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Sharing in the Benefits of Resource Developments:

A Study of First Nations-Industry Impact Benefits Agreement

March 2006

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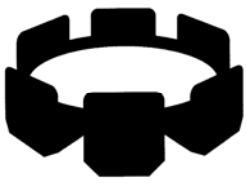
Final Report



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ACKNOWLEDGEMENTS

This study was made possible by financial contributions from the Assembly of First Nations, Western Economic Diversification Canada, Canadian Forest Service, Natural Resources Canada, Government of Alberta, EnCana Corporation, Government of British Columbia, Government of Ontario and INCO Ltd.

THE AUTHORS

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EXECUTIVE SUMMARY

This research describes and analyzes of the role of Impact and Benefits Agreements (IBA) in the resource development process with particular emphasis on understanding whose interests are at play, how these related to the public interest and whether there are opportunities or requirements to better align interests.

The research was conducted between June and December 2005. It involved a literature search and review, selection of projects for study, and interviews conducted with individuals who were directly involved in industry-First Nations negotiations or were members of institutions directly involved in regulation or public sector- First Nations relations. All interviewees were informed that the information provided was on the record but would not be attributed to any individual or organization. A list of interviewees is included in Annex 3. A stakeholders roundtable review of the report and recommendations was held on February 16, 2006 in Toronto. The final report reflects the discussion at the roundtable.

The research strongly suggests, first, that there is a need for the public sector to become more engaged in the world of impact benefits agreements related to major resource developments. The absence of any sort of regulatory framework around the negotiations of IBAs including content and timelines increases uncertainty for industry in an already highly uncertain environment. First Nations also need a greater public sector presence in the IBA process so that they can deliver to their citizens an effective benefits package. Second, IBAs are not and should not be about resource revenue sharing. Industry is in the business of wealth creation and it is the role of the public sector to be concerned about wealth distribution. Third, there needs to be a policy discussion and conclusion on the role of First Nations governments in the regulatory process. Fourth, the environmental regulatory process requires substantial clarification and how monitoring/mitigation should proceed. There is confusion as to the degree to which socio-economic factors ought to be part of the assessment. More generally, implementation of environmental assessment requirements is a major operational issue for industry.

Relating to these findings, several **recommendations** are made:

1. That the Government of Canada and where relevant, the provincial governments, provide a clear policy statement on how First Nations own source revenues acquired by way of IBAs will be treated vis-à-vis program transfer payments.

2. That the Government of Canada in partnership with the relevant provincial governments support First Nations in regional planning processes aimed at defining development opportunities and constraints including mapping of traditional pursuits and areas of cultural significance, and identifying educational and training needed to prepare for economic opportunities, and

the provision and timing of physical and social infrastructure related to development opportunities.

3. That the public sectors actively implement an expanded role in assisting First Nations to ensure that they have adequate resources including building human resource capacity to undertake community consultations related to resource project proposals. These consultations are necessary to fully canvass and address issues to form the basis of a comprehensive negotiating mandate and to establish appropriate change management strategies and processes to adequately prepare for and respond to resource developments.

4. That rather than leave socio-economic monitoring and adjustment to IBA negotiations, (or environmental assessment processes), First Nations and the other levels of government cooperate to develop and implement a comprehensive social plan in regions subject to major new resource developments to focus on socio-economic and related cultural impacts. This plan should include baseline data on socio-economic and relevant cultural indicators, means of monitoring indicators over time and defined programmatic responses to accommodate identified needs.

5. That provincial governments undertake policy consultations with First Nations and industry to consider whether IBAs should become a requirement to receive regulatory approval for a major resource development and if so, what parameters for IBAs should be defined. Guidelines, if developed should consider such matters as when an IBA is required, the appropriate parties to an agreement and means of determining the interested First Nations, content requirements including definitions of impacts, benefits to be included, engagement of federal and provincial agencies for program interfaces to implement defined benefits, timelines for negotiations, resources for negotiations (public and private sector), dispute resolution in the negotiation process, ratification procedures, and implementation measures including monitoring and dispute resolution.

6. If the policy consultations conclude that IBAs should remain as private contractual business arrangements between First Nations and industry, that the public sector should, nonetheless, provide a policy framework outlining the public interest in a clear and stable resource development process and expectations, if any, of the informal IBA process.

7. That the Government of Canada and the relevant provinces undertake a wide ranging public discussion on the role of First Nations in the resource development process including interpretations of Aboriginal and treaty rights with jurisdictional and regulatory implications. The aim of this discussion should be to reach sufficient understanding or public consensus to create a clear and stable regulatory environment where the roles and responsibilities of all interests are known and defined.

8. Recognizing that the complexity of clarifying and reaching agreement on means of implementing Aboriginal and treaty rights may be a lengthy process, it is recommended that the Government of Canada and provinces establish with First Nations tri-partite forums where they do not now exist as mechanisms for senior-level dialogue and expedited decision-making on interim implementation of First Nations' rights related to resource management and development. Such forums would provide for practical decisions to facilitate development without setting precedents that may trample on or otherwise prejudice Aboriginal or treaty rights or the rights of non-Aboriginal Canadians.

9. That the Government of Canada and the provinces engage in policy consultations with First Nations with the objective of defining a coordinated national policy legislating resource revenue sharing with First Nations. These consultations should consider means of defining and implementing the concept of equalization across all First Nations.

10. That the environmental assessment process be clarified in terms of expectations respecting socio-economic impacts and monitoring to include only those aspects that are specifically within the influence and control of the developer of a proposed project and not subject to other social forces.

INTRODUCTION

The impetus for this research arose from a series of discussions with various sponsors of the Public Policy Forum around the question of what aboriginal policy issues the Forum should focus on. From these discussions it became clear that understanding the complex relationships between the resource industries and First Nations was not only important to the economic future of Canada but also that this was an almost uncharted territory for public policy. Industry, for its part, appeared to be interested in understanding the factors that would facilitate development with the highest degree of certainty possible and First Nations appeared to be interested in understanding how they could maximize their participation in the benefits of economic development within the context of aboriginal and treaty rights. The public sector acknowledged that there appeared to be questions of the public interest implicit in the industry-First Nations interactions and was interested in the views of industry and First Nations in terms of an enhanced public sector role.

Research specifically related to the negotiation of impact benefits agreements (IBAs) seemed to offer an opportunity to investigate various parameters of these questions in a contained and contextualized environment which could hopefully offer some insights into a somewhat murky area of public policy.

The result of the research is not a "how-to" manual on how to best negotiate IBAs, but rather a description and analysis of the role of IBAs in the resource development process with particular emphasis on understanding whose interests are at play, how these related to the public interest and whether there are opportunities or requirements to better align interests.

Research Objectives

The original research objectives centred on understanding the process under which impact benefits agreements were negotiated, the content of the agreements, participant satisfaction with the process and content, the current role of the public sector, and the potential for public sector value added. As desirable as it might be, there was no intention of conducting *post hoc* evaluations of the outcomes associated with previously negotiated IBAs. The available anecdotal evidence related to resource developments that have been the subject of IBAs is generally positive in that employment and business opportunities have resulted, but there is no way of telling if these benefits would have been realized in the absence of an agreement.

It was intended that the investigation would concentrate on processes that were concerned directly with negotiating impact benefits agreements related to specific projects. The original intent was, in fact, to undertake a series of case studies. It became clear in the doing the preliminary work on a research design that project participants would not be willing to share information that could be directly attributed to them or to the specific project in which they were involved. For the most part the research is faithful to the objective of dealing with specific projects but it also

organically transformed into an informal review of the state of First Nations-industry-government relations. It became clear early on that IBA negotiations are a subset of a larger set of relationships involving industry, First Nations and governments, both federal and provincial, inextricably tied into discussions related to such things as regional economic development planning, the investment climate for resources development, environmental regulation and licensing, interpretation of treaty rights, and public sector duties to various segments of society. To some extent the research findings allow for commentary on the larger issues but rather than offering firm direction, are more suggestive of avenues for further discussion, dialogue or research.

It also became clear quite early into the project that term Impact Benefits Agreement (IBA) should be considered as a generic term rather than be limited to those agreements that are specifically referred to as IBAs. There are a variety of arrangements involving industry and First Nations that fit the general description of a negotiated agreement outlining mutual obligations related to the development of a resource in a specific territory. They can be termed IBAs, partnership agreements, participation agreements, benefits agreements, accommodation agreements, exploration agreements, or mutual understanding agreements. The research was designed to consider these arrangements as though they were IBAs and in reading this report IBA is used as a generic term to refer to all agreements of this class.

Research Methodology

The research methodology employed for this work involved a literature search and review, selection of projects for study and interviews conducted with individuals who were directly involved in industry-First Nations negotiations or were members of institutions directly involved in regulation or public sector- First Nations relations. All interviewees were informed that the information provided was on the record but would not be attributed to any individual or organization. Annex 3 lists all of individuals contacted through the course of the research which was conducted in June through December, 2005. Those interviewed include a roughly equal mix of individuals representing First Nations, industry and the public sector.

The research was limited to industry – First Nations agreements and processes because of time and resource constraints. While many of the study findings may apply to resource developments in areas populated by Inuit and Métis, their particular circumstances and/or rights might be sufficiently different so as to require specific study.

It became readily apparent that conducting research into this topic would be challenging. Participants on all sides of IBA negotiations are inherently cautious about talking to an outsider about the details of what are invariably confidential negotiations. This meant that it was often difficult to get the attention of the key participants and secure their participation in the study. Significant effort was expended in explaining the background and purposes of the research as a prelude to building sufficient trust to engage in the interviews. Some of those contacted did not

agree to interviews for various reasons including confidentiality, delicateness of the stage of negotiations, and research overload or fatigue. Nonetheless, a large number of interviews with knowledgeable individuals were conducted producing a rich source of original data for analysis.

A stakeholders roundtable was held on February 16, 2006 in Toronto to review and comment on the research findings and to discuss the recommendations. A list of the roundtable participants is included in Annex 5. The suggestions for improving the report have been incorporated into the text. The discussion of the recommendations is reported in Annex 4.

RESEARCH FINDINGS

While this research is aimed particularly at understanding the role of IBAs in the resource development process, it is impossible to view or discuss this in isolation. Ultimately the question is whether a development will proceed and if so, under what conditions, including level and quality of First Nations participation (essentially the content of an IBA). The negotiation of IBAs is intimately tangled into complex issues of Aboriginal rights, concepts of traditional territory, interpretation of treaties, First Nations' authority/jurisdiction over access to and development on traditional lands, cultural protection versus cultural change or evolution, Crown jurisdiction and any limits thereto, pro and anti-resource development/exploitation, environmental assessment and regulation, and on-going project monitoring.

To try to explain the findings as clearly as possible within this labyrinth of factors, the report is structured to dissect the discussion of IBAs into discrete parts, recognizing that this is a simplification, but necessary for clear analysis.

For purposes of analysis, the IBA process will be broken down into the following components:

-why IBAs are negotiated
-parties to negotiations
-content of IBA
-negotiation process
-monitoring and enforceability
-role of the public sector
-linkages to Aboriginal and treaty rights, traditional territory, and resource revenue sharing.
-linkages to environmental regulatory process

The report will present the data derived from the research, that is, what did the interviews tell us about a specific component of the IBA process. Then it will offer analysis of the facts: what insights do these data provide in terms of understanding the IBA process and what are the public policy implications of these insights. The analytical work will form the basis for policy recommendations.

1. Why negotiate an Impact Benefit Agreement?

The resource developer's perspective

Not surprisingly, the reasons why specific parties engage in IBA negotiations vary widely according to their objectives, circumstances and the apparent development opportunities.

There is evidence that industry has turned a corner in its relations with First Nations. In all instances where a large company or organization was involved in a resource development in regions where First Nations people are a major portion of the residents there was a commitment to a "good neighbour" policy. This can be expressed in relatively benign terms such as operating in a way that respects the physical and social environment to a more proactive approach that includes a corporate goal of strengthening the relationship with Aboriginal communities and stakeholders. Companies strive to become and be seen as good environmental stewards and good corporate citizens. This can be translated into a business practise that sees industry contributing directly the community either through support for social and cultural activities or through the provision of community infrastructure. This corporate objective which has been termed a "social conscience" can be identified as one motivation for entering into IBA negotiations. It should not be underestimated as a factor that enters into the calculus of potential investors and therefore not seen as a soft component related more to image than substance. A "good" corporate image is earned through serious attention to progressive social and environmental practise and should be a highly valued corporate asset.

Participants at the roundtable noted that increasingly industry is seeing the benefit of applying traditional ecological knowledge with a resultant paradigm shift where First Nations capacity is treated as an important benefit to project economics. This in turn fosters an environment of partnership rather than confrontation.

The research suggests that while developers increasingly understand the idea of corporate citizenship, they still tend to be more fixated on what they would see as the compelling business reasons around the project economics or regulatory environment to negotiate IBAs. Virtually all of those interviewed stressed the concept of enhancing certainty in the development process. Resource developments operate in a highly competitive international environment and attracting investment dollars for specific projects is a complex process involving a series of technical considerations including the quality of the resource, technology available to exploit the resource, market conditions and projections. In addition to the technical elements that go into a decision calculus there are a number of qualitative aspects that can have a significant bearing on whether a project can attract financing.

Based upon the interviews, a very important element is the stability of the decision-making environment in which the project is proposed. Large resource developments generally involve progressive stages from proving the physical quality of the

resources through to actual exploitation and production. Each of these stages involves a commitment of capital with the expectation that if the results of each stage are positive that the project will proceed to the next stage. This linear model necessarily assumes that all of elements which go into an equation are within the control of the resource developer. The nightmare scenario for a developer is to expend significant capital on what proves to be a good project from a technical and economic perspective only to be stymied by considerations outside of the technical, economic, or environmental parameters directly related to the project. The interviews suggest that resource developers go into a development project relatively confident that they can meet the technical aspects of public sector regulators.

What is much more daunting is the prospect of expending substantial capital on a property only to be faced further down the line with fierce and potentially intractable opposition from First Nations residing in the territory under development consideration.

Given this prospect, resource developers have increasingly recognized that a "good neighbour" policy is not only good for corporate image; it is a necessary business practise. A corporate motivation of avoiding Aboriginal opposition to a project inextricably leads to the realization that in order for a development to proceed smoothly (or at all), opposition avoidance has to be turned into project support.

Consequently, IBAs are seen by the resource developer as a means of securing support for the project essentially through an alignment of interests. The idea is to negotiate an IBA that successfully captures the concept of mutual economic prosperity. By reaching an understanding that is seen as a win-win, the IBA substantially reduces uncertainty for the project developers.

A part of the issue of uncertainty relates to time. Because of the huge upfront outlays of capital necessary to bring a project to the production stage, it is critical that the development proceed expeditiously to yield a return on the capital within an economic timeframe. One of the big worries of developers is that First Nations will use time-consuming litigation to destroy the economics of a project or potentially frustrate the timing of a project as a lever to extract enhanced benefits. An IBA is seen as a way of engaging the First Nation's interests to avoid litigation and avoid official confrontation of First Nation's interests.

From a legislative perspective, only the Inuit land claims agreements contain formal triggers requiring IBAs. The *Mackenzie Valley Resource Management Act* which covers the Mackenzie Valley in the NWT includes a provision that applicants for water permits required under the Act must enter into agreements with First Nations to compensate a First Nation "for any loss or damage resulting from any substantial alteration to quality, quantity or rate of flow of waters when on or flowing through its First Nation lands, or waters adjacent to its First Nation lands". It does not refer to agreements that contemplate benefits. Within the forestry sector, there are regulations in some provinces that require forest developers to engage Aboriginal people in

implementation of forestry projects. These tend to be of a fairly small scale and are not specific with respect to content or process.

The First Nations' perspective

The research indicates that First Nations approach the prospect of resource developments from three perspectives. Firstly, they start from the premise that any development, potential or proposed, within the boundaries of their traditional territory requires their consent and this consent cannot be assumed to be automatic. Secondly, First Nations consider that development should occur only if the affected communities realize the maximum possible benefits from any specific project. Thirdly, any development must be undertaken in a way that minimizes environmental impact and mitigates to the greatest extent possible impacts that cannot be avoided.

On the question of consent, First Nations generally hold the view that they have an inherent right to lands and resources within their traditional territory and this includes the explicit right to manage and participate in development of resources. In essence, First Nations assert jurisdiction over resource development. The implication of this assertion is that First Nations view the IBA negotiation process as *de facto* recognition of their authority within their territory. This is a major motivation for entering into IBAs. This topic is discussed later in the report under the section devoted to Aboriginal and treaty rights.

Starting from the premise that if development is to occur, First Nations in the development region ought to realize major benefits from the project means that First Nations are motivated to enter into negotiations to ensure they achieve a fair and reasonable arrangement. Experience has taught First Nations that unless they actively pursue their own interests it is most unlikely that anything close to maximum project benefits will accrue to them. Related to this, First Nations see IBA negotiations as a means to ensure that a project is developed in a manner that they find acceptable. Rather than leave all of the environmental mitigation measures, both physical and social, to the regulatory process, IBAs are seen as the opportunity to extract legally binding contractual commitments from developers. First Nations recognize that because of existing treaty rights and evolving and highly contentious legal concepts of aboriginal and treaty rights, they have substantial leverage in any regulatory processes. This leverage allows First Nations to use IBAs to further define and entrench aboriginal and treaty rights according to their interpretation of these rights.

Increasingly it appears that First Nations are also using IBAs as a means of moving from passive economic participation e.g. employment or project-related goods and services supply contracting to equity participation and a role in project management and directing the future of development. When a First Nation is comfortable that it has negotiated an IBA that responds to its interests, the IBA is seen by the First Nation as an indication of pro-active support for the project. They enter into the IBA because it represents a common interest of the First Nation and the resource developer for mutual economic prosperity.

It is noted above that one of the prime motivations for First Nations to enter into IBA negotiations is to ensure they receive maximum benefit from a project. However, the concept of achieving maximum benefits from a resource project is an extraordinarily difficult undertaking for First Nations. Many developments are proposed in regions where up until the time of the proposal there has been little or no direct experience with the industrialized society. A resource project can present a real conundrum: what for some might be positive benefits, for example, wage employment, may be seen by others as a negative impact, a loss of traditional lifestyle. First Nations tend to have a comprehensive view of development. The generation of economic wealth is important but creating wealth should be achieved in a way that enhances social or cultural values, or at least does not diminish these.

First Nations can represent different interests depending upon the specific role they are playing at any given time. First Nations are first and foremost governments. Whether operating under the legal structure of the federal *Indian Act* or exercising an inherent right of self-government, First Nations governments should be seen as part of the regulatory apparatus and part of the decision-making structure that regulates and approves development in the public interest.

Separate and apart from the public government role, First Nations often represent a business interest, a kind of private governmental role, whereby they negotiate business arrangements that are in the interest of the members of the First Nations and use the proceeds of successful business ventures for public purposes rather than private profit. First Nations are also called upon to perform the role of guardian of the culture (the way of life) and advocate of aboriginal and treaty rights. The implication for the IBA process is that these roles can be in conflict with one another and in order to successfully resolve issues that might arise in a negotiation, it may be useful to understand what hat the First Nation is wearing and thereby sort out the compromise that might be necessary to reach agreement.

2. *Parties to the negotiation of IBAs*

Setting aside for the moment the question as to what stage in the development process IBA negotiations should be commenced, given that there is no legal requirement to negotiate an IBA, but also given the strong motivation to reach an agreement with First Nations in the region of a possible development, how does a developer determine which First Nations are potential participants in an IBA negotiation? The research indicates that this is a very informal process usually commenced from the perspective of who will suffer impacts as a result of the project. This is subjective and open to substantial interpretation and controversy. Negative impacts are, of course, not the same as positive benefits and the zone of influence for the two can be quite different. It appears to be hit and miss as to whether First Nations have documented and mapped areas of traditional pursuits or cultural significance in advance of development proposals. There are often overlaps or competing interests amongst First

Nations in a region which complicates an already unclear situation. The resulting process is one of trial and error with potentially significant transactions costs for all parties.

Generally speaking, First Nations elected governments, asserting their role as the authoritative representative of the interests of the First Nations people in a region, demand that resource developers deal directly with their delegated spokespersons. First Nations assert the right to establish their own negotiations mandate and to negotiate the framework and content of an agreement with the resource developer. Under this scenario it is reasonable for the developer to expect the First Nations to sort out conflicting interests within the First Nations community(s) and come to the negotiating table with a consolidated interest and able to make commitments on behalf of the First Nations. While many First Nations governments operate in many ways as representative democracies, most are very small in terms of population and do not take binding decisions such as approving and signing an IBA without the ratification of the First Nations membership via a referendum. This may well go beyond what is legally necessary since an IBA does not represent a legal accommodation of damages to aboriginal or treaty rights.

Generally First Nations negotiators can only recommend an agreement for ratification. Whether a particular IBA garners the "official" support of a particular population through a referendum is undoubtedly important for a developer in terms of support for the project but it does not guarantee that other interests will not surface through the regulatory process and be given due consideration (with the concomitant time and resource expenses) or that legal proceedings will not be launched by someone who feels left out of the negotiations.

3. *IBA Content*

The first point concerning the content of industry-First Nations IBAs is that for the most part, agreements are confidential documents restricted to the parties to the agreement. Accordingly, for this study, specific signed IBAs were not reviewed. This is not to say, however, that their content is unknown. Many of those interviewed were able to share the general content of agreements, either final or in the process of negotiation.

IBAs are designed primarily to cover the interests of First Nations, and therefore tend to include the matters that motivate First Nations to enter into IBA negotiations: recognition of Aboriginal and treaty rights, compensation for negative impacts, protection of culture and cultural artefacts, employment and training, access to business opportunities, environmental aspects of project implementation, other financial considerations (sometimes including equity participation and means thereof), implementation and monitoring of the agreement and dispute resolution mechanisms to settle any disputes related to undertakings in the IBA. Industry signatories are also anxious to achieve their principal objective and therefore want to

include undertakings from the First Nations that, by virtue of the IBA having been negotiated and agreed to, the First Nations will support the project publicly and not raise objections in the regulatory process.

The conventional wisdom as to why IBAs are confidential documents relates to the argument that they contain private financial information that could be considered to be of commercial value and therefore should not be available to the resource developers' competitors. Probing this argument through the interviews suggested that this is generally not the case. The kind of financial information contained in the agreement is generally available through the company's investor prospectus including such things as resource quantity and valuation, expected extraction rates with costs and profit margins, taxation and royalty regimes, life expectancy of the project, potential expansion, and wind-up costs. The First Nations generally negotiate payments based upon the success of the project. IBAs include payment structures that are based upon the project reaching or exceeding specific milestones. For example, in the case of a mine, the IBA might include an annual base payment, additional payments once a certain level of profitability has been achieved, and likely a share of profits if the project exceeds the predicted levels. None of this information is particularly sensitive or confidential in terms of commercial competition.

It is the First Nations that wish to keep the financial information confidential. They express concerns that any funds received will be considered as Indian revenue moneys within the meaning of the *Indian Act* and potentially subject to federal regulation. It is noted that section 69(1) of the *Indian Act* provides that the Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys **and may amend or revoke any such order.** (Emphasis added). But generally speaking, First Nations are much more concerned that any revenues they receive through contractual arrangements with resource developers will be off-set by reductions in transfer payments from government. The fear is that the federal government, primarily the Department of Indian Affairs and Northern Development, will expect the First Nations to use any funds received for basic community programs such as education or social assistance and reduce the amount they currently receive from the government by the amount that the First Nation acquires by virtue of an IBA.

It is not that First Nations do not plan to use new resources to achieve public goals but rather their view is that the transfer payments they now receive are woefully inadequate to meet the needs of their citizens and to claw back new revenue leaves the First Nation no better off than before the resource development. First Nations indicate that they have been unable to obtain any clear position as to how IBA revenue is or would be viewed by the federal government. Federal officials point out that an "own-source revenue" policy respecting the negotiation of treaties is in place but can offer no guidance as to whether this is or would be considered the appropriate policy respecting First Nations that are not negotiating a modern treaty.

The absence of a policy framework makes it very difficult for First Nations to negotiate IBA arrangements that fully reflect their interests. Because they don't know how they might be forced to use the resources, First Nations are essentially obliged to try to negotiate benefits at a level that take into account a potential claw back.

Industry argues a similar point. The industry perception is very much along the lines of the First Nations, that the communities are very poorly financed, lacking in quality infrastructure, both physical and social. When a resource developer appears in the community to discuss First Nations participation in and support for a project in their region, the First Nation perceives this as **the** opportunity to deal with all or as much as possible of the cumulative effects of historic under-funding and neglect. Industry tends to hold the view that governments are off-loading public sector responsibilities onto the private sector. The lack of a public policy framework on the downstream treatment of financial benefits leads to long and drawn out negotiations limited ultimately by the economics of the project and/or the skill of the negotiators.

One of the implications of the confidentiality of the financial aspects of IBAs is that the transparency of the process is severely curtailed and limits the ability of band leaders and members to discuss options for administering, managing and expending funds. The IBAs serve only as the mechanism to ensure that funds flow from the resource developer to the First Nation. It is the First Nation that must structure the administration of these funds once they are received. To do so in an environment of secrecy is the opposite of modern public sector accountability and transparency to which First Nations subscribe.

This analysis highlights a very obvious feature of IBAs in that they are negotiated without the benefit of any guidelines, rules, timelines, etc. The research indicates that there is an informal sharing of information and documents amongst First Nations and industry such that each new negotiation is built on the past experience and therefore, in a very real sense, each IBA becomes a precedent. Even though circumstances might be quite different between the previous project and First Nations, the current IBA tends to use previously negotiated outcomes as a base for adjusting upward. This does not necessarily serve either the interests of First Nations or industry. The impacts and economics of projects, the technical aspects of the development and environmental issues, employment and business opportunities, training needs can vary widely. But there appears to be an unwritten rule that the IBA under negotiation has to cover the same topics as the others or somehow is deemed deficient. This is not the case and the drive to replicate can result in an unnecessarily protracted and acrimonious negotiation process.

In virtually all cases where IBAs are negotiated there is no statutory requirement for the agreement and therefore no guide as to content or timing. How do the parties come to agreement? The negotiation process, in one sense, is lop-sided in favour of the First Nations. The resource developer enters into IBA negotiations primarily to engage the First Nation in the project and gain support. While it might be argued that it is in the First Nation's interest to support a project and thereby reap the benefits,

First Nations have a *de facto* veto over the project. In the absence of content and time regulations, First Nations theoretically have the capacity to demand and extract extremely beneficial provisions from a resource developer. Because there are no guidelines structuring any of the IBA negotiation processes there are no obvious mechanisms for resolving negotiations impasses. What do the parties do if they cannot agree on a particular issue? The developer has no fall-back except to walk away from a project. Generally having invested substantial sums in pre-development phases this is not an attractive prospect. Some First Nations argue that any potential advantage they might have is mitigated by the imbalance in human and financial resources and thus negotiating capacity that they experience. Other First Nations confidently stress that they are able to effectively represent their interests.

It is clear that in the absence of a public policy framework, each outcome is dependent upon the skill of the particular negotiators involved based upon the mandates they are provided by their principals. The only touchstone is what others have negotiated and agreed to, and as discussed earlier, this may not be the best measure for success.

Given the First Nation's perspective of attempting to maximize net benefits means that a First Nation needs to be able to quantify impacts, both positive and negative. This implies that a First Nation has the capacity/resources to predict, measure, and quantify complex socio-economic processes. This is an area that has engaged social scientists for decades and remains an elusive and inexact science. The interviews indicate that First Nations have significant issues in monetizing social and cultural impacts, and suggests that in many instances, monetization itself is considered an impact, sometimes positive and sometimes negative. First Nations appear to be very concerned about the non-Aboriginal capacity to understand impacts and benefits from a perspective other than maximum economic returns. The research shows that, while First Nations accept the benefit aspects of IBAs in terms of training, employment and business opportunities, they view the agreements and the process by which they were negotiated as highly deficient because the agreements do not deal with the irreversible, intangible aspects of a changed way of life. This is not to suggest that they are necessarily looking for compensation for cultural loss but rather a recognition that the impacts of development on individuals and families needs to be given more attention, both in the development planning process and throughout the implementation phases. Industrial development for many First Nations continues an evolution of a hunting/fishing culture towards a monetary, wage-based economy. Younger generations may be essentially bi-cultural as a result of education and exposure to other cultures through electronic media but large scale developments can accelerate these changes very rapidly with positive and negative effects.

IBAs generally provide a structure for socio-economic organization at the community level to take advantage of opportunities such as labour force participation, business development, and in some cases, equity participation and some role in project decision-making and management. The research indicates that IBAs are evolving in terms of defining Aboriginal involvement and benefits. They are moving away from

establishing quotas or guaranteed levels of labour force participation or business opportunities to a concept of maximizing First Nations involvement. It is in a developer's interest to have qualified labour and contractors. If a First Nation can provide a substantial percentage of the qualified labour, it's a win-win. IBAs are structured with targets so that education and training plans can be established but generally there is an agreement that First Nation individuals will be given employment priority so long as they meet the job qualifications. In terms of business opportunities, rather than having static definitions of what constitutes an Aboriginal firm or Aboriginal control for purposes of preferential procurement, IBAs are structured to give the First Nation signatory discretion to define, on a case-by-case basis, what is and what is not Aboriginal control or what is an acceptable level of participation in a specific contract. This allows for an evolving calculation on what constitutes maximum First Nation benefit. As one interviewee stated, "30 percent of X is far more preferable than 51 percent of nothing".

Industry expressed some concern that while they are supportive of First Nations receiving priority to employment and business opportunities, they want to be careful to not exclude other potential beneficiaries. The research shows that this should not likely be a significant concern since, by and large, First Nations are ill-prepared to realize the full potential benefits that a significant resource development project can offer. With few exceptions, projects are proposed without the benefit of a regional planning framework. Communities are presented with often fairly well-developed proposals and are left to scramble and catch up. This means that they have not been adequately anticipating the development and do not have the training and skills projects underway which would deliver qualified labour force entrants within the timeframe of the project start-up. Because projects are generally put forward as one-offs, the First Nations have no context in which to frame their reactions as to possible impacts or benefits. The concept of cumulative impacts is well understood in physical terms but it is applicable in a socio-economic context as well. Unless First Nations can place a development in the longer term context of the evolving regional economy, they are limited to taking short run decisions, guessing as to overall future impacts.

Equally important for First Nations is the capacity of the community to manage its participation in the development process. The research demonstrates that First Nations are struggling with the management challenges. Those individuals in a leadership role are overtaxed and cover a much wider array of subjects than would normally be expected of individuals in other organizations. Communities in resource regions need a planning framework and the resources to develop a breadth of leadership capacity to be able to effectively engage with other parties in the development process. This is not to say that every community should have expertise in all aspects of complex projects but they do need the capacity to know when and who to hire, to evaluate the advice they receive and to confidently take decisions that are in the best interest of the community. IBAs offer a contractual avenue for First Nations to participate in detailed operations decisions related to how a resource will actually be developed and through the negotiated institutional structure can be used to ensure the community's views and interests are actively accommodated in the

developer's on-going actions. But this requires substantial expertise and First Nations require a good deal of support if they are to realize the potential benefits that an IBA offers.

It was noted earlier that recent IBAs and those now being negotiated often include profit sharing or equity participation for First Nations. First Nations are very clear that they do not view these payments or benefits in any way as resource revenue sharing. In their mind, IBAs are strictly business arrangements where First Nations add value to the project and any financial benefits that flow from this are a result of participating in developing the resource, not from the value of the resource.

Resource companies generally view financial payments as compensation for specific impacts such as the loss of habitat for traditional pursuits, either temporarily or permanent, and access to or use of specific lands. They are equally clear on the question of resource revenue sharing. They do not want IBAs to be viewed by governments as a means of delegating any requirement for resource revenue sharing. They are very concerned that governments have been content to observe the outcome of IBA negotiations which involve large financial transfers from the private sector to First Nations and implicitly validating these transfers as the appropriate levels of resource revenue transfers to First Nations.

RECOMMENDATION 1
That the Government of Canada and where relevant, the provincial governments, provide a clear policy statement on how First Nations own source revenues acquired by way of IBAs will be treated vis-à-vis program transfer payments.

RECOMMENDATION 2
That the Government of Canada in partnership with the relevant provincial governments support First Nations in regional planning processes aimed at defining development opportunities and constraints including mapping of traditional pursuits and areas of cultural significance, and identifying educational and training needed to prepare for economic opportunities, and the provision and timing of physical and social infrastructure related to development opportunities.

4. Negotiation Process

When in the development process is it appropriate to enter into IBA negotiations? The research turned up a range of answers to a seemingly straightforward question. In the mining industry it is quite complex. Only a very small number of mineral finds actually proceed to the full development of a mine. The process normally starts with prospectors gaining access to a territory which is the first time we encounter the concept of possible negative impacts or compensation for a perceived benefit. In most

instances, prospecting does not invoke an IBA negotiation process of the sort discussed in this report. The next phase of on-the-ground evaluation of mineral potential is more invasive and there are examples where the contractors do negotiate agreements with First Nations for access to traditional territory and provide for local benefits such as employment or goods and service procurements related to these normally very small undertakings.

On the one hand, most of the interviewees offered the view that it is important to start building a positive relationship between industry and First Nations as early as possible in the development process. This supports the notion of formalizing arrangements early. On the other hand, it was argued that junior mining companies do not have the resources to engage in negotiations around detailed technical environmental and socio-economic impacts and benefits. As was noted earlier, First Nations tend to view any outside interest in their traditional territory as having the responsibility to deal with a range of local issues, irrespective of the interest or capacity of the outsider. Junior companies often find themselves in the situation where they are expected to engage in resolving a variety of community problems that have no relation to a potential resource development in the vicinity of the community.

At the same time that First Nations are looking to establish the rudiments of undertakings from industry as to the shape of compensation for impacts and benefits early in the process, large companies are nervous about what juniors will agree to. Large companies are the ones that eventually end up undertaking the developments and they prefer to be able to negotiate arrangements with First Nations based upon their corporate objectives and the project economics without any previous “baggage”.

Some frustration was expressed by those in the mineral exploration business that there was no process, either formal or informal, to deal with issues raised by First Nations particularly relating to access to what they viewed as their territory. While this does not necessarily involve an IBA, it is at this stage that basic issues of jurisdiction come to light. Industry tends to be caught in the middle of what appears to be a volatile and evolving question of jurisdiction over resource management amongst governments including First Nations governments.

There appears to be an industry consensus that IBA negotiations should proceed only when there is a defined project that is formally proposed within an established regulatory process. Up until that point there may be arrangements negotiated for access or proving up of a resource but these agreements should be limited to the specifics of the actual activity and not project undertakings into future phases of a development that will undertaken by other actors.

Once a project is formally proposed, a negotiation process between the resource developer and a First Nation interest (which could include more than one First Nation) is engaged. Industry tends to have the resources, including the human resources, to mandate negotiators with clear instructions to reach an agreement as efficiently as possible in accordance with the developer’s corporate objectives. First

Nations operate in a much more complex environment. The First Nations political leadership normally takes the lead in a community consultation/education process as a precursor to establishing a negotiating mandate and engaging in formal negotiations with the developer. The interviews suggest that this is often a protracted and ill-defined part of the process. An important issue is one of resources. Who will pay the costs of engaging staff and other requirements of a consultation process? First Nations report that in some cases they are able to access government programs for some consultation funding but generally rely on industry for resources.

Consultations are used by the First Nations leadership as a gauge for community support and to provide the basis for the negotiating mandate. Large scale resource developments are complex projects and the First Nations negotiating team has to have, or have immediate access to, expertise in project financing and economics, technical engineering and environmental matters, and socio-economic considerations such as education/training and business opportunities. They have to be able to discern what is knowable and what is speculative and have the capacity to evaluate technical options within the context of their interests.

The interview data strongly supports the contention that the "quality" of the negotiation teams is the single most important factor in determining the efficiency of the negotiation process and the outcome of the process. First Nations generally have to buy expertise to conduct negotiations and to advise negotiators on technical matters. Resources for this purpose generally are provided by the resource developer and considered a project cost. Industry is divided on whether this practise is appropriate but the research suggests that it is in both parties interests to have the highest quality of expertise available to the First Nations. An industry investment in the First Nations negotiating team should produce a high return. First Nations are generally afforded full confidential access to the company's financial picture so that they can gauge the veracity and strength of company positions. But with this access, it is particularly important that First Nations have the capacity to understand and critically evaluate industry positions and arguments on project economics, especially important as it relates to discussions of compensation and profit sharing/equity participation.

Clear mandates, normally provided by Chief and Council, are a necessary component. These mandates should outline expected or acceptable outcomes but not instruct or constrain how the outcomes are to be achieved in the negotiation process. A clear mandate obviates the need for day-to-day oversight and frees community leadership to address government-to-government relationships. Negotiators suggest that the political trade-offs and considerations should be hashed out in the consultation and mandating stages so far as possible so that negotiations can be conducted on the basis of factual data and argument rather than on political considerations. Related to this, they suggest that the negotiation team not include political representatives since this tends to introduce political elements into the process which often has the effect of sidetracking and unduly prolonging negotiations. As in any other business dealings,

the clearer the distinction between political and business imperatives, the better the business decisions.

The IBA experience shows that for industry, agreements are ratified within their normal decision-making structure as operational decisions. First Nations generally conduct a formal referendum to ratify an agreement that the community leadership recommends to the First Nations membership. Because the IBA process is an informal one outside of the public sector regulatory process, the industry view is that a clear approval by First Nations members is an important legal protection for the validity of the negotiated IBA. Most projects extend over decades and it is important that the commitments spelled out in the IBA will be durable over the course of the project and able to withstand changes in political leadership or assault from disaffected parties (or from what have been termed "rogue" elements opposed to a particular development). Companies generally insist that the referendum receive the support of a majority of voters which includes all members of a First Nation whether on or off reserve territory.

Some frustration with the negotiation process was expressed in terms that the lack of structure for the negotiations, i.e. no content or timeline guidelines, means that the conduct of the negotiations is completely dependent upon the objectives and goodwill of the individuals around the table. The negotiations are captive to the dynamics of human interaction and personalities. If personality conflicts become evident, as happens in situations of high stakes and high stress, the negotiation process has no place to turn to lower the temperature or shift directions to a more constructive path. This fact makes it all that more important that negotiation teams from industry and First Nations be well mandated and staffed with the appropriate professional expertise to be able to conduct interest-based negotiations aimed at a fair and reasonable agreement. Both sides have to understand what each needs from the IBA and attempt to meet these objectives as efficiently as possible. It serves no ones' interest to insist upon unreasonable conditions that cannot be met.

Both industry and First Nations negotiators are adamant that how negotiations are conducted is an important aspect of a constructive on-going relationship between the resource developer and the First Nation. Acrimonious negotiations do not magically transform into a productive implementation process so it is important to pay attention to ensuring a professional, mutually respectful negotiation atmosphere.

RECOMMENDATION 3
That the public sectors actively implement an expanded role in assisting First Nations to ensure that they have adequate resources including building human resource capacity to undertake community consultations related to resource project proposals. These consultations are necessary to fully canvass and address issues to form the basis of a comprehensive negotiating mandate and to establish appropriate change management strategies and processes to adequately prepare for and respond to resource developments.

5. Monitoring and Enforceability

IBAs are negotiated to be justiciable and legally enforceable contracts. They contain commitments from both resource developers and First Nations that range from statements of intent or best efforts through to very specific actions such as establishing particular policies or institutional mechanisms and clear financial commitments. IBAs normally include the creation of an Implementation Committee to oversee the implementation of the IBA and means of monitoring the achievement of the undertakings included in the agreements. They generally include agreement on feedback mechanisms to permit adjustments in the training, employment, and business opportunities aspects as project realities unfold vis-à-vis pre-implementation projections.

Current IBAs include a well-defined and fairly elaborate process for resolving any disputes that might arise respecting implementation of the agreement. These typically flow along a continuum from dispute avoidance (i.e. working in a cooperative manner to solve issues before they become disputes), to negotiation to mediation and finally to arbitration, which can be binding and final, or can be referred to the courts for judgment.

The research did not uncover any issues respecting the enforcement or monitoring aspects of the IBAs as such but a significant issue was raised concerning the lack of monitoring of socio-economic impacts through the course of a development project. The IBAs are designed to compensate for defined losses resulting from loss of land use or access to land and thus a loss of economic livelihood and to deliver positive benefits in terms of wage employment and business opportunities. But they are not well-suited to consider the social impacts that go along with the positive benefits. First Nations suggest that there ought to be mechanisms that track the impacts of a major resource development upon the population. They are pleased with the monitoring of benefits specified in the IBAs but stress the need for monitoring the social changes that occur with a nimble means of helping people make the on-going adjustments, particularly when rapidly moving from a traditional or semi-traditional lifestyle into a wage economy.

Industry does not disagree with the need to consider social monitoring but argues that such monitoring is well beyond what can be reasonably expected of the private sector in a market economy. The kinds of data and institutional mechanisms that would be required to implement a program of this nature are outside the capacity of the private sector. They simply would not have the ability to collect the necessary data which would be of a personal and confidential nature not normally available to the private sector.

RECOMMENDATION 4
That rather than leave socio-economic monitoring and adjustment to IBA negotiations, (or environmental assessment processes), First Nations and the other levels of government cooperate to develop and implement a comprehensive social plan in regions subject to major new resource developments to focus on socio-economic and related cultural impacts. This plan should include baseline data on socio-economic and relevant cultural indicators, means of monitoring indicators over time and defined programmatic responses to accommodate identified needs.

6. Role of the Federal and Provincial Governments

The research demonstrates that the non-Aboriginal public sector has been virtually absent from direct involvement in IBA negotiations. As noted earlier, with the exception of the northern and Inuit land claims legislation, there are no statutory requirements for IBAs, and thus no direct role for government in overseeing the fulfillment of an obligation. This characterization, however, does not accurately reflect the actual practice.

In many cases, industry interviewees pointed to oblique but strong indications from public sector officials that satisfactory arrangements with First Nations potentially affected by a proposed project were a *sine qua non* for project approval. Both federal and provincial governments are in the shadows of the IBA process. While they do not provide significant input into the substance of the negotiations, they appear to be actively interested in the process and the outcome. Officials from both levels of government indicate that they are keen to ensure that First Nations benefit from resource developments and certainly have viewed IBAs as a key manifestation of fulfillment of this public objective. Up until very recently, governments' involvement has been primarily on providing some minimal support for First Nations in the negotiations process and on support to First Nations in the implementation of the IBAs, leaving the process and content of negotiations to the First Nations and industry. As a result of recent Supreme Court decisions all of this may change and it may change very dramatically.

In November 2004, the Supreme Court released its decisions in the Haida and Taku River cases which focussed on questions of duty to consult and accommodate impacts on aboriginal and treaty rights resulting from resource developments. The Court was clear that the duty of the Crown to deal honourably with First Nations cannot be delegated to the private sector and the legal responsibility for consultation and accommodation rests with the Crown. The Court also indicated that this does not mean that third parties, for example, resource developers, can never be liable to Aboriginal peoples. It noted that "if they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal

peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate".

But the Court also noted that "the Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments". The Court did not consider whether governments could, in a similar fashion, delegate to industry the required accommodation for Aboriginal or treaty rights. There would appear to a parallel logic in terms of how Aboriginal or treaty rights could be accommodated. IBAs explicitly deal with compensation for negative impacts that result from resource developments and, of course, go beyond the compensation component to include net benefits. This research has demonstrated that First Nations and industry negotiate the content of IBAs so as to satisfy First Nations that a resource development project should be supported and proceed because it adequately accommodates their interests.

Does it follow that such private contractual arrangements between industry and First Nations could or be construed to constitute the accommodation that the Supreme Court contemplated in the Haida and Taku River decisions? On the one hand, if the IBA is not considered due accommodation, then presumably it would be inappropriate for the public sector to tacitly require IBAs since First Nations would compensated for negative impacts by the public sector, and the IBA would constitute double compensation. On the other hand, if an IBA were considered due accommodation, is it appropriate for the public sector to leave the negotiations process in a *laissez-faire* mode? If the public sector were to rely upon the IBA as fulfilling the Crown's legal duty, it would likely want to know the full content of the IBA to be able to evaluate its effectiveness in achieving the public objective. The only alternative is to rely upon the fact that a First Nation and industry reached an agreement as *prima facie* evidence that the First Nation's needs and interests have been met fully.

Government officials indicate that the federal government and provincial governments are actively developing and/or revising their policies and guidelines on a duty to consult and accommodate. The role of industry and the use of IBAs will necessarily need to be considered in these deliberations.

Participants at the roundtable noted in particular the recent activities and efforts of the Government of British Columbia towards establishing a new relationship. It was noted that there are some successes in the treaty process and work on a shared decision-making process for land management. In addition, the Province has recently announced a $100 million fund for capacity development. The research did find and this reports notes that in modern treaty areas First Nations are asserting their jurisdiction and through interim arrangements other levels of government are accepting this assertion but it appears to be ad hoc and based upon specific negotiations. The result is that uncertainty still remains pending the outcome of individual negotiations.

The question asked of current IBA participants was whether or not the public sector should be involved in IBA negotiations. There were mixed answers to this question. Most participants suggested that some public sector guidelines would be helpful but what should be included is quite controversial. It was suggested that IBAs are needed only when developments are being proposed in regions where the economy is "under-developed" and the project represents a major distortion of the existing economy. This would suggest, for example, that IBAs would not needed in a region where development is already occurring and the economic factors such as a defined labour force, transportation access, and an established supply chain already exist. This argument ignores the fact that IBAs are currently used to provide for compensation for impacts as well as provide access to the economy.

Some argue that the only public sector guideline ought to be the simple requirement that an IBA be negotiated as a condition of project approval. The proponents of this point of view suggest that IBAs are business arrangements between First Nations and industry and as such negotiations are best left to the creativity of the parties, each pursuing its own interests. First Nations point out that they are generally under-resourced and at a disadvantage vis-à-vis industry in any negotiation process but nonetheless are extremely capable of representing their own interests and best able to determine an appropriate outcome from the First Nations perspective. The counterpoint to this argument is that simply requiring an IBA gives the First Nation a great deal of leverage, some have suggested too much leverage, and does not provide an incentive to negotiate a reasonable or timely agreement.

Industry interviewees stressed the need for public sector intervention to increase the degree of certainty in the resource development process. They argue that because governments now, either implicitly or explicitly, have made an IBA a condition of project approval, it is incumbent upon government to establish some parameters for the negotiation process. In particular, they stress that guidelines that would help clarify expectations would be beneficial for both sides of the negotiation table. Supporting this view, others have pointed out that the circumstances of First Nations vary greatly across the country and, in those instances where First Nations do not have substantial leverage in a development situation; they may not be able to realize significant benefits from a project in the absence of public sector guidelines.

If the public sector were to develop guidelines for IBA negotiations, what parameters might be included?

The first issue that arises is when should an IBA be required, that is, at what stage of the development process? The research suggests that while it is likely that a resource development will proceed based upon a series of agreements such as Memoranda of Understanding setting out arrangements for exploration or property assessments preliminary to actual development, an actual IBA should only be required when a project is at the stage of requiring regulatory approval.

The next issue involves determining the appropriate First Nations parties to an IBA negotiation. In some instances it is clear or obvious which First Nations have a direct interest in a project in the sense that clear impacts can be identified and attributed. In other cases it is not so clear and this lack of clarity can cause substantial uncertainty. It is suggested that IBA guidelines could include the means of determining the First Nations interest in a project, whether using a concept of direct impacts on Aboriginal or treaty rights or something related to territory such as a treaty area.

The issue of content within the IBA is more contentious. Prior to the Supreme Court decisions in Haida and Taku discussed above, both industry and First Nations saw the IBA as an appropriate tool for agreeing on compensation for the negative aspects of development that could be quantified and directly attributable to a proposed project. Whether governments will become directly involved in this aspect or continue to rely upon the informal IBA process is not clear. Nonetheless, for purposes of this work, it is suggested that a comprehensive IBA could be expected to cover impacts and guidelines could be developed to help determine appropriate measures of impacts.

Employment benefits for First Nations are a significant part of any resource development. If the public sector is going to continue to use adjacency benefits in project approvals, then any IBA guidelines should include specific measures specifying how First Nations individuals would be treated in terms of employment. Industry has been clear that it is willing and anxious to employ qualified First Nations people in resource projects and will put in place a variety of mechanisms to give preference to First Nations, within the bounds of labour and human rights legislation.

Closely linked to employment benefits is the question of education and training. Both industry and First Nations emphasize the need to closely coordinate employment opportunities with the capacity of the labour force to take advantage of the opportunities. This is area of direct interface with the public sector, both at the provincial and federal level. Two issues arise. Firstly, it is difficult for the public sector to plan for or even react to education and training needs *post facto* to an IBA. Education requirements to meet the qualifications for employment are a long term issue and have a long lead time relative to any specific resource project. This harkens back to the earlier discussion on the need for proactive regional planning so that First Nations are not always in a reactive mode and thus unable to optimize their level of benefits from a project. What it suggests, in the context of IBA guidelines, is that public sector agencies concerned with education and training be brought into the development picture as early as possible. Having said this, industry and First Nations both expressed concern about bringing public sector representatives into the actual negotiations. The concern is that negotiation schedules and discussions would be complicated exponentially and therefore a method should be found to engage the federal and provincial public sector in a timely manner outside of the IBA negotiations process.

Substantial frustration was expressed over how some current government training programs operate in that they do not make substantial training funds available until

the project has been approved. Given the lead times necessary for many First Nations individuals this is not an effective response and essentially frustrates the objectives of the IBA. A possible solution may lie in creating separate First Nations government-other levels of government-industry agreements on education and training that dovetail with the First Nation-industry IBA.

Similar points and arguments were raised in terms of support for First Nations business and economic development. While IBAs can provide for First Nations access to a variety of contracting opportunities related to a project, public sector program support is often a necessary part of taking advantage of these business opportunities. Timeliness is a critical component of responding to a procurement opportunity and the public sector cannot be in a completely reactive mode or it most likely will not be able to take decisions within the required timeframe. Again, arrangements parallel to, but outside of the IBA negotiations, would facilitate a more productive public policy response to assisting First Nations to take full advantage of the business opportunities presented by a given project.

Beyond the question of involving the public sector in IBA guidelines, a recurring theme in interviews with First Nations representatives was the inter-governmental nature of interactions between First Nations and other levels of government. The point being made is that generally "senior" governments treat First Nations as stakeholders rather than as part of the inter-governmental regime. They tend to see First Nations as a competitive interest rather than as a partner in discerning, representing, and protecting the public interest. This is a complex topic but one that is critical to the future of resource developments in Canada. What it suggests is that it is urgent for the federal and provincial governments to engage with First Nations to clarify roles and responsibilities in the resource development process. First Nations need to consider how they can and will balance competing/contradictory roles as part of the public sector regulatory process with a duty to protect/enhance the public interest with the role of a government that must seek to enhance the economic well-being of its citizens (where its role is to negotiate the most favourable IBA) with the role of a government charged with the assertion and protection of Aboriginal and treaty rights. As will be discussed in the next section of the report, defining the extent of First Nations jurisdiction over resource management is of central importance in terms of creating a more certain and stable regulatory and operating environment.

RECOMMENDATION 5

That provincial governments undertake policy consultations with First Nations and industry to consider whether IBAs should become a requirement to receive regulatory approval for a major resource development and if so, what parameters for IBAs should be defined. Guidelines, if developed should consider such matters as when an IBA is required, the appropriate parties to an agreement and means of determining the interested First Nations, content requirements including definitions of impacts, benefits to be included, engagement of federal and provincial agencies for program

interfaces to implement defined benefits, timelines for negotiations, resources for negotiations (public and private sector), dispute resolution in the negotiation process, ratification procedures, and implementation measures including monitoring and dispute resolution.

RECOMMENDATION 6
If the policy consultations conclude that IBAs should remain as private contractual business arrangements between First Nations and industry, that the public sector should, nonetheless, provide a policy framework outlining the public interest in a clear and stable resource development process and expectations, if any, of the informal IBA process.

7. Aboriginal and Treaty Rights

Central to understanding the significance of IBAs in the resource development process is a discussion of First Nations' concepts and interpretations of Aboriginal and treaty rights including aspirations of self-government and self-determination. As discussed earlier, First Nations face an array of issues when confronted with a development opportunity ranging from how to fulfill a desire on the part of many to participate in the wage economy to protecting a traditional way of life and avoiding loss of traditional cultural values. A resource development in an otherwise non-industrial social setting invokes a discussion of integration versus assimilation in terms of whether economic integration is unavoidably a slippery slope toward social assimilation.

In non-treaty areas of Canada, or areas where "modern" treaties are being or have been recently negotiated, First Nations have adopted the approach that they are the legitimate land-owners and governments within their traditional territories and have insisted upon their jurisdiction being recognized and respected in the regulatory process. This is achieved through a number of means.

Where treaties have been negotiated recently, Newfoundland and Labrador, British Columbia, Yukon, the Northwest Territories, and Nunavut, there are invariably agreements that set out the role of First Nations in resource development regulation. Not all of the machinery is yet in place to ensure a smooth process but the intent is clear. Where treaties have not yet been signed, First Nations and senior governments (each according to its jurisdiction) have entered into a variety of interim arrangements that give First Nations an effective voice in resource management. First Nations in these circumstances state that they are creating a workable relationship in terms of balancing the Crown's assertion of sovereignty and indigenous sovereignty. They assert that their rights as owners and governors of the land and thus the origin of their title, stem from prior occupation and they do not accept the idea that their title,

Aboriginal title, is inferior to that of the Crown. With the acquiescence of provincial governments, they deal with resource companies on the basis of consent, that is, industry recognizes their jurisdictional capacity. First Nations argue that, in return for this recognition, they provide a stable investment environment and more certainty in the regulatory process. For industry this is an important point because the central issues for industry are what government bodies are in charge and what the rules are. The higher the degree to which the process is knowable, the greater the capacity of industry to undertake risk analysis and thus manage uncertainty. Industry is essentially indifferent as to which bodies provide the regulatory oversight so long as the process is clear and regulations are fair and manageable from an economic perspective.

In treaty areas south of 60 there are some interesting views emerging. Until quite recently, the conventional wisdom was that the treaties were land cession instruments whereby First Nations ceded all of their (undefined) Aboriginal rights in exchange for specific treaty rights, generally in the form of reserve lands, Crown protection of assets, some additional resources, annual annuities, and the ability to use unoccupied Crown lands in their former territory for traditional pursuits.

What has emerged is an importation into treaty areas of language and concepts until recently heard only in non-treaty areas. First Nations are increasingly questioning and abandoning the conventional interpretation of treaties and arguing instead that treaties were agreements to share lands and resources not instruments of surrender. They argue that First Nations have retained an inherent right to govern their treaty territory and this right includes the ability to regulate and benefit from resource developments. This concept of an inherent right to govern is increasingly being used to undermine the legitimacy of provincial governments to exercise their constitutional jurisdiction over the management of lands and resources.

Participants at the roundtable noted that the affirmation and interpretation of indigenous rights is not limited to Canada but can be seen as a global phenomenon.

Consistent with the view of First Nations that, whether in treaty areas or not, they have an inherent right to benefit from the resources in what they consider to be their traditional territory, is the concept of resource revenue sharing. First Nations are extremely clear that the provisions of IBAs with industry do not represent resource revenue sharing. Industry, in their view, does not have the jurisdictional capacity to share resource revenues. It is only through government-to-government transfers that revenues can be shared. First Nations believe that the federal and provincial governments are obliged to share resource revenues obtained from their traditional lands. First Nations representatives suggested that resource revenue sharing should be legislated to create a firm financial footing for First Nations governments. The First Nations' view is that this strategy allows for an incremental implementation of self-government which will lead to self-sufficiency. Self sufficiency obviously requires access to revenues and this is seen as the most appropriate means of long term revenue generation tied to the traditional nation.

Industry, for its part, is not so clear. They expressed the concern that governments, by tacitly sanctioning the informal IBA process, are allowing First Nations to extract resources from the private sector, over and above what would be considered equitable. Industry argues that it pays both taxes and royalties to government and therefore should not be expected to pay resource rents to First Nations, albeit in a disguised form.

The roundtable discussion suggested that First Nations are being forced to use IBA processes to deal with issues well beyond project impacts and benefits because they do not have access to government through parallel processes. They have to put all of their energy into the IBA because in many cases it is the "only show in town". Participants also suggested that First Nations are starting to demand benefits beyond benefits from a project and are looking to achieve much more significant shares of the resource revenues so that they can truly maximize economic benefits from their territory. It was noted that British Columbia has implemented a form of resource revenue sharing of forest revenues across First Nations in that province.

Federal and provincial governments have generally considered that infringements on defined treaty rights by resource developments should be compensated (by the developers) but have been clear in their view that it is the Crown that retains the capacity for resource management. Industry expressed some concern that by agreeing to some parts of IBAs they may be creating new rights or creating legal precedent by agreeing to treaty interpretations that may not necessarily be in the larger public interest. Industry needs formal assurance from governments that it is most unlikely that First Nation-industry contractual agreements could be construed in any way to affect existing rights or create rights since these are not political documents but rather defined business arrangements that stand alone.

The situation in treaty areas, where it might be expected that there would be a high degree of certainty respecting Aboriginal rights, is quite the opposite. As discussed previously, IBAs are used by First Nations to extract significant regulatory and financial concessions from industry in an informal and undefined process. Industry is looking to government for guidance on what legal capacity First Nations have in the regulatory process. As noted above, certainty is a valuable commodity and industry is looking to government for help. They are prepared to live within the defined regulatory regime but it has to be knowable and the risk has to be scalable. They suggest that provincial governments are implicitly, if not overtly by turning a blind eye to the process and content of IBAs, supporting the premise that First Nations in treaty areas have jurisdiction over and the capacity to extract payments (rents) for access to and use of Crown land.

First Nations are in the position of being able to use uncertain legal positions in negotiations to extract agreement from industry. This is not to undervalue or comment on the validity of the First Nations position but rather to point out its effect is to increase uncertainty and de-stabilize the development process. If it is in the

public interest to promote environmentally-sound economic development, then it is incumbent upon the public sector to act in a way to facilitate development. In the previous section it was noted that the federal government and most provincial governments are actively pursuing policies and guidelines on the duty to consult related to Aboriginal and treaty rights. But this analysis suggests that the discussion process should reach well beyond that parameter to become a public policy debate on the meaning of treaty rights within the Canadian constitutional framework which embraces the concept of Aboriginal rights, and include an explicit discussion of the concept of traditional territory in the context of regional economic development.

The avenue most often used in the past to try and bring clarity to questions of this nature was the Courts. While this method of dispute resolution remains open, it is not well-suited to bring the breadth of discussion needed for a durable resolution. The questions raised are not strictly legal. What is at issue is the modern day social contract between the current Aboriginal people and the descendants of the original colonizers. This necessarily involves consideration of legal, economic, political, social and cultural matters. This discussion should not be placed on the shoulders of a resource developer in the guise of a social impact statement related to a particular development. This is a question of the broad public interest and is a dialogue that governments have been loath to initiate for fear of its complexity and consequences. Nonetheless, it is fundamental to re-establishing Canada as a country with a positive investment climate.

In the absence of a wide-ranging public dialogue, a practical first step is to either create or use existing forums involving public sector interests, including the First Nations public sector, to discuss and hopefully resolve specific resource management and jurisdictional issues on a practical basis to avoid the spectre of creating a legal precedent. It is the worry of giving away rights that might otherwise have been secured through better or harder bargaining that makes First Nations shy away from decisions or solutions that have a high degree of finality or permanence. Forums that can offer practical discussion and practical solutions to seemingly intractable political issues, even if only on an interim basis, can be a significant step toward a functional and flexible social contract.

RECOMMENDATION 7
That the Government of Canada and the relevant provinces undertake a wide ranging public discussion on the role of First Nations in the resource development process including interpretations of Aboriginal and treaty rights with jurisdictional and regulatory implications. The aim of this discussion should be to reach sufficient understanding or public consensus to create a clear and stable regulatory environment where the roles and responsibilities of all interests are known and defined.
Roundtable participants noted that it will be important in these discussions for the federal and provincial governments to be explicit about their respective roles and responsibilities. This may suggest that substantial federal-provincial

groundwork be laid before launching a policy process engaging First Nations and the public.
Participants noted an agreement at the November FMM in Kelowna to hold an economic development summit which presents an excellent occasion to clarify resource management practises and jurisdiction so as to enhance the environment for economic development.

RECOMMENDATION 8
Recognizing that the complexity of clarifying and reaching agreement on means of implementing Aboriginal and treaty rights may be a lengthy process, it is recommended that the Government of Canada and provinces establish with First Nations tri-partite forums where they do not now exist as mechanisms for senior-level dialogue and expedited decision-making on interim implementation of First Nations' rights related to resource management and development. Such forums would provide for practical decisions to facilitate development without setting precedents that may trample on or otherwise prejudice Aboriginal or treaty rights or the rights of non-Aboriginal Canadians.

RECOMMENDATION 9
That the Government of Canada and the provinces engage in policy consultations with First Nations with the objective of defining a coordinated national policy legislating resource revenue sharing with First Nations.

Roundtable participants cautioned about considering resource revenues from traditional territories of specific First Nations in a concept of equalizing these across First Nations generally. Participants noted that, given the variety of provincial/territorial revenue regimes, it may be difficult to conceive of a national policy. Rather, it may be more practical to aim for specific provincial/territorial regimes where the federal government is implicated as a full partner.

8. Linkages to Environmental Impact Assessment

The research points to a consensus amongst all interests involved in IBAs that the environmental regulatory process should be distinct and separate from the compensation and business arrangements that are the substance of IBAs. Having made this statement, however, there are many indicators that the processes are not kept separate and distinct. There are examples where environmental assessment panels have recommended that IBAs be in place as a condition of regulatory

approval. Generally these recommendations have not been accepted by government as legitimate exercise of the regulatory power. Nonetheless, there is anecdotal evidence that regulators do take comfort from a ratified IBA insofar as it is a demonstration that impacts have been sufficiently identified and compensated or mitigated in the eyes of those most directly affected by a project.

Industry is concerned that an ill-defined IBA process provides First Nations with a lever beyond that contemplated by environmental legislation to ensure all of their environmental issues are addressed. Indeed, IBAs often include significant undertakings with respect to environmental mitigation and management with the presumption that these are legally enforceable contractual obligations. As a further safeguard, First Nations may ratify an IBA at the conclusion of negotiations but normally do not officially sign off the document until the environmental assessment process is complete and the required regulatory measures have been identified. First Nations indicate that this is an important element for them to ensure that developments proceed in a manner that respects their relationship with the physical environment.

While not directly a part of this study, the substance of interviews overlapped into experience with and views of the environmental regulatory process. The research suggests that industry has significant concerns about the direction of the regulatory process as it relates to social impacts. There is a strong view that public sector regulators are inappropriately trying to make all social change that may result from increased economic activity directly referable to a project and thus subject to detailed impact assessment and monitoring. In particular, industry is concerned that the kinds of monitoring that are often contemplated are beyond the capacity of the private sector in terms of data collection including such things as health or education outcomes or social pathologies that may be evident as a result of a shift in individuals' lifestyles. Industry representatives expressed frustration that the content of environmental assessments is becoming increasingly uncertain as it wanders beyond bio-physical impacts into socio-economic considerations without any clear definitions of what social phenomena might reasonably be attributed to a specific project. The process has become very wide ranging and difficult to satisfy. There is a suggestion that government is too risk averse and transfers its inability to manage risk to the private sector. This returns to the theme of uncertainty in the resource development process and suggests that the environmental assessment process needs to be carefully reviewed to clarify content requirements and the appropriate roles for both the public and private sectors in socio-economic impact definition, monitoring and mitigation.

Discussion at the roundtable suggested that industry's concerns with the environmental impact assessment process go beyond those described in this report. While it is outside of the terms of reference of this work, it should be noted that industry is very concerned about the complexity and uncertainty associated with the EIA process and how it is implemented. It was pointed out that very often operational decisions are subject to review by multi-jurisdictional implementation committees

which means that many minor decisions are subject to individual permits, enormously adding to project uncertainty.

RECOMMENDATION 10
That the environmental assessment process be clarified in terms of expectations respecting socio-economic impacts and monitoring to include only those aspects that are specifically within the influence and control of the developer of a proposed project and not subject to other social forces.

CONCLUSIONS

The conclusion of this analysis is that the status quo has to change and there is some evidence that it will change. The research strongly suggests there is a need for the public sector to become more engaged in the world of impact benefits agreements related to major resource developments. Adopting a completely laissez-faire policy toward First Nation-industry relations is an abdication of government's responsibility to facilitate economic prosperity. The absence of any sort of regulatory framework around the negotiations of IBAs including content and timelines increases uncertainty in an already highly uncertain environment. It is perhaps unduly provocative to emphasize the fragility of the investment climate for resource developers in Canada but the research suggests that additional uncertainty occasioned by an unstable regulatory environment where it is unclear as to who makes the rules runs the risk of limiting development opportunities.

Limiting resource developments has obvious effects in reducing the national economic well-being through less demand for the goods and services that fuel developments. Limiting or eliminating development in regions where there are few other economic activities has a dramatic impact on the welfare of the people in those regions. While it may be true that undeveloped/unexploited resources remain to be developed potentially at a later date, it is not obvious that future development will occur or whether it would be more or less beneficial for future generations. First Nations desperately need economic opportunity. Rather than erect barriers to economic participation or leave development of opportunities to chance or un-defined negotiations, public policy must be used to ensure that development takes place in the public interest. This includes ensuring that First Nations' values and aspirations are accounted for in resource developments but it also means facilitating development in the interests of all and ensuring First Nations people become significant participants in the economy and are not left on the sidelines as passive observers or marginal players.

From an industry perspective, it is incumbent upon the public sector to establish some guidelines respecting the role of IBAs in the development process. These guidelines need to clarify when IBAs are needed, what is reasonable to expect from a private sector developer in terms of compensation and benefits that can be referable to the project in question, what is a reasonable timeframe to arrive at an agreement, and what public sector legislation, policies and programs are necessary to effectively implement the terms of an agreement.

From the First Nations perspective, there is a more complicated scenario. Even given the need for an economy, there are those within First Nations who do not support the development of an industrial economy seeing major resource development as abandoning traditional lifestyles and a slippery slope to cultural assimilation. The majority in First Nations, however, appear to recognize that the traditional lifestyle has already been significantly modified from a variety of forces but that that does not mean that traditional values or First Nations culture are necessarily weakened or eroded.

Within First Nations there is a strong sense that they have not been well-served by the federal or provincial governments and when a development opportunity arises, they have no choice but to use whatever leverage they have or can muster to extract maximum benefits from the developer. The research findings suggests that First Nations have more faith in the private sector to deliver benefits and are extremely wary of other governments' involvement since they do not trust that the federal or provincial governments will necessarily act in the First Nations' interests. First Nations are generally satisfied with the IBA process as it now stands so long as they can maintain an environment where they can "stretch the elastic band" to the extent possible without reaching the breaking point. The problem with this scenario is that is that it assumes that the level of uncertainty it creates is manageable. This may be a questionable assumption. Time and again throughout this study, the point was emphasized that developers have to be able to analyze risk. There are almost always good alternative options for investment dollars and First Nations run the risk that they will, perhaps inadvertently, foster a negotiation environment where the risks become undefined or unscalable and ultimately too high for developers to consider.

The conclusion is that First Nations also need a greater public sector presence in the IBA process so that they can deliver to their citizens an effective benefits package. The primary benefits of any economic activity lie in the employment and business opportunities. Both of these are predicated upon a vibrant and financially successful development. This can be facilitated by a clearer and well-defined IBA process.

The study also leads to the conclusion that IBAs should not be about resource revenue sharing. Industry is in the business of wealth creation and it is the role of the public sector to be concerned about wealth distribution. There is certainly a concern on the part of industry that IBAs are being used by government as vehicles of implicit resource revenue transfers and that is not appropriate. First Nations strongly agree that is governments that must take charge of resource rents. First Nations increasingly

hold the view that they are entitled to receive the benefits of direct resource rents from their traditional territories and do not accept that current public sector transfer payments to First Nations constitute a legitimate surrogate. The public sector, both the federal and provincial governments, urgently need to consider a policy response to this question and not within the context of the regulatory process for resource developments. The question of resource rents is quite separate from how the economic benefits of a particular development are to be realized. Socio-economic impacts and benefits should be distinct from payment for use of the resource.

This question is very much tied into the nature of Aboriginal title, concepts of ownership and the interpretation of treaties. It engages the question of long term financing of First Nations and means of realizing self-sufficiency. The conclusion of this research is that the federal and provincial governments need to consider seriously legislating significant levels of resource revenue sharing from identifiable projects as a means of financing First Nations and consider an equalization concept to ensure equitable distribution of resource revenues across First Nations.

Related to, but separate from resource revenue sharing, the study concludes that there needs to be a policy discussion and conclusion on the role of First Nations governments in the regulatory process. It is not appropriate for provincial governments to implicitly give First Nations undefined veto power through "winks and nudges" that unless IBAs are signed a resource development will not receive regulatory approval. In the current environment, IBAs are private contracts between First Nations and a resource developer. The First Nation in negotiating and signing an IBA is acting in its dual capacity of promoting the economic welfare of its citizens and protecting/promoting Aboriginal and treaty rights. It is not performing a regulatory function in this instance. Is it possible for a First Nation government to be a part of the regulatory process as well as an interested party in development? The short answer is, of course it is, just like other levels of government. The question is over what territory First Nations should exercise governmental powers. Like the issue of resource revenue sharing, there needs to be a full examination of the role of First Nations in resource management. Does the inherent right to self government include the right to manage resources? If so, how can this be exercised in the context of Canadian constitutional division of powers? Can management rights be exercised in or be extended to traditional territories (in the case of historic treaties) and what sorts of management partnerships with other levels of government can or need to be established?

While not directly a concern of this study, nonetheless, it must be concluded that the environmental regulatory process requires substantial clarification. There is confusion as to the degree to which socio-economic factors ought to be a part of an assessment. If socio-economic factors are important, which ones are directly attributable to a project and is it legitimately the role of the private sector in a free enterprise economy to be held responsible for social and cultural change/ evolution? The public sector needs to consider both the appropriateness and practicality of expecting private sector enterprises to monitor social change and propose mitigation measures. The study

suggests that the public sector may be abdicating its responsibilities in the guise of regulating development.

The complexity of the issues should not deter a public policy debate but it will be important that this debate be an open and inclusive discussion. The questions go to the very heart of the structure of Canadian society. It is important to the future of economic development to agree on the substance and modes of implementing the rights of Aboriginal people to lands and resources. This is not about esoteric legal arguments that should be decided by the Courts on the basis of narrow facts. First Nations are increasingly exercising jurisdiction according to their interpretation of Aboriginal and treaty rights. The evidence from this study suggests that governments, for the most part, are reluctant to engage the debate but are often *de facto* ceding jurisdiction to First Nations by turning a blind eye to the content of agreements between First Nations and industry. Governments are implicitly telling industry that they must satisfy the conditions imposed by First Nations if they want their developments to proceed.

Without trying to be unduly alarmist, the study evidence suggests the federal and provincial governments urgently need to coordinate a wide-ranging inclusive public policy discussion on questions of roles and responsibilities in the resource development process including issues of resource revenue sharing. The processes currently underway to discuss duties to consult and accommodate may provide the opportunity to enlarge the debate to cover these broader but no less critical and urgent questions. Governments should not consider that responding to the Supreme Court decisions clarifying their duties would be sufficient to bring the additional certainty and stability needed in the resource development process. The undertakings made by First Ministers in November at the Kelowna FMM to hold a summit on economic development may provide the perfect vehicle to raise the profile of these issues and set in motion a means of reaching conclusions that will provide the needed certainty and stability in the resource development process.

Annex 1 - Literature Review

Introduction

This literature review will describe and examine research undertaken between 1996 and 2006 on impact benefits agreements (IBAs). Although the focus of the review will be on those articles that explicitly analyze or compare IBAs, the review will also draw from other sources that will provide insight to the interests of the signatories when they negotiate impact benefits agreements.

Drawing on the literature, this review will describe the evolution, objectives, and elements of IBAs. The review will also describe the extent to which the literature believes IBAs meet the needs of the signatories as well as other themes and issues identified in the literature.

Defining Impact Benefits Agreements

Impact Benefit Agreements (IBAs) are agreements between aboriginal groups or government and industry relating to the exploration of natural resources. There are several types of agreements that are described in the literature, sometimes interchangeably and sometimes as distinct types of agreements.[1]

In *Thinking About Benefits Agreements: An Analytical Framework,* Janet Keeping describes several types of agreements. As she explains, the term 'socio-economic' is usually used to refer to older agreements made between governments on behalf of local communities with industry. 'Benefit Agreements' is a general term used for agreements which have a range of possible benefits, for example, social, economic, environmental and/or cultural development. 'Impact and Benefits Agreements' are agreements that by their title explicitly recognize that exploration activity will have an impact on the local community. Keeping notes that this is the term used in Article 26 of the Nunavut Land Claim Agreement. 'Participation Agreements' are agreements that specify that a local aboriginal community will have either equity participation or another type of participatory benefit from the project. This is a mandatory agreement under the Inuvialuit Final Agreement (IFA). 'Cooperation Agreements' are voluntary under IFA. They are developed when industry and aboriginal groups can come to an agreement on benefits without coercion. 'Revenue Sharing Agreements' are agreements that primarily or explicitly deal with revenues in their provisions.

[1] For example, Alex Kerr in *Impact and Benefit Agreement as Instruments for Aboriginal Participation in Non-renewable Resource Development: A Report on Selected Case Studies* distinguishes between IBAs which sometime focus on economic benefits, and socio-economic and environmental agreements which deal with capacity building and mitigative measures (p. 75). Tara L Campbell, MaryWyatt Singlinger and Kellie L. Johnston in *A review of the legal basis for Impact benefits Agreement* describe participation or access agreements as types of impact benefit agreements.

Although Keeping distinguishes between these types of agreements she notes that there is no legal significance in the name of the agreements and that many agreements share characteristics. She says that "the names given to agreements can be more or less informative, convenient of fashionable. But that other than that, they do not matter."[2] For the purposes of this literature review, the Public Policy Forum will refer to all these types of agreements as Impact and Benefits Agreements.

The Evolution of Impact Benefits Agreements

IBAs began to be negotiated in the mid seventies, usually as agreements between a federal or provincial government and industry. The government would negotiate to gain economic benefits for the local aboriginal community and to mitigate the negative socio-economic impact on their traditional lifestyle. It reflected a trend in government policy which was to develop employment opportunities through private sector activity.[3]

However, since the 1990s these agreements have increasingly been negotiated by aboriginal peoples themselves.[4] The literature describes several reasons for the increasing involvement of aboriginal groups in impact benefit agreements.[5]

First, there is a growing legal recognition of aboriginal rights established through treaties, land claim agreements and aboriginal court challenges.

The literature describes how treaty and land claims agreements can provide surface or subsurface rights to aboriginal groups. In these areas, industry must negotiate with aboriginal peoples. In *A Review of the legal basis for Impact Benefit Agreements* Campbell, Singlinger and Johnston describe industry's legal requirements to consult aboriginal peoples when operating and constructing a pipeline in Northern Canada. For example, they describe that as a result of the comprehensive Inuvialuit agreement, industry must consult with aboriginal peoples if they wish to cross Inuvialuit Lands to reach non-Inuvialuit Lands. In return for the use of lands, industry may have to reimburse "costs associated with any Inuvialuit Land Administration inspection of the development works sites and the nature and scope of such inspection; wildlife compensation, restoration and mitigation; employment, service and supply contracts; education and training; and equity participation or other similar types of participatory benefits."[6]

When a land claim agreement is pending, an interim agreement (like a framework agreement or agreement-in-principle) may encourage industry to consult with aboriginal peoples. For example, as Campbell, Singlinger and Johnston describe, a

[2] Alex Kerr, *Thinking About Benefits Agreements: An Analytical Framework, p.*.5.
[3] Alex Kerr, *Impact and Benefit Agreement as Instruments for Aboriginal Participation in Non-renewable Resource Development, p. 3.*
[4] Steven A. Kennett, *A Guide to Impact and Benefits Agreements.* p.37.
[5] Kerr, *Impact and Benefit Agreement as Instruments, p. 5.*
[6] Singlinger and Johnston *, A review of the legal basis,* p.6.

interim agreement reached by Deh Cho provides for the involvement of the Deh Cho First Nations in the planning and regulatory process. From the perspective of industry, IBAs can be an important way to ensure that the regulatory process runs smoothly.

There is a growing legal precedent that guarantees that local communities benefit from resource development. In *Local Benefits From Mineral Development: The Law Applicable in the Northwest Territories,* Janet M. Keeping describes statute law and land claims that were settled before 1999 which guarantee local benefits in mineral development in the North West Territories and Nunavut. However, the report points out that the guarantee for local benefits is not consistent, and suggests that legislation be enacted to ensure greater consistency.

The literature also describes how court decisions which have required the government to consult with aboriginal peoples are creating incentives for industry to also consult with aboriginal peoples. In *Duty to Consult*, the author describes how the government must consult with aboriginal groups when it is proposing to take an action that may infringe on aboriginal rights. In cases such as Sparrow (1990) Delgamuukw (1997), and more recently Taku River Tlingit and Council of the Haida Nation, the court has ruled that aboriginal peoples must be consulted even if their aboriginal rights have not been proven in court or confirmed by treaty. This consultation must be meaningful and responsive, and the government must be willing to make changes to its plans based on information received through the process.[7] The author points out that although these cases specify that only government is legally obligated to consult, industry has a vested interest in any consultation that the government undertakes regarding resource development. Being engaged early can help industry to address aboriginal groups concerns through modification of the project or involvement of aboriginal peoples in project design.[8]

Second, there is a growing desire among aboriginal groups to participate in negotiations with industry to mitigate the negative impacts of resource development and to use it as a tool to develop their communities economically.

The literature describes how aboriginal groups have shown a growing interest in playing an active part in economic developments, shifting from passive acceptance of low skill short-term employment to becoming masters of their own house and insisting upon partnerships that result in sharing of long-term benefits. This is the theme of an April 2004 conference where one participant noted: “First Nations are expressing a desire to build capacity and participate in the mineral industry in an

[7] Rosanne M. Kyle, *The Duty to Consult: The Supreme Court of Canada’s Decisions in the Haida Nation and Taku River Tlingit First Nation Cases.*
[8] Rosanne M. Kyle, *The Duty to Consult: The Supreme Court of Canada’s Decisions in the Haida Nation and Taku River Tlingit First Nation Cases.*

effort to break the cycle of dependence of northern communities on government funding and to reduce the individual's heavy reliance on community leadership."[9]

Finally, companies themselves have been choosing to consult aboriginal groups.

Industry has shown remarkable dexterity in responding to a rapidly changing environment. Resource developers have moved well outside of their traditional roles as profit-oriented business ventures into quasi-public sector roles of supporting short and long term socio-economic benefits. Although less emphasized in the secondary literature, it is clear from a scan of several websites that engaging local aboriginal communities is part of the public relations strategy of these companies. "The mineral industry is recognizing that a special situation exists when exploring in Traditional Lands and is adapting business practices to reduce negative impacts and increase social and economic opportunities for northern communities."[10]

The Elements of Impact Benefits Agreements

The literature describes how IBAs have evolved from being narrow in scope and focused only on employment, training and business opportunities to being much broader instruments of socio-economic development that include a range of provisions like fixed cash payments, environmental protection.[11]

Authors note that there are no standard templates for Impact Benefit Agreements and that in many cases the agreements are confidential which makes scrutiny of their contents difficult. Nevertheless, several articles examined for this literature review outline the contents of IBAs.[12]

In *A Guide to Impact and Benefits Agreements,* Steven Kenneth compares several IBAs and comprehensively outlines the following seven provisions of IBAs.

1) Introductory Provisions
IBAs have introductory provisions which describe the context for the agreements and set out the basis for the ongoing relationship between aboriginal groups and industry. There are usually standard contractual elements such as preambles, definitions, purpose sections and introductory provisions.

2) Provisions to encourage employment and provide training to local aboriginal communities.

[9] D'Silva Parker Associates, *Gathering Experience*.
[10] D'Silva Parker Associates, *Gathering Experience*
[11] Kennett, *A Guide to Impact and Benefits Agreements.* p.38.
[12] See for example, Irene Sosa and Karyn Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their use in Canada.*

IBAs are designed to provide employment for local aboriginal communities. In some IBAs targets of employment with the local aboriginal populations are created. Given the low education rates among aboriginal peoples, IBAs often also stipulate a role for industry to train aboriginal peoples, facilitate their recruitment, and retain them over the long-term.

3) Provisions to provide business opportunities for local aboriginal communities.
In order to develop aboriginal business, IBAs often include provisions for aboriginal business to provide goods and services to the mining industry. In some cases this means that industry will agree to "unbundle" services so that they can be bid on effectively by aboriginal business, or that aboriginal business are informed of opportunities or given the opportunity to bid in advance of other companies.

4) Provisions to specify industry's social, cultural and community support to mitigate the negative impacts of resource development on the community.
To address the negative impacts that mining may have on aboriginal society, culture and communities, IBAs often have provisions that require industry to: provide social and community assistance for employees and their family, fund community projects, and physical infrastructure and cultural activities at and outside of the workplace.

5) Provisions to provide financial compensation/benefits to local aboriginal communities. Aboriginal groups often negotiate cash payments, equity interests or other financial benefits. When aboriginal groups have land claim agreements that provide them surface and/or subsurface rights they may have royalties. However, these payments can also be established through separate royalty and land management regimes.

6) Provisions to provide environmental protection and cultural resources.
IBAs sometimes include specific environmental protection and monitoring provisions. They protect the habitat for wildlife so that traditional hunting and fishing can occur. IBAs also protect areas of cultural significance. For example, some IBAs stipulate that non-aboriginal employees are forbidden from specified areas of religious significance.

7) Procedural Provisions
As Kenneth describes, IBAs often have a series of provisions that deal with the mechanics of implementation. This can include a provision for creating implementation committees and a dispute resolution mechanism.

The Purpose of Impact Benefits Agreements

Most of the literature describes the purpose of IBAs from the perspective of Aboriginal signatories. They are agreements that seek to provide socio-economic benefit to local aboriginal communities and to mitigate the negative impacts of resource development on local communities. Most of the literature also focuses on

IBA as tools for protecting the environment and promoting sustainable development. Here are a few examples:

> *IBAs and other agreements considered in this paper encompass a spectrum of different approaches to securing economic benefits and mitigating the impacts of non-renewable resource development in Aboriginal communities. In terms of commonality, most arrangements deliver economic benefits locally through jobs, employment and commercial opportunities. They may also establish capacity building measures, for example through education, training and business development, and mitigate and monitoring, measure with respect to the environment and social and community health.*[13]

> *Impact benefit agreements are intended to ensure that Aboriginal peoples benefit from mining projects and are compensated for the negative impacts of mines on their communities, their land, and their traditional way of life.*[14]

> *Their primary purposes are: i) to address the adverse effects of commercial mining activities on local communities and their environments, and ii) to ensure that First Nations receive benefits from the development of mineral resources.*[15]

These definitions do not describe the purpose of these agreements from the perspective of industry. In *Socio-economic Impact Agreements in Canada 1990-2001,* Wolfe outlines the interests of industry in resource development including: a return of invested capital plus interest, a rate of return consistent with the high risk of investment, and security of long-term mineral tenure. However, he says that newly constructed aboriginal political institutions often do not understand industry's interests. He also notes that "the company expects aboriginal support for the project – especially at public hearings that inevitably precede the granting of licenses and permits."[16]

However, some authors argue that an explicit support for a development project puts aboriginal groups at a disadvantage because it weakens their bargaining power with industry in the future.[17]

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[13] Kerr, *Impact and Benefit Agreements as Instruments, p. 74.*
[14] O'Reilly, Kevin and Erin Eacott. *Aboriginal Peoples and Impact and Benefit Agreements: Report of A National Workshop*, Summary.
[15] Sosa and Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining,* p.2.
[16] W. J Wolfe, *Socio-Economic Impacts Agreements in Canada 1990-2001. Aboriginal Expectation Meet Conventional Legal, Financial and Business Practices*
[17] See for example, Nancy Morgan, The State of the Law on the Obligation to Consult with First Nations.

Impact Benefits Agreements and Success

Most of the secondary literature focuses on IBA from the perspective of aboriginal signatories, and suggest that they are inadequate or unable to meet the needs of aboriginal communities.

For example, in *Impact and Benefits Agreements as Instruments for Aboriginal Participation in Non-Resource Resource Development: A Report on Selected Case Studies*, Kerr says that IBAs,

i. are not effective instruments for wealth distribution, and can lead to greater inequality within aboriginal communities. This is because some will benefit from participating in the wage economy, but others will be disproportionably affected by its negative affects.
ii. provide for aboriginal participation in environmental decision making, but do not adequately consider the benefits of traditional knowledge.
iii. do not specify how financial compensation is to be used, and whether fiscal benefits are a form of compensation or whether they are intended to be used to mitigate any negative impacts.
iv. are able to provide opportunities for aboriginal peoples, but are less able to provide the training necessary to meet these opportunities.

Sosa and Keenan also note that although the literature describes IBA's as having characteristics of both contractual and regulatory instruments, because of the complexity of the socio-economic problems they are meant to address the language they use have few definitive targets and may have limited enforceability.

From Industry's perspective, achieving support of the project is a key indicator of success, because it helps to create certainty of the project.[18]

Process of negotiating Impacts Benefits Agreements

In *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada* Sosa and Keenan describe the process of negotiating and implementing IBAs. They suggest that to negotiate an effective IBA, aboriginal leaders should:

- discuss the impact of the resource development on the community level (However, the authors argue that they are usually negotiated with short time frames which does not allow adequate community consultation.);
- form a good negotiation team;
- secure funding to support the process that would be paid in part or full by funding;
- develop a negotiating position;
- negotiate an agreement with other aboriginal groups where aboriginal rights to

[18] Wolfe, *Socio-Economic Impacts Agreements*, p. 3.

land overlap (They note that if more than one aboriginal community is affected by the resource extraction then the process may pit communities against each other to the detriment of all communities.);

- establish cooperation principles between parties through a memorandum of understanding;
- keep long term perspective in mind;
- make agreements as specific as possible;
- establish conflict resolution mechanism;
- maintain communication with the company; and,
- do not agree to clauses that compromise the community's sovereignty or right to object to a damaging practices.

The literature notes that there is an inconsistency in the way IBAs are negotiated. Part of the inconsistency is a natural result of the different context within which each IBA is negotiated. For example, as Sosa and Keenan point out, aboriginal groups have different bargaining power depending on whether there rights are based on treaty rights, land claim agreements (agreed or pending) or aboriginal rights. Also, different types of resource developments would have different impacts on local aboriginal communities and thus would require a different type of agreement.

Some references to IBAs suggest that they are agreements that are only valuable if they begin prior to exploration. Others suggest that IBAs can only begin when planning has been done because that is when aboriginal people's can know the extent of the exploration and what they can gain from each stage. As Sosa and Keenan suggest, environment and social impact assessments provide key information for designing IBAs and in many cases, are appended to the agreements.[19] Others suggest that IBAs need and should be renegotiated at various stages.

Themes and Issues in the Literature

The literature highlights several themes and issues that should be the focus of further research and analysis.

Transparency of IBAs process and Contents

There is a consensus in the literature that more research is needed on IBAs. Key to this, many authors note, is increased transparency in the process and contents of IBAs. As already noted, many IBAs are confidential and are therefore not subject to public scrutiny. The literature suggests that the secrecy surrounding many IBAs is an impediment to developing a strategy for socio-economic development that benefits all parties involved. They note that transparency in the IBA process could lead to a better understanding of how resource extraction could be done to benefit aboriginal

[19] Sosa and Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies,* p.2.

communities. They also suggest that findings of future research should be shared with aboriginal communities in a way that is understandable to them.[20]

The Effect of IBAs on Local Communities

Most of the literature is written from an aboriginal perspective. The literature suggests that the process of developing IBAs can be costly for aboriginal communities and can often pit communities against each other when there are overlapping interests/claims to an area. This literature also expresses concern about the enforceability of sometimes "vague" components of IBAs.

There is a concern that the benefits of IBAs are not equally distributed among the local populations. Some of the literature notes that women are disproportionately affected by the negative impact of resource extraction[21] and are unable to take advantage of the economic opportunities presented.

A few authors also note that non-aboriginals may feel discriminated against. Sosa and Keenan present this concern as a social one, and Wolfe suggests that the implementation of preferential employment and contracting could become a legal issue.

Support for the Project

A key contested issue relating to the desired contents of IBA, is the inclusion of aboriginal support for the project. Those authors who focused on IBAs from the perspective of aboriginal signatories often suggest that including a provision which guarantees aboriginal support for the project weakens their bargaining position and puts aboriginal groups at a disadvantage in future negotiations.

However, from the perspective of industry, the refusal of aboriginal groups to support the project puts in question the nature and purpose of these agreements.

> *What are these Agreements? Are they statements of good intentions? Are they Memoranda of Understanding? Are they enforceable legal contracts with penalties for non-performance and procedures for dispute settlement?*[22]

[20] For example, see D'Silva Parker Associates. *Gathering Experience and Sharing Opportunities North of 51*, p. 29.
[21] See for example, Sosa and Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies*, p.17.
[22] Wolfe, *Socio-Economic Impacts Agreements*, p. 3.

The Role of the Players

The literature identifies several issues around the role of the negotiating parties in IBAs. Some authors suggest that there is too much latitude in the negotiation of IBAs and too much uncertainty about the roles and responsibilities of the different parties.

> *This situation arises because there are no formal regulatory guidelines for the negotiation of IBAs in any jurisdiction in Canada. As a result, the strength of the agreement from a First Nation perspective often depends on the community's bargaining power. This unfortunate situation leads to inconsistency and calls into question the value of the impact benefit agreement as a tool for achieving public policy goals.*[23]

Most of the literature agrees that aboriginal participation in IBAs is essential and welcomed. The concerns about aboriginal participation have to do with the capacity of aboriginal leaders to negotiate an appropriate agreement, and of the community to take advantage of the opportunities presented by resource extraction.

However, somewhat uniquely, Wolfe presents additional concerns regarding the role of aboriginal leaders and communities. He says that when aboriginal groups negotiate directly with industry they are assuming various and contradictory roles: the sovereign, land and resource owner, employees, employment agency or employees agenda., the independent contractor, the regulator and keeper of the environment, the shareholder/joint venture partner and the secured lender. He does not suggest that Aboriginal financial participation is impossible, but suggests that aboriginal participation should only occur within the context of an arms lengths shareholder-controlled corporation distinctly speared from government which assumes their role as landlord, regulator, and tax collector. [24]

Concerns about the role of industry in the literature revolve around the appropriate role of industry in social policy development and implementation. Several authors note that IBA agreements give industry a role in policy development that might not be appropriate. IBA may be "blurring of boundaries between government and business, mainly because economic development is seen as such an essential element in the improvement of aboriginal living standards." [25]

The literature is divided on the appropriate role of government in IBAs. Government already plays a role in IBAs. In some cases, government requires that IBAs be negotiated before licensing can occur and/or provides labour force and other data required to negotiate or implement IBAs. The government also provides some level of community training and capacity building for aboriginal leaders and their

[23] Sosa and Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies,* p.20.
[24] Wolfe, *Socio-Economic Impacts Agreements,* p. 5.
[25] Wolfe, *Socio-Economic Impacts Agreements,* p. 5.

communities. The literature appears to agree that governments should intensify this[26] and focus more resources on education so that aboriginal populations are able to take advantage of employment opportunities presented by resource extraction.

However, governments are keeping quite distant from the negotiating process. As already noted, this is the result of the trend towards greater aboriginal participation. However, this has led some authors to suggest that by not participating more actively in the process governments are downloading their responsibilities for important social services to industry.[27]

However, others suggest that the government should not be an active partner in the negotiating process and suggest instead that "the role of government should be that of technical and financial support rather than developing and implementing policy."[28]

Some of the literature suggests that another independent body may need to be created to help develop and implement IBAs fairly. For example, as it is noted in *Gathering Experience and Sharing Opportunities North of 51* there:

> *Need[s to be] an independent body to facilitate resolving any outstanding issues. Community gets stuck within obstacle and slows process. Independent body would identify different approaches to overcome obstacle and finds solutions to complicated issues*.[29]

The Effects of IBA on New Resource Developments

If implemented consistently and with the interests of both parties in mind, the literature suggests that IBAs can help facilitate exploration and development of national resources.

However, the literature notes that currently, negotiating IBAs is a costly, time consuming, and uncertain process. There is concern that this uncertainty may be an impediment to business development particularly in new industries.

Some think that industry, which stands to gain the most from resource extraction, should pay most or all of the costs.[30] Others see a role for government to subsidize part of the cost. For example, in *Growth and Diversification of the Diamond Industry. Report on the national Roundtable on Canada's Diamond Industry: Economic and*

[26] Natural Resources Canada. *Growth and Diversification of the Diamond Industry. Report on the national Roundtable on Canada's Diamond Industry: Economic and Social Contribution to 2015.*
[27] Sosa and Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies,* p. 9.
[28] D'Silva Parker Associates, *Gathering Experience,* p. 5.
[29] D'Silva Parker Associates, *Gathering Experience,* p. 15.
[30] For example, Sosa and Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies,* p. 19.

Social Contribution to 2015, it is suggested that Canadian Exploration Expenses should be expanded to include community consultation.

Some authors suggest that IBAs should be streamlined to make more timely[31] to avoid capital flight. However, others say a rushed process would lead to poor outcomes for aboriginal groups.

To streamline the process, industry has called the government to resolving land claims to get rid of some uncertainty when negotiated.[32]

It was also noted that given the costly and time-consuming nature of IBAs, larger companies may be at an advantage because they would have more resources to develop IBAs with local communities.

Conclusion

The literature review undertaken by the Public Policy Forum has identified several key resources relating to IBAs. Most of the research was undertaken in the early 2000s, however there has been a growing interested in recent years about IBAs in newly emerging industries such as diamond mining.

The literature suggests there are still many issues relating to IBAs that should be explored. These include: the transparency of the process and of the contents of IBAs and its impact on the development and success of these agreements; the extent to which IBAs should include aboriginal support for the resource development project; the role of the various signatories; the role of government or other bodies; and the extent to which IBAs can mitigate uncertainty in new resource developments.

[31] See for example, Natural Resources Canada. *Growth and Diversification of the Diamond Industry.*
[32] See for example, The Mining Association of Canada. *Aboriginal Economic Development and The Canadian Mining Industry. Presentation to the Standing Committee on Aboriginal Affairs and Northern Development.*

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Introduction

On February 16, 2006 the Public Policy Forum held a roundtable attended by senior leaders from business, the aboriginal community, and federal and provincial governments to discuss the draft version of the report *Sharing in the Benefits of Resource Developments: A Review of First Nations-Industry Impact Benefits Agreements*.

The roundtable provided participants with the opportunity to comment on the study, the draft report, and each of the 10 recommendations. As appropriate, the suggestions of participants are included in the final report of the study. This summary of the roundtable has been included as an Annex to act as a record of the meeting.

Suggestions on the Report

Participants made several suggestions to improve the report. The suggestions did not significantly change the findings or approach, but were instead intended to clarify the scope and content of the report. These have been captured in the text of this final report.

Participants also made several suggestions that were outside the scope of the paper, but that should be addressed in future research on this area:

- An analysis of the frameworks for Impact and Benefits Agreements already developed in Quebec through the James Bay Agreement.
- The impact of increasingly foreign ownership of resource extraction on aboriginal-business relationships.
- Participants suggested that similar research on Impact and Benefit Agreements should be conducted on other Aboriginal groups including Métis and Inuit.
- There is some preliminary evidence to suggest that the tax treatment of cost associated with engagement strategies of First Nations by industry may be inappropriate. Further research in this area may be useful and lead to practical recommendations for the benefit of the IBA process.
- More research on a mechanism for identifying the key aboriginal groups that should be consulted in an area by industry. This would facilitate the negotiation process because industry would be better able to identify the key players.
- More research on the extent to which IBAs might set precedents relating to First Nations and other aboriginal rights.

Suggestions Relating to the Recommendations

Participants were invited to comment on the draft versions of the recommendations. Please find below the draft versions and the comments provided by participants, if any.

RECOMMENDATION 1 - That the Government of Canada and where relevant, the provincial governments, provide a clear policy statement on how First Nations own source revenues acquired by way of IBAs will be treated vis-à-vis program transfer payments.

- Participants noted that although the contents of IBA agreements are confidential, because of disclosure requirements of Sarbanes-Oxley (and the impact of this American legislation on the activities of Canadian or multi-national companies) all financial activities must be disclosed. This creates urgency around this recommendation, because if governments want to find out how much First Nations are receiving; they may be able to do so.

RECOMMENDATION 2 - That the Government of Canada in partnership with the relevant provincial governments support First Nations in regional planning processes aimed at defining development opportunities and constraints including mapping of traditional pursuits and areas of cultural significance, and identifying educational and training needed to prepare for economic opportunities, and the provision and timing of physical and social infrastructure related to development opportunities.

- Participants noted that regional planning should start with integrated land management plans that were sensitive to the potential for large scale resource developments, perhaps employing a yellow light, red light system to identify development potential and imminence. The stage of imminent development would signal the need to plan for an IBA.
- Participants emphasized the existence of some regional planning initiatives but did recognize that these tended to be ad hoc and often sporadically resourced or supported.
- Participants noted that in some cases, the intent of education programs are established early on in IBA negotiation, but the necessary funding does not exist until the IBA is finalized. The challenge is to include government in a parallel process to deal address training and other needs, while not including them in the negotiation process.
- Participants stressed the need for multi-year programs and funding related to training and skills development given the multiple years needed for success in these areas.
- Participants noted the need to link specific project needs to transferable capacity and skills.

RECOMMENDATION 3 - That the public sectors actively implement an expanded role in assisting First Nations to ensure that they have adequate resources including

building human resource capacity to undertake community consultations related to resource project proposals. These consultations are necessary to fully canvass and address issues to form the basis of a comprehensive negotiating mandate and to establish appropriate change management strategies and processes to adequately prepare for and respond to resource developments.

- Participants emphasized the importance of providing information on resource industries to aboriginal communities in various languages, prior to the beginning of the negotiation of IBAs. This information can help First Nations communities prepare to take advantage of employment opportunities and to begin to determine the potential costs and benefits of resource extraction in their area. It was noted that the mining sector had produced some materials that could be used to help communities understand the costs and benefits of resource developments and help them prepare for decisions concerning development opportunities.

RECOMMENDATION 4 - That rather than leave socio-economic monitoring and adjustment to IBA negotiations, (or environmental assessment processes), First Nations and the other levels of government cooperate to develop and implement a comprehensive social plan in regions subject to major new resource developments to focus on socio-economic and related cultural impacts. This plan should include baseline data on socio-economic and relevant cultural indicators, means of monitoring indicators over time and defined programmatic responses to accommodate identified needs.

- Participants noted that the attempt to quantify the socio-economic impacts of a project should include a broad approach that because labour force mobility resource extraction can have impacts outside of its region of development.
- It was noted that industry is committed to ensuring the well-being of its employees and their families but is being asked to go well beyond these parameters. There was strong support for a recommendation of a parallel social planning process.
- It was noted that First Nations should function as the lead level of government in defining, monitoring and mitigating social impacts with the support of other levels of government

RECOMMENDATION 5 - That provincial governments undertake policy consultations with First Nations and industry to consider whether IBAs should become a requirement to receive regulatory approval for a major resource development and if so, what parameters for IBAs should be defined. Guidelines, if developed should consider such matters as when an IBA is required, the appropriate parties to an agreement and means of determining the interested First Nations, content requirements including definitions of impacts, benefits to be included, engagement of federal and provincial agencies for program interfaces to implement defined benefits, timelines for negotiations, resources for

negotiations (public and private sector), dispute resolution in the negotiation process, ratification procedures, and implementation measures including monitoring and dispute resolution.

- There were no comments on this recommendation.

RECOMMENDATION 6 - If the policy consultations conclude that IBAs should remain as private contractual business arrangements between First Nations and industry, that the public sector should, nonetheless, provide a policy framework outlining the public interest in a clear and stable resource development process and expectations, if any, of the informal IBA process.

- Participants noted that no two First Nations communities or any two resource extraction projects were the same and suggested that any framework devised should be flexible to accommodate the variety of circumstances.

RECOMMENDATION 7 - That the Government of Canada and the relevant provinces undertake a wide ranging public discussion on the role of First Nations in the resource development process including interpretations of Aboriginal and treaty rights with jurisdictional and regulatory implications. The aim of this discussion should be to reach sufficient understanding or public consensus to create a clear and stable regulatory environment where the roles and responsibilities of all interests are known and defined.

- In order to infuse timeliness into this recommendation, participants suggested that the report reference the undertakings relating to economic development made at the First Minister's Meeting in Kelowna in November, 2005.
- Participants suggested that the urgency of avoiding jurisdictional overlap be emphasized.

RECOMMENDATION 8 - Recognizing that the complexity of clarifying and reaching agreement on means of implementing Aboriginal and treaty rights may be a lengthy process, it is recommended that the Government of Canada and provinces establish with First Nations tri-partite forums where they do not now exist as mechanisms for senior-level dialogue and expedited decision-making on interim implementation of First Nations' rights related to resource management and development. Such forums would provide for practical decisions to facilitate development without setting precedents that may trample on or otherwise prejudice Aboriginal or treaty rights or the rights of non-Aboriginal Canadians.

- Participants asked whether industry should be included in the tri-partite forums.
- They also asked that any forum created not become an additional regulatory burden for industry. They noted for this to be the case, a clear mandate needed

to be created and the right stakeholders needed to be well represented.

RECOMMENDATION 9 - That the Government of Canada and the provinces engage in policy consultations with First Nations with the objective of defining a coordinated national policy legislating resource revenue sharing with First Nations. These consultations should consider means of defining and implementing the concept of equalization across all First Nations.

- Participants questioned whether the equalization issue should be included in this recommendation. Many were concerned that equalization issues are beyond the scope of the research project and required additional research and analysis. They also noted that equalization could mean between First Nations in an area, between First Nations nationally, or between aboriginal groups more generally.
- A participant suggested that "equalization" is a confusing term that could be confused with the federal-provincial equalization term.

RECOMMENDATION 10 - That the environmental assessment process be clarified in terms of expectations respecting socio-economic impacts and monitoring to include only those aspects that are specifically within the influence and control of the developer of a proposed project and not subject to other social forces.

- Participants strongly supported this recommendation and suggested that removing overlapping regulatory requirements in the environment assessment area should be a key goal of governments. It was clear from participants comments that current complexity of the environmental impact assessment process adds substantial uncertainty to the resource development process and needs urgent attention on the part of the public sector.

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