

Impact Benefit Agreements

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What are Impact Benefit Agreements?

- ▶ Impact Benefit Agreements (“IBAs”) are agreements between First Nations and project proponents with existing or planned projects in a First Nation’s Traditional Territory.
- ▶ IBAs are also known as: Mutual Benefit Agreements, Participation Agreements and Benefit Agreements, or Sustainability and Friendship Agreements,
- ▶ Accommodation Agreements generally refer to IBAs between the Crown and a First Nation.

Why Impact Benefit Agreements



- ▶ IBAs are:
 - ▶ based in the Crown's Duty of Consultation and Accommodation.
 - ▶ a response to the underlying issue of Aboriginal rights and title, and the uncertainty it creates
 - ▶ a result of an absence of law, and the need for proponents to minimize risk.
- ▶ UNDRIP and TRC: Calls to Action

Duty of Consultation and Accommodation

- ▶ The duty was first recognized by the Supreme Court of Canada in the 1997 *Delgamuukw* decision.
- ▶ *Haida Nation v. British Columbia*, 2004
 - ▶ established that the duty to consult was a binding, legally enforceable duty, grounded in the “Honour of the Crown”
- ▶ *Grassy Narrows v. Ontario (Natural Resources)*, 2014 SCC 48
 - ▶ The Crown can exercise its interests in Crown lands, however, its authority is subject to Treaty and is burdened by the Crown’s constitutional obligations, including fiduciary obligations.
- ▶ *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44
 - ▶ Court confirmed that unless they can obtain First Nation consent, the provinces must justify infringements of Aboriginal title

Key points of caselaw

- ▶ The Crown owes a duty of consultation and accommodation to First Nations.
- ▶ The Crown cannot delegate the duty to a third party.
- ▶ There is generally no legal requirement for proponents to consult with and accommodate First Nations.
- ▶ There is no legal requirement for the Crown to reach an agreement with respect to accommodation – the duty to accommodate does not provide First Nations with a veto on development within their territories.

FAKE NEWS

- ▶ Canada and British Columbia committed to implement and adopt the principles of UNDRIP and the TRC: Calls to Action.
- ▶ But, UNDRIP and TRC Calls to Action have not been implemented and are not legal requirements.

Why we need UNDRIP?

▶ Article 32

- ▶ requires states to “consult and cooperate in good faith... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources”
- ▶ Not a veto right

Why we need the TRC: Calls to Action

▶ Calls to Action

- ▶ 42 and 43 – Call on provincial and federal government to fully adopt and implement UNDRIP, and develop plans, strategies and measure to achieve this goal.
- ▶ 92 - Call to businesses to adopt UNDRIP “as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources

TRC:Call to Action 92 speaks to IBAs

- ▶ Commit to meaningful consultation, building, respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples, before proceeding with economic development projects.
- ▶ Ensure that Aboriginal peoples have equitable, access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal, communities gain long-term sustainable benefits from economic development projects.
- ▶ Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism

Why do proponents negotiate?



Why do Proponents negotiate?

- ▶ The proponents have the most at stake and relying on the Crown is uncertain.
- ▶ The Crown rarely has the budget, human resources or mandate to enter into negotiations and no sense of urgency.
- ▶ Retains control of the process and the ability to directly affect the outcome.
- ▶ In practice, the Crown expects, and frequently requires, proponents to consult with First Nations and reach an accommodation.

What the Proponent Gains

- ▶ Support of the First Nation.
- ▶ With support, it is easier for the proponent to:
 - ▶ Obtain the necessary government, regulatory and permit approvals for the project;
 - ▶ Obtain financing for the project;
 - ▶ Work the First Nations in the planning, construction, operation and closure of the project; and
 - ▶ Reduce uncertainty regarding potential First Nation opposition to the project.
- ▶ A basis for relationship building with the First Nation.

Why do First Nations negotiate

- ▶ Duty to Consult requires First Nations to participate in Environmental Review process but there is limited if any funding available.
- ▶ Protection of environment and archeological sites.
- ▶ Ability to participate in economy, aboriginal rights include the right to benefit economically from the land.
- ▶ Avoid reliance on Crown consultation to ensure protection of rights.
- ▶ Build “War Chest”, often capacity funding for participation and traditional use studies.

What the First Nation Gains

- ▶ Ability to influence the project at its earliest stages.
- ▶ Various Economic benefits.
- ▶ A basis for relationship building.
- ▶ Recognition of First Nation land ownership and jurisdiction over Traditional Territories.
- ▶ Economic benefits and income from resource extraction when there is no provision for First Nation taxation authority.

Negotiation Process – Early Engagement

- ▶ Generally, the earlier, the better for both parties
- ▶ Proponent benefits from early engagement:
 - ▶ Advantages in permitting and regulatory approval
 - ▶ Investor confidence and ease of financing
 - ▶ Establishing cost certainty
- ▶ First Nation benefits from early engagement:
 - ▶ Ability to influence project design and implementation
 - ▶ Reduced impacts to the community from internal review and debate
 - ▶ Reduced costs and complexity through the regulatory process
 - ▶ Increased negotiation leverage

Negotiation Process – What are the requirements?

- ▶ There is no template for negotiations and the process will be dictated by the First Nation and the proponent.
- ▶ The process may include following agreements:
 - ▶ Letter of Intent
 - ▶ Exploration Agreements
 - ▶ Capacity Funding Agreements
 - ▶ Negotiation Agreements
 - ▶ IBA

An IBA is a contract

- ▶ No requirements but you must be able to do or deliver what you say you will.
- ▶ Anything, can be put on the table as long as you have it but needs to be balanced with goals of the First Nation.



Determine what is important to the First Nation

What is generally included in an IBA?

- ▶ Main topics addressed in IBA include:
 - ▶ Definition of the Project
 - ▶ Identity of the Parties
 - ▶ Financial Considerations
 - ▶ Business Opportunities
 - ▶ Employment, Education and Training
 - ▶ Environmental Protection
 - ▶ Archeological Protection
 - ▶ Protection and Use of Traditional Knowledge
 - ▶ Project Certainty and Interests
 - ▶ Social and Cultural Impacts
 - ▶ Future Treaty or Title Impacts
 - ▶ Dispute Resolution.

Financial Considerations

- ▶ Payments generally follow project approval and completion schedule:
 - ▶ Signing IBA;
 - ▶ Receiving regulatory approval;
 - ▶ Beginning construction; and
 - ▶ Beginning of operation.
- ▶ Revenue sharing.

Business Opportunities

- ▶ Procurement options:
 - ▶ Direct Award;
 - ▶ “carve out” or “set aside”;
 - ▶ Bid Preferences;
 - ▶ First Nation content;
 - ▶ “favored trading partner: or
 - ▶ Right to match or first refusal.
- ▶ Royalty payments, Equity participation; and an ownership interest.

Employment, Education and Training

- ▶ Set aside of jobs and employment targets;
- ▶ Special consideration for Aboriginal people;
- ▶ Scholarships and Bursaries;
- ▶ Training funds; and
- ▶ Training for specific jobs.

Environmental and Archeological Protection

- ▶ Committees to meet and review works
- ▶ Monitors
- ▶ Requirements to exceed legislated standards
- ▶ Protections of harvesting areas, food and medicinal plants.
- ▶ Digging requirements.
- ▶ Chance find protocol.

Protection and Use of Traditional Knowledge

- ▶ Limit the use and publication of Traditional Knowledge.
- ▶ Ensure that all work product related to Traditional knowledge and use remains property of the First Nation.

Project Certainty

- ▶ Provide proponent with commitment not to delay project, including:
 - ▶ legal action against Crown;
 - ▶ First Nation will not support community protesters; and
 - ▶ First Nation will provide a support letter.

Additional Benefits

- ▶ IBAs often provide additional non-economic benefits to First Nations including:
 - ▶ Additional environmental provisions;
 - ▶ Shared decision making regarding the project;
 - ▶ Dispute resolution provisions;
 - ▶ Reduction of the project's negative impacts on the First Nation community; and
 - ▶ Significant capacity building opportunities.

Do Proponents have to engage First Nations?

- ▶ No, the proponent does not have any legal obligation to consult with a First Nation.
- ▶ The crown has the duty to consult and accommodate, not the proponent.
- ▶ The crown may require the proponent to enter into discussions with a First Nation as a part of the regulatory process, or as a requirement for permitting or licencing.
- ▶ Proponents enter engage First Nations because it is in their best interests.

Challenges

- ▶ Capacity
- ▶ Communication
- ▶ Maximizing Opportunities



Capacity

- ▶ Financial and human capacity issues:
 - ▶ Requires financial resources which need to make business sense for the proponent.
 - ▶ Requires human resources:
 - ▶ Staff to implement IBA;
 - ▶ Working groups;
 - ▶ Monitors;
 - ▶ Professionals; and
 - ▶ Committee members.

Communication

- ▶ Ensure that all parties have the same understanding of commitments.
- ▶ Effective and consistent communications.
- ▶ Risks
 - ▶ Inconsistent messaging;
 - ▶ Too much information; and
 - ▶ Distribution of information.
- ▶ Summarize IBA and identify:
 - ▶ Responsibilities;
 - ▶ Actions; and
 - ▶ Timing.

Maximize Opportunities

- ▶ Identify procurement strategy for proponent with the goal to maximize First Nation opportunities.
- ▶ Work with the proponent to identify the value for Aboriginal involvement.
- ▶ Proponent to create a registry and pre-qualify Aboriginal businesses.
- ▶ First Nations need to:
 - ▶ develop capacity through partnerships and joint ventures with qualified businesses;
 - ▶ work with partners to prioritize contracts;
 - ▶ Identified First Nation member businesses or members that may be qualified to do work;
 - ▶ Work with other First Nations to partner on work and pressure proponent for more opportunities; and
 - ▶ Work towards obtaining the prime or head contract.

New Concerns

- ▶ Generally, IBAs are confidential but a decisions *in Yahey v British Columbia* from January 2018 may open up agreements for the purpose of transparency.
 - ▶ The First Nation was looking for a permanent injunction on future development in their traditional territory claiming that the Province has allowed cumulative effects to the extent that members are left “with almost no traditional territory within which to meaningfully pursue their constitutionally protected cultural and economic activities.”
 - ▶ The Province sought disclosure of IBA documents, Joint Venture and other agreements to show that the First Nation had benefited from the development in their Traditional Territory.
 - ▶ The Court found that the disclosure was relevant, even regarding confidential IBAs.

Questions ?



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