Why Impact Benefit Agreements?

2019 Links To Learning
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What are Impact Benefit Agreements?

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

- IBAs are:
  - based on the Crown’s Duty of Consultation and Accommodation.
  - a response to the underlying issue of Aboriginal rights and title, and the uncertainty it creates
  - a result of an absence of law, and the need for proponents to minimize risk.

Duty of Consultation and Accommodation

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

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

Canada and British Columbia committed to implement and adopt the principles of UNDRIP, the TRC: Calls to Action, and the Missing and Murdered Indigenous Women and Girls: Calls to Justice.

But, UNDRIP, TRC Calls to Action, the Missing and Murdered Indigenous Women and Girls: Calls to Justice have not been implanted and are not legal requirements.
Why we need UNDRIP?

- Article 32
  - requires states to “consult and cooperate in good faith… in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources”

- Some of the other Articles
  - 3 – Right to self determination
  - 11 – Right to culture
  - 18, 19 & 23 – Right to participate in decision making
  - 24 – Right to health and protection of medicinal plants, animals and minerals
  - 25 – Right to maintain and strengthen spiritual relationship to land
  - 26 – Right to traditional lands and resources
  - 29 – Right to conservation and protection of environment

Why we need the TRC: Calls to Action

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

► Commit to meaningful consultation, building, respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples, before proceeding with economic development projects.

► Ensure that Aboriginal peoples have equitable, access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal, communities gain long-term sustainable benefits from economic development projects.

Why we need the Missing and Murdered Indigenous Women and Girls: Calls to Justice

► Calls to Justice 13.1 – 13.5 - Calls for Extractive and Development Industries

13.3 - We call upon all parties involved in the negotiations of impact-benefit agreements related to resource-extraction and development projects to include provisions that address the impacts of projects on the safety and security of Indigenous women, girls, and 2SLGBTQQIA people. Provisions must also be included to ensure that Indigenous women and 2SLGBTQQIA people equitably benefit from the projects.
But Wait There’s Hope!

POSSIBLE
GAME CHANGER AHEAD

Declaration on the Rights of Indigenous Peoples Act

- On November 28, 2019, the British Columbia Declaration on the Rights of Indigenous Peoples Act received Royal Assent becoming law.
  - The legislation is aspirational but provides a framework for implementation of UNDRIP, only where government and Ministers wish to exercise the powers.
  - There are no time frames or strong commitments, only yearly reporting.
  - However, there is power for Ministers or government decision makers to enter into agreements with Indigenous Governments without being limited by any other legislation.
Why do Proponents Negotiate?

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

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

Why do First Nations negotiate

- Duty to Consult requires First Nations to participate in Environmental Review process but funding is not sufficient.
- Protection of environment and archeological sites.
- Ability to participate in economy, aboriginal rights include the right to benefit economically from the land.
- Avoid reliance on Crown consultation to ensure protection of rights.
- Build “War Chest”, often capacity funding for participation and traditional use studies.
What the First Nation Gains

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

So what’s the deal?

► The First Nation agrees to support or not object to the project in exchange for benefits from the project proponent.
Negotiation Process – Early Engagement

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

Negotiation Process – What are the requirements?

- There is no template for negotiations and the process will be dictated by the First Nation and the proponent.
- The process may include the following agreements:
  - Letter of Intent
  - Exploration Agreements
  - Capacity Funding Agreements
  - Negotiation Agreements
  - IBA
- Alternatively, some First Nation have set up First Nation Led Assessment Processes
An IBA is a contract

► No requirements but you must be able to do or deliver what you say you will.
► Anything, can be put on the table but needs to be balanced with goals and needs of Nation.

Determine what is important to your Nation before negotiations

What is generally included in an IBA?

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

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

Business Opportunities

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

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

Environmental and Archeological Protection

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

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

Project Certainty

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

Additional Benefits

- IBAs often provide additional non-economic benefits to First Nations including:
  - Additional environmental provisions;
  - Shared decision making regarding the project;
  - Dispute resolution provisions;
  - Reduction of the project’s negative impacts on the First Nation community;
  - Relationship building;
  - Implementation Committee and
  - Significant capacity building opportunities.
Do Proponents have to engage First Nations?

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

Challenges

- Capacity
- Communication
- Maximizing Opportunities
Capacity

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

Communication

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

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

New Concerns

- Generally, IBAs are confidential but a decisions in \textit{Yahey v British Columbia} from January 2018 may open up agreements for the purpose of transparency.
  - The First Nation was looking for a permanent injunction on future development in their traditional territory claiming that the Province has allowed cumulative effects to the extent that members are left “with almost no traditional territory within which to meaningfully pursue their constitutionally protected cultural and economic activities.”
  - The Province sought disclosure of IBA documents, Joint Venture and other agreements to show that the First Nation had benefited from the development in their Traditional Territory.
  - The Court found that the disclosure was relevant, even regarding confidential IBAs.
- In October 2019 the court in a further decision in \textit{Yahey v British Columbia} found that disclosure of documents between the Province and Proponent were relevant and must be disclosed.
Questions?

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