THE ROLE OF IMPACT AND BENEFITS AGREEMENTS IN THE RESOLUTION OF PROJECT ISSUES WITH FIRST NATIONS

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Energy sector development in Canada frequently involves the need to address First Nations and other Aboriginal interests when government permits or approvals for facilities are involved. Impact and benefits agreements (IBAs) can play a meaningful role in the reconciliation of the interests and ambitions of both Aboriginal and non-Aboriginal communities. This article explores the potential advantages and challenges of working toward agreement to resolve First Nations concerns on a proposed project and also discusses the importance of a robust regulatory process in reaching such agreements.

Le développement du secteur énergétique du Canada comporte souvent le besoin de tenir compte des Premières nations et d'autres préoccupations autochtones lorsque des permis ou des approbations d'installations du gouvernement sont impliqués. Les ententes sur les répercussions et les avantages peuvent jouer un rôle considérable dans la réconciliation des intérêts et des ambitions à la fois des communautés autochtones et non autochtones. Cet article explore les avantages et défis potentiels de la négociation de telles ententes pour calmer les inquiétudes des Premières nations quant à un projet envisagé et discute de l'importance d'avoir une procédure réglementaire robuste pour aboutir à ces ententes.

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I. INTRODUCTION

Resource development in Canada, particularly in the energy sector, frequently involves the need to address First Nations and other Aboriginal interests when seeking government permits or approvals for facilities. Whether the development involves an oil sands facility, liquified natural gas terminal, pipeline proposal, or any other project requiring government

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or regulatory approval, project proponents must often respond to the challenges and concerns posed by Aboriginal groups.

The grounds for such challenges are based on the varied nature of rights asserted by First Nations. In areas subject to treaty, challenges may be based on alleged infringement of treaty rights, including adverse impacts on harvesting benefits and other traditional activities. In other areas, particularly in much of British Columbia, Aboriginal challenges or concerns may be based on unresolved land claims, where treaties or comprehensive land settlements have not been concluded. Aboriginal communities may also raise concerns based on apprehended impacts to the environment generally and regarding impacts on the social fabric of the community in proximity to a proposed project.

Typically, such issues are dealt with through the regulatory approval process, often as a matter of consultation, as the project proponent is engaged in efforts to assist in the discharge of the Crown's duty to consult.[1] First Nations objections through the regulatory process can create delays for the resolution of project approvals, both at the regulatory phase and, subsequently, through litigation. Delays in project approvals or sanction can have significant cost to proponents, as the impacts on construction windows, contractor availability, and lost market opportunities can result in direct costs and associated additional financing, legal, and regulatory expense.

Even if objections are rejected by regulators at the initial project approval stage, litigation by aggrieved parties can aggravate those delays, resulting in further uncertainty and expense. The many approvals and permits required on a large energy project, from initial leases through facility applications and rights of way can each potentially attract judicial review or appeal challenges. In the context of First Nations these are most commonly based on Crown consultation issues. Whether through consultation challenges before the tribunal itself or through the courts, challenges based on alleged consultation breaches can be time consuming and create significant uncertainty. A negative decision at one court level can lead to appeal and delay measured in months, if not years.[2]

First Nation and Aboriginal issues can also be dealt with through efforts to reach various forms of agreement with such groups, including memoranda of understanding, consultation agreements, and impact and benefits agreements (IBAs). This avenue of potential resolution has received less attention in the energy field, both at an academic level and in jurisprudence.

Negotiating reasonable agreements with First Nations can present significant opportunity and challenges for project proponents. Project proponents in the energy sector generally have no legal obligation to enter into such agreements.[3] The benefits to the proponent are largely derived from establishing "good neighbour" and business relationships and from the withdrawal of objections against approvals for projects. However, negotiations can be

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1 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 72, [2004] 3 SCR 511 [*Haida Nation*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].

2 See e.g. *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 BCLR (5th) 234.

3 By contrast, oil and gas operators north of 60 require approval of a "Benefits Plan" pursuant to the *Oil and Gas Operations Act*, RCS 1985, c O-7, s 5.2.

protracted and are often difficult to conclude until near the end of the regulatory process. Increasing expectations of First Nations in terms of what should be included in an agreement can also lead to a breakdown in negotiations, particularly in cases where the proponent is trying to tie the benefits of the agreement to actual impacts. Often, the claimed impacts are unclear and difficult to quantify. Further, the number of First Nation and other Aboriginal groups intervening against projects is also arguably increasing. In many cases, multiple Aboriginal groups are claiming compensation for impacts in the same area, from facilities proposed by the same proponent, making it more difficult to assess whose rights are actually being affected. All of these factors have the potential to lead to project delays and a breaking point for proponents who are prepared to do reasonable and mutually beneficial agreements, but not agreements at any cost.

Given the gravity of potential delay and expense which can flow from such First Nation issues, project proponents need to ensure that they maximize opportunities for favourable outcomes regardless of which option for resolution is ultimately chosen. Proponents should be looking to reach agreements where reasonable agreements can be done, but at the same time be well prepared to address First Nation concerns through the regulatory process, including public hearings, should negotiations reach an impasse. In particular, an early and concerted effort to engage Aboriginal groups with respect to both negotiating an agreement and sharing information about the proposed project and potential project impacts will provide the best opportunity to generate increased project certainty and a streamlined regulatory process.

The purpose of this article is to discuss the advantages and challenges which can be associated with the resolution of First Nation issues through such a collaborative process and agreement, typically an IBA. An IBA can play a complementary role in the project approval process, and where reasonable and timely negotiations occur, result in avoidance of the delay, cost, and uncertainty which are the bane of project proponents. This article also discusses the importance of a robust regulatory process in reaching such agreements and for maintaining alternative options if reasonable agreements are not achieved.

II. WHAT IS AN IMPACT AND BENEFITS AGREEMENT?

An IBA is an agreement executed between a project proponent and one or more First Nation, Inuit, or Métis communities. IBAs are increasingly used by resource developers to encourage Aboriginal participation in, and support for, proposed projects where such projects may potentially be hindered by issues which arise out of community concerns. These can include: (1) regulatory, litigation, or political opposition; or (2) withholding of key project input controlled by the First Nation, such as land rights or projects on First Nation reserves.

While agreements are increasingly utilized in the energy sector, they remain, in many cases, somewhat mysterious. There are no mandated requirements for these accords. Concluded agreements in the energy sector are rarely made public. Their terms are often kept confidential to the parties.

IBAs initially developed in the mining industry context, where land claim settlements in northern regions provided for a mandated agreement addressing the effects associated with

resource development and providing benefits to offset those impacts, as well as to recognize First Nation interests in the lands utilized for the projects. Such agreements intended to provide opportunities for training and employment for members of often remote Aboriginal communities, and prescribed other economic benefits, including revenue sharing for those groups. The agreements also addressed the adverse effects of development, in terms of impacts on environment and local culture and other economic activities.[4]

One characteristic of the early IBAs in the mining sector was that the agreements were concluded between the resource companies and government, representing the interests of the Aboriginal communities. This was in part a result of the requirements imposed by the legislation implementing land claim settlements in the Northwest Territories and Labrador, as examples.[5]

By contrast, an IBA in the energy sector is typically negotiated directly between the project proponent and the potentially affected First Nation.[6] This dynamic reflects the absence of express statutory or regulatory requirements which would impose the conclusion of an IBA as a necessary requirement of project approval or any minimum content for such agreements.

The absence of such direction provides both challenge and opportunity for potential parties to an IBA. On one hand, the absence of a mandated framework means that the scope, and even the potential First Nations with whom an IBA may be appropriate may be unclear. On the other hand, the IBA model provides a clean slate for a proponent and affected First Nation to negotiate a resolution of concerns arising from project effects and to provide benefits from the development of resources.

Details of the terms and provisions found in individual IBAs will vary depending on the context in which those agreements are formed. While there are provisions commonly found in most IBAs, each circumstance is unique, and the form of an IBA can be flexible to address the issues which arise in a given project. While the focus of this article is on IBAs, it should be recognized that other forms of agreements are also commonly made, often as part of the process of collecting traditional information about First Nations for regulatory approval purposes, or as a precursor to an IBA. Such agreements are often referred to as traditional knowledge (TK) or consultation agreements.

Several factors influence the content of an IBA: individual First Nation legal entitlements pursuant to treaty rights, modern land claim settlements, or Aboriginal rights claims; the nature of the proposed project and its potential impacts; the geographical area in which the

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4 A comprehensive discussion of IBAs, with a focus on the mining industry, is found in Steven A Kennett, *A Guide to Impact and Benefits Agreements* (Calgary, Canadian Institute of Resources Law, 1999); Janet Keeping, *Thinking About Benefits Agreements: An Analytical Framework*, online: Canadian Arctic Resources Committee <http://www.carc.org/pdfs/NMPWorkingPaper4Keeping.pdf>.

5 Jean-Paul Lacasse "Impacts and Benefits Agreements on Aboriginal Title Lands" in Dwight Dorey & Joseph Magnet, *Legal Aspects of Aboriginal Business Development* (Markham: Butterworths, 2005) 311 at 321.

6 The absence of direct Crown involvement can be seen as supportive of the self sufficiency of Aboriginal communities, but also raises concerns over relative bargaining equality (Courtney Fidler & Michael Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35:2 Environments 49 at 63, 66).

proposed project is to be undertaken including proximity to reserves; past dealings between the subject First Nation and the project proponent or proponents of other projects; the nature and extent of First Nation historical grievances; and First Nation political and governance issues.

Under an IBA, the First Nation usually becomes entitled to a benefit scheme provided by the project proponent. IBA benefit provisions will then often address two main project stages: (1) benefits in respect of the regulatory approval phase of a project; and (2) benefits in respect of the construction and ongoing operation phases of a project.

In exchange for the provision of such benefits, the project proponent typically receives commitments of project support, or at least of non objection from the First Nation. Such support can reduce the uncertainty associated with the project regulatory process, and reduce the risk of time and cost associated with conflict over the resolution of Aboriginal concerns at the approval stage, and in subsequent litigation. The project developer also hopes to establish a positive relationship with affected communities and obtain access to local knowledge, labour, and other forms of community involvement.

III. NO STANDARD FORMULA FOR IMPACT AND BENEFITS AGREEMENTS

Because Aboriginal concerns can arise in many different ways and involve a variety of issues, there is no standard format for the content of an IBA. With the exception of a small number of IBA obligations mandated by statute,[7] there is little guidance in the way of regulatory or other authoritative requirements which direct the form that an IBA should take, or the content it should contain to reflect Aboriginal and project concerns.[8] An IBA, therefore, is a flexible concept, that can be adapted to suit the particular challenges presented to a resource developer and affected Aboriginal communities.

By way of common example, if the First Nation has a concern about the potential environmental impact of a project, such as the effect of activities on vegetation used for traditional purposes, or on wildlife populations and aquatic resources important to the exercise of hunting or fishing rights, the IBA can address ongoing mitigation, monitoring, and reclamation requirements, and provide for a community role where appropriate.

Similarly, if there are concerns about the disturbance of important cultural, archeological, or sacred sites, an IBA can be adaptable to address those issues also. A Traditional Ecological Knowledge Study (TEK) with suitable funding and community participation could be an element of, or a precursor to, an IBA to respond to that issue.

Perhaps most significantly, an IBA can capture the desire to have First Nation communities, which may bear the adverse effects of development, also benefit from it. Such

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7 Lacasse, *supra* note 5.

8 Paul C Wilson & Charlene D Hiller, *Negotiating and Structuring Business Transactions with First Nations: Drafting Impact Benefit Agreements*, online: The Continuing Legal Education Society of British Columbia <http://www.cle.bc.ca/PracticePoints/ABOR/12-DraftingIBAs.pdf>.

benefit can arise most commonly from training and employment opportunities, but, in some cases, may extend to revenue sharing or equity participation in the project itself.

Any of these options requires analysis and negotiation unique to the proposed project and potentially affected communities. Identifying and negotiating appropriate details can be challenging and at times frustrating for participants. It can be difficult, for example, to find helpful precedents for detailed terms, particularly relating to economic benefits or compensation. In other cases, First Nations may point to agreements done with other proponents or other First Nations as setting the benchmark despite significant differences between proponents, projects, and impacts. As an example of the difficulties such comparisons can raise, the applicants in one recent case pointed to agreements achieved by other First Nations in other projects to support a claim that the Crown failed to discharge its obligation in longstanding duty to consult litigation. The Court rejected this suggestion, with Justice de Montigny observing:

> Socio-economic agreements and interim benefits agreements are heavily fact-dependant. They depend on the regulatory milieu, as well as on many other factors like the nature and size of a project, its likely impact on the Aboriginal community, and the fabric of that community.[9]

There is, therefore, no magic formula for an IBA. Each will be the result of negotiation tailored to the detail of the proposed development and the specific interests, claims, and impacts applicable to the project and First Nation in question. That said, there are general areas which an IBA can be expected to address. The following review identifies those key areas and a number of the issues to be addressed as a minimum to produce an IBA that meets the objectives of the parties.

IV. TYPICAL IMPACT AND BENEFITS AGREEMENT CONTENT

A. REGULATORY SUPPORT AND NON-OBJECTION

For the project proponent, obtaining certainty through the resolution of First Nations and Aboriginal issues is a key objective because of the time and cost risk that protracted consultation disputes and litigation can present. Accordingly, the most important provisions of an IBA are often those which define and settle the First Nations parties' position toward the project. An IBA should clearly address any aspect of the concerns that could result in objection or non-support that could delay or otherwise threaten the project.

An IBA will therefore typically contain appropriate and carefully drafted terms to reflect non-objection, and in some cases, express support obligations on behalf of the party First Nation. The purpose of such terms is to ensure that a project can proceed without interference from First Nation litigation, regulatory or political opposition, or the withholding of key project input. Such provisions will usually list the kinds of oppositional activities a First Nation is prohibited from undertaking, and may also include a general prohibition on "objection" to the project either directly or indirectly. In some cases, provisions may also include a release of any past alleged infringements of Aboriginal rights or interests by the

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[9] *Ka'A'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297, 406 FTR 229 at para 126.

project proponent and acknowledgment that Crown consultation obligations have been fulfilled.

Support and non-objection provisions should address all aspects of potential First Nation concerns. For example, it would be preferable to include non-objection provisions that not only prohibit opposition to the proponent's project and activities, but also go to the next step and preclude challenges to any and all associated permits and approvals and associated amendments, based on alleged deficiencies in the Crown's consultation obligations or otherwise. Because the duty to consult is a Crown obligation, the non-objection provisions must be broad enough to contemplate conduct beyond that of the proponent itself. For example, most major infrastructure projects require not only primary project approvals but also many ancillary approvals that are applied for later in the project development schedule such as water diversion and construction authorizations, authorizations to cross navigable waters, and municipal authorizations. In addition, many projects will require a host of amendments to primary approvals to respond to changes in design as the projects moves closer to final engineering and design or as greater operational experience is obtained. It is important for project proponents to take such later stage approvals into consideration when negotiating a comprehensive settlement agreement.

Parties also need to address the potential for future activities arising from the project. If there are expansions contemplated, mechanisms to address concerns which might arise at that time should be considered. Preferably, language in the IBA will clarify whether support and non-objection commitments extend to such future activities. However, First Nations may be reluctant to provide non-objection commitments for future activities without first seeing the details related to such activities. At the very least, it is often beneficial to define a process for reaching agreement on future stages of development.

Care in the drafting of such provisions will be important to maximize the potential effectiveness of such commitments. There has not been significant judicial consideration of IBAs generally, let alone non-objection covenants specifically. One can anticipate, however, that such covenants may be interpreted narrowly. Indeed, some commentators have suggested that such provisions may even be objectionable in some circumstances, and even seen as anti-democratic, or tantamount to a "gag order."[10]

B. REPRESENTATIONS AND WARRANTIES

Representations and warranties are used to structure and limit liability under an IBA, and to limit the risks inherent in commercial dealings with First Nation entities. The representations and warranties typically included in IBAs relate to the power of the parties to contract and to Band Council Resolutions necessary for the validity and enforceability of an IBA. As an IBA may be unenforceable where it has not properly been authorized by a valid Band Council Resolution, representations and warranties surrounding those instruments may be necessary to manage risk on the part of the project proponent.

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[10] Ken J Caine & Naomi Kragman, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North" (2010) 23:1 Organization & Environment 76 at 86; Keeper, *supra* note 4 at 7-8; Kennett, *supra* note 4 at 45-46.

Such terms may also play an important role in the event individuals or dissident factions in a recognized First Nation take steps to oppose a project, purportedly exercising collective rights, where accommodation with the authorized representatives has been achieved.[11]

C. ONGOING CONSULTATION PROCESS

Depending on the context in which an IBA is negotiated, various schemes and entities may be used to implement consultations between a project proponent and the First Nation. During the regulatory approval phase of a project, consultation between a project proponent and the First Nation is usually necessary to determine what effects a project will have on that First Nation. An IBA can include a form of communication and consultation schedule, under which representatives from the project proponent and representatives of the First Nation can meet to discuss their concerns. Project proponents will typically covenant to consider any information arising in such discussions when determining the operating protocol under which the project is to be developed.

Information collected by the project proponent during consultation is often required for a variety of reasons including: to assess the extent to which the First Nation may be impacted by the project; to evaluate whether there are other mitigation measures available to reduce impacts on the First Nation; to obtain a record for the Crown establishing that the procedural aspects of consultation have been completed; and to generally support consultation and the incorporation of TEK into project planning. It is necessary for project proponents to ensure that portions of the IBA dealing with consultation issues allow for the use of collected information for these purposes.

During the construction and operation phases of a project, IBAs may include ongoing consultation schemes, which are used to structure continued dialogue between the project proponent and the First Nation after the regulatory approval process, and to limit the risk of disputes between the parties during the latter stages of project development. To this end, some IBAs create formal committees for the purpose of managing ongoing relations during the lifecycle of a project. Any IBA creating such a committee should provide for its membership, powers, and protocols. Common arrangements include committees composed of representatives from the proponent and the party First Nation, who hold the power to issue directions relating to the project. Issues addressed by such committees may include such matters as site visits by elders, environmental monitoring, and reclamation.

D. FINANCIAL AND ECONOMIC BENEFITS

1. COMPENSATION

Financial compensation and benefit schemes are, from the perspective of the local community, in many cases the key element of the IBA. The nature, scope, and value of financial compensation under an IBA can be determined either through negotiations or

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[11] In the recent decision of *Behn v Moulton Contracting Ltd*, 2013 SCC 26, 357 DLR (4th) 236, the Supreme Court of Canada upheld a lower court decision striking the defence of individuals to justify a blockade based on breach of the duty to consult when there was no authorization from the community to advance that collective right.

through previous consultation agreements between the IBA parties, and will vary according to the nature of the project and the First Nation involved. Moreover, the particular mechanisms through which IBA payment obligations are discharged will vary according to the nature of the project. In some cases, financial compensation will be relatively simple, in the nature of lump sum or periodic payments to the community. In other cases, the compensation provisions will be considerably more sophisticated, with a view to generating longer term benefit for the First Nation group and which may reflect the overall impact and success of the project.

Because of the variability of project and community, as well as the potential impacts, there is no standard approach to all compensation terms for IBAs in the energy sector. In larger projects, however, there are certain features which may be commonly seen to reflect the different phases of the project, and indeed, the negotiations of the IBA itself**.**

During the approval phase of a project, for example, a project proponent commonly covenants to pay various First Nation costs incurred in relation to that process. These obligations vary depending on the nature of the IBA, and may include the costs of negotiating the agreement itself. Other compensation commonly provided for during the approval phase may include funding for Traditional Land Use or Traditional Knowledge Studies, which are designed to determine the risks posed to a traditional First Nation lifestyle by a project, and other funding for cultural activities.

Once a project has entered its construction and operation phases, different forms of financial compensation are generally provided for. IBAs may include one-time payments at various intervals throughout the project period, which may accrue to the First Nation on the occurrence of events such as regulatory approval, first production, or other project milestones. Conditions may be attached to the funds provided under one-time payments, such that the First Nation may only use those funds for certain purposes. Provisions entitling a First Nation trustee to control over the funds accrued under one-time payment obligations are often used to ensure appropriate disbursement.[12]

Annual payments, or other forms of structured payment such as production royalties, may also be included in an IBA where the underlying project is to proceed over a period of many years. In some instances, such payments may form the bulk of an IBA compensation scheme. As with one-time payments, control of the funds accrued will usually be left to a First Nation trustee.

Another form of financial compensation sometimes provided for in an IBA is an option for a First Nation to obtain a stake in the underlying project. Where multiple First Nation groups are party to an IBA, that stake may be held collectively amongst those groups. By granting an option to acquire a project stake to an IBA party First Nation, that First Nation gains an even greater incentive to ensure that the project proceeds according to plan.

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[12] Proponents in some cases may need to be aware of applicable anti-corruption and bribery legislation, and be cautious that the structuring of compensation provisions be in compliance with such requirements. The United States *Foreign Corrupt Practices Act*, 15 USC §§ 78dd-1 (1977), and the United Kingdom *Bribery Act 2010*, (UK) c 23, are two such examples.

Economic participation provisions are an increasingly common request for project proponents when dealing with First Nation entities.

2. TRAINING

Training benefits are common elements of IBAs where the underlying project will require significant training of personnel. The benefits of training provisions may flow two ways. The First Nation will gain significant training opportunities for its members, while a project proponent will gain access to workforce opportunities that may otherwise be unattainable. The range of provisions used to implement a training program is broad and may include a covenant on behalf of the project proponent to ensure that any contractors or subcontractors act in accordance with that program.

3. EMPLOYMENT

Employment programs are sometimes found in IBAs. Such a program may include a priority-hiring scheme, under which successful graduates from a training program, if implemented, can be hired. In the past, hiring-priority schemes were often extended to previously-credentialed or otherwise qualified members of the First Nation who wished to work on the project. However, those opportunities are now generally available regardless of whether an IBA provides for them. Where an employment and training scheme is provided for in an IBA, it will commonly be subject to some kind of oversight, either in the form of a reporting obligation, or through management by a committee, if one has been provided for.

4. BUSINESS OPPORTUNITIES

Business opportunity provisions are commonly included in IBAs. The scope and nature of any individual business opportunity scheme will vary according to the size of the project and the nature of goods and services necessary for its completion.

IBA business opportunity provisions usually operate to modify any tender processes which may be undertaken in respect of a project for the benefit of the party First Nation. Broadly, business opportunity provisions grant preferential treatment to First Nation contractors who can meet the criteria of a project tender. Although safety criteria are usually non-negotiable, some IBAs grant preferential treatment even where the First Nation contractor does not put forward the lowest bid.

The provisions used to implement a business opportunity scheme may include: a right of first refusal for First Nation businesses who wish to bid on tenders; negotiation protocols for determining whether or not a First Nation business will be able to complete a tender; financial support for First Nation contractors who require loans or bonds to bid on an individual tender; preferential treatment for non-competitive First Nation bids within certain thresholds; and lists of First Nation businesses who are to be notified in the case of any call for tenders. Reporting schemes may also be provided for, with such reports to flow either directly to the party First Nation, or to the monitoring committee if one has been provided for.

A frequent complication is a request by a particular First Nation for exclusivity with respect to all business opportunities that may be available for First Nations generally. Such arrangements are very difficult for proponents to agree to since there is often more than one First Nation claiming impacts in the same area in relation to the same project. Therefore, project proponents often require agreements with several First Nations, all of whom want access to the same business opportunities.

E. ENVIRONMENTAL CONCERNS

Aside from financial compensation and economic opportunity issues, measures to address environmental, social, and cultural concerns will make up a key element of IBA content. First Nation concerns regarding resource development projects frequently include apprehension over the impact to the environment. Such impacts can affect treaty rights, such as hunting and fishing rights, through adverse effects on wildlife, restricted access to traditional areas, increased access for non-Aboriginals, or apprehended impact on water and air quality. Impacts to other aspects of traditional ways of life such as traditional and medicinal plants may also loom as a significant matter to be addressed.

IBAs often create environmental monitoring schemes that may specifically address concerns of the affected community. Such schemes are generally funded by the project proponent, and are intended to address impacts that the project may have on the traditional ways of life which the party First Nation members may practice.

During the approval phase of a project, environmental monitoring schemes may take the form of consultation obligations on the part of the project proponent when assembling regulatory applications with an environmental component. Environmentally-sensitive areas of the geographical area within which a project is to proceed may be identified, along with risks posed to any wildlife, aquatic resources, or plant species required by the party First Nation's traditional lifestyle. Findings from these processes may be included in regulatory applications, along with mitigation plans.

Once a project has entered the construction and operation phases, IBAs may provide for ongoing monitoring schemes to prevent pollution or destruction of environmentally-sensitive areas, and to detect changes in the population levels or health of wildlife within the project region. Such monitoring schemes may be subject to the oversight of a management committee, if one has been provided for. An IBA may also need to address reclamation and abandonment concerns which may be anticipated at the end of a project life span.[13]

The inclusion of provisions to address environmental concerns, whether by way of monitoring, specific project practices, and mitigation measures or otherwise, will assist in obtaining certainty for this part of a project's approval. From the First Nation's perspective, meaningful involvement in the development of environmental practices can deliver substantive input reflecting the concerns of the affected community. Time and funding, as well as access to knowledgeable advisors, will be important factors to provide such input. To the extent that IBAs can be expected to continue to evolve as an important tool for

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[13] Kennett, *supra* note 4 at 94-95.

effectively resolving Aboriginal concerns, it will be important that these resources are available to First Nations.

It has been cautioned that the IBA model not undermine the overall environmental review process for a project, but should rather serve to supplement that oversight.[14] A comprehensive IBA should carry out that objective, with the advantage of a more orderly review process, and the provision of community perspective on environmental concerns.

F. CONFIDENTIALITY

Most IBAs contain provisions obligating all of the parties to keep the terms of the IBA confidential. The purposes of such provisions are varied. These purposes include strengthening the position of the parties in subsequent third-party negotiations, and to keep proprietary business plans confidential. There has also been commentary to suggest that confidentiality is sought from a First Nation's perspective to address the concern that funds received will be considered revenue under the *Indian Act* and potentially subject to federal regulation.[15] However, many IBAs permit disclosure where required by law, or during enforcement proceedings. IBA terms may also be subject to disclosure in financial reporting of the project proponent in some circumstances.

Some observers view the confidentiality associated with IBAs as negative, particularly as it relates to the leverage that may be available to First Nations and perceived power imbalances. Some commentators have suggested that confidentiality works to the advantage of industry, as it prevents different First Nations from working together and strengthening their bargaining position on particular projects.[16]

Another intriguing aspect of the issue of confidentiality goes to the negotiations themselves. As has previously been described, many of the same elements that will be necessary for effective negotiations toward an IBA, also apply in a consultation situation. These include project information exchange, consideration of parties' information with respect to project impact and mitigation requirements, and exchange of views toward accommodation of concerns and other information. Many of these elements could potentially be relied on as supportive of the discharge of the Crown's obligation to consult, which has been delegated to the project proponent.

Therefore, it is critical for the proponent and the First Nation to have a clear understanding of what information is confidential and what is not. The proponent must remain mindful of the need to demonstrate consultation efforts with the First Nation and to provide the information it collects concerning project effects to regulatory and government authorities. Such information will be necessary to complete the approval process, particularly if

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[14] Irene Sosa & Karyn Keenan, *Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada*, online: Canadian Environmental Law Association <http://s.cela.ca/files/uploads/IBAeng.pdf> at 21.

[15] Public Policy Forum, *Sharing in the Benefits of Resource Developments: A Study of First Nations Industry Impact Benefits Agreements*, online: Public Policy Forum <http://www.ppforum.ca/sites/default/files/report_impact_benefits-english.pdf> at 10.

[16] Sosa & Keenan, *supra* note 14 at 19. See also Caine & Kragman, *supra* note 10 at 86.

agreements are not ultimately reached and disputes regarding the adequacy of consultation arise.

The issue that should be considered prior to such negotiations, is whether the discussions and exchange of information involved in the negotiation will be considered confidential and therefore off limits from reference for consultation purposes. It is suggested that this issue be clarified in a negotiations protocol or confidentiality agreement at the outset of any such discussions. If negotiations themselves are to be considered as confidential, certain factual elements of that negotiation, including reports on environmental, economic, or other issues, which may be of assistance for consultation purposes, should be prepared and exchanged in such a manner as to allow reference in future discussions for those purposes.

Finally, it may be that there will be an increased move towards more disclosure of agreements between First Nations and project proponents. As an example, the most recent draft of the Alberta Government's Policy on Consultation with First Nations on Land and Natural Resource Management includes a requirement for disclosure of "consultation-related agreements."[17] Though the scope of this concept is uncertain, including whether it would extend to cover IBAs, the policy contemplates sanctions for those project proponents who fail to comply with such requirements.

G. OTHER COMMON PROVISIONS

Typically IBAs will include general covenants similar to those found in other commercial agreements, including covenants on the part of the project proponent obligating it to ensure that contractors or subcontractors act in accordance with the IBA. Termination, assignment, and force majeure provisions may also be included. As IBAs are private contractual arrangements between parties, choice of law and jurisdiction clauses may also be appropriate, and provide clarity in the event of dispute.

Enforcement concerns and dispute resolution matters should also be addressed. Will the parties work toward alternative dispute resolution? Will that preclude access to the courts? Given that an IBA is intended to foster improved relations and a less adversarial tone between a project proponent and First Nation, dispute resolution might include provisions for meetings between high level representatives of both parties before moving to a mandated arbitration or mediation process.[18] As in any commercial agreement, such elements require consideration and should be dealt with clearly in the resulting agreement.

To date, enforceability of IBAs, or indeed any aspect of these agreements, has not been a matter which has received significant judicial attention.[19] That may be a reflection of the

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17 Government of Alberta, "The Government of Alberta's Draft Alberta Government's Policy on Consultation with First Nations on Land and Natural Resource Management," online: Aboriginal Relations <http://www.aboriginal.alberta.ca/documents/GOAPolicy-FNConsultation-2013.pdf> at 9. The draft policy asserts that individual agreements will not be subject to public disclosure, through aggregate information based on the agreements would be released.

18 Wilson & Hiller, *supra* note 8, art 16.

19 A number of enforceability issues were anticipated and discussed in Sandra Gogal, Richard Riegert, and JoAnn Jamieson, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43:1 Alta L Rev 129 at 155. To date these issues largely continue to evade judicial consideration.

relative novelty of these agreements in the energy industry. More optimistically, it may reflect the advantages of improved opportunity and relationships which those agreements are intended to generate.

V. OVERLAP WITH FORMAL CONSULTATION AND REGULATORY PROCESS

In many parts of Canada a significant energy, natural resource, or large infrastructure development will carry with it the need to engage First Nation communities in the planning, regulatory approval, and execution stages. To the extent the project has the potential to impact First Nation interests, regulatory proceedings may invoke a review of these impacts and measures to mitigate them, or otherwise address First Nation concerns.[20] Where the Crown acts or undertakes conduct in relation to the project, Crown consultation obligations will also be triggered.[21]

Many of the same issues which will be addressed through such proceedings, including the discharge of delegated Crown obligations, will be those which would form the basis of discussions toward an IBA. The duty to consult comprises, at minimum, obligations to give notice of intended Crown action; to explain that conduct and the potential impact; and to receive and consider the concerns of potentially affected First Nations. Depending on the nature of the impact and the rights at issue, obligations to reasonably accommodate those concerns will also arise. Each of these consultation elements will typically be involved, and indeed exceeded, in meaningful negotiations toward an IBA.

There are numerous practical issues associated with the negotiation of IBAs which project proponents must allow for. One example goes to the necessity for confirming authority and ratification of an IBA. In some circumstances, community consultation and approval will be necessary and this may add to the time required to conclude the negotiations, particularly if the community is split on whether to enter into an IBA or in respect of the content of a proposed IBA. In other cases, First Nation communities will require an extensive period to assess the proposal and consider its ramifications before concluding negotiations.[22]

Project proponents must factor such allowances into their schedule forecasts and initiate engagement with affected First Nations as early as possible. It may be necessary that negotiations involve a team from the First Nation, which will seek extensive input from the community. In some circumstances, it will be necessary to conduct studies before the IBA can be negotiated or finalized. Funding for effective First Nation negotiations may also be required.

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20 For example, Directive 056 (Alberta Energy Regulator, *Directive 056: Energy Development Application and Schedules* (1 September 2011), online: Alberta Energy Regulator <http://www.aer.ca/documents/directives/Directive056.pdf>, of the Energy Resources Conservation Board requires an applicant to identify and engage potentially affected First Nation and Métis communities. For projects subject to National Energy Board approval, the NEB *Filing Manual* (National Energy Board, *Filing Manual* (Calgary: National Energy Board Publications Office, 2012)) is a starting point for identifying Aboriginal interests which are addressed in the approval process.

21 *Haida Nation*, *supra* note 1; *Mikisew Cree*, *supra* note 1.

22 See Lacasse, *supra* note 5 at 325.

It is also imperative that the project proponent continues to advance the regulatory approval process and be prepared to complete that process without an IBA. This means ensuring that all matters involving consultation with the First Nation are fully documented so that the proponent can demonstrate to the regulatory and government authorities what steps were taken to understand and reasonably resolve concerns. It also means advancing critical stages of the approval process so that backstops to negotiations with First Nations are created. For example, if a public hearing is required, setting a hearing date will provide a definitive time within which either negotiations are completed, or the matter will proceed without an agreement in place. A proponent who has done the work necessary to support a strong regulatory application, and who can demonstrate adequate engagement of potentially affected First Nations, is in a stronger position to negotiate favourable terms within an IBA. Such proponents are also best positioned to walk away from a bad deal. Conversely, a proponent who has neglected to develop a clear plan to proceed without an IBA is at risk of entering into less favourable agreements as pressure to obtain permits to start construction mounts.

Accordingly, a hearing date, and a willingness to proceed with the regulator, is often the most effective negotiating tool that a proponent can have. In most cases, the regulatory body cannot award to an Aboriginal group the type of benefits which can be included in an IBA, thus placing pressure on the Aboriginal group to conclude a reasonable agreement. Comprehensive preparation for a pending hearing will often be a strong driver to concluding an agreement if one can be reasonably achieved.

For the proponent, therefore, management of First Nations relationships through a proactive approach to both IBA negotiation and the regulatory process carries with it the potential for greater certainty on project schedule and regulatory process aspects.

VI. IMPACT AND BENEFITS AGREEMENTS AS RECONCILIATION

In the decisions related to consultation, the Supreme Court of Canada has reminded Aboriginal and non-Aboriginal parties that the fundamental objective of modern Aboriginal law is reconciliation. In *Mikisew Cree*, Justice Binnie observed:

> The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.[23]

It is submitted that IBAs can play a meaningful role in the reconciliation of the interests and ambitions of both Aboriginal and non-Aboriginal communities.[24] This article has attempted to illustrate the potential advantages and challenges of working toward agreement to resolve First Nations concerns on a proposed project, as a complement to the more traditional model involving the proponent's need to address consultation issues and deal with First Nations issues in a regulatory hearing. Ideally, the advantage of working toward and achieving an IBA carries the potential for a long term and productive relationship with the

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[23] *Supra* note 1 at para 1.

[24] For a recent paper which advocates for positive Aboriginal participation in the resource sector see Ken Coates & Brian Lee Crowley, *New Beginnings: How Canada's Natural Resource Wealth Could Reshape Relations with Aboriginal People* (Ottawa: Macdonald Laurier Institute, 2013).

affected First Nation communities. Beyond support for the specific project, the proponent can access the communities for employment purposes and the benefit of communities' local knowledge and input on environmental, archeological and other matters significant to project development, construction, and operation.

Resolution of First Nations concerns through an IBA can also provide certainty for project proponents in the area of regulatory approvals. Support from local communities can reduce the time and expense associated with regulatory proceedings where those communities appear as adversaries and in opposition to the project. In some cases, depending on the extent of the project and the regulatory scheme which is applicable, a formal public hearing may be avoided altogether.

The avoidance of litigation, either as a consequence of the regulatory proceedings or by way of a First Nation challenge alleging breach of consultation duties, will also enhance the certainty of project timing and cost.

None of the above should suggest that achieving IBAs with affected Aboriginal communities will be easy, or indeed achievable in all circumstances. As this article has attempted to explain, the most constructive approach to First Nations negotiations will entail significant effort and expense, and will require the proponent to allocate time to the process so that all parties have the ability to consider and respond to proposals, and undertake the necessary studies and research to approach negotiations in a meaningful and fair fashion.

Moreover, just as First Nations consultation may not result in agreement between parties, there is no assurance that even the most diligent and good faith negotiations towards an IBA will necessarily result in a concluded agreement. Nevertheless, undertaking fair and respectful negotiations may assist in building a longer term relationship with an affected community. At the same time, many of the elements of such negotiations may serve a role in supplementing the consultation efforts of the Crown and satisfying the requirements of regulators through the project review process.

It is submitted, therefore, that serious and early engagement in the negotiation process toward an IBA should be considered as a means of potentially avoiding the opposition of First Nations Communities to a significant energy project. The upfront investment in such negotiations has the potential to present a significant benefit to a project proponent in terms of avoiding cost and uncertainty associated with the regulatory process and any subsequent litigation arising through First Nations objections. At the same time, the project proponent must continue to prepare to meet the continuing challenges of the regulatory process and the need to consider and address the Crown's consultation duties. Increased sophistication on the part of First Nations negotiators means that all parties understand the implications of pending regulatory processes on the ideal timing for the conclusion of an IBA. Leverage may be increased or decreased depending on the status of the approval timetable.

For the project proponent, many of the efforts to resolve First Nation concerns will apply on both the regulatory and negotiation fronts. It is prudent in most cases to fully prepare to address both eventualities, so that if a reasonable agreement can be achieved, it will be done in all parties' interests, consistent with the objective of reconciliation.