The Aboriginal Tool-kit: what every mining principal needs to know when dealing with Aboriginal Peoples in Canada

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Any mining company exploring or operating in Canada will at some time find itself developing or needing to develop a working relationship with Aboriginal groups. The effectiveness of this relationship can have a critical impact on project development timelines and is a complex and at times delicate set of negotiations and communications which need to bridge cultural paradigms, custom and different perceptions of “value” and how it is interpreted for the industry actor and the Aboriginal community. This paper seeks to provide a primer on the three most critical topics that those involved in the mining industry need to understand or use in the evolution of their relationship with Aboriginal peoples. The first, rooted in case-law is a two-fold duty of consultation and accommodation, which, albeit confined to the Crown as a formal obligation, can have significant implications for the mining company and its project as well. The second, is the area of agreements with Aboriginal peoples – in particular concerning issues of enforceability, barriers to successful implementation and negotiation timing and process. The third critical topic for mining companies to assimilate is the central importance and care that must be taken in establishing dispute resolution mechanisms. An understanding of these three areas provides a basic tool-kit with which industry actors can begin to approach their Aboriginal counterparts.

The Duties of Consultation and Accommodation

Given that the meaning of “accommodation” has been left unclear by the Supreme Court of Canada in 2004, and it is arguably no clearer today, the following discussion aims to provide the reader with a working understanding of current views on the duties to consult and accommodate Aboriginal peoples as articulated in the *Haida Nation* and *Taku River*. In this context, it is important for industry actors to identify when the duty to consult/accommodate arises and be able to distinguish between the duty to consult and the duty to accommodate.

Industry actors may question why they need to be concerned with the duty to consult and/or the duty to accommodate as they are both responsibilities which are (currently) confirmed to government. True enough, but any project is likely to come to a standstill, no matter how good the relationship is between industry actors and Aboriginal peoples, no matter how complete or fair the IBA is, etc., if the government has not fulfilled its obligations to undertake and complete the duty to control and, if warranted, effected accommodation. So industry actors can
find themselves caught between a new world version of Charybdis and Scylla, as it were, trying to chart a course banded on either side by obstacles not of their own making, but that have the power to smash their project into pieces against the rocks.

While the duty to consult and accommodate only applies to government, and not to third parties (industry actors), in reality industry has just as much of a stake in successful accommodation as government. Resource development and infrastructure projects, regardless of their sector, generally require government approval or licensing. Projects on claimed lands have the potential to infringe the claimed rights, and thus the government’s act of approving them engages the duty to consult and accommodate.

Since the goal of the consultation and accommodation process is to prevent any harm to potentially valid claims, the engagement of this duty can be extremely disruptive to industry actors. Approvals can be quashed, causing plans to be shelved indefinitely, and even existing projects can be halted. Courts have recently given relief halting projects in response to a failure to consult and accommodate. Therefore, although industry cannot be held liable for a failure to consult and accommodate, it is in industry’s best interests to get involved in shaping the process to minimize the uncertainty that this duty creates.

The Decisions in Haida Nation and Taku River

Any discussion of the duty of consultation and duty of accommodation must be rooted in an understanding of the two key Supreme Court of Canada cases, *Haida Nation* and *Taku River*. The following outlines the broad points of impact of these two seminal decisions.

The crux of the decisions in *Haida Nation* and *Taku River* confirmed that a positive duty exists on the Crown to consult with and accommodate Aboriginal groups affected by land and resource development. The real significance of the decisions was the extension of the duty: previously, the duty only applied to Aboriginal land claims that had been proven. Now, however, the duty extends to Aboriginal groups who have claimed, but not yet established, Aboriginal title.

Since 2004, there have been over 50 cases which have considered the *Haida Nation* and *Taku River* decisions, which suggest that the issue arises or is considered applicable in quite a number of varying situations, and that the scope and collective understanding of the duty to consult and the duty to accommodate are still being defined. Part of this uncertainty stems from the general, flexible framework set out by the Supreme Court of Canada in its reasons, which is meant to be fleshed out gradually as more cases come before the courts. In *Haida Nation*, McLachlin J. explicitly stated that the determination of when the duty to accommodate arises will be decided on a case-by-case basis.

When does the Duty to Consult/Accommodate Arise?

The Crown’s duty to consult arises when it has real or constructive knowledge of the potential existence of Aboriginal rights or title and is considering conduct that might adversely affect it.
The scope of consultation required is proportionate to the strength of the asserted title or right and the seriousness of the potential adverse impact on it. Mere notice, disclosure of information, and discussion may suffice where claim to title is weak, the Aboriginal right limited, or the potential infringement minor. Where a strong claim exists, deep consultation including Aboriginal group submissions, Aboriginal participation in decision-making, and written reasons addressing Aboriginal concerns may be required. Herein lies one of the challenges embedded within the duty to consult: On what basis can one determine definitively in a particular situation, that the duty to consult has been amply fulfilled? In other words, how much consultation/accommodation is required in a particular set of circumstances?

The consultation must be meaningful, conducted in good faith, and include a willingness of the government to make changes. Interestingly, there is no duty to actually reach an agreement, and Aboriginal groups do not have “veto” power. The focus is more on process rather than result, which again makes for a vague framework in which all parties are to operate.

Notwithstanding the procedure-based emphasis of the duty to consult, in the event that the results of the consultation process suggest that government policy be altered, the duty to accommodate and address Aboriginal concerns may also arise. Where the consultation process discloses a strong *prima facie* case supporting both the Aboriginal right and the adverse effect of the government action, it is more likely that there will be a duty of accommodation. Conversely, when the claim and apparent harm are weaker, there may not be a duty to accommodate, or the duty may not be as extensive.

**Duty to Consult vs. Duty to Accommodate**

*Taku River*, provides a “hands on” example of the difference between the duty to consult and the duty to accommodate as a true-fold threshold of a right in the first instance, and an adverse effect in the second. In *Taku River*, an Aboriginal group participated in a three and a half year environmental assessment process related to reopening an old mine. During the course of the consultation significant concerns crystallized around the potential effect on wildlife and traditional land use. The Supreme Court of Canada held that the strength of the group’s land claim, which had undergone an extensive validation process in 1984 and had since been accepted for negotiation, combined with the potential adverse affects of the proposed mining road, required a “level of responsiveness to its concerns that can be characterized as accommodation”.1

From *Taku River*, we can see that while the duty to consult arises automatically upon the Crown’s knowledge of a claim, the duty to accommodate will only arise as the result of consultations. It appears that the duty to accommodate is triggered after sufficient evidence establishing Aboriginal right together with adverse effect has been led. The case-law since 2004, however, has not been wholehearted in endorsing this “threshold” approach.

Part of the confusion involved in discharging the duty to consult and the duty to accommodate is the difference between them. Although the duties are treated as one overarching duty by the Supreme Court of Canada in *Haida Nation*, as a practical matter they must be treated

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1 *Taku River* at para. 32.
as two duties, or at least a two-stage duty, as the duty to accommodate may not arise. Courts have not treated the interplay between these duties consistently. Some decisions have implied that a duty to accommodate arises automatically when a duty to consult is found. For instance, the Federal Court in *Native Council of Nova Scotia v. Canada (Attorney General)*\(^2\) has interpreted *Haida Nation* to mean that “the duty to consult goes hand in hand with a duty to accommodate”. Other courts, meanwhile, have treated the duty to accommodate as a very distinct threshold that may not be reached.

While the case law and commentary has been less conclusive surrounding the meaning and practical scope of the duty to accommodate, than it has on the duty to consult, one guiding principle that is of some assistance in this regard has emerged from the case law considering *Haida Nation* and *Taku River*, namely, that the focus is on the process, not the outcome. If a court finds that the Crown took proper steps to consult and accommodate, it will not overturn the outcome, despite any Aboriginal opposition to it.

*Industry Accommodation – A Practical Response*

Furthermore, it is worth placing the discussion of industry and its relationship to the duty of accommodation in a larger context. The last few years have seen various government efforts to adopt a code of corporate social responsibility – a legislative version of moral principles underpinning the actions of “good corporate citizens” - that would apply to industry actors operating both in Canada and abroad. In addition, as many of Canada’s resource-driven companies seek and develop projects around the world, they are faced with similar issues in accommodating local populations and non-governmental activist organizations, who increasingly seem to perceive themselves as international watchdogs of corporate behaviour. These trends suggest that while the duty to accommodate in Canada, thus far legally only applies to actions of the crown, looking forward, it is reasonably anticipated that consultation and accommodation with First Nations by industry actors will eventually be the expected standard of practice.

As a practical matter governments and resource developers should team up to shape the most effective and efficient process possible, *Haida Nation* anticipates this cooperation, specifically stating that the Crown may delegate some procedural aspects of consultation to industry while retaining ultimate responsibility for the process.

*Red Chris Development Co. v. Quock*\(^3\) sets a good example of how industry can proactively accommodate Aboriginal concerns. Red Chris, a mining company, wished to conduct exploration drilling on its mineral tenures in BC. In order to reach the tenures, it had to transport its heavy equipment across a stream important for trout spawning. A First Nation group blockaded the road on the basis of a land claim. Red Chris successfully obtained an injunction against the group, and the BC Supreme Court commented favourably on Red Chris’ accommodations. Red Chris had entered into a participation agreement with the Aboriginal group to negotiate issues as they arose following an environmental assessment. They had also already delayed the transport of their equipment because they had received notice of concerns.

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\(^2\) (2007), FC 45.

\(^3\) (2006), BCSB 1472.
over the trout spawn. To deal with this concern, Red Chris retained a biologist to determine when the spawn had ended, and took a number of steps to minimize the impact on the stream, including silt curtains, hay bales and oil absorbent, lowering the depth of the stream, and temporarily removing the fish from the stream and replacing them after the equipment had crossed.

**Practical Strategies for Effective Accommodation**

While the scope and practical understanding of the duty to accommodate continue to be developed, the existing body of experience and cases offer some suggested strategies that may be helpful to both government and industry participants faced with situations requiring accommodation. Below are, by no means, an exhaustive list of tips and suggestions in aid of effective accommodation:

- Begin a dialogue including all interested groups as early as possible. Government, First Nations and private interests should all be represented from the outset. Consider whether to involve facilitators or advisors accustomed to working in this area;

- Essential to the process is to understand what each interested party’s main concerns and priorities are. Establish a framework for effective communication by each group member – both for each member to speak and be heard. Actively listening is as important as speaking;

- After identifying the main issues, deal with some of the less contentious ones or those that are easier to find a common ground with. Essential to the process are good faith and trust – and these are demonstrated and established over the life of the discussions. The beginning of the relationship among the parties will have a great deal of influence over how the negotiations unfold;

- Consider whether there are ways to work around significant obstacles – for example, if your company wants to purchase land to build a mine that may be the subject of an Aboriginal right, explore whether a long term lease or irrevocable option with the First Nation;

- When making concessions, be clear concerning the scope and extent of the obligation – ensure that you can deliver on it and avoid open-ended covenants and obligations;

- Acknowledge that innovative compromises will often involve one or more of the parties agreeing to something that takes them into unfamiliar waters – build in flexibility to monitor and adapt the obligations and requirements if necessary; and

- Work the results of the consultations and any accommodation into a cohesive corporate or department social responsibility policy that can be further developed and provide a track record of the company’s efforts.
IBAS, Participation and Similar Agreements

For the purposes of this discussion, no differentiation will be made among Impact Benefit Agreements (“IBAs”), Participation Agreements and other memoranda of understanding, and agreements, all of which have the objective of articulating, to some extent, the relationship and relative responsibilities and obligations related to a project between industry actors and Aboriginal people. For case of reference, these will be discussed in the context of IBAs generally.

Key issues relevant to the effectiveness of IBAs include those surrounding the enforceability and amendment of IBAs as well as barriers to their 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. We then examine some of the challenging areas in IBAs to implement.

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 mechanisms in the IBA;
- maintain mutual respect, trust, openness and clear communication in dealings with all persons affected by the IBAs.

If, however, questions of enforcement arise, most will be resolved through the arbitration process, usually contained within the IBA.

Key to the 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.

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 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 IBAs and the duty to consult process is, could delays be 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 mechanism if feasible to include in the particular circumstances of the IBA.

What are the key barriers to implementing IBAs?

Generally, 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 Governmental 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 coordination the Government processes.

Uniform and Accepted Provisions

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 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 does not 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.4

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.5 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 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 principal 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.

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

5 Ibid., at p.5.
of all parties to the IBA. 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;

- differences in levels of funding from government and/or corporate actors to the IBA process and the models themselves.

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.

The Importance of ADR in the Aboriginal - Industry Context

In many ways, alternative dispute resolution (“ADR”) structures represent the preferred method to resolve disputes in the presence of mixed legal traditions such as the aboriginal and western contexts, which prevail in IBAs and in other negotiations with Aboriginal peoples in Canada. ADR structures’ inherent flexibility allow them to reflect the parties’ needs, expectations and traditions. Along with their great flexibility, however, comes a certain degree of danger – all too often, ADR clauses are given little time or focus during negotiations and are incorporated from other precedents almost as a “standard” clause in the final agreement. This approach, not only castrates much of the potential effectiveness of such clauses, but can also drive the parties into a process that permanently damages their relationship and does not yield a satisfactory result for one or more of the parties in the event of a dispute. As such, dispute resolution clauses are not to be taken lightly or negotiated/drafted in a “standard” fashion.

The focus of this section is not to provide an analysis of drafting techniques for ADR clauses, rather it aims to give the reader a better appreciation for the issues, concerns and possibilities of ADR as they must be taken into account for a particular set of circumstances that follow from the nature of the agreement under negotiation and the parties to it, themselves. The best way to avoid failed implementation of ADR structures is prevention. Prevention is best served by a clear appreciation for the issues and needs of the parties that arise from the agreement and using these as a basis for tailoring an ADR mechanism to suit these needs.

6 While an extensive discussion of all of the considerations that attend the structuring or the financial model and the calculation of the quantum is beyond the scope of this paper, readers are directed to Ciaran O’Faircheallaigh’s article: “Financial Models for Agreements between Indigenous Peoples and Mining Companies”, Aboriginal Policies and Public Sector Management, research paper No. 12, January 2003.
The Dispute Process Continuum

When faced with the challenge of choosing an ADR process to suit the objectives of the parties and/or their agreements, the universe of possibilities may appear overwhelming. Often, the choice is not just to identify one dispute resolution mechanism to address this aspect of the agreement. Rather, the ADR process is often structured to include a number of ADR processes, either successively, as less interventionist methods do not achieve resolution, or alternatively, to address different types of disputes that may arise between the parties. In this context, it is helpful to bear in mind the continuum of the dispute process

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Each of these processes will be briefly described in the paragraphs which ensue.

Negotiation

The least formal of the array of processes, this mandates the parties to attempt to negotiate a resolution to the dispute themselves. Negotiation would, in most cases, be the first method of attempting to resolve the impasse between or among rational parties even if it were not formally included in the agreement. This method is the least formal discussed and can use techniques such as interest-based bargaining to increase the likelihood of achieving resolution. It is less likely to permanently damage the relationship between the parties and can be quite flexible, hence, adapted to the specific needs and circumstances of each party.

Conciliation

Conciliation involves the appointment of a third party neutral who speaks to each party separately, attempting to identify common ground and reduce any tensions between the parties. Once the common ground has been identified, the parties return to the table to negotiate a resolution themselves (or with a mediator, if conciliation is used concurrently with mediation). The conciliator his/herself should not take part in the negotiation phase, s/he is merely to clarify the parties’ positions for themselves and one another. This process is usually conducted without prejudice to the legal positions of the parties.

Mediation

A mediator participates in negotiations between the parties and possibly their counsel. The mediator generally sets out the structure and rules of the process and performs a similar role

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\(^8\) Thompson, Bonita J., “Negotiating and Drafting Arbitration Clauses in Commercial Agreements”, Negotiating and Drafting Arbitration Clauses in Commercial Agreements, Osgood Hall Law School of York University Professional Development Program, January 16, 1997.
to that of the conciliator above in helping the parties clarify the issues and their relative position. The mediator can also assist the parties in developing creative solutions or approaches and promotes compromise. While sometimes a mediator is asked for his/her recommendation, generally this is viewed as a compromise of the neutrality essential to the mediator’s role in the dispute resolution process.

Early Neutral Evaluation

Early Neutral Evaluation or Neutral Case Evaluation involves the assessment of the dispute at an initial legal stage by an experienced neutral facilitator. Each side, often through its counsel, presents a brief narrative synopsis of its case to the facilitator, and may also tender documentary evidence. An oral opinion is issued by the facilitator that can be accepted or rejected by the parties. This process is also usually conducted without prejudice to the legal positions of the parties and can provide a fresh look at and opinion on the issues from an objective perspective.

Med-Arb

This approach combines mediation as the first stage of a two-step process that contemplates arbitration in the event of unsuccessful mediation. A key consideration for this structure is whether to have the same mediator as arbitrator for both processes. The prevailing wisdom favours having different facilitators for the mediation and arbitration portions as it is accepted that each phase requires different skills of the facilitator. As well, it is likely preferable to keep each component of this approach separate so that the parties do not use the mediation portion to position their case for the arbitration phase.

Arbitration

The most formal along the continuum of processes, arbitration utilizes an arbitrator or an arbitral panel to hold a hearing on the issue in dispute. The arbitrator has the power not only to hear and rule on the evidence and rules of procedure but also to call his/her own witnesses or experts. Generally, the arbitrator’s role is to render a ruling rather than to facilitate a settlement between the parties, however, some blurring of this function has occurred.

Reconciling Multiple Legal Traditions

Some of the processes described along the ADR continuum, as well as those alternatives that fall outside of it and are beyond the scope of this direction to detail, are more amenable to bridging across or incorporating multiple legal traditions. Given the involvement of a mix of Aboriginal and non-Aboriginal parties in the project that is the subject of the agreement and the likelihood that a number of disputes that arise will stem from the distinctive cultural experiences, commercially and otherwise, of the parties, it is much more important in agreeing on ADR procedures in the case of agreements involving aboriginal peoples, to choose an ADR process that addresses and attempts to incorporate both aboriginal and Western legal traditions.

Aboriginal and Western legal frameworks can be incorporated either through the process chosen and procedures used for dispute resolution or through the appointment of one or more facilitators who have experience with both traditions. The degree of emphasis between both
traditions will be a function of the weighting of each in: (i) choice of process, (ii) procedure for dispute resolution, and (iii) facilitators. This in itself, should be the subject of careful thought and negotiation between the parties when negotiating the original agreement.

*Strategies for Successful ADR Clauses*

In any ADR clause, all of the essential elements must be present:

- scope of ADR
- appointment of facilitators and participants (including detailed guidelines for the same)
- place of ADR
- law/procedures to be applied
- other rules adopted by the parties established
- language

Additionally, the following considerations should form part of each parties thought process and discussed during the drafting stage of the ADR clauses in the IBA or equivalent agreement:

- develop policies regarding the use of the ADR process in advance of negotiating the ADR provision;
- categorize potential disputes and consider appropriate ADR requirements;
- consider whether it is important to understand how the decision was reached in the ADR solution and, therefore, whether a “bare” or “reasoned” award is desirable;
- consider the types of damage that can be awarded and the time limitations for the same.

**Conclusion**

While the foregoing amounts to a reasonably detailed survey of the three topics most centrally important to mining actors in their relations with Aboriginal peoples, there is much written in this area which anyone about to embark on a series of negotiations or long-term relations with Aboriginal peoples is encouraged to review. Furthermore, this is one area, like many of the technical areas related to project development, in which it is critical to involve a person or group on your relationship building team who is experienced in Aboriginal matters.