

Making Modern Treaties Work – LCAC
Breakout 2C – Impact & Benefit Agreements

Moderator: Charles Morven, Chief Councillor, Nisg'a Village of Gitlaxt'aamiks

Panel: Margaret Rosling (Partner, Aldridge & Rosling LLP), Kim Gilson (Partner, Duboff, Edwards, Haight & Schachter), Guy Polden (Senior researcher, The Firelight Group)

PANNELIST 1: Margaret Rosling, Partner, Aldridge + Rosling LLP

- Margaret provided a brief background of experience in impact and benefit agreements, noting Aldridge & Rosling LLP advises Indigenous peoples on all aspects of treaty implementation, advising Indigenous peoples responding to major resource development projects (within all resource sectors) in their territories.
- This process has been successful working towards benefit agreements and understanding the impact of resource development on modern treaties.
- Aldridge & Rosling LLP prepare for negotiations and processes to ensure engagement and negotiation is successful.
- A benefit agreement is a product of a process of engagement between Indigenous Nations and project proponents.
- A benefit agreement should come only after the Indigenous government as a clear understanding of aspects;
 - o Impact on treaty benefits,
 - o Full understanding and opportunity to develop mitigation strategies to minimize impacts,
 - o Negotiated full financial benefits, and
 - o An ongoing framework for consultation.
- No two benefit agreements are the same, however the fundamental principle is that the process needs to be iterated, two equality resource parties coming together on all aspects including design, construction, implementation, reclamation and decommission.
- It is important to create a project where the impacts on treaty rights have been fully explored and mitigation strategies have been incorporated in project design.
- Aldridge & Rosling LLP ensure that the agreement provides for financial and other benefits appropriate to the level of impact and in line with the commercial imperatives of the project.
- The negotiation of any benefit agreement starts at the very first meeting and it is critical to set the foundation during that initial contact at the very early stages of project design.
- There has been an evolution of attitudes of proponents; in earlier projects the proponents would come to the meeting with the full project plan, what we're seeing now is the proponent comes very early in their evaluation with an open mind to talk about project design.
- It is important to take the time to educate the proponent on your treaty agreement, the difference between working with Indigenous governments under modern treaties can bring more certainty than would be available in other environments (asserted rights, not proven). It is an unfamiliar concept to many proponents what jurisdictions you have under treaties and what treaty rights are in general.
- Expectations should be set an early stage that lays out the foundation for engagement.

- Foundational principles identify that the process has to be iterative, there has to be dialogue about what the project is going to look like, what the impacts will be, mitigation strategies and the negotiation of benefit agreements.
- The project proponent has to understand they are negotiating with a group based on a treaty, not on the agreement with other First Nations and it has to be clear that the Indigenous government and project proponent have come to the table fully mandated with decision-makers present.
- It is often problematic not to have decision-makers at the table and it is not a good way to proceed with negotiations.
- There should be a non-disclosure agreement in place, and a capacity funding agreement has to be entered into before any negotiations take place.
- One of the foundational principles of a capacity funding agreement is that the Indigenous government's participation in commercial negotiation and regulatory process will be fully funded on a cost-recovery basis so it is important to record time and expenses against projects. As such, there is an expectation that Indigenous governments will come to the negotiations and regulatory processes equipped with advisors and experts that will be paid for under the capacity funding agreement.
- It is helpful to have a commercial table responsible for negotiations in the benefits agreement and a regulatory table that will discuss, with the proponent, impact and mitigation strategies, environmental assessment, financial negotiations.
- The Indigenous government should have a full and complete up to date financial modelling, retain a financial expert in that resource area, review the quality of the information you receive and rely on that financial expert to help you put forward a financial proposal.
- Before landing on a proposal for financial benefits, you will want to have an own-source revenue and tax advice from appropriate advisors. The regulatory table should be populated by subject matter experts in your own government and outside experts and advisors to complement.
- The need to develop close relationships with trusted advisors that you can use on resource development projects to help cut through issues, that understands your treaty and treaty impact, who is well-versed in mitigation strategies. It is important to create an environment with experts on both sides of the table; typically, when you put the experts together and ask them to solve a problem, they can get their quite quickly.
- Preparation is key for negotiations; make sure you are fully mandated by the government.
- There has to be enough room for everyone you want to bring to the table.
- Breakout rooms are often available that provide sufficient time to caucus, get alignment within your team, and you are able to ask for a caucus at any time. It is important to pay attention to reporting and communication throughout the process of engagement and providing ongoing reporting to your principals (monthly) and keep elective representatives up to speed.
- It is also worthwhile to spend all of the time you need to understand opportunities from design phase to reclamation, the terms are consistent with what your Nation needs, provisions relating to procurement and make sure they are bound by the terms that were agreed to in negotiations.

- A final recommendation to pay attention to and think about opportunities for revenue sharing agreements with provincial/territorial governments as there may be different jurisdictions have different opportunities.

PANNELIST 2: Kim Gilson, Partner, Duboff, Edwards, Haight & Schachter

- The use and occupation within traditional territories is disrupted by activities such as development projects and the establishment of parks.
- The benefits specific to Inuit are based on the Nunavut Agreement. Because what is being proposed is going to impact traditional use of land (not only development, parks need to be considered). Under the Nunavut Land Claims Agreement, impact benefit agreements may include any matter that could have a detriment impact or reasonably confer a benefit.
- Inuit Impact Benefit Agreements (IIBA) are signed to promote Inuit cultural goals, achieve and maintain a standard of living equal to other Inuit and Canadians, generally.
- Benefits must be related to the nature, scale and cost of the project and its direct and indirect impacts on Inuit.
- An IIBA is required for a major development project (as defined) on Inuit-owned lands that could have detrimental impact on Inuit.
- Parties should consider the level of complexity and detail required (general, principle based on specific/detailed); the approach may depend in part on the experience and competency of those tasked with implementation and the ability of the parties to work together towards common goals.
- It is important to consider government obligations; such as legislative requirements (archeological sites, protection of wildlife) in the purview of the territorial government. The IIBA creates a direct relationship and could be a valuable enforcement tool and may provide confidence to affected individuals but could also be problematic if it creates a two-level penalty system.
- Other matters to consider include training, preferential hiring, employment rotation, scholarships, labour relationships, business opportunities, housing, recreation, safety, health, language, research and development, access to project facilities, environmental concerns such as disruption to wildlife, outpost camps, information flow, liaison between Inuit and proponents, other Inuit impact benefits agreements and developments, implementation and enforceability including performance bonds and liquidated damages, conflicts or duplications with government responsibilities (housing, schools, medical, facilities), community needs (roads, water treatment, etc.), impacts on local residents (e.g. influx of Southerners (whether to transport incoming workers or have them remain in the communities), conditions imposed by the Nunavut Impact Review Board, and socioeconomic considerations.
- Financial formulas vary according to the type of project, size, length of project, financing needs and restrictions.
- Other important things to take into consideration include equity portions; when is it the appropriate time to put forward your requested amount, the proponents will counteroffer, and whether your goal is profit-oriented or what other needs the community may have.
- Typical IIBA provisions include implementation (through implementation officers, coordinators, committees which is the key to making it work), employment (preferential hiring, points of hire, employment targets/goals, language, schedules, employment

supports, and counselling), contracting (preference contracting and processes for ensuring local businesses have a fair opportunity to participate), access to facilities (access to the project site, access to the roads and other facilities), research and development (opportunities to participate in research activities, use of local knowledge, potential revenue), acquisition of assets (option to acquire project facilities no longer needed by the development), wildlife (consultation, reporting, wildlife management and conservation measures), economic, social and cultural wellness (monitoring or mitigating adverse effects of the project and its closure, enhancing long-term prosperity), dispute resolution, and renegotiation.

- Employment targets and monitoring are critical in determining success.
- Issues for negotiation include finding balance, community infrastructure support, timing (when to negotiate), confidentiality (developer's project details and provisions, particularly financial), leases, licenses and permits, and potential for project expansion. Other areas that the Inuit impact benefit agreements include are enforcement, dispute resolution, default (cross-default clauses).
- The project cannot start without an agreement in place and takes effect within 30 days, subject to Ministerial approval. There are also provisions for arbitration.

PANNELIST 3: Guy Polden, Senior Researcher, The Firelight Group

- The Firelight Group is an Indigenous-owned business that works for Indigenous communities with quality, fairness, respect, and social return at its core. They will be providing an Indigenous mapping workshop (free for Indigenous Nations/organizations) in May. The group has clients in Canada, Washington and Alaska; 60 have been supported on IBAs negotiation and implementation. They aim to help communities negotiate strong agreements with companies, support community negotiations teams leverage agreements that meet the community's priorities and values, bring together traditional knowledge and use, ecology and socioeconomic research, enhancing capacity through the benefits agreement toolkit, as well as training.
- New Horizons for IBAs has observed changes in the landscape of impact benefit agreements, namely Brownfields and care and maintenance agreements.
- Brownfield is negotiated in a context where a project is already operating while care and maintenance impact benefit agreements are negotiated in a context where a mine has been placed in care and maintenance phase (not producing at all which could severely weaken leverage in negotiations).
- Negotiations start off on much different footing, communities experience of living without an agreement and experiencing impacts without any benefits. This provides an opportunity to re-establish agency over the use of their lands and to gain control over operations, however it is also a challenging scenario with reduced leverage.
- Getting to the table is often the hardest part, however there is a greater amount of information available on impacts.
- The Firelight Group also works on the renegotiation of agreements. There are sometimes door openers that provide an opportunity for renegotiations including a clause in the agreement, permit or regulatory requirement, the agreement may have been breached which would allow a party to hit the reset button. There are unique opportunities for impact assessment, including looking back on predictions made in environmental

assessments and assess their accuracy, improved mitigations and accommodations, and it provides an opportunity to meaningfully update the benefits.

- There are opportunities to enhance long-term implementation as there is usually strong transition periods between negotiation and implementation, consistency on representatives, or process for transition for shift in representatives to manage turnover, capacity to manage and utilize funds in place, annual community meeting to celebrate and renew relationship between parties, peer-to-peer knowledge exchanges, periodic third-party implementation reviews.
- To conclude the presentation, Guy invited everyone to access the impact benefit agreement community toolkit available on their website.

Question:

1. There was an aspect of IBA that was not discussed: which is that it is very often done behind closed doors. What do you think about community engagement during IBA negotiations?

Response:

- Community tours in advance, community priorities
- Heard at regulatory phase, concerns are often interruption to wildlife. In the IBA process we have taken those things into account, looking to ensure that, to the extent possible, there is boots on the ground to know what is happening. Community involvement is not by any means a closed door.
- Ideally, this is something that is well supported within the community. Free speech, voices have opportunity to be heard. Government is entering into the IBA, there has been a full engagement about impacts and mitigation strategies, benefits against impacts has been reached.
- Support and certainty provisions of agreement, careful line to be drawn in negotiating those terms to ensure the responsibility of the Indigenous government is to uphold the agreement on behalf other government.

2. On the issue on land overlap between First Nations or Indigenous groups, it is easy in certain cases to ignore other groups, how do you address the land overlapping?

Response:

- Assertions of Aboriginal rights part of the territory governed by the treaty, not uncommon.
- Obligation to consult and, if necessary, accommodate Indigenous people who have assertive rights but are unproven is well developed in jurisprudence. The proponent works with government and takes the direction of government to determine who they are required to negotiate with.
- With large linear projects there will be overlaps and the approach that can be taken with confidence, treaty rights are very clear, benefits are negotiated within that context of the environment.

3. On renegotiation – when it comes to renegotiating an IBA, how do you make sure that a mine will come to you to say “it’s an expansion“, do you see any merit in having a very clear definition of what defines the project? Major argument with the proponent, with the

need to renegotiate, even if it's a new project why would you renegotiate if the benefits are the same? You still have money coming in, jobs are same, procurement process is same - what is the necessity to renegotiate?

Response:

- Agreements are complex, project description should be very clear and very certain.

4. On implementation – one of the major problems of IBA is that parties use a great deal of energy to negotiate, then the deal is ratified but after a while the implementation falters, once the construction phase is over. Should there be an implementation plan on the side to ensure that each provision is addressed?

Response:

- Implementation is a critical part of any agreement; many schedules are around implementation, needs to start at the day the IBA is entered into and throughout all stages
- Emphasize complex commercial agreements, product of many months of negotiations
- Times where drafting aren't perfect, use the opportunity for renegotiation to fix what we didn't get right. General principles for expansion projects, a lot of those things do not end up needing to be renegotiated
- Want to know how many Inuit hired, what kind of jobs, fired, left, for what reason, etc.