

# SEMINAR ON THE IMPLEMENTATION OF IMPACT BENEFIT AGREEMENTS : SUMMARY OF DISCUSSIONS



Photo credit : Thierry Rodon

**September 10 to 15, 2020**

**Mushuau-nipi**



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From September 10 to 15, 2020, the MinErAL network held a joint seminar on the implementation of impact benefit agreements (IBAs) with Indigenous partners and representatives at Mushuau-nipi, the ancestral site located north of Schefferville. The five-day seminar looked at issues related to IBA implementation. This summary highlights the problems, questions, and potential solutions discussed during the proceedings.

### Implementation and Issues of Capacity for the Two Parties

- The communities and mining companies often have limited financial and human capacity to implement the agreements.
- Employee turnover results in lost time and expertise. One suggestion is to create key positions for coordinating and monitoring IBA implementation.
- The human resources required to adequately support committees and band councils are often in short supply.
- Communication requirements are also considerable. Constant work is needed to ensure communities continue supporting mining company projects.

### Environmental Monitoring

- Indigenous Guardians with recognized expertise need to be recruited for environmental monitoring. It was suggested that Quebec develop a recognized training program in this area.
- For the mining companies, obligations to shareholders and government take precedence over IBAs. The usefulness of the committees set up under the IBAs therefore depends on who the mining companies assign to them.

### Jobs and Training

- Indigenous employment targets established under the IBAs are difficult for mining companies to meet. It may be worthwhile to negotiate compensation under the IBAs in the event targets are missed.
- Two of the main issues related to Indigenous mining jobs are access to senior positions and high turnover. To tackle these issues, staff could be hired to monitor Indigenous employment and help make allowances for pursuing land-based activities (e.g., during hunting season, etc.)
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### Social Acceptability and Consent

- IBAs often lack social acceptance in the communities. Insufficient transparency in the process is one of the reasons often given for this.
  - Publicly negotiated IBAs could improve transparency and foster greater acceptability.
  - As this could be hard to put into practice, steps should at least be taken to ensure that all groups are represented during negotiations (women, elders, youth, hunters, etc.).
  - As this could be hard to put into practice, steps should at least be taken to ensure that all groups are represented during negotiations (women, elders, youth, hunters, etc.).
- It would be advisable to coordinate negotiations at the nation level. Once negotiations are completed, however, each community should retain decision-making power.
- There is no single assessment grid for evaluating a project and deciding whether the benefits outweigh the drawbacks. By implementing a community-specific impact assessment process, communities can impose their own grid and secure community consent to the project before signing an agreement.



### Use of Royalties

- It seems preferable to invest royalties in trust funds, infrastructure, and public services rather than redistribute them to individuals. However:
  - infrastructure requires maintenance that communities may find hard to afford in the future;
  - investing in public services is not a sustainable strategy;
  - it is often difficult to put royalties in trust when immediate community needs are so great.
- It is important that those responsible for managing royalties develop a long-term strategy to ensure sustainable community development beyond the life of the mine.
- The government may decide to reduce its financial contributions to communities receiving significant royalty payments, which is why royalty amounts should remain confidential.
- It would be a good idea to establish mechanisms for internal collaboration between Indigenous nations and communities to assist in developing best practices.

### Subcontracting

- The size of the contracts often penalizes Indigenous businesses. Online bidding also prevents some businesses in remote areas from participating fully in the process.
- Participants reported that businesses often pay Indigenous subcontractors late. To prevent this from happening, guarantees could be included directly in the IBAs.

### Consultations

- Communities receive frequent requests for consultation, and it's hard for them to respond to all of them in a timely manner.
- In Quebec, the interim consultation guide has not been updated for years, and each department has adopted its own way of doing things.



# Introduction

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From September 10 to 15, 2020, the MinErAL network held a joint seminar on the implementation of impact benefit agreements (IBAs) with Indigenous partners and representatives at Mushuau-nipi, the ancestral site located north of Schefferville. The seminar, which was held in accordance with public health guidelines, brought together members of the Innu and Naskapi communities, representatives of Indigenous organizations and mining companies, and researchers and students in political science and law. Participants agreed to hold the seminar under Chatham House rules. This summary highlights the main issues discussed without identifying speakers or their affiliation.



Photo credit : Sabrina Bourgeois

# Implementation and Issues of Capacity for the Two Parties

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The issue of community and mining company capacity to implement impact and benefit agreements (IBAs) was discussed at length by participants.

## Staff turnover

IBA implementation requires negotiations and ongoing monitoring that may be hindered by staff turnover or a lack of human and financial resources, both within Indigenous communities and at mining companies. IBAs are negotiated confidentially, primarily by lawyers, but are implemented by others, which makes it easy to lose sight of the spirit of the agreement. Chiefs, community leaders, and company representatives change often, and turnover is also high among the representatives who sit on the monitoring committees. A lot of time is wasted as a result. Items have to be renegotiated because of personnel changes, expertise is lost, and provisions in the agreement are reinterpreted.

At the same time, relationships are sometimes forged between members of the committees or during negotiations, laying foundations for new bridges between communities and companies and facilitating IBA implementation.

For this reason, it's important to ensure continuity throughout the IBA process. One suggestion is get the people responsible for implementation involved as soon as negotiations start to ensure that they participate at every step. Key positions can be created to ensure this continuity. With Voisey's Bay and Opinaca (Newmont), for example, one person is responsible for monitoring the implementation of the IBA ("BA Enforcer"). This is a key position that allows for effective implementation monitoring by the communities.

## Community capacity

Participants reported that there are often insufficient human resources to properly support the committees established under IBAs. Even if there are many people with recognized expertise on the monitoring committees, the committees need trained teams to implement their decisions and follow up with the mining companies. The same is true for band councils. Their administrative staff is often limited, which means that every change in an administrative or elected positions results in a significant loss of knowledge and expertise.

Signing an IBA is no guarantee of success in its own right. Local capacities must also be strengthened to ensure effective implementation. One of the main issues raised was that the idea of "local capacity-building" at a general level—and not just in terms of mining-related skills—is usually absent from IBAs. At present, communities are often overburdened and lack the necessary human and financial resources to properly monitor each of the agreements and committees and ensure proper implementation. A new approach should be adopted to meet these needs.

## Communication needs

Communities with an IBA are also responsible for effectively conveying their needs to the mining company on an ongoing basis. They must establish a dialogue and keep the company informed. A community shouldn't assume that the company understands its needs. By the same token, the company is responsible for keeping the community up to date on developments and ensuring its ongoing support for the mining project.



## Mining company capacity

Mining companies may also have limits on their capacity to implement IBAs. Not only may their financial resources be limited, but given the limitations of the legal framework and the absence of specific constraints or indicators to be met in these agreements, companies don't necessarily prioritize IBA implementation in the face of other legal obligations. Participants noted that IBA implementation is not always a priority for companies, particularly if they are under pressure. Even if IBAs have become the industry norm for companies developing new mines or modifying or expanding existing ones, there are no government regulations dictating how they should negotiate and implement such agreements, whereas their environmental and financial obligations are, in contrast, clear. In this sense, IBA implementation may depend more on the goodwill of the company, which will judge its importance and how much a priority it is.

It was reported, for example, that mining companies may view IBAs as a form of approval for starting a project. Many IBA provisions have no obligation of results. The idea behind them is more one of making reasonable efforts to achieve the targets. Similarly, the performance obligations associated with some IBAs don't guarantee that the mining companies that signed them will meet their targets. Although the companies do strive to meet their commitments, they will often do an assessment to determine whether failing to do so is the less «costly» option in the event of a problem. Most IBAs have arbitration clauses if there is a dispute between the parties. It was suggested that mining companies would rather avoid appearing before a judge where they could have terms and conditions imposed on them in public.

## The role of government

IBA compliance is often one of the first things to fall by the wayside when a company is in difficulty. Without going so far as suggest that governments be given a role during negotiations, it was mentioned they should legislate to make IBAs mandatory, and not solely reliant on the goodwill of mining companies and their employees.

Companies are and must continue to be aware of the importance of these agreements, not only for the communities, but for their own business development. They need to see that measures such as the hiring of Indigenous Guardians are not a cost, but something beneficial and profitable for their mines. Not only do the Guardians help prevent environmental problems, they also act as experts who, once trained, can represent their community on various committees. The recruitment and training of Guardians helps ease the burden on communities by ensuring they have more experts to represent them. Strong, assertive nations with their own experts are a plus for mining companies and project stability.

# Environmental Monitoring

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Environmental monitoring is an important implementation issue. In an IBA, communities can negotiate provisions to strengthen environmental monitoring. In the IBA for the Voisey's Bay mine, for example, the mine funded the training and hiring of Indigenous Guardians. Political leaders played an important role in ensuring that staff were hired and that a meaningful protection plan was put in place. And the quality of the people recruited for Guardian positions has allowed for effective protection of the land. Among other things, Guardians helped the mine avoid a major spill—and the stiff fines that would have been imposed as a result. A recognized training program, like a certificate for example, should also be available in Quebec. Such a program would help foster recognition of Indigenous expertise. Without these skills and academic recognition, it is easy for the government and businesses to delegitimize Indigenous expertise and knowledge.

Environmental obligations take precedence over IBA obligations for the mining companies. The environmental monitoring committees are priority, and the role played by the committees set up under the IBAs depends in large part on the people responsible for them at the mine. It could be interesting to consider adding financial compensation provisions if the company does not meet its commitments.

Another matter related to environmental issues is the question of identity. How does one be Innu in the context of a mine?





# Jobs and Training

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The vast majority of IBAs contain Indigenous employment targets that the mining companies must try to meet. It's important to note that these are not quotas, and that in most cases, there is no penalty for mines that fail to meet their targets. It was noted that the Alouette aluminum plant is an exception, as it must pay penalties if job creation targets in processing are not met. It was seen as an interesting model, given the difficulty of meeting hiring targets.

One of the main challenges with respect to Indigenous mining jobs is access to senior positions. It was reported that many mines struggle to meet their Indigenous employment targets and that the positions filled are often those requiring the fewest qualifications, such as service jobs. Skilled jobs are still largely filled by non-Indigenous people.

Turnover is also very high among Indigenous workers, due in part to the fact that the positions held are usually low-skilled jobs. Participants reported that the corporate culture in some companies may still have racist and discriminatory overtones, which does little to foster retention and advancement. Training, mentoring, and awareness training within companies is needed to change this situation. At the same time, it could be a good idea to assign several Indigenous employees to work together on the same teams. It was reported that this could improve their work experience.

Lastly, jobs are often not adapted to Indigenous culture. For example, participants noted that companies could envisage granting time off during moose and goose hunting season to accommodate Indigenous workers and help retain Indigenous jobs. They also mentioned that efforts could be made to promote working conditions that help sustain a mixed economy (income from mining/returning to the land and vice versa), as presented in the report of the Royal Commission on Aboriginal Peoples. It is difficult, however, to convince private companies to provide such conditions, especially in a unionized workplace, when it is a minority of their employees who would benefit. There appear to be concerns about equity between Indigenous and non-Indigenous jobs, whereas in fact, the current situation disadvantages Indigenous employees.

The absence, in some cases, of Indigenous employability programs was cited as an additional handicap. And when IBAs do include provisions for employment and training assistance programs, their success is often limited. It was recommended that people be recruited to track employment and training rates and that more training be provided to the communities.

Even when companies do meet their employment targets, they are unwilling to compromise on qualifications when hiring. Most of the mining companies discussed at the seminar apparently have priority hiring clauses for Indigenous applicants with equal qualifications. Labour unions were also identified as potential obstacles to hiring. They need to be educated so they can be part of the solution. The metal workers union, for one, has a policy and plan to promote Indigenous hiring.

In light of these issues, questions arise as to whether hiring targets are the best way to contribute to Indigenous employment under IBAs. Perhaps IBAs should focus on job retention and job quality instead of fixed targets. Mining companies could offer compensation rather than pay penalties when targets are not met. Compensation could take the form of training funds for communities and should also be included in the agreements. It is important to remember, as participants noted during the seminar, that mines have a life span. Communities need to prepare. Training must go beyond mining jobs to aim at boosting overall community capacity. One example is the Rio Tinto mine, which provides homework help for high school students. The company Nouveau Monde Graphite, for its part, has set up a training program targeting generic skills. Although these measures don't focus exclusively on

the mining industry, they benefit communities by increasing the general skill level of the population, leaving them better qualified for high-level positions not just in the community, but also at the mining companies, which stand to benefit over the long term by having access to a bigger pool of skilled workers to recruit from. These measures also contribute to community development beyond the life of the mine.

Mining company funding for general training is typically perceived in a positive light, but it's important to stress that education and training are a government responsibility. Participants mentioned the difficulty of convincing governments to get involved, given how jurisdictions are shared between the Quebec government (education) and Ottawa (Indigenous relations). Yet it is their duty to provide proper funding for education and training. Governments should play a role, along with the mining companies, in developing such training programs. At Cégep de Sept-Îles, for example, mining companies have partnered with the cégep to provide custom-tailored courses.





# Social Acceptability and Consent

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## Negotiating in public

It is important to note that consent to a project is not the same as social acceptability of a project. The notion of free and informed prior consent is related to Indigenous political power and the concept of self-determination. It differs from social acceptability, which has to do with how acceptable—or unacceptable—a project is to a given population.

One recurring challenge noted during the seminar is the matter of securing community acceptance for IBAs. This may be due in part to the lack of transparency in the negotiating process. Negotiations are generally conducted by lawyers in private, with only a very small number of people from the community involved. Little information is publicly disclosed before the agreement is signed. Even during consultations or a referendum, the IBA is often only partially accessible. In many cases, a short summary without any financial clauses is all the that community has access to. Each community may have a different decision-making process.

The two IBAs signed for the Voisey's Bay mine are one notable exception. Innu and Inuit negotiators had established a position of strength by making the development of the mine conditional on the signing of a land claims agreement. To ensure the acceptability of the agreement in this context, IBA negotiations were conducted more publicly, and a referendum was held.

In light of this example, seminar participants wondered whether public negotiations could help secure social acceptability for projects and agreements. Public negotiations could help change the power dynamic between the mine and the community, increasing community involvement and, by the same token, bringing more public pressure to bear during negotiations. If the community has a role to play from the outset, it is easier to get more community members involved, not just professionals specializing in the field. As a result, people are more knowledgeable of the process and the agreement. In this sense, social networks can be a useful tool during negotiations and public consultations, just as they can be a hindrance. They have the advantage of making information more accessible, and the negotiation process more transparent, which can allow for greater citizen participation and facilitate social acceptability. But they can also amplify misinformation. Participants noted that there are always community members who tend to oppose development and who can polarize discussions.

For negotiations to be public, however, local leaders must take responsibility and seek consensus. Participants noted that divisions within communities can work to the advantage of mining company and create community conflicts. One model that could help avoid this is the Cree Nation approach. Under this approach, a community consultation process is defined by the Cree Nation Government before the start of negotiations with the mining company. This allows the Cree Government to present a united front during negotiations because the internal processes and mechanisms in place allow it to exchange information with the communities. In the case of the Matoush uranium mine, for example, criticism came from the community of Mistissini and was relayed by the Grand Council.

Another way to improve the social acceptability of IBAs is to include land users, elders, youth, and women in the IBA negotiating teams. This would also help ensure that the needs of the entire community are taken into account.

Lastly, band councils must keep the public informed and have the resources to do so. In reality, informed consent is hard to obtain because decisions are made under imperfect conditions and resources are limited, hindering a council's ability to adequately inform the community. This is where the notion of community capacity and expertise comes into play, both in terms of negotiations and in terms of community information and agreement monitoring. Many communities rely on external consultants during negotiations. Similarly, negotiations on the financial aspects of IBAs can be difficult to discuss publicly.

## Who should be consulted and who should negotiate?

Another big issue related to social acceptability and consent is the question of who is consulted and who is compensated when a mining project is developed. IBAs are often approved by the band council. But it is common practice, especially in the forestry sector and at Hydro-Québec, to divide up consultations and to consult and individually compensate families whose hunting territories are directly impacted by a project. Other community members are considered as not being impacted. This approach is highly inequitable and creates divisions within the communities.

Even when a band council approves an IBA, this doesn't guarantee the social acceptability of the project in question, which can still be criticized or rejected by the community. Seminar participants raised the issue of band council legitimacy. Band councils are a product of the Indian Act. In some nations such as the Innu, for example, governance was not traditionally structured along these lines. This generated a malaise that persists to this day around recognizing band council governance structures and processes.

At the same time, community members who don't have a hunting territory or beaver reserve of their own to claim rely on the band council to defend their interests. Even in cases where the band council organizes a consultation or referendum, it can orient the debate. This can lead to biased decision-making and limit the likelihood of obtaining informed consent. Public negotiations, consultations, and readily accessible information can counteract such bias.

Definitions of community membership also vary from one community to the next. These definitions allow communities to grow and, through hunter and fisher support programs, to occupy the land more effectively.

There is also the matter of whether IBAs should be negotiated more at the nation level than at the community level. The GNL Québec pipeline project, for example, will impact eight communities and three Indigenous nations. Although consensus is hard to achieve, it is important that the affected communities look at the project as a whole, and not just the impacts specific each of them individually. If only one in eight communities rejects the project, it could still go ahead, so it is important for the communities to establish a dialogue and exchange information. In the case of the pipeline, securing coordination between the communities and nations involved was a long process requiring more than a year of effort as well the creation of two committees, one political and one environmental. It is worth noting that decision-making power was not delegated to the committees but remained with the communities, each of which retained responsibility for giving its consent to the project.

The role and representativeness of regional, national and provincial Indigenous organizations, such as the AFNQL, can also be questioned. Given that these large organizations are not recognized under federal or provincial legislation, questions of legitimacy are often raised by their member nations, and unity is difficult to maintain within them.

This issue of who should be consulted and who has the legitimacy to sign an agreement is also important for industries seeking to ensure the acceptability of their projects. The example of the challenge by the Wet'suwet'en hereditary chiefs to the construction of a gas pipeline on their territory shows how important it is for both the community and for industry and government to ensure they obtain consent from all the leaders of the communities concerned, and not only the leaders recognized under the Canadian system. Similarly, the judgment in the Matoush Project stipulates that the minister must take into account the social acceptability of projects, although the minister's discretionary power remains important.

A good deal of work also remains to be done with the Quebec population, which stands to gain from stronger Indigenous nations. However, fears over veto power are often used to discredit Indigenous claims related to consent. Education is still needed.

Finally, community consent must be constantly renewed once an IBA is implemented. To ensure renewal, the community must be informed on an ongoing basis, and monitoring committees must include land users, elders, youth and women.



## How to assess a mining project

Another important question that emerged concerned how to weight and assess the impacts of a project and how to ensure that this weighting is respected. If project impacts are assessed before community consent is given, it is difficult to weight criteria such as financial gains and environmental impacts. A balance must be struck between job creation and culture, not to mention environmental concerns. There is no one-size-fits-all grid for assessing a project and deciding whether, for example, the financial benefits outweigh the environmental impacts. The assessment grid and score will vary depending on the stakeholders involved. Lawyers will accord greater importance to certain items, elders, youth and users of the territory will see the project differently, as will women.

The legacy of past mines can also play an important role in the social acceptability of a project. When Schefferville's IOC mine closed in 1982, Schefferville became a ghost town. Buildings were demolished, jobs disappeared, and there was no mine site rehabilitation. The environmental and social impacts of the closure are still apparent in the region today. This makes local communities more reluctant to accept new projects, even though the jobs and economic benefits generated by mining development may seem important to community vitality. This history plays a role in how a community assesses the impacts of new mining projects.

By implementing a community-specific process, the community can impose its own assessment grid and secure community consent to the project. The environmental assessment process is often not seen as a way to obtain community consent. However, the case of the Squamish Nation is an exception to the rule. The Squamish were able to impose their own environmental assessment process—a process conditional on the signing of an IBA—on both the mining company and, by extension, on government. In doing so, they imposed their own assessment criteria, taking ownership of the process by participating in the environmental assessment as a community. In this case, we can talk of informed consent. Quebec indigenous nations and organizations could benefit by learning and taking inspiration from Indigenous nations in British Columbia.

# Use of Royalties

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The Northern Sustainable Development Research Chair conducted a survey on royalty use by Indigenous communities. The study sought to better understand how royalties were managed and redistributed with a view to implementing more sustainable practices in royalty use. Eighteen communities took part in the survey.

The literature shows that in the United States, where there are Indigenous casinos, the revenues generated have not enriched Indigenous communities. In fact, communities with casinos are generally poorer than those without.

The survey also found that among the 18 communities surveyed, 88% spent some or all of their royalties on community services; 55% deposited some or all of their royalties in trust funds; 33% spent the funds on infrastructure; and 22% spent some or all of them on direct payments to IBA beneficiaries. This last option is the least sustainable way for a community to spend royalty funds. Seminar participants mentioned that returning money to community members directly in the form of cheques was not desirable. Service program creation is the preferred option because it has a more sustained impact on the community. Investments can also be made in infrastructure, but ongoing infrastructure maintenance costs can be hard for communities to meet. As for the trust fund option, it is very difficult for poorer communities to put money aside because their immediate needs are too great.

These statistics also reveal that even though IBA funds aren't intended for community services, which are a government responsibility, the needs are so great that most communities surveyed allocate their royalties to services anyway. When survey respondents were asked what type of services royalties were allocated to, the vast majority mentioned education and training. Other sectors identified included business development (33%), culture (33%), housing (22%), environment (22%), and medical services (11%). Participants noted that mining rents were actually replacing government funding in some communities. Indeed, one issue is that government funding is insufficient to meet community needs.

Revenues are managed by the band council in the vast majority of the communities (15/18), compared to only three where they are managed by a third party. The advantage of the third-party approach is that it keeps financial management free of political interference and thus ensures better management.

When funds are managed by the band council, it is important for the council to have a long-term strategy and not just try to meet the immediate needs of the community. Given the role that council members play in the community, however, it is hard for them to ignore the immediate demands and needs of their fellow citizens.

One of the reasons why communities are so secretive about the IBA funds they receive is their fear that the sums obtained will impact the funding they receive from the government. There have been situations in the past where federal funding has been reduced on account of royalties. In these cases, the amounts received were considered as own-source revenues, which can be used to justify a decrease in federal funding. In Nunavut, the land claims agreement stipulates that Inuit can collect royalties, but only up to the point where they achieve the same standard of living as other Canadians. For the government, royalties can apparently be seen as a drain on revenues; because they are paid out of company profits, they reduce the corporate taxes going to the government. For the northern communities, on the other hand, royalties help compensate for the impacts of mining, which are greater for them than for communities elsewhere in Canada. This helps explain why the Act respecting transparency measures in the mining, oil and gas industries, with its provisions requiring northern communities to divulge their royalty payments, was given such a poor reception in 2016. The legislation was seen as a signal that government was denying the communities' right to financial independence. In response to the legislation, the AFNQL successfully pressured the federal government to promise that this information wouldn't affect the amount of government funding allocated to the communities. However, the promise is only a commitment, and the government could very well change its mind after a future election.



Internal cooperation mechanisms would also be a useful way to keep other Indigenous nations informed about negotiations under way and IBAs already in effect. The FNQLSDI has established a trusting relationship with the communities over the years. Its confidential collection of IBAs could help communities negotiate more effectively. But for the moment, the organization doesn't allow for information to be shared internally between nations. Such exchanges of information are bound to develop in the years ahead, as suggested by the recent Cree-Innu agreement<sup>1</sup>. Other stakeholders, including companies and legal firms, are already talking, which helps them negotiate.

A system of equalization payments within the Indigenous nations could help communities develop on a more equal basis. An equalization mechanism is one of the core components of the Apuiat wind farm project on Quebec's North Shore, which seeks to redistribute project royalties equally between the communities. If a community decides not to take part in the project, its share of royalties will be invested in a trust fund where they will remain available if the community changes its mind.



Photo credit : Sabrina Bourgeois

<sup>1</sup> [Mamu Uitsheutun/Maamuu Wiicheutuwin Agreement](#)

# Subcontracting

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Participants reported that extensive mining activity in a region does not necessarily translate into benefits for local communities. The presence of FIFO workers and the practice of favouring outside suppliers over local businesses are two obstacles to this. Companies often have a lowest cost policy that takes priority over their willingness to award contracts to local businesses.

IBAs generally do include provisions favouring Indigenous businesses, usually in the form of preferential treatment for Indigenous companies, and in some cases, guaranteed contracts. IBAs may even specify a guaranteed amount to be awarded to Indigenous businesses in contract form, as is the case in Nunavut.

However, the size of the contracts and the bidding process itself can be barriers that put Indigenous businesses at a disadvantage. Contracts are often too big for local firms to qualify for, which excludes them from tendering. One suggestion is that mining companies divide up contracts to make it easier for local firms to bid. The bidding process, often online, can also be a barrier for companies in remote regions, preventing them from participating on an equal footing. Seminar attendees noted that this matter could be addressed in IBAs.

Subcontractors, whether Indigenous or not, are often not subject to the same standards as the mining company, especially with respect to Indigenous job creation targets.

This raises the issue of the criteria used to determine what constitutes an Indigenous business. In some cases, for example, it can be easy for non-Indigenous companies to establish a joint venture with an Indigenous partner in order to take advantage of the preferential treatment Indigenous firms enjoy when bidding on contracts. It is often the community or the nation's responsibility to keep a register of Indigenous businesses constituted according to specific criteria such as the percentage of Indigenous ownership and the region of operation, but also the percentage of Indigenous employees.

Lastly, participants noted that companies were sometimes late in paying their subcontractors, most often when they were experiencing financial problems. Yet it is difficult for small Indigenous businesses to shoulder the costs of such delays. In many cases, they don't have the cash reserves to cover their expenses. Sometimes, band councils can step in and help tide businesses over while they're waiting for payment, but the relationship of trust between the mining company and the community can be affected in the longer term. To prevent situations like this, IBAs can be negotiated to include a contingency fund that is established by the mining company once the agreement is signed. The fund would ensure suppliers are paid in case of delays or if the company goes bankrupt. Indigenous subcontractors, or the entire IBA, could also be designated as priority creditors in the event of bankruptcy or debt collection problems. The idea behind all of these solutions is to better protect Indigenous subcontractors by building guarantees against non-payment right into the IBA.



# Consultations

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Communities receive numerous consultation requests, but are unable to respond to all of them in a timely manner. This plays in government's favour because some consultations end up being streamlined or not really happening at all. When communities are unable to respond to consultation requests, governments are free to pursue the project development process under the assumption that the consultation has taken place. Communities can criticize consultation methods, but they can't refuse a consultation. Government regulatory processes with respect to consultations change in response to court rulings and the legal obligations they give rise to (e.g., the duty to consult). But the changes take time to be felt. Provincially, the government is still using an interim consultation guide that hasn't been updated for years. The guide is not aligned with other existing guides, such as the one developed by the FNQLSDI. What's more, the government did not adopt a standard consultation guide, but left each department and sector to adopt its own. As a result, practices vary from one department to the next.

With the changing consultation requirements and legal requirements, the issue is not so much how the province and businesses consult the communities, but how communities organize to consult their own members.

Companies have a role to play with government in improving these processes, as they often seem to get a better hearing than Indigenous communities do. But all too often, it still takes a crisis to get governments moving forward in their relationship with the Indigenous nations.



# Partners

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## Modern Treaty Implementation Research Project

This \$2.5 million, five-year SSHRC partnership is led by Stéphanie Irlbacher-Fox of Carleton University. Within this project, Thierry Rodon is responsible for Axis 5, which deals with the measurement of the well-being of communities and individuals following the implementation of a treaty. He is also interested in disputes that arise during the implementation of treaties.



## CICADA - Centre for Indigenous Conservation and Development Alternatives

We are a multidisciplinary research centre that targets the conceptual and practical potential of indigenous peoples' collective 'life projects' to generate innovative regimes of environmental protection and alternative visions of development. We bring together the projects and programs of more than seventy regular members and collaborators, representing great depth of experience in partnered research with indigenous peoples globally.







**The Knowledge Network Mining Encounters and Indigenous Sustainable Livelihoods: Cross-Perspectives from the Circumpolar North and Melanesia/Australia (the MinErAL network) brings together partners and researchers from the Canadian North, Fennoscandia, Australia, and New Caledonia. Its main focus is on indigenous peoples and mining encounters. It provides opportunities to indigenous organizations, regional and local governments and researchers to exchange and generate knowledge that will provide material for evidence-based decision-making.**

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