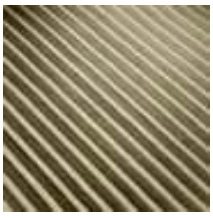

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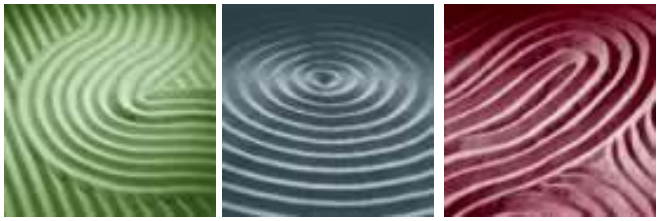

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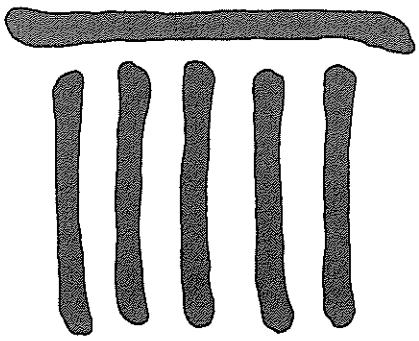
ABORIGINAL LAW-MINING

By Wendy A. Baker

October 2005



Aboriginal Law and Natural Resource Use

Materials prepared for the Continuing Legal Education seminar, *Aboriginal Law and Natural Resource Use*, held in Vancouver, B.C. on October 7, 2005.

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ABORIGINAL LAW AND NATURAL RESOURCE USE

ABORIGINAL LAW—MINING

These materials were prepared by Wendy A. Baker of Miller Thomson LLP, Vancouver, BC, for Continuing Legal Education, October 2005.

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I. Meaningful Engagement

In any proposed mining development, the first crucial step is to engage a First Nation in a dialogue, and to do so in a manner that ensures the engagement is meaningful.

Most importantly, any company contemplating development in First Nations territory must explicitly recognize the unextinguished aboriginal rights and title of the First Nations.

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1 This paper was prepared by Wendy A. Baker, of Miller Thomson LLP, and Kelly H. Russ. Significant contributions to the paper were made by Martin Gifford, of Miller Thomson LLP, and Barbara Harvey, articled student with Miller Thomson LLP.

Meaningful engagement/consultation requires, as a starting point, the recognition of aboriginal title and rights. The consultation process will not progress if the First Nations are put in the position of having to start at ground zero in proving rights and title. Rather, successful companies will recognize that aboriginal interests will be affected, and will move directly to the stage of working with the aboriginal groups to assess what interests will be affected, and how. Once that work has been done, the mining company and the First Nation(s) can begin defining a mutually beneficial relationship.

A. Notification

A resource development company interested in pursuing a project in First Nation's territory must begin the process with identifying the potentially affected First Nations and providing adequate notice to them. To be meaningful, the potentially affected First Nations must be notified at the planning stage, before the project is fully planned and committed. It will be difficult for the First Nations to accept the *bona fides* of the company if the project is fully planned and located before any contact is made with the First Nations. This may be stating the obvious but everything else flows from this first step and the Aboriginal-corporate relationship will be defined in large part by the notification process.

While effective notification may seem like an obvious first step in the resource extraction process, it has not always been the case:

> [A]boriginal communities stated that one of the truly significant issues is the lack of notification, consultation, and consent for exploration and development. In virtually all jurisdictions there were reports of the failure of industry and governments to provide reasonable, and in some cases legally required, notification of access to, and use of, lands and waters that are part of the resource base that sustains aboriginal communities.
>
> *Northern Perspectives*, Volume 23, No. 3-4, Fall/Winter 1995/96 ("Northern Perspectives"), in "Forward," at 2

The Oil and Gas Commission of B.C. has developed forms, available on its website, which illustrate the type of the "paper" notification given to First Nations in the context of oil and gas exploration. While these are specific to oil and gas, they are useful as guidelines for the mining industry. The various forms are attached to this paper.

> Oil and Gas Commission (B.C.) at: <http://www.ogc.gov.bc.ca/>
> http://www.ogc.gov.bc.ca/arb/arb_print.asp?aoid=15
> http://www.ogc.gov.bc.ca/arb/arb_print.asp?aoid=16
> http://www.ogc.gov.bc.ca/arb/arb_print.asp?aoid=17

During the course of the Mackenzie Valley Pipeline project, the Aboriginal Pipeline Agreement ("APG") was created in 2000 following meetings in Fort Liard and Fort Simpson. Thirty Aboriginal leaders from all regions of the Northwest Territories signed the resolution that created the APG and set its goals. The APG (Aboriginal Pipeline Group) represents the interests of Aboriginal people in the Northwest Territories in maximizing the ownership and benefits in a Mackenzie Valley natural gas pipeline.

> Aboriginal Pipeline Group at: <http://www.aboriginalpipeline.ca/>

The APG example is highlighted to illustrate the degree to which First Nations have organized to deal with a project that affects the territories of multiple First Nations.

The APG example also illustrates the degree to which companies have to educate themselves about which nations assert title and rights to the areas affected by the proposed development. Often a project will affect the rights of more than one nation.

B. Research and Identification

A full understanding of the political landscape in the affected areas requires development companies to be alive to the governing bodies within the aboriginal societies. For example, are there a series of bands or First Nations which must be consulted with and which hold authority with respect to development? Or are the First Nations, or bands, organized in a Council that is vested with authority to represent the nations in any developments that affect the environment, or affect economic interests.

A clear line of authority must be determined and approved within the affected First Nations, to allow for meaningful discussions to take place. The importance of the company clearly understanding and working with the accepted leadership of the aboriginal community can be seen in the recent case of *Fortune Coal Ltd. and Fortune Minerals Ltd. v. Oscar Dennis, et al.* (Vancouver Registry No. S054828), wherein the companies worked with the Talhtan Central Council to develop its mining proposal. The Talhtan Central Council was the recognized body governing resource development issues for the Talhtan and Iskut First Nations. As road building was set to commence, the company was met with objections from a group of people from the affected First Nations who claimed to represent the aboriginal interest in the affected area. The company worked extensively with the group to deal with their concerns, but ultimately did go to court to obtain an injunction on September 5, 2005, allowing them to commence operations. The injunction application was supported by the Talhtan Central Council. An injunction was obtained in large part because of the work the company had done with the Tahltan Central Council, which was recognized as the legitimate organization with decision-making authority over resource development issues in the Tahltan territory.

II. Legal Obligation to Consult

The need for consultation with aboriginal communities is now firmly established in Canadian law. While the obligation for consultation and accommodation lies primarily with the Crown, the reality is that companies must be part of the process. To a large extent, it is the companies that are in the best position to provide meaningful accommodation, and it is the companies that have the ability and the motivation to get the project in place quickly, without opposition, and with the co-operation of the local communities.

In the case of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [hereinafter *Haida*], the Supreme Court articulated the broad concepts which now outline the Crown's obligation to consult with First Nations in Canada when the Crown wishes to tenure Crown lands for the purposes of resource extraction on the traditional lands of Indigenous peoples and where Aboriginal title has not been extinguished or modified. The essence of the duties articulated by the Supreme Court are: (1) the duty to consult and accommodate Aboriginal people stemmed from, in part, the Honour of the Crown, (2) the positive duty to consult arose before Aboriginal title or rights were determined, (3) both sides must negotiate in good faith and that the Crown must not engage in "sharp dealing," and (4) Aboriginal people cannot frustrate the consultation process either, but in the end there is no duty to agree (para. 42).

The Supreme Court considered how the duty of consultation may vary in the face of a strong claim versus a weak claim. In the case of a weak *prima facie* case for Aboriginal rights or title, the Crown is required to give notice, disclose information, and discuss any issues raised in response to the notice. In the case of a strong *prima facie* case, the Crown must engage in deep consultation, which "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (paras. 43-44). Meaningful consultation may require the Crown to change its proposed course of action so as to accommodate a strong *prima facie* Aboriginal case of Aboriginal title or right and to minimize the impact of the proposed action and preserve the strong *prima facie* case until final resolution of the same (paras. 46-47). Accommodation does not give Aboriginal people a veto over the proposed course of action by the Crown but is rather an

opportunity for both the Crown and the Aboriginal people to reconcile their conflicting views. Reconciliation involves give and take by both parties (paras. 48-50).

There have been several significant cases that have relied upon the *Haida* case to essentially halt the transfer of land, resource extraction and expansion of existing business in the Province of British Columbia. In the case of *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] B.C.J. 444 (C.A.) (QL) [hereinafter *Musqueam*], the Musqueam Indian Band successfully appealed a decision that dismissed their judicial review of the Provincial Crown's authorization of the sale and transfer of land to the University of British Columbia and an injunction restraining the sale of the same until the determination of the Musqueam's claim of Aboriginal title to the land.

The Musqueam were successful, in part, because in the face of the Crown's concession of a strong claim to aboriginal title to the lands in question, the consultation undertaken by the Crown entities was left until too late of a stage in the sale process.

In the case of *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, [2204] B.C.J. No. 2804 (S.C.) (QL) [hereinafter *Homalco*], the Homalco Indian band was successful in obtaining a limited interim injunction restraining a salmon farmer from placing any more salmon stock in its growing pens as of the date of the filing of the Homalco Indian band's petition. The Ministry of Agriculture, Food and Fisheries issued various licenses, as per an amended agreement, to a salmon farmer whose facilities were located within the traditional territories of the Homalco Indian band. The Homalco Indian band was successful, in part, because: "the result of the grant of the amendment and the supply of fish within a very short space of time, by which I mean a matter of hours, at the most days, to the location, suggests that the Homalco Indian Band at the least has a basis upon which to claim that an injunction should be granted on an interim basis, pending disposition of its substantive claim." As in *Musqueam*, the issue of allowing adequate time for meaningful consultation with the Homalco Indian band with respect to the licenses was a significant factor in the court's decision to issue the interim injunction.

While the above cases deal expressly with the Crown's legal obligation to consult with First Nations, resource development companies should not assume that they can stand back from the consultation process. The reality is that it is often the companies that are most able to accommodate the aboriginal interests in a meaningful way. In addition, Crown consultation is historically slow and burdened with long-standing, fundamental disputes between the Crown and First Nations.

Resource companies which want to get on with business need to engage in meaningful consultation as soon as possible, and not focus on the niceties of legal obligations in this area. As stated by Judith Sayers, Chief Councillor of the Hupacasath First Nation:

> The smart companies will continue to see consultation and accommodation as building blocks for establishing positive, enduring relationships with Aboriginal communities. Those companies don't waste time and energy worrying about unextinguished rights and title—they've moved way past that, to focusing on the potential for success that lies in building mutual value and certainty.
>
> Dan Jepsen et al., "Mineral Exploration, Mining and Aboriginal Community Engagement: A Guidebook" (Vancouver: B.C. & Yukon Chamber of Mines, 2005) ("Chamber of Mines Guidebook") at 58

Similarly, Herb George, Chair of the First Nations Governance Centre, closed a recent presentation at "The Aboriginal Engagement & Sustainability Conference: Building Sustainable Relationship" (Vancouver: February 8-9, 2005) with this advice to industry:

> Don't rely on government to consult for you. For the same reasons that compelled the Supreme Court to spell out in Haida Nation that government cannot delegate its

duties of Aboriginal consultation and accommodation to industry, you should be very reluctant to delegate conduct of your Aboriginal business interests to government.

Chamber of Mines Guidebook at 32

III. Sustainable Relationships

When resource companies engage in meaningful dialogue with the affected First Nations communities they foster long term, sustainable relationships, which are important for the long-term success of the project. Sustainability continues to be the key goal for aboriginal communities and an important goal in long-term resource development. But what does sustainability mean in the context of mining projects in aboriginal territories?

The B.C. and Yukon Chamber of Mines has produced an outline which addresses the issue of sustainability, which proves a useful starting point:

10 Principles of Sustainable Relationships between the Mineral Sector and First Nations

1. recognize the asserted traditional territories and areas of cultural or heritage interest of Aboriginal Communities;
2. recognize that Aboriginal Communities have overlapping or shared traditional territories;
3. support the conclusion of fair, affordable and reasonable treaties (support the respect, recognition, and reconciliation process between Canada, B.C., Aboriginal People and First Nations);
4. respect the diversity of interests and cultures among Aboriginal Peoples;
5. respect the internal affairs of Aboriginal Communities;
6. have a common commitment to sustainability and respect for the land and its resources;
7. recognize that Aboriginal Communities have varying interests and objectives in relationships and co-operative ventures;
8. acknowledge that there is a shortage of capital to involve Aboriginal bands in co-operative ventures;
9. encourage the enhancement of Aboriginal capacity to develop training, employment and business opportunities in the resource sector; and
10. support Aboriginal aspirations in securing economic development.

See www.chamberofmines.bc.ca/firstnations.htm

Sustainability is of critical importance to First Nations. Mining projects have the potential to create serious and permanent disruption to the environment and the way of life of a people. However, any project in First Nation's territory also holds opportunities for the future of a people. The objective must be to recognize and minimize the potential disruption, and to maximize the opportunities for the first nations.

IV. Minimizing the Prospect of Litigation

Litigation over a proposed project is extremely costly and has the potential to completely derail the successful start up. Companies find themselves in litigation with First Nations, generally, one of two ways: the company is faced with a blockade or other interference by the affected First Nation and so commences an action against the First Nation seeking an injunction to allow the company to get on with its work, or the First Nation commences an action against the company, or a petition against the Crown and the company, seeking an injunction preventing the company from commencing or continuing work. Sometimes both applications will be brought in relation to the same project.

Once the company finds itself in litigation, the process is costly, slow and the dispute is in the public domain. These factors have the potential to seriously impact the project by impacting financing, diverting funds to litigation, delaying the commencement of construction, and eroding any goodwill in the local communities.

While litigation cannot be avoided in every case, it can be avoided in many cases, and the impact of litigation can be minimized, through effective, meaningful communication, consultation and consent.

Some of the most useful tools in engaging the First Nations communities to create solutions that support the communities and the project, are impact benefit agreements. Other tools include co-management agreements and joint ventures; however, a discussion of these is beyond the scope of this paper.

V. Impact Benefit Agreements

A. What are Impact Benefit Agreements?

Impact and Benefits Agreements ("IBAs"), sometimes described as Participation Agreements or Land Use Agreements, and are negotiated in the context of resource development in Canada between private companies and First Nations—with or without government involvement.

IBAs may be precondition to federal approval for resource development operations. The agreements establish the terms under which affected Aboriginal people will benefit from development projects. IBAs are different from other aspects of the regulatory and benefits package (set out in socio-economic and environmental agreements) in that they are private contracts between non-governmental parties and are subject to confidentiality provisions. In the context of unsettled land claims, IBAs permit benefits to flow to Aboriginal groups whose traditional lands include the area where mining or development is located.

> Agreements, Treaties and Negotiated Settlements Projects at:
> http://www.atns.net.au/biogs/A001987b.htm

IBAs can address with a range of issues including employment and training of Aboriginal people, profit-sharing, compensation and environmental regulation. Specific provisions requiring the negotiation of IBAs are found in certain land claims agreements, and some legislation regulating gas and oil development. They have also been used in the context of diamond mining operations where no legislative or claims-based requirements exist. The use of IBAs reflects the principle that Aboriginal people should share the benefits of resource development, and permit the shaping of those benefits to the requirements of individual communities and Aboriginal groups.

See:

Indian and Northern Affairs Canada, 'Building a Future: An Overview of Resource Development' June 2000, http://www.ainc-inac.gc.ca/pr/pub/bldg/ssa/index_e.html (at 20 September 2004);

Indian and Northern Affairs Canada, Environmental Policy, and Studies Division, Environment and Renewable Resources Directorate, http://www.ainc-inac.gc.ca/nin/docsnew/env/epsd_e.html (at 20 September 2004);

Indian and Northern Affairs Canada, Northern Affairs Program, Canadian Institute of Resources Law, 30 June 1997) 'Independent Review of the BHP Diamond Mining Process', http://www.ainc-inac.gc.ca/ps/nap/diamin_e.html (at 20 September 2004); and

Indian and Northern Affairs Canada, 'Resource Partnerships Program', http://www.ainc-inac.gc.ca/ps/ecd/ps/rpp/res0_e.html (at 27 September 2004).

Although IBAs have been successfully negotiated in Canada for years, particularly in the Yukon and Northwest Territories, there is very little literature about them. This is due in large part that IBAs are partly and wholly confidential in nature.

B. Who Uses IBAs?

IBAs are used by First Nations who are directly or indirectly impacted from a proposed resource extraction activity in their traditional territories, and by companies who are seeking to extract resources from:

- Indian reserve lands;
- Treaty lands;
- Land subject to aboriginal title;
- Land subject to aboriginal rights; and
- Land that is the subject of ongoing treaty/land claims negotiation

C. Why Use IBAs?

IBAs are flexible tools that can provide benefits to both First Nations and resource companies.

IBAs are negotiated for different reasons depending a variety of factors including a particular First Nation's land and resource rights, the regulatory framework that is in place, and the relationship that exists between affected communities and a mining company.

Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada," Paper, October 2001 at: Canadian Environmental Law Association of Canada website: <http://www.cela.ca/publications/cardfile.shtml?x=1021> [hereinafter Sosa/Keenan, IBA]

Where a land claims agreement is in place, there may be specific requirements for IBAs. For example, Article 26 of the Nunavut Land Claims Agreement ("NLCA") explicitly requires that IBAs be negotiated prior to the commencement of a "Major Development Project" and provides a list of the issues that are appropriate for inclusion in an IBA.

Sosa/Keenan, IBA at 7.

See: Article 26 of the NLCA at: <http://www.tunngavik.com/site-eng/nlca/articl26.htm>

Similarly, Article 10 of the Inuvialut Final Agreement ("IGA") sets out the terms of negotiating a Participation Agreement.

Sosa/Keenan, IBA at p. 7.

> See: Article 10 of the IFA at:
> <http://www.taiga.net/wmac/ifa/ifa_participationagreements.html>

The primary benefits for First Nations are the provision of some degree of control over:

- Resources;
- Environmental matters—pre- and post-extraction of resource;
- Impact of resource extraction on cultural practices;
- Pace of business development in their territories;
- Training and job development opportunities; and
- Financial benefits flowing from the extraction of resources from their territories.

For resource development companies, IBAs provide:

- Commercial certainty;
- Promotion of corporate responsibility;
- Access to traditional knowledge; and
- Access to local workforce

D. Where have IBAs Been Used?

Examples of IBAs negotiated since the 1990s, some more successful than others, include:

1. Golden Bear Mine in Telegraph Creek, B.C.

Chief Jerry Asp negotiated B.C.'s first IBA in 1998 between the Tahltan and North American Metals Corp. ("NAMC"), owners of the Golden Bear Mine.

Golden Bear was one of Canada's first and most successful heap leach gold mines.

The 1998 Golden Bear Agreement: Before beginning negotiations with NAMC, the Tahltan Tribal Council created the Tahltan Resource Development Policy to establish the ground rules for resource development. As Chief Jerry Asp explained in a speech at the 2003 First Nations Exploration and Development Symposium:

> The 1998 Golden Bear Agreement ... highlights governance structure and how a mining project may fit into the long-term plans of a community. We weren't looking for a few jobs, seasonal employment or a training program or two ... We needed a plan that would benefit our entire nation, not just a few individuals. In other words, we were looking for a nation-building model for economic development, not a job and training model.

The Golden Bear Agreement guaranteed a number of key benefits for the Tahltan, including: work on building the 160 kilometre road into the mine site, a three-year upgrading and maintenance contract, a minimum of 20 per cent of the work force at the mine site, and the right to negotiate for future contracts. The Tahltan also negotiated building the settling ponds, a five-year open-pit mining contract and general maintenance.

It wasn't all smooth sailing. In April of 1997, the Tahltan blockaded the access road to the mine, drawing attention to their concerns about being excluded from contracting opportunities and to their request that further environmental assessment be done on the mine's potential impact on their traditional territories. As Yvonne Tashoots (Tahltan Chief at the time) said in an interview with the Yukon News, "It was confrontational at the start." She noted that for several months all communications were filtered through a mediator, and concluded, "But as a result of our communication, we have all learned to respect each other a little more."

By September of that year, Tahltan band members made up 35 per cent of Golden Bear's employees, and the Tahltan had the mine camp's catering contract, as well as the maintenance contract for the road they had blockaded. "Things have improved," said Ian McDonald, (then-CEO and Chairman of Wheaton River Minerals Ltd. – owners of North American Metals). "I think they thought we were ignoring them and, perhaps, we were a little guilty of that." It should be noted that in April 2003, the Tahltan Mining Symposium was convened to:

> (1) review the relationship between the Tahltan people, their land and the mining industry; and (2) build a strategy to guide that relationship in the future. Seeking a win-win outcome, and guided by the Seven Questions to Sustainability (7QS) Assessment Framework, the participants considered past, present and potential future conditions as a foundation for ensuring positive outcomes for the Tahltan people and their territory in the years to come.
>
> Chamber of Mines Guidebook, at 59-61

2. Red Dog Mine

The Red Dog Mine is a zinc, lead and silver mine in Northwest Alaska, within the settlement lands of the Northwest Alaska Native Association ("NANA"). In 1982, development of Red Dog began with the selection of Cominco Ltd. to lease the deposit and operate the mine. The NANA/Cominco development agreement gives Cominco the rights to build and operate the mine and market the metals. In return, NANA receives an escalating percentage of royalties. NANA eventually will receive a 50% share of the mineral profits. Features of the agreement include ongoing management agreements that provide a variety of benefits for the community.

A NANA/Cominco joint management committee reviews and approves operations activities, and an employment committee helps guide the effort to hire, train and promote NANA shareholders. NANA and its subsidiaries also provide drilling, catering and other contracted services on the project.

The agreement also contains protections to ensure the development does not interfere with subsistence activities. Residents of Kivalina and Noatak, villages closest the mine site, serve on a subsistence committee which has significant authority to protect hunting, fishing, and other resources.

> Ron McLean & Willie Hensley, "Mining and Indigenous Peoples: The Red Dog Mine Story" (Ottawa: International Council on Metals and the Environment, 1994)

3. Vancouver Island's Eagle Rock Quarry Project

As part of a partnership agreement between Polaris Minerals Corporation, the Hucpacasath First Nation, and the Ucluelet First Nation, an IBA was negotiated that provides Eagle Rock's First Nation partners with preferential opportunities for business development, employment and training, and direct community funding

> Chamber of Mines Guidebook, at 54-58

4. BHP Ekati Diamond Mine

Canada's first surface and underground diamond mine officially opened on October 14, 1998. Located 300 km northeast of Yellowknife, NWT. BHP Diamonds has IBAs with four affected local Aboriginal groups. The agreements are confidential, but generally cover cash payments, scholarships, preferential hiring and business opportunities, and travel from home community to mine site.

> "BHP Billiton Diamonds In. EKATI Diamond Mine," Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/ps/nap/diamin/ekadia_e.html

The company provides priority recruitment, employee training and business opportunities for northerners and northern Aboriginal people. It has 600 employees, of which 80% are northern residents and 42% are northern Aboriginal people. BHP Diamonds Inc. has a Socio-Economic Agreement with the Government of the Northwest Territories to monitor social and economic benefits and impacts created by the mine. It also has an Environmental Agreement with the Government of the NWT., the Government of Canada and the four signatory Aboriginal groups to monitor and advise on the impacts of the mine.

> "Aboriginal partnerships and coordination," Natural Resources Canada, http://www.nrcan.gc.ca/mms/socipract/p_e.htm

There is annual consultation with impacted communities regarding the Socio-Economic Agreement, the Environment Agreement, and the IBAs. Under the Socio-Economic Agreement, BHP commits to creating business opportunities for Northern Aboriginal owned businesses and Northern owned businesses.

> "BHP Billiton Diamonds In. EKATI Diamond Mine," Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/ps/nap/diamin/ekadia_e.html

5. Falconbridge Limited

At Falconbridge, Traditional Knowledge is viewed as a valuable source of information about animal migration periods and hunting patterns of indigenous people. It provides guidance and helps develop an understanding of local culture and society. Developments in Northern Quebec have been adjusted to accommodate local populations. For instance, shipments do not take place between June and March so as not to disturb sea mammal migration.

Falconbridge completed an IBA with local Aboriginal groups, known as the Raglan Agreement. The Raglan Agreement gives priority to hiring and training qualified Inuit workers.

Cross-cultural training is important to smooth mine operations. To facilitate Inuit integration, Falconbridge has set up a career counselling and employee assistance program, as well as a cross-cultural training program for all employees—Inuit and southerners.

> "Aboriginal partnerships and coordination," Natural Resources Canada, http://www.nrcan.gc.ca/mms/sociprac/p_e.htm

6. Other

The government of Canada maintains a website which provides a summary of many of the IBAs presently in effect in Canada: < http://www.nrcan.gc.ca/mms/sociprac/p_e.htm >.

E. The Content of IBAs

Each agreement should begin with a general statement of the overall principles and understandings of the parties and the purposes of the IBA. Principles should include mutual respect by both parties, that the IBA is an active partnership, and that there is a long-term commitment by both parties to the IBA. Purposes should include a requirement for effective communication, training and employment of First Nations persons and non-First Nation persons where required, business opportunities for First Nation members, and long lasting benefits to the First Nation in the areas of economics, social and cultural preservation and enhancement. There should be a description of the extent of the project and the scope of the IBA. The project area and depth need to be defined carefully. The timeline of the project needs to be specified.

Paragraph 26.3.3 of the Nunavut Land Claims Agreement ("NLCA") refers to Schedule 26.-1 of the NLCA which deals with the possible content of an IBA. This Schedule provides a useful starting point in the discussion of content in an IBA. The points from the Schedule are set out below, followed by a discussion of how many of the points can be developed in an IBA.

First Nations training at all levels.

The IBA can create skill development and apprenticeship programs throughout all phases of the proposed project from general labour to upper management levels. There should be job specific training programs on the job site. Where possible, companies can access government funding for these types of developmental programs. There should be continuous monitoring of the hiring process. Training for other employment upon the closing of the project can be a feature of the agreement.

First Nations preferential hiring.

The IBA can set targets for the number of First Nations persons to be hired. An inventory of the available labour pool of a First Nation that is a party to an IBA can be established, in addition to a skills assessment of the available labour pool.

Employment rotation reflecting First Nations needs and preferences.

This may include time off for individual employees involved in traditional activities within the community, including fishing and hunting, addressing family crises, attending funerals, etc. There should be means for an individual to keep in touch with her/his family and to allow family members to visit the job site. In developing this aspect of the IBA, companies should also determine if there is a requirement for the provision of traditional foods.

Scholarships.

Labour relations.

IBAs must address cross-cultural training of non-First Nation employees and management. The agreement can address preferential treatment when layoffs occur, and employment opportunities upon the closing of the project.

Business opportunities for First Nations

The business opportunities can include:

(a) provision of seed capital;

(b) provision of expert advice;

Where traditional knowledge will assist the project, this can be addressed in the agreement, i.e., Falconbridge. In addition, First Nations may be involved in multiple resource developments in their territories, and may have developed significant and beneficial expertise which the company could access to its benefit.

(c) notification of business opportunities;

This may include an agreement that the company will use First Nation companies in relation to the project. In particular, construction of roads and buildings, catering, surveying, air transport, security, provision of supplies, and transportation to and from the project site are all services commonly contracted with First Nations corporations. The agreement may include the monitoring of First Nation companies.

(d) preferential contracting practices.

This may include the creation of a tendering process to facilitate bids from First Nation companies, and may include the training to First Nation companies on the tendering process. The training provided to First Nation companies include training in understanding the cost competitiveness of a tendering process, the quality of goods and services required, meeting technical specifications, on time delivery, and safety standards. Providing smaller and more specialized contracts in the beginning can allow First Nations to become more proficient in the tendering and delivering of goods and services.

Housing, accommodation and recreation.

Safety, health and hygiene.

Language of workplace.

Identification, protection and conservation of archaeological sites and specimens.

Research and development.

First Nations access to facilities constructed for the project such as airfields and roads.

Outpost camps.

Information flow and interpretation, including liaison between First Nations and proponent regarding project management and First Nations participation and concerns.

Relationship to prior and subsequent agreements.

Co-ordination with other developments.

Arbitration and amendment provisions.

There should be a process set out in an IBA to refer and resolve disputes to an independent arbitrator. Mediation should be mandatory before an arbitrator is retained. If mediation fails, there should be a determination of what issues the arbitrator should deal with and what issues should be resolved by a court hearing.

Implementation and enforceability, including performance bonds and liquidated damages clauses.

Obligations of subcontractors.

The IBA can address requirements that will be placed on subcontractors hired by the company. The concern of the First Nations is that the IBA will be effectively subverted by the company if subcontractors are not bound by certain conditions, such as preferential hiring requirements.

Any other matters that the Parties consider to be relevant to the needs of the project and First Nation

IBAs do have the potential to divide communities along economic and social lines. In addition, while IBAs may create wealth for a First Nation, they can also create social challenges such as possible increased alcohol and drug use, family members may have to leave their communities to access to the

benefits of an IBA, and jobs created pursuant to an IBA may hinder a First Nation member from participating in traditional hunting and fishing cultural practices. To counter these negative outcomes, parties may consider making funding available for substance abuse programs; individual and family counselling. Money management programs could be made available. Funding should be made available to maintain traditional practices.

Future Considerations

Every IBA must provide a mechanism to address problems and unanticipated situations that may arise during the project. Often IBAs will include a mechanism for an annual review of programs to address how well they are working, and where changes need to be made.

Environmental concerns and disruption of wildlife, including wildlife disruption compensation schemes.

In any resource development project, the importance of environmental considerations is self-evident. Before approaching a First Nations the company must determine what legislative scheme governs the mining activity to be undertaken.

First Nations concerns will include the impacts of mining activity on migration patterns of traditional food sources, fish habitat, water quality, and air pollution. Once the latter concerns have been determined, Environmental Agreements or components in IBAs can be negotiated which may include the following plans:

- Waste management;
- Hazardous materials;
- Water management;
- Emergency response;
- Abandonment and Restoration;
- Traffic management; and
- Construction of the project itself.

The drafting of an Environmental Agreement, which can be referenced to the IBA, should determine the following:

- The monitoring of the environmental planning process;
- The frequency of environmental assessment;
- What is to be assessed;
- Each party's responsibility;
- Plans to deal with emergency situations;
- Establishment of clear paths of communication;
- Determination of the costs of monitoring;
- Establishment of environmental standards in accordance with regulatory framework; and
- Clear delineation of which activities are allowed and which are prohibited.

With a mining project, the reclamation process should be considered in great detail at the outset of the project. Consideration should be given to the impact of the project upon its closing and the cost of

reclamation should be costed out in detail with provision made to ensure that there are sufficient funds available to guarantee its completion, taking into consideration inflationary pressures on the reclamation costs. The funds for a reclamation project could be secured by way of a security deposit.

F. Negotiating IBAs

The negotiation of an IBA is expensive and the costs of the same should be addressed. Will the development company pay and on what terms? Is it possible to share the costs with the First Nation or disperse it among the participating First Nations. Is there government funding available?

For most First Nations, resource development in their traditional territories may be a new experience. It is important to involve the First Nation in all stages of the project development process. This may include regular meetings and communications to keep the First Nation informed. Regular meetings will ensure that the negotiating team does not get ahead of the First Nation's understanding of what is occurring. It may be important to survey the community for potential positive and negative impacts on the First Nation at the outset.

Like all negotiations, the negotiation of an IBA takes a lot of time and requires detailed work and analysis. Companies and First Nations must ensure that there is a sufficient lead time to conclude an IBA. Sufficient lead time enables both parties to be effective during negotiations. Although both parties will have their own deadlines, the development company will have strict timelines so as to comply with the relevant regulatory framework and shareholder and other corporate obligations.

Both parties will have a strategy in the negotiation of an IBA. For First Nations, it may include the determination of the payment 'royalty' money, jobs, business opportunities, and protection of traditional practices and food sources. For the development company, an IBA must make 'business' sense. Both parties will set their respective priorities and must be willing to be flexible in conceding some issues.

As the APG example set out above illustrates, there is power in a unified approach by First Nations in the negotiation of an IBA. Development companies will not succeed in a 'divide and conquer' strategy with First Nations.

An IBA should avoid vague language because it becomes difficult to enforce. The use of 'reasonable standards' should be avoided in an IBA.

There should be a committee made up of all stakeholders affected by the resource extraction project. The committee may be responsible to monitor the implementation of the IBA and ensure that the targets set out in the IBA are been met and followed. The IBA should impose penalties for failing to meet the targets in the IBA and solutions should be set in the IBA to address the breach of an IBA.

The possibility of the project coming to an end, due to economic and legal factors, should be discussed.

VI. Engagement Guidelines

The following guidelines are intended as a summary of the principles outlined in this paper, and are drafted in reference to mining development, in particular.

(1) Depending on the strength of an Aboriginal peoples' claim, the degree of consultation will vary from a mere duty to inform in the case of a weak *prima facie* case, to deep consultation in the case a strong *prima facie* claim.

(2) Consultation with Aboriginal peoples should occur in the formative stages of a proposed mining project to ensure adequate Aboriginal peoples input and comment.

(3) Given the diverse makeup of Aboriginal peoples, it is important to consult with the Aboriginal peoples that are directly affected by a proposed mining project rather then any national organization, unless the policy has national significance.

(4) In the case of a proposed mining project that has national significance, all groups of Aboriginal peoples are to be treated equally and no one group is to be favoured over another during the consultation process.

(5) Consultation is a two way process. Aboriginal peoples must provide sufficient information, which includes information on the cultural practice sought to be infringed, and collaborate with the applicable legislative body. The failure of Aboriginal peoples to provide sufficient information on a cultural practice cannot be used as an excuse in future proceedings to argue a lack of consultation.

(6) To enable Aboriginal peoples meaningful input during the consultation process, there must be adequate funding to ensure that Aboriginal peoples have the ability to retain and pay legal counsel, scientific experts and, when required, translation from and to the respective Aboriginal language.

(7) Where applicable, consultation with Aboriginal peoples should be confirmed as an ongoing feature of any agreement.

(8) Consultation does not mean that a mining company and Aboriginal peoples have to reach an agreement at the end of a consultative process. The critical feature is that Aboriginal communities were fully informed, and their concerns were heard and, to the greatest extent possible, accommodated. However, it may not be possible to accommodate all concerns.

(9) Consultation may involve the opportunity for the Aboriginal peoples to make submissions, and formally participate in the decision-making process. Where appropriate, the mining company representative should provide written reasons to reveal how the concerns of the Aboriginal peoples were considered and how they impacted the decision made by the company.

(10) The mining company decision maker should carefully examine all the evidence that was presented to it, and where applicable, previous courts or tribunals, to determine if the concerns of the First Nations(s) were adequately addressed.

VII. Appendix A—Cover Letter for First Nations Packages

OIL AND GAS COMMISSION

Project Assessment Branch
200, 10003 - 110th Ave
Fort St. John, BC V1J 6M7

Phone: (250) 261-5700
Fax: (250) 261-5728
24 Hour: (250) 261-5700

COVER LETTER FOR FIRST NATIONS PACKAGES

File #:

WA #:

Geo #:

To:

- ☐ Blueberry River First Nation
- ☐ Dene Tha' First Nation
- ☐ Doig River First Nation
- ☐ Fort Nelson First Nation
- ☐ Halfway River First Nation
- ☐ McLeod Lake Indian Band
- ☐ Prophet River First Nation
- ☐ Saulteau First Nation
- ☐ West Moberly First Nation
- ☐ Other (specify):
- ☐ Other (specify):

The Oil and Gas Commission has received an application for a:

- ☐ Geophysical program
- ☐ Pipeline
- ☐ New Application
- ☐ Amendment
- ☐ Wellsite
- ☐ Other *(specify)*:
- ☐ Revision

Proponent/Company:

Project Name:

Attached is a copy of the above-noted application package for your review. The purpose of this review is to identify any potential infringements this project may have on your treaty rights to hunt, trap or fish.

We would appreciate receiving any comments you may have about this application within 10 working days. We would also appreciate being informed if you know of any other First Nation that may be affected by this application.

Please be aware that if we have not heard from you within 10 working days, the Oil and Gas Commission will proceed with an evaluation and decision of the application based on available information.

If you have any questions or concerns regarding this application, please feel free to contact the Aboriginal Relations & Land Use Branch at (250) 261-5749, or fax your written reply to (250) 261-5750.

Attachments:

- ☐ Application Form
- ☐ Timber Harvesting & Field Assessment
- ☐ Geophysical Application and Field Assessment
- ☐ 1:20,000 BCGS Sketch Plan (Pipelines Only)
- ☐ 1:50 000 Project Map
- ☐ 1:250 000 Access Map
- ☐ Survey/Construction Plan
- ☐ Archaeological Assessment Information Form

Attachments checked by: _____

VIII. Appendix B—First Nations Notification Cover Letter

OIL AND GAS COMMISSION

Aboriginal Relations and
Land Use Branch
200, 10003 - 110th Ave
Fort St. John, BC V1J 6M7

Phone: (250) 261-5749
Fax: (250) 261-5728
24 Hour: (250) 261-5700

FIRST NATIONS NOTIFICATION COVER LETTER

File # _____
WA # _____
Geo # _____

To:

- ☐ Fort Liard First Nation
- ☐ Kelly Lake Cree Nations
- ☐ Kelly Lake First Nation
- ☐ Kelly Lake Metis Settlement Society

The Oil and Gas Commission has received an application for a:

- ☐ Geophysical Program
- ☐ Pipeline
- ☐ New Application
- ☐ Amendment
- ☐ Wellsite
- ☐ Other (specify) _____
- ☐ Revision

Proponent/Company: _____

Project Name: _____

For your information, attached is a copy of the application package for the above noted project proposed for development in your area. Any comments can be sent to the attention of Lance Ollenberger, Manager, Aboriginal Relations and Land Use Branch at the address below.

Attachments:

- ☐ Application Form
- ☐ Timber Harvesting & Field Assessment
- ☐ Geophysical Application and Field Assessment
- ☐ Survey/Construction Plan (if applicable)
- ☐ 1:20,000 BCGS Sketch Plan (Pipelines Only)
- ☐ 1:50 000 Project Map
- ☐ 1:250 000 Access Map
- ☐ AAIF (Archaeological Assessment Information Form)

Attachments checked by: _____

IX. Appendix C—First Nation Consultation Pre-Assessment

OIL AND GAS COMMISSION

FIRST NATION CONSULTATION PRE-ASSESSMENT

File # _____
WA # _____
Geo # _____
Land Agent _____

Company: _____

Project: _____

Based on an Application Pre-Assessment, an application package for the above-noted project was NOT sent to the _____ First Nation(s) for review for the following reasons (explanation of what is being applied for and why):

Application Notes:

- Total area required for the project: _____ hectares
- Is the area required within an existing cleared area: ☐ Yes ☐ No ☐ Partially
- Is this an ☐ Amendment or a ☐ Revision?
  - If this is an amendment, please indicate the difference in the area required from what was originally proposed: ☐ Increase of ____ hectares; ☐ Decrease of ____ hectares; ☐ No change in area required
  - If this is an amendment, were there any issues identified by First Nations in the original application? ☐ Yes ☐ No ***If yes***, please elaborate:
- Trapper notification sent: ☐ Yes ☐ No

Aboriginal Relations Branch Comments:

☐ Agree ☐ Disagree

_____ _____
Aboriginal Relations & Land Use Branch Date

Upon completion return to: _____
Project Assessment Branch Program Manager