



BENEFIT SHARING AGREEMENTS IN BRITISH COLUMBIA: A GUIDE FOR FIRST NATIONS, BUSINESSES, AND GOVERNMENTS



Image by Gary Oker

*Prepared by Woodward & Company
for the Ecosystem-Based Management Working Group*

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This Guide is not a primer on aboriginal law or the law of consultation and accommodation. It does not provide any legal advice. It does not provide any guidance with respect to the legal duties of the parties in a given scenario. It begins with the assumption that the parties have informed themselves of their respective legal positions with respect to a development and have determined that it is necessary or desirable to reach a mutually acceptable agreement on First Nations involvement. All parties are advised to seek legal advice before negotiating, commenting on or signing any Benefit Sharing Agreement (BSA) or other agreements.

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Image courtesy Gary Oker, Doig River First Nation

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We sincerely hope this Guide will assist all parties in moving forward to the next generation of Benefit Sharing Agreements and ultimately to true recognition and reconciliation of aboriginal rights and title and mutually beneficial sustainable economic development.

Murray W. Browne

Krista Robertson

COVER ART

The “Phoenix Rising” design was created by Garry Oker, former Chief of the Doig River First Nation, artist, musician, and outstanding visionary on sustainable economic development and reconciliation between First Nations, government and industry.

“This original painting I created represents First Nations, government and industry working together on sustainable development and reconciliation. The symbolized trees and ledger sheet buildings represent our shared sustainable future. The swirling faces represent our ancestors’ dream vision and the future generations seeking a new cultural space. From the ashes of the past history of denial and exclusion rises a new spirit of reconciliation symbolized by the Phoenix Rising creating new cultural and economic space”.

-- Garry Oker --

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Executive Summary

“Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve... ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’. Let us face it, we are all here to stay.”¹

This famous advice and urging from former Chief Justice Lamer of the Supreme Court of Canada in the *Delgamuukw- Gisday’wa* aboriginal title case in 1997 set the context for the most recent wave of negotiated agreements involving First Nations. Although this pronouncement was only slightly more than a decade ago, there has been rapid progress in the transition between the historic pattern of denying aboriginal rights and excluding First Nations from the economy to modern recognition and reconciliation.

We are in a period of rapid transition but also significant uncertainty. Some business, government and First Nation representatives take a negative view that the situation is so complex and fraught with legal and political challenges that little can be accomplished until the courts finally sort out ownership and jurisdiction. Many others take a more positive view and venture forth into a world of new opportunities. The purpose of this Guide is to highlight opportunities and options for developing negotiated agreements that allow all parties to move forward in a respectful, sustainable and mutually profitable manner. We focus on Benefit Sharing Agreements (BSAs) and provide resources and references for the parties to develop BSAs. The guide also identifies strategies to achieve BSAs that meet the key objectives of recognition, accommodation and certainty cited below.

The lack of clarity regarding whether BSAs are required and who is responsible for them has created a confusing, complex and unlevel playing field in many Canadian jurisdictions where roles, responsibilities, and standards remain unclear.

We have analyzed dozens of court cases, academic analyses and BSAs from various jurisdictions. The primary focus has been on British Columbia but we have included many examples and comments from other Canadian and international jurisdictions. We have also conducted a number of interviews and a focus group to compile data on BSA implementation.

Our key observations include the following:

1. There are hundreds of BSAs that have been negotiated over the past 10-15 years. Many of these agreements fly ‘under the radar’. Any First Nation,

¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

government or corporate representatives facing or planning a project or development is likely to benefit from reviewing content of the agreements and the types of agreements that are in use and from the analyses of them.

2. Parties have different reasons for entering into BSAs. In some instances there are legal requirements or legal duties to consult. Even in the absence of legal requirements there is often a business case for entering into a BSA with First Nations. In addition to furthering “social licenses” and “good neighbour policies” many representatives of business and industry are finding competitive advantages in working with First Nations. This is particularly true in industries where ethical investment funds have an influence over financing or where there is consumer demand for ethically produced products.

BSAs are not a cure for all conflicts and uncertainties and will not resolve complex legal, political, cultural and historical issues of the past 150 years in one fell swoop. Nor should one company or project be expected to bear all of the burdens of history. However, each fairly negotiated agreement is an important step forward and we hope this Guide will assist in the journey of a thousand steps.

3. BSA participation can be improved through knowledge, capacity and experience. First Nations and other parties in the north that have negotiated and implemented multiple BSAs have much to teach us all. One example is the movement away from job commitments toward contracting opportunities, equity participation, and revenue-sharing that First Nations can apply to their own priority areas. In the United States, the Harvard Project has been helpful to identify key features of successful First Nations in terms of economic development and self-government.

4. Each BSA is different but many share common features. We have set out many of the key elements and our observations about them in Part II of this Guide.

5. There are a few examples of BSA requirements in legislation and Treaties. In general, these BSA requirements appear to lead to more stable and mutually beneficial BSAs than in situations where there are no BSA requirements.
6. The lack of clarity regarding whether BSAs are required and who is responsible for them has created a confusing, complex and unlevel playing field in many Canadian jurisdictions where roles, responsibilities, and standards remain unclear. Standardized government royalty-sharing models such as Forest and Range Opportunity agreements (FROs) in B.C. and (a better example) mining royalties in northern Treaties are a good start. However, in our view all parties and the interests of sustainable development would benefit from BSA standards or requirements, tailored to each sector. The Treaties in northern Canada and the Australian model (with BSA requirements but residual government authority) may be good places to start.

7. Capacity funding, clear communications, clear objectives from all parties, a clearly drafted BSA, and monitoring, reporting and dispute resolution provisions are all vital to successful BSAs.
8. We as a Nation in Canada are in the process of undoing over 150 years of denial of aboriginal rights and title and exclusion of First Nations from decision-making and the economy. BSAs are not a cure for all conflicts and uncertainties and will not resolve complex legal, political, cultural and historical issues of the past 150 years in one fell swoop. Nor should one company or project be expected to bear all of the burdens of history. However, each fairly negotiated agreement is an important step forward and we hope this Guide will assist in the journey of a thousand steps.

Summary of Key Elements in Benefit Sharing Agreements

In Part II of the Guide to Benefit Sharing Agreements we provide a detailed analysis and examples of key elements of a typical Benefit Sharing Agreement involving one or more First Nations and a corporate and/or government representative. Here is a short summary of Part II. We hope that this summary will serve as an introduction and checklist.

A. PRECONDITIONS FOR NEGOTIATIONS

1. Relationship Building

- There is no substitute for face-to-face meetings
- Meet early and often, starting at the initial planning stages of a project
- Corporate and government representatives need to spend time in the community at lunches, dinners and community events. First Nations need to take the time to meet and understand what is being proposed

2. Negotiation Framework

- Meet and scope out project and potential issues
- Consider starting with a non-binding MOU or draft Term Sheet

3. Capacity Funding for Negotiations

- Negotiations will fail if one or more of the parties do not have sufficient capacity and funding
- Companies and governments should consider providing initial up-front capacity funding for First Nations that require it
- First Nations should be prepared to commit to reasonable timelines and deliverables (though not necessarily project approval) if capacity funding is provided

4. Will the BSA be Legally Binding?

- Decide if BSA will be binding (typical) or if it can be a non-binding MOU

B. THE PARTIES

1. First Nation Parties

- If the project may affect rights, title or Territory, the BSA should be with the official representatives of the First Nation which may include elected or hereditary leaders or both
- For some agreements (such as holding fee simple land or structuring for an equity agreement) a First Nation corporation may be involved.

2. Government Parties

- Determine which ministries or agencies are involved and who will sign off

3. Corporate and Other Parties

- Determine appropriate legal entity (corporation, subsidiary, non-profit society) and ensure authorized signatories
- Ensure provisions to bind successor companies

C. BACKGROUND AND FOUNDATIONAL PRINCIPLES

- Draft appropriate “whereas” clauses

D. DEFINITIONS

- Define key terms
- For example, if the BSA provides for shared decision-making for some types of management decisions, define “management decisions” to clarify which ones

E. AGREEMENT PURPOSE

1. Certainty

- Set out what the BSA is providing and the relationship between the project and recognition of aboriginal rights and title
- What is each party giving and getting

2. Non-Derogation of Aboriginal Rights

- Unless otherwise agreed, confirm that the BSA is without prejudice and does not derogate from aboriginal rights or title

F. ADMINISTRATION AND IMPLEMENTATION COSTS

- Build on capacity funding: what does each Party need to implement the agreement (for example, management support, employment liaison, accounting support, etc.)
- For projects with revenue-sharing or equity, support to the First Nation may be reduced or ended once the project is generating revenue

G. COMMUNICATIONS

1. Communications

- Set out the contact people for each party and the process for ensuring good

communications throughout the project

2. Information Requirements

- Set out information required (for example, full and transparent reporting of revenues and costs or of employment statistics)

H. DECISION-MAKING

- Determine First Nation involvement in decision-making: will there be an advisory role or consultation, full shared decision-making, or something in between?
- Clearly set out which types of decisions will be made by which processes (for example, major decisions, business decisions, operating decisions, etc.)

I. ENVIRONMENTAL PROTECTION AND MAINTENANCE OF TRADITIONAL ACTIVITIES

1. Relationship to Legal Regulations

- Confirm which laws are assumed to apply and specify if the BSA is filling in any gaps in the laws (for example, BSA may specify requirements for re-planting a site with Native plants or medicines where provincial laws are silent)
- First Nations can enforce environmental protection and maintenance of traditional activity terms in a BSA if necessary and if the government is not enforcing the environmental laws, regulations or permit terms

2. Relationship to Environmental Assessment Process

- Specify if project is related to environmental assessment process
- Specify if BSA fills in any gaps in the environmental assessment process

3. Environmental Standards and Monitoring

4. Maintenance of Traditional Use

5. Application to Third Party Contractors

- Specify if all provisions relating to environmental protection and maintenance of traditional activities are binding on contractors working on the project

J. FINANCIAL ACCOMMODATION, COMPENSATION AND REVENUE-SHARING

1. Legal and Policy Context

- Accommodation may be legally required from government for some

serious potential infringements

- Government and companies may provide financial compensation or revenue sharing to build relations, acquire a “social licence”, etc. regardless of potential impacts

2. Accommodation from Government

- May be required or available via fixed programs (FRO), negotiations (major mining projects) or litigation settlement

3. Benefit Sharing from Companies

- Often available through revenue-sharing, equity arrangements, stock options or other opportunities

K. BUSINESS AND EMPLOYMENT BENEFITS

1. Business Opportunities

- In addition to revenue-sharing, there may be business opportunities for equity, joint ventures, service and supply contracts (perhaps with “open book” or preferred bidding, etc.

2. Employment Opportunities

- Employment arrangements can be mutually beneficial if First Nations provide good employees (especially in remote areas) and the First Nation members get jobs and training
- Be aware of potential problems with target-setting; make sure there is a support structure for placement, training, dispute resolution, etc.

L. COMMUNITY BENEFITS AND RESOURCES

- This can include virtually anything the parties agree on for the benefit of the community: infrastructure, recreation, school or health facilities or supplies, contributions to community events, scholarship funds, etc.

M. LAND AND ASSETS

1. Land Acquisitions

- The company or government may be able to provide lands to address First Nations needs
- It is usually much quicker to provide fee simple land; in B.C. First Nations must hold land in the name of an individual or corporation to register it in the Title Office
- First Nations may want land added to Reserve; the federal Addition-to-Reserve process is slow; companies and Provinces may want to end their

commitment at providing land without guaranteeing ultimate Reserve status

2. Licenses, Permits and Leases

- If a First Nation is willing to deal with provincial and federal assertions of jurisdiction, there may be opportunities to hold licenses, permits or leases as an interim step to reconciliation
- Ministries are sometimes willing to negotiate a waiver or deferral of application fees and other fees and taxes

N. TERM OF BSA

- The start and end date and any termination process are clearly set out

O. EVALUATION AND AMENDMENT

- Provide for periodic reviews and a process for any necessary amendments

P. ENFORCEABILITY AND DISPUTE RESOLUTION

- Make sure the BSA clearly sets out how its terms will be enforced and includes a process for dispute resolution

Q. CONFIDENTIALITY

- Review the interests of all parties: each party may want some aspects of a BSA kept confidential
- Be aware of government Freedom of Information laws, corporate shareholder disclosure obligations, and First Nation laws about protecting culture and knowledge

R. STANDARD CONTRACT CLAUSES

- If the BSA is meant to be legally binding, make sure it contains standard contract clauses

S. SIGNING AUTHORITY AND RATIFICATION

- Verify that the proper parties are represented (see 'B' above) and that each signatory has authority to sign
- Consider if a First Nation community meeting or vote is required (for example, if there is a major potential impact on aboriginal rights or title)

Part I. Introduction and How to Use This Guide



Part I. Introduction and How to Use This Guide

A. Purpose of This Guide

This Guide arose from observations that some First Nation, corporate and government representatives are not fully aware of all of the opportunities and options available to resolve issues through negotiated agreements. Court rulings on aboriginal rights and title, blockades, boycotts, and conflicts have created uncertainty for many projects, developments and authorizations, particularly in British Columbia but also elsewhere in Canada. This uncertainty delays or prevents many worthwhile projects, developments and partnerships.

The response of some parties is to either abandon their projects in favour of other ones that do not affect or involve First Nations or to plough ahead and risk conflict and failure. However, many other companies, governments and First Nations have come together to resolve the issues on their own through negotiated agreements.

The purpose of this Guide is to assist First Nations, government and companies to identify opportunities and options for Benefit Sharing Agreements (BSAs) and to provide resources and references for the parties to develop BSAs. The guide also identifies strategies to achieve BSAs that meet the key objectives of recognition, accommodation and certainty cited below.

B. What is a Benefit Sharing Agreement?

‘Benefit Sharing Agreement’ is a general term to describe a written agreement that is the outcome of a consultation process about a proposed resource extraction, project or development that has the potential to impact the Aboriginal rights or interests of one or more Aboriginal groups in Canada.

Other common terms for Benefit Sharing Agreements include:

- impact benefit agreements,
- interim measures agreements,
- project support agreements,
- cooperation agreements,
- development agreements,
- protection and benefit agreements,
- market access agreements,
- standard-setting or certification agreements,
- participation agreements, and
- accommodation agreements

Aspects of litigation settlements agreements, Joint Ventures, Treaties, Land Claims Agreements or interim or Final Agreements with First Nations may also be considered Benefit Sharing Agreements.

The terminology that will be used throughout this Guide is Benefit Sharing Agreement (“BSA”).

BSAs span a vast range of form and content. This Guide is applicable to any BSA in Canada that has the following core features and objectives:

1. the parties include at least one First Nation and a private company or a government agency or both;
2. the BSA recognizes First Nations interests affected by a Project or development; and
3. the BSA includes one or more of the following to accommodate or address First Nation interests
 - (a) involving First Nations in decision-making,
 - (b) providing capacity or enhancement for one or more First Nations or their communities or members,
 - (c) sharing the expected benefits of a development with potentially affected First Nations; and
 - (d) increasing certainty by clarifying the roles and expectations of the parties with respect to the project or development.

C. The Legal Framework for BSAs

While some BSAs may be applicable to development in urban centres, the majority of BSAs will be in respect of resource developments in more remote, less populated areas. In Canada and internationally, indigenous peoples tend to be disproportionately affected by resource developments because their traditional territories tend to be located in natural resource-rich areas, and because of their dependence on the integrity of the natural resources to maintain their traditional lifestyles and economies.

In Canada, the rights of First Nations to their traditional territories and the associated natural resources are protected under the section 35 of Canadian Constitution which reads:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The legal definition of aboriginal rights that are protected under section 35 includes any practice that is integral to the distinctive culture of a First Nation. Common examples include hunting, gathering and fishing rights but governance and management rights may also be included. The rights may include aboriginal title to lands which were exclusively occupied by a First Nation at the time of the assertion of British sovereignty in 1846. It is important to recognize that section 35 rights are based on traditional laws and practices and may include a wide range of practices and governance.

In some parts of Canada, First Nations rights are explicitly defined in treaties, either historic or modern. In other parts of Canada (especially British Columbia) large areas are not covered by historic or modern treaties and thus the rights remain unsettled. With respect to these areas, the Supreme Court of Canada has explicitly stated governments must consult with, and accommodate where required, First Nations whose rights may be impacted by a development or authorization.² The responsibility for ensuring consultation and accommodation rests with government but proponents often become involved.

In a number of modern northern treaties (mainly in the Northwest Territories and the Yukon) there are provisions requiring agreements be reached with the appropriate First Nations before a development that affects the First Nation’s treaty rights can be authorized.³

In regions of Canada where historic treaties predominate, the Supreme Court of Canada has made it clear consultation and/or accommodation is required with respect to a development that could affect a treaty right.⁴ In some instances the courts have prohibited development without the consent of the affected First Nation that holds the Treaty rights. In others, the courts have ruled that some historic treaties contemplate ‘taking up’ of lands and resources and the proposed developments may not require anything other than basic consultation.

2 Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511

3 See, for example, Gwich’in Final Agreement, 1992 and the list of provisions in Part IV.

4 Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005]

What is clear, however, is the reality in Canada that First Nations need to be included in the planning, implementation and monitoring of resource extraction, projects and developments that affect their rights, interest or Territories. The spectrum will range from cases where there is a clear legal obligation on the part of government to demonstrate that it has consulted with and accommodated First Nations prior to permitting development, to cases where there is a limited or uncertain duty.

Even where there is no clear legal duty to consult and accommodate, many companies have entered into BSAs as part of a ‘good neighbour policy’ or a commitment to secure a ‘social license’ or simply because it makes good business sense. There is an increasing trend for companies in certain sectors to build relations and negotiate agreements with First Nations to secure the approval of consumers and ethical investment funds. In some sectors such as forestry there are certification processes that identify ethically produced products. In other sectors such as mining, ethical investors pay close attention to major projects and the practices of various companies and base their investment decisions on their observations.⁵

Government agencies are increasingly negotiating BSAs as part of reconciliation or developing a New Relationship with First Nations.

Within this framework, in the course of less than two decades in Canada, BSAs have emerged as the predominant tool for government, companies, and First Nations to achieve a foundation of certainty for development to proceed.⁶ While BSAs by no means affect a complete reconciliation of Aboriginal rights within the framework of the Canadian Constitution, BSAs can establish strong and positive measures to enable sustainable economic development for the benefit of all parties.

D. How To Use this Guide

The purpose of this Guide is to aid First Nations, government and private companies in the negotiation and drafting of effective BSAs. The Guide is generally applicable to all resource sectors. It is not a primer of the law of consultation and accommodation,

⁵ See, for example, “Mining company excluded from the Government Pension Fund – Global due to contribution to serious environmental damage” Press release, published 30.01.2009, No.: 13/2009
<http://www.regjeringen.no/en/dep/fin/press-center/Press-releases/2009/mining-company-excluded-from-the-governm.html?id=543107>

⁶ The earliest dated sample in this Guide is 1990. The pace of the development of BSA’s accelerated significantly after 2004 and 2005 when the Supreme Court of Canada pronounced a duty to consult on the part of the government with any First Nation who has a reasonable claim that a government action may impact its aboriginal rights, or a treaty right that may be affected, respectively.

and does not provide any guidance with respect to the legal duties of the parties in a given scenario. It starts at the assumption that the parties have informed themselves of their respective legal positions with respect to a development and have determined that it is necessary or desirable to reach a mutually acceptable agreement on First Nations involvement.

Part II of the Guide is an annotated template for a BSA. There is no formula for drafting a BSA; every negotiation is different. However, there are key components that many BSAs will include. This template is intended to provide general information only. It is not an exhaustive catalogue and it is not a substitute for legal advice and should not be relied on as such. Parties should seek legal advice in drafting a proposed BSA, or at least a legal review of a draft agreement, before the terms are finalized.

Part III of the Guide focused on best practices around BSA implementation. It is based on interviews with individuals from a range of sectors and interests who have been involved in the development and implementation of BSAs.

Part IV is an overview of BSA requirements and practices in other jurisdictions.

Part V is a bibliography for reference and further reading.

Appendix One is a matrix of sample agreements. Where agreements are confidential, the names of the parties and identifiable terms have been excluded. The table will assist parties attempting to negotiate BSAs by providing an overview of the scope and range of BSAs in Canada and their common terms.

Appendix Two is a selection of sample agreements. The sample agreements have been selected for their representativeness or because they highlight interesting approaches; inclusion does indicate an endorsement on the part of the authors of a particular agreement.

Part II. Annotated Template of Key Components of a BSA



Part II. Annotated Template of Key Elements of a BSA

A. Preconditions for Negotiation

1. Relationship Building

Fair, lasting and mutually benefit agreements start with developing good relations. Often the people and relations matter just as much as the substance of the agreement, if not more so. It is important to understand that many BSA negotiations begin in a general atmosphere of dissatisfaction and distrust.

Most First Nations can recount dozens of examples where business and government representatives have ignored or excluded the First Nation in planning and commencing major resource extractions or developments in the First Nation's Territory. The First Nation may not hear about a project until the last minute when a corporate or government representative sends a form letter asking if the First Nation "has any interests that may be affected by the proposed project".

On the other hand, many government and industry representatives can cite countless examples of situations where they have sent letters, made phone calls, tried to schedule visits and received virtually no response.

Successful BSAs begin with a significant investment of time by all parties in getting to know each other. It is essential to start early in the planning stage and to be persistent in creating opportunities for face-to-face contact. For government and company representatives there is no substitute for going to the First Nation community, spending some time at lunches, dinners and community events and getting to know the First Nation community and members. For First Nation representatives, it is important to find time to meet and understand what is being proposed.

Investments in relationship-building are some of the most important investments anyone will ever make and may determine the success or failure of the entire project.

2. Negotiation Framework

If negotiations are complex, the parties should consider entering into memoranda of agreement (MOU) or similar, non-legally binding agreements to guide the negotiations. An MOU is based on a preliminary discussion of the parties about the negotiation process.

Clear timelines are key, in particular in relation to the timing of government permits that are required for the development. In most cases, negotiations on a BSA will take place prior to a company applying for a permit for a development, or at least prior to a permit being issued after an application. The courts have clearly stated that the governments have a duty to consult with affected First Nations at the early stages of a development, before a course of action is taken that may affect aboriginal rights.

From a practical point of view, companies will want to determine whether there will be First Nations opposition to a project prior to investing money that will not be recovered. It goes without saying that if a First Nation is engaged in negotiations with a company and/or government about a project before the project is commenced, there will be a much better opportunity to reach a mutually acceptable agreement.

An MOU is an opportunity for all parties to identify their timing needs and to reach an acceptable framework that provides guidance with respect to the timing of negotiations. Parties should turn their minds to broad contexts such as the need for exploratory and assessment work and financing deadlines on the part of the company, community processes and capacity on the part of First Nations, and legislated timelines on the part of government. Wherever possible, build in sufficient time for contingencies and potential delays.

Additional terms to an MOU could include:

- the location of the negotiations (e.g. in the First Nation community where the development is taking place, or alternating between government and/or company offices and the community);
- the names of individuals who are authorized to negotiate on behalf of the parties, including alternates if required;
- a process for setting agendas, recording meetings and other administrative matters; and
- capacity funding (see below).

Unless there is some particular reason for a binding agreement at this point (e.g. to deal with a highly confidential development), MOUs are usually not legally binding and do not establish a duty on any of the parties to reach an agreement. The concept of an MOU or other preliminary agreement to establish a negotiations process should not get overly bogged down. An MOU does not have to be exhaustive, it can simply point to a basic framework and can be a living document that should serve to create clarity around the process. Negotiation of a non-binding written framework can also serve as a relatively low risk ‘warm up’ towards BSAs that in most cases will be legally binding.

3. Capacity Funding for Negotiations

In a typical scenario where BSA negotiations occur there are three forces engaged:

1. a company is seeking legal rights to lands or resources or opportunities for financial gain;
2. the provincial and/or federal government has asserted jurisdiction will make a decision about whether it is in the public interest to grant the rights, usually for revenue purposes; and
3. one or more First Nations have recognized or asserted aboriginal rights that the government is legally required to protect against unjustified infringements.

A successful BSA that provides the foundation for a development requires that all parties be adequately resourced to participate in the negotiations. Negotiating a BSA is often a legally significant and high stakes process. Irreparable harm to aboriginal rights, as well as significant financial losses for all parties, could result if the process fails.

It is the reality in Canada that First Nations often have less human and financial resources than companies or government to support negotiation processes. While the courts have yet not clearly dictated a positive duty on the part of government or companies to provide adequate capacity funding to First Nations to engage in BSA negotiations, there is judicial recognition that the provision of financial capacity is an important aspect of the duty to consult. In addition, in several recent extraordinary cases, the courts have ordered governments to pay costs in advance to First Nations to litigate key rights and title issues.

Law aside, from a practical perspective, if one party to a negotiation has insufficient capacity to properly engage in the negotiations, the negotiations are likely to fail. Therefore, the parties need to turn their minds to this issue before commencing negotiations and determine whether one party, typically the one with the most incentive to reach an agreement, will provide the other party with a financial grant. If such funding is provided, there must be balance. A company cannot reasonably expect funding to create an obligation to agree, only an obligation to the receiving party to participate in the negotiations in good faith. On the other hand, a company or party providing funding likely has legitimate expectations that the funding lead to process results: they may wish to tie the funding to timely responses from the First Nation. The party providing the funds may also wish to provide capacity funding to match key stages of the negotiations, rather than in a lump sum in advance, in the event the negotiations do not progress past initial stages.

Ideally, most of the funding for capacity building for First Nations should go to First Nations and their members. Outside resource people are sometimes necessary and helpful, at least in the interim. For different projects, resource people may include lawyers, accountants, tax advisors, planners, appraisers, HR specialists, negotiators, etc. All parties may wish to support and encourage appropriate use of outside resource people but will hopefully emphasize the need to use such resources only on a temporary and constructive basis with the goal of increasing the First Nation's capacity and, wherever possible, training and mentoring members from the First Nation.

4. Will the BSA be Legally Binding?

Prior to entering into negotiations, there is one last consideration that the parties should determine in advance. Is the agreement under negotiation intended and expected by all parties to be a legally enforceable agreement? In most cases, it is in the interests of all parties that a BSA be legally enforceable so that it can be relied on with certainty. A review of the available literature, and the interviews carried out for this Guide indicate that legally enforceable agreements lead to better net benefits for all parties. On that basis, the structure and commentary of this Guide generally assume that the parties intend to be bound by the terms of a BSA. In cases where the parties agree that the BSA should not be legally binding, that intention should be clear at the outset, and should be explicitly stated in the BSA.

B. The Parties

1. First Nation Parties

An overarching principle of law is that First Nations have the right to choose their own governance structures. The courts have found that a Band, Tribe or Nation may enter into contracts, so there are several options with respect to naming a First Nation party to a BSA, provided that the following legal principles are reflected.

Customary Law

Generally, the legal authority of a First Nation to enter into an agreement with respect to resources is based on an aboriginal right to the resource, which is held in common by the successors to the aboriginal group that held the right at the time of contact. In cases where the members of a modern day Indian Act Band are the successors of the members of the historical organized group or tribe, it may be most logical for the BSA to be in the name of the Band. This includes situations where one or more tribes have been amalgamated into one Band, so long as those groups are the same groups who are affected, and thus entitled to benefits, from the development. In cases where the development affects a historical group that is broader or narrower than a Band, it is preferable to name the group specifically, such as a House, Hereditary Group, Tribe,

or Tribal Council, or larger Nation. However, if the parties wish to use these alternate terminologies, the aboriginal signatories should be able to demonstrate that there is a customary law foundation to establish the particular group as the proper party with authority with respect to the lands and resources at issue.

Representative Bodies

In the case of Tribal Councils or Treaty Societies, this is frequently not the case, but for political, economic or administrative reasons, the First Nation parties may wish to enter into a BSA as this type of group. In such cases, the Council or Society should be identified as acting on behalf of its member nations who are the rights holding groups based on custom. For example: X Treaty Society on behalf of the Y First Nation and the Z First Nation. The law is clear that Aboriginal rights are not assignable or transferable, but at least according to some courts, an aboriginal group may put forward a representative body to act on its behalf with respect to a BSA. From the First Nation perspective, a larger First Nation entity may have more negotiating power. From the point of view of government and companies, it may be easier to deal with a single, larger entity rather than several smaller groups. However, this approach is only advisable when there are clear common interests within the larger group. And even in cases where there is consensus with respect to common interests, the BSA may require detailed provisions identifying how benefits and responsibilities under the BSA will be allocated amongst smaller groups, for example, from a Tribal Council to a Band.

More Than One First Nation

Where there is more than one First Nation that may have rights and are therefore entitled to benefits with respect to a development, but the First Nations are not associated through a broader organizational structure, a company and/or government may be required to enter into more than one BSA. In determining which First Nations it should negotiate with, companies may rely on government to some extent to be aware of which First Nations the government will be required to consult with, and potentially accommodate, with respect to authorizing the development.

However, due diligence may include independent research on the part of the company to aid in identifying the aboriginal groups with rights or interests in a resource area. BSA negotiations may not necessarily be the same for each First Nation. For example, some First Nations may be more central to the development and thus more impacted, and thus entitled to greater compensation or benefits. Another First Nation may be less impacted, but in a better position to provide labour and supplies to the developer. It thus cannot be categorically stated that First Nations are always in a better position if they coordinate negotiations, or that companies should strive to coordinate negotiations with distinct First Nations within a development area. However, it is common sense that where there is a competing claim, it is to the benefit of First Nations, as well as

companies and government that the First Nation is supported to develop protocols with other First Nations in overlap areas.

In more unusual cases, the proper First Nation party may be a Nation confirmed by statute deeming the FN to be a legal entity with all the rights, privileges and responsibilities of a natural person, including the ability to sue and be sued. For example, the Westbank First Nation has such status under the Westbank First Nation Self Government Act (S.C. 2004, c. 17). Parties contracting with First Nation could be expected to rely on a First Nation to identify these circumstances.

Band-Held Corporations

In some circumstances, the First Nation party may be a Band-held or economic development corporation.⁷ This would generally only be appropriate to joint venture and service agreements, not agreements that recognize or reflect aboriginal or treaty rights. However, First Nations sometimes enter into agency agreements with their economic development corporation and authorize these corporations to deal with some aspects of their rights, title or Territory. Legal advice should be sought to ensure that the corporation has the authority to deal with rights, title or Territory.

There may also be a legal requirement for a First Nation to hold some assets under a corporate entity. For example, fee simple land provided as part of a BSA may need to be held by a Band corporation because the B.C. Land Title Office does not yet recognize Indian Act Bands as being legal entities entitled to register land title ownership.

As discussed in greater detail in Section ‘K’, the parties in some cases may wish to establish a separate agreement with respect to business arrangements arising out of BSA negotiations where the ideal party to represent the First Nation is a corporate entity, for example in situations where the First Nation wishes legal and financial liability to be restricted to a corporate entity rather than the Nation at large. There is an increasing trend towards the use of Limited Liability Partnerships and other corporate vehicles designed to limit First Nation liability. There are excellent resources available for First Nations to select the best legal vehicle to meet their legal, political and community objectives.

A Band-held corporation may also be preferable in circumstances where BSA negotiations may lead to conflicting roles on the part of the First Nation. For example, the First Nation may retain a role as a rights holder recognized as having environmental stewardship responsibilities, while at the same time the First Nation may emerge with

⁷ A typical structure in this regard is the board of directors includes members of the First Nation and the shares in the company are held by a trustee on behalf of the members of the Nation.

a business interest in the development. Another example is where a First Nation is tasked as acting as an employment agent for its members with respect to a development, while also having a business interest that would conflict with its duty to its membership. In such cases, a more comprehensive BSA can name an arm's length, Band-owned company as entitled to the business opportunities set out in the agreement, with the First Nation taking steps to separate the distinct and potentially conflicting roles it has. In cases where the contracting party is a Band-held corporation, the legal authority to enter into an agreement is dictated by the articles and bylaws of the corporation.

2. Government Parties

It is perhaps surprising that although the legal duty to consult with, and where applicable accommodate, First Nations, rests with the government⁸, there are as many examples of bilateral (two party) BSAs negotiated between a First Nation and a private companies as there are bilateral BSAs between First Nations and the federal and provincial governments. One reason is that the private sector tends to be more fluid, flexible and able to move more quickly than government policy. In areas where aboriginal rights and title are not subject to any treaty (mainly British Columbia but also parts of Ontario and other provinces and Territories), there has been an ongoing tension between First Nations, government and private companies as to whether the government or the private company should be required to reach an agreement with First Nations. Part of the tension includes disputing views over whether the government or companies should share project revenue or royalties with First Nations.

As will be discussed in detail later in Section 'J', companies typically take the view, in the case of major resource use permits, that they are paying the government already in royalties, stumpage, rent and/or taxes and that it is the responsibility of the government to share that revenue with First Nations. Forestry companies and mining companies in 1993 and 1997, respectively, applauded the British Columbia government's policy announcements that the government would share revenue with First Nations that was derived through stumpage and mining taxes from the companies.

However, government's willingness to engage in revenue sharing with First Nations remains very limited in British Columbia and in the rest of Canada, leaving many of the costs of BSAs to private companies. As one commentator describes, government often remains "in the shadows" of BSA negotiations, giving "oblique but strong indications [to private companies]...that satisfactory arrangements with First Nations potentially affected by a proposed project were a *sine qua non* for project approval" (Shanks 2006). In this way, government passes on its consultation obligations to

⁸ With limited exceptions. See, for example, the Gwich'in Comprehensive Land Claim Agreement, Article 21, which creates a legal duty on the part of a private company to consult with First Nations.

private actors. To make matters even more frustrating to First Nation and corporate parties, government ministries sometimes attempt to take credit for BSAs to which they have made no contribution. Government ministries and agencies often list BSAs between companies and First Nations as part of the government consultation record.

Government representatives sometimes state the view that they are legally prohibited from entering into BSAs by the law relating to “fettering”. Fettering can occur when a government decision-maker enters into a contract or agreement that prevents it from making decisions or exercising its discretion in the future. Government representatives are correct in stating that there is a legal doctrine against fettering discretion. In some circumstances, government decision-makers cannot fetter their discretion by entering into agreements that prevent them from making decisions in the future. However, this doctrine has been gradually eroding. Federal and provincial governments frequently enter into contracts and agreements and the courts have tended to uphold these contracts and agreements even if they fetter the discretion of the government. In addition, government must act in accordance with the Constitution and constitutional law clearly permits, and in some cases may require, agreements with First Nations that fetter the discretion of future government decision-makers. Treaties are the obvious example of constitutional agreements that fetter the discretion of government decision-makers.

In light of recent trends in the law and the requirement for government decision-makers to act in accordance with the Constitution in respect of aboriginal rights and title, there is little if any legal basis for government officials or negotiators to use the concept of fettering as an excuse not to enter into co-management or other agreements with First Nations. A full analysis of the legal issues relating to fettering is outside the scope of this Guide. However, excellent legal resources are available from a number of sources including Continuing Legal Education of B.C.

Notwithstanding the background role government frequently plays in BSA negotiations, there are an increasing number of BSAs to which the federal or provincial governments, or both are actually parties. The most common form of government party is the Minister who oversees the relevant legislation under which a permit for a development is issued. Agreements typically name the government actor as *Her Majesty the Queen in Right of Canada as represented by the Minister of [relevant ministry]*, in the case of the federal government, and as *Her Majesty the Queen in Right of [name of Province] as represented by the Minister of [relevant ministry]* in the case of provincial governments. In some cases, where the content of a BSA spans more than one ministry, additional Ministers will be named as parties (e.g. *Her Majesty the Queen in Right of British Columbia as represented by the Minister of Transportation and the Minister of Forests and Range*). Both the federal and a

provincial government may be party to a BSA where a development requires permits from both levels of government.

With respect to municipalities, the proper legal name of the municipality should be cited (e.g. “*Corporation of the District of [name]*”) and care should be taken to ensure the municipal partner is acting under the authority of its parent legislation and a valid by-law.

3. Corporate and Other Parties

The naming of a private company in an agreement is generally dictated by the company’s articles and bylaws. It is prudent to identify the exact name of the company, including its legal structure and its business address, for example: X Resources Company Ltd., duly incorporated under the laws of [name jurisdiction, i.e. B.C. or Canada] with a registered address of [address].

As with First Nation and government parties, it is possible to have more than one company as a party to an agreement. However prospective parties should consider whether more than one company a party to an agreement would create undue complication in drafting, and ultimately interpreting, which obligations apply to which companies.

A particular consideration is how companies bind their contractors to the terms of the agreement, for example, a provision requiring all contractors to comply with the employment equity provisions of a BSA. In most cases, provisions can be made to ensure that contractors, who may not yet be known and are not a party to the agreement, are bound by the terms of the agreement. This will be discussed in further detail under Section ‘K’ of the Guide.

Incorporated non-profit societies may also enter into agreements with First Nations. The naming of an incorporated society follows the same rules as the naming of a company (in accordance with the constitution and bylaws of the society). An example of this nature is an agreement whereby a society wishes to purchase or lease land in First Nations territory and seeks the First Nations consent by the negotiation of a BSA that may include co-management options, right of first refusal for sale and subsequent licences, etc. Although rare, there is no reason why an individual person, rather than a company, cannot also enter into a BSA with a First Nation.

It is important to recall that corporate and non-profit parties may change more frequently than government parties. This is particularly true in sectors such as mining and hydro where junior companies develop the opportunity and then sell or assign it

to larger and better funded entities. It is crucial to plan for sale and assignment and to specify that future companies and entities respect the terms of the BSA.

C. Background and Foundational Principles

After setting out the parties, BSAs typically start with a preamble, also known as recitals or ‘whereas’ clauses. The preamble is generally not legally binding, but it plays an important role in setting out the background and context of the BSA and the motives and intentions of the parties to enter into the legally binding clauses. For example, “*Whereas Company X is seeking a logging licence within the traditional territory of Y First Nation*”.

In areas where aboriginal rights are unsettled and the parties have different views that have not been resolved in negotiations, statements of each party’s view of its jurisdiction may be included in the preamble. For example:

Whereas the X First Nation asserts that it holds existing Aboriginal rights, including title and other interests, to the Traditional Territory as outlined in the map in Appendix “A”, including the right to stewardship of lands, waters and resources therein;

Whereas the Province asserts that the lands, waters and resources included in the X area are Crown lands, waters and resources, and are subject to the sovereignty of Her Majesty the Queen and the legislative jurisdiction of the Province of British Columbia.

Anything that is helpful to the interpretation of the BSA may be appropriate for inclusion on the preamble. These include, but are not limited to:

- a reference to broader, related processes, such as treaty or other land claims settlement negotiations or court actions to identify the BSA as an interim measure until a broader claim is resolved;
- reference to previous or related agreements to the BSA;
- a statement with respect to issues that remain unresolved and are outside the BSA, for example: “*Whereas the Province acknowledges that this Agreement does not constitute full consultation and accommodation and does not fully address all land-use interests of the X First Nation*”;
- statements setting out the parties’ interests in detail, for example: “*Whereas company X has staked or has applied for rights to various quartz mining leases in the [area], more particularly described in Schedule A attached hereto, which claims are in within the traditional territory of the X First Nation*” and “*Whereas the X First Nation has a relationship to the land that important to its culture and the maintenance of its community, governance*

and economy”;

- reference to other related processes, including assessments or legal actions, for example: “*Whereas an environmental assessment with respect to the project proposal was completed on [date]*”;
- reference to government policies that underpin government commitments in the BSA; and
- statements about the parties’ intentions to work together in a spirit of cooperation.

It should be noted that while the recitals are not generally considered to be legally binding, some recital sections explicitly state that the recitals form part of the agreement and should be used to interpret the agreement. Even in cases where such a clause is not present, parties should be aware that the recitals are important because they may be relied on by courts in interpreting the BSA. In some cases, statements that are important to one party but are not agreed to by the other party can go into the recitals in a manner that does not impute agreement to both parties. A good example of this are the parallel clauses with respect disagreement about government and First Nation jurisdiction, set out above.

If the project or project area is defined too broadly, a First Nation may inadvertently agree to a scope of development beyond what they had anticipated. If the project or project area is defined too narrowly, a company may believe they have secured First Nation’s support for work beyond what it actually has.

The recital clauses are typically demarcated alphabetically (i.e. A, B, C, D) rather than numerically to distinguish them from the terms of the agreement. Immediately following the preamble there is typically a clause stating that the remainder of the Agreement is intended to be legally binding. Common wording includes:

- In consideration of the mutual promises set out in this agreement, the Parties agree as follows:
- NOW THEREFORE it is agreed between the Parties hereto as follows: or
- Now therefore, with good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each Party, the Parties covenant and agree as follows:

D. Definitions

On its face, the definition section of a BSA is a drafting tool that serves to simply the language of the overall agreement so that the language can be clear and precise. However, the definition section can contain terms that are fundamental to the substantive aspects of a BSA. For example, the precise definition of the project or

project area that is the subject of the BSA is often found in a definition section. If the project or project area is defined too broadly, a First Nation may inadvertently agree to a scope of development beyond what they had anticipated. If the project or project area is defined too narrowly, a company may believe they have secured First Nation's support for work beyond what it actually has. Thus, parties should think carefully about definitions and use as precise language as possible. A definition of a project may break down distinct phases of the project to clarify, for example, whether the BSA applies to the development or reclamation phase as well as the operational phase.

Another example of a definition that has important legal consequences pertains to decision-making. There may be a clause in the BSA that says the company will refer all management decisions to a joint management committee. A list of decisions under a definition of "management decisions" will define the scope of the joint management provisions and will determine which decisions will be made jointly and which will not.

E. Agreement Purpose

This section of a BSA may be characterized as the heart of the agreement, with the benefit provisions and mitigation measures forming the legs and arms, and the communication and management sections at the head. Other common headings for this section include "Agreement Principles". Key principles may be articulated in this section with respect to environmental management and other operating principles; although if these are required in detail they may be more suitable for inclusion in the Management or Environmental Protection sections of the BSA. This section is also a logical place to state that the Parties intend (or do not intend, as the case may be) the BSA to be legally binding.

1. Certainty

This purpose section of the BSA typically includes what the government and/or companies are seeking from First Nations: a greater degree of certainty that the First Nation will not oppose or challenge the development. Examples of typical clauses in that regard include:

- *The purpose of this Agreement is to provide certainty and a stable operating environment for the Project;*
- *The purpose of this Agreement is to provide a basis for an effective working relationship between the Parties;*
- *The purpose of this Agreement is to establish conditions under which X First Nation will provide support to the Project;*

- *The purpose of this Agreement is to provide recognition and accommodation of the aboriginal rights of X First Nation aboriginal that will be impacted by the Project;*
- *The purpose of this Agreement is to recognize and protect the environmental integrity of the Project area and the traditional cultural practices of X First Nation;*
- *The objective of this Agreement is to provide for involvement of X First Nation in X Project*

While these statements appear on the surface to be relatively subjective and inconsequential, there is a legal subtext in purpose statements that has significant implications with respect to the legal status of First Nations rights and the duty on the part of the government to ensure that adequate consultation and accommodation has taken place prior to project approvals. It is likely not in a First Nation's best

It is likely not in a First Nation's best interest to provide a 'blank cheque' to the company or government with a broad consent or a 'no opposition' clause, particularly where the full operation and impact of the project are not yet known.

interest to provide a 'blank cheque' to the company or government with a broad consent or a 'no opposition' clause, particularly where the full operation and impact of the project are not yet known. For example, a First Nation should carefully consider whether to agree to a clause that states: "the First Nation will not lodge any complaints with the government or the courts in respect of the Project". This would put the First Nation in a worse position than it was prior to the agreement with respect to its ability to lodge a complaint or action against the company for a violation of environmental regulations, for example.

(O'Faircheallaigh & Corbett 2005). If a First Nation agrees to a broader consent clause, it should be made explicitly subject to the other Party acting in accordance with the terms of the BSA.

For companies and government, a component of certainty is addressed by clauses in the BSA where the First Nation represents and warrants that the Chief and Council, or an alternative authority who is signatory to the BSA has the authority to enter into the BSA on behalf of its members. Some BSAs also have a clause that require the signatory First Nation body to take legal responsibility in the event its membership does not act in accordance with the BSA, such as by opposing or interfering with a development after a BSA is signed, through direct and/or legal action.

Where there has been litigation with respect to a First Nation's opposition to a development, a BSA may be in the nature of a settlement agreement with respect to the litigation. In these circumstances, a BSA may have a clause stating the parties agree to a mutual release with respect to any associated litigation. Where a BSA is

very comprehensive, the government may seek a clause stating that the First Nation agrees that the BSA satisfies any legal obligation on the part of the government to consult and accommodate the First Nation and that there has not been any unjustified infringement of aboriginal rights or title in respect of specific permits or decisions covered by the BSA.

2. Non-Derogation of Aboriginal Rights

Given that the recognition of aboriginal rights is a defining characteristic of BSAs, in most cases the parties should consider clear provisions to identify the legal relationship of the BSA to aboriginal rights. It is well established in law that any instrument that purports to extinguish or surrender aboriginal rights to a private actor will be constitutionally invalid. Aboriginal rights can only be surrendered to the Crown, and even then only under strict rules. Typical non-derogation clauses, also known as ‘without prejudice’ clauses, include:

- *Nothing in this Agreement shall be construed to prejudice or derogate from any Aboriginal Interests of the X First Nation arising from their asserted traditional use and occupancy of their Traditional Territory, nor from any treaty or land claim agreements that may be negotiated;*
- *This Agreement, and the processes set out herein, is not a treaty or land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982;*
- *For greater certainty, this Agreement is not intended and shall not be construed to create, define, recognize, affirm, suspend, limit, deny, derogate or abrogate any Aboriginal rights or title of the X First Nation which may exist or be acquired in the future within the meaning of sections 25 and 35 of the Constitution Act, 1982;*
- *Except in proceedings directly related to the enforcement of this Agreement, the contents of this Agreement and any record created pursuant to it are not intended to limit any position any party may take with respect to future negotiations, and are without prejudice to any legal position that has been or may be taken by any party in any court proceeding, process or treaty negotiations or otherwise, and nothing in this Agreement shall be construed as an admission of fact or liability in any such proceeding or process; or*
- *Nothing in this Agreement, or any decision taken pursuant to it, will derogate from any existing legal obligations the Province or Canada may have to consult with and accommodate the X First Nation relating to any decisions that may impact the Aboriginal rights of the X First Nation.*

Despite the inclusion of such “without prejudice” clauses, a First Nation should be

aware that if it has entered into an accommodation agreement, the government will attempt to rely on a BSA, in some cases when it is not even a signatory, to demonstrate that it has discharged its legal duty to consult and accommodate. To that extent, a BSA may not be entirely without prejudice.⁹ Further, while such clauses will protect the underlying legal claims of a First Nation, there is the unavoidable reality that a resource extraction or development project will inevitably impact aboriginal rights in practice to some extent. For example, an accommodation agreement with respect to a logging plan may state it is without prejudice to an underlying Aboriginal title claim, but in the long run, the land base the First Nation may acquire under a land claims settlement or court declaration will be very different in character if it has been logged. For this reason, it is important that First Nations take the ‘long view’ of their interests in negotiating accommodation agreements, such as ensuring the BSA includes appropriate environmental and cultural protections.

Finally, the purpose section of the BSA, similar to the preamble, may identify what the BSA does not do. For example, there may be a clause which states that the purpose of the agreement is not to prevent or replace First Nations participation in related regulatory processes. Another example more typical to cases where the government has had no involvement in the BSA is a clause stating that the BSA does not discharge the government’s legal duty to consult with and accommodate the First Nation in respect of the project, for particular permits and on an ongoing basis. However, even where an agreement has an explicit clause stating that the First Nation acknowledges that in exchange for the benefits provided under the BSA it has been fully consulted, it is possible a court will find that the honour of the Crown requires the government to engage in further consultation if new information comes to light.

F. Administration and Implementation Costs

The importance of adequate human and financial resources cannot be over-emphasized. Studies assessing the success of BSAs indicate that most BSAs do not have sufficient provisions for First Nations to properly participate in the implementation and operation of the agreement (Prno 2007). Many First Nations are operating with severe capacity shortages. In the absence of new funding and support, it is usually not reasonable to expect First Nations to successfully negotiate and implement a BSA “off the side of their desk” in addition to their significant responsibilities to administer health, housing, education and other crucial community programs and services.

Lack of follow-up is a common problem that prevents the intended benefits of a BSA

⁹ In some cases such as *R. v. Seward*, B.C.J. NO. 1726 (MacKenzie Prov. Ct. J.) the courts have ruled that aboriginal and treaty rights have been suspended or limited by an agreement despite the inclusion of a non-derogation or without prejudice clause in the agreement.

from being fully realized (Prno, 2007). If a First Nation participant does not have a budget to cover the costs of BSA operation and management, the government or the companies will have to consider providing financial capacity to the First Nation. This is widely recognized and such terms are common in BSAs.

Company and government resources are certainly not limitless. When entering into BSAs, these parties must also seriously consider and actively dedicate human and financial resources they will require to be able to deliver on the promises contained in the BSA and manage the project.

Although this may not be specified in a BSA with respect to these parties, it must be accounted for in operational costs and should not be underestimated. Particularly for small or start-up companies, it is important to find all available sources of funding to help pay for these costs. It is often useful to check with Indian and Northern Affairs or with other companies or projects that have successfully acquired funding to develop and implement BSAs with First Nations.

Financial support provisions in a BSA should be clearly separated from other financial provisions such as revenue sharing or compensation for interference with First Nation interests or the exercise of rights. Financial support provisions are a cost of doing business. First Nations should identify their anticipated human resource needs for BSA administration and management in as much detail as possible. First Nations governments and managers need to commit to dedicating financial support funds in a BSA for their intended purpose and in some cases, allocate their own resources. Human and other resources needs may include:

- staff time to for general liaison with the other parties on overall implementation,
- staff time for general administration of the BSA,
- staff time for management and committee meetings,
- staff time to manage the employment provisions,
- staff time to manage the financial and accounting aspects of the BSA,
- staff time to manage community communication and participation,
- staff time for BSA review, record keeping and reporting,
- costs of community participation (e.g. elder honoraria, meeting costs),
- supply costs, office space, equipment costs,
- travel costs,
- consultant fees for technical advice including accounting, tax, and legal advice, and
- consultant fees for assessments and studies, etc.

If the project is major in scope, it is unrealistic to expect that a First Nation will have the ready capacity to absorb these kinds of costs. A First Nation, or a company in a major

agreement, may need to hire a dedicated manager to oversee BSA implementation.

In some cases funding may be available for First Nations from various sources including Indian and Northern Affairs funds for resource development and economic development opportunities. In such instances, a company's contribution may focus more on providing support for the First Nation to secure available funding.

If there are significant revenue sharing or business opportunities involved in a BSA, there may be provisions to phase out company/government funded operating costs at a point when the First Nation can be reasonably expected to share costs, or bear its own costs. Where First Nations or other parties will be providing 'in kind' contributions through staff or council time, this should still be identified in the BSA so the true costs of participation are known.

G. Communications

1. Communications

BSAs should be as explicit as possible in setting out communication mechanisms and expectations. A critical first is who will be the 'frontline' communication contact in the BSA. There should be notice provisions in the BSA that provide contact information for these individuals. It is acceptable to identify positions, i.e. Operations Manager or Band Administrator, where the Agreement is longer term and individuals may be expected to change positions over the term. There may be more than one contact identified for different sections of the BSA.

2. Information Requirements and Reporting

It is advisable to include specific clauses stating precisely what information will be exchanged and how it will be exchanged. In negotiations, parties should turn their minds to the questions of who, what, when, where and how of information in relation to each clause of the BSA. If there are obvious gaps, additional clauses should be added to fill in the details. In each case, the Parties should try to envision a predictable implementation scenario, and ask, if a third party were assessing our actions under this agreement, are the intentions of the Parties clear? Details may be set out in a general communications section of the BSA, as well as in specific sections, such as environmental management, business or employment sections. A general communications section may be useful to set out communication principles such as definitions of reasonable response times. Where information or decisions will be required on an urgent basis, the BSA should have mechanisms for a party to designate decisions for an expedited process, after the expiration of which a party is entitled to proceed to a dispute resolution process if required. The sharing of sensitive

or confidential information requires provisions for confidentiality. Confidentiality is discussed in detail in Section ‘Q’.

Record keeping and reporting on aspects of the BSA are very important tools to aid the parties in assessing the effectiveness of the BSA. They are also crucial to transparency and accountability with respect to the membership, constituencies and shareholders of parties to the BSA. Without reporting mechanisms, key objectives of a BSA may be lost. For example, if the BSA has an identified objective to increase employment opportunities for a First Nation community, a lack of employment records and reporting will make it impossible for the parties to assess this objective. Therefore, BSAs will ideally have specific terms setting out who will keep records, where they will be kept, who has access to them, what reports will be required and how often, who will receive reports, and how often reports will be made.

Where BSA negotiations determine that there are gaps in information that cannot be closed prior to the conclusion of a BSA, the parties can specifically identify such gaps and make provisions for securing this information. This generally needs to be coupled with a commitment on the part of all parties to respond to new information. For example, a Traditional Use Study may be required to assess all the potential impacts of a project, but the study may need to be ongoing over the span of the project. In the information section of a BSA there may be clauses that read:

The Parties acknowledge that the completion of a TUS will provide more complete information with respect to the impacts of the Project on X First Nation;

The Parties agree to commission a study (paid for by X), the terms of reference and budget for which are set out in “Schedule C” to this Agreement;

The Parties agree that within 30 days of the completion of the Study, a TUS committee, as established in “Schedule D” to this Agreement, will make binding recommendations to the parties to implement the findings of the TUS in accordance with the terms of this Agreement.

Other terms that may be included in a general communications section include communication mechanisms for monitoring, either with respect to the project impacts or the agreement itself. These typically involve the creation of joint committees and are discussed in detail in Sections ‘G’ and ‘P’ of the Guide. There is no ‘one size fits all’ provision for communications. In some cases, a simple appointment of a communication liaison for each party will suffice; other BSAs may have complete consultation codes setting out all manner of detail with respect to project management. BSAs often build communications around the establishment of committees. As

discussed above, it is important that a BSA have provisions for financing committee participation.

H. Decision-Making

The ultimate goal of reconciliation based on the Canadian Constitution requires full and meaningful involvement of First Nations in decisions which affect them taking into account federal and provincial government structures but also First Nation governance and laws. Even if a project or process cannot yet reach this point of reconciliation, each step is important. There are many successful BSAs that provide for some form of shared decision-making and lay the groundwork for reconciliation. For the purposes of this Guide, the general term shared decision-making is used to describe a range of management principles and structures that specifically contemplate one or more parties to a BSA being involved in some aspect of decision-making relating to the project, authorization or development.

There are various terminologies to describe shared decision-making principles and processes. These include collaborative management, joint management, co-operative management and joint decision making. There are also very specific principles around business management, which have particular interfaces with corporate law.

Consultation

At the lowest end of the spectrum of shared decision-making are provisions that commit to consultation. While there may be a range of communications that could be considered consultation (such as notification and a chance for comment), the defining edge is that consultation keeps the decision-making power in the hands of one party, because there is no binding or directly enforceable obligation on the part of that party to change their course of action. If the BSA is a bilateral agreement between a First Nation and a government party, management provisions that set out only a bare duty to consult are likely to be below the minimum threshold of the government's duty to a First Nation, which includes an obligation to take meaningful steps to address the First Nation's interests and accommodate the First Nation's rights.¹⁰

If the BSA is a bilateral agreement between a First Nation and a private company, it may be appropriate for some aspects of project management to be at the level of consultation only. However, even in these cases, maintaining a positive relationship with their First Nation counterpart would likely provide practical motivation for a company to take steps wherever possible to address First Nations interests.

¹⁰ However, in some situations, a First Nation may agree to this lower standard in exchange for benefits or shared decision-making or worthwhile processes in other areas.

Collaborative Management

The middle of the spectrum of shared decision making arrangements are provisions requiring the parties to consult about decisions relating to the Project that are coupled with an express obligation on the part of the government signatory and/or company party to address concerns. These types of arrangement are more analogous to the Crown's consultation and accommodation duty as developed in the common law. Common terminology employed by the government of British Columbia to describe this kind of shared decision making is 'collaborative management'. However, the management arrangement in a BSA should not rely on terminology, which can be interpreted differently by the parties. All management provisions need to be clearly set out in as much detail as possible. Typical language for this type of management approach is as follows:

The Company will make best efforts to accommodate X First Nations views, concerns and traditional knowledge with respect to environmental, social, cultural and heritage matters related to the Project and to the extent practicable and reasonable, incorporate them into Project planning and operations.

Companies and governments often seek limiting phrases, such as "to the extent it is economically and technically feasible" or "acting reasonably". While these kinds of qualifications may be reasonable in given circumstances and lead to a more balanced management approach, if drafted too broadly and used indiscriminately they can undermine the intentions of a collaborative management strategy and cause disputes with respect to implementation. The 'total' management scheme of a BSA can likely only be ascertained by reading the BSA as a whole, which may include management principles, communication rules, categorizations of decisions, management committees and dispute resolution processes.

Joint Management

At the upper range of the spectrum of BSA co-management options is a management structure that is often referred to as co-operative management or joint management. While the law appears to provide a foundation for joint management, and there are examples in some northern Treaties, this is not reflected in the majority of existing BSAs. However, the law has only recently reached a stage where it is clear that First Nations are entitled to consultation and accommodation with respect to decisions that may adversely affect their asserted or proven rights or title. It will take some time for the law to be fleshed out with respect to joint management principles that flow from the basic duty on the part of the government, and for a new generation of BSAs to catch up to the rapidly evolving law in this area.

Joint management structures strive for equality. They are typically comprised of an

equal number of representatives from each party, and are equally co-chaired by a member of each of the parties or chaired alternately. A consensus model generally guides joint management structures. If the parties fail to reach consensus, there may be a vote. However, equal representation can often lead parties to a stalemate: detailed dispute resolution processes are recommended as an accompaniment to joint management provisions. (See Section 'P' for detailed guidelines on dispute resolution provisions).

In terms of true joint decision-making, some of the most progressive BSAs in Canada are contained in northern Treaties and in mining agreements in northern Canada. Some of the Boards and Committees set out in the northern Treaties such as the Gwich'in Land and Water Board are decision-making bodies with full First Nation participation in issuing permits and authorizations. There are also examples of joint decision-making in joint venture and partnership agreements where First Nations have 50% or more of the shares.

Some of the most progressive BSAs in British Columbia relate to park and protected area management and land use planning where the provincial government has agreed to joint management in a few notable cases. The Gwaii Haanas Agreement (1993) with the Haida Nation provides for a management board that has equal representation of the Haida Nation and the government and establishes a consensus decision-making process. Similarly, but on a broader scope applicable to land use decisions in a large regional area, the Clayoquot Sound Interim Measures Extension Agreement (2008) establishes an equal representation board and a double majority vote process for decisions with respect to land use. The full text of these agreements can be found in Appendix 2. Some of the agreements arising from the provincial land use planning processes also approach joint decision-making. However, although the provincial government has committed to shared decision-making in the New Relationship document, in British Columbia we have yet to see the kind of joint decision-making in resource management that is in evidence in northern Treaties.

Categorizations of Decisions

It is often the case that some aspects of a Project are more appropriate for joint management decisions than others. By turning their minds to anticipated management decisions and attaching different management objectives to different groups of decisions, the Parties can build in the required flexibility. Further, this flexibility can provide middle ground where negotiations can get bogged down around matters of control. For example, environmental management decisions that could impact the exercise of aboriginal rights may be listed as requiring joint management decisions, while decisions related to non-environmental aspects of the project may be accorded consultation only status. Listing decisions is in itself a worthwhile exercise to put interests on the table so that management objectives are not debated in the abstract. If

decisions are listed, the Parties should consider commencing a list with language such as “including, but not limited to”. This avoids a scenario which can also bog down negotiations, namely, pressure on the Parties to identify every conceivable decision out of concern that decisions that were not anticipated will be outside the scope of the BSA.

I. Environmental Protection and Maintenance of Traditional Activities

In his study of factors for successful BSA implementation, Prno notes that one of the most common recommendations from BSA parties was improvement of environmental impact mitigation measures (Prno 1997). If a First Nation community is divided over whether to support a project, strong environmental protection measures in a BSA may offset concerns that First Nation signatories are ‘selling out’ traditional values to economic interests. This typically includes commitments on the part of the company to carry out environmental assessments, environmental protection measures, environmental management principles, environmental monitoring and restoration of an area after a project is complete.

In a large-scale development, it may be helpful to break the project into phases, such as development, construction, operation, decommissioning/reclamation and monitoring and have a specific section for each in the BSA. Site reclamation may not be contemplated in BSA negotiations because the parties are focused on project construction and operation. However, for the First Nations who will be left to live in the area after the development has concluded, reclamation and monitoring measures should be considered a fundamental aspect of a BSA.

1. Relationship to Legal Regulations

In most cases environmental protection measures in a BSA are in addition to the general legislative and regulatory standards set by government that are broadly applicable to the development, as well as to specific terms in development permits issued by government authorities. However, it is a good practice to state this explicitly in a BSA, and even to identify the applicable regulations in a schedule. If the permit is held by the company (and not jointly by a company and a First Nation), the company has the sole legal responsibility for compliance with the regulations and licence terms. The responsible government authorities have the sole responsibility for compliance and enforcement of regulations and permits based on legal standards. The BSA should state these principles explicitly.

In some cases, specific limits to development production or other terms would more

appropriately be placed in the development permits themselves, leaving them out of a BSA. This requires consultation and accommodation processes between governments and First Nations to be harmonized with BSA negotiations taking place between First Nations and companies.

A First Nation might consider the best means of enforcement in determining a strategy in this regard. If a term is in a permit and the company breaches it, the First Nation should be able to rely on the responsible government authority to take action to remedy the breach. Unfortunately, the government does not always have the interest or resources to enforce permit terms. If a term is in a BSA, or there is a clause in the BSA explicitly stating that the company must comply with the terms of the permit, the First Nation is in a better position to directly seek a remedy for a breach (assuming the BSA and the particular terms are legally enforceable as a matter of contract law).. Finally, a BSA should have a specific provision that the agreement is without prejudice to a First Nation's right to take legal action in tort law for various damages including unlawful trespass or pollution. It is likely not reasonable for a company to use a BSA to extinguish a First Nation's right to seek legal action in the event of a tort (legal wrongdoing) on the part of the company.

2. Relationship to Environmental Assessment Processes

Most major development projects, either by provincial and/or federal law or by demand of an affected First Nation, cannot proceed prior to the completion of an environmental assessment ("EA"). In many cases, an EA will have taken place with the participation of the First Nation, given that the courts have found a duty on the part of the government to consult with First Nations with respect to environmental assessments where their rights are at issue.¹¹ However, the state of EAs in Canada and British Columbia is in flux. Corporate proponents have expressed frustration with the slowness and cost of the EA process, particularly where there is a full federal-provincial joint review panel. First Nations have expressed frustration with the lack of consultation and the inability of EAs to deal with rights and title issues. It is difficult to predict whether EAs will become more 'streamlined' to meet corporate interests or more comprehensive to deal with aboriginal rights and title issues.

BSA negotiations typically take place alongside or after an EA process. It is generally assumed that a BSA will not occur if an EA has determined the project will have significant environmental impacts that cannot be mitigated. However, particularly in

¹¹ See, for example, *Dene Tha' v. Canada*, 2008 FCA 20, where the Dene Tha' successfully won a judicial review on the basis that Canada had failed to consult them in the Environmental Assessment of the Mackenzie pipeline. The court victory resulted in a \$25 million settlement to the Dene Tha'.

light of the current political and economic realities in Canada, this assumption may not stand. If a project has been approved despite significant adverse environmental impacts or if the governments have declined to subject it to a full EA process, it is very important for the parties to consider building mitigation and environmental protection measures into a BSA.

Often an EA will include specific prescriptions to address environmental impacts. Parties negotiating a BSA after an EA should be guided by the EA and may consider attaching the key parts of the EA to the BSA in the form of a schedule.

However, in the current context, there may be good reason to begin negotiating a BSA or at least an MOU before the EA process.¹² The EA process may be frustrating on all sides. Proponents and First Nations may be able to reduce uncertainties and frustration by developing their own approach. This may include funding to the First Nation for EA participation, agreements on timelines, studies or processes, a process or some agreed-upon principles for negotiating a more detailed BSA if the project is approved, etc. If the EA process set out in the applicable legislation is insufficient to meet the parties' needs, they may consider negotiating the details of their own process which meets government requirements but more specifically meets the interests of the parties.

Sometimes companies will ask First Nations to take, or not take, certain positions during the EA or approval process. This may be reasonable in some cases but coercive in others. First Nations that are asked to commit to certain positions regarding projects would be well advised to work with their councils, community and lawyer to consider all of the options and implications before making a decision.

In some cases, an EA will recommend further, more in depth studies or processes with respect to particular aspects of a development. EAs may be used to develop or guide specific environmental monitoring and review procedures in the BSA. For example, if an EA raises particular concerns with respect to water quality impacts in an area, the parties will be alerted to the need for a focus on monitoring water and setting out adaptive management and remediation measures.

3. Environmental Standards and Monitoring

Due to the technical complexities of environmental monitoring and the importance of environmental protection to most First Nations, a board or committee dedicated to

¹² We highly recommend that First Nations considering participation in an EA process consult with their lawyer and with the First Nations Environmental Assessment Working Group. FNEATW has an excellent toolkit for First Nations: www.fneatwg.org/toolkit.html.

implementation of the environmental aspects of a BSA will be beneficial in most cases. The committee can be structured to accommodate collaborative or joint decision-making where desired. A range of management structures is canvassed generally in Section 'H' above.

Standard Setting

There is little meaning to environmental monitoring without reference to objective standards. One option is simply adopting the applicable regulatory scheme established by the government in regard to development permits. But in many cases, BSAs adapt or tailor standards to meet the special needs of the project and a First Nation who will be affected. The traditional lifestyles of First Nations depend on a healthy environment, and the ability to sustain such traditions are a fundamental value and right recognized in the Canadian Constitution. Further, government environmental and health standards typically focus on agricultural, residential and industrial uses. There are no standards for acceptable levels of contaminants in wilderness lands use by First Nations for the harvesting and consumption of resources. If the proponent and the First Nation are concerned by the uncertainty caused by lack of government standards, the parties may wish to set their own standards in a BSA and may also formally request the federal or provincial regulator to accept these standards.

In many cases enhanced standards need not be invented in BSA negotiations, but can be adopted from external sources, such as environmental certification regimes¹³ or other established management systems, such as ecosystem based management.¹⁴ Widely accepted principles, such as the precautionary principle, may be defined and adopted.¹⁵ Traditional ecological knowledge and customary law may also be articulated and incorporated. Wherever possible, management standards should have identifiable targets and should specify uses.

Monitoring and Response

In addition to clear standards, an effective monitoring system requires ground-truthing.

13 For example, the Forest Stewardship Council is forestry practices certification body; companies that avail themselves of FSC certification receive market benefits in exchange for compliance with established forestry standards that have been determined through thorough governance processes to be environmentally sustainable. The FSC certification regime includes accommodation of First Nation interests. See <http://www.fsccanada.org/>.

14 For an overview of Ecosystem Based Management initiative in British Columbia, see http://www.gov.bc.ca/yourbc/ecosystem/em_planet.html?src=/planet/em_planet.html

15 In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, SCC 2001 40, the Supreme Court of Canada has adopted the following definition of the precautionary principle: Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Going out onto the land and observing the effects of a development should be a component of every monitoring system. First Nation guardians can be an excellent way to ensure that monitoring is happening on the ground. Guardians require funding and support. Ideally, provisions should be explicitly made for this in the BSA to ensure this mechanism is a benefit, rather than a burden, for First Nations. The proponent and the First Nation may be able to secure some government or environmental funding to partially support monitoring or guardian programs.

All parties must recognize that it is the legal responsibility of government to properly regulate the developments it permits, and to take the protection of aboriginal rights into account as it does so. Companies holding permits have a legal responsibility to act in accordance with applicable regulations. However, from a First Nation point of view, standard regulations may not serve to protect their interests, and there is a risk that government standards will not be monitored or enforced. First Nations guardians can fill this gap. A guardian program has the added benefit of maintaining the First Nations connection to the land base. Ideally, First Nations guardians are supported by elders in the community who have more in-depth traditional ecological knowledge. They should also receive training and be supported by technical assistants and scientific experts where required.

Just as monitoring without standards is problematic, standard setting and monitoring are hollow without a mechanism for this information to be meaningfully connected to decision-making. As discussed above, a management board with representation by both or all parties to a BSA provides a straightforward democratic structure. In smaller developments where there is no capacity to support such a structure, a simple communication line between a Chief and a CEO can be equally or even more effective, so long as all parties have a clear understanding of the weight that must be accorded to the First Nations interest at the point that it may diverge from that of the company. Once again, tools for dispute resolution are essential when the parties' best intentions to reach consensus are unsuccessful.

The seriousness of environmental issues for First Nations relate to a unique reliance on natural food sources and spiritual values related to a healthy environment. In cases where there is potential for major environmental impacts on the exercise of aboriginal rights, some BSAs provide the First Nation party with a right to require project activity to cease where the company is in default of an environmental regulation or protection measure established in the BSA, until such time as the default is remedied to the satisfaction of the First Nation. First Nations may also wish to have similar provisions when unanticipated impacts come to light in the process of the development.

Additional environmental safeguards in BSAs include the posting of security and performance bonds, typically into a trust account under the guidance of a management

board. In the event that the company does not meet its regulatory targets, or there is an accidental spill, the funds can be applied to remediation immediately to minimize impacts rather than waiting for the regulatory system to react. Another important term of enhanced protection commonly found in BSAs is funding for a First Nation to seek independent assessments, evaluations or audits of impact concerns. Recognizing that companies cannot make open-ended financial commitments in BSAs, such terms may be accompanied by an annual financial cap. Access to independent expertise usually requires an accompanying right to access sites and information from the company and/or the government.

Environmental mitigation measures in BSAs can also include habitat compensation and enhancement initiatives. For example, Polaris Minerals Corporation voluntarily spent over \$1.6 million to clean up an abandoned dump site near a fishing river as part of a cooperation agreement with the ‘Namgis and Kwakiutl First Nations.¹⁶

Environmental protection and restoration initiatives do not need to be restricted to the project area. Where harvesting patterns may be impacted by a development, it may be to the advantage of all parties for a company to fund the protection or restoration of habitat in alternative sites.¹⁷ Cumulative effect information is helpful to determine what BSA provisions will be required to preserve an acceptable range of options and abundance for traditional resource use.

4. Maintenance of Traditional Use

In addition to general environmental standards, BSAs typically have specific terms related to traditional use. These can be precise and time—and site—specific, such as development activity will be reduced during a migration period, or activity will cease if a cultural heritage feature is discovered. Other values may be protected by blanket prohibitions, such as a commitment on the part of the company not to use pesticides for pest control. Where a blanket prohibition is unrealistic, BSAs may have commitments that the company must provide notice or consultation, for example, to enable a First Nation to avoid harvesting berries in areas during pesticide application.

A BSA may also include provisions for the protection of important cultural or harvesting sites. For example, a BSA may specify that logging cannot take place in key hunting areas, or that buffer zones must be left around key fishery sites. Where

¹⁶ See Appendix 2 for a summary of the agreement.

¹⁷ In our view it is more likely to lead to a fair and lasting resolution on habitat enhancement or replacement if an agreement is reached through negotiation rather than through a company or government ministry unilaterally seeking to impose a habitat replacement solution to gain access to lands or resources.

access to a traditional use site is affected by the development, a BSA can provide for a right of way or access arrangement to secure continuous access. For example, a BSA may provide access to a sacred bathing site through a logging area, as well as a buffer around the site. All of these measures underscore the importance of taking steps to compile traditional use and archaeological impact assessment information prior to determining the terms of a development. Where information is incomplete, provisions must be made to ensure that new information will be factored into decision-making.

5. Application to Third Party Contractors

With respect to all environmental protection, it is essential that the parties also commit to bind third party contractors to the same standards. This includes First Nation companies providing services to a project. It is clear that a company cannot bind parties who are not signatory to the BSA, but the company can undertake in the BSA to require that any service contracts it enters into will import the necessary terms. In some cases where there are existing contracts, specific exceptions may have to be made so that a company does not put itself in a conflict of contracts. This underscores the benefit of commencing BSA negotiations early in development process so before irrevocable commitments have been made.

J. Financial Accommodation, Compensation and Revenue-sharing

1. Legal and Policy Context

The principles of financial compensation in BSAs are generally based on the recognition and reconciliation of aboriginal rights. However, they may also be based on business partnerships or a ‘good neighbour’ principle. The legal foundation in Canada for compensation for interference with aboriginal rights is grounded in the honour of the Crown and includes a duty to accommodate or ‘justify’ an infringement of a right. For example, the Supreme Court of Canada stated in *Delgamuukw* that “fair compensation will ordinarily be required when aboriginal title is infringed”.¹⁸ Financial compensation is generally viewed as one such form of accommodation.

The Supreme Court of Canada has stated that the Crown’s legal duty to accommodate, or compensate First Nations does not apply to private companies.¹⁹ Ironically, there are as many or more BSAs with revenue sharing provisions between private companies

¹⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075

¹⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511

and First Nations as there are between government and First Nations. This is possibly explained by the practical necessity for companies to secure support from First Nations for development permits. Companies have not been able to rely on government process to address First Nation accommodation in a timely fashion. In fact, the provincial and federal governments in Canada have generally been very reluctant extremely reticent to develop law or policy frameworks with respect to financial compensation to First Nations arising out of development impacts in First Nations traditional territories.

While companies have to some extent accepted the fact that financial compensation for affected First Nations is a cost of doing business, it is safe to say that the private sector has expressed frustration with having to fill the governments' shoes with respect to revenue-sharing. A company can be reasonably expected to take the view that it is paying royalties and taxes to the government already, and that the government should either share that revenue with First Nations or adjust the royalty and tax rates to take into account company contributions to First Nations.

From a public policy perspective, it is problematic for a number of reasons to have a patchwork of ad hoc private financial compensation packages to address unsettled aboriginal rights claims. Firstly, the vast majority of BSAs between a company and a First Nation are confidential.²⁰ In contrast, agreements made between government and First Nations are in the public domain. It is difficult to create any kind of fairness or comparability if much of the information is confidential.

Secondly, the ad hoc private process creates large discrepancies and an unlevel playing field. Companies that have the resources or that are facing significant First Nation litigation or blockades may negotiate BSAs with significant payments to First Nations while smaller companies or ones facing less organized opposition may pay nothing even if their project has greater potential impacts on the affected First Nation.

Finally, while corporate BSAs may create background pressure on the provincial and federal governments, these private BSAs do not deal with the honour of the Crown or the legal and constitutional requirement to recognize and reconcile aboriginal rights and title at the government-to-government level. It has been a clear tenet of aboriginal law in Canada since the Proclamation of 1763²¹ that the prior occupation of First

20 For the purpose of writing this Guide, we have compiled and reviewed dozens of BSAs on the understanding that they could be generally profiled, but not identified. The description of principles and approaches to financial compensation set out in this section are drawn from this range of samples. However, the agreements and provisions themselves are strictly confidential.

21 The relevant section reads: *And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or*

Nations is not a matter for settlers and companies to address directly. Accommodation and reconciliation are ultimately the responsibility of the Crown.

2. Accommodation From Government

Notwithstanding government reluctance in this regard, there are examples of financial accommodation or compensation provided by government through BSAs with First Nations. These are sometimes in the form of one-time payments and sometimes in the form of revenue-sharing. For the purpose of this Guide, the term revenue-sharing is used when the monies provided are directly related or referenced to a resource extraction or development

Most examples of financial compensation have arisen from treaties or from settlement of litigation or high profile disputes or potential disputes. Some of the early Treaties such as the 1850 Robinson Treaties provided for a form of revenue-sharing (a one-time payment of 2,000 pounds and a perpetual annuity of 600 pounds). Many modern northern Treaties have revenue-sharing for mining royalties. For example, a modern land claim treaty in the Northwest Territories set out a specific formula for revenue sharing that is tied to actual government revenues receipts, ranging from 7.5% to 50% (depending on whether the area is settlement land or outlying territory) of the first two million dollars in revenues, with a range of 1.5% to 5% of additional revenues (Banta 2005). The *Paix des Braves* agreement with the James Bay Cree in Quebec is likely the largest revenue-sharing package relating to any Treaty in Canada (over \$3.5 billion in revenue-sharing over a period of 50 years). The James Bay Cree agreement arose from over 30 years of litigation about the 1975 Treaty and ongoing disputes about a major hydro project in Quebec.

There are a number of examples of revenue-sharing arising from specific projects or litigation or disputes. The Labrador Inuit successfully negotiated a 5% royalty-sharing arrangement for the Voisey Bay project. The Haida Nation in B.C. negotiated an initial \$5 million payment relating to forestry in their territory. The Musqueam Nation in B.C. received land, cash and revenues from the settlement of major litigation relating to land in the city of Vancouver (four parcels of prime land, \$20.3 million in cash, plus a portion of lease revenues). The Treaty 8 First Nations in B.C. have negotiated a form of revenue-sharing based on the number of oil and gas well approvals in their Treaty area. The Osoyoos First Nation negotiated a share of revenues from the Mt. Baldy ski and resort area. The full text of the agreements referred to in this section can be found in Appendix Two. There are a number of other examples but they follow a similar pattern.

disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.

There are also examples of financial accommodation that are more program/policy-based. In British Columbia, the Ministry of Forests and Range and the Ministry of Energy, Mines and Petroleum Resources, in 2003 and 2008 respectively, made public announcements of policies to implement revenue-sharing with First Nations. The Ministry of Energy, Mines and Petroleum Resources has only indicated in public policy that the process for development of revenue sharing will be decided on a project-by-project basis. Since the policy applies only to new mining development, a pattern cannot yet be discerned. The Ministry of Forests and Range policy for sharing forestry revenues with First Nations is based on a population based formula (\$500 per person in each year of the BSA). Given that the amount provided has no connection to the value of resources taken from a First Nation territory in a given year, or to the stumpage revenue actually received by the Province, the policy arguably cannot be properly called revenue sharing. In a direct judicial consideration of the policy, the British Columbia Supreme Court found that revenue sharing should not be an arbitrary formula, but must be based on an assessment of the strength of the right claimed and the degree of infringement.²²

In many BSAs the type of compensation is not expressly defined, perhaps to avoid an admission on the part of the government that revenue sharing is required and the associated fear of a ‘floodgate’ of First Nation entitlement. However, government is well aware that it has to be able to demonstrate that it has accommodated First Nations rights with respect to resources. This has led to a range of names for financial benefits that are not explicitly tied to revenue, though they may be implicitly. These include:

- funding for consultation costs;
- capacity building funds;
- economic development funding;
- community development funds;
- agreement implementation funds;
- environmental monitoring; and
- funds for restoration projects.

Generally, these types of funding cannot be fairly considered compensation for infringement of aboriginal rights. In essence, they cover the costs for the First Nation governments to respond to and monitor a development. Given the very narrow scope of government revenue sharing in many areas of Canada it must be acknowledged that the principles of revenue sharing are not frequently realized in BSAs with government. Not surprisingly, companies often have to step up to fill the gap in operating areas where First Nations claims are unsettled.

22 *Huu-ay-aht First Nation v. Minister of Forests (British Columbia)* 2005 BCSC 697.

3. Benefit Sharing From Companies

It is important to begin by distinguishing profit-sharing or equity in joint venture arrangements from profit sharing and/or royalty payments in BSAs. We deal with equity and other arrangements in Section ‘K’ below.

There are many examples of companies providing financial benefits to First Nations through BSAs. These can be in addition to funds provided by government in the same or related BSA, or in a stand-alone agreement. Industry-First Nation BSAs tend to have a range of financial compensation commitments from ‘cost support’ type provisions listed above to pure profit sharing and/or royalty arrangements. Profit sharing and/or royalty provisions are often accompanied with employment and business opportunities in a BSA. In capital-intensive, rather than labour-intensive, developments, where there are a limited number of jobs and those jobs are highly skilled, profit sharing and/or royalties provide guaranteed direct benefits to a First Nation to help offset the impacts of a development.

There is a wide range of formulas in agreements between companies and First Nations that seek to find a fair balance for profit-sharing and/or royalty payments. Fixed payments tend to be set on an annual basis, often with clauses that build in financial information sharing and periodic reviews. A fixed payment rate provides a reliable benefit that will not fluctuate with external factors such as global markets and unforeseen operating costs. Variable profit sharing and/or royalties tend to be based on actual profit or net revenues. While this may ultimately be fairer as an accurate reflection of profit sharing principles, it is more complex and will normally require disclosure of financial accounting to ensure transparency. If complex financial benefit provisions are proposed, the parties should ensure that First Nations have the ability to seek expert advice and to carry out due diligence to ensure they are appropriate and reasonable in the circumstances.

Where developments have a long construction or start-up phase before profits are realized, profit sharing may not be triggered until the company reached a certain level of revenue or profit. Other adjustments, such as inflation adjustment and market adjustments may be contemplated to refine formulas. When BSAs pertain to non-renewable resources that tend to be extracted quickly and for a shorter period of time (such as for minerals, oil and gas), there are usually greater amounts of short-term profit sharing and/or royalty payments. With renewable resources such as forestry or hydro-electric development, there tend to be smaller profits for a longer period of time (Banta 2005). Profit sharing and/or royalty payments are typically reflective of these differences. In all cases, there needs to be a fair balance. First Nations should be treated fairly and not be expected to sign onto profit-sharing and/or royalty agreement provisions that fall victim to creative accounting and result in no actual revenues to the

First Nation. On the other hand profit sharing and/or royalties provided by companies needs to be proportionate to the project, the degree of impact, and the royalties already paid to government. Amounts must also be within the range of what a company can be reasonably expected to bear in a competitive global market.

In addition to profit sharing and/or royalties, BSAs between private companies and First Nations offer a range of other options under the category of financial compensation. These may include direct compensation for loss of harvesting activities, traplines and fishing sites. Some tourism business operators provide First Nations with a 'sustainability fee' based on the number of guests who visit a site. Others provide direct grants, similar to government grants, for dedicated purposes such as economic, community and capacity development. In some situations, First Nations may be able to offer tax receipts for corporate donations to charitable societies such as Elders' or Cultural Societies.

K. Business and Employment Benefits

1. Business Opportunities

Equity Provisions

There is a range of business opportunities for First Nations that have been established under private sector BSAs. At the most integrated level, joint venture agreements characterized by a 50/50 risk and profit sharing structure may be applied to an entire project, or to some aspects of company's operations in a development. However, if a company and a First Nation were contemplating a joint venture, it would likely be beyond the scope of a BSA as defined in this Guide. In some circumstances a company may form a joint venture with a First Nation controlled company, and enter into a separate BSA with the Nation as a whole that recognizes the joint venture agreement as a financial benefit related to the BSA. At the next level is a range of equity options, with the First Nations being granted shares or options in the company and rights to a proportionate share of profit with other shareholders. These may or may not include reciprocal obligations on the part of the First Nation to provide investment capital, which in some cases is facilitated by a loan from the company that will be paid back through profit sharing.

These arrangements may be accompanied by First Nation representation on the company Board of Directors. This not only provides for First Nation input into management decisions, it can build capacity in First Nations members in business management, and provide the First Nation with insights into the operations of the company. In such cases, First Nations directors need to carefully consider whether their legal obligations to the shareholders as company directors potentially conflict

with their representation of the Nations interests. Conflict of Interest Guidelines can be appended to a BSA to provide clarity in that regard.²³

Options for a First Nation to purchase shares at a later date may also be granted in a BSA.

Service and Supply Contract Opportunities ²⁴

More common business opportunities established through BSAs relate to service and supply contracts the company will require in the course of the development. At the top end of the spectrum is a right of first refusal (ROFR) of contracts to companies defined or deemed to be controlled by the First Nation. Terms along this line are necessarily limited to qualified companies. Some BSAs have precise definitions of what qualifies a First Nation company (e.g. a First Nation owns or exercises a minimum of 50% interest, beneficial interest or effective control).

At the next level, there can be provisions for advance notice and preference to First Nations before a call to tender is issued. Advance notice and preference can give First Nation businesses a significant advantage. Extra time can allow the First Nation to qualify for a bid where it may not otherwise. This may include seeking joint venture opportunities with other companies to achieve the required capacity. Some BSAs have transparent scoring systems to rate contract bids, whereby bids from companies that are controlled or operated by First Nations in the development area, or have a majority of First Nation employees, are given bonus points in the bid selection process. Other BSAs allow for “open book negotiations” whereby qualified First Nation businesses have the first opportunity to negotiate with a company for required contracts. If the negotiation process does not result in any contracts, the company has the right to engage in a competitive bid process, but it cannot accept a contract at a higher price than the last best price of the First Nation company. Objective criteria are generally preferable to clauses such as ‘the company will make best efforts to contract with First Nation to the extent it is commercially reasonable’, as such language is subjective and discretionary and is likely to lead to disputes.

If business opportunities are significant and a large focus of a BSA, the parties may consider an aboriginal business development coordinator and/or a business opportunity implementation committee. This can be helpful not only in early identification of contract opportunities, but in the tailoring of specific service contracts to match the

23 For sample provisions, see Clayoquot Sound Interim Measures Extension Agreement at p. 21 in Appendix 2.

24 The authors acknowledge materials produced by Michael McDonald of McDonald & Company for the Canadian Bar Association Vancouver Aboriginal Law Section, which greatly aided in the preparation of this section. Any errors or omissions in this summary are the sole responsibility of the authors.

First Nation's capacity, which may include unbundling of larger contracts. This kind of collaborative structure can also provide for the company to provide specific training, start up, or other financial support to First Nation businesses so they may maximize contract opportunities. This can be in the form of pure grants or advance payments. It can also include options for the company to provide letters of intent to the First Nation where the First Nation is seeking external funding or financing to secure business opportunities (such as the purchase of equipment). Companies can also provide 'in kind' support to First Nation business such as reduced rate equipment leases, training and technical support.

If a company has a collective agreement with one or more unions, commitments for contract and employment opportunities may be harder for a company to achieve without creating conflicts with collective agreements. These circumstances are very case-specific and a company may require legal advice to ensure harmonization of a BSA with collective agreements and applicable labour laws.

2. Employment Opportunities

Employment opportunities can be an important mutual benefit. For companies, employment provisions can provide access to a readily available and willing labour force in an otherwise remote area. For First Nations these provisions are an important benefit because they provide more direct benefits and opportunities to individual members of a First Nation community. Preferential employment benefits are more typically provided by companies, rather than governments, due to more flexible hiring policies in the private sector. Employment benefits can be realized in BSAs through set targets. Built-in flexibility is usually required so a company is ensured an ability to meet operational needs without breaching commitments in a BSA. These may include qualifiers such as *"after demonstrating best efforts, if the company cannot meet the target, the target is deemed to have been met"*. Formal assessment of the available workforce and training needs early on in BSA negotiations can greatly aid the parties in setting and achieving realistic targets. If a BSA has targets, companies should undertake to keep records to determine whether the targets were met, and if not, what the barriers are and how they can be addressed.

Ideally, employment benefits in a BSA are accompanied by support provisions to facilitate community hiring and successful long-term employment. Examples include:

- funding for a community employment liaison;
- hiring outreach and recruitment strategies;
- early posting notices and application dates for First Nation members;

- provision of letters of intent to employ individuals upon successful completion of a training program;
- summer jobs and internships;
- company training and mentorship programs;
- supporting opportunities to acquire driving licenses or providing transportation to the worksite from the Reserve;
- funding and implementation of an employment development plan appended to the BSA;
- flexible hiring criteria such as recognition of equivalent experience in lieu of education
- employee support programs;
- cultural sensitivity training for non-aboriginal employees and managers to reduce the risks of workplace harassment or discrimination; and
- flexibility to allow for hunting, fishing and other seasonal activities related to traditional culture.

Parties entering into BSAs with preferential hiring commitments should turn their mind to how these commitments can be extended to third party contractors and suppliers.

L. Community Benefits and Resources

There a limitless number of possibilities for governments and companies to provide direct benefits to community members. Many First Nation communities lack basic infrastructure, community services and recreational facilities. Funding contributions by companies to infrastructure or facilities such as community housing, cultural centres, transition houses, gymnasiums, sport fields and community gardens can often be leveraged with matching funds from governments.²⁵ School transportation equipment, play equipment, library acquisitions and scholarships may be meaningful benefits for the younger members of a community. As an alternative to identifying community benefits at the front end of a development project, a BSA can provide for a set annual funding contribution from the company to a trust account. Expenditures can be directed by a Board to provide for community consultation and transparency with respect to needs and priorities.

BSAs can also create tools and/or provide funding for assessing community health and wellness with key indicators. In most cases, such assessments are too subjective for implementation of targets or commitments on the part of a company or government, but they can be helpful in identifying changes in a community as the result of a development and in developing strategies to minimize or address negative impacts. For example, a consultant may be hired to interview residents a year after

²⁵ For an example of provisions for community housing see the 2010 Olympics Agreement at Tab 9 in Appendix 2.

a development has been in operation. Interviews may determine, for example, that increased traffic has affected quality of life. Simple measures such as traffic calming, scheduling or noise reduction barriers can be undertaken cooperatively by the parties once the issue is identified.

M. Lands and Assets

1. Land Acquisition

There are numerous benefits to First Nations in acquiring legal title or other rights to land through a BSA. For First Nations in more developed, populated areas, a shrinking land base to house an expanding population and/or members returning to the community may threaten the maintenance of kinship, community and culture. This is particularly the case where Indian Reserve allocations were small and have been subject to surrenders, expropriation and other forms of alienation. Land acquisitions may also be of value for economic development opportunities for a First Nation. First Nations can acquire land from either government or companies. Land held by companies can be gifted to First Nations as part of a compensation package, or can be held in partnership between a First Nation and a company as a component of business opportunity provisions.

The most common options for First Nation to exclusively acquire land are through fee simple title and through additions to Reserve lands. Fee simple land transfers may require the formation of a First Nation controlled legal entity that can hold legal title to land. The practice can vary between provinces but in provinces such as B.C. the Land Title Office strangely refuses to allow *Indian Act* Bands to register title to fee simple lands and instead requires the First Nation to appoint a trustee or to incorporate a holding company.

The Musqueam First Nation and B.C. *Reconciliation, Settlement and Benefits Agreement* at Tab 4 in Appendix 2 provides an example of fee simple land transfer provisions. These types of transfers can be legally complex and will usually require funding for legal advice and drafting.²⁶

Additions to Reserve require the co-operation of the federal government and can take an excruciatingly long time to complete. There is a federal Additions to Reserve program which requires environmental reviews, consultation with neighbouring First Nations and local governments and various other steps. Although the process could in theory be completed in a few months, parties should be prepared for the process to take

²⁶ See also the 2010 Legacy Agreement for an example of a commitment to provide land as a form of accommodation at Tab 9 in Appendix 2.

2-10 years. Companies providing land intended for Addition to Reserve may wish to end their commitment at the provision of the land rather than trying to guarantee the land will eventually become Reserve land.

2. Licences, Permits and Leases

As an alternative to whole or joint land title transfer, BSAs may provide for the granting of licences, permits and leases. Companies with large land holdings may be in a position to grant leases to First Nations on preferential terms for economic development opportunities, but typically these types of assets are provided by government.

The granting of an exclusive head lease to a First Nation, with an ability to sublet to third parties, is an interesting mechanism to give initial recognition to First Nations management and stewardship rights to lands. These types of arrangements may be controversial since some First Nations and lawyers may see them as an unnecessary acceptance of Crown title and authority in disputed land claims. However, for First Nations willing to explore these arrangements on an interim basis there are clear benefits. In addition to giving a First Nation control over land uses, the collection of sub lease fees can provide a source of revenue for First Nations, and can cover management costs while building management capacity. The facts that leases are a shorter term and do not require a change from Crown title make head leases an attractive interim option in cases where underlying land claims are unsettled.

The Hanson Island Management Agreement between the Province of B.C. and three coastal First Nations provides an example of head lease provisions (at Tab 8, Appendix 2). The Province wished to establish a legal protected area in the traditional territory of the three First Nations and the First Nations wanted to move toward greater management and control of key traditional areas. The agreement enables the granting of a head lease to a legal entity representing the Nations. In accordance with a management plan developed by a joint provincial-First Nation management board, the Nations have the legal authority to grant nearshore tenures to third parties such as kayak and tourism operators.

Government can also provide leases, licences and permits to First Nations that are not head leases and cannot be assigned. These types of assets can provide exclusive access to First Nations to lands and resources for cultural use and/or business opportunities. In British Columbia, there are a large number of forestry agreements that provide for direct awards of logging licences to First Nations.²⁷ In these Agreements, First Nations are required to pay the same stumpage fees as non First Nation licencees and are otherwise subject to all the normal rules and regulations applicable to other licences.

²⁷ See Gitanyow Forestry Agreement at Tab 2 in Appendix 2.

However, subject to terms under international agreements such as the Softwood Lumber Agreement with the United States, there is no legal reason why permits and licences granted to First Nation as part of a BSA that recognizes aboriginal rights claims cannot have reduced rent, royalties, fees or taxes as part of this recognition.

N. Term of BSA

There are many options with respect to the start and end date of a BSA and it is important that the parties turn their minds to the options and explicitly state their intentions in the terms. The default start date of a BSA is upon signing. If that is the intention of the parties, it should be made clear by dated signatures and a clause stating the agreement commences upon signing. In some cases, the agreement may commence at a later triggering event, such as the issuance of a development permit. Different parts of the BSA may be staged to start with different events such as the beginning of a phase of the project.

Agreements may be for a fixed term such as five years. Fixed terms are often accompanied by an optional renewal clause (on the mutual agreement of both parties). In some cases, the term of a licence may extend beyond the term of a BSA, in which case it should be explicitly stated.²⁸ This may be necessary when licence opportunities require a longer term but the parties wish to terminate or renegotiate the BSA on a shorter term. The BSA can terminate at an event, for which the precise date is unknown, such as the closure of a project or development. A term that starts or ends with a triggering event requires a precise definition and objective indicators of the event.

The parties also need to consider the appropriateness of termination clauses. Typically termination clauses include a duty to give notice to the other party, and may include a duty to provide written reasons for termination. The BSA can also specify triggering events that terminate the entire BSA, such as the failure of a party to uphold a key section of the BSA, or upon a finding that key term is invalid or unenforceable. This makes it clear to all parties what would constitute a fundamental breach of the BSA. Many agreements do not specify a termination date, and as such, could go on indefinitely unless there are clear termination clauses.

It is important to set out the consequences of termination. Do the revenue sharing payments continue or stop? Are there ongoing duties that survive termination such as environmental or remediation commitments? Each aspect of the BSA should be reviewed to determine what should happen to it if there is an early termination.

28 See Gitanyow Forestry Agreement at Tab 2 in Appendix 2 at p. 12, wherein the parties acknowledge that a forest licence granted under the BSA can extend beyond the term of the Agreement.

O. Evaluation and Amendment

As discussed in Section ‘G’, assessments of the effectiveness of BSAs identify lack of follow-up as a predominant cause of dissatisfaction (Prno 2007). BSAs commonly have clauses that provide for periodic review. Ideally, review clauses should be accompanied requirements for the parties to work in good faith to issues arising including amending the BSA where required. These types of clauses are difficult to enforce because the amendment of a signed agreement fundamentally requires the mutual agreement of the parties. However, both parties have a mutual interest in the successful implementation of the BSA and this provides a strong practical motivation for the parties to act in good faith. Periodic reviews should, at a minimum, create a structure for the process. Having an independent audit built into review provisions is a fair and reasonable approach to support this process. Studies undertaken at the beginning of a BSA, such as studies with respect to socio-economic impacts, can be brought into review processes to give parties insight and objective information.

Where objective measurements are identified in specific provisions of a BSA, aspects of a review process may be legally enforceable. For example, if records indicate that employment targets are not being met, this can trigger an obligation on the part of the company to provide compensatory measures. Some BSAs have a term that the revenue sharing provisions will be renegotiated if production profits rise or fall beyond set thresholds. Another example of this type of clause would be in cases where the regulatory regime for the project changes significantly. Where the parties chose to have clauses allowing for flexibility for renegotiation of some terms of a BSA, dispute resolution provisions (see Section ‘P’) will be essential to ensuring the overall agreement remains viable.

P. Enforceability and Dispute Resolution

Most BSAs are intended by the parties to be legally enforceable. They typically include provisions stating that the agreement is a legally binding. If the parties do not intend the agreement to be binding, such as in a memorandum of understanding or agreement in principle that sets out parties’ intentions with respect to the negotiation of a final agreement, a clause should explicitly state that the interim agreement is without prejudice to the respective legal positions of the parties prior to a final agreement effective date.²⁹

Basic contract law requires legally binding agreements to be based on an offer, acceptance and consideration: there must be something of value offered and agreed

²⁹ For example, Tsay Keh Dene AIP at p. 2, Tab 6 in Appendix 2

upon. As set out in Section ‘C’, an example of language that commonly indicates such an exchange is: In consideration of the mutual promises set out in this agreement, the sufficiency of which is confirmed by the parties, the parties agree as follows. There are acceptable variations on this language but it is important that the basic concept is expressed.

It is common sense that the enforceability of an agreement depends on clear, unambiguous language. When drafting a BSA, the parties should test each clause against the question of how a reasonable person would interpret the clause, and whether there are ambiguities. The parties can take some control over the remedies in the event of a breach of the term of a BSA by expressly identifying the remedies required. Express provisions providing penalties for failure to perform tend to create incentives for compliance. Typical default clauses provide parties with a period of time to remedy a default upon notice by the other party.

Dispute resolution provisions typically commit parties to resolve disputes by a staged process. This may commence with a right of either party to provide notice to the other party describing the nature of the dispute which triggers an obligation for both parties to discuss or negotiate in good faith to resolve the matter to their mutual satisfaction. Terms can specify that the negotiations will happen at an executive level of the respective parties, or otherwise by persons with authority to negotiate. If negotiation does not resolve the dispute within a period of time, such as 30 days, one or more parties can refer the matter to a mediator, and then (or directly) to an arbitrator who can make decisions with respect to the matter that will bind both parties.

The provisions may also specify a process for selection and appointment of a mediator or an arbitrator. If the parties cannot agree on the appointment of an arbitrator, a next step may bind the parties to submit to a final decision of a single arbitrator appointed pursuant to the applicable commercial arbitration legislation. Finally, the parties can agree to the mutual right to apply to a court of competent jurisdiction for an order to confirm or ratify an arbitrator’s decision so that it is legally enforceable. There are many details and nuances to dispute resolution clauses. A detailed example can be found in Article 10 in the Tsay Keh Dene AIP (Tab 6 in Appendix 2), while a simpler example, and one that references a processes drawn from aboriginal traditions, can be found in the Hakai Luxvbalis Conservancy Area Collaborative Management Agreement (2003).

Q. Confidentiality

Generally speaking, BSAs involving a government party are in the public domain. The government of Canada and each of the provinces and Territories are bound by freedom of information legislation that enables the public to request government

records, including most agreements entered into by government. Access to information legislation is always accompanied by companion privacy protection laws that give the government the right to strike out any information that would violate privacy rules before releasing information. Beyond legislative obligations, governments typically wish to promote settlements with First Nations to demonstrate progress. Therefore, agreements between governments and First Nations are often readily available in government publications and websites.

While a company may issue press releases announcing agreements with First Nations as a component of a public relations strategy or a shareholder disclosure obligation, these are typically in summary form so that the precise terms of the BSA often remain confidential.

Companies may have legitimate interests in keeping BSAs with First Nations confidential. However, it is a concern from a public policy perspective that a large number of BSAs are in the private domain. Most BSAs are dealing with aboriginal rights and environmental management, which are generally considered to be matters of broader public interest. Restrictive confidentiality clauses also limit First Nations' ability to share information and work together to strengthen their bargaining positions with a particular industry or company. They also prevent companies from sharing information with other First Nations they may be negotiating with.

In some cases, however, it may be in a First Nation's interest to maintain confidentiality of a BSA it has entered into with a company so that the appropriate government agency engages in a direct consultation and accommodation process with the First Nation with respect to project authorizations and does not rely on the efforts of a private company. Further, a First Nation may not want a company to publicize a BSA and promote a public impression that the particular industry or project is generally acceptable to First Nations. Publication may also risk misinformation or misinterpretation that could cause political damage to a First Nation government. Some BSAs have express provisions stating that any public statements made by either party with respect to the BSA must be made jointly or first approved by the other party.

Details in confidentiality provisions can create a range of options to address the specific interests of the parties. For example, many BSAs have provisions acknowledging that confidential information may be exchanged in the course of implementation, such as traditional use and cultural information on the part of a First Nation, or private financial information and trade secrets on the part of a company. The BSA can allow for the protection of information that is identified by either party as confidential so that it cannot be released to any third party without express written consent. These types of clauses are usually accompanied by reasonable exceptions, such as where information must be disclosed by the company in order to comply with regulatory

requirements, legal direction or other such obligations, or with respect to information that is already in the public domain.

R. Standard Contract Clauses

Most BSAs are by definition contracts: contract law generally applies to BSAs. There are a range of standard clauses that are typically included in BSAs. These include the following provisions:

- **indemnification**, where one party agrees to assume legal responsibilities for the other party's loss in relation to an issue under the BSA (usually for a breach of the BSA);
- **assignment**, where the parties confirm that the BSA is binding on successors to the parties (this may be a unique matter of customary governance for a First Nation and may require an express representation that the First Nation signatories have the ability to bind their members and respective heirs); and where the parties decide whether or not there will be rights of assignability to third parties;
- whether the **schedules** on the BSA are binding on the parties;
- a statement that the BSA is the entire agreement between the parties in relation to the subject matter therein (in government-First Nation BSAs relating to consultation and accommodation of aboriginal rights, this may need to be balanced with provisions wherein the parties acknowledge that broader reconciliation processes are underway and that the BSA does not restrict the ability of the First Nation to seek additional accommodation in respect of impacts to its aboriginal rights in respect of the development)³⁰;
- explicit clauses with respect to the **severability** of all clauses, and or whether the failure of certain clauses constitutes a fundamental breach that terminates the BSA;
- in the case of governments, statements that the BSA cannot be interpreted in a way that **fetters** the discretion given to any minister or First Nation or government official;
- a statement that the parties agree to obtain **independent legal advice** in respect of the BSA; and
- a statement that **time is of the essence** in the BSA.

The summary list set out above is not exhaustive list. Its purpose is to alert the parties negotiating a BSA that they need to be mindful of basic contractual issues. While such clauses may be 'boiler plate' they can have important legal consequences for

³⁰ See for example, the Gitanyow Agreement sections 9.7, 16.14 and 17.1 at Tab 2 in Appendix 2.

the parties. In addition, they can have unique application to First Nation parties and should be reviewed in that context. In the case of BSAs that are intended to be legally binding, legal review is strongly recommended for all parties before signing.

S. Signing Authority and Ratification

The signing authority on the part of a First Nation is based on similar principles to those set out in Section ‘B’ with respect to naming the proper party to the BSA: it largely depends on the customary law and present government structure of the First Nation party. The degree of authority and confirmation required may be relative to the degree of potential infringements of aboriginal rights. A minor business-oriented agreement with little impact on rights will likely require less formal and extensive authorization than a major accommodation agreement arising from significant impacts on aboriginal rights.

One or more individuals or representatives may sign a BSA. If a Band Council has authority in some matters and a hereditary leadership has authority in others, it is ideal to have both representatives as signatories. If a representative of a Band Council is signing the BSA, a Band Council Resolution would not typically be legally required, unless the BSA deals with Indian Reserve land. However, a duly passed resolution of a Band Council may be helpful in confirming the legal authority of a Chief or Band Councillor to sign a BSA.

Some BSAs contain an express clause where a Band Council signatory represents that he or she is authorized by a duly passed Band Council Resolution. Some go further and require the Band Council signatory to represent that it is the authorized representative of the Nation, and that it has consulted with the membership and hereditary leadership to seek this authority. This may be encompassed by a more general clause stating that each of the parties warrants that it has taken all necessary actions to authorize the execution of the BSA.

If a hereditary chief is signing a BSA, a process consistent with the laws or customs of the First Nation should be demonstrable. If a group of First Nations is represented in an agreement by a tribal council, or a similar modern or political organization that does not reflect the customary authority of the First Nation with respect to land and resources, it is advisable to have signatories to the BSA for each of the traditional groups in addition to a representative of the contemporary organization.

Whether a First Nation signatory should carry out a referendum or other formalized consultation process with its membership to ratify a BSA is also mostly a matter of customary and contemporary governance of the particular Nation. In cases where

there the project under the BSA is large and may involve significant environmental, social or legal impacts, there may be divisions in the community around project/BSA support. Where a BSA is likely to endure beyond the signatory First Nation government, companies may encourage their First Nation counterparts to carry out a formal ratification process, such as a referendum, so that the legitimacy of the BSA amongst the broader membership is clearly established. Where internal divisions within a Nation are serious and may lead to legal challenges, proof that the authorizing signatories carried out a consultation process with the membership assist a court in upholding the BSA if it is challenged.

For companies, as well as federal, provincial and local government signatories, signing authority is governed by the appropriate statute, and by the constating documents in the case of corporations and municipalities.

All parties are advised to seek legal advice before signing a legally binding BSA. As a matter of logistics, many BSAs provide that the agreement may be executed by the parties in counterparts and/or facsimile, meaning that the parties do not need to sign the BSA simultaneously. This may be necessary if the parties are geographically distant, but having everyone together in the room to sign the same agreement may save later confusion in identifying the authoritative version of the final agreement. If the BSA is executed in counterparts, the last party to execute should take responsibility for distributing the copy of the BSA that has all signatures, and initialled schedules, affixed. Witness's signatures are generally not legally required to ratify a BSA, but may be helpful in the event of a dispute with respect to execution. First Nations may also wish to have traditional witnesses or a traditional signing or witnessing ceremony.

PART III. IMPLEMENTATION AND BEST PRACTICES



Part III. Implementation and Best Practices

Summary of Implementation and Best Practices

Here are some best practices and recommendations that arose from our research and interviews:

1. *Relationship Building*

Fair, lasting and mutually benefit agreements start with developing good relations. Often the people and relations matter just as much as the substance of the agreement, if not more so. It is important to understand that many BSA negotiations begin in a general atmosphere of dissatisfaction and distrust.

Successful BSAs begin with a significant investment of time by all parties in getting to know each other. It is essential to start early in the planning stage and to be persistent in creating opportunities for face-to-face contact. For government and company representatives there is no substitute for going to the First Nation community, spending some time at lunches, dinners and community events and getting to know the First Nation community and members. For First Nation representatives, it is important to find time to meet and understand what is being proposed. Investments in relationship-building are some of the most important investments anyone will ever make and may determine the success or failure of the entire project.

2. *Research, Due Diligence, Careful Selection*

First Nations and companies need to do their research and due diligence and choose their partners very carefully. Many partnerships and joint ventures fail despite the best efforts of the parties. “Do your due diligence and find a good fit. Think about the long term.”

3. *Separate Business From Politics*

First Nations are usually best served by separating business from politics. This is a key recommendation from the Harvard Project resulting from years of study with many American tribes and is also reflected in our research and interviews for Canadian First Nations. A recent study on successful First Nation forestry companies and joint ventures in Canada revealed similar findings to the Harvard Project.³¹ Successful companies typically have “strong separation of management from band governance, participation in management planning,

31 The Harvard Project on American Indian Economic Development, <http://www.hks.harvard.edu/hpaied/>

and the use of staggered terms in band council elections”.³² It is difficult to enter into a stable long-term business partnership from the unstable platform of *Indian Act* 2-year elections.

However, it is important to have a nuanced understanding of separation in a First Nations context. There often needs to be a balance between separation for business purposes but connection for community and political purposes. A First Nation development corporation with no members from Council and no direction or principles from the community risks becoming an “outsider” that will no longer reflect community views. Successful First Nation businesses operate as businesses but under principles set by the community and Council.

4. *Assess And Build On Strengths; Understand And Minimize Weaknesses*
First Nations need to assess their location, community objectives and assets. This applies to both selecting potential projects and assessing leverage for negotiations. Every Nation has its strengths. For remote First Nations strengths may include legal leverage over resource developments that potentially infringe rights and a natural advantage in the ability to provide employees and contractors. There is little sense in a remote First Nation trying to replicate an agreement negotiated by a more urban First Nation in an area that is strategically important to the 2010 Winter Olympics. Similarly, an urban First Nation may not have the same leverage over forestry or mining developments that is available to more remote Nations. It is important to review what other Nations have done but each First Nation has unique strengths and leverage.
5. *Set Clear Objectives*
Each party needs to have clear objectives. Companies need a clear picture of why they are entering into discussions with First Nations? Are they seeking to meet consultation requirements, to assist in securing permits and authorizations, to be good corporate citizens and obtain a ‘social license’, to reduce risks of confrontations or litigation? Different objectives may necessitate different approaches and strategies.
Government parties need similarly clear objectives. Are they building a consultation record to meet legal or policy requirements or are they seeking to achieve reconciliation?
First Nations need to decide if they are seeking to oppose a project, or benefit from it, or simply get more information about it before making a final decision.

32 Trosper et al, “Institutional Determinants of Profitable Commercial Forestry Enterprises Among First Nations in Canada”, Forthcoming, Canadian Journal of Forest Research

Lack of clear objectives is a recipe for frustration on all sides. Ideally, the objectives should be linked to monitoring, tracking and reporting³³ so all Parties can collectively track the extent to which they are meeting their objectives.

6. *Assess And Support Capacity*

All parties may have capacity limits. First Nations are typically most limited by capacity issues but government representatives may be snowed under by consultation requirements and lack of resources or supporting policies, and companies may not have the capacity or experience to negotiate with First Nations. Each party should assess their own and each other's capacity and, if necessary, seek or provide funding and support to enhance the capacity of the other parties.

7. *Put It All On The Table And Then Focus*

Negotiations with First Nations are known for their complexity. Corporate and government representatives may become frustrated when First Nations want to discuss dozens of seemingly unrelated historical issues. However, to many First Nations all of the issues are inter-related. As one enlightened and experienced company representative stated: "We have excluded First Nations for over 150 years so we owe them a lot of listening time". Listening is part of respect and relationship-building. Successful BSA partners are able to take the time to listen to each other's issues and concerns, put all the issues on the table, and then move forward with practical and mutually beneficial solutions on key issues. First Nations cannot realistically expect one company or one project to address all historic grievances. However, corporate and government representatives can make significant progress by respectfully educating themselves about the history and culture of their First Nation partner and finding creative ways of dealing with at least some of the outstanding issues.

8. *Monitor And Revise If Necessary*

Business and political relationships are ongoing. BSAs require certainty and stability but also flexibility. Successful BSAs build in formal or informal review processes for the parties to check in from time to time and make sure the agreement is still working.

Interviews and Comments

Garry Oker, Doig River First Nation, DRE Oilfield Services

DRE is a First Nation owned corporation that has a corporate relationship with MDS. DRE started with a Joint Venture with MDS to offer operating services to oil and gas

33 See Section 'G' above regarding reporting.

operators in Treaty 8 Territory in northeastern B.C. The company has grown into an impressive operation that provides contract services to many major oil and gas companies and employs dozens of First Nation members.

DRE has also received final authorizations for a secure landfill.³⁴ This is a major industrial initiative that DRE has undertaken with funding and participation from CNRL. DRE identified that the lack of a secure landfill in northeastern BC was a significant limiting factor that was preventing oil and gas companies from quickly cleaning up spills and contaminated sites. DRE pursued the Peejay Secure Landfill with the twin goals of cleaning up and healing the lands and also creating economic opportunities.

DRE has been selected to receive the prestigious Community-Owned Business of the Year Award from the B.C. Aboriginal Business Awards.

DRE's web-site can be found at: <http://www.dreoilfield.com/> and includes an impressive informational and promotional video.

Here are some comments from Garry Oker:

“You have to capture the cultural capital of the First Nations people. First Nations have to step up to the plate about what they want, what parts of their culture, territory and laws they want to protect and where the opportunities are. Then industry and government has to respect this and agree to work with First Nations.

When we were working on DRE we did a lot of work identifying opportunities. We didn't want to compete with our own members who already had individual contracts with oil and gas companies. We wanted to create new opportunities for training and development. We approached some of the major oil and gas companies and said we would like to offer services. They said as long as we were competitive and offered something they needed, they would work with us.

Was there resistance from the companies? Not too much. The main issues were political. Companies felt concerned about past experiences where some of the job opportunities seemed to be directed to particular individuals or families for political reasons. They wanted to keep politics out of it. Some companies were also a bit suspicious that we were looking for special consideration because we are First Nations. We explained that we have rights and title but

34 http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/447725/1223058567424_8e248a8d30d9995f25eb53504fd1bb7fa5c4cfb0db3c.pdf

other than that, this is about business. We spent a lot of time developing the business relationships. We worked up, starting small and building trust. Now we have that trust. You can see examples on our web-site.”

Regarding the PeeJay Secure Landfill, Garry stated:

“We wanted to show that we could solve a problem for industry, and do in a way that respected the direction from our Elders to heal our lands. We worked with our Elders and members to design the secure landfill to the highest environmental standards.”

Anonymous Interview, NWT Mining from a First Nation Perspective

“We started negotiating mining IBAs over 10 years ago. At first we were really focused on jobs. Our members all wanted us to push for jobs so we did. It turned out a lot of the jobs didn’t come through. Or they did and we had nobody available or trained for them. Or our members would get downgraded to part-time or demoted. Looking back now I don’t think you can really force jobs or hiring despite the best intentions of all the parties.

The trend now is contracting and equity. Our First Nation and members have started up a lot of successful companies. Catering, hauling, transport, operations: mining companies have to hire one of our contractors every time they turn around because we are there and we are the best. Now instead of pushing for jobs we push for royalties and equity to generate funds that we can invest for the best benefit of our members.

Even though we focus on equity and contracting now, we still go after community benefits. Don’t be afraid to put on the table whatever your community needs. Then sit down and be flexible and negotiate something that works. Take the long view over a series of projects and you can get what your community needs.”

Anonymous Interview, B.C. Tourism Operator Perspective

“As a corporate philosophy, we have to adapt our corporate position to recognize First Nations as landlords in the territories we are operating in. When our licences were due for renewal, we needed the cooperation of the First Nations. We operate lodges in the territories of several different First Nations and have protocol agreements with most of them. One of our agreements has been in place for seven years. Under these agreements, we pay rent and

a sustainability fee (based on our volume of guests) to the First Nation. The fees go up incrementally each year for the first three years of new lodges, with a maximum cap for each year. Our bottom line is that we can't negotiate an agreement that will cause us to be uncompetitive. We learned that paying fees to a third party can cause confusion, so we strive in all cases to provide fees directly to the First Nation.

Another aspect of our agreements is a community fund that we commit to each year in a set amount. We provide the funds each year for a project request from a community committee. Since we commit to providing the same amount of money on an annual basis, a committee can plan for longer term projects. And we know that the funds are being applied to a project with broad community support.

We have learned that it can take years to build a good working relationship with a First Nation. In one case, it has taken eight years to reach the close of negotiations with a First Nation. In another case, it took several years to find out which individuals we should be dealing with. We need long term certainty, so we don't rush into agreements. It is extremely important to meet the Band Council in person. We typically request that our meetings are recorded in the minutes so that when Council members change, there is a record of our discussions. We find that having a consistent person who has existing relationships, or can develop personal relationships with members of the community is the best way to form a good working relationship. In many ways, companies have to realize that agreements rely on this individual as much as they do on the corporate commitments. Everything depends on doing what we say we will do.

We have employment and training commitments in our agreements, but we have provisions that allow us to hire outside them if necessary because of a small employment base in the areas we operate. We believe strongly in investing in successful employees and looking for opportunities for them to mentor other First Nations employees working in the company. We send hiring lists to the Band Councils directly and they act as a hiring agent for us so we do not create inequity issues in the community. We are interested in joint ventures and we have approached a First Nation to go into a joint hotel venture with us. We found that they were receptive to the concept, but unfortunately the Council was simply too busy to participate in such a venture. Capacity is always a challenge, but we will continue to look for other business opportunities to jointly pursue in the future. When we approach a First Nation to co-operate with us, we do it early on, so we can ask them first: what would make them happy? And we see what we can do."

Anonymous Interview, Oil and Gas Industry Representative

“We know we need to do business with First Nations. We are a big company and we have First Nation liaisons and contract specialists. We do a lot of contracts with First Nation members. Sometimes the politics are tough. It can be hard to know if contracting with one individual or family or contractor will cause problems with family politics or with other First Nations. We’re trying to do the right thing but it would really help if First Nations would get their acts together, too. We would like to see First Nations or groups of First Nations work out their internal politics and develop a hiring and contracting commission or some group we could deal with that isn’t tangled up in politics.”

Reported Comments of Dorothy Baert, Tofino Sea Kayaking

Dorothy Baert is a long-time and well-respected operator of Tofino Sea Kayaking. These are the comments attributed to her in an article in the Westcoaster:

“Dorothy Baert, owner of Tofino Sea Kayaking, said some local businesses are already collecting money on a voluntary basis for another First Nation’s projects. Baert said several tourism operators collected a “significant” amount of money this past summer for a Tla-o-qui-aht tribal park on Meares Island and a nearby trail. Baert said two-thirds of the money will be used for a tribal park and one-third will be used for the trail. She said the businesses are just waiting for the right opportunity to hand the money over. “We’re neighbours,” she said. “I think the idea of shared benefits speaks for itself.”³⁵

35 “Clayoquot Bands Say ‘No More’”, Westcoaster, February 4, 2009 (Article ID: 6078, <http://www.westcoaster.ca/modules/AMS/article.php?storyid=6078>)

PART IV. OTHER JURISDICTIONS AND BSA REQUIREMENTS



Part IV. Other Jurisdictions and BSA Requirements

A. Summary of Other Jurisdictions and BSA Requirements

In our analysis we have provided many examples of BSAs in Canadian and other jurisdictions. Some of these jurisdictions have legal or policy requirements for BSAs. An important question arises: Do requirements for BSAs produce positive results?

This is a somewhat controversial question. Some industry representatives have argued that they are already required to meet extensive regulatory and cost burdens through government approval processes and that it is unfair and unnecessary to impose yet another layer of requirements onto projects in relation to BSAs with First Nations. However, other industry representatives have stated that they accept the business case and moral obligation to negotiate BSAs with First Nations and that they will negotiate these agreements whether there are requirements or not. From this latter perspective, BSA requirements would have merit in levelling the playing field for all projects.

There is some academic analysis of this topic. Results are mixed and more analysis is required on this question. However, the general conclusion is that legal requirements for BSAs do have a number of benefits for First Nations, the environment, industry and government and that BSAs negotiated in this context often rank higher on various scales than those that are negotiated on a 'voluntary' basis.

The status quo in B.C. is difficult for a number of reasons including the following:

- Proponents do not know whether BSAs are required. This uncertainty limits investment and increases risks.
- The link is unclear between government accommodation of First Nations and BSAs between proponents and First Nations. Often the proponent and government are left pointing at each other and disagreeing over who bears the responsibilities and the costs.
- First Nations do not know whom they should be negotiating with and what may be used against them in court or in government decision-making.
- First Nations are often at the mercy of the good will and social policy of the proponent.
- There are frequently wide discrepancies in practice between small and large companies, between different proponents in the same sector, and between sectors.
- Proponents often feel trapped between lack of government/ statutory direction and the risk of First Nation blockades, boycotts or litigation.
- There is no standardized measurement to assess what is an adequate BSA. A proponent may do its best and still risk criticism or legal or direct action from a First Nation.

We acknowledge that it will be challenging to develop standard requirements for BSAs for all projects across all sectors. However, in our view, steps towards BSA requirements or guidelines would benefit all parties. There are many interesting models and options from other jurisdictions which could be piloted in B.C.

B. Analysis and Examples

1. International

O’Faircheallaigh and Corbett³⁶ carried out a comprehensive study of 45 mining BSAs in Australia, some negotiated under legislative requirements and others not. They conclude in part that legislative requirements strengthen indigenous bargaining power, move relationships closer to co-management and provide for more effective environmental management.

Here are some key findings of the O’Faircheallaigh and Corbett analysis:

- There are some international pressures to negotiate BSAs. For example, the World Bank requires that projects it helps to finance must devise and maintain mechanisms ‘for participation by indigenous people in decision-making throughout project planning, implementation and evaluation’, and must have development plans that give ‘full consideration to the options preferred by the Indigenous people affected by the project’ (World Bank Operational Directive OD 4.20 (1991), Articles 14(a), 15(d).
- There are generally problems with securing progress towards greater Aboriginal participation in environmental management: “virtually all avenues for their involvement (including general opportunities for public participation) occur through the environmental assessment and approval processes. Once a project has been approved, opportunities for ongoing participation in its environmental management are minimal or non-existent (Sindling, 1999)”.
- The *Aboriginal Land Rights (Northern Territory) Act 1996* and the Queensland Mineral Resources Act 1989 prohibit mineral development in aboriginal title areas without the consent of the Aboriginal landowners.

36 O’Faircheallaigh and Corbett, “Indigenous Participation in Environmental Management of Mining Projects: the Role of Negotiated Agreements” in *Environmental Politics*, Vol. 14, No. 5, 629-647, November 2005.

- The *Native Title Act 1993* creates a ‘right to negotiate for native title holders. Government and industry must negotiate any disputed proposed authorizations in good faith for at least 6 months. If an agreement is not reached within 6 months either party can trigger arbitration before the National Native Title Tribunal.

The 6-month negotiation requirement and the availability of arbitration before the National Native Title Tribunal in the *Native Title Act* establishes an interesting framework for negotiating BSAs. However, the authors conclude that the structure has not functioned well. Aboriginal groups have actually been disempowered. The proponent can simply wait out the 6 month negotiation period, make minimal efforts, and then win at the Tribunal: “...the NTTT has not, to date, refused to grant a single mining lease application, and has generally tended not to attach onerous conditions to leases it has decided may be issued”.³⁷

In contrast the consent requirements in the Aboriginal Land Rights (Northern Territory) Act have functioned reasonably well. The authors cite the positive results that have arisen from negotiations to reach consent. They also provide a very interesting observation about the over-riding jurisdiction of Cabinet to step in if a proponent and Aboriginal group cannot reach agreement and no consent is given:

“If the Aboriginal trustees refuse to consent, their refusal can be overridden by the Governor in Council, a possibility that has not arisen to date because the Aboriginal communities and mining companies concerned have reached negotiated outcomes”³⁸.

This experience in Australia may serve to counter the fear that granting aboriginal consent requirements will lead to a complete shut down of industrial development in B.C. It also opens up an interesting middle ground between absolute Crown decision-making and absolute First Nation consent.

The following provides some insight into BSAs in certain provinces and territories and other jurisdictions. While some BSA provisions are common to all, there are elements that vary greatly. It is important to note that the types of potential benefits depend upon several factors including the legal regime and the nature of the First Nations rights, land tenure, or its “authority” over its traditional lands.

The time period at which the particular BSA was negotiated is another important factor: earlier BSAs were likely negotiated with First Nation’s that lacked familiarity and experience with the process. When dealing with industry-First Nation BSAs,

³⁷ *Ibid*, at p. 635.

³⁸ *Ibid* at p. 634.

differences in corporate culture could affect a company's negotiating style. Further, relationships between certain First Nation signatories and industry proponents can be characterized as stronger than others, which can influence the success of some agreements.

Where overall trends cannot be concluded for a particular jurisdiction, examples of agreements are provided. The third section sets out unique requirements of BSAs in chart-form, followed by several examples of co-management elements in BSAs.

2. British Columbia

Status Quo

As with other Canadian jurisdictions, elements of BSAs in B.C. vary with the First Nation and the circumstances, and it is up to the parties to determine what terms will be included in their agreement. There are currently no legislative requirements we are aware of for BSAs with First Nations in B.C.

First Nation leaders have called for minimum standards for BSAs in B.C. The First Nations Leadership Council is seeking standards that would reflect a shift towards truly shared decision-making and revenue and benefit sharing that are based on recognition of aboriginal title. The provincial government in B.C. has committed to move toward shared decision-making in the New Relationship document and has recently committed in the Throne Speech to enact new "recognition" legislation which would create space for shared decision-making with First Nations.

British Columbia has developed a provincial policy on a type of revenue-sharing from government in the forestry sector and is considering revenue-sharing from mining on a case-by-case basis. The provincial government has also participated in a number of BSAs with First Nations and with First Nations and developers or industry. Some of these agreements arose from settlement of litigation (e.g. the Musqueam Reconciliation Agreement) but others are more based on a commitment to the New Relationship and general reconciliation (for example, the Osoyoos Mount Baldy Agreement and the Olympic Legacy agreements).

Treaties/ Land Claims

Provincial negotiations in B.C. currently do not have mandates to negotiate the types of provisions in Yukon and NWT Treaties and Land Claims that require BSAs in certain situations. The provincial government's stated premise is that Treaties should be final settlements that create "certainty" and that there should be not requirements outside of Treaty Settlement Lands for additional BSAs or accommodation agreements. However, provincial negotiating positions do allow for a type of revenue-sharing and for roles and benefits outside of Treaty Settlement Lands. The provincial position is

that, although there are no Treaty requirements for BSAs, such agreements are not precluded post-Treaty.

The Nisga'a Final Agreement requires all environmental assessments to "take into account any agreements between the project proponent and the Nisga'a Nation or a Nisga'a Village concerning the effects of the project"³⁹. This is a 'soft' provision that encourages BSAs. This provision has not been included in other recent Treaties in B.C.

Title and Rights Recognition

As a precursor to BSA negotiations, the First Nations Leadership Council is calling for a clear statement of recognition principles to act as a guide in reconciliation efforts. There have been various negotiations between the FNLC and senior provincial decision-makers. The timing is challenging but there may be new provincial recognition legislation before the next provincial election. The basic concept underlying the legislation is that aboriginal rights and title will be generally recognized and that statutory room will be created to enable shared decision-making with First Nations.

Interim Revenue Sharing

On the issue of revenue-sharing with government the Leadership Council proposed that interim revenue sharing occur immediately in the area of gaming, while discussions on broader revenue sharing continued. The provincial government has not yet accepted this proposal.

Current Provincial Government Revenue Sharing

The Province's position equates accommodation with revenue sharing. Provincial revenues generated from the sale of exploration rights are not contemplated as the kinds of revenues to be shared. Many other types of revenue sharing are excluded. First Nations have proposed revenue sharing of gaming revenues, oil and gas and mineral tenure sale revenues, property transfer tax revenues, Independent Power Project/ hydro project revenues, forestry revenues and many others.

The Province has developed the Forest and Range Opportunity program to provide some formula-based funds and timber allocations to First Nations. They have also mandated Treaty negotiators to include offers for "revenue sharing". However, neither of these are true revenue-sharing. They are program-based offers based on fixed per-capita formulas.

Links to BSAs

The provincial government in B.C. often takes corporate BSAs into account in assessing whether the Province should provide accommodation. Many First Nations

³⁹ Nisga'a Final Agreement, Environmental Assessment Chapter at para. 8(i).

object to this approach. A perception amongst First Nation is that the government has a duty to provide consultation and accommodation and that BSAs with industry are a separate matter. This relates to the issue of whether BSAs with industry should be kept confidential and not shared with government.

Shared Decision-Making

The New Relationship document commits the provincial government to carry out the following:

“We agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing...we recognize that we must achieve First Nations economic self-sufficiency and make First Nations a strong economic partner in the province and the country through sustainable land and resource development, through shared decision-making and shared benefits that support First Nations as distinct and healthy communities...”

These commitments have not yet been implemented but there are signs of progress. It is possible if they are implemented that they will lead to requirements for revenue sharing, shared decision-making and possibly BSAs that would put First Nations in B.C. on more of an equal footing with indigenous communities in other jurisdictions where revenue sharing and BSAs are required.

3. Nunavut

Article 26 of the Nunavut Land Claims Agreement requires an Inuit Impact and Benefits Agreement (IIBA) prior to the commencement of any “Major Development Project”, which is a defined term applying to any Crown corporation or private sector project of various types including exploration and development of resources and based on size measured by person years of employment, or capital cost. Provisions for IIBAs between Inuit and government for the establishment of national parks/sanctuaries are also contemplated. Where IIBAs are required, other regulatory processes cannot proceed until the requirement has been met. Similar provisions are in place for water compensation agreements in circumstances where the quantity or quality of the flow of water through Inuit owned lands may be compromised by development. Again, the Nunavut Water Board cannot proceed with issuing a water license until it is satisfied that a water compensation agreement has been entered into.

4. Northwest Territories

Land Claims

In the North West Territories all settled claims require the negotiation of BSAs as part of the process for securing access on aboriginal settlement lands⁴⁰. Land claims in the NWT, including the Inuvialuit Final Agreement, the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement, include a grant of land, a portion of which includes ownership of the surface and subsurface. The land claims also include provisions requiring the negotiation of agreements between the affected First Nation and developers⁴¹. These requirements to negotiate agreements are legally binding and constitutionally protected: land claim agreements are ratified by federal legislation and protected by s.35 of the *Constitution Act*.

Comprehensive land claim agreements in NWT provide First Nations with roles in renewable resource management and land use planning, and they receive a small share of non-renewable resource revenues from Crown royalties. The Dene First Nation's share of resource revenues are restricted in that they are taxable and that they apply only to resource royalties derived from traditional Dene lands, which are south of the oil and gas rich Mackenzie Delta and Beaufort Sea⁴². This is in contrast to the situation in the Yukon, where an accord signed by Yukon First Nations provides that all Yukon First Nations receive a share of revenues when development occurs on any of their traditional lands.

BSAs

BSAs in the NWT generally cover the following⁴³: quotas for employment and stipulation of training programmes⁴⁴; hiring a community liaison person; counselling

40 Klein, Heidi, John Donihee, & Gordon Stewart. (2004). Environmental Impact Assessment and Impact and Benefit Agreements: Creative Tension or Conflict? Paper presented at the 24th Annual Conference for the International Association for Impact Assessment, Vancouver at pg. 3

41 Klein, Heidi, John Donihee, & Gordon Stewart. (2004). Environmental Impact Assessment and Impact and Benefit Agreements: Creative Tension or Conflict? Paper presented at the 24th Annual Conference for the International Association for Impact Assessment, Vancouver at pg. 4

42 R. Banta (2005). Review of First Nation Resource Revenue Sharing – Discussion Paper prepared for the Assembly of First Nations at p. 36

43 North-South Institute. (2006). “Dealing Full Force”: Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies. Retrieved on March 7, 2006, from: http://www.nsi-ins.ca/english/pdf/Full_Force_Eng.pdf

44 The results of J. Prno's thesis concluded that the jobs provided to the majority of respondents contacted among the Dene, Inuit and Metis in NWT were for “dirty jobs” or “blue-collared labour”, and that overall, benefits flowing to Aboriginal communities

and support programs; increasing community business capacity and contracting opportunities; health and wellness programs; education programs; annual payments; dispute resolution mechanisms; scholarships and funding for cultural activities. Sometimes agreements are categorized as Socio-Economic Agreements which cover: hiring practices, employment targets and incentives; recruitment strategies, apprenticeship and training; literacy programs; support for women and families; business opportunities and financing; social and cultural well-being; establishment of a socio-economic monitoring agency; funding; and dispute resolution mechanisms.

The principle economic opportunities in the NWT lie in mining, forestry, oil and natural gas. The diamond industry is now the largest contributor to NWT's GDP, representing more than 50%. Central examples for BSAs in NWT concern diamond mines involving the Dene, Inuit and Metis agreements for BHP's Ekati Project, Rio Tinto's Diavik mine and De Beers' Snap Lake Project.

Some proponents view BSAs as a tool to secure First Nations' support for a project and may insist that this be a stated purpose in the agreement. The BHP Billiton Ekati Mine Project Impact and Benefits Agreement states:

“[i]n consideration for the [the company] entering into this Agreement, the [group in question] will not object to the issuance of any licenses, permits, authorisations or approvals to construct or operate the Project required by any regulatory body having jurisdiction over the Project.”

This clause prevented at least one First Nation from objecting to the decision by the NWT Water Board to grant a water licence to BHP for the Ekati mine, while denying First Nation communities compensation for the impact of this licence on their water use⁴⁵.

Communities that appear to benefit most from their BSAs are those that have secured some form of authority over their traditional lands (e.g. a settled land claim or self-government measures)⁴⁶.

represented a “very small percentage” of what mining companies would take home in profits. J. Prno, (2007), “Assessing the Effectiveness of Impact and Benefit Agreements from the Perspectives of their Aboriginal Signatories”. Graduate thesis: University of Guelph at pg. 99.

45 I. Sosa and K. Keenan, (2001). “Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada”. Online at: <http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/BSAeng.pdf> at pg. 10.

46 J. Prno, (2007), “Assessing the Effectiveness of Impact and Benefit Agreements from the Perspectives of their Aboriginal Signatories”. Graduate thesis: University of Guelph at pg. 86.

Another factor in the negotiation of a mutually beneficial BSA is the “capacity” of the community (e.g. number of trained employees, availability of financial resources, etc.). BSA signatories lacking authority over their traditional lands also tend to lack political influence in the region, and appeared to gain less from their BSAs⁴⁷. The following development initiatives have been suggested as improvements to BSA requirements by NWT First Nation communities: improved road conditions, new recreational facilities, improved housing, increased scholarship funding, and initiatives directed at the preservation of culture and language⁴⁸.

The Mackenzie Gas Project (“MGP”) has shifted focus away from potential revenue-sharing prospects over the past years. Indigenous groups have focused their attention on equity participation in the MGP, through the Aboriginal Pipeline Group, which holds one-third ownership of the pipeline⁴⁹. The focus on the pipeline is thought to have drawn First Nation leaders’ attention away from much larger financial issues related to revenues of the natural gas that will far exceed the pipeline profits⁵⁰. Some First Nations are seeking to negotiate fees for building the pipeline across their traditional lands; however, the compensation is insignificant in comparison to the public revenues of the resource itself⁵¹. In general, though, the MGP highlights some key trends including the increasing number of negotiations which include a commitment or opportunity for First Nations to participate in the equity of the project.

Even where the implementation of a BSA is required under a Land Claim Agreement, some commentators have suggested there is:

“too much latitude in their negotiation and too much uncertainty about the roles and responsibilities of the parties. This is because there are no formal regulatory guidelines for the negotiation of BSAs in any jurisdiction in Canada. As a result, the strength of the agreement from a First Nation perspective often depends on the community’s bargaining power.”⁵²

47 J. Prno, (2007), “Assessing the Effectiveness of Impact and Benefit Agreements from the Perspectives of their Aboriginal Signatories”. Graduate thesis: University of Guelph at pg. 87.

48 J. Prno, (2007), “Assessing the Effectiveness of Impact and Benefit Agreements from the Perspectives of their Aboriginal Signatories”. Graduate thesis: University of Guelph at pg. 100.

49 L. Dohla. “Mackenzie Valley Pipeline Moves Forward”, First Nations Drum. Retrieved on 14 June 2008.

50 R. Banta (2005). Review of First Nation Resource Revenue Sharing – Discussion Paper prepared for the Assembly of First Nations at p. 39

51 R. Banta (2005). Review of First Nation Resource Revenue Sharing – Discussion Paper prepared for the Assembly of First Nations at p. 40

52 I. Sosa and K. Keenan, (2001). “Impact Benefit Agreements Between Aboriginal

Mackenzie Valley

This model is area specific, based on the common land base of the Mackenzie Valley. First Nations are included in this model through the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim. The provisions include that the government shall pay to each First Nation, annually, an amount equal to:

- 7.5 percent of the first \$2.0 million of resource royalties received by government in that year; and
- 1.5 percent of any additional resource royalties received by government in that year.

The Agreements include verification mechanisms and consultation provisions on changes to the royalty/fiscal legislation regime. Royalties are defined to be mines or mineral production payment in, on or under the Mackenzie Valley but do not include payment for service or issuance of a right or interest or granting of an application. The Mackenzie Valley Resource Management Act, 1998 is used to implement major provisions of both Agreements.

5. Yukon

Yukon Oil and Gas Act

The *Yukon Oil and Gas Act*⁵³ has a clear requirement for consent of First Nations before oil and gas tenures can be approved by the Territorial government:

- 13(1)** Subject to section 41, before the effective date of a Yukon First Nation's Final Agreement, the Minister shall not
- (a) issue new dispositions having locations in the traditional territory of the Yukon First Nation; or
 - (b) subject to subsection (2), issue licences authorizing any oil and gas activity in the traditional territory of the Yukon First Nation, without the consent of the Yukon First Nation⁵⁴.

The consent requirement was one of the conditions of the federal-Territorial devolution agreement and is of a quasi-constitutional nature. The provision only applies to First Nations that have not completed Land Claims Agreements. There are two such remaining First Nations in the Yukon.

Communities and Mining Companies: Their Use in Canada". Online at: <http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/BSAeng.pdf> at pg. 20.

⁵³ **Oil And Gas Act, R.S.Y. 2002, c. 162, s.13.**

⁵⁴ *Ibid*, emphasis added.

Lawyers working with First Nations in the Yukon report that the provision works reasonably well and provides significantly more control and leverage than First Nations would have without it. There is apparently a dispute between the two First Nations regarding the usefulness of the provision (reportedly one First Nation wants to remove it because it requires joint consent in shared Territory areas).

For the majority of the First Nations in the Yukon that have completed Land Claims Agreements, there are revenue-sharing requirements built into their Treaties. The guiding mechanism is the Yukon Umbrella Agreement which provides for royalty sharing for all First Nations in the Yukon that sign a Treaty. Key points are as follows:

- Each First Nation receives 100% of the royalty revenues from its Category A lands (core Treaty lands)
- In the event that Canada transfers royalties to the Yukon government
 - First Nations receive 50% of first \$2million in excess of the Yukon First Nation Royalty received and
 - Receives 10% of excess
- The amount due to a Yukon First Nations in any year will not exceed the amount which if distributed equally among all Yukon Indian People would result in the Average per capita income for Yukon Indian people equal to the Canadian average per capita income.

6. Labrador Inuit Land Claim Agreement

The Labrador Inuit Land Claims Agreement provides for revenue sharing on/off settlement lands and for specific projects.

Subsurface Resource Revenue Sharing in Labrador Inuit Lands

The Nunatsiavut Government receive 25% of all provincial mining tax revenues from subsurface resources in Labrador Inuit Lands.

Subsurface Resource Revenue Sharing in the Labrador Inuit Settlement Area

The Nunatsiavut Government receive, annually, 50% of the first \$2 million and 5% of any additional provincial revenues from subsurface resource developments in the Settlement Area outside Labrador Inuit Lands and the Voisey's Bay area. These revenues will be capped at an amount which, if distributed among all Inuit, would give them a per capita income that is no higher than the average Canadian

Voisey's Bay

The Nunatsiavut Government receives 5% of provincial subsurface resource revenues from the Voisey's Bay Project. The Voisey's Bay area is not part of Labrador Inuit

Lands or the Settlement Area.

Inuit Impact and Benefit Agreements (IBSA's)

IBSA's which are to be negotiated between a developer and Labrador Inuit are compulsory for developments on Labrador Inuit Lands and for major developments in the Labrador Inuit Settlement Area outside Labrador Inuit Lands. A major development is any development that entails capital expenditures of \$40 million or 150 person years of employment in any five year period.

7. Quebec

The Crees of Quebec and the Quebec La Paix des Braves Agreement, 2003

The Agreement implemented existing obligations of the Quebec government to the Cree people under section 28 of the James Bay Agreement of 1975 after decades of court battles. It provides for the sharing of revenues and joint management of mining, forestry and hydroelectric resources on traditional Cree lands between Cree and Quebec governments. It aims at developing more equitable Cree participation in employment and revenue in natural resource industries in Northern Quebec

The agreement is based on a development model that relies on the principle of sustainable development partnership and respect for the traditional way of life of the Crees as well as on a long-term economic development strategy.

With a focus on long-term economic development and benefits, the agreement describes in detail the funding amounts involved in the new agreement and its indexation formula over a 50-year period.

Annual payment from Québec for the first three (3) financial years were:

- a) for the 2002-2003 financial year: twenty-three million dollars (\$23 million);
- b) for the 2003-2004 financial year: forty-six million dollars (\$46 million);
- c) for the 2004-2005 financial year: seventy million dollars (\$70 million).

For each subsequent financial year between April 1st, 2005 and March 31st, 2052, the annual payment from Québec is the greater of the two (2) following amounts:

- a) Seventy million dollars (\$70 million); or
- b) an amount corresponding to the indexed value of the amount of seventy million dollars (\$70 million) as of the 2005-2006 financial year in accordance with formula that reflects the evolution of the value of hydroelectric production, mining exploitation production, and forestry harvest production in the Territory.

Over a period of 50 years the agreement has an estimated value of between \$3.5 and \$5 billion in revenues coming from the territory that will return to the Cree from Québec Funds.

8. Saskatchewan

NorSask Forest Management License Agreement

Meadow Lake Tribal Council (“MLTC”) represents nine First Nations⁵⁵, of which their elected chiefs govern MLTC; each First Nation delegates responsibilities to MLTC and grants the tribal council corresponding authority to fulfill these responsibilities. In January 2001, Canada and MLTC signed a self-government agreement-in-principle, and Canada, MLTC and Saskatchewan signed a tripartite agreement-in-principle, which set the stage for economic development to follow⁵⁶.

The Saskatchewan government sold an unprofitable saw mill to MLTC, which was renamed NorSask Forest Products (“NorSask”), and came under full MLTC ownership in 1998. NorSask and Saskatchewan entered into a Forest Management License Agreement that gives NorSask harvesting rights and reforestation responsibilities for softwood and hardwood on 3.3 million ha of Crown land within MLTC traditional territories. The agreement also provides for extensive consultation with northern communities, hiring priority for area residents, and a requirement that hardwood processing capacity must be present in order to maintain hardwood harvesting rights. The license is overseen by Mistik Management, a 50/50 joint venture between NorSask and Miller Western.

There is a series of co-management boards that enable MLTC communities to have input on where logging takes place, the shape and size of cuts, harvesting plans, reforestation, location of logging roads and other matters.

9. Ontario

BSAs in Ontario cover a diverse area of sectors from casinos to mining and manufacturing. The following summarizes a unique agreement that highlights the influence of corporate policy on First Nation economic development. The second

⁵⁵ Represented by nine First Nations: Birch Narrows, Buffalo River, Canoe Lake, Clearwater River, English River, Flying Dust, Island Lake Makwa Sahgaiehcan and Waterhen Lake

⁵⁶ Saskatchewan, “Agreements-in-Principle Signed by Meadow Lake First Nations”, January 22, 2001. Online at: <http://www.gov.sk.ca/news?newsId=2174365d-58a1-47d6-8e85-17c874472878>

section notes the significance of the mining sector as an up-and-coming area for revenue-sharing in Ontario.

Niigon Technologies

The Niigon example may not correctly be characterized as a BSA in that it represents a wholly-owned First Nation business venture that was made possible through private funding (“angel investor”, Robert Schad). However, with the increasing emergence of Corporate Social Responsibility in Canadian business culture, this type of agreement may become more common.

Moose Deer Point First Nation (“MDPFN”) and Husky Injection Molding Systems Inc. (“Husky”) entered into a joint venture in 2001 leading to the creation of Niigon Technologies Ltd (“Niigon”)⁵⁷, an injection molding plant to provide small plastic parts for the automobile and electronics industries. It is important to note that this joint venture would not have been possible without the assistance of Robert Schad, President of Husky. This investment is a principle element of Husky’s Corporate Social Responsibility strategy and is recognized as a notable precedent for a partnership with a First Nation.

MDPFN provided land, human resources and \$2 million for the project; Ontario contributed approximately \$6 million in start-up and capital funding. Husky developed the facility design and provided equipment, training and managerial and technical support until the First Nation was in the position to run the facility independently. The Schad Foundation (created by the President of Husky) donated \$6.5 million for improvements in community housing, education and wellness. Niigon is wholly owned by MDPFN, thus the revenues stay with the First Nation.

The Niigon Board of Directors consists of seven members, one appointed by the MDPFN Council, one by the MDPFN Community Association and one by Husky. Those three directors then jointly choose the 4 remaining directors.

Significant terms of the agreement are as follows: Niigon may purchase additional equipment from Husky at very favourable terms and obtain advisory and training services free of charge; college training of 8 community members and additional training for a further 20 community members is provided by Husky; Niigon will not be subject to any property taxes by MDPFN for the first five years, however, the First Nation will charge user fees for water, snow removal and similar services; Niigon has a partnership with Nypro, a U.S.-based molding firm, to provide training and

⁵⁷ J. Graham and H. Edwards, Options for Commercial Enterprises in First Nations. Institute on Governance: Ottawa, 2003; Ontario Ministry of Aboriginal Affairs, “Niigon – a Joint Venture to Inspire More Aboriginal/Private Partnerships”, February 19, 2003. Online at: http://www.aboriginalaffairs.gov.on.ca/english/news/archives/news_030219b_3.asp

marketing services. Lastly, the agreement allows hiring of an experienced general manager from outside the community to help ensure its long term profitability.

Mining Sector Reform

Public consultation is currently being undertaken for the modernization of the Ontario *Mining Act*⁵⁸. The deadline for submissions was set at January 15, 2009, which also marked the end of consultation with Ontario's First Nations. Resource revenue sharing with affected First Nations is being recommended for the mining activities. Some details of the Ontario Mineral Industry Cluster Council⁵⁹ recommendations follow:

- The establishment of a First Nations Royalty Fund for managing and distributing the revenues. The proposal is restricted to the mining sector and includes a \$50 million annual contribution as a base to the Trust fund, which would come from existing mining tax streams; and a contribution 1% of gross revenue from all new mines and expansions to the Fund over and above the \$50million base;
- First Nations will assume responsibility and plan for sustainable economic and social development of their communities on a scale that equates with their share of the resource revenue sharing;
- The terms of the Fund are renewable every ten years.

58 R.S.O. 1990 c. M. 14

59 Ontario Mineral Industry Cluster Council. "Update on Resource Revenue Sharing between the Government of Ontario and First Nation Communities", Meeting presentation notes, September 24th, 2008 ("OMICC")

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APPENDIX 1. MATRIX OF ELEMENTS FROM VARIOUS BSAS

APPENDIX I. BENEFITS SHARING AGREEMENT MATRIX

The following comparison matrix presents a sampling of the broad range of BSAs examined in the development of this Guide.

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Eskay Creek Mine: Collaborative Agreement		Mining	BC	2004	Tahltan Central Council (Tahltan Nation)	Barrick Gold Corp.	N	N	N	N	Y - [1]	Y - [2]		[3]	[4]
Kwadacha First Nation Interim Agreement	Interim Management Agreement	Hydro	BC	2006	Kwadacha First Nation	BC Hydro	BC	Y	N	N	Y - [5]	N	Y - [6]	[7]	[8]
Tsay Keh Dene First nation Interim Agreement	Interim Management Agreement	Resource Development	BC	2006	Tsay Keh Dene First Nation (TKDFN)	BC Hydro	BC	Y	Y - [9]	N	Y - [10]	N	[11]	[12]	[13]
Ekati Diamond Mine: Impact and Benefits Agreement	IBA and Socio-Economic Agreement	Mining	NWT	1998	Hamlet of Kugluktuk, Kitikmeot Inuit Association	BHP Billiton Diamonds Inc.	NWT (and Canada for env't'l agreement)	N	N	N	Y - [14]	Y - [15]			IBA and Socio-Economic Agreement

Notes

16. Brookfield Power (formerly Brascan) is a major international corporation with a commitment to working with First Nations and local stakeholders

17. Brookfield Power (formerly Brascan) is a major international corporation with a commitment to working with First Nations and local stakeholders

18. Proponent entitled to 17.5% of the gross income of the sale of petroleum products from the Mineral Claims

19. First Nation appoints Proponent as Manager to arrange with 3rd party industry participants the exploration, development, production, operation and marketing of petroleum, natural gas, etc from the Mineral Claims in its discretion

20. FN granted mineral claims and surface claims provided for under an agreement with Canada

21. FN completely controls the direction of the resource use

22. Proponent receives percentage of revenues for its work

23. FN holds the surface and mineral claims and engages Proponent to manage and ultimately be granted the claims subject to the total supervision and control of the FN

24. Contracting opportunities; training; scholarships, employment

25. First Nation input on any concerns they have; cooperative environmental consultation process

26. Management Advisory Committee with First Nation representation

27. In light of unsundered aboriginal interests; participation and employment benefits; no revenue sharing impacts of the mine

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Kwagis Power Ltd, Kokish River, Limited Partnership	Joint Venture	Hydro	BC	2006	Namgis First Nation	Brookfield Power	N	Y	Y	N	Y	Y	Y	[16]	Joint Venture for 40 Megawatt micro hydro project
Wa'as Power, Clint Creek, Limited Partnership	Joint Venture	Hydro	BC		Namgis First Nation	Brookfield Power	N	Y	Y	N	Y	Y	Y	[17]	Joint Venture for micro hydro project
Management and Participation Agreement	Management and Cooperation Agreement	Mining	YK	2000	Confidential	Confidential	N	Y - [18]	N	N	N	N	N	FN possesses the claim and is contracting out the work	[19]
Management and Participation Agreement	Management and Cooperation Agreement	Mining	YK	2000	Confidential	Confidential	N	Y	N	Y - [20]	N	N	[21]	[22]	[23]
Socio-Economic Participation Agreement	Socio-Economic Participation Agreement	Mining	YK	2004	Confidential	Confidential	N	N	N	N	Y - [24]	Y - [25]	Y - [26]	n/a	[27]

Notes

16. Brookfield Power (formerly Brascan) is a major international corporation with a commitment to working with First Nations and local stakeholders

17. Brookfield Power (formerly Brascan) is a major international corporation with a commitment to working with First Nations and local stakeholders

18. Ford entitled from up to 20% of petroleum production revenues from mineral claims; Proponent entitled to 17.5% of the gross income of the sale of petroleum products from the Mineral Claims

19. First Nation appoints Proponent as Manager to arrange with 3rd party industry participants the exploration, development, production, operation and marketing of petroleum, natural gas, etc from the Mineral Claims in its discretion.

20. FN granted mineral claims and surface claims provided for under an agreement with Canada

21. FN completely controls the direction of the resource use.

22. Proponent receives percentage of revenues for its work.

23. FN holds the surface and mineral claims and engages Proponent to manage and ultimately be granted the claims subject to the total supervision and control of the FN

24. Contracting opportunities; training; scholarships, employment

25. First Nation input on any concerns they have; cooperative environmental consultation process.

26. Management Advisory Committee with First Nation representation

27. In light of unsurrendered aboriginal interests; participation and employment benefits; no revenue sharing.

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Snap Lake Project: Impact and Benefit Agreement	IBA	Mining	NWT	2006	Tlicho First Nation (Dogrib Treaty 11 Council)	De Beers Canada	N							[28]	[29]
Victor Project: Syncrude Oil Sands Impact and Benefit Agreement	IBA	Mining	ON	2005	Attawapiskat First Nation	De Beers Canada	N	N	N	N	Y - [30]	N	N	[31]	[32]
Diavik Diamonds Project: Participation Agreement	Participation Agreement	Mining	NWT	2000	North Slave Métis Alliance	Diavik Diamond Mines Inc. - DDMI	N	N		N	Y		Y		[33]
Apple Bay Quarry: Mining Participation and Royalty Agreement	Participation Agreement	Mining	BC	2003	Quatsino First Nation	Electra Gold Ltd.	N	Y - [34]			Y - [35]	N	N	N	[36]

Notes

28. Tlicho are a party to two IBAs previous that address employment and business opportunities

29. Stressing benefits for those who cannot participate directly in the mining economy

30. Business opportunities, employment and training

31. In 2002, DeBeers funded construction of an \$800,000 training centre in Attawapiskat to help prepare members for employment at the Victor Mine; additional training facilities

32. IBA based upon business opportunities, employment and training

33. Cooperative agreement between the company and FN that address employment and business opportunities to that group; mutual objectives.

34. Royalty - \$1.00 for each metric tonne of production

35. Employment and training

36. Agreement requires Company to pay to the Quatsino First Nation a royalty and provide services of Community Development Consultant

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
MOU - Uranium Exploration	Mining MOU	Mining	NU	2008	Nunavut Tunngavik Incorporated (NTI)	Forum Uranium Corp		[37]					[38]	[39]	[40]
Siksika Environmental Ltd.	First Nation Company / Joint Venture	Environmental Consulting	AB	2001	Siksika	Golder Associates	N	First Nation owned	Y - full FN ownership	N	[41]	Y - [42]	Y - FN Owns and runs	[43]	First Nation owned company with support from Golder
IMG-Golder	Joint venture	Environmental Consulting	NWT	2001	Inuvialuit	Golder Associates	N	Partnership	[44]	N	[45]	Y - [46]	Y - [47]	[48]	[49]

Notes

37. NTI will receive a 12% Net profits Royalty, limited to 75% of gross revenues. The value of any uranium component of the gross revenues shall be 130% of the actual value of uranium
38. Upon completion of a Feasibility Study that recommends production, NTI will have the election to either form a joint venture and hold a 20% participating interest or, be granted a 7.5% Net Profits Royalty that will be calculated in the same manner as the 12 % Net Profits Royalty with the exception that gross revenues shall include the actual value received from any uranium component
39. NTI has two options: it can pay for 20% of the development and construction of the mine and reap 20% of the mine's net revenue, or NTI can contribute no money to the mine's development and collect 19.5% net royalty on profits, measured against the accumulated costs of constructing the mine. Forum will pay \$500 signing bonus and commit to execution of an Exploration Agreement within 90 days; upon signing of Exploration Agreement, Forum will pay \$0.50/ha as an annual rental fee for the first year, complete an initial exploration program of compilation of historical data, geological mapping and an airborne geophysical survey to a minimum of \$4.00 per hectare in the first year and issue 1 million shares of the Company within six months. Shares issued will be released for trading over a 24 month period; Forum will pay annual rental fees and minimum annual exploration work requirements during term of agreement; Forum will conduct additional exploration of prospecting, mapping ground geophysics and 2,500 metres of diamond drilling within 5 years. Forum will charge a 10% Operators Fee to the project account (5% on contracts over \$100,000)
40. NTI granted company permission to explore Inuit-owned land recently freed up by NTI's uranium policy
41. Golder supplies professional support to IMG-Golder; priority for First Nations training and employment
42. First Nation participation in environmental studies, training and contracting
43. Golder is a firm of anthropological and environmental consultants that is committed to working with First Nations; Siksika Environmental Ltd is wholly owned and run by Siksika with Golder support Golder involved with a project where six companies sponsored traditional land use and knowledge study of north-eastern Alberta.
44. Inuvialuit owns majority share of company
45. Golder supplies professional support to IMG-Golder; priority for Inuit and First Nations training and employment
46. Inuit and First Nation participation in environmental studies, training and contracting
47. Varied management depending on project, ie. FN may provide researchers who complete field work and write final studies with Golder support, or, with approval from local communities, Golder may take lead role in research and reporting
48. Golder is a firm of anthropological and environmental consultants that is committed to working with First Nations
49. Jointly-owned; Inuvialuit owners are the majority shareholders with Golder holding remaining shares

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Business Partnership between Mt. Baldy Ski Resort and Osoyoos Indian Band	Joint venture	Tourism	BC	2006	Osoyoos Indian Band	Mt Baldy Ski Resort	N	Y- [50]	Y - [51]	[52]	N	N	N	[53]	In response to expansion request for ski resort that lies within OIB territory.
Haida Nation Interim Forest Revenue-Sharing Agreement	Forest Revenue-Sharing Agreement	Forestry	BC	2008	Haida Nation	N	BC	Formula-based payments	N	Y	Y - forest tenure	N	N	[54]	Revenue-sharing and tenure
Gitanyow Forestry Agreement	Forestry - FRO	Forestry	BC	2006	Gitanyow	N	BC	Formula-based payments	N	Y	Y - forest tenure		Y	[55]	[56]
Tla-oqui-aht First Nation Interim Agreement on Forest & Range Opportunities	Forestry - FRO	Forestry	BC	2006	Tla-o-qui-aht First Nation	N	BC	Y	N	N	N	N	N	[57]	[58]

Notes

50. Revenue sharing, 2.5% equity; fixed percentage of the first-time land sales by Mt Baldy Ski Corp from any lands purchased by Mt Baldy from the Province

51. 2.5% equity ownership of Mt. Baldy Ski Resort

52. Prior rights to subscribe for any or all of the shares that may be granted by the resort, other than to its existing shareholders; resort and band will explore co-marketing for golf/ski/wine tour packages and establishment of an Nk'Mip information centre in Mt. Baldy area

53. Inclusion of Nk'Mip language in signage at resort; free season lift passes for band members kindergarten-grade 12, including rentals and lessons; 50% discount on all lift passes, ski rentals and lessons for all other band members

54. Haida's revenue-sharing share is markedly higher than most forestry agreements in B.C.; this is part of ongoing litigation and was backed by blockades; link to land-use planning

55. Funding provided for forest restoration; funding for capacity building

56. Gov't FRO program; some economic opportunities and interim payments related to forestry but program is policy and formula-based

57. Economic benefits from forest tenure absent from this agreement; interim payments made annually to the FN - \$397,979 for term of agreement;

58. Create economic opportunities and improve social conditions of FN; provide interim payment and other benefits to FN related to forestry

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Haida Letter of Understanding	Forestry - Land Use Interim	Forestry - Land Use	BC	2005	Council of the Haida Nation	N	BC	Initial payment of \$5 million	[59]	Y - [60]	N	Y - [61]	Y - [62]	[63]	[64]
Haida Strategic Land Use Plan	Land Use Planning	Forestry - Land Use	BC	2007	Council of the Haida Nation	N	BC	N	N	Y - [65]	N	Y - [66]	Y	[67]	[68]
Squamish Land Use Agreement	Land Use Planning	Land use	BC	2007	Squamish First Nation	N	BC	N	N	Y - protected areas	N	Y - [69]	Y - [70]	[71]	[72]
Turning Point Protocol	Land Use Planning and Interim Measures	Land Use Planning	BC	2001	Gitga'at, Haida, Haisla, Heiltsuk, Kitasoo/Xaixais, Metlakatla First Nation, Old Massett, Skidegate	N	BC	N	N	N	N	Y - [73]	Y - [74]	[75]	[76]

Notes

- 59. Led to Haida forest tenure
- 60. Protected lands and forests
- 61. Linked to land-use planning agreement
- 62. Led to new approach to land use planning
- 63. Arose from Haida litigation and Haida-community blockades to protect rights, title and ecosystem
- 64. Agreement protected large areas from clear cutting pending further negotiations
- 65. Protected lands and forests
- 66. Ecosystem Based Management
- 67. Arose from Haida litigation and Haida-community blockades to protect rights, title and ecosystem
- 68. State of the art joint land use plan; protected vast areas of Haida Territory and old growth forest
- 69. New protected areas and sustainable management
- 70. Collaborative management agreement for protected areas and conservancies
- 71. Squamish developed and defended its own land use plan which was recognized in court; BC agreed to a joint process resulting in a joint plan
- 72. Two new conservancies; recognition of 'Wild Spirit Places'; collaborative management
- 73. Ecosystem Based Management
- 74. New approach to land-use planning and decision-making
- 75. Resulted from extensive strategic lobbying by First Nations, enviro groups and local communities
- 76. Set the stage for numerous planning and resource agreements on the Coast and multi-million dollar funding agreements

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Musqueam Reconciliation Agreement	Land and Cash Settlement	Lands	BC	2008	Musqueam First Nation	N	BC	Y - [77]	N	Y - [78]	N	N	N - [79]	[80]	[81]
Long Term Oil and Gas Agreement - Blueberry River First Nation	Oil and Gas Agreement	Oil and Gas	BC	2007	Blueberry River FN (BRFN)	N	BC	N	N	N	education	N	N	[82]	[83]
Ts'yl-os Park Xeni Gwet'in Management Agreement	Parks and Protected Areas	Parks and Protected Areas	BC		Xeni Gwet'in - Tsilhqot'in	N	BC	N	N	N	N	Y - [84]	Y - [85]	[86]	
Kluane National Park Reserve: Champagne and Aishihik First Nations Final Agreement	Parks and Protected Areas	Parks	BC	1993	Champagne and Aishihik First Nations	N	BC	N	N	N		Y - [87]	[88]		[89]

Notes

77. Portion of cash based on % of lease payments

78. Four parcels of land and \$20.3 million

79. But land transferred to FN

80. Litigation settlement: Musqueam won on failure to consult re: Crown land transfers

81. Transfer of 4 high value parcels of land including golf course and casino (existing leases continue) plus cash

82. Funding for implementation of agreement; more of a consultation framework for notification than anything else

83. Establishes process for BRFN involvement in Oil and Gas policy and regulatory development

84. Commitment to sustainable management

85. Not full co-mgmt but extensive involvement in developing management plans

86. Sacred area for Xeni Gwet'in and strong interest from local tourism operators to cooperate; within claim area for Tsilhqot'in Nation case

87. Designated as a Special Management Area under the agreement

88. Park management advised by Kluane National Park Management Board. Membership: Two Champagne-Aishihik/Two Parks Canada. Board will increase in size as other Yukon First Nations with traditional territories in the park (Kluane & White River First Nations) sign final agreements

89. Agreement to jointly manage park. Designates park within Champagne-Aishihik traditional territory as Special Management Area, including harvesting and trapping rights

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Clayoquot Sound Interim Measures Extension Agreement: A Bridge to Treaty	Co-management	Protected Areas	BC	2008	Tla-o-qui-aht First Nations, Ahousaht First Nation, Hesquiaht First Nation, Toquaht First Nation & Ucluelet First Nation	N	BC	N	N	N	Maintenance of commercial position of Toquaht in forest industry	N	Y - Central Region Board made up of First Nations and others	FNs have 30 days to respond to proposals from tenure holders or government agencies; protection of culturally modified trees	Intention of Agreement is to continue to conserve resources in Clayoquot Sound Area
Wildlife Consultation and Collaboration Agreement	Wildlife Agreement	Protected areas	BC	2008	Blueberry River First Nation	N	BC	N	N	N	N	N	[90]		[91]
Treaty 8 First Nations Economic Benefit Agreement	Economic Benefits Agreement	Resource Development	BC	2008	"Treaty 8 First Nation": Doig River FN, Fort Nelson FN, Prophet River FN; West Moberly FN	N	BC	Y - [92]	Y - [93]	N	N	N	N	[94]	[95]

Notes

90. Contemplation of a collaborative process in the future

91. Set out processes to address impacts on s. 35(1) rights in relation to wildlife management decisions.

92. Yearly payment to the Trust for each year in accordance with formula found in Agreement

93. One payment following signing of agreement and further payments following signing and ratification of five completed Agreements set out in this Agreement; possibility of further relative equity payment subject to the opt-in of Halfway FN or Saulteau FN

94. Possibility of further relative equity payment subject to the opt-in of Halfway FN or Saulteau FN

95. Parties seeking to agree on degree to which the Treaty 8 FNs will share in revenues as calculated according to the formula set out in the Agreement; the Agreement reflects complete Agreement on revenue-sharing and compensation for infringement of rights under s.35(1)

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Accommodation Agreement re Mount Baldy Ski Resort	Accommodation Agreement	Tourism	BC	2006	Osoyoos Indian Band	N	BC	Y - [96]	N	N	N	N	N	[97]	[98]
Big Springs Recreation Area Tobacco Plains Agreements	Parks; Lands	Tourism; Lands	BC	2009	Tobacco Plains FN; Ktunaxa Nation	N	BC	N	N	Y - [99]	N - [100]	Y - [101]	Y - [102]	[103]	
Nisga'a Final Agreement	Treaty - Land Claim	Land and Governance	BC	2000 revised in 2001	Nisga'a First Nation	N	BC and Canada	Y - [104]	Y	Y - fee simple lands	Y - [105]	Y - [106]	Y - Nisga'a governance	[107]	[108]
Nunavut Land Claims Agreement	Treaty - Land Claim	Land and Governance	Nunavut	1993	Inuit	N	Canada	Y - [109]		[110]	Y - [111]	[112]	[113]		[114]

Notes

97. Includes escalation provision that allows Osoyoos Band to receive a greater portion of their percentage of the revenue over the early years of the Plan

98. Agreement sets out a revenue-sharing framework for the development of Crown lands within OIB traditional territory; in response to expansion request for ski resort that lies within OIB territory

99. Transfer of 6.7 ha of land

100. But will likely be some jobs for FN members to manage the rec area

101. Started as a form of co-management of rec area

102. Started as joint mgmt and led to land transfer

103. This started with complaints about damage to cultural sites in the rec area but also complaints about cottage lands on lands with high proof of aboriginal title next to the Reserve, led to an engagement protocol and ended in a land transfer

104. One-time payment of \$253 million; annual transfers to the Nisga'a of over \$32 million for program and service delivery for health, social, education, and land and resource management

105. Funding for capacity development and training

106. Environmental assessment set out in agreement; contemplates projects that are off Nisga'a Lands, but might cause adverse effects on Nisga'a Lands and interests.

107. Canada will pay \$10.3 million for the establishment of a fisheries conservation trust and \$3.2 million to B.C. to assist persons potentially affected by the Final Agreement; Canada and B.C. will share estimated costs of \$3.1 million for surveying Nisga'a Lands and \$30 million for purchasing third party interests; Nisga'a entitled to domestic harvest prior to BC designating protective status upon a wildlife species; Nisga'a entitled to harvest migratory birds

108. Agreement transferred approx 2,000 km² of Crown land to the Nisga'a Nation, created a provincial park and water reservation

109. Capital transfer payments of \$1.148 billion payable to the Inuit over 14 years; share of federal government royalties for Nunavut Inuit from oil, gas and mineral development on Crown lands; \$1.17 billion over 15 years as compensation for Crown lands that are not Inuit property; 50% of first \$2 million royalties and 5% of additional royalties

110. Title to the Nunavut Inuit to over 350,000 km²; 35,257km² includes mineral rights; Agreement also creates 3 new federally funded national parks

111. \$13 million Training Trust Fund related to work in oil, gas and mineral development on Crown lands

112. Environmental management board, with equal representation

113. Inuit governance through new Territory of Nunavut; equal representation of Inuit with government on new wildlife management, resource management and environmental management boards

114. Agreement provides title to the Nunavut Inuit to over 350,000 km²; establishes clear rules of ownership and control over land and resources

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Sahtu Dene Metis Comprehensive Land Claim Agreement	Treaty - Land Claim	Land and Governance	NWT	1993 and 1994	[115]	N	Canada	[116]	Y	[117]	N	Y - [118]	Y - [119]		[120]
Agreement Concerning a New Relationship	Treaty - Land Claim	Land and Governance	PQ	2008	Cree of Eeyou Istchee	N	Canada	Y - [121]	Y - \$1.4 billion in compensation		[122]	N	Y - [123]	[124]	[125]
Dene Tha' Mackenzie Gas Project Agreement	Accommodation	Oil and Gas	NWT	2008	Haida Nation	N	Canada	N	N	\$25 million cash	N	Y - [126]	Protocol	[127]	[128]
Gwaii Haanas Agreement	Co-management	Protected Areas	BC	1993	Council of the Haida Nation	N	Canada	N	N	N	N	Y	[129]	[130]	[131]

Notes

115. Dene of Colville Lake, Deline, Fort Good Hope and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Normal Wells

116. Government to pay FN annually amount equal to 7.5% of the first 2 million of resource royalties received by government in that year and 1.5% of any additional resource royalties received by government in that year; payment of \$75 million over a 15 year period

117. 41,437 km², with subsurface rights on 1,813 km² of this land

118. Environmental impact assessment and review processes

119. Sahtu Dene and Metis participation in institutions of public government for renewable resource management, land use planning and water use, and environmental impact assessments and review in Mackenzie Valley; self-governance agreements

120. Agreement provides lands, monies, shared management and self-governance to the Sahtu Dene and Metis

121. Payments when agreement comes into force

122. Additional funding for training programs and facilities

123. Cree - Canada Standing Liaison Committee consisting of Cree representatives

124. Brings resolution to litigation over the James Bay and Northern Quebec Agreement; establishes a 2-phased process for modernizing Cree governance and establishes a dispute resolution mechanism

125. Agreement implemented existing obligations of the Quebec government to the Cree people under s.28 of the James Bay Agreement, 1975. provides for the sharing of revenues and joint management of mining, forestry and hydroelectric resources on traditional Cree lands between Cree and Quebec governments; agreement is based on a development model relying on principle of sustainable development partnership and respect for traditional way of life of the Cree as well as long-term economic development strategy

126. Some involvement in enviro decision-making through protocol

127. Resulted from successful litigation about failure to consult in establishing the environmental assessment process

128. This is an after-the-fact accommodation agreement that was driven by litigation; it also includes two protocols

129. Jointly managed by the Archipelago Management Board. Membership: Two Haida Nation/Two Parks Canada. Aim is to reach consensus

130. Acknowledgment of cultural activities and traditional resource harvesting activities on lands and non-tidal waters

131. Agreement to constructively and co-operatively share planning, operation and management of the park, and apply the highest standards of protection and preservation

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Labrador Inuit Land Claim Agreement	Treaty - Land Claim	Land and Governance	NL	2003	Labrador Inuit Association	N	NL and Canada	[132]	Y - [133]	Y - [134]	[135]	Y - [136]		[137]	[138]
Voisey's Bay Environmental Management Agreement	Environmental Management	Mining	NL	2002	Labrador Inuit Association and the Innu Nation	N	NL Crown and Federal Crown	N	N	N	N	Y	Y- [139]	[140]	[141]
Casino Rama Revenue Agreement	Revenue Agreement	Casino	ON	2000	Mnj-ikaning FN Ltd Partnership and Ontario FN Ltd Partnership	N	Y - [142]	Y - [143]	N	N	Y	N	Y - [144]	[145]	[146]

Notes

132. Subsurface Resource Revenue Sharing in Labrador Inuit Lands - the Nunatsiavut Government will receive 25% of all provincial mining tax revenues from subsurface resources in Labrador Inuit Lands; in Labrador Inuit Settlement Area, the Nunatsiavut Government to receive 50% annually of the first \$2 million and 5% of any additional provincial revenues from subsurface resource developments in the Settlement Area outside the Labrador Inuit Lands and the Voisey's Bay area; amounts not to exceed per capita income of average Canadian; Nunatsiavut Government to receive 5% of provincial subsurface resource revenues from the Voisey's Bay project
133. Provincial contracts to be awarded to competitive Inuit bids where all tendering requirements met; ROFR for Nunatsiavut if owner of a Commercial Wildlife operation ("CMO") intends to sell or transfer operation; Inuit employment at CMO's; ROFR to establish any Aquaculture Facility in the Settlement Area
134. Labrador Inuit Settlement Area, 72, 500 km²; provides for establishment of the Torngat Mountains National Park Reserve within the settlement area; Nunatsiavut entitled to lands in the Voisey's Bay Area after termination and rehabilitation of the Voisey's Bay Project; Nunatsiavut has ROFR should any land in the Voisey's Bay Area become available for transfer or designation
135. Provincial contracts to be awarded to competitive Inuit bids where all tendering requirements met
136. Environmental Impact Assessment and Review; Nunatsiavut Government to appoint members for any board, tribunal or public review panel required under the Environmental Protection Act.
137. Voisey's Bay area not to be part of Labrador Inuit Lands or the Settlement Area; Inuit Impact and Benefit Agreements must be negotiated between a developer and Labrador Inuit for developments on Labrador Inuit Lands and for major developments in Labrador Inuit Settlement Area outside of Labrador Inuit Lands; Nunatsiavut Government must approve a proposal for a Water Use Permit prior to it being reviewed by the Minister in Inuit Lands
138. Agreement sets out details of land ownership, resource sharing and self-governance
139. Environmental Management Board consists of equally represented parties; Technical Environmental Review Committee open
140. Funding for Labrador Inuit and Innu Nation participation provided by provincial and federal Crown in the EMB and TERC = \$450,000 max annually
141. Environmental Management Agreement that creates EMB and TERC that will in turn advise the parties of the environmental effects of the project
142. Provincial Crown and Crown Corp, Ontario Lottery and Gaming Corporation
143. Immediate transfer of 65% of Accumulated Net Revenues to OFNLP and 35% of Accumulated Net Revenues; monthly transfers to both OFNLP and MFNLP of the same percentages
144. Sitting on relevant boards and having right to veto certain transactions
145. For the first 5 years of the agreement, MFNLP received 35 percent with 65% being distributed through OFNLP to the FNs under the limited partnership; the Ontario Superior Court recently determined that this arrangement was not to last in perpetuity and that the current revenue-sharing is under a 50-40-10 formula, with 50% distributed according to the population of the community, 40% distributed equally among all communities, and 10% set aside for distribution to listed remote communities
146. Enhancement of growth and capacity of ON FNs; ON agrees that ON FNs are to receive the Accumulated Net Revenues and the Ongoing Net Revenues in respect of the casino as long as the casino continues to be conducted and managed by the ON Lottery and Gaming Corp or the Province or OLG or the Province is entitled to Ongoing Net Revenues, whichever is later

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
Naikun Wind farm	Joint Venture	Hydro/ Wind energy	BC	MOU 2007, Partnership 2009	Haida Nation	Naikun Wind Energy; Naikun Wind Operating Inc.	N	Y	Y - [147]	N	?	Y - [148]	Y - [149]	[150]	
2010 Olympics: Shared Legacies Agreement	Accommodation	Tourism	BC	2002	Squamish and Lil'Wat First Nations	Olympic Bid Corporation	BC	Y-Fixed	Y	Y - [151]	Y - [152]	N	Y - [153]	[154]	
Orca Sand and Gravel Project: Polaris Minerals, Kwakiutl First Nation	IBA	Mining Aggregates	BC	2005	Kwakiutl	Polaris Minerals	N	Y - [156]	N	N	Y - [157]	Y - [158]	Y	[159]	Recognizes rights and title;
DRE Oilfield Services	First Nation Company / Joint Venture	Oil and Gas	BC		Doig River First Nation	Y	N	N	Y - First Nation owns	N	Y - [160]	Y - [161]	FN controls	[162]	[163]

Notes

147. Limited partnership with shared equity

148. EA through BC, Federal & Haida

149. Shared decision-making in Ltd. partnership context

150. Part of a long-term relationship to develop the project; strong public and local support

151. 300 acres of land; ownership of the Nordic Centre in the Callaghan Valley, the Sliding Centre for bobsled and luge and the Athlete Centre; 50 moveable houses from the Olympic villages will become the property of the Nations

152. \$2.3 million for a skills and legacy training project; guarantee of contracting opportunities in the Callaghan Valley for trail clearing and construction, timber processing, etc.

153. Members of both FNs will manage, operate and own the Nordic Centre, Sliding Centre and Athlete Centre; Nations will co-direct \$110 million endowment fund established to operate the Nordic Centre and Sliding Centre facilities

154. \$3 million toward the construction of the Squamish Lil'wat Cultural Centre; Aboriginal youth sports legacy endowment fund.

155. Olympics to be held on asserted traditional territories of the Four Host First Nations

156. \$0.09 cents per tonne royalty to community fund

157. Target of 50% of jobs to FNs; commitment to contract locally

158. Polaris spent \$1.6 million to voluntarily clean up an abandoned dump site nearby; various fisheries and enviro commitments

159. Polaris is committed to negotiating agreements with FNs as part of its social contract

160. Preferential hiring and training of First Nation members

161. Committed to highest standards to protect Treaty rights

162. Leveraged by Treaty rights but business focus; started as Joint Venture with Myco/MDS and evolved

163. Started as a jobs and training venture and grew into a solid company; over 100 employees, many FN, solid business model

Agreement Title	Type	Sector	Prov. or Terr.	Year Signed	Aboriginal Group(s)	Industry Group(s)	Gov't(s)	Revenue Sharing	Equity	Land/ Assets	Jobs, Contract Training	Enviro Issues	Coop. Mgmt or Shared D-Making	Specific Factors or Comments	Key Points
NorSask Lake Forest Management License Agreement	Joint venture	Forestry	SK	1998	Meadow Lake Tribal Council	Miller Western	SK	All revenues go to MLTC	N	Nor-Sask saw mill	N	N	Y - [164]	[165]	[166]

Notes

164. Series of co-management boards that enable MLTC communities to inform decisions on harvesting plans, reforestation, logging roads and other matters

165. Forest Management License overseen by Mistik Management, a 50/50 joint venture between NorSask and Miller Western

166. NorSask (wholly owned by MLTC) given harvesting rights and reforestation responsibilities for softwood and hardwood on Crown land within MLTC Traditional Territories. License requires extensive consultation with northern communities, hiring priorities for area residents and securing hardwood capacity with Miller Western

APPENDIX 2. SELECTED SAMPLE AGREEMENTS

Appendix II. Sample Agreements

The agreements listed in this Appendix are provided as examples only. The sample agreements have been selected for their representativeness, or to illustrate a section of the annotated template in Part II; inclusion does not indicate an endorsement on the part of the authors, or of the EBM Working Group, of a particular agreement.

1. Haida Nation and Minister of Forests and Range (B.C.) *Interim Forest Revenue-Sharing Agreement*
2. Gitanyow Huwllp and Minister of Forests and Range (B.C.) *Forestry Agreement*
3. Osoyoos Indian Band and Minister of Tourism (B.C.) *Accommodation Agreement Re: Mount Baldy Ski Resort*
4. Musqueam Indian Band and Minister of Aboriginal Affairs and Reconciliation (B.C.) *Reconciliation, Settlement and Benefits Agreement*
5. The Innu of Labrador and Minister of Labrador and Aboriginal Affairs (Newfoundland and Labrador) *Memorandum of Agreement Concerning the Voisey's Bay Project*
6. Tsay Keh Dene First Nation and B.C. Hydro and B.C. *Interim Agreement*
7. The Crees of Quebec and the Quebec *La Paix des Braves Agreement Concerning a New Relationship*
8. Mamalilikula, 'Namgis and Tlowitsis First Nations and Minister of Sustainable Resource Management *Hanson Island Management Agreement*
9. Squamish and Lil'wat Nations, the Vancouver 2010 Bid Corporation and the Province of British Columbia *Partners Creating Shared Legacies From the 2010 Olympics and Paralympic Winter Games*
10. British Columbia and the Hwiih of the Tla-o-qui-aht First Nations, the Ahousaht First Nation, the Hesquiaht First Nation, and the Ucluelet First Nation, *Clayoquot Sound Interim Measures Extension Agreement*, March 31, 2008
11. The Government of Canada as represented by the Minister of the Environment, and the Council of the Haida Nation, for and on behalf of the Haida Nation and represented by the Vice President of the Council, *Gwaii Haanas Park*

Agreement, January, 1993

In public summary form only:

12. Namgis First Nation and Polaris Minerals Corporation *Cooperation Agreement and Impact and Benefits Agreement*
13. Sechelt First Nation and Plutonic Power *Impact Benefit Agreement*

