

# Used and Abused: Negotiated Agreements

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## Abstract

Aboriginal groups and mining proponents are taking a transactional approach through negotiated agreements to work in partnership. This paper examines how bilateral agreements are used to maximize legal certainty and work cooperatively through the regulatory mine approval process. Anecdotal evidence is presented on how the Crown is benefiting from negotiated agreements to lessen their fiduciary duty towards Aboriginal peoples vis-à-vis third parties, and how this ‘weighing-in’ strains the original spirit and intent of what the agreement set out to do. This paper draws on a British Columbia, Canada, case study to consider how the Crown is *using* and perhaps even *abusing* negotiated agreements.

## 1.0 INTRODUCTION

Few would disagree that the last quarter century has witnessed a fundamental change in how Aboriginal groups and the mineral industry in Canada operate. Within this transformative extractive climate, a transactional approach has been taken up and is most evident in Negotiated Agreements (NAs), signed between mining proponents and Aboriginal groups. The existence of NAs to maximize industrial certainty, by enabling cooperation through reciprocity and the binding of promises, would otherwise be difficult to achieve exclusively through the Crown.

NAs have the ability to contribute to a more sustainable mine life cycle, however, in a broader legislative context, NAs may inadvertently impede the long-term aspirations and prosperity of a community. In this paper, anecdotal evidence is presented and ideas are put forth on NAs in Canada’s mineral development regime. Much of the inquiry and discussion is directed at how NAs intersect with the existing legislative framework, i.e. the Crown’s fiduciary duty to Aboriginal peoples, as well as regulatory environmental management frameworks (i.e. environmental impact assessment). Case study data are based, principally, on the corresponding author’s (Fidler 2008) M.A.Sc. thesis, *Aboriginal Participation in Mineral Development: Environmental Assessment and Impact and Benefit Agreements*.

The premise of this paper is to exemplify how NAs are *used*, and perhaps even *abused*, by the Crown. The original spirit and intent<sup>2</sup> of NAs may be in jeopardy, and although NAs exist in the (private) realm of contract law, it is the Crown who is increasingly

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<sup>2</sup> In this context, ‘spirit and intent’ is determined by signatories, i.e. the proponent and Aboriginal community, and the agreement can represent any number of provisions and objectives. Bottom line, a NA is not developed by signatories to lessen the fiduciary duty of the Crown.

weighing in on, and becoming reliant on, not only the key principles set forth in the agreements, but the existence of these agreements altogether. In this way, perhaps it is best to stand back and acknowledge the profoundness of these agreements and the precedent being set, particularly when the Crown is not privy to the process or content, but increasingly encourages NAs within the mine approval process and development sequence. One concern presented here is that perhaps too much onus resides on the proponent, and the Crown's proficiency to discharge procedural consultation obligations to third parties is intensified through such agreements. In this vein, there is heightened confusion on accountability and how Aboriginal-Crown relations are being offloaded to third parties by the Crown.

## **2.0 OVERVIEW**

Each Aboriginal group has the right to a government-to-government relationship with the Crown, and the authority to enter into negotiations and agreements with mineral proponents. There is a corresponding interest between mining proponents and Aboriginal groups to develop NAs, which are, in effect, encouraged by the Crown. NAs are accepted as new phenomena of corporate social responsibility and linked to the rise of Aboriginal self determination. Concurrently, they offer a practical opportunity for the Crown to use third parties' engagement activities and negotiations, and subsequently rely on the reconciliation and accommodation efforts achieved.

### **2.1 Basis for Negotiated Agreements**

There are some fundamental bases for the negotiation of development agreements. These include:

- The legal duty to consult with Aboriginal peoples “arises when the Crown has knowledge, real or constructive of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it” (*Haida Nation v. British Columbia* [Ministry of Forests] 2004, SCC 73 at para 35).
  - ⇒ Third parties do not have the legal duty to consult; they can however be held responsible for certain procedural aspects of consultation, as delegated by the Crown.
- Accommodation: consultation may uncover a duty to accommodate, “taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim” (*Haida*, supra para 53).
  - ⇒ For the proponent, who is time sensitive, accommodation can be done through avoidance, which could mean altering the project design to avoid or minimize infringement. Alternatively, where issues cannot be resolved, there is always the option for monetary compensation.

Considering the above, proponents cannot rely entirely on the Crown, and the procedurally unformed administrative climate projects exist in. Therefore, industry is approaching mineral development with Aboriginal peoples in a two fold manner: (1) accommodate Aboriginal concerns regarding the project and transplant this knowledge into the project design and planning process, and by so doing, (2) ensure infringement and grievances are at a minimum – mitigated, compensated and addressed wherever possible so that business can proceed effectively with legal certainty. Aboriginal peoples are using NAs to (1) pick up on the absence of legislative ‘hooks’ in the Environmental Impact Assessment (EIA) process

(particularly in the realm of socio-economic and cultural issues, for example cumulative impacts); and, (2) to further the aspirations and objectives of the community beyond what is traditionally been made affordable by the Crown as the regulator and provider.

Under various circumstances, NAs can act as a layer of protection for Aboriginal interests and can acknowledge issues (grievances) Aboriginal peoples have that have not been taken up with the Crown. Furthermore, NAs may help ensure the project's design has the most minimal footprint on the land and do not interrupt traditional practices, while simultaneously creating economic and employment opportunities in the market economy.

## **2.2 Environmental Management**

From a hierarchical top down perspective, there is a solid and regulated framework that offers a legitimate *representative* structure for engaging Aboriginal people in mineral development. In practice, at the 'ground level', this is controversial, as the degree of *required* consultation is subject to interpretation by the Crown, based on its understanding of how a potential or established Aboriginal right, title and interests, may be infringed by the project (Fidler 2008). Despite recent decisions to recognize rights and title, there is still disparity on the premise of interpretation regarding consultation and accommodation requirements, and how these unfold in the regulatory EIA process required for mineral development. Nevertheless, the traditional command-control regulatory approaches to prevent environmental degradation and solicit Aboriginal participation are slowly being replaced by more strategic models, employed vis-à-vis NAs and evolving, and more iterative EIA.

## **3.0 TRIPARTITE RELATIONSHIP**

The Crown's role with respect to mining activities is to provide a stable legal and regulatory framework that will encourage responsible mining activities. Importantly, the bilateral relationship between industry and an Aboriginal group is crucial for building trust, respect, and long-term certainty. It is therefore this tripartite relationship –Aboriginal group, mining proponent and Crown - that offers insight on how NAs (co-) exist within the mine approval process (inclusive of EIA) and broader legislative structure.

The process to address Aboriginal rights to lands and resources in Canada exists within a dynamic evolving relationship with many actors, on many levels. This complex web of existing relationships create a range of overlapping and sometimes incompatible value systems, underlying decisions related to mining, land use tenure, and the way in which the natural environment is managed. It remains an ongoing process of reconciliation which recognizes and affirms existing Aboriginal and treaty rights of First Nations, Inuit and Métis in Section 35 of Canada's *Constitution Act*, 1982. Recent court decisions, (*Haida Nation v. British Columbia*; 2004, *Taku River Tlingit First Nation v. British Columbia*; 2004), have contributed to informing how reconciliation will play out through consultation and the balancing of rights and interests of Aboriginal peoples, the State and other Canadians.

Consultation and engagement activities on behalf of industry may lean more towards *expected* versus *required* actions, and nevertheless, these commitments and actions between industry and Aboriginal communities remind us how important legal certainty and obtaining local consent are in this ad hoc climate. This is particularly poignant as the size of capital investment required for mineral development is time (i.e. commodity cycle) sensitive. With the ambiguous administrative climate, the law is somewhat clear, but procedurally unformed. Case law regarding consultation with Aboriginal peoples in Canada continues to experience reform and currently maintains the premise that the duty to consult is the responsibility of the

Crown. However, the Crown can delegate procedural orders to third parties (*Haida Nation v. British Columbia* 2004). In *Haida v. British Columbia* (2004), the Supreme Court of Canada clarified consultation standards, espousing the distinction between the Crown's *duty* to consult with the voluntary adjunct *option* to consult, which "is open to industry in order to improve community or business relations" (Isaac et al. 2005). This means, legally, the Crown must act to honour and respect its fiduciary relationship with Aboriginal peoples as defined in the *Canadian Constitution* 35(1), but can engage industry to assist in fulfilling these objectives. While the Crown has the responsibility to consult, and in some cases accommodate Aboriginal peoples to avoid infringement of rights, title and interests, industry has increasingly taken up the role, and from the perspective of industry and Aboriginal peoples, is acting as the *surrogate*. As of late, industry is especially prudent to be informed and well versed in case law decisions regarding consultation, as they have a direct impact on how business proceeds and where the onus of responsibility lies for each party.

Notwithstanding the Crown's fiduciary duty towards Aboriginal peoples, exploration activities on Aboriginal treaty or traditional lands do not always trigger the Crown to be involved and consult. It is then in industry's best interest to engage with the local community and instigate a framework for information sharing to precede and fold into the regulatory EIA process. This reflects the fact that exploration can adversely impact communities, and companies must accept Aboriginal principles and aspirations at the exploration stage to proceed successfully through to development stage. The need to remedy deficiencies perceived in the EIA, or provide more security of land tenure (certainty) through consent, has led many communities and mining proponents towards NAs. Meaningful engagement of Aboriginal peoples in the development and management of mineral development is essential and can help to avoid conflict and community opposition which can inflict costly and lengthy legal battles, and perhaps even restrict access to the land and resources (Banerjee 2001).

#### **4.0 CASE IN POINT: FROM AN ABORIGINAL-INDUSTRY PERSPECTIVE**

The Galore Creek Project in northwestern British Columbia (BC), on traditional Tahltan territory, offers a framework for inquiry and discussion. This section offers an assessment through key informant interview data performed by the author for her M.A.Sc. thesis (Fidler 2008), along with a review of the Galore Creek Project's EIA and Participation Agreement (PA), referred to here, generically as the NA. Considering this case study, the results advance the premise that there is a well articulated concern by Tahltan members and the proponent, NovaGold Ltd., that the Crown was too reliant on the scope and contents of the NA during the mine approval process. In turn, various opinions via key informant interviews (Fidler 2008) are cited to reinforce the position taken in this paper.

The Tahltan Nation has always identified itself as a distinct society that is tied to the land both in the past and future and has a long history with mining. The Tahltan have never formally relinquished or surrendered the lands and resources within Tahltan territory, and continue to occupy the land and use resources, exercising title and rights as Aboriginal people and their interests as Canadians.

The notion of continuity and reconciliation are important, as is that of sustainability, as the Tahltan have experienced adjustment and movement over the years and still strive to retain and preserve tradition and heritage. The Nation's traditional ways and practices underwent significant change with the arrival of newcomers (e.g. fur traders, prospectors and resource developers) on Tahltan territory and furthermore, when BC, the Dominion, and Canada administered law and policy to the territory previously managed by the sovereign Tahltan Nation (Fidler 2008). Newly introduced administrative mechanisms and influence of

change led the Tahltan to proactively develop policies and initiatives that are consistent with their internal ambitions, but also with external mandate and legislation (Davidson & Rattray 2007).

#### **4.1 Galore Creek Negotiated Agreement**

The Galore Creek NA, signed between the Tahltan Nation and NovaGold Ltd. was instrumental in defining and scoping out how the Tahltan and proponent would collaborate to achieve EIA approval. The Tahltan's involvement in the EIA was solidified in the NA to facilitate communication from the Nation, in identifying environmental effects and impacts of the project on Tahltan Nation title, rights and interests, and to determine how to avoid or minimize such impacts.

Figuratively, for the Tahltan, there *are* two tracks that together create a larger interactive system to address issues and concerns in a mineral scenario. While the prescribed regulatory and proscribed (NA) purposes of each mechanism seem clear, key informant interviews reveal a different scenario. From the Tahltan perspective, although the NA is separate from the judicially confided government duty to consult, with distinct parameters and processes that the government is not privy to, there remains a systemic and well articulated concern that NAs are lessening the government's obligation towards the Aboriginal peoples as a greater onus is placed upon the proponent. This concern is manifested in the Tahltan's experience with Galore Creek, but is also acutely relevant nationwide, as a potentially problematic overlap or duplication is occurring between public EIA and the consultation process and private NAs. Undoubtedly, this *prima facie* evidence will have a significant impact on how NAs contribute to mineral development and how a community develops both internally and externally with the broader Canadian State.

The breadth of the NA reflects many issues protected under EIA legislation, but also goes further to provide additional investment security for the proponent and benefits to the Tahltan Nation. In particular the Tahltan expressed their frustrations over the Province's reliance on the proponent to fulfill their legal requisites, and the lack of decision making authority First Nations have in the process. Tahltan responses as to whether it is clear on how the EIA and NA work together consistently maintained that the intent of both processes is clear but too often the government blurred the boundaries by using the agreement as a principle of acquiescence (Fidler 2008). Tahltan respondents expressed concern that the government is admittedly *not involved*, but somehow still view the agreement as a component of consultation even though the duty to consult is judicially confined to the government. The current Tahltan Chief's (McLean in Fidler 2008) concern was expressed over the explicit absence of socio-economic issues in the EIA and government's ability to skirt around social issues reinforces the imperative for a NA to pick up on the areas government does not have the capacity to, or is unwilling to address.

The proponent made it clear the two processes were separate, but *parallel*, and the government is the only one who clouds it and views the EIA as part of the NA. From the proponent's perspective, the NA adds value to the EIA process, notwithstanding that this feeds into the roles and responsibilities of the government. The proponent maintains that the major problem within the processes is that legally, the Province is responsible for accommodation, *but* is increasingly sharing their responsibility by delegating it to industry. "[NA] discussions are occurring at a local level", the proponent maintains, and is separate from the provincial level and the Province's obligation to First Nations. The contention here, from this industry perspective, is that EIA and NA are separate – this is "consistent with the Tahltan view but inconsistent with the provincial view...that the NA takes care of their requirement to consult and accommodate" (Fidler 2008).

Consultant responses<sup>3</sup> on this topic furthered the need for government to address and clarify their role on NAs. One respondent said it is clear about what they are *trying* to achieve (from a high level), but it is not actually clear on how they work together. Another consultant concurred, stating that it is not clear on how the processes are working together and it “needs to be clear for *everyone* and not just for elected council” (Fidler 2008). On these grounds, this consultant states that NAs originated as useful tools but with time have evolved to symbolize *acquiescence* for a project and to this end NAs “are being viewed by the government as a means to an end for consultation”.

With respect to clarity over the processes, the NA is signed between the Tahltan Nation and NovaGold Ltd. However, if Aboriginal rights and title are affected, it is the government’s duty to accommodate, but government is allowing industry to accommodate for them, making it very confusing over who is accountable. Based on key informant interviews and irrespective of case law decisions that affirm third parties are not responsible for consultation and accommodation of Aboriginal peoples, there still remains skepticism on how the Crown is involved and how the Crown fulfilled its duties with respect to the Galore Creek Project. A very important step for industry and Aboriginal groups is to have a clear understanding of the appropriate boundary between NAs and EIA – and how the model is set up – so that the boundary can be better respected and defended.

## **5.0 USE AND ABUSE**

The last thirty years have seen a paradigm shift in the ways of doing business with First Nations. Even with these advancements, the courts have not really opined on the issues they have the fiduciary obligation and the duty to act honourably in (Czarnecka 2008). Industry and Aboriginal people want clarity from the courts on issues relating to the overlap of EIA and NAs, and how that impacts consultation and accommodation.

The theoretical objective of each mechanism remains clear, but in practice, the integrity of NAs with their once good intent are underpinned by the Crown, and the vagueness that stems from the ability to delegate procedural aspects of consultation. The government is unable to, or not willing to accommodate Aboriginal people and “industry is taking on the responsibility of government and sitting down with specific Aboriginal groups in order to provide the institutional framework” to move projects ahead (Czarnecka 2008). Perhaps in this light, NAs can stand, in part, as a proxy for lack of sufficient regulatory governance.

It is indisputable that the NA did not overlap with the regulatory process in the context of Galore Creek. Ostensibly, the Tahltan benefited from the NA, but simultaneously they chose to raise additional concerns that they were not confident the Province would address. These areas, which should have been covered in the EIA<sup>4</sup>, reflect the government’s reliance on the NA and affected the agreements’ utility and the original spirit of intent that the parties strived for. From the Tahltan perspective, although the NA is separate from the judicially confided government duty to consult and entails distinct parameters from EIA, there remains a systemic and well articulated concern that the agreement, in effect, lessened the government’s obligation towards the Nation.

To counter this concern, an NA signed between the Tahltan Nation and Fortune Minerals Limited (2009) for the Mount Klappan Project, February 09, 2009 specifically set out arrangements detailing the context of the NA within the broader relationship with the Crown:

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<sup>3</sup> Consultants interviewed worked specifically on permitting, EIA, and governance issues pertaining to the project.

<sup>4</sup> See Fidler (2008) for a review.

This Agreement between Fortune Minerals and the TCC [Tahltan Central Council] does not commit the TCC to support the Mount Klappan project. The Agreement recognizes that the Tahltan Nation holds aboriginal title and rights in their traditional territory, which includes the location for the proposed Mount Klappan project. In addition, the Agreement does not displace the Crown's obligations to consult and accommodate the Tahltan with respect to the Mount Klappan project and does not imply Tahltan consent for the E[I]A process.

Many Aboriginal communities and mining companies feel the government is not effectively moving forward to address certain areas of articulated deficiency, like cumulative social impacts (an ill-defined component of EIA) and engaging in meaningful consultation, and therefore are inappropriately weighing in on private NAs.

## **6.0 FINAL WORDS**

The problematic nature of NAs goes far beyond the topics divulged here. This paper examined the procedural and substantive approach the two parties took via the NA, but also considered the broader legal context and how the Tahltan exist within the Canadian Federation. The persevering theme of this paper remains: a more democratic process, predicated on shared responsibilities and decision making is critical and will be founded on tenets of inclusion, engagement and respect, and not hasty contractual short term solutions. Research reinforces the value of trust and ongoing collaboration and community dialogue between Aboriginal peoples, industry and the Crown.

## REFERENCES

- Banerjee, B. (2001). Corporate Citizenship and Indigenous Stakeholders – Exploring a New Dynamic of Organisation – Stakeholder Relations. *The Journal of Corporate Citizenship*, 1: 39-55.
- Czarnecka, M. (2008, May). Rethinking Aboriginal Business Relations. *Lexpert Magazine*.
- Davidson, G. & Rattray, C. (2007). *Creating Inclusive Environmental Assessments in Canada: an Example from Northwest British Columbia*. Paper Presented at the International Association for Impact Assessment, Seoul, July 3-9, 2007.
- Fidler, C. (2008). *Aboriginal Participation in Mineral Development: Environmental Assessment and Impact and Benefit Agreements*. M.A.Sc. Thesis, The University of British Columbia.
- Fidler, C. & Hitch, M. (2007). Impact and Benefit Agreements: A Contentious Issue for Aboriginal and Environmental Justice. *Environments Journal*. 35 (2), 49-69.
- Fortune Minerals Limited (2009). <http://www.fortuneminerals.com/s/Home.asp>. Accessed February 14, 2009.
- Isaac, T., Knox, T. & Bird, S. (2005). The Crown's Duty to Consult and Accommodate Aboriginal Peoples: The Supreme Court of Canada's Decisions in *Haida Nation v. BC* and *Weyerhaeuser and Taku River Tlingit First Nation v. BC*. *Aboriginal Law Group*, January, 1-8.
- NovaGold Ltd. (2009). <http://www.novagold.com/index.asp>. Accessed February 16, 2009.
- Tahltan Resource Development Policy (Draft)* (1987). Tahltan Central Council: Dease Lake, British Columbia. Retrieved January 13, 2008, from <http://tahltan.org/RDC.doc>

### Legislation

- Constitution Act* 1982. s. 35.
- Indian Act*, 1985, c. 1-5.

### Case Law

- Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.
- Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.