitment of additional funds?).
- How will the leadership be informed?

A lot of time and resources are needed to undertake a thorough review and follow up on the review findings. It is important to ensure that an agreement provides sufficient funds and resources available to support this work.

Amendment of Provisions

The requirements for amendment should not be too onerous, or problems with agreements will not be addressed. Companies can be risk-averse in this area and, in some cases, insist on sticking with the original terms of the agreement because they see changing any part of the agreement as opening up a Pandora's box.

Some recent agreements in Australia have avoided the complexities (perceived or real) of amending agreements by having fundamental issues and the overall working relationship and principles between the parties set out in a core agreement that is not easily amended. Separate management plans are attached to the core agreement and deal with issues such as employment, training, cultural heritage, and environmental management. A much simpler procedure is set out for amending the management plans.

Amendments can be important for a few reasons. First, the relationship between the company and community is dynamic, which can result in unanticipated situations that need to be addressed through the amendment of certain provisions. Failure to do so can undermine the trust and confidence of parties in each other. Second, the body of knowledge, understanding and approaches to IBAs is changing as more and more IBAs are negotiated and more participants continue to hone the approaches used.[266] Finally, the alternative to an amendment may often be dispute resolution, which can be expensive and disruptive of relationships.[267] Revisiting and revising sections of the IBA is a proactive way to avoid the need for formal dispute resolution and the potential for erosion of the relationship.

Some examples of clauses that have been amended include:

- Changes to start-up times and skills training. If it becomes apparent that construction delays will change the start-up date or there are changes to the businesses or skills needed, training or business development commitments can be revised to meet new operating conditions, and potentially to trade some post-construction benefits for other benefits.[268]
- Significant expansion of the project or development of a new project in the same geographic area. For example, one agreement provides that, "This Agreement shall be renegotiated if the proven and probable ore reserves on the [project] claim block increase to a level equal to, or in excess of, [a threshold quantity]. Proven and probable ore reserves, for the purposes of this Agreement, will be defined in accordance with [mining company] corporate policy, which may change from time to time."[269]

While not necessarily a common provision for mining IBAs, integrating a "most favoured nation" clause into an IBA would trigger amendments to the financial provisions of an IBA. In a situation where a proponent signs a higher-favoured—paying agreement with another community, a most favoured nation clause would ensure that any previous agreements are modified to be equal to the new, higher-paying agreement (e.g., by increasing a royalty rate and/or fixed payments). This type of clause would be highly valuable since it would ensure that a community always has the best deal that has been negotiated with that proponent.

Factors External to the Agreement

There are many factors outside of the agreement that can impact success. For example, if the general education system is not working effectively, getting Indigenous people into skilled jobs can be tough. Or, if housing in the region of the mine is poor and overcrowded, there may be pressure on families to leave the area. It may not be possible to manage these wider issues through an IBA. Nonetheless, they can be recognized as possible barriers to implementation, and the parties can agree to work jointly to minimize their negative effects on implementation (e.g., through scholarship provisions, childcare supports). Some general external factors that can impact implementation are discussed below.

Political Agency

Implementation mechanisms often fail to recognize Indigenous political agency and so fail to engage Indigenous political actors in the design of institutions. As a result, even though agreement provisions exist on paper, they do not become a reality. Implementation mechanisms may be designed by non-Indigenous people and be modelled on similar structures at other projects or in different contexts. They may not take shape in the way intended or have the intended effect because they have no organizational fit with local cultural values and governance norms.

It may not be possible to manage these wider issues through an IBA, but they can be recognized as possible barriers to implementation, and the parties can agree to work jointly to minimize their negative effects.

For example, the negotiation and consultation model of the corporation can be inappropriate if the social unit in which people organize and identify is through the family, the clan, or the church.[270] The result is a failure to engage with Indigenous political actors to achieve a mutually acceptable approach to implementation issues,[271] a lack of transparency, an exclusion of Indigenous people from decision-making, and a less effective relationship.

Support of Key Actors and Groups

It may take the political support of many different groups to effectively implement agreements. At the Troilus Mine in Quebec, the support of the Cree Nation of Mistissini through active promotion of employment in the mining industry is cited as one of the key factors in achieving success.[272] The Qikiqtani Skills and Training for Employment (Q-STEP) is another successful example of collaboration leading to positive outcomes for Inuit in the Qikiqtani region. Qikiqtani Inuit Association (QIA) collaborated with Baffinland, the Government of Canada, the Government of Nunavut, and Kakivak Association to launch the Q-STEP in 2017. Through Q-STEP, Inuit are able to gain skills, training, and certification necessary for mining and non-mining related jobs.[273] In one case in northern Canada, the failure of an Indigenous executive to work as a team led to neglect of implementation meetings

for more than two years. If the provincial government is responsible for training and education, and changes priorities so it no longer supports capacity building, this can also impact success.

Change in Policy or Government

Government policy shifts can also erode the basis for an agreement. For example, new administrations can dismantle legislation or institutional apparatus critical to the effective implementation of agreements.

Rivalry Between Government Departments

In some cases, many government departments end up having some responsibility for training or education. As a result, considerable turf protection and jockeying can occur that interferes with the implementation of the agreement.[274]

Changing Capacity, Policy and Legislation in Relation to Implementation

If there is rapid turnover in organizations, people knowledgeable about and critical to the implementation of the agreement, the history, spirit, and intent of agreements and of related legislation can be lost. Agreements are often established with legislative or policy frameworks that support their implementation, but a lack of information in place to familiarize staff with these frameworks can lead to actions inconsistent with the goals of the parties. (For strategies, see *Build Mechanisms to Deal with Staff Turnover* on page 288). It is vital to train new staff well with a full agreement primer. While staff can change, so too can the policy and legislative context.

New mineral exploration, development, community consultation, or closure (or traditional knowledge and so on) may emerge in a region. For example, in 2026, the Tłı̨chǫ Government issued a call for mineral exploration after establishing new rules for land access. Staff need to be aware of the changing context and examine if the agreement is impacted by adjustments. Review processes are brought in for these types of adjustments.

Project Viability and Margins

Expectations about implementation may not be met if the project doesn't start on time, is mothballed or closed for an extended period, or if low commodity prices or other factors reduce operating margins.

While some protections against these problems can be built into agreements through the type of royalty chosen and provisions for minimum annual payments, problems with project viability will minimize the upside potential for revenue streams to support implementation, may affect the ability to meet employment and training goals, and can interfere with the priority given to implementation of the IBA.

Examples of Tools For Implementation and Management of Agreements

- **ANNUAL MEETING CALENDAR** with meeting dates, time, and location. The calendar can be set towards the end of the year and revisited after every meeting to ensure the dates still work for people.
- **ANNUAL WORKPLANS** outlining key priorities, activities or initiatives for the given year with a clear timeline and milestones, as well as the party responsible for actioning it.
- **IMPLEMENTATION BUDGET** template outlining key categories from the agreements, such as staff salary, meeting expenses, community engagements, equipment, care and maintenance of infrastructure, training, and administration costs.
- **KNOW YOUR IBA PRESENTATION** that can be used for onboarding and orientation for new staff, leadership, and committee members.
- **FINANCIAL PAYMENT/SPENDING TRACKER** to track incoming funds and spending. Having one system to track all the payments will make the financial reporting less tedious.
- **MEETING AGENDA** to plan, structure and run meetings efficiently. Having a standing agenda item will help move things efficiently by keeping people focused on the priority and intended outcomes.
- **MEETING MINUTES OR RECORD OF MEETINGS** template to ensure meetings are being recorded consistently, including any motions, action items, and key decisions.
- **IBA NEWSLETTERS** to share IBA updates with the community. This can be done quarterly or annually, depending on the capacity.

Ongoing Relationships

This section discusses ongoing relationships for parties to the agreement, focusing on three key questions:

- How do you use the agreement to build a relationship?
- How is trust built between the parties?
- What are the major barriers to the maintenance of trust over time?

Using the Agreement to Build a Relationship

Often, companies and communities can pay close attention to agreements in the first few years of operation, but then steadily decrease their attention to implementation as the project becomes well established or towards closure. Attention to the following areas helps maintain agreements as living documents, with adaptations made as needed.

- **KEEP COMMUNICATION ALIVE.** Communication channels need to be constantly reinforced so that informal contacts and formal meetings are taking place.
- **MAINTAIN CAREFUL RECORDS** of meetings, discussions, correspondence, reports, and data, such as the tracking of commitments.
- **COMMIT TO QUICK AND ONGOING ACTION** on issues that arise before they become disputes. A fundamental goal of the agreement should be to solve problems as early as possible through effective communication and early warning systems. It is important to support this goal with training for employees in dispute management.[275]
- **IF DISPUTES DO OCCUR,** companies and communities should train their personnel to view them as a source of valuable information that can lead to improved operations, reduced risk, and a supportive relationship with the community.[276]
- Keep **IBA ORIENTATION MATERIALS** up to date to reflect recent changes from review, amendments, dispute resolution process, and changes in membership.
- Consider hosting mandatory annual **'KNOW YOUR IBA'** sessions with staff, leadership, and/or community.
- **BUILD IMPLEMENTATION PLANS.** Even if plans are developed only internally, they can guide people in their commitments over time.
- **CLEARLY COMMUNICATE** which parts of an agreement are confidential and what can and cannot be shared publicly. Sharing sensitive and confidential information may lead to disputes and potentially arbitration.

Keep communication alive. **Communication channels need to be constantly reinforced so that informal contacts and formal meetings are taking place.**

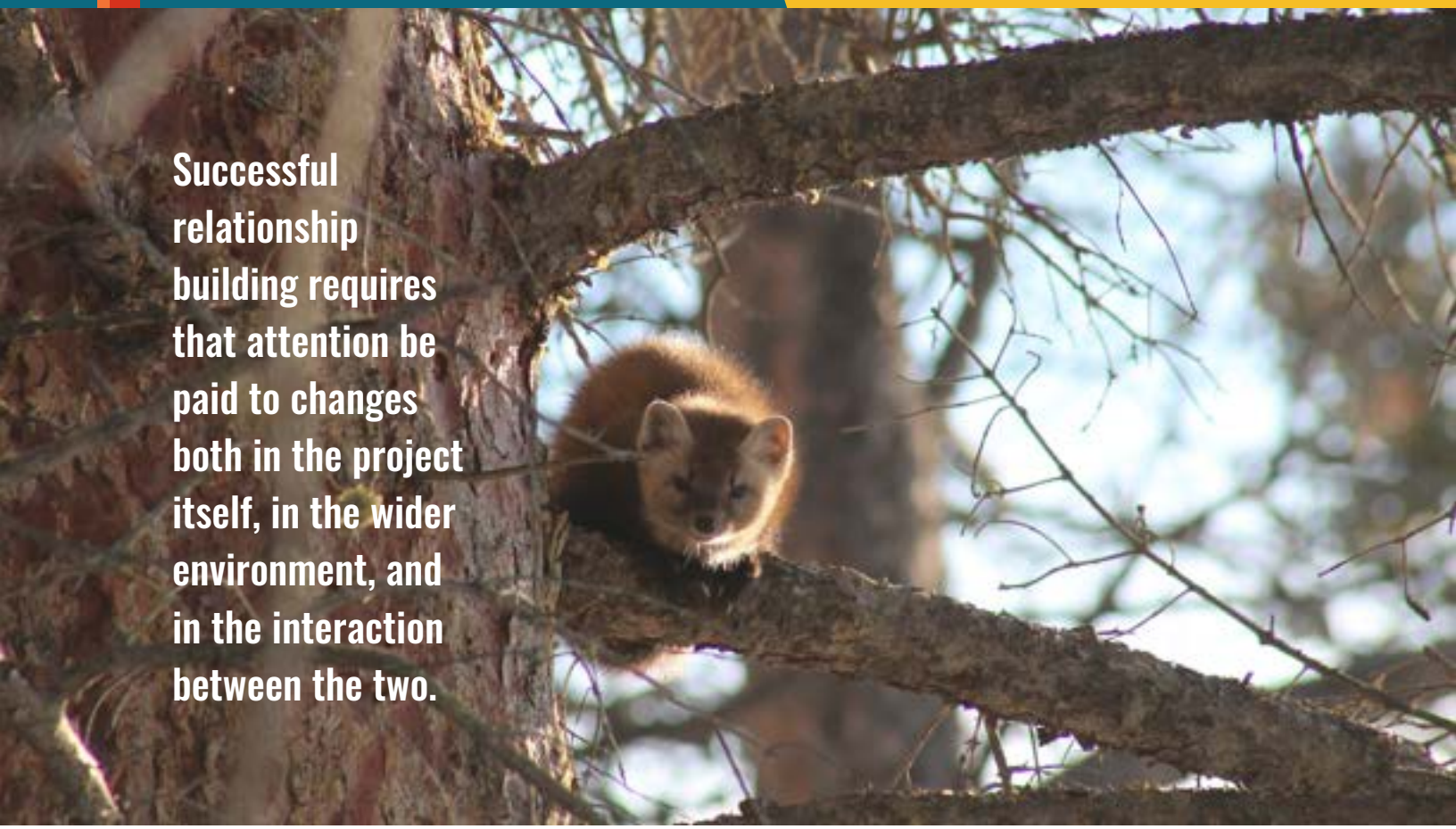
Table 5.2 provides an example of how one organization tracks some of the commitments from an IBA. This organization goes through a yearly review of every item of the IBA to track actions, status, and timing commitments. This kind of planning (either joint or separate) can include identification of the obligations of the parties, activities, and schedules. Implementation management often includes a plan, the creation of accompanying documents (e.g., financial transfer agreements), and a description of how the new relationship should operate.

Table 5.2 Sample Yearly Review of an IBA

Section	Requirement	Action	Status	Timing
Schedule A: Implementation Committee	*Membership of the Committee:* Four members with two being appointed by [the company] and two appointed by [the community].	Consider using senior rep and/or outside support. Arrange for orientation of committee reps and staff.	Workshop to orientate reps and staff on agreement and roles and responsibilities.	Orientation workshop – Fall.
Schedule B: Company-Community Liaison	*Intent:* [company] will employ a Liaison Officer. The Liaison will assist with implementation of the agreement (from the company perspective) and may sit on the Implementation Committee.	Hire Liaison Officer in the fall, and orient to the agreement.	Advertise position in local papers and on radio.	Monitor.
Schedule C: Agreement Coordinator	*Intent:* [The community] will hire and/or appoint a Coordinator within 30 days of a [mining] Project Construction Decision. The Coordinator will assist with implementation of the Agreement (from the community's perspective).	Hire Agreement Coordinator. Consider the role of Coordinator vis-à-vis overall requirements (e.g., coordinator could be responsible for culture and community development programs only).	Consider the use of senior (community) officials or external support to fulfil other aspects.	Coordinator position currently out for competition.

Table 5.2, Yearly Review, continued

Section	Requirement	Action	Status	Timing
Schedule D: Training and Education Opportunities	*Training – General:* use training and education funds to provide community members with training and education opportunities in the mining sector (i.e., scholarships, pre-trades training, etc.), with [company] and other agencies.	Develop a training strategy to assist the [community] with decisions relating to training.	Workshop on training.	Monitor and encourage [company] participation in on-site training initiatives.
Schedule E: Employment Opportunities	*Employment Support System:* [The company] will implement a support system comprised of: drug and alcohol rehab, money management, etc.; cross-cultural training; Family Assistance Program; serve country foods; prohibit alcohol and drugs; on-site communication services at its cost (for employees to maintain contact with home).	Inform communities and workers, and provide guidance to the company on access to country foods and Elders for cross-cultural orientations.	Family Assistance Program and other similar provisions are provided in conjunction with other agencies in the region. It will be important for employees to know they have access to these programs.	Ongoing.
Schedule F: Business and Contracting Opportunities	*Application:* Provisions of this schedule apply to all contracts except an explosives contract and drilling contract.	Monitor.	All other contracts will be available to [company] businesses on a bid basis.	Ongoing – monitor.
Schedule I: Abandonment and Reclamation	*Intent:* To provide for progressive reclamation activities for the [mining] project throughout the life of the project consistent with terms of licenses, permits, etc.	Inform [community] lands department of provisions.	Workshop for lands department on provisions.	Ongoing: monitor.



Successful relationship building requires that attention be paid to changes both in the project itself, in the wider environment, and in the interaction between the two.

Building Trust and Tackling Barriers

- **COMMUNICATE AND REACH OUT.** A major barrier to effective implementation is the failure to communicate and to build a strong relationship. For example, the Tłı̨chǫ Nation invites mining staff out on the land on annual canoe trips, hunts, and other community gatherings to familiarize senior staff with their culture. Another community hosts annual celebrations where the parties not only share program updates with community members but also participate in the games and feast.

- **BUILD MECHANISMS TO DEAL WITH STAFF TURNOVER.** As staff leave, there is a loss of institutional knowledge and familiarity with the agreement or legislation, and there is also an absence of policy learning. High turnover makes it difficult to establish and maintain relationships. There is a need for education of new personnel in the company and the community. *It is difficult to overestimate this point*. Vital knowledge can be lost if responsibilities are not clearly defined when transitions occur. The company and community will need to implement strategies such as mentorship, job shadowing, cross-training, and requiring that all new senior managers undertake an orientation on the agreement. Furthermore, Indigenous groups can design policies or organizational procedures that describe the relationships and protocols in place. This can ensure there is continuity built in for new staff. Creating a toolkit with a checklist of responsibilities or expectations, as well as links to useful resources and contact information, can help new staff get up to speed and help minimize turnover.

- **BUILD STRONG RELATIONS BETWEEN PEOPLE WITH SIMILAR RESPONSIBILITIES** within the company and the community, for example, between employment and training officers in the company and community liaison officers, or between company environmental staff and community environmental monitors or advisors. This is particularly important because when the goals are unmet, for example, if employment targets are low, turnover is high, or Indigenous employees are not treated well, the relationship between the community and company can be negatively impacted.[277]

- **EDUCATE LOCAL PEOPLE AND THE COMPANY** about the agreement, This is an essential and ongoing responsibility. This can be achieved in several ways, including hosting mandatory 'Know your IBA' sessions to educate company employees, community staff, and contractors about the nature of the agreement; hosting annual community forums or celebrations to share success stories and discuss challenges; or sharing information through newsletters or social media announcements.

  "Know your IBA" briefing sessions can focus on:

  - Why the agreement is in place, including its goals, benefits, achievements, and how it operates;
  - Roles and expectations of employees and contractors; and
  - The constructive role of community criticisms of project operations, as complaints and opposition, can be a source of valuable information.[278]

- **USE DATA FOR ADAPTIVE MANAGEMENT.** Successful relationship building requires that attention be paid to changes both in the project itself and in the wider environment, and in the interaction between the two. A key issue here involves collecting data and figuring out how to use it. For example, data on safety, wellness, hiring, and promotion are often collected but not effectively used to make changes. Collection of reliable and appropriate data is one matter, but following up on it is critical. For example, one working group wanted to understand the employment barriers in the community and decided to conduct a survey. One of the major barriers identified through the survey was the lack of educational credentials. To address this issue, the working group allocated some funds from their annual budget to support interested community members in taking their high school equivalency exams. It is important to let data (quantitative and qualitative) inform implementation initiatives.

- **CONSIDER CUMULATIVE INSTITUTIONAL FATIGUE,** especially if there are multiple projects in the region (e.g., Snap Lake, Diavik, and Ekati diamond mines in the NWT). With three operating diamond mines and a separate environmental management board for each mine, people are burdened with many commitments. This reflects a lack of adaptive management in the region, because the social institutions to manage the mines become carved in stone, with no possibility of institutional change as new mines emerge. The lack of coordination between the three environmental bodies is marked, as is the lack of any effective cumulative-effects assessment regime for impacts on either the biophysical or human environment.

Summary of Section 5

- Establish clear goals for implementation of the agreement.
- Build strong institutional structures for implementation, based on culturally appropriate models.
- Develop implementation plans and review them often.
- Define who is responsible for implementing parts of the agreement.
- Build in transition plans for turnover of employees.
- Ensure there are strong community champions of the agreement who are matched inside the company by equally influential corporate champions.
- Negotiate resources for implementation of the agreement, including funds, access to expertise, and staff or information resources.
- Anticipate staffing, program, and policy needs and start to build the capacity for them.
- Build in penalties and incentives and then use them to motivate action.
- Develop a system for monitoring the implementation of the agreement.
- Build an easy-to-use system for amending parts of the agreement that are most likely to be affected by changing circumstances.
- Anticipate external factors that can influence implementation success and then plan to deal with them.
- Use the agreement to build a strong relationship.
- Involve the company in local activities to build trust. ■

NOTES TO SECTION 5

254 Office of the Auditor General of Canada 2007.
255 Makivik et al., 2014.
256 O'Faircheallaigh 2002.
257 O'Faircheallaigh 2003a, 6.
258 O'Faircheallaigh 2003a, 19.
259 Crooke et al. 2006, 14.
260 Crooke et al. 2006.
261 Crooke et al. 2006, 12.
262 O'Faircheallaigh 2003c, 9.
263 O'Faircheallaigh and Rodon 2024.
264 Qikiqtani Inuit Association 2017.
265 Penn and Croquet 2008, 22.
266 Diges 2008.
267 Diges 2008, 5.
268 Adapted from Diges 2008.
269 Kennett 1999, 97.
270 Gibson and Kemp 2008.
271 O'Faircheallaigh 2003b.
272 Penn and Croquet 2008.
273 Qikiqtani Inuit Association, n.d.
274 O'Faircheallaigh 2003a, 7.
275 CAO 2008.
276 CAO 2008.
277 Prno et al. 2010.
278 Adapted from CAO 2008, 53.

References

Altman, J. and D. Smith. 1994. *The Economic Impact of Mining Moneys: The Nabarlek case*. Western Arnhem Land, Discussion Paper 63/1994. Canberra: CAEPR, ANU.

Archibald, L. and M. Cronkovich. 1999. *If gender mattered: A case study of Inuit women, land claims and the Voisey's Bay Nickel project.* Ottawa: Status of Women, Canada.

Asch J., K. Broadhead, G. Lloyd-Smith and S. Owen. 2018. *Secwepemc Lands and Resources Law Research Project* Victoria: Indigenous Law Research Unit.

Australian Government. 2022. *Australian Government response to the Joint Standing Committee on Northern Australia's: A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge and Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia – Interim Report.* dcceew.gov.au/sites/default/files/documents/australian-response-to-destruction-of-juukan-gorge.pdf.

Austvik, O. G. 2007. *Reflections on permanent funds: The Norwegian pension fund experience.* Presentation made at Gordon Foundation Fort Good Hope meeting, May 4.

Barker, T. and D. Brereton. 2005. *Survey of Local Aboriginal People Formerly Employed at Century Mine: Identifying factors that contribute to voluntary turnover.* Centre for Social Responsibility in Mining Research Paper No. 4. Brisbane, Queensland: University of Queensland.

Barsch, R. and K. Bastien. 1997. *Effective Negotiation by Aboriginal Peoples: An action guide with special reference to North America*. Geneva: International Labour Office.

Bass, S., P. Seth, R. Czebiniak and M. Filbey. 2003. *Prior informed consent and mining: Promoting the sustainable development of local communities.* Washington: Environmental Law Institute.

Beach, R., D. Brereton and D. Cliff. 2003. *Workforce turnover in FIFO mining operations in Australia: An exploratory study*. Centre for Social Responsibility in Mining, Sustainable Minerals Institute, University of Queensland, Brisbane.

Bergner, K. 2006. *The Crown's duty to consult and accommodate*. Presented at the Canadian Institute's 2nd Annual Conference on Aboriginal Consultation, Vancouver, BC.

Blondin, T. 2007. *Exploring common ground: Aboriginal communities and base metal mining in Canada.* Presentation to the Canada Forum Mining Conference, Sudbury, Ontario, November 14-15.

Boreal Leadership Council. 2012. *Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons, and case studies towards practical guidance for developers and Aboriginal communities*, borealcanada.ca/documents/FPICReport-English-web.pdf

Boutillier, R. 2009. *Stakeholder 360.* Accessed July 2, 2009. www.stakeholder360.com/index.htm.

BC First Nations Energy & Mining Council. 2009. *Sharing the Wealth: First Nation Resource Participation Models.* West Vancouver: BCFNEMC.

Bruce, A., and E. Hume. 2015. "The Squamish Nation Assessment Process: Getting to Consent." Ratcliff & Company LLP. ratcliff.com/.

Canada Development Investment Corporation. n.d. "Canada Indigenous Loan Guarantee Corporation." cdev.gc.ca/indigenous-loan-guarantee-program/.

Canada Infrastructure Bank. n.d. "Indigenous Community Infrastructure Initiative (ICII)." cib-bic.ca/en/indigenous-community-infrastructure/.

Canadian Environmental Assessment Agency. 2005. *Orientation to the Canadian Environmental Assessment Act — Participant Manual.*

Castrilli, J. 1999. *Environmental regulation of the mining industry in Canada: An update of legal and regulatory requirements.* Toronto: Walter & Duncan Gordon Foundation (The Gordon Foundation).

Christenson, E. 1999. *Myths and Realities of Inuit Impact Benefits Agreements: A perspective of myths and realities of Inuit Impact Benefits Agreements and highlights of the first Inuit IBA negotiated under the Nunavut land claims agreement*. Prepared for the Kitikmeot Inuit Association.

Compliance Advisory Ombudsmen (CAO). 2008. *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*. Washington: CAO.

Corbett, T. and C. O'Faircheallaigh. 2006. Unmasking the politics of native title: The national native title tribunal's application of the NTA's arbitration provisions. *University of Western Australia Law Review* 33(1): 153-177.

Crooke, P., B. Harvey and M. Langton. 2006. Implementing and monitoring land use agreements in the minerals industry — The Western Cape Communities co-existence agreement. In M. Langton, O. Mazel, L. Palmer, K. Shain, M. Tehan (eds.), *Settling with Indigenous Peoples*. Annandale, NSW: The Federation Press, pp. 1-20.

Diges, C. 2008. *Sticks and bones: Is your IBA working? Amending and enforcing Impact Benefit Agreements*. Toronto: McMillan Binch Mendelsohn LLP.

Dreyer, D. 2002. *Economic development for Kaska Dena communities: Improving Impact and Benefits Agreements in order to increase benefits from mining projects.* MA dissertation, University of Northern British Columbia.

Energy Resources of Australia Limited, Northern Land Council, and the Traditional Aboriginal Owners of the Jabiluka Project land. 2005. *Jabiluka Long Term Care and Maintenance Agreement.*

Fidler, C. and M. Hitch. 2007. Impact and Benefit Agreements: A contentious issue for environmental and Aboriginal justice. *Environments Journal* 35(2): 50-69.

Firelight Group and First Nations Major Projects Coalition. 2025. An Introduction to Indigenous-Led Assessment. firelight.ca/assets/publications/reports/an-introduction-to-indigenous-led-assessment-.pdf.

First Nations Environmental Assessment Technical Working Group (FNEATWG). 2004. *First Nations Environmental Assessment Toolkit*. Victoria: FNEATWG. fnbc.info/resource/first-nations-environmental-assessment-toolkit-fneatwg.

First Nations Health Authority. 2017. "Mount Polley Mine Health Impact Assessment and Screening/Scoping Process Report."

First Nations Major Projects Coalition. 2019. Ownership Model Handbook: First Nations Project Ownership and Access to Capital for Investment in Major Infrastructure Projects.

Forest Peoples Programme. 2008. *A Community Guide to the International Finance Corporation's Performance Standard 7 on Indigenous Peoples (PS7). Guide to IFI Standard*s. Moreton-in-Marsh, UK: Forest Peoples Programme.

Gibson, G., A. MacDonald and C. O'Faircheallaigh. 2010. Cultural considerations associated with mining and Indigenous communities. In P. Darling (ed.), *Society for Mineral Economists Handbook*, Special edition.

Gibson, G., and A. MacDonald. 2024. Building connections between impact and benefit agreements and environmental and social impact assessment. In F. Vanclay & A. Esteves (Eds.), The Routledge Handbook of Social Impact Assessment and Management (Ch. 34). Routledge.

Gibson, G. 2008. *Negotiated Spaces: Home, work and relationships in the Dene diamond economy*. PhD dissertation, University of British Columbia, Vancouver, BC.

Gibson, G. and D. Kemp. 2008. Corporate engagement with Indigenous women in the minerals industry: Making space for theory. In C. O'Faircheallaigh and S. Ali (eds), *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility*. Sheffield, UK: Greenleaf Publishing, pp. 104-123.

Gibson, R. 2006. Sustainability assessment and conflict resolution: Reaching agreement to proceed with the Voisey's Bay nickel mine. *Journal of Cleaner Production.* 14: 334-348.

Gibson, G., Vermette, K., Lapointe, U., Gunton, C., Pelletier, R., & Lambrecht, F. 2025. "Economic Agreements: Trends, Opportunities, and Challenges." Presentation by Firelight at the Indigenous Connections Summit, Tiohtià:ke (Montreal), March 13, 2025. Accessed October 20, 2025. connexionsautochtones.org/en/economic-agreements-with-first-peoples/

Gibson, G., K. Yung, L. Chisholm, and H. Quinn with Lake Babine Nation and Nak'azdli Whut'en. 2017. Indigenous Communities and Industrial Camps: Promoting healthy communities in settings of industrial change. Victoria, B.C.: The Firelight Group.

Gilmour, B. and B. Mellet. 2013. The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations. *Alberta Law Review* 51(2): 385-400.

Global Indigenous Data Alliance. n.d. "CARE Principles." Accessed October 16, 2025. gida-global.org/care.

Gogal, S., R. Riegert and J. Jamieson. 2005. Aboriginal Impact and Benefit Agreements: Practical considerations. *Alberta Law Review* 129(43): 129-157.

Government of British Columbia. 2015. *Independent Expert Engineering Investigation and Review Panel Report on Mount Polley Tailings Storage Facility Breach.* January 30. mountpolleyreviewpanel.ca/final-report

Government of British Columbia. 2023. "Mount Polley Mine Tailings Storage Facility Breach (August 4, 2014)." Accessed October 20, 2025. gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-incidents/past-spill-incidents/mt-polley.

Government of Canada. 2011. *Aboriginal Consultation and Accommodation Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. Minister of the Department of Indian Affairs and Northern Development. publications.gc.ca/site/archivee-archived.html?url=https%3A%2F%2Fpublications.gc.ca%2Fcollections%2Fcollection_2011%2Finc-inac%2FR3-111-2011-eng.pdf.

Government of Newfoundland and Innu Nation. 2002. *Memorandum of Agreement Concerning the Voisey's Bay Project.*

Government of the Northwest Territories and BHP Billiton Diamonds Inc. 1996. *Socio-Economic Agreement: BHP Diamonds Project.* Tabled in the 4th session of the 13th Assembly.

Gunton, C., T. Gunton, J. Batson, S. Markey, and D. Dale. 2021. Designing fiscal regimes for impact benefit agreements. *Resources Policy 72*, 102004. doi.org/10.1016/j.resourpol.2021.102004.

Haida Nation and Heiltsuk Nation. 2014. "Treaty of Peace, Respect, and Responsibility."

Harvey, B. and S. Nish. 2005. Rio Tinto and Indigenous community agreement making in Australia. *J. of Energy & Natural Resources Law* 23(4): 499-510.

Henderson, L. and G. Voogd. 2001. *Benefits Agreements: A situational analysis.* Laurie Henderson Professional Corporation.

Henderson, L. 2001. *Benefits Agreements: Some legal issues considered.* Laurie Henderson Professional Corporation.

Hennessy, L. 2007. *Negotiating Indigenous sustainability measures of protection in agreements with mining companies*. Research report for Pacific Environment, Berkeley, CA.

Holden, A. and C. O'Faircheallaigh. 1995. *The Economic and Social Impact of Silica Mining on Hope Vale, Aboriginal Politics and Public Sector Management Monograph No. 1.* Brisbane: Centre for Australian Public Sector Management, Griffith University.

Human Rights and Equal Opportunity Commission (HREOC). *Development and Indigenous Land: A human rights approach*. Sydney, NSW: Human Rights and Equal Opportunity Commission.

Impact Assessment Agency of Canada. 2021a. "Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions." Accessed May 20 2025. canada.ca/en/impact-assessment-agency/programs/aboriginal-consultation-federal-environmental-assessment/indigenous-knowledge-policy-framework-initiative/indigenous-knowledge-policy-framework-project-reviews-regulatory-decisions.html.

Impact Assessment Agency of Canada. 2021b. "Gender-based Analysis Plus in Impact Assessment." Accessed March 13, 2026. canada.ca/content/dam/iaac-acei/documents/policy-guidance/gender-based-analysis-plus/guidance-gender-based-analysis-plus-impact-assessment.pdf

Impact Assessment Agency of Canada. 2026. Practitioner's Guide to Federal Impact Assessments. canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html.

Innu Nation Task Force on Mining Activities. 1996. *Ntesinan Nteshiniminan Nteniunan: Between a Rock and a Hard Place.* Final report of the Innu Nation Task Force. Innu Nation Office: Sheshatshui, Nitassinan.

Innu Nation Task Force on Mining. 1995. *Ntesinan, Nteshiniminan, Nteniunan: Between a rock and a hard place*. Participatory Research Process on Mining. Ntesinan (Labrador). ryakuga.ca/best/ntesinan.html

International Council on Mining and Metals (ICMM). 2024. *Indigenous Peoples and Mining: Position Statement*. icmm.com/website/publications/pdfs/mining-principles/position-statements_indigenous-peoples.pdf?cb=83768.

Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada. *Nunavut Land Claim Agreement*. Accessed May 6, 2009. gov.nu.ca/hr/site/doc/NLCA.pdf.

Inuit Tapiriit Kanatami. 2018. "National Inuit Strategy on Research: Advancing Inuit Self-Determination." Accessed October 16, 2025. itk.ca/projects/national-inuit-strategy-on-research/.

Jepsen, D., B. Joseph, B. McIntosh, and B. McKnight. *Mineral Exploration, Mining and Aboriginal Community Engagement.* BC & Yukon Chamber of Mines.

Joint Review Panel. 2007. *Kemess North Copper-Gold mine project: Joint Review Panel report*. Accessed May 6, 2009. bristolbayalliance.com/images/JPR%20Final%20Report%20Exec%20Summary.pdf

Jones, P. 2007. *American Indians and Oil and Natural Gas Exploitation: Case examples.* Paper delivered to the Annual Conference of the Society for Applied Anthropology, Tampa, Florida, 28 March—1 April 2007.

Katona, J. 2002. "Cultural Protection in Frontier Australia." *Flinders Journal of Law Reform.* austlii.edu.au/au/journals/FlinJlLawRfm/2002/3.pdf.

Keeping, J. 1999. *Local benefits from mineral development: The law applicable in the Northwest Territories*. Calgary: Canadian Institute of Resources Law.

Keeping, J. 1998. *Thinking about benefits agreements: An analytical framework.* Prepared for Canadian Arctic Resources Committee, Yellowknife: NWT.

Keeping, J. 2005. *The legal and constitutional basis for benefits agreements: A summary.* carc.org/pubs/v25no4/3.htm

Keewatin Tribal Council (KTC). 2025, July. *The Mineral Assessment Tool (MAT).* Prepared by Firelight Research Inc. Final report. Winnipeg, MB. firelight.ca/assets/publications/reports/ktc-report-mineral-assessment-tool-july-2025-final-compressed.pdf.

Kennett, S. 1999. *A guide to Impact and Benefit Agreements.* Calgary: Canadian Institute of Resources Law.

Ker, A. 2000. *Impact and Benefits Agreements as Instruments for Aboriginal Participation in Non-Renewable Resource Development: A report on selected case studies.* Ottawa: National Round Table on the Environment and the Economy.

Kischuk, P. 2001. *Yukon Benefits Agreements: Policy Options*. Whitehorse: Yukon Economic Development.

Kitselas First Nation and The Minister of Environment and Climate Change Strategy. 2023. "Kitselas – Province of BC Environmental Assessment Agreement." April 20. gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/signed_kitselas-province_of_bc_environmental_assessment_agreement_20april2023.pdf.

Kivalliq Inuit Association and Agnico Eagle Mines Limited. 2017. *Meliadine Inuit Impact and Benefit Agreement*. aemnunavut.ca/wp-content/uploads/2016/09/Meliadine-INUIT IBA.pdf.

Klein, H., J. Donihee and G. Stewart. 2004. *Environmental impact assessment and Impact and Benefit Agreements: Creative tension or conflict?*

Lake Babine Nation, Minister of Indigenous Relations and Reconciliation, and Crown-Indigenous Relations and Northern Affairs. 2021. "Lake Babine Nation Foundation Agreement - Amending Agreement #1." March 29. gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/lbn_amending_agreement_1_-_signed_mar_31_2021.pdf.

Lange, L. 1985. *Employment of Native Women at the Norman Wells Oilfield Expansion and Pipeline Project*. Arctic Institute of North America: Calgary.

Lehr, A. and G. Smith. 2010. *Implementing a corporate free, prior, and informed consent policy: Benefits and challenges.* Washington: Foley Hoag LLP eBook.

Loxley, J. (2019). Assessment of the Mary River Project: Impacts and benefits. University of Manitoba. oceansnorth.org/wp-content/uploads/2025/03/Assessment-of-the-Mary-River-Project-Impacts-and-Benefits-final-draft.pdf

Mackenzie Valley Environmental Impact Review Board (MVEIRB). 2007. *Socio-economic Impact Assessment Guidelines.* Yellowknife, NT: Mackenzie Valley Environmental Impact Review Board, March 2007.

MVEIRB. n.d. "Reference Material." reviewboard.ca/reference_material?section=18.

Makivik Corporation, the Kativik Regional Government, Nunavik Regional Board of Health and Social Services et al. Parnasimautik Consultation Report: On the Consultations Carried out with Nunavik Inuit in 2013. November 14, 2014. parnasimautik.com/2014-consultation-report/. McKenna, S. 1995. Negotiating mining agreements under the Native Title Act. 1993. *Agenda* 2(3): 301-312.

Mining Industry Human Resources Council (MiHR). 2024. "Workplace 2024: Trends, Priorities and Insights from Canada's Mining Workforce."

Mining Industry Human Resources Council (MiHR), Abacus Data. 2023. "Perceptions and Interest in a Mining Sector Career: Youth Perceptions Survey 2023."

Ministry of Energy and Mines. 2015. "Investigation Report of the Chief Inspector of Mines: Mount Polley Mine Tailings Storage Facility Breach." Government of British Columbia.

Ministry of Indigenous Relations and Reconciliation. 2024. "Economic and Community Development Agreements – Province of British Columbia." Government of British Columbia. Accessed

October 17, 2025. gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/economic-and-community-development-agreements.

National Inquiry into Missing and Murdered Indigenous Women and Girls. 2019. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.* https://www.mmiwg-ffada.ca/final-report/.

Natural Resources Canada. 2025. "National Benefits-Sharing Framework." Accessed March 13, 2026. natural-resources.canada.ca/natural-resources-indigenous-peoples/national-benefits-sharing-framework.

Natural Resources Canada. 2024. "ESTMA Data Portal." natural-resources.canada.ca/minerals-mining/services-mining-industry/extractive-sector-transparency/links-estma-reports.

Nicholas, G. and C. Smith. 2020. "Considering the denigration and destruction of Indigenous heritage as violence." In Apaydin, V. (ed.), Critical Perspectives on Cultural Memory and Heritage: Construction, Transformation and Destruction. London: UCL Press, pp. 131–154. doi.org/10.2307/j.ctv13xpsfp.14

Noble, B. and K. Storey. 2005. Towards increasing the utility of follow-up in Canadian EIA. *Environmental Impact Assessment Review*. 25: 163-180.

Northern Ontario Business Staff. May 28, 2025. "Taykwa Tagamou Nation closes a $20-million groundbreaking deal on a Timmins nickel project." *Northern Ontario Business.* northernontariobusiness.com/industry-news/mining/taykwa-tagamou-nation-closes-a-20-million-groundbreaking-deal-on-a-timmins-nickel-project-10724190.

Nouvet, Dominique. 2009. *The duty to consult and accommodate: Overview of the current law*. Presented at the Pacific Business & Law Institute Conference on Mining in Aboriginal Communities, Vancouver, BC, March 5.

Nunavut Land Claims Agreement. 2005. *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*.

O'Faircheallaigh, C. 1995a. *Mineral development agreements negotiated by Aboriginal communities in the 1990s.* Centre for Aboriginal Economic Policy Research Paper. No. 85.

O'Faircheallaigh, C. 1995b. *Negotiations between mining companies and Aboriginal communities: Process and structure.* Centre for Aboriginal Economic Policy Research Paper. No. 86.

O'Faircheallaigh, C. 1996. Negotiating with resource companies: Issues and constraints for Aboriginal communities in Australia, In *Resources, Nations and Indigenous Peoples*, ed. R. Howitt, J. Connell and P. Hirscu, 185-202. Oxford: Oxford University Press.

O'Faircheallaigh, C. 1999. Making social impact assessment count: A negotiation-based approach for Indigenous people. *Society & Natural Resources* 12: 63-80.

O'Faircheallaigh, C. 2000. *Negotiating major project agreements: The 'Cape York Model'.* Australian Institute of Aboriginal and Torres Strait Interior Studies. Number 11.

O'Faircheallaigh, C. 2002. Implementation: The Forgotten Dimension of Agreement-Making in Australia and Canada. *Indigenous Law Bulletin* 5: 14-17.

O'Faircheallaigh, C. 2003a. *Implementing agreements between Indigenous peoples and resource developers in Australia and Canada.* Aboriginal Politics and Public Sector Management. Research Paper No. 13.

O'Faircheallaigh, C. 2003b. *Financial models for agreements between Indigenous peoples and mining companies.* Aboriginal Politics and Public Sector Management. Research Paper No. 12. Griffith University: Centre for Australian Public Sector Management.

O'Faircheallaigh, C. 2003c. *Negotiating a better deal for Indigenous landowners: Combining 'research' and 'community service'.* Aboriginal Politics and

Public Sector Management. Research Paper No. 11. Griffith University: Centre for Australian Public Sector Management.

O'Faircheallaigh, C. 2004. Denying citizens their rights? Indigenous people, mining payments and service provision. *Australian J. of Public Administration* 63(2): 42-51.

O'Faircheallaigh, C. 2006a. Aborigines, mining companies and the state of contemporary Australia: A new political economy or 'business as usual'? *Australian J. of Political Science* 41(1): 1-22.

O'Faircheallaigh, C. 2006b. *Environmental Agreements in Canada: Aboriginal participation, EIA Follow-Up and environmental management of major projects*. Calgary: Canadian Institute of Resources Law.

O'Faircheallaigh, C. 2006c. Mining agreements and Aboriginal economic development in Australia and Canada. *Journal of Aboriginal Economic Development* 5(1), 74-91.

O'Faircheallaigh, C. 2007a. *Reflections on the sharing of benefits from Australian Impact and Benefit Agreements.* Presentation made at Gordon Foundation Fort Good Hope meeting, May 4.

O'Faircheallaigh, C. 2007b. *Understanding corporate-Indigenous agreements on mineral development: A conceptual framework.* Paper delivered to the Annual Conference of the Society for Applied Anthropology, Tampa, Florida, 28 March – 1 April 2007.

O'Faircheallaigh, C. 2008. Negotiating Cultural Heritage? Aboriginal-Mining Company Agreements in Australia. *Development and Change 39*(1), 25-51. doi.org/10.1111/j.1467-7660.2008.00467.x.

O'Faircheallaigh, C. 2015. Criteria for evaluating negotiation outcomes, in: *Negotiations in the Indigenous World*. Routledge.

O'Faircheallaigh, C. 2020. Impact and benefit agreements as monitoring instruments in the minerals and energy industries. *The Extractive Industries and Society 7*, 1338–1346.

O'Faircheallaigh, C. 2021. Explaining outcomes from negotiated agreements in Australia and Canada. Resources Policy 70, 101922.

O'Faircheallaigh, C. and T. Corbett. 2005. Indigenous participation in environmental management of mining projects: The role of negotiated agreements. *Environmental Politics* 14(5): 629-647.

O'Faircheallaigh, C. and S. Ali. 2008. Understanding Corporate-Aboriginal Agreements on Mineral Development. In C. O'Faircheallaigh and S. Ali (eds), *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility.* Sheffield, UK: Greenleaf Publishing, pp. 67-82.

O'Faircheallaigh, C., and R. Lawrence. 2019. Mine closure and the Aboriginal estate. *Australian Aboriginal Studies* (Canberra) 65–81.

O'Faircheallaigh, C., and A. MacDonald. 2022. "Indigenous Impact Assessment: A Quiet Revolution in EIA?" In *Routledge Handbook of Environmental Impact Assessment*. Routledge.

O'Faircheallaigh, C., and T. Rodon. 2024. Realizing Indigenous rights: Effective implementation of agreements between Indigenous Peoples and the extractive industry. In: *Mining and Indigenous Livelihoods.* Routledge.

Office of the Auditor General of Canada. 2007. *October Report of the Auditor General of Canada*. oag-bvg.gc.ca/internet/English/parl_oag_200710_03_e_23827.html

Office of the Auditor General of British Columbia. 2016. An Audit of Compliance and Enforcement of the Mining Sector.

Ontario FNEATWG. 2009. *First Nations Environmental Assessment Toolkit for Ontario.* Toronto: Chiefs in Ontario.

Ontario Mining Association. "Mining 101." Accessed January 21, 2026. oma.on.ca/ontario-mining/mining-101/.

Ontario Mineral Industry Cluster. *Guide for Junior Exploration Companies and Prospectors: Building a dialogue with Aboriginal communities*

is critical.... Accessed October 8, 2008. ontarioprospectors.com/publications/BuildingADialogueAboriginalCommunities.pdf

O'Reilly, K. and E. Eacott. 1998. *Aboriginal Peoples and Impact and Benefit Agreements: Report of a national workshop, Northern minerals program working paper No. 7.* Yellowknife, Canadian Arctic Resources Committee.

Paine, I. 2009. *Maximizing benefits from IBAs.* Presented May 13, 2009, to the Land Claims Coalition Conference.

Palmer, L. and M. Tehan. 2007. 'Anchored to the land': Asserting and recognizing Aboriginal jurisdiction in the Northwest Territories. Settling with Indigenous Peoples. In *Settling with Indigenous People: Modern treaty and agreement-making*. Marcia Langton, Odette Mazel, Lisa Palmer, Kathryn Shain and Maureen Tehan (eds.), pp. 66-93.

Penn, A. and V. Croquet. 2008. *Implementing the Troilus Agreement: A joint study of Cree employment and services contracts in the mining sector.* Cree Nation of Mistissini, Cree Regional Authority and Inmet Mining Corporation.

Pretes, M. and M. Robinson. 1989. Beyond boom and bust: A strategy for sustainable development in the north. *Polar Record* 25(153): 115-120.

Prno, J., B. Bradshaw, and D. Lapierre. 2010. "Impact and Benefit Agreements: Are They Working." In *Canadian Institute of Mining, Metallurgy and Petroleum Annual Conference*, Vancouver, British Columbia. impactandbenefit.com/UserFiles/Servers/Server_625664/File/IBA%20PDF/CIM%202010%20Paper%20-%20Prno,%20Bradshaw%20and%20Lapierre.pdf.

Province of British Columbia. *The New Relationship*. gov.bc.ca/arr/newrelationship/ down/new_relationship.pdf.

Public Services and Procurement Canada. 2022. "Annex 9.4: Requirements for the Set-aside Program for Indigenous Business." In Supply Manual (AP Official Source). canadabuys.canada.ca/en/how-procurement-works/policies-and-guidelines/supply-manual/chapter-9-annexes#_9-4.

Qikiqtani Inuit Association. n.d. "Training and Jobs." qia.ca/what-we-do/training-and-jobs/.

Qikiqtani Inuit Association. 2017. "Baffinland Iron Mines owes QIA $7.3 million says Arbitration Panel." News release. qia.ca/wp-content/uploads/2017/07/2017-07-06-decision-on-qia-baffinald-arbitration-win.pdf

Qikiqtani Inuit Association and Baffinland Iron Mines Corporation. 2018. "The Mary River Project Inuit Impact and Benefit Agreement." qia.ca/wp-content/uploads/2018/10/Mary-River-INUIT IBA-Signed.-October-22-2018.pdf.

Quinn, R. 2005. *Mining agreements: Content ideas.* Perth: National Native Title Tribunal. nntt.gov.au

Robinson, M., M. Dickerson, J. Van Camp, W. Wuttunne, M. Pretes and L. Binder. 1989. *Coping with the Cash: Background study prepared for the NWT's Legislative Assembly's Special Committee on the northern economy.* Committee on the Northern Economy. Calgary: Arctic Institute of North America.

Roquet, V. and C. Durocher. 2007. *Implementing the Troilus Agreement: A joint study of Cree employment and service contracts in the mining sector.* Cree Nation of Mistissini, Cree Regional Authority and Inmet Mining Corporation.

Sandlos, J. and A. Keeling. (Eds.), 2015. *Mining and Communities in Northern Canada: History, Politics, and Memory*. University of Calgary Press.

"SEDAR+ Landing Page." n.d. Accessed October 17, 2025. sedarplus.ca/home/.

Shanks, G. 2006. *Sharing in the benefits of resource development: A study of First Nation Industry Impact and Benefit Agreements.* Ottawa: Public Policy Forum.

Sosa, I. and K. Keenan. 2001. *Impact Benefit Agreements between Aboriginal communities and mining companies: their use in Canada. Ottawa:* Canadian Environmental Law Association.

Storey, K., M. Shrimpton, J. Lewis and D. Clark. 1989. *Family life impacts of offshore oil and gas employment.* Institute of Social and Economic Research, Memorial University, Newfoundland.

Sweeting, A. and A. Clark. 2000. *Lightening the Lode: A guide to responsible large-scale mining*. Washington: Conservation International Policy Paper.

Tahltan Central Government. 2025. "Tahltan Nation stands firm on free prior and informed consent and partnership amidst concerns with Bill 15." Press release. May 28, 2025. tahltan.org/tahltan-nation-stands-firm-on-free-prior-and-informed-consent-and-partnership-amidst-concerns-with-bill-15/.

Taku River Tlingit First Nation. 1995. *What we need to know: Information requirements for Redfern Resources' project report for Tulsequah Chief Mine*.

The First Nations Information Governance Centre. n.d. "The First Nations Principles of OCAP® – The First Nations Information Governance Centre." Accessed October 16, 2025. fnigc.ca/ocap-training/.

Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada. 2005. *Bill C-14,* Tłı̨chǫ *Land Claims and Self Government Agreement.* Assented to 15 February 2005, Statutes of Canada.

Trebeck, Katherine. 2008. Exploring the responsiveness of companies: corporate social responsibility to stakeholders. *Social Responsibility Journal* 4(3), 349-365.

United Nations Declaration on the Rights of Indigenous Peoples Act Implementation Secretariat. 2023. *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan.* Department of Justice Canada. justice.gc.ca/eng/declaration/ap-pa/ah/index.html/.

United Nations Department of Economic and Social Affairs (UNDESA). 2004. *An Overview of the principle of Free, Prior and Informed Consent and Indigenous People's in International and Domestic Law and Practice*. New York. PFII/2004/WS.2/8.

Veit, P., R. Nshala, M. Ochiengè Odihiambo, J. Manyindo. 2008. *Protected Areas and Property Rights: Democratizing eminent domain in East Africa.* Washington: World Resources Institute. Accessed June 29, 2009. http://pdf.wri.org/protected_areas_and_property_rights.pdf

Vitti, C., Arnold, B.J. 2022. The Reprocessing and Revalorization of Critical Minerals in Mine Tailings. *Mining, Metallurgy & Exploration* 39, 49–54. https://doi.org/10.1007/s42461-021-00524-6

Wabun Tribal Council, Brunswick House First Nation, Chapleau Ojibway First Nation, Flying Post First Nation, Matachewan First Nation, Wahgoshig First Nation, and Government of Ontario. 2018. "Firestry and Mining Resource Revenue Sharing Agreement."

Weitzner, V. 2006. *Dealing full force: Lutsel K'e Dene First Nation's experience negotiating with mining companies.* Ottawa: The North-South Institute and Lutsel K'e Dene First Nation. www.nsi-ins.ca

Wilkinson, P. 2001. *Impact and Benefit Agreements: An overview and evaluation.* Prepared for the Attawapiskat First Nation.

Wolfe, W. 2001. *Socio-Economic Impact Agreements in Canada, 1999-2001.* Paper presented at Prospectors and Developers Association of Canada, Toronto, Tuesday, March 13.

Woodward & Company. 2009. *Benefit sharing agreements in British Columbia: A guide for First Nations, businesses and governments*. Victoria, BC.

Yukon Environmental and Socio-Economic Assessment Board. n.d. *Guide to Interested Persons and the Public to Participate in Assessments*. https://yesab.ca/wp-content/uploads/2017/11/Guide-to-Interested-Persons-and-the-Public-to-Participate-in-Assessments.pdf.

Zorilla, C. with A. Buck, P. Palmer and D. Pellow. 2009. *Protecting your Community Against Mining Companies and other Extractive Industries: A guide for community organizers.* Boulder, CO: Global Response.

Resources Available Online

- **AGREEMENTS, TREATIES AND NEGOTIATED SETTLEMENTS PROJECT** in Australia hosts a database of agreements and other resources: www.atns.net.au
- **BC FIRST NATIONS ENERGY AND MINING COUNCIL** provides several helpful resources related to mining, energy, and environmental assessment at fnemc.ca/. These include webinars, reports, and examples of agreements with mining companies.
- **CANADA'S NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS** released Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a and 1b in 2019. The specific Calls to Action for Extractive and Development Industries (13.1-5) are particularly relevant for IBAs. The report is accessible at mmiwg-ffada.ca/final-report/.
- **FIRELIGHT** has developed several landmark reports that dive deeper into topics related to IBAs. Some specific resources to consider include:
  - Gibson, G. and the Firelight Group. 2017. Culture and Rights Impact Assessment: A Survey of the Field. Mikisew Cree First Nation. firelight.ca/assets/publications/reports/mcfn-303_mapp-report.pdf.
  - Gibson, G., Hoogeveen, D., MacDonald, A., and the Firelight Group. 2018. Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review. Gwich'in Council International. firelight.ca/assets/example_projects/firelight-gwich'in-indigenous-led-review_final_web_0.pdf.
  - Firelight and FNMPC. 2025. An Introduction to Indigenous-Led Assessment: Key Considerations and Principles. firelight.ca/assets/publications/reports/an-introduction-to-indigenous-led-assessment-.pdf.
  - Firelight. 2025. Mineral Assessment Tool. firelight.ca/assets/mat-feature_digital.pdf.
- **FIRST NATIONS ENVIRONMENTAL ASSESSMENT TOOLKIT** provides in-depth information about the environmental assessment process: fnhpa.ca/_Library/KC_BP_3_Mgmt_Pro/FN_Environmental_Assessment_Toolkit.pdf.

- **FIRST NATIONS MAJOR PROJECT COALITION** provides many different tools and resources to support First Nations in building capacity around decision-making for major projects in their territory. These include environmental tools, economic learning modules, and other reports and publications: fnmpc.ca/tools-and-resources/. Some specific FNMPC resources include:
  - FNMPC. 2025. The Case for Phase 0: Improving Impact Assessment Efficiency and Effectiveness. Report. fnmpc.ca/wp-content/uploads/FNMPC_Phase0_web_08192025.pdf.
  - FNMPC. 2024. Spirit of the Land: FNMPC Technical and Policy Toolkit for Assessing and Seeking Restitution for Project-Specific and Cumulative Effects on Indigenous Cultural Rights. fnmpc.ca/wp-content/uploads/FNMPC_SOTL_Toolkit.pdf.
  - FNMPC. 2019. Ownership Model Handbook: First Nations Project Ownership and Access to Capital for Investment in Major Infrastructure Projects. fnmpc.ca/wp-content/uploads/FNMPCOwnershipModelHandbookFebruary2019.pdf.
- **IMPACT ASSESSMENT AGENCY OF CANADA** also provides materials on the nature of the process and public involvement in impact assessments: canada.ca/en/impact-assessment-agency.html. Some specific IAAC resources to review include:
  - Practitioner's Guide to Federal Impact Assessments (2026). canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html.
  - Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (2021). canada.ca/content/dam/iaac-acei/documents/programs/indigenous-knowledge-policy-framework.pdf.
  - Guidance: Gender-based Analysis Plus in Impact Assessment (2021). canada.ca/content/dam/iaac-acei/documents/policy-guidance/gender-based-analysis-plus/guidance-gender-based-analysis-plus-impact-assessment.pdf.
- **INITIATIVE FOR RESPONSIBLE MINING ASSURANCE** (IRMA) offers a global standard for responsible mining: responsiblemining.net/resources/#full-documentation-and-guidance.
- **INTERNATIONAL ASSOCIATION FOR IMPACT ASSESSMENT** (IAIA) provides a list of Key Citations in the field: iaia.org/wp-content/uploads/2025/02/Key-Citations_Indigenous-Peoples.pdf.
- **INTERNATIONAL COUNCIL ON MINING AND METALS** (ICMM) has a number of resources and important policy statements that its members adhere to, including its Position Statement on Indigenous Peoples and Mining: icmm.com/en-gb/our-principles/position-statements/indigenous-peoples.
- **MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD** developed guidelines for mitigating socio-economic and cultural impacts early in the IA process, in their Socio-Economic Impact Assessment Guidelines, 2007. reviewboard.ca/file/1024/download?token=1DDLP3jP.

- **MINING INDUSTRY HUMAN RESOURCES COUNCIL** hosts information for communities to learn more about careers in mining, including education and training programs (such as Mining Essentials: Work Readiness Training for Indigenous Peoples), and resources such as job descriptions and a downloadable guide on occupations in mining: mihr.ca/wp-content/uploads/2020/03/MIHRGuidetoAboriginalCommunities.pdf.

- **MININGWATCH CANADA** provides news and resources at www.miningwatch.ca, including the primer Mining Investors: Understanding the legal structure of a mining company and identifying its management, shareholders and relationship with the financial markets miningwatch.ca/sites/default/files/Mining_Investors.pdf.

- **NATURAL RESOURCES CANADA** mining pages provide a wide range of online resources, including a Natural Resources and Indigenous Peoples section (natural-resources.canada.ca/natural-resources-indigenous-peoples), and the downloadable Exploration and Mining Guide for Aboriginal Communities (natural-resources.canada.ca/sites/nrcan/files/mineralsmetals/files/pdf/abor-auto/mining-guide-eng.pdf)

- **SEDAR+** is the portal used to file, disclose, and search for information in Canada's capital markets. Publicly traded companies have to file their technical reports, financial statements, and other management forms at sedarplus.ca/home/.

- **SIMON FRASER UNIVERSITY** has developed an Impact Benefit Agreement Guidebook (2020), which focuses specifically on maximizing income generated from an IBA for communities, summarizing different revenue-generating tools, a model for estimating revenues, and guidance on choosing a tool at sfu.ca/rem/planning/research/iba/handbook.html.

- **TRUTH AND RECONCILIATION COMMISSION OF CANADA** released 94 Calls to Action in 2015 to advance reconciliation and address the legacy of residential schools. Many of these are directly relevant to IBAs, including Call to Action 92: Business and Reconciliation, at ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf.

Index

A

About the Authors 11

Access to Mining Tenures 200

Access to the Courts and Government Regulators 79

Accommodation 233

Acknowledgements 12

Advanced Exploration 30

Agreement Tracking Table 180

Amendment of Provisions 281

Analyzing the Project and the Broader Environment 26

Assess and Improve the Bargaining Position 156, 160

Assessing and Reducing Risks Associated with Company Funding 132

B

Bargaining Strengths and Weaknesses 156

Baseline Conditions in the Socio-economic and Cultural Environment 137

Benchmarks to Determine Potential Royalty Rates and Mining Payments 215

Bringing in 'Power Figures' 174

Brownfield Agreement 127

Budget 131

Budget Management 134

Budget Needs 133

Budgets 134, 182

Build a Relationship 285

Building Trust and Tackling Barriers 288

Business Development 237

C

Canadian Major Projects Review Process and Regulation 56

Capacity Building in Data Analysis 122

Career Advancement 231

Cash Payments (Including Advanced Payments) 204

Catastrophic or Unplanned Events 247

Change in Policy or Government 283

Closure and Reclamation 39

Closure & Long-Term Care 254

Communication 200

Communication clauses 200

Communications Strategy 147

Community and External Advisor Negotiator Roles 108

Community Concerns 155

Community Goals, Planning, and Politics 83

Company Negotiation Tactics and Community Responses 177

Company Tactics 177

Conducting Negotiations and Reaching Agreements 166

Confidentiality 121, 192

Confidentiality Clauses 130

Confidentiality provisions 81

Connections between IBAa and IAs 77

Construction 35
Consultants 107
Consultants' Briefing Notes 125
Contract Law 195
Corporate Confidentiality Clauses 130
Corporate Responsibility 82
Cultural Environment 137
Cultural Practices and Language 252
Culture and Cultural Heritage 250
Cumulative Effects 247

D

Data Access and Authorization 121
Data Analysis 122
Data Requirements 112
Data Storage, Retrieval and Access 112
Definitions 189
Determining How Data Will Be Used 123
Develop a Strong Negotiation Position 161
Dispute Resolution 191
Disunity 88
Diversified Equity 207
Documentation and Communication of Negotiation Meetings 179
drilling programs 31
Duty to Accommodate 49
Duty to Consult 48

E

Early Exploration 29
Education and Training 228
Elders 150
Employment 221
Employment Coordinators 230
Employment Targets 223
Environmental Assessment 37
Environmental Management 241
Environmental Provisions 243
Equity 206
Establish a Structure for Negotiations 95
Estimating Costs 131
Existing and 'Legacy' Mines 21
Exploration agreement 126
Exploration Agreements 128
External Advisor Negotiator Roles 108

F

Federal Impact Assessment 57
Financial securities 38
Focus on Process as Well as Outcome 18
Forming Networks 19
"Free Entry" Mining System 32
Free, Prior and Informed Consent 194
Free Prior Informed Consent 43
Free, Prior Informed Consent 43
Funding Sources 131

G

Gather Information About the Project, Commodity and Company 134
Gathering and Managing Information 111
Gender and Impact Benefit Agreements 20
Gender and Negotiations 100
Greenfield 29

H

Harvester Compensation and Traditional Use 253
Historic and Modern Treaties 50

How to Use this Toolkit 22

I

Ideal Timing for IA and IBA Negotiations 72

Identifying Those Who Can Affect the Process 150

Identify Options and Provisions for Negotiated Agreements 185

Impact Assessment Follow-Up 61

Impact Assessment In Canada 56

Impact Assessment Process Steps 57

Impact Assessment Questions 139

Impact Assessment Review 60

Impacts During Advanced Exploration 142

Impacts During Closure 144

Impacts During Construction 142

Impacts During Operations 144

Implementation 276

Implementing Agreements and Maintaining Relationships 268

Implications for Broader Agreements and Land Claims with the State 81

Indigenous Businesses 237

Indigenous Data Control 111

Indigenous Law 55

Indigenous Law and Values 184

Indigenous-led assessments 67

Indigenous Monitors 246

Indigenous Participation in Impact Assessment 62

Indigenous Rights: The Canadian Context 46

Indigenous Rights: The International Context 40

Information is Power 17

Information Needs and Sources, by Topic 114

Information-sharing and Consultation with the Company 152

Information-Sharing with the Community 153

Infrastructure and Facilities 239

Interest Mapping 99

International Context 40

International Court 45

Introduction to the Toolkit 14

Involving Vulnerable or Important Groups 150

K

Keeping Things on Track 181

L

Land Claim Agreements 51

Land Claims with the State 81

Learning from Others' Experiences 136

'Legacy' Mines 21

Legacy or Brownfield Agreement 127

Legal Provisions 186

Legislative and Policy Levers for IBAs 53

Level of Impact Assessment Review 60

Licenses and Permits 36

Location and Investment Decision 28

M

Maintaining Confidentiality 121

Making the Decision to Negotiate 16

Managing Information 111

Mandate, Governance, and Decision Making 96

Meeting Language 177

Meeting Locations 176

Meetings 169

Memorandum of understanding (MoU) or Negotiation Agreement 126

Memorandums of Understanding (MoUs) or Negotiation Protocols 129

Mine Life Cycle 28

Mineral Assessment Tool 34

Mineral Claims 36

Mining Payment Distribution 220

Mining Payments 202

Mining Payment Trends 216

Mining Payment Utilization 217

Mitigating Impacts 145

Mitigation Measures 245

Monitoring and Management Systems 242

Monitoring and Reporting 279

Mount Polley Mine Disaster 249

N

Near-Mine Projects 29

Negotiating Team Composition 101

Negotiating Team Role with the Community 108

Negotiating Team Selection Process 103

Negotiation Agenda 171

Negotiation is Not Consent 17

Negotiation of IBA After IA 75

Negotiation of IBA and IA at the Same Time 76

Negotiation of IBA Before IA 73

Negotiation structure example 97

Negotiation Team 98

Nicaragua's Awas Tingni People 45

O

Ongoing Relationships 285

Operations 38

Outside Experts Versus Training In-House Staff 105

P

Payments, Penalties, and Incentives 278

Permits 36

Phases of Indigenous-Led Assessments (ILAs) and Impact and Benefit Agreeemnts (IBAs) 66

Political Agency 282

Political Strategies 80

Preamble 188

Precursor Agreements 126

Preparing for Negotiations 94

Principle of Equivalency 173

Project Design 33

Project Viability and Margins 283

Prospector's Licence 36

Provincial and Territorial Impact Assessment 59

Public Meetings 149

R

Reaching Agreements 166

Reclamation 39

Reconciliation agreement 127

Recruitment 222

References 291

Relationship Building 183

Removing Harmful People 175

Resources Available Online 300

Retention 229

Returning to the Negotiating Table if Community Support is Absent 262

Revenue sharing agreement 126

Risk Tolerance for a Given Form of Payment 213

Role of Technical Experts on the Negotiating Team 104

Roles for Advisors and Community Negotiators 168

Roles of Key People on the Negotiating Team 106

Royalties Based on Profits 205

Royalties Based on Value of Production 205

Royalties Based on Volume of Outputs 205

Rules for Negotiations 109

S

Sample Rules for Negotiations 109

Signing and Launching an Agreement 263

Social impact assessment 141

Socio-economic and Cultural Environment 137

Socio-Economic Impacts 140

Spectrum of Indigenous Involvement in Impact Assessment Process 65

Stages in Impact Assessments and IBAs 71

Stewardship agreement 127

Strategic engagement agreement 127

Strategies to Address the Wider Implications of IBAs 89

Strategies to Influence Companies or Bring Companies to the Table 135

Structure for Negotiations 95

Structure of the Toolkit 23

Substantive Issues and Provisions 198

Surface vs. Subsurface Rights 32

T

Tactics at the Negotiation Table 173

Tactics Outside of the Negotiation Room 178

Technical Experts 104

Technical studies 34

Term sheet 126

Timing of the Negotiation of IBAs and IAs 68

Timing the IA and IBA: Three Scenarios 72

Tools For Implementation and Management of Agreements 284

Toxic Material and Substances 245

Tracking and Responding to Community Concerns 155

Traditional Use 253

Training In-House Staff 105

U

Union Relationships 235

United Nations 41

United Nations Declaration on the Rights of Indigenous Peoples 43

Unity Between Indigenous Nations 86

Unity Within Communities 84

Universal Declaration of Human Rights 41

W

Walking Out 174

Wider Implications of Agreement Making 78

“Windfall” Profits 209

Women 150

Women in mining 227

Workplace Environment 232

Y

Yearly Review of an IBA 286

Youth 150

Glossary and Acronyms

ABORIGINAL A common, collective term for referring to Indigenous people in Australia. In this toolkit, the term Indigenous (the more common international term, see below) is preferred, and Aboriginal is primarily used in reference to Aboriginal law.

CAPITAL COSTS The costs of establishing or expanding a project, including equipment and building costs, and of replacing equipment (as opposed to ongoing operating costs, such as wages and consumables).

COMMODITY Physical substances, such as metals, that can be bought or sold in a marketplace.

CONSENT Consent is the authority of an Indigenous community to approve or reject a project; this is sometimes framed as "non-objection" when a community may not support a project. Consent is more than consultation, but it may not meet the standards set out by FPIC, below.

CONSULTATION Processes that provide meaningful information about mining projects to Indigenous people and record their responses, which may or may not be acted upon by mining companies or the state government.

CROWN LAND Land owned on behalf of all Canadians by federal, provincial, and territorial governments and that is administered and regulated by the responsible government.

FEASIBILITY Analysis to determine whether a proposal will be possible and profitable. Results of a feasibility study may serve as the basis for a final decision by a proponent (and financial institutions) to develop a mineral project.

FIRST NATIONS First Nations are one of the three Indigenous groups formally recognized in Canada, alongside Inuit and Métis.

FPIC FPIC stands for Free, Prior, and Informed Consent. It represents a standard of consent based on Indigenous sovereignty, ensuring that decision-making is: free from manipulation, coercion, or intimidation; that consent is obtained prior to any action or development takes place; and that the community receives all relevant information in a timely, accessible way needed to make an informed decision.

GOVERNMENT Used throughout this toolkit to refer to various state governments that may have overlapping jurisdictions with Indigenous communities (e.g., federal, provincial, state, or territorial governments).

GREENFIELD Greenfield exploration involves searching for mineral deposits in areas that have had little or no prior exploration or mining.

IBA An impact and benefit agreement is a contractual agreement between an Aboriginal community or entity and a resource development company, such as a mining company.

IMPACT ASSESSMENT (IA) Impact assessment (or environmental impact assessment in some jurisdictions) evaluates a project's effects on the environment. There are many levels of assessment, as described in Section 2.

IMPACT ASSESSMENT REPORT A report prepared by the responsible impact assessment agency that analyzes a project's potential impacts based on the Impact Statement, input from local communities, the public, and Indigenous Peoples, other jurisdictions, and experts. Conditions to address adverse impacts may be proposed. This report is intended to inform regulator decision-making.

IMPACT STATEMENT A detailed technical report submitted by project proponents, based on requirements set by the responsible impact assessment agency, that identifies and assesses the project's impacts on surrounding environments and communities, as well as any proposed mitigation measures to address adverse impacts.

INDIGENOUS The original people of a land or region. In Canada, Indigenous refers collectively to First Nations, Inuit, and Métis peoples within Canada. While used as an inclusive term, it is important to recognize that each group holds distinct rights, Knowledge, and cultural practices. To avoid implying pan-Indigenous perspectives, this toolkit uses group-specific language and context wherever possible.

INDIGENOUS COMMUNITIES Includes groups of Indigenous people and Indigenous governing bodies with the authority to negotiate agreements on their behalf. These may include treaty groups, landholding corporations, hereditary Chiefs, and other types of Indigenous governing bodies, as well as Indigenous communities that do not have a formal government.

INDIGENOUS KNOWLEDGES Indigenous Knowledges refers to the complex knowledge systems of Indigenous Peoples and reflects unique, place-based teachings, languages, governance, and histories. Because of the diversity of Indigenous cultures and worldviews, there is no standardized definition of Indigenous Knowledges, and meanings can differ across communities. This toolkit uses Nation-specific language to refer to knowledge related to specific Nations or peoples wherever possible.

INDIGENOUS-LED IMPACT ASSESSMENT (ILA) A process in which one or more Indigenous communities define the scope and methodology for assessing impacts and identifying potential benefits of a proposed project, ensuring responsiveness to their unique contexts.

INDIGENOUS PROTECTED AND CONSERVED AREA (IPCA) This term was coined by the Indigenous Circle of Experts in their 2018 report We Rise Together, to be used in the Canadian context to refer to "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems. Culture and language are at the heart and soul of an IPCA". Given this broad definition and the diversity of Indigenous Peoples and perspectives, individual Nations and communities may have specific definitions of what an IPCA means to them. IPCAs are a practical expression of the rights set out under UNDRIP, including free, prior and informed consent (FPIC).

INFRASTRUCTURE The basic facilities, such as roads, ports, power, and water supplies, needed for the functioning of a mine.

INUIT Inuit are one of the three Indigenous groups formally recognized in Canada, alongside First Nations and Métis. Inuit Nunangat is the Inuit homeland, which ranges across the Arctic including the Inuvialuit Settlement Region (Northwest Territories), Nunavut, Nunavik (Northern Quebec), and Nunatsiavut (Northern Labrador) land claim regions.

INUIT IBA (Inuit Impact and Benefit Agreement) is a contractual agreement between an Inuit community or entity and a resource development company, such as a mining company.

JOINT VENTURE A partnership or conglomerate, often formed to share risk or expertise in relation to a particular project.

JURISDICTION The territorial range of authority or control.

LEGACY In mining, this often refers to a closed and/or abandoned mine site. There may be continuing environmental damage from such sites.

MÉTIS Métis are one of the three Indigenous groups formally recognized in Canada, alongside First Nations and Inuit. The Métis Nation has a distinct identity of Indigenous and Euro-settler ancestry that emerged from the fur trade and established communities with unique cultures, traditions, and languages across parts of Manitoba, Saskatchewan, Alberta, and surrounding areas.

MOU A Memorandum of Understanding sets out the principles for a community and a mining company to work together to achieve an agreement that will create mutual benefit.

NEGOTIATOR A person engaged in back-and-forth communication to reach an agreement between two or more parties.

PRE-FEASIBILITY STUDY Following the preliminary economic assessment (PEA), a pre-feasibility study is a comprehensive study of the technical and economic viability of a project. It includes analyzing and selecting mining and processing methods, and includes capital and operating cost estimates.

PRELIMINARY ECONOMIC ASSESSMENT (PEA) First stage of economic analysis of a mining project with the lowest level of accuracy, also known as a scoping study.

RECLAMATION Restoration of mined land to a state as close as possible to its original contour, use or condition.

REHABILITATE OR RESTORE The process used to repair the impacts of mining on ecosystems, lands, and waters.

STAKEHOLDER Any party that has an interest ("stake") in a project. Not usually used in reference to Indigenous communities.

TAILINGS Material disposed of from a mill after most of the valuable minerals have been extracted.

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