Acknowledgements

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1.2 Methodology

frameworks from industry associations like ICMM and Minerals Council of Australia are evidence that corporate reputation is a key driver of sustainability and recognition of Indigenous rights in the resource development world

and signed by elected official(s) or leaders that legitimately represent all

From a legal point of view, EIA and IBA are usually separate processes with different objectives: EIA is a governmental process that focuses on assessing and mitigating adverse environmental impacts, while an IBA is a negotiated agreement between a project proponent and First Nation or stakeholder that deals with a broader range of issues such as distribution of project benefits, capacity development, and collaborative governance in addition to mitigating environmental, social, and other impacts. In practice, the two processes often overlap (Fidler, 2008) and can be used together to establish then bind the project proponent to commitments (Galbraith et al., 2007). Linking IBAs to EIA can be advantageous for the communities experiencing resource development, especially if each process is transparent and communicative.
Despite overlapping in practice, the relation between EIA and IBA is not well defined in the literature and existing discussions are predominantly case-specific (Cox, 2013).

commences to ensure Indigenous people will be consulted throughout the EIA process. However, Caine and Krogman (2010) argue that signing an IBA before EIA is complete may be dangerous for the local communities, as it means agreeing to a project before knowing all potential impacts. Lukas-Amulung (2009) identifies a model where IBAs and EIA are integrated by developing a bilateral IBA-EIA coordination plan from the

-EIA coordination, especially during implementation, monitoring, and follow-up of each process. Finally, Fidler (2010) proposes evaluating the relationship between industry, communities, and the State to better determine how the IBA and EIA processes interact.

Chapter 3

Best Practices Literature

3.1 Introduction

This chapter develops best practice criteria for IBAs. The chapter contains summaries of IBA-related literature organized into three sections: Canadian IBA related literature, literature based on IBA research in other developed countries, and literature pertaining to IBAs in less developed countries. Each summarized article includes a description of the best practices or recommendations from that article. The reviewed literature includes work by academics, project proponents, and international, national, and local scale non-government organizations. There are a total of twenty-seven reports, guides, peer-reviewed articles, and book chapters summarized in this chapter. The best practices from the articles are then integrated into a comprehensive list of best practices.
It should be noted that this report does not distinguish between Indigenous and non-Indigenous communities in the creation of best practices. However, all the literature that was reviewed to inform the best practices includes reviews of IBAs signed by an Indigenous community and/or is focused on providing guidance for developing Indigenous community IBAs. The best practices identified in this report are, therefore, applicable to Indigenous communities.

3.2 Literature Review Methods

Literature for the review was collected using search engines and snowballing techniques. Google scholar and the Simon Fraser University library database were searched using the

Community

-reviewed,

such as the International Council on Mining and Minerals (2015) and Rio Tinto (2016) reports, similar key terms were used to search Google. In addition, the Columbia Centre

(CCSI, 2018a; 2018b). CCSI is an interdisciplinary research institution based out of Columbia University; it specializes in exploring and applying sustainable international investment ideas. The reference lists of all reviewed documents were subsequently consulted to identify additional related literature.

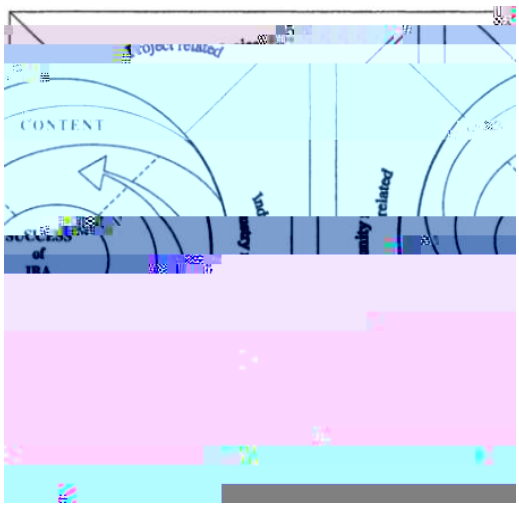
3.3 Best Practices for IBA Negotiation and Implementation in Canada

3.3.1 O'Reilly and Eggertt, 1999

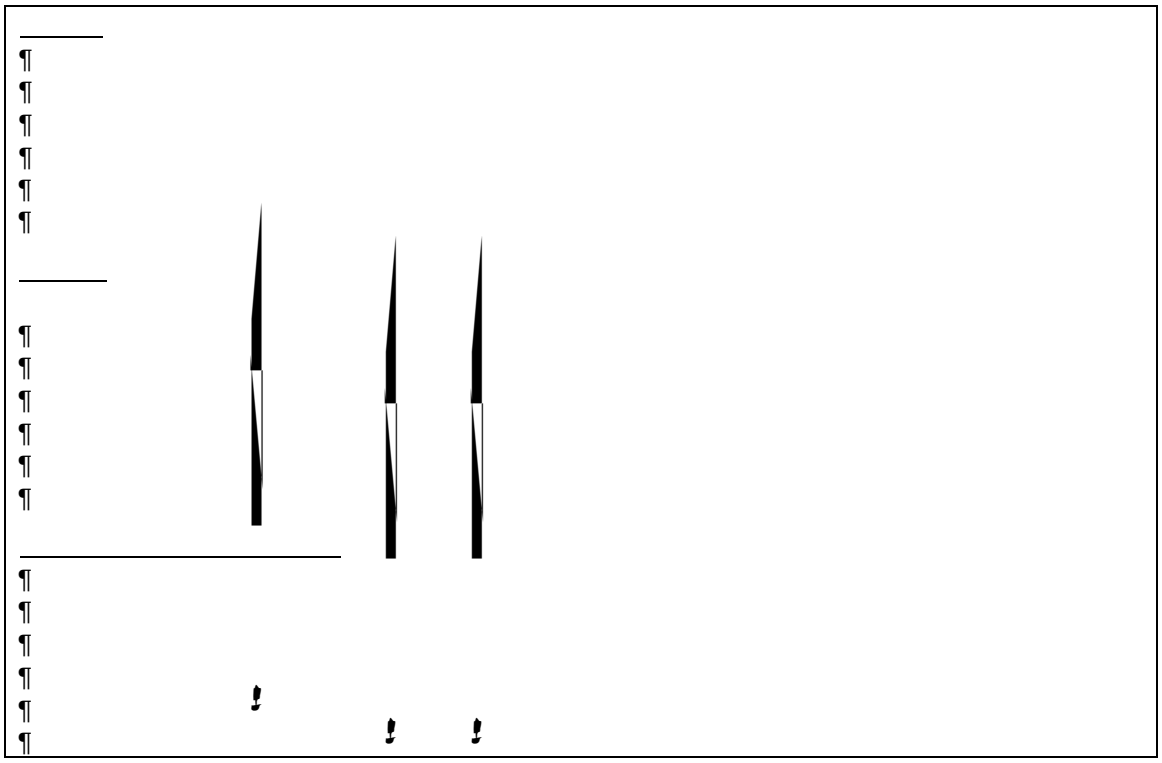
Impact and Benefits Agreement Workshop. The workshop was organized by the

3.3.2 [illegible]

Sosa and Keenan (2001) provide an overview of IBAs based on existing literature and interviews with Aboriginal IBA negotiators and members of MiningWatch Canada, an advocacy group that promotes safe and sustainable mineral development (MiningWatch Canada, 2018). Further input was provided by the Canadian Environmental Law Association, an environmental justice advocacy group. Recommendations are summarized below (Figure 3-2).



Moreover, Dreyer (2004) lists recommendations for creating successful IBAs (Figure 3-4). The most important criterion for IBA success, according to Dreyer (2004), is full



Gogal, Riegert, and Jamieson (2006) provide a guide to community-project proponent relationships for Canadian project developers. The guide informs project developers about what to anticipate during negotiations with Aboriginal communities, what

2.3.5 Fidler and Hitch, 2007

Fidler and Hitch (2007) assess the broad implications of using IBAs as a benefits acquisition tool: while the authors acknowledge that these agreements can be mutually beneficial for signatories, they question whether IBAs perpetuate injustices in the long term through inequality of resource distribution. Fidler and Hitch (2007) commence their study with a review of mineral development processes, environmental assessment, and IBAs. Based on their review, they develop a list of common provisions in IBAs (Table 3-

IBAs are primarily signed to meet the project

recognition and reconciliation of Aboriginal interests

safeguards the project. Additionally, Fidler and Hitch (2007) argue that confidentiality hinders the ability of Aboriginal groups to get a fair deal through IBAs by limiting

es. Non-confidential agreements benefit First Nations, so long as government support for communities remains intact.

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the relationship between the company and community fosters mutual benefits and is productive for both parties.

3.3.8 Knotsch and Warda, 2009

Knotsch and Warda (2009) identify good practices and process for negotiation, development, and implementation of IBAs by reviewing Canadian IBAs. The paper stems from discussions with representatives of four Inuit regions and Inuit national organizations about community benefits, sustainability, resource development, and IBAs orth. Eight practices that engender community benefits from resource development are identified:

1) learn about the IBA process and negotiation from others;
2) conduct community consultation before negotiations;
3) involve and communicate with the entire community;
4) have and pursue specific negotiation goals;
5) do not allow economic development or similar goals to overshadow community well-being;
6) ensure negotiation principals are acceptable to all parties;
7) continually monitor relationships; and
8) coordinate agreement implementation.

Identify how a contractual relationship with a mining company could affect community engagement with political, judicial, and regulatory systems. Do so as soon as possible so that threats, opportunities and challenges of the IBA can be prepared for.

Focus attention on key agreement provisions

In addition to substantive issues, such as economic benefits and project scale, focus on IBA process provisions, such as confidentiality and project support. Demands must not exceed what each party is able to offer; otherwise, it may be preferable to not have an agreement.

Avoid the 'negotiation bubble'

Recruit a community-based steering group to oversee negotiations and ensure community needs and goals are being addressed. Furthermore, have a negotiation budget that finances community meetings and a community representative on the negotiation team. Finally, a community-based social impact assessment should be conducted prior to negotiations.

Prno, Bradshaw, and Lapierre (2010) assess IBAs by comparing outcomes to objectives

2007. All IBAs were confidential, so the general aims of IBAs established by Galbraith, Bradshaw, and Rutherford (2007) were used as proxy objectives: IBAs are established to build positive relationships between the company and community, to secure benefits for Aboriginal communities, to relieve capacity burdens, and to follow-up the environmental assessment process.

IBAs were assessed by collecting and triangulating three datasets (Prno, 2007; Prno et al., 2010): a time series of socio-

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3.3.12 Siebenmorgan and Bradshaw, 2011

Siebenmorgan and Bradshaw (2011) identify best practices for IBAs by assessing agreements made in Northern Ontario. Their goal is to identify how IBAs can be used to address the unique socio-economic conditions, cultural interests, and community development expectations of Aboriginal signatories. To conduct this study, the researchers nts, and other grey literature, then interviewed fourteen key informants, including chiefs, IBA negotiators, and IBA implementation officers, and attended an IBA practitioner workshop.
Siebenmorgan and Bradshaw (2011) identify that meeting community expectations for consultation, development,

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identifies good practices for negotiating and implementing agreements that are equitable, in the interest of the affected communities, and promote fair sharing of benefits between industry and community. Data for the report comes from review of approximately 140 agreements, in-depth case studies of a small number of those agreements, and the experiences of ISS and ACILC team members. Report recommendations are listed in Figure 3-6.

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3.5 Best Practices for IBA Negotiation and Implementation in Developing Countries

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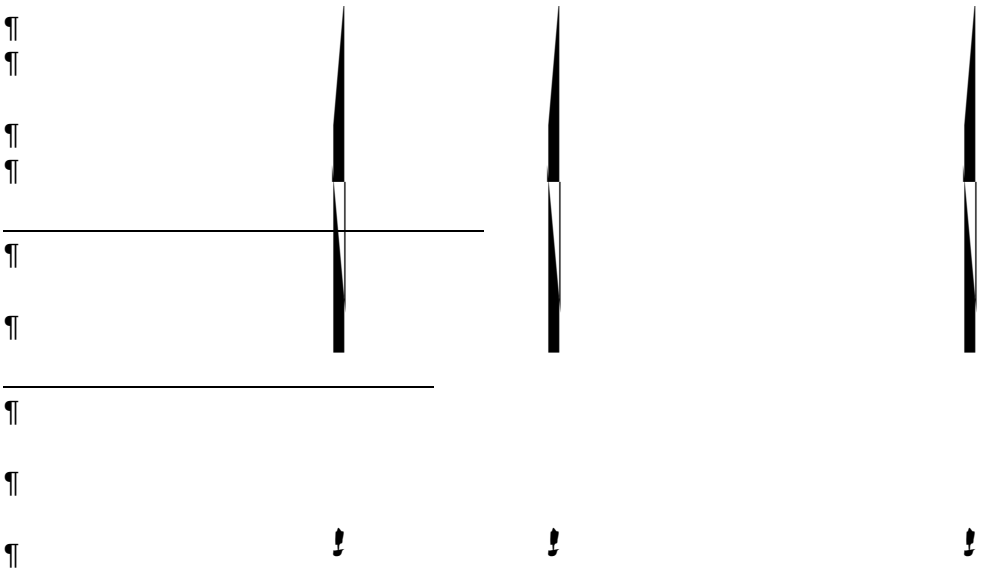

3.5.2

social responsibility tool. The study defines a good IBA as one where: the outcome is arrived at through fair negotiation, the communities or their representatives are engaged

create mutual obligations between parties, and the agreement includes provisions that address broader development objectives in addition to financial compensation. The report does not assess IBA implementation.

The utilizes information from secondary sources, interviews with professionals in the extractive sector, and case studies. First, a desktop review was conducted to gather information about IBAs. Interview questions were developed using literature review findings, and interviews were conducted with industry professionals, experts in IBA design and implementation from Africa, South America, Asia, and Australia. Subsequently, the research team reviewed several agreements. Three of these reviews are outlined in detail in the report.

The document is separated into four main sections: a brief overview and history of IBAs; a guide to deciding which communities should partake in IBA negotiations; a discussion of government, company, and community capacity to create and implement IBAs; and information about role of stakeholders in negotiation, formation, and implementation of IBAs. Key findings of the report are summarized below.

Conditions for Effective IBAs

According to this study, the following conditions improve IBA success:

1) the agreement process is inclusive of all stakeholders;
2) is seen as fair and equitable by all members and representatives of communities that are party to the agreement;
3) all parties are committed to the agreement and its objectives; and
4) each party understands and accepts their obligations and .;s4r.s5912 0 6u n BT /F22.oF9.775 356.88 T

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relationship management; factors contributing to agreement success or failure; and compensation and benefit content of IBA.
According to the RESOLVE (2015) report, successful agreements essentially provide the company access to the project site and a social license to operate in return for mitigating

During negotiations, the study recommends:
1) ensuring that the community's negotiator and signatory are seen as legitimate by the community;
2) giving community members adequate time to interpret, understand, discuss, and comprehend the project and its impact;
3) that communities utilize the tools of FPIC and the option of rejecting the agreement and project to protect their interests; and
4) publicly disclosing the agreement.

Government presence and policy were positive drivers of IBA negotiation and implementation success (RESOLVE, 2015). According to RESOLVE (2015), governments should create resource development rules that clearly outline expectations for consultation, revenue sharing, and company-community relay36(n)7(t)-7(i)1(o)1(n)-1(s)-3 0 0 9 12 0 TJETQ0omnefi

3.5.6 Oxfam IBIS in Sierra Leone, 2016

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3.6 Best Practice Criteria

A list of best practices for IBAs was developed from the literature review (Table 3-6). Recommendations from the literature were recorded and integrated into a single list to eliminated overlap and duplication. These recommendations are organized under eleven themes, forty-six sub-criteria, which are defined as best practices, and eighty-six indicators. Germane indicators for each sub-criterion were created in the form of questions, using logic and recommendations from the literature, to help apply the sub-criteria in the evaluation. The framework was further refined during the case study evaluation

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Case Study Context

4.1 Case Study Ev aluation

The framework described in chapter 3 is used to evaluate a Canadian IBA case study. the project is in operation and therefore there is evidence on how the IBA is working, the IBA is relatively recent, and most of the information on the IBA and the project necessary to complete the evaluation are in the public realm. As with in case study, it is important to emphasize the findings from this evaluation may not be applicable to other cases because of unique features. For example, this case study has some specific characteristics including having a well-defined governance structure of duly elected representation that existed before this project, a relatively self-contained low-density population, and a mandatory obligation to prepare an IBA under Nunavut law (*Nunavut Land Claims Agreement (NLCA), s. 26.2.*1).

4.2 Canadian Legal Context

IBAs are de facto mandatory, but not legislatively required in most of Canada (O'Reilly & Eacott, 1999; Sosa & Keenan, 2001). Notable exceptions are Nunavut, where IBAs are mandatory on Inuit-owned land (Bowes-Lyon et al., 2009; *NLCA*, s. 26.2.1) and the Northwest Territories (NWT), where benefits must be negotiated for oil and gas development (*Oil and Gas Operations Act*, S.N.W.T. 2014, s. 17) and a participation agreement must be signed before development on Inuvialuit land (*Inuvialuit Final Agreement*, s. 10). That said, while there is a legal requirement for the Crown to consult and accommodate Aboriginal interests in Canada, this requirement does not extend to industry outside of the exceptions noted above, and, in fact, cannot be replaced by industry consultation and accommodation of Aboriginal peoples (Lawson Lundell LLP, 2005; *Haida Nation v. British Columbia, 2004*). However, the legal implications of inadequate consultation combined with augmented community empowerment and burgeoning international standard of FPIC (Rodhouse & Vanclay, 2016) mean that there is an incentive for industry to ensure Aboriginal interests are accommodated prior to resource extraction. The rise of IBA prevalence in parts of Canada where they are not legislatively required may be an outcome of this.

4.2.1

The *Royal Proclamation, 1763* was the first legislative acknowledgement of what is now called Aboriginal title in Canada: Aboriginal peoples hold title through the use and occupancy of the land. The *Constitution Act, 1867*, s 91(24),

the *Constitution Act, 1982* recognized and affirmed Aboriginal and treaty rights and became the basis of the duty to consult. Section 35(1) of *The Constitution Act, 1982* affirms responsibility of governments in Canada to Aboriginal peoples. If Aboriginal

promote and enforce Inuit interests (White, 2009). The Nunavut Government and NTI outline their relationship and responsibilities to one another in the *Clyde River Protocol* (White, 2009).

Three recognized regional Inuit organizations exist within NTI: the Kivalliq Inuit Association, the Kitikmeot

seven days after submission (*NLCA*, *s.* 26.8

Nunavut.

If the project requires NIRB monitoring, the term and conditions of this monitoring will be in the Project Certificate, the screening decision, or any Nunavut Water Board approvals (NIRB, 2017). Monitoring, according to the NIRB (2017), aims to measure the

use and land use adhere to terms and conditions, to gather baseline information so that terms and conditions of land and resource use approvals can be enforced, and to assess whether actual impacts are the same as predicted impacts.

4.3.6 Water Licensing in Nunavut

Water in Nunavut is protected, managed, and regulated by the Nunavut Water Board

proponent may be required to apply to the NWB for authorized use or for one or more Type A or Type B water licenses (NWB, 2017b; Figures 4-5; 4-6). According to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (*SC 2002, c 10, Sch. 2*), activities utilizing less than $50m^3$ of water per day require authorized use but no license, activities that require between $50m^3$ and $300m^3$ of water per day must apply for a Type B license, and activities that use more than $300m^3$ of water daily require a Type A water license. Acquiring a Type A water license requires extensive public review so that those who w

(Figure 4-

4.4 The Qikiqtani Inuit Organization and Impacted Communities

4.4.1 The Qikiqtani Inuit Association (QIA

2012b). The QIA was founded in 1996 and became a registered Inuit society in 1997 (Baffinland, 2012b). QIA is a non-profit land claim and community organization that aims to protect and promote Inuit rights and values (Baffinland, 2012b; Williams, 2015). The association represents over 14,000 Inuit from thirteen communities in the Qikiqtani, or Baffin, region (QIA, 2017a). These communities are in the high arctic, Baffin Island, and the Belcher Islands (QIA, 2017a; Figure 4-7).

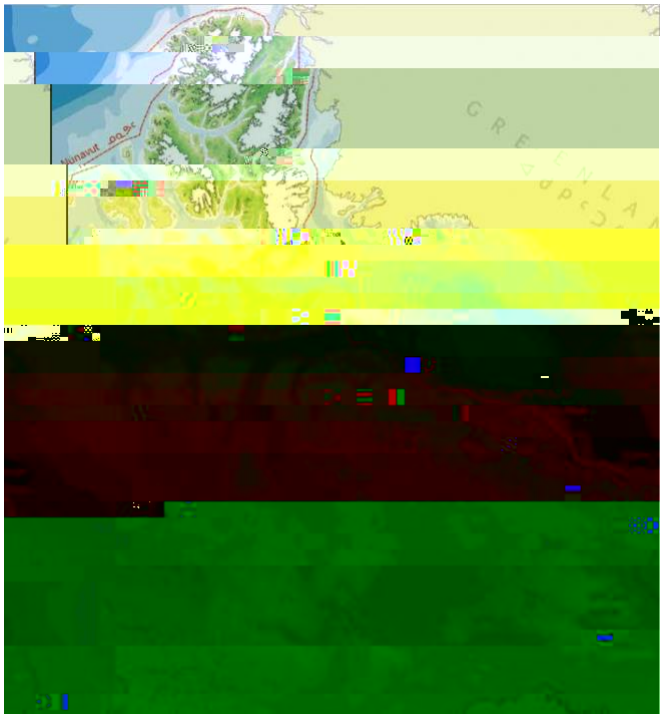

Figure 4-7. Communities represented by the QIA (QIA, 2016)

The MRP site contains an estimated 350 million tons of iron ore (Baffinland, 2014b;

4.6 The

4.8 Mary River Project Phase 2

Changes to the MRP were submitted as part of a phase 2 project proposal in 2014. In April 2015, the new proposal, which included the need for ice breakers, was originally determined to not be in compliance with the North Baffin Regional Land Use Plan (NWT and Nunavut Chamber of Mines, 2015c). However, exception was given by the Minister of INAC, and on July 14, 2015, MRP phase 2 was given approval to go through the impact assessment process (Baffinland, 2015a; NWT and Nunavut Chamber of Mines, 2015c). On February 3, 2017, the initial phase 2 proposal was submitted (Baffinland,

projects (Bell, 2017). Baffinland held informational sessions in all five North Baffin Island Communities in May and June of 2017 (Leite, 2017). As this proposal is a departure from the original MRP proposal, the QIA plans to reopen the IBA for renegotiation if phase 2 is accepted by the NIRB (Ducharme, 2015).

the -criterion 1.2 is not scored because the extent that vulnerable groups participated in the IBA negotiation process is not delineated in any of the reviewed documents and is therefore unknown.

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5.5 Has Broad Commitment

The third evaluation criterion is that the parties are strongly committed to the IBA. This criterion comprises six sub-criteria and seven indicators (Table 5-3). The evaluation indicates that all four evaluated sub-criteria are met. The QIA is seen as legitimate by the impacted communities and the communities are committed to the agreement, thereby meeting sub-criterion 3.3. The sub-criterion about company commitment to the IBA (3.4) ce on MRP IBA government boards. The other two sub-criteria clear IBA role (3.5) and no government abdication of responsibilities (3.6) are met by the clear IBA guidelines in the *NLCA* (3.5) and the fact that neither the Canadian nor Nunavut governments have decreased funding to the five North Baffin Island Communities (3.6). Two sub-criteria could not be evaluated due to lack of information.

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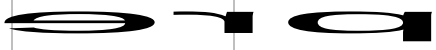

Has Open Communication

The fourth evaluation criterion is that IBAs foster open communication. This criterion has four sub-criteria measured using eight indicators (Table 5-4). Two sub-criteria (4.2 and 4.3) are met, one (4.4) is largely met, and one (4.1) is partially met. The sub-criteria regarding publically available documents (4.2) and regular communication between signatories (4.3) are met because the MR IBA, and monitoring reports are publicly available; and there are yearly forums, which are attended by both IBA signatories and the public. Regarding sub-criterion 4.4, the IBA is governed by the executive comm2 0 612 79ub-13(t)7(te7(te7(t, bu912 0 612 e9e0487 0050>13 0052 1 005yn(n)21(d)]T

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5.9 Is Comprehensive

The seventh evaluation criterion is that the IBA is comprehensive. This criterion comprises three sub-criteria and four indicators (Table 5-7). One sub-criterion regarding

the breadth of IBA provisions (7.2) is met. Sub-criterion 7.1, which deals with addressing all phases of the project, is only partially met because the MRP IBA is valid until project termination and does not address closure or reclamation. The final sub-criterion (7.3) that specifies the need for a complementary community development plan is largely met: a development plan exists for the area, but funding for the

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5.11 Is Implemented

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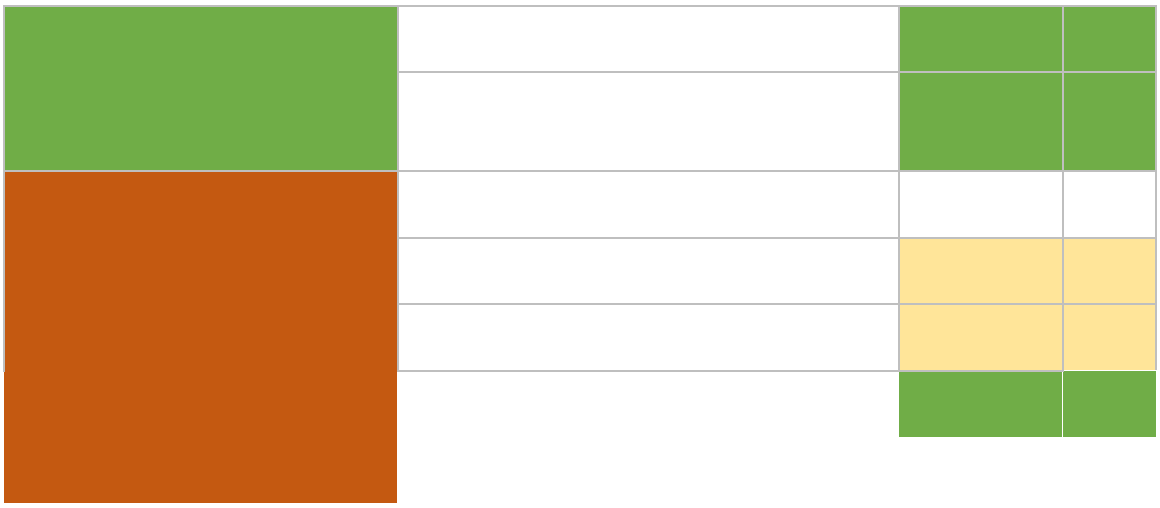

Article	Criteria										
From Canada	1	2	3	4	5	6	7	8	9	10	11
O'Reilly and Eacott, 1999	x		x	x	x		x	x	x	x	x
Sosa and Keenan, 2001	x		x	x	x			x	x		

Dreyer, 2004

In the end, IBAs are a tool that can help achieve equitable benefit sharing, acquire a SLTO, and achieve FPIC; accomplishing these purposes should be the central focus of Impact Benefit Agreements.

Unnatural law: Rethinking Canadian environmental law and policy.

The Globe and Mail

Benefit sharing agreements in British Columbia: A guide for First Nations, businesses, and governments

. Organization and Environment

About

Progressive Aboriginal Relations Research Series,

Guidance for communities interacting with investors.

Directory of community guidance on agreements relating to agriculture or forestry investments.

relating

Nunavut median total income of taxfilers with income by region and community, 1999 to 2014

NIRB Project Certificate [No.: 005]

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North Baffin Regional Land Use Plan

NTI Media Centre.

From Rights to Results

Why agreements matter: A resource guide for integrating agreements into communities and social performance work at Rio Tinto

The Northern Review, 41

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Community benefits from offshore renewables: Good practice review

Oil, gas and energy law intelligence 9

Census Profile, 2016 Census

Resources Policy 45

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Impact benefit agreements between Aboriginal communities and mining companies: Their use in Canada

Mining community development agreements: Practical experiences and field studies

World Bank Extractive Industries Source Book: Good Practice Notes on Community Development Agreements