

Survey of Impact Benefit Agreements

Impact benefit agreements (IBAs), also referred to as cooperation agreements, accommodation agreements, and participation agreements, have evolved into a cornerstone of the modern Canadian mining regime. Across Canada, IBAs operate as private contractual agreements, negotiated between resource proponents and Indigenous communities.¹

As private contractual agreements, IBAs can reflect unique circumstances, reflect community and business preferences, be responsive to market forces, and serve as risk mitigating tools for proponents and Indigenous groups. IBAs can act as tools to accommodate Aboriginal interests, ensure that benefits and opportunities flow to impacted communities, and address social risk factors within a community such as adverse socio-economic and biophysical effects of rapid resource development.

Most IBAs in Canada, including those examined in this survey, have been developed within the current context of positive tension between parties IBA negotiating parties. IBAs are rarely mandated, however section 35 rights are subject to duties of consultation and, where appropriate, accommodation. The degree of consultation and accommodation required is rarely precisely known, though it may ultimately be arbitrated by the Crown or its delegates. IBAs have developed as a voluntarily negotiated tool to address this uncertainty.

This survey examines the content of IBAs, including typical subject matters, and the range of associated benefits provided. Except where data has been collected from public sources, all data has been anonymized. This survey is intended to inform the development of the Mineral Resources Act.

We analyzed three publicly disclosed IBAs, two mining projects and one hydroelectric project, in this review. Additionally, we have examined dozens of non-disclosed IBAs. The following publicly disclosed IBAs have been examined:

- New Afton Participation Agreement between Kamloops Division – Secwepemc Nation and New Gold Inc. dated March 20, 2008 (“New Afton Participation Agreement”);
- Impact Benefit Agreement between Homalco Indian Band and Alterra Power Corp. dated on July 15, 2011 (“Alterra – Homalco IBA”); and
- Chinuchi Agreement between Nemaska Lithium Inc. and the Cree Nation of Nemaska and the Grand Council of the Crees (EEYOU ISTCHEE) and the Cree Nation Government dated November 7, 2014 (“Nemaska – Cree Chinuchi Agreement”).

New Afton Participation Agreement

The New Afton Participation Agreement, a form of IBA, was entered into between the Kamloops Division – Secwepemc Nation and New Gold on March 20, 2008. New Gold is the registered

¹ Though private in nature, some IBAs, particularly in Northern Canada, result from legislated requirements. See the *Nunavut Agreement* and the *Tlicho Agreement*.

and beneficial owner in fee simple of the New Afton Mine Site and is committed to carrying out the project in a cooperative and respectful long-term relationship with the Kamloops Division – Secwepemc Nation. Shuswap members are defined as members of the Kamloops Indian Band and the Skeetchestn Indian Band, the two Indian bands comprising of the Kamloops Division of the Secwepemc Nation.

Alterra – Homalco IBA

The Alterra – Homalco IBA was entered into between Homalco Indian Band and Alterra Power Corp. on July 15, 2011. Alterra is developing the Bute Inlet Hydroelectric Project, which has its generation facilities as part of its associated transmission facilities located in Homalco Territory.

Nemaska – Cree Chinuchi Agreement

The Nemaska – Cree Chinuchi Agreement was entered into on November 7, 2014 between Nemaska Lithium Inc., the Cree Nation of Nemaska, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government. Nemaska Lithium intends to develop and operate a spodumene deposit in the Eeyou Istchee James Bay region. The project, named Whabouchi, consists of extracting spodumene from an open-pit mine for a period of about 20 years, with plans to continue mining by underground infrastructure. The ore will be concentrated on-site and the concentrate is then to be shipped by road to the Chibougamau-Chapais area.

Review of Subject Matters

The reviewed IBAs typically address the following topics: evidence of community authorization; engagement resourcing; benefit payments; joint ventures or joint ownership arrangements; environmental considerations; employment opportunities; labour force training; preferred procurement; commitments from Indigenous groups; renegotiation clauses; and confidentiality.

Along with our analysis of each subject matter, we have summarized typically associated provisions. Most IBAs are designed to address unique circumstances and may address only a few of the subject matters identified.

Evidence of Community Authorization

Authorization provisions are a risk management tool to ensure that the party signing onto the IBA on behalf of an Indigenous community is the appropriate and fully authorized representative. Often, the Indigenous community is represented by the band council and the signatory for the Indigenous group will represent that they have all the necessary approvals and authorizations for entering into the IBA. This is consistent with how, in typical commercial agreements, corporations will represent and warrant that they are a duly incorporated company and have passed the resolutions necessary for entering and authorizing such an agreement.

Typical relevant representations include representing and warranting that an Indigenous community's council is the duly constituted council for the Indigenous community and that they have received all necessary approvals to enter into the IBA. The signing party for the Indigenous community will also represent and warrant that they have good and sufficient power,

authority and right to enter into the agreement and perform all obligations of the Indigenous community under the agreement.

Some IBAs include an indemnity provision to ensure that if members of the Indigenous community take legal action against the proponent, the Indigenous group representatives who are a party to the IBA and who have made representations that they are duly authorized, will indemnify the industry for any loss.

Example Provisions

Authority in the New Afton Participation Agreement is established in the recitals where it says, "The Kamloops Division asserts that it holds certain inherent aboriginal rights and interests in respect of the Shuswap Territory". The authority is further supported by Kamloops Division – Secwepemc Nation's assertion that it will ensure that Shuswap Members are aware of, and act in accordance with the Kamloops Division's commitments under the agreement.

In the Representations and Warranties section of the Nemaska – Cree Chinuchi Agreement, the Cree parties state that they represent all of the applicable Cree bands and Cree peoples. In addition, the Cree parties consent to the Whabouchi Project in accordance with the terms of the agreement.

Engagement Resourcing

The costs of participating in negotiations regarding the development of a mine can be substantial for an Indigenous community. Costs occur from the outset, with early engagement costs such as hall rentals and communication costs. Legal costs, the cost to review environmental data, costs to communicate with a community, and the costs to undertake specific research relating to Indigenous land use occur throughout the exploration and development of a mineral resource.

IBA terms typically provide that the industry proponent will pay for the reasonable costs for participation. These costs can be set in an annual budget and be agreed upon in advance between the parties. The costs the proponent will cover can include project related costs, fixed costs, travel costs, legal costs, costs for consultants, and reimbursement for time and expenses of a chief and council and other band members and advisors.

IBAs can also require that the partner Indigenous community to reach out and negotiate with other affected Indigenous communities on behalf of the proponent. Such outreach and consultations efforts are typically funded by a proponent.

Negotiation costs covered by proponents for a small mineral project may be set at a fixed overall amount (\$██████████ in one situation), or be calculated based on an annual amount (\$██████████ for another small mineral project). Larger projects with substantial elements, including the negotiation of joint ownership arrangements, may reach \$██████████. New Gold did not cover the negotiation costs for the New Afton Participation Agreement and instead, each

party paid for its own fees, expenses and disbursements incurred in connection with the agreement (though substantial payments were to be made on an annual basis).

Liaison Structures

IBAs frequently provide for an appointment of a liaison person. Liaison persons are typically hired and employed by the Indigenous government, with a portion, or all of their salary being reimbursed by the proponent. Alternatively, some IBAs establish committees responsible for monitoring, reviewing and evaluating the implementation of the IBA requirements.

Liaison persons and committees can act as a bridge of communication between the parties and provide a venue for Indigenous communities to communicate concerns or questions about the project. These roles can also facilitate more formal or focused consultation with the Indigenous community with respect to environmental, socio-cultural and socio-economic terms of the project.

Example Provisions

An example of the use of liaison structures is seen in the New Afton Participation Agreement, which established a joint implementation committee ("JIC"). The JIC is comprised of four individuals: one from the Kamloops Indian Band and one from the Skeetchestn Indian Band and two from New Gold. The mandate for the JIC is to provide a collaborative forum for open and frank dialogue between the parties as they relate to all matters related to the project. Such matters include: environmental matters, human resources, business opportunities, the IBAs implementation generally, and any concerns that may arise from the project. New Gold, acting commercially reasonably, retains the authority for making final decisions as to whether to follow the recommendations, advice or reports of the JIC. All confidential information presented to the JIC must remain confidential.

Benefit Payments

IBAs typically contemplate different types of payments: a lump sum, amounts payable upon various milestones, and ongoing payments tied to the profitability of the project.

Lump-sum and Milestone Payments

A typical payment structure involves paying a lump sum upfront, usually upon the execution of the agreement. Thereafter, there could be payments tied to milestones, annual payments, or ongoing payments based on production or profitability. In the New Afton Participation Agreement, New Gold paid a signing bonus of \$50,000, a \$100,000 bonus for early execution of the agreement, and annual payments based on profitability, with a minimum floor payment, each year thereafter.

As an example of the quantum of lump sum payments, two small mining projects [REDACTED] [REDACTED] agreed to payments of \$ [REDACTED] upon the issuance of a mine permit. Similar amounts were also payable upon execution of the IBA. In contrast, a

large scale mine [REDACTED] agreed to a lump-sum payment of \$ [REDACTED] upon signing.

Lump-sum and milestone payments are only distinguishable by when they are paid. Either type of payment may be used for the same purpose, however lump-sum payments are typically made upon signing an agreement, while milestone payments are only paid upon the occurrence of a milestone.

The type of milestones employed vary by project. In the most typical circumstance, the initial lump sum payment in the ranges above will be paid upfront upon entering into the IBA and further payments will be made upon the completion of the environmental assessment, or obtaining other required permits. The commencement of production will often represent the final milestone.

Lump-sum and milestone payments are often targeted at achieving specific purposes. Such purposes may be to expressly provide benefit, or to compensate for negative effects. Examples of express benefits include education and awareness, counselling, harvester support, elders, youth and community support. Examples of compensatory purposes include flood relief, impact on harvesting, and disruption in traditional activities such as hunting, trapping, fishing and gathering.

Some IBAs expressly provide lump-sum or milestone payments in consideration for a community relinquishing certain legal actions and claims which may arise against a proponent for such things as negative impacts on Aboriginal and treaty rights arising from the project. It is also usual that the Indigenous group will covenant that the industry will not be required to provide additional financial consideration with respect to the Indigenous members not being able to engage in traditional activities as a result of the project. In the IBAs that we analyzed, we have seen a range of \$ [REDACTED] to \$ [REDACTED] for such compensation. A mining project that employs around approximately [REDACTED] people paid \$ [REDACTED] to compensate for the disruption of traditional activities, including [REDACTED]. This is in addition to the lump sum and ongoing payment already provided. Another mining project that employs approximately [REDACTED] people paid \$ [REDACTED] for flood relief. On the higher end, a project that employs more than 400 people paid \$ [REDACTED] to compensate for harvesting losses. Such releases and commitments are often subject to a review clause negative effects from the project exceed certain levels.

Where milestone payments are intended fund specific purposes, restrictions may be placed on how funds are managed and used. For example, the IBA may require that the lump sum be paid in trust to compensate for the negative effects of the project or for the bettering of the Indigenous community. There have been societies and non-profit foundations established to manage the funds to ensure that the funds benefit the entire Indigenous community.

Annual Payments

Some IBAs contemplate annual payments, not otherwise tied to profitability. As an example of the quantum of such annual payments, [REDACTED] small mining projects [REDACTED] [REDACTED] paid annual amounts of \$ [REDACTED] to \$ [REDACTED].

Ongoing Profitability/Output Payment

IBAs often contemplate payments that are tied to the profitability or output of a project. By tying payments to profitability or mine output, proponents can limit the financial burden of IBA payments when resource pricing is depressed and production low, while allowing Indigenous communities to share in the profitability of the project when resource prices and production levels rise. Certain IBAs have built-in contingency for the price of commodities so that different percentages will be paid depending on the price the product is selling for as opposed to production levels.

In the IBAs that we have analyzed, we see a range of [REDACTED] % of project income being paid to Indigenous groups as ongoing payment.

Sample Payment Structures for Ongoing Payment in Mining

Example A:

- [REDACTED] % of project net income below gold price of \$ [REDACTED];
- [REDACTED] % of project net income at resource price above \$ [REDACTED]; and
- [REDACTED] % of project net income if resource price exceed \$ [REDACTED].

Example B

- Minimum annual payment of \$ [REDACTED] and [REDACTED] % of cumulative net cash flows

Example C (New Gold):

- Before capital costs repaid, the greater of:
 - 0.5% of Net Smelter Returns (gross value less some costs);
 - \$250,000; and
 - \$500,000 if average copper sales prices exceed \$2.50/lb;
- After capital costs repaid, the greater of:
 - \$1,000,000;
 - 1% of Net Smelter Returns where average copper sales price is \$2.50 or less;
 - 1.5% of Net Smelter Returns where average copper sales price exceed \$2.50 but not exceeding \$3.00; and
 - 2% of Net Smelter Returns where average copper sales price exceed \$3.00.

New Gold under its New Afton Participation Agreement committed to a first annual payment of \$250,000. In each subsequent year in which commercial production has occurred and where New Gold's capital costs have not been entirely repaid, the greater of (a) 0.5% of the Net

Smelter Returns for that year; (b) \$250,000; or (c) \$500,000 if the realized price of copper exceeds \$2.50 a pound.

Once capital costs have been entirely repaid by the project, annual payment will be the greater of (a) \$1,000,000; (b) 1% of NSR for that year if the realized price of copper is \$2.50 or less a pound; (c) 1.5% of the NSR if the realized price of copper exceeds of \$2.50 a pound without exceeding \$3 a pound; or (d) 2% of the NSR for that year if the realized price of copper in that year is in excess of \$3 a pound.

Other Ongoing Payments

It is common under IBAs that the money will be paid to a foundation or society that is dedicated to the development of social, cultural and environmental interests of the communities located within the affected area. The payments that are made to these foundations can be lump sum payments or be tied to profitability of the project.

Scholarships and trusts are also typically established under IBAs. In the IBAs that we have reviewed, the range of scholarship contributions are from \$ [REDACTED] to \$ [REDACTED] annually. For example, [REDACTED] dedicated \$ [REDACTED] annually, during the span of the project, to a trust fund to support scholarships for [REDACTED].

Proponents can also partner with existing community non-profits for specific community projects and pay lump sum contributions.

Joint Ventures or Joint Ownership

Some IBAs contemplate joint ownership of a mineral project, either through joint ownership of a holding company, or through a joint venture structure. These structures allow for the interest of mining proponents and Indigenous communities to be aligned, and allows both parties to share in the economic output of the mineral asset.

The joint venture structures contemplated by the IBAs we have reviewed do not require the Indigenous community to put capital at risk. Instead, ownership structures typically contemplate that the proponent will provide non-recourse loan funding which will be repaid from project profits.

The three publicly disclosed agreements examined in this review do not contemplate the creation of a joint venture or shared ownership.

Environmental Considerations

IBAs provide a forum for proponents and Indigenous communities to formalize how they will review, consider, accommodate, and compensate for environmental impacts of mining.

Within an IBA, a proponent will typically acknowledge the consequential effects their project might have on the environment. This will be accompanied by an undertaking to mitigate

impacts and undertake environmental rehabilitation in accordance with best international practices. It is also common for a proponent to commit to seeking ISO 14001 (environmental management systems standard) or similar certification for the project.

IBAs can also establish comprehensive environmental protocols that will regulate project processes to ensure that the least intrusive methods are used when developing the project and producing the resources. The Environmental Management System established under the New Afton Participation Agreement is an example of such protocol.

Early Indigenous Participation

At the pre-development stage, IBAs can formalize the inclusion of Indigenous communities in the review and development of mine plans, environmental assessment applications, and reclamation plans. The review of environmental data may require qualified technical experts and at times, IBAs may provide funding for the Indigenous community's experts. In the IBAs that we have reviewed, the range of funding provided for such engagement ranges from \$ [REDACTED] to \$ [REDACTED]. The amount is negotiated between the parties to cover costs such as engaging technical experts.

Some IBAs will also require that the proponent fund studies and reports. Examples of funded reports are on environmental effects of the project, assessment of project impact and traditional land use studies. These studies can range from \$ [REDACTED] to \$ [REDACTED]. On the lower end, the funds are used for traditional land use studies, which includes analyzing historic and current baseline. On the higher end, the costs are to cover an assessment of project impact.

As an example, under the New Afton Participation Agreement, New Gold will submit drafts of its permit applications to Secwepemc Nation at least 30 days prior to the date that New Gold intends to submit a permit application. The parties will then work collaboratively to ensure that there is a meaningful opportunity for the Kamloops Division – Secwepemc Nation to review and provide input in accordance to the specified process set out in the IBA. The Indigenous group may raise any concerns they have and New Gold will use its commercially reasonable efforts to address or resolve the identified concerns. Under this process, Secwepemc Nation retains the right to make submissions to the authorities reviewing the Permit Application concerning any matter of interest in it.

Ongoing Indigenous Participation

IBAs also frequently provide an avenue for the Indigenous community to raise concerns throughout the project. IBAs can provide funding for the Indigenous partner to engage an environmental monitor, and may require ongoing data and reports to be submitted to the Indigenous partner. An environmental monitor can act as a liaison between the Indigenous community and the proponent, relaying community concerns to the proponent and collecting and communicating proponent feedback and engagement efforts.

IBAs, as noted elsewhere, can also create committees composed of proponent and community representatives, to review and discuss environmental concerns.

Ongoing Indigenous Participation – Nemaska Example

The Nemaska – Cree Chinuchi Agreement contemplates the creation of a committee to review environmental matters. The committee consists of 4 members, with equal representation for the proponent and the Indigenous communities. The committee, in cooperation with Nemaska Lithium, is to be involved in the development and implementation of an Environmental Management System for the project. To facilitate the committee's ongoing role, Nemaska Lithium must provide the committee with annual environmental reports. Nemaska Lithium is also required to promptly notify the committee in the event of any non-compliance or environmental incident. Nemaska Lithium will also develop a rehabilitation and restoration plan with the environment committee.

Nemaska Lithium must provide the committee with an annual budget up to a maximum of \$25,000 for training and capacity building of the members.

Ongoing Indigenous Participation – New Gold Example

The New Afton Participation Agreement provides a mechanism for the Kamloops Division – Secwepemc Nation to monitor the project's environmental effects. Kamloops Division – Secwepemc Nation is authorized under the agreement to enter onto the mine property once a year to take samples of water, air or soil for gathering environmental related data. If the Indigenous group discovers that New Gold is not in compliance with its terms of the Mine Permit or of any permit, licence or authorization legally required for New Gold for the project, Kamloops Division – Secwepemc Nation may share this information with the committee established under the agreement and the parties will promptly thereafter seek to effectively and mutually resolve, address and, if necessary, correct any non-compliance. The Kamloops Division – Secwepemc Nation is prohibited from disclosing the information relating to non-compliance to any other parties except in the circumstance where the non-compliance is not remedied.

Employment Opportunities

One of the key elements found in almost every IBA is a commitment to provide employment opportunities to Indigenous community members. Employment provisions can help proponents source a local labour force, increase the benefit of mining to the community, and increase community support for the project during the life of the mine.

Preferred Hiring

IBAs typically set out preferential hiring commitments which prioritize the hiring of Indigenous community members. Typically these clauses provide lesser priority to other non-partnering Indigenous communities and other local residents.

IBAs can also set minimum target levels for Indigenous employment. Typically commitments are for Indigenous employment of between 25% and 50% of all levels of positions within the operation. Under the New Afton Participation Agreement, a target will be set by New Gold, having consideration to the availability of candidates who meet minimum qualifications for each

position and the availability of new jobs. This target is not a quota or otherwise legally enforceable.

Under the hiring policy established in the Nemaska – Cree Chinuchi Agreement, Nemaska Lithium will fill the position by hiring a qualified candidate with preference in the following order:

- a) a member of the Nemaska R20 Family (defined as certain identified Cree members);
- b) a Cree person of Nemaska; and
- c) another Cree person.

There will also be a Whabouchi Implementation Committee established and on an annual basis, the committee will review information related to employment and make recommendations to the Parties to see how to improve short-term Cree employment objectives. In addition, the committee will be provided information for grounds of refusing Cree candidates for employment. Grounds of refusal are: qualifications, criminal record, references, performance at the interview and other factors. Note that some IBAs limit whether a criminal record can disqualify a candidate.

Human Resource Processes

Protocols and policies can also be established under IBAs to address human resources policy. Under such protocol and policies, the proponent may be required to create job descriptions that must be approved by a committee which includes community representation. These protocols and policies may also allow for special leave applications for traditional or cultural purposes.

IBAs can also establish a human resources committee to allow input on employment practices and the hiring and termination of employees. A human resources inventory can be set up which consists of Indigenous group members who are, or who desire to be, active in the work force. In the New Afton Participation Agreement, the position of a coordinator was created to facilitate the implementation of New Gold's preferential hiring and contract policy. Pursuant to the agreement, New Gold also needs to establish and maintain an HR Inventory and develop a human resources strategy. The strategy will propose fixed target level of employment for Indigenous community members and identify the type of training or apprenticeship needs that New Gold may consider to enable Indigenous group members to qualify as suitable candidates for jobs.

Labour Force Training

To maximize the positive impact of employment provisions within an IBA, proponents typically agree to fund or provide training to community members.

IBAs often contemplate training protocols, training budgets and capacity building plans. Proponents will also typically provide apprenticeships, co-op programs, summer training, upgrading and pre-employment training in advance of the project commencement so that there will be adequate time for training prior to the commencement of operations.

Apart from the initial training, it is common that there will be ongoing training for interested Indigenous members. As noted earlier, IBAs can provide for scholarships so that Indigenous members can attend external trade schools rather than requiring that the industry proponent cultivate in-house training programs.

Many IBAs also provide that cultural sensitivity training is implemented for non-Indigenous members, in order to promote a culturally aware workplace. An example of this is in the New Afton Participation Agreement whereby New Gold agreed to provide cross-cultural training, implement an anti-discrimination policy, and provide work-site counselling and an employment assistance program.

IBAs frequently stipulate that the Indigenous group will also seek government funding for training programs.

Labour Force Training – New Gold Example

The New Afton Participation Agreement requires that an initial training program be designed on a reasonable and cost effective basis to deliver appropriate training to allow community members to secure long term employment with New Gold. The Kamloops Division – Secwepemc Nation can provide constructive input on the training program. However, while New Gold must develop a training program, the Agreement expressly provides that funding for such training must be provided by the Government of Canada or any other party other than New Gold.

Labour Force Training – Nemaska Example

Under the Nemaska – Cree Chinuchi Agreement, Nemaska Lithium will contribute up to \$75,000 a year for a training fund which will be used to deliver programs related to the mining industry in general and for the Whabouchi Project. In addition, Nemaska Lithium will provide an annual budget for the Whabouchi Implementation Committee to a maximum of \$15,000 for training and capacity building of its members and those of any committee established by the Whabouchi Implementation Committee.

Preferred Procurement

To increase the distribution of the benefits of mining, and increase the long-term economic capacity of Indigenous partners, IBAs typically provide preferred procurement commitments for community-owned contractors, subcontractors, and suppliers. In many instances, proponents will also require that preferred procurement processes are adopted by their contractors and subcontractors.

As with preferred employment targets, preferred procurement commitments may provide for lesser levels of preference for other local suppliers, other Indigenous suppliers, and suppliers who employ a local workforce.

One IBA that was reviewed [REDACTED]

Labour Force Training – New Gold Example

Under the New Afton Participation Agreement, the general objective is to maximize the business opportunities for Shuswap Businesses. A Shuswap Business Registry is to be established to ensure that there is an inventory of Shuswap Businesses. Shuswap businesses will receive advance notice of business opportunities and will have preferential rights to negotiate in advance of any other interested parties.

Preferred Procurement – Nemaska Example

Under the Nemaska – Cree Chinuchi Agreement, early notice of upcoming contracts is given to Cree Enterprises, and qualifying Cree Enterprises are given priority to negotiate contracts on commercially reasonable and competitive terms. Where an agreement cannot be made, Nemaska Lithium can use tendering or other methods, but must consider “Cree Content” when selecting a supplier. The weighting of the Cree Content criterion in any purchasing process depends on the nature of the service or good, and the technical elements of the service or good, with weightings ranging from “up to 5%” to “up to 15%.”

Under the agreement, Nemaska Lithium’s contractors and subcontractors will have to provide reports on the Cree content of the contracts awarded to them.

Nemaska Lithium will contribute a maximum of \$50,000 per year towards the Nemaska / Whabouchi Business Development Fund for the purpose of supporting the development of Nemaska Cree Enterprises.

Commitments from Indigenous Communities

As discussed, IBA’s are typically negotiated within the positive tension of section 35 rights. In exchange for the benefits provided by the proponent, the proponent receives support from the Indigenous community to support the project when it comes before Crown decision makers in applications for the permits, licenses, and leases required to develop the project. To further support these purposes, there is frequently a clause that acknowledges that the consultation efforts undertaken with the Indigenous community are adequate for the purposes of section 35.

The commitment made by an Indigenous community to support a project is usually qualified to ensure that support is never coerced. For example, IBAs may allow the Indigenous community to raise concerns with a Crown decision maker only after they have raise the concerns with the proponent and the proponent has refused to make commercially reasonable amendments to the project. Similarly, if there are material changes to any proposed, planned or actual project operations, then the Indigenous community may withdraw their support. For example, in the New Afton Participation Agreement, the proponent covenants that they will not seek any

changes or amendments of a material nature to their mine permit without first providing information to the Secwepemc Nation.

IBAs also typically allow for the withdrawal of support where the proponent breached its obligations under the IBA.

General Restraint

In addition to reducing section 35 risks, IBAs often provide additional protections to proponents against unwanted action. Indigenous communities will often commit to refraining from interfering with the proponent's legal, beneficial or contractual interests or tenures in the project and will not support or encourage its citizens to interfere with or obstruct the project. The Indigenous community may also commit to use reasonable best efforts to prevent its citizens from frustrating or delaying the development of the project.

Finally, IBAs almost always limit the Indigenous community's ability to take legal action against the proponent. For example, Indigenous groups under an IBA will covenant to not bring a court action, or challenge the decision of governmental or regulatory authority, where it relates to the granting of a permit or approval necessary to develop the project. This limitation is demonstrated by the New Afton Participation Agreement.

In the New Afton Participation Agreement, the Kamloops Division – Secwepemc Nation gives consent to the project and agrees that it will not challenge before a court of law any of New Gold's interest, permits, licenses or other authorizations relating to the project.

Tax and Tenure Stabilization

IBAs can also include tax and tenure stabilization clauses. Tax and tenure stabilization clauses stipulate that if the Indigenous group gains ownership rights to project land and/or minerals, or obtains jurisdiction or authority to tax the area where the project is situated, the Indigenous group will not impose more onerous terms and conditions than what is already provided for in the agreement. These terms may be limited in time, so that they only last for ten or twenty years after the Indigenous community gains tenure or jurisdiction. This language is seen in the New Afton Participation Agreement.

Renegotiation Clauses

IBAs can require that the parties meet periodically to review the IBA. Alternatively, the IBA can set a termination date and allow for written notice to be provided before expiration of the IBA for an option to extend the agreement. The periods for review range from three to five years and IBA terms can range from project duration to decades. Arbitration Clauses are provided under "*Dispute Resolution*" below.

Confidentiality

Confidentiality clauses within IBAs address a diversity of matters. The primary concern for most IBA signatories is maintaining the confidentiality of key terms such as compensation amounts (though the *Extractive Sectors Transparency Measures Act* has challenged the confidentiality of such information). For proponents, planning and operational data shared with the Indigenous community, especially where the proponent is a public company, require the maintenance of confidentiality. For Indigenous communities, traditional knowledge and other information impacting rights and culture may also require confidentiality.

The reasons for confidentiality clauses within IBAs are manifold, however absolute confidentiality, in most cases, is not practicable.

Typically, parties to an IBA may disclose the fact that they have entered into an IBA but the terms of the IBA are confidential and cannot be disclosed to a third party except with the prior consent of the other party, and such consent cannot be unreasonably withheld if such disclosure is necessary.

There can be carve outs for what information is not considered confidential or what groups or individuals may receive confidential data. For example, parties to the IBA are usually allowed to disclose the information to potential acquirers or advisors of the company. Indigenous groups are usually allowed to disclose the information to the Indigenous groups' citizens provided that the industry proponent is notified.

Example Provisions

Despite the New Afton Participation Agreement being publicly filed, there are confidentiality provisions which says that the parties will ensure that any information, documents, reports or other material provided by one of the parties to the other party is treated as confidential and may not be disclosed except in specific circumstances. The agreement is allowed to be released to third parties such as lenders, investors, advisors and any other third parties that the two parties will need to share the agreement for its management.

Most of the Alterra – Homalco IBA was retracted for confidentiality reasons. The access portion is disclosed and the public is assured that Homalco consents to Alterra's use of the access routes during construction and operations for the project life. The confidentiality provision imposes blanket confidentiality related to the agreement with carve outs either in specific circumstances or to specified people.

There is a general prohibition to disclose confidential information in the Nemaska – Cree Chinuchi Agreement with exceptions to this general prohibition.

Dispute Resolution

IBAs are often intended to reflect a near-full description of the intended relationship between a proponent and an Indigenous community. IBA specify dispute resolution processes to avoid

unnecessary conflict, create certainty, and maintain the IBA as the governing document for the relationship between the parties.

Dispute resolution mechanisms vary between agreements. The typical first step in most dispute resolution mechanism is to require negotiation between the parties and failing that, the matter may be referred to a mediator. In the case where mediation is unable to resolve the matter, conflicts are typically referred to binding arbitration, with each party responsible for its own costs.

Dispute Resolution – New Gold Example

The dispute resolution process in the New Afton Participation Agreement is a four step process. The first part requires the parties to attempt to resolve the dispute by discussion. If the dispute remains unresolved, then a spokesperson will be appointed who will have full authority to resolve the dispute on behalf of the Kamloops Division – Secwepemc Nation, who can then meet with the General Manager of the project. If the solution is identified, the spokesperson and general manager will sign a letter recording the resolution. If the two are unable to resolve the dispute, the matter will first go to mediation, and failing that, to binding arbitration.

Dispute Resolution – Nemaska Example

A dispute resolution mechanism is also set out in the Nemaska – Cree Chinuchi Agreement. The Whabouchi Implementation Committee will make all efforts required to settle the dispute amicably through cooperative and open discussions. If the Whabouchi Implementation Committee fails to settle the dispute, the officers will make efforts to settle the dispute. Failing that, the dispute will be referred to mediation. If a settlement is not reached through mediation, then the matter will be referred to arbitration.

Termination

The IBA will usually stipulate when the agreement will terminate. IBA termination dates may be: at the end of the project if there are no more potential resources in the area; after the completion of rehabilitation; if one party is in default; or by a specified date.

The New Afton Participation Agreement provides that the agreement will terminate upon any of: completion of the closure plan by New Gold, by mutual agreement, if force majeure events that have existed for a minimum period of 2 years and for which New Gold has provided notice that the project is no longer feasible to operate; or if commercial production has not begun by April 2011. Despite termination of the IBA, New Gold is required to comply with its closure plan.

The Nemaska – Cree Chinuchi Agreement will terminate upon expiry of the term, upon mutual agreement, upon notice to the other party, bankruptcy or insolvency of either party, and upon an event of default that has not been remedied.