

Strategic risk assessment and management of Indigenous issues in the extractive sector

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ABSTRACT The development curve in the extractive sector has become longer, steeper, and riskier due to increased social, legal, and political risks from various stakeholders. Indigenous peoples are a unique stakeholder because their growing legal rights to lands and resources can often determine a project's outcome. A project will only be successful if it is able to obtain the legal permits, withstand any judicial reviews, and gain and maintain the social license to operate. Stakeholder identification, management, and engagement are key risk-mitigation tools required to successfully convert risks into opportunities.

■ **KEYWORDS** Aboriginal title and rights; Corporate and social responsibility (CSR); Extractive sector; Impact benefits agreement (IBA); Indigenous peoples; Management and engagement; Risk management; Social, legal, and political risk (SLP); Social license to operate (SLO); Stakeholder identification; United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

RÉSUMÉ La courbe de développement du secteur de l'extraction s'est allongée, elle est devenue plus abrupte et plus hasardeuse en raison de l'accroissement des risques sociaux, légaux et politiques venant des divers intervenants. Les peuples autochtones sont des intervenants uniques puisque leurs droits légaux croissants sur les terres et les ressources déterminent souvent ce qu'il adviendra d'un projet. Un projet ne pourra réussir que s'il est capable d'obtenir les permis légaux, passer à travers les analyses judiciaires, puis obtenir et maintenir le permis social d'exploitation. L'identification des intervenants, la direction et l'engagement constituent les outils clés de l'atténuation des risques nécessaires pour bien convertir les risques en possibilités.

■ **MOTS CLÉS** Déclaration des Nations Unies sur les droits des peuples autochtones (DNUDPA); direction et engagement; entente sur les répercussions et les avantages (ERA); gestion des risques; identification des intervenants; permis social d'exploitation; peuples autochtones; responsabilité sociale des entreprises (RSE); risques sociaux, légaux et politiques; secteur de l'extraction; titres et droits des Autochtones

EMERGING RISKS FOR THE EXTRACTIVE SECTOR

The extractive sector faces challenging and uncertain times. Since 2011, a number of very significant and promising mining projects have been halted due to opposition from Indigenous peoples, most notably:

- Taseko's USD\$800 million Prosperity mine in Canada;
- Newmont's \$4.8 billion Conga mine in Peru;
- Goldcorp/New Gold's \$3.9 billion El Morro mine in Chile;
- South American Silver's \$500 million Malku Khota mine in Bolivia;
- Barrick's \$16.5 billion Pascua Lama mine project in Chile and Argentina; and
- Anglo American's \$8 billion Pebble mine project in USA.

Not surprisingly, since mid-2011 many publicly listed companies in the extractive sector have seen their share value plummet by more than 80% off their historic highs.

Social, legal, and political risks (SLPs)

Beyond the "market risk", the extractive sector today faces significant SLPs from so many stakeholders that this has led to uncertainty, loss of confidence, and, accordingly, loss in market value. Some of these stakeholders include

- governments increasing taxes and mineral royalties, and using other methods of expropriation, resulting in more resource nationalism;
- local, state, or municipal governments trying to cope with the challenges, impacts, and indirect costs related to mining projects, and seeking a larger portion of the economic benefits from either the national government and/or the company;
- Indigenous peoples wanting greater say on the size and scope of mining projects and economic benefits for projects being developed in their traditional territories;

- environmental and civil society groups challenging the rationale for mining projects and advocating for higher levels of environmental stewardship;
- shareholders/investors pushing for greater socially responsible investing;
- “Occupy” and “Idle No More” type protest movements possibly blocking access to mine sites and causing significant disruption;
- digital “cause marketing campaigns” by “name-and-shame” groups potentially influencing the perception of risk as well as shifting public opinion against a project; and
- lenders requiring better assessment and mitigation for the project’s stability.

Steeper and longer development curves

These SLPs present a real challenge for mining companies to bring proven mineral resources into commercial production within a specific time and budget envelope. Newmont spent an estimated \$800 million on the now-halted Conga mine (Emery, 2012). Similarly, Taseko has spent more than \$120 million on permitting alone for the Prosperity mine. The development curve from initial exploration to mine startup has become longer, steeper, riskier, and more expensive as SLPs have grown in scope and complexity. For this reason, more due diligence and a proactive stakeholder identification, engagement, and management strategy is required. It is also important that the desire for meaningful engagement with Indigenous peoples be genuine, as this is a critical foundation for building relationships.

INDIGENOUS PEOPLES: NOT JUST ANOTHER STAKEHOLDER

Indigenous peoples are unique stakeholders because of their distinct legal rights to and interests in lands and resources. Aboriginal title and rights are gaining more recognition and leverage; these *sui generis* rights are legally unique and distinctive and might overlap other legal, surface, and subsurface rights. Moreover, these legal rights are geographic and site specific. Thus, Indigenous peoples are able to claim and assert legal rights to lands and resources that are part of the mining project footprint, which sets them apart from other stakeholders.

Permitting triangles

Because of their legally recognized right to specific lands and resources, Indigenous peoples are able to form strategic alliances with other stakeholders, such as environmental groups, nongovernmental organizations (NGOs), and other civil society groups who “piggy-back” on these legal rights to gain even more leverage against a project. When Indigenous peoples form alliances with other stakeholders, this increases momentum and can become a daunting challenge for the extractive sector. On the other hand,

an impact benefits agreement (IBA) between a company and an Indigenous group can smooth and shorten the permitting process significantly. Because of this growing influence, a tug-of-war often exists between the mining company and the environmental movement to have the Indigenous peoples on their “side”. As strategic alliances form and develop, they are often widely advertised on social media and can become the cornerstone of digital cause campaigns.

It is also worth noting that Indigenous peoples do not always act in a collective manner. For example, clans and other familial subgroups might or might not act in tandem: A portion of the Indigenous peoples could oppose or support a project. Thus, support or opposition to a project might be equivocal but it is often misrepresented in this way.

Alliance with the environmental movement If an Indigenous group opposes a proposed mine, then an alliance with environmental and civil society groups (Figure 1) can result in the following:

- longer and more difficult legal hurdles for the permitting process;
- a greater chance of judicial challenges to permits;
- barriers to access equity and debt financing;
- a greater challenge for companies to fulfill their stated corporate social responsibility (CSR) mandates;
- alliances with other stakeholders, such as local governments and activist shareholders; and
- a physical blockade to the project on the ground.

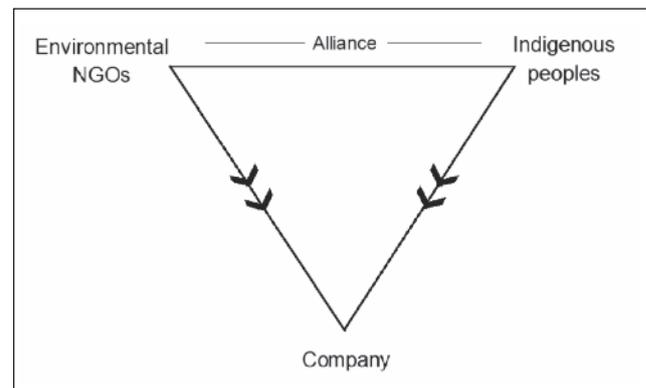


Figure 1. Permitting triangle showing alliance of Indigenous peoples with the environmental movement

Alliance with the company On the other hand, if the Indigenous group lends its support to a project (Figure 2), then the company might enjoy the following benefits:

- significantly easier overall stakeholder management because other stakeholders might not be able to assert a legal interest to the proposed mining area;
- a smoother environmental review and permitting process;
- significantly fewer risks of successful legal challenges against the project; and

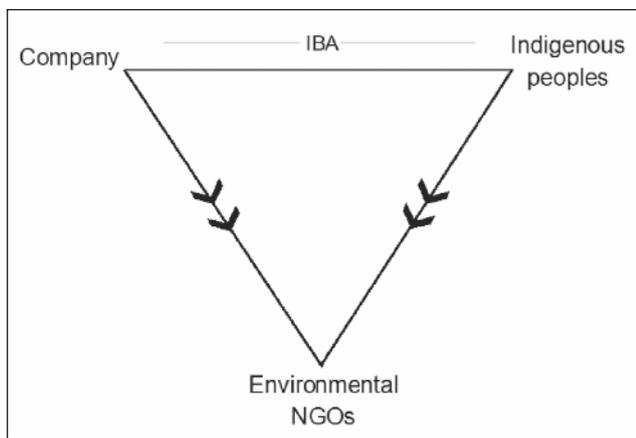


Figure 2. Permitting triangle showing impact benefits agreement (IBA) of Indigenous peoples with the company.

- a better chance of the company achieving its CSR goals for meaningful Indigenous participation and gaining a social license to operate (SLO).

WHO ARE INDIGENOUS PEOPLES?

A commonly used definition of Indigenous peoples was developed by Martinez Cobo (2010):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

National governments and constitutions in many countries accord legal recognition and status to Indigenous peoples. In Canada, sections 25 and 35 of the *Constitution Act* (1982), the *Indian Act* (1985), and a host of other legislation gives legal recognition to more than 630 First Nations.

The United States recognizes more than 560 Tribes. Similarly, many other national governments have legally recognized and accorded Indigenous peoples through domestic legislation known as “hard laws.” In the Philippines, the *Indigenous Peoples’ Rights Act* of 1997 (1997) creates significant legal rights for Indigenous peoples to their “ancestral lands”.

In many other jurisdictions in the world, however, Indigenous peoples have no meaningful recognition or legal status. In many countries, democratic principles and

human rights are not developed or entrenched in the national fabric or conscience. In these cases, the identification of Indigenous peoples and the assessment of their legal rights under domestic laws could pose a challenge.

Where are the Indigenous territories?

Aboriginal title is unique in law and, practically speaking, very difficult to establish. The concept of *terra nullis* has been rejected in many jurisdictions; however, there is legal recognition that the concept of aboriginal title existed theoretically at the time of the first European explorations. Some argue that traditional village sites might be where aboriginal title can be established—that the Indigenous group had sole use, control, and occupation of a geographically defined area.

Indigenous peoples might have been nomadic and/or had a seasonal rotation among various encampments but they still would have remained very much dependent on the land and resources in a broader geographic area. The areas of settlement therefore would be different from those of seasonal use and occupation. In traditional societies, often vast tracts of lands were used for hunting, gathering, and cultural and spiritual activities. These aboriginal rights are often more difficult to delineate and define. In many cases, multiple Indigenous groups used the same resources, leading to overlapping claims.

Section 35 of Canada’s *Constitution Act* (1982) states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Those rights and declaration of aboriginal title was made on June 26, 2014, by the Supreme Court of Canada in its landmark decision in *Tsilhqot’in Nation v. British Columbia* (2014). Broadly understood as a game-changer, this decision has added to the momentum and leverage being gained by Indigenous peoples and will advance debate on the scope and content of aboriginal title, in Canada and around the world. Aboriginal peoples in Canada see the decision as transformative, elevating them from mere stakeholders to recognized landowners.

In the United States, the Tribes were also forced onto reservations, but many still maintain a claim to larger traditional territories. Along the coast of Nicaragua, where the aboriginal people are the dominant majority, their aboriginal title has been recognized by the state government. In Australia, as a result of the Mabo decision (*Mabo and Others v. Queensland*, 1992), the concept of aboriginal title is gaining traction in limited areas.

In almost all cases, Indigenous groups will be able to present maps showing their asserted “traditional territory”; however, there will likely be no formal agreement or recognition by the government or courts to these boundaries. For this reason, it is important for a company to gain local legal advice on these issues to understand the legal implications and strengths of any asserted claims. Those that do provide local legal advice should also be familiar with the United

Nations (UN) framework and international jurisprudence on Indigenous peoples from forums such as the Inter-American Court of Human Rights.

UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

On September 13, 2007, the UN General Assembly adopted the UNDRIP to promote the human rights of approximately 370 million Indigenous peoples around the world. The declaration sets out the individual and collective rights of Indigenous peoples, including their rights to culture, identity, language, employment, health, education, and other issues (UNDRIP, 2008).

Some of the key provisions are found in Article 8(2) (UNDRIP, 2008), which provides that nation states must protect Indigenous peoples and their territories:

States shall provide effective mechanisms for prevention of, and redress for:

- (a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources; and
- (c) any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.

The UNDRIP also “emphasizes the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations.” It “prohibits discrimination against Indigenous peoples”, and “promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development” (UNDRIP, 2008).

In 2007, only four countries in the UN voted against the UNDRIP: Australia, Canada, New Zealand, and the United States, all jurisdictions with large mining industries. Since then, all four governments have succumbed to domestic and international pressure and ratified the UNDRIP—another indication of the growing influence of Indigenous peoples.

Hard versus soft laws

The UNDRIP is a declaration in international law and is thus considered a “soft law”. Rather than setting out sanctions or remedies, the UNDRIP is a “norm of international law.” This contrasts with Canada’s domestic laws (“hard laws”), which require that Indigenous peoples be consulted and accommodated before project permits can be issued by the Crown. There can be, and often are, legal challenges to hard-law requirements in the courts from both sides.

As a practical matter, however, the requirements for an SLO are transforming some soft laws into hard laws. The World Bank Group is bound by the UNDRIP, and the

International Finance Corporation (IFC) adheres to its own performance standards when investing in or lending to a project. These standards have been adopted by 77 of the world’s leading financial banks, including all five in Canada. Known as the “equator principles”, they are “a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions” (Equator Principles, 2010). Lenders will now look beyond EBITDA (earnings before interest, taxes, depreciation, and amortization) and debt-service ratios toward a real assessment of Indigenous engagement and an SLO.

The IFC Performance Standard 7 (IFC, 2012) deals with Indigenous peoples and was updated on January 1, 2012:

The Performance Standards are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities.

Performance Standard 7 warrants careful review of its insights into the issue of engagement with Indigenous peoples. In many ways, it offers a checklist of issues and processes that could be required by lenders and socially responsible investing funds (IFC, 2012).

FREE, PRIOR, INFORMED CONSENT (FPIC)

The concept of FPIC of Indigenous peoples had its roots in the International Labour Organization’s Resolution 169, passed in 1989 (International Labour Organization, 1989). At the time, it was limited in scope with respect to the forced relocation of Indigenous peoples. The FPIC concept has found its way into the UNDRIP and has expanded to include situations other than forced relocations. Initially, Performance Standard 7 provided that the “C” was for “consultation”; however, after much debate and controversy, the new version of the Performance Standard 7 has revised it to “consent”.

As a concept, FPIC is challenging practically for two reasons. First, FPIC assumes that the aboriginal rights and title of Indigenous peoples to their lands and resources are clearly delineated and recognized. This is not the case, except in very finite locations around the world. In the United States and Canada, postage-stamp-sized “reservations” exist where aboriginal people have statutory rights; however, most First Nations and Tribes claim much larger traditional territories, without agreement with the governments on these boundaries. Second, Indigenous peoples are not necessarily organized or legally recognized as a group. With this in mind, how can consent be legally obtained from an undefined or unorganized group?

Of significance, the FPIC concept has now migrated from Performance Standard 7 to a commonly made demand by Indigenous peoples when dealing with governments and industry. It has resulted in paradigm, language, and expectation shifts, and has sparked a growing debate in many circles. Industry associations will have a different view and interpretation of this issue compared to other NGOs, and the debate will no doubt continue: consent versus consult? The industry, however, should be aware of these growing and shifting expectations. Notwithstanding these challenges, if a company requires debt for a project or export credit guarantees, an effective and documented engagement with Indigenous peoples will now be required. This is the new “Golden Rule”.

CSR

The Canadian government defines CSR as “the way companies integrate social, environmental, and economic concerns into their values and operations in a transparent and accountable manner” (Industry Canada, 2011). Another way of putting this is how the company views its corporate policies in addressing identified stakeholder issues.

The UNDRIP started conceptually at the committee level in the UN in 1989. Since then, the recognition gained by Indigenous peoples at the UN has been so significant that it has added to the broader requirement for corporate responsibility and human rights, giving momentum to the Indigenous revolution. In 2005, Dr. John Ruggie was appointed by the UN to address the need for more government and corporate responsibility for human rights. This was the genesis of the “Protect, Respect and Remedy” Framework and Guiding Principles, the UN Global Compact, and the Global Reporting Initiative (United Nations Global Compact, 2015). This work has added to the CSR expectations and requirements of companies, making the rights of Indigenous peoples explicit and prominent.

That said, a webpage or company policy on CSR does not equate to either gaining or maintaining an SLO. Many companies in the extractive sector have detailed CSR policies and objectives but have failed to gain or maintain an SLO. In companies where the executive leadership has fully embraced and understood the need for an SLO, CSR is central to senior management’s stewardship of company resources and reputation as they progress through the development curve.

Companies able to accurately assess these SLPs and develop a proactive strategy to meaningfully address them will be more successful in navigating the narrow path required to bring economically viable resources through to the development and operation of a sustainable mine. Examples of this include the Detour gold project in northern Ontario, the New Gold project near Kamloops, British Columbia, and the Polaris Minerals project on northern Vancouver Island, British Columbia. On the other hand, companies that are in a reactive mode and fail to understand

and assess the SLPs will encounter many detours and roadblocks. CSR is not a “photo op” for a corporate website or corporate philanthropy. Rather, it has become a required strategy that is measured and reported, and rewarded with successfully permitted projects that result in higher stock values and enhanced corporate reputations.

SLO

Every mining project has to undergo an environmental and legal permitting process and ensure that the permits withstand legal challenges and reviews. Beyond this legal requirement, a real need exists for companies to obtain and maintain an SLO. An SLO is not a document but rather an ongoing dynamic relationship that exists between the company and all stakeholders affected by a project.

Companies are required to develop a strategy, commit financial and human resources, and provide undertakings and assurances to be granted legal permits for the exploration, development, construction, and operation of a project. Likewise, a real, proactive strategy is also needed to gain and maintain an SLO. Strategies for stakeholder identification, management, and engagement need to be developed from the outset and then continually assessed and refined. It is important for the company to identify all stakeholders, even those that might be physically distant from the project such as NGOs, who can nonetheless become significant activists, especially through social media. Because an SLO is a dynamic relationship, the interplay and relationships among stakeholders can also have a significant impact on the project. The company could get caught in stakeholder “crossfire” or be blindsided by new alliances that become increasingly challenging to manage.

For a company to commit corporate resources, including its reputation, to a project, it needs certainty that it can navigate the uphill permitting process and, at the same time, gain and maintain an SLO. Because no assurances can be made in a project’s outcome, the company must have confidence in its strategy and the project team’s ability to gain the legal permits and an SLO.

All of this makes it even more difficult for companies to gain an SLO when Indigenous peoples oppose mining projects. The need for companies in the extractive sector to develop a proactive strategy to properly address the issues raised by Indigenous peoples is a significant and growing obstacle in the development and permitting process. Simply put, companies that understand this issue will succeed, and those that do not will struggle and likely fail. Thus, it is vital for a company to develop an effective Indigenous engagement strategy from the outset, converting risks into opportunities.

Stakeholder identification, management, and engagement

Addressing the concerns of stakeholders is a growing challenge for the extractive sector. In 2011, Deloitte's *Tracking the Trends* report identified securing an SLO by engaging stakeholders as the centre-stage issue for mining companies (Deloitte, 2015). Deloitte's 2012 report identified the issue as “[r]estless [s]takeholders: the demand for heightened corporate social responsibility” (Deloitte, 2015). Their 2013 report noted that “[o]btaining permits, negotiating with local communities, attracting qualified labour, partnering with EPCM suppliers, procuring sufficient equipment and materials, transitioning from exploration to development—these activities all require years of advance planning” (Deloitte, 2015).

Engaging with stakeholders is a very personal process because it is a relationship-building exercise. The team of people that represents the company, including consultants, must have a clear mandate and focus on their tangible objectives. Communication between the corporate head office and its on-the-ground team needs to be transparent. But, more than those objectives, there is a real need to develop respectful and honest relationships and to find common ground. More important than the result, the key goal must be the relationship-building process, which is established on trust, respect, and communication.

Companies need to find the balance between meaningfully engaging with stakeholders and maintaining realistic expectations with communities, all without a level of tokenism. Strong engagement manages expectations and provides real responses to issues. This process of meaningful engagement with stakeholders will add to the costs of the project and might lengthen the development timeframe; however, failure to do this properly will be even more expensive, not only in economic costs and investor confidence, but also in reputation risks.

INDIGENOUS ENGAGEMENT STRATEGY

The human rights impact assessment (HRIA) undertaken by the company will assist with its due diligence and the development of its strategy.

Initial steps

Some initial steps need to be taken by the company, in the form of the following questions.

First, who will undertake the HRIA? The selection of the team and/or consultants is critical. Local knowledge and language skills are required, as is a reputation for professionalism, fairness, integrity, and transparency.

Second, what is the physical footprint of the project? Where are the water resources coming from, and which watersheds will potentially be impacted? What are the impacts on the downstream users? Where are the utility and transportation corridors?

Third, which groups of Indigenous peoples are potentially affected? Who are they, how are they organized, and are there any interrelationships among these communities? How do they use the project area? Is it for seasonal activity or close to their core area of use? Are you able to access knowledge of their use and occupation of the project area from third parties? Also, can you assess the strength of their asserted use or claim to a part of the project area?

Initial engagement

The company should seek to initiate contact at the earliest opportunity, even prior to initial exploration work. Although important to recognize legal and cultural norms, do not overlook interpersonal norms. If you start the exploration work before initiating contact, there could be ill-will and a misunderstanding of intent and approach to Indigenous peoples. Remember, you are a guest on their lands and want to be seen as a good neighbour.

If more than one group is claiming use of the project area, then you need to develop a strategy to address the overlaps. Which group has the stronger claim? What is their own history of dealing with each other? Should they be approached jointly or separately? It is also important to understand the history of Indigenous peoples, their challenges and successes, and their track record in dealing with all levels of government. Also, what is their track record and reputation in dealing with industry? What are their economic and human resource development needs?

It is also important to be respectful of their leadership and organizational structures, which could be formal, informal, or both. Is there a chief and council, and is it hereditary or elected? Is there an elder's group? Is there an economic development portfolio? Is there a lands and environmental department?

When and how are decisions made by this Indigenous community? Are these made by a council or the whole group? Are “family groups” dominant? Who are the decision makers in the community? Is there a separate administration? Are processes and structures formal or informal?

How to initiate contact

Whom do you approach, and how? This is a critical step in the relationship-building exercise. Do you send a letter or meet in person? Whom from the company do you involve: the CEO, VP Exploration/Corporate Development, consultants, or legal counsel? With whom do you meet in the Indigenous community: the chief, the council, the elders, or the band manager? A really important consideration for the company is to have the same faces present throughout the process, for the sake of efficiency, continuity, and consistency.

Role of the government

In Canada, the legal requirement for consultation falls on the government, raising the question: Should the gov-

ernment drive while you take the back seat? The answer is no. The company has the most to gain and lose; therefore, the company needs to lead the relationship-building process. Previous bureaucratic indifference from or an acrimonious history with the government could negatively impact your project. In other jurisdictions, the government might demand to take the lead and you might be forced to have a secondary role only. A fine balance exists of adhering to government policy but also ensuring that the concerns raised by the Indigenous peoples are integrated into the decision-making processes.

Basis of the IBA

It is important to hear and understand the concerns of the Indigenous peoples with respect to the project: concerns, for example, about sites considered to have high spiritual/archaeological significance; about the environment, and water in particular; and about economic opportunities and social impacts. It is important that these concerns are meaningfully integrated into the project.

Beyond this initial dialogue, it is also important to develop a relationship that can result in an IBA. What should the company offer? Do your risk/benefit analysis. Internally decide what you need from the Indigenous group and what you can offer in return. Local employment and procurement can be valuable, but a larger financial interest or stake through royalty-sharing is also important. Further, develop mechanisms and processes to deal with the issue of unaddressed or unexpected impacts.

Where is the Indigenous group's legal leverage? Examine the requirements on the permitting processes. Assess how the Indigenous group's support of the project can shorten and streamline the permitting process. Assess how opposition from the Indigenous group can delay or derail the project. Assess how other civil society and environmental groups gain or lose legal leverage depending on whether the Indigenous group has signed on to an IBA. The use of social media has become an effective tool to move public opinion and to organize protests and rallies. The "Occupy" and "Idle No More" movements helped galvanize widespread rallies and bring media attention to social justice issues.

Government support

What is the government's position on Indigenous participation? Assess what government support can be provided for the project. Are there offsets for royalty payments made to the Indigenous group? Are there funds to support training and employment? Is there support for infrastructure development? Can you ensure the investment climate being offered by a government can be maintained through a project development agreement? Will the government agree to binding international arbitration?

What impacts will the project have on the local government and infrastructure? Are municipal permits required? Are

there local taxes? What impact will the project have on local services such as schools, hospitals, and law enforcement?

The above is certainly not an exhaustive list. In cases where the project is situated in Africa, Asia, Central and South America, a real analysis and assessment will have to be made concerning the stability, transparency, and integrity of the national and local governments. An assessment of country risk is critical. As the demand for minerals grows, the move into more unstable regions of the world is inevitable.

Real tension can also appear in these less stable jurisdictions on the recognition of local Indigenous groups. The situation might arise where a company seeks to enter into an IBA with an Indigenous group that the national government does not support, or even opposes. This is where country risk assessment comes into play, and the principle of the rule of law might lead to a view that the jurisdiction is too risky to warrant further effort or investment.

Common pitfalls and challenges

One of the more challenging parts of engaging with communities is knowing what should be put into an IBA. A balance must be struck between what is needed and what can be afforded. In the Canadian context, the Supreme Court of Canada in *Haida Nation v. British Columbia* (2004) laid out these two principles in its decision:

- the duty to consult is on the government and not industry (although industry needs to take the lead on this issue); and
- the spectrum for consultation from mere notification to deep and meaningful consultation will depend on the strength of the asserted claim and the potential impact on aboriginal rights and title.

Regardless of where you are on the consultation spectrum, there is the possibility for a veto. The "no-go" option is not what mining companies want to hear. Being mindful of this possibility from the outset, however, might cause you to abandon the project early in the exploration process.

Many have advocated for the Canadian consultation approach to be followed in other jurisdictions. Consultation must be timely, done in good faith, and not seen as an opportunity to just "blow off steam". The company needs to demonstrate that it has responded to and incorporated the concerns of the Indigenous peoples into the project. There is no need to agree on where you are on the spectrum, and hard bargaining is permitted, but the consultation must have some form of accommodation. Without this, the consultation is meaningless.

A third factor drives consultation, one that is critical but not articulated in the case law: the ability of the Indigenous peoples to articulate, advocate, and engage. If an Indigenous group has a good strength of claim with significant potential impacts but no means of properly engaging, it can miss the opportunity to have a real role and enjoy any benefits.

On the other hand, if an Indigenous group has a very articulate leader, a website showing where development is permitted in its territory, and the ability to rally with other stakeholders, the Indigenous group might be able to extract significant concessions, even if the true strength of claim is weak and the project impacts are minimal.

This third factor becomes critical for stakeholder management and engagement. The Indigenous peoples can create process risks that lead to delays and uncertainty, especially as they engage other stakeholders. The strategic use of capital and human resources to develop an IBA can lead to the certainty required for investment decisions to proceed with a project.

Common elements in an IBA

It is quite common for companies to provide Indigenous groups with some capacity funding to review projects and to engage in the consultation process. Companies need to gain access to traditional knowledge and to understand the strength of the asserted claim and traditional land-use patterns.

There might be some initial exploratory agreements but the real goal is to get to an IBA. This is where the company assesses what it needs in terms of support for the project and what incentives it can provide. The internal assessment must be reasonable according to the unique circumstances for each project and Indigenous group.

Because each project and community have variations, there is no standard IBA. A helpful publication on IBAs is available, however (Gibson & O’Faircheallaigh, 2015), outlining these common elements:

- project definition, design, and location;
- support for the environmental and permitting processes;
- opportunities for preferential employment and training, and procurement of goods and services;
- equity/royalty participation;
- project monitoring;
- project scope and expansion; and
- closure and reclamation.

In many cases, discussions between the company and the Indigenous group are entered into with confidentiality and “without prejudice”; however, if talks break down, the company might want to table its last offer “with prejudice”, presenting that in court if a judicial challenge is brought by the Indigenous peoples. The court would then decide if the accommodation offer was reasonable.

Similarly, the Indigenous group will also want to table and present its strength of claim and asserted project impacts. It might want to show inflexibility on the part of the company regarding the scope, design, and location of the project, and the lack of benefits. There will be paper trails on both sides to show who was the more reasonable or unreasonable party, depending on the case.

Hostile or no response

In some cases, the initial response from an Indigenous group might be “go home” and “not in our territory”; or there is no engagement or response until near the end, when it is “no”. In such cases, having a paper trail is always important because there will be a contest to appear the more reasonable party, especially in the eyes of the court.

In other cases, an enthusiastic leader might promise he can deliver the community’s support and green lights all the way. Treat this with obvious caution. The key is not only to engage with the leadership, but also to make sure you are connected to the centre of the community. That said, be careful not to interfere with internal governance and politics.

Continuity

From initial contact before the start of exploration work, to the all project permits and funding in place to start construction, the process could take 5–10 years, or longer. It is important to understand and recognize that the elected leadership of an Indigenous group might go through two or three election cycles in this timeframe, most likely meaning a change in the leadership.

Similarly, in the company there might be turnover in the project personnel and even in leadership and/or ownership of the project. These changes can be disruptive because the people involved might change, as could corporate focus and strategy.

Because this is a relationship-building exercise, it is important to have widespread buy-in and commitment from the company and the Indigenous group. The fundamental pillars for building this relationship are trust, respect, and communication—critical elements to every healthy relationship. Likewise, the need for good faith, transparency, and integrity is essential.

An individual’s skillset, experience, background, cultural sensitivity, common sense, and good judgment will determine their success in the relationship-building task. Team leads must have the full support and commitment of senior management to undertake this role. Also, everyone needs a long-term vision of the goal, and to deal appropriately with the ups and downs along the way. Do not walk away. Be patient and remain focused.

CONCLUSIONS

It is no longer sufficient for a project to simply obtain the legal permits required for exploration, construction, and ongoing operations. The bar has now been raised for projects to also gain and maintain an SLO. The time, costs, and risks in developing mining projects have become much more significant. The SLPs alone, especially failure to properly and meaningfully consult with Indigenous peoples, together with environmental and civil society groups, can easily derail or stop a project.

In the extractive sector, the requirement to clear this Indigenous “hurdle” is increasingly daunting and challenging, consequently adding significant time and costs to the steep and long development curve. Companies and governments that develop proactive strategies to meaningfully address the concerns and wishes of Indigenous peoples will be able attract more investment to develop more mining projects. In contrast, governments and companies not choosing this path will likely encounter friction and conflict, which can escalate into social unrest and violence.

An IBA can provide stability for projects to help gain access to equity and debt markets, fulfill the CSR mandates, and lead to the development of sustainable projects. This ensures that all of the project’s soft costs are recovered and that the company enhances its bottom line and reputation. The process of developing and concluding an IBA will hopefully result in an SLO being obtained. This has to be understood as an effective risk-management strategy.

The process whereby a company seeks to connect with Indigenous peoples is often more important than the result. This has to be seen as a partnership and a relationship-building exercise between a company and the affected Indigenous peoples. When done properly, and a real partnership emerges, project stability and certainty are significantly enhanced. This is the foundation for a civil society.

Benefits pie

For a project to proceed, it must be environmentally sound and sustainable and withstand the challenge from civil society and environmental groups. Those challenges are less daunting when you have the Indigenous peoples standing by your side and supporting the project. As global demand for resources continues to grow, it must be understood that the benefactors from any project must include:

- project shareholders/investors,
- government,
- the local community, and
- Indigenous peoples.

The “benefits pie” must be divided into at least these four pieces. If there is protracted discussion on this very point, getting the project to fruition will be a challenge. On the other hand, if there is a genuine desire to share the pie, a collaborative approach will hopefully build relationships that will streamline the development process of the project, hence, increase the size of the pie and as a result, the benefits available to all parties. An effective Indigenous engagement strategy can convert risks into opportunities. In this way, the triple bottom line of people, profit, and planet can be met.

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