Sticks and Bones: Is Your IBA Working? Amending and Enforcing Impact Benefit Agreements

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If a project is likened to the creation of a person, Impact Benefit Agreements ("IBAs") would be the skeleton of the project. An IBA provides the necessary minimalist structure of all of the "moving parts" required for the project, but still muscle, sinew, tissue and skin must still be added for the project to actually function. The IBA is not stand-alone or self-sufficient vis a vis the project, but neither can most projects come to life without the underpinning of an IBA. Like a misaligned skeleton, however, the effectiveness of the project and the experience of the community with the project will be impaired by a less effective or poorly functioning IBA.

Equally, the IBA depends for health on the vitality of the "soul" - the relationship between the Aboriginal and non-Aboriginal parties to the project. Unlike most other written agreements, there is great pressure on an IBA to anticipate and allow for all manner of future possibilities, as well as to be a living, breathing document, which contains sufficient flexibility to evolve as the project realities and the parties’ relationship with one another change over time.

In order to understand the problem with the notion of an IBA as a living document, it is helpful to return to the "skeleton" example – if one part of the skeleton breaks and needs to be reset, doctors are called in to reset the bones so that they can grow back together – not a far cry from the concepts of enforcement we will be discussing below. Amendment, presents a challenge to
the IBA “skeleton” – and demonstrates the difficulty with amendment. An IBA is the result of a long-term negotiation among the parties to it – once completed, it takes a significant amount of time and energy to canvas all of the stakeholders to agree on amending the “skeleton”. Accordingly, one of the key issues for parties to an IBA to consider, is the introduction of one of more mechanisms to provide for amendment in certain areas of agreed scope without the necessity of going as deep as amendment to the IBA skeleton itself.

In addition to enforcement and amendment issues, this paper will also examine barriers to implementing IBAs and other matters relating to implementation. We begin with a basic outline of enforcement mechanisms then turn to a discussion of how to reconcile conflicts between the duty to consult and IBAs. The next sections of the paper deal with amendments to IBAs – both generally and to dispute resolution clauses themselves. We then examine some of the challenging areas in IBAs to implement and briefly consider whether corporate social responsibility principles can be instructive in the IBA process. Finally, we look at interim arrangements and the advantages and disadvantages of the same.

Are IBAs enforceable?

While various levels of government have issued cautionary statements regarding the enforceability of IBAs, they are generally treated as binding obligations. It must be remembered that enforceability is a consequence of a breakdown in communication, understanding or implementation. The best method to resolve questions of enforcement, therefore, is to be proactive:

- build in effective communication mechanism in the IBA
- maintain mutual respect, trust, openness and clear communication in dealings with all persons affected by the IBA
If, however, questions of enforcement arise, most will be resolved through the arbitration process, usually contained within the IBA. Much has been written in this area – for a discussion of the same and selected references, see my paper written for this conference in September, 2007 entitled: “The Case for ‘Made to Measure’: avoiding failed implementation through effective dispute resolution clauses”.

Key to effective enforcement is to have an efficient and clear dispute resolution process, usually layered from informal to increasingly formal as the dispute continues to be unresolved at the initial levels of the resolution mechanism. The difficulty lies in enforcing IBAs as against third parties, and in the case of the Government to the extent that a failure of the Government’s obligations, such as the duty to consult is alleged, which then interferes with the operation of the IBA. The principal means of enforcement of the rights afforded a party to an IBA as against a third party, unfortunately, remains litigation. The specific issue of interaction between IBAs and the duty to consult is discussed below.

If, however, during or after the IBA negotiations are concluded, a party to the IBA is aware of a third party whose interests are likely to have an impact on the operation of the IBA, a proactive approach is suggested. Consider reaching a formal agreement or understanding with the party in question before the conflict develops.

Interestingly, as well, there is little discussion in the mainstream literature of the extent of enforcement of IBAs, as well as quantification of success and failure of IBAs and specific clauses within them.\(^1\) Of course, the principal reason for this is the frequently confidential nature of IBAs, an attribute that will be discussed below.

\(^1\) Sosa, Irene and Karyn Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: their use in Canada" at p.1.
Reconciling conflicts between the duty to consult vs. IBAs: What happens to the IBA?

One of the most interesting areas of potential conflict lies between IBAs, typically negotiated between Aboriginal peoples and industry actors, and the duty to consult, which, to date, has been judicially confined to be a duty of Government vis a vis Aboriginal peoples. The difficulty, is that typically Government are excluded from most of the IBA process, yet the timing, extent, completion and success of the duty to consult process lies almost exclusively with Government.

The potential consequence of a mismatch in timing between the IBA and the duty to consult process is, could be delays detrimental to both the project and the community as the IBA will, in most cases, need to be suspended, until the duty to consult process is concluded satisfactorily. This should be an area of discussion between the industry actors and the Aboriginal community during the IBA negotiations, and each side should keep the other informed of the progress of the duty to consult process. Furthermore, it is recommended that the industry actor keep the Government generally apprised of the project development timeline, progress against timeline, and if permitted by the confidentiality agreement or interim agreement between the parties, of the general progress of the IBA negotiations.

In this way, hopefully, surprises can be avoided on all sides, and in the best case, the timing of both processes can be encouraged to dovetail more effectively. In the worst case, the Government will have been put on notice of the timeline and dependence of development on its own actions, and may be liable to one or more of the parties to the IBA in the case of a significant delay in concluding the duty to consult process. As well, if there is to be a gap, effective communication about the status of the duty to consult process can allow the parties to the IBA to mitigate some of the effects of the delay.
It is also recommended that the duty to consult and any issues relating thereto of which the parties are aware at the time of the negotiation of the IBA are reflected in the IBA; as well, the IBA should contemplate a transitory or “force majeure-like” set of provisions to deal with timing and other issues that could arise from the duty to consult process. Parties should also consider whether it is feasible to include Government formally in the dispute resolution process – to the writer’s knowledge, this approach has not been applied to date, but it would appear to be a sensible mechanic if feasible to include in the particular circumstances of the IBA.

Reconsidering sections of an IBA: Is this a growing trend?

Revisiting, reconsidering and amending sections of an IBA seems naturally to be a growing trend for a few reasons:

- the dynamic relationship underlying the IBA results in unanticipated situations that need to be addressed through amendment of certain provisions otherwise can undermine the trust and confidence of all parties to the IBA and their relationships with one another

- the body of knowledge, understanding and approach to IBAs is changing as more and more IBAs are negotiated and more participants continue to hone the approaches used

- the alternative to amendment may often be dispute resolution, which is far less preferable.

Unanticipated Changes

First, the nature of the relationship that an IBA governs is dynamic – an IBA, more than many other types of contractual arrangements attempts to address a series of future aspects of a relationship between parties that do not necessarily have all of the information and answers concerning those future aspects at the time the IBA is agreed.
What is meant by this can be illustrated by the following example: suppose an IBA provides for Aboriginal employment and technical skills training during and after construction of a mine. As construction progresses it becomes apparent that start-up will be significantly delayed due to the increase in delivery time for long lead items required for construction of the plant. In addition, the long lead time item has been altered from the originally anticipated one so that for the first phase of production, one operating circuit will be dropped in order not to cause an even greater delay in start-up. Those Aboriginal persons being trained for technical jobs relating to the post-construction permit will now have an undetermined gap between the end of their training at a new skill and any chance to of employment of that skill. Furthermore, suppose that for whatever reason, there wasn’t a great deal of community interest in a number of the areas where technically skilled Aboriginal employment was mandated by the IBA.

In the intervening time, as a result of the added services represented on site during the construction phase, a number of members of the Aboriginal community have gotten acquainted with the provider of supplies to the construction site by helicopter. The provider is experiencing a shortage of available helicopters as well as skilled personnel required to fly the helicopters and deliver supplies. The Aboriginal group approaches the mining company for funding to allow them to purchase a number of helicopters and enter into a partnership with the helicopter provider whereby they will be trained to fly the helicopters and have an equity interest in the business. This could be an opportunity to revisit the skills training component of the IBA and amend it to remove the post-construction obligations of the mining company in favour of an up-front payment for the equity interest in the helicopter company and the skills training required therefor.

This is only one simple example of how needs, expectations and ability to deliver on obligations can change over time in ways that were not anticipated by the parties to the IBA at the outset and a problem that might otherwise become a sore in the relations between both sides can be addressed in a positive way for all stakeholders.
Evolving Climate and Approach to IBAs

The second principal reason to expect an upward trend in revisiting certain sections of IBAs over time lies in the natural evolution of the knowledge surrounding IBAs themselves. As will be discussed below in favour of more limited post-negotiation confidentiality provisions, the body of knowledge surrounding IBAs is changing as we all collectively have more experience with them.

As IBAs are generally entered into in order to address issues relating to a long-term relationship be Aboriginal and non-Aboriginal parties, they are only as good as the collective thinking behind them at the time they were originally negotiated. Just as the relationship between the parties to an IBA evolve over time, so does the relationship and approach to IBAs based on collective experience. The failure to adjust an IBA to more modern thinking can result in the erosion of the relationship of the parties to the IBA.

Revisit to Resolve

As can be seen from the helicopter example above, if left unamended, the result could have resulted in some form of dispute resolution, where the Aboriginal group might have alleged that the mining company was not fulfilling its obligations with respect to skilled technical jobs during the production phase. In effect, revisiting and potentially revising certain sections of and IBA is a proactive informal application of dispute resolution, and hopefully avoids the potential erosion of the relationship that often accompanies a dispute as well as saving time and money spent on the dispute resolution route.

Of course the danger with the concept of the IBA as a living breathing document that will require amendment or update in light of specific circumstances or the general evolution of thinking
regarding IBAs is potentially dangerous as it is accompanied inherently by the notion that the IBA is never “final”. Care must be taken to balance the need to revisit amendments for legitimate reasons, be they changes in the specific situation governed by the IBA or the progression of IBAs in concept and practice with the need both parties have for certainty surrounding the framework which underpins their relationship.

One way to deal with this balance issue, is to provide for areas likely to require amendment in advance, by setting out a specific process for the amendment of those sections without the need to amend the IBA as a whole. These amendments might be of a more procedural nature, and be specifically permitted to be dealt with by the coordinating committee, for example. In this way, the lugubrious process of amendment – tantamount to the initial negotiation of the IBA can be avoided, while permitting some flexibility in the “skeleton” to allow for evolution and growth of the relationships between the parties and the project.

What are the key barriers to implementing IBAs?

Generally, the key barriers to implementing IBAs, (other than the unforeseeable), are concentrated in the areas of:

- the need to streamline and coordinate the Government process
- the need for evolved and accepted uniform provisions
- communication issues
- capacity issues
- succession issues

Each of the above will be discussed in more detail below.
Streamlined Government Process

This refers to the duty to consult and any corresponding need for accommodation, discussed previously in this paper as well as the project related Government approval process – assessment, permitting etc. As was pointed out earlier in this paper, before, during and after the IBA negotiation process, it is critical for all parties to the IBA to be aware of, allow for and assist, to the extent possible in coordinating the Government processes.

Uniform and Accepted Provisions

As stated elsewhere in this paper, it would be extremely helpful for a uniform or modal IBA standard to be developed, recognizing that IBAs are also responsive to very unique and particular circumstances. If, however, some basic standards could be established for usual clauses and normal circumstances encountered in IBAs, this would streamline the negotiation process and allow the parties to focus on the issues unique to their situation.

Communication

One of the key barriers to implementing IBAs is the lack of effective mechanisms for open communication between the parties to the IBA. Critical to the ongoing health of inter-party relations relative to the project, the IBA should contemplate both an informal and a formal ongoing structure such as a coordination committee comprised of representatives from all parties.

Capacity

As numerous examples have indicated, such as the IBAs relating to the Dona Lake and Golden Patricia projects, it is important that the IBA be reflective of real limitations – both those of the parties to the IBA and the of the project themselves. For example, a common component of
IBAs relates to employment targets. The IBA can provide for all of the employment targets desirable, but if the community doesn’t have the capacity – for whatever reason – to fill them, the impact on the project as well as the community will be negative, and the potential for serious problems to occur is present due to an unrealistic commitment in the IBA.

**Succession Issues**

So much of the success of an IBA is dependent on the personal relationship between the parties at all levels. As a result, it is important for the community and the project operator to each consider and communicate concerning their respective succession planning to ensure a seamless ongoing relationship.

**Implementing specific IBA clauses – the challenges**

From a general discussion of barriers to implementation, we move on to specific areas in IBAs that have been demonstrated by experience to prove more challenging to implement. These can be generally categorized as: environmental assessments, confidentiality provisions, use of appropriate financial models and employment provisions.

**IBAs and Environmental Assessments**

One of the issues becoming apparent is the lack of involvement of Aboriginal peoples in environmental assessment, monitoring and review. Early examples of this issue include that of BHP (now BHP Billiton) in relation to the Ekati diamond project in the Northwest Territories. Part of the environmental assessment process for this project saw the creation of an independent agency charged with monitoring the environmental aspects of the project on an ongoing basis. This agency, called the Independent Environmental Monitoring Agency (“IEMA”) was structured to be independent of both government and Aboriginal peoples. Over time, however, it
became apparent that the IEMA did not sufficiently take into consideration traditional ecological knowledge.\(^2\)

Effective approaches to environmental issues will require a considered dialogue between science and traditional ecological knowledge. Of course, one of the reasons for the historical omission of Aboriginal input with respect to environmental assessment and monitoring matters, lies in the lack of necessary resources within Aboriginal communities to assess environmental impact and issues, and while this capacity issue continues to require attention, of equal additional importance is the introduction of traditional ecological knowledge into the environmental mix.

The foregoing experience serves to underline a few points that should be borne in mind during the IBA negotiation process: just because a legal framework exists, does not mean that it is tailored to be appropriate for the project in question. Furthermore, if there are specific Aboriginal concerns with respect to environmental issues, these should be woven into an environmental monitoring and assessment structure that should be created and included in the IBA.

Confidentiality Provisions

Care needs to be taken as well in the scope of confidentiality provisions, in particular, with respect to the area of post-agreement disclosure. This was one area identified by discussion groups during The Aboriginal Peoples’ Impact and Benefit Agreement (IBA) Workshop held in Yellowknife.\(^3\) It was pointed out that Aboriginal peoples need to be able to share the information with their communities when involved in other negotiations and/or with other


\(^3\) Ibid., at p.5.
parties. Additionally, it must be considered that the Aboriginal negotiators are effectively negotiating the IBA on behalf of the community and the shroud of mystery afforded by confidentiality provisions erodes the principle of full, open and frank relations between/among all parties to the IBA. This in turn can lead to mistrust and/or misunderstandings about the way the IBA was intended to work from the perspective of members of the community.

Additionally, it would be helpful to develop a library of IBAs with a view to developing a standard of principles and provisions, as well as model clauses where appropriate for a uniform IBA. This would help to inform participants in the process of the generally accepted standards and would allow them to focus on the areas specific to their circumstances.

Use of Appropriate Financial Models

One of the areas of difficulty in IBAs is developing an appropriate financial model – balancing the considerations that accompany the decision of whether to provide for one lump sum payment or an ongoing formula requiring administration, monitoring and review on the part of all parties to the IBA.\(^4\) The ultimate structure and design of the financial model used often reflect the more basic weaknesses underlying IBAs:

- lack of capacity of individual communities in the areas of representation during negotiations, as well as to develop the required monitoring and ongoing assessment mechanisms
- difficulty of coordinating decisions by government actors in the process

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\(^4\) While an extensive discussion of all of the considerations that attend the structuring of the financial model and the calculation of the quantum is beyond the scope of this paper, readers are directed to Ciaran O’Faireheallaigh’s article: “Financial Models for Agreements between Indigenous Peoples and Mining Companies”, *Aboriginal Policies and Public Sector Management*, research paper No. 12, January 2003.
differences in levels of funding from government and/or corporate actors to the IBA process and the models themselves.\textsuperscript{5}

**Employment Provisions**

The main issue relating to employment provisions is that of community capacity, which has been discussed above. Again, this may be one area where certain minimum guarantees are put in place, but a mechanism is included in the IBA to amend and address capacity issues if they arise, without the need to amend the IBA as a whole.

**Can Corporate Social Responsibility ("CSR") principles guide IBA negotiations?**

While an entire paper could be devoted to the potential lessons that can be learned and appropriated from the successful application of corporate social responsibility principles in international asset contexts, the concept will merely be introduced here to alert readers to the availability of a broad international experience with similar issues to those experienced in the Canadian context.

Briefly, corporate social responsibility has been a growing trend in international resource development over the last five years. Canadian companies have most often taken the lead in developing and applying these principles, which consider the nexus of project development and its impact for local communities and the environment, as well as the interplay of these issues, with governmental ones – does this sound familiar?

Despite the obvious similarities between the Canadian and international experience, it is interesting that these two worlds have not cross-pollinated more directly. Specific cultural and
foreign governmental issues have required companies operating in an international context to take very creative approaches to corporate social responsibility as applied to their projects.

While Canadian actors have taken a leading role in the development of corporate social responsibility principles, there are numerous international experiences and literature on which to draw – knowledge of this area can only enrich the approach by parties to a specific IBA and parties should be strongly encouraged to look to this valuable international resource as IBAs and their attendant concepts continue to evolve.

**Interim Arrangements: A Short-Term Solution?**

Interim agreements are just that, transitional accords designed to protect certain elements important to each of the parties during the negotiation period. Interim agreements are almost always a part of the IBA process. They usually occur prior to the development stage of the project and can be quite simple or quite elaborate in their scope. At the time an interim agreement is negotiated, the final parameters of the project are usually not established, thus preventing the negotiation of a full-blown IBA. That said, there is nothing preventing the parties from laying out in detail much of the known framework so that these issues can be re-evaluated and amended if necessary at the time of negotiation of the IBA, otherwise, they allow for greater focus on the more sensitive or contentious issues at a later date.

The other key advantage of an interim agreement is that it begins to solidify and deepen the relationship between the parties and set out expectations for the IBA process. A key element to address in any interim agreement is the interaction of the IBA negotiation process, the governmental processes outlined above and the project development timeline.

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6 “After the Miners are Gone” http://www3.law.nyu.edu/kingsbury/spring04/indigenousPeoples/classmaterials.htm
Conclusions

IBAs are at a fascinating juncture at present – there have been a number of years of collective experience with them – both in terms of negotiation and implementation and we are beginning to be in a position to evaluate this collective experience and begin to distill what works and what the key areas are to watch, improve and develop creative solutions around. This paper and this conference are part of that evaluation process, and it is hoped that with the evolution of the scope of confidentiality provisions, that dialogue can become more meaningful and practical in this area. Similarly, it would be helpful if work could begin on a uniform or model set of IBA provisions which could be refined as our collective experience grows. Finally, key areas for additional work and reflection include the contributions that can be made from the international sphere of corporate social responsibility and in the area of interim agreements. All of these initiatives can help to create strong bones in the IBA “skeleton”.