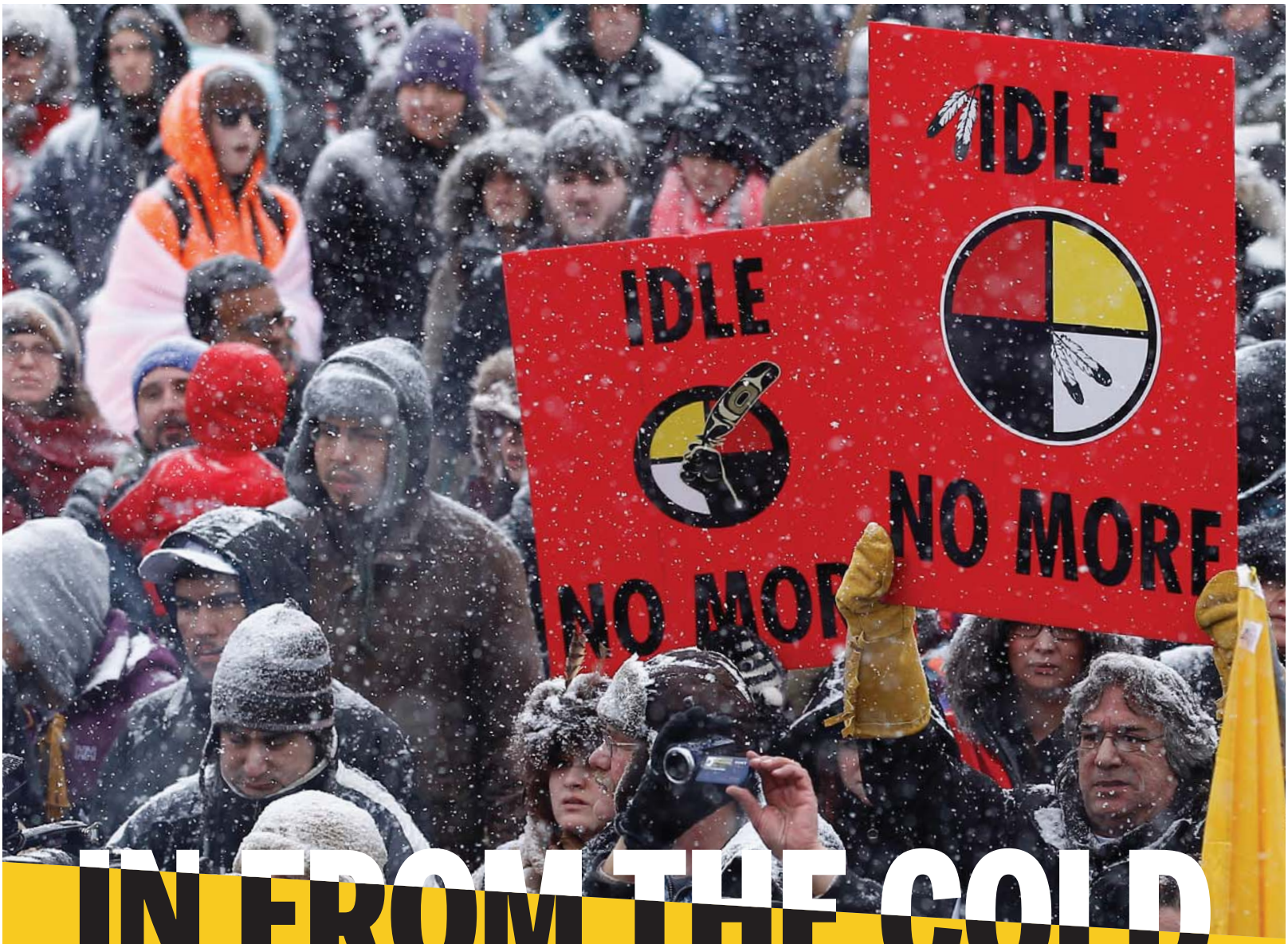


Photograph Chris Wattie/Reuters

IN FROM THE COLD

Jobs and community investment? That's a given. Today, First Nations involvement in mining and energy development also means early consultation, equity partnerships and, increasingly, deals on their terms

By Mark Anderson

Anyone looking to gain an understanding of the scope and complexity of First Nations engagement in the mining and energy sectors need look no further than the Frog Lake First Nation northwest of Lloydminster, Alta. In 2000, Frog Lake became the first native-owned oil producer in Canada, when it created the Frog Lake Energy Resource Corp. (FLERC) in order to extract and market the estimated three million barrels of heavy crude on its reserve land. Since then, in partnership with Calgary-based Twin Butte Energy Ltd. (TSX:TBE), FLERC has sunk hundreds of wells—78 alone in 2011—and is now producing upwards of 3,000 barrels a day.

As the oil flows, so too do the dollars: net income for FLERC increased by 62% to $10.4 million in fiscal 2011, $9.8 million of which was distributed to the 2,500-member Frog Lake First Nation in the form of royalties. With a 50% stake in the production, Twin Butte benefitted similarly, "a real win-win," in the words of Twin Butte chief executive Jim Saunders, who describes his partnership with FLERC and its CEO Joe Dion as "a wonderful, peer-to-peer relationship."

As for Dion, he's made it clear that FLERC is in the oil business, and since oil prices are going to be buoyed by improved access to market—including the contentious Northern Gateway and Kinder Morgan pipeline proposals that would carry Alberta oil west to the Pacific—"we may be on the side of encouraging the development of these projects, rather than opposing, as some First Nations are doing now along the proposed pipeline routes."

Fair enough. Except that in January, Frog Lake was also one of two

bands that launched a legal challenge to the federal Conservative government's omnibus bills C-38 and C-48—the same pieces of legislation that galvanized the Idle No More movement by weakening the *Environmental Protection Act* and *Navigation Protection Act*, effectively making it easier to pursue resource extraction projects in the face of native opposition.

More confounding yet, Dion sees no contradiction in supporting pipelines and opposing the very legislation designed to ease passage of those same pipelines. "We're going to [Prime Minister] Harper and saying, 'Don't just pass laws without consulting us, sit down with us and negotiate some kind of arrangement.' Protecting the environment is always the first priority, but we recognize that we can't protect it all. We have to protect as much as we can while still creating growth and jobs."

Similar dynamics, meanwhile, are playing out throughout Canada: First Nations are showing a willingness—eagerness even—to participate in resource development projects affecting their land, but they're not willing to do so without consultation and ultimately compensation. And thanks to a 40-year evolution in Impact Benefit Agreements, court rulings and legislation, First Nations are increasingly negotiating from a position of strength. For mining and oil companies looking to extract resources from land owned or occupied by First Nations—or indeed simply crossing those lands with pipelines, railways or roads—the news is both good and bad: good in that many First Nations have become extremely sophisticated in articulating what they want in terms of benefits from projects, which can shorten the time it takes to negotiate deals; bad in that expectations in terms of fair compensation continue to escalate, sometimes unreasonably.

"It's a moving target every year," says Robin Goad, chief executive of London, Ont.-based Fortune Minerals Ltd. (TSX:FT), which owns the Arctos anthracite mine in northern British Columbia and the NICO gold-cobalt-bismuth-copper mine in the Northwest Territories, requiring deals to be struck with three separate First Nations—the Tahltan, Gitxsan and Tlicho. "Aboriginal groups and stakeholders are becoming more aware of what other deals have been cut, they're moving toward using social media to talk to other bands to see what deals they're striking, and as a result expectations grow with every Impact Benefit Agreement."

The uncertain path and outcome of negotiations, meanwhile, makes it difficult for resource companies to access the investment necessary to pursue development projects on aboriginal lands. "Whether the bands are sophisticated or not when it comes to negotiations isn't the issue," says Killian Charles, an investment analyst with Montreal-based Industrial Alliance Insurance and Financial Services Inc. "The issue is that every time the negotiating process has to be started from scratch, from point zero, and there's no certainty in terms of what the end result will be. There's no template, and there's no single organization that oversees negotiations, that says, 'This is the standard agreement, this is what everyone else gets, this is what's fair.'"

None of this, of course, has prevented Fortune from engaging with the First Nations affected by its mining projects, and attempting to strike the best deals possible. "By the letter of the law you don't have to

Joe Dion, CEO Frog Lake Energy Resource (left), and Jim Saunders, CEO Twin Butte Energy: A "wonderful peer-to-peer relationship"

Photograph Chris Bolin

come to an agreement, but without one projects can be significantly delayed," says Goad. "In practice it's better for everyone if a mutually agreeable deal can be struck, and it's certainly better in terms of accessing financing. Banks are all about maximizing returns and managing risk, and if you can mitigate risk with good community relations, you're more financeable."

HOW DID WE GET HERE? According to Ottawa-based consultant Doug Paget, who's been tracking aboriginal engagement in the mineral sector for more than 30 years, the first Impact Benefit Agreement (IBA) in Canada was struck in 1974, when Mineral Resources International approached the federal government for funding to build roads and other infrastructure supporting its Nanisivik lead-zinc mine on the northern tip of Baffin Island. The government agreed, but on the condition that Mineral Resources committed to hiring 60% of its workforce from the local Inuit community. "Of course they never got anywhere close to that threshold, because the target was completely unrealistic," notes Paget. Nevertheless, Nanisivik established the first expectations that mining projects on or abutting traditional First Nations territories would be tied to community benefits, chiefly employment.

IBAs proliferated over the next 15 years, but were all negotiated by either provincial, territorial or federal governments on behalf of First Nations: it wasn't until the late 1980s that First Nations developed the expertise to negotiate their own deals with resource development companies. "At this time the IBAs were all pretty standard," says Paget. "They included things like jobs, training and preferential contracting of First Nations businesses for support services such as road building, provisioning and camp maintenance."

All that changed in 1992 when Falconbridge approached the Inuit people of Kangiqsujuaq and Salluit in northern Quebec and informed them of their intent to develop the Raglan nickel-copper ore body adjacent to their communities. Almost immediately it became clear that community leaders were not willing to give their blessing to the project—without which Falconbridge was unlikely to receive the Quebec environmental assessment certificate necessary to begin work—unless they were compensated far beyond the levels previous IBAs had established. Specifically, the communities for the first time demanded cash payments and a profit-sharing arrangement. The Raglan Agreement, struck three years later, included a compensation package estimated at between $60 million and $100 million over the life of the project, in addition to jobs and priority awarding of contracts to Inuit businesses for services required during the mine's operating phase.

The impact of the Raglan Agreement—which effectively ushered in the modern era of IBAs between resource companies and First Nations—was immediate and far-reaching. "At the time, BHP Billiton was already negotiating with First Nations over the development of the Ekati diamond mine near Yellowknife, and overnight the ground shifted beneath them," notes Paget. BHP, too, would end up including cash payments as part of its IBAs: $250,000 per year for each of four affected Dene communities, despite the fact none had a settled land claim.

Yet another First Nation, the Tlicho, prospered by leveraging its access to diamond mining contracts into a $100-million holding company, Tlicho Investment Corp., involved in everything from construction and trucking to food services, fuel distribution, logistics and aviation. By 2006, contracts with the three diamond mines were generating nearly $600 million in annual gross revenue for northern aboriginal businesses.

"Because you can track what's happened in the diamond mining industry you can see how it has transformed the Northwest Territories and had a profoundly positive effect on the First Nations," says Paget. "The diamond mines have resulted in a much more literate society, people are used to working and there's wealth in the communities."

A PATH TO PARTNERSHIPS

Forty years of mining and energy company-First Nations relations: from quotas to cash to consultation

1974

First Impact Benefit Agreement (IBA) in Canada negotiated between Mineral Resources International and the Canadian government, setting quotas for First Nations hiring at Mineral Resources' Nanisivik lead-zinc mine on the northern tip of Baffin Island.

1988

First IBAs signed bilaterally between industry and First Nations

1992

Raglan Agreement becomes first IBA with a cash component, when Falconbridge agrees to compensate affected Inuit communities between $60-$100 million over the life of the Raglan nickel-copper mine in northern Quebec.

2000

Frog Lake Energy Resource Corp. becomes first native-owned oil producer in Canada.

2004

Duty to Consult verdict handed down by the Supreme Court of Canada strengthens First Nations negotiating hand by ruling that government must consult and, where appropriate, accommodate aboriginal concerns and interests when proposed development projects could adversely affect territorial lands.

2012

Yukon Court of Appeal rules that exploration companies can't stake claims on public land without first consulting affected First Nations and addressing their concerns, further strengthening aboriginal bargaining position.

2013 (JAN.)

Gift Energy Ltd. and One Earth Oil & Gas partner to develop first aboriginal-owned oilsands project.

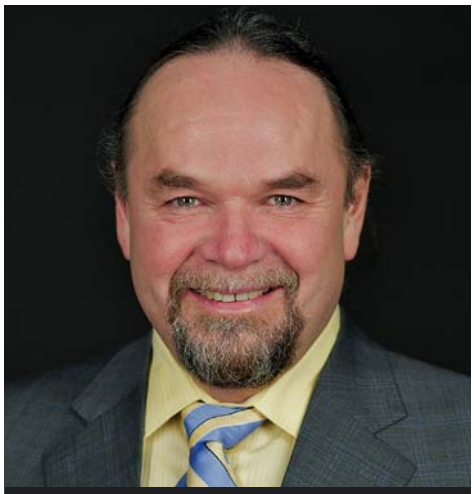
2013 (APR.)

Amendments to Ontario *Mining Act* take effect, requiring resource companies to consult with First Nations before undertaking substantive exploration activities, further strengthening aboriginal bargaining position.

Even as this process was evolving in the Northwest Territories, for First Nations elsewhere in Canada, negotiating with resource development companies was still somewhat of a catch-as-catch-can proposition: prospectors, exploration companies and mining juniors struck deals with First Nations if and when they felt it was expedient to do so, according to how much pressure was being exerted by treaty rights, land claims and environmental legislation. Once again, however, the dynamic changed in 2004, when the Supreme Court ruled that Canada has a duty to consult and, where appropriate, accommodate aboriginal concerns and interests when proposed development projects might adversely affect First Nations, even in cases where land claims are unproven or unsettled.

As with the Raglan Agreement, fallout from the duty to consult ruling was immediate and wide-ranging, as seen by the rapid increase in negotiated deals: in 2004, the year the ruling came out, a mere seven IBAs were signed between First Nations and mining companies; in 2005 that number jumped to 13, then 21, and so on until last year 37 IBAs were signed, for a total of 180 negotiated deals nationwide. "The mining companies got it," says Paget. "After the duty to consult came down they understood quite quickly that they had to cut deals in order for their projects to proceed. They started going to the First Nations and saying, 'We want to come on your land, we understand you have claims to it, how can we work together?'"

Companies that simply ignored the ruling and conducted their exploration activities as if aboriginal lands were uninhabited and unclaimed, ran into trouble almost immediately. Last year, the Wahgoshig First Nation sought and was granted an injunction against Solid Gold Resources Corp. (TSX-V:SLD), preventing the mining junior from conducting exploration drilling on its Lake Abitibi property in northern Ontario. The reason? Solid Gold had made no effort to consult with the community prior to drilling on its territorial land. Solid Gold is appealing the ruling based on the argument that the duty to consult rests not with them but the Ontario government. Regardless of the outcome, however, the damage has largely been done: CEO Darryl Stretch was fired by Solid Gold's board in December, progress in exploring the Abitibi property remains tied up in litigation, Solid Gold shares lost 80% of their value, and Wahgoshig chief Dave Babin ruled out working with the company in any capacity going forward, unless ownership changes.



Glenn Nolan, PDAC's first aboriginal president, VP of aboriginal relations, Noront Resources

It didn't help that Stretch once publicly characterized First Nations as "hostile third-party governments," a view that until recently was all too common. "That was the prevailing sentiment at the Prospectors and Developers Association of Canada prior to 2004," admits PDAC director and Avalon Rare Metals Inc. (TSX:AVL) chief executive Don Bubar. "First Nations were seen as the enemy, hostile parties that had to somehow be overcome. I was new on the PDAC board then, and my views were different from the mainstream. I said 'No, First Nations can potentially be allies, and they have land rights anyway that we have to respect.'"

"COMPANIES LIKE OURS HAVE WORKED AROUND THE WORLD, ENGAGING WITH LOCAL COMMUNITIES; NOW THEY'RE BRINGING THESE VALUES BACK TO CANADA"

It's a testament to how far attitudes have changed that PDAC last year selected its first aboriginal president, former Missanabie Cree First Nation chief Glenn Nolan, who also serves as vice-president of aboriginal relations for Noront Resources Ltd. (TSX-V:NOT), a mining junior with properties in the so-called Ring of Fire in the James Bay Lowlands of northern Ontario. Nolan credits shifting attitudes in part to generational change, the rise of a new cadre of mining executives who grew up in an era where accommodating indigenous populations was simply a normal part of doing business. "Senior executives at companies like Noront have worked around the world, engaging with local communities, building schools and water treatment facilities, and now they're bringing these values back home to Canada."

Not that legitimate concerns over the negotiation process don't remain, one being the challenge of managing the expectations of aboriginal communities as to what constitutes fair compensation from resource companies active on their lands. "Especially early in the exploration stage, communities sometimes have the expectation that mining companies should be doing things like building hockey rinks or sponsoring cultural activities, when in fact they have to spend their limited resources on exploration," says Nolan.

Adds Bubar: "Deal inflation is a real phenomenon, and a lot of it is instigated by third party advisers, who often have their own agenda. They're brought in after a company has started negotiation, and often they come in with the intention of blowing up a deal and starting over, which is their way of keeping the clock ticking. They create expectations that are not realistic, and it ends up costing the project time and everyone money unnecessarily."

New provincial legislation and court rulings, meanwhile, continue to alter the balance of power. Changes to the Ontario *Mining Act* mean that, starting in April, exploration companies will for the first time be required to submit exploration plans and apply for exploration permits. Approval of those plans and permits will rest with Ministry of Northern Development and Mines, and will be largely dependent on whether the companies in question have adequately consulted with First Nations and accommodated their interests.

And this past December, a Yukon First Nation successfully argued that the territory's so-called "free entry" system of granting mineral rights to anyone who physically stakes a claim on public land, runs afoul of the Supreme Court's duty to consult ruling. The Yukon Court of Appeal's decision in favour of the Ross River Dena Council raises the spectre of companies having to consult First Nations prior to even staking claims, and could have nationwide implications, not least in neighbouring British Columbia where laws that allow mining claims to be staked online with a credit card—and without consulting aboriginals—may now be vulnerable to legal challenges.

"If the provinces continue to ignore the ruling of the court you will see further litigation, further confrontation and a complete lack of confidence by the investment community," predicted Dave Porter, CEO of the First Nations Energy & Mining Council, in January.

As for the resource companies that have to navigate these shifting legislative and legal shoals, Bubar says the best advice he can give is to start building relationships and trust with communities as early as possible in the negotiation cycle. In 2005, when Avalon acquired the Nechalacho rare earth deposit at Thor Lake, southeast of Yellowknife, Bubar had to negotiate with not one, but three First Nations, each of which had competing unresolved land claims and historic rivalries. "We were just very persistent in our community engagement early on, holding meetings as often as possible, bringing leaders to the annual PDAC conference in Toronto, hosting workshops on exploration and mining in the community schools, hiring locals and generally demonstrating goodwill."

Even so, it wasn't until July of 2012—a full six years after negotiations began—that Avalon signed its first "accommodation agreement" with the Deninu K'ue First Nation, with two more agreements yet to be finalized

Photograph Prospectors and Developers Association of Canada

Fortune Minerals has struck agreements with three First Nations on two projects, including its Arctos anthracite mine in northern B.C.

with the Yellowknives Dene and Lutsel K'e First Nations. As for the deal itself, in addition to the normal IBA guarantees of jobs, business opportunities and environmental protections, it includes the latest trend in negotiated benefits: an equity component. Specifically, a 10% stake in Avalon's Thor Lake rare earths project, evenly split between the three nations.

"Offering equity was an idea I had in mind from day one," says Bubar. "It struck me as a model of the future, where First Nations would become active players and real participants in the industry, instead of accepting more traditional revenue-sharing agreements." He says he expects equity-based IBAs to become increasingly common, and envisions a time when aboriginal people make the leap to owning their own exploration companies and mining juniors, initiating projects on their own terms and driving their own equity deals.

Glimpses of that future are already being seen within a handful of First Nations, including the business-minded Tlicho in the Northwest Territories, the Kasabonika Lake First Nation northeast of Sioux Lookout, Ont., which has created its own mineral exploration company and is busy buying up claims, and Ontario's Mohawk Garnet Inc., which is developing a native-owned mine on Wahnapitae First Nation land east of Sudbury.

Meanwhile, back in the oil patch, the future is seemingly now. In January, Gift Energy Ltd., the oil company owned by the Gift Lake Metis in the Peace River area of northwest Alberta, partnered with Calgary-based One Earth Oil & Gas Inc. to develop the first aboriginal-owned oilsands project. They will be joined shortly by the Cold Lake First Nation and Fort McKay First Nation, both of which are gearing up to become oil producers in their own right, while across the border in Saskatchewan, the Onion Lake Cree Nation has already partnered with two oil companies.

And at Frog Lake, Joe Dion has been making moves of his own. In November of 2010 he negotiated a $30-million deal with Chinese private investment firm Sichuan Ruifeng Investment Management Co. Ltd. to create a new oil production company, Windtalker Energy Corp., that will be drilling on Frog Lake reserve land, and also looking for expansion opportunities by acquiring additional land or production elsewhere in Alberta, Canada or even the U.S. If all goes well, Windtalker will eventually be taken public. "The goal of turning Windtalker into a publicly traded company was a big part of the negotiations," says Dion. "That's the kind of big thinking we need more of."

As for the ongoing Idle No More protests, with their hunger strikes, days of action and legal challenges, he says he both understands and sympathizes. "The people are angry, and they have a right to be angry. There's a lot of wealth in the ground, and for too long First Nations haven't been getting their rightful share. There's no reason why First Nations, industry and government can't all work together to find fair solutions. After all, it's not like there aren't enough resources to go around."

Photograph Fortune Minerals Ltd.