Impact Benefit Agreements – Taking Control With Insurance

Presented by:
Ryan Ginnish & Malcolm Smith, Thunderbird Commercial Insurance; Jennifer Radford, Borden Ladner Gervais LLP; Doug Bourque, BMO Bank of Montreal; and Chief James Delorme, Klahoose First Nation
Speaker Order & Context

Ryan Ginnish - Partner, Thunderbird Commercial Insurance
- Presentation Overview, Panelists Introductions

Malcolm Smith – Partner, Thunderbird Commercial Insurance
- Insurance Perspective

Jennifer Radford - Partner, Borden Ladner Gervais LLP
- Legal Perspective

Doug Bourque – Director of Aboriginal Banking, Bank of Montreal
- Financial & Lender Perspective – Key Areas of Lender Focus

Chief James Delorme – President, Qathen Xwegus Management Corp.
- Negotiating Impact Benefit Agreements – Securing Involvement & Control of Risk and Risk Transfer for Projects & Joint Ventures
Hundreds of IBA’s have been signed in Canada mostly in:

- Resource Extraction – there are currently 182 Mining IBA’s signed
- Energy – Hydro (run-of-the-river), Wind & Geothermal
- Real Estate

No Standard Agreement:

- Each IBA is customized to meet the needs & objectives of the project

Every IBA has an Insurance Component:

- The moment any survey or exploration of a potential project moves forward, insurance becomes an issue that needs to be addressed and the Aboriginal community should be involved before any activity occurs on their lands
1) Ensure the designated community representative is involved in all meetings & correspondence regarding the placement of insurance, putting risk management/mitigation services in place and/or issues surrounding security.

2) The designated community representative has signed off on all insurance or surety before binding, including approval of all risk management and security for the project and/or JV operations.

3) The community representative must be notified and approve of any significant changes in the insurance policies, bonding, risk management plans or security.
Additional Goal – Insurance & IBA’s

1) That the community be directly involved in either the selection of the Insurance Broker or the creation of a Joint Venture to create an insurance brokerage.

2) Where possible and appropriate, the community receive a share of the commissions or fees earned in placing the insurance for these ventures as own source revenues.
INSURANCE – OVERVIEW

From Project Concept to Decommissioning

Malcolm P. Smith
Partner
Thunderbird Commercial Insurance
Every aspect, activity and operation related to a project or a joint venture must be reported to the insurance carriers through the insurance broker(s).

There is a wide range of risks a community is exposed to when entering into an impact benefit agreement: reputational injury, environmental impairment, financial loss, property damage, personal law suits…

The community leadership should ensure they are involved in these important decisions that effect the community’s wellbeing and financial health.
Data provided to insurers could include what type of turbine is purchased for a power project;

- A new type of turbine may not meet the insurance company’s requirements for proven performance and reliability thus not be eligible for Testing & Commissioning or Delayed Start Up Coverage.

- These coverages are crucial to protect the project’s revenue stream requirements on which the ventures financing is based; without coverage no funding.
Every IBA include Indemnity Clauses;

- Indemnity clauses cover each party's assumption of legal responsibility for losses in relation to the agreement and often specify details of insurance:
  - Type of insurance
  - How the insurance premiums will be funded
  - Who will be named insureds on the policies
A community representative with good knowledge of insurance should be involved in all meetings where decisions on insurance coverages are made;

These insurance decisions would include:

- Choice of insurance broker(s): engagement, service..
- Types of insurance coverages required: various
- Terms of insurance: limits, deductibles, insureds...
- Cost of insurance: fees, premiums, retentions...
- Bonding requirements: bid, performance, labour & materials, environmental financial surety…
Types of Insurance

Projects that result in an IBA are often large in scope;

- Insurance for these projects covers a wide range of insurance products:
  - Directors & Officers Liability
  - Errors & Omissions Liability
  - Commercial General Liability
  - Testing & Commissioning/Delayed Start Up
  - Course of Construction & Wrap Up Liability
  - Property, Transit, Cargo, Equipment Breakdown
  - Business Interruption and Failure to Supply
  - Bonding, both for project & aboriginal contractors
  - Etcetera…
D&O Liability Insurance

1. Protect D’s & O’s personal assets off reserve.

2. Attract and retain qualified D’s & O’s.

1. High Costs of Defence - even if there is no liability.

2. Covers D’s & O’s liability if organization unable to indemnify defense costs or claim settlement.

3. Help the company monitor and provide defense costs associated with responding to lawsuits and investigations.
Decisions on coverages, limits & deductible are crucial;

- A coverage missed, a limit underinsured or a high deductible can cause a financial hardship or even project failure:
  - Often engineers carry a low limit on their Errors & Omissions polices; a design flaw can cost $millions.
  - It is important that the community be involved in who is named on insurance policies, certificates of insurance... coverage could depend on it.
  - Insurance polices are dynamic and changes could effect coverage so participation is necessary.
Insurance is a high cost line item in any project;

- Major projects have a greater potential for a large loss and as thus the insurance premiums are substantial:
  - Insurance premiums for resource extraction, construction and energy development, including bonding, can be hundreds of thousands of dollars.
  - It is vital for the community to be involved on the decisions on how these costs are allocated.
  - Insurance brokers are normally paid a % of the premium paid so in turn earn significant income with nothing returned to the community(s) involved.
For communities with large property holdings and multiple business interests there is the potential to create their own insurance brokerage and partner with an insurance broker to share revenues;

- A conservative benchmark for a general insurance broker commission is 15%. If a community is paying a total of $1,000,000 in insurance or has potential to if insurance is including in the IBA, then a minimum annual revenue would be $150,000.
INSURANCE BROKERAGE
Equity & Operations

- General insurance broker equity is based on a ratio of annual revenues which currently is 3 to 1. At the revenue noted previously of $150,000 the brokerage would be valued at $450,000. This equity created after only one year of operation.

- A commercial general insurance brokerage can operate out of a small office and one Level III general licensed agent.

- Start up costs are minimal; can be completed for under $25,000 if office leased.
Legal Perspective

Negotiating Insurance Terms in Impact Benefit Agreements

Jennifer Radford
Partner
Borden Ladner Gervais LLP
The CGL Policy Example: Take Advantage of It

- Impact and Benefit Agreement: legal instrument to manage consequences development projects may have on communities
- Allowing industry to develop on land they would not otherwise have access to is an enormous opportunity
- Why should they not have all the associated risk?
- Negotiating insurance terms in IBAs: ensure they do
The CGL Policy Example: Take Advantage of It

Insurance: Major Component of Risk Management

- Typical mining project
  - Directors and officers liability insurance
  - General liability for all stages of mining
  - Excess Liability & Umbrella
  - Workers Compensation
  - Property and Equipment
  - Business Income
  - Boiler and Machinery
  - Auto Liability
  - Cargo
  - Employment Practices Liability
  - Pollution and Environment Liability
The CGL Policy Example: Take Advantage of It

Why are communities not hearing about insurance from industry?

- If community insists on being “named” insured on industry policy, premiums increase for industry player taking out insurance
- Industry not assuming all risk
The CGL Policy Example: Take Advantage of It

Overview of Coverages

- The insurer will pay money insured legally obligated to pay as “compensatory damages”:
  - “bodily injury” or “property damage”
  - “personal and advertising injury:
  - “property damage” to premises of others rented to or occupied by the insured

- Claims covered: insurer has duty to defend the insured and to indemnify against any damages awarded
The CGL Policy Example: Take Advantage of It

- The Duties To Defend And Indemnify
- In purchasing a CGL policy, an insured is buying two benefits:
  - right to a defence
  - right to an indemnity
CASE STUDY

- Oil leak from an industry project. It migrates to damage third party property on adjacent land. Adjacent land owner sues community and industry player.
The CGL Policy Example: Take Advantage of It

- If community not “named” insured under industry’s CGL policy:
  - Community GCL policy will respond
  - Community and own insurer will have to defend lawsuit by third party
  - Subrogation
  - Policy premiums may increase
The CGL Policy Example:
Take Advantage of It

- If community is “named” insured under industry policy:
  - Industry policy will respond
  - Industry insurer has duty to defend community and indemnify community against any damages
  - Avoid lawsuit and changes to risk ratings with own insurer
In addition to negotiating term of being named as insured on industry policy, remember:

- All projects will have consultants and subcontractors

- Term allowing for community to ensure other players have own insurance and policy limits sufficient
The CGL Policy Example: Take Advantage of It

Goals:

- Layers of insurance and defence against third parties
- Transfer risk of project to industry
The CGL Policy Example: Take Advantage of It

- As part of IBA negotiation process:
  - Have legal counsel who can explain insurance issues and ramifications
  - Negotiate appropriate terms to ensure project developed and operated with minimal risk to community
Impact Benefit Agreements

Using IBA Revenue to Finance Your Projects

Doug Bourque
Director, Aboriginal Banking
BMO Financial Group
Impact Benefit Agreements

General Information (1)

- Legally binding private contracts between First Nation & resource developer
- Provide direct or indirect economic incentives
  - Profit Sharing
  - Compensation Payments
  - Local employment
  - Local supplier contracts

Source:
(1) Canadian Business Ethics Research Network
Impact Benefit Agreements

General Information (cont’d)

- Provisions
  - Environmental protection
  - Site remediation
  - Preservation of locally significant habitats
IBAs

- Monies from IBAs generally go into a Trust
- Paid to First Nation, not Band Corporation
- General Terms
  - IBA funds are not considered “Indian Monies”
  - Funds are assigned directly from payor to Bank
  - Use of lawyer for direction of Monies to Bank
  - BMO ability to lend against income stream from Trust:
    For Bands who have existing build up of IBA funds
  - Bank will lend contingent on the strength of source
    (company/government)
IBAs

- **Nuances**
  - Bands with financial stability, who can demonstrate the Income stream from the Trust and provide BCR as guarantee do not need to assign IBA moneys to the Bank
What First Nations Should Do

- Due Diligence on Source
  - Financial Statements
  - History
  - Insurance on potential risk of project
- Payment Agreement
  - Length of Project
  - Payment terms
  - Any restrictions
- What is best for the First Nation
  - Direct assignment to Bank in some cases
  - BCR
Negotiating Impact Benefit Agreements

Securing Involvement and Control of Risk and Risk Transfer for Projects and Joint Ventures

Chief James Delorme
President
Qathen Xwegus Management Corp.

Presented by Doug Bourque,
Bringing Capacity to the Table

- **Building a negotiating team**
  - Team members have social background along with business experience
  - Keep team small: lawyers have a place but cannot replace wisdom of key community members
  - Make firm roles of team and keep a communication plan in order

- **Understand Roles**
  - Proponent and Prime contractor needs the First Nation not the other way around
  - Respect for cultural practices and protocol strictly followed

- **Community Objectives**
  - Clear communication with membership in regards to vision of project and what is best for entire Nation.
  - Maintain consistent messaging to members and proponents
Partners and Joint Venture

○ Best Practices
  ○ Learn from other IBA’s on successes through partnership
  ○ Sources of partnership: school districts, municipalities, provincial and federal agencies, industry, non-profit
  ○ Agreements with community partners are equal in importance to ones with proponent

○ Short Term vs. Long Term
  ○ Create strategies to secure needs of Nation are being met
  ○ Identify what challenges can take place: Change of First Nation Leadership
  ○ Making sure agreements are recognized by council and have community approval

○ Moving Ahead
  ○ Legacy projects involving educational targets must be included
  ○ Risks assessment on what relationship really means
Opportunities for the Nation

o Framework for Training and Employment
  o Making sure IBA has provisions for ‘Hire Membership First’ policy
  o Training and long term strategies so workers have something to look forward to after the project is finished
  o Ensure employment liaison opportunities are clearly supported by proponent and prime contractor (including sub trades).

o Specific opportunities for Economic Development
  o Creation of a Nation owned economic development corporation financial supported by proponent
  o Food and camp services
  o Fuel, logistics and travel
  o Infrastructure: Road building, construction trades, access to territory agreements
Community support and clear communications with all stakeholders

Respect for cultural practices and protocol strictly followed

Create negotiating team with experience but knowledge about community

Learn from best practices from other IBA’s

Partnerships with proponent and other sources must have long term as well as short term benefits including employment and economic development opportunities

Make sure agreements have dynamic financial packages including share options

Make clear to the proponent that they need the Nation more than the Nation needs them

Focus on a legacy that helps preserve culture, a way of life and the health and well being of a Nation for generations to come
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Discussion

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