

**THE STRATEGIC RISK ASSESSMENT AND MANAGEMENT OF  
INDIGENOUS ISSUES IN THE EXTRACTIVE SECTOR**

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## **THE STRATEGIC RISK ASSESSMENT AND MANAGEMENT OF INDIGENOUS ISSUES IN THE EXTRACTIVE SECTOR**

### **ABSTRACT**

The extractive sector today faces growing social, legal and political risks (SLPs) from so many different stakeholders including national and local governments, name and shame groups, civil society and environmental groups, and the “Occupy” movement. Beyond these stakeholders, there are the indigenous peoples who have growing legal, social, political and economic influence which can often determine the outcome of the Project. The development curve in the extractive sector from initial exploration to mine start-up has become longer, steeper and more risky and expensive as these SLPs have grown in scope and complexity. Even if a project is permitted or starts commercial production, its ongoing development and operations are also facing these SLPs. The continuous assessment of these SLPs and the strategy to mitigate for them has now become critical for every project in the extractive sector. A project will only be successful if it is able to obtain the legal permits to operate, then withstand any judicial reviews, and then also to be able to gain and maintain the Social License to Operate (SLO). Stakeholder identification, management and engagement are key risk-mitigation tools. This paper focuses on the growing influence that indigenous peoples are now enjoying and the impacts on the extractive sector. Indigenous peoples are a unique stakeholder group because their legal rights and interests to lands and resources, their aboriginal title and rights, are gaining more recognition. When indigenous peoples form alliances with other stakeholders, this simply adds to their growing momentum and leverage, and this can become a daunting challenge for the extractive sector. More due diligence is required by companies to understand and assess the challenges posed by operating in areas claimed by indigenous peoples. There is a real need for mining companies to develop an effective indigenous engagement strategy to address these challenges in order to successfully convert risks into opportunities. Early identification and engagement with the indigenous peoples is required and the goal should be to conclude an Impact Benefits Agreement (IBA) with the affected indigenous peoples. The real objective must be to develop a real and transparent relationship between the company and the indigenous peoples so as to gain and maintain the SLO.

### **KEYWORDS**

Indigenous peoples, Aboriginal title and rights, UN DRIP, FPIC, extractive sector, CSR, Social License to Operate, Impact Benefits Agreements, Risk management.

### **EMERGING RISKS FOR THE EXTRACTIVE SECTOR**

These are very challenging and uncertain times for the extractive sector. Over the last 18 months a number of very significant mining projects that looked so promising have been halted because of opposition from indigenous peoples. A few notable examples include:

- Taseko’s \$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 Malku Khota Mine in Bolivia; and
- Barrick’s \$8.5 Billion Pascua Lama Mine Project in Chile/Argentina

Not surprisingly many publicly-listed companies in the extractive sector have their shares trading at 40–60% off their historic highs from just 12–18 months ago.

### **Social, Legal and Political Risks (SLPs)**

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

- Renewed resource nationalism, with governments increasing taxes, mineral royalties, and using other methods of expropriation;
- Local, state or municipal governments trying to cope with the challenges, impacts and the 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 to have greater say on the size and scope of mining projects as well as 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 (SRI);
- “Occupy” and “Idle No More” type of protest movements that can block access to the mine sites and cause significant disruption;
- Digital “cause marketing campaigns” by “name and shame” groups that could influence the perception of risk as well as shift public opinion against a project; and
- Lenders that require a better assessment and mitigation for the project’s stability.

### **Steeper and Longer Development Curves**

All of these SLPs make it a real challenge for mining companies to bring proven mineral resources into commercial production within a specific time and budget envelop. Estimates are that Newmont spent \$800,000,000 on the Conga Mine that has been now halted (retrieved from <http://www.bloomberg.com/news/2012-06-25/newmont-s-conga-gold-project-gets-peru-authorization.html>). Similarly, Taseko has spent over \$150,000,000 on permitting for the Prosperity Mine. The development curve from initial exploration to mine start-up has become longer, steeper and more risky and expensive as these 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 critically important that the desire for meaningful engagement with indigenous peoples be respectful and genuine as these are the critical foundations required for building relationships.

### **INDIGENOUS PEOPLES: NOT JUST ANOTHER STAKEHOLDER**

Indigenous peoples are a unique stakeholder because of their distinct legal rights and interests to lands and resources; their aboriginal title and rights are gaining more recognition and leverage. These *sui generis* rights are legally unique and distinctive and may 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 the lands and resources that are a part of the mining project footprint; this is what sets them apart from other stakeholders.

### **Tug-of-War**

Because of this legal recognition to specific lands and resources, indigenous peoples are able to form strategic alliances with other stakeholders, such as environmental groups, 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 simply adds to their growing momentum and can become a daunting challenge for the extractive sector. On the other hand, an IBA between a

company and an indigenous group can smoothen and shorten the permitting process significantly. Because of this growing influence, there is often a tug-of-war between the mining companies and the environmental movement to have the indigenous peoples on “their” side. As these strategic alliances form and develop, they are often widely advertised via 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 fashion. There are often clans and other familial sub groups that may or not act in tandem. It could be that a portion of the indigenous peoples may oppose or support a project. Thus, support or opposition to a project may not be equivocal but it is often misrepresented in this way.

#### Alliance with the Environmental Movement

If the indigenous group opposes a proposed mine, then an alliance with environmental and civil society groups may result in the following:

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

#### Alliance with the Company

On the other hand, if the indigenous group lends its support behind a project then, the company may enjoy the following benefits:

- overall stakeholder management becomes significantly easier because the other stakeholders may not be able to assert a legal interest to the proposed mining area;
- the environmental review and permitting process will move forward more smoothly;
- the risks of successful legal challenges falls significantly;
- the company is able achieve its CSR goals for meaningful Indigenous participation; and
- the company is more likely to gain the SLO.

### **WHO ARE INDIGENOUS PEOPLES?**

A common used definition of indigenous peoples has been developed by Martinez Cobo: 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 (retrieved from <http://indigenouspeoples.nl/indigenous-peoples/definition-indigenous>).

National governments and constitutions in many countries accord legal recognition and status to indigenous peoples. In Canada, Section 25 and 35 of the *Charter*, the *Indian Act*, and a host of other legislation that gives legal recognition to more than 630 First Nations (retrieved from <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> and <http://laws-lois.justice.gc.ca/eng/acts/I-5/>, respectively).

In the United States, there are over 560 recognized Tribes. Similarly, many other national governments have recognized and accorded indigenous peoples with legal recognition through their own domestic legislation, which are known as “hard laws.” For example in the Philippines, the *Indigenous*

*Peoples' Rights Act* creates significant legal rights for indigenous peoples to their “ancestral lands” (retrieved from [http://www.congress.gov.ph/download/ra\\_10/RA08371.pdf](http://www.congress.gov.ph/download/ra_10/RA08371.pdf)).

However, there are also many other jurisdictions in the world where indigenous peoples have no meaningful recognition or legal status. There are many countries where democratic principles and human rights are not developed or entrenched into 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 at law and, practically speaking, very difficult to establish. The concept of *Terra Nullis* has been rejected in many jurisdictions and there is legal recognition that concept of aboriginal title existed theoretically at the time of first European exploration. The question then becomes one of scope and timing. Some argue that traditional village sites may be where aboriginal title can be established; that the indigenous group had sole use, control and occupation of a geographically-defined area.

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

Section 35 of Canada's *Constitution Act* which was passed in 1982 states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” As we have now passed the 30<sup>th</sup> anniversary of the *Charter*, there has not been a single judicial finding of aboriginal title in Canada (retrieved from <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>).

In the United States, the “tribes” were also forced onto reservations, but many still maintain a claim to larger traditional territories. In Nicaragua, along the region of the coast, where the aboriginal people are the vast 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 (No. 2)* (1992) 175 CLR 1) the concept of aboriginal title is gaining traction in some limited areas.

Thus, 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. It is, for this reason, important for a company to gain local legal advice on these issues to understand the legal implications and strengths of the asserted claims. Those that do provide local legal advice should also be familiar with the 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 (UN DRIP)**

More than five years ago, on September 13<sup>th</sup>, 2007, the UN General Assembly adopted UN DRIP looking to promote the human rights of approximately 370,000,000 indigenous peoples around the world. The Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues (retrieved from [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)).

Some of the key provisions are found in Article 8(2) which provides that States must protect indigenous peoples and their territories:

Article 8 (2). 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;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

UN DRIP 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 it "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."

In 2007, only 4 countries in the UN voted against UN DRIP: Australia, Canada, New Zealand and the United States, all of which are jurisdictions in which mining is a large industry. Since then, all 4 governments have succumbed to domestic and international pressure and ratified the UN DRIP. This again, is another indication of the growing influence of indigenous peoples.

### **Hard vs. Soft Laws**

UN DRIP is a declaration in international law and hence is considered to be a "soft law". There are no sanctions or remedies set out in the UN DRIP; it is a "norm of international law." This is in contrast to Canada's domestic laws which require that indigenous peoples must be consulted and accommodated before project permits can be issued by the Crown. There can be, and there often are, legal challenges to these hard law requirements in the courts from both sides.

However, as practical matter, the requirements for the SLO are transforming some of these soft laws into hard laws. The World Bank Group is bound by the UN DRIP and the International Finance Corporation has set out Performance Standards to which it will adhere prior to making an investment or loan to a project.

These standards have been adopted by 77 of the leading financial banks on the world including all 5 in Canada. These are known as the Equator Principles and this is "a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions". (retrieved from <http://www.equator-principles.com/>). Lenders will now look beyond EBITDA and debt service ratios and there will a real assessment of indigenous engagement and the SLO.

The International Financial Corporation's Performance Standard # 7 deals with indigenous peoples and was updated on January 1<sup>st</sup>, 2012. (retrieved from [http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES)). "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 a careful review, as it is insightful into the issue of engagement with indigenous peoples. It is, in many ways, a checklist of issues and processes that may be required by both lenders and SRI funds.

### **FPIC**

The concept of "Free, Prior, Informed Consent" (FPIC) of indigenous peoples had its roots in International Labour Organization's Resolution 169, passed in 1989 (retrieved from <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>). At the time it was limited in scope with respect to the forced relocation of indigenous peoples. The FPIC concept has found its way in to the

UN DRIP and was expanded to include situations other than forced relocations. Initially Performance Standard # 7 provided that the “C” was for consultation and after much debate and controversy, the new version of the Performance Standard # 7 has moved to consent.

FPIC, as a concept, is practically challenging for two reasons. Firstly, FPIC assumes that the aboriginal rights and title of indigenous peoples to their lands and resources are both clearly delineated and recognized. This is not the case, except in very finite locations around the globe. There are in the US and Canada postage-stamp-sized “reservations” where aboriginal people have statutory rights. However, most of these First Nations and Tribes claim traditional territories that are quite large and there is no agreement with the governments on these boundaries. Secondly, indigenous peoples are not necessarily organized or legally recognized as a group – and with this challenge, how do you legally obtain consent from an undefined or unorganized group?

What is of significance is that 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 a mind shift, a language shift, and an expectation shift. There is a growing debate in many circles on this issue. Industry associations will have a different view and interpretation on this compared to other NGOs. The debate will no doubt continue: consent vs. consult? However, the industry should be aware of these growing and shifting expectations. Notwithstanding these challenges, if a company requires debt for a project or export credit guarantees, then an effective and documented engagement with indigenous peoples will now be required – this is the new “Golden Rule”.

### **Corporate and Social Responsibility (CSR)**

The Canadian Government, through Industry Canada, defines CSR as “the way companies integrate social, environmental, and economic concerns into their values and operations in a transparent and accountable manner” (retrieved from [http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h\\_rs00577.html](http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00577.html)). Another way of putting this is the way in which the company sees its own corporate policies on addressing identified stakeholder issues.

UN DRIP started as a concept 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, and added momentum to the Indigenous Revolution. In 2005, Dr John Ruggie was appointed by the United Nations to address the need for more government and corporate responsibility for human rights. This was the genesis for the “Protect, Respect and Remedy Framework” Guiding Principles, the UN Global Compact and the Global Reporting Initiative. (retrieved from [http://www.unglobalcompact.org/Issues/human\\_rights/The\\_UN\\_SRSR\\_and\\_the\\_UN\\_Global\\_Compact.html](http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSR_and_the_UN_Global_Compact.html)). All of this has added to the CSR expectations and requirements on companies. Throughout all of this work, the rights of indigenous peoples have been explicit and prominent.

However, a webpage or company policy on CSR will not equate to either gaining or maintaining the SLO. There are many companies in the extractive sector that have detailed CSR policies and objectives but have failed to gain or maintain the SLO. There are some companies where the executive leadership has fully embraced and understood the need for the SLO and, in such cases, CSR is central to senior management’s stewardship of the company’s resources and reputation as they move through the development curve.

Companies which are able to accurately assess these NTRs 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 and the Polaris Minerals Project on Northern Vancouver Island. On the other hand, companies that are in a reactive mode and fail to understand and assess the NTRs, will find 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.

### **Social License to Operate**

Every mining project has to go through an environmental and legal permitting process, and then ensure that the permits withstand legal challenges and reviews. But beyond this legal requirement, there is a real need for companies to both obtain and maintain the SLO. The SLO is not a document – rather it is an ongoing dynamic relationship that exists between the company and all stakeholders that are affected by a project.

Companies are required to develop a strategy, commit financial and human resources, and provide undertakings and assurances in order to be granted the legal permits for the exploration, development, construction, and operation of a project. Likewise, a real proactive strategy is also needed to both gain and maintain the 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 may be physically distant from the Project such as NGOs, but who can become significant activists, especially through social media. Because the SLO is a dynamic relationship, the interplay and relationships amongst the stakeholders can also have a significant impact on the project. The company could get caught in the crossfire amongst stakeholders or be blindsided by new alliances which become more challenging to manage.

In order for a company to commit its corporate resources, including its reputation, to a project, it needs to have certainty that it will be able to navigate the uphill permitting process and, at the same time, will be able to gain and maintain the SLO. As there are no assurances in the outcome for the company, it has to have confidence in both its strategy and the project team to gain both the legal permits and the SLO.

All of this makes it even more difficult for companies to gain the 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 hurdle in the development and permitting process for the extractive sector. Simply put, companies which understand this issue will succeed and those which don't will struggle and often fail. Thus, it is vital for a company to develop an effective Indigenous Engagement Strategy (IES) from the outset. This is how risks can be converted 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 Trends* report identified securing a social license by engaging stakeholders as the center-stage issue for mining companies. In 2012, Deloitte's *Tracking Trends* report identified the issue as "Restless Stakeholders: the demand for heightened corporate social responsibility". In 2013, the *Tracking Trends* report noted that "Obtaining 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" (retrieved from [http://www.deloitte.com/view/en\\_CA/ca/industries/energyandresources/mining/index.htm](http://www.deloitte.com/view/en_CA/ca/industries/energyandresources/mining/index.htm)).

Engaging with stakeholders is a very personal process because it is a relationship-building exercise. The team of people that represent the company, including the consultants, must have a clear mandate and focus on what their tangible objectives are. Communication between the corporate head office and the on the ground team needs to be transparent and clear. But, more than those objectives, there is a real need to develop respectful and transparent relationships. There is a need to find that common ground and the process to get there, is often even more important than the result. The key goal must be the relationship-building process.



Companies need to be able to find the balance between meaningfully being able to engage with stakeholders while at the same time neither increasing expectations unrealistically nor infuriating them with 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. This may also lengthen the development time-frame. However, the failure to do this properly will be even more expensive not only in terms of economic costs and investor confidence, but also in terms of reputation risks.

## **AN INDIGENOUS ENGAGEMENT STRATEGY**

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

### **Initial Steps**

There are some initial steps that need to be taken by the company. Firstly, the selection on the team/consultants who will undertake the HRIA is critical. Local knowledge and language skills are required and a reputation for professionalism, fairness, integrity and transparency.

Secondly, what is the physical footprint of the project? From where are the water resources coming and which watersheds are potentially going to be impacted? What are the impacts on the downstream users? Where are the utility and transportation corridors?

Thirdly, which groups of indigenous peoples are potentially affected? Who are they, how are they organized and is there any interrelationships between these communities? What do they use the project area for? Is it a seasonal activity or close to their core area of use? Are you able to access from third parties, knowledge of their use and occupation of their project area? You will also need to assess the strength of their asserted use/claim to a part of the project area.

### **Initial Engagement**

The Company should seek to initiate contact at the earliest opportunity, even prior to the initial exploration work. It is important to recognize both legal and cultural norms, but do not overlook personal norms. If you wait to initiate contact, and start the exploration work, there could be both ill-will and a misunderstanding of what you are doing and your understanding and approach to indigenous peoples. Remember, that 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 strength of claim? What is their own history of dealing with each other? Do you approach them jointly or separately? It is also important to understand the history of the indigenous peoples, their challenges and successes, and their history of dealing with all levels of government? Also what is track record and reputation with industry? What are their needs for both economic development and human resources development?

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

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

### **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 do you meet in person? Whom from the Company do you get involved: the CEO, VP Exploration/Corporate Development, Consultants, or legal counsel? Then the other big question is 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 some constant faces throughout the process for efficiency, continuity and consistency.

### **Role of the Government**

An issue that often arises is do you let the government take the lead? In Canada, the legal requirement for consultation falls on the government, thus should the government take the lead and do you take the back seat? The answer to this is no. The company has the most to gain and lose and therefore the company needs to be in the lead in the relationship-building process. There may be bureaucratic indifference from or a previous acrimonious history with the government, both of which could negatively impact on your project. In other jurisdictions, the government may demand to take the lead and you may be forced to have a secondary role only. There is a fine balance here of not offending the government but also making sure that the concerns being raised by the indigenous peoples are being integrated into the decision making processes.

### **The Basis of the IBA Agreement**

It is important to listen and understand what the concerns are of the indigenous peoples with respect to the Project. There could be sites where they have high spiritual/archaeological values. There could be concerns about the environment, and water in particular. There could be concerns about economic opportunities and social impacts. It is important that these concerns are meaningfully integrated into the Project.

Beyond, this it is also important to get to an IBA. What should the company offer? Do your risk/benefit analysis. Internally decide on what you need from the indigenous group and what you can offer in return. Local employment and procurement can be important, but a larger financial interest or stake through royalty-sharing is important. Also develop mechanisms and processes to address the issue of unaddressed or unexpected impacts.

Where is the indigenous group's legal leverage? Examine the requirements on the permitting processes. Assess how having the indigenous group support the project can shorten and streamline the permitting process. Assess how having the indigenous group oppose the project can delay or derail the project. Assess how other civil society and environmental groups gain or lose legal leverage depending on whether or not the indigenous group has signed on to an IBA. The use of social media has become a very effective tool to move public opinion and to organize protests and rally. The "Occupy Movement" and "Idle No More" movement helped to galvanize widespread rallies and bring media focus on 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 that investment climate/envelope that is 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 about the stability, transparency and integrity of the national and local governments. An assessment of the country risk is critical. As the demand for minerals is growing, the move into more unstable regions of the world is inevitable.

A real tension may also appear in these less stable jurisdictions on the recognition of local indigenous groups. The situation may arise where a company is seeking to enter into an IBA with an indigenous group that the national government does not want to see, and to which it may even be opposed. This is where the country risk assessment comes into play, and the principle of the rule of law may lead to a view that the jurisdiction is too risky to warrant any further effort or investment.

### **Some Common Pitfalls and Challenges**

One of the more challenging parts of the exercise is to know what you should put into an IBA. There is a balance here between what is needed and what can be afforded. In the Canadian context, the Supreme Court of Canada in its 2004 decision in *Haida* (*Haida Nation v. British Columbia (Minister of Forests)*). [2004] 3 S.C.R. 511, 2004 SCC 73.) laid out these two principles:

1. the duty to consult is on the Government and not industry (yet industry needs to take the lead on this issue); and
2. the spectrum for consultation from mere notification to deep and meaningful consultation which will depend on (a) the strength of the asserted claim; and (b) the potential impact on aboriginal rights and title.

Within the range 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. However, you should be mindful of this possibility from the outset, and you may even want to stop or abandon the project early in the exploration process.

Many have advocated that this Canadian approach on consultation should be followed in other jurisdictions. Consultation must be timely, done in good faith, and should not be seen as an opportunity to just “blow off steam.” The company needs to show that it has demonstrably responded and incorporated the concerns of the indigenous peoples into the project. There is no need to come to an agreement on where you are on the spectrum and hard bargaining is permitted. But the consultation must have some form of accommodation and, without this, the consultation is meaningless.

What is also of critical importance and not articulated in the case law is a third factor that drives consultation: the ability of the indigenous peoples to articulate, advocate and engage. There are instances where an indigenous group has a very strong strength of claim and significant potential impacts, but does not properly engage and thereby misses an opportunity for a real role and benefits.

On the other hand, there may be an indigenous group that has a very loud and articulate leader, a website declaring where development is permitted in portions of its territory, and is able to rally with other stakeholders. In such cases the true strength of claim may be weak, the project impacts minimal, but the indigenous group is able to extract significant concessions.

This third factor becomes critical for stakeholder management and engagement. The indigenous peoples can create process risks that can lead to delays and uncertainty, especially as they engage other stakeholders. The disciplined use of capital resources and the certainty required for investment decisions requires project stability and certainty, which can be gained through an IBA.

## **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 understand the strength of the asserted claim and traditional land use patterns.

There may be some initial exploratory agreements but the real goal is to get to an IBA. It is here where the company makes its assessment of what it needs in terms of support for the project and what incentives it wishes to provide. The internal assessment that is done must be reasonable in the circumstances and these will be unique for each project and indigenous group.

Each project and each community will have variations and there is no standard IBA. There is a helpful publication on IBAs available at [www.ibacommunitytoolkit.ca/](http://www.ibacommunitytoolkit.ca/). The common elements of an IBA will often include:

- 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, the discussions between the company and the indigenous group are undertaken with confidentiality and on a “without prejudice” basis. However, if the talks break down, the company may want to table its last offer on a “with prejudice” basis and would then be present that to Court on a judicial challenge brought on 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 may want to show inflexibility on the part of the company on the scope, design and location of the project and the lack of benefits. There will be paper trails on all sides, to show who was the more reasonable or unreasonable party, as the case may be.

## **Hostile or No Responses**

In some cases, the initial response from an indigenous group may be “go home” and “not in our territory”. Or in other cases there is no engagement or response except near the end, when it is “no”. In such cases, it is always important to keep a paper trail as there will be a contest to appear to be the more reasonable party, especially in the eyes of the court.

In other cases, you may have an enthusiastic leader, promising that he can deliver to you the community and green lights all the way. This should be treated with obvious caution. The key is to engage with the leadership, but also make sure that you are connected to the center of the community. However, be cautious not to interfere with internal governance and politics.

## **Continuity**

From the initial contact being made before the start of exploration work, to the point where all the projects permits and funding is in place to start construction, may take 5 or 10 years, if not longer. It is important to understand and recognize that the elected leadership of an indigenous group may go through to two or three election cycles in this time frame and there will most likely be change in the leadership.

Similarly, in the company there may be changes in the project personnel and even in leadership and/or ownership of the project. These changes can be disruptive not only because people may change, but also because there could be a change in corporate focus and strategy.

Since this is a relationship-building exercise, it is important that there is widespread buy-in and commitment from both the company and the indigenous group. The fundamental pillars for building this relationship are trust, respect and communication. These elements are critical to every important relationship. The need for good faith, transparency and integrity on all sides is essential.

Each individual's skill set, experience, background, cultural sensitivity, common sense and good judgment will determine how successful they will be in this relationship-building task. It is important that the team leads have the full support and commitment of senior management to undertake this role. Also, everyone has to have a long-term vision in order to get to this goal; there are bound to be ups and downs in the process. 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 to also require projects to gain and maintain the SLO. The time, costs, and risks to develop mining projects has become much more significant. The NTRs, especially the failure to properly and meaningfully consult with indigenous peoples, on its own and when coupled 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 becoming more daunting and challenging, consequently adding both significant time and costs to the steep and long development curve. Companies and governments which 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, if this path is not chosen by governments and companies, this will likely lead to friction and conflict, which can escalate into social unrest and violence.

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

The process on which a Company embarks 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 this is done properly, and a real partnership emerges, then project stability and certainty are enhanced very significantly. This is the foundation for a civil society.

### **The Benefits Pie**

In order for a project to proceed, it must be environmentally sound and sustainable, and withstand the challenge from civil society and environmental groups. Those challenges become 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 has to be understood that the benefactors from any project must include:

- the shareholders/investors in the project;
- the Government;
- the local community; and
- the indigenous peoples.

This “benefits pie” must be divided into at least these 4 pieces. If there is a 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 this pie, the collaborative approach will hopefully develop and build relationships, that will streamline the process for the development of the project, and hence the increase size of the pie, and therefore 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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