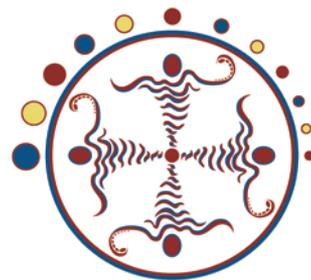


building capacity

INDIGENOUS
LEADERSHIP
DEVELOPMENT
INSTITUTE INC.



Welcome & Overview of Seminar

Facilitator

Alvin L. Chartrand MBA RPT

“...treaties envisioned Aboriginal peoples and settlers sharing wealth and stewardship of this great land. Since we are all here to stay, we must continue to build relationships of trust, mutual respect and support. The road to reconciliation may be long and difficult but it is a road that all peoples, Aboriginal and non-Aboriginal must walk together.”

**–Report of the Ipperwash Inquiry p.
692**

Constitution Act, 1982 and Aboriginal Rights

Aboriginal consultation stems from the Crown's fiduciary obligation towards Aboriginal Peoples and s.35 of the *Constitution Act, 1982*

- Section 35 of the *Constitution Act* recognizes and affirms Aboriginal rights, but they are not absolute
- Aboriginal rights may be infringed if Crown can satisfy the justification test established in *R. v. Sparrow*[1990]
- The Crown must show that the offending legislation has a valid legislative objective
- If the objective is valid, the infringement must be justified in a four step test

Origins of Aboriginal Consultation

Sparrow test for determining whether the infringement is justified:

- Is there as little infringement as possible in order to effect the desired result?
- Whether priority in allocation of the right has been given to the Aboriginal group?
- Where expropriation occurs, is fair compensation available?
- Whether the Aboriginal group concerned has been consulted with respect to conservation measures?

Origins of Aboriginal Consultation

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.

Origins of Aboriginal Consultation

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."

The Duty to Consult

- Honour of the Crown, goal of reconciliation
- Duty triggered by government conduct with potential to affect existing/asserted Aboriginal rights
- Consultation must be “meaningful”
- Crown can delegate procedural aspects of the duty to third parties
- Third party consultation efforts may be considered by the Courts to determine if the Crown duty is met
- Consultation may include negotiation and accommodation
- Depth of consultation varies depending on seriousness of impacts and strength of claim

Theory vs. Practice

Courts say:

- The duty to consult is owed by the Crown and cannot be delegated
- Procedural aspects can be delegated
- No clear line between procedural aspects and non-procedural aspects
- Proponents depend on getting approvals from Crown
- In practice, proponents do most of the consultation for the Crown

Considerations

- Identifying who to consult with and how consultation is to occur
- Addressing capacity issues for Aboriginal communities to engage in consultation
- Identifying traditional use areas
- Addressing overlapping jurisdictions
- Determining required level of Aboriginal Consultation
- Incorporation of Aboriginal communities' own Consultation Protocol and expectations of Prior Informed Consent
- Development of terms and conditions for exploration plans and permits

Considerations

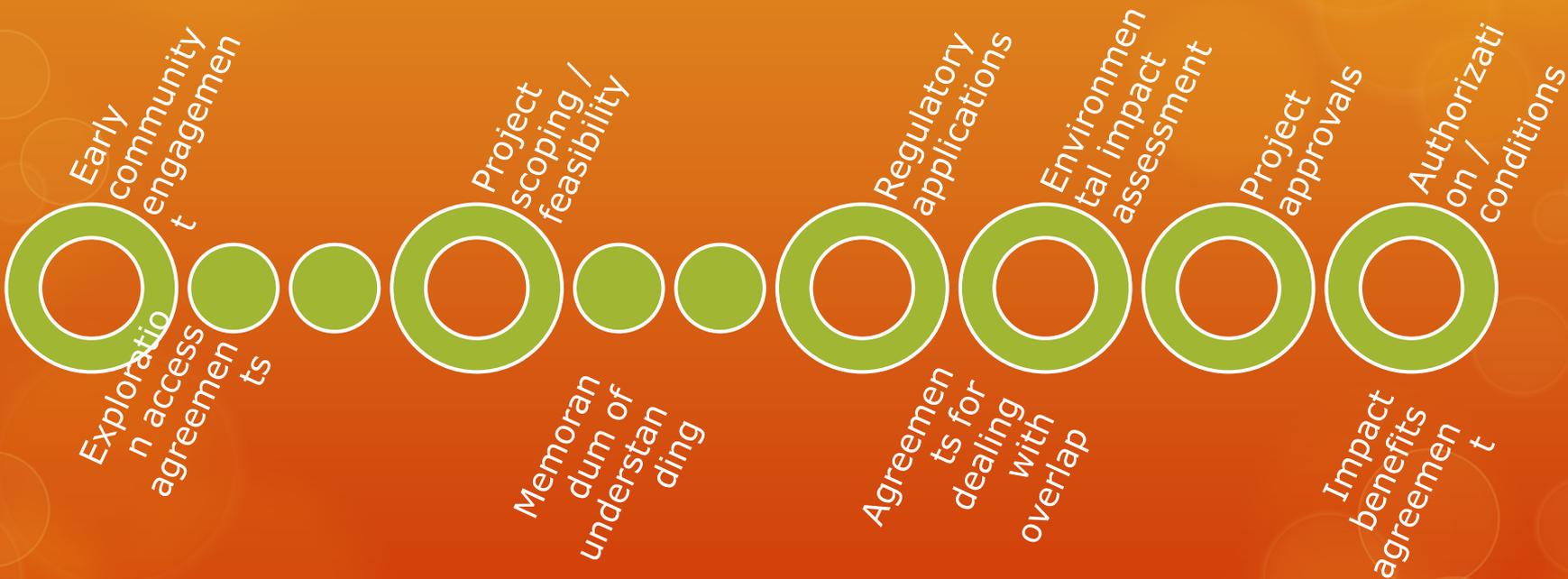
- Development of mechanism for dispute resolution
- Appointment of designated body/individual
- Incorporation of suitable timing for Aboriginal communities' involvement
- Definition of any governmental powers and reporting requirements

The Duty to Consult and Agreements

- The result of Environmental Assessment / approval consultation is often captured in an agreement, which will outline the impacts of the project, mitigation and benefits provided, including financial compensation
- Called impact benefit agreements, benefit agreements or Participation Agreements

Environmental Regulatory Reviews & IBAs

Environmental Regulatory Reviews



Impact and Benefit Agreements

IBAs & Environmental Impact Assessment

As exploration and mining can cause unspecified environmental damage during various stages and long after the project has been completed, there is a need to minimize the negative impact that sometimes cannot be avoided. Damages at times cannot be clarified or assessed until long after the actual work has been completed. Although mining came a long way in terms of reducing the more obvious environmental impacts, much needs to be done to reduce the negative effects of water contamination or risks to wildlife, etc., to alleviate the unintended environmental and social consequences.

Impact benefit agreements attempt to define and evaluate those unforeseen or unavoidable impacts, and offset them by providing benefits to those whose lives will be affected in all the stages of the mining process, while at the same time offering access and opportunity to the benefits of economic development.

As Klein et al. (2004) have put it, this may help explain why these agreements are called “impact and benefit agreements.”

Legal Status of IBAs

- Legally binding private contracts between signatories
- IBAs also have characteristics of regulatory instruments
- They are encouraged or required as a precondition for granting government licenses, approvals, or permits

Aboriginal Communities Are:

- Participating in industry organizations (for example: Mining Sector Organizations)
- Creating First Nation development corporations
- Developing own Consultation Guidelines /Protocols to provide to proponents
- Signing more MOUs with exploration companies than ever before
- Entering into more First Nation-Government agreements than ever before

Impact Benefit Agreements (IBAs): Definition and Purpose

An IBA is defined as a *confidential* agreement negotiated in the context of resource development between a company, the relevant provincial or territorial government and affected Indigenous organizations. An IBA establishes the terms under which Indigenous people will benefit from a development project. Today, Indigenous communities or regional governments negotiate the proper use of their land, how to lessen or offset (mitigate) anticipated and non-anticipated damages, and ways to ensure maximum achievable economic benefit to the community.

Impact Benefit Agreements (IBAs): Definition and Purpose

From the legal perspective, IBAs are privately negotiated contractual arrangements between a company putting forward the proposal to explore and extract the minerals (called the 'proponent'), and an Indigenous community, each side representing different and occasionally converging expectations. IBAs can be two-party or multi-party agreements.

Although governed by the common law of contract, these agreements typically contain characteristics of both contractual and regulatory instruments, being either voluntary in nature or a precondition for the granting of a government license or permit. Kerr (2000) and Campbell et al. (2001) describe capacity building and participation or access agreements as types of impact benefit agreements. The private nature of impact benefit agreements makes them subject to confidentiality provisions

Impact Benefit Agreements (IBAs): Definition and Purpose

IBAs can focus solely on economic benefits or, more broadly, contain socio-economic and environmental clauses such as community capacity building, respecting traditions, and alleviating the ecological burden of the mine development. Depending on the region and the land claim settlement, different agreements stipulate the requirement for proponents to talk to people potentially affected by the project.⁶ Even without a legislative framework to guide the process in the North, IBAs are now widely accepted as standard practice for new mines (Kennett, 1999; Shanks, 2006). Indian and Northern Affairs Canada (INAC) (now AAND) may demand that an IBA be negotiated because of perceived significant social/environmental impact or to satisfy its obligation towards Aboriginal people where land claims are outstanding (see *Figure 3*). The negotiation of IBAs is now considered to be a factual, albeit unwritten, regulatory requirement in Canada's North (Sosa and Keenan, 2001, p. 8).

IBAs in a Legal Vacuum

- No regulatory context for enforcement or compliance
- Breakdown in communication, understanding, or implementation leads to questions of enforceability and in some cases legality
- This conflict may be resolved through arbitration, or litigation, but not always favorable: costly, does not help the relationship
- It is important to implement an effective dispute resolution process designed by Aboriginal communities while fully involving stakeholders
- Consider whether it would be feasible to include Government as a role to strengthen their Crown consultation duty?

Preparing For Negotiations

- Establish a structure for negotiations and a negotiating team with specific skills & capacities to support successful negotiation;
- Develop a plan for gathering & 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 & understand what the community wants to protect through a negotiated agreement and gain from it;
- Determine how and when to share information with the company and community and consult with the community;
- Assess bargaining positions; and
- Determine objectives and develop a strong negotiating position.

MOU Content

- Legal information, such as definition of the parties, the purpose of the agreement, recognition of rights, representation, the nature of the relationship, etc.
- Negotiation principles;
- Assistance (financial and other resources);
- Steps to be taken to reach an agreement, including a preparation phase, a negotiation phase, and a drafting & documentation phase, as well as a consultation & negotiation period;
- Contact 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)

MOU Content

- Location and timing of negotiations;
- Substantive issues for negotiation and sequence for negotiation; and
- 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* below);
- Funding arrangements (see *Assessing and Reducing Risks Associated with Company Funding* on page 81); and
- Dispute resolution process.

Estimating Costs & Determining Funding Sources

Common reasons for companies to provide funds to communities include:

- There is a need for the developer to fund community engagement as part of any initial framework agreement (i.e., companies fund communities to engage).
- 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 required EIA submissions. For instance, in the mid-1990s the Canadian company Alcan funded a community-controlled social impact assessment (SIA) and used the report produced by the community as the SIA component of the environmental impact statement it had to produce for government.

Determining Funding Sources

What to consider in future IBA negotiations:

- Address the need for experienced and committed people to negotiate IBAs.
- Ensure that union agreements do not stand in conflict to IBAs.
- Give bidding preferences to Aboriginal contractors.
- Build a sharing culture so that the community which benefits most is willing to support more distant communities.
- Partner with government in developing training programs so that Aboriginal people can be trained quickly to meet the mining company's needs.

Strategies – Key Success Factors

Improve Capacities of Aboriginal Community

- Workforce Capacity
- Business Opportunities
- Community capacity
- Stewardship

Strategies – Key Success Factors

Build workforce capacity

- Employment opportunities and prospects
 - Local hiring: broaden recruiting pool to include local community
 - Education and training: establish mentoring program and on-the-job training for aboriginal people
- Aboriginal awareness at workplace
 - Deliver diversity training sessions at all levels of the corporation
 - Encourage local involvement by offering community experts and elders a role or reaching out to aboriginal students and other youth programs

Strategies – Key Success Factors

Corporate commitment to accommodation

- Contribute to economic development
 - Establish clear principles of corporate governance in structuring business arrangements with aboriginal communities
 - Ensure aboriginal business or joint venture has strong management capacity
 - Match your business opportunities with aboriginal business ventures by local procurement
 - Include aboriginal businesses and other community groups in potential economic benefits

Strategies – Key Success Factors

Corporate commitment to accommodation

- Foster aboriginal relations and establish trusts
 - Develop community profiles and customize approach to involvement
 - Identify existing and asserted aboriginal or treaty rights
 - Conduct traditional use studies
 - Understand level of capacities and expectations of aboriginal community
 - Enter into framework agreements or cooperation protocols
 - Ensure priorities for both aboriginal communities and industry are addressed
 - Work out a measure of stability and continuity in operations
 - Partnership with other business, educational institutions, governments and NGOs

Strategies – Key Success Factors

Corporate commitment to accommodation

- Encourage stewardship of aboriginal people
 - Lead in initiating traditional use studies
 - Participate in environmental monitoring and management
 - Resource management studies
 - Ecological management studies
 - Fish and wildlife management studies

Best Practices

Being as specific as possible: it is important to define community needs and set up achievable objectives while avoiding broad interpretations of the implementation. This practice supports narrowing the focus of the IBA agreement.

Ensuring that the principles of negotiations are mutually acceptable to the parties. This gives the community an ability to achieve a properly structured agreement that can provide for resolving differences. There is a role for properly structured IBAs to resolve differences. IBAs can break the mould of the workplace, local economy, environment and change the culture of resource developments.

Best Practices

Monitoring the relationships on an ongoing basis because the agreement is medium term, typically ranging from seven to 10 years.

Conducting in-depth community consultations prior to negotiations by listening to people, and preferably visiting each aboriginal community that is potentially affected. Representatives should sit at the table providing feedback and trying to identify and resolve issues and differences in an open manner. Being open includes asking for concerns and agreeing to disagree.

Best Practices

Being open and honest in communicating the agreement development: meetings should involve not only the workers, but also the entire community. A strong representation from outside of the resource harvesting or extraction company with the capacity to make changes and decisions is required. Focusing on priority goals—economic development, training and employment are typical priority goals because of the limited opportunities for Aboriginal people, but they should not overshadow community well-being objectives.

Ensuring effective coordination is very important for both the company and Inuit group. It is good to have an aboriginal liaison or business development or employment coordinator on the company side.

Each IBA should have a permanent overseer position within the respective Inuit government or organization.

Best Practices

Feeling empowered (as landowners) in the negotiation and sticking to objectives: for example, if the goal is to ensure hiring preferences for Aboriginal people, it is important that this goal is achieved.

Learning from experience and approaches of others: in particular, it is important to learn more about the exact process of negotiating IBAs. Learning methods may include networks, seminars and conferences, and study tours with Aboriginal people organizations that have developed specific approaches to facilitate fair and mutually acceptable agreements by the parties.

List of know IBAs

- [http://www.impactandbenefit.com/IBA Database List/](http://www.impactandbenefit.com/IBA_Database_List/)

Manitoba Impact Benefit Agreements

The number of Agreements signed or in the developmental stages are as follows:

- East Side Road authority – Community Benefit agreements – 13
- Minago Project Consultation – Norway House Cree Nation
- Provincial efforts in providing regional and local socio-economic benefits have been primarily through settlement agreements to compensate for adverse effects of developments in the North by Manitoba Hydro, which is both the proponent and a Crown corporation.
- Furthermore, in 2007, the Northern Manitoba Sector Council was established to address recruitment, training and retention in the resource sector, particularly for Aboriginal people. The Manitoba government has an Aboriginal procurement policy.
- Through its consultation protocol, Manitoba encourages BAs with First Nations and Métis groups affected by mines, but it does not require them. It is expected that developers will engage Aboriginal communities, and avoid or mitigate adverse effects on their exercise of their Aboriginal or Treaty rights.

Source: Priority Project on Sustainable Resource Development – Benefit Agreements in Canada`s North August 2013 p 13

Participant Feedback & Wrap-Up

Please take a few moments to complete the training session's evaluation form.

Your comments and suggestions assist the Indigenous Leadership Development Institute in meeting your Governance and Leadership needs

Participant Feedback & Wrap-Up

Thank-you for attending the Manitoba Learning Match 2014 and the Indigenous Leadership Development's presentation of **Impact Benefits Agreements**

Enjoy the rest of the sessions and have a safe trip home!