

# Aboriginal Mining Guide

How to negotiate lasting benefits for your community

[www.miningguide.ca](http://www.miningguide.ca)

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The purpose of this Guide is to help Aboriginal communities to decide if they can gain lasting benefits from mining. It also explains how to negotiate with mining companies in order to gain those benefits while protecting the environment and the community's quality of life.

With the expansion of the mining sector in Canada, Aboriginal experience with mining and mining companies is growing month by month. To keep this publication in step with such rapid growth, we welcome readers' advice, suggestions, and discussion of this Guide on-line at [www.miningguide.ca](http://www.miningguide.ca).

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## Introduction

Photo: Dawson City, Yukon

From Labrador to the High Arctic and from northern Ontario to Yukon, First Nations, Innu, and Inuit are confronting the complex and diverse world of mining.

Mining and Aboriginal communities are not exactly a “natural” match. While harvesting from the land has declined in economic importance, the rhythms of the natural environment remain close to the heart of most communities. Even many of the Aboriginal people who now live in cities maintain a strong tie to “place” – to their traditional territory and culture.

Mining is essentially different. While the mine is in one particular place, the industry is driven by markets around the world. The money for mining comes from outside the region, from investors whose primary interest is profit. The ore extracted from a mine is usually shipped away for processing. Once it’s left, it’s gone for good; the industry is non-renewable. Our vast appetite for everything from gold rings to snow-mobiles drives mining corporations to roam the globe in search of a big find.

With their power, wealth, and influence, these corporations may simply appear threatening to Aboriginal communities. The reality is more complex. Some First Nations and Inuit are becoming very skilled at using their leverage to good effect. They are learning ways to reduce the risks that mining poses to the environment and to their communities.

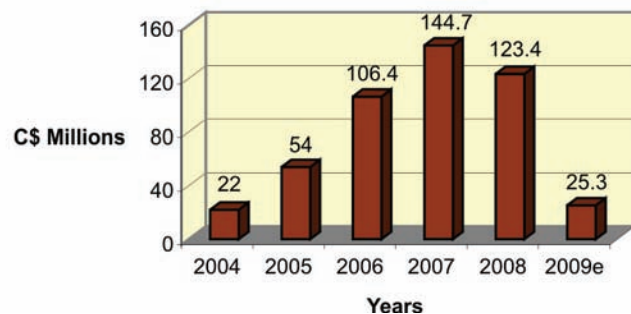
They are also learning ways to capture the benefits that mining can offer them

The prospect of Aboriginal communities gaining real benefits from mining is greater than it was 20 years ago. Working in their favour is a greater recognition of Aboriginal rights. In addition, a social and environmental consciousness is evolving in some parts of the mining industry. Modern mining may yet live down its historic reputation for callous profit-taking and dumps of toxic waste.

It will never live down its exposure to worldwide markets, however. In 2006 and 2007, prices for a wide range of minerals and metals soared. In many parts of Canada, including Yukon, exploration companies spent millions of dollars looking for valuable ore bodies. (See Diagram Intro-1. Please note that values for 2009 are projected.) Then in late 2008, prices crashed.

A financial crisis that started with home mortgages in the United States slashed the demand for all types of goods and services across the globe. The demand for many of the industrial raw materials produced in the mining sector fell off. As a result, exploration in Yukon and elsewhere has nose-dived.

Diagram Intro-1: Yukon Exploration Expenditure



Such are the markets for the global commodities produced by mining. The stakes are high. Big money is made and lost. Still, prices could rocket up again within a few years. This is not something Aboriginal communities can control, or mining companies for that matter.

But even when people's intentions are good and mineral prices are high, it is neither simple nor straightforward to



generate lasting benefits for local communities from a mine. That takes careful planning. It takes persistence, clarity about one's goals, and research. It takes carefully-prepared and -conducted negotiations that capture the whole range of benefits: revenues, training and jobs, business opportunities, and management experience and ability. With good negotiation and good implementation, a mine can be made to generate benefits that outlive the mine itself, and build the community's self-reliance. With poor negotiation or poor implementation, a mine can divide communities, weaken families, and degrade social and environmental conditions.

In short, mining offers no quick fix to the challenges faced by Aboriginal communities. The *Aboriginal Mining Guide* will help Aboriginal communities to decide if they can gain lasting benefits from mining. It also explains how to negotiate with mining companies in order to gain those benefits while protecting the environment and their quality of life.

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## THE CONTENTS IN SUMMARY

**Module 1** explains five perspectives that parties commonly bring to the negotiation of mining benefits. Only one, the Community Economic Development Perspective, moves to the forefront of negotiations the community's interest in greater self-reliance, brought about through the long-term process of capacity building. If communities are to approach mining from this perspective, they first have four strategic issues to resolve: the community's vision of its future quality of life, and its perception of its current strengths and weaknesses; the community's readiness to strive for a full range of benefits, long-term as well as short-term; its readiness to devote profits to building community assets; and its readiness to form partnerships in order to contend for valuable, demanding business opportunities.

**Module 2** details the five stages of mining, right from the prospector's axe to the closing and reclamation of a mine site. It highlights the opportunities and benefits possible at each stage and summarizes the impacts a mining project can have on a community's way of life, economy, and natural environment. It defines the different types of benefit that people bring to the negotiating table and their points of leverage. It shows how each stage is affected in Yukon by mining regulations and the provisions of the Umbrella Final Agreement. It also looks at how some communities are creating mining policies or protocols to guide their engagement in this sector. This information is basic to the negotiation of a valuable role for a community in mining.

**Module 3** is a short but crucial explanation of the concept of leverage. Political action, court cases, and negotiation over the last 40 years have boosted the leverage of Aboriginal communities in business negotiations. To use that leverage to capture real benefits from mining companies requires some different skills, values, and attitudes.

For the community that decides to seek benefits from mining, **Module 4** describes all the preparation or "homework" necessary before negotiations start. Effective negotiators strive for deals in which every party at the table wins. It is necessary to determine what benefits each party might bring to an agreement, and what benefits it must get in return to satisfy its long-term interests. The module also explains how negotiations open. The representatives of the community and the company establish the issues they wish to discuss and the order in which to discuss them (the "negotiation agenda").

This is the general process Aboriginal communities and mining companies use to prepare to negotiate one of two kinds of agreement.

One kind is the Impact Benefits Agreement (IBA) or Socio-Economic Participation Agreement (SEPA). Without a SEPA or IBA, mining rarely takes place in northern Canada now. **Module 5** goes into detail on the provisions that SEPAs and IBAs involve, how they are negotiated, and important lessons to learn from the ones signed to date.

A second kind of agreement is the Joint Venture, or jointly-owned company. It is another tool that Aboriginal communities commonly use to capture benefits from mining. The Joint Venture assigns to an Aboriginal organization a share in the ownership of a business that provides services to mines. **Module 6** provides information specific to the negotiation of a Joint Venture.

It is crucial not only to negotiate these agreements well, but to make sure they are carried out in full. Without close monitoring and procedures for hearing complaints, correcting mistakes, and reviewing the provisions, SEPAs, IBAs, and Joint Ventures are of little value to a community. **Module 7** summarizes this and several other Key Learnings about the role Aboriginal communities can take in mining.

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## CASE STUDIES

Over the last 30 years, Aboriginal people have gained a lot of experience using SEPAs and Joint Ventures to advance their interests. Well negotiated and implemented, these agreements can capture for local people benefits that otherwise would only enrich investors far away.

Some communities have negotiated with corporate mining giants, some with junior companies. Sometimes two or three Aboriginal communities have negotiated with one company. Sometimes the negotiations have involved land claims as well as mining benefits, so federal, provincial, or territorial governments have been at the table as well. In some cases and in some respects, Aboriginal communities have been satisfied with their agreements. In others, they have been disappointed. There are important lessons that Aboriginal people across the North can gain from this vast range of experiences.

We have chosen five of these experiences as case studies in the negotiation of agreements between Aboriginal communities and mining companies. Each case study illustrates a number of important issues. They appear at the end of this introductory module.

1. **Northwest Territories Diamond Mines**. In 12 years, one Aboriginal community has been involved in negotiations with three different mining companies. This case study shows how a community's lack of capacity can lead to poor agreements. However, it also shows how, by learning from one agreement, a community can negotiate later agreements more effectively (p. Intro-10).
2. **Raglan Mine** (Quebec). An Innu organization shows how capacity located at a regional level can bring about a solid agreement, of real value to all parties. A sound understanding of leverage has brought benefits to multiple communities, including significant amounts of revenue (p. Intro-21).
3. **Brewery Creek Mine** (Yukon) This story demonstrates how an excellent team of negotiators recognized that part-ownership of a mine was not in the best interest of their community. They were able to come to a solid agreement with a junior mining company that at first had little desire for a working relationship with the community (p. Intro-30).

4. **Voisey's Bay Mine** (Newfoundland and Labrador). In this story, earlier experiences in land claims negotiation enabled an Aboriginal group to recognize its points of leverage and negotiate effectively with a mining company. The community's equal representation on the environmental assessment panel ensures that the mine addresses local social, economic, and environmental concerns (p. Intro-38).
5. **Keno Hill Silver District** (Yukon). This story shows how several agreements may be concluded, one built on top of the other. The result, to date, is an exploration agreement over the highly promising – but as yet undeveloped – Bellekeno East Deposit. This agreement is strong on implementation procedures. What benefits an actual mine will generate remains to be determined (p. Intro-45).

(We provide no separate case study of a Joint Venture. However, Modules 5 and 7 supply many details about the negotiation of a trucking Joint Venture servicing mines in northern Saskatchewan.)

Please become familiar with each case study. As you read the modules, watch for the \*starred links. They indicate which case study offers a good example of a point made in the text.

SEPA's and Joint Venture agreements are usually confidential. So the actual content of each agreement and its results are often hard to get. Only the details of the **Raglan Agreement** have been made public. Although we made our best effort to provide as much information as possible in each case study, there are big gaps in most of the stories. (The SEPA concerning Bellekeno East Deposit has only just been concluded. The information about its implementation is very limited for now.) Please refer to the endnotes for the information sources.

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## A SHORT HISTORY OF SEPAs

In 1974, the Mackenzie Valley Pipeline Inquiry looked into the impact that a gas pipeline and energy corridor might have on Canada's North. It was led by Justice Thomas Berger. He recommended a 10-year moratorium on pipeline construction and that any future pipeline be subject to provisions that would protect the people of the North, their environment, and their economy.

The results of this Inquiry started to shift the outlook of mining companies. They began to realize that part of their business was to come to agreements with the Aboriginal communities that mining was going to affect. Impact Benefits Agreements (IBAs) was the early name for these agreements. Section 35 of the Canadian Constitution, which protects Aboriginal and Treaty rights, exerted more pressure on mining companies and Aboriginal communities to conclude these agreements.

A great many new names for these agreements have also grown up. They get called partnerships agreements, cooperation agreements, participation agreements, benefits agreements, accommodation agreements, economic development agreements, socio-economic participation agreements, and socio-economic accords. The name often just depends on what a mining company and an Aboriginal community choose to call their agreement.

In the case studies we call the agreements by the names people commonly use. (For example, the "Raglan Agreement.") Otherwise, for the sake of simplicity, the *Aboriginal Mining Guide* refers to all these agreements between Aboriginal communities and companies that own and operate actual mines as Socio-Economic Participation Agreements (SEPAs).

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## A SHORT HISTORY OF JOINT VENTURES

Joint ventures became common in the United States in the 1970s. Since 1980, they have attracted the attention of a great many Aboriginal communities and Aboriginal Development Corporations (ADCs) in Canada too.

Joint Ventures are a strategy that businesses use to succeed in today's increasingly competitive economy. The firm that acts alone cannot easily integrate all the capital, technology, and skills needed to handle complex opportunities and rapidly changing circumstances. Even large companies nowadays use Joint Ventures to fill gaps in their capacity that would otherwise keep out of reach some highly rewarding business opportunities.

One of the pioneers of Joint Ventures in Aboriginal communities was Kitsaki Development Corporation, the business arm of the La Ronge Indian Band in northern Saskatchewan. Starting in 1984, under the leadership of Chief Executive Officer Bill Hatton, Kitsaki used Joint Ventures to gain a substantial role and benefits in mining and other strategic economic sectors. Many of the things learned from that experience, and published in the book *Aboriginal Joint Ventures* (1993),<sup>i</sup> are reproduced in the *Aboriginal Mining Guide*.

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## ENDNOTES

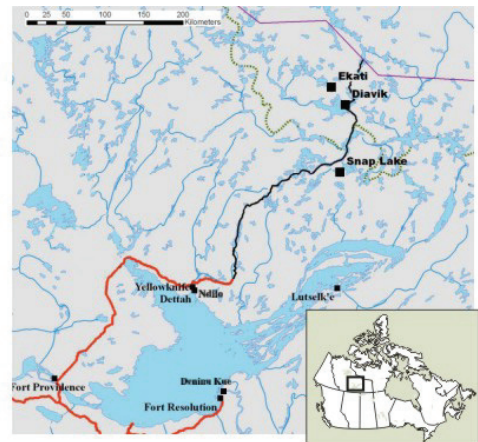
<sup>i</sup> Mike Lewis and William J. Hatton, *Aboriginal Joint Ventures: Negotiating Successful Partnerships* (Port Alberni: Centre for Community Enterprise, 1993). This book is still available in portable document format (PDF) from The CED Digital Bookshop, [www.cedworks.com](http://www.cedworks.com).



## Case Study #1: Northwest Territories Diamond Mines<sup>i</sup>

Lutsel K'e Dene (LKD) First Nation is located on the east arm of the Great Slave Lake, Northwest Territories, 200 km from Yellowknife. Of the 700 members, about 400 live in the community. There is a shortage of houses and the cost of living is high. The community is isolated and there are few good jobs to be had. The education system is considered poor.

Three other Dene peoples also live in the lands around Great Slave Lake, known as Akaitcho territory: Dettah, Ndilo, and Deninu Kue. They are known as the Akaitcho Treaty 8 First Nations. None of them has a settled land claim. (See map.<sup>ii</sup>) They do have an Interim Measures Agreement, however. That gives them some influence in who receives land-use permits and water licenses in the Northwest Territories.



LKD has had intense experience with three diamond mines - Ekati, Diavik, and Snap Lake. During the years 1996 through 2007, LKD and its neighbour First Nations negotiated with three different mining companies.

Ekati, owned by BHP Billiton, is Canada's first diamond mine. Ekati produces about 3% of the world's rough diamonds by weight, and 6% by value. Mining began at Ekati in October 1998. The diamonds are mined underground and from an open pit. Ekati is expected to close in 2023.



Panda Pit at Ekati Mine. Photocredit: Independent Environmental Monitoring Agency.

Diavik Diamond Mine, owned by Rio Tinto, is located 100 km southeast of Ekati. Diavik's Environmental Assessment began in 1999 and mining began in January 2003. Diavik is expected to close in 2020.



Snap Lake is located south of both Ekati and Diavik. It is the first diamond mine in Canada that is wholly underground. De Beers bought the mine in 2000 and received permits to build and operate the mine in 2004. Mining began there in early 2008. It is expected to close in 2029.

Mining companies have been making more and more requests to work on LKD First Nation traditional territory. Junior companies have also been actively exploring the area for a long time. They often apply for new exploration permits. The community frequently has opposed the applications.

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## THE NEGOTIATION

For Ekati mine, LKD and the other Akaitcho Treaty 8 First Nations negotiated an Impact Benefits Agreement (IBA) in 1998. For Diavik LKD negotiated a Participation Agreement (PA) in 2001. For Snap Lake, LKD negotiated another IBA in 2007. Each agreement turned out differently. Every time LKD was able to learn from its experience and make the next agreement better than the one before.

In the case of Ekati, there were actually three agreements in which LKD was involved: an environment agreement and a socio-economic agreement, as well as the IBA. All three were signed after construction of the mine had already begun. LKD only got 60 days to be involved in the negotiation of all three.<sup>iii</sup>

A lack of time, resources, and knowledge kept LKD leaders from going fully prepared into the negotiation of the Ekati mine. They were overwhelmed by the complex plans for the mine. It was also difficult for them to foresee how the mine might affect their people and the traditional

territory. Other issues also made a good deal hard to come by:

- The technical language used to describe diamond mining and its potential impacts was unfamiliar.
- Information about the value of the diamonds to the company was insufficient. Because of that, LKD was at a disadvantage when negotiating compensation.
- Negotiators did not have enough time to keep LKD elders and other community members fully informed.
- The Government of Canada denied Deninu Kue First Nation funding for the IBA negotiations, even though it is an Akaitcho Treaty 8 First Nation and the mine would affect its livelihood, too. LKD, Dettah, and Ndilo resolved instead to share their negotiation funding with Deninu Kue. This has been a source of tension among Akaitcho Dene First Nations ever since.

This first experience, while generally negative, did teach some lessons that the LKD took into the negotiation on the Diavik mine. Business opportunities at the mine were identified more effectively and targets for jobs and business contracts negotiated with more success. Training workshops and expert interpreters reduced the problems of the LKD with the language of mining. The leaders also knew they had the right to take the time to negotiate properly.

Discussions about Snap Lake began in 2002 when De Beers and LKD signed a Memorandum of Understanding to negotiate an IBA. The Memorandum outlined each topic they would discuss and when they would discuss it. Negotiations were to continue through 2003 and the IBA was expected to be complete in June 2003. In fact, it was not signed until April 2007 – two years longer than neighbouring First Nations took in their negotiations with De Beers. LKD took its time.

An important part of the negotiations with De Beers was traditional knowledge (TK). An agreement between De Beers, the governments of Canada and the Northwest Territories, and four Aboriginal groups created The Snap Lake Environmental Monitoring Agency. On it are four scientific experts as well as four elders who have lived in the area of the mine site. In this way the agency combines traditional knowledge with scientific knowledge.

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## THE DEAL

The details of the Ekati IBA are confidential. It is known to have included annual compensation payments of \$250,000 for all four First Nations<sup>iv</sup> and terms for employment and business opportunities, training programs, and scholarships.<sup>v</sup>

Here are some of the important terms of the Ekati IBA:

- Quotas for employment<sup>vi</sup>
- Annual cash payments<sup>vii</sup>
- Training and education programs<sup>viii</sup>
- Health and wellness programs, counselling and support programs<sup>ix</sup>
- numerous and challenging opportunities for community businesses<sup>x</sup>
- Scholarships and funding for some cultural activities (for example, caribou hunts)<sup>xi</sup>
- BHP Billiton must pay for an Independent Monitoring Agency to track how well the parties carry out the terms of the IBA<sup>xii</sup>

The LKD in return had to agree that community members would not oppose future mine expansion or other activities by BHP Billiton on the claim block. By signing all the agreements LKD affirmed its support of the mine's construction and operation, as approved by government.<sup>xiii</sup>

To LKD, this agreement was the beginning, not the end of negotiations with BHP Billiton. The IBA requires that the parties to the deal review it in five years. LKD leaders will use this review to renegotiate the aspects of the agreement that they are not happy with. Several clauses in the agreement (for example, those concerning compensation payments) are not renegotiable, however.<sup>xiv</sup>

Although its details may not be made public, the Diavik Participation Agreement is similar to the Ekati agreement. One difference is that the Diavik agreement orders that the mine's entire workforce eventually come from the North.

Like the Ekati IBA, the Snap Lake IBA provides the LKD with benefits like training, education, employment, business opportunities, and compensation. It also sets a target of 40% local employment during the construction of the mine.

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## THE RESULTS

A number of good things have come from these three agreements. There are compensation payments, jobs, and training for the LKD. There is money for community hunts and to buy food, clothing, and other things. There are more businesses and joint ventures. (See the “**Summary of Benefits To Date**,” below.)

The agreements also have been a source of unhappiness. During negotiations, elders became very anxious for the community. People grew tired of meetings. Young people felt left out of the negotiations. The negotiating teams felt overwhelmed.

As a result, there were serious misunderstandings about the scope of the Ekati IBA. People thought it just concerned some of the diamond pipes, not BHP Billiton's entire claim. Government recognized and funded only three of the four First Nations party to the negotiation.

Sometimes the problem lay not with the agreement itself, but in how it was implemented. Members of the LKD disagreed over how to use the compensation payments. BHP Billiton did not keep the LKD members as well-informed as it promised. Members also felt the company did not create all the jobs that it promised local people. But the LKD was unsure how to get the company to change its ways.

As the Ekati IBA required, BHP Billiton funded an Independent Monitoring Agency to act as a “watchdog.” This has made Ekati one of the most closely monitored mines in Canada. But people have also wondered how “independent” the agency could be, when the company pays all its bills. When mine impacts have been greater than projected, BHP Billiton has claimed that the mine did not cause the impacts. BHP Billiton has also reduced its funding of the agency.

(When it negotiated the Diavik Participation Agreement, the LKD tried to correct this monitoring problem. LKD First Nation insisted that the agreement set up a monitoring committee that only had community members. However, the highly technical language of mining information made their work very difficult to do.)

Ekati has not created nearly as many jobs for LKD members as expected. A number of barriers keep community members from getting jobs at the mine or from starting businesses that support the mine. The Local Employment Officer listed five major barriers to LKD employment:

- lack of job readiness
- lack of training in technical skills
- drug and alcohol problems
- lack of local people and agencies to support business development
- lack of capital to lend to businesses or to invest in them

Mining companies continue to request permission to work in LKD traditional territory. In 2005, two diamond and two uranium mining companies applied to Mackenzie Valley Land and Water Board for exploration permits. LKD responded quickly. Asserting its right of refusal under the Interim Measures Agreement, LKD wrote strong letters to the Board, urging that it reject the four applications. Each was instead referred for environmental assessment. All four companies then withdrew their applications. They said that they did not want to undertake a full environmental assessment to get a “simple” exploration permit.<sup>xv</sup>



Angus Haviyok works for Nuna, providing infrastructure and transport for the mining industry in the Western Arctic. It is a Joint Venture between Kitikmeot, Nunasi Corporation and Pilot Shipping. Photocredit: Kitikmeot Corporation and Jiri Hermann.

## SUMMARY OF BENEFITS TO-DATE

IBAs have enabled the LKD and its First Nation neighbours to embark on a variety of businesses and joint ventures. The tables below summarize the benefits to all four First Nations from the Ekati, Diavik, and Snap Lake agreements. Only a few numbers are specific to the LKD. They show how few of the Diavik and Snap Lake mine jobs (1%) are going to LKD First Nation members.

Contracts with the three mines generated Gross Revenues of nearly \$600 million for northern Aboriginal businesses in 2006 and about the same in 2007. The portion captured by the LKD First Nation is unknown.<sup>xvi</sup>

### Ekati<sup>xvii</sup>

<b>Revenues*</b>	<ul style="list-style-type: none"> <li>Compensation of \$250,000 per year to each of the four Aboriginal communities as long as the mine is running.</li> <li>No profit or revenue sharing.</li> </ul>
<b>Management/ Decision Making</b>	Unknown but given the inexperience of community members, it is highly unlikely there was any.

<b>Jobs</b>	<ul style="list-style-type: none"> <li>▪ Since 1999 an average of 32% of the annual workforce has been Aboriginal.</li> <li>▪ Of the jobs filled by Aboriginal people, 55% are semi-skilled, 24% skilled, 18% entry-level, and 3% professional.</li> <li>▪ Of the jobs filled by women, 27% are Aboriginal.</li> <li>▪ In 1997 22 LKD members were employed, but six months later only 3 members. This drop in employment was due to low wages, no overtime, little room for advancement, no native food, and concern about environmental hazards.</li> </ul>
<b>Training</b>	<ul style="list-style-type: none"> <li>▪ 63% of apprentices have been Aboriginal.</li> <li>▪ The Workplace Learning Program offers employees training at the mine site specific to their needs, as well as Aboriginal content.</li> </ul>
<b>Downstream Business</b>	In 2007, out of a <u>procurement</u> budget of \$480 million, \$125 million (26%) was spent on northern, Aboriginal-owned businesses (up from 14% in 1999). Denesoline, a LKD company, works on core sampling and other engineering services

## Diavik<sup>xviii</sup>

<b>Revenues</b>	<ul style="list-style-type: none"> <li>▪ Annual cash payments of approximately \$804,000 to each community.</li> <li>▪ No profit or revenue sharing.</li> </ul>
<b>Management/ Decision Making</b>	In 2005, the Aboriginal Leadership Development Program was launched. It is intended to increase the number of Aboriginal people qualified for supervisory and management jobs at Diavik.
<b>Jobs</b>	<ul style="list-style-type: none"> <li>▪ An average of 33% of the annual workforce was Aboriginal in 2007. (This is up from an average of 26% in 2000-2007.)</li> <li>▪ Only 1% (average of 5) of the mine's employees are LKD members.</li> </ul>
<b>Training</b>	<ul style="list-style-type: none"> <li>▪ As of 2009 there have been 42 graduates from the Aboriginal Leadership Development Program.</li> <li>▪ There are heavy duty mechanic apprenticeships, underground miner training, and an administrative assistant training program.</li> </ul>
<b>Downstream Business</b>	<ul style="list-style-type: none"> <li>▪ In 2007, \$276 million (38%) of a total <u>procurement</u> budget of \$727 million was spent on northern Aboriginal businesses (37% in 2004).</li> <li>▪ Since 2000 the total spending on Aboriginal businesses has been \$1.5 billion (44% of the procurement budgets).</li> <li>▪ Half of the mine's operations are <u>outsourced</u> to contractors. Virtually all are northern businesses. Most are Aboriginal. Joint ventures with Aboriginal and non-Aboriginal partners are encouraged.</li> <li>▪ In 2005 Kitikmeot Cementation Mining and Development (a Joint Venture between Kitikmeot Corporation and Cementation Canada) was awarded a multi-million dollar contract for underground mine development at Diavik. This contract has continued to unfold into additional work for KCMD as Diavik approaches its Operation Stage.</li> </ul>

## Snap Lake<sup>xix</sup>

<b>Revenues</b>	Unknown
<b>Management/ Decision Making</b>	None to date for First Nations.
<b>Jobs</b>	<ul style="list-style-type: none"> <li>▪ In 2007, 12% (126 full-time jobs) of the annual workforce was Aboriginal (up from 39 in 2005).</li> <li>▪ 64% of the jobs filled by Aboriginal people are semi-skilled or unskilled. 1% (5 jobs) of the annual workforce is LKD.</li> </ul>
<b>Training</b>	<ul style="list-style-type: none"> <li>▪ A Mine Training Society was created in 2004. De Beers has a representative on it. 300 Aboriginal people have taken its programs and found jobs in mining.</li> <li>▪ The mine has hired training coordinators. There have been five training programs in the trades for Aboriginal people. \$600,000 has been invested in the Kimberlite Training and Technical Centre in Yellowknife.</li> </ul>
<b>Downstream Business</b>	<ul style="list-style-type: none"> <li>▪ By the end of 2007, \$939.2 million spent on construction, of which Aboriginal businesses in the NWT were awarded \$438.5 million (46.7%).</li> <li>▪ Use of a NWT Business Registry to identify potential northern businesses.</li> <li>▪ Business information sessions have been held to increase participation.</li> </ul>

\* Revenues include a number of possibilities, including compensation, royalties, profit or equity sharing and/or one time or regular payments. See [Module 5](#).

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## POSTSCRIPT

Canada is the world's third largest producer of diamonds. It produces an estimated \$1.5 billion worth of diamonds each year. Direct benefits accrue to the federal and territorial governments through royalties and business and personal income taxes from diamond mines. Indian and Northern Affairs Canada estimates that over the life of the mines in the Northwest Territories, the Ekati, Diavik, and Snap Lake projects will collectively generate royalties of \$1.6 billion, federal business taxes of \$2.6 billion, territorial taxes of \$1.3 billion, and employee and other business income taxes of \$4.7 billion (2004 estimated figures). From 2000 to 2008, the territorial government's total revenues grew from \$823 million to \$1.47 billion.<sup>xx</sup>



With such substantial revenues, it is worth noting how little financial benefit Lutsel K'e Dene was able to negotiate in their agreement. It is noted in the document "Dealing Full Force" that the community still does not realize that it can oppose a mine and leverage better results for themselves.<sup>xxi</sup> As you will see in the next case study, capacity, knowledge, and being organized can lead to far better results.

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## ENDNOTES

<sup>i</sup> Many of the details in this case study have been taken from Vivian Weitzner, "Dealing Full Force: Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies" (Ottawa: The North South Institute, January 2006). 13 August 2009  
<<http://www.nsi-ins.ca/english/pdf/lk-en.pdf>>.

<sup>ii</sup> Map based on Virginia Valerie Gibson, "Negotiated Spaces: Work, Home and Relationships In The Dene Diamond Economy," Thesis submitted to the University of British Columbia, Department of Graduate Studies (Mining Engineering), May 2008, p. 19. 17 August 2009  
<[http://www.impactandbenefit.com/ubc\\_2008\\_spring\\_gibson\\_virginia.pdf](http://www.impactandbenefit.com/ubc_2008_spring_gibson_virginia.pdf)>.

<sup>iii</sup> LKD was an actual signatory to one of these agreements, the IBA. The socio-economic agreement was signed only by BHP Billiton and the Government of the Northwest Territories signed. The environmental agreement was signed by BHP Billiton, the Government of the Northwest Territories, and the Department of Indian and Northern Affairs.

<sup>iv</sup> Richard Gleeson, "Looking for more: Akaitcho leaders say BHP offering a raw deal," Northern News Services, October 2, 2000. 16 September 2009  
<[http://www.nnsi.com/frames/newspapers/2000-10/oct2\\_00bhp.html](http://www.nnsi.com/frames/newspapers/2000-10/oct2_00bhp.html)>; "Some Deninu Kue members won't get diamond dollars," cbc.ca, May 3, 2007. 16 September 2009  
<<http://www.cbc.ca/canada/north/story/2007/05/03/nwt-deninu.html>>; and Weitzner, p. 17.

<sup>v</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories," *Natural Resources Canada*. 14 September 2009 <<http://www.nrcan.gc.ca/smm-mms/abor-auto/html/eka-08-eng.htm>>.

<sup>vi</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories."

<sup>vii</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories."

<sup>viii</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories."

<sup>ix</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories."

<sup>x</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories."

<sup>xi</sup> "Info Bulletins: Partnership Agreements – Ekati Diamond Mine - Northwest Territories."

<sup>xii</sup> "Why was the Agency Created?" *Independent Environmental Monitoring Agency*. 14 September 2009 <<http://www.monitoringagency.net/AbouttheAgency/WhywastheAgencyCreated/tabid/61/Default.aspx>>.

<sup>xiii</sup> Weitzner, p. 29.

<sup>xiv</sup> Weitzner, p. 10.

<sup>xv</sup> Cited in Weitzner, p. 12.

<sup>xvi</sup> Impact Economics, "2008 NWT Diamonds," (NWT/Nunavut Chamber of Mines and Mining Association of Canada, October 2008), p. 13 (fig. 9), 35 (fig. 34). 13 August 2009 <[http://www.mining.ca/www/media\\_lib/MAC\\_Documents/Diamond\\_Affairs/2009/NWT\\_Diamonds\\_2008\\_Final\\_v3.pdf](http://www.mining.ca/www/media_lib/MAC_Documents/Diamond_Affairs/2009/NWT_Diamonds_2008_Final_v3.pdf)>.

<sup>xvii</sup> Results have been taken from the most recent socio-economic report available, "Annual Report on Northern Employment and Spending: 2007 Operations Phase – Ekati Diamond Mine" (BHP Billiton). 1 May 2009 <<http://www.bhpbilliton.com/bbContentRepository/docs/2007EkatiAnnualReportOnNorthernEmploymentAndSpending.pdf>>.

<sup>xviii</sup> Results have been taken from the most recent full-year socio-economic monitoring reports available. The first full report is from 2003. These results are from the 2007 report, "Diavik Diamond Mine: Socio-Economic Monitoring Report for Operations January to December 2007" (Diavik Diamond Mines, Inc.). 1 May 2009 <[http://www.diavik.ca/documents/Diavik\\_2007\\_SEMA\\_Report.pdf](http://www.diavik.ca/documents/Diavik_2007_SEMA_Report.pdf)>.

<sup>xix</sup> Results have been taken from the most recent available socio-economic report, "Naturally Northern: 2007 Snap Lake Mine Socio-Economic Report" (DeBeers Canada, Snap Lake Mine), pp. 5-7, 11, 16, 21-22. 1 May 2009 <[http://www.debeerscanada.com/files\\_2/documents/2007SnapLakeSocioEcReport.pdf](http://www.debeerscanada.com/files_2/documents/2007SnapLakeSocioEcReport.pdf)>.

<sup>xx</sup> "Economic Impact: Generating Revenues," *Diamondfacts.org*, 13 August 2009 <[http://diamondfacts.org/difference/economic\\_impact.html](http://diamondfacts.org/difference/economic_impact.html)> and "2008 NWT Diamonds," p. 27.

<sup>xxi</sup> Weitzner, p. 29.

## Case Study #2: The Raglan Mine

Raglan mine lies about 1,800 km north of Montreal, deep in the Nunavik territory of northern Quebec. Nunavik is sparsely populated, with approximately 10,000 residents living in 14 communities. The two communities closest to Raglan are Salluit (1,000 residents) and Kangiqsujuaq (550 residents). The nickel/copper mine property lies 60 km west of Kangiqsujuaq (Wakeham Bay) and extends about 55 km. (See map.<sup>i</sup>)

Raglan ore-bodies were discovered in the 1930s. In the 1960s, mining giant Falconbridge Limited acquired the assets of the various mining companies that were exploring the Raglan property.<sup>ii</sup> At the time, the Inuit had little or no say in the way in which any mining project would proceed. In 1975, however, the James Bay and Northern Quebec Agreement (JBNQA) outlined the economic and cultural rights of Aboriginal people in Quebec's north, and how these rights were to be protected. To administer and invest compensation payments made under the JBNQA, Makivik Corporation was established in 1978. Its executive and Board of Directors are all elected by the Inuit residents of Nunavik.

Prior to developing the Raglan property, Falconbridge decided to



Raglan Mine complex. Photocredit: Xstrata Nickel.

strike a deal with Makivik and the residents of Salluit and Kangiqsujaq. What unfolded was *The Raglan Agreement*. It is the first Impact and Benefits Agreement (IBA) in Canada between only a mining company and the Aboriginal people that its mining would affect. There had been IBAs before, but government had always co-signed them.

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## THE NEGOTIATION

In 1992, Falconbridge went to inform the people of Kangiqsujaq and Salluit of its intention to develop the Raglan ore bodies, and to ask, “How can we contribute to your community?” It quickly became clear that the company confined its ideas of a “contribution” to little more than basic community projects.

The people were not happy. In an earlier consultation between themselves, the company, the regional government, and several provincial ministries, they had made their concerns clear. They wanted to participate in the development and its economic spin-offs, not just observe it. They did not wish to abandon their traditional pursuits, despite their interest in employment for wages. They were also concerned about the effect mining would have on the environment and on the number of southern people coming to their lands. In 1993 they asked Makivik to intervene on their behalf and negotiate with Falconbridge.<sup>iii</sup>

The Inuit knew they wanted to benefit from the mine. Their position in negotiations was weakened by the fact the Raglan property was not on Inuit land. Still, they had two leverage points. First, Falconbridge needed a provincial Environmental Assessment Certificate for Raglan. If the Inuit opposed the mine, Falconbridge’s chances of getting the certificate would be in serious jeopardy. Second, the Inuit had claims pending to the

margins of Hudson's Bay and Hudson Strait. If these claims were recognized, the Inuit would have offshore jurisdiction that would threaten the passage of Falconbridge ships.

With Makivik's intervention, a *Memorandum of Understanding Regarding Negotiation of an Agreement in Respect of the Mining Project Near Deception River*<sup>iv</sup> was drawn up. It outlined principles concerning the environment, employment, training, and compensation that would form the basis for negotiation of an IBA with Falconbridge.

After two years of intensive negotiations, the **Raglan Agreement** was concluded on February 28, 1995. There were six signatories to the agreement: Falconbridge, Makivik, the villages of Kangiqsujuaq and Salluit, and the land-holding companies of each village.

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## THE DEAL

The Raglan Agreement has five principal benefits:

1. It awards **priority of employment** to qualified Inuit residing in Salluit and Kangiqsujuaq, in the region as a whole, and to other Nunavik Inuit.
2. It awards **priority in contracts** to competitive Inuit enterprises for work required during the mine's operating phase.
3. It makes **compensation and profit-sharing** payments to the benefit of Salluit, Kangiqsujuaq, and Nunavik region inhabitants.
4. It establishes the **Raglan Committee** with one member from each of Salluit, Kangiqsujuaq, and Makivik, and three from Falconbridge. The task of this permanent committee is to oversee

implementation of the agreement and to review any major environmental issues that may arise.

5. It establishes procedures for **monitoring the environment** beyond regulatory requirements. The results of this monitoring are to be regularly reported to the Raglan Committee.

Additional highlights of the agreement are:

- A joint committee to oversee training programs.
- An overall compensation package estimated at \$60-\$100 million over the life of the project. A **Guaranteed First Allocation** of \$10 million is to be paid over the first 15 years of the project (and continue thereafter at \$800,000 per year until the end of the project). A **Guaranteed Second Allocation** of \$4,125,000 is to be paid over the first 15 years of the project (and continue thereafter at \$275,000 per year to the end of the project.) A **Profit Sharing Allocation** is to commence in the sixth or seventh year of operation, and will pay the Aboriginal signatories 4.5% of Annual Operating Cash Flow.
- **Additional Payments** of \$50,000 made to Makivik every year for ten years.
- A representative of Makivik appointed to the mine's Board of Directors.
- Detailed projections of the mine's development are to be submitted. Deviation from the mine's original specifications will trigger re-negotiation of the agreement.
- The mine's development may require relocation of Inuit camps and equipment. In that case, separate discussions are to address the necessary compensation or remediation.
- Any party may still claim compensation for damages caused by toxic substances that result from the mine operations.
- There is a dispute resolution process to follow, if the parties cannot resolve a dispute by negotiation.

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## RESULTS

The mine opened in February 1998. It is in full operation and employs about 300 workers. It is currently expected to have a lifespan of 30 years.

Each year 130,000 tonnes of nickel-copper concentrate are produced at Raglan and shipped to Quebec City during the 8-month shipping season. From Quebec City it goes by rail to a smelter in Sudbury. It then returns to Quebec City for shipment to Falconbridge's refinery in Norway. (The original agreement did not permit the company to explore or mine any additional ore-bodies on the Raglan Property. However, the parties later agreed to an amendment that has permitted Falconbridge to exploit several new sites.)

Although there have been problems implementing the Raglan Agreement, the spirit of cooperation between mine management and Inuit people remains strong. There is a genuine willingness to work through issues and resolve them. Inuit generally seem happy to have jobs at the site and are proud to work there.

Everything that happens on-site is passed on to the Raglan Committee, whose Inuit members report back to their communities. In this way communities are kept informed about what is going on. They can also bring their concerns or problems to the Committee.



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## SUMMARY OF BENEFITS TO DATE

<b>Revenues*</b>	<p>Profit sharing: (after 6-7 years)</p> <p>2005 - \$300,000 (1<sup>st</sup> year)</p> <p>2006 - \$16.7 million</p> <p>2007 - \$32.6 million</p> <p>2008 – \$6.8 million<sup>v</sup></p> <p>As of the end of 2008, Raglan has delivered over \$65.4 million to the communities. These profits have been dedicated to the welfare and economic advancement of the Inuit. Grants have been made to Inuit nonprofit organizations (furniture assembly, Illuapiit structure, housing), cultural organizations, and to recreational facilities in each of the 14 Nunavik communities.</p>
<b>Management</b>	Makivik representation on Mine's Board of Directors.
<b>Jobs</b>	The mine targets 20% Inuit employment. In 2006 Inuit employment was reported to vary from 15-18%.
<b>Training</b>	<ul style="list-style-type: none"> <li>▪ The Raglan Employment and Technical Training Committee addresses issues of discrimination and the pace of promotion.</li> <li>▪ Since 1998 the mine and government have invested \$10 million in training initiatives. New plans concern the development of skilled trades training, cross-cultural initiatives, and the <u>retention</u> of Inuit employees.</li> </ul>
<b>Downstream</b>	<ul style="list-style-type: none"> <li>▪ In 2005, 13% of the mine's annual procurement budget and in 2007, 17% of that budget was spent on Inuit businesses and services.</li> <li>▪ In 1996, the Inuit company Nuvumiut Developments Inc. signed a joint venture with Falconbridge to carry out open pit mining for nickel 1997-2004. Nuvumiut continues to specialize in open pit mining, exploration drilling, underground drilling, construction, and in environmental issues.</li> <li>▪ Numerous other joint ventures have involved trucking, air transport, and catering.</li> </ul>

\* The money is placed in a trust, which distributes 25% of the money to the Makivik Corporation, 30% to Kangiqsujaq, and 45% to Salluit.

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## CHALLENGES

Three key challenges have emerged in the implementation of the Raglan Agreement: employment, family impacts, and on-site issues.



Although the mine aims to have a workforce that is 20% Inuit, no quota has been set. Employment quotas have their advantages and disadvantages. Makivik believes goodwill on the part of the company is probably the best guarantee of fair treatment.

Although priority is given to Inuit employment, the turnover of Inuit employees is high (70% compared with 15% among non-Inuit employees). Generally, older Inuit are not hired, and most of the jobs are entry level. Inuit say that they feel like second-class citizens at the mine site and that they do not get promoted at the same pace as non-Inuit employees. The presence of Inuit-, French-, and English-speakers on the site creates difficulties in communication.

Improving the quantity and quality of jobs performed by Inuit at Raglan is one of the biggest challenges. A number of issues are at play, including:

- Location and distance. The mine site is 60 km from the closest village, with no connecting road.
- Separation from family and community is very difficult for Inuit workers. Falconbridge has implemented flexible scheduling for them, but more solutions need to be found.
- Testing indicates that Nunavik education standards are up to two years behind southern standards.
- Inuit students and young workers lack the skill base for the technical job training they need for work at Raglan's very modern operation.
- There are significant cultural differences to bridge when bringing inexperienced Inuit workers into the Raglan operation.

Priority in the award of contracts is supposed to go to local Inuit. Often contracts have been obtained by regional organizations or awarded to private non-Inuit

enterprises instead. This is likely to be a reflection of local capacity as well.

Finally, Makivik has conducted studies on the environmental and social impact of the mine. Some results are disturbing:

- In some families, both parents work at the site. Even if their schedules are staggered, it means that child care is required for two weeks straight while the parents or extended family work.
- It is common for employees who return to the community during time-off to abuse alcohol.
- Child neglect and substance abuse affect the entire community, as well as the individuals or families directly involved.
- A water quality study found nickel concentrations of 68 parts/billion, a level exceeding the Quebec standard of 25 parts/billion.

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## **POSTSCRIPT**

The Raglan Agreement is considered a successful agreement especially in regards to the financial compensation being realized by the Inuit. Makivik, an experienced corporation, has been able to organize participation of all their communities and negotiate a significant financial compensation for mining activity on their land. (This differs sharply from Lutsel K'e Dene's earlier agreements.) The Raglan Agreement shows how a representative Aboriginal regional organization can bring together experience and capacity in order to achieve solid long-term benefits for the communities affected by a mine.

Raglan also demonstrates the importance of having a cooperative relationship between the Aboriginal group and the mining company:

*“However impressive the Raglan Agreement may be, it’s still just a piece of paper. What really matters is the attitude of the parties – after the Agreement is signed. With Raglan, certainly there have been (and continue to be) problems to solve, but the attitude on both sides has remained very positive, seeking solutions instead of finding obstacles.”<sup>vi</sup>*

*(Robert Lanari, Project Director, Makivik Corporation)*

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## ENDNOTES

<sup>i</sup> Map based on Claire Vivier, “Falconbridge’s Perspective on Sustainable Development and Mining: The Raglan Experience,” *Non-Ferrous Metals and their Contribution to Sustainable Development*. 17 August 2009

<[http://www.nfmsd.org/wg\\_production/docs/raglan\\_presentation.ppt#2](http://www.nfmsd.org/wg_production/docs/raglan_presentation.ppt#2)>.

<sup>ii</sup> Information from Robert Telewiak, “The Raglan Nickel Mine: What comes after an Impact/Benefits Agreement (IBA)? Case Study 8” in *Building Sustainable Relationships: Aboriginal Engagement and Sustainability* (Toronto: Canadian Business for Social Responsibility, February 2005), pp. 63-72. 13 August 2009

<<http://www.cbsr.ca/sites/default/files/CBSRAboriginalEngBook.pdf>>. In August 2006, Xstrata PLC acquired ownership of Falconbridge Limited and has been operating the Raglan mine under the Xstrata Nickel business unit since that time. Xstrata is the fourth largest global nickel producer.

<sup>iii</sup> Telewiak, p. 65.

<sup>iv</sup> *Mining and Indigenous Peoples: Case Studies* (Ottawa: International Council on Metals and the Environment. July 1999), p. 25. 13 August 2009

<[http://www.goodpracticemining.org/documents/ion/ICMM\\_IndigPeop-CseStd.pdf](http://www.goodpracticemining.org/documents/ion/ICMM_IndigPeop-CseStd.pdf)>.

<sup>v</sup> Find information on the profit-sharing and cumulative year-to-date amounts received by Makivik up until the end of 2008 at “Media Centre: News Releases,” *Xstrata*. (28 July 2009)

<<http://www.xstrata.com/media/news>>.

<sup>vi</sup> Telewiak, p. 72.

### Case Study #3: Brewery Creek<sup>i</sup>

Brewery Creek Mine was originally developed by Loki Gold (or “Loki”), which later merged with VLB Resources (Viceroy). The mine is located in central Yukon about 57 km east of Dawson City. The mine was licensed in 1995, and mining began the following year, reaching full production in May 1997. It was a seasonal open pit that refined its product through a year-round heap leach operation. Eight mine and maintenance personnel worked 12-hour days over a 14-day on and 7-day off rotation. The mine was permanently shut down in 2002. With the exception of some remaining site facilities, the mine has been fully reclaimed. Alexco Resources Corporation became the mine’s owner in 2005.<sup>ii</sup>



The Brewery Creek Mine was the largest lode gold mine ever constructed in the Yukon and the largest open pit, heap leach operation north of 60. The mine is located on Tr’ondëk Hwëch’in (TH) traditional lands. TH has a population of about 1100 people of whom a third live in the traditional territory.



Reclaimed Brewery Creek Mine area. Photocredit: Government of Yukon.

Originally Loki predicted a mine life of only 8 years. TH therefore wanted to conclude with Loki what was then called a Socio-Economic Development Agreement that would develop skills and opportunities that would continue to benefit the community after the mine closed. It seemed prudent to ensure that TH realized benefits not just through direct employment but also upstream, through a share of the mine's ownership.

When negotiations with Loki commenced TH still had not negotiated a Land Claims Agreement. They had not ceded or surrendered any rights within their traditional territory. Even if they had concluded such an agreement, they would still have retained substantially unaltered harvesting rights and rights to water quality. With the support of the mining industry as a whole, Loki perceived it had a fundamental right to operate in traditional territories. Still, the company was having difficulty attracting investors. Loki knew that in order for the mine to be viable and move ahead, a challenge to the company's perceived right could not be risked.

Loki wanted certainty with respect to regulatory procedures and Aboriginal rights and title. An agreement with TH would make it easier to finance the project. Finally, Loki was interested in securing local cooperation in the provision of power, transportation services, and in the development of housing options.

TH knew that a well-crafted agreement, focused on Aboriginal training, employment and the development of entrepreneurial skills, would enable the members to build a foundation for longer-term economic success.

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## THE NEGOTIATION

Negotiations started in early 1995. TH's negotiating team comprised three outside consultants and four representatives of the First Nation. Two of the latter were responsible for ensuring the wishes of the First Nation community were presented at the negotiating table. In turn they would circulate information to the community about the negotiations. There was also a land claims representative who ensured that the negotiations reflected TH's environmental and land claims concerns.

TH entered negotiations with clear and tangible goals. They needed Loki to understand that the First Nation wanted to play a significant role in the economic activities that would take place on their traditional lands. Early in negotiations, TH Chief and Council made it clear that protection of the environment was the number one priority.

In a large community meeting, TH members and the negotiating team developed agenda items to be pursued in an agreement with Loki. TH made a proposal to Loki that called more for a partnership than just an agreement with the company. At the same time, TH launched an in-depth Due Diligence on the company. The Due Diligence included reviewing company and shareholder structure, Board members, a Bankable Feasibility Study, investment strategies, and financing and geological reports.

As the negotiations proceeded TH realized that the mining company was not willing to negotiate any agenda item that might imply an actual working relationship. For example, Loki refused to discuss the possibility of TH holding in trust the mining company's reclamation money, even though the arrangement would have been very favorable to the company. TH recognized that

getting a significant agreement with the company was going to be more arduous than expected. Thus, they had to re-evaluate their strategy.

### **The Equity Issue**

Like many resource-based companies at that time, Loki did not understand Aboriginal rights. It did not believe that it needed to address the concerns of First Nations in order to proceed with the development of a mine. Negotiations actually broke down when Loki reneged on an earlier agreement to put equity participation on the negotiation agenda.

Additionally Loki was not forthcoming with access to information important to completing the Due Diligence. When Loki would summarize the progress of the negotiations, its write-up did not always reflect what the parties had agreed upon. Loki even lobbied federal, territorial, and municipal politicians for their support in circumventing or placating TH's "unreasonable" concerns.

TH had always sought to build a relationship of trust and cooperation with Loki so that the company could succeed with the Brewery Creek mine and so that TH members would realize economic benefits. Since the latter aspect was not acceptable to the company, there was no reason Loki should enjoy the former. TH and Loki found themselves at an impasse.

TH informed the Minister of Indian and Northern Affairs Canada (INAC) that the First Nation would not support the development of the mine and would do whatever was necessary to ensure that it would not proceed. TH had also engaged a world class team to help in the environmental assessment. The First Nation was forcing major design modifications to the mine development to



make the leaching process more environmentally sound. These actions caused an outcry both in the region and across Yukon. Nonetheless, it brought Loki grudgingly back to the table.

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## THE DEALMAKER

The benefits that TH originally desired from an agreement included equity participation and contracting and employment preference. Before talks resumed, TH reconsidered its desire to share in the mine's equity in light of the Due Diligence and Loki's approach to the negotiations. TH realized that Loki, a junior mining company, was not experienced in mine development. The company was thinking of using untried technology in a northern location.

Brewery Creek was also Loki's only project, so it was difficult for the company to concede a share of the ownership. Major mining companies usually have several developments of various sizes in play, each operated by a subsidiary corporation. Because Majors literally have their eggs in more than one basket, it is easier for them to be more flexible in their approach to mining. They can agree to a Joint Venture on one project without affecting the control of the parent corporation. This does not apply to Juniors like Loki that may only own one property. That is all they have and a piece of it is a piece of the parent corporation itself. They cannot fathom giving up something so valuable.

Once it understood this about Loki, TH began to realize that equity participation was not so desirable after all. The risk would simply be too great. Instead, TH sought a cash settlement. This proved to be the dealmaker. Loki stopped resisting a deal. The two negotiating teams moved ahead once again to negotiate issues and benefits.



(Subsequently, the Brewery Creek property was purchased by Viceroy, whose attitude to working with First Nations was much more progressive.)

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## THE DEAL

In April 1995, Loki and TH signed off on a 6-point Heads of Agreement – an agreement in principle that would become the basis for a more detailed and legally binding agreement. The agreement gave Loki the support and stability it needed. One clause stipulated a cash settlement for quiet enjoyment on the part of Loki. Another clause stipulated preferential contracting treatment for small, owner-operated Aboriginal businesses and in specified cases “sole source” contracting for TH. (That is, these contracts would be earmarked for TH alone to provide.)

In the meantime, TH had been in Joint Venture negotiations with Procon Mining and Tunneling and Viceroy. Once the Heads of Agreement was signed, TH introduced these Joint Venture partners to the Loki negotiating team. The Loki representatives had not expected that the First Nation would be in a position to take advantage of this clause. They were quite shaken by the caliber of TH’s partners. Subsequently, TH won the contract to build an access road to the mine and to construct portions of the leach pad. In turn TH provided Loki with a quarry permit that enabled the company to haul gravel from interim protected TH settlement land.

(That August the memorandum was broadened to include another clause. It required Loki to pay compensation to TH members who could demonstrate that they suffered economic loss or reduction in harvesting opportunities.)

The complete socio-economic development agreement was signed in September 1997. It included employment, scholarships, finder's fees, preferential contracting treatment, and a framework for exploration and Joint Ventures on TH settlement land. It also gave TH representation at technical, operational, and environmental management meetings.

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## **THE RESULTS**

The mine itself only actually lasted five years out of the predicted eight. Although the First Nation could have been more effective in the implementation of some smaller opportunities, it was quite successful in capturing the larger downstream benefits. Through this agreement and a related Joint Venture, the TH development corporation (Chief Isaac Inc.), TH acquired two active, successful, and expanding businesses, MacKenzie Petroleum and Kluane Transport. They employ about 45 people regionally and territorially. The cash settlement enabled TH to design and build a state-of-the-art Child Development Centre which provides pre-natal through to 12-year-old programming for the community of Dawson City.

Through the Joint Venture partners many opportunities arose for TH and community contractors who otherwise would not have secured those contracts. In the end Dawson realized that First Nation involvement brought about a more environmentally-sound mining project with greater opportunities for involvement of the whole local population.

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## SUMMARY OF BENEFITS TO DATE

<b>Compensation</b>	<ul style="list-style-type: none"><li>▪ TH received amounts agreed upon for quiet enjoyment, apprenticeship, and scholarship funds.</li></ul>
<b>Management</b>	<ul style="list-style-type: none"><li>▪ A FN liaison representative was hired.</li><li>▪ First Nations management and technical representatives were appointed to the Loki mine management team.</li></ul>
<b>Jobs</b>	<ul style="list-style-type: none"><li>▪ 45 TH citizens were employed on the project during construction.</li></ul>
<b>Training</b>	<ul style="list-style-type: none"><li>▪ Various training programs were launched to prepare individuals for jobs at the site.</li></ul>
<b>Downstream</b>	<ul style="list-style-type: none"><li>▪ TH received several contracts to provide services at the site during the mine's construction and its operation.</li><li>▪ Han Housing Ltd, a First Nation construction firm, constructed the camp and the interior of the assay lab.</li><li>▪ TH had the bus contract to provide transportation from Dawson City to the mine site.</li><li>▪ The TH/Procon/Viceroy Joint Venture built an access road to the mine and constructed portions of the leach pad.</li><li>▪ A local petroleum and freight delivery company and the First Nation developed a Joint Venture. It provided fuel and lubricants to the mine operation and the bulk of Loki/Viceroy freight requirements.</li></ul>

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## ENDNOTES

<sup>i</sup> Much of the content for this case study is derived from Gary Wilson, "Anatomy of a Joint Venture, One First Nation's determination has set a new benchmark in northern mining", in *Making Waves*, Vol. 7, No. 4 (Winter 1996): 9-13.

<sup>ii</sup> The mine has recently changed ownership again. It may re-open to explore other deposits on the property whose extraction is now feasible on account of the rising price of gold.

## Case Study #4: Voisey's Bay Mine

The Voisey's Bay Nickel Mine is one of the largest mining projects in Canada since World War II. It is located between Utshimassits (or Davis Inlet, pop. 500) and Nain (pop. 1,000) in Labrador, on land shared by Inuit and Innu people. Both communities have a lot of unemployment, low income, and social problems.

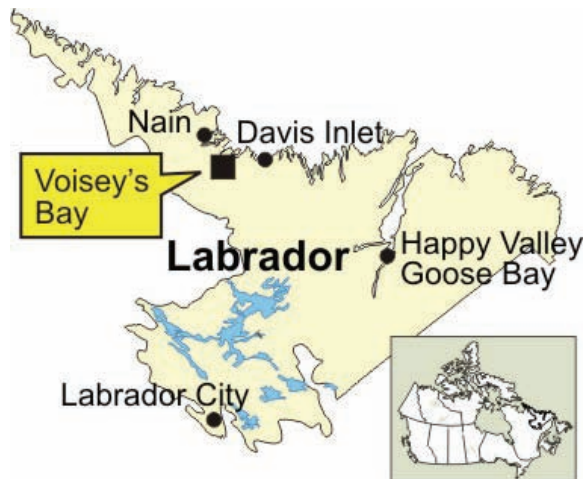
Two geologists looking for diamonds discovered the Voisey's Bay nickel deposit in 1994. The discovery set off an exploration rush. By 1997 more than 245,000 claims had been registered, covering more than two-thirds of Labrador.

In August 1996, the International Nickel Company of Canada bought the Voisey's Bay site for \$4.1 billion.<sup>i</sup>

International Nickel then created a second business, Voisey's Bay Nickel Company, to build and run the mine. (For simplicity, this case study will just refer to the mining company as "Inco.") By mid-1999 the company had invested about \$80.8 million in the exploration of the site.

The exploration rush had soured relations between the Innu and Inuit on one hand, and governments and exploration and mining companies on the other. The Innu and Inuit wanted a say in the discussions and decisions concerning the Voisey's Bay mine. If it were to move ahead they wanted benefits as well as compensation for the impact it would have on the environment.

Another key issue was land claims. The explorers were staking mineral claims on lands that were traditional territories of the Innu and the Inuit.



Open pit mining began at Voisey's Bay in August 2005 and processing began that September. The first mine is expected to operate for 14 years. However, the site has much potential. Inco hopes its exploration program will enable mining to continue at the site for 30 years or even longer.



Geologists view the Voisey's Bay open pit. Photocredit: Joshua Duggan.

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## THE NEGOTIATION

The Voisey's Bay mine negotiations started in 1997. That is when the Innu, the Labrador Inuit Association, and the provincial and federal governments signed a Memorandum of Understanding (MOU).

Before a mine is approved, a company is required to set up a panel to carry out an environmental assessment. The panel's report must be accepted by the federal, provincial, or territorial government. But at Voisey's Bay, the Innu and Inuit wanted to set limits on resource development in their traditional territories. So their negotiators made sure that the MOU outlined an environmental assessment process that involved their communities as well. All the parties to the MOU appoint the members of the environmental assessment panel. Its report must be submitted to the presidents of the Innu Nation and the Labrador Inuit Association, as well as government. Innu people were themselves to complete the baseline studies of their communities. The environmental assessment had to

include traditional knowledge as well as scientific knowledge.

The environmental assessment process ran from 1997 to 1999. It showed how important it would be for the Innu, Inuit, and mining company to negotiate Impact Benefits Agreements (IBA) in order to deal with issues that were not settled due to outstanding land claims. Ideally both the Innu and Inuit wanted their land claims settled before any mining occurred. The Panel however recommended that participation and compensation would be adequately dealt with through IBAs. Environmental concerns would be dealt with by the development of an environmental co-management agreement between the Innu and Inuit and the federal and provincial governments.

### **Resolving the Environmental Dispute**

The negotiation of the IBAs started in 1999. In general, the talks did not go smoothly. Both Aboriginal communities feared the harm that exploration and mining would cause. Inco was reluctant to negotiate compensation for such damage.

The Government of Newfoundland and Labrador decided it might let the mine go ahead before the environmental assessment was complete. The Innu took them to court. They also carried out civil disobedience, drew in the news media, and found political allies to take up the Aboriginal cause. All this public and legal action finally halted the development of the mine. Inco realized that it was clearly in its best interest to partner with Aboriginal people, not fight them. (This victory also helped to speed up the negotiation of Inuit and Innu land claims.)

When the ore could be shipped was another very difficult issue to resolve. Inco wanted to be able to ship year round. The Inuit did not want ice-breaking in winter. A

small working group with company and Inuit representatives worked on the issues. It took a number of years to negotiate and build trust. A separate shipping agreement was developed outside of the IBA. However within the IBA it was noted that ratification of the IBA by the Inuit also meant Inuit consent for winter shipping.

IBAs were finally concluded between Inco and the Innu and Inuit separately in 2002. By that time, the Nunatsiavut government had taken the place of the Labrador Inuit Association.<sup>ii</sup>

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## THE DEAL

These are the main provisions of the IBAs:

- **Education and Training.** Inco must contribute specific amounts of money to career counselling, Stay-in-School programs, scholarships, and school awards. The company must also participate in a construction training program and a student employment program.
- **Employment.** Priority goes to hiring Innu and Inuit. Aboriginal people should make up 25-50% of the mine's workforce. (Inco cannot be forced to meet these targets, however.)
- **Workplace Conditions.** Advisory committees of Inuit and Innu employees can make recommendations to the mine's managers. Aboriginal employees shall be able to go on leave for cultural reasons (for example, hunting). Innu and Inuit elders shall be able to make visits to the mine site. Other programs and events will promote understanding between Aboriginal and non-Aboriginal people.
- **Business Opportunities.** Priority will go to aboriginal companies when the mine purchases goods and services.
- **Financial Compensation.** There are baseline fixed payments to Nunatsiavut Government and Innu Nation



over the life of the mine. Additional payments are payable depending on the overall prosperity of the operation. Separate payments are made to the Innu Nation and to the Nunatsiavut Government as compensation for loss of harvesting opportunities.

- Of the **royalties** Inco pays annually to the Government of Newfoundland and Labrador, Nunatsiavut is to receive 3%, and the Innu to receive 5%. These royalty details are included in the land claim agreements or agreements in principle between Nunatsiavut and the Innu Nation with the provincial government, not the IBA.
- **Environmental Protection.** Inco is to fund environmental monitors who are at the mine site at all times. These monitors are employees of the Innu Nation and Nunatsiavut and report directly to them.
- **Implementation.** Joint committees of Inco, Inuit, and Innu representatives will be appointed to make sure that the provisions of the IBA are properly carried out.
- **Dispute resolution.** To date all disputes have been resolved by discussions between leaders of Inco, the Inuit, and the Innu.

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## THE RESULTS

Both the Innu and Inuit decided to create trusts to manage compensation payments from the IBAs. Rules specify when and how the funds can be spent. They can be spent to preserve and enhance Aboriginal languages and culture. They can be spent on programs for youth and on training. Some money is set aside in heritage funds, because the resources belong to future generations as well as to the Aboriginal people of today.

The rules of the trusts also permit compensation money to be spent on several important tasks at the mine. The responsibilities that Aboriginals have overseeing implementation, reviewing the project, and consulting with the communities – these are all paid for with



compensation money. It also pays for monitors who make sure that the mine follows environmental procedures.

As a result, the compensation payments are being managed in a way that benefits all Innu and Inuit, not just a few.

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## SUMMARY OF BENEFITS TO DATE<sup>iii</sup>

<b>Revenues</b>	<ul style="list-style-type: none"> <li>Between 2003-2007 the Innu Band received over \$4 million in mining revenues.<sup>iv</sup></li> <li>No other revenue information has been made available to the public.</li> </ul>
<b>Management/ Decision Making</b>	The Innu and Inuit have no direct representation on the Board and thus no direct access to financial information or decision-making at this level. Influence on management is confined to representation of Innu and Inuit on the Implementation Committees.
<b>Jobs</b>	Of the workforce supporting the mine, 24% (390) are Innu or Inuit.
<b>Training</b>	<ul style="list-style-type: none"> <li>The Joint Voisey's Bay Employment and Training Authority (JETA), which is an Aboriginal-controlled nonprofit, oversees the design and management of programs that prepare people for work at the mine. By 2006, 350 people had taken part in this training.</li> <li>Innu and Inuit employment coordinators have been hired to help Aboriginal people find jobs at the mine.</li> <li>In March 2006 a skills development centre opened at the mine to help workers improve their personal and work skills.</li> </ul>
<b>Downstream</b>	<ul style="list-style-type: none"> <li>Aboriginal and non-Aboriginal companies formed Joint Ventures during the mine's <u>Exploration Stage</u>.</li> <li>Contracts worth \$515 million were awarded to Aboriginal companies during the mine's <u>Construction Stage</u>.</li> <li>To date the mine has awarded all major and most minor <u>service contracts</u> to Aboriginal companies. They are supplying site services such as security, air transport, medical services, catering and housekeeping, shipping, environmental management, and equipment maintenance.</li> </ul>

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## ENDNOTES

<sup>i</sup> The two geologists who discovered the Voisey Bay nickel deposit were working for Diamond Fields Resources Inc. The International Nickel Company of Canada is now known as Vale Inco.

<sup>ii</sup> The chronology of the negotiations is summarized on slide 4 of Tom Padden, “The Voisey’s Bay Project 2002 – 2006” (Expo Labrador, Happy Valley-Goose Bay, NL, June 20, 2006). 17 August 2009 <[http://expolabrador.com/2006\\_Presentations/VBNC\\_Tom\\_Paddon.pdf](http://expolabrador.com/2006_Presentations/VBNC_Tom_Paddon.pdf)>. A diagram on Slide 22 also illustrates the linkage between partners, tools, objectives, and the goal of community capacity-building.

<sup>iii</sup> Data for this case study come from a number of sources. The three most important are: *Aboriginal Engagement in the Mining and Energy Sectors: Case Studies and Lessons Learned*, Report to Energy and Mines Ministers (2008), 5 May 2009 <<http://www.nrcan-rncan.gc.ca/mms-smm/abor-auto/pdf/stu-etu-eng.pdf>>; 2006 *Social Responsibility Report*, Voisey’s Bay Nickel Company, Ltd., 5 May 2009 <<http://vinl.valeinco.com/SocialResponsibility2006/index.htm>>; and Isabella Pain and Tom Paddon, *Negotiating Agreements: Indigenous And Company Experiences: Presentation of the Voisey’s Bay Case Study from Canada* (Moscow, 3-4 December 2008), 5 May 2009 <[http://www2.ohchr.org/english/issues/indigenous/docs/workshops/Vale\\_Inco\\_Canada\\_Voiseys\\_Bay\\_case\\_Moscow\\_Workshop.pdf](http://www2.ohchr.org/english/issues/indigenous/docs/workshops/Vale_Inco_Canada_Voiseys_Bay_case_Moscow_Workshop.pdf)>.

<sup>iv</sup> “Voisey’s Bay royalties ‘wasted’ in past: Innu chief,” *CBCnews.ca*, 4 July 2007. 17 August 2009 <<http://www.cbc.ca/canada/newfoundland-labrador/story/2007/07/04/voiseys-innu.html>>.

## Case Study #5: Keno Hill Silver District

Keno Hill Silver District is in central Yukon. The district once had 42 mines all in production at the same time. The town of Mayo, 400 km northeast of Whitehorse, had its beginnings during this mining boom. Right up to the 1950s sternwheelers travelled up the Stewart River to Mayo to load the ore extracted from Keno Hill.

The last of the Keno Hill mines shut down in 1989. The government of Canada declared them abandoned and put the district's assets up for sale in 2005. In December 2007, with the approval of the Yukon government, all the assets were sold to Alexco Resources Corporation. It is a mining junior that specializes in exploring for silver and other precious metals and reclamation. The purchase transferred to Alexco ownership of 14,980 hectares (about 35 by 16 km) of mining leases, quartz claims, and crown grants. The area includes 35 historic mines (with silver now estimated to exceed 1 million tonnes). Acid drainage from the mines has created a serious environmental hazard. A condition of the sale was that Alexco clean up the area.

The purchase also won Alexco the right to explore the properties for possible future production. An assessment in July 2008 indicated that one deposit in the district, Bellekeno East, might be particularly rich. The assessment projected for Bellekeno an average annual production over five years of 3.3 million ounces of silver, 30.1 million pounds of lead, and 24.5 million pounds of zinc.<sup>i</sup>

Bellekeno lies within the traditional territory of the First Nation of Na'Cho Nyäk Dun (NND), population 472 and close to Keno City, which has a largely non-Aboriginal population of 18. (The mine is not located within NND's



1830 square miles of settlement lands, however.) Most NND members live in Mayo.

In 2007 and 2008, Alexco and NND entered into a number of agreements concerning Bellekeno as well as Alexco's other activities in Keno Hill. In 2009 Alexco concluded a silver purchase agreement with Silver Wheaton Corporation. The money from that agreement enabled Alexco to start advanced exploration and bulk sampling at Bellekeno. If these results confirm Bellekeno's viability, and if the mine gets the necessary approvals and permits, Alexco expects to start production there in 2010. The mine will have a life of approximately five years.

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## THE NEGOTIATION

NND and Alexco started negotiating early in 2007, before the sale of Keno Hill Silver District was finalized. Since then, they have come to three agreements: a Memorandum of Understanding (MOU), a Negotiation Agreement, and an Exploration Cooperation Benefits Agreement (CBA).

They signed the MOU in March 2007. It outlined how they would cooperate and support any future development in the Keno Hill Silver District, as well as its eventual closure and reclamation. It also explained how any agreement would be monitored, that is, what the parties to the agreement would do to ensure everyone kept the commitments they made.

Then, in August 2007, NND suspended negotiations. NND claimed that the federal and provincial governments were not consulting the First Nation properly about the sale of Keno Hill to Alexco. According to a recent decision of the Supreme Court of the Yukon (Little Salmon/Carmacks First Nation vs Government of Yukon), the Crown could not approve the transfer of rights within the traditional

territories of self-governing First Nations without "government to government dialogue" first. NND settled its land claim in 1993 and is self-governing.

Simon Mervyn, Chief of NND said that the Yukon government had only carried out "courtesy consultations" with the First Nation concerning the sale. The government, he said, "paid lip service to our rights" while cooperating eagerly with Alexco. "Our First Nations people have used these lands for generations," he said. "We intend to be fully involved in the decision making process regarding their reclamation and redevelopment."<sup>iii</sup>

In response, Alexco stated that it understood and sympathized with NND grievances. Alexco said it would help the government and NND discuss the Keno Hill sale meaningfully.

In the meantime, market traders on the stock exchange reacted to the stall in negotiations. The company's stocks plummeted in value from about \$5.50 per share to about \$3.50.

Seeing the impact of NND's actions, Alexco hurried to get negotiations going again. By September 2007, Alexco and NND had concluded a Negotiation Agreement.<sup>iii</sup> It outlined two further types of agreement that Alexco and the NND would negotiate. One, an Exploration Cooperation Benefits Agreement, would concern activities already underway in Keno Hill, like exploration and protection of the environment from the old mines. The second, a Comprehensive Cooperation Benefits Agreement, would be negotiated if Alexco decided to develop the Bellekeno mine. Under the Negotiation Agreement, Alexco provides NND with money to help cover its negotiation expenses.

## **Building Relationships**

From the beginning of the Exploration CBA negotiations, NND wanted three main things: protection for the land and environment; employment opportunities for its citizens; and business opportunities for local Aboriginal entrepreneurs. It also wanted to make sure the Exploration CBA was a sound basis for the Comprehensive CBA, if Bellekeno were to go into production.

As Alexco and NND negotiated, they realized that there could be many more “Bellekenos” in the future. It seemed wise to write a process that these other negotiations could also follow. This Cooperative Engagement Process outlines principles to guide the actions of mining companies that have mineral interests within NND traditional territory. This document also outlines how NND will manage any activities within its traditional territory.

NND’s business arm is NaCho Nyäk Dun Development Corporation. One of its staff members, Tom Lie, was spokesperson for NND in the negotiations. He emphasized to Alexco that NND had settled a land claim. Alexco was therefore negotiating with a government and must behave accordingly. Alexco’s senior CEO should get to know the NND Chief and Council personally so that the discussion would truly proceed among leaders.

Repeatedly both NND and Alexco have noted how much the negotiation process is about building relationships and trust, not just business deals. First and foremost, mining companies want certainty about the terms under which a mine may go forward. First and foremost, First Nations want benefits from the mine.

In May 2008 Alexco and NND signed the Exploration CBA.

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## THE DEAL

Bellekeno is a good example of how a series of agreements can be built, one on top of the other. Both the MOU and the Negotiation Agreement formed the foundation for the Exploration CBA.

The Negotiation Agreement confirmed NND's support in principle for Alexco's current activities in the district. It provided "project certainty," that is, it assured Alexco that NND would support the development of mines in the Keno Hill Silver District. It established how NND and Alexco would work together as a team while the company continued its exploration and reclamation work in the area. The Negotiation Agreement also stated that Alexco and NND would collaborate to ensure NND's meaningful participation in all the regulatory processes related to mining development in the district (environmental assessments and water licenses, for example).

The Exploration CBA explains in detail how Alexco and NND will collaborate in regulatory processes. It also establishes the foundation on which Alexco and NND will be able to conclude Comprehensive CBAs as the development of the Keno Hill proceeds.

### **Provisions of the Exploration CBA**

The Exploration CBA does five main things:

- It assures NND support for the development of mineral deposits in Keno Hill Silver District ("project certainty").
- It describes a new Cooperative Engagement Process. This process ensures the full participation of NND in all environmental approvals, current and future, that relate to mining in the Keno Hill Silver District.

- It commits Alexco and NND to work together to find the contractors and partners for trucking, catering, and many other downstream services.
- It lists 18-20 important tasks, which party to the agreement is responsible for each task, and when it will get done.
- It outlines the financial support Alexco will provide so that NND can participate more fully in mine development. Alexco will pay for certain NND scholarships. It will pay for the technical support NND members require to take part in some regulatory processes (baseline studies and reports on traditional knowledge, for example). Alexco will also pay for an NND Mining Coordinator who will keep the First Nation up to date on what's happening with Alexco's mining projects. This Coordinator will pass on information about job and contract opportunities as well.<sup>iv</sup>

There are important differences between this Exploration CBA and other agreements between mining companies and Aboriginal communities. NND and Alexco are proud of these differences.

One difference is the absence of employment and contracting quotas that reserve specific amounts of work and business for Aboriginal people. Instead, the Exploration CBA expresses Alexco's intention to employ more NND workers and contractors over time as they become more skilled and competitive. Alexco aims to develop this NND capacity with a series of partnerships, each of which is more advanced than the one previous. The first partnerships involve contracts for hauling water, transporting employees, and catering. Later contracts will require still more experience, skill, and equipment, like drilling or laboratory services. By this means, NND members will be able to keep winning contracts in Keno Hill Silver District well into the future. In that way, even after Bellekeno mine closes, NND will still receive benefits from it.



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## RESULTS

The negotiation of three agreements in less than two years was no easy task for NND or Alexco. Wisely, both parties used the negotiation process to create mutual respect and trust. Alexco worked hard to understand and address NND concerns and wishes. The fact that NND had a settled land claim also affirmed its importance in all decisions made about the future of the district.

Many agreements fail because of poor implementation. The parties agree on what should occur, but they do not specify who is responsible for each task, and how to make sure each task is completed. In the case of Keno Hill, the MOU described from the get-go how the implementation of agreements was to be carried out and monitored. The Exploration CBA, by including 18-20 commitments, displayed the same determination on both sides to make implementation happen. Monitoring of the Exploration CBA occurs weekly or bi-weekly, and the monitoring committee meets monthly. This gets problems identified and dealt with swiftly.

The position of Mining Coordinator has not been filled to date. Although this position was nice in theory, both parties realized that there was no need for a full-time person yet. The Mining Coordinator will instead become a member of NND staff. He or she will have responsibilities for many types of project development as well as the monitoring of the Exploration CBA. If the Bellekino mine moves to production, Alexco will hire its own liaison officer who will work directly with this Coordinator.

Profit sharing or other compensation is not part of any of the agreements at present.

Downstream opportunities have begun to develop. Alexco has negotiated a catering contract with ESS/NND, a Joint

Venture between Compass Canada and NaCho Nyäk Dun Development Corporation. The Joint Venture must order supplies and prepare and serve three meals per day to people working on the Bellekeno project.<sup>v</sup>

Alexco is also negotiating with NaCho Nyäk Dun Development Corporation to transport personnel the 36 km between Mayo and Elsa, near Keno Hill. Settling this contract is a high priority matter. The corporation may first use a 15-passenger bus to do the job. But the service may expand to meeting charter aircraft at the airport. If the opportunities arise, still more schedules could be arranged to serve more people and more destinations.

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## **SUMMARY OF BENEFITS TO DATE**

The Exploration CBA was concluded only recently. There are no benefits to report in addition to those described above. NND continues to court junior mining companies with interests in its traditional territory.

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## **POSTSCRIPT**

This case study shows the type of negotiation that is occurring in Yukon between exploration companies and First Nations. A key ingredient missing in the Keno Hill agreements to date is revenue.

It has been argued that it is unwise to negotiate revenue during the Exploration Stage of a mine. It is said to reduce the attractiveness of the project to potential investors. Indeed, when NND stood its ground over the government's failure to consult with it appropriately, Alexco's stock prices fell. But this fall in price actually served to speed up the mining project. Clearly, the temporary "unattractiveness" of the project to potential investors increased NND's "leverage" or influence in negotiations. It is not clear whether NND used this

leverage in any way to improve the Negotiation Agreement or the Exploration CBA.

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## ENDNOTES

<sup>i</sup> Information cited from Rose Raglan, "Mining News: Keno Hill still promises silver payday," *North of 60 Mining News*, Vol. 13, No. 30 (July 27, 2008). 17 August 2009  
<<http://www.petroileumnews.com/pntruncate/843790406.shtml>>.

<sup>ii</sup> See "First Nation of Na-Cho Nyak Dun Suspends All Keno Hill Regulatory Talks," *NationTalk*, 17 August 2007. 17 August 2009  
<<http://www.nationtalk.ca/modules/news/article.php?storyid=2687>>.

<sup>iii</sup> <http://nationtalk.ca/modules/news/article.php?storyid=3418>

<sup>iv</sup> "Alexco Resource Corp. and First Nation of the Na-Cho Nyak Dun Conclude Negotiation Agreement," *NationTalk*, 25 September 2007. 17 August 2009  
<<http://www.cbc.ca/canada/north/story/2008/05/26/alexco-nndfn.html>>.

<sup>v</sup> See "Bellekeno Preliminary Economic Assessment Technical Report: Keno Hill Silver District" (*Vancouver, B.C.*: SRK Consulting, June 2008). 17 August 2009  
<[http://www.alexcoresource.com/i/pdf/2008-06-30\\_Bellekeno\\_Tech\\_Report\\_PEA.pdf](http://www.alexcoresource.com/i/pdf/2008-06-30_Bellekeno_Tech_Report_PEA.pdf)>.

## Notes



## **Module 1**

### **Putting Communities First**

Yukon River, near Dawson.  
Photocredit: Jay Armitage  
Photography.

Mining companies are businesses. An Aboriginal community is not. Governments are neither businesses nor communities. People in business, government, and communities all have different assumptions about how the world works. They have different views about wealth – what it is, how you get it, and what it is for. They have different views about how important mining is to communities, and about how important communities are to mining.

To negotiate good agreements with mining companies you have to understand the basic assumptions that you and the other parties bring to the negotiation table. It is particularly important to understand how they would answer the question, “What is it that makes communities prosper?”

That question may sound straightforward but it is complicated. No two communities have the same access to valuable resources. Some are located close to rivers and lakes, fertile land, mineral deposits, or big markets, for example. Some are not. Yet even when that access to resources is about the same, some places prosper, and some do not. So what makes the difference – “What is it that makes communities prosper?”

There are about five main perspectives on the issue. Four of these perspectives, if not held in check, can damage aboriginal interests. Only the fifth, in our view, is a basis on which you and the other people at the table can reach an agreement that really benefits your community.

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## THE CAPITAL PERSPECTIVE

*What is it that makes communities prosper? Free-run **Capital**. When capital is allowed to run where it wants, it goes to the towns, regions, or businesses which offer investors the best returns. Those returns make the amount of capital available for investment grow and grow. When we invest only in the very best, we build the communities of the future.*

This perspective pays close attention to the productive, expanding parts of the economy. Places and industries which do not offer high enough returns on investment get overlooked. The impact which investment or a lack of investment may have on a community, its residents, or its environment, is of less importance. People are supposed to follow capital as it flows to promising places and industries.

Historically, this is just the way mining has worked. Large amounts of capital have been raised from investors and lenders in the expectation that big returns were to be had. People who wanted to work in the mine moved or commuted to the mine site. Communities that already existed in the area of the mine could like it or lump it. Toxic dumps and other environmental damage still dot this country, the legacy of many abandoned mines. They go on creating problems long after the investors, managers, and workers have moved on.

Things are changing to be sure. The language of “corporate social responsibility” is finding its way into the mining industry. Some people even talk about “sustainable

mining.” As the *\*case studies* (pp Intro 10-53) clearly demonstrate, many efforts are being made to address Aboriginal concerns about mining more effectively. Shareholders, Aboriginal people, and environmentalists are all monitoring more closely the environmental impact of mines in Canada. All this is to be welcomed. However, it is equally important to remember four inescapable facts about mining.

- Most mines last less than 15 years.
- Mines generate huge volumes of waste rock and toxic tailings. (20 tons for every ounce of gold, for example.)
- Mines can generate local benefits and tax revenue. But the profits from mines still usually go to shareholders scattered across the globe, far from the mine site.
- Communities in the vicinity of mines stay. Mines and miners do not.

These realities drive mining companies to view their projects – and the neighbouring communities - primarily from the Capital Perspective. That is, “Things prosper when they give a good return on capital. When they don’t, it’s time to move on.”

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## THE BIG BUSINESS PERSPECTIVE

*What is it that makes communities prosper? **Big business.** What’s good for a large corporation is good for the community. It puts the whole community to work. When a big business increases its profits and reduces its costs and risks, the whole community benefits. On the other hand, things which hinder big business, hinder the community too.*

It is normal and responsible for any business to strive to make more money than it spends. Without a profit, a business has no money to reinvest, nor any set aside for difficult periods. The more a business reduces its costs



and risks, the more likely it is to make a profit and stay in operation.

Exploration companies and mine developers are no different. They want to keep their costs and risks down. Many of the challenges that Aboriginal communities want to overcome are just risks in the eyes of mining companies. Many of the things in which Aboriginal communities are interested – jobs, training, sub-contracts – are just costs, from the perspective of mining companies. Not surprisingly, they want those risks and costs to be as low as possible. When money has to be spent, they want that money to work hard – for them.

Until 25 years ago mining companies paid little attention to the costs that they pushed onto communities and onto government. The serious impact that mining had on a community's way of life and its natural environment was not entered as a "cost" in the companies' books. Nowadays, mining companies take these costs much more seriously, but not always for the best reasons. Some companies do make great efforts to behave as responsible corporate citizens. Other companies say they are responsible, when in fact they are not.

It is vital for an Aboriginal community to assess carefully how ethical a mining company's practices have been. As a big business, its idea of community mindedness and environmental responsibility may not be the same as yours.

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## THE SMALL BUSINESS PERSPECTIVE

*What is it that makes communities prosper? **Small business.** Small is beautiful. Once people get their own private businesses up and running, they pass on benefits (jobs and income) to other community members. As a result, communities don't depend so heavily on government transfer payments or the success of a big corporation.*



Small is seldom seen as beautiful in the mining industry. Finding a big, rich lode is the dream of the prospector, the mining geologist, the junior exploration companies, and mine developers and their investors. Moreover, with dozens or hundreds of employees and machines to feed, house, maintain, and transport, mines have big needs to meet.

To meet these needs, the mining industry prefers to hire a few big businesses with plenty of equipment, staff, and experience. For example, contracts for haulage of mining products are often awarded to large trucking companies. One- or two-person businesses find it difficult to compete for such large, complex contracts.

Sometimes communities negotiate agreements that break down big contracts to a size and scale appropriate to Aboriginal businesses. Alternatively, communities negotiate terms that allow them to pair up their businesses ("Joint Venture") with larger, more experienced companies.

The problem with the Small Business Perspective is its assumption that any small business will thrive so long as its owner is energetic and clever. Actually, small business are like fish. They swim in a friendly, supportive environment of customers, suppliers, credit, and investment capital. Without such necessities, they go belly up.

Aboriginal communities have to keep that in mind, if they think a few entrepreneurs are all that's required to capture real benefits from a mine. Local entrepreneurs can't go it alone. If a mining company refuses to unbundle contracts or to encourage Aboriginal Joint Ventures, those entrepreneurs won't even get in the door.

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## THE INDUSTRIAL RECRUITMENT PERSPECTIVE

*What is it that makes communities prosper? **Industrial recruitment.** The community that attracts Big Name businesses or branch plants to its vicinity can expect to receive a shower of benefits. There will be new jobs, and with those jobs will come greater local purchasing power and a bigger tax base. The industry's demand for goods and services will prompt local businesses to start or grow. All this new money will help the community pay for roads, water and sewer systems, schools, and parks.*

This is a perspective that is common among planners at all levels of government – local, regional, territorial, provincial, and federal. Like the Big Business Perspective, it assumes that growth is the highest goal and that private corporations are the only way to achieve it. What's different about the Industrial Recruitment Perspective is the role it assigns to government in economic growth. The role of government at all levels is to please industry and compete for it with a variety of incentives.

This competition can cost provincial, territorial, regional and local governments a lot of time and money.

To bring about large projects, like mines, governments often spend a lot on infrastructure and other supports to make a region more “development friendly.” With smaller industries, communities will try to outdo each other with streets, lighting, tax breaks, and ready-made industrial sites.

The trouble is, when one community or region wins the competition, the others lose. Yet even the winner may find that the costs outweigh the benefits that the new industry brings. Large businesses which have been lured to an area often purchase their goods and services from the outside. Consequently many of the benefits which were supposed to shower down locally end up elsewhere.

Moreover, it is not uncommon for companies to threaten that they will move if governments are not “friendlier.” This is especially the case with a global industry such as mining. Companies with mineral rights in a number of places around the world are able to move their operations to the ones with lower taxes and less environmental regulation.

When all is said and done, the Industrial Recruitment Perspective encourages communities to behave like they are the servants of industry, not its partners.

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## **THE COMMUNITY ECONOMIC DEVELOPMENT (CED) PERSPECTIVE**

The Capital, Big Business, Small Business, and Industrial Recruitment perspectives have one thing in common. They all assume that the future of Aboriginal communities hinges on the actions of powerful outsiders or a few resourceful insiders. Not so with community economic development (CED). As its name suggests, CED makes the community the foremost player in its own development. From the CED Perspective, the community's dependence on the initiative and resources of a select few is part of the problem. From the CED Perspective,

- every resident has a role to play in making the community prosper, not just a few.
- the personal health and growth of individual members are important investments, as well as their technical abilities as drivers, carpenters, managers, etc.
- small business improves as a local environment of skills, attitudes, organizations, and services grows up in support of it.
- jobs and businesses are especially valuable if they enable local people to rely on each other, rather than on outside suppliers.

- the earnings and savings of community members and their businesses should be reinvested locally as much as possible.
- community- and privately-owned and operated enterprises that promote local investment, employment, and training are crucial.

As important as economic growth, or jobs, or higher personal incomes may often be, they are not the community's ultimate goal. Instead, the community is striving to become more self-reliant: to increase its capacity to plan and build an economic future that suits the values, priorities, and needs of its members.

From the CED Perspective, community self-reliance is the goal. You approach it by steadily increasing your community's capacity – people, skills, organization, and systems that enable the community to set targets, marshal adequate resources, and carry out decisions quickly and efficiently. This is not a short-term process. In fact, it never ends. The experience, skills, and profits gained from one business or project get invested in another. Like a snowball rolling down a mountain, the further you go, the larger your community's capacity grows. Greater capacity is used to capture more benefits; more benefits are captured to build greater community capacity.

No two Aboriginal communities are alike in terms of capacity. Some communities spend their time managing constant crises. They struggle with high levels of stress and distress. There seems to be little space or capacity to think beyond the short term. Others have accumulated a lot of skills and experience. While they still face serious challenges, they are able to manage opportunities and difficulties systematically. They have a strong system of planning, research, policy-making to guide them as they make decisions.

When it comes to playing a role in mining, communities will always find their capacity to be an issue. Whatever stage it is at - Exploration, Construction, Operation, or Closure and Reclamation - mining is a complex business. The Aboriginal community with greater capacity is better prepared to capture benefits from a mine. This does not mean an inexperienced community cannot protect itself or capture benefits, however. It will just find a good agreement a lot harder to get, and will require a lot more help to get it. For examples of the different levels of capacity at which Aboriginal communities make a start in mining, see the *\*NWT Diamond Mines* (p. Intro-10), and *\*Raglan Mine* (p. Intro-21) case studies.

Many Aboriginal communities choose to create a separate organization to coordinate and manage projects, including businesses with a role in mining. This organization, often called an Aboriginal Development Corporation, plays a key role in the partnerships between the community, government, and private sector that help build the community's capacity.

The *Aboriginal Mining Guide* approaches the role of Aboriginal communities in mining from the CED Perspective. That means the value of mining, if any, depends on the *opportunity* it presents for building community capacity.

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## 4 STRATEGIC ISSUES

Opportunities sometimes “just happen” – but more often they must be created. To be ready and able to turn mining into an *opportunity* to build the capacity of a community, its leaders and members have four strategic issues to address.

1. **Vision:** What quality of life do community members desire for the generations to come? On what strengths

can we rely and what weaknesses must we overcome to get there? Will mining help or hinder the journey?

2. **Benefits:** Are we prepared to blend short-term benefits with benefits that have a longer lasting impact?
3. **Use of Profits:** Are we prepared to use profits to increase the community's long-term assets, as well as immediate needs?
4. **Partners:** Are we prepared to collaborate with outsiders in order to get the capacity that big economic projects require?

Anyone who wonders how mining can be used to strengthen community self-reliance must address these issues up front. They will have a major effect on the strategy you design for getting benefits from mining (and may even lead you to decide to resist it). Failure to do so will guarantee difficulties that multiply over the years, in mining or in economic development generally. Therefore, the earlier they are addressed, and the clearer the decisions about each, the better.

These strategic issues will likely touch off some very lively debate. This is good. The views and information exchanged will prove invaluable when it comes to negotiating good agreements and implementing them successfully.

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## STRATEGIC ISSUE #1: VISION

Creating a community vision is often talked about but seldom done. A vision projects the quality of life that citizens desire for their community – its culture and heritage, its social and economic situation, its environment, its political and organizational development – far in the future.



A vision expresses what people want to see blossom for their children and grandchildren. But it is more than that. Equally important is for the vision to look reality square in the face. It must also include an honest analysis of the community's strengths and weaknesses and what is happening in the wider world. Clarity about what is as well as what ought to be helps community members determine their long-term priorities: what they really have to do if their vision is to become the reality of future generations.

These Big Picture questions are not a matter just for a few people to think about and answer. The community as a whole must discuss them thoroughly. Without wide understanding and buy-in over the community's long-term priorities, trouble is almost guaranteed.

In the future of most northern communities, natural resources continue to loom large. Traditionally, Aboriginal livelihoods have depended on the health of the water, plants, forest, tundra, wildlife, and fish. While the economic importance of traditional pursuits has receded, their well-being still has much cultural importance. At the same time, the rest of the world has developed an enormous interest in these natural resources – especially in mining some of them.

The extraction of minerals, fossil fuels, and metals from the earth has an impact on the environment that lasts for generations. Local people know this. They do not readily trust the claims of outsiders to new mining practices and greater social responsibility. On the other hand, local people need jobs and they would rather capture wealth than watch it hauled away.

Over next 10 years, big increases in the cost of fossil fuels will be a challenge to miners and Aboriginal communities alike. Carbon emissions from mines are high. It is likely that governments will start to tax these emissions. Both these

factors can also be expected to affect the contribution that mining can make to community self-reliance.

In short there are tensions. To arrive at a vision a community has to talk about these tensions and choices. Unfortunately, this does not often happen. Thus, Aboriginal communities end up responding to other people's plans and agendas rather than shaping their own.

It is the responsibility of an Aboriginal community to decide where mining (and all the good and bad effects mining might have) fit in this vision of the future. Could its potential benefits help bring the vision closer to reality? Are there ways to reduce or offset the potential impacts of mining on the community?

If the answer to these questions is "yes," another set of decisions must be made. The community has to decide which values, principles, and protections will keep its interests in the forefront of negotiations with a mining company.

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## STRATEGIC ISSUE #2: BENEFITS

An agreement with a mining company might capture five types of benefit for an Aboriginal community:



The agreement might supply a share in the **profit** from mining. Profit is the money left over from the sale of a product or service after all the costs of producing and supplying it has been paid.



It might supply opportunities to gain **management experience**. That may mean making the actual decisions about how a division, department, or business is run. It can also mean a paid, advisory position on a board that oversees the managers of a mine.





It might supply opportunities for a wide range of **jobs**. They will vary in terms of the skills they require; the hours, effort, and danger they involve; and the money they pay. Many of these jobs are not with the mining company itself, but with businesses that have won contracts to supply services to the mine.



It might supply **training** for many of these jobs.



A SEPA might supply **compensation** for use of traditional territory or for the effect that the mine has on the community's environment and way of life. (Compensation is not a benefit that Joint Ventures offer.)

There is a lot of disagreement over which benefits are the best to get. Are jobs and training the most important, or are management and profits? The relative importance of the five types of benefit is a crucial issue for communities who want to build their capacity.

On the one hand, let's face it - people want jobs, so they can earn income. They apply pressure to their leaders to make more jobs available. If there is a choice to be made between creating a job and ensuring a profit, unemployed people will prefer the decision that favors their immediate interests - jobs. Understandably, profits will seem pretty remote to people who just need to make a living. The politician who chooses profits over jobs is likely to get a hard time when elections next come round.

On the other hand, in many Aboriginal communities, jobs come and jobs go. The trees are cut, the quarry is dug, or the pipeline is laid, and the jobs that came with each

project are over. The income those jobs generated for the workers has been spent on family needs or will be shortly.

Yet the community as a whole has not grown wealthier. No assets, like buildings, roads, skills, or savings - have been created that the community can apply to another project of its own choosing. A strategy that gives top priority to getting jobs from a mining development is not sufficient if greater community capacity is the ultimate goal.

For that, profits are needed that the community can reinvest in businesses and in infrastructure that businesses require. Still, neither profits nor jobs will do much good without management. Management brings together the people and resources required for a project, organizes them, and applies them in order to achieve good results on schedule. One of the most important of those resources is information, including financial data. Making use of information to solve problems and improve performance is a key function of management. It takes years of experience to build up the knowledge needed to manage projects effectively. Training, as you can imagine, is an essential way to accelerate that learning process for managers or for any other complex type of job.

Compensation can help build community capacity, too. Tr'ondëk Hwëch'in negotiated compensation for individual members whose livelihoods would be harmed by the Brewery Creek gold mine. But lump sums of money were also to be set aside for the First Nation to spend on apprenticeships and scholarships. (See **\*Case Study #3: Brewery Creek Mine**, p. Intro-30.)



To build community capacity, capture from an agreement the widest possible range of benefits.

So no one type of benefit can serve the community well unless the others are captured, too. But which type should get priority? Are all equally important, perhaps? No. If your community wants to increase its self-reliance by stick-handling a steady process of capacity-building, mining benefits have the following priority:

**Diagram 1-1**

1. Profits	Long Term
2. Management	Long Term
3. Jobs	Short Term
4. Training	Short Term
5. Compensation	Long Term or Short Term

Jobs result from sustainable businesses, that is, businesses which can pay their own way over the short- and long-term. Businesses cannot be sustained if they do not make a profit. They cannot support self-reliance if they do not make a profit.

When it comes to building capacity, jobs are a short-term benefit. They generate the income that households require to put food on the table, clothes on children's backs, and gas in the tank. Training enables people to gather the skills to do their jobs better and to qualify for more complex jobs. But jobs do not increase the money available to the community for reinvestment. For that, profits are required from businesses that are so skillfully designed and managed that they cover their costs, and have money left over. Profit and management are long-term benefits that the community can use, over time, to create a lot more short-term benefits on its own.

Again, all four types of benefit are required when increasing a community's capacity. In fact, leaders may

find it necessary to raise the priority of jobs and training to keep electors patient so they can catch a glimpse of what long-term benefits can achieve.

In a mining negotiation it is important to keep all this in mind. As the *\*Raglan Mine* (p. Intro-21) and *\*NWT Diamond Mines* (p. Intro-10) case studies demonstrate, there are many different stages to mining and mining projects come in many different sizes. Some mines last a few years and others go on for decades. Each mine presents different opportunities to capture benefits and each mine is subject to different risks.

An Aboriginal community has to clarify those opportunities and those risks, and then figure out what to negotiate for. The advice of the *Aboriginal Mining Guide* is this: pay close attention to the opportunities a mine creates to access profits.

### **Upstream and Downstream Benefits**

Before we leave this strategic issue, it is important to make another distinction between benefits.

There are two parts to the mining industry: upstream and downstream. Upstream refers to exploring for ore and extracting it. Downstream refers to all the additional work that makes it possible to explore for the ore and extract it. Trucking, catering, housekeeping, and vehicle maintenance are some examples.

Opportunities for many types of benefit arise both upstream and downstream.

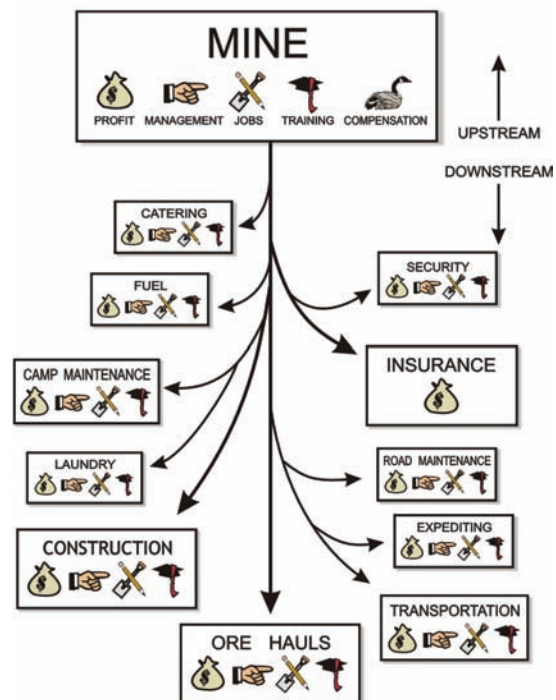
Upstream opportunities in mining are well-known for the rich benefits they create. Extracting and shipping ore from a mine can make a great number of well-paid jobs and as job training programs available to Aboriginal community

members. Profits are more difficult to achieve from the upstream. Profits generally require a share in the mine's ownership, which is costly and risky. The machines, equipment, and skills involved in upstream work require millions, sometimes over a billion dollars in investment before the mine even opens. Changes in the price of a mineral on international markets can rapidly turn a profitable mine into an unprofitable one. (Notably, communities in Nunavik have managed to negotiate a share of profits from the Raglan Mine without sharing in its ownership. See \*Case Study #2, p. Intro-21.)

There are plenty of opportunities and benefits available downstream in the mining industry, however. They still involve investment and risk. But they can be captured if the community has negotiated effectively with a good Joint Venture partner.

Look at Diagram 1-2, depicting some of the benefits created by a mine. The mine itself offers a wide range of benefits, but so does each of the business opportunities created by the mine's demand for goods and services. The trucking company, for one, can generate profits and opportunities to develop management skills and influence, as well as jobs and training. The trucking company could also create downstreams of its own, like owner-operator trucking sub-contracts and mechanical servicing contracts.

Diagram 1-2



### STRATEGIC ISSUE #3: USE OF PROFITS

“We are going to start a store and then use its profits to meet other community needs?” How often have you heard that formula? It sounds good. Profits are spent helping people with funerals and emergencies, or starting a new

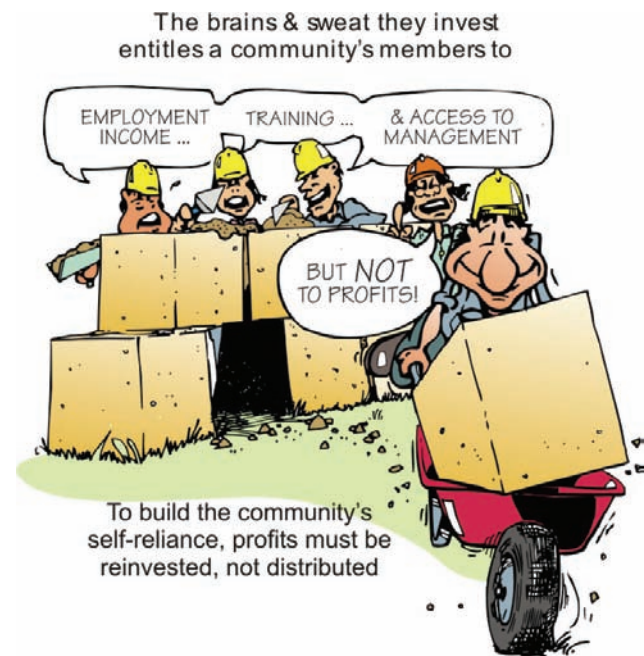
program. In the short term, people are pleased. In the long term, the community gets no closer to self-reliance, despite a profitable, community-owned business.

The problem is that the profit is not being used as capital - as something the community can reinvest to build more assets. Instead, the profit is being treated as income - as something to spend on immediate necessities.

For Aboriginal communities that use profits in this way, self-reliance will remain a fantasy. Why? Because profits are a precious resource. Unlike grants or transfer payments, the community can dispose of profits without someone else's approval. When used as capital, profits can bring together the resources needed (loans, equipment, infrastructure, expertise, for example) to build more businesses. Those businesses will create more jobs and more profits. Those profits then can be reinvested. Profit, when used as capital, is vital to the building of community capacity.

It is sometimes argued that profits must be distributed, if that's what community members want. When a profit is made by a community business, after all, the members are the ultimate owners of the business. Shouldn't they get to decide what happens to the profit?

But it is wiser to think of the community's economy as a bus owned by all the residents and their descendants. To give members unrestricted access to profits will bring the bus to a standstill. Profits are the benefit upon which all the other benefits depend. Community members may be entitled to a ride on the bus, but they are not entitled to



strip it of its tires and fuel. The bus is owned by everyone, not just by a group of individuals.

To help make this distinction clear, most aboriginal communities nowadays have established a development corporation. The community owns it. This ownership is usually represented by shares held in trust by the community's government or the development corporations' board. Individual community members are entitled to get certain rewards out of the development corporation, depending on what each of them put into it. If, as employees, they contribute brainpower and muscle power, they are entitled to a wage or salary, and training. Once they have enough knowledge and skills, they are also entitled to a shot at management.

But unless individual members have invested capital in the development corporation, they are not entitled to capital rewards. That is, as individuals, they are not entitled to a share of its profits. As the *\*Raglan Mine* case study (p. Intro-21) shows, an arrangement like this has enabled Makivik Corporation to become part owner of another mine.

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#### **STRATEGIC ISSUE #4: PARTNERS**

Large mining projects require a lot of resources. Anyone who wants to get involved in them in a big way must have a lot of capital and equipment. They also need to have on tap highly-specialized and very expensive talent. Such specialists are rare. Even the largest mining companies only employ them exactly when and where their skills are required.

Consequently, a single Aboriginal community may find it difficult to capture benefits from projects of this scale. However, Aboriginal communities can work together to acquire the capacity and capital they need to contend for a role. A number of remote communities might decide to



combine some of their resources in a regional organization. (Makavik Corporation, which is owned and controlled by several Innu communities, is described in the *\*Case Study #2: Raglan Mine*, p. Intro-21.)

The Joint Venture is another way to boost a community's experience and capacity. It joins together two or more parties to carry out a particular business. The parties contractually agree to share in the profits and losses of the business.

Some people oppose Joint Ventures, because ownership is shared between an Aboriginal community and an outside company. They say that 100% Aboriginal ownership is the only way to go if aboriginal people are to determine their own future. Joint ventures, they point out, necessarily water down the Aboriginal share in a business' profits.

But 100% Aboriginal ownership also means "owning" 100% of its risks. Unless the Aboriginal community already has capacity, or enough money to hire experienced and talented managers, it will end up learning about business management the hard way. Profits and other benefits may be reduced. They may find that 100% ownership means owning 100% of nothing. Joint ventures are safer, more durable responses to the need for capacity, especially in an industry like mining.

Clearly, partnerships of any kind are no easy row to hoe. Any combined effort requires careful negotiation of each participant's inputs, responsibilities, and benefits. But if they want to capture lasting benefits from mining, Aboriginal communities must be willing to work with partners.







## Module 2 Mining Basics

Mining has been part of the North American economy for centuries. Aboriginal people used rocks for tools, building materials, decorations, and weapons. They also recovered materials from these rocks – copper, flint, chert, siltstone, obsidian, and ochre. Copper was used for adornment, sculpture, shields, daggers, and spearheads. Flint was used for starting fires and making knives, scrapers, spear points, and arrowheads. Red ochre was used for painting. Aboriginal people traded these materials throughout the Americas.

Diavik Diamond Mine, NWT.  
Photocredit: Kitikmeot Corporation  
and Jiri Hermann.

Mining is again playing an important role in the lives of many Aboriginal people. Some 1200 Aboriginal communities are located within 200 km of 180 active mines and 2500 exploration properties.<sup>1</sup> Many of these communities go to great lengths to try and get benefits from these mining projects.

The mining industry is made up of many different interests and businesses. Here is a list of the main players:

- **Government** manages mineral claims and provides permits for exploration.
- **Prospectors**, using geological maps and other tools, explore for minerals that could lead to a mine.
- **Junior Exploration Companies** (or “Juniors”) are smaller companies that look and test for marketable ore

deposits. A few Juniors also own small operating mines. Juniors generally make their money by selling properties they have explored to larger companies. Juniors are very active in Yukon's mining sector.

- **Major Mining Companies** (or "Majors") employ many people with a wide range of skills and in every stage of the mining business. Majors make their money from the sale of the commodity they are mining.
- **Technicians** are specialists in complex tasks like warehousing, laboratory or environmental work, and computer services.
- **Service Providers** are independent businesses that are contracted to supply a mine with some of its needs. Drillers, couriers, helicopter pilots, geophysical surveyors, geologists, and caterers are all service providers.
- **Equipment Suppliers and Manufacturers** are service providers who build, supply or maintain mining equipment such as machinery, drills, trucks, and conveyors.
- **Construction Companies** build mining infrastructure, like roads, bridges, buildings, and processing facilities.
- **Industry Associations** address issues common to companies active in a sector of the economy. They also represent the interests of those companies before the public and government.
- **Stock Market Investors** channel their own capital or that of clients into the mining industry. They are especially important during the Exploration Stage of mining.
- Some **customers** are manufacturers who purchase metals, diamonds, and other commodities and turn them into products. Other customers are end consumers. They purchase for their own use the products containing the mined material.

All or most of these players have to work closely with one another at nearly every stage of mining. The good news is

that Aboriginal communities can no longer be left off the list of main players. However, as the \*Case Studies show, even as “main players” Aboriginal communities do not always gain lasting benefits. That requires many other things, including a basic understanding of the five stages of mining. Without understanding the basics, a sound negotiation strategy cannot be designed.

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## THE FIVE STAGES OF MINING<sup>ii</sup>

There are five stages to mining: 1) Exploration, 2) Feasibility and Planning (sometimes called “Development”), 3) Construction (sometimes called “Pre-Production”), 4) Operation, and 5) Closure and Reclamation. Aboriginal people who want to get involved in a mine need to think through the impacts and opportunities each of these stages may bring to the life of their community.

This section presents information on each of these five stages:

- The government regulations, laws, licenses, and permits that require attention at each stage. (Only the acts and regulations that apply across Canada and Yukon are covered.)
- The range of benefits that may be available at each stage in terms of profits, management, training, jobs, and compensation.
- The kinds of agreement that may be appropriate at each stage. These agreements address issues that may arise between the mining project, the community, and/or government. When the negotiation of the agreement actually occurs is up to the parties involved. Some agreements may be negotiated at more than one stage (see table below). However, an agreement that assigns benefits to one or more parties must be signed *before* the work commences that will actually create those benefits. When agreements get signed

after the work commences, benefits are much more difficult to realize.

### Possible Agreements during the 5 Stages of Mining

Exploration	Feasibility and Planning	Construction	Operation	Mine Closure and Reclamation
<ul style="list-style-type: none"> <li>Memorandums of Understanding (MOUs)</li> <li>Negotiation Agreement (NAs)</li> <li>Exploration Cooperation Benefit Agreements</li> <li>Joint Ventures (JVs)</li> </ul>	<ul style="list-style-type: none"> <li>MOUs</li> <li>NAs</li> <li>Exploration Cooperation Benefit Agreements</li> <li>Socio-Economic Participation Agreements (SEPAs)</li> </ul>	<ul style="list-style-type: none"> <li>SEPAs may still be concluded at the very beginning of this stage</li> <li>JVs</li> </ul>	<ul style="list-style-type: none"> <li>SEPAs may be renegotiated if that is part of the original agreement and circumstances require</li> <li>New JVs may be developed as new opportunities arise during the life of the mine operation</li> </ul>	<ul style="list-style-type: none"> <li>JVs may be developed as long term monitoring or closure/ reclamation opportunities are realized</li> </ul>

- Every stage of mining can have serious impacts on people and on the environment. An impact at one stage may recur at another stage. These impacts can be minimized, given thoughtful and steady attention at all times. We discuss the potential impacts of mining at the end of this module. (See topic “Mining Impacts,” p. 2-35.)
- Note that there is no sharp distinction between the different stages of mining. Many mining activities, major players, agreements, and business and employment opportunities appear during more than one stage.

Go to [Appendix 2](#) for a table that summarizes the five stages of mining and the major players, the types of agreement, and the business and job opportunities important to each.

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## STAGE 1: EXPLORATION

This first stage of mining includes prospecting; geological, geochemical, and geophysical assessments; drilling and the evaluation of drilling results; scoping studies; and possibly prefeasibility studies. These activities can cost from \$50,000 to \$20 million/year. Their cost can total anywhere from \$20 million to over \$150 million before construction of a mine actually begins.<sup>iii</sup> It can take 3-10 years before feasibility decisions are made.



A geologist examines rock for minerals.  
Photocredit: Istock

There are three types of exploration:

- Initial or “grassroots” exploration: searching for a deposit in an area where the mineral has not been found before.
- “Brownfield” exploration: searching for additional deposits on land where the mineral has been found before.
- On-mine-site exploration: searching for more mineral deposits on a property where mining is already occurring.

Although every mine starts as an exploration project, most exploration projects do not become mines. The success rate is particularly low for “grassroots” exploration. Less than 1 in 10,000 mineral showings actually become a mine. The capability of a mine will depend on the amount and quality of ore that can be recovered there. The price of this ore (or “commodity”) can change, depending on the demand for it in the global marketplace. When an economically-viable mineral deposit is discovered, there can be great financial and professional rewards for the companies and people involved.

The exploration company will use a scoping study to begin to determine the deposit’s economic viability. This is a



rough evaluation. Researchers apply their experience and industry standards to a small amount of the data collected locally, for example, through drilling. The study outlines the market value of the minerals and all the costs associated with building, operating, and reclaiming a mine there. Scoping studies are generally a “guesstimate,” that is, their accuracy is border-line.

The next step is the prefeasibility study. It may be used at the Exploration Stage to determine if continued exploration is justified. It can also be used to decide whether or not to move to a full feasibility study (which occurs in the Feasibility and Planning Stage) or to search out a Joint Venture partner for the next stage of the project.<sup>iv</sup> Prefeasibility studies have a higher level of accuracy than scoping studies. The projection of the site’s potential is based on more detailed local data, instead of industrial experience and standards. Enough drilling and testing has occurred to support a basic engineering analysis. Prefeasibility studies can cost \$50,000-\$500,000. They may also identify issues or problems that require further research during the Feasibility and Planning Stage.

After the prefeasibility study comes the feasibility study, which examines these matters in still greater depth during the mine’s **Feasibility and Planning Stage** (see below, p. 2-16). Prefeasibility studies sometimes occur early in the Feasibility and Planning Stage, too.

### **Exploration Companies**

The Exploration Stage is dominated by the Juniors. They do a wide range of exploration work, but are usually the ones that do “grassroots” exploration. Juniors generally just employ a few professional geologists and have annual expenditures of \$250,000-\$5,000,000. Some Juniors work with Joint Venture partners or contract out all their work to other firms.

Juniors typically finance their exploration on the stock exchange. They raise money by selling shares to people willing to take a risk in hopes of a big pay-off. They sometimes carry out scoping and prefeasibility studies in order to make a property more attractive to investors or buyers. Canada is the world's leading centre for acquiring the investment money needed for mineral exploration.<sup>v</sup>

Majors engage in exploration too. They can often use their own revenues to finance exploration, and have the largest exploration budgets. Yet Juniors have discovered most of the major mineral deposits in the past 20 years. Why?

- Majors spend their exploration budgets drilling around known deposits (their own).
- Majors focus their efforts on searching for large deposits.
- Majors are not as willing as Juniors to take risks.
- Majors have higher overhead and bigger bureaucracies.
- Majors like to reduce their risk by buying into deposits after Juniors have made the discovery.
- There are many more Juniors than Majors.

Over the past five years, a lot of money has been spent on mine exploration in Canada. This is because global demand has driven up the prices for mining commodities of all kinds.

Approximately 150 exploration projects were undertaken in Yukon in the summer of 2008. The largest was the Selwyn project of Selwyn Resources Ltd. (a Junior). Since 2005 the company has spent almost \$50 million on exploration, feasibility, and environmental programs. The company hopes to take Selwyn into the Operation Stage. Whether it can or not depends on its ability to attract capital or, at the very least, to attract a Major as a partner.

## Acts and Regulations

If they believe an area has mining potential, prospectors in many parts of Canada must apply for a prospecting license at a Mining Recorder's Office. They can then stake claims to the parts of that area that look promising.

A prospecting license is not required in Yukon. In Yukon, you stake a claim by going into the field and personally driving stakes into the ground around the place of interest. A single mineral claim in Yukon can be up to 1500 square feet in size. Multiple claims may be staked at one time. In B.C., you can use the Internet to make a claim.

To record a claim, prospectors submit an application and a fee to the Mining Recorder's Office. Once a claim is staked and approved by the appropriate government agency, the prospector has the exclusive right to explore that piece of ground for a certain time. Any area of open Crown Land can be staked, including land traditionally used by Aboriginal people and communities. Land cannot be staked on an Indian Reserve or Category A Settlement Lands. Someone who has a new mineral right on Category B or Fee Simple Settlement Land has a right to access that claim without First Nation permission so long as no heavy equipment is used. (However, First Nations are asserting their rights on traditional territory in ways that are extending their influence at this stage. See **Module 3: Getting the Most Out of Leverage.**)

### *Environmental Impact*

Prospectors and exploration companies sometimes carry out an inventory of environmental features, or conduct an environmental baseline study, early in this stage. As official records of the condition of the natural environment before any mining occurs, these studies help establish a mine's feasibility. Federal, provincial, and territorial



governments encourage (but do not require) prospectors and exploration companies to communicate with Aboriginal people during environmental baseline studies. Consequently, these studies can be a good opportunity for Aboriginal people to enhance the prefeasibility and feasibility process with traditional knowledge (TK).

In the past, traditional knowledge was not very important to baseline studies. Researchers only took scientific information seriously. Some Aboriginal people consider traditional knowledge confidential, and some do not. Now, the Yukon Environmental and Socio-economic Assessment Act (YESAA) and the processes of many other jurisdictions recognize traditional knowledge to be just as important as scientific information. Some exploration companies understand how traditional knowledge can help establish the conditions under which a mine may be more feasible. (For example, by understanding local patterns of animal behaviour, the company can work around migration routes and rutting grounds.) There is still a ways to go, but there is a growing realization of the value that traditional knowledge can add to the mining industry. (For additional information about traditional knowledge, see **Module 3, “YESAA,”** p. 3-9.)

#### *4 Classes of Exploration Program*

The government of Yukon divides exploration programs into four classes. Each class disturbs the environment to a different degree, so each class is subject to a different level of assessment and approval.

- **Class 1** programs cause minimal disturbance and do not require government approval, but are subject to operating conditions.
- **Class 2** programs cause moderate disturbance and require government approval.

- **Class 3** programs cause significant disturbance. They require the submission of a detailed operating plan prior to approval.
- **Class 4** programs cause significant disturbance. They require the submission of a detailed operating plan and possibly public consultation as well, prior to approval.

During the Exploration Stage, Class 1 and Class 2 exploration programs are most common. Class 3 and Class 4 programs typically occur in the second stage of mining, Feasibility and Planning. Class 2, Class 3, and Class 4 programs all also require assessment under YESAA. The regulations that apply to them are explained under the topic “[Special Yukon Legislation](#),” p. 2-19 below.

The table below summarizes the approval requirements for all four classes of exploration program.

### Yukon Exploration Programs

	Class 1 (grassroots)	Class 2 (upper level grassroots)	Class 3	Class 4
<b>Environmental Disturbance</b>	Minimal	Moderate	Significant	Significant
<b>Government Approval</b>	No - but must adhere to Operating Conditions	Yes – Apply for Class 2 notification	Yes – submission of a detailed operating plan necessary	Yes – submission of a detailed operating plan and may require public consultation
<b>Time Line</b>	Activities and reclamation finished in one year	Complete within 12 months of start date	Up to 10 years duration	Up to 10 years duration
<b>YESAA Assessment</b>	No	Yes	Yes	Yes

### Engagement Protocols

Engagement protocols (or policies) are a way for Aboriginal communities to restrain the expectations and practices of companies before Class 2 exploration begins.

Engagement protocols are guidelines for companies to follow, step by step, when they wish to develop resources in traditional territories. These protocols can be very valuable to both a community and to a mining company. They make clear the community's expectations as to how development inquiries are to be made and the issues to discuss. When Aboriginal communities have to negotiate several agreements over a short time, an engagement protocol can reduce the expense and the fatigue involved.

In the case studies selected for the Aboriginal Mining Guide, many Aboriginal communities wrote protocols as a result of their experience in negotiations. The Innu Nation involved with the Voisey's Bay mine (see [\\*Case Study #4](#), p. Intro-38) wrote *A Matter of Respect: Guidelines to the Mining Industry*. The protocol written by the Lutsel K'e Dene (see [\\*Case Study #1: NWT Diamond Mines](#), p. Intro-10) has 12 clear guidelines for outsiders who wish the community's permission to undertake activities. Alexco and NaCho Nyäk Dun wrote a Cooperation Engagement Protocol as a result of their consultations (see [\\*Case Study #5: Keno Hill Silver District](#), p. Intro-45).

In B.C., Tahltan Nation has had a very detailed mining protocol since the late 1980s. In 2006, the Tahltan signed a [SEPA with NovaGold Canada](#) for a copper, gold, and silver mine at Galore Creek. The protocol helped to ensure that the agreement reflected the desires of the Tahltan.

An engagement protocol should be written in close consultation with the whole community. It should reflect the community's long-term goals, values, and interests. The protocol should be clear in its expectations. It should avoid vague, general statements that people can misinterpret. In other words, even when the authors of the protocol are not around, development and negotiations should proceed in about the same way every time.

Some protocols are very detailed. Others instead describe a policy for engagement with resource developers. Each community will express its expectations in the way it finds most suitable. (Protocols that are extremely complex and demanding will be useful neither to the community nor to developers, however.) Just by clarifying its expectations, a community will help itself develop a long-term strategy of economic development.

See [Appendix 1](#) for samples of Engagement Protocols.

### **Benefits and Opportunities**

Exploration historically has occurred without much benefit going to Aboriginal communities. A Junior may employ a few Aboriginal people to provide some services. But it does not usually have the money or the motivation to do much more.

This has started to change over the last ten years. Communities that learn about the needs of the exploration companies are capturing benefits. Catering, transportation services, or direct employment on the exploration crew are all possible. Unlike a mine, that usually operates year round, almost all the benefits possible at the Exploration Stage are seasonal. But work experience gained at this stage can help build skills and knowledge that prove useful in other areas, whether or not a mine actually starts up.

### **Agreements**

Agreements are of three types at this stage: Memorandums of Understanding, Negotiation Agreements, and Joint Ventures.

### *Memorandums of Understanding*

At the outset of exploration a community may want to consider negotiating a Memorandum of Understanding (MOU) with an exploration company. An MOU explains the principles that the signatories will follow in order to work together for mutual benefit. Both sides make concessions. A community generally promises the company access to its lands for exploration, and not to interfere with permit applications. A company generally promises to take measures to protect the community's environment or way of life. In some circumstances compensation or access fees have been included as part of the agreement.

In the Exploration Stage, an MOU could also set out terms for future negotiations between a community and a mining or exploration company and for the capture of potential benefits. While MOUs have rarely been used this way in the past, recent experience indicates that it may be very worthwhile.

MOUs are not legally binding contracts. You are not obligated by the law to carry them out after you have signed. (An MOU may develop into a contract, however.)

### *Negotiation Agreements*

Another option is for the community and the company to make a Negotiation Agreement. Negotiation Agreements are legally binding. They detail the principles under which the parties will make future agreements, if the mine continues to go forward.

*Sometimes both a Memorandum of Understanding and a Negotiation Agreement are concluded. NaCho Nyäk Dun First Nation and Alexco Resources Corporation did that when they bargained over the development of Yukon's Keno Hill Silver District. The MOU affirmed the First Nation's cooperation and*

*support for mining in the District, and for the mine's eventual closure and reclamation. The Negotiation agreement expanded the MOU into a legally binding contract. (See \*Case Study #5: Keno Hill Silver District, p. Intro-45.)*

### *Joint Ventures (JVs)*

There are contract opportunities to be gained during the Exploration Stage. Some of the best JVs available are for providing services to exploration companies. Catering, camp construction, equipment supply, sampling, fuel hauling, and expediting are examples of these services. Additionally, more Aboriginal groups are getting involved in exploration work itself, like diamond drilling. This involves some highly technical skills. JVs are one way for an Aboriginal community or organization to boost its capacity and take advantage of these opportunities.

*Webequie First Nation is the only community near a nickel-copper deposit found by Noront Resources in the James Bay lowlands of northern Ontario. The community decided that a JV was the way to capture some benefit from the Exploration Stage. Webequie negotiated a JV with Cyr Drilling Ontario Ltd. in August 2008. Webequie owns 20% of the Joint Venture company. Cyr provides the training and jobs. Webequie has the option to buy out Cyr in 2013. Mining might go ahead at the site, or it might not. Either way, Webequie is positioned to capture benefits from exploration activity right away and can contract out to other exploration companies that may come into their area.<sup>vi</sup>*

Webequie and NaCho Nyäk Dun used different types of agreement to achieve different purposes. In NaCho Nyäk Dun's case, an MOU and a Negotiation Agreement assured the mining company of community support for

mining and cooperation. The First Nation then built into the Exploration Cooperation Benefit Agreement the opportunity to capture business contracts. NaCho Nyäk Dun is currently building sample boxes to hold drilling samples. In Webequie's case, a JV helped the community to carry out the actual drilling.

## 1. Exploration Stage

Aboriginal Business Opportunities	Aboriginal Job Opportunities	Act, Regulations, Laws and Permits	Agreements
<ul style="list-style-type: none"> <li>▪ Prospectors</li> <li>▪ Line cutters</li> <li>▪ Caterers</li> <li>▪ Equipment suppliers</li> <li>▪ Camp staff</li> <li>▪ Samplers</li> <li>▪ Camp construction workers</li> <li>▪ Assisting geologists with environmental baseline studies</li> </ul>	<ul style="list-style-type: none"> <li>▪ Geologists</li> <li>▪ Geophysicists</li> <li>▪ Assistants to specialists (geological assistant, research assistant, scientific assistant, field assistants)</li> <li>▪ Drill Operators</li> <li>▪ Pilots</li> </ul>	<ul style="list-style-type: none"> <li>▪ Claim Application</li> <li>▪ Prospectors License</li> <li>▪ <u>Land use permit</u> (depending on the amount of work and size of project)</li> <li>▪ Tree cutting permit (if trees must be felled in order to explore)</li> <li>▪ (in Yukon) YESAA</li> <li>▪ Class 2 exploration notification</li> <li>▪ Submission of a detailed operating plan for Class 3 exploration</li> </ul>	<ul style="list-style-type: none"> <li>▪ Memorandum of Understanding (MOU)</li> <li>▪ Negotiation Agreement (NA)</li> <li>▪ Exploration Cooperation Benefit Agreements</li> <li>▪ Joint Ventures (JVs)</li> </ul>

### *Never Too Early for an Agreement*

Despite a growing number of court cases about Aboriginal title and rights (see **Module 3: Getting the Most Out of Leverage**), exploration companies legally still have “free entry” to Crown land in Canada. Searching for and exploiting minerals gets a higher priority than nearly every other land use - including Aboriginal use of traditional lands.

Nevertheless, a recent study reveals that Aboriginal communities have won significant benefits from agreements

made early in the mining process. The study documents several examples of Juniors who agreed to financial benefits to Aboriginal communities at the Exploration Stage. Interviews with many Juniors show that their exploration budgets are not as tight as many people believe. Six of these companies were willing to offer First Nations free or subsidized equity interest in a property. One Junior offered a 25% equity interest. Three Juniors were willing to pay First Nations a \$70,000 compensation fee during the Exploration Stage. Many Juniors say they earmark 5-10% of their exploration budgets for the expenses relating to consultation with Aboriginal communities.<sup>vii</sup>

It therefore makes sense to give attention earlier rather than later to negotiating agreements with exploration companies.

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## **STAGE 2: FEASIBILITY AND PLANNING**

A lot of detailed research takes place at this stage to determine if a mine really is viable and if it is, to prepare for its construction.

Results from scoping and prefeasibility studies during the Exploration Stage will have determined that further investment makes sense. Feasibility studies and environmental assessments are now necessary to determine the mine's business viability, to raise financing, and to pass all the regulatory requirements.<sup>viii</sup> Exploration activities almost always continue during the Feasibility and Planning Stage. (They can even proceed while the mine is operating, in hopes of finding more ore.) The Planning and Feasibility Stage of a mine can take 2-7 years to complete.

### **Feasibility Studies**

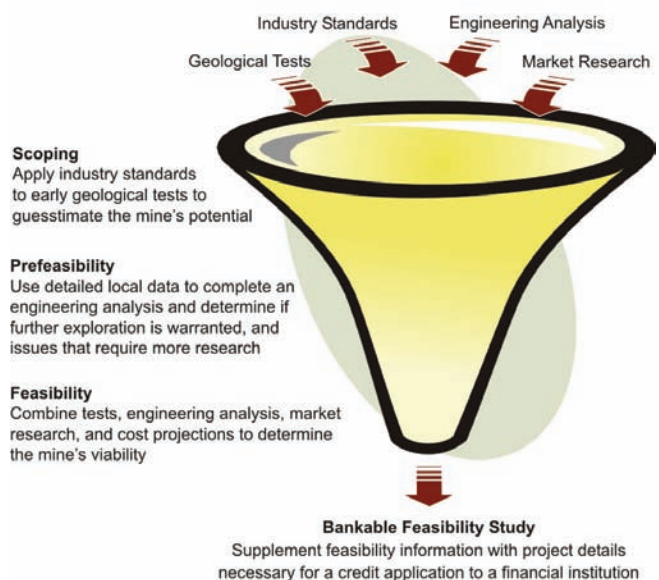
A feasibility study determines whether a mine is likely to be a viable business. Researchers take all the test work



and data gathered previously about the site and combine that with an engineering analysis and a detailed examination of markets and all costs that developing and decommissioning the mine will entail. (See **Module 4** for more details). A thorough feasibility study can range in cost from \$2-20 million and can take two or more years to complete.

A very detailed feasibility study may also be called a Bankable Feasibility Study. It is “bankable” because it is suitable for a mining company to present to financial institutions when applying for a loan for the project. In addition to a geological test results and an engineering analysis, the Bankable Feasibility Study specifies the assumptions under which the project would proceed, in addition to a strategy, development conditions, and outcomes for the project. With this information, a financial institution can determine the collateral, premium, repayment schedule, and the risks and rewards such a loan would involve

Diagram 2-1: The Mine Feasibility Funnel



A Bankable Feasibility Study also gets several other important processes underway. It signals that the final engineering, business planning, and construction planning for the mine may proceed. It starts a process of government review. (The mining company submits a project description to governments or local boards.) It starts the environmental assessment (EA) process that must be completed before construction commences. The Bankable Feasibility Study also triggers the negotiation of a SEPA.

Moving through all the steps of analysis from scoping to feasibility study can take 3-6 years. Costs start at \$2 million.

They may go as high as \$100 million if special testing facilities are required on-site. By the time the feasibility studies for the Howard's Pass lead-zinc mine in Kaska territory, Yukon, are complete, they will likely have cost the developer (Selwyn Resources) about \$100 million.<sup>ix</sup>

## **Acts and Regulations**

Before mining activity may commence in any part of Canada, every project must first undergo assessment and second, regulation. Assessment identifies both the environmental and socio-economic effects a mine may have, their seriousness, and how they may be reduced. Regulation occurs when government agencies issue the permits, licenses, or other approvals for which they are responsible.

A great many regulatory requirements, licenses, permits, and leases apply to the Feasibility and Planning Stage of a mine. The regulations are meant to make the mine develop in a way that will benefit people and minimize harm to the environment. In Yukon, permits for exploration or mine feasibility will not be granted until an environmental assessment is done.

### *Mining leases*

Mineral rights belong to the Crown and in Yukon, to First Nations with Category A Settlement Lands. These rights can be leased by individuals or companies, but not purchased. A mining lease is a legal contract for the right to work a mine and extract the mineral for a specified length of time, in return for a specified fee, or royalty. The lease sets the boundaries where the company can extract, build, and dump materials. To get a lease, the company must submit a mine closure and reclamation plan, a yearly fee, and large security deposits. Without a mining lease, you cannot develop a property into a mine.

In Yukon, new mineral rights on Category B Settlement Lands or Fee Simple Lands are regulated by the Placer Mining Act (PMA) or the Quartz Mining Act (QMA).

### *Permits*

The most important permits concern land and water use, mine closure, and reclamation.

Water licenses are provided by provincial and territorial agencies, which oversee water discharge. Water crossing permits are issued under the Navigable Water Protections Act. If a mine is expected to have an impact on fish habitat, authorization under Section 35 of the Fisheries Act is required.

Any effects a mine might have on migratory wildlife have to be assessed under the provisions of the Canada Migratory Bird Convention Act and the Canadian Species at Risk Act. Every province and territory has a range of policies and legislation of its own to address risks to wildlife.

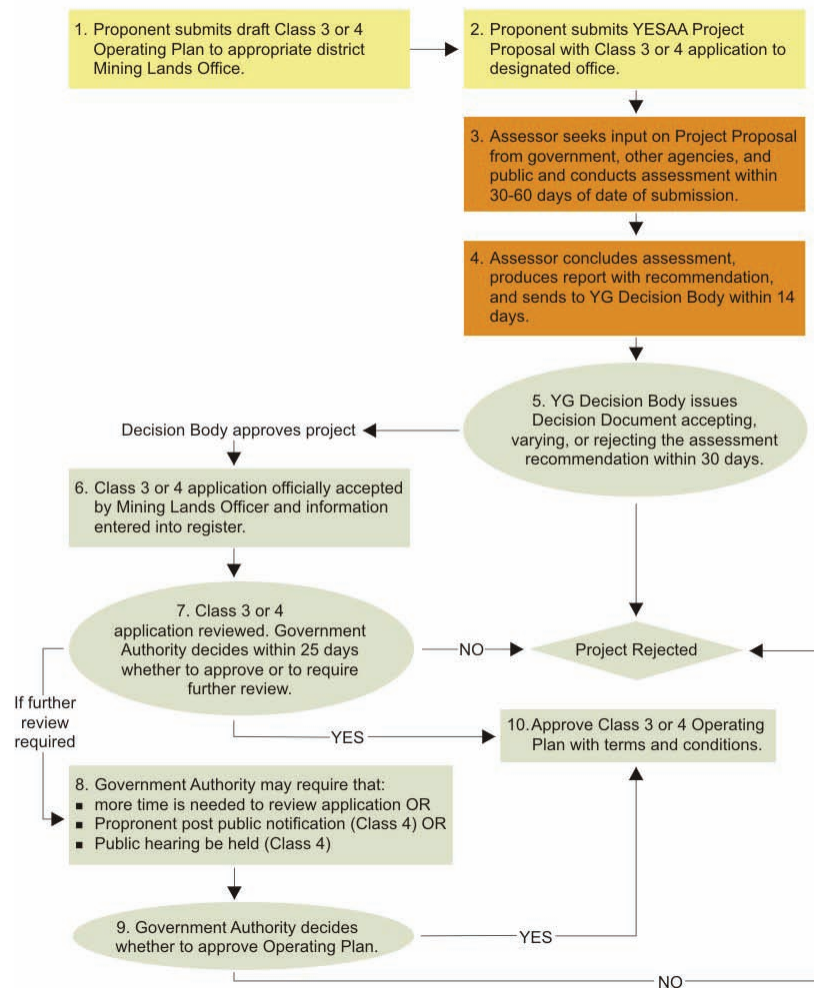
### *Special Yukon Legislation*

The Yukon has its own assessment legislation with regard to approval of mining and other development projects. The Yukon Environmental and Socio-economic Assessment Act (YESAA) creates a single process of environmental and socio-economic assessment to cover all the federal government's requirements for protecting the environment. It typically requires the completion of base-line studies that describe the physical, social, or economic environment of the area that the mine will impact. (These studies vary in their required scope and detail.) Reclamation and closure plans explain how the land will be repaired on an ongoing basis during mining operations as well as after they finish.

Yukon also divides mining exploration programs into four classes, depending on how greatly they may affect the

environment. (See “4 Classes of Exploration Program,” p. 2-9.) Diagram 2-2<sup>x</sup> explains the assessment process under YESAA for Class 3 or 4 exploration programs.

Diagram 2-2



It is desirable for mining companies to submit their proposal to the First Nation government between steps 1 and 2. This is not required, but it helps to foster good relations. This timing is of particular benefit if it raises issues (for example, the need to complete a heritage assessment) that are best dealt with before the submission of the YESAA Project Proposal.

### *Umbrella Final Agreement*

In Yukon, the Umbrella Final Agreement (UFA) also establishes the unique water rights of First Nations. Water that is on or flows through or adjacent to the Settlement Lands of Yukon First Nations must remain substantially unaltered in quality, quantity, and rate of flow (including seasonal flow).

Water licenses are granted by the Yukon Territory Water Board (YTWB). The Board may grant a water license that interferes with a Yukon First Nation's water rights, although by legislation (as stated in the UFA), that should only occur if there is no alternative. In that case, the Board will require the licensee to pay the First Nation compensation. It is up to the water license applicants to prove to the Board that they will not make a significant impact on local First Nations water. Since First Nations representatives sit on the YTWB, they have direct input as to whether a license may be granted. So when a mining company applies for a water license, First Nations have an opportunity to leverage benefits.

### **Community Consultation**

During the evermore detailed planning of the Feasibility and Planning Stage, Aboriginal communities have opportunities to enter into discussions with mining companies. It is also the point at which research must be carried out in support of any community opposition to the mine. Firm social, economic, or environmental grounds must be documented if a mine is going to be opposed.

An experienced and wise mining company knows to take the initiative and consult with Aboriginal communities well before it submits reports or proposals to government regulators. For this consultation to be meaningful, communities too must make an early start and define

areas of interest and concern to discuss with the mining company. This will help shape later negotiations.

In Yukon, plans for large development projects must be submitted for assessment under YESAA. Prior to that submission, it is obligatory (and beneficial) for companies to consult the First Nations whose settlement lands or economic and social well-being may be harmed by such projects. For smaller projects, consultation may not be obligatory, but proactive companies will do so regardless. As well, for *any* project on Settlement A or Settlement B lands, companies are required to consult directly with the First Nation concerned. On those lands, the First Nation is a regulator of activities.

A wide range of community consultation often takes place during a mine's Feasibility and Planning Stage:

- Public meetings and hearings
- Open houses
- Workshops
- Focus groups
- Interviews
- Meetings and discussions about environmental assessment and applications for licenses and permits

Consultations provide the larger community with an opportunity to provide feedback. By reviewing project descriptions and by leading scientific studies or studies of traditional knowledge, communities can give input to the planning of the mine. Simultaneous with these consultations are discussions between top company officials and the community's Chief and Council or other negotiator(s). It is at this point that the negotiation of agreements with the mining company can start to take shape.

## Agreements

The Feasibility and Planning Stage is an excellent time for a mining company and an Aboriginal community to develop a good relationship. Indeed, an agreement may be even be struck during the **Exploration Stage** (p. 2-5, above). But it's during the Feasibility and Planning Stage that the mining industry decides if a mine is feasible and who its owners and operators will be. This usually takes several years, though. So when should SEPA negotiations begin?

There is no single “best time” at which to start SEPA negotiations. Conserve your time, effort, and money for the time at which they can count. If negotiations start too early, when the mine's feasibility is still in question, a lot of money could be wasted on what turns out to be a non-starter. If negotiations start too late, well after the mine's feasibility is confirmed, the negotiations may be rushed.

The response of the mining industry to the prefeasibility or feasibility study is one good clue to the timing question, however. If the exploration company holds onto the property in order to operate a mine there, or if another company quickly buys up the property, the industry obviously considers the site promising. That is a good time to start building a relationship with the potential owner.

Were a Major to buy up the property, it may be worthwhile to negotiate downstream benefits from just the ongoing exploration work. The service needs of geologists, drillers, and other workers may create business, jobs, and training opportunities for Aboriginal people. Financial benefits may also be negotiable, as during the Exploration Stage.

What's of crucial importance is to conclude a SEPA before the Construction Stage commences. If construction gets underway without a SEPA in place, the Aboriginal



community will have far less leverage during the negotiations.

To resolve the timing question, communities and companies often conclude Interim Agreements. In an Interim Agreement, the parties “fill in” as many of the seven sections standard to a SEPA (see **Module 5**) as they can. For example, the parties may already agree on provisions for Community, Social, and Cultural Support. Or, they may already agree that the amount and schedule of compensation payments will only be finalized after completion of the environmental assessment.

Interim Agreements are agreements in principal. Their provisions can be readily amended during the SEPA negotiations. Interim Agreements are very useful, nonetheless. They help the parties begin to deepen their relationship by setting aside what they can agree on now, so they can focus on other, more sensitive and contentious issues later.

*NaCho Nyäk Dun and Alexco concluded their various agreements during the Exploration and Feasibility and Planning stages. (See **\*Case Study #5: Keno Hill Silver District**, p. Intro-45.) Since the mine is not a certainty yet, these agreements concern the terms of future agreements if the mine were to move ahead:*

- *how these future agreements will be implemented and monitored.*
- *the measures that Alexco will take to build the capacity of NaCho Nyäk Dun.*
- *the jobs or downstream business contracts Alexco will offer first to NaCho Nyäk Dun members who have the necessary experience and skills.*

Indian and Northern Affairs Canada (INAC) often assists Aboriginal groups with the costs of negotiating agreements with mining companies. In 2008 INAC announced that it



would provide Liard First Nation Development Corporation with \$245,000 to help cover the cost of negotiating a SEPA with Selwyn Resources Ltd.<sup>xi</sup> This money would come from INAC's [Strategic Investments in Northern Economic Development](#) program. Mining companies often pay the costs of negotiation, too. See **Module 4, "Covering the Costs of Negotiation,"** p. 4-31.)

## 2. Feasibility and Planning Stage

Aboriginal Business Opportunities	Aboriginal Job Opportunities	Act, Regulations, Laws and Permits	Agreements
<ul style="list-style-type: none"> <li>Prospectors</li> <li>Line cutters</li> <li>Caterers</li> <li>Equipment suppliers</li> <li>Camp staff</li> <li>Samplers</li> <li>Camp construction workers</li> </ul>	<ul style="list-style-type: none"> <li>Geologists</li> <li>Geophysicists</li> <li>Assistants to specialists (geological assistant, research assistant, scientific assistant, field assistants)</li> <li>Drill Operators</li> <li>Pilots</li> <li>Drill operators, line cutters, prospectors, and samplers</li> <li>Accountants</li> <li>Environmental Technicians</li> </ul>	<ul style="list-style-type: none"> <li>Land use permit (depending on the amount of work and size of project)</li> <li>Tree cutting permit</li> <li>Water License</li> <li>Quartz Mining License</li> <li>( in Yukon ) YESAA Assessment</li> <li>Submission of a detailed operating plan for Class 3 or 4 exploration</li> </ul>	<ul style="list-style-type: none"> <li>Memorandum of Understanding (MOU)</li> <li>Negotiation Agreement (NA)</li> <li>Exploration Cooperation Benefit Agreement</li> <li>Socio-Economic Participation Agreements (SEPA's)</li> </ul>

## STAGE 3: CONSTRUCTION

Construction refers to the building of an entire mining facility: the mine itself, the processing plant or "mill," and all the roads, rails, sewer and water lines, housing (or "infrastructure") needed to support the operation. This stage takes place after all the permits and regulations have been confirmed. It requires large investments to be made. It creates a large number of jobs and contracting opportunities.



Laying forms at Diavik Diamond Mine. Photocredit: Kitikmeot Corporation and Jiri Hermann.

The Construction Stage generally takes 2-4 years. Costs can range from \$100 million up to \$3 billion. Ekati and Diavik, two remote diamond mines in the Northwest Territories (see \*Case Study #1, p. Intro-10) cost respectively \$750 million and \$1.3 billion to construct. Smaller mines that are close to highways, electricity, or railroads are likely to have much lower construction costs.<sup>xii</sup> For example, the Wolverine project in southeast Yukon cost \$175.6 million to build.<sup>xiii</sup>

Some of the infrastructure necessary to a mine may not be built by private companies. Other parties may build it, especially government.

## **Acts and Regulations**

Permits for excavation, buildings, and for the use of explosives are required from a variety of provincial or territorial agencies. Other necessary permits might include:

- Transmission line permit to construct, operate and maintain an electric power transmission line.
- On-site sewage disposal permit to install a sewage disposal system.

## **Benefits and Opportunities**

As in the two previous stages, construction creates business opportunities in services (transport and catering, for example). There is now a far greater need for construction trades and services, however. Depending on the mine, a port may be required, or schools, community centres, and recreational facilities. Each will require the work of architects, builders, cabinet-makers, electricians, plumbers, drywallers, and other trades.

## Agreements

SEPAs concluded *prior* to mine construction can enable Aboriginal communities to capture many significant downstream opportunities during this stage. There may be compensation payments or the construction of community infrastructure. Still more significant at this stage are the business opportunities, and the jobs and training they entail. While brief, the Construction Stage is intense. It provides more job opportunities in any given year during its short duration, than any other stage.

Joint Ventures (see **Module 6**) are a crucial way for an Aboriginal community to capture some of this abundance of business opportunities.

*During the construction of Diavik Diamond Mine (see **\*Case Study #1**, p. Intro-10), employment averaged 800 workers and peaked at about 1,500. Of almost \$1.3 billion in construction contracts and contract commitments signed during that stage, about \$900 million were with northern businesses. Two-thirds of that amount was with Aboriginal Joint Ventures and other Aboriginal companies.*

*In their SEPA, Tr'ondëk Hwëch'in (TH) and Loki Gold agreed that TH alone should be allowed to bid on certain contracts. (See **\*Case Study #3: Brewery Creek Mine**, p. Intro-30.) The Loki representatives did not expect that the First Nation would have the capacity to take advantage of this clause. They were in for a surprise. Even before the SEPA was signed, TH started negotiating a Joint Venture with Procon Mining and Tunneling and VLB Resources. With these partners, TH was able to win the contract to build an access road to the mine and to construct portions of the leach pad. In turn, TH provided Loki with a quarry permit that enabled the company to haul gravel from interim protected TH Settlement Land.*

Note that a SEPA will concern not only the benefits available during the Construction Stage, but during the Operation Stage of the mine as well. Training programs during construction may help prepare Aboriginal people for the job opportunities that arise once production begins.

Most SEPAs are primarily concerned with the business, training, and job opportunities generated by the mine itself. However, there are examples of Aboriginal communities that choose to focus on other priorities.

*At Snap Lake, in addition to a SEPA with the Lutsel Ke Dene, DeBeers concluded a SEPA with the Tlicho people. This agreement's terms focus on the promotion of traditional livelihoods. Instead of serving a small number of members with an interest in wage-paying, industrial work, the SEPA fosters the cultural well-being of the whole Tlicho people.<sup>xiv</sup>*

Whether or not this approach to a SEPA is appropriate depends on the community's vision of its future. (See [Module 1, "Strategic Issue #1: Vision,"](#) p. 1-10).

### 3. Construction Stage

First Nations Business Opportunities	First Nations Job Opportunities	Act, Regulations, Laws and Permits	Agreements
<ul style="list-style-type: none"> <li>Prospectors</li> <li>Line cutters</li> <li>Caterers</li> <li>Equipment suppliers</li> <li>Camp staff</li> <li>Samplers</li> <li>Camp construction workers</li> <li>Laboratory services</li> <li>Line clearing.</li> <li>Construction trades and services</li> <li>Heavy Equipment operation</li> <li>Supply of goods and services</li> <li>Infrastructure development opportunities</li> </ul>	<ul style="list-style-type: none"> <li>Accountants</li> <li>Environmental Technicians</li> <li>Trades helper</li> <li>Heavy equipment operators</li> <li>Warehouse technicians</li> <li>Administrative assistance</li> <li>Trades occupations</li> <li>Safety coordinators</li> <li>Managers</li> <li>Engineers</li> </ul>	<ul style="list-style-type: none"> <li>YESAA</li> <li>Land use permit (depending on the amount of work and size of project)</li> <li>Excavation, building and use of explosive permits</li> </ul>	<ul style="list-style-type: none"> <li>Socio-economic Participation Agreement (SEPA) (often called an Impact Benefit Agreement or IBA) may still be concluded at the very beginning of this stage</li> <li>Joint Venture (JV)</li> </ul>

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## STAGE 4: MINE OPERATION

A mine is in operation when people and equipment are actually extracting minerals from the earth. After extraction, the minerals are processed into metals, non-metals, or industrial mineral products. In addition to the production and processing of minerals, mine operations involve hiring, training, commissioning, and expansion.



Jericho Diamond Mine. Photocredit: Kitikmeot Corporation and Jiri Hermann.

Mining is of two types: surface (often called “open pit” or “open cast”) and underground. Surface mining removes a thin layer of overburden to expose and extract rock that contains marketable minerals (ore). The costs of surface mining are relatively low and can bring about mass production. The deeper the ore deposits, the more a company must use underground mining to extract them. Some projects start off with surface mining and then go underground as the deposit gets deeper. Surface mining can be highly mechanized and require relatively few employees. Not surprisingly this method has a better safety record than underground mining.



Excavation: A scoop removes broken rock from the entry to a new ramp. Source: iStock.

Small or large, a mine involves four main kinds of work: 1) excavation of the ore, 2) processing of the ore, 3) storage and management of waste, and 4) a range of supporting services.

The **excavation** is where people and equipment move the earth and remove the ore.

The **processing** plant or “mill” crushes and screens the ore to separate its marketable minerals from the material that is not marketable (waste rock). If there is more than one mineral in the ore, the mill separates them from one another as well. Some mines have a mill on site. Others



Processing: The mill at Lupin gold mine, Nunavut, in 1997. Lupin operated from 1982 to 2006. Photocredit: LCGS Russ.



haul the ore elsewhere to be processed. A smelter may be the next step in processing. Smelting is the melting or fusing of the ore in order to separate out the metallic parts. Smelters may be built near or at the mine site but often they are located someplace else.

**Waste storage** is needed for waste rock from the excavation and for the material thrown out by a mill after processing (the tailings).

**Supporting services** include anything necessary for the people and equipment involved in excavation, processing, and waste storage. Repair shops, labs for testing the quality of the ore, change rooms, living quarters, warehouses, and offices are all examples of supporting services.

A mine can operate for several years or several decades. The length of its operating life depends on how much mineral the rock contains (its grade) and on the selling price of the mineral. As that price rises, lower grade rock may become worth mining. As the selling price of the mineral falls, only high-grade rock is worth mining. So the quantity of ore at a mine (the ore body) grows and shrinks as mineral prices change. The ore body also grows and shrinks as the costs of mining it change.

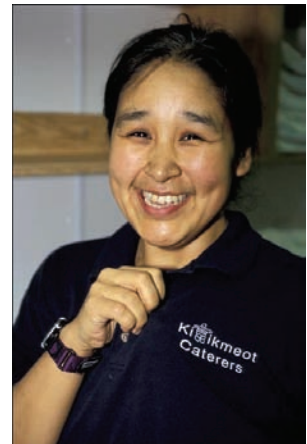
Revenue from a mine can run from hundreds of millions to billions of dollars.

## Acts and Regulations

At this stage, provincial or territorial legislation requires that a mining company get a quarry permit to extract and remove topsoil, sand, gravel, or rock from a pit or site. The permit specifies how much and what type of material may be taken.



Waste storage: The landfarm at the Ekati site, where contaminated soil and other dangerous substances are stored. Photocredit: Independent Environmental Monitoring Agency.



Supporting services: Kitikmeot Caterers, a Joint Venture between Kitikmeot Corporation and Horizon North Logistics, provides catering, housekeeping, and janitorial services to the mining industry. Photocredit: Kitikmeot Corporation and Jiri Hermann.

## Benefits and Opportunities

A mine's Operation Stage offers a number of longer-term opportunities and benefits, especially in downstream businesses. Whether Aboriginal communities can capture them will depend in part on the details of the SEPA they negotiated earlier, their determination to see it implemented, and their capacity to negotiate solid Joint Ventures (see [Module 6](#).) The community must ensure that the mining company makes good on the terms to which it agreed. (See [Module 7](#), p. 7-6 for issues in implementation and monitoring.)

### 4. Mine Operation Stage

First Nations Business Opportunities	First Nations Job Opportunities	Act, Regulations, Laws and Permits	Agreements
<ul style="list-style-type: none"> <li>▪ Business opportunities in exploration services, construction and camp services</li> <li>▪ Underground and surface contract mining</li> <li>▪ Road maintenance</li> <li>▪ Equipment maintenance</li> <li>▪ Transportation such as fuel and ore haul</li> <li>▪ Insurance</li> <li>▪ Recycling</li> </ul>	<ul style="list-style-type: none"> <li>▪ Accountants</li> <li>▪ Environmental Technicians</li> <li>▪ Trades helper</li> <li>▪ Heavy equipment operators</li> <li>▪ Warehouse technicians</li> <li>▪ Administrative assistance</li> <li>▪ Trades occupations</li> <li>▪ Safety coordinators</li> <li>▪ Managers</li> <li>▪ Engineers</li> </ul>	<ul style="list-style-type: none"> <li>▪ Mining lease</li> <li>▪ YESAA</li> <li>▪ Canadian Environmental Protection Act (CEPA)</li> <li>▪ Fisheries Act (FA)</li> <li>▪ Explosives Act</li> <li>▪ Navigable Water Protection Act.</li> <li>▪ Water License</li> <li>▪ Quarry permit</li> <li>▪ Transmission line permit</li> <li>▪ On-site Sewage disposal permit</li> </ul>	<ul style="list-style-type: none"> <li>▪ A SEPA may be renegotiated if that option is part of the original agreement and circumstances require.</li> <li>▪ Joint Ventures (JVs)</li> </ul>

How many benefits the community captures also depends on the ability of members to qualify for the jobs. The explanations of the previous four stages have noted a variety of job opportunities. The following table shows how these opportunities break down in terms of skill and education requirements: entry-level, semi-skilled, skilled and professional. Additional education and training



programs may be necessary to increase the job options of community members.

### Jobs and Education

Type of Job	Examples	Education Requirements
<b>Entry-Level</b>	<ul style="list-style-type: none"> <li>Trades helpers</li> <li>Heavy Equipment operators</li> <li>Housekeeping services</li> </ul>	<ul style="list-style-type: none"> <li>Grade 12 education or equivalent</li> <li>These requirements can encourage young people to stay in school long enough to meet the requirement. If very few community members meet these requirements, the mining company may agree to waive them for a time.</li> </ul>
<b>Semi-Skilled</b>	<ul style="list-style-type: none"> <li>Warehouse technicians</li> <li>Administrative assistants</li> <li>Trades occupations</li> <li>Trucking</li> <li>Smelter positions</li> </ul>	<ul style="list-style-type: none"> <li>Grade 12 education or equivalent</li> <li>Some work experience.</li> </ul>
<b>Skilled</b>	<ul style="list-style-type: none"> <li>Trades occupations</li> <li>Safety coordinators</li> <li>Environmental technicians</li> </ul>	<ul style="list-style-type: none"> <li>College diploma or trades certification</li> </ul>
<b>Professional</b>	<ul style="list-style-type: none"> <li>Managers</li> <li>Engineers</li> <li>Geologists</li> <li>Scientists</li> <li>Accountants</li> </ul>	<ul style="list-style-type: none"> <li>University Degree</li> </ul>

## STAGE 5: MINE CLOSURE AND RECLAMATION

No mine lasts forever. They close for a number of reasons. The most common are that the ore body has run out, or mineral prices have fallen, or costs have risen. All might make mining in a particular location unprofitable.

The time needed to shut a mine depends on many factors. The bigger and more complex the operation, the longer it takes to close. The site must be returned to its natural state or something close to that. As a result, mines that have had a greater



Replanting at the Ekati Diamond Mine site. Photocredit: Independent Environmental Monitoring Agency.

impact on the environment take longer to close. The reviews required to ensure a mine closes properly also take time. Sometimes it takes 2-5 years to close a mine. If a lot of environmental monitoring or treatment is required, it may take decades.

The plans for mine closure are drafted during the Construction Stage. Further details in these plans are worked out during the operation of the mine. Closure involves shut-down, decommissioning, reclamation, and post-closure.

Before **shut-down**, the mine owner must notify a great many stakeholders that production is going to end. Employees and their representatives must be told, as must governments (municipal, provincial and federal), media, and mining associations. When all production has stopped, employees begin to be laid off. A small labour force is kept on to shut down equipment. The mine closure plan indicates which skills this labour force requires.

**Decommissioning** involves things like removing buildings, sealing off underground openings, and the monitoring of water and waste rock. **Reclamation** begins whenever and wherever there is land that the mine no longer needs for operations. It can involve recontouring the ground, capping it with a growth medium, and then seeding and fertilizing it.

Finally, **post-closure** involves monitoring the site. Depending on the results of reclamation, post-closure can go on for a long time.

The mining company must set aside enough money to complete closure, from shutdown through to post-closure. This financial assurance may be a few million dollars for a small mine or over \$100 million for a large mine.

## Acts and Regulations

Yukon Territory has a rigorous reclamation and closure policy. The policy clearly defines the responsibilities of mine operators to have professionals complete a closure plan. The government agency that provides the reclamation permit also has to approve the mine owner's monitoring plan. Certain jurisdictions may require special air and sewage permits. The operator must satisfy the territorial or provincial government that the requirements for decommissioning and the objectives of the closure plan are fully met. Then the mining company will get a written acknowledgment of release. The site is then considered closed.

## Benefits and Opportunities

There are opportunities for the community to be involved in reclamation and monitoring. Since community members are generally committed to remain in the area, they are particularly well-suited to carry out the monitoring. All these possibilities are best worked out well in advance during the Feasibility and Planning Stage of the mine, and then written into the SEPA.

### 5. Closure and Reclamation Stage

First Nations Business Opportunities	First Nations Employment Opportunities	Act, Regulations, Laws and Permits	Agreements
<ul style="list-style-type: none"><li>▪ Exploration Business Opportunities*</li><li>▪ Building drainage systems</li><li>▪ Water sampling and analysis</li><li>▪ Water treatment</li><li>▪ Dismantling transmission lines</li><li>▪ Site security</li></ul>	<ul style="list-style-type: none"><li>▪ Field and lab assistants</li><li>▪ Trades personnel</li><li>▪ Equipment operators and mechanics</li><li>▪ Inspectors</li><li>▪ Security and First aid personnel</li><li>▪ Pilots</li></ul>	<ul style="list-style-type: none"><li>▪ Reclamation permit</li></ul>	<ul style="list-style-type: none"><li>▪ Joint Ventures (JVs)</li></ul>

\* New exploration may take place during Closure and Reclamation. Therefore business opportunities that arose in the Exploration Stage may recur here.

See [Appendix 2](#) for a “Summary of Aboriginal Opportunities during the 5 Stages of Mining.”

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## **MINING IMPACTS**

Mining can bring many benefits and opportunities. It can cause many impacts as well, socially, culturally, and environmentally. A community must be aware of these possibilities while negotiating with a mining company. It is important for the agreement to reduce the damage from mining, and to compensate the community for impacts that are unavoidable.

### *Stages 1-4 Impacts*

Impacts can occur even at the Exploration Stage. Exploration camps may remain in place for a number of years. Planes and helicopters come in and bring supplies. Once drilling starts, more machinery and people arrive in the area. However, compared to construction and mine operation, impacts at this early stage are minimal.

During the Construction Stage, roads, site preparation, buildings, waste management installations, and transmission lines can all have a much more serious impact. So can the sudden and large influx of outsiders.

Job and business opportunities during construction are many. (See “[Construction Stage](#),” p. 2-25.) The community members who have more skills can earn high incomes. This can create tension with neighbours. Traditional seasonal lifestyles, schooling, and time spent with family can be affected. Alcohol and drug problems can sometimes get worse. Construction may also alter archaeological and heritage sites, traditional

and non-traditional land use, water flow, water quality, and fisheries.

The impacts of the Operation Stage of mining are similar to those of the Construction Stage. Dust and emissions may cause a fall in air quality as well. The difference is that the Operation Stage is likely to last much longer. Impact on water systems vital to Aboriginal livelihoods may also occur. If the community does not take action, the impact on its way of life may grow much more serious.

### *Stage 5 Impacts*

Even closure and reclamation have impact. A number of factors can pose a serious risk to the environment of the mine site. Waste rock piles and mining slopes can become unstable. The structures that contain mine tailings can leak. Acids and metals can leach out into the surrounding soil.

The social impacts of closure and reclamation are the reverse of the ones experienced earlier. Work hours and the number of jobs decline. The skills acquired from training and employment can fall into disuse or lead to community members moving away to get other jobs. The fall in population and the closure of government-funded services can reduce community capacity and social services. The return to a traditional lifestyle can be surprisingly difficult. This is especially the case if the mine has been going for many years and people have not lived traditionally during that time.

These are possibilities for which a community needs to prepare well in advance. It will need to find new resources to support social services. It will have to create employment opportunities for people who have lost their jobs. It must seek out new business partners who will see the advantages of the area's quality workforce and infrastructure.

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## ENDNOTES

- <sup>i</sup> Mining Development, *Natural Resources Canada*, 2005. 8 July 2009 <<http://www.nrcan-rncan.gc.ca/mms-smm/abor-auto/htm/dev-exp-eng.htm>>.
- <sup>ii</sup> The main sources of information for this topic are the *Mining Information Kit for Aboriginal Communities* (Ottawa: Natural Resources Canada, 2006), 8 July 2009 < <http://www.nrcan-rncan.gc.ca/mms-smm/abor-auto/pdf/kit-gui-eng.pdf> > and Robert Stevens, *Exploration and Mining Essentials* (Yukon Mine Training Association, November 2008).
- <sup>iii</sup> Stevens, *Exploration and Mining Essentials*.
- <sup>iv</sup> Stevens, *Exploration and Mining Essentials*.
- <sup>v</sup> Over 60% of the total amount of investment money needed around the world for mineral exploration is raised in Canada. See Shauna Qureshy, "Landlords And Political Traps: How Mineral Exploration Companies Seek Access To First Nation Territory," (Ottawa: Carleton University, 2006), p. 26. 10 July 2009 <<http://www.impactandbenefit.com/Squireshy%20paper.pdf>>.
- <sup>vi</sup> "Our News," *Cyr Drilling International Ltd.* 25 January 2010 <<http://cydrilling.com/index.php/our-news/12-first-nations-community-gets-into-the-drilling-business>>.
- <sup>vii</sup> Qureshy, "Landlords and Political Traps," p. 26.
- <sup>viii</sup> Derived from Susan R. Poos, P.E., Senior Mining Engineer, "Feasibility Study Does Not Mean Feasible", *Pincock Perspectives*, No. 57 (August 2004). 8 July 2009 <<http://www.pincock.com/perspectives/Issue57-Feasibility-Study.pdf>>.
- <sup>ix</sup> Brian O'Hara, "A Field Trip: Yukon's top 10 mining and exploration projects," *Resource World Magazine*, August 2008, 20-26
- <sup>x</sup> "Energy, Mines and Resources (EMR) Assessment - Regulatory Guide: A guide to explain how EMR's regulatory regime works with the assessment process under the Yukon Environmental and Socio-economic Assessment Act (YESAA)" (Whitehorse: Yukon Department of Energy, Mines, and Resources), p. 27. 8 July 2009 <[http://www.yukonminingrecorder.ca/pdf/yesaa\\_guide\\_final\\_web.pdf](http://www.yukonminingrecorder.ca/pdf/yesaa_guide_final_web.pdf)>.
- <sup>xi</sup> Liard First Nation has since decided that a full SEPA is not yet justified. Feasibility is not as yet established. Nor is it known if the exploration company will actually become the mine operator.
- <sup>xii</sup> *Mining Information Kit for Aboriginal Communities* (Ottawa: Natural Resources Canada, 2006), p. 28.
- <sup>xiii</sup> Rose Ragdale, "Mining News: Production decision on tap at Wolverine," *North of 60 Mining News*. 8 July 2009 <<http://www.petroleumnews.com/pntruncate/146528943.shtml>>.
- <sup>xiv</sup> Stephanie Irlbacher-Fox and Stephen J. Mills, "Devolution and Resource Revenue Sharing in the Canadian North: Achieving Fairness Across Generations" (Toronto: Walter and Duncan Gordon Foundation, 2007). 10 July 2009 <[http://www.gordonfn.org/resfiles/Forum\\_DiscussionPaper.pdf](http://www.gordonfn.org/resfiles/Forum_DiscussionPaper.pdf)>.

## Notes





### **Module 3**

## **Getting the Most Out of Leverage**

Leverage is the influence you can gain in a situation on account of something unusual you possess, like money, skill, authority, or location. If you know the value of this possession, you can use it like a crowbar, and open what might otherwise be closed to you.

A visit the Diavik Diamond Mine site from Donald Haviyok (c), former President of Kitikmeot Inuit Association, and Olayuk Akesuk (r) former Nunavut Minister of Economic Development and Transportation. Photocredit: Kitikmeot Corporation and Jiri Hermann.

As little as 40 years ago, the leverage of Aboriginal communities in decisions regarding their traditional territory in Canada was uniformly low. Although they relied heavily on these lands and waters, they had no say in who got permission to change and use them. Industry was able to extract and sell resources from traditional territories with little regard to the wishes, interests, or values of Aboriginal communities.

Since then the situation has been slowly changing. By means of political action and court cases, Aboriginal people in different parts of the country have been struggling to have their rights and title recognized. Consequently, the leverage of Aboriginal communities has progressively increased. The ability and experience of Aboriginal leaders in certain kinds of negotiation has also increased.

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## **POLITICAL ACTION, THE COURTS, AND NEGOTIATION**

Things really began changing in 1969. Aboriginal people revolted against a proposed federal policy to assimilate them by eroding their rights. So angry was Aboriginal leadership across Canada that in a matter of months they organized the National Indian Brotherhood to press home their point. The negotiations over the next several years featured steady resistance to any policies that would erode aboriginal status as Canada's First peoples.

In the meantime the Nisga'a Tribal Council in northwest B.C. was pressing its case for recognition of Aboriginal rights and title through the courts. Numerous attempts over the previous 100 years to do so, including several delegations to Victoria in the late 1800s, got them nowhere. In the early 70's Prime Minister Trudeau echoed the common view held for decades: he flatly dismissed Aboriginal rights as too "vague and ill-defined" to be taken seriously.

Then, in 1973, the Supreme Court of Canada issued a decision in the Nisga'a case that changed forever the landscape of negotiations between the governments and Aboriginal people. Three judges ruled that Aboriginal title existed. Three said it no longer existed. The seventh rejected the case on a technicality. It was not a clear win. Still, it was sufficient to make Trudeau admit there was more to Aboriginal title than he had supposed. No longer could the politicians ignore Aboriginal peoples' assertion of their rights.

Thus began a contentious mix of political action, court cases, and negotiations that still continues today. Without political action and court action, it is possible that these negotiations may never have occurred.

Some of the most important of these events took place in Yukon. During the 1970s, pipeline developments were infringing on Aboriginal rights there. Fighting the pipeline and getting the federal and territorial governments to the negotiating table were key Aboriginal objectives. It worked. But who might have surmised that once those negotiations began, it would take 20 years to reach agreements? The process is not entirely complete even now. A whole generation of leadership worked to finally put in place the Umbrella Final Agreement and then 11 First Nation Final Agreements and Self-Government Agreements.

After 40 years of struggle, many court decisions, acts, and regulations now affirm Aboriginal rights to consultation and reasonable accommodation of interests prior to development. This all increases the leverage of Aboriginal communities in decisions about mining in and around their traditional lands.

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## 7 IMPORTANT COURT DECISIONS

Here are seven of the most important court decisions. Each casts doubt on how provincial and territorial laws apply to the extraction of resources from traditional lands. In this way, these decisions create uncertainty for the mining industry, and potential leverage for Aboriginal peoples:

- **Delgamuukw-Gisdaywa Title Case:** In 1997 the Gitksan and Wet'suwet'en First Nations in northern B.C. got the Supreme Court of Canada to recognize the existence of Aboriginal title to land and resources. This ruling undermined the Province's long-standing position that all Aboriginal interests had been extinguished.

- **Yal-Skeena Cellulose Case:** In 2002, the B.C. Supreme Court struck down the transfer of a logging tenure owned by Skeena Cellulose in northwest B.C. The transfer was invalid because Skeena Cellulose had not first consulted or accommodated the six First Nations whose traditional lands were involved.
- **Haida Tree Farm License Case:** The Haida challenged the validity of logging licenses held by Weyerhaeuser Corporation on the Queen Charlotte Islands. In November 2004, the Supreme Court of Canada affirmed that the Crown has a duty to consult and accommodate First Nations, even before title or rights are proven.
- **Hupacasath Tree Farm License Privatization Case:** In late 2005 the B.C. Supreme Court confirmed that Aboriginal title could exist on fee simple or private land. The court ruled that the Crown had failed to consult with Hupacasath First Nation about the privatization of forest lands in its traditional territory.
- **Taku River Tlingit Case:** Redfern Resources proposed to reopen the Tulsequah Chief mine and build an industrial highway through the heart of the traditional territory of Taku First Nation. Redfern challenged B.C.'s environmental assessment process after it rejected the proposal. The B.C. Supreme Court found in Redfern's favour; so did the B.C. Court of Appeals. Redfern lost, however, when the Province of B.C. finally appealed the case to the Supreme Court.
- **Tsilhqot'in Land Title Case:** In 2007, The B.C. Supreme Court ruled that the Tsilhqot'in had proven title to approximately 2,000 square km in the Brittany Triangle region of B.C. The judge ruled that they had an Aboriginal right to hunt, trap, and trade skins and pelts over an additional 2,000 square km.

This was the first time a Canadian Court ruled that Aboriginal right exists to a large territory.

- **Little Salmon/Carmacks First Nation Case:** The First Nation asked the Yukon Supreme Court to review a decision made by the Director of the Agriculture Branch of the territorial government. This official had granted to an applicant some land within the traditional territory and near the settlement lands of Little Salmon First Nation. The First Nation said that the Director's decision should be set aside because he had not consulted adequately with the Little Salmon nor had he tried to accommodate them, which was his legal duty. The government said that this duty did not apply when a First Nation had signed a comprehensive land claims agreement, as the Little Salmon had in 1997. In 2008, the Court decided that a duty to consult and accommodate still existed, and that Yukon had not complied with that duty. The Court quashed the Director's decision.<sup>i</sup>

Several Aboriginal communities in northwest Ontario have taken political and court action to try and increase their leverage over the land. They have banned mining and other industries from their lands altogether. However, their story, to date, is not a happy one. They understood these court decisions to affirm the right of Aboriginal communities to have some control over development projects affecting their traditional lands. This interpretation has encountered stiff opposition from a mining company and the provincial government.

*In late 2005, Kitchenuhmaykoosib Inninuwug (KI), Muskrat Dam, Wapekeka, and Wawakapewin jointly declared a moratorium on mining exploration on their traditional territories. In February 2006, KI blockaded a winter road that Platinex Inc. used to reach its*



*exploration sites on traditional KI lands. KI argued that their inherent right to decide what happens on their lands was violated when the Ontario government granted mining claims without consulting them. Platinex sued the First Nation for \$10 billion, which countersued the company and the government as well. In July 2006, a provincial court ordered the Government of Ontario to conclude a Memorandum of Understanding with KI and Platinex. The MOU was to include the government's obligation to consult with KI prior to development.*

*By October 2007, legal proceedings had bankrupted KI. The court prohibited KI from interfering in Platinex's activities. KI stated that they would not allow Platinex back on their land. The First Nation's Chief, Donny Morris, and five councillors were charged with contempt of court and went to jail.*

*Booming mineral prices have accelerated exploration throughout northern Ontario. Unrest among Aboriginal communities there is growing. At least nine First Nations have now called for a moratorium on logging and mining on their lands because of inadequate consultation by government prior to approval of these activities. Ontario amended its Mining Act in May 2009 as a result. However, First Nations insist the amendments are not enough. The Mining Act still fails to recognize that First Nations have the option of saying "no" to mining.*

This struggle is not likely to be over yet. However, it shows what careful consideration must be given when using in one part of the country the leverage applied successfully in another part. Winning strategies require that you are clear about your objectives and the means available to reach them. Litigation and political action are strategies that require a lot of allies, time, and resources.

## Limits to the Free Entry System

Recent policies, laws, and decisions have also given Aboriginal communities greater leverage in mining projects in the Yukon.

Up until 1990, mining laws across Canada (except in Alberta, Nova Scotia, and Prince Edward Island) strictly upheld the Free Entry System. It encourages prospectors and miners to find and develop Canada's mineral resources, no matter who owns or uses the land. All the minerals in our public lands (90% of Canada) and most of the minerals in private lands (10% of Canada) belong to the Crown. The Crown transfers its mineral rights to prospectors and miners on a "first come, first serve" basis. People who use or own the surface of the land may not deny prospectors and miners entry. Only First Nations Settlement A lands, national parks and most provincial parks, and land with federal buildings on it are excluded from the Free Entry System.

Beginning with the Umbrella Final Agreement (UFA), several agreements and laws now put limits on the Free Entry System in Yukon.

UFA, signed in 1992, explains how the federal and Yukon governments will settle the land claims of the Yukon's 14 First Nations. It also specifies First Nation's rights to water, to the surface of settlement lands, and in the development of those lands:

- *Water rights:* Yukon First Nations have a unique right to the water which is on or flows through or adjacent to their settlement lands. It must remain unaltered in its quality, quantity, and rate of flow (including seasonal flow). Water licenses across the Yukon are the decision of the Yukon Territory Water Board (YTWB). It is up to water license applicants to prove to the Board



that they will not alter a First Nation's water in any significant way, or if they do, to compensate the First Nation.

- *Surface rights*: The Surface Rights Board will settle disputes over rights to the surface of the land. First Nations representatives will always make up half the members of the board.
- *Development Assessment*: Development Assessment legislation is to be enacted. This led to the creation of YESAA. (See the topic "YESAA," p. 3-9 below.)

## **Environmental Assessment**

The **Canadian Environmental Protection Act** (CEPA) came into force in 1999. It requires that an environmental assessment come before any major industrial development happens. CEPA explains how to monitor industrial projects for pollutants and, if damage is done, how to correct it and compensate people for it. CEPA also says that the traditional knowledge of First Nations is just as important to environmental assessment as scientific research and knowledge.

Environmental assessment (EA) is often presented as a way to make mines less harmful to the environment. Typically, EAs have been used to improve projects and come up with ways to reduce the effect a mine might have on the environment. There is little evidence that EAs have ever been used in Canada to refuse development, until very recently.

In March 2008, however, a B.C. and federal government EA panel rejected the Kemess North Project proposed by Northgate Mineral Corporation. The panel recognized that the mine would bring jobs and other economic benefits over its 13-year lifespan. Nevertheless, the panel concluded that overall, "the benefits of project development do not outweigh the costs."

This is called the “contribution to sustainability” test. A similar test was applied in the 1990s to the Voisey’s Bay Nickel mine. It was decided that the mine could go ahead but only under certain conditions. Shortly after the rejection of Kemess North, the “contribution to sustainability” test was used in another EA. The White Point mine in Nova Scotia was rejected.

The “contribution to sustainability” test may become more common. It certainly is another point of leverage worth of careful consideration. But some within the mining industry can be expected to lobby hard against it.<sup>ii</sup>

## **YESAA**

In 2003 the federal government passed the Yukon Environmental and Socio-economic Assessment Act (YESAA). The Act sets out a process to assess the environmental and socio-economic effects of projects and other activities in Yukon or that might affect Yukon.

This process requires any mining company that wants permission to undertake a project to first submit a Project Proposal to the Yukon Environmental and Socio-economic Assessment Board (YESAB). If the Proposal is complete, YESAB will carry out an assessment of the environmental and socio-economic effects of the project and what could be done to lessen (“mitigate”) these effects. During the assessment, First Nations and the rest of the public always have a period of time in which to comment on a project. After the assessment is concluded, YESAB will either recommend that the regulator or “Decision Body” – the Government of Yukon and sometimes a First Nation as well – approve the project or reject it. YESAB may also recommend that the project be allowed to proceed if some changes are made to it.

Three types of document are essential in a Project Proposal to YESAB:

1. The company needs to complete a “base-line study.” The base-line study reviews the physical, social, and economic environment that its development project will affect. This study should rely on traditional knowledge (TK) as well as scientific information. YESAA requires assessors to give full and fair consideration to both types of information. The company can learn from First Nations in the area how best to include their traditional knowledge in the environmental assessment. (Some companies provide funds to help record traditional knowledge.)

That information is then used to make sure the proposed project avoids sacred and sensitive areas. First Nations may also cite traditional knowledge in their submissions to YESAB during the assessment.

Traditional Knowledge workshop concerning Ekati Mine.  
Photocredit: Independent Environmental Monitoring Agency.



2. The company must complete and submit all its permit applications. The application for Mining Land Use Approval must include the company’s reclamation and closure plans. These plans explain how the land will be repaired during mining operations and after operations end.
3. Mining companies that wish to undertake larger projects are required to consult directly with the First Nations whose traditional lands the mine will affect. Mining companies must submit to YESAB proof that this consultation has taken place before YESAB will commence the assessment. For example, SEPA and JV agreements may serve as proof that consultation has taken place. Consultation is not a requirement for smaller projects or explorations – but companies find it to their benefit to do so.

YESAB 's recommendation to the regulator(s) may be influenced by the results of consultation, too. After all, YESAB's primary task is to reduce the harm that a project may cause to the environment and to socio-economic conditions. Therefore, YESAB could well take into consideration any commitments (in an MOU or SEPA, for example) that a mining company decides to make that will reduce such impacts. Likewise, YESAB may take into consideration the failure of a company to make such commitments.

(If a project of *any* size is to take place on Settlement Lands, the company is required to reach an agreement with the First Nation concerned. The First Nation is a regulator of activities on those lands, by virtue of its Final Agreement. Note that Aboriginal rights in Settlement A Lands differ from Settlement B Lands. Settlement A Lands give First Nations surface *and* subsurface rights. Settlement B Lands give First Nations surface rights only. Mineral claims made on what a land claims agreement later designated as Settlement A Land are still valid. Aboriginal leaders should check with a legal specialist if they are uncertain how their rights to an area compare with those of a company.)

Once they have received YESAB's recommendation, the regulator(s) must issue a Decision Document that accepts, rejects, or varies YESAB's guidance. They and other bodies, notably the Yukon Territory Water Board, then issue or deny permits and licenses in accordance with that Decision Document. (The UFA stipulates that the Water Board, like the YESAB, must have First Nation representation.)

For projects involving Settlement B Lands, a decision from a First Nation (as another regulatory body) may be required before development proceeds. If there are disputes over a mining company's access to a claim on

Settlement B Lands, these disputes can be taken to the Surface Rights Board. It will then decide whether or not to issue an order permitting access to the claim and outlining the terms and conditions of that access.

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## **THE ART OF NEGOTIATING AGREEMENTS THAT WORK**

All these laws and regulations strongly encourage mining companies to consult with First Nations and to enter into agreements with them. All have been achieved through enormous effort. Many have only been achieved after bitter battles.

These achievements have honed the negotiation skills of a generation of Aboriginal leaders. (Indeed, some leaders would say that the constant demands on them to negotiate are a modern-day curse. It is hard for them to find time for anything else.) These achievements have also shaped the attitudes of Aboriginal leaders about the right way to negotiate on behalf of their communities.

Some of these skills and attitudes are useful in the world of business. Negotiations with businesses like mining companies must always affirm Aboriginal interests. About that there is no question. Indeed, during some business negotiations, there may be little choice but to force the other party to recognize your rights and power.

But very seldom will that be the case. Negotiations with businesses truly succeed only when *all* signatories to an agreement leave the table satisfied that their interests have been reasonably satisfied. Each party comes to the table with leverage. Each party will use its leverage to try and realize benefits and limit risks.

Mining companies have a high need for certainty, for example. The ups and downs in the prices of metals and

other minerals on world markets are trouble enough when trying to raise money for a multimillion dollar investment. The added risk that Aboriginal communities might challenge a company's right to explore or mine would be discouraging to investors. That gives the communities leverage.

Mining companies have plenty of leverage too, of course. They have great expertise in minerals, engineering, business management, and global markets. They too have interests that an agreement must accommodate. When community and company fully appreciate the leverage that they each bring to a mining opportunity, it becomes possible to reach an agreement that realizes benefits for everyone – an agreement that works.

There are many books written about negotiations, conflict resolution, and the development of agreements that work. They describe the values, attitudes, and behaviours that make agreements easier to reach and to keep in business, unions, politics, and in our personal lives. The same values, attitudes, and behaviours also apply in the negotiation of SEPAs and JVs.

### **A Commitment to Win-Win**

There are four ways to reach agreements: the Win-Lose approach, the Lose-Win approach, the Lose-Lose approach, and the Win-Win approach. Only the Win-Win approach can achieve lasting benefits for all concerned.

#### *Win-Lose*

In **Win-Lose**, one party forces the other to give up. Agreements obtained via this route can yield short-term benefits to the winning party. Then a power struggle usually follows. At best, the losing party will have little commitment to fulfilling the



agreement. At worst, the loser will sabotage it. Ultimately, nobody really wins.

*Right in the middle of summer, the Government of Canada announced that BHP Billiton and the Lutsel K'e Dene had only 60 days to conclude an IBA for the Ekati mine. (See **\*Case Study #1, NWT Diamond Mines**, p. Intro-10.) That was enough time for the company to get ready. It was not nearly enough for the community.<sup>iii</sup> The result was an agreement that failed to reflect the needs and wants of community members<sup>iv</sup>. They learned from this experience, however. Next time they would demand the time to do the necessary homework before negotiations began. In negotiations with Rio Tinto over the Diavik mine, the Lutsel K'e Dene negotiating team took its time to consult with the community, to get clear on its desires, and to gather technical information. The community was happier with the details of this agreement. Because everybody gained from it, the agreement is stronger.*

### *Lose-Win*

In **Lose-Win**, one party sacrifices its interests in order to gain agreement. This approach also yields poor results over the long run. Like a marriage in which one spouse constantly gives in to the other, one party to the relationship is fearful, and the other disrespectful.



### *Lose-Lose*

In the **Lose-Lose** approach, each party takes satisfaction in merely doing the other damage, and “suffering less” than the other does. This is more like warfare than negotiation. Any agreement that the parties happen to reach is





merely a ceasefire. Everyone leaves the room hurt and eager for revenge.

*In its negotiation with Loki Gold over the Brewery Creek mine (see \*Case Study #3, p. Intro-30), Tr'ondëk Hwëch'in originally wanted to get a share of the mine's ownership. Loki Gold felt that was asking too much. Tr'ondëk Hwëch'in became frustrated because Loki Gold did not appear interested in a working relationship with the community. Loki Gold refused to provide the information that Tr'ondëk Hwëch'in needed to do due diligence on the company. It was a Lose-Lose approach to negotiation, and talks finally broke down. They only resumed when, upon further investigation, Tr'ondëk Hwëch'in realized that a share in ownership was not in its best interest.*

### Win-Win

Agreements that work have results that each party experience as a win. As simple as this may sound, it is not easy to commit yourself to reach agreements in which both parties win. Much of our way of life runs on the assumption that somebody has to lose, if anyone is to win. Our movies, sports, and politics all affirm that the people who really matter and succeed are those who defeat others.



Nonetheless, Win-Win situations are all around us. A loving family, a productive workplace, or a profitable relationship between two businesses are examples. They all are signs of a sincere commitment on everyone's part to their own well-being and to the well-being of their companions.

To negotiate an agreement with a mining company that will last and help build your community's capacity, a commitment to Win-Win is essential.

### **Know What You Want & Believe in It**

To get what you want, you have to know what you want. You have to have a clear idea of where you are going and what you need to get there. What's more, having clarified what you want, believe in it. People often come to the table with positions they don't really believe in. As you approach the negotiating table, be aware of your own sense of integrity and value. If you have honestly worked out your interests and believe in them, your confidence at the table and your credibility will be much greater. It will also help your negotiating team stay on track.

### **Commit to Listen at least 51% of the Time**

To create a Win-Win agreement, you have to understand what the other party wants. To gain that understanding you have to listen actively to everything the other party says (and does not say), in both words and body language. As the saying goes, we each have two ears and just one mouth; maybe we're meant to listen twice as much as we talk. If we don't listen actively to the other party, we become prisoners of our own assumptions about them. The agreements we happen to reach will be short-lived, because they are not fully based on reality.

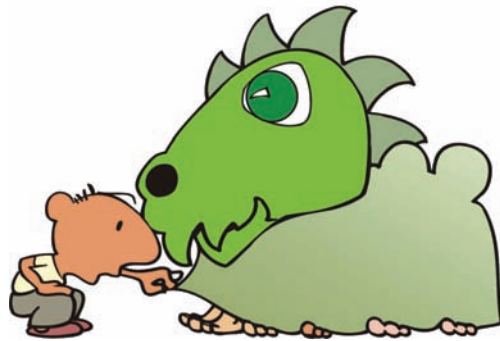
### **Acknowledge the Other Party's Humanity and Interests**

Establish a rapport and build a relationship with the party with whom you wish to agree. Make sure they know that you view them as human beings, and not just as representatives of some big corporation.

Put yourself in their shoes. Ask yourself: What would be a “win” for them in this negotiation? Moreover, make sure they know you want the answer to that question. It may be hard to acknowledge the other party's interest in a deal. After all, your mandate is to obtain maximum benefits for your community. But it is easier to reach a deal when the others can see that you are concerned with generating benefits that are important to them as well.

Lastly, sell the other party on the benefits that they stand to gain from your co-operation and participation. This can have a powerful effect in negotiations if you have really understood the motives and needs of the party you are negotiating with. You need a negotiating strategy that stays focused on what you want, but shows the people across the table how the satisfaction of your interests can help them get what they want.

Acknowledge the humanity & the interests of the other party.



### **Understand the Culture of the Negotiating Table**

Every negotiation has a life of its own. Activity ebbs and flows. Sometimes there will be long periods when little seems to get accomplished. Other times, you will be “on a roll.” You will achieve agreement on a lot of issues very quickly.

It is important is that your negotiating team is comfortable with this culture of the negotiation table. Be sure your negotiators are empowered to speak up when they do not understand what is happening. Make sure they can bring in technical expertise to answer their questions as early as possible.

These are the values, attitudes, and behaviours that are fundamental to successful negotiation.

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## ENDNOTES

- i “Modern Treaties and the Duty to Consult: ‘Little Salmon’ Revisited,” The Free Library. 12 August 2009 <<http://www.thefreelibrary.com/Modern+Treaties+and+the+Duty+to+Consult:+%22Little+Salmon%22+Revisited.-a0186288664>>.
- ii Robert Gibson and Alberto Fonseca, “Application Denied,” *Alternatives*, 26 May 2009. 8 July 2009 <<http://www.alternativesjournal.ca/articles/application-denied>>.
- iii Ellen Bielawski, *Rogue Diamonds: The Rush for Northern Riches and Dene Land* (Toronto: Douglas and McIntyre, 2003), pp. 45-50.
- iv Vivian Weitzner, “Dealing Full Force: Lutsel K’e Dene First Nation’s Experience Negotiating with Mining Companies” (Ottawa: The North South Institute, January 2006), p 9 ff. 13 August 2009 <<http://www.nsi-ins.ca/english/pdf/lk-en.pdf>>.



## Module 4 Doing Your Homework

If an Aboriginal community has decided not to oppose a mine, but to seek benefits from it instead, there is a lot of work to do before negotiations open. This work is like the “homework” people do to prepare for a test. It is essential, if the community is to capture durable benefits from the negotiations.

Kitikmeot Cementation Trainees and Staff Underground at Diavik Mine. Photocredit: Kitikmeot Corporation and Jiri Hermann.

This is true, whether you aim to negotiate a Socio-Economic Participation Agreement (SEPA) or a Joint Venture (JV). A Memorandum of Understanding or Negotiation Agreement made during the Exploration Stage of the mine (see **Module 2**, p. 2-5) will certainly help with your homework. But they are no substitute for it.

This module explains the six kinds of homework you have to do before SEPA negotiations open:

1. Determine your long-term interests.
2. Identify the benefits you bring to the deal.
3. Identify the benefits that you want from a deal.
4. Determine if the mining company can actually deliver these benefits.

5. Design a negotiation strategy which can capture the benefits important to your community.
6. Assemble your negotiating team.

All this homework also applies when you prepare for JV negotiation. Additional homework specific to JV negotiation is explained at the beginning of **Module 6**.

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## **HOMEWORK #1: DETERMINE YOUR LONG-TERM INTERESTS**

Module 1 emphasized how important it is for a community to have a wide-ranging vision of its future: its culture and heritage, its social and economic situation, its environment, its political and organizational development. (See Module 1, “**Strategic Issue #1: Vision**,” p. 1-10.) If mining is part of this vision, and if the community has already completed an engagement protocol for mining companies, you will have a head start. In the absence of these, make certain to have at least:

- an understanding of your community’s interests, priorities, and opportunities.
- a catalogue of your community’s strengths and weaknesses.
- a detailed and clear understanding of trends within the mining industry, the opportunity that exists in your area, and the main players and their track records.
- a familiarity with regulations concerning the mining industry. (See **Module 2**.)

This information will clarify what your community wants in the long run, and how this is to be achieved. By being clear about your long-term interests, you will be better able to specify what you want in the agreement. It will also help you define what you are prepared to offer in return for these benefits. If this work is not done, good results will not be forthcoming.



*Lutsel K'e Dene First Nation was told it had only 60 days to prepare for its first negotiation with BHP Billiton. (See **\*Case Study #1: NWT Diamond Mines**, p. Intro-10.). The mining company was eager to get to the negotiation table. The Lutsel K'e Dene faced an impossibly steep learning curve.*

- *They knew nothing about the diamond mining industry and had difficulty understanding the technical language used at the table regarding diamond mining.*
- *They knew nothing about BHP Billiton's record in mining or its relations with Aboriginal communities. They had no idea what to expect from the company.*
- *Community members felt that the company held back important information. But they didn't know that they could ask for it.*
- *They didn't know that they had the option to say "no" at the negotiation table.*
- *They and BHP Billiton frequently disagreed over what exactly they were negotiating.*
- *The Lutsel K'e Dene negotiation team didn't get a chance to keep the community updated on the progress of negotiations.*

*As a result, BHP Billiton dominated the negotiations due to its greater capacity and readiness. The discussion was mostly about the company's needs and the company's perception of the First Nation's needs. Having not had the time to do their homework, the Lutsel K'e Dene negotiators could not truly represent their side at the negotiating table. The voice of the Lutsel K'e Dene was not heard strongly and the resulting agreement returned few benefits to them.<sup>i</sup>*

*The story at the Voisey's Bay mine is different. (See **\*Case Study #4**, p. Intro-38.). Unlike the Lutsel K'e Dene, the Innu Nation leadership sought a mandate*



*from the communities before entering negotiations with Inco. The views of community members were set down in the protocol "A Matter of Respect: Innu Nation Guidelines for the Mining Industry." It explained all the key concerns people had about mining and the key benefits they wanted from mining. This information was of major importance to Innu leaders: they knew what their people wanted from the negotiations with Inco. The result was a comprehensive agreement that both parties are apparently pleased with. The Innu were able to negotiate fixed and variable cash payments, along with solid training, employment and business opportunities. (The financial details are confidential.) Implementation is reported to be going well. Both parties to-date feel positive about the agreement and their working relationship with each other.*

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## **HOMEWORK #2: WHAT BENEFITS DO YOU BRING TO THE NEGOTIATING TABLE**

To design an effective negotiation strategy, you have to be clear about the benefits you bring to the negotiating table. These benefits are said to be either *contributive* or *attributive* in value.

Contributive value can be seen and counted, and is readily expressed in terms of dollars. Such benefits are concrete, like equipment, money, land and buildings. Attributive value is not necessarily visible and countable, but is very important to the SEPA or JV under consideration. It is the value that people recognize and “attribute” to things like access to the market or to connections to suppliers, management capacity, patents, licenses, and influence.

Aboriginal communities that have settled their land claims have some important benefits to bring to the negotiating table. A First Nation with Settlement A Lands owns the

sub-surface rights to those lands. If a mine is proposed on those lands, these rights are an important *contributive* benefit the First Nation can bring to the negotiating table. On its Settlement B Lands, a First Nation owns the surface rights only. Even so, by its control over access to any mine proposed on those lands, a First Nation possesses an important *attributive* benefit.

In Yukon, a First Nation can realize attributive benefits from non-settlement lands in its traditional territory as well. Mining companies there are required to submit Project Proposals for environmental review and to apply for water licenses. In both instances, the co-operation of First Nations with traditional lands that will be affected by the project is valuable to a mining company. This co-operation, while not necessarily decisive to a mining proposal, is an attributive benefit that Yukon First Nations can bring to the negotiating table. (See [Module 3](#), “YESAA,” p. 3-9.)

*In 1975, the James Bay and Northern Québec agreement awarded lands to a number of Aboriginal peoples in northern Québec, including the Inuit of Nunavik. But the Raglan Property that Falconbridge wanted to develop lay outside those lands. (See [\\*Case Study #2: Raglan Mine](#), p. Intro-21.) So the Inuit communities, represented by Makivik Corporation, had no contributive benefits to bring to the negotiation table. Their bargaining position looked weak.*

*Then Makivik realized two things. First, Falconbridge needed an Environmental Assessment Certificate. If the Inuit were opposed, the company's application for the certificate would likely get rejected. Second, Falconbridge needed to ship ore from Raglan south through Hudson Bay Strait during the summer. The Inuit had a land claim pending to those shores and waters. If and when they won the claim, they could*

*block those shipments. These two attributive benefits gave Makivik the bargaining power it needed to negotiate what became the first Impact and Benefits Agreement (IBA) in Canada between a mining company and the local Aboriginal people.*

## The “Big Stick”

Not to be discounted is the leverage that can come from the threat to protest and block mine development. This “big stick” should never be used lightly. Yet it can be powerful when used well. Mining companies must raise money in the financial markets. The threat of active resistance can create real problems raising cash. It can even affect the prices of a mining company’s shares. Carefully applied, the possibility of resistance can encourage mining companies to be more co-operative - so long as a win-win agreement is the final goal.



*In 2007, NaCho Nyäk Dun suspended negotiations with Alexco Resources over the Bellekeno East Deposit. (See **\*Case Study #5: Keno Hill Silver District**, p. Intro-45.) The Yukon government was not seriously consulting a self-governing First Nation about the sale of land within its traditional territory. When negotiations were suspended, investors took notice. The value of Alexco’s shares on the stock market quickly fell from \$5.50 to \$3.50 each. This prompted Alexco to urge that negotiations resume. It supported NaCho Nyäk Dun’s demand that the government consult it appropriately.*

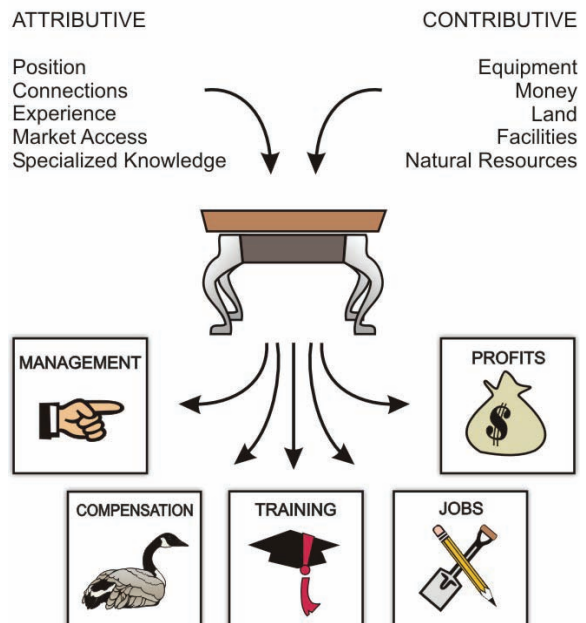
Those are the benefits that an Aboriginal community can bring to the table.

### HOMEWORK #3: BENEFITS TO GAIN FROM A DEAL

There are five major types of benefits in any deal. Training and jobs are short-term benefits of particular importance to individuals. Profits and management are long-term benefits that the whole community can use to build its assets and capacity. Compensation may be either short- or long-term in its effect, depending on how the community puts this money to work. These five types of benefit are available both in the mine's upstream and downstream. (See **Module 1**, p. 1-16.)

*The benefits that Aboriginal communities capture in an agreement can be diverse. In the case of the Raglan Mine (see **\*Case Study #2**, p. Intro-21), Makivik managed to secure profits and compensation payments, a seat on the board (that is, influence in the mine's management), training, and job opportunities. In the case of the NWT Diamond Mines (see **\*Case Study #1**, p. Intro-10), the Aboriginal communities involved did not have on hand the capacity of a regional organization like Makivik. The revenue and compensation paid to the Lutsel K'e Dene have been very small compared to the success of Raglan and other mines profiled in this publication.<sup>ii</sup>*

Understand the benefits that you bring to a deal, & the benefits that can flow from it.



To negotiate effectively, however, Aboriginal communities need more details about these potential benefits. Research is necessary into the particular ore and the mining methods involved, and the skills, goods, services, and numbers of people they require at different stages.

The profit that the proposed mine could generate is vitally important information. Projected profits help the community to get realistic about the jobs, training, business contracts, and revenues for which to negotiate. They are also an indication of how eager the mining company might be to make a deal.

This information is difficult to get. You may have to deduce it from other data, like the mine's expected output, life, and the current and projected value of the commodities it extracts.

*Generally, the greater the time and effort a company devotes to negotiating a deal, the greater the profit the mine is expected to make. Alexco put a lot of effort into its negotiations with NaCho Nyäk Dun over the Keno Hill Silver District (see \*Case Study #5, p. Intro-45). Small wonder. Just before negotiations broke down in 2008, an assessment projected for Bellekeno a large annual production of silver, lead, and zinc over five years. That told Alexco that an agreement with NaCho Nyäk Dun was well worth the trouble.*

The benefits a mine or joint venture might deliver are one thing. Whether or not the company you are dealing with can actually deliver those benefits is another matter. That must be resolved through much more detailed examination during Due Diligence and during the actual negotiations. (See **Homework #4: Assess the Mining Company**, p. 4-12 below.)

### **Interests, Risks, and Benefits**

When mining companies decide they have a feasible project in hand, they have three major concerns. They wish to 1) minimize the project's risk, 2) secure financing to undertake it, and 3) maximize the financial return it brings to their shareholders. These are the company's

primary interests as they approach negotiations with an Aboriginal community.

Mining is a risky venture. A lot of money can be made at it. A lot of money can be lost at it, too. Anything mining companies can do to reduce risk is very important to them. Aboriginal communities are a potential risk and a potential benefit to a mining company, and mining companies know it.

The primary interests of Aboriginal communities are generally broader than those of mining companies. First, impacts as well as benefits are of concern to Aboriginal communities. They are the ones, not mining companies, who will have to live with the impact that a mine might have on the local environment and way of life. Second, Aboriginal communities must deal with diverse interests and perspectives among their members. It may be difficult for a community to arrive at a common understanding of what it wants from a mine. For a mining company, that understanding is pretty simple: the mine should make the highest possible return for the shareholders.

When an Aboriginal community thinks about the benefits it wants to gain from an agreement, there are three major questions to answer. Which of the benefits a mine makes available are most important to our community? When do they become available in the life of the mine? By what means can we capture them?

Which benefits fit the strategic vision? Which opportunities might have a life long after the mine has closed? Which job opportunities meet the interests, skills and capacities of community members? Which business opportunities will likely generate the most profit or suitable jobs? Which training investments will be most cost-effective? What are the risks?

These questions are essential to negotiating from a CED Perspective (see **Module 1**, p. 1-7). They enable you to create a menu of opportunities and benefits that will build the community's capacity and self-reliance.

### **When are the benefits available?**

Generally, all five types of benefit become available during a mine's Construction and Operation stages. Even during the Exploration Stage, however, there are downstream opportunities for generating revenue. (See **Module 2**, p. 2-14 for information about the Webequie and Cyr Drilling Joint Venture.) There are also significant benefits that parties can earmark during the Exploration Stage in the event that a mine proves feasible and proceeds to the Construction Stage.

*NaCho Nyäk Dun and Alexco Resources negotiated an Exploration Cooperation Benefits Agreement over the Bellekeno East Deposit in Yukon's Keno Hill Silver District (\***Case Study #5**, p. Intro-45). The agreement is limited to exploration. Nonetheless, the parties built into the agreement a promise to conclude a Comprehensive Cooperation Benefits Agreement (CBA) if a mine goes ahead. Both parties agreed that the mine's opportunities should be developed in such a way that the benefits to NaCho Nyäk Dun might outlive the mine. (It is only projected to have a life of 5-7 years). Businesses started while the mine is active should make some money and build capacity. They may be able to carry on after the mine closes.*

*NaCho Nyäk Dun wanted to see profit-sharing built into future CBAs as well. But it is understandable why this benefit was more than the company could provide. No one yet knows if the mine will go ahead, nor does anyone know how profitable it might be. Moreover, such a clause might have scared investors*



*away. Building the relationship has required building trust. It was reasonable and appropriate for NaCho Nyäk Dun not to insist on a share of the profits from a mine that is still just a possibility.*

### **How might we capture these benefits?**

When determining which benefits a community wants from a deal, remember also that there may be more than one way to capture a benefit. The capture of profit upstream, or through annual payments from the mine, may be difficult to negotiate, but not impossible. (See *\*Case Study #2: Raglan Mine*, p. Intro-21.) But almost every case study describes the significant benefits that Aboriginal communities won downstream, in business opportunities. Benefits were captured both upstream and downstream by the Aboriginal interests in the Voisey mine.

*The Innu Nation and the Labrador Inuit Association have IBAs with Inco in regard to the Voisey's Bay Nickel Mine. (See *\*Case Study #4: Voisey's Bay Mine*, p. Intro-38.) Both these agreements guarantee the Aboriginal communities the first opportunity to meet the mine's supply and service needs. The company also encouraged Aboriginal businesses to Joint Venture as necessary in order to get enough capacity to fulfill these contracts. As a result, most of the contracts are with businesses wholly or partly owned by Aboriginal people. They provide site services, security, air transport, medical services, catering and housekeeping, equipment maintenance, and shipping support.*

*The IBAs also explain how the Innu and Inuit are to share in the mine's revenues. Nunatsiavut Government and Innu Nation are guaranteed specified annual payments over the life of the mine. Additional payments may be payable, depending on*

*how great the mine's profits are. While this sounds encouraging, it is difficult to predict how big (or how small) these payments may be. That makes them a difficult basis on which to keep building community capacity.*

*The downstream benefits, by contrast, are consistent and concrete. For example, contracts worth \$515 million were awarded to Aboriginal companies during the project's Construction Stage alone.*

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## **HOMEWORK #4: ASSESS THE MINING COMPANY**

By this time, you know what benefits an agreement could generate. You also know which benefits you want to target. The next job is to determine if the company in question can, in fact, deliver those benefits to your community. You deepen your understanding of the character of the company, how it is positioned in the industry and what its prospects are. This will help you understand how best to deal with the company at the negotiating table.

It is vital to know about the previous work and experiences of a mining company (its "track record"). You need to know the company's strengths and weaknesses as well as the perspective it will bring to negotiations. Without this solid understanding of the company and the mining it wants to do, you cannot design an effective negotiating strategy. Here are the key questions to which you need answers:

- What is the company's past financial performance?
- How well has it performed against competitors? Is it a leader or a follower? Is it relatively small or is it a big, international firm?

Understand the other party's interest in making a deal.



- If it is relatively small or new, what experience do its directors and managers (its “principals”) have? Where did they work before? What did they learn from that experience?
- What is its reputation among other companies in the mining industry?
- How responsibly has it treated the natural environment in the past?
- What has been its experience with SEPAs or JVs? What is its reputation among Aboriginal communities?
- What is its reputation among communities in general? Has it a history of supporting infrastructure development or community economic development?

The point of this research is to try and understand the *credibility* of potential partners. Does the company’s track record show a history of long term and stable relationships? Or has it a reputation to “love ’em and leave ’em”? Does it stick to its agreements or break them at the first sign of trouble?

This isn’t about looking for past failures. Every company will have had good times and bad times. But it is important to find out how a company has faced failure and grown from that experience.

The name for this process of investigation is Due Diligence. There are two main phases to Due Diligence. The first can be undertaken when it is clear which company will be the owner of a mining property. (Juniors often explore a property, but rather than develop it themselves, sell it to another mining company with greater resources and experience. See Module 2, “**Exploration Stage**,” p. 2-5.) The second phase of Due Diligence can be undertaken once a Bankable Feasibility Study is complete.

## **Due Diligence Phase 1: Get The Basics**

Among the most important sources of corporate information for the first phase of Due Diligence are the securities websites of governments. In order to raise money by selling shares on the stock market, companies must post key information about their ownership, structure, and character on these sites. For companies listed on the Canadian stock exchange, go to [www.sedi.ca](http://www.sedi.ca). For companies listed on the United States stock exchange, go to [www.sec.gov](http://www.sec.gov). From these sites you can view or download such company reports as:

- the Insider's profile
- the Issuer's profile
- a summary of reports that the company compiled for the securities regulation authorities

From these reports you can draw the following types of information:

- a company overview, including what the company does and its basic principles.
- a list of people on its Board of Directors
- any regulatory or licensing problems it may have had
- the company's record (positive and negative) regarding the law
- legal issues concerning the company's relationships or any legal judgments that the company has experienced.
- how the company operates, the projects in which it has been involved, and how these have unfolded.
- trading and public record information
- conflicts of interest and other insider trading information

Mining industry journals and internet searches are another way to get information about the company. These information sources may offer the views and analyses of other players in the mining industry, including some who can comment critically on the company's business or

social and environmental performance. You might discover if the company has engaged or is engaged in mining activity involving other Aboriginal communities. Make a note of the names of people, organizations, and communities cited in these sources. You can follow up with them for clarification or for more in-depth interviews.

Make sure to organize your research material well and to keep track of all your sources of information. Then you will have no trouble finding data or going back for more data as you do your analysis.

## **Due Diligence Phase 2: Analyze the Bankable Feasibility Study**

Due Diligence on a company and the mining project it wants to undertake must include an analysis of its Bankable Feasibility Study. That analysis should focus on seven things.

### *1. Engineering and Geological Elements*

The study's engineering and geological data are going to say a lot about the mine's potential profitability. The size and richness of the ore body will be described in detail. This will indicate the quality and extent of discoveries to date. So will the study's explanation of the options and costs for actually developing the site.

The engineering and geological data also are very important for determining the best way to extract the ore. If it is close to the surface, open pit mining is a likely development strategy. If the ore body is deeper, an underground mine or combination of surface and underground mining may be necessary. This option carries it with far greater costs. (See Module 2, "**Stage 4: Mine Operation**," p. 2-29.)

Similarly, the concentration of the ore body will have a big impact on processing costs. Ore with a higher percentage

of marketable commodities and less waste (“high grade ore”) is going to be much more profitable to process than a low grade ore. Similar energy and equipment will produce a much greater volume of marketable product from high grade ore than from low grade ore. The costs of waste management and reclamation will also be projected in this part of the study.

## *2. Markets and Prices*

Engineering and geological data provide a foundation for understanding a mine’s output and costs. But to get a clear idea of its potential profitability, you also need to know where the product will be sold, how its selling price varies, and what effect that variation could have on the viability of the mine. Mining produces commodities (gold, zinc, lead, molybdenum, etc.) that are sold in a global marketplace. (See [Introduction](#), p. Intro-2) Prices in that marketplace can rise and fall steeply over short periods of time. The range over which the price of a particular commodity varies, and the market forces that cause the price to change, are additional clues to the viability of a mining project.

In addition to the Bankable Feasibility Study, market information for mining commodities can be found through mining and industrial associations and in trade journals. Nonprofit “watchdogs” of the mining industry are another possible source. Here are some examples:

- Mining Association of Canada: [www.mining.ca](http://www.mining.ca)
- Infomine, Mining Intelligence and Technology: [www.infomine.com](http://www.infomine.com)
- Prospectors and Developers Association of Canada: [www.pdac.ca](http://www.pdac.ca)
- Miningwatch: [www.miningwatch.ca](http://www.miningwatch.ca)

Many of these websites offer links to additional organizations of a similar nature.

### *3. Transportation*

The cost of transporting the ore from the mine for further processing is another important topic that the Bankable Feasibility Study will cover. You need to know how far and by what means the ore must travel from the mine to the rail head or port. Consider all the inputs and infrastructure that transportation involves: roads, trucks, bridges, fuel consumption, etc. They will tell you something about the cost of mining and about the range of downstream contracts your Aboriginal community may want to target.

### *4. Energy*

Mining is energy intensive. The location, the type of mining, and the processing involved all affect the amount and type of energy required. How much energy will be needed? How will it be produced? If electricity is required, is the supply available adequate to the mine's projected needs? Will new power lines need to be installed? If diesel fuel will be required to run a generator, how far must it be hauled? Perhaps liquid natural gas will be an alternative. If so, it will first have to be shipped to a port or other location with the facilities for handling this type of energy.

Much of the information pertaining to the mine's energy supplies will be found in the Bankable Feasibility Study. What may require a closer look is the mining company's projection of increases in the price of energy and how they might affect the mine. Two things need to be looked at.

First, what are the company's assumptions about energy prices? Oil and gas production is considered to have reached its peak. From this point forward, production of these fossil fuels will fall further and further behind consumer demand. Their prices can be expected to rise significantly. This is a key risk in any business but especially to energy-intensive businesses like mining. Jeff



Rubin, former chief economist for the Canadian Imperial Bank of Commerce, is well-known for the accuracy of his predictions in energy pricing. Rubin thinks oil prices will reach \$225 per barrel by 2012, nearly four times their level in August 2009. He may be wrong. But give it some thought. How profitable would this mine be if fuel prices were to triple in the next five years?

Second, does the company project the impact that penalties for carbon emissions could have on the mine's costs? Carbon dioxide is one of the primary "greenhouse gases" that is causing climate change. Companies whose operations emit carbon dioxide should well expect to pay a price for it in the near future. Mining companies that get their electricity from diesel, oil, natural gas, or coal may be charged per tonne of carbon they emit. Alternatively, they may be subject to a carbon tax, as in B.C. Or, they may be obliged to pay both a charge per tonne of emissions and a carbon tax. Does the Bankable Feasibility Study show any awareness of these possibilities? If it does, what costs does it project? If it does not, be sure to ask the company why.

### *5. Financing*

The Bankable Feasibility Study should also explain how the company expects to finance the mine. You want to learn how much the company has invested to date. To cover the costs of development, does the company intend to use its own equity, and if so, how much? How much, if any, do they intend to raise on the stock market? How much will they have to borrow to construct the mine? How much working capital do they expect to need for start-up and for operations?

The answers to these questions will enable you to understand the mine's projected financial structure. This in turn will help you to see where the company is strong

financially, and where it is vulnerable. This information could be important in the design of your negotiating strategy.

#### *6. Employment and Contracting*

The Bankable Feasibility Study will outline the projected size of the workforce and the various types of worker that will be employed. It should also indicate what aspects of mine operations may be contracted out. Lastly, it should indicate the extent to which the company is thinking about Aboriginal community(ies) in the project's vicinity and the role they might play in its development.

#### *7. Assessing Impacts on your Community*

SEPAS often include fixed cash payments to cover the costs of the impacts that a mine has on the community. For example, the mine may damage the livelihoods of trappers or hunters, or it may harm community life or the environment. The Bankable Feasibility Study may shed some light on the impacts that the company expects the mine to have on the community. Once you combine this information with other research and traditional knowledge, you will have a better idea of what impacts are likely to occur and how the community might be compensated for them.

Note: Many Aboriginal communities do not have the experience yet to assess all these factors on their own. They require assistance from people who have brought mines into production and thoroughly understand the mining industry. Their advice can cost \$100-200 per hour. Make sure to budget for this work and secure the necessary resources from internal sources, from government, from industry, or from some combination of the three.

See [Appendix 3](#), p. A-16 for a detailed list of items to include in Due Diligence.

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## **HOMEWORK #5: DESIGN A STRATEGY**

It is time to evaluate your homework to this point. The following questions will help you make the assessment:

- Are we clear about our long-term interests? What are they?
- What are the key trends in the mining industry – in the region, the country, and globally? Where are the sectors that are growing in the mining industry? What results are mining companies achieving?
- What benefits are we bringing to the table? What does the company need that we can provide?
- What benefits should this deal capture for us? What benefits will the mine create upstream? What downstream opportunities will it create?
- How does the range of benefits that a deal could capture compare with our community vision? Does the opportunity serve our long-term interests?
- What are our community's strengths and weaknesses? What can we handle, given our community's current capacity and our members' skills and experience? What other resources (government support, investment, or grants, for example) can we realistically expect to bring to this deal?

### **The 6 Steps of Strategy Design**

To design an effective negotiating strategy, follow these six steps. Make sure you can answer each question clearly and in detail:

1. Decide which benefits you want to gain from the deal. What is the maximum you hope to gain? What is the minimum you can accept (your "bottom line")? Outline the consequences for the community of these maximum and minimum objectives, were you to achieve them.

2. Write down the most important benefits a deal would bring to the mining company. Why will they be better-off after signing the deal than they were before? Be clear and honest about their interests. Put yourself in their shoes.
3. Describe in greater detail the benefits you want to negotiate as well as the protection (from environmental harm, for example). Might there be ways to “piggy-back” one of these benefits with others?
4. Consider very carefully how to “package” the benefits you and the other party want from the deal. You have to help the company’s representatives see that by agreeing to what you want, they will get what the company wants. What line of reasoning might achieve this? In other words, determine how both parties will win from a deal, and figure out how to express this as persuasively as possible. Sell benefits!



Commit to adding value to a venture, so that everyone benefits from your participation.

5. Decide how, in the event of an agreement, you want to measure the delivery of benefits. What measures and targets will reassure the community that the company is truly holding up its end of the bargain? (See [Measuring the Delivery of Benefits](#), p. 4-23 below.)
6. Write an explanation of the importance of each of the major benefits or issues that you want to negotiate. You need to be able to express your position on these matters so clearly that the other party will understand you – even if they don’t agree.

You now have a strategy. Read [Homework #6](#) (p. 4-25, below) in order to assemble a negotiating team that can carry out the strategy with confidence and competence.

## Target a Wide Range of Benefits

To design an effective strategy, look for ways to exchange the benefits your community can offer for the widest range of benefits that the mine could possibly offer. Some key benefits to target may be those of value not only to your community, but to its neighbours and to non-Aboriginal companies.

For example, you may learn from the Bankable Feasibility Study that the mining company will need to build roads and bridges to the mine site. Building that infrastructure will create a variety of job and business opportunities that are a good fit with your community's vision. Of course, the infrastructure will also have an impact on some of your traditional lands. What benefits can your community offer that will help the mine proceed and create these job and business opportunities? What benefits could you get in return?

Building that infrastructure will require environmental approvals. These approvals can be difficult and time-consuming to get. During negotiations, you might agree to make submissions supportive of the mine to regulators. In exchange, you might negotiate compensation for the impact of the infrastructure on your land. You could also make your support conditional on receiving preference when contracts are awarded for certain downstream services – fuel hauling and road construction, perhaps. That negotiation strategy will target some important short-term benefits for community members.

But let's take things a step further. To meet the business needs of a mining company, you must also consider the capacity of your community. How many community members and businesses are ready, willing, and able to take these jobs and bid on these contracts? Are training programs necessary to close gaps in trade skills and

business management? Those programs may also be benefits to capture in the SEPA negotiation. Now your negotiation strategy targets a wider range of short-term benefits.

Still, even with the training programs, it may be unwise to assume that your community alone can meet all the mine's needs in terms of those downstream services. So if you intend to target them for negotiation, start to scope out partners with whom you might share the opportunities. That preference in the award of downstream contracts would be a key benefit that you could offer to prospective Joint Venture partners, both Aboriginal and non-Aboriginal. In return, Joint Ventures would become opportunities for your community to capture profits and management experience from the construction and operation of the mine. (See *\*Case Study #3: Brewery Creek Mine*, p. Intro-30.)

Now your strategy aims to capture a very wide range of benefits, for others as well as for your community. A SEPA negotiated on this basis could be expected give your community capacity a solid boost over the long term.

### **Measuring the Delivery of Benefits**

Prior to negotiations it is very important to decide how you will measure the delivery of benefits.

A mining company might be *able* to deliver benefits. Its track record may confirm a *willingness* to deliver them. So might its representatives during negotiations. They may even sign an agreement that says they will deliver. But in the years to come, how will the community know for sure that the company has come through? If you don't determine in advance which results to measure, and targets for them to reach, you won't really know how well the agreement is serving the community.

## Quotas

Quotas are a common way to measure the results of agreements that are supposed to deliver jobs and business opportunities. For instance, you could negotiate for a quota (usually measured in percent) of the jobs a mine creates. You could then set a target of 20%, that is, 20% of the jobs must be filled by members of your community. That may be reasonable if enough of the community members have the skills and experience to help the company meet that quota. If they are too few, the quota would be unfair to the company. (Meeting it might also put the wrong kind of pressure on the community, too.) Instead, you may choose a more flexible measure and target. You may suggest that community members with the necessary qualifications get considered first during hiring.

Quotas, in short, place a responsibility on both parties to an agreement. Before you choose a quota for measuring results, figure out whether your community can deliver on it too.

*In 1995, Makivik Corporation signed the Raglan Agreement with Falconbridge Ltd. (See \*Case Study #2: Raglan Mine, p. Intro-10.) This agreement made commitments to create jobs for members of Inuit communities within a region of northern Quebec. It also established a trust fund that grows over the life of the mine. However, the agreement made no mention of how the implementation of these promises was to be measured. The mine's workforce has never been more than 20% Inuit. Does that figure mean Falconbridge has kept its commitment to create jobs? Or that it has reneged on that commitment?*

*Likewise, Falconbridge provides information on the mine's operations to the community and publishes an annual report on its environmental sustainability. But*



*no targets have been set against which this performance can be compared.*

*Overall, the agreement's success is due to the goodwill that has grown up between Makivik and Falconbridge. For some, this lack of performance measures gives the mine more flexibility, and helps it succeed. For most others, it is a serious weakness of the Raglan Agreement. How do you know if you're approaching your destination if you haven't said where exactly you want to go in the first place?*

#### *Other Considerations in Performance Measurement*

Cut-and-dried performance measures and targets are not for everyone. Tracking such results will take time and skill. You will have to project the capacity you will require to monitor the implementation of the agreement, and the cost of hiring or building up that capacity if it is not already available.

Hard numbers also leave no room for error. Should your partner fail to achieve the results specified in the agreement, that should have consequences. These consequences should be written into the agreement, too.

And remember: what's good for the goose is good for the gander. Just as you take performance measurement seriously, so might the mining company. It too will likely want the agreement to specify what benefits the community will deliver, and by when.

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#### **HOMEWORK #6: ASSEMBLE A NEGOTIATING TEAM**

Almost all Aboriginal communities have Aboriginal Development Corporations (ADCs). An ADC is often a key organization in the negotiation of SEPAs. The ADC's executive director or chair will likely be on the negotiating team. Aboriginal governments and ADCs must be clear

with each other about their respective roles and responsibilities during negotiations. For example, it may be the ADC's job to discuss financial or employment benefits. But the Aboriginal government will likely have the greater say when negotiating access to traditional lands.

In addition, it is critical that an Aboriginal community's negotiators be capable, representative, and accountable. They must also have at hand a support team of technical specialists.

### **Capable & Representative**

The negotiating team you select must be knowledgeable, representative of the whole community, and capable of addressing key issues. Yet it must also be able to draw on appropriate technical and legal support. Ask yourself these questions:

- Can our negotiating team speak all the different languages that will be spoken at the table? Can they translate complex technical information to the community in a way that everyone can understand?
- Does our negotiation team represent the full scope of our community? Have we considered youth and Elder representation?
- Is each negotiator a strong and visible member of the community, or an outsider?



Lawyers can work out the language ...  
but only you can negotiate a good deal.

Lawyers will be key in drawing up the agreement once negotiations have been completed. Keep them available for consultation as needed. But it is best that they stay out of the negotiating room. Aboriginal communities inexperienced in negotiations with businesses are often tempted to let authority slide into the



hands of technical advisors, especially lawyers. This does no favour to their credibility in the eyes of the company, nor does it build community capacity. Even in the event that a negotiator must be hired, make sure the negotiation experience builds the skills and authority of the Aboriginal members of the negotiating team.

*In 1995 Tr'ondëk Hwëch'in (TH) and Loki Gold entered into negotiations to develop an agreement in regards to the Brewery Creek Mine. (See \*Case Study #3, p. Intro-30.) Early in the process they recognized that a team of experienced individuals would be required to assist in the negotiations. A negotiating team was composed of three outside consultants and four First Nation representatives.*

*The three consultants had expertise in mining issues and negotiating Aboriginal and private mining Joint Ventures. They were well-versed in mine development. They also had experience with the legal issues that Aboriginal business and mining involve. TH provided a staff member from the economic development corporation, two TH members, and a representative from the First Nation's land claims department.*

*One person was to co-ordinate the consultants, meetings, seminars, legal experts, and other events during the negotiations. The two TH representatives had to ensure that the wishes of the community were presented at the negotiating table. They also took information back to the community about the progress of the negotiations. The land claims representative had to make sure that the negotiations covered TH's concerns about the environment and land claims.*

## **Accountable**

The negotiation team is accountable to the community as a whole. This is a lot of pressure, as well as a lot of work. Make sure that the team members are aware of this and are prepared to take on this workload.

It is best if the negotiation team has a formal mandate from the Aboriginal government. It should be clear how the team will report the progress of negotiations to leadership and to other community members. If nothing else, these steps will protect both the team and the Aboriginal government from unpleasant surprises.

Chief and Council have to know what the negotiators need from them during the negotiations. That may include their advice on changes to the negotiation strategy or other problems that arise.

One smart way to ensure effective communication is to put a councillor on the negotiating team. You might ask a councillor to act as an observer, for example. S/he can then verify that the rest of the team does what it said it would do, and does not make a deal on the basis of some other criteria. By refraining from negotiating, the councillor can also watch the behaviour of all the participants closely. The councillor can then report his or her insights to the rest of the team when negotiations recess.

(Note that the accountability of the company's negotiators is also important. If they are not the decision-makers, or if they do not have the decision-makers' confidence, they may be the wrong people to talk to. Your homework should enable you to judge the authority of the negotiators across the table from you.)

## The Support Team

At certain points during their discussions negotiators will require the assistance of specialists of one kind or another.

The advice of the community's education director or co-ordinator of training programs, for example, may be very important to have. Likewise, depending on the deal, other specialists might come in handy. Environmental impact analysts, industrial or technical experts (like geologists), and financial analysts are examples. All this can cost a lot of money.

*Whenever negotiating agreements with mining companies Aboriginal people will need to bring in technical help. In the case of the \*Voisey's Bay Mine, p. Intro-38, the Innu Nation needed help with supervision of the negotiation and with the review of the project. The Innu needed help hiring technical experts and consulting with the communities. The Innu also needed advice about monitoring the environmental procedures so that the impact on the environment was the least possible.*

*The Lutsel K'e Dene learned from their experience with the Ekati Mine, when they had little or no technical help. (See \*Case Study #5: Keno Hill Silver District, p. Intro-45.) When negotiating Diavik and Snap Lake, the leaders knew they could demand the time and help necessary to assess the information at hand. As a result, the later agreements were more favourable to the Lutsel K'e Dene than the Ekati IBA. The leaders also had improved their understanding of mining operations and the companies' intentions.<sup>iii</sup>*

Imagine negotiations in which the company asserts that it can commit so much money to training. The Aboriginal

negotiators think it may not be enough. Negotiations start to bog down. The Aboriginal negotiators then turn to their “back bench.” They ask the training co-ordinator for a list of the programs and procedures on which they have based their position on training needs. This data may give them the leverage they need to get the company’s representatives to reconsider their training budget.

### *Dealing with Complexity*

A lawyer familiar with Aboriginal businesses is an important resource for negotiators. S/he should be easily accessible when issues arise that threaten to confuse the negotiating team.

Negotiations can become extremely complex. One or two heads may no longer suffice to keep track of all the data and proposals being exchanged. It is common to reach a point in the process when someone at the table says, “Look folks, why don't we move to the next point. We're going to have some of our people run some numbers for us on this matter. We then can return to it later.” This approach makes for smoother negotiations. It also lets the people on the other side of table know that you are organized.

When agreements are very complex, it may be necessary to hire a negotiator. Negotiating a share in the ownership of a mine, for example, is not a simple matter. It involves brokerage of millions of dollars. An experienced negotiator can be critical to winning benefits in such a large and complex deal.

In this case, hire someone who is experienced in business. Preferably, s/he will be a professional from the industry and not a lawyer. This person should understand what makes a deal and how to manage the dynamics of negotiations. Above all, hire somebody in whose expertise and loyalty you have confidence.

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## COVERING THE COSTS OF NEGOTIATION

The cost of negotiations may include the following:

- **Meeting costs**, including travel and accommodation for the negotiators.
- **Cost of a hired negotiator**. An experienced negotiator will charge \$800-\$1500 per day plus expenses “door-to-door.”
- **Costs of specialized technical and legal assistance**. Get estimates of fees and expenses if you intend to keep experts “on tap” during the course of negotiations. Estimate also the legal costs of finalizing an agreement.
- **Costs to your organization**. The negotiations will have to be supported by staff and other organizational resources. Estimate the time and expenses that will involve. Although they may not be recoverable, these are real costs. They may have an impact on other parts of the organization’s mandate.
- **Costs of due diligence, feasibility analysis, and technical reporting**. These are transaction costs you must incur in order to reach a reasonable and prudent deal, and they can be very high. A geologist may cost \$10,000 - \$30,000, for example.

### Funding Options

For First Nation projects, the cost of negotiations can be supported through the [Strategic Investments In Northern Economic Development \(SINED\)](#). It is funded through INAC’s Targeted Investment Fund. Some provincial governments also have programs that may help pay the transaction costs of a deal.

The mining company involved often covers costs of SEPA negotiations. This is more acceptable now that the negotiation of a SEPA has become standard procedure.



SEPAAs are not just an agreement; they craft the basis for a cooperative relationship. It is therefore generally in the best interest of the company to ensure that the Aboriginal community has the resources to negotiate meaningfully. Mining companies also often prefer to ensure that negotiations are directly between them and the community, and that government is not involved.

Not all companies may be able to afford to do this, of course. Others may not want to. If not, a community must make certain it can get government funding. Otherwise it is unlikely that they will be able to afford meaningful involvement in the negotiation process.

If a company does choose to cover the costs of negotiations, it is up to the First Nation to treat that assistance with respect. A stronger, more trusting relationship with the company may then develop. This, in turn, can lead to better agreements.

*NaCho Nyäk Dun entered into negotiations with Alexco Resources in 2007. (See **\*Case Study #5: Keno Hill Silver District**, p. Intro-45.) In two years they developed an MOU, a Participation Agreement, and then an Exploration Co-operation Benefits Agreement. All these required money that the First Nation did not have.*

*Alexco knew this, and wanted to work with NaCho Nyäk Dun in good faith. The company covered the cost of the negotiations including the cost of travel, the hiring of technical people, and other expenses. NaCho Nyäk Dun was extremely grateful for this financial assistance and used it wisely. The negotiating team often chose to stay at the homes of friends when travelling, instead of incurring the cost of a hotel. They also planned the meetings carefully. When they were held in Vancouver, they would try to*

*line up other necessary meetings there too, and then split the travel costs with other projects.*

*Alexco appreciated all this. The First Nation's efforts showed respect for them and their assistance. As a result, NaCho Nyäk Dun and Alexco have a strong and trusting relationship, and both parties are very satisfied with their agreements. The way the costs of the negotiations were covered affected the whole deal.*

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## **OPENING THE NEGOTIATIONS**

You have done all your homework. You have an understanding of the needs and vision of your community, and what you want from any company that wishes to work with you. You know what you want over the long term, and what you require in the short term in order to move towards that vision. Your team is equipped with a negotiation strategy and appropriate technical support. You are ready to open negotiations.

The opening of negotiations is devoted to establishing the topics to discuss and the order in which to discuss them (the “agenda”). It is the acid test of your understanding of the motivations and needs of the other party, whether it's a mining company or possible Joint Venture partner. If your preparatory research, analysis, and planning are on target, the results can be powerful.

But before even the discussion of agenda commences, consider your “style and presence.”

### **Style & Presence at the Table**

You are approaching the negotiating room. You have done hours of homework to prepare for these discussions. Make sure that you present yourself to the other party in a

fashion that does all that preparation justice. As you come in the door, remember to

- demonstrate that you understand your economic and community self-interests.
- be explicit and clear when you present your ideas and information.
- sell benefits, demonstrate where your interests coincide with theirs.
- behave as an equal.

Be direct and attentive. Right from the word go, let them know who you are. Show that you are meeting them because the company and your community share an interest in doing business. Indicate that you have learned about their interests and operations, that you want to learn more, and that you wish to discuss mutual benefits.

Listen to their explanation of what they are doing and what they hope to do. Ask questions to clarify anything you are wondering about. Then take the initiative, and outline the key features of the deal you would like to discuss.

Present your point of view with theirs in mind. Make it clear how the satisfaction of your interests is a way to satisfy their interests. Sell them on the benefits they themselves will capture if you are satisfied. For example, it is not to your advantage to tell them, “We want a share in ownership or access to profits.” It would be wiser to say: “We want to discuss how we can maximize our opportunities in this deal while ensuring that the mine is profitable over the long term.”

You are not looking to be “bought off.” You intend to be a participant in the mining opportunity and a key stakeholder – and you expect to be treated as equals by the company's representatives. They will respect the certainty

you display about your interests and intentions, even if it takes them off guard momentarily.

### *Mutual trust and respect*

Avoid using threats, especially when you are bargaining from a position of power. If a land claim or political action of yours has prompted the company to negotiate, treat it as a benefit to be kept under the table rather than on the table. You don't have to spell out the implications of a land claim, or how you can disrupt their development plans. The company already knows you are able to exercise influence. "Walk softly with that Big Stick." Remember, the other party probably carries a Big Stick of its own. Once the sticks come out, they are difficult to put away. They are better suited to building a relationship based on fear, not trust.

Keep an eye on what you want from the deal, while selling benefits to the company. Try to build a bridge between your community and them so you can both share greater benefits. Industry understands the complex business of mining. Aboriginal communities need to respect that expertise. In turn, mining companies have to respect and understand Aboriginal communities and their core interests. You want mining companies to realize that you have interests that are also of interest to them.

Whether you make your pitch to the representatives of a mining company or a possible JV partner, they have to know you're serious. They have to know you can back up your word. They're going to look you in the eye and assess you. They'll ask themselves, "Do these people mean what they say? Will they tell us one thing and do another? Can they be had?" Communicate your intention to be a full and honourable participant by your body language, and by the intensity with which you bargain. It's not a matter of getting yourself all "psyched up." Instead, show them you're ready to

sit down and work out every nook and cranny of this relationship. They'll get the message.

During negotiations there will be times when you encounter something that you don't understand. You may sometimes feel pressured or pushed up against the wall. At these points, don't be afraid to take a break. You will not lose face. Say something like, "You seem to have a good point there, but we're not sure we understand all its implications. We need to take a break and talk to our advisors." This is fair ball. It is used in negotiations all the time.

When clear differences of opinion emerge, your belief in yourself and your understanding of your interests become key. Only people who lack self-assurance are ready to "go to the mat" and fight the moment differences emerge. They compensate for their insecurity by playing tough. Instead, remain friendly, calm, and matter-of-fact as you make your position plain. Say, "Well, this is the way we see it," or "No, we don't think we can do that."

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## **ESTABLISH THE AGENDA**

### **Explore the Long-Term Interests of Each Party**

To kick off the discussion of issues and items to be negotiated, each party should outline its long-term interests to the other. Each should present a vision of how the project might serve all the parties around the table. This will help clarify the basis for the negotiations and for a possible future relationship. It will help define the extent and import of their common interests as well as potential points of tension.

Get out on the table all the issues that are important to your team and community. This is not a time to be coy. The negotiating agenda has to reflect your real issues.

Holding back or being secretive about what you want will backfire. It is difficult to introduce new issues after the agenda is complete.

### *Commit to Communicate*

Even when people are completely “up front,” this first exchange of information may take some time and effort.

*In the early 1990s Falconbridge wanted to realize a huge opportunity in the Raglan Property (see \*Case Study #2, p. Intro-10). The communities of Salluit and Kangirsujuaq wanted to ensure that they were participants in, not just observers to the mine and its economic spin-offs. Falconbridge knew community support was essential to get the development approved. The Inuit knew they wanted to benefit from the mine.*

*Falconbridge hired a local advisor to provide a liaison between the company and the two communities. A community consultation process brought together people from every walk of life. In the room together were company personnel, villagers, mayors and councils, the Kativik regional government and Environmental Quality Commission, Makivik Corporation, the federal Coast Guard, and Québec provincial ministries responsible for mining and environment.*

*Through these discussions, it became clear that the main concerns of the local people centred on three things:*

- *the environment*
- *employment*
- *the influx of southern people to their lands*

*This information provided a clear starting point for discussions. Falconbridge informed the Inuit that they needed shipping access through waters within Inuit traditional territory. The Inuit knew that this and support for the mine were of critical importance to Falconbridge. The two parties worked hard to express their needs and interests to each other. They worked together in good faith. After two years of negotiations, they signed the landmark Raglan Agreement.*

*No agreement is without its problems. However, the spirit of co-operation between the mine's management and Inuit people is still strong. There is a genuine willingness to communicate with each other, work through issues, and find solutions.*

The parties you meet across the negotiating table may not always express their long-term interests so forthrightly. That's why the six pieces of homework are so important to this stage of negotiations. When you introduce this information during the discussions where appropriate, the others will realize that you know what influences their decision-making. Once "they know that you know," their tongues may loosen. They may become more willing to get their interests out on the table where they can be factored into the agenda.

The start of negotiations is something like a "first date." The couple wants to know if they are compatible. So they explore one other's interests and gets an idea of what is important to each of them. Then they can decide if and how their respective desires and values might fit together.

### **Clarify Benefits**

Once compatibility has been confirmed, negotiators give short shrift to romance. The courtship cannot be extended over months and years. Time and money are at stake.



They plunge right into a discussion of a basis on which to strike a deal.

Each team of negotiators expresses what it wants from a deal. Points of agreement and difference are clarified.

When substantial differences arise, each party may begin to indicate the benefits it will bring to the deal, and how its participation addresses the key interests and benefits of the other.

Luckily, over the years the SEPAs have begun to take on a more established format. The details of their contents vary widely between agreements. But a broad pattern of what will and what will not be talked about is easy to determine beforehand. Here are some standard topics of discussion:

- Employment and training
- Economic development and business opportunities
- Social, cultural, and community support
- Financial provisions and equity participation
- Environmental protection and cultural resource
- Use of traditional knowledge
- Confidentiality and dispute resolution
- Implementation, monitoring and reporting
- Renegotiation, project expansion, and sale of project to other parties<sup>iv</sup>

**Module 5** describes these provisions (and more) in detail. Each section has its own complexities. Think about each carefully when you are doing your homework.

One final point: be sure to get all your discussion and conclusions about the agenda down on paper for reference during the negotiation of the actual agreement. Negotiations can become complex. People lose track. Failure to keep a clear record in a convenient form can lead to poor quality results.

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## ENDNOTES

<sup>i</sup> Vivian Weitzner, “Dealing Full Force: Lutsel K’e Dene First Nation’s Experience Negotiating with Mining Companies” (Ottawa: The North South Institute, January 2006), pp. iii, 9-10, 13. 13 August 2009 <<http://www.nsi-ins.ca/english/pdf/lk-en.pdf>>.

<sup>ii</sup> “Dealing Full Force,” pp.9-10, 13, 29.

<sup>iii</sup> “Dealing Full Force,” pp. iii, 9, 15.

<sup>iv</sup> Condensed from Steven A. Kennett, *A Guide to Impact and Benefit Agreements* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1999).



## Module 5 Negotiating Benefits Agreements

Socio-Economic Participation Agreements (SEPA)s have changed a lot over the years. At first they were fairly simple. They aimed to provide as many opportunities as possible in employment, training, and business to the community or communities that a mine would affect.

Alexco engineers watch a mining contractor's scoop tram head into the Bellekeno East mine. The tube is for underground ventilation. Photo permission of Alexco Resource Corporation.

The earliest SEPAs were just between the mining companies and government. When Aboriginal communities became more active participants, SEPAs became 3-way agreements between communities, a mining company, and government. Over the last 10 years, the role of government has grown smaller and smaller. SEPAs nowadays only occasionally include government. Generally they are negotiated directly between the company and the Aboriginal community or organization.

Individual SEPAs are almost always confidential. (Only the **Raglan Agreement** has been made publicly available.) Thus, almost all our examples come from books about SEPAs and not from the SEPAs themselves. The most important of these books is *A Guide to Impact and Benefits Agreements*, which describes agreements concluded in the years 1974-1996.<sup>1</sup> More recent agreements could be different.

A SEPA can include a wide range of elements, but need not include them all. As well as employment, training, and business opportunities, SEPAs nowadays detail fixed cash payments and sometimes a direct share in mining profits. SEPAs also pay a lot more attention to implementation than ever before. They are more comprehensive and often more complex than they used to be.

*The Raglan Agreement (see \*Case Study #2: Raglan Mine, p. Intro-21) was very complex. It had seven signatories: Makivik Corporation, Falconbridge Limited, Qarqalik Landholding Corporation of Salluit, Northern Village Corporation of Salluit, Nunaturlik Landholding Corporation of Kangiqsujaq, Northern Village Corporation of Kangiqsujaq, and Société Minière Raglan Du Québec Ltée. Among other matters, its provisions address environment and mitigation, Inuit training and employment, Inuit enterprises, financial matters, dispute resolution, and toxic substances.*

The rest of this module discusses the seven sections of a SEPA that should be negotiated before a mine proceeds to the Construction Stage:

1. Introductory Provisions
2. Employment and Training
3. Economic Development and Business Opportunities
4. Social, Cultural, and Community Support
5. Financial Provisions and Equity Participation
6. Environmental Protection and Cultural Resources
7. Other Substantive and Procedural Provisions

(Many of these elements may be introduced in earlier MOUs, Negotiation Agreements, or Interim Agreements. Some may even be foreshadowed in an Aboriginal community's Engagement Protocols.)

If you are developing a SEPA for the first time, study the case studies well. Follow that up by reading some of the sources listed in the Bibliography. Then talk to others to learn about their experiences in the negotiation process. An agreement will embody a large number of commitments. Those commitments will not be carried out if funding is not available to pay for their implementation. Therefore ensure that the agreement stipulates the funding necessary to make each commitment a reality.

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## 1. INTRODUCTORY PROVISIONS

This section is commonly seen in any formal agreement. It is full of “whereas’s,” “wherefores,” and “therefores.” The contents may be laid out in a series of subsections:

### **Preamble and Recitals**

These are the principles, common understandings, and objectives that the parties agree to follow as they draw up the SEPA. It also sets out the basis for the agreement. This section can be useful in the event that issues arise regarding the spirit and letter of the agreement. It includes statements in which both parties describe their general expectations: the economic and other benefits they expect from the project and its environmental, social, and other costs.

### **Purpose**

This section notes the purpose and the intent or objectives of the parties. The **Raglan Agreement** has seven objectives. Two are

- to facilitate the development and operation of the Raglan Project in an efficient and environmentally sound manner.

- to secure the support of the Inuit parties for the development and operation of the Raglan Agreement.

## **Definitions**

This subsection defines the terms, acronyms, and abbreviations used in the agreement.

## **Identification of Parties and Specification of Beneficiaries**

This information is often located in the recitals or just in the agreement's title and signature lines. This subsection may also describe them in greater detail. In this subsection some SEPAs distinguish between the categories of Aboriginal recipients or beneficiaries.

## **Coming into Effect of the Agreement**

This subsection explains what triggers the implementation of the agreement.

## **Term of the Agreement**

SEPAs typically will remain in force from Construction through to Closure and Reclamation. However, a variety of factors may apply to the term of an agreement. A SEPA may terminate if the project fails to receive regulatory approvals or to reach certain stages by certain dates.

Alternatively, some activities may go on longer than the agreement. For instance, a SEPA may be negotiated that terminates when exploration activities end, but includes provisions concerning rights, contracts, and business arrangements after that termination date. (These provisions are said to “survive” the termination.)



This subsection should make it clear what exactly will bring the agreement and activities to an end.

## **Overall Description of the Project**

This subsection outlines the mining project and/or mining activities to be undertaken. It specifies the company operations to which the impact and benefit provisions relate. These details are very important, as the experience of the Lutsel K'e Dene with the Ekati mine demonstrates.

*The Ekati Agreement between Lutsel ke Dene and BHP Billiton (\*Case Study #1: NWT Diamond Mines, p. Intro-10) covered any diamond mining activity that BHP Billiton might undertake on its property. The Lutsel K'e Dene thought the agreement only applied to a single kimberlite pipe. They felt that BHP Billiton should have tried harder to make this clear to them. As a consequence, resentment and distrust of the mining company grew. The Lutsel K'e Dene were stuck with a poor agreement that could not be amended when other projects became a possibility in the area. This sort of misunderstanding can lead to the failure of agreements.<sup>ii</sup>*

*By contrast, the areas to which the Raglan agreement actually applies are clearly noted. (See \*Case Study #2: Raglan Mine, p. Intro-21). The agreement also notes the process that the company must follow if it wishes to develop possibilities outside those areas. If a new project receives all the necessary approvals, the existing agreement will be amended so that its terms and conditions will apply to the new project.*

## **Project Stages**

The distinct stages (sometimes called “phases”) of the mining project are described here. Impacts and benefits



from a project can vary significantly from one stage to another. Only if people know exactly when one stage ends and another begins (and the “grey” areas of transition in between) will they know when to expect different opportunities to kick in. The various stages of mining activity are covered in **Module 2**.

### **Aboriginal Support for the Project**

This section can vary from agreement to agreement. In some SEPAs, the Aboriginal party expressly declares that it will not oppose the project in the environmental assessment (EA) or regulatory proceedings. Other agreements do not include this provision. It is understood by the parties, and they show their trust for each other by not putting it “in writing.”

Successful negotiations rely on an honest and open relationship between the parties. Each party must strive to ensure that the agreement means the same to the others as it does to them. So if a company did not insist on a provision that ensured Aboriginal support during EA, and the Aboriginal group then opposed the project, the company might feel misled. It would be a sign that the relationship of the parties to the negotiation had not been open, honest, and co-operative.

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## **2. EMPLOYMENT AND TRAINING**

This section of a SEPA records provisions concerning the employment and training of members of Aboriginal communities.

### **General Employment Provisions**

SEPAs use a number of methods to encourage higher levels of Aboriginal participation in a mining project. Some assure that *qualified* members of the Aboriginal

community will be able to find jobs. Others set employment quotas that must be met. If there are not enough qualified people to fill those quotas, however, that creates a problem. (See [Module 4, “Measuring the Delivery of Benefits,”](#) p. 4-23.)

Neither of these methods may do much for Aboriginal employment without additional provisions to train people for the jobs.

#### *Identification of Employment Opportunities and Labour Supply*

The number and type of workers required by a mine will change dramatically over its life. What sort of worker will be in demand, how many are needed, by when, and how many qualified people are already available – all this information is critical to the mine and to the community. SEPAs usually outline how both the demand for and the supply of labour will be collected and reported.

#### *Labour Force Development Plan*

This subsection outlines the commitment of the parties to develop a plan (or “human resources strategy”) to equip people with the skills needed upstream and downstream from the mine. Such a plan might include

- the job opportunities that a mine is expected to create at different stages and locations.
- the labour pool of local people whose age and ability is suitable for these jobs.
- The barriers that may keep people from training or applying for jobs, or from retaining these jobs.
- The investments needed to get local people ready, willing, and able to qualify for training and entry level positions.

- The training and apprenticeship programs necessary to prepare people for these jobs.
- The cost of implementing this plan and sources of funding to implement it.

### **Employment Related Community Outreach**

This subsection explains how information about employment opportunities will be communicated to the community.

### **Recruitment and Hiring**

This subsection has provisions to make it easier to attract Aboriginal candidates to jobs at a mine. Personal development and motivation programs will help people to find direction in their lives and make use of their talents. They then will be more likely to take advantage of training programs and job opportunities that arise.

### **Employment Preferences**

The provisions in this subsection would explain when the company must fill positions first and foremost with local and Aboriginal people. Often the company will agree to make “best efforts” to hire Aboriginal people to certain jobs. The stronger the commitment between the two parties, the more likely these “best efforts” will bring good results.

*Often SEPA's include a quota for the percentage of employees that will be Aboriginal. This may seem like a good way to ensure that local communities capture employment benefits from a mine. However, as the Luts'el K'e Dene discovered (see **\*Case Study #1: NWT Diamond Mines**, p. Intro-10), you also have to specify which Aboriginal people you mean. For example, the Diavik mine has been averaging 33% Aboriginal employment annually – but only 1% of the*

*workers are Lutsel K'e Dene. Because of this experience, they have recommended that the SEPA's employment quotas be changed to specify what portion of the quota will come from each of the four Aboriginal communities.*

With or without quotas, a community must have members available who can do the work these positions require. If it cannot supply enough workers, it may be difficult to discern who is responsible for poor results – the company, the community, or the community's members.

### **On-the-Job and Other Training**

Generally, training is essential if Aboriginal people are to fill positions in a mining project. Therefore the SEPA should include commitments by the mining company to develop and implement Aboriginal training programs. The SEPA must also stipulate funding for the training, from the company and/or from government.

It is also advisable to stipulate the linkage between successful training and actual employment. The Ekati Mine IBA (see *\*Case Study #1: NWT Diamond Mines*, p. Intro-10) overlooked that linkage. Community members could get training, but BHP Billiton was not required to hire them. Make sure that your agreement stipulates that individuals who graduate from a training program will still find positions open for which they are now qualified to apply.<sup>iii</sup>

### **Contracting and Subcontracting**

SEPA's may require that contractors and subcontractors have the same obligations to employ and train local Aboriginal people as the mining company does.

## **Apprenticeship Programs**

Most SEPAs specify apprenticeships as well as job opportunities for local Aboriginal people.

## **Educational and Scholarship Programs**

SEPAs may commit the company to fund scholarships for Aboriginal students. The scholarships will help them undertake post-secondary studies in fields related to the mining industry.

## **Employee Evaluation and Advancement**

This subsection concerns procedures for evaluating the skills of employees. It also states that programs will be set up to help people upgrade and qualify for higher positions.

*In March 2006 a skills development centre opened at the Voisey's Bay mine (\*Case Study #4, p. Intro-38). The centre helps workers improve their personal and work skills.*

*The Lutsel K'e Dene struggled to get their members trained for work at Ekati mine, and to get and keep them employed there.<sup>iv</sup> Far fewer members than expected have found long-term work there. (See \*Case Study #1: NWT Diamond Mines, p. Intro-10.) Learning from this experience, they and other Aboriginal communities made sure that the Diavik Mine SEPA addressed employment and training more specifically. Diavik's developer, Rio Tinto, launched the Aboriginal Leadership Development Program in 2005. It has increased the number of Aboriginal people working at Diavik's supervisory and management level.*

## **Labour Relations and Discipline**

Mining operations often involve labour unions. It is important to ensure the terms of the SEPA are not contrary to agreements between the mining company and unions. Often a company will try to make the provisions of the SEPA part of the union collective agreement.

## **Work Rotations and Vacations**

Mine workers at fly-in mining operations are often expected to work two weeks on and two weeks off. If the community is nearby, the work rotation may be four days on four days off. These days most companies are sensitive to how work rotation may affect traditional Aboriginal pursuits, such as hunting and trapping. Companies often attempt to accommodate these needs with vacations and leaves of absence.

## **Transportation**

This subsection details how the mining company will provide transportation to the mine and back from local communities or points of hire.

*In their Exploration Cooperation Benefits Agreement (see \*Case Study #5: Keno Hill Silver District, p. Intro-45) NaCho Nyäk Dun and Alexco handle transportation to and from the mine site with a contract. Alexco contracts NaCho Nyäk Dun Development Corporation to transport local workers between Mayo and Elsa with a 15-passenger bus. This service may be expanded to meet charter aircraft and more. As the Keno Hill project grows, additional transportation service may be arranged to other towns. In this way, a growing business has been realized in the area, as well as a service to the mine.*

## **Work Site Conditions - Accommodation, Food, and Recreation**

Some SEPAs may include provisions about work site conditions to help Aboriginal individuals feel more welcome. Traditional food may be served. Aboriginal employees may be provided with a freezer and kitchen in which to store and prepare their food.

## **Counselling and Employee Support**

Aboriginal employees may not be used to separation from family for long periods of time. Such working conditions can be difficult for them. As well, addictions and other problems often keep them from holding their jobs over time. Counselling and employee support systems can help deal with such issues.

*The Employment and Training section of the Raglan Agreement (\*Case Study #2: Raglan Mine, p. Intro-21) provides for personal and career counselling and support systems for trainees.*

## **Language of Work**

The SEPA may stipulate which language(s) will be used on the mine site. Translators or language training may also be provided.

## **Cross-Cultural Issues**

Unfortunately, racism is often experienced at mine sites. This is often cited as one of the reasons that Aboriginal people quit their jobs. The company may decide to provide cross-cultural training to reduce these difficulties. Cross-cultural training can teach non-Aboriginal employees about Aboriginal culture. It can



also teach Aboriginal people about the non-Aboriginal culture they are dealing with.

*To ensure good relations between people at the Voisey's Bay Mine (see \*Case Study #4, p. Intro-38), all employees must take training in cross cultural awareness as well as in gender sensitivity.*

### **Restrictions on Employees**

These provisions bar certain things from the mine site, like alcohol, drugs, and firearms. The Voisey's Bay site is alcohol- and drug-free.

### **Employment Committee**

Often SEPAs set up a committee of company and community representatives to deal with employment opportunities and issues. Local community members and mine management may bring to the committee many of the matters mentioned above for resolution. Sometimes this work is left to an Implementation Committee.

### **Aboriginal Employment Coordinator**

This may be a full-time or part-time position. The SEPA should stipulate where the coordinator will be housed and how the position will be funded. The coordinator makes sure that the mine's many employment and training programs run smoothly together. This position is key to the capture of employment benefits for members of the Aboriginal community.

*At the Voisey's Bay Mine (see \*Case Study #4, p. Intro-39), the Training and Employment Coordinator of the Labrador Inuit Association (LIA) worked with contractors to ensure qualified LIA members got and kept jobs at the Anaktalak Bay site. The coordinator sits*

*on referral committees for two of the largest employers, Torngait Services Incorporated and IKC-Borealis. Her presence on the hiring committees has translated into more employment for LIA members.*

## **Evaluation of Aboriginal Employment**

Most companies these days explain their employment and contracting targets and achievements in an annual report. At minimum, there should be a periodic review of Aboriginal employment.

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## **3. ECONOMIC DEVELOPMENT OPPORTUNITIES**

This section of the SEPA concerns business opportunities that will arise primarily downstream from the mine, and how to increase Aboriginal participation in them. Very important here are measures that will help Aboriginal people find business partners. (For example, provisions that give Aboriginal businesses priority in downstream opportunities or that build the experience and skills of Aboriginal business owners.)

It is often the job of the Implementation Committee to see that many of the provisions of this section get carried out.

### **General Provisions Regarding Contracting and Business Opportunities**

Most SEPAs stipulate that the mining company will try to subcontract work to Aboriginal businesses. Sometimes a SEPA will specify that a quota of the total annual value of those contracts will go to Aboriginal businesses. At other times a SEPA will express a preference for Aboriginal businesses if they qualify to do the work.

## **Identification of Businesses and Business Opportunities**

This subsection outlines how the company will make sure that Aboriginal businesses are aware of opportunities. Often a registry of Aboriginal businesses is drawn up. A list of opportunities can also be made public so that Aboriginal entrepreneurs may act on them or bid on the contracts.

## **General Preferences for Aboriginal Businesses**

This subsection may detail the options a mining company will use when securing goods and services through contractors. One option may be to issue requests for proposal or invitations to tender. The company may then negotiate directly with Aboriginal businesses that have the ability to deliver certain goods or services in a timely, efficient, and competitive manner.

To establish a preference for Aboriginal businesses, this subsection may require the mining company to provide advanced notice of its contract requirements to the Aboriginal party or to award contracts directly to them. It may also stipulate that non-Aboriginal contractors must make efforts to use Aboriginal subcontractors, suppliers, and employees.

Aboriginal businesses may also receive the first right to negotiate for specified types of contracts. Those types of contract may be listed right in the SEPA.

*The Brewery Creek SEPA (see **\*Case Study #3**, p. Intro-30) stipulates that Loki Gold will negotiate contracts in good faith with Tr'ondëk Hwëch'in (TH) for the following services:*

- *fuel supply, storage, and distribution*
- *housing supply*

- *bussing*
- *site security*
- *road maintenance*
- *freighting requirements*
- *vehicle leasing and maintenance*
- *concrete batching*
- *lube supply*

*For the term of each contract, TH will be the sole source of that service for the mining company and for its mine site contractors. TH must fulfill those contracts in a timely, efficient and competitive manner. Otherwise, the company may consider other sources when a new contract is put to tender. The company will unbundle large contracts so that TH can take on more of the work.*

*Two contracts, one for fuel and the other for trucking, TH undertook as Joint Ventures with companies based in Dawson City. In both cases, TH eventually bought out the owners, who were nearing retirement. While the Brewery Creek mine closed years ago, these two companies continue to operate. They employ 45 people.*

Remember to define the term “Aboriginal Business” with care.

*The Raglan Agreement (see **\*Case Study #2: Raglan Mine**, p. Intro-21) defines "Inuit Enterprise" as a partnership, including a Joint Venture, of which at least 50% is owned by one or more Inuit. It can also be a co-operative or non-share capital corporation, in which the majority of voting members are Inuit. It can also be a share-capital corporation in which a majority of the voting shares are beneficially owned by Inuit people or by any of the aforementioned partnerships, co-operatives, or corporations.*

*Note that, to many people, a Joint Venture with less than 50% Aboriginal ownership is still an “Aboriginal business.” This need not be a serious problem. Even minority ownership can be very powerful if the Joint Venture agreement is carefully negotiated. (See Module 6, “**Factors Affecting the Allocation of Shares**,” p. 6-16),*

### **Procedure for Securing Contract Goods and Services on a Competitive Basis**

This subsection explains how competitive bids are to be ranked. It provides definitions and guidance about how bids are to be assessed.

### **“Unbundling” of Contract Requirements**

In this subsection the mining company explains how it will tailor service contracts to the capacity of Aboriginal businesses. That entails breaking down big contracts into smaller components that suit the abilities, experience, and assets (for example, trucks and planes) of Aboriginal business owners.

### **Monitoring of Contracting**

This subsection stipulates how contracting to Aboriginal businesses is to be monitored and reported. Only with these provisions can the parties learn if contracting is occurring as they agreed, and adjust matters if they go off-course.

### **Assistance for Local Business Development**

Often local Aboriginal businesses are unable to take advantage of service contracts. This section would explain how the mining company has agreed to help Aboriginal businesses to increase their capacity (with an assistance program, for example).

*To build up the capacity of Aboriginal business, Nacho Nyäk Dun and Alexco chose to create a Business Development Committee. (See \*Case Study #5: Keno Hill Silver District, p. Intro-45.) It is a partnership between the company and the First Nation of Nacho Nyäk Dun. First the Committee provides basic services, in catering and housecleaning for example. As the businesses gain experience, Alexco works with them to improve their management and expand their range of services.*

## **Research and Development**

Provisions for partnerships in research and development may be built into a SEPA. By helping Aboriginal partners develop specialized expertise and technology, a mining company may prepare Aboriginal businesses for longer-term business opportunities. A SEPA may identify areas for joint research and development projects, for example:

- ice road construction and maintenance
- land reclamation methods
- wind and power generation technologies
- water and sewage disposal and treatment for remote camps
- socio-economic monitoring and impact assessment

Aboriginal businesses may be well-suited to playing a role in research and development that addresses the challenges peculiar to mining in remote locations and harsh climates.

## **Right of First Refusal on Equipment and Property**

Lack of equipment is one of the biggest barriers faced by Aboriginal businesses. In the course of mining, however, valuable equipment and other property may become surplus and go up for sale. A mining company may choose

to give the Aboriginal party the right to bid on that equipment before anyone else does. This right of first refusal can help Aboriginal businesses acquire the equipment necessary to take advantage of more business opportunities.

### **Committee on Economic and Business Development**

The SEPA may set up a committee to handle matters of economic and business development. However, like the Employment and Training Committee, this task may well be left to the Implementation Committee.

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## **4. SOCIAL, CULTURAL AND COMMUNITY SUPPORT**

This section of the SEPA addresses the positive and negative impacts that the mining project may have on the Aboriginal community and its culture. A Committee for Community Support may be set up to deal with these impacts. Other community services concerned with communication and environmental protection may also be set up.

### **Communication and Consultation**

Most SEPAs emphasize how the Aboriginal community must be consulted and informed about the mining project. This is so problems can be caught and resolved before they become too grave. The publication of a newsletter is often an important part of this communication.

*De Beers Snap Lake Mine (see \*Case Study #1: NWT Diamond Mines, p. Intro-10) produces a quarterly newsletter called Snap Shot. Its purpose is to provide information on the development and operation of the diamond mine at Snap Lake.*



## **Social and Community Assistance Counselling**

Counselling and information programs may be set up to help deal with problems that the mining project causes or makes worse. Examples are family and marital problems, stress and anxiety, and alcohol and drug abuse.

## **Community Projects and Physical Infrastructure**

In this subsection the mining company would commit to assist financially or in some other way the construction of community infrastructure. This might include a meeting hall, recreation facilities, or some other improvement to the community's quality of life.

## **Aboriginal Cultural and Economic Activities**

This subsection details how the mining company will try to reduce the mine's impact on the community's lifestyle, culture, and traditional activities.

*Several provisions of the Voisey's Bay SEPA address the impact that the mine may have on the traditional ways of life of the Inuit and Innu. (See \*Case Study #4, p. Intro-38.) Mine employees are strictly prohibited from hunting, fishing, or harvesting of any kind in the project area to ensure natural resources come under no additional pressure.*

*Winter shipping was the biggest concern, however. The ice is a highway for Inuit and Innu who harvest from the ice and travel by snowmobile during the winter. Many local people have cabins and traditional hunting areas on the south side of the ice breaker track. Sometimes the ship's track takes a very long time to re-freeze.*

*The two parties set up a small group to consider this issue, which was so important to both of them. It took*

*the group a number of years to work out a solution. Finally, the Inuit and Inco designed and had constructed a large pontoon that can be deployed immediately after a ship has passed. This reduces to a matter of hours the time it takes to travel to the other side of the ship's track, which otherwise can take days.*

## **Monitoring of Social Impacts**

This subsection stipulates how social impacts will be monitored and reported throughout the life of the mine.

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## **5. FINANCIAL PROVISIONS AND EQUITY PARTICIPATION**

Money is the subject of this section of the SEPA: how much of the mine's money is to be shared with the Aboriginal community, and how exactly the community will get that share. Many of the terms used in this section may seem foreign and complicated: "Gross Revenues," "Annual Net Profit," "Annual Operating Cash Flow," for example. But a basic understanding of these terms is critical if you are to capture from a SEPA the full range of benefits for your community.

We preface our explanation of this section, therefore, with a brief review of key financial terms. (This reference is reproduced in [Appendix 4](#), p. A-19 if you want to keep it handy.)

### **Some Accounting Basics**

There are four main ways to calculate how much money businesses make in the course of a fiscal year. Each calculation results in a different dollar amount. When negotiating financial provisions with a mining company, you must decide which of these calculations will be the basis for your discussions.

## 1. Gross Revenues

This is the most simple of the three calculations. Gross Revenues (or “the Gross”) is all the money a business earns from the sale of its products during a fiscal year:

\$ Value of goods sold in the fiscal year = **Gross Revenues**

Gross Revenues is a higher figure than the other three because no money is deducted from it. For that reason, some Aboriginal groups are thinking about negotiating for “a percentage of the Gross.” Mining companies are against using Gross Revenues when negotiating the financial provisions of a SEPA. The Gross does not show how much money it takes to run a business. Mining companies therefore argue that the Gross is an unfair basis for calculating a variable cash payment.

## 2. Annual Operating Profit

This calculation subtracts from Gross Revenues two types of cost. First come the Variable (or “Direct”) Costs. This is the money the business spent directly on making the product, like wages, fuel, and raw materials.

	Gross Revenues
Minus	– Variable Costs
Equals	<b>= Gross Profit</b>

Second come the Fixed (or “indirect”) costs. This is the money spent on running the business as a whole: management, administration, and leases, for example. One important Fixed Cost is the wearing out of equipment and buildings in the course of the year, or “Annual Depreciation.”

	Gross Profit
Minus	– Fixed Costs
Equals	<b>= Annual Operating Profit</b>

Unlike other Fixed Costs, Depreciation is not money the business has actually spent in the fiscal year. It is money that the business will spend when the buildings and equipment have to be replaced. In a mine with millions of dollars invested in such assets, Depreciation can be a very big number. By deducting Annual Depreciation from Gross Profit, a business reduces the taxes it has to pay.

### *3. Annual Net Profit*

This third calculation deducts still more of the costs of business: the interest paid on loans, taxes and royalties owed to government, and head office costs. These are called Other Costs.

$$\begin{array}{rcl} & \text{Annual Operating Profit} & \\ \text{Minus} & & \text{– Other Costs} \\ \hline \text{Equals} & & \text{= Annual Net Profit} \end{array}$$

Net profit is of great interest to shareholders. It indicates how much the value of their investment in the business is growing.

### *4. Annual Operating Cash Flow*

This fourth calculation uses several of the dollar values from the previous three calculations. It starts with the Annual Operating Profit. Annual Depreciation is then added back in (because that money is not actually spent during the year). Finally, the taxes that are payable to government are subtracted.

$$\begin{array}{rcl} & \text{Annual Operating Profit} & \\ \text{Plus} & & \text{+ Annual Depreciation} \\ \text{Minus} & & \text{– Taxes} \\ \hline \text{Equals} & & \text{= Annual Operating Cash Flow} \end{array}$$

### *How Important are the Differences Between these Options?*

Here is an example of the different look these calculations give to the success of a hypothetical mine in one fiscal year.

Here is the mine's Annual Operating Cash Flow.

Annual Operating Profit	\$100,000,000
Add Annual Depreciation	+ \$45,000,000
Subtract Taxes	– \$20,000,000
<b>Annual Operating Cash Flow</b>	<b>= \$125,000,000</b>

Compare this with the mine's Annual Net Profit.

Annual Operating Profit	\$100,000,000
Subtract Taxes	– \$20,000,000
<b>Annual Net Profit</b>	<b>= \$80,000,000</b>

Annual Operating Cash Flow is a far higher figure than the Annual Net Profit. Annual Operating Cash Flow is a much more advantageous way for an Aboriginal community's representatives to calculate the prosperity of a mine when negotiating a SEPA. (See *\*Case Study #2: Raglan Mine*, p. Intro-10.)

These are some basics of business accounting. It is worth the effort to get a firm grasp of this information. For more detailed explanations of each of these key terms, go to [www.investorwords.com](http://www.investorwords.com).

### **Rationale for Cash Payments**

This subsection explains why cash payments are to be made to the Aboriginal community. There may be many reasons:

- To ensure that the Aboriginal community that it will receive direct economic benefits from the project.

- To compensate the Aboriginal community for the foreseen impacts of the mining project.
- To secure the support of the Aboriginal community for the development and operation of the project.
- To ensure that payments under the agreement can be handled in a specific way when the company pays taxes. (For example, that these payments may be considered as deductions from mining royalties, or from income tax.)

### *The “Case” Against Financial Compensation*

Mining royalties are a type of tax that mining companies pay on the value of the resources that they extract from the ground. Governments in many parts of Canada (including Yukon) have agreed to pass on a portion of mining royalties to Aboriginal communities. In certain parts of the country, there are no such arrangements.

Where such arrangements do exist, mining companies often argue that these royalty payments are a kind of financial compensation to Aboriginal communities. Since these communities “already” receive this money, they should expect less financial compensation from a SEPA - or even none at all.

This argument is unsound for two reasons. First, royalty sharing is the result of a government-to-government agreement. It has nothing to do with the mining company. Second, royalties are a tax on the use of public resources. It is a cost that mining companies must pay, whether or not they pay financial compensation to Aboriginal communities.

To use royalty payments as an excuse to reduce or avoid provisions for financial compensation is a very questionable way to conduct SEPA negotiations. The mining company that does so may hope to mislead an ill-informed Aboriginal party. It stands to reason that a mining

company should strive to limit its costs and maximize returns to shareholders. That is no excuse for negotiating in bad faith, however.

## **Fixed Cash Payments**

Fixed cash payments are payments that do not rise and fall with the company's cash flow or profitability, mineral prices, the quantity of ore extracted, or any other variable. Fixed cash payments may at first appear generous. However, if a mine is successful, fixed cash payments can be extremely small in comparison to the money that the company is making, as the following example shows.

*In the case of the Ekati mine (see \*Case Study #1: NWT Diamond Mines, p. Intro-10), Lutsel K'e Dene, Dettah, Ndilo,, Deninu Kue and each agreed to receive an annual fixed payment of \$250,000.<sup>v</sup> This fixed payment is tiny compared to what other First Nations have achieved in other settings and to the profits made from mining diamonds in the region.<sup>vi</sup> Lutsel K'e Dene achieved a better financial provision (annual compensation of \$804,000) in the Participation Agreement for the Diavik mine. Still, in light of the profit that mine makes annually for Rio Tinto, the fixed payment is very small.*

Fixed cash payments are one way to share in the wealth created by a mine. But take care during negotiations not to accept fixed cash payments and to forego variable cash payments. Variable cash payments may offer far greater financial benefits over the long term. Through the combination of fixed and variable cash payments stipulated by the **Raglan Agreement**, Inuit and Innu communities have captured substantial benefits – far greater than the Lutsel K'e Dene have achieved in any of their IBAs. (See next topic, “**Variable Cash Payments**.”) It will be interesting to see if the renegotiation of these



agreements results in more even-handed financial provisions.

### **Variable Cash Payments**

Variable Cash Payments are payments that do rise and fall over time. This is because they are calculated on the basis of factors that change: a mine's production rates, its production costs, and/or market conditions. Many agreements have not included variable cash payments. Others have. Variable cash payments can have a big impact on the amount of financial compensation that an Aboriginal community receives.

There are four main options in terms of variable cash payment: Net Smelter Return, percentage of Gross Revenues, percentage of Net Profit, and percentage of Annual Operating Cash Flow.

#### *1. Net Smelter Return*

Net Smelter Return (NSR) is a percentage of the total sales of the mine's product, minus the costs of transportation to the smelter, and the costs of smelting and refining. The percentage is generally very small - less than 2.5%. The advantage of the NSR is that it can generate revenue for the Aboriginal community as soon as a mine starts selling its product.

If a mine's profits were low, an Aboriginal community could realize more revenue through a NSR than through variable cash payments that are profit-based. If a mine's profits were high, other options for variable cash payment would generate better revenue for the community. To decide which option could generate the best return, consult an industry expert.

*In the Yukon, Sherwood Copper Corporation started production at the Minto mine in 2007. In a Cooperation Agreement with Sherwood, Selkirk First Nation negotiated a modest 0.5% Net Smelter Return on mine production. The agreement ensured local employment and contracting opportunities for First Nation businesses. It also committed Sherwood to provide training for construction, mining, and processing plant jobs.<sup>vii</sup>*

## **2. Percentage of Gross Revenues**

This option for variable cash payment assigns to the Aboriginal community a percentage of the value of the mine's total product sales. Very recently, a few Aboriginal parties have bargained for a percentage of Gross Revenues. As far as we know, they have not succeeded in making it part of a SEPA. Mining companies argue that a percentage of "the Gross" is unfair, because it takes into account none of the costs of production. (See [Appendix 4](#), p. A-19.)

Mining companies might reconsider this position if they looked at a common practice in the agricultural sector. Farmers often use a percentage of Gross Revenues when renting or leasing their land. They charge the other party a percentage of the value of the yield per acre. When the yield is good, the payment goes up. When the yield is bad, the payment goes down. This is considered fairer than charging a fee based on the acreage leased, which remains fixed despite factors the farmer cannot control (like the weather). In the mining industry, world commodity prices would be just such an uncontrollable factor.

In SEPA negotiations to date, mining companies have stoutly resisted variable cash payments based on the percentage of Gross Revenues. It will be interesting to see

if their minds can be changed by the logic of the example set by the agricultural sector.

### *3. Percentage of Annual Operating Cash Flow*

Unlike the previous option, a percentage of Annual Operating Cash Flow takes into account certain costs of production at a mine, as well as revenues. (See [Appendix 4](#), p. A-19.) It is a type of profit-sharing.

A percentage of Annual Operating Cash Flow was captured by the Aboriginal communities that were party to the Raglan agreement (see [\\*Case Study #2: Raglan Mine](#), p. Intro-21). The provisions are very innovative, and have generated large financial benefits for the communities. The company is allowed roughly six years to use its earnings to recoup its costs of exploration and construction. After that, it will share 4.5% of the mine's Annual Operating Cash Flow with the neighbouring Inuit communities and with Nunavik Region as a whole. As a result, Makivik Corporation received payments of \$300,000 in 2005, \$9.3 million in 2006, \$32.6 million in 2007, and \$6.8 million in 2008. A total of \$65.4 million has flowed back to Aboriginal interests.<sup>viii</sup>

### *4. Percentage of Annual Net Profit*

Another option for variable cash payment is the percentage of Annual Net Profit. This is the profit that the owners (shareholders) of a company draw earnings from, either as a dividend or as an increase in share price. While Annual Net Profit is definitely a legitimate item to negotiate, the Annual Operating Cash Flow is a much better target. It will yield an even higher return to the Aboriginal groups that succeed in negotiating it. (See [Appendix 4](#), p. A-19.)

To have access to a mining company's Annual Net Profit, you require a share in its ownership, or "equity interest." In other words, you must first put cash and other assets of your own at the disposal of the company. (See Module 6, "**Factors Affecting the Allocation of Shares**," p. 6-16.) Equity interests in large companies are usually acquired through the purchase of shares on the stock market.

We found no examples of Aboriginal communities that negotiated equity interests in Canadian mines. Nonetheless, equity interests are a possibility. The SEPA that Tr'ondëk Hwëch'in negotiated with Loki Gold/Viceroy awarded the Aboriginal community no equity interest in the Brewery Creek mine. (See **\*Case Study #3**, p. Intro-30.) However, were that mine ever to expand onto Tr'ondëk Hwëch'in's Category A Settlement Lands, things would be different.

*Tr'ondëk Hwëch'in's Due Diligence of the mining company and project revealed that the ore body extended into Category A Lands. Tr'ondëk Hwëch'in therefore negotiated provisions for an equity interest in any expansion of the mine onto those lands. The company would pay for the exploration and for any subsequent Feasibility Study. If the Feasibility Study turned out to be bankable, the company and Tr'ondëk Hwëch'in could then enter into a Joint Venture agreement. The company would get a 70% equity interest in that mining, and Tr'ondëk Hwëch'in would get 30%.*

## **Compensation Provisions**

This subsection stipulates compensation that the company will pay to Aboriginal harvesters or others for losses or expenses they incur as a result of the mine.

The Raglan Agreement (see **\*Case Study #2: Raglan Mine**, p. Intro-21) addresses compensation in two ways.

First, there is compensation for relocation. If Inuit camps and equipment have to move because of the mine, compensation must be discussed and paid. Second, there is compensation for damage from toxic substances. If the operation of the mine poisons some part of the environment, compensation must be discussed and paid.

### **Suspension of Payments**

This subsection says under certain circumstances fixed and variable payments may stop. For instance, if the mine is not making money or if the market value of the mineral drops, payments may be suspended.

### **Development and Remedial Fund**

The SEPA may establish a fund for specific purposes. It could be used to promote traditional Aboriginal activities or to reduce damage done by mining. Generally money in such a fund is held in trust by the Aboriginal party.

### **Adjustments for Inflation**

This subsection explains how cash payments may change because of inflation.

### **Tax Implications**

This subsection is likely to be included if government is a signatory to the SEPA. The mining company may specify that its cash payments to the Aboriginal party will be deducted from the company's income tax, for example.

### **Security Deposit**

This subsection specifies the deposit that the mining company must make to ensure there is money for site

reclamation and for compensation. Typically, government regulations require that this deposit be made, however.

### **Expenses for Administration, Management, and Implementation**

This subsection details sources of funding to cover the costs of implementing the SEPA. The company should provide the largest share of the funding. The Aboriginal community may also choose to contribute, if it is able.

### **Reimbursement of Negotiation Expenses**

The costs of negotiation can range widely, from \$150,000-\$600,000, depending on the size and complexity of the project. If the Aboriginal party does not have the money to negotiate effectively, the quality of the agreement will suffer. That may harm the relationship between the Aboriginal party and the mining company. For that reason, the mining company may agree to reimburse the Aboriginal party's costs of negotiation. While these up-front costs are substantial, the benefits from a well-negotiated agreement can be much greater. (See *\*Case Study #2: Raglan Mine*, p. Intro-21, and *\*Case Study #4: Voisey's Bay Mine*, p. Intro-38.)

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## **6. ENVIRONMENTAL PROTECTION AND CULTURAL RESOURCES**

The environment and cultural resources of an Aboriginal community usually undergo a lot of change because of mining. Although the Environmental Assessment process will address these issues, a SEPA often does too. Protection of the environment is one of the top three issues that most Aboriginal communities want a SEPA to address.

## **General Provisions Regarding Environmental Compliance**

In this subsection the parties' commit to protect the environment during every stage of the mine by complying with all the laws, regulations, and project permits.

## **Specific Environmental Protection and Monitoring Provisions**

This subsection may include details about action the company will take to limit the mine's environmental impact. Independent advisory or monitoring committees are often established to make sure these measures are carried out properly. This subsection can be very detailed, depending on the mining project, the location, and the operation.

## **Wildlife**

This subsection is written into some SEPAs to address specific Aboriginal concerns about wildlife.

## **Abandonment and Reclamation**

Nowadays mines are not approved unless the company completes a detailed closure and reclamation plan that is acceptable to all stakeholders. This process is regulated outside SEPAs. Nevertheless, SEPAs may address issues of mine abandonment and reclamation as well.

## **Protection of Cultural Resources and Areas of Cultural Significance**

This subsection concerns specific rules and actions for protecting cultural resources and areas of significance.

Parties to a SEPA often negotiate a separate environmental agreement as well. Alternatively, as a result



of the Environmental Assessment process, the mining company and the federal and territorial or provincial governments may strike an environmental agreement.

*For the Ekati Mine, BHP Billiton and the governments of Canada and the Northwest Territories signed an Environmental Agreement. Attached to that agreement (See \*Case Study #1: NWT Diamond Mines, p. Intro-10.) was an Implementation Protocol that four Aboriginal organizations (including Lutsel K'e Dene) signed as well.<sup>ix</sup>*

*Despite the shortcomings in its IBA, the Ekati Mine is one of the most closely monitored mines in Canada. The protocol provided a means for all parties to work together to establish an Independent Environmental Monitoring Agency as a watchdog. BHP Billiton provides funding for the Agency. The federal and territorial governments have also provided funding.<sup>x</sup>*

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## **7. OTHER SUBSTANTIVE AND PROCEDURAL PROVISIONS**

Any agreement is only as good as its implementation. This section therefore should be thought through carefully.

Earlier agreements did not put much thought into implementation and evaluation. Now most SEPAs have detailed information about how implementation will occur and how the success of the agreement will be evaluated. Generally a SEPA includes information on an Implementation or Management Committee, a liaison officer, an agreement evaluation process. It may also include information on Aboriginal, treaty and constitutional rights, and obligations to meet the terms of any collective agreement.

## **Amendment and Renegotiation of the Agreement**

SEPAs contain standard provisions about when and how the parties may choose to amend or renegotiate the agreement. This may be triggered by a variety of circumstances. For example, the project may expand, or inconsistencies may develop between the SEPA and regulatory processes.

## **Anticipation of Project Expansion and Other Projects or Activities**

Some SEPAs address the possibility that the mine will expand or that the mining company will get involved in other projects in the same area. Provisions in this subsection explain how such an eventuality will benefit or impact the Aboriginal party.

## **Confidentiality and Release of Information**

The SEPA may include provisions about the confidentiality of information. This information may concern the mining project itself, the terms of the SEPA, or Traditional Knowledge that should remain confidential.

## **Implementation Committee**

Implementation Committee members are generally representatives of the parties to the agreement. Sometimes outsiders to the agreement are included as well. This committee must meet regularly in order to catch issues as they arise. This may be the only committee that is struck in the agreement. If that is the case, its members will not only oversee implementation, but specific aspects within each section of the agreement.

*The two SEPAs connected with the Voisey's Bay Mine (\*Case Study #4, p. Intro-38) set up joint oversight committees to guide implementation. Each Aboriginal*

*community has its own committee. It meets quarterly to deal with any concerns that may have arisen. The committee may also choose to turn its attention to other matters that are newly important in the operation of the mine.*

### **Annual Reporting on Agreement Implementation**

Each year the company usually completes a formal report on key issues of the SEPA, such as employment, training, business expenditures etc.

### **Formal Evaluation of the Agreement**

Independent consultants may be hired to interview stakeholders and formally evaluate the SEPA. Their report on the SEPA performance may act as a trigger for its renegotiation.

### **Dispute Resolution**

Hopefully, the parties to the SEPA will have no disputes about the agreement. Just in case, though, it is highly recommended that the SEPA explain the steps both parties must follow if a serious disagreement arises between them. This “dispute resolution mechanism” usually specifies a first, second, and third authority that each must try to resolve the matter.

*The Voisey’s Bay Mine SEPA (see **\*Case Study #4**, p. Intro-38) has a very detailed section on dispute resolution. It contains a formal procedure for addressing disputes between the parties. The procedure has many steps, the most essential of which is a discussion by members of one of the joint oversight committees. If the issue cannot be resolved at this level it then rises to the level of the President of Nunatsiavut, the Grand Chief of the Innu Nation, and the President of Inco. Failing*

*resolution at this level, the matter may have to be resolved in court. To date no disputes have gone further than a discussion between the presidents.*

## **Enforceability and Remedies**

Most SEPA's today are legally binding contracts. This subsection may contain details about how the agreement is to be enforced.

### **“Boilerplate” Contractual Provisions**

This subsection lists standard provisions for contracts. Examples are the grounds for terminating the agreement, the notice required for termination, the law governing the agreement, and liability in case of default.

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## **ENDNOTES**

<sup>i</sup> Steven A. Kennett, *A Guide to Impact and Benefits Agreements* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1999).

<sup>ii</sup> Vivian Weitzner, “Dealing Full Force: Lutsel K’e Dene First Nation’s Experience Negotiating with Mining Companies” (Ottawa: The North South Institute, January 2006), p. 10. 13 August 2009 <<http://www.nsi-ins.ca/english/pdf/lk-en.pdf>>.

<sup>iii</sup> “Dealing Full Force,” p. 17.

<sup>iv</sup> “Dealing Full Force,” p. 17.

<sup>v</sup> “Dealing Full Force,” pp. 16, 17.

<sup>vi</sup> “Dealing Full Force,” p. 29.

<sup>vii</sup> “Sherwood Announces Robust Returns from Feasibility Study on Minto Copper-Gold Project,” Alaska Canada Rail Link Newsletter, July 13, 2006. 28 September 2009 <<http://alaskacanadarail.com/newsletter-06-06.html>>.

<sup>viii</sup> Profit-sharing and cumulative year-to-date amounts received by Makivik up to the end of 2008 are found at “Xstrata Nickel: Inuit communities receive \$6.8 million in profit-sharing from Xstrata Nickel’s Raglan mine,” Xstrata Media Centre / News Releases, June 4, 2009, Xstrata plc. 28 September 2009 <<http://www.xstrata.com/media/news/2009/06/04/1715CET>>.

<sup>ix</sup> “Why was the Agency Created?” *Independent Environmental Monitoring Agency*. 14 September 2009 <<http://www.monitoringagency.net/AbouttheAgency/WhywastheAgencyCreated/tabid/61/Default.aspx>>.

<sup>x</sup> “Why was the Agency Created?” *Independent Environmental Monitoring Agency*.

## Notes



## Module 6 Negotiating Joint Ventures

Many of the things that apply to negotiating a Socio-Economic Participation Agreement (SEPA) also apply to negotiating a Joint Venture (JV).

- You need a clear idea of the community's vision of its future and how business development can serve that. (See [Module 1](#).)
- You need a solid understanding of the business that the agreement will involve. (See [Module 2](#).)
- You need to understand where you have leverage and how to use it in business negotiations. (See [Module 3](#).)
- You need to prepare for negotiations by examining your long-term interests, and the range of benefits you bring to a deal and want from it. You have to make certain the other party can deliver those benefits. You have to put together a negotiating strategy and team to capture those benefits. (See [Module 4](#).)

Yet despite these similarities, negotiating a JV also differs from negotiating a SEPA in several essential ways.

- When preparing for JV negotiations, the first task is to select a promising venture to pursue and then a likely JV partner to pursue it with.
- Because they select one another, the signatories of JV agreements can more readily behave like partners.

The KCMD crew working on the forms at Diavik Diamond Mine. KCMD is a Joint Venture between Kitikmeot Corporation and Cementation Canada. Photocredit: Kitikmeot Corporation and Jiri Hermann.



Their negotiations usually create a whole new company to co-ordinate that partnership. Due Diligence and the completion of a Feasibility Study and Business Plan may occur right during negotiations, but the order in which they occur can vary.

- The organization negotiating on behalf of the Aboriginal community will most likely be a business corporation, like the other party(ies) to the agreement. (For simplicity, the information in this module is addressed to Aboriginal Development Corporations. In most cases nowadays, ADCs represent Aboriginal interests during JV negotiations.)
- The JV agreement is not one document, but three. A Heads of Agreement clarifies the major points of each section of a Shareholder Agreement. Finally, there is a Management Agreement.
- JV agreements are usually devoted wholly to business matters and do not include social or cultural provisions.
- JV agreements do not necessarily come after SEPAs. Sometimes, a JV with one party can increase your capacity for certain types of contract, and thereby strengthen your hand when you negotiate a SEPA with a second party. (See [\\*Case Study #3: Brewery Creek Mine](#), p. Intro-30.)

To illustrate important points this module uses the experiences of Kitsaki Development Corporation. Lac La Ronge Indian Band created Kitsaki in 1982 to serve as the community's business arm. Bill Hatton, Kitsaki's Chief Executive Officer in those early years, describes how the ADC became a pioneer of Aboriginal JVs in northern Saskatchewan.

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## WHAT IS A JOINT VENTURE?

The JV is generally understood as a business to which two or more parties contribute the land, capital, and services essential for operations. In return they get share of its



ownership and control. It is a kind of partnership, and is usually incorporated under Canada's Companies Act. (The Income Tax Act has a much narrower definition of Joint Ventures.)

JVs can be short term or long term. The longer they are made to last, the more likely they can deliver long-term as well as short term benefits to the community. In the early 1980s, Kitsaki discovered that JVs in northern Saskatchewan were typically short term. Consequently, they lost much of their power for building community self-reliance.

*A First Nation and a trucking company would form a trucking Joint Venture to provide haulage to mines. The two parties would agree to split the revenue from the contract 50-50, or in whatever proportion they contributed capital. The contract usually ran no more than 2-3 years. It was just an arrangement to secure one contract or one market. Aboriginal people gained a share in the profits and some jobs for Class A drivers, but no role in management. Their partner ran the operations. (Even the First Nation's share of the profit was probably small. Their partner would hide much of the JV's profit amongst the costs of operation.) This kind of Joint Venturing does not build the capacity of an Aboriginal community.*

*Kitsaki decided that longer-term partnerships would guarantee much more in the way of lasting benefits. It negotiated a Joint Venture with Tri-Mac to haul ore from mines in the region. We did not let the Joint Venture stop at trucking, though. With Tri-Mac we also got into auto parts and repairs and a marshalling yard for the mining companies.*

*You see, jobs are not a good enough reason to Joint Venture. Most people go into business to make profits.*

*Everything else to them is a cost. Management is a cost. It's a price business-owners pay in order to control events so that they can make profits. Employment is regarded by most major employers as a necessary cost (and an evil one at that). If machines could do it cheaper, they would be purchased to do it.*

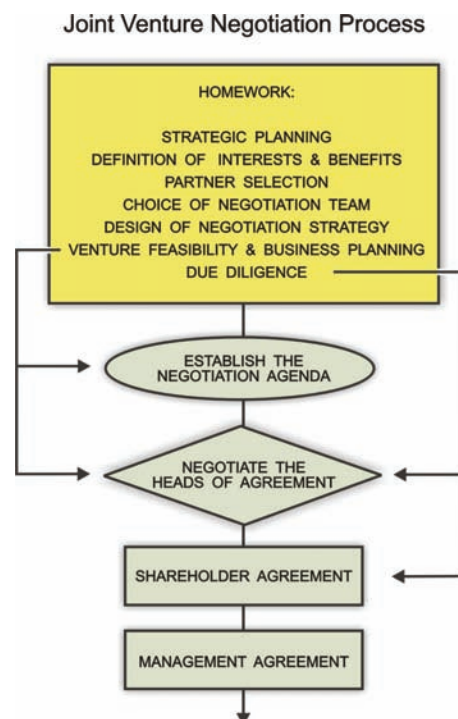
*So when you spec a Joint Venture, jobs are not enough. You have to attempt to capture the full range of benefits. That means profit, participation in management and control – and jobs. If you are sensible and shrewd in your dealing, you can secure more durable benefits and still protect yourself from unpleasant experiences.*

## SELECTING VENTURES & PARTNERS – THE THEORY

There are five stages in JV negotiation. The first involves much of the same homework as SEPA negotiation requires. (See diagram at right.) But there are some important differences.

In SEPAs, Aboriginal communities have no choice over who they are going to negotiate with. They have to deal with the company that has won the rights to the mining property. By contrast, when it comes to JVs that supply goods and services to the mine, there may well be plenty of potential partners to choose between.

An Aboriginal Development Corporation that aims to build the self-reliance of its community has to make a strategic choice of both ventures and partners. It has to select only those that will be instrumental – that will perform a specific function – in the achievement of the community's vision.



Venture selection comes first, partner selection second. The ADC identifies the venture opportunities that are viable and aligned with the community's long-term interests. Only then does it look for a suitable partner. Alternatively, non-Aboriginal companies may make the first move. They may have done enough homework to know if they have an Aboriginal partner, they could be better positioned to win a contract. They then propose a venture to the ADC.

Either way, the ADC will have before it venture proposals to pursue with a partner. The ADC knows it hasn't the capacity to "go it alone."

To evaluate the proposals, do three things. First, analyze each one. Make sure the projected numbers for production, costs, investment, and markets add up and overlook no significant factors. (If several proposals have been submitted, competition will have induced the bidders to present their best offers at the outset. The ADC will then have a better idea of the benefits it can realistically bargain for in negotiations.) Second, check over the track record of the companies that made the submissions and the character of their leaders. Third, hire an independent party with expertise and experience in the business in question to carry out Due Diligence on the most promising proposal.

Having identified a promising venture, the next thing is to assess the potential partner more rigorously. Again, it is a 3-step procedure.

### **1. Determine Their Interest in a Long-Term Partnership**

Your community's economy will not be well-served by a series of brief, unconnected business deals. Make sure your prospective partner is looking for a "meaningful relationship," and not just a "one-night stand."

Select Joint Venture partners carefully.



## 2. Check Out Their Track Record

Assess the track record of your prospective partner from six points of view. (This is very similar to the SEPA checklist found in Module 4, “**Homework #4: Assess the Mining Company**,” p. 4-12.)

- Financial Performance: What is their financial performance? What are their gross revenues and what is their net profit? What is the size of their asset base? How much debt are they carrying?
- Performance against Competitors: What is their performance compared with other businesses in the same industry? What is their reputation among competitors?
- Marketing and Networking Capacity: What kind of market network do they have? What is the reputation of the company in the marketplace as a supplier of goods and/or services?
- Past Performance as a JV Partner: How have they performed as a partner in other JVs? Are there any lawsuits pending due to partnership disputes? Are they considered an honourable partner? Do they keep agreements?
- Experience with Aboriginal Business Interests: Have they any experience in working with Aboriginal JV partners? Check it out, if they do. Likewise, find out more about any experience they have with an Aboriginal labour force.
- Environmental Track Record: If it is a business that potentially pollutes, what is their environmental track record? Are they committed to minimal environmental impact? Check out their record with regulatory agencies.



Your answers to these questions will not only help you to select a partner, they will inform your negotiating strategy. If your most suitable partner is still less than perfect, for example, terms can be added to an agreement in order to protect the ADC's interests in very specific ways.

### **3. Understand Their Short-Term Interests in the Business**

Your partner may have other interests that need clarification. For one, companies have shareholders to whom managers are answerable. Those shareholders almost all have an overriding interest in earning a healthy return on their investment. You can assume, therefore, that any partner will want to make money.

Their interest in you may reflect other, more specific interests of theirs. For example, a heavy equipment company may be looking for a way to cover the costs of servicing the debt on some underutilized vehicles. This goal could be met by simply keeping the equipment working, and not by generating profits. Without careful assessment and negotiation, their short-term pain could compromise the long-term gain of an Aboriginal JV partner.

*You really have to check out your prospective partners. No matter how warm and fuzzy you may feel in the presence of a charming personality, always check out their credit worthiness; their history of financial dealings; their relations with other partners; and their performance within the industry. You have to know the liabilities as well as the strengths they would bring to a deal.*

*I remember one deal that Kitsaki was considering. In the process of checking our prospective partner out we discovered some very interesting things.*

*We discovered they had Gross Revenues of several hundred million a year, yet their net profit was about \$1 million. That told me right away that their performance was either really pitiful, or they were hiding profits. The quality of their relationships with other partners wasn't encouraging either. They were embroiled in lawsuits with at least a couple of firms. Aside from being inefficient, evidently, they were hard to get along with. Maybe they weren't honouring their deals.*

*This all caused us a great deal of concern. Had it been up to me, I would have turned them down. But the chief said to make a deal. So Kitsaki was obliged to structure a deal it could live with. We had to protect ourselves from what appeared to be poor management and relationship habits. Then, in order to bind them to the deal, we had to sell them on the quality of the relationship we could offer. Now that chief operated on the basis of trust. When he shook your hand, you had a deal. He stuck with it. You stuck with it. Fortunately, that was exactly the sort of qualitative thing which gave us the advantage.*

*Three years later, when we were all fat and happy, we had a meeting with the president of our partner firm. He said, "You know, we were really worried about you guys." (As if we weren't worried about them!) "If we'd known then what we know now, we would never have hesitated. You're the only partner we've got that isn't waiting to stab us in the back. You're the only partner who is determined to add value to the deal."*

*In other words, they had come to see us as honourable partners. I have to say that they had earned our respect as well.*

If this investigation affirms that this is the partner for you, it's time to carry out a Feasibility Study on the venture. With that in hand, proceed to negotiate the Heads of Agreement.

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## SELECTING VENTURES & PARTNERS – REAL LIFE

In real life, the sequence in which Due Diligence, Feasibility Study, and the Heads of Agreement occur may be more complex. It will depend on whether the venture in question is a new one or an acquisition. It will depend on the benefits you and your prospective partner can contribute to the JV. It will also depend on how much time is available to capture an opportunity.

Consider one of Kitsaki's experiences:

*Our first Joint Venture was a new trucking business. We were motivated by a lucrative contract. There was a specific time frame in which to tender our bid. We couldn't have all of the feasibility and due diligence work done before we had to bid. We started our Heads of Agreement negotiation assuming the business would be profitable. Here is how our timing went.*

- *In September Kitsaksi staff held preliminary discussions about the venture opportunity. We began to do homework on our potential partner(s).*
- *In October we initiated negotiations on the Heads of Agreement. They were finished within 60 days, by the end of November.*
- *At the beginning of November we started a Feasibility Study and then a business plan. They were done by the middle of December.*
- *The Due Diligence began in mid-December and was finished by the end of February.*
- *The Shareholder Agreement was concluded that May.*

*Nine months in all. The bidding process made it wise to commence negotiating a contract just on the basis of the Heads of Agreement.*



This story raises several important points.

First, you will seldom have 100% of the information you would like to have at the beginning of negotiations. To start discussions, you just need enough information to satisfy yourself that the venture in question is sound. The rest of your research has to proceed during negotiations.

Second, circumstances may dictate that a contract is negotiated and operations commence merely on the basis of the Heads of Agreement. That has its risks. A Heads of Agreement is not legally binding. If your research affirms the quality of your partner, it could be a risk worth taking.

Third, the Feasibility Study is a crucial document for determining profitability. It is unwise to sign a Heads of Agreement without being convinced that the business is viable and worth your investment. In the example, the partners commissioned a feasibility analysis very early in the process. Operations were underway before the business plan was completed.

Fourth, the timing of the Due Diligence can vary. When the venture is a new one, it can start between the time you have a Heads of Agreement right up to commencement date of the business.. When the venture involves the purchase of all or part of an existing business, things are different. Due Diligence can and should start right away, and include everything from that business' finances and equipment, right down to an inventory of the office supplies. Practically no asset is irrelevant.

*You have to find out that everything your partners says about themselves is true – everything. You almost can't ask too much.*



*Partners make all kinds of claims about what they can contribute to a venture. They say they've got 28 trucks. Well, it would be nice to know that the trucks run or are capable of running, what mileage is on them. You've got to get out there and kick the tires. You have to look for "inflation speak." For example, they call that thing a truck and it's a 1983 Toyota. You have to make sure that their financial statements aren't doctored. You've got to get some second opinions. Details matter. Don't ignore the little things*

*Your partners are going to do that with you. It's a sort of flinch test. And believe me, in spite of the fact they may be annoyed at having to be accountable, they will have more respect for you. They will understand that you're paying attention.*

Feasibility study and Due Diligence can have a significant impact on JV negotiations. Where circumstances permit, get them started and finished as early as possible. Whatever the circumstances, complete the Due Diligence before signing the Shareholder agreement. It finalizes the JV.

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## **NEGOTIATING THE HEADS OF AGREEMENT**

The Heads of Agreement may be thought of as a bundle of smaller agreements. Together they express the substance of the future relationship of the signatories.

Everything is up for discussion until the parties sign the Heads of Agreement. Once signed, it is an agreement in principle, like an engagement ring. It is symbolic of the parties' commitment to one another, binding them in morally but not legally. The signatories to a Heads of Agreement do not attempt to make substantial changes to the basis of the relationship they envision. Lawyers translate the Heads of Agreement faithfully, section by

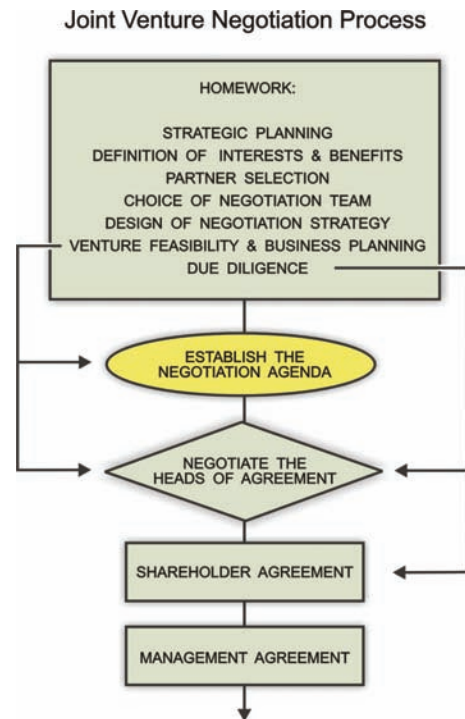
section, into the Shareholder Agreement. Once signed, the Shareholder Agreement is legally binding.

To start the negotiation, review each party's understanding of the agenda. (See Module 4, “Establish the Agenda,” p. 4-36.) The agenda established that a deal was possible, given the key features cited. The responsibility of the negotiators as they enter this stage of the negotiation is to adhere to that agenda as closely as possible.

The transition from an agenda to the framework of a legal agreement is worth a moment's pause. What seemed clear when you were discussing the agenda can become fuzzy. Issues which you thought were settled may re-emerge. As negotiators, be precise about what you understood and about what is important to you. Conflict of one kind or another is bound to occur as you negotiate the Heads of Agreement. By checking in with one another at the start, you can reduce the number and seriousness of the disputes.

By this stage it is assumed that all parties are in earnest about the negotiation. They have essentially made promises of “exclusivity” and “confidentiality.” They will not negotiate another deal that would compete with this one, nor will they reveal its contents to anyone. These promises protect the effort and costs incurred by each party to undertake the transaction. They also assure that nobody present considers the negotiation a frivolous exercise.

The rest of this module defines and illustrates each of the elements within a Heads of Agreement in the order in which they are usually negotiated.



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## 1. THE RECITALS

The recitals are full of “whereas’s,” “wherefores,” and “therefores.” They say

- who the parties to the negotiation are.
- what names each party uses to identify themselves.
- what the following document represents (usually, an agreement to do business under the terms outlined).
- a statement that tells the reader to witness that the parties have agreed to the provisions outlined.

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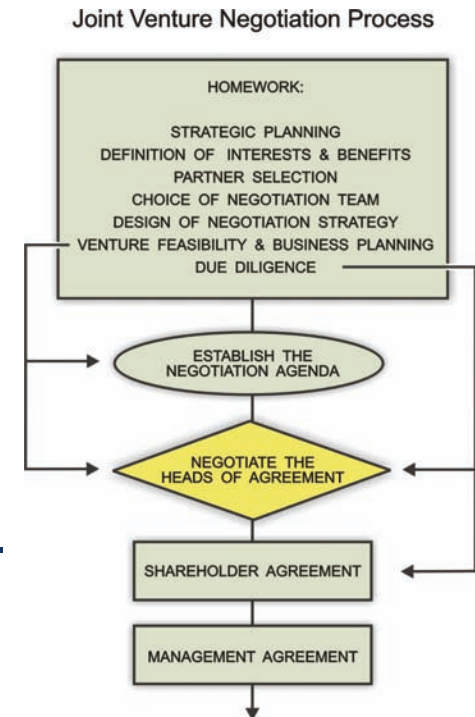
## 2. INCORPORATION AND OWNERSHIP STRUCTURE

This section

- spells out the intent of the parties to form a JV.
- gives the JV a name and defines how it will be governed (under the laws of the province or territory).
- explains how the JV’s capital shall be organized in terms of classes of shares, and how the shares will be divided among the owners.

### The Legal Form of Incorporation

“Joint Ventures” happen when two or more parties participate in a project, a series of projects, or a continuing business activity. So a JV occurs whenever an Aboriginal community develops and operates a business with another party. That party may be an individual person, a corporation, or some other kind of organization. The community may undertake the deal through its government, through a subsidiary ADC, or through an individual Aboriginal person.



Legally, “Joint Venture” refers to a general partnership, a limited partnership, or a corporation governed by a Shareholder Agreement that defines the rules under which operations will proceed. All these legal forms are subject to the laws of the province or territory in which the business is to be located.

Other legal forms may be appropriate for JVs, too. The decision depends on the business, the interests of the prospective partners, and the intended duration of their initiative. An Aboriginal Development Corporation (ADC) that seeks a partner for a 3-5 year catering contract would likely want to form a limited partnership. Something of longer duration, like a truck hauling contract for a mine, might be incorporated as a company. Taxation is another consideration: each legal form may be differently taxed. Finally, if the JV involves one party buying into an existing business, the legal form of the latter will probably be retained.

The selection of a legal form for the JV will ultimately be a matter for negotiation. (ADCs should get professional advice if there is any question as to which legal form may best suit their interests.)

To simplify matters, the rest of this module assumes that a new legal entity is being created by two or more firms in order to undertake a specific business for a long period of time. Thus, most of this module concerns the legal form known as a corporation, in which the parties to the JV are shareholders.

(A corporation is also a better instrument for building the Aboriginal community’s self-reliance. JVs that take the legal form of general partnerships and limited partnerships are often used to capture profits and jobs. These forms are not as good as corporations for building management capacity or credit worthiness.)

## Ownership and Share Structure

A shareholder is a person or corporation that owns all or part of a business enterprise. Joint venturers are by definition part owners, because they each control some of the business' shares. The value of the shares held by any one shareholder is known as the shareholder's equity.

Shares take several forms, each with its own rates, rights, and preferences. Among many other things, the negotiation of the Heads of Agreement will establish the types of share to be created, and the rules and rights that will apply to each type. The law is very flexible in this respect, so shares can be tailored to particular groups of investors. (This flexibility is another strength of the corporation as a legal form for a JV.)

The two basic types of share are the common share and the preferred share. Common shares entitle the shareholder to vote at the annual meeting and on important corporate decisions. As a rule, each share is worth one vote. (Some varieties are designed to carry more than one.) Common shares also expose the shareholder's investment to all the risks of business.

Preferred shares do not have a vote, but the investment of preferred shareholders is better protected. If something goes wrong with the business, preferred shareholders get reimbursed the value of their shares before common shareholders do.

Shareholders generally play a rather limited role in a corporation. They are expected to provide capital, review the managers' decisions, and give over-all direction. But they also use their voting power to elect the board of directors. Shareholders then look to the directors for guidance and results. Therefore, the degree to which you

control a corporation depends heavily (but not exclusively) on the percentage of its total shares that you own.

### *Factors Affecting the Allocation of Shares*

When negotiating ownership and share structures, several factors come into play.

- The amount of capital invested by each party is important. If the project is worth \$1 million and one partner puts in \$600,000, that partner would get 60% of the shares, everything else being equal. However, things are rarely that simple, for many contributions do not come in cash.
- Buildings, equipment, machinery, and land might be contributed by one or both parties to the venture. The value of each contribution will have to be appraised and factored into the allocation of shares.
- The licenses brought to the table by each party can be very valuable. The success of the business may depend on the patents, trademarks, or other confidential information which one party owns. This is particularly the case in manufacturing businesses. Similarly, an Aboriginal community's influence on permits or licenses can be very significant.
- Other contributive and attributive benefits can also affect the allocation of shares. Examples are the value of existing contracts or market segments or access to special equity funding, to debt or training funds, and to management expertise.
- If the aboriginal collaboration is key to securing a particular opportunity, or where they have ownership of the land, such as category A lands in the Yukon settlement, these are worth equity directly in the company.



*Tr'ondëk Hwëch'in made sure when they negotiated their SEPA that strong clauses were inserted that gave clear preference to any company where they had an ownership position. They used these to very good effect. Two of the downstream opportunities they targeted were supplying fuel to the mine and providing hauling services to and from the mine. With a strong preference in hand they were able to acquire a significant minority equity ownership interest in two different local companies, without any cash. The value and projected profitability of the contracts leveraged direct ownership. Since, Tron Dek has bought out the remaining ownership interest in both these companies.*

Share allocation is often misunderstood. In a mining deal worth \$100 million, for instance, an ADC is unlikely to get more than 5% of the common shares. That may sound poor - the ADC will not exercise control with just 5%. Still, it can leverage a lot of benefits with that allocation, like access to downstream contracting opportunities. (ADCs may negotiate SEPAs that capture those downstream opportunities despite no share in mine ownership. See [\\*Case Study #2: Raglan Mine](#), p. Intro-21.)

#### *Drawbacks and Alternatives to Common Shares*

Had an ADC a greater number of common shares, it might also be vulnerable to “cash calls.”

A cash call is a demand for capital. Many common shareholders may be subject to a cash call when their business requires more capital. Say a mine came upon adjacent ore bodies and chose to rapidly expand operations. The JV that does the mine's trucking would have to expand, too. All shareholders in the JV holding 5% or more of its common shares could receive a cash call.

Any shareholder unable to answer that call stands to see his/her ownership of the business reduced by the other partners.

So ownership comes with a kicker: possible exposure to cash calls. Also, if the business loses money, an owner is exposed to losses. To be allocated a lot of common shares is only good if the ADC has ready access to cash.

If an ADC wishes to gain influence in a big firm, there are alternatives to common share ownership. For example, the ADC may well be able to secure one or two non-voting seats on the board of directors. In this way, the ADC can take part in company discussions as well as monitor the decision-making. Alternatively, the Heads of Agreement could stipulate that the ADC gets a representative on the management committee.

Still another option is for the Heads of Agreement to include a section of rules that the business must obey. These rules are called “protective covenants.” For example, there are many JVs in which Aboriginal parties have negotiated equity, but use protective covenants to avoid exposure to cash calls. See the topic “**Protective Covenants**,” p. 6-37.)

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### 3. SCOPE OF BUSINESS

This section describes the kind of business the corporation is going to undertake, and its limits:

- what it is.
- where it will and won't take place.
- the duration of the business.

At this point, you should make doubly sure that the other party imagines this relationship within the same time frame you do. Do you want to do just this project together, or

have you anything else in mind? As Module 1 explains (see Module 1, “**The Community Economic Development Perspective**,” p. 1-7), if greater capacity and self-reliance are your goal, short-term projects may not be as useful. Review your research on benefits and on the interests motivating your partner's behaviour.

In this section there may also be certain restrictions your ADC wishes to place on its partner. You may insist that the partner act on no other opportunities affecting your interests in this region or sector. If they agree, they cannot do any business in the area defined unless they work with you.

### **Market Segments and Geographical Limits**

Negotiations around the scope of business can become complex. Negotiating market segments as well as geographical limits is quite common even in a business like trucking. As Bill Hatton explains,

*Kitsaki had permits to haul diesel fuel and carry freight from La Ronge, Saskatchewan to points north. The possibility of serving the Key Lake Mine as well made us go looking for a Joint Venture partner.*

*Kitsaki's purpose was not just to sustain its current business. We also wanted to expand the business in order to increase Kitsaki's revenue and job creation. So we wanted a partner who could give us the capacity to undertake most or all of the bulk fuel hauling into northern Saskatchewan. We approached a firm that primarily did bulk hauling in the north.*

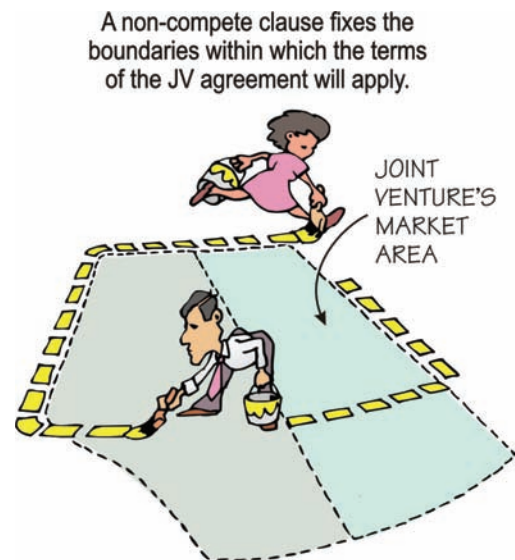
*In the negotiations we wound up spending a lot of time trying to agree about the scope of business. The intended partner at first wanted to limit the scope to the Key Lake Mine. Basically, they didn't see beyond*

*working with us on the haul to Key Lake. We were unknowns at the time. They likely felt it was risky to do business with an Aboriginal partner.*

*Saskatchewan policy, however, requires mines to build into contracts a preference for Aboriginal and northern businesses. Mining companies put out the word that would-be contractors were strongly advised to partner with an Aboriginal or northern company. Moreover, the partnership should be intended to last longer than the contract on which they bid.*

*So we explained to our intended partner how they needed a reliable Aboriginal partner. We made crystal clear our desire to expand our trucking business so it could compete for the hauling contracts to all the mines north of the 54th parallel. They accepted this. Then they tried to restrict the agreement to everything north of the 55th parallel. (This fixing of geographical boundaries is called a “non-compete clause”.) We knew there was an awful lot happening between 54 and 55. We managed to get them to drop the non-compete clause.*

*We did not define our interests merely in terms of geography, but in terms of market segments as well. The intended partner felt that it was bringing a very specific market to the deal. We did too - we held a very good contract for the haul of diesel fuel. We needed to protect our interest in those hauls. Ultimately, we agreed that certain kinds of haul were exclusively reserved for us for a period of time. Other segments we contributed to the Joint Venture as part of our equity.*



Similarly, in a very different business, parts of a resort JV might be reserved for the exclusive or primary benefit of one partner or another. Say you have a hotel and a golf course. One partner might retain the golf course while the other gets exclusive right to the benefits from the golf carts and the pro shop. In the hotel, one partner may control the benefits related to the restaurant. The other handles the bar and off-sales. The negotiation of these matters will be shaped by the interests and capacities of each partner.

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#### **4. COMMENCEMENT DATE**

This section indicates when the business and the provisions of this agreement will take effect.

The commencement date is usually some specific event that will trigger the business. If you are operating a catering contract for an exploration company, you will want the business to start when exploration activities do. If your JV involves building roads and maintenance for a mine, things may gear up with the mine's Construction Stage.

Kitsaki's trucking JV had a couple of commencement dates. The first was ninety days after the start of negotiations. This was a pretty tight time frame. They eventually started even earlier under an additional agreement that remained in force until the Shareholder Agreement was worked out six months later.

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#### **5. DIRECTORS AND OFFICERS**

This section establishes

- how many directors the JV shall have, who shall nominate them, and how they shall report.
- who shall nominate the chairman of the board.
- how officers are appointed.

- who shall be the President (the Chief Executive Officer).

Typically, you are assigned directors in proportion to the shares you hold. An ADC that has over 50% of the shares should have the majority of the directors. Be mindful of the powers given to the chair. A chairperson can either have a vote, or can merely preside at meetings and have no vote.

Be very attentive to language at this point, to ensure that you are not unwittingly awarding undue influence to a partner.

If your ADC is to have a minority position in a JV, make sure that the Heads of Agreement includes protective covenants (see below, “**Protective Covenants**,” p. 6-37). The directors and officers have to follow the regulations contained in the Shareholder Agreement, no matter who owns most of the shares. So long as the Shareholder Agreement clearly reflects the ADC's interests, even minority representation on the board will have significant influence.

## 6. CAPITAL

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This section spells out

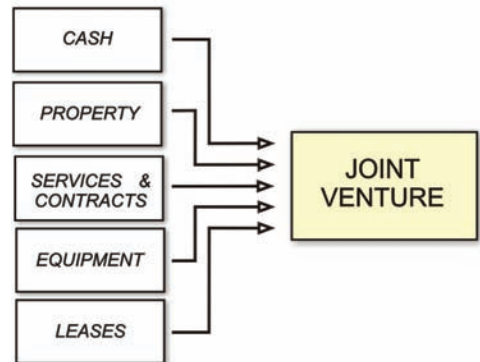
- the responsibilities of the parties to provide capital to the corporation.
- action to be taken, should one party fail to meet its obligations under the agreement.

This is where the parties to the JV tackle the issues of how, when, where, and why capital or assets will be contributed. Where the capital contribution is not in cash, the value is attributed to services and other benefits

brought by that partner. Schedules usually specify the date by which capital is to be contributed and in what form.

Some of the matters to consider in this section are summarized below. (See Diagram 6-1)

Diagram 6-1: Types of Capital Contribution



### **Cash**

Cold, hard cash is the most likely and obvious form in which to contribute capital to a JV. Shareholders might make these contributions only to cover its initial expenses. Alternatively, each partner may have to contribute a lot of cash because of the nature of the project and because it cannot borrow enough money. No lender is going to provide 100% of a venture's cash needs. The partners must therefore come up with the balance.

### **Property**

Contributions may also be made in the form of property. It may be real property, with fee title and on-site improvements and facilities. It may be machinery and equipment required in the business. See the Topic “**7. Equipment**,” below p. 6-28.

### **Services and Contracts**

Sometimes partners have little or no cash or property to contribute to a JV. Instead, they seek to obtain a shareholder interest by offering services to the venture. Organizing the JV or its financing or managing the business are all examples. Such partners essentially sell these services for a price equal to the value of the shares they are allocated.



This occurred when a construction firm was formed to compete for the construction of a new ferry terminal on traditional lands on Vancouver Island. The First Nation managed to negotiate a 20% share of the firm's equity with no exposure to cash calls. From the perspective of the company, it was granting equity in return for marketing and brokerage services.

ADCs may also have experience and expertise to contribute in return for a share in the company. They might offer to negotiate favourable loans or loan guarantees from an ADC. They might also obtain financing from the Aboriginal Business Development Program or arrange federal funding for training.

Parties to the JV may also contribute any contracts they have in hand. Once the net value of these contracts has been appraised, they too can be considered part of the capital contribution.

## **Lease**

A capital contribution may also take the form of a lease of real property. For example, a partner with an option on or title to a piece of property could assign that right to the JV.

Say a marshall yard for a trucking venture is to be built on Aboriginal land. The ADC might acquire a lease from its government at a favourable rental. The ADC could then contribute that lease or assign the lease to the JV in return for a percentage of ownership. The partners then ascribe to the lease a dollar value so that it can be compared to the other capital contributions. This value can be determined by any one of a number of methods, including present value analysis.

## **Timing of Contributions**

Having determined the capital contributions that each shareholder will make, the next likely issue is when each contribution shall occur. This is especially important for contributions in cash. A shareholder may offer \$50,000 to a project, but will only contribute \$25,000 now and \$25,000 in nine months. The agreement must specify when and how these contributions will be made.

## **Defaults**

The agreement must also carefully specify the consequences of a failure to make the agreed contributions. A JV can only proceed on the expectation that the various obligations will be met on time. If certain cash contributions are not made, the project's cash flow and loan arrangements may well be compromised.

## **Additional Capital Contributions**

The JV will start on the basis of a projected Profit and Loss Statement and Balance Sheet. These financial projections clarify assumptions about the project's capital needs and operations. They are only estimates, however. To survive, the venture may well end up needing capital above and beyond these estimates. Therefore, the agreement should indicate how each partner is going to be assessed for additional contributions, if required.

- Will the additional contributions be mandatory or voluntary? If mandatory, state who is responsible for determining a need for additional capital. ADCs with little access to capital must be careful here to negotiate for a protective clause. (See “**Protective Covenants**” below, p. 6-37)

- If additional voluntary or mandatory contributions are made, how will they affect each shareholder's ownership interest? Will it change or remain the same?
- If the ownership interest changes, can it change to such a degree as to alter who controls the enterprise? Even if ownership does not change, the allocation of profits might well change. The partner who made the additional contribution will receive in return a proportionately larger slice of the profit.
- What if a shareholder defaults on his/her commitment to make additional capital contributions? If there is no penalty, a partner may simply refuse. That could jeopardize the JV.

### **Loans by Shareholders**

In addition to capital contributions, or as an alternative to additional capital contributions, shareholders may loan money to the business. Rather than invest money, some shareholders will prefer to lend to a JV. The interest rates to be charged and how the loan will be secured must be worked out. This is called a shareholder loan.

Note that the final agreement should state that such loans are “subordinate” to all the JV's third party debts and liabilities. In other words, if the JV fails, shareholders' loans will be amongst the last to be repaid. (The agreement may also state that these loans will nevertheless get repaid before any capital is returned to shareholders.)

### **Leasing of Property**

Rather than contribute land or equipment, a partner might rather lease it to the JV. The partner can then retain title to the property. This arrangement might also suit the other partner better, if the value of that property could represent an undesirably large share of the JV's ownership. The JV

might also lease the property at market value to allow a more even allocation of shares among the shareholders.

Kitsaki's trucking JV is a good example of the way various forms of capital can be brought into play. The partners blended cash, assets, and contracts to capitalize the venture. It shows how complex this part of the negotiation can get, and reveals some financing innovations.

*In the trucking deal I believe Kitsaki contributed about \$1.7 million in contracts, \$540,000 in capital, and \$150,000 or so in equipment. Taken together, this made for about \$2.3 million in equity. We relied on the government to come up with a cash contribution, too. That put us in a bit of a dilemma. It took the government approximately 26 months to respond to our business plan.*

*In the meantime we were forced to find another way to come up with our capital contribution. There was no way we could come up with it by the due date. But the contracts and equipment we were contributing to the project certainly had value.*

*Our partner was gracious enough to loan us the capital that we needed. (This is a fine example of how a good partner can help an ADC get financing that is otherwise unavailable.) Naturally, we had to repay the loan with interest. This could have left us in a vulnerable position. If we defaulted on our payments, they could shut us out of the business. But since provincial policy required northern or Aboriginal participation in businesses in the mining sector, that option would hurt them as much as it would us. Without an Aboriginal partner, they weren't going to do business with that mine at all.*

*In the end, they made a fair amount of money from us in interest. When the money finally did come in from the government, we were able to cash it out very happily with benefits to spare.*

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## 7. EQUIPMENT

This section normally deals with

- the acquisition, lease, use, trade, and loan of equipment to the JV by either party or from some outside concern (as well as its disposal).
- methods of valuation, compensation, depreciation, and use.

This section is in a way a part of the capital section. However, machinery and equipment have other aspects that require attention, over and above their value as capital contributions. A comprehensive and thorough Due Diligence must check every claim a party makes about equipment s/he intends to contribute. An independent assessment of the value of the equipment is necessary. Standard industry rate structures for renting or leasing equipment are also needed.

Again, Kitsaki's experience illustrates the principles to apply in any JV negotiation to which parties bring existing assets.

*Each party to Kitsaki's trucking Joint Venture contributed some pieces of equipment, and leased or rented others. The equipment was of varying ages and conditions and in various stages of depreciation. There were two basic questions for the negotiators:*

- *How is each party to be compensated for its equipment?*
- *What shall be the ground rules for using this equipment in the business?*

*If the equipment is contributed capital, the parties must agree how its value is to be assessed and recognized in the share allocation. If the equipment is leased or rented, on the other hand, a payment schedule has to be worked on the basis of standard industry rate structures.*

*For the policy regarding the use of equipment, you will have to agree to compensation formulas. When the parties don't make equal contributions, things can get complicated. Sharp operators can overcharge for the use of their equipment. They can also use their own equipment wherever possible in order to maximize their return.*

*Kitsaki didn't have nearly as much equipment as our partner did. They were also to act as the operator. That meant we had to negotiate clauses to ensure that they wouldn't give their equipment preferential use. Compensation was further complicated by the fact we reserved market segments for the exclusive profit of each party. If only one party was to benefit from a haul that required special equipment, that party would also have to see to financing the additional equipment, rather than expect the partnership to.*

*Sometimes equipment leasing or renting to the venture can be straightforward. Both parties benefit proportionately after all costs have been charged against the Joint Venture. This was not the case in our trucking venture! If equipment issues are important to your Joint Venture negotiation, consider making available to your team someone with detailed technical knowledge.*

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## 8. ALLOCATION OF PROFITS

This is generally the most interesting and the least straightforward section of the Heads of Agreement. An agreement may start out dividing profits equally. It gets complicated by the parties' other businesses or contracts, by their special equipment, or by their relationships with other firms.

The simplest basis for the allocation of profit is share ownership. Say an ADC holds 60% of the shares and its partner holds the rest. If there was a \$100,000 profit,, the ADC would get \$60,000 and the partner would get \$40,000.

But the scope of the business and the benefits contributed by each party can add “wrinkles” for the negotiators to iron out.

Say one partner wants exclusive access to benefits from a certain market segment for a period of time. For example, one partner might contribute a marshalling yard to a trucking JV. That partner might then claim a certain percentage of the profits for the use of the yard.

Then again, you may have a business that you want to expand with the assistance of a minority partner. The intended partner is poor in cash, but rich in management or marketing expertise. If the distribution of the JV's profits is based only on contributed capital, that firm may not be interested. To sweeten the deal, you could agree to make the profit allocation reflect expertise as well as contributed capital. Alternatively, make this minority partner responsible for the most lucrative part of the business. Then they could get more of the profit from that area, but less of the profit from other areas.

Kitsaki's trucking JV reserved market niches for each partner. (See Topic “**Scope of Business**” above, p. 6-18).



As a result, the division of profits had to be very complex. Kitsaki's partner reserved for itself most of its existing markets and contracts north of the 54th parallel. When those contracts expired, the JV could then try to renew them. If it renewed them, the standard profit-sharing formula would apply.

Critical to the successful negotiation of this section is your ability to put yourself in your partners' shoes. Negotiators must acknowledge the benefits that each party brings to the table. To move the discussion along they must remain committed to Win-Win.

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## **9. MANAGEMENT & STAFFING**

This section normally explains the appointment of management. It specifies

- which party nominates or seconds management.
- the approvals which are required.
- the compensation to be paid.
- the general intent of the parties regarding hiring and training.

One of the most important provisions for ADCs is the definition of management and decision-making procedures. Generally, non-Aboriginal partners will claim the authority to make most or all decisions on account of their experience and skills. Indeed, ADCs will often be looking for partners with a track record in managing the type of business under consideration.

This is a section where the ADC must be very clear about what it wants. How high in priority are profits, compared with jobs and management capacity?

If management capacity is high in priority, the ADC must work out in some detail the meaning of this commitment.

Perhaps no Aboriginal manager is available or is likely to become available in the very near future. In that case, it may be wise to add a provision that the JV will hire a qualified candidate if and when one becomes available. (See Module 5, “**Employee Evaluation and Advancement**,” p. 5-10.)

*You have to be fairly careful about your philosophy when the section on management and staffing. From the beginning, control your expectations. Act to secure a management and workforce that can carry out the duties of the business in a very competitive and profitable way.*

*Our practice at Kitsaki was to view staffing as an important opportunity to get Aboriginal people employed. We did not insist that they get every job, however. We often didn't have anyone qualified to fill a position. In those cases, we went for a qualified, experienced person provided by the partner or recruited further afield.*

*Nearly always Kitsaki relied heavily on management appointed from our partner. We just didn't have access to experienced Aboriginal management for any of our Joint Ventures. In most cases, things worked out regardless.*

*We felt we should create opportunities. First Nation members who made themselves equal to the opportunities could expect to go to work. This meant hiring members wherever possible. Kitsaki went to considerable effort to find qualified candidates and to put together training programs so members would qualify. What we didn't want to create was the expectation that anyone was entitled to a job by virtue of being a member of the First Nation.*

*Likewise, we made sure the agreement expressed our long-term intention to have Aboriginal managers. There*

*was no time schedule, however. Management is challenging and requires great skill. Management talent cannot be expected to develop on a schedule set at the time of a Heads of Agreement or Shareholder Agreement. Therefore, I recommend that Aboriginal management always be included as an aim and as an intent, but never as a scheduled requirement.*

*Over the years, the First Nation realized that if profit was a priority, they had to be particular about management. It is possible to find or to train competent Aboriginal management, but it will certainly take time.*

*Finally, remember that good intentions pave the road to hell. Be sure to back up good intentions about training with money. Earmark a specific percentage of your annual profits or operations budget to training. In the case of the trucking venture, we set aside at least 1%, which is a good rule of thumb. It may not be adequate in specific circumstances, however.*

## **Management Internship Programs**

If you want the JV to build Aboriginal management capacity, internship programs become another matter for negotiation. This discussion can be tricky. Your intended partner may well resist the whole idea. They may consider it a drain on time and energy that will make it more difficult to make decisions quickly and flexibly.

To overcome this resistance, be realistic about the demands of management and about the size of the current pool of internship candidates. Specify the skills and attitudes a management intern must have. Specify the level of performance s/he must attain at the different levels of a demanding training process. Specify the responsibilities that the intern would assume at each level of this training process.

In some businesses, the training process could take years. Good management does not grow overnight. In a longer term JV it makes complete sense to capture this benefit. If your JV is short-term, however, you will have to pursue management development very deliberately in order to achieve your goal.

A small mine may operate for only 3-7 years. That is a very short time frame for JVs based on the mine's downstream opportunities. It may be very difficult to negotiate provisions for management development within such a short time frame. In this case, the experienced partner may not necessarily be interested in investing in management development.

To ensure that a transfer of key skills takes place, the ADC has to pin down its partner's training responsibilities at the outset. A training syllabus could be drafted. It should indicate how the training program will be implemented over the various phases of the project, including the skills to be transferred. It also should detail which member(s) of the Aboriginal community will be the trainee(s) and who is to do the training.

### **Other Staffing Issues**

The leeway you grant the manager in appointing other staff depends on how familiar you and your partner are with the business sector. If it is new to your partner, be watchful, no matter how experienced that partner may be in other businesses.

*If the business is one that your partner has done before and done well, you can usually take their staffing recommendations at face value as well as their methods for costing contracts and what not. Just be sure to scrutinize their track record and to familiarize yourself with industry standards.*

*If the business is similar to one that your partner knows, but has new constraints or circumstances, it's a different story. Examine your actual staffing needs very carefully. Leave management lots of flexibility, but be ready to closely monitor staff costs and performance from the board level. Make sure you can find out exactly what you're getting from each staff position. Be careful about the authority you give the manager to commit funds, to make purchases, and to borrow money. Know the "approval levels" current in the industry, that is, the dollar amounts at which management requires board approval for a decision.*

*The agreements you reach about management can be written into the Shareholder Agreement, or they can be put in a separate management agreement or contract. Personally I favour the idea of a management contract. It is far easier to change than a Shareholder Agreement if circumstances warrant. Changing a Shareholder Agreement can be nearly as sticky as changing the Canadian constitution.*

See the "Issues in Joint Venture Management" below, p. 6-41.

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## **10. FINANCIAL REPORTING**

This section specifies

- the what, where, when, and how of financial reporting.
- when and under what circumstances audits will be performed.

Specify what you want to see from the JV by way of cash flows, capital, year-end budget, pro formas, profits and losses, and balance sheet. Also specify how regularly you want them.

Let common sense and the nature of the JV guide your decision about the amount of reporting. It goes without saying that you must have monthly statements. Bi-weekly reports may be useful in some businesses. Seldom do owners require information more frequently than this.

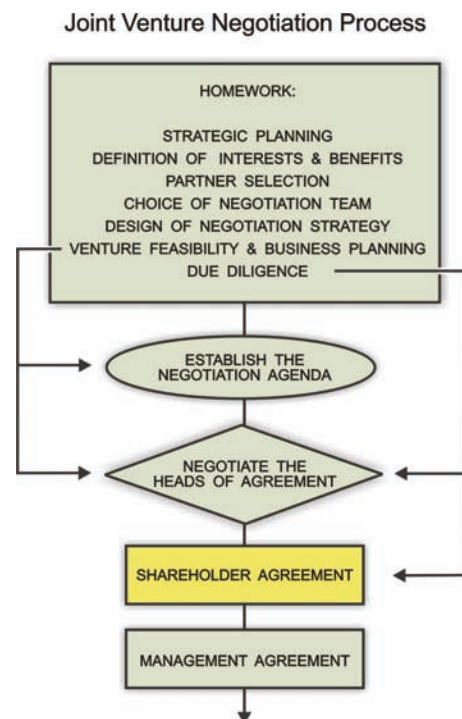
Do not confuse “financial accountability” with an urge to know the daily or weekly operations of a business. Too much financial analysis is devoted to the quarterly performance and cash flows, instead of a corporation’s annual and long-term financial performance. Since the 1970s, managerial performance has been measured increasingly against the previous quarter. Knowing “more and more about less and less,” people have lost sight of the bigger picture. To help you decide what you want and how often, take a look at the industry’s standard procedures.

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## 11. SHAREHOLDER AGREEMENT

This section reiterates and defines the standard provisions of the Shareholder Agreement. It also highlights other matters of importance which the parties have not covered elsewhere (see for example, “**Protective Covenants**” below, p. 6-37).

The shareholder agreement puts into formal legal language all the important benefits and protections that you expect to get from the JV. It is far more significant than any number of decisions that you may later get from the board of directors. Having a seat or several seats on the board has its value, but the Shareholder Agreement takes pre-eminence in the end. Skillfully assembled, it should protect against even the most malicious partners. (See **Appendix 6** for a checklist of headings in a Shareholder Agreement.)



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## 12. PURPOSE OF THE HEADS OF AGREEMENT

This final passage usually outlines the subjects of further negotiations between the parties. It sets limits to the rights of claim or action by one party against the other. It also serves as a guide to each party's attorney in the preparation of the Shareholder Agreement.

In reality, this section makes it formal that the parties agree that

- a definitive Shareholder Agreement will be drafted.
- negotiations will continue as specified.
- confidentiality and exclusivity will be maintained.
- the parties will do all the things necessary to prepare the business for its date of commencement.

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## PROTECTIVE COVENANTS

Aside from the standard 12 headings, Heads of Agreement often include clauses that report additional matters to which the parties have agreed. Most of these clauses take the form of “protective covenants.”

Protective covenants modify or restrict the behaviour of the parties in order to channel benefits to one or the other of them. It is often appropriate for the covenant to indicate the consequences or penalties, should a party fail to live up to the covenant. As parts of the Heads of Agreement, protective covenants are included in the Shareholder Agreement. There, backed by the power of the law, they become powerful means for constraining the actions of a JV.

Protective covenants can be written at any stage of the negotiation of the Heads of Agreement. Anything of particular importance to a party can be specified. If training is a significant part of the deal, for instance, a covenant



about work force preparation could be written. The same would apply if downstream benefits or environmental safeguards became an important part of the discussions.

Let's say a First Nation development syndicate organized itself as a corporation in order to negotiate a deal with a mining company. The syndicate put together enough capital to take a 6% share of the mine's ownership. Its advisor observed that under normal circumstances, any partner with 4.9% or more of the shares is subject to cash calls. (In mining you may not even be protected from cash calls with less than 5% of the common shares.)

What to do? The syndicate could reduce its equity to less than 5%. It might also be possible to negotiate for preferred shares. (While non-voting, preferred shares do not subject their owners to cash calls. If it had special benefits to offer, the syndicate might still secure a seat on the board even as a preferred shareholder.)

Alternatively, the syndicate could negotiate a protective covenant against cash calls.

Protective covenants can also be an effective way to protect the interests of smaller and more inexperienced partners. Picture a JV partner who holds 49% of the shares but is not fully confident about the financial management practices of the majority (or "managing") partner. A protective covenant could instruct that financial reports be provided monthly. Failure to do so would result in the minority partner automatically getting 51% ownership. When the parties sign the Shareholder Agreement, the minority partner's remedy to the potential problem gets the force of law.

*Kitsaki innocently accepted common shares in the trucking deal. In the first nine months a big growth in contracts meant the Joint Venture all of a sudden*

*needed to spend \$1.5 million on trailers. We discovered that we were vulnerable to cash calls to finance those transactions. Fortunately, business was good and our cash flow was strong. We took the money right out of profits.*

*As you can see, common shares can be a 2-edged sword. They look good. They look fair. But you could have your interests just as well served (and maybe better protected) as a preferred shareholder.*

*Say you owned between 40% and 51% of the business. Its cash flow showed you that you were likely to be pretty liquid. Your combination of assets and profits would suffice to finance any unanticipated growth. Then you can go for the common shares. When you only are looking at 1% or 6% of the shares in a large project (like a mine), it's a tougher call. In that case, define all the benefits that you want from the deal and insert protective covenants to guard against arbitrary action by the majority shareholders.*

*Remember: the real source of benefits is your Shareholder Agreement.*

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## **BEYOND THE HEADS OF AGREEMENT**

In the normal course of events, the annotated Heads of Agreement is passed on to the lawyers and they begin to draft it into legal language. Their work will be quicker - and your costs will be lower - if the document has been carefully negotiated and clearly expressed.

A good lawyer will do more than just draft. S/he will carefully review the provisions with your interests in mind, and may recommend changes. Do not select for this task the regular lawyer the ADC has on retainer. That person may be very conversant in Aboriginal law or general

practice law. What the ADC needs at this point is a corporate lawyer well-drilled in the complexities of structuring JVs. If this specialist does uncover inconsistencies or request more information, the parties should reconvene, settle the issues, and supply the lawyer with the additional instructions.

As before, keep the lawyers out of the negotiating room. You are the one who has to do the negotiating. It does not make sense to pay someone \$300-500/hour simply to sit at the table with you.

### **Five Common Problems at this Late Stage**

Many issues may get missed during the negotiation of the Heads of Agreement, and emerge during the drafting of the Shareholder Agreement. Here are five of the most common.

First, the Shareholder Agreement will require buy/sell or “shot-gun” provisions. These explain when and how one JV partner can swiftly and with minimum liability terminate another partner's participation. For example, one partner may go bankrupt, may decide to sell out, or may want to bring in new and unwanted investors. The buy/sell provisions give the other partner(s) the option to shut that partner out.

Second, lawyers may recommend changing the share structure of the JV. They may recommend this to reduce its tax liability, for example, or to make the business more attractive other investors without reducing the authority of the original partners. To do this, you typically add more classes of share.

Third, the JV's commencement date may have to change. This could change the timing of capital contributions.

Fourth, changes in capital contributions may occur. Say one of the tractor trailers promised to a trucking deal had

an accident. That would mean the details of the capital section would have to change.

Fifth, one partner might have second thoughts about the distribution of benefits. This may not necessarily be a ploy. It may involve an insight which will penalize no-one, and may even bring net benefits to the JV. However, if the partner wants to reopen major sections of the agreement, there could be trouble.

Technically, negotiation is still possible prior to the signing of the Shareholder Agreement. As an agreement in principle, after all, the Heads of Agreement is not legally binding on its signatories. Everyone is free to back out.

The whole negotiating process is designed to progressively narrow things down and achieve clarity. If it suddenly strikes you that the JV does not really fit your interests anymore, despite the fact that you signed the Heads of Agreement, you have to make your discomfort known. Just don't be surprised the "engagement" is broken as a result.

If they have invested a lot in the JV in the meantime, however, your co-signatories may have grounds to take you to court.

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## **ISSUES IN JOINT VENTURE MANAGEMENT**

### **The Management Agreement**

A JV Management Agreement should explain

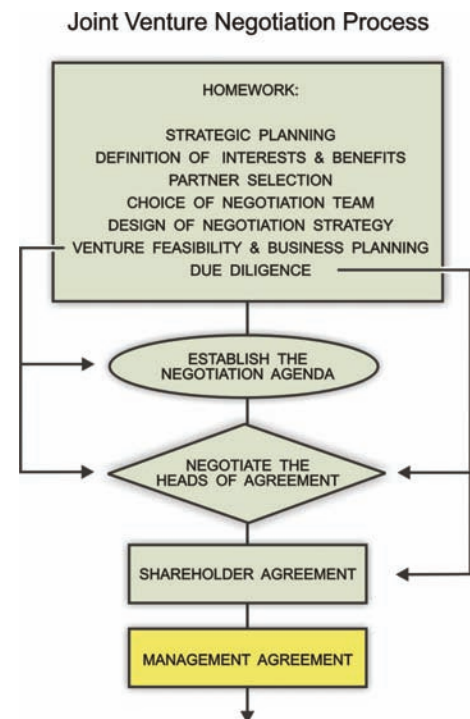
- what is to be reported to whom, when, and in what form.
- management's role in increasing the knowledge and skills of board members.

The management of a JV raises for ADCs the key issue of reporting. Financial reports (see “**Financial Reporting**” above, p. 6-35) are only one of the matters requiring attention.

Once financial reports start to roll in, directors sometimes start to look at the JV merely from a detailed, operational point of view. Having worked so hard to negotiate a Shareholder Agreement, they forget the need to monitor the venture at a strategic level. Moreover, their focus on operational detail may distract them from other, equally important aspects of the Shareholder Agreement, such as environmental practices, or regular reports to the communities involved.

To thwart this tendency right from square one, require an annual audit of the Shareholder Agreement. In short, make sure you are getting what you said you wanted and what is due, under law. You may choose to hire an outside consultant to conduct the assessment. You will probably have to cover that cost yourself. (The JV is not likely to, unless it is built into the agreement.) But it will be a worthy investment if it ensures that the benefits negotiated are actually being delivered.

An audit of management should also be built into the management agreement. Are managers performing to industry standards? Are management practices and procedures at the board and managerial level consistent with standard industry practices and the Shareholder Agreement? This type of audit can be carried out as required, but once a year at minimum. Between management audits, it is a good idea for the board to require regular narrative reports from management.



Don't let operational details distract you from the strategic performance of the Joint Venture.

When directors lack experience in the industry, managers must be sure to educate the board about significant issues. This is very important to maintaining quality control. People cannot control management if they do not learn the standards and performance they should expect from the business and its manager.

### **Being an Active and Honourable Partner**

*Joint Venturing can be a lot like hunting moose. It isn't hard to bag one. It can be a lot of fun. But once you've bagged it, you might have to cut it up and hump it out. Maybe in three foot of water in a swampy river delta, no less. Then what will you do? The same applies to Joint Ventures. It's easy enough to target one. Doing a good deal requires people with the skill and character to carve things up and carry them out.*



Being a good JV partner means actively adding value. If you want to build a reputation as an honourable partner (a very important asset if you want to build a more self-reliant community), don't sit back and expect management and your partner to do everything. The Aboriginal partner needs to commit to building a successful business.

How is this done? In the case of its trucking JV, Kitsaki used their northern networks to hunt out contracts. They also helped bring those contracts in. This built a lot of respect for Kitsaki as a partner. That is how the ADC created so many JVs and Gross Revenues of well over \$50 million in a relatively few years.

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## **JOINT VENTURES – ONE STRATEGY AMONG MANY**

JVs are a way of doing business that, if used strategically, can enable Aboriginal communities to build greater self-reliance.

ADCs are working in a context where time, talent, and resources are constrained, and where the need to generate economic benefits is great. JVs are an important strategy for maximizing benefits while reducing risks. Also, in opportunity-rich environments, they can make Aboriginal businesses more numerous and sustainable.

What JVs offer is a way of organizing businesses without requiring ADCs to become experts in every business, every time. Instead, ADCs can concentrate on becoming expert in managing the development process, particularly in strategic thinking, brokering, and deal negotiation. Done well, JVs will have a long-term, positive impact on the capacity of ADCs to deliver four major types of benefit to their constituencies: profits, management, jobs, and training.

Nevertheless, JVs are not a quick fix to all the challenges that Aboriginal communities face as they build their self-reliance. The organization and management of a development corporation are crucial to weaving JVs into a sustained, long-term strategy. Human resource development strategies and programs that build the skills and job-readiness of community members are critical in both the short and the long term. Small business and entrepreneurial development also have an important role to play in some communities and regions.

That said, JVs, properly negotiated and implemented, can be an excellent way for Aboriginal communities to increase their capacity to plan and build economic futures suitable to the values, priorities, and needs of their members.





## Module 7 Key Lessons

The Aboriginal Mining Guide explains how Aboriginal communities can capture lasting benefits from Socio-Economic Participation Agreements (SEPAs) and Joint Ventures (JVs) in the mining sector. The Guide explains how to decide if mining fits with a community's long-term interests. If there is a fit, the Guide explains how to prepare for SEPA and JV negotiations, how to conduct them, and how to implement them. Five case studies and other examples in the Guide help to define best practices in SEPA and JV negotiations, and the consequences of not following best practice.

Mining geologists in Yukon.  
Photo permission of Alexco  
Resource Corporation.

Of all the lessons learned so far from the experiences of Aboriginal communities in these types of negotiation, 7 seem most important:

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### 1. BUILD RELATIONSHIPS

The experiences of Makivik and Falconbridge, of Inco and the Innu and Inuit, and of NaCho Nyäk Dun and Alexco all have the same message: the stronger the relationship that a mining company and an Aboriginal community develop, the more likely it is that a SEPA or JV will succeed.

Better agreements result when all the parties to the negotiation act in good faith, try to understand each other's interests, and make sure there are only winners leaving the table, no losers. Even so, no agreement is perfect. When implementation becomes a challenge, a positive relationship between an Aboriginal community and a mining company will help them to deal with issues more swiftly and to everyone's satisfaction.

Threats, rejecting the interests of other parties, or condemning their motives – these options are only worthwhile when you are certain that the others are deliberately disrespecting your rights and interests. This option may cause the other parties to stop and reconsider their actions. It may also cause them to retaliate. If you use it, be prepared to forgo an effective business relationship with the other parties.

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## **2. KNOW YOUR LEVERAGE POINTS AND YOUR RIGHTS**

The mining industry has an enormous sense of entitlement to explore and exploit resources on Crown land. Some industry representatives respond to any challenge to this entitlement with indignation. They assume the long-term interests of the industry are compatible with Aboriginal communities.

The legal basis for the industry's self-confidence is now in doubt. In Yukon, Final Settlements are awarding both surface and sub-surface rights to Aboriginal communities. The YESAA establishes an important role for Aboriginal communities in the environmental assessment process that must precede industrial development on traditional lands.

Other territories and provinces are also taking Aboriginal title more seriously, before and after land

settlements have occurred. Court decisions in B.C. and Yukon have placed limits on what corporations, of any kind, can do on traditional lands without Aboriginal approval. These decisions may not carry the same weight in other jurisdictions. Nor do these decisions cancel out the great influence that industrial corporations enjoy because of their skills, experience, and wealth. (See [Module 3](#).)

What this legislation and these court decisions all do is clarify points of Aboriginal leverage: the events in the development process at which Aboriginal approval or co-operation is a substantial benefit to offer a project. Access to the land, water permits, and environmental and social impact assessment are three major points of leverage. By knowing their points of leverage, Aboriginal communities that want a role in mining can decide when to “sell” the benefit of their approval or co-operation, and under what terms.

This may not always be possible. Some mining companies may still reject the value of this benefit and prefer a confrontation with an Aboriginal community. More likely, however, mining companies nowadays will weigh the value of this benefit against the risks of rejecting it. Delays in development and public disapproval of their actions both can have a serious effect on the share values of mining companies.

By understanding your points of leverage as excellent opportunities to sell benefits, it is possible to realize strong relationships with mining companies and lasting benefits for Aboriginal communities. That assumes, of course, that you already have determined that mining has a role to play in building your community’s future.

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### **3. WORK OUT YOUR VISION AND BE REALISTIC IN YOUR EXPECTATIONS**

When a mine comes to an area, some community members may believe that it will automatically create jobs, contracts, and money. Others may see only the problems the mine will create. In reality, the mine will likely create both. To gain more of the possible benefits and reduce the possible problems, community capacity is key.

“Capacity” refers to the people, skills, organization, and systems that enable the community to set targets, marshal adequate resources, and carry out decisions quickly and efficiently. Capacity is generally built up over time by reinvesting the experience, skills, and profits gained from one business or project in other ones.

To build the capacity to deal with mining, however, a community starts with policy decisions on four “strategic issues.” They express

1. its vision of its future quality of life, and what role – if any – mining might play in that.
2. its determination to realize from mining a full range of benefits, long-term as well as short-term.
3. Its intention to apply profits to the community’s long-term needs as well as its immediate needs.
4. Its readiness to collaborate with outsiders when necessary in order to get additional capacity.

By looking first at this vision, and the values and priorities on which it is based, communities can judge how much mining can actually contribute to their future. If mining does have something substantial to offer, then attention must be paid to acquiring benefits that advance the community’s long-term interests as well as its short-term ones. The acquisition and reinvestment of profit by and for the community is crucial to those long-term interests. So

too is the will to work in partnership with outsiders. No community can “do it all.” By closing gaps in the community’s capacity, outsiders can put within reach a much wider range of opportunities to capture benefits.

Once these four policy decisions are made, you will have a better understanding of how mining can contribute to – but not guarantee – your community’s self-reliance. You will be better able to target the benefits you want, to sell the benefits you have, and to protect what your community values. In short, you will be better prepared to achieve agreements that bring the most benefits possible with the least risk.

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#### **4. INVOLVE THE COMMUNITY IN DECISION-MAKING**

Negotiations with mining companies are often very hard work. If you don’t have the community on your side during negotiations, the work is even harder. Moreover, an agreement that is not well-received by the community may be very difficult to implement.

This breakdown in community confidence and support can occur for several reasons. If negotiations had to take place quickly, there may not have been enough time to keep people informed. If negotiations involve technical details that are difficult for the negotiators to understand, communication with the community may also fall by the wayside. The negotiators are embarrassed to show how much trouble they themselves have with the information.

By involving all residents in the discussion of the four strategic issues, everyone gets a chance to have his or her say about the community’s future. This will bring about greater buy-in when decisions are made regarding development. It will also help keep communication lines open and the community well-informed and supportive during SEPA negotiations.

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## **5. BE A FULL PARTICIPANT IN AN AGREEMENT'S IMPLEMENTATION AS WELL AS ITS NEGOTIATION**

The SEPA is a living document. Like a plant, it must be tended and watered with close attention. It must also adapt and grow as project realities and opportunities change over time. Much the same applies to a relationship with a Joint Venture partner. Neither “just take care of themselves.” The value of the best negotiation is seriously jeopardized when skill and energy is not invested in the agreement’s implementation, dispute resolution, and amendment.

To a great degree, effective implementation depends on the provisions of the agreement itself. It must establish the benchmarks for progress, the authorities who will track them, and procedures for bringing forward and addressing complaints and suggestions. But effective implementation also depends on capacity. Members of Aboriginal communities must steadily deepen their knowledge of mining, its technical language, and implementation procedures in order to “level the playing fields” on which its representatives and those of the mining company meet. The greater the knowledge an Aboriginal community has regarding the mining industry and the terms of the agreement itself, the better the results that an agreement can realize.

This is particularly the case in light of the turnover of mining company staff. The senior corporate officials involved in SEPA negotiations may move on to other projects during implementation or before it even starts. On-site mine managers may not understand why certain commitments appear in the SEPA or the context in which they were negotiated.<sup>i</sup> Over time, the Aboriginal signatories to the agreement may be the only ones who remain “on location.” Their intimacy with the agreement



and the history of its implementation will be very important to its subsequent success.

Of course, turnover is common among Aboriginal leaders, too. So make a point of documenting how and why you arrived at each provision of the agreement. Future leaders can then review this record and realize the importance of implementing the entire package.

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## **6. DO NOT FINALIZE A SEPA NEGOTIATING STRATEGY “ON SPEC”**

It's never too early to start building relationships with mining companies. There are significant benefits to cull at the Exploration Stage through Joint Ventures, even if a mine does not go ahead. (After all, most do not.) That's why it is wise to have an Engagement Protocol completed in advance of requests or proposals from exploration companies. Having the rules available will help these relationships get off on the right foot.

It is possible to decide too early on your SEPA negotiating strategy, however.

A mining company only needs to negotiate a SEPA once the Bankable Feasibility Study is finished. The Bankable Feasibility Study compiles all the projections that financial backers (bankers or investors) require to make their decisions about how much money to risk on the mine. In order to reassure them, the mining company wants project certainty. The company's need for an agreement with the Aboriginal community is therefore most urgent – and the community's leverage is therefore highest.

Prior to the completion of the Bankable Feasibility Study, it may be unwise for you to devote a lot of time and effort to finalizing a negotiating strategy. You will be spending that time and effort “on spec.” A great many crucial facts and



figures about the mine will still not be available to you. If a Bankable Feasibility Study is not forthcoming, the mine will not go forward. You will probably have learned a lot, but your planning will have been wasted.

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## **7. THE MINING SECTOR IS GETTING HARDER TO PREDICT, NOT EASIER**

Due to global demand for mineral commodities, to climate change, and to the rising cost of fossil fuels, nearly everything about mining will “take off” in the coming ten years. Mining opportunities, returns, risks, and costs can all be expected to rise. The interests of Aboriginal communities and of the natural environment will enjoy much more leverage when mining decisions are made. But the sector itself will be even more unpredictable than it has been in the past. You are fully justified in taking great pains to weigh what mining will do *for* your community and what it might do *to* your community.

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## **ENDNOTES**

<sup>i</sup> Virginia Valerie Gibson, “Negotiated Spaces: Work, Home and Relationships In The Dene Diamond Economy,” Thesis submitted to the University of British Columbia, Department of Graduate Studies (Mining Engineering), May 2008, p. 1120. 17 August 2009  
<[http://www.impactandbenefit.com/ubc\\_2008\\_spring\\_gibson\\_virginia.pdf](http://www.impactandbenefit.com/ubc_2008_spring_gibson_virginia.pdf)>.



## Appendices

### **APPENDIX 1: ABORIGINAL COMMUNITY POLICIES, GUIDELINES, AND PROTOCOLS IN CANADA**

These principles govern the community's approach to negotiations on mining and other areas. In general the development principles require that:

- The development not pose a threat of irreparable environmental damage.
- The agreement not prejudice outstanding Aboriginal claims.
- There will be more positive social benefits than negative
- There be opportunity for education, training and employment.
- There be provisions for equity participation.
- There be opportunities created for the development of Tahltan businesses.

There is a formal commitment by the developer to assist Tahltans in accomplishing these objectives.

#### **Guidelines for a respectful relationship between the Innu Nation and the mineral exploration industry.**

A respectful relationship requires companies and individuals involved in mineral exploration activities in Nitassinan to recognize and incorporate these guidelines in their dealings with the Innu Nation:

The Ekati mine landfarm, where hydrocarbon-contaminated soil is stored and treated. Photocredit: Independent Environmental Monitoring Agency.

1) that the Innu are the original inhabitants of this land. They have rights protected under the Constitution Act (1982), which include priority rights to lands and resources. These rights are the subject of ongoing land rights negotiations involving the Innu Nation, Canada and Newfoundland, and the Labrador Inuit Association. Mineral exploration which is carried out in Nitassinan without Innu consent is prejudicial to Innu rights;

2) that the Innu people continue to depend on land for foods, well-being, and spiritual and cultural values. The Innu Nation requires accurate, complete and timely information at all stages of exploration activities to decide if their rights are being affected and to determine how they can be protected. Companies must commit to full disclosure of information about their activities and must be willing to provide assistance to ensure that the Innu can undertake independent assessments of these activities;

3) that the Innu people have the right to determine the social and economic future of their communities. There must be a commitment from companies to respect the aspirations of the Innu people, including their choices of employment and vocation, and the uses of their land. If requested by the Innu Nation, companies must be prepared to offer preferential training, employment and business opportunities to Innu people in a manner acceptable to the Innu Nation;

4) that Innu harvesting activities take precedence over other uses of Nitassinan and accordingly must be afforded first consideration in planning exploration activities and siting camps. This is consistent with the Sparrow line of cases in the Supreme Court of Canada;

5) that exploration activities may have a negative impact on Innu cultural, historical and spiritual sites. The Innu Nation must be involved in an archaeological survey of

any areas that may be affected by exploration activities prior to the commencement of such activities to ensure that historic or cultural resources will not be affected prior to siting a drill or camp site, cutting grid lines, etc. In the event a burial or archeological site is identified during operations, companies must suspend operations and contact the Innu Nation to determine what action is appropriate;

6) that there is very little available environmental baseline information for most of Nitassinan, but that the Innu people have knowledge about the environment and ecology of Nitassinan which is based on thousands of years of collective experience. Innu ecological knowledge must be incorporated into planning, management and operational decisions in a manner acceptable to the Innu Nation;

7) that because the potential impacts of exploration activities may have negative effects on the Innu people and the land, water, wildlife and plants that they depend on, companies must adopt strict environmental protection practices acceptable to the Innu Nation to avoid or prevent such impacts. In cases where there is insufficient data regarding potential impacts, exploration activities will not be initiated until there is adequate data to ascertain the nature and severity of the impact;

8) that the cultural, ecological, social and economic impacts of exploration activities may not be restricted to the immediate area and duration of a specific project. Companies must recognize that because of the intensity of exploration activities and other developments in Nitassinan, consideration must be given to cumulative effects.

9) that certain areas because of their cultural importance or ecological sensitivity may be designated by the Innu Nation as protected areas. Protected area networks are

essential contributors to cultural integrity, environmental health, landscape and biological diversity, and ecological processes. Companies must respect these limitations on exploration activities;

10) that because of the intensity of mineral exploration activities in Nitassinan, a comprehensive approach to cultural and environmental protection is required. The mineral exploration industry as a whole must commit to supporting mechanisms for comprehensive studies and the meaningful participation of the Innu Nation in the interim regulation of mineral exploration and development;

11) that the Innu Nation must be consulted and involved in environmental data collection, monitoring studies and identification of mitigation measures related to environmental assessment of exploration activities or potential developments;

12) that the Innu Nation must be consulted and involved in monitoring mineral exploration activities in Nitassinan. Companies should be prepared to fund and facilitate site visits by Innu observers to their camps and exploration sites to encourage good communication and to ensure that activities are proceeding in ways that are respectful of Innu rights and the environment;

13) that where there is damage caused by exploration activities, companies must be responsible for the costs of any cleanup, restoration, reclamation or enhancement work required.

An expanded version of the guidelines entitled “Mineral Exploration in Nitassinan: A Matter of Respect: Innu Nation Guidelines for the Mining Industry” is available online at [http://www.miningwatch.ca/sites/miningwatch.ca/files/Innu\\_guidelines.pdf](http://www.miningwatch.ca/sites/miningwatch.ca/files/Innu_guidelines.pdf)

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(709) 497-8398 Fax: (709) 497-8396 Email:  
innuenv@web.apc.org.

### **Handbook for Mineral Exploration Companies Operating in Nunavik, Quebec**

The Inuit of Nunavik have published, through their Nunavik Mineral Exploration Fund Inc., a handbook which is primarily a list of contacts for permits required by mining companies operating in Inuit lands.

### **A Guide to Mineral Exploration and Development on Inuit Owned Land in Nunavut** (revised January 2000)

The Inuit in Nunavut have established a comprehensive set of directions to help guide mining exploration and development on Inuit-owned lands. While the guide has no legal force, the rights of third parties on such lands are governed exclusively by agreements or licenses that are based on compliance with the guidelines.

The detailed guide can be found online at  
<http://www.ntilands.com/pdfdoc/guide.pdf>

### **Guidelines for Environmental Assessments with Indigenous People**

The Centre for Traditional Knowledge in Canada has created an extensive set of guidelines for undertaking environmental assessments targeted at Indigenous peoples, corporations and governments (Emery and Patten 1997). These guidelines are excellent and could be applied to mining operations.



### *Guidelines for Indigenous People*

1. Form a Representative Group:
  - Choose team members according to skills
  - Community needs to have legal status
2. Predict all the impacts of the project:
  - Good predictions mean good decisions
  - Include women and women's knowledge to improve predictions
  - Be skeptical of predictions of great wealth
  - Leave broad margins of error in predictive modeling
3. Don't be left out:
  - Be alert to new projects
  - Don't just refuse to cooperate when decisions have pre-empted your authority— find out what legal recourse is available
  - To be effective, participate fully
  - Establish financing for your participation
  - Train to be involved in the assessment
  - Participation by women will improve the assessment
  - Use communication techniques to meet your needs
  - Work with the media: Be message-driven, not question-driven
4. Know the rules:
  - Government sets the rules, the Corporation defines the process
  - Establish your own spokespersons
  - Enhance your power base: include others such as national and regional Aboriginal groups.
  - Ask lots of questions
  - Translation is important, particularly for elders
  - Women help interpret the rules
  - Negotiate the timeline
  - Preserve/record your customary Aboriginal rights



5. Use your traditional knowledge, don't give it away:
  - Transmit traditional knowledge on your own terms
  - Distinguish between ancient and modern traditional knowledge
  - Participatory use of traditional knowledge can be better than selling it
  - Traditional knowledge of women is often invisible
  - Become a legal entity
  - Shape your traditional knowledge access agreements carefully
6. Insist on your rights, know your bottom line:
  - Know your rights
  - Safeguard your rights
  - Settle the question of land ownership before you agree to the project
  - State your limits to the project
  - Do a cost-benefit analysis of the project for the community and the corporation
  - Third party arbitration can help
7. Find out what the corporation knows and how it operates:
  - Classify land use from your perspective first
  - Challenge scientific findings
  - Create a report card on the corporation's past
8. Know what you need:
  - Get a technical summary
  - Prepare a community list of questions
  - Hire someone you trust to interpret science-based knowledge
  - Protect your community from societal impacts of alcohol, drugs, diseases, migration to cities
9. Find out what the corporation wants from you. Begin a full dialogue:
  - Establish how the dialogue will proceed

- Establish needs for necessary background information
- Set agendas together with the corporation
- Alternate chairing the discussions between the community and the corporation
- Be prepared to provide an explanation of the organizational structure of the community, who its leaders are, what are the community's long-range goals, what is the social and economic makeup of the community
- Ask the corporation to supply an organization chart with the local representatives identified on the chart. Find out how the impact assessment will be done and by whom
- Have the community define what it wants from the project

10. Don't be outmanoeuvred:

- Resist unreasonable demands
- Too little time can lead to poor decisions
- Insist on meaningful consultation, not just information
- Do not allow anyone to undermine the credibility of traditional knowledge
- Do not accept a disregard for community standards
- Insist on open door negotiations including Indigenous peoples, not private negotiations

11. Inform and involve nearby communities:

- Define direct effects
- Define indirect effects
- If you are the neighbour, become informed

12. Communicate directly with government agencies:

- Do not settle for second-hand information – go to the source
- Use international and national protocols

### *Guidelines for Corporations*

1. Local customs and etiquette are important:
  - Carry out socio-economic research on the community before contact
  - Consider training staff who will interact with Indigenous peoples
  - Tread carefully – proper protocol is important throughout the project
2. Predict all the impacts on the community:
  - Define key issues and concerns to save time and money
  - If impacts will be serious, international attention may result
  - Combining science and traditional knowledge markedly improves predictions
3. Don't leave Indigenous peoples out:
  - Include Indigenous peoples right from the beginning to avoid disputes
  - Help the community to become involved – it improves relationships
  - Financing community participation prevents charges of excluding the community
  - Include the community in managing and monitoring the on-going project
4. It's to your advantage to play straight:
  - You need to help the local community to understand the corporation's needs
  - Culture clash can be harmful to both parties – be careful
  - Working with local people is beneficial to both parties
5. Communicate so that Indigenous peoples understand:
  - An empathetic attitude is important to success
  - Work in groups and always use the local language
  - Get the information across in an easy to grasp manner
  - Evaluate the success of your communication:

- Evaluate the progress at regular intervals – can everyone follow the project? Does everyone understand the implications? Are the corporate representatives perceived to be helpful, hostile, competent or out to lunch? Do the men and women participate equally or appropriately for the culture?
- Do it together with local community
- Don't use outsiders unless the community agrees
- Give people the needed time
- You may be a health risk to Indigenous people – be careful

6. Intellectual, cultural, and traditional resource rights:

- Determine the rights of the Indigenous community for your own benefit
- Settle land ownership disputes before initiating the project
- Customary Aboriginal rights need to be settled early

7. Work with traditional knowledge:

- Site-specific traditional knowledge is of great value to the project
- Partner with Indigenous peoples; the value-added is immense
- Traditional knowledge and the work of Indigenous peoples is not free

8. Negotiate based on equity, empowerment and respect:

- Be respectful
- Be sure to include everyone in the negotiation, including men, women and children
- Empower the community through meaningful consultations
- Help the community to define its expectations so you understand them

9. The local community will need complete information:

- Provide a complete report with technical details in plain language
- Provide a cost-benefit analysis
- Reach agreements on the limits of the project

10. Legally correct actions may be dangerous to both parties:

- Do not try to outmanoeuvre the community or try to “divide and conquer”
- Make sure everyone has time to think
- Attempting to undermine the credibility of traditional knowledge is not useful
- Maintain cultural respect for the community

11. Make sure the neighboring communities are informed and involved:

- Joint assessments of impact are important

12. Call for arbitration to get past non-productive situations:

- If relationships erode, try a simple self-examination
- Agree on an acceptable arbitrator

#### *Guidelines for Governments*

1. Establish sustainability policies for natural resources and Indigenous people:

- Set policies to rationalize exploitation of non-renewable resources
- Set policies on the basis of sustainability for renewable resources
- Set policies on the basis of sustainability of quality of life for Indigenous peoples

2. Develop sustainability strategies by involving all stakeholders:

- Good strategies are based on the needs of all people
- Multi-stakeholder negotiations work in many countries

3. Separate government agencies that exploit from those that regulate:

- Regulatory agencies should not have an inherent conflict of interest

- Manage access to isolated Indigenous peoples to maintain their social, cultural and physical health
  - Research the socio-economic background of the community before making contact
4. Enforce the traditional resource rights of Indigenous people:
- Be aware of relevant international statutes and conventions
5. Fund capacity-building among your nation's Indigenous peoples

### **The Inuit Tapirisat Research Principles**

The Inuit Tapirisat of Canada has produced a useful list of principles based on existing ethical guidelines and the concerns expressed by members of Inuit communities. Mining companies wishing to undertake consultations could benefit from adhering to such principles.

1. Informed consent should be obtained from the community and from any individuals involved in research.
2. In seeking informed consent the researcher should at least explain the purpose of the research; sponsors of research; the person in charge; potential benefits and possible problems associated with the research for people and the environment; research methodology; participation of or contact with residents of the community.
3. Anonymity and confidentiality must be offered and, if accepted, guaranteed except where this is legally precluded.

4. Ongoing communication of research objectives, methods, findings and interpretation from inception to completion of project should occur.
5. If, during the research, the community decides the research is unacceptable, the research should be suspended.
6. Serious efforts must be made to include local and traditional knowledge in all stages of research including problem identification.
7. Research must avoid social disruption.
8. Research must respect the privacy, dignity, cultures, traditions and rights of Aboriginal people.
9. Written information should be available in the appropriate language(s).
10. The peer review process must be communicated to the communities, and their advice and/or participation sought in the process.
11. Aboriginal people should have access to research data, not just receive summaries and research reports. The extent of data accessibility that participants and communities can expect should be clearly stated and agreed upon as part of any approval process.

For further information contact: Inuit Tapirisat of Canada,  
Suite 510, 170 Laurier Avenue W., Ottawa, Canada K1P 5V5.

Source: Gail Whiteman and Katy Mamen. "Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector." Ottawa: The North-South Institute, 2002. pp. 97-103. Reproduced with permission.



## APPENDIX 2: SUMMARY OF ABORIGINAL OPPORTUNITIES DURING THE 5 STAGES OF MINING

	Exploration	Feasibility and Planning	Construction	Mine Operation	Closure and Reclamation
Mine Activities	<ul style="list-style-type: none"> <li>Exploration               <ul style="list-style-type: none"> <li>Grass Roots</li> <li>Brownfield or intermediate</li> <li>On mine site exploration</li> </ul> </li> <li>Scoping Study</li> <li>Pre feasibility</li> <li>Advanced Exp</li> </ul>	<ul style="list-style-type: none"> <li>Advanced Exploration</li> <li>Scoping Study</li> <li>Pre feasibility</li> <li>YESA may be initiated</li> <li>Feasibility</li> <li>Mine Closure Plan developed</li> </ul>	<ul style="list-style-type: none"> <li>Financing</li> <li>Mine Plan</li> <li>YESA</li> <li>Mine Construction</li> <li>Processing facility construction and tailings feasibility</li> </ul>	<ul style="list-style-type: none"> <li>Operations</li> <li>Hiring</li> <li>Training</li> <li>Commissioning</li> <li>Expansion</li> </ul>	<ul style="list-style-type: none"> <li>Mine Closure Plan implemented</li> <li>Expansion possibilities explored</li> <li>Resultant Infrastructure analyzed: Roads, Hydro, Buildings, Equipment</li> <li>Required ongoing monitoring</li> </ul>
Major Players	<ul style="list-style-type: none"> <li>Prospectors</li> <li>Juniors</li> <li>Majors</li> <li>Government</li> <li>Contractors/Service Providers</li> <li>Investors</li> </ul>	<ul style="list-style-type: none"> <li>Juniors</li> <li>Majors</li> <li>Consulting Firms</li> <li>Government</li> <li>Financial Institutions</li> <li>Communities</li> </ul>	<ul style="list-style-type: none"> <li>Same as Feasibility except not likely Juniors</li> <li>Equipment Suppliers</li> <li>Construction Companies</li> </ul>	<ul style="list-style-type: none"> <li>Same as Pre-Production</li> <li>Service Providers</li> <li>Schools</li> <li>Industry Associations</li> <li>Customers</li> </ul>	<ul style="list-style-type: none"> <li>Mining Companies</li> <li>Governments</li> <li>Communities</li> <li>Other</li> </ul>
Aboriginal Capacity Building	<ul style="list-style-type: none"> <li>First Nation capacity identified</li> </ul>	<ul style="list-style-type: none"> <li>First Nation capacity identified               <ul style="list-style-type: none"> <li>Funding applications submitted</li> <li>Training plans explored</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Mine training               <ul style="list-style-type: none"> <li>Funding identified</li> <li>Courses in place</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Training underway and modified (if need be)</li> <li>Mining Liaison maintained</li> </ul>	
Common Aboriginal Business Opportunities	<ul style="list-style-type: none"> <li>Digging and trenching with heavy equipment;</li> <li>Tree planting;</li> <li>Construction of camps;</li> <li>Equipment/ vehicle rental;</li> <li>Drilling contracting;</li> <li>Expediting</li> <li>Transportation and freight services;</li> <li>Fuel Supply</li> <li>Camp Services – food accommodation and catering</li> <li>Labour</li> <li>Air Support rental</li> <li>Line Clearing</li> <li>Laboratory Services</li> </ul>	<ul style="list-style-type: none"> <li>Exploration Business Opportunities</li> </ul>	<ul style="list-style-type: none"> <li>Exploration Business Opportunities except tree planting, construction of camps and line clearing.</li> <li>Construction trades and services</li> <li>Heavy Equipment operation</li> <li>Supplying goods and services</li> </ul>	<ul style="list-style-type: none"> <li>Pre-production Business Opportunities</li> <li>Contract Mining both underground and open pit</li> <li>Road Maintenance</li> <li>Recycling</li> </ul>	<ul style="list-style-type: none"> <li>Exploration Business Opportunities</li> <li>Building drainage systems</li> <li>Water sampling and analysis</li> <li>Water treatment</li> <li>Dismantling transmission lines</li> <li>Site security</li> </ul>

	Exploration	Feasibility and Planning	Construction	Mine Operation	Closure and Reclamation
Common Aboriginal Job Opportunities	<ul style="list-style-type: none"> <li>■ geologists</li> <li>■ geophysicists</li> <li>■ scientists</li> <li>■ drill operators</li> <li>■ pilots</li> <li>■ field assistants</li> <li>■ camp staff</li> <li>■ line cutters</li> <li>■ prospectors</li> <li>■ samplers</li> </ul>	<ul style="list-style-type: none"> <li>■ Exploration Employment Opportunities</li> <li>■ Accountants</li> <li>■ Environmental Technicians</li> </ul>	<ul style="list-style-type: none"> <li>■ Same as Feasibility except not line cutters, prospectors and samplers</li> <li>■ Trades helper</li> <li>■ Heavy equipment operators</li> <li>■ Warehouse technicians</li> <li>■ Administrative assistance</li> <li>■ Trades occupations</li> <li>■ Safety coordinators</li> <li>■ Managers</li> <li>■ Engineers</li> </ul>	<ul style="list-style-type: none"> <li>■ Same as Pre-production</li> <li>■ Miners</li> <li>■ Blasters</li> <li>■ Surveyors</li> <li>■ Supervisors</li> <li>■ Trainers</li> <li>■ Clerks</li> <li>■ Computer technicians</li> <li>■ Executives</li> <li>■ Security officers</li> <li>■ Laboratory technicians</li> <li>■ Assayers</li> <li>■ Human resource specialists</li> <li>■ Public relations specialists</li> <li>■ Marketing personnel</li> <li>■ Nurses</li> <li>■ Truck drivers</li> <li>■ Photographers</li> </ul>	<ul style="list-style-type: none"> <li>■ Exploration Employment Opportunities</li> <li>■ Trades personnel</li> <li>■ Equipment operators and mechanics</li> <li>■ Inspectors</li> <li>■ Security and First aid personnel</li> </ul>

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## APPENDIX 3: DUE DILIGENCE

Due Diligence is the procedure through which each party to a joint venture negotiation ascertains (in detail) if the others can bring to the deal all they claim they can. No shareholders agreement should be signed until this work has been done.

Due diligence usually concerns physical, countable assets. Most joint ventures have one or more parties contributing assets and equipment. When an established business is being acquired, the partners are buying shares of real property and assets. In either case, the actual condition and value of the assets in question must be confirmed before negotiations proceed any further.

This attention to detail demonstrates the “diligence due” a deal of such proportions. It will also demonstrate to prospective partners an ADC's capacity for solid research and its refusal to take anything for granted. The same procedure is sometimes extended to investigate the track record and technical ability of a partner. This assessment may be more subjective in nature, but no less important.

Do not sign a Shareholder Agreement until you are *objectively* convinced 1) that the business makes financial sense and 2) that everything your partner says is true, is in fact true.

### **Due Diligence**

In order to undertake a proper due diligence process you or more probably your attorney will have to formally investigate your intended partners, as they will you. The first step in the process is to obtain copies of all pertinent financial and legal documents. Your attorney or accountant should request them, review them, and report their findings to you.

The necessary documentation includes but is not limited to:

1. Articles of incorporation, bylaws, partnership agreements
2. Membership of the Board of Directors.
3. Stockholders (Institutional and personal).
4. List of business locations.
5. All major assets owned by partner.
6. Contingent, short and long-term liabilities.
7. All copyrights, patents, and trademarks.
8. All contracts, licensing agreements, authorities, permits, realty agreements, etc.
9. All insurance policies.
10. Major customers and suppliers.
11. Audited financial statements (last 3-5 years).
12. Income tax returns (3-5 years).
13. Any and all litigation.

A thorough mining due diligence study or mining valuation must examine many critical factors directly affecting the final appraisal by the mining consultant.

The mining due diligence review or mineral mining property provides reasonable assurance of the basis of investment related to purchase, financing, and internal assessment. A mining due diligence scope of work is presented below:

### *Overview Analysis of Property*

- Property - control, lease terms, surface, reliability of title
- mineral - reserve, quality
- mineral mine ability - geology, overburden, previous mining, physical conditions, accessibility, other constraints
- Mine - operations, services, support
- Marketing - transportation, markets, realization

### *Related Studies*

- Legal
- Environmental
- Employee Related Liabilities
- Accounting

### *Evaluate and Select Mining Plan*

- Mining Equipment Selection
- Mine Layout
- Mine Support
- Coal Preparation/Mineral Processing

### *General Cost Analysis*

- Annual Production Capacity
- Mining Requirements
- Capital Expenditures
- Mine Supply Cost
- Mine Production Cost
- Off-Site Transport
- Markets and Transportation

### *Final Valuation*

- Discounted Cash Flow Analysis
- Risks and Sensitivity Analysis

Find a Due Diligence checklist on the four pages following.

## CORPORATE HISTORY

1. Date of incorporation.
2. Purpose.
3. Changes in Corporate identity or purpose.
4. Description of present business.
5. Securities, stocks and classes, and investments.
6. Ownership.
7. Share values and trade activity.
8. Where qualified to do business.
9. Subsidiaries.
10. Review of shareholder and Board of Directors meeting minutes.
11. Legal addressee and locations of all offices, yards, assets and facilities.
12. Financial.
  - 12.1. General.
    - 12.1.1. Authenticity and source of financial data.
  - 12.2. Financial status.
    - 12.2.1. Financial condition of business.
    - 12.2.2. Asset analysis.
      - 12.2.2.1 Cash position (monthly for 2 years).
      - 12.2.2.2 Projection of cash flow (for net 6 months).
      - 12.2.2.3 Condition of receivables (bad debt experience, turnover, and reserves).
      - 12.2.2.4 Working capital.
      - 12.2.2.5 Investments.
      - 12.2.2.6 Any employee or officer loans (what extent, amounts, and situations).
      - 12.2.2.7 Analysis of prepaid expenses and deferred charges.
      - 12.2.2.8 Properties and assets.
        - A. Extent and rate of depreciation.
        - B. Operating or dormant.
        - C. Net value of assets compared to sales.
        - D. Extent and type of insurance coverage.
      - 12.2.2.9 Basis of any goodwill valuation.
    - 12.2.3. Liabilities analysis.
      - 12.2.3.1 Loans (amounts, sources dates, and rates).
      - 12.2.3.2 Payables (policy on payment and discounts).
      - 12.2.3.3 Reserves.
      - 12.2.3.4 Liabilities.
        - A. Existing and threatened litigation.
        - B. Guaranteed notes and obligations.
        - C. Liabilities for large contracts and purchases.
        - D. Pension liabilities.
        - E. Other commitments.
      - 12.2.3.5 Income tax status.
      - 12.2.3.6 Status of real estate and personal property taxes.

## Due Diligence Checklist

### 12.2.3.7 Financial operations.

#### A. Statement of operations (P&L's).

#### B. Sales and income analysis.

- ☐ Sales by contract.
- ☐ Sales by service.
- ☐ Other income.

#### C. Internal controls.

#### D. Cost of sales and gross profits.

- ☐ Amounts and proportion of overhead.
- ☐ Important trends of equipment and labour costs.
- ☐ Analysis of trends in equipment costs.
- ☐ Fixed and variable costs.
- ☐ Profit and gross margins by service.
- ☐ Profit and gross margins on most typical contracts.
- ☐ Suggested economies.
- ☐ Future cost increases.
- ☐ Future increases in cost of purchased assets.

#### E. Analysis of expenses (trends, amounts).

- ☐ Cost of sales.
- ☐ Administration costs.
- ☐ General expenses.
- ☐ Suggested savings in all expenses.

#### F. Analysis of profit from operations.

- ☐ Profits by branches and divisions, etc.
- ☐ Profits by contract category.
- ☐ Deductions.
- ☐ Surplus net profit.

#### G. Analysis of surplus net profit.

- ☐ Profits from other operations.
- ☐ Profits from other sources.
- ☐ Deductions.
- ☐ Final surplus net profit.

#### H. Earnings (10 years).

- ☐ Operational cash gains or losses.
- ☐ Total operational gains or losses.
- ☐ Earnings expressed as % of sales.
- ☐ Earnings expressed as % of invested capital.

#### I. Ten year dividend record.

- ☐ Kind and amount of paid dividends.
- ☐ % of earnings paid out as dividends per annum.
- ☐ Arrears in dividends.



## SERVICES

1. Major classifications and ranked order of importance.
2. Analysis of major contracts.
  - 2.1. Literature on services.
  - 2.2. Description and use of services.
  - 2.3. Competition.
    - 2.3.1. Identity and ranking of principal competitors.
    - 2.3.2. Ranking in industry.
    - 2.3.3. Relative quality and price of services.
    - 2.3.4. Market shares of each competitor.
  - 2.4. Market acceptance and trends.
  - 2.5. Trade name practices and values.
  - 2.6. Status and importance.
  - 2.7. Completeness of services.
  - 2.8. Sales patterns.
3. Markets and Prices.
  - 3.1. Statistics.
    - 3.1.1. Location.
    - 3.1.2. Market shares (local, regional, national).
    - 3.1.3. Trends.
    - 3.1.4. Pricing leadership.
  - 3.2. Characteristics.
    - 3.2.1. Seasonal character.
    - 3.2.2. Influential economic factors.
    - 3.2.3. Stability.
    - 3.2.4. Susceptibility.
  - 3.3. Competitive practices.
    - 3.3.1. Competitive and trade practices.
    - 3.3.2. Extent of other co-operation.
  - 3.4. Price situation.
    - 3.4.1. Industry policies.
    - 3.4.2. Stability of price structures.
    - 3.4.3. Influencing factors.
    - 3.4.4. Trends of prices.
    - 3.4.5. Future outlook.
  - 3.5. Safety.
    - 3.5.1. Hazards.
    - 3.5.2. Liabilities, insurance coverages, and costs.
    - 3.5.3. Existing claims.
    - 3.5.4. Common hazards.

3.6. Equipment.

- 3.6.1. Identify critical equipment.
- 3.6.2. Identify vendors and ultimate sources.
- 3.6.3. Existing and potential shortages and quality problems.
- 3.6.4. Alternative sources and equipment.
- 3.6.5. Inter-division or branch pricing difficulties.
- 3.6.6. Review vendor contracts.

**GOVERNMENT BUSINESS**

- 1. Description of services.
- 2. Status and type of contracts (prime or sub-, and extent).
- 3. Methods of payment and pricing.
- 4. Present competitive situation.
- 5. Future outlook.
- 6. Government appropriations status to fund contracts.
- 7. Possibilities for termination for convenience of government.
- 8. Security status.
- 9. Any government assets among assets.
- 10. Contract compliance issues.

**FACILITIES**

- 1. Land and Buildings.
  - 1.1. Legal description, and ownership.
  - 1.2. Appraisals.
  - 1.3. Surveys, and facilities layouts.
  - 1.4. Possibilities for sales and leasebacks.
  - 1.5. Insurability.
  - 1.6. Condition of buildings, yards, infrastructure, and repairs needed.
  - 1.7. Housekeeping.
- 2. Equipment.
  - 2.1. Description, age and value of major items of equipment.
  - 2.2. Special equipment specifications.
  - 2.3. Flexibility and adaptability to other work.
  - 2.4. Condition and ownership of equipment.

**OUTLOOK**

- 1. Earnings prospects for share.
- 2. Return on capital required to operate Corporation.
- 3. Cash flow projections.

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## APPENDIX 4: SOME ACCOUNTING BASICS

There are four main ways to calculate how much money businesses make in the course of a fiscal year. Each calculation results in a different dollar amount. When negotiating financial provisions with a mining company, you must decide which of these calculations will be the basis for your discussions.

### *1. Gross Revenues*

This is the most simple of the three calculations. Gross Revenues (or “the Gross”) is all the money a business earns from the sale of its products during a fiscal year:

\$ Value of goods sold in the fiscal year = **Gross Revenues**

Gross Revenues is a higher figure than the other three because no money is deducted from it. For that reason, some Aboriginal groups now negotiate for “a percentage of the Gross.” Mining companies are against using Gross Revenues when negotiating the financial provisions of a SEPA. The Gross does not show how much money it takes to run a business. Mining companies therefore argue that the Gross is an unfair basis for calculating a variable cash payment.

### *2. Annual Operating Profit*

This calculation subtracts from Gross Revenues two types of cost. First come the Variable (or “Direct”) Costs. This is the money the business spent directly on making the product, like wages, fuel, and raw materials.

	Gross Revenues
Minus	– Variable Costs
Equals	<b>= Gross Profit</b>

Second come the Fixed (or “indirect”) costs. This is the money spent on running the business as a whole: management, administration, and leases, for example. One important Fixed Cost is the wearing out of equipment and buildings in the course of the year, or “Annual Depreciation.”

$$\begin{array}{rcl}
 & \text{Gross Profit} & \\
 \text{Minus} & \text{– Fixed Costs} & \\
 \hline
 \text{Equals} & \text{= Annual Operating Profit} &
 \end{array}$$

Unlike other Fixed Costs, Depreciation is not money the business has actually spent in the fiscal year. It is money that the business will spend when the buildings and equipment have to be replaced. In a mine with millions of dollars invested in such assets, Depreciation can be a very big number. By deducting Annual Depreciation from Gross Profit, a business reduces the taxes it has to pay.

### 3. *Annual Net Profit*

This third calculation deducts still more of the costs of business: the interest paid on loans, taxes and royalties owed to government, and head office costs. These are called Other Costs.

$$\begin{array}{rcl}
 & \text{Annual Operating Profit} & \\
 \text{Minus} & \text{– Other Costs} & \\
 \hline
 \text{Equals} & \text{= Annual Net Profit} &
 \end{array}$$

Net profit is of great interest to shareholders. It indicates how much the value of their investment in the business is growing.

### 4. *Annual Operating Cash Flow*

This fourth calculation uses several of the dollar values from the previous three calculations. It starts with the Annual Operating Profit. Annual Depreciation is then

added back in (because that money is not actually spent during the year). Finally, the taxes that are payable to government are subtracted.

	Annual Operating Profit
Plus	+ Annual Depreciation
Minus	– Taxes
Equals	<b>= Annual Operating Cash Flow</b>

*How Important are the Differences Between these Options?*

Here is an example of the different look these calculations give to the success of a hypothetical mine in one fiscal year.

Here is the mine's Annual Operating Cash Flow.

Annual Operating Profit	\$100,000,000
Add Annual Depreciation	+ \$45,000,000
Minus	– \$20,000,000
<b>Annual Operating Cash Flow</b>	<b>= \$125,000,000</b>

Compare this with the mine's Annual Net Profit.

Annual Operating Profit	\$100,000,000
Minus	– \$20,000,000
<b>Annual Net Profit</b>	<b>= \$80,000,000</b>

Annual Operating Cash Flow is a far higher figure than the Annual Net Profit. Annual Operating Cash Flow is a much more advantageous way for an Aboriginal community's representatives to calculate the prosperity of a mine when negotiating a SEPA. (See *\*Case Study #2: Raglan Mine*, p. Intro-21.)

These are some basics of business accounting. It is worth the effort to get a firm grasp of this information. For more detailed explanations of each of these key terms, go to [www.investorwords.com](http://www.investorwords.com).

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## **APPENDIX 5: A SAMPLE HEADS OF AGREEMENT**

A Heads of Agreement commonly contains the following sections. The five pages following p. A-24 contain an example of such an agreement.

### **1. Recitals**

These express who is doing what, and formally identify the parties to the document (parties of the 1st and 2nd part); what the document represents (usually an agreement), and what is intended.

### **2. Incorporation and Capital**

This section spells out the intent of the parties to form a corporation (joint venture or partnership), gives it a name and defines how it will be governed (under the laws of the province or territory); and lays out how the authorized capital of the corporation shall be structured by class of shares and the division of shares in ownership.

### **3. Scope of Business**

This section lays out the business of the corporation: what it is, and where it will and won't take place, as well as the duration of the business.

### **4. Commencement Date**

A statement about when the business and the provisions of your agreement start.

### **5. Directors and Officers**

This section sets out how many directors there shall be, who shall nominate them, who shall nominate the

chairman of the board, how the officers are appointed, and who shall be the president.

## 6. Capital

This section spells out the responsibilities of the parties to the joint venture to provide capital to the corporation. It also identifies any formulas or remedies to be used, should a party to the agreement fail to meet his/her obligation.

## 7. Equipment

This section normally deals with the corporation's acquisition, lease, use, trade, loan, and disposal of equipment from either party or some outside concern. It also explains methods of valuation, compensation, depreciation, and use.

## 8. Allocation of Profits

The distribution of profits within even a simple venture may be complicated by the parties' other businesses, contracts, special equipment, or relationships with other firms.

## 9. Staffing

This section normally explains the appointment of management. It specifies which party nominates or seconds management, the required approvals and compensation, and the general intent of the parties regarding hiring and training.

## 10. Financial Reporting

This section specifies the character, extent, frequency, and quality of financial reports.

## 11. Shareholders Agreement

This section reiterates and defines the provisions of the shareholder agreement, and other matters of importance which the parties deem appropriate.

## 12. Purpose of the Heads of Agreement

This passage usually provides a Statement of Intent, for the purpose of outlining subjects of further negotiations between the parties, and limits the rights of claim or action.

In reality the purpose is to formalize agreement upon creation of a definitive Shareholder Agreement, to continue specific negotiations, to ensure confidentiality and exclusivity, and to do all things necessary to prepare the business to start on the commencement date. It clearly acts to limit the actions of the parties (to the business at hand), bars any competitive efforts, and serves as a guide to their attorneys in preparation of the Shareholder Agreement.

Find a Sample Heads of Agreement on the five pages that follow.



This Heads of Agreement dated \_\_\_\_\_ 1992.

Between \_\_\_\_\_  
\_\_\_\_\_ of the first part  
and \_\_\_\_\_  
\_\_\_\_\_ of the second part

whereas \_\_\_\_\_ and \_\_\_\_\_ intend to cause to be incorporated a corporation under the laws of the \_\_\_\_\_ (Province or Territory) for the purpose of carrying on the truck transportation business;

and whereas it is intended that \_\_\_\_\_ and \_\_\_\_\_ will be shareholders of the said corporation;

and whereas the parties intend to negotiate and enter into a Definitive Shareholder's Agreement governing their respective rights and obligations as shareholders in the said corporation;

and whereas the parties have reached agreement on certain matters which will form the basis of further negotiations.

now therefore this agreement witnesseth that the parties herein agree and declare as follows:

## 1. INCORPORATION AND CAPITAL

1.1. The parties shall cause to be incorporated under the laws of the \_\_\_\_\_ (Province or Territory) a corporation ("The Corporation") to be known as \_\_\_\_\_ or such other name as agreed to by the parties.

1.2. The authorized capital of the corporation shall initially be comprised of three classes of shares, namely:

- 1.2.1. Common Shares
- 1.2.2. Class A Non-voting
- 1.2.3. Class B Non-voting

And shall be held by the parties as follows:

- 1.2.4. Common Shares - 51% \_\_\_\_\_ - 41% \_\_\_\_\_
- 1.2.5. Class A Non-voting Shares - 100% \_\_\_\_\_
- 1.2.6. Class B Non-voting Shares - 100% \_\_\_\_\_

The rights, restrictions, conditions, and prohibitions attaching to these said shares shall be agreed to by the parties prior to the commencement date as hereinafter defined.

## 2. SCOPE OF BUSINESS

2.1. The scope of business operations of The Corporation shall be limited to:

- 2.1.1. All transportation services presently being performed by \_\_\_\_\_ or \_\_\_\_\_ on behalf of \_\_\_\_\_

- 2.1.2. All future hauling of \_\_\_\_\_ or \_\_\_\_\_ or their respective affiliates to \_\_\_\_\_ of \_\_\_\_\_ (specify areas) in the \_\_\_\_\_ (Province or Territory) excluding the hauling of goods or commodities originating outside of the \_\_\_\_\_ (Province or Territory), and excluding any \_\_\_\_\_ (specific commodities) hauled on behalf of \_\_\_\_\_ (specify client) by \_\_\_\_\_ (specify party).
- 2.1.3. All hauling of \_\_\_\_\_ (specify business) presently being performed by \_\_\_\_\_ (specify party) or \_\_\_\_\_ (specify party) north of \_\_\_\_\_ (specify location) in this \_\_\_\_\_ (Province or Territory).
- 2.1.4. All vehicle repair operations currently carried out by \_\_\_\_\_ (specify party) in \_\_\_\_\_ (specify location) in \_\_\_\_\_ (specify location).
- 2.1.5. Operation of the \_\_\_\_\_ (specify business) currently operated by \_\_\_\_\_ (specify party).
- 2.1.6. Any other transportation or related business that \_\_\_\_\_ (specify party) or \_\_\_\_\_ (specify party) mutually agree upon.

### 3. COMMENCEMENT DATE

- 3.1. It is intended that the Corporation shall commence business on \_\_\_\_\_ (specify date) ("The Commencement Date").

### 4. DIRECTORS AND OFFICERS

- 4.1. The Board of Directors shall be comprised of seven (7) members, four of whom shall be nominees of \_\_\_\_\_ (specify party) and three of whom shall be nominees of \_\_\_\_\_ (specify party). The \_\_\_\_\_ (specify party) shall be the Chairman of the Board of Directors.
- 4.2. The officers of the Corporation shall be appointed by the Board of Directors with the President being a \_\_\_\_\_ (specify party) nominee.

### 5. CAPITAL

- 5.1. It is intended that \_\_\_\_\_ (specify party) and \_\_\_\_\_ (specify party) will contribute equally to meet the capital requirements of the Corporation. If one party is not able to meet its obligation to contribute capital, that party's share of profits will be reduced proportionate to the amount of capital which that party has failed to contribute.

### 6. EQUIPMENT AND SERVICES

- 6.1. It is intended that, to the extent that it is practical and economically viable, the Corporation will purchase and own its equipment. If it is determined that a long-term lease of equipment from either of the parties would be appropriate, the lease rentals shall be based on:
- 6.1.1. Interest at prime plus 2%;
- 6.1.2. Equipment will be valued at its fair market as at the commencement of the lease;

- 6.1.3. Tractors will be depreciated to 20.8% of their initial acquisition costs after the earlier of 5 years following the initial acquisition and 600,000 miles; and
- 6.1.4. Trailers will be depreciated to 4% of their initial acquisition cost after 8 years following the initial acquisition.

All long-term equipment leases from either party shall be subject to the approval of the Board of Directors of the Corporation.

- 6.2. If the Corporation requires the equipment on a short-term basis, it may lease such equipment from either party. The party providing the equipment on a short term basis shall be entitled to:
  - 6.2.1. If a tractor is leased and a driver is provided, 65% of revenue earned by the tractor while on lease to the Corporation;
  - 6.2.2. If a trailer is leased, 15% of the revenue earned by the trailer while on lease to the Corporation.
- 6.3. If either party has suitable equipment available for use in the Corporation's business, subject to the prior approval of the Board of Directors of the Corporation, the Corporation may purchase such equipment at its fair market value.
- 6.4. \_\_\_\_\_ (specify party or parties) is presently engaged by \_\_\_\_\_ (specify project) located at or near \_\_\_\_\_ (specify location) pursuant to the terms of the contract \_\_\_\_\_ (specify contract) dated \_\_\_\_\_ ("The \_\_\_\_\_ Contract"). For the period commencing on the Commencement Date and ending on the earlier of the expiry of the \_\_\_\_\_ Contract and \_\_\_\_\_ (specify date) \_\_\_\_\_ will lease the trailers used to haul \_\_\_\_\_ (specify commodity) to the \_\_\_\_\_ (specify project) of the Corporation. Upon expiry of the said lease term, the Corporation shall be entitled to purchase the \_\_\_\_\_ trailers for a purchase price to be agreed upon and specified in the lease.
- 6.5. Any services or facilities of either party made available or used by the Corporation shall be at cost except as follows:
  - 6.5.1. Labour cost for equipment maintenance shall be charged on the same basis as maintenance is charged by that party for its own equipment;
  - 6.5.2. Parts supplied should be at cost plus 5%;
  - 6.5.3. Office space shall be rented at market value;
  - 6.5.4. Tires supplied shall be at cost plus 5%.
- 6.6. If the Corporation subcontracts hauling to either party, the party performing the work shall be entitled to 90% of revenue earned with respect to such work.

## 7. ALLOCATION OF PROFITS

- 7.1. Except as otherwise provided in this Heads of Agreement, the profits of the Corporation or so much thereof as determined appropriate by the Board of Directors or the Corporation shall be paid by dividend equally to \_\_\_\_\_ (Party of the First Part) and \_\_\_\_\_ (Party of the Second Part). All profits from \_\_\_\_\_ (specify exception) as hereinafter determined shall be

paid by dividend to \_\_\_\_\_ (specify contract) and \_\_\_\_\_ (specify date). Profits from the " \_\_\_\_\_ " (specify contract) shall be determined by:

7.1.1. Determining what percentage of total revenue of the Corporation is earned from the " \_\_\_\_\_ " (specify) Contract; and

7.1.2. The percentage determined under (7.1.1.) above shall be the percentage of all profits of that Corporation allocated to \_\_\_\_\_ (specify party) as profits under the \_\_\_\_\_ (specify) Contract.

#### 8. STAFFING

8.1. The Operations Manager of the Corporation shall be a Seconded from \_\_\_\_\_ (specify party). The Corporation shall pay to \_\_\_\_\_ (specify party) for such Seconded, his base salary plus 25%, plus any relocation costs. The Seconded shall be subject to approval of the Board of Directors of the Corporation. All other required staff shall be hired or seconded as determined appropriate by the Board of Directors of the Corporation.

8.2. To the extent reasonably possible, the Corporation shall train, develop, and employ members of \_\_\_\_\_ (specify). It is the intent of both parties to assist in a training process where it is considered to be in the best interests of the Corporation.

#### 9. FINANCIAL REPORTING

9.1. The Corporation shall maintain proper financial books and records and shall provide each of the parties in a timely manner with annual audited financial statements and monthly financial statements.

#### 10. SHAREHOLDERS AGREEMENT

10.1. It is intended that the Shareholders Agreement to be entered into by both parties, shall include:

10.1.1. Buy-Sell Provisions.

10.1.2. Provisions for the dissolution of the Corporation at the insistence of either party.

10.1.3. Non-competition provisions to be applicable during the period a party is a Shareholder of the Corporation.

10.1.4. Provisions governing:

10.1.4.1 The voting of shares;

10.1.4.2 The election of Directors and appointment of Officers;

10.1.4.3 Authority for expenditures by officers of the Corporation; and

10.1.4.4 Such other matters as the parties may agree upon including such provisions of the Heads of Agreement as the parties deem appropriate.

#### 11. PURPOSE OF THIS HEADS OF AGREEMENT

11.1. This Heads of Agreement is a declaration of intent only for the purposes of outlining the subject matters of further negotiations between the parties and shall not give rise to any right of action or claim by one party against the other.

11.2. The parties agree to continue negotiations in order to finalize a Definitive Shareholder's Agreement, appropriate Lease Agreements, and to resolve such other matters as may

be necessary in order to prepare the Corporation to commence business on the Commencement Date. Neither party hereto shall enter into discussions or negotiations with any other party concerning the establishment of a business similar to or in competition with the Corporation for the period commencing on the date first above written and ending \_\_\_\_\_.

In witness whereof the parties have executed this Heads of Agreement on the date and year first above written.

\_\_\_\_\_  
Per

\_\_\_\_\_

\_\_\_\_\_  
Per

\_\_\_\_\_

## Notes

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## **APPENDIX 6: OUTLINE OF SHAREHOLDER AGREEMENT**

The contents of a shareholder agreement are commonly structured in the following fashion. Note that provincial and territorial law may alter this list.

### **RECITALS**

1. Commencement date
2. Scope of business
3. Registered office
4. Capital and financing
5. Equipment
6. Services
7. Allocation of profits
8. Board of Directors and Officers
9. Management and staffing
10. Default
11. Sale of shares
12. Closing
13. No pledging of shares
14. Accounting and control
15. Voting of shares

- 16. Notices
- 17. Confidentiality
- 18. Governing law
- 19. Interpretation
- 20. No assignment
- 21. Endorsement of share certificates
- 22. Entire agreement
- 23. Enurement
- 24. Acknowledgement



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## APPENDIX 7: RAGLAN AGREEMENT

Go to [www.miningguide.ca/sites/all/files/RaglanAgreement.pdf](http://www.miningguide.ca/sites/all/files/RaglanAgreement.pdf).

## Notes



## Annotated Bibliography

Mining in Canada's north.  
Photocredit: iStock.

- Canadian Business for Social Responsibility. "The Raglan Nickel Mine: What comes after an Impact Benefits Agreement (IBA)? Case Study 8." In ***Building Sustainable Relationships: A Compendium of Leadership Practices in Aboriginal Engagement and Sustainability***.  
<http://www.cbsr.ca/sites/default/files/CBSRAboriginalEngBook.pdf>

A panel discussion with representatives of the parties involved in the 1995 Raglan nickel/copper mine Impact Benefit Agreement between Falconbridge and the Makivik Corporation in Quebec. Said to be Canada's first IBA to be directly negotiated between a mining company and the Aboriginal people affected, the agreement's lengthy consultation and negotiation history was discussed, along with the on-going process of its implementation.

- Cleghorn, C. (1999). ***Aboriginal Peoples and Mining in Canada: Six Case Studies***. MiningWatch Canada.  
<http://www.miningwatch.ca/en/aboriginal-peoples-and-mining-canada-six-case-studies>

An overview of how Aboriginal communities have come to terms with mining and mineral exploration in their territories. Each case study includes a brief summary of the project or problem followed by a description of how it is

being addressed, and then concludes with lessons learned. Case studies include Innu Nation, Lutsel K'e Dene First Nation, Tahltan First Nation, Little Salmon Carmacks First Nation, Makivik Corporation, and the Nishnawbi-Aski Nation.

- De Beers Canada. (2007). **2007 Snap Lake Socio-Economic Report.**

[http://www.debeerscanada.com/files\\_2/documents/2007SnapLakeSocioEcReport.pdf](http://www.debeerscanada.com/files_2/documents/2007SnapLakeSocioEcReport.pdf)

This is the third annual report in fulfillment of the May 2005 Socio-Economic Agreement with the Government of the Northwest Territories. The document reviews the work that has been done to maximize the employment and economic benefits of the Snap Lake Mine for NWT residents and businesses.

- Diavik Diamond Mines. (2007.) **Diavik Diamond Mine Socio-Economic Monitoring Report For Operations January To December 2007.**

[http://www.diavik.ca/documents/Diavik\\_2007\\_SEMA\\_Report.pdf](http://www.diavik.ca/documents/Diavik_2007_SEMA_Report.pdf)

This is one of a regular series of reports issued by Diavik Diamond Mines under its 1999 Socio-Economic Agreement with regional Aboriginal groups. It presents a variety of statistics and information, such as employment data, business benefits, workforce development programs, and cultural and community well-being projects.

- Diges, Carmen, (2008). **Sticks and Bones: Is Your IBA Working? Amending and Enforcing Impact Benefit Agreements,** MacMillan Binch Mendelsohn LLP.

[http://www.mcmillan.ca/upload/publication/CDiges\\_Sticks-and-Bones\\_0208.pdf](http://www.mcmillan.ca/upload/publication/CDiges_Sticks-and-Bones_0208.pdf)

This paper examines enforcement and amendment issues of IBAs. It also examines barriers to implementing IBAs

and other matter relating to implementation. It begins with a basic outline of enforcement mechanisms then turns to discussion of how to reconcile conflicts between the duty to consult and IBAs. Following sections of the paper deal with amendments to IBAs – both generally and to dispute resolution clauses themselves. It looks at some of the challenging areas in IBAs to implement and briefly considers whether corporate social responsibility principles can be instructive in the IBA process. Finally, it looks at interim arrangements and the advantages and disadvantages of the same.

- Dreyer, D. & Myers, H. (2004). ***Impact and Benefits Agreements: Do the Ross River Dena benefit from Mineral Projects?*** Northern Land Use Institute, University of Northern British Columbia.  
[http://www.impactandbenefit.com/Dreyer\\_2004\\_UNBC.pdf](http://www.impactandbenefit.com/Dreyer_2004_UNBC.pdf)

An evaluation of IBAs' success in providing long- and short-term benefits to Aboriginal communities, including the case of the Ross River Dena First Nation in the Yukon. A theoretical IBA framework is measured against actual IBAs for the Faro Mine and the Kudz Ze Kayah agreement. Recommendations are put forth to help communities negotiate future IBA negotiations and as hypotheses for further studies.

- Environmental Mining Council of British Columbia. (1998.) ***Mining in Remote Areas: Issues and Impacts***. MiningWatch.  
<http://www.scribd.com/doc/13654978/Mine-Impacts-Kit>

Information kit profiling some of the major impacts associated with mine development in remote areas of Canada. It examines impacts of new roads on intact ecosystems and the livelihoods of Aboriginal communities linked to them. The community impacts section looks at

the mining economics of boom and bust, social and cultural impacts, and health and safety. Case studies cover the Innu and Voisey's Bay, Ross River in the Yukon, the Dene Nation, and Tulsequah Chief.

- Fidler, C. (2008). ***Aboriginal Participation in Mineral Development: Environmental Assessment and Impact and Benefit Agreements***. MASc Thesis, The University of British Columbia.  
[http://www.impactandbenefit.com/ubc\\_2009\\_spring\\_fidler\\_courtney.pdf](http://www.impactandbenefit.com/ubc_2009_spring_fidler_courtney.pdf)

In a mineral development scenario, Aboriginal groups rely heavily on Environmental Assessment (EA) and Impact and Benefit Agreements (IBAs) to address their interests and concerns. While EA and IBAs are separate processes – EA is legislated and informed by the Crown, and IBAs operate in the realm of private contract law – together, the two are part of a parallel process that connect the Aboriginal group(s), Government and the mining proponent. IBAs support a more inclusive development based on consultation, partnership and participation. IBAs and EA have the potential to enhance Aboriginal involvement in mineral development and positively influence the design and planning of the mine. This thesis examines the Tahltan Nation's involvement and participation in the Galore Creek Project in British Columbia, and demonstrates the challenges and opportunities that arose during the EA and IBA process. It uses key informant interviews to gain multiple perspectives – from the proponent, Tahltan, and Government, to understand how the Tahltan utilized the EA and IBA to participate in the mineral development.

- Fidler, C. and Michael Hitch, (2007), ***Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice***, Environments Journal Volume 35(2) 2007.  
<http://impactandbenefit.com/Fidler%20and%20Hitch,%202007%20-%20IBAs-contentious.pdf>

Impact and benefit agreements (IBAs) have become a common part of a standard package of agreements negotiated between an industrial proponent and a representative aboriginal organization. IBAs recognize aboriginal peoples' interests with the land and parallel more broadly with the corporate social responsibility phenomena. IBAs seek to establish a bond based on consultation and support of both parties in a mineral development scenario. Challenges facing IBAs include their confidential nature and their relationship to conventional environmental assessment (EA). IBAs go beyond the regulatory and advisory EA processes and often find themselves in conflict due to overlapping objectives and blurred boundaries. IBAs can perpetuate injustices if benefits are not equally distributed to the community or if monitoring and follow-up on behalf of both parties are not continuous. To consider both challenges and opportunities, brief descriptions and comparison of IBAs and EAs are discussed and questions regarding the advantages of IBAs are considered.

- First Peoples Worldwide. (1998). ***After the Miners are Gone: A Backgrounder on First Nations' Impact and Benefit Mining Agreements in Canada***.

The backgrounder highlights examples of Canadian Impact and Benefit Agreements: Dona Lake Agreement, Musselwhite Agreement, Raglan Agreement, and the Whitehorse Mining Initiative. Each represents claims for damage on First Nations land, including the negative impacts on hunting and gathering activities of those

communities. The summaries are introduced by way of the negative cultural, social, environmental, and political impacts that are seen to outweigh potential benefits that mining may bring to the community.

- Hipwell, William et al. (2002) ***Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change***. The North–South Institute.  
<http://www.nsi-ins.ca/english/pdf/syncanadareport.pdf>

After an overview of the economic, social, cultural/spiritual, health, gender, and cumulative impacts of mines, this working discussion paper explores the Aboriginal community response to resource development, including IBAs, joint ventures and various forms of resistance. Multi-stakeholder processes such as the Whitehorse Mining Initiative are also looked at. A number of case studies, from the Takla and Tahltan in British Columbia to Nunavik and Mistissini Cree in Quebec, are presented.

- Irlbacher-Fox, Stephanie and Stephen J. Mills, (2007). ***Devolution and Resource Revenue Sharing in the Canadian North: Achieving Fairness Across Generations***, Walter and Duncan Gordon Foundation.  
[http://www.gordonfn.org/resfiles/Forum\\_DiscussionPaper.pdf](http://www.gordonfn.org/resfiles/Forum_DiscussionPaper.pdf)

This paper provides an overview of progress on devolution and resource revenue sharing within the three territories, current to May 2007. Serving as an evidentiary basis for discussion, it contains an overview of emerging issues and lessons learned from devolution and resource revenue sharing negotiations and agreements. Drawing from the experiences of Indigenous peoples' governments and from other jurisdictions which address issues of intergenerational equity in their stewardship of nonrenewable resource benefits, this paper presents options for promoting intergenerational equity as a desirable fiscal, economic, and social policy goal. It



provides an overview of the importance of both power and revenue sharing among governments for promoting sustainable economic development in the North.

- Gibson, Virginia Valerie, (2008). ***Negotiated Spaces: Work, Home And Relationships In The Dene Diamond Economy***, (PhD Thesis for the University of British Columbia).  
[https://circle.ubc.ca/bitstream/2429/800/1/ubc\\_2008\\_spring\\_gibson\\_virginia.pdf](https://circle.ubc.ca/bitstream/2429/800/1/ubc_2008_spring_gibson_virginia.pdf)

This thesis examines Dene engagement with the diamond mining economy in Canada's Northwest Territories. While historic treaties, policy and regulation create situations of powerlessness, the space for the negotiation of a bilateral relationship between Treaty mining companies and communities exists, formalized as Impact and Benefit Agreements. An initial emphasis on socio-cultural impacts and vulnerability of the communities in relation to the mines illuminated variable outcomes. This led to a central focus on how outcomes are negotiated, with the outcomes strongly related to forms of community and cultural resilience.

Communities enter new relationships with mining companies with the expectation of reciprocity, so that the exchanges are economic, social, cultural, spiritual and symbolic. This thesis outlines this process as it plays out in the mining economy and as it is manifest in spaces of negotiation, each of which invokes social capital and reciprocity. These include negotiations between: diamond mining companies and the communities; government and communities; diamond mining companies and the workers, and miners and their families and communities. Each of these negotiations is vital in creating the possibility of employment and business.

However, relationships with the settler government and with Treaty mining companies are constrained. Many of the limitations identified relate to the assumption by settler society of the universality of their particular values, practices and culture. The thesis argues that Treaty mining companies can shift approaches, both in the orientation to relationship and in the implementation of agreements through the lifecycle of the mine.

- Government of Canada. (2006.) ***Mining Information Kit for Aboriginal Communities.***  
<http://www.nrcan-rncan.gc.ca/mms-smm/abor-auto/pdf/kit-gui-eng.pdf>

This Information Kit was developed by the Government of Canada to help Aboriginal communities better understand the mining cycle (exploration, development, operation, and closure), and to increase their capacity to participate in mining-related activities. Within each cycle, the kit covers the five areas. It offers an overview, discusses related Acts and Regulations, identifies common environmental and social impacts, highlights employment and economic opportunities, and provides community experiences, strategies and success stories.

- Hitch, M. (2006). ***Impact and Benefit Agreements and the Political Ecology of Mineral Development in Nunavut.*** (Geography Doctorate thesis)  
<http://uwspace.uwaterloo.ca/handle/10012/992>

This thesis concludes that IBAs tend to unequally distribute decision-making powers in favour of industrial and regional Inuit association actors. Hitch argues that this concentration marginalizes members of the local community, environmental and other non-governmental organizations, and federal, territorial and hamlet government actors.

- Indian and Northern Affairs Canada. (2005). ***Report on Aboriginal Participation in Mining in Canada: Mechanisms for Aboriginal Community Benefits (Thirteenth Annual Report)***.  
<http://www.ainc-inac.gc.ca/nth/mm/pubs/abo13/abo13-eng.pdf>

This report highlights successful projects and best practices on Aboriginal participation in the minerals industry from across the country. The mechanisms for Aboriginal community participation and benefits are divided into three categories: strategies; agreements and policies; and education, training and knowledge sharing.

- Innu Nation, 1995. ***Mineral Exploration in Nitassinan: A Matter of Respect: Innu Nation Guidelines for the Mining Industry***. Sheshatshiu, Canada: Innu Nation.  
[http://www.miningwatch.ca/sites/miningwatch.ca/files/Innu\\_guidelines.pdf](http://www.miningwatch.ca/sites/miningwatch.ca/files/Innu_guidelines.pdf)

The Innu Nation of Canada (1995), in response to mineral exploration and development in Labrador (of which Voisey's Bay is the most notorious), developed a set of guidelines outlining in detail their concerns about environmental and cultural impacts, and the steps that should be taken by companies interested in exploration on Innu territory. Building upon past community experiences, these guidelines attempt to educate outsiders and provide an extensive history of Innu occupation of their territory and their contact with mining and industrialized society; and an overview of Innu culture and worldview, highlighting the importance of land and land stewardship. The guidelines also emphasize the importance of the process of healing past conflicts. The document outlines the Innu response to mining activity and gives information on how to go about obtaining Innu consent. The Innu Guidelines are a good example of Indigenous peoples' assertion of expectations from mining companies,

and should be reviewed by Indigenous communities and companies alike prior to the initiation of mining projects on Indigenous lands.

- International Council on Metals and the Environment, July 1999, ***Mining and Indigenous Peoples: Case Studies***.  
<http://www.goodpracticemining.org/search.php?Query=indigenous>

These case studies illustrate the approaches taken by five mining companies – Cominco, Falconbridge, Hamersley, Placer Dome and WMC – in their relations with indigenous communities located in the vicinity of a mining operation. Each case study provides a multi-faceted look at the relationship between company and community, examining successes as well as difficulties. All five case studies emphasize the lessons learned, such as the importance of community consultation, corporate commitment and cross-cultural understanding.

- Kennett, Steven A., (1999). ***A Guide to Impact and Benefit Agreements*** (Calgary: Canadian Institute of Resources Law).

This paper contributes to filling the information gap between the common practice of negotiating IBAs and the emergence of an extensive descriptive and analytical literature examining these agreements by reviewing contextual factors relevant to IBAs and providing an overview of the topics that they commonly address.

Part I of the paper places IBAs in context, beginning with a review of socio-economic considerations. The paper then turns to the legal and policy context for IBAs and the project-specific factors that shape these agreements. Part I concludes with brief comments on the legal nature of IBAs and the role of government in the IBA process.

Part II of the paper examines the contents of IBAs. Beginning with an overview of general trends relating to IBAs, the discussion then turns to the issues addressed in these agreements. The topics covered include employment and training; economic and business development; social, cultural and community support; financial provisions; and environmental protection. The paper concludes by underlining the growing importance of IBAs in Canada and noting the potential of these agreements to meet the needs of aboriginal organizations, mining companies and government.

- LaPierre, Dianne, M. and Ben Bradshaw, (2008). ***Why Mining Firms Care: Determining Corporate Rationales for Negotiating Impact and Benefit Agreements***, Canadian Institute of Mining, Metallurgy and Petroleum Conference, May 4-7, 2008.  
[http://www.businessethicscanada.ca/about/cbern2008meeting/annualmeetingparticipantinfo/file\\_Lapierre\\_and\\_Bradshaw\\_at\\_CIM\\_2008.pdf](http://www.businessethicscanada.ca/about/cbern2008meeting/annualmeetingparticipantinfo/file_Lapierre_and_Bradshaw_at_CIM_2008.pdf)

Mining firms in Canada are increasingly incorporating the social and environmental interests of their stakeholders into their projects in an effort to become more sustainable. Such initiatives have included negotiating Impact and Benefit Agreements (IBAs) directly with would-be impacted, often aboriginal, communities near resource developments in the Canadian north. Why does a mining firm take on this extra time-and cost-intensive initiative when governments and regulatory measures are in place to address social and environmental issues? Past research has paid little attention to the corporate rationales for IBAs. Based on document review and interviews with mining executives, this study investigates the rationales of mining firms that 'over-comply' with legislative requirements by negotiating IBAs or similar types of agreements with communities. The results

indicate that mining firms increasingly recognize IBAs as an intrinsic part of the permitting process. When queried, executives regularly identified the negotiation of agreements as 'the right thing to do'. While this response could be read in ethical terms, a commercial rationale is also clearly present. By building strong relationships with nearby communities, addressing community concerns, and directing benefits to local people, all of which are explicitly achieved with an IBA, mining firms are maintaining their long-term financial viability, thus their sustainability, within an evolving industry.

- MiningWatch Canada. (2006.) ***An Insult to Aboriginal People: A Critique of the Mining Information Kit for Aboriginal Communities.***  
<http://www.miningwatch.ca/en/insult-aboriginal-people-critique-mining-information-kit-aboriginal-communities>

This critique of the Government of Canada's Mining Information Kit for Aboriginal Communities argues that the government kit does not fully explain the potential for serious environmental, social, and cultural impacts of mining on Aboriginal governments and communities; that it lacks discussion of the relationship of mineral staking and exploration on questions of Aboriginal rights and title; and that it does not provide resources, links, or a bibliography as a reference for Aboriginal people and organizations. Actual community based experiences are discussed, lending evidence to the negative impacts throughout the mining cycle.

- Natural Resources Canada, (2008). ***Aboriginal Engagement in the Mining and Energy Sectors: Case Studies and Lessons Learned***, Report to Energy and Mines Ministers, 5 May 2009.  
<http://www.nrcan-rncan.gc.ca/mms-smm/abor-auto/pdf/stu-etu-eng.pdf>

This document comprises 16 case studies on Aboriginal engagement in the mining and energy sectors involving governments, communities, and industry that range from preliminary geoscience mapping to exploration, operation, and the rehabilitation of abandoned sites. These case studies illustrate the mutual benefits of investing in stronger relationships and partnerships between governments, Aboriginal peoples, and the industry. The approach to Aboriginal engagement varies from project to project and over the mining sequence. In some of the case studies presented, significant aspects of Aboriginal engagement in the mining sector are defined through formal negotiated agreements such as Memoranda of Understanding (MOU) or Impact and Benefits Agreements. Other cases illustrate the importance of mutual understanding and respect, openness, and continuous dialogue in building and maintaining successful relationships between companies and Aboriginal communities.

- Northwatch and MiningWatch Canada, (2008 revised), ***The Boreal Below: Mining Issues and Activities in Canada's Boreal Forest Region.***  
[http://www.miningwatch.ca/sites/miningwatch.ca/files/Boreal\\_Below\\_2008\\_web.pdf](http://www.miningwatch.ca/sites/miningwatch.ca/files/Boreal_Below_2008_web.pdf)

This report has been prepared by Northwatch and MiningWatch Canada to provide an overview of mining activities and issues, including an inventory of operating mines and a preliminary cataloguing of closed and abandoned mines and new mineral development activities in Canada's boreal. The report offers a survey and general analysis of mining activities and impacts, but falls short of being fully comprehensive, particularly in its cataloguing of mining activity (other than operating mines). This is chiefly because the time and resources allocated to the task permitted only an initial review and inventorying. The report provides a solid and reliable overview, and refers

the reader to additional resources and information sources.

- Pain, Isabella and Tom Paddon, ***Negotiating Agreements: Indigenous And Company Experiences: Presentation of the Voisey's Bay Case Study from Canada***, (Moscow 3-4 December 2008). 5 May 2009.  
[http://www2.ohchr.org/english/issues/indigenous/docs/workshops/Vale\\_Inco\\_Canada\\_Voiseys\\_Bay\\_case\\_Moscow\\_Workshop.pdf](http://www2.ohchr.org/english/issues/indigenous/docs/workshops/Vale_Inco_Canada_Voiseys_Bay_case_Moscow_Workshop.pdf)

This presentation provides a history and overview of the Voisey's Bay experience as it relates to the Innu, Inuit and Vale Inco. Elements of the process that led to the agreement, elements of the agreements themselves, and lessons learned are all covered.

- Prno, J. (2007). ***Assessing the Effectiveness Of Impact And Benefit Agreements From the Perspective of their Aboriginal Signatories***. Masters of Arts Thesis Presented to Faculty of Graduate Studies at the University of Guelph.  
<http://www.impactandbenefit.com/Prno%20-%20MA%20Thesis.pdf>

This thesis examines IBAs in the Northwest Territories to determine whether they are meeting their intended aims. It finds considerable evidence that such agreements are delivering positive outcomes for northern Aboriginal communities, which represents a significant change to typical outcomes of the past.

- Qureshy, Shauna, (2006). ***Landlords And Political Traps: How Mineral Exploration Companies Seek Access To First Nation Territory***, Carleton University.  
<http://www.impactandbenefit.com/Squireshy%20paper.pdf>

While Canadian law grants “free entry” for mineral exploration on Crown land, many exploration companies



seek either formal, negotiated agreements or non-negotiated acquiescence from First Nation communities before beginning exploration programs. Not all companies *obtain* acquiescence/agreement before proceeding, however. Based on 33 interviews the author conducted with junior and major companies and consultants, this paper proposes and tests two hypotheses: 1) companies prefer to seek acquiescence rather than negotiating agreements if they believe a First Nation's "landlord perceptions" can be weakened; and 2) companies will proceed even if they fail to obtain acquiescence/agreement if they believe they can detect "political traps" ahead of time and avoid them. This paper finds these factors to be much better predictors for how companies approach First Nations than companies' size and wealth, their vulnerability to First Nation threats, or pressures for corporate social responsibility.

- ***The Raglan Agreement***, (1995).  
<http://pubs.aina.ucalgary.ca/makivik/C1236.pdf>

This document is the actual Impact Benefit Agreement that was drawn up between Makivik Corporation and various parties and Falconbridge regarding the Raglan Mine. This is the only Impact Benefit Agreement widely available for viewing.

- Shanks, G. (2006). ***Sharing in the Benefits of Resources Developments: A Study of First Nations- Industry Impact Benefits Agreements***. Public Policy Forum.  
[http://www.ppforum.ca/sites/default/files/report\\_impact\\_benefits-english.pdf](http://www.ppforum.ca/sites/default/files/report_impact_benefits-english.pdf)

This paper analyzes the role of Impact and Benefits Agreements (IBAs) in the resource development process. It includes different sets of perspectives and interests that each side brings to such negotiations. It explains how

Impact and Benefits Agreements are designed to appease First Nations groups, while, generally, expediting resource development project timelines. The author believes, however, that even the IBA process has limitations, positing that First Nations members have an inherent control over the IBA process and the capacity to demand extremely prosperous provisions from a given resource developer. At the same time, industry has its own interests and high calibre negotiating resources that have the potential to overwhelm the process. Shanks notes that this can lead to impasse, with no guidelines for resolution. Without a public policy framework, he suggests negotiations will invariably be based on negotiating skill and mandate.

- Sharvit, Cheryl and Lisa, Sumi, (2001). ***Beneath the Surface: Aboriginal Rights and Mining Law in British Columbia***, Environmental-Aboriginal Guardianship through Law and Education.  
[http://www.miningwatch.ca/sites/miningwatch.ca/files/Beneath\\_the\\_Surface.pdf](http://www.miningwatch.ca/sites/miningwatch.ca/files/Beneath_the_Surface.pdf)

This publication provides an overview of:

- aboriginal rights law in Canada,
- the laws that govern mining in British Columbia, and
- provincial policies relating to mining and First Nations.

It also explains mining processes, and discusses some of the potential impacts of mining activities on land and water. Knowledge of some of these risks, it is hoped, will assist First Nations to make informed decisions regarding proposed mineral exploration and development in their territories. An awareness and understanding of the law that governs mining in British Columbia, and of the constitutional protection of aboriginal rights, should assist First Nations in developing strategies to address mineral exploration and mining developments in their territories. The materials also include cases studies and discuss

some of the approaches First Nations have used to work with industry and government when mine developments occur in, or are proposed for, their territories.

- Sosa, I. & Keenan, K. (2001). ***Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada***. Canadian Environmental Law Association, Environmental Mining Council of British Columbia and CooperAcción.  
<http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/IBAeng.pdf>

In this overview of impact and benefit agreements (IBAs), the authors analyze factors that determine their success or failure, and the extent to which they have been enforced. This analysis extends to IBAs with provisions to minimize the potentially negative social and cultural impacts of mining projects. The authors also look at the costs of these Agreements as well their limitations and traps, concluding with a series of recommendations about how communities can best approach their own mining IBA.

- Tahltan First Nation, (2003). ***Out of Respect - The Tahltan, Mining and the Seven Questions to Sustainability***, International Institute for Sustainable Development.  
[http://www.iisd.org/pdf/2004/natres\\_out\\_of\\_respect.pdf](http://www.iisd.org/pdf/2004/natres_out_of_respect.pdf)

The Tahltan Mining Symposium was convened in April 2003 to (1) review the relationship between the Tahltan people, their land and the mining industry; and (2) build a strategy to guide that relationship in the future. Seeking a win-win outcome, and guided by the Seven Questions to Sustainability (7QS) Assessment Framework, the participants considered past, present and potential future conditions as a foundation for ensuring positive outcomes for the Tahltan people and their territory in the years to

come. Out of Respect describes the process and documents the resulting strategy.

- Weitzner, Viviane Anita, (2004). ***Dealing Full Force: Negotiating with Mining Companies – Lessons from the Lutsel K'e Experience***, The North–South Institute and Lutsel K'e Dene First Nation  
<http://www.nsi-ins.ca/english/pdf/lk-en.pdf>

This project gathered the views of women, youth, elders, miners, negotiators and leaders in Lutsel K'e Dene First Nation (LKDNF) regarding the impacts of mining, and lessons learned from consultations and negotiations with mining companies and government. The findings will be used to strengthen other indigenous communities, particularly in South America, in their interactions with companies, governments and non-governmental organizations.

Negotiation processes have strengthened since the first Impact Benefit Agreement (IBA) was negotiated with BHP. LKDFN now uses its own negotiators, follows a consultation protocol, undertakes community-based monitoring and uses its aboriginal rights to further its aspirations. However, youth feel left out of decision-making. Also, even if LKDFN is getting better at negotiating conditions through IBAs, many do not feel there is an option to say “no” to mining.

- Whiteman, Gail and Katy Mamen, (2002). ***Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector***. North-South Institute.  
[http://www.nsi-ins.ca/english/pdf/lit\\_rev/lit\\_rev\\_final.pdf](http://www.nsi-ins.ca/english/pdf/lit_rev/lit_rev_final.pdf)

This literature review attempts to synthesize and expand current knowledge concerning the consultation and

participation of Indigenous peoples within the international mining sector. They provide an overview and synthesis of consultation and engagement practices, drawing from academic literature, as well as civil society, industry, and government initiatives. However, they also attempt to move the debate away from a narrowed focus on consultation. They argue that a shift toward “responsible” mining requires a broader approach—the *meaningful participation* of Indigenous peoples at both the consultation and decision-making level of natural resources management, including the right to prior informed consent.

- Winfield, M. et al. (2002). ***Looking Beneath the Surface: An Assessment of the Value of Public Support for the Metal Mining Industry in Canada***. Pembina Institute for Appropriate Development and MiningWatch Canada.  
[http://pubs.pembina.org/reports/belowthesurface\\_en.pdf](http://pubs.pembina.org/reports/belowthesurface_en.pdf)

This document argues that negative social, environmental and economic impacts are intrinsic to the metal mining industry. Given this, questions are raised on alternate forms of sustainable uses of natural resources as a means to promote greater sustainable employment in remote communities, who face the disruptions of the boom-and-bust cycles of mining. The Yukon is one of the regions highlighted in the report.

- Vale Inco, (2006) ***2006 Social Responsibility Report***, Voisey’s Bay Nickel Company, Ltd. 5 May 2009  
<http://vinl.valeinco.com/SocialResponsibility2006/index.htm>

This is the third of a regular series of reports issued by Vale Inco/Voisey’s Bay Nickel Company Limited. This is a report to stakeholders on the progress they are making in developing the Voisey’s Bay project.

## Notes





## Glossary

**Aboriginal Development Corporation:** corporation that represents one or more Aboriginal communities and is the entity through which business that benefits the community occurs.

Tundra Plug. Photocredit:  
Independent Environmental  
Monitoring Agency.

**Acid Drainage:** water pollution that results when sulphur-bearing minerals associated with coal are exposed to air and water and form sulphuric acid and ferrous sulphate. The ferrous sulphate can further react to form ferric hydroxide (“yellowboy”), a yellow-orange iron precipitate found in streams and rivers polluted by acid mine drainage.

**Advanced Exploration:** excavating an exploration shaft or other entry way; construction of an access road to the mine site; diversion or damming of a watercourse to permit bulk sampling; or other types of work that usually occur once significant mineralization is discovered.

**Agreement:** any explicit, signed document that is negotiated and includes mutual concessions or limitations placed on both sides. Examples are Negotiation Agreements, Exploration Cooperation Benefit Agreements, Socio-Economic Participation Agreements.

**Agreement in Principle:** an agreement which participants are not legally obliged to keep. It is therefore non-binding.

**Annual Net Profit:** calculated by subtracting a company's total expenses from total revenue in a fiscal year, thus showing what the company has earned (or lost) in that year. (Also called “net income” or “net earnings.”)

**Annual Operating Cash Flow:** a measure of a company's financial health. Equals cash receipts minus cash expenditures over a given period of time; or equivalently, net profit plus amounts charged off for depreciation, depletion, and amortization.

**Annual Operating Profit:** a business' Gross Revenues, minus Variable and Fixed Costs.

**Assessments:** the process of gathering and documenting information about a mine's viability and impacts.

**Attributive Benefit:** assets whose importance cannot be readily expressed in terms of dollars (e.g., experience, connections, or specialized knowledge).

**Bankable Feasibility Study:** a comprehensive analysis of a project's economics that banks and other financial institutions can use to make investment or lending decisions.

**Baseline Study:** a report on soil and vegetation types, wildlife, and water analysis. Some also include social and cultural conditions. The background data provide a reference point that can be used to measure the impacts of a mining project over time. If the project goes ahead, that can be used in the environmental assessments.

**Bulk Sampling:** taking samples in arbitrary, irregular units rather than discrete units of uniform size for analysis.

**Business Development:** strategies and techniques used to create and grow economic enterprises.



**Business Plan:** a document that describes the goals of a business for a specific time frame (usually 3-5 years) and the strategy to be followed to achieve these goals. Making a business plan is a 4-step process: data collection and business definition, research analysis, strategy formulation, and forecasting.

**Canada Migratory Bird Convention Act:** most migrating birds found in Canada are protected under the Migratory Birds Convention Act (M.B.C.A.) of 1917. For details, go to <http://www.pnr-rpn.ec.gc.ca/nature/migratorybirds/dc00s06.en.html>.

**Canadian Species At Risk Act:** an Act respecting the protection of wildlife species at risk in Canada  
<http://laws.justice.gc.ca/en/s-15.3/text.html>.

**Capital:** cash, property, equipment, services, and contracts or leases.

**Category A Settlement Lands:** in Yukon, lands in which a specified First Nation owns both the surface and the subsurface.

**Category B Settlement Lands:** in Yukon, lands in which a specified First Nation owns the surface but not the subsurface. The First Nation has no ownership over whatever is under that ground.

**Civil Disobedience:** refusal to obey civil laws in an effort to bring about change in a situation, governmental policy or legislation, characterized by the use of passive resistance or other non-violent means.

**Clause:** a subdivision (often numbered) of a document, that clarifies, defines, or explains the subject matter. Often called a provision.

**Closure and Reclamation Stage:** restoration of disturbed and/or mined land to its original contour, use, or condition.

**Commissioning:** testing to see if a mine or part of the mine performs as intended, and is ready for operation.

**Commodity:** physical substances, such as metals, that can be sold or exchanged in a marketplace.

**Compensation:** something (such as money) given or received as payment or reparation (as for a service or loss or injury).

**Comprehensive Cooperation Benefits Agreement:** this may be the name of an agreement that is essentially the same as a Socio-Economic Participation Agreement.

**Construction Stage:** the stage in which all facilities, buildings, roads etc. necessary for the operation of a mine are built.

**Confidentiality:** a promise not to reveal the contents of an agreement to anyone.

**Contributive Benefit:** assets which are easily seen, counted, and appraised in terms of dollars (e.g. equipment, land, or money).

**Corporation:** the most common form of business organization. It pursues set objectives and is empowered with legal rights usually only reserved for individuals, such as to sue and be sued, own property, hire employees, or loan and borrow money.

**Crown:** the Crown refers to the sovereign or to the power and authority of the monarchy. In Canada, the powers and authority of the sovereign have been delegated to the Governor General of Canada.

**Diamond Pipes:** The diamond is the hardest natural substance known. It is found in a type of igneous rock known as kimberlite. The vertical shafts of kimberlite that extend deep inside the earth often contain diamonds and may be called “diamond pipes.”

**Dispute Resolution:** a process by which two or more parties may discuss their disagreements and come to decisions about how to proceed.

**Downstream:** downstream business refer to suppliers of products and services such as exploration, production, processing, product development, technical services, marketing and sales that supply the mine but are not owned by the mine.

**Drilling:** the primary means of bringing rock samples to the surface. Often called “diamond drilling” since the bit used is made of diamond. Drilling is a major expense, costing \$50 or more per metre.

**Due Diligence:** a financial and technical investigation to determine whether an investment is sound. Each party to a business agreement uses Due Diligence to ascertain the actual quantity and quality of the assets which the others claim they can contribute.

**Economic Viability:** the degree to which a mining project can proceed and return a profit to investors.

**Engagement Protocols:** policies or guidelines developed by Aboriginal groups themselves or in conjunction with mining companies. They generally will outline in detail the concerns about environmental and cultural impacts and the steps that should be taken by companies interested in exploration or mining on traditional territory.

**Environmental Assessment:** a written report, compiled prior to a production decision that examines the effects that proposed mining activities will have on the natural surroundings.

**Environmental Procedure:** a procedure used to manage and control impact on the environment and in turn to aim to protect the environment from industrial activities.

**Equity:** the dollar value of what a person or organization owns (as opposed to debt, which indicates what a person or organization owes). A person or organization can have an equity interest in something if they have part or full ownership.

**Equity Financing:** raising funds through a combination of individual and institutional investors. In mining this is most often through the stock markets.

**Exclusivity:** a promise not to negotiate another deal that would compete with the one now being concluded.

**Expansion:** increasing the area or size of a mine or exploration area. Expansion may trigger a new environmental assessment.

**Exploration Company:** a company whose principal activity is that of exploration.

**Exploration Properties:** an area of land on which prospecting, sampling, mapping, diamond drilling and other work involved in searching for or determining the extent of an ore body occurs.

**Exploration Cooperation Benefits Agreement:** an agreement struck between an Aboriginal group and a mining company which outlines benefits that each party may realize during the Exploration Stage. Benefits for the

mining company may include the ability to explore for minerals with the support of the Aboriginal community. Benefits for the Aboriginal community may be jobs, financial compensation, business opportunities, etc.

**Exploration Stage:** the whole range of activity from searching for and developing mineral deposits.

**Feasibility Study:** a study of a proposed project's product or service, market, competition, organization, and finances to determine if it can make a profit.

**Feasibility and Planning Stage:** the stage in mining when advanced exploration activities help develop and support Feasibility Studies and clarify the extent and nature of the mining project. Development of the necessary mining operation plans, permits, and closure and reclamation plans occur at this stage.

**Fee Simple Settlement Lands:** lands identified as such in a First Nation Final Agreement and excludes subsurface rights excepting specified substances. It carries with it the same form of fee simple title as is held by individuals.

**Fixed Cash Payment:** a fixed amount of money that a Benefit Agreement stipulates to be paid out to Aboriginal communities or organizations in compensation for a mining project taking place in their traditional territory.

**Free Entry System:** the dominant means of granting mineral tenures in Canada today. It gives mining companies the exclusive right to Crown-owned mineral substances from the surface of their claim to an unlimited extension downwards. There are three primary rights associated with the law of free entry:

- the right of entry and access on virtually all lands.

- the right to locate and register a claim without consulting the Crown.
- the right to acquire a mineral lease with no discretion on the part of the Crown.

**Grade:** the quantity and quality of metals, diamonds or other minerals.

**Gross Revenues:** money generated by all of a company's operations, before deductions for expenses ("the Gross").

**Heads of Agreement:** a non-binding summary of the main issues on which the parties intend to base an agreement.

**Heritage Funds:** funds set to the side for purposes of funding projects related to heritage, culture, traditional life.

**Impact Benefits Agreement:** a contractual agreement, usually between an Aboriginal community or entity and a mining company.

**Impacts:** the effect or impression of one thing on another such as the impact of a mining project on the life of an Aboriginal community.

**Implementation:** the carrying out or execution of an agreement, decision, or plan.

**Implementation Committee:** the group responsible for putting a decision, plan, or contract into effect.

**Income:** money one earns by working or by capitalizing from other people's work.

**Industrial Mineral Products:** non-metallic, non-fuel minerals used in the chemical and manufacturing industries. Examples are asbestos, gypsum, salt, graphite, mica, gravel, building stone, and talc.

**Infrastructure:** the basic facilities, equipment, roads, transmission lines, sewage, water, and other installations needed to support the functioning of a mine.

**Interim Agreement:** an agreement that is put in place during a period in which final decisions or agreements are still being negotiated.

**Investment:** the purchase of a financial product or other item of value with an expectation of favourable future returns. Generally, “investment” means the deliberate use of money in order to make more money.

**Joint Venture:** commonly, a business to which two or more parties contribute the essential land, capital, and services, in return for a share in its ownership and control. (Note: the Joint Venture is very strictly defined under Canadian law.)

**Junior Company:** a mining company that has no mining operations. It must rely almost entirely on the capital markets to finance its exploration activities.

**Labour Pool:** the source of trained people from which workers can be hired.

**Land Use Permit:** a permit granted governing activities that are related to land use.

**Legal forms:** the structure of an enterprise in the eyes of the law. Canadian law recognizes several ways of structuring a business: the partnership (general and limited), corporation, sole proprietorship, society, and co-operative are among the best known. The law has a specific description of each, including who owns the assets, how decisions are made, and how it is taxed.

**Leverage:** strategic advantage or the power to act effectively. In negotiation, leverage is a measure of which side, at any given moment, has a greater ability to influence the other side.

**Licenses:** documents that must be obtained in order to apply for or carry out certain activities.

**Limited Partnership:** a legal partnership where some owners are allowed to assume responsibility only up to the amount invested.

**Management Agreement:** an explanation of what the Joint Venture management should report to whom, when and how. These reports will include audits and descriptions of management performance, as well as financial matters related to compensation, performance standards, etc.

**Memorandum of Understanding:** a document that records an understanding between a community and a mining or exploration company. The MOU defines principles for working together for mutual benefit.

**Metals:** one of more than a 100 basic earth elements, grouped under minerals. Includes iron, lead, zinc, and copper.

**Mineral:** A naturally-occurring, homogeneous substance that has a definite chemical composition and (usually) a crystalline structure.

**Monitoring:** the act of observing something and often keeping a record of it. People monitor mining activities or impacts in order to determine their effect on the land, resources, and communities.



**Navigable Water Protections Act:** an Act concerning the protection of navigable waters. For details, go to <http://laws.justice.gc.ca/en/N-22>.

**Negotiation Agreement:** an early agreement in the mining process, likely to occur in the Exploration Stage, which would outline the basis of the relationship between the Aboriginal group and the mining company and how the relationship will evolve if the mine moves forward.

**Net Smelter Return:** a percentage of the total sales of the mine's product, minus the costs of transportation to the smelter and the costs of smelting and refining.

**Non-Metals:** one of more than a 100 basic earth elements, grouped under minerals. Includes coal, asbestos, gems, gravel.

**Operation Stage:** stage in mining in which the metal or mineral is extracted from the ground and processed on site or off-site.

**Ore:** the naturally-occurring material (rock) from which minerals are extracted through breaking down and processing.

**Ore Body:** a mineralized mass whose characteristics and economic limits have been examined.

**Outsourced:** to subcontract (work) to another company.

**Overburden:** materials above the ore deposit that have to be removed before the ore can be extracted.

**Permits:** legally-binding permissions that govern activities that may occur during exploration or mine operation, like quarrying, use or impact on water, building of transmission lines, etc.

**Placer Mining Act:** an Act respecting placer mining in Yukon Territory. Placer mining is the technique of recovering gold from gravel.

**Present Value Analysis:** a method used to determine the present value of money for the payment of future rent.

**Prefeasibility:** a preliminary study undertaken to determine if it would be worthwhile to proceed to a Feasibility Study.

**Procurement:** the process of acquiring goods or services for a project.

**Project Certainty:** the likelihood that a project will be able to meet its intended outcomes.

**Prospecting:** the first step in exploration in which prospectors search for clues of the presence of valuable mineral deposits. The objective of prospecting is to identify a target worthy of further testing by more expensive exploration methods.

**Provision:** an action or item stipulated by an agreement. Often called a clause.

**Quartz Mining Act:** controls and administers rights to explore and extract minerals on Crown land, and sets out the process for making mineral claims and the requirements for maintaining exclusive rights to mineral claims, for the purpose of mineral exploration, development, and production.

**Quiet Enjoyment:** the right to the undisturbed use of property by a tenant or landowner.

**Quota:** the share that is due from, due to, or allocated to a person or group.

**Regulations:** rules that govern activities that are occurring on the land.

**Retention:** a systematic effort to create and foster an environment that encourages current employees to remain employed.

**Royalty:** in mining, a royalty is a tax that mining companies pay to government for the extraction of public resources. In Yukon, mining royalties are a percentage of an amount roughly equivalent to a company's Annual Operating Profit.

**Scoping:** a preliminary study undertaken to determine if it would be worthwhile to carry out a pre-feasibility study.

**Section 35 of the Fisheries Act:** a regulation that no person shall carry on any work or undertaking that results in the harmful alteration, disruption, or destruction of fish habitat.

**Self-Reliance:** the capacity of a community to plan and build an economic future that suits the values, priorities, and needs of its members.

**Service Contracts:** agreement whereby a contractor supplies time, effort, and/or expertise instead of a tangible product.

**Shareholder Agreement:** a legally-binding document which describes the mutual obligations of the parties to a Joint Venture.

**Showings:** a rock specimen revealing the presence of a certain mineral.

**Signatory:** any person or organization who has signed as a signatory to a document or agreement.

**Smelter:** Where ores are processed (using heat) to produce metals.

**Socio-Economic Participation Agreements (SEPAs):** private, confidential contracts between Aboriginal communities and resource developers, like mining companies. SEPAs specify how the communities that will be affected by the development of a resource will also benefit from that development. Many SEPAs include terms about the employment and training of Aboriginal people, compensation payments, protection of the environment, and profit-sharing. SEPAs are often called Impact Benefits Agreements (IBAs) and Cooperation Benefit Agreements (CBAs), and other names. The *Aboriginal Mining Guide* calls them all SEPAs.

**Strategic Investments In Northern Economic**

**Development:** a set of programs offered by Indian and Northern Affairs Canada in the Yukon, Northwest Territories and Nunavut. The goal of this initiative is to promote the economic development of the North, strengthening territories' economies and generating important economic opportunities for Northerners, their businesses, and their communities.

**Sub-Surface Rights:** rights to resources that lie beneath the earth's surface.

**Tailings:** waste material from an ore processing mill, the leftovers after most of the valuable minerals have been extracted.

**Toxic Substances:** poisonous matter (either man-made or natural) which causes sickness, disease and/or death to plants or animals.

**Traditional Knowledge (TK):** the knowledge, observations, and understandings about the natural

environment, and about the relationships between living beings and their environment, that Aboriginal people have accumulated over many generations.

**Transaction Costs:** a cost incurred in making an economic exchange. The negotiation of a SEPA has costs. These costs are related to all financial, staff and other costs incurred by either party to a negotiation to plan, negotiate and conclude a SEPA or Joint Venture.

**Trust:** a legal arrangement in which an individual (the *trustor*) gives fiduciary control of property to a person or institution (the *trustee*) for the benefit of beneficiaries.

**Umbrella Final Agreement:** an agreement between the Government of Canada, the Council For Yukon Indians and the Government of Yukon. The Umbrella Final Agreement (UFA) was reached in 1988 and finalized in 1990. It is the overall “umbrella” agreement of the Yukon Land Claims package and provides for the general agreement made by the three parties in a number of areas. While the agreement is not a legal document, it is a political agreement made between the three parties. The UFA is the basis upon which final agreements with First Nations were negotiated. These are legal agreements and 11 of the 14 Yukon First Nations have concluded their final agreements.

**Upstream:** the actual mining operations owned and controlled by a mining company.

**Variable Cash Payment:** a cash payment based on a mathematical formula that contains variables, like costs of production. Consequently, the amount of the cash payment can change as the variables do.

**Waste Rock:** barren rock or mineralized material that is too low in grade to be economically processed.

**Yukon Environmental and Socio-economic Assessment Act (YESAA):** a federal law, passed by Parliament in May 2003. It establishes a process to assess the social, economic, and environmental effects of projects on the Yukon. The Act is a requirement of the Umbrella Final Agreement and Yukon First Nation final agreements. See [http://www.yesab.ca/about\\_us/faqs.html](http://www.yesab.ca/about_us/faqs.html)

**Yukon Territory Water Board:** an independent administrative tribunal established under the Yukon Waters Act (<http://www.gov.yk.ca/legislation/acts/waters.pdf>). The Board is responsible for the issuance of water use licences for the use of water and/or the deposit of waste into water.