



Indigenous – corporate private governance and legitimacy: Lessons learned from impact and benefit agreements



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ABSTRACT

This paper argues that impact and benefit agreements (IBAs) between Indigenous groups and resource companies are properly understood as a form of private governance. Viewing IBAs through a private governance lens generates important insights for both governance scholars and for scholars interested in the structuring of Indigenous-corporate relations in the context of resource development. In order to develop this argument, we present a case study of a specific arrangement between a Canadian First Nation and a multi-national mining company with a particular focus on the governance elements of the contract and the implications for legitimacy that arise from the arrangement. Our central claim is that IBAs, as a form of private governance, require a theory of legitimacy that goes beyond contractual consent, but must account for both procedural and substantive legitimacy demands. We then identify the key lessons that can be taken for indigenous law and governance scholars and private governance scholars from our analysis.

1. Introduction

As Indigenous rights receive increasing recognition through international instruments and domestic constitutional law, private resource developers have been encouraged, and some contexts, required, to secure the consent of Indigenous groups whose lands and livelihoods may be impacted by proposed resource activities. The principal mechanism by which Indigenous consent is gained is impact and benefit agreements (IBAs) concluded between resource companies and Indigenous groups. Through IBAs, Indigenous communities participate in the economic benefits that arise from extraction activities and receive commitments from resource developers respecting the responsible management of the environmental and social impacts that often accompany resource development (Kennett, 1999; Sosa and Keenan, 2001; Galbraith et al., 2007; Fidler and Hitch, 2007; O’Faircheallaigh, 2008).

The structuring of community benefits and the management of environmental and social externalities are commonly understood as being the province of state regulatory action (Galbraith et al., 2007). Despite the public role these private arrangements are fulfilling, there has been only limited attention to the governance dimensions of IBAs. This is, perhaps, not surprising since IBAs have most often been negotiated as confidential arrangements. As a practical matter, the unavailability of these agreements due to their confidential nature has

limited their examination to those scholars and practitioners with direct experience in the negotiation of IBAs (Caine and Krogman, 2010; O’Faircheallaigh, 2010, p.70). In addition, the form of IBAs is contractual and, unlike other much-studied private governance arrangements, such as certification schemes or reporting mechanisms (Cashore et al., 2004; Miedinger, 2006; Green, 2014), does not seek to create and impose standards on third parties. As such, IBAs fall outside the scope of arrangements that the private governance literature has focused on, which tend to emphasize the legislative form of private governance. Finally, much of the private governance literature has focused on transnational activities, where private governance is understood to be responding to a “governance gap” that exists beyond the state (Vogel, 2008; Green, 2014; Cutler et al., 1999). IBAs, on the other hand, are situated within domestic legal settings, where the government maintains its primacy in the exercise of authority, albeit contested in relation to Indigenous control over natural resources.

Despite these differences, we argue that IBAs are usefully examined through the lens of private governance. In particular, understanding the governance dimensions of IBAs brings into focus which goods (economic, social, environmental) are subject to the arrangement, the respective roles of the parties in managing these issues, and the mechanisms employed through the IBA to implement, monitor and enforce the commitments of the parties. We are also interested in how IBAs relate to the wider normative context surrounding the relation-

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ship between the state, Indigenous groups and resource companies. Insofar as the arrangements satisfy public duties and respond to constitutional and transnational rights owed to Indigenous people, IBAs are embedded in a specific normative context, and provide an opportunity to examine the relationship between public and private forms of obligation; an issue that governance scholars have identified as being of particular interest (Vogel, 2008, 275; Bartley, 2011). Finally, understanding IBAs as a form of private governance directly raises questions respecting the legitimacy of the arrangement. Here the governance literature exploring the procedural and substantive requirements that may be necessary to justify the exercise of private authority can be usefully drawn upon to examine the extent to which IBAs are likely to satisfy these conditions, and has potential, in our view to improve our understanding of how IBAs may be structured to enhance the prospects of cooperation between Indigenous groups and resource developers, a longstanding challenge for both communities (Anaya, 2013; Eyford, 2013; Prno and Slocombe, 2014).

The objective of this paper is to explore the governance dimensions of IBAs, and in doing so develop an understanding of IBAs linked to their particular governance functions. Flowing from this, we identify the key lessons that can be drawn for both Indigenous law and governance scholars and private governance scholars that arise from applying the private governance lens to IBAs.

We do this with reference to a specific IBA concluded between the Fort Albany First Nation (FAFN), Kashechewan First Nation (KFN) and DeBeers Canada Inc. (DBC) in relation to the Victor Diamond Mine (VDM) located in Northern Ontario, Canada. Unlike many IBAs, the VDM IBA was not subject to confidentiality requirements, and was provided to the authors for research purposes.¹ In addition to this particular IBA, we have also examined much of the surrounding documentation that led to the mine approval, other IBAs concluded with different communities in relation to this project, and we conducted interviews with key participants in the negotiation process from both DBC and FAFN.

This approach has the advantage of being able to develop a richer and more contextually sensitive picture of the IBA, which allows us to better understand the intentions of the parties and the approach taken. This is particularly relevant to our consideration of questions relating to legitimacy, which are contingent on a range of community expectations and understandings about the relationship of the mine to the respective rights of the parties. The disadvantage of this approach is that it limits the generalizability of our findings as each IBA will respond to the specific circumstances of its application, while the parties themselves will come to the negotiations with different sets of rights, community circumstances and histories. While recognizing this limitation, IBAs have developed in accordance with a common form and content and respond to a similar set of background norms and historical circumstances (Sosa and Keenan, 2001; Fidler and Hitch, 2007). Our intent is to develop a conceptual understanding of IBAs as a form of private governance, and to generate new theoretical and practical insights about this form of governance, which might be the subject of further empirical examination.

Section 2 begins with a description of the background to, and key features of, the VDM IBA. We then unpack the governance elements in more detail by drawing on the private governance literature to identify specific governance forms and functions. Here we consider the specific, contractual form that IBAs take, but point to the dualist nature of IBAs that combine both transactional and regulatory logics in their structure (drawing on Cafaggi, 2013). Section 3, again drawing on the private governance literature, considers the implications of conceptualizing IBAs as private governance arrangements for developing an understanding of IBA legitimacy that reflects the particular governance

functions and context in which IBAs are situated. Section 4 considers some of the key practical implications that may be drawn from applying a governance perspective to IBAs, as well as, how IBAs may provide private governance scholars with an important example of contractual governance with growing transnational importance.

2. The Victor Diamond Mine IBA

2.1. Background

The Victor Diamond Mine is located on the traditional lands of the Mushkegowuk Cree located on the west coast of James Bay in Northern Ontario. The mine is owned and operated by DBC. Advanced exploration was carried out in 2000 and 2001, as well as in 2003, after which DBC determined that the Victor Kimberlite deposits were minable. The affected communities are geographically remote First Nations. In addition to the FAFN and the KFN, the project impacted the traditional lands of the Attawapiskat (AttFN) and Moose Factory First Nations (MFFN). The inhabitants of the communities engage in traditional activities (hunting, trapping, gathering, fishing and other subsistence activities), which are still an important part of the Cree culture and the local economy (Whitelaw et al., 2009). The Victor Diamond Mine is the first mining development in the region.

The mine consists of an open pit mine, and an on-site ore processing facility. Other major project components include: waste stockpiles, water management facilities, accommodations, onsite roads, an air strip, pipelines, a power line corridor, a new winter road from Attawapiskat to the mine and expanded winter road from Moosenee passing FAFN and KFN to AttFN. Following a federal comprehensive environmental assessment for the mine site and Ontario class environmental assessments for the winter road and transmission line, the mine was approved in 2005. The predicted impacts from the mine and associated infrastructure include contaminants to land, air and water resources, as well as impacts on wildlife from linear facilities (Whitelaw et al., 2009).

Construction began in 2006 and was completed in 2008. The mine construction costs were estimated to be approximately \$1 billion (CAD). It produces approximately 600,000 carats of very high quality diamonds per year. The mine has an expected twelve-year life span, although DeBeers is actively pursuing the expansion of its mining operations in the immediate area through the development of further kimberlite deposits. Under Ontario law, DeBeers pays royalties to the Ontario government.

The mine lands are legally owned by the provincial Crown, but are part of the traditional territory of the Mushkegowuk Cree. The lands were surrendered by the Cree to the government under Treaty 9, which preserves the right of the First Nations “to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered”, but these rights are subject to a “taking up” clause, which allows the Crown to develop lands for “settlement, mining, lumbering, trading or other purposes” (Treaty 9, Articles of Treaty). These rights are the subject of litigation between the First Nations and the Crown, which focuses on oral promises by the Crown made during treaty talks that provided higher levels of protection for Indigenous hunting and fishing rights than the Treaty provides (CBC, 2014).

Of the affected communities, AttFN is closest to the mine, and its traditional lands are most clearly impacted by the mine. FAFN and KFN also have members whose traditional hunting activities are impacted by the mine operations. The winter road and transmission line cross the Indian Reserve lands owned jointly by FAFN and KFN, as well lands used for traditional purposes. DBC began IBA negotiations exclusively with AttFN, and concluded a joint agreement with them in 2005. The Agreement with FAFN and KFN was not concluded until 2009, well after the mine was constructed and operating.

¹ The VDM IBA between Fort Albany First Nation and Kashechewan First Nation and DeBeers Canada Inc, dated April 15, 2009 is on file with the authors.

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