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Behind the Curtain, Impact Benefit Agreement Transparency in Nunavut

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Article abstract

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Behind the Curtain, Impact Benefit Agreement Transparency in Nunavut

Chris HUMMEL*

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Les ententes sur les répercussions et avantages (ERA) font généralement l'objet de clauses de confidentialité. Au Nunavut, la tendance récente à les rendre publiques favorise un certain contrôle en la matière. À la lumière de cette divulgation, le présent article analyse le contenu des ERA du Nunavut et les conséquences à court terme de leur

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divulgation pour aboutir à trois conclusions : (1) de par leur portée, le contenu des ERA du Nunavut est quasi législatif et s'assimile davantage au droit public qu'au droit privé — une caractérisation qui favorise la transparence ; (2) le rôle croissant des ERA par rapport à l'obligation de consulter peut également justifier une transparence accrue, et (3) la transparence des ERA au Nunavut a contribué à la circulation des idées parmi les communautés, ce qui a entraîné un examen critique constructif de la part du public et des universitaires. En tirant ces conclusions, le présent article ne suggère pas que toutes les ERA devraient être publiques. Il existe diverses raisons pour lesquelles les parties optent pour la confidentialité. Néanmoins, la tendance à l'abandon de la confidentialité au Nunavut invite à une réflexion plus large sur les avantages de la transparence des ERA.

En los acuerdos de impacto y beneficios (AIB) se suscriben cláusulas de confidencialidad. En Nunavut, la reciente tendencia de publicarlas ha fomentado un cierto control sobre la materia. A la luz de esta divulgación, este artículo analiza el contenido de los AIB de Nunavut y las consecuencias de su divulgación a corto plazo, para llegar a tres conclusiones : (1) Por su alcance, el contenido de los AIB de Nunavut es cuasi legislativo, y se asimila más al derecho público que al derecho privado, lo cual es una caracterización que favorece la transparencia. (2) El creciente rol de los AIB en relación con la obligación de consulta puede igualmente justificar una mayor transparencia. (3) La transparencia de los AIB en Nunavut ha contribuido al intercambio de ideas entre las comunidades, lo que ha conllevado a un examen crítico y constructivo por parte del público y de los universitarios. Llegando a estas conclusiones, este artículo no propone que todos los AIB deberían ser públicos. Existen diversas razones por las cuales las partes pueden optar por la confidencialidad. Sin embargo, la tendencia existente para desistir de la confidencialidad en Nunavut invita a realizar una reflexión más amplia sobre las ventajas de la transparencia de los AIB.

Impact Benefit Agreements (IBAs) hide in the shadows of legal discourse. Though hundreds are thought to exist in Canada[1], nearly all are hidden from public view by industry-standard confidentiality clauses. As such, IBAs are immune from the scrutiny of scholars, regulators, journalists, and third-party Indigenous groups. In some cases, IBAs are inaccessible even to the members of the communities that sign them. There are a variety of reasons why both Indigenous communities and extractive proponents opt for IBA confidentiality. However, under this cloak of secrecy, it is impossible to investigate the actual merits of transparency.

A recent trend towards IBA publicity in Nunavut may shed light on this enigma. In Nunavut, some Inuit organizations and mining companies have agreed to publish the contents of their IBAs. In light of this unique disclosure, this paper analyses the contents of Nunavut's IBAs and the short-term consequences of their transparency, reaching three conclusions :

1) The contents of Nunavut's IBAs are quasi-legislative, both in the scope of their provisions and the scale of their impacts. As such, despite technically being considered private law contracts, IBAs may

1. Brendan Marshall, "Facts & Figures of the Canadian Mining Industry", *The Mining Association of Canada*, Ottawa, 2014, [Online], [mining.ca/sites/default/files/documents/Facts_and_Figures_2014.pdf] (March 4th, 2019).

normatively belong in the category of public law, where transparency and accountability are bedrock principles ;

2) The case for IBA transparency may be further supported by the increasing role of IBAs in the operation of the Duty to Consult and Accommodate Indigenous people ;

3) IBA transparency in Nunavut has arguably enriched public discourse surrounding IBAs. The accessibility of IBA contents has allowed ideas to spread among Nunavut's communities and has invited constructive public and academic scrutiny.

In reaching these conclusions, this paper does not suggest that all IBAs ought to be publicized. Nunavut's context is distinguishable in many ways from that of other Indigenous communities in Canada and abroad. Nonetheless, the trend away from confidentiality in Nunavut invites a broader discussion about the merits of transparency.

1 Background

1.1 Impact Benefit Agreements and Confidentiality Clauses

Under a simple definition, an IBA is an agreement executed between a proponent of a project and one or more First Nation, Inuit, or Métis communities that are potentially impacted by that project[2]. Typically, the proponent's objective in signing an IBA is to secure or encourage Indigenous support for the project. IBA often require communities to forego enforcing their Aboriginal, civil or administrative rights against the project[3]. In exchange, the proponent typically pledges to identify, mitigate, offset and monitor environmental or socio-cultural impacts and to confer certain benefits to community members, often in the form of financial compensation, employment guarantees, training programs and tendering opportunities for local businesses[4].

The significance of IBAs continues to evolve in light of the Duty to Consult and Accommodate Indigenous people, pursuant to section 35 of the *Constitution Act, 1982*[5]. As will be discussed later in this paper, IBAs can be a factor in assessing whether the Crown has honourably exercised

2. Brad Gilmour and Bruce Mellett, "The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations", (2013) 51 *Alta. L. Rev.* 385, 389.
3. *Id.*
4. *Id.*
5. *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), s. 35.

their consultation obligations, especially where the Crown has delegated operational aspects of consultation onto a proponent[6].

There is no standard formula for IBAs. Generally, they are not prescribed or mandated by legislation[7]. Rather, they emerge voluntarily as common law contracts whose terms vary as widely as the parties and projects themselves. Projects differ in the type of resources being extracted, scale of operations, vulnerability of surrounding ecosystems, proximity to communities, political and socio-economic conditions and local Aboriginal and treaty rights[8]. The malleability of IBAs allows them to be tailored to suit the tremendous variation in context, which is partly why they have gained traction as an industry "best practice[9]".

Despite the diversity of IBA content, there is one term whose inclusion is nearly universal : confidentiality. Despite an estimated 265 active IBAs in Canada[10], very few people ever read them because they are obscured from public view[11]. Typically, proponents demand confidentiality clauses to protect the privacy of their plans and financial information and to conceal precedents from subsequent third-party negotiations[12]. However, as discussed further in the next section of this paper, First Nations may also request IBA confidentiality to keep their financial information private from the Federal government.

1.2 The Rationale for Confidentiality among First Nations

Many First Nations request confidentiality in IBAs to shield their financial information from the Federal government. A common concern among First Nations is that the Federal government seeks their IBA financial information for the purpose of "clawing back" Federal transfer funding in proportion to IBA revenue[13]. A longstanding Indigenous and Northern Affairs Canada (INAC) policy has been for First Nations to

6. See Section 2.2 of this paper.
7. There are specific exceptions, such as the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, s. 5.2, which mandates a "Benefits Plan" for oil and gas projects north of 60 degrees latitude.
8. Bram F. Noble, *Introduction to Environmental Impact Assessment. A Guide to Principles and Practice*, 3rd ed., Oxford, Oxford University Press, 2015.
9. Marcello M. Veiga, Malcolm Scoble and Mary Louise McAllister, "Mining with communities", *Natural Resources Forum*, vol. 25, nº 3, 2001, p. 191.
10. B. Marshall, *supra*, note 1.
11. B. Gilmour and B. Mellett, *supra*, note 2, 396.
12. *Id.*
13. Connor Bildfell, "The Extractive Sector Transparency Measures Act : Critical Perspectives", (2016) 12 *McGill J. Sus. Dev. L.* 231, 261.

report "Own-Source-Revenue" (OSR), including income from "collecting taxes and resource revenues or by generating business and other income[14]". However, income arising from IBAs is currently exempt from reporting under the OSR policy[15].

In recent years, the Federal Government has compelled financial transparency through legislation. The 2013 *First Nations Financial Transparency Act* (FNFTA)[16] required 581 First Nations to provide financial information — including the salaries and expenses of band chiefs and councillors — and to publish them on the INAC website. This received widespread backlash from First Nations around Canada, with many First Nations refusing to report and being sued for it[17]. The legislation was interpreted by many as an attempt to scapegoat specific First Nations leaders for the financial woes of their communities and to discredit First Nations governments at large[18].

Similarly to FNFTA, the 2014 *Extractive Sector Transparency Measures Act* (ESTMA)[19] imposed disclosure requirements on Indigenous communities. ESTMA requires Canadian oil, gas and mining companies to disclose payments made to all levels of government around the world[20]. ESTMA's main objective is to hold Canadian multi-national extractive companies accountable in countries afflicted by poverty and corruption ; however, ESTMA applies within Canada as well.

ESTMA initially made a temporary exception for disclosing payments to Canadian Indigenous governments, but that exception expired in 2017[21]. Most of the payments to Indigenous governments by proponents occur through IBAs, so ESTMA has the effect of circumventing the exception

14. Canada, Indigenous and Northern Affairs Canada, "Own-Source Revenue for self-governing groups", [Online], [www.rcaanc-cirnac.gc.ca/eng/1354117773784/1539869378991#sec2] (May 1st, 2019).
15. *Id.*
16. *First Nations Financial Transparency Act*, S.C. 2013, c. 7 (hereafter "FNFTA").
17. Karina Roman, "Ottawa takes First Nations to court over transparency law", *CBC News*, December 8th, 2014, [Online], [www.cbc.ca/news/politics/ottawa-takes-first-nations-to-court-over-transparency-law-1.2864735] (March 4th, 2019).
18. Sean Jones, "The myth of the First Nations Financial Transparency Act", *The Globe and Mail*, November 6th, 2015, [Online], [www.theglobeandmail.com/report-on-business/rob-commentary/the-myth-of-the-first-nations-financial-transparency-act/article27125271/] (March 4th, 2019).
19. *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376 (hereafter "ESTMA").
20. *Id.*, s. 9.
21. C. Bildfell, *supra*, note 13, 261.

to OSR reporting for IBAs[22]. Consequently, this measure has been largely criticized by Indigenous communities as an attempt to justify the withdrawal of federal funding in proportion to resource revenue[23].

In light of the history of oppression suffered by First Nations at the hands of the Federal government, these recent compelled transparency measures have arguably contributed to the climate of distrust that deters openness of First Nations. As such, First Nations may have a variety of legitimate concerns about disclosing the contents of their IBAs to the Federal government.

1.3 The Emergence of Transparency in Nunavut

In contrast to the compulsory disclosures of ESTMA, transparency emerged organically in Nunavut when some Inuit representative organizations and mining companies agreed to disclose their IBAs to the public. To understand the process that lead to these decisions, the legal and political context of Nunavut is important.

Nunavut is a territory in northern Canada, officially established on April 1st, 1999, when the federal *Nunavut Act*[24] came into force. Though the *Nunavut Act* governs much of the Territorial administration, the founding document of Nunavut is a modern treaty, the *Nunavut Land Claims Agreement* (NLCA)[25], signed in 1993 between Canada and Nunavut Tunngavik Incorporated (NTI), an organization representing Inuit people in Canada[26]. The territory of Nunavut is over 2 000 000 km^2 which is 20 % of Canada by area and the fifth largest sub-national jurisdiction in the world. Despite its grand scale, Nunavut has a population of fewer than 40 000 people, the vast majority of whom are Inuit[27].

As a modern treaty "recognized and affirmed" by section 35 (1) of the *Constitution Act, 1982*[28], the NLCA carries constitutional force[29]. In addition to delineating the area comprising the overall territory of Nunavut[30],

22. *Id*., 262.
23. *Id*.
24. *Nunavut Act*, S.C. 1993, c. 28.
25. *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada*, 1993 (hereafter "NLCA").
26. At the time of signing, NTI was known as "Tunngavik Federation of Nunavut".
27. Statistics Canada, "Population and Dwelling Count Highlight Tables, 2016 Census, Ottawa", [Online], [www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm ?Lang=Eng&T=101&SR=1&S=3&O=D#tPopDwell] (March 4th, 2019).
28. *Constitution Act, 1982*, *supra*, note 5, s. 35.
29. NLCA, *supra*, note 25, s. 2.2.1.
30. The "Nunavut Settlement Area", see *id*., s. 3.

the NLCA establishes exclusive Inuit title to about 350 000 km^2 of land scattered throughout the territory. These are known as Inuit-Owned Lands (IOL)[31] and are vested in Designated Inuit Organizations (DIO), regional administrative bodies appointed by the NTI[32]. During NLCA negotiations, IOL were selected based on several factors including traditional occupation, wildlife abundance, cultural significance and mineral resource potential[33]. IOL were divided up among three regional DIOs : the Qikiqtani Inuit Association (QIA), the Kivalliq Inuit Association (KivIA) and the Kitikmeot Inuit Association (KitIA). These DIOs are structured as not-for-profit corporations and are governed by Boards of Directors whose members are elected by each community in the region[34].

In contrast with other Canadian jurisdictions, Nunavut has made signing IBAs a mandatory precondition for major resource extraction projects on IOL[35]. Under section 26.2.1 of the NLCA, a "Major Development Project[36]" may not commence on IOL until the proponent and the regional DIO have signed an Inuit Impact Benefit Agreement (IIBA). Under the NLCA, the terms of the IIBA may be freely negotiated between the parties and are enforceable under ordinary common law contract principles[37]. Only a few mandatory IIBA terms exist, such as the requirement for arbitration procedures[38] and periodic renegotiation[39]. IIBAs negotiation and arbitration is constrained by a set of guiding principles, at s. 26.3.3 :

> (a) benefits shall be consistent with and promote Inuit cultural goals ;
>
> (b) benefits shall contribute to achieving and maintaining a standard of living among Inuit equal to that of persons other than Inuit living and working in the Nunavut Settlement Area, and to Canadians in general ;

31. *Id.*
32. *Id.*, s. 19.3.1.
33. Robert McPherson, *New Owners in Their Own Land. Minerals and Inuit Land Claims*, Calgary, University of Calgary Press, 2003.
34. Qikiqtani Inuit Association, "About Us", [Online], [qia.ca/about-us/] (March 16th, 2018).
35. Other examples of mandatory IBA provisions exist in the *Inuvialuit Final Agreement*, 1984 ; *Labrador Inuit Land Claims Agreement*, 2005 ; *Tlicho Land Claims and Self-Government Agreement*, 2003 ; and *Eeyou Marine Region Land Claims Agreement*, 2011.
36. Under NLCA, *supra*, note 25, s. 26.1.1, "Major Development Project" is defined to include any private sector project involving development or exploitation of natural resources that is at least 5 years long and which entails over 200 "person-years" of employment or over $35 000 000 in capital costs.
37. *Id.*, s. 26.4.2 and 26.9.1.
38. *Id.*, s. 26.6.1-26.8.5.
39. *Id.*, s. 26.10.1.

> (c) benefits shall be related to the nature, scale and cost of the project as well as its direct and indirect impacts on Inuit;
>
> (d) benefits shall not place an excessive burden on the proponent and undermine the viability of the project; and
>
> (e) benefit agreements shall not prejudice the ability of other residents of the Nunavut Settlement Area to obtain benefits from major projects in the Nunavut Settlement Area[40].

Though transparency is not mandated under the NLCA or any legislation, it appears to be emerging as a "best practice" in the region. Many recent mine IIBAs have been voluntarily disclosed to the public. For example, IIBAs between KivIA and Agnico Eagle Mines Limited are publicly available due to clauses that expressly preclude confidentiality[41]. The 2013 Mary River Project IIBA, negotiated between QIA and Baffinland Iron Mines Corporation (Baffinland), allows either party to disclose the terms and conditions of the Agreement[42], which QIA elected to do in 2015[43]. In furtherance of transparency, the Mary River IIBA's dispute resolution mechanism requires arbitration decisions to be publicly disclosed[44]. In 2017, this provision was engaged when QIA and Baffinland sought arbitration for a royalty dispute, enabling an unprecedented adjudicative legal analysis of an IBA to be released to the public[45].

The shift towards transparency may have a lot to do with Nunavut's unique political context. With its 40 000 people distributed in 25 communities spread across 2 000 000 km^2 and represented by 3 DIOs, the Inuit of Nunavut are culturally heterogenous and dispersed, with representation that is very centralized. As is discussed later in the paper, these

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40. *Id*., s. 26.3.3.
41. Kivalliq Inuit Association and Agnico Eagle Mines Limited, *Whale Tail Project Impact and Benefit Agreement*, 2017, s. 3.13 (hereafter "Whale Tail IIBA"); Kivalliq Inuit Association and Agnico Eagle Mines Limited, *Meliadine Project Impact and Benefit Agreement*, 2015, s. 3.13 (hereafter "Meliadine IIBA"); Kivalliq Inuit Association and Agnico Eagle Mines Limited, *Meadowbank Project Impact and Benefit Agreement*, 2006, amended in 2011 and 2017, s. 3.13 (hereafter "Meadowbank IIBA").
42. Qikiqtani Inuit Association and Baffinland Iron Mine Corporation, *The Mary River Project Inuit Impact and Benefit Agreement*, 2013, s. 25.6 (hereafter "Mary River IIBA").
43. QIA Board of Directors, *Resolution RSB-16-05-30: The Mary River Project Inuit Impact and benefit Agreement – Article 5 Disclosure*, Clyde River, Board of Directors Meeting, 2016.
44. Mary River IIBA, *supra*, note 42, s. 21.10.
45. *Qikiqtani Inuit Association* v. *Baffinland Iron Mines Corporation*, June 30th, 2017, arbitration pursuant to dispute resolution procedures of the Mary River Project IIBA s. 21.10 (hereafter "*QIA* v. *Baffinland*").

circumstances can foster distrust and dissent among communities, a problem which transparency is aimed at remedying[46].

2 Discussion

The discussion of IBA transparency in this paper is divided into three sections. The first section focuses on the contents of Nunavut's IBAs, arguing that their provisions are quasi-legislative, resembling public law more than private law — a characterization which attracts public accountability and transparency.

The second section outlines the role that IBAs have played in the operation of the Crown's Duty to Consult and Accommodate Indigenous people, a feature which potentially makes them even more amenable to public scrutiny.

The third section describes various practical benefits demonstrated by a transparent public discourse surrounding IBAs in Nunavut.

2.1 The Public Law Character of IBAs

IBAs are treated by the common law as mere private law instruments, with the community representative body as one contracting party and the proponent as the other. The NLCA requires parties to enforce IIBAs in accordance with the common law of contract[47]. Accordingly, the recent arbitration decision *QIA* v. *Baffinland*[48] interprets the provisions of the IIBA by applying common law contract principles. Under contract law principles, the two parties are free to agree on any degree of confidentiality.

But IBAs are not ordinary contracts. Based on the scope of their provisions and the scale of their impacts, IBAs are quasi-legislative, better characterized as instruments of public law than private law. Public law is defined by its function in mediating the power imbalance between the state and its citizens, but it can also apply more broadly to quasi-public entities that wield compulsory powers or are afforded responsibilities of exceptional public import. Transparency and public accountability are bedrock principles of public law precisely because they temper legislative and quasi-legislative power. Given the monumental role of IIBAs in Nunavut, their transparency was arguably essential in that context to preserve public trust and integrity.

46. See Section 2.3.3 of this paper.
47. NLCA, *supra*, note 25, s. 26.9.1.
48. *QIA* v. *Baffinland*, *supra*, note 45.

2.1.1 Public Law vs Private Law

Public law and private law are fundamental categories in the Canadian legal system, with pre-confederate roots drawing from both the British common law and French civil law traditions[49]. Private law governs relationships between legal persons (including corporate bodies), and includes civil law of property, contract, tort and equitable doctrines such as trusts and unjust enrichment[50]. Public law, on the other hand, structures legal relationships between persons and the state, and between different institutions within the state. Public law defines the scope of government authority over its citizens and includes constitutional, administrative, criminal and other areas of regulatory law[51].

The essence of the distinction between the two is the principle of accountability[52]. While private law is about intervening in the everyday business of individual interactions, public law is about structuring checks and balances into the broader exercise of public power. To this end, the mechanisms of public law include judicial reviews of administrative decision-making, oversight of government authority under the *Constitution Act, 1867*[53] and *1982*[54], and enforcement of citizens' rights against the government via the *Canadian Charter of Rights and Freedoms*[55].

Transparency is a core value of public law, linked inherently to legitimacy and accountability[56]. Though the Constitution does not explicitly mention it, transparency has been expressly protected in constitutional jurisprudence. The Supreme Court of Canada (SCC) has enumerated core democratic values underpinning the freedom of expression and freedom of the press under the *Charter*: (1) participation in social and political decision-making, (2) the search for truth and (3) for individual self-fulfillment[57]. Transparency and open government have been protected in the spirit of these core values by ensuring journalists and citizens have access to public

49. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Toronto, Carswell, 2007, nº 21-2.
50. Craig Forcese and others, *Public Law. Cases, Commentary, and Analysis*, 3rd ed., Toronto, Emond Publishing, 2015, p. 3.
51. *Id*., p. 4.
52. *Id*., p. 6.
53. *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).
54. *Constitution Act, 1982*, *supra*, note 5.
55. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra*, note 5, s. 2 b).
56. C. Forcese and others, *supra*, note 50, p. 11.
57. *Montréal (City)* v. *2952-1366 Québec Inc*., [2005] 3 S.C.R. 141, 2005 SCC 62.

decision-making forums such as legislatures and courts[58]. This protection extends to important public documents. In *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*[59] the SCC ruled that public access to government documents is to be protected "where it is shown that, without desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded[60]".

Since Confederation, the historic distinction between public and private law has blurred as governments have increasingly intervened to regulate the lives of their citizens. For example, labour relations, which were originally private law matters are now so thoroughly regulated that employment decisions are subject to public law interventions. Business activity, too, was once governed only by private contract and tort, but statutory rules and decision-makers have brought it increasingly under the rubric of public law[61].

Courts in judicial reviews have played a key role in drawing this boundary, when tasked with determining whether the exercise of administrative power is public or private in nature[62]. While this jurisprudence addresses the distinction primarily, if not exclusively, to determine whether a decision-maker is amenable to judicial review, the criteria enumerated in case law are nonetheless informative for the normative exercise of characterizing IBAs for the purpose of accountability.

In *Air Canada* v. *Toronto Port Authority*[63], the Federal Court of Appeal (FCA) acknowledges that there is no comprehensive answer about which exercises of power are private and which are public, because nominally public entities can sometimes perform private functions and vice versa[64]. At par. 60, the FCA lays out a number of factors for determining whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law :

— *The character of the matter for which review is sought*. Is it a private commercial matter, or is it of broader import to members of the public ? […]

58. *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 ; *Re Southam Inc.* v. *The Queen (nº 1)*, (1983) 41 O.R. (2d) 113 (Ont. C.A.).
59. *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, 2010 SCC 23.
60. *Id*., par. 37.
61. P.W. Hogg, *supra*, note 49, nº 21-2.
62. *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, par. 81 ; *Martineau* v. *Matsqui Institution*, [1980] 1 S.C.R. 602, 617.
63. *Air Canada* v. *Toronto Port Authority et al.*, 2011 FCA 347 (hereafter "*Air Canada*").
64. *Id*., par. 46-57.

— *The nature of the decision-maker and its responsibilities.* […]

— The extent to which a decision is founded in and shaped by law as opposed to private discretion. […]

— *The body's relationship to other statutory schemes or other parts of government.* […]

— *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity.* […]

— *The suitability of public law remedies.* […]

— *The existence of compulsory power* […] over the public at large or over a defined group.

— *An "exceptional" category of cases where the conduct has attained a serious public dimension*. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public[65].

Though it is rare, there is precedent for courts to categorize nominally private entities under the umbrella of public law in judicial review. Some examples include :

— a commercial procurement contract issued by a federal Crown corporation[66] ;

— a business advisory committee in the Northwest Territories with non-statutory authority to grant "Northern Business Status[67]" ;

— election procedures of an Indigenous governing body empowered by a land claims Agreement-in-Principle[68] ;

— a Bilateral Agreement between Provincial car safety regulator and private corporation ;

— The agreement oversaw professional car mechanic accreditation[69].

With these contractual instruments and procedures subject to public law interventions under administrative law principles, it is not unthinkable that an IBA could fall under a similar classification.

65. *Id*., par. 60.
66. *Rapiscan Systems, Inc.* v. *Canada (Attorney General)*, 2014 FC 68.
67. *Volker Stevin N.W.T. ('92) Ltd.* v. *Northwest Territories*, 1994 CanLII 5246, 113 D.L.R. (4th) 639 (N.W.T. C.A.).
68. *Pokue* v. *Innu Nation*, 2014 FC 325.
69. *Société de l'assurance automobile du Québec* v. *Cyr*, [2008] 1 S.C.R. 338, 2008 SCC 13.

2.1.2 The Quasi-Legislative Nature of IBA Provisions

A single major extractive project can dramatically alter thousands of people's lives, with economic, social and environmental impacts resembling that of a public institution. IBAs play a key role in mediating these impacts. With provisions addressing, among other things, employment standards, environmental protection and contract procurement, IBA provisions can sometimes appear more like legislation than contract. Such vast, quasi-public power demands a proportionate level of accountability, which is why IBAs may belong in the more transparent realm of public law.

In *Air Canada*, a matter is more likely to be under the purview of public law if it is "of broader import to members of the public[70]", or "where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public[71]". IBA-bearing projects often have tremendous public import and, in the context of small, remote Indigenous communities with histories of oppression, their effect can certainly be described as exceptional.

In Nunavut, the Mary River mine is expected to introduce approximately $160 million of dollars in jobs and benefits to nearby fly-in Inuit communities who have had little to no previous industrial or commercial production[72] and have unemployment rates high above the national average[73]. Though an increase in wealth is in many ways a positive impact, the rapid elevation of family income in the absence of proper social supports has been shown to exacerbate pre-existing domestic abuse and addiction issues, making women and children less safe in some circumstances[74]. In addition to shifts in socio-economic conditions, major extractive projects impose irreversible impacts on the environment which has a unique and profound significance to land-based Indigenous cultures[75]. Regardless of

70. *Air Canada*, *supra*, note 63, par. 60.
71. *Id.*
72. Eric Adedayo and Eric Werker, "Estimating the Value of Benefits in Benefit-Sharing Agreements", (2019) [unpublished draft article, archived at Beedie School of Business, Simon Fraser University, Vancouver].
73. Statistics Canada, "Labour force characteristics by territory, three-month moving average, seasonally adjusted and unadjusted, last 5 months", [Online], [www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/lfss06-eng.htm] (March 5th, 2019).
74. Pauktuutit Inuit Women of Canada, "The Impact of Resource Extraction on Inuit Women and Families in Qamani'tuaq, Nunavut Territory", [Online], [www.pauktuutit.ca/social-and-economic-development/social-development/resource-extraction] (March 4th, 2019).
75. Kevin O'Reilly and Erin Eacott, "Aboriginal Peoples and Impact and Benefit Agreements : Report of a National Workshop", 1998, [Online], [carc.org/wp-content/uploads/2017/10/NMPWorkingPaper7OReilly.pdf] (March 5th, 2019).

whether a major project's impacts are positive or negative, such rapid, monumental changes are inevitably disruptive and require a high degree of oversight.

The IBA is instrumental in mediating these tectonic shifts in community life. As seen in Table 1, the contents of the Nunavut's IIBAs directly address issues of major public import, including royalty rates, hiring targets, employment standards, subcontracting procurement, and mitigation of environmental and cultural impacts. Royalties are paid to the DIO and invested in a variety of regional economic, cultural, environmental and social programming. In the absence of a tax base in many Indigenous communities, IBA land-based extraction royalties are arguably the closest substitute for representative taxation.

Table 1 : Publicly significant contents of Nunavut IIBAs

Contents of Provision	IIBA Provision	
	Qikiqtani Region (Mary River)[76]	**Kivalliq Region (Meadowbank, etc.)[77]**
Royalty Rates for the DIO	Article 5	Schedule E
Inuit hiring targets	Article 6	Schedule C
Employment and workplace standards	Article 7.7, 7.14	Schedule C
Subcontracting Procurement Protocols	Article 7.10 – 7.13, 11	Schedule B
Employee education and training mandates	Article 8	Schedule C
Initiatives for Inuit cultural relevance	Article 16, 18, 19	Schedule D
Environmental impact monitoring	Article 17	Schedule J
Dispute Resolution Procedures	Article 21	Schedule H

Another indicator of public law status from *Air Canada* is the presence of a compulsory power over the public[78]. Although local involvement in the Nunavut projects is voluntary, the proponent has established a virtual monopoly on the local labour market combined with an intractable impact on culturally and economically significant Inuit-owned lands. Although not strictly "compulsory", the impacts of the project on local populations are so inexorable that the IBA may bear equivalency to *Air Canada*'s criterion.

Many of *Air Canada* factors also seem to require that there should be some source of legislative authority empowering an entity that is subject to

76. Mary River IIBA, *supra*, note 42.
77. Meliadine IIBA, *supra*, note 41, Meadowbank IIBA, *supra*, note 41 and Whale Tail IIBA, *supra*, note 41.
78. *Air Canada*, *supra*, note 63, par. 60.

public law. These factors would likely be met in the case of the Nunavut's IIBA as it is mandated by the NLCA. It is uncertain the degree to which these factors would apply to IBAs outside of Nunavut, except in other contexts where IBAs are similarly mandatory[79].

Considering their deep socio-economic import, IIBAs are arguably quasi-legislative in both scope and scale. The monolithic impact of a major project on local communities is akin to that of a public institution and a corresponding measure of accountability and transparency is justified.

2.2 IBAs and the Duty to Consult and Accommodate

The public law characterization of IBAs is further supported by the increasingly instrumental role of IBAs in the operation of the *sui generis* right to consultation and accommodation under *Constitution Act, 1982*, section 35 (1)[80].

The Duty to Consult and Accommodate was established by a trio of Supreme Court of Canada cases in 2004 and 2005 : *Haida Nation*[81], *Taku River*[82] and *Mikisew Cree*[83]. *Haida Nation* lays out the doctrinal principles of the duty. The duty is a procedural right owed by the Crown to Indigenous groups which arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it[84]".

The requirements of the Duty will vary in accordance with the severity of the potential impact. Where claims are weak, rights are limited, or infringements are minor, the Duty may only require notice, disclosure of information and discussion of issues raised. Where claims are strong, rights have central significance, or the severity of impact is high, deeper consultation and accommodation is required[85]. At its strongest, the Duty requires the full consent of Aboriginal people before the infringing conduct can continue[86].

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79. See, *supra*, note 35.
80. *Constitution Act, 1982*, *supra*, note 5, s. 35 (1).
81. *Haida Nation* v. *British Columbia (Minister of Forest)*, [2004] 3 S.C.R. 511, 2004 SCC 73.
82. *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.
83. *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
84. *Haida Nation* v. *British Columbia (Minister of Forest)*, *supra*, note 81, par. 35.
85. *Id*., par. 43 and 44.
86. *Tsilhqot'in Nation* v. *British Columbia*, [2014] 2 S.C.R. 257, 2014 SCC 44, par. 77-79.

The process of consultation is animated by the "Honour of the Crown", a high-level fiduciary duty. The Honour of the Crown is "not a mere incantation, but rather a core precept [of consultation] that finds its application in concrete practices[87]". Negotiations and consultations with Aboriginal people must be meaningful and conducted in good faith[88]. The Crown has "a positive obligation to reasonably ensure that" the Indigenous group's "representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action[89]".

Although IBAs are between the proponent and the Indigenous group, and not the Crown, they nevertheless can, and do, play a role in consultation. In *Haida Nation*, the SCC states that the Crown "may delegate procedural aspects of consultation to industry proponents seeking a particular development[90]". IBA negotiation between proponents and Indigenous groups is a common form of delegation encouraged by the Crown[91]. Ritchie[92] outlines several issues with this sort of delegation, one of which is the fact that, along with procedural elements of the duty, many substantive aspects get delegated as well. Consequently, the constitutional role of the Crown can be diluted as they shift from a fiduciary role of guarding Aboriginal rights to a "neutral arbiter" role of seeking balance between parties, with Indigenous communities treated as mere stakeholders[93].

Ritchie's point is illustrated in recent case law. In *Ktunaxa*[94], the court unanimously ruled that the duty to consult was met for the approval of a ski resort on sacred lands in large part because of the negotiation of an Impact Management and Benefits Agreement (IMBA) between the proponent and the community who was contesting it[95]. In both *Ka'a'gee*

87. *Haida Nation* v. *British Columbia (Minister of Forest)*, *supra*, note 81, par. 16.
88. *Id.*, par. 41.
89. *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, *supra*, note 83, par. 64.
90. *Haida Nation* v. *British Columbia (Minister of Forest)*, *supra*, note 81, par. 53.
91. Kaitlin Ritchie, "Issues associated with the implementation of the duty to consult and accommodate aboriginal peoples : threatening the goals of reconciliation and meaningful consultation", (2013) 46 *U.B.C. L. Rev.* 397, 425.
92. *Id.*
93. Rachel Ariss, Clara MacCallum Fraser and Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate : Towards Reconciliation ?", (2017) 13 *McGill J. Sus. Dev. L.* 1, 17.
94. *Ktunaxa Nation* v. *British Columbia*, [2017] 2 S.C.R. 386, 2017 SCC 54.
95. The court split on whether the decision under review infringed on the claimiant's freedom of religion under the *Charter*, *supra*, note 55, s. 2 a).

Tu[96], and *Prophet River*[97] a consultation process involving Crown delegation to "socio-economic agreements" and IBAs between First Nations and proponents was seen to be adequate to meet the duty.

In addition to their role in Crown delegation, IBAs are critical to consultation because they often contain provisions which restrict communities from enforcing consultation rights against the project. For example, Nunavut IIBAs between KivIA and Agnico Eagle contain boilerplate provisions which state : "KIA will not initiate any judicial or administrative procedure, nor initiate any other activity whatsoever, intended to delay or block the [project], except in accordance with this Agreement or the Production Lease or any other lease or license issued by KIA for the [project][98]."

It is thought that these sorts of forbearance clauses are standard practice, and indeed a central objective, of IBAs across Canada[99].

In summary, IBAs have a dual purpose in the exercise of the right to consultation and accommodation : (1) facilitating the delegation of the Crown's duty and (2) forbearance from communities enforcing the right itself. Both roles are very significant. The right to consultation and accommodation is constitutionalized and *sui generis* and the Honour of the Crown which animates it is a high fiduciary duty. It is arguable that any instrument that may detract from the exercise of such a right ought to be subject to a comparably high degree of accountability.

Compounded with their quasi-legislative socio-economic impacts, the role of IBAs in consultation further the characterization of IBAs as instruments of public, and not private, law. Accordingly, transparency can be a mechanism for achieving a degree of public accountability appropriate for public law. Once again borrowing the rationale of the Supreme Court in *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*, a right of access to information exists where, "without desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded[100]".

96. *Ka'A'gee Tu First Nation* v. *Canada (Attorney General)*, 2012 FC 297, 406 FTR 229, par. 126-132.
97. *Prophet River First Nation* v. *British Columbia (Environment)*, 2017 BCCA 58, upholding 2015 FC 1030.
98. Meliadine IIBA, *supra*, note 41, s. 3.1.6 ; Meadowbank IIBA, *supra*, note 41, s. 3.1.6 and Whale Tail IIBA, *supra*, note 41, s. 3.1.6.
99. B. Gilmour and B. Mellett, *supra*, note 2, 389.
100. *Ontario (Public Safety and Security)* v. *Criminal Lawyers' Association*, *supra*, note 59, par. 37.

2.3 The Practical Benefits of Transparent Public Discourse

In addition to public law character of Nunavut's IBAs, support for transparency can be found in some of the practical outcomes of public disclosure in Nunavut: (i) remedying information disparities, (ii) perpetuating standards of corporate social responsibility and (iii) enriching public scrutiny and democratic participation.

2.3.1 Remedying Information Disparities

Despite their widespread voluntary inclusion in IBAs, confidentiality clauses may be putting Indigenous communities in an information deficit relative to better-resourced proponents. In the United States, confidentiality clauses have been struck down by courts for conferring unconscionable "informational advantages" on the stronger party in an imbalanced power dynamic. Regardless of whether confidentiality clauses in IBAs are ever substantively unconscionable, there is a practical case to be made that they confer analogous "informational advantages" on proponents in certain circumstances. As Nunavut may be beginning to illustrate, widespread IBA transparency could counter such disparities by enabling the free flow of public standards and precedents.

While confidentiality clauses in IBAs have never been struck down by courts, it is not unthinkable that they could be impugned for being an unconscionable contract term. Courts of equity have historically asserted jurisdiction to set aside unfair agreements or terms born out of inequality in bargaining power. This is known as the doctrine of unconscionability and has been fused into Canadian common law of contract[101]. To set aside an agreement or a term on the grounds of unconscionability, one must establish (1) a sufficient inequity of bargaining power and (2) that an undue advantage or benefit is secured because of that inequality by the stronger party[102].

Most commonwealth courts have only intervened to rescind an agreement on the grounds of unconscionability where there has been a severe discrepancy in capacity involving, for example, disabled or elderly parties[103]. However, some cases have expanded the doctrine to rescind transactions that are "sufficiently divergent from community standards of commercial morality[104]". An example comes from the House of Lords'

101. John D. McCamus, *The Law of Contracts*, 2nd ed., Toronto, Irwin Law, 2012, p. 424.
102. *Morrison* v. *Coast Finance Ltd.*, (1965) 55 D.L.R. (2d) 710 (B.C. C.A.).
103. J.D. McCamus, *supra*, note 101, p. 432.
104. *Harry* v. *Kreutziger*, (1978) 95 D.L.R. (3d) 231 (B.C. C.A.), par. 26.

Schroeder[105] case, where an agreement between a large music publisher and a young and unknown musician was rescinded on grounds of unconscionability because it restricted the artist from selling his work in the marketplace.

Unconscionability can be applied to rescind egregious individual terms of agreements as well, even in situations where there is relative parity in bargaining power. In Canadian law, this application of the doctrine has been limited to striking down "limitation of liability" clauses that entirely prevent parties from taking legal action[106]. In contrast to the restrictive application of the unconscionability doctrine in Canadian jurisprudence, it is a standard form of relief in American law to strike individual clauses on grounds of unconscionability[107].

Confidentiality clauses, specifically, may be vulnerable to the doctrine of unconscionability. Under more expansive American doctrines, confidentiality clauses have been struck down[108]. In *Larsen* v. *Citibank FSB*[109], for example, the Eleventh Circuit appellate court, a consumer class-action was brought against a contract of adhesion with a multibillion-dollar financial institution, CitiBank. The contract had arbitration provisions which required parties to "keep confidential any decision of an arbitrator[110]". Applying the equitable unconscionability doctrine, the court struck down the confidentiality clause. They ruled that the clause gave the bank an "informational advantage[111]" over consumers which would discourage meaningful consumer participation in the arbitration process. Because the bank was the only repeat participant in arbitration, they had access to all precedents and prior evidence while each consumer was forced to start from scratch. Confidentiality in this instance prevented standards from proliferating among consumers which exacerbated the existing power imbalance between the parties.

The relative positions of parties to IBAs bear analogies to the inequitable relationships and "undue advantages" characteristic of the unconscionability doctrine, especially the "informational advantage" that led the

105. *A Schroeder Music Publishing Co. Ltd* v. *Macaulay*, [1974] 3 All ER 616.
106. See *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 and *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, 2010 SCC 4.
107. J.D. McCamus, *supra*, note 101, p. 440.
108. Christopher R. Drahozal, "Confidentiality in Consumer and Employment Arbitration", (2015) 7 *Y.B. Arb. & Mediation* 28.
109. *Larsen* v. *Citibank FSB*, 871 F.3d 1295 (11th Cir. 2017).
110. *Id.*, p. 46.
111. *Id.*, p. 50.

eleventh circuit court to strike down Citibank's confidentiality clause. Many scholars have documented discrepancies in capacity between communities and relatively well-connected and well-funded proponents[112], which may be considered "sufficiently divergent from community standards of commercial morality[113]" to constitute an unconscionable disparity in bargaining power. Major proponents have access to more expensive full-service law firms and consultants, many of whom bear a wealth of institutionalized knowledge about IBA precedents and strategies. Indigenous groups, on the other hand, often do not have equivalent access to the same wealth of resources[114]. Analogous to the facts of *Larsen* v. *CitiBank FSB*, a climate of IBA confidentiality perpetuates an "informational disadvantage", where the more powerful proponent party may be dialed into insider information while the less powerful community is not.

Generalized transparency in IBA provisions may be a remedy for this sort of "informational disadvantage". Many scholars agree that the confidential nature of IBAs prevents communities from looking to other agreements for ideas, precedents and standards[115]. Transparency, in theory, can "level the playing field[116]" by allowing free access to IBA precedents which can be used by communities as benchmarks in negotiation.

With transparency in full effect, Nunavut may be providing early signs of such benefits. The public availability of IIBAs has already facilitated

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112. Ken J. Caine and Naomi Krogman, "Powerful or Just Plain Power-Full ? A power Analysis of Impact and Benefit Agreements in Canada's North", *Organization & Environment*, vol. 23, nº 1, 2010, p. 76 ; Michael Hitch and Courtney Riley Fidler, "Impact and Benefit Agreements : A Contentious Issue for Environmental and Aboriginal Justice", *Environments Journal*, vol. 35, nº 2, 2007, p. 45 ; Public Policy Forum, "Sharing in the Benefits of Resource Developments : A Study of First Nations-Industry Impact Benefits Agreements", 2006, [Online], [ppforum.ca/wp-content/uploads/2018/05/Sharing-in-the-Benefits-of-Resource-Development-PPF-report.pdf] (March 5th, 2019) ; Delgermaa Boldbaatar, Nadja Kunz and Eric Werker, "Improved resource governance through transparency : Evidence from Mongolia", *The Extractive Industries and Society*, 2019 [under press] and Andrés Mejía Acosta, "The Impact and Effectiveness of Accountability and Transparency initiatives : The Governance of Natural Resources", *Development Policy Review*, vol. 31, nº s1, 2013, p. s89.
113. *Harry* v. *Kreutziger*, *supra*, note 104, par. 26.
114. Public Policy Forum, *supra*, note 112.
115. Cathleen Knotsch and Jacek Warda, "Impact Benefit Agreements : A Tool for Healthy Inuit Communities ?", *National Aboriginal Health Organization*, 2009, [Online], [ruor.uottawa.ca/bitstream/10393/30211/1/2009_IBA_Summary.pdf] (March 5th, 2019) ; Irene Sosa and Karyn Kennan, "Impact benefit agreements between Aboriginal communities and mining companies : Their use in Canada", 2001, [Online], [www.cela.ca/sites/cela.ca/files/uploads/IBAeng.pdf] (March 6th, 2019).
116. C. Bildfell, *supra*, note 13, 264.

information-sharing in both Kivalliq and Qikiqtani regions during recent IIBA negotiations. While renegotiating their Mary River IIBA, the QIA recently expressed an intention to incorporate ideas from the neighbouring KIA. At the public QIA Board Meeting on February 28 2018, QIA President PJ Akeeagok said, while discussing strategy for the upcoming negotiation : "Examples from different IIBAs are taking shape from each region. For example, … in the Kivalliq region … we can look there for ideas and see what's working elsewhere[117]."

When the renegotiated Mary River IIBA was unveiled in October 2018, it contained some new provisions that resembled content from Kivalliq region's IIBAs. Examples of changes that appear in the new Mary River that also appear in existing Kivalliq IIBAs include :

— more in-depth community and family counsellor roles[118] ;

— more robust accountability mechanisms to assure minimum Inuit hiring targets are met[119] ; and

— more elaborate and specific Inuit training programs[120].

The new additions to the Mary River IIBA may not have come directly from Kivalliq. But, given the QIA's expressed intention to look to other regions, it seems likely, or at least possible, that the accessibility of Kivalliq's IIBA's facilitated the propagation of ideas and standards. Presumably, as KivIA and KitIA negotiate and re-negotiate IIBAs in the future, they will also look to QIA's publicized precedents.

As QIA's sophisticated negotiating tactics demonstrate, Indigenous communities are not always at an "informational disadvantage" relative to the proponents they negotiate with. However, not all Indigenous groups are in equivalent circumstances. Free access to a public network of precedents and standards may have the effect of "levelling the playing field" against such information disparities and imbalances in bargaining power.

2.3.2 Perpetuating International CSR Standards

Despite Canada's norm of IBA secrecy, an international trend towards transparency in IBAs is already growing as a standard of corporate social responsibility (CSR). Echoing the discussion in the previous section, the purposes of this trend are to hold powerful governments and proponents

117. Recorded at public QIA Board of Directors, *QIA Board of Directors Meeting*, Iqaluit, Nunavut, February 28th, 2018, Agenda item 6.
118. Mary River IIBA, *supra*, note 42, s. 11.7 and Whale Tail IIBA, *supra*, note 41, s. 4.1.
119. Mary River IIBA, *supra*, note 42, s. 7.16 and Whale Tail IIBA, *supra*, note 41, s. 6.
120. Mary River IIBA, *supra*, note 42, s. 11.7 and Whale Tail IIBA, *supra*, note 41, s. 14.

accountable and to allow standards to proliferate in the developing world. By espousing transparency, IBAs in Canada could contribute to a growing international climate of trust and accountability.

The Extractive Industries Transparency Initiative (EITI) is a joint effort by 49 resource-rich countries to disclose financial and contractual information surrounding extractive projects with the goal of combatting corruption and pushing for increased public benefits[121]. EITI has initiated disclosure of US $1.9 trillion worth of government revenues since 2003. EITI has also recently expanded their standards to require disclosure of non-financial socio-economic performance of their projects[122]. The *EITI Principles* provide rationale for their initiative : "A public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development […] We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability[123]."

Another similar initiative is ResourceContracts.org, a repository for thousands of publicly available oil, gas and mining contracts, including full text and plan language summaries. It is a joint initiative of the World Bank, the Natural Resource Governance Institute and the Columbia Center on Sustainable Investment. Their rationale for transparency is as follows : "Despite the critical role these contracts play in setting the rules for investments in extractive industries, they are often difficult to discover […] This can result in a critical lack of knowledge for governments as they try to negotiate the best terms for their citizens, and can result in missed opportunities to learn from other's past successes or missteps[124]."

Both ResourceContracts.org and EITI have rationale for CSR standards of accountability and transparency which are similar to those discussed earlier in this paper.

Canada's ESTMA initiative is also in step with this international trend towards transparency ; although, unlike EITI, ESTMA compels disclosure of raw payment figures and not broader social benefits that make up the bulk of IBA contents. As discussed in Part II, Section 3, imposing

121. Extractive Industry Transparency Initiative, "The EITI Requirements", [Online], [eiti.org/eiti-requirements] (April 7th, 2018).

122. *Id.*

123. Extractive Industry Transparency Initiative, "The EITI Principles", [Online], [eiti.org/document/eiti-principles] (April 7th, 2018).

124. Resource Contracts, "About this site", [Online], [resourcecontracts.org/about] (March 6th, 2019).

transparency on Indigenous communities through Federal legislation is problematic due to the climate of distrust and apparent scapegoating it incites. I raise ESTMA here not necessary to promote this model as the only solution, but rather to indicate Canada's contribution to global CSR standards and the shift towards transparency.

With transparency becoming a norm in major extractive projects worldwide and in Canada, it may be an appropriate moment to reconsider the practical merits of transparency in domestic IBAs. Although the international initiatives discussed above are designed to confront problems more particular to the developing world, such as institutional poverty and corruption, their moral justification is salient in the Canadian context where IBA confidentiality has created systemic disadvantages for Indigenous communities relative to their proponent counterparts. With the leverage of global CSR norms, Indigenous communities are in a position to resist confidentiality in their IBAs if they desire to.

2.3.3 Enriching Democratic Participation

Confidentiality precludes the scrutiny of the public. As mentioned in the previous section, proponents tend to have greater access to private resources and consultants than do Indigenous communities. Another way that publicity may have the effect of leveling this "playing field" is by welcoming support from allies in the public domain. Furthermore, not only does confidentiality close the door to public support, it stifles open democratic discourse about the contents of IBAs. Such open discourse gives voice to community members to participate in decision-making and hold proponents and governments accountable.

IIBA transparency invites input from the media, academia, stakeholder groups and other Indigenous communities[125]. In Nunavut, when the QIA released the full contents of the Mary River IIBA to the public, local news media played a key role in propagating the disclosure[126]. News media have followed the Mary River project closely, providing an important service by updating the public on the status of the project and reporting on

125. Ginger Gibson and Ciaran O'Faircheallaigh, "IBA Community Toolkit. Negotiation and Implementation of Impact and Benefit Agreements", *Walter & Duncan Gordon Foundation*, 2015, [Online], [gordonfoundation.ca/app/uploads/2017/02/toolkit-english.pdf] (March 6th, 2019).

126. Guy Quenneville, "Nunavut Inuit group shows its members the mining money", *CBC News*, May 23rd, 2016, [Online], [www.cbc.ca/news/canada/north/nunavut-unit-mining-money-1.3596102] (March 6th, 2019).

community opinions[127]. Disclosing specific IIBA provisions only deepens the capacity for analysis and discussion.

By limiting the sharing of project details with media and other stakeholders, confidentiality may impair this public engagement mechanism. This is arguably problematic for communities if they decide to resist any aspect of the project. Because IBAs typically require pledges not to legally challenge the project, communities are left with little leverage if they encounter a need for resistance. In such circumstances, their capacity to publicly challenge the reputation or social licence of a corporation may be a crucial remaining "lever[128]". This is not to suggest that all projects should inevitably be resisted ; however, much like litigation, media-empowered protest is a valid last-resort mechanism for ensuring accountability, corporate social responsibility and enforcement of rights[129]. Confidentiality impairs this by limiting disclosure of the project's terms.

In addition to media scrutiny, IIBA transparency in Nunavut has facilitated academic scrutiny. In 2018, Eric Werker[130] completed a study of the Mary River IIBA's economic metrics, estimating the total share of benefits relative to the total estimated mine revenue, comparing it to another publicly-available IBA in Ghana. In conducting this study, Werker was presumably able to easily download the IIBA in its entirety directly from QIA's website. At risk of being too self-referential, I would also argue that the analysis in this very paper demonstrates the benefits of transparency. At various points, I have been able to cite specific provisions of the Nunavut IIBAs to critically assess their public importance. Neither this paper nor Werker's analysis would have been possible if confidentiality was in effect. Opening the door to academic scrutiny is a cost-free benefit to communities, made possible through public transparency.

Perhaps more profoundly than its facilitation of external alliances, IIBA transparency has had the effect of informing and enriching internal public participation in the project. In the QIA Board Resolution authorizing the full disclosure of the Mary River IIBA, the stated purpose of the resolution was "to promote transparency between QIA and all of QIA's

127. Sara Frizzell, "Baffinland mine ramps up production, ships record amount, minor spills also increase", *CBC News*, October 19th, 2017, [Online], [www.cbc.ca/news/canada/north/baffinland-shipping-spills-1.4361174] (March 6th, 2019).
128. G. Gibson and C. O'Faircheallaigh, *supra*, note 125, p. 51.
129. *Id*., p. 52.
130. Eric Werker, Maggie Cascadden and Katherine Zmuda, "Policies for Generating Socioeconomic Benefits from Natural Resource Extraction Projects", *A Research Report for the Government of the Northwest Territories*, April 23rd, 2017.

members[131]". In a press release, President Akeeagok said : "It is crucial for beneficiaries to have access to information from their organization to be well informed[132]."

Despite the openness surrounding the Mary River project, there has been dissent in Nunavut about the mine itself. Communities adjacent to the Mary River mine such as Mittimatalik (Pond Inlet) have expressed discontent about the IIBA and distrust towards the QIA[133]. However, IIBA transparency has allowed these communities to voice informed grievances over specific provisions, both in the news media[134] and in regulatory hearings[135].

IIBA disclosure has also allowed the QIA to respond to community grievances with a high degree of specificity. For instance, QIA issued a *3-Year Report* in 2016 outlining detailed concerns they had with the Mary River IIBA, echoing community feedback[136]. QIA subsequently announced a renegotiation plan for the IIBA, which included thorough consultation with the communities most affected by the project[137]. To further enhance accountability, they hired as their Chief re-negotiator a former territorial Premier who is from one of the communities adjacent to the mine[138]. QIA has also continually released blog posts and media releases which explain in detail how they are investing mine royalties[139].

131. QIA Board of Directors, *supra*, note 43.
132. G. Quenneville, *supra*, note 126.
133. Jim Bell, "Baffinland railway may be 'dead,' Pond Inlet group declares", *Nunatsiaq News*, January 8th, 2018, [Online], [nunatsiaq.com/stories/article/65674baffinland_railway_may_be_dead_pond_inlet_group_declares/] (March 6th, 2019).
134. *Id.*
135. *Submission to the Nunavut Planning Commission for the Public Hearing on North Baffin Regional Land Use Plan Amendment Application by Baffinland Iron Mines Corporation*, November 17th, 2017, [Online], [lupit.nunavut.ca/app/dms/script/dms_download.php ?fileid=13256&applicationid] (March 6th, 2019).
136. Qikiqtani Inuit Association, "Mary River Project Inuit Impact and Benefit Agreement. Three Year Review 2013-2016", [Online], [qia.ca/wp-content/uploads/2017/06/160916-qia-iiba-3yearreview-eng-final-2.pdf] (March 6th, 2019).
137. Qikiqtani Inuit Association, "PSA : QIA's community meetings on renegotiation of Mary River IIBA", March 28th, 2018, [Online], [qia.ca/psa-qias-community-meetings-on-renegotiation-of-mary-river-inuit-impact-and-benefits-agreement/] (March 6th, 2019).
138. *Id.*
139. Qikiqtani Inuit Association, "QIA announces $19 million Inuit training project", November 15th, 2017, [Online], [qia.ca/qia-announces-19-million-inuit-training-project/] (March 6th, 2019) and Qikiqtani Inuit Association, "What made the QIA annual budget grow from $19M to $25M ?", February 28th, 2018, [Online], [qia.ca/what-made-the-qia-annual-budget-grow-from-19m-to-25m/] (March 6th, 2019).

QIA's decision to disclose the Mary River IIBA created a feedback loop of public accountability. Once the public gained access to the IIBA, their questions and comments prompted more transparency from the QIA and engaged public participation, shaping the implementation and renegotiation of the IIBA. Especially in circumstances such as Nunavut's, where centralized representative bodies negotiate on behalf of geographically disparate populations, the effect of transparency is more profound in enabling public scrutiny. It fosters a reciprocal dialogue between representatives and the represented. It gives voice to the broader public in decision-making and furthers meaningful democratic engagement.

Conclusion

By publicly disclosing the contents of their IBAs, organizations in Nunavut have not only provided their members with crucial information about major projects, they have provided the public with a rare and concrete example of what IBA transparency looks like in practice. An early glance at the outcomes in Nunavut would indicate that transparency may have opened an unprecedented regional public dialogue about the contents of IBAs, enabling furthering free collaboration, critical analysis, and democratic engagement. If applied more broadly, such transparency could potentially have the effect of improving equity and accountability among Indigenous communities, governments and proponents. In addition to the practical case for transparency, a normative case can be made that IBAs belong in the more transparent and accountable realm of public law, rather than private law, based on the quasi-legislative and constitutional scope and scale of specific IBA provisions.

The politics of transparency are complex. It is well beyond the scope of this paper to capture all the nuances favouring both disclosure and confidentiality. As such, this paper does not presume to challenge Indigenous communities' motives for electing confidentiality or to question the integrity with which any community handles its own finances. Rather, it uses Nunavut as a case study to invite further discussion about IBA transparency. Extractive proponents and INAC are in a position to consider how their powerful role incentivizes the norm of confidentiality, how that norm may be eclipsing the merits of transparency and how reversing this trend could contribute to a broader climate of trust and accountability.