

ENSURING CULTURAL PROTECTION AND IDENTIFYING THE RIGHTS OF FAMILIES IN THE CONTEXT OF IBAs

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HUTCHINS LEGAL INC.
AVOCATS-BARRISTERS & SOLICITORS

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Part I

Ensuring cultural protection as part of IBAs

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The changing role of IBAs

- Traditional role of IBAs: emphasis put on ensuring that Aboriginal communities benefit from the economic spinoffs (jobs and financial compensation)
- The role of IBAs beyond the economic spinoffs must also aim to acknowledge the governance of Aboriginal communities and protect and accommodate the cultures of these communities
- Jurisprudential developments in terms of ancestral rights and consultation and accommodation rights
- Importance of taking the rights of families into account in IBAs

4 CULTURAL PROTECTION IN THE NEGOTIATION OF IBAs

- Before the negotiations: Determine objectives, negotiation plan
- During negotiations: Make cultural protection a priority
- **“The community cannot use these lands in a way that would destroy this value.”** (*Delgamuukw*, paragraph 129)
- Promoter’s contribution to cultural protection and traditional knowledge
- Importance of adapting the IBA to the specific and cultural context of each community

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CULTURAL PROTECTION IN THE IMPLEMENTATION OF IBAs

- Participate in resource management and cultural protection
 - Decision-making power (councils, organizations)
 - 100% Aboriginal management, co-management, joint management
 - Participation in planning and establishing program objectives
- Supervise the implementation of protective measures
 - **The role of the community, experts and promoters**
 - **Plan proper financing**
- Evaluate and consider sociocultural impacts
- Identify heritage resources of the First Nation
- Mechanisms to address unexpected and prohibited impacts
- Re-negotiation and renewal

6 EXAMPLES OF PROTECTIONS TO INCLUDE IN THE IBA PREAMBLE

- Recognition that the **transmission of** the First Nation's **societal, cultural and spiritual values** to future generations is essential to its survival
- Specific collaboration and involvement of the Parties to reach this goal
- Parties' commitment to pursue the collaboration beyond the agreement
- Assurance by the promoter that the affected territory will be respected as well as its **historical, spiritual, societal and economical importance** (planning, construction of the project and during the **operational life of the project**)
 - Ex. Ensure the mitigation of impacts on the First Nation's cultural, sacred and historic sites

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EXCERPT OF THE PREAMBLE OF AN IBA NEGOTIATED BY HUTCHINS LEGAL INC.

The Proponent and First Nation specifically wish to work cooperatively together to:

*Ensure respect for the Affected Territory and its historical, spiritual, social and economic importance to the First Nation by the proponent during the planning and construction of the Project and during the operation and decommissioning of the Project (“**Operational Lifetime**”) so that there is mitigation of impacts to the First Nation’s cultural, sacred or historic sites;*

8 EXAMPLES OF PROTECTIONS TO INCLUDE IN THE IBA TEXT

- **Preservation, promotion and safeguarding** of cultural and spiritual practices, customs and activities
- Recognition of the rights of Aboriginal people as per the **United Nations Declaration on the Rights of Indigenous Peoples**
- Plan for the environmental impacts to include the **impacts on cultural heritage**
- Integration of **Aboriginal customary laws** namely through the inclusion of Aboriginal laws in the definition of applicable laws

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EXCERPTS OF AN IBA NEGOTIATED BY HUTCHINS LEGAL INC.

*“**Law**” means, with respect to any Person, property, transaction, event or other matter, any written or unwritten law, rule, statute, regulation, order, judgment, decree, treaty, [First Nation] Indigenous Law when disclosed and agreed to by the Proponent, or other requirement having the force of law relating or applicable to such Person, property, transaction, event or other matter, and includes, where appropriate, any interpretation of the foregoing (or any part thereof) by any Person having jurisdiction over it, or charged with its administration or interpretation.*

*“**Environmental Laws**” means any statutes, laws, regulations, orders, bylaws, permits or other authorizations of any Regulatory Authority, now or hereafter in force, relating in any way to the physical environment or human health, including common law and equity, and [First Nation] Indigenous Law when disclosed and agreed to by the Proponent and including all regulations promulgated thereunder from time to time, or any other legally binding protocols, codes, or standards adopted by any Regulatory Authority.*

10 EXAMPLES OF PROTECTIONS TO INCLUDE IN AN IBA TEXT

- Identification of **the cultural heritage** to preserve, ex.
 - Minimize activities on **sacred sites** or sites with **historical, cultural, pedagogical or archeological importance**
 - Protection of **traditional knowledge** by IBAs and recognition of its importance to evaluate impacts

EXCERPTS OF AN IBA NEGOTIATED BY HLI REGARDING CULTURAL HERITAGE IDENTIFICATION

The Parties agree that it is important to identify and protect any and all additional First Nation's Heritage Resources in the Affected Territory not identified to date.

To ensure the proper identification and protection of the First Nation's Heritage Resources during the construction of the Project, the First Nation shall choose from time to time individuals designated as Monitors who shall:

(a) identify any further Heritage Resources not previously identified and inform the Proponent of such sites; and

(b) liaise with the Proponent's Aboriginal Consultant as applicable, to ensure mitigation of impacts and to

facilitate Project requirements in compliance with the Proponent and the First Nation's guidance

12 EXAMPLES OF PROTECTIONS TO INCLUDE IN AN IBA TEXT

- Supervision and restoration
 - Short-term supervision
 - Restoration
 - Long-term use and supervision
- Healing ceremonies

EXCERPTS OF AN IBA NEGOTIATED BY HUTCHINS LEGAL INC. REGARDING LONG-TERM MONITORING

*For each of the following 5 years following construction of the Project, the Proponent anticipates it will be obliged by the NEB to perform **annual post-construction monitoring** of the Restoration. As part of this post-construction monitoring, The Proponent will retain one or more **First Nation Monitors to assist with the post-construction monitoring**. The Monitors shall assist in the evaluation of the efficacy of the Restoration, manual Restoration of the First Nation's Heritage Resources and Affected Territory and monitor any further impact of the Project on the First Nation's Heritage Resources and Affected Territory and carry out any other relevant follow-up activities.*

*The Proponent agrees to **facilitate First Nation's access to the First Nation's Heritage Resources** on the Project right of way and their use for traditional purposes, such as **herb gathering, fasting and teachings**, and the First Nation agrees to abide by any of the Proponent's reasonable policies or procedures for accessing the Project's right of way to the extent necessary and required by such reasonable policies and procedures. **The Parties will from time to time discuss the appropriateness of such policies and procedures** as they might apply to the First Nation.*

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EXCERPTS OF AN IBA NEGOTIATED BY HUTCHINS LEGAL INC. REGARDING TRADITIONAL CEREMONIES

The First Nation intends to plan and participate in approximately two Healing Ceremonies during the construction phase of the Project to commemorate changes to the land and ecosystem and its cultural, historical, educational and spiritual significance to the First Nation. These ceremonies will last approximately 2 to 5 days each.

The Healing Ceremonies will take place at those times and locations to be determined by the First Nation and communicated to the Proponent at least two weeks in advance of their occurrence.

The Proponent undertakes not to disturb by noise or otherwise, obstruct or interfere with the Healing Ceremonies through construction, transport of persons or material or other works by the Proponent or its subcontractors on or around the ceremonies while they are taking place.

15 EXAMPLES OF PROTECTIONS TO INCLUDE IN AN IBA TEXT

- **Training, employment and work environment**
 - Flexible schedule to accommodate traditional practices
 - Hunting
 - Spiritual practices
 - Intercultural training (for Aboriginal and non-Aboriginal workers)

16 EXAMPLES OF PROTECTIONS TO INCLUDE IN AN IBA TEXT

- **Implementation committee:**
 - See to the implementation of the agreement
 - Contribute to the communication and collaboration between the Parties
 - Resolve disputes
 - Establish timelines and steps to follow

Part II

Identifying the rights of families in the context of
IBAs

18 IDENTIFYING THE RIGHTS OF FAMILIES IN THE CONTEXT OF IBAs

- Role of IBAs in cultural protection
- Importance for IBAs to evolve to reflect the evolution of Aboriginal rights
 - Ex.: Right to governance and territory management
- New legal trend recognizing the rights of families on their territories
 - Right to consultation and accommodation
 - Right to be fully involved in the decision-making process for decisions that affect their rights and interest, including environmental assessment processes and IBAs
- Importance for Aboriginal governments to include families in these processes

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VARIOUS ABORIGINAL GROUPS CAN BE ABORIGINAL RIGHT HOLDERS

- Sources of Aboriginal rights = customs, practices and traditions that existed before coming into contact with Europeans and that continue to exist today.
- The Aboriginal nation, band or sub-group such as an Aboriginal family, clan, descendant group, tribe, women or children
- Must be assessed on a case-by-case basis and according to Aboriginal perspectives
- In some cases, the families hold Aboriginal rights

20 SOME FAMILIES HOLD ABORIGINAL RIGHTS ON THEIR TERRITORIES

- Role of families in the governance and protection of the territory:
 - First heirs of their respective territories
 - Protectors, guardians and managers of the resources
- Special rights and interests on their traditional family territories
- These families have the right to be consulted and accommodated when rights and interests are likely to be affected

WHAT GROUP HAS THE RIGHT TO CONSULTATION AND ACCOMMODATION?

Behn vs. Moulton Contracting Ltd, 2013 CSC 26

- *[...] some rights, although held by the Aboriginal community, are nevertheless **exercised by members as individuals** or granted to these members. Such rights can consequently have **both collective and individual attributes**. **Community members can have an interest in protecting these rights as individuals.** [paragraph 33]*

Manatch vs. Louisiana-Pacific Canada Ltd, 2014 QCCS 4350

- ***One can question the true nature of a consultation when there is real and longstanding dissent among an Aboriginal nation.** This is even more important when the Crown is informed of the situation, as is the case here. [paragraph 72]*

22 COLLABORATION AND INVOLVEMENT OF THE FAMILIES

- Importance of involving the families in consultations and decision-making processes surrounding the projects
- As part of IBAs:
 - Importance of accommodating the families, including economic spinoffs
- Promote the protection of the rights and interests of families and the social acceptance of projects by the community
- To do this, we recommend adopting a protocol for the families

PROTOCOL FOR THE FAMILIES

- No one-size-fits-all model
- Importance of planning how the families will be consulted and accommodated
 - Clear rules
 - Transparency
 - Flexibility
 - Process accepted by the community
 - Can vary according to the nature of the project
- Possibility of determining the rules based on Aboriginal customary laws

EXAMPLES OF MEASURES TO TAKE THE RIGHTS OF FAMILIES INTO ACCOUNT IN IBAs

- Recognition of the traditional knowledge of the families and their knowledge of the territory
 - Integration of the traditional knowledge of the families and their knowledge of the territory in all phases of project assessments
- Include the families in the teams conducting the on-site monitoring work
- Involve the families in the IBA implementation committees
- Promote the hiring of members of families whose rights and interests are affected

THANK YOU FOR YOUR PARTICIPATION

- For more information, please visit our website at www.hutchinslegal.ca and do not hesitate to contact us.

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