IMPACT BENEFIT AGREEMENTS BETWEEN ABORIGINAL COMMUNITIES AND MINING COMPANIES: THEIR USE IN CANADA

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FOREWORD

This report is part of an ongoing collaborative effort between the Environmental Mining Council of British Columbia, the Canadian Environmental Law Association and CooperAcción: Acción Solidaria para el Desarrollo. The purpose of this collaboration, which has been supported with funding from the Canadian International Development Agency (CIDA) and the Weedon Foundation, is to build capacity among communities affected by mining in Peru and Canada, based on the belief that, by exchanging information and experiences between these communities, they will be better equipped to defend their rights and interests vis-à-vis mineral development projects. In the past, such projects have proved to have significant adverse environmental, social, cultural and economic effects.

The report presents an overview of impact and benefit agreements (IBAs). These agreements are signed between mining companies and First Nation communities in Canada in order to establish formal relationships between them, to reduce the predicted impact of a mine and secure economic benefit for affected communities. IBAs are increasingly used by First Nations in Canada to influence decision making about resource exploitation in their lands. In negotiating and implementing these agreements, communities are learning important lessons that can help others in Peru or elsewhere in Canada.

Despite years of experience negotiating these agreements in Canada, the corresponding literature is limited and fairly recent. There is little analysis of the factors that determine their success or failure, or of the extent to which they have been enforced. This is largely due to the fact that many of these agreements are partly or wholly treated as confidential.[1] In addition, most of the literature available about IBAs focuses on the Yukon and Northwest Territories and therefore, may not reflect the reality of First Nations in provinces like Ontario where natural resource and aboriginal issues are framed in a different political and legal context. As a result, the authors sought to supplement the material available by interviewing members of First Nations that have been involved in IBA negotiations, to the extent that time, distance and budget constraints allowed.

For this research CELA drew from its experience as a legal aid clinic that periodically provides legal advice to First Nations in Ontario, as well as a founding member of MiningWatch Canada (MWC), a young, nation-wide coalition of social justice, environmental and indigenous organisations that responds to the impacts of irresponsible mining practices in Canada and abroad. Among MWC members are organisations like the Canadian Arctic Resource Committee, the Yukon Conservation Society and the Innu Nation, organizations that work directly with indigenous communities affected by mining and that have produced materials that were used in this report. MiningWatch Canada also held two workshops to discuss the impact of mining on local communities.[2]

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INTRODUCTION

Mining projects can have enormous social, cultural and environmental impacts on local communities. They can generate pollution, cause land expropriation and displacement, affect wildlife and crops, create social tension and economic inequalities, and disrupt family and community life. Mining can also bring economic benefits, in the form of employment, contracts, or the purchase of locally-produced goods. Very often, however, communities are unable to reap these potential benefits, due to limited experience and skill development, inadequate access to information and limited funding opportunities.

One way to minimise the negative impacts of mining projects and to ensure local benefit is through the negotiation of binding agreements between companies and communities. In Canada, these agreements are commonly called impact and benefit agreements (IBA).[3] These agreements are mechanisms for establishing formal relationships between mining companies and local communities. Their primary purposes are: i) to address the adverse effects of commercial mining activities on local communities and their environments, and ii) to ensure that First Nations receive benefits from the development of mineral resources.

IBAs do not usually identify or quantify a mine's predicted impacts. However, environmental and social impact assessments provide key information for designing IBAs and in many cases, are appended to the agreements. In circumstances where such assessments have not been conducted, IBAs may establish mechanisms to ensure that communities participate in, or are consulted during, an assessment process.

1.0 THE PARTIES TO AN IBA

Early IBA analogues were negotiated between government and the private sector and primarily focussed on the setting of employment targets for local people in mining projects.[4] As

aboriginal rights have gained judicial and political recognition, and as more First Nations have settled land claims in recent decades, First Nations have begun to negotiate directly with mining companies. While many First Nations welcome this change, others are concerned that their interests may not be served without some kind of government involvement, whether as a party to an agreement or by providing funding to First Nations for the negotiation of an agreement.[5]

In the negotiation of an IBA, First Nation parties can be represented by band councils, chiefs or aboriginal development corporations. Some First Nations in Canada and Australia have found that having one development corporation or institution represent several Aboriginal communities or land owners in their negotiation with mining companies can be very beneficial, provided that good communication and community consultation mechanisms are established. This allows for more efficient and effective use of available leadership and expertise and can avoid the "divide and conquer" strategy that some mining companies have used in the past.[6] When more than one aboriginal party is involved, the agreement may give preferential status to one over the others, such as to the community that lives closer to the mine.

2.0 THE LEGAL FRAMEWORK

2.1 Aboriginal and Treaty Rights

This section provides a brief overview of the legal rights of Canadian First Nations including Aboriginal rights, treaty rights and rights that are defined in Aboriginal land claim agreements. The extent of these rights, and the degree to which they may be infringed upon by government, is a developing area of law.

Canadian jurisprudence recognizes a unique category of rights that are enjoyed exclusively by First Nations. These Aboriginal rights are based on First Nations' occupation and use of the land prior to the arrival in Canada of Europeans. These rights are legally described as *sui generis*, meaning of their own kind or class. Aboriginal rights encompass a range of rights, including Aboriginal title to land. Aboriginal title is a right that is held communally by a First Nation. It affords the nation exclusive use and occupation rights to the land, for a variety of purposes.[7] Although Canadian courts have begun to define the specific nature and content of Aboriginal rights, there persists significant ambiguity regarding their extent. However, several commentators argue that with *Delgamuukw*,[8] the Supreme Court of Canada has established that Aboriginal title includes ownership of mineral resources.[9]

The inclusion of mineral ownership in Aboriginal title does not necessarily mean that First Nation owners may develop those resources. In *Delagmmukw*, the court established that Aboriginal title does not include the right to use lands in a manner that destroys the relationship between Aboriginal peoples and their lands. As an illustration, the Supreme Court of Canada states that strip mining a hunting ground would preclude further hunting in that area and would therefore be a prohibited use. In addition, there may be circumstances in which the government may infringe upon Aboriginal title, preventing its free exercise by First Nations. When, and to

what extent First Nations are precluded from developing the resources that are included in Aboriginal title, is an evolving area of law.

Treaty rights are those that are granted in the specific agreements that have been entered into by particular First Nations and the federal government of Canada. The majority of these agreements were signed in the 1800s and early 1900s. In the making of a treaty, according to the written documents that were prepared by government representatives, the First Nation party cedes title to often large tracts of land in return for benefits such as monetary payments, and hunting and fishing rights, in the area in question. In other words, the First Nation gives up all claims of ownership over the land and the government obtains title. The content and legality of these agreements is often contested by their First Nation signatories, who argue that their representatives often did not understand the complex legal documents. Many First Nations argue that the written treaty documents do not reflect the oral negotiations that took place.

Land claim agreements are modern treaties. These agreements establish a First Nation's rights with respect to a defined area of land and routinely cover resource management issues, including mineral rights. For example, the *Nunavut Land Claims Agreement*[10] grants the Inuit title to approximately 350,000 km^2 and mineral rights to approximately 35,000 km^2. Land claim agreements can also include the establishment of new institutions and regimes for regulating land and resource use in the land claim area. For example, the *Nunavut Land Claims Agreement* establishes the Surface Rights Tribunal to resolve conflicts in the land claim area. Such conflicts may occur over areas where the Inuit have the right to occupy or use the land (occupancy or usufrutory rights) but where third parties hold the subsurface rights. An example of such a situation occurs where the Inuit have been granted hunting rights to an area of land that lies within the land claim area but which is Crown-owned. In other words, under the land claim agreement, the government retains ownership of this are of land but the First Nation is granted the right to hunt on the land. As owner of such lands, the Crown may grant the subsurface rights to the land to a mining company. Because mine development and hunting are generally mutually-exclusive forms of land use, the Tribunal would be called upon to resolve this land use conflict.

Both Aboriginal and treaty rights are constitutionally protected in Canada. The federal government may still infringe on these rights, but not without the requisite justification.[11]

2.2 Mining Regulation

Mineral Tenure

Generally, mineral rights follow land ownership in Canada. Collectively, the Canadian federal and provincial governments own approximately ninety percent of Canadian land. Consequently, these parties own and control the vast majority of the country's mineral resources. However, private development of public mineral assets is secured through the "free entry" system of mine staking. This system, which ensures that tenure to mineral resources is

available on a first-come, first-served basis, is the *modus operandi* in virtually all Canadian jurisdictions.[12] Under this system, mining proponents stake (mark) an area of public land for future exploration and in so doing, establish a right to the mineral resources in the claimed area. First Nations and environmentalists have long complained that this archaic system perpetuates an ethic of exploitation and gives priority to mining over other land uses.[13]

In some situations, First Nations may hold tenure to mineral resources. Land claim agreements and treaties may assign mineral rights to their areas, to First Nation parties. Similarly, as described above, Aboriginal title may afford ownership rights to mineral resources. When First Nations own mineral rights, third parties may not stake such areas without the explicit permission of the First Nation owner. This is discussed below.

Mining Regulation

Canada is a federal state consisting of ten provinces. The Canadian Constitution identifies those subject areas over which the federal government has jurisdiction to legislate.[14] Federal law is applicable to the entire nation. The Constitution also identifies subject areas over which provincial governments may legislate.[15] Provincial laws are applicable only in the particular province where they are passed. Finally, Canada contains three territories. These areas are governed by the federal government.

The regulation of natural resources in Canada is complex. Generally, provincial governments have constitutional jurisdiction to regulate natural resource exploitation in their territories. This means that each province in Canada has a distinct regulatory system governing the mining industry. In the Yukon and Northwest Territories, the federal government is the regulator. In Nunavut, mineral development is governed through resource management agreements under the *Nunavut Land Claims Agreement*.

Adding complexity to this scenario is the jurisdiction of the federal government to legislate with respect to certain aspects of the mining industry, nation-wide. For example, the federal government has constitutional jurisdiction to regulate Canadian fisheries. Under the federal *Fisheries Act*,[16] the federal government has responsibility for the protection of fish habitat and waters frequented by fish, areas that are often adversely impacted by mining activities. Furthermore, both federal and provincial environmental assessment legislation may also apply to a mining development.[17]

Finally, Indian reserves are areas that are owned by First Nation Bands and which may only be alienated (sold or given) to the federal government. A First Nation Band is a legal entity, of which there are over six hundred in Canada, that is created under the federal *Indian Act*.[18] A Band is analogous to a community or nation of indigenous people. Bands elect governments which have jurisdiction over any reserve land that the Band may have. Indian reserves are a creation of the *Indian Act*. They are areas of land that may have been identified in a treaty or may have been established by government order. First Nations have expressed their dissatisfaction with the level of control they exercise over decisions that affect their reserves.

The development of mineral resources on Indian reserve lands is regulated by the *Indian Act* and the *Indian Mining Regulations.*[19]

2.3 When are IBAs Negotiated?

Recent decades in Canada have seen increased political and legal recognition of the rights of this country's First Nation peoples. This recognition has coincided with more explicit acknowledgement of both historical and current injustices suffered by Canadian Aboriginal people. In 1982, the Canadian Constitution was amended to explicitly protect the existing Aboriginal and treaty rights of Canada's First Nations. In addition, there is a growing and evolving body of jurisprudence in Canada that recognizes and defines First Nations' rights. In 1996, the federally-appointed Royal Commission on Aboriginal Peoples concluded its lengthy and comprehensive investigation and released an extensive report including recommendations for resolving outstanding questions on the legal, political and economic rights and responsibilities of Canada's Aboriginal peoples. Several fora have been established to resolve outstanding Aboriginal land claims. In 1999, the new territory of Nunavut was created, a process that included the ratification of a land claim agreement that protects the land and resources of the Inuit.

Despite these achievements, the legal, economic and social condition of First Nations in Canada is far from satisfactory. However, the slow advances described above are important accomplishments and have resulted in wider recognition of the legitimate role of First Nations in governance and economic development. This backdrop has supported the increasing prevalence of IBAs.

Impact and benefit agreements in Canada are negotiated for different reasons, depending on the particular First Nation's land and resource rights, the regulatory framework that is in place and the relationship that exists between affected communities and the mining company.

Land Claims

Where land claims have been settled, the First Nation may own surface and subsurface rights to some areas within the land claim settlement area. Such ownership allows the First Nation to control whether and how mining can proceed. Generally, the First Nation will have developed a mineral leasing or permit system for third parties that are interested in developing First Nation mineral reserves. Such regulatory requirements allow First Nations to impose the negotiation of an IBA.

There may also be portions of a land claim settlement area where the First Nation owns just the surface land, while the Crown owns the subsurface rights. In such cases, the land claim agreements often grant First Nations a significant degree of control over access to the land.[20] As discussed above, land claim agreements usually include arbitration provisions for those situations where the First Nation and the holder of the subsurface rights cannot reach an

agreement on surface access. Such agreements generally include compensation to the First Nation in exchange for access to its land.

There are also likely to be portions of a land claim settlement area for which the Crown owns both surface and subsurface rights. The First Nation may still exercise some rights, such as notification and consultation rights, regarding the use of this land.[21]

Outstanding land claims or land claims negotiations may serve as sufficient initiative for mining companies to enter IBA discussions with First Nations. For example, in the case of the Raglan mine in Northern Quebec, the mining company Falconbridge agreed to negotiate with the native Makivik corporation because the federal government had recognized an Inuit claim as meriting negotiation. Although the claim area did not include the mine, it could potentially have affected mine transportation routes.[22]

Furthermore, a land claim agreement may explicitly require the negotiation of IBAs for resource exploitation activities. This is the case with the *Nunavut Land Claims Agreement* which requires that an Inuit Impact and Benefit Agreement (IIBA) be negotiated between the company and the involved Inuit organisation prior to the commencement of a "Major Development Project"[23] and provides a list of the issues that are appropriate for inclusion in IIBAs. The federal Minister of the Department of Indian and Northern Affairs exercises some powers with regard to the coming into effect of an IIBA.

Likewise, the *Inuvialuit Final Agreement* in the Northwest Territories establishes provisions for the negotiation of different types of agreements which fulfil some of the functions of IBAs. The negotiation of a "Participation Agreement" is mandatory when permanent access is granted to Inuvialuit lands in order to undertake significant commercial activities such as mining.[24]

Aboriginal Rights

When land claims are outstanding, mineral rights may be unclear, particularly if there are conflicting claims. However, First Nations may exercise some rights regarding land use decisions for these areas, possibly as part of their constitutionally-recognized Aboriginal rights. This is an evolving area of law.

Government Policy

In other instances, where IBAs are not sought through First Nation and or resource rights nor are required under a land claim agreement, government may demand that an IBA be negotiated for a specific project, on an ad hoc basis. Such a requirement may be part of an overall social policy to benefit Aboriginal communities or may result because the mine is predicted to have a significant social and/or environmental impact. In the case of the Ekati mine in the Northwest Territories, the mining company BHP and aboriginal organizations voluntarily entered into IBA negotiations. During the approval process for a water license, when an agreement was not yet forthcoming, the Minister of the Department of Indian Affairs and Northern Development

(DIAND) made the granting of the license conditional on there being "satisfactory progress" in the negotiations during a 60 day period. The negotiation of IBAs is now considered to be a *de facto*, albeit unwritten, regulatory requirement in the North.[25]

Governments may also require negotiation on a case-by-case basis in order to satisfy their fiduciary obligation towards Aboriginal peoples. This requirement may be imposed more frequently in areas where land claims are outstanding. Canadian governments' fiduciary relationship with First Nations requires them to act in the best interest of First Nations and to protect Aboriginal rights.

Private Sector Initiative

Finally, mining companies may view IBAs as a beneficial tool and thus be willing to negotiate them despite the absence of legal requirements to do so. IBAs can be a good public relations practice and can help garner local support for a project, thus reducing its social risk. In addition, when mining is taking place in remote and isolated areas, these agreements may be a way to secure a labour force for the mine at reasonable cost.

2.4 The Legal Status of IBAs

IBAs are commonly treated as private contracts between the signatories. For example, the *Nunavut Land Claims Agreement* states that IIBAs "may be enforced by either party in accordance with the common law of contract."[26] Where there is no such legal provision, IBAs may specify that they be applied in accordance with the law of contract. However, at least one commentator has warned against the characterization of IBAs as purely private contracts, given the role that they may play in the regulation of mining activities, such as when they are encouraged or required as a precondition for the granting of a government license or permit.[27] In such cases, IBAs may have characteristics of both contractual and regulatory instruments.

3.0 PRE-NEGOTIATION

An IBA usually is, and should be, the result of a process of community consultation and capacity-building. The mine at issue may be the community's first experience with the mining industry, people may not be aware of the positive and negative impacts of mining activities and therefore, may have a difficult time deciding what to include in an IBA. The community may also be divided regarding whether mining should proceed in their territory and if so, under what conditions.[28] As a result, before entering into negotiations with a company, band councils or leaders usually discuss the impact of mining at the community level and obtain a "mandate" from the community. The problem however, is that very often IBA negotiations occur within short time frames that do not allow communities to digest all the information about the project, seek advice from consultants with appropriate expertise and make an informed decision.

Defining a negotiating position from the outset has several advantages. First, the process of consultation that is undertaken in order to arrive at such a position develops awareness among community members about the issues at stake and engages them in the process.[29] Second, having a clear position on paper increases the chances of promoting one's agenda. In this way, the community's priorities, and not the company's, will form the starting point for negotiations. Finally, the community's position also represents a benchmark for measuring progress in the negotiations and developing alternative proposals in the case of standstill.[30]

Before entering into the negotiation of the IBA, some communities have found it useful to sign a memorandum of understanding or agreement in principle to establish the "rules of the game" for the negotiation, identify the negotiators on both sides and specify the communication channels to be followed. While the negotiation of such a memorandum is a time consuming task, it can also avoid problems down the road, such as the failure of the parties to comply with their obligations during the negotiation, leader cooptation or use of the "divide and conquer" strategy by the company.[31]

Where multiple First Nation parties negotiate separate agreements with the same company, it may be useful for the First Nations to agree on principles of cooperation such as which what decisions can be made independently and which must be made jointly, and whether there is a "privileged" party in the agreement that receives greater benefit (for example, communities that live closer to the mine and which therefore will be more greatly affected).

4.0 IBA CONTENT

This section provides a brief discussion of the contents of impact benefit agreements. While earlier agreements focussed on employment, more recent IBAs may include environmental restrictions, social and cultural programs, dispute resolution mechanisms and revenue sharing provisions, among other elements. In the context of government cutbacks to social programs and environmental regulation, the wide scope of these agreements and the reduced government role in their negotiation and execution has led to criticism that IBAs are a form of government downloading that sees companies act as welfare providers and communities as environmental watchdogs.

There is no formula for the drafting of an IBA. While the following discussion includes examples of the issues that are most commonly addressed in impact benefit agreements, the particular provisions will ultimately depend on the expectations and needs of each community, as well as the predicted impact of the mine. Examples of some agreements have been included by way of illustration.

4.1 Introductory Provisions

IBAs commonly include an introductory section that identifies the parties to the agreement, provides information about their legal rights, states the purposes and the objectives of the agreement,[32] defines the terms and acronyms used in the agreement and specifies when the agreement comes into force and when it terminates. Where there is a government party to the agreement, the preamble may refer to the link between the IBA and government policy objectives, land use planning goals or social programs.

As explained above, companies may view IBAs as a tool to secure First Nations' support for a project and may insist that this be a stated purpose in the agreement. By the same token, companies may seek to include, in this introductory section or elsewhere in the text, a clause prohibiting First Nation parties from opposing a project during the government licensing or environmental assessment process. For example, the model agreement used by BHP states that:

> [i]n consideration for [the company] entering into this Agreement, the [group in question] will not object to the issuance of any licenses, permits, authorisations or approvals to construct or operate the Project required by any regulatory body having jurisdiction over the Project.[33]

In the case of the Ekati mine, this clause prevented at least one First Nation from objecting to the decision by the Northwest Territory Water Board to grant a water licence to BHP, while denying First Nation communities compensation for the impact of this licence on their water use. The inclusion of such clauses should be avoided, particularly where IBAs are negotiated at an early stage of a project when information about its predicted impacts may be insufficient or uncertain.[34]

The introductory section may also include a description of the project, its phases and duration, the estimated size of the deposit and the infrastructure it will require, or a reference to a document containing such information. This serves various purposes. First, it is a point of reference for the commitments related to the project. In addition, clearly describing the works to which the agreement applies, including ancillary infrastructure, reduces opportunities for disagreement should the project expand in the future. It will be much clearer when operations have expanded beyond their original scope, requiring amendment to the IBA or the negotiation of a new agreement. Finally, identifying the phases of the project (initial and advanced exploration, construction, etc.) may also be useful in the design of social and employment programs, as project needs and impacts may vary from phase to phase.

4.2 Employment

Provisions regarding the employment of First Nations in a mining project are usually a central focus of IBAs. Entry into the mining workforce is often difficult for aboriginal people because of differing educational backgrounds, lack of experience in the sector, the presence of cultural barriers and discrimination at the workplace and the imposition of work schedules that are

unfamiliar to aboriginal people (for example, the fly-in, fly-out system). As a result, IBAs often incorporate complex employment provisions that may include some of the following:

1.- A hiring policy that gives preference to First Nation job candidates and sets targets or quotas for First Nation employment in the project – whether in the form of a number of jobs, or a percentage of the total employment offered at the mine. This policy may establish some equivalence between work experience and schooling, so that indigenous people who have little or no formal education are considered in the hiring process. It may also specify requirements regarding the advertising of available positions in order to give advance notice and priority to aboriginal people (for example, in aboriginal newspapers).

2.- Other strategies to maximise aboriginal participation in employment, such as the creation of programs to keep First Nations informed about job opportunities in the project and the skills required for those jobs, about available training opportunities, etc.

3.- Provisions to ensure that aboriginal people are the least affected in the case of a lay-off by, for example, giving priority to aboriginal status over seniority.

4.- Provisions that help remove the cultural hurdles to aboriginal participation in the workplace. These can include flexible work schedules to accommodate traditional activities such as hunting and trapping, facilities to allow the preparation of traditional "country" food in the work camp, specifications about housing in the camps, a requirement to use First Nation languages at work,[35] cross-cultural training for both First Nation and non-First Nation employees as a way to prevent discrimination, and career support mechanisms for First Nation employees (for example, counselling). These provisions are important to ensure that aboriginal people feel comfortable at work, thus reducing employee turnover, a problem identified in some of the cases analysed for this report.

5.- A clear definition of the procedures for employee evaluation and advancement, as well as labour relations and employee discipline rules, with the purpose of avoiding discrimination against Aboriginal people by superiors. In some instances, this information has been translated into aboriginal language.

6.- Training and apprenticeship programs for Aboriginal people, educational programs in primary and secondary schools regarding the mining industry, and scholarships that allow local people to study careers related to the mining industry. Where there is a government party to the agreement, communities may demand that it cover some of the expenses of this training.

7.- Specific formulae for calculating Aboriginal participation in the workplace and a requirement that the company collect and publish the information necessary to calculate Aboriginal participation.

8.- A provision ensuring that subsidised transportation is provided from the communities to the work site. Where Aboriginal-owned transportation companies are available, IBAs may call for the hiring of these local contractors.

IBAs may also create a joint company-First Nation committee to oversee the enforcement of the employment-related clauses, to address employment issues on an ongoing basis, and to design and implement labour development plans. These plans are prepared regularly (for example, annually) in order to modify IBA employment requirements in response to changing circumstances and when employment strategies prove ineffective. The plans also establish deadlines for meeting Aboriginal employment targets. An Aboriginal employment coordinator may be hired to act as a liaison between the company and Aboriginal workers.

Minerals are non-renewable resources that offer finite opportunities for economic development. In addition, mining projects can be put on hold due to factors beyond the control of a company or First Nation such as a drop in the value of a mineral on the international markets. For these reasons, it is essential that First Nation communities consider their employment opportunities in the long run when negotiating IBAs. It is advisable that communities seek investment in education and training in skills that are transferrable to other industries.[36] Some IBAs go beyond this and include provisions to help First Nation employees find alternative work when the mine closes.

Finally, IBAs may demand that some of the above requirements be imposed not only on the mining company but also on its contractors and subcontractors, which are not usually parties to the agreements.

4.3 Economic Development and Business Opportunities

This section of an IBA promotes the establishment and development of aboriginal businesses that can supply the mining company with necessary goods and services.

Agreements often include a clause obliging the mining company to give priority to Aboriginal businesses when awarding contracts. This may include the setting of specific target such as the provision of a certain percentage of the mine's needed goods and services by Aboriginal businesses. IBAs may specify the formula to be used for calculating Aboriginal content in tenders. The achievement of Aboriginal-content targets can be facilitated by requiring that the company inform Aboriginal organisations about contract opportunities before publicly advertising them. Failing the identification of an appropriate Aboriginal business, the IBA may require that the non-Aboriginal business wining the contract employ as many Aboriginal people as possible. The company can also be asked to give a detailed written explanation to those First Nation bidders that are unsuccessful in securing contracts.

Very often, Aboriginal businesses do not have the technical, institutional and financial capacity and expertise to provide the goods and services that are needed by a company and to present successful tenders within a limited time frame. Some IBAs try to address this issue by:
a) requiring the mining company and to provide information about the company's tendering process,
b) requiring the mining company or government to give or fund workshops on how to prepare tenders,
c) providing extensions to Aboriginal businesses in the preparation of tenders,
d) requiring that the company assist Aboriginal businesses to secure financing by, for example, providing them with letters of intent or conditional contracts[37] or by encouraging Aboriginal and non-Aboriginal enterprises to form joint ventures,
e) requiring that the company give Aboriginal businesses advance payments in order to help them to initiate contracts,[38]
f) allowing aboriginal businesses to use the company's infrastructural services, such as roads and airstrips, and
g) "unbundling" contracts. This refers to the division of complex contracts into smaller, simpler components that are tailored to specific Aboriginal businesses.

A joint company-First Nation committee may be established to facilitate the involvement of Aboriginal businesses in a project and to facilitate communication between the parties. Such a committee can be granted responsibility for the monitoring and reporting requirements that may be established under an IBA regarding the involvement of First Nations' businesses in the mining project. In addition, an Aboriginal coordinator may be hired to assist Aboriginal businesses to take advantage of contract opportunities offered by the company.

IBAs may list the goods and services that the project is predicted to need during its lifespan in order to help communities identify business opportunities. Finally, some IBAs call for the creation of an Aboriginal business registry that can be made available to the mining company. Funding for the creation and maintenance of such a registry should be specified in an IBA.

4.4 Financial/Equity Provisions

IBAs may include clauses ensuring that local communities receive other economic benefits from the mine, apart from employment. These benefits commonly include royalties, profit shares or fixed cash amounts that are linked to specific events in the lifetime of the mine.[39] They may also include equity interests in the project, with possible representation of First Nation parties on the company's board of directors.

Equity participation in mineral development is a way in which First Nations can secure funds to invest in capacity-building and economic diversification, while building entrepreneurial, financial and administrative capacity. However, equity participation poses the risk of negative returns. In addition, Aboriginal communities often lack the initial capital needed to acquire such equity.

The section of an IBA that is focussed on financial contributions may also include compensation to individuals who suffer losses caused by the operation of the mine for example, hunters.[40] Compensation mechanisms are important because a mine may have impacts that are greater than those predicted. IBAs may also specify the process to determine who is an "affected" party and the method to be used for calculating compensation.

When drafting IBA clauses related to economic opportunities or compensation, it is useful to keep in mind that mining often causes significant economic inequalities within a community. Mining can enhance the income opportunity of some (those who are able to secure jobs or contracts at the mine, those who receive compensation) while undermining the sources of income of others (those whose land is expropriated or polluted, those who depend on wildlife that is adversely affected by mining activities, etc).[41] A mechanism to address these imbalances may be necessary to help affected groups could be useful.[42]

4.5 Environmental Protection

Environmental provisions may be found in the body of an impact benefit agreement or in the form of a schedule to the agreement. The parties can also negotiate an environmental agreement that is separate from the IBA.[43] The environmental provisions contained in IBAs supplement all applicable environmental laws and regulations. In jurisdictions where these regulations are weak or ambiguous, or in the case of projects that are not required to go through an environmental impact assessment, this section may be a First Nation's only chance to ensure that the environmental impact of the project will be minimised.

Where an environmental impact assessment (EIA) is required and has been conducted, an IBA can include, either in the main body or in the form of an attachment, an analysis of the project's anticipated impacts, the measures that will be taken to minimise them and sometimes, a commitment to explore alternatives to particularly damaging practices.[44] If the IBA is signed prior to the commencement of the EA process, the agreement may establish guidelines and mechanisms to ensure First Nation participation in that process.

It is advisable that communities establish their own environmental standards and seek to incorporate these standards in an IBA. Existing legal standards may be weak or unclear. They may also be unsuitable for First Nation communities which often rely more intensively on natural resources than urban communities and which often place cultural and spiritual value on nature. Furthermore, existing standards are vulnerable to amendment. Indeed, in recent years, the mining industry has lobbied against prescriptive standards in Canada and for the weakening of environmental regulations.[45] The establishment of more stringent environmental requirements than those that exist at law should avoid the use of qualifiers such as "suitable" or "satisfactory." Instead, parties should seek to establish clear, quantifiable, prescriptive requirements that a court could unambiguously interpret and enforce.

Some First Nations require that specific measures be taken to minimise the impact of a mine on wildlife and sites of economic or cultural importance for First Nations. For example, the impact of mining activities on caribou herds is a common concern in IBAs in the North,[46] as well as in the work of the Independent Monitoring Agency for the Ekati mine. IBAs can also include special provisions for the protection of burial sites.

In most cases, baseline studies are needed to quantify contaminant levels prior to the initiation of mining activities. These data can be of enormous value for the company's environmental management plans, to environmental regulators and to the judiciary, should it be called upon to enforce an IBA. Baseline studies are especially important where there were previous mining or industrial operations in order to establish where the new operator's responsibility begins. IBAs may require that the company complete these baseline environmental studies and disseminate them among First Nations, or complete them jointly with First Nations.

An IBA may establish an independent monitoring system and/or a monitoring committee. Such a committee would grant First Nation parties the right to undertake environmental monitoring in order to assess compliance with company commitments and to verify company reports regarding environmental performance. An IBA may also reaffirm the right of First Nations to access the company's monitoring locations in order to take samples. Because conducting independent monitoring can be very expensive, the IBA should specify who will fund these activities, be it the company and/or government.
Members of the monitoring committee should have discretion in the expenditure of the funds. An interesting example of such a group is the Independent Monitoring Agency established for the Ekati mine, which receives funding by the government and the company BHP. The Agency has seven members which are appointed by government, the company and the community.

IBAs can establish formal mechanisms for ongoing consultation on the company's environmental management plans and mitigation measures. By specifying the Aboriginal organisation or representative that is to be consulted and the procedure to be followed for such consultation, First Nations can increase their chances of having real input into decision-making and reduce the likelihood of the company using the "divide and conquer" strategy. IBAs may also include a restriction that certain parts of the environmental management or mine closure plan may not be changed without Aboriginal consent.

IBAs may also include contingency measures and may specify the events or pollution levels that would trigger their use. These trigger points should reflect Aboriginal concerns (for example, they could include pollution measurements in wildlife or crops) and should be low enough to prevent irreversible damage. Financial assurances for implementing these contingency measures should be provided up front, so that implementation does not become embroiled in dispute, allowing on-going pollution.

An IBA may require that the company prepare an inventory of all the products and materials that will be used in the mine, plans for the storage and handling of such substances, and contingency plans in the event of spill or discharge. Such inventories should be disseminated to

First Nation parties, who should have the ability to explicitly prohibit the use of certain products.

A contentious issue regarding the environmental impact of mining is a company's obligations regarding mine closure and reclamation. Most Canadian jurisdictions require companies to file a closure/reclamation plan for each mine. However, because some impacts such as acid mine drainage can adversely affect the environment for decades after mining operations have ceased, and because there are already many polluting "orphan" mines in Canada,[47] this is an area that indigenous communities and environmentalists would like to see more heavily regulated. Among companies, there has been a tendency to lobby for "exit tickets" that allow them to surrender the closed mines to the Crown and be free of any future liability. Other companies fold or declare bankruptcy, in which case responsibility for environmental damage is difficult to enforce.

One way to solve the problem of abandoned mines is to negotiate the provision of a trust fund or security deposit by the company, specifically targeted towards covering future reclamation costs. This money can be returned to the company once the mine and surrounding areas are clean and reclaimed (for example, upon receipt of clean samples from pre-defined areas), and following the passage of a defined period of time that should be long enough to cover unforeseen long-term impacts. Financial assurances for mine reclamation are already required in some Canadian jurisdictions, but they have been under attack by the mining industry.[48]

Finally, IBAs can also affirm the right of First Nations to claim damages for environmental harm incurred as a result of the construction or operation of the mine,[49] as well as for economic losses caused by this environmental damage, such as the loss of cattle or wildlife. In some cases, a methodology for calculating those damages is specified.

4.6 Social and Cultural Issues

Mining projects can have huge social and cultural impacts on local communities. Negotiations with mining companies can be very time and resource consumptive and can cause divisions within the community. Mine construction and operation usually brings outsiders and with them, new traditions and at times, discrimination. Local workers have to adapt to new, at times demanding, work schedules (such as the "fly-in-fly-out schedule"), which often results in less time for traditional activities like hunting and time spent with family. These changes can cause a great deal of tension within First Nations communities, can negatively impact on traditional cultural practices and can result in increases in alcoholism, child neglect and domestic violence.

As a result, IBAs may include provisions to minimize the potentially negative social and cultural impacts of mining projects. These provisions vary and can be wide-ranging. They may include a general prohibition on the accessing of Aboriginal lands, hunting grounds, and burial and sacred sites by non-Aboriginals. Moreover, an IBA may place positive obligations on a company to develop social programs such as counselling services in order to help Aboriginal

communities deal with stress, financial and infrastructural support for community projects or recreational programs, and special provisions to protect social groups at risk, such as women and children.

Social impact assessments and anthropological or social baseline studies provide key information to develop social programs and to protect the interests of the community. In Canada and Australia, there are interesting experiences where aboriginal people have conducted such studies themselves or have become significantly involved in their development.[50] Such involvement can act as a catalyst for community discussion about the mine, create awareness about its impacts and define the community's goals and aspirations in the negotiation with mining companies. In the case of the Ekati mine, the participation of community elders in such investigations has played an important role in identifying burial and hunting sites that require protection.[51]

IBAs may include the development of programs and/or committees to monitor the social and cultural impacts of a mine. In the case of the Ekati mine, the Lutsel K'e Dene First Nation is conducting a series of studies in relation to the impact of the mine, some of which rely heavily on traditional knowledge.

The impact of mining projects on women is an area that is increasingly drawing attention among First Nation communities, non-governmental organizations and academics and that in the future may be reflected in IBAs. Because employment opportunities at mines have traditionally been male-oriented, and because women are often disproportionately impacted by the social problems associated with mining (for example, an increase in alcoholism and overall tension in the community may lead to more domestic violence; inflation caused by mining may affect women-headed households disproportionately, etc.), it is often held that women "stand to gain the least and lose the most" with mineral development.[52] This is a concern of the Inuit and Innu women of Labrador who face a proposed mineral development in Voisey's Bay. They called for a study of these issues in the assessment review process for the mine – including the use of gender-specific methodology.[53]

The granting of monetary compensation or preferential employment opportunities to Aboriginal people may lead non-Aboriginals who live and work in the area to feel that they are being discriminated against. While addressing the complex issue of Aboriginal rights in Canadian society is obviously beyond the scope of an IBA, communities can take measures to minimise these tensions. Such measures could include the establishment of programs to create awareness among non-Aboriginal people of the purpose and rationale of an IBA and that foster a greater understanding of Aboriginal cultures. In such programs, it is important to emphasise that the benefits that Aboriginal communities receive under IBAs are compensation for the mineral and other forms of wealth that companies extract from their territories, often at the expense of disturbing the environment and community life.

5.0 IBA IMPLEMENTATION AND ENFORCEMENT

Despite several decades of IBA negotiations in Canada, the corresponding literature is fairly recent and includes little analysis regarding the success of these agreements. Different variables affect the extent to which an IBA may succeed in accomplishing its objectives, such as how committed the parties are, how realistic their expectations, how much information the Aboriginal party has access to and how clearly drafted the agreement and its implementation plan are.

An IBA may establish an implementation committee, sometimes also called coordination or management committee. This committee usually consists of representatives of the company and First Nation, and may also include independent members that are jointly appointed.[54] Its main role is to keep regular, open communication between the parties, to promote compliance with the objectives of the agreement, to serve as a forum to discuss and resolve implementation problems and to appoint special committees or staff to conduct specific tasks. In addition, other committees may be established to address specific issues on a regular basis such as employment and environmental management. IBAs can also include requirements for their formal periodic evaluation. This can be carried out by the implementation committee or by independent consultants.

It is common for IBAs to be written in vague language, with ambiguous terms that hinder their implementation and enforcement. Commitments like "to take all reasonable steps", "to make reasonable efforts" or "provided that there is no adverse economic effect on the cost of the project"[55] present a problem when a third party such as government, court or arbitrator has to adjudge whether the agreement has been breached.

Some IBA provisions such as financial provisions or environmental commitments should be made very specific by setting out numeric standards and by specifying penalties in case of breach. However, other provisions, such as those dealing with business and employment opportunities, are more useful when drafted in a way that allows for flexibility and adaptability to mine progress and changes in mine needs. The mechanisms and responsibilities for the periodic review of these issues should be clearly specified, however.

It is advisable that an IBA establish dispute resolution mechanisms and require that these mechanisms be exhausted before more confrontational and costly enforcement measures, such as litigation, are resorted to.[56] However, First Nations should also have the option of accessing Canadian judicial avenues if needed, by ensuring that they have the financial means to do so and that the terms of the IBAs can be unambiguously interpreted by a court.

Some First Nations in Canada have tried to include financial incentives or penalties to encourage corporate compliance with IBAs. For example, the Labrador Inuit Association has signed an agreement in which employment quotas are linked to revenue. The Association wins a percentage of the company's profit margin if, in a particular year, the company does not fill the designated quota of Inuit employees. However, this approach runs the risk that it will be difficult to secure additional jobs beyond the quota and that the company may insist on penalising the community if it cannot provide enough employees to fill the quota.[57]

IBAs usually contain a standard clause stating that the agreement may be negotiated or amended under certain circumstances, such as the expansion of the project.[58] Where IBAs are signed at an early stage of the project, amendment or renegotiation clauses are useful because it may be hard to anticipate all of the project's impacts at such an early stage. IBAs may also be changed or renegotiated simply upon agreement of the parties.

6.0 CONFIDENTIALITY

Confidentiality is often imposed by the corporate party during IBA negotiations. The parties can discuss the agreement with third parties in a general way but cannot go into specific details. Some IBAs also include a clause that forbids the First Nation party from releasing any confidential information obtained through the negotiation of the agreement, after the negotiation has ended, except when there is a legal obligation to release such information. In other cases, the entire agreement is confidential.

Confidentiality clauses are a contentious issue. While it is understandable that a company may wish to treat some parts of an agreement confidentially, such as those clauses that could affect its share price, confidentiality clauses significantly limit the extent to which Aboriginal communities can learn from each other's experiences and the extent to which the general public and government are informed about such agreements. In addition, when multiple First Nation parties negotiate separate agreements with the same company, confidentiality prevents them from working together, strengthening their bargaining position and negotiating fair agreements. Confidentiality clauses should be avoided.

7.0 COST OF IBAs

Starting with the process of community consultation and finishing with the closure of a mine, negotiating and implementing an IBA is an expensive process. Consequently, the issue of funding needs to be addressed from the beginning. While the availability of funds for an affected community will not place them on equal footing with a mining company, it will significantly improve the community's bargaining position and its possibilities of enforcing an agreement.

Negotiation costs include travel expenses, legal and environmental expertise and information dissemination among community members, among others. Some IBAs require that the company reimburse Aboriginal communities for the costs incurred in their negotiation.[59] However, these communities may not have money to pay the costs up-front or the ability to obtain loans. In Canada, some First Nations have secured money from the company in advance of the negotiation process, without restrictions regarding the consultants or lawyers that they could hire. In other instances, government has provided funding for IBA negotiations. This was the case with the first Inuit Impact and Benefit Agreement which was negotiated between Echo Bay Mines and the Kitikmeot Inuit Association.[60]

Implementation and enforcement of an IBA is also an expensive task. The various committees have expenses and their members have to meet, often travelling long distances and neglecting economic activities. Conducting environmental monitoring requires the hiring of experts and the use of sophisticated equipment. Where controversies arise, there are costs involved in the hiring mediators. IBAs should clearly specify how these expenses will be paid.

In addition to the monetary costs, there are the social costs of having community leaders consumed by the often prolonged information-gathering and negotiation processes associated with IBAs. This takes what are often scarce human resources away from other important issues such as land claims and social issues.

8.0 LIMITATIONS AND TRAPS

This section includes reflections that are based on Canadian First Nations' experiences with IBAs and on the critiques of several commentators:

It is impossible to overestimate the importance of considering IBA implementation during negotiation. Parties should strive for a consensus-based implementation plan that unambiguously sets out roles and responsibilities.

Unless the IBA (or some other mechanism such as a land claim agreement or a revenue - sharing agreement) includes a measure for revenue sharing, the economic benefit received by a community will be very localized. In other words, there will be no regional benefit, despite the possibly of there being widespread impacts from mine operations. This scenario is especially problematic in situations where the provincial or central government does not collect royalties that are reinvested in affected regions.

When there are multiple First Nation parties, the use of bilateral negotiation strategies may result in competitiveness among affected communities. This is especially the case where the negotiations are confidential. Communities can insist that negotiations be collective and open in order to avoid the use of the "divide and conquer" strategy.

There is little guidance regarding what an IBA should contain and exactly which provisions a First Nation should seek. According to the Kitikmeot Inuit Association, even where the negotiation of IBAs is mandated under a land claims agreement, as is the case under the *Nunavut Land Claims Agreement*, and the land claims agreement gives guidelines regarding IBA content and procedure, there is still too much latitude in the negotiation of IBAs and too much uncertainty about the roles and responsibilities of the different parties.[61] This situation arises because there are no formal regulatory guidelines for the negotiation of IBAs in any jurisdiction in Canada. As a result, the strength of the agreement from a First Nation perspective often depends on the community's bargaining power. This unfortunate situation leads to inconsistency and calls into question the value of the impact benefit agreement as a tool for achieving public policy goals.

IBA negotiations can last for *years*. The financial and human resource costs are very great.

A common reason for the failure of an IBA is the premature closure of the mine. This should be contemplated during negotiations and should be addressed in the agreement.

The economic development goals of IBAs have not always been met. There is often a poor match between the mine's needs and the skills and interests of First Nations people. Employment quotas are rendered meaningless if there aren't Aboriginal people who are qualified to fill needed jobs. It is necessary to have a long lead-up time (pre-operation) for skill development and education, allowing First Nations to have meaningful participation in the mining sector. The alternative is for First Nations to fill positions that require little or no training. This curbs sustainable economic development and breeds dependency.

There is scepticism about whether IBAs are good tools for the promotion of long-term Aboriginal economic development given the boom-bust nature of mining.

Mechanisms must be established beforehand in order to permit communities to make collective decisions about the management and allocation of cash payments.

There is a concern that the use of IBAs for environmental regulation purposes will undermine the development and application of strong, universally-applicable legal regulatory systems. Moreover, the tying of environmental performance to negotiations concerning the transfer of economic benefits may result in trade-offs that weaken environmental protection.

Information from environmental and/or socio-economic impact assessments could be very useful to First Nations in their IBA negotiations. First Nations may therefore insist that such studies be undertaken pre-negotiation.

IBAs should address major changes in circumstances such as the sale of the mine. In particular, it should be decided whether the purchasing company will be obliged to honour the agreement or whether a new agreement will be negotiated.

9.0 CONCLUSIONS

Impact and Benefit Agreements are one way to address many of the social, environmental and cultural impacts of mining projects and to ensure that local communities benefit from these projects. However, the contribution of commercial mining operations to community development depends on the type of agreement that is negotiated, how it is drafted, whether it is conceived with a long-term vision and how it is linked to development policy. This, in turn, depends on the legal protection, government support, financial resources, and access to expertise and information that Aboriginal communities are afforded.

The experience of First Nations in Canada in the negotiation of IBAs is instructive. Recommendations that First Nation communities and legal advisors have to offer about IBAs include:

1.- Form a good negotiation team, with people who can represent the interests of all the sectors of the population involved, as well as experts in environmental, legal and mining issues. Try to separate the team from the internal politics of the community (particularly if there is a high turnover of leaders or chiefs).

2.- Secure funding. Forming a team, developing a plan, and negotiating and implementing an IBA can be very expensive. IBAs should include generous provisions for covering the costs of implementation committees, reporting and consultation. Ideally, the company should cover some or all of these costs.

3.- Develop a good plan. Make sure that your community understands the impacts of mining and what is at risk by holding discussions at the community level and where possible, request that the company/government give you enough time to consult with your community. With the help of experts, develop a negotiating position that can serve as a reference. Be clear as to which elements are non-negotiable.

4.- Establish cooperation principles between the parties (mining companies, government, other communities). This can be done by signing a memorandum of understanding.

5.- Keep a long-term perspective in mind. Do not settle for a few jobs and recreational programs at the expense of neglecting environmental protection and community development. Invest in training, skills development and economic diversification.

6.- Make agreements as specific as possible, so that they can be enforced. Avoid vague language. Clearly specify responsibilities and targets and time frames for meeting them, formulas for calculating aboriginal employment and participation in economic development, environmental standards, and contingency measures and the indicators that trigger them.

7.- Establish conflict resolution mechanisms that can be resorted to before taking more radical and costly measures like going to court or trying to close down the mine's operations.

8.- Maintain communication with the company. IBAs are just one component of a relationship between the company and the community that has to be continuously nurtured.

9.- Do not agree to clauses that compromise the community's sovereignty or its right to object to a particularly damaging practice. Avoid stating that the purpose of the agreement is to support the project. The benefits that a community receives are a share of the wealth that a company takes from the community's territory and is compensation for the environmental and social impacts that mining will have. Communities do not need to compromise their power in exchange for such compensation.

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1. CELA examined some IBAs and relied on analysis of other agreements (e.g. Kennett 1999b). In the case of the Ekati mine, whose agreements are confidential, model agreements were used.

2. The proceedings from the workshops "Between a Rock and a Hard Place" (1999) and "On the Ground Research" (2000) can be found at www.miningwatch.ca.

3. "Impact and Benefit Agreements" is not the only label under which these agreements appear. In Canada, they are also called Human Resources Development Agreements, Socioeconomic Agreements, Participation Agreements, Cooperation Agreements, etc. Sometimes the name reflects the content of the agreement. However, from a legal perspective, the name is not important, so long as the terms and purpose of the agreement are clearly defined and the agreement is enforceable (Keeping, 1998).

4. Earlier agreements between government and mining companies were most commonly called "Socio-Economic Agreements."

5. Keeping, 1998 at 5.

6. For example, in Canada, the Tahltan Development Corporation represents three Tahltan communities in Northwest B.C. and has established an Advisory Group on Mining to handle the workload involved in the negotiation with mining companies. Likewise, in the Northern Territory in Australia, the Central Land Council represents traditional landowners in their negotiation with development proponents. This practice has strengthened the position of Aboriginal parties in negotiations (CLC 1994, 1998).

7. *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (SCC).

8. *Ibid.*

9. See EAGLE and EMCBC, 2001, Patterson, 2001, and Isaac, 1999.

10. *Nunavet Land Claims Agreement* (Ottawa: DIAND, 1993).

11. See *R. v. Sparrow*, [1990] 3 C.L.N.R. 160.

12. Exceptions include the provinces of Alberta, Nova Scotia and Prince Edward Island (Chambers and Winfield, 2000).

13. For a critique of the free entry system see Bankes and Sharvit, 1998.

14. For example, criminal law.

15. For example, education.

16. *Fisheries Act* R.S.C. 1985, c. F-14.

17. For an overview of the environmental regulation of mining in Canada, see Chambers and Winfield, 2000.

18. R.S.C. 1985, c. I-5.

19. C.R.C. 1978, c. 956. The *Indian Mining Regulations* do not apply to British Columbia. Instead, mineral development on Indian reserves in that province is governed by the 1943 federal-provincial BC Indian Reserves Mineral Resources Agreement.

20. For example, the Sahtu Dene Metis and the Gwich'in comprehensive land claims agreements in the Northwest Territories require that a developer attempt to negotiate an access agreement with the First Nation. (Kennett, 1999b).

21. For example, the Sahtu Dene Metis and the Gwich'in comprehensive land claims agreements. (Kennett, 1999b).

22. O'Reilly and Eacott, 1998.

23. Article 26 of the Nunavut Land Claim Agreement defines a Major Development Project as one that entails the "development or exploitation, but not exploration, of resources wholly or partly under Inuit owned lands" and the hiring "during any five-year period, [of] more than 200 person years of employment or entails capital costs in excess of thirty-five million dollars ($35,000,000.00), in constant 1986 dollars" (quoted in Keeping, 1999 at 53).

24. Keeping, 1999 at 31.

25. See Kennett, 1999b, and Personal Communication, Doug Paget, DIAND, October 12, 2001.

26. Article 26.9.

27. Kennett, 1999b.

28. At times these divisions correspond to differences within the community in terms of economic activities (for example, farmers may be more opposed to mining than truck drivers), age (because elder people may seek to preserve traditional culture whereas young people may want jobs at the mine), gender (because work opportunities at mines have traditionally been more available to men, whereas women tend to carry the impacts of mining more heavily), etc.

29. The experience of the Innu in Labrador through the work of the Taskforce on Mining Activities was very interesting in this regard (www.innu.ca).

30. See the analysis of the Cape York negotiation model in O'Faircheallaigh, 2000.

31. In the case of the Raglan Agreement, the Makivik Corporation signed a Memorandum of Understanding with Falconbridge. The Innu Nation has also drafted a document entitled "Mineral Exploration in Nitassinan: A Matter of Respect", which is available at www.innu.ca. Companies are asked to read this document before negotiating with the Innu Nation. Likewise, the Tahltan First Nation set a series of development principles in the 1980s that to date provide guidance in the negotiation with mining companies.

32. For example, the purposes of the Raglan Agreement between five First Nation corporations and Société Minière Raglan du Québec Ltée are to:
-facilitate the development and operation of the mine in an efficient and environmentally sound manner
-facilitate equitable and meaningful participation for Inuit Beneficiaries
-ensure that Inuit Beneficiaries derive direct and indirect social and/or economic benefits
-ensure that the monitoring of impacts takes place and that unforeseen impacts, or impacts the scope or significance of which are greater than foreseen, are addressed
-secure the support of the Inuit Parties for the development and operation of the mine, and
-provide an efficient ongoing working relationship between the parties.

33. Quoted in Keeping, 1999a at 77.

34. The framework for IBA negotiation established under the *Nunavut Land Claims Agreement* prevents companies from including clauses of this kind by stating that "the negotiation and conclusion of an IIBA shall be without prejudice to any participation by the DIO [Designated Inuit Organization], any other Inuit organization, and any Inuit in any hearings or other proceedings of the NIRB [Nunavut Impact Review Board], the National Energy Board or any other administrative agency, or to the enforcement or contesting of any decision or order of such agency". (Art. 26, section 26.9.2. Quoted in Kennett, 1999a at 46).

35. This could include the translation of job advertisements, workplace signs and instructions into Aboriginal languages. Some IBAs also include language training for First Nations employees. Under the Raglan Agreement, the rules of conduct and the assessment criteria for work in the mine are to be explained to employees in trilingual format.

36. O'Reilly and Eacott, 1998; Kennett, 1999b.

37. The Inuit IBA between Echo Bay and the Kitikmeot Inuit Association for the ULU Project reads "for contracts under $100,000, Echo Bay shall provide letters of intent to those businesses to which Echo Bay intends to award a contract subject to the business being able to obtain financing; and for those contracts for an amount greater than $100,000, Echo Bay will provide conditional contracts" (5.20).

38. The IIBA between Echo Bay and the Kitikmeot Inuit Association reads: "for contracts less than $50,000, Echo Bay may provide the successful Inuit business, excluding joint ventures, a 5% advance payment to assist the business in start-up. Echo Bay may elect to provide the 5% advance payment through in-kind services." (5.21).

39. For example, under the Raglan Agreement, the First Nation signatories receive CDN$1 million payable when the company decides to proceed with the mine and CDN$1 million payable when the mine starts producing commercially. Payments are placed in a trust fund. Likewise, the agreement envisages that the communities will receive CDN$575,000/year for the first 5 years of commercial production; CDN$775,000/year for years 5 – 9 of commercial production and CDN$1,075,000/year for years 10 to the end of commercial production (if the mine operates for 15 years, the Inuit will receive CDN$14,125,000). The Inuit also receive 4.5% of annual operating cash flow. This includes mine revenues less costs (costs include payments that are made to the Inuit). During 15 years of operation, this could be worth between $50 and $60 million dollars.

40. Under the Raglan Agreement, the parties are to enter into a separate protocol governing compensation or remedial measures for individual Inuit harvesters whose camps and equipment need to be relocated in order to accommodate the works associated with the mine.

41. O'Faircheallaigh, 1998.

42. Inequalities can also arise between communities. In the Yukon Territory, there is an accord among First Nations whereby all communities can receive financial benefits from resource development projects, even from those occurring on another First Nation's land.

43. For example, the Environmental Agreement for BHP's Ekati mine with signatories BHP, the federal government, and the government of the Northwest Territories. Aboriginal organizations signed an implementation protocol for the Agreement.

44. With regard to the Raglan project, the mining company commissioned an Environmental Impact Assessment (EIA) for the mine. The EIA identifies the mine's potential environmental impacts and assesses the significance of these impacts. The EIA also sets out mitigation measures that the company agrees to undertake with respect to the impacts identified. Should better or more cost effective mitigation measures be discovered, the company, following consultation with the Raglan Committee (an oversight committee), may replace the measures originally identified in the agreement.

45. See Chambers and Winfield, 2000.

46. The Lupin Socio-Economic Plan between Echo Bay Mines and the Government of the Northwest Territories reads: "the company will take whatever precautions are necessary to minimise disruption to the migrating herds, including suspension of flights to the site for periods of up to 2 weeks."

47. It is estimated that there are 10,000 abandoned mines in Canada and 6,000 abandoned tailings sites, and that less than 20% of the lands affected by abandoned metal mines have ever been reclaimed (Chambers and Winfield, 2000 at 42).

48. Financial assurances for closure are required in British Columbia but have been under attack. See Chambers and Winfield, 2000.

49. For example, the Raglan Agreement includes a clause assuring that the agreement does not affect the right of any party to claim damages caused by toxic substances that result from mine operations.

50. See O'Faircheallaigh, 1999; Lane et. al, 1997.

51. BHP currently has stewardship for approximately 126 archeological sites (Kerr, 2000 at 17).

52. Tongamiut Inuit Annait, 1997.

53. *Ibid*.

54. The Raglan Agreement provides for the creation of the Raglan Committee. Its purposes are to provide a formal forum for communication between the parties, to establish a framework for cooperation regarding the implementation of the agreement and the mine, and to carry out a number of additional functions. The committee is comprised of 3 representatives from both the Inuit and

company Parties. There is a series of provisions regarding decision making and dispute resolution within the Committee.

55. Taken from the model agreement used by BHP, discussed in Keeping, 1998.

56. Under the Raglan Agreement, parties must first try to resolve any disputes by negotiation. Failing this, the agreement dispute resolution mechanism is invoked. The dispute is submitted to the Raglan Committee. If the Committee fails to come to a decision that is supported by a majority of its membership, the issue goes to the Presidents of the parties. They are permitted to refer the dispute to formal mediation/arbitration. If the Presidents fail to resolve the dispute or to refer it to mediation or arbitration, any party can commence legal proceedings.

57. See O'Reilly and Eacott, 1998.

58. Under the Raglan Agreement, if the company decides to exploit deposits in the claims area, other than those named in the agreement, it must undertake an Environmental Assessment and present the results to the First Nation party. Based on the EA, the parties, through the Raglan Committee, will prepare and execute a summary of the impacts, mitigation measures, monitoring programs and the significance, following mitigation, of the impacts resulting from the new developments. This summary then becomes an annex to the agreement.

59. In the case of the Raglan mine the company paid CDN$195,000.

60. O'Reilly et.al, 1999.

61. Kennett, 1999b.