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**Anatomy of a Resource
Project: IBA Workshop**
Canadian Aboriginal Minerals Association
MEETING MINDS, MAKING MINES:
19th Annual Conference

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McDonald & Company
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Recent & Current IBA Work (Examples)

- **Victor Diamond Project** - IBA in 2005 - Attawapiskat First Nation and De Beers Canada Inc.
- **Orca Sand & Gravel Project** - IBA in 2005 – between Kwakiutl Band Council and Polaris Minerals Ltd.
- **Galore Creek Project** - Participation Agreement in 2006 - Tahltan Central Council and NovaGold Canada Inc.
- **TMX Anchor Loop Pipeline** - Project Agreements in 2007 - Simpcw First Nation, Canada Hydro Developers and North American Construction
- **Thor Lake Rare Earth Metals Project** – current negotiations – Yellowknives Dene and Avalon Rare Metals
- **Gahcho Kue Diamond Mine** – current negotiations – Yellowknives Dene and De Beers Canada Inc.

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Anatomy of a Resource Project: IBA Process from Exploration through Implementation

Outline

- Impact Benefit Agreement (Overview)
- Exploration Issues
- Crown- First Nations Context
- IBA's and Environment
- Preparing for Negotiations
- Negotiation Approach
- Negotiations
- Implementation

Anatomy of a Resource Project: IBA Process from Exploration through Implementation

A. Impact Benefit Agreements Overview

- Agreement between resource development company and First Nation
- Also referred to as "Participation Agreement", "Development Agreement" or "Accommodation Agreement"
- Generally implemented upon or prior to a construction of a mine

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Impact Benefit Agreement

- An effective IBA will:
 - minimize adverse social and environmental impacts of a project
 - maximize business opportunities, economic, employment and training benefits from a project
 - provide an effective framework for cooperation with an industry partner
 - establish a clear framework for implementing the IBA terms

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Typical Steps:

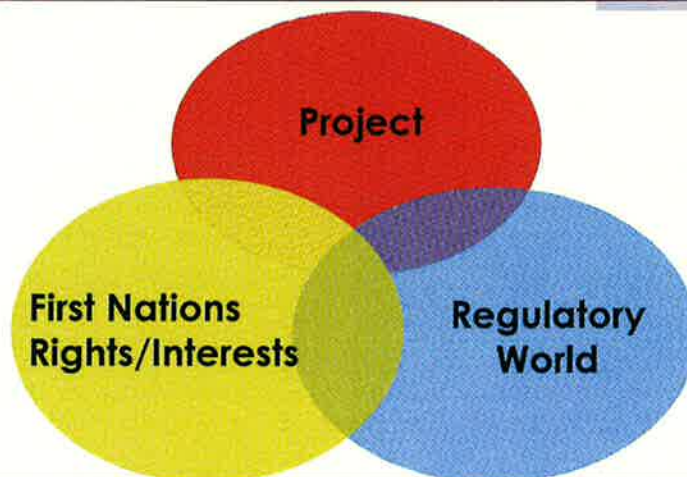
- Information Gathering
- Developing Positions
- Preparing for and structuring Negotiations
- Conducting Negotiations
- Implementing Agreements

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Typical Steps for Project Development

- Exploration
- Advanced Exploration/Feasibility
- Permitting
- Arrange Project Financing
- Construction
- Operations
- Closure & Remediation

Anatomy of a Resource Project: IBA Process from Exploration through Implementation



Anatomy of a Resource Project: IBA Process from Exploration through Implementation

B. Exploration Issues (Common Concerns):

- "Can't complete IBA until we know we have a mine"
- "Can't tie future owner/major's hands"
- "Can't afford IBA type benefits now/yet"
- "First Nation can't provide support too soon"

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Exploration Issues (potential solutions)

- Limit agreements to commitments in exploration phase
- Permit/approvals – limited
- Time frame– limited
- Scope of work– limited
- Use early phase "Development or Exploration Agreements"
- Cooperative approach to future development and IBA negotiations

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Exploration Issues

- Exploration Agreement (typical terms):
 - Scope of Support – exploration only
 - Environment and cultural protection
 - Employment and training
 - Contracting
 - Compensation and Options
 - Reporting
 - Dispute resolution
 - General provisions

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C. Negotiation Preparation

- Know relationship dynamics among Crown, Proponent, and First Nation(s)
- Know Project
- Know Your Goals
- Good Relationship/Communications Set

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Crown – First Nation Relationship

Crown



First Nation

- | | |
|--|---|
| <ul style="list-style-type: none"> ▪ Duty to consult & accommodate ▪ Government decision maker (project approval) ▪ Grants third party interest ▪ Government policies on consultation and accommodation ▪ Legislative limitations | <ul style="list-style-type: none"> ▪ Duty to respond and engage in consultation offers ▪ Holds constitutionally protected rights ▪ Seeks protection of rights ▪ Consultation and accommodation policies |
|--|---|

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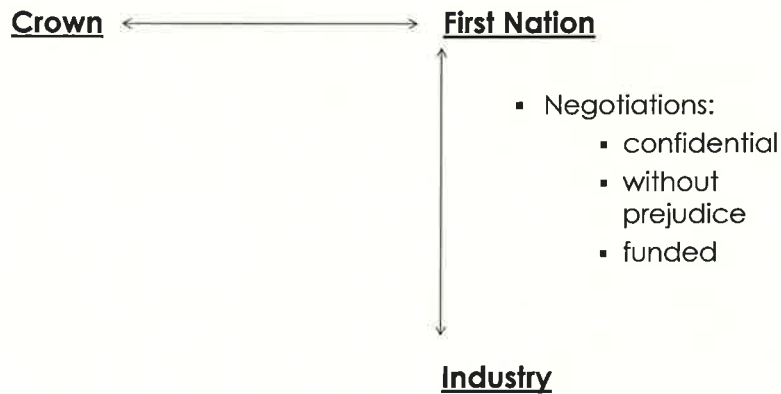
Industry



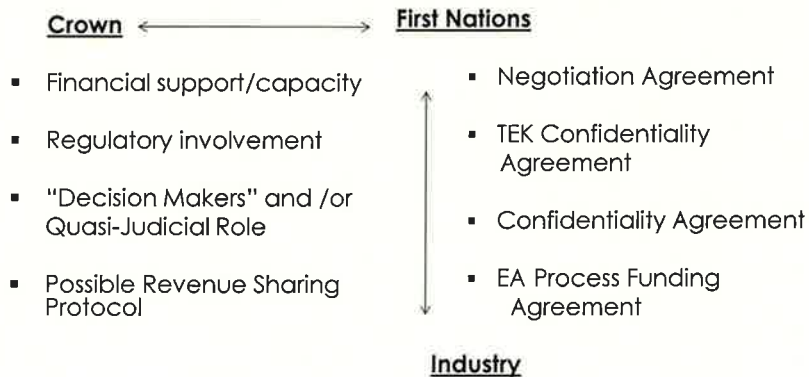
First Nation

- | | |
|---|--|
| <ul style="list-style-type: none"> • Business interests • Delegated consultation activities • Confined in by policy, law and economics • Required TK data/study | <ul style="list-style-type: none"> • Holder of TK • Limited capacity (time & HR) • Treaty Rights relationship with crown • Can negotiate |
|---|--|

Anatomy of a Resource Project: IBA Process from Exploration through Implementation



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Crown  First Nations

- Consultation Protocols
- Revenue Sharing Agreements
- "Co Management Agreements"
- Interim Measures Agreements

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Preparing for Negotiations

- Information Gathering - Time and Resources Required
 - Due Diligence of Project
 - Corporate Due Diligence
 - Investor Due Diligence
 - Current Stage of Development?
 - Likelihood that Project is Credible?
 - Access to Information

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Preparing for Negotiations

- Review Regulatory Process:
 - Environmental Assessment Process(es)
 - License and Permitting Processes
 - Third Party Interests (eg. Tenures for Land Titles, Mining, Forest, or Water legislation)
 - Applicable Crown Policies on Consultation & Accommodation

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Preparing for Negotiations

- Review Aboriginal Law Issues:
 - Traditional Knowledge
 - History of First Nation
 - Applicable Aboriginal Law: Treaty? Land Claim Settlement? TLE? Specific Claims? Aboriginal rights or title?
 - Overlaps? Multiple First Nations?
 - Ongoing Negotiation or Litigation?

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Preparing for Negotiations

- Review Legal Position & Options:
 - Project opposition
 - Project delay
 - Factors
 - costs
 - timing
 - likelihood of success
 - impact on negotiation leverage

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Preparing for Negotiations

- **Concurrent** discussions:
 - within First Nation community (internal)
 - other First Nations (overlap issues)
 - Crown (consultations and negotiations)
 - Proponent (consultations and negotiations)
 - potential Business Partners and Investors
 - Press/Public

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Preparing for Negotiations

- Determine Goals (Short and Long Term) with Community Input and Support
- Core values:
 - preserve and protect rights
 - preserve culture, way of life, connection to land
 - environmental stewardship
 - economic and social self-sufficiency
 - community development
- Factors for accepting development:
 - development complies with core values

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Preparing for Negotiations

- Determine strategy for:
 - negotiations with proponent
 - negotiations with investors
 - negotiations with jv partners
 - negotiations with government
 - position with regulators/courts
 - Position with Public/Press

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Preparing for Negotiations

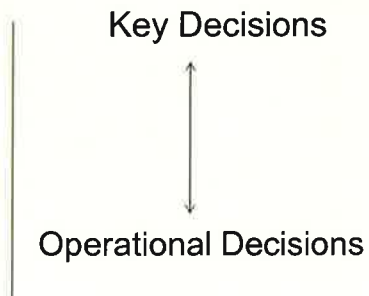
- Set Negotiation Team members
- Negotiations Led by Leadership (Advisors Play Support Role)
- Obtain & Maintain Community Mandate/Input
- Retainers w/ Consultants/Experts – Environmental experts, financial advisors
- Confidentiality Agreements with Consultants/Experts

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Preparing for Negotiations

Determine Internal Governance:

- Membership
- Leadership
- Business Committee
- Negotiation Team
- Lead Negotiator



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Preparing for Negotiations (Process Agreements)

- Interim/Exploration Agreement
- EA Funding Agreement
- Negotiation Agreement
- Confidentiality Agreement (access to data)
- Traditional Ecological Knowledge ("TEK") Agreement

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Example: Attawapiskat First Nation & DeBeers Canada Inc.

- Initial Exploration Agreement – late 1990's
- Terminated mid-2002
- All consultation and negotiation halted in mid 2002

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Attawapiskat First Nation & DeBeers Canada



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Internal Review (Summer 2002)

- Community dialogue/decision making
- Regulatory review
- Initial due diligence
- Community consensus and team building
- Permitting/Feasibility Efforts (Fall 2002)
- Communications to Regulators
("Slow Down & Consult")

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"Feasibility Partnering Agreement" Nov. 2002

- training centre
- capacity funds
- compensation
- monitoring
- contracting preferences
- employment preference
- joint permit review process
- recognition of rights
- without prejudice to full project

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TEK Confidentiality Agreement Negotiated

- Early 2003
- included TEK Working Group Terms of Reference
- TEK Required for EA processes

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Negotiation Agreement

- (early 2003)
- Without prejudice negotiations
- Confidential negotiations
- Funded negotiations
- Project development veto

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- Second Interim Agreement
- Similar to Feasibility Partnering Agreement

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IBA Negotiations

- May 2003 to June 2005
- Numerous Community Member Only Info Sessions
 - January to June 2005
 - Community, Cochrane, Moosenee, Timmins, Toronto
- June 21, 2005 Community Ratification (over 85% in favour)

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Federal EA

- Completed Fall 2005
- First Nation review of EA Approval Fall 2005
- November 3, 2005 IBA Signed

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D. Environment and IBAs

- Aboriginal and Treaty Rights
- Evidence of Right?
- Evidence of Impacts?
- Strength of Claim
- **Regulatory Steps?** Discretion of Decision Makers (EA Process focus of this presentation)
- Duties of Consultation and Accommodation?
- Mistakes or Faults in Duty?
- Regulatory Uncertainty?
- Opportunities for Influence (leverage) for FNs?

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Timing of Environmental Assessment/Negotiations

- Environmental issues are complex matters that must be addressed prior to negotiations in a confidential matter, but the parties would also be involved in on-the-record dialogue with government on regulatory matters like EA's
- First question: will IBA negotiations ensue prior to, during, or after an environmental assessment?

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Timing of EA's/Negotiations

- Negotiations after a completed EA is most beneficial for the Proponent from a risk management perspective
- This creates more certainty for Proponent
- Enhances Proponent's negotiation leverage
- A completed EA means the FN will have to challenge validity of the EA/regulatory process (lengthy, expensive and risky)

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Timing of EA's/Negotiations

- For FN's, ideal time to negotiate is prior to filing of an application for an EA, aka Environmental Impact Statement (EIS), Environmental Assessment Application, or Developers Assessment Report (DAR)
- FN review of early drafts of these documents helps to identify early, broad concerns with project
- Key Aboriginal law and environmental issues; "go-no-go" issues can be identified

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Timing of IBA Negotiations

- Many proponents will seek IBA negotiations as late in the regulatory process as possible
- This potentially increases tension among the parties
- Potentially moves the parties to time sensitive and positional bargaining

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Why seek environmental protection in IBA's?

- FNs typically do not trust government regulators to enforce environmental conditions of approval and require contractual commitments for added protection
- Government conditions for acceptable levels of protection or mitigation are not always acceptable to FNs
- Test(s) for addressing environmental protection may not sufficiently protect, culture, traditional use/ knowledge, or Aboriginal/ treaty interests
- Government regulations susceptible to change over the life of the project

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Why seek environmental protection in IBA's?

- Environmental monitoring not always sufficient for FNs
- Environmental gaps exist in legislative framework, necessitating additional conditions based on contract
- EA processes may not be sufficiently thorough
- IBA conditions on environmental protection can possibly be included as additional governmental conditions in regulatory approach

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EA Shortcomings (Possible)

- Generally, EA processes are both structurally and practically inadequate to permit meaningful consultation and accommodation on potential adverse impacts of asserted or proven Aboriginal/ treaty rights
- Proponents are delegated the procedural aspects of consultation and can be seen as "partners" in consultation with government, incorporated into the Crown's consultation "record"

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EA Shortcomings (Possible)

- government discussion regarding aboriginal or treaty rights may be carried on through the EA process
- Government bodies conducting the EA often prefer to use the terms "environmental effects" or "aboriginal interests" rather than potential impacts on "treaty rights" or "aboriginal rights" (*Haida* Test not used)
- This debate does not necessarily accord with respect of the duty to consult and accommodate First Nations (two differing languages)

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EA Shortcomings (Possible)

- EA's largely focused on identifying the potentially negative "environmental effects" of a project and how these effects can be avoided, mitigated or made "acceptable" (FN rights are not given priority)
- EA legislation provides little or no guidance as to how the duty to consult and accommodate fits into this analysis
- At times, the discussion surrounding "environmental effects" can be so narrow that it can exclude certain aspects of FN concerns about aboriginal or treaty rights

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EA Shortcomings (Possible)

- Definition of "environment" may not adequately correspond with case law definition of potential or proven Aboriginal/treaty rights and their protection
- Scoping of EA often too narrow
- Transboundary impacts not always considered
- Monitoring requirements may not be sufficient
- Closure and reclamation requirements may not be sufficient
- EA process may not allow for sufficient traditional and elder/member evidence to be considered

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EA Shortcomings (Possible)

- FN may not have an adequate opportunity to challenge/question proponents conclusions, which are often in dispute
- Some jurisdictions fail to adequately consider cumulative effects assessment
- Still no clear direction between feds and provinces on federal legislation related to threatened species
- Where quasi-judicial tribunals are involved, the Crown and such tribunals may be uncertain as to how duty to consult and accommodate is fulfilled
- Decision-making power of EA processes are often limited and cannot mandate negotiations or most accommodations typical in IBA's

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EA Participation

- FN and the proponent may enter into an agreement to allow the FN resources to adequately participate in the regulatory and environmental processes headed by the Crown
- this is often referred to as an EA or Regulatory Process Funding Agreement

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EA Process Funding Agreement

- FN participation in, if not carrying out, studies such as traditional use, wildlife, plant, ecology, fisheries and archaeological studies
- FN review of existing studies carried out
- Community information sessions
- Confidentiality, protection and ownership of Indigenous knowledge and TEK
- Without prejudice and non-derogation language, including that FN has not necessarily agreed that the regulatory process is adequate solely due to its involvement

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EA Process Funding Agreement

- Disclosure of FN interests in the project area and concerns with the planned project
- Enhancement of threatened species and correlative habitat
- Appropriate funding for FNs work and involvement in the above referenced materials

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E. Negotiation Approach

- Positional Approach:
 - Proponent doubts First Nations ability to affect the project and views First Nation as one of many "special interests" or "stakeholders"
 - First Nations use regulatory, media, political, litigation leverage
 - Parties maintain contentious bargaining positions
 - Minimal relationship and trust built
 - Agreements take longer and are more costly
 - Implementation remains contentious

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Negotiation Approach

- Suggested Approach:
 - Aboriginal/treaty rights and title recognized and understood
 - Commercial realities of exploration and development recognized and understood
 - Trust and relationships developed
 - First Nation seen as a partner, not a "special interest"
 - Negotiation & EA Agreement (and any other necessary agreements) put in place and negotiations commence
 - Partnerships built for productive implementation

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Negotiation Approach

- Interest based negotiations recommended
- Negotiation training essential
- Maintain cultural values and strength in negotiation process
- Internal negotiations required (often neglected)

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Negotiation Approach (Principles/Steps)

- Relationship
- Communications
- Interests
- Options
- Alternatives
- Fairness
- Agreement/Commitments

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Negotiation

- Typically Contains the Following Topics:
 - Certainty Language
 - Environmental and cultural protection
 - Financial Matters
 - Business Opportunities
 - Employment/Training
 - Infrastructure Use
 - Implementation
 - Dispute Resolution
 - Ratification

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Negotiations

- Certainty Language
 - Regulatory cooperation and support
 - Non-derogation
 - Scope of rights abeyance
 - Claims against the Crown

Anatomy of a Resource Project: IBA Process from Exploration through Implementation

Negotiations

- Environmental
 - Scope of Project
 - Environmental Emergencies
 - EA process involvement
 - Monitoring and Closure
 - Raising legitimate concerns (environmental, heritage values and TEK)
 - Costs for involvement

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Negotiations

- Environmental
 - Environmental Management
 - Consideration of Traditional Ecological Knowledge
 - Compensation for unpredicted adverse environmental affects
 - Ongoing permitting
 - Temporary Suspension

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Negotiations

- Financial Participation:
 - Initial Payments
 - Construction Payments
 - Annual Guaranteed Minimum Payments
 - Implementation Payments (employment, training, monitoring, etc.)
 - Upside Participation (based on NSR, GOR, or Free Cash Royalty)
 - Payments During Suspension
 - Equity Options

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Negotiations

- Factors Affecting Quantum and Structure
 - government tax & royalty base
 - likelihood of government accommodation
 - degree of impact
 - viability/profitability of project
 - other similar agreements
 - implementation requirements
 - other benefits in agreement
 - negotiation leverage of parties

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Negotiations

- Financial Participation
 - Need to negotiate access to financial feasibility data
 - Right of verification by First Nation of financial information
 - Independent financial analysis by First Nation

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Partners not Opponents:

- Project Value Factors:
 - The size of the anticipated returns
 - The date that the returns will be received
 - The risk that is taken to obtain the returns

"First Nations Risk" can significantly reduce project value by delaying expected returns and/or increase the overall risk

"First Nations Risk" can be reduced by recognizing costs of engaging First Nations in contentious manner and providing the opportunity to acquire project equity on financially attractive terms

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Negotiations

- Business Opportunities
 - Goals:
 - Maximize business development
 - Increase capacity
 - No increases to proponent's costs and project schedule
 - Preference options:
 - Without competitive bid process (open book negotiations)
 - With competitive bid process
 - Combination of both

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Negotiations

- Business Opportunities:
 - To facilitate First Nations business to supply goods and service to project
 - Number of contracts where "First Nations businesses" get priority for "Open Book Negotiations"
 - See CAMA presentation (2010) or soon at www.mcdonaldandco.com

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Negotiations

- Training:
 - training takes time and planning
 - preferences (initial ongoing hires)
 - training strategy to maximize employment
 - funding of training programs
 - training facility/ resources
 - pre employment training
 - prior learning assessments
 - qualifications/ standards

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Negotiations

- Employment:
 - maximize employment of First Nation members at project
 - employment objectives- a percentage of workforce
 - fixed targets- minimum employment commitment
 - company or First Nation to employ Aboriginal employment coordinators

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Negotiations

- Employment:
 - Human resources inventory
 - Company and First Nation cooperation for human resources strategy/plan
 - IBA to co-exist with collective agreements- unions (notice of attempts to certify) with First Nation standing

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Negotiations

- Use of Facilities
 - Access to project facilities
 - Use of airstrip by third parties
 - Use of access roads by third parties

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Negotiations

- Implementation
 - Implementation Committee
 - Implementation Coordinator(s)
 - Implementation Plan(s)
 - costs
- Dispute Resolution
 - Final and binding
 - Interim relief

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Negotiations

Ratification / Approval Process

- Aboriginal Rights and Title issues are communally held
- Community Meetings (on and off reserve)
- Designing Ratification Process
 - vote or meeting?
 - mail in ballots?
 - required majority?
 - sufficient notice?
 - level of detail provided?

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Implementation

- Steps/Activities
 - Corporate & Tax Structuring/Planning
 - Advanced Tax Rulings
 - Training Proposals/Plans
 - Wealth management (Trust Creation)
 - Business Development Strategy
 - Joint Venture Negotiations
 - Ongoing Environmental Review/Monitoring
 - Prepare Implementation Plan

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Implementation Activities

- HR Data Base
- Business Registry
- Staff /Teams:
 - IBA Coordinator
 - HR Coordinator
 - Training Coordinator
 - Environmental Monitors
 - Committee(s)
 - Business Arm HR
 - Trust Committee

Anatomy of a Resource Project: IBA Process from Exploration through Implementation

Conclusion

- maintain flow of information
- Recognize the size of the tasks and prepare for them
- time it takes to complete an IBA can be affected by:
 - how seriously industry proponent takes First Nation
 - willingness of industry proponent to treat First Nation as a partner and not with skepticism
 - lack of funding or capacity for the First Nation
 - Degree of preparation by First Nation
 - State of First Nation governance
 - availability of professional studies in a timely manner
 - issues internal to the company (i.e. financing dependent on First Nations support)
 - Differing opinions on leverage