Review of IBA Literature and Analysis of Gaps in Knowledge

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GAP ANALYSIS REPORT #9
Introduction

Negotiated directly between resource developers and indigenous communities with limited state interference, company-community agreements have been used in support of such prominent developments as Vale’s Voisey’s Bay mine in Labrador, and the three diamond mines operating in the Northwest Territories developed by BHP Billiton, Rio Tinto and DeBeers Canada. Company-community agreements offer developers certainty against local protest and opposition, which generally translates into expedited permitting; in return, communities secure enhanced impact mitigation and tangible benefits including financial payments, training and employment, and preferential contracting for mine services (Sosa and Keenan, 2001; O’Faircheallaigh, 1999; Fidler, 2010). Given this dual focus on the management of impacts and the delivery of benefits, they are frequently identified as Impact and Benefit Agreements (IBAs), though other labels have been used for agreements that achieve the same purpose. Galbraith et al. (2007) describe these agreements as ‘supreregulatory’ in that they necessarily exist and function alongside, though are not officially a part of, regulatory processes like Environmental Assessment. Notwithstanding this legislative gulf, company-community agreements are ubiquitous in Canada and Australia and are beginning to emerge elsewhere. With the growth of IBAs, scholarship has emerged that seeks to make sense of, and critique, the phenomenon.

The following serves to review this existing literature and identify knowledge gaps. The review is organized into five sections reflecting five dominant threads in contemporary scholarship: IBA effectiveness; the interaction of IBAs with regulatory processes and institutions; the legal basis of IBAs; IBAs and social justice; and IBA negotiation and implementation.

IBA Effectiveness

This area of research continues to garner attention in IBA literature as negotiated agreements are comparatively new and there is uncertainty as to the effectiveness of negotiated agreements in delivering benefits to Aboriginal communities (O’Faircheallaigh and Corbett, 2005; Prno and Bradshaw, 2008; Prno, 2007; O’Faircheallaigh, 2007; Siebenmorgen, 2009; Sinclair et al, 2008; Gibson and O’Faircheallaigh, 2010).

While there is consensus that IBAs do present an opportunity to create fair compensation regimes, uncertainty exists as to whether these potentialities transform into experienced benefits for affected communities (Fidler, 2009; Prno and Bradshaw, 2008; O’Faircheallaigh, 2007; Klein et al, N.D.; Cowell et al. 2011; Irlbacher-Fox and Mills, 2008). Since 2007 there have been three distinct research projects undertaken (Prno, 2007; Siebenmorgen, 2009; Fidler, 2009; Fidler and Hitch, 2009) which aimed to evaluate the effectiveness of IBAs in delivering benefits to Canadian Aboriginal communities. Fidler and Hitch’s (2009) research looks to gain a clearer understanding of the ways IBAs interact with regulatory processes (EA) via the Tahltan Nation’s experience with the Galore Creek project in British Columbia. Fidler and Hitch (pg. 6, 2009) conclude that ‘The theoretical objective of each mechanism remains clear, but in practice, the
integrity of NAs with their once good intent are underpinned by the Crown”. Resulting from regulatory processes which appear to be “unable to, or not willing to accommodate Aboriginal people” private industry is assuming the responsibility of the government and sitting down with specific Aboriginal groups (Fidler and Hitch pg. 6, 2009). Ultimately, Fidler and Hitch (pg.6, 2009) conclude that as a result of failed regulatory governance in this particular case, negotiated agreements (IBA) served as a “proxy” for effective regulatory governance which in turn contributed to appropriate compensation regimes.

While the effectiveness of IBAs in delivering benefits to affected communities has been documented, not enough time has elapsed in order to accurately evaluate the reach and breadth of these benefits. As a result, there is a gap between the expected success of IBA processes and the actual delivery of equitable benefits. The following areas can be considered as knowledge gaps which require further study.

1) An analysis of negotiation processes in order to determine whether or not particular approaches were effective at delivering benefits equitably.
2) An analysis of distribution strategies in order to determine whether or not particular approaches were effective at delivering benefits equitably.
3) Determining if negotiation processes that were perceived to be successful (i.e. equitable) at the time of agreement, ultimately created systems that delivered benefits equitably?
4) Are IBA’s best thought of as a ‘gap filler’ which is most effective when used in conjunction with regulatory processes, or are they most effective as a stand-alone process?
5) Are IBAs benefiting communities? Are they meeting their explicit and implicit aims?
6) Are IBAs benifiting industry? Are they meeting their explicit and implicit aims?
7) What methods are suitable for gauging IBA effectiveness?
8) Can mining, when undertaken with IBAs, contribute to sustainable community economic development? What conditions must be present?

IBA interaction with regulatory processes and institutions

Legally, IBAs and regulatory processes are viewed as distinct processes with different stakeholders and unique governance structures. While regulatory processes typically look at the mitigation of environmental, and to a lesser extent, socio-economic impacts; IBAs and NAs primarily focus on socio-economic impacts, capacity development, and the impact of development on traditional practices (Fidler, 2009; Galbraith et al, 2007; Lukus-Amulung, 2009; Wright and White, 2012). Although distinct, each type of agreement can be considered as “supraregulatory” in nature being that the framework and content of the agreement are not “explicitly pre-scribed in legislation yet they are typically used alongside regulatory processes like EA” (Galbraith et al, pg.28, 2007).
Lukas-Amulung notes from her research of development processes in the NWT, regulatory processes and IBAs/NAs overlap in three key areas; the scoping stage, the deliberation stage, and NA consultations. This process is outlined in Figure 1.

**Figure 1. Lukus-Amulung’s Interaction of negotiated agreements and regulatory processes in the NWT**

In conjunction with Lukus-Amulung’s conceptualization of the IBA EA overlap, Fidler (pg. 237, 2009) discusses that “EIA and NA can be conceptualized as parallel processes on parallel tracks. NA discussions occur at a local level and are voluntary, whereas EIA and consultation with the Crown occur at a Provincial and Federal level are prescribed”. While in practise there is
typically overlap between the processes, from a theoretical perspective, EIA and NA are distinct processes with different objectives (Fidler, 2009).

There is considerate literature which supports the notion that IBAs and NAs are being increasingly used resulting from the failings of regulatory processes. A general review of these failings with normative criteria is presented in figure 2 (Galbraith et al, 2007; Doelle and Sinclair, 2006):

Figure 2.

<table>
<thead>
<tr>
<th>EA failings</th>
<th>Normative criteria</th>
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<tbody>
<tr>
<td>Narrow scope and inflexible design</td>
<td>Broad in scope and flexible in design</td>
</tr>
<tr>
<td>Exclusionary methods</td>
<td>Inclusive approach</td>
</tr>
<tr>
<td>Process over product</td>
<td>Emphasize goals as well as process</td>
</tr>
<tr>
<td>Discretionary and short-term decisions</td>
<td>Emphasize meaningful and long-term decisions</td>
</tr>
<tr>
<td>Token and restrictive consultation</td>
<td>Encourage partnership</td>
</tr>
<tr>
<td>Excludes benefits</td>
<td>Plan for positive outcomes</td>
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In addition to the regulatory gaps, there is also the issue of EA processes typically focussing on negative impacts of a development with no consideration of the associated positive impacts (Galbraith et al., 2007). In response to this, IBAs have been utilized to not only address the negative impacts of development, but also to manage the distribution of benefits delivered to stakeholders (O'Faircheallaigh, 2009; Galbraith et al., 2007).

As negotiations typically precede regulatory processes, IBAs can be viewed as a tool which initiates a framework for the sharing of information that precedes and subsequently folds into regulatory EA processes. Negotiation processes which achieve this aim while also remediing perceived deficiencies in EA processes are increasingly being called upon because of their apparent benefits to both parties (Fidler, pg.237, 2009).

As exploratory activities on Aboriginal treaty or traditional lands does not typically ‘trigger’ Crown involvement in the form of consultation, often the first stakeholder to reach out to potentially affected communities is industry via NAs or IBAs (Fidler, 2009; Galbraith et al. 2007). From the perspective of a potentially affected Aboriginal community, this exploratory activity in the region can be considered as an infringement on Aboriginal rights which occurs in advance of any Crown involvement and before the start of regulatory processes (Fidler, 2009). Resulting from this, negotiations which precede ‘intensive’ exploration activities and continue throughout the lifespan of the mine until decommissioning are inherently more effective at
addressing identified issues than regulatory processes because of EA’s limited scope (Fidler, 2009; Galbraith et al. 2007).

Negotiated agreements have been utilized as a way to provide communities with an alternative way to forward their interests and uphold their right to negotiate the mitigation of environmental and socio-economic impacts (O’Faircheallaigh and Corbett, 2005; Noble and Birk, 2011; O’Faircheallaigh, 2007). Considered by some as “adjunct to the EIA process”, negotiated agreements in the form of IBAs can foster the development of inclusive land-use planning processes, provide a platform to build trust amongst stakeholders, and offer opportunities for local communities to engage in resource planning and impact management processes (Galbraith et al., 2007; O’Faircheallaigh, 2007; Noble and Birk, pg. 18, 2011).

These potentialities are highlighted in the Galore Creek NA where the negotiation process was viewed as “instrumental in defining how the Tahltan and proponent would collaborate to achieve EIA approval (Fidler 2008). As Fidler highlights,

“The main components and objectives of the Galore Creek NA can be summarized as such:

- A framework for communication and partnership;
- Legally binding enforceable contract;
- Benefits to Tahltan from Galore, and support from Tahltan to Galore;
- Covers all stages of the project: permitting, construction, operation, and closure.

It is important to note that in the case of the Galore Creek NA, the topics covered via negotiation processes were seen to address many of the same issues that are protected under EA legislation as well as going further to provide investment security for the proponent and the securing of benefits for the Tahltan Nation throughout the lifetime of the mine (Fidler 2009, pg. 240).

Noble and Birk (pg. 19, 2011), discuss the potential benefits of linking “negotiated agreements and associated monitoring programs with EIA-based follow-up practices in support of improved community engagement and project impact management”. This potential linkage highlights the ways in which negotiated agreements can be utilized in unique ways to achieve the aims of project developers, Aboriginal community members, and government in the fulfilment of legislative and regulatory requirements.

While negotiated agreements in the form of IBAs do possess the potential to ameliorate certain failings of provincial and federal regulatory processes, they are not without their challenges. These challenges are best highlighted in the following excerpt (Fidler pg.242, 2009);

“Contracts with corporate interests have wider and important implications for relationships between Aboriginal groups, the state, and civil society; and these implications need to be carefully considered in negotiation strategies (Gibson
2008; O’Faircheallaigh 2006). Indeed NAs can complement the EIA process, but it is important to acknowledge that the original spirit and intent of these voluntary bi-lateral agreements are not to lessen the Crown’s duty to consult with Aboriginal people. More-over, NAs are not intended to act as a substitute or stand-in for EIA matters. While IBAs make good business sense, they cannot be taken in isolation to the broader judicial system.”

Another point of concern is that while negotiated agreements do create a participatory space for potentially affected Aboriginal communities, this inclusion does not extend itself into the realm of regulatory powers. That is to say, while IBAs do invite Aboriginal communities to participate in the discussion, this process has not extended into the realm of community members participating in regulatory decision-making (O’Faircheallaigh, 2007). While certain regimes are required - as a result of environmental agreements - to consider recommendations from Aboriginal parties and provide rationale for the acceptance or rejection of said recommendations, “Aboriginal participation does not, in any of the agreements, extend to the exercise of regulatory powers” (O’Faircheallaigh, pg. 336, 2007). In addition there is the potential for a community’s involvement in IBA negotiations to affect their relationship with institutions like AANDC and the provinces resulting from the fiscal and political implications of negotiations (O’Faircheallaigh, 2000; O’Faircheallaigh, 2012; White and Wright, 2012).

Although Lukus-Amulung, Fidler and other case studies do provide us with a framework of the areas of overlap, the relationship between negotiated agreements and regulatory processes remains somewhat unclear (Fidler and Hitch, 2007; Noble and Birk, 2011). In addition to this, the outcomes of recent changes to the CEAA have yet to be witnessed which adds another level of uncertainty as to the way in which IBAs/NAs and regulatory processes can be expected to interact (White and Wright, 2012).

The following areas can be considered as knowledge gaps which require further study.

1. Is there the potential to harmonize EIA and IBA processes?
2. Can IBAs be treated as a gap filler for EIA processes or is it considered a distinct process with different outcomes?
3. Is the present relationship of IBAs and EIA productive? Is this working? (Some research on how these processes work in conjunction with each other but not much analysis discussing if they are productive)
4. Has there been an attempt to vest regulatory powers in local communities? (i.e. Create a conservation authority type of organization which could also conduct follow up)
5. Are there programs available to build local capacity in order to administer regulatory processes?
6. Does a community’s participation in IBAs negatively impact its relations with institutions like AANDC and the Provinces?
Legal Basis of IBAs (description and emergence of IBAs)

Resulting from the protection enshrined in section 35(2) of the Constitution Act of 1982, modern treaties have been established that provide extensive rights regimes and legally enforceable requirements for federal and provincial governments (Papillon, 2011). For Aboriginal communities who have signed a treaty they consider section 35(2) as the “main constitutional document regulating their relationship with the Canadian federation” (Papillon, pg. 299, 2011).

While the provincial governments have the authority to enact laws governing the management and control of natural resources, the federal government retains authority over natural resources in certain situations including national parks, Indian reservations, the continental margin, and parts of the Territories (White and Wright, 2012). With this being said, the jurisdictional control and management of resources on Aboriginal and First Nations lands are more convoluted resulting from the Constitution Act and the legislative responsibility of federal and provincial governments to “Indians and lands reserved for Indians” (CITE Sec 35). Resulting from this legislative responsibility, both Provincial and Federal governments have a responsibility to consult and accommodate when the Crown contemplates action that may have an adverse impact on an established or asserted Aboriginal or treaty right (MNDM, para.2, 2012).

Resulting from the Supreme Court of Canada’s landmark 2004 decision in Haida Nation v. BC (Minister of Forests), [2004] 3 S.C.R. 511 “Accommodation Agreements,” “Participation Agreements” or “Impact and Benefit Agreements,” or other similarly themed agreements have
become the preferred means of documenting the unique arrangements between Aboriginal peoples and proponents of industrial projects on lands subject to claims for aboriginal rights or title. This approach also supports the Declaration on the Rights of Indigenous Peoples (2007), the International Labour Organization’s Convention 169\(^1\), and the Free Prior and Informed Consent Principle (FPIC).

While the ways that NAs and IBAs support the FPIC principle are not entirely clear, there is consensus that NAs and IBAs do support the FPIC principle which seeks to protect the rights of Indigenous and Aboriginal peoples to participate in decisions that affect their treaty or traditional lands with a particular focus on natural resource development (Boreal Leadership Council, 2012). In support of this mandate, the United Nations Declaration on the Rights of Indigenous Peoples broadened the principle to include (Boreal Leadership Council, pg.3, 2012):

- a range of project development activities;
- the right to redress for lands, territories and resources that had been adversely affected; and
- a commitment by the state to obtain free, prior, and informed consent of indigenous peoples before the approval of any project affecting their lands or territories and other resources.

Considering Canada’s unique constitutional relationship with Aboriginal people and the interplay of Aboriginal people’s pre-existing rights and the jurisdiction of governments in resource development decisions, there is consensus amongst observers of a “pressing need to define and support responsible development that involves FPIC” (Boreal Leadership Council, 2012; White and Wright, 2012; O’Faircheallaigh, 2012; Kennet, 1999).

As a result of ongoing negotiations, a large portion of First Nation land claims have been settled in Northern Canadian communities (Caine and Krogman, 2010; Wright and White, 2012;

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\(^1\) The International Labour Office’s ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1991) states that indigenous peoples have the right ‘to participate in the use, management and conservation’ of natural resources on their traditional lands, and that governments must establish procedures to consult them before allowing exploitation of such resources (Article 15).

The United Nations Draft Declaration on the Rights of Indigenous Peoples (1993) recognises the rights of indigenous peoples to ‘their lands, territories and resources’, the contribution indigenous knowledge can make to proper management of the environment and the right of indigenous people to ‘control the total environment of the lands . . . which they have traditionally owned or otherwise occupied’ and ‘to determine and develop priorities and strategies for the development or use of their lands’ (Preamble, Articles 26, 30; C. O’Faircheallaigh & T. Corbett, pg. 630, 2005).
O’Faircheallaigh, 2012). These agreements have resulted in a new set of political institutions largely driven by unique arrangements for internal governance by Aboriginal, Inuit, and First Nations communities (Fidler 2009; Wright and White, 2012; Caine and Krogman, 2010). It is speculated that resulting from the creation of these new governance structures as well as continued political pressure, public engagement and consultation processes have become more robust with social licences being considered a vital aspect of the development process (Prno and Bradshaw, 2007; O’Faircheallaigh, 2010; Sinclair et al, 2008; Wright and White, 2012).

As the literature discusses, the increased usage of IBAs in Northern development practices can suggest two things, 1) they have been more effective than regulatory processes in delivering benefits to affected communities and 2) they are convenient and practical ways of addressing the Duty to Consult and Accommodate legislation as well as supporting FPIC principles (Garton, 2009; Bradshaw et al., 2007; Limerick et al., 2012; Boreal Leadership Council, 2012).

Although IBAs can be considered as consultation between industry and the affected First Nation, it is important to note that they do not negate the Crown’s duty to consult with the First Nation. While the Crown may delegate the procedural aspects of consultation to industry, (via IBAs), the Crown is still responsible for the substantive duty of consultation (Wright and White, 2012; Garton, 2009).

As the Crown is not party to bilateral agreements in the form of IBAs, it can be determined that the Crown’s substantive duty to consult is not fulfilled in these processes, IBAs can be considered as accommodation but not official Crown consultation (Wright and White, 2012). This being said, there is evidence that in practise IBAs are used in place of Crown consultation and accommodation (private communication with MWA).

A key aspect of IBAs is project certainty provisions. These provisions which some consider to be inherent in the IBA process, provide assurance that in exchange for the mitigation of social and environmental impacts and the delivery of benefits to the affected community, the community will not (ergo cannot) oppose the development project. In essence, certainty provisions provide the proponent with a ‘social license’ to operate. This aspect of IBAs is at the crux of their utility as the social license provides project developers (investors) with certainty that there will be no delays due to political contention (O’Faircheallaigh, 2000; White and Wright, 2012).

There is some debate as to whether IBAs should require that a community support the development project as project parameters can easily change throughout the course of development. Project parameters can include changing commodity prices, delays in construction, policy changes, new local/provincial/federal governments, extreme weather events in region, and changing public opinion. For some, the IBA only provides certainty that they have come to an agreement to have an ongoing dialogue rather than an outright acceptance of the development project in its entirety (Gibson and O’Faircheallaigh, 2010; private communication with MWA).
At this time there is no federal policy that explicitly requires the negotiation of IBAs a precondition for the regulatory approval of mineral development in northern Canada. In addition, there are no clear federal or provincial policy guidelines that establish substantive or procedural parameters for IBAs. While IBA community toolkits (Gibson and O’Faircheallaigh, 2010) have been created with the intent of assisting Aboriginal communities in the IBA negotiation process, there has yet to be legal requirements for IBAs to be in place prior to development (Kennett, 1999; White and Wright, 2012). With this being said there is a widespread perception that extractive resource development will not proceed without a negotiated agreement in place. Kennett suggests that this perception has been “fostered by the federal government in at least three ways;

1. The decision by the Minister of DIAND [now AANDC] to require “satisfactory progress” on IBAs before project approvals would be granted for BHP’s Ekati diamond mine.
2. The advice that DIAND officials give to mining companies operating in the North is that companies are at least encouraged...to negotiate IBAs with Aboriginal organizations.
3. DIAND (AANDC) provides funding through the Resource Access Negotiations (RAN) Program to assist aboriginal organizations in negotiating IBAs.

The following areas can be considered as knowledge gaps which require further study.

1) As IBAs are treated as de facto replacements for Duty to Consult and Accommodate requirements, should there be more robust legislation to ensure follow up with the intent of preventing this from occurring.
2) Or, is this a positive trend which reduces participation fatigue in affected communities and should be promoted via more flexible legislation?
3) Historically, have IBAs been flexible enough to ensure that changes in political structures as well as commodity prices do not disproportionately affect local communities?
4) Does a decision by a potentially affected Aboriginal community to begin negotiations imply community consent to a proposed project? i.e. Does the agreement to negotiate imply consent throughout the lifecycle of the development?
5) How do communities understand their legal rights? How does this impact their approach to IBA negotiations?
6) How does industry approach IBA Negotiations? Is it a rights-based discussion or is it based on “how much money will it take to get the project the green light”? Does this matter?
Over the past twenty five years exploration and development of northern Canadian mineral and petroleum resources has steadily grown. It can be argued that the impacts of this increased development have been felt acutely by Aboriginal and Northern communities as a result of (amongst other factors); singularly focussed economic strategies, disparate distribution of benefits, capacity gaps, and an economic reliance on a volatile commodity -boom bust nature of extractive resource development- (Quereshy, 2006; Fidler and Hitch, 2009; Galbraith et al, 2007; Irlbacher-Fox and Mills, 2008; Siebenmorgen and Bradshaw, 2011; Gibson 2005). In an attempt to address these issues, public consultation and engagement strategies rooted in negotiation have been progressively employed in Northern and International development processes with a goal of building appropriate compensation regimes (Fidler and Hitch, 2009; Irlbacher-Fox and Mills, 2008; Siebenmorgen and Bradshaw, 2011).

Resulting from colonial legacies and ineffective engagement and consultation strategies, a common sentiment of Northern and Aboriginal communities is that engagement processes only seek to inform communities of the best decision rather than consulting community members to decide what the best decision is (Weitzner via Lutsel K’e Dene First Nation, 2006; Caine and Krogman, 2010, Fidler, 2009). While legislation regarding public engagement does require consultation, it does not specify public engagement outcomes and typically does not require follow up to ensure agreements are honoured. Resulting from this, benefits are often not delivered appropriately to affected communities and in turn perpetuate existing inequalities (O’Faircheallaigh, 2002; Caine and Krogman, 2010; Sosa and Keenan, 2001; Quereshy, 2006).

While a lack of consultation cannot be entirely credited for the disparity of benefits between stakeholders, there is evidence that strengthened public engagement processes via negotiated agreements are effective tools in creating appropriate compensation regimes and in some cases help corporations earn a social licence to operate (Noble and Birk, 2011; Sinclair et al., 2008; O’Faircheallaigh, 2007; O’Faircheallaigh, 2010; Knotsch, 2009; Fidler, 2009).

Although relations between Aboriginal communities, proponents, and federal/provincial institutions still face challenges, relations have improved over the past 15 years due to increased negotiation and a recognition by industry and government that inclusive decision-making processes produce better outcomes (Fidler, 2009; Galbraith et al, 2007; White and Wright, 2012; O’Faircheallaigh, 2009).

Negotiated agreements in the form of impact and benefit agreements (IBAs) are considered a supra-regulatory tool used to mitigate the impacts associated with extractive resource developments. Their intent is also to ensure that compensation and benefits are delivered equitably to Aboriginal communities whose communities or lands may be potentially affected by developments (Galbraith et al., 2007; Prno et al., 2010). While they have been used in conjunction and alongside other regulatory processes, IBAs and negotiated agreements (NAs) are
considered independent negotiations between a community and private industry and as such are not considered Crown consultation.

As a result of historical practices, social justice and sustainable development are controversial terms in extractive resource development scenarios (O’Faircheallaigh, 2007). While the relatively short life cycle of mineral development must be acknowledged, there are inclusive planning processes that can be used to help avoid boom and bust scenarios and actualize sustainable development within the resource development context (Fidler, pg. 234, 2009).

A review of the literature discusses several motivators for the use of inclusive decision-making processes as outlined throughout this and other chapters. While upholding social justice and ethical obligations do not appear to be motivators for industry involvement in IBAs, strong industry buy-in has been evidenced in numerous cases. Figure 1 and 2, which are taken from Lapierre and Bradshaw (pg. 4-5, 2008), highlight identified motivators for private industry in their study of 14 firms who participated in IBA processes. It should be noted that IBAs, NAs, and other similarly themed agreements between mining companies and Aboriginal communities or governments numbered one hundred and eighty two (182) on February 2012 (NRCAN, 2012).

![Figure 2: IBA Motivations Identified from Interviews](image)

The information presented in these tables is supported by comments from industry representatives stating that “community engagement is a matter of ‘good business’ given that a project is unlikely to proceed without a relationship as manifested in the establishment of an IBA” (Lapierre and Bradshaw, pg.7, 2008). This approach is important to note as it further entrenches the recognition that inclusive planning via IBAs constitute as a “necessary cost of doing business” and a “wise investment”, which can provide consistency to the development process (Lapierre and Bradshaw, pg.7, 2008). Resulting from this, the question can be asked, does the intent of private industry matter (business case rather than normative/ethical considerations), or are we only concerned with the outcome of an IBA negotiation taking place?
While sustainability efforts have continued through unique approaches to environmental regulation, there are concerns that persist. Ongoing issues relating to employment are seen to be problematic for relationship building between industry and community and are seen as a roadblock to equitable compensation (Prno et al., 2010; Gibson and O’Faircheallaigh, 2010; White and Wright, 2012). Additionally, the legacy generated by previous regional and international mining operations continues to create negative perceptions of resource development companies and serves as a significant obstacle throughout all stages of negotiation processes (Prno et al., 2010).

In addition, attention has been drawn to the “differences in capacity between wealthy and well-organized mining companies and small and relatively impoverished Aboriginal organizations...[as well as] capacity differences among the IBA community signatories, which, they felt, enabled some to achieve better IBA outcomes than others” (Prno et al., pg.7, 2010).

These concerns are in addition to the community concerns identified by Lapierre and Bradshaw (pg.8, 2010) in their review of 14 firms who negotiated IBA agreements.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Concerns</th>
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| Benefits                      | - IBA benefits are focused primarily on mining-oriented tasks (e.g., mining employment and training); community members not involved in mining activities do not benefit proportionally.  
- Only non-management (e.g., ‘blue collar’) positions are available to Aboriginal workers at the mines.  
- Benefits received by Aboriginal communities are not commensurate with mining company profits.  
- A wider distribution of benefits is desired (e.g., for community improvement projects, social programming, cultural activities and preservation).  
- IBAs should include profit sharing and/or royalty payments to communities.  
- Aboriginal employment targets at some mines have not been met. |
| Transparency and Community Involvement | - The details of IBAs are not well known in communities, due to the confidentiality of these agreements or poor communication and information sharing by Aboriginal organizations. This makes it difficult for community members to know if they are receiving what they are entitled to.  
- Community-based IBA monitoring programs do not exist. The presence of these would help ensure mining companies fulfill their IBA commitments.  
- There are no opportunities for IBA renegotiation once an agreement has been signed.  
- Youth have not been meaningfully involved in decisions regarding regional mineral development. |
| Mining-Related Impacts        | - Mining has exacerbated existing social issues and in some cases created new ones (e.g., substance abuse, family breakdown, cultural loss, an increased cost of living).  
- Mining has created a number of environmental impacts (e.g., site pollution and contamination, impacts to caribou).  
- Limits on the amount of regional mineral development are needed. |

In response to many of the failings associated with regulatory processes and typical public engagement strategies, a devolution of power from federal to Aboriginal governments has been proposed (Irlbacher-Fox and Mills, 2008). As it is difficult to distill lessons learned from the
small amount of cases where power was transferred from the federal to local governments, there are some common themes that do emerge. As Irlbacher-Fox and Mills (pg.9, 2008) discuss “common themes include the desire of territorial governments and Indigenous peoples seeking as much control as possible over resources, and that revenues remain in the North.

An important aspect of IBAs and NAs is the capture of economic rent by an impacted Aboriginal community. Economic rent is broadly defined as “the difference between the value of the resource and the cost of producing the resource, allowing for a reasonable profit margin” Irlbacher-Fox and Mills (pg.17, 2008). The negotiation of economic rents are seen to vary resulting from numerous factors including commodity prices, social context, and “government policy choices including taxation, fees, royalties, and the partial ownership of resources” (Irlbacher-Fox and Mills, pg.17, 2008). Through use of innovative policy choices, Aboriginal communities can mandate (via power devolution) the appropriate type of policy that will allow for equitable compensation beyond the limited life cycle of the mine (CITE). The negotiation of IBAs are seen to contribute to this devolution of power and highlight that when given the opportunity, Aboriginal communities will work in conjunction with private industry in the creation of equitable compensation regimes.

The following areas can be considered as knowledge gaps which require further study.

1. Do IBAs have the potential to ameliorate historical boom-bust trends?
2. In light of their private nature, do IBAs reinforce exclusive development practices or can they be a tool for inclusive governance?
3. Are IBAs a counterbalance to historical injustice or do they perpetuate them?
4. What are alternatives to IBAs that might create greater opportunities for communities in terms of both economic development and social justice?
5. Is there a need for outcomes based analysis of IBAs and EA public engagement strategies?

**IBA negotiation and implementation**

A review of relevant literature suggests that IBA negotiation processes have been used frequently since their introduction over 15 years ago resulting from their ability to assess and mitigate impacts not covered in typical EA processes. In response to the failings of public participation in EA processes - which have been categorized as being ineffective, costly, time consuming, inefficient, and tools of placation -, negotiated agreements via IBAs have been used progressively in resource development projects in northern and Aboriginal communities in Canada (Doelle and Sinclair, 2005; White and Wright, 2012; Caine and Krogman, 2010; Vanclay and Esteves et al., 2011; O'Faircheallaigh 2009).

A review of case studies over the past 15 years highlights that the negotiation of impact and benefit agreements and other forms of participatory agreements have yielded various results
Due to a variety of reasons including the multi-stakeholder nature of negotiations and changing regulatory frameworks, IBA negotiation processes do not always produce results which are desirable by all stakeholders. Although outcomes are seen to be variable, the general trend of IBA negotiations have generally seen to be progressive and an effective tool in addressing many of the weaknesses of EIA (Noble and Birk, 2010; Isaac and Knox, 2004; Booth and Skelton, 2011; White and Wright, 2012; O’Faircheallaigh 2009).

As Noble and Birk (pg. 18, 2010) discuss, “such agreements [IBAs] can play an important role in the long-term planning and integration of ‘community’ into resource planning and development”. As such, there is considerable literature that outlines the effectiveness of IBAs in addressing certain EIA weaknesses including “the limited engagement of local communities in the post-decision stages of project development, the lack of mechanisms to build trust amongst stakeholders, and the limited resources made available to local communities to engage in resource planning and impact management processes” (Noble and Birk, 2010 pg .18; O’Faircheallaigh 2009; Esteves et al., 2012; Galbraith et.al, 2007; Siebenmorgen and Bradshaw, 2011; White and Wright, 2012; Doelle and Sinclair, 2005).

Through a reading of social impact assessment (SIA) literature it can be understood that IBAs contribute to current good practices in the SIA field (Esteves et al., 2012; IAIA 2009). Adapted from Vanclay and Esteves (2011, pp. 11–12), the following highlights best practices for SIA in relation to NAs and IBAs:

- creating participatory processes and deliberative spaces to facilitate community discussions about desired futures, the acceptability of likely impacts and proposed benefits, and community input into the SIA process, so that there can be a negotiated agreement with a developer based on free, prior and informed consent;
- scoping the key social issues (the significant negative impacts as well as the opportunities for creating benefits);
- identifying ways of mitigating potential impacts and maximizing positive opportunities;
- developing a monitoring plan to inform the management of change;
- facilitating an agreement-making process between the communities and the developer ensuring that principles of free, prior and informed consent (FPIC) are observed and that human rights are respected, leading to the drafting of an IBA.

A review of the literature highlights that negotiated agreements between private industry and Aboriginal communities hold the potential to create new opportunities for all stakeholders to share in the economic benefits generated by resource extraction (Galbraith et.al, 2007; Siebenmorgen and Bradshaw, 2011; Fidler, 2009; O’Faircheallaigh 2009; Esteves et al., 2012). In this, there is the potential to ameliorate a “community’s short-term and often urgent need to
fund services such as housing, health and education and to augment Aboriginal incomes that are usually well below the national average” (O’Faircheallaigh 2009 pg, 3). Additionally, Prno’s (2010) research suggests that while IBAs cannot ensure that adequate follow-up will occur, they do promote on-going communication with the mining firms, which suggests that either directly or indirectly, IBAs have enabled EA/SIA follow-up (Prno, pg.5, 2010).

While IBAs are generally seen to be a progressive process and an overall effective tool in addressing the gaps of regulatory processes, they do posses various challenges to their successful implementation (O’Faircheallaigh 2009; Doelle and Sinclair, 2005; Fidler, 2009; Siebenmorgen and Bradshaw, 2011). The impact of existing power dynamics on negotiations processes and existing capacity gaps between private industry and the potentially affected Aboriginal community have been highlighted as key challenges (O’Faircheallaigh 2009; O’Faircheallaigh 2012; White and Wright, 2012; Caine and Kroaman, 2010; Galbraith et al., 2007; Siebenmorgen and Bradshaw, 2011). In addition to these challenges, IBA negotiations often miss the opportunity to directly address community health needs and as previously mentioned IBA outcomes and implementation can be highly variable (O’Faircheallaigh, 2009”; Bradshaw, 2012).

Concerns also exist in regards to the wider implications of agreement making in IBA processes, including confidentiality, Aboriginal access to judicial and regulatory systems, and required Aboriginal support for projects (O’Faircheallaigh, 2009). As well, there is the concern that IBAs have the potential to become an isolated process relative to regulatory and community planning processes (O’Faircheallaigh, 2009).

Credence must also be given to the distinctly different approaches which can be employed in the negotiation process by each stakeholder. Distributive approaches to negotiation typically assume that each stakeholder in the negotiation process is motivated by economic rationality and posses the capacity to identify the actions which will maximise the potential for economic benefit (O’Faircheallaigh, 2000). With this assumption guiding negotiation processes, it can be assumed that a negotiation process which allows all stakeholders the opportunity to maximize economic benefits will generate good or more desirable outcomes. A review undertaken by O’Faircheallaigh (pg. 3, 2000) discusses that “In many cases, participants in negotiations do not appear to be driven by principles of economic maximization. In addition, they usually operate with limited information, making it extremely difficult or impossible to develop maximising strategies”.

As well, recent work undertaken by O’Faircheallaigh (pg. 1, 2012) highlights the “agency of indigenous women in negotiations surrounding major resource projects on indigenous lands”. While typically it is thought that Aboriginal and Indigenous women are not included in the negotiation processes, and resultantly do not benefit equitably, O’Faircheallaigh’s (2012) personal experience as a negotiator for Indigenous communities in Australia and his research in Canada indicates that Indigenous women often play a central role in negotiations.
As not much is known about the impact of women in negotiation processes other than the limited work by O’Faircheallaigh further research is required to better understand the ways in which Aboriginal and Indigenous women can influence negotiations and the institutional and political contexts that shape their involvement in decision-making processes (O’Faircheallaigh, 2012). Resulting from different approaches to negotiation as well as the unique role of Aboriginal women in negotiation processes the exercise of overt and covert power is a crucial issue and concern for the success of IBA negotiation and implementation (Bradshaw, Presentation, 2012; O’Faircheallaigh, 2012; White and Wright, 2012).

The complicated nature of negotiation processes in Aboriginal and Northern communities is considered to be a result of the confluence of several unique factors. These factors are outlined below:

- The prevalence of multiple actors with varying levels of technical and procedural capacity;
- Uncertain/changing political climate including changing legislation and regulatory processes;
- Unique Aboriginal governance institutions including mandated monitoring and follow up programs;
- Legislative requirements to consult and accommodate potentially affected Aboriginal communities;
- Changing commodity prices and the boom and bust nature of extractive resource development (O’Faircheallaigh, 2010; O’Faircheallaigh, 2000; Vanclay and Esteves, 2011; Prno and Bradshaw, 2008; Birk and Noble, 2011).

In addition to the unique factors associated with negotiation processes in northern and Aboriginal communities, the following list - adapted from O’Faircheallaigh (pg.2, 2000) and Weiss (pg. 298, 1997) - identifies mechanisms which affect each stakeholder in the negotiation process. Understanding these factors has been identified as critical to the success of any negotiation processes;

- The type and extent of previous experience in similar negotiations;
- Environmental forces acting on each party;
- The degree of fit between parties’ negotiation goals;
- Leadership;
- The behaviour of individual negotiators;
- The internal activities (away from the negotiating table) of the parties;
- The benefits and costs of the last proposal on the table.

As discussed in Galbraith et al. (2007) and more recently in Noble and Birk (2010), further research (specifically case study analysis) is needed in order to determine the overall effectiveness of IBAs and NAs. Through this a more robust assessment can be levied in order to
determine the amount in which binding negotiated agreements legitimately contribute to, among other things, sustainable development and environmental justice.

The following areas can be considered as areas which require further research.

1. How variable are IBA negotiations and implementation?
2. To what degree are IBA negotiations informed by well-conceived and inclusive community visioning exercises?
3. How much information sharing occurs among communities and among companies, and how does this impact IBA negotiations?
4. What are contemporary and historical constraints to effective IBA negotiation and implementation, and how can they be addressed?
5. What is the role of Aboriginal and Indigenous women in IBA negotiation processes?
6. What are the governance and capacity issues that have to be addressed to improve IBA negotiation and implementation?
References


Sosa, I., & Keenan, K. (2001). Impact Benefit Agreements Between aboriginal Communities and Mining Companies: Their Use in Canada. 1-29.
