

**SOCIO-ECONOMIC IMPACT AGREEMENTS  
IN CANADA 1990 – 2001**

**Aboriginal Expectations Meet Conventional Legal, Financial  
And Business Practices**

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Prospectors and Developers Association of Canada  
Toronto, Tuesday, March 13, 2001

## **SOCIO-ECONOMIC IMPACT AGREEMENTS (IBA's) IN CANADA**

### **Aboriginal Expectations Meet Conventional Legal, Financial and Business Practices**

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During the 1990's, new discoveries of diamonds in the Northwest Territories, Au and base metals in Yukon and Ni-Cu in Labrador, coincided with rapid changes in the political, legal and regulatory landscape of Northern Canada. As DIAND went about finalizing land claim settlements in Nunavut, the Western Arctic, Yukon and Mackenzie Valley, the certainty previously provided to the mineral industry by a legal framework of Territorial Land Use Regulations, Canada Mining Regulations, Yukon Quartz Mining Act etc. was impacted by new management boards, arbitration panels and ad hoc negotiated settlements. In order to reach final feasibility and obtain project financing, mining companies had to compensate for this legal and regulatory uncertainty by developing working arrangements with Aboriginal people.

In the 10 years since 1990, negotiation of Impact and Benefits Agreements (BA's) between Aboriginal groups and mining companies seeking mine development approval has typically been a one-sided affair. For the most part, mining companies danced to the Aboriginal tune in order to preserve shareholder investment and mineral resource assets. These projects held measured ore reserves with quantifiable economics so the Aboriginal side rushed to maximize it's financial take from the project while the mining company carefully calculated how much it could give away without impairing the financial viability of the project.

Once the known economic reserves in Northern Canada have been permitted for production, a new negotiation model will be needed - one that will focus on the longer-term need to attract new early-stage exploration investment capital in a globally competitive environment. To do this, aboriginal leaders must come to see the value that mineral resource development can have in improving the living standards of their people – without affecting their culture in a negative way.

Here is a list of the main Impact and Benefit Agreements signed during the last 10 years. Each of these is the product of a unique negotiation. No two are exactly alike. Therefore, what follows is not a reflection of any one specific Agreement. Instead, I have tried to distill the common elements that appear repeatedly in negotiations between Mining Companies and Aboriginal Groups. –

#### **ABORIGINAL SOCIO-ECONOMIC/PARTICIPATION AGREEMENTS IN CANADA**

##### **Mine Development**

**1990 - 2000**

<b>PROJECT</b>	<b>PROJECT OWNER(S)</b>	<b>ABORIGINAL GROUP(S)</b>
Raglan Nickel	QB Falconbridge Limited	Nunavik Makivik Corp.
Musselwhite	ON Placer Dome Inc.	Windigo, Cat Lake, Shibogama, North Caribou Lake, Kingfisher, Wunnumin Lake First Nations
Brewery Creek	YT Viceroy Resource Corp.	Tr'on dek Hwech'in F.N.

Ekati	NT	BHP/Diamet	Akaiicho Treaty 8 Council Dogrin Treaty 11 Council North Slave Metis Association Kitikmeot Inuit Association Inuit of Kugluktuk
Diavik	NT	Rio Tinto/Aber Diamond Mines	Yellowknives Dene Dogrob Treaty 11 Council North Slave Metis Association
Voisey's Bay	NF	Inco Limited	Labrador Inuit Association Innu Nation
Meliadine	NT	WMC/Cumberland/Complex	Nunavut Tungavik Corp. Kivalliq Inuit Association
Kudz Ze Kayah	YT	Cominco Ltd.	Ross River Dena

These agreements often contain so-called soft language and depart significantly from the style and format of the precise legal contracts to which the corporate culture is accustomed. In fact one might reasonably ask: "What are these Agreements?" Are they statements of good intentions? Are they Memoranda of Understanding? Are they enforceable legal contracts with penalties for non-performance and procedures for dispute settlement?

With 10 years experience behind us, it is possible to make some generalizations about the expectations of the two sides in IBA negotiations. Most First Nations Groups have expectations that reflect (1) a desire for active participation in economic progress, (2) a recognition that education is a key element for this participation and (3) a need for assurances that wildlife and the environment will not be impaired by development. The main expectations can be summarized as follows.

- Recognition of Aboriginal Rights and Sovereignty.
- Employment – Percentage Targets and Hiring Policy.
- Training and Scholarships.
- Contracting and Business Opportunities – Bidding Policy.
- Up Front Cash Payments – Compensation for Land Use Loss ± Mineral Lease Payments.
- Protection of Wildlife and the Environment.
- Royalties Payable on Mineral Production.
- Possible Financial Participation in Project via Assumption of Equity or Debt.

In 2001, Canadian mining and exploration companies generally address aboriginal expectations by: (1) employment, training and education commitments; (2) contracting and business opportunities related to mine development and operation; (3) cash compensation for loss of surface access and (4) protection of wildlife and the environment. For the most part, these items are not contentious, although in the absence of U.S. style affirmative action laws, implementation of preferential employment and contracting may become a legal issue. Royalties payable on mineral production are an outstanding issue where unsettled land claims leave mineral ownership unresolved (e.g. British Columbia).

Aboriginal financial participation by assumption of project debt or equity also presents a difficult issue for the mining company. Mandatory assignment of project equity after 90% of the risk has been eliminated has always been a difficult pill to swallow, no matter what the circumstances, and ownership of the project assets has to be matched with legal liabilities that may not be apparent to the aboriginal partner. On the other hand, the financing of mining project debt involves risks that are best evaluated by banking institutions who make it their full-time business to syndicate loans of this type. The recourse of a creditor is to foreclose on the ownership of the resource so to some extent, especially if they hold a royalty, aboriginals could be in the position of foreclosing on themselves. In any event, project debt is not likely the most suitable allocation of First Nations cash resources.

On the mining company side, first and foremost, the company expects aboriginal support for the project – especially at public hearings that inevitably precede the granting of licences and permits. Otherwise, the developer's overall expectations are much the same as they are anywhere else in the world: (1) return of invested capital plus interest, (2) a rate of return on invested capital consistent with the high risk of mining ventures and (3) security of long term mineral tenure. We in the mining industry hold these truths to be self-evident – maybe we could

- Clarification of Resource Ownership and Taxation Powers.
- Assurance that Exploration Investment is Linked to an Exclusive Right to Develop, Mine and Market Mineral Products.
- Assurance of Export Rights.
- Assurance of Appropriate Regulatory Time Frames.
- Procedures for Dispute Resolution.
- Assurance that Interests in Projects can be Pledged as Collateral for Financing.
- Assurance that Rights in Projects can be Assigned without a Requirement for a New Licence/Agreement.

Most of these requirements are well understood by political jurisdictions that aspire to attract mineral exploration investment. They are by no means uniformly obvious to newly constructed aboriginal political institutions. Item 3 was apparently not obvious to Newfoundland either. Resource ownership questions and powers of taxation can only really be resolved by land claim settlements. These are questions for government. The granting of exclusive long term exploration rights or leasing rights is a difficult hurdle for the First Nation which has only recently won its absolute Charter protected sovereign rights. Similar reluctance may be encountered if the First Nation must submit its authority to a dispute resolution process via an outside arbitrator or court.

Somehow, aboriginal groups must come to understand that exclusive mineral tenure and the implied right to extract, process and sell minerals are the only assets held by many exploration companies. These assets are impaired to the point of being worthless, if they cannot be pledged as collateral or freely assigned by sale or option. Impairment of one company's asset greatly increases the risk that other companies will quietly re-allocate future investment elsewhere.

Finally, my conclusion is that too many negotiating problems are introduced into the mining company-aboriginal relationship when the aboriginal entity assumes potentially conflicting roles. Most commonly these will be:

- The Sovereign
- The Land and Resource Owner
- The Employee, Employment Agency or Employee's Agent
- The Independent Contractor
- The Regulator (Keeper of the Environment)
- The Shareholder/Joint Venture Partner
- The Secured Lender

In moving to develop new political structures and institutions, aboriginals have naturally tried to cover all bases. This has led to the blurring of boundaries between government and business, mainly because economic development is seen as such an essential element in the improvement of aboriginal living standards. In Canada, direct involvement of government in the resource business has never been a very popular or successful policy. We do have examples; SOQUEM, the Quebec Government exploration and development company and the N.D.P. inspired Manitoba Minerals Corporation come to mind; but these have never been a great success in terms of returning the taxpayer/shareholder investment. This is not to say that Aboriginal financial participation is impossible, only that if it does take place, it must be within the context of an arms length shareholder-controlled corporation distinctly separate from government institutions that assume the roles of sovereign landlord, regulator, tax and royalty collector.

Aboriginal Governments at regional and local levels need to develop a long-term vision about mineral development in Northern Canada and what it can contribute to the future of their children. Some reality checks and adjustments must inevitably occur on both sides in order to achieve compatibility between aboriginal aspirations and the expectations of international risk capital investors who must be attracted to finance mineral exploration in remote, high cost areas. Otherwise, sparse tourism will be the only possible economic engine in vast areas of the Canadian arctic and sub-arctic.