

Ryerson University Institute for the Study of Corporate Social Responsibility – Dec 11, 2015

Indigenous community consent and Canada's mining sector:
What Role for Impact and Benefit Agreements?
(featuring a case study of the permitting/operation of the Voisey's Bay Nickel Mine as seen by the Nunatsiavut)

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Acknowledgements:
ArcticNet; and the Social Sciences and Humanities Research Council of Canada





First nations don't have a veto, but they do have options

Without clear criteria for assessing consultation on Enbridge's pipeline proposal, the door is open for protracted judicial review

Globe and Mail, Feb 21, 2012

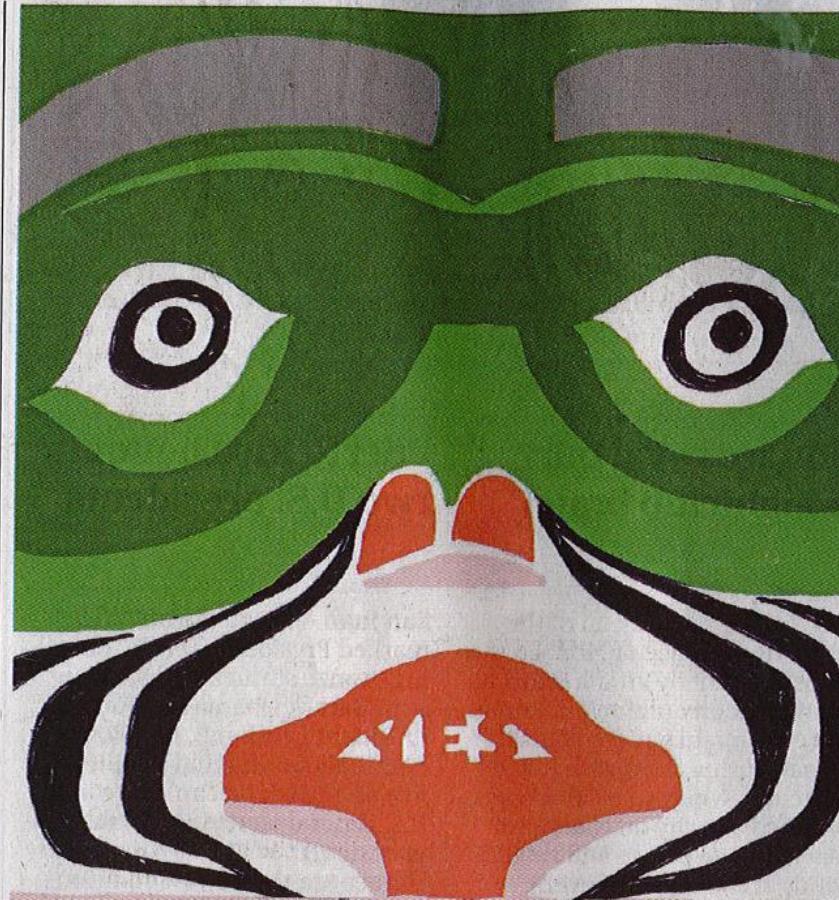
TOM FLANAGAN

Co-author of *Beyond the Indian Act: Restoring Aboriginal Property Rights*

The Conservative government has shown that it favours Enbridge's proposed Northern Gateway pipeline to carry bitumen from Alberta's oil sands to the B.C. deepwater port of Kitimat. Despite this open support, there's a risk that the Northern Gateway proposal could go the way of the Mackenzie Valley pipeline – ultimately approved in principle but held up so long it never gets built, because the market has found alternative options.

About 50 first nations lie in Northern Gateway's path. Consultation with these first nations will be critical, so let's look at the legal framework.

In the 1997 *Delgamuukw* case, the Supreme Court of Canada held that aboriginal title still exists across British Columbia where treaties have never been signed. That includes most of the



compensation? Yes. Veto? No: Treaty 8 first nations are in a situation that is different in law but similar in practical effect. They surrendered their aboriginal title, but Treaty 8 gave them the right to continue hunting, fishing and trapping on Crown land until the government took up such lands for other purposes. The Supreme Court decided in *Mikisew* (2005) that the government had to consult Treaty 8 nations before approving infrastructure that might affect their wildlife harvesting rights, even off reserve. Again, consultation, accommodation and compensation are involved but not a right of veto.

Enbridge has been discussing Northern Gateway with first nations for at least five years. It has offered them an equity stake in the pipeline plus other benefits, and has also made cash grants to some first nations to finance their participation in the consultations. Another level of consultation is now being carried out by the Northern Gateway

Oil pipeline consultation with aborigines doesn't equate to veto, report argues

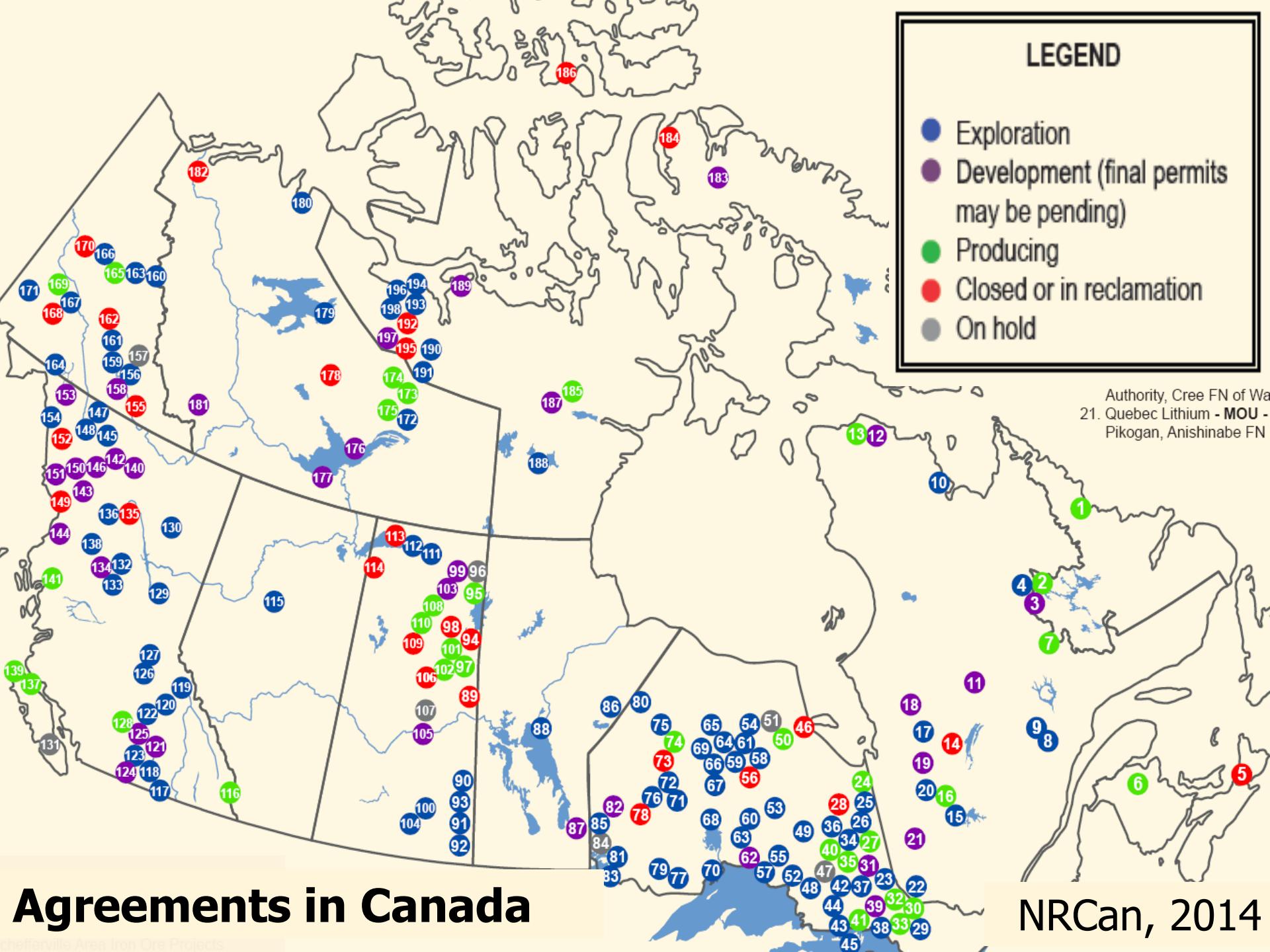


CLAUDIA CATTANEO | May 12, 2014 6:52 PM ET

More from Claudia Cattaneo



While debate has been ongoing in the oil & gas sector, Canada's mining sector has largely managed to avoid the debate and simply make progress through agreement-making.





IBA Research Network

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LIST OF KNOWN IBAs

[*Download the NRCAN Map of Agreements in Canada- 2010* \(pdf\)](#)

Project	Province or Territory	Status in 2009	Agreement Title	Year Signed	Aboriginal Signatory/Signatories	Industry Signatory/Signatories
Syncrude Oil Sands	Alberta	Producing	Unspecified	1993-1998	Athabasca Native Development Corp.	Syncrude Canada Ltd.
Apple Bay Quarry	British Columbia	Producing	Mining Participation and Royalty Agreement	2003	Quatsino First Nation	Electra Gold Ltd.
Eskay Creek Mine	British Columbia	Closed	Collaborative Agreement	2004	Tahltan Central Council (Tahltan Nation)	Barrick Gold Corp.
Galore Creek Project	British Columbia	Construction Suspended	Participation Agreement	2006	Tahltan Central Council (Tahltan Nation)	NovaGold Canada Inc.
Golden Bear	British		Socio-		Tahltan Central	Barrick Gold (previous)

[Home](#) / [Newswire](#) / [Avalon and the Deninu K'ue First Nation Enter into Accommodation Agreement](#)

Avalon and the Deninu K'ue First Nation Enter into Accommodation Agreement

by NationTalk on June 8, 2012

Toronto, Ontario – June 7, 2012 – Avalon Rare Metals Inc. (TSX:AVL)(NYSE Amex:AVL) (“Avalon” or the “Company”) is pleased to announce that it has entered into an accommodation agreement (“Accommodation Agreement”) with the Deninu K’ue First Nation (“DKFN”).

The Accommodation Agreement provides for business and employment opportunities for the DKFN related to the Company’s Nechalacho Deposit and associated facilities in the Northwest Territories (the “Project”) and contains measures to mitigate environmental and cultural impacts that may result from the project development. The Accommodation Agreement also commits the DKFN to supporting timely completion of the environmental assessment, permitting and development processes of the Project.

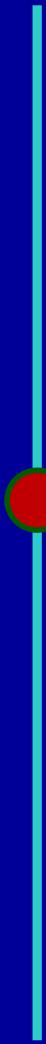
The definitive financial structure for the Project has not been finally determined, but it is expected that it will take the form of a limited partnership, in which the DKFN will participate as one of its business opportunities. Upon receipt by Avalon of certain regulatory permits and approvals, the DKFN will acquire 3,333 limited partnership

Impact and Benefit Agreements (IBAs)

- Increasingly non-voluntary (i.e. have effectively become institutionalized in Canada)
- *Supra-regulatory* (i.e. complementary) though largely confidential
- Address a key governance gap through (further) mitigation of project impacts and delivery of benefits to local Indigenous communities



Community Conditions



Status quo

Project w/o EA mitigation

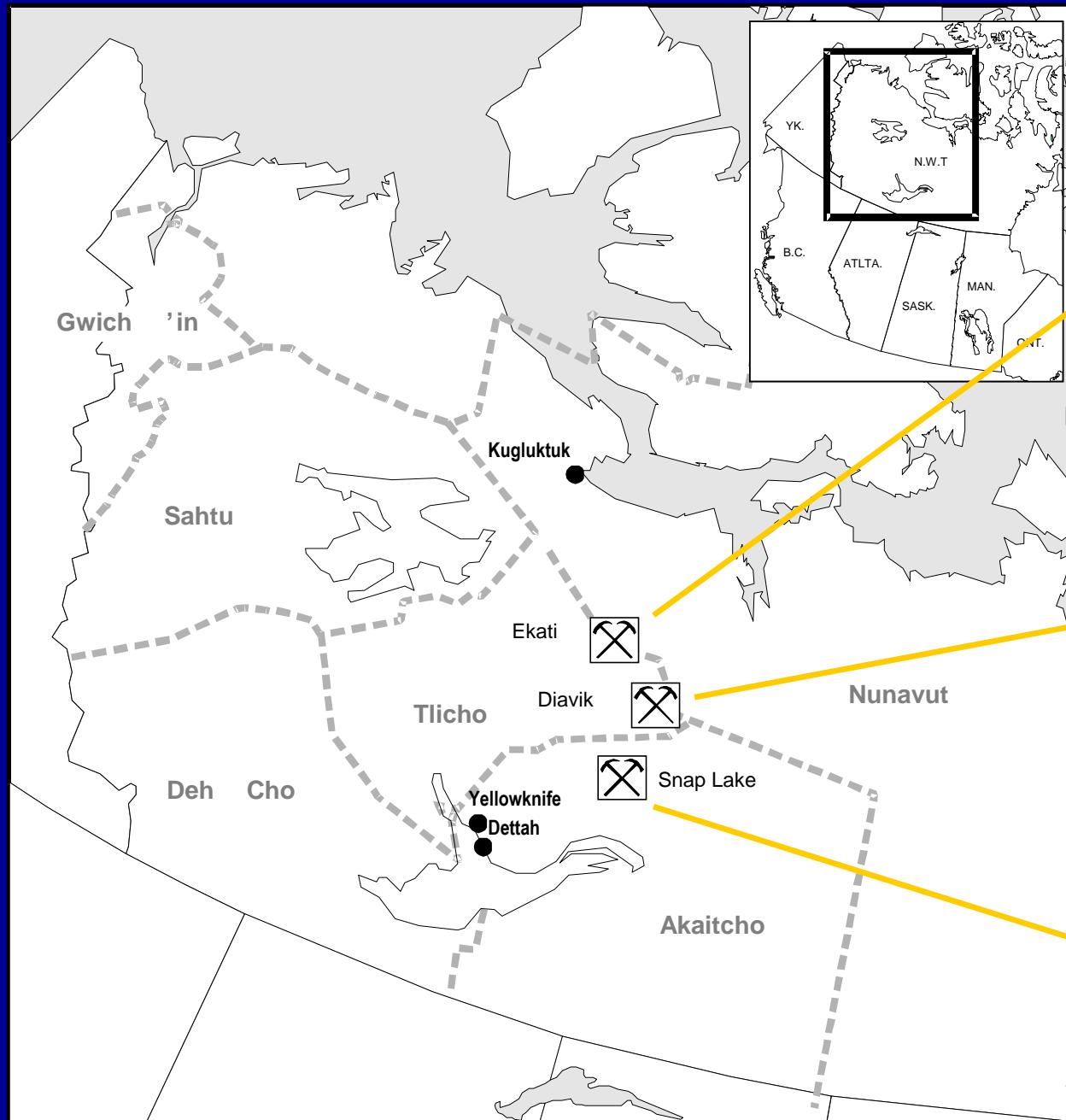
Project w/ EA mitigation

Project w/ IA

Project w/ I&BA

Impact and Benefit Agreement (IBA)

Typical Content	
For Indigenous Communities	For Mining Firms
<ul style="list-style-type: none">• Financial payments• Employment and training• Preferential Contracting• (added) Environmental and Cultural protection/monitoring• Education Scholarships• Community development• Dispute resolution processes• In-kind provisions and other community-specific interests (e.g. Voisey's Bay shipping agreement)	<ul style="list-style-type: none">• Establishes formal, long term relationship with community (which can be publicized to stakeholders)• Assurance that mining activities will not be disrupted• Access to community infrastructure and workforce



Project	Owner(s)	IBA Signatories
Ekati Diamond Mine (producing as of Oct 1998)	BHP-Billiton	<p>Tlicho Government (then Dogrib Treaty 11) (Oct. 1996)</p> <p>Lutsel K'e Dene FN (Nov. 1996)</p> <p>Yellowknives Dene FN (Nov. 1996)</p> <p>North Slave Métis Association (Jul. 1998)</p> <p>Kitikmeot Inuit Assoc. and the Inuit of Kugluktuk (Dec. 1998)</p>
Diavik Diamond Mine (producing as of Jan 2003)	Diavik Diamond Mines Inc. (Aber Diamonds and Rio Tinto plc)	<p>North Slave Métis Association (Mar. 2000)</p> <p>Tlicho Government (then Dogrib Treaty 11) (Apr. 2000)</p> <p>Yellowknives Dene FN (Oct. 2000)</p> <p>Kitikmeot Inuit Association (Sept. 2001)</p> <p>Lutsel K'e Dene FN (Sept. 2001)</p>
Snap Lake Diamond Mine (producing as of 2010)	De Beers Canada	<p>Yellowknives Dene FN (Nov. 2005)</p> <p>Tlicho Government (Mar. 2006)</p> <p>North Slave Métis Association (Aug. 2006)</p> <p>Lutsel K'e Dene FN (June 2007)</p>

The Con Mine Shaft as visible from Dettah, NWT



Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North

Organization & Environment

23(1) 76–98

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Ken J. Caine¹ and Naomi Krogman¹

IMPACT AND BENEFIT AGREEMENTS
AND THE NEOLIBERALIZATION
OF RESOURCE GOVERNANCE
AND INDIGENOUS-STATE RELATIONS
IN NORTHERN CANADA

Emilie Cameron and Tyler Levitan

Studies in Political Economy 93 SPRING 2014

A old mine pit in Schefferville, within the Labrador/Quebec Iron Trough and the traditional territories of the Innu of Matimekush-Lac-John and the Naskapi Nation of Kawawachikamach, both of whom have IBAs with new developers.



FPIC = Free, Prior & Informed Consent

consent that is given by fully informed indigenous people, without coercion, intimidation or manipulation, before an activity begins and according to their own decision making processes (Sosa, 2011).



License to Operate

Indigenous Relations and Free Prior and Informed Consent in the Mining Industry

Irene Sosa
October 2011



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International support for FPIC

- International Labour Organization (1989) Convention No. 169: Indigenous and Tribal Peoples Convention.
- United Nations (2007) Declaration on the Rights of Indigenous Peoples.
- International Finance Corporation (2011) Performance Standard 7: Indigenous Peoples; and Guidance Note 7: Indigenous Peoples

Recent signs in Canada...

Office of the
Prime Minister



Cabinet du
Premier ministre

Ottawa, Canada K1A 0A2

Dear Dr. Bennett:

I am honoured that you have agreed to serve Canadians as Minister of Indigenous and Northern Affairs.

In particular, I expect you to work with your colleagues and through established legislative, regulatory, and Cabinet processes to deliver on your top priorities:

- To support the work of reconciliation, and continue the necessary process of truth telling and healing, work with provinces and territories, and with First Nations, the Métis Nation, and Inuit, to implement recommendations of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

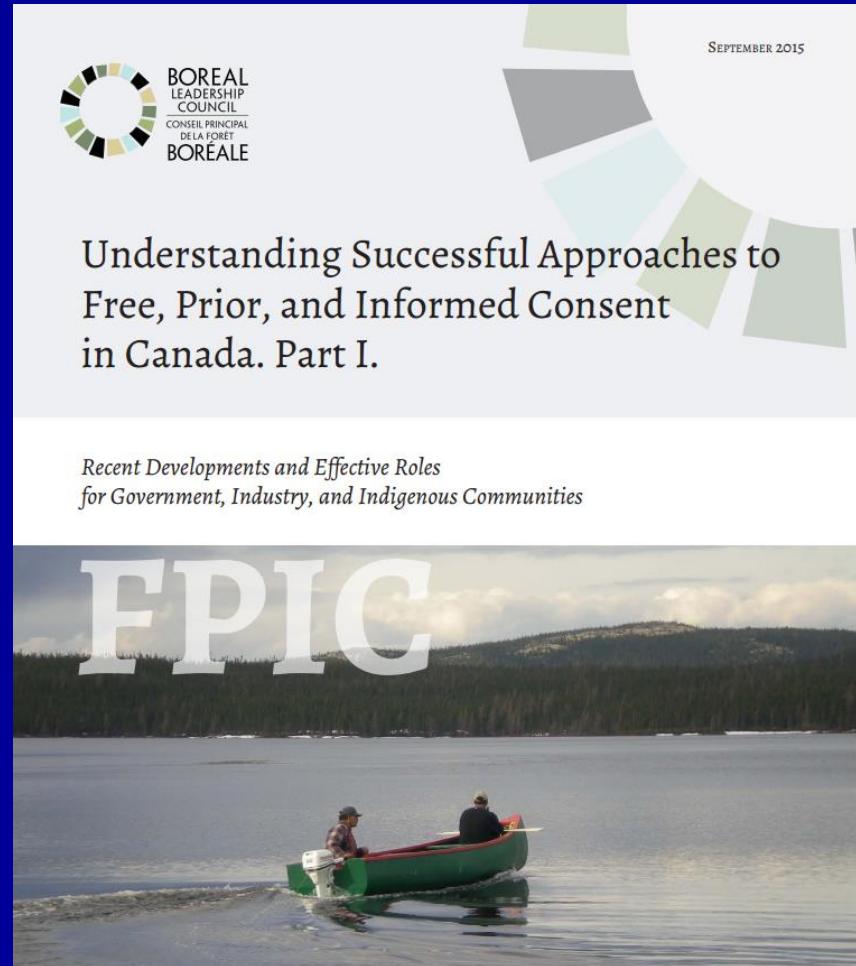
Business and Reconciliation

92. We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

- i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.

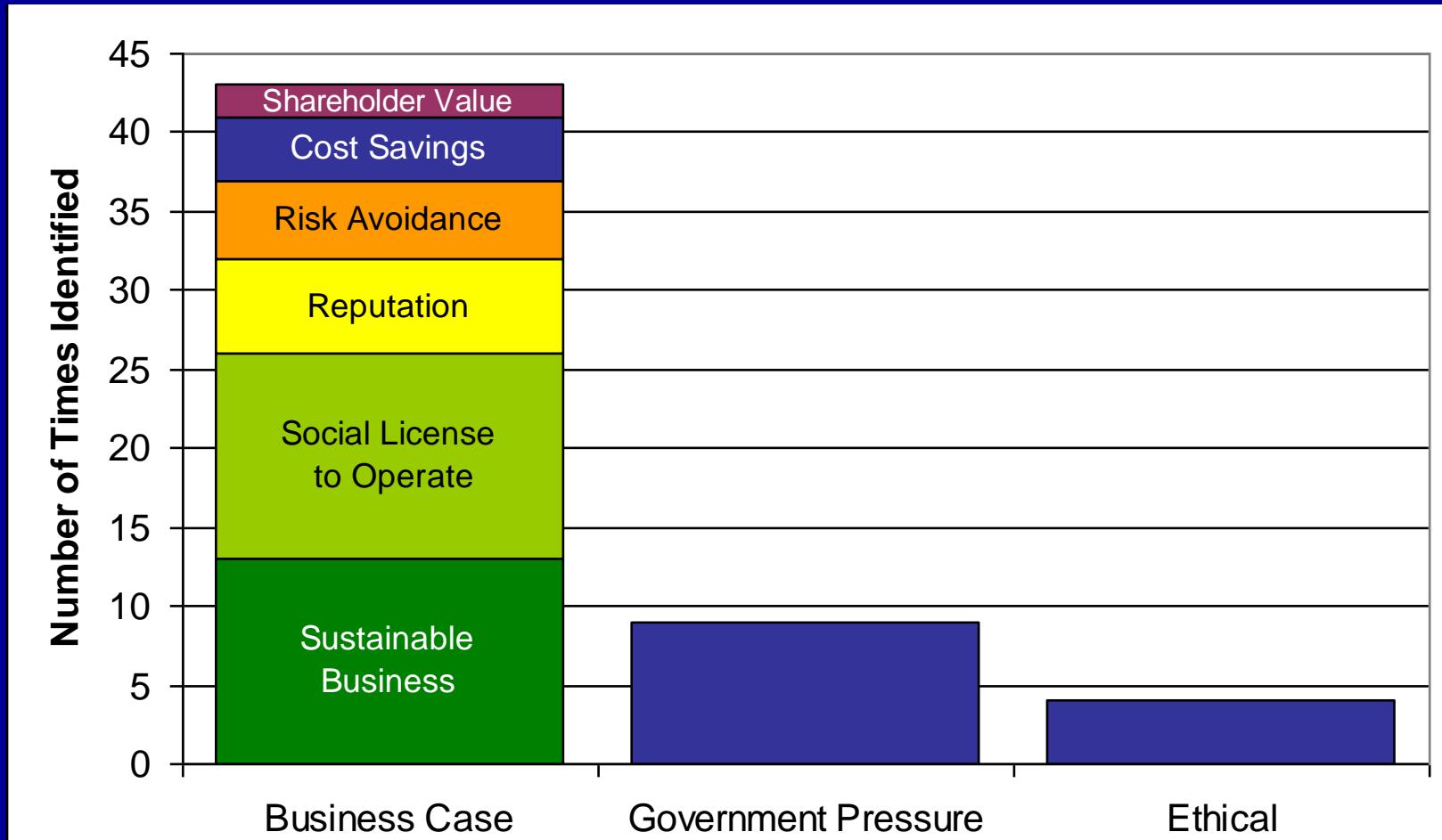
IBAs as a reflection of FPIC?

- *IBAs are increasingly held up as one of the best, concrete examples of FPIC (Sosa, 2011)*
- ...especially so where the IBA was evidently:
 - free (e.g. NG– VBNC)
 - prior (e.g. Attawapiskat – DeBeers)
 - informed (e.g. Wahgoshig – Detour Gold)



Does this view worry mining companies?

What we discovered in 2007: Corporate Rationales for signing IBAs as identified in Interviews



Source: Lapierre and Bradshaw, 2008

What we discovered in 2007: Corporate attitudes regarding IBAs as identified in interviews

RELUCTANCE → ACCEPTANCE → EMBRACING



What we discovered in 2013

Corporate views of what their pursuit of an IBA implied for consent

- for some companies (e.g. De Beers), affording communities the right of consent is already policy
- for all others, the pursuit of an IBA can indeed be viewed as their *implicit* acknowledgement of a community's right to consent

What does this mean for evolving Aboriginal rights in Canada?

It means more of the status quo:

- the Crown need not explicitly recognize a right of consent (except where legally secured);
- industry will continue to shoulder the burden of securing consent (indeed, they have largely come to accept it); and
- communities will continue to work in two spheres:
 - asserting their rights through public processes; and
 - realizing their interests through private negotiations

Canadian regulatory and *supra*-regulatory processes associated with contemporary resource developments

Process	EA	Cons. & Accom.	IBAs	Resource Revenue Sharing
Concerns addressed	environmental & social conditions	infringement of Aboriginal Rights	'peace in the valley' / securing of benefits	'peace in the valley' / securing of benefits
Legal Basis	CEAA et al.	Constitution	none (save for select regions)	Constitution (BC)
Cultural Basis (evolving norms)	do no harm	'the right thing to do'	social license/ FPIC light	economic development (outside BC)

The fundamental FPIC challenge

- If the securing of FPIC by proponents is to become the new standard for resource developments on indigenous lands, can it be done in a way that:
 - reflects varied indigenous governance systems of decision-making;
 - avoids interpretation of consent as a one-time decision, manifest in a signature on a dated agreement; and yet
 - offers industry sufficient assurance to secure financing and enable development?



The Voisey's Bay Nickel Mine and the Nunatsiavut



The story

- In 1993 Diamond Fields Resources discovered rich nickel deposit 56.5 kms. from Nain, in an area with outstanding and unresolved aboriginal land claims (Inuit and Innu)
- Nickel deposit in Labrador Inuit Territory
- Inco had an aggressive timetable
- Nunatsiavut Government priority was negotiating the settlement of land claims
- Negotiating an IBA was second priority but would address as a matter of contract, benefits Inuit would receive from the project
- Inco entered into IBA negotiations without a regulatory requirement to do so

The story (cont.)

- Negotiations with NG began in late 1995
- Between July 1996 and December of 1997, both a financial offer and comprehensive IBA were rejected by NG
- In the midst of this, NG and Innu Nation staged a protest at the Voisey's Bay site because construction was progressing without the EA process being completed. NG and Innu Nation successfully applied for a court injunction to stop construction until the EA was complete.
- NG provided a counter-offer to Vale which was rejected by in March of 1998
- NG and Innu Nation presented a joint position on the major issues by December of 1999
- Starting in 2000, there was an impasse with the provincial government on the project configuration, putting IBA negotiations on hold

The story (cont.)

- This time was used to continue informal communications with Vale and to hold community discussions on Winter Shipping which was a major issue for Inuit and there was disagreement about the need for winter shipping.
- IBA negotiations restarted in mid-2001 and occurred over approximately a year
- Labrador Inuit ratified the IBA mid-2002 and it came into effect on July 29, 2002 (All beneficiaries had an opportunity to vote on the IBA, regardless of where they were living)
- At the time the IBA came into effect, negotiations continued for a Winter Shipping Agreement with a timeline of one year to have it in place

The story (cont.)

- Winter shipping was considered to be an impasse issue for numerous reasons:
 - ✓ Inuit are Sikumiut – People of the sea ice
Sea Ice is used for hunting, fishing and travel
 - ✓ Ice is a significant tie that connects the Inuit Circumpolar community
 - ✓ Inuit life, culture and society are integrally linked to the sea ice
 - ✓ Knowledge of the environment has contributed to the survival of Inuit
 - ✓ Inuit understand the movements of the pack ice in relation to wind and tides
 - ✓ We know where to find snow on the ice for building shelters, where seals keep their breathing holes. Where polar bears den and travel.
 - ✓ We know when it is safe to take small boats out into moving pack ice.
- In addition to these reasons, on two previous occasions, when the ice had been broken and refrozen, deaths were involved.

The story (cont.)

The separate shipping agreement took 18 months to negotiate and includes limits on the number of winter shipments, closure periods for any shipping, ship design, ballast water dumping, and the need for Inuit ship monitors. Measures to enable ice travel after a shipment were added later.



Nunatsiavut View of IBAs

The Nunatsiavut came to see their IBA as:

- A tool that enabled a direct relationship between Inco/Vale and the Nunatsiavut;
- Formal recognition of this relationship (and each party's commitments)
- A mechanism for the mine developer to share benefits from the project; and
- The embodiment of the Labrador Inuit's collective consent to the project.

Broad aims of the IBA

- To establish and maintain an effective relationship based on mutual respect, co-operation, trust and good faith;
- To establish measures to protect the environment;
- To protect and support social and cultural values; and
- To provide significant benefits and fair compensation to Inuit

This objectives were built into the 16 chapters of the IBA, the key elements of which covered...

Employment Measures

- Aboriginal applicants screened and interviewed before non-aboriginal candidates
- If there is a qualified aboriginal applicant, process goes no further
- Inuit IBA has adjacency process
- Qualified aboriginal female applicants bypass adjacency

Training Opportunities

- Some training completed during construction phase such as HEO, Crane Operator, Industrial Electricians, and some Supervisory training.
- Training now targeted to positions where there are no aboriginal candidates through IBA training funds
- Women encouraged to train in non-traditional trades
- Certified ABE offered at the Voisey's Bay Mine Site.
- Community based training is encouraged.

Business Development

- All Inuit businesses must be at least 51% Inuit owned or be majority controlled by Inuit.
- Nunatsiavut Government and VALE determine businesses eligible to become Qualified Business Entities.
- All procurement opportunities go to Inuit and Innu business first for interest

Workplace Conditions

Site policies include:

- Zero-tolerance regarding racial, gender, sexual or any other type of harassment
- Alcohol and drug free site
- Inuit Employee Advisory Committee advises VALE and NG on workplace conditions
- Country kitchen

Environment

- Includes 2 independant Inuit Environmental Monitors who are employees of Nunatsiavut Government
- Our monitors have access to all areas of the Voisey's Bay Mine/Mill site
- Included in all site meetings regarding issues pertaining to the environment at Voisey's Bay.

Communications

- Communications very important in managing any tensions of community and regional needs
- Travel to communities at least twice a year to discuss IBA implementation
- Ensure all beneficiaries understand IBA commitments

Financial

- Received a lump sum payment for use of the land
- Also receive royalty payments depending on price of nickel
- Loaned money back and now receive monthly payments with interest
- Initial payment will be almost triple value of lump sum payment

Dispute Resolution

- We have a formal dispute resolution committee made up of two representatives each from NG and Company
- One of our reps must be female
- meet quarterly on issues that may be contentious
- In the early days there were a lot more issues
- Have never had to go beyond committee to resolve any issues

Accomplishments

- A number of beneficiaries trained during the construction phase
- At present, 44% of permanent employees are Inuit from entry level to supervisory
- Inuit businesses and joint ventures have obtained approximately 35% of business opportunities
- School & elder visits
- Environmental Protection
- Inuit Employee Advisory Committee
- Country Food Kitchen

Lessons Learned by the NG

There have to be benefits for all involved - all parties must actively want the project to proceed because it will meet an interest that is of importance to them.

Empower the community - affected communities must feel that their voice has been heard and that what they have said has been taken into account.

Build capacity and strong communities – This is equally important for the Company who needs employees and businesses to take up opportunities

Honesty – There is no value in hiding bad news; you need to build a relationship based on openness and transparency

Credibility - Can't be bought, takes time and usually pain to attain

Lesson learned by Ben

- Communities pursuit of consent rights may reflect a variety of interests:
 - to be able to say 'no' to development
 - where wanted, to be able to find acceptable and sustainable sources of employment and economic development
 - to be able to influence project design in order to protect natural and cultural heritage
 - to be able to exercise good governance and authority in order to make sound decisions



NESKANTAGA FIRST NATION
PRIVATE PROPERTY
NO TRESPASSING

VIOLATORS WILL BE PROSECUTED
Call Neskantaga First Nation (807) 475-3570 for
permission to access these lands





QIA signs Mary River iron mine benefits agreement

Proposed mine on Baffin Island would operate for 21 years, say owners

CBC News Posted: Sep 06, 2013 4:44 PM CT | Last Updated: Sep 07, 2013 8:20 AM CT



A signing ceremony for the Mary River Project was held Friday in Iqaluit. (CBC)

For projects like this, community expectations around delivering transformative change are huge. Meeting these expectations is almost impossible.

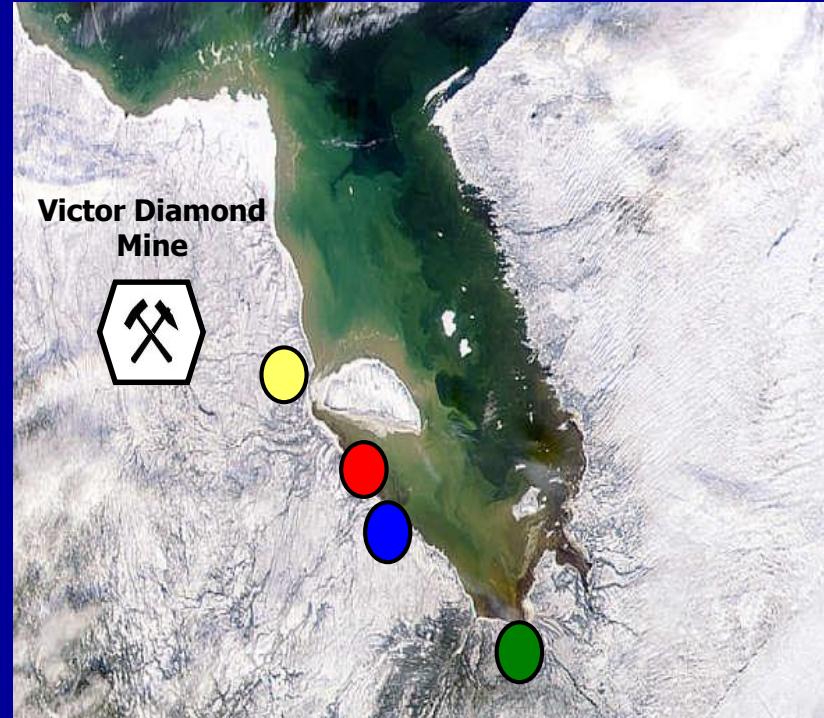
Are IBAs meeting Communities' Expectations?

De Beers Victor Mine:

- MEA & MoU signed '99 w/ Attawapiskat; IBA signed '05 (at time of EA approval)
- IBA signed '06 w/ Moose Cree
- Production begins '08
- IBA signed '09 w/ Kashechewan/Fort Albany

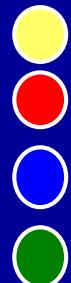
Troubles in Attawapiskat

- '09 winter road blockade over limited implementation of IBA
- '11 housing crisis/questioning of utility of the IBA



IBA Signatories

Attawapiskat First Nation
Kashechewan First Nation
Fort Albany First Nation
Moose Cree First Nation



Many IBAs routinely fail to meet expectations

- Are notoriously hard to implement
- Are clearly delivering wealth, but unclear if they are delivering improved community well-being
- Suffer from weak socio-economic impact monitoring and adaptive management
- Are inherently challenged by growing community expectations and tighter industry profit margins of late
- Unjustly require communities to make sound decisions that must last multiple generations

This is why a large portion of this community guide to IBA negotiation and implementation is dedicated to preparing communities to make such decisions

IBA COMMUNITY TOOLKIT

Negotiation and Implementation of Impact and Benefit Agreements

www.ibacommunitytoolkit.ca



By Ginger Gibson
and Ciaran O'Faircheallaigh

March 2010
Updated June 2011



Commissioned by
the Walter & Duncan
Gordon Foundation



Learning from those who have done the hard work...

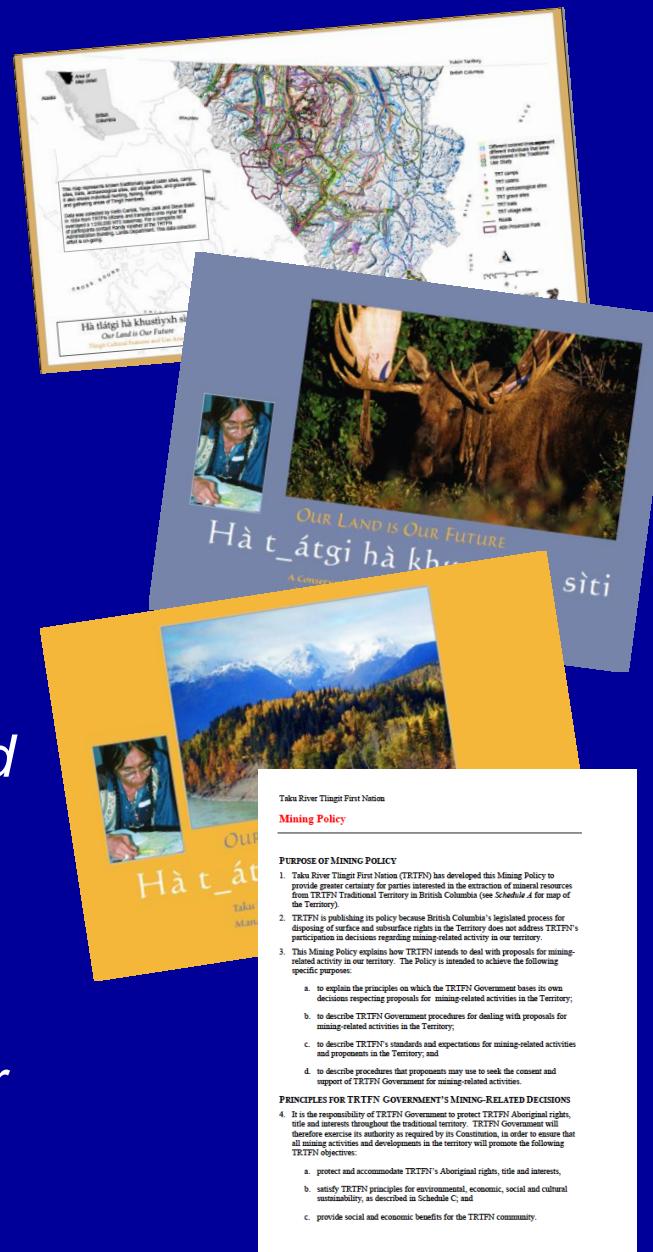
Taku River Tlingit First Nation
Tulsequah Chief Mine
Atlin, BC



Nunatsiavut Government
Voisey's Bay Nickel Mine
Nain, NL

Taku River Tlingit: Exercising Authority

- 1980s-90s – Traditional use studies and mapping with Elders
- 2003 - *TRTFN Territory Conservation Area Design / Ha Tlatgi Ha Khustiyxh Siti: Our Land is Our Future*
- 2007 – *TRTFN Mining Policy*
- 2007 – *Framework Agreement for Shared Decision Making Respecting Land Use and Wildlife Management*
- 2009 – *Interim Collaborative Harvest Plans for Sheep, Caribou, Moose & Lower Taku Grizzly Bear*
- 2011 – *Atlin Taku Land Use Plan*



Factors that appear to improve the odds of an IBA meeting a community's expectations

IBA Negotiation Process/Content	IBA Implementation
<ul style="list-style-type: none">• Existing community vision and land use plans• MoUs and pre-IBA agreements in place• Integration with EA• Community involved and aware (& IBA ratified)• Time to negotiate• IBA tailored to local needs and interests	<ul style="list-style-type: none">• Strong implementation provisions• Increasing community training and capacity• Wise use of IBA funds• Clear dispute resolution measures• IBA as shared-value creation, not merely a negotiated social licence...

Changing the nature of IBA negotiations

- There will always be elements to negotiate in an IBA
- However, the overall aim of the exercise (and hence mindset of the parties) must be to create shared value for the two parties



Nakumek!

Questions?