



Dispute Resolution Clauses in Impact Benefit Agreements with First Nations

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The Setting/Context of the Agreement

1. The Aboriginal Entity

- Government or public body performing a function of Government
- Democratically elected; jurisdictions/powers; finite geographical jurisdiction.
- Tax Exemption



The Setting/Context of the Agreement

2. Principals of Aboriginal Entity

- bear heavy responsibility for present and future generations of members/beneficiaries
- are not wholly profit driven
- what IS important?
- are heavily reliant upon advisors
- “most favored nations” principles



The Setting/Context of the Agreement

3. Principals of Project Proponent

- motivated/driven by return on capital
- “get it done” push



The Setting/Context of the Agreement

4. Who is Not in the Room?

- the “meat in the sandwich”
- be aware of 3 or more ring circus reflecting pressures of other levels of government focused upon:
 - royalties or economic rents that might have to be shared
 - licensing and permitting check stops
- their impact may also be influencing project proponent, without aboriginal party knowing.



Other Legislation Bearing Negotiation

- US Foreign Corrupt Practices Act
- Canadian Extractive Sector Transparency Measures Act
- What Impact on Negotiation?
- What impact on Confidentiality?



Other Principles Bearing on Interpretation

- Honour of the Crown.
- Impact of Aboriginal Entity public body, “qualified donee” position.



Practical Observations

1. Why/How Did it get to a Dispute?

- difference in interpretation of undefined terms/concepts
- complex terms
- “silly bugger” behavior
- different views of fallout - closure of Project?
- win-win or win-lose?
- legislative change
- unforeseen commercial events/consequences



Practical Observations

2. Solutions

- Complexity - Incorporate Hypothetical Examples as Schedules



Practical Observations

3. Example of Complexity

- Payments as “Canadian Development Expenses” for Income Tax
- Benefit of tax deduction calculation to Proponent
- 30% declining balance; applicable tax rate;
- verified calculation of payment due
- audit/review right

Practical Observations

The Clause

- 1.0 Each of the following amounts shall be paid by the Company to Aboriginal Party as a Supplemental Payment at the time, in the manner and to the extent provided below:
 - a) For each Year in which a Loan is outstanding, an amount equal to the Relevant Percentage of the Interest payable for the Particular Year, to be paid on or before June 30 of the second Year following the Particular Year;
 - b)
 - i) an amount equal to 27% of the Pre 2009 Declining Balance Amount for 2009 to be paid on or before June 30, 2010;
 - ii) an amount equal to 27% of the Pre 2009 Declining Balance Amount for 2010 to be paid on or before June 30, 2011;

Practical Observations

The Clause Cont'd

- iii) an amount equal to 27% of the Pre 2009 Declining Balance Amount for 2011 to be paid on or before June 30, 2012;
 - iv) an amount equal to 27% of the Pre 2009 Declining Balance Amount for 2012 to be paid on or before June 30, 2013;
 - v) an amount equal to 27% of the Pre 2009 Declining Balance Amount for 2013 to be paid on or before June 30, 2014;
- c) For each Year commencing after 2008, an amount equal to 27% of the Post 2008 Declining Balance Amount for the particular Year to be paid on or before June 30 of the second Year following the particular Year.

The obligation set out in this clause shall survive termination of this Agreement.



Practical Observations Developer's Perspective

2010	2011	2012	2013	2014	2015	2016
\$ 1,234,567.40	\$ 1,234,567.99	\$ 1,234,567.92	\$ 123,456.28			
	12,345.43					
		12,345.77				
			123,456.56			
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\$ 1,234,567.40	\$ 1,234,567.43	\$ 1,234,567.69	\$ 1,234,567.84			



Practical Observations Aboriginal Party's Perspective

2010	2011	2012	2013	2014	2015	2016	2017	2018
\$ 1,234,567.39	\$ 1,234,567.33	\$ 1,234,567.70	\$ 1,234,567.47	\$ 1,234,567.92				
	12,345.43	12,345.34	12,345.02	12,345.30	\$ 12,345.45			
		123,456.53	12,345.88	12,345.82	12,345.21	\$ 12,345.82		
			123,456.12	123,456.48	123,456.34	123,456.56	\$ 123,456.34	
				123,456.47	123,456.23	123,456.74	123,456.16	\$ 123,456.74
\$ 1,234,567.39	\$ 1,234,567.77	\$ 1,234,567.58	\$ 1,234,567.49	\$ 1,234,567.98	\$ 123,456.23	\$ 123,456.11	\$ 123,456.50	\$ 123,456.74



Practical Observations

4. Why Hasn't it been resolved?

- Memory - Uncertainty attributable to retirement/loss of negotiators of IBA
- Attempting to maintain good relations by not “elevating”.
- lack of limitation periods
- No hypothetical example schedule prepared