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Chapter 20B
INTERNATIONAL COMPARISON OF SOLUTIONS TO ABORIGINAL RIGHTS ISSUES ASSOCIATED WITH MINERAL DEVELOPMENT: FREE, PRIOR AND INFORMED CONSENT— THE CANADIAN CONTEXT

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Synopsis

§ 20B.01 Introduction

§ 20B.02 Background

- **[1] Mining—Economic Context**
- **[2] Canada's Aboriginal Peoples**

§ 20B.03 Legal Context

- **[1] Aboriginal Rights Before 1982**
- **[2] Constitutional Basis of Aboriginal Rights**
- **[3] Meaning of "Aboriginal and Treaty Rights"**
  - **[a] Aboriginal Rights**
  - **[b] Treaty Rights**

§ 20B.04 Crown's Duty to Consult and Accommodate

- **[1] Overview**
- **[2] Scope and Content of the Duty**
- **[3] Do Third Parties Owe a Duty to Consult?**
- **[4] Accommodation—Balance and Compromise**

§ 20B.05 Impact and Benefit Agreements

- **[1] Introduction**
- **[2] Background**
- **[3] Negotiation of IBAs**

[4] **Areas of Cooperation in IBAs**

[5] **Examples of IBAs**

[a] **Voisey's Bay**

[b] **The Victor Diamond Mine**

§ 20B.06 Conclusion

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§ 20B.01 Introduction[*] [**]

When in 2007, after decades of development and debate, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[1] only four states voted against it: Canada, Australia, New Zealand, and the United States.[2] At the time, Canada's key concern was that UNDRIP's text with respect to the concept of "free, prior and informed consent" (FPIC)[3] was ambiguous and overly

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[1]G.A. Res. 61/295, U.N. GAOR, 61st Sess., Supp. No. 49, (Vol. III), U.N. Doc. A/61/49 (Sept. 13, 2007).

[2]UNDRIP was approved by a majority of 143 states, with 11 abstentions. *See* United Nations, Press Release, "Historical Milestone for Indigenous Peoples Worldwide as UN Adopts Rights Declaration" (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_pressrelease.pdf.

[3]The general principle of FPIC was first introduced by the International Labour Organization (ILO) in 1989 to protect the rights of indigenous peoples who were subject to involuntary settlement. *See* ILO, "C169 - Indigenous and Tribal Peoples Convention, 1989" (ILO 169). Article 16.2 of ILO 169 provides:

> Where the relocation of these people is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provides the opportunity for effective representation of the peoples concerned.

UNDRIP significantly broadened the principle of FPIC to include a range of project development activities and a commitment by the state to obtain FPIC before the approval of any project affecting indigenous lands, territories, or other resources. *See* UNDRIP arts. 10, 28, 29, 32. The International Finance Corporation (IFC), the lending arm of the World Bank Group, also incorporated the concept of FPIC under certain circumstances into its Performance Standards on Environmental and Social Sustainability (IFC Performance Standards). *See* IFC, "Performance Standard 7—Indigenous Peoples" (Jan. 1, 2012) (relocation of Aboriginal peoples; impacts to lands or natural resources subject to traditional

broad, and could potentially be interpreted as an absolute veto afforded to Aboriginal communities, especially as it related to natural resource development in Canada.[4]

While all four countries have since endorsed UNDRIP, Canada has been adamant that FPIC does not give Aboriginal peoples an absolute veto over natural resource development in Canada. Instead, the Canadian government's position is that the concept of FPIC is integrated in Canada through existing federal policy on Aboriginal consultation and, where appropriate, accommodation, and is interpreted in a manner that is consistent with the Constitution of Canada and Canada's legal framework.[5] Instead of establishing a hierarchy of rights, Canada's framework places significant emphasis on the principle of balancing rights in an attempt to reconcile Aboriginal interests with the broader Canadian community. In other words, it is a process of give-and-take:

> 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 what I stated . . . to be a basic purpose of [Section 35 rights] — "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.[6]

To understand how FPIC concepts are currently being developed and implemented in Canada, this chapter begins with a brief overview of (1)

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ownership or under customary use; or significant impact on critical cultural heritage). FPIC builds on the IFC's existing concept of "informed consultation and participation." *See id.* para. 12. While it is clear that the IFC Performance Standards intend for FPIC to be something more than the right to be consulted, IFC acknowledges that "[t]here is no universally accepted definition of FPIC" and that "FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the [Aboriginal] community explicitly disagree." *Id.*

The IFC Performance Standards, including the concept of FPIC, also form the foundation for the Equator Principles, a credit risk management framework for environmental and social risk in project finance, adopted by 80 financial institutions as of June 3, 2013 (including five of Canada's largest banks). *See* Equator Principles Ass'n, "The Equator Principles III" (June 2013).

[4] *See, e.g.*, Statement by Ambassador John McNee Permanent Representative of Canada to the United Nations to the 61st Session of the General Assembly on the Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007), http://www.aadnc-aandc.gc.ca/eng/1100100014060/1100100014061; *see also* Kevin O'Callaghan & Luis Carlos Rodrigo Prado, "Free, Prior, and Informed Consent: International Origins and Its Application in Canada and Peru," 58 *Rocky Mt. Min. L. Inst.* 18-1, 18-25 to 18-32 (2012); Kevin O'Callaghan, "Corporate Social Responsibility: A Framework for Understanding the Legal Structure," 57 *Rocky Mt. Min. L. Inst.* 17A-1, 17A-8 to 17A-9 (2011).

[5] *See* Dep't of Aboriginal Affairs & N. Dev. Can., "Aboriginal Consultation and Accommodation—Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (Mar. 2011).

[6] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 186.

the mining sector's role in the Canadian economy, (2) Aboriginal peoples in Canada, and (3) Canada's constitutional and legal regime regarding Aboriginal peoples. The chapter will then outline the common law duties of consultation and accommodation of Aboriginal peoples that have developed in Canada in the context of natural resource development. Finally, while significant tension exists in Canada with respect to what FPIC means and how it should be implemented, the chapter will examine the use of "impact and benefit agreements" (IBA) in Canada's mining sector as a mechanism for building and maintaining respectful relationships with Aboriginal communities and implementing the principle of FPIC throughout the life cycle of natural resource projects in Canada.

§ 20B.02 Background

[1] Mining—Economic Context

In short, mining is, and is expected to remain, a cornerstone of the Canadian economy.[7] While the vast majority of these mineral resources in Canada are located on public lands owned by the Crown,[8] Aboriginal peoples have Aboriginal rights that are integral to the access, use, and development of these mineral resources. As a result, there is an inherent tension between natural resource development and Aboriginal rights in Canada that makes working with Aboriginal groups an essential part of how natural resource development occurs.

[2] Canada's Aboriginal Peoples

"Aboriginal peoples" is a collective name for the original peoples of Canada and their descendants. Canada's Constitution Act, 1982[9] recognizes three groups of Aboriginal peoples: Indians (commonly referred to as First Nations), Métis, and Inuit.[10] These are three distinct Aboriginal peoples with unique histories, languages, cultures, and spiritual beliefs.[11]

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[7] *See* Natural Res. Can. (NRCan), "Key Mining Facts 2012," http://www.nrcan.gc.ca/minerals-metals/nmw-smc/4450; NRCan, "Canada is a Global Mineral Exploration and Mining Giant," http://www.nrcan.gc.ca/media-room/news-releases/2013/6907; Gilles Rhéaume & Margaret Caron-Vuotari, The Conference Bd. of Can., *The Future of Mining in Canada's North* (Jan. 2013).

[8] In Canada, the "Crown" refers to both the federal and provincial governments, as the case may be. As noted below, in general, the provinces own the majority of the land and natural resources in Canada. *See infra* note 14.

[9] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (Constitution Act, 1982).

[10] *Id.* s. 35(2).

[11] The term "Indian" is defined by the federal Indian Act, R.S.C. 1985, c. I-5. The Inuit are Aboriginal peoples settled in the Arctic and sub-Arctic regions of Canada. The Métis are Aboriginal peoples who trace their heritage to mixed Indian and European settlers.

Approximately 4.3% of the population of Canada, or about 1.4 million people, identify themselves as being of Aboriginal origin.[12]

While an examination of the treatment of Aboriginal peoples in Canada is beyond the scope of this chapter, it is difficult to deal with the concept of FPIC in a discrete manner without dealing with the influences of many factors that impact this issue. Suffice it to say that Canada is significantly burdened by past actions that resulted in the erosion of the political, economic, and social systems of Canada's Aboriginal peoples. As a result, there are significant and troubling gaps that continue to persist between the social and economic conditions of Aboriginal Canadians and those of the general Canadian population. These gaps pose profound challenges to Canada as a whole.

Further, outstanding Aboriginal land claims remained largely ignored by the Canadian government well into the twentieth century. Not until 1973, as a result of the landmark *Calder v. Attorney-General of British Columbia*[13] decision of the Supreme Court of Canada, did the federal and provincial governments renew efforts to negotiate comprehensive modern treaties in non-treaty areas of Canada (largely British Columbia and Canada's North) and resolve specific land claims arising from alleged non-fulfillment of Canada's historic treaties. To date, this has been an extremely slow, cumbersome, and contentious process in Canada. As a result, the nature and extent of Aboriginal and treaty rights remain unclear in many areas of Canada (including those areas with mineral resources).

As discussed below, it is against this backdrop of complex historical legacies that Canada's mining sector seeks to use IBAs as a mechanism to build and maintain stronger relationships with Aboriginal peoples in Canada in a manner that respects and supports Aboriginal and treaty rights. However, as is also discussed below, Canada's mining sector is keenly aware that IBAs alone cannot achieve reconciliation between Aboriginal peoples and Canadians more generally. Unless and until meaningful progress is made by the Canadian government in addressing these significant social, economic, and legal issues, IBAs in and of themselves cannot fully mitigate against the social and legal risk surrounding the development of natural resource projects in Canada.

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[12] Statistics Can., "2011 National Household Survey: Aboriginal Peoples in Canada: First Nations People, Métis and Inuit" (May 8, 2013). Although Aboriginal peoples in Canada live in all settings, this chapter focuses on Aboriginal peoples in remote northern communities, as most mining activity in Canada takes place in these areas.

[13] [1973] S.C.R. 313. *See* § 20B.03[1], *infra*.

§ 20B.03 Legal Context

Canada has a unique constitutional relationship with Aboriginal peoples, which adds complexity to the implementation of FPIC concepts in Canada.[14]

[1] Aboriginal Rights Before 1982

By way of background, the extent to which Aboriginal rights survived European settlement was in considerable doubt in Canada until as late as 1973, when the Supreme Court of Canada decided the landmark *Calder* case.[15] Before *Calder*, Aboriginal claims were not even recognized by the federal government as having any legal status: "aboriginal claims to land. . . . are so general and undefined it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community."[16]

Calder involved an application for a declaration that the Aboriginal title of an Aboriginal group's traditional territory had never been lawfully extinguished.[17] The Court held that Aboriginal title did exist at common law and would continue to exist unless validly extinguished by surrender to the Crown or by specific legislation.[18] The Court described Aboriginal title as "a right to occupy the lands and enjoy the fruits of the soil . . . which does not in any way deny the Crown's paramount title as it is recognized by the law of nations."[19] *Calder* confirmed that Aboriginal rights to land flow

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[14] Canada has a federal system of government, which means that certain legislative powers are delegated to the federal and provincial levels of government. Canada's Constitution Act, 1867 gives the Parliament of Canada exclusive authority to legislate over "Indians, and Lands reserved for the Indians," but does not provide or ensure any constitutional protection for Aboriginal rights. Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 91(24) (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.). The provinces have ownership and control of the bulk of Crown land and natural resources and have an important practical role to play. However, the provincial legislatures may not pass laws that, in "pith and substance," are about Indians and Indian lands, but may enact laws of general application that apply to Aboriginal peoples and their lands, such as provincial hunting, fishing, conservation, and wildlife management. *See* Peter W. Hogg, "The Constitutional Basis of Aboriginal Rights" *in Aboriginal Law Since Delgamuukw* 3, 4 (Maria Morellato ed., 2009).

[15] *Calder*, [1973] S.C.R. 313. See Hogg, *supra* note 14, for a discussion of Aboriginal rights in Canada before 1982. Note that Aboriginal peoples in Canada have always maintained their right to self-government and that, while they may have granted the Crown certain rights in treaties, they have never granted the Crown the right to govern Aboriginal peoples.

[16] Minister of Indian Affairs & N. Dev., *Statement of the Government of Canada on Indian Policy, 1969* 13 (1969).

[17] *Calder*, [1973] S.C.R. at 317.

[18] *Id.* at 316.

[19] *Id.* at 352.

from their traditional use and occupancy of lands and continue until lawfully extinguished; Aboriginal title rights are dependent on the goodwill of the Crown.[20] Because the federal Crown had until then denied the existence of Aboriginal title in Canada, the recognition of Aboriginal rights in *Calder* had a significant impact on Crown policy and initiatives.[21] As a result, *Calder* set the stage for the subsequent development of Aboriginal rights in Canadian case law.

[2] Constitutional Basis of Aboriginal Rights

The Constitution of Canada is the supreme law of Canada. In 1982, as part of a larger constitutional reform package in Canada, the rights of Aboriginal peoples were specifically protected under section 35 of the Constitution Act, 1982 (Section 35 Rights). It provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[22]

Since 1982, these Section 35 Rights provide the constitutional protection of Aboriginal rights that was lacking at common law and have had a profound impact on the development of Canada's legal regime with respect to Aboriginal peoples and how their Aboriginal and treaty rights are protected in the development of natural resources in Canada. In *R. v. Sparrow*,[23] the Supreme Court of Canada expressed this significant shift as follows:

> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.[24]

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[20] *Id.* at 328.

[21] Thomas Isaac, *Aboriginal Law: Commentary and Analysis* 73 (2012). Shortly after the *Calder* decision, the federal government commenced a comprehensive land claims process to settle the issue of Aboriginal title in areas of Canada that were not subject to historic treaty (largely in British Columbia and Canada's North).

[22] Constitution Act, 1982, s. 35(1).

[23] [1990] 1 S.C.R. 1075.

[24] *Id.* para. 64. In *Sparrow*, the Supreme Court of Canada opined that "[t]he phrase 'existing aboriginal rights' must be interpreted flexibly" and "are 'affirmed in a contemporary [and not historical] form' " (i.e., present-day activities may be the modern form of the historical practice, custom or tradition).

The *Sparrow* case interpreted Section 35 Rights as providing a constitutional guarantee of Aboriginal and treaty rights, which were no longer vulnerable to legislative extinguishment. However, Section 35 Rights are not absolute and may be limited by statute if the limitation can be justified in accordance with the *Sparrow* justificatory analysis (i.e., the legislative objective is "compelling and substantial" and infringes the Aboriginal right no more than is necessary to achieve the purpose).[25] The Court in *Sparrow* went on to state:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).[26]

[3] Meaning of "Aboriginal and Treaty Rights"

[a] Aboriginal Rights

Aboriginal rights are those rights held by Aboriginal peoples that relate to activities that are an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. As Aboriginal rights were undefined in section 35, a series of constitutional conferences was held in the 1980s in an attempt to define and clarify those rights. Disagreements between the federal government, the provinces, and Aboriginal groups, however, prevented a consensus from being reached. As a result, Aboriginal groups turned to the courts in Canada to help define not only the scope and extent of their rights, but also to identify and recognize rights and treaties.

The first legal definition of Aboriginal rights was provided by the Supreme Court of Canada in *R. v. Van der Peet*:[27]

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples

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[25] *Id.* paras. 61–71. An example of a compelling and substantial objective is the prevention of harm to the general population or to Aboriginal peoples from the exercise of an Aboriginal right or rights.

[26] *Id.* para. 65.

[27] [1996] 2 S.C.R. 507.

> from all other minority groups in Canadian society and which mandates their special, legal, and now constitutional, status.[28]

The Court went on to state: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[29] For First Nations and Inuit communities, this means that the activity must have existed at the time of first contact with Europeans. For Métis communities, the activity must have existed prior to the time of effective European control. In applying the *Van der Peet* test, a current practice, custom or tradition must have continuity with the historic practice, custom or tradition and it must remain integral to the community's culture.[30]

Section 35 Rights recognize and affirm a spectrum of Aboriginal rights. Aboriginal title, which is a subcategory of Aboriginal rights, is the highest form of Aboriginal rights (i.e., Aboriginal "occupancy rights"). In general, for Aboriginal title to be established, an Aboriginal community must have occupied the lands prior to the Crown asserting sovereignty over the lands, there must be continuity between present and pre-sovereignty occupation, and the occupation must have been exclusive at the time the Crown asserted sovereignty over those lands.[31] Like other Aboriginal rights, Aboriginal title is not absolute. It can be infringed where such infringement is justified. Given that establishing Aboriginal title is an extremely complex and lengthy process for Aboriginal groups, the courts have been consistently clear that negotiations—not the courts—are the best means of achieving reconciliation.

For an Aboriginal right to be recognized and affirmed as a Section 35 Right, it must have existed on April 17, 1982, when the Constitution Act, 1982 came into effect; rights that were extinguished by the Crown prior to the date are not "revived" by that provision.[32] As noted above, these rights are not absolute and can be infringed by the Crown.[33]

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[28] *Id.* para. 30.

[29] *Id.* para. 46.

[30] *Id.* paras. 49–74.

[31] Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 117.

[32] Isaac, *supra* note 21, at 32.

[33] *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 172. The Crown can infringe Aboriginal and treaty rights if it can prove that the infringement is a legitimate and justifiable infringement of existing Aboriginal rights. *See also* R. v. Sparrow, [1990] 1 S.C.R. 1075.

[b] Treaty Rights

Treaty rights are those specific rights that are contained in treaties entered into between the Crown (i.e., France or Britain and after 1867, Canada) and Aboriginal peoples. By way of background, starting in the early sixteenth century, the Crown entered into treaties between Aboriginal peoples and European settlers defining the respective rights and obligations of Aboriginal people and the Crown. Under some of these historic treaties, First Nations surrendered their interests in their lands in exchange for such things as reserve lands, payments, and hunting, fishing, trapping, and gathering rights (subject to the terms of the treaty).[34] While these existing treaty rights have been constitutionally recognized and affirmed under section 35, and are legally enforceable against the Crown,[35] suffice it to say that Aboriginal groups did not see these historic treaties as an extinguishment of their land rights and there has been extensive litigation to date as to the nature and extent of treaty rights in Canada. Such uncertainty continues and is a notable challenge for Canada's mining sector.

Further, treaties were not entered into uniformly throughout Canada and do not cover most of the land in British Columbia and Canada's North. As a result, any existing Aboriginal rights and title in these areas are unextinguished, undefined, and uncertain.[36] Unresolved land claims continue to pose notable challenges for Canada's mining sector as the nature and extent of Aboriginal rights in non-treaty areas also remain unclear.

As discussed above, in 1973 the Supreme Court of Canada recognized the existence of Aboriginal title and spurred the federal Crown to negotiate comprehensive land claims in areas of Canada where Aboriginal rights had not been addressed by historical treaties.[37] These comprehensive land claims agreements are modern-day treaties that aim to "provide certainty and clarity to ownership and use of land and resources" in those areas where Aboriginal title has not been resolved by historical treaty or

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[34] Aboriginal Affairs & N. Dev. Can., *Treaties with Aboriginal People in Canada* (Sept. 15, 2010). In Canada, there are 68 major historical treaties. These treaties cover most of Ontario, the Prairie Provinces, parts of Vancouver Island, the Northwest Territories, and Atlantic Canada. The geographical extent of Canada's historical treaties (1725 to 1923) can be seen at http://atlas.nrcan.gc.ca/data/english/maps/reference/national/hist_treaties/map.pdf.

[35] Isaac, *supra* note 21, at 109.

[36] *Id.* at 162.

[37] *See* Calder v. Att'y-Gen. of B.C., [1973] S.C.R. 313; *Treaties with Aboriginal People in Canada*, *supra* note 34.

by legislation.[38] This modern treaty-making process is an ongoing process that aims to resolve the issue of ownership over lands and natural resources and lead to self-government agreements. Over time, this process may reduce the risks and uncertainty associated with mining development in Canada. However, as noted above, the land claims process in Canada has been extremely slow, cumbersome, and contentious. As the only enduring means of settlement of Aboriginal claims is ultimately by way of treaty (including self-government powers and stable financing for Aboriginal government), Canada's mining sector has a keen interest in seeing this process move forward more efficiently in order to ensure a just settlement for Aboriginal peoples in Canada and greater clarity to ownership and use of land and resources.

§ 20B.04 Crown's Duty to Consult and Accommodate

[1] Overview[39]

The Crown's duty to consult and, where appropriate, accommodate Aboriginal peoples is set out in a trilogy of Supreme Court of Canada cases: *Haida Nation v. British Columbia*;[40] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*;[41] and *Mikisew Cree First Nation v. Canada*.[42] In these cases, the Supreme Court of Canada established a legal framework for the duty to consult and accommodate Aboriginal interests, which is based in the principle of the honour of the Crown and Section 35 Rights.[43] The Crown has a duty to consult with Aboriginal peoples when the Crown has knowledge of the existence or potential existence of an Aboriginal right or treaty right and the Crown contemplates conduct that might adversely affect the right in question.

In *Haida*, the Supreme Court of Canada affirmed that, while Aboriginal land claims are unresolved, the honour of the Crown entails a duty to consult with and, if necessary, accommodate Aboriginal peoples where an act or omission of the Crown may adversely impact an Aboriginal right or

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[38] Dep't of Indian Affairs & N. Dev., *Comprehensive Land Claims Policy* (1986). Since 1975, there have been 22 comprehensive claims agreements, commonly known as "modern treaties," concluded across northern Québec, the Northwest Territories, the Yukon, and British Columbia.

[39] It is beyond the scope of this chapter to review the extensive case law since 2004 applying the Supreme Court of Canada's duty to consult framework to natural resource projects in Canada. See Isaac, *supra* note 21, for a detailed review of such case law.

[40] 2004 SCC 73, [2004] 3 S.C.R. 511.

[41] 2004 SCC 74, [2004] 3 S.C.R. 550.

[42] 2005 SCC 69, [2005] 3 S.C.R. 388.

[43] *See* R. v. Badger, [1996] 1 S.C.R. 771, para. 41.

interest.[44] The *Haida* duty to consult was an interim protection measure, intended to safeguard Aboriginal interests while Aboriginal rights were in dispute or under treaty negotiation:

> Put simply, Canada's aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[45]

In *Taku River*, the Supreme Court of Canada held that where consultation and any resulting accommodation sufficiently addressed Aboriginal rights and concerns, the honour of the Crown would be satisfied.[46] Further, as in *Haida*, the Court clarified that meaningful consultation did not require agreement, and accommodation required only a reasonable balance between Aboriginal concerns and competing considerations.[47]

In *Mikisew Cree*, the Supreme Court of Canada held that the Crown's duty to consult as discussed in *Haida* also applies to treaty rights.[48] While the Crown had a treaty right to build the road in question, the Crown was nevertheless under an obligation to inform itself of the impact the road would have on the exercise by the Mikisew Cree First Nation of their hunting and trapping rights over the land in question. The Court held that such

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[44] *See Haida*, 2004 SCC 73, para. 47. In this case, the provincial Crown had issued a licence to cut trees on provincial Crown land to a forestry company. The lands were traditional territories of the Haida and were the subject of a land claim. The Court held that the province had a duty to consult with the Haida before issuing the licence. Not having done so, the provincial Crown was in breach of the Haida's Section 35 Rights and the licence was invalid. *See id.* para. 78.

[45] *Id.* para. 25.

[46] *Taku River*, 2004 SCC 74, para. 24. In this case, a mining company proposed to build an access road in an area subject to an unresolved land claim. The Supreme Court of Canada noted that the First Nation participated fully in the statutory environmental assessment process, that its views were put before the ministers involved in the process and that the final project approval contained measures addressing the First Nation's short- and long-term concerns. The First Nation was consulted throughout the process and its concerns were accommodated.

[47] *Id.* para. 25.

[48] *Mikisew Cree*, 2005 SCC 69, para. 3. This case involved the construction of a proposed road in a national park. The Mikisew Cree First Nation argued that the road could impact the treaty rights to hunt and trap: "the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between Aboriginal and non-aboriginal peoples." *Id.*

consultation was key to the achievement of the overall objective of the modern law of treaty and Aboriginal rights, namely reconciliation.[49]

The duty to consult and, where appropriate, accommodate Aboriginal communities when developing natural resources is therefore a constitutional duty, the fulfillment of which is consistent with the honour of the Crown.[50] The Crown's duty to Aboriginal peoples is an integral part of the broader goal of reconciliation of Aboriginal peoples and the Crown. The substantive Aboriginal rights affirmed by section 35 require the Crown to pursue "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[51] To achieve this goal, balance and compromise are necessary:[52] "Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests."[53]

[2] Scope and Content of the Duty

As noted above, the duty to consult is the duty of the Crown to consult Aboriginal peoples when an interest of Aboriginal peoples is adversely affected by an act of the Crown. The duty applies to Aboriginal rights, treaty rights, and Aboriginal title.[54] The nature and scope of the duty to consult is highly contextual and will vary greatly depending on the nature of the affected Aboriginal interest.[55]

In *Haida*, the Supreme Court of Canada described the duty to consult as existing on a broad spectrum and proportionate to two factors: (1) the strength of the Aboriginal group's claim proportionate to the Aboriginal right; and (2) the degree of the potential adverse effect of the Crown's

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[49] Similarly, in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, the Supreme Court of Canada held that the Crown's duty to consult as discussed in *Haida* also applies to modern treaties, which were not "complete codes." *See id.* para. 94. As honour of the Crown and the duty to consult exist independently of contract or the treaty, the Crown's duty to consult is simply a part of the "essential legal framework within which the treaty is to be interpreted and performed." *Id.* para. 69.

[50] R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 6.

[51] R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 31; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 186.

[52] *Taku River*, 2004 SCC 74, para. 42.

[53] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, para. 34.

[54] *See Delgamuukw*, [1997] 3 S.C.R. 1010; R. v. Sparrow, [1990] 1 S.C.R. 1075; R. v. Badger, [1996] 1 S.C.R. 771.

[55] *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 168.

decision on the right.[56] This means that in cases where the claim is weak or the adverse effect minimal, mere notification may be sufficient to satisfy the Crown's duty to consult. On the other end of the spectrum, where both the claim and the potential adverse effect are strong, deep consultation and accommodation may be appropriate. For example, in the mining context, a decision by a regulator to issue a permit to take water for mine operations will generally require deeper consultation (e.g., consultation plus substantive engagement demonstrating how any concerns were considered and, if necessary, addressed) than a decision by the regulator to simply transfer such permit to a related entity as part of a corporate reorganization (e.g., mere consultation, such as notification and information sharing). Similarly, a decision to issue an exploration permit will generally require much less consultation than a decision to approve the management of tailings in a lake.

Only in very exceptional cases would Aboriginal groups have a "veto" over mining development:

> [The duty to consult] does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[57]

The obvious challenge for all stakeholders in the mine development process is achieving this balance and compromise in a manner that is consistent with the Aboriginal group's Section 35 Rights in order to achieve reconciliation.

In the context of mining development, consultation focuses on "how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests."[58] Further, mining companies in Canada have learned the hard way that a strictly legal analysis of the appropriate level of consultation to satisfy the duty to consult is not always good practice. As a result, mining companies often exceed the minimum consultation threshold to enhance Aboriginal relationships and to ensure that the process is not open to challenge or criticism. Finally, while the courts have not required mining companies to fund the consultation process, mining companies often provide significant

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[56] Haida Nation v. British Columbia, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 39.

[57] *Id.* para. 48.

[58] *Rio Tinto*, 2010 SCC 43, para. 83.

participation funding to Aboriginal groups to ensure that they have adequate resources to participate in the consultation process.

The duty to consult Aboriginal peoples does not manifest in every encounter between the Crown and Aboriginal peoples.[59] It arises when: (1) the Crown knows of a potential claim or right, such as real or constructive knowledge of a resource or land to which it attaches;[60] (2) Crown conduct or a Crown decision engages a potential Aboriginal right;[61] and (3) there is the possibility that the proposed Crown conduct will have an adverse effect on the Aboriginal claim or right.[62]

[3] Do Third Parties Owe a Duty to Consult?

The Supreme Court of Canada has held that third parties, such as mining companies, do not have a duty to consult Aboriginal communities under common law.[63] The duty to consult is owed by the Crown; legal responsibility for the duty and for the requirement to uphold the duty of the Crown cannot be delegated to third parties.[64] However, the Crown can, and generally does, delegate certain procedural aspects of consultation to third parties. As a result, mining companies in Canada play a key role in the day-to-day aspects of the Crown's consultation process.[65] This means that the Crown's duty to consult has a significant impact on the mining sector's relations with Aboriginal communities and has become an extremely powerful tool for Aboriginal groups to influence regulators, in particular during the environmental impact assessment process with respect to a proposed mining project.[66]

Further, in some provinces, mining companies are also required by statute to consult with Aboriginal communities. In Ontario, for example,

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[59] *See* UNDRIP art. 23(2).

[60] *Haida*, 2004 SCC 73, para. 35; *Rio Tinto*, 2010 SCC 43, para. 40.

[61] *Rio Tinto*, 2010 SCC 43, para. 42. This refers to conduct that may adversely impact on the Aboriginal claim or right in question. Government action that engages the duty to consult is not confined to government exercise of statutory powers or decisions which have an immediate impact on lands and resources; a high-level decision with a potential for adverse impact suffices. *Id.* para. 44.

[62] *Id.* para. 45. Evidence of past wrongs is not sufficient to prove that the proposed Crown conduct will have an adverse effect on the Aboriginal claim or right; the adverse effect must be caused by the proposed Crown conduct.

[63] *See Haida*, 2004 SCC 73, paras. 53–55.

[64] *Id.* para. 53.

[65] Isaac, *supra* note 21, at 328.

[66] David Hunter, Nalin Sahni & George McKibbon, "A New Paradigm for Aboriginal Consultation in Ontario" (Ont. Bar Ass'n Dec. 2012).

recently amended regulations under the Mining Act[67] now require Aboriginal consultation for companies submitting mine closure plans and closure plan amendments for advanced exploration and mine production stage projects.[68] Proponents of a mine governed by Ontario's Mining Act must notify the Ontario Ministry of Northern Development and Mines in advance of the submission of a closure plan.[69] The Ministry will review the proponent's notice and provide written direction with respect to consultation with Aboriginal communities, which may require the proponent to prepare a plan for consultation with Aboriginal communities, establish a schedule for making interim reports to the Ministry, or do such other things as the Ministry considers appropriate in the circumstances.[70] The proponent must then conduct consultation as directed by the Ministry with the specified Aboriginal communities.[71]

In the new federal Canadian Environmental Assessment Act, 2012,[72] there is also an expanded list of environmental effects on Aboriginal peoples that must be taken into account by mining companies during the environmental impact assessment process (i.e., health and socio-economic conditions, physical and cultural heritage, and structures of historical, archeological, paleontological, or architectural significance).

[4] Accommodation—Balance and Compromise

Once a duty to consult exists, a duty to modify government plans or policy to accommodate Aboriginal concerns may arise.[73] When required, the duty to accommodate is not a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Rather, it is the exercise of the Crown's discretion taking into account each relevant interest and circumstance, "including the First Nation entitlement and the nature and seriousness of the impact" of the proposed measure on the entitlement.[74]

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[67] R.S.O. 1990, c. M.14.

[68] *See* Mine Development and Closure Under Part VII of the Act, O. Reg. 240/00, s. 8.1(1). Each province and territory of Canada is governed by its own set of mining laws and regulations.

[69] *Id.*

[70] *Id.* s. 8.1(3).

[71] The purpose clause in the Mining Act was also amended, expressly requiring mineral resources to be developed "in a manner consistent with the recognition and affirmation of . . . [Section 35 Rights] . . . , including the duty to consult . . . ." Mining Act, R.S.O. 1990, c. M.14, s. 2.

[72] S.C. 2012, c. 19, s. 52.

[73] *Taku River*, 2004 SCC 74, para. 25.

[74] *Little Salmon*, 2010 SCC 53, para. 81.

Like the duty to consult, the duty to accommodate is flexible and contextual. In *Little Salmon*, the First Nation in question voiced concerns about a proposed development bordering on its settlement lands. The lands formed part of the First Nation's traditional territory, to which its members had treaty rights of access for hunting and fishing. The proposed development included a grant of the 65-hectare plot of land to an individual not affiliated with the First Nation and its subsequent agricultural conversion.[75] The First Nation argued that the Crown acted without proper consultation and without proper regard to its concerns.[76] The Supreme Court of Canada found that the proposed development would have had only a minor impact on Aboriginal rights and interests and that the Aboriginal group did not have alternative suggestions to the development. It only sought the rejection of the development. The Court held that the duty of consultation was discharged through providing notice and information and, given the nature of the proposal, there was nothing in the treaty or surrounding circumstances that gave rise to a requirement of accommodation.[77]

As discussed above, the Crown's duty to consult and, where appropriate, accommodate is not a veto or duty to agree with the impacted Aboriginal community. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns: "Compromise is inherent to the reconciliation process."[78] As a practical matter, however, consultation discussions in the mining context are often based on the expectation by Aboriginal groups that some form of compensation will be forthcoming.

§ 20B.05 Impact and Benefit Agreements[79]

[1] Introduction

As discussed in the introduction to this chapter, while significant tension exists in Canada with respect to what FPIC means and how it should be implemented, this section of the chapter will examine the use of IBAs in Canada's mining sector as a mechanism for (1) building and maintaining respectful relationships with Aboriginal communities and (2) implementing

[75] *Id.* para. 3.

[76] *Id.* para. 4.

[77] *Id.* paras. 81–82.

[78] *Taku River*, 2004 SCC 74, para. 2.

[79] Such agreements may be referenced in various ways, including socio-economic participation agreements, accommodation agreements, participation agreements, cooperation and benefit agreements, benefit-sharing agreements, etc. We collectively refer to such agreements as IBAs for the purposes of this chapter.

the principle of FPIC at the proposal stage and throughout the life cycle of natural resource projects in Canada. While IBAs are certainly not intended to be a panacea for the significant social, economic, and legal challenges discussed in § 20B.03[1], above, IBAs do play a key role in respecting and supporting Aboriginal rights until such time as the Crown and Aboriginal communities have resolved outstanding treaty matters in Canada.

[2] Background

By way of background, the Crown's duty to accommodate Aboriginal interests often leads to lengthy and politicized processes, weighed by historic grievances between federal and/or provincial governments, proponents, and affected Aboriginal groups. Since the early 1990s in Canada, IBAs have emerged as a common means of addressing Aboriginal interests, whether such agreements formally achieve accommodation or simply address affected interests such that mining development may proceed.[80] IBAs are legally required by certain modern treaties in Canada or may be pursued by development proponents on a voluntary basis.[81] Whether mandatory or voluntary, the successful negotiation of IBAs has led the mining industry to play a key role in addressing Aboriginal interests in Canada.[82]

IBAs with respect to mining projects have now become commonplace in Canada, addressing Aboriginal interests where: (1) consultation has

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[80] An early example of an IBA of sorts is a 1974 development agreement for the Nanisivik Mine, a zinc-lead mine in what is now Nunavut. For an overview of the failings of this agreement, see Robert B. Gibson, *The Strathcona Sound Mining Project: A Case Study of Decision Making* (Feb. 12, 1978), http://artsites.uottawa.ca/sca/doc/Background-Study-No.-42-The-Strathcona-Sound-Mining-Project-A-Case-Study....pdf.

[81] For example, the Nunavut Land Claims Agreement requires that the proponent of any "Major Development Project" that will be situated wholly or partially on Inuit-owned lands to enter into an Inuit IBA before any mine may proceed. *See* Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada, art. 26, pt. 2 (May 25, 1993) (NLCA); *see also* Nunavut Land Claims Agreement Act, S.C. 1993, c. 29. Examples of IBAs negotiated under this agreement include Agnico-Eagle Mines Limited's Inuit IBA dated October 2011 for the Meadowbank Mine (Nunavut's only operating mine) with the Kivalliq Inuit Association. The Meadowbank mine is the first operating gold mine to be constructed on Inuit-owned land in the post-NLCA era. For a copy of the IBA, see http://aemnunavut.ca/index.php?q=en/meadowbank/permits-and-agreements. Since 1993, three other Inuit IBAs have been negotiated pursuant to the NLCA for two gold projects and one diamond mine.

[82] The Mining Association of Canada (MAC) states that over 300 "IBA-like" agreements have been negotiated over the past 20 years in Canada to facilitate mining proposals. Approximately 100 of those agreements cover 61 projects. The remaining 220 IBA-like agreements are for earlier stages of the mining cycle (e.g., exploration agreements). There are approximately 27 IBAs for producing mine sites in Canada. *See* MAC, "F&F 2012—Facts & Figures of the Canadian Mining Industry," http://www.mining.ca/www/media_lib/MAC_Documents/Publications/2013/Facts%20and%20Figures/FactsandFigures2012Eng.pdf.

identified affected Aboriginal interests and appropriate accommodation has not yet been determined by the Crown; (2) accommodation provided by the Crown is not viewed as adequate by the Aboriginal group; or (3) a proponent seeks Aboriginal support for the development beyond any achieved through accommodation. In any of these instances, the proponent may pursue the negotiation of an IBA as a means to avoid protracted litigation regarding the subject Aboriginal interests and to minimize uncertainty and delay. The negotiation of an IBA allows the proponent to develop a relationship directly with the Aboriginal group, communicating development constraints and addressing social and economic goals independent of regulatory authorities.

While the mining proponent pursues an IBA to gain community support with respect to its access on traditional Aboriginal lands and the mine activities affecting Aboriginal interests, an Aboriginal community might consider entering into an IBA as a means to minimize the project's impacts to the environment, their territory, and communities and to obtain benefits that support socio-economic development within the community. Chronic poverty and social issues in some Aboriginal communities and political conflicts between federal, provincial, and Aboriginal leaders have contributed to the view that IBAs may provide Aboriginal communities with an opportunity to monetize impacts from mines for the purpose of pursuing community development.[83] As mining often occurs in areas that have experienced little prior development, an IBA may provide one of the only means of such community development.[84] Aboriginal groups seek to directly address issues with respect to development within their communities without government constraints and negotiating private sector IBAs allows such independence.

It should be noted that while IBAs typically contain provisions expressly confirming Aboriginal support for the mining project, IBAs cannot affect existing treaty rights or any other Aboriginal rights and would typically not

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[83] Gordon Shanks & Sandra Lopes, Public Policy Forum, "Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements," at 12–14 (Mar. 2006).

[84] There is limited information available regarding the effectiveness of IBAs in large part due to the lack of academic review and the confidential nature of most IBAs. Analysis to date suggests that benefits have been realized and acknowledged by Aboriginal communities but concerns exist. In particular, the benefits are viewed as not commensurate with the nature of the use and the profits of the mine operator. *See* Jason Prno, Ben Bradshaw & Dianne Lapierre, "Impact and Benefit Agreements: Are they working?," *Canadian Institute of Mining, Metallurgy and Petroleum Annual Conference* 5–8 (May 11, 2010). While there are no reported Canadian cases with respect to the interpretation or enforcement of IBAs, this may not be indicative of the parties' satisfaction with the implementation of an IBA but rather that conflicts are being addressed through confidential dispute resolution.

affect claims and interests. In fact, IBAs generally confirm that they do not impact such rights, claims, or interests.[85] Notwithstanding that IBAs will not resolve Aboriginal claims or define Aboriginal interests in the subject area, they are viewed as a practical means of securing Aboriginal support for the proposed mine.

[3] Negotiation of IBAs

Although both the mining industry and Aboriginal peoples secure benefits through the negotiation of IBAs, there are many challenges to achieving mutual agreement. Without specialized expertise, it is difficult for Aboriginal communities to properly consider potential environmental and social impacts and financial returns.[86] Inequality in capacity may lead to challenges to any agreement reached, including differing views on implementation of an IBA. As a result, it is common for significant funding to be provided to Aboriginal communities by the mining proponent (and in some cases the Crown) to allow for experts to be retained to consider the project and affected interests.

Capacity issues may also arise with respect to the timing and volume of decisions to be made in the negotiation of an IBA. The expectations of the mining industry with respect to timing may not take into account governance structures within Aboriginal groups that often involve multiple layers of decision makers (e.g., band councils, hereditary chiefs, elders, etc.) and the need for broad consensus to reach an agreement. Pressures on the individuals providing leadership within an Aboriginal community may be significant and could affect the ability to maintain a critical path in negotiations.[87] Even when the Aboriginal community has agreed to commence IBA negotiations, it often takes 12 to 24 months to reach agreement.

The issues of with whom a proponent should negotiate and what decision-making process will be followed in order to ratify an IBA are critical matters that require considerable understanding of the particular Aboriginal community. In addition to ensuring that all necessary parties are involved in the consideration of affected interests and that appropriate

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[85] Woodward & Co., Ecosystem-Based Management Working Group, "Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses, and Governments," at II-15 to II-16, http://archive.ilmb.gov.bc.ca/slrp/lrmp/nanaimo/cencoast/ebmwg_docs/hw03b_benefit_sharing_final_report.pdf.

[86] *See* Ginger Gibson & Ciaran O'Faircheallaigh, Walter & Duncan Gordon Found., "IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements," at 76, 80, 109 (Mar. 2010); *see also* Irene Sosa & Karyn Keenan, "Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada," at 8 (Oct. 2001).

[87] Shanks & Lopes, *supra* note 83, at 13.

parties are identified to negotiate an IBA, the Aboriginal community will often seek (and a mine proponent would typically support) a community vote by which ratification of an IBA is achieved. While such ratification is not necessarily evidence of consent or consensus, it would confirm the breadth of support within the community. This may be viewed as a form of acceptance of the project and may be the strongest mandate available to address affected Aboriginal interests in the context of the mine development. However, on a practical level, even when ratification has been undertaken by the community and a majority of community members support the IBA, opposition may exist that could challenge IBA implementation.

One of the most significant challenges regarding the implementation of IBAs is the reliability of the governance structures within the Aboriginal community. Financial and technical oversight within the community may not be sufficient to ensure transparency and accountability with respect to monitoring and securing benefits under the IBA. While the mining industry has no role in the function of Aboriginal communities, until social and economic development has progressed to an extent where governance has been strengthened, proponents may wish to include in IBAs the provision of expert support to the Aboriginal community throughout implementation of the IBA.

[4] Areas of Cooperation in IBAs

In circumstances where IBAs are being entered into on a voluntary basis, the range of benefits and issues that are addressed is limited only by the nature of the development and the Aboriginal interests involved. Over the past decade, the scope of IBAs has expanded significantly from a relatively limited list of socio-economic matters (e.g., employment, training, and limited annual payments) to comprehensive and complex financial commitments and environmental assessment, monitoring, and reporting requirements extending beyond regulatory requirements. Notwithstanding the extent to which unique interests, issues, and concerns may be addressed in IBAs, there are a number of issues that are typically included, as follows:[88]

(1) Employment. As many mining developments are in remote areas, affected Aboriginal groups often lack the necessary formal education and relevant work experience to take advantage of employment opportunities at the mine. Barriers may exist with respect

[88] *See* Joseph Eliot Magnet & Dwight A. Dorey, *Legal Aspects of Aboriginal Business Development* 322–23 (2005); Gibson & O'Faircheallaigh, *supra* note 86, at 131–65; Sosa & Keenan, *supra* note 86, at 10–17.

to recruitment, retention, and advancement. Such issues may be addressed by establishing employment and hiring plans that include quotas and hiring preferences for members of the Aboriginal group.

(2) Education and Training. In addition to training that may be provided to employees, IBAs may support existing schools, encourage education upgrading by adults, and establish job training opportunities in the community. The focus of such training may be related to particular skills required in mine operations or to simply providing literacy and numeracy programming to support community development generally.

(3) Business Opportunities. In addition to direct employment, a proponent may agree to provide preferential opportunities to businesses operated by local Aboriginal groups. Such arrangements can be facilitated through preferential RFP processes as well as requiring local recruiting and hiring with respect to contracts awarded to non-Aboriginal businesses. Where Aboriginal groups are constrained by relevant skills and access to capital for start-up costs, proponents may support small business investments and even offer operational support for such endeavours.

(4) Financial Compensation. In addition to preferential hiring and business opportunities, modern IBAs generally include financial compensation through some form of profit sharing, revenue stream, fixed payments, and/or some other financial arrangement. Recently, there has been an increase in IBAs that provide an opportunity for the Aboriginal community to become an owner in the project. Accountability with respect to the expenditure of compensation may be an issue and proponents may prefer to identify particular socio-economic objectives for which their contributions would be earmarked or secure third-party experts to provide support to the Aboriginal community in the management of such funds. Given increasing voluntary and mandatory disclosure requirements on the mining industry with respect to payments to host governments, proponents must consider whether any financial compensation, which is typically confidential pursuant to an IBA, is required to be disclosed. If so, any such disclosure requirements should be reflected in the IBA. To date, the lack of transparency of IBA payments has been a source of criticism by some civil society organizations. While payments to Aboriginal groups may not need to be disclosed under securities disclosure rules, many mining companies are increasingly keen to have full disclosure of IBA terms to ensure greater transparency.

(5) Individual Compensation. In mining projects, where impacts to land or its use are direct, compensation to individuals who have specific interests or activities affected (e.g., hunting, trapping, harvesting, etc.) may be facilitated through the IBA.

(6) Infrastructure Benefits. Significant infrastructure investment is often tied to mining projects including the construction of roads, airports, ports, power facilities, and water supplies. Access to such facilities throughout the life of the mine can help boost local development. As well, such infrastructure may not have reached end-of-life by the time of mine closure and, if transferred at nominal cost, could benefit the local community.

(7) Environmental and Safety Management. In addition to ensuring the safety of workers (including employees and contractors from Aboriginal groups), IBAs often include specific obligations regarding the environment. Monitoring of environmental impacts and closure obligations are particularly contentious issues and sustainability may be an objective of the IBA. Direct participation of Aboriginal groups in such management and monitoring may lead to co-management structures that not only protect health, safety, and the environment but also develop local expertise.

(8) Social and Cultural Issues. The recognition of traditional use of the subject lands and the protection of cultural assets is critical in recognizing Aboriginal interests, but IBAs may also address issues such as discrimination against Aboriginal groups, as well as other social impacts of industrialization in remote areas. Promotion of culture, such as through mandating the use of local language and availability of traditional foods, may also be stipulated in the IBA. The use of traditional knowledge in environmental management may be a priority under the IBA.

(9) Implementation. IBAs often impose obligations on a proponent to study and track particular issues of relevance to the Aboriginal community, including delivery of benefits under the IBA. IBAs generally establish a committee comprised of representatives from the Aboriginal group, independent third-party experts, and the proponent to ensure ongoing communication and implementation planning. Principles for ongoing communication and cooperation are often set out in order to facilitate the sharing of information and concerns throughout the project, and capacity support and funding may be provided.

(10) Approval, Consent, and Support. One of the most significant benefits for proponents from IBAs is the opportunity to limit opposition

activities of groups receiving benefits and obtain express support for the mining project. Such constraints may include (a) prohibitions on objecting or appealing governmental approvals and undertakings to recognize such approvals, (b) constraints on interference with mine operations, (c) waivers of legal claims with respect to the operator or the project, or (d) undertakings to communicate support for the project.[89] Obviously, such constraints and undertakings may be controversial to secure and difficult to enforce. An IBA may provide for sufficient information-sharing, complaints processes, and dispute resolution mechanisms (as well as benefits), such that an Aboriginal group may be prepared to forego particular opposition activities and demonstrate support.[90] However, such constraints and undertakings may be ineffective with respect to particular members of the community who are not in support of the IBA.

(11) Renegotiation. Given mining projects have a long life, modern IBAs often contain provisions for ongoing review of the IBA (e.g., future mine expansion has not been agreed to).

(12) Enforcement. Dispute resolution procedures are generally set forth in an IBA, ranging from relatively informal complaints procedures to binding arbitration. As well, the parties may wish to have the option of seeking a remedy in the courts.

The act of an Aboriginal community agreeing to address impacts and accept benefits from a project under an IBA may be viewed as the provision of consent with respect to the mine development. However, the nature of the releases, waivers, and undertakings provided by the Aboriginal community regarding project support (see (10), above) may be the true indication of the degree of consent secured under the IBA. By arriving at a contractual agreement, the parties accept that an IBA is currently the most effective means to achieve Aboriginal consent to a mine development.

[5] Examples of IBAs

It is beneficial to consider examples of IBAs in order to understand the challenges in securing Aboriginal consent where rights have not been defined by government or the courts. Such examples also demonstrate the extent and limitations of the IBAs reached, where a practical approach to achieving support for the mine development cannot resolve historic

[89] *See* Gibson & O'Faircheallaigh, *supra* note 86, at 124–25.

[90] For example, many IBAs contain "Approval, Consent, and Support" provisions, which expressly state that, subject to the mining company complying with its IBA obligations, the Aboriginal group consents to and supports the development, construction, and operation.

grievances, underlying rights, or chronic socio-economic problems and may make the project subject to ongoing claims and disputes.

[a] Voisey's Bay

An early example of a voluntary IBA negotiation for a large-scale mining development is the experience of Voisey's Bay Nickel Company (VBNC) (now known as Vale Newfoundland & Labrador Limited) in Labrador, on Canada's northeastern coast.[91] This remote area had a challenging history of federal, provincial, and Aboriginal relations. At the time the nickel deposit was discovered in the early 1990s, the Inuit and Innu had been involved in land claim negotiations with the federal government for more than 15 years, with no resolution in sight.

In the mid-1990s, the Innu and Inuit staged various activities opposing the development of the Voisey's Bay nickel mine. First, the exploration of the mine was challenged on the basis that it had been undertaken without consideration of, or protection for, Aboriginal interests. In February 1995, after issuing an eviction notice, the Innu blockaded access to the development site and resisted police efforts to secure the site for 12 days.[92] After VBNC acquired the Voisey's Bay mineral claims in August 1996, and mining was planned to commence in 1999, efforts increased to address Aboriginal concerns.[93] However, it was not until January 1997 that an agreement was reached for the conduct of a federal environmental assessment, with intervenor funding provided to allow for Innu and Inuit participation.[94] In August 1997, Innu and Inuit protesters blocked road and airstrip construction on the basis that such work was premature in advance of the environmental assessment (EA). Shortly thereafter, in response to an appeal of the denial of an injunction sought by the Labrador Inuit Association (LIA),

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[91] Other early examples of IBAs include BHP Billiton's four IBAs (1996/1998) with the First Nations, Inuit, and Métis groups in the vicinity of Canada's first diamond mine and Goldcorp Inc.'s Musselwhite Agreement (1996, renewed 2001).

[92] Robert B. Gibson, "Sustainability Assessment and Conflict Resolution: Reaching Agreement to Proceed with the Voisey's Bay Nickel Mine," 14 *J. of Cleaner Prod.* 334, 339 (2006).

[93] S.W. Marcuson et al., "Sustainability in Nickel Projects: 50 Years of Experience at Vale Inco" 210:10 *Eng'g & Mining J.* 52 (Dec. 10, 2009).

[94] *See* Gov'ts of Canada, Newfoundland, and Labrador, LIA & Innu Nation, "Memorandum of Understanding [(MOU)]," *in Voisey's Bay Mine and Mill Environmental Assessment Panel Report* app. c (Mar. 1999) (Joint EA Panel Report) (MOU signed Jan. 31, 1997), http://www.ceaa.gc.ca/default.asp?lang=En&n=0A571A1A-1&printfullpage=true.

the Newfoundland Court of Appeal determined that infrastructure work should be halted until the EA took place.[95]

The EA was completed in March 1999. The assessment determined that environmental impacts could be mitigated such that the project could proceed. However, the assessment also recommended that agreements be entered into with respect to Aboriginal land claims and that IBAs be entered into with Innu and Inuit groups as a precondition of development.[96] The federal government refused to commit to settle the Innu and Inuit land claims prior to approving the mine development. In September 1999, an application was filed in federal court by Innu and Inuit organizations requiring land claim resolution prior to project approval.[97]

Throughout 2000 and 2001, extensive negotiations took place between each of the federal and provincial governments, VBNC, the Innu Nation, and the LIA. In particular, VBNC admitted that it had been unrealistic in its early assessments of Aboriginal concerns and came to understand that "development would not go ahead without Inuit and Innu consent."[98]

In June 2002, VBNC reached agreements with both the Innu and Inuit as to benefits and protections that would be granted in conjunction with the development of the mine. On June 25, 2002, the LIA and the Innu Nation voted to accept the IBAs negotiated with VBNC, effectively consenting to the development of the mine. While voter turnout was only half of those eligible, over 80% of the Inuit and over 70% of Innu who voted supported the IBAs.[99] The Voisey's Bay IBAs addressed education and training, preferential employment opportunities for Aboriginals (of at least 25% and up to 50% of the mine workforce), and preferential business opportunities for Aboriginal companies in supply and service contracts to the mine. As well, the IBAs provide compensation for anticipated impacts from the mine, including loss of harvesting opportunities. Monitoring programs were established for the benefit of the Aboriginal communities.[100] The IBAs set

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[95] Labrador Inuit Ass'n v. Newfoundland (Minister of Environment & Labour) (1997), 152 D.L.R. (4th) 50 (Nfld. C.A.).

[96] *See* Joint EA Panel Report, *supra* note 94.

[97] Joan Kuyek, "Innu Nation going to court to halt Voisey's Bay," *Native News* (Sept. 7, 1999).

[98] Inco Ltd., *Nickel on the Big Land: The Voisey's Bay Development* 30, 40, 42 (2006).

[99] "Innu OK Voisey's Bay deal," *The Halifax Daily News* (June 26, 2002) (Lexis).

[100] Isabella Pain & Tom Paddon, "Negotiating Agreements: Indigenous and Company Experiences: Presentation of the Voisey's Bay Case Study from Canada," *International Seminar on Natural Resource Companies, Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution* (Moscow, Dec. 3–4, 2008).

a framework for environmental co-management that was considered to be an innovative model of sustainability, addressing socio-cultural, economic, and ecological concerns.[101]

In conjunction with the settlement of the IBAs, the Innu and Inuit agreed to allow mine project authorizations to be issued by federal and provincial governments based upon a development agreement that would recognize land claim negotiations and rights under the IBAs, rather than requiring all land claims to be settled prior to development. Such development agreement was negotiated with the province (upon whose lands the mine would be developed). In addition to confirming the supremacy of rights under the IBAs, the development agreement grants revenue sharing rights to the Innu and the Inuit (5% and 3% respectively) of provincial revenues from the project.[102]

Development of the Voisey's Bay mine proceeded, with both managerial and operational involvement in implementation of the IBA obligations.[103] In 2005, the mine became operational. The IBAs are confidential, as are reports with respect to their implementation. However, VBNC sustainability reports periodically provide highlights of such implementation, with Aboriginal employment noted at or above 50% of the mine workforce, suggesting a level of success under the IBAs.[104] In January 2005, a land claims agreement was entered into by the LIA and the provincial and federal governments. This agreement addresses revenue sharing with respect to future development of owned and co-managed lands and specifically affirms rights granted under the Voisey's Bay IBA.[105] The land claims of the Innu Nation have yet to be resolved.

In March 2013, VBNC negotiated the underground expansion of the mine, extending the operation life of the facility to 2035. In the amendment of the development agreement with the province addressing such expansion, the application of the IBAs to all future development and operations

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[101] Gibson, *supra* note 92, at 342.

[102] Voisey's Bay Development Agreement Among Her Majesty the Queen in Right of Newfoundland and Labrador and Voisey's Bay Nickel Company Limited and Inco Limited (Sept. 30, 2002), http://www.nr.gov.nl.ca/nr/royalties/legal.pdf.

[103] Pain & Paddon, *supra* note 100, § 5.

[104] Inco Ltd., "Moving Towards Sustainability: 2005 Good Neighbours Report on Health, Safety, Environment and Community," at 8 (2005); Vale Inco Newfoundland & Labrador Ltd., "Corporate Social Responsibility Annual Report 2008," at 3 (2008); Vale Newfoundland & Labrador, "Corporate Social Responsibility Annual Report 2010," at 2 (2010).

[105] Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada (2004).

of the mine was acknowledged, confirming that the employment and business opportunity preferences, as well as compensation and revenue sharing will be enhanced as production expands.[106] This suggests that the Innu and Inuit have provided support for such expansion, again demonstrating successful implementation of the IBAs.

The Voisey's Bay negotiations stand apart in the evolution of IBAs as there is likely no better example of Aboriginal stakeholders taking such a multifaceted approach in advancing their positions. Through protests, media events, and legal challenges directed at federal and provincial governments and the mine proponent, the Innu and Inuit were able to redirect the development plan for the mine and influence negotiations to such an extent that new models of co-management and revenue-sharing were invoked. Although the mine development was initially delayed beyond its proposed operation commencement date in order to negotiate the IBAs, the project proceeded expeditiously after agreements were reached and the parties have continued to work cooperatively under the IBAs for more than a decade. As the land claims of the Innu remain unresolved, it may be assumed that sole reliance on the Crown or legal remedies to resolve Aboriginal rights would have resulted in significant project delays and loss of economic benefits for both VBNC and the Aboriginal communities.

[b] The Victor Diamond Mine

Notwithstanding that IBAs have become commonplace with respect to mine development in Canada, such agreements do not always ensure cooperative efforts throughout the operation of a mine. The example of the IBA entered into between De Beers Canada Corporation (De Beers) and the Attawapiskat First Nation is an example of an agreement that was intended to set a foundation for cooperation throughout the projected life of the Victor mine.[107] However, such early cooperation was not sufficient to address all community concerns and De Beers has faced escalating demands and impacts to mining operations.

The operation of the open pit diamond mine impacts 5,000 hectares of the traditional lands of the Attawapiskat First Nation. The Attawapiskat First Nation has significant social and economic issues, perhaps to an

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[106] Agreement Among Gov't of Newfoundland and Labrador, Vale Newfoundland and Labrador Ltd. & Vale Canada Ltd., "Fifth Amendment to the Voisey's Bay Development Agreement" (Mar. 28, 2013), http://www.nr.gov.nl.ca/nr/royalties/amendment_agreement5.pdf.

[107] De Beers' policy, specific to Canada, requires free, prior, and informed consultation before mining exploration begins. De Beers also has an FPIC policy that indicates a project must have Aboriginal community support before initiating any significant operations where they will have a "substantial" impact on Aboriginal interests. *See* De Beers Group, "De Beers Group Community Policy" (Jan. 2012).

even greater extent than other remote Aboriginal communities in Canada. Reportedly, over 80% of its community members are unemployed and receiving social assistance. Housing and infrastructure problems have reached crisis proportions in recent years.[108]

In conjunction with government consultation obligations, De Beers initiated consultation with Aboriginal groups long before any public announcement regarding the proposed mine. In November 1999, De Beers signed a memorandum of understanding (MOU) with the Attawapiskat First Nation, in anticipation of the negotiation of an IBA. In 2002, the Attawapiskat First Nation expressed concerns regarding its capacity to protect its treaty and Aboriginal rights and terminated the MOU in order to allow for further internal consideration and legal advice.[109] Following such review, the parties entered into a feasibility partnering agreement that addressed issues such as environmental monitoring, health and safety in mine operations, permitting processes, and business opportunities for the community. As well, De Beers committed to a financial contribution of $150,000 to promote economic and social development and $600,000 toward the construction of a training centre in the community to allow for education upgrading. The contract for construction of the winter access road to the proposed mine was also granted to Attawapiskat First Nation.[110] The agreement resulted in the Attawapiskat First Nation providing support for De Beers' feasibility study of the Victor mine and related preliminary work.

Following the feasibility study and the public announcement of the proposed mine, the Ontario government provided financial support (approximately $130,000) to Attawapiskat First Nation to support the negotiation of the IBA.[111] Government funding of $10 million was pledged for skills training in the community and further commitments were made by De Beers with respect to training facilities and equipment.[112]

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[108] "De Beers and Attawapiskat First Nation formalize agreement for Victor Project," *Canada NewsWire* (Dec. 12, 2002) (LexisNexis) (Victor Project).

[109] Drew Hasselback, "Natives halt De Beers diamond project," *National Post* (Aug. 1, 2002) (LexisNexis).

[110] Victor Project, *supra* note 108.

[111] "Attawapiskat receive assistance for De Beers agreement," *Diamond Intelligence Briefs* (Mar. 28, 2003) (LexisNexis).

[112] John Ivison, "Another facet of troubled reserve; Attawapiskat gets hefty diamond mine payments," *National Post* (Dec. 7, 2011) (LexisNexis).

Negotiation of the IBA commenced in 2003 at the same time that De Beers undertook the construction of the employment centre.[113] An agreement in principle was reached between De Beers and the Attawapiskat First Nation in December 2004, and in June 2005 the IBA was ratified by over 85% of community members. The IBA addressed training, education, preferential employment and business opportunities, and environmental management requirements. As well, the IBA provided for direct financial compensation of Attawapiskat First Nation, in addition to servicing and employment contracts. It is projected that such compensation will reach approximately $30 million over the 12-year mine life. Following ratification, the federal government committed over $360,000 to Attawapiskat First Nation to help them take advantage of the business opportunities at the Victor mine.[114] In November 2005, the IBA was signed. According to De Beers, Attawapiskat First Nation gave its consent through the IBA to a defined area of exploration and mining of 18 kimberlite pipes. If pipes were to be added to extend the mine, there would be new negotiations.[115]

Throughout 2006 and 2007, approximately 500 Attawapiskat community members were employed in the construction of the Victor mine and various Attawapiskat companies were involved in supporting the construction (through the provision of services such as supplying catering, dynamite and helicopters). The mine opened in 2008 and since that time approximately one fifth of the full-time jobs at the mine (100 of 500 positions) have been held by Attawapiskat First Nation members.[116] Since the commencement of construction to the present, De Beers reports that approximately $360 million in contracts have been granted to companies run by the Attawapiskat First Nation or its affiliates.

De Beers has confirmed that it has satisfied its commitments under the IBA and it has also made various efforts to support the Attawapiskat community, including conducting a literacy program, providing emergency housing (at a cost of approximately $1 million), and lobbying the

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[113] Teviah Moro, "Diamonds offer hope of jobs for Attawapiskat, but youth lack needed education," *The Canadian Press* (Nov. 16, 2004) (LexisNexis).

[114] "Proposed diamond mine could bring benefits," *Windspeaker* (Sept. 2005) (LexisNexis). De Beers paid for the referendum, at a cost of $150,000. The percentage of people voting in the election is unclear, with reports suggesting anywhere from 22% to 48% of the population voted in the referendum.

[115] Boreal Leadership Council, "Free, Prior, and Informed Consent in Canada," at 20 (Sept. 2012), http://www.borealcanada.ca/documents/FPICReport-English-web.pdf.

[116] Tom Ormsby, "Attawapiskat, De Beers enjoy close relationship," *Guelph Mercury* (Dec. 22, 2011) (LexisNexis).

federal government for new school facilities.[117] Reportedly, De Beers has also offered project management and maintenance planning support to Attawapiskat First Nation.[118] In 2009, the Victor mine was recognized by *Mining Magazine* as the "Mine of the Year." In 2010, De Beers received the Prospectors and Developers Association of Canada (PDAC) Environmental Social Responsibility Award, in part for its cooperation with Aboriginal communities surrounding Victor mine.

Notwithstanding successes under the IBA, there have been periods of strain. In 2009, members of the First Nation blockaded the winter road (the key supply line to the mine), interrupting the transport of supplies that were essential to mine operations throughout the year.[119] The central issue in the blockade was the need to revisit the IBA due to ongoing economic challenges of the community as well as lack of transparency of financial returns from the mine, asserted lack of legitimacy of the leadership, and lack of legitimacy of the IBA. That said, there was not broad community engagement in the blockade and community leadership did not endorse the protest. Although the matter was resolved peacefully, similar blockades occurred again in 2011. In February 2013, further blockades by a small number of Attawapiskat First Nation members could not be resolved amicably with band council and De Beers sought and obtained a court order providing injunctive relief. However, the court ruling against the Attawapiskat community members was not enforced by police or band council. Instead, De Beers resolved the matter by providing further undertakings to reconsider the IBA and related employment and training issues.

The Victor Mine is an example of early outreach by a mine proponent and collaboration with all levels of government for the purpose of community development. Both De Beers and the Attawapiskat First Nation have made public comments with respect to the IBA commitment establishing a relationship for ongoing cooperation in the future. However, such efforts did not secure sufficient support to ensure uninterrupted mine operations. In circumstances where social and economic conditions are desperate and government response to such issues is viewed by the First Nation as inadequate, a mining proponent such as De Beers may be looked to for community and individual support and services beyond IBA commitments (and beyond what private-sector entities should arguably be providing in

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[117] De Beers Group, "Report to Society 2009: Living up to diamonds," at 70, 73 (2010).

[118] Danielle Wong, "Protesters visit De Beers to voice their frustration; Company mines diamonds on Attawapiskat lands, but won't help support community, residents say," *Toronto Star* (Aug. 20, 2009) (LexisNexis).

[119] Al Pope, "Strangers get rich, locals get desperate," *Yukon News* (Nov. 25, 2011) (LexisNexis).

Canada). With operational pressures due to opposition activities, a mine operator may have limited leverage to resist reopening IBAs to increase benefits. The Victor Mine provides a clear warning as to the limited efficacy of IBAs where Aboriginal governance structures cannot be relied upon to uphold the terms of the IBA.

§ 20B.06 Conclusion

In May 2013, the International Council on Mining & Metals (ICMM) approved a position statement which "sets out ICMM members' approach to engaging with Indigenous Peoples and to [FPIC]."[120] In ICMM's view, FPIC comprises a process based on good faith negotiations with Aboriginal communities and an outcome. The outcome is that Aboriginal peoples can give or withhold their consent to a project. ICMM members expressly commit in the position statement to work to obtain the consent of Aboriginal communities for projects that are located on lands traditionally owned by or under customary use of Aboriginal peoples and are likely to have significant adverse impacts on Aboriginal peoples.[121] The position statement is an important public commitment endorsed by leading global mining companies and is consistent with the IFC's FPIC requirements.

However, the position statement clearly recognizes the right of states to make decisions on the development of natural resources and that in most countries, neither Aboriginal peoples nor other groups have a right to veto projects. The position statement acknowledges that where consent cannot be reached, a host government may decide to proceed with a project, balancing the rights and interests of Aboriginal peoples with the wider population.[122]

Civil society organizations have been quick to take issue with ICMM's language regarding balancing the rights of Aboriginal peoples with the wider population,[123] but this balancing concept is consistent with Canada's

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[120] ICMM, "Position Statement on Indigenous Peoples and Mining" (May 2013), http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining. ICMM member companies include Barrick, Goldcorp, Inmet, and Teck. The MAC and PDAC are ICMM association members. The MAC is also set to release a state-of-play report regarding FPIC shortly.

[121] *Id.* at Commitment 4.

[122] *Id.* at Recognition Statements 4, 5.

[123] *See, e.g.*, Oxfam America, "Posts Tagged 'Free Prior Informed Consent,'" http://politicsofpoverty.oxfamamerica.org/tag/free-prior-informed-consent/. For more detailed commentary on FPIC generally, see Cathal Doyle & Jill Cariño, "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (May 2013); Boreal Leadership Council, *supra* note 115; Irene Sosa, Sustainalytics, "License to Operate—Indigenous Relations and Free Prior and Informed Consent in the Mining Industry" (Oct. 2011).

constitutional and legal regime regarding Aboriginal peoples, which also reflects the notion of balancing Aboriginal and societal rights to achieve reconciliation.

While there no doubt remain significant challenges to implement FPIC in Canada, IBAs are, at a minimum, a practical, interim, and imperfect solution to obtain and maintain the consent of Aboriginal peoples for projects that are likely to have significant adverse impacts on Aboriginal rights. Almost 20 years of experience in Canada suggests that IBAs can help to build constructive and mutually beneficial relationships between mining companies and Aboriginal communities. Critics may argue that the IBA approach in Canada reflects a narrow interpretation of FPIC, but in practice the IBA approach has been an important step to operationalize Section 35 Rights. It also goes a long way to achieve the balance and compromise consistently articulated by the Supreme Court of Canada since 1990. While the Canadian government and Aboriginal peoples work to resolve outstanding Aboriginal rights, IBAs will continue to be an important mechanism to build and maintain stronger relationships with Aboriginal peoples in a manner that respects and supports Aboriginal rights in Canada and implements the principle of FPIC through a mine's life cycle.