



**Supporting Inclusive Resource Development (SIRD)  
East Africa  
TRAINING PROGRAM  
2019**



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# UNDER THE MICROSCOPE: TRANSPARENCY & GOVERNANCE ISSUES RELATING TO RESOURCE CONTRACTS

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PRESENTED BY:

SELINA LEE-ANDERSEN (MCCARTHY TÉTRAULT LLP) &

AMYN F. LALJI (MILLER THOMSON LLP)



# TOPICS OF TODAY'S DISCUSSION

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## PART I

- Natural Resource Governance
- Contract Transparency, Revenue Transparency and Tools for Accountability & Auditing
- International Standards & Legal Tools for Contract Transparency
- Barriers for Women in Extractive Transparency Initiatives

## PART II

- Engaging with Indigenous Groups
- Impact Benefit Agreements and Resource Revenue Sharing Agreements



# PART I

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# WHAT IS NATURAL RESOURCE GOVERNANCE?

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- The International Union for the Conservation of Nature refers to **natural resource governance** as “the **norms, institutions** and **processes** that determine how **power** and **responsibilities** over natural resources are exercised, how **decisions** are taken and how **citizens** – men, women, indigenous people and local communities – **participate** in and **benefit** from the management of natural resources”.
- Several dimensions of governance are fundamental to ensuring the **sustainable exploitation of natural resources** and **fair distribution of revenues**. **Contract** and **revenue transparency** is essential for increasing accountability within the context of natural resource management.
- However, transparency alone will not achieve sustainable development outcomes – it must be supported by **strong regulatory frameworks, robust institutions, collaborative and adaptive management** practices, **sound fiscal policies** and a **leadership commitment** to optimize the use of revenues to the **benefit of citizens**.



# THE CASE FOR CONTRACT TRANSPARENCY

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- Contracts between companies and governments for the exploitation of publicly held natural resources document the **terms** and **costs** of **extraction**. Traditionally they have been kept **secret**, but the **publication** of contracts, licences and permits has emerged as a **new international norm**.
- **Benefits For Companies:** greater business certainty, reduced risk of corruption, social licence.  
→ To facilitate contract transparency, companies can make public statements promoting contract transparency, support a contract transparency requirement in the Extractive Industries Transparency Initiative (EITI), and make disclosures where they can.
- **Benefits for Governments:** increased public trust and support, evidence-based decision making based on a higher quality of information, increased capacity for negotiation, improved monitoring and enforcement, reputational benefits, positive credit risk and revenue outcomes.
- **Benefits for Civil Society:** increased ability to monitor resource development, reduced risk of corruption, better access to information, ability to hold public officials and companies accountable.



# THE CHALLENGE OF SECRECY

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- Until recently, secrecy in the extractive industries was a common practice, but **contract transparency** in extractive industries has emerged as an **international norm**.
- **Confidentiality clauses** are used to prevent information from being disclosed to the public; however confidentiality clauses that are most commonly used do not fully prevent most forms of disclosure, despite the contrary claims of some companies and states.
- Section 22 of Denmark's 8<sup>th</sup> Round **Model** License provides that the license's confidentiality provisions "*shall not prevent the disclosure of such information if:*
  - ***No legitimate interest of the Licencee requires the information to be kept confidential;***
  - ***it is determined that the Licencee's interest in maintaining confidentiality must yield to considerations of essential public interest; ...***".



# REVENUE TRANSPARENCY

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- Contract transparency also includes the **disclosure of financial data**, including revenues from the extractive industries and payments from companies to governments (by revenue stream, company and project).
- In Canada, reports filed under the ***Extractive Sector Transparency Measures Act*** (ESTMA) provide the public with access to data on project level royalty, tax and other payments made by oil, gas and mining companies. More than 750 companies have filed reports.
- July 2018 – An investigation by journalists at the Narwhal found that mining companies in Canada are paying a smaller percentage of taxes and royalties compared to their operations in other countries.
- 2017 – an estimated CAD \$8.7 billion worth of gold was extracted from Canadian mines (the most valuable of mined resources in Canada), but much of the wealth does not extend to surrounding communities and municipal governments. In some cases, mining companies paid as little as 0.5% of the gold's value in taxes and fees; this compares to 8% to 15% paid by these companies in other countries.





# TOOLS FOR GOVERNMENT ACCOUNTABILITY

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- Canada – Office of the Comptroller General (OCG) is a key instrument in the Government of Canada’s commitment to accountability and transparency to Canadians. OCG plays a key role in implementing the *Federal Accountability Act*.

## Other Tools:

- Ministerial accountability and government departments’ own internal audit processes and service standards.
- Public consultation requirements in various regulatory processes.
- Public inquiries (i.e. official reviews ordered by governments) at federal and provincial levels.
- Freedom of information legislation.
- Legislative protection for “whistleblowers” (i.e. employees that reveal serious wrongdoing within their organizations) under the Canadian *Criminal Code*, *Public Servants Disclosure Protection Act*, and provincial legislation.
- Non-governmental organizations (e.g. Democracywatch, Canadian Taxpayers Federations).

# GOVERNMENT AUDIT FUNCTIONS IN CANADA

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**Auditor General of Canada** → an appointed officer of Parliament with a mandate to audit the accounts of Canada and to investigate the financial affairs of the federal government. The Auditor General holds office for a non-renewable term of 10 years and is accountable to Parliament.

- The Auditor General's mandate includes both attesting to the accuracy of the government's financial statements and examining how well the government has managed its financial affairs. The Speaker tables the reports of the Auditor General in the House of Commons.
- The Office of the Auditor General audits both government activities (including health, culture, finance, agriculture, transportation and scientific research) and environmental matters.

**Department of Finance Canada** → Has an Internal Audit Directorate which supports the Departmental Audit Committee and liaises with the Office of the Auditor General.

- Each province also has an Auditor General which oversees provincial government finances and other matters.



# A CLOSER LOOK – ALBERTA'S ROYALTY SYSTEM FOR OIL SANDS PROJECTS

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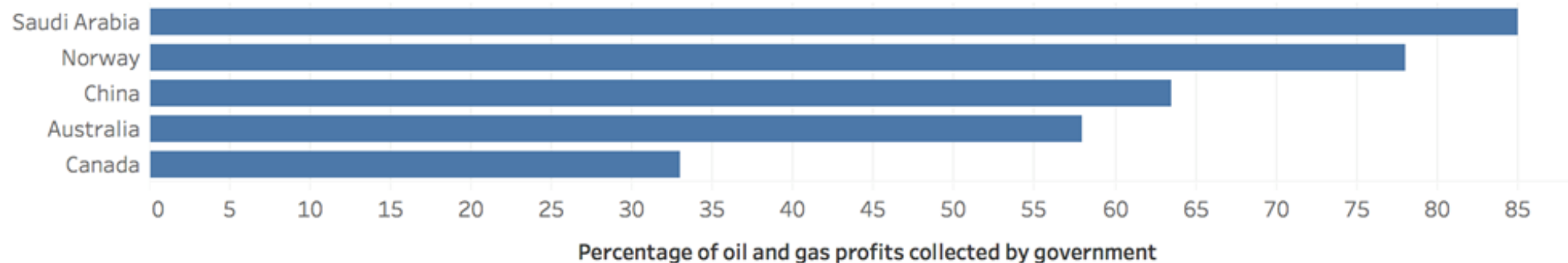
- In Alberta, Canada, the mining and oil & gas extraction industry is a significant contributor to the province's economic prosperity – in 2015, this industry made up 27.4% of Alberta's GDP.
- Alberta has a generous royalty system, which was designed to incentivize company investment in the early days of oil sands development.
- Alberta regularly publishes data on royalties from the oil & gas sector.
- A recent analysis of data released by the Alberta Government and reported under ESTMA found that Canada captures roughly 32% of oil industry profits, which is far lower than other oil-producing countries.



# ROYALTIES – POLICY CONSIDERATIONS

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- Alberta's 30 most productive oil sands projects accounted for more than 95% of oil produced in 2017, generating CAD \$53.5 billion in revenues. The top companies made CAD \$10.14 billion in profits, while Alberta collected CAD \$2.37 billion in royalties.
- This information drives important policy questions. Also, are Albertans getting a fair share of their resource wealth?
- Issues to consider in setting royalty rates: impacts on pace of development, economic benefits from energy projects, flow of investment dollars, fairness in project returns for energy companies/investors.



Source: *The Narwhal*

# THE PUSH FOR GREATER TRANSPARENCY OF ALBERTA'S OIL & GAS LIABILITIES

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- While the Alberta government is transparent about its oil & gas revenues, it is far less transparent when it comes to the province's **oil & gas liabilities**.
- Alberta's oil & gas liabilities have been growing for decades, with recent data showing that the **cost of cleaning up** Alberta's **300,000+ unreclaimed oil & gas wells** is between **CAD \$40 to \$70 billion**. Only **CAD \$2 billion** is held in securities to protect taxpayers from the risk of being left on the hook for these costs.
- In order to find solutions, all stakeholders must have **access to accurate information** about the **true clean-up costs** for active and inactive oil & gas infrastructure in Alberta.
- **Alberta Liabilities Disclosure Project** is an independent and non-partisan initiative that is pushing for accurate and transparent government-level data relating to Alberta's oil & gas liabilities.



# INTERNATIONAL STANDARDS THAT INCORPORATE CONTRACT TRANSPARENCY

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- **Extractive Industries Transparency Initiative (EITI)** – encouraged since 2013.
- **International Monetary Fund – Pillar IV of *Fiscal Transparency Code*** states that project-level disclosure of resource revenues and the publication of contracts are now established international norms.
- **International Finance Corporation** (World Bank Group) requires contract transparency since 2014 (summary of terms accepted).
- **Natural Resource Charter – Precept 2 [Accountability and Transparency]** – calls for transparency of information along the entire chain of decisions.
- **UN General Assembly** – encouraged as a means of **protecting human rights** in business operations.



# CONTRACT TRANSPARENCY – CURRENT STATE OF AFFAIRS

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- **Extractive Industries Transparency Initiative (EITI)** is the global standard to promote the open and accountable management of oil, gas and mineral resources, including contract disclosure.
- EITI Standard requires the **disclosure of information along the extractive industry value chain** from the point of extraction, to how revenues make their way through the government, and how they benefit the public.
- EITI Implementing Countries include Tanzania. Uganda, Kenya and Canada are not members (although Canada provides financial support to EITI).
- EITI reports that as of August 2019:
  - 29 EITI countries have disclosed at least some resource contracts;
  - more than 900 contracts have been published by EITI countries; and
  - 16 companies have stated their support for contract transparency.



## Governments that have disclosed at least some extractive industry licenses or contracts



**EITI members**

**Non-EITI members**

*Source: Past the Tipping Point? Contract Disclosure within EITI  
(Hubert & Pitman, March 2017)*



# LEGAL TOOLS FOR IMPLEMENTING CONTRACT TRANSPARENCY

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- Constitution (e.g. Niger, Philippines, Mexico)
- Legislation (e.g. natural resource and securities laws, freedom of information laws)
- Model contracts (e.g. Association of International Petroleum Negotiators (AIPN) produces model contracts that are widely accepted and used in the international energy industry.
- Government ratification or parliamentary approval of major resource contracts
- Ministerial Orders and review by regulatory agencies
- Well-drafted confidentiality clauses
- Others?



# RECOGNIZING BARRIERS FOR WOMEN IN EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVES

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- There is a need to recognize the **structural barriers** that **impede women** and other **marginalized groups** from being able to **participate meaningfully** in **extractive industry transparency initiatives**.
- Women often bear the brunt of the **social and environmental costs** of the sector and have limited access to the benefits. At the same time, there is often a **gender imbalance** in **decision-making processes** in respect of how natural resources are managed. Women are also **underrepresented** in international initiatives such as EITI.
- A **greater awareness** of **gender issues** within the extractives sector is needed before a **fundamental shift in thinking** can take place.
- Tools to raise awareness include **gender training** at the organizational level, **engaging with women's groups** on issues relating to the extractives sector, and enabling more opportunities for more **gender-equal participation** in organizations and within decision-making processes.
- Better **research** and **gender disaggregated data** is fundamental because the impacts of gender policies cannot be evaluated in a meaningful way without solid evidence.



# SELECTED RESOURCES

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- Extractive Industries Transparency Initiative: <https://eiti.org/homepage>
- Association of International Petroleum Negotiators – Model Contracts: <https://www.aipn.org/model-contracts/>
- Online contract repositories (e.g. [www.resourcecontracts.org](http://www.resourcecontracts.org); [https://repository.openoil.net/wiki/Main\\_Page](https://repository.openoil.net/wiki/Main_Page))
- Company Web Sites and Stock Exchanges (SEDAR, EDGAR and other securities disclosure)
- Government Ministry web sites; Official Government Gazettes
- Resourceprojects.org – provides open source data on oil, gas and mining payments on a project-level basis.
- Alberta’s Royalty Framework: <https://www.alberta.ca/royalties.aspx>
- Alberta Liabilities Disclosure Project: <https://www.aldpcoalition.com/>



# PART II

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# 1. INTRODUCTION

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- This section will provide details on how Canadian governments and companies have sought to engage with Indigenous groups to address their concerns resulting from extractive projects, and to create economic opportunities.
- We will provide an overview of Impact Benefit Agreement and Resource Revenue Sharing Agreements and reflect on how the Canadian experience with these agreements could be applied in the East African context.



## 2. OVERVIEW OF KEY CONCEPTS IN THE CANADIAN AND INTERNATIONAL CONTEXT

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- History & Overview of Historic and Contemporary Treaties with Indigenous Groups in Canada
- S. 35 of the Canadian Constitution:
  - the legal and practical significance of recognizing the “existing aboriginal and treaty rights of aboriginal peoples in Canada”
  - Relevance of “Duty to Consult in Canada”
  - implications for resource development
- Overview of UNDRIP and the relevance of key provisions in the context of indigenous rights and resource development.



## 2. OVERVIEW OF KEY CONCEPTS IN THE CANADIAN AND INTERNATIONAL CONTEXT (cont.)

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- When is consent required:
  - on a *de jure* basis
  - on a *de facto* basis
- Concepts of accommodation and compensation in Canadian Law and Internationally
  - Impact Benefit Agreement
  - Revenue Sharing



# 3. OVERVIEW OF IMPACT AND BENEFIT AGREEMENTS

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- What is an Impact and Benefit Agreement (“IBA”)?
- Impact Benefit Agreements are Agreements concluded between resources development companies and impacted community or Indigenous groups that seek to mitigate impacts to community groups or Indigenous groups as well as facilitate economic opportunities and benefits.
- From a resource development company perspective, IBAs provide a framework for engaging community or Indigenous groups in resource development projects in a manner that facilitates the “non-opposition” or support of impacted community or Indigenous groups.





# KEY ELEMENTS OF IBAs

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- IBAs can also be called Participation Agreements, Mutual Benefit Agreements, Relationship Agreements, etc.
- Such Agreements are contracts that outline:
  1. the impacts of a project on a First Nation;
  2. the obligations of the proponent and the First Nation;
  3. the benefits that will be realized by the First Nation; and
  4. the benefits are provided as accommodation for environmental impacts and can include financial accommodation provisions and business opportunities preferences.



# BASIS FOR IMPACT AND BENEFIT AGREEMENTS IN CANADA

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- Section 35 of the *Constitution Act, 1982*
  - 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
  - The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty. Pending settlement, the Crown is bound by its honor to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.



# BASIS FOR IMPACT AND BENEFIT AGREEMENTS IN CANADA (cont.)

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- The Duty to Consult:

- Origin in *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73
- The duty to consult with Aboriginal peoples and accommodate their interest arises out of the honour of the Crown.
- Further refined in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43.

Trigger:

1. Crown Knowledge;
2. Contemplated Crown Conduct; and
3. Possibility that the Contemplated Conduct may adversely affect an Aboriginal claim or right.



# BENEFITS OF IMPACT AND BENEFIT AGREEMENTS

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- Effective IBAs will:
  - Provide an effective framework for cooperation with a company;
  - Minimize adverse social and environmental impacts of a project; and
  - Maximize business opportunities, as well as economic, employment and training benefits available to an impacted Community.
  - Establish firm requirements to “prefer” cost competitive and qualified Community business; drafting of preference language is key.



# IMPACT AND BENEFIT AGREEMENTS AND FINANCIAL PARTICIPATION AND BUSINESS OPPORTUNITIES

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- Accommodation Provisions through IBAs
- Several different tools can be used for First Nations to benefit financially through IBA:
  - Equity
  - Royalty/Dividends (Net Smelter Return/IRR)
  - Upside Participation
  - Business contracts, jobs, training
  - Combination
  - Full ownership



# IMPACT AND BENEFIT AGREEMENTS AND FINANCIAL PARTICIPATION AND BUSINESS OPPORTUNITIES

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- Contracting and business opportunities:
  - Typically, a proponent will provide an adversely impacted community with a certain amount of contracting opportunities.
  - A common methods for accommodating adversely impacted communities
  - Value of contracts is often underestimated
  - Different methods for awarding contracts:
    - Direct – provided directly from proponent to Aboriginal business
    - Set aside – provided directly from subcontractor to Aboriginal business
    - Select tender – tenders sought from a group of Aboriginal businesses.



# FINANCIAL ACCOMMODATION PROVISIONS THROUGH IBAs

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- Revenue sharing:
  - Revenue sharing through an IBA would mean that the Community group has financial participation in the project. Revenue can be shared through several different methods, including:
    - Profit share (preferable based on Gross Income)
    - Royalty (Net Smelter returns);
    - Fixed payments; or
    - Guaranteed base



# FINANCIAL ACCOMMODATION PROVISIONS THROUGH IBAS (cont.)

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- Community Ownership / equity:
  - It can be arranged that a Community group can have a level of ownership over the project at commencement or during life of project.
  - Can carry the opportunity for significant benefits as well as potential losses and / or liabilities.





# IMPLEMENTATION OF IMPACT AND BENEFIT AGREEMENTS

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- Effective agreements are complete agreements:
  - Set out how, when, where and by whom commitments will be implemented;
  - Vague commitments lead to disputes.
- Obligations and benefits must be clear.
- Impacted group must be involved in drafting.
- Implementation committee may be very helpful.
- Each situation is different and IBAs should differ accordingly.



# IMPLEMENTATION OF IMPACT AND BENEFIT AGREEMENTS (cont.)

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- Common Pitfalls of Implementation
  - Lack of resolve despite a good agreement;
  - Imprecise drafting;
  - Lack of monitoring and review initiatives;
  - Lack of incentives to meet objectives;
  - Lack of funding and adequate resources;
  - Unclear responsibilities;
  - Lack of involvement of key personnel;
  - Failure to take a long-term perspective.



# IMPORTANCE OF RELATIONSHIP BUILDING

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- We only do business with people we like
- Business partners are friends
- Relationships must begin as early as possible to establish mutual understanding and respect;
- IBAs provide industry with an opportunity to further develop relationships;
- Lack of respect will affect the future working relationship; and
- Building a relationship with impacted communities will create certainty for the company.



# BENEFITS OF AN IBA FOR COMPANIES

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- Provides certainty of the project to be implemented
- Gives social license to proceed
- Gets Community support during life of project
- Full support of impacted group on accessing Environmental permits
- Easier to acquire financing for the project
- Prevents disruptions during life of project



# BENEFITS OF AN IBA FOR COMMUNITY GROUPS

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- Nations leadership develops relationship with project proponents
- Keeps the First Nation or community fully aware of the progress of the project
- Keeps members informed
- Able to address Environmental issues
- Provides business opportunities, jobs and training



# 4. RESOURCE REVENUE SHARING AGREEMENTS

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## Overview

- In addition to Impact Benefit Agreements between resource development companies and community groups, Resource Revenue Sharing Agreements are becoming more common to accommodate for impacts and create economic opportunities for affected populations.
- Through these agreements, Indigenous groups have sought a share of government revenues derived from natural resource extraction on their traditional territories. Some governments on Canada have been more receptive to resource revenue sharing than others.



# 4. RESOURCE REVENUE SHARING AGREEMENTS (cont.)

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- In addition to Impact Benefit Agreements between resource development companies and community groups, Resource Revenue Sharing Agreements are becoming more common to accommodate for impacts and create economic opportunities for affected populations.
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# 4. RESOURCE REVENUE SHARING AGREEMENTS

## (cont.)

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- 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.
- These agreements seek to strengthen relationships with impacted Indigenous communities and enhancing social and economic outcomes.
- Some Canadian governments have been more receptive than others to these types of agreements.





# RESOURCE REVENUE SHARING AGREEMENTS IN BRITISH COLUMBIA, ONTARIO AND THE YUKON

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- 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.

(Julie Abouchar: July, 2018)



# EXAMPLES OF RESOURCE REVENUE SHARING AGREEMENTS

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- British Columbia
- Ontario
- Yukon



# 5. LESSONS LEARNED

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- Reflections
- Possible opportunities for Impact Benefit Agreements and Resource Revenue Sharing Agreements in the East African context.



# QUESTIONS & DISCUSSION

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