

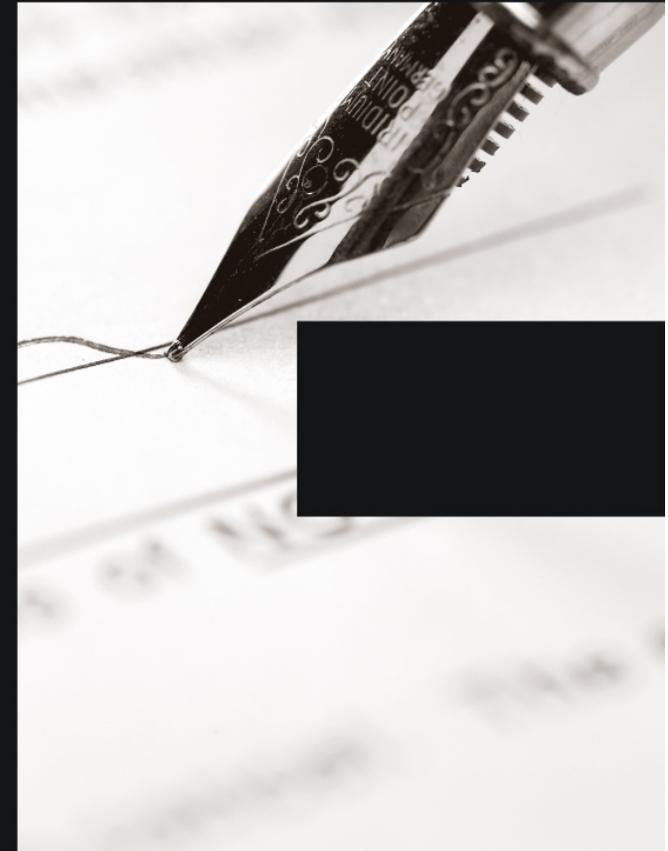
RICHTER

**Presented by :
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Dispute Resolution in First Nation Impact And Benefit Agreements



Introduction



- Harvey Sands is a Partner of Richter, a nationally recognized accounting and advisory firm. He specializes in Assurance, Advisory and Aboriginal Services.
- Harvey's practice includes representation of and counsel to Aboriginal and First Nations groups in Impact and Benefit Agreements (IBA) financial participation, negotiations and entitlements, business valuation, due diligence, investment, and joint venture negotiations and structuring. More specifically, he consults with Aboriginal and First Nations' groups on Collaboration Agreements/IBA and joint venture focused on financial analysis and valuation of resource development projects, financial project participation and economic benefit matters, capacity building and various capital deployment, management, governance, investment matters, as well as financial matters and valuations in Land Claim financial negotiations.
- Regularly invited as a speaker at conferences, Harvey has lectured extensively on various aboriginal advisory and taxation matters, real estate and business advisory topics in Quebec, Nunavut, Ontario, Newfoundland and Labrador.



Introduction



- Effective dispute resolution of matters arising from First Nation Impact and Benefit Agreements (IBA) requires a sensitivity and understanding of the underlying framework of the expected Agreements, stress points, cultural demographics and the nature of project operations governed by the IBA relationship.
- One special feature is that disputes go beyond commonplace commercial monetary matters and thus the nature of the disputes are far more complex and personal. Commercial disputes being highly monetary tend to be more static and historical in nature (E.G. particular time, waterfall, benchmark or claim at a moment in time).
- IBA disputes involve dynamic and on-going relationships, operations and on-going performance, rights and obligations of the parties. The IBA is often an inter-generational agreement and deals with a broad range of socio-economic, cultural and capacity matters (Complex quantitative and qualitative relationships and priorities are the norm).
- Financial disputes can involve financial compensation obligations and/or financial participation entitlements .
- Employment disputes can be cultural in genesis whereby a local work force must develop disciplines previously outside their environment –scheduling, alarm clocks ,conflicts between community and seasonal hunting and fishing activities vs, work and shift requirements. Thus specific performance and personal obligations and ingrained cultural disruptions and seminal emotions are involved

Introduction to IBAs



- Impact and benefits agreements (IBAs) are increasingly recognized as part of the standard package of regulatory and benefits requirements associated with major natural resource development projects in Canada and result from a desire by a Proponent to operationalize a project (e.g. the massive nickel mine developed by Inco at Voisey's Bay, Labrador; the development of pipelines through aboriginal territories and numerous forestry projects).
- Particularly when projects are located within traditional aboriginal territories and in proximity to aboriginal communities, IBAs are emerging as the primary means of establishing a formal relationship between the project developer and local people. IBAs, benefits plans and related regulatory requirements are being relied upon increasingly by governments as instruments of regional economic development.
- IBAs have 2 principal purposes from the perspective of government and aboriginal parties:
 - To address the concerns of aboriginal people and other local residents regarding the adverse effects that large-scale mineral development may have on their communities, culture, way of life, natural environment and land-based economic activities;
 - To ensure that local people and communities have the opportunity to obtain both short-term and long-term benefits from mineral development occurring in their region.



Introduction to an IBA and their principal components

Introduction to IBAs



- Both purposes reflect the underlying premise that it is no longer acceptable to develop natural resources in a manner that imposes significant costs at the local level while the benefits are enjoyed elsewhere. From the Resource industry perspective, IBAs are coming to be viewed as one element of the complex set of regulatory, community relations, technical, and economic considerations that must be addressed if a major resource or infrastructure project development is to progress smoothly from the initial planning stages to final approval and operational status. Even when the negotiation of IBAs is not required by law or directed by government policy, these agreements may be used by resource development proponents to address local concerns that, if ignored, could crystallize into organized and effective opposition to natural resource and infrastructure Development Projects (“Projects”).

Impact and Benefit Agreement (IBA)

- In recent years, there has been a proliferation of commercial arrangements, generally negotiated among developers (also referred to herein as Developers/Project Proponents), Aboriginal group representatives, and, sometimes, federal, provincial or territorial Government respecting measures and undertakings on behalf of the respective parties pertaining to the exploitation of commercial opportunities (Development Projects) on or adjacent to the lands on or in respect of which Aboriginal groups claim an interest.

Alternative Names: Participation Agreement

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

Impacts of Natural Resource and Infrastructure Development



- The negative economic, social, cultural and environmental impacts of Projects can be significant.
- The destruction of economic resources used by aboriginal people through damage to land, wildlife and fisheries – subsistence issues;
- The disruption of hunting, trapping and gathering activities;
- In some instances, the dispossession of aboriginal people themselves;
- Social and cultural disruption resulting from the loss of land – including the plants and animals that it supports – or damage to sites of cultural or spiritual significance;
- Threats to cultural identity, social integrity and individual self-esteem that can result from an influx of outsiders who have different economic, social and cultural values and circumstances and whose presence may create or exacerbate problems such as alcohol abuse, prostitution and the emulation of unsustainable consumption patterns; and
- Disruptions to social structures and cohesion, family structures and individual lifestyles that may result from the difficulties in adjusting to industrial employment, the substantial increase of cash income available to some individuals, and the issues associated with the use and distribution of the money paid to aboriginal communities.

The Impacts of Natural Resource and Infrastructure Development (Cont.)

- The impacts of development projects on aboriginal communities need not, of course, be uniformly negative. Many of the potential negative impacts can be controlled or even eliminated by appropriate environmental protection measures and by designing the physical infrastructure and operating procedures of the Development Project so as to limit disruption of the traditional ways of life, economic activities and social structures of aboriginal communities.
- On the other side of the equation, Development Projects have the potential to bring significant benefits to aboriginal communities, many of which suffer from high unemployment, low incomes, inadequate infrastructure, and weak or non-existent private sector economic activity. In particular, the potential benefits of a Development Project include:
 - **IBA Benefits are often matters of dispute:**
 - Increased direct employment opportunities, in terms of the number of jobs available to aboriginal people and the level of income that can be earned from these jobs;
 - Increased opportunities for aboriginal people to gain work experience and to develop and apply specialized skills, thereby improving their overall ability to generate income through the wage economy;
 - Indirect economic effects resulting from the infusion of employment income into aboriginal communities (e.g., increased purchases of local goods and services, increased traditional economic activities such as hunting and trapping due to the ability of wage-earners to purchase improved equipment, and the use of employment income to invest in income-generating assets);
 - Improvements in community infrastructure and the implementation of economic development and social programs through the use of cash payments (e.g., royalty payments) received from Project developers;
 - Business development opportunities whereby aboriginal businesses can act as suppliers to the Project, as contractors or subcontractors, or as joint venture partners or in related businesses; and
 - Opportunities for aboriginal people to make use of the Project facilities and related social and physical infrastructure (e.g., airstrips, roads, ports, medical facilities, etc.).

Contents of an Impact and Benefit Agreements



THE PROJECT-SPECIFIC CONTEXT

- Even in the absence of a clear legal or policy framework for IBAs, these agreements may nonetheless be negotiated between project developers, aboriginal organizations and, in some cases, governments.

THE LEGAL NATURE OF IBAS

- IBAs are generally drafted in contractual language and follow standard contractual format. They thus have the appearance of legally binding agreements between the parties, analogous in many respects to private commercial contracts.

THE CONTENT OF IMPACT AND BENEFITS AGREEMENTS

The following provides a summary of commonplace IBA contents:

- Introductory provisions;
- Typically disputed matters:
 - Employment and training;
 - Economic development and business opportunities;
 - Social, cultural and community support;
 - Financial provisions and equity participation;
 - Environmental protection and cultural resources; and
 - Other substantive and procedural provisions.

Introductory Provisions of an IBA



PURPOSE

- Many IBAs contain introductory clauses setting out the purpose or purposes of the agreement and the intent or objectives of the parties. These provisions generally reflect:
- The interest of the Developer/Project Proponent in the efficient operation of the project;
- The interest of the aboriginal or government parties in achieving maximum economic and other benefits from the project and in minimizing social, environmental and other negative impacts; and

The mutual interest of the parties in developing a positive working relationship. For example, purpose sections in IBAs may state that the agreement is intended to:

- Facilitate the development and operation of the project in an efficient and environmentally sound manner;
- Ensure that the project results in the economic and social benefits sought by the aboriginal and government parties, including employment, business opportunities and training;
- Minimize any negative social and environmental effects of the project and protect the aboriginal way of life, including traditional land-based activities such as hunting, fishing and trapping;
- Provide for ongoing monitoring of the economic, social and environmental impacts of the project;
- Define the working relationship between the parties and provide a framework for communication, consultation and cooperation; and
- Secure the support of the aboriginal party for the project.

PROJECT PHASES



IBAs may also specify a number of distinct phases of the Development Project. Identification of these phases in the agreement may be useful because the impacts and benefits from a project can differ significantly depending on the phase of operations. **Different disputes develop during the various phases of the Project.**

The project phases identified in IBAs may include:

- Exploration phase, Advanced exploration phase; Project development or project definition phase;
- Project construction phase; Commercial production or operation phase; and
- Project decommissioning, abandonment and reclamation phase.

➤ EMPLOYMENT AND TRAINING

- Achieving local benefits in the form of employment and training is usually a key objective of aboriginal and government parties to IBAs. The importance of this objective reflects the high levels of unemployment and underemployment in many of the regions of Canada where resource development is occurring.

➤ GENERAL EMPLOYMENT PROVISIONS

- IBAs usually affirm the interest of the parties in encouraging a high level of aboriginal participation in the Project. In some cases, employment targets may be set. These targets may be explicitly applicable to both contractors and subcontractors, as well as to the Development Project company. An alternative to establishing fixed targets in the IBA itself is to require that targets be developed on a regular basis and incorporated into annual labour force development plans.

Recruitment & Contracting



IBAs may contain a number of provisions intended to facilitate the recruitment of aboriginal employees. For example, the Developer may agree to consult with the aboriginal party when developing specific recruitment policies and procedures intended to maximize aboriginal employment on the Project. The Developer may also formally agree that all positions at the project will be open to aboriginal people having the required ability, work skills and qualifications.

Recruitment efforts may be targeted through specific programs. For example, the company may undertake to establish a summer job program for students in order to provide interested young people with an early opportunity to gain experience working at the Project site.

The Responsibility for failure of/and to realize undertakings can be borne by both parties.

Employment Preferences

- IBAs may contain provisions that oblige the Developer, where possible, to fill positions with local and aboriginal people. The Developer may simply make a “best efforts” undertaking in this regard or the agreement may include specific procedures that give aboriginal or local candidates priority in obtaining available positions.

Contracting and Subcontracting

- IBAs may require that employment and training obligations agreed to by the Project developer shall also be applied to contractors and subcontractors. These provisions are important because much of the labor force working on a Project, particularly in the construction phase, may be employed by contractors or subcontractors who are not parties to the IBA.
- Example: [The mining company] shall require its contractors and their subcontractors to recruit as employees on a preferential hiring basis over a period of time dictated by the contractors' work requirements and vacancies, suitably qualified [aboriginal people] and [aboriginal people] who successfully complete the training foreseen in the [training programs established pursuant to the agreement]. [The mining company] shall monitor its contractors regarding compliance with this obligation in accordance with [the agreement].

LABOUR RELATIONS AND DISCIPLINE



Work Rotations and Vacations

- IBAs, particularly for projects in remote locations, generally address the work rotations that apply to aboriginal employees. Provision may also be made for periodic leaves of absence or extended vacations.

Language of Work

- IBAs may specify the principal language(s) of work on the project and may include measures to accommodate aboriginal employees who lack a good knowledge of the working language(s).

Cross-Cultural Issues

- Measures to address cross-cultural issues are included in IBAs to facilitate the long-term retention of aboriginal employees and to ensure the smooth operation of a multicultural work-force.
- Cross-cultural training may also include programs to familiarize aboriginal employees with non-aboriginal culture and with distinctive features of the resource industry that include, in the words of one IBA, "mining industry cultures".

RESTRICTIONS ON EMPLOYEES

- IBAs may specify restrictions or prohibitions regarding access to alcohol and possession of firearms on the project site. In addition, restrictions relating to access to aboriginal lands and communities may be imposed on non-aboriginal employees. Fishing by employees in the vicinity of the Development Project may also be limited or prohibited

Local Economy



GENERAL PREFERENCES FOR ABORIGINAL BUSINESSES

- IBAs may specify that the Developer/Proponent has a number of options when seeking to secure goods and services. These options may include issuing a request for proposals or an invitation to tender, or negotiating directly with aboriginal businesses that have the ability to deliver the goods or services of the required quality in a timely, efficient and competitive manner.

Assistance for Local Business Development

- Although the potential for local economic spin-offs from Development projects is often considerable, the capacity to take advantage of these opportunities may be lacking. IBAs can address this issue by providing for direct assistance for local business development. This assistance may take a number of forms. For example, the Developer may agree to:
 - Fund, organize and conduct tendering workshops in order to ensure that local businesses are aware of opportunities related to the Project and to provide information on the company's tendering process.
 - The Developer may also undertake to provide technical or other assistance to facilitate the establishment of specified aboriginal businesses.
 - In addition, IBAs may link company initiatives with access by aboriginal people and businesses to government programs available to assist business and economic development.

FINANCIAL PROVISIONS AND EQUITY PARTICIPATION



Aboriginal organizations may use IBA negotiations to obtain cash payments, equity interests in Development Projects and other financial benefits. Where aboriginal organizations own the subsurface minerals that are to be mined or have surface rights in the vicinity of the Project, they may be entitled to royalties or other payments from the Developer. Payments based on aboriginal subsurface or surface ownership may be specified in IBAs or established through separate royalty and land management regimes.

Disputes involving financial provision generally require a Capital Determination input requirement.

Cash Payments

- Ensuring that the aboriginal party and the people that it represents receive direct economic benefits from the project;
- Compensating the aboriginal party for the foreseen impacts of the Project;
- Securing the support of the aboriginal party for the development and operation of the project; and
- Securing the support of the aboriginal party for specified tax treatment of payments under the agreement (e.g., the treatment of payments as taxable deductions for mining duties and income tax purposes).
- They may be reduced in the event of a decrease in the Project's production level or profit margin.

FINANCIAL PROVISIONS AND EQUITY PARTICIPATION (CONT)



Fixed Cash Payments

- These payments may be characterized as 'fixed' if they are set at a predetermined amount that is not tied to cash flow, profitability, pricing of extracted resources, quantity of resources extracted or any other variable. Fixed payments are intended to provide a guaranteed minimum amount of cash to the aboriginal beneficiary.

Variable Cash Payments

- IBAs may provide for variable payments to the aboriginal party or a designated beneficiary over the life of the Project. These payments may be determined according to a formula based on one or more variables such as cash flow, profitability, resource prices and quantity of resources extracted. These payments are intended to allow the aboriginal party to share in the benefits from successful operation of the Project, including any windfall that may accrue to the Developer should mineral or oil prices increase dramatically. From the Developer's perspective, variable payments have the advantage of being linked, directly or indirectly, to the level of activity, cash flow or profitability of the Project.
 - Timing,
 - Waterfalls,
 - Benchmarks,
 - Quantum Determination,
 - Legitimacy of Accounting (imported costs and exported revenues, non-arm's length transaction)
 - Ex. Below Mine Site RR, profitability created offsite due to processing.



Part 2: Dispute Resolution

Dispute Resolution



DISPUTE RESOLUTION

- These provisions typically begin with undertakings by the parties to act in good faith in carrying out their respective obligations and to resolve disagreements, where possible, through cooperation and negotiation. The agreement may then specify the stages to be followed in addressing disputes, beginning with good faith negotiations and then proceeding to mediation and compulsory arbitration in the event that the dispute has not been resolved at the preceding stage.
- The process involves implementation committee members, senior FN council members, leadership delegates from both parties (Senior Company officers and FN Leadership).

ENFORCEABILITY AND REMEDIES

- The enforceability of IBAs and the remedies available for the breach of these agreements will in general be determined by the governing law of contract, as applied to the particular circumstances raised by the agreement in question and the nature of the alleged breach.

Avoiding Conflict – Proper Implementation



- Best Practices for avoiding conflict:
 - Develop a an in depth and equitable Impact and Benefit Agreement outlining the responsibilities and commitments of both Parties;
 - Meets the needs and goals of both Parties;
 - Is well designed, defined and detailed;
 - Inter-Generational Agreement;
 - In line with the Evolved IBA National Standards.
 - Carefully outline the procedures for Dispute resolution to avoid on-going disputes and conflict.
 - Ensure an effective Implementation Committee is created to ensure the IBA is properly adopted and followed:
 - To supervise the application of the Agreement in accordance with its terms and to help solve any problems that may arise.

Dispute Resolution



Parties shall endeavor to amicably resolve any dispute in connection with the Agreement by negotiation. Dispute Resolutions to be non-adversarial, informal and cost efficient.

Disputes

- If negotiation fails, Parties are to use the following dispute resolution procedure prior to any other available remedies, except matters for which Mandatory Arbitration is specified (described below).
- Where a dispute cannot be amicably resolved by the Mining Firm and the First Nation, the First Nation to give written notice of the dispute to the Mining Firm, and the parties to hold meetings to settle the dispute within XX days from the date of receipt of the notice.
- Aggrieved party notifies other party in writing and dispute submitted to **Implementation Committee**.
- Implementation Committee's decision to settle dispute requires assent of majority of members present, including at least 2 members appointed by Mining Firm and at least 2 members appointed by Aboriginal Parties.
- If Implementation Committee fails to resolve dispute within 90 days or within a mutually agreed upon extension thereto, dispute to be submitted in writing to the presidents of each party who have 90 days or any mutually agreed upon extension thereto to resolve it.
- Presidents may jointly nominate neutral third party to fact-find and make recommendations to assist them or may jointly refer dispute to formal mediation under jointly agreed terms and conditions, cost to be borne by Mining Firm;

Dispute Process



- Any dispute related to or arising out of the interpretation of the Agreement (“Dispute”) to be dealt with as set out under (A) “Dispute Resolution Process”, and: (i) disputes regarding payments by the Mining Firm to the Aboriginal Party shall be submitted to (B) “Final and Binding Financial Arbitration” as described below; (ii) any other dispute related to financial matters shall be submitted to (C) “Final and Binding Arbitration” as described below; and (iii) disputes of the following nature shall be submitted to a Court of competent jurisdiction in the agreed upon jurisdiction:
 - Application or interpretation of treaty rights,
 - Unauthorized disclosure of confidential information,
 - Rights of the Parties to terminate the Agreement,
 - Breach of representations and warranties and related indemnities,
- Failing resolution of any Dispute by Parties, any affected Party may submit it to Mediation or Arbitration;
- Failing resolution of Dispute by Implementation Committee within 30 days, executive officer of Mining Firm responsible for the Project, Mine Manager, Chief of First Nation and First Nations’ Regional Authority shall meet to address and resolve Dispute.

Mediation



- ❑ If Dispute cannot be resolved by the Implementation Committee, the Executive Committee, or a special meeting of the Presidents of Parties, or by good faith negotiation of the parties within a reasonable time, it is submitted to a mediator selected by Parties pursuant to a procedure proposed by the mediator, and acceptable to Parties, or alternatively, mediation is conducted under the *National Mediation Rules* of the ADR Institute of Canada, Inc.
- ❑ Project Proponent to pay for the costs of the mediation facilities and the mediator. Any mediation settlement by the Parties is documented in writing and if mediation settlement varies the language of the Agreement, it is recorded in writing, signed by both Parties and joined to the Agreement as an attachment.

Arbitration



- Within 30 days following notification Parties to appoint by mutual agreement a single arbitrator
 - If parties cannot agree on a single arbitrator, then each party will select 1 arbitrator and the 2 such arbitrators will jointly select a 3rd arbitrator. Failing such selection, the 3rd arbitrator will be appointed by a Judge of a competent Court.
- Arbitration may be conducted in English or in Aboriginal language, and translation and interpretation shall be provided as required.
- Parties may, at any time, resolve a Dispute by mutual agreement, which shall be recorded in writing and signed by authorized representatives of the Parties;
- A dispute that either Party refers to arbitration shall be finally resolved by arbitration pursuant to the *National Arbitration Rules* of the ADR Institute of Canada, Inc
- Parties are required to perform their obligations under the Agreement pending final resolution of the dispute unless agreement to the contrary because impossible, impracticable or undesirable, or unless the arbitrator has made an interim order to the contrary
- Each party shall pay its own costs relating to such arbitration, including costs of its appointed arbitrator and its counsel. All other costs and expenses related to arbitration proceedings shall be jointly paid in equal share by the parties unless otherwise determined by arbitrator (baseball style or as awarded by arbitrator).

Arbitration



- Arbitration hearings to proceed within 30 days
- Where a party's defense relies on the expiry of a statutory limitation period, the calculation of the limitation period shall not include any period of time from the date of the notice of the dispute up to the conclusion of mediation proceedings (clock is stopped).
- Notwithstanding the termination of the Agreement, parties' obligations with respect to the resolution of any dispute that is outstanding at the time of termination shall survive, and the provisions of dispute resolution proceedings pertaining to arbitration shall survive and apply to any dispute pertaining to an obligation that expressly survives termination.
- Cashflow or Royalty disputes: cost of audit, arbitration or determination usually awarded if material misstatement (eg. Greater than 3%) is awarded.

Arbitration Decision



- Carve Outs: Arbitrator does not have authority to alter, modify, amend or add new provisions to the Agreement or to render decisions that are inconsistent with its terms and conditions.
- Arbitrators to render final and binding decision between Parties, within 2 months following the date of appointment. Such decision includes, when a Dispute is related to alleged non-compliance with a Party's obligation, a delay to remedy such default and measures required to remedy said default, if applicable.
 - Subject to judicial review, parties acknowledge that they will not apply to the courts to interfere with or limit the scope of arbitration.
 - Arbitration panel shall not have power to change, alter, modify or amend any terms, conditions and provisions of the Agreement.
 - Procedures and proceedings relating to Dispute settlement is Confidential Information
- Within 30 days of delivery of decision, parties may require clarification as to the meaning of the decision.
- Where a Party fails to comply with Arbitration Panel's decision, any Party may file a copy of the decision in the competent court having jurisdiction in the province or territory specified in the Agreement, whereupon the decision will be entered in the same way as a judgment or order of that court and is enforceable as such

Royalty Disputes



- “Royalty Dispute” means any dispute or difference arising or occurring between the Parties in relation to any issue concerning the obligations of Mining Firm to pay a Royalty to First Nation.
- Parties will attempt to resolve Royalty Dispute informally by discussion
- If Parties are unable to resolve Royalty Dispute by informal discussions, it shall be submitted to arbitration before a single qualified arbitrator in accordance with the relevant act of the province or territory specified in the Agreement.
- Project Proponent will continue to make all Royalty payments, subject to adjustment on final resolution of Royalty Dispute (No use of economic coercion.)
- Either Party may seek from the arbitrator any interim relief that may be necessary in respect of a default in making Royalty payments pending final resolution of the Royalty Dispute.

Financial Disputes



- General resolution provisions for other disputes – the goal being non-adversarial, cost-efficient and the application of an informal manner of dispute resolution and then only the exceptional use of the dispute resolution provisions.
- Carve-outs are detailed as being: Confidential Information; matters resulting in interruption of normal mining operations; termination right disagreements. As well, certain First Nation / Provincial Agreement matters are to be considered carved-out and outside the scope of the general provisions.
- In the event there is a failure to agree, the provisions then force a notice of arbitration by either a sole arbitrator or by a panel of three (each party appoints one), the two appoint a third or the third is appointed by the Court.
- Each party pays its own costs.
- The process does not interrupt continuing obligation of performance by either party unless impossible or impractical.

Binding Financial Arbitration



- If Aboriginal Party does not accept Mining Firm payment calculation of payments due under the Agreement, a meeting to be held between executive officer of Mining Firm responsible for Project, the Mine Manager and two high level representatives of the Aboriginal Party to resolve the issue
- If within 20 days of such meeting the issue is not resolved, Aboriginal Party may have calculation verified by its auditors and such report to be delivered within 60 days of receipt of all required information. If no verification notice sent by Aboriginal Party, it is deemed to have accepted the calculation.
- If there is still no agreement on the payment calculation, the Aboriginal Party may, within 15 days of auditor's report, submit disagreement to final and binding financial arbitration by notice of arbitration to Mining Firm and arbitrator stating reasons for disagreement with payment calculation. If Aboriginal Party fails to deliver arbitration notice, it is deemed to have accepted the payment calculation.
- Arbitration Panel to have jurisdiction to determine all questions of fact or questions of mixed law and fact, to make an award, grant interim or final relief (including injunctive or other equitable relief), and to order the payment of interest and costs. If not otherwise decided, each Party bears its own costs and an equal share of the other costs of arbitration.

Case Study: 2014



- In the event (i) the Parties are unable to agree on the calculation of the First Nation's Payment within thirty (30) days following the receipt of the report of the Auditors; or (ii) of any other disagreement related to or arising out of any other provision of this IBA, the Parties agree to apply the following dispute resolution process:
 - The FN Parties or Project Proponent may give notice to each other of the Financial Dispute for settlement of the Financial Dispute in accordance with the provisions of the IBA, such notice shall be required to be provided within fifteen (15) days of the expiry of the period referred to therein;
 - The President of Project Proponent and the Chief of the First Nation or any other senior officer any of them shall make all efforts required to settle the Financial Dispute amicably; the Officers, under such terms and conditions as they deem appropriate, may jointly nominate a neutral third party to fact-find and make recommendations to assist them in settling the Financial Dispute;
 - In the event the Officers settle the Financial Dispute, the settlement agreement shall be recorded in writing and shall be immediately implemented by the Parties in accordance with its terms;
- ☐ in the event the Officers do not settle the Dispute within a period of forty-five (45) days from the date the notice referred was given, either the Project Proponent or First Nation may file for arbitration.

Case Study 2014



➤ Arbitration:

- Unless otherwise agreed to by the Parties, all proceedings, discussions at meetings and other discussions in view of settling a Financial Dispute under this Chapter, including arbitration, shall be held in camera and without limiting the generality of the foregoing, all information that is disclosed, including all statements made and all documents submitted as part of the dispute resolution process, all pleadings and all evidence, shall be confidential and shall be deemed to be Confidential Information, unless their submission is required by law or by a court order or in connection with an application for homologation or cancellation of the arbitral award;
- Following the issuance of the Notice of Financial Arbitration, the Parties shall jointly and promptly appoint an arbitrator to conduct the arbitration. Failing the joint appointment of an arbitrator by the Parties within a period of thirty (30) days from the date on which the Notice of Financial Arbitration is given, the arbitrator shall be appointed by a judge of the Superior Court of Québec on the motion of either Party;
- ❑ If no motion for the appointment of an arbitrator is filed within thirty (30) days from the date on which such motion may be filed and, as a result thereof, no arbitration can proceed, the Financial Dispute shall be deemed to be terminated and shall not be the subject of any further dispute resolution process under this Chapter or legal proceedings.

Case Study 2014



- Nothing in the arbitration (i) prohibits either the Parties from making, on a without prejudice basis, an offer of settlement relating to a Financial Dispute at any time after a Notice of Financial Arbitration is given or (ii) prohibits either Party having given notice of a Financial Dispute from withdrawing such notice at any time prior to the settlement of such Financial Dispute through the dispute resolution process.
- Following the Notice of Financial Arbitration and the appointment of the arbitrator, the arbitration shall be conducted with the necessary adaptations, provided however that the Parties agree that no other provisions other than disputed clause shall apply to any arbitration initiated.

Exhibit 1: Implementation

Project / Implementation Committee



- Purpose: to operationalize and supervise the application of the Agreement in accordance with its terms and to help solve any problems that may arise.
- Implementation Committee formed with role of forum of communication among parties, framework for cooperation regarding Project and implementation of Agreement, and duties assigned to it under the Agreement. Composition: equal representation of Mining Firm and Aboriginal Parties and Committee may unanimously agree to appoint an independent 3rd party member.
- Implementation Committee role and responsibilities:
 - primary formal mechanism for communication and co-operation between the parties and the dispute resolution ,
 - resolve disputes referred to it under Agreement,
 - review and address issues arising from committee reports,
 - review functions and structure of committees to improve effectiveness and efficiency,
 - carry out other functions jointly referred by the parties,
 - Develop action plan including timetables and procedures to ensure compliance with obligations of parties and committees under Agreement and oversee carrying out of action plan, including annual review and reports to presidents of parties, recommendations as to amendments and improvements and review of attainment of employment & contracting targets.

Implementation Committee



- All members representing Aboriginal Parties must have decision making power or direct access to decision making power and 1 member representing Mining Firm must have such power
- With equal membership from all Parties and an Implementation Committee based on-site established to ensure that the provisions of the Agreement are observed and to resolve any disputes or any other difficulties arising under it.
- Any decision or recommendation requires approval of at least 1 representative of each of Aboriginal Party and Mining Firm. Role: to review various aspects of the application of the Agreement terms pertaining to employment and contracting and may make recommendations to the parties, to receive and comment on various reports in these areas as required by the Agreement, to establish limits of aboriginal access to project lands for traditional activities, to be consulted by the Parties on various matters as set out in the Agreement.
- Meets quarterly to examine progress on all aspects of the Agreement as well as to air outstanding issues, follow up on past business and identify any potential future concerns.

Implementation Committee



- Specific working groups with equal membership from each of the negotiating parties established to overview and manage areas of employment, contracting, and culture and community
- Parties to provide information and reports directly to the Implementation Committee and to exchange information via the Project Committee in accordance with terms of the Agreement (environmental, contracting
- Each Aboriginal Party to hire a representative (paid by funds from Mining Firm) to consult with and make recommendations to Mining Firm on implementation of Agreement
- Parties may bring certain matters to the Project Committee for review and decision (ex. review of contracting compliance reports). Parties to consult the Project Committee regarding certain matters set out in the Agreement (ex. training programs to be established by Mining Firm)

Implementation Committee



- Action plan to be approved by presidents of Mining Firm and Aboriginal Party.
- Implementation Committee will report quarterly to parties in writing regarding performance of their obligations and responsibilities, the operation of the committees, progress towards objectives and issues requiring remedial action.
- Mining Firm to fund cost of Aboriginal Party participation on Implementation Committee based on jointly approved budget.
- Mining Firm and Aboriginal Party will use achievement of quantifiable objectives or other performance indicators in the Agreement in the performance evaluations of managers and committee members.
- At least annually a representative of Aboriginal Party will address board of Mining Firm, and vice versa, regarding implementation and other areas of interest.
- Decisions other than disputes: majority of members present at meeting provided that such assenting majority includes one member from each of the Mining Firm and the Aboriginal Parties. If agreement on a proposal cannot be attained after at least 2 consecutive meetings, upon the request of at least 2 members the matter may be referred to the presidents of the Parties and the dispute resolution process kicks in.

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