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Exploration Agreements in Manitoba: Tips and Pitfalls

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published 03/16/2026

Introduction

Benefit agreements among resource developers and First Nations have the potential to serve as a tool for the advancement of **economic reconciliation** and are a partial answer to the Truth and Reconciliation Commission's calls to action for business. They can also help to generate the **social licence** necessary to advance projects.

Background

Some ten years ago or more, the idea of exploration agreements moved across the border into Manitoba from Ontario, where they had been in use for some time. All the exploration agreements that I have seen advanced by First Nations in my practice have more or less followed the same Ontario form.

Exploration agreements are not a requirement of the "big C" constitutional duty of consultation that must be satisfied by the Crown in right of the Province of Manitoba (or any government) when making permitting and other decisions that have the potential to adversely affect Aboriginal or Treaty Rights. Provincial representatives are clear.

Manitoba does not require a developer to enter into an exploration agreement with a potentially affected First Nation as a condition of permit approvals. The agreements can, however, serve to advance "small c" consultation, often referred to as **engagement —** that is, the relationship-building with neighbours which helps to achieve project support from all affected communities.

Purpose of exploration agreements

The stated purpose of the exploration agreements is to promote a **cooperative and mutually respectful relationship** between the developer and the First Nation in whose traditional territory mineral exploration is planned to take place. The "template" agreement includes:

- An acknowledgement of mutual respect and benefit;
- Requirements to report exploration expenditures and results to the First Nation (subject to some confidentiality protections);
- First Nation support for the exploration project;
- Payment of up to five percent of exploration spending into a development fund controlled by and for the benefit of the First Nation;
- Providing funding to the First Nation for an environmental monitor, an environmental/elders committee, consultants, and to support internal community engagement activities;
- Paying compensation for disruption of harvesting activities;
- Providing priority opportunities for First Nation businesses, employment, and training; and
- A commitment to enter into an impact benefit agreement (IBA) with the First Nation covering listed subject matter as a precondition of undertaking any mine or mill development.

Challenges for developers

A **cookie-cutter** approach to exploration agreements can operate as a significant obstacle to mineral exploration, development, and investment, especially at the early stages. A call for an exploration agreement can present a roadblock for a junior exploration company.

Can it afford the associated incremental project costs, which easily get into the tens of **thousands of dollars or more**, at such a speculative stage? Are the levels of reporting and monitoring appropriate for low-impact activities, such as aerial prospecting or drilling? Will contracting for a driller, for example, offer any real opportunities for meaningful community employment, training, or businesses? Will similar agreements be required by other Indigenous groups with overlapping traditional resource areas? Will the developer's contractors also be requested to enter into similar agreements, and will any associated costs then be passed along?

Key considerations for developers

From a developer's perspective:

- In any percentage-of-spend model, identify included and excluded expenditures;
- Ensure any information sharing and disclosure complies with securities law, contractual, and continuous disclosure obligations;
- Negotiate reasonable caps on payments that reflect the level of activity and potential adverse impacts;
- Have an objective claims system to support compensatory payments;
- Realistically evaluate economic opportunities, and align them with other obligations, such as project schedule, cost, and safety;
- Allow "cure periods" to ensure that minor issues do not translate into a withdrawal of community support;
- Seek credit for government supports that may be available;
- Provide for a timely consultation process where consultation is contemplated; and

- Consider a dispute resolution mechanism, such as mediation.

Distinction between exploration and development

Timing and obligations for IBAs

A fundamental concern for any proponent is accepting the obligation to negotiate an **IBA** for a mining or mill project that does not exist even at a conceptual level.

The template exploration agreement distinguishes between exploration and mine development. It expressly defines exploration activities as excluding development, construction, operation, or decommissioning of a mine or mill. (Presumably it then does include advanced exploration.)

It further confirms that the agreement does not constitute consent to mine development, and that mine approval requires a future **IBA**. The current social and legal context may make an IBA a practical necessity for any mine development.

The question, however, is one of timing. Should a junior developer at the exploration stage commit itself and any subsequent owner of the mineral interest to enter an IBA with the counterparty to the exploration agreement? Is that the right time to outline the terms of reference for the negotiation of any IBA, including financial participation? Will a subsequent owner be able to negotiate variations to the original commitments?

Key considerations for drafting exploration agreements

Exploration agreements, when used, require **disciplined drafting and implementation**. Essential elements include:

- Clear limits on scope
- Well-defined financial obligations
- Operational flexibility
- Alignment with securities law
- Careful positioning for any future IBA negotiations

Strategic use of exploration agreements

When approached strategically, exploration agreements can reduce **social licence risks** and enhance project certainty. When approached casually, they can create **long-term leverage points** that materially affect project economics. Proponents that are amendable to entering

an exploration agreement should view these agreements not as mere process, but as **foundational project documents**, requiring the same care as any joint venture or financing instrument.

John Stefaniuk primarily practices **natural resource**, **environmental** and **property development law** at TDS. To learn more about John and his practice, visit his website bio at **www.tdslaw.com/jds**.
