

DATE	May 25, 2018
RE	Benefits Agreements in Legislation

## **PART 1: OVERVIEW:**

Our review of regulatory and legislative practices for the provision of benefits and benefit agreements identified only four regimes that clearly and expressly contemplate the provision of benefits. Though our search included mining, oil and gas, and forestry regimes, benefits were identified formally in oil and gas regimes, and in policy for Saskatchewan mining regimes.

## **PART 2: ANALYSIS:**

### **1. *Yukon Oil and Gas Act*, RSY 2002, c. 162:**

[www.gov.yk.ca/legislation/acts/oiga.pdf](http://www.gov.yk.ca/legislation/acts/oiga.pdf)

#### **Summary:**

The *Yukon Oil and Gas Act* (the "Yukon Act") applies to proposed oil and gas activity on three categories of land: Indigenous lands, Crown lands, and lands with surface tenure owned by the Indigenous groups and subsurface tenure owned by the Crown. The Yukon Act mandates that a benefits agreement must be in effect before a proponent may carry on any oil and gas activity on these lands. The benefits agreement is intended to benefit both the territory's Indigenous groups and its non-Indigenous residents. The benefits specified in the Yukon Act include employment, training, and procurement. The content of these benefits agreements is dependent on the category of the lands on which the proposed project is situated. There does not appear to be any express system monitoring the progress and achievements of these benefits agreements. The agreements are enforceable by contract law.

#### **a) Subject of the benefits?**

The Yukon Act's benefit agreements are intended to provide opportunities for Indigenous groups, their citizens, residents of the communities affected by the oil and gas activity, and other Yukon residents. In every agreement, the proponent undertakes to provide employment, training, and procurement opportunities for these groups.

In addition, the Yukon Act provides for the provision of other benefits. Though not specifically defined, other benefits must be commensurate with the nature, scale, duration, and cost of the work to be undertaken by the proponent in relation to the oil and gas activity. However, these benefits may not place an excessive burden on the proponent.

#### **b) How are the benefits determined?**

The ownership of the land dictates which non-proponent party makes the final determination as to the implementation of the benefits in the agreement. Where an Indigenous group has full surface and subsurface ownership, the Indigenous group makes the final determination to accept a benefits agreement. For Crown lands, the Crown makes the final determination to accept a benefits agreement. Where the oil and gas activity will be occur on lands in which an Indigenous group owns the surface and the Crown owns the subsurface, the determination of

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the benefits are subject to negotiation between the three parties (the Indigenous groups, the Minister, and the proponent). If they cannot agree on whether to approve a benefits agreement, they must submit the matter to arbitration.

**c) How are the benefits arbitrated?**

For proposed oil and gas activities on lands in which the surface is owned by Indigenous groups and the subsurface is owned by the Crown, any of the three negotiating parties may submit the matter to arbitration. Once the matter is submitted to arbitration, an arbitrator will settle the terms of the benefits agreement. The arbitration is subject to two important time constraints. First, both parties must provide the arbitrator with their last position within three days of the arbitrator's appointment. Second, the arbitrator will make an award within one month of its appointment. This may be extended by an application to the Supreme Court.

**d) How is the process monitored?**

There does not appear to be a formal system in place for monitoring the provision of benefits. However, such a system could be provided by the agreement.

**e) How are the benefits enforced?**

There does not appear to be any statutory system in place for enforcing the benefit agreements. However, the benefit agreements are enforceable through contract law.

**f) Exceptions**

A benefit agreement will not be required in two situations. First, where the oil and gas activity will not entail costs in excess of the prescribed amount (\$1,000,000) in any 12-month period. Second, if both the Indigenous group and the Minister have agreed to waive the requirement for a benefits agreement.

**2. *Canada Oil and Gas Operations Act, RSC 1985, c. O-7:***

[Laws-lois.justice.gc.ca/eng/acts/O-7](http://Laws-lois.justice.gc.ca/eng/acts/O-7)

**Summary:**

The *Canada Oil and Gas Operations Act* (the "Canada Act") allows a proponent to propose a benefits plan which will then be approved or waived by the Minister. The benefits plans are intended to benefit Canadian manufacturers, consultants, contractors, and service companies, Canadians more generally, and any specific disadvantaged individuals or groups identified by the Minister. The benefits detailed in the Canada Act include employment, training, and the opportunity to compete for procurement opportunities. The Canada Act contains an arbitration clause for disputes between the Minister and a relevant regulator regarding benefits plans covering oil and gas activities on trans-boundary pools or fields. There does not appear to be any express system monitoring the progress and achievements of these benefits plans. The enforcement of the benefits plan is unclear.

**a) Subject of the benefits?**

The benefits provided by the benefits plans are intended to provide opportunities for Canadian manufacturers, consultants, contractors, and service companies, and Canadians more

generally. In the plans, the proponent undertakes to provide employment and procurement opportunities to target beneficiaries.

In addition, the Minister, in their discretion, may also require that a benefits plan provide additional opportunities for training, employment, and procurement to disadvantaged individuals or groups.

**b) How are the benefits determined?**

In circumstances where the Minister is the final authorizing authority, the Minister makes the final determination to approve a benefits plan. If, however, the work or activity will occur in a transboundary pool or field that is the subject of a joint exploitation agreement the final decision to approve the plan will be negotiated between the Minister and the appropriate regulator. If the parties cannot agree on whether to approve the plan or not, the matter goes to binding arbitration by an expert.

**c) How are the benefits arbitrated?**

For the proposed oil and gas activities that are on lands with a trans-boundary pool or field, the plan must be approved by both the Minister and the appropriate regulator. If the two parties cannot agree on the content of the plan submitted for approval, the matter is referred to an expert. The expert's decision is deemed to be approval by the Minister of the plan. As a result, arbitration moves the power completely from the Minister to the expert.

**d) How is the process monitored?**

There does not appear to be any system in place to monitor the provision of benefits besides those agreed to in the benefits agreement.

**e) How are the benefits enforced?**

There does not appear to be any statutory system in place for enforcing benefits agreements. It is unclear whether these agreements are enforceable under contract law.

**3. Northwest Territories Oil and Gas Operations Act, SNWT 2014, c. 14:**

[www.justice.gov.nt.ca/en/files/legislation/oil-and-gas-operations/oil-and-gas-operations.a.pdf](http://www.justice.gov.nt.ca/en/files/legislation/oil-and-gas-operations/oil-and-gas-operations.a.pdf)

**Summary:**

The benefits of the Northwest Territories Oil and Gas Operations Act (the "NWT Act") are the same as the *Canada Oil and Gas Operations Act* above. The determination of the benefits is also the same. The NWT Act does not have an express monitoring process in place. The enforcement of the benefits plan is unclear.

**a) Subject of the benefits?**

The benefits are laid out in the same language as those under the *Canada Oil and Gas Operations Act* above.

**b) How are the benefits determined?**

The benefits are determined in the same way as those under the *Canada Oil and Gas Operations Act*.

**c) How are the benefits arbitrated?**

The NWT Act does not appear to provide a framework for arbitration.

**d) How is the process monitored?**

There does not appear to be any system in place to monitor the provision of benefits besides those agreed to in the benefits agreement.

**e) How are the benefits enforced?**

There does not appear to be any statutory system in place for enforcing benefits agreements. It is unclear whether these agreements are enforceable under contract law.

#### **4. Saskatchewan's Human Resource Development Agreement**

**Summary:**

In Saskatchewan, mining legislation does not require a benefits agreement. Instead, as a matter of policy, Mine Surface Lease Agreements ("MSLA") require that proponents of mining operations in north Saskatchewan enter into Human Resource Development Agreements ("HRDA"). The HRDAs are intended to provide residents of Saskatchewan's north with employment and training opportunities. While HRDAs are standardized agreements, their implementation is often negotiated. There is no arbitration of HRDAs. The provision of benefits is monitored by reporting requirements and are enforceable by contract law.

**a) Subject of the benefits?**

The HRDAs are intended to provide employment and training opportunities for Saskatchewan's northern residents. To accomplish this, the HRDA requires proponents to use best efforts to recruit residents of Saskatchewan's north. Priority is given to local municipalities and First Nation communities. In addition, the HRDA requires proponents to establish internal training programs that promote the qualification of residents of Saskatchewan's north as certified journeypersons.

**b) How are the benefits determined?**

The HRDA is a standardized agreement. However, the form of its implementation is often negotiated between the proponents and the Ministry of Economy.

**c) How are the benefits arbitrated?**

There is no arbitration for HRDAs. There also does not appear to be a need for arbitration since the expectations are clear from the beginning.

**d) How is the process monitored?**

The Government of Saskatchewan retains the primary responsibility to monitor the success of activities relating to the provision of socio-economic benefits in Saskatchewan's north. To do so, the Ministry of Economy requires the proponent to prepare and submit two reports on a routine

basis specifying the proponent's progress and achievements in addressing the objectives of the HRDA. These reports are the Human Resource Development Plan and the Employment Status Report.

**e) How are the benefits enforced?**

HRDAs are not prescribed documents required by any legislation or regulation, though their form has been adopted and standardized through policy. As independent contracts entered into by proponents and the Ministries of Economy, HRDAs are enforceable through contract law.

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