The Role of Impact Benefit Agreements in the Protection of Culture

First Nations of Quebec and Labrador Sustainable Development Institute

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Overview

1) Protecting Culture in the Making of IBAs
   - The Legal Framework Governing the Making of IBAs: Jurisprudence, Constitution, Indigenous Law, International Law
   - The Place of an IBA in the Institutional Framework – Environmental Laws, Treaties
   - Asserting the “Indigenous difference”: Aboriginal perspective, legal systems and culture

2) Preparing the grounds for IBA Negotiations: Precursor and Preliminary Agreements

3) Going Forward – Monitoring, New Impacts, Management, Renegotiations
The Legal Framework
Governing the Making of IBAs

Fundamental holdings of the Supreme Court of Canada:

1. Aboriginal rights include Aboriginal title (*Delgamuukw*).

2. Land is what makes an Indigenous person who he or she is (*Delgamuukw*).

3. Aboriginal rights and title are inalienable because of their special significance to Aboriginal communities as communities (*Delgamuukw, Tsilhqot’in*).

4. Aboriginal rights are a limit on both federal and provincial jurisdiction and proponent conduct (*Tsilhqot’in at para. 141*).
The Legal Framework
Governing the Making of IBAs

Fundamental holdings of the Supreme Court of Canada:

5. The Aboriginal perspective is always important (*Delgamuukw, Van der Peet, Sparrow*).

6. The Crown’s fiduciary duty or trust obligation governs dealings with land (*Tsilhqot’in*).

7. In justifying incursions into Aboriginal title, the principles of rational connection, minimal impairment and proportionality of impact apply (*Tsilhqot’in, Delgamuukw, Haida*).
The Place of an IBA in the Institutional Framework

Environmental Law
• The emphasis should not be on impact-benefit but rather impact avoidance, requiring development not to transform Aboriginal societies and culture but rather “to work around” them.

Treaties
• The considerations referred to in this presentation apply also to Treaty lands and Treaty peoples.
• There is a growing realization that Treaties did not affect rights but affirm nationhood and Indigenous attachment to lands and culture.
• Treaties are an appropriate way to incorporate IBA provisions.
Example: *The James Bay and Northern Quebec Agreement*

- The first comprehensive treaty of the modern era, *The James Bay and Northern Quebec Agreement*, sought to strike a balance between traditional cultural ways and encroaching industrialization:
  - It provides for **income security** for those wishing to pursue **harvesting as a way of life**. $600 million paid out to date.
  - It incorporated the **first mandatory environmental and social impact assessment process in Canada** and provides for **Cree and Inuit participation** on evaluating and review committees.
Example: *The James Bay and Northern Quebec Agreement*

Section 30 on Income Security contains the following objectives:

• **30.2.1** An *income security program* (hereinafter referred to as “the program”) to provide an income guarantee and benefits and other incentives for Cree people who wish to pursue harvesting activities as a way of life is established by and in accordance with this Section.

• **30.2.8** The program shall ensure that *hunting, fishing and trapping shall constitute a viable way of life for the Cree people*, and that individual Crees who elect to pursue such way of life shall be guaranteed a *measure of economic security* consistent with conditions prevailing from time to time.

• **30.2.9** The program shall ensure that as an alternative to transfer payments or guaranteed annual income programs existing from time to time *there exists through the program effective incentive to pursue harvesting as a way of life for the Cree people.*
Example: The James Bay and Northern Quebec Agreement

Environmental Provisions (Sections 22 and 23) Section 22.2.2. The said regime provides for:

a) A procedure whereby environmental and social laws and regulations and land use regulations may from time to time be adopted if necessary to minimize the negative impact of development in or affecting the Territory upon the Native people and the wildlife resources of the Territory;

b) An environmental and social impact assessment and review procedure established to minimize the environmental and social impact of development when negative on the Native people and the wildlife resources of the Territory;

c) A special status and involvement for the Cree people over and above that provided for in procedures involving the general public through consultation or representative mechanisms wherever such is necessary to protect or give effect to the rights and guarantees in favour of the Native people established by and in accordance with the Agreement;

d) The protection of the rights and guarantees of the Cree people established by and in accordance with Section 24 [harvesting section];

e) The protection of the Cree people, their economies and the wildlife resources upon which they depend;

f) The right to develop in the Territory [subject of course to the environmental regime].
The Place of an IBA in the Institutional Framework

Statutory Framework

• Be aware of protections provided by environmental legislation.

• No need to bargain away what proponents are statutorily obliged to do.
Asserting the “Indigenous difference”, Aboriginal perspective, legal systems and culture

• Arrangements with developers should be subject not only to common law, statutes and regulations, but also to Indigenous law of the host Nation or community.

• Indigenous laws form an integral part of the common law.

“The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread -- the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.” (Van der Peet, para. 263).
Asserting the “Indigenous difference”, Aboriginal perspective, legal systems and culture

• The importance of traditional knowledge should be acknowledged by industry.

• Example: MBA for the Foothills Ojibway in Alberta. We defined the peoples’ **Land Rights** as:

  *All inherent rights, rights recognized by section 35(1) of the Constitution Act 1982 and any other constitutional rights held by the Foothills Ojibway with respect to the Affected Territory under domestic Canadian Law, as well as all inherent rights relating to lands pursuant to Indigenous customary law and the United Nations Declaration on the Rights of Indigenous peoples,*...
Asserting the “Indigenous difference”, Aboriginal perspective, legal systems and culture

• The proponent should undertake to **contribute to cultural protection and cultural knowledge**.

• Cautionary note and **powerful legal tool** to use in negotiation with proponent:

  “The community cannot put the land to uses which would destroy that [inherent and unique] value”

  *(Delgamuukw, para 129).*
The Controversy over Confidentiality

Arguments in favour of more transparency in IBA negotiations

Advantages of Transparency:

• Access to the "state of the art" for IBAs and what industry already agreed to.

• Pushes existing models further:
  • Aboriginal/states and Aboriginal/industry relations are dynamic.
  • Not true that what hasn’t been done before cannot be done.

• Could help courts consider the fairness, reasonableness or correctness of an IBA in cases where IBA parties clash.

• Allows for precedents or cultural protection provisions.
Preparing the grounds for IBA Negotiations: Precursor Agreements

Pre-IBA stage: Need to formalize community-proponent relations at the earliest opportunity, prioritizing Aboriginal cultural values, traditions and perspective

First Step: Entering into Precursor Agreements

- Agreement-in-Principle, Memorandum-of-Understanding, Statement of Intent/Joint Mission Statement, etc.
- Made before or during early stages of regulatory approval process/EA process
- Not enforceable and not binding on the parties

Objectives:
- Developing a relationship of trust and cooperation between the community and the proponent and addressing mutual goals and concerns
- Establishing a dialogue and engaging in a process of information-sharing
- Informing community members of the project’s description and planning

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Preparing the grounds for IBA Negotiations: Preliminary Agreements

Second Step: Negotiating and Entering into Preliminary Agreements

• More recent phenomena: Pre-development Agreement, Exploration Agreement, Consultation/Negotiation Agreement, Service Agreement, etc.

• Objectives:
  • Collecting information and conducting necessary research in order to establish the factual basis required for IBA negotiations.
  • Ensuring, and defining specific arrangements for, active participation of the community and its members in the formal process leading the IBA, in particular conducting in-depth community-led traditional land use studies.
  • Laying the grounds for certain provisions and/or setting out a framework for IBA negotiations.

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Preparing the grounds for IBA Negotiations: Preliminary Agreements

• Typically made in a parallel fashion in the early stages of the regulatory approval/EA process.

• Provide for enforceable obligations and are binding on the parties.
  • Must not include any engagement with respect to the final acceptance of the project by the community.

• Provide for a fixed or annual payment; Funding for community-led research, exploratory studies and documentation for purposes of project impact assessment; Other financial benefits related to pre-construction/exploitation development activities (training, employment, business opportunities, etc.).

• May provide for the transfer of proponent’s obligations to the purchaser or successor in case of sale, transfer or other operations affecting the project.
Preparing the grounds for IBA Negotiations: Preliminary Agreements

The **type**, **content** and **timing** of Precursor/Preliminary Agreements depend on the community’s situation and needs and specific circumstances of the project.

Key consideration: approach based on **priorities and cultural values, traditions and Aboriginal perspective** supporting the community’s position/defining its participation in the project.

- Negotiate **funding to ensure active participation of the community** in conducting an adequate and realistic impact assessment and relevant studies
  - Involve members and traditional users of the territory, elders, hunters and trappers, holders and keepers of Traditional Knowledge

- Community-led research and studies may include:
  - **Cultural portrait** of the community (sacred sites, burial grounds, heritage sites and archeological property, animals and other traditional resources, etc.)
  - **Baseline socio-economic, environmental and cultural conditions**
  - Independent **Social Impact Assessment** (SIA)
Preparing the grounds for IBA Negotiations: Preliminary Agreements

Benefits:

• Increase **social acceptability** of the project within the community.
• Provide greater level of security to the parties regarding project sustainability.
• Possibility for the proponent to include community-led studies and reports in the regulatory/EA processes.
• Enable the community to **build a solid negotiation position**.
• Ensure a **more accurate impact assessment** of the project and **more effectively tailored compensation initiatives**.

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Going Forward:
IBA terms that look to the future

- Monitoring
- Addressing New or Prohibited Impacts
- Management, Decision-Making, Planning
- Renegotiation/Renewal Clauses
Monitoring Cultural Impacts and Protections

• Supervising the impacts, benefits and the implementation of the IBA.

• Monitoring can include:
  
  • On the ground monitoring of the project’s impacts.
  
  • Assessment of cultural protection measures in the IBA.

• *Who?* Community, experts, proponent can all have a role.

• Funding of monitoring a key term.
Addressing New or Prohibited Impacts

• Unforeseen Impacts
  • What happens if there is an impact that was not included in the IBA?
    • Ex: Digging uncovers unknown burial ground.
  • Project to stop to prevent further harm.
  • Terms to assess the impact, compensate for loss, or come to new agreement to address the problem.

• Prohibited Impacts (breach of the IBA)
  • Ex: Monitoring shows damage to sacred site to be protected under the IBA.
  • Terms for compensation, dispute resolution, going to court.
    • Indigenous law, key principles to guide disputes.
Management of Cultural Resources and Protections

• Decision-making power is key

• Management bodies—setting up boards, organizations
  • Bodies created by the IBA that function under the terms. Can “give life” to principles of the IBA. Flexible, adaptive, can innovate.
  • 100% Aboriginal management, co-management, joint-management.
  • Can be involved in planning, setting goals, developing programs.
  • Terms in IBA to ensure a continued role in the management of cultural resources and connection to culture.
Case Study:
Planning in the Torngat Mountains National Park

• Traditional lands of Inuit of Nunavik and Labrador Inuit
  • Area of great historical and cultural significance for Inuit.
  • Park established in 2008, after negotiations, court case, and set of agreements, including Treaties.

• Park IBAs (PIBAs) with Inuit of Nunavik, Labrador Inuit and Parks Canada

• Core objective in the PIBAs:
  “recognize and honour Inuit knowledge and the special historical and cultural relationship between Inuit and the land as part of the living legacy of the national park.”

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Case Study:
Planning in the Torngat Mountains National Park

• Co-operative Management Board (CMB)
  • PIBAs set up co-operative management of the Park. Inuit and Parks Canada are partners.
  • 7 members: Parks Canada, Makivik Corporation and the Nunatsiavut Government each appoint two members, plus independent chair.

• Management Plan for the Park
  • By Parks Canada and Inuit – based on shared vision.
  • 2010 Plan focuses on connection of Inuit to land, their traditional knowledge and sharing of culture.
  • Base camp, transmission of traditional knowledge, eco-tourism
  • 5-year review of Plan to be completed in 2017.
Renewal and Renegotiations Terms

• Parties can agree to renegotiate all or part of IBA
  • Preference to keep original principles in place, address new developments, lessons learned.
  • Important for projects with long life.
  • Specify when (time/ “milestones”) and subjects to be included. Important to keep leverage.
  • Should address cultural impacts and protections.

• Renewal and Maintaining Relationship
  • Regular meetings between parties.
  • Reassessment of benefits and impacts, addressing problems.
  • Clause in original IBA: Allow for amendments to problem solve.
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