

Working Towards Economic Reconciliation: Government Resource Revenue Sharing in British Columbia, Ontario, and the Yukon

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Introduction

On May 3, 2018, the Government of Ontario and a number of First Nations signed resource revenue sharing agreements. The agreements require Ontario to share a percentage of government generated revenue from certain mining and forestry operations with First Nations. The agreements are the first of their kind in Ontario. British Columbia and the Yukon also have their own resource revenue sharing agreements with Indigenous communities. Resource revenue sharing agreements differ between these provinces and territory. This article explores the nature and scope of government resource revenue sharing agreements in British Columbia, Ontario, and the Yukon.

Background

Across Canada, Indigenous peoples have advocated for a share of government revenues derived from natural resource extraction on their traditional territories.¹

Government resource revenue sharing agreements are formal agreements between a federal or provincial government and an Indigenous government for the sharing of government revenues generated from natural resource extraction.² These agreements aim to promote reconciliation by strengthening government-to-government relationships and enhancing social and economic well-being of indigenous communities.³

British Columbia's Benefit Sharing Agreements

British Columbia implemented resource revenue sharing through “benefit sharing agreements.” The use of benefit sharing agreements began in 2005 when the Canadian and British Columbian governments and the Leadership Council Representing the First Nations of British Columbia

¹ Prospectors & Developers Association of Canada, “Government Resource Revenue Sharing with Aboriginal Communities in Canada: A Jurisdictional Review”, 2014, at 3, online: <http://www.pdac.ca/docs/default-source/priorities/aboriginal-affairs/pdac-grs-report-2014.pdf?sfvrsn=12d4dd98_0> [PDAC].

² *Ibid.*

³ Economic and Community Development Agreement between British Columbia and Nak’azdli First Nation, June 12, 2012, at 3–4, online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/nak-azdli-band>> [Nak’azdli ECDA]; Wabun Tribal Council Resource Revenue Sharing Agreement, April 30, 2018 [Wabun Agreement].

signed “The New Relationship”.⁴ “The New Relationship” is a vision document that sets out an action plan to establish a new government-to-government relationship based on “respect, recognition and accommodation of aboriginal title and rights.”⁵ It commits to establishing processes for shared decision-making about land use and for mutually acceptable benefit sharing.⁶

Resource revenue sharing in British Columbia operates on a sector-by-sector and project-by-project basis. The province has established benefit sharing agreements in sectors such as mining, forestry, natural gas, and clean energy.⁷ Within each sector-specific benefit sharing agreement, individual agreements are negotiated for each project by the provincial government and impacted First Nation groups.⁸

The Economic and Community Development Agreement (ECDA) is one type of benefit sharing agreement that is used for sharing of direct mineral tax revenue derived from new mines or major mine expansions.⁹ For example, the ECDA between British Columbia and Nak’azdli First Nation provides for sharing of resource revenue received by British Columbia from the Mt. Milligan Mine project.¹⁰ The mine is located on Nak’azdli Territory over which Nak’azdli First Nation asserts Aboriginal rights and title.¹¹

Under the Nak’azdli ECDA, the amount of annual payments made by British Columbia to Nak’azdli First Nation is 12.5% of the difference between the total amount of tax, penalty and interest paid by the mine Proponent during a given fiscal year and the total amount of tax and penalty refunded to the Proponent and interest paid to the Proponent during the fiscal year.¹² If the amount of tax, penalty and interest paid by the Proponent is less than the amount of tax, penalty and interest refunded to the Proponent, British Columbia will offset 12.5% of the difference between those two amounts against any subsequent payments British Columbia would otherwise have to make in any subsequent fiscal year.¹³ British Columbia pays the money into a trust for the benefit of the Nak’azdli First Nation members. The money is used to achieve certain objectives such as education, housing, infrastructure and health, as Nak’azdli First Nation determines appropriate.¹⁴

⁴ PDAC, *supra* note 1 at 19.

⁵ Government of British Columbia, “The New Relationship” at 1, online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new_relationship_accord.pdf> [The New Relationship].

⁶ *Ibid.*

⁷ Government of British Columbia, “First Nations Negotiations”, online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations>>.

⁸ Government of British Columbia, “Economic and Community Development Agreements”, online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/economic-and-community-development-agreements>>.

⁹ *Ibid.*

¹⁰ Nak’azdli ECDA, *supra* note 3 at 3–4,

¹¹ *Ibid* at 4.

¹² *Ibid* at 5.

¹³ *Ibid* at 5–6.

¹⁴ *Ibid* at 12.

The Nak'azdli ECDA is silent as to whether the ECDA replaces any impact benefit agreements between the Nak'azdli First Nation and the Proponent. However, the ECDA does state that it does not change or affect Nak'azdli First Nation's jurisdiction, responsibilities or decision-making authority.¹⁵

Ontario's Resource Revenue Sharing Agreements

Until recently, Ontario had no resource revenue sharing mechanism in place. On May 3, 2018, the provincial government announced that it signed three separate resource revenue sharing agreements with a number of First Nations covering resource extraction in the mining and forestry sectors.¹⁶ These resource revenue sharing agreements benefit thirty-two communities across three First Nation organizations: Grand Council Treaty #3, Wabun Tribal Council, and Mushkegowuk Council.¹⁷

In contrast to British Columbia's project-by-project approach, Ontario's resource revenue sharing agreements set out pre-determined commitments to share certain percentages of the Crown revenue from mining and forestry projects. For example, the Wabun Tribal Council Resource Revenue Sharing Agreement ("the Agreement") provides for the payment to First Nations of 40% of total attributed Crown revenue for mines existing prior to April 1, 2018 and 45% of total attributed revenue for mines coming into existence after April 1, 2018.¹⁸ The Agreement also provides for the payment to First Nations of 45% of the revenue received by Ontario for Crown forest resources harvested from designated forestry projects.¹⁹ Ontario will pay these funds to the Wabun Tribal Council, which will then distribute funds to a number of participating First Nations according to percentages set out in the Agreement.²⁰ The funds are to be used to promote one or more of the following matters: economic, community, and cultural development, education, and health.²¹

Unlike British Columbia's ECDAs, Ontario's three resource revenue sharing agreements specifically state that the agreements are not intended to discourage independent impact benefit agreements between forestry and mining proponents and the participating First Nations.²² The agreements recognize that impact benefit agreements are an "important contribution to sustainable economic development and relationship-building."²³

¹⁵ *Ibid* at 21.

¹⁶ Government of Ontario, Ministry of Northern Development and Mines "Ontario Partners with First Nations to Share Forestry and Mining Revenues", May 3, 2018, online: <<https://news.ontario.ca/mndmf/en/2018/05/ontario-partners-with-first-nations-to-share-forestry-and-mining-revenues.html>>.

¹⁷ Government of Ontario, Ministry of Northern Development and Mines, "Resource Revenue Sharing", online: <<https://www.mndm.gov.on.ca/en/mines-and-minerals/resource-revenue-sharing>>.

¹⁸ Wabun Agreement, *supra* note 3 at 17.

¹⁹ *Ibid* at 13–14.

²⁰ *Ibid* at 20–21.

²¹ *Ibid* at 2–3.

²² *Ibid* at 3; Mushkegowuk Council Resource Revenue Sharing Agreement, April 30, 2018 at 3; Grand Council Treaty #3 Resource Revenue Sharing Agreement, April 30, 2018 at 3. .

²³ *Ibid*.

Ontario's resource revenue sharing agreements are set to come into force in fall 2019, barring any change in direction from Ontario's newly elected government.

The Yukon's Land Claims Agreements

Unlike British Columbia's benefit sharing agreements and Ontario's resource revenue sharing agreements, resource revenue sharing in the Yukon consists of arrangements developed within the context of land claims agreements.²⁴ Land claims agreements negotiated between federal and territorial governments and indigenous communities frequently contain clauses providing for resource revenue sharing with indigenous communities.²⁵

Resource revenue sharing provisions in Yukon land claims agreements follow a template set out in the Umbrella Final Agreement ("UFA").²⁶ The UFA is a policy document signed in 1993 that guides Yukon First Nations and the Yukon government in their negotiations to conclude individual land claim agreements.²⁷

Chapter 23 of the UFA sets out the terms for resource royalty sharing that individual land claim agreements can adopt.²⁸ "Yukon First Nation Royalty" is a royalty collected by Yukon First Nations for resource development.²⁹ "Crown Royalty" is collected by the Yukon government for resource development.³⁰ Chapter 23 provides that the Yukon government will pay to Yukon First Nations 50% of the first \$2,000,000 of any amount by which the Crown Royalty exceeds the Yukon First Nation Royalty in a particular year.³¹ After the first \$2,000,000, the Yukon government will pay to Yukon First Nations 10% of any additional amount by which the Crown Royalty exceeds the Yukon First Royalty.³²

Disputes between Yukon First Nations and the Yukon government arose over the operation of Chapter 23, resulting in delayed payments under the UFA.³³ Yukon First Nations argued that the UFA operated to exclude Crown Royalty payments to some First Nations when other First Nations had a highly profitable right to a Yukon First Nation Royalty.³⁴

On May 7, 2018, the Yukon government announced that it signed an agreement with Yukon First Nations, titled "Chapter 23 Implementation Agreement".³⁵ Under the Chapter 23 Implementation

²⁴ PDAC, *supra* note 1 at 6.

²⁵ *Ibid.*

²⁶ *Ibid* at 11.

²⁷ *Ibid* at 10.

²⁸ Umbrella Final Agreement, at 256, online: <<https://cyfn.ca/agreements/umbrella-final-agreement/>>.

²⁹ *Ibid* at 255.

³⁰ *Ibid.*

³¹ *Ibid* at 256.

³² *Ibid.*

³³ Chapter 23 Implementation Agreement, online: <http://www.eco.gov.yk.ca/aboriginalrelations/pdf/Chapter_23_Implementation_Agreement_FINAL_-_signed.pdf> [Chapter 23].

³⁴ Jackie Hong, Yukon News, "Yukon First Nations, Territorial Government Sign Resource Royalty Sharing Agreement", May 9, 2018, online: <<https://www.yukon-news.com/news/yukon-first-nations-territorial-government-sign-resource-royalty-sharing-agreement/>>.

³⁵ *Ibid.*

Agreement, a large Yukon First Nation Royalty payment to one Yukon First nation will no longer wipe out Crown Royalty payments for all First Nations.³⁶ Any royalties or non-refunded rents received by the Yukon government and paid to an affected Yukon First Nation for an existing resource project on land that becomes settlement land will no longer be included in the calculation of Crown Royalty to be shared with Yukon First Nations under Chapter 23.³⁷

Like British Columbia's ECDAs, the Chapter 23 Implementation Agreement is silent as to whether the Agreement replaces any impact benefit agreements negotiated directly between Yukon First Nations and proponents of resource development projects. However, the UFA recognizes that, subject to terms in individual land claim agreements, each Yukon First Nation has the power to administer land management programs and charge rent or other fees for use and occupation of Settlement Land.³⁸

Nunavut's Inuit Impact and Benefit Agreements

In Nunavut, the land claims agreement (the Nunavut Agreement) takes a different approach to resource revenue sharing. While it does not set out any particular percentage of revenue to go to the Inuit beneficiaries, it does mandate that proponents of any Major Development Project enter into an Inuit Impact and Benefit Agreement (IIBA).³⁹ Any proponent of a Major Development Project must negotiate an IIBA with Nunavut Tunngavik Inc. or a designated Regional Inuit Association prior to commencing the Project.⁴⁰ The benefits conferred under these IIBAs are to contribute to achieving and maintaining a standard of living among Inuit living in the Nunavut Settlement Area equal to that of Canadians in general.⁴¹

Impact of Government Resource Revenue Sharing on Industry

Many groups in the natural resource industry support the implementation of resource revenue sharing agreements. For example:

- ◆ The Prospectors and Developers Association of Canada supports government policies and mechanisms that implement resource revenue sharing to the extent they do not result in changes to tax regulations that would increase costs for companies⁴²
- ◆ The Yukon Chamber of Mines has been advocating for a government revenue sharing agreement with Yukon First Nations since 2014⁴³
- ◆ The Ontario Mining Association called the Ontario government's commitment to revenue sharing a "great incentive" for newer developments and existing mines,⁴⁴ and

³⁶ *Ibid.*

³⁷ Chapter 23, *supra* note 33, s 4.1.

³⁸ UFA, *supra* note 28 at 46.

³⁹ Nunavut Land Claims Agreement, art 26.2.1.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, art 26.3.3.

⁴² PDAC, *supra* note 1 at 4.

⁴³ Hong, *supra* note 34.

- ♦ The Ontario Forest Industries Association supports resource revenue agreements as long as they do not impact forestry companies' bottom line.⁴⁵

Indigenous governments and proponents negotiate impact benefit agreements that frequently direct a portion of mining revenues to Indigenous governments. If provincial governments increase mineral taxes to generate additional First Nation revenue, and the mine proponent also pays a portion of mining revenue to First Nations, proponents could see this as a double tax. This has become a consideration in impact benefit agreement negotiations.

Looking Forward

The different government resource revenue sharing agreements in British Columbia, Ontario and the Yukon illustrate that these agreements are adaptable to each province or territory's specific situation. While by no means a complete reconciliation of indigenous rights, resource revenue sharing can be a positive step in promoting stronger government-to-government relationships fostering sustainable economic development, and may play a role in unlocking stalled major projects. Given the support from both indigenous communities and industry, we expect to see government resource revenue sharing agreements being adopted increasingly across Canada.

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⁴⁴ Ian Ross, "Playing Politics with Resource Revenue Sharing", Northern Ontario Business, May 17, 2018, online: < <https://www.northernontariobusiness.com/industry-news/mining/playing-politics-with-resource-revenue-sharing-927728>>.

⁴⁵ *Ibid.*