Impact and Benefit Agreements: The Role of Negotiated Agreements in the Creation of Collaborative Planning in Resource Development

by

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ABSTRACT

Impact and Benefit Agreements: The Role of Negotiated Agreements in the Creation of Collaborative Planning in Resource Development

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Over the past twenty five years exploration and development of northern Canadian mineral and petroleum resources has steadily grown. With predictions of continued growth in resource development there is escalating concern regarding the associated negative environmental and social impacts. In particular, there are concerns that the impacts of this increased development will be felt acutely by Aboriginal and Northern communities. While the duty to consult and accommodate and mandated public engagement via environmental assessment (EA) do require consultation to occur, they do not specify public engagement outcomes, and typically do not require follow up to ensure agreements are honoured. As a result, benefits are often not distributed appropriately and the existence of 'poverty in the midst of resource abundance' continues in many Canadian Aboriginal communities. In response to these failures as well as environmental concerns, there has been increased political contention in resource development. Consequently, there is growing recognition of the importance in obtaining community support (i.e. 'social license') for individual development projects. Bilateral private negotiations between private industries and potentially affected Aboriginal communities, also known as Impact and Benefit Agreements (IBAs), have been progressively used to obtain this highly valued 'social license'. Findings from this research suggests that the communities who benefited the most from IBA processes were those who worked in a collaborative manner with

other communities and private industry. Observers of IBA processes remarked that through collaboration both a community's capacity and the ability to secure land rights are increased due to pooled resources and shared regional authority.

Despite cases of implementation failure, overall, IBAs present significant potential for capacity development resulting from the opportunity to negotiate the type and amount of benefits related with the project. While these negotiation processes require access to expertise (and as such might be limited by existing capacity), key informants noted that they do provide opportunities for communities to shape the type of capacity - trade skills, governance skills, technical skills - that is developed resulting from a project. While more research is still needed to determine the contribution of IBAs to collaborative planning processes, this research indicates that IBAs are an effective tool in collaboration as they build trust, promote direct communication between Aboriginal communities and private industry and facilitate capacity development.

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Section 1 - Introduction

1.1 Introduction

Over the past twenty five years exploration and development of northern Canadian mineral and petroleum resources has steadily grown. As roughly 30 percent of Canada's gross domestic product (GDP) is fuelled by exports with natural resources accounting for half of that, the resource extraction sector is projected to continue to grow over the next 25 years (OAC, 2012). The Office of the Auditor General reports that over the next 10 years there are 600 major resource projects, representing $650 billion in new investments already under way or being planned (OAC, 2012). Additionally, financial gains associated with the potential extraction of chromite deposits in the Ring of Fire in Northern Ontario have been estimated at C$50 Billion (Lazenby, 2013).

It can be argued that the impacts of this increased development will be felt acutely by Aboriginal and Northern communities as a result of various factors including; singularly focussed economic strategies, disparate distribution of benefits, capacity gaps, and an economic reliance on the volatile '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 2006). Mindful of colonial legacies and ineffective engagement and consultation strategies of the past, Northern and Aboriginal communities express concern that legislated regulatory public engagement processes are not sufficient. There is a perception by Aboriginal communities that regulatory public engagement processes only seek to *inform* communities of the best decision rather than consult community members to *decide* what the best decision is (Weitzner via Lutsel K'e Dene First Nation, 2006; Caine and Krogman, 2010). The

public engagement processes which can be considered the main drivers of engagement and consultation relating to resource development in Canada are identified below (Fidler, 2009);

1. public engagement components of environmental assessment
2. bilateral negotiations between private industry and Aboriginal communities; and
3. public engagement with Aboriginal communities as a result of duty to consult and accommodate legislation.

While the Duty to Consult and Accommodate and mandated public engagement via environmental assessment (EA) processes do require consultation, they do not specify public engagement outcomes, and typically do not require follow up to ensure agreements are honoured. Resulting from this, many analysts suggest that benefits are often not distributed appropriately to affected communities and in turn perpetuate existing inequalities (O'Faircheallaigh, 2009; Caine and Krogman, 2010; Sosa and Keenan, 2001; Quereshy, 2006). Although the financial benefits associated with extractive resource development have the potential to lift marginalized communities out of poverty, over the past 25 years this typically has not occurred. As Caine and Krogman (2010, pg. 77), note, "In the Canadian North, Aboriginal well-being and values have been fundamentally affected by the colonial project, where the imperative of resource extraction accelerated the signing of Treaties". They speculate that resulting from these treaties Aboriginal people were distanced from decision making processes, with government and private industry taking the reins via regulatory processes such as EA, the National Energy Board (NEB) and Natural Resources Canada (NRC).

While a lack of meaningful consultation in the past cannot be entirely credited for the disparity of benefits between private companies and community members, there is evidence that strengthened public engagement processes are effective in creating appropriate compensation

regimes (Noble and Fidler, 2011; Sinclair et al., 2008; O'Faircheallaigh, 2007; O'Faircheallaigh, 2012; Knotsch and Warda, 2009; Fidler, 2009). Adding to this potential, Caine and Krogman (2010, pg.77) note that "An array of regulatory and intergovernmental collaborative institutions triggered a much more consultative and cooperative approach from industries wishing to extract oil, gas, and minerals from the region [Aboriginal Communities]."

One such public engagement strategy that likely resulted from these consultative and cooperative approaches were private negotiations between private industries and potentially affected Aboriginal communities, also known as Impact and Benefit Agreements (IBAs). Over the past fifteen years these voluntary negotiations have been progressively employed in Northern and international development processes with the goal of identifying potential socio-economic impacts and creating suitable benefit regimes in order to mitigate the concerns of the community (Fidler and Hitch, 2009; Irlbacher-Fox and Mills, 2008; Siebenmorgen and Bradshaw, 2011). In essence, IBAs can be viewed as a mechanism to gain public support or 'social license' for a specific project through mutual negotiations between private companies and potentially affected Aboriginal communities.

Resulting from their recent emergence many questions regarding IBAs remain, including how they are used in conjunction with other public engagement processes, and their contribution, if any, to collaborative land-use planning processes. While these questions persist, we do know there is growing contention surrounding resource development projects in Canada especially mega projects such as the XL pipeline and the Northern Alberta oilsands. In addition, concerns regarding individual projects - such as Platinex's exploration without consulting the KI First Nation as well as more recent actions (road blockade, hunger strikes, protests) by Attawapiskat

community members in response to the DeBeers mine (CBC-A, 2013)- highlight the need for more inclusive decision-making processes.

As well, concerns regarding the broader relationships between the federal and provincial governments and Aboriginal communities have been recently highlighted with the 'Idle No More' movement (CBC-B, 2013; Barrera, 2013). High profile mega development projects have drawn considerable media attention to the need for private industry to gain community acceptance and trust before a project is implemented (KII003, 2013; Lazenby, 2013; O'Faircheallaigh, 2010). While public opposition to unwanted resource development has gained recent media attention, it is important to note that an awareness of Aboriginal concerns is a by-product of continued work by NGOs, advocacy groups, and empowered Aboriginal leaders over the past 30 years.

This paper reviews the current state of knowledge regarding the benefits and challenges associated with the use of IBAs and assess the effectiveness of IBAs in the creation of collaborative planning processes involving Aboriginal participants. The paper provides a deep review of relevant literature and reports on key informant interviews (KIIs) with practitioners and lawyers who have extensive (more than 10 years) experience with negotiated agreements and IBAs in Canada. Key informants were selected in order to ensure regional representation from across Canada as well as fairly equal representation between private consultants (planners, human environment specialists, and negotiation specialists) and lawyers who have worked with both private industry and Aboriginal communities in the negotiation of IBAs. Appendix A outlines the 11 key informants who were interviewed according to the sector they work in and a brief background of their professional focus. For the purpose of this report, the interviewees will be hereafter referred to by the codes ascribed to them as key informant interviews (KII) and the

chronologic order they were interviewed (i.e. KII 001-KII 011). In order to reduce risk to all participants, interviewees were advised that specific details or identifiers were not being sought and if possible to avoid providing these details. A review of the questions which guided the semi-structured interviews has been attached in Appendix B.

1.2 Identified Knowledge Themes

The following four knowledge themes were identified through a review of relevant academic and grey literature and were furthered via key informant interviews. These themes will be explored at length throughout the paper with each theme being considered in relation to the research objective as well as highlighting further areas of research. These themes can be seen below.

1. IBAs in Relation to Legal/Constitutional Frameworks
2. IBA Effectiveness in the Creation and Facilitation of Collaborative Planning Processes
3. Negotiation Processes and Implementation of Agreements
4. The Role of IBAs in the Creation and Facilitation of Capacity Development

Through a review of these topics a more thorough understanding of the ways private negotiations interact and impact mandatory (EA/duty to consult) public engagement processes will be advanced. This will be done to determine the specific contributions of IBAs in the creation and facilitation of collaborative planning processes.

1.3 Overview of Research

This research project offers a review of the current state of knowledge regarding the benefits and challenges associated with the use of negotiated agreements; as well as an assessment of the utility of IBAs in the creation of collaborative planning processes. Ideally, this

research paper will provide support to Aboriginal communities navigating resource development processes as well as the practitioners who support these communities.

For the purpose of this report the term 'Aboriginal' and 'First Nations' will be used interchangeably in reference to Aboriginal, First Nations, Métis, and Inuit groups. This research recognizes that each of these groups is unique and thus has differing relationships with federal, provincial and territorial governments. However for ease of reference throughout the report and because most research discussed 'Aboriginal' or 'First Nations' communities these identifiers have been used.

This major research paper is based on data collected through in-depth grey and academic literature reviews as well as key informant interviews. This approach allowed for a thorough exploration of issues relating to negotiations between private industry and Aboriginal communities with a focus on the interaction between regulatory (EA), legislative/constitutional (Duty to Consult) and voluntary public-engagement processes. This approach is particularly appropriate for understanding the complex interaction between stakeholders as there are various parties affected by resource development projects. This research paper is organized in the following manner: Section 2: Background explores key theoretical concepts regarding collaborative planning in relation to Aboriginal communities; Section 3 offer a brief background on IBAs; Sections 4-7: discuss the major themes regarding negotiated agreements between Aboriginal communities and private industry with a specific focus on collaborative planning; Section 8: suggests potential directions for further research; and Section 9 summarizes findings and outlines main conclusions.

Section 2 - The Role of Public Engagement in Collaborative Planning

2.1 Increasing Contention and the Need for Social License in Resource Development

With predictions of continued growth in resource development there is mounting concern regarding the associated negative environmental and social impacts. In particular, there are concerns that the impacts of increased development will be felt acutely by Aboriginal and Northern communities. Resulting from the disparate allocation of benefits, the existence of "poverty in the midst of resource abundance" continues to be a reality for many Canadian Aboriginal communities (Tonts et al., 2012, pg. 288). In response to these failures as well as environmental concerns, there has been increased political contention in resource development. Consequentially, there is growing recognition of the importance in obtaining community support (i.e. 'social license') for individual development projects. A few examples of this contention between Aboriginal communities and private industry are outlined below.

- the Wet'suwe'ten First Nation recently threatened to shut down (via road blockades) the $455-million expansion of the Huckleberry Mines Ltd operations in northern B.C. resulting from failed negotiations regarding preferential hiring practices (O'Neil, 2013).
- the KI First Nation's opposition to Platinex Mine's exploration activities where six community leaders were imprisoned as a result of a lawsuit filed by Platinex. This action led some to state that these community leaders were "political prisoners in a democratic country called Canada" (SooToday, 2008; Wilkes,2011).
- Wahgoshig First Nation's opposition to Solid Gold Resources exploration on their land without consultation led the Wahgoshig First Nation to state that "Solid Gold Resources...is engaging in practices reminiscent of the early 1900s and is threatening the

foundations that have recently been established in industry/First Nation relations" (Rick Owen via Wahgoshig First Nation 2013, pg1).

- Broad opposition to the Northern Gateway and Keystone XL pipelines from Aboriginal and First Nations groups throughout Alberta, British Columbia and the United States. Concerns associated with the opposition include;
    - "We have a lot of issues at stake...We're going to stop these pipelines one way or another" (Graveland, 2013).
    - "If we have to keep going to court, we'll keep doing that," (Graveland, 2013)
    - "If this pipeline goes through, your government [Canadian Government] will further assist in the raping and pillaging of the lands of my ancestors," (Marsden, 2013).
- Internationally, the Marlin mine in Guatemala which was considered to be "developed without adequate consultation and in violation of the rights of indigenous people" has been requested by the Committee of Experts of the International Labour Organization (ILO) of the United Nations to be suspended due to aforementioned engagement concerns (Compliance Advisor Ombudsman, 2005).

Resulting from contention as highlighted above, there have been various statements made by industry and government as to the need for meaningful consultation with Aboriginal communities. Below, two of the more significant statements regarding the need for social licence are highlighted.

> *''successful mining and metals operations require the support of the communities in which they operate now, and in the future, to ensure continued access to land and resources.''* - International Council on Mining and Metals, 2009

> *"If we don't get people on side, we don't get the social licence — politics often follows opinion — we could well get a positive regulatory conclusion from the joint panel...but if the population is not on side, there is a big problem"* - Joe Oliver, Minister of Natural Resources (Cattaneo, 2012)

There is also recognition in the financial community of the importance of social licence with daily reports highlighting the financial impact of project delays due to social opposition (Globe and Mail, 2013; Financial Post, 2013). In addition to this, the recent 'Idle No More' movement, which spread across Canadian and the globe at a viral rate, highlights the increased potential for the internet as an effective tool for collective action as well as an effective method for widespread and rapid dissemination of a message (Barrera, 2013).

It can be speculated that the recent recognition of the need for social licence is a by-product of a greater understanding that inclusive and collaborative approaches produce better outcomes. Through media reports as well as government and industry official statements, there can be no denying that obtaining social licence through meaningful engagement is just as important today as obtaining environmental regulatory licence has been over the past 20 years (OMNR, 2013; ICMM, 2009).

2.2 Planning for Sustainability through Collaborative Planning Processes

Resulting from Arnstein's (1960, ch.2) seminal work in the late 1960's (Figure 1.1), collaboration in decision-making has come to be viewed as an integral part of planning for sustainability with support from international governance bodies, various planning theorists, practitioners and local municipalities. In this, planners play a key role in the push for more collaborative development processes by shaping the form and direction of how decisions are

made, and by creating spaces for dialogue that support meaningful public participation (Innes and Booher, 2002). Proponents of collaborative planning suggest that planning and policy professionals can be a key part of a harmonization process that brings stakeholders together, enables information to flow, builds trust and reciprocity, connects networks, and mobilizes action (Thomson and Perry, 2006; Morton, Gunton and Day, 2011). In its most basic form, collaborative planning has the potential to provide power to communities in shaping the procedures, processes, and agendas that shape development in a region (Innes and Booher, 2002). Without authentic dialogue at the core of these processes very few of these benefits can occur. Planning processes that allow all stakeholders to speak in an open and informed way about their needs, interests and understandings creates the opportunity for shared outcomes and ownership of a proposed vision and course of action (Cropper, 1996; Thomson and Perry, 2006).

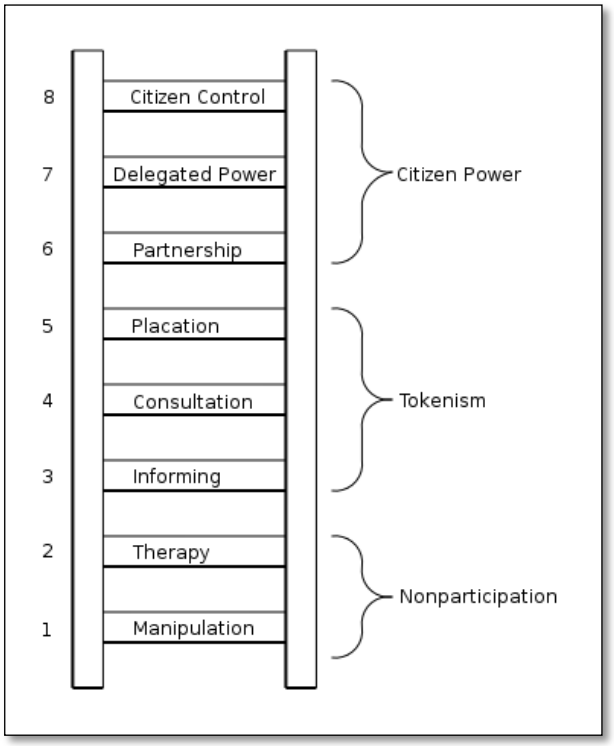


Figure 2.1 – Arnstein's Ladder of Citizen Participation

2.2.1 Collaborative Planning Defined

In its most ideal form collaboration implies a positive, purposive relationship between organizations that retain autonomy, integrity and distinct identity, and thus, the potential to withdraw from the relationship (Cropper, 1996). The level of 'collective action' in each process is defined by the amount of inclusivity in the actual decision-making process. These levels increase from; 1) informing people of a decision (networking), 2) to discussing and obtaining

agreement (co-ordination), 3) to discussing and negotiating agreement (co-operation) and 4) to joint decision-making and shared responsibility (collaboration). Collaboration is defined by Himmelman as "exchanging information, altering activities, sharing resources, and enhancing the capacity of another for mutual benefit and to achieve a common purpose" (Himmelman, 1996, ch.5). Table 2.1 highlights the spectrum of collective action and ways that capacity development and decision-making processes are impacted by the level of mutual action taken by stakeholders.

Table 2.1 - Spectrum of Collective Action in Decision-making Processes (Himmelman, 1995)

Process	**Information**	**Activities**	**Resources**	**Capacity**	**Decision Making**	**Outcome**
Networking	Sharing for mutual benefit			Knowledge	Inform network of outcomes	Mutual benefit
Co-ordination	Sharing for mutual benefit	Alter activities for mutual benefit		Knowledge and mutual strengthening of activities	Discuss and obtain agreement	Mutual benefit and achievement of common purpose
Cooperation	Sharing for mutual benefit	Alter activities for mutual benefit	Sharing for mutual benefit	Knowledge support and ability to act	Discuss and negotiate decisions and outcomes	Mutual benefit and achievement of common purpose
Collaboration	Sharing for mutual benefit	Alter activities for mutual benefit	Sharing for mutual benefit	Enhance capacity for mutual benefit as a non formal unitary organization	Joint decision making and sharing of authority and responsibility	Mutual benefit and achievement of common purpose

Currently there are several initiatives and programs which seek to employ a collaborative or at the very least a co-operative approach to Aboriginal planning processes (OMNR, 2012). Initiatives such as the *First Nations Carbon Collaborative* serve as an example of a collaborative

effort where several stakeholders work together to build capacity within First Nations in order to access the benefits associated with existing and emerging resource extraction projects (IISD, 2012).

2.3 Public Engagement with Aboriginal Communities

With regard to resource development that either occurs on Aboriginal treaty lands or affects Aboriginal peoples, public engagement takes on an even more important role in regulatory and planning processes. Resulting from the Crown's constitutional obligation to consult and accommodate with Aboriginal peoples, (which will be discussed later in further detail) unique engagement strategies have been employed to ensure opportunities for meaningful public participation. Consultation between government, private industry and Aboriginal communities is important in extractive resource development processes as it is often these discussions which result in either community acceptance or rejection of a project.

In particular, consultation is a key issue for First Nations and Aboriginal peoples as it "signals respect for legal Aboriginal rights and gives the opportunity for First Nations to exercise their jurisdiction over, and their social and economic interest in, lands and natural resources" (FNCF, 2008, pg.5). As well, consultation has the potential to create long term relationships which aid in the reconciliation of ongoing issues originating from colonial legacies and in effective engagement strategies of the past (FNFC, 2008; White and Wright, 2012; Diges, 2008). Table 2.2 which is taken from the First Nations Consultation Framework briefly highlights the ways in which consultation is important to all stakeholders (FNCF, 2008, pg.6).

Table 2.2 - Importance of Consultation in Decision-making Processes

Importance of Consultation

For Aboriginal People

- Consultation signals respect for Aboriginal rights
- Consultation provides the opportunity for Aboriginal People to protect their rights.

For the Crown

- Consultation provides the opportunity to uphold the "honour of the Crown"
- Engaging in consultation can result in a longer term commitment to build a sustainable relationship and reconcile the ongoing issues originating from the past.

For Third Parties

- Consultation improves commercial certainty, predictability, and timeliness of decisions
- Consultation activities can create mutually beneficial relationships with First Nations.

2.4 Frameworks for Collaborative Planning with Aboriginal Communities

International governance standards such as the *Declaration on the Rights of Indigenous Peoples* (2007), the *International Labour Organization's Convention 169*, and the *Free Prior and Informed Consent* principle (FPIC) can be seen to support collaborative planning principles as outlined by Himmelman. Considering Canada's unique constitutional relationship with Aboriginal peoples 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; O'Faircheallaigh, 2012; Kennet, 1999).

The FPIC principle has emerged as a key principle in international law and governance related to Aboriginal peoples and has been widely utilized in private sector policies of corporate

social responsibility (CSR) in extractive industries. In a joint statement[1] made at the Permanent Forum on Indigenous Issues, Kenneth Deer (2011, para.1-3) noted that;

> *"The right of Indigenous peoples to grant or withhold approval for actions affecting their rights is an integral element of the right of self-determination.....Free, prior and informed consent is also an indispensable safeguard for other rights of Indigenous peoples. Such rights are routinely violated when Indigenous peoples are excluded from or marginalized in the decision making process."*

FPIC is widely accepted as a necessary measure to ensure a level playing field between Aboriginal communities, government, and private industry stakeholders (Baker and McLelland, 2003). In line with international human rights law, the FPIC principle has a central place as it establishes the basis on which equitable agreements between local communities and private industry can be developed in order to ensure that the legal and customary rights of Aboriginal peoples and other local rights holders are respected (Forest Peoples Programme, 2008).

An integral aspect of the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) is the "right for Indigenous Peoples to be included in impact assessment processes"(Croal and Tetreault, 2011, pg.2). With the UNDRIP stipulating that;

> *"Free and Prior Informed Consent (FPIC) needs to be respected when Indigenous Peoples are implicated by projects on and near their lands and traditional territories. The declaration also establishes a right for Indigenous Peoples to consider themselves distinct from the dominant*

[1] Joint Statement of: Assembly of First Nations, Chiefs of Ontario, Grand Council of the Crees (Eeyou Istchee), First Nations Summit, Haudenosaunee of Kanehsatà:ke, Innu Council of Nitassinan, Indigenous World Association, International Organization of Indigenous Resource Development (IOIRD), Louis Bull Cree Nation, Montana Cree Nation, National Association of Friendship Centres, Native Women's Association of Canada, Samson Cree Nation, Union of BC Indian Chiefs, Amnesty International, First Peoples Human Rights Coalition, Canadian Friends Service Committee (Quakers), Amnistie Internationale, Hawai'i Institute for Human Rights, KAIROS: Canadian Ecumenical Justice Initiatives.

society and be respected as such" (Joint Statement - Union of BC Indian Chiefs, 2011).

Recognizing this, in 2011 the International Association for Impact Assessment (IAIA 2011, pg.3 released a list of best practices regarding impact assessment and the gathering of traditional knowledge (TK). In Vignette 2.1 a brief review of these principles has been outlined.

Vignette 2.1 International Association for Impact Assessment - Best Practice Principles for Respecting Indigenous Peoples and Traditional Knowledge (Croal and Tetreault, 2012)

- Provide an open and transparent impact assessment process;
- Agree on the degree of participation;
- Participation of Indigenous Peoples must be meaningful;
- Ensure gender equality;
- Allow mediation;
- Include native customs;
- Provide interpretation and translation;
- Safeguard against exploitation;
- Use TK responsibly;
- Use TK only within its context;
- Plan ahead: Incorporating alternate ways of decision making into impact assessment can take time.

Through regulatory consultation processes such as EA and the duty to consult and accommodate, there is an opportunity for meaningful engagement of community members who may be affected by a proposed resource extraction project. As well, regulatory and legislative processes have the potential to provide much needed frameworks that support collaborative planning in resource development (Doelle and Sinclair, 2005; Gibson, 2005; Croal and Tetreault,

2012; Himmelman, 1995). With continued support from international governance agencies as well as the prevalence of mandated public engagement in regulatory processes, there appears to be meaningful opportunities for the creation of collaborative planning.

2.4.1 Collaborative Planning via Environmental Assessment

A central problem for any decision-making system is to develop a means for predicting likely future changes that may impact a region or a particular community and to accommodate where there may be unanticipated changes. As noted by various academics, governmental and non-governmental agencies, "EA and other tools play an important role in attempting to meet this need...As planning policies are instrumental in the future use of land, they are linked to potential direct and indirect environmental impacts" (Jones et al., 2005, pg.5).

Adding to the recognition of EA and planning, in 1988 the Auditor General of Canada (OAGC 1988, para.1) noted that "environmental assessment is a critically important planning tool, given the potential for serious and irreversible damage to the environment from human activity".

At its most basic level, environmental impact assessment (EIA) processes seek to predict and mitigate the impacts of proposed resource development projects before they are carried out. This aligns with the most recent iteration of the *Canadian Environmental Assessment Act*, 2012 (CEAA 2012) which states that, "An environmental assessment:

- identifies potential adverse environmental effects;
- proposes measures to mitigate adverse environmental effects;
- predicts whether there will be significant adverse environmental effects, after mitigation measures are implemented; and

- includes a follow-up program to verify the accuracy of the environmental assessment and the effectiveness of the mitigation measures" (CEAA 2012, para.5).

2.4.2 Public Engagement in EA Processes

Currently there are over 100 countries that incorporate EA as a standard aspect of their environmental management process (Devlin and Yap, 2008). For many of these nations, public participation is considered a fundamental component of environmental planning and serves as an important linkage to democratic decision-making (Lemon et al, 2004; Devlin and Yap, 2008; Gibson 2006). Consultation and engagement in EIA processes is considered to be so crucial it has led some to state that "EIA is not EIA without consultation and participation" (Wood, 2002, pg.277) and that "the basic legitimacy of an EA process is questionable if the process does not provide for meaningful participation" (Stewart and Sinclair, 2007, pg.162).

While the benefits of public participation are seldom disputed, the way in which we plan and implement public engagement strategies remains contentious (Stewart and Sinclair, 2007). This is reinforced by Hartley and Wood, (2005, pg.320) when they discuss that, " the debate continues about exactly how to undertake public participation...when it should commence, the methods that should be used and which members of the public should be consulted." Without clear guidelines as to what 'good' participation models look like, planners have tended to rely on pre-designed templates of what they consider to be effective models for participatory planning (Lemon et al., 2004). Some observers lament that while the "one size fits all" approach to public engagement typically seen in EA has been effective in creating process, it has been frequently cited for ineffectiveness and a continuance of bureaucratic 'top-down' approaches to decision-making (Gibson, 2005; Galbraith, 2007; Devlin and Yap, 2008).

While it can be argued that recent iterations of EA legislation have broadened the formal scope of public participation in EA, there must be a recognition of the challenges that assessment processes continue to face (Devlin and Yap, 2008; Galbraith et al., 2007; Gibson et al., 2005). In Vignette 2.2 a summarized list of concerns regarding public consultation in EA is presented. It should be noted that this list in not exhaustive and is merely a brief outline of the various challenges of EA-driven public participation (Galbraith et al., 2007; Gibson et al., 2005).

Vignette 2.2 EA Public Participation Challenges

- EA has historically been criticized for excluding the general public and local forms of knowledge in key steps of the process;
- EA focus on process rather than outcomes;
- Proponent led EA has tended more towards mere compliance with obligatory stages rather than a pro-active approach
- Follow-up and monitoring seldom required or allocated sufficient resources (Gibson et al, 2005; Croal and Tetreault, 2006; Berkes, 1988).

While many of the challenges facing public engagement can be considered a by-product of EA legislation, it must be recognized that decisions regarding land use planning are context specific and to a large extent culturally determined (Lemon et al., 2004; O'Faircheallaigh, 2010). Local political context and a community's previous interactions with resource development dramatically affect the way mandated public engagement activities are received by a community. Resulting from this, there have been several iterations of best practices for public engagement which have sought to create flexibility in order to be contextually sensitive while also adhering to legislative process (Bristow and Munday, 2011). As well, bilateral private negotiations

between private industry and potentially affected Aboriginal communities -also termed Impact and Benefit Agreements (IBAs)- have been utilized to address public consultation gaps by creating opportunities to discuss socio-economic and environmental concerns of a particular resource development project (O'Faircheallaigh, 2009; Galbraith et al., 2007).

2.5 Section Summary

Collaboration in decision-making has come to be viewed as an integral part of planning processes as it creates opportunities for stakeholders to discuss and negotiate decisions as well as contribute to joint decision-making processes with shared risks. In Canada, EA has been identified as a critically important planning tool with mandated opportunities for public consultation throughout the process. While the benefits of public participation are seldom disputed, the way in which we plan and implement public engagement strategies remains contentious. Resulting from historical legacies and public engagement failures of the past, voluntary, good-faith negotiation processes such as IBAs have been steadily called upon to achieve community support. While primarily used by industry as a means to obtain social licence from potentially affected Aboriginal communities, consultation with Aboriginal communities signifies respect for legal Aboriginal rights and the opportunity for Aboriginal People to protect these rights. In the following sections IBAs will be looked at in further detail via interviews with IBA practitioners and a review of relevant literature.

Section 3 - Impact and Benefit Agreements – Background

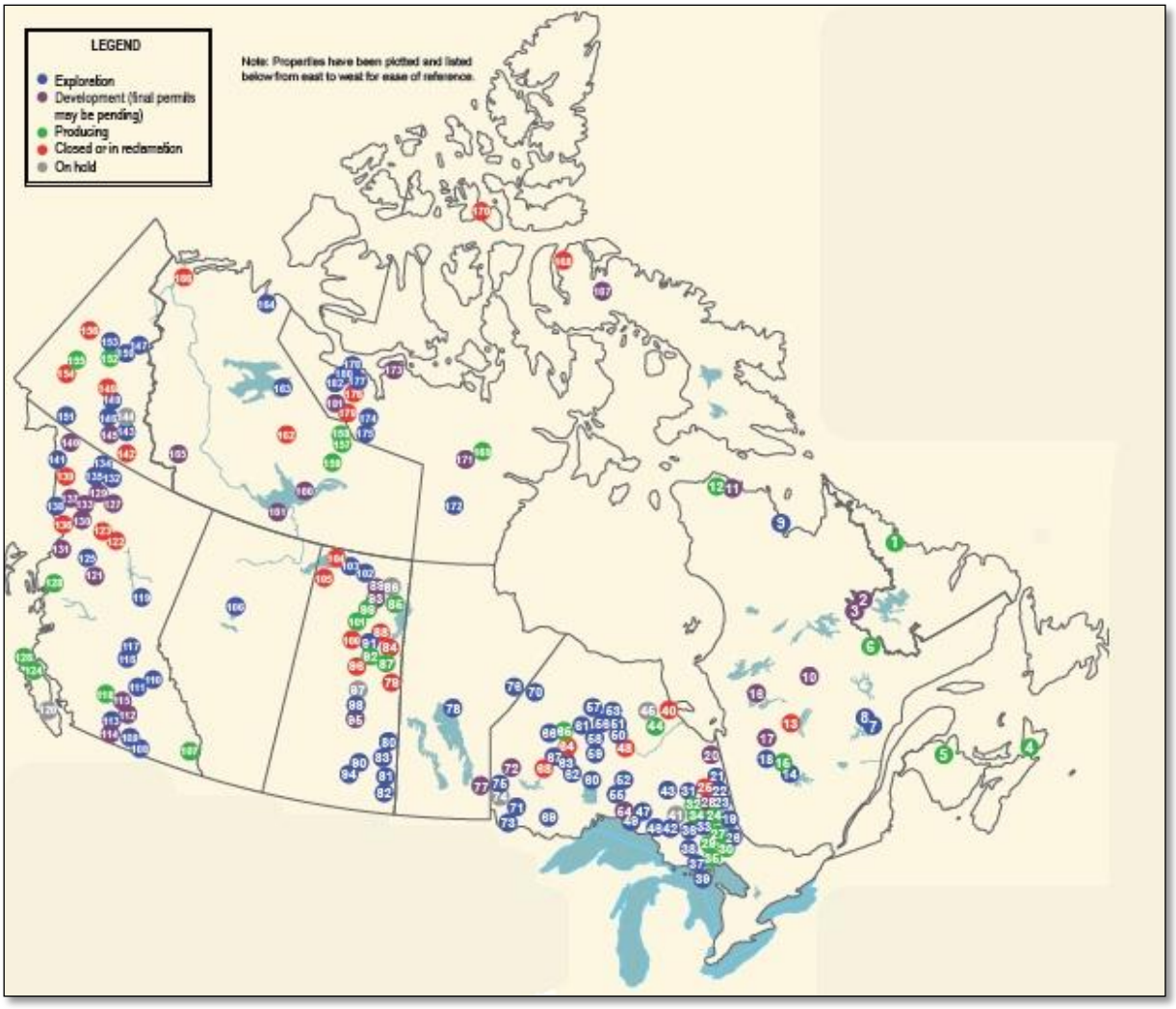
3.1 IBA Background

While legislative, constitutional and regulatory public engagement processes have historically been viewed by Aboriginal communities to be ineffective, there is evidence that strengthened public engagement via negotiated agreements (NAs) (also termed IBAs) are effective in creating appropriate compensation regimes (Noble and Fidler, 2011; Sinclair et al., 2008; O'Faircheallaigh, 2007; O'Faircheallaigh, 2010; Knotsch and Warda,2009; Fidler, 2009). Resulting from their increasing use over the past fifteen years, the negotiation of contractual agreements between Aboriginal communities and mining companies has become standard practice in Canada with there being 182 Negotiated Agreements (NAs), Impact and Benefit Agreements (IBAs) or other similar agreements in place as of February 2012 (Prno, 2007; Caine and Krogman, 2010; NRC, 2012; Fidler, 2009). The dispersion and type of these agreements can be seen in Figure 3.1 (NRC, 2012).

3.2 What do IBAs discuss and what Triggers Them?

As the social and political context in which extractive resource development occurs is quite varied, the mechanisms which trigger private negotiations as well as the content of these negotiations also vary. Generally, a decision to enter into negotiation is made on the part of the proponent as they initiate the process with a decision to develop or extract a resource. As a result of this decision, the impact that a proposed development will have on Aboriginal lands or peoples must be identified and if possible mitigated. This is partially achieved through IBAs which are negotiated bilaterally between project proponents and Aboriginal groups whose lands or communities will be affected. (Klein et al. nd, pg.1; Lapierre and Bradshaw, 2008).

Figure 3.1 - Map of IBA, Negotiated Agreements and other similarly themed negotiation processes (NRC, 2012)



Negotiations typically include discussions on royalties and equity payments, environmental planning concerns, social investment, use of traditional knowledge (TK), acknowledgment of legal provisions relating to the Crown, and monitoring and follow-up programs (Gibson 2008; O'Faircheallaigh 2007; Sosa and Keenan 2001; Fidler, 2009). Also these agreements provide an opportunity for Aboriginal communities and private industry to discuss preferential hiring practices and potential business contracts. While the contents of these

agreements vary considerably on a project to project basis they typically focus on socio-economic issues (Fidler 2009, pg. 237).

A key aspect of IBAs is project certainty provisions. These provisions which some consider to be inherent to 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 can 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, or federal governments, extreme weather events, and changes in public opinion. In response to these changing parameters, some argue that an 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; KII 001, 2013).

3.3 Section Summary

Resulting from their increasing use, IBAs have become commonplace in resource development processes over the past 15 years. While IBA negotiations are entered into voluntarily, they are now considered a *de facto* reality in resource development that impacts Aboriginal peoples. As the contents and provisions of these agreements vary considerably from

project to project, there is no set template for the types of impacts and benefits discussed in each negotiation. With this being said, IBA negotiations typically focus on socio-economic issues with the goal of obtaining community acceptance (i.e. 'social license') in order for private industry to commence development.

In Sections 4-7, IBAs are further examined through an exploration of the following four themes.

1. IBAs in Relation to Legal/Constitutional Frameworks
2. IBA Effectiveness in the Creation and Facilitation of Collaborative Planning Processes
3. Negotiation Processes and Implementation of Agreements
4. The Role of IBAs in the Creation and Facilitation of Capacity Development

Through a review of these themes a more thorough understanding of the ways private negotiations interact and impact mandatory (EA/duty to consult) public engagement processes will be advanced. This will be done to determine the specific contributions of IBAs in the creation and facilitation of collaborative planning processes in resource development.

4 - IBAs in Relation to Canadian Legal/Constitutional Frameworks

4.1 –Legal Frameworks that Affect Aboriginal Peoples in Canada

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, 2011, pg. 299).

Section 35 is protects Aboriginal rights to engage in "practices, customs and traditions" that are distinctly integral to Aboriginal culture and reflect activities of Aboriginal communities when they first came into contact with Europeans (FNCF, 2008, pg. 6). Although these rights benefit from constitutional protection, they are not absolute, which is a result of the legal recognition that "the Crown can infringe these rights insofar as it can justify its action" (FNCF, 2008, pg. 6). In essence, if the crown sufficiently justifies that they acted in a way which truly recognizes the existence of Aboriginal rights they have discharged their duty to protect Aboriginal rights which in some cases includes just consultation (White and Wright, 2012; FNCF, 2008).

4.1.1 Duty to Consult and Accommodate

As highlighted above, Sec.35 of the Constitution Act outlines the constitutional responsibility of federal and provincial governments to "Indians and lands reserved for Indians" (White and Wright, 2012, pg1). Resulting from this, the Crown has 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, 2012, para.2,).

As individual projects have varied negotiation and consultation processes (for IBAs as well as EAs), the mechanisms that can aid in the discharge of the Crown's obligation to consult are varied. While private negotiations play an important role in the identification of stakeholders and outline potential impacts and mitigation strategies, legally, privately negotiated agreements can only serve as an administrative support for official crown consultation processes. That is to say, private industry can bring the sides together to talk and ensure that all relevant stakeholders are invited to participate in discussions, but they cannot take the place of government representatives in the consultation and accommodation process. This is outlined in Sec 51 of the Haida Nation vs B.C. Forests court judgement when it states;

> *"The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments...However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated".*

The duty to consult and accommodate is rooted in the concept of the 'honour of the Crown' which in essence means that "the Government must act with honour and integrity in its dealing with First Nations" (FNCF, 2008, pg. 6). Decisions affirmed in a number of landmark cases, Haida Nation v. British Columbia (Minister of Forests), 2004; Taku River v. British Columbia (Project Assessment Director), 2004; and Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005) by the Supreme Court of Canada determined that the Crown has a duty to consult when three elements are present (White and Wright, 2012):

- Contemplated Crown conduct
- Potential adverse impact

- Potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the Constitution Act, 1982.

The three elements above clarify that the duty to consult and accommodate not only arises when Aboriginal peoples have proven rights (i.e. legal precedence), but also when they have "potential rights", i.e. rights that are asserted, but have not been proven to exist by a court of law (FNCF, 2008, pg. 6).

4.1.2 Duty to Consult: Obligation to Discharge Replaced via IBAs

Evidence gathered through this research suggests that IBAs are *de facto* replacing the Crown's role in consultation and accommodation as community concerns are typically alleviated via IBAs. Interviews suggested that once a community partakes in an IBA and they express satisfaction with the process, the Crown will consult with the community in a brief manner to ensure no concerns remain. Resulting from this, it can be considered that private industry does all 'the heavy lifting' in the consultation and accommodation processes. As one key informant stated, "Private industry is replacing the government in their Duty to Consult – government sits on the sidelines because they know private industry needs social license" (KII 005, 2013). Vignette 4.1 outlines comments that highlight the interrelationships between IBAs and the duty to consult and accommodate.

Vignette 4.1 Key Informant Observations on Duty to Consult

- Often the government observes the negotiation processes and if the community is happy then the duty to consult is discharged.
- Role of government – absconded the negotiation role and given it to industry.
- If the government fails to discharge the duty, the victims of this are the

proponent....the paradox is if the government fails to consult and the First Nations go to court and if the court finds in favour of nations, the proponent is penalized as the project is blocked.

- The Government is not pro-active and this creates a broken process from the start.
- Proponents will often push for the IBA to discharge the Duty to Consult

4.2 - Unique Arrangements for Collaborative Planning – Land Claims Agreements

Resulting from ongoing negotiations, a large portion of First Nation land claims agreements have been settled in Northern Canadian communities (Caine and Krogman, 2010; Wright and White, 2012; 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). In the following section land claim agreements are discussed further as they have been considered by some observers as larger versions of IBAs that provide unique legislated opportunities for collaborative planning alongside Aboriginal communities (KII 011; KII 009). While the depth and breadth of IBAs are minimal in comparison to land claims agreements, a look into these modern treaties provides a relatable example for industry, government, and Aboriginal communities when aiming to create and facilitate pro-active collaboration amongst stakeholders.

Typically provinces do not mandate the use of IBAs and NAs in regards to resource development instead preferring to let these negotiations happen independent of Crown action. This being noted, there are several unique arrangements in the Yukon, Northwest Territories, Nunavut and Québec resulting from land claims agreements and agreements for self governance

that mandate the use of IBAs/NAs. Comprehensive land claims agreements, which some call 'modern treaties' usually are "entered into where Aboriginal land and resource rights have not been addressed by previous treaties or any other legal means" (Land Claims Agreements Coalition, 2013, para.1). These treaties represent relationships at a nation-to-nation/government-to-government level between the federal government, an Aboriginal signatory and on occasion, a province or territory (Land Claims Agreements Coalition, 2013). Land claims agreements typically seek to address matters such as;

- Ownership and use of lands, waters and natural resources, including the subsurface;
- Management of land, waters, and natural resources, including fish and wildlife;
- Harvesting of fish and wildlife;
- Environmental protection and assessment;
- Economic development and employment;
- Capital transfers;
- Royalties from resource development;
- Impact benefit agreements;
- Parks and conservation areas;
- Social and cultural enhancement;
- The continuing application of ordinary Aboriginal and other general programming and funds; and
- Self-government and public government arrangements. (INAC, 2007; Land Claims Agreements Coalition, 2013; DAAIR, 2013)

It is important to note that when land claims agreements (modern treaties) are ratified, "the treaty rights they contain are constitutionally recognized and protected", and as a result "the terms of these agreements take precedence over other laws and policies in Canada" (Land Claims Agreements Coalition, 2013, para.4). The recognition and protection of these constitutional rights is a crucial aspect of land claims as it ensures political autonomy for Aboriginal and First Nations communities in decision-making processes. A detailed schedule of modern land claims agreements is presented in Table 4.1. This table outlines the type of agreement, when it was

ratified or finalized and other potential land claims. Additionally, in Figure 4.1 a map outlining the geographical boundaries of existing land claims agreements is provided.

Table 4.1 –Modern Land Claims Agreements and Yukon First Nations Final Agreements

Name of Agreement	**Year**
James Bay and Northern Quebec Agreement	November 1975
Northeastern Quebec Agreement	January 1978
Inuvialuit Final Agreement	June 1984
Gwich'in Comprehensive Land Claim Agreement	December 1992
Nunavut Land Claims Agreement	May 1993
Yukon First Nations Final Agreements	
Champagne and Aishihik First Nations	May 1993
First Nation of Nacho Nyak Dun	May 1993
Teslin Tlingit Council	May 1993
Vuntut Gwitchin First Nation	May 1993
Little Salmon/Carmacks First Nation	July 1997
Selkirk First Nation	July 1997
Tr'ondëk Hwëch'in First Nation	July 1998
Ta'an Kwäch'än Council	January 2002
Kluane First Nation	October 2003
Kwanlin Dün First Nation	February 2005
Carcross/Tagish First Nation	October 2005
Sahtu Dene and Metis Comprehensive Land Claim Agreement	September 1993
Nisga'a Final Agreement	May 2000
Tlicho Land Claims and Self Government Agreement	August 2003
Labrador Inuit Land Claims Agreement	December 2005
Nunavik Inuit Land Claims Agreement	July 2008
Tsawwassen First Nation Final Agreement	March 2009
Eeyou Marine Region Land Claims Agreement	July 2010
Maa-nulth Final Agreement	April 2011

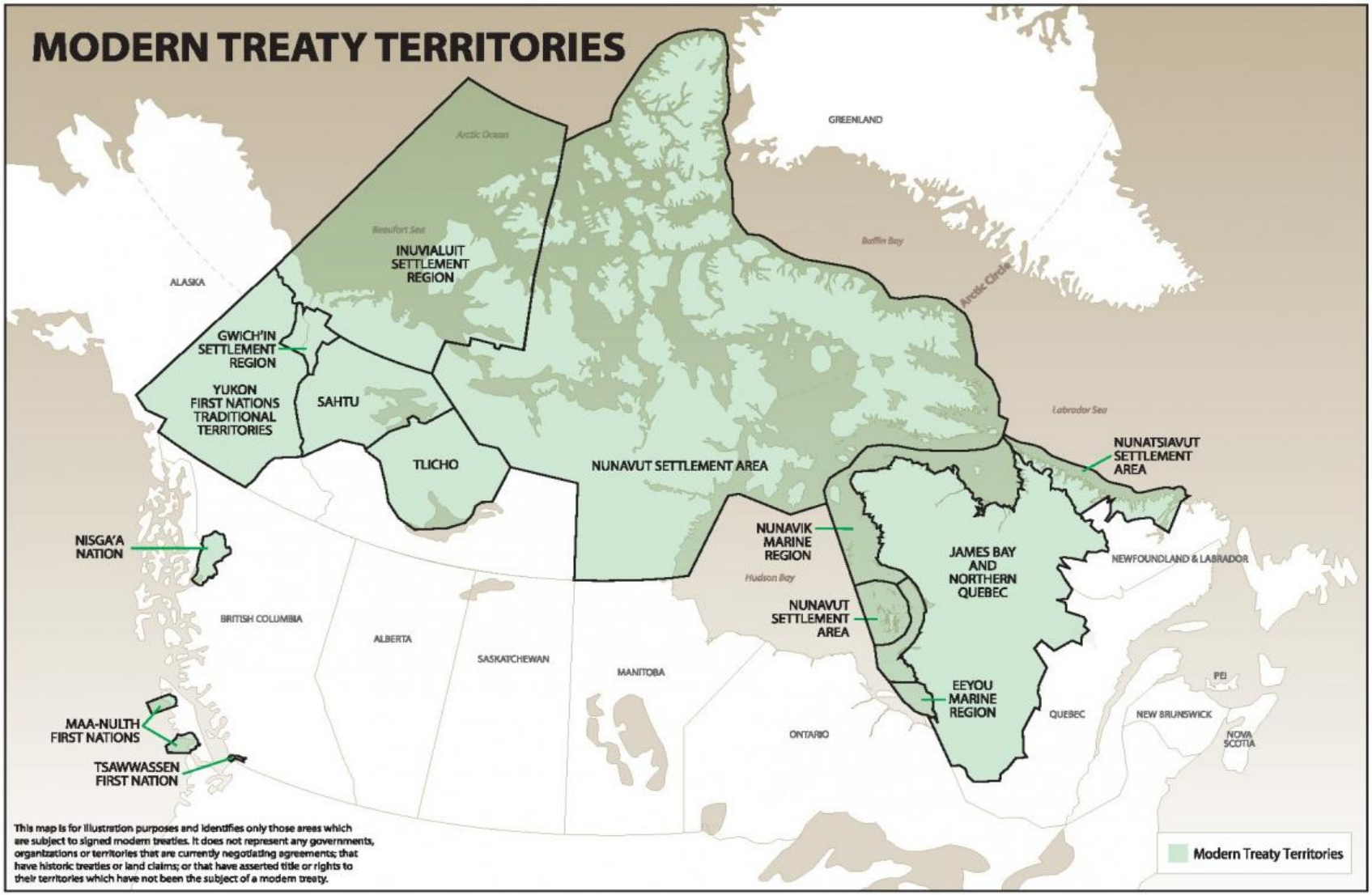
Table 4.2 – Completed and Ongoing Agreements in the Northwest Territories (AANDC, 2007)

Treaty Land Entitlement Processes (specific claim) • Salt River First Nation Treaty Settlement Agreement (June 2002) • Hay River Reserve Establishment (1974)
Ongoing land, resource and self-government negotiations: • Akaitcho Treaty 8 Land, Resources, and Self-Government Negotiations • Inuvialuit Self-Government Negotiations • Gwich'in Self-Government Negotiations • Deh Cho Process (land, resources and governance negotiations) • Déline Community Self-Government Negotiations • Northwest Territory Métis Nation Process (land and resources negotiations, with self-government negotiations as a second stage) • Tulita Yamoria Community Secretariat Self-Government Negotiations • Norman Wells Self-Government Negotiations • Fort Good Hope and Colville Lake's respective requests to begin negotiations have been made

While IBAs and land claims agreements are entirely separate processes, there is overlap in what they aim to achieve. As land claims agreements and IBAs both seek to address socio-economic as well as environmental concerns, IBAs can be a useful tool that works within land claims agreements processes. Evidenced from the number of modern treaties agreed upon in Canada, it is clear that finalizing successful land claims agreements is entirely possible. Akin to IBAs, each land claims agreement is a unique process with various confounders that can affect the outcome; as a consequence land claims agreements outcomes are variable. While land claims have been effective in creating and facilitating collaborative planning, cognizance must be given to the length and extent of bureaucratic-based land clams negotiation processes. As highlighted in Section 5.2.2, low levels of existing community capacity serve as a major obstacle in the

creation of successful IBAs. This reality rings true for land claims agreements as well, without a certain level of community sophistication in governance and bureaucratic skill sets, land claims agreements are difficult to implement successfully. Consequentially, land claims agreements are not always an appropriate course of action and must be considered in relation to existing social, political and historical contexts.

Figure 4.1 - Map of Modern Treaties in Canada



(Land Claims Agreements Coalition, 2013)

4.4 Summary - Contribution to Collaborative Planning

While constitutional mechanisms such as land claims agreements present an ideal solution to the various challenges facing collaborative planning, there are many factors for Aboriginal communities to consider before entering into negotiations. Short political timelines, varying degrees of community capacity, differing governance approaches (territories vs. Provinces), and the historical legacies of resource development all contribute to the opportunities available for First Nation and Aboriginal communities. While duty to consult and accommodate case law secures opportunities for consultation between government and affected communities, evidence gathered through this research suggests that IBAs are *de facto* replacing the Crown's role in consultation and accommodation. This is a troubling finding as it appears that, at times, the Crown is absconding it's legal obligation to consult and accommodate Aboriginal and First Nations communities. While the ways this transfer from government-led to industry-led consultation will impact collaborative planning are yet to fully be seen, it can be reasonably speculated that a continued 'outsourcing' of consultation responsibilities to industry will erode an already troubled relationship between government and Aboriginal communities.

Section 5 – IBA Effectiveness in the Creation and Facilitation of Collaborative Planning Processes

5.1 IBA Effectiveness

Research regarding the effectiveness of negotiated agreements and IBAs continues to garner attention in planning and impact assessment literature as IBAs are relatively new and as such there is uncertainty regarding their outcomes (Sinclair et al, 2008; Gibson and O'Faircheallaigh, 2010). While there is consensus that IBAs do present an opportunity to create equitable compensation regimes, uncertainty exists as to whether these potentialities transform into experienced benefits for affected communities (Fidler, 2009; Siebenmorgen, 2009; Cowell et al. 2011). In the following sub sections the challenges and benefits of using IBAs for the creation and facilitation of collaborative planning will be outlined. For the purpose of this report, the challenges and benefits relating to IBAs are not being compared from a cost benefit approach to effectiveness; rather, I am outlining the challenges and benefits of typical IBA negotiation processes to provide a review of their utility or 'effectiveness' in the creation and facilitation of collaborative planning processes. Through this, the pitfalls of unsuccessful IBAs will be outlined and hopefully avoided in future negotiations, while the beneficial aspects of IBA negotiations can be focussed upon.

5.2 Challenges facing IBAs

Although negotiated agreements in the form of IBAs do possess the potential to ameliorate historical legacies and certain failings of provincial and federal regulatory processes, they are not without their challenges. The negative environmental and social legacies left from mining operations of the past continue to impact Aboriginal communities today. This, as well as government support of these projects has contributed to a justifiable culture of skepticism in

Aboriginal communities when discussing the benefits of resource development (Prno et al., 2010). The challenges below highlight concerns in relation to transition of power from regulators to communities, capacity gaps between communities and community concerns regarding IBA negotiations.

5.2.1 Challenges - Transition of Regulatory Powers

While negotiated agreements do create a participatory space for potentially affected Aboriginal communities, this 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, community members are not 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, 2007, pg. 336). Aboriginal groups are encouraged to comment and make suggestions but the ultimate decision making power lies in the hands of government officials. In addition, there is the potential for a community's involvement in IBA negotiations to affect their relationship with the federal and provincial governments (O'Faircheallaigh, 2012; White and Wright, 2012). One participant noted that, "there is a legitimate fear in First Nations communities that if the government gives money for development processes they will give less money elsewhere...like education and health care funding" (KII 009). As collaboration (according to Himmelman) requires joint decision making and sharing of authority and responsibilities, it can be seen that in certain circumstances, IBAs are not contributing to collaborative planning.

With this in mind it is important to note that IBAs typically have a project-based focus and as such are not targeting to affect larger decision-making regimes (KII 003; KII 011). Land claims agreements which look at broader decision-making regimes are seen to be more suitable for this type of power transfer (KII 011).

5.2.1.1 Challenge –Limitations Due to Timing of IBA Negotiations

As many Aboriginal communities do not have land claims agreements in place, IBAs are often seen as the only opportunity for communities to address their limited role in decision-making processes (KII 002; KII 003). Typically, Aboriginal communities will enter into IBA negotiations looking to gather the appropriate information to determine what the adverse or beneficial effects of a project are, and to use the IBA to enhance mitigation efforts. If this does not occur, communities will then look to use the impacts identified via the IBA process to inform the EA. Key informants noted that this does not happen for a variety of reasons;

- IBAs are confidential,
- there is hostility between negotiation parties, and
- EA agencies have no responsibility to make socio-economic mitigation strategies (KII 010).

As private negotiations typically precede EA processes, they play a unique role in the identification of impacts and potential mitigation strategies. A troubling consequence of this timeline is the inability for impacts identified in EA processes to be considered in IBA negotiations. While some IBAs are open to re-negotiation, this is not the case for all IBA negotiations processes and as a result, certain IBAs have been ineffective in responding to the evolving concerns of Aboriginal communities. This undoubtedly serves as a challenge to the facilitation of collaborative planning processes as in these instances Aboriginal communities only receive isolated moments of power where they can affect the outcome of the project.

5.2.2 Challenges - Capacity Gaps

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" (Prno et al., 2010, pg.7). It can be sufficiently argued that these differences in capacity have enabled particular communities to achieve better IBA outcomes than others (KII, 009; Prno et al., 2009). For example, the Moose Cree IBA is considered to be much stronger and thus more successful than the Attawapiskat IBA (KII 001; KII 009). Observers speculate that resulting from the sophistication of the Moose Cree community they were able to leverage for benefits, particularly where local economic development was concerned(KII, 001; KII 009). In comparison, although the Attawapiskat IBA has been implemented, outcomes of the IBA are currently being contested by members of the community due to inequity concerns (CBC-A, 2013). As with the challenges facing shared decision-making authority outlined in section 5.2.1, addressing existing capacity gaps often goes beyond the realm of IBAs and are best handled through long-range planning processes which then IBAs can be a tool within.

5.2.3 Challenges - Community Concerns

As exploratory activities on Aboriginal treaty or traditional lands do not typically 'trigger' Crown involvement in the form of consultation (with exception to recent implementations of the 2009 amendment to the Ontario Mining Act), often the first stakeholder to reach out to potentially affected communities is industry via exploratory agreements 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). Although not required, exploratory agreements and IBAs are becoming commonplace in resource development as companies start to understand the business case for pro-active engagement with potentially affected communities (KII 003; KII 009).

Aboriginal 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, communities' worry that IBAs have the potential to become an isolated process relative to regulatory and community planning processes and thus their concerns will not be addressed (O'Faircheallaigh, 2009). Research undertaken by Prno, Lapierre and Bradshaw (2010, pg.8) in their review of 14 firms that negotiated IBA agreements provides greater insight into community concerns regarding IBAs, their research is outlined in Table 5.1.

Table 5.1 - Summarized community concerns regarding IBAs and regional mineral development (Prno, Bradshaw and Lapierre, 2010, pg.7)

ISSUE	***CONCERNS***
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	• 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 Involvement	• 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.

5.2.4 Challenges – Summary

The concerns raised in table 5.1 provide a good overview of the challenges facing IBA negotiation processes at a broader level. Paying particular attention to challenges of IBAs in the creation and facilitation of collaborative planning, the following can be considered as significant challenges.

- IBA outcomes and implementation can be highly variable due to lack of existing capacity in Aboriginal communities as well as lack of commitment by industry and government to develop capacity in potentially affected communities.
- Differences in capacity between private industry and Aboriginal organizations add to power imbalance between stakeholders and hamper collaborative decision-making efforts.
- There are limited opportunities for IBA re-negotiation once an agreement has been signed, this leads to isolated moments of power for Aboriginal communities.
- Community-based IBA monitoring programs which review agreements and ensure follow up and implementation, largely do not exist.
- IBA negotiations can potentially affect fiscal relationships with federal and provincial governments.

- The details of specific IBAs are not well known in communities because of their confidential nature, an aspect unique to Canadian IBAs (Australian IBAs are communicated to the community and kept confidential to the greater public).

While a review of these challenges does highlight somewhat daunting obstacles, there are progressive processes in place such as land claims agreements and government supported training programs that are alleviating these concerns. With this being said, implementation of agreements still remains a primary obstacle facing IBAs. In Section 6 negotiation processes and implementation of IBA agreements are explored in further detail as they present unique challenges to collaborative planning efforts.

5.3 Benefits of IBAs

As IBAs and negotiated agreements are fairly recent phenomenon in resource development and planning, much research is still needed. With this being said, despite their challenges, private negotiations between industry and communities have been effective in providing Aboriginal peoples with an alternative way to advance 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). While the challenges facing IBAs presents an ongoing concern, the contribution of IBAs to the creation of collaborative planning processes cannot be overlooked.

5.3.1 Benefits – The Contribution of IBAs to Collaborative Planning

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, 2011, pg. 18). 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, 2009, pg.240). As Fidler (2009, pg. 237) 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".

Noble and Birk (2011, pg. 19), 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 flexibility of negotiated agreements in employing novel approaches to achieve the aims of project developers, Aboriginal community members, and government. Key informants commented that, "there will always be a role for IBAs...there is creativity and flexibility in these processes to address issues that are not directly related to the mine but impact the granting of social license" (KII 011). As well it was noted that "IBAs are absolutely critical to assessing the socio-economic impacts and knowledge gathering" (KII 007).

Although IBAs do posses several challenges including implementation and privacy concerns, they appear to be an effective tool for collaborative planning as they built trust between stakeholders and create opportunities for mutual decision-making to occur. Albeit difficult to link the impact of IBA negotiations to the creation of land claims agreements and

modern treaties, it can be speculated that resulting from their power sharing nature, IBAs contribute to the creation and facilitation of collaborative planning processes.

5.3.2 Benefits – Economic Opportunities

A well noted and obvious benefit of IBAs is the potential for economic gain. Resulting from the vast amount of money that is invested and profited in extractive resource development, bilateral negotiated agreements hold the potential to create new economic opportunities for Aboriginal and First Nations communities (Siebenmorgen and Bradshaw, 2011; 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).

5.3.3 Benefits - Contribution of IBAs to EA Planning Processes

Legally, IBAs and Canadian environmental assessment processes are viewed as distinct 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 IBA/NA 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, 2007, pg.28). The existence of an IBA/EA overlap is reinforced by key informants who noted that "there is a lot of interactions between IBA and EA processes... at times impacts identified in the IBA were used in the EA process" (KII 009).

Lukas-Amulung notes from her research of development processes in the NWT that regulatory processes and IBAs/NAs overlap in three key areas; the scoping stage, the deliberation stage, and NA consultations. This process is outlined in Appendix C. In conjunction with Lukus-Amulung's conceptualization of the IBA/ EA overlap, Fidler (2009, pg. 237) indicates that "EIA and NA can be conceptualized as parallel processes on parallel tracks". While in practise it appears there is typically overlap between the processes, from a theoretical perspective, EIA and NA are distinct processes with different objectives (Fidler, 2009).

Since 2007, there have been three distinct research projects undertaken (Prno, 2007; Siebenmorgen, 2009; Fidler, 2009) which aimed to evaluate the effectiveness of IBAs/NAs in delivering benefits to Canadian Aboriginal communities. Specifically, Fidler's (2009) research looked to gain a clearer understanding of the ways IBAs interact with regulatory processes (EIA) via the Tahltan Nation's experience with the Galore Creek project in British Columbia. Fidler (2009, pg. 240) found that, "The Tahltan's involvement in the EIA was solidified in the NA, which was ratified mid-way through the EIA process, with negotiations beginning prior to the EIA being triggered". These findings indicate that in this case the IBA was effective in facilitating discussions between industry and First Nations before the EA took place.

Throughout my research IBAs were repeatedly identified in the key informant interviews as an effective collaborative planning tool which "sets the table" for future negotiation processes by creating trust between private industry and Aboriginal communities (KII 003). It can be speculated that resulting from the pro-active consultation which occurs as a result of the IBA/NA, trust is built between the two parties which is carried into future EA consultation processes (KII 005). While a nuanced aspect of the IBA/NA process, trust was identified numerous times in key informant interviews as a typical outcome of good IBA/NA processes and

critical to the success of future negotiation processes (KII 002; KII 003; KII 010; KII 011: KII 006).

As private 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 remedying perceived deficiencies in EA processes are increasingly being called upon because of their apparent benefits to both parties (Fidler, 2009, pg.237). For example key informants noted that IBA processes are used as leverage for getting the deal they want because IBAs and EA have an impact on each other. In essence, both of these processes are utilized in conjunction as they are effective tools to bring attention to the issues that matter the most to them (KII 002; KII 003).

5.3.3.1 Benefits – Summary: IBA contribution to EA

Overall, key informants supported notions revealed in the literature review that while IBAs and EA regulatory processes are distinct, they do interact. As well, because these interactions occur in unique ways relating to each specific IBA negotiation and EA review process, outcomes will be variable. One key informant noted that "IBA/NA processes occur simultaneously but there is not much interaction" (KII 006) while others stated that "there is a lot of interactions between IBA and EA processes" (KII 009). Although these statements are contradictory, they reinforce the multiple ways EA engagement processes interact with IBA negotiations and the variability of IBA/EA outcomes.

While Lukus-Amulung's work and other case studies do suggest areas of overlap, the relationship between negotiated agreements and EA processes remains somewhat unclear. Adding to this uncertainty, the outcomes of recent changes to the *CEAA* have yet to be witnessed

which adds another level of ambiguity as to the way in which IBAs/NAs and EAs can be expected to interact (White and Wright, 2012). While there is evidence that highlights the connectivity of these consultation processes, both key informants and the literature highlight that these are distinctly separate processes with different goals and outcomes. With this in mind, it can be reasonably postulated that resulting from the increased interactions between EA and IBA/NA processes, significant opportunities for collaboration have been created through enhanced communication and increased information sharing.

5.3.4 Benefits – Summary

Although it is difficult to identify the specific aspects of the IBA/NAs that were 'effective', it can be reasonably proposed that their collaborative nature and the timing of the negotiations (IBA/NA being the primary contact point with affected communities) are significant contributors to their utility. Resulting from the literature review and key informant interviews, it appears that overall IBAs are seen to be an effective tool in the following areas;

- building trust and creating avenues for dialogue
- securing local benefits for Aboriginal communities
- creating investment security for industry
- possessing flexibility to discuss various impacts and issues
- playing a key role in knowledge gathering and assessing socio-economic impacts
- creating trust which carries through to future negotiations
- facilitating early and ongoing discussions between industry and the First Nations
- relieving capacity strains in Aboriginal communities

While more research is still needed, it appears that IBAs have served as an effective tool in creating and facilitating collaborative decision-making. As the literature and key informants suggest, the communities who benefited the most from their IBAs (and thus where the IBA can be considered to be more effective), were those with existing negotiation capacity who have also

been able to secure some form of authority over their traditional lands through land claims or other unique governance arrangements. In relation to this, it is important to note that IBAs are intentioned to only serve as a tool in a larger collaborative planning process and as such they possess inherent limitations or boundaries to what they can affect. In order for IBAs to be used effectively they must be considered in relation to larger collaborative planning processes to ameliorate the challenges and enhance the benefits.

Section 6 - Negotiation Processes and Implementation of Agreements

6.1 Negotiation Processes

In each negotiation process, there are distinctly different approaches that can be utilized by each stakeholder. Distributive approaches to negotiation typically assume that each stakeholder in the negotiation process is motivated by economic rationality and possesses 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 (2000, pg. 3) suggests that "In many cases, [Aboriginal] 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". The complicated nature of negotiation processes in Aboriginal, First Nations and Northern communities is considered to be a result of the confluence of several unique factors. These factors include the prevalence of multiple actors with varying levels of technical and procedural capacity as well the uncertain/changing political climate in Aboriginal communities (2 year terms for Chief and Council). In addition to these unique confounders, there are specific mechanisms which can affect stakeholders in any negotiation process. Understanding these factors (outlined below) has been identified as critical to the success of any negotiation process;

- 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 (adapted from O'Faircheallaigh (2000, pg.2) and Weiss (1997, pg. 298).

6.2 The Need for Follow Up and Implementation

The literature and key informants identified implementation of agreements as the most important aspect of the IBA process. Largely overlooked due to the lengthy timelines of these agreements and a focus on the immediate financial aspects, implementation is viewed as a major impediment to transfer of benefits from industry to Aboriginal communities (KII 003; KII 006; KII 008; KII 010; O'Faircheallaigh, 2009). Implementation is seen to fail as a result of agreements that are not strategic and as a result lack mechanisms for implementation of the agreement. As well, a reduced focus on implementation often occurs due to the distraction of ongoing construction processes and the various short term economic benefits that typically come with development (KII 010; KII 011; KII 004). While there was little discussion regarding solutions to implementation failure, it was identified by all key informants as an area of concern. With this in mind, one key informant discussed the utility of "implementation committees" who see the process through, from vision to implementation (KII 006). In Vignette 6.1comments from key informants which highlight the need for implementation and the various reasons for implementation failure are presented.

Vignette 6.1 - Key Informant Observations on Implementation of Agreements

- ...implementation is the tough part – this has not happened very well in many places across Canada – third world conditions persist alongside economic opportunities.
- The implementation falls short of what is envisioned – proponent has community support

and they implement half heartedly....First Nation can be at fault too, but generally it is the proponent who loses this vision because of frantic construction schedules.

- The biggest challenge is getting the agreements to be tactical and implementable rather than just fulfilling social licence obligations.
- Once the social licence is gained there is a lack of focus on continued engagement and follow up...this is a result of a business practices approach.
- Often people [both parties] want to get the negotiation process over with and in the end forget about the necessity to follow up on these agreements.

6.3 IBA Negotiation: Business Rationale

A review of the literature discusses several motivators (associated benefits) for the use of inclusive decision-making processes. While upholding social justice and ethical obligations are often cited in industry CSR documents as the drivers of pro-active engagement; research conducted by Lapierre and Bradshaw (2008) indicate that often industry's rationale for engaging communities is predicated on it making 'business sense'. Figure 6.1 and 6.2, which are taken from Lapierre and Bradshaw (2008, pg, 4-5), highlight identified motivators for private industry involvement in private negotiations with Aboriginal communities.

Figure 6.1 – IBA Motivators Identified in Corporate Documents

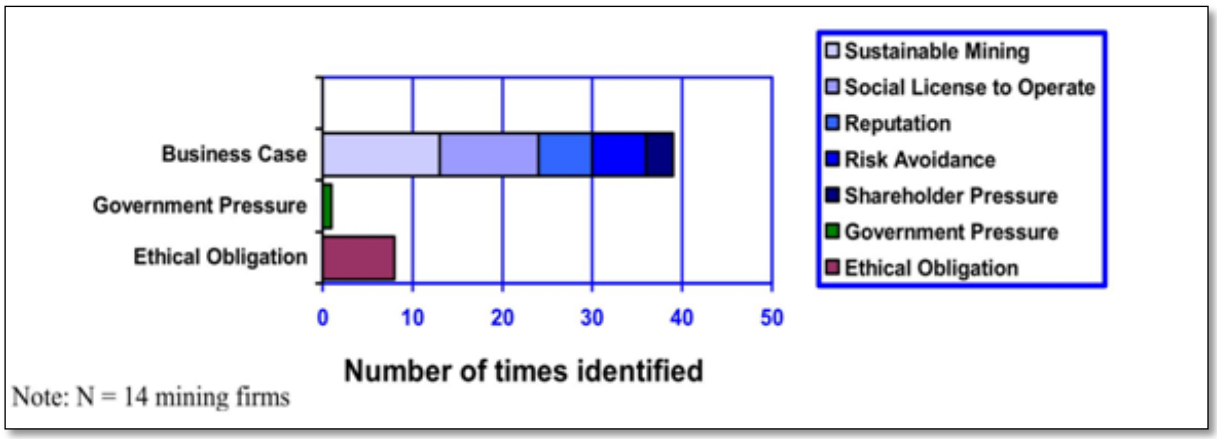
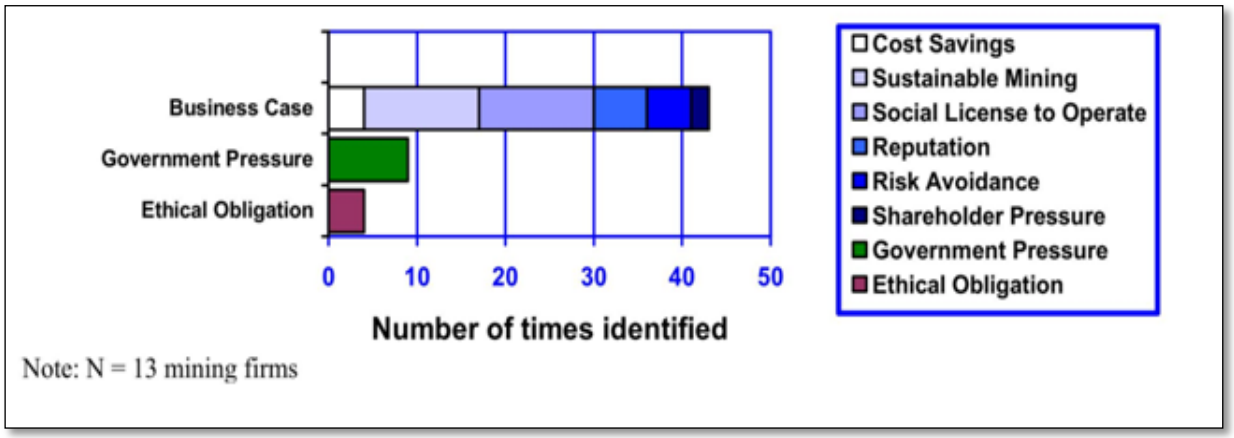


Figure 6.2 – IBA Motivators Identified from Interviews



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, 2008, pg.7). This approach is important to note as it further entrenches the recognition that inclusive planning via IBAs constitute a "necessary cost of doing business" and a "wise investment", which can provide consistency to the development process (Lapierre and Bradshaw, 2008, pg.7). Findings from key informant interviews bolster this assertion with a key informant frankly stating; "IBAs are a de facto reality in resource development in Canada- a company who doesn't want to use an IBA is going about things the wrong way – they are choosing the contentious road" (KII 003).

The variability of negotiation processes makes it difficult to attribute specific actions to outcomes, especially what actions can be considered as 'ethical behaviour'. This being said, one key informant noted that "affected communities express that there is ethical behaviour when there is a clear connection between the efforts and results" (KII 002). As communities are aware of the company's 'brand' and reputation overall (most importantly the amount of political turbulence the proponent has experienced in the past) the utility of trust building via IBAs is

crucial to obtaining social licence. The benefits of pro-actively engaging affected communities for private industry are many, below some of these benefits (which were identified by key informants) are listed;

- Opens up greater dialogue regarding how industry runs their business and how this aligns with the needs of the First Nation.
- Pro-active engagement via IBAs can mitigate a number of business risks by creating expected process and outcomes.
- Beneficial for industry-government relations as government agencies are satisfied with the high level of engagement occurring as a result of IBAs.
- When there is greater collaboration there is more opportunity to pursue economic development at a more sophisticated level by all parties.

6.4 Summary - Contribution to Collaborative Planning

As highlighted above, pro-active engagement with Aboriginal communities (via IBAs) has resulted in increased trust between these parties as well as greater economic opportunities resulting from a shared economic vision. Also, IBAs are seen to generate certainty in development processes by creating space for dialogue where community goals and visions can be communicated to industry and then acted upon. With this being said the challenge of IBA implementation serves as a distinct obstacle to the creation of collaboration planning processes as benefits which aim to increase capacity are not delivered to communities. Although IBAs do possess the potential to create and facilitate collaborative planning processes, if these agreements are not implemented or only partially implemented, the benefits of resource development will continue to evade Aboriginal communities. While more research is needed regarding their success, implementation committees were forwarded as a possible solution to IBA implementation failure.

Section 7 - The Role of IBAs and NAs in Creating and Delivering Capacity

7.1 IBAs and Capacity Delivery

The continued prevalence of negotiated agreements suggests that they have been effective at delivering significant economic and social benefits to affected Northern communities. This notion is furthered by analysis from O'Faircheallaigh (2010, pg.71) who states, "At a broader level, access to mining income can provide Aboriginal groups a degree of autonomy from the state... adding to their negotiating power in dealing with the state in relation to service delivery, land title and management, and governance". Being that resource development projects have immediate (acute) and future (chronic) impacts, it is important to understand the way compensation regimes affect the trajectory of a community both positively and negatively. As O'Faircheallaigh notes above, effective use of mining income has the potential to create autonomy and enhance a community's resilience. Contrary to this, ineffective use of resource income can further existing inequalities, create economic and political dependency, and have immitigable environmental and social impacts (Quereshy, 2006; Prno, Lapierre and Bradshaw, 2010).

7.2 Defining Capacity

As evidenced by the recent state of emergency (declared in May 2013) in Attawapiskat and Kashechewan First Nations, even in the wake of profitable resource development, unacceptable living conditions persist for many Aboriginal communities contributing to what many call "poverty in the midst of resource abundance" (CBC-C, 2013; Tonts et al., 2012, pg. 288). Commonly identified as an obstacle to benefits attainment, lack of existing capacity in communities is a major challenge facing Aboriginal and Northern peoples, in particular remote northern communities. Very broadly, the term 'capacity development' refers to the creation or

facilitation of processes which increase community autonomy through improved technical, bureaucratic, economic development and governance skills (Morgan, 2006; OECD, 2006). With this mind it is important to note that the term is ambiguous and as such capacity development may refer to a variety of things. In particular, capacity development in the Northern Canadian context can take many forms, below is a generalized list of the socio-economic components (capacity builders) typically found in IBAs.

- on-site skills and training programs;
- industry-specific contribution funding to post-secondary education and programs;
- contribution agreements with First Nation, federal, provincial and territorial governments for specific training upgrades;
- youth and student career fair sponsorships;
- information and capacity sharing of technical resources;
- equipment and infrastructure purchase;
- establishment of joint committees on specific baseline studies (i.e., wildlife monitoring, water management; mitigation and avoidance measures, etc.);
- specific hiring of Aboriginal employees by Proponents for management training;
- board observer or director positions of Proponent for executive training;
- development of entrepreneur business acumen through joint management and mentoring of Aboriginal collaborative business ventures;
- supportive lending or financial programs for the development of Aboriginal joint ventures; and
- capacity building trust or foundations (Alexander via PIDAC, 2013)

Resulting from the extensive amount of resource extraction projects in the Canadian North, there are several northern communities who have established themselves as leaders in the negotiation of land claim agreements, environmental impact assessments (EIA), and NAs/ IBA's (Caine and Krogman, 2010, Fidler, 2009, Knotch and Warda, 2006). Communities such as the

Tli Cho Government, Lutsel k'e Dene First Nation, Yellowknives Dene First Nation and the North Slave Metis Alliance have worked together to create the Snap Lake Environmental Monitoring agency which was a by-product of "the environmental agreement between De Beers Mining Canada, the Government of Canada, the Government of the Northwest Territories and [the aforementioned] affected Aboriginal groups" (SLEMA, 2013, para. 1). This type of collaboration between communities is most likely a result of existing capacity and the willingness of individual communities to work together to identify mutual areas of interest and concern in relation to the De Beers diamond mine. While the specific ways knowledge is transferred between communities has not been studied, it can be speculated that through collaborative planning the opportunity does exist for communities to learn from each other's experiences in order to gain capacity.

7.3 Success of Negotiation Processes Dependent on Existing Capacity

Throughout interviews with key informants, the varied nature of negotiation processes and their outcomes was highlighted. Overall there was a strong sentiment that while IBAs do posses the potential to contribute to capacity development, this is not always the case resulting from the amount of existing capacity in communities. Participants noted that low levels of existing community capacity in advance of a project were a primary reason for reduced success of IBAs. As well, participants lamented that often communities who lacked capacity would focus on the financial aspects of IBAs rather than the smaller pieces which were considered to be the real drivers of capacity development (KII 004). These smaller pieces vary but overall were considered as secondary economic development corollary to the project and largely included non-project related service sector activities (KII 011; KII 009; KII 007). With this in mind, several key informants discussed the high levels of sophistication in various Aboriginal

communities resulting from their previous experiences with development and a commitment by the communities to correct historical wrongs. Below are comments from key informants which highlight the varying levels of existing community capacity in IBA negotiations processes.

Vignette 7.1 – Key Informant Observations Regarding Capacity Development

- The amount of disparity between the communities is amazing – there are large differences in capacity between communities.
- The IBAs I have been a part of, had heavyweights on both sides that have a solid understanding of what is at stake and the best way to achieve this....the David and goliath aspects are things of the past.
- The capacity to take advantage of the opportunities presented is a big sticking point, generally the companies will honour these agreements but there has to be existing capacity that can take advantage of this.
- Capacity to participate in the process must occur before and during the process. It is best to do things that have a legacy.
- Wage inflation, employment migration – These are big costs that are very difficult to determine...First Nation must have capacity to determine what appropriate compensation is.

7.4 Summary - Collaboration and Cooperation between Communities via IBAs

Overall the level of cooperation and coordination between Aboriginal communities was varied and there was no consensus that ongoing collaboration between communities is occurring as a result of IBAs. Some key informants discussed the existence of regional IBAs and the utility of communities working together stating that "Regional IBAs would be ideal instead of these fragmented approaches which result in no information sharing (KII 007). This being said, regional IBAs were a rare occurrence with IBA negotiations typically occurring between individual communities or governments and private industry. While competition and political

rivalry between communities was seen to inhibit collaboration, geography and technology were also identified as obstacles. In Vignette 7.2 comments from key informants outline the challenges facing Aboriginal communities and the potential benefits of greater collaboration.

Vignette 7.2 Key Informant Observations on the Challenges of Collaboration between Communities

- Tough to get all people to agree to split the pie – have to get all people to agree to split the pie in equal ways – cannot multiply the pie by four, must divide it equally.
- First Nations are shooting themselves in the feet when they want to individually negotiate IBAs, should look to work together and sign a comprehensive agreement.
- There is communication between nations – they have different reasons for doing this...Would say there is less collaboration more communication happening between nations.
- Has seen both competition and collaboration with First Nation communities – When First Nations work together they get more because the proponent can't use divide and conquer approach (i.e. use terms of one agreement to barter with another agreement).

Section 8 - Discussion and Further Research

8.1 Current Knowledge

Interviews with Canadian practitioners and lawyers reveal that IBAs are seen as an effective tool in creating trust between private industry and communities if there is a meaningful commitment by both parties for early and ongoing communication as well as follow up to ensure delivery of benefits. In particular, IBAs were identified as a useful tool in establishing trust in the early stages of a project which often continued throughout EA processes and into the development and operation phases of a project. Weaknesses of IBA processes identified in the literature review were reinforced in interviews, with privacy concerns, capacity strains and implementation failure being identified as the main obstacles to successful IBAs. Below I have outlined the major knowledge identified through this research project.

8.1.1 IBAs Legal Frameworks - Duty to Consult

Evidence gathered through this research suggests that IBAs are *de facto* replacing the Crown's role in consultation and accommodation processes as the Crown typically conducts consultation once IBAs have already occurred. While the Crown still consults the community, private industry is seen as doing all the 'heavy lifting' as they are engaging communities first with the intention of obtaining social license to operate. As the onus to consult and accommodate Aboriginal communities lies with the Crown, the interactions between IBAs and duty to consult processes will likely garner increased legal attention in the future.

8.1.2 IBA Effectiveness

This research suggests that IBA negotiation processes have been effective in the creation of collaborative planning as they generate opportunities for collaboration through trust building,

enhanced communication and sharing of risks and benefits. For industry, IBAs offer protection against interrupted construction and operation timelines resulting from unaddressed political or social contention; as well, successful IBAs help reinforce a positive corporate image which is easily marketable. For communities, IBAs provide an opportunity to have direct discussions with industry regarding potential impacts of a project and the most appropriate accommodation and mitigation measures. Furthermore, IBAs reinforce Aboriginal autonomy in decision-making, and where implementation occurs; IBAs are seen to relieve capacity strains through delivery of benefits to the communities. While the outcomes of IBAs are variable, they have been frequently used as they initiate a framework for on-going dialogue which carries onto EA and duty to consult engagement activities.

8.1.3 Collaborative Negotiation Processes and Implementation of Agreements

The varied outcomes of negotiation processes in Aboriginal communities are considered to be a result of interactions between several unique factors. These factors include the prevalence of multiple actors with varying levels of technical and governance capacity, as well as changing political and economic climates in Aboriginal communities. Both the literature and research participants suggested that through increased development of governance and bureaucratic capacity, Aboriginal communities will be better equipped to negotiate in a collaborative manner with industry.

Unsuccessful implementation of IBAs was noted as a major failure in typical IBA negotiations. Lengthy construction timelines, capacity strains and a focus on immediate financial benefits were all forwarded as causes for implementation failure. Although an obvious point, without implementation of IBAs, the transfer of benefits from industry to Aboriginal communities cannot occur. As implementation remains a major challenge, IBA implementation

committees (which oversee IBAs from negotiation to implementation) have been forwarded as a possible solution.

8.1.4 Capacity Development

IBAs present significant potential for capacity development resulting from the opportunity to negotiate the type and amount of benefits related with a project. While these negotiation processes require access to expertise (and as such might be limited by existing capacity), key informants noted that they do provide opportunities for communities to shape the type of capacity (trade skills, governance skills, technical skills) that is developed resulting from a project. Consequentially, it can be speculated that capacity which is developed as a result of IBA processes, contributes to the creation and facilitation of collaborative planning processes.

8.2 Further Research

While discussions with key informants and the literature review did reveal certain aspects regarding IBA processes and their effectiveness, overall there were still many issues in need of further research. The exact ways that IBA and EA processes interact are still quite ambiguous as well as the utility of these interactions. Also, the role that IBAs play in the delivery of sustained capacity to Aboriginal communities is unknown with large amounts of variability being evidenced in IBA outcomes. In Vignette 8.1 these areas of further research are outlined through the positing of specific policy and research questions. These questions seek to further current understandings of IBA effectiveness in particular the effectiveness of IBAs in the creation of sustained capacity development. As well, in section 8.2.1 the utility of researching cumulative effects assessment, which was broadly identified as a knowledge and practice gap, is discussed.

Vignette 8.1 Potential Policy and Research Questions

- Is there the potential to harmonize EIA and IBA processes?
    - Is this a good/bad thing?
- To what degree are IBA negotiations informed by well-conceived and inclusive community visioning exercises?
- 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?
- Can extractive resource development, when undertaken with IBAs, contribute to sustained (20 – 25 years) community economic development? What conditions must be present?
- What are alternatives to IBAs that might create greater opportunities for communities in terms of both economic development and social justice?

8.2.1 IBA/NA Contribution to Cumulative Effects Assessment

The need for cumulative effects assessment (CEA) was highlighted by a majority of key informants and indentified as a 'gap area' where much research is needed. Overall, key informants identified the need for CEA and expressed doubt regarding the achievement of sustainable resource development without an impact assessment method that takes into account multiple projects over longer timeframes (KII 009; KII 010; KII 011; KII 002). IBAs were suggested by one key informant as a potential consultation mechanism for CEAs as they are flexible enough to consider both socio-economic and environmental concerns. While largely a

theoretical consideration, further research into the utility of IBAs/NAs in the creation of collaborative CEA posits unique opportunities for increased environmental protection and furtherance of socio-economic livelihoods in extractive resource development.

8.2.2 Case Studies for Further Research

Recent research undertaken by Siebenmorgen (2009) outlines the varying success of industry-led community engagement strategies with a review of the Kitchenuhmaykoosib Inninuwug (KI) First Nation's experience with Platinex Inc and the James Bay coastal First Nation's (JBcFN) experience with De Beers Canada. As highlighted in Section 2.1, the KI First Nation's relationship with Platinex can be considered as contentious, while by comparison, the JBcFN negotiations with De Beers were considered a success (Siebenmorgen, 2009). As both projects were initiated in similar regulatory frameworks and involved Aboriginal communities from northern Ontario, the difference in results is intriguing. Siebenmorgen (2009, slide 85) found that "the IBAs negotiated between the company and [JBcFN] communities served to alleviate most concerns, while providing mechanisms for communities to benefit from mineral development". In contrast, relations between the KI First Nation and Platinex resulted in the Ontario government paying $5 million to Platinex for the release of its' mining claims, as well as "increased public attention to Aboriginal rights and mining issues across Canada" (Siebenmorgen, 2009, slide 32).

While initially proposed to be a successful model by Siebenmorgen, in light of recent political and social contention, a review of the JBcFN's IBA negotiation process could provide insight into what actions and interactions affected the trajectory of relations between the communities, De Beers, and the Federal government. As well, other communities in the JBcFN region appeared to benefit more from their IBAs than others. A follow up on the long-term

impacts of these initially successful IBAs could provide insight into what actions contributed to collaborative planning and also pitfalls to avoid in future negotiations.

Section 9 - Conclusion

9.1 Concluding Thoughts

As the extraction of natural resources is poised to grow in coming years, concerns regarding the negative impacts of development on Aboriginal and Northern communities continue to mount. While the duty to consult and accommodate and public engagement via environmental assessment (EA) do create spaces for consultation, they do not specify engagement outcomes, and typically do not require follow up to ensure agreements are honoured. As a result, benefits are often not distributed appropriately and the existence of 'poverty in the midst of resource abundance' continues in many Canadian Aboriginal communities. In response to these failures as well as environmental concerns, there has been increased political contention in resource development. Consequentially, there is growing recognition of the importance in obtaining community support (i.e. 'social license') for individual development projects. Negotiations between private industries and potentially affected Aboriginal communities via IBAs have been progressively used to obtain 'social license' in advance of development projects. Due to their recent emergence as well as the variability of their outcomes, more research is needed to determine overall IBA effectiveness. With this being said, my research suggests that IBAs are an effective tool for collaborative planning as they build trust, promote direct communication between Aboriginal and industry stakeholders and facilitate capacity development. While there was no consensus that ongoing collaboration between communities is occurring as a result of IBAs, regional IBAs and collaborative approaches to planning were identified as beneficial and contributed to better IBA outcomes.

Although my research found that IBAs are in a *de facto* manner replacing the Crown's role in consultation and accommodation processes, it is important to note the variability in IBA

negotiations. Resulting from the confluence of unique political, social and economic factors, IBA outcomes and timelines are difficult to predict. As consultation timelines for IBAs, EAs and the duty to consult differ from project to project, the ways these processes interact with each other also changes with each project. With this being said, participants noted the over-arching benefits of early engagement with Aboriginal communities in well-intentioned and meaningful discussions.

Overall, my research suggests that IBAs present significant potential for capacity development and are an effective planning tool that can be used within larger collaborative planning processes. While implementation failure, privacy concerns and capacity gaps present substantial challenges; IBAs possess significant potential for collaboration resulting from the opportunity for Aboriginal communities to directly negotiate the impacts and benefits of a particular resource development project.

Appendix

Appendix A - Research Participants (key informants)

Key Informant	**Sector**	**Location**
KII 001	Private consultant specializing in First Nation consultation and natural resource development	Ontario
KII 002	Private Consultant and environmental planner with Aboriginal communities	Ontario
KII 003	Aboriginal Rights Lawyer and Author on Aboriginal relations	Ontario
KII 004	Private consultant in Aboriginal Services	Alberta
KII 005	Private consultant in environmental services	Quebec
KII 006	Aboriginal rights lawyer	Ontario
KII 007	Private consultant specializing in the Human environment	Ontario
KII 008	Aboriginal rights lawyer	Ontario
KII 009	Private consultant specializing in negotiations in resource development	Northern Ontario
KII 010	Private consultant specializing in collaborative community energy planning with Aboriginal communities	Ontario
KII 011	Private consultant specializing in Socio-economic Effects and Project Assessment, Energy and Resource Policy and Strategic Planning	Yukon

Appendix B – Key Informant Interview Discussion Questions

Discussion Questions

Process

1. How do IBAs interact with other regulatory and institutional public engagement processes? – (specifically Duty to Consult and Accommodate)

2. Is there an overlap between IBA and EA processes?
    a. Are these overlapping areas considered redundant or beneficial to the public-engagement process?
3. There is evidence to suggest that many of the impacts and mitigation strategies employed in EA processes are by-products of IBA negotiations, is this an accurate portrayal of these interactions?
4. Do legislated and regulatory processes such as Duty to Consult and EA, work in conjunction with the IBA process or are they seen as entirely separate?

Effectiveness

5. Although not their explicit intention, are IBAs an effective tool in identifying the impacts associated with extractive resource development?
6. Are IBAs an effective tool in the mitigation of impacts?
    a. Can the delivery of benefits to affected communities be considered mitigation?
7. Current state of IBAs, are they increasing in use, declining in use, remaining somewhat static?

Capacity Development

8. How is capacity development advanced via IBAs and in your opinion how successful have they been?
9. Forms that capacity development can take include;
    a. Skills and training
    b. Governance
        i. Policy and legislation (Planners)
        ii. Political (Politicians/ Community Leaders)

iii. Administration (Technical Support)

c. Infrastructure – community centres/ roads
d. Economic Development

10. What is the best way to approach capacity development in a community in order to create equal benefits for all community members? (i.e. who pays, who teaches/trains, where does this take place?)
11. What methods have been effective at delivering capacity to affected communities in the wake of extractive resource development?
    a. IBAs
    b. Environmental Monitoring Groups (Follow up programs)
    c. Regulatory processes (i.e. *FNOGMMA*)

Economic

12. How do IBAs benefit companies? What is the rationale for their use?
    a. CSR to secure development/create certainty in processes?
    b. Ethical obligations – 'good business practice'
13. What financial mechanisms do you advise for your clients to seek? Why?
    a. Lump-sum payments
    b. Monthly/ quarterly payments
    c. % of project – payout levels are commensurate with profitability of development, moving payouts
    d. Etc...
14. Have IBAs been effective at creating equitable compensation within a,
    i. Community
    ii. Region
    iii. Province

Appendix C - Lukus-Amulung's Interaction of negotiated agreements and regulatory processes in the NWT

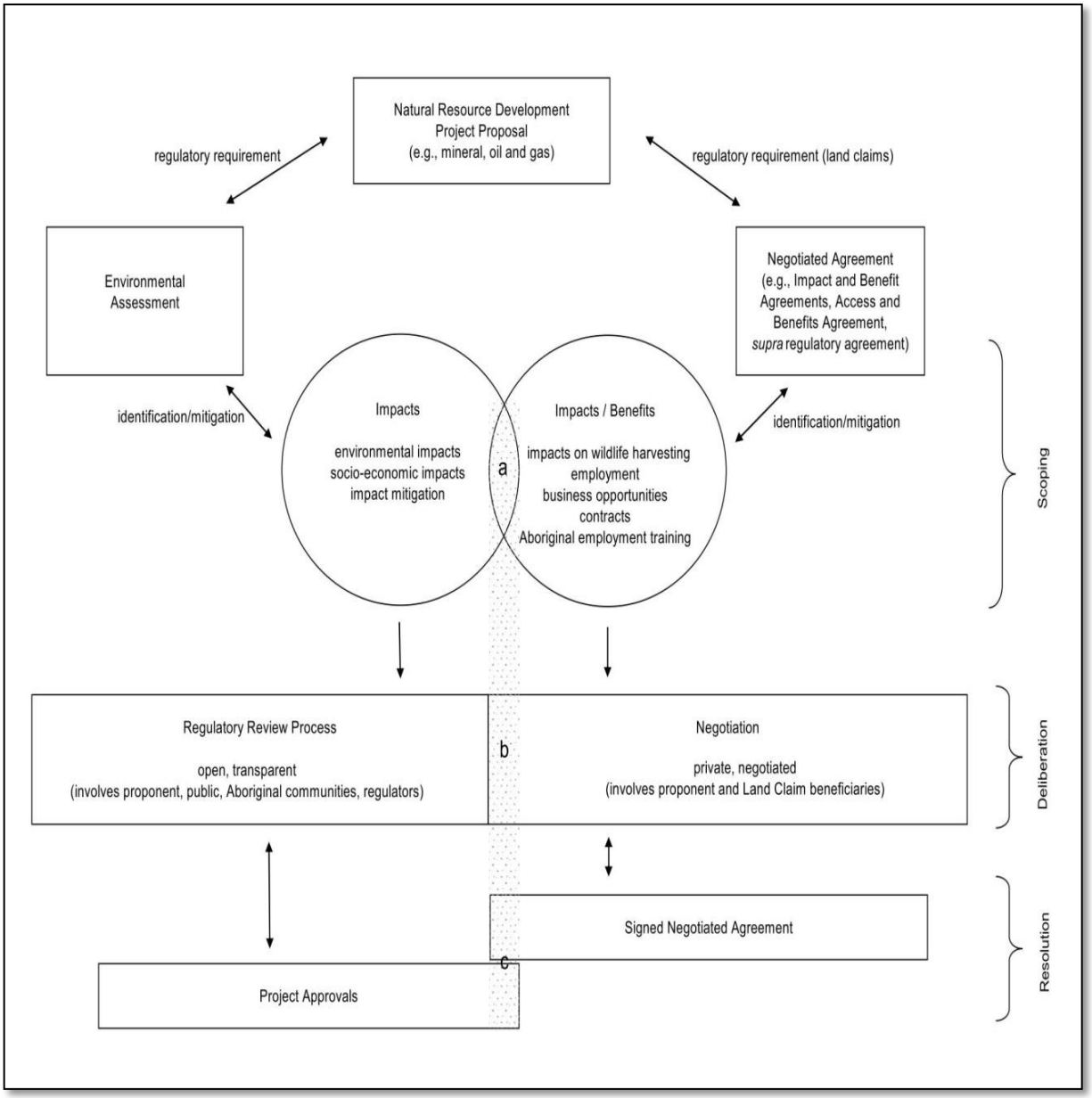


Figure 5.1 - A conceptualization of the overlapping relationship between negotiated agreements (NAs) and environmental assessment EA) in the Northwest Territories. Potential overlaps are indicated by the shaded area. The overlaps in the environmental assessment and negotiated agreements processes exist in: (a) the scoping stage, when project impacts and benefits are identified; (b) the deliberation stage, when regulatory review of the EA and the negotiation of the NAs occur; and (c) the resolution stage, when project approvals are granted and NAs are signed (Lukas-Amulung, pg. 32, 2009).

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